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

WALTER ROSALES, LOUIS AYHULE) Civ. No. 2:20-cv-00521 JAM CKD

GOMEZ, ESTATE OF KAREN TOGGERY,)

ESTATE OF HELEN CUERRO, ESTATE)

OF WALTER ROSALES' UNNAMED) **PLAINTIFFS' OBJECTION TO NOTICE**

BROTHER, ESTATE OF DEAN ROSALES,) **OF RELATED CASES**

ESTATE OF MARIE TOGGERY, ESTATE)

OF MATTHEW TOGGERY, APRIL)

LOUISE PALMER, and ELISA WELMAS)

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF)

INTERIOR; DAVID BERNHARDT,)

Secretary of the Interior; AMY DUTSCHKE,)

Regional Director, BIA; JOHN RYDZIK,)

Chief, Environmental Division, BIA; AND)

DOES 1-10,)

Defendants.

1. This Case Is Not Related to Case No. 15-cv-1145, since Plaintiffs Make Different Claims, Against Different Defendants, and Make no Claims Against Any Interest of the Jamul Indian Village.

This case is not related to Plaintiffs' prior Case No. 15-cv-1145. Plaintiffs' prior action sought relief against different federal and non-federal defendants, including individual members of the Jamul Indian Village ("JIV"), and its tribal property, which relief is not sought here.

The prior action was procedurally dismissed without prejudice pursuant to Fed. R. Civ. P., Rules 12(b)(7), 19 and 41(b), due to the sovereign immunity of these members of the JIV. The prior action therefore did not finally adjudicate any substantive claims, reach the merits, nor have any issue preclusive effect on the claims in this action against these Defendants. That dismissal was affirmed by the Ninth Circuit, December 11, 2019, and Plaintiffs' petition for rehearing was denied on Feb. 4, 2020. ECF, Ninth Circuit Case No. 17-16967, Doc. 62.

1 This complaint is unrelated to the Plaintiffs' prior complaint, since it does not seek the
 2 remedies stated in the prior amended complaint, names different Defendants, seeks no remedy
 3 affecting any interest of the JIV, and does not make the following allegations in ECF Case No.
 4 15-cv-1145, Doc. 65, ¶¶ 12, 13, lines 11-15, 22, lines 17-24, 33, line 26, 34, lines 20-23, 50, lines
 5 21-28, 50(D), lines 11-14, 52-53, and Prayer (A), lines 23-28. These prior claims were dismissed
 6 under Fed. R. Civ. P., Rules 12(b)(7) and 19, on August 30, 2017, without prejudice under Fed.
 7 R. Civ. P., Rule 41(b), for seeking to enjoin JIV property, without joining JIV as a party, which is
 8 not an adjudication on the merits, and thus does not have claim preclusive effect. ECF, Case No.
 9 15-cv-1145, Doc. 98; Fed. R. Civ. P. 41(b); *Followway Productions Inc. v. Maurer*, 603 F.2d 72,
 10 76 (9th Cir. 1979); *Univ. of Pittsburgh v. Varian Med. Systems, Inc.*, 569 F.3d 1328, 1332 (Fed.
 11 Cir. 2009), citing *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1866), and 18A Charles
 12 A. Wright, *Federal Practice and Procedure* § 4438 (2d ed. 1987).

13 Here, Plaintiffs seek personal injury damages for the on going desecration of their
 14 families human remains that arose as a result of the Defendants' unlawfully allowing the
 15 intentional excavation of Plaintiffs' families remains on or about February 10, 2014. The
 16 complaint seeks no remedy affecting any interest of the JIV, which has no right, title, or interest
 17 in, nor control over, the lineal descendant Plaintiffs' families' remains, 25 U.S.C. §§ 3001(13),
 18 3002(a)(1), and 43 C.F.R. §§10.2(d)(1) and (2), 10.6(a)(1), HSC 7001. Moreover, the JIV has
 19 irrevocably waived any claim for repatriation or disposition, pursuant to 43 C.F.R. §10.15(a)(1).
 20 *Bonnichsen v. U.S. Dept. of Army*, 969 F. Supp. 614, 624 (D. Or. 1997), *aff'd*, 367 F.3d 864 (9th
 21 Cir. 2004); *Thorpe v. Borough of Jim Thorpe (Thorpe)*, 2011 U.S. Dist. Lexis 135242, *10
 22 (M.D. Pa. 2011)(Casetext).

23 The prior action did not adjudicate, nor resolve, the merits of any of Plaintiffs' continuing
 24 personal injury and personal property damage claims against the Defendants here, for the
 25 unlawful excavation of Plaintiffs' lawfully interred families' human remains and funerary objects
 26 from both federal and tribal land, within the supervision and control of the Department of the
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 28

1 Interior, when they were trucked and dumped in a landfill 20 miles away.¹ ECF, Doc. 1, ¶¶2-6,
 2 19, 22-35, 37-39. This action arises from the Defendants' continuing breach of their
 3 constitutional, statutory and common law duties to protect the lineal descendant Plaintiffs'
 4 families' remains from unlawful excavation and to repatriate those remains for re-interment with
 5 the dignity, cultural tradition and religious rites required by law, thereby causing Plaintiffs' in
 6 excess of \$8 million in personal injury and personal property damage. ECF, Doc. 1, ¶¶2-6, 19,
 7 22-35, 37-39.

8 Therefore, since this action's claims involve events occurring after the events charged in
 9 the prior action, and since the prior action is no longer pending, the two actions are not related.
 10 *Bravo v. Sup. Court*, 149 Cal.App.4th 1489, 1494 (2007), finding:

11 [A]lthough the two cases involve the same employee and the same employer, the
 12 current action arises out of later events distinct from those in the previous action.
 13 Therefore, the current action does not constitute a continuation of the previous
 14 action.

