

# Reclamation Manual

## Directives and Standards

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**Subject:** Inadvertent Discovery of Native American Graves Protection and Repatriation Act (NAGPRA) Cultural Items on Tribal Lands

**Purpose:** Provides procedures for addressing inadvertent (i.e., unplanned) discoveries of NAGPRA cultural items on tribal lands due to Reclamation projects and activities.

**Authority:** Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa-470mm); Illegal Trafficking in Native American Human Remains and Cultural Items (18 U.S.C. 1170); National Historic Preservation Act of 1966 (16 U.S.C. 470); Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. 3001 et seq.); Native American Graves Protection and Repatriation Act Regulations (43 CFR Part 10); Protection of Archaeological Resources Regulation (43 CFR Part 7); and appropriate tribal codes and regulations.

**Contact:** Land, Recreation, and Cultural Resources Office, D-5300

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1. **Background.** Occasionally, natural processes or human activities expose previously unknown NAGPRA cultural items (Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony) on tribal lands. Such discoveries can occur during the course of activities by Reclamation personnel and contractors. Federal and tribal laws and regulations govern the treatment of NAGPRA cultural items.
2. **Scope.** This Directive and Standard establishes the procedures for addressing and resolving inadvertent discoveries on tribal lands. It is intended to:
  - A. Identify the legal authorities governing the protection and/or disposition of NAGPRA cultural items;
  - B. Establish a set of procedures for contacting and coordinating with the appropriate tribal, Bureau of Indian Affairs (BIA), and Reclamation officials;
  - C. Identify the party responsible for funding actions (protection or excavation) resulting from the discovery of NAGPRA cultural items; and
  - D. Instruct Reclamation offices to inform special use permit holders, contractors, and employees of their responsibilities to protect and report discoveries of NAGPRA cultural items.
3. **Definitions.**
  - A. **Cultural Items** means Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony [25 U.S.C. 3001(3)].

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- B. **Funerary Objects** means items that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed intentionally at the time of death or later with or near individual human remains. Funerary objects must be identified by a preponderance of the evidence as having been removed from a specific burial site of an individual affiliated with a particular Indian tribe or as being related to specific individuals or families or to known human remains. The term 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, individual human remains were deposited, and includes rock cairns or pyres which do not fall within the ordinary definition of grave site [43 CFR 10.2(d)(2)].
- C. **Human Remains** means the physical remains of the body of a person of Native American ancestry. The term does not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets. For the purposes of determining cultural affiliation, human remains incorporated into a funerary object, sacred object, or object of cultural patrimony must be considered as part of that item [43 CFR 10.2(d)(1)].
- D. **Indian Tribe** means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or corporation as defined in or established by the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians [43 CFR 10.2(b)(2)].
- E. **Native American** means of, or relating to, a tribe, people, or culture indigenous to the United States, including Alaska and Hawaii [43 CFR 10.2(d)].
- F. **Objects of Cultural Patrimony** means items having ongoing historical, traditional, or cultural importance central to the Indian tribe or Native Hawaiian organization itself, rather than property owned by an individual tribal or organization member. These objects are of such central importance that they may not be alienated, appropriated, or conveyed by any individual tribal or organization member. Such objects must have been considered inalienable by the culturally affiliated Indian tribe at the time the object was separated from the group. Objects of cultural patrimony include items such as Zuni War Gods, the Confederacy Wampum Belts of the Iroquois, and other objects of similar character and significance to the Indian tribe as a whole [43 CFR 10.2(d)(4)].
- G. **Reclamation's Authorized Official** means an individual with the delegated authority to coordinate the resolution of NAGPRA related issues. This individual will usually be a cultural resources professional or the Contracting Officer's Technical Representative

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located in either the area or regional office, depending on the nature, scope, and location of a project.

- H. **Responsible Indian Tribe Official** means the principal leader of an Indian tribe or Native Hawaiian organization or the individual officially designated by the governing body of an Indian tribe or Native Hawaiian organization or as otherwise provided by tribal code, policy, or established procedure as responsible for matters relating to NAGPRA [43 CFR 10.2(b)(4)].
- I. **Sacred Objects** means items that are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. While many items, from ancient pottery sherds to arrowheads, might be imbued with sacredness in the eyes of an individual, NAGPRA is specifically limited to objects that were devoted to a traditional Native American religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony [43 CFR 10.2(d)(3)].
- J. **Tribal Lands** means all lands which: (1) Are within the exterior boundaries of any Indian reservation including, but not limited to, allotments held in trust or subject to a restriction on alienation by the United States; or (2) Comprise dependent Indian communities as recognized pursuant to 18 U.S.C. 1151 (i.e., these lands are statutorily defined as Indian Country, whether or not they are located inside or outside of a reservation); or (3) Are administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act of 1920 and section 4 of the Hawaiian Statehood Admission Act [43 CFR 10.2(f)(2)].

