

**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' REPLY BRIEF**

**WEBB & CAREY**  
Patrick D. Webb (Cal. Bar 82857)  
402 W. Broadway, Suite 1230  
San Diego, California 92101  
Tel (619) 236-1650  
Fax (619) 236-1283  
Attorneys for Appellants

**TABLE OF CONTENTS**

Introduction. . . . . 19

1. The Jamul Indian Village is Not a Required, nor an Indispensable, Party to this Action. . . . . 19

2. There is No Claim Preclusion Because: (1) Rosales’ Present Desecration Claims Are Not the Same as Any Prior Claims, (2) Do Not Seek Any Remedy on Tribal Land, and (3) There Was No Prior Final Adjudication of any Issue in this Action.. . . . 27

3. The Non-Federal Appellees Have No Sovereign Immunity for their Illegal Desecration and Conversion of Rosales’ Families’ Remains.. . . . 31

4. Since the Trial Court Has Not Yet Ruled Upon the Merits of the Appellees’ Claims that Rosales Lacks Standing or Has Failed to State Claims this Action Must be Remanded . . . . . 34

5. Rosales Has Properly Pled Article III Standing and Waiver of Federal Appellees Sovereign Immunity.. . . . 35

6. The APA and FTCA Also Waive Sovereign Immunity for Rosales’ Claims Against the Federal Appellees . . . . . 37

    A. APA Waiver of Sovereign Immunity. . . . . 38

    B. FTCA Waiver of Sovereign Immunity. . . . . 40

7. Rosales Has Properly Plead a Conversion Claim for Money Damages Against Both the Federal and Non-Federal Appellees . . . . . 42

8. In the Alternative NAGPRA Remedies are not Awarded, Rosales Remains Entitled to *Bivens* Claims Against the Federal Appellees. . . . . 46

9. Dutschke and Ryzdik Violated Rosales’ Free Exercise of Religious Burial Rights. . . . . 48

10. Dutschke and Ryzdik Violated Rosales' Fifth Amendment Rights to Due Process and Just Compensation. ....	52
Conclusion.....	55

**TABLE OF AUTHORITIES**

**Cases**

*Allen v. Jones*,  
104 Cal.App.3d 207 (1980). . . . . 42

*Ashcroft v. Iqbal*,  
556 U.S. 662 (2009). . . . . 47

*Avery v. United States*,  
680 F2d 608 (9<sup>th</sup> Cir. 1982).. . . . . 40

*Bivens v. Six Unknown Named Agents (Bivens)*,  
403 U.S. 388 (1971). . . . . 46, 47, 48

*Bonnichsen v. United States (Bonnichsen)*,  
367 F.3d 864 (9<sup>th</sup> Cir. (2004). . . . . 23, 37

*Broudy v. United States*,  
722 F.2d 566 (9<sup>th</sup> Cir. 1983). . . . . 40

*Burlesci v. Petersen*,  
68 Cal.App.4th 1062 (1998).. . . . . 43

*Burwell v. Hobby Lobby Stores, Inc.*,  
134 S.Ct. 2751 (2014).. . . . . 50, 51

*Butz v. Economou*,  
438 U.S. 478 (1977). . . . . 47

*Chatterton v. Boone*,  
81 Cal.App.2d 943 (1947).. . . . . 45

*Christensen v. Superior Court (Pasadena Crematorium of Altadena)*,  
54 Cal.3d 868, (1991).. . . . . 20, 41

*Clark v. Bear Stearns & Co.*,  
966 F.2d 1318 (9<sup>th</sup> Cir. 1992). . . . . 29

*Cobell v. Norton*,  
240 F.3d 1081 (D.C. Cir. 2001). . . . . 38-39

*Cohen v. Groman Mortuary, Inc.*,  
231 Cal. App. 2d 3 (1964).. . . . 43

*Cook v. AVI Casino Ent. Inc.*,  
548 F.3d 718 (9<sup>th</sup> Cir. 2008). . . . . 33

*Costello v. United States*,  
365 U.S. 265 (1961). . . . . 29

*Davis v. Passman*,  
442 U.S. 228 (1979). . . . . 47

*Doe v. United States*,  
58 F.3d 494 (9<sup>th</sup> Cir. 1995). . . . . 24

*East Bay Asian Local Development Corp. v. State of California*,  
24 Cal.4th 693 (2000). . . . . 50

*E.E.O.C. v. Catholic University of America*,  
83 F.3d 455 (D.C. Cir. 1996). . . . . 49

*Evans v. Shoshone-Bannock LUPC*,  
736 F.3d 1298 (9<sup>th</sup> Cir. 2013). . . . . 32

*Fallon Paiute-Shoshone Tribe v. BLM*,  
455 F.Supp.2d 1207 (D. Nev. 2006).. . . . 39

*Feminist Women's Health Center, Inc. v. Philibosian (Philibosian)*,  
157 Cal.App.3d 1076 (1984). . . . . 51

*FGS Constructors Inc. v. Carlow (FGS)*,  
823 F.Supp. 1508, 1513 (W.D.S.D.1993), *aff'd in part and reversed*  
*in part*, 64 F.3d 1230 (8<sup>th</sup> Cir. 1995)... 40, 41

*Followay Productions Inc. v. Maurer*,  
603 F.2d 72 (9<sup>th</sup> Cir. 1979). . . . . 24, 30

*Fox v. City of Los Angeles*,  
22 Cal.3d 792 (1978). . . . . 51

*Frankfort Digital Servs. v. Kistler*,  
477 F3d. 1117 (9<sup>th</sup> Cir. 2007). . . . . 29

*Gibson v. United States*,  
781 F.2d 1334 (9<sup>th</sup> Cir. 1986). . . . . 48

*Groth v. Owners Ins. Co.*,  
2014 U.S. Dist. LEXIS 71884 (9<sup>th</sup> Cir. 2014)... 21

*Hafer v Melo*,  
502 U.S. 21 (1991). . . . . 31

*Hartelius v. Northern Burlington R.R. Co.*,  
1999 U.S. App. Lexis 2771 (9<sup>th</sup> Cir. 1999)... 44

*Hartford Fin. Corp. v. Burns*,  
96 Cal.App.3d 591 (1979)... 44

*Hartman v. Moore*,  
547 U.S. 250 (2006). . . . . 47

*Holt v.Hobbs*,  
135 S.Ct. 853 (2015)... 51-52

*Industrial Ind. Co. v. United States*,  
504 F.Supp. 394 (E.D. Cal. 1980)... 40

*Jerves v. United States*,  
966 F.2d 517 (9<sup>th</sup> Cir. 1992). . . . . 41

*Larson v. Domestic and Foreign Commerce Corp.*,  
337 U.S. 682 (1949). . . . . 48

*Lewis v. Clarke (Lewis)*,  
137 S. Ct. 1285 (2017). . . . . 31, 33

*Love v. United States*,  
915 F.2d 1242 (9<sup>th</sup> Cir. 1989). . . . . 47

*Maxwell v. County of San Diego (Maxwell)*,  
708 F.3d 1075 (9<sup>th</sup> Cir. 2013). . . . . 31, 32, 33

*McNeil v. United States*,  
508 U.S. 106 (1993). . . . . 41

*Messerall v. Fulwider*,  
199 Cal. App. 3d 1324 (1988). . . . . 43

*Michigan v. Bay Mills Indian Community*,  
134 S.Ct. 2024 (2014). . . . . 26, 32

*Montgomery v. Board of Retirement*,  
33 Cal.App.3d 447 (1973).. . . . . 49

*Morgan v. California*,  
743 F.3d 728 (9<sup>th</sup> Cir. 1984). . . . . 48

*Newman v. Sathyavaglswaran (Newman)*,  
287 F.3d 786 (9<sup>th</sup> Cir. 2002). . . . . 53, 54

*Norton v. SUWA*,  
542 U.S. 55 (2004). . . . . 38

*O’Donnell v. Slack*,  
123 Cal. 285 (1899).. . . . . 41

*Oklahoma Tax Comm. v. Citizen Band of Potawatomi Tribe of Okla.*,  
(“*Oklahoma Tax Comm.*”),498 U.S. 505 (1991). . . . . 31

*Palmquist v. Standard Acc. Ins. Co.*,  
3 F.Supp. 358, 360 (S.D. Cal. 1933).. . . . . 42, 53

*People v. Van Horn*,  
218 Cal.App.3d 1378 (1990). . . . . 41

*Pistor v. Garcia (Pistor)*,  
791 F.3d 1104 (9<sup>th</sup> Cir. 2015). . . . . 21, 31

*Poggi v. Scott*,  
167 Cal. 372 (1914).. . . . . 45

*Pueblo of San Ildefonso v. Ridlon*,  
103 F.3d 936 (10<sup>th</sup> Cir. 1996). . . . . 39

*Pullman-Standard v. Swint*,  
456 U.S. 273 (1982). . . . . 34

*Puyallup Tribe, Inc. v. Dept. of Game of State of Wash.* (“*Puyallup*”),  
433 U.S. 165 (1977). . . . . 31

*Quechan Indian Tribe v. United States (Quechan)*,  
535 F.Supp.2d 1072 (S.D. Cal. 2008).. . . . . 19, 41, 46

*Rasmussen v. Superior Court*,  
51 Cal.4th 804 (2011).. . . . . 54

*Rivas v. Napolitano*,  
714 F.3d 1108 (9<sup>th</sup> Cir. 2011). . . . . 34



*Rolex Watch, U.S.A., Inc. v. Michel Co.*,  
179 F.3d 704 (9<sup>th</sup> Cir. 1999). . . . . 34

*Rooney v. United States*,  
634 F.2d 1238 (9<sup>th</sup> Cir. 1980). . . . . 41

*Rosales v. United States*,  
824 F.2d 799 (9<sup>th</sup> Cir. 1987). . . . . 34

*Ross v. Forest Lawn Mem. Park*,  
153 Cal.App.3d 988, 993-94 (1984). . . . . 42

*Saari v. Jongordon Corp.*,  
5 Cal.App.4th 797 (1992). . . . . 42

*Salt River Project Agric. Imp. & Power Dist. v. Lee*,  
672 F.3d 1176 (9<sup>th</sup> Cir. 2012). . . . . 26, 27

*San Carlos Apache Tribe*,  
272 F. Supp. 2d at 887 (D. Ariz. 2003). . . . . 39

*Sands v. Morongo Unified Sch. Dist.*,  
53 Cal.3d 863 (1991). . . . . 51

*Santa Clara Pueblo v. Martinez*,  
436 U.S. 49 (1978). . . . . 31

*Shah v. Co. of Los Angeles*,  
797 F.2d 743 (9<sup>th</sup> Cir. 1986). . . . . 24

<i>Sherbert v. Verner</i> , 174 U.S. 398 (1963). . . . .	51
<i>Shermoen v. United States</i> , 982 F.2d 1312 (9 <sup>th</sup> Cir. 1992). . . . .	23
<i>Sinai Mem. Chapel v. Dudler</i> , 231 Cal.App.3d 190 (1991). . . . .	42
<i>Sinai Temple v. Kaplan</i> , 54 Cal.App.3d 1103 (1976). . . . .	43
<i>Staley v. McClurken</i> , 35 Cal.App.2d 622 (1939).. . . . .	45
<i>Syverson v. IBM</i> , 472 F.3d 1072 (9 <sup>th</sup> Cir. 2007). . . . .	30
<i>Thody v. Ives</i> , 2016 U.S. Dist. Lexis 24095 (C.D. Cal. 2016).. . . . .	48
<i>Thomas v. United States</i> , 189 F.3d 662, 664 (7 <sup>th</sup> Cir. 1999). . . . .	25
<i>Thorpe v. Borough of Jim Thorpe</i> , 2011 U.S. Dist. Lexis 135242 (M.D. Pa. 2011). . . . .	25, 26
<i>United States v. Basler Turbo-67 Conversion DC-3 Air</i> , 1996 U.S. LEXIS 4685 (9 <sup>th</sup> Cir. 1996). . . . .	29

*United States v. Creek Nation*,  
295 U.S. 103 (1935). . . . . 35

*United States v. Hatter*,  
532 U.S. 557 (2001). . . . . 24, 29

*United States v. Lee*,  
106 U.S. 196 (1882). . . . . 47

*United States v. Smith*,  
499 U.S. 160 (1992). . . . . 38

*United States v. Washington*,  
641 F.2d 1368 (9<sup>th</sup> Cir. 1981). . . . . 30

*United States v. Yakima Tribal Court*,  
806 F.2d 853 (9<sup>th</sup> Cir. 1986). . . . . 33, 48

*Vagim v. Haslett Warehouse Co.*,  
131 Cal.App. 197 (1933).. . . . . 45

*Vann v. Kemthphorne*,  
467 F.Supp.2d 56, *aff'd in part*, 534 F.3d 741 (D.C. Cir. 2008).. . . . . 39

*Varela v. Wells Fargo Bank*,  
15 Cal.App.3d 741 (1971).. . . . . 44

*Viall v. Scott*,  
1991 U.S. App. Lexis 22051 (9<sup>th</sup> Cir. 1991).. . . . . 45

*White v. Univ. of California*,  
765 F.3d 1010 (9<sup>th</sup> Cir. 2014). . . . . 23

