No. 15-___

IN THE

Supreme Court of the United States

TIMOTHY WHITE, ROBERT L. BETTINGER and MARGARET SCHOENINGER,

Petitioners,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES MCMANIS
Counsel of Record
MICHAEL REEDY
CHRISTINE PEEK
LAUREN COATNEY
TYLER ATKINSON
MCMANIS FAULKNER
50 W. San Fernando St.
10th Floor
San Jose, CA 95113
(408) 279-8700
mreedy@mcmanislaw.com

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QUESTIONS PRESENTED

The Native American Graves Protection and Repatriation Act (NAGPRA), which governs repatriation of human remains to Native American tribes, contains an enforcement provision that states, "The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce the provisions of this chapter." 25 U.S.C. § 3013. Over a strong dissent, a divided Ninth Circuit panel held that a party can prevent judicial review of controversial repatriation decisions by claiming a tribe is a "required party" under Rule 19 of the Federal Rules of Civil Procedure, if the tribe invokes tribal immunity. The questions presented are:

1. Whether Rule 19 of the Federal Rules of Civil Procedure mandates that a district court dismiss any case in which a Native American tribe with immunity is deemed to be a "required party."

2. Whether tribal immunity extends to cases where Rule 19 is the only basis for adding a tribe, no relief against the tribe is sought, and no other forum can issue a binding order on the dispute; and if so, whether Congress abrogated tribal immunity as a defense to claims arising under NAGPRA.

PARTIES TO THE PROCEEDINGS

Petitioners Timothy White, Robert Bettinger, and Margaret Schoeninger, professors at the University of California, were appellants in the court of appeals and plaintiffs in the district court.

Respondents, the Regents of the University of California ("Regents"), Mark Yudof (former President of the University of California), Marye Anne Fox (former Chancellor of the University of California, San Diego), Pradeep Khosla (current Chancellor of the University of California, San Diego), and Gary Matthews (Vice-Chancellor of the University of California, San Diego), were appellees in the court of appeals and defendants in the district court. Respondent Janet Napolitano (current President of the University of California) was an appellee in the court of appeals. Collectively, these Respondents are referred to as the "University."

Respondent Kumeyaay Cultural Repatriation Committee ("KCRC"), a consortium representing twelve federally recognized Kumeyaay Indian tribes, was an appellee in the court of appeals and a defendant in the district court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Timothy White, Robert L. Bettinger, and Margaret Schoeninger respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 1a-44a) is published at 765 F.3d 1010 (9th Cir. 2014). The opinion of the United States District Court for the Northern District of California (App. 45a-79a) is unreported, but is available at 2012 WL 12335354.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 2014. App. 1a. A timely petition for rehearing en banc was denied on August 21, 2015. App. 80a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This case involves the interpretation and application of Rule 19 of the Federal Rules of Civil Procedure, reproduced at App. 104a-116a. The case also involves the interpretation and application of the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. §§ 3001-3013, reproduced at App. 81a-103a.

INTRODUCTION

Petitioners filed this case because the University, relying on NAGPRA, decided to transfer prehistoric human remains, aged from 8,977 to 9,603 years old

and found in a rare double burial in La Jolla, California (the "La Jolla remains"), to an 18-member Native American tribe that plans to bury them. App. 5a, 17a-18a & n.5. Repatriation would irrevocably destroy the research potential of the remains, which are essential to understanding the population of the Americas during the last era of the Stone Age. Ninth Circuit ECF 74-3, ¶¶ 3-5; United States District Court (USDC) ECF 12, ¶¶ 13-14; & ECF 19 at 2:1-11. Petitioners, who are scientists at the University of California, want to study the La Jolla remains to enhance humanity's understanding of the earliest human inhabitants in North America. App. 18a; USDC ECF 12, ¶¶ 33-35. Under the University's Human Remains Policy, Petitioners likely woud be able to study the remains. App. 22a; USDC ECF 12, Exh. A. p. 7, VIII.B.

Genetic analysis of the remains, which the University has not allowed, would contribute significantly to our understanding about the entrance of humans into the Americas. Ninth Circuit ECF 74-3, ¶¶ 4-10; USDC ECF 12, ¶¶ 11-13. If the Ninth Circuit's decision is not reversed, the source of this knowledge will be lost forever. Ninth Circuit ECF 74-3, ¶ 3; USDC ECF 12, ¶¶ 13-14.

NAGPRA grants jurisdiction to United States district courts "over any action brought by any person alleging a violation," and authorizes courts "to issue such orders as may be necessary" to enforce it. 25 U.S.C. § 3013. The district court here ruled it could *not* review the University's NAGPRA decision because Ninth Circuit precedent requires dismissal when a "necessary party" under Rule 19(a) asserts tribal immunity. App. 72a-75a. The court "reluctantly" granted Respondents' motions to dismiss, stating the

case "raises troubling questions about the availability of judicial review under NAGPRA." App. 47a, 76a-78a.

The Ninth Circuit's 2-1 majority opinion, after superficially reviewing the Rule 19(b) factors, held that a "wall of circuit authority" mandated dismissal because the tribes and KCRC were immune, and "when the necessary party is immune … there may be 'very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.'" App. 32a-33a (quoting *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1465, 1460 (9th Cir. 1994) and *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991)).

This Court previously rejected this type of formulaic approach to Rule 19 in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968) ("*Provident*"), finding mandatory dismissal conflicts with the equitable purpose of Rule 19. Nevertheless, lower federal courts now routinely ignore *Provident*, choosing instead to follow Ninth Circuit Rule 19 decisions and to expand this Court's more recent holding in *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008), to require dismissal whenever an absent tribe has immunity. The Ninth Circuit's decision further undermines Rule 19 and *Provident* by providing a template to cut off access to the courts not only in NAGPRA cases, but many other cases.

The Ninth Circuit's decision also contravenes Congress' intent in enacting NAGPRA – to provide a forum to adjudicate competing interests created by NAGPRA's repatriation provisions. The majority's decision warps this function by allowing tribes to use NAGPRA as both a sword (to challenge a repatriation decision) and a shield (to prevent anyone else from

challenging a repatriation decision). If tribal immunity applies in this manner, as the Ninth Circuit held, museums and tribes could easily evade NAGPRA's enforcement provision, contrary to Congress' express intent. *See* 25 U.S.C. § 3013.

STATEMENT OF THE CASE

A. Statutory Framework.

1. Rule 19 of Federal Rules of Civil Procedure.

Rule 19 outlines the requirements for mandatory joinder. A party is "required" if (1) the court cannot provide complete relief in the party's absence, or (2) the party claims an interest relating to the subject of the action and disposing of the action in the party's absence (i) would impair the party's ability to protect its interest as a practical matter, or (ii) subject an existing party to a substantial risk incurring double, multiple, or otherwise inconsistent obligations. Fed. R. Civ. P. 19(a).

Rule 19(b) outlines four nonexclusive factors courts may consider to determine whether, "in equity and good conscience," an action should proceed when a required party cannot be joined. Fed. R. Civ. P. 19(b).

2. Native American Graves Protection and Repatriation Act.

Congress enacted NAGPRA "in response to widespread debate surrounding the rights of tribes to protect the remains and funerary objects of their ancestors and the rights of museums, educational institutions, and scientists to preserve and enhance the scientific value of their collections." App. 6a-7a (citing *Bonnichsen v. United States,* 367 F.3d 864, 874

n.14 (9th Cir. 2004); S. Rep. No. 101-473, at 3 (1990)). NAGPRA provides a framework for establishing ownership and control of "Native American" remains held by museums, which include federally funded educational institutions. *See*, *e.g.*, 25 U.S.C. §§ 3001(8), 3002, 3005. "[T]he statute unambiguously requires that human remains bear some relationship to a *presently existing* tribe, people, or culture to be considered Native American." *Bonnichsen,* 367 F.3d at 875 (emphasis in original).

A decision to classify human remains as "Native American" under NAGPRA is arbitrary or capricious if it lacks adequate factual support. *Id*. at 879. There must be evidence to connect the remains to an existing tribe or people. *See id.* at 880-82. If that evidence does not exist, the remains are not "Native American," and NAGPRA does not apply. *See id.* at 882. As described below, whether the University erred by labeling the La Jolla remains "Native American" under NAGPRA is a matter of serious debate, and became the basis for the underlying lawsuit. USDC ECF 25, ¶¶ 19-22, 40-50, 52-58.

B. Factual Background.

In 1976, during an excavation of the Chancellor's residence at UC San Diego, an archaeological team discovered a burial site containing the remains of two individuals. App. 5a. The La Jolla remains are among the earliest known human remains ever found in North or South America. App. 5a.

After their excavation, the La Jolla remains were stored in different locations, including UCLA, the National Museum of Natural History, and the Smithsonian Institution. App. 6a. In a letter supporting

repatriation, Vice-Chancellor Matthews admitted they were not returned to UC San Diego until 2008, which "[i]n some respects . . . represents UC San Diego's first receipt of the collection." USDC ECF 45, Exh. 1 to Exh. C, p. 3.

Pursuant to NAGPRA, the University filed a "Notice of Inventory Completion" with the Department of the Interior ("DOI") in 2008 ("2008 Notice"), and listed the La Jolla remains as "not culturally identifiable" with any tribe. USDC ECF 12, ¶ 6. The 2008 Notice was silent on whether the La Jolla remains qualified as "Native American" under NAGPRA.[1] USDC ECF 12, ¶ 6.

Pursuant to a written policy, the University makes human remains accessible for research by qualified scientists. USDC ECF 25, ¶ 36 & Exh. A to ECF 25, VIII.B. Petitioner Schoeninger, who studies subsistence strategies of early humans, asked to study the La Jolla remains in 2009, but was denied. USDC ECF 12, ¶¶ 2, 11-12. Petitioner Bettinger, whose research focuses on hunter-gatherers, sought permission to study the remains in 2010, but never received a reply. Ninth Circuit ECF 74-3, ¶¶ 2, 4. Petitioner White, renowned for his study of ancient human remains, sought the University's permission to study the remains

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[1] "The legislative history [of NAGPRA] is virtually devoid of references to material older than A.D. 1492." Ryan Seidemann, *Altered Meanings: the Department of the Interior's Rewriting of the Native American Graves Protection and Repatriation Act to Regulate Culturally Unidentifiable Human Remains*, 28 Temple Journal of Science, Technology, & Environmental Law 1, 9 n.48 (2009). During Senate hearings in 1988, Senator Daniel Inouye stated, "We are also fully in concurrence with the importance of knowing how we lived a thousand years ago or a million years ago, whatever it may be." *Id*. at n.49.

from 2009 to 2011, but never received a response. USDC ECF 25, ¶¶ 2, 34. The Ninth Circuit held Petitioners have Article III standing because the University agrees they will suffer a concrete injury, traceable to the challenged action, if the La Jolla remains are repatriated. App. 20a-21a. The Ninth Circuit found that a favorable decision likely would redress that injury because Petitioners could study the remains if they are not "Native American," and therefore not subject to NAGPRA. *Id.* at 21a-22a.

In May 2010, the DOI published new regulations requiring museums and federal agencies to transfer "culturally unidentifiable" remains to Native American tribes unless the museum or agency could prove a "right of possession." *See* 43 C.F.R. § 10.11(c). In June 2010, KCRC asked the University to transfer the La Jolla remains to KCRC under the new regulations, claiming the remains were "Native American" because the University listed them on the 2008 Notice. App. 15a.

In 2011, the University's Advisory Group on Cultural Repatriation and Human Remains and Cultural Items issued a report acknowledging "concerns expressed by experts about the scientific uncertainty that the remains are 'Native American[.]'" App. 16a.

In December 2011, the University issued its final Notice of Inventory Completion (App. 17a-18a), which stated the remains were Native American despite the Advisory Group acknowledging scientific and legal concerns about that claim. The 2011 Notice stated the remains would be transferred to the 18-member La Posta Band of Diegueno Mission Indians ("La Posta Band"). App. 18a n.5.

While studying the La Jolla remains "could reveal knowledge of great benefit to humankind generally" (Ninth Circuit ECF 74-3, ¶ 4), repatriation would cut off further research, even as technology advances. Scientists can now produce sequence data from nearly all of the 3.2 billion nucleotides of the human genome, thereby creating a new field of study, dubbed "Paleo-genomics," which studies genome sequences from ancient human remains. Ninth Circuit ECF 74-3, ¶¶ 6-9. These new studies could be critical, especially in light of mounting evidence that the previously agreed upon model of humanity's arrival in the Americas was incorrect. *See* Andrew Curry, Opinion, *Finding the First Americans*, N.Y. Times, May 20, 2012, at SR12; Heather Pringle, *The First Americans*, Scientific American, Nov. 2011, pp. 36-45at 36. Petitioners filed suit to preserve this irreplaceable source of knowledge.

C. Procedural History.

1. After Their Case is Removed, Petitioners File a Petition for Writ of Mandamus and First Amended Complaint.

Petitioners originally filed their lawsuit in Alameda County Superior Court. The University removed it to the Northern District of California. Because the parties could not agree on how to preserve the La Jolla remains, Petitioners sought and obtained a Temporary Restraining Order ("TRO"). USDC ECF 19. The court found Petitioners had shown "the requisite likelihood of irreparable harm, as well as serious questions going to the merits of their claim." USDC ECF 19, 2:1-11. After the TRO issued, the parties stipulated to a Preliminary Injunction to preserve the remains during the legal proceedings. USDC ECF 23.

In May 2012, Petitioners filed a Petition for Writ of Mandamus and First Amended Complaint for Declaratory and Injunctive Relief, naming the Regents, University officials, and KCRC as defendants. USDC ECF 25. The Petition for Writ of Mandamus ("Writ Petition"), which named only the University defendants, alleged the University violated NAGPRA by failing to make an adequate finding that the La Jolla remains qualified as "Native American" under NAGPRA. *Id.* at ¶¶ 39-50. The Petition requested a peremptory writ directing the University to (1) set aside the 2008 and 2011 Notices; (2) make a formal determination whether the remains are "Native American" under NAGPRA; and (3) cease and desist from any actions taken to transfer the La Jolla remains to the La Posta Band. USDC ECF 25, p. 22.

The First Amended Complaint alleged causes of action for (1) violation of NAGPRA, (2) breach of the public trust, and (3) violation of Petitioners' First Amendment rights. USDC ECF 25, ¶¶ 51-76. KCRC was named as a defendant only on the first cause of action. USDC ECF 25, p. 17.

2. The District Court Reluctantly Grants Respondents' Motions to Dismiss, Characterizing the Result as "Troubling."

The University moved to dismiss under Rule 12(b)(7) and Rule 19, on the ground that KCRC and the Kumeyaay tribes were necessary and indispensable parties that could not be joined because of tribal immunity. USDC ECF 37, pp. 5-17. KCRC moved to dismiss on the ground that it was immune as an "arm of the tribe." USDC ECF 41. The district court granted the motions. App. 79a.

In its order, the district court observed this case "raises troubling questions about the availability of judicial review under NAGPRA." App. 47a. The court recognized that although Petitioners "and the public interest are threatened with profound harm in this case, the statutory scheme and controlling case law leaves this Court with no alternative." App. 47a. Although bound by Ninth Circuit precedent, the court cited conflicting Tenth Circuit authority, *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977) (holding a "necessary" tribe was not "indispensable" under Rule 19), and stated the same result could apply here if the court had discretion to balance the Rule 19(b) factors. App. 74a-75a. After describing the dismissal as "unsatisfactory," the court "reluctantly" granted the motions. App. 77a-78a. It suggested, however, that Petitioners "appeal this order and invite the Ninth Circuit to consider whether the logic of *Manygoats* ought to be adopted in present circumstances." App. 75a, n.16.

3. By a 2-1 Majority, the Ninth Circuit Upholds Tribal Immunity and Dismissal Under Rule 19.

The Ninth Circuit's majority opinion did not address *Manygoats*, nor did it discuss whether the Writ Petition could survive on its own. It affirmed dismissal under Rule 19 because, in the majority's view, a "wall of circuit authority" required dismissal, "regardless of whether a remedy is available, if the absent parties are Indian tribes invested with sovereign immunity." App. 32a-33a. Citing Ninth Circuit precedent, the court held:

> Although Rule 19(b) contemplates balancing the factors, "when the necessary party is immune from suit, there may be very little

> need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor."

App. 32a (internal quotations omitted).

The majority and the dissent agreed the tribes and KCRC were immune, and rejected Petitioners' argument that Congress abrogated tribal immunity in enacting NAGPRA. App. 23a-27a, 35a, 40a & n.3.

The dissent considered the Writ Petition separately, and found KCRC and the tribes were neither necessary nor indispensable because the primary issue was whether NAGPRA even applied. App. 35a-43a. It distinguished the "wall of circuit authority" on the ground that, in each case cited by the majority, "the absent tribe was a party or signatory to a contract sought to be enforced." App. 43a. For these reasons, and because it concluded the Rule 19(b) factors generally disfavored dismissal, the dissent would have reversed the lower court's judgment and remanded the case for further proceedings without KCRC. App. 42a-44a.

4. Current Status of the La Jolla Remains.

The La Jolla remains are in the physical custody of the San Diego Archaeological Center. App. 6a. By stipulation and order, the University is enjoined from changing their location. USDC ECF 23. The Ninth Circuit granted Petitioners' motion to stay issuance of mandate in this matter for 90 days (until November 29, 2015) pending the filing of this petition. Ninth Circuit ECF 75.

REASONS FOR GRANTING THE WRIT

The petition should be granted to resolve lower federal courts' misapplication of Rule 19 in cases involving Native American tribes. The Ninth Circuit majority opinion, as well as the "wall of circuit authority," automatically results in dismissal when a tribe with immunity is determined to be a "required party" under Rule 19(a). Applying Rule 19 in this manner conflicts with this Court's decision in *Provident* and the plain language of Rule 19(b) because the finding that a required party cannot be joined should start the analysis of whether a party is "indispensable," not end it.

The district court wanted to perform an equitable Rule 19(b) analysis, but Ninth Circuit precedent precluded it. App. 72a-75a. Several state supreme courts, as well as legal commentators, have rejected this short-circuiting of Rule 19(b) in cases involving tribal immunity, further necessitating review.

In upholding tribal immunity and rejecting Petitioners' congressional abrogation argument, the Ninth Circuit also disregarded Congress' clearly expressed intent that district courts serve as forums to adjudicate ownership and repatriation disputes under NAGPRA. If this Court does not address these issues of national importance, the Ninth Circuit decision will be used to prevent judicial review of NAGPRA disputes. It also has far reaching implications for access to the courts in any case where tribal immunity is asserted.

I. LOWER FEDERAL COURTS' APPLICATION OF RULE 19 TO DISPUTES INVOLVING TRIBAL IMMUNITY UNDERMINES THE PLAIN LANGUAGE OF RULE 19 AND CONFLICTS WITH THIS COURT'S RULING IN *PROVIDENT* .

Rule 19(b) requires courts to determine whether, "in equity and good conscience," an action should proceed when a required party cannot be joined. It outlines four nonexclusive factors to balance in deciding whether an action should proceed or be dismissed. The Ninth Circuit majority opinion undermines this equitable process by automatically dismissing when the party that cannot be joined has tribal immunity.

A. Ninth Circuit Precedent Mandates Dismissal if the Required Party Has Tribal Immunity Regardless of the Equities Specific to the Case.

1. Rule 19 and *Provident* Give Courts Discretion to Proceed in the Absence of "Required" Parties.

Courts employ a three-step inquiry under Rule 19, asking: (1) "whether a nonparty should be joined under Rule 19(a)"; (2) "whether it is feasible to order that the absentee be joined"; and (3) "whether the case can proceed without the absentee." *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 779-80 (9th Cir. 2005).

Rule 19(b)'s equitable factors were added in 1966.[2] At the time, courts were moving away from equitable considerations and toward a formulaic approach to joinder. *See Schutten v. Shell Oil Co.*, 421 F.2d 869, 871-74 (5th Cir. 1970) (discussing history of Rule 19 and 1966 amendment); *see also* App. 108a, Advisory Committee Notes, Rule 19, Defects in the Original Rule, Textual Defects (3), 1966 (noting original Rule 19 focused on technical rights and obligations, not pragmatic considerations).

In *Shields v. Barrow*, 58 U.S. 130 (1854), this Court characterized "indispensable" parties as those without whom a court "could make no decree, as between the parties originally before it, so as to do complete and final justice between them without affecting the rights of [the absentee.]" *Shields,* 58 U.S. at 139-42. In applying the concept of "complete and final justice," lower courts often held that a person whose interest "may be affected" by a judgment was indispensable, and therefore had a substantive right to be joined; if they could not be joined, the action must be dismissed. *See Provident*, 390 U.S. at 123-25. This resulted in courts invariably finding the absent party was "indispensable," regardless of factual equities. *Schutten*, 421 F.2d at 871-72; *Automotive United Trades Org. v. Washington*, 285 P.3d 52, 58 (Wash. 2012) ("*Automotive*") ("[Pre-1966], a determination that a party was 'necessary' often led to a rubber-stamping of the party as 'indispensable.'"); *see also* John W. Reed,

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[2] In 2007, the word "required" replaced "necessary" and the word "indispensable" was removed. *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 855-57 (2008) (2007 changes to Rule 19 are stylistic and not substantive).

Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327, 340-46 (1957).

Shortly after the 1966 amendments, this Court interpreted the revised Rule 19 in *Provident*. That case involved a declaratory judgment action by the estate of an individual killed in an automobile accident against the estate of the driver and the liability insurer of the vehicle owner. *Provident*, 390 U.S. at 104-06. Although the case had gone to trial, the Third Circuit held it should have been dismissed for failure to join the vehicle owner as an indispensable party, reasoning that a judgment against the insurer could diminish the owner's funds for future lawsuits. *Id.* at 106-07. The Third Circuit ruled there was no need to analyze Rule 19(b) because the potential adverse effect on the owner's interest mandated dismissal. *Id.*

This Court reversed, concluding the "inflexible approach adopted by the Court of Appeals in this case exemplifies the kind of reasoning that the Rule was designed to avoid[.]" *Id.* at 107. The Court held the Third Circuit erred in not applying Rule 19(b)'s equitable factors, and if it had, "it could hardly have reached the conclusion it did." *Id.* at 112, 116-25. The Court rejected the notion that the inability to join a party whose interest may be adversely affected by a judgment always requires dismissal. *Id.* at 118-20. Rather, Rule 19(b) starts with the premise that a "necessary party" cannot be joined, and directs courts to then determine whether that party is "indispensable" in the context of the particular litigation. *Id.*

2. Federal Courts Consistently Dismiss Cases Involving Tribal Immunity Without Adequately Considering Rule 19(b).

Notwithstanding *Provident*'s admonition against dismissing cases solely for prejudice to an absent party, federal courts now apply Rule 19 to automatically dismiss cases involving tribal immunity. Relying upon Ninth Circuit precedent, federal courts dismiss these actions on the ground that "when the necessary party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor."[3] App. 32a (internal quotations omitted); *Enterprise Mgmt. Consultants, Inc. v. United States*, 883 F.2d 890, 892-94 (10th Cir. 1988); *see also Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002) ("[W]e have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs."); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1161-63 (9th Cir. 2002); *Manybeads v. United States*, 209 F.3d 1164, 1166 (9th Cir. 2000); *Clinton v. Babbitt*, 180 F.3d 1081, 1090-91 (9th Cir. 1999) (tribe's interest in immunity outweighed plaintiffs' interest in litigating their claim); *Kescoli v. Babbitt*, 101 F.3d 1304, 1310-11 (9th Cir. 1996) (although two of four Rule 19(b) factors favored plaintiffs, tribal immunity was decisive); *United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 478-80 (7th

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[3] As noted by the district court, only one federal appellate court has found that a tribe is "necessary," but not "indispensable." App. 74a (finding *Manygoats* the "sole exception" to dismissal where a tribe is a necessary party.) *Manygoats* is discussed at Section I.C.1, *infra*.

