

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

JOHN THORPE, et al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 3:10-cv-1317-ARC
)	
BOROUGH OF JIM THORPE, PENNSYLVANIA, et al.,)	(Judge A. Richard Caputo)
)	
)	
Defendants.)	

**BRIEF OF THE PLAINTIFFS IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

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**BRIEF OF THE PLAINTIFFS IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

The Plaintiffs, Richard Thorpe, William Thorpe, and the Sac and Fox Nation of Oklahoma (collectively the “Plaintiffs”), hereby move for summary judgment pursuant to Fed. R. Civ. P. 56.

INTRODUCTION

Following his death in 1953, the remains of the world famous Sac and Fox athlete Jim Thorpe were shipped to numerous cities around the country as a potential tourist attraction. Eventually, more than a year later, his remains were interred in a mausoleum in the newly renamed Borough of Jim Thorpe, Pennsylvania—a place the athlete is never known to have visited. In fact, leaders of the community had arranged for the burial as part of a grandiose plan to boost tourism and economic development. Thus was repeated a recurring injustice in the American Indian experience—the treatment of their remains as objects to be exploited, and the denial of Indians’ and tribes’ human right to bury their own according to their own customs and traditions.

Addressing this, Congress in 1990, in one of a series of major Indian civil rights enactments, adopted the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.* (the “NAGPRA”). Among other legal protections, the statute recognized the *right* of Indian people and tribes to repatriate human remains possessed and controlled by “museums”—a broadly defined term

that includes governments such as the Borough. Despite this law, the Borough has steadfastly refused to repatriate Jim Thorpe's remains to his surviving sons and his tribe.

This case thus presents an overriding legal question—namely, whether NAGPRA applies to the Borough. No genuine disputes exist concerning the material facts relating to the applicability of the federal statute, and a determination on summary judgment is therefore appropriate. The Court should rule, as a matter of law, that NAGPRA is applicable to the Borough and the remains of Jim Thorpe, and issue appropriate orders directing the Borough to comply with the statutory processes relating to Plaintiffs' request for repatriation.

BACKGROUND

The circumstances leading up to this litigation tell not only a story of the American Indian experience and the Sac and Fox experience, but also the reason Congress enacted NAGPRA: to prevent a continuation of a legacy of the violation of Indian peoples' right to bury their own dead in accordance with tribal customs and practices, and to prevent the improper treatment of their remains. In this case, Jim Thorpe's sons and his tribe invoke federal law intended to recognize their basic rights and to fulfill their father's desire to be buried in Sac and Fox Indian country—not in the place in Pennsylvania selected by non-Indians after his death

for tourism and economic development.

Jim Thorpe as Athlete and as Sauk Indian

Today Jim Thorpe is known for his unequalled athletic versatility and triumphs, and also for the unjust reversal of his personal fortune. Historians record that Thorpe's athletic potential was recognized almost by accident while he was a student at the Carlisle Indian Industrial School.¹ Soon Thorpe began excelling at sports, including track and field and baseball, and also in football, a sport in which he shortly came to be regarded as a phenomenon.² As a contestant at the 1912 Olympics in Stockholm, Sweden, Thorpe won gold medals in the pentathlon and the decathlon, and thereafter came to be known as the "world's greatest athlete."³ In early 1913, however, he was stripped of his Olympic medals in what history generally regards as an injustice.⁴

¹ In 1907, on the way to a baseball game, he passed by a group of varsity track athletes practicing the high jump, asked if he could try, and then exceeded their performances. Word quickly spread to the school's famous football coach, Glenn S. "Pop" Warner, who very soon recognized his great potential as an athlete. See Robert W. Wheeler, *Jim Thorpe: World's Greatest Athlete* at 50-51 (1975) [hereinafter *World's Greatest Athlete*]; Kate Bufford, *Native Am. Son: The Life & Legend of Jim Thorpe* at 42-43 (2010) [hereinafter *Native Am. Son*].

² See *Native Am. Son* at 57-81, 97-117; *World's Greatest Athlete* at 63-98.

³ See *Native Am. Son* at 119-34; *World's Greatest Athlete* at 99-113 & app.

⁴ See *Native Am. Son* at 157-67; *World's Greatest Athlete* at 141-52. In 1983, after an effort that had begun in the 1940s, the International Olympic Committee presented replicas of Thorpe's medals—made from the original molds—to his surviving

Like many Indian people, Jim Thorpe lived in two worlds. Thorpe was born in 1887 within the Sac and Fox Indian Reservation in the Oklahoma Territory, now part of present-day Oklahoma.⁵ As a member of the Thunder clan, Thorpe was given the Indian name Wa-tha-huk, meaning “the bright path the lightning makes as it goes across the sky.”⁶ To the Sac and Fox people Thorpe was and is known not only for his athletic accomplishments but also his work for his tribe, and on behalf of the legal rights of Indian people and tribes in general.⁷ In his later years, Thorpe repeatedly told the members of his Indian family that he wanted to be buried in Sac and Fox Indian country.⁸

The great athlete died from a heart attack on March 28, 1953, in Lomita,

children. *See Native American Son* at 375-79.

⁵ Thorpe was born on May 22, 1887, at Bellemont, a crossroads within the Sac and Fox Reservation near present-day Shawnee, Oklahoma. *See Native Am. Son* at 6; *see also World’s Greatest Athlete* at 3.

⁶ *See Native Am. Son* at 6; *see also* Ex. 3, at ¶ 8.

⁷ *See Native Am. Son* at 277-78, 283-87, 295-97, 302-05; *World’s Greatest Athlete* at 196, 214-15.

⁸ Ex. 1, at ¶ 7 (Aff. of W. Thorpe); Ex. 2, at ¶ 7 (Aff. of R. Thorpe); Ex. 9, at 36 ll.7-12 (Depo. of W. Thorpe); Ex. 10, at 24 ll.3-7 (Depo. of R. Thorpe). The intended location of Thorpe’s burial was the Garden Grove cemetery, which is where his father is buried and which is on Indian land. *See* Jack McCallum, *The Regilding of a Legend*, *Sports Illustrated*, Oct. 25, 1982, at 48, 54 [hereinafter *Regilding of a Legend*]; Ex. 1, at ¶ 10; Ex. 3, at ¶ 11.

California.⁹ Thorpe's third wife, Patricia Askew Thorpe (known as "Patsy"), initially "wanted nothing to do with her husband," and donations of money and mortuary services had to be enlisted to prepare his body for burial.¹⁰ However, within days and "once she realized that [Jim Thorpe's] death was opportunity," Patsy Thorpe began seeking financial commitments for a memorial.¹¹ Nevertheless, at the request of Thorpe's Indian family his remains were returned to Shawnee, near where he was born.¹²

On Sunday, April 12, 1953, members of the Sac and Fox Thunder clan and other members of his Indian family gathered at a farm near Shawnee for the beginning of a two-day funeral conducted in accordance with Sauk burial customs and traditions.¹³ However, as the funeral ceremonies began, Patsy Thorpe,

⁹ See *Native Am. Son* at 363; *World's Greatest Athlete* at 225.

