September 30, 2021

Via email only
The Honorable Bryan Newland
Assistant Secretary, Indian Affairs
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The Honorable Shannon Estenoz
Assistant Secretary for Fish and Wildlife and Parks
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Ms. Melanie O'Brien, Program Manager
National NAGPRA Program, National Park Service
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Re: Comments regarding the Draft NAGPRA Regulations

Dear Assistant Secretary Newland and Assistant Secretary Estenoz,

Thank you for initiating Tribal consultation on the important matter of reevaluating and reforming the regulations implementing the Native American Graves Protection and Repatriation Act (25 U.S.C. Chapter 32) ("NAGPRA"). The Association on American Indian Affairs (the Association) has separately filed comments on the draft regulations, but joins in this filing with the Alliance of Colonial Era Tribes (ACET)[1] to focus on the proper interpretation of the federal government's responsibility to state recognized Tribes. By incorporation, ACET concurs with the separate comments submitted by the Association. Together, the Association and ACET urge the Department to issue regulations that are in line with the Act, whose plain language, properly read, includes state recognized Tribes. Present NAGPRA procedures and consultation wrongfully exclude and ignore state recognized Tribes.

State recognized Tribes fall within the statutory definition of "Indian Tribe." NAGPRA's definition of "Indian Tribe" includes those entities "recognized as *eligible* for the special programs and services provided by the United States to Indians because of their status as

[1] The Alliance of Colonial Era Tribes (ACET) is an intertribal league of sovereign American Indian Nations, both federal and state recognized, of the eastern and southern seaboard of the continental United States, who can each trace their history from the colonial era.

Indians." 25 U.S.C. § 3001(7) (emphasis added). The current draft regulations add limiting language to the Act's definition: "as evidenced by its inclusion on the list of recognized Indian Tribes published by the Secretary under 25 U.S.C. § 5131." However, there are state recognized Tribes eligible for certain programs and services provided by the United States to Indians, that are not included on this list. The regulations cannot shrink the rights unambiguously expressed in the Act. "If the intent of Congress is clear, that is the end of the matter … the agency must give effect to the unambiguously expressed intent of Congress."[2]

State recognized Tribes are expressly *eligible* for some, if not all, special programs and services provided by the United States to Indians, even if they are not currently receiving those services. These federal programs and services available to state Tribes include, but are not limited to:

- NAHASDA (Native American Housing and Self Determination Act);
- LIHEAP (Low Income Heat & Energy Assistance Program);
- WOIA (Workforce Opportunity and Investment Act);
- COVID Relief - Consolidated Appropriations Act, Dec. 2020, rental programs – specifically related to NAHASDA participation;
- Small Business Act (minority contracting) – extending preference in federal contracting to state Tribes. The Small Business Administration has created Hubzones for contracting preference, further recognizing status of state recognized Tribes based on federal census data;
- Indian Arts and Crafts Act
- Federal Boarding School Program, which included children from Tribes that did not then have federal recognition (as some still do not). Those children, by reason of their identity as members of Indian Tribes were subject to the brutal educational programs authorized by the federal government. Those who died or were buried at such schools there should be returned to their people, regardless of current status.

Because these programs are made available to state recognized Tribes specifically because of their status as Indians, without regard to federal recognition, all state recognized Tribes fall within NAGPRA's definition of "Indian Tribe."

The draft regulations should be revised to clarify inclusion of state recognized Tribes for full remedial processes under NAGPRA. NAGPRA is a sweeping implementation of the federal trust responsibility to Indian Tribes – providing not just rights but remedies to protect the burials of their Ancestors, and to their communities, Ancestors, their burial belongings, sacred objects and objects of cultural patrimony. Nearly all of the Ancestors in question were born, lived, and passed on before the concept of federal acknowledgment existed. Cultural items, too, were created and taken before the current system of federal acknowledgment. The statute aims to restore the break in relationship between Ancestors and cultural items unjustifiably taken from

[2] *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984).

their resting places and their descendants. NAGPRA, properly implemented, aims to reconnect generations of Indigenous communities, starting from Ancestral relations and reaching generations of descendants who have come into existence in a changed world.

NAGPRA's enactment acknowledges and carries out the "Special relationship between Federal Government and Indian tribes and Native Hawaiian organizations." 25 U.S.C. § 3010 (section title). Its remedial purpose is thwarted when the Department does not implement the broad and inclusive definition of "Indian Tribe" by excluding state recognized Tribes. The Act commits to restore Ancestors to their proper place, among their descendants, and necessarily includes all Indigenous Ancestors, burial items, and cultural patrimony reasonably associated with any Tribe, people, or culture Indigenous to the United States.

NAGPRA acknowledges the federal fiduciary obligation to remedy previous neglect and affirmative mistreatment of the burials of Indigenous Ancestors and the dispossession of culture. The duty to repatriate is an express delegation of the federal trust obligation to remedy the accumulated harms represented by thousands of Ancestors, waiting for many decades to go home. In this context, federal recognition status loses meaning, and time periods transform. Communities have been disrupted for centuries, and the healing must begin as soon as possible. The federal trust responsibility transcends the artificial regulatory distinction that would divide a Native American burial from Native American descendants. Disregarding the definition that includes state recognized Tribes in NAGPRA is not only contrary to law, it is an improper evasion of a solemn trust.

