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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WALTER ROSALES AND KAREN TOGGERY, ESTATE OF HELEN CUERRO, ESTATE OF WALTER ROSALES' UNNAMED BROTHER, ESTATE OF DEAN ROSALES, ESTATE OF MARIE TOGGERY, ESTATE OF MATTHEW TOGGERY, APRIL LOUISE PALMER, and ELISA WELMAS Plaintiffs, v. **AMY DUTSCHKE, Regional Director, BIA; JOHN RYDZIK, Chief, Environmental Division, BIA; KENNY MEZA; CARLENE A. CHAMBERLAIN; ERICA M. PINTO; ROBERT W. MESA; RICHARD J. TELLOW; PENN NATIONAL GAMING INC.; SAN DIEGO GAMING VENTURES, LLC; and C.W. DRIVER,** Defendants.	Civ. No. **COMPLAINT DEMANDING TRIAL BY JURY**

OUTLINE OF CLAIMS

NATURE OF THE ACTION

1. Plaintiffs, WALTER ROSALES and KAREN TOGGERY are Native American residents of San Diego County of one-half or more degree of California Indian blood, and former leaders of the half-blood Indian community, known as the Jamul Indian Village, "JIV," who until recently lived on the Indian cemetery in Jamul, where their families have lived since the late 1800's. Rosales and Toggery own and control their families' human remains and funerary objects that were interred in burial sites below, on, and above the Indian cemetery. Those remains and objects have been feloniously disinterred and desecrated by the Defendants in a race to illegally build a casino on the U.S. government's portion of the Indian cemetery property before they are stopped and the law is enforced.

2. The executive council members of the JIV, along with the complicity of the other Defendants, have committed some of the most heinous and grisly of crimes in their headlong rush to illegally build a casino on the U.S. government's portion of the Jamul Indian cemetery. The Defendants have intentionally and feloniously disinterred and desecrated Rosales and Toggery's families' human remains and funerary objects, and unceremoniously dumped them on a CalTrans highway construction site. These crimes are felonies, and Defendants have no immunity for having committed them.

3. Alleged members of the JIV have repeatedly and falsely testified concerning these crimes. They first claimed that there weren't any interments on the government's portion of the Indian cemetery. Then they admitted that they learned of the interments, but denied any knowledge of the interments at the time that Rosales and Toggery's families remains were dug up and dumped on CalTrans construction site. Now, their most recent declarations under oath admit that they began construction, with knowledge of the interment of Rosales and Toggery's families remains and funerary objects on the government's portion of the Indian cemetery, and intentionally had them excavated and removed.[1]

[1]See for e.g., Defendant and one time JIV chairman, Kenny Meza's admission in the January 2003 *California Lawyer*: "All the stuff that my brother, parents, godparents, and uncles once owned has been burned and buried on this land. And when the bulldozers come, they're going to dig it all up."

4. Rosales and Toggery, along with Plaintiffs, APRIL PALMER and ELISA WELMAS, hereby sue two federal agency officials, the executive officers of the half-blood community, and their contractors for their continuing personal injuries arising from this desecration of their families' human remains and funerary objects, pursuant to this Court's concurrent jurisdiction over the federal Defendants and the government's portion of the Jamul Indian cemetery property on which Rosales and Toggery's families' remains and funerary objects were desecrated, and from which they were illegally excavated and removed. See, *Michigan v. Bay Mills Ind. Community ("Bay Mills")* (2014) 134 S.Ct. 2024, 2035, discussed further herein.

PARTIES

5. Plaintiffs, WALTER J. ROSALES, and KAREN TOGGERY, are Native American residents of San Diego County of one-half or more degree of California Indian blood.

6. Plaintiff, WALTER J. ROSALES, is also a lineal descendant and son of Native American, Helen Cuerro, the personal representative of his mother's estate, the ESTATE OF HELEN CUERRO, his son's estate, the ESTATE OF DEAN ROSALES, his unnamed brother's estate, the ESTATE OF WALTER ROSALES' UNNAMED BROTHER, and a lienal descendant with ownership and control of their human remains and Native American cultural items, as set forth in Cal. Pub. Res. C. 5097.9-5097.99 and Health & Safety C. 7001 and 7100. "[T]he next of kin...have property rights in the body which will be protected, and for a violation of which they are entitled to indemnification." *Christensen v. Sup. Ct.* (1991) 54 Cal.3d 868, 890, citing *O'Donnell v. Slack* (1899) 123 Cal. 285, 289.

7. Plaintiff, KAREN TOGGERY, is also a lineal descendant and daughter of Native American, Marie Toggery, and the personal representative of her mother's estate, the ESTATE OF MARIE TOGGERY, as well as the mother of her son Matthew Toggery, and the personal representative of the ESTATE OF MATTHEW TOGGERY, and a lineal descendant with ownership and control of their human remains and Native American cultural items, as set forth in Cal. Pub. Res. C. 5097.9-5097.99 and Health & Safety C. 7001 and 7100.

8. Plaintiff APRIL LOUISE PALMER, is the sister of DEAN ROSALES, and the daughter of WALTER ROSALES, and the granddaughter of HELEN CUERO, and a resident of Riverside

County.

9. Plaintiff ELISA WELMAS is the mother of DEAN ROSALES, the former wife of WALTER ROSALES, and the daughter-in-law of HELEN CUERO, and a resident of Riverside County.

10. Defendant AMY DUTSCHKE is Regional Director for the Pacific Region of the Bureau of Indian Affairs, "BIA," with an office in Sacramento, California.

11. Defendant JOHN RYDZIK is the Chief of the Environmental Division of the BIA, with an office in Sacramento, California.

12. These individual federal Defendants are being sued both in their official and personal capacities for decisions for which they bear the responsibility and allowing and facilitating the desecration of Plaintiffs' families human remains and funerary objects by causing the construction of an illegal casino on the portion of the Jamul Indian cemetery owned by the U.S, in violation of federal and state law, including Constitutional violations. Each individual Defendant has acted, or threatened to act, under the color of federal governmental authority to the injury of Plaintiffs in violation of federal law and in excess of federal limitations upon their power and authority. *Ex parte Young* (1908) 209 U.S. 123; *Michigan v. Bay Mills Indian Community* (2014) 134 S.Ct. 2024, 2035; *Salt River Project Agricultural Improvement and Power District v. Lee* (9th Cir. 2012) 672 F.3d 1176, 1177.

13. Defendants KENNETH MEZA, CARLENE A. CHAMBERLAIN, ERICA M. PINTO, ROBERT W. MESA, and RICHARD J. TELLOW, are current and/or former officials of the JIV.

14. These individual non-federal Defendants are being sued in their personal capacities for allowing and facilitating the desecration of Plaintiffs' families human remains and funerary objects by causing the construction of an illegal casino on the portion of the Jamul Indian cemetery owned by the U.S, in violation of federal and state law, including Constitutional violations. Each individual Defendant has acted, or threatened to act, under the color of federal governmental authority to the injury of Plaintiffs in violation of federal law and in excess of federal limitations upon their power and authority. *Ex parte Young* (1908) 209 U.S. 123; *Michigan v. Bay Mills Indian Community* (2014) 134 S.Ct. 2024, 2035; *Salt River Project Agricultural Improvement and Power District v. Lee* (9th

Cir. 2012) 672 F.3d 1176, 1177.

15. The JIV is not a party to this action, and is not a federally recognized tribe under the Indian Reorganization Act, "IRA," 25 U.S.C. 461 et seq., has no sovereign immunity, and has no right, title or interest in Plaintiffs' families' human remains and funerary objects, or in the government's portion of the Jamul Indian cemetery.

16. Defendant PENN NATIONAL GAMING, INC. (PENN NATIONAL) is a corporation doing business in California. Penn National signed management and development contracts with the JIV, and is implementing them by constructing or managing the construction of the illegal casino on that portion of the Indian cemetery owned by the U.S.

17. Defendant SAN DIEGO GAMING VENTURES, LLC (SDGV) is a corporation doing business in California, and is a subsidiary affiliate of Penn National, that was identified in the Federal Register as seeking approval of a Gaming Management Contract as the corporate entity proposing a gaming management contract with JIV for the management of the illegal casino on the portion of the Indian cemetery owned by the U.S.

18. Defendant C.W.DRIVER, is a corporation and contractor doing business in California. Plaintiffs are informed and believe, and on that basis allege that C.W.DRIVER has been retained by JIV council members, Penn National and/or SDGV to construct, and is currently constructing, the illegal Indian casino on the portion of the Indian cemetery owned by the U.S.

19. The true names and capacities, whether individual, corporate, associate or otherwise, of DOES 1-20, are unknown to Plaintiffs at this time, who, therefore, sue said Defendant by said fictitious names. Plaintiffs are informed and believe, and based thereon allege, that DOES 1-20 are responsible in some measure for the actions, events and happenings herein alleged, and was the legal cause of injury and damages to the Plaintiffs as herein alleged, and thereby causing irreparable damage to Native American human remains, along with the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in Cal. Pub. Res. C. 5097.9-5097.99, by knowingly and/or willfully mutilating, disinterring, wantonly disturbing, excavating and willfully removing them to state property without authority of law. When the true names and capacities of

said Defendants are ascertained by Plaintiffs, Plaintiffs will seek leave to amend this complaint to insert their true names and capacities, and will serve said Doe Defendants when they become known.

20. At all times herein mentioned, Defendants, and each of them, were the agent, employee and/or joint venturer of their co-defendants, and were acting within the course and scope of such agency, employment and/or joint venture, with the permission and consent of their co-defendants and defendants. Furthermore, that at all times herein mentioned, Defendants, while acting as principals, expressly directed, consented to, approved, affirmed and ratified each and every action taken by the other herein alleged. Each reference to one defendant is also a reference to each and every other defendant. Plaintiffs are informed and believe and thereon allege that the defendants, and each of them, conspired with each other, to engage in acts in furtherance of a conspiracy to wrongfully and illegally violate the Plaintiffs' rights, rendering each of the defendants jointly and severally liable for all resulting and irreparable personal injury and damage to Plaintiffs.

JURISDICTION AND VENUE

21. The jurisdiction of this Court is invoked pursuant to 5 U.S.C. §§701 -706, 18 U.S.C. §§ 1151, 1162 and 1166, 25 U.S.C. §465 et seq., 2700 et seq., 3001-13, 28 U.S.C. §§ 1131 et seq., 1343, 1360, and 2201-2202.

22. Plaintiffs' claims also arise under California common and statutory law, to the same extent that any California court has jurisdiction over other civil and criminal causes of action, and those civil laws of California that are of general application to private persons or private property shall have the same force and effect, as they have elsewhere within California., as held for e.g., in *People v. Van Horn* (1990) 218 Cal. App.3d 1378, and *Christensen v. Sup. Ct.* (1991) 54 Cal.3d 868, 887.

23. The Defendants do not have immunity from suit.

24. An actual case and controversy exists among the parties, warranting the Court's declaration pursuant to 28 U.S.C. § 2201 of the rights, remedies and relations of the parties with respect to the Plaintiffs' ownership and control of their families' human remains and funerary objects, the portion of the Indian cemetery owned by the U.S., and whether or not it qualifies as land eligible for gambling under the Indian Gaming Regulatory Act, "IGRA." 25 U.S.C. 2014 et seq.

25. All applicable federal administrative remedies have been exhausted prior to initiating this

lawsuit against the Defendants as required by 5 U.S.C. §704. This action arises under federal law, including IRA, 25 U.S.C. §§ 465 *et. seq.* IGRA, 25 U.S.C. §§ 2700 *et seq.* and 18 U.S.C. § 1166, the Native American Graves Protection Act, "NAGPRA," 25 U.S.C. 3001 et seq., the Archaeological Resources Protection Act, "ARPA," 16 U.S.C. §470aa et seq., the U.S. Constitution, the California Admissions Act of 1850, and principles of federalism.

26. Venue is proper in the District Court for the Eastern District of California under 28 U.S.C. §§1391(b) and (e) and 5 U.S.C. § 703 . Venue is proper in this judicial district because at least one defendant resides or has an office in this judicial district, and because a substantial portion of the events giving rise to the Plaintiffs ' claims occurred in this district.

27. The Plaintiffs have standing to pursue the claims asserted in this complaint. *Bond* v. *United States* 131 S.Ct. 2355 (20 11), *Match -E-Be-Nash-She-Wish Bandv. Patchak* 132 S.Ct. 2 199 (2012), *Michigan v. Bay Mills Indian Community* (20 14) 134 S.Ct. 2024, 2035, *Christensen v. Sup. Ct.* (1991) 54 Cal.3d 868, 887, and *Palmquist v. Standard Acc. Ins. Co.*, 3 F.Supp. 358 (S.D. Cal. 1933).

GENERAL ALLEGATIONS

1. Walter Rosales and Karen Toggery Own and Control Their Families Human Remains and Funerary Objects

A. History of the Jamul Indian Cemetery and Remnants of Capitan Grande Band

28. Since the community of Jamul was a part of the Republic of Mexico, the Native American families of which Walter Rosales and Karen Toggery are the lineal descendants have inhumed, interred, deposited, and dispersed more than a hundred of their deceased family members' human remains, and items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in NAGPRA, 25 U.S.C. 3001-2, 43 C.F.R. 10.1-17, and Cal. Pub. Res. C., "P.R.C.," 5097.9-5097.99, according to their religious beliefs in burial sites below, on, and above the ground at the Indian cemetery in Jamul.[2]

[2]"'[B]urial site' means any natural or prepared physical location, whether originally below, on, or above the surface fo the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited." 25 U.S.C. 3001(1). California law further protects lawfully interred cremations. "'Human remains' or 'remains' means the body of a deceased person, regardless of its state of decomposition, and cremated remains," Cal. Health & Safetey Code, "H.S.C.," 7001,

29. These Indians have lived on an acre of private land that has been dedicated as an Indian cemetery, in Jamul, California, since at least the latter part of the Nineteenth Century. See, Exs. A, B, C, E, and F. The BIA Director of Tribal Government Services further stated on July 1, 1993: "The Jamul Indians lived on one acre of private land and on land deeded to the Diocese of San Diego as an Indian cemetery." Ex. I, at 3.

30. According to the federal government, these Indians are the remnants of the Capitan Grande tribe, and thus have not been, and are not subject to being, recognized as a separate tribe under the IRA. 25 U.S.C. 461, et seq. On January 18, 1982, the California Program Office of the Indian Health Service found: "Sometime in the 1800's, Indians from the nearby El Capitan Grande area settled adjacent to an existing cemetery near the village of Jamul." FONSI for Domestic Water Supply & Waste Disposal Facilities, Project No. CA 79-719. The Capitan Grande tribe was divided into the Barona and Viejas bands, when the San Diego River was dammed, and El Capitan Reservoir was created and allowed to flood the Capitan Grande village in the 1930's.

31. When California was a part of the Republic of Mexico between 1823 and 1846, all Indians living in and around the Indian cemetery in Jamul had already become full citizens of the Republic of Mexico on February 4, 1821, pursuant to the Plan of Iguala, which was one of the charter documents of the Mexican Republic.[3] Thereby, they were no longer treated as members of separate tribes, they had the right to own land, and subject to a property qualification, could vote.

32. Between 1846 and 1850, California was governed by several United States Military Governors. The territory that was to become California, including the Jamul cemetery, was ceded to the United States by Mexico in 1848 pursuant to the Treaty of Guadalupe Hidalgo. 9 Stats.922

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since "'interment; means the disposition of human remains...in the case of cremated remains, by inurnment, [or] placement below, on, or above the surface of the earth," in a cemetery, H.S.C. 7009, and constitutes a protected "burial site," H.S.C. 8012, which is defined as the "process of placing human remains in a grave," H.S.C. 7013, which is further defined as "a space of earth in a burial park, used or intended to be used, for the disposition of human remains," H.S.C. 7014, which in turn is defined as "a tract of land for the burial of human remains in the ground, used, or intended to be used, and dedicated, for cemetery purposes." H.S.C. 7004. See, Ex. U, as to the religious beliefs and burial practices of the Kuymeyaay from whom Rosales and Toggery have descended.

[3] Therein the charter provides: "All the inhabitants of New Spain, without distinction, whether Europeans, Africans or Indians, are citizens fo the monarchy, with the right to be employed in any post, according to their merits and virtues."

(1850). The treaty provided for the protection of public and private property rights. Specifically property rights "of every kind," (including Indian property rights in their dead) that were respected under Mexican law were also to be respected by the United States. *Id.*

B. Creation of the Sanctified Indian Cemetery, Place of Worship, and Religious Ceremonial Site in Jamul

33. "It is a universally held belief among Indians that if the dead or the funeral goods interred with them are disturbed, their spirits will wander, and in the words of [Supreme Court Justice of the Pawnee Nation]Walter Echo-Hawk, that 'restless spirits will bring evil to those who allowed their graves to be disturbed.'... While actual practices and religious beliefs may vary widely between cultures, and even within ethnic groups, the concern for the dead and the sensibilities of the living is a universal value held by all societies in all ages. The sepulture of the dead has, in all ages of the world, been regarded as a religious rite. The place where the dead are deposited, in all civilized nations and many barbarous ones is regarded in some measure at least, as consecrated ground... Consequently, the normal treatment of a corpse, once it is decently buried, is to let it lie. This idea is so deeply woven into our legal and cultural fabric that it is commonplace to hear it spoken of as a 'right.'" Thomas, "Indian Burial Rights Issues: Preservation or Desecration," Spring 1991, 59 *U.M.K.C. Law Review* 747.[4]

34. "Burial rites or their counterparts have been respected in almost all civilizations from time immemorial. [Citations.] They are a sign of the respect a society shows for the deceased and for the surviving family members. … [For example] The outrage at seeing the bodies of American soldiers mutilated and dragged through the streets is … a[n] … instance of the … understanding of the interests decent people have for those whom they have lost. Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own. In addition this well-established cultural tradition

[4] See the universal condemnation of the Poarch Creek Band of Creek Indians desecration of the Hickory burial ground to build a casino, by the Inter-Tribal Council of the Five Civilized Tribes of the Chickasaw, Choctaw, Cherokee, Muscogee (Creek) and Seminole Nations, representing 750,000 blood descendants, in Ex. S, and former Vice Chair Okla. Indian Affairs Comm., Dan Jones,' "You'll Mock Death But Once," *Indian Country Today*, 8- 20- 2012, Ex. T.

acknowledging a family's control over the body and death images of the deceased has long been recognized at common law." *National Archives and Records Admin. v. Favish*,541 U.S. 157, 167-68 (2004).

35. "[T]he next of kin...have property rights in the body which will be protected, and for a violation of which they are entitled to indemnification." *Christensen v. Sup. Ct.*. 54 Cal.3d 868, 890 (1991), citing *O'Donnell v. Slack*, 123 Cal. 285, 289 (1899), finding violation of the Health & Safety Code to be *per se* negligent under Evid. C. 669. "A surviving spouse, entitled to custody and possession of a deceased person for the purposes of preservation and burial, may maintain an action for damages against anyone who unlawfully and without authority mutilates or destroys such body." *Palmquist v. Standard Acc. Ins. Co.*, 3 F.Supp. 358 (S.D. Cal. 1933). Cal. H.S.C. 8301.5 further evidences Rosales and Toggery's interest in the proper disposition of their families' remains: "The Legislature recognizes... The urge to associate even after death also stems from an intense social and cultural need to ensure that people are connected with their past, and also to ensure that the graves and surrounding grounds are kept, tended, adorned, and embellished according to the desires and beliefs of the decedent, family, or group."

36. From their birth, Rosales and Toggery have been the lineal descendants of the Native American families that have lived and have inhumed, interred, deposited, and dispersed more than a hundred of their deceased family members' human remains, and items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in P.R.C. 5097.9-5097.99, H.S.C. 7001 and 7100, and NAGPRA, 25 U.S.C. 3001-2, 43 C.F.R. 10.1-10.17, according to their religious beliefs in burial sites below, on, and above the Jamul Indian cemetery for more than a hundred years. Recently, the San Diego Museum of Man repatriated a significant collection of Native American human remains and funerary objects, which have also been inhumed, interred, deposited, dispersed, and placed, in burial sites below, on, and above, the cemetery.

37. Rosales and Toggery have personal knowledge of more than 20 of the hundreds of Native Americans whose human remains, and items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of

cultural patrimony, as defined in P.R.C. 5097.9-5097.99, H.S.C. 7001 and 7100, and NAGPRA, 25 U.S.C. 3001-2, 43 C.F.R. 10.1-10.17, have been interred and deposited in burial sites below, on, and above the Indian cemetery in Jamul.

38. Walter Rosales was personally present when his un-named younger brother's human remains and his mother, Helen Cuerro's human remains, and his son, Dean Rosales' human remains, were inhumed, interred, and deposited, along with the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in P.R.C. 5097.9-5097.99, H.S.C. 7001 and 7100, and NAGPRA, 25 U.S.C. 3001-2, 43 C.F.R. 10.1-10.17, in burial sites below, on and above the ground on the portion of the Indian cemetery of which Rosales and Toggery are the beneficial owners and the U.S. holds title.

39. Karen Toggery was personally present when her mother, Marie Toggery's human remains and her son, Matthew Tinejero Toggery's human remains, were inhumed, interred and deposited, along with the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in P.R.C. 5097.9-5097.99, H.S.C. 7001, 7100, and NAGPRA, 25 U.S.C. 3001-2, 43 C.F.R. 10.1-10.17, in burial sites below, on and above the ground at the Indian cemetery.

40. The interments of Rosales and Toggery's families' remains and funerary objects are further corroborated by the Cal. Dept. Of Health Permits for Disposition of Human Remains, San Diego and Riverside County Death Certificates, and the San Diego Rural Fire Prot. Dist. Daily Logs of the cremated funerary objects. Ex. K.

41. Rosales and Toggery are the lineal descendants that own and control their predecessors' human remains and Native American and associated cultural items, which are personal rights, as set forth in P.R.C. 5097.9-5097.99, H.S.C. 7001, 7100, and 25 U.S.C. 3001-2, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, which have been inhumed, interred, deposited, dispersed, and placed, in burial sites below, on and above the cemetery over the last 100 years.

42. By virtue of these acts, a Native American sanctified cemetery, place of worship, religious

and ceremonial site, and sacred shrine, as defined by P.R.C. 5097.9, H.S.C. 7003-4, 8558, 8560, 8580, NAGPRA, 25 U.S.C. 3001, and 43 C.F.R. 10.2, have been located at the cemetery, which dedication to cemetery purposes all of its landowners are estopped to deny by their acquiescence in such use for more than 100 years. This dedication to cemetery use also means that the government's portion of the Indian cemetery is not a reservation. *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1268 (10th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002); *Mechoopda Indian Tribe of Chico Rancheria v. Schwarzenegger*, 2004 WL 1103021, *12 (E.D. Cal. 2004).

43. Property so dedicated to cemetery purposes shall be held and used exclusively for cemetery purposes, unless and until the dedication is removed from all or any part of it by an order and decree of the superior court of the county in which the property is situated, pursuant to H.S.C. 8580. Moreover, after such dedication by use and as long as the property remains dedicated to cemetery purposes, no road, alley, pipe line, pole line, or other public thoroughfare or utility shall be laid out, through, over, or across any part of it without the consent of not less than two-thirds of the owners of those interred there, pursuant to H.S.C. 8560.

C. The Indian Cemetery Property Has Always Been Private Property

44. The Indian cemetery in Jamul has been private property since before California became a State. It covers more than 7 acres and at least 3 parcels of property according to San Diego County Recorders' parcel maps, and probably extends onto what is now a California ecological reserve.[5] Exs. A-F. Native American families and their lineal descendants occupied and possessed that cemetery and the property contiguous to that Indian graveyard in Jamul, California, since the private property was owned at various times by Mexican Governor and Don, Pio Pico, U.S. General Henry S. Burton and his widow Maria Amparo Ruiz de Burton, John D. Spreckel's Coronado Beach Company, the Lawrence and Donald Daley families, the Catholic Diocese, and by the U.S. as trustee for the beneficial ownership of "Jamul Indians of one-half degree or more Indian blood," as reflected

[5] Historical cemeteries are often subsequently discovered to extend beyond later erected temporal fencing, as in Pallyup, Washington, and San Diego's El Campo Santo Cemetery, where many graves have been discovered beneath what is now San Diego Ave. See Ex. P.

in Exs. A-F.[6]

45. On September 26, 1912, J.D. Spreckel's Coronado Beach Company deeded a portion of the cemetery in Jamul to the Roman Catholic Bishop of Monterey and Los Angeles, a corporate in sole of the State of California, "to be used for the purposes of an Indian graveyard and approach thereto," "to have and to hold the above granted and described premises unto the said Grantee, his successors and assigns forever for the purpose above specified," as set forth in Exs. A, B, C, and E. In 1912, Father LaPointe and the Catholic church erected a chapel at the cemetery. Since 1956 the diocese of St. Pius X has maintained the chapel, for the purpose of ministering at the Indian cemetery.

46. Subsequently, the Catholic Diocese has retained title, ownership and control of a portion of the cemetery granted by the Coronado Beach Company. The Catholic Diocese also explicitly maintained for "[itself and its] successors or assigns an easement for (1) utility service lines and (2) ingress and egress over the existing well-traveled road," which the San Diego County tax assessor's maps continue to describe as "the Indian cemetery," as set forth in Exs. B & E.

47. The remaining portion of the private Indian cemetery property, where Appellants' families' remains were originally interred, but from which they have been illegally disinterred, excavated and removed, is now owned by the United States, Ex. D, jurisdiction over which has never been ceded by the State under 40 U.S.C. 255 and Government Code 127.

