

Title 43-Public Lands: Interior  
Subtitle A-Office of the Secretary of the Interior

Part 10-NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT  
REGULATIONS (DRAFT THREE 4/21/92)

Subpart A-Introduction

Sec.  
10.1 Purpose  
10.2 Authority  
10.3 Applicability  
10.4 Definitions  
10.5 Consultation

Subpart B-Cultural Items in Museums or Federal Collections

10.6 Procedures for Consultation  
10.7 Procedures for Determining Right of Possession  
10.8 Procedures for Conducting Inventories and Developing Written Summaries  
10.9 Procedures for Repatriation and Disposition

Subpart C-Cultural Items Recovered from Federal or Tribal Lands

10.10 Procedures for Consultation  
10.11 Procedures for Determining Ownership  
10.12 Procedures for Intentional Excavation  
10.13 Procedures for Inadvertent Discovery

Subpart D-Administration

10.14 Dispute Resolution Procedures  
10.15 Review Committee  
10.16 Grant Procedures  
10.17 Penalties

Subpart E-Appendices

10.18 Sample Memorandum of Understanding Regarding Collection Use,  
Treatment, and Right of Possession  
10.19 Sample Memorandum of Understanding Regarding Graves Protection and/or  
Disturbance  
10.20 Sample Repatriation Agreement involving Disposition of Federal  
Property  
10.21 Review Committee Charter  
Authority: 25 U.S.C. 3001

Subpart A-Introduction

10.1 Purpose

These regulations implement provisions of the Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. 3001-3013), which affirms the ownership rights of Native Americans to cultural items with which they are affiliated by descent or culture. These regulations establish uniform definitions, standards, procedures, and guidelines required of Federal agencies, museums receiving Federal funds, and Indian tribes and Native Hawaiian organizations while:

(a) conducting inventories and developing written summaries of Native American cultural items that in the past have been controlled by Federal agencies and museums receiving Federal funds in preparation for deliberations concerning repatriation;

(b) establishing lineal descent or cultural affiliation between modern Native American individuals, or Indian tribes and Native Hawaiian organizations and Native American cultural items;

(c) undertaking appropriate repatriation or other disposition of these cultural items;

(d) excavating and appropriately disposing of Native American cultural items found on Federal or tribal lands whenever in situ preservation and protection of the items is not feasible; and

(e) establish a committee to monitor and review the implementation of the inventory and identification process and the repatriation activities required by the statute.

NAGPRA REGULATIONS

DRAFT 3: 4/21/92 PAGE 1

## 10.2 Authority

These regulations are promulgated pursuant to Section 13 of the Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. 3011). The authority to develop regulations affecting all Federal agencies, museums receiving Federal funds, and Indian tribes and Native Hawaiian organizations is assigned to the Secretary of the Interior.

## 10.3 Applicability

The regulations in this part apply to Native American human remains and other kinds of cultural items as defined in Section 2 of the Act and Section 10.4(b) of these regulations. Such remains and objects may have been, or will be, excavated or removed from Federal or tribal lands, or inadvertently discovered pursuant to the authorities of the Antiquities Act (16 U.S.C. 431-433), the Reservoir Salvage Act (16 U.S.C. 469-469c), the National Historic Preservation Act (16 U.S.C. 470h-2), or the Archeological Resources Protection Act (16 U.S.C. 470aa-mm). Federal agencies and museums receiving Federal funds must comply with the Act and these regulations for all cultural items as defined by Section 4.4(b) of these regulations, in their holdings or under their control as of the date of enactment, regardless of whether or how or when these items were taken from Federal or tribal lands, or from lands owned by others, if certain provisions contained in the definitions given in Section 4 of these regulations apply. In the event that items were removed from Federal lands which later were transferred from the administrative control of one agency to another, the agency managing the lands at the time of the removal is responsible for complying with the provisions of this Act with respect to those items, unless the ownership of said cultural items has been otherwise conveyed.

## NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 2

## 10.4 Definitions

Definitions in this section have been grouped according to whether they are affected parties, cultural items, provenience, ownership criteria, and procedures:

(a) Affected parties applies to persons or entities who implement or are impacted by the requirements and provisions of the Act. As used in these regulations, the term:

- (1) "Secretary" means Secretary of the Interior.
- (2) "Federal agency" means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution.
- (3) "Federal agency official" means the head of a Federal agency or designee responsible for carrying out the provisions of the Act.
- (4) "museum" means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other government agency.
- (5) "museum official" means the museum director or designee responsible for carrying out the provisions of the Act.
- (6) "Native American" means of, or relating to, a tribe, people, or culture indigenous to the United States.
- (7) "Indian tribe" means any tribe, band, nation, or other organized Indian 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.

## NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 3

- (8) "Native Hawaiian" means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.
- (9) "Native Hawaiian organization" means any organization that:
  - (i) serves and represents the interests of Native Hawaiians;

(ii) has as a primary and stated purpose the provision of services to Native Hawaiians; and

(iii) has expertise in Hawaiian Affairs, and shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei.

(10) "Native American representative" means an individual who represents an Indian tribe or Native Hawaiian organization, as designated by the governing body for the purposes of carrying out the provisions of the Act.

(11) "traditional religious leader" means a individual member of an Indian tribe or Native Hawaiian organization who is recognized by members of the group as an expert in the group's traditional religious beliefs and practices.

(b) Cultural items apply to specific objects or remains. For the purposes of this part, the term:

(1) "human remains" means the physical remains of the human body, including but not limited to bones, teeth, hair, ashes, mummified or otherwise preserved soft tissues.

(2) "associated funerary objects" means:

(i) cultural items that, as 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, or

(ii) other cultural items reasonably believed to have been made exclusively for burial purposes or to contain human remains.

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 4

(3) "unassociated funerary objects" means cultural items 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, but for which the associated human remains are not in the possession or control of the Federal agency or museum. These cultural items must be identified 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 or Native Hawaiian organization, or as being related to specific individuals or families or to known human remains.

(4) "sacred objects" means 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. The definition includes both objects needed for ceremonies currently practiced by traditional Native American religious practitioners and objects needed to renew ceremonies that are part of traditional religions. The operational part of the definition is that there must be "present day adherents" in either instance. While many items might be imbued with sacredness in the eyes of an individual, from ancient pottery sherds to arrowheads, provisions of the statute are specifically limited to objects that were devoted to a traditional Native American religious ceremony or ritual and which has religious significance or function in the continued observance or renewal of such ceremony.

(5) "objects of cultural patrimony" means objects 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. These objects are of such central importance that they may not be alienated, appropriated, or conveyed by any individual group member. Such object shall have been considered inalienable by such Native American group at the time the object was separated from such group. Objects of Native American cultural patrimony include items such as Zuni War

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 5

Gods, the Wampum belts of the Iroquois, and other objects of similar character and significance to the Indian tribe as a whole.

(6) "unclaimed cultural items" means objects for which a known lineal descendent or culturally affiliated Indian tribe or Native Hawaiian organization is established but which are not claimed for a period of five years following notification.

(7) "unaffiliated cultural items" means objects for which no lineal descendants or culturally affiliated groups have been identified during or after the inventory process.

(c) Provenience applies to locations or places. As used in this part the term:

(1) "Federal lands" means 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.

(2) "tribal land" means:

(i) all lands within the exterior boundaries of any Indian reservation;

(ii) all dependent Indian communities as defined under 18 U.S.C. 1151.

(iii) 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.

(3) "aboriginal land" means Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as having been used exclusively and occupied by some Indian tribe.

(4) "archeological site" means a location that contains or may contain burial sites or human remains or other cultural items as defined in the Act.

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 6

(5) "burial site" means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as part of the death rite or ceremony of a culture, human remains have been deposited.

(7) "repository" means a facility such as a museum, archeological center, laboratory or storage facility managed by a university, college, museum, other educational or scientific institution, a Federal, State, or local Government agency or Indian tribe that can provide professional, systematic and accountable curatorial services on a long term basis.

