

**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.)	

**RESPONSE TO MOTION OF THE BOROUGH OF JIM
THORPE FOR SUMMARY JUDGMENT**

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**RESPONSE TO MOTION OF THE BOROUGH OF
JIM THORPE FOR SUMMARY JUDGMENT**

The plaintiffs, Richard Thorpe, William Thorpe, and the Sac and Fox Nation of Oklahoma (collectively the “Plaintiffs”), pursuant to Fed. R. Civ. P. 56 and M.D. Pa. R. 7.8 and 56.1, hereby respond to the motion for summary judgment of the defendant, the Borough of Jim Thorpe, Pennsylvania (the “Borough”). (Docs. 93 & 96.)

INTRODUCTION

The Borough, in its continuing effort to avoid its obligations under the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.* (“NAGPRA”), has moved for summary judgment on two grounds, neither of which provide a defense to the statute as a matter of law. The Borough’s first argument turns on a misapplication of the “probate exception” to federal jurisdiction. Under a correct analysis, the probate exception has no application to the circumstances in this case. Similarly, the Borough also asserts a laches defense, which is not permitted under NAGPRA, and which, in any event, would be precluded by the Borough’s failure to follow the requirements of the statute.

The Plaintiffs, on the other hand, have in their motion for summary judgment (Doc. 95) demonstrated the applicability of the statute to the Borough and remains of Jim Thorpe, and thus their entitlement to judgment as a matter of

law. The Plaintiffs' motion, therefore, resolves all of the issues in this case in favor of the Plaintiffs. The Court should enter a judgment in favor of the Plaintiffs and should deny the Borough's motion.

BACKGROUND

The issue before the Court is whether NAGPRA applies to the Borough and the remains of Jim Thorpe, the great Sac and Fox athlete. The limited facts necessary to make this determination are undisputed and largely a matter of historical record. Jim Thorpe died in 1953, while married to his third wife Patricia Askew Thorpe—known as “Patsy.” Shortly after his death, in accordance with his wishes and with Patsy's consent, Thorpe's remains were returned to Shawnee, Oklahoma, for last rites and burial, including a traditional ceremony to be conducted by the Sac and Fox Nation. However, after the traditional ceremony was begun, Patsy—with the assistance of law enforcement—had Thorpe's remains removed and stored.

Thereafter, Patsy, seeking to capitalize on her husband's fame, shipped his remains to other cities. Eventually, she reached an agreement with Mauch Chunk and East Mauch Chunk, Pennsylvania—towns which Thorpe is never known to have visited—which sought the burial site as part of a grandiose economic development and tourism scheme. The towns agreed to merge under the name

“Jim Thorpe,” and proceeded to commercialize the famous athlete’s burial. All of this occurred despite objections from Thorpe’s Indian family.¹

In 1990, NAGPRA was enacted to remedy the very type of treatment of Native American remains that occurred in this case—the exploitation and commercialization of Indian people’s remains by non-Indians. The statute placed certain obligations on “museums”—defined broadly as entities, such as the Borough, which have custody of or control over Native American remains. The basic obligations include publication of an inventory of Native American remains and consultation with lineal descendents and culturally affiliated Indian tribes. After these processes are complete, the statute provides that a museum *must* repatriate remains if requested by a lineal descendent or a culturally affiliated Tribe. No dispute exists that the Borough failed—and continues to refuse—to comply with NAGPRA and to allow a repatriation process to proceed.²

This lawsuit initially was brought by Jim Thorpe’s son, John, for declaratory and injunctive relief providing for the application of NAGPRA to the Borough and

¹ A more detailed recitation of the historical facts, with reference to relevant sworn testimony, as well as literary, biographical, and journalistic accounts, appears in Plaintiffs’ brief in support of its motion for summary judgment. (Doc. 98, at 1-13.)