¹⁰ See *Native Am. Son* at 365-66.

¹¹ See *Native Am. Son* at 366-67; *World's Greatest Athlete* at 228-29.

¹² See *Native Am. Son* at 368-69. Historians record that Patsy Thorpe, at least initially, acknowledged her husband's wishes and agreed to a burial in Sac and Fox country. See *World's Greatest Athlete* at 228-29.

¹³ See *Native Am. Son* at 369-70; see also Gilbert Hill, *Tribe Has Secret Rite for Thorpe's Farewell*, *Daily Oklahoman*, Apr. 13, 1953, at 1; Ex. 1, at ¶¶ 8-10; Ex. 2, at ¶ 9; Ex. 3, ¶¶ 5, 9 & 13; Ex. 9, at 38 ll.11 to 39 ll.9; Ex. 10, at 35 ll.16 to 36 ll.7, 40 ll.9 to 41 ll.3.

accompanied by law enforcement officers, arrived and had the casket removed.¹⁴

The Sauk funeral was therefore never completed, and this disrespect for tribal customs and practices is remembered to this day in Sac and Fox country as a serious injustice committed by the non-Indian world.¹⁵

The Odyssey of Jim Thorpe's Remains

In the following days, Patsy Thorpe, angered by Oklahoma's delay in finalizing plans for a memorial, began a macabre odyssey of shopping her husband's remains to a city or town that would best meet her demands.¹⁶ After learning from a television broadcast in Philadelphia about the economic development efforts of two dying Pennsylvania coal mining towns—Mauch Chunk and East Mauch Chunk—Patsy Thorpe began negotiating with leaders of the communities to bury her husband there.¹⁷

Indeed, extensive plans were made to use the body of Jim Thorpe to reverse the towns' economic fortunes. Local leaders agreed to merge the communities into

¹⁴ See Bill Crawford, *All American: The Rise & Fall of Jim Thorpe* at 231 (2005) [hereinafter *All American*]; *Native Am. Son* at 370; Ex. 1, at ¶¶ 8-10; Ex. 2, at ¶ 9; Ex. 9, at 38 ll.11 to 39 ll.9; Ex. 10, at 35 ll.16 to 36 ll.7, 40 ll.9 to 41 ll.3.

¹⁵ Ex. 1, at ¶ 13; Ex. 2, at ¶ 9; Ex. 3, at ¶ 15.

¹⁶ See *All American* at 232; *Native Am. Son* at 370-71; *Regilding of a Legend* at 36.

¹⁷ See *Native Am. Son* at 372-73; *World's Greatest Athlete* at 229-30; see also *Regilding of a Legend* at 56 & 63.

a single borough, to be named “Jim Thorpe.”¹⁸ The plans called not only for a mausoleum but also for an extensive commercialization of the Jim Thorpe name, including a football shrine, a museum, a 500-bed hospital, an Olympic stadium, and a sporting goods factory with a Jim Thorpe trademark.¹⁹ Patsy Thorpe signed an interment agreement to ensure that the town consolidation occurred, and she reportedly was paid expenses and perhaps additional sums of money to further “cement the deal.”²⁰

The plans for Jim Thorpe, in death, to save the Borough faced setbacks from the beginning. It took three years for the Borough to deliver on the promised mausoleum, and none of the grandiose developments focused on commercializing the grave ever materialized.²¹ Meanwhile, in Sac and Fox eyes the desecration of his remains continued. Believing the casket was too heavy, the locals had it opened and examined the body.²² Subsequently, a group of protestors tried to “pry

¹⁸ See *Native Am. Son* at 373; *World’s Greatest Athlete* at 230. Patsy Thorpe is said to have suggested that the two towns “unite and benefit monetarily from tourism by using the name of a well-known person as a drawing card.” Rosemary K. Updyke, *Jim Thorpe, the Legend Remembered* at 78 (1997).

¹⁹ See *All American* at 232; *Native Am. Son* at 372; *Regilding of a Legend* at 64.

²⁰ See *Native Am. Son* at 373; see also *Regilding of a Legend* at 63.

²¹ See *Native Am. Son* at 373-74; see also *Regilding of a Legend* at 64.

²² See *Native Am. Son* at 373.

the coffin out of the crypt with the intent of dumping it” on the front porch of the home of one of the promoters of the burial initiatives.²³

Within a few years, when it became clear that the efforts to use Jim Thorpe’s remains for economic development were futile, two referendums were called to reverse the name change.²⁴ Before the first vote, vandals defaced the mausoleum with a hammer.²⁵ As a local community leader expressed: “You mention Jim Thorpe and nobody knows what you’re talking about,” to which he added, in an interview with *Sports Illustrated*, “All we got is a dead Indian.”²⁶

Repatriation of Jim Thorpe’s Remains

The burial of Jim Thorpe in a town he never visited, and the driving motives for the burial—commercialization, tourism, and mascotism—have been recurring themes in the Sac and Fox Nation’s experience. The great Sauk war chief Black Hawk, an ancestor of Jim Thorpe, died in October 1838, and was buried near Rock

²³ *See id.*

²⁴ *See Native Am. Son* at 374; *see also Regilding of a Legend* at 64.

²⁵ *See Native Am. Son* at 374.

²⁶ *Native Am. Son* at 374 (quoting *Regilding of a Legend* at 48, 53); *see also All American* at 232. Other community leaders are also reported to have expressed the same sentiment. *See Scorecard: Living Legend*, *Sports Illustrated*, Nov. 20, 1978, at 17.

Island, Illinois, but “even in death the white people would not let him rest.”²⁷ A year after his burial it was discovered that Black Hawk’s remains had been dug up and his head removed, and, a few months later, the rest of his remains were stolen.²⁸ The grave robber was a local doctor “who had the bones cleaned and wired together so as to put the skeleton of the famous Sauk leader on display in his office.”²⁹ After Black Hawk’s family complained, the governor of the Iowa Territory had the skeleton seized, but it was again put on display in a museum.³⁰

Nor is the recorded treatment of Indian people’s remains a historical problem, because Indian graves and remains continue to be viewed as objects of curiosity to be managed and possessed by non-Indians.³¹ It was against this history and continuing societal views toward Indians that NAGPRA was adopted. Subsequently, tribes such as the Sac and Fox Nation have developed NAGPRA programs to utilize the statute to protect their people’s rights in this area and to

²⁷ See Kerry A. Trask, *Black Hawk: The Battle for the Heart of Am.* at 303 (2006).

