Docket No. 13-2446 & 13-2451

In the

United States Court of Appeals

for the

Third Circuit

JOHN THORPE;
SAC AND FOX NATION OF OKLAHOMA;
WILLIAM THORPE; RICHARD THORPE;
Plaintiffs-Appellees/Cross Appellants,

-v.-

BOROUGH OF JIM THORPE;
MICHAEL SOFRANKO; RONALD CONFER; JOHN MCGUIRE;
JOSEPH MARZEN; W. TODD MASON; JEREMY EMLBER;
JUSTIN YAICH; JOSEPH KREBS; GREG STRUBINGER;
KYLE SHECKLER; JOANNE KLITSCH;
Defendants-Appellants/Cross-Appellees.

On Appeal from an Order Entered by the Honorable A. Richard Caputo,
United States District Judge, Middle District of Pennsylvania,
No. 3: 10-cv-1317-ARC

BRIEF OF *AMICUS CURIAE* THE NATIONAL CONGRESS OF THE AMERICAN INDIANS IN SUPPORT OF PLAINTIFF-APPELLEE JOHN THORPE, *ET AL.* AND AFFIRMANCE OF THE DECISION BELOW

MATTHEW CAMPBELL
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c)(1), and 3d Cir. L.A.R. 26.1, Amicus Curiae National Congress of American Indians ("NCAI") makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: Counsel for NCAI is aware of no such corporation.

/s/ Matthew Campbell Dated: October 28, 2013

MATTHEW CAMPBELL
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS, & RULES

LEGISLATIVE HISTORY

OTHER AUTHORITIES

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY[1]

Amicus Curiae National Congress of American Indians ("NCAI") is the oldest and largest national organization representing the interests of American Indians. NCAI's membership is comprised of Indian tribal governments and individual tribal members. NCAI advocates for Indian tribes and American Indian/Alaska Native citizens throughout the United States on a multitude of issues. These issues include American Indian human rights, civil rights, and cultural rights among others. NCAI has a long history of supporting Native peoples' rights to repatriation of Native American human remains and funerary objects in a culturally appropriate and sensitive manner.

NCAI offered extensive Congressional testimony in support of the "historic, landmark"[2] Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001, *et seq.* ("NAGPRA"). NCAI has an ongoing interest in NAGPRA's proper implementation and has shown continued commitment to its preservation and enforcement. For example, in 2012 NCAI re-established the NCAI Tribal NAGPRA Commission.

---

[1] Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] S. Alan Ray, *Native American Identity and the Challenge of Kennewick* Man, 79 Temp. L. Rev. 89, 90 (2006).

NCAI is thus well-positioned to provide this Court with critical context on the creation of NAGPRA, as well as the unique facets of American Indian cultural resources and repatriation. Indian tribes' unique history and cultural rights must be considered when addressing issues that affect American Indians and Alaska Natives. Tribes and their citizens enjoy a unique political relationship with the United States under numerous treaties, federal statutes, and the U.S. Constitution. *See Morton v. Mancari*, 417 U.S. 535 (1974). The unique political relationship between Indian tribes and the United States is also evidenced by the entire Title 25 of the United States Code, and numerous Supreme Court holdings, which distinguish Indian tribes as sovereign political entities and impose fiduciary duties upon the United States toward the tribes. Tribes' government to government relationship with the United States is part of the history and context of NAGPRA, and that history demonstrates the Act's constitutionality. Further, the objectives of NAGPRA, which NCAI helped to craft, confirm that it applies to this case.

Counsel for NCAI has consulted with counsel for all parties to this appeal and none oppose NCAI's filing of this brief as an Amicus Curiae. Therefore NCAI files this amicus brief pursuant to Fed. R. App. P. 29 and 3d Cir. L.A.R. 29 without a motion for leave to file.

SUMMARY OF ARGUMENT

NAGPRA was enacted, first and foremost, as human rights legislation. It protects the culture and heritage of Native Americans and Native Hawaiians, including their right to properly bury their relatives and descendants according to their traditions and beliefs. NAGPRA also seeks to protect burial sites, human remains, and cultural items from future desecration and therefore applies to contemporary burials.

Congress' authority to enact NAGPRA is solidly grounded in the Spending Clause, Commerce Clause, Treaty Clause, Property Clause, and Congress' pre-constitutional powers. NAGPRA satisfies the four pronged analysis set forth by the Supreme Court for legislation based on the Spending Clause. NAGPRA promotes the general welfare, imposes unambiguous conditions that are related to the federal interest of protecting and advancing culture and heritage, and NAGPRA is not independently unconstitutional under the Tenth Amendment or other Constitutional provisions. The Indian Commerce Clause and Treaty Clause give Congress broad powers to legislate in Indian affairs, and NAGPRA helps fulfill the federal interest of protecting and advancing Indian culture and heritage.

The District Court properly found that the Borough is a museum under NAGPRA, and that it applies in this instance. NAGPRA's definition of museum is broad, but not as broad as it could have been. There was some concern when

NAGPRA was being debated about its scope, but the scope was limited to institutions and state and local governments. The Borough fits soundly into this category, and was properly held to be a museum.

Finally, laches is an equitable defense that generally should not apply to NAGPRA claims because it is inconsistent with NAGPRA's language and scheme.

ARGUMENT

I. NAGPRA IS LANDMARK HUMAN RIGHTS LEGISLATION THAT IS INTENDED TO REPATRIATE REMAINS AND PREVENT THE FUTURE DESECRATION AND SALE OF REMAINS AND CULTURAL ITEMS.

NAGPRA has been described as "historic, landmark legislation for Native Americans. It represents fundamental changes in basic social attitudes toward Native Peoples by the museum and scientific communities and the public at large." S. Alan Ray, *Native American Identity and the Challenge of Kennewick* Man, 79 Temp. L. Rev. 89, 90 (2006). "NAGPRA is arguably the most important example of cultural property legislation in our history and has established an international landmark for such legislation." James D. Nason, *Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation*, 12 Stan. L. & Pol'y Rev. 255, 255 (2001).