(d) Ownership is established by considering the following criteria. As used in this part, the term:

(1) "right of possession" means possession obtained with the voluntary consent of an individual or group that had authority of alienation.

(2) "lineal descendent" means an individual tracing his or her ancestry directly and without interruption to the individual whose remains and associated funerary objects are being claimed under the Act.

(3) "cultural affiliation" means that there is a relationship of shared group identity which can reasonably be traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.

(4) "prior ownership or control" means legitimate possession by an identifiable individual or group from which contemporary Native American individuals, Indian tribes or Native Hawaiian organizations are descendent.

(e) Procedures and required documents apply to processes that are required while implementing the provisions of the Act. As used in this part, the term:

(1) "inventory plan" means a written document, prepared by a Federal agency or museum receiving Federal funding, that identifies the activities, personnel, funding needs, and schedule that

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 7

will be used by a Federal agency or museum to complete the inventory of its Native American human remains and associated funerary objects.

(2) "inventory report" means an itemized list, prepared by a Federal agency or museum receiving Federal funding, that describes individual Native American human remains and associated funerary objects contained in a collection and establishing the lineal descent, cultural affiliation, or lack of either between the remains and objects and a modern individual, Indian tribe, or Native Hawaiian organization, based upon the geographical origin, acquisition, accession, and other readily available information about the human remains and associated funerary objects.

(3) "summary" means a written description, prepared using available information, of the scope of a collection containing unassociated funerary objects, sacred objects, or objects of cultural patrimony, and including descriptive information about the kinds of objects included, the geographical location from which the items originally were removed, the means and period of their acquisition and the known or likely cultural affiliation of the items in cases for which it is readily ascertainable.

(4) "consultation" means an exchange of written and/or oral communication regarding a proposed activity for purposes of achieving mutual understanding and agreement.

(5) "notification" means the formal and legal written processes of informing lineal descendants or groups for which cultural affiliation is established or likely of the completion of an inventory or of an inadvertent discovery.

(6) "intentional excavation" means the planned archeological removal of Native American human remains and other cultural items from previously identified or expected burial or archeological sites on Federal or tribal lands.

NAGPRA REGULATIONS  
DRAFT 3: 4/21/92: PAGE 8

(7) "inadvertent discovery" means the unanticipated encounter detection of Native American human remains or cultural items from previously unidentified or unknown burial or archeological sites.

(8) "advice of discovery" means any written communication, submitted by a person who has discovered human remains or other cultural items, to a Federal agency official, and, as appropriate, to the landowning Native American group.

(9) "inadvertent discovery agreement" means a course of action developed in consultation with appropriate Indian tribes and Native Hawaiian organizations, that identifies the care, treatment, and disposition of specific cultural items that are inadvertently discovered.

(10) "cultural item recovery plan" means a plan developed in consultation prior to an undertaking, that identifies the care, treatment, handling, and disposition of cultural items that may be encountered in undertaking a project on Federal or tribal lands.

(11) "treatment" means the methods and techniques of archeological excavation, analysis, and recording to which cultural items are subjected in planned excavation and inadvertent discovery situations.

(12) "disposition" means the relinquishment of control by Federal agencies to the lineal descendants or culturally affiliated Indian tribe or Native Hawaiian organization of cultural items following their treatment.

#### 10.5 Consultation

Each Federal agency and museum responsible for compliance with the Act shall:

NAGPRA REGULATIONS  
DRAFT 3: 4/21/92 PAGE 9

(a) make a reasonable and good faith effort to identify potential lineal descendants and the Indian tribes and Native Hawaiian organizations that are culturally affiliated with the cultural items that are affected by actions that the Federal agency or museum proposes to undertake;

(b) provide reasonable opportunities for potential lineal descendants and culturally affiliated Indian tribes and Native Hawaiian organizations to identify themselves;

(c) seek the assistance of potential lineal descendants and culturally affiliated Indian tribes and Native Hawaiian organizations, and other sources of expertise, including, but not limited to, academic institutions and State agencies responsible for Native American concerns, to identify traditional religious leaders who should be consulted;

(d) define consultation procedures that take into account the cultural values of the pertinent tribes and organizations;

(e) ensure that Indian tribe and Native Hawaiian organization representatives and traditional religious leaders have reasonable and timely opportunities to learn about, comment upon, and consult regarding actions that the Federal agency or museum may carry out while implementing the provisions of the Act;

(f) initiate and carry out consultation in accordance with such procedures at the earliest feasible stage in planning an action that may affect Native American cultural items, providing all pertinent information to potential consulting parties and affording such parties reasonable opportunities to respond and otherwise to participate in consultation;

(g) strive to reach agreement among consulting parties on a course of action; and

(h) maintain complete and adequate records of consultations.

NAGPRA REGULATIONS  
DRAFT 3: 4/21/92 PAGE 10

Subpart B-Cultural Items in Museums or Federal Collections

#### 10.6 Procedures for Consultation

Federal agency and museum officials are responsible for consulting with Indian tribe and Native Hawaiian organization officials and traditional religious leaders in developing and completing the inventory of Native American human remains and associated funerary objects in cultural items museum or Federal collections. This consultation must be conducted in accordance with the general provisions of Section 10.5 of these regulations.

(a) Required Consultation. Federal agency and museum representatives shall consult with:

(1) Native American representatives and traditional religious leaders of all applicable Indian tribes and Native Hawaiian organizations:

(i) from whose lands cultural items originated;

(ii) from whose judicially established aboriginal lands cultural items originated;

(iii) that can reasonably be assumed to be culturally associated with the cultural item; and, (2) in the case of cultural items believed to be affiliated with Native Hawaiians, both the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei.

(b) Initiation of Consultation. Federal agency and museum officials shall begin consultation at the earliest possible opportunity, but no later than the first of the following to occur:

(1) the point in the inventory process when the cultural affiliation of human remains and associated funerary objects is being investigated actively, or

NAGPRA REGULATIONS  
DRAFT 3: 4/21/92 PAGE 11

(2) upon provision of the written summary of unassociated funerary objects, sacred objects and objects of cultural patrimony to potentially affiliated tribes and Native Hawaiian organizations, or

(3) five years from the date of enactment of the Act.

(c) Provision of Information. Federal agency and museum officials must provide the following information in writing to potentially culturally affiliated Indian tribes and Native Hawaiian organizations:

(1) general requirements:

(i) a list of other potentially culturally affiliated Indian tribes or Native Hawaiian organizations (if any) that may be, or have been, consulted regarding the same cultural items;

(ii) indication that upon request and in a reasonable manner to be agreed upon by all parties, they may have access to the cultural items, records, catalogues, relevant studies or other pertinent data for the limited purposes of determining geographic origin, cultural affiliation, and basic facts surrounding the acquisition and accession of cultural items currently in the collection;

(2) additional requirements for inventories:

(i) a general description of how they plan to conduct the inventory;

(ii) the projected time frame for conducting the inventory;

(iii) indication that documentation used to identify cultural affiliation will be sent upon request in addition to the inventory lists;

(d) Requests for Information. Federal agency and museum officials shall request the following information from the appropriate Indian tribe and Native Hawaiian organization representatives:

(1) general requirements:

NAGPRA REGULATIONS  
DRAFT 3: 4/21/92 PAGE 12

(i) name and address of the individual officially designated by the Indian tribe or Native Hawaiian organization as its representative in consultations on matters related to these cultural items;

(ii) names and addresses of traditional religious leaders who should be consulted regarding the collections;

(iii) how the Indian tribe or Native Hawaiian organization would like the consultation to proceed;

(iv) a list of individuals or other tribes who should be contacted to participate in the consultation process.

(v) a list of the kinds of cultural items that the tribe considers to be sacred or objects of cultural patrimony.

