

APPENDIX A

Summaries of Law and Regulations

I. NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

The Native American Graves Protection and Repatriation Act (NAGPRA) was enacted into law on November 16, 1990. The Act is codified in Title 25 of the United States Code, beginning at section 3001 of Title 25. The Act provides authorization for the repatriation of Native American human remains, funerary objects, associated funerary objects, unassociated funerary objects, sacred objects and objects of cultural patrimony.

The regulations promulgated under the authority of the Act are found in Title 43 of the U.S. Code of Federal Regulations beginning at section 10. The regulations develop a “systematic process for determining the rights of lineal descendants and Indian tribes and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated.”

A. Summary of Statutory Requirements of the Act

i. Ownership and Control (Section 3 of the Act)

The Act provides that the priority of ownership or control of Native American cultural items (defined as including Native American human remains, associated funerary objects, unassociated funerary objects, sacred objects and objects of cultural patrimony) which are excavated or discovered on Federal or tribal lands after November 16, 1990 shall be first with lineal descendants of a Native American whose human remains and associated funerary objects are the subject of the excavation or discovery.

If lineal descendants cannot be identified, then in the case of unassociated funerary objects, sacred objects, or objects of cultural patrimony, the priority of ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be first with the Indian tribe or Native Hawaiian organization on whose land such objects or human remains were discovered. The next priority is with the Indian tribe or Native Hawaiian organization that has the closest cultural affiliation with the human remains or objects and that, upon notice, states a claim for the human remains or objects.

If the cultural affiliation of objects cannot be reasonably ascertained and if the cultural items were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the U.S. Court of Claims as the aboriginal land of an Indian tribe, then ownership and control rests with the Indian tribe that is recognized as aboriginally occupying the area in which the cultural items were discovered, if upon notice, that tribe states a claim for human remains or objects. If however, it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the human remains or objects than the tribe that is recognized as aboriginally occupying the area in which the human remains or objects were discovered, then ownership and control is with the Indian tribe that has the strongest demonstrated relationship, if upon notice, that tribe states a claim for the human remains or objects.

The Act also addresses unclaimed Native American human remains and objects, the intentional excavation and removal of Native American human remains and objects, and the inadvertent discovery of Native American human remains and objects. The Act does not prevent the governing body of an Indian tribe or Native Hawaiian organization from expressly relinquishing control over any Native American human remains or title to, or control over, any funerary or sacred object.

ii. Inventory (Section 5 of the Act)

The first requirement of the Act is the authorization and directive that each Federal agency and each museum that has possession or control over holdings or collections of Native American human remains and associated funerary objects must compile an inventory of such items and identify the geographical and cultural affiliation of each item to the extent possible based on information possessed by the Federal agency or museum.

The inventories and identification are to be completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders, and are to be completed not later than November 16, 1995. The inventories and identifications are to be made available to a review committee both during the time they are being conducted and thereafter.

iii. Notification

The Act provides that within six months following the completion of the inventory, the Federal agency or museum shall notify the affected Indian tribes or Native Hawaiian organizations if the cultural affiliation of particular Native American human remains or associated funerary objects has been determined. The notice is to include information that identifies each Native American human remains or associated funerary objects and the circumstances surrounding the acquisition of such remains or objects.

The notice must also list those human remains or associated funerary objects that are clearly identifiable as to tribal origin, as well as those human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with an Indian tribe or a Native Hawaiian organization but which are determined, by reasonable belief and the totality of circumstances surrounding the acquisition of the human remains or objects, to be culturally affiliated with the Indian tribe or Native Hawaiian organization to whom the notice has been sent.

iv. Summary (Section 6 of the Act)

The Act also authorizes and directs each Federal agency or museum that has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony to prepare a written summary of those objects based upon available information held by the agency or museum. The summary is to describe the scope of the collection, the kinds of objects in the collection, reference to geographical location, the means and period of acquisition and cultural affiliation where this information is readily ascertainable.

The Act provides that the summary is to be completed not later than November 16, 1993, following consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders, and the summary is in lieu of the object-by-object inventory. Indian tribes and Native Hawaiian organizations are to have access to records, catalogues, relevant studies or other pertinent data for the purposes of determining geographic origin, cultural affiliation, and other basic facts surrounding the acquisition and accession of Native American objects.

v. **Repatriation (Section 7 of the Act)**

The Act establishes the requirements for the repatriation of Native American human remains and objects that are possessed or controlled by Federal agencies and museums.

a. *Native American Cultural Items Identified by Inventory*

With regard to Native American human remains and associated funerary objects that are identified as part of the Act's required inventory, the Act provides for the expeditious return of human remains or objects upon the request of a known lineal descendant of the relevant Native American or of the Indian tribe or Native Hawaiian organization unless the items are deemed to be indispensable to the completion of a specific scientific study whose outcome is of major benefit to the United States or upon a showing which the agency or the museum cannot overcome, that the agency or museum does not have the right of possession to the human remains or objects. If the cultural items are the subject of scientific study, they must be returned no later than 90 after the completion of the study.

