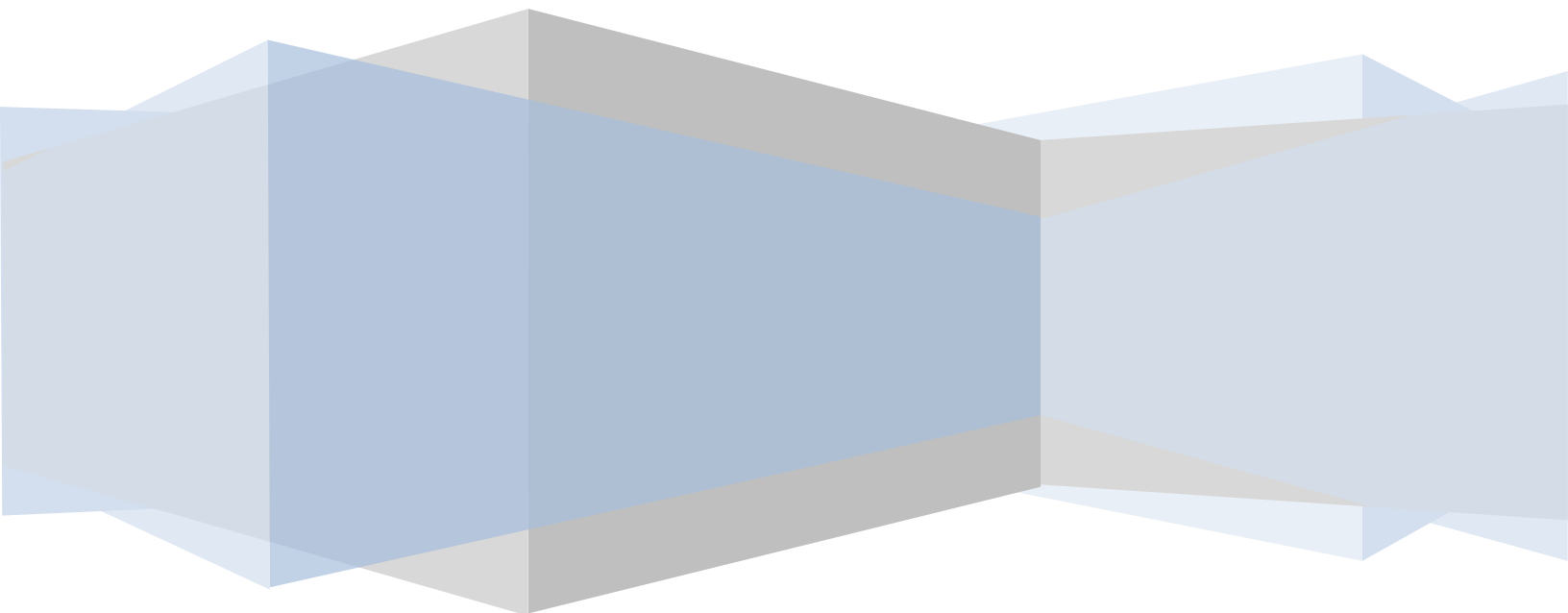


**Fundamentals for Managing the Cultural Heritage Program**

# **Native American Graves Protection & Repatriation Act**

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# **Native American Graves Protection & Repatriation Act**

## **Background**

The Native American Graves Protection and Repatriation Act is commonly known by the acronym NAGPRA. It establishes ownership of Native American human remains and certain other items found on federal land. It also provides a process for museums and federal agencies to return these remains and objects to lineal descendants and culturally affiliated Indian tribes.

NAGPRA is a product of political compromises. It was crafted from six different bills introduced into Congress beginning in 1988. Its roots lie in the Indian Civil Rights Movement of the 1960s, when Native Americans began to be more vocal about the injustices they suffered at the hands of non-Indians. Part of the injustice they decried was the 19<sup>th</sup> century Army practice of collecting parts of Indians slain on battlefields and sending them to the Army Medical Museum for study. Archaeologists and physical anthropologists also came under fire for digging up thousands of Native American ancestors and storing them in museums for study and sometimes display.

