



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

September 22, 2016

The President  
The White House  
Washington, D.C. 20500

Re: OSC File No. DI-13-3684

Dear Mr. President:

Pursuant to my duties as Special Counsel, I am forwarding to you reports from the Department of the Interior based on disclosures received from a whistleblower formerly employed by the Bureau of Reclamation (BOR), Mid-Pacific Regional Office (MPRO), Sacramento, California. I reviewed the reports and, in accordance with 5 U.S.C. § 1213(e), provide the following summary of the agency investigation and whistleblower comments, as well as my findings.<sup>1</sup>

The whistleblower, Patrick Williams, who consented to the release of his name, was a museum specialist in archeology at MPRO from 2007 to 2013. He alleged that MPRO failed to comply with requirements of the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), 25 U.S.C. § 3001, *et. seq.*, and 43 C.F.R. Part 10 – Native American Graves Protection and Repatriation Regulations.

The Office of Special Counsel (OSC) referred Mr. Williams's allegations to Secretary of the Interior Sally Jewell for investigation and report under 5 U.S.C. § 1213(c) and (d). Secretary Jewell delegated responsibility for reviewing and signing the report to then-Assistant Secretary for Water and Science Jennifer Gimbel.

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<sup>1</sup>The Office of Special Counsel (OSC) is authorized by law to receive disclosures of information from federal employees alleging violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. § 1213(a) and (b). OSC does not have the authority to investigate a whistleblower's disclosure; rather, if the Special Counsel determines that there is a substantial likelihood that one of the aforementioned conditions exists, she is required to advise the appropriate agency head of her determination, and the agency head is required to conduct an investigation of the allegations and submit a written report. 5 U.S.C. § 1213(c). Upon receipt, the Special Counsel reviews the agency report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(e)(2). The Special Counsel will determine that the agency's investigative findings and conclusions appear reasonable if they are credible, consistent, and complete based upon the facts in the disclosure, the agency report, and the comments offered by the whistleblower under 5 U.S.C. § 1213(e)(1).

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## **Background**

NAGPRA provides a mechanism for federal agencies and museums to return Native American cultural items, such as human remains, funerary objects, sacred objects or objects of cultural patrimony, to lineal descendants and culturally-affiliated Indian tribes and Native Hawaiian organizations. According to Mr. Williams, many of MPRO's holdings, a significant number of which are stored at MPRO's New Melones Artifact Storage Facility in Jamestown, California, are unaccessioned and uncatalogued cultural collections that include human remains and artifacts. Accessioning is the formal, documented process to legally add an object or group of objects to a museum collection.

The agency investigation substantiated two elements included in one of Mr. Williams's four allegations. These elements involved the timely consultation with the potentially affiliated tribes regarding a human tooth that San Francisco State University (SFSU) returned to BOR in March 2013.

The report explained the distinction between NAGPRA cultural items, such as human remains, and museum property. NAGPRA cultural items are not museum property. Neither NAGPRA and its implementing regulations, nor DOI or BOR policies and procedures, require NAGPRA cultural items to be accessioned or catalogued. Indeed, the report states that the intent of the Reclamation Manual Directive and Standards is "... to establish policy and procedure for addressing NAGPRA cultural items after the enactment of NAGPRA to ensure NAGPRA cultural items are no longer accessioned into Reclamation's permanent museum collection, but instead, are properly safeguarded until their repatriation can be effected." A summary of the disclosures and DOI's investigative findings follows.

## **The Allegations and the Initial Agency Report**

### *MPRO failed to properly catalogue and accession NAGPRA-related items*

Mr. Williams alleged that management instructed MPRO staff to set aside collections with human remains without accessioning or cataloguing them. (Memorandum dated September 7, 2012 entitled "Museum Property Procedure.") As a result, according to Mr. Williams, MPRO maintained records for initial site surveys and excavations, but, post memorandum, it no longer recorded or analyzed data on items uncovered from subsequent excavations. Consequently, MPRO failed to properly accession thousands of items and human remains recovered from the New Melones Reservoir Project. Mr. Williams asserted that many of these remains and items have been in the possession of MPRO for approximately 30 years. Mr. Williams alleged that MPRO's failure to properly record and catalogue newly-discovered and long-stored human remains and funerary items in its possession violated NAGPRA.

