

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

JOHN THORPE, an individual; :
RICHARD THORPE, an individual; :
WILLIAM THORPE, an individual; :
and the SAC AND FOX NATION, :
OF OKLAHOMA, a federally :
recognized Indian tribe :
Plaintiffs, :

vs. :

BOROUGH OF JIM THORPE, PA, :
MICHAEL SOFRANKO, RONALD CONFER, :
JOHN McGUIRE, JOSEPH MARZEN, :
W. TODD MASON, JEREMY MELBER, :
JUSTIN YAICH, JOSEPH KREBS, :
GREG STRUBINGER, KYLE SHECKLER :
& JOANNE KLITSCH, :
Defendants. :

**Case No.: 3:10-cv-01317-ARC
(Judge A. Richard Caputo)**

Jury Trial Demanded

**BRIEF IN OPPOSITION TO PLAINTIFFS, RICHARD THORPE, WILLIAM THORPE,
AND THE SAC AND FOX NATION’S MOTION FOR SUMMARY JUDGMENT AND
BRIEF IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT AS TO THE
ISSUE OF FEDERAL FUNDS**

AND NOW, comes the Defendant Borough of Jim Thorpe (hereinafter the “Borough”), by and through its counsel, William G. Schwab & Associates, and respectfully submits its Brief in Opposition to the Plaintiffs’ Motion for Summary Judgment.¹

The Borough also submits this Brief in Support of its Cross Motion for Summary Judgment as to the issue of Federal Funds in that the Borough is not a museum under the

¹No grounds for a permanent injunction against the Borough are raised in their Motion for Summary Judgment. As such they are not addressed herein as it is the Borough’s position that non-stated grounds for a permanent injunction are waived by the Plaintiffs, as set forth in its Response to Plaintiff’s Motion for Summary Judgment and the Cross Motion for Summary Judgment. On those grounds alone this Court should deny the Plaintiffs’ Motion for Summary Judgment.

Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001, *et seq.* (“NAGPRA”).

I. INTRODUCTION

The large part of the first ten (10) pages of the Plaintiffs’ Brief in Support of their Motion for Summary Judgment consists of irrelevant facts. See *e.g.*, F.R.E. 401(b) (fact must be of consequence in determining the action).

The question before the Court is whether NAGPRA applies to the Borough. If the Court finds in the affirmative, then the next question is whether the Borough should be enjoined to compile an inventory and subsequently proceed with administrative procedures under the NAGPRA and 43 C.F.R. 10.1, *et seq.*

The highly speculative allegations of commercial exploitation cited in Mr. Robert Wheeler’s book, which are referenced by Plaintiffs, are not material facts before the Court – nor is the author’s attempt to rewrite history for his own financial gain.² The Introduction by the Plaintiffs appear to read more as the novel with romanticized stories of legend, rather than based upon actual facts made part of this record.

Despite the Plaintiffs’ contrary assertion that, for the last fifty years, they had no legal tools before the enactment of NAGPRA to address their request to repatriate the remains of Jim Thorpe, the Plaintiffs correctly note that they have never sought reinterment under Pennsylvania law,³ via 9 P.S. Section 52, *et seq.*, or to otherwise contest the valid California probate proceedings, which vested the responsibility of properly burying Jim

²See Exhibits 1 and 2 to Answer to Plaintiffs’ Statement of Facts, Affidavits of Michael Koehler and John Thorpe stating that Mr. Wheeler is the undisclosed principal of the Plaintiffs and is directing the litigation herein.

³See Pls.’ Brief in Support of Summary Judgment, P. 32.

Thorpe's remains to his third wife, Patricia ("Patsy") Thorpe (See Def.'s Statement of Facts in Support of its Motion for Summary Judgment ¶¶ 33, 36).

More so, as the Plaintiffs properly point out in their Brief, the purpose of NAGPRA is to return all human remains and cultural objects obtained to prevent exploitation (Pls.' Brief, P.17). There has been no allegation that the burial of Jim Thorpe on Borough grounds was done to exploit anything. The Plaintiffs are asking this Court to expand the plain language of the Act and its underlying CFR regulations to inject the federal government into what has, historically, been family and state matters. Patsy buried her husband in conformity with California Estate Law (See Exhibit A and B to Def.'s Motion for Summary Judgment).