²⁸ See *id.*

²⁹ See *id.*

³⁰ See *id.* at 304. The Sauk warrior’s bones remained there until 1855, when the building burned. See *id.*

³¹ In recent years, the Sac and Fox Nation has been confronted with situations including the desecration of the grave of an infant in a tribal cemetery. See *Infant’s Grave Disturbed in Sac & Fox Cemetery*, Sac & Fox News, Mar. 11, 1992, at 3.

take corrective actions through repatriations. The Nation's NAGPRA program has, among other initiatives, repatriated remains within states including Illinois, Iowa, Missouri, and Pennsylvania.³²

Even though Jim Thorpe's burial in the Borough pre-dated NAGPRA by more than three decades, his sons and other members of his Indian family have never given up on achieving a repatriation. Jim Thorpe's sons protested his burial in the Borough beginning immediately following his death, but those and subsequent efforts toward repatriation were ignored.³³ Not until the enactment of NAGPRA did they, along with other Indian people and tribes, have the necessary legal tools to exercise rights with respect to their father's burial.

**MOVANTS' STATEMENT OF MATERIAL FACTS AS TO
WHICH NO GENUINE ISSUE OF FACT EXISTS**

For purposes of Fed. R. Civ. P. 56(c)(1) and M.D. Pa. L.R. 56.1, no genuine issue of fact exists with respect to the following material facts.

1. The legendary athlete Jim Thorpe died on March 28, 1953. He was an American Indian of Sauk heritage, and he was an enrolled member of the Sac and Fox Nation. Jim Thorpe was a descendent of the great Sac and Fox chief Black Hawk and a member of the Thunder clan. (Ex. 3, at ¶ 7; Ex. 4, at ¶ 4 (Aff. of G.

³² Ex. 3, at ¶¶ 3-6.

³³ Ex. 1, at ¶ 11-12; Ex. 2, at ¶ 11.

Wilburn).)

2. The individual plaintiffs, Richard Thorpe and William Thorpe, are the sons and lineal descendants of Jim Thorpe, and are his sole surviving children.

Richard Thorpe and William Thorpe are Native American and are enrolled members of the Sac and Fox Nation of Oklahoma. (Ex. 1, at ¶¶ 5-6; Ex. 2, at ¶¶ 4 & 6; Ex. 4, at ¶ 4.)

3. The Sac and Fox Nation of Oklahoma is a federally recognized Indian tribe, having its seat of government within the Sac and Fox Reservation in Oklahoma.³⁴ (Ex. 3, at ¶ 2.)

4. The Sac and Fox Nation has a culture, traditions, and a religion, including traditional customs and religious practices relating to burials. (Ex. 3, at ¶¶ 13, 15.)

5. Following his death, traditional Sac and Fox funeral and burial rites were begun for Jim Thorpe, but were interrupted and were never completed. (Ex. 1, at ¶¶ 8-10; Ex. 2, at ¶¶ 8-9; Ex. 3, at ¶¶ 11-12, 14; Ex. 9, at 38 ll.11 to 39 ll.9; Ex. 10, at 35 ll.16 to 36 ll.7, 40 ll.9 to 41 ll.3.)

6. In May 1954, a year after Jim Thorpe's death, the Borough and his widow, a non-Indian, entered into an interment contract under which she agreed to

³⁴ See BIA, *Indian Entities Recognized & Eligible to Receive Servs. from BIA*, 77 Fed. Reg. 47,868, 47,871 (Aug. 10, 2012).

bury her husband's remains within the Borough. The individual Plaintiffs and the Nation were not parties to such agreement. (Ex. 13 (Agreement of May 19, 1954); Ex. 12, at 84 ll.3 to 85 ll.7.)

7. In May 1954 Jim Thorpe's remains were interred within the Borough, on Borough-owned land, in a mausoleum maintained by the Borough. The Borough possesses and exercises control over the remains of Jim Thorpe, and claims to hold actual ownership rights in his remains. (Ex. 12, at 81 ll.7 to 83 ll.5; Doc. 22, at 19-22 (ruling Thorpe's remains are "human remains" for purposes of NAGPRA).)

8. The Borough has, since November 16, 1990, received federal funding in the form of direct grants or loans or indirect financial aid.³⁵ (Exs. 5-8 & 15 &

³⁵ Exhibits 5 through 8 contain documents that were produced by Pennsylvania state and local governmental entities in response to document subpoenas, and are substantive evidence of federal funds received directly or indirectly by the Borough. Each is accompanied by a sworn affidavit or certification that establish the admissibility of the information contained in the documents as an exception to the evidentiary rule against hearsay for records of a regularly conducted activity under Fed. R. Evid. 803(6). Specifically, each such sworn affidavit or certification states that each document: (a) was made at or near the time by, or from information transmitted by, someone with knowledge; (b) was maintained in the course of a regularly conducted activity; and (c) was made as part of a regular practice of that activity. As an exception to the evidentiary rule against hearsay, these documents are properly authenticated pursuant to Fed. R. Evid. 902(11).

The documents relating to the Borough's federal funding, therefore, are authenticated and properly within a recognized hearsay exception and would be admissible in and of themselves at trial, and therefore may be properly considered on summary judgment as substantive evidence. *See Landtect Corp. v. State Farm Mut. Life Assurance Co. of Am.*, 605 F.2d 75, 81 n.7 (3d Cir. 1979) (holding documents that are

attachs.; Ex. 16 (chart)); (Ex. 14, Admis. No. 3 (Borough's Resp. to Plf.s' 1st Req. for Adm.); Ex. 12, ¶ 28 (Borough's Answer to 2d Amend. Compl.).)

9. The Borough is a governmental subdivision or arm of the Commonwealth of Pennsylvania, which has, since November 16, 1990, received federal funding in the form of direct grants or loans or indirect financial aid. (Exs. 5-8 & 15 & attachs.; Ex. 16 (chart)); (Ex. 14 at 3 (Req. No. 6).)

10. The Borough has not complied with the requirements of NAGPRA with respect to the human remains of Jim Thorpe, including that the Borough: (a) has not initiated a consultation and/or consulted with the Plaintiffs concerning cultural affiliation and preparation of an inventory of human remains, (b) has not prepared an inventory of Native American human remains; (c) did not complete an inventory of human remains containing certain required information by November 16, 1995, and send a "notice of inventory completion" to the Secretary of the Interior, Departmental Consulting Archaeologist; (d) has not afforded the Plaintiffs an opportunity to request repatriation of remains and any items culturally affiliated with them; and (e) has not repatriated the remains of Jim Thorpe to the

relevant and admissible are properly considered in determining a motion for summary judgment); *Kohr v. Johns-Manville Corp.*, 534 F. Supp. 256, 257-58 (E.D. Pa. 1982) (holding documents that would be admissible at trial are properly considered as substantive evidence in deciding a motion for summary judgment).

