



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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IN REPLY REFER TO
Memorandum

To: Sherry Hutt, Manager
National NAGPRA Program, NPS

From: Edith R. Blackwell, Associate Solicitor
Division of Indian Affairs
Office of the Solicitor

Barry N. Roth, Associate Solicitor
Division of Parks and Wildlife
Office of the Solicitor

Subject: List of Indian tribes for the purposes of carrying out the Native American Grave Protection and Repatriation Act (NAGPRA)

Under 43 C.F.R. § 43.10(b)(2), “[t]he Secretary will distribute a list of Indian tribes for the purposes of carrying out [NAGPRA] through the [National NAGPRA Program].” You have asked for our guidance on the contents of that list in light of the recent recommendation of the Government Accountability Office (GAO). We understand that you intend to broadly distribute this guidance, including posting on the National NAGPRA website.

In its recent report, *Native American Graves Protection And Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act* (GAO-10-768), the GAO noted that, “[i]n accordance with the regulations, National NAGPRA developed a list of Indian tribes for the purposes of carrying out NAGPRA that includes federally recognized tribes and, at various point [sic] in the last 20 years, ANCSA corporations.” *Id.*, at 41.¹ Based on its investigation, GAO then concluded that,

NAGPRA’s enactment and National NAGPRA’s original development of the list of Indian tribes for the purpose of carrying out NAGPRA coincided with an ongoing debate within Interior about the status of ANCSA corporations. However, Interior’s Solicitor has since clarified the status of the ANCSA corporations, and they are no longer on BIA’s list of federally recognized tribes. Accordingly, the rationale for National NAGPRA continuing to include them as Indian tribes for the purpose of carrying out NAGPRA is unclear.

Id., at 54. GAO’s recommendation based on this finding was that

¹ The list was originally developed by the Office of the Departmental Consulting Archeologist in the National Park Service, which had responsibility for the NAGPRA regulations at that time. That responsibility has since been moved to the National NAGPRA Program, a separate office in the National Park Service.

To clarify which entities are eligible under NAGPRA, we recommend that National NAGPRA, in conjunction with Interior's Office of the Solicitor, reassess whether ANCSA corporations should be considered as eligible entities for the purposes of carrying out NAGPRA given the Solicitor's opinion and BIA policy concerning the status of ANCSA corporations.

Id., at 55.²

As explained below, we conclude that the concerns raised by GAO are valid and need to be further addressed by the National NAGPRA Program Office as soon as feasible.

NAGPRA defines "Indian tribe" as

any tribe, band, nation, or other organized group or community of Indians, *including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act)* [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

25 U.S.C. § 3001(7) (emphasis added). This definition was inserted into NAGPRA on the Senate floor to replace a definition in a previous version that simply referred to the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450b; ISDEAA). The only difference between the two definitions is that the one in the ISDEAA includes Alaska Native corporations ("... including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act . . ."), whereas the one Congress passed in NAGPRA does not. The reason for the change, according to a statement of Representative Bill Richardson (who introduced the Senate amendment in the House of Representatives) was to "delete[] land owned by any Alaska Native Corporation from being considered as 'tribal land.'" 136 Cong. Rec. 36,815 (1990).³

The key language in the NAGPRA definition of "Indian tribe" for determining which groups should be on the list of Indian tribes for the purposes of carrying out NAGPRA is that the group must be "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." In 1994, Congress required that the Secretary give public notice of the federally recognized Indian tribes by publishing a list of "all Indian tribes which the Secretary recognizes to be eligible for the special programs and services

² In addition to the list of tribes for purposes of NAGPRA, the website also includes a list of Native Hawaiian organizations compiled from published notices. GAO did not address that list in its report. We agree with the National NAGPRA Program that such a list is useful and that published notices is a reasonable source.

³ This is also consistent with the treatment in ANCSA of cultural resources. Section 14(h)(1) of ANCSA (43 U.S.C. 1613(h)(1)) authorizes the Secretary to withdraw 2 million of the 40 million acres provided for the settlement for, among other things, conveyance to regional corporations "fee title to existing cemetery sites and historic places." Since Congress has made express provision for cemetery sites and historic places going to regional corporations, it would seem that there is no justification for implying a broader application of NAGPRA to include all corporations as tribes.

provided by the United States to Indians because of their status as Indians.” 25 U.S.C. § 479a—1 (the “List Act”). The Bureau of Indian Affairs publishes that list annually in the Federal Register. Because Congress used exactly the same language in both statutes, the BIA’s annual list of federally recognized tribes is the list of Indian tribes for the purposes of carrying out NAGPRA.

The first BIA list of federally recognized tribes after passage of the List Act contained an extensive discussion of the status of Alaska Native Villages and the regional and village corporations. 60 Fed. Reg. 9250 (1995). That analysis relied on a comprehensive Opinion of the Solicitor concerning governmental jurisdiction of Alaska Native Villages over land and nonmembers. Sol. Op. M-36975 (January 11, 1993) (available at <http://www.doi.gov/solicitor/opinions/M-36975.pdf>). That Opinion concludes that “[w]e have rejected the notion that there are no tribes in Alaska. Which Native villages are tribes is a fact-specific determination beyond the scope of this Opinion.” *Id.*, at 132. That fact-specific determination was made by the BIA in the 1995 list under the List Act, and has been updated every year since, including a large group of Alaska Native Villages on the list, and no regional or village corporations. Thus, the contents of the BIA list are consistent with the plain language of the NAGPRA definition of “Indian tribe”, and no entities need be added or subtracted from that list for NAGPRA purposes. As noted above, however, the basis for our conclusion that Alaska regional and village corporations are not “Indian tribes” for purposes of NAGPRA is the explicit exclusion of the corporations from the statutory definition. Thus, even if the BIA list did include such corporations, the National NAGPRA Program would need to delete them from its list of Indian tribes for purposes of NAGPRA.