48. In 1924, Congress conferred citizenship on all Indians born in the United States including the Indians of San Diego County. 8 U.S.C. § 1401(b). And, by reason of the 14th amendment, the grant of federal citizenship had the additional effect of making Indians citizens of the states where they resided. State citizenship bestows rights and corresponding duties which one is not free to selectively adopt or reject. Included with a citizen's rights and duties is the obligation to comply with State and local laws and regulations and pay appropriate taxes for the support of State and local governments. The Defendants attempt to use an illegal April 10, 2013 Indian Lands decision to insulate the government's portion of the Indian cemetery from state and local laws, regulations and

[6]See also, *United States v. Pio Pico,* 27 F.Cas. 537 (1870); *Estate of Burton*, 63 Cal. 36 (1883); *G.W.B.McDonald, Administrator v. Burton,* 68 Cal. 445 (1886); *Henry H. Burton v. Maria A. Burton,* 79 Cal. 490 (1889); *In re Burton's Estate,* 93 Cal. 459 (1892); and *McDonald v. McCoy*, 121 Cal. 55 (1898), tracing the history of the private ownership of the property.

taxation is unconstitutional, violates equal protection, and therefore is arbitrary, capricious and against the law.

49. The Indian cemetery has never ceased to be private property. The cemetery was never part of, nor reserved or withdrawn from, public domain lands. It has always been privately owned; first within Mexico, then the Republic of California, then within the United States when acquired from Mexico by way of the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1850), and now within the State of California, since the United States ceded jurisdiction over all such private property acquired from Mexico to the State of California, when it was admitted to the Union on an "equal footing," with the same jurisdiction over all private property, as all other States, per Article IV, Section 3 of the U.S. Constitution. Thereby, California received regulatory and police power jurisdiction over all private property within the State, including the Jamul Indian cemetery.

D. A Portion of the Indian Cemetery is Gifted to the United States for the Beneficial Ownership of Individual Half-Blood Indians in Jamul

50. Sometime after September 26, 1912, J.D. Spreckel's Coronado Beach Company and its successors transferred the remaining portion of the cemetery in Rancho Jamul to the Daley family, and on December 12, 1978, Lawrence and Donald Daley gifted a 4.66 acre portion of the cemetery by recording a grant deed of what is now known by the San Diego County recorder's parcel number, 597-080-04, to "the United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." Ex. D. This land was conveyed to the United States as trustee for its beneficial owners, "Jamul Indians of one-half degree or more Indian blood," including Rosales and Toggery's families, the ownership and possession being that of ordinary proprietors. *Paul v. United States*, 371 U.S. 245, 264 (1963).

51. The Daley families agreed to convey title to the land then occupied by the Plaintiffs' families to the United States under California trust law for the explicit benefit of those half-blood Jamul Indians then occupying the property. The Daley families specifically agreed to this form of conveyance in order to provide a place protected by the United States as a trustee to protect the living and the dead against all forms of alienation, trespass, desecration, mutilation, disinterment, and any other infringement. This conveyance constitutes a donation of property for the benefit of Indians, pursuant to 25 U.S.C. 451.

52. Thus, the government's portion of the Indian cemetery remains in a California trust for the benefit of the half-blood Jamul Indians described on the face of the deed. *Coast Indian Community v. U.S.* ("*Coast*"), 550 F.2d 639 (Fed. Cl. 1977); *United States v. Assiniboine Tribe* ("*Assiniboine*"), 428 F.2d 1324, 1329-30 (Fed. Cl. 1970); *Chase v. McMasters* ("*Chase*"), 573 F.2d 1011, 1016 (8th Cir. 1978), cert. denied, 439 U.S. 965 (1978); *United States v. State Tax Comm.*, 535 F.2d 300, 304 (5th Cir. 1976); *City of Shakopee v. United States*, 1997 U.S. Dist. LEXIS 2202, *19-20 (D. Minn. 1997); and as recognized by *Carcieri v. Salazar,* 555 U.S. 379, 382-83, 388-90, 394-95, 398-99 (2009), citing *Opinions of the Solicitor* at 668, 724, 747, and 1479 (1979), attached hereto as Ex. H.

53. The BIA Director of Tribal Government Services further admits: "On June 28, 1979, the United States acquired from Bertha A. and Maria A. Daley [Lawrence and Donald's wives] a portion of the land known as 'Rancho Jamul' which it took 'in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate.' ...The United States accepted these conveyances of land in accordance with the authority contained in Sections 5 and 19 of the Indian Reorganization Act of 1934." Exhibit I, at 3. Section 5 of the IRA, 25 U.S.C. § 465, permits the U.S. to take land into trust for "Indians." Section 19 of the IRA in turn defines "Indians" to include: "all other persons of one-half or more Indian blood." 25 U.S.C. § 479. The text of Section 19 has not changed since its enactment in 1934.

54. Congress specifically enacted the IRA, 25 U.S.C. 465, to ensure that land acquired in trust for individual Indians would not be alienated by anyone without the government's express approval. In fact, the IRA continues to specifically provide for the acquisition of land by the United States for the benefit of individual Indians "through purchase, relinquishment, gift, exchange, or assignment...for the purpose of providing land for Indians." 25 U.S.C. 465, as acknowledged by the Supreme Court in *Carcieri v. Salazar* ("*Carcieri*"), 555 U.S. 379, 399 (2009).

55. [T]itle shall be taken in the name of the United States **in trust for the** Indian tribe or **individual Indian for which the land is acquired**, and such lands or rights shall be exempt from State and local taxation. 25 U.S.C. 465. (emphasis added).

56. "Section 5 [25 U.S.C. 465] authorizes the Secretary of the Interior to purchase or otherwise acquire land for landless Indians," and not just for "recognized Indian tribes now under Federal jurisdiction," at the time of the enactment of the IRA in 1934. H.R. Rep. No.

1804, 73d Cong., 2d Sess. 6-7 (1934).

57. The Federal government's *Handbook of Federal Indian Law*,[7] provides that "...[A] number of statutes have allowed individual Indians to obtain trust or restricted parcels out of the public domain and not within any reservation. ..." *Id*., (DOI 1982) Ch. 1, Sec. D3c, p. 40-41, and (DOI 2005) §3.04 (n114) Fn 443, citing *City of Tacoma v. Andrus*, 457 F. Supp. 342 (D.D.C. 1978), and *Chase*, 1016.

58. The government's *Handbook* also admits that: "The Secretary may exercise this authority for all individuals of one-half or more Indian blood.... This approach has also been used for the Quartz Valley Indians, Duckwater Shoshone Indians, Yomba Shoshone Indians, Port Gamble Band of Clallam Indians, and Sokaogan Chippewa Indians (Mole Lake Band)... This procedure has been suggested for other Indian groups as well. *E.g.*, May 1, 1937, *reprinted in Opinions of the Solicitor*, *supra* not 76, at 1479 (status of Nahma and Beaver Island Indians)." *Handbook* (DOI 1982) Ch.1, Sec. B2e, pp.15-16, fn. 86, and (DOI 2005) § 3.02, 146 (n99) Fn105.

59. The acquisition and designation of these Jamul Indians of one-half degree or more Indian blood as the beneficial owners of the cemetery property, follows the history, custom and practice of similar acquisitions and designations of other half-blood communities after June of 1934. "The Secretary has long exercised his §465 trust authority [to] take land into trust for...individual Indians who qualified for federal benefits by lineage or blood quantum. For example,...the Mole Lake Chippewa Indians of Wisconsin,...the Shoshone Indians of Nevada, the St. Croix Chippewa Indians of Wisconsin, and the Nahma and Beaver Inland Indians of Michigan. See 1 DOI, *Opinions of the Solicitor*, pp. 706-707, 724-725, 747-748 (1979)," *Carcieri*, J. Stevens dissenting at 406-7; Ex. H, and also includes the Mississippi Choctaws.

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[7] Congress directed the Secretary of Interior to revise and republish Cohen's *Handbook* in 25 U.S.C. 1341(a)(2), thereby binding the U.S. by its admissions with regard to the lands held in trust for individual Indians.

E. The United States Designated the Individual Half-Blood Indians in Jamul as the Beneficial Owners of the Government's Portion of the Indian Cemetery

60. The United States Department of Interior, Bureau of Indian Affairs, August 3, 2000 response to a Freedom of Information Act (FOIA) request, confirms that the "current trust parcel was accepted into trust in 1978 for Jamul Indians of ½ degree (4.66 acres)," and that there is "no record of the 1978 trust parcel being known as the Jamul Village," as reflected in Ex. F.

61. This is consistent with the half-blood community's constitution, Article II, Territory, which does not identify the 4.66 acre cemetery parcel, as within the territory of the Jamul Indian Village in Ex. G. It is also consistent with Cal. Dept. of Fish & Game, May 21, 2007 Map of Watershed, Wildlife and Creek Beds Surrounding JIV and Lakes Entertainment Properties, Ex. L; Governor Gray Davis' Director of Community and Intergovernmental Relations letter of July 17, 2001, finding JIV's proposed need to acquire and use trust land as inconsistent with the Rancho Jamul Ecological Reserve and the Multiple Species Conservation Plan established by U.S. Dept. of Fish & Wildlife Service, Cal. Dept. Fish & Game, and the County of San Diego, due to "significant and potentially unmitigable adverse impacts," and a "paradigm for the kind of land use conflicts the BIA should not permit," Ex. M, and Governor Arnold Schwarzenegger's Legal Affairs Secretary's letters of August 29, 2005 and December 20, 2005, April 2, 2007, and April 5, 2007, finding the JIV to be in breach of the Compact for proposing, among other violations, to operate Class III gambling on land that does not qualify for such gambling. Ex. N.

62. Therefore, when the U.S. accepted the deed for the portion of the cemetery on which Rosales and Toggery lived, the U.S. thereby designated the individual Indian families then possessing and residing thereon as the beneficial owners under California trust law. Similar forms of the Jamul grant deed have long been accepted by the BIA and similar designations of individual Indians' beneficial ownership have long been made by the BIA, and enforced by the courts. *Coast* at 651 n32; *Assiniboine*, at 1329-30; *State Tax Comm.*, at 304, *Chase* at 1016, and as recognized by *Carcieri* at 382-83, 388-90, 394-95, 398-99 (2009), citing *Opinions of the Solicitor* at 668, 724, 747, and 1479 (1979), Ex. H.

63. *Coast*, held on nearly identical facts, that the parcel in question, "was not acquired for a tribe, leaving only the possibility under the [Indian Reorganization] Act that it was purchased for

individual Indians. The deed and proclamation say nothing to contradict this. Thus, the land was taken in trust for the individual Coast Indian Community members. *Coast*, 550 F.2d 639, 651, n32."

64. The *Coast* deed "was conveyed to the United States: ...'in Trust for such Indians of Del Norte and Humboldt Counties, in California, eligible to participate in the benefits of the [Indian Reorganization] Act of June 18, 1934, as shall be designated by the Secretary of the Interior...'" 550 F.2d 641-41.

65. The Jamul deed was conveyed to the United States "in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." See, Ex. D. There, as here, "the United States acquired the [land]...pursuant to ... 25 U.S.C. 465, which provided that the title to land acquired under it 'shall be taken in the name of the United States in trust for the...individual Indian for which the land is acquired...'" *Coast*, 651, n32.

66. This is consistent with the federal regulations for then unorganized groups of individual Indians, whereby such designation of such individual Indians as beneficial owners was accomplished by: (1) locating the individual Indians on the parcel, (2) providing for their needs, (3) acquiescing in their continued presence on, and use of, the parcel for more than 28 years, (4) building houses for them on the parcel, (5) providing them with services usually accorded to Indians living on such property, (6) allowing them to inhume, inter, deposit, disperse and place the human remains and funerary objects of their dead, below, on, and above the property, and further (7) providing strong and uncontroverted evidence of their designation as the beneficial owners of that portion of the Indian cemetery, parcel 597-080-04, as a matter of law, within the meaning of the grant deed, as in *Coast*, *Assiniboine*, *State Tax Comm* and *Chase*.

67. In *Chase v. McMasters* ("*Chase*") 573 F.2d 1011, 1016 (8th Cir. 1978), the court enforced an individual Indian's beneficial ownership of trust land acquired for her benefit under the IRA, stating: "The Secretary may purchase land for an individual Indian and hold title to it in trust for him...Section 465 lists gifts among the means by which the Secretary may acquire land, and it was amended to authorize acquisition of land in trust for individual Indians... See 78 Cong. Rec. 11126 (1934)... The land acquired may be located... without a reservation." *Chase*, at 1016. "The Act not only authorized the Secretary to acquire land for Indians, 25 U.S.C. 465, but continued the trust

status of restricted lands indefinitely, 25 U.S.C. 462..." *Chase*, at 1016.

68. "[I]t is now firmly established that the Indian title is equivalent to beneficial ownership." *In re Fredenberg*, 65 F.Supp.4, 6 (D. Wis. 1946). See also, *Choctaw & Chicasaw Nations v. Seitz*, 193 F.2d 456 (10th Cir. 1951), *cert. denied*, 343 U.S. 919 (1952); *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984); *Narragansett Tribe of Indians v. So. R.I. Land Dev. Corp.*, 418 F.Supp. 798 (D.R.I. 1976).

69. Therefore, the government's portion of the Indian cemetery was taken in trust for the individual half-blood Native American families then possessing and residing on the cemetery parcel, including Rosales and Toggery and their families, pursuant to 25 U.S.C. 465, as held in *Coast*, *Assiniboine Tribe*, *State Tax Comm., Chase*, and acknowledged in *Carcieri*, citing the *Opinions of the Solicitor*, Ex. H.

F. California Retains Concurrent Jurisdiction over the Jamul Indian Cemetery, and Finds Gambling on the Government's Portion of the Indian Cemetery Would be Detrimental to the Surrounding Community

70. The state of California retains full police power jurisdiction over the government's portion of the Jamul Indian Cemetery, beneficially owned by the individual half-blood Jamul Indians, just as any state does with many federal cemeteries, like Fort Rosecrans in San Diego or Arlington National Cemetery.[8] "Such [proprietorial] ownership and use without more do not withdraw the lands from the jurisdiction of the state." *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650 (1930).

71. The cemetery has always been privately owned; first within Mexico, then the Republic of California, then within the United States when acquired from Mexico by way of the Treaty of Guadalupe Hidalgo of 1848, 9 Stat. 926, and now within the State of California, since the United States ceded jurisdiction over all such private property acquired from Mexico to the State of California, when it was admitted to the Union. On September 9, 1850, when California was admitted to the Union, 9 Stats. 452 (1850), California entered the Union on an "equal footing" with, and with the same jurisdiction and regulatory authority over all private property, as all other States, per Article IV, Section 3 of the U.S. Constitution.

[8] See the Navy Jurisdictional Maps for San Diego, depicting federal ownership of Fort Rosecrans National Cemetery, in Haines, *Federal Enclave Law*, (Atlas 2011) at 266. Ex. Q.

72. Thereby, California received regulatory and police power jurisdiction over all public domain property not reserved to the United States, and all private property within the State, including the Indian cemetery in Jamul.

73. The Constitution places the authority to dispose of public land exclusively in the Congress and executive power to convey any interest in these lands must be traced to some Congressional delegation of its authority. *Sioux Tribe v. United States*, 316 U.S. 317, 326 (1942); *Donahue v. Butz*, 363 F.Supp. 1316, 1321 (N.D. Cal. 1973). Here, no portion of the cemetery was ever part of, reserved or withdrawn from, public domain lands by any act of Congress or delegation of its authority. Once public domain lands are conveyed to the State or into private ownership, the United States retains no regulatory authority over such lands. *Hawaii* v. *Office of Hawaiian Affairs, 556* U.S. 163, 176 (2009); *Kleppe v. New Mexico* 426 U.S. 529, 540 (1976). After public domain property is conveyed to the State, or into private ownership, the United States no longer has authority to acquire non-public domain lands, nor can they be restored to federal jurisdiction by a unilateral federal act that purports to change the nature of the original grant of jurisdiction to the State, without condemnation or consent of the State by a majority of its legislature. *Hawaii v. Office of Hawaiian Affairs,* 556 U.S. 163, 176 (2009), "Congress cannot, after statehood, reserve or convey. ...lands that have already been bestowed upon a state..." As confirmed in several recent Supreme Court decisions, including *Carcieri v. Salazar* and *Hawaii v. Office of Hawaiian Affairs*, and *City of Sherrill v. Oneida Indian Nation*, 544 U..S. 197 (2005), the federal government has had no authority to create a reservation or Indian lands on public domain lands within the exterior boundaries of the State of California, since well before the government's portion of the Indian cemetery was gifted to the U.S. in 1978.

74. Though the Federal government has the power under Article I, Section 8 of the U.S. Constitution to acquire land within a State: "To exercise exclusive legislation in all cases whatsoever,... over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings;" and to thereby acquire the "special maritime and territorial jurisdiction," under 18 U.S.C. 7, it may only do so "by consent of the legislature of the State in which the same shall be." "Without the

State's consent" the United States does not obtain the benefits of Art. I, § 8, cl. 17, its possession being simply that of an ordinary proprietor. *James v. Dravo Contracting Co.*, 302 U.S. 134, 141-142 (1937)." *Paul v. United States* 371, US 245, 264 (1963). Here, there is no evidence that California has ever consented to cede its concurrent jurisdiction over the government's portion of the Indian cemetery, as required by 40 U.S.C. 255 and Cal. Govt. C. 127.

75. Upon such land acquisitions by the Federal government as an ordinary proprietor, the United States does not have exclusive jurisdiction over the property. "The Constitution does not command that every vestige of the laws of the former sovereignty must vanish. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred. This assures that no area however small will be left without a developed legal system for private rights." *Paul v. United States*, 371, US 245, 264-65 (1963).

76. Hence, if an Indian reservation were to be lawfully created, unlike here where no reservation has been created, "an Indian reservation is considered part of the territory of the State." *Nevada v. Hicks,* 533 U.S. 353, 361-62 (2001). "It is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State....Such reservations are part of the State within which they lie..." *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650 (1930). This is the reason that lawfully created " Indian reservations, however, are not [exclusive] federal enclaves," and are a subset of partial federal enclaves where the State has never consented to cede its jurisdiction over the land to the United States. *Carcieri v. Norton* (1st Cir. 2005) 398 F.3d 22, 31-32. "State sovereignty does not end at a reservation's border." *Nevada v. Hicks,* 533 U.S. 353, 361 (2001), quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561(1832).

77. Therefore, when the State of California entered the Union the Jamul Indian cemetery was private property and remains within the concurrent jurisdiction of the State of California today. Moreover, the State of California has never ceded its concurrent jurisdiction over the cemetery. This is confirmed by the lack of any "notice of such acceptance" of the "cession of such jurisdiction, exclusive or partial," having been filed with the Governor of the State of California, as required by

40 U.S.C. 255, and the lack of any entry in the "index of record of documents with description of the lands over which the United States acquired jurisdiction," required by Cal. Govt. Code 127.

78. California's general consent to the acquisition of state lands by the United States is limited to lands lawfully purchased or condemned, as set out in Government Code §110, and does not apply to gifts, as made by the Daleys here. 25 U.S.C. 451. Thus, the portion of the cemetery owned by the U.S. remains within the concurrent jurisdiction of the State of California today. See for e.g., *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), "state laws may be applied unless such application would ...impair a right granted or reserved by federal law;" and *Acosta v. County of San Diego,* 126 Cal. App. 2d 455 (1954). Moreover, the Supreme Court has acknowledged that Congress' power to exercise control over Indian affairs, still has "constitutional limits" if its Indian legislation "interferes with the power or authority of any State." *United States v. Lara*, 541 U.S. 193, 205, (2004); *Gila River Indian Cmty. v. United States*, 2013 U.S. App. LEXIS 10056, *91, (9th Cir. 2013) J. Smith, dissenting.

79. Moreover, since the government's portion of the Indian cemetery was never conveyed to the JIV, any subsequent acquisition of the land by an I.R.A. tribe must comply with the after 1988 acquired provisions of IGRA in 25 U.S.C. 2719. "Therefore, while the Secretary of the Interior investigates whether gaming on the proposed trust land... 'would not be detrimental to the surrounding community,' the proper spokesperson for the land in question is necessarily a representative of the state where the land is located.""Unless and until the appropriate governor issues a concurrence, the Secretary of the Interior has no authority under 25 U.S.C. 2719(b)(1)(A) to take land into trust for the benefit of an Indian tribe for the purpose of the operation of a gaming establishment." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 367 F.3d 650, 656 (7th Cir. 2004); see also, *Confederated Tribes of Siletz Indians v. United States*, 841 F.Supp. 1479, 1486 (D. Ore. 1994).

80. Here, both California Governors, Davis and Schwarzenegger, have already determined that the proposed gambling establishment would be "detrimental to the surrounding community," and no subsequent governor has determined that it would not be detrimental to the surrounding community. As catalogued in former Governor Davis' July 17, 2001 letter, Ex. M, to the Acting

Superintendent of the BIA, and Governor Schwarzenegger's September 10, 2004, Ex. N, letter to Clayton Gregory, Pacific Regional Director of the BIA, their determination that such a gaming establishment would be detrimental to the surrounding community is also shared by the local government officials, including United States Representative Duncan Hunter, then California State Senator David G. Kelley, then State Assemblyman, now Senator Jay La Suer, the County of San Diego Board of Supervisors, Otay Water District, the Jamul/Dulzura Planning Group, the Sierra Club, the Endangered Habitats League, the Back Country Coalition, not to mention several thousand residents of Jamul. See, Ex. AA.

81. As both Governors Davis and Schwarzenegger inescapably concluded: the "proposal is inconsistent with the Multiple Species Conservation Plan, established by the United States Fish and Wildlife Service, the State Department of Fish and Game and the County of San Diego, restrictions on development and presents a serious threat to the viability of a significant portion of the State's recently acquired ecological reserve." "...here, there are significant potentially unmitigable adverse impacts on sensitive State resources..." "...The Bureau's own rules, likewise, compel rejection of this application. In this case, the ...proposed use represents a paradigm for the kind of land use conflicts which the Bureau should not permit to occur..." "...it unnecessarily threatens to degrade significant State environmental resources and is thus inimical to the public health and welfare. We believe that a fair balancing of ...interests in this instance requires that the Bureau deny the... application at this time." Exs. M & N.

82. Therefore, since the government's portion of the Indian cemetery has never been taken into trust for any tribe, nor transferred to any tribe, any subsequent acquisition by the United States, through purchase or condemnation of the property, in trust for a tribe, will be after October 17, 1988, and does not have the state's consent to cede jurisdiction to the United States, the land still will not qualify for gambling under IGRA, since, as noted above, the Governor has not concurred in a Secretarial determination that "a gaming establishment on newly acquired lands would not be detrimental to the surrounding community." 25 U.S.C. 2719(b)(1)(A).

83. California's trust law and concurrent jurisdiction also govern the enforcement of Rosales and Toggery's beneficial interest in the grant deed for the government's portion of the Indian cemetery.

> 84. The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a ...disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated...The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal government was created, and would seriously embarrass the landed interests of the State." *United States v. Fox*, 94 U.S. 315, 320-21 (1877).

85. "The *Fox* case is only one of a long line of cases which have consistently held that part of the residue of sovereignty retained by the states, a residue insured by the Tenth Amendment, is the power to determine...who may be made beneficiaries," of a deed to the United States. *United States v. Burnison*, 339 U.S. 87, 91-92 (1950).

86. Hence, Rosales and Toggery's beneficial interest in the government's portion of the Indian cemetery remains subject to California's trust and estates law, particularly since it is undisputed that the Secretary of the Interior has yet to approve the acquisition of the property in trust for the JIV, pursuant to the government's land acquisition regulations. 25 C.F.R. 151.3. which provide: "No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary."

87. Moreover, since the Indian cemetery remains within the concurrent jurisdiction of the State of California today, and was never reserved from the public or private domain, California retains State and local police power over the cemetery pursuant to the 10th Amendment of the U.S. Constitution and Pub. Law 280, 18 U.S.C. 1162 and 28 U.S.C. 1360.

88. Criminal conduct by Indians which causes injury remains within California jurisdiction, 18 U.S.C. 1162, 28 U.S.C. 1360, and will be deemed the proximate cause of an injury, thereby superseding any prior negligence which might otherwise be deemed a contributing cause. *Koepke v. Loo,* 18 Cal.App.4th 1444, 1449 (1993). This is the same criminal jurisdiction California has if one of the columbariums at Fort Rosecrans Nat'l Cemetery was vandalized and disinterred a veteran's remains from its niche.

89. Thus, the Cal. Pub. Res., Health & Safety Codes and CEQA, concurrently govern the use of the Jamul Indian cemetery, along with the federal NAGPRA, 25 U.S.C. 3001 et seq., which defines

the portion of the cemetery in which the U.S. holds title, as "Federal lands other than tribal lands which are controlled or owned by the United States." 25 U.S.C. 3001(5) and 43 C.F.R. 10.2(f)(1) and 10.4(d).

90. Furthermore, federal regulations, 25 C.F.R. 1.4(b), and the DOI July 2, 1965 Secretarial Order, 30 F.R. 8722, adopted and made applicable "all of the laws, ordinances, codes, resolutions, rules or other regulations of the State of California, now existing or as they may be amended or enacted in the future, limiting, zoning, or otherwise governing, regulating or controlling the use or development of any real or personal property, including water rights, leased from or held or used under agreement with and belonging to any Indian...that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States and located within the State of California."

G. Defendants' Desecration of Rosales & Toggery's Families' Human Remains and Funerary Objects

91. More than 20 eyewitnesses have testified to Rosales and Toggery's families' interment on the cemetery property, and the undeniable evidence that the Defendants have illegally disinterred and dumped Rosales and Toggery's families' human remains and funerary objects on a State highway project at the juncture of State Routes 11-125-905 on the Mexican border, in declarations on file in *Rosales et al. v. CalTrans et al.,* San Diego Superior Court Case No. 2014-00010222.

92. Before any excavation of the cemetery parcel, Rosales and Toggery continuously and repeatedly put all persons, including the Defendants, the California Attorney General, the Native American Heritage Commission, the San Diego County Coroner, the California Victim Compensation and Government Claims Board, U.S. District Courts for the District of Columbia and So. California, and the San Diego Superior Court, on written notice of:

(A) Their ownership and control, as lineal descendants, of their deceased Native American family members' human remains, and the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in P.R.C. 5097.9-5097.99, NAGPRA, 25 U.S.C. 3002, and its regulations, 43 C.F.R. 10.1-10.17, that for more than 100 years have been inhumed, interred and deposited in burial sites below, on and above, the Indian cemetery on which they lived; and

(B) Their preference, as lineal descendants, to leave their families' human remains and funerary objects in place, as required by P.R.C. 5097.98, the CEQA Guidelines, 14 Cal. Code Regs. 15126.4 (b)(3), and NAGPRA, 25 U.S.C. 3002, and its regulations at 43 C.F.R. 10.1-10.17.