Exhibit 16 is a summary of the evidence of federal funding produced pursuant to the subpoenas, and is submitted for demonstrative purposes only.

individual Plaintiffs or the Nation. (Ex. 12 at 80 ll.23 to 81 ll.6 (Tr. of Depo. of Borough); Ex. 3, at ¶ 16.)

SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate if the movant, by presentation of record materials—including depositions, documents, affidavits, or declarations—“shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56. To be material, a fact must have the potential to alter the outcome of the case; disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment. *See N.A.A.C.P. v. N. Hudson Reg’l Fire & Rescue*, 665 F.3d 464, 475 (3d Cir. 2011); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986) (“Factual disputes that are irrelevant or unnecessary will not be counted.”).

Summary judgment is particularly appropriate where the only issues to be resolved are legal, including where, as here, the case primarily concerns interpretation and application of a statute to a specific set of undisputed material facts. *See Berry v. First Nat’l Bank of Mercer Cnty.*, 892 F. Supp. 127, 128 (W.D. Pa. 1994); *LTV Steel Co., Inc. v. N.W. Eng’g & Constr., Inc.*, 41 F.3d 332, 334 (7th Cir. 1994).

In addition to the usual standards for adjudicating motions for summary judgment under Fed. R. Civ. P. 56, NAGPRA—as civil rights legislation intended

to benefit Indian people and to correct a history of injustices—should be interpreted in favor of the class it was intended to protect, including, in this case, the Plaintiffs.³⁶ *See United States v. Corrow*, 119 F.3d 796, 799-800 (10th Cir. 1997). The canons of construction for statutes intended to protect or benefit Native Americans require that such statutes “be construed liberally in favor of the Indians, with ambiguous provisions interpreted for their benefit.” *Yankton Sioux Tribe v. U.S. Army Corps of Eng’rs*, 83 F. Supp. 2d 1047, 1056 (D.S.D. 2000) (citing *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 269, 112 S. Ct. 683, 693 (1992)).

SUMMARY OF THE ARGUMENT

Under the existing rulings of law made in this case, and the plain language of NAGPRA, the Plaintiffs have demonstrated they are entitled to a determination on summary judgment that the remains of Jim Thorpe are subject to NAGPRA. As the Court already has determined, the remains of Thorpe are “human remains” under the statute. Further, the Borough is an entity within the scope of NAGPRA’s broad definition of a “museum,” because there is no genuine dispute of fact that it has possession and control over Native American human remains and has, since

³⁶ *See* 25 U.S.C. §§ 3001 & 3005; *see also* C. Timothy McKeown & Sherry Hutt, *In the Smaller Scope of Conscience: The Native American Graves Protection & Repatriation Act Twelve Years After*, 21 U.C.L.A. J. of Env’tl Law & Policy 153, 154-57 & n.24 (2002-03).

the effective date of NAGPRA, received federal funding.

Additionally, the Borough can assert no legal defenses to repatriation under NAGPRA. The statute recognizes no defense to a repatriation of human remains based on a possessory or ownership right, and state-law grounds that might be asserted are pre-empted. Since none of the material facts relating to the Plaintiffs' entitlement to invoke NAGPRA are genuinely disputed, the Plaintiffs are entitled to a determination on summary judgment that NAGPRA applies to the remains of Jim Thorpe, and that the Borough must comply with the statute.

ARGUMENT & AUTHORITIES

I. THE REMAINS OF JIM THORPE, A NATIVE AMERICAN, ARE SUBJECT TO BEING REPATRIATED IN ACCORDANCE WITH THE REQUIREMENTS OF NAGPRA

Already, the Court has made rulings concerning two fundamental elements of a NAGPRA claim—namely, that the remains of Jim Thorpe are “human remains” for purposes of defining the Borough as a “museum” under NAGPRA (Doc. 22, at 19-22), and that the Borough is an entity intended to be covered by the statute (Doc. 22, at 20; Doc. 67, at 10).³⁷ Some 60 years ago, the Borough procured the remains of Jim Thorpe for the purpose of generating tourism, and to

³⁷ The Court has also ruled in Plaintiffs' favor on other threshold legal matters, including that Plaintiffs have standing (Doc. 22, at 5-7), that Plaintiffs' claim is ripe (Doc. 22, at 7-13), that Plaintiffs have stated a claim under NAGPRA (Doc. 22, at 19-22), and that joinder of additional parties is not necessary (Doc. 67, at 2-8).

this day the Borough owns and maintains the monument constructed for that purpose. No material factual disputes exist that NAGPRA is applicable to the Borough, and as a “museum” the Borough is required, as a matter of law, to comply with the requirements of the statute.

A. NAGPRA Is Applicable to Native American Human Remains Within the Possession and Control of the Borough

The enactment of NAGPRA in 1990 marked a significant achievement in the long struggle of Native Americans to reclaim control over their ancestors’ remains and to avoid their exploitation. Prior to the enactment of NAGPRA, American Indian people had faced a long history of having their peoples’ remains disrespected and desecrated, which included grave robbing and the treatment of remains as scientific curiosities, or worse.³⁸ But this legacy encompassed numerous issues, and has long included—as this case illustrates—the use of Indian remains and graves as roadside attractions.³⁹ NAGPRA was therefore crafted broadly to remedy a serious violation of Indian peoples’ civil rights.

NAGPRA is applicable to “museums,” although in order to remedy the

³⁸ See, e.g., H. Rep. No. 101-877, at 8-11 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4367-4370.

³⁹ As one NAGPRA commentator has observed, “[u]ntil recently, tourist attractions offered families a fun-filled day of viewing dead Native Americans in excavated mounds” and other similar roadside attractions. Robert T. Willingham, *Holding States & Their Agencies Accountable Under the Museum Provisions of NAGPRA*, 71 Univ. Mo. Kans. City L. Rev. 955, 956-57 (Summer 2003).

overall problems addressed by the statute Congress broadly defined that term far beyond its usual understanding. A “museum” for purposes of NAGPRA is any entity, including governmental entities, that possesses or controls Native American remains and that receives or benefits from federal funding. Specifically, a “museum” is defined by NAGPRA as

“any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency.”

25 U.S.C. § 3001(8); *see also* 43 C.F.R. § 10.2(a)(3) (2012). Applying this legal definition to the circumstances in this case, the Court correctly ruled that the Borough is a “museum” on the basis that the Borough possesses remains that are “human remains” for purposes of NAGPRA. (Doc. 22, at 20.)

No factual disputes exist that prevent a determination on summary judgment that the Borough is a “museum.” Broadly drafted, NAGPRA includes human remains within the overall protections for all “cultural items.” *See* 25 U.S.C. § 3001(3). The implementing regulations give the term “human remains” its ordinary meaning as “the physical remains of the body of a person of Native American ancestry.” 43 C.F.R. § 10.2(d)(1). There is no dispute that Jim Thorpe was a Sauk Indian, and that, therefore, his remains are the remains of a person of “Native American ancestry.” (Plf.s’ Fact Nos. 1 & 7.)