b. *Native American Cultural Items Identified by Summary*

For Native American human remains and associated funerary objects that are identified as part of the Act's required summary, the Act provides for the expeditious return of human remains or objects upon the request of a known lineal descendant of the relevant Native American or of the Indian tribe or Native Hawaiian organization unless the items are deemed to be indispensable to the completion of a specific scientific study whose outcome is of major benefit to the United States, or upon a showing which the agency or the museum cannot overcome, that the agency or museum does not have the right of possession to the human remains or objects, or when there are multiple requests and competing claims to any cultural item and the Federal agency or museum cannot determine which requesting party is the most appropriate claimant. In the case of competing claims, the agency or museum may retain a cultural item until the parties either agree on the disposition of the item or the matter is resolved either through a process provided by the Act or by a court of competent jurisdiction.

c. *Native American Cultural Items not identified as Culturally Associated through Inventory or Summary*

Where the cultural affiliation of Native American human remains or funerary objects has not been established either in the Act's required inventory or the required summary, or the remains or objects are not included in any inventory, the Act provides for the expeditious return of the human remains or objects upon request of an Indian tribe or a Native Hawaiian organization if the tribe or organization can show by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information and expert opinion, its cultural affiliation with the human remains or objects. The exceptions to the requirement for the repatriation of human remains and objects in this category are for scientific study or where there are competing claims.

d. *Repatriation of Sacred Objects or Objects of Cultural Patrimony*

The Act provides for the expeditious return of sacred objects or objects of cultural patrimony to a direct lineal descendant of an individual who owned the sacred object, or to an Indian tribe or Native Hawaiian organization who owned or controlled the object, or to an Indian tribe or Native Hawaiian organization if a member of the tribe or organization owned or controlled the object and there are no identifiable lineal descendants of the member or the lineal descendants of the member have failed to make a claim for the object. This requirement is also subject to the exceptions for scientific study, where an agency or museum can prove its right of possession, or in the circumstances of competing claims.

e. Liability

The Act provides that any museum that repatriates an item in good faith under the authority of the Act will not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the Act. This section of the Act does not address the liability of Federal agencies under the same circumstances.

vi. Review Committee (Section 8 of the Act)

The Act authorizes the establishment of a seven-member committee that is charged with monitoring the inventory, summary, and identification process to ensure fair and objective considerations and assessments of all available and relevant information and evidence. In addition, the Act provides that upon the request of any affected party, the committee is to review and make findings related to the identity or cultural affiliation of cultural items or the return of such items, and facilitating the resolution of any disputes relating to the return of items.

The committee is further charged with compiling an inventory of culturally-unidentifiable human remains that are in the possession and control of each Federal agency and museum and with recommending specific actions for the development of a process for the disposition of human remains if the parties deem it desirable. Finally, the Act charges the committee with consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the committee's scope of work, consulting with the Secretary of the Interior in the development of regulations under the Act, performing other related functions assigned by the Secretary, and making recommendations regarding future care of cultural items that are to be repatriated.

vii. Penalties and Subpoenas (Section 9 of the Act)

The Act authorizes the assessment of civil penalties by the Interior Secretary for violations of the Act, and authorizes the issuance of subpoenas.

viii. Grants (Section 10 of the Act)

The Act authorizes the Interior Secretary to make grants to Indian tribes and Native Hawaiian organizations for the purpose of assisting them in the repatriation of Native American cultural items and to make grants to museums to assist them in conducting inventories and preparing summaries.

ix. Application of Act (Section 11 of the Act)

The Act provides that the requirements of the Act are not to be construed to limit the authority of any Federal agency or museum to return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations or to individuals, or to enter into any other agreement with the consent of a culturally-affiliated tribe or organization as to the disposition or control over items covered by the Act.

The Act further provides that the Act may not be construed to delay actions on repatriation requests that were pending on the date of enactment of the Act, deny or otherwise affect access to any court, to limit any procedural or substantive rights which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations, or to limit the application of any Federal or State law pertaining to theft or stolen property.

II. SUMMARY OF REGULATORY PROVISIONS

Publicly promulgated regulations play the important role of implementing our nation's laws. Earlier in this section, a brief summary of several sections of the Act was presented as background for this study. The following section further explains the specific language and process to be followed, per the Act. For example, the earlier statutory section, "Inventory (Section 5 of the Act)," is further explained here in the language of the regulatory process as, "Inventories (§10.9)."

Introduction (Subpart A)

Application of Regulations (§10.1)

The regulations to the Act provide that the regulations apply to the identification and appropriate disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony that are in Federal possession or control, or in the possession or control of any institution or State or local government receiving Federal funds or which are excavated intentionally or discovered inadvertently on Federal or tribal lands.

The regulations also provide that they apply to human remains, funerary objects, sacred objects, or objects of cultural patrimony that are indigenous to Alaska, Hawaii, and the continental United States, but not to territories of the United States.

Definitions (§10.2)

By defining the terms and phrases "Federal agency", "Federal agency official", "museum", "possession", "control", "receives Federal funds", "museum official" and "person", the regulations identify who must comply with the regulations [§10.2(a)].

By defining the terms "lineal descendant", "Indian tribe", "Native Hawaiian organization", "Native Hawaiian", and "Indian tribe official", the regulations establish who has standing to make a claim under the regulations [§10.2(b)].