93. On March 10, 2014, the California Victim Compensation and Government Claims Board received Plaintiffs claims, and on March 11, 2014, notified Plaintiffs that the Board found: "Based on its review of [Plaintiffs'] claim, Board staff believes that the court system is the appropriate means for resolution of these claims, because the issues presented are complex and outside the scope of analysis and interpretation typically undertaken by the Board...The Board's rejection of your claim will allow you to initiate litigation should you wish to pursue this matter further."

94. Such notice has been published in the records of the Catholic Diocese, newspapers of general circulation, letters to CalTrans, the records and files of the San Diego Superior Court and in the Public Access to Court Electronic Records. In addition, the recorded declaration by the Coronado Beach Company and the Catholic Diocese provided constructive notice to all persons of the dedication of the cemetery property to cemetery purposes, pursuant to H.S.C. 8551-8558, which dedication shall not be affected by any alienation of the property or nonuse, except as provided by H.S.C. 8550-8561, which has not occurred here.

(1) California Health & Safety, Public Resources and Penal Code Violations

95. Despite such express notice, Defendants commenced operations on February 10, 2014, and conducted grading, operation of heavy equipment, moving and hauling dirt and/or gravel and other construction activities, excavated and removed Rosales and Toggery's families' human remains and funerary objects, causing them to be illegally dug up and deposited on state property owned and controlled by CalTrans in violation of the following California statutes:

Health and Safety Code, "H.S.C.," §§:

> 7050.5 & 7052, both provide that mutilation, disinterment, and wrongful removal of human remains is a **felony**, and prohibit further excavation or disturbance of the site or any nearby area reasonably suspected to overlie adjacent remains until the lineal descendants preference for "preservation of the Native American human remains and associated items in place," has "been made to the person responsible for the excavation, in the manner provided in Section 5097.98 of the Public Resources Code,"

7054, providing that disposal of human remains in any place except a cemetery is a misdemeanor,

7054.6, prohibiting removal of cremated human remains kept in or on the property owned and occupied by anyone who is a person in control of the disposition of remains without their consent, and without the authority of a permit for disposition granted under Section 103060,

7054.7, prohibiting commingling remains without express written consent of the lineal descendants,

7055, prohibits removal of remains out of the district in which the death occurred without a permit,

7500, prohibiting removal of remains without an order of the health dept. or superior court,

8011, without applying state's **repatriation** policy with NAGPRA,

8015-16, requiring upon demand the agency **shall repatriate** human remains,

Public Resources Code, "P.R.C.":

5097.5 prohibiting excavation of historic burial grounds,

5097.7 providing for forfeiture of vehicle and equipment used to excavate historic burial grounds,

5097.9 prohibiting public agency from interfering with Plaintiffs' free exercise of religion, and damage to a sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property,[9]

5097.94 mandatorily providing that **the court shall issue an injunction** to prevent irreparable damage to and assure access to a sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, unless there is clear and convincing evidence, that the public interest and necessity require otherwise,

[9] Here, by virtue of the Plaintiffs' families' burials and the landowners' acquiescence for more than 100 years, the Church, the State and the federal government are estopped to deny that a Native American sanctified cemetery, place of worship, religious and ceremonial site, and sacred shrine, as defined by P.R.C. 5097.9, and H.S.C. 7003-4, and 8558, 8560, 8580, have been located at the cemetery, now on State property partially owned by the federal government as a private proprietor, and within the concurrent jurisdiction of both California and the U.S.

5097.94(k) providing for **mediation**, **upon application of either of the parties**, disputes arising between landowners and known descendents relating to the treatment and disposition of Native American human burials, skeletal remains, and items associated with Native American burials. The agreements shall provide protection to Native American human burials and skeletal remains from vandalism and inadvertent destruction and provide for sensitive treatment and disposition of Native American burials, skeletal remains, and associated grave goods consistent with the planned use of, or the approved project on, the land.

5097.97 providing for investigation of any Native American's claim that a sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property has been irreparably damaged,

5097.98 providing upon the discovery of Native American human remains, which may be an **inhumation or cremation and in any state of decomposition** or skeletal completeness, and any items associated with the human remains, **the landowner shall ensure that the immediate vicinity** according to generally accepted cultural or archaeological standards or practices where the Native American human remains are located, **is not damaged or disturbed** by further development activity and shall confer with the most likely descendants as to their preference to **preserve the remains "in place,"** and that **any items associated** with the human remains that are placed or buried with the Native American human remains are **to be treated in the same manner as the remains**.

5097.98(e)(f) Where the parties are unable to agree on the appropriate treatment measures, the human remains and items associated and buried with Native American human remains **shall be reinterred** with appropriate dignity...**in a location not subject to further and future subsurface disturbance**.

5097.99 providing that **possession of Native American human remains without an agreement** treating or disposing, with appropriate dignity, of the human remains and any items associated with Native American burials is a **felony**,

5097.991 providing it is the policy of the state that Native American remains and associated grave artifacts shall be **repatriated**,

5097.993 providing that anyone unlawfully excavating upon, removing, destroying, injuring, or defacing a Native American burial ground on public or private land is guilty of a misdemeanor and subject to a fine of $50,000 for each violation;

and Penal Code section 487, grand theft.

96. No permit has been posted by Defendants to excavate soil from the cemetery and deposit it on state property owned and controlled by CalTrans; nor have they notified the San Diego County coroner of their intent to disturb human remains on the site and any nearby area reasonably suspected to overlie adjacent human remains, as required by H.S.C. 7050.5, and ARPA, 16 U.S.C. 470aa et

seq., and 43 C.F.R. 10.3(b)(1).

97. No permit required by H.S.C. 7500 et seq., has been posted at the cemetery or the state property owned and controlled by CalTrans on which excavated soil from the cemetery has been deposited, for anyone to grade, excavate, damage, disinter, remove or otherwise alter or deface, or attempt to grade, excavate, damage, disinter, remove or otherwise alter or deface, human remains or funerary objects from the cemetery. Nor can any such permit be granted, without the consent of the closest lineal descendants owning and controlling the human remains and funerary objects, which consent Rosales and Toggery, who are the owners of their families' human remains and funerary objects, have not granted.

98. Furthermore, no permit required by Title 25 U.S.C. 3002(c) and 16 U.S.C. 470cc has been posted by any federal land manager on the property for anyone to grade or excavate the Indian cemetery parcel upon which a casino is illegally being built. Nor can any such permit be granted by any federal land manager under 16 U.S.C. 470cc, without the consent of all of the Indian beneficial owners, which consent Rosales and Toggery have not granted.

99. Defendants also failed to obtain the appropriate permits from the San Diego Coroner and/or obtain the necessary judgment from a Superior Court authorizing the removal and disposition of Rosales and Toggery's families' remains, and any disuse of the government's portion of the Indian cemetery, required by H.S.C. 7050.5, 7500 and 8580, and P.R.C. 5097.98 and 5097.99.

100. Furthermore, Defendants' knowing mutilation, disinterment, wanton disturbance, excavation and willful removal of such human remains by grading, operation of heavy equipment, moving dirt and/or gravel, and other construction activities, and dumping of the excavated soils from the cemetery on state property owned and controlled by CalTrans, without authority of law is a crime, under H.S.C. 7050.5, and any person willfully mutilating or disinterring any remains known to be human without authority of law is guilty of a felony, under H.S.C. 7052, as is anyone obtaining or possessing, or who removes with malice or wantonness, and without authority of law, any Native American artifacts or human remains from a Native American grave or cairn, pursuant to P.R.C. 5097.99, and any person who deposits or disposes of any human remains in any place, except in a

cemetery, is guilty of a misdemeanor, pursuant to H.S.C. 7054.

101. P.R.C. 5097.98, further provides that upon notice and recognition of the presence of Native American human remains, which may be an inhumation or cremation, and in any state of decomposition or skeletal completeness, the landowner is obligated to ensure that the immediate vicinity, according to generally accepted cultural or archaeological standards or practices where the Native American human remains are located, is not damaged or disturbed by further development activity, so long as the lineal descendants' preferences are to preserve the Native American human remains and associated items in place, and that any items associated with the human remains that are placed or buried with the Native American human remains are to be treated in the same manner as the remains.

102. Here, Rosales and Toggery's preferences are to preserve their families' Native American human remains and associated cultural items "in place," as the lineal descendants' with ownership and control of their predecessors' human remains and associated cultural items, pursuant to NAGPRA, 25 U.S.C. 3002, 43 C.F.R. 10.1-10.17, and the directives of the National Center for Cultural Resources and the National NAGPRA Program, Ex. W, P.R.C. 5097-5097.994, H.S.C. 7100, and CEQA and its *Guidelines*. Cal. Code Regs., tit. 14, § 15000 et seq., developed by the Office of Planning and Research and adopted by the Resources Agency. P.R.C. 21083; *id.*, former 21087. "[C]ourts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA." *Laurel Heights Improvement Assn. v. Regents of University of California,* 47 Cal.3d 376, 391, fn.2 (1988).

103. The Defendants have violated the CEQA Guidelines and the directives of the National Center for Cultural Resources and the National NAGPRA Program, as published on its website, http://www.cr.nps.gov/nagpra/, copies of which are attached as Exhibit W, and Cal. Pub. Res. Code 5097.98, as amended September 30, 2006, since the U.S. is the undisputed title owner of the land where the Native American human remains (which may be an inhumation or cremation and in any state of decomposition or skeletal completeness) were discovered, identified, excavated and removed, and since they have failed to stop work and ensure that the immediate vicinity, according to generally accepted cultural or archaeological standards or practices where the Native American

human remains are located, is not damaged or disturbed by further development activity, where, as here, the lineal descendants' preferences are to preserve the Native American human remains and any items associated with the human remains that are placed or buried with the Native American human remains, in place.

104. The California Environmental Quality Act Guidelines also provide that preservation in place is the preferred manner to mitigate impacts on historic archaeological resources, including human remains and their associated funerary objects, since preservation in place maintains the relationship between artifacts and the archaeological context, and avoids conflict with religious or cultural values of groups associated with the site. 14 Cal. Code Regs. 15126.4(b)(3). Preservation in place is accomplished by planning construction to avoid archaeological sites and deeding the site into a permanent conservation easement. 14 Cal. Code Regs. 15126.4(b)(3)(B)1 and 4; see also 14 Cal. Code Regs. 15064.5(e).

(2) NAGPRA Violations

105. The Defendants have also violated NAGPRA, 25 U.S.C. 3001 et seq., and its regulations, 43 C.F.R. 10.1-17, by failing to cease all forms of construction activity in connection with an on-going activity, where there has been a discovery, identification, excavation and removal of Native American human remains and funerary objects, as here, without a prior written plan of action on Federal lands. The Defendants have also violated the statute and its regulations by failing to cease all activity in the area of the identification of the human remains, failing to make reasonable efforts to protect the items discovered before resuming such activity, and failing to provide written notice to the lineal descendants, consultation with known lineal descendants, and a written plan of action for disposition and repatriation, including the kinds of objects considered cultural items; the planned treatment, care, and handling, including traditional treatment, of human remains and other cultural items; the place and manner of delivery of Plaintiffs' families' human remains and funerary objects, as required by 25 U.S.C. 3002(d) and 43 C.F.R. 10.2(f), 10.2(g)(4), 10.4(b), 10.4(c), 10.4(d) and (e), 10.5, 10.6 and 10.10.

106. Here, where "the discovery [of human remains] occurred in connection with an activity,

including (but not limited to) construction, mining, logging, and agriculture," the Defendants have failed to "cease the activity in the areas of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection," in violation of 25 U.S.C. 3002(d)(1). Moreover, the work may not resume, until the remains and funerary objects are properly protected as required by section 43 C.F.R. 10.4(d) and 10.6, where, as here, the Defendants have failed to secure and protect the human remains and funerary objects, including stabilizing and covering them, in the first place. *San Carlos Apache Tribe v. U.S.*, 272 F. Supp. 2d 860, 888-90 (D. Ariz. 2003), and *Yankton Sioux Tribe v. U. S.(Army Corps of Engineers)*(*Yankton Sioux I*), 83 F.Supp.2d 1047, 1057 (D. S.D. 2000), *Yankton Sioux II*, 209 F. Supp.2d 1008, 1021-22 (D.S.D. 2002), and *Yankton Sioux III*, 258 F. Supp.2d 1027, 1032-5 (D.S.D. 2003).

> 107. The [Army] Corps [of Engineers] was required to comply with the notice, certification, and consultation provisions of the NAGPRA regarding the discovery of the cemetery and its contents...As the federal agency responsible for managing the site, it must 'further secure and protect the inadvertently discovered human remains, including where necessary, stabilizing and covering.' *Yankton Sioux I,* at 1057.

108. In the *Yankton Souix* trilogy, the State of South Dakota and its contractors were developing 100 camping spots, new roads, comfort stations, parking lots and dumping stations at the North Point Public Recreation Area at Lake Francis Case.

> 109. The Court notes that all persons conducting construction activities at North Point must comply with NAGPRA as to *each* inadvertent discovery of Native American human remains [and] funerary objects...In addition, *each* inadvertent discovery of Native American cultural items will require compliance with the protection, notification, certification and consultation duties imposed by NAGPRA and its implementing regulations. *Yankton Sioux II*, 209 F Supp.2d 1008, 1025-26.

110. Here, Defendants knew that Rosales and Toggery's families' human remains and funerary objects were being unlawfully and intentionally excavated and removed from the cemetery parcel, and the Defendants failed to: (a) obtain the required Archaeological Resources Protection Act (ARPA) permit from the Deputy Commissioner of Indian Affairs at the BIA, as required by 43 C.F.R. 10.3(b) and 10.4(d)(1)(v), *San Carlos Apache Tribe v. U.S.* 272 F. Supp. 2d 860, 888-90, citing *Yankton Sioux I* 83 F. Supp.2d at 1057; (b) provide written notice to, consult with or, obtain

the consent of, the lineal descendants to the Federal agency's proposed treatment of the human remains, funerary objects, sacred objects, or objects of cultural patrimony to be excavated, and the proposed disposition of any human remains, funerary objects, sacred objects, or objects of cultural patrimony, and failed to provide a list of all lineal descendants that are being, or have been, consulted regarding the particular human remains, funerary objects, sacred objects, or objects of cultural patrimony, pursuant to 43 C.F.R. 10.5; (c) prepare and provide a written plan of action to the lineal descendants that establishes custody, treatment, care, and handling of human remains and funerary objects, and disposition of the remains and objects consistent with their custody as required by 43 C.F.R. 10.5 and 10.6; and (d) prove the consultation or consent was shown to the Federal agency official responsible for the issuance of the required permit, in violation of 43 C.F.R. 10.3(b), 10.4(d)(1)(v) and 10.4(e)(iii), and 43 C.F.R. 10.4(d)(1)(vi) and 10.4(e)(iv).[10]

111. Here, the Defendants further failed to comply with 43 C.F.R. 10.4(c), which provides, where the federal official is given notice of the Native American human remains and funerary objects, for which no plan of action was developed prior to the discovery, in connection with an on-going activity on Federal lands, the person in addition to providing the notice required by 25 U.S.C. 3002(d)(1), must stop the activity in the area and make a reasonable effort to protect the human remains, funerary objects, sacred objects, or objects of cultural patrimony.

112. The Defendants further failed to comply with 43 C.F.R. 10.4(d)(1), and (ii) and (e)(1) and (ii), which provides, as soon as possible, but no later than three days after receipt of the written confirmation of notification of the Native American human remains by the federal official, for which no plan of action was developed prior to the notification, the responsible Federal agency official must take immediate steps, if necessary, to further secure and protect the human remains, funerary

[10] *Yankton Sioux II & III*' injunctions were based upon 43 C.F.R.: "10.4 governing inadvertent discoveries explicitly incorporates the requirements of 10.3(b) [which requires an ARPA permit, notification of, and consultation with, lineal descendants and a written plan for disposition and repatriation] if the inadvertently discovered remains must be excavated or removed. See 43 C.F.R. 10.4(b)(1)(v);" 209 F. Supp.2d 1008, 1021. *Yankton Sioux II* reserved judgment for a permanent injunction, and a continuing injunction against construction was granted as to the site where the human remains were interred in *Yankton Sioux III*, "the Court will order that no further excavation, building or other construction activities be conducted in Area A..." 258 F. Supp.2d at 1034.

objects, sacred objects, or objects of cultural patrimony, including, as appropriate, stabilization or covering on Federal lands. See, *San Carlos Apache Tribe v. U.S.* 272 F. Supp. 2d 860, 888-9 (D. Ariz. 2003).

113. None of this was done. No federal agency official has taken any steps, let alone immediate steps, to protect Rosales and Toggery's families' human remains and funerary objects. The Defendants have further failed to provide written notice and a plan of action that documents the traditional treatment of human remains and other cultural items; the planned treatment, care, and handling, including the nature of reports to be prepared, as required by 43 C.F.R. 10.3(b)(1) for a permit to be issued by the Bureau of Indian Affairs under 16 U.S.C. 470aa et seq.; and the planned disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony as required by 43 C.F.R. 10.6. The "...lack of [written] notice may [alone] support the issuance of a permanent injunction regarding the notice requirements." *Yankton Sioux II* , 209 F. Supp.2d 1008, 1020 (D.S.D. 2002).[11]

114. The Defendants failed to initiate the consultation with the lineal descendants required in 43 C.F.R. 10.4(d)(iv). As noted in *Yankton Sioux I* at 1055-58, no one is allowed to conduct construction activity in the area of a discovery, identification, excavation and removal of human remains, until the federal agency "has consulted with possible lineal descendants and other tribes whose members might be buried at the site, and used that consultation to develop a written plan of action. See 43 C.F.R. 10.3(b); 43 C.F.R.10.4(d)(1)(v)."

115. The Defendants further failed to comply with 43 C.F.R. 10.6, by failing to transfer physical custody of the discovered human remains, funerary objects, sacred objects, or objects of cultural

[11] See for e.g., the May 1, 2003 Draft Agreement for Consultation, Treatment and Disposition of Human Remains and Cultural Items that may be Discovered Inadvertently During Planned Activities at the Statute of Liberty between DOI, National Park Service and the Delaware Nation and the Stockbridge-Munsee Community of Wisconsin, at 2-3, which states: "The Park and the Tribes agree that the preferred treatment of inadvertently discovered human remains and cultural items is to leave the human remains and cultural items *in-situ* and protect them from further disturbance...If the remains and cultural items are left *in-situ*, no disposition takes place and the requirements of 43 C.F.R. 10.3-10.6 will have been fulfilled. The specific locations of discovery shall be withheld from disclosure (with the exception of local law enforcement officials and tribal officials as described above) and protected to the fullest extent allowed by federal law." Ex. T.

patrimony to Rosales and Toggery as the lineal descendants, following appropriate procedures, which must respect traditional customs and practices, after thirty days notice to the lineal descendants. They further failed to publish the required notices two times at least a week apart, of the proposed disposition in a newspaper of general circulation in the area in which the human remains, funerary objects, sacred objects, or objects of cultural patrimony were discovered, and failed to solicit further claims to custody, prior to disposition. The Federal agency official then failed to send a copy of the notice and information on when and in what newspaper(s) the notice was published to the Manager of the National NAGPRA Program.

116. The federal Defendants have also violated the directives of the National Center for Cultural Resources and the National NAGPRA Program, as published on its website,[12] along with P.R.C. 5097.98, since the U.S. is the undisputed title owner of the land where the Native American human remains (which may be an inhumation or cremation and in any state of decomposition or skeletal completeness) were interred, and since they have failed to stop work and ensure that the immediate vicinity, according to generally accepted cultural or archaeological standards or practices where the Native American human remains are located, is not damaged or disturbed by further development activity, where, as here, the lineal descendants' preferences are to preserve the Native American human remains and any items associated with the human remains that are placed or buried with the Native American human remains, in place.[13]

117. The Defendants further failed to comply with 43 C.F.R. 10.10, by failing to repatriate Rosales and Toggery's lineal descendants' human remains and associated funerary objects as they have requested. The repatriation of human remains, funerary objects, sacred objects, or objects of cultural patrimony must be accomplished by the Federal agency in consultation with the requesting lineal

[12] http://www.nps.gov/nagpra/MANDATES/INDEX.HTM; see for e.g.: http://www.nps.gov/nagpra/TRAINING/SubpartB_Overview.pdf; http://www.nps.gov/nagpra/TRAINING/Discovery_Tribal_Lands.pdf. Ex. W.

[13] See for e.g., the May 1, 2003 Draft Agreement for Consultation, Treatment and Disposition of Human Remains and Cultural Items that may be Discovered Inadvertently During Planned Activities at the Statute of Liberty between DOI, National Park Service, the Delaware Nation and the Stockbridge-Munsee Community of Wisconsin, at 2-3, maintaining the lineal descendants' preferences that the human remains and associated items remain in place. Ex. V.

descendants, as appropriate, to determine the place and manner of the repatriation. 43 C.F.R. 10.10. None of which has been done here.[14]

> 118. ...[T]he regulations' concern for the traditional treatment of Native American human remains and funerary objects, see 43 C.F.R. 10.5(e)(7), and (g), suggests that the [Army] Corps should be sensitive to any desire of the...members to perform the actual recovery of the remains and the ...requests for treating the remains with dignity until final custody of the remains can be determined. *Yankton Sioux I* at 1059.

> 119. The process necessary for legally and culturally proper reburial should be continuing even as this lawsuit progresses, and no further excavation, building or other construction activities [shall] be conducted...until...the human remains and funerary objects inadvertently discovered...are properly buried according to law and the customs of the peoples culturally affiliated with those remains and objects...The other issues raised in this litigation can be decided after the human remains and funerary objects have been properly reburied. *Yankton Sioux II* at 1025.

120. The government's fiduciary duty and general trust responsibility over Native Americans compels the enforcement of the NAGPRA regulations against any third parties who are mutilating, desecrating, disinterring, excavating and removing Rosales and Toggery's families' human remains and funerary objects, and further compels restraining such third parties from excavation, operation of heavy equipment, movement and hauling of dirt and gravel, or any other construction activities on the site of all burial grounds, human remains, and associated funerary objects, until the remains and funerary objects are properly protected as required by NAGPRA and its regulations. *Yankton Sioux I,* at 1057, *Yankton Sioux II*, at 1021-22, and *Yankton Sioux III*, at 1032-5; *San Carlos Apache Tribe v. U.S.* 272 F. Supp. 2d 860, 888-90 (D. Ariz. 2003).

121. The government's trust responsibility over Native Americans ensures that federal law protects both the majority and minority of a half-blood Indian community's members. "The Secretary of the Interior is charged not only with the duty to protect the rights of any tribe, but also the rights of individual members. And the duty to protect these rights is the same whether the infringement is by nonmembers or by members of the tribe." *Seminole Nation of Okla. v. Norton*, 223 F. Supp.2d

[14] See, the detailed descriptions required for the human remains and cultural items being repatriated in the Notice of Intent to Repatriate Cultural Items in the Possession of the San Diego Museum of Man, published in 64 Fed. Reg. 56,219 (October 18, 1999), 69 Fed. Reg. 4315 (January 29, 2004), 69 Fed. Reg. 4316 (January 29, 2004), at Ex. X. Currently, the National NAGPRA Program of the National Park Service has published 50,518 such notices of repatriated human remains and 1,185,948 repatriated associated funerary objects, since NAGPRA was adopted in 1990. http://www.nps.gov/nagpra/FAQ/INDEX.HTM#Discovery.

122, 137-38, 146-47 (D.D.C. 2002); *Milam v. United States*, 10 Indian Law Reporter ("ILR") 3013, 3017 (D.D.C. Dec. 23, 1982).[15] The government is not allowed "to be guided by the results it favors in its relationship with Indian tribes..." *Seminole* at 137-38, 146-47; *Milam*, at 3017. See also, *Thomas v. United States*, 141 F. Supp.2d 1185, 1203 (W.D. Wisc. 2001).

122. In discharging this trust duty, federal courts hold the United States to the highest fiduciary standard to take "all appropriate measures for protecting" individual Indian interests. *U.S. v. Creek Nation,* 295 U.S. 103, 109-10 (1935); *Osage Tribe of Indians of Okla. v. U.S.*, No. 99-550 L, (Ct. Fed. Cl. 2006), quoting *Coast Indian Cmty. v. U.S.*, 550 F2d 639, 652 (Ct. Cl. 1977)("the United States must be held to the 'most exacting fiduciary standards' in its relationship with the Indian beneficiaries." "The 'standard of duty for the United States...is not mere 'reasonableness' but the highest fiduciary standards.'" *Minn. Chippewa Tribe v. U.S.*, 14 Cl. Ct. 116, 130 (1987); *U.S. v. Mason*, 412 U.S. 391, 398 (1973); *Duncan v. U.S.*, 667 F.2d 36, 45 (Fed. Ct. Cl. 1981)(citing *Coast, supra*).

(3) Plaintiffs' Continuing Irreparable Damage

123. Defendants' knowing and wilful grading, excavation, demolition, operation of heavy equipment, moving dirt and/or gravel, and other construction activities, have been mutilating, disinterring, wantonly disturbing, intentionally excavating, willfully removing Rosales & Toggery's families' human remains and funerary objects, and dumping them on state property owned and controlled by CalTrans, in breach of their duty of care, have thereby caused, and will continue to cause, unless enjoined, severe and irreparable physical and bodily injury, including severe emotional distress and personal injury damages to Rosales and Toggery and their families' human remains, along with the items associated therewith, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in, and

[15] Thus here, where both the propriety of non-tribal third parties efforts to co-opt an Indian community's affairs and "the acts of federal officials in approving" such an action," are in question, the matter is not insulated from federal court review. *Milam*, at 3015, citing *Harjo v. Kleppe*, 420 F. Supp. 1110, 1117 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978); *U.S. v. Pawnee Business Council*, 382 F. Supp. 54, 59 (N.D. Okla 1974). "As trustee, the United States is charged with the responsibility of safeguarding, from both external and internal threats...the political rights of Indians." *Milam* at 3015.

prohibited by, H.S.C. §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, 8011, 8015-16, P.R.C. 5097.9-5097.99, Penal Code 487, NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, and the general trust responsibility of the federal Defendants over Indians, in an amount in excess of $4 million, subject to proof at trial.

