

**DEFENDANTS' REPLY BRIEF TO PLAINTIFF'S SUGGESTION IN OPPOSITION TO  
DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

If one would take a reading as the Plaintiff does, a deceased relative with Native American lineage could be buried according to the family's wishes in a private cemetery that gets flags from the Veterans Administration for Memorial Day and since the cemetery has possession and control of the Native American remains and gets federal funds in the form of flags and other designations for veterans, then it is now a "museum". Because it

is a “museum”, it can now be sued under NAGPRA and the wishes of the family at the time their loved one died is of no consequence since any lineal descendent later can come in and circumvent the family’s original desires. This interpretation goes against anything that anyone finds in the legislative history of the NAGPRA.

The Plaintiff takes the further position that, since the cemetery acts as a “museum” by the mere fact that it receives federal funds, it is bound by the provisions of NAGPRA. This is such a broad reading that it also conflicts with First Amendment rights. The Plaintiff’s reading tramples on the religious rights of the deceased and their families whose religious beliefs may demand to have their loved ones remain undisturbed after death.

While the Plaintiff purports that we repeatedly and mistakenly intermix difference provisions of NAGPRA, that is how his Complaint is written. On one hand, the Plaintiff is asking for repatriation of the remains, while on the other hand, he says he has standing based on the museum portions of the Act. However, if it were not for the museum portions of the act, then this Court would not have jurisdiction.

Therefore, it is logical to look at the legislative history and the intent behind the Act and whether it was ever intended to apply to modern day burials arranged by the deceased’s family. Somewhere there has to be a time when the family’s religious and cultural wishes must remain sacrosanct after their loved one dies. The spirit of the Act is to be a shield to protect the dignity of Native American ancestral remains that have cultural or ongoing historical significance central to a recognized tribe and repatriate such remains that were either stolen or otherwise improperly removed from tribal burial grounds or lineal

descendants and housed by government agencies or government subsidized museums<sup>1</sup>.

The Act was not devised to settle intra-family disputes. A modern body that was buried according to a Native American's religious and tribal rites should not be exhumed by one family member today, transported and re-interred halfway across the country to a cemetery not affiliated with deceased's faith, only to be exhumed next year by another lineal family member who wants to inter the remains somewhere else. See *Kickapoo Tradition Tribe v. Chacon*, 46 F. Supp.2d 644 (W.D. Tex 1999)(holding that the NAGPRA does not apply to burials of modern individuals). If the Plaintiffs interpretation of the NAGPRA was followed, then Native American remains could conceivably wander across the country at the desire of each generation of lineal descendants. Surely the Act was not intended to have such far reaching implications.

## **B. Plaintiff Lacks Standing Under the NAGPRA.**

### **1. NAGPRA was not intended to apply to modern human remains that have no ongoing historical or cultural significance to the tribe.**

"[T]he term "human remains" was intended to mean ancient human remains. . . ."  
*Kickapoo Traditional Tribe v. Chacon*, 46 F. Supp.2d 644, 650 (W.D. Tex 1999). The  
*Kickapoo* Court further states:

While it is true the Court must begin with the express language of the statute itself, see *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980), in ascertaining the meaning of that language the Court must also consider "the language and design of the statute as a whole." *K Mart Corp. V. Carter, Inc.*, 486 U.S. 281, 291 (1988)(court must "not look merely to a particular clause in which general words may be used but will take in connection with it the whole statute. . . and the objects and policy of the law"). This is because "even apparently plain words, divorced from the context in which they arise and which their creators intended them to function, may not accurately convey the meaning the creators intended to impart. It is only

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<sup>1</sup> Jim Thorpe lacks the necessary ongoing historical or cultural significance to any recognized Native American Tribe. Jim Thorpe has historical relevance based on his numerous athletic achievements and as an Olympic hero.

within context that a word, any word, can communicate an idea.” *Leach v. FDIC*, 860 F.2d 1266, 1270 (5<sup>th</sup> Cir. 1988). Consequently, in considering whether the term “human remains” applies to [a modern] corpse, the Court looks to the language and intent behind NAGPRA as a whole.