The history of events that lead to NAGPRA's passage is replete with stories of remains being obtained by soldiers, government agents, pothunters, private citizens, museum collecting crews, and scientists in the name of profit,

entertainment, science, or development. *See* Robert E. Bieder, A Brief Historical Survey of the Expropriation of American Indian Remains (1990), reprinted in *Hearings on S. 1021 and S. 1980 Before the Senate Select Comm. on Indian Affairs*, 101st Cong., 278-363 (1990) ("Senate Hearing"); Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 Ariz. St. L.J. 35, 40 (1992). At one point, the search for and collection of Indian body parts became official federal policy with the Surgeon General's Order of 1868. *See* Senate Hearings, *supra*, at 319-20 (statement of Robert Beider); *see also* 136 Cong. Rec. S17,174-175 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye). Collectors would, among other things, "make money from selling Indian skulls to the Army Medical Museum." 136 Cong. Rec. S17,174 (statement of Sen. Inouye).

Over a hundred years later, "[d]igging and removing the contents of Native American graves for profit or curiosity ha[d] been common practice." H.R. Rep. No. 101-877, at 9 (1990); *see also* 136 Cong. Rep. H10,988 (daily ed. October 22, 1990) (statement of Rep. Campbell). Witnesses from private art dealers testified that "a war shirt in very good condition containing scalp locks could be sold for $200,000 on the open market." H.R. Rep. No. 101-877, at 13; *Protection of Native American Graves and the Repatriation of Human Remains and Sacred Objects: Hearing on H.R. 1381, H.R. 1646, and H.R. 5237 Before the H. Comm. on Interior*

and Insular Affairs, 101st Cong. 255 (1990) ("House Hearing") (statement of James Reid, Vice President of Antique Tribal Art Dealers Assoc.). While hard to believe, even skulls can be in private collections. House Hearing, *supra*, at 258 (statement of James Reid, Vice President of Antique Tribal Art Dealers Assoc.).

Senator McCain noted that tribal and federal officials had been unable, as of 1990, to "prevent the continued looting of [N]ative American graves and the sale of those objects by unscrupulous collectors." 136 Cong. Rec. S17,176; *see also* Senate Hearing, *supra*, at 69 (statement of Keith Kintigh, discussing continued looting). Thus, Congress chose to incorporate criminal provisions into NAGPRA to prevent the future theft and corresponding sale of remains and cultural items on the black market. 136 Cong. Rec. S17,176; *see also* 18 U.S.C. § 1170 (2012); Senate Hearing, *supra*, at 69 (statement of Keith Kintigh) ("Elimination of the market for these items by prohibiting their sale or purchase would do far more to protect Native American human remains than all other provisions of this bill and all other antiquities legislation combined."); Sen. Rep. No. 101-473, at 7 (1990).

Along with the 1868 Surgeon General's Order, state and federal common law and statutory law contributed to the disparate treatment of Native American burials and funerary objects. *See* Trope, *supra*, at 45-47. In particular, the Antiquities Act of 1906 defined dead Native American remains on federal lands as "archeological resources" thereby converting these remains into "federal property."

See Trope, *supra*, at 42-43; 16 U.S.C. § 431-433 (2012). As a result, many remains were disinterred pursuant to a federal permit for their preservation in museums. *Id.* The Archaeological Resources Protection Act of 1979 ("ARPA") likewise deemed Native American human remains as "archaeological resources." *See* 16 U.S.C. §§ 470bb(1), 470cc(b)(3), 470dd (2012). These "resources" were owned by the federal agency over the area where the remains were found and required to be preserved in museums. *Id*.

These laws classified Native American human remains as "property" that could be owned. They contributed to – even encouraged – grave digging on federal land pursuant to a federal permit. *See* Trope, *supra*, at 42-43; *see* Senate Hearing, *supra*, at 187 (statement of Walter Echohawk); *see* Sherry Hutt, *Illegal Trafficking in Native American Human Remains and Cultural Items: A New Protection Tool*, 24 Ariz. St. L.J. 135, 137 (1992). This is in sharp contrast to the legal treatment of non-Indian burials and remains, which were generally protected from looting and disturbance. NAGPRA was needed to ensure equal treatment of Native American remains. *See* Sherry Hutt & C. Timothy McKeown, *Control of Cultural Property as Human Rights Law*, 31 Ariz. St. L.J. 363, 366, 372-73 (1999).

Another key aspect of NAGPRA is the protection of Native American cultural values and human civil rights. As Senator McCain noted, cultural items are those items "necessary for the continuing practice of [N]ative American religions,

funerary objects and objects that are of central importance to the tribe such that they cannot be owned, alienated or conveyed by any individual." 136 Cong. Rec. S17,176. Preserving Native American culture, as Representative Mink noted, is one aspect of this legislation. 136 Cong. Rec. H10,991. Protecting Native American culture includes protecting Native American spiritual beliefs. Some Native representatives testified that the "spirits of their ancestors would not rest until they are returned to their homeland" and that such beliefs have generally been ignored. H.R. Rep. No. 101-877, at 13. Senator Inouye explained:

> When human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers that came to this continent that are lying in glass cases. It is Indian remains. The message that this sends to the rest of the world is that Indians are culturally and physically different from and inferior to non-Indians. This is racism.
>
> In light of the important role that death and burial rites play in [N]ative American cultures, it is all the more offensive that the civil rights of America's first citizens have been so flagrantly violated for the past century.

