

# The Native American Graves Protection and Repatriation Act

Covers

Native American

- Human remains
- Associated funerary objects
- Unassociated funerary objects
- Sacred Objects
- Objects of Cultural Patrimony

That are

In collections controlled by

- Federal agencies
- Museums

Excavated or discovered on

- Federal land
  - Tribal land
- After Nov. 16, 1990

Look at:  
NAGPRA

- Section 5
- Section 6
- Section 7

And:  
43 CFR

- 10.8
- 10.9
- 10.10
- 10.11
- 10.13

Look at:  
NAGPRA

- Section 3

And:  
43 CFR

- 10.3
- 10.4
- 10.5
- 10.6
- 10.7

## **DEVELOPMENT OF NAGPRA REGULATIONS 43CFR 10.7**

DISPOSITION OF UNCLAIMED HUMAN REMAINS, FUNERARY OBJECTS, SACRED OBJECTS, OR OBJECTS OF CULTURAL PATRIMONY.

### PRELIMINARY SCHEDULE OF DEVELOPMENT ACTIVITIES

#### Initial Consultations (November 2003-February 2005)

- Regional meetings with Federally recognized Indian tribes
- NAGPRA Review Committee
- Meetings with government affairs liaisons of scientific and museum organizations

#### Compilation and Assessment of Consultation Viewpoints (completed by April 2005)

- Review of comments provided during meetings
- Synthesis of written comments provided after meetings

#### Call for Comments (submitted to Federal Register April 2005)

- Call for suggestions about disposition process for unclaimed cultural items under NAGPRA published in Federal Register

#### Preparation of Draft of NAGPRA Regulation 43 CFR 10.7

- Review within National NAGPRA program, and revisions
- Review within NPS, and revisions
- Review within DOI, and revisions
- Review by NAGPRA Review Committee, and revisions

#### Publication of Notice of Proposed Rulemaking and Call for Comments in Federal Register

- Compilation and synthesis of comments

#### Revision of NAGPRA Regulation 43 CFR 10.7

- Revision based on comments received
- Review within National NAGPRA program, and revisions
- Review within NPS, and revisions
- Review by DOI, and revisions
- Review by NAGPRA Review Committee, and revisions

#### Publication of NAGPRA Regulation 43 CFR 10.7 Final Rule or Publication of New Notice of Proposed Rulemaking and Call for Comments in Federal Register



## Briefing Paper

### NAGPRA Regulations: Reserved Sections

Responsibility for promulgating NAGPRA regulations, 43 CFR 10, rests with the Secretary of the Interior, who has delegated drafting responsibility to the National Park Service. NPS follows the Administrative Procedures Act and other statutes in promulgating regulations. Draft regulations are reviewed internally within the National NAGPRA program and other programs within NPS prior to publication for public comment. Interested persons may participate in the rulemaking through submission of written comments. If revisions of the proposed rule are extensive, the draft regulations may be published a second or more times in the *Federal Register*, inviting written public comment each time.

The Native American Graves Protection and Repatriation Review Committee also has an active role in the preparation of 43 CFR 10. It has provided initial commentary and guidance for preparation of drafts by NAGPRA staff. Once the drafted regulations have been reviewed within the NPS, they are provided to the Review Committee for additional comment.

Currently, four reserved sections of the NAGPRA regulations remain to be promulgated:

**Section 10.7. Disposition of unclaimed human remains, funerary objects, sacred objects, or objects of cultural patrimony.** This section applies to cultural items found on Federal or tribal land after November 16, 1990. The National NAGPRA program is preparing for consultation with the Review Committee, Native American groups, and representatives of museums and the scientific community prior to drafting the regulation, as stipulated in the statute. Consultations will focus on a several key issues, including the number of unclaimed cultural items held by Federal agencies, agency accessioning and deaccessioning authorities, and the status of culturally unidentifiable remains found on Federal lands.

**Section 10.II. Disposition of culturally unidentifiable human remains.** This section is intended to carry out Section 8 (c)(5) of NAGPRA by providing a process for the disposition of culturally unidentifiable human remains, and will remove the current requirement that such remains must be retained. Key issues to be addressed include determining who may make a claim for culturally unidentifiable human remains, under what circumstances transfer may take place, and reporting requirements. A draft of this section was provided for Review Committee comment at the May 2002 meeting in Tulsa, OK, and November 2002 meeting in Seattle, OK. Review Comments from the Tulsa and Seattle meetings have been incorporated into a second draft, which is currently in program review.