By defining the terms "Secretary", "Review Committee", and "Manager, National NAGPRA Program", the regulations establish who is responsible for carrying out the regulations [§10.2(c)].

By defining the terms "human remains", "funerary objects", "associated funerary objects", "unassociated funerary objects", "sacred objects", "traditional religious leader", "objects of cultural patrimony", and "cultural affiliation", the regulations establish what objects are covered by the regulations [§10.2(d)].

By defining the terms "Federal lands", "tribal lands", "inventory", "intentional excavation", and "inadvertent discovery", the regulations establish the types of lands to which the excavation and discovery provisions of the regulations apply [§10.2(f)].

The regulations also contain a definition for the term "cultural affiliation" [§10.2(e)] and definitions of the terms "summary", "inventory", "intentional excavation", and "inadvertent discovery" [§10.2(g)] for purposes of establishing what procedures are required by the regulations.

Although the statute contains a definition of the term "cultural items", which includes human remains, associated funerary objects, unassociated funerary objects, sacred objects and cultural patrimony, the regulations do not contain a definition of the term.

Intentional Excavation of Native American Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony from Federal or Tribal Lands (Subpart B)

The regulations provide that intentional excavation of human remains, funerary objects, sacred objects, and objects of cultural patrimony on Federal or tribal lands is permitted if they are excavated or removed in compliance with the requirements of the Archaeological Resources Protection Act and its implementing regulations. In the case of private lands within the exterior boundaries of an Indian reservation, the Bureau of Indian Affairs (BIA) is designated as the agency to issue permits for such excavations. In the instance of lands administered for the benefit of Native Hawaiians under the Hawaiian Homes Commission Act, 1920, the Department of Hawaiian Home Lands is authorized to issue permits for excavations with the Hawaii State Historic Preservation Division of the Hawaii Department of Land and Natural Resources acting in an advisory capacity.

The regulations further provide that objects can only be excavated on tribal lands following consultation with the tribe or Native Hawaiian organization and the consent of the tribe or organization. The disposition of objects must be consistent with the custody requirements of the regulations, and proof of consultation or consent must be submitted to the agency official who is responsible for the issuance of the required permit.

Procedures Associated with Intentional Archaeological Excavations – Notice and Consultation (§10.3)

The regulations provide that a Federal agency official must make reasonable efforts to determine whether a planned activity may result in the excavation of human remains, funerary objects, sacred objects or objects of cultural patrimony. In addition, prior to the issuance of any approvals or permits for a planned activity, the Federal agency official must provide written notification to Indian tribes or Native Hawaiian organizations that are likely to be culturally affiliated with the remains or objects that may be excavated, as well as written notice to any Indian tribe that aboriginally occupied the area of the planned activity and any other tribes or organizations that the official reasonably believes may have a cultural relationship to the remains or objects.

The written notice must describe the planned activity, the general location of the activity, the basis upon which it was determined that remains or objects are expected to be found, and the basis for determining likely custody pursuant to the regulations. The notice must also propose a time and place for meetings or consultations to further consider the activity, the proposed treatment of any remains or objects that may be excavated, the proposed disposition of any remains or objects, and if there is no response within 15 days of the provision of written notice, telephone contact must also be made with the Indian tribe or tribes or with Native Hawaiian organizations.

Following consultation, the Federal agency official must complete a written plan of action and execute the steps in the plan. If the planned activity is also subject to review under section 106 of the National Historic Preservation Act (NHPA), the Federal agency official must coordinate consultation and any subsequent agreement for compliance with the Act with the requirements of the NAGPRA regulations and must also comply with NHPA's section 106.

Inadvertent Discoveries of Native American Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony on Federal or Tribal Lands (§10.4)

The regulations provide that any person who knows or who has reason to know that he or she has inadvertently discovered human remains or objects on Federal or tribal lands after the date of enactment of NAGPRA (November 16, 1990), must provide immediate telephone notification of the discovery with written confirmation to the responsible Federal agency official with respect to Federal lands and to the responsible Indian tribal official if the discovery is on tribal lands. In addition to providing notice, the person must stop

activity in the area of inadvertent discovery and make a reasonable effort to protect the human remains or objects discovered.

No later than three working days following the receipt of notice of an inadvertent discovery, the responsible Federal agency official must certify receipt of notification, take immediate steps if necessary to further protect the discovered remains or objects, notify by telephone along with written confirmation the Indian tribes or Native Hawaiian organizations that are likely to be culturally affiliated or have a cultural relationship with the remains or objects. The notification must include pertinent information as to the kinds of remains or objects, their condition, and the circumstances of the discovery. The responsible Federal agency official must then initiate consultation consistent with § 10.5 of the NAGPRA regulations and take steps to assure that requirements and procedures of § 10.3(b) are complied with if the remains or objects must be excavated or removed, or to assure compliance with §10.6 of the regulations to ensure the disposition of all remains or objects.

Thereafter, the activity that resulted in the inadvertent discovery may resume 30 days after the Federal agency receiving notice of the discovery confirms receipt of the notice and if the resumption of the activity is otherwise lawful, or the activity may be resumed if there is a binding agreement executed between the Federal agency and the culturally-affiliated tribes or Native Hawaiian organizations that provides for a recovery plan for the excavation or removal of the remains or objects. In either circumstance, the disposition of all human remains and objects must be carried out consistent with §10.6 of the regulations.