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The investigation determined that the September 7, 2012 memorandum was not intended to delay or prevent the identification and repatriation of NAGPRA cultural items, as alleged. Rather, the memorandum was an attempt by management to ensure the integrity of its museum property and NAGPRA programs. Mr. Williams is not, according to the report, a physical anthropologist and did not have NAGPRA identification or inventory experience. He and other employees were instructed via the September 7, 2012 memorandum to set aside possible human remains until a qualified anthropologist could examine and inventory them to prevent the incorrect identification of faunal (animal) remains as NAGPRA human remains and the entering of incorrect information into the Region's accession books.

The report found no merit to Mr. Williams's additional allegation that MPRO did not prepare a written summary of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony within three years of NAGPRA's enactment. Similarly, the investigation determined that Mr. Williams's contention that MPRO failed to properly accession thousands of human remains and funerary objects recovered from the New Melones Reservoir Project was inaccurate. Again relying on the distinction between NAGPRA cultural items and museum property, the investigation found that the process of entering NAGPRA cultural items into BOR's museum property collection via accessioning is prohibited.<sup>2</sup> In addition, the report stated that it was unlikely that archeologists recovered significant numbers of human remains during construction of the project, as alleged by Mr. Williams, because they were required to leave any human remains discovered in place.

*MPRO failed to properly document loans of funerary objects*

Mr. Williams alleged that MPRO violated the provisions of NAGPRA, requiring agencies to maintain detailed records of loans of Native American remains and artifacts. According to Mr. Williams, MPRO does not have curation agreements with or loan documentation from non-federal repositories known to be in possession of BOR collections and artifacts. Mr. Williams disclosed that MPRO has loaned funerary objects to museums and academic institutions without completing required loan documentation in violation of DOI policy, thus rendering these items untraceable. Additionally, Mr. Williams asserted that, in accordance with NAGPRA, items for which cultural affiliation has been determined can only be part of an exhibit, loan, or research project after consultation with and written approval from the lineal descendants or affiliated tribe.

The investigation did not substantiate this allegation. Again, the report cited the distinction between museum property and NAGPRA cultural items and stated that

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<sup>2</sup> According to the report, the concern with accessioning NAGPRA cultural items in BOR's museum property records is that once they are accessioned, they must be formally deaccessioned before the items can be repatriated to a tribe. The report describes the deaccessioning process as "lengthy and cumbersome" but necessary "... to remove any indicia of ownership by the United States prior to repatriation."

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curation agreements are typically used for the long-term housing or storage of museum property with non-federal repositories, while loan agreements typically involve a limited number of objects for a short period of time. The investigation found that MPRO does not have museum property curation agreements in place with non-federal facilities "... because of complicated, unresolved ownership issues." It did not identify any legal violations or conclude that the lack of curation agreements and loan documentation constituted a NAGPRA violation. Similarly, the report did not substantiate the allegation that MPRO loaned funerary objects to museums and academic institutions without completing required loan documentation. The report explained the cards Mr. Williams referred to as "loan cards" were actually "object removed" cards used to denote the location from which a stored item was temporarily removed for purposes of short-term loans. None of the "object removed" cards cited by Mr. Williams corresponded to NAGPRA items, and the directive cited by Mr. Williams applies only to museum property. Similarly, the investigation did not substantiate Mr. Williams's assertion that many BOR collections and artifacts on loan to non-federal repositories have not been accessioned in MPRO records or Interior Collection Management System (ICMS), because accessioning is strictly a museum property action. Finally, the investigation did not substantiate Mr. Williams's allegation that MPRO did not verify or report loans because of a lack of staff, time, or money. Rather, the investigation concluded that museum property collections in non-federal facilities have not been accessioned because of a lack of clarity regarding ownership. Thus, according to the report, no violation of NAGPRA or museum law, regulation, or policy occurred.

