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DATE

Samuel Kohn  
*Senior Counselor to the Assistant Secretary—Indian Affairs*  
Department of the Interior—Bureau of Indian Affairs (BIA)  
1849 C Street NW  
Washington, DC 20240

Re: Comment on Discussion Draft of Revisions to 25 CFR Chapter II (Indian Arts & Crafts Board), Implementing the Indian Arts and Crafts Act

Dear Mr. Kohn,

On behalf of [INSERT NAME OF TRIBE/NATIVE-OWNED AGRICULTURAL BUSINESS], I am submitting the following comments on the BIA's discussion draft of revisions to 25 CFR Chapter II, implementing the Indian Arts and Crafts Act (IACA). Although protecting Native-made products and the livelihoods of Tribal citizens is an admirable and important goal, adding agricultural products to the IACA regulations would be a very new step for BIA and should be taken thoughtfully, after meaningful discussion with the Native producers who would be impacted by it. The draft regulation that BIA has released raises several serious questions and concerns, which I share below for the record.

1. Will Native-grown/raised/harvested/processed agricultural products presumed to be "Indian products" under the IACA framework, or will Native food producers need to seek certification of each agricultural product they market?

The draft is unclear about this issue right now, but this is an important question for BIA to resolve; if this question is not answered thoughtfully, BIA will do more harm than good to Native agriculture. If BIA is going to proceed with pulling agricultural products under the IACA, the easiest way for BIA to protect a Native producer's product would be to amend this draft and make it very clear in this regulation that most, if not all, Native-produced agricultural products will be presumed to be "Indian products." This would offer IACA protections to Native producers and allow them to continue marketing their products as Native-made without needing to wait for certification, which could take a very long time. As written, the draft leaves open a strong possibility that many Native agricultural products would need to be certified first through the IACB processes before

a Native producer continued marketing them as Native made. This would create a significant potential backlog of products awaiting certification.

If BIA does intend to make most, or even many, Native agricultural products receive a certification first before being marketed as Indian products, this will hurt Native agricultural businesses who will have to wait in line for an unknown amount of time before they are cleared to market their products as Native-made. Marketing products in this way often helps Native producers receive a higher price point for their products, or even access market channels that they would have trouble breaking into without marketing their products as Native made. However, if the majority of Native producers would need to seek certification for any/all of their agricultural products to make sure they were not risking legal liability for marketing their products as Native made, this will create a serious problem due to the sheer volume of Native-produced agricultural goods on the domestic market today.

According to the last National Census of Agriculture, over 80,000 Native producers grow, raise, and harvest \$3.5 billion in raw market value of agricultural products each year. Over 50,000 Native-owned or operated farms make up 3% of total US farms. These producers and farms represent millions of agricultural products, and those are just the ones that we know of—there are more Native entrepreneurs who are not necessarily counted in this national dataset, but who are still producing foods and selling them as Native-made. As our Tribal Nations continue to invest in agricultural businesses like meat-processing facilities and commercial kitchen spaces, which help Tribal citizens bring their products to market by providing local processing opportunities, Native produced value-added products will only continue to grow. The wider availability of Native produced foods has also supported a growing number of Indigenous chefs, who use Native-made products in their dishes. The way the draft is written, these chefs might also need to stand in line for a long time to receive a certification if they wanted to avoid significant legal risk.

These large numbers of potential products that would need certification, along with the realities of needing to sell fresh food products quickly to avoid loss, would create a serious problem for all Native producers, food entrepreneurs, and even Indigenous chefs. BIA can solve this problem by either revising the draft to create a presumption that Native ag products are Indian products which don't require additional certification, or by simply declining to regulate agricultural products in this way at all and removing the agricultural product language from the draft. There is a precedent for the latter option, as BIA has considered including ag products in the IACA regulations before and declined to do so.

2. How can BIA rethink certification requirements for agricultural products that may be touched by more than one person during growing seasons?

One of the biggest concerns in the draft regulation is the treatment of a Native-made food product that is touched by even one non-Indian person during its production process. This would require certification if a Native producer wanted to market their product as Native made. This is an unnecessary step for agricultural products and will add to the certification wait time, because many agricultural products today likely do have non-Native involvement at some point in their production process. This is because of the labor-intensive needs of agricultural producers. Many Native farmers and ranchers may use non-Native laborers in their operations, because agricultural laborers are challenging to find, both for farm/ranch labor and for processing facilities. The current draft of this regulation does not really seem to consider that reality, and would make a Native producer go through the certification process even if there was only one non-Native person working in their fields at harvest time or touching their beef products as they were processed in a meat processing plant.

