



SOCIETY FOR AMERICAN ARCHAEOLOGY

November 28, 2005

Dr. Sherry Hutt
Manager, National NAGPRA Program
National Park Service
1849 C Street N.W.
Washington, DC 20240

Dear Dr. Hutt:

Please find attached the Society for American Archaeology's response to the Federal Register notice of October 7, 2005, requesting comments from museums and scientific organizations regarding the Department of the Interior's development of regulations for the disposition of unclaimed cultural items under NAGPRA. The accompanying statement follows up and formalizes more preliminary comments delivered by Keith Kintigh on behalf of SAA in National NAGPRA's consultation with museums and scientific organizations in Albuquerque on November 15th, and his and Susan Bruning's comments on this issue to the NAGPRA Review Committee on November 16, 2005.

The SAA is an international organization that, since its founding in 1934, has been dedicated to research about and interpretation and protection of the archaeological heritage of the Americas. With more than 6900 members, the Society represents professional archaeologists in colleges and universities, museums, government agencies, and the private sector. The SAA has members in all 50 states as well as many other nations around the world.

The accompanying comments are SAA's formal reply to your invitation for consultation. In addition to their use by National NAGPRA, we request that they be distributed to the full Review Committee, which expressed considerable interest in them.

Thank you for the opportunity for consultation.

Yours truly,

A handwritten signature in black ink, appearing to read "Kenneth M. Ames", written over a light blue horizontal line.

Kenneth M. Ames
President
Society for American Archaeology

cc: Rosita Worl

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

With more than 6900 members, SAA is the leading organization of professional archaeologists in the United States. Starting in 1989, SAA led the scientific community in working with congressional staff on the language of the Native American Graves Protection and Repatriation Act (NAGPRA). We provided testimony at Senate and House Committee hearings and helped form a coalition of scientific organizations and Native American groups that strongly supported NAGPRA's enactment. Since that time, we have closely monitored its implementation and have consistently provided comment to the Department of the Interior, to the NAGPRA Review Committee, and to the Congress.

With this letter SAA responds to the Federal Register notice of October 7, 2005¹, requesting comments from museums and scientific organizations regarding the Department of the Interior's development of regulations for the disposition of unclaimed cultural items under NAGPRA. This statement follows up the more preliminary comments provided by Keith Kintigh on behalf of SAA in National NAGPRA's consultation with museums and scientific organizations in Albuquerque on November 15th and his and Susan Bruning's comments on this issue to the NAGPRA Review Committee on November 16, 2005. SAA's thinking on this issue has been informed by discussions at the consultation session and at the Review Committee meeting. Thus, these comments should be taken to supersede the oral statements we provided.

Background, Terminology, and Legal Considerations

With this letter we endeavor to respond systematically to the questions posed for the consultation, as listed in the Federal Register notice:

Participants in the consultation meetings are requested to comment on the following issues:

- How should the regulations deal with the distinction between cultural items for which ownership or control has been ascertained pursuant to 43 CFR 10.6 (a) but

¹ Fed. Reg. Vol. 70, No. 194, Page 58741.

the identified lineal descendant, Indian tribe, or Native Hawaiian organization has not claimed the cultural items and cultural items for which ownership or control cannot be ascertained pursuant to 43 CFR 10.6 (a)?

- How long may a cultural item removed from Federal land after November 16, 1990, remain in Federal agency possession before it is considered unclaimed?
- What are the appropriate dispositions for unclaimed cultural items?
- How should the regulations deal with the management, preservation, and use of unclaimed cultural items?

At the outset, SAA would like to articulate certain perspectives that guide its responses to the stated questions:

Balance. SAA believes that NAGPRA presents a balance between the legitimate interests of science and the public and the legitimate interests of lineal descendants, Indian tribes, and Native Hawaiian organizations recognized in NAGPRA.

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

Repository. By “repository” SAA means a museum, federal agency, or federally-funded institution, as defined in NAGPRA, that has custody of human remains or other cultural items discovered on Federal or tribal land since November 16, 1990.

Documentation. SAA believes that all human remains excavated or removed pursuant to an ARPA permit in accordance with 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’s Section 3(a) and will contribute to our collective knowledge about the human past.

Consistency with Law and Policy. The following responses to the consultation questions are constrained by the assumption that any regulations promulgated with respect to unclaimed cultural items must be consistent with NAGPRA and other applicable law (including ARPA), and official DOI policy and are guided by SAA’s Statement of the Treatment of Human Remains, which we believe is consistent with DOI policy.