The Borough has attached to its Answer to Plaintiffs' Statement of Facts hereto as Exhibit 1, an Affidavit of Michael Koehler, who is the eldest grandson of Jim Thorpe from his first marriage with Charlotte Thorpe. As indicated in Mr. Koehler's Affidavit, his mother attended the signing of the agreement with the Borough to provide a resting place for Jim Thorpe. Moreover, the children of Jim Thorpe's first marriage organized Indian tribal ceremonies to sanctify the grounds upon which Jim Thorpe was buried. Moreover, as Mr. Koehler indicates, there is great concern on his side of the family as to Mr. Wheeler's involvement, as a behind the scenes non-party actor, in this lawsuit. Lastly, there is a feeling that if NAGPRA was to apply, the family will have limited influence over the Tribe as to where Jim Thorpe will ultimately be laid to rest (See Michael Koehler Affidavit).

Simply put, the central question before the Court is whether, under NAGPRA, the Borough is a museum.

In order to decide the above question, this Court must decide if, when the Borough obtained funds given to it by the Commonwealth of Pennsylvania and the County of Carbon, some of which funds might be traceable through a trickle down theory from monies

originating from the federal government, that is enough to meet NAGPRA's meaning of "receiving federal funds".

There is no dispute of fact that the Borough never obtained funds **directly** from the federal government.

In regards to possession, the Borough, like a cemetery, has control of remains buried within its lot. The Borough does not contest that the remains of Jim Thorpe are buried on Borough owned property under similar circumstances; much in the same way as a private cemetery would have a contract with the executrix of the estate for the burial of a family member. The estate maintained ultimate ownership and possession of the beloved family member. See *Cal. Health and Safety Code* § 7100.

II. NAGPRA IS NOT APPLICABLE TO THE BOROUGH OF JIM THORPE

The Plaintiffs make much ado in Part One of their Motion for Summary Judgment that the Borough has not complied with NAGPRA.

For the purposes solely of their Summary Judgment Motion, if, *in arguendo*, one accepts the non-compliance with the inventory and registration sections of NAGPRA as a true fact⁴, the Plaintiffs must still show that it is undisputed that the Borough of Jim Thorpe ("the Borough") is a "museum.". The crux of Plaintiffs' argument rises and falls on whether the Borough "receives Federal funds".⁵

In interpreting statutory language, the plain meaning of a statute is to be applied unless the statute is ambiguous or if applying the unambiguous plain meaning would

⁴ At trial, this is a matter that would have to be proven by the Plaintiffs herein.

⁵"It is not the role of the Court to 'sift through the record in search of evidence to support a party's opposition to summary judgment...Judges are not like pigs, hunting for truffles buried in briefs.'" *Miles-Hickman v David Powers Homes, Inc.* 589 F. Supp. 2nd 849, 863, n. 26 (SD Texas 2008). Likewise here the Plaintiffs have attached exhibits without pinpointing cites in them for what they think they show to enable the Court or the Borough to adequately address the exhibits.

yield an absurd result. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct 1942 (2000). A “museum” is defined by NAGPRA as:

[a]ny institution or State or local government agency (including any institution of higher learning) that **receives Federal funds** and has possession of, or control over, Native American cultural items.
[emphasis added]

25 U.S.C. § 3001(8).

In support of their assertion that the Borough has received federal funds, the Plaintiffs cite *Grove City College v. Bell*, 465 U.S. 555 (1984), where the Court held that the receipt of federal funds need not be direct, but can be indirect to fulfill the “federal funds” requirement. *Grove City* dealt with a statutory interpretation that specifically included indirect federal funds in its definition.⁶ NAGPRA has no such express language including beneficiaries.

The case before the Court is more similar to *Department of Transportation v. Paralyzed Veterans of America (Paralyzed Veterans)*, 477 U.S. 597, 607 (1986). There, the Supreme Court clarified its holding in *Grove City*. It held that *Grove City* “does not stand for the proposition that federal coverage follows the aid past the recipient to those who merely benefit from the aid...”