² A more detailed description of NAGPRA’s processes, including the administrative nature of a repatriation proceeding, and its processes for dealing with competing repatriation claims, appears in Plaintiffs’ response to the Borough’s motion to dismiss (Doc. 49, at 5-17), and were discussed by this Court in denying the Borough’s motion to dismiss (Doc. 67, at 5-8).

to Jim Thorpe's remains. Thorpe's remaining living sons, William and Richard, were added as individual plaintiffs, along with the Sac and Fox Nation, shortly after the death of John Thorpe in 2011. No factual dispute exists as to Jim Thorpe's Sac and Fox heritage, or that the Borough has custody and control of Jim Thorpe's remains. In its motion for summary judgment, the Borough raises just two defenses—the federal “probate exception” and laches—neither of which provide a defense to NAGPRA.

ADDITIONAL SUMMARY JUDGMENT STANDARDS

Where, as here, the moving party bears the burden of establishing an affirmative defense, summary judgment should be denied if the moving party fails to establish any element essential to the defense. *See Anderson v. CONRAIL*, 297 F.3d 242, 247 (3d Cir. 2002). Failure to support any essential element of a claim or defense renders all other facts immaterial. *Id.*

SUMMARY OF THE ARGUMENT

Concerning its first ground for summary judgment, the Borough misapplies the so-called “probate exception” to federal jurisdiction, which, under a correct analysis, has no application to this case. The Borough's obligations under NAGPRA do not concern the administration of a will or property of any probate estate. The Borough's argument relies entirely on the fallacy that Jim Thorpe's

remains are a form of *personal property* that formed part of his probate estate—a proposition that has been expressly rejected under state law governing Jim Thorpe’s probate.

Similarly, the Borough’s laches argument fails because the defense is not recognized under NAGPRA. Under applicable Third Circuit law, laches is not a defense because Congress did not provide a statute of limitations for NAGPRA claims, and in fact expressed its intent that such claims may be brought at any time. Further, the Borough cannot invoke an equitable defense because its own conduct has been inequitable. The Borough has for many years ignored its statutorily mandated obligations under NAGPRA. To allow the Borough to avoid its obligations through a laches defense would thwart congressional intent.

The Borough has, as a matter of law, failed to establish the essential legal elements of its affirmative defenses. The Borough’s motion should be denied.

ARGUMENT & AUTHORITIES

I. THE “PROBATE EXCEPTION” TO FEDERAL JURISDICTION IS INAPPLICABLE BECAUSE JIM THORPE’S REMAINS WERE NOT PROPERTY OF ANY PROBATE ESTATE

In attempting to apply the federal “probate exception” to NAGPRA, the Borough misapplies the law and omits directly applicable precedent that defeats its basic argument. As it has consistently done in its previous filings, the Borough

incorrectly characterizes Jim Thorpe's remains as a form of *personal property*.

The Borough's argument is that Jim Thorpe's estate was probated shortly after his death in a California probate court, and that his remains were part of the *res* of his estate that was distributed to Patsy. The Borough, however, fails to acknowledge controlling law that no one owns human remains, and that remains are not part of a decedent's probate estate.

The Supreme Court recently described the limited scope of the "probate exception" as follows:

"[T]he probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. *But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.*"

Marshall v. Marshall, 547 U.S. 293, 311-12, 126 S. Ct. 1735, 1748 (2006)

(emphasis added). The flaw in the Borough's argument is that Jim Thorpe's remains cannot legally be considered a *res*—property over which a probate court could have exercised *in rem* jurisdiction. The *Marshall* court described the theory of the probate exception as being founded in the general principal that "when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*." *Id.* In the absence of a *res*, the probate exception does not apply.