124. Defendants' knowing and wilful grading, excavation, demolition, operation of heavy equipment, moving dirt and/or gravel, and other construction activities, have been mutilating, disinterring, wantonly disturbing, intentionally excavating, and willfully removing Rosales & Toggery's families' human remains and funerary objects, and dumping them on state property owned and controlled by CalTrans, in breach of their duty of care, has also caused and will continue to cause, unless enjoined, irreparable damage to, and interference with, the Plaintiffs' free expression and exercise of Native American religion as provided in the United States Constitution and the California Constitution, and has caused and shall continue to cause, unless enjoined, severe and irreparable damage to the Plaintiffs' Native American sanctified cemetery, place of worship, religious or ceremonial site, and sacred shrines located on said parcels, in an amount in excess of $4 million dollars, subject to further proof at trial.

125. Such acts will also unduly interfere with the Plaintiffs' civil rights to due process and equal protection of the laws. Plaintiffs will be greatly and irreparably damaged by reason of Defendants' infringement and violation of these civil rights, and unless Defendants are enjoined by this court, said acts will further violate Plaintiffs' civil rights, and further irreparably harm the Plaintiffs.

126. Defendants' conduct has created what the California Supreme Court describes as "liability for the serious emotional distress caused by such egregious, but clandestine, misconduct," which caused "Plaintiffs to suffer physical injury, shock, outrage, extreme anxiety, worry, mortification, embarrassment, humiliation, distress, grief and sorrow." *Christensen v. Sup. Ct.* (1991) 54 Cal.3d 868, 887.

127. These "statutes governing the disposition of human remains exist not only to ensure removal of dead bodies and protect public health, but also to prevent invasion of the religious, moral, and esthetic sensibilities of the survivors. These laws were enacted to prevent the type of harm alleged

here to the statutory rights holders, and create a duty to those persons....If, under the circumstances, [one Defendant] should have foreseen that the [other defendants] would violate the law, then its conduct may be found to be negligent per se." These statutes "reflect a policy of respecting the religious, ethical, and emotional concerns of close relatives and others having an interest in assuring that the disposition of human remains is accomplished in a dignified and respectful manner." "A policy of respecting religious beliefs with regard to the disposition of human remains is manifest." *Christensen v. Sup. Ct.* (1991) 54 Cal.3d 868, 893-94, 896, 897.

128. "Similar recognition that the sensibilities of all survivors merit protection is found in...[H.S.C.] Section 7050.5 [which] prohibits desecration of human buried remains, and makes special provision for proper disposition of Native American remains discovered during an excavation. The Legislature's findings include express recognition of Native American 'concerns regarding the need for sensitive treatment and disposition' of such remains. (Stats. 1982, ch. 1492, §1. Subd. (2) p. 5778)." *Christensen v. Sup. Ct.* (1991) 54 Cal.3d 868, 897.

129. Breach of these statutory duties "cause[s] mental anguish to the decedent's bereaved relations...in their most difficult and delicate moments...[t]he exhibition of callousness or indifference, the offer of insult and indignity, can of course...visit agony akin to torture on the living....The tenderest feelings of the human heart center around the remains of the dead." *Christensen* at 895, citing *Allen v. Jones*, 104 Cal.App.3d 207, 211 (1980).[16]

(4) Plaintiffs' Irreparable Damage Will Continue Unless Enjoined

130. To prevent such wrongful conduct of the defendants as herein alleged, Plaintiffs are entitled to a temporary, preliminary and permanent injunction to prevent great and irreparable injury resulting from the infringement and violation of these personal and civil rights, from the likelihood that damages cannot properly compensate Plaintiffs for such irreparable personal harm, and that

[16] See for e.g., The Inter-Tribal Council of the Five Civilized Tribes of the Chickasaw, Choctaw, Cherokee, Muscogee (Creek) and Seminole Nations, representing 750,000 blood descendants condemning the Poarch Creek Band of Creek Indians' desecration of the Hickory burial ground, and the former Vice Chair of the Okla. Indian Affairs Comm., Dan Jones,' "You'll Mock Death But Once," *Indian Country Today*, August 20, 2012. Exs. S and T.

Defendants will be unable to respond in damages, and from the difficulty or impossibility to ascertain the exact amount of personal bodily injury and personal property damage Plaintiffs have sustained, and will in the future sustain. These ongoing and continuing injuries sustained by Plaintiffs cannot be fully compensated in damages and Plaintiffs are without an adequate remedy at law without the imposition of the requested equitable injunctive relief.

131. In *Yankton Sioux II and III*, the Courts granted both a preliminary and permanent injunction to maintain the status quo, which included "that the Court order defendants to cease all construction activity at location A [the site of the human remains]," based upon: (1) the threat of irreparable harm to the plaintiffs' human remains and funerary objects from construction activities at the site of their discovery; (2) the balance of harm tipping in favor of the plaintiffs given the inherently sensitive nature of the human remains and funerary objects, and the minimal harm to the third party State contractors, and the fact that there could be no harm to the Federal defendants since they were already compelled to comply with NAGPRA; (3) the fact that it was probable that plaintiffs would prevail "on at least some of their NAGPRA claims," since, as here, the government was wrong to assert that it need not comply with the requirements of 10.3(b) with regard to discoveries of human remains, which ultimately supported a permanent injunction restraining construction at the site of the human remains; and (4) the public interest, since Congress directed the protection of such Native American cultural items in NAGPRA, given the plaintiffs' beliefs about how disturbance of the families' remains affects plaintiffs' lives. 209 F. Supp.2d 1008, 1022-24, and 258 F. Supp.2d 1027, 1032-34.

132. See also, *Center for Biological Diversity v. Dept. of Fish & Wildlife,* 2014 Cal.App. LEXIS 256 (2014), DFW and the developer were enjoined until an environmental impact report was prepared and complied with the CEQA *Guidelines*, 14 Cal. Code Regs. §15126.4(b)(3)(A), (b)(3)(B)1 and 4, and 15064.5(e), requiring the preservation of human remains "in place." There, development was barred within a 100 foot buffer around the remains preserved in place, and there was an "immediate cessation of grading," and the human remains were required to be "handled or treated consistent with §5097.98 and *Guidelines* §15064.5(e)." *Id.,* *117. In *Ballona Wetlands Trust v. City of Los Angeles*, 201 Cal.App.4th 455, 469 (2011), a writ of mandate vacated the City's

certification of the EIR and its project approvals and ordered the EIR revised for failure to discuss preservation "in place" as a means to mitigate the significant effects on human remains.

133. San Diego Superior Court Judge Judith Hayes granted similar injunctive relief against Padre Dam Municipal Water District's $20 million reservoir and pumping station project because it would violate the P.R.C. and H.S.C., and was needed to prevent severe irreparable damage and desecration to the original Capitan Grande Band's sacred burial site. The water district was ordered to find an alternative site for the project, despite the fact that delay was costing $150,000 per month, and finding another site would add $10 million to the cost, and would likely force the district to drop the project. Although the pumping station would have benefitted the Band, the balance of hardships was in favor of protecting the Native Americans' cultural patrimony, according to the Band's Tribal Chairman Bobby L. Barrett: "To move forward and desecrate this sacred burial ground would dishonor those who have been laid to rest there." See, Case No. GIC 2010-00093203, Ex. O.

134. Similarly, in Puyallup, Washington, a stop work order was recently issued for all work by Trammel Crow in front of the Indian Willard Cemetery, which is 200 years old, fearing ancestral remains might be disturbed, and where tribal archaeologist Brandon Renyon stated: "We don't know the boundaries of the cemetery, because it dates back to the 1800's, maybe earlier." There the city was unaware until recently that anyone contended that the area of the cemetery included a larger area outside the existing fence. "There's no way to tell how many are buried within the fences, and no certainty on how far beyond those fences grave sites might exist." LaRue, *The News Tribune*, December 2, 2013, Ex. P.

135. In San Diego's Old Town, the fence also does not enclose all of the grave sites at El Campo Santo Cemetery beneath San Diego Ave. www.oldtownsandiegoguide.com. The most likely descendents of Graton Rancheria also obtained an order repatriating Coast Miwok Indian remains and artifacts for reinterment pursuant to CEQA *Guidelines*, **before** construction of the $55 million Rose Lane housing development on San Francisco Bay. Ex. R.

136. The desecration of Rosales and Toggery's families' remains and funerary objects also requires Defendants to be enjoined due to their failure to complete the Supplemental Environmental

Impact Statement that must be prepared, reviewed, and given a public hearing, concerning their violations of Cal. P.R.C., H.S.C. Penal Codes, and NAGPRA, before construction is allowed. See for e.g., *Quechan Indian Tribe v. U.S.* 535 F.Supp.2d 1072, 1106, 1121-22 (S.D. Cal. 2008), finding Western Area Power Admin. agency *per se* liable for inflicting severe and irreparable damage to the cultural sites in violation of P.R.C. 5097.5, 5097.9, and Pen. C. 622.5, which were also alleged to have violated NEPA; *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912, 914 (D.C. Cir. 2003), finding the Army Corps of Engineers Environmental Impact Statement complied with NEPA's requirement to take a hard look at Indian "burial remains and cultural artifacts on the transferred lands;" and *Slockish v. U.S.F.H.A.*, 2012 U.S. Dist. LEXIS 118718, *41 (D. Ore. 2012), finding that the administrative record should be supplemented, under the NEPA exception for administrative review, to further develop the government's prior knowledge of cairns and burial sites on the project property, and to determine whether the agency "neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative or otherwise swept stubborn problems or serious criticism . . . under the rug," citing *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988).

137. Defendants' grading, operation of heavy equipment, moving and hauling dirt and/or gravel, and other construction activities, excavation and removal of Rosales & Toggery's families' human remains and funerary objects, and dumping them on state property owned and controlled by CalTrans has also caused and will continue to cause, unless enjoined, irreparable damage to, and interference with, the Native American sanctified cemetery, place of worship, religious and ceremonial sites, sacred shrines located on federal lands, and the free expression and exercise of Native American religion as provided in the United States and the California Constitutions, in violation of Pub. Res. C. 5097.9-5097.994. Defendants' conduct has barred and will continue to bar appropriate access by Native Americans to the Native American sanctified cemetery, place of worship, religious and ceremonial sites, sacred shrines located on federal lands.

138. Where, as here, adequate and appropriate mitigation is not available, and since there is no clear and convincing evidence that the public interest and necessity require otherwise, the Court is required to issue an injunction, to prevent severe and irreparable damage to, and to assure

appropriate access for Native Americans to, the Native American sanctified cemetery, place of worship, religious and ceremonial sites, and sacred shrines located on the federal lands, as required by P.R.C. 5097.94, NAGPRA, 25 U.S.C. 3001 et seq., and 43 C.F.R. 20.1-17.

2. JIV Has No Right, Permit or Authorization to Desecrate Plaintiffs' Families Remains to Build a Casino on the Jamul Indian Cemetery

139. The JIV does not have any right, authorization or permit to construct, what after all these years, remains an illegal casino, on the portion of the Jamul Indian cemetery, beneficially owned by Rosales and Toggery, and titled in the U.S. Moreover, the JIV has no standing to oppose Plaintiffs' claims before this federal court, because the JIV has no cognizable interest in Rosales and Toggery's families' human remains and funerary objects or the government's portion of the Jamul Indian Cemetery, and because the JIV has failed to exhaust its administrative remedies before coming to Court. The JIV did not exist when the U.S. acquired the portion of the Indian cemetery for the individual half-blood Indians in Jamul, and has never acquired nor exercised governmental power over that portion of the Indian cemetery on which it is illegally building a casino.

140. The land does not qualify for Indian gambling because it was not acquired by the JIV, nor taken into trust for the JIV, since the JIV was not recognized under federal jurisdiction in 1934, *Carcieri v. Salazar*, 555 U.S. 379 (2009), and the JIV has never been recognized by the federal government as a "tribe" under the Indian Reorganization Act, 25 U.S.C. 479. It has only been recognized as a "half-blood Indian community," which has no right to build a casino on the cemetery parcel under IGRA, since the Indian cemetery is not held in trust for a tribe, and no tribe lawfully exercises governmental power over the cemetery property. 25 U.S.C. 2701 and 2703(4); *La Courte Oreilles Band of Lake Superior Chippoewa Indians v. United States* 367 F.3d 650, 657 (7th Cir. 2004); *Confederated Tribes of Siletz Indians v. United States*, 841 F.Supp. 1479, 1486 (D. Ore. 1994).

A. JIV was not Recognized Under Federal Jurisdiction in 1934

141. It is undisputed that because the JIV did not then exist, it could not be, and was not, recognized under federal jurisdiction when the IRA was adopted on June 18, 1934. "Congress has

restricted the eligibility for... "organizing" under the IRA to "tribes" recognized under federal jurisdiction in 1934. *Sandy Lake Band of Miss. Chippewa ("Sandy Lake") v. United States*, 2012 U.S. Dist. LEXIS 63458, *3-4 (D. Minn. 2012), citing *Carcieri*. As with the Ukiah Valley Pomo Indians, "the IRA dictates which tribes are eligible to invoke the IRA, and plaintiffs cannot satisfy that definition." *Allen v. United States*, 871 F.Supp.2d 982, 993 (N.D. Cal. 2012). "Congress delegated to the Secretary the authority to promulgate rules and regulations governing Secretarial elections," under the IRA, 25 U.S.C. 479, and the regulations are codified in 25 C.F.R. Part 83. *Sandy Lake*, 2012 U.S. Dist. LEXIS 63458, *3; *Muwekma Ohlone Tribe v. Salazar*, 813 F.Supp.2d 170, 173 (D.D.C. 2011).

142. "Congress has specifically authorized the Executive Branch to prescribe regulations...to determine which Indian groups exist as tribes," and the BIA has prescribed regulations to determine which Indian groups may qualify to "organize" or "reorganize" as tribes, under the IRA. *James v. HHS*, 824 F.2d 1132, 1137 (D.C. Cir. 1987); *Miami Nation of Indians of Indiana v. U.S.D.O.I.*, 255 F.3d 342, 350-51 (7th Cir. 2001), finding the Miami Nation failed to satisfy DOI's regulations for recognition as a tribe.

143. The Department of Interior promulgated regulations in 1978, establishing a uniform procedure for "recognizing" American Indian tribes, known as Part 83. 25 C.F.R. 83.1-83.13. *Allen*, 871 F.Supp.2d 982, 990. To obtain federal recognition, a tribe must demonstrate that it's "membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity." 25 C.F.R. 83.7(c): Ex. I, at1. *Sandy Lake* went on to hold:

144. ...by requiring an entity seeking an IRA election to first request federal acknowledgment, the regulations ensure that the evidence the Sandy Lake Band offers in support of its claim that it qualifies as an Indian tribe under Section 479 will be presented to the appropriate agency with the requisite expertise and established regulatory process. ...

Carcieri v. Salazar, 555 U.S. 379 (2009) held that the term "now under Federal jurisdiction" refers to Indian tribes under Federal jurisdiction in 1934. The effect of this holding is that the Secretary may not expand the definition of Indian tribes eligible for an IRA election to include those not under Federal jurisdiction in 1934. *Id.*, at *9-10, and repeating its holding for emphasis again at *25-26.

145. The Supreme Court "has long made clear that Congress and therefore the Secretary-lacks constitutional authority to 'bring a community or body of people within [federal jurisdiction] by arbitrarily calling them an Indian tribe.'" *Carcieri*, at 412, J. Stevens, dissenting, and citing *United States v. Sandoval*, 231 U.S. 28, 46 (1913). Moreover, a tribe cannot establish governmental jurisdiction through its unilateral actions. *City of Sherrill v. Oneida Indian Nation* (*Sherrill*), 544 U.S. 197, 203, 219-20 (2005); *Citizens Against Casino Gambling in Erie Co. v. Stevens* (*CACGE*), 945 F.Supp. 2d 391, 401 (W.D.N.Y. 2013).

B. JIV Never Acquired Nor Exercised Governmental Power Over the Government's Portion of the Jamul Indian Cemetery On Which It is Illegally Building a Casino

146. Since the JIV did not exist when the IRA was enacted on June 18, 1934, it was not under federal jurisdiction and the federal government could not recognize a government to government relationship with the JIV, nor allow the JIV to acquire or exercise governmental power over the government's portion of the Jamul Indian cemetery. *Carcieri v. Salazar* (2009) 555 U.S. 379, 382-84, 395 (2009). At most, JIV was a community of individual Indians not affiliated with a tribe. Consequently, the federal government was without the legal authority to acquire or hold, and did not acquire or hold, any portion of the Indian cemetery in trust for the JIV. The IRA only authorizes the Secretary of the Interior to take land in trust for "any recognized Indian tribe now under Federal jurisdiction," in 1934. 25 U.S.C. § 479.

147. The Supreme Court further holds that the IRA does not allow the Secretary to lawfully take land into trust for a tribe, that was not "now under Federal jurisdiction," when the IRA was enacted on June 18, 1934. *Carcieri v. Salazar*, 555 U.S. 379, 382-3 (2009): "Because the record in this case establishes that the [] Tribe was not under federal jurisdiction when the IRA was enacted, the Secretary does not have the authority to take the parcel at issue into trust." See also, *United States v. John*, 437 U.S. 634, 650 (1978).

148. Various federal documents admit that the JIV was not named among the tribes listed as receiving services from the federal government in 1934, as shown in the government's Haas Report entitled Ten Years of Tribal Government under the IRA. The JIV is not named in the BIA's list of Governing Bodies of Indian Groups Under Federal Supervision in 1965. Further, Senate Report No.

1874, dated July 1958, notes that the JIV had never received any social services from the BIA due to the status of its members as Indians. As Justice Breyer acknowledges in *Carcieri*, at 398, the JIV is not among the list of 258 tribes compiled by the DOI following enactment of the IRA, citing the *amicus* Brief for Law Professors Specializing in Federal Indian Law, at App. 2, No. 12, 2008 WL 3991411.

149. Consequently, because the JIV had never previously existed, and was not a recognized tribe under federal jurisdiction in June of 1934, the JIV never acquired, nor has been transferred, nor has ever lawfully exercised governmental power over that portion of the Indian cemetery on which the individual half-blood Jamul Indians resided, and which was gifted to the U.S. by the Daleys in 1978. Therefore, the U.S. was without the legal authority to acquire this land, and did not acquire this land, in trust for the JIV, and only acquired this land in trust for the individual half-blood Jamul Indians, including Walter Rosales and Karen Toggery's families, who were then living at the Indian cemetery.

C. JIV Has Never Been Recognized as an IRA Tribe

150. The law governing Federal recognition of an Indian tribe is universally clear. The JIV has failed to have been federally recognized as a tribe, as opposed to a half-blood Indian community, by any of the three means of recognition: (1) an act of Congress, (2) the administrative procedures set for in Part 83 of the Code of Federal Regulations,[17] or (3) a decision of a United States court.[18] *Allen v. United States* (*Allen*), 871 F.Supp.2d 982, 994 (N.D. Cal. 2012), citing *David Laughing Horse Robinson v. Salazar* (*Robinson*), 838 F.Supp.2d 1006, and later at 885 F.Supp.2d 1002, 1024-26 (E.D. Cal. 2012); *Cherokee Nation of Okla. v. Norton* (*Cherokee Nation*), 2005 U.S. Dist. LEXIS 2773, *3-4, *34 (10th Cir. 2005), reversing the "listing" of the Delaware Tribe, because it "never

[17] For example, the mandatory criteria for Federal acknowledgment includes that: "The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900," 25 C.F.R. 83.7, which the government concedes JIV cannot establish here. Ex. I; see also, *Price v. Hawaii*, 764 F.2d 623, 627 (9th Cir. 1985) finding the *Houohana* did not "satisfy the historical requirement for tribal status implicit in 83.7(a)," because it was founded in 1974.

[18] None of Rosales and Toggery's prior litigation was decided on the merits; all of their lawsuits were procedurally dismissed for lack of jurisdiction, and therefore produced no final judgments that the JIV was ever recognized as an IRA tribe.

formally petitioned for acknowledgment," and reversing the DOI's recognition as arbitrary, capricious and against the law for "failing to follow the Part 83 procedures for recognizing an Indian tribe;" *United Tribe of Shawnee Indians v. United States* (*Shawnee*), 253 F.3d 543, 547-48 (10th Cir. 2001); and *James v. HHS* (*James*), 824 F.2d 1132, 1137 (D.C. Cir. 1987).

151. The Supreme Court also holds that "Congress did not intend to delegate interpretive authority to the Department [of Interior, as to when a tribe was recognized under Federal jurisdiction]." *Caricieri* at 397. J. Breyer, concurring. The Supreme Court "has long made clear that Congress and therefore the Secretary-lacks constitutional authority to 'bring a community or body of people within [federal jurisdiction] by arbitrarily calling them an Indian tribe'." *Carcieri* at 413, J. Stevens, dissenting, citing *United States v. Sandoval*, 231 U.S. 28, 46 (1913). As noted above, a tribe cannot establish jurisdiction through its unilateral actions. *Sherrill* at 203, 219-20; *CACGE* at 401.

152. The court in *Allen* also notes that the government's *Handbook of Federal Indian Law* provides "that there are several federal statutes that specifically define the term 'Indian tribe,' and these statutes reveal that tribes 'cannot be neatly divided into 'recognized' and 'non-recognized' tribes for all purposes; rather, a tribe may be a legal entity for some federal purposes, but not for others.'" 871 F.Supp.2d 982, 991, citing 3.02(6)(a) (2005 ed.). "The term 'Indian tribe' has distinct and different meanings for native people and for federal law." *Id*., at 992, citing 3.02(2) (2005 ed.).

153. Here, it is undisputed that JIV has yet to be federally recognized under any of the three means: (1) Congress has never recognized the JIV, (2) the JIV has admittedly failed to petition for, and has never received, recognition under Part 83, and (3) no court has, or had, jurisdiction to decide whether the JIV qualifies for federal recognition as a tribe, since the JIV never exhausted the administrative recognition procedure Congress delegated to the Executive branch. *Allen*, at 991-94; *Robinson* at 1024-26, citing *Shawnee*, at 547-48; *Cherokee Nation*, at *2-*3, *34; *James*, at 1137.

154. Here, the JIV voluntarily elected not to seek recognition under the Part 83 IRA regulations, 25 C.F.R. 83.1-83.13, as a federally recognized "tribe,"when they only petitioned for recognition as a "half-blood dependent Indian community." BIA's Tribal Government Services July 1,1993 letter to Raymond Hunter, Ex. I. In fact, JIV purposefully elected not to petition for administrative

recognition as an IRA tribe, because they thought it would take too long, and they didn't want to wait for dispersal of the federal benefits which they have been receiving as a half-blood Indian community, since 1981. Ex. I. Therein, the federal Defendants are bound by their admission that:

155. The origin of the Jamul Indian Village is different from that of an historic tribe. The term 'tribe' as used in Federal Indian affairs generally refers to a community of people who have continued as a body politic without interruption since time immemorial and retain powers of inherent sovereignty.... Ex. I, 1.

156. You will recall that prior to 1980, the Jamul Indian Village was not a federally recognized tribal entity. During the 1970's representatives of the Village explored with the Bureau of Indian Affairs (Bureau) means whereby it could obtain Federal recognition and were variously advised the only avenues open to them were to seek a legislative solution, go through the Federal acknowledgment process, or the more limiting action of recognition by the Secretary as a half-blood organization. It was pointed out that acknowledgment of existence as an Indian tribe and of existence as a half-blood community are two different things. Ex. I, 2.

157. In order for the Secretary to acknowledge the Jamul community as a tribe under 25 C.F.R. Part 83, previously 25 C.F.R. 54, it would have to submit a detailed petition and undergo a lengthy process of consideration. Several years would have been required to complete this. If the community was not determined to exist as a tribe after this consideration, it would still have the option to organize as a half-blood community under the IRA. Representatives of the Village opted to seek recognition as a half-blood Indian community even though they were aware of the limitations that result from organizing as a half-blood community. Ex.I, 2.

158. ...on November 7, 1975, the Commissioner of Indian Affairs...notified the Area Director that pursuant to Section 19 of the Indian Reorganization Act (IRA) of June 18, 1934 (25 U.S.C. 479), certain benefits of that Act are available to persons of one-half or more Indian blood even though they lack membership in a federally recognized tribe. **The Commissioner found that while those individuals at Jamul of one-half degree or more Indian blood do not now constitute a federally recognized entity and do not possess a land base**, they are entitled to services provided by the Bureau to individual Indians pursuant to Section 19 of the IRA. The Commissioner further held that should these Jamul half-bloods secure, in trust status, the tract of land on which they reside they would be eligible to organize as a community of adult Indians of one-half degree or more Indian blood under Section 16 of the IRA. Ex. I, 2.

159. On July 12, 1979, the Commissioner of Indian Affairs in response to an inquiry advised the Sacramento Area Director [of the BIA] that: 'To be created as a community of persons of one-half degree or more Indian blood, the Jamul Inidans must first organize under the Indian Reorganization Act...When this proposal has been adopted by the community in an election called by the Secretary, and has been approved by the Secretary, the Jamul Indians will be able to receive services as [such] a community. Ex. I, 3.