The *Paralyzed Veterans* Court held that there were two distinct classes:

1. intended recipients of federal assistance; and,

⁶ Federal financial assistance means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:
(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and
(ii) Scholarships, loans, grants, wages or other funds extended to any entity for **payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.** 34 C.F.R. §106.2(g)(1).[emphasis added].

2. intended beneficiaries of federal assistance.

In *Paralyzed Veterans*, airlines benefitted from the federal funds, but never received a penny of financial assistance directly from the federal government. The Court concluded the airlines were the intended beneficiaries, not recipients of federal funds, and therefore did not fall under the requirements of Section 504 of the Rehabilitation Act. *Id.*, at 605.⁷ The U.S. Supreme Court went on to distinguish its decision in *Grove City* finding federal assistance can be direct or indirect. The *Paralyzed Veterans* Court explains that, in *Grove City*, the issue was whether the “intended recipients”, not the “intended beneficiaries”, were subject to federal regulation as a result of an agreement contractual in nature. *Id.*, at 606.

The Court’s opinion reads in part:

By limiting coverage to recipients, Congress imposes the obligation of §504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to “receive” federal funds.

Id. at 606.

The Court explained that the intended recipient in *Grove City* was the college. Although the college did not receive federal funds directly, because the college had a contractual relationship with the federal government and it had the ability to accept or reject federal funds (tuition monies) for its benefit it was an intended recipient. *See Id.*

⁷ The Supreme Court was interpreting specific statutory language in the act which stated:

No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 U.S.C.A. § 705(20)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination **under any program or activity receiving Federal financial assistance** or under any program or activity conducted by any Executive agency or by the United States Postal Service. 29 U.S.C.A. § 794. [emphasis added]

Here, there has never been a contractual relationship between the Borough of Jim Thorpe and the federal government.⁸

The documents offered by the Plaintiffs in Support of their Motion for Summary Judgment actually support this reading.⁹ All the documents cited by the Plaintiffs are between the Commonwealth of Pennsylvania and the Borough or between and the County of Carbon and the Borough. Nothing in the exhibits show any contractual relations between the federal government and the Borough. Also, no evidence has been presented that any federal monies were specifically earmarked for the Borough as the intended recipient.

In *Paralyzed Veterans*, the Court points out that the airlines did not receive the federal assistance directly and they did not have the opportunity to accept or reject the federal assistance. The airport operators were the intended recipients of the FAA funding and the airlines were the intended beneficiaries that benefitted from the federal funds. The airport operators had a direct contractual relationship with the federal government and chose to accept the funding and be subjected to statutory requirements of the federal government. As intended beneficiaries, the airlines were not subject to these statutory requirements. *Id.*, at 609. The Court found the argument that the

⁸Plaintiffs cite *Bentley v. Cleveland Cnty. Bd. Of Cnty. Comm'rs*, 41 F3d 600, 603-604 (10 Cir. 1994) (*Bentley*) supporting their view that federal funds need not be direct, but can be indirect to be considered as having "received federal funds". As in *Grove City*, the defendants in *Bentley* had a contractual relationship with the federal government. The *Bentley* defendants had the ability to accept or reject the federal funds for which they contracted. *Id.* at 602. In the present case, there is no privity of contract between the Borough and the Federal Government.

⁹Plaintiffs have failed to pinpoint cite to any of the subpoenaed documents in their exhibits showing the Borough directly received federal funds. "It is not the role of the Court to 'sift through the record in search of evidence to support a party's opposition to summary judgment....'" *Miles-Hickman v. David Powers Homes, Inc.*, 589 F.Supp. 2d. 849, 863 n. 26 (S.D. Tex. 2008).

airports and the airlines were “inextricably intertwined” to be over broad and unpersuasive.

“In almost any major federal program, Congress may intend to benefit a large class of persons, yet it may do so by funding—that is, extending federal financial assistance to a limited class of recipients.” *Id.* at 609-10.

It is important to note that in response to the Supreme Court’s decision that Congress adopted a law to include the airlines as intended recipients under the Act by enlarging the scope of the law. It passed the Air Carrier Access Act of 1986 (ACAA), 49 U.S.C.S. § 41705, later that year to broaden the language of the act to include the airlines as intended recipients.

