

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

**Consultation with the National Park Service
April 18, 2007**

On behalf of the Society for American Archaeology, thank you for the opportunity to consult with the Department of the Interior on the development of regulations relating to unclaimed cultural items under the Native American Graves Protection and Repatriation Act.

The Society for American Archaeology (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. SAA represents professional archaeologists in colleges and universities, museums, government agencies, and the private sector. SAA has members in all 50 states as well as many other nations around the world. 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.

The statements offered here by SAA respond to the Federal Register notice dated April 5, 2007¹, 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.

Background, Terminology, and Legal Considerations

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:

- 1) How should the regulations address distinctions between:
 - a) Human remains, funerary objects, sacred objects, or objects of cultural patrimony remaining in Federal care for which ownership or control is with a lineal descendant or an Indian tribe or Native Hawaiian organization on whose lands the cultural items were discovered?
 - b) Human remains, funerary objects, sacred objects, or objects of cultural patrimony remaining in Federal care for which an Indian tribe or Native Hawaiian organization has stated a claim based on cultural affiliation, aboriginal land, or cultural relationship?
 - c) Human remains, funerary objects, sacred objects, or objects of cultural patrimony remaining in Federal care for which a non-federally recognized Indian group has stated a claim based on a relationship of shared group identity?

¹ Fed. Reg. Vol. 72, No. 69, Page 18192.

- d) Human remains and associated funerary objects remaining in Federal care for which no claim has been made?
- 2) Do current regulations regarding the curation of Federally-owned and administered archaeological collections [36 CFR 79] adequately address the management, preservation, and use of human remains, funerary objects, sacred objects, or objects of cultural patrimony remaining in Federal care?

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 the Archaeological Resources Protection Act (ARPA). Our responses are also guided by SAA's Statement Concerning the Treatment of Human Remains, which we believe is consistent with Department of the Interior’s current policies.

“**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 Categories of Cultural Items. The questions set forth in the Federal Register notice focus on cultural items “remaining in Federal care.” Our comments are based on the assumption that such items have been removed from Federal or tribal land since NAGPRA’s enactment and are in the physical custody of a federally-funded institution or federal agency. The second question posed, relating to the curation regulations, supports this assumption.

Requirement to State a Claim. NAGPRA is very clear about when a claim must be stated in order to vest ownership or control in a party. Because the statute explicitly identifies those times when a claim must be made, SAA feels strongly that the statute should also be read to acknowledge those times when interests vest without the need to state a claim. The interests of those parties whose claims vest without the need to make a claim should be recognized and protected, allowing those parties to assert control over disposition if and as they choose to do so, without the worry that others may assert claims before them and take control over disposition of

the items. In contrast, those who are required to make a claim must do so in order for their interests to vest under the statute.

As discussed in detail below, the SAA respectfully submits the following positions relating to the regulation of human remains and other cultural items as “unclaimed” under NAGPRA and the proper handling of items in federal care:

- (1) Ownership or control over human remains and cultural items removed from federal or tribal lands since NAGPRA’s enactment vests in a lineal descendant, Indian tribe, or Native Hawaiian organization if and as provided in Section 3(a). When the statute requires the assertion of a claim, such a claim must be made by a qualified claimant in order to vest ownership or control in such claimant. ARPA and other applicable law otherwise define ownership and/or control of such items.**
- (2) Human remains and cultural items removed from federal lands after NAGPRA’s enactment should be subject to regulation as “unclaimed cultural items” under 43 CFR 10.7 only if (i) a claim is statutorily required to vest ownership or control under Section 3(a), (ii) a qualifying claimant is identified, (iii) the qualifying party fails to assert a claim, and (iv) no other qualifying party asserts a claim authorized by the statute.**
- (3) The federal curation regulations set forth in 36 CFR 79 adequately and appropriately address the management, preservation, and handling of human remains and other cultural items remaining in federal care unless and until other disposition under NAGPRA occurs. Ongoing curation of items respects the rights of parties who have inherent ownership or control but have not yet requested other disposition. Curation also respects the rights of future claimants to direct disposition if and as they are identified and make a claim. Finally, curation as provided in 36 CFR 79 fulfills the legal requirements of ARPA and other applicable laws relating to the handling of cultural items in federal care.**