“**Unclaimed cultural items**” are explicitly defined in NAGPRA section 3(b) as human remains and other cultural items that have not been claimed under the provisions of section 3(a) [see inset].

Proposed Classes of Unclaimed Cultural Items. The National NAGPRA office has suggested a distinction between two classes of unclaimed cultural items which we would characterize as:

- cultural items for which a legitimate claimant has been ascertained pursuant to NAGPRA Section 3(a) but the identified party has not claimed the cultural items; and
- cultural items for which no legitimate claimant has been identified pursuant to the hierarchy presented in Section 3(a).

The questions posed by National NAGPRA suggest a scope for “unclaimed cultural items” that includes cultural items with potential ownership or control by one of the five categories of “claimants” listed in Section 3(a) that have not been claimed by the appropriate claimant *plus* the residual cultural items for which none of the five categories of claimants has been identified.

We suggest, however, that an alternative reading attends more closely to the language of the statute and leads to a somewhat different conclusion.

Section 3(a) describes how ownership or control of cultural items discovered on federal or tribal lands after the enactment of NAGPRA will vest in one of the five parties listed, in lieu of federal government ownership or control under the Archaeological Resources Protection Act of 1979 (ARPA) or other applicable laws. Thus, NAGPRA Section 3(a) is not primarily concerned with identifying claimants but instead, as the title of the section suggests, about establishing “ownership or control.”

SECTION. 3. OWNERSHIP.

(a) Native American Human Remains and Objects.-The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after the date of enactment of this Act, **shall be** (with priority given in the order listed) -

(1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or

(2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony -

(A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;

(B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects **and which, upon notice, states a claim** for such remains or objects; or

(C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe -

(1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, **if upon notice, such tribe states a claim** for such remains or objects, or

(2) if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, **if upon notice, such tribe states a claim** for such remains or objects.

(b) Unclaimed Native American Human Remains and Objects.-Native American cultural items not claimed under subsection (a) of this section shall be disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee established under section 8 of this title, Native American groups, representatives of museums and the scientific community.

A careful review of the text of Section 3(a) reveals that ownership is conveyed automatically (that is, in the absence of a claim) to the first two of the 3(a) categories, which include lineal descendants and tribal landowners [paragraphs 3(a)(1) and 3(a)(2)(A)]. *However*, the remaining three categories specifically demand a statement of a claim by the relevant party to establish ownership.²

Inherently Owned Items. Because the first two categories of claimants inherently own or control items at issue, those items are not subject to formal claims and therefore *cannot* qualify as “unclaimed” under the statute. Hence, they cannot be subject to Section 10.7 regulation as unclaimed cultural items. Ownership is absolute unless it is explicitly relinquished under NAGPRA Section 3(e). When a lineal descendant can be identified, the law understandably does not anticipate any regulatory disposition that might contravene the owner’s prerogative, regardless of the timing of the descendant’s actions to assert control over disposition. Similarly, tribal sovereignty was an issue of

² Note that the custody regulations set forth in 43 CFR Section 10.6 fail to acknowledge the statute’s express language requiring certain parties to state a claim in order to obtain ownership or control of items pursuant to Section 3(a). Nonetheless, the statutory language is controlling, and its requirements must be met.

paramount importance when the Section 3 hierarchy of ownership was drafted. Accordingly, the statutory language leaves cultural items discovered on tribal lands under the ownership or control of the tribe on whose land they were discovered and *not* subject to other disposition by regulation, regardless of the timing of the tribe's actions to assert control over disposition. Thus, neither of these first two categories can ever be considered "unclaimed" and subject to regulatory disposition because there is no claim involved in establishing ownership or control in the first place. Rights to determine disposition under Section 3(a) are preserved in lineal descendants and tribal landowners, regardless of action or inaction by those parties.

Claimable Items. In contrast, the three lower priority categories under Section 3(a) explicitly require claims [see inset above] and, consequently, items available to those parties qualify as unclaimed under Section 3(b) in the absence of a stated claim by the identified party. Where a potential claimant is identified, but that claimant fails to state a claim as required by the statute, then the item at issue is subject to regulation under Section 3(b) as an item "not claimed under subsection (a)."

