November 1, 2023

Dear Honorable Acting Special Counsel Ms. Karen Gorman,

I am providing a response to the Department of the Interior's ("Department") September 6, 2023 response submitted to Former Special Counsel Mr. Henry J. Kerner regarding the October 22, 2021 referral (OSC File No. DI-21-000866) of a whistleblower disclosure referred to the Office of the Special Counsel for investigation by the Secretary of the Interior and the Office of the Special Counsel. The case was referred to the Department's Office of Inspector General (OIG) for investigation.

The whistleblower allegations included substantial violations of laws, rules, or regulations; gross mismanagement; and an abuse of authority by two archeologists at the National Park Service ("NPS") at an NPS Archeological Center ("NPS Facility") by "Archeologist 1" and "Archeologist 2." The Special Counsel referred three allegations to be investigated:

> 1. Archeologist 1 and 2 violated the Archeological Resources Protection Act and the Native American Graves Protection and Repatriation act by facilitating the transfer of looted Native American funerary items and human remains from a third party to NPS;
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> 2. The involvement of Archeologist 1 and 2 with the Southeast Archaeology Foundation ("Partner Organization") and their promotion of personal ventures using the Partner Organization's resources, violated federal regulations and agency policy on ethical conduct; and
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> 3. Archeologist 1 and 2 failed to consult with Native American tribes prior to investigating and excavating burial mounds in violation of statutory, regulatory, and policy requirements.

According to the report, the OIG substantiated over a dozen findings concerning two National Park Service archeologists' interactions with a Partner Organization and improper use of federal resources. This included NPS Archeologist 2's numerous violations of Government Ethics Standards; NPS Director's Order 21; and violations of eight federal laws including 5 C.F.R. § 2635.808; 18 U.S.C. § 209; 31 U.S.C. § 1353; 44 U.S.C. § 501; 5 C.F.R. § 2635.101(b)(2) and (14); 5 C.F.R. § 2635.702(b); and 5 C.F.R. § 2635.704. The OIG also determined that NPS Archeologist 2 improperly used funds of over $13,888.90 (including moving some to his personal bank account); benefited from travel to conferences being improperly paid by the partner organization; and having hired family members for government work. These violations spanned over an approximately 8-year time-frame.

The OIG, however, incorrectly concluded that the two National Park Service archeologists in question did not violate the Archaeological Resources Protection Act ("ARPA") or the Native American Graves Protection and Repatriation Act ("NAGPRA"). This finding is completely in error and an incorrect determination, and must be found to be in error, and reversed, or this is a true miscarriage of justice. A failure to reverse this inaccurate determination will likely contribute to a flawed legal precedent that will hinder future pursuits of justice.

The activity in question stems from the illegal looting of Native American burial mounds on federal property (Tyndall Air Force Base, near Panama City, Florida) in the late 1960s by a private looter. Though this case is not about the looter's illegal actions, *per se*, it is about the illegal actions of the two NPS Archeologists who acted corruptly and who conspired to and successfully engaged a private citizen to violate ARPA and NAGPRA in their interest. In so doing, NPS Archeologist 1 and 2 violated ARPA and NAGPRA.

Ample evidence exists to indicate that the looter of funerary pots and Native American human remains from federal property had no right of possession for this collection, and had in fact, for nearly 50-years, harbored stolen federal property (*e.g.,* Native American funerary pots) and the human remains of two Native American people he had illegally removed from burial mounds on federal property. The OIG state in their report that they could not "verify whether the archaeological collector possessed a proper permit to excavate archaeological items on federal land" and therefore the two National Park Service archeologists in question did not violate the Archaeological Resources Protection Act ("ARPA") or the Native American Graves Protection and Repatriation Act ("NAGPRA"). The OIG greatly erred in this determination, simply because they could not find a permit, as well as relying on the flimsy premise of taking the word of the looter's widow that her husband "had a permit" to excavate human remains and funerary pots from federal property. This is *impossible*, as the Antiquities Act of 1906 (54 U.S.C. §§320301-320303, see also 43 CFR 3, Preservation of American Antiquities) forbids a federal agency from allowing private excavations and for issuing a permit to a private individual to excavate archeological sites on federal lands for their own personal gain or private collection.