If the inadvertent discovery is made on tribal lands, then receipt of notice must be confirmed by the relevant tribal official no later than 3 working days after notice is made, and the procedures referenced above are to be pursued consistent with sections 10.3(b) and 10.6 of the regulations.

Federal agency officials are charged with coordinating their responsibilities under §10.4 of the regulations with their emergency discovery responsibilities under section 106 of the National Historic Preservation Act (NHPA) or section 3(a) of the Archaeological and Historic Preservation Act (AHPA). Compliance with the NAGPRA regulations does not relieve Federal agency officials from their duty to comply with the requirements of NHPA or AHPA.

Importantly, the regulations provide that all Federal authorizations to carry out land use activities on Federal or tribal lands, including leases and permits, must include a requirement that the holder of the authorization notify the appropriate Federal or tribal official immediately upon the discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony as required by §10.4(b) of the NAGPRA regulations.

Consultation (§10.5)

Section 10.5 of the regulations establishes the manner in which consultation must be carried out as part of the intentional excavation or inadvertent discovery of human remains or objects.

Federal agency officials must consult with known lineal descendants and Indian tribal officials from: (1) Indian tribes on whose aboriginal lands the planned activity will occur or where the inadvertent discovery has been made; (2) Indian tribes and Native Hawaiian organizations that are, or are likely to be, culturally affiliated with human remains or objects; and (3) Indian tribes and Native Hawaiian organizations that have a demonstrated cultural relationship with the remains or objects.

Upon receiving notice or otherwise becoming aware of an inadvertent discovery or a planned activity that has either resulted in or may result in the intentional excavation or inadvertent discovery of human remains or objects, the responsible Federal agency official must take steps to identify the lineal descendants or Indian tribe or Native Hawaiian organization that is entitled to custody of the remains or objects, and must

provide written notice to known lineal descendants and to Indian tribes or Native Hawaiian organizations that are likely to be culturally affiliated with the remains or objects, to Indian tribes that aboriginally occupied the area, and to Indian tribes and Native Hawaiian organizations that have a demonstrated cultural relationship with the remains or objects.

The notice that the Federal agency official provides must propose a time and place for meetings or consultation on the Federal agency's proposed treatment of the remains or objects and consultation must seek to identify traditional religious leaders who should also be consulted. During the consultation, the Federal agency officials must provide written information to lineal descendants and officials of Indian tribes and Native Hawaiian organizations that are likely to be affiliated with the remains or objects. The information provided is to include a list of all lineal descendants and Indian tribes and Native Hawaiian organizations that are being or have been consulted regarding the particular remains or objects, and an indication that additional documentation that is used to identify affiliation will be supplied upon request.

In addition, during the consultation the Federal agency officials must request information from Indian tribes or Native Hawaiian organizations that are, or are likely to be affiliated with the remains or objects including the name and address of the Indian tribal official who is to act as a representative in consultations, the name and appropriate methods to contact lineal descendants who should be contacted to participate in the consultation process, recommendations on how the consultation process should be conducted, and the kinds of cultural items the tribe or organization considers likely to be unassociated funerary objects, sacred objects, or objects of cultural patrimony.

Following consultation, the Federal agency official must prepare, approve and sign a written plan of action that is to be provided to the lineal descendants, Indian tribes and Native Hawaiian organizations involved. The lineal descendants and Indian tribe officials may also sign the written plan of action. The plan of action must comply with §10.3(b)(1) of the regulations and must document the kinds of objects to be considered as cultural items as defined in section 10.2(d), the specific information used to determine custody pursuant to section 10.6, the planned treatment, care and handling of remains or objects, the planned archaeological recording of remains or objects, the kinds of analysis planned for each object, any steps to contact tribal officials at the time of excavation or discovery, the kind of traditional treatment to be afforded remains or objects, the nature of reports to be prepared, and the planned disposition of the remains or objects.

The regulations express a preference for the formulation of comprehensive agreements between Federal agencies and Indian tribes and Native Hawaiian organizations that relate to intentional excavations or inadvertent discoveries, Federal land management activities that could result in excavations or discoveries of human remains or cultural items, consultation, determination of custody, and treatment of remains or cultural items. The signed agreements or correspondence related to the effort to reach agreements must constitute proof of consultation as required by the regulations.

The regulations provide that the Federal agency official must be cognizant that Indian tribal officials may need to confer with traditional religious leaders prior to making recommendations, and that tribal officials are under no obligation to reveal the identity of traditional religious leaders.

Custody (§10.6)

In this section, the regulations establish a definition of the term "custody" and establish an order of priority for custody of human remains or cultural items.

For purposes of this section, custody means ownership or control of human remains, funerary objects, sacred objects or objects of cultural patrimony that are intentionally excavated or inadvertently discovered.

Custody applies to all intentional excavations and inadvertent discoveries made after November 16, 1990, or before the effective date of the regulations.

