

TESTIMONY OF FRANKLIN DEVINNEY, Jr.
PRESIDENT OF THE NATIVE AMERICAN CHURCH OF IDAHO, INC
BEFORE THE HOUSE COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON INTERIOR, ENVIRONMENTAL AND RELATED AGENCIES
March 3, 2023

Request: We request the House Committee on Appropriations to support the Peyote Habitat Conservation Demonstration Project in the amount of \$5,000,000.

Introduction. Almost a century ago, the Native American Church of Idaho was organized and incorporated in Idaho on April 1, 1925. It is located on the Fort Hall Reservation in southeastern Idaho and its members include enrolled members of the Shoshone-Bannock Tribes and other federally recognized tribal members. The NAC of Idaho is one of the oldest chartered Native American Churches in the United States.

The peyote religion or peyotism, is the oldest continuously practiced religion in the western hemisphere. Its roots have been documented back at least ten thousand years before Christian religions came to the North American continent, and used by the indigenous people of the lower Rio Grande River in the United States and Mexico.¹ The religion was introduced into the United States in the nineteenth century.²

The first introduction of peyotism to the Shoshone and Bannock in Idaho came from Sam LoneBear, a Lakota Indian from South Dakota in the early 1900's. In about 1923, members of our Tribes, Eugene Diggie, Grant Martin, Peter Jim, Willie George, and Tom Edmo traveled to Oklahoma, and received the chief peyote and staffs from our relatives of the Comanche Tribe. Since 1923, Native American Church ceremonies have been held according to the Comanche tradition throughout the Fort Hall Reservation.

The only place in the world where peyote cactus plants grow naturally is in the desert regions of the Rio Grande Valley in southwestern Texas and Northern Mexico.³ Each year, members of the NAC of Idaho travel to the "Peyote Gardens" in Texas to purchase peyote from Texas licensed distributors of peyote. In 1991, the state of Idaho recognized the sacramental use of peyote in Idaho, and exempted the transportation, possession and use of peyote by members of a federally recognized tribe from the state's controlled substance restriction provisions, following testimony and support of legislation sponsored by members of the NAC of Idaho.⁴ Importantly, the Idaho state legislators recognized, after much education, the importance of the holy sacrament peyote in the ceremonial practices of the Native American Church. Indeed, many state and federal courts

¹ See Omer C. Stewart, *Peyote Religion: A History*, 16-44 (U. Okla. Press 1987); Weston LaBarre, *The Peyote Cult* (New York 1969); J.S. Slotkin, *The Peyote Religion*, (Free Press, Glenco, IL 1956).

² Id.

³ *United States v. Boyll*, 968 F.2d 21, 26 (10th Cir. 1992);

⁴ See IDAHO CODE 37-2732(A) (2014).

have also acknowledged the peyote sacrament as central to the NAC religious practices and it is regarded as a deity; thus, a peyote religion cannot exist without access to peyote.⁵The sacramental use of peyote in the ceremonies of the Native American Church is very complex. To our NAC members, the sacred peyote contains powers to heal body, mind and spirit. It is a teacher; it teaches the way to spiritual life through living in harmony and balance with the forces of the creation. Peyote is believed to embody a spiritual deity and the ingestion of the peyote assists church participants in communicating directly with the Creator. As Indigenous people, we have strong ties to the earth and environment by relying heavily on natural herbal and mineral medicines, such as peyote. Peyote plays a vital role in strengthening and healing individuals, families, communities, and the tribe. Therefore, it is imperative that peyote in Texas continues to remain available for our people, now, and into the distant future.

Use of Peyote is Protected under Federal Law. Pursuant to the Federal Controlled Substance Act (CSA), peyote is classified as a Schedule I controlled substance that imposes a one-year jail sentence, a one-thousand-dollar fine, or both for possession.⁶ However, the American Indian Religious Freedom Act (AIFRA) provides a federal peyote exemption for NAC members to legally use peyote for religious purposes.⁷ Native American members of Native American Churches in the United States can legally purchase peyote buttons from federally licensed peyote distributors in Texas. Members of the NAC of Idaho strictly control the use of the holy sacrament, and follow federal and Texas laws to ensure the integrity of the church and protection of peyote.