*Wilson v. Bittick*,  
63 Cal.2d 30 (1965).. . . . 30

*Wisconsin v. Yoder*,  
406 U.S. 205 (1972). . . . . 51

*Yankton Sioux I*,  
83 F. Supp.2d at 1054-57 (D. S.D. 2000).. . . . 39

*Yankton Sioux II*,  
209 F Supp.2d at 1026-27 (D.S.D. 2002).. . . . 39

*Yankton Sioux III*,  
258 F. Supp.2d at 1035-36 (D.S.D. 2003). . . . . 39

*Yassin v. Corr. Corp. Of Am*,  
2011 U.S. Dist. Lexis 110393 (S.D. Cal. 2011).. . . . 49

*Zaslow v. Kroenert*,  
29 Cal.2d 541 (1946). . . . . 44

**Statutes, Rules and Regulations**

U.S. Const. Amend., 1, 5, and 14. . . . . 35, 51, 52, 53

Cal. Const. Article 1, Sections 1, 3, 4, 7, 13, 19, 24 and 31. . . . . 35, 50

5 U.S.C. 706(1) and (2).	38
16 U.S.C. 470aa .	35
16 U.S.C. 470cc.	20, 35
18 U.S.C. 1957.	35
18 U.S.C. 1962.	35
25 U.S.C. 3001.	35
25 U.S.C. 3001(5).	21
25 U.S.C. 3001(13).	20, 23, 53
25 U.S.C. 3001(15).	21
25 U.S.C. 3002.	20, 35
25 U.S.C. 3002(a).	20, 23
25 U.S.C. 3002(a)(1).	22, 23, 32, 53
25 U.S.C. 3002(c).	20, 22, 38
25 U.S.C. 3002(c)(2).	26, 39
25 U.S.C. 3002(c)(4).	39

25 U.S.C. 3003. ....	26
25 U.S.C. 3005. ....	35
25 U.S.C. 3009. ....	35, 46
25 U.S.C. 3013. ....	35
28 U.S.C. 2675(a). ....	40
28 U.S.C. 2679. ....	52
42 U.S.C. 1996. ....	35
42 U.S.C. 2000bb-1.....	35, 49-50
42 U.S.C. 2000cc.....	35
43 C.F.R. 10.1-10.17.....	35, 39
43 C.F.R. 10.1(b)(3). ....	23
43 C.F.R. 10.2(d)(1). ....	35
43 C.F.R. 10.2(f). ....	35
43 C.F.R. 10.2(g)(4). ....	35

43 C.F.R. 10.3(b).....	35
43 C.F.R. 10.4(b).....	35
43 C.F.R. 10.4(c).....	35
43 C.F.R. 10.4(d).....	35
43 C.F.R. 10.4(d)(1)(v).....	35
43 C.F.R. 10.4(e).....	35
43 C.F.R. 10.5.....	35
43 C.F.R. 10.6.....	35
43 C.F.R. § 10.9(b)(1).....	35
43 C.F.R. 10.10.....	35
43 C.F.R. 10.10(b)(1).....	35
43 C.F.R. 10.15.....	26, 35
43 C.F.R. 10.17.....	35, 46
Fed. R. Civ. P., Rule 5(b)(2)(E).....	42
Fed. R. Civ. P., Rule 8(b)(6).....	33

Fed. R. Civ. P., Rule 12(b)(7).	35
Fed. R. Civ. P., Rule 12(d).	19, 21
Fed. R. Civ. P., Rule 19.	19, 29
Fed. R. Civ. Proc., Rule 19(a)(1)(B)(i).	25
Fed. R. Civ. Proc., Rule 19(a)(1)(B)(ii).	26
Fed. R. Civ. Proc., Rule 56.	19
E.D. Cal. Local Rule 135(a), (f), (g)(1).	42
Cal. Civil Code 1928.	45
Cal. Civil Code 1852.	45
Cal. Code of Civil Procedure 389(b).	29
Cal. Evid. C. 669.	42
Cal. Health & Safety C. 7001.	20, 53
Cal. Health & Safety C. 7050.5.	35
Cal. Health & Safety C. 7052.	35
Cal. Health & Safety C. 7054.	35



Cal. Health & Safety C. 7054.6.....	35
Cal. Health & Safety C. 7054.7.....	35
Cal. Health & Safety C. 7055. ....	35
Cal. Health & Safety C. 7100. ....	20, 23, 35, 53
Cal. Health & Safety C. 7500. ....	35
Cal. Health & Safety C. 8011. ....	35
Cal. Health & Safety C. 8012. ....	35, 46
Cal. Health & Safety C. 8015-16. ....	35
Cal. Health & Safety C. 8301.5(d). ....	50
Cal. Health & Safety C. 8558. ....	35
Cal. Health & Safety C. 8560. ....	36
Cal. Health & Safety C. 8580. ....	36
Cal. Health & Safety C. 103060. ....	36
Cal. Penal C. 487.....	36
Cal. Penal C. 622.5. ....	36

Cal. Pub. Res. C.5097.9-5097.99. . . . .	20, 36, 46, 53
Cal. Pub. Res. C. 5097.5. . . . .	20, 36, 46, 53
Cal. Pub. Res. C. 5097.9. . . . .	20, 36, 42, 46, 50
Cal. Pub. Res. C. 5097.94. . . . .	20, 36, 46, 53
Cal. Pub. Res. C. 5097.95. . . . .	20, 36, 46, 53
Cal. Pub. Res. C. 5097.98. . . . .	20, 36, 46, 53
Cal. Pub. Res. C. 5097.98(e). . . . .	20, 36, 46, 53
Cal. Pub. Res. C. 5097.98(f). . . . .	20, 36, 46, 53
Cal. Pub. Res. C. 5097.99. . . . .	20, 36, 46, 53
Cal. Pub. Res. C. 5097.991. . . . .	20, 36, 46, 53
Cal. Pub. Res. C. 5097.993-.994. . . . .	20, 36, 46, 53
Cal. Pub. Res. C. 21083. . . . .	36
14 Cal. Code. Regs. 15126.4 (b)(3). . . . .	36
14 Cal. Code Regs. 15064.5(e) . . . . .	36

## **Introduction**

The Rosales Appellants (hereinafter Rosales) properly plead claims for personal injury damages, conversion and declaratory relief, based upon the illegal disinterment and removal of the Rosales' families' remains without the notice, consent, permits, written plans and just compensation required by the Constitution and the NAGPRA, AIRFA, RFRA, and RLUIPA statutes. See, Appellants' Statutory Addendum; ER44-51; section 5(a)-(e), *infra*. These facts are treated as admitted, having not been denied in an answer. Fed. Rules Civ. P., Rule 8(b)(6).

### **1. The Jamul Indian Village is Not a Required, nor an Indispensable, Party to this Action**

The Jamul Indian Village (JIV) is not a required party because Rosales seeks no remedy affecting JIV interests or Indian trust lands held by the United States. Rosales' "claims do not rise and fall on the ownership of land." *Quechan Ind. Tribe v. United States*, 535 F.Supp.2d 1072, 1100 (S.D. Cal. 2008).

Contrary to the Non-Federal Appellees brief (NFAB) at 10, Rosales properly opposed all of the Appellees' Rule 19 motions to dismiss. ER163-65. Rosales also moved to continue the Rule 19 motions, because 150 pages of "matters outside the pleadings were presented," which therefore "must be treated as [motions] for summary judgment under Rule 56." Fed. R. Civ. Pro., Rule 12(d);

Appellants' Supplemental Excerpt of Record (ASER) 16-31. Judge Mueller erred at law by striking Rosales' motion without deciding it, ECF 86, and by failing to find the disputed material issues of intertwined jurisdictional facts in Appellees' motions precluded summary judgment. Rosales has consistently contested, and certainly hasn't waived its appeal of, the erroneous Rule 19 dismissal.

Appellees don't deny that Rosales' claims are based upon their ownership and control of their families' human remains, which are their personal property. 25 U.S.C. 3001(13), 3002; H.S.C. 7001, 7100; P.R.C. 5097.9-5097.994; *Christensen v. Superior Court (Christensen)*, 54 Cal.3d 868, 890, 896-977 (1991).

Rosales' claims do not depend upon whether the land on which their families were interred is federal lands or tribal lands, because the lineal descendants own and control their families remains "**on Federal or tribal lands,**" 25 U.S.C. 3002(a), and since the "intentional removal from or excavation of Native American cultural items from **Federal or tribal lands,** ...is only permitted... pursuant to a permit issued under section 470cc of Title 16," which requires that the lineal descendants maintain ownership, control and possession of their families' remains. 25 U.S.C. 3002(c). This was admitted in the Federal Appellees' Answering Brief (FAB) 5-6, and in non-federal Appellee, Kenny Meza's declaration, admitting he intentionally and "personally supervised... [t]he

removal of soil usually went 3-6 feet deep.”ER34:8-12.

“‘Federal lands’ means any land other than tribal lands which are controlled or owned by the United States...” and ‘tribal lands’ means—(B) ...all dependent Indian communities,” like JIV here. 25 U.S.C. 3001(5) and (15).

Rosales’ claims do not depend on the location of the Indian cemetery, which is on both federal and tribal lands.<sup>1</sup> Nor does Rosales challenge any consent by JIV to the disinterment. In fact, according to JIV, it claims no knowledge of the disinterment of the families’ remains from tribal lands, ER 149:1-2, since it was admittedly performed by the individual Appellees outside the lawful scope of their JIV employment. ER 33:23-34:12, where Kenny Meza admits to having personally supervised the contractor Appellees’ excavation of the remains without due process notice, Rosales’ consent, and without the dignity required by the

---

<sup>1</sup> A jury must resolve the material dispute between the Rosales’ declarations and that of the individual Appellees, as to the disinterment, trucking and dumping of Rosales’ families’ remains; which is why denial of Rosales’ Rule 12(d) motion is an error at law. ASER 11-31. Contrary to Appellees, NFAB 17, four acres of the cemetery is located on land on which construction was completed. ER58-75, 185:3-189:22. Contrary to NFAB at 52, Rosales and Toggery’s declarations, ER184-218 and ECF 40-1 and 40-2, were never stricken, and were properly incorporated in opposition to the non-federal Appellees’ second motion to dismiss and remain in the record on appeal here. ER 230:21; *Groth v. Owners Ins. Co.*, 2014 U.S. Dist. LEXIS 71884, \*27 (9<sup>th</sup> Cir. 2014) denying summary judgment due to a disputed, but non-stricken, affidavit. Nor were any objections thereto sustained. *Pistor*, at 1112, declarations admitted on issue of immunity.

NAGPRA statutes, which the federal Appellees had the highest fiduciary duty to provide Rosales, and which specific actions all of the Appellees unlawfully withheld, thereby causing Rosales severe personal injury. Moreover, such notice, consent, and dignity would not have affected JIV's use of tribal land whatsoever, had the remains been lawfully relocated in a proper cemetery pursuant to NAGPRA regulations. 25 U.S.C. 3002(a)(1) and (c), and section 5 below.

Because the families' remains have now been disinterred, trucked and dumped twenty miles away beneath SR 905, Rosales does not seek any remedy on federal or tribal land. Since the remains are now on state property, no NAGPRA regulation will be applied to tribal lands, the status of which is simply not at issue here.

Circumstances have dramatically changed since this action was filed, and no remaining remedy will affect any JIV interest. Since the disinterment of the remains was not enjoined, and the construction on the Jamul Indian Cemetery was completed over a year ago, Rosales' remedies have been reduced to damages for the desecration, and an injunction preserving the families' remains "in place" beneath the state highway. Neither of which are sought against JIV. Nor will these remedies affect JIV in any way, nor invalidate any JIV ordinance or contract. JIV admits it has no legal interest in the Rosales' families' remains or the state

highway beneath which they are interred, particularly since repatriation to federal or tribal land is no longer requested or practically feasible.

Appellees do not identify any protected interest that will be impaired or impeded by Rosales' remedies. Any claim to such a protected interest is "patently frivolous," as a matter of law, per 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 (9<sup>th</sup> Cir. 1992), since JIV has no lawful right, title, interest or control over, or in, Rosales' families' remains, nor in the highway beneath which they are interred. *White v. Univ. of California*, 765 F.3d 1010, 1016 (9<sup>th</sup> Cir. 2014), and *Bonnichsen v. United States (Bonnichsen)*, 367 F.3d 864, 875 (9<sup>th</sup> Cir. (2004)). Since the Rosales lineal descendants are still alive, no tribe has any right, title, interest or control over the families' remains. *Id.*; 25 U.S.C. 3001(13) and 3002(a)(1).

Rosales' personal injury claims do not seek, nor require, a final adjudication as to whether: (1) JIV is a federally recognized tribe, (2) the Jamul Indian Cemetery is tribal land, or (3) the Compact was violated. None of these disputed allegations constitute an element of any of the three causes of action for violation of the Rosales' First and Fifth Amendment rights, NAGPRA, AIRFA, RFRA, RLUIPA, Cal. H.S.C., P.R.C., and Penal codes, common law conversion or

injunctive relief.<sup>2</sup>

These non-material background paragraphs are unnecessary to Rosales' claims. Rosales therefore, for the purpose of this appeal, abandons TAC paragraphs: 12, 13, lines 11-15, 22, lines 17-24, 33, line 26, 34, lines 20-23, 50(a) and (d), 52, 53, and paragraph 2(A) and (D) of the prayer, since these paragraphs are not elements of the NAGPRA, conversion or declaratory relief causes of action. An issue not asserted on appeal may be abandoned. *Shah v. Co. of Los Angeles*, 797 F.2d 743, 747 (9<sup>th</sup> Cir. 1986). This Court has "repeatedly held" that leave to amend may be granted, "even if no request to amend the pleading was made..." *Doe v. United States*, 58 F.3d 494, 497 (9<sup>th</sup> Cir. 1995). Thus, Rosales' remaining remedies affect no alleged interest of JIV.