Cir. 1996) ("A plaintiff's inability to seek relief, however, does not automatically preclude dismissal, particularly where that inability results from a tribe's exercise of its right to sovereign immunity."); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460-61 (9th Cir. 1994); *Keweenaw Bay Indian Community v. State*, 11 F.3d 1341, 1345, 1347-48 (6th Cir. 1993); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547-48 (2d Cir. 1991); *Confederated Tribes*, 928 F.2d at 1500.

3. The District Court Lacked Discretion to Balance the Equities of This Case Under Ninth Circuit Precedent.

Both the district court and the Ninth Circuit cited the "wall of circuit authority" as the primary reason to dismiss this case. App. 32a-33a; 73a-74a. In doing so, the district court stated the fourth Rule 19(b) factor, Petitioners' lack of an alternative forum, "strongly disfavors dismissal," but found it lacked discretion to fully consider this factor given Ninth Circuit precedent:

> While [the phrase "in equity and good conscience"] would appear to afford the Court some discretion in determining whether or not to dismiss under Rule 19, . . . virtually all cases to consider the question appear to dismiss under Rule 19, regardless of whether a remedy is available, if the absent parties are Indian tribes invested with sovereign immunity.

App. 73a.

"[T]his Circuit has consistently dismissed actions under Rule 19 where it concludes an Indian tribe is 'necessary' yet not capable of joinder due to sovereign immunity, and therefore, this Court does not have the discretion to decide otherwise." App. 75a.

Giving decisive weight to a tribe's immunity contradicts the equitable purpose of Rule 19(b). Because Ninth Circuit precedent prevented the district court from exercising discretion, this case is an appropriate vehicle to correct the ongoing misapplication of Rule 19, and to mandate compliance with *Provident*.

B. This Court Should Clarify Whether Its Statement in *Pimentel* – That Dismissal "Must Be Ordered" When a Foreign Sovereign Cannot Be Joined – Extends to Tribal Immunity Cases.

In *Pimentel*, this Court interpreted Rule 19(b) in the context of foreign sovereign immunity, finding that when a foreign sovereign is a "required" party and cannot be joined, dismissal "must be ordered" if the interests of the absent sovereign could be injured. *Pimentel*, 553 U.S. at 867. Lower federal courts have extended this reasoning to dismiss cases involving tribal immunity.

Pimentel was an interpleader action concerning ownership of property allegedly stolen by Ferdinand Marcos. The Court held the action could not proceed without the Republic and a Philippine commission, which were required parties, but immune under the Foreign Sovereign Immunity Act. *Id.* at 863-64. Reversing the Ninth Circuit, the Court held that in balancing the Rule 19(b) factors, insufficient weight was given to the foreign sovereigns' immunity. *Id.* at 864-69. The majority stated, "[W]here sovereign

immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Id.* at 867.

The Court then analyzed the remaining Rule 19(b) factors and found the other parties would not be prejudiced by dismissal. Specifically, the fourth factor – whether plaintiff would be left without an adequate remedy – did not weigh in favor of proceeding. The "plaintiff" was an interpleader, and the Court found that dismissal served the purpose of the interpleader: "to prevent a stakeholder from having to pay two or more parties for one claim." *Id.* at 872. Additionally, a separate action was pending in a Philippine court that could resolve the ownership issue. *Id.* at 858, 872-73.

The majority acknowledged that "the balance of equities may change in due course." *Id.* at 873. This language suggests the *Pimentel* majority did not intend its holding – that foreign immunity be given dispositive weight under Rule 19(b) when there is a potential for injury and the sovereign's claims are not frivolous – to operate as a bright line rule mandating dismissal in all immunity cases.

Lower courts now apply *Pimentel* in this manner, and have expanded it to tribal immunity cases. *See, e.g., Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1283-84 (10th Cir. 2012) (citing *Pimentel* to support holding that an action should be dismissed where a tribe could not be joined because of immunity); *Klamath Tribe Claims Comm. v. United States*, 106 Fed. Cl. 87, 95-96 (Fed. Cl. 2012), *aff'd*, 541 Fed. Appx. 974, 980 (Fed. Cir. 2013) (citing *Pimentel* for proposition that if a required party has immunity, "the entire case must be dismissed" if the interests of the

sovereign could be injured, even when no alternative forum exists); *Vann v. Salazar*, 883 F. Supp. 2d 44, 48-50 (D.D.C. 2011), *rev'd on other grounds, Vann v. United States Dep't of Interior*, 701 F.3d 927 (D.C. Cir. 2012) (citing *Pimentel* as mandating dismissal in tribal immunity cases); *Brewer v. Hoppa*, 2010 WL 3120105 *2-3 (W.D. Wash. Aug. 9, 2010).

One district court rejected a tribe's argument that tribal immunity "must be given cardinal weight in the indispensability calculus of 19(b)" under *Pimentel*. *Diné Citizens v. U.S. Office of Surface Mining*, 2013 WL 68701, *3-6 (D. Colo. Jan. 4, 2013). The *Diné* court declined to apply *Pimentel*, distinguishing it on several grounds, including that (1) the *Diné* plaintiffs challenged alleged non-compliance with federal law, whereas the *Pimentel* plaintiffs sought to resolve property ownership; (2) unlike *Pimentel*, the *Diné* plaintiffs lacked an alternative forum, which "weighs crushingly against dismissal"; and (3) "most vitally," *Pimentel* addressed foreign sovereign immunity, which raises equitable considerations that may not exist in the same measure for tribal immunity. *Id.* at *3-6. Instead, the court found *Manygoats* to be persuasive and applied its reasoning to hold that although the tribe was "necessary," it was not indispensable, and the case could proceed without it. *Id.* at *6.

With few exceptions, federal courts apply *Pimentel* as a bright line rule for dismissal in cases involving tribal immunity. Because this application is at odds with Rule 19's requirement for a fact specific balancing of the equities, and because, as noted by the *Diné* court, *Pimentel* is distinguishable from tribal immunity cases, the Court should grant certiorari to clarify whether *Pimentel* requires dismissal of cases in which a tribe asserts immunity.

C. Courts That Undertake a Complete Rule 19(b) Analysis Allow Cases to Proceed Even Though a Required Party Has Tribal Immunity.

Courts that are not bound by the Ninth Circuit's mandate to dismiss when an absent tribe asserts tribal immunity have permitted cases to proceed after properly balancing the Rule 19(b) factors.

1. *Manygoats* Applied Rule 19(b) to Hold an Administrative Challenge Should Proceed Even Though a Tribe Was Both Necessary and Immune.

As noted, *Manygoats* did not mandate dismissal when a necessary party asserted tribal immunity. *Manygoats,* 558 F.2d at 558-59. In *Manygoats*, members of the Navajo Tribe sought to enjoin a uranium mining agreement, arguing that an Environmental Impact Statement ("EIS") was inadequate. *Manygoats,* 558 F.2d at 557. The Tribe was held a "necessary" party under Rule 19(a) because it would receive financial benefits under the agreement. *Id.* at 558.

Under Rule 19(b), the Tenth Circuit held the relief sought, a ruling on the adequacy of the EIS, would not prejudice the Tribe because it "does not call for any action by or against the Tribe." *Id.* at 558-59. On the other hand, dismissal for nonjoinder would produce an "anomalous result," because no one, except the Tribe, could seek review of an EIS for development on Indian lands. *Id.* at 559. This result would be inconsistent with NEPA's policy. *Id.* Therefore, "[i]n equity and good conscience," the Tenth Circuit ruled the case "should and can proceed without the presence of the Tribe as a party." *Id*.

The district court below demonstrated frustration with its lack of discretion by observing, "as in *Manygoats*, dismissal appears to conflict with certain aspects of NAGPRA, including its enforcement provision, which creates a private right of action." App. 76a. It described the practical effect of tribal immunity on NAGPRA cases:

> [I]nvoking sovereign immunity selectively permits the tribes to claim the benefits of NAGPRA, without subjecting themselves to its attendant limitations.

App. 78a.

Had the district court been able to exercise discretion under Rule 19(b), as in *Manygoats*, it could have reached a similar result: allowing the case to proceed because a judgment would not require action by or against the tribes, and because the lack of an alternative forum creates an "anomalous result" that allows tribes to prevent judicial review of questionable NAGPRA decisions.

2. State Courts of Last Resort Reject Federal Courts' Inflexible Application of Rule 19 and Allow Actions to Proceed Even if a "Required Party" has Tribal Immunity.

All state high courts to address the issue have ruled that the public interest in adjudicating the legality of government actions and the plaintiff's lack of an alternative forum can outweigh tribal immunity under state joinder rules based on Rule 19.

In *Automotive*, the Washington Supreme Court held that absent tribes were necessary, but not indispensable, parties to a lawsuit challenging the

constitutionality of disbursements made to tribes by the State of Washington. *Automotive*, 285 P.3d at 61. Plaintiff, an automotive trade organization, sought a declaration that disbursements under the compacts were unconstitutional, and a writ of prohibition against future disbursements. *Id.* at 54.

The state moved to dismiss on the ground that the tribes were necessary and indispensable, but could not be joined due to tribal immunity. *Id.* Under CR 19(a), Washington's analog to Rule 19(a),[4] the court found the tribes were necessary parties because they had a financial interest, but could not be joined because they were immune. *Id.* at 55-57.

The Washington court reviewed the history of Rule 19 and *Provident*, noting that both the federal and state joinder rules were amended in 1966 to eliminate the application of rigid standards. *Id.* at 57-58. After addressing each CR 19(b) factor, the *Automotive* court held the case could proceed. *Id.* at 58-61.

The court emphasized that its ruling did not undermine the principles of tribal immunity, "but rather recognizes that dismissal would have the effect of immunizing *the State*, not the tribes, from judicial review." *Id.* at 60 (emphasis in original). Similarly, the dismissal here immunizes *the University* from judicial review.

In *Panzer v. Doyle*, 680 N.W.2d 666 (Wis. 2004), *overruled on other grounds as stated in Dairyland Greyhound Park, Inc. v. Doyle*, 719 N.W.2d 408 (Wis.

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[4] "Because CR 19 is based on and is substantially similar to [Rule] 19, we may look to the abundant federal cases interpreting that rule for guidance." *Automotive,* 285 P.3d at 55; *see* App. 121a-122a.

2006), the Wisconsin Supreme Court found a lawsuit regarding the governor's authority to enter into gaming contracts with tribes could proceed without the tribes, because dismissing the case would "deprive this court of its own core power to interpret the Wisconsin Constitution and resolve disputes between co-equal branches of state government." *Id.* at 670, 683.

Although *Panzer* did not perform an indispensable party analysis *per se*, it cited with approval *Dairyland Greyhound Park, Inc. v. McCallum*, 655 N.W.2d 474 (Wis. Ct. App. 2002) (analyzing Wisconsin's corollary to Rule 19 – Wis. Stat. § 803.03),[5] finding its own conclusion consistent with the *Dairyland* analysis. *Panzer*, 680 N.W.2d at 683 n.20. In *Dairyland*, a Wisconsin court of appeals rejected the federal courts' approach to Rule 19, finding prejudice to an absent tribe is not determinative:

> If the prejudice factor controls the indispensable party determination, there would be little point in conducting a separate indispensable party inquiry. The rule could simply say that a party is both necessary and indispensable whenever the requirements of [the state equivalent of 19(a)] are satisfied, but that is not what the rule provides.

Dairyland, 655 N.W.2d at 485.

The court ruled the lawsuit should proceed because any prejudice to the tribes was outweighed by the fact that dismissal would leave plaintiff without an adequate remedy, and "an important legal issue having

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[5] App. 123a-128a.

significant public policy implications will evade resolution." *Id.* at 487.

New York's highest court has held tribes that are necessary parties are not indispensable in a challenge to the governor's authority to enter into gaming agreements with Native American tribes. *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 798 N.E.2d 1047, 1057-59 (N.Y. 2003). Weighing the five factors of CPLR 1001(b),[6] New York's version of Rule 19(b), the Court of Appeal held tribal immunity is outweighed by the lack of an alternative forum for plaintiff, and more importantly, the public's interest in judicial review of executive branch decisions:

> [I]f we hold that the Tribe is an indispensable party . . . no member of the public will ever be able to bring this constitutional challenge. In effect, the Executive could sign agreements with any entity beyond the jurisdiction of the Court, free of constitutional interdiction. The Executive's actions would thus be insulated from review, a prospect antithetical to our system of checks and balances.

Id. at 1058.

Like Petitioners here, plaintiffs in these lawsuits sought equitable relief against decisions by state actors in excess of their lawful authority. Absent clarification from this Court, the ability to obtain relief for executive overreaching when a "required party" has tribal immunity will be significantly hampered. Federal courts should have discretion to do equity in these situations, as Rule 19(b) allows, as *Provident* compels, and as state high courts have done.

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[6] App. 117a-120a.

3. Recent Law Review Articles Criticize the Application of Rule 19 in Cases Involving Tribal Immunity as Contrary to the Plain Language and Intent of Rule 19.

In addition to state high courts, legal commentators have noted the perverse effects of federal courts' application of Rule 19 in cases involving tribal immunity. *See* Katherine Florey, *Making Sovereigns Indispensable:* Pimentel *and the Evolution of Rule 19*, 58 UCLA L. Rev. 667, 682-97 (2011); Ross D. Andre, Comment, *Compulsory* [*Mis*]*joinder: The Untenable Intersection of Sovereign Immunity and Federal Rule of Civil Procedure 19*, 60 Emory L.J. 1157, 1179-96 (2011); Nicholas V. Merkley, *Compulsory Party Joinder and Tribal Sovereign Immunity: A Proposal to Modify Federal Courts' Application of Rule 19 to Cases Involving Absent Tribes as "Necessary" Parties*, 56 Okla. L. Rev. 931, 947-49 (2003).

These commentators criticize federal courts' current application of Rule 19 as being at odds with the plain language and intent of the rule as set forth in *Provident*. *See*, *e.g.*, Florey, *supra*, at 686 ("Despite courts' efforts to locate the rule of indispensable sovereigns within *Provident*'s analysis, the policy nonetheless remains both anomalous within the realm of Rule 19 jurisprudence and potentially in tension with *Provident*'s broader mandates."); Andre, *supra*, at 1197 ("While the overall trend in Rule 19 jurisprudence since its revision in the 1960s has been toward flexible solutions to each unique dispute, its treatment in the context of sovereign immunity is an outlier."); Merkley, *supra*, at 955-56, 966-67 (arguing that federal courts' application of Rule 19 in cases involving absent tribes fails to serve the interests of the plaintiff

and society at large because of an overemphasis on the potential prejudice to the tribe).

D. This Court Should Grant Review to Affirm That a Rule 19 Analysis Must Be Equitable and Fact Specific, as the Dissent Recognized.

While the Ninth Circuit majority mischaracterized Petitioners' action as a property dispute (App. 29a-30a), the dissent correctly viewed it as a dispute about whether the University complied with NAGPRA in designating the La Jolla remains as "Native American." App. 36a. The dissent stated that "all parties have 'have an equal interest in an administrative process that is lawful,'" and that there is no legally protected interest in an agency's procedures. App. 38a & n.2 (citing *Makah Indian Tribe v. Verity,* 910 F.2d 555, 558-59 (9th Cir. 1990)).

Applying Rule 19 to the underlying Writ Petition, the dissent held that KCRC was not a "necessary" party because it had only a general interest in the University's determination about whether the remains were "Native American" under NAGPRA, and that the University had an identical interest in defending its designation.[7] App. 35a-40a. The dissent

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[7] The dissent's finding that KCRC and the tribes are not "necessary parties" under Rule 19(a) is consistent with Tenth Circuit rulings that in a suit challenging an administrative decision, any prejudice to absent tribes is reduced by the presence of the administrative decision maker, whose interest in defending its decision is aligned with the tribe's interest in having the decision upheld. *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001), *superseded by statute on other grounds as stated in Citizens Exposing Truth About Casinos v. Kempthorne,* 492 F.3d 460, 462 n.1, 468 (D.C. Cir. 2007); *Kansas v. United States*, 249 F.3d 1213, 1225-27 (10th Cir. 2001).

found that because all four Rule 19(b) factors favored proceeding with the litigation, KCRC was not an "indispensable" party, and the litigation should proceed. App. 40a-43a.

Consistent with the rationale of *Provident*, 390 U.S. at 116-19, the dissent applied Rule 19(b) in a manner that gave weight to the facts alleged and the relief sought in the Writ Petition. App. 35a-36a, 40a-42a. By failing to conduct the same analysis, the majority opinion ignored this Court's directive in *Provident*.

Because the majority of federal courts automatically dismiss cases under Rule 19 when a necessary party has tribal immunity, this Court should grant review to clarify how Rule 19 applies in these cases and to mandate compliance with *Provident*.

II. THE SCOPE OF DISTRICT COURTS' AUTHORITY TO ADJUDICATE DISPUTES UNDER NAGPRA IS AN ISSUE OF NATIONAL IMPORTANCE THAT WARRANTS IMMEDIATE REVIEW.

When a tribe has immunity, it may not be sued unless the tribe waives its immunity or Congress abrogates it. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 416-18 (2011); *see also id.* at 418-23 (holding arbitration provisions in contract constituted clear waiver). Any such waiver must be "clear"; likewise, Congress must "unequivocally" express its intent to abrogate immunity. *See id.* at 418 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)).

Both the district court and the Ninth Circuit considered whether Congress abrogated tribal immunity in enacting NAPGRA, but concluded it did not. App. 23a-25a; 57a-60a. The lower courts applied the "unequivocally expressed" standard in an overly narrow fashion to reach this result.

NAGPRA provides both an independent basis for jurisdiction and a private right of action for "any person alleging a violation of [NAGPRA]." 25 U.S.C. § 3013; *Bonnichsen v. United States*, 969 F. Supp. 614, 627 (D. Or. 1997). The plain language of § 3013 and NAPGRA's other provisions make clear that Congress intended district courts to adjudicate competing interests in Native American remains, notwithstanding the judge-created doctrine of tribal sovereign immunity.

A. The District Court and the Ninth Circuit Hold NAGPRA's Enforcement Provision Does Not Abrogate Tribal Immunity.

On its own initiative, the district court analyzed whether tribal immunity applied, since Congress expressly gave district courts jurisdiction to hear NAGPRA claims. App. 57a-65a. The district court noted only one case that discussed the issue indirectly, *Rosales v. United States*, 89 Fed. Cl. 565, 584-86 (Fed. Cl. 2009),[8] but found *Rosales* did not expressly consider whether tribal immunity applied under

[8] *See also Rosales v. United States*, No. 07CV0624, 2007 WL 4233060, at *6-10 (S.D. Cal. Nov. 28, 2007) (dismissed on the alternate ground that plaintiffs failed to allege federal agencies had any duties under NAGPRA); *Hawk v. Danforth*, No. 06-C-223, 2006 WL 6928114, at *1 (E.D. Wis. Aug. 17, 2006) (declining to address tribal immunity and questioning whether it applied).

NAGPRA. App. 57a, n.10. The district court concluded that NAGPRA's enforcement provision, 25 U.S.C. § 3013, did not waive tribal immunity (assuming a "required party" can assert tribal immunity in a dispute between non-tribes over whether particular remains are covered by NAGPRA). App. 58a-60a.

The Ninth Circuit also concluded NAGPRA's enforcement provision did not abrogate tribal immunity, premised on the assumption that the tribes and KCRC would be immune absent waiver or congressional abrogation. App. 23a-24a. The majority opined that 25 U.S.C. § 3013 contained no language expressly abrogating tribal immunity, and rejected Petitioners' other arguments on the immunity issue. App. 24a-25a.

B. The Lower Courts' Decisions Defeat Congress' Clear Intent to Allow Judicial Review, and Destroy NAGPRA's Ability to Resolve Claims for Covered Items Held By Museums.

Read as a whole, NAGPRA unequivocally expresses congressional intent to give district courts authority to resolve disputes arising under NAGPRA. In addition to the fact that 25 U.S.C. § 3013 authorizes a private right of action for declaratory and injunctive relief, the following provisions of NAGPRA show Congress intended to give district courts the power to render binding decisions in disputes involving one or more tribes:

- 25 U.S.C. § 3002 – NAGPRA's "Ownership" provision, governing Native American cultural items discovered on Federal or tribal lands, contemplates that multiple tribes could make competing claims. *See*,

e.g., 25 U.S.C. § 3002(c)(2) (establishes "preponderance of the evidence" standard for ranking strength of cultural relationship when evaluating competing claims).

- 25 U.S.C. § 3003 – NAGPRA's "Inventory" provision requires covered entities to identify the geographical and cultural affiliation of each item. *See* 25 U.S.C. § 3003(a), (b)(2). This requirement facilitates the identification of tribal claimants.
- 25 U.S.C. § 3005 – NAGPRA's "Repatriation" provision contemplates that more than one tribe may assert a right to repatriation, *and that district courts could resolve competing claims*. *See* 25 U.S.C. § 3005(e) ("Where there are multiple requests for repatriation of any cultural item and, after complying with the requirements of this chapter, the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition *or the dispute is otherwise resolved* pursuant to the provisions of this chapter or *by a court of competent jurisdiction*.") (emphasis added).
- 25 U.S.C. § 3006 – the federal regulation implementing NAGPRA's "Review Committee" provision expressly states that any action of the Review Committee established by the Secretary of the Interior is *advisory only and not binding*. *See* 43 C.F.R. § 10.16(b); *see also Fallon Paiute-Shoshone*

Tribe v. U.S. Bureau of Land Mgmt., 455 F. Supp. 2d 1207, 1221-22 (D. Nev. 2006) (confirming same).

- 25 U.S.C. § 3009(3) – "[n]othing in [NAGPRA] shall be construed to . . . deny or otherwise affect access to any court."[9]

Although none of these provisions directly references tribal immunity, no "magic words" are required to show Congress' intent to abrogate it. *See F.A.A. v. Cooper*, 132 S. Ct. 1441, 1448 (2012). Rather, Congress need only express its intent "unequivocally." *See C & L Enterprises*, 532 U.S. at 418; *Santa Clara Pueblo*, 436 U.S. at 58-59.

In the analogous context of voluntary waiver, this Court has held a tribe's agreement, in a standard form construction contract, (1) to arbitrate disputes, (2) be governed by Oklahoma state law, and (3) to have arbitral awards enforced in "any court of competent jurisdiction of [Oklahoma]," was clear evidence of waiver. *See C & L Enterprises*, 532 U.S. at 414, 418-22. Here, Congress decreed that district courts have jurisdiction over "any action brought by any person" alleging violation of a statute that specifically created a system to adjudicate repatriation and ownership disputes between multiple tribes. Just as the arbitration clause in *C & L Enterprises* would be meaningless if a party asserted sovereign immunity (*id.* at 422), Congress' provisions for review and enforcement of NAGPRA disputes would be meaningless if a tribal claimant asserted immunity.

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[9] 25 U.S.C. § 3009(4) also states nothing in NAGPRA is intended to "limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations," but this provision does not specifically reference tribal immunity.

The Ninth Circuit did not address the effect on tribal immunity of any provision other than the enforcement provision. App. 23a-25a. Under the majority's holding, any tribe designated by a museum to receive remains could cut off other parties' access to the courts by asserting tribal immunity. This holds true even if the repatriation decision is unsupported by the evidence; there is another tribal claimant with a potentially superior claim; or non-qualifying remains were erroneously included on an inventory, as here.