(2) for inventories, the names and addresses of potential lineal descendants of the individual remains and associated cultural items under consideration are also required.

#### 10.7 Procedures for Determining Right of Possession

This section identifies procedures to be followed in order to establish lineal descent, cultural affiliation, and prior ownership or control of cultural items in museum or Federal collections. Federal agencies or museums must apply these criteria during the inventory or summary development process, or Indian tribes or Native Hawaiian organizations must apply them in order to demonstrate a connection with cultural items.

(a) Human Remains and Associated Funerary Objects. The right of possession of Native American human remains and associated funerary objects is assigned in priority order to:

NAGPRA REGULATIONS  
DRAFT 3: 4/21/92 PAGE 13

(1) the Federal agency or museum, when the original acquisition was accomplished with the full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization,

(2) the lineal descendants,

(3) the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects.

(b) Unassociated Funerary Objects, Sacred Objects, and Objects of Patrimony. The right of possession of unassociated funerary objects, sacred objects, and objects of cultural patrimony is assigned in priority order to:

(1) the Federal agency or museum, when the original acquisition was accompanied with the voluntary consent of an individual or group with authority to alienate such objects,

(2) the lineal descendants of the individual who previously owned or controlled the object,

(3) a requesting Indian tribe or Native Hawaiian organization which can show that the sacred object was formerly owned or controlled by a member.

(c) Lineal Descent. Lineal descent between a claimant or group of claimants and an individual's remains, associated funerary object, or object formerly under that individual's ownership or control shall be established by a direct and uninterrupted relationship between the claimants and the individual in question.

(d) Cultural Affiliation. Cultural affiliation between a present-day Indian tribe or Native Hawaiian organization and an individual's remains and

associated funerary objects shall be established through some combination of geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical or other relevant information or expert opinion.

NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 14

(1) cultural affiliation of an Indian tribe or Native Hawaiian organization to Native American human remains or cultural items shall be established by a simple preponderance of the evidence. Claimants do not have to establish cultural affiliation with absolute certainty.

(2) determination of a cultural affiliation between a present-day Indian tribe or Native Hawaiian organization and the human remains and cultural items of an earlier group must satisfy all of the following criteria:

(i) existence of an identifiable present-day group. Evidence to support this claim can include:

(A) Federally recognized tribes are automatically included as present-day groups.

(B) copy of a current governing document that describes membership criteria and procedures governing the affairs of the Indian tribe or Native Hawaiian organization, and/or

(C) a listing of all current members and their addresses, establishing that a substantial portion of the membership constitutes a present-day community, and/or

(D) evidence that the present-day Indian tribe or Native Hawaiian organization is essentially distinct from any other Indian tribe or Native Hawaiian organization.

(ii) existence of an identifiable earlier group. Evidence to support this claim must:

(A) establishes the existence of the earlier group as a biologically distinct population, or

(B) documents distinct patterns of material culture manufacture and distribution for the earlier group, or

(C) establishes the identity and cultural characteristics of the earlier group.

(iii) existence of a shared group identity which can be reasonably traced between the present-day Indian tribe or Native Hawaiian organization and the earlier group. Evidence to support

NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 15

this claim must demonstrate that a present-day group has been identified from historical times to the present, on a substantially continual basis, as descending from members of the earlier group.

(3) in the case of conflicting claims, degrees of cultural affiliation shall be (with priority given in the order listed):

(i) in the group who has inhabited the specific area prehistorically and/or historically and who continues to do so, who can demonstrate through a preponderance of the evidence that they have an exclusive shared relationship with the individuals represented by the human remains or with the group who owned or controlled the items in question.

(ii) in the group who prehistorically and/or historically inhabited the specific area but moved away as a group to a reservation or similar type of settlement, who can demonstrate through a simple preponderance of the evidence that they have an exclusive shared relationship with the individual represented by the human remains or with the group who owned or controlled the items in question.

(iii) in the group who once inhabited the specific area contemporaneously with other groups at the time during which human remains or cultural items were made or deposited through a simple preponderance of the evidence that they have a shared, yet not necessarily exclusive, relationship with the individuals represented by the human remains or with the group who owned or controlled the items in question.

(4) Available documentation may fail to establish reasonably cultural affiliation between present-day American Indian tribes or Native Hawaiian organizations and specific cultural items. Such studies as are necessary to collect new information that will or are likely to demonstrate cultural affiliation:

NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 16

(i) may commence without agreement between the repository and the potential claimant, only if the result is expected to bear upon cultural affiliation that is otherwise in doubt;

(ii) will be limited to the sole purpose of determining cultural affiliation;

(iii) will be conducted in conjunction with the inventory process;

(iv) will not be used solely as an impediment to the return of said cultural items; and

(v) will be paid for by the Federal agency or museum unless otherwise agreed.

(e) Prior Ownership or Control. Prior ownership or control shall be established by a preponderance of geographical, kinship, biological, archeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion demonstrating legitimate possession of a sacred object or object of cultural patrimony by an identifiable individual or group from which contemporary individuals or groups are descendent.

(f) Determination of lineal descent, cultural affiliation, or prior ownership or control can be established either:

(1) during the inventory or summary process activities that are carried out by museums or Federal agencies, or

(2) through a preponderance of the evidence that is presented by a descendent or affiliated Indian tribe or Native Hawaiian organization.

10.8 Procedures for Conducting Inventories and Developing Written Summaries

This section identifies the procedures that Federal agencies and museums receiving Federal funds must follow in order to identify, describe, and evaluate Native American human remains and other

NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 17

cultural items that may be included in their holdings. The procedural requirements vary according to the kind of cultural item being considered.

(a) Inventory for Human Remains and Associated Funerary Objects.

(1) Inventory Flexibility. The inventory process must be flexible in recognition of the varying size and scope of holdings and the quality of documentation among the nation's repositories.

(2) Standards for Inventory Content. Museum or Federal agency officials shall conduct an inventory of the human remains and associated funerary objects for which they are responsible.

(i) Basic description of human remains shall consist of the following: nature of the remains (e.g. cremation, skeleton, isolated bone, or partial skeleton), basic descriptive information by individual, or by skeletal elements when individuals cannot be identified, geographic origin, cultural affiliation or absence of cultural affiliation, and the basis for establishing cultural affiliation or its absence.

(ii) Basic description of the associated funerary objects shall include the inventory designation of the human remains with which the object is associated, object type, basic descriptive information of each object, geographic origin, cultural affiliation, and the basis for establishing cultural affiliation.

(3) The product of inventory activities is an inventory report. An inventory report shall consist of the descriptions and evaluations outlined in section 10.8(a)(2).

(4) Required Inventory Procedure

(i) Inventory and identification requirements. Each museum or Federal agency should develop an understanding of the scope of its holdings of human

remains and associated funerary objects. Of major concern are the geographical origins and Native American cultural groups known or likely to be represented in the collections of human remains and associated funerary objects. Once

NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 18

each repository has identified the geographical origins of its holdings and potential or established cultural affiliations that may be represented in the collections, museum and Federal agency officials shall consult with the lineal descendants, tribal government and Native Hawaiian organization officials, and traditional religious leaders from all potentially affiliated groups.

(ii) Each museum and Federal agency shall develop an inventory and identification plan that outlines the activities, schedule, and funding required to complete the inventory and identification of the it's holdings of Native American human remains and associated funerary objects within the time period required by the statute.

(iii) Requirement to supply available documentation in addition to geographical and cultural affiliation. Each repository shall examine accession files, catalogues, research reports, field notes, photographs, and other related documentation, to determine what additional documentation exists related to human remains and associated funerary objects in the collection. Upon request by the official representative of an Indian tribe or Native Hawaiian organization which receives or should have received notice, a museum or Federal agency shall supply additional available documentation to supplement the basic descriptions required by subsection a(2).