None of these facts are required to award Rosales' damages and an injunction to maintain their families' remains where presently interred. Nor will Rosales' remedies have any affect on: (1) JIV's federal recognition, (2) the use of tribal land, or (3) the Compact. Therefore, JIV is not a required party in this action,

---

<sup>2</sup>This is why none of the prior litigation improperly referenced without a proper record of the complaints, answers, and judgments is relevant here. None of the prior procedural dismissals were on the merits, nor involve identical claims or parties, since unlike the prior litigation, here, no remedy is sought on federal or tribal lands. Therefore the prior dismissals do not preclude any claims here. *United States v. Hatter*, 532 U.S. 557, 566, (2001); *Followay Productions Inc. v. Maurer*, 603 F.2d 72, 76 (9<sup>th</sup> Cir. 1979), and discussion at section 2 *infra*.



just as the affiliated tribes were not required parties in *Thorpe v. Borough of Jim Thorpe (Thorpe)*, 2011 U.S. Dist. Lexis 135242, \*10 (M.D. Pa. 2011).

JIV is not a required party under Fed. R. Civ. Proc., Rule 19(a)(1), since: (1) the court can “accord complete relief among existing parties,” (2) 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 in *Thorpe*, at\*10, and *Thomas v. United States*, 189 F.3d 662, 664 (7<sup>th</sup> Cir. 1999), and admitted at FAB, 25. Appellees also concede that Rosales would have no adequate remedy if the action were dismissed for non-joinder. NAFB at 42.

*Thorpe* is not irrelevant. It is based on nearly identical claims, and expressly holds that the affiliated tribes were not required parties under Rule 19(a)(1)(B)(i), because the Plaintiff’s remedies under NAGPRA would not impair or impede any claimed interest of the tribes, which were represented, as here, before the NAGPRA Review Committee, and therefore not required in the federal action.

There, as here, the land manager who had possession of the remains was bound to provide due notice, and obtain consent from the next of kin required by NAGPRA, before the remains could be disinterred and reburied. NAGPRA requires both a federal land manager and a museum with possession of the remains

to provide these specifically required actions. 25 U.S.C. 3002(c)(3)-3003, permitting excavation and removal only by the lineal descendants, who own and control the disposition of the remains, not their tribe.

There, Jim Thorpe died in California, was buried in Pennsylvania by his third wife in the Borough of Jim Thorpe, and when non-lineal descendants and affiliated tribes sought to disinter and return the remains to the Sac & Fox nation in Oklahoma, the court dismissed their claims because the remains were owned, controlled and properly interred by his next of kin.

There, the affiliated tribes were not required parties under Rule 19(a)(1)(B)(ii), because 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...NAGPRA ensures that they will never be subject to double, multiple or inconsistent obligations.” *Thorpe* at \*10-12.

Finally, Appellees fail to deny that the trial court failed to follow *Michigan v. Bay Mills Indian Community (Michigan)*, 134 S.Ct. 2024, 2035 (2014)(tribal immunity does not bar an injunction against tribal officers responsible for unlawful conduct), and *Salt River Project Agric. Imp. & Power Dist. v. Lee (Salt River)*, 672 F.3d 1176, 1181 (9<sup>th</sup> Cir. 2012), since a tribe is not an indispensable party, where it may be adequately represented by other Appellees. (1) “[T]he

officials' interes are aligned with the tribe's interests;" (2) "there is no reason to believe the Navajo official defendants cannot or will not make any reasonable argument that the tribe would make if it were a party;" and (3) "there is no indication that the tribe would offer any necessary element to the action that the Navajo official defendants would neglect." *Salt River* at 1180-81. Here, as there, the non-federal Appellees were sued for their acts "under color of governmental authority" in violation of law. ER40:20.

Here, JIV is not a required party, since it has no interest that will be affected by the remaining remedies, which are only sought against the individual federal and non-federal Appellees, all of whom, have an obligation to represent JIV, and have an equal interest in defending against Rosales' claims. The remedies are not sought against JIV, nor would they conflict with any JIV obligations. For all of these reasons, the trial court's erroneous dismissal must still be reversed, and the action remanded.

**2. There is No Claim Preclusion Because: (1) Rosales' Present Desecration Claims Are Not the Same as Any Prior Claims, (2) Do Not Seek Any Remedy on Tribal Land, and (3) There Was No Prior Final Adjudication of any Issue in this Action.**

Rosales' prior lawsuits do not preclude their present claims for desecration. First, Rosales' present claims did not arise until the desecration began in 2014;

hence none of the prior claims involved identical claims. In fact, the prior litigation was found to be premature in that no desecration had yet taken place.

Moreover, this action seeks no injunctive relief on any tribal lands, since the families' remains have been removed from the Jamul Indian Cemetery, unlike the prior litigation that sought to enjoin construction on the Jamul Indian Cemetery.

Finally, there has been no prior final adjudication of any remaining issue in this claim for personal injury damages and an injunction to maintain the remains now beneath the state highway. All of the prior litigation was dismissed on procedural grounds based upon the allegation that the prior remedies would have impaired the use of JIV's tribal lands.

Hence, none of the prior litigation was ever decided on the merits of identical claims. Nor do any prior procedural dismissals without a decision on the merits have any *res judicata* or collateral estoppel affect on any issue in this action. Appellees' admit, there can be no issue preclusion without a final adjudication in the prior action. FAB 19. Here, there are no prior final adjudications of any issue pending in this case. None of those cases finally decided that Rosales would not be damaged when their families' remains were disinterred from the Indian cemetery, and then trucked and dumped beneath SR 905. Nor was there any prior final decision that those remains were not protected

by the 1<sup>st</sup> and 5<sup>th</sup> Amendments, and the federal and state NAGPRA statutes, from the Appellees' disinterment, desecration and conversion.

Moreover, since the Appellees have failed to provide a "sufficient record," including complete copies of the prior complaints, answers, and orders, there is no proper record upon which this Court may base any issue preclusion in this action. *United States v. BaslerTurbo-67 Conversion DC-3 Air*, 1996 U.S. LEXIS 4685, \*7-8 (9<sup>th</sup> Cir. 1996); *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1321 (9<sup>th</sup> Cir. 1992), where the record failed to show what issues were previously litigated, the Court of Appeal will not consider the issue on appeal; *Frankfort Digital Servs. v. Kistler*, 477 F3d. 1117, 1123 (9<sup>th</sup> Cir. 2007), "[a]ny reasonable doubt as to what was decided by a prior judgment should be resolved against giving it [issue preclusive] effect."

Since all of the referenced prior cases were procedurally dismissed, due to a lack of jurisdiction to decide the merits in the absence of an indispensable party claiming sovereign immunity, none of those decisions have any issue preclusive effect under the doctrines of *res judicata* or collateral estoppel, having been "dismissed without prejudice," per both F.R.C.P. or F.C.F.C., Rule 19, and C.C.P. 389(b). *Costello v. United States*, 365 U.S. 265, 286-87 (1961); *United States v. Hatter*, 532 U.S. 557, 566, (2001), no issue preclusion where the court did not

reach the merits of the Cherokee Nation's claim; *Followay Productions Inc. v. Maurer*, 603 F.2d 72, 76 (9<sup>th</sup> Cir. 1979); *Syverson v. IBM*, 472 F.3d 1072, 1078 (9<sup>th</sup> Cir. 2007); *United States v. Washington*, 641 F.2d 1368, 1374 (9<sup>th</sup> Cir. 1981), because “the causes of action and factual issues litigated [by the Indian Claims Commission] were different, the doctrines of res judicata and collateral estoppel are therefore inapplicable;” and *Wilson v. Bittick*, 63 Cal.2d 30, 35-36 (1965).

Here, no court has made a prior final decision on the merits of identical claims as to the desecration of the Rosales’ families’ remains which began in 2014. *Rosales IX*, (using Appellees’ reference), No. 3:07cv624 (S.D. Cal. 2007), was dismissed as premature, since, unlike here, an injunction was sought on tribal lands, and there had not yet been any desecration of the remains. Here, no injunction is sought on tribal lands, and the families’ remains were, in fact, intentionally excavated and removed in February 2014.

*Rosales VI*, *Rosales v. United States*, No. 98-860 (Fed. Cl. 2008) and *Rosales X*, *Rosales v. United States*, No. 08-512, 89 Fed. Cl. 565 (Ct. Fed. Cl. 2008), *aff’d*, No. 2010-5028, 2010 U.S. App. LEXIS 19443 (Fed. Cir.), did not involve any NAGPRA claims, but claims for damages arising from Rosales’ wrongful eviction, which was dismissed for lack of jurisdiction under the Tucker Act. Neither jurisdictional ruling decided the merits of any claim by Rosales here.

In *Rosales VII, Rosales v. United States*, No. 01-951 (S.D. Cal. 2002), *aff'd*, 73 Fed. Appx. 913 (9<sup>th</sup> Cir. 2003), this Court affirmed another procedural dismissal for lack of an indispensable party, since Appellants sought possession of a portion of the Indian cemetery. Hence, any trial court dicta (which was not adopted by this Court) concerning the cemetery trust parcel is not a final decision on the merits and therefore is neither *res judicata* or collateral estoppel here.

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

The trial court's dismissal due to the alleged sovereign immunity of JIV employees, erroneously fails to follow *Lewis v. Clarke (Lewis)*, 137 S. Ct. 1285, 1292 (2017), and *Maxwell v. County of San Diego*, 708 F.3d 10075, 1087 (9<sup>th</sup> Cir. 2013), which hold that tribal officers, employees and contractors have no sovereign immunity for their individual illegal acts taken under color of law, even in the course of their official duties. See, *Hafer, Oklahoma Tax Comm., Santa Clara Pueblo, Puyallup Tribe, and Pistor* (chief of police), at AOB 46.

Here, the non-federal Appellees are sued in their individual capacities, because they acted illegally in excess of their authority in desecrating and converting the families' remains in violation of the NAGPRA statutes. ER40:15-21, 41:7-20. Appellees ignore that "[A]llegations of acts outside an officer's

authority are by definition individual capacity claims.” *Maxwell* at 1989.

The non-federal Appellees are not sued for any official acts of JIV. Officially, JIV has no authority to disinter and relocate the families’ remains, while there are non-consenting surviving lineal descendants. 25 U.S.C. 3002(a)(1). In fact, JIV steadfastly maintains it took no official action to relocate the families’ remains. ER159:1-2, 150:14-16.

Moreover, Appellees silently concede that approval, payment, and supervision of construction did not require illegal disinterment, desecration and conversion of Rosales’ families’ remains. The individual Appellees were not sued for lawful construction activities, which would not have disinterred the families’ remains without consent and re-interment in a proper cemetery. They were sued for illegal disinterment, desecration and conversion of the remains. Appellees ignore that NAGPRA regulations should have been followed during any lawful construction, but they weren’t, thereby entitling Rosales to damages for their families’ disinterment and relocation without consent.

Here, since these acts were committed by the individuals in excess of any official authority, *Michigan*, at 2035; *Evans v. Shoshone-Bannock LUPC*, 736 F.3d 1298, 1307, fn. 10 (9<sup>th</sup> Cir. 2013), “the tribe’s sovereign immunity] arguments are without merit.” “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 (9<sup>th</sup> Cir. 1986). These acts remain by law admitted, having not been denied in an answer. Fed. Rules Civ. P., Rule 8(b)(6).

Here, the non-federal Appellees have no sovereign immunity for the personal injury damages caused by their violation of NAGPRA and conversion of the families’ remains. As in *Lewis*, “This is a negligence action arising from a tort committed by [the individuals] on a... highway within the State...which will not require action by the sovereign or disturb the sovereign’s property...here, immunity is simply not in play.” *Id.*, at 1292. As in *Maxwell*, “the [individuals] do not enjoy tribal sovereign immunity because a remedy would operate against them, not the tribe...the sovereign is not the real, substantial party in interest...Any damages will come from their own pockets, not the tribal treasury.” *Id.*, at 1087-89, distinguishing *Cook v. AVI Casino Ent. Inc.*, 548 F.3d 718 (9<sup>th</sup> Cir. 2008), erroneously cited by the trial court, where, unlike here, the individuals were sued in their official capacity. “There is no reason to give tribal officers broader sovereign immunity protections than state or federal officers.” *Maxwell*, 1089.

**4. Since the Trial Court Has Not Yet Ruled Upon the Merits of the Appellees' Claims that Rosales Lacks Standing or Has Failed to State Claims this Action Must be Remanded**

“When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the district court. *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92, 72 L. Ed. 2d 66, 102 S. Ct. 1781 (1982).” *Rolex Watch, U.S.A., Inc. v. Michel Co.*, 179 F.3d 704, 711 (9<sup>th</sup> Cir. 1999).

Therefore, since the trial court did not rule upon the Appellees' claims that Rosales lacks standing and did not sufficiently state a claim, due to its erroneous view that JIV is a required party, the matter should be remanded to permit the trial court to rule on those claims in the first instance, before they are reviewed by this Court.