Although not addressed in the GAO report, we recognize that the definition of “Indian tribe” in the Secretary’s NAGPRA regulations is contrary to the statutory definition. Both the proposed and final regulations use the ISDEAA definition (including Alaska regional and village corporations), rather than that enacted by Congress in NAGPRA. As stated in the final regulations,

Indian tribe means any tribe, band, nation, or other organized Indian group or community of Indians, including any Alaska Native village *or corporation* as defined in or established by the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

43 C.F.R. § 43.10(b)(2) (emphasis added).⁴ The discussion in the preamble to the final regulations does not state why this definition differs from that in NAGPRA; in fact, that discussion only confuses the issue further:

⁴ The proposed regulations also included in the text of the definition an extensive discussion of the BIA acknowledgement process, and implied that nonfederally recognized Indian groups could still “qualify” as an Indian tribe for purposes of NAGPRA. That definition prompted several comments, including recommendations to expand the list to include non-recognized groups or groups that could be recognized (but have chosen not to be) and to “interpret the statutory definition to apply to Indian tribes that are recognized as eligible for benefits for the special programs and services provided by ‘any’ agency of the United States to Indians because of their status as Indians.”

As was explained in the preamble of the proposed regulations, the definition of Indian tribe used in the Act was drawn explicitly from an earlier version of the bill (H.R. 5237, 101th Congress, 2nd Sess. sec. 2 (7), (July 10, 1990)) using a specific statutory reference. The final language of the Act is verbatim from the American Indian Self Determination and Education Act (25 U.S.C. 450b).

* * *

One commenter recommended deleting the reference to Alaska Native corporations in the definition of Indian tribe. The American Indian Self Determination and Education Act, the source for the definition of Indian tribe in the Act, explicitly applies to Alaska Native corporations and, as such, supports their inclusion under the Act. Alaska Native corporations are generally considered to have standing under these regulations if they are recognized as eligible for a self-determination contract under 25 U.S.C. 450b.

60 Fed. Reg. 62136 (1995). According to the preamble, the drafters of the regulations used the ISDEAA definition, apparently assuming that Congress had merely substituted the language of the ISDEAA definition for the statutory cross-reference without any change in the language. As shown above, however, Congress did not merely import the ISDEAA language, but changed it specifically to “delete[] land owned by any Alaska Native Corporation from being considered as ‘tribal land.’” Thus, contrary to the preamble, the inclusion of regional and village corporations in the ISDEAA definition does not support inclusion of the corporations in the NAGPRA regulations; such inclusion in the regulations is contrary to the plain language of NAGPRA and the clear intent of the changes made by Congress in the statutory definition. “We have here an instance where the Congress, presumably after due consideration, has indicated by plain language a preference to pursue its stated goals In such case, neither [a] court nor the agency is free to ignore the plain meaning of the statute and to substitute its policy judgment for that of Congress.” *Alabama Power Co. v. United States EPA*, 40 F.3d 450, 456 (D.C. Cir. 1994). *See also, United Keetoowah Band of Cherokee Indians of Okla. v. United States HUD*, 567 F.3d 1235, 1243 (10th Cir. Okla. 2009) (same); *Chevron U. S. A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress”).

We understand that the recommendation and analysis on this issue in the GAO report has engendered significant uncertainty on the part of museums and federal agencies concerning the basis under the law of Alaska regional and village corporations to assert claims for human remains and other cultural items and whether the NAGPRA requirements for consultation with Indian tribes apply to Alaska regional and village corporations. You and your staff have also

60 Fed. Reg. 62136 (1995). The Review Committee concurred with this recommendation. *Id.* The Secretary, however, did not agree to the proposed expansion of the list, and, for clarity, deleted all of the discussion of the BIA acknowledgement process and any express language or implication that nonfederally recognized Indian groups (with the exception of the Alaska regional and village corporations) could qualify as an Indian tribe for purposes of NAGPRA. *Id.* This clarification was also the reason for the Secretary promising a list of tribes for purposes of NAGPRA.

expressed similar uncertainty concerning whether Alaska regional and village corporations are authorized under the law to bring matters to the NAGPRA Review Committee or can be recipients of grant money. Nevertheless, we cannot recommend that the National NAGPRA Program ignore the regulatory definition while it remains in place. *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1329 (9th Cir. 1982) (amendment of a rule requires notice to affected parties via rulemaking). We therefore strongly recommend that the regulatory definition of “Indian tribe” be changed as soon as feasible to conform to the statutory definition (i.e., not include Alaska regional and village corporations).

The change to the regulations and the list required by the statutory definition would mean that the Alaska regional and village corporations could not be the primary entities for purposes of consultation, claims, repatriation, disposition, or grants under NAGPRA. This does not, however, mean that they would be completely excluded from those processes. Indian tribes often employ consultants or agents to assist them in the NAGPRA process, and a regional or village corporation could certainly act in that capacity as well. Further, non-federally recognized Indian groups (such as a regional or village corporation) can participate in joint claims with Indian tribes.

In conclusion, NAGPRA clearly does not include Alaska regional and village corporations within its definition of Indian tribes. Furthermore, the legislative history confirms that this was an intentional omission on the part of Congress. Therefore, the National NAGPRA Program’s list of Indian tribes for purposes of NAGPRA must not include the Alaska regional and village corporations. The Program is, however, currently bound by its regulations that differ from the statutory definition on this point. As noted above, we therefore suggest that the regulations be changed as soon as feasible to address this issue, followed by a corresponding change in the list.