**Section 10.13. Future applicability.** This section will provide guidance for museums and agencies that receive new collections or discover previously unreported existing collections that may include Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony. A draft of this section was reviewed by the Review Committee in 1996 and in 2002. A proposed rule has been prepared and is currently under review within the NPS.

**Section 10.15(b). Failure to claim where no repatriation or disposition has occurred.** This section falls under that part of the regulations dealing with limitations and remedies. No drafting of this section has been completed and key issues remain to be identified.



## Briefing Paper: 43 CFR 10.7

### *What is NAGPRA?*

The Native American Graves Protection and Repatriation Act (NAGPRA) provides a process for museums and Federal agencies to return certain Native American cultural items -- human remains, funerary objects, sacred objects, or objects of cultural patrimony -- to lineal descendants, culturally affiliated Indian tribes and Native Hawaiian organizations. NAGPRA also provides for the disposition of cultural items excavated or discovered on Federal and tribal lands after November 16, 1990.

### *Who is responsible for promulgating NAGPRA regulations?*

Responsibility for promulgating NAGPRA regulations, 43 CFR 10, rests with the Secretary of the Interior, who has delegated drafting responsibility to the National Park Service. Within NPS, the National NAGPRA program carries out this responsibility.

### *What does 43 CFR 10.7 cover?*

43 CFR 10.7 is titled "Disposition of unclaimed human remains, funerary objects, sacred objects, or objects of cultural patrimony." This regulation will provide a disposition process for Native American cultural items found on or removed from Federal and tribal lands after November 16, 1990, that have not been claimed or cannot be claimed by federally recognized Native American tribes or Native Hawaiian organizations. This is a separate regulation from 43 CFR 10.11, "Disposition of culturally unidentifiable human remains," that addresses the disposition of culturally unidentifiable Native American human remains that are in Federal agency or museum collections.

### *Who must be consulted in developing this regulation?*

NAGPRA requires that 43 CFR 10.7 be developed in consultation with the Native American Graves Protection and Repatriation Review Committee, Native American groups, and representatives of museums and the scientific community, as specified in 25 U.S.C. 3002(b). In addition to these groups, the National NAGPRA program is seeking comment from representatives of Federal agencies that have NAGPRA responsibilities.

### *Have consultations about this regulation taken place?*

National NAGPRA hosted a meeting with representatives of Federal agencies in Washington, DC, in July 2003. A consultation was also held with tribal and Federal agency representatives to coincide with the National Congress of American Indians meetings in Albuquerque, NM, in November 2003.

### *What opinions were expressed during these consultations?*

Tribal representatives expressed the view that this regulation should safeguard the rights of federally recognized tribes to make claims for human remains and other cultural items where there is a cultural relationship between the cultural items and a tribe. Many tribal representatives expressed the wish that human remains and other cultural items encountered on Federal lands be left undisturbed or reburied nearby. Federal agency representatives provided comments on developing a process for caring for human remains and cultural items removed from Federal lands that is consistent with statutory and regulatory requirements.