136. Cong. Rec. S17,174. As a result of this history, Congress recognized that NAGPRA truly is "human rights" legislation. *See United States v. Carrow*, 119 F.3d 796, 800 (10th Cir. 1997) (*citing* Trope, *supra*, at 37); Senate Hearing, *supra*, at 38 (statement of Paul Bender, Trustee Heard Museum); S. Rep. No. 101-473, at 2; H.R. Rep. No. 101-877, at 10.

In order to protect Native cultures and human rights, and combat the historical and continuing theft of Native American remains and funerary objects, Congress enacted NAGPRA to achieve two principal objectives. *See Carrow*, 119 F.3d at 799-800 (citing H.R. Rep. No. 101-877); S. Rep. No. 101-473, at 1. The first objective, which the Borough of Jim Thorpe ("Borough") and amicus curiae Michael Koehler and John Thorpe rightly acknowledge, is to protect Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony presently on Federal or tribal lands. *Id.*; Brief of the Borough of Jim Thorpe at 20, Thorpe et al. v. Borough of Jim Thorpe et al., No. 13-2446 & 13-2451 (3d Cir. Sept. 23 2013) ("Borough Brief"); Brief for Michael Koehler & John Thorpe as Amici Curiae Supporting the Borough at 6, Thorpe et al. v. Borough of Jim Thorpe et al., No. 13-2446 & 13-2451 (3d Cir. Sept. 30, 2013) ("Amici Curiae Brief"). Essential to protecting those items are the discovery and criminal provisions in NAGPRA. *See* 18 U.S.C. § 1170; 25 U.S.C. § 3002. The second objective, which the Borough minimizes, is to repatriate Native American human remains, associated funerary objects, sacred objects, and objects of cultural patrimony currently held or controlled by Federal agencies or by museums. *See Carrow*, 119 F.3d at 799-800 (citing H.R. Rep. No. 101-877); S. Rep. No. 101-473, at 1.

Through these two objectives, Congress sought to repatriate human remains and other objects by ensuring human remains and cultural items are returned. Congress also sought to prevent the future desecration and sale of human remains and associated funerary objects by outlawing the sale and purchase of these items and protecting those items found on federal or tribal lands. NAGPRA's repatriation objective applies with full force to this case.

II. EVEN THOUGH THE CONSTITUTIONAL CLAIMS ARE WAIVED, NAGPRA IS CONSTITUTIONAL UNDER THE SPENDING CLAUSE, COMMERCE CLAUSE, TREATY CLAUSE, OR CONGRESS' PRE-CONSTITUTIONAL AUTHORITY.

As outlined by the Thorpe's in their brief, the Borough's constitutional arguments have been waived. Brief of John Thorpe; Sac and Fox Nation of Oklahoma; William Thorpe; and Richard Thorpe at 33-37, Thorpe et al. v. Borough of Jim Thorpe et al., No. 13-2446 & 13-2451 (3d Cir. Oct. 23 2013) ("Thorpe's Brief"). Even if they had not, however, NAGPRA is constitutional.

a. NAGPRA'S MUSEUM PROVISIONS ARE CONSTITUTIONAL UNDER THE SPENDING CLAUSE.

NAGPRA's museum provisions are constitutional under U.S. Const. art. I, § 8, cl. 1.[3] The Supreme Court has long held that Congress can place conditions on

[3] The legislative history indicates that the museum provisions in NAGPRA were enacted pursuant to the Spending Clause as the original proposed penalty was to disqualify museums for the receipt of any future federal funds if they were not in compliance. H.R. Rep. No. 101-877, at 26; House Hearing, *supra*, at 311-12 (statement of Am. Assoc. of Museums).

the receipt of federal funds. *See South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2604 (2012). *Dole* is the leading case in this area. *Id.* In *Dole*, the Supreme Court held that the Spending Clause allowed Congress to withhold federal highway funds from states that allow anyone under the age of 20 to purchase alcoholic beverages. 483 U.S. at 207-212. In doing so, the Court set forth the basic multi-part test to determine whether federal spending limitations are constitutional. *See Koslow v. Pennsylvania*, 302 F.3d 161, 175-76 (3d Cir. 2002).

"Spending Clause legislation must: (1) pursue the general welfare; (2) impose unambiguous conditions on states, so they can exercise choices knowingly and with awareness of the consequences; (3) impose conditions related to federal interests in the program; and (4) not induce unconstitutional action." *Id.* at 175 (citing *Dole*, 483 U.S. at 207-08, 210).

The general welfare requirement is not a particularly high barrier "especially in light of the fact that 'the concept of welfare or the opposite is shaped by Congress . . .'" *Helvering v. Davis*, 301 U.S. 619, 645 (1937); *see Dole*, 483 U.S. at 207 (stating that courts should "defer substantially" to the judgment of Congress). As discussed in more detail in Part I above, NAGPRA easily passes this requirement as it was first and foremost human rights legislation. *See Carrow*, 119 F.3d at 800.

NAGPRA also satisfies *Dole's* second requirement – it imposes unambiguous conditions on recipients of federal funds. The Supreme Court has explained that courts must ask whether a state official or recipient of federal funds would clearly understand the obligations in the act. *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). NAGPRA's inventory, summary, and repatriation provisions are clear and unambiguous, and many museums have easily understood its provisions. *See* 25 U.S.C. §§ 3003, 3004, 3005. For example, the Michigan State Police recently completed a NAGPRA inventory. *See* 78 Fed. Reg. 59,954-55 (Sept. 30, 2013). Many other state and local governments evidently understand NAGPRA's provisions. *See, e.g.,* 78 Fed. Reg. 50,098-99 (Aug. 16, 2013) (St. Joseph County Sheriff's Department, Centreville, MI); 78 Fed. Reg. 48,900-01 (Aug. 12, 2013) (State Historical Society of Wisconsin, Madison, WI); 78 Fed. Reg. 34,121-23 (June 6, 2013) (Dallas Water Utilities, Dallas, TX); 76 Fed. Reg. 14,058 (March 15, 2011) (Fremont County Coroner, Riverton, WY); 73 Fed. Reg. 49,483 (Aug. 21, 2008) (Arkansas Highway and Transportation Department). There is nothing ambiguous about the scope of NAGPRA – it applies to "any institution or State or local government agency . . . that receives Federal funds and has possession of, or control over, Native American cultural items." 25 U.S.C. § 3001(8). "Native American," "cultural items," and "receives Federal funds" are all defined for clarity. *See* 25 U.S.C. §§

3001(3), (9); 43 C.F.R. § 10.2(a)(3)(iii). When a repatriation request for human remains is made, a museum "shall expeditiously return such remains and associated funerary objects." 25 U.S.C. § 3005(a)(1). NAGPRA's language clearly sets forth its scope and requirements.