Moreover, Appellees do not deny that where, as here, the jurisdictional facts are disputed and coextensive with the merits of Rosales' claims, the dismissal must also be reversed because the "jurisdictional issue and the substantive claims are so intertwined...the intertwined jurisdictional facts must be resolved at trial by the trier of fact." *Rosales v. U.S.*, 824 F.2d 799, 803 (9<sup>th</sup> Cir. 1987); *Rivas v. Napolitano*, 714 F.3d 1108, 1113 (9<sup>th</sup> Cir. 2011). Here, since the disputed

infringement of Rosales' First and Fifth Amendment rights and private rights of action for the desecration of their families' remains establish both the Court's subject matter jurisdiction under Rule 12(b)(7) and the merits of Rosales' claims, Rosales remains entitled to a jury trial, and dismissal must be reversed.

**5. Rosales Has Properly Pled Article III Standing and Waiver of Federal Appellees Sovereign Immunity**

The Appellees' desecration of the Rosales' families' remains has caused severe on-going personal injury, since the February 10, 2014 disinterment, trucking and dumping of the remains beneath SR 905, which may be redressed in damages and an injunction to maintain the remains beneath State Route 905.

The federal Appellees concede that they have no sovereign immunity for damages caused in breach of the government's fiduciary duty under the Tucker Acts and NAGPRA to protect the remains, FAB 33, see the *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935) line of cases, AOB at 25, and ER174-75, since they violated at least 46 specific statutory duties under the 1st and 5<sup>th</sup> Amendments, 16 U.S.C. §470aa and cc, 18 U.S.C. §§1957, 1962, NAGPRA, 25 U.S.C. §§3001-2, 3005, 3009, 3013, 43 C.F.R. 10.1-17, AIRFA, 42 U.S.C. §1996, RFRA, 42 U.S.C. §2000bb-1, 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, 8011, 8012, 8015, 8016, 8558, 8560,

8580, 103060, P.R.C. §§5097.9-5097.99, 21083, Cal. Penal Code §§487, 622.5, 14 Cal. Code Regs. 15064.5(e) and 15126.4(b)(3), and the common law, as alleged in the TAC, ER45:20-47:14, and conceded by the trial court's order. ER12:14-20.

These are not vague or conclusory inactions, but specific actions that they were required to take, but did not perform, thereby causing Rosales' injury in fact. Each of these laws were specifically violated when the individual federal land managers at the BIA, Appellees Dutschke and Ryzdik, failed to: (a) obtain the required permits before the intentional excavation and removal of Rosales' families' remains from the Indian Cemetery on Federal and tribal lands to state property, (b) provide Rosales the required notice and obtain their consent, (c) provide Rosales just compensation, ownership and control of the disposition of those remains upon disinterment, (d) create a written plan of action for disposition and a reasonable effort to protect the remains "in place," according to the traditional treatment of Rosales' families' remains required by law and the National Center for Cultural Resources and the National NAGPRA Program, Exs. L and M to the TAC, ER118 and 123, and (e) transfer physical custody of the remains to Rosales for re-interment with the dignity required by law in a place not subject to further disturbance. ER45:20-47:14.

The NAGPRA laws were further violated by the non-Federal Appellees' intentional disinterment of the remains without notice to, and consent by, Rosales, thereby desecrating the remains without the dignity to which they are due by law.

Had these specific actions, required by law been taken by the federal and non-federal Appellees, the Rosales' families' remains would not have been trucked and dumped on a highway construction site. They would have been handled with the proper dignity due the relocation of any Native American cemetery, and re-interred in a proper cemetery.

Therefore, both the Tucker Acts and the APA waive immunity for actions "unlawfully withheld," because the federal land managers failed to take discrete agency action that they were required to take, as conceded by FAB at 21. For having caused this injury in fact, both the federal and non-federal Appellees owe Rosales redress in damages, thereby establishing the triad for Article III standing.

**6. The APA and FTCA Also Waive Sovereign Immunity for Rosales' Claims Against the Federal Appellees**

Federal Appellees concede that sovereign immunity for tort claims arising from constitutional and statutory violations of the NAGPRA statutes and California's state law is waived by the APA. FAB 34, citing *Bonnichsen v. United States*, 367 F.3d 864, 874-5 (9<sup>th</sup> Cir. 2004). Similarly they concede that it is

waived by the FTCA, FAB 34, citing *United States v. Smith*, 499 U.S. 160, 166 (1992).

**A. APA Waiver of Sovereign Immunity**

Federal Appellees similarly concede that the APA waiver of sovereign immunity also applies to the specific actions required by the NAGPRA statutes, listed in section 5 above, that were “unlawfully withheld,” when the federal land managers “failed to act” as required. FAB 9, 36, 38; 5 U.S.C. §706(1) and (2). Rosales is no longer asserting claims based upon the final agency Indian lands decision.<sup>3</sup>

These 46 specific actions are in fact “discrete agency action that [the federal land manager] is required to take,” when Native American human remains are intentionally removed and excavated from tribal lands. 25 U.S.C. 3002(c); *Norton v. SUWA*, 542 U.S. 55, 63 (2004); ER45-49, 171:25, summarized in section 5 above (a)-(e). Contrary to Appellees, they are not claims based on “public trust” or other “broad mandates, such as... the public interest.” FAB 39. See for e.g., *Cobell*

---

<sup>3</sup> The publication of the BIA’s Indian lands decision, as the lead agency for the NIGC, at 78 Fed. Reg. 21398, and the subsequent approval of JIV’s gaming ordinance, both without a proper Supplemental Environmental Impact Report (SEIR), are no longer at issue here, since the families’ remains have been relocated, construction has been completed, and no remedy is sought that requires an SEIR.

*v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001); *Vann v. Kemthphorne*, 467 F.Supp.2d 56, 72, 74, fn. 14, *aff'd in part*, 534 F.3d 741 (D.C. Cir. 2008), where the Secretary's failure to act regarding the Cherokee election was a final agency action subject to judicial review, and actions for injunctive relief against individual tribal officers acting outside the scope of their authority were “not actions against the sovereign.”

Similarly there was no sovereign immunity for the government’s failures to take discrete agency action required by NAGPRA in *Yankton Sioux I*, 83 F. Supp.2d at 1054-57, *Yankton Sioux II*, 209 F Supp.2d at 1026-27, *Yankton Sioux III*, 258 F. Supp.2d at 1035-36, and *San Carlos Apache Tribe*, 272 F. Supp. 2d at 887, NAGPRA “governs the intentional excavation or removal of Native American human remains and objects from **federal or tribal lands** and does not allow excavation or removal unless items are removed or excavated pursuant to an ARPA permit,...” and consultation and consent of the lineal descendants, as required under 25 U.S.C. 3002(c)(2), (4) and 43 C.F.R. 10.1-17; *Fallon Paiute-Shoshone Tribe v. BLM*, 455 F.Supp.2d 1207, 1213, 1216-17 (D. Nev. 2006) and *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936, 938-39 (10<sup>th</sup> Cir. 1996), finding the federal land managers arbitrarily failed to determine affiliation, consult and repatriate, as required by NAGPRA.

## **B. FTCA Waiver of Sovereign Immunity**

Appellees admit that the FTCA waives U.S. sovereign immunity. FAB 40. Rosales has properly plead presentation of their FTCA claims, when Dutschke and Ryzdik received written notice of Rosales' claims in their Amicus Brief in 13cv1920, ECF 75-2, on February 11, 2015, more than six months before the Rosales Appellants amended their complaint to state FTCA claims on May 20, 2016, pursuant to 28 U.S.C. 2675(a). *FGS Constructors Inc. v. Carlow (FGS)*, 823 F.Supp. 1508, 1513 (W.D.S.D.1993), *aff'd in part and reversed in part*, 64 F.3d 1230 (8<sup>th</sup> Cir. 1995).

Dutschke and Ryzdik were given notice in the amicus brief: (1) of the general bases of Rosales' desecration claims, (2) that Rosales was seeking more than \$250,000, for the desecration of 5 family members' remains, which amount was amended to \$4 million and received by federal Appellees on September 23, 2015, and (3) more than six months passed without final disposition of Rosales' claims. ER45:12-14. All of which is memorialized in the September 23, 2015 Form 95, Ex. O, ER171, pursuant to *Broudy v. United States*, 722 F.2d 566, 568-69 (9<sup>th</sup> Cir. 1983), *Avery v. United States*, 680 F2d 608, 610-11 (9<sup>th</sup> Cir. 1982), *Industrial Ind. Co. v. United States*, 504 F.Supp. 394, 399 (E.D. Cal. 1980).

“[T]he presentment requirements of section 2675(a) do not require the



claimant to set forth his legal theories of recovery...if the administrative claim ‘fairly apprises the government of the facts leading to the claimant’s injury...’” *FGS* at 1513; *Rooney v. United States*, 634 F.2d 1238, 1242-3 (9th Cir. 1980). Here, the federal Appellees are estopped by the Local Rules to deny they received notice of Rosales’ claims in the amicus brief more than 6 months before the FTCA claim was first filed. ER45:11-14.

The original complaint did not plead jurisdiction under the FTCA, which was only added in the FAC, SAC and TAC, beginning on May 23, 2016. This was more than 6 months after receipt of the amicus brief on February 11, 2015, and after the claims were deemed denied on August 11, 2015. Neither *McNeil v. United States*, 508 U.S. 106 (1993), nor *Jerves v. United States*, 966 F.2d 517 (9<sup>th</sup> Cir. 1992) apply, since their original actions both alleged FTCA damage claims, unlike here, where Rosales’ original complaint sought no FTCA damage claims. Here, Rosales originally only pled private rights of action under the NAGPRA statutes and the APA’s waiver of sovereign immunity. The amended complaints were then filed more than 6 months later, without resolution of the FTCA damage claims. *Christensen*, at 890, citing *O’Donnell v. Slack* (1899) 123 Cal. 285, 289; *People v. Van Horn*, 218 Cal.App.3d 1378, 1391-92 (1990), finding standing to contest illegal possession of remains under P.R.C. 5097.99; *Quechan* at 1100,

1108, 1121-22, P.R.C. 5097.9, finding Native Americans' standing and private right of action for interference with Native American religion and damage to ceremonial sites; and *Palmquist v. Standard Acc. Ins. Co.*(*Palmquist*), 3 F.Supp. 358, 360 (S.D. Cal. 1933); finding a private right of action for *per se* negligence in violation of NAGPRA and California law, like PRC 5097.9, under Evid. C. 669.

The federal Appellees received Rosales' Amicus Brief, Rosales' Opposition to their first MTD, ECF 40, 13:3-6 (pointing out the February 11, 2015 FTCA claim presentation), and the September 25, 2015 Form 95, Ex. O, ER171, upon electronic filing pursuant to E.D. Cal. Local Rule 135(a), (f), (g)(1), and Fed. R. Civ. P. 5(b)(2)(E). Hence, Rosales' FTCA claims were not made prematurely, and the federal land managers received the requisite 6 months in which to evaluate their claims.

**7. Rosales Has Properly Plead a Conversion Claim for Money Damages Against Both the Federal and Non-Federal Appellees**

The common law has long recognized personal injury and personal property damages arising from desecration, mutilation or disinterment of the dead.

*Palmquist* at 360; *Allen v. Jones*, 104 Cal.App.3d 207 (1980); *Ross v. Forest Lawn Mem. Park*, 153 Cal.App.3d 988, 993-94 (1984); *Sinai Mem. Chapel v. Dudler*, 231 Cal.App.3d 190, 197 (1991); *Saari v. Jongordon Corp.*, 5 Cal.App.4th 797,

803-4 (1992). Next of kin have a quasi-property right in the body of a deceased for purposes of interment. *Sinai Temple v. Kaplan*, 54 Cal. App. 3d 1103,1110 and fn. 13 (1976); *Cohen v. Groman Mortuary, Inc.*, 231 Cal. App. 2d 3, 4–5 (1964).

Rosales has properly pled conversion since both the federal and the non-federal Appellees prevented Rosales from exercising their immediate right to possession, control and disposition of their families' remains. As conceded at FAB at 45, Rosales has properly pled ownership and right to control their families' remains, wrongful disposition of that property by the Appellees in concert with one another, and damages. All of the Appellees are alleged to have at one time or another been in possession of Rosales' families' remains, and have dispossessed Rosales' rights to ownership and control of the disposition of their families' remains.

An action for conversion need only allege that “she was entitled to immediate possession at the time of conversion.” *Messerall v. Fulwider*, 199 Cal. App. 3d 1324, 1329 (1988). Conversion ““rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. ...’ ” *Burlesci v. Petersen*, 68 Cal.App.4th 1062, 1065 (1998). “To establish a conversion,” one need only show the Defendant

“prevent[ed] the owner from taking possession of the property.” *Zaslow v. Kroenert*, 29 Cal.2d 541, 550 (1946), “conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.” *Id.*, at 549.

Here, “defendants and each of them, wrongfully refused plaintiff's request to take possession of the personal property...pursuant to its right to immediate possession thereof, and defendants, and each of them, thereby converted said personal property, and are therefore liable to plaintiff for damages.” *Hartford Fin. Corp. v. Burns*, 96 Cal.App.3d 591, 601-2 (1979). Failure to protect a property interest over which the defendant exercised dominion and control, resulted in a judgment for conversion. *Hartelius v. Northern Burlington R.R. Co.*, 1999 U.S. App. Lexis 2771, \*3-4 (9<sup>th</sup> Cir. 1999).

Having failed to return Plaintiff's property on demand, defendant is guilty of conversion, since it “exercise[d] a dominion or control over the goods which is in fact inconsistent with the plaintiff's rights.” *Varela v. Wells Fargo Bank*, 15 Cal.App.3d 741, 749-750 (1971). Thus, even where a defendant had no actual knowledge that it possessed the Plaintiff's property when it took possession, defendant remained liable for conversion, since the defendant had the intent to exercise dominion over the property and, necessarily, everything in it.