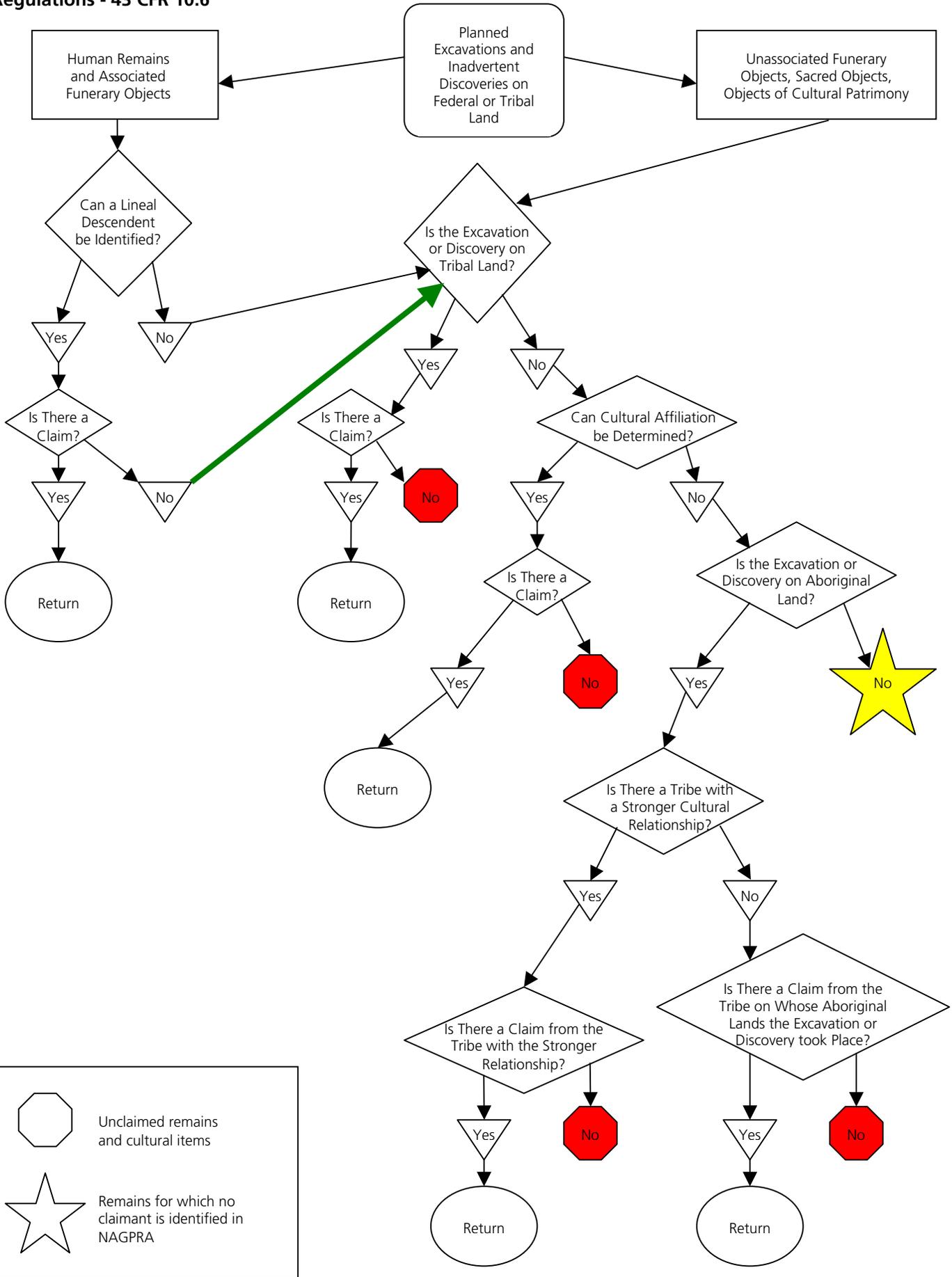
### *Are additional consultations planned?*

National NAGPRA is planning a series of regional consultation meetings with tribal and Federal agency representatives to be completed by June 2005. Comments from museum and scientific organizations will be solicited by letter, and through meetings with the designated representatives of these organizations. The Native American Graves Protection and Repatriation Review Committee is also expected to participate in the preparation of 43 CFR 10.7.

### *Has any drafting of the regulation taken place?*

National NAGPRA has not yet drafted this regulation. Drafting of the proposed rule will begin not later than the completion of consultation.