After the *Paralyzed Veterans* decision finding airlines were not the intended recipients of federal assistance, Congress, in 1986, enacted the ACAA which addressed the airlines specifically and stated:

(a) In general. In providing air transportation, **an air carrier**, including (subject to section 40105(b) [49 U.S.C.A. § 40105]) **any foreign air carrier**, may not discriminate against an otherwise qualified individual...

49 U.S.C.A. § 41705. [emphasis added].

Four years later in 1990, when NAGPRA was enacted, Congress chose not to draft the plain language in NAGPRA to apply to mere intended beneficiaries of federal assistance as it did in the Air Carrier Access Act of 1986 or the language discussed in *Grove City*.¹⁰ The plain language in NAGPRA only speaks to direct recipients of federal funds. 25 U.S.C. § 3001(8). Therefore, the Borough fails to meet the definition of

¹⁰As in *Grove City*, Congress also acted to change the statutory language after the decision in *Bentley* to include sub-recipients of federal funds to be covered by statutory requirements. *Bentley*, 41 F.3d at 603. Again, in the case at hand, Congress never went back to change the statutory language in NAGPRA.

“museum” under NAGPRA and is not subject its statutory requirements.

The Plaintiffs have also claimed that the Borough receives federal funds as a political entity that has been established by statute,¹¹ much like a corporation is a creature of statute. It argues that because it is a creation of the Commonwealth, anything that the Commonwealth gets should be attributed them. This reading flies in the face of the plain meaning of statutes as discussed supra. Even if you assume some funding sources that the Borough receives originated from the federal government, the Plaintiffs have still failed to meet their burden.

The first source that the Plaintiffs cite is Commonwealth funds that the Borough get through the Liquid Fuels Tax. This source of funding comes entirely from the Commonwealth, not the federal government, and is a statutorily maintained distribution of the Commonwealth’s Gas Tax. *Liquid Fuels and Fuels Tax Act*, 75 Pa.C.S. § 9020; (Exhibit F to Exhibit 3 of the Defendants’ Counter Statement of Facts). Every time we fill our gas tanks in our vehicles in Pennsylvania, the state gas tax goes into this fund and is distributed per a statutory formula. No federal funds are included in our state gas tax.

The second source of funding from which the Plaintiffs’ claim that Borough benefits, is the Pennsylvania Infrastructure Investment Authority Act (PENNVEST), 35 Pa.C.S.A. § 751.1 *et seq.* The enabling statute for this “limited class” recipient declares that the health of millions of citizens of the Commonwealth is at risk due to deteriorating water supply and sewage disposal systems. The purpose of this Act is to “assist in financing projects to protect the health and safety of the citizens of this Commonwealth and to promote the economic development of Pennsylvania.” *Id.*, at § 751.2(7). Funds

¹¹ BOROUGH CODE 53 P.S. § 45201, *et seq.*

initially came from the general fund of the Commonwealth and bonds issued by the Authority in its own right. 35 Pa.C.S.A. § 751.5.

Neither the exhibits of the Plaintiffs nor the Borough indicate if the Borough received any trickle down money or even any commingled money that may have originated from the federal government. Furthermore, nothing in the exhibits or information known by the Borough demonstrates that even if PENNVEST received federal funds that the Borough was an intended beneficiary of those funds. (See Exhibits C, D, & E of Exhibit 3, Affidavit of Maria Sebelin to the Def.'s Answer and Counter Statement of Additional Facts in Support of Cross Motion).

The residents of the Commonwealth and specifically the residents of the Borough are, at best, intended beneficiaries of clean water by a state authority. The Commonwealth chose the Borough to be a beneficiary of this funding—not the federal government. As a result, the Borough is able to provide safe water to its citizens and maintain a safe sewage disposal system.

Similar to the airlines in *Paralyzed Veterans*, the Borough never contracted with the federal government, nor received any direct federal money, but merely benefitted from the state PENNVEST program to improve the water supply in the Commonwealth.¹² As the intended recipient of this state program, the Commonwealth then distributed funds directly to the Borough without federal involvement. If Congress wanted the Borough to be included in its definition under NAGPRA, it could have easily done so as it did in the Air Carrier Access Act of 1986. *Compare*, 49 U.S.C. § 41705.

