



USET

SOVEREIGNTY PROTECTION FUND

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*Transmitted Electronically
To nagpra_info@nps.gov*

September 30, 2021

Shannon Estenoz
Principal Deputy Assistant Secretary for Fish and Wildlife and Parks
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

Dear Principal Deputy Assistant Secretary Estenoz,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Dear Tribal Leader Letter (DTLL) sent on July 8, 2021 on proposed revisions to regulations of the Native American Graves Protection and Repatriation Act (NAGPRA). USET SPF attended the Tribal consultations held by the Department of the Interior (DOI) on August 9, 13, and 16, 2021. We appreciate that DOI was responsive to the concerns of Tribal Leaders and THPOs by extending the comment deadline to September 30, 2021 to provide additional time to review these proposed revisions. While we defer to our member Tribal Nations and historic preservation partners with greater NAGPRA expertise for granular level comments on the proposed revisions to NAGPRA—due to their highly technical nature—our comments will focus on issues regarding consultation, comprehensive agreements, and the confirmation of existing collections.

USET SPF is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.¹ USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

¹ USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe—Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Because there is Strength in Unity

Proposed Revisions to NAGPRA Require Further Tribal Consultation

NAGPRA was enacted by Congress in November 1990 to establish a process for Tribal Nations to protect and bring home our ancestors, our funerary items, and items of cultural and sacred importance stolen from our people or otherwise illegitimately obtained. Through consultation and collaboration, NAGPRA mandates federal agencies and federally funded museums that are holding the remains of our ancestors and sacred items to expeditiously return them to Tribal Nations or our lineal descendants. However, the current process is broken due to inefficient compliance and enforcement mechanisms that undermine our abilities to bring our ancestors and sacred items home to their rightful places.

USET SPF understands that the DOI NAGPRA Tribal consultations held this year are based on proposed revisions to the regulations drafted under the previous Administration, and these proposed revisions are based on DOI consultations held over a decade ago. While we appreciate DOI revisiting these proposed revisions, it has become evident that further Tribal consultation is required. There must be a renewed focus on proposed NAGPRA revisions due to new developments in the decade since the previous Tribal consultations. In addition, the rationale for some of these proposed changes has not been adequately explained by DOI. Prior to the initiation of a formal rulemaking process, there must be serious consideration and input provided by Tribal Nations and their technical experts on these issues.

An item especially deserving of further deliberation is whether the Program should be relocated to the Office of the Assistant Secretary – Indian Affairs (AS-IA). The full implications of this proposed change—including AS-IA’s capacity to take on this function—must be contemplated and explained in active discussion with Tribal Nations in order for us to offer guidance on this question. We urge additional consultation on this and other proposed revisions prior to the issuance of a proposed rule.

In addition to requesting further consultation, the following sections of these comments are on several initial areas of the proposed regulations that we believe to be important to empowering Tribal Nation decision-making for the return of our ancestors and sacred items:

Comprehensive Agreements Must First be Signed by Tribal Nations

Under Subpart B, Sec. 10.4 there are proposed changes regarding “Comprehensive Agreements” (Agreements). These Agreements require consultation with Tribal Nations to develop land managing activities that are likely to result in the “discovery” or excavation of cultural items. Proposed revisions to this section state that these Agreements must first be signed by an official of a federal agency before being provided to “all consulting parties”, which includes Tribal governments. In recognition of Tribal sovereignty, Tribal Nations must have the authority to review any binding agreement prior to it being officially signed and issued by a federal agency and its officials. Any form of Agreement should be negotiated in good faith by federal agencies and agreed upon by the leadership of affected Tribal Nations. Additionally, every federal agency should develop Agreements in consultation with Tribal Nations regarding lands managed by their respective agency to comply with Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”. The development of these Agreements would provide Tribal Nations with a transparent agency land management plan and would further support us in protecting our ancestors and sacred items.