To meet this requirement, museums and Federal agencies shall summarize existing records for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American human remains and associated funerary objects. Data required in addition to the basic fields identified in subsection a(2) include the site designation (for reference purposes), acquisition type (e.g. gift, field collection, etc.), acquisition date and relevant studies and reports. Specific information on site location that could lead to looting or vandalism shall not be released pursuant to the Archaeological Resources Protection Act (16 U.S.C. 470aa-mm) .

NAGPRA REGULATIONS

DRAFT 3: 4/21/93 PAGE 19

(iv) Notification. Within six months of completion of the inventory, the museum or Federal agency official shall notify appropriate Indian tribal and Native Hawaiian organization officials of the Native American human remains and associated funerary objects in their collections with which they are or may be affiliated. Notification shall consist of a certified letter, with return receipt requested, which includes a list of the human remains and associated funerary objects. Whenever known, the circumstances of acquisition shall be provided for each entry. If appropriate given the nature of the holdings, two lists shall be provided:

(A) lists of human remains or associated funerary objects that are clearly identifiable as being affiliated with the notified Indian tribe or Native Hawaiian organization; and

(B) lists of human remains and associated funerary objects that may be reasonably believed to be the remains or funerary objects affiliated with the notified Indian tribe or Native Hawaiian organization.

A copy of each certified notification letter shall be sent to the Secretary of the Interior who shall publish each notice in the Federal Register.

(4) Extension of the deadline may be requested by any museum that has been unable to complete the inventory and identification process within the required time period. The Secretary of the Interior may extend statutory time requirements upon finding that the museum has undertaken a good faith effort. An indication of good faith shall include the development of a written plan to carry out the inventory and identification process. Minimum components of an inventory plan are: definition of the steps required, the position title(s) of the persons responsible for each step, the planned schedule of implementation of the plan, and funding required to implement the plan.

NAGPRA REGULATIONS

DRAFT 3: 4/21/92 PAGE 20

(b) Summary for Unassociated Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony.

(1) General Requirements. Based on available information, each museum or Federal agency official shall provide a written summary describing holdings of unassociated funerary objects, sacred objects, and objects of cultural patrimony. The summary shall serve in lieu of an object-by-object inventory for these kinds of cultural items, although if an inventory of such items is available it may be substituted. The summary shall be completed within the time frame required by the statute.

(2) Standards for Summary Content. The written summary shall contain information on the scope of each kind of object within the repository's holdings. For each kind of object covered by the summary, it shall also contain an estimated number of objects, reference to geographical location, the means and period of acquisition, and observations about lineal descent or cultural affiliation, where readily ascertainable.

(3) Requirement for access to records. In a reasonable manner to be agreed upon by all parties, official representatives of Indian tribes and Native Hawaiian organizations shall have access to records, catalogues, relevant studies or other pertinent data for the limited purposes of determining the geographic origin, cultural affiliation and basic facts surrounding acquisition and accession of Native American unassociated funerary objects, sacred objects, and cultural patrimony.

#### 10.9 Procedures for Repatriation and Disposition

(a) Human Remains and Associated Funerary Objects.

(1) Evidence of lineal descent or cultural affiliation shall be based upon:

(i) the Federal agency and museum's inventory process, or

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 21

(ii) where the claimant can show lineal descent or cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral tradition, historical, or other relevant information or expert opinion.

(2) Once it is established that lineal descent or cultural affiliation exists between an individual, Indian tribe, or Native Hawaiian organization and particular Native American human remains or associated funerary objects the Federal agency official or museum official shall, upon request of the lineal descendent or culturally affiliated Indian tribe or Native Hawaiian organization, return those cultural items as expeditiously as possible.

(b) Unassociated Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony.

(1) Federal agency and museum officials shall attempt to identify lineal descendents of former owners or cultural affiliation for unassociated funerary objects, sacred objects, or objects of cultural patrimony. A potential lineal descendent or culturally affiliated Indian tribe or Native Hawaiian organization may provide evidence on their own behalf to support a claim of lineal descent or cultural affiliation.

(2) The Federal agency or museum official shall expeditiously return sacred objects and objects of cultural patrimony upon request where the following conditions exist:

(i) the items conform to the definition for an unassociated funerary object, sacred object, or object of cultural patrimony; and

(ii) evidence presented by the claimant exists which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession to such object; and

(iii) the items had been:

(A) in the claimant's ownership or control; or

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 22

(B) in the ownership or control of an individual from which the claimant is a lineal descendent; or

(C) in the ownership or control of the Native American group from which the claiming Indian tribe or Native Hawaiian organization is a descendent.

(3) Repatriation of unassociated funerary object, sacred object, or object of cultural patrimony is not required when the Federal agency or museum official can establish the right of possession. However, Federal agencies and museums may, on their own authority, return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations, or individuals.

(d) Scientific and Medical Study. For purposes of the application of these regulations, there are three kinds of study pertaining to cultural items.

(1) Studies ongoing at the date of enactment. Cultural items may be a part of a specific scientific study that was ongoing or incomplete as of the date of enactment. If repatriation of such items is requested by a lineal descendent, Native American tribe, or Native Hawaiian organization, then those items must be expeditiously returned, unless:

(i) the items are indispensable to the completion of the scientific study; and  
(ii) the outcome of such study would be of major benefit to the United States.

(2) Studies necessary to determine the cultural affiliation of human remains or other cultural items. In some cases, it may be necessary to conduct new scientific study for the sole purposes of determining cultural affiliation between a modern Indian tribe or Native Hawaiian organization and specific cultural items. The provisions attending such studies shall be as specified in Section 6(d)(4) of these regulations.

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 23

(3) Other future studies. For any and all other studies which do not have as a stated objective the determination of cultural affiliation, consent from the lineal descendent or culturally affiliated Native American tribe or Native Hawaiian organization is required. Such consent is to be derived through consultation and development of a written plan that considers the kind of study, treatment, and handling of cultural items, as well as who bears the financial responsibility.

(4) In all cases, cultural items retained for study must be returned to the requesting lineal descendent or culturally affiliated Indian tribe or Native Hawaiian organization within 90 days of the completion of the specific study.

(e) Sharing of Information. Reports and other records held by Federal agencies and museums often contain information that is not published or common knowledge, but may be of interest to lineal descendants, American Indian tribes, or Native Hawaiian organizations. Such information shall be shared with descendants and potential affiliates in order to assist them in demonstrating valid claims for cultural items, subject to the requirements of the Archaeological Resources Protection Act and its implementing regulations regarding disclosure of protected archaeological site location information. Federal agencies and museums also may share such information with each other to assist in the identification of appropriate lineal descendants or cultural affiliation. The Federal agency official or museum official shall ensure that sensitive or confidential information about cultural items is provided only to those who may assist in such lineage or affiliation identification.

(f) Multiple Requests for Repatriation. Where there is more than one request for repatriation of any cultural item(s) and the Federal agency official or museum official cannot determine clearly which requesting party is the most appropriate claimant, the Federal agency official or museum official may retain such item(s) until the requesting parties agree upon the disposition of the item(s) in question.

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 24

If the competing parties cannot reach agreement on the appropriate disposition of an item(s), then they may request the Review Committee facilitate the resolution of the dispute.

(g) Liability of Claims. Any museum and museum official that repatriates any cultural item(s) in good faith as prescribed by Section 7 (f) of the Act and these regulations, shall not be held 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 provisions of the Act.

(h) Disposition of Federal property as part of a repatriation action. Federal agency officials are authorized by this Act to transfer human remains, associated funerary objects, unassociated funerary objects, sacred

objects, and objects of cultural patrimony to identified lineal descendants or culturally affiliated American Indian tribes, or Native Hawaiian organizations. Federal agency officials shall insure that internal agency procedures are adequate to maintain adequate records to permanently document all repatriation actions including what property was transferred and to whom at what

(i) Relinquishment. Nothing in these regulations shall prevent a lineal descendant or the governing body of an American Indian tribe or Native Hawaiian organization from expressly relinquishing title to, right of possession, or control over any Native American human remain, funerary object, sacred object, or object of cultural patrimony.