*Viall v. Scott*, 1991 U.S. App. Lexis 22051, \*22 (9<sup>th</sup> Cir. 1991), held appellants responsible for conversion caused by their negligent supervision in failing to prevent the conversion. Mere good faith of the defendant in refusing to deliver the property to the owner, upon demand, is no defense to the action of conversion. *Poggi v. Scott*, 167 Cal. 372, 375 (1914); *Staley v. McClurken*, 35 Cal.App.2d 622, 628 (1939); *Vagim v. Haslett Warehouse Co.*, 131 Cal.App. 197 (1933).

“An action for conversion of personal property lies against a bailee, who, upon demand, wrongfully refuses to deliver possession thereof to the owner and exercises dominion over the property to the owner's detriment.” *Chatterton v. Boone*, 81 Cal.App.2d 943, 945-46 (1947). Plaintiff need only prove “ownership of the property, the right of possession and a demand therefor [to] establish a prima facie case of conversion against the bailee.” *Id.*

There is no dispute that the federal land managers Dutschke and Ryzdik came into possession and control of Rosales’ families’ remains when they were lawfully interred on the government’s portion of the cemetery. They therefore had the duty of a bailee to use ordinary care "for its preservation in safety and in good condition," and “to prevent further loss and deterioration... Civ. Code, §§ 1928, 1852. This they failed to do.” *Id.* Having failed to permit Rosales to exercise

ownership and control of the disposition of their families' remains, the federal Appellees, thereby in concert with the non-federal Appellees, did, in fact, convert Rosales' personal property by depriving them of their rightful possession without their consent.

Similarly, the non-federal Appellees wrongfully refused to deliver possession of Rosales' families' remains upon Rosales' demand, when the Appellees had no right to such possession whatsoever. All Appellees therefore remain liable for their conversion of the Rosales' families' remains.

**8. In the Alternative NAGPRA Remedies are not Awarded, Rosales Remains Entitled to *Bivens* Claims Against the Federal Appellees**

The Federal Appellees concede that Congress' provision of a private right of action under NAGPRA avoids the need for the imposition of an implied right of damages for an individual federal officer's violation of the Constitution or the NAGPRA statutes under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). FAB 46-49.<sup>4</sup> However, should the NAGPRA

---

<sup>4</sup> There is no federal preemption with regard to Native American burial rights, rather there is an explicit savings clause in both the federal NAGPRA, and California's HSC and PRC for the private rights of action under both state and federal law against federal officials. 25 U.S.C. 3009, 43 C.F.R. 10.1(b)(3) and 10.17, HSC 8012, and PRC 5079.9-5079.994. See for e.g., *Quechan Ind. Tribe v. United States*, 535 F.Supp.2d 1072, 1100 (S.D. Cal. 2008), and cases cited at ER172:10-13.

remedies not be awarded to the Appellants, they remain entitled to damages under *Bivens*.

“[T]he Supreme Court recognizes an implied damages remedy under the Due Process Clause of the Fifth Amendment,” against federal officials in their individual capacities for which there is no sovereign immunity. ECF 63-1, 3:11-12, citing *Davis v. Passman*, 442 U.S. 228 (1979). For example, a federal official who acts outside of his federal statutory authority is held strictly liable for his trespassory acts. *Butz v. Economou*, 438 U.S. 478, 489 (1977). See, e. g., *United States v. Lee*, 106 U.S. 196 (1882), where an ejectment action enforced the Takings Clause of the Fifth Amendment against federal officers; *Love v. United States*, 915 F.2d 1242, 1249 (9th Cir. 1989), where denial of due process was a proper *Bivens* claim against the individual federal employees.

Moreover, since First Amendment rights are considered so clearly established constitutional rights, even though the Supreme Court has not yet explicitly held an implied remedy under the Free Exercise Clause, it “assume[s], without deciding, that respondent's First Amendment claim is actionable under *Bivens*. *Ashcroft v. Iqbal*, 556 U.S. 662, 675-76 (2009), “[t]he implied cause of action [under *Bivens*] is the “federal analog to suits brought against state officials under 42 U.S.C. § 1983. *Hartman v. Moore*, 547 U.S. 250, 254, n. 2 (2006).”

*Gibson v. United States*, 781 F.2d 1334, 1342 (9<sup>th</sup> Cir. 1986), recognizes a First Amendment *Bivens* remedy, as does *Thody v. Ives*, 2016 U.S. Dist. Lexis 24095, \*4 (C.D. Cal. 2016), finding denial of the free exercise of religion is appropriately a *Bivens* action. Hence, Plaintiffs do not seek to “extend *Bivens* liability to any new context or new category of defendants.”

“If a federal official...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*. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 696-97 (1949). Any claim making such constitutional allegations is not barred by sovereign immunity and is within the jurisdiction of the federal court. *Id.*, 701-2. The claim is made only against the official and not against the United States, as the official was acting individually and not in his capacity as a government agent. *Id.*” *United States v. Yakima Tribal Court*, 806 F.2d 853, 859 (9<sup>th</sup> Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); *Morgan v. California*, 743 F.3d 728, 731 (9<sup>th</sup> Cir. 1984).

## **9. Dutschke and Ryzdik Violated Rosales’ Free Exercise of Religious Burial Rights**

In addition to their *Bivens* claims, Rosales’ free exercise of their religious burial rights were impermissibly burdened by the government. Dutschke and



Ryzdik denied Rosales' ownership, control and free exercise of the right to bury their families' remains according to their religion, which does not permit their dead to be disinterred and desecrated. Thereby the government "interfer[ed] with a believer's ability to observe the commands or practices of his faith." *E.E.O.C. v. Catholic University of America*, 83 F.3d 455, 460 (D.C. Cir. 1996); *Montgomery v. Board of Retirement*, 33 Cal.App.3d 447, 450-52 (1973), finding no compelling state interest for substantial denial of free exercise of religion. Where "Plaintiff has alleged...a substantial burden on his ability to exercise his religion, [a]ccordingly, Defendants' Motion to Dismiss Plaintiff's statutory claims under RFRA is denied, [and] the Court denies Defendant[']s motion to dismiss Plaintiff's First Amendment Free Exercise claims." *Yassin v. Corr. Corp. Of Am*, 2011 U.S. Dist. Lexis 110393, \*\*13, 16 (S.D. Cal. 2011).

RFRA also waives U.S. sovereign immunity and provides: "A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." "Government shall not substantially burden a person's exercise of religion," unless "application of the burden to the person--(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §

2000bb-1; see also, P.R.C. 5097.9, and H.S.C. 8301.5(d).

The federal Appellees have no compelling interest to burden the exercise of Rosales' religious burial rights. Nor do they have any right to choose between differing customs of Native American religion, as they did here, preferring the disinterment of Rosales' families' remains, without their consent in violation of the free exercise of their religious rights not to permit them to be disinterred or desecrated.

"Free exercise and enjoyment of religion without discrimination or preference are guaranteed." Cal. Const. Art. 1, §4. The California Supreme Court holds that the free exercise of religion is guaranteed "without discrimination or preference." Art. 1, §4. "[T]he intent [of the clause] is to ensure that free exercise of religion is guaranteed regardless of the nature of the religious belief professed, and that the state neither favors nor discriminates against religion." *East Bay Asian Local Development Corp. v. State of California*, 24 Cal.4th 693, 719 (2000); see, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2778 (2014), warning "that courts must not presume to determine...the plausibility of a religious claim."

Any federal official's "action showing a preference for [a] belief will be strictly scrutinized and must be invalidated unless it is justified by a compelling governmental interest with which 'it is closely fitted to further [that] interest.'"

*Feminist Women's Health Center, Inc. v. Philibosian (Philibosian)*, 157 Cal.App.3d 1076, 1088 (1984), finding the government's releasing 16,000 fetuses to a private cemetery, illegally preferred a Catholic religious ceremony without secular purpose in violation of Art. 1, §4; *Fox v. City of Los Angeles*, 22 Cal.3d 792, 796 (1978), California's free exercise guarantee is broader than the federal guarantee because "preference is forbidden," even when there is no discrimination. "We must never forget that the religious freedom of every person is threatened whenever government associates its powers with one particular religious tradition." *Id.*, 805; *Sands v. Morongo Unified Sch. Dist.*, 53 Cal.3d 863, 874-75 (1991).

Rosales' rights to protect their dead from illegal possession and desecration in violation of their personal religious beliefs, are quintessentially individual rights protected by the Free Exercise Clauses, RFRA and RLUIPA, from infringement by the federal Appellees. U.S. Const. 1<sup>st</sup> Amendment; Cal. Const. Art. I §§4 & 24; *Philibosian*. at 1088; *Sherbert v. Verner*, 174 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2775 (2014), finding the contraceptive mandate substantially burdened owners' religious practices and was not the least restrictive means of furthering the governmental interest in violation of RFRA; see also, *Holt v. Hobbs*,

135 S.Ct. 853, 859 (2015), finding state prison’s grooming policy impermissibly burdened prisoner’s free exercise of religion in violation of RLIUPA.

Here, the federal Appellees also ignore that Dutschke and Ryzdik were sued in their official capacity, and that “the United States is automatically substituted as the Defendant, pursuant to the Westfall Act, 28 U.S.C. 2679.” ER40:11-12. Thus, the trial court’s dismissal must also be reversed because JIV has no interest in the award of Rosales’ remedies for the government’s impermissible burden on the free exercise of their families’ religious burial rights.

**10. Dutschke and Ryzdik Violated Rosales’ Fifth Amendment Rights to Due Process and Just Compensation**

Dutschke and Ryzdik also deprived Appellants of their personal property rights in their families’ remains, “without due process of law and just compensation,” when they allowed them to be dug up, trucked and dumped beneath SR 905, without a pre-deprivation trial of the material issues of fact raised in the TAC. U.S. Const. 5<sup>th</sup> Amendment. This is not a claim for any invasion of real property, but for the denial of Rosales’ constitutional, personal injury and personal property rights in their families’ remains. The government’s portion of the Indian cemetery is both federal lands and tribal lands, because it is owned in fee simple by the United States. ER67. Rosales is thereby entitled to the federal

Appellees protection of their families’ remains from intentional disinterment and removal without their consent and without due process and just compensation. *Id.*; 25 U.S.C. 3001(13), 3002(a)(1); H.S.C. 7001, 7100; P.R.C. 5097.9-5097.994.

“[L]ongstanding recognition in the law of California, paralleled by our national common law,” holds “that next of kin have the exclusive right to possess the bodies of their deceased family members [and] creates a property interest, the deprivation of which must be accorded due process of law under the [Fifth and] Fourteenth Amendment of the... Constitution.” *Newman v. Sathyavaglswaran (Newman)*, 287 F.3d 786, 788, 790-94 (9<sup>th</sup> Cir. 2002); *Palmquist*, 3 F.Supp. 358, 360 (S.D. Cal. 1933), permitting personal injury damages caused by unauthorized removal of organs from family remains.

In *Newman*, the Los Angeles coroner’s harvesting of the parents’ dead children’s corneas, without notice or consent, was a taking of the families’ property without due process of law in violation of the Fourteenth Amendment. *Newman*, at 796-97. There, as here, the taking is undisputed. The federal Appellees do not deny that Rosales’ families’ remains were illegally disinterred, trucked and dumped beneath SR 905, without just compensation, and without the required permits Dutschke and Ryzdik were personally obligated to obtain before any disinterment and the denial of Rosales’ ownership and control of the

disposition of those remains.

Rosales' property rights in their families' remains can't be denied without due process, a trial of the disputed facts, and just compensation. *Id.*; *Rasmussen v. Superior Court*, 51 Cal.4th 804, 808 (2011), granting review to reverse summary judgment due to triable issues of fact concerning ownership of church property. "[W]e must 'take as true all allegations of material fact stated in the complaint.'" *Newman*, 788. Just as "the parents had exclusive and legitimate claims of entitlement to possess, control, dispose and prevent the violation of the... bodies of their deceased children," so too, were Rosales' property rights in their families' remains denied without due process and just compensation. *Newman*, 796. There, as here, the government "did not merely 'take a single strand from the bundle of property rights: it chopped through the bundle, taking a slice of every strand.'" *Newman*, 798.

"The property rights that California affords to next of kin to the body of their deceased relatives [were] infringed... when [the government allowed the desecration of] those bodies without the consent of the parents." *Newman*, 798. The federal Appellees "may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Newman*, 799, finding "the failure to afford a pre-deprivation hearing," "turns on issues of fact that cannot be properly examined" without a trial on the merits.

Thus, the trial court's dismissal without a trial must also be reversed because JIV has no interest in the award of Rosales' remedies for the government's taking without just compensation.

### **Conclusion**

The trial court's erroneous dismissal must be reversed, and Rosales' remaining claims must be remanded for trial because: (1) non-party JIV is not a required or indispensable party, and (2) none of the Appellees have sovereign immunity for the personal injury damages caused by their illegal desecration of Rosales' families' remains, in violation of the Constitution, the NAGPRA statutes and common law, as properly pled in the TAC.

Dated: April 27, 2018.

Respectfully submitted,

/s/Patrick D. Webb

Patrick D. Webb

Attorneys for Appellants

**Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-16967**

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

- This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1. The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b). The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1)  separately represented parties; (2)  a party or parties filing a single brief in response to multiple briefs; or (3)  a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the longer length limit authorized by court order dated . The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.
- This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits set forth at Ninth Circuit Rule 32-4. The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant

Date

("s/" plus typed name is acceptable for electronically-filed documents)



## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the forgoing Appellants' Reply Brief with Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system on April 27, 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: April 27, 2018.