QUESTION 1

The first question posed by National NAGPRA asks how the regulations should distinguish among various categories of cultural items in federal care. The question distinguishes among cultural items and claimants in a manner we would characterize as follows:

1. *[Question 1(a)]* **“Lineal Descent Items”**: Cultural items for which a lineal descendant has been identified;
2. *[Question 1(a)]* **“Tribal Land Items”**: Cultural items discovered on tribal lands;
3. *[Question 1(b)]* **“Affiliation Claimants”**: Cultural items for which a claim has been made by a party asserting cultural affiliation;
4. *[Question 1(b)]* **“Aboriginal Land Claimants”**: Cultural items for which a claim has been made by a party asserting rights based on aboriginal land relationship;
5. *[Question 1(b)]* **“Cultural Relationship Claimants”**: Cultural items for which a claim has been made by a party asserting rights based on a cultural relationship other than cultural affiliation or aboriginal land;
6. *[Question 1(c)]* **“Non-Federally Recognized Claimants”**: Cultural items for which a claim has been made by a non-federally recognized group;

7. [Question 1(d)] **“Unclaimed Items”**: Human remains and associated funerary objects for which no claim has been made.

In an effort to be as clear and precise as possible, we will provide our comments by category listed above:

1 Cultural items for which a lineal descendant has been identified (“Lineal Descent Items”):

NAGPRA Section 3(a)(1) provides lineal descendants with first priority of ownership and control over **human remains and associated funerary objects**. Lineal descendants are *not* required by the statute to assert a claim in order to have such priority of ownership or control. It is only if the lineal descendant cannot be ascertained that Section 3(a)(2) allows parties with lower priority rights to assert a claim. SAA submits that the regulations applicable to Section 3(a)² incorrectly permit lower priority parties to claim human remains or associated funerary objects with known lineal descendants if the descendants fail to assert a claim. Section 3(a)(1)(A) does not require a known lineal descendant to assert a claim in order to have his or her interests vest – the statute’s express language gives inherent rights of ownership or control to known lineal descendants.

If a lineal descendant is identified for human remains or associated funerary objects, then in the absence of direction from the descendant those remains and objects should be retained in federal custody and appropriately curated until such time, if any, that a known lineal descendant directs otherwise. Human remains and funerary objects with known lineal descendants cannot qualify as “unclaimed” because no claim is required to vest ownership or control. In contrast, if a lineal descendant is not ascertained, then lower priority parties may proceed with claims for ownership or control as provided in Section 3(a)(2) and if a qualifying claimant is identified but fails to state a claim, then the items may properly fall within the “unclaimed items” regulations.

2. Cultural items discovered on tribal lands (“Tribal Land Items”):

Section 3(a)(2)(A) gives to an Indian tribe or Native Hawaiian organization priority of ownership and control over human remains and cultural items removed from its tribal land, subject only to the higher priority rights of a known lineal descendant (in the case of human remains or associated funerary objects). The statute does *not* require the tribe or organization to state a claim to items removed from its land in order to have a right of ownership and control in those items. In the absence of direction from the tribe or organization, the cultural items should be retained in federal custody and appropriately curated until such time, if any, that the tribe or organization directs otherwise. Tribal Land Items cannot qualify as “unclaimed” because no claim is required to vest ownership or control.

3. Cultural items for which a claim has been made by a party asserting cultural affiliation (“Affiliation Claimant”):

If, with respect to human remains or other cultural items, an Indian tribe or Native Hawaiian organization demonstrates cultural affiliation by a preponderance of the evidence and asserts a claim, then the tribe or organization may have ownership or control under Section 3. If a

² 43 CFR 10.6(a).

qualifying Affiliation Claimant is identified but fails to state a claim, and no other qualifying claimant asserts a claim, then the items may properly fall within the “unclaimed items” regulations.