160. In approving the IRA constitution, the Village was authorized to exercise those self-

> governing powers that have been delegated by Congress or that the Secretary permits it to exercise...For example, some IRA entities availed themselves of the opportunity to adopt an IRA constitution...However, they are composed of remnants of tribes who were gathered onto trust land. Those persons had no historical existence as self-governing units. They now possess only those powers set forth in their IRA constitution. **They are not an inherent sovereign...Such is the case with Jamul Indian Village.** Ex. I, 3.[19] (emphasis added)

161. Here, JIV is a dependent half-blood Indian community, and not a federally recognized tribe. As conceded by the federal government, the JIV are the remnants of the Capitan Grande tribe, and thus are not subject to being recognized as a separate tribe. On January 18, 1982, the California Program Office of the Indian Health Service stated: "Sometime in the 1800's, Indians from the nearby El Capitan Grande area settled adjacent to an existing cemetery near the village of Jamul." FONSI for Domestic Water Supply & Waste Disposal Facilities, Project No. CA 79-719.

D. A Half-Blood Indian Community is Not an IRA Tribe and has No Inherent Sovereignty

162. The U.S. Supreme Court and the Ninth Circuit in compliance therewith, hold that a half-blood dependent Indian community of individual Indians is not a federally recognized Indian tribe. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998); *United Sates v. McGowan*, 302 U.S. 535, 539 (1938); *United States v. Sandoval*, 231 U.S. 28, 47 (1913); *Nisqually Ind. Tribe v.Gregoire*, 623 F.3d 923, 927 (9th Cir. 2010), "the [Frank's Landing] Community is not a federally-recognized Indian tribe; rather, it is a 'self-governing dependent Indian Community;'" see also, *United States v. Arrieta*, 436 F.3d 1246, 1249 (10th Cir. 2006) finding the assault on Shady

[19] It should be noted that though the term "created tribe" has fallen into disuse upon the adoption of the 1994 amendments to the Part 83 recognition procedures, however, "the 94 amendments do not appear to prohibit the BIA from requiring a tribe to trace its roots to a historic Indian tribe in order to attain federal recognition." *United Houma Nation v. Babbit*, 1996 U.S. Dist. LEXIS 16437, *8 (D.D.C. 1996). "As evidence that Congress has forbidden making any distinction between historic and non-historic tribes in the administrative acknowledgment process, the plaintiffs point to the 94 Amendments. However, the test of these amendments does not provide compelling support that Congress has spoken directly to this issue. While both amendments, codified at 25 U.S.C. 476 (f) and (g), prohibit making distinctions among those Indian tribes that have attained federal recognition, neither section addresses the process by which Indian tribes actually achieve federally recognized status." *Id.*, at *9. "...[A]t least at this stage of the case, the argument is unpersuasive. ...there appears to be scant, if any, evidence that Congress intended the same prohibitions to apply to the process by which tribes achieve federal recognition." *Id.*, at *10.

Lane was not within a reservation or allotment, but was within the Pojoaque Peublo dependent Indian community.

163. When the United States designated the individual half-blood Indians in Jamul as the beneficial owners of that portion of the Indian cemetery in which they were in possession in 1978, they became eligible to organize, and were subsequently organized, as a community of adult Indians of one-half degree or more Indian blood under Section 16 of the IRA. But this did not recognize the community as an IRA tribe.

164. The Federal government's *Handbook of Federal Indian Law*, authorized and funded by Congress in the Indian Civil Rights Act of 1968, 25 U.S.C. 1341(a)(2), admits that "[p]ersons of one-half or more Indian blood...but not residing on a reservation cannot organize under the IRA, but are nevertheless eligible to enjoy some of its provisions." *Id.*, Ch.1, Sec. B2e, at 15-16 (1982 Ed.), citing *Maynor v. Morton*, 510 F.2d 1254, 1256-57 (D.C. Cir. 1975), upholding the DOI's finding that: "These people" [the Siouan or Lumbee Indians] did "not obtain tribal status or any rights or privileges in any Indian tribe." In *Maynor*, the D.C. Circuit specifically found:

165. ...the IRA was primarily designed for tribal Indians, and neither Maynor nor his relatives had any tribal designation, organization, or reservation at that time, it is clear from the language of the statute that some benefits of the Act were also open to any nonreservation Indian who could prove that he possessed at least one-half Indian blood. Among these benefits was the right to petition the Secretary to establish a reservation for such individuals, which, if granted, would afford them access to a wide range of federal Indian services (as members of a recognized Indian group on a reservation). *Maynor* at 1256-57.

166. There, the Court further found that the North Carolina Lumbee Indians were not a recognized IRA tribe, and though entitled to petition for recognition and the proclamation of a reservation, they did not petition for either, and like the JIV here, were content to receive the federal monetary benefits accorded their recognition as a half-blood dependent Indian community. "This and other benefits available under the IRA to non-reservation Indians were first detailed in a memorandum, dated 8 April 1935, to [John Collier] the Commissioner of Indian Affairs from then Assistant Solicitor Felix S. Cohen, who later authored the treatise Federal Indian Law (1942)." *Maynor* at 1256, fn. 7. Cohen's memo stated:

167. "Clearly, this group [Siouan Indians of North Carolina, now known as the Lumbee Indians] is not a recognized Indian tribe 'now under federal jurisdiction' within the language of section [479]. Neither are the members of this group residents of an Indian reservation (as of June 1, 1934).These Indians, therefore, like many other Eastern groups, can participate in the benefits of the [IRA] only in so far as individual members may be one half or more Indian blood."[20]

168. Cohen's memo goes on to point out just what the IRA then stated: that if such landless half-blood Indians petition for the proclamation of a reservation, and such a reservation is proclaimed and they reside thereon, they will then qualify under 25 U.S.C. 476 to reorganize and adopt a constitution, when recognized as a tribe for the purposes of the IRA. 25 U.S.C. 476 as it existed from when it was enacted in 1934, until it was first amended in 1988, provides:

> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe.

169. However, qualifying to become recognized, is not automatic recognition. The formerly landless Indians must still comply with the regulations mandated by Congress and prescribed by the Secretary to become recognized as a an IRA tribe. 25 C.F.R. 83 et seq. These Part 83 regulations for recognition as an IRA tribe were finally put in place in 1978. Thus, a half-blood dependent Indian community must still go through the Part 83 recognition process, to become recognized as an IRA tribe, even when they have been allowed to adopt a constitution and bylaws as a dependent half-blood Indian community. This, the JIV has voluntarily chosen not to do. BIA's Tribal Government Services July 1,1993 letter to Raymond Hunter, Ex. I, 1-3.

170. A group of non-tribal landless Indians cannot simply acquire land and unilaterally declare themselves an IRA tribe, without complying with the federal regulations for such recognition; a tribe cannot establish jurisdiction through its unilateral actions. *Sherrill* at 203, 219-20; *CACGE* at 401.

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[20] Brownell, Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law, 34 U. Mich. J.L. Reform 275, 287 (2001), citing article quoting unpublished memorandum from Cohen to Collier of April 8, 1935; the full memo can be found in the Collections of the Manuscript Division, Justice Blackmun Papers on *U.S. v. John*, 437 U.S. 634, Library of Congress.

171. Therefore, here, as in *Maynor*, where such landless Indians failed to petition for the proclamation of a reservation, and were not under federal jurisdiction in 1934, like the JIV, they remain a half-blood dependent Indian community, and did not become a federally recognized IRA tribe. Based upon Cohen's 1935 memo, the *Maynor* court concluded:

> Following enactment of the IRA in 1934, plaintiff Maynor and 208 other persons residing in Robeson County petitioned the Secretary for recognition as persons of one-half or more Indian blood. The Department of the Interior sent a team of anthropologists and other specialists to determine the quantum of Indian blood of each applicant. After extensive study, in 1938 a total of only 22 applications including Maynor's, were approved.
>
> Maynor and the other 21 were informed by the Department that they were "entitled to benefits established by the Indian Reorganization Act. Please note that no other benefits are involved. These people do not obtain tribal status or any rights or privileges in any Indian tribe." *Maynor* at 1256-57.

172. Here, the governmental Defendants are also estopped to deny that the Director of Tribal Government Services has further stated on July 1, 1993: "The Constitution of the Jamul Indian Village was approved by the Deputy Assistant Secretary-Indian Affairs on July 7, 1981. In approving the IRA Constitution, the Village was authorized to exercise those self-governing powers that have been delegated by Congress or that the Secretary permits it to exercise... For example, some IRA entities availed themselves of the opportunity to adopt an IRA constitution... However, they are composed of remnants of tribes who were gathered onto trust land. Those persons had no historical existence as self-governing units. They now possess only those powers set forth in their IRA constitution. **They are not an inherent sovereign**... **Such is the case with Jamul Indian Village**." Ex I, 3 (emphasis added).

173. [T]he term "dependent Indian communities"...refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements–first, they must have been set aside by the Federal Government for the use of the Indians as Indian land, second, they must be under federal superintendence. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 (1998).

174. "Frank's Landing is a geographic location consisting of three parcels of land, none of which is located on the Nisqually or Squaxin Reservations. The parcels are instead held in trust by the United States for the benefit of individually named Indians. The three parcels were set aside for these individuals in 1918. The people, society, and government located at and associated with Frank's Landing are referred to as the "Community." The Community is not a federally-recognized Indian tribe; rather, it

> is a "self-governing dependent Indian Community." *Nisqually Ind. Tribe*, 623 F.3d 923, 927.

175. In *United Sates v. McGowan*, 302 U.S. 535, 537, 539 (1938), Justice Black held that the Reno Indian Colony was a dependent Indian community, because the Federal government held the Colony's land in trust for the benefit of the individual Indians residing there:

> The Reno Indian Colony is composed of several hundred Indians residing on a tract of 28.38 acres of land owned by the United States and purchased out of funds appropriated by Congress in 1925 and 1926...The policy of Congress, uniformly enforced through the decisions of this Court, has been to regulate the liquor traffic with Indians occupying such a settlement. This protection is extended by the United States 'over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state.' *United States v. Sandoval*, 231 U.S. 28, 46...Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out...The federal prohibition against taking intoxicants into this Indian colony does not deprive the state of Nevada of its sovereignty over the area in question. The federal government does not assert exclusive jurisdiction within the colony. Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments. *McGowan*, 302 U.S. 535, 538-39.

176. The Ninth Circuit further holds that whether "a group of citizens of Indian ancestry...has maintained an organized tribal structure...is a factual question which a district court is competent to determine." *United States v. Washington*, 641 F.2d 1368, 1371, 1373 (9th Cir. 1981), finding that "the appellants had not functioned since treaty times as 'continuous separate, distinct and cohesive Indian cultural or political communities;" *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 632 (9th Cir. 1992). Where those facts are in conflict, as here, a trial is required before the Court may determine the status of the dependent Indian community, presuming the group of Indians has exhausted its administrative remedies, has standing, and has become a party to the action. None of which the JIV has done.

177. [W]e have not addressed the question whether any Alaskan native village constitutes an Indian tribe for the purpose of sovereign immunity. We cannot reach this question because, as noted above, the district court failed to enter express findings of fact or develop a record to support its conclusion that the Native Village of Tyonek is an Indian tribe protected by sovereign immunity. Accordingly, we must remand so that an adequate record can be prepared so that we may review this 'complex factual question.'" *Tyonek*, at 635.

178. Here, the Ninth Circuit holds that the JIV can't have any Court finally determine the half-blood Indian community's status, without a trial and without having exhausted the administrative remedies under 25 C.F.R. Part 83 with the BIA. See, Section 3 below; *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1388 (9th Cir. 1988) *reversed on other grounds*, 522 U.S. 520 (1998), "As we have outlined, not all Indian communities are considered tribes and therefore sovereign powers. The community in this case may not be sovereign. Until that uncertainty is resolved, amici's contention is premature...[T]he ultimate conclusion as to whether an Indian community is Indian country is quite factually dependent. It is also dependent on whether the inhabitants constitute a tribe for legal purposes, which, as we discussed earlier, is another complex factual question." *Id.*, 1388, 1391. Ultimately, the Supreme Court found that the Native Village of Venetie was not a sovereign, and was not even a dependent Indian community, unlike here, primarily because the U.S. was no longer the title holder and the land was not under the superintendence of the Federal government. 522 U.S. 520, 532.

179. The Tenth Circuit has held in *United States v. Martine*, 442 F.2d 1022, 1023-24 (10th Cir. 1971) that the "proper approach" to the determination of the status of a dependent Indian community is to hold a trial as to any conflicting facts: There:

> 180. The term "Indian country' as used in section 1151 includes Indian reservations, dependent Indian communities, and all Indian allotments. The particular place where the accident took place was neither on an Indian reservation nor on an allotment. It was in an area known as the Ramah community and on land owned by the Navajo Tribe, it having been purchased with tribal funds from a corporate owner. Jurisdiction therefore rests on the claim that the area in question is a dependent Indian community.
>
> 181. The trial court received evidence as to the nature of the area in question, the relationship of the inhabitants of the area to Indian Tribes and to the federal government, and the established practice of government agencies toward the area....Only after considering all of the various factors we have noted, as well as any other relevant factors, can the trial court determine the status of a particular area. The mere presence of a group of Indians in a particular area would undoubtedly not suffice. *Martine*, 442 F.2d 1022, 1023-24.

182. Similarly, the Eighth Circuit holds in *United States v. South Dakota*, 665 F.2d 837, 839-43 (8th Cir. 1981) that the "proper approach" in determining the status of a dependent Indian community is to hold a trial of any conflicting facts concerning the following factors:

> 183. [W]hether a particular geographical areas is a dependent Indian community depends on a consideration of several factors. These include: (1) whether the United States has retained 'title to the lands which it permits the Indians to occupy' and 'authority to enact regulations and protective laws respecting this territory,' 636 F2d at 212, citing *United States v. McGowan*, 302 U.S. 535, 539, 58 S. Ct. 286, 288, 82 L. Ed. 410 (1938); (2) 'the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area,' 636 F.2d at 212, citing *United States v. Martine*, 442 F.2d 1022, 1023 (10th Cir. 1971); (3) whether there is 'an element of cohesiveness ... manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality,' 636 F.2d at 212-13, citing *United States v. Morgan*, 614 F.2d 166, 170 (8th Cir. 1980); and (4) 'whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples,' 636 F.2d at 213, citing *United States v. Mound*, 477 F. Supp. 156, 158 (D.S.D. 1979), citing *Youngbear v. Brewer*, 415 F.Supp. 807, 809 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74 (8th Cir. 1977).

184. There, the Court declared that the housing project located within the City of Sisseton to be a "dependent Indian community" within the meaning of the federal statute defining "Indian country," 18 U.S.C. 1151(b), and held that the fact that the State had asserted jurisdiction over the housing project did not necessarily defeat the finding that the project was a dependent Indian community. *United States v. South Dakota.*, at 841-42. There, as here, the grant deed explicitly conditioned the transfer to the United States: "The land so transferred by this Corporation will be used exclusively for a Low Rent Housing Project and will not be used for any other purpose." *Id.*, 839-41. The Court also found that: "The test for determining what is a dependent Indian community must be a flexible one, not tied to any single technical standard such as percentage of Indian occupants." *Id.,* 842. There, as here, many of the "programs provided to the project residents are provided under contract with the federal government, through the BIA and the IHS [Indian Health Service]."

185. Thus, JIV's Secretarial election only adopted a constitution for a half-blood Indian community and not an IRA tribe. The JIV was never a body politic that continued without interruption since time immemorial, never had powers of inherent sovereignty, and was not a single identifiable group that historically governed itself or functioned as a single autonomous political entity.

186. When the half-blood community, known as Jamul Indian Village, was created and first recognized, it was not, and subsequently has never been an IRA tribe. More importantly, it was a landless entity. To date, no branch of the United States government has set aside or created an

Indian reservation or taken the government's portion of the cemetery into trust for the half-blood Indian community known as the Jamul Indian Village. The government's portion of the Indian cemetery was not acquired for any Indian tribe, and has never been recognized by any branch of the federal government as being land subject to the lawful exercise of any tribal governmental power, including the half-blood Indian community known as the Jamul Indian Village.

E. Listing of a Half-Blood Indian Community Does Not Create or Recognize an IRA Tribe

187. There is no "listing" of the JIV as a recognized IRA tribe in any of the three ways in which such recognition can be made: (1) Congress has not recognized the JIV, (2) the executive branch has not conducted the required review in the administrative procedures set forth in Part 83 of the C.F.R.,, and (3) there is no final decision on the merits by any U.S. court with jurisdiction to decide the merits of the JIV status. *Allen*, at 991-94; *Robinson* at 1024-26, citing *Shawnee*, at 547-48; *James*, at 1137; *Cherokee Nation*, at *2-3, *34, twice reversing the "listing" of a tribe, finding, as here, "the Delawares never formally petitioned for acknowledgment," and reversing the DOI's recognition as arbitrary, capricious and against the law for "failing to follow the Part 83 procedures for recognizing an Indian tribe."

188. While such "listing" was once held to "generally," but not always, constitute recognition as a tribe, see for e.g., *Larimer v. Konocti Vista Casino*, 814 F.Supp.2d 952, 955 (N.D. Cal. 2011) and *Ingrassia v. Chicken Ranch Bingo & Casino*, 676 F.Supp.2d 953, 957 (E.D. Cal. 2009), the decision upon which these cases rely, *Cherokee Nation of Okla. v. Norton*, 117 F.3d 1489, actually holds that the DOI's listing "cannot be dispositive of the sovereign immunity issue," *Id.*, 1499, and has twice been upheld by the Tenth Circuit. There, the Court of Appeal explicitly found that a listing on the *Federally Recognized Indian Tribe List Act of 1994* is not dispositive of tribal status. *Cherokee Nation* at *3-4, *34. There, as here, the DOI's "listing" of the Delaware Tribe was found to be arbitrary, capricious and against the law for "failing to follow the Part 83 procedures for recognizing an Indian tribe," where the Delawares "never formally petitioned for acknowledgment." There, as here, the purported tribe was also not an indispensable party because it was not a recognized tribe. *Id.*

189. Thus, contrary to the false public statements by the JIV, being "listed" pursuant to the *Federally Recognized Indian Tribe List Act of 1994*, does not necessarily mean that the "entity" is a federally recognized tribe or that the entity has any inherent sovereignty, because the list includes entities that are not tribes, have no inherent sovereignty, and only possess limited powers delegated by Congress, such as half-blood Indian communities. The "list used the term 'entities' in the preamble and elsewhere to refer to and include all the various anthropological organizations, such as bands, pueblos and villages," 60 F.R. 9250, see also 44 F.R. 7235, many of which are dependent Indian communities, and not tribes. *Alaska v. Native Village of Venetie Tribal Gov't.,* 522 U.S. 520 (1998); see for e.g., *Nisqually Ind. Tribe v.Gregoire*, 623 F.3d 923, 927 (9th Cir. 2010). In fact, the federal government has long conceded that the subsequent "wholesale listing of Alaska native entities" therein is strong evidence that not every entity "listed" is a recognized tribe. See, Judge Karlton's discussion at 16, in his April 23, 1992 Order granting the federal defendants' motion for summary judgment, *Ione Band of Miwok Indians v. Burris*, Civ. No. S-90-993 LKK (E.D. Cal. 1992), Ex. Y & Z.

190. The original "list" published by the BIA in 1978 did not list the Jamul Indian Village. 44 F.R. 7235. The original list also is more accurately titled "*Indian Tribal Entities that Have a Government-to-Government Relationship with the United States*," since "[t]he United States recognizes its trust responsibility to these Indian entities and, therefore, acknowledges their eligibility for programs administered by the Bureau of Indian Affairs." 44 F.R. 7235. JIV was not "listed" therein, until November 24, 1982, following its election to become a "half-blood dependent Indian community." 47 F.R. 53130-33.

191. Moreover, the 1995 preamble to the list continues to state: **"Inclusion on the list does not resolve the scope of powers of any particular tribe over land or non-members."** 60 F.R. 9251 (emphasis added). Hence, even the subsequent lists after 1994 by their own terms only include: "Indian Tribal Entities Within the Contiguous 48 States Recognized and Eligible to Receive Services From the Bureau of Indian Affairs." 60 F.R. 9250; compare the original 1979 listing of "tribal entities." 44 F.R. 7235. Being on the list says nothing about exercising governmental power over land, nor whether the entity was qualified to organize or reorganize as a tribe under the IRA. Here,

the JIV was only recognized to be a "half-blood dependent Indian community" in 1981, and is not, and never was, recognized as a tribe under federal jurisdiction in 1934, or thereafter.

192. Hence, the JIV's inclusion on this administrative list of entities and groups entitled to receive federal services is with the caveat that the JIV has never petitioned or received recognition as an IRA tribe from the executive branch of the United States under 25 CFR Part 83, and that Congress, as the legislative branch, has yet to recognize the JIV, and thus the United States has yet to lawfully exercise federal jurisdiction over any tribe, known as the JIV.

193. Therefore, any listing of the JIV's eligibility to receive federal monetary benefits, does not create, nor recognize the entity as an IRA tribe, and only acknowledges its existence as a half-blood dependent Indian community. Moreover, "[a]dministrative actions taken in violation of statutory authorization or requirement are of no effect." *City of Santa Clara v. Andrus*, 572 F.2d 660, 677 (9th Cir. 1978), citing *Utah Power & Light Co. v. United States*, 243 U.S. 389, 392 (1917), and "unauthorized agency action may be disregarded as null and void." See, e.g., *Employers Ins. Of Wassau v. Browner* , 52 F.3d 656, 665 (7th Cir. 1995); *N.L.R.B. Union v. Federal Labor Relations Auth.*, 834 F.2d 191, 196 n. 6 (D.C. Cir. 1987); *Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 293 (2d Cir. 2006).

F. The State Compact Does Not Create Nor Recognize an IRA Tribe, Nor Allow JIV to Exercise Governmental Power over any portion of the Jamul Indian Cemetery and Further Requires That Construction Be Enjoined Until the Compact is Amended

194. The fact that the JIV entered into a Compact with the State of California along with 65 other entities claiming to be tribes, on October 18, 1999, does not indicate, nor create, a recognized IRA tribe in any of those entities. Nor does it allow gambling on, or allow the JIV to exercise governmental power over, any specific parcel of land or any portion of the Jamul Indian Cemetery. The JIV Compact is silent as to the location of any proposed gambling site. http://www.cgcc.ca.gov/documents/compacts/original_compacts/Jamul_Compact.pdf. Similarly, JIV's Gaming Ordinances are also silent as the location of any proposed gambling site.

195. There was intense political pressure to execute these Compacts, and the State did not require that each Indian entity establish by a preponderance of the evidence that it had been lawfully

recognized by the United States, or that it lawfully exercised governmental power over any land proposed for Indian gambling. Instead the State accepted the entities' representations on faith, subject to disavowal if, as here, the representations turned out not to be true.

196. Moreover, the Ninth Circuit has specifically found that non-site-specific gaming ordinances and compacts, like JIV's, do not authorize gambling on any particular parcel of land, and only upon subsequent acquisition or identification of the parcel on which gambling is proposed, will the NIGC be required to determine whether the specific parcel of land qualifies for Indian gambling; until the specific parcel of land is identified upon which gambling is proposed there is nothing to approve or disapprove under 25 U.S.C. 2710(b)(1). *North Co. Community Alliance v. Salazar* 573 F.3d 738, 747 (9th Cir. 2009), "IGRA does not require a tribe to submit a site-specific proposed ordinance as a condition of approval by the NIGC under 2710(b)," and "the NIGC was not required in 1993, when it approved the Nooksacks' non-site-specific Ordinance to make an Indian lands determination for the parcel on which the Casino is located."

197. Hence, until construction of a casino was located on the portion of the Indian cemetery beneficially owned by the individual half-blood Indians, including Rosales and Toggery, in the NIGCs April 10, 2013 notice of intent to prepare a Supplemental Environmental Impact Statement, there was no Indian lands decision, and the Compact, like JIV's original gambling ordinances, was silent as to where any gambling facility was going to be constructed.

198. Because the State recognized that it was being asked to accept the 65 entities' representations on their face, in haste, and without any evidence or hearing to determine the true facts, the State made the enforceability of the Compact contingent upon the terms of Section 15.6 of the Compact, wherein each entity is limited to the facts as represented, many of which have subsequently been found, as here, not to be true. Therein the Compact further states: "In entering into this Compact, the State expressly relies upon the forgoing representations of the Tribe [that it is a federally recognized tribe with Indian land as defined by IGRA], and the State's entry into the Compact is expressly made contingent upon the truth of those representations as of the date of the Tribe's execution of this Compact." Hence, where the representations that the JIV is a federally recognized tribe with Indian

land as defined by IGRA have turned out not to be true, the JIV's Compact is expressly unenforceable and void *ab initio*.

199. Section 4.2 of the Compact further limits proposed gambling to only those lands authorized under IGRA: "The Tribe may establish and operate not more than two Gaming Facilities, and only on those Indian lands on which gaming may lawfully be conducted under the Indian Gaming Regulatory Act." Here also, since the JIV has no land over which it lawfully exercises governmental power, the Compact does not authorize any gambling on the government's portion of the Indian cemetery.

200. When on May 5, 2000, the DOI approved the 1999 JIV Compact, the DOI also expressly conditioned its approval as follows: "The terms of the Compact are approved only to the extent that they authorize gaming on 'Indian Lands' as defined by IGRA, now or hereafter acquired by the Tribe." Hence, neither the Compact, nor the JIV gaming ordinances, constitute any approval of gambling on the government's portion of the Indian cemetery beneficially owned by the individual half-blood Indians, nor do they constitute any Indian Lands decisions by the state government. There never was an Indian Lands decision, as to the government's portion of the Indian cemetery, until the NIGC issued its April 4, 2013 Notice of Intent to Prepare a Supplemental Environmental Impact Statement, which remains an abuse of discretion, arbitrary, capricious and against the law.

201. In further recognition of the haste in which the State was being asked to negotiate the 65 compacts, and the then proven inadequacy of Section 10.8, to protect the off-Reservation environment from significant adverse impacts, the State further protected the communities in the neighborhoods of the proposed gambling facilities by specifically providing that all construction of such gambling facilities shall cease, after the Governor calls for the amendment of Section 10.8 to further prevent significant adverse environmental effects from the construction and operation of a casino, until Section 10.8 was so amended.