On October 6, 1994, Congress passed American Indian Religious Freedom Act Amendment (AIRFAA), which provided that “the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful and shall not be prohibited by the United States or any State.”⁸ A subsection of AIRFAA entitled the “Traditional Indian Religious Use of Peyote” states:

Notwithstanding any other provision of law, the use, possession, or transportation

⁵ See, e.g., *Native Am. Church of N.Y v. United States*, 468 F. Supp. 1247, 1251 (S.D.N.Y. 1979) (“Plainly the [Native American] Church was sui generis because it was the only religious organization then in existence that regarded peyote as a deity.”); *People v. Woody*, 61 Cal. 2d 716, 722 (Cal. 1964) (“To forbid the use of peyote is to remove the theological heart of Peyotism.”); *Whitehorn v. State*, 1977 OK CR 65, ¶6; *Kennedy v. Bureau of Narcotics & Dangerous Drugs*, 459 F.2d 415, 416 (9th Cir. 1972); *State v. Whittingham*, 19 Ariz. App.27, 29 (Ariz. Ct. App. 1973)(“Without it [Peyote] the sacraments of the Native American Church are obliterated.”); *Toledo v. Nobel-Sysco, Inc.*, 651 F. Supp. 483, 487 (D.N.M. 1986) (“The use of peyote is central to the Native American peyote religion.”);

⁶ SCHEDULE OF CONTROLLED SUBSTANCES, 21 U.S.C. §812(c)(12)(2018); PENALTIES FOR SIMPLE POSSESSION, 21 U.S.C. §844(a)(2010)

⁷ NATIVE AMERICAN CHURCH, 21 C.F.R. §1307.31 (1973)(“Federal Peyote Exemption”). See also PROTECTION AND PRESERVATION OF TRADITIONAL RELIGIONS OF NATIVE AMERICANS, 42 U.S.C. §1996 (1994).

⁸ 42 U.S.C. 1996a.

of peyote by an Indian for bona fide traditional ceremonial purposes in connection with such practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State. No Indian shall be penalized or discriminated against on the basis of such use, possession or transportation, including, but not limited to, denial of otherwise applicable benefits under public assistance programs.⁹

Most importantly, AIRFAA protects “the right of Indians to practice their religion under any Federal or State law.”¹⁰ Congress in enacting AIRFAA recognized the importance of peyote to native peoples and preserving their religious beliefs. Congress also understood that peyote as the sacrament and central component to the NAC must be protected and preserved. Without the holy peyote the NAC will not survive. It is thus imperative that the Congress continue to be the beacon, the branch of government to protect and preserve peyote that is the primary element of the Native American Church religion.

Federal Government’s Trust Duty to Protect Tribal Cultures. The federal government has a longstanding obligation to preserve Native American cultures. Along with Congress's power to “regulate Commerce ... with the Indian Tribes” under the Indian Commerce Clause of the U.S. Constitution comes an obligation of trust to protect the rights and interests of federally recognized tribes and to promote their self-determination.¹¹ In fact, the preservation of Indian culture is “fundamental to the federal government's trust relationship with tribal Native Americans”.¹² It has a compelling interest in protecting Indian cultures from extinction, growing from government's “historical obligation to respect Native American sovereignty and to protect Native American culture.”¹³ This “unique guardian-ward relationship between the federal government and Native American tribes” allows legislation or regulations to avoid strict scrutiny altogether. Based on this trust relationship, Congress possesses an “extraordinarily broad” power to legislate with respect to Indian tribes,¹⁴ and categories respecting Native Americans are political, rather than religious or racial distinctions.¹⁵ The Supreme Court has therefore held that limited hiring preferences for Native Americans at the Bureau of Indian Affairs did not constitute

⁹ 42 U.S.C. §1996a(b)(1) (emphasis added).

¹⁰ 42 U.S.C. §1996a(d)(4) (emphasis added).

¹¹ *Morton v. Mancari*, 417 U.S. 535, 552 (1974) (quoting U.S. Const. art. I, § 8, cl. 3); *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

¹² *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216 (5th Cir.1991).

¹³ *Rupert v. Director, U.S. Fish & Wildlife Serv.*, 957 F.2d 32,35 (1st Cir. 1992); *see also Peyote Way of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216 (5th Cir. 1991.)

¹⁴ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).