Even if the United States could still bring suit against a tribe, as the Ninth Circuit suggests (App. 25a-26a), that would not resolve disputed claims for items held by museums, because the United States does not represent the museums' interests, nor is there a NAGPRA requirement that the United States file suit on their behalf. Likewise, the United States does not represent the interests of Petitioners, and cannot be compelled to sue on their behalf. The Ninth Circuit's holding thus creates significant disparity in access to the courts based on the identity of the repatriating party – federal agencies would have access while museums would not – a result not supported by the plain language of NAGPRA.

Taken together, all of NAGPRA's provisions show Congress intended to make district courts available to resolve disputes involving one or more tribal claimants. *See* 25 U.S.C. §§ 3005(e), 3006, 3013; 43 C.F.R. § 10.16(b). If one tribe could cut off relief for all other parties by asserting immunity, Congress' intent would be subverted. But that is the binding result of the Ninth Circuit holding that the tribes are immune, and Congress did not abrogate that immunity. The majority opinion renders NAGPRA useless as a tool to resolve competing claims for items held by museums,

despite unequivocal language authorizing courts to resolve these disputes.

C. In The Alternative, This Case is an Excellent Vehicle to Consider Whether the Doctrine of Tribal Immunity Extends to Situations in Which No Relief is Sought Against the Tribe, and There is No Other Forum That Can Bind the Parties.

This Court recently upheld the doctrine of tribal immunity in a suit against a tribe arising from off-reservation commercial activities. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2032-39 (2014). The *Bay Mills* majority emphasized, however, that Michigan was not without recourse to right the wrong it alleged, and reserved judgment on whether immunity would apply if there were no other recourse. *Id.* at 2036, n.8 ("We need not consider whether the situation would be different if no alternative remedies were available."); *see also* App. 72a (noting University did not contest that relief would effectively be unavailable to plaintiffs); *Nevada v. Hicks*, 533 U.S. 353, 364-65 (2001) (tribal courts lack jurisdiction over state officials for causes of action relating to their performance of official duties); *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682, 685 (10th Cir. 1980) ("There has to be a forum where the dispute can be settled."). This case presents just such a situation, because there is no alternate forum, theory, or strategy that would allow Petitioners to challenge the University's designation of the La Jolla remains as "Native American," if the lower courts' rulings are upheld.[10]

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[10] This Court may address whether immunity extends to tribes joined under Rule 19 to a NAGPRA claim, because the district

In contrast to this Court's opinion in *Bay Mills*, 134 S. Ct. at 2035, the district court here rejected any argument that the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), could be used to join the tribe or KCRC. App. 78a-79a. Observing that personal-capacity suits are appropriate "only where individual assets or personal actions are targeted," the district court opined that advocating for repatriation could not support such a suit, and was almost certainly constitutionally protected. App. 78a.

Although 25 U.S.C. § 3003 requires that inventories be completed "in consultation with" tribal governments, NAGPRA does not grant the La Posta Band and KCRC any authority to decide whether the La Jolla remains qualify as "Native American." This Court has not determined whether a tribe's interest in preserving its original natural rights in matters of local self-government is sufficient to support immunity in disputes under NAGPRA, a statute that governs how non-members interact with tribes and grants jurisdiction to district courts to resolve disputes. 25 U.S.C. §§ 3003(b)(1)(A), 3005(e), 3007, 3013.

Tribal self-determination does not benefit from transferring human remains that have no relationship to a presently existing tribe, people, or culture. *See Bonnichsen*, 367 F.3d at 876. Tribal immunity should not extend to situations where no relief is sought against a tribe and no other forum is available. Whether tribes may assert immunity under these

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court's opinion addressed whether tribal immunity may be asserted as a defense to NAGPRA claims, and because both the district court and the Ninth Circuit addressed whether KCRC was entitled to immunity as an "arm of the tribe." *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); App. 26a-27a; 57a-62a & n.10.

circumstances is a matter of national importance because, absent clarification, parties whose interests are affected by NAGPRA – including tribes – will find themselves without a forum to resolve their disputes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES MCMANIS
Counsel of Record
MICHAEL REEDY
CHRISTINE PEEK
LAUREN COATNEY
TYLER ATKINSON
MCMANIS FAULKNER
50 W. San Fernando St.
10th Floor
San Jose, CA 95113
(408) 279-8700
mreedy@mcmanislaw.com

November 19, 2015

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-17489
D.C. No. 3:12-cv-01978-RS

TIMOTHY WHITE; MARGARET SCHOENINGER; ROBERT L. BETTINGER,

Plaintiffs-Appellants,

v.

UNIVERSITY OF CALIFORNIA; REGENTS OF THE UNIVERSITY OF CALIFORNIA; JANET NAPOLITANO; MARYE ANNE FOX, in her individual and official capacity as Chancellor of the University of California, San Diego; GARY MATTHEWS, in his individual and official capacity as Vice Chancellor of the University of California, San Diego; KUMEYAAY CULTURAL REPATRIATION COMMITTEE,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California Richard Seeborg, District Judge, Presiding

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Argued and Submitted
December 3, 2013—San Francisco, California
Filed August 27, 2014

Before: Stephen S. Trott, Sidney R. Thomas, and Mary H. Murguia, Circuit Judges.

Opinion by Judge Sidney R. Thomas; Dissent by Judge Murguia

OPINION

SUMMARY*

Native Graves Protection and Repatriation Act

The panel affirmed the district court's dismissal of an action under the Native Graves Protection and Repatriation Act on the basis that the affected tribes and their representatives were indispensable parties and could not be joined in the action.

The action concerned the "La Jolla remains," two human skeletons discovered during an archaeological excavation on the property of the Chancellor's official residence at the University of California-San Diego. The tribes claimed the right to compel repatriation of the La Jolla remains to one of the Kumeyaay Nation's member tribes. Repatriation was opposed by the plaintiffs, University of California professors who wished to study the remains. The professors sought a declaration that the remains were not "Native American" within the meaning of NAGPRA, which provides a framework for establishing ownership and control of newly discovered Native American remains

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

and funerary objects, as well as cultural items already held by certain federally funded museums and educational institutions.

The panel held that the plaintiffs had Article III standing to bring suit because if the La Jolla remains were repatriated, the plaintiffs would suffer a concrete injury that was fairly traceable to the challenged action. In addition, this injury was likely to be redressed by a favorable decision.

The panel held that NAGPRA does not abrogate tribal sovereign immunity because Congress did not unequivocally express that purpose. The panel held that the "Repatriation Committee," a tribal organization, was entitled to tribal sovereign immunity as an "arm of the tribe." In addition, the Repatriation Committee did not waive its sovereign immunity by filing a separate lawsuit against the University or by incorporating under California law.

The panel held that the tribes and the Repatriation Committee were necessary parties under Federal Rule of Civil Procedure 19(a)(1) and were indispensable under Rule 19(b). In addition, the "public rights" exception to Rule 19 did not apply. Accordingly, the district court properly dismissed the action.

Dissenting, Judge Murguia agreed with the majority that the plaintiffs had Article III standing, that NAGPRA did not abrogate the sovereign immunity of the tribes, and that the Repatriation Committee was entitled to sovereign immunity. She would hold, however, that the Committee was not a necessary and indispensable party because it was neither necessary nor indispensable to resolution of the question whether the University properly determined that the

remains were Native American within the meaning of NAGPRA.

COUNSEL

Lauren Coatney (argued), James McManis, Michael Reedy, and Christine Peek, McManis Faulkner, San Jose, California, for Plaintiffs-Appellants.

Michael Mongan (argued) and Michelle Friedland, Munger, Tolles & Olson LLP, San Francisco, California; Charles F. Robinson, Karen J. Petrulakis, and Margaret L. Wu, Office of the General Counsel, University of California, Oakland, California; Bradley Phillips, Munger, Tolles & Olson LLP, Los Angeles, California; Dennis Klein, Office of the Campus Counsel, University of California San Diego, La Jolla, California, for Defendants-Appellees Regents of the University of California, Mark G. Yudof, Janet Napolitano, Marye Anne Fox, and Gary Matthews.

Dorothy Alther (argued), California Indian Legal Services, Escondido, California, for Defendant-Appellee Kumeyaay Cultural Repatriation Committee.

OPINION

THOMAS, Circuit Judge:

In this appeal, we consider whether the Native American Graves Protection and Repatriation Act ("NAGPRA" or "the Act") abrogates tribal sovereign immunity and, if not, whether the district court properly dismissed this declaratory judgment action because the tribes and their representatives were indispensable parties under Fed. R. Civ. P. 19 and could not be joined in the action. We conclude that NAGPRA does not abrogate tribal sovereign immunity and that the affected tribes and their representatives

were indispensable parties. Therefore, we affirm the district court's judgment.

I

In 1976, Gail Kennedy, a professor at the University of California-Los Angeles ("UCLA"), led an archaeological field excavation project on the property of the Chancellor's official residence at the University of California-San Diego ("UCSD" or "the University"). During the excavation, the archaeological team discovered a double burial site and uncovered two human skeletons (the "La Jolla remains"). Scientists estimate that the La Jolla remains are between 8977 to 9603 years old, making them among the earliest known human remains from North or South America.

The property on which the La Jolla remains were discovered was aboriginally occupied by members of the Kumeyaay Nation, which consists of a number of federally recognized Indian tribes[1]. The Kumeyaay, also known as the Ipai, Tipai, or the Diegueño, aboriginally occupied areas of the southwestern United States and northwest Mexico. The Kumeyaay Nation currently occupies various lands extending from San Diego and Imperial Counties in California to 75 miles south of the Mexican border[2].

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[1] These tribes include the Barona Band of Mission Indians; Campo Band of Kumeyaay Indians; the Ewiiaapaayp Band of Kumeyaay Indians; the Inaja-Cosmit Band of Mission Indians; the Jamul Indian Village; the La Posta Band of Mission Indians; the San Pasqual Band of Mission Indians; the Iipay Nation of Santa Ysabel; the Sycuan Band of the Kumeyaay Nation; and the Viejas Band of Kumeyaay Indians (collectively "the Tribes" or the "Kumeyaay Nation").

[2] Aboriginal interest in land generally is described as a tribe's right to occupy the land. It is not a property right, but "amounts to a right of occupancy which the sovereign grants and protects

Since their discovery, the University has maintained custody of the La Jolla remains, but they have been stored at multiple locations, including UCLA, the San Diego Museum of Man, the National Museum of Natural History, and the Smithsonian Institution. The La Jolla remains are presently in the physical custody of the San Diego Archaeological Center.

The present dispute is over the custody of the La Jolla remains. The Tribes and their representatives claim the right to compel repatriation of the La Jolla remains to one of the Kumeyaay Nation's member tribes. Repatriation is opposed by Plaintiffs Timothy White, Robert L. Bettinger, and Margaret Schoeninger ("Plaintiffs" or "the Scientists"), professors in the University of California system, who wish to study the La Jolla remains.

Resolution of the dispute is largely governed by NAGPRA, which was passed by Congress in 1990. NAGPRA provides a framework for establishing ownership and control of (1) newly discovered Native American remains and funerary objects (collectively "cultural items") and (2) cultural items already held by certain federally funded museums and educational institutions. *See* 25 U.S.C. §§ 3001-3013. NAGPRA was enacted in response to widespread debate surrounding the rights of tribes to protect the remains and funerary objects of their ancestors and the rights of museums, educational institutions, and scientists to preserve and enhance the scientific value of their

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against intrusion by third parties." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955). The right, which is residual in nature, comes from the legal theory that discovery and conquest gave conquerors the right to own the land but did not disturb the tribe's right to occupy it. *See Johnson v. M'Intosh*, 21 U.S. 8 Wheat 543, 588-91 (1823).

collections. *See*, e.g., *Bonnichsen v. United States*, 367 F.3d 864, 874 n.14 (9th Cir. 2004); S. Rep. No. 101-473, at 3 (1990) (describing testimony "indicat[ing] the need for a process in which meaningful discussions between Indian tribes and museums regarding their respective interests in the disposition of human remains and objects in the museum[s 1 collections could be discussed and the resolution of competing interests could be facilitated").

NAGPRA applies only to "Native American" cultural items, and it defines "Native American" to mean "of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. § 3001(9). In *Bonnichsen*, we interpreted NAGPRA's definition of "Native American" to mean of or relating to a "presently existing Indian trib[e]," people, or culture. 367 F.3d at 875.

The Department of the Interior is the agency charged with administering NAGPRA. Under NAGPRA, the Secretary must establish a review committee for the purpose of making findings and recommendations related to "the identity or cultural affiliation of cultural items" or "the return of such items." *See* 25 U.S.C. § 3006(c)(3). The Review Committee's recommendations are "advisory only and not binding on any person." 43 C.F.R. § 10.16(b).

NAGPRA contains, among other things, an "ownership" provision and a set of "repatriation" provisions. The ownership provision applies only to Native American cultural items excavated on federal or tribal lands after the effective date of the Act. 25 U.S.C. § 3002. The provision generally vests ownership and control over the cultural items in the lineal descendants of a deceased Native American. § 3002(a)(1). If lineal descendants cannot be identified, then the provision

vests ownership in the tribe on whose land the remains were discovered (if they were discovered on tribal lands), or in the tribe having the closest "cultural affiliation" with the remains (if they were discovered on non-tribal federal lands). § 3002(a)(2)(A)—(B). If the remains are discovered on non-tribal federal lands and no cultural affiliation can be established, then the ownership provision vests ownership and control in the tribe "that is recognized as aboriginally occupying the area in which the objects were discovered." § 3002(a)(2)(C)(1). NAGPRA defines "cultural affiliation" as "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." § 3001(2). NAGPRA permits tribes to prove aboriginal occupation by way of a final judgment from the Indian Claims Commission or the United States Court of Federal Claims, a treaty, an Act of Congress, or an Executive Order. 43 C.F.R. § 10.11(b)(2)(ii).

NAGPRA's repatriation provisions apply to Native American cultural items already held by a federal agency or museum at the time that NAGPRA was enacted, and therefore apply to the La Jolla remains, which at that time were already in the University's possession. The Act's repatriation provisions require the agency or museum to compile an inventory of the "Native American" cultural items within its possession and to determine each item's "geographical and cultural affiliation." 25 U.S.C. § 3003(a). Upon the request of a culturally affiliated tribe or organization, the agency or museum must "expeditiously return" culturally affiliated items to the tribe. § 3005(a)(1). If no cultural affiliation is established, then the provisions provide that "such Native American human remains and funerary objects shall be expeditiously

returned where the requesting Indian tribe . . . can show cultural affiliation by a preponderance of the evidence based on geographical kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion." § 3005(a)(4).

The repatriation provisions also permit the agency or museum to delay the return of culturally affiliated items if the items are "indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States." § 3005(b). The repatriation provisions do not, however, provide a course of action for circumstances in which the remains are "culturally unidentifiable." *See generally* Rebecca Tsosie, *NAGPRA and the Problem of "Culturally Unidentifiable" Remains: The Argument for a Human Rights Framework*, 44 Ariz. St. L.J. 809, 817 (2012) (describing Congress's intent to permit the Secretary of the Interior to promulgate regulations addressing culturally unidentifiable remains).

As a "museum" subject to NAGPRA[3], the University promulgated "Policy and Procedures on Curation and Repatriation of Human Remains and Cultural Items." Pursuant to that policy, the University also established a systemwide "Advisory Group on Cultural Affiliation and Repatriation of Human Remains and Cultural Items" ("the University Advisory Group") to facilitate compliance with NAGPRA. The University Advisory Group reviews campus decisions regarding

[3] Section 3003 requires "[e]ach Federal agency and each museum" to compile an inventory of Native American cultural items. The University, as an "institution of higher learning," is a "museum" under NAGPRA. *See* § 3001(8). If the University does not comply with NAGPRA's provisions, it may incur a penalty. § 3007.

cultural affiliation and repatriation and assists in the resolution of disputes that arise involving cultural items in the University's possession. It is made up of at least "one University faculty member delegated principal responsibility for compliance with [the University's] policy" and "two Native American members to be selected by the President or designee from among nominees submitted by each campus." The Vice Provost for Research is the liaison to the University Advisory Group from the University's Office of the President.

The Native American Heritage Commission ("Heritage Commission") is the California state agency charged with identifying and cataloging Native American cultural resources. *See* Cal. Pub. Res. Code §§ 5097.91, 5097.94. Pursuant to its authority under state law, the Heritage Commission notifies the "most likely descend[ant]" of Native American remains and provides that descendant an opportunity to inspect the site from which the remains were removed. Cal. Pub. Res. Code § 5097.98. It also makes recommendations "for treatment or disposition, with appropriate dignity, of the human remains." *Id.* The state-law "most likely descend[ant]" determination does not resolve any questions of affiliation under NAGPRA.

In March 2007, the Heritage Commission identified the Kumeyaay Cultural Repatriation Committee ("the KCRC" or the "Repatriation Committee") as the "most likely descendant" for the La Jolla remains. The Repatriation Committee is a tribal organization that was formed in 1997 by tribal resolutions from each of its twelve Kumeyaay Nation member tribes. The organization describes itself as "an outgrowth of tribal

leaders and members [sic] concerns over the repatriation efforts, or lack thereof, under [NAGPRA] in San Diego."

In August 2006, the Repatriation Committee sent a letter to the University requesting that the La Jolla remains be repatriated to one of its member tribes. In late 2007, the University began consulting with the Repatriation Committee to determine the geographical and cultural affiliation of the La Jolla remains. Concurrent to those consultation efforts, the University also conducted, pursuant to its policy for complying with NAGPRA, an academic assessment to determine the cultural affiliation of the La Jolla remains. The assessment was completed in May 2008.

The academic assessment concluded that the La Jolla remains are "culturally unidentifiable." The assessment found "that there is not a preponderance of evidence to support an affirmation of cultural identification or affiliation with any modern group." With respect to the Kumeyaay, the assessment concluded,

> Although there is evidence from material culture that people have lived in the San Diego region since the late Pleistocene or early Holocene, the linguistic analyses and archaeological evidence indicate that the Kumeyaay moved into the region within the last few thousand years. Kumeyaay folklore and oral tradition emphasize water (both fresh and marine) and a specific region within the Mohave Desert as their places of origin. Given the early Holocene age of the skeletons, we placed less emphasis on the evidence from these sources. . . . [H]aplogroups present in a terminal Pleistocene skeleton from the

> Pacific Northwest and in extant coastal Native Californians are rare or absent in the few Kumeyaay mitochondrial genomes so far analyzed. The burial pattern of the 2 skeletons recovered from the UCSD property differs from that of the Kumeyaay as reported in early ethno-graphies.[4]

The assessment also concluded that "[a]ll that can be said conclusively is that the skeletal morphology of the two skeletons provides no support for a finding of cultural affiliation between the two and the Kumeyaay." Based on the assessment, the University filed its required Notice of Inventory Completion and inventory with the Department of the Interior listing the La Jolla remains as not culturally identifiable with the Tribes. The inventory was silent regarding any determination of whether the La Jolla remains are "Native American" as that term is defined under NAGPRA.

After the academic assessment was completed, it was forwarded to the University Advisory Group for use in preparing a recommendation. At the same time, the University's Vice Chancellor for Resource Management and Planning, Gary Matthews, wrote to University Provost and Executive Vice President Rory

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[4] The Pleistocene is the time period spanning 2.6 million to 11,700 years ago, and the Holocene is the time period spanning 11,700 years ago to the present. A "haplogroup" is a population sharing a common ancestor. The mitochondrial genome is the DNA string found in mitochondria, which is normally inherited only from the mother. *See* International Science Times, *Tracing the Earliest Americans Through Mitochondrial DNA*, http://www.isciencetimes.com/articles/6344/20131119/tracing-earliest-americans-through-mitochondrial-dna.htm (last visited July 23, 2014).

Hume describing the 2006 repatriation request and urging the Provost to repatriate the La Jolla remains. Matthews noted that "[t]here are no competing requests for repatriation, and the KCRC is the legally recognized [most likely descendant] in San Diego, as confirmed by the State of California Native American Heritage Commission." Matthews went on to note that "Native Americans comprise less than 1% of the students at UC San Diego with not one Kumeyaay student represented in those meager numbers," and concluded that "[o]ne strategic and meaningful step forward would be to address the spirit of the law and required actions contained within NAGPRA" by repatriating the remains to the Repatriation Committee. "This action would have a profound effect on bridging the gap that is clearly evident between the Native American Community and the University of California."

In February 2009, the University prepared a proposed request form asking the Department of the Interior's NAGPRA review committee to act on an agreement between the University and the Repatriation Committee that would permit transfer of the La Jolla remains to the Tribes. In that request for action, the University stated that the La Jolla remains were "determined to be Native American" based on their age, the location in which they were excavated, and oral traditional and folkloric information provided by the Tribes. Specifically, the form stated,

> [T]he Kumeyaay firmly believe that their people have lived in this region since the "beginning." For example, the Viejas Band considers the Kumeyaay (referred to as Digueno) to be the original native inhabitants of San Diego County — having lived in this

> region for more than 10,000 years. *See* http://www.viejasbandofkumeyaay.org/html/tribal_history/kumeyaay_history.html. Similarly, the Sycuan Band states that their ancestors have lived in the San Diego area for 12,000 years —"[t]he earliest documented inhabitants in what is now San Diego County are known as the San Dieguito Paleo-Indians, dating back to about 10,000 B.C." See http://sycuan.com/history.html. In addition, the local Kumeyaay "avow a deep sense of personal and communal responsibility for the recovery and proper reburial of all human remains of people who predate European settler society." (modification in original).

The form was submitted to the Department of the Interior, but was later withdrawn for reasons that are unclear from the record before us.

In May 2010, while the University Advisory Group was considering the academic assessment and developing a recommendation, the Department of the Interior promulgated regulations pertaining to the disposition of "culturally unidentifiable" remains and funerary objects. *See* 43 C.F.R. § 10.11. The regulations apply to "human remains previously determined to be Native American under § 10.9 [the regulation setting forth the inventorying process], but for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified." § 10.11(a). Culturally unidentifiable remains removed from federal lands must be transferred to "[t]he Indian tribe or tribes that are recognized as aboriginal to the area from which the human remains were removed." *See* § 10 .11(c)(1)(ii).

In June 2010, the Repatriation Committee wrote to the University presenting its legal position that the new NAGPRA regulations required the transfer of the La Jolla remains to the Repatriation Committee. According to the Repatriation Committee,

> The human remains are "Native American." NAGPRA is only concerned with Native American remains. By its own actions, UCSD has treated the human remains as "Native American." UCSD submitted the human remains in its NAGPRA inventory; submitted the inventory to the UCSD NAGPRA Working Group and has had several interactions with the NAGPRA Designated Federal Officer regarding the disposition of the human remains. This action, coupled with meetings with KCRC regarding the human remains, demonstrates that UCSD has and continues to treat the human remains as "Native American." KCRC also points to the work of Dr. Mayes that shows through her analysis that a tooth from the female human remain has a prominent shoveling, which is a characteristic still present in modern day Native American populations.

The Repatriation Committee concluded that, because the La Jolla remains are "Native American" but "culturally unidentifiable," the new Department of the Interior regulations required the University to transfer the La Jolla remains to the Repatriation Committee, the group "recognized as aboriginal to the area from which the human remains were removed." See 43 C.F.R. § 10.11(c)(1)(ii).

