



Basic Consultation Requirements of NAGPRA for Federal Land Managers: What's a Manager to Do?

James D. Wilde and Clifford Brown

This article introduces the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) and outlines basic compliance procedures for most federal agency land managers. NAGPRA is actually civil rights law, but federal cultural or natural resource managers generally are assigned responsibility for NAGPRA compliance within affected agencies. The Act deals only with "NAGPRA objects," defined in NAGPRA as Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony. NAGPRA has three basic parts. The first deals with collections under federal control or in museums prior to 1990. The second deals with intentional removal or inadvertent discovery of NAGPRA objects. The third deals with criminal penalties for illegal trafficking in NAGPRA objects. This article addresses only the first two parts, with the primary focus on the second part; that is, processes required and recommended for intentional removal and inadvertent discovery of NAGPRA objects on federal lands. © 2003 Wiley Periodicals, Inc.

INTRODUCTION

The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) is civil rights legislation, not historic preservation law. Even so, compliance responsibility for NAGPRA is usually placed on cultural resources managers (CRMs) at federal facilities throughout the United States. NAGPRA interacts in important ways with historic preservation laws, primarily the National Historic Preservation Act of 1966 (NHPA) and the Archaeological Resources Protection Act of 1979 (ARPA). Most CRMs are familiar with the NHPA and ARPA, but are less familiar with the requirements of NAGPRA.

James D. Wilde, Ph.D., is the archaeologist for the Headquarters, Air Force Center for Environmental Excellence, at Brooks City-Base, Texas. He provides program and project management, review, and consultation, to Air Force installations, major commands, and the Air Staff. Clifford Brown, Ph.D., is senior archaeologist with John Cullinane Associates. He provides advice and assistance under contract to the Navy Cultural Resources Office.



Concepts crucial to understanding and engaging in effective tribal relations are defined in a variety of federal policy documents.

NAGPRA is a law that requires federal agencies and museums to transfer custody of certain cultural items to American Indian tribes or Alaskan Native villages or corporations. The law also requires federal agencies to consult with the Indian tribes about these items and about projects that might result in the discovery or excavation of these items. The way we view it, NAGPRA has three basic parts. The first describes what agencies must do with archaeological or historical collections in the possession of federal agencies (or museums) when the act was passed in 1990. The second describes procedures that agencies must follow when they plan to intentionally excavate or remove "NAGPRA objects" (defined below), or when they inadvertently discover NAGPRA objects on agency land. The third describes criminal penalties for illegally trafficking in NAGPRA objects and other unlawful activities. This article addresses the first two parts, but focuses primarily on the second part because intentional excavation and inadvertent discovery of NAGPRA objects are likely to be issues that federal agencies will most commonly face.

For collections made prior to 1990, the law requires agencies to a) prepare summaries and inventories of its NAGPRA objects, b) distribute that data to appropriate Indian tribes and the National Park Service, c) consider tribal claims for those items, and, as appropriate, d) transfer those items to the claimants with the best case. All these things were to be finished by November 1995, according to NAGPRA. This means that completing the required inventories and summaries should be the highest priority for federal agencies that have potential NAGPRA objects in their collections and have yet to comply with this part of the Act.

Important Terms

Concepts crucial to understanding and engaging in effective tribal relations are defined in a variety of federal policy documents.¹ Probably most important is the trust obligation the United States government has to the tribes. Under the Federal Trust Doctrine, the United States, and individual agencies of the federal government, owe a fiduciary duty to Indian tribes to protect Indian lands, resources, and off-reservation treaty rights to the fullest extent possible when agency actions might affect those lands and rights. The trust responsibility is met by the agency's compliance with federal statutes and regulations.

Another important concept is "federal recognition." Federal agencies are obligated to interact on a government-to-government basis only with those American Indian tribes and Alaskan Native villages or corporations that are granted special status as sovereign entities. Currently, over 560 tribes are recognized by the Bureau of Indian Affairs² as eligible for government-to-government consultation, and to receive services from the federal government. The number of federally recognized tribes increases periodically as the Bureau of Indian Affairs approves tribal petitions for recognition or as recognition is conferred through legislation. Federal laws and individual agency policies govern interactions with

federally recognized tribes. Unrecognized tribes and state-recognized tribes have no special status under federal laws. This does not preclude consultation should they have an interest in, or be impacted by, a proposed action. Consult with non-federally recognized tribes as you would with other groups of U.S. citizens (i.e., as government-to-private party consultations).