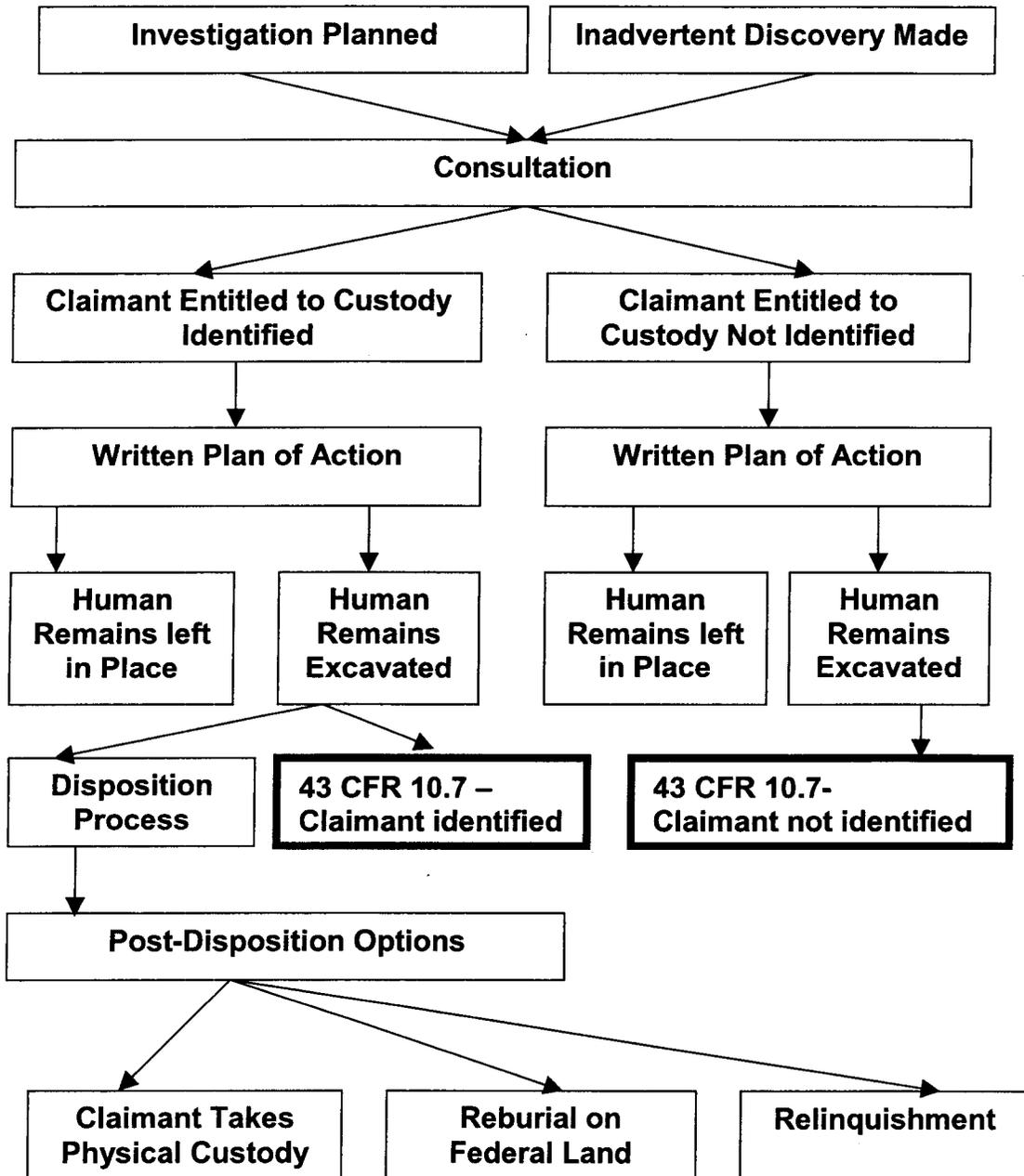
# Priority of Custody Regulations - 43 CFR 10.6



 Unclaimed remains and cultural items

 Remains for which no claimant is identified in NAGPRA

**Intentional Archeological Excavation and Inadvertent Discovery of Native American Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony on Federal lands after November 16, 1990**



# **Excavations and Discoveries: Key NAGPRA Terms**

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## **Indian Tribe**

Any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. [Statute]

## **Cultural Affiliation**

A relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group. [Statute]

## **Cultural Items**

- human remains
- associated funerary objects
- unassociated funerary objects
- sacred objects
- objects of culturally patrimony

[Statute]

## **Associated Funerary Objects**

Objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects. [Statute]

## **Unassociated Funerary Objects**

Objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe. [Statute]

## **Sacred Objects**

Specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and

## **Objects of Cultural Patrimony**

An object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

**Federal Agency**

Any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution. [Statute]

**Federal Agency Official**

Any individual authorized by delegation of authority within a Federal agency to perform the duties relating to these regulations [43 CFR 10]. [Regulations]

**Federal Land**

Any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971. [Statute]

Any land other than tribal lands that are controlled or owned by the United States Government, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act. United States "control," as used in this definition, refers to those lands not owned by the United States but in which the United States has a legal interest sufficient to permit it to apply these regulations without abrogating the otherwise existing legal rights of a person. [Regulations]

United States "control" refers to those lands not owned by the United States but in which the United States has a legal interest sufficient to permit it to apply these regulations [43 CFR 10] without abrogating the otherwise existing legal rights of a person. [Regulations]

**Tribal Land**

- all lands within the exterior boundaries of any Indian reservation;
- all dependent Indian communities;
- any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3.