In March 2011, the University Advisory Group issued its report and recommendations pertaining to the La Jolla remains. Among other things, the University Advisory Group addressed "whether the remains were 'Native American' as defined by NAGPRA and case law" and noted that the University may have "implicitly concluded that the remains were Native American" by filing a Notice of Inventory Completion and undergoing the process of establishing "cultural affiliation." Some members of the University Advisory Group "voiced strong concern that there had not been adequate review/analysis" of that question and "totally opposed the idea that UCSD should proceed as though the remains are Native American, even though they might not be." The University Advisory Group's discussion pertaining to disposition of the remains was "fractured," and so its recommendation "focused mostly on the issue of consultation and not on the issue of ultimate disposition." In its report, the University Advisory Group recommended additional consultation, reanalysis of certain funerary objects listed with the La Jolla remains, and revisions to the Notice of Inventory Completion on the issue of whether the La Jolla remains were indeed "Native American." On the last issue,

> [o]ne suggested approach for addressing the uncertainty surrounding the matter of whether the remains are "Native American" was to insert language into the UCSD's new Notice of Inventory Completion acknowledging that given the age of the remains, there is some uncertainty on the matter of whether they meet the legal definition of "Native American," but that the campus has decided to proceed under the presumption that they

> are, given that the campus already circulated a previous NAGPRA inventory listing these remains, given that the campus wishes to make a disposition, and given that doing so will ensure that there is adequate notice to the public and to potentially interested tribes that a disposition is going to be made. This approach would avoid having to re-open an issue that already was dealt with in the previous inventory, but would partially address concerns expressed by experts about the scientific uncertainty that the remains are "Native American," and avoid taking a definitive possibly precedent-setting position in a high profile matter.

In May 2011, the University President, Mark Yudof, wrote to the Chancellor at UCSD, Marye Anne Fox, authorizing disposition of the La Jolla remains subject to certain conditions and recommendations. Specifically, President Yudof requested that UCSD engage in broader consultation efforts and revise its Notice of Inventory Completion to reflect the "deep division of opinion within the [University] Advisory Group, with regard to the status of the remains as Native American under NAGPRA."

In December 2011, the University issued its final Notice of Inventory Completion, which stated, "The human remains are Native American." It further stated,

> Pursuant to 43 C.F.R. 10.11(c)(1), and based upon request from the Kumeyaay Cultural Repatriation Committee, on behalf of The Tribes, disposition of the human remains is to the La Posta Band of Diegueno Mission

Indians of the La Posta Indian Reservation, California.[5]

The Plaintiffs, who teach at the University of California-Berkeley, University of California-Davis, and University of California-San Diego, allege that they requested an opportunity to study the La Jolla remains in 2009 and 2010 but were never granted permission to do so by Chancellor Fox. The Scientists believe that they will have opportunities to study the La Jolla remains—which they allege hold the highest "degree of research potential" in the "New World"—if the University does not transfer the La Jolla remains to the La Posta Band.

Between December 2011, when the University filed its final Notice of Inventory Completion, and January 2012, Plaintiffs and the University attempted to resolve outside of court their dispute over the La Jolla remains. After those settlement discussions failed, the Repatriation Committee filed a complaint against the University in the U.S. District Court for the Southern District of California seeking declaratory relief and an

[5] The Repatriation Committee's policy is that the member tribe geographically closest to the location in which the remains were found should act as the tribe for the purposes of repatriation. According to the Repatriation Committee, the La Posta Band is geographically closest to the La Jolla remains. The land area of the La Posta reservation is approximately 3500 acres, and the reservation is located in and around Boulevard, California. The tribe has 18 members. *See* University of San Diego, *San Diego Native Americans—Indian Reservations in San Diego County*, http://www.sandiego.edu/nativeamerican/reservations.php#LaPosta (last visited July 23, 2014).

injunction compelling the transfer of the La Jolla remains to the La Posta Band[6].

Afterward, the Scientists filed a Petition for Writ of Administrative Mandamus and an initial complaint in California state court alleging causes of action for (1) violations of NAGPRA, (2) breach of the public trust, and (3) violation of Plaintiffs' First Amendment rights. On all of their claims, the Scientists alleged that the University failed to make a formal and adequate finding that the La Jolla remains were "Native American" within the meaning of NAGPRA, and that the University's decision to transfer the La Jolla remains pursuant to NAGPRA was therefore arbitrary and capricious and not supported by the evidence. The University removed the action to the United States District Court for the Northern District of California, and the Scientists later amended their complaint to add the Repatriation Committee as a defendant.

The University moved to dismiss the complaint on the ground that the district court lacked subject-matter jurisdiction over the claim because (1) the Repatriation Committee and the twelve Kumeyaay tribes are necessary and indispensable parties who cannot be joined under Federal Rule of Civil Procedure 19 because they are immune from suit, (2) Plaintiffs lack standing under Article III, and (3) Plaintiffs' public trust and First Amendment claims are unripe.

The district court granted the University's motion to dismiss, concluding that the Repatriation Committee

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[6] After the district court denied the Repatriation Committee's and Defendants' joint motion to stay the proceedings in the Southern District of California, the parties stipulated to a dismissal without prejudice.

is a necessary and indispensable party under Fed R. Civ P. 19 that could not be joined because it is immune from suit. Plaintiffs timely appealed.

II

The first question we must decide is whether Plaintiffs have Article III standing to bring this lawsuit. In order to establish Article III standing, a plaintiff must show (1) a concrete injury, (2) fairly traceable to the challenged action of the defendant, (3) that is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Plaintiff White is a professor of integrative biology at the University of California-Berkeley. He holds Bachelor of Science degrees in biology and anthropology from the University of California-Riverside, along with a Master of Arts and Ph.D in biological anthropology from the University of Michigan-Ann Arbor. His field research concentrates on the study of ancient humans.

Plaintiff Bettinger is a Professor of Anthropology at the University of California-Davis. He holds a Bachelor of Arts and a Ph.D. in anthropology from the University of California-Riverside. His scholarship and fieldwork have focused on hunter-gatherers and the population expansions of hunter-gatherers.

Plaintiff Schoeninger is a professor of anthropology at the University of California-San Diego. She holds a Bachelor of Arts in anthropology from the University of Florida, a Master of Arts in anthropology from the University of Cincinnati, and a Ph.D. in anthropology from the University of Michigan. Her research centers on the subsistence strategies of early humans.

The University does not contest that if the La Jolla remains are repatriated, the Scientists will suffer a concrete injury that is fairly traceable to the challenged action. Instead, the University contends that the injury is not likely to be redressed by a favorable decision. We therefore focus on only the third *Lujan* factor.

To establish redressability under Article III, a plaintiff "must show only that a favorable decision is *likely* to redress his injury, not that a favorable decision *will inevitably* redress his injury." *Beno v. Shalala*, 30 F.3d 1057, 1065 (9th Cir. 1994). A showing that is "merely speculative" is insufficient. *Lujan*, 504 U.S. at 561 (internal quotation marks omitted).

The Scientists seek a declaration that the La Jolla remains are not "Native American" within the meaning of NAGPRA.

In their complaint, Plaintiffs seek the opportunity to study the La Jolla remains. In response, the University argues that, even if the remains are not Native American, the University would still have "unfettered discretion" to decide whether and how to dispose of them. Therefore, the University argues, the Scientists have not shown that they would likely be able to study the La Jolla remains even if they obtained relief.

As Plaintiffs point out, however, the University is bound by its "Human Remains and Cultural Items" policy. That policy requires the University to maintain human remains for the public trust for such purposes as "education[] and research." It also requires that "[r]emains . . covered by this policy shall normally remain accessible for research by qualified investigators, subject to approval by the curator of the relevant

campus collection." Taken together, those two provisions of the policy suggest that it is "likely" that qualified researchers would have the opportunity to study the remains if they are not "Native American" and subject to NAGPRA.

The University does not dispute that Plaintiffs are qualified researchers employed by the University of California system. And we assume that the University follows its established policies. Thus, if the La Jolla remains are not "Native American" and subject to NAGPRA, then the University's own policy suggests that Plaintiffs likely would be able to study them. A favorable judicial decision is therefore likely to redress Plaintiffs' alleged injuries. Plaintiffs have alleged sufficient facts to establish Article III standing to maintain this lawsuit.

The University relies on *Glanton v. AdvancePCS Inc.*, 465 F.3d 1123, 1125 (9th Cir. 2006), but *Glanton* is distinguishable. The plaintiffs in *Glanton* claimed that the defendant had charged the employee welfare benefit plans too much for drugs, which caused the plans to demand higher co-payments and contributions from participants. Therefore, the plaintiffs contended their suit, if successful, would ultimately decrease the plans' co-payment or contribution requirements. We held that this assertion of redressability was too speculative because the plan was not bound to change its co-payment or contribution policy and there was no indication that it would do so. In contrast, here, the University does not possess unfettered discretion as to the La Jolla remains because the University's handling of remains is subject to the "Human Remains and Cultural Items" policy.

III

The next question we must decide is whether NAGPRA abrogates the sovereign immunity of the Indian tribes. The district court properly concluded that it does not. Indian tribes are entitled to immunity from suit, particularly on matters integral to sovereignty and self-governance. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-58 (1978) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)). Congress has plenary authority, however, to "limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Id*. at 56. Suits against Indian tribes are therefore barred absent congressional abrogation or a clear waiver from the tribe itself. *Okla. Tax Comm 'n v. Citizen Band of Potowatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). "[T]o abrogate such immunity, Congress must 'unequivocally' express that purpose." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031 (2014) (quoting *Santa Clara Pueblo*, 436 U.S. at 58) (second modification and second internal quotation marks omitted). Indeed, when Congress intends to abrogate tribes' sovereign immunity, that intent cannot be implied, but must be "unequivocally expressed" in "explicit legislation." *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004) (internal quotation marks omitted).

NAGPRA, by its terms, does not explicitly abrogate tribal sovereign immunity. Thus, the Act does not contain an "unequivocal expression" of abrogation.

Plaintiffs argue that NAGPRA's enforcement clause does so. It confers on district courts the "jurisdiction over any action brought by any person alleging a violation of this [Act]." 25 U.S.C. § 3013. However, that section does not contain any language expressly

abrogating tribal sovereign immunity. A similar argument was rejected by the Supreme Court in *Santa Clara Pueblo*. In that case, the Court held that a statutory provision providing federal courts with "jurisdiction of any civil action authorized by law to be commenced by any person" did not abrogate tribal sovereign immunity. 436 U.S. at 53 & n.4, 59.

The Scientists also argue that because NAGPRA waives sovereign immunity on the part of the United States, NAGPRA must also have abrogated tribal sovereign immunity because immunities of the two sovereigns are "coextensive." Plaintiffs misperceive the nature of tribal sovereign immunity. "Indian tribes are "domestic dependent nations" that exercise "inherent sovereign authority." *Bay Mills Indian Cmty*, 134 S. Ct. at 2030 (quoting *Okla. Tax Comm'n*, 498 U.S. at 509. "The tribes' status as distinct, independent political communities qualified to exercise powers of self-government arises from their original tribal sovereignty over their members rather than from any constitutional source." *Montana v. Gilham*, 133 F.3d 1133, 1137 (9th Cir. 1998). Thus, "tribes retain whatever inherent sovereignty they had as the original inhabitants of this continent to the extent that sovereignty has not been removed by Congress." *Id.* Therefore, the sovereignty of the United States and the Indian tribes are not "coextensive" in the sense that the waiver of one by Congress necessarily constitutes the waiver of the other. Nothing in a Congressional waiver of sovereign immunity on behalf of the United States alters the rule that abrogation of tribal sovereign immunity by Congress must be "unequivocally expressed" in "explicit legislation." *Krystal Energy Co.*, 357 F.3d at 1056.

Further, suits concerning the United States under NAGPRA are not authorized by any specific portion of that statute, but rather under the Administrative Procedure Act ("APA"), which contains an express limited sovereign immunity waiver for suits seeking non-monetary relief against the United States. 5 U.S.C. § 702. No court has held that the sovereign immunity waiver in the APA by the United States also serves as a general abrogation of tribal sovereign immunity.

Plaintiffs also make the policy argument that permitting tribes to invoke sovereign immunity would frustrate the purpose of NAGPRA, highlighting the district court's statement expressing that concern. However, when properly asserted, sovereign immunity applies regardless of the merit of the action or overarching policy considerations. Indeed, the Supreme Court recently rejected such a holistic statutory argument in *Bay Mills Indian Community.* 134 S. Ct. at 2033-34. And, as the Supreme Court observed, "it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity." *Id*. at 2037. Moreover, as the University points out, the United States retains the right to bring an action against a tribe, *see United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986), so that it could act to litigate issues under NAGPRA if necessary.

For all these reasons, we conclude that the district court properly determined that NAGPRA does not abrogate tribal sovereign immunity.

IV

A

The district court also properly concluded that the Repatriation Committee was entitled to tribal sovereign immunity as an "arm of the tribe." Tribal sovereign immunity not only protects tribes themselves, but also extends to arms of the tribe acting on behalf of the tribe. *Miller v. Wright*, 705 F.3d 919, 923-24 (9th Cir. 2013), *cert. denied*, 133 S. Ct. 2829 (2013); *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008); *see* also *Bay Mills Indian Cmty*, 134 S. Ct. at 2031 (describing the rule that tribal sovereign immunity extends to suits arising from a tribe's commercial activities, even when they take place off Indian lands).

In determining whether an entity is entitled to sovereign immunity as an "arm of the tribe," we examine several factors including: "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities." *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010).

As the district court found, the Repatriation Committee was created by resolution of each of the Tribes, with its power derived directly from the Tribes' sovereign authority. The Repatriation Committee is comprised solely of tribal members, who act on its behalf. KCRC tribal representatives are appointed by each tribe. The process by which the Repatriation

Committee designates the particular tribe to receive remains under NAGPRA is defined and accepted by the Tribes. The Repatriation Committee is funded exclusively by the Tribes. As the district court noted, the whole purpose of the Repatriation Committee, to recover remains and educate the public, is "core to the notion of sovereignty." Indeed, "preservation of tribal cultural autonomy [and] preservation of tribal self-determination," are some of the central policies underlying the doctrine of tribal sovereign immunity. *Breakthrough Mgmt. Grp., Inc.*, 629 F.3d at 1188 (quoting *Dixon v. Picopa Const. Co.*, 772 P.2d 1104, 1111 (Ariz. 1989)).

Given these undisputed facts, the district court properly concluded that the Repatriation Committee was an "arm of the tribe" for sovereign immunity purposes and, given only speculative arguments, did not abuse its discretion in denying the Plaintiffs further discovery on the question.

B

The district court also properly concluded that the Repatriation Committee did not waive its sovereign immunity by filing suit against the University in the Southern District of California or by incorporating under California law. A voluntary waiver by a tribe must be "unequivocally expressed." *Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994) (citing *California ex rel. Cal. Dep't of Fish & Game v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979)). Waiving immunity as to one particular issue does not operate as a general waiver. Thus, when a tribe files suit, it submits to jurisdiction only for purposes of adjudicating its claims, but not other matters, even if related. *Okla. Tax Comm 'n*, 498 U.S. at 509.

We have previously rejected the Plaintiffs' alternative argument that a tribe's decision to incorporate waives its sovereign immunity. *Am. Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1099 (9th Cir. 2002).

The district court did not err in concluding that the Repatriation Committee had not waived its sovereign immunity.

V

Given that NAGPRA did not abrogate tribal sovereign immunity, and that tribal immunity extends to the Repatriation Committee, the question is whether the Tribes and the Repatriation Committee were necessary parties under Federal Rule of Civil Procedure 19(a)(1) and, if so, whether under Rule 19(b) the party is indispensable such that in equity and good conscience the suit should be dismissed. We conclude that the district court properly dismissed the action pursuant to Rule 19.

A

Rule 19(a) provides a two-pronged inquiry for determining whether a party is "necessary." *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991)[7]. First, the

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[7] FRCP 19(a) provides, in full,

A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

court must determine whether complete relief can be afforded if the action is limited to the existing parties. *Id.*; Fed. R. Civ. P. 19(a)(1)(A). Second, the court must determine whether the absent party has a "legally protected interest" in the subject of the action and, if so, whether the party's absence will "impair or impede" the party's ability to protect that interest or will leave an existing party subject to multiple, inconsistent legal obligations with respect to that interest. *Id.* If the answer to either of those questions is affitniative, then the party is necessary and "must be joined." Fed. R. Civ. P. 19(a)(1). The inquiry under Rule 19(a) "is a practical one and fact specific." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118-19 (1968)).

There is no doubt that the Tribes and the Repatriation Committee have a legally protected interest within the meaning of Rule 19. Indeed, the language of the rule contemplates that a party need only have a "claim" to an interest. Fed. R. Civ. P. 19(a)(2). Rule 19 is designed to protect "a party's right to be heard and to participate in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of that party." *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992).

Here, the Repatriation Committee has made formal claims to the La Jolla remains on behalf of the Kumeyaay Tribes. The Heritage Commission, the

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(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

California state agency charged with making the determination, identified the Repatriation Committee as the "most likely descendant" for the La Jolla remains. The University has filed a Notice of Inventory Completion with the Department of the Interior indicating that the Tribes are the designated recipients. The Tribes and the Repatriation Committee unquestionably have a sufficient claim to a legally protected interest to satisfy Rule 19. Indeed, their claim is at the heart of the dispute.

The Scientists argue that the Tribes and the Repatriation Committee do not have a "legally protected interest" because the La Jolla remains have not been established to be "Native American" within the meaning of NAGPRA and, in fact, are not. However, that argument misses the point of the Rule 19(a) inquiry. The question is whether the Tribes and the Repatriation Committee have a claim that is not "patently frivolous." *Shermoen*, 982 F.2d at 1318.

The interest of the Tribes and the Repatriation Committee would also unquestionably be "impaired or impeded" if the suit were allowed to proceed without the Tribes or the Repatriation Committee as parties. If the Scientists prevail in their claim that the La Jolla remains are not "Native American" within the meaning of NAGPRA and succeed in their efforts to enjoin transfer of the remains to the La Posta Band, then the claims of the Tribes and the Repatriation Committee will be extinguished without the opportunity for them to be heard.

Contrary to the Plaintiffs' assertions, the University cannot sufficiently represent the interests of the Tribes or Repatriation Committee. At present, their interests are aligned. There is some reason to believe

that they will not necessarily remain aligned. However, as the district court pointed out, the University "has a broad obligation to serve the interests of the people of California, rather than any particular subset, such as the people of the Kumeyaay tribes." Thus, the different motivations of the two parties could lead to a later divergence of interests. For example, if a court were to determine that the La Jolla remains should not be transferred to the Kumeyaay under NAGPRA, it is questionable whether—perhaps even unlikely that—the University and the Kumeyaay would pursue the same next course of action.

Thus, the district court properly concluded that the Tribes and the Repatriation Committee were necessary parties within the meaning of Rule 19(a).

B

The district court also properly determined that the Tribes and the Repatriation Committee were indispensable parties under Fed. R. Civ. P. 19(b). There are four factors for determining whether a party is indispensable:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and

> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder.

Fed. R. Civ. P. 19(b).

Obviously, a judgment in favor of the Scientists would prejudice the Tribes and the Repatriation Committee. It would declare that they had no rights to the La Jolla remains and prevent transfer of the remains to the La Posta band. Because the Tribes and the Repatriation Committee seek custody, there is no provision that could be included in such a judgment that would protect their interests or serve to lessen the effect. The Plaintiffs claim that the University can protect the interest of the Tribes and the Repatriation Committee; however, as we have discussed, their interests are distinct and, although they are aligned at present, their interests could quickly diverge. A judgment rendered in the absence of the Tribes and the Repatriation Committee would be inadequate because, as the district court noted, the necessary parties would not be included and an injunction would not be effective against absent parties. The fourth factor strongly favors the plaintiffs, who would be prevented from obtaining redress for their claims.

Although Rule 19(b) contemplates balancing the factors, "when the necessary party is immune from suit, there may be 'very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.'" *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (quoting *Confederated Tribes*, 928 F.2d at 1499). As the district court correctly noted, "virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether a remedy is available, if the

absent parties are Indian tribes invested with sovereign immunity." (citing *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150 (9th Cir. 2002); *Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000); *Clinton v. Babbit*, 180 F.3d 1081 (9th Cir. 1999); *Kescoli v. Babbit*, 101 F.3d 1304 (9th Cir. 1996); *McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989).)

Given this wall of circuit authority, the district court properly concluded that the Tribes and the Repatriation Committee were indispensable parties under Rule 19(b).

C

The district court correctly concluded that the "public rights" exception to Rule 19 did not apply. The Supreme Court has explained that "[i]n a proceeding . . . narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *Nat'l Licorice Co. v. Nat'l Labor Relations Board*, 309 U.S. 350, 363 (1940). In order for the public rights exception to apply, (1) "the litigation must transcend the private interests of the litigants and seek to vindicate a public right" and (2) "although the litigation may adversely affect the absent parties' interests, the litigation must not destroy the legal entitlements of the absent parties." *Kescoli v Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (internal quotation marks omitted). As the district court properly observed, the public rights exception cannot apply here because the rights of the Tribes and the Repatriation Committee will be extinguished if the Plaintiffs prevail in their claims.

VI

In sum, as qualified scientists, the Plaintiffs have standing to assert the claims. The district court properly concluded that NAGPRA did not abrogate the Tribes' sovereign immunity; that, as an arm of the Tribes, the Repatriation Committee was entitled to sovereign immunity, and had not waived it by filing a separate lawsuit or by incorporating in California; that the Tribes and the Repatriation Committee were necessary and indispensable parties under Fed.R.Civ. P. 19; and that the public interest exception to Rule 19 did not apply. Therefore, the district court did not err by dismissing the action.

AFFIRMED.

MURGUIA, Circuit Judge, dissenting:

I agree with the majority that Plaintiffs' complaint contains sufficient factual allegations, which we must accept as true, to establish that a favorable judicial decision is likely to redress their alleged injuries. Plaintiffs therefore have Article III standing to bring this lawsuit. I also agree that the Native American Graves Protection and Repatriation Act (NAGPRA) does not abrogate the sovereign immunity of the Indian tribes, and that the district court properly exercised its discretion when it denied Plaintiffs' request to conduct additional discovery on the question whether the Kumeyaay Cultural Repatriation Committee (KCRC) could properly be considered an "arm" of the Kumeyaay tribes. And, I agree that the district court properly concluded that the KCRC did not waive its immunity when it sued the University in the Southern District of California or when it incorporated under California state law.

The majority and I part ways, however, on the question whether the KCRC is a necessary and indispensable party under Federal Rule of Civil Procedure 19. Our precedents require us to resolve that question in light of the nature and scope of the parties' dispute which, as I see it, is whether the University properly determined that the La Jolla remains are "Native American" within the meaning of NAGPRA and therefore whether, as a threshold matter, NAGPRA applies here at all. Because I read those precedents to compel the conclusion that the KCRC is neither necessary nor indispensable to the resolution of that particular question, I respectfully dissent.

Plaintiffs petitioned for a writ of administrative mandamus under California state law directing the

University "to make a formal determination whether or not the La Jolla Skeletons are 'Native American' within the meaning of NAGPRA." In the alternative, Plaintiffs sought declaratory and injunctive relief, likewise requesting that the court "declar[e] . . . that the La Jolla Skeletons are not 'Native American.' " The parties' dispute is therefore limited to the correctness of the University's administrative determination it is not, as it was framed in the district court, a "property dispute, in which the parties assert conflicting ownership interests" in the La Jolla remains. In other words, this case is not about whether NAGPRA compels repatriation; instead, it is about whether NAGPRA, which concerns only Native American remains, applies in the first place.

Rule 19(a)(1)(B)(i) makes an absent party "necessary" if the party "claims an interest relating to the subject of the action and is so situated that disposing of the action in the [party's] absence may . . as a practical matter impair or impede the [party's] ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i). Although the party's claimed interest must be more than speculative, *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1155 n.5 (9th Cir. 2002), it need merely be a "claim"—that is, "[j]ust adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of that party." *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992).

In this case, Defendants characterize the tribes as "paradigms of 'necessary parties' " because the KCRC and the tribes have a nonfrivolous claim to—and therefore a "legally protected interest" in—the La

Jolla remains. Defendants contend that the tribes' interest would be impaired or impeded if the lawsuit were to proceed in their absence because the tribes' "claim to the ownership and control of the Remains lies at the very core of the parties' dispute. What is more, they allege, the University cannot adequately represent the tribes' interest in this action because of the University's "broad obligation to serve the interests of the people of California, rather than any particular subset, such as the people of the Kumeyaay tribes."