4. Cultural items for which a claim has been made by a party asserting rights based on aboriginal land relationship (“Aboriginal Land Claimant”):

Claims of ownership or control under Section 3 based solely on aboriginal land use or cultural relationship (discussed in the next point) are very limited and specific in scope and must satisfy the requirements set forth in Section 3(a)(C).

Section 3(a)(C) provides:

“(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) [sic] 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) [sic] 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.” (emphasis added).

The statute makes very clear that a qualified Aboriginal Land Claimant must have had its aboriginal land claim recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims. A claim based on an aboriginal land relationship that was not so adjudged cannot qualify as a claim under Section 3.

Further, such claimant’s right to control the disposition of claimed remains or cultural items is subordinate to a claim by an Indian tribe demonstrating a stronger cultural relationship, if any, as discussed in the next point.

If a qualified Aboriginal Land Claimant is identified but fails to state a claim, and no other qualifying claimant asserts a claim, then the items may properly fall within the “unclaimed items” regulations.

5. Cultural items for which a claim has been made by a party asserting rights based on a cultural relationship other than cultural affiliation or aboriginal land (“Cultural Relationship Claimant”):

Section 3(a)(C)(2) of NAGPRA provides the sole basis upon which a group may assert a claim for items removed from federal land under Section 3 based on a cultural relationship other than cultural affiliation or adjudged aboriginal land use.

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 landowner, or culturally affiliated tribe or organization, and, *second*, there must be a tribe whose aboriginal land rights to

the lands from which the object were removed were recognized by a final decision of the Indian Claims Commission or U.S. Court of Claims. If and only if those elements are met, then the claimant may qualify as a Cultural Relationship Claimant and take precedence over a competing claim by the Aboriginal Land Claimant by demonstrating a stronger cultural relationship.

It is important to reiterate that if there is no qualifying Aboriginal Land Claimant, then there is no basis upon which a party can assert a claim based on a cultural relationship other than cultural affiliation. The structure of Section 3(a)(C) makes clear that a Cultural Relationship Claimant can only assert a claim in order to take precedence over an otherwise qualified Aboriginal Land Claimant with a weaker cultural relationship to the items at issue. It should also be noted that only Indian tribes are listed as parties that can qualify as potential claimants based on cultural relationship.

If a qualifying Cultural Relationship Claimant is identified but fails to state a claim and no other qualifying claimant asserts a claim, then the items may properly fall within the “unclaimed items” regulations.

6. Cultural items for which a claim has been made by a non-federally recognized group (“Non-Federally Recognized Claimant”):

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)

Only groups which satisfy NAGPRA’s definition of “Indian tribe” or “Native Hawaiian organization” are qualified under the statute to make a claim. The Department of the Interior has consistently interpreted NAGPRA’s definition of Indian tribe to mean those Indian tribes granted “federal recognition” by the Federal government, which is reflected in the list of federally recognized tribes prepared by the Bureau of Indian Affairs and referenced by National NAGPRA in its implementation of the NAGPRA process. If an organized group can demonstrate that it is “recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians” then it qualifies under the statutory definition of “Indian tribe.” Native Hawaiian organizations have different qualifying elements: they must (i) serve and represent the interests of Native Hawaiians, (ii) have as a primary and stated purpose the provision of services to Native Hawaiians, and (iii) have expertise in Native Hawaiian affairs.”

Other groups, including those recognized as tribes at the state level, cannot qualify as claimants under NAGPRA without meeting the elements set forth in the statutory definitions. While SAA acknowledges that there are many organized and long-standing Native American groups who, for a variety of reasons, remain non-federally recognized, the statute itself is unequivocal in its requirement that a group meet its definitions of “Indian tribe” or “Native Hawaiian organization” in order to have legal standing to assert a claim under NAGPRA. Similarly, there are groups with ties to lands based on aboriginal occupation, migration, and use, but whose ties have not been recognized by a final judgment of the ICC or Court of Claims. The statute is, once again, unequivocal in its requirement that a final judgment support a claim based on aboriginal land use. Regulations may not circumvent the express statutory language by

granting standing to groups who do not meet the statutory definitions. In direct response to the question posed by National NAGPRA, claims by non-federally recognized groups do not fall within NAGPRA's purview and they should not therefore impact the regulations at issue.