Other Items. Our reading of the law has an important implication. It indicates that those remains and objects for which no party in Section 3(a)'s hierarchy is identified are *not* subject to claims under Section 3(a) and therefore cannot not be categorized as "unclaimed" under Section 3(b). Those items are not legally subject to Section 3(a)'s ownership or control provisions until such time, if at all, that such a party is identified and, if applicable, states a claim. It is important to note that the Section 3(a) hierarchy does *not* allocate ownership or control over all remains and cultural items removed from federal land after NAGPRA's enactment; there is no default category of ownership or control listed in Section 3(a). In light of the ongoing applicability of the Archaeological Resources Protection Act and other federal laws and regulations, we submit that items removed from federal lands but for which no Section 3(a) owner is identified remain under the ownership or control of the Federal government until such time, if at all, that a party identified in a Section 3(a) category is identified and, if applicable, a claim is stated. At that time, ownership or control, and therefore control over disposition, would transfer from the Federal government to the applicable party.

Thus, we conclude that the *only* cultural items subject to regulation as unclaimed remains under Section 10.7 are those items identified above as *claimable items*, which have potential owners in 3(a)(2)(B) and 3(a)(2)(C) (culturally affiliated tribes, occupants of aboriginal lands, or more closely related tribes) whose establishment of ownership requires a claim. We will argue below that that this construal of the law does not leave other human remains or cultural items unprotected, nor does it create any new categories of cultural items under NAGPRA. Instead, this construal helps clarify the items that the statute intends to regulate as “unclaimed,” while acknowledging that the remaining items are given adequate protection under other applicable laws and regulations.

Ownership and Control. Within NAGPRA’s Section 3(a), “ownership or control” is established *either* through a party’s **status** as a lineal descendant or as an Indian tribe or Native Hawaiian organization on whose land the object or remains were discovered *or* by the assertion of a **claim** by a party satisfying the requirements of 3(a)(2)(B) [the most closely culturally affiliated Indian tribe or Native Hawaiian organization] or 3(a)(2)(C) [a tribe on whose formally recognized aboriginal lands the remains or objects were discovered or a tribe with a stronger relationship]. Only the party with the highest priority under Section 3(a)’s hierarchy is entitled to ownership or control. If the individual, tribe or organization with the highest priority has explicitly relinquished ownership or control under NAGPRA Section 3(e), the right to obtain ownership or control would revert to the individual, tribe or organization (if any) with the next highest priority.

Claim. SAA understands a “claim,” for purposes of NAGPRA’s Section 3, to be a formal assertion of ownership or control by one of the Section 3(a)(2)(B) or 3(a)(2)(C) parties which is required to state a claim in order to establish ownership. Asserting a claim vests ownership or control in the Indian tribe or Native Hawaiian organization having priority to assert a claim under Section 3(a) and triggers its ability to control the disposition of the cultural items. However, a claim does *not* necessarily lead to a particular or an immediate disposition. A claim creates a *right to control* disposition; the type and manner of disposition – temporary or ultimate – must then be carried out in accordance with the wishes of the claimant, which will vary in timing, form, and substance based on each claimant’s circumstances.

Disposition. The goal of NAGPRA is not to require universal reburial or universal transfer from federal custody (an option Congress rejected) but instead is to empower designated individuals, tribes, and Native Hawaiian organizations to *control* disposition of the remains or objects, *whatever that disposition might be*. Section 3(c)(3) states that “the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b) of this section.” Thus, SAA believes that "disposition" refers to a final settlement or determination³ with respect to the control over human remains or other cultural items. Disposition may include, but is not limited to, the following:

- transfer of custody of the cultural items to a legitimate owner (for burial, curation, display, or any other use deemed appropriate by the owner.)
- maintenance of the cultural items in a repository under mutual agreement of the owner and the repository.
- temporary maintenance of the cultural items in a repository while the owner determines whether more appropriate disposition options are suitable to its particular circumstances.

(Please note that SAA acknowledges that concerns have been expressed over references to “owning” human remains. NAGPRA accommodates the unique circumstances involving human remains by referring to “ownership or control” rather than merely addressing ownership. As used in this statement, the term “owner” should be read to include a party who is entitled to control the disposition of human remains under NAGPRA.)

SAA will now address the specific questions, slightly restated to conform to our understanding of the statute.