The order of priority for human remains and associated funerary objects is with the lineal descendants of the deceased individual. Where a lineal descendant cannot be identified or no claim is made, then with respect to unassociated funerary objects, sacred objects, and objects of cultural patrimony, the priority is with the Indian tribe on whose lands the remains or objects were excavated or discovered, the Indian tribe or Native Hawaiian organization having the closest cultural affiliation with the remains or objects as determined pursuant to §10.14(b) which sets forth the criteria for determining lineal descent, or in circumstances where the cultural affiliation cannot be determined, the Indian tribe aboriginally occupying the area of Federal land (as recognized by a final judgment of the Indian Claims Commission or the U.S. Court of Claims as being the aboriginal land of an Indian tribe) from which the remains or objects were excavated or discovered, or a different Indian tribe or Native Hawaiian organization that has a stronger cultural relationship with the remains or objects if it can be shown by a preponderance of the evidence that the tribe or organization has the strongest demonstrated relationship with the objects.

The process for the transfer of custody of remains or cultural items provides that the Federal agency official must publish notice in a newspaper of general circulation in the area in which the remains or cultural items were excavated or discovered at least two times a week at least a week apart and the transfer of custody must not take place until at least 30 days after the publication of the final notice. This notice and the information on when and where it was published must also be sent to the Manager of the National Park Service. No transfer of custody can take place if additional claimants come forward and the Federal agency cannot clearly determine which claimant is entitled to custody. If no additional claimants respond to the notice, then transfer of custody to a lineal descendant or the relevant Indian tribe or Native Hawaiian organization can proceed but only following appropriate procedures which must respect traditional customs and practices of the culturally-affiliated tribe or organization.

Disposition of Unclaimed Human Remains, Funerary Objects, Sacred Objects or Objects of Cultural Patrimony (§10.7)

This section of the regulations is reserved for the future promulgation of regulations.

Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony in Museums and Federal Collections (Subpart C)

Summaries (§10.8)

To implement section 6 of the Act, the regulations require each museum or Federal agency that has possession or control over collections that may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony to complete a summary of the collection so that the information contained in the summary may be provided to lineal descendants and culturally-affiliated Indian tribes or Native Hawaiian organizations that may wish to request the repatriation of those objects. The summary is in lieu of an object-by-object inventory of collections, although if an inventory is available, it may be substituted for the summary. Federal agencies are responsible for assuring that these requirements are met for all collections from the lands each Federal agency manages or which are generated by actions of a Federal agency whether the collections are held by the Federal agency or by a non-Federal institution.

The summary must include an estimate of the number of objects in the collection, a description of the kinds of objects included, information on the manner of acquisition of the objects, when and where the objects were acquired, and information relevant to the identification of lineal descendants and cultural affiliation.

Summaries are to be completed no later than November 16, 1993, and in the process of developing the summaries, museum and Federal agency officials are required to consult with tribal officials and traditional religious leaders from whose lands the objects originated or who are or are likely to be culturally affiliated with the objects, or from whose aboriginal lands the objects originated.

Museum and Federal agency officials must document information related to the objects, provide a description of each object and the antiquity of the objects, and must use this documentation to determine the individuals, Indian tribes, and Native Hawaiian organizations with which such objects are affiliated, including accession and catalogue entries, acquisition information, including the source and date and place and means of acquisition, and a summary of the evidence used to determine cultural affiliation.

The repatriation of objects to lineal descendants, culturally-affiliated Indian tribes or Native Hawaiian organizations must not proceed prior to submission of a notice of intent to repatriate being provided to the Manager of the national NAGPRA program, and publication of the notice of intent to repatriate in the Federal Register, describing the objects in sufficient detail so as to enable other individuals, tribes or organizations to determine their interest in the claimed objects, and containing information relative to cultural affiliation. The Manager must publish the notice of intent to repatriate in the Federal Register and repatriation may not occur until at least 30 days after publication of the notice.

Inventories (§10.9)

This section of the regulations implements section 5 of the Act, by requiring each museum and Federal agency that has possession or control over holdings or collections of human remains and associated funerary objects to compile an inventory of such objects, and to the extent possible, identify the geographical and cultural affiliation of each item, for the purpose of facilitating repatriation. Consultation with lineal descendants, and Indian tribes and traditional religious leaders from whose tribal or aboriginal lands the remains or objects originated or who are likely to be culturally-affiliated with the remains or objects.

During the inventory consultation, museums and Federal agency officials must provide written information to lineal descendants and to officials and traditional religious leaders representing Indian tribes or Native Hawaiian organizations that are likely to be culturally-affiliated with the remains or objects including a list of all tribes and Native Hawaiian organizations that are or have been consulted, a general description of the conduct of the inventory, a projected time frame for conducting the inventory, and an indication that additional documentation used to identify cultural affiliation will be supplied upon request.

Also during the inventory consultation, museum and Federal agency officials may request information from lineal descendants of individuals whose remains and associated funerary objects are or are likely to be included in the inventory and the names and appropriate methods to contact traditional religious leaders who should be consulted, and the kinds of objects an Indian tribe or a Native Hawaiian organization reasonably believes to have been made exclusively for burial purposes or to contain human remains of their ancestors.

The inventories must contain documentation on accession and catalogue entries, acquisition information including the source and date and place and means of acquisition of each object, a description of the remains or objects including dimensions, photographic documentation, antiquity if known, and a summary of the evidence. Two separate documents make up the inventory: (1) a list of all human remains and associated funerary objects that are identified as being culturally-affiliated with one or more present-day Indian tribes or Native Hawaiian organizations; and (2) a list of all culturally-unidentifiable human remains and associated funerary objects for which no culturally-affiliated present-day Indian tribe or Native Hawaiian organization can be determined.