Indeed, the established and longstanding general law—in California, Pennsylvania and elsewhere—is that there is no property right in human remains.³ Accordingly, under this fundamental principal—which the Borough ignores entirely—the disposition of human remains is not part of a probate estate. In *Estate of Jimenez v. Jimenez*, 65 Cal. Rptr. 2d 710 (Cal. Dist. Ct. App. 1997), the court expressly held that “[t]he body of one whose estate is in probate unquestionably forms no part of the property of that estate.”⁴ *Id.* at 714 (quoting *O’Donnell v. Slack*, 55 P. 906, 907 (Cal. 1899)). Thus, where, as here, no testamentary instructions were left, the matter of burial location is not cognizable

³ See 25A C.J.S. *Dead Bodies* § 2, at 228-29 (2012); 22A Am. Jur. 2d *Dead Bodies* § 3 (citing, *inter alia*, *Jimenez*, 56 Cal. Rptr. 2d at 714); see also *Wynkoop v. Wynkoop*, 42 Pa. 29, 1861 WL 5846, *4 (Pa. 1861) (noting “[t]here is no right of property in [human] remains, from their very nature” and “[n]o authority for such claim can be shown in any civilized community from the time of Adam”).

⁴ In *Jimenez*, a dispute among heirs was brought in a probate court concerning the decedent’s wishes for her burial. *Id.* at 712. The decedent left a will but did not provide any instructions. *Id.* at 711. The appeals court upheld the probate court’s dismissal holding that, where a decedent’s will leaves no instructions as to burial, “the probate court has no jurisdiction” and, accordingly, that a dispute over disposition of the remains “belongs in the civil court.” *Id.* at 715-16. In this case there is no dispute that Jim Thorpe left no will, and left no testamentary instructions as to the disposition of his remains. (Doc. 94-3 (Def’s. Ex. C).)

The holding of *Jimenez* demonstrates the lack of any legal basis in the Borough’s bare assertion that probate property includes “remains by extension.” (Doc. 96, at 8.) As demonstrated, human remains are *not* “property” subject to distribution in probate.

in a probate court, as has been suggested by the Borough.⁵

The Borough also incorrectly relies on the California interment statute, California Health & Safety Code § 7100, as a basis for applying the probate exception. Section 7100 is a statute—similar to those in most states—that governs initial burial decisions. The Borough again ignores *Jimenez*, which held that application of § 7100 is not cognizable in a probate court. *Id.* at 740-41. The court specifically held that the relevant provisions of § 7100 “are not located in the Probate Code” and “they do not specifically empower the probate court to enforce them.” *Id.* Accordingly, “where the decedent’s wishes are not contained in a will, a dispute over disposition of the remains belongs in the civil court, not probate.” *Id.* at 741.

The Borough incorrectly relies on § 7100 because this case does not concern burial in the first instance, but rather concerns a request for repatriation—a right conferred by NAGPRA. As discussed, the rights conferred by § 7100 are not property rights and, as such, § 7100 relates only to burial “in the first instance.”⁶

⁵ See also *O’Donnell*, 55 P. at 907 (holding where a will is silent as to burial instructions “the court in probate has no such power”)

⁶ See 25A C.J.S. *Dead Bodies* § 19 (2012) (noting “[t]here 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”); 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.”)

Walker v Konitzer, 31 Cal. Rptr. 906, 909 (Cal. Dist. Ct. App. 1963). Accordingly, the *Jimenez* court held that § 7100 has no application in a case addressed to disinterment or reinterment, which is governed by another set of laws. *See* 65 Cal. Rptr. 2d at 713-14 (citing *Walker*, 31 Cal. Rptr. at 909). This case similarly relates to reinterment as provided by non-probate law.

In this case, the applicable law is NAGPRA, which preempts state law on reinterment and disinterment because the remains are Native American and are in the custody of a “museum.”⁷ *See Kurns v. A.W. Chesterton, Inc.*, 620 F.3d 392, 395 (3d Cir. 2010). In *Jimenez*, the Court found that application of California law on disinterment was not within probate court jurisdiction because such laws were not in the probate code, and were not addressed to any probate issues. 65 Cal. Rptr. 2d at 715. Similarly, NAGPRA is federal law and, more importantly, is not addressed to any probate issue, and its application would thus not be cognizable in a probate court.⁸

⁷ *See* Br. in Supp. of Plfs.’ Mot. for Summ. J. (Doc. 98, at 31-34).