*MPRO failed to notify Native American tribes of NAGPRA-controlled artifacts*

Mr. Williams alleged that, since the 1970s, MPRO failed to comply with NAGPRA provisions requiring federal agencies to inform Indian tribes of long-stored or newly-discovered human remains and funerary artifacts in its possession. By way of example, Mr. Williams reported that BOR notified the Paiute Tribe of human remains and funerary objects found during an initial survey and excavation of the Los Melones Project, Tuolumne County Site, but did not inform potentially affiliated tribes of additional items returned to BOR from SFSU. Mr. Williams further alleged that BOR officials failed to respond to requests from Native American tribes. In his capacity as a museum specialist, Mr. Williams was responsible for compiling and organizing site records and documentation (including correspondence) on the archaeological collections. He asserted that there was no response in the official record to communications from the Yokut and Washo Tribes expressing interest in pursuing reclamation and working through NAGPRA processes to secure the repatriation of human remains and associated funerary objects.

The report substantiated one instance where MPRO did not properly notify potentially affiliated tribes following the discovery of human remains in BOR's possession. Specifically, the inventory list accompanying two boxes of collections

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transferred to BOR from SFSU contained an entry for one human tooth from a cultural site in the New Melones Project area. The investigation found no indication that the MPRO initiated consultation with potentially affiliated tribes regarding the human tooth, as required by NAGPRA, or completed the required revision of the NAGPRA inventory. The report, dated March 13, 2016, concluded that MPRO would be in violation of NAGPRA if it did not initiate consultation and complete the inventory on or before March 31, 2015, two years from the date it received the item via the transfer from SFSU.<sup>3</sup>

The investigation did not substantiate any other instances in which MPRO failed to meet its NAGPRA-mandated obligation to notify Native American tribes of NAGPRA-controlled artifacts. According to the agency report, Mr. Williams's allegation is based on approximately two cubic feet of bone he pulled while accessioning and cataloguing the New Melones collection. The investigation concluded that Mr. Williams's identification of this bone as human was "not credible." With respect to the New Melones Reservoir Project collection, the investigation determined that archeological field excavation teams followed agency policies when they encountered human remains.<sup>4</sup> In addition, the investigation determined that MPRO completed the mandated NAGPRA inventory of the New Melones collection in 1996 and submitted it to DOI's NAGPRA coordination office and the National Park Service's National NAGPRA Program office. The investigation verified that MPRO repeatedly attempted to initiate consultations with Native American tribes by letter.

Mr. Williams provided what he believed were several examples of MPRO's failure to respond to overtures from tribes to pursue repatriation of human remains and funerary objects. The investigation substantiated the allegation that MPRO violated section 5(b)(2) of NAGPRA and agency regulation by failing to respond in a timely manner to a Bishop Paiute Tribe 2011 request for information. The investigation, however, did not substantiate Mr. Williams's allegation that MPRO officials failed to respond to requests from the Director of the Santa Rosa Rancheria expressing interest in pursuing repatriation of human remains and funerary objects from the San Luis Rey collection. Testimony elicited during the course of the investigation established that officials responded to this request, that those discussions were active and ongoing, and that Mr. Williams, in his capacity as a museum specialist, would have no knowledge of or role in these discussions.<sup>5</sup> Mr. Williams also alleged that MPRO failed to respond to similar requests made by the Washoe Tribe between 2012 and 2013. The investigation found no evidence to substantiate this allegation but suggested that Mr. Williams may have confused the

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<sup>3</sup> As noted below, the supplemental report submitted to OSC by the agency indicates that the mandated communication regarding the human tooth was initiated in a timely manner.

<sup>4</sup> This policy, according to the report, required the archeologists working on the New Melones Project to leave human remains undisturbed or, in some cases, the remains would be excavated, analyzed, and returned to the site and reinterred.

<sup>5</sup> With respect to a specific allegation that the Region did not communicate with the potentially affiliated Yokut Tribe of the Santa Rosa Rancheria, the report acknowledged there were gaps in the communication between the Region and the tribe, but that these gaps did not rise to the level of a NAGPRA violation.

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Washoe Tribe with the inquiries made by the Bishop Paiute Tribe to which, as indicated above, MPRO did not respond in a timely manner.