For over a century, the Antiquities Act of 1906 has been the primary historic preservation law that expressly forbids this very type of illegal activity—and specifically promulgates that all "antiquities" and archeological artifacts are to remain under the protection of <u>the United States of America</u>, and they are never permitted to be taken off federal lands to go into private collections. The Antiquities Act established the basis for the federal government's efforts to protect archeological sites from looting and vandalism. It obligates federal land-managing agencies to carry out measures to protect archeological and historical sites on their lands by implementing a permitting process and ensuring that all resulting collections go to educational institutions. As such, the Antiquities Act is the primary legal act that protects archeological resources on federal lands, and includes provisions that requires potential researchers to secure permission from federal land managers to conduct archeological investigations and to remove objects from federal lands; provides for penalties upon conviction for unauthorized activities, such as excavation and removal of objects without a permit; authorizes the President of the

United States to establish national monuments; provides authority to the Secretaries of Agriculture, Interior, and War to review and grant permits to qualified institutions; and most importantly, *requires all excavated materials be permanently preserved in public museums*, not private collections.

Under the *Antiquities Act, § 3.3 Permits; to whom granted*, it states: "Permits for the examination of ruins, the excavation of archeological sites, and the gathering of objects of antiquity will be granted, by the respective Secretaries having jurisdiction, to reputable museums, universities, colleges, or other recognized scientific or educational institutions, or to their duly authorized agents." § 3.5 Application, states: "Each application for a permit should be filed with the Secretary having jurisdiction, and must be accompanied by a definite outline of the proposed work, indicating the name of the institution making the request, the date proposed for beginning the field work, the length of time proposed to be devoted to it, and the person who will have immediate charge of the work. The application must also contain an exact statement of the character of the work, whether examination, excavation, or gathering, and the public museum in which the collections made under the permit are to be permanently preserved. The application must be accompanied by a sketch plan or description of the site or area to be examined, excavated, or searched, so definite that it can be located on the map with reasonable accuracy." The evidence provided to the OIG in this case clearly indicates that the looter did not meet any professional qualifications, was not part of any reputable museum, university, college, or other recognized scientific or educational institution, nor was he a duly authorized agent. Therefore, evidence overwhelmingly indicates that this collection was obtained without a permit and that the looter did not have right of possession.

Even if a permit had been issued to the looter, it still would have been a violation of the Antiquities Act, as the looter did not have the right of possession to keep this federal collection, and he would have been required to have placed the artifacts in an approved educational institution, museum, or a curatorial for perpetuity. No federal agency would ever have permitted the looting of mounds for looters to add funerary pots and human skulls to their private collections. Therefore, the OIG erred, and should have determined that the looter illegally obtained and illegally possessed this collection, and the looter did not have the authority to sell them. His earlier action was in violation of the Antiquities Act (16 U.S.C. 431-433), and later in 2017, the looter again violated ARPA and NAGPRA by trafficking in Native American human remains and funerary objects from federal lands that he did not have the right of possession for.

Evidence provided to the OIG demonstrated that the two National Park Service archeologists understood the person who "offered to sell" the items to them was not a professional, rather a looter, and that he was in possession of a massive collection of looted artifacts and Native American human remains illegally stolen from burial mounds all over the panhandle of northern Florida. The OIG determined that that in 2017, this same looter approached NPS Archeologist 1 and "…offered to sell the NPS some Native American potsherds that he retrieved from burial mounds on Tyndall Air Force Base near Panama City, Florida, in the 1960s." These were not simply "potsherds." This is a *substantial* collection constituting five large boxes of at least 21 nearly whole Native American funerary pots. Over 1200 years ago, people of the Swift Creek and Weeden Island Periods had placed these funerary pots in burial mounds with their Ancestors as

grave goods, as part of ceremonial death rites. Many of these funerary pots are decorated with intricate Swift Creek Complicated Stamped and Weeden Island Incised decorations and markings that indicate they were mortuary items, and most have "kill holes" at the bottom of the pots that were done in ceremony by Native Americans as part of the final death rite for their Ancestors. These funerary pots were never meant to be disturbed and removed from the burial mounds and their Ancestors they were placed with, as this disrupts the sacred resting places and the journeys of these people. As well, to remove the skulls and human remains of these Ancestors from their graves is an inhuman, despicable crime. This is the very reason that Congress enacted the Native American Graves Protection Act (NAGPRA) and the Archaeological Resources Protection Act, to protect the wholesale looting and decimation of Native American graves and burials.

According to the OIG, NPS archeologist 1 told the collector that the NPS could not purchase the items from him because the purchase would be in violation of 18 U.S.C. § 1170. This proves that NPS Archeologist 1 was aware that under 18 U.S.C. § 1170(a), "Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains as provided in the Native American Graves Protection and Repatriation Act shall be fined in accordance with this title, or imprisoned not more than 1 year and 1 day, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 10 years, or both." NPS archeologist 1 was also likely aware that under the act, 18 U.S.C. § 1170 (b), "Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 10 years, or both." NPS archeologist 1 admitted he was aware of the law, and yet he purposefully circumvented the law to obtain the collection for his own morbid research, study, and use.