The Court of Appeals for the Sixth Circuit recently determined that the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which is similar to NAGPRA, satisfied the second *Dole* requirement. *See Cutter v. Wilkinson,* 423 F.3d 579, 585 (6th Cir. 2005). RLUIPA applies to "any program or activity that receives Federal financial assistance[.]" 42 U.S.C. § 2000cc-1(b)(1). NAGPRA applies to 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." 25 U.S.C. § 3001(8). The Court of Appeals held that the "statutory language of RLUIPA, which explains that the Act applies to 'any program or activity that receives Federal financial assistance,' 42 U.S.C. § 2000cc-1(b)(1), is not ambiguous." *Cutter*, 423 F.3d at 585; *see also Madison v. Virginia*, 474 F.3d 118, 125 (4th Cir. 2006) (same); *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002) (same). Likewise, NAGPRA is not ambiguous in its application, and provides clear notice to institutions and state and local governments of its conditions. The prison officials in *Cutter* went on to argue that the "least restrictive means" test laid out in

RLUIPA also showed ambiguity. 423 F.3d at 586. The Court of Appeals again disagreed, finding that all that is necessary under the second *Dole* requirement is that the statute put the recipient of funds "on notice" of its requirements. *Id.* NAGPRA's provisions similarly provide ample notice.

With regard to the third *Dole* requirement, NAGPRA imposes conditions directly related to the federal interest it was enacted to protect. First and foremost, Congress has a significant interest in protecting human rights, which NAGPRA does. *See Carrow* 119 F.3d at 799-800. Further, Congress has an interest in protecting Indian grave sites from desecration, and returning remains in the possession or control of museums to lineal descendants and related tribes. *Id.* The conditions NAGPRA imposes are the excavation and criminal provisions to protect human remains and cultural items, and the museum provisions to repatriate remains. 25 U.S.C. §§ 3002, 3005.

In *Dole*, the Supreme Court found that the drinking age condition on the receipt of federal funds was sufficiently related to the expenditure of highway funds and safe interstate travel. 483 U.S. at 208-09. In this instance, the conditions imposed by NAGPRA are directly related to, and directly advance, its purpose of protecting human rights and remains, and repatriating Indian remains in the possession of museums. What is required is that the "conditions attached to federal funding be related to a federal interest." *Charles v. Verhagen*, 348 F.3d 601, 608

(7th. Cir. 2003) (internal citation omitted). Through NAGPRA, Congress has expressed a clear interest in protecting human rights. As this Court noted in the Rehabilitation Act context, the interest in human rights legislation, which is undeniably significant and clearly reflected in the legislative history, flows with every dollar spent. *Koslow*, 302 F.3d at 175-76.

The Borough asserts that the receipt of federal funds must have a nexus to activities related to museums. Borough Brief at 45. The District Court, however, correctly relied on *Grove City* to find the Borough received federal funds, and this Court has cited that case with approval in its previous Spending Clause analysis. *See Koslow*, 302 F.3d at 176 (citing *Grove City Coll. v. Bell*, 465 U.S. 555, 571 n. 21 (1984)). Further, the Supreme Court rejected the Borough's nexus argument in *Sabri v. United States*, 541 U.S. 600, 605-06 (2004). As the Court noted, money is "fungible," and can be drained off in one account because federal money is flowing into another. *Id.* at 606. Thus, the Court rejected Sabri's argument that the statute there was unconstitutional because "it fails to require proof of any connection between a bribe or kickback and some federal money." *Id.* at 604-07; *see also Koslow*, 302 F.3d at 176 (recognizing that funds are fungible). In *Koslow*, the funds that the prisons received were illegal alien funds, not anti-discrimination funds. 302 F.3d at 166-67. This Court there noted that it was virtually impossible to determine whether federal dollars paid for Koslow's salary or any benefits he

received. *Id*. Likewise, it is virtually impossible to determine whether any federal funds the Borough received went to maintain Jim Thorpe's mausoleum, or the grounds or streets around it that provide access, thereby freeing up funds for the Borough to directly maintain the mausoleum. As a result, the Borough's nexus argument misses the mark.

Regardless, part of the federal funds the Borough received were Federal Emergency Management Assistance ("FEMA") funds, which have a sufficient relationship to the conditions imposed by NAGPRA. Rec. Doc. 98-6. With the exception of "restoring a facility," FEMA does not affect the application of the National Environmental Policy Act ("NEPA") to other FEMA actions. 42 U.S.C. § 5159 (2012); *see* Memorandum from Richard S. Shiver, Acting Environmental Officer, on Documentation of NEPA CATEX to Regional Environmental Officers (June 20, 1997), *available at*: http://www.fema.gov/media-library-data/20130726-1730-25045-3430/catex_documentation_policy.pdf (discussing that other environmental laws still apply). NEPA generally requires the federal government to "preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice[.]" 42 U.S.C. § 4331(4) (2012); *see also* Office of External Affairs, Federal Emergency Mgmt. Agency, FEMA Tribal Policy (2010), *available at:*http://www.fema.gov/media-

library/assets/documents/20441?id=4445. FEMA regulations adopted this identical language. 44 C.F.R. § 10.4(a)(2). As a result, through FEMA expenditures there is a federal interest in protecting culture and heritage, which would include Native American human rights, burials, and culture. NAGPRA's inventory and repatriation provisions directly relate to this federal interest of protecting culture and heritage.[4]