NAGPRA does not define the term “human remains.” Instead, this term is included within the category of “cultural items.” See 25 U.S.C. §3001(3). Other “cultural items consist of associated and unassociated “funerary objects,” and “cultural patrimony.” *Id.* Under the canons of statutory construction known as *noscitur a sociis*, “a word is known by the company it keeps.” *Babbitt v. Sweet Home Chapter of Communities for Great Oregon*, 515 U.S. 687,694 (1995). Placement of the term “human remains” within the larger category of “cultural items” thus suggests that NAGPRA was not meant to apply to a recently buried corpse which is of no particular cultural or anthropological interest . . . *Id.*

Although the Act does not apply to modern remains, it applies to historic and prehistoric remains. See *Yankton Sioux Tribe v. U.S. Army Corp of Engineers*, 83 F. Supp. 2<sup>nd</sup> 1047 (D.S.D. D. 2000). For example, the NAGPRA did not apply to prevent the disinterment of a modern person<sup>2</sup>, who died in 1999, from her burial site on tribal land because the disinterment was sought to perform an autopsy and the Native American remains were not of any cultural or anthropological interest. See *Kickapoo*. Likewise, Native American remains that were buried in a cemetery from approximately 1838 through 1894 were protected under the NAGPRA when the remains were inadvertently discovered on Federal land because these remains were not modern and to read the statute to apply to only prehistoric remains would render the statute meaningless. See *Yankton*.

Here, the application of the NAGPRA is obvious, it does not apply to modern human remains as the Plaintiff contends. The Defendants’ position is reinforced by the Plaintiff’s own interpretation of the Statute based on *Yankton* when he states, NAGPRA applies to “historical remains and those in caskets.” Jim Thorpe was a modern person, an American

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<sup>2</sup> A person who has lived within the past 100 years. C. Timothy McKeown and Sherry Hutt, In the Smaller Scope of Conscience: *The Native American Graves Protection & Repatriation Act Twelve Years After*, 21 UCLA J. L. & Pol’y 153, 174 (2003)

athlete, without ongoing historical or culturally significance to the Sac & Fox Tribe. He died in 1954 and was laid to rest in the consolidated Borough of Jim Thorpe in accordances with his religious beliefs and tribal rites pursuant to the wishes of his widow, who entered into a contract with the Borough to ensure her husband was properly memorialized. Because Jim Thorpe's remains are not prehistoric or historic and are not of ongoing historical or cultural significance to the tribe, the NAGPRA does not apply.

**2. Even though John Thorpe is a lineal descendant of Jim Thorpe, he is not within the zone of interest envisioned by the NAGPRA because the Act was not created to resolve intra-family disputes concerning modern human remains.**

The zone of interest test determines whether the interests sought to be protected by a complainant is an interest a statute attempts to protect. *Bennet v. Spears*, 520 U.S. 154, 163 (1997). Simply put, statutory standing exists if the statute accords the injured plaintiff the right to sue the defendant to redress the injury. *Graden v. Conexant Sys. Inc.*, 496 F.3d 291,295 (3d Cir. 2007). To determine whether a plaintiff has statutory standing and falls within the zone of interest, the court must first look at the text of the statute and then, if ambiguous, to congressional intent such as legislative history. *Id.*

Here, the NAGPRA states that lineal descendants have standing; however, when the statute is read in its entirety it becomes clear that lineal descendants have standing only if the ancestral remains sought have ongoing cultural significance. The legislative history of the NAGPRA reinforces this interpretation because the act was created to repatriate Native American remains and artifacts that had been removed, stolen, or improperly acquired from Native American grave sites mainly during the Nineteenth Century and early part of the Twentieth Century. See H.R. REP. 101-877,8-9 (1990).