[Statute]

**Aboriginal Lands**

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 an Indian tribe. [Regulations]

**Indian Tribe Official**

The principal leader of an Indian Tribe or Native Hawaiian organization or the individual officially designated by the governing body of an Indian tribe or Native Hawaiian organization or as otherwise provided by tribal code, policy, or established procedure as responsible for matters relating to these regulations [43 CFR 10]. [Regulations]

# Intentional Archaeological Excavation of Native American Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony on Federal and Tribal Lands after November 16, 1990

## Federal Lands: Initiating Consultation

The Federal agency official must take reasonable steps to determine whether a planned activity may result in the excavation of Native American human remains and other cultural items. The Federal agency official must **notify in writing** and **initiate consultation with any known lineal descendant** and the **Indian tribes and Native Hawaiian organizations** –

- **who are or are likely to be culturally affiliated with the human remains and other cultural items that are expected to be found;**
- **on whose aboriginal lands the planned activity will take place; and**
- **who the Federal official reasonably believes to have a cultural relationship to the human remains and other cultural items that are expected to be found.**

The written notification must –

- describe the planned activity, its general location, and the basis on which it was determined that human remains and other cultural items may be excavated;
- describe the basis for determining likely custody under 43 CFR 10.6, "Priority of Custody;" and
- propose a time and place for meetings or consultations.

## Tribal Lands: Obtaining Consent

NAGPRA allows the intentional excavation of Native American human remains and other cultural items on tribal lands **only with the consent of the appropriate Indian tribe or Native Hawaiian organization.**

Prior to excavation or removal, an ARPA permit must be obtained as follows –

- for private lands within the exterior boundaries of any Indian reservation, the Bureau of Indian Affairs will serve as the permit issuing agency; or
- for lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, the Department of Hawaiian Home Lands will serve as the permit issuing agency, with the Hawaii State Historic Preservation Division of the Department of Land and Natural Resources acting in an advisory capacity.

Final custody and disposition must be consistent with 25 USC 3002 (a), "Priority of Ownership," and 43 CFR 10.6, "Priority of Custody."

## During Consultation

The **purpose** of consultation is to **help the Federal agency determine who is entitled to custody** of the human remains and other cultural items under NAGPRA so that the disposition process can be completed, and **to discuss the Federal agency's proposed treatment** of the human remains and other cultural items.

The Federal agency official must **provide in writing** –

- a list of all lineal descendants, Indian tribes, or Native Hawaiian organizations that are being, or have been, consulted; and
- an indication that additional documentation will be provided on request.

The Federal agency official **must request, as appropriate** –

- names and addresses of the Indian tribe official who will act as the tribe's representative in consultation;
- names and appropriate methods to contact lineal descendants;
- recommendations on how consultation should be conducted; and
- the kinds of cultural items that are considered to be unassociated funerary objects, sacred objects, or objects of cultural patrimony.

If the planned activity also requires consultation under section 106 of the National Historic Preservation Act (NHPA), **the Federal agency should coordinate any consultation and agreements under NHPA with the requirements of NAGPRA.**

## After Consultation – Written Plan of Action

The Federal agency official must prepare, approve, and sign a written plan of action. The plan of action must document the kinds of objects to be considered as cultural items; the planned treatment, care, and handling, including traditional treatment, of human remains and other cultural items; the planned archeological recording of the human remains and other cultural items; the kinds of analysis planned for each kind of object; and the nature of reports to be prepared.

The written plan of action must also include --

- the **specific information used to determine custody** of the human remains and other cultural items; and
- the **planned disposition** of the human remains and other cultural items.

**Custody must be determined in accordance with 25 USC 3002 (a), "Priority of Ownership," and 43 CFR 10.6, "Priority of Custody."**

(over)

## Excavation and Removal

Excavation or removal of the human remains and other cultural items must take place following the requirements of the Archeological Resources Protection Act (ARPA) (16 U.S.C. 470aa et seq.) and its implementation regulations. This includes issuance of an ARPA permit by the cognizant Federal agency.