⁸ Even if state law was applicable, it would be the disinterment laws of Pennsylvania, where Jim Thorpe is currently buried—not the laws of California—which further demonstrates the lack of probate jurisdiction of any California court. As is discussed in Plaintiffs’ brief in support of their motion for summary judgment (Doc. 98, at 33-34), the enactment of NAGPRA would justify reinterment even if an analysis of Pennsylvania law was germane. *See Novelli v. Carroll*, 420 A.2d 469, 471-72 (Pa. Super. Ct. 1980); *Pettigrew v. Pettigrew*, 56 A. 878, 880 (Pa. 1904); 9 Pa. Cons. Stat. Ann. § 52.

Thus, not only were Plaintiffs not required to address the relevant matters in a California probate court, such would necessarily have been dismissed for lack of probate jurisdiction. *Id.* In *Marshall*, the probate exception was found inapplicable to a tort claim which did not concern the “the probate or annulment of a will[,]” nor did the claim “seek to reach a *res* in the custody of a state court.” 547 U.S. at 312, 126 S. Ct. at 1748. Similarly, in this case, Plaintiffs’ claims have not challenged any will, nor does it concern any *res* over which the probate court could have exercised jurisdiction. As in *Marshall*, Plaintiffs’ claims in this case fall “far outside the bounds of the probate exception.”⁹ *Id.* 547 U.S. at 308, 126 S. Ct. at 1746. The Borough cannot rely on the probate exception as a matter of law.

II. THE BOROUGH CANNOT, AS A MATTER OF LAW, ASSERT A DEFENSE OF EQUITABLE LACHES UNDER NAGPRA

The Borough—having, undisputedly failed to comply with the mandatory requirements of federal law—attempts to invoke the equitable doctrine of laches to overcome the clear intent of Congress. Congress, however, did not provide for any limitations on enforcement actions under NAGPRA, and the defense of laches cannot, as a matter of law, be invoked to avoid mandatory requirements under a

⁹ The Borough’s citation to *United States v. Beasby*, 257 F.2d 278 (3d Cir. 1958), a non-probate forfeiture case, is not germane, because that case, too, relies on a court’s exercise of *in rem* jurisdiction over property. As discussed, human remains are not property and cannot form a *res*, for probate or for any other purpose, and a court would be unable to exercise *in rem* jurisdiction over such remains.

federal statute. Further, even if a laches defense was available, the Borough could not assert it in view of its failure to comply with its threshold obligations to issue notices and to take other actions to permit a party with standing to request repatriation under NAGPRA.

A. The Borough's Failure to Comply with Its Statutory Obligations Precludes it from Asserting a Laches Defense

Laches is an equitable defense subject to equitable considerations, including that the party asserting laches must have "clean hands." *United States v. One Toshiba Color Television*, 213 F.3d 147, 156-59 (3d Cir. 2000). Where, as here, the party asserting laches "substantially contributed to the delay," through its own inequitable conduct or otherwise, laches is unavailable as a defense. *In re After Six, Inc.*, 167 B.R. 35, 44 (E.D. Pa. 1994). In particular, laches is not available to a party such as the Borough seeking to avoid mandatory obligations under federal law with which it has failed or refused to comply.

There is no dispute that the Borough at no time undertook to comply with any of the requirements of NAGPRA. (Plfs.' Fact No. 10 (Doc. 98, at 13).) Based on its custody and control of Native American human remains, the Borough was obligated, as of the effective date of NAGPRA, to begin the process of creating an inventory, consulting with lineal descendants and tribal governments, and notifying affected descendants and Indian tribes. *See* 25 U.S.C. § 3003(b) & (d); 43 C.F.R.

§ 10.9. The Borough was also obligated to deliver a copy of the inventory for publication in the *Federal Register* to notify and protect the public's interest. *See* 25 U.S.C. § 3003(e); 43 C.F.R. § 10.9(e)(7). It is not until these processes are complete that a lineal descendant or culturally affiliated Indian tribe is in a position to request a repatriation of human remains. *See* 25 U.S.C. at § 3005; 43 C.F.R. § 10.10.