The Court has rejected the Borough's suggestions that the statute should be read narrowly as applying only to "ancient" or "historic" remains.⁴⁰ (Doc. 22, at 21.) Drawing an analogy from similar remedial legislation, the Court explained that "no one would reasonably contend that the civil rights statutes passed in the wake of the Civil War do not apply to modern situations simply because there were aimed at a historical evil." (Doc. 22, at 21.)

The Court has further held that "the statute's language is unambiguous" as to its overall scope, and that "[t]he term 'Native American human remains' plainly encompasses the remains of Jim Thorpe." (Doc. 22, at 21.) Thus, NAGPRA's application to the remains of Jim Thorpe as an individual of Native American ancestry is established for purposes of summary judgment as a matter of law.

B. No Genuine Dispute Exists that the Borough Has Possession and Control over the Remains of Jim Thorpe

Likewise, no genuine dispute of fact exists with respect to the other requirements of NAGPRA, including that the Borough "has possession of, or control over" the remains for purposes of the statutory definition of a "museum." The remains of Jim Thorpe currently are buried within a monument or mausoleum within the corporate limits of the Borough and which is on Borough land, and

⁴⁰ See also *Yankton Sioux Tribe*, 83 F. Supp. 2d at 1055-56 (holding NAGPRA applies to all Native American remains, and not only remains of prehistoric origin).

which is owned, controlled, and maintained by the Borough. (Plf.s' Fact No. 7.) The Borough is in physical possession and control of the remains, and thus undisputedly satisfies this requirement of the statute.

As noted, NAGPRA applies to "museums," which requires in general terms that such an entity must have "possession of, or control over, human remains[.]" 42 C.F.R. § 10.2(a)(3). The use of the disjunctive "or" means that NAGPRA applies if the Borough's interest in the human remains of Jim Thorpe fulfills either the "possession" or "control" standards. The NAGPRA regulations define "possession" as having "physical custody of human remains . . . with a sufficient legal interest to lawfully treat the objects as part of its collection for purposes of these regulations." 42 C.F.R. § 10.2(a)(3)(i). The regulations further define "control" as having "a legal interest in human remains . . . to lawfully permit the museum . . . to treat the objects as part of its collection for purposes of these regulations[.]" 43 C.F.R. § 10.2(a)(3)(ii). These requirements are easily satisfied with respect to the Jim Thorpe monument.

That the remains of Jim Thorpe currently are buried on Borough land and within a monument owned, controlled, and maintained by the Borough is sufficient to satisfy the requirements of both "possession" and "control." The "possession" of remains for purposes of NAGPRA does not require legal ownership in the

traditional sense, but only “physical custody.”⁴¹ The Borough has “physical custody” because the remains currently are buried on and within Borough property—and beyond the custody of the lineal descendants or the Nation. For the same reason, the Borough has “control” over the remains.

Any contention that the Borough lacks possession or control of Jim Thorpe’s human remains has no serious basis in fact or logic, and cannot create a genuine factual dispute for purposes of summary judgment. *See* Fed. R. Civ. P. 56(c)(1). Although the Borough, in some of its arguments, attempted to disclaim legal possession and control over the remains, it has, at the same time, opposed the application of NAGPRA so as to maintain possession and control. Indeed, the Borough has asserted the position in this litigation that—contrary to law—it actually has ownership rights to the remains. (Ex. 12, at 81 ll.7 to 83 ll.5.) If the Borough were to concede that it does not possess and control the remains of Jim Thorpe, it plainly would acknowledge that the protected class under NAGPRA has rights under the statute that it does not intend to impede.

⁴¹ As noted herein, Congress was clearly aware that human remains cannot be owned or possessed as property and, therefore, “physical custody” is an appropriate standard. *See* Pt. II(A), *infra*.

C. The Borough Has Received Federal Funding as Required for NAGPRA's Application to the Borough as a "Museum"

There is also no genuine dispute that the Borough is a "museum" under NAGPRA because it has received federal funds for purposes of the statute. Such a requirement is unremarkable, as Congress frequently places requirements or conditions on the recipients or beneficiaries of federal dollars, and it is easily satisfied in this case under the broad language of NAGPRA. It is beyond genuine dispute that since the enactment of NAGPRA the Borough has received or has benefitted from, directly or indirectly, significant sums of federal grant and loan monies.

The NAGPRA regulations broadly define the term "receives Federal funds" to mean

“[t]he receipt of funds by a museum after November 16, 1990, from a Federal agency through any grant, loan, contract (other than a procurement contract), or other arrangement by which a Federal agency makes or made available to a museum aid in the form of funds. Federal funds provided for any purpose that are received by a larger entity of which the museum is a part are considered Federal funds for the purposes of these regulations. For example, if a museum is a part of a State or local government or a private university and the State or local government or private university receives Federal funds for any purpose, the museum is considered to receive Federal funds for the purpose of these regulations.

43 C.F.R. § 10.2(a)(3)(iii). As defined, federal funds can be received directly, or through a larger governmental entity that receives and administers such monies.

There is no genuine dispute that the Borough has received federal funding through

federal grants and loans.⁴² (Plf.s' Fact No. 8.) Additionally, this requirement is satisfied because the Borough is a subdivision of the Commonwealth of Pennsylvania, and of Carbon County, which have received significant amounts of federal funds since NAGPRA was enacted.⁴³ (Plf.s' Fact No. 9.)

Imposition of federal law and regulation on recipients of federal funding has long been held as a proper exercise by Congress of the spending clause in the United States Constitution. *See South Dakota v. Dole*, 483 U.S. 203, 206-07, 107 S. Ct. 2793, 2795-96 (1987) (citing *United States v. Butler*, 297 U.S. 1, 66, 56 S. Ct. 312, 319 (1936)); *see also* U.S. Const. art. I, § 8, cl. 1. NAGPRA's imputation of federal funds received by a larger entity "of which the museum is a part" is also a well-established practice under federal law, and it was purposely incorporated into the act on the basis of similar provisions in similar civil rights legislation, including the Americans with Disabilities Act (the "ADA"), 42 U.S.C.

⁴² Documents produced by Pennsylvania governmental sources reflect that the Borough has received federal grants and loans since 1996 in an amount exceeding \$13 million. These have included grants under the American Recovery and Reinvestment Act of 2009, as well as from the Federal Emergency Management Agency and the U.S. Department of Housing and Urban Development's Community Development Block Grant Program and other federal sources. (Ex. 16, at 1-2.)

⁴³ Public documents show that the Commonwealth of Pennsylvania received in excess of \$2 billion in federal funding for fiscal year 2011. (Ex. 16, at 3.) Documents produced by Carbon County, Pennsylvania show that it received in excess of \$6 million in federal funding for fiscal year 2011. (Ex. 16, at 3.)

