



Texas Department of Transportation

DEWITT C. GREER STATE HIGHWAY BLDG • 125 E. 11TH STREET • AUSTIN, TEXAS 78701-2462 • (512) 463-8585

October 17, 2005

Vicki Smiling Water Harraghy
Larry Running Turtle Salazar
Gulf Coast Indian Confederation
2705A Laguna Shores Road
Corpus Christi, TX 78418

re: Request for NAGPRA Consultation, Spur 3, CSJ 3596-01-001

Dear Ms. Harraghy and Mr. Salazar:

In response to an inquiry from Dr. Fred McGhee, we are responding to your Gulf Coast Indian Confederation (Confederation) request to become a consulting party under Native American Graves Protection and Repatriation Act (NAGPRA).

The Texas Department of Transportation (the department) believes that the Confederation does not have a right to consultation under the NAGPRA. The Act requires institutions that meet the definition of a museum to determine, to the extent possible, the cultural affiliation of burials, funerary objects, sacred objects, and objects of cultural patrimony and to consult with culturally affiliated tribes or lineal descendants. Cultural affiliation under that act is defined as "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian *tribe* or Native Hawaiian organization and an identifiable earlier group" (25 USC 3001 §2(3), emphasis added). Indian tribe, under the Act, "means any *tribe*, band, nation, or other organized group or community of Indians...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 USC 3001 §2(7)). The Confederation is not listed among the list of Federally recognized tribes with the Secretary of Interior, and you describe the Confederation as a "not for profit organization based in Corpus Christi." The Confederation has not demonstrated that it is eligible for special Federal programs and services because of its members' status as Indians.

The NAGPRA website (<http://www.cr.nps.gov/nagpra/FAQ/INDEX.HTM#Non-Federal>) states that nonfederally recognized tribes can, under certain circumstances, be a consulting party under NAGPRA:

"Under NAGPRA, only Federally recognized Native American tribes, Native Alaskan villages and corporations, and Native Hawaiian organizations may claim cultural items. NAGPRA *does not require* museums and Federal agencies to consult with nonfederally recognized *tribes*. However, the Native American Graves Protection and Repatriation Review Committee has recognized that there are some cases in which nonfederally recognized *tribes* may be appropriate claimants for cultural items. Museums, if they wish, may consult with nonfederally recognized *tribes*. (Because NAGPRA requires Federal agencies to consult government-to-government with Federally recognized *tribes*, it may be difficult for Federal agencies to include non-recognized *tribes* in NAGPRA consultations.) Museums and Federal agencies that wish to return Native American human remains and cultural items to nonfederally recognized *tribes* must make a

request for review of a proposed disposition to the Review Committee. (emphasis added)"

The department does not believe the Confederation's request for NAGPRA consultation is appropriate in this case because the Confederation is a non-profit organization that has not demonstrated (1) affiliation with a Federally recognized tribe, (2) that it is a Federally recognized tribe, or (3) that it is eligible for special Federal programs and services because of its members' status as Indians.

Lineal descendants are defined in NAGPRA's implementing regulations at 43 CFR 10.2(b)(1) as "an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate tribe or Native Hawaiian organization or by the common law of descentance to a known Native American individual whose remains, funerary objects, or sacred objects are being claimed." The Confederation has not provided information to demonstrate direct ancestry or common law of descentance of any of its members to known individuals who might be buried in or near the project area. Thus, there is no evidence that any members of the Confederation have standing as lineal descendants under NAGPRA.

The department recognizes that it does have responsibilities under NAGPRA because the department meets the definition of a museum under that Act. The Act defines a museum as "any institution or State or local government agency... that received Federal funds and has possession of, or control over, Native American cultural items" (25 USC 3001 §2(8)). However, the department's project has not advanced to a stage where consultation under NAGPRA would occur, even with recognized tribe and lineal descendants. Because the project does not occur on Federal or tribal land, it is not subject to work stoppages or other consultation steps mentioned by the Confederation in your letter. Under NAGPRA, those steps apply only to projects on Federal or tribal lands, and the department's project is not so located. The NAGPRA requirement for consultation by museums starts when a final disposition plan is being developed for a collection. Because the department's project is not yet complete and could encounter more human remains, development of a final disposition plan is premature because the plan must contain a full analysis and inventory of all the collected materials. The final disposition plan will be developed in consultation with tribes. Upon completion, the final disposition plan must be posted on the Federal Register, where the Confederation and other parties will be afforded an opportunity to provide comments to be considered before implementation of the plan.

Consequently, TxDOT's position on the Confederation's request to be a consulting party under NAGPRA is that:

- the project does not occur on Federal or tribal land and therefore is not subject to work stoppages or other consultation steps required for projects on Federal or tribal land. The department is therefore in compliance with NAGPRA requirements for discovery of human remains;
- the Confederation has not demonstrated that it meets the criteria for a party to be consulted under NAGPRA. The department is therefore in compliance with NAGPRA requirements to consult with recognized or unrecognized tribes, and with individuals having demonstrated descentance from known individuals;
- the project has not been completed, and hence is not yet ready for commencement of NAGPRA consultation. The department is therefore in compliance with the provisions of NAGPRA governing museum consultation during development of disposition plans

- NAGPRA consultation with tribes will occur during development of the final disposition plan;
- the Confederation will have an opportunity to provide comments on the final disposition plan as required by law when the plan is posted on the Federal Register, and
- the prematurity of NAGPRA consultation notwithstanding, the Department and the Federal Highway Administration have been consulting with federally recognized tribes and other interested members of the public in accordance with the implementing regulations (36 CFR 800.2) for Section 106 of the National Historic Preservation Act. Those same regulations allow for other groups to come forward and request consulting party status (36 CFR 800.2(c)). The Confederation has not submitted a request to become a consulting party under Section 106.

If you have any questions, please contact me at 512/416-2626 or nkenmot@dot.state.tx.us. Also, if you still wish to review, or have Dr. McGhee review, the releasable documents requested in your letter of July 29, 2005, please contact me.

Sincerely,

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Director, Cultural Resources Section
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cc:

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