As I see it, Defendants' argument fails first on its premise. Contrary to the way in which the tribes frame it, this is not a property dispute over the La Jolla remains—indeed, the University has already found that the remains are culturally unidentifiable because there is "[s]imply . . not a preponderance of evidence to support an affirmation of cultural identification or affiliation with any modern group." Neither party suggests any problem with respect to the University's procedural or substantive determination surrounding cultural affiliation, nor does either party take issue with the Department of the Interior's 2010 regulations requiring culturally unidentifiable human remains to be transferred to the tribe or tribes "recognized as aboriginal to the area from which the human remains were removed." *See* 43 C.F.R. § 10.11. Thus, this action will not resolve whether, under NAGPRA, the Kumeyaay tribes are entitled to "ownership or control" of the La Jolla remains—assuming NAGPRA applies, that question has already been resolved.[1]

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[1] The majority similarly misstates the relief that Plaintiffs seek. According to the majority, a judgment in Plaintiffs' favor would "declare that [the tribes] had no right to the La Jolla

Plaintiffs instead take issue with the procedures underyling the University's determination that the remains are "Native American" as that term is defined under NAGPRA. As the tribes readily concede, "NAGPRA is only concerned with Native American remains." So, to the extent that Plaintiffs' claims are limited to that single administrative determination, any "interest" the tribes have in this litigation is identical to the interest of any other party: all parties "have an equal interest in an administrative process that is lawful." *Makah Indian Tribe*, 910 F.2d at 559.[2] The KCRC's interest is no different from the generalized, nonspecific interest of any other "presently existing tribe, people, or culture." *Bonnichsen v. United States*, 367 F.3d 864, 875 (9th Cir. 2004).

To be sure, as the majority correctly notes, for the purposes of Rule 19, the tribes need only assert a "claim" to an interest, not an actual or vested one. See Fed. R. Civ. P. 19(a) (defining a "required" party as one who "claims an interest relating to the subject of the action" (emphasis added)). Here, the tribes would be entitled to compel repatriation of the La Jolla remains if they are in fact "Native American." Thus, the tribes have, at the very least, a nonfrivolous "claim" to an interest in the subject matter of this dispute.

But the nature of Plaintiffs' claim is not such that, "as a practical matter," proceeding with this litigation in the tribes' absence would "impair or impede the [tribes'] ability to protect" that interest. Fed. R. Civ. P.

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remains and prevent transfer of the La Jolla remains to the La Posta Band." That is not so. A judgment in Plaintiffs' favor would merely declare that NAGPRA does not compel repatriation.

[2] Generally, there is no legally protected interest in an agency's procedures. See *Makah Indian Tribe*, 910 F.2d at 558.

19(a)(1)(B)(i). We have previously held that the level of impairment resulting from a party's absence "may be minimized if the absent party is adequately represented in the suit." *Makah Indian Tribe*, 910 F.2d at 558. Because the KCRC's interest in the process leading to the University's administrative determination that the La Jolla remains are "Native American" is no different from any other party's, *see id.* at 559, the University, as an existing party, is in a position to adequately protect the interest of the KCRC and the tribes.

In determining whether an existing party can adequately represent the interests of an absent party, we are to consider three factors: (1) whether the interests of the existing party "are such that it will undoubtedly make all of the absent party's arguments," (2) whether the existing party "is capable of and willing to make such arguments," and (3) "whether the absent party would offer any necessary element to the proceedings that the present party would neglect." *Shermoen*, 982 F.2d at 1318 (stating the factors that courts consider under Rule 24(a) in the context of determining adequacy under Rule 19(a)).

The University's interest in this litigation is almost identical to that of the tribes: the interest in properly and lawfully determining the "Native American" status of the La Jolla remains. Because that is so, it is difficult to imagine any argument the KCRC might make that the University has not already made and will not ultimately make if the action proceeds. Either the University's determination that the remains are "Native American" was arbitrary and capricious or it was not—in any event, the evidence on which that determination was based was evidence that the KCRC

itself provided. In that sense, practically every argument the KCRC could make is an argument that the University will likewise offer to defend its determination. The first factor of the *Shermoen* adequacy test therefore suggests that the tribes will adequately be represented by the University.

The second and third *Shermoen* factors likewise favor a finding that the tribes will adequately be represented. With respect to the second, there is no suggestion in the record that the University is incapable of making or unwilling to make the arguments that the KCRC would likely make. And as to the third, no party identifies a "necessary element" of this lawsuit that the tribes could offer but that the University would neglect. Applying *Shermoen*, I would accordingly conclude that the KCRC is not "so situated that disposing of the action in [its] absence may . . . as a practical matter impair or impede [its] ability to protect" its claimed interest in this litigation. Fed. R. Civ. P. 19(a)(1)(B)(i).

Nor is the KCRC an indispensable party. If an absent party is necessary and cannot be joined,[3] then the court must determine whether "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). That determination requires a four-part inquiry, which is set forth under the Rule:

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[3] I agree with the majority that, because NAGPRA does not abrogate the sovereign immunity of the Indian tribes, the KCRC and the tribes are immune from suit and therefore "cannot be joined" for the purposes of Rule 19(b). *See Confederated Tribes of Chehalis Indian Reservation v. Ltijan*, 928 F.2d 1496, 1499 (9th Cir. 1991). Thus, because the district court concluded that the KCRC was a necessary party under Rule 19(a), it properly reached the "indispensability" inquiry under Rule 19(b).

When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).[4]

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[4] The majority suggests that there may be "little need for balancing Rule 19(b) factors" in cases in which the absent party is entitled to immunity from suit. Indeed, a few of our sister circuits have concluded as much. See, e.g., *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1496 (D.C. Cir. 1995); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 549 (2d Cir. 1991); *Enterprise Mgmt. Consultants, Inc. v. United States*, 883 F.2d 890 (10th Cir. 1988). "Cognizant of these out-of-circuit decisions, the Ninth Circuit has, nonetheless, consistently applied the four part balancing test [under Rule 19(b)] to determine whether Indian tribes are indispensable parties." *Dawavendewa*, 276 F.3d at 1162.

The first factor, prejudice, is essentially the same as the "necessary" inquiry under Rule 19(a). *Confederated Tribes*, 928 F.2d at 1499. As I explained above, because the tribes' interests in this litigation are no different than the interests of any other party, and because those interests can adequately be represented by the University, I would conclude that the first factor favors proceeding with the litigation in the tribes' absence.

The remaining factors similarly favor proceeding with the litigation. On the second, the extent to which prejudice could be lessened or avoided, I see no partial or compromise remedy that would lessen potential prejudice, but because of my conclusion on the first factor, I would conclude that the second factor likewise favors proceeding. See Fed. R. Civ. P. 19(b)(2). On the third, whether a judgment in the KCRC's absence would be adequate, again, the inquiry in this case is limited to the correctness of the University's determination that the La Jolla remains are "Native American"—a determination in which the KCRC has no specific, legally protected interest. Thus, nothing suggests that a judgment rendered in KCRC's absence would be inadequate. *See* Fed. R. Civ. P. 19(b)(3); *Philippines v. Pimentel*, 553 U.S. 851, 870 (2008) ("[A]dequacy refers to the 'public stake in settling disputes, whenever possible.' "). And finally, on the fourth factor, it seems clear, in light of the sovereign immunity of the Indian tribes, that Plaintiffs have no adequate remedy if this lawsuit is dismissed. See Fed. R. Civ. P. 19(b)(4). Because, on balance, the factors we generally consider under Rule 19(b) disfavor dismissal, I would conclude that the KCRC is not an indispensable party in whose absence this lawsuit could not proceed.

Although the majority suggests otherwise, my conclusion in this respect is not inconsistent with a "wall of circuit authority." In each of the cases the majority and the district court cite to support that assertion, the absent tribe was a party or signatory to a contract sought to be enforced. *See Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002) (lawsuit seeking termination of gaming compacts to which the tribe was a party and that would otherwise automatically renew); *Dawavendewa*, 276 F.3d 1150 (9th Cir. 2002) (lawsuit challenging a provision of a lease agreement to which the tribe was a signatory); *Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2002) (lawsuit challenging settlement agreement to which the tribe was a party); *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999) (same); *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996) (same); *McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989) (lawsuit seeking to enforce a lease agreement to which the tribe was a party). As we have observed, "[Mc) procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." *Dawavendewa*, 276 F.3d at 1156. This is not such a case, however; I therefore disagree that the reasoning or outcomes of those cases compel the same conclusion here.

Plaintiffs' complaint takes issue with a specific, threshold question: whether the University properly deter iiined that the La Jolla remains are "Native American" within the meaning of NAGPRA and therefore whether, as a threshold matter, NAGPRA applies at all. I would conclude that the KCRC is neither necessary nor indispensable to the resolution of that question and that this lawsuit may therefore

proceed in its absence. I would not reach the question whether the public rights exception to Rule 19 applies in this case, and I would instead reverse the district court's judgment and remand this case for further proceedings.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

[Filed 10/09/12]

No. C 12-01978 RS

TIMOTHY WHITE, *et al.*,

Plaintiffs,

v.

UNIVERSITY OF CALIFORNIA, *et al.*,

Defendants.

ORDER GRANTING KUMEYAAY CULTURAL REPATRIATION COMMITTEE'S MOTION TO DISMISS AND GRANTING REGENTS' OF THE UNIVERSITY OF CALIFORNIA MOTION TO DISMISS

I. INTRODUCTION

In 1976, an archaeological team discovered an exceedingly ancient and rare double human burial site on the official residence of the Chancellor of the University of California, San Diego (UCSD), on a La Jolla bluff, overlooking the Pacific Ocean. According to plaintiffs, University of California Professors Timothy White, Robert L. Bettinger, and Margaret Schoeninger, the unearthed remains, known as the "La Jolla Remains," are of profound scientific

significance, due to their relatively good condition and extraordinary age – between 8,977 to 9,603 years, or roughly five hundred generations old. Since the discovery, the University has maintained custody of the Remains, and in recent years, plaintiffs have requested an opportunity to study them, but to no avail The University, meanwhile, in an attempt to comply with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C § 3001, *et seq.*, has inventoried the La Jolla Remains and artifacts found with them, and determined to grant a request from the Kumeyaay Cultural Repatriation Committee (KCRC) to transfer them to the La Posta Band of the Dieguefio Mission Indians, a federally-recognized Kumeyaay tribe.[1] The KCRC asserts a cultural affiliation to, and a right to repatriation of, the Remains, and intends to inter them.

Plaintiffs contend the Kumeyaay tribes cannot establish a right to repatriation, and filed this suit to block the transfer. Crediting plaintiffs' concern that the Kumeyaay would promptly bury the Remains, irreparably destroying their scientific value, this Court temporarily enjoined the University from transferring or altering the condition of the Remains, and the parties subsequently stipulated to a similarly structured preliminary injunction, pending resolution of this litigation. The University defendants[2] now

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[1] The Kumeyaay nation is a consortium of federally recognized tribes that encompasses: the Barona, Inja-Cosmit, La Posta, Manzanita, Mesa Grande, and San Pasqual Bands of Dieguefio Mission Indians, the Campo, Ewiiaapaayp, Sycuan, and Viejas Bands of Kumeyaay Indians, the Jamul Indian Village, and the Iipay Nation of Santa Ysabel.

[2] The University defendants include: (1) the University of California itself, (2) the Regents, (3) Mark G. Yudof, sued individually and in his capacity as president, (4) Marye Anne Fox,

move to dismiss the First Amended Complaint (FAC) pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(b)(7), on the grounds that the Kumeyaay tribes are indispensible parties, yet sovereign immune from suit. Defendant KCRC made a special appearance to move to dismiss, also on the grounds that it enjoys immunity as an "arm of the tribe." Plaintiffs filed a single opposition to both motions. In consideration of the briefs, the arguments raised at the hearing, and for all the reasons set forth below, the KCRC's motion to dismiss must be granted, and the University defendants' motion to dismiss must also be granted. Such result is not reached lightly. It is, rather, compelled by tribal immunity, and admittedly, raises troubling questions about the availability of judicial review under NAGPRA. As will become clear, while plaintiffs and the public interest are threatened with profound harm in this case, the statutory scheme and controlling case law leaves this Court with no alternative.

II. BACKGROUND[3]

The instant suit weighs the claims of plaintiffs, three academic scientists who specialize in the study of early humans and wish to preserve the La Jolla Remains for future research, against the interests of the KCRC, which maintains the Remains are the

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sued individually and in her capacity as Chancellor of UCSD, (5) Gary Matthews, sued as an individual and in his capacity as Vice Chancellor of UCSD. Defendants correctly maintain that the "University of California" is not a proper defendant, and that the Regents must be sued in its place. *See* Cal. Const. art IX, § 9(f); Cal. Gov't Code § 811.2. The University is therefore dismissed as a named party.

[3] The facts set forth in the FAC, which may be accepted as true for purposes of the motions to dismiss, are set forth below.

sacred property of the Kumeyaay. Added to the mix is the University of California, which believes it has complied with the law by preparing to deliver the Remains to the Kumeyaay.[4] In an effort to resolve such competing claims, and in recognition of "the unique relationship between the Federal Government and Indian tribes," *see* 25 U.S.C. § 3010, Congress passed NAGPRA in 1990, conferring ownership rights over remains and associated objects upon Native Americans in certain circumstances. *Id.* at § 3002. There can be no question that the law was "intended to protect the dignity of the human body after death by ensuring that Native American graves and remains be treated with respect." *Bonnichsen v. United States*, 367 F.3d 864, 876 (9th Cir. 2004) (citing S. Rep. No. 101-473, at 6 (1990)). Yet the law's key ownership provision "was not intended merely to benefit American Indians, but rather to strike a balance between the needs of scientists, educators, and historians on the one hand, and American Indians on the other." *Id.* at 874 n.14.

It follows that "Congress's purpose is served by requiring the return to modern-day American Indians of human remains that bear some significant relationship to them." *Id.* at 877. *See* also 5 U.S.C. § 3002(a) (preconditions for "ownership or control"). NAGPRA generally requires state agencies and institutions of higher learning that receive federal funds to inventory Native American remains and associated funerary items, in consultation with relevant tribes, in order to "identify the geographical and cultural affiliation of each item." *Id.* at § 3003. Once the inventory is

[4] The La Jolla Remains, as well as a set of artifacts discovered contemporaneously, such as stones and shells, are currently housed at the San Diego Archaeological Center on the University's behalf.

complete and if repatriation appears warranted, the custodian of the remains submits the inventory to the Department of Interior (DOI), *id.* at § 3003, it is published in the Federal Register, and if no other parties come forward to assert a claim, the remains are transferred. *Id.* at § 3005. *See* also H.R. Rep. 101-877, *reprinted at* 1990 U.S.C.C.A.N. 4367, 4367-68 ("The Act also sets up a process by which Federal agencies and museums receiving federal funds will inventory holdings of such remains and objects and work with appropriate Indian tribes and Native Hawaiian organizations to reach agreement on repatriation or other disposition of these remains and objects").

The Secretary of the Interior is authorized to adopt regulations pursuant to NAGPRA under § 3011 of the Act. Of particular relevance here, in 2010, the Secretary promulgated a regulation governing the disposition of "culturally unidentifiable" remains that meet NAGPRA's definition of "Native American." 43 C.F.R. § 10.11. The rule requires institutions in possession of such remains to transfer them to "(i) [t]he Indian tribe ... from whose tribal land, at the time of excavation or removal, the human remains were removed; or (ii) [t]he Indian tribe or tribes that are recognized as aboriginal to the area from which the human remains were removed." *Id.* at 10.11(c).

Significantly, NAGPRA includes an enforcement provision that creates a private right of action: "The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce the provisions of this chapter." *See* 25 U.S.C. § 3013; *Bonnichsen v. U.S. Dep't of Army*, 969 F. Supp. 614,

627 (D. Or. 1997) (NAGPRA creates private right of action that provides for declaratory and injunctive relief). Finally, as the University defendants emphasize, the law also includes a savings clause whereby "[n]othing in this chapter shall be construed to ... limit the authority of any ... museum to ... return or repatriate Native American cultural items to Indian tribes." *Id.* at § 3009.

In 2010, the KCRC wrote to the University to request repatriation of the La Jolla Remains. In response, UCSD Vice Chancellor Gary Matthews circulated a draft Notice of Inventory Completion to the University-wide Advisory Group on Cultural Repatriation and Human Remains and Cultural Items ("the Advisory Group") for review.[5] According to plaintiffs, the draft Notice was deficient in a number of respects, and in particular, incorrectly concluded that the La Jolla Remains were "Native American." It also recognized the Remains to be "culturally unidentifiable" or in other words, there is insufficient evidence to support a cultural link to the Kumeyaay.[6] Upon review, the Advisory Group recommended that

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[5] Under the University's "Policies and Procedures On Curation and Repatriation of Human Remains and Cultural Items," *see* Exh. A to FAC, the Advisory Group must review determinations made by individual University campuses in response to NAGPRA requests for repatriation. The Group reports its findings and recommendations to the University president, who has discretion to accept or reject its advice.

[6] In 2006, and again in 2008, the Advisory Group concluded that the La Jolla Remains were "culturally unidentifiable." Formal Notices of Inventory Completion stating as much were forwarded to the Department of the Interior, and published in the Federal Register. As the earlier Notices took no position as to whether or not the Remains were "Native American," plaintiffs maintain the Notices never should have been filed.

UCSD: (1) not forward the draft without first consulting with tribes other than the Kumeyaay, and (2) reassess whether the items found with the remains qualify as "associated funerary objects," and if not, revise the draft accordingly. According to plaintiffs, there was no consensus within the Advisory Group as to what else, if anything, to recommend.

In 2011, University President Mark Yudof wrote to UCSD Chancellor Marye Anne Fox, stating that he would defer to UCSD's determination, reflected in the draft Notice, that the Remains are "Native American," and instructed her to proceed with repatriating them to the La Posta Band of the Diegueno Mission Indians, subject to the conditions that UCSD was to: (1) reanalyze whether the items found with the remains constitute "funerary objects" and revise the draft inventory accordingly, (2) revise the draft to recognize a "division among experts" as to whether the Remains qualify as "Native American" under NAGPRA, and (3) consult more broadly with other tribes to determine whether competing claims existed. Plaintiffs allege that UCSD failed to reconsider the supposed funerary items and the published Notice does not reflect recognition of "division among experts" about the Native American status of the Remains.

On December 5, 2011, the University's final Notice of Inventory Completion was published in the Federal Register. It concluded that the La Jolla Remains are "Native American," that the approximately 25 objects found at the same site are "reasonably believed to have been placed with or near" the Remains "at the time of death or later as part of the death rite or ceremony," and that "the land from which the Native American human remains were removed is the aboriginal land of the Dieguno (Kumeyaay) Tribe. *See* Exh. B to FAC.

It stated that the Remains would be repatriated to the La Posta Band if no other party laid claim to them by January 4, 2012.

According to the FAC, the University's general policy is that remains and cultural items are to be made available for research by qualified investigators. Plaintiffs therefore allege it is highly probable they will be permitted to study the La Jolla Remains if the University retains possession of them. To date, however, they have been denied that opportunity, despite repeated requests to University administrators. Plaintiffs initiated the instant suit in the Alameda Superior Court on April 16, 2012, and defendants subsequently removed the case to this Court. The FAC alleges that the University defendants wrongfully concluded the La Jolla Remains are "Native Americans" and seek declaratory relief to that effect, or an order requiring a formal finding from the University.

Plaintiffs further allege that transferring the Remains would breach defendants' duty to administer the University as a public trust and in the public interest. Finally, plaintiffs assert that transfer would violate their First Amendment right to study the Remains. The FAC seeks, among other remedies, declaratory relief and a permanent injunction prohibiting the University from transferring the Remains to any Native American tribe.

Some background on the KCRC is warranted: it is a California corporation that represents the 12 tribes of the Kumeyaay nation.[7] According to the KCRC, it was

[7] Plaintiffs request judicial notice of the fact that the KCRC is currently listed as "suspended" by the California Secretary of

formed in 1997 by resolution of the 12 tribes, and is comprised of representatives from each, who are appointed and removed only by their respective tribes.[8] It is funded exclusively by contributions from its member tribes, though not necessarily all contribute. It describes its purpose as, "to ensure that tribal interests are fully protected under NAGPRA and to further public understanding of the importance of preservation of Indian culture and values." Banegas Decl. In Supp. of KCRC's Mot. to Dismiss at ¶ 5. It claims to be the "designated" entity to receive remains and artifacts under NAGPRA for the Kumeyaay tribes, and its authority flows from, and may be limited or withdrawn by them. *Id.*; Notice of Inventory Completion, 68 Fed. Reg. 42757-42758 (July 18, 2003) (recognizing KCRC as the authorized NAGPRA representative of the La Posta Band). When a federal agency or museum notifies KCRC of remains or artifacts to be repatriated, the tribe that is located in closest proximity to the site where the items were discovered acts as the recipient. If, for some reason, that tribe cannot accept the items, the KCRC will, by consensus and with permission, designate another

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State. *See* Exh. T to Pls.' Req. for Jud. Notice. That fact, even if assumed to be true, is of no legal significance.

[8] The Court may consider facts beyond the pleadings for purposes of a motion to dismiss for failure to join a necessary party. *First Fin. Ins. Co v. Butler Chamberlain-Neilsen Ranch Ltd.*, No. C 10 2004, 2010 WL 4502151, at *2 (N.D. Cal. Nov. 2, 2010). The KCRC has filed a declaration from a member and spokesperson attesting to the facts stated herein, as well as copies of the tribal resolutions that created the KCRC. Plaintiffs provisionally request an opportunity to conduct discovery on the KCRC for purposes of fully briefing this motion, a request not warranted in light of the sufficiently developed record as to the identity of the KCRC.

tribe to receive the items in question. Although, as noted, the KCRC argues here it is entitled to sovereign immunity as an "arm of the tribe," and must be dismissed, days before this action was commenced, it sued the University in the District Court for the Southern District of California, contending that the University's failure to complete the transfer of the Remains violated NAGPRA. The University filed a motion to dismiss on May 11, 2012, which currently remains pending.

III. LEGAL STANDARD

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Pleadings are "so construed as to do substantial justice." Fed. R. Civ. P. 8(f). A complaint must have sufficient factual allegations to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) based on the "lack of a cognizable legal theory" or on "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). When evaluating such a motion, the court must accept all material allegations in the complaint as true, even if doubtful, and construe them in the light most favorable to the non-moving party. Twombly, 550 U.S. at 570. "[C]onclusory allegations of law and unwarranted inferences," however, "are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996). When dismissing a complaint, leave to amend must be granted unless it is clear that the complaint's deficiencies cannot be cured

by amendment. *Lucas v. Dep't of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995).

Failure to join a party deemed "indispensible" under Rule 19 provides a basis for dismissal. Fed. R. Civ. P. 12(b)(7); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1459, 1458 (9th Cir. 1994). The requisite analysis under Rule 19 proceeds in three stages. *EEOC v. Peabody W. Coal Co.*, 610 F.3d 1070, 1078 (9th Cir. 2010) ("*Peabody II*"). First, a party "who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction" is "necessary" to the maintenance of the action if "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a); *Peabody II*, 610 F.3d at 1078, *Quileute*, 18 F.3d at 1458. In other words, a nonparty is "necessary" if joinder is "desirable in the interests of just adjudication." *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 779 (9th Cir. 2005) ("*Peabody I*") (quoting Fed. R. Civ. P. 19 Advisory Committee Note (1966)). To perform this analysis, the Court "must determine whether the absent party has a legally protected interest in the suit," and if so, whether "that interest will be impaired or impeded by the suit." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (emphasis in original). "'There is no precise formula for determining whether a particular nonparty should be joined under Rule 19(a).... The determination is heavily influenced by the facts and circumstances of each case.'" *Peabody II*, 610 F.3d at

1081 (quoting *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 468 (9th Cir. 1986)).