According to the OIG, NPS Archeologist 1 "asked a friend of his (Person 1) to purchase the potsherds from the archeological collector." This proxy "straw" buyer was requested by NPS archeologist 1 to purchase the items for him so that he could circumvent the law and obtain the collection. According to the OIG, Person 1 in fact gave a personal check for $1,000 to NPS Archeologist 1 so that NPS Archeologist 1 could go to the looter's house to purchase the collection, as well as two Native American skulls. NPS Archeologist 1 and NPS Archeologist 2 drove nearly 2 hours over to the looter's private residence to purchase the collection from the looter. According to the OIG, Person 1, acting as a proxy "straw" buyer who provided the money to NPS Archeologist 1 to purchase the funerary collection, never intended to take possession of the collection and intended to purchase it solely for NPS Archeologist 1. Person 1 never took possession of the 21 funerary pots, and they were transported directly to the NPS Archeological Center by NPS Archeologist 1 and NPS Archeologist 2, where they were then stored for nearly 5 years in carboard boxes on a hallway shelf until they were confiscated as evidence by the OIG in 2021. The Native American skulls were insensitively handled, viewed, photographed, and studied by NPS Archeologist 2, who also directed University students and NPS staff to 3D digitally scan the funerary pots and skulls to create a permeant

digital record and to aid him in his planned publications. Even though National Park Service staff used the facilities of the NPS archeological center, stored the collections on site, expended staff time and NPS funds to work on researching and documenting the collection (which constitutes the definition of "a Federal Undertaking" under Section 106 of the Historic Preservation Act, no Native American tribal consultation or Section 106 Consultation was ever done on any of this work, which is a violation of the NHPA.

Even though NPS Archeologist 1 stated that his intention was to "donate them" to the State of Florida, he did this without the prior permission or approval from the State of Florida, or the NPS. The actions of NPS Archeologist 1 are clearly in violation of ARPA, as the law stipulates that offering or assisting, with the arrangement to sell, purchase, exchange, transfer and/or transport of these items is a violation of ARPA (16 U.S.C. § 470ee(b)), and that their willing and knowing involvement in facilitating these acts was conspiratorial in nature and amounts to illicit trafficking of archeological resources. Any exchange, receipt, or transport of the funerary objects and/or human remains constitutes violations of ARPA, as well as of Florida's unmarked burial laws (Title XLVI Chapter 872) and NAGPRA (25 U.S.C. § 3001 et seq.). Further, ARPA 16 U.S.C. § 470ee (d) stipulates that it is a violation for any person to knowingly counsel, procure, solicit, or employ any other person to violate any sections of the act. Both NPS Archeologist 1 and 2's actions were clearly violations of NAGPRA and ARPA. The use of NPS equipment and funds to handle, apply glue, reconstruct, study, photograph and 3D digitally scan this funerary collection without proper consultation with Native American tribes is also a violation of NHPA.

The OIG report states that NPS archeologist 1 told OIG investigators that he subsequently gave the human remains and potsherds to a Collections Conservation Supervisor employed by the State of Florida. During the OIG investigation, they interviewed the State of Florida Collections Conservation Supervisor who denied receiving any potsherds from Archaeologist 1, and who told the OIG that the State did not accept artifacts that were not collected on State Land (indicating they likely knew they were from federal lands). Interestingly, the State of Florida did accept the two Native American skulls, but not the 21 funerary pots, even though all were from the same federal property. It should be underscored that that the State of Florida did not and does not have the right of possession of this stolen federal property, even though NPS Archeologist 1 "donated" the collection to them. The looter did not have the permission to excavate and retain this collection, nor did he ever have the right of possession. NPS Archeologist 1 and 2 did not have the authority or right as NPS archeologists or as private citizens to offer to sell, purchase, exchange, transfer, or transport stolen Native American human remains and funerary pots from federal lands. To do so was a crime. To have counseled, procured, solicited, and arranged a private citizen (Person 1) to purchase the funerary pots and skulls did not circumvent the law, it violated the law. That Archeologist 1 admitted awareness of 18 U.S.C. § 1170 demonstrates that he knowingly violated the act. That NPS Archeologist 1 and 2 conspired to obtain this collection for profit to the looter (who benefited from the financial transaction) amounts to trafficking.

Unfortunately, the OIG made another major error when they concluded the following. In their report they state:

> The OIG also evaluated if Archaeologist 1 and 2 violated 18 U.S.C. § 1170 when they came into possession of the human remains potentially of Native American origin. 18 U.S.C. § 1170 is only applicable if human remains of a Native American are transported for sale or profit. Because neither Archeologist 1 nor 2 transported the human remains for profit, the OIG determined that their actions did not violate 18 U.S.C. § 1170.