Tribes and organizations like the National Congress of American Indians and the Native American Rights Fund expressed their outrage to Congress about museum collections containing ancestral human remains and objects buried with them. In the late 1980s this issue reached a point where legislation was passed, culminating in the enactment of NAGPRA on November 16, 1990.

Both the House and the Senate issued reports on NAGPRA, and these instruct us about the intent of Congress – what Congress had in mind when it drafted what later became the law. If you are interested in reading these reports, they are readily available on the internet. The House Report is No. 101-877, and the Senate Report is No. 101-473. Regulations implementing the law are found at 43 CFR Part 10.

## **Items Subject to NAGPRA**

NAGPRA applies to Native American human remains, funerary objects that are associated with human remains and those that are not, sacred objects, and objects of cultural patrimony that are found on federal lands. These items are defined in 43 CFR 10.2. Note that for purposes of complying with NAGPRA, the term Native American includes Alaska Natives, and the term Indian tribe includes Alaska Native corporations.

Human remains – It may seem obvious what human remains are, but keep in mind that for purposes of complying with NAGPRA, these do not include remains naturally shed from the body such as hair woven into cordage or basketry, nor does it include blood residues on tools, or coprolites. And if part of a body is incorporated into a sacred object or object of cultural patrimony, we should deal with it as a sacred object or object of cultural patrimony for purposes of complying with the law, not as human remains. If part of a body is incorporated into something that is neither a sacred object nor an object

of cultural patrimony, it should be considered human remains, e.g., scalps on cou sticks and other trophy items.

Funerary objects – these must have intentionally been placed with the burial as part of a death rite or ceremony. A projectile point embedded in human remains in a burial is not a funerary object. Also, any object made exclusively for interment with the dead or to hold human remains is an associated funerary object, even if it was never interred with a burial. Pots with kill holes, commonly found in the Southwest, are considered associated funerary objects even if no human remains are with them because they were made for interment.

Sacred objects – these (a) must have been devoted to use in a religious ceremony, (b) that use must have been their primary purpose, and (c) they must have religious significance. If we don't have enough evidence that something is a sacred object, we should determine that it isn't. The affiliated tribe then has the burden of proof. If a tribe offers oral history about the sacred nature of an object, we may consider that oral history sufficient evidence that it is a sacred object.

The object must also be needed by traditional religious leaders for the conduct of religion by present-day adherents. But we should be very careful before we try to judge the validity of this. The Constitution does not want government deciding questions of religious orthodoxy and heresy. Even if a tribe no longer practices the religion but says it needs the object to rejuvenate the religion, we should agree it is a sacred object. We have a responsibility to evaluate the reliability and credibility of oral history evidence submitted, but we should avoid being overly critical about whether the religious practice is traditionally “correct.”

Objects of cultural patrimony – an object of cultural patrimony (a) must have had central importance to the tribe *at the time it was used in the past*, (b) cannot be owned by an individual, (c) cannot be alienated by an individual, i.e., cannot be sold or given away as though it were private property, and (d) must have been considered inalienable by the tribe *at the time it was separated from the tribe*. The tribe has the burden of proving all four of these thresholds. Given these four tests, it would be difficult to determine any items from prehistoric archaeological sites to be objects of cultural patrimony.

**No age limitation.** Unlike the Archaeological Resources Protection Act that establishes a minimum age for items protected by that law, there is no minimum age for items covered under NAGPRA.

### **Pre-NAGPRA vs. Post-NAGPRA**

NAGPRA is almost like two separate laws because its provisions for items possessed or controlled by federal agencies before November 16, 1990, when it was signed into law, are different from its provisions for items discovered after November 16, 1990. We commonly refer to items collected before NAGPRA was enacted as existing collections, or museum collections, and items found after NAGPRA was enacted as new discoveries.

Sections 5, 6 and 7 of the law apply to existing collections. Section 3 of the law applies to new discoveries.

Even the terms used in the regulations differ between these two groups of items. The term “repatriation” is used when items in existing collections are given to tribes, but the term “transfer of custody” is used when newly discovered items are given to tribes. The rules governing which Indian tribe or individual should receive the items differ between the two groups, as well.