If a party is deemed "necessary" under Rule 19(a), the second question is whether joinder is feasible. Joinder may be unavailable if, for instance, venue is improper, the Court lacks personal jurisdiction over the party, or joinder would destroy subject matter jurisdiction. *Peabody I*, 400 F.3d at 779. Of relevance here, if a party enjoys sovereign immunity, subject matter jurisdiction is deficient. *Kiowa Tribe of Okla. v. Manufacturing Techs.*, Inc., 523 U.S. 751, 754 (1998); *Cook v. AVI Casino Enters.*, Inc., 548 F.3d 718, 722 (9th Cir. 2008) (affirming dismissal for lack of subject matter jurisdiction due to tribal entity's sovereign immunity).

Third and finally, if joinder is not feasible, the Court must determine whether the party is "indispensible" under Rule 19(b), that is, whether "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." To make that determination, the Court is to consider: "(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided...; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b); *Peabody II*, 610 F.3d at 1078 (an "indispensable party" is "one who not only has an interest in the controversy, but has an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.").

In order to determine whether Rule 19 requires the joinder of additional parties, the court may consider evidence outside of the pleadings. *See McShan v. Sherrill*, 283 F.2d 462, 464 (9th Cir. 1960). The party moving for dismissal under Rule 12(b)(7) "bear[s] the burden in producing evidence in support of the motion." *See Biagro Western Sales, Inc. v. Helena Chem. Co.*, 160 F. Supp. 2d 1136, 1141 (E.D.Cal. 2001) (citing *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier*, 17 F.3d 1292, 1293 (10th Cir. 1994)).

IV. DISCUSSION

A. Sovereign immunity

The University defendants argue both the KCRC and the tribes themselves enjoy sovereign immunity and may not be sued. The KCRC agrees it is entitled to immunity. Of course, if the KCRC is immune, it must be dismissed for lack of subject matter jurisdiction. In that event, the tribes themselves would also be entitled to immunity, a result the University defendants contend would preclude further litigation under Rule 19.[9] Plaintiffs maintain that the KCRC is not immune, or else has waived its immunity by bringing suit in the Southern District in California. Neither side, however, has identified a case directly addressing whether Native American tribes may claim sovereign immunity as a defense to claims advanced under NAGPRA.[10] As a general matter, "Indian tribes

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[9] The KCRC takes no position as to whether it or the tribes are "indispensible" to the litigation under Rule 19, leaving that argument to the University defendants.

[10] The only case to address the issue indirectly, *Rosales v. United States*, 89 Fed. Cl. 565, (Fed. Cl. 2009), held that, where members of the Jamul Indian Village (a tribe of the Kumeyaay) sued the United States on a variety of theories, including violation of NAGPRA, seeking to take ownership of land allegedly

are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Okla. Tax Com'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (citing *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831)). Consequently, they are "subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribes*, 523 U.S. at 754 (1998) (collecting cases).

1. Legislative waiver

Although the parties have not briefed the issue of legislative waiver, given the eventual result reached in this order, and the concerns raised by such result, it is instructive to note that

Congress does not appear to have waived the tribes' right to sovereign immunity against claims brought under NAGPRA. While the law does contain an enforcement provision, § 3013, it does not expressly waive tribal immunity, and the Ninth Circuit has cautioned that "such a waiver may not be lightly implied." *People of State of Cal. v. Quechan Tribe of Indians*, 595 F.2d 1153, 1156 (9th Cir. 1979). Multiple courts have found that the federal government's immunity is waived under NAGPRA, by operation of the law's enforcement provision, and the Administrative Procedure Act. *See*, *e.g, Bonnischen*, 969 F. Supp. at 627. No case, however, has considered, in

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taken without just compensation by the federal government, all of the plaintiffs' claims were time-barred as well as collaterally estopped. In the alternative, the Court of Federal Claims held that the tribal government was also a necessary and indispensible party, yet immune, warranting dismissal. *Id.* at 586. *Rosales*, however, did not expressly discuss the application of immunity to NAGPRA claims in particular, and in any case, the relevant portion of the opinion is plainly dicta

depth, tribal sovereign immunity under NAGPRA, and the law's legislative history does not reflect consideration of the issue.

Congress unquestionably has the power to limit the tribes' sovereign immunity, and as a corollary to this principle, "laws of general applicability" presumptively apply to the tribes.[11] *See FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). That is, a "general statute applying to all persons includes Indians and their property interests." *Id. See also United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980) ("federal laws generally applicable throughout the United States apply with equal force to Indians on reservations"), and *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115-16 (9th Cir. 1985) (collecting cases). Here, the parties appear to assume that NAGPRA is not a law of general applicability, and that position is certainly plausible given that by its terms NAGPRA creates obligations only applicable to federal

[11] The Ninth Circuit has recognized several exceptions to the foregoing rule, applicable when the law at issue does not extend to Native Americans by its express terms, and when: "(1) the law touches exclusive rights of self-governance in purely intramural matters'[,] (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'[,] or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations ....'" *Coeur d'Alene*, 751 F.2d at 1116 (citing *Farris*, 624 F.2d at 893-94). Assuming that is a correct premise, in such instances, the tribes are accorded immunity from suit. Application of the *Coeur d'Alene* rules to other statutory frameworks has produced a variety of results. *See, e.g.*, *Coeur d'Arlene*, 751 F.2d at 1116 (Occupational Health and Safety Act applicable to tribally owned commercial enterprise); *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683 (9th Cir. 1991) (Employee Retirement Income Security Act applicable to tribally operated health center).

agencies and museums that receive federal funds. *See* 11 U.S.C. §§ 3003, 3001.

2. "Arm of the tribe"

Assuming that the Kumeyaay tribes themselves could claim immunity from suit under NAGPRA were they named as parties – a premise that is not debated– the first disputed question is whether the KCRC is entitled to immunity as an "arm of the tribe." "[T]he settled law of our circuit is that tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself." *Cook*, 548 F.3d at 725. The key inquiry in this regard is "whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe." *Id.* (quoting *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006)). Plaintiffs and the KCRC look to the Tenth Circuit's seminal case, *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010), for guidance, and although that opinion is of persuasive authority only, it comports with the Ninth Circuit's approach to "arm of the tribe" analysis. *Breakthrough* assesses the nature of the tribal entity by examining six factors, namely: (1) the entity's formation, (2) its purpose, (3) its structure, ownership, and management, including the level of control the tribe exercises, (4) whether the tribe intended to extend its sovereign immunity to the entity, (5) the financial relationship between the tribe and the entity, and (6) whether the purposes of tribal immunity are served by granting immunity. *Id. See also Cook*, 548 F.3d at 726 (extending sovereign immunity to casino based on tribe's formation, management, financial relationship, and control).

Plaintiffs argue that they do not have access to sufficient facts to assess whether or not the KCRC is acting as an "arm of the tribes." While in other circumstances, some preliminary discovery might be appropriate, here it is sufficiently clear on the current record that the KCRC is acting as an extension of the tribe and therefore entitled to immunity. The evidence submitted by the KCRC reflects that it was created by resolution of each of the 12 Kumeyaay tribes, and thus derives its power directly from their sovereign authority. It is comprised solely of members of the tribes, who act on its behalf. Although plaintiffs point out that the KCRC's deliberative and decision-making process is not entirely clear, which they suggest defeats any inference that the KCRC truly "represents" the tribes, as noted above, it is at least evident how it designates the particular tribe to receive remains under NAGPRA. Plaintiffs likewise suggest it is significant that financial "contributions" from the tribes are voluntary. For purposes of determining whether the KCRC is a "subordinate economic entity" of the tribes, however, the more salient fact is that it is funded exclusively in that manner. *See generally Breakthrough*, 629 F.3d at 1187-89. Because it does not receive financial support from non-tribal entities, the KCRC cannot fairly be seen as a vehicle for other interests.[12]

That said, plaintiffs are correct that the self-interested and unsupported claim by KCRC that its

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[12] To the extent the parties debate it, the "protection of the tribe's monies," is not implicated by the current case because the requested relief is declaratory and injunctive, rather than a monetary judgment. *Breakthrough*, 629 F.3d at 1888 (citing *California v. Cabazon Band of Mission Indians*, 480 U S 202 218-19 (1987))

constituent tribes intended their sovereign immunity to extend to the Committee, cannot, without more, stand. Similarly, the KCRC also argues that the tribes have not granted it authority to waive immunity, but that is inconsistent with the fact that the KCRC has apparently done so in the action before the Southern California District Court. Ultimately, that factor is not dispositive, however, given all of the foregoing, and the fact that the KCRC's purpose – to recover tribal remains, and educate the public accordingly – is core to the notion of sovereignty. As the KCRC itself points out, disregarding immunity in these circumstances would undermine the sovereign rights of the tribes to self-determination, i.e., their right to organize, and to determine how best to exercise and defend their rights under NAGPRA. *See Breakthrough*, 629 F.3d at 1188 (quoting *Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 258 (1989)) (purposes of immunity include the "preservation of tribal cultural autonomy, [and] preservation of tribal self-determination"). Plaintiffs' suggestion to the contrary, that allowing litigation to proceed does not implicate the tribes' sovereignty, is untenable and, not surprisingly, unsupported by precedent. In sum, the KCRC is entitled to immunity as an "arm" of the Kumeyaay tribes.

3. Voluntary waiver

Supposing the KCRC can claim immunity, plaintiffs suggest it has nonetheless waived it by filing suit against the University in the Southern District of California, or by incorporating under California law. A voluntary waiver by a tribe must be "unequivocally expressed." *Pit River Home and Agr. Co-op. Ass'n v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994) (citing *People of State of Cal. ex. rel. Cal. Dep't of Fish and Game v. Quechan Tribe of Indians*, 595 F.2d 1153,

1155 (9th Cir. 1979)). Waiving immunity as to one particular issue does not operate as a general waiver. Thus, when a tribe files suit, it only submits to jurisdiction for purposes of adjudicating its claims, but not other matters, even if related. *Okl. Tax Com'n*, 498 U.S. at 509.

That was the rule applied by the United States Supreme Court in *Oklahoma Tax Commission*. In that case, the tribe sued for injunctive relief to prevent the Tax Commission from enforcing an assessment based upon cigarette sales to tribal members and non-members that occurred on the reservation. The Tax Commission counterclaimed to enforce the assessment. The Supreme Court held that the tribe was immune, and that the District Court lacked jurisdiction to hear the counterclaim, despite the tribe's initiation of litigation. *Id.* (citing *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940)) ("a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe"). *See also McClendon*, 885 F.2d at 630 ("[A] tribe's waiver of sovereign immunity may be limited to the issues necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts."), and *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539 (10th Cir. 1987) ("Although the Tribe's filing of the *Jicarilla* litigation may have waived its immunity with regard to Dome's intervention in that suit, we cannot construe the act of filing that suit as a sufficiently unequivocal expression of waiver in subsequent actions [brought by Dome] related to the same leases [at issue in *Jicarilla*].").

Here, KCRC has apparently submitted to jurisdiction before the District Court for the Southern District of California by filing suit against the University, seeking to compel transfer of the Remains. While plaintiffs stress that the subject matter of the Southern California action is identical to the issue presented in this case, they are unable to muster any authority for the proposition that waiving immunity in that forum also effects a waiver here. Plaintiffs invoke *United States v. Oregon*, 657 F.2d 1009, 1014-16 (9th Cir. 1981), but misconstrue the facts of the case to suggest that the tribe waived its immunity by "intervening in a prior action." Pls.' Opp'n at 10:11.

Actually, in *Oregon*, the tribe successfully intervened in the litigation under Rule 24(a)(2) of the Federal Rules of Civil Procedure, and also entered into a consent decree that required any disputes between the parties to be settled by the District Court in Oregon. Both of those actions provided a basis for jurisdiction, according to the Ninth Circuit. 657 F.2d at 1014-16. Here, by contrast, there is no independent agreement by the KCRC or the Kumeyaay to submit to jurisdiction, and neither group has intervened in this action. *Oregon* therefore does not support the proposition that a suit over the same subject matters renders a tribe amenable to suit in a different forum, and plaintiffs are unable to locate any other case that so holds. Consequently, the Southern California suit cannot amount to a waiver of immunity in these proceedings.

Plaintiff's alternative suggestion, that incorporation by the KCRC effects a waiver is even less tenable. Plaintiffs' only authority for this argument is a decision by the Washington State Supreme Court. *See Wright v. Colville Tribal Enter. Corp.*, 159 P.2d 1275,

1280 (Wash. 2006). Wright merely notes that "[a] tribe may waive the immunity of a tribal governmental corporation by charter." *Id* (emphasis added). It does not suggest that incorporation necessarily waives immunity. That result would also plainly contravene binding Ninth Circuit precedent holding, "[a] tribe that elects to incorporate [itself] does not automatically waive its tribal sovereign immunity by doing so." *Am. Vantage Cos. v. Table Mountain Racheria*, 292 F.3d 1091, 1099 (9th Cir. 2002). Consequently, the suggestion that the KCRC's corporate status impacts its claim to immunity must be rejected. Because the KCRC may claim the benefit of immunity as an "arm of the tribes," and has not affirmatively waived it, its motion to dismiss must be granted.

B. Rule 19

The University defendants move to dismiss the FAC in its entirety on the grounds that the Kumeyaay tribes are "indispensible" parties under Rule 19 of the Federal Rules of Civil Procedure, yet have not been joined. *See* Fed. R. Civ. P. 12(b)(7) ("failure to join a party under Rule 19" provides basis for dismissal). As noted above, the required analysis under Rule 19 proceeds in three steps.

1. Necessity

The first question is whether the tribes are "necessary," in the sense that they "claim[] an interest relating to the subject of the action" and are "so situated that disposing of the action in the [tribes'] absence may: (i) as a practical matter impair or impede [their] ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R.

Civ. P. 19(a). To perform this analysis, the Court "must determine whether the absent party has a *legally protected interest* in the suit," and if so, whether "that interest will be impaired or impeded by the suit." *Makah Indian Tribe*, 910 F.2d at 558 (emphasis in original). Although there are few "categorical rules informing this inquiry" into whether or not a legally protected interest is at play, *see Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962, 970 (9th Cir. 2008), such interest "must be more than a financial stake, and more than speculation about a future event." *Id.* (citations omitted). *See McLaughlin v. Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO*, 847 F.2d 620, 621 (9th Cir. 1988) (quoting *Northrup Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1046 (9th Cir. 1983)) ("Speculation about the occurrence of a future event ordinarily does not render all parties potentially affected by that future event necessary or indispensable parties under Rule 19."). A "substantial" interest, such as a claim under a contract, or "an interest in a fixed fund or limited resource that the Court is asked to allocate may also be protected." *Cachil Dehe Band*, 547 F.3d at 970-71 (citing *Makah Indian Tribe*, 910 F.2d at 558-59). On the other hand, the interest need not rise to the level of "property in the sense of the due process clause." *Makah Indian Tribe*, 910 F.2d 558. Again, the determination is "practical" in nature and "fact-specific." *Cachil Dehe Band*, 547 F.3d at 970 (quoting *Makah Indian Tribe*, 910 F.2d 558).

The next question is whether or not the Kumeyaay, or the La Posta Band at least, advance a "legally protectable" interest. Plaintiffs' suggestion that the Kumeyaay have no valid claim to the Remains because they are not "Native American," as NAGPRA requires,

may be correct on the merits, but it would plainly be premature to reach that ultimate, disputed question to assess necessity under Rule 19. It is impossible to escape the conclusion that the tribes possess a sufficiently concrete and substantial interest to qualify under Rule 19 as a necessary party. NAGPRA extends rights of "ownership" and "control" over human remains and funerary items to qualifying tribes. Accordingly, the present dispute is appropriately analogized to an ordinary property dispute, in which the parties assert conflicting ownership interests. It is true, of course, that the tribes' asserted right to the Remains has not yet been tested or upheld in this litigation, and thus, in some sense it might be seen as contingent upon future rulings. On the other hand, the University has already determined that the La Posta Band is the proper recipient of the Remains, and there is clearly no need for the tribes' interest in the Remains to be vested, as might be required for due process purposes. In addition, there can be no doubt that it is the substantive ownership interest the tribes seek to vindicate, not some less concrete interest in compliance with administrative procedures. *Compare with Makah*, 910 F.2d at 559 ("The absent interest would not be prejudiced because all of the tribes have an equal interest in an administrative process that is lawful.").

Plaintiffs insist the Kumeyaay tribes cannot credibly claim an interest in the Remains because only the La Posta Band has asserted such an interest during the administrative process. Defendants reply that the La Posta Band is the designated tribe to receive the Remains, but all of the tribes, acting through the KCRC, asserted an interest in them. The dispute is of little apparent consequence because, even assuming plaintiffs are correct, the question becomes whether or

not the La Posta Band is "necessary."[13] In other words, the distinction drawn by plaintiffs between the La Posta Band and the Kumeyaay has no apparent legal significance under Rule 19. Given the foregoing discussion, there can be little serious question the La Posta Band, at least, claims "an interest relating to the subject of the action," and that adjudication of plaintiffs' claims in its absence would practically impair its ability to defend its asserted interest in the Remains.

To the latter point, plaintiffs alternatively urge that the University may act as an adequate representative of tribal interests, such that the tribe faces no disadvantage. The University persuasively contends it has a broad obligation to serve the interests of the people of California, rather than any particular subset, such as the people of the Kumeyaay tribes. Plaintiffs counter that the University has abrogated its responsibilities to the public and protected only the interests of the tribes. It draws this inference from the assumption that the University may have shared information about pre-litigation negotiations between

[13] The parties also dispute whether the KCRC can adequately represent tribal interests. The University defendants maintain that the KCRC cannot adequately defend the interests of the La Posta Band, because unspecified conflicts could arise between the 12 tribes represented by the KCRC. That concern does not appear to be shared by the KCRC itself, and is entirely speculative, given that no other tribe has asserted a claim to the Remains at issue. Plaintiffs maintain the KCRC is an adequate representative, as it is the authorized NAGPRA representative for the La Posta Band, even if it is not an "Indian *tribe*," and therefore not an appropriate recipient of the Remains. *See* 25 U.S.C. § 3002 (emphasis added); Banegas Decl. at ¶ 5; 68 Fed. Reg. 42757-42758 (July 18, 2003). Even assuming KCRC were an appropriate representative, however, it is sovereign immune as an "arm of the tribe" and may not be joined.

itself and plaintiffs with the tribes.[14] That speculation does not, without more, compel the conclusion the University's interests are aligned with those of the tribes. The University, of course, insists it has merely attempted to satisfy its legal obligations under NAGPRA. Indeed, legal compliance appears to be the University's only demonstrated interest in the present action; it represents it has not yet determined what to do with the Remains if plaintiffs prevail in obtaining a judicial declaration that there is no obligation under NAGPRA to transfer the Remains to the Kumeyaay. Moreover, as a practical matter, it is difficult to accept plaintiffs' suggestion that the University is conspiring to divest itself of a precious artifact that some of its own professors are willing to sue to retain. There is simply no indication in the record why the University would pursue such a course of action, absent some legal obligation. Accordingly, it cannot be concluded that tribal interests will be adequately represented so long as the University participates. Either the La Posta Band, or its representative the KCRC, is a "necessary" party under Rule 19.

2. Joinder

If a party is deemed "necessary" under Rule 19(a), the second question is whether joinder is feasible. Joinder may be unavailable if, for instance, venue is improper, the Court lacks personal jurisdiction over the party, or joinder would destroy subject matter jurisdiction. *Peabody I*, 400 F.3d at 779. Of relevance here, if a party enjoys sovereign immunity, subject matter jurisdiction is deficient as to that party. *Kiowa*

[14] Plaintiffs draw that inference based on the fact that the KCRC filed suit in the Southern District one day before the expiration of a tolling agreement between plaintiffs and the University.

Tribes, 523 U.S. at 754; *Cook*, 548 F.3d at 722 (affirming dismissal for lack of subject matter jurisdiction due to tribal entity's sovereign immunity). Here, neither the La Posta Band nor the KCRC can be joined due to sovereign immunity.

3. Indispensability

Third and finally, if joinder is not feasible, the Court must determine whether the party is "indispensible" under Rule 19(b), that is, whether "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." To make that determination, the Court is to consider: "(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided...; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b). An "indispensable party" is "one who not only has an interest in the controversy, but has an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Peabody II*, 610 F.3d at 1078.

Plaintiffs insist the Kumeyaay do not have a meritorious claim under NAGPRA to the Remains, and therefore cannot be prejudiced by a ruling in their absence. That line of reasoning cannot be accepted, of course, because it simply assumes what plaintiffs set out to establish in this action. There can be no serious question that the La Posta Band's interests in the Remains may be prejudiced if these proceedings continue without them, given that plaintiffs expressly

seek a judgment that they have no such claim to the Remains. Alternatively, as a means to lessen such prejudice, plaintiffs suggest the University can adequately represent the tribal interests so as to eliminate any need for their participation. *See Makah Indian Tribe*, 910 F.2d at 559 ("the presence of a representative may lessen prejudice"). For the reasons discussed above, however, that contention is also unpersuasive. Finally, although the Kumeyaay could, of course, voluntarily intervene to protect their interest, to do so they would have to waive their immunity. *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991) ("the ability to intervene if it requires a waiver of immunity is not a factor that lessens prejudice"). In sum, the first and second factors clearly militate against proceeding without the participation of the tribe.

The parties dispute whether the Court could enter a complete judgment without participation of the tribes. Plaintiffs argue full relief can be afforded under Federal Rule of Civil Procedure 65, which provides that injunctive relief may reach "the parties" and "other persons who are in active concert or participation with" them. Fed. R. Civ. P. 65(d)(2). Defendants reply that the tribes are not acting "in concert" with the University, and in any case, injunctive relief cannot reach nonparties that are entitled to sovereign immunity. Indeed, as the Ninth Circuit explained in *In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539, 545 (9th Cir. 1996), "[w]hile Rule 65(d) indeed automatically makes the injunction ... binding upon persons 'in active concert or participation with' [parties] who have actual notice of the injunction," in order to enforce the injunction against non-parties acting in concert with bound parties, there must be personal jurisdiction. "An injunction against [a

sovereign immune entity] in the absence of personal jurisdiction over it would be futile, as the court would be powerless to enforce its injunction." *Id.* Defendants also insist the relief plaintiffs seek, if afforded them, would place the University at risk of incurring inconsistent obligations, depending on the outcome of the litigation initiated by the KCRC in the Southern District of California. Plaintiffs have not addressed this additional problem. The third factor therefore also appears to favor dismissal under Rule 19.

Plaintiffs correctly point out that the fourth factor – "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder" – strongly disfavors dismissal. "[I]f no *alternative forum* is available to the plaintiff, the court should be 'extra cautious' before dismissing the suit." *Makah Indian Tribe*, 910 F.2d at 560 (citing *Hodel*, 788 F.2d at 777). The University, for its part, does not appear to contest that if this action is dismissed, relief would effectively be unavailable to plaintiffs.[15] Instead, defendants simply argue that dismissal is required under the case law. They rely on the Ninth Circuit's direction in *Quileute Indian Tribe v. Babbit*, 18 F.3d 1456, 1460 (9th Cir. 1994):

> We have noted, however, that when the necessary party is immune from suit, there may be "very little need for balancing Rule 19(b) factors because immunity itself may be

[15] At the hearing, plaintiffs represented that they were concerned intervention in the Southern District action would not provide them an opportunity to obtain relief because the KCRC arguably has not subjected itself to jurisdiction on the threshold issue of whether or not the Remains qualify as "North American" under NAGPRA.