(k) Unaffiliated Human Remains and Unclaimed Cultural Items.

(1) Unaffiliated human remains. If lineal descent or cultural affiliation of human remains and other cultural items cannot be established during the inventory process or through subsequent claims by individuals, American Indian tribes or Native Hawaiian organizations, items shall be considered unaffiliated. Federal agency officials and museum officials shall report the inventory information about such remains in their holdings to the Secretary. The Secretary will transmit this information

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 25

to the Review Committee. The Committee is responsible for compiling an inventory of unaffiliated human remains in the possession or control of each Federal agency and museum, and for recommending to the Secretary specific actions for developing a process for the disposition of such human remains.

(2) Unclaimed cultural items. Native American cultural items for which lineal descendants or culturally affiliated American Indian tribes or Native Hawaiian organizations have been identified that are not claimed within five (5) years of consultation under section 3 of the statute, or notification under section 7 of the statute, shall be considered unclaimed. Federal agency officials and museum officials shall report on the presence of such cultural items in their holdings to the Secretary. Federal agencies and museums shall continue to curate these items following accepted professional standards.

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 26

Subpart C-Cultural Items Recovered from Federal or Tribal Lands

#### 10.10 Procedures for Consultation

Federal agency officials shall consult with the appropriate Indian tribe or Native Hawaiian organization officials prior to any undertaking which may effect Native American human remains or cultural items, or upon discovery of cultural items on Federal or tribal lands.

(a) Whenever possible, Federal agencies should enter into programmatic agreements with appropriate Indian tribes or Native Hawaiian organizations that have claimed, or are likely to claim, cultural items found on Federal lands or as a result of Federal agency activities on tribal lands. Such agreements should address all agency land management activities that could result in the excavation or discovery of cultural items that are covered by provisions of the statute. Consultation should lead to the establishment of terms and conditions for effectively implementing Section 3 (c) and (d) of Act, which address the treatment and disposition of cultural items uncovered either as a result of intentional excavation or through inadvertent discovery.

(b) The Federal agency official shall be cognizant that Native American officials may need to confer with traditional, non-official leaders or elders of the tribe prior to rendering a decision regarding agreement.

(c) The Federal agency official shall attempt to accommodate the wishes of culturally affiliated Indian tribes and Native Hawaiian organizations regarding the treatment of any Native American human remains and other cultural items.

(d) The Federal agency official shall follow the wishes of the affiliated Indian tribe or Native Hawaiian organization regarding the disposition of any Native American human remains and other cultural items.

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 27

(e) Written Agreement. The consultation should result in a document, signed

by the appropriate Federal agency official and official Native American representatives. The document shall condition the issuance of a permit under section 4 of the Archaeological Resources Protection Act of 1979 (93 Stat. 721; 16 U.S.C. 470aa et seq.), which is required for the removal of cultural items pursuant to Section 3(c)(1) of the Act. At minimum, consultation should document the understanding between lineal descendents or culturally affiliated tribes or Native Hawaiian organizations and Federal agency officials responsible for the undertaking on the following:

- (1) The application of the statutory definitions of each kind of cultural item;
- (2) The treatment, care, and handling of any cultural items recovered;
- (3) The kinds of scientific analysis that is appropriate for each kind of cultural item;
- (4) The nature of the dissemination/distribution of scientific or medical reports prepared on the cultural items;
- (5) The ultimate disposition of each kind of cultural item.

#### 10.11 Procedures for Determining Ownership

(a) Human Remains and Associated Funerary Objects. The ownership or control of Native American human remains and associated funerary objects is assigned in priority order to:

- (1) the lineal descendants,
- (2) whichever of the following can demonstrate right of possession through a preponderance of the evidence showing a cultural affiliation with the remains and associated funerary objects:

(i) the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered, or

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 28

(ii) the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects, or

(iii) the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered by a final judgment of the Indian Claims Commission or the United States Court of Claims.

(b) Unassociated Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony. The right of possession of unassociated funerary objects, sacred objects, and objects of cultural patrimony shall be assigned to whichever of the following which can demonstrate a preponderance of the evidence showing a cultural affiliation with the objects:

(1) the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered, or

(2) the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects, or

(3) the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered by a final judgment of the Indian Claims Commission or the United States Court of Claims.

(c) Lineal Descent. Lineal descent between a claimant or group of claimants and an individual's remains or associated funerary objects shall be established by a direct and uninterrupted relationship between the claimant(s) and the individual in question.

(d) Tribal Land. Claims based upon the provenience of cultural items on tribal land shall be established through geographical information establishing the discovery of said items within the boundaries established in section 10.4(c)(2).

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 29

(e) Cultural Affiliation. Cultural affiliation between a contemporary Indian tribe or Native Hawaiian organization and an individual's remains and associated funerary objects shall be established through some combination of

geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical or other relevant information or expert opinion which meets the requirements outlined in section 10.7(d).

(f) Aboriginal Land. Claims based upon the provenience of cultural items within the aboriginal land of an identified Indian tribe or Native Hawaiian organization shall be established through geographical information establishing the discovery of said items within Federal land that is recognized by a final judgment of Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe.

(g) If the ownership of cultural items is in dispute, the cultural items may be held by the Federal agency pending resolution of the dispute.

(h) Relinquishment. Nothing in this section shall 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 object, sacred object, or object of cultural patrimony.

#### 10.12 Procedures for Intentional Excavation

(a) In the absence of any previous formal agreement between the agency and the appropriate American Indian tribe or Native Hawaiian organization regarding the provisions of the Act, the Federal agency official or the non-Federal users of Federal or tribal lands through the agency, shall determine whether a proposed activity such as agency operations, development, or archaeological

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 30

research might or will result in the disturbance of Native American burial sites or the burial locations within archaeological sites, or encounter cultural items as defined in Section 4 of these regulations.

(b) If it is determined that disturbance of such items on Federal lands may occur, the Federal agency official shall inform appropriate American Indian tribe or Native Hawaiian organization in writing of agency intentions, and that the agency desires to consult for the purposes of reaching agreement with official representatives of the tribe(s) or organization(s) to determine appropriate treatment and disposition of such items.

(c) This communication shall:

(1) describe the proposed activity and its general location, including how the agency has determined that Native American burial or cultural items may be affected by the project and what prudent and feasible steps have been taken to avoid or minimize possible disturbance to such sites or areas;

(2) describe the agency's proposed treatment of cultural items recovered through archeological excavation in advance of the project;

(3) propose a specific course of action to be followed should human remains or other cultural items be encountered from burial or archeological sites that have not been identified prior to the initiation of project execution, and

(4) propose a time and place for meetings or consultations should such be needed to resolve further issues and reach agreement.

(d) Proof of Consultation. Written agreements as described above, once signed by both parties, or evidence of notification and attempts to consult, also demonstrate proof of consultation.

(e) Specific Pro-visions for Projects on Federal Lands.

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 31

(1) If after good faith consultation the Federal agency and Native American owners cannot reach agreement on the treatment and disposition of the cultural items from Federal lands, cultural items will be returned to the appropriate American Indian tribe or Native Hawaiian organization after a period not to exceed one (1) year following project completion, unless otherwise agreed.

(2) If there is a dispute between American Indian tribes or Native Hawaiian organizations over the appropriate disposition of the cultural items that may be recovered from Federal lands, the

hierarchy of ownership set forth in Section 3(a) of the Act shall prevail.  
(f) Specific Provisions for Projects on Tribal Lands.

(1) For undertakings occurring on tribal lands, consent must be obtained from the tribe on a plan for treatment and disposition of cultural items that will be disturbed by the agency's activities.

