



August 31, 2015

Ms. Melanie O'Brien
Manager
National NAGPRA Program
1201 Eye Street NW #846
Washington, DC 20005

Dear Melanie,

On behalf of the Society for American Archaeology, I thank you for the opportunity to offer you, as Manager of the National NAGPRA Program, suggestions on concrete steps to take to re-establish confidence in the fairness, balance and transparency of both National NAGPRA Program and the National NAGPRA Review Committee activities.

As you know, the Society for American Archaeology 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 nearly 8,000 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. Most notably, SAA was deeply involved in forging the legislation that became NAGPRA, helping to draft and negotiate a law that strove for balance between institutions' interests and those of Native Americans and Native Hawaiians.

As we articulated during our visit to your office earlier this month, not only SAA but also many museums and other stakeholders believe that both the National NAGPRA Program and the Review Committee process have been compromised over the last decade. Many museums have disengaged from the review and repatriation process because they doubt they will receive a fair hearing, or that the RC will help resolve problems that remain unresolved through other means. In turn, this disengagement presents other stakeholders with frustrations in negotiating claims under the Act. Such perceptions of bias, documented in the 2010 GAO report, present a real impediment to proper implementation of the Act.

We also mentioned to you that NAGPRA implementation at the grassroots level has been proceeding quite well in nearly all cases. We noted, however, that it is both unfortunate and ironic that the federal-level entities responsible for helping resolve barriers to NAGPRA implementation have themselves become perceived as significant barriers to implementation.

The concrete suggestions below were developed collaboratively by those in our visiting group, which included former members of the Review Committee, persons with extensive museum experience, and members of SAA's Repatriation committee. Our suggestions cover a wide range of topics, including reform of training and orientation to the law; the ethical obligations of RC members; ensuring that the National NAGPRA Program and Review Committee work on areas mandated by the statute, regulations or agency policy; restoring National NAGPRA Program past practices that enhance Review Committee focus on resolving problems; effective pre-meeting preparation; ongoing engagement between public meetings for

Review Committee members; assessment of National NAGPRA Program activities vis-a-vis mission creep; and reforms to optimize the effectiveness of National NAGPRA Program staff.

Training

The National NAGPRA Program “develops and issues guidelines, technical information, training and other programs...” [145 DM 5.2]. 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 recommend the following steps be taken:

- 1) Training should be provided by the National NAGPRA Program rather than outside sources. This would ensure that content is consistent and closely follows the statute and regulations. If panels are used for training, they should be balanced and include the perspectives of a range of institutions.
- 2) Because the information provided during training is perceived as the official and correct reading of the law, the content of the training should be based solely on the language in the statute and regulations and refrain from making statements about the “spirit” of NAGPRA, which are not defined and can be perceived in different and conflicting ways. In the past, National NAGPRA Program training consisted of an extensive review of the specific language of the law and regulations, but this has been glossed over in recent courses, while statements about the spirit of NAGPRA have increased. The training must provide technically correct information (e.g. Minimum Number of Individuals [MNI] is a technically-defined estimate by physical anthropologists, not a “best guess” by laypersons). Such training should be consistent from one session to the next, for example, we have observed that the National NAGPRA Program has been inconsistent in its description of the 10.11 process, regarding whether the regulation requires any new action.
- 3) The training must acknowledge that there are complexities and ambiguities in the law and regulations. It should not present NAGPRA in simplistic terms, and should also refrain from issuing opinions that are not strictly based on the law. For example, consultation is not defined in the law or regulations but has been characterized during recent training courses as a “magic bullet” which can lead to cultural affiliation. For example, smaller museums may find consultation beyond those tribes most likely to be affiliated infeasible. Moreover, we believe that in certain instances, consultation may not provide sufficient information for affiliation. Trainings have also portrayed consultation as necessary before a museum can undertake any research on its collections, though the statute and regulations do not require this.
- 4) The Designated Federal Officer (DFO) must ensure that all new members of the Review Committee complete their training (including ethics training and review of statutory authority and role of the RC).

Review Committee Meeting Process

The Review Committee and DFO share responsibility for ensuring that the proceedings are fair and balanced [245 DM 1.1.C.24 and 145 DM 5.2]. We have two recommendations for this topic:

- 1) The DFO should begin each meeting by reviewing the role of the Review Committee under the statute and as a FACA organization—as was the practice many years ago. This

language is important for reminding all participants of the nature of the work of the committee.