The Borough's failure to comply with these statutory obligations points to the fundamental reason laches is not available to challenge the application of federal statutes that, like NAGPRA, contain no limitations period. By failing to take the actions required of it under federal law, the Borough effectively has denied the Plaintiffs their right formally to request repatriation.

A situation analogous to that in this case was presented in *Covelo Indian Community v. Watt*, 551 F. Supp. 366 (D.D.C. 1982). In 1966, Congress enacted a statute of limitations for claims the government, as trustee over Indian trust and restricted lands, could bring against third parties for damage to those lands. *Id.* at 369. As the end of the limitations period approached for pre-1966 claims, Congress extended the time limit several times. *Id.* In the last of its extension enactments, Congress included a provision requiring that the Secretary of the Interior submit to Congress legislative proposals to resolve pre-1966 claims. *Id.*

When the government failed to timely submit the required report, the plaintiff Indian tribes filed a class action suit against Interior for its failure to comply with the Congressional mandate. *Id.*

As with Plaintiffs' claims against the Borough, the relief sought in *Covelo* was "declaratory and mandatory injunctive relief to secure rights and duties [plaintiffs] claim are owed them . . . by the [government] defendant." *Id.* at 368. Also, as with Plaintiffs' claims against the Borough, the rights and duties that Plaintiffs claim are owed to them are rights secured by an act of Congress (NAGPRA). The government in *Covelo* raised a laches defense arguing that "plaintiffs had enough knowledge concerning the decisions not to litigate and not to propose legislation, to institute a lawsuit much earlier in time." *Id.* at 381 n.12. The Court rejected this argument holding that "[i]f anyone has been guilty of foot-dragging in pursuing this matter, it has been [the government] defendants." *Id.* The court held that the government's "equable [laches] defense must, therefore, fail." *Id.* The Borough's failure to comply with the congressionally mandated processes of NAGPRA requires the same result.

Additionally, to allow the Borough to avoid its statutory obligations through the application of laches would, in itself, cause an inequity, because it would render NAGPRA unenforceable in many situations and would be contrary to

Congress' intent and public policy. *See Cheruku v. Att'y Gen. of the U.S.*, 662 F.3d 198, 209 (3d Cir. 2011) (holding “[a] court may not award equitable relief in contravention of the expressed intent of Congress.); *City of Reading, Pa. v. Austin*, 816 F. Supp. 351, 368 & n.20 (E.D. Pa. 1993) (holding defense of laches requires consideration of the equities of not only the parties, but also of the public). The text of the provision of NAGPRA authorizing this enforcement action, 25 U.S.C. § 3013, provides for no time limit on when an enforcement action may be brought—and the record could not be clearer that none was intended.

During the rulemaking process, the Secretary of the Interior described Congress' intent on the timeliness of NAGPRA claims as follows:

“One commenter proposed inclusion of a ten year time limit during which Indian tribes must make claims for repatriation. Time limits for claims were discussed by Congress when the bill was being considered but were not included in the Act. Inclusion of such time limits in the regulations would contradict Congressional intent.”

Dept. of Int., *NAGPRA Regs.*, 60 Fed. Reg. 62,134, 62,155 (Dec. 4, 1995). The enforcement provision of NAGPRA thus provides a measure that can be invoked at any time and under a variety of circumstances. Had Congress intended to limit the time for NAGPRA enforcement actions, it clearly would have done so in the statute.

To allow the Borough to avoid its obligations by having “dragged its feet”

for an extended period of time would incentivize such conduct and would thwart Congress' intent in providing a clear process for repatriation of Native American remains, without limitation as to when such claim can be brought. Such considerations require a finding that laches is not available as a defense where, as here, a museum simply ignores its obligations for an extended period of time. Such a precedent would render NAGPRA unenforceable in many instances, where museums could simply refuse to comply in hopes that no enforcement action is ever brought against them.¹⁰ The Borough, therefore, cannot avail itself of a laches defense in this case, as a matter of law.