The report stated that MPRO hired a NAGPRA Coordinator in August 2012 who was, at the time of the report, preparing to undertake a follow-up review of the New Melones collection to verify the accuracy of the 1996 NAGPRA inventory. The report stated that, “[i]t would be appropriate for the Region to notify the tribes again and schedule consultation before and during the follow-up review...” While the report determined that there had been no confirmed identifications of human remains in the New Melones collection in addition to those identified in the 1996 NAGPRA inventory, MPRO acknowledged that if, during the course of the follow-up review, previously unreported NAGPRA items were found, MPRO would need to update the 1996 inventory accordingly. In addition, the NAGPRA Coordinator would be responsible for consulting with Indian tribes regarding any newly-identified remains.

*MPRO improperly removed NAGPRA records from ICMS*

Mr. Williams reported that during his tenure, he entered approximately 5,000 NAGPRA artifacts in the ICMS. He contended that in August 2012, Regional Archaeologist Lauren Perry directed that records of human remains and funerary objects be deleted from the ICMS. Mr. Williams asserted that these records were deleted to obscure the number of NAGPRA-regulated collections and loans under BOR’s control and that the deletion of these records constituted a violation of NAGPRA and other regulations.

The agency investigation did not substantiate the allegation. In support of its conclusion, the report made several findings. First, during his interview, Mr. Williams provided conflicting information in response to repeated questions regarding his allegation that he made approximately 5,000 entries of NAGPRA artifacts into ICMS, which were deleted. Second, MPRO is not currently using BOR’s ICMS tracking system for its museum property collection. MPRO has not yet developed a system for entering items into ICMS in a manner that utilizes the required field and descriptive terms BOR’s ICMS requires. According to the report, a module was established to permit MPRO employees to practice entering data. Although the database does not log specific changes to records or note deletions to records, a review of the data entered into the module indicated no change in the number of items from the time of the ICMS launch to the investigation, suggesting that no records were deleted. Third, according to the report, the ICMS database is used only for BOR’s museum property, not for NAGPRA cultural items. A specific module for NAGPRA items was created within ICMS for use by other DOI bureaus, but BOR does not require its use. According to the report, if NAGPRA cultural items were entered into ICMS, “the repatriation process would be severely frustrated because [these items] would have to be deaccessioned.” In summary, the investigation concluded that Mr. Williams was, as alleged, instructed not to enter

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NAGPRA items into the ICMS database, but that instruction was correct and there was no basis to conclude that entries were improperly deleted or that MPRO attempted to obscure the number of NAGPRA-related collections and loans under its control.

### **The Agency's Recommendations**

The report made three specific recommendations. First, the report recommended that MPRO re-establish consultation with the Bishop Paiute Tribe concerning the human remains and provide the information they requested in 2011. Second, the report recommended that MPRO initiate consultation with the potentially affiliated tribes regarding the one human tooth that was moved from SFSU to the MPRO repository on March 31, 2013. Finally, the report recommended that MPRO engage additional NAGPRA and museum property specialists to complete the accessioning and cataloging of the museum property collection from the New Melones project and, because of the size of the collection, determine whether any potential NAGPRA cultural items may have inadvertently been included in the collection. If NAGPRA and museum property specialists located such items, the report recommended that MPRO use additional staff to verify these items, assist with NAGPRA's consultation process with appropriate tribes, and effect timely repatriation of NAGPRA cultural items to the tribes. Additionally, the report recommended that MPRO focus its NAGPRA efforts on completing the additional documentation for the San Luis Rey collection affiliated with the Yokut Tribe of the Santa Rosa Rancheria. As a result of these investigative findings, BOR requested \$500,000 in additional funding for NAGPRA-related activities addressed in this report.

### **Mr. Williams's Comments**

Mr. Williams's comments referenced a 2009 Office of Inspector General (OIG) report entitled, "Museum Collections: Accountability and Preservation (December 2009C-IN-MOA-0010-2008)," which found that "DOI is failing to fulfill its stewardship responsibilities over museum collections." While the OIG report did not address BOR's failure to abide by the requirements of NAGPRA specifically, it found a significant backlog of unaccessioned objects stored at the New Melones facility. Mr. Williams asserted that, despite the 2009 OIG report which included 13 specific corrective action recommendations, conditions the OIG found in 2008-2009 have not appreciably changed.