Another important concept relates to land ownership and management. Federal statutes such as the NHPA, ARPA, and NAGPRA apply to activities on or over lands owned, managed, leased to, and under the control of federal agencies. They also apply to activities that affect Indian lands, which are lands held in trust by the United States for the benefit of any Indian tribe or individual, or lands held by any Indian tribe or individual that are subject to restrictions by the federal government against alienation. These laws generally do not apply to private lands, although they may if an activity is federally financed. Land ownership is also relevant because archaeological collections generally belong to the individual or organization that owned the land at the time they were excavated. Sometimes, title to archaeological collections is not clear. When that is the case, the first step in establishing ownership is determining who owned the land when the collection was made. This may require the assistance of professional real estate specialists.



Anyone who plays a role in managing federal land should be concerned about NAGPRA.

NAGPRA 101

Anyone who plays a role in managing federal land should be concerned about NAGPRA. Are there any archaeological sites on your land? Surprisingly, most land has the potential to contain archaeological sites. It is risky to assume that there aren't any sites. To better understand your NAGPRA responsibilities (and possible liability), you should evaluate objectively the possibility that NAGPRA objects will be uncovered by activities on the land. To do this, you need to know what NAGPRA objects are, what the likelihood of finding a site is, and also whether the site will probably produce these items.

What Are NAGPRA Objects?

NAGPRA focuses on four specific categories of Native American objects:

- Human Remains
- Funerary Objects
- Sacred Objects
- Objects of Cultural Patrimony

Collectively, these are called "NAGPRA Objects," and they are defined in implementing regulations 43 Code of Federal Regulations (CFR) Part 10.2. They might have been removed from graves during archaeological excavations or perhaps purchased by traders or researchers and sent to museums; they might be part of private collections that were

given to state museums that accept federal funding; or, they might have been intentionally excavated or inadvertently discovered on federal or Indian lands after 1990.

Native American human remains are skeletal elements and other physical remains³ of ancestral American Indians, Alaskan Natives, and Native Hawaiians. No other human groups are included. Remains found in North America or Hawaii of European or Asian explorers, pioneers, colonialists, traders, soldiers, sailors, etc., are not covered by NAGPRA. This means that human remains found on federal or Indian lands, and their contexts, should be studied thoroughly to determine whether or not they are covered by NAGPRA. Artifacts associated with buried human remains often provide evidence necessary to make the determination.

Funerary objects are items intentionally placed with the body during burial. There are two types of funerary objects as they relate to collections and museum displays—associated and unassociated. Associated funerary objects are items directly related with specific human remains in the same museum or federal collection or items that are known to have been manufactured specifically for burial purposes or to contain human remains. Unassociated funerary objects are those intentionally placed items for which the original human remains are not in the same museum or federal collection.

Sacred objects are “[s]pecific ceremonial items needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.”⁴ Objects of cultural patrimony “have ongoing historical, traditional, or cultural importance central to the Indian tribe or Native Hawaiian organization itself, rather than [being] property owned by” individuals.⁴ Many sacred objects and objects of cultural patrimony were purchased, traded, or otherwise collected from tribes during the 1800s and early 1900s. Tribes, in some cases, have gone to court to retrieve these objects, which, they argue, never should have left Indian control in the first place.

Will NAGPRA Objects Be Recovered During a Project?

If there are American Indian or Alaskan Native archaeological sites in a project area, then there is a chance that NAGPRA objects will be found. Federal law, particularly the NHPA, normally calls for an archaeological survey or similar investigation before starting most federal agency projects. Therefore, a land manager should know *in advance* if an archaeological site is likely to be disturbed by a project. Ideally, the manager will also know something about the age and nature of the site (modern, historic, really ancient, etc.). This kind of information is crucial in deciding whether NAGPRA objects are likely to be uncovered during a project or activity. Common sense also plays a role. Will the project disturb the ground surface? How? Excavation? Erosion? Unless a professional, competent investigation has cleared the area, you should not assume that archaeological sites or burial



... a land manager should know in advance if an archaeological site is likely to be disturbed by a project.

places are not present just because none have been uncovered to date. If there is a reasonable expectation that an American Indian archaeological site will be affected by a project, then the land manager should initiate NAGPRA consultations.