### **Existing collections (pre-NAGPRA)**

These are human remains, funerary objects, sacred objects and objects of cultural patrimony in the possession or control of federal agencies prior to November 16, 1990. These are addressed in Sections 5, 6 and 7 of the law.

**Inventories.** Human remains and associated funerary objects possessed or controlled by a federal agency before November 16, 1990, were to have been inventoried within five years after NAGPRA was enacted, i.e., by November 16, 1995. The inventory is a detailed, item by item description of each set of human remains and each associated funerary object, including information about how these items were acquired. It also includes the agency’s determinations of the present-day tribes that are culturally affiliated with each item, based on categories of evidence that are defined in the law and regulations. The inventory is done in consultation with potentially affiliated tribes. The State Office NAGPRA Coordinator, who is usually the Deputy Preservation Officer, takes lead responsibility for preparing the inventory. When the inventory is finished, the NAGPRA Coordinator or Deputy Preservation Officer prepares a Notice of Inventory Completion and sends it to the Washington Office NAGPRA Coordinator, who forwards it to the National NAGPRA Program Manager in the National Park Service for publication in the *Federal Register*.

**Determining affiliation.** BLM must use available evidence to determine the present-day federally recognized tribe or tribes that are culturally affiliated with human remains and other NAGPRA items under BLM’s possession or control. The law states that the evidence must be based on geography, kinship, biology, archaeology, anthropology, linguistics, folklore, oral tradition, history, or other relevant information or expert opinion. Neither the law nor its regulations presume that any particular type of evidence is better, or more persuasive, than any other type of evidence. BLM must look at the totality of the evidence and make determinations on a case by case basis. The standard of proof is a “preponderance of the evidence,” which means slightly more than 50 percent, no matter how slightly the evidence might tip the scale.

The discussion of affiliation here focuses on tribes, not individual lineal descendants. Lineal descendants have first priority to receive human remains and associated funerary objects to which they are affiliated, but because they must prove an unbroken chain of descent going back to a known, named individual whose remains are in a museum collection, determining affiliation with a lineal descendant would be

unusual. Although rare, some lineal descent cases have been processed by federal agencies.

Culturally unidentifiable human remains. If BLM cannot determine the affiliation of inventoried human remains by a preponderance of the evidence, BLM must provide a list of these remains to the National NAGPRA Program Manager. BLM must retain possession of culturally unidentifiable human remains until regulations are promulgated governing their disposition. Regulations have yet to be adopted for the disposition of culturally unidentifiable remains. Section 10.11 of the regulations has been reserved for this purpose.

**Summaries.** Museum collections that might contain unassociated funerary objects, sacred objects and objects of cultural patrimony possessed or controlled by a federal agency before November 16, 1990 were to have been summarized within three years after NAGPRA was enacted, i.e., by November 16, 1993. Summaries are different from inventories. Instead of a detailed item by item description, summaries only provide a very general description of each museum collection. Summaries are not published in the *Federal Register*, but they are sent to potentially affiliated tribes.

**Updating inventories and summaries.** Although the inventories and summaries of collections should have been completed by the mid-1990s, the reality is that new collections are continually coming to light as museums find them in their facilities. Sometimes museums uncover new information showing that items in their possession came from BLM-administered lands. When this happens, inventories and summaries have to be updated and tribes consulted as necessary. Also, new tribes continue to be added to the list of federally recognized tribes, bringing new consultation partners into the compliance process. Because of this, consultation with tribes about museum collections will continue into the future. It did not end in 1995, despite the timeframes specified when NAGPRA was enacted. In fact, a new section was added in 2007 to the 43 CFR 10 regulations [43 CFR 10.13] that addresses requirements to inventory museum collections and consult with tribes about NAGPRA items in the future.

**Issue:** When tracking down collections “owned” by BLM, and by that I mean collections under BLM’s possession or control, it is important to determine who owned the land at the time the collections were excavated or removed from that land. Just because it is BLM land now doesn’t mean BLM owns the collections from it. If a parcel of land is administered by BLM now, but was privately owned when the items were excavated, BLM cannot claim ownership of those collections. Conversely, if a parcel of land is privately owned or State owned now, but was administered by BLM at the time the items were excavated, BLM will claim ownership over those collections.