B. The Borough Relies on Trademark Law that Is Not Applicable in this Circuit, and the Application of Which Would Preclude the Borough's Defense

The Borough's reliance on a laches defense largely is based on a series of decisions in a trademark case from the District of Columbia Circuit—the law of which is contrary to the prevailing law of the Third Circuit. Application of Third Circuit law would, in fact, support the conclusion that laches is not an available defense to the Borough. Thus, even under an application of the Borough's cited law, denial of its motion is appropriate as a matter of law.

The decisions cited by the Borough are from the litigation of *Pro-Football*,

¹⁰ Repatriations under NAGPRA—by nature and by design—typically cannot proceed quickly for many reasons, including tribes' limited funding. (Plf.s' Resp. to Borough's Statement of Facts Ex. 4, ¶ 3.)

Inc. v. Harjo—an action brought by the owner of the Washington Redskins for review and reversal of a decision of the Trademark Trial and Appeal Board cancelling the trademark name as disparaging to Native Americans. The Native Americans’ challenge was brought pursuant to a provision of the Lanham Act, 15 U.S.C. § 1064(3), which provides that a petition to cancel a trademark registration may be brought at “any time” under certain circumstances described at § 1052(a), including where the mark is disparaging to a person or group. *See Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 47-48 (D.C. Cir. 2005). The D.C. Circuit upheld the district court’s reversal of the trademark cancellation, including on the basis of laches as it applied to six of the seven Native American claimants. *See id.*

The Borough relies on the *Harjo* decision by analogy in its assertion of a laches defense, but omits that in so holding the D.C. Circuit expressly disagreed with the Third Circuit’s holding that laches is *not* an available defense to cancellation petitions brought pursuant to § 1064(3). *See id.* at 48 (citing *Marshak v. Treadwell*, 240 F.3d 184, 193-94 & n.4 (3d Cir. 2001)). The *Marshak* case was brought under § 1064(3) for cancellation of the registered trademark “The Drifters,” which the claimant argued was fraudulently obtained. *See id.* at 187-90. The court held that § 1064(3)’s allowance for such an action to be brought “at any time” was “clear even if that particular subsection is viewed in isolation” and that,

therefore, the statutes permissive language precluded a laches defense. *Id.* at 192-93 & n.2.

The prevailing law in this Circuit would thus preclude the Borough from relying on a laches defense because, as with § 1064(3) of the Lanham Act, NAGPRA permits claimants to bring an enforcement action at any time. As outlined above, the provision of NAGPRA that authorizes Plaintiffs' cause of action, 25 U.S.C. § 3013, provides no limitation on when an enforcement action may be brought. The Secretary of the Interior's commentary on Congress' intent to allow claims for repatriation without any time limitation confirms that such claims can be brought at any time, similar to a claim under § 1064(3). *See* 60 Fed. Reg. at 62,155.

Accordingly, if the Borough's analogy to Lanham Act cases is appropriate, the Borough cannot assert a laches defense under the prevailing law of the Third Circuit and its argument fails as a matter of law.

C. The Borough Has, as a Matter of Law, Failed to Meet Its Burden in Establishing a Laches Defense

Even if laches was a defense available to a NAGPRA enforcement action, the Borough could not meet its burden of establishing its application in this case. A laches defense requires (1) an "inexcusable delay in instituting suit," and

(2) “prejudice resulting to the defendant from such delay.”¹¹ *Toshiba Television*, 213 F.3d at 157. Delay itself is not sufficient to bar a claim or to support a finding of prejudice. *In re Sheckard*, 394 B.R. 56, 66 (E.D. Pa. 2008). The “essential element of laches is prejudice” and the party asserting the defense “must show that it has suffered some significant injury from the delay[.]” *Id.* Because NAGPRA enforcement proceedings are subject to no statute of limitations, the burden is on the Borough to establish both elements. *See Great A&P*, 735 F.2d at 81. As the Borough cannot establish even a *prima facie* laches defense, its summary judgment motion should be denied. *See id.*