The third source of federal funding from which the Plaintiffs' claim Borough benefits, comes from the Pennsylvania Emergency Management Agency (PEMA). The

¹² See Exhibit 3 of Answer to Pls.' Statement of Facts that PennVest funds came from PA Treasury.

Governor of the Commonwealth is “responsible for meeting the dangers to this Commonwealth and People presented by disasters.” 35 Pa.C.S.A § 7301(a). It is the responsibility of the Governor to declare a state of disaster emergency when necessary and activate the Commonwealth’s response. 35 Pa.C.S.A. § 7301(c),(d). PEMA was created by the legislature to “assure prompt, proper and effective discharge of basic Commonwealth responsibilities relating to civil defense and disaster preparedness, operations and recovery”. 35 Pa.C.S.A § 7311. One of the duties of PEMA is to administer grant programs to political subdivisions for disaster management. The Borough of Jim Thorpe is the beneficiary of grant monies from PEMA to care for the safety and health of its citizens in the event of a disaster.

As with PENNVEST, the Borough did not receive, as an intended or contractual recipient, money directly from the federal government for emergency management. The Plaintiffs’ evidence shows nothing to support their allegations that any funds were actually received by the Borough under any of the documentation that they attached to the Plaintiffs’ Statement of Facts.

When the Governor decides to declare an emergency, PEMA administers and distributes grant money for emergency management purposes to the Borough as beneficiary. The source of that money is unknown and unproven except that the Borough’s evidence shows the money it actually received came from the PA Treasury. (Exhibit A to Exhibit 3 of the Def.’s Answer to Pls.’ Statement of Facts and Counter-Statement). That is the only fact actually known.

The fourth source of federal funding from which the Plaintiffs’ claim the Borough receives is through the Pennsylvania Community Development Block Grant Entitlement Program for Nonurban Counties and Certain Other Municipalities. 35 Pa.C.S.A. § 1751. The purpose of this block grant program is to provide funding for community

development projects. This assistance is distributed to the county governments throughout the Commonwealth (Exhibit E to Exhibit 3 of the Def.'s Answer to Pls.' Statement of Facts). In Carbon County, where the Borough is located, the monies are given to the County by the Commonwealth to determine how much, for what purposes and to which of the 19 municipalities that are geographically located in the county, should receive the county's money. Not every municipality receives money every year.

As with PENNVEST, the Borough receives no direct funding from the federal government through the community block program, but may benefit from the distribution of the funding (Exhibit E to Exhibit 3 of the Def.'s Answer to Pls.'s Statement of Facts). The funding mechanism is similar as that found in *Paralyzed Veterans* where the airlines benefitted from the federal monies received by the intended recipient airport operators. Here, the Borough is, at best, twice removed from any federal monies, *if any federal monies are even be used to fund this program*, but again the source of that money is unknown and unproven. Except that the Borough's evidence shows the money received came from the County of Carbon (Exhibit E to Exhibit 3 of Def.'s Answer to Pls.' Statement of Facts).

Simply put, the Borough of Jim Thorpe has no contractual relationship with the federal government and has not received direct federal funds. (Exhibits A-F to Exhibit 3 of the Def.'s Answer to Pls.' Statement of Facts) . The Borough, as were the airlines in *Paralyzed Veterans*, is unable to reject certain federal funds or terminate participation in any federal grant program, because some funds received by the Borough may come to it through the Commonwealth of Pennsylvania. The Commonwealth retains the ability to contract with the federal government to receive funds for its own purposes for many matters, and by the plain meaning, is the intended recipient. Once the Commonwealth

has the money, then it is up to the Commonwealth how it will spend and through what manner it will be spent. The Commonwealth would have the right to spend all of it by itself if it chose to do so.

This is similar to the Healthcare Act of 2010, where federal government would allow the states to set up health insurance exchanges subsidized with federal funds. In the case of the Commonwealth, it rejected participation in setting up its own insurance exchange, even if the Borough residents would have benefitted from it (See Philadelphia Inquirer, December 14, 2012, Article by Amy Worden, Exhibit 4 to the Def.'s Answer to Pls.' Statement of Facts).