You have to know the history of land status in order to determine ownership of collections that may have been in museums for decades or, in some cases, more than a hundred years. But what if you cannot determine land jurisdiction at the time the collections were removed? This does happen, and when it does, we have two options. BLM can assume control over the collections based on a reasonable determination that

the land was federal if most of the land in that Township and Range, or general region, was administered by BLM at the time the materials were removed. The other option is to decline ownership of the collections, asserting that without more specific locational information, BLM cannot assume control in that instance. Four cases like this have come up so far, and in each case, BLM has assumed control of the collections.

If collections were taken from BLM land that was later transferred to another federal agency such as the U.S. Forest Service, generally the BLM would have control. However, the two agencies might negotiate for both to share the responsibility. In some cases in Alaska, the federal agency that currently manages the land has assumed NAGPRA responsibilities, because large amounts of public land have been transferred among federal agencies in that State.

**Repatriating existing collections.** If a culturally affiliated tribe makes a claim for items in inventories or summaries, the items must be repatriated to the tribe within 90 days after the agency receives the tribe's written request unless competing claims are received that must be resolved. A notice must be published in the *Federal Register* before the items can be repatriated. For items identified in summaries, which would include unassociated funerary objects, sacred objects, and objects of cultural patrimony, the required notice is called a Notice of Intent to Repatriate. For items identified in inventories, which would include human remains and associated funerary objects, the required notice is the Notice of Inventory Completion prepared as part of the inventory process. The purpose of these notices is to describe the items in sufficient detail to enable other tribes to determine their interest in them. BLM submits the notice to the National NAGPRA Program Manager, who publishes it in the *Federal Register*. BLM must wait at least 30 days after the notice is published before transferring possession to give other tribes a chance to submit competing claims.

**Parties who can claim existing collections.** The parties who can claim human remains and items in existing collections are lineal descendants and culturally affiliated tribes.

Any Indian tribe determined to be culturally affiliated with items in existing collections has the right to claim those items. This is different from the priority rules for claiming new discoveries which we will talk about later. Neither the law nor the regulations set out a priority for claimants of existing collections with the sole exception of sacred objects which lineal descendants have the first right to claim. Instead, the law and regulations refer to "the most appropriate claimant" based on the preponderance of the evidence.

If BLM receives more than one claim for items in an existing collection and cannot determine the most appropriate claimant, it must retain the items until the dispute is resolved. The disputing parties can resolve the dispute themselves, which often happens. BLM also has the option of submitting the dispute to the NAGPRA Review Committee and following its recommendations, although recommendations of the Review Committee are advisory only and are not legally binding. A third way for a dispute to be resolved is by court order resulting from a lawsuit.

In some instances when several affiliated tribes have claimed the same remains and the most appropriate claimant could not be determined, the dispute has been resolved by repatriating the remains jointly to a group of affiliated tribes or to one tribe acting on behalf of a group of tribes.

**Issue#1:** An unintended consequence of NAGPRA is that it can create dissension among tribes that claim affiliation to the same remains. For example, the Piman-speaking tribes in Arizona claim to be the descendants of the prehistoric Hohokam, but so do the Hopi Tribe, and there is evidence to support both tribes' claims. In one instance, the Gila River Indian Community, one of the Piman tribes, requested the return of some human remains from a Hohokam site. BLM notified the Hopi of Gila River's claim because the Hopi were also determined to be affiliated with Hohokam remains. At first, the Hopi said they would dispute Gila River's claim. As you can imagine, this caused tension between the two tribes, and it was some time before the issue was resolved. Eventually, the Hopi deferred to Gila River's claim, and the remains were transferred to Gila River. A similar potential for conflict exists between the Hopi and the Navajo, both of whom claim cultural affiliation to ancestral Puebloan groups. In situations like this, the federal agency can find itself in the middle trying to mediate between two or more disputing tribes.