15 Moreover, two actions are not related, where the first is dismissed for procedural reasons
 16 without deciding the merits of the substantive claims. *Dubee v. P.F. Chang's China Bistro Inc.*,
 17 Case No. C 10-01937 WHA (N.D. Cal. 2011)(Casetext), finding:

18 [T]hese two actions are not related within the meaning of Civil Local Rule
 19 3-12....Because the Dubee action settled before the undersigned judge was able to
 20 reach issues related to the merits of the underlying class allegations, no
 21 duplication of effort will result from leaving the assignment of the newer action
 22 undisturbed, even given the above-stated similarities between the two actions.

23 The prior action simply did not finally adjudicate any of Plaintiffs' continuing personal
 24 injury and personal property damage claims arising from the Defendants' *per se* negligence and
 25 breaches of fiduciary duties in violation of the First and Fifth Amendments of the U.S.
 26 Constitution, Article 1 of the California Constitution, NAGPRA, ARPA, AIRFA, RFRA,
 27 RLUIPA, and Cal. Common Law, Health & Safety, Public Resources and Penal Codes,² for

28 ¹ The U.S. holds fee simple title, in trust for the half-blood Jamul Indians within a dependent
 Indian community, to the portion of the Indian cemetery from which Plaintiffs' remains were
 unlawfully excavated. ECF, Case No. 15-cv-1145, Doc. 1-1, Exs. A-D, F, Doc. 1-2, Ex. J. However,
 this action, unlike the prior action, seeks no remedy affecting either federal land or tribal land.

² The Native American Grave Protection Act (NAGPRA), 25 U.S.C. §§3001-13, 43 C.F.R.
 §10.1-17, the Archaeological Resources Protection Act (ARPA), 16 U.S.C. §470aa-dd, 43 C.F.R.

1 which the United States has waived sovereign immunity in the the RFRA, 42 U.S.C. §2000bb-
 2 1(c) and the RLUIPA, 42 U.S.C. §2000cc(a)(1), the Tucker Acts, 28 U.S.C. 1346(a)(2),
 3 1491(b)(1), 1505, the Federal Tort Claims Act (FTCA), 28 U.S.C. §1346(b), §1402(b), §2401(b),
 4 §§ 2671-2680, and the Administrative Procedure Act (APA), 5 U.S.C. 702.

5 Now that the procedural defects in the prior action are not restated in this action,
 6 Plaintiffs are well within their rights to file this independent action against the Defendant land
 7 managers, who are continuing to cause Plaintiffs in excess of \$8 million in damages.

8 This action does not fit the definition of a related action, under Local Rule 123, since it
 9 does not involve all of the same parties, nor does it involve any of the real property claims raised
 10 in the prior action. Nor did the prior action reach any substantive question of fact or law likely to
 11 effect a substantial savings of judicial effort in this action, since none of those issues were
 12 decided, when the prior action was procedurally dismissed. More importantly, since this action
 13 raises no claims affecting any interest of the JIV, there are no grounds for the same result to
 14 follow in this separate action against the Defendant land managers. Nor are there any other
 15 reasons, entailing substantial duplication of labor, if the actions were heard by different judges.
 16 As found in *Kaufman v. Callfire Inc.*, Case No. 14-cv-1333-H-DHB, at *2 (S.D. Cal. Dec. 1,
 17 2014)(Casetext):

18 The Court does not have reason to believe that this action calls for the
 19 determination of any similar facts or adjudication of any identical questions of
 20 law. See Civ. L.R. 40.1(g). For that reason, it is not a related case and the
 undersigned declines transfer of this action under the low-number rule.

21 Judge Karlton refused to reassign *Conservation Cong. v. U.S. Forest Service*, Case NO.
 22 S-11-2605 LKK/EFB, at *3 (E.D. Cal. 2013)(Casetext), under Local Rule 123, stating:

23 On balance, the court finds that the above-captioned case is not related to
 24 Conservation Congress v. United States Forest Service, et al.,
 25 2:12-cv-02800-GEB-CKD, because each case requires substantially different
 factual and legal analyses. Here, assignment to the same Judge is not likely to
 effect a substantial savings of judicial effort.

26 § 7.13(a)–(b), the American Indian Religious Freedom Act (“AIRFA”), 42 U.S.C. §1996, the
 27 Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb-1, the Religious Land Use &
 Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc, the Cal. Health & Safety Code (“HSC”) §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, 8011-12, 8015-16, 8102, 8301.5, 8558, 8560,
 28 8580, 103060, the Cal. Public Resources Code (“PRC”) §§5097.9-5097.99, and the Cal. Penal Code
 §§487 and 622 1/2.

1 Even where a subsequent action states some of the same claims as stated in a prior action,
2 the two are not sufficiently related to find that there would be undue burdensome duplication and
3 labor and expense or conflicting results if the cases are conducted before different Judges. *In re*
4 *Bimbo Bakeries FLSA Actions*, Case Nos.C 05-00829 JW, C 08-3553 MEJ (N.D. Cal. 2008),
5 finding that though two actions contained substantially the same wage and hour claims, the
6 subsequent action was not related to the prior action because it also involved gender and
7 disability discrimination, harassment, and retaliation claims that are not made by in the prior
8 case.

9 Similarly here, assignment to the same judge is not likely to effect a substantial savings of
10 judicial effort, since the prior action did not adjudicate any of the continuing personal injury and
11 personal property claims stated in this action.

12 **Conclusion**

13 For all of these reasons, this action is not related to Case No. 15-cv-1145, and should not
14 be reassigned, pursuant to Local Rule 123.

15 Dated: July 18, 2020

WEBB & CAREY APC

16 /s/Patrick D. Webb
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