While the Plaintiff claims he has standing under a plain reading and that the Defendants have mixed the museum portion with the repatriation portion, his interpretation

of the NAGPRA is misguided. The Plaintiff is now raising the museum portion for standing purposes, however, this section clearly does not afford the Plaintiff standing because he seeks to obtain modern human remains. For example, is a medical college that receives a cadaver of Native American lineage a museum under NAGPRA? Is a veterans' cemetery run by a state a museum pursuant to the NAGPRA if a soldier of Native American lineage who served in Iraq is buried there? To all these questions the legislative intent as well as case law would say 'no', however, this is exactly how the Plaintiff's broad interpretation of the Act is presented.

**C. The Borough of Jim Thorpe is not a museum pursuant to the NAGPRA because it does not have control over Native American remains that are protected under the Act.**

A museum is any state or local government agency that has control over Native American cultural items, including human remains, and receives direct or indirect federal funding. 25 U.S.C. 3001(8). Human remains, pursuant to the act as evidenced by case law and legislative history includes prehistoric and historic remains, but does not include modern remains. See *Kickapoo Tradition Tribe v. Chacon*, 46 F. Supp. 2d 644 (W.D. Tex 1999)(Modern human remains buried on tribal lands are not protected by permit requirements of NAGPRA); see also *Yankton Sioux Tribe v. U.S. Army Corp. of Engineers*, 83 F. Supp. 2d 1047(2000)(NAGPRA applies to historical human remains that were buried between approximately 1838 and 1894 because they were historical and if the Act only applied to prehistorical remains the Act would be meaningless); see also *Fallon Paiute-Shoshone Tribe v. United States BLM*, 455 F. Supp.2d 1207 (NAGPRA applies to prehistoric remains that were between 1,500 and 2,000 years old). Furthermore, "[t]he NAGPRA exists to give protection to Native American artifacts, cultural items, and other such objects ' having ongoing historical, traditional, or cultural importance central to the

Native American group or culture itself, rather than property owned by an individual Native American.” *Romero v. Becken*, 256 F. 3d 349, 354-55 (5<sup>th</sup> Cir. 2001)(citing 25 U.S.C. 3001(3)(D)). The legislative history further supports the rationale that the Act does not pertain to modern human remains because the legislative history states that the purpose of the act is repatriate Native American human remains and artifacts that have been removed from Native American grave sites mainly during the Nineteenth Century and early part of the Twentieth Century. H.R. REP. 101-877, 8-9(1990).

Here, the remains of Jim Thorpe were buried in 1954 in the consolidated Borough of Jim Thorpe according to the wishes and desires of his widow, Patricia G. Thorpe. Jim Thorpe was buried according to his religious beliefs and further received tribal rites in accordance with his Native American heritage. His body was not removed from any sacred tribal burial grounds prior to his interment in the Borough of Jim Thorpe nor were his remains stolen or otherwise improperly obtained by the Borough. Because Jim Thorpe’s remains do not have ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, the NAGPRA should not apply. His burial site is therefore not a museum and repatriation is not justified.

**D. 1983 Claim Preclusion By The Express Private Right of Action Under NAGPRA for Repatriation of Native American Remains and Elaborately Detailed Administrative Remedy Available to Resolve the Dispute.**

In order to state a valid claim for relief under 1983, the 1983 action must (1) create a federal right and (2) not attack a statute that already provides a remedy. *See Fitzgerald v. Barnstable School Committee*, 129 S.Ct. 788 (2009). “In determining whether a subsequent statute precludes the enforcement of a federal right under § 1983, [the U.S. Supreme Court] ha[s] placed primary emphasis on the nature and extent to that statute’s remedial scheme.” *Id.*, at 794. As the *Fitzgerald* Court noted in its prior case decisions

involving claim preclusion, “the statutes at issue required plaintiffs to comply with particular procedures and/or exhaust particular administrative remedies prior to filing suit. *Id.*, at 795. The NAGPRA statute sets forth that federal administrative regulations will be propounded to protect the enforcement of the NAGPRA. 25 U.S.C. § 3011. Codifications are in place that set up a detailed complaint procedure to resolve potential NAGPRA claims. It is clear from the federal statutory and regulatory scheme of NAGPRA, that private or administrative resolution is favored before judicial intervene proceeds.<sup>3</sup>

In the *Fitzgerald* case, the U.S. Supreme Court noted that Section 901(a) of Title IX provides that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to the discrimination under any education program or activity receiving. 20 U.S.C. § 1681(a).” *Id.* The *Fitzgerald* Court noted that the statute’s only express enforcement mechanism, 20 U.S.C. § 1682, is an administrative procedure resulting in the withdrawal of federal funds. Moreover, the U.S.

