



SOCIETY FOR AMERICAN ARCHAEOLOGY

September 12, 2016

Ms. Melanie O'Brien
Manager, National NAGPRA Program
National Parks Service
United States Department of the Interior
1201 Eye Street NW Room 846
Washington, DC 20005

Dear Melanie,

On July 13–15, 2016, the NAGPRA Review Committee (RC) met in Missoula, Montana. Two members of SAA's Committee on Repatriation—Angela Neller and Lauren Sieg—attended the meeting. Lauren and Angela provided the summary upon which this letter is based, with the focus being SAA's concrete suggestions in its August 31, 2015, letter and the issues noted as emerging in the Norman meeting, discussed in SAA's February 2, 2016, letter to the National NAGPRA Program (NNP). This letter highlights positive developments and the areas of continued concern.

Overall, the Designated Federal Official's (DFO) continues to maintain a tone that is far more balanced and respectful than that of her predecessor, a trend that is very encouraging. On the other hand, the tone of some RC members, especially that of the Chair, was far less respectful than it had been at the Norman meeting. This is especially troubling because the Chair sets the tone for the meeting. For example, the Chair repeatedly scolded both tribal and museum representatives who participated in the meeting via telephone for their failure to appear in person. In turn, another RC member picked up on this theme and chastised a federal agency representative who had a last minute emergency and could not attend, although the representative submitted a lengthy written report for the RC's review. Participation, preferably in-person but also via telephone, in NAGPRA meetings should be encouraged, but the RC discourages participation when it is openly critical of the representatives who are trying to engage in the process.

In its August 2015 letter, 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 be enforced. For the Missoula meeting, there did not appear to be any last minute, new materials for the RC members to add to their binder or consider in the context of a dispute and this helped the RC's deliberations run more smoothly.

We are gratified that the member position nominated by Tribes was been filled just prior to the Missoula meeting as this it had been open since May 2015, far longer than the 90-day window specified in the statute. SAA especially hopes that NNP has been acting proactively to solicit nominations for a traditional religious leader, which are due in September.

SAA's August 2015 letter 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. Unfortunately, the DFO did not do so in Norman nor in Missoula. The need for such guidance was apparent as committee members asked for points of clarification regarding the RC's purview, responsibility, and their options for decisions at several points during the meeting.

The SAA also requested that the DFO or Counsel intervene when the Committee departed from its statutory authority and/or did not base its decisions on the statute and its regulations. Lack of such corrections continued to be a problem at the Review Committee's activities under NAGPRA and as a FACA committee in Missoula. For example, statements that face-to-face consultations, rather than other forms of communication were necessary went uncorrected. There was also a lengthy discussion about NAGPRA's Section 3, over which the Committee has no authority. It took a Committee member's question to Counsel about the RC's role before Counsel pointed out the limitations of the RC's statutory authority. At such times, it would have been helpful for the DFO or Counsel to follow up with information about what is required under the statute and regulations, ask for clarification, and remind the Committee of its mandate and authority.

A more problematic example of a lack of guidance emerged during the hearing of the dispute over cultural affiliation of human remains from Paak'u. The AMNH culturally affiliated the human remains with the Pueblo of Santa Ana (PSA), the Pueblo of San Felipe (PSF) and the Pueblo of Santo Domingo. PSA and PSF submitted claims for repatriation, and PSA disagreed with the cultural affiliation made by the museum, asking the RC to find that it was the *only* culturally affiliated tribe and was the most appropriate claimant.

Representatives of both the PSA and the PSF were present at the meeting and provided testimony, while the AMNH representative called into the meeting and read a short statement summarizing its decision. During the discussion, it became apparent that the "dispute" was actually a profound disagreement between the two pueblos, whose divisions were deepening and positions becoming more intractable during the dispute hearing process.

The RC's statutory mandate tasks it with "facilitating the resolution" of disputes, which could occur through a dispute resolution process alternative to a formal dispute hearing. In its August 2015 letter, the SAA wrote, "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 (used the) dispute hearing as its only resolution mechanism." It is SAA's perspective that, in situations such as this case, the formal dispute hearing should be a last resort rather than the first choice, given the sensitivity of the matters under discussion.