Respectfully submitted,

/s/Patrick D. Webb

Patrick D. Webb

Attorneys for Appellants

**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' STATUTORY AND REGULATORY ADDENDUM**

**WEBB & CAREY**  
Patrick D. Webb (Cal. Bar 82857)  
402 W. Broadway, Suite 1230  
San Diego, California 92101  
Tel (619) 236-1650  
Fax (619) 236-1283  
Attorneys for Appellants

**STATUTORY AND REGULATORY ADDENDUM**

**TABLE OF CONTENTS**

Relevant portions of the Archeological Resources Protection Act of 1979,  
16 U.S.C. §470aa and cc . . . . . 4

Relevant portions of the Native American Graves Protection Act, NAGPRA,

25 U.S.C. §3001, Definitions. . . . . 8

25 U.S.C. §3002, Ownership. . . . . 11

25 U.S.C. §3005, Inventory for human remains and funerary objects. . . . . 13

25 U.S.C. §3009, Savings provisions. . . . . 13

25 U.S.C. §3013, Enforcement. . . . . 13

43 C.F.R. 10.1, Purpose, Applicability and Information collection. . . . . 14

43 C.F.R. 10.2, Definitions. . . . . 15

43 C.F.R. 10.3, Intentional Archaeological Excavation . . . . . 23

43 C.F.R. 10.5, Consultation. . . . . 25

43 C.F.R. 10.6, Custody. . . . . 30

43 C.F.R. 10.9, Inventories. . . . . 32

43 C.F.R. 10.14, Lineal Descent and cultural affiliation. . . . . 33

43 C.F.R. 10.15, Limitations and remedies. . . . . 33

43 C.F.R. 10.17, Dispute resolution. . . . . 34

Relevant portions of the American Indian Religious Freedom Act, AIRFA, 42 U.S.C. §1996. ....	36
Relevant portions of the Religious Freedom Restoration Act, RFRA, 42 U.S.C. §2000bb. ....	37
Relevant portions of the Religious Land Use and Institutionalized Persons Act, RLUIPA, 42 U.S.C. §2000cc.....	38

**Relevant Provisions of the Archeological Resources Protection Act of 1979,  
16 U.S.C. §470aa and cc**

**§ 470aa. Congressional findings and declaration of purpose**

(a) The Congress finds that--

- (1) archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation's heritage;
- (2) these resources are increasingly endangered because of their commercial attractiveness;
- (3) existing Federal laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage; and
- (4) there is a wealth of archaeological information which has been legally obtained by private individuals for noncommercial purposes and which could voluntarily be made available to professional archaeologists and institutions.

(b) The purpose of this Act [16 USCS §§ 470aa et seq.] is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before the date of the enactment of this Act [enacted Oct. 31, 1979].

**§ 470cc. Excavation and removal**

(a) Application for permit. Any person may apply to the Federal land manager for a permit to excavate or remove any archaeological resource located on public lands or Indian lands and to carry out activities associated with such excavation or removal. The application shall be required, under uniform regulations under this Act [16 USCS §§ 470aa et seq.], to contain such information as the Federal land manager deems necessary, including information concerning the time, scope, and location and specific purpose of the proposed work.

(b) Determination by Federal land manager prerequisite to issuance of permit. A

permit may be issued pursuant to an application under subsection (a) if the Federal land manager determines, pursuant to uniform regulations under this Act [16 USCS §§ 470aa et seq.], that--

- (1) the applicant is qualified, to carry out the permitted activity,
- (2) the activity is undertaken for the purpose of furthering archaeological knowledge in the public interest,
- (3) the archaeological resources which are excavated or removed from public lands will remain the property of the United States, and such resources and copies of associated archaeological records and data will be preserved by a suitable university, museum, or other specific or educational institution, and
- (4) the activity pursuant to such permit is not inconsistent with any management plan applicable to the public lands concerned.

(c) Notification to Indian tribes of possible harm to or destruction of sites having religious or cultural importance. If a permit issued under this section may result in harm to, or destruction of, any religious or cultural site, as determined by the Federal land manager, before issuing such permit, the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance. Such notice shall not be deemed a disclosure to the public for purposes of section 9 [16 USCS § 470hh].

(d) Terms and conditions of permit. Any permit under this section shall contain such terms and conditions, pursuant to uniform regulations promulgated under this Act [[16 USCS §§ 470aa](#) et seq.], as the Federal land manager concerned deems necessary to carry out the purposes of this Act [[16 USCS §§ 470aa](#) et seq.].

(e) Identification of individuals responsible for complying with permit terms and conditions and other applicable laws. Each permit under this section shall identify the individual who shall be responsible for carrying out the terms and conditions of the permit and for otherwise complying with this Act [[16 USCS §§ 470aa](#) et seq.] and other law applicable to the permitted activity.

(f) Suspension or revocation of permits; grounds. Any permit issued under this section may be suspended by the Federal land manager upon his determination that the permittee has violated any provision of subsection (a), (b), or (c) of

section 6 [[16 USCS § 470ee\(a\)](#), (b), or (c)]. Any such permit may be revoked by such Federal land manager upon assessment of a civil penalty under section 7 [[16 USCS § 470ff](#)] against the permittee or upon the permittee's conviction under section 6 [[16 USCS § 470ee](#)].

(g) Excavation or removal by Indian tribes or tribe members; excavation or removal of resources located on Indian lands.

(1) No permit shall be required under this section or under the Act of June 8, 1906 ([16 U.S.C. 431](#)), for the excavation or removal by any Indian tribe or member thereof of any archaeological resource located on Indian lands of such Indian tribe, except that in the absence of tribal law regulating the excavation or removal of archaeological resources on Indian lands, an individual tribal member shall be required to obtain a permit under this section.

(2) In the case of any permits for the excavations or removal of any archaeological [archaeological] resource located on Indian lands, the permit may be granted only after obtaining the consent of the Indian or Indian tribe owning or having jurisdiction over such lands. The permit shall include such terms and conditions as may be requested by such Indian or Indian tribe.

(h) Permits issued under Antiquities Act of 1906.

(1) No permit or other permission shall be required under chapter 3203 of title 54, United States Code, for any activity for which a permit is issued under this section.

(2) Any permit issued under chapter 3203 of title 54, United States Code [[54 USCS §§ 320301](#) et seq.], shall remain in effect according to its terms and conditions following the enactment of this Act [enacted Oct. 31, 1979]. No permit under this Act [[16 USCS §§ 470aa](#) et seq.] shall be required to carry out any activity under a permit issued under the chapter 3203 of title 54, United States Code [[54 USCS §§ 320301](#) et seq.], before the date of the enactment of this Act [enacted Oct. 31, 1979] which remains in effect as provided in this paragraph, and nothing in this Act [[16 USCS §§ 470aa](#) et seq.] shall modify or affect any such permit.

(i) Compliance with provisions relating to undertakings on property listed in the National Register not required. Issuance of a permit in accordance with this section and applicable regulations shall not require compliance with [section 306108 of title 54, United States Code](#).

(j) Issuance of permits to State Governors for archaeological activities on behalf of States or their educational institutions. Upon the written request of the Governor of any State, the Federal land manager shall issue a permit, subject to the provisions of subsections (b)(3), (b)(4), (c), (e), (f), (g), (h), and (i) of this section for the purpose of conducting archaeological research, excavation, removal, and curation, on behalf of the State or its educational institutions, to such Governor or to such designee as the Governor deems qualified to carry out the intent of this Act [[16 USCS §§ 470aa](#) et seq.].



**Relevant portions of the Native American Graves Protection Act, NAGPRA,  
25 U.S.C. §§3001, 3002, 3005, 3009, 3013, 43 C.F.R. 10.1-17**

**25 U.S.C. § 3001, Definitions**

For purposes of this chapter, the term—

(1) “burial site” means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited.

(2) “cultural affiliation” means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or [Native Hawaiian organization](#) and an identifiable earlier group.

(3) “cultural items” means human remains and—

(A) “associated funerary objects” which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and [associated funerary objects](#) are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.

(B) “unassociated funerary objects” which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe,

(C) “sacred objects” which shall mean specific ceremonial objects which are needed by traditional [Native American](#) religious leaders for the practice of traditional [Native American](#) religions by their present day adherents, and

(D) “cultural patrimony” which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or [Native Hawaiian organization](#) and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

(4) “Federal agency” means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution.

(5) “Federal lands” means any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971 [[43 U.S.C. 1601](#) et seq.].

(6) “Hui Malama I Na Kupuna O Hawai’i Nei” means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaii by that name on April 17, 1989, for the purpose of providing guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues.

(7) “Indian tribe” means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act [[43 U.S.C. 1601](#) et seq.]), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(8) “museum” means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, [Native American](#) cultural items. Such term does not include the Smithsonian Institution or any other Federal agency.

(9) “Native American” means of, or relating to, a tribe, people, or culture that is indigenous to the United States.

(10) “Native Hawaiian” means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(11) “Native Hawaiian organization” means any organization which—

(A) serves and represents the interests of Native Hawaiians,

(B) has as a primary and stated purpose the provision of services to Native Hawaiians, and

(C) has expertise in Native Hawaiian Affairs, and shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai’i Nei.

(12) “Office of Hawaiian Affairs” means the Office of Hawaiian Affairs established by the constitution of the State of Hawaii.

(13) “right of possession” means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or [Native Hawaiian organization](#) with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as applied in [section 3005\(c\) of this title](#), result in a Fifth Amendment taking by the United States as determined by the United States Court of Federal Claims pursuant to [28 U.S.C. 1491](#) in which event the “right of possession” shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

(14) “Secretary” means the [Secretary](#) of the Interior.

(15) “tribal land” means—

(A) all lands within the exterior boundaries of any [Indian reservation](#);

- (B) all dependent Indian communities;
- (C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3.

## **25 U.S.C. § 3002 Ownership**

(a) Native American human remains and objects. The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after the date of enactment of this Act [enacted Nov. 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; or

(2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony--

(A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;

(B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or

(C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims [United States Court of Federal Claims] as the aboriginal land of some Indian tribe--

(1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or

(2) if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.

(b) Unclaimed Native American human remains and objects. Native American cultural items not claimed under subsection (a) shall be disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee established under section 8 [[25 USCS § 3006](#)], Native American groups, representatives of museums and the scientific community.

(c) Intentional excavation and removal of Native American human remains and objects. The intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only if--

- (1) such items are excavated or removed pursuant to a permit issued under section 4 of the Archaeological Resources Protection Act of 1979 [[16 USCS § 470cc](#)] (93 Stat. 721; [16 U.S.C. 470aa](#) et seq.) which shall be consistent with this Act;
- (2) such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization;
- (3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b); and
- (4) proof of consultation or consent under paragraph (2) is shown.

**§ 3003. Inventory for human remains and associated funerary objects**

(a) In general. Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item [items].

**§ 3009. Savings provisions**

Nothing in this Act shall be construed to--

- (1) limit the authority of any Federal agency or museum to--
  - (A) return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations, or individuals, and
  - (B) enter into any other agreement with the consent of the culturally affiliated tribe or organization as to the disposition of, or control over, items covered by this Act;
- (2) delay actions on repatriation requests that are pending on the date of enactment of this Act [enacted Nov. 16, 1990];
- (3) deny or otherwise affect access to any court;
- (4) limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; or
- (5) limit the application of any State or Federal law pertaining to theft or stolen property.

**§ 3013. Enforcement**

The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this Act and shall have the authority to issue such orders as may be necessary to enforce the provisions of this Act.

## **25 C.F.R. § 10.1 Purpose, applicability, and information collection.**

- (a) Purpose. These regulations carry out provisions of the Native American Graves Protection and Repatriation Act of 1990 (Pub.L. 101-601; [25 U.S.C. 3001-3013](#); [104 Stat. 3048-3058](#)). These regulations develop a systematic process for determining the rights of lineal descendants and Indian tribes and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated.
- (b) Applicability. (1) These regulations pertain to the identification and appropriate disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony that are:
- (i) In Federal possession or control; or
  - (ii) In the possession or control of any institution or State or local government receiving Federal funds; or
  - (iii) Excavated intentionally or discovered inadvertently on Federal or tribal lands.
- (2) These regulations apply to human remains, funerary objects, sacred objects, or objects of cultural patrimony which are indigenous to Alaska, Hawaii, and the continental United States, but not to territories of the United States.
- (3) Throughout this part are decision points which determine how this part applies in particular circumstances, e.g., a decision as to whether a museum "controls" human remains and cultural objects within the meaning of the regulations, or a decision as to whether an object is a "human remain," "funerary object," "sacred object," or "object of cultural patrimony" within the meaning of the regulations. Any final determination making the Act or this part inapplicable is subject to review under section 15 of the Act. With respect to Federal agencies, the final denial of a request of a lineal descendant, Indian tribe, or Native Hawaiian organization for the repatriation or disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony brought under, and in compliance with, the Act and this part constitutes a final agency action under the Administrative Procedure Act ([5 U.S.C. 704](#)).
- (c) The information collection requirements contained in this part have been approved by the Office of Management and Budget under [44 U.S.C. 3501](#) et seq. and assigned control number 1024-0144. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

## **25 C.F.R. § 10.2 Definitions.**

In addition to the term Act, which means the Native American Graves Protection and Repatriation Act as described above, definitions used in these regulations are grouped in seven classes: Parties required to comply with these regulations; Parties with standing to make claims under these regulations; Parties responsible for implementing these regulations; Objects covered by these regulations; Cultural affiliation; Types of land covered by these regulations; and Procedures required by these regulations.