It was the Commonwealth that was in the position to accept those funds cited by the Plaintiffs above and the requirements with which they must comply as a result of accepting those funds-- not the Borough. In *Paralyzed Veterans*, the Court stated, "an attempt to fuse airports and airlines into a single program or activity is unavailing." *Paralyzed Veterans*, 477 U.S. 611. Here, an attempt to fuse the Borough and the Commonwealth into a single program or activity is equally ineffective.

As a matter of law, the evidence produced by the Plaintiffs and the Borough in response thereto demonstrate that no factual dispute exists as to the Borough receiving federal funds within the meaning of NAGPRA . Therefore, under the plain language of NAGPRA, the Borough does not meet the definition of "museum" and cannot be held to comply with its requirements because, by its plain meaning, federal funds do not include trickle down monies to intended beneficiaries.

As such, the Court should grant the Borough's cross motion on the issue of federal funds and dismiss the Plaintiffs' action.

II. LAW OF CASE PRECLUDES IMMEDIATE REPARATION

In Part Two of the Plaintiffs' Motion for Summary Judgment, the Plaintiffs state that

they “have demonstrated entitlement to a summary judgment applying the NAGPRA statute to the Borough, as well as associated relief **requiring the Borough** to comply with requirements under law **to repatriate the remains of Jim Thorpe**,” [emphasis added].

This is contrary to the Law of Case Doctrine.

If this Court finds NAGPRA applies to the Borough, then, as this Court has previously ruled, NAGPRA governs and its procedures apply in the event a basis exists to permanently enjoin the Borough to do so.

Specifically, in this Honorable Court’s February 4, 2011 Memorandum states that “the plaintiff’s claim will be construed to proceed solely under the NAGPRA.” In this Honorable Court’s Memorandum of November 23, 2011 this Court found that complying with NAGPRA would mean:

Defendants would first need to compile an inventory of all Native American human remains in their possession or control and then identify the geographical and cultural affiliation of all remains. 25 U.S.C. 3003(a). As part of the inventory and identification processes, Defendants would be required to consult with lineal descendants of any individuals whose remains are included on the inventory and Indian tribe officials and traditional leaders that are culturally affiliated with the remains. 43 C.F.R. 10.9 (b)(1). Defendants would then need to give notice to all tribes affiliated with the human remains. *Id.* 3003(d)(1).

The Law of Case Doctrine states that “when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *Arizona v. California*, 460 U.S. 605, 618 (1983). Under Law of Case Doctrine, a prior decision should be followed unless:

- (1) the decision is clearly erroneous and its enforcement would work a manifest injustice;
 - (2) intervening controlling authority makes reconsideration appropriate; or,
 - (3) substantially different evidence was adduced at a subsequent trial.
- Southwest Marine Inc. V Danzig*, 217 F.3d 1128, 1136 (9th Circ. 2000).

bypasses the procedural requirements mandated by NAGPRA. As stated by this Court, under NAGPRA procedure, the Borough would first need to compile an inventory of all Native American human remains in their possession or control and then identify the geographical and cultural affiliation of all human remains" (See this Honorable Court's Memorandum dated November 23, 2011). This may require the Defendant to petition the Pennsylvania State Court to allow the disinterment of the remains to allow an inventory to be taken in compliance with the public health and safety laws of the Commonwealth.

Defendants would then be required to give notice to **all** known lineal descendants and tribes affiliated with the human remains.¹³

Plaintiffs' second request for relief, namely that Defendant be required to immediately repatriate the remains of Jim Thorpe, would make complying with this NAGPRA procedure an impossibility. Their request is statutorily flawed.

Respectfully submitted,

WILLIAM G. SCHWAB & ASSOCIATES

Dated: January 18, 2013

By: /s/William G. Schwab
WILLIAM G. SCHWAB, ESQUIRE

By: /s/Adam R. Weaver
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¹³To direct immediate repatriation to Plaintiffs would also preclude the other 11 lineal heirs from Jim Thorpe's first family from any participation in any repatriation process violating those individuals' due process rights to be heard and have input under NAGPRA. As this Court held when Borough raised the issue that indispensable parties had not been joined, they would not be precluded from any final decision on Jim Thorpe's remains.