Finally, there is no independent constitutional bar to NAGPRA. The Borough argues that NAGPRA is unconstitutional under the Tenth Amendment. It is well recognized, however, that the Tenth Amendment is not an independent constitutional bar to Spending Clause legislation. *See Bell v. New Jersey*, 461 U.S. 773, 790 (1983). "Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty." *Id.* As the Seventh Circuit noted,

> when Congress engages in a constitutional use of its delegated Article I powers, the Tenth Amendment does not reserve that power to the States. In other words, the Tenth Amendment does not restrict the

[4] Likewise, the American Recovery and Reinvestment Act ("ARRA"), under which the Borough received funds, Rec. Doc. 98-6, sought to invest in, among other things, environmental protection. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 3(a)(4), 123 Stat. 115, 116 (2009). ARRA also devoted resources "to ensuring that applicable environmental reviews under [NEPA] are completed on an expeditious basis and that the shortest existing applicable process under [NEPA] shall be utilized." *Id.* at § 1609, 123 Stat. at 304. By incorporating NEPA, ARRA expenditures, just like FEMA expenditures, have tied to them a federal interest in protecting Native American human rights, burials, and culture, which directly relates to NAGPRA's conditions.

> range of conditions Congress can impose on the receipt of federal funds, even if Congress could not achieve the goal(s) of those conditions directly.

Verhagen, 348 F.3d at 609 (internal citations omitted); *see Cutter*, 423 F.3d at 588-89. Thus, the Tenth Amendment is no bar.

Additionally, the financial inducement provided for in NAGPRA is not so coercive as to constitute compulsion. *See Sebelius*, 132 S.Ct. at 2601-2608 (holding that the penalty of withholding existing and future Medicaid payments amounted to coercion); *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*,__ F.3d __, No. 13–1713, 13–1714, 13–1715, 2013 WL 5184139 (3d Cir. Sep. 17, 2013) (discussing anti-commandeering principles, although no page numbers have been assigned). NAGPRA, as originally proposed, had a penalty provision similar to the statute in *Dole* and *Sebulius* – an unconditional withholding of federal funds. H.R. Rep. No. 101-877, at 26; House Hearing, *supra*, at 311-12 (statement of American Assoc. of Museums). NAGPRA as enacted, however, has no such a penalty and the Borough has not argued its hearing provision for non-compliance is unduly coercive. *See* 25 U.S.C. § 3007. This is not a case where the Borough will lose *all* of its federal funding if it fails to comply. *See Sebelius*, 132 S.Ct. at 2604-2605. Nor is this a case where the Borough or State must enact a law or take title to certain property. *See generally New York v. United States*, 505 U.S. 144 (1992). Here, just as in *Dole*, Congress has offered "relatively

mild" encouragement to the museums to repatriate remains. *Dole*, 483 U.S. at 211-12. The repatriation of such remains, however, remains the prerogative of museums not merely in theory but in fact. *Id.* Encouraging museums to comply with NAGPRA by conditioning the receipt of federal funds on the repatriation provisions is constitutional.

b. NAGPRA IS CONSTITUTIONAL UNDER THE COMMERCE CLAUSE, TREATY CLAUSE, PROPERTY CLAUSE, OR CONGRESS' PRE-CONSTITUTIONAL AUTHORITY, AND POSES NO EQUAL PROTECTION[5] CHALLENGES.

Even if the NAGPRA museum provisions are not constitutional under the spending clause, which they are as described above, NAGPRA is constitutional under the Indian commerce clause, U.S. Const., art. I, § 8, cl. 3, and treaty clause, U.S. Const., art. II, § 2, cl. 2. It is well established that the Indian Commerce Clause and the Treaty Clause give Congress broad authority to legislate in Indian affairs.[6] *See United States v. Lara*, 541 U.S. 193, 200 (2004); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *United States v. Pendleton*, 658

[5] The Borough does not explicitly make an equal protection argument, but implies one may exist. Borough Brief at 20, 30.

[6] The Borough cites to Justice Thomas' discussion on the Indian commerce clause in *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, 2571 (2013). Borough Brief at 20, 30, 34. Justice Sotomayor noted in her dissent, however, that no "party advanced this [constitutional] argument, and it is inconsistent with this Court's precedents holding that Congress has 'broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as plenary and exclusive,' founded not only on the Indian Commerce Clause but also the Treaty Clause." *Id.* at 2584, n. 16 (citing *United States v. Lara*, 541 U.S. at 200–201 (2004)).

F.3d 299, 306 (3d. Cir. 2011) (citing *Lara*, 541 U.S. at 200); *Cohen's Handbook of Federal Indian Law* §5.01-5.02(2), at 383-92 (Nell Jessup Newton ed., 2012) ("Cohen's"). NAGPRA's excavation provisions are constitutional under the Property Clause, U.S. Const., art. IV, § 3, cl. 2, as the Property Clause empowers Congress to dispose of and regulate "the Territory or other Property belonging to the United States." *Id.; see generally Kleppe v. New Mexico,* 426 U.S. 529 (1976); *Cohen's* § 5.01(1), at 385.

Additionally, Congress has legislative authority consistent with the "adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as 'necessary concomitants of nationality.'" *Lara*, 541 U.S. at 201 (internal citations omitted); Matthew L.M. Fletcher, *Preconstitutional Federal Power,* 82 Tul. L. Rev. 509 (2007); *Cohen's* at § 5.01(4), at 389-390. This pre-constitutional power also provides authority for Congress to legislate in Indian affairs.