Who Are the Players in NAGPRA?

- Federal agencies that manage or control public lands are required to comply with NAGPRA. Agencies are also required to comply with NAGPRA if they own or control NAGPRA objects in their museums or archaeological collections.
- Museums that receive federal funds and possess or control NAGPRA remains and objects are also required to comply. Federal agencies with collections in state or local museums provide funds for museums to complete actions required by the Act.
- Indian tribes and specific Native Hawaiian organizations are granted standing by NAGPRA to make claims on and receive NAGPRA remains and objects from federal agencies and museums. The Act outlines a hierarchical list of priority for claiming custody of NAGPRA remains and objects. The priority for custody, from highest to lowest, is:
 - Lineal descendants;
 - The Indian tribe on whose lands the NAGPRA remains or objects were found;
 - The Indian tribe or Native Hawaiian organization that has the closest cultural affiliation with the NAGPRA remains or objects; and
 - The Indian tribe aboriginally occupying the federal land on which the NAGPRA remains or objects were found.



Federal agencies that manage or control public lands are required to comply with NAGPRA.

What Actions Are Required?

Essentially, the Act requires five different kinds of actions by federal agencies in regard to NAGPRA remains and objects.

- For collections made before 1990, when the Act was signed into law:
 - **Summaries:** NAGPRA requires federal agencies to review collections of artifacts from their lands to determine if the collections might contain NAGPRA objects. The agencies must create summaries of the collections and send them to appropriate tribes. Agencies and museums should consult with potential claimants during the process of developing summaries. The tribes review the summaries for NAGPRA-related items of concern. Summaries should have been completed by 16 November 1993. Federal agency units should create summaries promptly if they have not already done so.



A federal agency may allow qualified archaeologists to excavate NAGPRA items for several purposes.

- Inventories: Federal agencies should review their archaeological and historical collections and create item-by-item descriptions of NAGPRA human remains and associated funerary objects. The agencies must consult with potential claimants during the preparation process and then send the inventories to appropriate tribes. The tribes review the inventories for related NAGPRA items of concern. For each inventory, a "Notice of Inventory Completion," which includes a summary of the findings, needs to be sent by the agency to the Departmental Consulting Archaeologist at the Department of the Interior. Depending on the results of the inventory, the notice will either be published in the Federal Register or sent to the NAGPRA Review Committee. Inventories should have been completed by 16 November 1995, so, needless to say, they should be completed promptly.
- For inadvertent discoveries or intentional excavations after 1990:
 - Follow the consultation process required in 43 CFR Part 10.3 prior to approving intentional excavation of NAGPRA remains or objects (see below).
 - Follow the consultation process required in 43 CFR Parts 10.4 and 10.5 for inadvertent discoveries of NAGPRA remains and objects (see below).
- Transfer custody:
 - Repatriate NAGPRA remains and objects collected prior to 1990 per 43 CFR Part 10.10 (see below).
 - Transfer custody of intentionally excavated or inadvertently discovered NAGPRA remains and objects per 43 CFR Part 10.6 (see below).

What Is the Process for Intentional Excavation of NAGPRA Remains and Objects?

A federal agency may allow qualified archaeologists to excavate NAGPRA items for several purposes. The remains and objects might be part of a larger archaeological research project, or they might need to be moved prior to a construction project. Intentional excavation is allowed ONLY IF:

- Objects are excavated and removed by qualified researchers. An ARPA permit is required for non-federal researchers prior to project approval. Federal archaeologists, anthropologists, and qualified researchers under contract to the installation are not required to obtain an ARPA permit for intentional excavation.
- A research design has been completed and reviewed by the agency. This is required for an ARPA permit, and is recommended as part of the required Plan of Action developed by the agency.

- The federal land manager (in DOD, the Installation Commander) has consulted appropriate affiliated Indian tribes about the proposed project.
- Plans for disposition of the remains and objects are consistent with NAGPRA and 43 CFR 10.6. Disposition is outlined in the written Plan of Action.⁵
- Consultation or tribal consent is documented before the agency issues an ARPA permit or before the agency begins work with its own archaeologists. The Plan of Action, signed by the federal land manager, is proof of consultation under NAGPRA.