7. Human remains and associated funerary objects for which no claim has been made (“unclaimed item”):

Section 3(a) describes how ownership or control of cultural items discovered on federal or tribal lands after the enactment of NAGPRA may vest in one of five parties (lineal descendants, tribal landowners, culturally affiliated tribes, adjudged aboriginal land occupants, and culturally related tribes) in lieu of the federal government. If no qualifying vested party is identified for an item, Section 3(a) does not allocate ownership or control over the item. Ownership is instead governed by ARPA, which continues in force and effect and explicitly asserts federal ownership of items meeting its definitions and discovered on federal lands, or other applicable law. Only items qualifying for ownership or control under Section 3(a) should be affected by Section 3(b). Section 3(b) provides that items unclaimed under Section 3(a) are subject to regulation, which is the basis for this consultation. Thus, the question becomes which items should be deemed to be “unclaimed” under Section 3(a) and what disposition options should be available for those items, consistent with current law and policy.

At the 2005 consultation regarding unclaimed cultural items, SAA offered comments related to unclaimed cultural items. Because the questions posed for this consultation raise similar issues, we reiterate some of those comments here.

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.

As discussed earlier, a careful review of the text of Section 3(a) reveals that ownership or control of cultural items is conveyed automatically (that is, in the absence of a claim) to the first two of the 3(a) parties – known lineal descendants and tribal landowners³. *However*, the remaining three categories of groups – culturally affiliated tribes, aboriginal land occupants, and culturally related tribes – must qualify under the statutorily-established definitions for those groups and are explicitly required to assert a claim to establish ownership or control over human remains or cultural items.⁴

Inherently Owned Items. In order for an item to qualify as “unclaimed” and therefore subject to regulatory directives as to disposition, a claim must be required in order for a party’s interest in the item to vest under the statute. With two types of parties, (i) identified lineal descendants of human remains and associated funerary objects, and (ii) Indian tribes and Native Hawaiian organizations from whose lands human remains or other cultural items are removed, the descendants, tribes, and organizations inherently own or control the items at issue. No formal claim is required in order to vest rights in those groups and therefore the items *cannot* qualify as “unclaimed” under the statute. Ownership or control is absolute unless it is explicitly relinquished by the owning/controlling party under NAGPRA Section 3(e). A regulatory disposition contrary to the owner’s prerogative would violate the group’s rights granted by statute.

Identified lineal descendants should retain the right to assert control over the disposition of human remains and associated funerary objects without the concern that other claimants might come forward sooner and seek repatriation or other disposition options inconsistent with the descendants’ rights. Similarly, tribal sovereignty was an issue of 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 or organization on whose land they were discovered. Those items are *not* subject to other disposition by regulation or third party claims (other than lineal descendants), regardless of the timing of the tribe’s actions to assert control over disposition. Thus, neither of these first two categories should be subject to regulatory disposition as “unclaimed items” because there is no claim involved in establishing ownership or control under the statute. Rights to determine disposition under Section 3(a) are preserved in known lineal descendants and tribal landowners, regardless of action or inaction by those parties.

Claimable Items. Three other categories of groups under Section 3(a) are explicitly required to assert claims [see inset] and, consequently, items available to those parties may qualify as unclaimed under Section 3(b) in the absence of a stated claim by a qualified party. Where a potential claimant is identified for an item, but that claimant fails to state a claim as required by the statute, then the disposition of the item may be subject to regulation under Section 3(b) as an item “not claimed under subsection (a).”

Other Items. Section 3 does *not* allocate ownership or control of *all* human remains and cultural items found on federal lands. There is no default category of ownership or control listed in Section 3(a). Only the specific parties identified in Section 3(a) may obtain ownership or control of items newly discovered or removed from federal lands. If no qualifying party is

³ NAGPRA Sections 3(a)(1) and 3(a)(2)(A).