**Issue #2:** Another issue is that some tribes have not wanted to claim human remains in museum collections because they do not want to rebury those remains on their reservation lands. Many tribes believe such remains should be reburied as closely as possible to the locations from which they were removed. BLM's policy until recently was that human remains and funerary objects held in museums and then repatriated to tribes could not be reburied on BLM-administered lands. In October 2006, this policy was changed with Instruction Memorandum No. 2007-002. NAGPRA materials that have been held in museums and that are repatriated to tribes can now be reburied on public lands, including lands withdrawn from multiple uses and mineral entry such as wilderness areas, when authorized by Washington Office on a case-by-case basis. An example of this is that the Anasazi Heritage Center was allowed to rebury human remains from their collections on heritage center grounds, at the request of the affiliated tribes.

### **New discoveries (post-NAGPRA)**

New discoveries are human remains, funerary objects, sacred objects and objects of cultural patrimony intentionally excavated or inadvertently discovered on federal land after November 16, 1990. New discoveries are addressed in Section 3 of the law.

**Notification.** According to NAGPRA, whoever discovers human remains or other NAGPRA items on federal land must notify the land manager in writing. In most cases when such items are discovered, the first notification BLM will receive is a phone call from the discoverer or a company representative. When we receive that phone call, we should:

1. Visit the site and document its condition with photos. This will protect us from claims that we didn't adequately protect the site until the remains were removed.

2. Establish a site monitoring process.

3. If there any contractors on the ground connected with the activity that caused the remains to be discovered, we should make sure they understand it is *their* responsibility to monitor and otherwise protect the site.

In some states, state law requires that the state coroner be notified, as well, even for human remains discovered on federal land.

When we receive written confirmation of the phone call from the discoverer, we should:

1. Certify, in writing, that we received written confirmation.

2. Within 3 days of certifying that we received written confirmation, we must telephone all tribes (a) "likely to be" culturally affiliated, and (b) any tribe that aboriginally occupied the area of discovery, and (c) any other tribe "with a demonstrated cultural relationship" or "reasonably known to have a cultural relationship" to the discovered items ("cultural relationship" is not defined in the law or the regulations). We must also send written confirmation to these tribes. And we must initiate consultation with these tribes – all this within three days.

**30-day stop-work period.** Work at the site of discovery has to stop for 30 days after we have certified receipt of the written notice of the discovery. So if we want the stop-work period to be as short as possible, we should certify receipt of the written notice immediately.

The purpose of the 30-day stop-work period is to give the agency time to consult with affiliated tribes to determine the procedures that will be followed to remove the remains (if they have to be removed), how the remains should be treated, and how they will be transferred to the most closely affiliated tribe or reburied on site. It is important to remember that neither the law nor the regulations specify a set period of time for completing or termination consultation. The 30-day stop-work period only relates to the conduct of activities in the area of discovery. It does not mean that consultation must be completed within this period of time, or that BLM has no obligation to consult once this period has elapsed.

**Recovery Plans.** Recovery Plans are optional. They specify the procedures to be used when it is necessary to excavate or remove human remains or other NAGPRA items inadvertently discovered on federal lands. Recovery Plans document the affiliated tribe's concurrence with the proposed excavation or removal and allow activities in the area of discovery to proceed prior to expiration of the 30-day waiting period. Recovery Plans must be signed by the affiliated tribe. There is no specific format for a Recovery Plan – it can include anything the agency and tribes want. If you don't think you will be able to



prepare a Recovery Plan and obtain the affiliated tribe's signature on it within the 30-day waiting period, you should skip this option and move directly to preparing a Plan of Action.

