



November 18, 2005

Dr. Nancy Kenmotsu
Cultural Resources Director
Texas Department of Transportation
125 E. 11th Street
Austin, TX 78701-2483

RE: Gulf Coast Indian Confederation NAGPRA Request for human remains and cultural items at archaeological site 41NU2, the "Callo del Oso" site.

Dear Dr. Kenmotsu:

The Gulf Coast Indian Confederation has received your letter, dated October 17, 2005 in which you informed us of TxDOT's official position regarding the NAGPRA request we made in July of this year. I am responding to your letter on behalf of and as a member of the Confederation, and ask that your response be addressed to FLMA at the Austin address shown in the header above, as well as to Mr. Running Turtle Salazar and Ms. Smiling Water Harraghy at their Corpus Christi address.

Our position has not changed. We still hope that we can bring this matter to a mutually agreeable solution administratively. However if need be, as part of our initial efforts at seeking NAGPRA enforcement we will be filing a claim with the Secretary of the Interior charging that TxDOT has and continues to violate NAGPRA, and will continue to keep our legal options open down the road.

TxDOT's rationale for denying our NAGPRA claims is flawed. Among other things, it is fundamentally flawed in terms of its understanding of what NAGPRA is and does. Quite frankly, TxDOT's response and handling of this situation has been insulting to our intelligence. We say this not to be rude, but as heavy hearted Indian people who find your bureaucratic and administrative attempts to "make this go away" to be paternalistic and to be violating our basic religious freedoms and obligations.

Please allow us to address several aspects of your letter in turn:

Question 1: "NAGPRA doesn't apply to the Gulf Coast Indian Confederation because they are not a federally recognized tribe."

Answer: Federal recognition is not a prerequisite under NAGPRA to seeking the law's enforcement or to requesting repatriation. Repatriation requests, for instance, may be made by "any tribe, band, nation, or other organized group or community of Indians."¹ We have emphasized this point repeatedly in our previous correspondence.

Question 2: "NAGPRA doesn't apply here because the inadvertent discovery of human remains did not occur on federal or tribal land."

¹ 25 U.S.C. § 3001(7), 3005

Answer: As your Oct. 17 letter concedes, TxDOT and the State of Texas Attorney General already agree that NAGPRA's museum provisions apply.² NAGPRA requires the "expeditious return"³ of human remains and other items upon request, and mandates that the return "shall be in consultation with the requesting lineal descendant or tribe." Since the beginning of TxDOT's archaeological work on 41NU2 over nine years ago, TxDOT has consistently refused to comply with the "expeditious return" requirement and it has not consulted with Indian tribes in accordance with NAGPRA.⁴ In fact, under the flawed assumption that only federally recognized tribes can consult, you have been rebuffing Mr. Running Turtle Salazar's repeated attempts at good faith consultation and partnership for over seven years. This discourtesy is deeply disrespectful and we can only surmise that it is based upon long-held prejudices about American Indians in South Texas on the part of Texas archaeologists that you appear to share.

Question 3: "The Gulf Coast Indian Confederation is not culturally affiliated."

Answer: At this stage the question of cultural affiliation is not at issue. NAGPRA, among other things, is a law of *disclosure*. TxDOT is obligated to disclose whether or not it has Native American remains (and other items covered under NAGPRA) in its possession *in the first place*, and to *then* begin the process of establishing affiliation among the claimants that come forward. TxDOT *cannot* claim that groups such as the Gulf Coast Indian Confederation cannot establish cultural affiliation if it *has not first complied with the disclosure requirements of NAGPRA* in the first place. This reverses the procedure specified in 43 CFR 10.

Moreover, we find TxDOT's misreading of this process to be profoundly illogical, even befuddling. TxDOT refuses to disclose the nature of the remains and artifacts in its possession in keeping with the law, and then unilaterally declares it isn't required to do so because the Confederation cannot establish affiliation. How is the Confederation (or anyone else) supposed to establish affiliation if TxDOT refuses to first disclose exactly what it has in its possession? Your thinking on this issue is simply backwards.