### **(a) Who must comply with these regulations?**

(1) Federal agency means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution as specified in section 2 (4) of the Act.

(2) Federal agency official means any individual authorized by delegation of authority within a Federal agency to perform the duties relating to these regulations.

(3) Museum means any institution or State or local government agency (including any institution of higher learning) that has possession of, or control over, human remains, funerary objects, sacred objects, or objects of cultural patrimony and receives Federal funds.

(i) The term "possession" means having physical custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony with a sufficient legal interest to lawfully treat the objects as part of its collection for purposes of these regulations. Generally, a museum or Federal agency would not be considered to have possession of human remains, funerary objects, sacred objects, or objects of cultural patrimony on loan from another individual, museum, or Federal agency.

(ii) The term "control" means having a legal interest in human remains, funerary objects, sacred objects, or objects of cultural patrimony sufficient to lawfully permit the museum or Federal agency to treat the objects as part of its collection for purposes of these regulations



whether or not the human remains, funerary objects, sacred objects or objects of cultural patrimony are in the physical custody of the museum or Federal agency. Generally, a museum or Federal agency that has loaned human remains, funerary objects, sacred objects, or objects of cultural patrimony to another individual, museum, or Federal agency is considered to retain control of those human remains, funerary objects, sacred objects, or objects of cultural patrimony for purposes of these regulations.

(iii) The phrase "receives Federal funds" means the receipt of funds by a museum after November 16, 1990, from a Federal agency through any grant, loan, contract (other than a procurement contract), or other arrangement by which a Federal agency makes or made available to a museum aid in the form of funds. Federal funds provided for any purpose that are received by a larger entity of which the museum is a part are considered Federal funds for the purposes of these regulations. For example, if a museum is a part of a State or local government or a private university and the State or local government or private university receives Federal funds for any purpose, the museum is considered to receive Federal funds for the purpose of these regulations.

(4) Museum official means the individual within a museum designated as being responsible for matters relating to these regulations.

(5) Person means an individual, partnership, corporation, trust, institution, association, or any other private entity, or, any official, employee, agent, department, or instrumentality of the United States, or of any Indian tribe or Native Hawaiian organization, or of any State or political subdivision thereof that discovers or discovered human remains, funerary objects, sacred objects or objects of cultural

patrimony on Federal or tribal lands after November 16, 1990.

(b) Who has standing to make a claim under these regulations?

(1) Lineal descendant means an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization or by the common law system of descentance to a known Native American individual whose remains, funerary objects, or sacred objects are being claimed under these regulations.

(2) [Reserved]

(3) (i) Native Hawaiian organization means any organization that:

(A) Serves and represents the interests of Native Hawaiians;

(B) Has as a primary and stated purpose the provision of services to Native Hawaiians; and

(C) Has expertise in Native Hawaiian affairs.

(ii) The term Native Hawaiian means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii. Such organizations must include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna 'O Hawai'i Nei.

(4) Indian tribe official means the principal leader of an Indian tribe or Native Hawaiian organization or the individual officially designated by the governing body of an Indian tribe or Native Hawaiian organization or as otherwise provided by tribal code, policy, or established procedure as responsible for matters relating to these regulations.

(c) Who is responsible for carrying out these regulations?

(1) Secretary means the Secretary of the Interior or a designee.

(2) Review Committee means the advisory committee established pursuant to section 8 of the Act.

(3) Manager, National NAGPRA Program means the official of the Department of the Interior designated by the Secretary as responsible for administration of matters relating to this part. Communications to the Manager, National NAGPRA Program should be sent to the mailing address listed on the National NAGPRA Contact Information Web site, <http://www.nps.gov/agpra/CONTACTS/INDEX.HTM>.

(d) What objects are covered by these regulations? The Act covers four types of Native American objects. The term Native American means of, or relating to, a tribe, people, or culture indigenous to the United States, including Alaska and Hawaii.

(1) Human remains means the physical remains of the body of a person of Native American ancestry. The term does not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets. For the purposes of determining cultural affiliation, human remains incorporated into a funerary object, sacred object, or object of cultural patrimony, as defined below, must be considered as part of that item.

(2) Funerary objects means items that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed intentionally at the time of death or later with or near individual human remains. Funerary objects must be identified by a preponderance of the evidence as having been removed from a specific burial site of an individual affiliated with a particular Indian tribe or Native Hawaiian organization or as being related to specific individuals or families or to known human remains. The term burial site means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which, as part of the death rite or ceremony of a culture, individual human remains were deposited, and includes rock cairns or pyres which do

not fall within the ordinary definition of gravesite. For purposes of completing the summary requirements in § 10.8 and the inventory requirements of § 10.9:

(i) Associated funerary objects means those funerary objects for which the human remains with which they were placed intentionally are also in the possession or control of a museum or Federal agency. Associated funerary objects also means those funerary objects that were made exclusively for burial purposes or to contain human remains.

(ii) Unassociated funerary objects means those funerary objects for which the human remains with which they were placed intentionally are not in the possession or control of a museum or Federal agency. Objects that were displayed with individual human remains as part of a death rite or ceremony of a culture and subsequently returned or distributed according to traditional custom to living descendants or other individuals are not considered unassociated funerary objects.

(3) Sacred objects means items that are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. While many items, from ancient pottery sherds to arrowheads, might be imbued with sacredness in the eyes of an individual, these regulations are specifically limited to objects that were devoted to a traditional Native American religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony. The term traditional religious leader means a person who is recognized by members of an Indian tribe or Native Hawaiian organization as:

(i) Being responsible for performing cultural duties relating to the ceremonial or religious traditions of that Indian tribe or Native Hawaiian organization, or

(ii) Exercising a leadership role in an Indian tribe or Native Hawaiian organization based on the tribe or organization's cultural, ceremonial, or religious practices.

(4) Objects of cultural patrimony means items having ongoing historical, traditional, or cultural importance central to the Indian tribe or Native Hawaiian organization itself, rather than property owned by an individual tribal or organization member. These objects are of such central importance that they may not be alienated, appropriated, or conveyed by any individual tribal or organization member. Such objects must have been considered inalienable by the culturally affiliated Indian tribe or Native Hawaiian organization at the time the object was separated from the group. Objects of cultural patrimony include items such as Zuni War Gods, the Confederacy Wampum Belts of the Iroquois, and other objects of similar character and significance to the Indian tribe or Native Hawaiian organization as a whole.

(e) (1) What is cultural affiliation? Cultural affiliation means that there is a relationship of shared group identity that can be reasonably traced historically or prehistorically between members of a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group. Cultural affiliation is established when the preponderance of the evidence--based on geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical evidence, or other information or expert opinion--reasonably leads to such a conclusion.

(2) What does culturally unidentifiable mean? Culturally unidentifiable refers to human remains and associated funerary objects in museum or Federal agency collections for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified through the inventory process.

(f) What types of lands do the excavation and discovery provisions of these regulations apply to?

(1) Federal lands means any land other than tribal lands that are

controlled or owned by the United States Government, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act ([43 U.S.C. 1601](#) et seq.). United States "control," as used in this definition, refers to those lands not owned by the United States but in which the United States has a legal interest sufficient to permit it to apply these regulations without abrogating the otherwise existing legal rights of a person.

(2) Tribal lands means all lands which:

- (i) Are within the exterior boundaries of any Indian reservation including, but not limited to, allotments held in trust or subject to a restriction on alienation by the United States; or
- (ii) Comprise dependent Indian communities as recognized pursuant to [18 U.S.C. 1151](#); or
- (iii) Are administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act of 1920 and section 4 of the Hawaiian Statehood Admission Act (Pub.L. 86-3; [73 Stat. 6](#)).
- (iv) Actions authorized or required under these regulations will not apply to tribal lands to the extent that any action would result in a taking of property without compensation within the meaning of the Fifth Amendment of the United States Constitution.

(g) What procedures are required by these regulations?

(1) Summary means the written description of collections that may contain unassociated funerary objects, sacred objects, and objects of cultural patrimony required by § 10.8 of these regulations.

(2) Inventory means the item-by-item description of human remains and associated funerary objects.

(3) Intentional excavation means the planned archeological removal 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 (c) of the Act.

(4) Inadvertent discovery means 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.

(5) Disposition means the transfer of control over Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony by a museum or Federal agency under this part. This part establishes disposition procedures for several different situations:

(i) Custody of human remains, funerary objects, sacred objects, and objects of cultural patrimony excavated intentionally from, or discovered inadvertently on, Federal or tribal lands after November 16, 1990, is established under § 10.6.

(ii) Repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony in museum and Federal agency collections to a lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization is established under § 10.10.

(iii) Disposition of culturally unidentifiable human remains, with or without associated funerary objects, in museum or Federal agency collections is established under § 10.11.

(iv) Disposition of unclaimed human remains, funerary objects, sacred objects, or objects of cultural patrimony is governed by § 10.7.

(h) Unclaimed cultural items means Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony:

(1) That have been excavated or discovered on, and removed from, Federal lands after November 16, 1990, and

(2) Whose disposition under [25 U.S.C. 3002](#)(a) and § 10.6 of this part has

not occurred because either:

- (i) Within one year after publication of a notice under § 10.6(c) of this part, no Indian tribe or Native Hawaiian organization has sent a written claim for the cultural items to the appropriate Federal agency, or no lineal descendant has responded to a notice for human remains and associated funerary objects; or
- (ii) Within two years after knowing or having reason to know that cultural items were excavated or discovered, and removed, the appropriate Federal agency could not reasonably identify any Indian tribe or Native Hawaiian organization or lineal descendant as a potential claimant.

### **25 C.F.R. § 10.3 Intentional archeological excavations.**

(a) General. This section carries out section 3 (c) of the Act regarding the custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony that are excavated intentionally from Federal or tribal lands after November 16, 1990.

(b) Specific Requirements. These regulations permit the intentional excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony from Federal or tribal lands only if:

- (1) The objects are excavated or removed following the requirements of the Archaeological Resources Protection Act (ARPA) ([16 U.S.C. 470aa](#) et seq.) and its implementing regulations. Regarding private lands within the exterior boundaries of any Indian reservation, the Bureau of Indian Affairs (BIA) will serve as the issuing agency for any permits required under the Act. For BIA procedures for obtaining such permits, see 25 CFR part 262 or contact the Deputy Commissioner of Indian Affairs, Department of the Interior, Washington, DC 20240. Regarding lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Pub. L. 86-3, the Department of Hawaiian Home Lands will serve as the issuing agency for any permits required under the Act, with the Hawaii State Historic Preservation Division of the Department of Land and Natural Resources acting in an advisory capacity for such issuance. Procedures and requirements for issuing permits will be consistent with those required by the ARPA and its



implementing regulations;

(2) The objects are excavated after consultation with or, in the case of tribal lands, consent of, the appropriate Indian tribe or Native Hawaiian organization pursuant to § 10.5;

(3) The disposition of the objects is consistent with their custody as described in § 10.6; and

(4) Proof of the consultation or consent is shown to the Federal agency official or other agency official responsible for the issuance of the required permit.

(c) Procedures.

(1) The Federal agency official must take reasonable steps to determine whether a planned activity may result in the excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony from Federal lands. Prior to issuing any approvals or permits for activities, the Federal agency official must notify in writing the Indian tribes or Native Hawaiian organizations that are likely to be culturally affiliated with any human remains, funerary objects, sacred objects, or objects of cultural patrimony that may be excavated. The Federal agency official must also notify any present-day Indian tribe which aboriginally occupied the area of the planned activity and any other Indian tribes or Native Hawaiian organizations that the Federal agency official reasonably believes are likely to have a cultural relationship to the human remains, funerary objects, sacred objects, or objects of cultural patrimony that are expected to be found. The notice must be in writing and describe the planned activity, its general location, the basis upon which it was determined that human remains, funerary objects, sacred objects, or objects of cultural patrimony may be excavated, and, the basis for determining likely custody pursuant to § 10.6. The notice must also propose a time and place for meetings or consultations to further consider the activity, the Federal agency's proposed treatment of any human remains, funerary objects, sacred objects, or objects of cultural patrimony that may be excavated, and the proposed disposition of any excavated human remains, funerary objects, sacred objects, or objects of

cultural patrimony. Written notification should be followed up by telephone contact if there is no response in 15 days. Consultation must be conducted pursuant to § 10.5.

(2) Following consultation, the Federal agency official must complete a written plan of action (described in § 10.5(e)) and execute the actions called for in it.

(3) If the planned activity is also subject to review under section 106 of the National Historic Preservation Act ([16 U.S.C. 470](#) et seq.), the Federal agency official should coordinate consultation and any subsequent agreement for compliance conducted under that Act with the requirements of § 10.3 (c)(2) and § 10.5. Compliance with these regulations does not relieve Federal agency officials of requirements to comply with section 106 of the National Historic Preservation Act ([16 U.S.C. 470](#) et seq.).

(4) If an Indian tribe or Native Hawaiian organization receives notice of a planned activity or otherwise becomes aware of a planned activity that may result in the excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony on tribal lands, the Indian tribe or Native Hawaiian organization may take appropriate steps to:

- (i) Ensure that the human remains, funerary objects, sacred objects, or objects of cultural patrimony are excavated or removed following § 10.3 (b), and
- (ii) make certain that the disposition of any human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently as a result of the planned activity are carried out following § 10.6.