The federal trust relationship is distinct from acknowledgment status. Just as federal acknowledgment does not create a Tribe, neither does it create a federal relationship, but rather confirms that one has always been in existence, albeit not "recognized" by the federal government. The federal trust responsibility to Indian Tribes cannot lightly be avoided, and the federal government cannot rely on its own current ignorance of a Tribe to disclaim that responsibility. In *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, the United States Court of Appeals for the First Circuit held that the United States has, at least, an inchoate trust responsibility to unrecognized Tribes. 528 F. 2d 370, 373 (1st Cir. 1975). The remedy at stake here should not wait for federal acknowledgment of the present descendants.[3] Nor does NAGPRA require that delay.

Tribes may wait for decades for a determination of their federal status. The Ancestor should not be trapped in that process, which has no bearing on an identity that predates federal acknowledgment. If any Tribe can demonstrate close cultural affiliation to an Ancestor or to a cultural item covered by the Act, then the right of repatriation is unquestionable – as measured against a museum or agency that has no right of possession. NAGPRA creates an absolute remedy of repatriation, and imposes that obligation on any and all museums having no right of possession. Ancestors belong with their descendants; further delays compound the harm.

When state recognized Tribes have improperly been denied direct access to NAGPRA,

[3] The District Court had required federal action to preserve the Tribe's rights. *See Passamaquoddy,* 528 F.2d at 373.

Ancestors languish on shelves for additional generations. A state Tribe without access to federally recognized partners in a consortium is denied opportunity to demonstrate incontestable cultural affiliation. For example, the Secretary issued a Final Determination for the Shinnecock Nation in 2010, after a 32-year process. Before federal acknowledgment, the Nation, continuously recognized by New York for centuries, actively sought to repatriate remains and cultural items from various covered museums, but because current regulations fail to clarify that state recognized Tribes are Tribes "eligible for federal programs and services," Shinnecock was ignored until after the Nation's federal status was determined. Since then, the Nation has welcomed home several hundred Ancestors, with more repatriation pending. The first rounds of repatriation returned hundreds of Ancestors who had been pillaged from known traditional burial grounds during golf course construction, including Shinnecock Hills Golf Course (on historic tribal lands barely a mile from the Shinnecock reservation). Most of the remains not thrown away were removed to the American Museum of Natural History in New York City, and to the Southhold Indian Museum, a private facility across the Peconic Bay from Shinnecock. For all those years, the Shinnecock people lived with the pain of the desecrated burials and the continuing – nearby – separation from their relatives. The Nation's cultural affiliation was never in doubt, the identity of the Ancestors was never in doubt, nor was there any valid right of possession in any other than the rightful descendants. Federal recognition had no bearing on the express definition of "Indian Tribe" under the statute, or underlying moral principles.

The federal trustee's delay in resolving Tribal acknowledgment should not obstruct the moral imperative to end the harm caused by historical grave robbing. In 2011, the United States announced its support for the Declaration on the Rights of Indigenous Peoples ("UNDRIP"):

> Most importantly, [UNDRIP] expresses aspirations of the United States, aspirations that this country seeks to achieve within the structure of the U.S. Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies.[4]

It would be inconsistent with UNDRIP to deny state Tribes the repatriation and disposition rights that UNDRIP Article 12 holds applicable to all Indigenous Peoples, regardless of governmental status:

> 1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; *and the right to the repatriation of their human remains*.
>
> 2. *States shall seek to enable the access and/or repatriation of ceremonial objects and human remains* in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

(Emphasis added.)

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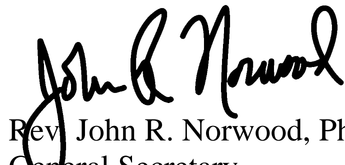
[4] *Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. Dept. of State (Jan. 12. 2011), available at https://2009-2017.state.gov/s/srgia/154553.htm

The United States gains nothing by denying state recognized Tribes the ability to retrieve their relatives and cultural items from exile. Permitting institutions to continue such wrongful holding perpetuates centuries of erasure and abuse. The regulations should be revised to clarify that museums and federal agencies holding materials related to Native American burials, sacred objects, and objects of cultural patrimony have full repatriation, disposition, and consultation obligations to any Indian Tribe or NHO, including state recognized Tribes "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Their inclusion need not alter the Department's other duties pursuant to 25 U.S.C. § 5130, to maintain a separate list of federally acknowledged Tribes. The regulation can expressly limit its application to preclude any inference that the Secretary has conferred broader federal acknowledgment

We ask, therefore, that the Department's implementing regulations delete limiting language currently in the draft regulations and expressly include state recognized Tribes within the definition of "Indian Tribe" for the purpose of 25 U.S.C. § 3001(7). We look forward to discussing this with you in the continuing consultation process.

Sincerely,



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