Question 4: "The Gulf Coast Indian Confederation is just a group of Indians. Their organization is just a non-profit organization. They have no standing to put forward a claim."

Answer: This is a misreading of NAGPRA and inverts the legal burdens incumbent upon the entities mentioned in the law. According to Section 15 of the law and 43 CFR 10, a federal district court action to enforce NAGPRA's provisions may be brought by "*any person* alleging a violation of any of the Act's provisions." It should be stressed that the burden of compliance at this stage is squarely *upon TxDOT itself* not upon the Gulf Coast Indian Confederation, Indian Tribes, or members of the public.

Question 5: "TxDOT will comply with the museum provisions of NAGPRA once the project is over, because the possibility of future inadvertent discovery of human remains is still there."

Answer: NAGPRA *does not* allow agencies or museums to deliberately drag out projects indefinitely to avoid compliance with the law. 43 CFR 10 and the NAGPRA Review Committee have established a timetable for this process, which TxDOT is obligated to follow.⁵ TxDOT must declare ALL of the human remains, associated funerary objects, and objects of cultural patrimony it has dug up at 41NU2 since its

² 25 U.S.C. § 3001(8)

³ 25 U.S.C. § 3005(a)(1) requiring expeditious return upon the establishment of cultural affiliation.

⁴ The NHPA and NAGPRA are separate laws, and Section 106 consultation does not fulfill NAGPRA obligations.

⁵ Federal Register Vol. 69, No. 202, 10/20/04, 61615

work there began over nine years ago. It is at that point that potential affiliates (federally recognized or not) will come forward.⁶

Question 6: "TxDOT has been consulting with Indian Tribes as a normal part of its Section 106 obligations. This also fulfills NAGPRA requirements."

Answer: The mention of Section 106 in your letter is irrelevant to the issue at hand. TxDOT long ago foreclosed upon the Confederation's ability to meaningfully participate in this project under Section 106, and obviously did not wish significant Indian participation. Moreover, we have established that TxDOT did not *truly* consult with the Tonkawa Tribe of Oklahoma, among other federally recognized tribes, regarding this project, despite the fact that this tribe is obviously culturally affiliated.⁷ We had hoped that as an archaeological professional that you would have long ago learned to never conflate the requirements of Section 106 with the requirements of NAGPRA. NAGPRA is first and foremost human rights and civil rights legislation⁸ and was not crafted as a piece of historic preservation law in the usual sense.

In spite of everything, we still harbor hope that room exists for the establishment of good faith collaboration between the GCIC and TxDOT, as well as with the tribes copied on this letter. It is important for you to bear in mind that the proper religious and spiritual treatment of these human remains and cultural artifacts is our primary concern, not necessarily the mechanics of who "will" or "won't" eventually receive them. We amicably extend our hand to you, and ask that you do the same, for the sake of the ancestors crying out for protection and blessing. However given the historically unprecedented looting of this archaeological site over the past 105 years, you surely understand the enormous sensitivity of this issue for American Indians in Corpus Christi and Native Americans in general.

Best Regards,



Fred L. McGhee, Ph.D.
President and Principal Investigator
Fred L. McGhee & Associates

cc: Mr. Anthony E. Street, President, Tonkawa Tribe of Indians of Oklahoma
Ms. LaRue Martin Parker, Chairperson, Caddo Nation
Sherry Hutt, National NAGPRA Program Manager
Ms. Katherine Minter Cary, Office of the Attorney General
Mr. Walter Echohawk, Native American Rights Fund

⁶ We would like to remind you, once again, that TxDOT's cultural affiliation decisions (such as, for instance, any attempt by TxDOT to claim that the 41NU2 remains are culturally unaffiliated, which TARL has done) can be appealed to the NAGPRA Review Committee and can also be brought before a federal district court.

⁷ TxDOT admitted as much when it conducted its Refugio repatriation.

⁸ 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, 59 (1992).