

Legal Sidebar

Jim Thorpe's Tribe and Sons Continue Fight against the Borough of Jim Thorpe, Pennsylvania

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As reported in an earlier [post](#), the Sac & Fox Nation (Tribe) and two sons of the legendary Native American athlete Jim Thorpe brought suit, under the Native American Grave and Repatriation Act (NAGPRA), against the borough of Jim Thorpe, Pennsylvania, where Jim Thorpe is buried under an agreement between Thorpe's widow and heir and the borough. The Tribe and the sons seek to gain custody of Thorpe's remains so that the Tribe can bury him in Oklahoma, Thorpe's home state, according to tribal custom.

Among other things, NAGPRA requires "museums" to return human remains, funerary objects, and the like to the proper tribe or lineal descendant upon request. The term "museum" includes state and local agencies that receive federal funds and that have control over Native American remains. Finding that the borough of Jim Thorpe received federal funds and had control over Native American remains, the district court concluded that the borough was a museum and ruled in favor of the Tribe and the sons. The borough appealed to the U.S. Court of Appeals for the Third Circuit ([Third Circuit](#)) and won. Now the Tribe and Thorpe's sons have petitioned the Supreme Court to hear the case.

The Third Circuit described NAGPRA as "an attempt to respond to the looting and plundering of Native American burial grounds and the theft of cultural artifacts from Native American tribes that continued to pour salt into the many wounds that have been inflicted on Native Americans throughout the history of the United States." The court seemed to see NAGPRA as an effort to stop the continued violation of native rights by the on-going holding of Native American objects and remains acquired by looting, or otherwise without consent, and to prevent looting and theft in the future. With those purposes in mind, the court concluded that the borough of Jim Thorpe was not a "museum" within the meaning of NAGPRA. The court explained that usually when a court interprets an unambiguous statute, it looks to the text of the statute, not its legislative history, to determine Congress's intent. However, the court explained, when literal application of the text would produce a result inconsistent with Congress's intent, courts need not apply the statute as written. Quoting the Supreme Court, the court wrote: "[s]tatutory interpretations which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." The court concluded that literal application of the statute would be inconsistent with Congress's intent because it is written so broadly that it would cover items freely given to states and municipalities by tribes, as well as remains buried according to the Native American's wishes. However, in the court's view, NAGPRA is directed at acquisition and possession that occurred without tribal or family consent. Therefore, because "[t]here is ... no limitation that would preserve the final wishes of a given Native American or exempt determination of his or her final resting place from the procedural requirements of NAGPRA," the court concluded that the statute as it is written should not apply and reversed the district court.

In seeking Supreme Court review, the Tribe and Thorpe's sons have characterized the issue as follows: "whether the absurdity doctrine allows courts to exempt otherwise covered entities from NAGPRA based on how the entity acquired the Native American remains." It appears unlikely that the Supreme Court will take the appeal. Generally, the Court takes appeals when there is a split among the circuit courts and the issue has broad implications. There is no split among the circuit courts, and this issue does not appear to have broad implications. Accordingly, it seems likely that the Third Circuit's decision will control the case, and Jim Thorpe's remains will stay where his widow placed them, in Jim Thorpe, Pennsylvania.

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