NPS Archeologist 1 and 2 were certainly engaged in illegally trafficking of stolen funerary items, and transported the collection, including the two Native American skulls, *for profit*. According to the OIG, NPS Archeologist 1's "friend" (Person 1) paid $1,000 for the collection with her personal check, and so the looter certainly profited from this sale. Money was exchanged, stolen federal property was sold and NPS Archeologist 1 and 2 arranged for, coordinated, offered, and transported this collection—inclusive of illegally looted Native American funerary pots and Native American skulls—for profit. One cannot deny that the transaction was financial, that the transaction was for profit, that the transaction was arranged for by NPS Archeologist 1 and 2, and that none of this would have transpired without the direction of NPS Archeologist 1 and 2 to do so. Archaeologist 1 and 2 therefore clearly violated 18 U.S.C. § 1170. Again, NPS Archeologist 1 and 2s' involvement, offering and assisting with the arrangement to sell, purchase, exchange, transfer and/or transport of these items is a clear violation of ARPA (16 U.S.C. § 470ee(b)), and NPS Archeologist 1 and 2's willing and knowing involvement in facilitating these acts amounts to illicit trafficking of archeological resources.

Even in the absence of proof of a monetary exchange for the skulls themselves, ***any*** exchange, receipt, or transport of the funerary objects and/or human remains constitutes violations of ARPA, as well as of Florida's unmarked burial laws (Title XLVI Chapter 872) and NAGPRA (25 U.S.C. § 3001 et seq.). Further, ARPA 16 U.S.C. § 470ee (d) stipulates that it is a violation for any person to knowingly counsel, procure, solicit, or *employ* any other person to violate any sections of the act. As such, prohibited acts and criminal penalties under ARPA §470ee(b), "Trafficking in archaeological resources the excavation or removal of which was wrongful under Federal law" states the following: "No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange any archaeological resource if such resource was excavated or removed from public lands or Indian lands in violation of—…. (2) any provision, rule, regulation, ordinance, or permit in effect under any other provision of Federal law." Again, since there is evidence of a violation of the Antiquities Act (the looter did not have the right of possession of the funerary pots and Native American skulls, the looter did not have the authority to sell stolen federal property; and NPS Archeologist 1 and 2 *knowingly* engaged in a financial transaction, for profit, for purchasing the funerary pots, as well as to take into possession and transport the Native American skulls, is unquestionably a violation of ARPA and NAGPRA. The fact that NPS Archeologist 1 and 2 *knowingly* "procured" and solicited funds from their friend, Person 1, to purchase this federal collection is even more egregious. The corrupt and conspiratorial nature of these actions by NPS Archeologist 1 and 2, who used their official positions to circumvent and break multiple laws needs to be strongly condemned.

Lastly, the fact that the OIG substantiated over a dozen violations of Government Ethics Standards; NPS Director's Order 21; and violations of eight federal laws, but that they could not determine that NPS Archeologist 1 and 2 also clearly violated ARPA and NAGPRA on multiple counts suggests that the OIG is more interested in financial crimes, rather than crimes that violate cultural resources laws and Native American civil rights, which is at the heart of the Native American Graves Protection and Repatriation Act. That the OIG would not put forth more effort into determining that clear, and very egregious violations of ARPA and NAGPRA in fact did occur, is very disappointing. No doubt that the Department of the Interior is taking a monumental risk to its reputation by not finding that ARPA and NAGPRA were indeed violated by two very malfeasant, corrupt and rogue NPS Archeologists. Without an official condemnation for their illicit actions, there is bound to be widespread public outcry from Native American tribes, the Historic Preservation Community, NAGPRA practitioners, human rights advocates and ethical archaeologists who will never condone this lack of a finding.

I beseech the Department to reverse this finding and find that there is more than probable cause to find that NPS Archeologist 1 and 2 violated NAGPRA and ARPA. These egregiously unethical and despicable actions by NPS Archeologists need to serve as an example of exactly why Congress enacted these very laws—to protect the most sensitive and fragile resources from being removed from their resting places, and to provide equal protection under the law to Native American graves, burial sites and human remains.

Lastly, I implore the Department of Interior to officially resubmit the case to the US Attorney's Office and request a formal declination of both ARPA and NAGPRA charges to enter into the official Administrative Record that the Department in fact brought the findings of these violations to the US Attorney's Office for due consideration. This will also allow the Agency Official to pursue a more accurate Administrative Investigation and to be able to take a more appropriate action in this case.

Thank you to you and your staff very much for your attention to this important investigation.

Sincerely,