As noted, a delay itself is not sufficient to establish a laches defense. *See In re Sheckard*, 394 B.R. at 66. The delay must be “inexcusable.” *Toshiba Television*, 213 F.3d at 157. In *City of Reading*, 816 F. Supp. at 367, *supra*, the court held that a delay is “excused” where the party asserting the defense contributed to the delay through its own inequitable conduct. Thus, for the same reason that the Borough’s inequitable conduct in failing to timely perform its statutory obligations defeats its laches defense in the first instance, it also excuses any delay in the bringing of this enforcement action. The Borough merely cites a delay in the filing of this enforcement action, while ignoring its own inequitable

¹¹ These elements are conjunctive and both elements must be met. *See E.E.O.C. v. Great Atlantic & Pacific Tea Co.*, 735 F.2d 69, 80 (3d Cir. 1984).

conduct, and offering no citation or analysis in support of “inexcusability.”

The Borough also cannot establish the second element of prejudice. Causation must be considered because any arguable prejudice must be directly caused by the delay. *See City of Reading*, 846 F. Supp. at 367 (citing *Waddell v. Small Tube Prod., Inc.*, 799 F.2d 69, 76 (3d Cir. 1974)). In this case, causation, as a matter of law, precludes a finding of prejudice. The bases of the Borough’s argued prejudice—a change in the town’s name, change in street signage and mapping services, and construction and maintenance of the monument site—all occurred *prior to* enactment of NAGPRA, and before Plaintiffs had a NAGPRA cause of action available. (Doc. 96, at 14-16.) Any prejudice the Borough may argue could not have been caused by any delay of the Plaintiffs, but would be attributable to the fact that Plaintiffs had no NAGPRA cause of action until after the statute was enacted.

The Borough has further failed to establish prejudice due to the limited nature of this case, which concerns only an interpretation of NAGPRA and a determination as to its applicability. The limited facts necessary to make this determination are not disputed—namely, that Jim Thorpe was of Native American heritage, and that his remains currently are interred within the Borough and are within the Borough’s custody and control. Thus, the loss of historical witnesses, as

argued by the Borough, is not a source of legal prejudice, because historical testimony is unnecessary as to the relevant facts. Further, the Borough's argument that it does not receive federal funding is not supported by any evidence, and, in any event, would not require the testimony of witnesses or documents that are no longer in existence.

Further, Plaintiffs' NAGPRA complaint does not seek a change in the Borough's name, the demolition of the monument at Jim Thorpe's grave, or the replacement of any signage. Plaintiffs merely request declaratory and injunctive relief compelling the Borough to comply with NAGPRA. The Borough, therefore, cannot rely on these asserted facts as somehow prejudicial. Thus, even if laches were an available defense, the Borough has failed to meet its *prima facie* burden of establishing its applicability.¹²

CONCLUSION

Neither of the two grounds the Borough argues for avoiding the application of NAGPRA are, as a matter of law, valid defenses to NAGPRA. The Borough's misplaced reliance on the "probate exception" is based on its failure to acknowledge other controlling law. The Borough also cannot rely on the doctrine

¹² For the foregoing reasons, the Borough's motion for summary judgment should be denied as a matter of law. However, in the event the Court were to find any merit in the Borough's laches defense such matters would require a limited evidentiary hearing. *See Waddell*, 799 F.2d at 74 n.2.

of laches, as a matter of law, to avoid an enforcement action under NAGPRA, where Congress intended no time limitation. The Borough has not demonstrated entitlement to a summary judgment on any issue.

Respectfully submitted,

s/ Daniel E. Gomez

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January 24, 2013

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

1. As required by M.D. Pa. R. 7.8(b)(2), I certify that this brief is proportionally spaced and contains 4,999 (maximum 5,000) words, in 14-point font (body of the brief only, excluding tables and certificates).
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CERTIFICATE OF SERVICE

I hereby certify that on this the 24th day of January, 2013, I electronically transmitted a full, true, and correct copy of the above and foregoing instrument, the “RESPONSE TO MOTION OF THE BOROUGH OF JIM THORPE 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):

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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:

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