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<sup>3</sup>Pursuant to 25 U.S.C. § 3006, within 120 days after the date of enactment of this Act, the Secretary shall establish a committee to monitor and review the implementation of the inventory and identification process and repatriation activities required...25 U.S.C. § 3006(a). The Committee established under subsection (a) shall be responsible for reviewing and making findings relating to the return of such items upon the request of any affected party. 25 U.S.C. § 3006(c)(3). The Committee shall be responsible for facilitating the resolution of any disputes among Native American lineal descendants and museums relating to the return of such items. 25 U.S.C. § 3006(c)(4). The Committee shall be responsible for consulting with Indian tribes and museums on matters within the scope of the work of the committee affecting such tribes or organizations. 25 U.S.C. § 3006(c)(6). The Committee shall be responsible for making recommendations, if appropriate, regarding future care of cultural items which are to be repatriated. 25 U.S.C. § 3006(c)(9). The Committee shall make the recommendation under subsection (c)(5) in consultation with Indian tribes and appropriate scientific and museum groups. 25 U.S.C. § 3006(e). The Secretary shall promulgate regulations to carry out the provisions of NAGPRA. 25 U.S.C. § 3011. Exhaustion of remedies. (1) A person’s administrative remedies are exhausted only when the person has filed a written claim with the responsible museum or Federal agency and the claim has been duly denied under this part. 43 C.F.R. § 10.15(c).



Supreme Court has previously recognized an implied private right of action despite the fact that Title IX does not expressly create such a private right of action. *Id.* (citing *Cannon v. University of Chicago*, 441 U.S. 677, 717, 99 S.Ct. 1446, 60 L.Ed. 2d 560 (1979)). As indicated by the *Fitzgerald* Court, these remedies, the withdrawal of federal funds and an implied cause of action, stand in stark contrast the carefully tailored enforcement schemes of other federal statutes that preclude Section 1983 claims. *Id.* Further, the *Fitzgerald* Court noted that a comparison of the substantive rights and protection guaranteed by Title IX under the Equal Protections clause supported the conclusion that Congress did not intend Title IX to preclude Section 1983 claims. *Fitzgerald*, at 796.

In the present case, and contrary to Title IX's implied private cause of action, the NAGPRA creates an express private cause of action. *See Id.*, see also 25 U.S.C. § 3013. The Plaintiff makes the disjointed argument that NAGPRA does not explicitly foreclose a claim for Section 1983 relief. That is not the test for determining 1983 preclusion. As set forth by the *Fitzgerald* Court, the "relevant question is not whether Congress envisioned that two types of claims would proceed together in addressing gender discrimination in schools; it is whether Congress affirmatively intended to preclude this result. The limited nature of constitutional protections against gender discrimination in 1972 offers no evidence that Congress did." *Id.*, at 797 (Footnote 2). Thus, the question is not whether Congress expressly wrote that 1983 claims are precluded or envisioned to run in unison to NAGPRA claims as the Plaintiff suggests, but rather whether Congress expressly created a carefully tailored enforcement mechanism to adequately address the relief for alleged violations of NAGPRA. Section 3013 of NAGPRA, expressly states that "[t]he United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to

enforce the provisions of this chapter.” 25 U.S.C. § 3013. Congress could not be any clearer in creating an express private cause of action in drafting this code section. It is clear that NAGPRA was meant to be the statutory mechanism for addressing the Defendants’ alleged violations under NAGPRA. *Compare Fitzgerald*, at 797. It is also apparent that when Congress enacted NAGPRA, it explicitly envisioned that private plaintiffs could bring a claim under the NAGPRA after exhaustion of administrative remedies.

