

**The Society for American Archaeology's Comments on the
Development of NAGPRA Regulations Regarding Unclaimed Cultural Items**

**Comments at Review Committee Meeting
April 20, 2007**

Good afternoon. My name is Susan Bruning and I am appearing today on behalf of the Society for American Archaeology. Thank you for the opportunity to comment briefly regarding the development of regulations relating to unclaimed cultural items under the Native American Graves Protection and Repatriation Act. We participated in consultations earlier this week relating to those regulations and will submit a written statement to augment those comments.

SAA is an international organization that, since its founding in 1934, has been dedicated to the research, interpretation, and protection of the archaeological heritage of the Americas. With over 7,100 members, the Society is the leading organization of professional archaeologists in the United States and is a scientific organization that has consistently contributed to the efforts and discourse on NAGPRA's development and implementation.

At the outset, SAA would like to articulate three perspectives that guide its comments:

Respect. Human remains should be treated with dignity and respect at all times.

Balance. SAA believes that NAGPRA represents a balance among the legitimate interests of all parties who care for and about the human cultural heritage: descendants, Indian tribes, Native Hawaiian organizations, science and the public. In a joint letter presented to President Bush on November 2, 1990, in support of NAGPRA's passage, representatives of the major Native American, museum, and scientific organizations confirmed that NAGPRA represented a "carefully constructed compromise." SAA continues to support that position and encourages those implementing the law to honor the balance of interests reflected in the statute.

Documentation. SAA believes that all human remains and cultural items excavated or removed in accordance with NAGPRA Section 3(c) deserve thorough forensic documentation consistent with professional standards, which will contribute to the process of accurately identifying parties entitled to ownership or control under NAGPRA and will contribute to our collective knowledge about the human past.

I would also like to acknowledge and commend the comments of Mr. Willie Jones and other committee members yesterday who encouraged all parties to this process to listen and to seek to communicate effectively throughout consultation and other aspects of NAGPRA's implementation process. Communication among all parties is an essential element that serves both the letter and the spirit of this law.

In its federal register notice addressing upcoming regulations for NAGPRA Section 3(b) relating to unclaimed remains, the National NAGPRA office posed several questions and requested comments. Briefly, SAA responds to those questions as follows:

QUESTION 1

The first question posed by National NAGPRA asks how the regulations should distinguish among various categories of cultural items in federal care. Those categories are treated in a variety of ways by Section 3, with the unclaimed items regulations applicable to some categories but not to others.

We would like to speak to three overall categories of cultural items removed from federal or tribal lands since NAGPRA's enactment. Section 3 provides inherent ownership or control by some parties without a need to make a claim. For other items, a claim is required to establish ownership or control. The third category of items are those that remain outside the ownership or control provisions of Section 3. The second category of cultural items – those for which a claim is required – is the only category that should be subject to regulation under Section 3b.

First: No Claim Required. Identified **lineal descendants** and Indian tribes and Native Hawaiian organizations from whose **tribal land** cultural items are removed have the right to control the disposition of certain cultural items without have to make a claim. These parties take priority of control even if there are other qualified claimants based on cultural affiliation, aboriginal land, use, or other cultural relationship.

Second: Claim Required.

Affiliation: Under Section 3(a)(2)(B), if an Indian tribe or Native Hawaiian organization demonstrates **cultural affiliation**, then the tribe or organization may establish ownership or control under Section 3. Here, however, a claim *is* required to establish ownership or control in the item. Cultural affiliation is a key basis for many resolutions under NAGPRA, and it should be a topic of continued focus as we address the ways in which parties can work towards resolving the status of unclaimed items.

Aboriginal Lands/Cultural Relationship: Claims of ownership or control based solely on **aboriginal land use** or **cultural relationship** not rising to the level of affiliation are specific and limited in scope under NAGPRA. The statute sets explicit requirements in Section 3(a)(C) for parties to qualify under these bases.

The statute requires that, in order to qualify as an **aboriginal land claimant** under Section 3a, a tribe must have had its aboriginal land claim recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims. Section 3 is unambiguous about this requirement.