The Intentional Excavation Process:

- Take reasonable steps to determine whether a planned activity will result in intentional excavation of NAGPRA items. Use ethnographies, archaeological research files, and historical research to determine the likelihood of finding buried NAGPRA items in a given area.
- Notify in writing tribes likely to be culturally affiliated with any NAGPRA items recovered. The order of priority for consultation is the same as for custody (i.e., lineal descendant, etc).
- Meet and consult with appropriate tribal officials to discuss the activity, treatment, and disposition of NAGPRA items.
- Complete a written Plan of Action, signed by the Commander, Commanding Officer, Park Superintendent, or equivalent responsible official. Tribal signatures are not required.⁵
- Provide a copy of the Plan of Action to the appropriate affiliated tribes.
- Faithfully execute the Plan of Action.



NAGPRA remains and objects are sometimes unearthed unexpectedly during construction activities on federal lands.

What Is the Process for Inadvertent Discoveries on Federal Lands?

NAGPRA remains and objects are sometimes unearthed unexpectedly during construction activities on federal lands. These encounters are called inadvertent discoveries. The actions required when agencies, contractors, or private individuals discover possible human remains or NAGPRA objects on federal lands are:

- Cease activity near the discovery and protect the remains. Establish a protected zone around the discovery location large enough to encompass the discovered remains, associated objects, and other buried human remains that might be in the area.
- Identify the remains. Are they human? Are they part of a recent crime scene? Are they remains of ancestral American Indians, Alaskan Natives, or Native Hawaiians? Archaeologists, physical anthropologists, county coroners, and other qualified specialists can help identify the remains. If the evidence indicates they are not covered by NAGPRA, but are still relatively ancient, the remains are likely covered by ARPA and the NHPA.



The Plan of Action must be signed by the responsible federal agency official . . .

- If the remains or objects are covered by NAGPRA, the finder must immediately notify the responsible federal agency official by phone followed by written confirmation. In DOD, the installation CRM is usually the one notified. The CRM immediately notifies the installation commander by phone, email, or in personal conversation (record communication in a memo).
- The federal agency official or commander must:
 - Certify by filing a signed and dated memo for the record that he or she received the discovery notification within 3 working days (the date of this certification starts a mandatory 30-day period of work cessation in the area of the discovery).
 - Take immediate steps to secure and protect the discovery, or confirm in a memo with the finder and CRM that this has already been done.
 - Notify by telephone, followed by letter, the tribes likely to be culturally affiliated with the remains or objects:
 - The federal agency official must take appropriate steps to identify the lineal descendant or tribe entitled to custody of the remains or objects.
 - Those entitled to custody are the appropriate groups to notify.
 - The letter to the tribe should propose times and places for consultations.
 - The federal agency official or commander consults with the lineal descendants or other tribal representatives to decide on treatment and disposition of the remains and objects.
 - Consult to develop a Plan of Action if the NAGPRA items must be excavated or removed. The Plan of Action must be signed by the responsible federal agency official, but not by the tribal representatives.
 - Resume activity no sooner than 30 days after the federal agency official or commander certified the discovery notification.

What Is a Plan of Action?

A Plan of Action is a written document required for excavating and removing NAGPRA remains and objects from their buried location. It isn't an agreement document, because only the signature of the federal agency official is required. A good Plan of Action should contain, at a minimum (not necessarily in this order):

- Descriptions of the kinds of objects known or likely to be found that will be considered NAGPRA cultural items;
- Specific information that will be used to determine custody, if custody will be transferred (this section should closely follow and refer to 43 CFR Part 10.14).
- Planned treatment, care, and handling of recovered NAGPRA remains or objects;

- Analyses proposed for each kind of NAGPRA item;
- Steps to contact tribal officials if more remains or objects are encountered during the removal project;
- Traditional treatment to be afforded the human remains while they are still in the ground and after removal;
- The nature of reports to be prepared and timetables for report completion;
- Planned disposition of the NAGPRA remains and objects; and
- Conditions for resuming construction in the vicinity of the discovery.