⁴ 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.

identified for a cultural item within Section 3(a)'s hierarchy, the item is not subject to a shift of ownership from the federal government, under ARPA or other applicable law, to a party under NAGPRA. Those items are *not* subject to claims under Section 3(a) – and they cannot, therefore, be categorized as “unclaimed” under Section 3(b) –until such time, if at all, that a qualified claimant is identified. 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 or claimant is identified, must remain under the ownership or control of the Federal government, consistent with ARPA, the federal curation regulations, and other applicable law, regulation, and policy, until such time, if at all, that a party identified in a Section 3(a) category is identified and, if applicable, asserts a claim. At that time, ownership or control over disposition would shift from the federal government to the applicable qualified 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*, for which a party qualifying under 3(a)(2)(B) or 3(a)(2)(C) has been identified but whose right of ownership or control requires a claim. We submit that that this construal of the law does not leave other human remains or cultural items unprotected. Instead, this construal helps clarify the items that the statute intends to regulate as “unclaimed,” while acknowledging that the remaining items will be given appropriate protection under other applicable laws and regulations.

Summary of Response to Question 1:

SAA respectfully submits that Lineal Descent Items (with respect to human remains and associated funerary objects) and Tribal Land Items (with respect to all cultural items) are outside the scope of 43 CFR 10.7 regulations because no claim is required in order to vest ownership or control with the applicable individual, tribe, or organization. A claimant otherwise qualified under the statute to assert a claim to a cultural item may obtain ownership or control by making a claim for such item. If one or more qualified claimants for an item exist but no qualified claimant asserts its claim, then the item would qualify for regulation under 43 CFR 10.7 as an unclaimed cultural item.

We now turn to the last question posed by National NAGPRA, which addresses the manner in which unclaimed items should be managed while in federal care.

QUESTION 2.

Do current regulations regarding the curation of Federally-owned and administered archaeological collections [36 CFR 79] adequately address the management, preservation, and use of human remains, funerary objects, sacred objects, or objects of cultural patrimony remaining in Federal care?

SAA believes that the federal curation regulations set forth at 36 CFR 79 adequately and appropriately address the management, preservation, and handling of human remains and other cultural items in federal care.

SAA submits that human remains and other cultural items for which a qualified claimant has not 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, if at all, as they are claimed by a qualified party. 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 access potentially entails a loss of important 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, relinquishing its 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 at a later date is preserved).

The management, preservation, and handling 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:

(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.

An Indian tribe or Native Hawaiian organization that is a qualified claimant for certain items under section 3(a)(2)(B) or 3(a)(2)(C) but has not yet asserted a formal claim may reasonably wish to become involved in the management, preservation, or handling of those items while they remain in a repository. In such a case, we believe that the tribe or organization should assert its claim to establish its rights and then 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 identified claimants 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 may be restricted in

accordance with the expressed wishes of the claimant qualified to obtain ownership or control over disposition under Section 3(a).

SAA submits that the process of asserting a claim should be simple and low-cost, constituting basically the statutorily-required step of a party (whose right to make a claim has been established) stating that it claims its 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 or items, then, in effect, the identified party *establishes its available rights*. 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 solely to *claimable items*, which include human remains and other cultural items for which (i) a qualifying claimant has been identified within the Section 3(a) hierarchy, and (ii) the statute requires a claim in order to vest ownership or control. Inherently owned or controlled remains and objects, and remains and objects for which no qualified Section 3(a) claimant has been identified, are not properly the subjects of regulation under Section 3(b). Those 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.

Secondly, 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 in coordination with the curating repository, without the imposition of arbitrary time deadlines or pre-determined disposition options.

Finally, 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. There is no need, and indeed it would create unnecessary complexity and potential confusion, to create separate curation regulations for Section 3 items. The current federal curation regulations provide for respectful and effective handling of human remains and other cultural items remaining in federal care.

Thank you for the opportunity to provide comments on behalf of the SAA. We appreciate your efforts to thoroughly consider the views of all interested parties and the important implications of these regulations.

[Presented by Susan Bruning, Chair, SAA Committee on Repatriation.]