(2) If, in spite of a good faith consultation effort, there is no consent from the American Indian tribe or Native Hawaiian organization whose tribal land is being impacted concerning the treatment and disposition of such cultural items as may be affected during project implementation, the project may proceed only if it is possible to avoid burial sites or archeological sites containing cultural items.

#### 10.13 Procedures for Inadvertent Discovery

(a) Any person who knows, or has reason to know, that Native American human remains or cultural items have been discovered on Federal or tribal lands must notify, in writing, the responsible Federal agency official or appropriate Indian tribe or Native Hawaiian organization of the discovery. This notice is termed advice of discovery.

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 32

(b) If the discovery occurs in connection with an on-going activity on Federal or tribal lands, the Federal agency official responsible for the activity shall ensure that activity in the vicinity of the discovery ceases immediately. Further, the Federal agency official shall also:

(1) take immediate steps to secure and protect discovered human remains and other cultural items, including as appropriate, stabilization, covering or reburial; and

(2) immediately notify by certified, return receipt letter, the appropriate Indian tribe or Native Hawaiian organization of the discovery, and include pertinent information as to kind of material, condition, and the circumstances surrounding the discovery.

(c) The activity may resume:

(1) On Federal lands, 30 days after the Federal agency official receives the returned receipt from the certified notification letter.

(2) On Tribal or Native Hawaiian lands, only after consent by the Indian tribe or Native Hawaiian organization that it concurs with a discovery plan for the removal, treatment, and disposition of the cultural items.

(3) Upon reaching agreement with the appropriate Tribes, the activity may resume immediately on Federal or Tribal lands, even if 30 days have not expired.

(d) Thirty Day Consultation Period for Inadvertent Discoveries on Federal and Tribal lands. The purpose of the 30 day consultation period is to provide the culturally affiliated Indian tribes and Native Hawaiian organizations, who are the owners of cultural items, the opportunity to reclaim the human remains and other cultural items from federal lands. Indian tribes and Native Hawaiian organizations will determine the ultimate disposition of cultural items on their lands. During this period:

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 33

(1) The Federal agency official shall notify within 24 hours the appropriate Indian tribe or Native Hawaiian organization believed to be owners of said cultural items.

(2) This notification must consist of all available information on the discovery situation, including the kinds of cultural items discovered, their apparent age and condition and propose a treatment plan. The Federal agency official shall request consultation with the tribe on the disposition of the discovered cultural items.

(3) Within thirty (30) days of notification, the Tribe must either concur in the proposed plan, propose an alternative treatment and disposition plan for the cultural items, or forfeit its consultation rights regarding removal, disposition and treatment.

(4) If the Tribe does not respond, the Federal agency may authorize removal of the items only from federal lands in accordance with its treatment and disposition plan and the terms and provisions of the ARPA permit. The cultural items shall be considered unclaimed and disposed of to the appropriate

tribe after a period not to exceed one year following section 10.9(k) of these regulations.

(5) If the Tribe concurs in the Federal agency's plan, such plan shall be implemented.

(6) If after good faith consultation, the agency and the Tribe cannot reach agreement on the treatment of the discovered items the material may be removed and the cultural items returned to the Tribe after a period not to exceed one year following project completion.

(e) Special Provisions for Inadvertent Discovery on Tribal Lands. As owners of cultural items found on its lands, an Indian tribe or Native Hawaiian organization must consent prior to the implementation of any plan calling for the removal of the cultural items. In the absence of agreement on a plan, the Federal agency must either continue consultation until an agreement is reached or, avoid and preserve the cultural items in place.

NAGPRA REGULATIONS  
DRAFT 3: 4/21/92 PAGE 34

Subpart D-Administration

#### 10.14 Dispute Resolution Procedures

(a) Kinds of potential disputes. The following decisions shall be subject to the dispute resolution procedures set forth in this section:

- (1) character of the items or objects;
- (2) determination of cultural affiliation;
- (3) determination of right of possession;
- (4) appropriate disposition of human remains and other cultural items.

(b) Hierarchy of dispute resolution forums. Disputes among lineal descendant, Indian tribes, or Native Hawaiian organizations and Federal agencies or museums related to the determination of cultural affiliation, right of possession or the character of cultural items, or disputes as to the appropriate disposition of human remains or cultural items shall be resolved in compliance with the Administrative Dispute Resolution Act (PL 101-552, 104 Stat. 2736) and Executive Order 12778 regarding Civil Justice Reform, and with priority given in the order listed:

- (1) whenever feasible, through informal discussions, negotiations and settlements rather than through any formal or structured process or court proceeding,
- (2) through formal or structured Alternative Dispute Resolution (ADR) processes, including negotiation, mediation, or related techniques when use of ADR techniques or processes shall be deemed warranted in the context of a particular claim or claims, and that such use will contribute materially to the prompt, fair, and efficient resolution of the claims. The Federal agency official shall

NAGPRA REGULATIONS  
DRAFT 3: 4/21/92: PAGE 35

neither seek nor agree to the use of binding arbitration or any other equivalent ADR technique which precludes exercise of that agency's discretion.

(3) through litigation in Federal court. The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this Act and shall have the authority to issue such orders as may be necessary to enforce the provision of this Act.

(c) Review Committee Role

(1) The Native American Graves Protection and Repatriation Act Review Committee may become involved in facilitating the resolution of disputes that cannot be resolved at local or regional levels among lineal descendants, Indian tribes, or Native Hawaiian organizations, and Federal agencies or museums. Review Committee actions may include:

- (i) participation in discussions between Indian tribes or Native Hawaiian organizations and Federal agencies or museums in the development of agreements,
- (ii) convening the parties to the dispute,
- (iii) reviewing the facts of the dispute and making a finding,

(iv) after consultation with the Secretary, recommending a settlement of the dispute to the disputing parties.

(2) The Review Committee shall serve as an advisory body only. Findings related to the resolution of disputes shall not be binding on the disputing parties or the Secretary.

(d) Retention of Cultural Items. The Federal agency, museum or Indian tribe shall retain Native American cultural items until the requesting parties agree upon their disposition or the dispute is otherwise resolved pursuant to the provisions of this Act or by a court of competent jurisdiction.

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 36

##### 10.15 Review Committee

(a) Membership:

(1) Selection Procedures:

(i) Composition. The Secretary shall appoint the seven members of the Review Committee according to the following formula:

(A) 3 from nominations submitted by American Indian tribes, Native Hawaiian organizations, and traditional Native religious leaders with at least two of such persons being traditional Indian religious leaders.

(B) 3 from nominations submitted by national museum organizations and scientific organizations, and

(C) 1 from a list of persons developed and consented to by all of the members appointed to subparagraphs (A) and (B).

(ii) Vacancies. In the event vacancies shall occur, such vacancies shall be filled by the Secretary in the same manner as the original appointment within 90 days of the occurrence of such vacancy.

(iii) The Secretary shall not appoint Federal officers or employees to the committee.

(2) Reimbursement. Review Committee members shall serve without pay, but shall be reimbursed at a rate equal to the daily rate for GS-18 of the General Schedule for each working day (including travel time), plus travel expenses, including per diem in lieu of subsistence, in accordance with section 5702 and 5703 of title 5, United States Code.

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 37

(b) Duties. The Review Committee shall:

(1) develop a list of mutually agreed upon persons from which the Secretary shall appoint the seventh Review Committee member.

(2) designate one Review Committee member as chairman.

(3) consult with:

(i) Indian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the committee affecting such tribes or organizations, including the development of agreements which provide for the disposition of Native American human remains, funerary objects, sacred objects or objects of cultural patrimony, and

(ii) the Secretary in the development of regulations to carry out this Act, and such other related functions as the Secretary may assign to the committee,

(4) monitor the inventory and establishment of cultural affiliation process to ensure a fair, objective, and consistent consideration and assessment of all available relevant information and evidence,

(5) compile an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains. The committee shall make these recommendations in consultation with Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups.

