

Notifying and Consulting Tribes under the Native American Graves Protection and Repatriation Act

I. Notifying and Consulting Tribes for Inadvertent Discoveries under NAGPRA. The Native American Graves Protection and Repatriation Act (NAGPRA) requires that any person who inadvertently discovers Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony (defined in 43 CFR 10.2(d)) on Federal lands must notify the responsible Federal official.

A. Within three days after receiving written confirmation of an inadvertent discovery, the responsible Field Manager must take the following steps:

1. Certify, in writing, that he/she received written confirmation that items covered by NAGPRA were discovered. This certification can be a brief memorandum to the file.
2. Visit the site and document its condition with photos. This will protect BLM from claims that it failed to adequately protect the site until the remains were removed.
3. Take immediate steps to secure the site and protect the discovered items. In some states, state law requires that the state coroner be notified, as well, even for human remains discovered on federal land.
4. Establish a site monitoring process.
5. If there any contractors on the ground connected with the activity that caused the remains to be discovered, make sure they understand it is *their* responsibility to monitor and otherwise protect the site.
6. Notify by telephone, and send a written notice, to the following:
 - a. Known lineal descendants (it would be highly unlikely that lineal descent could be traced unless the discovery is from the recent historic period),
 - b. Tribes “likely to be culturally affiliated” with the items discovered,
 - c. Tribes that aboriginally occupied the area (based on a final decision of the Indian Claims Commission or U.S. Court of Claims), and
 - d. Other tribes which have a “demonstrated cultural relationship” or are “reasonably known to have a cultural relationship” to the items discovered.
7. Initiate consultation.

B. The written notice in #6, above, should:

1. Make it clear that the notice is being sent as required by Sec. 3 of NAGPRA and its implementing regulations 43 CFR 10.4 and 10.5.

2. Describe the kinds of human remains and funerary objects that were discovered and their condition as well as BLM can determine. (Note: The regulations also require notices to describe sacred objects and objects of cultural patrimony but discovering and recognizing such objects in archaeological contexts would be extremely unlikely).

3. Describe the circumstances of their discovery.

4. Propose a time and place for meetings or consultation to further consider the inadvertent discovery. Consultation will include proposals for treatment and disposition of any remains and objects that may be excavated. (Note: BLM is required to determine affiliation and transfer custody only if the discovery must be excavated or removed. If the discovery will remain in place, it will stay under federal ownership and control).

5. List all tribes that have been, or are being, consulted about the inadvertent discovery.

6. State that any additional documentation used to identify affiliation will be supplied upon request.

C. During consultation, the Field Manager must ask the following:

1. The names and addresses of traditional religious leaders who should also be consulted.

2. Recommendations on conducting the consultation process.

Neither the law nor the regulations specify a set period of time for completing or terminating 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.

II. Recovery Plans for Inadvertent Discoveries under NAGPRA. Recovery Plans [see 43 CFR 10.4(d)(2)] are optional. They specify the procedures and guidelines to be used when it is necessary to excavate or remove Native American human remains, funerary objects, sacred objects or objects of cultural patrimony 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, including data recovery or other treatment, prior to the expiration of the 30-day waiting period required by NAGPRA. Recovery Plans must be signed by the affiliated Indian tribe(s). If the Field Office believes it will not likely be able to prepare a Recovery Plan and obtain the affiliated tribe's signature on it within the 30-day waiting period, the Field Office should skip this option and move directly to preparing a Plan of Action (see IV, below). A Plan of Action must be prepared for excavation or removal of an inadvertent discovery even if a Recovery Plan has been prepared and signed.

III. Notifying and Consulting Tribes before Intentionally Excavating or Removing Items Covered under NAGPRA. NAGPRA requires BLM to notify and consult with Indian tribes before authorizing the excavation or removal of Native American human remains, funerary objects, sacred objects or objects of cultural patrimony from Federal lands. NAGPRA also requires that any such intentional excavation or removal is in compliance with the permitting provisions in Section 4 of the Archaeological Resources Protection Act (ARPA). ARPA requires BLM to notify and consult with Indian tribes who ascribe religious or cultural importance to a place before any archaeological resources are excavated or removed from that place.

A. Before the BLM undertakes or authorizes the excavation or removal of items covered under NAGPRA, the Field Manager must send written notice to the following [see 43 CFR 10.3(c)(1) and 10.5(b)]:

1. Known lineal descendants (it would be highly unlikely for lineal descendants to be known unless the human remains were from the recent historic period),
2. Tribes “likely to be culturally affiliated” with the items to be excavated,
3. Tribes that aboriginally occupied the area (based on a final decision of the Indian Claims Commission or U.S. Court of Claims), and
4. Tribes that, in BLM’s opinion, have a “demonstrated cultural relationship” or are “likely to have a cultural relationship” to the items that are expected to be found.

B. The written notice should:

1. Make it clear that the notice is being sent as required by Sec. 3 of NAGPRA and its implementing regulations 43 CFR 10.3 and 10.5; and by Sec. 4(c) of ARPA and its implementing regulations 43 CFR 7.7.
2. Describe the planned activity, including its general location.
3. Describe the basis upon which BLM determined that human remains or funerary objects might be excavated. The regulations also require this for the excavation of sacred objects and objects of cultural patrimony but it is unlikely that such objects would occur in an archaeological context or that BLM would have any basis for believing they may be excavated.
4. Describe the basis for determining likely custody.
5. Contain a disclaimer stating that no final determinations of cultural affiliation can be made until the remains are excavated and examined.

6. Propose a time and place for meetings or consultation to further consider the intentional excavation, including BLM's proposed treatment and disposition of any remains and objects that may be excavated.

7. List all tribes that have been, or are being, consulted about the intentional excavation.

8. State that any additional documentation used to identify affiliation will be supplied upon request.

The written notice should be followed with a telephone call if no response is received in 15 days.

C. During consultation, the Field Manager must ask the following:

1. The names and addresses of traditional religious leaders who should also be consulted.

2. Recommendations on conducting the consultation process.

Neither the law nor the regulations specify a set time period for completing or terminating consultation.

IV. Plans of Action for Excavation or Removal of Items Covered under NAGPRA. A Plan of Action must be completed prior to excavating or removing Native American human remains and other NAGPRA items. This is true regardless of whether the remains or items were inadvertently discovered or were already known and selected for intentional excavation. The Field Manager must prepare and sign the Plan of Action following consultation with the tribes described in I and III, above. The tribes involved must be given a copy of the Plan and should be afforded an opportunity to sign it. Obtaining the signatures of tribal officials is, however, not mandatory. 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.

V. Newspaper Notice for Transferring Custody of Items Covered under NAGPRA. A newspaper notice must be published before transferring custody of NAGPRA materials that are excavated and removed from public lands after November 16, 1990. The purpose of the newspaper notice is to give potentially interested lineal descendants and tribes enough

information to determine their interest in claiming custody of the materials and to ensure that all potential claimants receive due process before their rights are precluded by transfer of custody. The newspaper notice can be prepared by the Field Office under the direction of the State Office NAGPRA Coordinator, and a copy is sent to the BLM's Washington Office. The notice is published in a newspaper of general circulation in the area where the materials were found and, if applicable, in a newspaper in the area in which the affiliated tribe resides. The notice must be published two times at least one week apart, and transfer of custody cannot occur until 30 days after publication of the second notice. If additional claimants come forward, transfer of custody must be delayed until all claims have been resolved.