If the inventory results in the identification or likely identification of the cultural affiliation of any particular human remains or associated funerary objects with one or more Indian tribes or Native Hawaiian organizations, the museum or Federal agency must send the inventory to such tribes or organizations including all information required under this section and a notice of inventory completion that summarizes the results of the inventory within 6 months after completion of the inventory. The notice of inventory completion must summarize the contents of the inventory in sufficient detail to enable recipients to determine their interest in claiming the inventoried items, identifying each set of human remains or each associated funerary object and the circumstances surrounding its acquisition, and describe the cultural affiliation or the lack of cultural affiliation but which given the totality of circumstances are likely to be culturally-affiliated with a particular tribe or Native Hawaiian organization.

Upon request by an Indian tribe or Native Hawaiian organization that has received or should have received a notice of inventory completion and a copy of the inventory, a museum or Federal agency must supply additional available documentation to supplement the information provided with the notice. For these purposes, documentation means a summary of existing museum or Federal agency records including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining geographic origin, cultural affiliation, and basic facts surrounding the acquisition and accession of human remains and associated funerary objects.

If the inventory results in a determination that the human remains are of an identifiable individual, the museum or Federal agency must convey that information to the lineal descendant of the deceased individual, if known, and to the Indian tribe or Native Hawaiian organization of which the deceased individual was culturally affiliated.

If the museum or Federal agency official determines that it has possession or control over human remains that cannot be identified as affiliated with a particular individual, tribe or Native Hawaiian organization, the museum or Federal agency official must provide a notice of this result and a copy of the list of culturally-unidentifiable human remains and associated funerary objects to the manager of the national NAGPRA program, who in turn must make this information available to the members of the NAGPRA Review Committee.

The notice of inventory completion and a copy of the inventory must also be sent to the manager of the national NAGPRA program, and the manager must publish notices of inventory completion received from museums and Federal agencies in the Federal Register. Good faith efforts to complete an inventory are evidenced by the initiation of active consultation and documentation regarding the collections and the development of a written plan to carry out the inventory process, and at a minimum, the components of the inventory plan must include a definition of the steps required, the position titles of the persons responsible for each step, a schedule for carrying out the plan, and a proposal to obtain the necessary funding.

Repatriation (§10.10)

This section of the regulations provides for the criteria and processes associated with the repatriation of: (1) unassociated funerary objects, sacred objects, and objects of cultural patrimony; and (2) human remains and associated funerary objects; and also addresses exceptions to the repatriation requirements, the place and manner of repatriation, record of repatriation, and the disposition of culturally-unidentifiable human remains.

The regulations provide for the expeditious repatriation of unassociated funerary objects, sacred objects, and object of cultural patrimony if the following criteria are met: (1) the human remains or associated funerary objects meet the definitions established in §10.2(d)(1) or (2)(i), and (2) the affiliation of the deceased individual to a known lineal descendant, present-day Indian tribe, or Native Hawaiian organization has been reasonably traced through the procedures outlined in §10.9 and §10.14 of the regulations or has been shown

by a preponderance of the evidence presented by a requesting Indian tribe or Native Hawaiian organization pursuant to section 7(c) of the Act, and non of the specific exceptions listed in §10.10 (c) apply.

Repatriation must take place within 90 days of receipt of a written request repatriation that satisfies the requirements of §10.10(b)(1) from the culturally-affiliated Indian tribe or Native Hawaiian organization provided that the repatriation may not occur until at least 30 days after publication of the notice of inventory completion in the Federal Register as described in §10.9.

The requirements for repatriation do not apply to: (1) circumstances where human remains or cultural items are indispensable to the completion of scientific study whose outcome is of major benefit to the United States, although repatriation must occur within 90 days after completion of the study; (2) circumstances where there are multiple requests for the repatriation of human remains or cultural items and the museum or Federal agency cannot determine by a preponderance of the evidence which party is the most appropriate claimant, then the remains or items may be retained until the parties agree upon the appropriate recipient or the dispute is resolved pursuant to the regulations or a court of competent jurisdiction; (3) circumstances in which a court of competent jurisdiction determines that repatriation would result in a taking of property without just compensation within the meaning of the Fifth Amendment to the U.S. Constitution, in which case the custody of the items must be in accord with otherwise applicable law; or (4) circumstances where the repatriation is not consistent with other repatriation limitations identified in §10.15 of the regulations. Nothing in the regulations may be construed to prevent a museum or Federal agency, where otherwise so authorized, or a lineal descendant, an Indian tribe, or a Native Hawaiian organization from expressly relinquishing title to or right of possession or control over any human remains or cultural items.

The place and manner of repatriation must be accomplished in consultation with the requesting lineal descendants, or culturally-affiliated tribe or native Hawaiian organization. In addition, the museum or Federal agency official must inform the recipients of any presently-known treatment of the remains or cultural items with pesticides, preservatives, or other substances that represent a potential hazard to either the objects or to persons handling the objects. Museums and Federal agencies are required to adopt internal procedures adequate to permanently document the content and recipients of all repatriations. Pursuant to otherwise applicable law, the museum or Federal agency official may take steps necessary to ensure that information of a particularly sensitive nature is not made available to the general public.