Mr. Williams objected to the conduct of the investigation. He expressed concern that the agency only interviewed five BOR employees; he asserted that the agency should have interviewed additional witnesses and given the opportunity to analyze the items he identified as potentially NAGPRA items. Mr. Williams asserted that the agency conducted the investigation in a manner designed to "rebut the disclosure rather than to obtain the complete picture." Moreover, he contended that BOR investigators accepted the accounts provided by agency officials interviewed without any attempt to independently verify the information they provided. By way of example, Mr. Williams

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cited the investigators' acceptance without independent expert verification that the bones Mr. Williams identified as human were faunal.

Mr. Williams also asserted that although the agency investigation did not substantiate his disclosures, the response "tacitly admits" some of his allegations. For example, Mr. Williams commented that in its recommendation, BOR stated that the New Melones collection is so large that MPRO should use additional staff to verify the existence of any additional NAGPRA cultural items, assist with the NAGPRA consultation process with appropriate tribes, and effect repatriation. Mr. Williams asserted that this recommendation, along with the recommendation that \$500,000 in additional funding be sought, supports his allegation that MPRO was neglecting key NAGPRA functions.

Mr. Williams commented that BOR investigators should have interviewed tribal representatives who were involved in the collections. While the agency declined to interview suggested witnesses because of their purported lack of involvement with the collections, Mr. Williams asserted that the tribal representatives and tribes he suggested be interviewed were directly involved in the collections and should, therefore, have been interviewed.

Mr. Williams requested that OSC require the agency to consult with an independent expert to analyze the bones identified by Mr. Williams as human and by the agency as faunal. Further, Mr. Williams requested that OSC establish a timeline for completion of the agency review of the New Melones collections. Finally, Mr. Williams requested that OSC provide a copy of his disclosure and the agency report to the potentially affected tribes in an effort to address their concerns and to demonstrate BOR's commitment to transparency.

### **The Agency Supplemental Report**

In response to issues Mr. Williams raised in his comments, OSC sought additional information from the agency. With respect to Mr. Williams's comment that nothing has appreciably changed regarding BOR's stewardship of artifacts and collections within its control since the 2009 OIG report, the agency first distinguished between the mandated procedures for accessioning and cataloging museum property and the handling of NAGPRA cultural items. While noting that NAGPRA cultural items are not accessioned or catalogued as museum property, the supplemental report outlined the progress MPRO has made since issuance of the report, including the hiring of a Museum Specialist; the accession of 108 items and cataloguing of 43,893 items since 2009; the completion of all the corrective actions set forth in the OIG inspection report regarding the New Melones Artifact Storage Facility; the 2014 construction of a new curation facility to house the New Melones museum collections; movement of the artifacts stored at the New Melones facility to the newly-constructed facility; and the sorting and organization of the boxes of



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museum collections and associated records in preparation for accessioning and cataloging.

In response to a question as to whether it has made any progress towards compliance with NAGPRA since the OIG report, the agency (first noting that the report addressed museum property rather than NAGPRA cultural items) described several “major accomplishments.” These accomplishments included the 2012 hiring of a Ph.D. level physical anthropologist to serve as the Regional NAGPRA Coordinator; the development by the NAGPRA Coordinator of processes for identifying and handling Native American human remains; consultation with tribes; and development of a NAGPRA database to track cultural items, documents, and consultations. Additional accomplishments included the relocation of NAGPRA cultural items housed at the New Melones Curation Facility to the new facility cited above; the drafting of inventories of these items; the re-packaging of human remains; and the development of plans for identifying NAGPRA documents, records and potential NAGPRA cultural items. Further, in 2015, MPRO submitted draft NAGPRA inventories and initiated or re-initiated consultation with eight potentially affiliated tribes via letters, meetings, and telephone calls; MPRO developed a NAGPRA project management plan and budget for addressing the recommendation presented in the investigation; and BOR received an appropriation of \$500,000 for NAGPRA-related activities, \$255,000 of which was given to MPRO to address the NAGPRA backlog.