Also, the NAGPRA provides the remedies available that the Plaintiff seeks, namely the repatriation of the body of Jim Thorpe; this is not a Section 1983 claim. Section 3013 of NAGPRA expressly grants this Court the authority to issue such orders as necessary to enforce the provisions of the act. A Section 1983 claim is merely bootstrapping of an alternative remedy with threats of monetary and punitive damages against individual officers of the Borough of Jim Thorpe and the Borough itself for what the Plaintiff essentially alleges and describes as committing no acts but yet acting under the color of state law when not doing anything.

#### **E. Official and Qualified Immunity**

The Plaintiff has attempted to make the argument that the Defendants’ have not raised the argument of qualified immunity. This confounds the logic and purpose of qualified immunity. There is no categorically distinct difference to be made between officer immunity and qualified immunity. They are essentially the same thing, just variations of immunity. The Plaintiff does not contest that the individuals sued within his complaint are officers of the Bureau of Jim Thorpe. In fact, the Plaintiff sets forth in his allegations that the individual Defendants were acting under color of state law throughout the time frame of the facts alleged in the Plaintiff’s Complaint. Apparently, the Plaintiff is attempting to sue

the individual Defendants not for injunctive relief to repatriate Jim Thorpe's remains but rather is attempting to sue them strictly for monetary damages in contravention to the NAGPRA. The officer Defendants would not have the authority to repatriate the remains of Jim Thorpe in their individual capacity but only in their official capacity. The individually named Defendants have absolutely no power to personally turn over Jim Thorpe's remains outside their official capacity.

As noted by the *Romero* Court, qualified immunity should be granted to all government defendants sued in their individual capacities when the plaintiff merely recites conclusory allegations and provides no specific details about the involvement of the individual defendants. *Romero v. Becken*, 256 F.3d 349, 355 (5<sup>th</sup> Cir. 2001). In fact, the case cited by the Plaintiff of *Hafer v. Melo*, 502 U.S. 21 (1991), stands for the proposition that state officials sued in individuals capacity suits may be entitled to qualified immunity when sued in their individual capacity. The *Hafer* case distinguishes the difference between individual capacity and official capacity as follows: "the phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." Pursuant to footnote 10 of the *Hafer* decision, a state official in his or her official capacity, when sued for injunctive relief, would be a person under Section 1983 because official capacity actions for prospective relief are not treated as actions against the state. The practical effect of the *Hafer* case is that the judge must decide whether a suit is official or individual capacity at the outset of a litigation.

In order to state a valid cause of action in order to survive a motion to dismiss under F.R.C.P. 12(b)(6) for a personal capacity suit, the Plaintiff must "show that the official, acting under color of state law, caused the deprivation of a federal right." *Hafer*, at 25. It

is interesting to note at the outset that the Plaintiff is attempting to impose personal liability on the mere conclusory allegation that the individually named Defendants were acting “acting under color of state law” but yet at the same time alleges that the Defendants committed no acts. How can one be acting under color of state law and yet not commit any actions? The Defendants respectfully suggest that the Plaintiff cannot have it both ways of alleging that the individual Defendants did not act and were acting under color of state law at the same time. Furthermore, there is no allegations in the Plaintiff’s Complaint that he ever informed any of the Defendants of any alleged injuries under the NAGPRA before commencing this suit.

#### **F. Necessary and Indispensable Parties**

If the Plaintiff has a valid cause of action, it is clear from the statute that all the lineal descendants have a right to notice so that a person’s body would not wander across the country at the whim of each generation just because the human remains are of Native American ancestry. Each lineal descendant is therefore a necessary and indispensable party under Rule 19 of the Federal Rules of Civil Procedure. This is supported by 43 C.F.R. 10.12(e)(3) that requires notice to be given to any and all lineal descendants and all Indian Tribes culturally affiliated with the remains, before repatriation.

For the reasons set for above, the Defendants pray this Honorable Court to dismiss the Complaint filed by the Plaintiff.

Respectfully submitted,

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