As stated above, the responsible federal agency official or commander approves and signs the Plan of Action. This signature signifies that the commander intends to carry out the plan. Consulting lineal descendants or tribal official signatures is not required,⁵ but the agency must supply copies of the signed Plan of Action to the appropriate lineal descendants or tribes. The signed Plan of Action should immediately be executed. Work in the area of the discovery may resume once the conditions described in the Plan of Action are met, even if the 30-day work cessation period has not ended.



Comprehensive Agreements are written documents completed prior to planned activities . . .

How Can the Agency Avoid the 30-Day Work Cessation Rule?

The regulations offer agencies the option of developing Comprehensive Agreements⁶ ahead of planned construction or development. Comprehensive Agreements are written documents completed prior to planned activities in which the parties (the agency and the Indian tribes) define and specify actions, consultations, and custodial decisions that will take place if NAGPRA remains or objects are found during a wide range of planned activities: "These agreements should address all Federal agency land management activities that could result in the intentional excavation or inadvertent discovery of human remains" and other NAGPRA objects.⁶ These broad and sweeping agreements will undoubtedly be useful when and if an agency or installation confronts NAGPRA remains and objects.

Federal agencies should also consider using what is called a "Contingency Plan of Action" (which is not specifically mentioned in 43 CFR 10, but which is a logical step between Comprehensive Agreements and project-specific Plans of Action). It is a more appropriate and useful agreement document in many cases because it addresses only a proposed project, not a host of activities undertaken by the agency. Such plans will be more useful and easier to negotiate than Comprehensive Agreements. A Contingency Plan of Action is a document, completed prior to a single undertaking, that defines and specifies actions, treatments, consultations, and custodial decisions that will occur if NAGPRA remains or objects are discovered during that undertaking. A Contingency Plan of Action eliminates the 30-day consultation period, because work specified in the plan would begin immediately after an inadvertent discovery. As with Comprehensive Agreements, both the federal agency

official and consulting tribal representatives must sign the Contingency Plan of Action.

Who Determines Custody?

NAGPRA specifically states that the responsible federal agency official must evaluate claims and determine the appropriate custody of NAGPRA remains and objects.⁷ In general, the validity of claims relies on lineal descent and proven cultural affiliation. Both lineal descendant and cultural affiliation are specifically defined in the regulation. The burden of proof lies with the purported lineal descendant and the tribes claiming cultural affiliation.⁸ The order of priority specified in the law is as follows:



In general, the validity of claims relies on lineal descent and proven cultural affiliation.

- The strongest claims are those of a lineal descendant of the human remains. 43 CFR Part 10.14 defines lineal descendant as “an individual tracing his or her ancestry directly and without interruption...to a known Native American individual whose remains, funerary objects, or sacred objects are being requested....” This requires that the remains be identified as an individual whose descendants can be traced.
- “Closest” cultural affiliation is used to determine custody in cases where a lineal descendant cannot be determined, and also for unassociated funerary objects, sacred objects, and objects of cultural patrimony. Cultural affiliation is “a relationship of shared group identity that might reasonably be traced historically or prehistorically between a present-day tribe or Native Hawaiian organization and an identifiable earlier group.”⁹ 43 CFR Part 10.14(c) lists all of the requirements that must be met to substantiate a claim of cultural affiliation:
 - The present-day tribe or Hawaiian organization must have standing under the regulations.
 - There must be evidence of the existence of the identifiable earlier group. Such evidence might establish the identity and cultural characteristics of the earlier group, document distinct patterns of material culture manufacture and distribution, or establish that the earlier group was a biologically distinct population.
 - Evidence of a shared group identity must be reasonably traced between the present-day tribes or organizations and the earlier group. Evidence can come from a variety of fields, such as archaeology, geography, biology, linguistics, and history, or can be based on expert opinion. Claimants do not have to establish cultural affiliation as scientific certainty, but by a “preponderance of evidence.”¹⁰
- Aboriginal occupants of federal lands also may claim custody. Determine aboriginal occupants using:
 - Indian Land Claims Commission final judgments
 - U.S. Court of Claims judgments
 - Ethnographic and historic research

What If There Are Conflicting Claims?