§ 12101 *et seq.*⁴⁴

Civil rights legislation, including not only the ADA, but also the Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq.*, as amended, as well as the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, impose similar obligations on the basis of federal funding, and the resulting federal case law provides a framework for interpreting the “federal funds” requirement in NAGPRA. These decisions hold that the receipt of federal funds need not be direct, but can be indirect. *See Grove City College v. Bell*, 687 F.2d 684, 690-96 (3d Cir. 1982), *aff’d* 465 U.S. 555, 558-70, 104 S. Ct. 1211, 1213-20 (1984). This rule applies to secondary or sub-recipients of federal funds that were first received by a state or local government or agency and then disbursed to the recipient. *See Bentley v. Cleveland Cnty. Bd. of Cnty. Comm’rs*, 41 F.3d 600, 603-04 (10th Cir. 1994).

The language in NAGPRA that funds received “for any purpose” satisfy the

⁴⁴ In responding to comments at the time the NAGPRA regulations were promulgated, the Secretary of the Interior responded as follows:

“One commenter requested deletion of the last two sentences of the definition that clarify the applicability of the rule to museums that are part of a larger entity that receives Federal funds, questioning if the legislative history supports such an interpretation. One commenter supported the present definition of institutions receiving Federal funds. Application of Federal laws to institutions that receive Federal funds is common, being used with such recent legislation as the Americans with Disabilities Act. These laws typically are interpreted to apply to organizations that are part of larger entities that receive Federal funds.”

Dept. of Int., *NAGPRA Regs.*, 60 Fed. Reg. 62,134, 62,135 (Dec. 4, 1995).

statutory requirements is also consistent with federal law that federal funds received makes federal requirements applicable to the recipient, regardless of the reason or purpose of such federal funding.⁴⁵ *See id.* at 603; *see also Koslow v. Pennsylvania*, 302 F.3d 161, 175-76 (2002) (holding federal interests expressed through legislation “flows with every dollar spent by a department or agency receiving federal funds”). Accordingly, there is no requirement in NAGPRA that federal funds be received directly, or that such funding have any specific purpose. For purposes of this case, there is no requirement that the federal funding received by the Borough relate to the Jim Thorpe monument.

No genuine dispute exists that the Borough and the Commonwealth have received federal funds since enactment of NAGPRA on November 16, 1990. (Plf.s’ Fact Nos. 8 & 9.) This funding has included direct grants and loans to the Borough, as well as federal funds disbursed by certain agencies of the Commonwealth and by Carbon County, Pennsylvania. (Exs. 7-9.) Thus, for

⁴⁵ The Supreme Court in *Grove City College* held that federal funds did not trigger “institution-wide” coverage of Title IX, but it did so on a basis of language in Title IX referring to a federally funded “program or activity.” 465 U.S. at 569-70, 104 S. Ct. at 1220-21. This language does not appear in NAGPRA and, to the contrary, NAGPRA provides a definition that funding received “for any purpose” is sufficient to establish its application. Further, the language at issue in the *Grove City College* decision was superseded by amendments to the relevant statutes. *See Bentley*, 41 F.3d at 602-03 (describing amendments to the Rehabilitation Act providing for institution wide coverage on the basis of receipt of federal funds). Institution-wide coverage on the basis of the receipt of federal funds is also proper under the spending clause. *See Koslow*, 302 F.3d at 175-76.

purposes of summary judgment the Plaintiffs have established, as a matter of law, that the Borough receives federal funds and possesses or controls Native American human remains, and it is therefore a “museum” subject to the requirements of NAGPRA.

No dispute exists in this case that the Plaintiffs are within the class intended to be protected under NAGPRA. Further, no genuine disputes of fact exist with respect to the requirements for the application of NAGPRA. No dispute exists, either, that the Borough has not complied with NAGPRA. The Court should therefore grant a summary judgment in the Plaintiffs’ favor determining that NAGPRA is applicable, and that the Borough must comply with the requirements of the statute as to repatriation.

II. THE BOROUGH HAS NO LEGAL CLAIM, UNDER NAGPRA OR OTHERWISE, TO RETAIN THE HUMAN REMAINS OF JIM THORPE

At the time of its previous rulings on the Borough’s various motions to dismiss, the Court noted that a ruling was premature concerning the Borough’s asserted defense that it had a “right of possession” to keep Jim Thorpe’s remains. (Doc. 22, at 23.) However, as a matter of law, neither NAGPRA nor the general law recognize a “right of possession” or a right of ownership with respect to human remains, and no such defense is available to the Borough in this case. In

fact, NAGPRA recognizes no legal or factual defenses to a repatriation of human remains beyond those associated with the threshold elements of its applicability.

The Borough can therefore demonstrate, as a matter of law, no defenses that would prevent a repatriation under NAGPRA.

A. NAGPRA’s Definition of “Right of Possession” Does Not Create a Legal Defense to Repatriation of Human Remains

Under the general law—including the law of Pennsylvania—there is no property right or right of ownership in human remains.⁴⁶ Consistent with this universal concept, NAGPRA provides for no defense—or for an exception to the applicability of the statute—based on a “right of possession” or ownership of human remains. Instead, where repatriation of human remains within the scope of the statute is requested, the “museum” must comply.

The provision of NAGPRA governing repatriation of human remains is found at 25 U.S.C. § 3005(a)(1), which provides that where the cultural affiliation of Native American human remains and associated funerary objects is established,

“the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or organization and pursuant to subsections (b) and (e) of this section, *shall expeditiously return such remains* and associated funerary objects.”

⁴⁶ See generally 25A C.J.S. *Dead Bodies* § 2, at 228-29 (2012) (discussing common law recognition that “[t]here is no property right in a dead body”); see also *Wynkoop v. Wynkoop*, 42 Pa. 29, 1861 WL 5846, *4 (Pa. 1861) (noting “[t]here is no right of *property* in such remains, from their very nature. No authority for such claim can be shown in any civilized community from the time of Adam”) (emphasis in original).

Id. (emphasis added). This provision, which applies *exclusively* to human remains and associated funerary objects (or burial artifacts within the grave), provides no exception or any ability to assert a “right of possession.”⁴⁷ This language requires that the museum “shall” repatriate on a request of a lineal descendant and/or culturally affiliated tribe.⁴⁸

Additionally, other sections of NAGPRA make clear that a “right of possession” is only a defense to repatriation of “Native American unassociated funerary objects, sacred objects or objects of cultural patrimony,” as defined, and not human remains. Repatriation of these particular items is governed by a different provision, 25 U.S.C. § 3005(c), which provides that on a request for repatriation of such item

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

Id. (emphasis added). Thus, it is clear on its face that NAGPRA contemplates a

⁴⁷ Section (b) referenced in this provision concerns the right to complete scientific studies, which is not applicable to this case. Section (e) concerns processes for dealing with competing claims for repatriation. As was discussed in this Court’s Memorandum of November 23, 2011 (Doc. 67, at 5-8), any such competing request would be the subject of NAGPRA’s consultation process.

