



## **ASSOCIATION ON AMERICAN INDIAN AFFAIRS**

Protecting Sovereignty • Preserving Culture  
Educating Youth • Building Capacity  
SINCE 1922

December 23, 2021

The Honorable Bryan Newland  
Assistant Secretary, Indian Affairs  
U.S. Department of the Interior  
consultation@bia.gov

Re: DOI Board School Initiative Written Comments

Dear Assistant Secretary Newland,

Thank you for the opportunity to provide written comments on the important work that is being undertaken by the Department of the Interior to investigate boarding schools. The work to investigate, repair, protect and repatriate our children from boarding schools across the country is critical for our Nations to heal from the targeted genocide against us. The civilization and education regulations were historic federal policies designed to either eliminate or assimilate Native Americans, for the sole purpose of dispossessing Native Nations of their land and resources and perpetuate further colonization. This colonization has caused deep trauma, hurt, and pain to all people, as well as our lands and our relationships. We look eagerly and cautiously forward on the Administration's efforts that have a continuing effect on our health, safety and welfare.

The Association on American Indian Affairs is the oldest non-profit serving Indian Country. The Association was formed in 1922 to change the destructive path of federal policy from assimilation, termination and allotment, to sovereignty, self-determination and self-sufficiency. Throughout our 99-year history, the Association has provided national advocacy on watershed issues that support sovereignty and culture, while working at a grassroots level with Tribes to support the implementation of programs that affect real lives on the ground. The Association has an all-Native Board of Directors and staff, and is guided by grassroots relationships with Tribal representatives on the ground that direct our efforts. The Association is also an open national membership organization where any individual can become a member, regardless of Tribal affiliation or none at all, if they support our vision of creating a world where diverse Native American cultures and values are lived, protected and respected.

Since our inception, the Association has been working to end civilization laws, boarding schools, and adoption programs, and fight against the breaking up Indian families to achieve

intergenerational healing. In every successful effort, there is a preceding long-term commitment and plan of action. Your efforts with the Boarding School Initiative demands an **ongoing government commitment that will continue well beyond the current Administration**. Currently, the Initiative's purpose is limited to an initial collection and review of Department documents and records, and compilation of the existing data within the Department's jurisdiction. We are hopeful that the government's purpose for the three consultations and written comments is so it can develop a long-term commitment and plan of action that will continue until the truth is told and our children are protected and repatriated. It is the obligation of the federal government to develop a long-term strategy and solution to allow for the truth and pain to be understood and then repaired through reparation, protection and repatriation.

The Association is providing comments below that speak to how the government must provide processes and protocol that do not further burden descendants, families, communities, bands, Tribes and Nations.

### **Returning and Protecting Our Children.**

Not all boarding schools will be found on federal or Tribal lands. Some are on private and state lands. Records and other information may be potentially outside federal jurisdiction. All efforts to investigate, protect and return must apply cohesively regardless of the status of land or whether information is held by state governments, churches or private individuals, as this will cause a checkerboarded result causing further harm and burden to Tribes and individuals. Thus, the federal government must find a nexus to apply to all boarding schools, their records, marked and unmarked gravesites and other information regardless of where it is currently located. There are many laws - such as environmental, endangered species, public health and criminal laws that apply regardless of where the activity being regulated is occurring. Moreover, these boarding schools were permitted - either directly or indirectly - by federal policies to eliminate or assimilate Indigenous peoples, their families, and communities and end Native Nation land holdings.

One option for a federal nexus is that the federal government was actively and passively involved in allowing boarding schools to occur, which involved forcibly removing Native children from their families. The status of land is not the nexus, but the actions of the federal government that allowed the activity to occur is the nexus, through civilization and education regulations and other acts of direct and indirect violence. The federal government benefitted from this activity in its efforts to weaken Native Nations and to destroy generations of people that were meant to serve as culture bearers, language speakers and leaders of their Native Nations.

The processes and protocols created to find our children must impose the least amount of burden to Nations, families and descendants. Native Nations, families and descendants should not have to pay for the repatriation of their children, nor pay costs to develop histories. The costs of research, investigation, recovery and repatriation must be borne by the federal government or private entities (that are permitted to exist by federal or state government) that caused the harm. Furthermore, this funding should be easily accessible to Native Nations, families, and descendants, and be non-competitive funding.

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There must also be a process to protect children and their resting places in perpetuity if the descendants, families or Nations wants them to remain undisturbed, or where the child's connection to their relatives is unknown.

### **Repatriation process under NAGPRA or new legislation.**

NAGPRA and its regulations can be used **now** to repatriate children from boarding school cemeteries through the intentional excavation provisions of the Act. 25 U.S.C. § 3002, applies to excavate known Ancestors through intentional excavation, 3002(c). The Act also provides a priority order for repatriation to occur, 3002(a): Lineal descendants first, then the Tribe or Native Hawaiian Organization with the closest cultural affiliation or connection.