With regard to culturally-unidentifiable human remains, if the cultural affiliation of remains cannot be identified, that information must be reported to the Manager of the National NAGPRA Program who will in turn transmit the information to the NAGPRA Review Committee. The Review Committee is responsible for compiling an inventory of culturally-unidentifiable remains of each museum or Federal agency, and for recommending to the Secretary specific actions for the disposition of those remains.

Disposition of Culturally-Unidentifiable Remains (§10.11)

This section is reserved for the future promulgation of regulations.

Civil Penalties (§10.12)

Section 9 of the Act authorizes the Secretary of Interior to assess civil penalties for failure to comply with the requirements of the Act, and section 10.12 defines “failure to comply” as including actions taken after November 16, 1990 to sell or transfer remains or cultural items in a manner that is contrary to the provisions of the Act, including the unlawful sale or transfer of remains or cultural items to a person or institution that is not required to comply with the Act. In addition, the Secretary may impose civil penalties

for failure to complete summaries after November 16, 1993. After November 16, 1995, civil penalties may be imposed if inventories have not been completed. After May 16, 1996, or 6 months following completion of an inventory, penalties may be imposed if the museum or Federal agency has not notified culturally-affiliated Indian tribes or Native Hawaiian organizations or refuses to repatriate remains or cultural items, or repatriates remains or cultural items before notice is published in the Federal Register, or does not consult with lineal descendants, Indian tribal officials, or traditional religious leaders, or does not inform repatriation recipients of any presently-known treatment of remains or cultural items with pesticides, preservatives, or other substances that represent a potential hazard to the objects or to persons handling the objects. Each instance of failure to comply constitutes a separate violation. The section also provides information on how to notify the Secretary of a failure to comply and the steps the Secretary must then take, including a hearing and appeals process.

Future Applicability (§10.13)

This section establishes how the Act applies to museums and Federal agencies after the expiration of the statutory deadlines for the completion of summaries and inventories with regard to new holdings or collections, or newly Federally-recognized Indian tribes, or the receipt of new Federal funds, or when a previous decision is amended.

For new holdings and collections, the museum or Federal agency official must provide a summary as required by §10.8 to any Indian tribe or Native Hawaiian organization that is or is likely to be affiliated with the collection within 6 months of receiving the new collection or holdings, and must complete an inventory of the new holding or collection within 2 years after receiving the new collection or holding. Additional pieces or fragments of previously repatriated remains or objects may be returned to the appropriate tribe or Native Hawaiian organization without publication of a notice in the Federal Register, if they do not change the number or cultural affiliation listed in the previous notice.

The same timelines (6 months for summaries and 2 years for inventories) apply to the provision of notice to a newly Federally-recognized Indian tribe. If new Federal funds are received by a museum, it must provide a summary of its collection within 3 years of the receipt of new Federal funds, and must complete an inventory within 5 years of the receipt of new Federal funds. A museum or Federal agency must publish in the Federal Register an amendment to any previously published notice if the museum or Federal agency revises its decision in a manner than changes the number or cultural affiliation of the listed cultural items.

General (Subpart D)

Lineal Descent and Cultural Affiliation (§10.14)

This section establishes procedures for determining lineal descent and cultural affiliation between present-day individuals and Indian tribes or Native Hawaiian organizations and human remains or cultural items in museum or Federal agency collections or which have been intentionally excavated or inadvertently discovered from Federal lands. The procedures may also be used by Indian tribes and Native Hawaiian organizations with respect to tribal lands.

Limitations and Remedies (§10.15)

This section provides a procedure if there is a failure to make a timely claim prior to repatriation. A subsection is reserved for the promulgation of future regulations where a failure to make a claim occurs when no disposition or repatriation has occurred. The section also contains savings provisions.



Review Committee (§10.16)

The Review Committee is charged with advising the Congress and the Secretary on matters relating to the regulations and the Act, including but not limited to monitoring the performance of museums and Federal agencies in carrying out their responsibilities under the Act, facilitating and making recommendations for the resolutions of disputes as described in §10.17, and compiling a record of culturally-unidentifiable human remains that are in the possession or control of museums and Federal agencies and recommending actions for their disposition.

Dispute Resolution (§10.17)

This section addresses formal and informal resolutions of disputes and the role of the Review Committee in the facilitation of an informal resolution of disputes that are not resolved by good faith negotiations.

Sample “Summary”

From the Code of Federal Regulations, the following was prepared by the National Park Service and published on August 1, 1994:

The following is a generic sample and should be used as a guideline for preparation of summaries tailoring the information to the specific circumstances of each case.

Before November 17, 1993

Chairman or Other Authorized Official
Indian tribe or Native Hawaiian organization
Street
State

Dear Sir/Madame Chair:

I write to inform you of collections held by our museum which may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony that are, or are likely to be, culturally affiliated with your Indian tribe or Native Hawaiian organization. This notification is required by section 6 of the Native American Graves Protection and Repatriation Act.