## **25 C.F.R. § 10.5 Consultation.**

Consultation as part of the intentional excavation or inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony on Federal lands must be conducted in accordance with the following requirements.

(a) Consulting parties. Federal agency officials must consult with known lineal descendants and Indian tribe officials:

(1) from Indian tribes on whose aboriginal lands the planned activity will occur or where the inadvertent discovery has been made; and

(2) from Indian tribes and Native Hawaiian organizations that are, or are likely to be, culturally affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony; and

(3) from Indian tribes and Native Hawaiian organizations that have a demonstrated cultural relationship with the human remains, funerary objects, sacred objects, or objects of cultural patrimony.

(b) Initiation of consultation.

(1) Upon receiving notice of, or otherwise becoming aware of, an inadvertent discovery or planned activity that has resulted or may result in the intentional excavation or inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony on Federal lands, the responsible Federal agency official must, as part of the procedures described in § 10.3 and § 10.4, take appropriate steps to identify the lineal descendant, Indian tribe, or Native Hawaiian organization entitled to custody of the human remains, funerary objects, sacred objects, or objects of cultural patrimony pursuant to § 10.6 and § 10.14. The Federal agency official shall notify in writing:

(i) Any known lineal descendants of the deceased Native American individual whose human remains and associated funerary objects have been or are likely to be excavated intentionally or discovered inadvertently; and

(ii) the Indian tribes or Native Hawaiian organizations that are likely to be culturally affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony that have been or are likely to be excavated intentionally or discovered inadvertently; and

(iii) the Indian tribes which aboriginally occupied the area in which the human remains, funerary objects, sacred objects, or objects of cultural patrimony have been or are likely to be excavated intentionally or discovered inadvertently; and

(iv) the Indian tribes or Native Hawaiian organizations that have a demonstrated cultural relationship with the human remains, funerary objects, sacred objects, or objects of cultural patrimony that have been or are likely to be excavated intentionally or discovered inadvertently.

(2) The notice must propose a time and place for meetings or consultation to further consider the intentional excavation or inadvertent discovery, the Federal agency's proposed treatment of the human remains, funerary objects, sacred objects, or objects of cultural patrimony that may be excavated, and the proposed disposition of any intentionally excavated or inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony.

(3) The consultation must seek to identify traditional religious leaders who should also be consulted and seek to identify, where applicable, lineal descendants and Indian tribes or Native Hawaiian organizations affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony.

(c) Provision of information. During the consultation process, as appropriate, the Federal agency official must provide the following information in writing to the lineal descendants and the officials of Indian tribes or Native Hawaiian organizations that are or are likely to be affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently on Federal lands:

(1) A list of all lineal descendants and Indian tribes or Native Hawaiian organizations that are being, or have been, consulted regarding the particular human remains, funerary objects, sacred

objects, or objects of cultural patrimony;

(2) An indication that additional documentation used to identify affiliation will be supplied upon request.

(d) Requests for information. During the consultation process, Federal agency officials must request, as appropriate, the following information from Indian tribes or Native Hawaiian organizations that are, or are likely to be, affiliated pursuant to § 10.6 (a) with intentionally excavated or inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony:

(1) Name and address of the Indian tribe official to act as representative in consultations related to particular human remains, funerary objects, sacred objects, or objects of cultural patrimony;

(2) Names and appropriate methods to contact lineal descendants who should be contacted to participate in the consultation process;

(3) Recommendations on how the consultation process should be conducted; and

(4) Kinds of cultural items that the Indian tribe or Native Hawaiian organization considers likely to be unassociated funerary objects, sacred objects, or objects of cultural patrimony.

(e) Written plan of action. Following consultation, the Federal agency official must prepare, approve, and sign a written plan of action. A copy of this plan of action must be provided to the lineal descendants, Indian tribes and Native Hawaiian organizations involved. Lineal descendants and Indian tribe official(s) may sign the written plan of action as appropriate. At a minimum, the plan of action must comply with § 10.3 (b)(1) and document the following:

(1) The kinds of objects to be considered as cultural items as defined in § 10.2 (b);

(2) The specific information used to determine custody pursuant to § 10.6;

- (3) The planned treatment, care, and handling of human remains, funerary objects, sacred objects, or objects of cultural patrimony recovered;
- (4) The planned archeological recording of the human remains, funerary objects, sacred objects, or objects of cultural patrimony recovered;
- (5) The kinds of analysis planned for each kind of object;
- (6) Any steps to be followed to contact Indian tribe officials at the time of intentional excavation or inadvertent discovery of specific human remains, funerary objects, sacred objects, or objects of cultural patrimony;
- (7) The kind of traditional treatment, if any, to be afforded the human remains, funerary objects, sacred objects, or objects of cultural patrimony by members of the Indian tribe or Native Hawaiian organization;
- (8) The nature of reports to be prepared; and
- (9) The planned disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony following § 10.6.

(f) Comprehensive agreements. Whenever possible, Federal Agencies should enter into comprehensive agreements with Indian tribes or Native Hawaiian organizations that are affiliated with human remains, funerary objects, sacred objects, or objects of cultural patrimony and have claimed, or are likely to claim, those human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently on Federal lands. These agreements should address all Federal agency land management activities that could result in the intentional excavation or inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony. Consultation should lead to the establishment of a process for effectively carrying out the requirements of these regulations regarding standard consultation procedures, the determination of custody consistent with procedures in this section and § 10.6, and the treatment and disposition of human remains, funerary objects,

sacred objects, or objects of cultural patrimony. The signed agreements, or the correspondence related to the effort to reach agreements, must constitute proof of consultation as required by these regulations.

(g) Traditional religious leaders. The Federal agency official must be cognizant that Indian tribe officials may need to confer with traditional religious leaders prior to making recommendations. Indian tribe officials are under no obligation to reveal the identity of traditional religious leaders.

## **§ 10.6 Custody.**

(a) Priority of custody. This section carries out section 3 (a) of the Act, subject to the limitations of § 10.15, regarding the custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently in Federal or tribal lands after November 16, 1990. For the purposes of this section, custody means ownership or control of human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently in Federal or tribal lands after November 16, 1990. Custody of these human remains, funerary objects, sacred objects, or objects of cultural patrimony is, with priority given in the order listed:

(1) In the case of human remains and associated funerary objects, in the lineal descendant of the deceased individual as determined pursuant to § 10.14 (b);

(2) When a lineal descendant of a deceased Native American individual cannot be ascertained with respect to the human remains and associated funerary objects, and with respect to unassociated funerary objects, sacred objects, and objects of cultural patrimony:

(i) In the Indian tribe on whose tribal land the human remains, funerary objects, sacred objects, or objects of cultural patrimony were excavated intentionally or discovered inadvertently;

(ii) In the Indian tribe or Native Hawaiian organization

that has the closest cultural affiliation with the human remains, funerary objects, sacred objects, or objects of cultural patrimony as determined pursuant to § 10.14 (c);  
or

(iii) In circumstances in which the cultural affiliation of the human remains, funerary objects, sacred objects, or objects of cultural patrimony cannot be ascertained and the objects were excavated intentionally or discovered inadvertently on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of an Indian tribe:

(A) In the Indian tribe aboriginally occupying the Federal land on which the human remains, funerary objects, sacred objects, or objects of cultural patrimony were excavated intentionally or discovered inadvertently, or

(B) If a preponderance of the evidence shows that a different Indian tribe or Native Hawaiian organization has a stronger cultural relationship with the human remains, associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony, in the Indian tribe or Native Hawaiian organization that has the strongest demonstrated relationship with the cultural items.

(b) Custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony and other provisions of the Act apply to all intentional excavations and inadvertent discoveries made after November 16, 1990, including those made before the effective date of these regulations.



(c) Final notice, claims and disposition with respect to Federal lands. Upon determination of the lineal descendant, Indian tribe, or Native Hawaiian organization that under these regulations appears to be entitled to custody of particular human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently on Federal lands, the responsible Federal agency official must, subject to the notice required herein and the limitations of § 10.15, transfer custody of the objects to the lineal descendant, Indian tribe, or Native Hawaiian organization following appropriate procedures, which must respect traditional customs and practices of the affiliated Indian tribes or Native Hawaiian organizations in each instance. Prior to any such disposition by a Federal agency official, the Federal agency official must publish general notices of the proposed disposition in a newspaper of general circulation in the area in which the human remains, funerary objects, sacred objects, or objects of cultural patrimony were excavated intentionally or discovered inadvertently and, if applicable, in a newspaper of general circulation in the area(s) in which affiliated Indian tribes or Native Hawaiian organizations members now reside. The notice must provide information as to the nature and affiliation of the human remains, funerary objects, sacred objects, or objects of cultural patrimony and solicit further claims to custody. The notice must be published at least two (2) times at least a week apart, and the transfer must not take place until at least thirty (30) days after the publication of the second notice to allow time for any additional claimants to come forward. If additional claimants do come forward and the Federal agency official cannot clearly determine which claimant is entitled to custody, the Federal agency must not transfer custody of the objects until such time as the proper recipient is determined pursuant to these regulations. The Federal agency official must send a copy of the notice and information on when and in what newspaper(s) the notice was published to the Manager, National NAGPRA Program.

### **25 C.F.R. § 10.9 Inventories.**

(a) General. This section carries out section 5 of the Act. Under section 5 of the Act, each museum or Federal agency that has possession or control over holdings or collections of human remains and associated funerary objects must compile an inventory of such objects, and, to the fullest extent possible based on information possessed by the museum or Federal agency, must identify the geographical and cultural affiliation of each item...

**§ 10.14 Lineal descent and cultural affiliation.**

(a) General. This section identifies procedures for determining lineal descent and cultural affiliation between present-day individuals and Indian tribes or Native Hawaiian organizations and human remains, funerary objects, sacred objects, or objects of cultural patrimony in museum or Federal agency collections or excavated intentionally or discovered inadvertently from Federal lands. They may also be used by Indian tribes and Native Hawaiian organizations with respect to tribal lands.

(b) Criteria for determining lineal descent. A lineal descendant is an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization or by the common law system of descent to a known Native American individual whose remains, funerary objects, or sacred objects are being requested under these regulations. This standard requires that the earlier person be identified as an individual whose descendants can be traced...

(e) Evidence. Evidence of a kin or cultural affiliation between a present-day individual, Indian tribe, or Native Hawaiian organization and human remains, funerary objects, sacred objects, or objects of cultural patrimony must be established by using the following types of evidence: Geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion.

(f) Standard of proof. Lineal descent of a present-day individual from an earlier individual and cultural affiliation of a present-day Indian tribe or Native Hawaiian organization to human remains, funerary objects, sacred objects, or objects of cultural patrimony must be established by a preponderance of the evidence. Claimants do not have to establish cultural affiliation with scientific certainty.

**§ 10.15 Limitations and remedies.**

(d) Savings provisions. Nothing in these regulations can be construed to:

- (1) Limit the authority of any museum or Federal agency to:
  - (i) Return or repatriate human remains, funerary objects, sacred objects, or objects of cultural patrimony to Indian tribes, Native Hawaiian organizations, or individuals; and
  - (ii) Enter into any other agreement with the consent of the culturally affiliated Indian tribe or Native Hawaiian organization as to the disposition of, or control over, human remains, funerary objects, sacred objects, or objects of cultural patrimony.
  
- (2) Delay actions on repatriation requests that were pending on November 16, 1990;
  
- (3) Deny or otherwise affect access to court;
  
- (4) Limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; or
  
- (5) Limit the application of any State or Federal law pertaining to theft of stolen property.

**25 C.F.R. §10.17 Dispute resolution.**

(a) Formal and informal resolutions. Any person who wishes to contest actions taken by museums, Federal agencies, Indian tribes, or Native Hawaiian organizations with respect to the repatriation and disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony is encouraged to do so through informal negotiations to achieve a fair resolution of the matter. The Review Committee may aid in this regard as described below. In addition, the United States District Courts have jurisdiction over any action brought that alleges a violation of the Act.

(b) Review Committee Role. The Review Committee may facilitate the informal resolution of disputes relating to these regulations among interested parties that are not resolved by good faith negotiations. Review Committee actions may include convening meetings between parties to disputes, making advisory findings as to contested facts, and making recommendations to the disputing parties or to the Secretary as to the proper resolution of disputes consistent with these regulations and the Act.

**Relevant portions of the American Indian Religious Freedom Act, AIRFA,  
42 U.S.C. §1996**

Henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

**Relevant portions of the Religious Freedom Restoration Act, RFRA,  
42 U.S.C. §2000bb**

(a) Findings. The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in [Employment Division v. Smith, 494 U.S. 872 \(1990\)](#) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes. The purposes of this Act are--

(1) to restore the compelling interest test as set forth in [Sherbert v. Verner, 374 U.S. 398 \(1963\)](#) and [Wisconsin v. Yoder, 406 U.S. 205 \(1972\)](#) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

**Relevant portions of the Religious Land Use and Institutionalized Persons Act, RLUIPA, 42 U.S.C. §2000cc**

(a) Substantial burdens.

(1) General rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application. This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion.

(1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits. No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.



## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the forgoing Appellants' Statutory and Regulatory Addendum with Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system on April 27, 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: April 27, 2018.

Respectfully submitted,

/s/Patrick D. Webb

Patrick D. Webb

Attorneys for Appellants