



United States Department of the Interior



NATIONAL PARK SERVICE

P.O. Box 37127

Washington, D.C. 20013-7127

IN REPLY REFER TO

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OCT 20 1992

Memorandum

To: Those Who Have Requested a Copy of Draft 4 of the Proposed Regulations Implementing the Native American Graves Protection and Repatriation Act

From: Departmental Consulting Archeologist *J.P. McManis*

Subject: Distribution of Draft 4 to Requestors

The attached copy of Draft 4 of the proposed regulations is the result of a review of Draft 3 and the many detailed comments received on it. It also includes modifications resulting from consultation with the Review Committee established by the statute. This text reflects the detailed discussions held with the Review Committee during its third meeting from 8-10 October 1992. This draft is being made available those who request it because it was the subject of discussion at the Review Committee meeting, which was an open public meeting.

It is our intention to take the steps necessary to move this draft forward as a set of proposed regulations for publication in the Federal Register and general public comment. It is likely that some further editing or modifications will occur as part of this process. We are not soliciting comments on this draft. Those interested in the further development of these implementing regulations should watch for the publication of the proposed version in the Federal Register and take that opportunity to provide comments.

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 4:October 10, 1992]

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Authority: 25 U.S.C. 3001 et seq.

Subpart A-Introduction

§ 10.1 Purpose and Applicability

(a) *Purpose.* These regulations implement provisions of the Native American Graves Protection and Repatriation Act of 1990 (Pub.L. 101-601; 25 U.S.C. 3001-3013; 104 Stat. 3048-3058). The Act addresses the rights of lineal descendants and members of Indian Tribes and Native Hawaiian organizations to certain human remains and cultural items with which they are affiliated. The Act authorizes the Secretary of the Interior to develop and promulgate regulations for its implementation.

(b) *Applicability.*

(1) These regulations pertain to the identification and appropriate disposition of human remains and cultural items that are:

(i) in Federal possession or control; or

(ii) in the possession or control of an institution or State or local government receiving Federal funds; or

(iii) excavated or discovered on Federal or Tribal lands.

(2) These regulations apply to human remains and cultural items which are indigenous to Alaska, Hawaii, and the continental United States but not to territories of the United States.

§ 10.2 Definitions

In addition to the term "Act," which shall mean the Native American Graves Protection and Repatriation Act as described above, definitions used in these regulations are grouped in five classes:

(a) interested parties; (b) human remains and cultural items; (c) cultural affiliation; (d) location; and (e) procedures.

(a) *Interested parties* are persons who implement or are referenced in these regulations. As used in these regulations, the term:

(1) "Secretary" means the Secretary of the Interior.

(2) "Review Committee" means the advisory committee established pursuant to Section 8 of the Act.

(3) "Departmental Consulting Archeologist" means the official of the Department of the Interior designated by the Secretary as responsible for the administration of matters relating to these regulations. Communications to the Departmental Consulting Archeologist should be addressed to:

Departmental Consulting Archeologist

Archeological Assistance Division

National Park Service

P.O. Box 37127

Washington, D.C. 20013-7127.

(4) "Federal agency" means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution as stipulated in Section 2 (a)(4) of the Act.

(5) "Federal agency official" means the individual within a Federal agency designated as being responsible for matters relating to these regulations.

(6) "museum" means any institution or State or local government agency (including any institution of higher learning) that has possession of, or control over, human remains or cultural items and receives Federal funds. The phrase "receives Federal funds" means the receipt of funds by a museum after November 16, 1990, from a Federal agency through any grant, loan, contract (other than a procurement contract), or other arrangement by which a Federal agency makes or made available to a museum assistance in the form of funds. Federal funds provided for any purpose which are received by a larger entity of which the museum is a part are considered Federal funds for the purposes of these regulations. For example, if a museum is a part of a State or local government or a private university and the State or local government or private university receives Federal funds for any purpose, the museum is considered to receive Federal funds.

(7) "museum official" means the individual within a museum designated as being responsible for matters relating to these regulations.

(8) "Native American" means of, or relating to, a Tribe, people, or culture indigenous to the United States.

(9) "Indian Tribe" means any Tribe, band, nation, or other organized Indian 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. Interested groups that wish to determine if they qualify as an Indian Tribe under this definition should consult the *Federal Register* for the current list of recognized Indian Tribes as published by the Bureau of Indian Affairs, U.S. Department of the Interior. Interested groups which are not included in this list but wish to be considered as an Indian Tribe for the purposes of these regulations should contact the Bureau of Indian Affairs to ascertain whether they are qualified.