Our ethnographic collection includes approximately 200 items specifically identified as being manufactured or used by members of your Indian tribe or Native Hawaiian organization. These items represent various categories of material culture, including sea and land hunting, fishing, tools, household equipment, clothing, travel and transportation, personal adornment, smoking, toys, and figurines. The collection includes thirteen objects identified in our records as “medicine bags.”

Approximately half of these items were collected by John Doe during his expedition to your reservation in 1903 and accessioned by the museum that same year (see Major Museum Publication, no. 65 (1965).

Another 50 of these items were collected by Jane Roe during her expeditions to your reservation between 1950–1960 and accessioned by the museum in 1970 (see Major Museum: no. 75 (1975). Accession information indicates that several of these items were collected from members of the Able and Baker families.

For the remaining approximately 50 items, which were obtained from various collectors between 1930 and 1980, additional collection information is not readily available.

In addition to the above mentioned items, the museum has approximately 50 ethnographic items obtained from the estate of a private collector and identified as being collected from the “northwest portion of the State.”

Our archeological collection includes approximately 1,500 items recovered from ten archeological sites on your reservation and another 5,000 items from fifteen sites within the area recognized by the Indian Claims Commission as being part of your Indian tribe’s aboriginal territory.

Please feel free to contact Fred Poe at (012) 345–6789 regarding the identification and potential repatriation of unassociated funerary objects, sacred objects, or objects of cultural patrimony in this collection that are, or are likely to be, culturally affiliated with your Indian tribe or Native Hawaiian organization. You are invited to review our records, catalogues, relevant studies or other pertinent data for the purpose of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of these items. We look forward to working together with you.

Sincerely,

Museum Official
Major Museum

Sample Notice of Inventory Completion

From the Code of Federal Regulations, the following was prepared by the National Park Service and published on August 1, 1994:

The following is an example of a Notice of Inventory Completion published in the FEDERAL REGISTER.

National Park Service

Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects from Hancock County, ME, in the Control of the National Park Service.

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is hereby given following provisions of the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003(d), of completion of the inventory of human remains and associated funerary objects from a site in Hancock County, ME, that are presently in the control of the National Park Service.

A detailed inventory and assessment of these human remains has been made by National Park Service curatorial staff, contracted specialists in physical anthropology and prehistoric archeology, and representatives of the Penobscot Nation, Aroostook Band of Micmac, Houlton Band of Maliseet, and the Passamaquoddy Nation, identified collectively hereafter as the Wabanaki Tribes of Maine.

The partial remains of at least seven individuals (including five adults, one subadult, and one child) were recovered in 1977 from a single grave at the Fernald Point Site (ME Site 43-24), a prehistoric shell midden on Mount Desert Island, within the boundary of Acadia National Park. A bone harpoon head, a modified beaver tooth, and several animal and fish bone fragments were found associated with the eight individuals. Radiocarbon assays indicate the burial site dates between 1035-1155 AD. The human remains and associated funerary objects have been catalogued as ACAD-5747, 5749, 5750, 5751, 5752, 5783, 5784. The partial remains of an eighth individual (an elderly male) was also recovered in 1977 from a second grave at the Fernald Point Site. No associated funerary objects were recovered with this individual. Radiocarbon assays indicate the second burial site dates between 480-680 AD. The human remains have been catalogued as ACAD-5748. The human remains and associated funerary objects of all nine individuals are currently in the possession of the University of Maine, Orono, ME.

Inventory of the human remains and associated funerary objects and review of the accompanying documentation indicates that no known individuals were identifiable. A representative of the Wabanaki Tribes of Maine has identified the Acadia National Park area as a historic gathering place for his people and stated his belief that there exists a relationship of shared group identity between these individuals and the Wabanaki Tribes of Maine. The Prehistoric Subcommittee of the Maine State Historic Preservation Office's Archaeological Advisory Committee has found it reasonable to trace a shared group identity from the Late Prehistoric Period (1000-1500 AD) inhabitants of Maine as an undivided whole to the four modern Indian tribes known collectively as the Wabanaki Tribes of Maine on the basis of geographic proximity; survivals of stone, ceramic and perishable material culture skills; and probable linguistic continuity across the Late Prehistoric/Contact Period boundary. In a 1979 article, Dr. David Sanger, the archeologist who conducted the 1977 excavations at the Fernald Point Site and uncovered the abovementioned burials, recognizes a relationship between Maine sites dating to the Ceramic Period (2,000 B.P.-1600 A.D.) and present-day Algonkian speakers generally known as Abenakis, including the Micmac, Maliseet, Passamaquoddy, Penobscot, Kennebec, and Pennacook groups.

Based on the above mentioned information, officials of the National Park Service have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity which can be reasonably traced between these human remains and associated funerary objects and the Wabanaki Tribes of Maine.

This notice has been sent to officials of the Wabanaki Tribes of Maine. Representatives of any other Indian tribe which believes itself to be culturally affiliated with these human remains and associated funerary objects should contact Len Bobinchock, Acting Superintendent, Acadia National Park, P.O. Box 177, Bar Harbor, ME 04609, telephone: (207) 288-0374, before August 31, 1994. Repatriation of these human remains and associated funerary objects to the Wabanaki Tribes of Maine may begin after that date if no additional claimants come forward.

Dated: July 21, 1994