⁴⁸ See *Shenango Inc. v. Apfel*, 307 F.3d 174, 193 (3d Cir. 2002) (holding “shall” is mandatory when used in a statute) (citing *United States v. Monsanto*, 491 U.S. 600, 607, 109 S. Ct. 2657, 2662 (1989)).

right of possession to be a consideration only with respect to certain objects, and not human remains.

Regulations enacted pursuant to NAGPRA also clearly make the distinction between § 3005(a)(1)'s governance of repatriations of human remains and § 3005(c)'s limited application to objects. The “right of possession,” as found at 43 C.F.R. § 10.10(a)(2), like the similar language in the statute, expressly applies *only* to “Native American unassociated funerary object[s], sacred object[s], [and] object[s] of cultural patrimony[.]” *Id.* Human remains are the subject of a separate subsection—subsection (b). Subsection (b) does not contain any “right of possession” exception to the application of NAGPRA, as appears in subsection (a).

NAGPRA thus establishes Congress' recognition that human remains cannot be rightfully “possessed” or owned in the same manner that might apply to a physical object. The Secretary of the Interior, in responding to comments at the time the NAGPRA regulations were promulgated, confirmed that the statute creates no “right of possession” defense to repatriation of human remains, and, further, refused to construe the “right of possession” defense as applicable to human remains. In the rulemaking process

“[o]ne commenter recommended reiterating the applicability of ‘right of possession’ to human remains and associated funerary objects recognized in the last sentence of section 2(13) of the Act [25 U.S.C. § 3001(13)] in this section of the regulations. American law generally recognizes that human

remains cannot be ‘owned.’ This interpretation is consistent with the second sentence of section 2 (13) of the Act that specifically refers to unassociated funerary objects, sacred objects, and objects of cultural patrimony, and with section 7 (a)(1) and (a)(2) of the Act [25 U.S.C. §§ 3005(a)(1) & (2)] in which no right of possession to human remains or associated funerary objects is inferred.”

Dept. of Int., *NAGPRA Regs.*, 60 Fed. Reg. 62,134, 62153 (Dec. 4, 1995).

Accordingly, none of the inventory, consultation, or repatriation provisions of NAGPRA with respect to human remains provide for “right of possession” as a defense.⁴⁹ In fact, it was the theory that non-Indians could own and use for

⁴⁹ The defined term “right of possession” with respect to human remains found at 25 U.S.C. § 3001(13) is, as discussed, not applicable on its face to requests for repatriation of human remains, and in any event, such definition on its own is not operative law. *See Hamilton v. Brown*, 4 Vet. App. 528, 536 (U.S. Ct. Vet. App. 1993) (“[d]efinitions, whether statutory or regulatory, are not themselves operative provisions of law . . . [r]ather, such a statutory, or, as here, regulatory, definition is no more than an appositional phrase to be inserted, for interpretive purposes, after the defined term in the operative statutory provision[.]”).

Notably, the only operative provision of NAGPRA that uses the term “right of possession” with respect to human remains is the criminal provision, which was codified as 18 U.S.C. § 1170(a), and which provides as follows:

“Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American *without the right of possession* to those remains *as provided in the Native American Graves Protection and Repatriation Act* shall be fined in accordance with this title, or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 5 years, or both.”

Id. (emphasis added). Thus, a plain reading of NAGPRA makes clear that, with respect to human remains, “right of possession” is only a defense to a *criminal prosecution* because *only* the criminal provision uses the term in the context of human remains, and as such, such definition has no bearing on this case. *See In re Visteon Corp.*, 612 F.3d 210,

commercial purposes Indian people's remains that was one of the main reasons NAGPRA was adopted. Summary judgment is appropriate on this issue because, as a matter of law, there is no set of facts or circumstances by which the Borough can avoid NAGPRA's application by a claimed "right of possession."

B. NAGPRA Preempts All State Law "Defenses" to Repatriation, Although its Provisions are Consistent with the General Law on Reinterments

NAGPRA, as federal law, preempts any state-law defense a party attempting to resist a repatriation might assert. Under the Supremacy Clause of the United States Constitution, "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."⁵⁰ *Kurns v. A.W. Chesterton, Inc.*, 620 F.3d 392, 395 (3d Cir. 2010) (quoting *Free v. Bland*, 369 U.S. 663, 666, 82 S. Ct. 1089, 1092 (1962)). State law is preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 2275 (1990)). The mandatory language of NAGPRA can therefore not be overridden by state laws that might arguably be used to resist a

226 (3d Cir. 2010) ("[t]he language Congress chose when crafting a statute must be considered first and foremost, and if plain and unambiguous, it must be credited[.]").

⁵⁰ Federal preemption has long been recognized as grounded in the Supremacy Clause of Article VI of the Constitution, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI.

repatriation.

Congress enacted NAGPRA “to protect Native American human remains . . . and to repatriate Native American human remains . . . currently held or controlled by . . . museums.” *Corrow*, 119 F.3d at 799-800. NAGPRA’s reach in “restoring countless ancestral remains and cultural and sacred items to their tribal homes warrants its aspirational characterization as ‘human rights legislation.’ ” *Id.* Plainly, if state law could prevent NAGPRA’s application, it would “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Kurns*, 620 F.3d at 395. Thus, to the extent the Borough might otherwise rely on state law to retain possession of Jim Thorpe’s remains, such laws must “yield” to NAGPRA, which is federal legislation intended to remedy precisely this type of situation. *See id.*

Notably, however, the enactment of NAGPRA and its purpose is entirely consistent with the general law with respect to reinterments. In fact, Pennsylvania law allows for reinterments on a showing of “reasonable cause” taking into consideration “the interests of the public, the wishes of the decedent and the rights and feelings of those entitled to be heard by reason of relationship or association.” *Novelli v. Carroll*, 420 A.2d 469, 471-72 (Pa. Super. Ct. 1980) (citing *Pettigrew v. Pettigrew*, 56 A. 878, 880 (Pa. 1904)); *see also* 9 Pa. Cons. Stat. Ann. § 52. As

noted, NAGPRA was enacted as civil rights legislation, taking into account the public interest in preventing the commercial and other misuse of Native American human remains and providing for involvement of lineal descendants.⁵¹ Thus, even if state law was relevant, reinterment pursuant to NAGPRA would be proper.