Generally, in order to be acknowledged as an Indian Tribe under these regulations, an Indian entity must be ethnically and culturally identifiable and have had a substantially autonomous and continuous tribal existence throughout history until the present. Groups, associations, organizations, or corporations of any character formed in recent times generally do not qualify, nor do splinter groups, political factions, communities or entities of any character which separate from the main body of an Indian Tribe unless it can clearly identify that the group has functioned throughout history as an autonomous entity. Except as otherwise indicated, the term Indian Tribe when used in these regulations shall also mean Native Hawaiian organizations as defined below.

(10) "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.

(11) "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 Native Hawaiian Affairs, and shall include the Office of Hawaiian Affairs and *Hui Malama I Na Kupuna O Hawai'i Nei*.

(12) "Indian Tribe official" means the individual officially designated by the governing body of an Indian Tribe as responsible for matters relating to these regulations.

(13) "traditional religious leader" means a member of an Indian Tribe who is recognized by members of that Indian Tribe as:

(i) being responsible for performing cultural duties relating to the ceremonial or religious traditions of that group, or

(ii) exercising a leadership role in an Indian Tribe based on the group's cultural, ceremonial, or religious practices.

(14) "lineal descendant" means an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian Tribe to a known Native American individual whose remains, funerary objects, or sacred objects are being claimed under these regulations.

(15) "person" means an individual, partnership, corporation, trust, institution, association, or any other private entity, or, any official, employee, agent, department, or instrumentality of the United States, or of any Indian Tribe, or of any State or political subdivision thereof.

(b) *Human remains and cultural items* are specific Native American human remains or objects. For the purposes of these regulations, the term:

(1) "human remains" means the physical remains of a human body, including but not limited to bones, teeth, hair, ashes, or mummified or otherwise preserved soft tissues of a person of Native American ancestry. The term does not include remains or portions of remains freely given by the individual from whose body there were obtained, such as hair made into ropes or nets. Human remains incorporated into a cultural item shall be considered as part of that cultural item.

(2) "cultural items" means, collectively, associated funerary objects, unassociated funerary objects, sacred objects and objects of cultural patrimony.

(3) "associated funerary objects" means:

(i) 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 that also are currently in the possession or control of a museum or Federal agency, or

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

(4) "unassociated funerary objects" means items that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been intentionally placed with or near 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 a museum or Federal agency. 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 as being related to specific individuals or families or to known human remains.

(5) "sacred objects" means items that are specific ceremonial objects needed by traditional Native American religious leaders for the current practice of traditional Native American religions by their present-day adherents. While many items, from ancient pottery shards to arrowheads, might be imbued with sacredness in the eyes of an individual, these regulations are 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.

(6) "objects of cultural patrimony" means cultural items having ongoing historical, traditional, or cultural importance central to the Indian Tribe itself, rather than property owned by an individual Tribal member. These objects are of such central importance that they may not be alienated, appropriated, or conveyed by any individual Tribal 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.

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

(d) *Location* describes the property on which human remains or cultural items are discovered or excavated. As used in these regulations the term:

(1) "Federal lands" means any land other than Tribal lands that are controlled or owned by the United States government, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.). United States "control" refers to those lands in which the United States has a legal interest sufficient to permit it to apply these regulations without abrogating the otherwise existing legal rights of a person.

(2) "Tribal lands" means all lands, excluding privately owned lands, which:

(i) 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;

(ii) comprise dependent Indian communities as recognized pursuant to 18 U.S.C. 1151;

(iii) are administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and Section 4 of the Hawaiian Statehood Admission Act (Pub.L. 86-3; 73 Stat. 6).

(3) "aboriginal lands" means Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Claims Court as land aboriginally occupied by an Indian Tribe.

(e) *Procedures* are the processes that are required to implement these regulations. As used in these regulations, the term:

(1) "summary" means the written description of collections that may contain unassociated funerary objects, sacred objects, and objects of cultural patrimony required by § 10.8 of these regulations.

(2) "inventory" means the item-by-item description of human remains and associated funerary objects.

(3) "intentional excavation" means the planned archeological removal of human remains or cultural items found under or on the surface of Federal or Tribal lands.

(4) "inadvertent discovery" means the unanticipated encounter or detection of human remains or cultural items found under or on the surface of Federal or Tribal lands pursuant to Section 3 (d) of the Act.