202. Therein the Compact further provides in Section 10.8.3(b): "On or after January 1, 2003, but not later than March 1, 2003, the State may request negotiations for an amendment to this Section 10.8 on the ground that, as it presently reads, the section has proven to be inadequate to protect the

off-Reservation environment from significant adverse impacts resulting from Projects undertaken by the Tribe or to insure adequate mitigation by the Tribe of significant adverse off-Reservation impacts."

203. Section 10.8.3(c) of the Compact further provides: "If the State has requested negotiations pursuant to subdivision (b) but, as of January 1, 2005, there is neither an agreement nor an order against the State...then, on that date, the Tribe shall immediately cease construction and other activities on all projects then in progress that have the potential to cause adverse off-Reservation impacts, unless and until an agreement to amend this Section 10.8 has been concluded between the Tribe and the State."

204. As the JIV concedes in its *amicus* brief, AB 4:25, the portions of the Compact that survive the JIV's misrepresentations, are both federal law and a binding contract on the JIV. *Cuyler v. Adams*, 499 U.S. 433, 440 (1981); See also, *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997) and IGRA, 25 U.S.C. 2710(d)(1)(c) and (d)(3).

205. On February 28, 2003, Governor Davis served the state's notice triggering the amendment process of Section 10.8 on all of the 65 Compact tribes, including the JIV. *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, No. 04CV1151, 2008 WL 6136699, *3 (S. D. Cal. Apr. 29, 2008), *aff'd,* 602 F.3d 1019 (9th Cir. 2010). The JIV ignored the Governor's request and did not negotiate an amendment of Section 10.8. Nor did the JIV obtain a Court order against the state that it need not renegotiate Section 10.8 of the Compact with the State. California further failed to withdraw this request to renegotiate Section 10.8 prior to March 1, 2003, as conceded by the JIV. In the meantime, 13 of the now 73 Compact tribes negotiated amended compacts with the State. See, http://www.cgcc.ca.gov/?pageID=compacts. [21]

206. Therefore, on January 1, 2005 the JIV was required by the terms of the Compact to immediately cease construction and other activities on their proposed casino projects on the government's portion of the Indian cemetery unless and until JIV reaches an agreement with the

[21] Thus, after Gov. Davis was recalled, his later attempt to withdraw his demand to renegotiate Section 10.8 on his way out of office in November of 2003, was too late to prevent the agreed upon January 1, 2005 injunction of all casino construction projects without an amended compact.

State to amend this Section 10.8, and until JIV establishes a preponderance of evidence that JIV lawfully has exhausted its administrative remedies and demonstrated pursuant to the Part 83 regulations that it was under federal jurisdiction as of June 18, 1934, and has lawfully been permitted to exercise governmental power over the government's portion of the Indian cemetery. None of which has yet been established.

G. Because the IRA Bars Transfer of the Government's Portion of the Indian Cemetery to the JIV, the JIV has Never Lawfully Exercised Governmental Power over that parcel.

(1) The Individual Half-Blood's Beneficial Ownership of their Families' Final Resting Place Was: Never Transferred to the JIV, Never Taken into Trust for the JIV, and JIV Has Never Exercised Governmental Power over that Cemetery Property.

207. The Jamul Indians of one-half degree or more Indian blood, including Rosales and Toggery, have never attempted to transfer, nor lawfully transferred, their individual beneficial interest in the government's portion of the cemetery property to the JIV, because such a transfer is barred by the IRA, as confirmed in *Carcieri*. Moreover, the JIV never applied to have that portion of the cemetery taken into trust for the JIV, nor has the DOI Secretary taken that portion of the cemetery into trust for the JIV, and the JIV has never exercised governmental power over that portion of the cemetery.

208. Just as the JIV never applied for, or obtained, recognition as an IRA tribe under 25 C.F.R. 83 et seq., or applied for, or had a reservation proclaimed under 25 U.S.C. 467, the JIV has never applied for, or acquired, the government's portion of the Indian cemetery to be taken into trust under 25 C.F.R. 151 et seq.[22] *City of Shakopee v. United States*, 1997 U.S. Dist. LEXIS 2202, *19-20 (D. Minn. 1997). There still must be: (1) a formal application to have land taken into trust, (2) findings by the Secretary either denying the application or intending to take the land into trust, (3) a notice of appeal rights to all interested parties, including state and local governments, (4) an opportunity for administrative appeal, (5) a notice of final agency decision published in the Federal Register or newspaper of general circulation for 30 days, and (6) the opportunity for review in the appropriate

[22] 25 C.F.R. 151.3, provides: "No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary."

federal district court under 25 C.F.R. 151.12(b). *City of Shakopee v. United States*, 1997 U.S. Dist. LEXIS 2202, *19-20 (D. Minn. 1997). None of the six required procedures have occurred here.

209. This is confirmed by the absence of any grant deed purporting to make such a transfer. Just as the IRA bars the government from taking the portion of the Indian cemetery into trust for the JIV, the IRA also bars the individual Indians of one-half degree or more Indian blood living in Jamul that have been designated the beneficial owners of that parcel, from lawfully transferring their beneficial interest and trust status to the JIV, since it was not under federal jurisdiction in June of 1934. *Carcieri* at 382-3. Thus, the government's portion of the Indian cemetery held in trust for the individual half-blood Indians in Jamul has never been transferred to the JIV, and the JIV has never lawfully exercised governmental power over that portion of the Indian cemetery.

210. This is further confirmed by the United States Department of Interior, Bureau of Indian Affairs, August 3, 2000 response to a Freedom of Information Act (FOIA) request, confirms that the "current trust parcel was accepted into trust in 1978 for Jamul Indians of ½ degree (4.66 acres)," and that there is "no record of the 1978 trust parcel being known as the Jamul Village," as reflected in Ex. F. This is consistent with the half-blood community's constitution, Article II, Territory, which does not identify the 4.66 acre cemetery parcel, as within the territory of the Jamul Indian Village. Ex. G. It is also consistent with Governor Arnold Schwarzenegger's Legal Affairs Secretary's letters of August 29, 2005 and December 20, 2005 to the Jamul Indian Village in Ex. N.

211. This is further confirmed by the fact that during 1996 a faction of individuals, who were not all Jamul Indians of one-half degree of Indian blood, claims to have admitted Jamul Indians, who were only one-quarter Indian blood, as members of the community, and now comprise more than a majority of the members of the community. Thus, the JIV is further legally precluded by the 1978 grant deed from claiming any beneficial ownership interest in the cemetery parcel, since JIV now claims to be comprised of a majority of members who are, admittedly, not one-half degree or more of Indian blood.

212. The JIV therefore has never had jurisdiction over, nor lawfully exercised governmental power over the cemetery parcel, and there has never been a transfer of the parcel to the subsequently

organized half-blood community, nor has the Secretary of the Interior ever lawfully designated the subsequently organized half-blood community to be a beneficiary of the grant deed for the cemetery property, nor has the Secretary ever taken that portion of the cemetery property into trust for the JIV.

(2) The U.S. Never Transferred the Beneficial Ownership of the Cemetery Property from the Individual Indians to the Half-Blood Community

213. Where, as here, no subsequent grant deed for the cemetery parcel was ever recorded, the individual beneficial ownership of the trust property was not, as a matter of law, transferred to any subsequently recognized half-blood community, including the JIV. *Coast*, 550 F.2d 639, 651; *United States v. Assiniboine Tribe* ("*Assiniboine*"), 428 F.2d 1324, 1329-30 (Fed. Cl. 1970); *United States v. State Tax Comm.*, 535 F.2d 300, 304 (5th Cir. 1976); and *Opinions of the Solicitor* at 668, 724, 747, and 1479; Exhibit H.

214. The U.S. has no evidence that the subsequently created half-blood community, known as the "Jamul Indian Village," was ever designated as the beneficiary of the cemetery parcel, nor that any grant deed ever transferred the cemetery property to the half-blood community. In fact, the only evidence is that the Secretary of the Interior designated the individual "Jamul Indians of one-half or more Indian blood" to be the beneficiaries of the cemetery property, by allowing them to reside upon the California trust land for 28 years, just as occurred in *Coast*, 550 F.2d at 651, n32; Ex. F.

215. Since Congress never granted the half-blood community known as the Jamul Indian Village "jurisdiction" over the cemetery parcel to which the U.S. holds title, the express beneficiaries of the deed to the United States for the cemetery parcel were, and still are, the individual half-blood Jamul Indians who were allowed to reside on the property since 1978, and not the half-blood community that was subsequently recognized by an acting deputy assistant secretary of the BIA in 1982. *United States v. Sandoval* (1913) 231 U.S. 28, 46, citing *United States v. Holliday*, 70 U.S. 407, 418 (1865); see also, *Kansas v. Norton*, 249 F.3d 1213, 1229-31 (10th Cir. 2001).

216. Thus, the government is estopped to deny, that the "only possible" beneficial owners of the cemetery property and designation that exists in the 1978 grant deed, as a matter of law, is that the cemetery parcel was taken in trust for the "individual" "Jamul Indians of one-half degree or more

Indian blood," as was held in *Coast*, 550 F.2d at 651, n32, *Assiniboine*, 428 F.2d 1324, 1329-30 and *State Tax Comm.*, 535 F2d. at 304, and acknowledged by the Supreme Court in *Carcieri* at 382-83, 388-90, 394-95, 398-99.

217. The Government further admits that it failed to follow its own guidelines for recording a grant deed to a subsequently recognized half-blood community, and therefore the existing grant deed for the cemetery parcel, as a matter of law, only created a beneficial interest in the individual Jamul Indians of one-half degree or more Indian blood. *Opinions of the Solicitor*, at 668, 724, 747, and 1479; Exhibit H. There, the Solicitor of the Interior specifically advised the field personnel of the BIA that any transfer of the individual Indians' designated beneficial interest to any subsequently recognized tribe, must still be accomplished the old fashioned way by recording a grant deed.

218. Here, no grant deed ever transferred the individual Indians' designated beneficial interest in the cemetery parcel to any tribe. Following the recording of the original 1978 grant deed there is no subsequent record of any transfer of the parcel from the United States' trust on behalf of the individual half-blood Jamul Indians designated by the Secretary to the JIV.

219. The U.S. is estopped to deny that its own *Handbook of Federal Indian Law*, (DOI 1982) Ch. 11, B3, pp. 615-16, and (DOI 2005) §16.03, p. 883, concedes that all individual designated beneficiaries are cotenants in the trust land held by the U.S., and have equal rights to possession of the property, and no single cotenant has the right to exclude any other cotenant from the property. Cal. Civil Code 685-86; *Zaslow v. Kroenert*, 29 Cal.2d 541, 548 (1946). Therefore, all of the individual cotenants must consent to any transfer of their individual beneficiaries' designation to a subsequently recognized "tribe," before the subsequently recognized "tribe" may lawfully be designated as the beneficiary and acquire "jurisdiction" over the cemetery parcel. *Id.*

220. Here, Rosales and Toggery have not consented to any transfer of their beneficial interest in the cemetery parcel. Nor is there evidence of any such consent by any, let alone all, of the individual Indian co-tenants to transfer their beneficial interest in the cemetery parcel. Quite simply, the government never recorded a subsequent grant deed, transferring the individual Indian beneficiaries' interest in the cemetery parcel to the half-blood community known as Jamul Indian Village.

221. Here, it is no wonder that the "Jamul Indians of one-half degree or more Indian blood" have never consented to transfer their individual designation as beneficial owners to any subsequently created half-blood community, since the Interior Board of Indian Appeals found non-members participating in the half-blood Indian community, perhaps from the time the entity was first created in 1982. 32 IBIA 166.

222. The government's *Handbook of Federal Indian Law* further explains the significant distinction between (1) taking land into trust for "individual" Indians, before they are allowed to become a half-blood community under the IRA, as here, and (2) recognizing a landless half-blood community and requiring the Secretary to transfer the land in trust from the individual Indians, with their consent, to the half-blood community, after it was recognized. *Id.*, (DOI 2005) §3.02, p. 135. Here, after the half-blood community was finally recognized in 1982, the government never obtained the consent of the individual Indians to transfer the cemetery parcel into trust for the half-blood community. Nor did the government ever convey title to the cemetery parcel in trust for the half-blood community known as the JIV.

223. For example, the DOI Solicitor's Memorandum concerning the St. Croix Chippewas, *Opinions of the Solicitor*, at 724, Ex. H, cited by both the *Handbook*, (DOI 2005) § 3.02, 146 (n99) Footnote 105, and Justices Breyers at 398-99, and Stevens, at 407, in *Carcieri*, confirms that where the grant deed, Ex. D, fails to contain the final phrase, "until such time as they organize under section 16 of the [IRA] and then for the benefit of such organization," the property remains in trust for the individual Indians, who have never decided to transfer their beneficial interest to any subsequently recognized half-blood community.

224. This is exactly what happened here. The original grant deed, Ex. D, did not contain the phrase transferring the beneficial interest in the property to the subsequently recognized half-blood community known as the JIV. It is undisputed that the half-blood Indian community did not exist and was not under federal jurisdiction in 1934, and was not organized until 1982. The half-blood community known as the JIV still has not been recognized by Congress, has not completed the

administrative remedies to become recognized under the Part 83 regulations, and has not been finally determined to be a recognized tribe by any court.

225. There is also no dispute that the Government failed to follow its own guidelines in recording the grant deed. *Opinions of the Solicitor* at 668, 724, 747, and 1479, attached in Ex. H. Hence, for there to be any subsequent transfer of the individual Jamul Indians' designated beneficial interest in the cemetery parcel to any subsequently recognized half-blood community, such a transfer must still be accomplished the old fashioned way by recording a grant deed. Here, no grant deed ever transferred the individual Indians' designated beneficial interest in the government's portion of the cemetery parcel to the half-blood community known as the JIV.

226. These Solicitors' memoranda also admit that the 1978 trust acquisition cannot be made for a half-blood community that did not then exist. For example, with regard to the Mississippi Choctaw, the Solicitor found that a grant deed simply cannot "designate" a community that doesn't exist as a beneficiary, since "there is in fact no existing tribe of Indians in Mississippi known as the Choctaw Tribe." *Opinions of the Solicitor*, at 668, Ex.H. There, Solicitor Margold describes how the grant deed should have been prepared to put the property in trust for the Mississippi Choctaws: "The United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior, **until such time as the Choctaw Indians of Mississippi shall be organized as an Indian tribe** pursuant to the act of June 18, 1934 (48 Stat. 984), and **then in trust for such organized tribe**." *Opinions of the Solicitor*, at 668 (emphasis added), Ex. H. Similarly here, no such language appears in the 1978 Jamul grant deed. Ex. D.

227. There, the individual Choctaws had to consent and the deed had to be amended and re-recorded to designate any subsequently recognized community a beneficiary. Since the deed did not contain the words: **"until such time as the Choctaw Indians of Mississippi shall be organized as an Indian tribe**" or "**then in trust for such organized tribe**," the property remained in trust for the individual Indians, and not a tribe, as held in *Coast*, 550 F.2d at 651, and *State Tax Comm.*, 535 F.2d 300, 304, where the court held that the absence of the words "then in trust for such organized tribe" in a relief act designating individual Choctaw beneficiaries meant that "only those individuals

designated by the Interior Secretary were to have the benefit of this" designation, since "[n]either a tribe nor a reservation is mentioned."

228. The government's own Solicitor's written instructions to its BIA field superintendents states: "In all of those cases where the title papers have already been returned to the field, instructions should be given to the field agents to have the deeds corrected before they are recorded. In that case where the deed has already been recorded and accepted, it will be necessary to secure a new deed. The necessary corrections will be made in the other cases which are now pending in this office. The error...arises perhaps out of unusual circumstances, but its one that might have been avoided." *Opinions of the Solicitor*, at 668, Ex.H.

229. Here, the consent of the individual half-blood Jamul Indians, including Rosales and Toggery, has never been obtained, and the original deed has never been changed, altered, or re-recorded. The 1978 grant deed does not contain the words, "until such time as they organize," proscribed by the U.S. Solicitor to put the property into trust for a subsequently recognized half-blood community, after it was organized. Ex. D. Nor does it state: "and then in trust for such organized tribe." Moreover, it is undisputed that there was no transfer of the designation of the individual Indian beneficiaries to any subsequently recognized half-blood community, since no subsequent grant deed has ever been recorded.

230. Therefore, as a matter of law, the government Defendants are estopped by its own Solicitor's memoranda and the failure to record any subsequent grant deed transferring the government's portion of the Indian cemetery to deny that it is still held in trust for the designated individual half-blood Jamul Indian beneficiaries, since the government concedes that the "Jamul Indians of one-half degree or more Indian blood,"did not exist as a tribe, and were not recognized as a tribe in 1978, let alone in 1934. *Opinions of the Solicitor* at 668, 724, 747, 1479, Ex. H, and Ex. I.

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(3) JIV Has No Right, Permit or Authorization to Build a Casino on the portion of the Indian Cemetery Beneficially Owned by Individual half-blood Indians and Under the Concurrent Jurisdiction of California, Because No Grant Deed Ever Transferred Governmental Control over the Cemetery Property to JIV

231. Since there was never a subsequent transfer of the individual Indians' beneficial interest in the cemetery parcel to the subsequently organized half-blood community, the individual beneficial ownership of the cemetery parcel has never been under the governmental power of the Jamul Indian Village, and as such, is federal private property, not tribal lands, and does not qualify for gambling under 25 U.S.C. 2703, remains subject to California's concurrent jurisdiction and law, including, but not limited to, Public Law 83-280, Cal. Pub. Res. Code and Cal. Health & Safety Codes, CEQA and NAGPRA, 25 U.S.C. 3002, as further required by 25 C.F.R. 1.4(b), and the DOI July 2, 1965 Secretarial Order, 30 F.R. 8722, and remains in trust for the beneficial use and quiet enjoyment of the individuals of one-half or more degree of Indian blood, including Rosales and Toggery, who then resided on the property.

232. Therefore, since the government and the individual half-blood Indians living in Jamul are barred from lawfully transferring their beneficial interest and trust status to the JIV, and since the JIV was not under federal jurisdiction in June of 1934, the JIV has never lawfully exercised governmental power over the parcel, which thereby precludes the parcel from qualifying for gambling under IGRA, since IGRA only permits gambling on "Indian lands," "over which an Indian tribe exercises governmental power." 25 U.S.C. 2703(4)(B). "The Secretaries of the Interior [and the NIGC] have no authority to permit gaming on after acquired trust lands absent the power delegated by Congress in IGRA." *La Courte Oreilles Band of Lake Superior Chippoewa Indians v. United States,* 367 F.3d 650, 657 (7th Cir. 2004).

233. Since the government's portion of the Indian cemetery was never transferred to the JIV and remains within the concurrent jurisdiction of the State of California today, and was never reserved from the public or private domain, California retains State and local police power over the cemetery

pursuant to the 10th Amendment of the U.S. Constitution and Pub. Law 280, 18 U.S.C. 1162 and 28 U.S.C. 1360.

234. Thus, the Cal. Pub. Res., and Health & Safety Codes, concurrently govern the use of the Jamul Indian cemetery, pursuant to 25 C.F.R. 1.4(b), and the DOI July 2, 1965 Secretarial Order, 30 F.R. 8722, along with the federal NAGPRA, 25 U.S.C. 3001 et seq., which defines the portion of the cemetery in which the U.S. holds title, as "Federal lands other than tribal lands which are controlled or owned by the United States." 25 U.S.C. 3001(5) and 43 C.F.R. 10.2(f)(1) and 10.4(d).

3. JIV has No Standing as a Required or Indispensable Party or an *amicus curiae*, Because it has Failed to Exhaust its Administrative Remedies and is Not a Recognized IRA Tribe

A. JIV Failed to Petition for Recognition as an IRA Tribe

235. The federal government admits that the JIV never petitioned under the Part 83 regulations to be recognized as an IRA "tribe," before it attempted to utilize the IRA to adopt its constitution as a "half-blood dependent Indian community" to obtain federal benefits. Ex. I. Having failed to petition for recognition as an I.R.A. tribe, the JIV has no standing to seek to have its status determined in this action, because it has failed to exhaust its administrative remedies to lawfully obtain recognition as an IRA tribe. *Nisqually Indian Tribe v. Gregoire* ("*Nisqually*") 623 F.3d 923, 927 (9th Cir. 2010); *White Mountain Apache Tribe v. Hodel* (*White Mountain Apache Tribe*), 840 F.2d 675, 677 (9th Cir. 1988); *Allen v. United States*, 871 F.Supp.2d 982, 991-93 (N.D. Cal. 2012) "'[F]ederal courts may not assert jurisdiction to review agency action until the administrative appeals are complete,' [citing] *White Mountain Apache Tribe*;" *Cherokee Nation of Okla. v. Norton*, 2005 U.S. Dist. LEXIS 2773, *3-4, *34 (10th Cir. 2005), reversing the "listing" of the Delaware Tribe, because it "never formally petitioned for acknowledgment, and reversing the DOI's recognition as arbitrary, capricious and against the law for failing to follow the Part 83 procedures for recognizing an Indian tribe;" *Butte Co. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010), DOI's arbitrary and capricious refusal to consider evidence why Tribe's land was not Indian lands remanded to exhaust administrative remedies; *Sandy Lake Band of Miss. Chippewa ("Sandy Lake") v. United States*, 2012 U.S. Dist. LEXIS 63458, *10 (D. Minn. 2012) dismissing plaintiffs' action for lack of subject matter

jurisdiction and failure to engage in the Federal acknowledgment process and failing to exhaust administrative remedies; and *United Houma Nation v. Babbit*, 1996 U.S. Dist. LEXIS 16437, *4, *8 (D.D.C. 1996), denying an injunction to freeze the administrative review process, where the group "failed to satisfy the historic criterion of 25 C.F.R. 83.7(e), and related provisions of 25 C.F.R. 83.7(a) and (b)."

236. See also, *Ione Band of Miwok Indians v. Burris*, Civ. S-90-993 LKK, (E. D. Cal. 1996), Exs. Y & Z, granting the governmental defendants summary judgment, finding "the Ione Band did not pursue the administrative federal recognition process," and "Plaintiffs' failure to apply for recognition through the administrative process described in the acknowledgment regulations bars their claims because there is no final agency action yet ripe for review," citing *White Mountain Apache Tribe*, and *James v. HHS*, 824 F.2d 1132 (D.C. Cir. 1987), dismissing plaintiffs' claims for lack of jurisdiction and failure to exhaust administrative remedies under 25 C.F.R. 83, which was followed most recently by *Mackinac Tribe v. Jewell*, 1:14-cv-0456 KBJ, Document 19, 25-28 of 29 (D.D.C. March 31, 2015); *David Laughing Horse Robinson v. Salazar*, 885 F.Supp.2d 1002, 1031-32 (E.D. Cal. 2012), finding the Court had no jurisdiction to determine "whether the Kawaiisu are the present day embodiment of the alleged historical tribe," because to do so "would infringe upon the role committed to the other two branches and violate separation of powers," where plaintiffs failed to exhaust administrative remedies for acknowledgment under 25 C.F.R. 83, citing *Shinnecock Ind. Nat. v. Kempthorne*, 2008 WL 4455599, *1 (E.D.N.Y. 2008), finding such a "quintessentially political decision must be left to the political branches of government and not the courts."

237. In *Allen*, the Ukiah Valley Pomo Indians were not a federally recognized tribe. They sought to organize under the IRA, but the court found that "before plaintiffs can invoke the provisions of the IRA, they must first complete acknowledgment proceedings before the BIA and become federally recognized." 871 F.Supp.2d 982, 991. Since "the IRA provides a definition of the term 'tribe,' ...as the government contends...recognition as a 'tribe' is a prerequisite to invoking the provisions of the IRA....the group seeking to organize must make a 'prima facie' showing that they are a 'tribe' within the meaning of the IRA," and not just a half-blood Indian community. *Id.*, at 991-92.

238. Here, the the government concedes that the JIV voluntarily elected not to make such a prima facie showing and did not petition for recognition as an IRA tribe, and merely sought recognition as a "half-blood dependent Indian community," even though they were fully "aware of the limitations that result from organizing as a half-blood Indian community." Ex. I at 2. The JIV half-blood Indian community has never initiated or completed an application to be formally recognized as an IRA tribe under 25 C.F.R. Part 83. Therefore, JIV, like the Ukiah Pomos, Franks Landing Indian Community and the Sandy Lake Band, never became a federally recognized tribe, even though they have been recognized as a half-blood dependent Indian community, and have been "listed" on the Tribal Entities that have a Government-to-Government Relationship with the United States. 44 F.R. 7235, as noted above.

239. Hence, not only does the executive branch "listing" of the JIV as an entity entitled to limited federal benefits not constitute recognition of the JIV as a tribe under the IRA, but the executive branch is not authorized to create a tribe by recognizing JIV as a tribe without JIV exhausting the administrative acknowledgment procedures in compliance with the government's Part 83 regulations. *James v. HHS* 824 F.2d 1132, 1139 (D.C. Cir. 1987); *David Laughing Horse Robinson v. Salazar*, 885 F.Supp.2d 1002, 1031-32 (E.D. Cal. 2012); *Shinnecock Ind. Nat. v. Kempthorne*, 2008 WL 4455599, *1 (E.D.N.Y. 2008).

240. As noted above, the Supreme Court "has long made clear that Congress and therefore the Secretary-lacks constitutional authority to 'bring a community or body of people within [federal jurisdiction] by arbitrarily calling them an Indian tribe'." *Carcieri* at 413, J. Stevens, dissenting, citing *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

241. [I]n respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts. *Id.*, 47.

242. A tribe cannot establish jurisdiction through its unilateral actions. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203, 219-20 (2005). "Where no expression of congressional intent or purpose exists, a tribe cannot establish jurisdiction through its unilateral actions." *Citizens Against Casino Gambling in Erie Co. v. Stevens*, 945 F.Supp. 2d 391, 401 (W.D.N.Y. 2013), landless

Kialagee Tribal Town did not obtain jurisdiction over a restricted allotment owned by members of the Muscogee Nation through unilateral act of leasing the land.