This creates an added burden on Native producers that is not consistent with the goals of the IACA. The IACA was passed by Congress to protect Indian artists' economic interests because non-Indian people were selling artworks and falsely claiming they were Native-made. This interfered with the ability of Indian artists to make a living from their artworks, because a non-Indian person was receiving an economic benefit through false advertising. That's not the same situation as a Native rancher who brings cattle to be processed in a plant where one or more non-Indians may be working the processing line; it is also not the same as a Native farmer who hires seasonal laborers including non-Indians to help harvest their fresh produce. Even if there is a non-Native person working in the assembly line or on the farm, the actual food products that the Native producer takes to market will still result in money going to the Native producer for that product. There is no false advertising at issue, because neither the non-Indian farm laborer or the non-Indian meat packer are selling the food products. Who a Native producer chooses to hire out of her profits is her decision, and not BIA's. BIA should rethink these requirements when it comes to agricultural products.

3. What is BIA's plan to increase staff and/or the Indian Arts and Crafts Board (IACB) commissioners to account for the amount of new products that might need certification and/or technical assistance and market support?

BIA and the IACB will be potentially responsible for certifying millions of Native agricultural products if the current draft becomes the final regulation. This is a significant concern for Indian Country agriculturalists and Tribal Nations engaged in agribusiness, who already encounter serious delays in processing existing requests for other BIA actions due to the underfunding and understaffing of BIA. How many staff does BIA have working on this program now? What is BIA's plan to hire and train additional staff to support the regulation of millions of new products under the IACA?

Similarly, in the current IACA framework, the Indian Arts and Crafts Board (IACB) Commissioners have some responsibilities to support Indian artists and craftspeople that would also be applied to Native producers if this draft were to be finalized as it is written. Does the BIA have a plan to work with Congress and add any additional Commissioners that might be needed in order to accomplish this, especially a Commissioner with agricultural experience? The current Commissioners are well-respected Native artists and craftspeople, but it is not clear what agricultural production experience they have, or what they would want to offer Native producers in terms of support, like technical assistance in bringing their products to market. That is usually a service that the U.S. Department of Agriculture would offer, not BIA, but if BIA pulls ag products under the IACA the commissioners will have a statutory responsibility to serve Native producers as well. Does BIA plan to add a commissioner with agricultural experience? The number of commissioners is limited to five and that is set by statute, which would have to be changed by Congress, not BIA. It would take time for Congress to consider that change and amend the law, so what will BIA and the IACB do to support Native producers during that delay?

#### 4. Additional Considerations: Impact on Native producers' Access to Credit and Beginning Native Farmers and Ranchers

Beyond the concerns already raised, has BIA considered the collateral impact that this rule could have on Native producers' access to credit for their operations? As written, Native producers who continue to market their products as Native-made without certification will be at risk of significant financial penalties. For many producers, the certification process is unfeasible for all the reasons listed above. A producer who is forced to take the risk of continuing without certification could not only be risking legal liability, but could also face repercussions from lenders. Lenders are generally risk-averse, and would likely perceive this regulation as a potential liability or something that would impact the stability of a producer's income stream. This could lead to fewer lending options for Native producers, which would be a disaster for Indian Country agriculture, given that Native producers already struggle more than any other group of producers to access credit on fair terms. If producers are unable to access credit because of perceived instability in their business plans due to this overly burdensome regulation, BIA will have singlehandedly undermined over thirty years of progress that Tribal Nations and advocates have made in increasing capital access. Indian Country agriculture not only supports food access for Tribal citizens, it is also a significant driver of Native economies and creates intergenerational wealth for Native families. BIA's draft imperils all of this by creating a regulatory burden that does not need to exist.

Finally, this draft rule also discourages new and young Native farmers and ranchers from entering into agriculture, which goes against ongoing efforts to increase food

security in Indian country. The average age of all farmers has been rising over the last twenty years, with fewer and fewer young people coming in to take over operations as elders retire. This is as true in Indian Country as it is in the rest of the United States; the average age of the Native farmer is 56.6 years old, and only 9% of all Native producers are under the age of 35. Encouraging the next generation of Native agriculturalists is critical to continuing and growing the successes of Indian Country agriculture, but by enacting overly burdensome regulations that stifle productivity, impact earnings, and limit access to credit, we risk creating yet another barrier to young Native people transitioning into agriculture. This is just one example of the ripple effect this draft rule could have on Native agricultural economies and the future of food access in Tribal communities.

In summary, the draft as it is currently written raises serious concerns for any Tribal citizen involved in food production, whether they are a farmer, rancher, fisher, chef, or entrepreneur. BIA should remove the agricultural product language from this regulation entirely, but if the agency is determined to do this, I urge you to revise the provision as recommended here.

Sincerely,

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