The inherent difficulty of sharing sensitive and secret information in a public meeting—a concern that was articulated by the PSF in documents—should have prompted the RC Chair and DFO to consider alternative resolutions prior to accepting this case as a formal dispute in its present form.

Moreover, the fact that the RC needed no additional testimony from the museum suggests that *this dispute was not a case that should be approached as a formal dispute between a tribe and museum, but rather between two tribes.*

The RC agreed with the AMNH's cultural affiliation. It did not make a determination on the most appropriate claimant but instead recommended that PSA "take the lead" in the repatriation because it had previous experience repatriating remains and funerary objects from Paak'u that had been housed in other institutions. The SAA Repatriation Committee notes that the previous Paak'u repatriations were based on inventories that *excluded* other potentially affiliated tribes from the consultation process.

The RC's recommendation is troubling for a several reasons, two of which relate to the SAA's previously stated concerns. First, the RC's recommendation conflicts with the law: *under NAGPRA, if a most appropriate claimant cannot be determined, museums cannot repatriate until the culturally affiliated claimant tribes are in agreement on the recipient tribe(s)*. To repatriate without such an agreement would violate the sovereign and cultural rights acknowledged in NAGPRA. Besides the ambiguous legal position of the RC's decision, its recommendation is vague: it is not clear what "take the lead" means, and the recommendation provided no further directions to the tribe.

Second, SAA representatives found the lack of guidance from the DFO or Counsel to be problematic, especially in view of the first point. Neither the DFO nor Counsel made the legal stipulations clear to the RC or the disputing parties, nor did they ask the RC to clarify what was meant by "take the lead," which might have provided the RC a chance to reformulate the recommendation so that it met the statutory requirements and was actionable.

In sum and more generally, SAA supports NNP and the RC chair in seeking to propose alternative dispute resolution formats when cases appear in the docket for which such a choice may be more appropriate. SAA reiterates its offer of assistance to NNP in identifying alternative dispute options.

The other dispute heard in Missoula, between the Wiyot Tribe and the Phoebe A. Hearst Museum of Anthropology (PAHMA), underlines continuing perceptions of the RC process noted in SAA's August 2015 letter. In it, we expressed concern that,

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 (emphasis ours). In turn, this disengagement presents other stakeholders with frustrations in negotiating claims under the Act (emphasis ours). Such perceptions of bias, documented in the 2010 GAO report, present a real impediment to proper implementation of the Act.

The PAHMA representative read a statement that the museum chose not to participate in the dispute hearing because it did not believe that the hearing would be a fair process, declining to take further questions about the dispute.

RC members may well have felt unjustly accused of actions that occurred before their tenure, and they also may have fundamentally disagreed with the PAHMA's approach and/or its statement. SAA strongly commends the RC for nonetheless focusing on the submitted information and asking thoughtful questions of the tribal representatives. The RC members had questions for the PAHMA as well, and the absence of the museum response limited the RC's ability to fully deliberate. The RC ultimately found that the objects in question were sacred objects rather than objects of cultural patrimony, as did the University of California Office of the President's Advisory Committee. SAA finds that the RC's deliberation modeled a moderate, problem solving tone that serves as an excellent counter-example to the alleged bias in process.

Other RC comments on the final day of the meeting were more troubling, at times sounding retaliatory (e.g., “there will be consequences” for the museum) or inappropriate (e.g., references to other NAGPRA issues with the PHMA, posing questions to a speaker presenting on other issues about problems encountered with the PHMA). Again, this is a matter of seeking to set a more moderate, less reactive tone.

SAA reiterates that that National NAGPRA Program should consider SAA to be a useful resource in re-engaging with museum communities. This is an especially auspicious moment for such matters, given that a member of a museum sits on SAA’s Board of Directors, several serve on SAA’s Repatriation Committee, and SAA member and former RC member, Dr. Alex Barker, a museum director, is President-Elect of the American Anthropological Association. Please know that SAA is willing to discuss such strategies with the Manager and Counsel as they see fit.

With my best wishes and thanks for your attention.

Sincerely,

A handwritten signature in black ink, appearing to read "Diane Gifford-Gonzalez". The signature is written in a cursive, somewhat stylized script.

Diane Gifford-Gonzalez
President