In response to a question regarding the impact the OIG report had on the backlog, the agency indicated that no specific programming changes were made as a result of the investigation, but the accessioning and cataloging process was placed on a temporary hold while MPRO developed the plan for moving the museum collection and NAGPRA cultural items to the new facility. After “conducting a 100% inventory” of the collections in the New Melones Curation Facility, the MPRO revised the estimated number of uncatalogued items to 164,981, from the original estimate of 421,657 items.<sup>6</sup> The accessioning and cataloging process was again put on hold, because the new curation facility was completed and the collections were inventoried, moved, and organized. The current full-time, permanent Museum Specialist, with assistance from two temporary staff members, is dedicated to drafting and finalizing the management plan to complete the accessioning and cataloging process and address the backlog.

In response to an inquiry regarding the projected timeline for curing the backlog of unaccessioned and uncatalogued museum property, the agency stated that, assuming the temporary staff is funded through calendar year 2017, the museum collections housed at the New Melones Curation Facility are expected to be accessioned and catalogued by

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<sup>6</sup> The report indicated that the agency could not explain the basis for the origin of this estimate and described it as “likely an informal estimate that was made many years ago” despite the specificity of the number. The report characterized Mr. Williams’s estimate of 1.3 million objects as “a gross overestimate...not supported by the actual housed museum collections.”

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the end of 2017. Any potentially remaining NAGPRA items will be identified in the process of sorting through the museum collection backlog. The agency expects the number of newly-discovered NAGPRA cultural items discovered during this process to be *de minimus*, because the New Melones Project archeologists worked under a policy that required them to leave any human remains in place rather than remove them. MPRO, therefore, established a goal of completing its work on the NAGPRA cultural items in the New Melones Curation Facility by the end of calendar year 2017. The timeframe for completion of the repatriation process is dependent upon the amount of time it takes to complete tribal consultations.

### **Mr. Williams's Comments in Response to the Supplemental Report**

Mr. Williams again stated that the content of the agency's supplemental report tacitly validates the substance of his original disclosure. He noted that although almost three years have passed since he filed his disclosure, the agency is still, according to the supplemental report, developing plans, creating draft inventories and working on the NAGPRA backlog. Mr. Williams noted that NAGPRA compliance continues to remain "a goal and not a reality," and that the renewed effort to comply with NAGPRA is attributable to his disclosure and OSC's referral of this matter to the Secretary. Finally, Mr. Williams maintained that the agency has made little progress to comply with NAGPRA and that "BOR continues to struggle with achieving NAGPRA compliance."

### **The Special Counsel's Findings and Conclusions**

I have reviewed the original disclosure, the agency reports, and Mr. Williams's comments. While, based on that review, I have determined that the agency's reports contain all of the information required by statute and the findings appear reasonable, I share Mr. Williams's concerns regarding the NAGPRA compliance issues. However, while NAGPRA compliance is not complete, the agency has made progress. Evidence of this progress includes the completion of the new curation facility; the relocation of NAGPRA cultural items formerly housed at the New Melones Curation Facility; and the hiring of a full-time Regional NAGPRA Coordinator. The agency has planned additional actions, including the development of a NAGPRA database to track cultural items; the initiation or re-initiation of communication with potentially affiliated tribes; the development of a process for identifying and handling Native American human remains; the establishment of plans for identifying NAGPRA documents, records, and potential NAGPRA cultural items; the development of a NAGPRA project management plan; and the appropriation of \$500,000 to BOR for NAGPRA-related activities. These are all positive steps. However, Mr. Williams is correct that full NAGPRA compliance remains "a goal," and is not yet reality. Therefore, BOR management should take any and all steps necessary to implement and execute the plans and developments cited above and achieve its stated goal of making full NAGPRA compliance a reality by the end of calendar year 2017. BOR's compliance should be reviewed again at that time. I commend

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Mr. Williams for bringing this matter to light; his disclosure and the investigation have resulted in progress toward significant change.

As required by 5 U.S.C. § 1213(e)(3), I have sent copies of the agency reports and Mr. Williams's comments to the Chairmen and Ranking Members of the Senate Committee on Energy and Natural Resources and the House Committee on Natural Resources. I have also filed a copy of this letter, the agency reports, and Mr. Williams's comments in our public file, which is available online at [www.osc.gov](http://www.osc.gov), and closed the matter.

Respectfully,



Carolyn N. Lerner

Enclosures