NAGPRA is a proper exercise of Congress' broad authority to legislate in Indian affairs. NAGRPA, therefore, is the law of the land under the Supremacy Clause. *Antoine v. Washington,* 420 U.S. 194, 204 (1975). Further, because Congress has such authority, there are no Tenth Amendment concerns as the Borough argues. *New York*, 505 U.S. at 156 ("If a power is delegated to Congress

in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.").

NAGPRA likewise raises no equal protection concerns. The Supreme Court has recognized that legislation in Indian affairs raises no equal protection dilemmas if it is tied to Congress' unique obligation toward Indians. *Mancari*, 417 U.S. at 551-555; *see Rice v. Cayetano,* 528 U.S. 495, 518-21 (2000); *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827, 850-53 (9th Cir. 2006). This is because there is a political relationship between federally recognized tribes and the United States that gives rise to a political, rather than racial, classification. *Id.* As a result, a rational basis test is generally applied to Indian legislation rather than a strict scrutiny standard for racial classifications. *Id.* NAGPRA specifically applies to federally-recognized tribes, *see* 25 U.S.C. § 3001(7) (2012), and seeks to repatriate remains to descendants and related tribes.[7] Congress explicitly recognized that NAGPRA "reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations[.]" 25 U.S.C. § 3010 (2012). NAGPRA is therefore tied to the fulfillment of Congress' unique

[7] Because all descendants are included under NAGPRA, 25 U.S.C. § 3005 (2012), and NAGPRA is not to be construed to violate individual rights, such as spouses rights, 25 U.S.C. § 3009(4) (2012), there is no equal protection concern here as NAGPRA does not separate out or classify those individuals and treat them differently. *See Nordlinger v. Hahn,* 505 U.S. 1, 10 (1992). Rather, they are all entitled to participate in the repatriation proceeding. *See* 25 U.S.C. § 3005(e).

obligation toward the Indians, and thus satisfies the rational basis test set forth in *Morton*.[8] 417 U.S. at 551-555.

III. THE DISTRICT COURT CORRECTLY HELD THAT NAGPRA APPLIES TO THE BOROUGH AND TO THE REMAINS OF JIM THORPE.

a. THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS INTENDED THE TERM "MUSEUM" TO APPLY BROADLY.

NAGPRA's statutory definition of "museum" by its plain language covers a broad array of entities. *See* 25 U.S.C. § 3001(8). Local governments, such as the Borough, that receive federal funds and have possession of remains are considered museums under NAGPRA. *Id.* The legislative history also supports this conclusion.

Congress carefully considered NAGPRA's definition of "museum" and modified it to be less expansive. Representative Richardson outlined areas of concern and compromise in NAGPRA and noted that one point of compromise was the scope of individuals and entities covered. 136 Cong. Rec. H10,990. After the Antique Tribal Arts Dealers Association raised concerns about the broad

[8] Additionally, "NAGPRA does not protect any class of property not protected within the tenets of American property law. NAGPRA does not create any new or special rights for Native Americans. Rather, the statute applies common law property rights principles consistent with enumerated NAGPRA categories. NAGPRA affords Native Americans equal protection under the law." Hutt, *Control of Cultural Property*, *supra*, at 373. This is the essence of human rights legislation. *Id*. at 366.

definition of museum, pointing out that it could potentially include private individuals that receive grants or social security payments, the definition was narrowed. *Id*. Specifically, the definition of museum was narrowed to include only institutions or state or local government agencies. *Id.; see* 25 U.S.C. § 3001(8). Senator Inouye confirmed that he did not believe that the rights of private antique dealers would be taken away, thus confirming that the application of NAGPRA was not as broad as some had feared. 136 Cong. Rec. S17,174. The District Court correctly held that NAGPRA applies to the Borough – a local government that receives federal funds. *See* Appx. I at 63-75.

b. THE STATUTORY SCHEME AND LEGISLATIVE HISTORY SHOW THAT CONGRESS INTENDED NAGPRA TO APPLY TO CONTEMPORARY BURIALS.

The District Court correctly found that NAGPRA applies to contemporary burials. Appx. I at 21. As the District Court noted, "no one could reasonably contend that civil rights statutes passed in the wake of the Civil War do not apply to modern situations simply because they were aimed at a historical evil." *Id.* Likewise, NAGPRA, while aimed at repatriations, is human rights legislation also aimed at preventing future harms. *See Carrow,* 119 F.3d at 799-800.

The Borough and amicus curiae assert that applying NAGPRA here would lead to an absurd result because Jim Thorpe's third wife properly had the authority to dispose of his remains. Borough Brief at 23, 28-29; Amici Curiae Brief at 13-18.

We are not dealing with the initial burial of Jim Thorpe, but rather the repatriation of him. *See* Thorpe's Brief at 30-33. NAGPRA merely applies similar standards to Native American remains, such as common law re-internment, that have long applied to non-Native remains. Hutt, *Control of Cultural Property*, *supra*, at 373. Ensuring that the law equally applies has long been the heart of human rights legislation and is not absurd.

The Borough and amicus curiae point to *Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F.Supp.2d 644 (W.D. TX) (1999), for support. Borough Brief at 25; Amici Curiae Brief at 15-16. That case dealt with whether NAGPRA would prevent a potential murder investigation. *Chacon*, 46 F.Supp.2d at 645-6. Initially, this matter is quite distinguishable from *Chacon* in that this Court is not addressing whether NAGPRA's excavation provisions can prevent a criminal investigation. *Id.* This case involves the application of NAGPRA's museum provisions to civil, not criminal, matters.

