



February 2, 2016

Ms. Melanie O'Brien, Manager  
National NAGPRA Program  
National Park Service  
1201 Eye Street, NW  
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Washington, D.C. 20005

Dear Melanie:

On November 18–19, 2015, the NAGPRA Review Committee (RC) met in Norman, Oklahoma. Four members of SAA's Committee on Repatriation attended the meeting. They met on November 19 to compare meeting notes in light of the concrete suggestions that SAA offered the National NAGPRA Program (NNP) in its August 31, 2015, letter. This communication summarizes their observations.

There was unanimous agreement that overall, the Designated Federal Official's (DFO) tone was far more balanced and respectful than that of her predecessor. Similarly, the tone of the RC members generally was more mutually respectful. Despite this improvement, SAA remains concerned about several issues. Those of greatest concern are (1) missed opportunities for the DFO or Counsel to correct inaccurate statements about details of the law during the meeting; and (2) "moving goalposts" for the work expected of museums and agencies.

### **(1) Review Committee Meeting Process**

SAA's August 2015 letter suggested the DFO begin each meeting by reviewing the RC's role, as this reminds all participants of the nature of the committee's work. With two new RC members, such a review would have been especially valuable. While the DFO explained the composition of the committee (3 museum/scientific representatives, 3 tribal representatives, and 1 consensus nominee), neither she nor Counsel went into the RC's statutory role or responsibilities, nor offered corrections to misapprehensions in statements by RC members.

For example, two RC members asserted that NAGPRA consultations must be in-person meetings. Some ambiguity concerning consultation *per se* does exist, as consultation is not defined in the law and regulations. For the inventory, "Consultation *may* be initiated with a letter, but *should* be followed up by telephone or face-to-face dialogue" (emphasis added). We are concerned that, failing a nuanced and correct reading of the statute and regulations by NNP staff, such member opinions may be interpreted as fact by new RC members and by anyone who attends the meeting or read the transcripts.

SAA also suggested that, to ensure that the RC is well-informed and prepared in advance of each meeting, the DFO develop a firm policy for submitting documentary materials in a timely manner and that the deadlines be enforced. At the November RC meeting, substantial new information and testimony were introduced during the request for disposition of culturally unidentifiable human remains. New information submitted just before or during the meeting complicates the RC's ability to make a measured recommendation, and SAA repeats the recommendation for a firm deadline.

We do appreciate that the DFO and Counsel might not have wanted to appear too heavy-handed during the first meeting of the newly constituted RC, but perhaps there are tactful ways of focusing on the statute and regulations to clear up misconceptions.

## **(2) “Moving the Goalposts” of Compliance, RC Remit, and NNP Workload**

Though the RC has no oversight role when it comes to violations of NAGPRA, the DFO routinely updates the RC on civil penalty investigations as part of the annual report on the activities of the NNP. This last November, the RC Chair stated that museums found to be out of compliance should “stay on [the Committee’s] radar” and be “strongly invited” to come before the RC to provide updates on their progress. It would have been especially helpful for the DFO or Counsel to remind RC members that the RC has no oversight role when it comes to violations of NAGPRA, and that the DFO’s updates are presented as a courtesy.

NNP’s production and updating of formerly drafted reports on compliance –compiled at an earlier RC’s request – are not required of NNP by statute or regulations, so far as SAA can see. We remain concerned about the seeming intent of the second report<sup>1</sup> – one certainly not initiated by the present DFO. This report appears to be based on an assumption that museums were required to provide documentation of their consultations; demonstrate that these occurred prior to the finding of cultural affiliation; and to notify NNP that no consulting party could be identified for certain cases, none of which were required at the time the NAGPRA inventories were due. This appears to question the good faith and legal efforts of those institutions that have actually complied with NAGPRA’s requirements by the initial deadlines and before details of the regulations were known.

From SAA’s viewpoint, this seems to “move the goalposts” for compliance with NAGPRA. We fear that moves such as the reports can be destructive of a mutually trusting relationship between NNP and museums. Moreover, the work involved in compiling and updating these lists, running webinars on them, etc., diminishes NNP’s ability to focus on its core functions with its limited staffing. With that concern in mind, the SAA does recognize and appreciates the fact that the Committee did not assign any new reports to the NNP staff during the recent meeting.

### **Summary**

In sum, SAA observers found the first meeting of the new RC reflected a “fresh start” in tone and leadership of the RC over those of the previous cycle. From our point of view as one of the stakeholders in assuring a balanced and transparent RC process, SAA believes some points require further attention and action. These are especially in the area the DFO’s and Counsel’s orienting the RC to the actualities of the law and regulations, setting consistent standards for submittal of materials, and assuring that the RC does not exceed its legal remit in assigning itself or the NNP staff work.

We appreciate that some of these “corrections” to RC members’ misapprehensions may most tactfully and effectively be conveyed *outside* of the public meeting, at least initially. However, we believe that staying closer to the law and regulations is the path forward for assuring balance and transparency for all concerned.

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<sup>1</sup> “Museums’ and Federal Agencies’ Culturally Unidentifiable Inventories with No Indication of Mailing to Tribes.”

We trust that you and your staff will understand that our candid feedback is intended to help refine the process and understandings of the law and its regulations on the part of all.

Thank you for your attention.

Yours truly,

A handwritten signature in black ink, appearing to read "Diane Gifford-Gonzalez". The signature is fluid and cursive, with the first name "Diane" written in a larger, more prominent script.

Diane Gifford-Gonzalez  
President

cc: David Tarler