However, NAGPRA has one important limitation that must be corrected: NAGPRA's application is limited to federal and Tribal lands. Thus, without an amendment to the Act to broaden its application to all lands where Ancestors are found, NAGPRA cannot resolve the full scope of repatriation of children in marked and unmarked gravesites across the country (which would also work to fix the checkerboarded protection NAGPRA currently gives to our Ancestors and cultural items: our Ancestors, their burial belongings and our cultural items remain in need of protection regardless of where they are located).

To carry out the purposes of NAGPRA and to support efforts to repatriate children from marked and unmarked gravesites connected to boarding schools, the definition of federal lands should be broadened to incorporate the increasingly urgent concerns for repatriation of Native children who did not survive their violent and forced boarding school experience. Many of those graves are unmarked, and only now being searched for and discovered. While a few boarding school sites remain on federal or Tribal lands, other boarding schools and their marked and unmarked cemeteries have been turned over to states, churches or private ownership. Regardless of the current land status surrounding those graves, they contain the human Ancestral remains of precious children whose presence is the direct result of federal educational programs, federal school funding or permissions, and shameful assimilation policies. The United States cannot evade responsibility by having transferred title to land that holds children's graves, or for having provided funding that resulted in those children's deaths. We believe the federal government retains a fiduciary responsibility for the repatriation of those children to their relatives and affiliated Tribal Nations or NHOs. Providing a definition of federal lands that includes marked and unmarked graves of victims of federally owned or funded boarding schools is necessary to pre-empt state laws that may not provide an efficient and appropriate process for repatriation.

But NAGPRA should apply at least to federal and Tribal lands **now** to support repatriation of children where the boarding school cemetery is on federal lands. Currently, the U.S. Army has refused to use NAGPRA to repatriate children from the Carlisle Indian Industrial Boarding School property, stating that it has its own process and that NAGPRA does not apply. As an agency of the United States, the Army explicitly bears the federal NAGPRA responsibility. Rather than following NAGPRA, the U.S. Army has chosen to use its own internal procedures, applicable to the repatriation of soldiers from around the world. Those regulations, adopted without regard to the fiduciary obligations central to NAGPRA and without Tribal consultation, only allow for a lineal descendant to repatriate their Ancestor, and further burdens the process by requiring affidavits and other information to "prove" descendancy. The Army's processes do not allow a community, band, Tribe or Nation who is related but

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unable to show direct descendancy to repatriate their children. This is extremely problematic, and has caused ongoing harm, trauma, and hurt.

Furthermore, the Army asserts that the *Thorpe v. Borough of Jim Thorpe* case from the Third Circuit Court of Appeals prevents the application of NAGPRA to disinter a known grave or cemetery of a Native American (at least within the Third Circuit states). The Army's argument is misplaced. The judge in that case declined to apply the repatriation provisions of NAGPRA, stating that the federal nexus was too attenuated to invoke the NAGPRA repatriation remedy - the case was about a contemporary individual and a family dispute and not about the human rights abuses the Act was meant to correct. Under these facts, the city could not be defined as a "museum." However, the court did not apply the graves protection provisions, nor were the graves protection provisions used to argue the case. The graves protection provisions are used when there is an intentional or inadvertent excavation of Ancestors and their burial items and should be used by the Army.

The Act and the current graves protection provisions allow for the intentional removal of Ancestors and their burial belongings from federal or Tribal lands and can be utilized now to support this growing initiative. Moreover, if NAGPRA's definition of "federal lands" was broadened to require the protection and repatriation of Native American Ancestors regardless of where they are located, then our Ancestors and our children could all be protected equally. This is a national issue and requires a national remedy - similar to many national environmental and public health laws.

### **Remedies Must Apply to All Indigenous Children.**

This is not an issue for only federally recognized Tribes. The damage caused by federal policies and boarding schools has affected descendants, families, communities and bands of Indigenous Peoples regardless of their status - then or now - as "federally recognized Tribes." This legal phrase is recent, and does not define whether the child that was stolen from their family was Indigenous/Native American or Native Hawaiian. The remedies provided through this process should be open to all relatives whose Ancestors were a part of these boarding schools. Children were taken before there was a federally recognized Tribes list. Therefore, the remedies must be inclusive to all descendants, families, communities, bands, and Native Nations equally, so as to avoid any further burdens and traumas.

### **Descendants, Families and Native Nations Must Control the Story.**

This important work must be rooted in the consent of the descendants, families, communities, bands, Tribes and Nations involved. The stories that come from this work are for them to tell; they are so very personal and shed light on intergenerational traumas, the destruction of familial and community structures, and loss of language and identity that can re-trigger that trauma. Safe places should be created for these stories to be told in a safe and culturally appropriate way, and face-to-face. These stories are not for "Tribal consultation" or for government record-keeping. Researchers, data miners and the public should not have access to this information without the free, prior and informed consent of the Indigenous people and Native Nations involved.

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Thank you for this opportunity to provide comments. If you have any questions or concerns, do not hesitate to reach out to me at [shannon@Indian-affairs.org](mailto:shannon@Indian-affairs.org) or 240-314-7155.

*Yakoke,*

A handwritten signature in black ink, appearing to read 'Shannon', with a long horizontal flourish extending to the right.

Shannon O'Loughlin, Choctaw  
Chief Executive & Attorney

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