In addressing NAGPRA, the *Chacon* Court ruled that NAGPRA did not apply for two reasons, only one of which was necessary to its holding. First, the Court ruled that the term "human remains" in the statute was intended to mean "ancient human remains or those with some sort of cultural or archaeological interest." *Id.* at 650. To support this determination, the Court looked to the canon

of construction of *noscitur a sociss*[9] rather than looking to the regulatory definition of human remains at 43 C.F.R. § 10.2(d)(1) (2011). In relying on the canon, the Court determined that the placement of the term human remains within the category of "cultural items" suggested that NAGPRA was not meant to apply to a recently buried corpse that is of no cultural[10] or anthropological interest, "but which is sought by state authorities for the purposes of conducting an inquest." *Id.*

The Court then looked to ARPA for additional support because NAGPRA uses ARPA's permit process for its excavation and discovery provisions. *Id*. at 650-51. ARPA protects archaeological resources, which includes human remains that are of archeological interest. *Id*. To obtain a permit under ARPA, one must show that the permit will be used to further archeological knowledge. *Id*. The Court concluded, therefore, that to construe "human remains" to include remains of people that have recently passed on would nullify the ARPA permit requirement as used by NAGPRA. *Id.* That, however, would not be the case. NAGPRA specifically incorporates ARPA's permit requirement, but only to the extent that it is "consistent" with NAGPRA. 25 U.S.C. § 3002(c)(1); House Hearing, *supra*, at

[9] "[A] word is known by the company it keeps." *Chacon*, 46 F.Supp.2d at 650.

[10] Interestingly, it does not look as if the question of whether the remains were of cultural interest to the tribe was addressed in an evidentiary hearing in *Chacon*. *Id.* This seems contrary to NAGPRA, especially since the legislative history establishes that many tribes do have a cultural interest in ensuring that the remains of their members are properly buried. *See* H.R. Rep. No. 101-877, at 13.

145 (statement of Society for American Archeology). NAGPRA specifies that the intentional removal or excavation of cultural items can be for many purposes rather than just the archeological purposes the *Chacon* court referenced. Specifically, the removal or excavation can be for purposes of "discovery, study, or removal" and not merely for purposes specified in ARPA. 25 U.S.C. § 3002(c).

Additionally, ARPA places ownership of excavated items in the federal government thereby doing away with any repatriation. *See* 16 U.S.C. §§ 470bb(1), 470cc(b)(3), 470dd. NAGPRA, on the other hand, places the ownership of items found on federal or Indian lands in tribes and requires repatriation. 25 U.S.C. §§ 3002, 3005. As the legislative history summarized in Part I above shows, ARPA contributed to the problem NAGPRA sought to resolve. The *Chacon* Court's reliance on the ARPA permit requirement to limit NAGPRA's definition of "human remains," therefore, was misplaced. The *Chacon* Court's second reason for finding NAGPRA did not apply in that unique instance is not at issue here as there is no criminal investigation.

Rather than *Chacon*, this Court should follow the sound reasoning of the court in *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 83 F.Supp.2d 1047 (D. S.D. 2000). For example, if NAGPRA only applies to prehistoric remains as the Corps in *Yankton* argued and the Borough argues here, not only would the lineal descendant provision be meaningless, but the criminal provision would also

be stripped. NAGPRA's criminal provision provides that 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" shall be fined or imprisoned accordingly. 18 U.S.C. § 1170(a). If NAGPRA only applied to prehistoric remains rather than all human remains, then a person could potentially dig up Jim Thorpe's remains and any funerary items he was buried with, or for that matter any other native persons, and sell them on the black market without violating NAGPRA's criminal provision. Such a result would defeat an essential objective of NAGPRA – the protection of Native American graves and burial sites.

As outlined in Part I above, NAGPRA was not only meant to repatriate remains, but was also intended to prevent future harms. Testimony at the legislative hearings noted that there is still a market for many objects associated with Native American remains. Accordingly, Congress specifically incorporated criminal provisions into NAGPRA to prevent the future theft and corresponding sale of remains and cultural items on the black market. 136 Cong. Rec. S17,176; *see also* 18 U.S.C. § 1170. Holding that NAGPRA only applies to prehistoric remains would severely limit the criminal provision contrary to Congress' intent.

This Court, rather than *noscitur a sociss*, should apply the well-recognized canons of construction dealing with Indian affairs and civil rights to broadly interpret NAGPRA's scope. *See Ramah Navajo School Bd. v. Bur. of Revenue,* 458

U.S. 832, 846 (1982) ("We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be construed generously . . ."); *Scheidemantle v. Slippery Rock Univ. State System of Higher Ed.*, 470 F.3d 535, 538-39 (3d Cir. 2006) (remedial civil rights and human rights statutes should be interpreted broadly). Finally, there is legislative history that shows that NAGPRA, unlike ARPA, was intended to apply to remains or objects that are less than 100 years old. House Hearing, *supra*, at 141 (statement of the Society for American Archaeology) (noting the only broader protection NAGPRA offers over ARPA was with remains or objects less than 100 years old). Accordingly, the statutory scheme and legislative history shows that NAGPRA applies to contemporary burials.

IV. LACHES WOULD BE INCONSISTENT WITH NAGPRA'S SCHEME AND POLICY.[11]

The equitable defense of laches should not bar NAGPRA claims. Laches should not categorically apply when it is inconsistent with the language of a statute or its remedial purpose. *See United States v. Lawrence* 276 F.3d 193, 196 (5th Cir.2001); *United States v. Tuerk*, 317 Fed.Appx. 251, 253 (3d Cir. 2009); *see also Canadian St. Regis Bank of Mohawk Indians v. New York*, Nos. 82–CV–0783, 82–CV–1114, 89–CV–0829, slip op., 2013 WL 3992830 at *16, n. 24 (N.D.N.Y. July

[11] The Thorpe's Brief sufficiently addresses the merits of the laches argument, Thorpe's Brief at 49-55, and NCAI supports the District Court's determination in that regard. *See* Appx. I at 75-78.