243. Having failed to petition for recognition as an I.R.A. tribe under the Part 83 regulations, the JIV therefore has no standing to appear as *amicus curiae*, or otherwise in this action.

B. JIV Failed to Petition for Proclamation of a Reservation

244. There is no dispute that the JIV has never applied for, nor had proclaimed, a reservation under 25 U.S.C 467. Moreover, the JIV has never been qualified to be "organized" or "reorganized" as a "tribe," under the Indian Reorganization Act, since it has never resided on a reservation. *Coast Indian Community v. U.S.* ("*Coast*"), 550 F.2d 639 (Fed. Cl. 1977), 550 F2.d 639, 651, n. 32; *Handbook of Federal Indian Law*, Ch.1, Sec. B2e, at 15-16 (1982 Ed.), citing *Maynor v. Morton*, 509 F.2d 1254 (D.C. Cir. 1975); Ex. I, at 3.

245. Neither Congress, nor the Secretary of the Interior under the delegated power of 25 U.S.C. 467, ever proclaimed an Indian reservation in Jamul, since Congress specifically limited California to four Indian reservations in 1864, pursuant to The Four Reservations Act § 2, ch. 48, 13 Stat. 39, 40. *Mattz v. Arnett*, 412 U.S. 481, 489-91 (1973). These four reservations, the Round Valley, the Mission, the Hoopa Valley, and the Tule River, do not include one for the JIV. Moreover, the government has conceded that the Mission Reservation's 19 tracts in So. California did not include any land in Jamul, California, nor even mention any tribe in Jamul. See, *Mattz v. Arnett*, 412 U.S. 481, 493, n. 15, 494 (1973).

246. Moreover, the dedication of the government's portion of the cemetery to cemetery use also confirms that it is not a reservation. *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1268 (10th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002), "Although the Huron Cemetery was reserved by the federal government in the 1855 treaty, it is uncontroverted that the reservation was made strictly for purposes of preserving the tract's status as a burial ground. For these reasons, we conclude the Secretary's determination that the Huron Cemetery is a "reservation" for purposes of IGRA, and his resulting determination that the Shriner Tract can be used by the Wyandotte Tribe for gaming purposes under the IGRA (25 U.S.C. 2719(a)(1)), was incorrect;" *Mechoopda Indian Tribe of Chico*

Rancheria v. Schwarzenegger, 2004 WL 1103021, *12 (E.D. Cal. 2004), finding "It is hard to believe that the Tribe really wants to negotiate to build a gambling casino on their burial ground, but that is what they argue...[However] the Tribe can prove no set of facts establishing that it has Indian land eligible for a gaming facility under the IGRA," due to the use restriction on the cemetery parcel.

247. An Indian tribe's jurisdiction and authority to exercise governmental power over particular property derives from the will of Congress. *United States v. Sandoval* 231 U.S. 28, 46 (1913), citing *United States v. Holliday*, 18 L.Ed. 182, 186; see also, *Kansas v. Norton*, 249 F.3d 1213, 1229-31 (10th Cir. 2001). Here, since Congress never granted the JIV "jurisdiction" over the portion of the cemetery to which the U.S. holds title, and has never created a reservation for the JIV, the express beneficiaries of the grant deed were and still are, the individual half-blood Jamul Indians who were allowed to reside on the property since 1978, including Rosales and Toggery, and not the half-blood Indian community, known as the JIV.

248. At one time, "[a]n Indian reserveration...may be set apart by an act of Congress, by treaty, or by executive order." *Peters v. Pauma School Dist.*, 91 Cal.App. 792, 794 (1928), holding, "the

249.facts set forth in the findings do not establish that petitioner resides upon an Indian reservation." However, However, at no time has Congress, a treaty, or an executive order, created a reservation for the JIV.

250. A reservation cannot be established by "custom or prescription." *Id*., citing 31 Corpus Juris, 499. "The fact that a particular tribe or band of Indians have for a long time occupied a particular tract of country does not constitute such tract an Indian reservation." *Peters,* at 794, quoting the *Matter of Forty-Three Cases Cognac Brandy*, 14 F. 539 (D.Minn. 1882).

251. Here, not only is there no act of Congress, treaty, or executive order, creating a reservation in Jamul, there is no administrative Secretarial "proclamation" or "application for a proclamation" of any reservation over non-public domain land in Jamul, as required by 25 U.S.C. 467, as a matter of law. *Peters v. Pauma School Dist.*, 91 Cal.App. 792, 794 (1928); *Citizens Exposing Truth About Casinos v. Kempthorne,* 492 F.3d 460, 469 (D.C. Cir. 2007), "the Sackrider property would not qualify as a reservation until the Band applied for and obtained a reservation proclamation under 25

U.S.C. 467;" *Donahue v. Butz*, 363 F.Supp. 1316, 1323 (N.D. Cal. 1973), finding executive officials have no "trust responsibility, right or duty to set aside reservation lands."

252. Here, just as with the JIV's express election not to exhaust its administrative remedies and to forgo applying for recognition as an IRA tribe under the Part 83 regulations, the JIV has similarly failed to apply for a proclamation of any reservation under 25 U.S.C. 467, and neither the Congress, nor the Secretary of the DOI, has proclaimed any reservation for the JIV.

253. "During the 1850's, the modern meaning of Indian reservation emerged, referring to land set aside under federal protection for the residence or use of tribal Indians, regardless of origin...This definition of the term 'reservation' has since been generally used and accepted." *Handbook of Federal Indian Law*, §3.04[c][ii] p. 165 (DOI 2005). However, the creation of a reservation still requires there to be "tribal" Indians of a federally recognized tribe, which JIV is not, and an act of Congress to lawfully create or authorize setting aside such a reservation, and it can no longer be created by the mere acceptance of a grant deed under the IRA. *Id.*; 43 U.S.C. 150; see for example, *Sac & Fox Tribe of the Mississippi in Iowa v. Licklider*, 576 F.2d 145, 149-50 (8th Cir. 1978), creation of any reservation still required the property to be beneficially held for a federally recognized treaty tribe, the Sac & Fox Tribe of the Mississippi in Iowa.

254. The government's regulations for Indian land acquisitions further defines and limits a reservation to: "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction." 25 C.F.R. 151.2(f) (45 F.R. 62036, Sept. 18, 1980). Therefore here, the government's portion of the Indian cemetery is not a reservation, since the JIV has never applied for, and has yet to be recognized by the United States as having, governmental jurisdiction over any portion of the Indian cemetery.

255. Though the Executive Branch once had its own authority to withdraw public lands to create Indian reservations, which the Supreme Court had previously affirmed in *U.S. v. Midwest Oil Co.*, 236 U.S. 459 (1915), and acknowledged in *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902), Congress explicitly eliminated that authority in 1919. 43 U.S.C. 150: "No public lands of the United States shall be withdrawn by Executive Order, proclamation or otherwise, for or as an Indian

reservation except by act of Congress." (June 30, 1919, ch. 4, §27, 41 Stat. 34.); *Handbook of Federal Indian Law*, §1.04, p. 81, n498 (DOI 2005).

256. The Government's *Handbook of Federal Indian Law* (DOI 1982) declares: "Any implication that lands purchased [or acquired] for tribes under section 5 of the IRA [25 U.S.C. 465] would constitute a reservation is negated by section 7 of that Act, 25 U.S.C. 467..." Ch. 1, Sec. D5, page 45, fn. 158. Thus, the Government's mere acquisition of the land in trust for the benefit of half-blood individual Jamul Indians did not create a reservation. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), acquisition of federal forest lands under the IRA did not create, nor become part of, a reservation; *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1257 (10th Cir. 2001); *Wisconsin v. Stockbridge-Munsee Community* 67 F.Supp. 2d 990, 1003 (E.D. Wis. 1999), granting preliminary injunction prohibiting Defendants from conducting Class III games on trust land not within any reservation.

C. JIV Has Failed to Exhaust its Administrative Remedies, and Has No Standing To Seek a Determination as to Whether It Qualifies to be Recognized as an IRA Tribe

257. JIV is barred from seeking JIV's status from the court, because JIV has failed to exhaust its administrative remedies to lawfully obtain federal recognition as an IRA tribe. Therefore, JIV has no standing as either a necessary or indispensable party, nor by way of an *amicus curiae*, or otherwise.

258. Thus, the Court must await JIV's completion of the formal application for recognition under the Part 83 administrative procedure, which JIV hasn't even commenced, before the Court will have jurisdiction to decide whether the JIV has been lawfully recognized by the federal government. *James v. HHS* 824 F.2d 1132, 1139 (D.C. Cir. 1987).

259. In the meantime, JIV has no standing in this action, since it is neither a required nor an indispensable party to this action. *Michigan v. Bay Mills Ind. Cmty.("Bay Mills"),*134 S.Ct. 2024, 2035 (2014); *Salt River Project Agric. Imp. & Power Dist. v. Headwaters Resources Inc.*, 672 F.3d 1176, 1177 (9th Cir. 2012), finding "the tribe is not a necessary party because the tribal officials can be expected to adequately represent the tribe's interests in this action and because complete relief

can be accorded among the existing parties without the tribe;" *Thomas v. United States*, 189 F.3d 662, 664 (7th Cir. 1999), which specifically holds that the Lac Courte Orielles Band of Lake Superior Chippewa Indians was not a required or indispensable party to an action alleging that the federal defendants had failed to follow the administrative procedures for Secretarial elections.

260. For example, "[W]hether the Kawaiisu are entitled to such acknowledgment is a non-justiciable political question and thus beyond the purview of the court...This court's determination of whether the Kawaiisu are the present day embodiment of the alleged historical tribe, would infringe upon the role committed to the other two branches and violate separation of powers...Here, the proper resolution of the claim is to proceed first through the administrative process because recognition is the issue. Recognition requires the DOI's special expertise to determine tribal status...the plaintiffs claim would be dismissed for failure to exhaust administrative remedies because those remedies have not been exhausted." *David Laughing Horse Robinson v. Salazar*, 885 F.Supp.2d 1002, 1031-32 (E.D. Cal. 2012).

261. "The key distinction is that the land claims may be justiciable, but the tribal status is not....it is undisputed that the Kawaiisu has never been recognized under the DOI/BIA's acknowledgment regulations, the executive-not the courts-must make the recognition determination...Where tribal status is at issue, the issue requires exhaustion of administrative remedies." *Id.*, 1032-33.

262. "[T]he court concludes that the district court was correct in ruling that appellants were required to exhaust administrative channels concerning the issue of tribal recognition prior to seeking judicial review." *James v. HHS* 824 F.2d 1132, 1139 (D.C. Cir. 1987), and followed by *Mackinac Tribe v. Jewell*, 1:14-cv-0456 KBJ, Document 19, 25-28 of 29 (D.D.C. March 31, 2015). "In this case, requiring exhaustion of the Department of the Interior's procedures for tribal recognition, before permitting judicial involvement, serves the purposes of the exhaustion doctrine." *Id.*, at 1137, citing *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50-51 (1938). "[R]equiring exhaustion allows the Department of the Interior the opportunity to apply its developed expertise in the areas of tribal recognition. The Department of the Interior's Branch of Acknowledgment and Research was established for determining whether groups seeking tribal recognition actually constitute Indian tribes and presumably to determine which tribes have previously obtained federal recognition. See,

25 C.F.R. 83.6(b)...It is apparent that the agency should be given the opportunity to apply its expertise prior to judicial involvement." *Id.*, at 1138, citing *Runs After v. United States*, 766 F.2d 347, 351-52 (8th Cir. 1985).

263. In *Shinnecock Ind. Nat. v. Kempthorne*, 2008 WL 4455599, *1 (E.D.N.Y. 2008) the court dismissed the recognition claims as a matter of law finding: "The issue of federal recognition of an Indian tribe is a quintessential political question that, in the first instance, must be left to the political branches of government and not to the courts." "As *James* and *Shawnee* demonstrate, historical recognition by the Executive Branch does not allow... an entity to completely bypass the BIA's recognition process." *Id.,* 1034.

264. Hence, the JIV has no lawfully recognized sovereignty, and exercises no lawful governmental power over any land that qualifies for Indian gambling. Thus, it has no protectable interest justifying participation in this action, nor can it be an indispensable party, since the executive council members have been named as Defendants and can adequately represent the JIV's alleged interests, as held in *Michigan v. Bay Mills Indian Community,* 134 S.Ct. 2024 (2014)*, Thomas v. United States*, 189 F.3d 662, 664 (7th Cir. 1999), and *Salt River*, *supra*, at 1177. Here, just as in *Thomas*, the JIV has been "trying to leverage its failure to follow the prescribed statutory procedures into an unreviewable decision," as to its status as a half-blood dependent Indian community, "by taking advantage of Rule 19. We cannot condone this kind of ploy." *Id*., at 669. Neither can this Court.

4. There Has Been No Prior Final Adjudication of any Issue in this Action

265. Contrary to the public statements by the JIV, the merits of Rosales and Toggery's prior litigation have never been found lacking, abusive, or to have deprived the JIV of any rights as a half-blood Indian community. Similarly, JIV has failed to demonstrate that any prior litigation was ever decided on the merits, or that any prior procedural dismissal of Rosales and Toggery's prior claims without a decision on the merits has any *res judicata* or collateral estoppel affect on any issue pending in this action.

266. There can be no issue preclusion without a final adjudication in the prior action. Here, there are no prior final adjudications of any issue pending in this case.

267. Since the JIV is not a party to this action, and has not properly supported its erroneous public assertions with the requisite "sufficient record," including complete copies of the prior complaints, answers, and orders in the prior litigation, there is no record of any issue preclusion in this action. *United States v. BaslerTurbo-67 Conversion DC-3 Air*, 1996 U.S. LEXIS 4685, *7-8 (9th Cir. 1996), the seeker of issue preclusion "must introduce a sufficient record to clearly demonstrate the fact that the very issues have been previously litigated between its opponent and someone else;" *Frankfort Digital Servs. v. Kistler*, 477 F3d. 1117, 1123 (9th Cir. 2007), "[a]ny reasonable doubt as to what was decided by a prior judgment should be resolved against giving it [issue preclusion] effect."

268. It is not enough that the party introduce the decision of the prior court; rather, the party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated. *Id.* Where the record before the district court was inadequate for it to determine whether it should apply the doctrine of collateral estoppel, we will not consider the issue on appeal. *Clark v. Bear Stearns & Co*., 966 F.2d 1318, 1321 (9th Cir. 1992).

269. Plaintiffs are not collaterally estopped by any of the prior litigation among Rosales, Toggery, the federal and state agencies, since none of those cases decided any of the merits of the claims in this action. Here, there will be no re-litigation because the substantive issues weren't litigated in any of the prior litigation. Most importantly, none of those cases ever decided the merits of the fact that the JIV was never under federal jurisdiction in 1934, and that Rosales and Toggery's families remains are to be protected on the government's portion of the Indian cemetery.

270. All of the prior litigation among the members of the JIV were dismissed on procedural grounds, due to a lack of jurisdiction to decide the merits in the absence of an indispensable party, claiming, albeit falsely, sovereign immunity, all of which have been superceded by subsequent Supreme Court opinions. Therefore, none of those decisions have any issue preclusive effect under the doctrines of *res judicata* or collateral estoppel, having been "dismissed without prejudice," per both F.R.C.P. or F.C.F.C., Rule 19, and C.C.P. 389(b). *Costello v. United States*, 365 U.S. 265, 286-87 (1961); *United States v. Hatter*, 532 U.S. 557, 566, (2001), no issue preclusion where the court did not reach the merits of the Cherokee Nation's claim; *Wilson v. Bittick*, 63 Cal.2d 30,

35-36 (1965), "the involuntary dismissal which terminated that proceeding was in no sense a ruling on the substance of the plaintiff's claim."[23]

271. Dismissal under F.R.C.P. Rule 12(b)(7) due to an absent required party under federal Rule 19 is without prejudice, and therefore is not an adjudication on the merits, and thus does not have claim preclusive effect. *Followay Productions Inc. v. Maurer*, 603 F.2d 72, 76 (9th Cir. 1979); *Univ. of Pittsburgh v. Varian Medical Systems, Inc.*, 569 F.3d 1328, 1332 (Fed. Cir. 2009), citing *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1866), and 18A Charles A. Wright, *Federal Practice and Procedure* § 4438 (2d ed. 1987).

272. Issue preclusion applies only to preclude litigation of issues "actually and necessarily decided at the previous proceeding [that are] identical to the one which is sought to be relitigated, and where "the first proceeding ended with a final judgment on the merits;" *Syverson v. IBM*, 472 F.3d 1072, 1078 (9th Cir. 2007); *Whelan v. Abell*, 48 F.3d 1247, 1255-56 (D.C. Cir. 1995); and "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding." *Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948). If it is "uncertain whether [an] issue was actually and necessarily decided in [prior] litigation, then relitigation of the issue is not precluded." *Next Wave Personal Comm. Inc. v. F.C.C.*, 254 F.3d 130, 147 (D.C. Cir. 2001).

273. For example, in *United States v. Washington*, 641 F.2d 1368, 1374 (9th Cir. 1981), the appellants claimed that the court was bound by decisions of the Indian Claims Commission and the Court of Claims in which the appellants were allowed to pursue claims on behalf of members.

[23] The fact that there has been a lot of litigation among the members of the JIV is merely a testament to the procedural hurdles that must be overcome in finally reaching a decision on the merits, now that *Carcieri v. Salazar*, 555 U.S. 379 (2009), and *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012), and *Michigan v. Bay Mills Ind. Cmty.,*134 S.Ct. 2024 (2014) have cleared the procedural underbrush, and established that the land doesn't qualify for gambling, Plaintiffs have standing, and the JIV is not an indispensable party, when its executive officers are sued in their individual capacity for violating the law. Like the 58 years it took for *Brown v. Board of Education*, 347 U.S. 483 (1954) to repudiate *Plessy v. Ferguson*, 163 U.S. 537 (1896), and the decades of litigation to establish the Tobacco Companies' liability, many disputes take years before a final decision on the merits may be entered. Rosales and Toggery, have laudably persisted in the assertion of the truth, despite the fact that the merits of Plaintiffs' claims have never been decided in any of the prior litigation.

"Those claims, however, involved compensation for individuals, not fishing rights for tribal units. The causes of action and factual issues litigated were different, and the doctrines of res judicata and collateral estoppel are therefore inapplicable." *Id.*, 1374, citing 1B Moore's Federal Practice, P0.405(1), (3).

274. Neither *res judicata* nor collateral estoppel bars the re-litigation of an issue, unless the issue was "necessary to support the judgment entered in the prior proceeding." *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1060, 1086 (9th Cir. 2007); *Knox Co. Educ. Assn. v. Knox Co. Bd. Educ.*, 156 F.3d 361, 376 (6th Cir. 1998); *Anthan v. Prof. Air Traffic Controllers Org.*, 672 F.2d 706, 710 (8th Cir. 1982). A decision has precedential value only as to "the precise issues necessarily presented and necessarily decided." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). A summary disposition on appeal affirms only the judgment of the court below, and no more may be read into the summary disposition on appeal than was essential to sustain that judgment. *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 182-183 (1979).

275. Here, contrary to public statements by the JIV, no court has made a final decision on the merits as to the identical issues, as for whom the United States holds the portion of the Indian cemetery in trust, and the fact that the JIV was not under federal jurisdiction in 1934:

276. *Rosales v. Kean Argovitz Resorts*, No. 00cv1910 (S.D. Cal. 2000), was dismissed for failure to state a claim under the Civil Rights Acts for invidious discrimination against Native Americans by Lakes Gaming, and reached no final decision as to whether the JIV was under federal jurisdiction in 1934, or the merits of the beneficial ownership of the government's portion of the Indian cemetery.

277. *Rosales VII*, Case No. 01cv951 (S.D. Cal. 2001) was appealed,[24] and the Ninth Circuit affirmed a procedural dismissal for lack of an indispensable party. Hence, any dicta concerning for

[24] Rosales and Toggery adopt JIV's roman numeral naming convention when referring to the prior lawsuits.

whom the cemetery parcel was held in trust is not a final decision on the merits and can provide no basis for *res judicata* or collateral estoppel.[25]

278. *Rosales IX*, No. 3:07cv624 (S.D. Cal. 2007), was dismissed as premature since the court found a lack of subject matter jurisdiction since then, unlike here and now, there had not yet been an actual discovery of desecrated human remains, and due to the absence of an indispensable party. Again, such procedural dismissal is not a final decision on any of the merits as to whether the JIV was under federal jurisdiction in 1934 or the ownership of the government's portion of the Indian cemetery.

279. *Rosales X*, No. 1:08cv512, 89 Fed. Cl. 565 (Ct. Fed. Cl. 2008), claim for damages arising from their wrongful eviction was similarly dismissed for lack of jurisdiction under the Indian Tucker Act, and due to an absent indispensable party. Neither jurisdictional ruling decided the merits of any claim by Plaintiffs here. The JIV is no longer an indispensable party following *Michigan v. Bay Mills Ind. Commty,* 134 S.Ct. 2024 (2014), and Plaintiffs naming of the executive council members of the JIV as Defendants. Moreover here, Plaintiffs' personal injury claims arising from the desecration of Plaintiffs' families' remains did not accrue under the Indian Tucker Act, until excavation began on or about February 10, 2014.

280. In none of Rosales and Toggery's prior actions were their claims the same as Plaintiffs raise here. None of those claims were premised upon the 2014 desecration of their families' human remains and funerary objects, obviously because it had not yet occurred. Most importantly, the

[25] Moreover, since the Ninth Circuit in *Rosales VII* ordered the So. Dist. of Cal. not to exercise its jurisdiction in equity and good conscience under F.R.C.P. Rule 19, and in *Rosales IX*, the So. Dist. of Cal. followed that order, there still has been no decision on the merits as to the beneficial ownership of the cemetery parcel, and the So. Dist. Cal.' statements concerning such ownership are not binding on this Court, nor do they preclude any of Plaintiffs' claims here. "When a judgment is based upon alternative grounds or multiple grounds, and on appeal it is affirmed on only one ground, without reaching the others, only the issue reached on appeal is a basis for collateral estoppel." *Janicki Logging Co. Inc. v. U.S.*, 36 Fed. Cl. 338, 340 (Ct. Cl. 1996), *aff'd* 124 F.3d 226 (Fed. Cir. 1997)(table); *see also*, *Trauma Service Group, Ltd. v. United States*, 33 Fed. Cl. 426, 433, fn. 5 (CFC 1995). No more may be read into summary disposition on appeal than is essential to sustain that judgment. *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 182-183 (1979). Thus, the Ninth Circuit's final decision was that the federal court did not have jurisdiction to decide the beneficial ownership of the cemetery parcel, which as noted above is a procedural dismissal without prejudice, and not a final decision on the merits.

Plaintiffs here, do not seek allotments or land patents, for loss of the beneficial interest in the government's portion of the Indian cemetery, as Rosales and Toggery did in *Rosales VII, IX* and *X.*

281. No court has finally determined that Plaintiffs' claims accrued more than 6 years before this action was filed. Plaintiffs' claims here do not arise from the date of the grant deed for the government's portion of the Indian cemetery, but from the 2014 desecration of their families' remains and funerary objects. Moreover, until April 10, 2013, 78 F.R. 31398, though the individual and corporate Defendants had been threatening to build a casino for almost 20 years, and had made applications to acquire other trust lands, no tribal, state or federal action had ever identified the government's portion of the Indian cemetery as being qualified for Indian gambling.

282. Moreover, since the individual members' prior lawsuits were all dismissed for lack of jurisdiction, the procedural findings therein are not final decisions on the merits as to who are the beneficial owners of the cemetery parcel. As to this issue, even if the half-blood dependent Indian community, known as the JIV, may have been mistakenly assumed to be the beneficial owner of the government's portion of the cemetery parcel in some of the prior litigation, there was never a final adjudication of that fact, or whether anyone other than the U.S. lawfully exercised governmental control over the government's portion of the cemetery parcel.

283. Thus, the status of the government's acquisition has never been finally decided, and Plaintiffs' claims are not barred by any statute of limitation, since Plaintiffs are well within six years of the government first asserting that it made an Indian Lands Decision on April 10, 2013. *Wind River Mining Corp. V. United States*, 946 F.2d 710 (9th Cir. 1991). Moreover, as noted above, "administrative actions taken in violation of statutory authorization or requirement are of no effect," *City of Santa Clara v. Andrus*, 572 F.2d 660, 677 (9th Cir. 1978), citing *Utah Power & Light Co. v. United States*, 243 U.S. 389, 392 (1917), and "unauthorized agency action may be disregarded as null and void," without regard to any statute of limitations. See, e.g., *Employers Ins. Of Wassau v. Browner* , 52 F.3d 656, 665 (7th Cir. 1995); *N.L.R.B. Union v. Federal Labor Relations Auth.*, 834 F.2d 191, 196 n. 6 (D.C. Cir. 1987); *Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 293 (2d Cir. 2006), "The D.C. Circuit has explained that ...substantive challenges to agency action–for example, claims that agency action is unconstitutional, that it exceeds the scope of the agency's

substantive authority, or that it is premised on an erroneous interpretation of a statutory term–have no time bars..."

5. There Has Been No Prior Final Adjudication that JIV was an Indispensable Party, all of which have been Superceded by Recent United States Supreme Court Decisions

284. There has been no prior final decision on the merits as to whether JIV is either a required or an indispensable party in any action–all such prior procedural dismissals being without prejudice, and the law having been fundamentally changed in the meantime. *Costello v. United States*, 365 U.S. 265, 286-87 (1961)*; Followay Productions Inc. v. Maurer*, 603 F.2d 72 (9th Cir. 1979); *Wilson v. Bittick*, 63 Cal.2d 30, 35-36 (1965).

285. As noted above, procedural dismissals under both federal and state rules due to a lack of subject matter jurisdiction or an absent required party are without prejudice, as a matter of law (even if mistakenly delineated with prejudice by the trial court), and therefore are not an adjudication on the merits, and thus do not have claim preclusive effect. *Dredge Corp. v. Penny*, 338 F.2d 456, 463 (9th Cir. 1964); *Univ. of Pittsburgh v. Varian Medical Systems, Inc.*, 569 F.3d 1328, 1332 (Fed. Cir. 2009), citing *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1866); *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1284 (10th Cir. 2012) and 18A Charles A. Wright, *Federal Practice and Procedure* § 4438 (2d ed. 1987).