4. **NAGPRA Responsibilities.** Ideally, the procedures for addressing discovered NAGPRA cultural items on tribal lands are expressly provided in either an Archaeological Resources Protection Act (ARPA) permit, tribal permit, or some other agreement document. Those procedures are to be followed when a permit or agreement contains such provisions. However, if a permit or agreement has not been obtained, or does not expressly establish procedures for addressing inadvertent discoveries, the following process is to be followed:

- A. **Discoverer.** Any person who knows, or has reason to believe, that he/she has discovered NAGPRA cultural items on tribal lands must:
- (1) **Contact the Responsible Indian Tribe Official.** Immediately contact the responsible Indian tribe official by telephone, or in person, followed with written confirmation of the discovery.

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- (2) **Contact Reclamation's Authorized Official.** Immediately contact Reclamation's authorized official by telephone, or in person, followed with written confirmation of the discovery.
- (3) **Leave Cultural Item Unaltered.** Do not collect from, disturb, or damage the cultural items, unless otherwise directed to do so in a previous established agreement document.

**B. Reclamation's Authorized Official.** This individual will:

- (1) **Coordinate With the Responsible Indian Tribe Official.** After receiving notice of a discovery, immediately contact the responsible Indian tribe official and confirm by telephone, or in person, that the discovery has been made and begin to coordinate appropriate protection or mitigation measures.
- (2) **Coordinate With the Other Involved Parties.** As appropriate, and in consideration of the views of the tribe, coordinate with the other involved parties, such as BIA, to resolve any issues that may have arisen.
- (3) **Comply With All Applicable Laws.** Comply with all applicable laws, including tribal laws and regulations governing the discovery of NAGPRA cultural items.
- (4) **Establish an Administrative Record of the Discovery.** Responsible offices must establish a reviewable administrative record. The administrative record should include, but is not limited to, all documents and materials directly or indirectly considered by Reclamation decisionmakers related to the discovery of NAGPRA cultural items on tribal lands. This includes documents and materials relevant to the process of decisionmaking. The administrative record on the discovery shall be kept on file at the appropriate Reclamation office. A summary of this record, plus updates of the status of the discovery, should be provided to the Federal Preservation Officer (D-5300) in a timely manner.

**C. Custody.** Ownership and right of control over the disposition of NAGPRA cultural items shall be in accordance with the order of priority provided in NAGPRA and its implementing regulations.

**D. Costs.** Costs related to activities covered in these Directives and Standards should normally be charged to the Reclamation project or activity responsible for the inadvertent discovery.

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#### 5. Permits and Agreements.

A. **ARPA Permit.** An ARPA permit issued by the BIA is normally required to excavate or remove NAGPRA cultural items from tribal lands. However, when Federal lands are located within the boundaries of an Indian reservation, the Federal land managing agency will issue the ARPA permit for activities on those lands. The ARPA permit will usually include stipulations about the treatment of NAGPRA cultural items and may contain other requirements imposed by the tribe. The ARPA permit holder must adhere to all of the terms and conditions of the ARPA permit, including the provisions regarding the treatment NAGPRA cultural items.

- (1) ARPA permitting procedures for lands of Indian tribes, or individual Indians, which are either held in trust by the United States or subject to a restriction against alienation are provided at 43 CFR 7.35.
- (2) Additional guidance on BIA's permitting procedures can be found in the regulations titled Protection of Archaeological Resources, implementing both ARPA and NAGPRA, at 25 CFR Part 262.
- (3) Consult with BIA for information about permit procedures and requirements for obtaining consent, including written permission, from the tribal government or individual Indian land owners. Note that an ARPA permit does not remove the requirement for any other permit required by tribal law.

B. **Tribal Permit.** All permits required by tribal law must be obtained for activities on lands under the jurisdiction of an Indian tribe.

- (1) The tribal permit holder must adhere to all of the terms and conditions of the tribal permit, including the provisions regarding the treatment of NAGPRA cultural items.
- (2) Information about any permit, license, or other form of authorization the tribe might require can be obtained by contacting the appropriate tribal government official in person or in writing.

C. **Agreement Documents.** Agreement documents between Reclamation and the tribe, and other entities as appropriate, may be used to memorialize agreed upon procedures for dealing with the inadvertent discovery of NAGPRA cultural items on tribal lands. When these agreements exist:

- (1) All agreement stipulations regarding the treatment of NAGPRA cultural items must be followed by all Reclamation employees and contractors.

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(2) All Reclamation employees and contractors working on tribal lands must be instructed to adhere to the terms and conditions of any NAGPRA related agreement document.

6. **Contracts.** The following discovery clause, or a modified clause containing necessary language from tribal laws or regulations, should be included in all Reclamation issued contracts for work on tribal lands.

“In the event of a discovery of suspected NAGPRA cultural items on tribal lands, the contractor shall be responsible for complying with all applicable Federal and tribal laws. Unless otherwise specified in an ARPA permit, tribal permit, or agreement document establishing discovery procedures, the contractor shall cease activity and make a reasonable effort to stabilize and protect such discoveries until authorized to proceed. The contractor shall immediately provide an oral notification to the responsible Indian tribe official and inform Reclamation's authorized official of the discovery of suspected NAGPRA cultural items on tribal land. The contractor shall forward a written report of their findings to the responsible Indian tribe official by certified mail along with a copy of the report to Reclamation's authorized official. Implementation of protective and/or mitigative measures specified by the responsible tribe official, in coordination with Reclamation, shall be the responsibility of the contractor.”