What is the appropriate disposition for human remains and other cultural items whose ownership or control under NAGPRA is subject to the statement of a valid

³ The 8th edition of Black's Law Dictionary provides the following three definitions of "disposition." SAA believes that NAGPRA's legislative history and statutory language both point to the second definition as the most appropriate definition in this context, particularly because the transfer referred to in the first definition may be carried out as one option encompassed by the second definition: 1) The act of transferring something to another's care or possession. 2) A final settlement or determination. 3) Temperament or character; personal makeup.

claim, yet the appropriate Indian tribe, or Native Hawaiian organization has not stated such a claim?

SAA submits that human remains and other cultural items for which a legitimate claimant has been identified in accordance with Section 3(a)'s priority list should remain under the administration (custody) of the Federal government and should be respectfully maintained in a repository meeting Federal standards (36 CFR 79) until such time as they are claimed. The curation regulations set forth in 36 CFR 79 accommodate both *federally-owned* collections and *federally-administered* collections owned by others. While in the physical custody of a repository, irrespective of ownership status, human remains and cultural items will be curated according to professional standards and in a manner that can accommodate the religious needs of Indian tribes and Native Hawaiian organizations with regard to appropriate handling and access.

This disposition has the advantage of maintaining the rights of the claimant to claim the remains or items at any future date. When the language of NAGPRA was negotiated, Congress rejected suggestions that there be a temporal limit on claims under NAGPRA (e.g., that human remains or other cultural items not claimed within 5 years would no longer be subject to claims under NAGPRA). SAA opposed any statute of limitations on NAGPRA claims and continues to do so in this case.

It is important to recognize that any removal of human remains or other cultural items from public control damages the public interest through the loss of their ability to contribute unique knowledge about the past. We see this loss as balanced by NAGPRA's Section 3(a) ownership provisions that *derive from* the claimant's relationship to these human remains and other cultural items.

We further suggest that the regulations might recommend that Federal agencies convey periodic notices to identified tribal or Native Hawaiian claimants of the existence of human remains and other cultural items that they are entitled to claim, along with a brief summary of the conditions of their discovery and the options available to the group including: asserting a claim and taking possession or negotiating a joint curation arrangement with a repository, relinquishment of their claim, not claiming the items but requesting information should any significant action be contemplated for these items, or doing nothing (in which case their ability to claim the cultural items is preserved).

What are the appropriate dispositions for these unclaimed human remains and cultural items whose ownership or control cannot be established under NAGPRA Section 3(a)?

As discussed above, SAA believes that the statute does not authorize NAGPRA regulation of these human remains and other cultural items. However, in the event that authority for such a regulation is found, SAA offers the following comments.

Clear direction has been provided by Mr. Paul Hoffman, Deputy Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior, whose July 28 testimony before the Senate Subcommittee on Indian Affairs forcefully laid out the Department's position:

"We believe that NAGPRA should protect the sensibilities of currently existing tribes, cultures, and people while balancing the need to learn about past cultures and customs. In the situation where remains are not significantly related to any existing tribe, people, or culture they should be available for appropriate scientific analysis."

SAA strongly agrees with this portion of Mr. Hoffman's testimony. Following DOI policy, SAA believes that these human remains and other cultural items should remain under the custody of the Federal government and should be respectfully maintained in a repository meeting Federal standards (36 CFR 79) and should be available for appropriate scientific analysis. It is possible that for some of these remains, ownership or control under NAGPRA 3(a) could be established at some future date. In this case, the proposed disposition has the additional virtue of maintaining the rights of future claimants.

SAA notes that many of the human remains and other cultural items whose ownership cannot be established under NAGPRA have this status because they lack of a significant relationship to a contemporary Indian tribe or Native Hawaiian organization. Despite their classification by Federal agencies as unclaimed cultural items under NAGPRA, current court decisions and DOI policy dictate that some (but not all) of these human remains and other cultural items cannot be considered Native American human remains and are thus not subject to NAGPRA. SAA submits that these remains and items, if

subject to NAGPRA, would fall outside the scope of regulation under Section 3(b) unless and until a legitimate claimant is identified in the hierarchy of Section 3(a).⁴

How long may a cultural item whose ownership or control has been established under NAGPRA and which was removed from Federal land after November 16, 1990, remain in Federal agency possession before it is considered unclaimed?

SAA's proposed dispositions effectively obviate the question. Once the potential ownership or control of remains or objects is established and notice to the potential claimant has been made, but the required claim has not been stated, the items simply remain unclaimed until they are claimed. As noted above, items owned or controlled by lineal descendants or those removed from tribal lands are inherently owned and controlled by those parties, regardless of any assertion of a claim, and therefore they should not fall within the regulatory control of Section 3(b).

