



October 11, 2017

Ms. Melanie O'Brien  
Program Manager  
National NAGPRA Program  
National Park Service  
1849 C Street NW  
Mail Stop 7360  
Washington, D.C. 20240

Dear Ms. O'Brien:

From March 15 to March 16, 2017, the NAGPRA Review Committee (RC) met in Denver, Colorado. The meeting was preceded by an Open Forum event on March 14. Four members of the Society for American Archaeology's (SAA) Committee on Repatriation—Jordan Jacobs, Marc Levine, Nell Murphy, and Angela Neller—attended the meeting. Although the four committee members met to discuss their impressions of the meeting, only Jordan Jacobs and Nell Murphy contributed to the summary as both Neller and Levine were meeting participants.

Jacobs and Murphy compared their notes with the concrete suggestions that SAA offered the National NAGPRA Program (NNP) in its August 31, 2015, letter. Overall, we are encouraged to see that the Designated Federal Officer (DFO) and RC have implemented a number of recommendations that SAA offered in its 2015 letter and subsequent communications. For example, the DFO consistently reviewed the RC's role and reminded all participants of the nature of the committee's work, misinformation was often corrected and the RC discussed ways of improving its facilitation of disputes.

We have also identified a few issues of concern, such as a focus on issues outside the RC's purview, and the "rubber stamping" of disposition requests for culturally unidentifiable human remains. We offer a fuller summary of the meeting below.

### **Training, Open Forum**

There was no formal training session preceding this meeting. Instead, a one-day Public Roundtable and Open Forum were held, featuring a panel of NAGPRA participants from federal and state agencies, federally recognized tribes and others. While not a training, NNP's participation and selection of the panelists and moderator may be perceived as endorsing each participant's interpretation of the NAGPRA statute and regulations and perspectives on best practices. The panel did not appear to represent a full spectrum of NAGPRA practitioners and a number of statements that seemed to misconstrue the law (43 CFR 10.11) and NAGPRA-related court decisions (*Bonnichsen*) were left uncorrected.

As SAA noted in its August 31, 2015, letter, training is critical to implementation of NAGPRA. Poor training methodology in the past has led to unrealistic expectations about the ease and simplicity of the process, flawed implementation, expectations that museums will not participate in good faith, and a host of other problems. We continue to recommend that only NNP staff members provide in-person training, and that roundtables and public forums, while at times useful, should not replace formal training.

## **Review Committee Meeting Process**

### Process

Generally, we were encouraged by the professionalism that the DFO and RC exhibited throughout the meeting. For example, the RC thanked each participant for their presentation and asked how it could be of assistance. A forum that is welcoming to all participants is likely to encourage greater attendance and engagement.

In SAA's August 2015, letter, it suggested the DFO begin each meeting by reviewing the role of the RC as this reminds all participants of the nature of the committee's work. The DFO initiated most agenda items with a review of the relevant regulatory language concerning the RC's role. Our impression is that this made the meeting run more smoothly, as RC members were reminded of the role and purview of the committee.

In its August 2015, letter, the SAA also suggested that the DFO develop a firm policy for submitting documentary materials in a timely manner, that these materials be submitted to all concerned parties, and that the deadlines are enforced. The purpose of this suggestion is to ensure that the RC is well informed and prepared in advance of each meeting. At this meeting, substantial new information was introduced during the request for disposition for culturally unidentifiable human remains from San Bernardino County, California. The introduction of this new information confused the Committee's decision-making process.

In its September 2016 letter, SAA pointed to instances when the DFO and Counsel did not correct misinformation and, overall, we see much improvement in this area. For example, after a presentation that focused, in part, on regulating research of culturally unidentifiable human remains, the DFO reminded participants that recommendations on changes to the law in this regard would be outside the purview of the Review Committee and the Department of the Interior and would require Congress to amend NAGPRA. Additionally, after a different presentation which questioned the actions of a Federal agency, Counsel pointed out that the circumstances described appeared to be beyond NAGPRA's scope. She also reminded participants that NAGPRA does not cover all burials but those of Native Americans inadvertently discovered on Federal lands after 1990 and those remains found in museums and Federal agency collections.

We encourage the DFO and Counsel to continue to correct misinformation as Review Committee minutes and transcripts are public record, and no opportunity exists to enter corrections into the public record once the meeting is adjourned.

### Unwarranted Scrutiny

In past correspondence, SAA has described instances of unwarranted scrutiny of museums and implications of non-compliance without having all the facts at hand. For the most part, this was absent from this meeting. In fact, one committee member expressed reservations, after a public comment presentation, about drawing any conclusions before the committee had a full accounting of the incident. This is a significant improvement in restoring balance and fairness to the conduct of the RC during the meeting; however, the legacy of that practice was apparent at several points over the course of the session.

In the instance cited above, one committee member, after hearing the presentation during public comment, chided a Federal agency representative by name and other agencies more generally for not fully complying with NAGPRA, even though the committee had only limited information. Moreover, Counsel pointed out that the circumstances described in the presentation appeared to be outside of NAGPRA's scope.

In another instance, a committee member chastised a museum representative for not holding enough in-person consultations. This statement was made in the absence of any complaints about the museum from tribal representatives. Neither the DFO nor Counsel reminded the RC that there is no requirement for in-person consultation. As the SAA has pointed out in earlier correspondence, NAGPRA does not define consultation and many museums, federal agencies and tribes lack the time and resources to engage in face-to-face consultations. In many cases, tribes request to consult in other ways, particularly by phone and email, and it is likely that *most* NAGPRA consultations take the form of letters, phone calls, e-mails, etc.