(6) facilitate the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or

museums relating to the return of such items including convening the parties to the dispute if deemed desirable as to the determination of cultural affiliations, right of possession or the character of the items or remains or objects.

NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 38

(7) review and make findings. Findings will not be binding on the parties but that the review committee shall be an advisory committee which make recommendations to the Secretary and helps facilitate resolution of disputes regarding the provisions of this Act. Findings will be restricted to:

- (i) the identity or cultural affiliation of cultural items,
- (ii) the return of such items,
- (iii) extensions of time for the completion of the inventory process,
- (iv) future care of cultural items which are to be repatriated.

(8) submit:

(i) an annual report to the Congress on the progress made and any problems encountered in implementing the inventory and repatriation provisions of this Act during the previous year,

(ii) other reports to the Secretary or Congress as the Committee considers appropriate,

(9) terminate at the end of the 120-day period beginning on the day the Secretary certifies, in a report submitted to Congress, that the work of the committee has been completed.

(c) staff support and documentation

(1) The Secretary shall establish such rules and regulations for the committee as may be necessary.

(2) The Secretary shall provide reasonable administrative and staff support necessary for the deliberations of the committee.

(3) Any records and findings made by the review committee pursuant to this Act relating to the identity or cultural affiliation of any cultural items and the return of such items may be admissible in any action brought under section 15 of the Act.

NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 39

10.16 Grant Procedures

(a) The Native American Grave Protection and Repatriation Act Grant Program. The Act provides for the Secretary to establish a grant program to provide Federal financial assistance to Indian tribes, Native Hawaiian organizations and museums in order to comply with certain provision of the Act.

(b) Eligibility. The following are eligible to apply for grants under the Native American Graves Protection and Repatriation Act Grants Program:

(1) Indian tribes that are recognized as eligible for the special for the special programs and services provided by the United States because of their status as Indians;

(2) Native Hawaiian organizations that represent the interests of Native Hawaiians, have as their stated purpose the provision of services to Native Hawaiians, and have expertise in Native Hawaiian affairs;

(3) institutions, state and local government agencies (including institutions of higher learning, that receive Federal funds and have possession of, or control over, Native American cultural items.

(c) Applicable Regulations. The following regulations apply to the Indian tribe, Native Hawaiian organization, or museum that applies for a grant under the Native American Graves Protection and Repatriation Act Grants Program:

(d) Appropriate Activities. The Secretary is authorized to provide Federal financial assistance under this program to conduct one or more of the following projects:

(1) Indian Tribe or Native Hawaiian organization.

(i) for the costs associated with consulting with Federal agencies or museums concerning inventories, written summaries, and cultural items in the holdings of those organizations;

(ii) for the costs associated with repatriating cultural items;

NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 40

(iii) for the costs of curating cultural items that have been repatriated under the Act.

(2) Museum. For the purpose of assisting the museums in conducting the inventories and establishing cultural affiliation as required under the Act.

(e) Application. To be considered for a grant under this program, an Indian tribe, Native Hawaiian organization, or museum must submit to the Secretary an application containing the following:

(1) Information showing that the application is:

(i) An Indian tribe, as defined in (b) (1) above; or

(ii) An organization primarily serving and representing Native Hawaiians; or

(iii) a museum, as defined by the Act, which receives Federal funds and has possession of, or control over, Native American cultural items.

(2) A description of the project or projects—from among those listed in (d)—the applicant proposes to conduct under its grant.

(3) A description of how the proposed project is likely to aid the Indian tribe, Hawaiian organization, or museum in carrying out the provisions of the Act.

(4) For additional information on the status of the grants program and additional applications procedures interested Indian tribes, Native Hawaiian organizations, and museums should contact the Departmental Consulting Archeologist, Archeological Assistance Division, National Park Service, P.O. Box 37127, U.S. Department of the Interior, Washington D.C. 20013-7127.

(f) Evaluation Criteria. The Secretary awards a grant to an applicant if:

(1) The applicant meets the requirements of eligibility in (b); and

(2) The Secretary determines that the application meets the requirement at (d).

NAGPRA REGULATIONS

DRAFT 3: 4/21/52: PAGE 41

10.17 Penalties

(a) Prohibited acts.

(1) No person may sell, purchase, use for profit, or transport for sale or profit, the human remains of a Native American without the right of possession to those remains as provided in the Act.

(2) No person may sell, purchase, use for profit, or transport for sale or profit any Native American cultural items obtained in violation of the Act.

(3) No museum that receives Federal funds and has possession of, or control over, Native American cultural items, may fail to comply with the requirement of this Act.

(b) Criminal penalties. Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit the human remains of a Native American without the right of possession to those remains as provided in the Act or Native American cultural items obtained in violation of the Act shall be fined in accordance with chapter 53 of title 18 of the United States Code, or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined in accordance with chapter 53 of title 18 of the United States Code, or imprisoned not more than 5 years, or both.

(c) Civil penalties

(1) The Secretary may assess a civil penalty against any museum which has failed to comply with the requirements of this Act.

(2) Notice of failure to comply. The Secretary shall serve a notice of failure to comply upon any museum believed to be subject to a civil penalty, either in person or by registered or certified mail (return receipt requested). The Secretary shall include in the notice:

(i) A concise statement of the facts believed to show failure to comply;

NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 42

(ii) A specific reference to the provision(s) of this part which allegedly have not been complied with;

(iii) The amount of penalty proposed to be assessed, including any initial proposal to mitigate or remit where notice of a proposed penalty amount will be served after the damages associated with the alleged failure to comply have been ascertained;

(iv) Notification of the right to file a petition for relief pursuant to paragraph (4) of this section, or to await the Secretary's notice of assessment, and to request a hearing in accordance with paragraph (7) of this section. The notice shall also inform the person of the right to seek judicial review of any final administrative decision assessing a civil penalty.

(3) The museum served with a notice of failure to comply shall have 45 calendar days from the date of its service (or the date of service of a proposed penalty amount, if later) in which to respond. During this time the museum may:

(i) Seek informal discussions with the Secretary;

(ii) File a petition for relief in accordance with paragraph (4) of this section;

(iii) Take no action and await the Secretary's notice of assessment;

(iv) Accept in writing or by payment the proposed penalty, or any mitigation or remission offered in the notice. Acceptance of the proposed penalty or mitigation or remission shall be deemed a waiver to the notice of assessment and of the right to request a hearing under paragraph (7) of this section.

(4) Petition of relief. The museum served with a notice of failure to comply may request that no penalty be assessed or that the amount be reduced, by filing a petition for relief with the Secretary within 45 calendar days of the date of service of the notice of failure to comply (or of a proposed penalty amount, if later). The petition shall be in writing and signed by a official authorized

NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 43

to sign such documents. The petition shall set forth in full the legal or factual basis for the requested relief.

(5) Assessment of penalty.

(i) The Secretary shall assess the civil penalty upon expiration of the period for filing a petition for relief, upon completion of review of any petition filed, or upon completion of informal discussions, whichever is later.

(ii) The Secretary shall take into consideration all available information, including information provided pursuant to paragraphs (3) and (4) of this section or furnished upon further request by the Secretary.

(iii) If the facts warrant a conclusion that the museum has complied, the Secretary shall so notify the museum served with a notice of failure to comply, and no penalty shall be assessed.

(iv) If the facts warrant a conclusion that a failure to comply has occurred, the Secretary shall determine a penalty in accordance with section (11).

(6) Notice of assessment. The Secretary shall notify the museum served with a notice of failure to comply of the penalty amount assessed by serving a written notice of assessment, either in person or by registered or certified mail (return receipt requested). The Secretary shall include in the notice of assessment:

(i) The facts and conclusions from which it was determined that provisions of the Act were not complied with;

(ii) The basis in paragraph (11) for determining the penalty amount assessed and/or any offer to mitigate or remit the penalty; and

(iii) Notification of the right to request a hearing, including the

procedures to be followed, and to seek judicial review of any final administrative decision assessing a civil penalty.