> viewed as the compelling factor." Nevertheless, we have directed district courts to apply the four-part test to determine whether Indian tribes are indispensable parties.

Id. (citations omitted). Defendants also invoke *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397, 1405 (D. Haw. 1995), which held that native Hawaiian groups not party to NAGPRA litigation could not be adequately represented by the federal government and were "indispensable parties who must be joined before a repatriation claim may proceed." *Id.* The Court's analysis, however, was confined to a few sentences, and did not address any of the four factors under Rule 19. Plaintiffs reply that the Court should determine, per Rule 19, and "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." While that language would appear to afford the Court some discretion in determining whether or not to dismiss under Rule 19, neither plaintiffs nor the Court, in its own research, have identified a case in which litigation proceeded without a party deemed "necessary," yet entitled to sovereign immunity. Instead, virtually all cases to consider the question appear to dismiss under Rule 19, regardless of whether a remedy is available, if the absent parties are Indian tribes invested with sovereign immunity. *See, e.g.*, *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150 (9th Cir. 2002); *Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000); *Clinton v. Babbit*, 180 F.3d 1081 (9th Cir. 1999); *Kescoli v. Babbit*, 101 F.3d 1304 (9th Cir. 1996); *McClendon*, 885 F.2d 627. Although plaintiffs seek to distinguish these cases as concerning contracts to which the tribes were a party, that distinction does not

appear to be material to the analysis. Rather, these cases reflect the broader judgment that a "'[p]laintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity' [because] 'society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.'" *Quileute*, 18 F.3d at 1460-61 (citations omitted).

The sole exception to this trend is *Manygoats v. Klepe*, 558 F.2d 556, 557-58 (10th Cir. 1977), which reversed a dismissal order by the District Court in an action by private plaintiffs challenging the adequacy of an environmental impact statement. Contrary to the weight of authority, the Court held that although the interests of the Navajo tribe, which granted Exxon the right to explore for and mine uranium, were implicated, it was not an "indispensible" party to the litigation:

> Dismissal of the action for nonjoinder of the Tribe would produce an anomalous result. No one, except the Tribe, could seek review of an environmental impact statement covering significant federal action relating to leases or agreements for development of natural resources on Indian lands. NEPA is concerned with national environmental interests. Tribal interests may not coincide with national interests. We find nothing in NEPA which excepts Indian lands from national environmental policy. The controlling test of Rule 19(b) is whether in equity and good conscience the case can proceed in the absence of the Tribe. ... In equity and good conscience the case should and can proceed without the presence of the Tribe as a party.

Id. Although there is a strong case to be made that the same result should obtain here, *Manygoats* is an out-of-circuit decision which has not been embraced by the Ninth Circuit in the many years that have followed. Instead, this Circuit has consistently dismissed actions under Rule 19 where it concludes an Indian tribe is "necessary" yet not capable of joinder due to sovereign immunity, and therefore, this Court does not have the discretion to decide otherwise.[16]

4. Public rights exception

In a final attempt to avoid dismissal, plaintiffs argue this case falls under the "public rights" exception to Rule 19. That doctrine permits the relaxation of traditional joinder rules. *Makah Indian Tribe*, 910 F.2d at 560. Under the exception, "[i]n a proceeding ... narrowly restricted to the protection and enforcement of *public rights*, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 363 (1940) (emphasis in original). For the exception to apply, "the litigation must transcend the private interests of the litigants and seek to vindicate a public right." *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (citing *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1500 (D.C. Cir. 1995). Further, "although the litigation may adversely affect the absent parties' interests, the litigation must not 'destroy the legal entitlements of the absent parties.'" *Id.* (citing *Conner v. Burford*, 848 F.2d 1331, 1459 (9th Cir. 1988). Because plaintiffs are asserting the University wrongly concluded the

[16] Plaintiffs may, of course, elect to appeal this order, and invite the Ninth Circuit to consider whether the logic of *Manygoats* ought to be adopted in present circumstances. That decision, however, is properly reserved to the Court of Appeals.

Remains are "Native American" under NAGPRA, rather than, for example, some defect in the administrative process, it appears doubtful that this case is properly characterized as vindicating "public rights." *Makah Indian Tribe*, 910 F.2d at 559 ("To the extent the Makah seek to enforce the duty of the PFMC and the Secretary to follow statutory procedures in the future, this is a 'public right' and this action becomes one that potentially benefits all who participate in the ocean fishery."). Ultimately, that question need not be decided, however, because as defendants correctly note, the public rights doctrine is not properly invoked where, as here, the tribe's asserted interest in the Remains will be extinguished if plaintiffs prevail. For that reason, the public rights exception does not apply, and this case must be dismissed under Rule 19.

The troubling implications of that conclusion are worth noting. As the issuance of temporary and preliminary injunctive relief in this matter reflects, plaintiffs invoke important and substantial interests, reflecting the unique scientific and historical value of the Remains and artifacts at issue. Moreover, here, as in Manygoats, dismissal appears to conflict with certain aspects of NAGPRA, including its enforcement provision, which creates a private right of action. 25 U.S.C. § 3013 ("The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce the provisions of this chapter."); *Bonnichsen*, 969 F. Supp. at 627 (recognizing private right of action). There can be no question that Congress intended for judicial review of determinations made under NAGPRA, and as the Ninth Circuit held in *Bonnischen*, relying on legislative history, the statute was not intended to protect the interests of

Indians alone.[17] *Bonnichsen*, 367 F.3d at 874 n.14 (citing S. Rep. No. 101-473, at 6 (1990)) (NAGPRA "was not intended merely to benefit American Indians, but rather to strike a balance between the needs of scientists, educators, and historians on the one hand, and American Indians on the other."). It follows that plaintiffs like the scientists in this action unquestionably have standing to bring their claims under the enforcement provision: "§ 3013 does not limit jurisdiction to suits brought by American Indians or Indian tribes. 'Any person' means exactly that, and may not be interpreted restrictively to mean only "any *American Indian* person' or 'any Indian Tribe.'" *Id.* at 874 (emphasis in original).

The foregoing observations lead to the conclusion that Congress likely intended actions such as the one at bar to proceed. As noted above, NAGPRA does not appear to effect a legislative waiver, and the statute's legislative history reflects no consideration of how tribal sovereign immunity might impact the availability of judicial review for non-Indians. Yet this case leaves little doubt as to the doctrine's practical effect: honoring tribal sovereign immunity will permit tribes to frustrate review under NAGPRA by refusing to submit to jurisdiction where, as here, a regulated entity has made a determination favorable to the tribes and decided to repatriate remains. At the same time, tribes retain the option of waiving their immunity to challenge an unfavorable determination under NAGPRA – as the KCRC has done in the Southern District. In other words, invoking sovereign immunity

[17] Neither the District Court, nor the Court of Appeals had occasion to address sovereign immunity in *Bonnischen* because, as it happened, the relevant tribes voluntarily intervened in the litigation.

selectively permits the tribes to claim the benefit of NAGPRA, without subjecting themselves to its attendant limitations. This is undeniably an unsatisfactory result which a higher court or other branch of government may elect to address as a matter of policy. This Court, however, does not have that luxury but must dismiss this action, reluctantly, as the current state of the law requires.

C. Other arguments

Although the University defendants also request dismissal on the grounds that plaintiffs lack standing under NAGPRA, and have asserted First Amendment and public trust claims that are unripe, such matters need not be addressed because Rule 19 requires dismissal. Dismissal must be with prejudice. While plaintiffs request an opportunity to amend in order to name tribal officials as defendants under *Ex Parte Young*, 209 U.S. 123 (1908), that option is not available. Plaintiffs' theory is that "sovereign immunity does not extend to tribal officials acting beyond the scope of their authority, in violation of federal law." Pls.' Opp'n at 16. They therefore seek to name certain officials in their individual capacity. Personal-capacity suits are appropriate only where individual assets or personal actions are targeted. *Kentucky v. Graham*, 473 U.S. 159, 165-67 (1985). As defendants also rightly point out, advocating for transfer of the Remains to the Kumeyaay under NAGPRA is hardly a violation of federal law; in fact, such petitioning is almost certainly protected under the First Amendment. Finally, the Ninth Circuit has previously rejected attempts by plaintiffs to circumvent tribal immunity by naming individual officials rather than the tribe. *See, e.g., Dawavendewa*, 276 F.3d at 1159-60 (plaintiff's assertion of personal-capacity claims "strikes us

as an attempted end run around tribal immunity" given that the "real claim" is against the tribe itself).

V. CONCLUSION

For the reasons set forth above, defendants' motions to dismiss must be granted without leave to amend.

IT IS SO ORDERED.

Dated: 10/9/12

/s/ Richard Seeborg
RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed August 21, 2015]

No. 12-17489
D.C. No. 3:12-cv-01978-RS
Northern District of California, San Francisco

TIMOTHY WHITE; *et al.*,

Plaintiffs-Appellants,

v.

UNIVERSITY OF CALIFORNIA; *et al.*,

Defendants-Appellees.

ORDER

Before: THOMAS, Chief Judge, and TROTT and MURGUIA, Circuit Judges.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. See Fed. R. App. P. 35.

Appellants' petition for rehearing en banc, filed September 10, 2014, is denied.

APPENDIX D

TITLE 25. INDIANS
CHAPTER 32. NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION

25 USCS §§ 3001 – 3015

§ 3001. Definitions

For purposes of this Act, 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 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 pre-ponderance 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 USCS §§ 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 [42 USCS §§ 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 7(c) [25 USCS § 3005(c)], result in a Fifth Amendment taking by the United States

as determined by the United States Claims Court [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; [and]

(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 [note preceding 48 USCS § 491].

§ 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.

(d) Inadvertent discovery of Native American remains and objects.

(1) Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after the date of enactment of this Act [enacted Nov. 16, 1990] shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands, if known or readily ascertainable, and, in the case of lands that have been selected by an Alaska Native Corporation or group organized pursuant to the Alaska Native Claims Settlement Act of 1971 [43 USCS §§ 1601 et seq.], the appropriate corporation or group. If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection. Following the notification under this subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, the activity may resume after 30 days of such certification.

(2) The disposition of and control over any cultural items excavated or removed under this

subsection shall be determined as provided for in this section.

(3) If the Secretary of the Interior consents, the responsibilities (in whole or in part) under paragraphs (1) and (2) of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary with respect to any land managed by such other Secretary or agency head.

(e) Relinquishment.

Nothing in this section shall prevent the governing body of an Indian tribe or Native Hawaiian organization from expressly relinquishing control over any Native American human remains, or title to or control over any funerary object, or sacred object.

§ 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].

(b) Requirements.

(1) The inventories and identifications required under subsection (a) shall be—

(A) completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders;

(B) completed by not later than the date that is 5 years after the date of enactment of this Act [enacted Nov. 16, 1990], and

(C) made available both during the time they are being conducted and afterward to a review committee established under section 8 [25 USCS § 3006].

(2) Upon request by an Indian tribe or Native Hawaiian organization which receives or should have received notice, a museum or Federal agency shall supply additional available documentation to supplement the information required by subsection (a) of this section. The term "documentation" means a summary of existing museum or Federal agency records, including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American human remains and associated funerary objects subject to this section. Such term does not mean, and this Act shall not be construed to be an authorization for, the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.

(c) Extension of time for inventory.

Any museum which has made a good faith effort to carry out an inventory and identification under this

section, but which has been unable to complete the process, may appeal to the Secretary for an extension of the time requirements set forth in subsection (b)(1)(B). The Secretary may extend such time requirements for any such museum upon a finding of good faith effort. An indication of good faith shall include the development of a plan to carry out the inventory and identification process.

(d) Notification.

(1) If the cultural affiliation of any particular Native American human remains or associated funerary objects is determined pursuant to this section, the Federal agency or museum concerned shall, not later than 6 months after the completion of the inventory, notify the affected Indian tribes or Native Hawaiian organizations.

(2) The notice required by paragraph (1) shall include information—

(A) which identifies each Native American human remains or associated funerary objects and the circumstances surrounding its acquisition;

(B) which lists the human remains or associated funerary objects that are clearly identifiable as to tribal origin; and

(C) which lists the Native American human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with that Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects

culturally affiliated with the Indian tribe or Native Hawaiian organization.

(3) A copy of each notice provided under paragraph (1) shall be sent to the Secretary who shall publish each notice in the Federal Register.

(e) Inventory. For the purposes of this section, the term "inventory" means a simple itemized list that summarizes the information called for by this section.

§ 3004.

Summary for unassociated funerary objects, sacred objects, and cultural patrimony

(a) In general.

Each Federal agency or museum which has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony shall provide a written summary of such objects based upon available information held by such agency or museum. The summary shall describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable.

(b) Requirements.

(1) The summary required under subsection (a) shall be—

(A) in lieu of an object-by-object inventory;

(B) followed by consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders; and

(C) completed by not later than the date that is 3 years after the date of enactment of this Act [enacted Nov. 16, 1990].

(2) Upon request, Indian Tribes [tribes] and Native Hawaiian organizations shall have access to records, catalogues, relevant studies or other pertinent data for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American objects subject to this section. Such information shall be provided in a reasonable manner to be agreed upon by all parties.

§ **3005.**

Repatriation

(a) Repatriation of Native American human remains and objects possessed or controlled by Federal agencies and museums.

(1) If, pursuant to section 5 [25 USCS § 3003], the cultural affiliation of Native American human remains and associated funerary, objects with a particular Indian tribe or Native Hawaiian organization is established, then the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or organization and pursuant to subsections (b) and (e) of this section, shall expeditiously return such remains and associated funerary objects.

(2) If, pursuant to section 6 [25 USCS § 3004], the cultural affiliation with a particular Indian tribe or Native Hawaiian organization is shown with respect to unassociated funerary objects, sacred

objects or objects of cultural patrimony, then the Federal agency or museum, upon the request of the Indian tribe or Native Hawaiian organization and pursuant to subsections (b), (c) and (e) of this section, shall expeditiously return such objects.

(3) The return of cultural items covered by this Act shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items.

(4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 5 [25 USCS § 3003], or the summary pursuant to section 6 [25 USCS § 3004], or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (e) and, in the case of unassociated funerary objects, subsection (c), such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.

(5) Upon request and pursuant to subsections (b), (c) and (e), sacred objects and objects of cultural patrimony shall be expeditiously returned where—

(A) the requesting party is the direct lineal descendant of an individual who owned the sacred object;

(B) the requesting Indian tribe or Native Hawaiian organization can show that the object was owned or controlled by the tribe or organization; or

(C) the requesting Indian tribe or Native Hawaiian organization can show that the sacred object was owned or controlled by a member thereof, provided that in the case where a sacred object was owned by a member thereof, there are no identifiable lineal descendants of said member or the lineal descendants, upon notice, have failed to make a claim for the object under this Act.

(b) Scientific study.

If the lineal descendant, Indian tribe, or Native Hawaiian organization requests the return of culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.

(c) Standard of repatriation.

If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this Act and presents evidence which, if

standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession, then such agency or museum shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

(d) Sharing of information by Federal agencies and museums.

Any Federal agency or museum shall share what information it does possess regarding the object in question with the known lineal descendant, Indian tribe, or Native Hawaiian organization to assist in making a claim under this section.

(e) Competing claims.

Where there are multiple requests for repatriation of any cultural item and, after complying with the requirements of this Act, the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this Act or by a court of competent jurisdiction.

(f) Museum obligation.

Any museum which repatriates any item in good faith pursuant to this Act shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state [State] law that are inconsistent with the provisions of this Act.

§ 3006.

Review committee

(a) Establishment.

Within 120 days after the date of enactment of this Act [enacted Nov. 16, 1990], the Secretary shall establish a committee to monitor and review the implementation of the inventory and identification process and repatriation activities required under sections 5, 6, and 7 [25 USCS §§ 3003, 3004, and 3005].

(b) Membership.

(1) The Committee [committee] established under subsection (a) shall be composed of 7 members,

(A) 3 of whom shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders with at least 2 of such persons being traditional Indian religious leaders;

(B) 3 of whom shall be appointed by the Secretary from nominations submitted by national museum organizations and scientific organizations; and

(C) 1 who shall be a pointed by the Secretary from a list of persons developed and consented to by all of the members appointed pursuant to subparagraphs (A) and (B).

(2) The Secretary may not appoint Federal officers or employees to the committee.

(3) In the event vacancies shall occur, such vacancies shall be filled by the Secretary in the same manner as the original appointment within 90 days of the occurrence of such vacancy.

(4) Members of the committee established under subsection (a) shall serve without pay, but shall be reimbursed at a rate equal to the daily rate for GS-18 of the General Schedule [5 USCS § 5332]

for each day (including travel time) for which the member is actually engaged in committee business. Each member shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5, United States Code.

(c) Responsibilities.

The committee established under subsection (a) shall be responsible for—

(1) designating one of the members of the committee as chairman;

(2) monitoring the inventory and identification process conducted under sections 5 and 6 [25 USCS §§ 3003 and 3004] to ensure a fair, objective consideration and assessment of all available relevant information and evidence;

(3) upon the request of any affected party, reviewing and making findings related to—

(A) the identity or cultural affiliation of cultural items, or

(B) the return of such items;

(4) facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable;

(5) compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for such remains;

(6) consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the committee affecting such tribes or organizations;

(7) consulting with the Secretary in the development of regulations to carry out this Act;

(8) performing such other related functions as the Secretary may assign to the committee; and

(9) making recommendations, if appropriate, regarding future care of cultural items which are to be repatriated.

(d) Admissibility of records and findings.

Any records and findings made by the review committee pursuant to this Act relating to the identity or cultural affiliation of any cultural items and the return of such items may be admissible in any action brought under section 15 of this Act [25 USCS § 3013].

(e) Recommendations and report.

The committee shall make the recommendations under paragraph (c)(5) [subsection (c)(5)] in consultation with Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups.

(f) Access.

The Secretary shall ensure that the committee established under subsection (a) and the members of the committee have reasonable access to Native American cultural items under review and to associated scientific and historical documents.

(g) Duties of Secretary.

The Secretary shall—

(1) establish such rules and regulations for the committee as may be necessary, and

(2) provide reasonable administrative and staff support necessary for the deliberations of the committee.

(h) Annual report.

The committee established under subsection (a) shall submit an annual report to the Congress on the progress made, and any barriers encountered, in implementing this section during the previous year.

(i) Termination.

The committee established under subsection (a) shall terminate at the end of the 120-day period beginning on the day the Secretary certifies, in a report submitted to Congress, that the work of the committee has been completed.

§ 3007.

Penalty

(a) Penalty.

Any museum that fails to comply with the requirements of this Act may be assessed a civil penalty by the Secretary of the Interior pursuant to procedures established by the Secretary through regulation. A penalty assessed under this subsection shall be determined on the record after opportunity for an agency hearing. Each violation under this subsection shall be a separate offense.

(b) Amount of penalty.

The amount of a penalty assessed under subsection (a) shall be determined under regulations promulgated pursuant to this Act, taking into account, in addition to other factors—

(1) the archaeological, historical, or commercial value of the item involved;

(2) the damages suffered, both economic and noneconomic, by an aggrieved party,[;] and

(3) the number of violations that have occurred.

(c) Actions to recover penalties.

If any museum fails to pay an assessment of a civil penalty pursuant to a final order of the Secretary that has been issued under subsection (a) and not appealed or after a final judgment has been rendered on appeal of such order, the Attorney General may institute a civil action in an appropriate district court of the United States to collect the penalty. In such action, the validity and amount of such penalty shall not be subject to review.

(d) Subpoenas.

In hearings held pursuant to subsection (a), subpoenas may be issued for the attendance and testimony of witnesses and the production of relevant papers, books, and documents. Witnesses so summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States.

§ 3008.

Grants

(a) Indian tribes and Native Hawaiian organizations.

The Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations for the

purpose of assisting such tribes and organizations in the repatriation of Native American cultural items.

(b) Museums.

The Secretary is authorized to make grants to museums for the purpose of assisting the museums in conducting the inventories and identification required under sections 5 and 6 [25 USCS §§ 3003 and 3004].

§ 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.

§ **3010.**

Special relationship between Federal Government and Indian tribes and Native Hawaiian organizations

This Act reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.

§ **3011.**

Regulations

The Secretary shall promulgate regulations to carry out this Act within 12 months of enactment [enacted Nov. 16, 1990].

§ **3012.**

Authorization of appropriations

There is authorized to be appropriated such sums as may be necessary to carry out this Act.

§ **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.

History:

(Nov. 16, 1990, P.L. 101-601, § 2, 104 Stat. 3048.)

APPENDIX E

Rule 19. Required Joinder of Parties

(a) Persons Required to Be Joined if Feasible.

(1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) Joinder by Court Order. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) Venue. If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and

good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) Pleading the Reasons for Nonjoinder. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) Exception for Class Actions. This rule is subject to Rule 23.

NOTES

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007.)

Notes of Advisory Committee on Rules—1937

Note to Subdivision (a). The first sentence with verbal differences (e.g., "united" interest for "joint"

interest) is to be found in [former] Equity Rule 37 (Parties Generally—Intervention). Such compulsory joinder provisions are common. Compare Alaska Comp. Laws (1933) §3392 (containing in same sentence a "class suit" provision); Wyo.Rev.Stat.Ann. (Courtright, 1931) §89–515 (immediately followed by "class suit" provisions, §89–516). *See also* [former] Equity Rule 42 (Joint and Several Demands). For example of a proper case for involuntary plaintiff, *see Independent Wireless Telegraph Co. v. Radio Corp. of America*, 269 U.S. 459 (1926).

The joinder provisions of this rule are subject to Rule 82 (Jurisdiction and Venue Unaffected).

Note to Subdivision (b). For the substance of this rule *see* [former] Equity Rule 39 (Absence of Persons Who Would be Proper Parties) and U.S.C., Title 28, §111 [now 1391] (When part of several defendants cannot be served); *Camp v. Gress*, 250 U.S. 308 (1919). *See* also the second and third sentences of [former] Equity Rule 37 (Parties Generally—Intervention).

Note to Subdivision (c). For the substance of this rule see the fourth subdivision of [former] Equity Rule 25 (Bill of Complaint—Contents).

Notes of Advisory Committee on Rules—
1966 Amendment

General Considerations

Whenever feasible, the persons materially interested in the subject of an action—see the more detailed description of these persons in the discussion of new subdivision (a) below—should be joined as parties so that they may be heard and a complete disposition made. When this comprehensive joinder cannot be accomplished—a situation which may be encountered

in Federal courts because of limitations on service of process, subject matter jurisdiction, and venue—the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action.

Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action. It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.

Defects in the Original Rule

The foregoing propositions were well understood in the older equity practice, see Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 Colum.L.Rev. 1254 (1961), and Rule 19 could be and often was applied in consonance with them. But experience showed that the rule was defective in its phrasing and did not point clearly to the proper basis of decision.

Textual defects.—

(1) The expression "persons * * * who ought to be parties if complete relief is to be accorded

between those already parties," appearing in original subdivision (b), was apparently intended as a description of the persons whom it would be desirable to join in the action, all questions of feasibility of joinder being put to one side; but it was not adequately descriptive of those persons.

(2) The word "Indispensable," appearing in original subdivision (b), was apparently intended as an inclusive reference to the interested persons in whose absence it would be advisable, all factors having been considered, to dismiss the action. Yet the sentence implied that there might be interested persons, not "indispensable." in whose absence the action ought also to be dismissed. Further, it seemed at least superficially plausible to equate the word "indispensable" with the expression "having a joint interest," appearing in subdivision (a). *See United States v. Washington Inst. of Tech.*, Inc., 138 F.2d 25, 26 (3d Cir. 1943); cf. *Chidester v. City of Newark*, 162 F.2d 598 (3d Cir. 1947). But persons holding an interest technically "joint" are not always so related to an action that it would be unwise to proceed without joining all of them, whereas persons holding an interest not technically "joint" may have this relation to an action. *See* Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 Mich.L.Rev. 327, 356 ff., 483 (1957).