23, 2013) ("To conclude otherwise, as Defendants appear to urge the Court to do, would be to ascribe a broader and disturbingly anti-democratic meaning to the recent line of laches cases—that remedial causes of action specifically preserved by Congress may be vitiated in the courts by the categorical application of an equitable defense."). Applying laches to NAGPRA claims could operate to repeal it by implication without any legislative action, which is not favored. *Hui v. Castenada,* 559 U.S. 799, 810 (2010) ("As we have emphasized, repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest.").

The legislative history shows that a statutory deadline for filing claims was raised as a concern. House Hearing, *supra*, at 249 (statement of Richard W. Edwards, Jr.). Specifically, Mr. Edwards, Jr. raised the issue as a concern on behalf of himself and other artifact collectors. Mr. Edwards, Jr. stated that NAGPRA would give rights to tribes to items in the possession of individuals despite being long barred by statutes of limitations. *Id.* NAGPRA, despite those concerns, did not include a statutory time frame for filing claims. *See also Implementation Of The Native American Graves Protection And Repatriation Act, Hearing Before the S. Comm. on Indian Affairs*, 104th Cong. 185 (1995) ("Implementation Hearing") (statement of Department of Interior) (reiterating that there is no Statute of Limitations for Tribal Claims under NAGPRA).

If NAGPRA claims are barred by the passage of time, the Act would be completely useless to tribes and family members attempting to repatriate remains and cultural objects that have been in the possession of museums for decades, or even over a century, many of which were likely possessed unknown to tribes and families. Additionally, repatriations can be very expensive and take a long time to complete. For example, NAGPRA museum inventories were required to be completed by 1995. 25 U.S.C. § 3003(b)(1). At least one survey has shown, however, that many federal agencies had not completed the required inventory as of May 2008, thereby delaying any repatriation request. Julia A. Cryne, *NAGPRA Revisited: A Twenty-Year Review of Repatriation Efforts*, 34 Am. Indian L. R. 99, 107 (2010). Even after a repatriation request is made, repatriation can take years and be very costly. *See Finding Our Way Home: Achieving the Policy Goals of NAGPRA: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 47-9 (2011) (statement of Mark Macarro, Chairman, Pechanga Band of Luiseno Indians) (describing the over 15 year ongoing process Pechanga engaged in to repatriate La Jolla remains); *id*. at 62-4 (statement of Mervin Wright, Jr., Vice Chairman, Pyramid Lake Paiute Tribe) (describing issues with the current repatriation process); Implementation Hearing, *supra*, at 38-9 (statement of Robert Pergeroy) (stating that a Pawnee repatriation took three years and cost $51,000).

Therefore, laches should not be a defense to repatriation claims filed under NAGPRA as it would be inconsistent with the federal scheme and policy.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's holding that NAGPRA applies to the Borough and the remains of Jim Thorpe.

Respectfully Submitted,

/s/ Matthew Campbell
MATTHEW CAMPBELL
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I certify, pursuant to Rules 28.1(e)(3) and 32(a)(7)(C) of the Fed. R. App. P. and 3d Cir. L.A.R. 31.1(c) that the attached brief of amicus curiae NCAI:

(1) complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 6,824 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 3d Cir. L.A.R. 29.1(b);

(2) complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type style requirements of Fed. R. App. R. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font;

(3) has been scanned for viruses using Microsoft Security Essentials Virus Definition Version 1.161.904.0, and Malwarebytes Anti-Malware Version 2013.10.28.10 and is free from viruses; and

(4) that the text of the electronic brief is identical to the text in the paper copies.

/s/ Matthew Campbell
MATTHEW CAMPBELL
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel for Amicus Curiae

CERTIFICATE OF BAR MEMBERSHIP

I certify, pursuant to 3d. Cir. L.A.R. 28.3(d), that I am a member of the Bar of this court.

/s/ Matthew Campbell

Matthew L. Campbell
CO Bar No. 40808
NM Bar No. 138207
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760
mcampbell@narf.org

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2013, I electronically filed the foregoing "BRIEF OF AMICUS CURIAE THE NATIONAL CONGRESS OF THE AMERICAN INDIANS IN SUPPORT OF PLAINTIFF-APPELLEE JOHN THORPE, ET AL. AND AFFIRMANCE OF THE DECISION BELOW" with the Clerk of Court for the United States Court of Appeals for the Third Circuit via the Court's appellate CM/ECF system. Participants in the case who were registered CM/ECF users were served by the CM/ECF system at that time:

Christopher G. Fusco, cfusco@callahanfusco.com
Vincent R. Garvey, ECF@uslawcenter.com
Daniel E. Gomez, dgomez@cwlaw.com
Charles L. Riddle, Charles@charleslriddle.com
William G. Schwab, ECF@uslawcenter.com
Stephen R. Ward, sward@cwlaw.com
Daniel H. Wheeler, dhwheeler@comcast.net

Further, I hereby certify that on October 28, 2013, I served ten (10) paper copies on the Clerk of Court for the United States Court of Appeals for the Third Circuit via First Class Mail. I also served one paper copy via regular United States mail on each of the following:

William G. Schwab
Vincent R. Garvey
WILLIAM G. SCHWAB & ASSOCIATES
811 Blakeslee Boulevard Drive East
Lehighton, Pennsylvania, 18235

Christopher G. Fusco
CALLAHAN & FUSCO
72 Eagle Rock Avenue, Suite 320
East Hanover, New Jersey 07936

Daniel H. Wheeler
610 Montgomery School Lane
Wynnewood, Pennsylvania 19096

Stephan Ward
Daniel Gomez
4000 One Williams Center
Tulsa, OK 74172-0148

/s/ Matthew Campbell

Matthew L. Campbell
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760
mcampbell@narf.org

Counsel for Amicus Curiae