The basis of the Borough's asserted defense is an interment agreement that, on its face, does not purport to convey any property rights in the human remains. State laws on interment are addressed solely to allowing family members or others to select a burial location—not to possession or ownership of human remains.⁵² Accordingly, under the instrument at issue Patsy Thorpe merely selected a burial site, and agreed not to seek reinterment as long as the Borough maintained its new name.⁵³ (Plf.s' Fact No. 6 & Ex. 14.) However, this obligation was imposed solely on Patsy Thorpe and her heirs, and was *not* binding on Jim Thorpe's sons or

⁵¹ See *Corrow*, 119 F.3d at 799-800 (citing Jack F. Trope & Walter R. Echo-Hawk, *The Native Am. Graves Protection & Repatriation Act: Background & Legislative History*, 21 *Ariz. St. L.J.* 35, 59 (1992) (noting "NAGPRA is, first and foremost, human rights legislation. It is designed to address the flagrant violation of the 'civil rights of America's first citizens'")).

⁵² See 25A C.J.S. *Dead Bodies* § 2.

⁵³ See 22A Am. Jur. 2d *Dead Bodies* § 50 (2012) ("Once the duty to furnish a proper burial has been discharged, the body is in the custody of the law rather than in the spouse next of kin, as it is before interment. Thus, the disinterment or disturbance of the body after burial is subject to the control of the courts.") (citations omitted); 25A C.J.S. *Dead Bodies* § 19 (2012) ("There is a distinction between the rights existing prior to burial and those after burial because after its interment, the body is in the custody of the law") (citations omitted).

the Nation, who were not signatories, and who are not her heirs. Further, this agreement in no way can supersede the Plaintiffs' rights under NAGPRA to request repatriation. (Plf.s' Fact No. 6.) As a matter of law, this internment agreement cannot provide the Borough with a defense to repatriation under NAGPRA.

The Borough has no factual or legal defenses to the application of NAGPRA arising from its almost 40 years of possession and control of the remains of Jim Thorpe.⁵⁴ This case is therefore proper for resolution in Plaintiffs' favor on summary judgment.

CONCLUSION

For the foregoing reasons, the Court should grant a complete summary judgment in favor of the Plaintiffs ruling that NAGPRA applies to the remains of Jim Thorpe, and that the Borough must comply with the repatriation provisions of

⁵⁴ In the Joint Case Management Plan (Doc 77, at 9), the Borough suggested that the United States Supreme Court's decision in *Marshall v. Marshall*, 547 U.S. 293, 126 S. Ct. 1735 (2006), could strip this Court of subject matter jurisdiction under a "probate and/or domestic relations exception[.]" Contrary to the Borough's characterization, however, the case has no bearing on these proceedings, and in fact holds contrary to what the Borough implies. While the Supreme Court in *Marshall* did indeed recognize a "probate exception," which it characterized as similar to a "domestic relations" exception to federal jurisdiction, it found such to be "distinctly limited" in scope and wholly inapplicable to that case. *See id.* 547 U.S. at 310, 126 S. Ct. at 1747. In this case, no issue has been raised with respect to any will or the administration of Jim Thorpe's estate or distribution of any property. As was the case in *Marshall*, the claims and issues raised in this matter are "far outside the bounds of the probate exception[.]" *Id.* 547 U.S. at 308, 126 S. Ct. at 1746.

the statute.

Respectfully submitted,

s/ Daniel E. Gomez

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December 31, 2012

**CERTIFICATE OF COMPLIANCE WITH
LOCAL RULE 7.8(b)(2)**

1. As required by Local Rule 7.8(b)(2), I certify that this brief is proportionally spaced and contains 8,982 words, in 14-point font (body of the brief only, excluding tables and certificates), and complies with the limit of 9,000 words, as was agreed to by the parties and approved by the Court on a teleconference held Wednesday, December 19, 2012.

2. I relied on my word processor software to obtain the count, and it is "Microsoft Word 2007."

3. I certify that the information on this form is true and correct to the best of my knowledge and belief after a reasonable inquiry.

s/ Daniel E. Gomez

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CERTIFICATE OF SERVICE

I hereby certify that on this the 31st day of December, 2012, I electronically transmitted a full, true, and correct copy of the above and foregoing instrument, the “BRIEF OF THE PLAINTIFFS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT,” to the Clerk of Court using the Electronic Case Filing System (the “ECF System”) for filing and transmittal of a Notice of Electronic Filing to the filing following ECF registrants (names only):

Christopher G. Fusco, Esq.
Daniel E. Gomez, Esq.
Chad L. Klasna, Esq.
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Scot M. Wisler, Esq.

I further hereby certify that on the same date I served the same document by regular United States mail, with proper postage fully prepaid thereon, on the following, who are not registered participants in the ECF:

None

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APPENDIX OF EXHIBITS

The Plaintiffs, Richard Thorpe, William Thorpe, and the Sac and Fox Nation of Oklahoma, hereby submit the following exhibits in support of their motion for summary judgment.

No.	Description
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Affidavits

1. Affidavit of William K. Thorpe (Dec. 28, 2012).
2. Affidavit of Richard A. Thorpe (Dec. 27, 2012).
3. Affidavit of Sandra K. Massey, Historic Preservation Officer, Sac and Fox Nation (Dec. 28, 2012).
4. Affidavit of Gwen Wilburn, Enrollment Specialist, Sac and Fox Nation of Oklahoma (Dec. 12, 2012).
5. Affidavit of Custodian of Records of the Pennsylvania Infrastructure Investment Authority (Nov. 17, 2012) (with excerpted documents attached).
6. Certification of Custodian of Records of the Office of the Budget of the Commonwealth of Pennsylvania (Nov. 2012) (with excerpted documents attached).
7. Affidavit of Custodian of Records of Carbon County, Pennsylvania (Nov. 21, 2012) (with excerpted documents attached).
8. Affidavit of Custodian of Records of the Pennsylvania Department of Transportation (Nov. 21, 2012) (with documents attached).

Deposition Testimony

9. Transcript of Deposition of William K. Thorpe (July 16, 2012) (excerpted).

10. Transcript of Deposition of Richard A. Thorpe (July 16, 2012) (excerpted).
11. Transcript of Deposition of Representative of Borough of Jim Thorpe, Pa., Designated Pursuant to Fed. R. Civ. P. 30(b)(6) (Oct. 23, 2012) (excerpted).

Borough's Discovery Responses & Admissions

12. Defendant Borough of Jim Thorpe's Answer & Affirmative Defenses to Plaintiffs' Second Amended Complaint (Jan. 25, 2012) (Doc. 75).
13. Response to Plaintiffs' First Requests for Production (Oct. 22, 2012) (excerpted).
14. Answers of Borough of Jim Thorpe, Pa., to Requests for Admissions (Nov. 28, 2012) (excerpted).
15. Partial Response of Borough of Jim Thorpe, Pa., to Plaintiffs' Second Requests for Production (Dec. 17, 2012) (excerpted).

Other Summary Judgment Materials

16. Summary of Federal Funds Received by Borough of Jim Thorpe, Carbon County, and the Commonwealth of Pennsylvania