Notices in the Federal Register Regarding Repatriation Must be Timely

Under Sec. 10.7 of the proposed NAGPRA revisions, DOI states that when a cultural item is removed from federal or Tribal lands, the agency official must determine, as soon as possible, the lineal descendant or Tribal Nation that has priority for the return (“disposition”) of the item. Sec. 10.7(a) states that, “consultation on cultural items may be required to determine the disposition of a cultural item and may continue until the

appropriate official sends a disposition statement for the cultural items...” (emphasis added) We do not agree with this terminology and urge that consultation *is* required to determine the “disposition” of cultural items, since Tribal Nations are the final authority on our cultural heritage. This section also proposes changing the publication of intended “disposition” from local newspapers to the Federal Register. Although the Federal Register is easier to access, subscribe to, and can send alerts to an email account, there is a lag time between the submission of a Notice and the actual publication of a Notice. If DOI is going to change the method of “disposition” publications from newspapers to the Federal Register, then the time between an agency submission to publication should be no longer than 30 days. Additionally, under Sec. 10.7(d)(2), an agency official must submit a notice within 30 days of intended “disposition” to the Manager of the National NAGPRA Program for publication in the Federal Register. To encourage expediency, USET SPF recommends that Sec. 10.7(d)(2)(ii) be revised to require that the Manager of the National NAGPRA Program publish notices of intended “disposition” within 14 days of receipt from an agency official. We also recommend this change to section 10.7(e)(3)(ii) regarding notices of proposed transfer or reinterment of cultural items. Federal agencies must provide timely notification to Tribal Nations regarding the “discovery” or excavation of any sacred item. This is vital to protecting our cultural heritage and ensuring the proper care for our sacred items.

Federal Agencies and Museums Must Publish Itemized Lists and Summaries of Holdings or Collections Containing Our Ancestors and Sacred Items

Under Subpart C, Sec. 10.8, DOI proposes a new regulatory requirement that no later than 395 days of the publication of a Final Rule on new NAGPRA regulations all museums must submit a “statement” describing any federal agency holdings or collections in its custody to the relevant federal agency and the National Park Service. While USET SPF is not opposed to this proposal, we recommend that “statements” should be thorough, in-depth, and transmitted directly to Tribal Nations in addition to federal agencies. Sec. 10.9 provides a proper framework for how federal agencies and museums should publish summaries or itemized lists of holdings or collections containing our ancestors and sacred items. Specifically, Sec. 10.9 states that:

“A summary must include: (i) the estimated number and a general description of the unassociated funerary objects, sacred objects, and objects of cultural patrimony in a holding or collection; (ii) the county and state where the unassociated funerary objects, sacred objects, and objects of cultural patrimony originated; (iii) the acquisition history (provenance) of the unassociated funerary objects, sacred objects, and objects of cultural patrimony; (iv) other information relevant for identifying: (A) lineal descendants, culturally affiliated Indian Tribes or Native Hawaiian organizations, or geographically affiliated Indian Tribes or Native Hawaiian organizations; (B) any object or item as an unassociated funerary object, sacred object, or object of cultural patrimony; and (v) the presence of any potentially hazardous substances used to treat any of the unassociated funerary objects, sacred objects, or objects of cultural patrimony, if known.”

We also request that museums and federal agencies also be required to submit summaries and itemized lists of human remains and associated funerary objects in their possession that are under control of other institutions, such as state and local agencies and other institutions that receive federal assistance.

Conclusion

An essential aspect of the federal trust obligation to Tribal Nations is the duty to protect, preserve, and restore our cultural heritage. Native peoples have endured many injustices as a result of federal policy, including federal actions that sought to terminate Tribal Nations, assimilate Native people, and to erode our territories and cultures. The theft of our ancestors, their funerary items, and sacred cultural items is a primary example of the ongoing injustice we face. The federal government has an opportunity to right some of these historic wrongs by developing NAGPRA regulations that empower Tribal Nations to bring our ancestors and sacred items home—where they belong. We appreciate that DOI is examining ways to

strengthen these regulations and we look forward to working with you to ensure that any proposed NAGPRA revisions fully empower Tribal Nations to protect and care for our ancestors and sacred items. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 615-838-5906.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Francis', with a long horizontal stroke extending to the right.

Kirk Francis
President

A handwritten signature in black ink, appearing to read 'K. A. Carroll', with a stylized, cursive script.

Kitcki A. Carroll
Executive Director