## Prior to Disposition – Notice of Intended Disposition

At least 30 days prior to transferring the human remains and other cultural items to the claimant entitled to custody, the responsible Federal agency must first publish a **Notice of Intended Disposition**. The Notice must –

- be published two times (at least a week apart) in a newspaper of general circulation in the area in which the human remains and other cultural items were discovered;
- be published two times (at least a week apart) in a newspaper of general circulation in the area or areas in which the affiliated Indian tribes or Native Hawaiian organization members now reside;
- provide information as to the nature and affiliation of the human remains and other cultural items; and
- **solicit further claims to custody.**

The Federal agency official must send a copy of the notice and information on when and where it was published to the National NAGPRA program.

## Disposition

Disposition is the formal transfer of Native American human remains and other cultural items excavated or inadvertently discovered on Federal or tribal lands after November 16, 1990, to the lineal descendants, Indian Tribes, or Native Hawaiian organizations that have been determined to be the legitimate claimants.

In completing the disposition, the claimant formally accepts custody (ownership). Disposition should be documented, must be consistent with 25 USC 3002 (a), "Priority of Ownership," and 43 CFR 10.6, "Priority of Custody," and does not take place automatically 30 days after the publication of the second Notice of Intended Disposition

## Post-Disposition Options

### Claimant Takes Physical Custody

The legitimate claimant takes physical possession of the human remains and other cultural items. Where allowable, and upon agreement with the claimant, the Federal agency may provide temporary care until the claimant is able to take physical custody.

### Reburial on Federal Land

The human remains and other cultural items may be reburied on Federal land, if the agency's policies and procedures permit such activities.

### Relinquishment

Under NAGPRA [25 USC 3002(e)], the governing body of an Indian tribe or Native Hawaiian organization may expressly relinquish control over any Native American human remains, or title to or control over any funerary object or sacred object.

# Inadvertent Discovery of Native American Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony on Federal Lands After November 16, 1990

## Discovery

The person who makes the discovery must **immediately notify the responsible Federal official** by telephone and provide written confirmation to the responsible Federal official.

If the inadvertent discovery occurred in connection with an on-going activity, the person must **cease the activity** in the area of the inadvertent discovery and **make a reasonable effort to protect the human remains and other cultural items**.

## Initiating Consultation

No later than three working days after receiving written confirmation of the notification, the responsible Federal agency official must **certify receipt of the notification**, and take immediate steps, if necessary, to **further secure and protect the human remains and other cultural items**. **NOTE:** activity that resulted in the discovery may resume thirty days after the Federal agency official certifies receipt of the notification.

The responsible Federal agency official must also **notify by telephone** (with written confirmation) and **initiate consultation** with **any known lineal descendant** and the **Indian tribes and Native Hawaiian organizations** –

- **who are or are likely to be culturally affiliated with the human remains and other cultural items;**
- **on whose aboriginal lands the remains and cultural items were discovered; and**
- **who are reasonably known to have a cultural relationship to the human remains and other cultural items.**

Consultation is initiated with a written notification. The written notification must propose a time and place for meetings or consultation.

## During Consultation

The **purpose** of consultation is to **help the Federal agency determine who is entitled to custody** of the human remains and other cultural items under NAGPRA so that the disposition process can be completed, and **to discuss the Federal agency's proposed treatment** of the human remains and other cultural items.

The Federal agency official must **provide in writing** –

- a list of all lineal descendants, Indian tribes, or Native Hawaiian organizations that are being, or have been, consulted; and
- an indication that additional documentation will be provided on request.

The Federal agency official **must request, as appropriate** –

- names and addresses of the Indian tribe official who will act as the tribe's representative in consultation;
- names and appropriate methods to contact lineal descendants;
- recommendations on how consultation should be conducted; and
- the kinds of cultural items that are considered to be unassociated funerary objects, sacred objects, or objects of cultural patrimony.

## After Consultation – Written Plan of Action

The Federal agency official must prepare, approve, and sign a written plan of action. The plan of action must document the kinds of objects to be considered as cultural items; the planned treatment, care, and handling, including traditional treatment, of human remains and other cultural items; the planned archeological recording of the human remains and other cultural items; the kinds of analysis planned for each kind of object; and the nature of reports to be prepared.

The written plan of action must also include --

- the **specific information used to determine custody** of the human remains and other cultural items; and
- the **planned disposition** of the human remains and other cultural items.

