Case No. 17-16967

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER ROSALES AND KAREN TOGGERY, ESTATE OF HELEN CUERRO, ESTATE OF WALTER ROSALES' UNNAMED BROTHER, ESTATE OF DEAN ROSALES, ESTATE OF MARIE TOGGERY, ESTATE OF MATTHEW TOGGERY, APRIL LOUISE PALMER, and ELISA WELMAS, Appellants,	)
vs.	)
AMY DUTSCHKE, Regional Director, BIA; JOHN RYDZIK, Chief, Environmental Division, BIA; KENNY MEZA; CARLENE A. CHAMBERLAIN; ERICA M. PINTO; PENN NATIONAL GAMING INC.; SAN DIEGO GAMING VENTURES, LLC; and C.W. DRIVER, Appellees.	)

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

APPELLANTS' REPLY BRIEF

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Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appellees do not identify any protected interest that will be impaired or impeded by Rosales' remedies. Any claim to such a protected interest is "patently frivolous," as a matter of law, per 25 U.S.C. 3002(a), 43 C.F.R. 10.2(d)(1), HSC 7100, as held in *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992), since JIV has no lawful right, title, interest or control over, or in, Rosales' families' remains, nor in the highway beneath which they are interred. *White v. Univ. of California*, 765 F.3d 1010, 1016 (9th Cir. 2014), and *Bonnichsen v. United States* (*Bonnichsen*), 367 F.3d 864, 875 (9th Cir. (2004). Since the Rosales lineal descendants are still alive, no tribe has any right, title, interest or control over the families' remains. *Id*.; 25 U.S.C. 3001(13) and 3002(a)(1).

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

injunctive relief.[2]

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

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

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

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

JIV is not a required party under Fed. R. Civ. Proc., Rule 19(a)(1), since: (1) the court can "accord complete relief among existing parties," (2) JIV has no protected interest "relating to the subject matter of the action that would as a practical matter be impaired or impeded," and (3) no "existing party is subject to incurring double, multiple, or otherwise inconsistent obligations," just as in *Thorpe*, at*10, and *Thomas v. United States*, 189 F.3d 662, 664 (7th Cir. 1999), and admitted at FAB, 25. Appellees also concede that Rosales would have no adequate remedy if the action were dismissed for non-joinder. NAFB at 42.

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

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

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

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

There, the affiliated tribes were not required parties under Rule 19(a)(1)(B)(ii), because NAGPRA "states that after repatriation of human remains to a party, all claims by any other party are 'irrevocably waived.' 43 C.F.R. §10.15...NAGPRA ensures that they will never be subject to double, multiple or inconsistent obligations." *Thorpe* at *10-12.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

no injunction is sought on tribal lands, and the families' remains were, in fact, intentionally excavated and removed in February 2014.

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

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

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

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

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

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

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

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

Here, since these acts were committed by the individuals in excess of any official authority, *Michigan*, at 2035; *Evans v. Shoshone-Bannock LUPC*, 736 F.3d 1298, 1307, fn. 10 (9th Cir. 2013), "the tribe's sovereign immunity] arguments are without merit." "If an employee of the United States acts completely outside

his governmental authority, he has no immunity." *United States v. Yakima Tribal Court*, 806 F.2d 853, 859 (9th Cir. 1986). These acts remain by law admitted, having not been denied in an answer. Fed. Rules Civ. P., Rule 8(b)(6).

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

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

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

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

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

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

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

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

The federal Appellees concede that they have no sovereign immunity for damages caused in breach of the government's fiduciary duty under the Tucker Acts and NAGPRA to protect the remains, FAB 33, see the *United States v. Creek Nation,* 295 U.S. 103, 109-10 (1935) line of cases, AOB at 25, and ER174-75, since they violated at least 46 specific statutory duties under the 1st and 5th Amendments, 16 U.S.C. §470aa and cc, 18 U.S.C. §§1957, 1962, NAGPRA, 25 U.S.C. §§3001-2, 3005, 3009, 3013, 43 C.F.R. 10.1-17, AIRFA, 42 U.S.C. §1996, RFRA, 42 U.S.C. §2000bb-1, RLUIPA, 42 U.S.C. §2000cc, the California Constitution, Article I, Sections 1, 3, 4, 7, 13, 19, 24 and 31, H.S.C. §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, 8011, 8012, 8015, 8016, 8558, 8560,

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

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

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

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

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

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

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

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

A. APA Waiver of Sovereign Immunity

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

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

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

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

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

B. FTCA Waiver of Sovereign Immunity

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

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

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

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

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

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

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

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

The common law has long recognized personal injury and personal property damages arising from desecration, mutilation or disinterment of the dead. *Palmquist* at 360; *Allen v. Jones*, 104 Cal.App.3d 207 (1980); *Ross v. Forest Lawn Mem. Park*, 153 Cal.App.3d 988, 993-94 (1984)*; Sinai Mem. Chapel v. Dudler*, 231 Cal.App.3d 190, 197 (1991)*; Saari v. Jongordon Corp.*, 5 Cal.App.4th 797,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"If a federal official...commits an unconstitutional act, he cannot be acting on behalf of the government because his actions go beyond the scope of his authority and are *ultra vires*. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 696-97 (1949). Any claim making such constitutional allegations is not barred by sovereign immunity and is within the jurisdiction of the federal court. *Id.*, 701-2. The claim is made only against the official and not against the United States, as the official was acting individually and not in his capacity as a government agent. *Id.*" *United States v. Yakima Tribal Court*, 806 F.2d 853, 859 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); *Morgan v. California*, 743 F.3d 728, 731 (9th Cir. 1984).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

disposition of those remains.

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

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

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

Conclusion

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

Dated: April 27, 2018.

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

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Signature of Attorney or Unrepresented Litigant: /s/Patrick Webb

Date: 4-27-2018

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

CERTIFICATE OF SERVICE

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

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

Dated: April 27, 2018.

Respectfully submitted,
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