¹⁵ *United States v. Antelope*, 430 U.S. 641, 645–46 (1977).

unlawful race discrimination.¹⁶ Other federal circuits have extended this principle to the Establishment Clause context.¹⁷

Peyote is Under Threat. There has been a dramatic decrease in the number, size, extent and density of the peyote population in South Texas. Land development activities in the United States, specifically urban sprawl, ranching, and agriculture, have placed peyote in jeopardy. Generally, most Texas cattle ranchers have no interest in protecting peyote and prohibit trespassers from entering their property. Several cattle ranchers in South Texas have switched from cattle ranching to creating game hunting reserves and have erected high fences around their property. Land owners protecting against trespassers helps conserve the peyote cactus but also prevents Indians from accessing their sacred plants. This developing peyote shortage has increased prices and reduced the size of peyote buttons sold by Texas peyote dealers. Because of the very small geographic area where peyote can grow, as well as overharvesting problems, peyote supplies are already quite low. Additionally, when federal agents seize peyote from individuals not protected by law, they destroy the plant—leading to the desecration and loss of thousands of peyote buttons that would have otherwise been used in a NAC meeting.

Proposed Peyote Habitat Demonstration Project. The AIRFAA brought to the forefront the need to continue a dialogue about how to safeguard for Native people our way of worshipping in our sacred places and preserving medicine plants and ceremonial resources. This act was the first step to ensure that Native people can continue to worship. The extent to which this is or isn't the case, however, depends on federal policies, as Native people today still struggle to go to their sacred places on federal lands, to harvest plants and resources. The AIRFAA is a hollow promise if the peyote plant is no longer accessible or is destroyed by land use practices.

The Native American Church of North America is proposing a separately-funded grant program within the U.S. Department of Agriculture's existing Conservation Reserve Program, or as a stand-alone grant program to be administered by the U.S. Department of the Interior's Office of the Assistant Secretary – Indian Affairs. The project will be cooperative and collaborative effort between the federal government, tribes, Native American Church members and private landowners.

Farmers and ranchers will be part of the solution. The Peyote Habitat Project will compensate land owners for converting their lands into Peyote habitat and will fund activities that focus on

¹⁶ *Mancari*, 417 U.S. at 553–54.

¹⁷ *Rupert*, 957 F.2d at 35 (rejecting a non-Native American's Establishment Clause challenge to permit regulations under the BGEPA); *Thornburgh*, 922 F.2d at 1217 (finding no Establishment Clause violation where federal law exempted members of the Native American Church from a prohibition on peyote possession); see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (Kennedy, J., and O'Connor, J.) (“In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases.”).

the conservation of and managed harvest of Peyote. We note that two of the largest Natural Resources Conservation Service working lands programs, Environmental Quality Incentive Program and Conservation Stewardship Program, contain practices that are meant to help conserve wildlife habitat on private land. EQIP and CSP could facilitate the conservation of habitat for endangered species such as peyote in need of conservation. Private farmers, some of the nation's best land stewards, would be supported to achieve even higher levels of resource conservation, and restoration of the sacrament peyote for native peoples. This would be voluntary participation by landowners and could follow the established application and fee schedules and process of the NRCS program. It is a win-win situation to assist farmers or landowners and the Indigenous peoples' use of the holy sacrament in our traditional ceremony.

The proposed project should be immune from constitutional attacks arguing that it discriminates in favor of a suspect class. Under *Morton v. Mancari*,¹⁸ federal laws treating members of Indian tribes differently are not viewed as involving a suspect racial classification for the purpose of evaluating the constitutionality of such laws under the equal protection clause. Instead, the classification of Indian is viewed as a political classification; an Indian tribe is a political organization with a government-to-government or trust relationship with the United States. As such, federal laws treating members of Indian tribes differently are not evaluated under strict scrutiny and will not be disturbed "as long as [they] can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians."¹⁹ Indian tribes attempting to protect sacred sites.

¹⁸ *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

¹⁹ *Id.* at 552. Such legislation should also be immune from attacks asserting that it is in violation of the establishment clause, since it represents precisely the kind of remedy the Court in *Employment Div. of Oregon v. Smith*, 494 U.S. 872 (1990), suggested religious practitioners should be seeking. The legislation/appropriation does not in and of itself create an exemption for Indian tribes attempting to protect sacred sites.