



November 14, 2014

Ms. Melanie O'Brien
Acting Program Manager
National NAGPRA Program
National Park Service
1201 Eye Street, NW
8th floor (2253)
Washington, D.C. 20005

Dear Ms. O'Brien,

The Society for American Archaeology (SAA) is pleased to provide the National NAGPRA Program with the following comments on the NAGPRA Review Committee's Draft Procedures for the resolution of disputes between Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums concerning items covered by the Native American Graves Protection and Repatriation Act of 1990. These comments are based on the October 2014 version of the procedures, which were included in the materials sent to Review Committee members in preparation for this month's meeting of the panel.

SAA is an international organization that, since its founding in 1934, has been dedicated to the research about and interpretation and protection of the archaeological heritage of the Americas. With more than 7,000 members, SAA represents professional archaeologists in colleges and universities, museums, government agencies, and the private sector. SAA has members in all 50 states as well as many other nations around the world.

General comment:

The regulations state that the Review Committee may facilitate dispute resolution in one of three actions: (1) "convening meetings between parties to disputes," (2) "making advisory findings as to contested facts," and (3) "making recommendations to the disputing parties or to the Secretary as to the proper resolution of disputes." In general, the procedures are not clear enough on how each of these three actions may be pursued, instead largely conflating or eliding these distinct actions to focus on a formal hearing process.

Specific comments:

1. Section I, "... of providing resolution ...": The statute states that the Review Committee "may facilitate"
2. Section II, last sentence: This statement could be interpreted to be delegating the DFO the responsibility the statute gives to the Review Committee. This statement should be

rephrased to make clear that the ultimate responsibility for facilitating disputes—whether the dispute requires a formal hearing or whether it can be addressed through alternative dispute resolution—resides with the Review Committee.

3. Section III, last sentence: In the Review Committee sections of the statute, non-federally recognized Indian groups are not explicitly mentioned. However, it seems that the Review Committee may have the authority to oversee disputes with these groups if they are considered an “interested party” or relating to findings of “contested facts” under 43 CFR 10.17(b). The statutory authority regarding disputes with non-federally recognized Indian groups should be clarified.
4. Section V.C.: The regulations mention “disposition” but also “repatriation”: both should be specifically included here.
5. Section V.C. and V.E.: It is unclear why any “culturally unidentifiable” human remains that fall under section V.E. would not simply fall under Section V.C.
6. Section VI.A.2.e.: The term “rejected” here is too narrow to cover the range of reasons a dispute might arise between interested parties. A revised statement might read: “... including any correspondence that illustrates the nature of the dispute ...”
7. Section VI.B.: A third item (c) might be helpful to include: “The DFO will keep the Review Committee informed of and convey all relevant information about potential disputes.”
8. Section VI.C.2.: “30 days”: Although the SAA understands the need for an expeditious process, 30 days in some cases may be too brief. For instance, if a museum is unaware of there even being a potential dispute, it could take more than 30 days to assemble a thorough and appropriate response. A more realistic time frame would be 60 days.
9. Section VI.D.: The logic of this procedure would seem to lead inevitably to a hearing before the Review Committee. Between VI.C. and VI.D. is a step missing in which the Review Committee with input from the DFO decide if in fact a hearing is the most appropriate next step. For example, it might be determined that alternative dispute resolution measures could be effective, rather than a formal hearing. The procedure should outline how this intermediate step of deciding which resolution measures might be most appropriate and effective.
10. Section VI.E.3.: How will this time restriction be enforced? Perhaps it is better not to have a specific time if it cannot realistically and respectfully be enforced. Instead, perhaps a statement about keeping the hearing to an appropriate length being equal for all interested parties, as determined by the Review Committee, would be a more realistic approach.
11. Section VI.E.6.: The procedure prior to this point has been using “parties” (alone) or “interested parties” and now using the phrase “disputing parties.” This third phrase may introduce confusion; unless used here intentionally, only the first two phrases should be used.
12. Section VI.G.: The procedure’s restrictions on contact do not seem to cover a range of potential issues. Such as: Can there be indirect communications through a third party? Should the contact be restricted to discussions about the dispute but allow other kinds of contact? At what point can communications resume—e.g., immediately after a hearing or publication of findings in the *Federal Register*?

13. Section VI.G.: A number of additional considerations might be given here:
 - a. After the deadline for submitting materials has passed, it should be clear that no additional materials will be accepted;
 - b. All materials submitted should be shared between the parties to ensure full communication between them (although stated in VI.A.2.e. it would make more sense to have this stated here, or at least re-stated in this section).
14. Section VII.A.: Numerous organizations provide specific guidelines for recusal; adhering to a specific set of rules could perhaps ensure fairness to the process. Some of these rules importantly allow any disputing party to raise a conflict of interest concern, which must be responded to. Also, it would be appropriate to explicitly ask the individual who recused herself or himself to also leave the room.
15. Section VIII.B.: The requirement for the DFO's recusal should also be applied to the Review Committee Chair along with her/his delegation of responsibility.

We appreciate your time and consideration of this important issue. Please contact us if you have any questions.

Regards,

A handwritten signature in blue ink that reads "Jeffrey H. Altschul". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Jeffrey H. Altschul, Ph.D., RPA
President