286. Any prior procedural dismissal based upon alleged indispensability has also been superceded by the United States Supreme Court decisions in *Carcieri v. Salazar*, 555 U.S. 379 (2009), finding the JIV has no protectable interest in the government's portion of the cemetery parcel, since the JIV was not under federal jurisdiction in 1934, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012), finding that neighbors have standing to challenge Indian lands decisions under the A.P.A., and *Michigan v. Bay Mills Ind. Cmty.("Bay Mills"),*134 S.Ct. 2024 (2014), which holds that even if the JIV, were a federally recognized tribe in 1934, which it isn't, it would not be either a required, nor an indispensable, party to this action, since the JIV executive council members have been named as individual Defendants, and since they have no

immunity for violating IGRA, failing to comply with the IRA, and violating NAGPRA and California's public nuisance statutes. Therein, the Supreme Court holds:

> And if Bay Mills went ahead anyway, [and operated a illegal casino] Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license. See §432.220; see also §600.3801(1)(a) (West 2013) (designating illegal gambling facilities as public nuisances). As this Court has stated before, analogizing to *Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)*, **tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct**. See *Santa Clara Pueblo*, *436 U.S. at 59, 98 S. Ct. 1670, 56 L. Ed. 2d 106*...In short (and contrary to the dissent's unsupported assertion, see *post,* at 11), the panoply of tools Michigan can use to enforce its law on its own lands–no less than the suit it could bring on Indian lands under §2710(d)(7)(A)(ii)–can shutter, quickly and permanently, an illegal casino. *Bay Mills*, 134 S. Ct. 2024, 2035. (emphasis added).[26]

287. Since these decisions have so fundamentally changed the law, the Supreme Court's intervening decisions also create an exception to any issue preclusion under the doctrine of collateral estoppel or otherwise. "[E]ven if the core requirements for issue preclusion are met, [which have not been met here] an exception to the doctrine's application would be warranted due to [the Supreme] Court's intervening decision...", citing the RESTATEMENT (SECOND) OF JUDGMENTS, §28, Comment *c* (1982), which also states: "where the core requirements of issue preclusion are met, an exception to the general rule may apply when a 'change in [the] applicable legal context' intervenes." *Bobby v. Bies*, 556 U.S. 825, 836, (2009); *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 362-63 (1984); *Montana v. United States,* 440 U.S. 147, 162 (1979); *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948); *Burlington N. Santa Fe R.R. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 770 (9th Cir. 2003). "Courts have crafted an exception to the collateral estoppel principle when there has been a change in the applicable law between the time of the original decision and the subsequent litigation in which collateral estoppel is invoked." *Bingaman v. Department of the Treasury*, 127 F.3d 1431, 1437 (Fed. Cir. 1997).

[26] It should be noted that the Supreme Court has also recently held in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2212 (2012), that a neighboring citizen or group of citizens, like the Plaintiffs here, have standing to challenge the illegal acts of such executive council members, and their contractors, just as any State was held to have standing to sue the executive council members for violating the IRA, IGRA, NAGPRA or any of the State's laws in *Bay Mills.*

6. JIV Remains an Unessential Third Party to this Action and is Adequately Represented by the Named Defendant Executive Council Members who have No Immunity for Violating California and Federal law

288. Now that the U.S. Supreme Court has resolved the split among the Circuits in *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014), JIV is not an indispensable party to this action, as a matter of law, where it is adequately represented by its executive council members, as here, who are named defendants, and are not immune for their violations of the IRA, IGRA, NEPA, NAGPRA and California's P.R.C., H.S.C. and Penal Codes. By eliminating the prior split in the circuits, the Supreme Court has also eliminated the grounds for the prior procedural dismissals that prevented the merits of Rosales and Toggery's claims arising from the desecration of their families' remains and the beneficial ownership of the government's portion of the Indian cemetery from being finally adjudicated, until now.[27]

289. "Nor does the immunity extend to members of the tribe just because of their status as members. ...When tribal officials act outside the bounds of their lawful authority, however, most courts would extend the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to allow suits against the officials, at least for declaratory or injunctive relief." *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 40 Cal.4th 239, 248 (2006), citing *Ex parte Young*, 209 U.S. 123 (1908); *Boisclair v. Sup. Ct.* 51 Cal.3d 1140, 1157-58 (1990). See also, *Salt River Project Agricultural Improvement and Power District v. Lee*, 672 F.3d 1176, 1177 (9th Cir. 2012).

290. In sum, we hold that (1) the Navajo Nation is not a necessary party under Rule 19(a)(2)(A) because the plaintiffs seek relief only against the current Navajo officials; (2) the Navajo nation is not a necessary party under Rule 19(a)(1)(B)(I) because the officials adequately represent the tribe's interests, and (3) the Navajo Nation is not a necessary party under Rule 19(a)(1)(B)(ii) because its absence will not risk subjecting the plaintiffs to inconsistent obligations.

Indeed, a contrary holding would effectively gut the *Ex parte Young* doctrine. That doctrine permits actions for prospective non-monetary relief against state or tribal officials in their official capacity to enjoin them from violating federal law, without

[27] Compare *Burlington Northern Railroad Co. v. The Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), "tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law," with *Shermoen v. United States*, 982 F2d 1312, 1319-20 (9th Cir. 1992), attempting to create an exception to *Burlington Northern* for "relief requiring affirmative action by a sovereign or the disposition of unquestionably sovereign property," neither of which can be found in the enforcement of NAGPRA and California's H.R.C. and P.R.C., after the holding in *Bay Mills.*

> the presence of the immune State or tribe. *See Ex parte Young*, 209 U.S. 123 (1908). *Salt River Project Agricultural Improvement and Power District v. Lee,* 672 F.3d 1176, 1181 (9th Cir. 2012).

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

292. Even if *Bay Mills* had not held that a tribe is not an indispensable party, where its non-immune executive council members have been sued, the JIV also has no "legally protected interest" to be an indispensable party, because its "claimed" interest is "patently frivolous." *Davis v. United States*, 192 F.3d 951, 958-59 (10th Cir. 1999), reversing the dismissal of plaintiffs' Certificates of Degree of Indian Blood (CDIB) claims, finding the Tribe was not an indispensable party, since the Tribe's claim to a protected interest was patently frivolous, since there was no evidence in the record that the Tribe had "a legitimate claimed interest in Plaintiffs' CDIB claim."

293. Here, the JIV's claim to exercise governmental power over the U.S. government's portion of the Indian cemetery is just as patently frivolous, since there simply is no evidence disputing the fact that the JIV was not under federal jurisdiction in 1934, and therefore has never lawfully exercised governmental power over the government's portion of the Indian cemetery.

294. In *Yellowstone County v. Pease,* 96 F.3d 1169, 1172 (9th Cir. 1996), the Ninth Circuit found that a tribal court had no legally protected interest, where the Tribe had no legal interest in the tax to be collected from the defendant.

> Pease's contention that the tribal court has a legally protected interest in maintaining a court system that adjudicates property rights is also without merit. First, this case is not about the Tribe's right to tax reservation lands; rather, this action arose from Pease's claim that the *County,* a political subdivision of the State of Montana, is powerless to tax his fee-patented property...unlike other cases where courts have concluded that tribes are necessary parties under Rule 19(a), ...the tribal court does not have a legally protected interest that would be impaired or impeded by the County's suit. *Id.*

295. In *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier*, 17 F.3d 1292, 1294 (10th Cir. 1994), the United States failed to show that the Absentee-Shawnee tribe had a "legally protected interest," since the tribe had never been granted an "undivided trust or restricted interest" in the land.

> The 1872 Act does not create any "undivided trust or restricted interest" of the Absentee-Shawnee tribe in the Potawatomi tribe's land ....this "interest" is merely an expectation...This expectation is not a legally protected interest for purposes of 12(b)(7) necessary party analysis. *Potawatomi*, 17 F.3d 1292, 1294.

296. Similarly here, the JIV has no legally protected interest in the U.S. government's portion of the Indian cemetery. At best, it has an expectation that someday it might be recognized as an IRA tribe under federal jurisdiction in 1934, and that it might lawfully acquire land that qualifies for Indian gambling, with the concurrence of the Governor that such acquisition and use would not be detrimental to the community. But until both of these requirements are met, JIV has no legally protectable interest in the government's portion of the cemetery property, and remains an unessential third party to Plaintiffs' action.

297. Moreover, where, as here, "plaintiffs' action focuses solely on the propriety of [governmental action], the absence of a Tribe does not prevent the plaintiffs from receiving their requested declaratory relief." *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1258 (10th Cir. 2001); *Kansas v. United States,* 249 F.3d 1213, 1226 (10th Cir. 2001), "although the tribe had an economic interest in the suit's outcome," its gaming interest was not a sufficiently direct interest to make the tribe an indispensable party, since "the Federal Defendants' interests, considered together, are substantially similar, if not identical, to the Tribe's interests...;" *Antoine v. United States,* 637 F.2d 1177, 1181-82 (8th Cir. 1981),"the government [and its employees] may be held liable... regardless of the presence or absence of other potential parties."

298. Enjoining the Defendants from violating IRA, IGRA, NAGPRA and California's P.R.C., H.S.C. and Penal Codes will not invalidate any lawful ordinances, rules, regulations or practices of the JIV half-blood Indian community. Nor will such an injunction impair JIV's ability to exhaust its administrative remedies. Nor will it impair the negotiation, adoption, and enforcement of JIV's compact, ordinances, rules, regulations or contracts in compliance with the IRA and IGRA. Plaintiffs' relief does not seek to, and would not, invalidate any lawful compact or contract; while

any unlawful portion of any compact or contract entered by or among the Defendants is void and unenforceable in any event.

299. The fact that the named Defendants have no sovereign immunity for violating these laws, and all have the same interest as does the JIV in defending against these violations, the JIV is precluded from erroneously asserting any sovereign impairment under *E.E.O.C. v. Peabody W. Coal Co.*, 619 F.3d 1070, 1082 (9th Cir. 2010), or *Greyhound Racing, Inc. V. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002), *Pit River Home v. United States*, 30 F.3d 1088, 1092 (9th Cir. 1994), *Conf. Tribes of Chehallis Reservation v. Lujan*, 928 F.2d 1496, 1497 (9th Cir. 1991), *Dawavendewa v. Salt River Project Agric. Imprv. and Power Dist.*, 276 F.3d 1150 (9th Cir. 2002), and *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992). None of these cases are apposite, since the non-immune individual government office holders were not named Defendants, as they are here, under the *Ex parte Young* doctrine reaffirmed in *Bay Mills*, and available to adequately represent the absent immune governmental entities.

300. *Shermoen* and *Dawavendewa* are also limited to their facts, and only apply where the "relief cannot be granted by merely ordering the cessation of the [illegal] conduct complained of," as here, where Plaintiffs' relief requires no "affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Id.*, 1320. Here, Plaintiffs merely seek damages and an injunction based upon the Defendants' violation of the law, and do not seek the disposition of any unquestionably sovereign property.

301. Hence, Plaintiffs' injunctive relief will not prevent the half-blood JIV Indian community from exercising any sovereignty, since the government's portion of the Indian cemetery has never been lawfully subject to JIV's governmental power. Moreover, since *Bay Mills* holds that JIV is adequately represented by its executive council members and contractors, who are named Defendants in this action, JIV therefore cannot be prejudiced, as a matter of law, by a decision on the merits that it was not recognized under federal jurisdiction in 1934, and therefore cannot lawfully exercise governmental power over that portion of the Indian cemetery.

302. Neither the half-blood JIV Indian community, nor any other community of citizens, has the right to plant a flag in the U.S. government's portion of a privately owned Indian cemetery in California, and falsely claim sovereignty over it, and prevent the lineal descendants from protecting their families' remains against their false claims. A half-blood community of Indians simply cannot establish jurisdiction through its unilateral actions. *Sherrill* at 203, 219-20; *CACGE* at 401.

303. Thus, JIV is neither a required nor indispensable party to this action, since the executive council members have been named as Defendants and can adequately represent the JIV's alleged interests, as held in *Bay Mills, Thomas, supra*, at 664, and *Salt River*, *supra*, at 1177. As noted above, and just as in *Thomas*, the JIV is "trying to leverage its failure to follow the prescribed statutory procedures into an unreviewable decision," as to its status as a half-blood dependent Indian community, "by taking advantage of Rule 19. We cannot condone this kind of ploy." *Id*., at 669. Neither can this Court.

304. This action may now finally decide the merits of Plaintiffs' claims for the desecration of their families' remains on the government's portion of the Indian cemetery property. JIV is not a required or indispensable party to this action, as a matter of law, since none of the federal, corporate or individual Defendants have any immunity for their violations of IRA, IGRA, NAGPRA and the California P.R.C., H.S.C. and Penal Codes, after *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2035 (2014), and since they have been named as Defendants.

FIRST CAUSE OF ACTION

(Tortious Violation of Statute and Negligence Against All Defendants)

305. Plaintiffs incorporate by reference each and every allegation contained in paragraphs 1 through 303, inclusive, of this complaint as though fully set forth herein.

306. The Defendants owe a duty of care to the Plaintiffs to exercise reasonable care and comply with the law in the performance of the work they perform, including, but not limited to, complying with the U.S. Constitution, particularly Amend. 1, 4, 5, and 14, NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, Article I, Sections. 1, 2, 3, 4, 7, 13, 19, 24 and 31 of the California Constitution, the California Environmental Quality Act, Cal. Health & Safety Code §§7050.5, 7052, 7054, 7054.6,

7054.7, 7055, 7500, Public Res. Code 5097.9-5097.99, and Penal Code 487, and not violating the Plaintiffs' civil rights, as are enjoyed by California citizens, due to their age, ancestry and their political and religious beliefs.

307. Plaintiffs are informed and believe and thereon allege, that Defendants both intentionally and negligently breached their duty to Plaintiffs by failing to use reasonable care to protect the interests of, and prevent personal injury to, the Plaintiffs, by violating the law, and by negligently acting in the manner set forth in the allegations incorporated herein.

308. These acts include, but are not limited to: mutilating, disinterring, wantonly disturbing, demolishing, excavating, willfully removing, and permitting the dumping of the Plaintiffs' families' human remains and funerary objects on federal and state property, causing severe bodily injury, emotional distress, and irreparable damage to the Plaintiffs and their personal property, Native American human remains, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in, and prohibited by, NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, the California Environmental Quality Act, Cal. Pub. Res. Code §§21000-21177, 14 C.C.R. 15000-15387, Cal. Health & Safety Code §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, 8011, 8015-16, and Cal. Pub. Res. Code §§ 5097.9-5097.99, and Penal Code 487.

309. These acts have caused Plaintiffs' severe personal, physical and bodily injury, including severe emotional distress, and irreparable damage to themselves and their personal property, Native American human remains, along with the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, and Cal. Pub. Res. Code 5097.9-5097.99, by knowingly and/or willfully mutilating, disinterring, wantonly disturbing, and willfully removing, damaging, or otherwise altering or defacing, them without authority of law, in an amount in excess of $4 million, subject to further proof at trial.

310. These acts have also caused substantial emotional distress and personal injury and irreparable damage to, and interference with, the Plaintiffs' free expression and exercise of Native American religion as provided in the United States Constitution and the California Constitution, and has caused

and shall further cause severe and irreparable damage to the Plaintiffs' Native American sanctified cemetery, place of worship, religious or ceremonial site, and sacred shrines, in an amount in excess of $4 million, subject to further proof at trial.

311. Such acts will also unduly interfere with the Plaintiffs' civil rights to due process and equal protection of the laws. Plaintiffs will be greatly and irreparably damaged by reason of Defendants' infringement and violation of these civil rights, and unless Defendants are enjoined by this court, said acts will further violate Plaintiffs' civil rights, and further irreparably harm the Plaintiffs. Plaintiffs have therefore suffered general and consequential damages proximately caused by the Defendants' negligence in an amount subject to proof at the time of trial.

SECOND CAUSE OF ACTION

(For Declaratory and Injunctive Relief against all Defendants)

312. Plaintiffs incorporate by reference each and every allegation contained in paragraphs 1 through 310, inclusive, of this complaint as though fully set forth herein.

313. Plaintiffs are the lineal descendants' with ownership and control of their predecessors' human remains and Native American associated cultural items, as set forth in NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, Cal. Pub. Res. Code 5097.9-5097.99, and Cal. Health & Safety Code 7100, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony.

314. Plaintiffs' preferences are to preserve their families' Native American human remains and associated cultural items in place, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in, and required by, NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, Cal. Pub. Res. Code 5097.9-5097.99, and the CEQA Guidelines, 14 Cal. Code Regs.15126.4 (b)(3).

315. Pursuant to NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, Cal. Public Resources and Health & Safety Codes and the regulations adopted pursuant thereto, Plaintiffs are entitled to;

(A) an injunction preventing Defendants from any further knowing and/or willful mutilation, disinterment, wanton disturbance, excavation, and willful removal of Plaintiffs' Native

American human remains, along with the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, without authority of law, and permitted dumping of the Plaintiffs' families' human remains and funerary objects on state property owned and controlled by CalTrans, which have caused, and will continue to cause, irreparable damage to the Plaintiffs' Native American human remains, along with the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in Cal. Pub. Res. Code 5097.9-5097.99 and NAGPRA 25 U.S.C. 3001 et seq., and 43 C.F.R. 10.1-17;

(B) a written plan of action specifically including Plaintiffs' ownership, custody and control of, and the kind of traditional and planned treatment, care and handling of, and the disposition and repatriation of, any of their human remains, funerary objects sacred objects, or objects of cultural patrimony which have been, or may be, recognized pursuant to Cal. Pub. Res. Code 5097.98, and NAGPRA, 25 U.S.C. 3001 et seq., and 43 C.F.R. 10.1-17;

(C) transfer of custody to Plaintiffs any of their Native American human remains and funerary objects that have been disturbed, excavated and otherwise removed from where they were originally interred, pursuant to Cal. Pub. Res. Code 5097.98, and NAGPRA, 25 U.S.C. 3001 et seq., and 43 C.F.R. 10.1-17;

(D) repatriation of Plaintiffs' families' Native American human remains and funerary objects that have been disturbed, excavated and otherwise removed from where they were originally interred, pursuant to Cal. Pub. Res. Code 5097.98, H&S Code 8015-16, and NAGPRA, 25 U.S.C. 3001 et seq., and 43 C.F.R. 10.1-17; and

(E) prevention of further disturbance of Plaintiffs' human remains and funerary objects until the Plaintiffs' preference for the preservation of their Native American human remains and associated items in place, and that any items associated with the human remains that are placed or buried with the Native American human remains are to be treated in the same manner as the remains,

is carried out pursuant to Cal. Health and Safety Code 7050.5 and Cal. Pub. Res. Code 5097.98, and NAGPRA, 25 U.S.C. 3001 et seq., and 43 C.F.R. 10.1-17.

316. Cal. Pub. Res. Code 5097.95 and NAGPRA, 25 U.S.C. 3009, provide that all government agencies shall cooperate in carrying out their duties under the California Native American Graves Protection Act, as codified in Cal. Pub. Res. Code 5097.9-5097.99, H&S Code 8100 et seq., and NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17. Therefore, since the personal rights of the Plaintiffs, as the lineal descendants of their Native American ancestors, cannot be adequately protected without preventing the unlawful excavation, removal and dumping of their families' human remains and funerary objects on state property owned and controlled by CalTrans, Plaintiffs are entitled to an injunction to preserve their preference that their families' human remains and associated cultural items remain "in place," as called for in Cal. Pub. Res. Code 5097.9-5097.99, and NAGPRA, 25 U.S.C. 3001 et seq., and 43 C.F.R. 10.1-17, and which have been inhumed, interred, and deposited in burial sites below, on and above the cemetery over the last 100 years.

317. If the Defendants are not enjoined from knowingly and wilfully grading, operating heavy equipment, moving dirt and/or gravel, and other construction activities, and otherwise mutilating, disinterring, wantonly disturbing, demolishing, excavating, willfully removing, and causing irreparable damage to, the Plaintiffs' personal property, Native American human remains, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in, and prohibited by, NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, Cal. Health & Safety Code §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, Public Res. Code 5097.9-5097.99, and Penal Code 487, the Plaintiffs will continue to suffer severe and irreparable personal injury, physical and bodily injury, including severe emotional distress.

318. Cal. Pub. Res. Code 5097.97 also provides that since the Native American individual Plaintiffs have advised the California Native American Heritage Commission that a proposed action by a government agency may cause severe or irreparable damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, or may bar appropriate access thereto by Native Americans, and the proposed action would result in such damage or interference, and the government agency fails to accept the mitigation measures

recommended, Plaintiffs' action is further authorized by Cal. Pub. Res. Code 5097.94 to prevent severe and irreparable damage to, and to assure appropriate access for Native Americans to, the Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property.

319. Plaintiffs are also entitled to a temporary, preliminary and permanent injunction to prevent the Defendants' further violation of Cal. Pub. Res. Code 5097.9, and to prevent any government agency, and any private party from using or occupying government owned property, or operating on government owned property, under a public license, permit, grant, lease, or contract made on or after July 1, 1977, in any manner whatsoever to interfere with the free expression or exercise of Native American religion as provided in the United States Constitution and the California Constitution; and to prevent any such agency or party from causing severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, where, as here, there is no clear and convincing showing that the public interest and necessity so require.

320. Cal. Pub. Res. Code 5097.94 further provides that where, as here, severe and irreparable damage will occur, appropriate access will be denied, appropriate mitigation measures are not available, and there is no clear and convincing evidence that the public interest and necessity require otherwise, the court shall issue an injunction, to prevent severe and irreparable damage to, and to assure appropriate access for Native Americans to, the Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property. The California legislature specifically provided, in enacting the 1982 amendments to Cal. Pub. Res. Code 5097.94, that: "The purpose of the act is: To provide protection to Native American human burials and skeletal remains from vandalism and inadvertent destruction."

321. Similarly, Cal. Pub. Res. Code 5097.98, as amended, provides that upon the recognition of Native American human remains, which may be an inhumation or cremation, and in any state of decomposition or skeletal completeness, the Plaintiffs are entitled to a temporary, preliminary and permanent injunction to prevent the government landowner from failing to ensure that the immediate vicinity, according to generally accepted cultural or archaeological standards or practices where the

Native American human remains are located, is not damaged or disturbed by further development activity, so long as the lineal descendants' preferences are to preserve the Native American human remains and associated items in place, and that any items associated with the human remains that are placed or buried with the Native American human remains are to be treated in the same manner as the remains.

322. Therefore, since the individual Plaintiffs, lineal descendants of the Native Americans whose human remains, and the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in NAGPRA, 25 U.S.C. 3001 et seq., and Cal. Pub. Res. C. 5097.9-5097.99, have been inhumed, interred, and deposited in burial sites below, on and above the cemetery over the last 100 years, seek to preserve these Native American human remains and associated items in place, the court is required to issue an injunction to prevent their further mutilation, disinterment, disturbance, excavation, removal, and severe and irreparable damage on both federal and state property in violation of NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, the California Constitution, the California Environmental Quality Act, Cal. Health & Safety Code §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, Public Res. Code 5097.9-5097.99, and Penal Code 487.

323. An actual controversy has arisen and now exists between Plaintiffs and Defendants regarding their respective rights, duties and obligations in that Plaintiffs contend that Defendants are liable to Plaintiffs for the statutory, contractual, and tortious personal injuries and deprivations of their civil rights alleged herein, and defendants deny such liability to Plaintiffs.

324. Plaintiffs desire a judicial determination of the respective rights of Plaintiffs and Defendants.

325. Such a declaration is necessary and appropriate at this time so that the parties may ascertain their rights and duties with respect to each other.

326. Plaintiffs have been greatly and irreparably damaged by reason of said Defendants' statutory and tortious deprivations of Plaintiffs' personal and civil rights alleged herein, and unless Defendants are enjoined by this court, they will continue the violation of Plaintiffs' rights further irreparably harming the Plaintiffs.

327. As a result of the wrongful conduct of said defendants as herein alleged, Plaintiffs are entitled to a temporary, preliminary and permanent injunction to prevent great and irreparable injury resulting from the infringement and violation of their personal and civil rights, from the likelihood that damages cannot properly compensate Plaintiffs for such irreparable personal harm, from the likelihood that Defendants will be unable to respond in damages, and from the difficulty or impossibility to ascertain the exact amount of personal bodily injury and damage Plaintiffs have sustained, and will in the future sustain. These ongoing and continuing injuries sustained by Plaintiffs cannot be fully compensated in damages and Plaintiffs are without an adequate remedy at law without the imposition of the requested equitable injunctive relief.

WHEREFORE Plaintiffs pray for judgment as follows:

1. General and compensatory damages according to proof;

2. That the Defendants, and their officers, agents, servants, employees and attorneys and all persons in active concert with them, or any of them, be temporarily, preliminarily and permanently enjoined from permitting dumping, grading, excavating, removal, operating heavy equipment, moving dirt and/or gravel, or any other construction activities, involving any portion of the Jamul Indian cemetery in violation of NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, the California Constitution, the California Environmental Quality Act, Cal. Health & Safety Code §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, Public Res. Code 5097.9-5097.99, and Penal Code 487, and otherwise mutilating, disinterring, removing, excavating, and disturbing in any way, any Native American human remains, and the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, and Cal. Pub. Res. C. 5097.9-5097.99.

3. That Plaintiffs be awarded punitive damages;

4. That Plaintiffs be awarded their reasonable attorneys' fees, costs, and expenses in this action; and

5. That Plaintiffs be awarded such other and further equitable and legal relief as this court may deem just and proper.

JURY DEMAND

Plaintiffs hereby demand trial by jury.

Dated: May 26, 2015

WEBB & CAREY

/s/Patrick D. Webb
Attorneys for Rosales and Toggery