Occasionally, different tribes will claim human remains and NAGPRA objects. The responsible federal agency official can decide which claimant is entitled to custody based on the preponderance of evidence. The official also can wait until the claimants work out custody among themselves. In some cases the federal agency official must wait until a federal court settles the matter.¹¹

What Are the Requirements for Transfer of Custody?

Once the federal agency official, a court, or different tribal claimants have determined custody, the decision and a notice of the proposed disposition must be published at least twice, at least one week apart, in local and regional newspapers. The notice, relevant dates, and names of publishing newspapers must be sent to the Departmental Consulting Archaeologist, National Park Service, Washington, DC.¹² Actual transfer of custody should be expeditious, but cannot occur until at least 30 days after the last notice is published to allow additional claimants to come forward. Similarly, the actual transfer cannot take place until at least 30 days after the Departmental Consulting Archaeologist has published a Notice of Intent to Repatriate or Notice of Inventory Completion in the Federal Register. The transfer must respect customs and practices of appropriate lineal descendants or tribes.¹³



Occasionally, different tribes will claim human remains and NAGPRA objects.

SUMMARY

- Deal with old (1990 and earlier) collections promptly, if you haven't already.
- Identify and evaluate sites in advance of projects.
- Consult with federally recognized claimant tribes and lineal descendants early if there appears to be potential for a NAGPRA issue to surface.
- Plan to use a Comprehensive Agreement or a Contingency Plan of Action when practical and appropriate.
- Examine finds carefully to be sure they are NAGPRA items. Not everything that is unearthed is related to native peoples.
- If your project does result in the collection of NAGPRA items, follow the regulations meticulously.
- Carefully determine cultural affiliation based on the best evidence available.
- Do everything possible to make the consultation and repatriation process open and fair.

Need Help and Advice?

Air Force:

- Dr. James D. Wilde, HQ AFCEE/ECS, DSN 240-6546, james.wilde@brooks.af.mil
- Ms. Julia Cantrell, HQ AFCEE/ECS, DSN 240-3515, julia.cantrell@brooks.af.mil

Navy:

- Dr. Clifford Brown, 1322 Patterson Ave. SE, Suite 1000, Washington Navy Yard, DC 20374, DSN 325-9193, brownc@nav-fac.navy.mil

National Park Service:

- Dr. Paula Molloy, Public and Professional Outreach, National NAGPRA Program, 202-343-1095, paula_molloy@nps.gov
- Ms. Karen Mudar, National Center for Cultural Resources, National NAGPRA Program, 202-343-3395, karen_mudar@nps.gov ❖

NOTES

1. E.g., "Department of Defense American Indian and Alaskan Native Policy" and "Tribes and the Federal Trust Relationship" (<http://www.doi.gov/oait/docs/fedtrust.htm>),
2. Federal Register, Vol. 67, No. 134, pp. 46327-46333, July 12, 2002.
3. "Human remains" includes other tissues as well as bones, but does not include body parts (such as hair, nail clippings, or baby teeth) that are lost naturally during life.
4. 43 CFR Part 10.2(d).
5. 43 CFR Part 10.3(c)(2) and 43 CFR Part 10.5(e).
6. 43 CFR Part 10.5(f)
7. 43 CFR Part 10.14, and p. 54, Supplementary Information, Native American Graves Protection and Repatriation Act, 43 CFR Part 10, Section 10.14, which states, "On Federal lands, Federal agency officials are responsible for determining which modern Indian tribes and Native Hawaiian organizations may have valid claims upon human remains, funerary objects, sacred objects, or objects of cultural patrimony that are excavated intentionally or discovered inadvertently on lands they manage."
8. Tribes and lineal descendants must provide information to substantiate their claims [43 CFR 10.10(a) and (b)].
9. 43 CFR Part 10.14(c).
10. 43 CFR Part 10.14(e).
11. For assistance in dealing with conflicting claims, see 43 CFR Part 10.6(c), 10.15(a)(2), and 10.17.
12. 43 CFR Part 10.2(c): Full address is Department Consulting Archaeologist, Archaeology and Ethnology Program, National Park Service, NC 340, 1849 C Street NW Washington, DC 20240; 202-373-4101.
13. See 43 CFR 10.6 and 10.10 for details.