One last example was the testimony, from the dais, of the RC's Chairman concerning the 2016 transfer and reburial of the Kennewick Man/Ancient One. These statements followed a presentation by the Columbia Plateau Inter-Tribal Repatriation Group concerning those events. The Chairman's comments—in which he criticized the US Army Corps' conduct and NAGPRA process, and made statements concerning the remains' Native American status and cultural affiliation—seemed inappropriate, given his involvement in the case and official position within one of the claimant tribes.

### Inadvertent Discovery

The RC is not charged with oversight of inadvertent discovery, and yet a large percentage of each presentation by a federal agency representative was devoted to NAGPRA's Section 3 and 10.7 compliance. The DFO had invited the federal agency representative to attend and present at earlier meetings, and it is unclear whether the invitations specifically defined the RC's purview.

We fully support the efforts to comply with these aspects of NAGPRA, but the RC meetings are, by definition, not the forum for those discussions. The DFO and solicitor should remind the RC and members of the audience that inadvertent discovery is beyond the purview of the RC.

### Disposition of Culturally Unidentifiable Human Remains

The RC heard multiple requests for disposition of culturally unidentifiable human remains during this meeting. Two cases raised specific concerns:

- The RC recommended disposition of human remains found in a San Bernardino County, California collector's estate—and now in the control of the County's coroner—to the local San Manuel Band of Mission Indians. This decision amounted to a “rubber stamp” of the request from the County coroner but did not meet the standards for NAGPRA compliance for several reasons. First, an assessment did not clearly identify the remains as Native American. Second, the remains were not culturally affiliated to the San Manuel Band nor were they known to be from the traditional territory of the San Manuel Band. Instead, there was reason to believe that the remains were removed from a location in the Four Corners region, which was the collector's area of interest. Nonetheless, no tribes in the Four Corners region had been consulted. While two committee members dissented with the recommendation, this decision demonstrates what we see as a departure from the RC's past practice of carefully reviewing the facts of each case, ensuring adequate consultation, and requiring adequate documentation that the human remains are Native American prior to making a recommendation.
- The RC recommended disposition of human remains in the possession and control of the State of Florida's Bureau of Archaeological Research, Division of Historical Resources (BAR) to the non-federally recognized Unkechaug Nation. In this case, the cultural attribution of the remains was clearly indicated: Matinecock Indian, Long Island. It is apparent from the records submitted that the Florida BAR did not fully research the cultural affiliation for the human remains. The descendants of the Matinecock may be part of at least four federally recognized tribes: the Shinnecock Nation, Stockbridge Munsee Community of Mohican of Indians, Delaware Tribe of Indians, and Delaware Nation. Although the Florida BAR cannot be expected to be an expert on New York tribal history, it possessed—and presented—information to suggest a possible affiliation. Nonetheless, the RC did not question the state's determination that the human remains were culturally unidentifiable. Furthermore, the RC did not question the lack of consultation with other potentially affiliated or potentially interested, federally recognized tribes (i.e., the Stockbridge Munsee Community of Mohican Indians, Delaware Tribe of Indians, and Delaware Nation). The limited amount of consultation is at odds with the inventory and cultural affiliation requirements of the law as well as the regulations for disposition of culturally unidentifiable human remains. The preamble of 43 CFR 10.11 notes that to protect the rights of federally recognized tribes, a museum or Federal agency may only transfer control of culturally unidentifiable human remains to an Indian group that is not federally recognized after full consultation with relevant federally recognized tribes. Based on the comments of the RC Chair throughout the meeting, it appears that the RC is over-emphasizing the *form* of the consultation (although the law doesn't require face-to-face consultation), while the *thoroughness* of the consultation (which is required) and adherence to the statutory/regulatory provisions is not carefully reviewed. In its haste to approve the disposition request, the RC overlooked key questions about whether the human remains are culturally unidentifiable, whether adequate consultation had occurred, and whether the transfer met the requirements of the 10.11 regulation.

### Subcommittee Report and Discussion on Responding to Critiques of Committee Actions

In its August 2015 letter, SAA addressed the RC's charge of facilitating the resolution of disputes and noted that the RC, especially its Chair and the DFO, are responsible for conducting this work in a fair, balanced, and transparent manner. More specifically, it wrote that whenever possible, the Review Committee should strive to find resolutions to disputes prior to a formal hearing, as formal hearings tend to be an adversarial process that often serves to harden positions rather than find compromises or workable solutions. In its September 2016 letter, SAA cited the dispute over human remains and associated funerary objects from the Paak'u site as an example of how positions between parties can become intractable during the dispute hearing process.

The RC has since appointed a subcommittee to address the suggestions and critiques it has received from SAA and other parties and, during the meeting, it proposed a number of changes. To increase transparency, the subcommittee proposed a series of changes to the meeting procedures. To improve its facilitation of disputes, one committee member suggested that RC members receive training in dispute resolution and that it form a subcommittee to help disputing parties before they come before the larger committee. All suggestions were generally well received, but the RC identified several issues that need further consideration before any of the proposed changes or suggestions could be finalized. We found it promising that the RC has taken seriously the comments and suggestions it has received over the last two years.

SAA encourages the RC to continue its careful consideration of improvements to the meeting and facilitation processes, and we offer our assistance in this regard.

Sincerely,

A handwritten signature in cursive script that reads "Susan M. Chandler".

Susan M. Chandler, RPA  
SAA President