- 2) At the start of each meeting, the DFO and Review Committee Chair should also remind everyone in attendance to maintain a respectful atmosphere for all the parties. This includes being attentive to everyone speaking and using respectful language. In the past, the Review Committee Chair took responsibility for maintaining a civil and respectful throughout the meeting.

The Review Committee also has certain responsibilities assigned to it under the Act and in its charter. The DFO, counsel, and Review Committee members (especially the Chair) must work within those parameters to ensure that the work of the committee is perceived as fair and transparent. Several actions would assist in this effort:

- 1) In the past, the Review Committee's ability to carry out its responsibilities in an effective manner has been hampered by vacancies on the panel that went unfilled for long periods of time. The Secretary should, in accordance with 25 USC 3006(b)(3), make every effort to fill any openings on the Committee within the 90 day period set forth in the statute.
- 2) To facilitate a balanced Review Committee meeting process, the DFO should develop a firm policy for submitting documentary materials in a timely manner, this must be communicated to all concerned parties, and deadlines should be enforced. This is will ensure that the Review Committee is well-informed and prepared in advance of each meeting.
- 3) The DFO and counsel should intervene if the Committee is not acting within its statutory authority and/or is not basing its decisions on the statute and regulations. This is critical because Review Committee minutes and transcripts are public record, and no opportunity exists to enter corrections into public records after the meeting is adjourned.
- 4) The DFO should be even-handed in the amount and type of communication he or she has with individual Review Committee members outside of formal committee meetings.
- 5) The Review Committee should not consider the National NAGPRA Program as its research arm; it should assign them work sparingly and only when absolutely necessary to meet a specific statutory obligation.

The Review Committee is charged with facilitating the resolution of disputes and making recommendations to the Secretary regarding the identification or cultural affiliation of cultural items or the return of such items. The Review Committee, especially its Chair, and the DFO are responsible for conducting this work of the Committee in a fair, balanced, and transparent manner.

- 1) At the start of any request for a finding or a dispute hearing, the DFO should remind everyone present at that the Review Committee's findings and recommendations to the Secretary are advisory rather than compulsory, but would carry weight should a matter be taken to court.
- 2) Whenever possible, the Review Committee should strive to find resolutions to disputes prior to a formal dispute hearing. Formal dispute hearings are an adversarial process and often serve to harden positions rather than find compromises or workable solutions. In recent years, the Review Committee has dispute hearing as its only resolution mechanism. To this end, both training and the NNP Manager's ongoing administrative work should include strategies for maintaining collaborative communication among Review Committee members between the formal hearings.
- 3) The DFO should report to the Review Committee any decisions by the Secretary at the first Review Committee meeting that is held after the Secretary issues the decision. This

would greatly increase the transparency of the Review Committee recommendation process, especially when the Secretary's decision differs from the Committee's recommendation.

National NAGPRA Program Responsibilities

The National NAGPRA Program has certain responsibilities assigned to it in the Departmental Manual [145 DM 5.2]. However, in recent years, the program exceeded these responsibilities, adding to the perception of the Program's lack of balance and transparency. Two specific recommendations for addressing this issue are:

- 1) The National NAGPRA Program should ensure that the Notices are complete, technically correct, and meet the requirements of the law and regulations. Specific problems with Notices of Inventory Completion were outlined in SAA's letter of March 13, 2015.
- 2) The National NAGPRA Program should return its focus to its core functions as outlined in the statute, regulations, and manual, namely publishing notices, making grants, providing assistance to tribes and museums, and supporting the Review Committee. For example, the effort to scan and publish digital copies of all inventories or summaries has taken staff time away from core Program functions.

Please do not hesitate to contact me at dianegg@saa.org should you wish further clarification of these concrete suggestions. I can forward your queries to the Repatriation Committee and other relevant committees and experts. Naturally, we understand that our suggestions are simply that—those of a concerned body of stakeholders with a long history of representing the interests of archaeological research and preservation at the national and local level.

Finally, I'd like to reiterate our statement at the meeting that SAA and its members stand ready to help in any way we can to advance the important activities taking place under the Act, and to overcome barriers to the Act's full implementation. We very much look forward to working constructively with you and the National NAGPRA Program to make the law work effectively and fairly for all stakeholders.

With my best wishes,



Diane Gifford-Gonzalez
President

Cc:

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