How should the regulations deal with the management, preservation, and use of unclaimed cultural items?

The management, preservation, and use of unclaimed remains and other cultural items should be consistent with existing Federal laws and regulations and with the curation policies of the custodial repository. The curation regulations set forth at 36 CFR 79 acknowledge that certain items may be of religious or cultural importance to Indian tribes, and they allow for the development and implementation of specific terms and conditions to accommodate those needs while the items remain in the custody of a repository. Section 79.10(c) states as follows:

⁴ The disposition of culturally unidentifiable human remains (CUHR) is a particular issue about which the NAGPRA Review Committee is charged with making recommendations; we will provide our comments on that issue when those recommendations are made. Note that CUHR may overlap with, but are not wholly subsumed within, the scope of Section 3. CUHR may include remains removed following NAGPRA's enactment as well as other remains in institutional custody. In contrast, unclaimed remains and cultural items subject to Section 3 may include CUHR removed from federal or tribal lands subsequent to NAGPRA's enactment as well as funerary objects, sacred objects, objects of cultural patrimony, and human remains with an identifiable claimant under the Section 3(a) hierarchy.

(c). *Religious uses.* Religious remains in a collection shall be made available to persons for use in religious rituals or spiritual activities. Religious remains generally are of interest to medicine men and women, and other religious practitioners and persons from Indian tribes, Alaskan Native corporations, Native Hawaiians, and other indigenous and immigrant ethnic, social and religious groups that have aboriginal or historic ties to the lands from which the remains are recovered, and have traditionally used the remains or class of remains in religious rituals or spiritual activities.

If there is an Indian tribe or Native Hawaiian organization that is a legitimate claimant under section 3(a)(2)(B) or 3(a)(2)(C) but which has not asserted a claim, it may reasonably wish to dictate or restrict the management, preservation, or use of its unclaimed human remains or other cultural items that remain in a repository. However, in this case, we believe that such individual, tribe or organization should assert a claim and negotiate a mutually acceptable custodial arrangement with the repository. Note that the scope of parties with a potential interest in accessing items for religious or spiritual activities under 36 CFR 79.10(c) may reach beyond the identified claimant under NAGPRA Section 3. Thus, the assertion of a claim under Section 3(a) may also serve as a means by which other parties' activities relating to the religious use of items are restricted in accordance with the expressed wishes of the claimant.

SAA submits that the process of asserting a claim should be simple and low-cost, constituting basically the statutorily-required step of a party stating that it claims a right to control the disposition of remains and other cultural items for which it has received a notice. Once a party provides a written response to that notice, claiming the right to control the disposition of those remains and/or items, then, in effect, the identified party *accepts the identification determined by others* as to its priority right to own or control particular remains and other items. The party thus attains ownership or control as provided in the statute and can thereafter work with the repository on its own timetable, in accordance with its particular circumstances, to determine an appropriate disposition plan for the remains and items.

Conclusion.

SAA respectfully submits that federal regulations for the disposition of unclaimed cultural items under Section 3(b) of NAGPRA should apply to *claimable items*, which include human remains and other cultural items for which (i) a potential owner has been identified within Section 3(a)'s hierarchy, and (ii) a claim must be stated by the potential owner, as required by the statute. Inherently owned or controlled remains and objects, and other remains and objects for which no Section 3(a) party has been identified, are not properly the subject of regulation under Section 3(b). Those human remains and cultural items are governed by other existing laws and regulations and, with respect to culturally unidentifiable human remains, will also be addressed in connection with Review Committee recommendations as required by NAGPRA. Section 3(b) regulations can and should work in complement with the curation regulations set forth at 36 CFR 79 to ensure that curating repositories have consistent guidance with respect to items in their custody.

Finally, the regulations should establish a simple, low-cost process to state a claim under Section 3(a) in order to obtain ownership or control over remains and cultural items. An Indian tribe or Native Hawaiian organization with priority rights identified in accordance with the hierarchy set forth in Section 3(a) should be informed of those rights and should be able to state its claim simply by acknowledging in writing that it claims its right to obtain ownership or control under Section 3(a). This would enable a Section 3 claimant to "upon notice, state a claim," as provided in the statute and thereby trigger its right of ownership or control over the human remains or other cultural items at issue. Disposition of remains and cultural items can thereafter be determined by the claimant in manner and timing suitable to its particular needs and wishes, without the imposition of arbitrary time deadlines or pre-determined disposition options.