In order for a party to claim human remains or other cultural items based solely on a **cultural relationship** that does not rise to the level of cultural affiliation, two key

elements must exist: *first*, there must be no ascertained lineal descendant, tribal land rightsholder or culturally affiliated tribe or organization, and, *second*, there must be a qualified aboriginal land claimant. If, and only if, those elements are met, then the statute empowers the claimant to take precedence over the interests of the aboriginal land claimant by demonstrating its stronger cultural relationship.

The structure of Section 3a, with its very specific limits on aboriginal land and cultural relationship claims, highlights the fact that NAGPRA anticipates **cultural affiliation** as the primary basis for resolving ownership and control of Native American cultural items.

Parties obtaining ownership or control of items based on cultural affiliation, aboriginal land interests, or cultural relationship **must make a claim** and meet the requirements set forth in the statute in order to establish those rights under Section 3a. If no claim is made, then the items would properly fall within the “unclaimed items” regulations.

Third: Items outside the ownership or control provisions of Section 3.

Ownership or control of some cultural items removed from Federal lands since NAGPRA’s enactment may not be established under Section 3 because no party meeting Section 3a’s requirements has been identified.

At this week’s consultation, we were requested to comment on the status of claims by **non-federally recognized groups**.

NAGPRA very explicitly limits qualifying claimant groups to Indian tribes and Native Hawaiian organizations as defined in the statute. Section 12 of NAGPRA states:

“This Act reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations *and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.*”(emphasis added)

The statute clearly sets forth the requirements for a tribe or organization to have standing to make a claim under NAGPRA. Unambiguous requirements of a statute cannot be expanded or contracted by regulation. We are all subject to the statutory parameters within which we seek to most effectively and fairly implement NAGPRA.

We acknowledge that there are many organized and long-standing Native American groups who, for a variety of reasons, remain non-federally recognized. There are also groups whose relationships to aboriginal lands were not recognized by a final ICC or Court of Claims judgment. However, when implementing NAGPRA, we are constrained by the requirements of the statute, and NAGPRA is unequivocal in its requirements for groups to have legal standing to assert a claim under NAGPRA.

Unclaimed Items and the Claims Process – general comments

Items subject to claims under Section 3a but not claimed by a party authorized to make a claim can qualify as “unclaimed items” subject to regulation under Section 3b. However, items *not* subject to claims under Section 3a are not subject to regulation under Section 3b. This includes items that do not need to be claimed due to a descendant’s or tribe’s inherent ownership or control under Section 3a as discussed earlier, and it also includes items for which there is no claimant meeting Section 3a’s requirements, in which case ownership or control remains with the federal government under ARPA and other applicable law. If, at a later time, a party having ownership or control rights to such an item under Section 3 is identified, then the status of that item can change and the claims process can proceed.

The process of asserting a claim should be simple and low cost, providing those parties with the right to make a claim the ability to establish their rights and thereafter work with the repository on its own timetable, in accordance with its particular circumstances, to determine an appropriate disposition plan for the item. Items for which a rights holder is identified under Section 3 should be handled in a manner protective of those rights, and items without an identified Section 3 rights holder should be cared for in a manner that protects the rights of others, including potential future claimants and the public interested in our shared human heritage, consistent with the balance of interests acknowledged in NAGPRA.

QUESTION 2. SAA believes that the federal curation regulations set forth at 36 CFR 79 establish an appropriate structure for the management, preservation, and handling of human remains and other cultural items in federal care. The current structure can serve as a foundation upon which to enhance ways in which museums, agencies, tribes, and organizations can, as Madam Chair mentioned yesterday, work together to develop “best practices” that are consistent with professional standards and the cultural interests of the Native American groups involved.

While in the physical custody of a repository, irrespective of ownership status, human remains and cultural items should be curated according to professional standards and in a manner that can accommodate appropriate handling and access, consistent with the interests addressed by NAGPRA. The curation regulations acknowledge that certain items may be of religious or cultural importance to Indian tribes and Native Hawaiian organizations, and they allow for the development and implementation of specific terms and conditions to accommodate those needs while in federal care. A number of museums have had successful experiences working with tribes in a collaborative manner to develop appropriate parameters for ongoing curation of cultural items. Their experiences may serve as useful models for other institutions working with Native American descendants, tribes and organizations in the context of federal curation. This is another area where ongoing dialog can help all parties involved understand the interests and concerns at stake and lead to the most effective and appropriate means of caring for these items.

Thank you for your time and attention.