(3) The use of "indispensable" and "joint interest" in the context of original Rule 19 directed attention to the technical or abstract character of the rights or obligations of the persons whose joinder was in question, and correspondingly distracted attention from the pragmatic considerations which should be controlling.

(4) The original rule, in dealing with the feasibility of joining a person as a party to the action, besides referring to whether the person was "subject to the jurisdiction of the court as to both service of process and venue," spoke of whether the person could be made a party "without depriving the court of jurisdiction of the parties before it." The second quoted expression used "jurisdiction" in the sense of the competence of the court over the subject matter of the action, and in this sense the expression was apt. However, by a familiar confusion, the expression seems to have suggested to some that the absence from the lawsuit of a person who was "indispensable" or "who ought to be [a] part[y]" itself deprived the court of the power to adjudicate as between the parties already joined. *See Samuel Goldwyn, Inc. v. United Artists Corp.*, 113 F.2d 703, 707 (3d Cir. 1940); *McArthur v. Rosenbaum Co. of Pittsburgh*, 180 F.2d 617, 621 (3d Cir. 1949); cf. *Calcote v. Texas Pac. Coal & Oil Co.*, 157 F.2d 216 (5th Cir. 1946), cert. denied, 329 U.S. 782 (1946), noted in 56 Yale L.J. 1088 (1947); Reed, *supra*, 55 Mich.L.Rev. at 332–34.

Failure to point to correct basis of decision. The original rule did not state affirmatively what factors were relevant in deciding whether the action should proceed or be dismissed when joinder of interested persons was infeasible. In some instances courts did not undertake the relevant inquiry or were misled by the "jurisdiction" fallacy. In other instances there was undue preoccupation with abstract classifications of rights or obligations, as against consideration of the particular consequences of proceeding with the action and the ways by which these consequences might be

ameliorated by the shaping of final relief or other precautions.

Although these difficulties cannot be said to have been general analysis of the cases showed that there was good reason for attempting to strengthen the rule. The literature also indicated how the rule should be reformed. *See* Reed, *supra* (discussion of the important case of *Shields v. Barrow*, 17 How. (58 U.S.) 130 (1854), appears at 55 Mich.L.Rev., p. 340 ff.); Hazard, *supra*; N.Y. Temporary Comm. on Courts, First Preliminary Report, Legis.Doc. 1957, No. 6(b), pp. 28, 233; N.Y. Judicial Council, Twelfth Ann.Rep., Legis. Doc. 1946, No. 17, p. 163; Joint Comm. on Michigan Procedural Revision, Final Report, Pt. III, p. 69 (1960); Note, *Indispensable Parties in the Federal Courts*, 65 Harv.L.Rev. 1050 (1952); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 Harv.L.Rev. 874, 879 (1958); Mich.Gen. Court Rules, R. 205 (effective Jan. 1, 1963); N.Y.Civ. Prac.Law & Rules, §1001 (effective Sept. 1, 1963).

The Amended Rule

New subdivision (a) defines the persons whose joinder in the action is desirable. Clause (1) stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or "hollow" rather than complete relief to the parties before the court. The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter. Clause (2)(i) recognizes the importance of protecting the person whose joinder is in question against the practical prejudice to him which may arise through a disposition of the action in his absence. Clause (2)(ii) recognizes the need for considering whether a party may be left, after the

adjudication, in a position where a person not joined can subject him to a double or otherwise inconsistent liability. *See* Reed, *supra*, 55 Mich.L.Rev. at 330, 338; Note, *supra*, 65 Harv.L.Rev. at 1052–57; *Developments in the Law, supra*, 71 Harv.L.Rev. at 881–85.

The subdivision (a) definition of persons to be joined is not couched in terms of the abstract nature of their interests—"joint," "united," "separable," or the like. *See* N.Y. Temporary Comm. on Courts, First Preliminary Report, *supra; Developments in the Law, supra*, at 880. It should be noted particularly, however, that the description is not at variance with the settled authorities holding that a tortfeasor with the usual "joint-and-several" liability is merely a permissive party to an action against another with like liability. *See* 3 *Moore's Federal Practice* 2153 (2d ed. 1963); 2 Barron & Holtzoff, *Federal Practice & Procedure* §513.8 (Wright ed. 1961). Joinder of these tortfeasors continues to be regulated by Rule 20; compare Rule 14 on third-party practice.

If a person as described in subdivision (a)(1)(2) is amenable to service of process and his joinder would not deprive the court of jurisdiction in the sense of competence over the action, he should be joined as a party; and if he has not been joined, the court should order him to be brought into the action. If a party joined has a valid objection to the venue and chooses to assert it, he will be dismissed from the action.

Subdivision (b).—When a person as described in subdivision (a)(1)–(2) cannot be made a party, the court is to determine whether in equity and good conscience the action should proceed among the parties already before it, or should be dismissed. That this decision is to be made in the light of pragmatic considerations has often been acknowledged by the

courts. *See Roos v. Texas Co.*, 23 F.2d 171 (2d Cir. 1927), cert. denied, 277 U.S. 587 (1928); *Niles-Bement-Pond Co. v. Iron Moulders, Union*, 254 U.S. 77, 80 (1920). The subdivision sets out four relevant considerations drawn from the experience revealed in the decided cases. The factors are to a certain extent overlapping, and they are not intended to exclude other considerations which may be applicable in particular situations.

The first factor brings in a consideration of what a judgment in the action would mean to the absentee. Would the absentee be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor? The possible collateral consequences of the judgment upon the parties already joined are also to be appraised. Would any party be exposed to a fresh action by the absentee, and if so, how serious is the threat? *See* the elaborate discussion in Reed, *supra*; cf. *A. L. Smith Iron Co. v. Dickson*, 141 F.2d 3 (2d Cir. 1944); *Caldwell Mfg. Co. v. Unique Balance Co.*, 18 F.R.D. 258 (S.D.N.Y. 1955).

The second factor calls attention to the measures by which prejudice may be averted or lessened. The "shaping of relief" is a familiar expedient to this end. *See*, e.g., the award of money damages in lieu of specific relief where the latter might affect an absentee adversely. *Ward v. Deavers*, 203 F.2d 72 (D.C.Cir. 1953); *Miller & Lux, Inc. v. Nickel*, 141 F.Supp. 41 (N.D.Calif. 1956). On the use of "protective provisions," *see Roos v. Texas Co.*, *supra*; *Atwood v. Rhode Island Hosp. Trust Co.*, 275 Fed. 513, 519 (1st Cir. 1921), cert. denied, 257 U.S. 661 (1922); cf. *Stumpf v. Fidelity Gas Co.*, 294 F.2d 886 (9th Cir. 1961); and the general statement in *National Licorice Co. v. Labor Board*, 309 U.S. 350, 363 (1940).

Sometimes the party is himself able to take measures to avoid prejudice. Thus a defendant faced with a prospect of a second suit by an absentee may be in a position to bring the latter into the action by defensive interpleader. *See Hudson v. Newell*, 172 F.2d 848, 852 mod., 176 F.2d 546 (5th Cir. 1949); *Gauss v. Kirk*, 198 F.2d 83, 86 (D.C.Cir. 1952); *Abel v. Brayton Flying Service, Inc.*, 248 F.2d 713, 716 (5th Cir. 1957) (suggestion of possibility of counterclaim under Rule 13(h)); cf. *Parker Rust-Proof Co. v. Western Union Tel. Co.*, 105 F.2d 976 (2d Cir. 1939) cert. denied, 308 U.S. 597 (1939). See also the absentee may sometimes be able to avert prejudice to himself by voluntarily appearing in the action or intervening on an ancillary basis. *See Developments in the Law*, *supra*, 71 Harv.L.Rev. at 882; Annot., *Intervention or Subsequent Joinder of Parties as Affecting Jurisdiction of Federal Court Based on Diversity of Citizenship*, 134 A.L.R. 335 (1941); Johnson v. Middleton, 175 F.2d 535 (7th Cir. 1949); *Kentucky Nat. Gas Corp. v. Duggins*, 165 F.2d 1011 (6th Cir. 1948); *McComb v. McCormack*, 159 F.2d 219 (5th Cir. 1947). The court should consider whether this, in turn, would impose undue hardship on the absentee. (For the possibility of the court's informing an absentee of the pendency of the action, see comment under subdivision (c) below.)

The third factor—whether an "adequate" judgment can be rendered in the absence of a given person—calls attention to the extent of the relief that can be accorded among the parties joined. It meshes with the other factors, especially the "shaping of relief" mentioned under the second factor. Cf. *Kroese v. General Steel Castings Corp.*, 179 F.2d 760 (3d Cir. 1949), cert. denied, 339 U.S. 983 (1950).

The fourth factor, looking to the practical effects of a dismissal, indicates that the court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible. See *Fitzgerald v. Haynes*, 241 F.2d 417, 420 (3d Cir. 1957); *Fouke v. Schenewerk*, 197 F.2d 234, 236 (5th Cir. 1952); cf. *Warfield v. Marks*, 190 F.2d 178 (5th Cir. 1951).

The subdivision uses the word "indispensable" only in a conclusory sense, that is, a person is "regarded as indispensable" when he cannot be made a party and, upon consideration of the factors above mention, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it.

A person may be added as a party at any stage of the action on motion or on the court's initiative (*see* Rule 21); and a motion to dismiss, on the ground that a person has not been joined and justice requires that the action should not proceed in his absence, may be made as late as the trial on the merits (*see* Rule 12(h)(2), as amended; cf. Rule 12(b)(7), as amended). However, when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person (subdivision (a)(2)(ii)), and is not seeking vicariously to protect the absent person against a prejudicial judgment (subdivision (a)(2)(i)), his undue delay in making the motion can properly be counted against him as a reason for denying the motion. A joinder question should be decided with reasonable promptness, but decision may properly be deferred if adequate information is not available at the time. Thus the relationship of an absent person to the action, and the practical effects of an adjudication upon him and others, may not be sufficiently revealed at the pleading stage; in such a case it would be

appropriate to defer decision until the action was further advanced. Cf. Rule 12(d).

The amended rule makes no special provision for the problem arising in suits against subordinate Federal officials where it has often been set up as a defense that some superior officer must be joined. Frequently this defense has been accompanied by or intermingled with defenses of sovereign community or lack of consent of the United States to suit. So far as the issue of joinder can be isolated from the rest, the new subdivision seems better adapted to handle it than the predecessor provision. *See* the discussion in *Johnson v. Kirkland*, 290 F.2d 440, 446–47 (5th Cir. 1961) (stressing the practical orientation of the decisions); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 54 (1955). Recent legislation, P.L. 87–748, 76 Stat. 744, approved October 5, 1962, adding §§1361, 1391(e) to Title 28, U.S.C., vests original jurisdiction in the District Courts over actions in the nature of mandamus to compel officials of the United States to perform their legal duties, and extends the range of service of process and liberalizes venue in these actions. If, then, it is found that a particular official should be joined in the action, the legislation will make it easy to bring him in.

Subdivision (c) parallels the predecessor subdivision (c) of Rule 19. In some situations it may be desirable to advise a person who has not been joined of the fact that the action is pending, and in particular cases the court in its discretion may itself convey this information by directing a letter or other informal notice to the absentee.

Subdivision (d) repeats the exception contained in the first clause of the predecessor subdivision (a).

Notes of Advisory Committee on Rules—

1987 Amendment

The amendments are technical. No substantive change is intended.

Committee Notes on Rules—2007 Amendment

The language of Rule 19 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 19(b) described the conclusion that an action should be dismissed for inability to join a Rule 19(a) party by carrying forward traditional terminology: "the absent person being thus regarded as indispensable." "Indispensable" was used only to express a conclusion reached by applying the tests of Rule 19(b). It has been discarded as redundant.

APPENDIX F

NY CLS Civil Practice Law & Rules, § 1001

§ 1001. Necessary joinder of parties

(a) Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant.

(b) When joinder excused. When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party. In determining whether to allow the action to proceed, the court shall consider:

1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;
3. whether and by whom prejudice might have been avoided or may in the future be avoided;
4. the feasibility of a protective provision by order of the court or in the judgment; and

5 whether an effective judgment may be rendered in the absence of the person who is not joined.

Advisory Committee Notes:

It is believed that this section expresses the actual practice in the courts although it differs in language from the CPA provisions. The colorless and misleading expression "united in interest" is eliminated in favor of other language which closely follows that found in CPA § 193(1), and which may be traced to § 102 of the original Field code. The term "conditionally necessary" is also eliminated, although the new CPLR section does recognize that there are some persons who must be joined if it is possible to do so, but whose joinder is excused if jurisdiction over them cannot be obtained. *See* generally 12 NY Jud Council Rep 45, 163-191 (1946). Cf. CPA § 194 ("real party in interest"); Fed R Civ P 19(a) ("having a joint interest").

The provision for making a person a defendant when he refuses to join as a plaintiff is found in § 194 of the CPA, being derived from the Field code which borrowed it from the chancery practice. The wording follows Federal rule 19(a).

Subd (a) is, of course, subject to the provisions of subdivision (b) and to the provisions of § 1005 governing class actions.

Subd (b) classifies the persons described in subdivision (a) into those who are indispensable and whose absence will result in the dismissal of the action, and those who are not indispensable and whose joinder is excused if jurisdiction over them cannot be obtained. Cf. Fed R Civ P 19(b); CPA § 193(2). This subdivision is principally devoted to the case of the necessary party who is not indispensable. It provides that he must be brought in if he is subject to the jurisdiction of the court, but that if he cannot be brought in, the court in its discretion can proceed without him. This is

essentially the same provision which is found in CPA § 193(2) which excuses the joinder if the person cannot be "brought in without undue delay."

A new feature of the section is the enumeration of five criteria for determining whether a person is so important as a party that the action must be dismissed if he is not joined. A germ of the idea may be present in CPA § 193(1), where there is reference to an absentee who "would be inequitably affected by the judgment." This language is borrowed from the Iowa rule. 12 NY Jud Council Rep 168, 178 n 57 (1946). The considerations enumerated are those emphasized in the case law, which, on analysis, indicates that the subject defies definitive statement and that decision must rest in the sound discretion of the court. The fundamental philosophy is that indispensability should be determined in the light of all the factors and interests involved including those of the court, and that there is no single certain criterion for determining whether a person is an indispensable party. Not only should the effect of nonjoinder be considered, but also the question of who might avoid or minimize its consequences. The reference in (5) of subd (b) is to the possibility that a judgment rendered in the absence of some person would, on account of that absence, be so hollow or inconclusive that it would be a waste of the court's and the parties' time to proceed with the litigation.

The wording of the subdivision permits the court to postpone the determination of indispensability until the trial or judgment stage is reached. This may be desirable in cases where it cannot be determined at a preliminary stage whether it is safe or reasonable to enter a judgment in the absence of some person who may have an interest. Of course, no one is legally

bound by a judgment unless he is a party to the action or is represented by a party, but a dispensable person is sometimes affected by a judgment in some practical way without being legally bound by it.

Provisions, like those of Federal rule 19(b), excusing the joinder if it would deprive the court of its jurisdiction, are not included, since they are significant only in connection with the diversity jurisdiction of the Federal courts and have no place in state procedure. A provision like that of Federal rule 19(b) which speaks of persons "subject to the jurisdiction of the court as to both service of process and venue" has been omitted in view of proposed § 502 of the article on venue. Cf. CPA § 193.

Derivation Notes:

Earlier statutes: CPA §§ 193, 194, 475; CCP §§ 446, 456, 457, 488; Code Proc § 136.

Revision Notes:

Laws 1963, ch 532, made two types of changes: first, some provisions were designed to correct the typographical errors which existed in the CPLR. Second, other provisions incorporated into the CPLR, without any change in substance, all pertinent amendments to the C.P.A. which were passed and approved during the 1962 legislative session. In this connection, only changes in language were made to conform to the style and format of the CPLR. Those C.P.A. amendments of 1962 essentially covered by original provisions of the CPLR, and those C.P.A. amendments pertaining to areas transferred on September 1, 1963, to laws other than the CPLR, were not incorporated into this act.

APPENDIX G

State of Washington, Civil Rule 19

Rule 19. Joinder of persons needed for just adjudication

(a) Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (A) as a practical matter impair or impede the person's ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and the person's joinder would render the venue of the action improper, the joined party shall be dismissed from the action.

(b) Determination by court whenever joinder not feasible. If a person joinable under (1) or (2) of section (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the

absent person being thus regarded as indispensable. The factors to be considered by the court include:

(1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties;

(2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;

(3) whether a judgment rendered in the person's absence will be adequate;

(4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading reasons for nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons joinable under (1) or (2) of section (a) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of class actions. This rule is subject to the provisions of rule 23.

(e) Spouse or Domestic Partner must join – Exceptions. [Reserved. *See* RCW 4.08.030.]

APPENDIX H

Wisconsin Stat., § 803.03

803.03. Joinder of persons needed for just and complete adjudication.

(1) PERSONS TO BE JOINED IF FEASIBLE.

A person who is subject to service of process shall be joined as a party in the action if:

(a) In the persons absence complete relief cannot be accorded among those already parties; or

(b) The person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the persons absence may:

1. As a practical matter impair or impede the person's ability to protect that interest; or

2. Leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his or her claimed interest.

(2) CLAIMS ARISING BY SUBROGATION, DERIVATION AND ASSIGNMENT.

(a) Joinder of related claims. A party asserting a claim for affirmative relief shall join as parties to the action all persons who at the commencement of the action have claims based upon subrogation to the rights of the party asserting the principal claim, derivation from the principal claim, or assignment of part of the principal claim. For purposes of this section, a person's right to recover for loss of consortium shall be deemed a derivative right. Any public assistance recipient

or any estate of such a recipient asserting a claim against a 3rd party for which the public assistance provider has a right of subrogation or assignment under s. 49.89 (2) or (3) shall join the provider as a party to the claim. Any party asserting a claim based upon subrogation to part of the claim of another, derivation from the rights or claim of another, or assignment of part of the rights or claim of another shall join as a party to the action the person to whose rights the party is subrogated, from whose claim the party derives his or her rights or claim, or by whose assignment the party acquired his or her rights or claim.

(b) Options after joinder.

1. Any party joined pursuant to par. (a) may do any of the following:

a. Participate in the prosecution of the action.

b. Agree to have his or her interest represented by the party who caused the joinder.

c. Move for dismissal with or without prejudice.

2. If the party joined chooses to participate in the prosecution of the action, the party joined shall have an equal voice with other claimants in the prosecution.

3. Except as provided in par. (bm), if the party joined chooses to have his or her interest represented by the party who caused the joinder, the party joined shall sign a written waiver of the right to participate that shall express consent to be bound by the judgment in the action. The waiver shall become binding when filed with the court, but a party may withdraw the waiver upon timely motion to the judge to whom the case has

been assigned with notice to the other parties. A party who represents the interest of another party and who obtains a judgment favorable to the other party may be awarded reasonable attorney fees by the court.

4. If the party joined moves for dismissal without prejudice as to his or her claim, the party shall demonstrate to the court that it would be unjust to require the party to prosecute the claim with the principal claim. In determining whether to grant the motion to dismiss, the court shall weigh the possible prejudice to the movant against the states interest in economy of judicial effort.

(bm) Joinders because of implication of medical assistance. If the department of health services is joined as a party pursuant to par. (a) and s. 49.89 (2) because of the provision of benefits under subch. IV of ch. 49, the department of health services need not sign a waiver of the right to participate in order to have its interests represented by the party that caused the joinder. If the department of health services makes no selection under par. (b), the party causing the joinder shall represent the interests of the department of health services and the department of health services shall be bound by the judgment in the action.

(c) Scheduling and pretrial conferences. At the scheduling conference and pretrial conference, the judge to whom the case has been assigned shall inquire concerning the existence of and joinder of persons with subrogated, derivative or assigned rights and shall make such orders as are necessary to effectuate the purposes of this section. If the case is an action to recover damages based on alleged criminally injurious conduct, the court shall inquire to see if an award has been made under subch. I of ch. 949 and if

the department of justice is subrogated to the cause of action under s. 949.15.

(3) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE.

If any such person has not been so joined, the judge to whom the case has been assigned shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If a person as described in subs. (1) and (2) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include:

(a) To what extent a judgment rendered in the persons absence might be prejudicial to the person or those already parties;

(b) The extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;

(c) Whether a judgment rendered in the persons absence will be adequate; and

(d) Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(4) PLEADING REASONS FOR NONJOINDER.

A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subs. (1) and (2) who are not joined, and the reasons why they are not joined.

(5) EXCEPTION OF CLASS ACTIONS.

This section is subject to s. 803.08.

HISTORY:

Sup. Ct. Order, 67 Wis. 2d 585, 643 (1975); 1975 c. 218; 1979 c. 189, 221; 1983 a. 192; 1985 a. 29; 1989 a. 31; 1995 a. 27; 1997 a. 35; 1999 a. 9; 2001 a. 103; 2005 a. 253; 2007 a. 20 ss. 3752, 9121 (6) (a)

NOTES:

When the constitutionality of a statute is challenged in an action other than a declaratory judgment action, the attorney general must be served, but failure to do so at the trial level was cured by service at the appellate level. *In Matter of Estate of Fessler*, 100 Wis. 2d 437, 302 N.W.2d 414 (1981).

Sub. (2) (b) requires a subrogated party to choose one of the listed options or risk dismissal with prejudice. *Radloff v. General Casualty Co.* 147 Wis. 2d 14, 432 N.W.2d 597 (Ct. App. 1988).

The mere presence of a party does not constitute "participation" under sub. (2) (b). A subrogated insurer who exercises none of the 3 options under sub. (2) (b) must pay its fair share of attorney fees and costs if it has notice of and does nothing to assist in the prosecution of the action. *Ninaus v. State Farm Mutual Automobile Insurance Co.* 220 Wis. 2d 869, 584 N.W.2d 545 (Ct. App. 1998), 97-0191.

Failure to comply with the technical requirement under sub. (2) (b) that a joined party must file a written waiver of the right to participate in the trial does not prevent the joined party's assertion that it had a representation agreement with the joining party. *Gustafson v. Physicians Insurance Co.* 223 Wis. 2d 164, 588 N.W.2d 363 (Ct. App. 1998), 97-3832.

Whether a party is an "indispensable party" requires a 2-part inquiry. First it must be determined if the party is "necessary" for one of the 3 reasons under sub. (1). If not, the party cannot be "indispensable" under sub. (3). If the party is found necessary, then, whether "in equity and good conscience" the action should not proceed in the absence of the party must be determined. *Dairyland Greyhound Park, Inc. v. McCallum*, 2002 WI App 259, 258 Wis. 2d 210, 655 N.W.2d 474, 02-1204.

If a person has no right of intervention under s. 803.09 (1), the courts have no duty to join that person sua sponte as a necessary party under sub. (1) (b) 1. The inquiry of whether a movant is a necessary party under sub. (1) (b) 1. is in all significant respects the same inquiry under s. 803.09 (1) as to whether a movant is entitled to intervene in an action as a matter of right, including the requirement that the interest of the movant is adequately represented by existing parties. A movant who fails to meet that requirement for intervention as of right may not simply turn around and force its way into the action by arguing that the court must join the movant, sua sponte, as a necessary party under s. 803.03 (1) (b) 1. *Helgeland v. Wisconsin Municipalities,* 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1, 05-2540.

NOTE: Chapter 803 was created by Sup. Ct. Order, 67 Wis. 2d 585, 638 (1975), which contains explanatory notes. Statutes prior to the 1983-84 edition also contain these notes.