## NAGPRA REGULATIONS

DRAFT 3: 4/12/92: PAGE 44

## (7) Hearings

(i) Any museum wishing to request a hearing on a notice of assessment of civil penalty may file a written, dated request for a hearing with the Hearing Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203-1923. The respondent shall enclose a copy of the notice of failure to comply and the notice of assessment. The request shall state the relief sought, the basis for challenging the facts used as the basis for charging the failure to comply and fixing the assessment, and the respondent's preference as to the place and date for a hearing. A copy of the request shall be served upon the Solicitor of the Department of the Interior personally or by registered or certified mail (return receipt requested), at the address specified in the notice of assessment. Hearings shall be conducted in accordance with 43 CFR Part 4, Subparts A and B.

(ii) Waiver of right to a hearing. Failure to file a written request for a hearing within 45 days to the date of service of a notice of assessment shall be deemed a waiver of the right to a hearing.

(iii) Commencement of hearing procedures. Upon receipt of a request for a hearing, the Hearing Division shall assign an administrative law judge to the case. Notice of assignment shall be given promptly to the parties, and thereafter, all pleadings, papers, and other documents in the proceeding shall be filed directly with the administrative law judge, with copies served on the opposing party.

## (iv) Appearance and practice.

(A) Subject to the provisions of 43 CFR 1.3, the respondent may appear in person, by representative, or by counsel, and may participate fully in those proceedings. If respondent fails to appear and the administrative law judge determines such failure is without good

## NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 45

cause, the administrative law judge may, in his/her discretion, determine that such failure shall constitute a waiver of the right to a hearing and consent to the making of a decision on the record made at the hearing.

(B) Departmental counsel, designated by the Solicitor of the Department, shall represent the Secretary in the proceedings. Upon notice to the Secretary of the assignment of an administrative law judge to the case, said counsel shall enter his/her appearance on behalf of the Secretary and shall file all petitions and correspondence exchanges by the Secretary and the respondent pursuant to subpart (c) of this part which shall become part of the hearing record. Thereafter, service upon the Secretary shall be made to his/her counsel.

## (v) Hearing administration.

(A) The administrative law judge shall have all powers accorded by law and necessary to preside over the parties and the proceedings and to make decisions in accordance with 5 U.S.C. 554-557.

(B) The transcript of testimony, the exhibits, and all papers, documents and requests filed in the proceedings shall constitute the record for decision. The administrative law judge shall render a written decision upon the record, which shall set forth his/her findings of fact and conclusions of law, and the reasons and basis therefore, and an assessment of a penalty, if any.

(C) Unless notice of appeal is filed in accordance with paragraph (6) of this section, the administrative law judge's decision shall constitute the final administrative determination of the Secretary in the matter and shall become effective 30 calendar days from this decision.

(D) In such a hearing, the amount of civil penalty assessed shall be determined in accordance with this part, and shall not be limited by the amount assessed by the Secretary or any offer of mitigation or remission made by the Secretary.

## NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 46

(vi) Appeal

(A) Either the respondent or the Secretary may appeal the decision of an administrative law judge by the filing of a "Notice of Appeal" with the Director, Office of Hearings and Appeals, U.S. Department of Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203-1923, within 30 calendar days of the date of the administrative law judge's decision. Such notice shall be accompanied by proof of service on the administrative law judge and the opposing party.

(B) Upon receipt of such a notice, the Director, Office of Hearings and Appeals, shall appoint an ad hoc appeals board to hear and decide an appeal. To the extent they are not inconsistent herewith, the provision of the Department of Hearings and Appeals Procedures in 43 CFR Part 4, Subpart A, B, and G shall apply to appeal proceedings under this subpart. The decision of the board on the appeal shall be in writing and shall become effective as the final administrative determination of the Secretary in the proceeding on the date it is rendered, unless otherwise specified therein.

(vii) Report Service. Copies of decisions in civil penalty proceedings instituted under the Act may be obtained by letter of request addressed to the Director, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203-1923. Fees for this service shall be as established by the Director of that Office.

(8) Final administrative decision

(i) Where the museum served with a notice of violation has accepted the penalty pursuant to paragraph (c)(4) of this section, the notice of violation shall constitute the final administrative decision;

NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 47

(ii) Where the museum served with a notice of assessment has not filed a timely request for a hearing pursuant to paragraph (g)(1) of this section, the notice of assessment shall constitute the final administrative decision.

(iii) Where the museum served with a notice of assessment has filed a timely request for a hearing pursuant to paragraph (g)(1) of this section, the decision resulting from the hearing or any applicable administrative appeal therefrom shall constitute the final administrative decision.

(9) Payment of penalty.

(i) The museum assessed a civil penalty shall have 45 calendar days from the date of issuance of the final administrative decision in which to make full payment of the penalty assessed, unless a timely request for appeal has been filed with a U.S. District Court as provided in section (7)(i) of the Act.

(ii) Upon failure to pay the penalty, the Secretary may request the Attorney General to institute a civil action to collect the penalty in the U.S. district court for the district in which the museum assessed a civil penalty is found. Where the Secretary is not represented by the Attorney General, a civil action may be initiated directly by the Secretary. In such action, the validity and amount of the penalty shall not be subject to review.

(10) Other remedies not waived. Assessment of a penalty under this section shall not be deemed a waiver of the right to pursue other available legal or administrative remedies.

(11) Civil penalty amounts.

(i) Maximum amount of penalty

(A) Where the museum being assessed a civil penalty has not committed any previous violation of any prohibition in section (a), the maximum amount of the penalty shall be the

NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 48

full archeological, historical, or commercial value of the item(s) involved plus any damages suffered, both economic and noneconomic, by the aggrieved party.

(B) Where the museum being assessed a civil penalty has committed any previous violation of any prohibition in section (a), the maximum amount of the penalty shall be double the full archeological, historical, or

commercial value of the item involved plus any damages suffered, both economic and noneconomic, by the aggrieved party.

(C) In addition, any museum that fails to comply with the relevant provisions of the Act shall be ineligible to receive Federal funding during the period of non-compliance.

(ii) Determination of penalty amount, mitigation, and remission. The Secretary may assess a penalty amount less than the maximum amount of penalty and may offer to mitigate or remit the penalty.

(A) Determination of the penalty amount and/or a proposal to mitigate or remit the penalty may be based upon any of the following factors:

(1) Agreement by the museum being assessed a civil penalty to provide an inventory of all human remains and associated funerary objects and a summary of all unassociated funerary objects, sacred objects, and cultural patrimony, and;

(2) Agreement by the museum being assessed a civil penalty to repatriate human remains and other cultural items to the appropriate lineal descendants, Indian tribes or Native Hawaiian organizations, or;

(3) Demonstration of hardship or inability to pay, provided that this factor shall only be considered when the museum being assessed a civil penalty has not been found to have previously violated the regulations in this part, or;

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 49

(4) Determination that the museum being assessed a civil penalty did not willfully fail to comply, or;

(5) Determination that the proposed penalty would constitute excessive punishment under the circumstances.

(B) The Secretary shall consult with and consider the interests of the appropriate lineal descendants, Indian tribes or Native Hawaiian organizations prior to proposing to mitigate or remit the penalty.

(C) All civil penalty monies and any item forfeited under the provisions of this section shall be transferred to the appropriate Native American individual, Indian tribe, or Native Hawaiian organization.

#### NAGPRA REGULATIONS

DRAFT 3: 4/21/92: PAGE 50

#### Subpart E-Appendices

§ 10.18 Sample Memorandum of Understanding Regarding Collection Use, Treatment, and Right of Possession

§ 10.19 Sample Memorandum of Understanding Regarding Graves Protection and/or Disturbance

§ 10.20 Sample Repatriation Agreement Involving Disposition of Federal Property

§ 10.21 Review Committee Charter