**Custody must be determined in accordance with 25 USC 3002 (a), "Priority of Ownership," and 43 CFR 10.6, "Priority of Custody."**

(over)

**Will the human remains and other cultural items be left in place?**

**Yes**

The Federal agency secures the site of discovery, and the disposition process does not continue further.

**OR**

**No**

**Excavation or removal of the human remains and other cultural items must take place following the requirements of the Archeological Resources Protection Act (ARPA) (16 U.S.C. 470aa et seq.) and its implementation regulations. This includes issuance of an ARPA permit by the cognizant Federal agency.**

### **Prior to Disposition – Notice of Intended Disposition**

**At least 30 days prior to transferring the human remains and other cultural items** to the claimant entitled to custody, the responsible Federal agency must first publish a **Notice of Intended Disposition**. The Notice must –

- be published two times (at least a week apart) in a newspaper of general circulation in the area in which the human remains and other cultural items were discovered;
- be published two times (at least a week apart) in a newspaper of general circulation in the area or areas in which the affiliated Indian tribes or Native Hawaiian organization members now reside;
- provide information as to the nature and affiliation of the human remains and other cultural items; and
- **solicit further claims to custody.**

The Federal agency official must send a copy of the notice and information on when and where it was published to the National NAGPRA program.

### **Disposition**

Disposition is the formal transfer of Native American human remains and other cultural items excavated or inadvertently discovered on Federal or tribal lands after November 16, 1990, to the lineal descendants, Indian Tribes, or Native Hawaiian organizations that have been determined to be the legitimate claimants.

In completing the disposition, the claimant formally accepts custody (ownership). Disposition should be documented, must be consistent with 25 USC 3002 (a), "Priority of Ownership," and 43 CFR 10.6, "Priority of Custody," and does not take place automatically 30 days after the publication of the second Notice of Intended Disposition

### **Post-Disposition Options**

#### **Claimant Takes Physical Custody**

The legitimate claimant takes physical possession of the human remains and other cultural items. Where allowable, and upon agreement with the claimant, the Federal agency may provide temporary care until the claimant is able to take physical custody.

#### **Reburial on Federal Land**

The human remains and other cultural items may be reburied on Federal land, if the agency's policies and procedures permit such activities.

#### **Relinquishment**

Under NAGPRA [25 USC 3002(e)], the governing body of an Indian tribe or Native Hawaiian organization may expressly relinquish control over any Native American human remains, or title to or control over any funerary object or sacred object.

# Inadvertent Discovery of Native American Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony on Tribal Lands After November 16, 1990

## Discovery

The person who makes the discovery must **immediately notify the responsible Indian tribe official** by telephone and provide written confirmation to the responsible Federal official.

If the inadvertent discovery occurred in connection with an on-going activity, the person must **cease the activity** in the area of the inadvertent discovery and **make a reasonable effort to protect the human remains and other cultural items**.

## Indian Tribe Official

No later than three working days after receiving written confirmation of the notification, the responsible Indian tribe official may **certify receipt of the notification**, and take immediate steps, if necessary, to **further secure and protect the human remains and other cultural items**.

**NOTE:** activity that resulted in the discovery may resume thirty days after the Indian tribe official or Native Hawaiian organization certifies receipt of the notification.

**Will the human remains and other cultural items be left in place?**

### Yes

The site of discovery is secured, and the process is complete.

**OR**

### No

**Excavation or removal of the human remains and other cultural items may take place only with the consent of the appropriate Indian tribe or Native Hawaiian organization, and must follow the requirements of the Archeological Resources Protection Act (ARPA) (16 U.S.C. 470aa et seq.) and its implementation regulations.**

Prior to excavation or removal, an ARPA permit must be obtained as follows –

- for private lands within the exterior boundaries of any Indian reservation, the Bureau of Indian Affairs will serve as the permit issuing agency; or
- for lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, the Department of Hawaiian Home Lands will serve as the permit issuing agency, with the Hawaii State Historic Preservation Division of the Department of Land and Natural Resources acting in an advisory capacity.

Final custody and disposition must be consistent with 25 USC 3002 (a), "Priority of Ownership," and 43 CFR 10.6, "Priority of Custody."

# WHAT SHOULD BECOME OF UNCLAIMED NATIVE AMERICAN HUMAN REMAINS AND CULTURAL ITEMS?