**Plans of Action.** Plans of Action are not optional. They must be prepared for excavation or removal of human remains or other NAGPRA items even if a Recovery Plan has already been prepared and signed. A Plan of Action must be prepared regardless of whether the remains to be removed were inadvertently discovered or were already known and selected for intentional excavation. The BLM must prepare and sign the Plan of Action after consulting with the appropriate tribes. The tribes involved must be given a copy of the Plan and should be given an opportunity to sign it. Obtaining a tribe's signature is not mandatory, however. BLM can implement a Plan of Action after the Field Manager signs it, even if no tribe signs it. All Plans of Action must address the items listed in 43 CFR 10.5(e), which are:

- Steps to contact tribal officials at the time of excavation or inadvertent discovery of cultural items,
- Information on the kinds of objects that are considered cultural items,
- Information used to determine custody,
- The planned treatment, care and handling of the cultural items, including traditional treatments
- The recording and analysis planned for the cultural items and the nature of reports to be prepared
- The planned disposition of the cultural items.

**Newspaper notices.** A newspaper notice must be published before transferring custody of new discoveries. The newspaper notice can be prepared by the Field Office under the direction of the State Office NAGPRA Coordinator. The purpose of the notice is to give potentially interested tribes enough information to determine their interest in claiming custody and to ensure that all potential claimants receive due process before their rights are precluded by transfer of custody. The newspaper notice must be published two times, at least two weeks apart, and transfer of custody cannot occur until 30 days after publication of the second notice. Once we transfer custody, all claims by other tribes are extinguished.

**Comprehensive Agreements.** BLM can enter into comprehensive agreements with tribes that have claimed, or are likely to claim, human remains or other NAGPRA items. The purpose of these agreements is to address BLM land management activities that could result in the intentional excavation or inadvertent discovery of human remains or other NAGPRA items and describe procedures for consulting with tribes and determining custody, treatment and disposition. Such agreements are not mandatory, but they can provide a means for coming to agreement with affiliated tribes before remains are inadvertently discovered or intentionally excavated, thereby reducing the likelihood that projects will be delayed.

**Transferring custody.** The parties who can claim custody of new discoveries are, in priority order:

1. Lineal descendants (for human remains and associated funerary objects only).
2. The tribe on whose lands the items were excavated or discovered.
3. The tribe having the closest cultural affiliation to the items, and
4. The tribe that aboriginally occupied the area where the items were excavated or discovered. The determination of which lands were aboriginally occupied must be based on a final judgment of the Indian Claims Commission or the U.S. Court of Claims.

Remember that NAGPRA only recognizes claims from tribes that are federally recognized. Indian groups that have not received federal recognition have no right of claim under NAGPRA. However, lineal descendants who can trace their ancestry directly and without interruption to a known Native American individual whose remains are being requested have first priority to claim those remains regardless of whether those lineal descendants are members of federally recognized tribes.

**Unclaimed items.** New discoveries not claimed by any of the parties who could rightfully claim them must remain in the possession of the agency until regulations are promulgated governing their disposition. Regulations have yet to be adopted for the disposition of unclaimed items. Section 10.7 of the regulations has been reserved for this purpose.

**Issue.** Giving a priority claim to tribes on whose land the remains and other items are found can create tensions with other tribes whose ancestors previously occupied that same land. The Navajo and Hopi situation is a good example. Archaeologists believe that the Navajo arrived in the Southwest about 600 years ago, and that their large reservation now includes land that was occupied by the ancestors of the Hopi for 2,000 years before the Navajo arrived. The Navajo say their oral history evidence places them in the Southwest centuries earlier than what archaeologists say. Regardless of the archaeological evidence or oral history evidence, the Navajo have priority claim to remains found on their land. Ancestral Puebloan burials discovered on the Navajo Reservation can be claimed by the Navajo, even though the Hopi consider them to be the remains of Hopi ancestors.

**Custody transferred for items removed.** BLM is required to determine affiliation and transfer custody if NAGPRA items are excavated or removed from the public lands. Policy that allows reburial of inadvertent discoveries that are not removed from the immediate vicinity of the discovery was included in the 2004 version of Handbook H-8120-1. The 2004 Handbook also includes policy allowing portions of skeletons removed from the area of discovery to be reburied with the rest of the skeleton on site. This policy was primarily intended to allow skulls collected by looters to be reunited with the rest of the skeletons in the ground. The WO is currently revisiting the 2004 policy in light of more recent legal interpretations, and the reburial policy for new discoveries may in the future be revised in a way that will put it on firmer legal ground.