(5) "possession" by a museum or Federal agency of human remains or cultural items means having physical custody of such objects with a sufficient legal interest to lawfully treat the objects as part of its collection for purposes of these regulations.

(6) "control" means having a legal interest in human remains or cultural items not in the physical custody of the museum or Federal agency sufficient to lawfully permit the museum or Federal agency to treat the objects as part of its collection for purposes of these regulations.

Subpart B- Human Remains and Cultural Items Recovered from Federal or Tribal Lands

§ 10.3 Intentional Excavations

(a) *General.* This section implements Section 3 (c) of the Act. Under Section 3 (c), the ownership or control of human remains and cultural items that are intentionally excavated from Federal or Tribal lands after November 16, 1990, is generally with, subject to the conditions set forth in these regulations, a lineal descendant of the individual whose remains or cultural items were excavated, the Indian Tribe on whose land the human remains or cultural items were excavated, or the culturally affiliated present day Indian Tribe. This section sets forth procedures to bring about this ownership.

(b) *Specific Requirements.* The intentional excavation of human remains or cultural items from Federal or Tribal lands is permitted only if:

(1) the objects are excavated pursuant to applicable legal requirements, including, if otherwise required, a permit issued pursuant to 43 CFR 7 or other Federal agency regulations implementing the Archaeological Resources Protection Act (16 U.S.C. 470aa et seq.);

(2) the objects are excavated after consultation with or, in the case of Tribal lands, consent of, the appropriate Indian Tribe;

(3) the disposition of the objects is consistent with their ownership as described below; and

(4) proof of the consultation or consent is shown.

(c) *Procedures.*

(1) Any person who intends to undertake an activity on Federal or Indian lands which may result in the excavation of human remains or cultural items shall immediately notify in writing the responsible Federal agency official or Indian tribe official. The requirements of these regulations

regarding the planned activity shall apply whether or not this required notice is or was duly provided. The requirements of the Act also apply to excavation or removals that occurred after November 16, 1990, but prior to the effective date of these regulations.

(2) The Federal agency official shall take reasonable steps to determine whether a planned activity, of which he or she has received notice or otherwise is aware, may result in the excavation of human remains or cultural items from Federal lands. Prior to issuing any approvals or permits for activities otherwise required by law, the Federal agency official shall notify in writing the Indian Tribe or Tribes that are likely to be culturally affiliated with any human remains or cultural items that may be excavated. The Federal official shall also notify any present-day Indian Tribe which aboriginally occupied the area of the activity and any other Indian Tribes that the Federal official reasonably believes may have a relationship to the human remains and cultural items that are expected to be found. The notice shall be in writing and shall describe the planned activity, its general location, the basis upon which it was determined that human remains or cultural items may be excavated, and, the basis for determining likely cultural affiliation pursuant to § 10.14 of these regulations. The notice shall also propose a time and place for meetings or consultations to further consider the activity, the Federal agency's proposed treatment of any human remains or cultural items that may be excavated, and the proposed disposition of any excavated human remains or cultural items. Consultation shall be conducted pursuant to § 10.5 of these regulations.

(3) If the planned activity is also subject to review under Section 106 of the National Historic Preservation Act (16 U.S.C. 470 *et seq.*), the Federal agency official should coordinate consultation and any subsequent agreement for compliance conducted under that Act with the requirements of § 10.3 (c)(2) and § 10.5 of these regulations.

(4) If an Indian Tribe receives notice of a planned activity or otherwise becomes aware of a planned activity that may result in the excavation of human remains or cultural items on Indian lands, the Indian Tribe should take appropriate steps to make certain that any human remains or cultural items excavated or discovered as a result of the planned activity are disposed of in accordance with their ownership as described in § 10.6 of these regulations.

§ 10.4 Inadvertent Discoveries

(a) *General.* This section implements Section 3 (d) of the Act. The ownership or control of human remains and cultural items that are discovered inadvertently on Federal or Tribal lands after November 16, 1990, is generally with, subject to the conditions set forth in these regulations, a lineal descendant of the individual whose remains or cultural items were discovered, the Indian Tribe on whose land the human remains or cultural items were discovered, or the culturally affiliated present day Indian Tribe. This section sets forth procedures to bring about the disposition of the ownership of these objects.

(b) *Discovery.* Any person who knows of the discovery of human remains or cultural items on Federal or Tribal lands after November 16, 1990, must provide notification of the discovery, in writing, to the responsible Federal agency official with respect to Federal lands, and, with respect to Tribal lands, to the responsible Indian Tribe official. The requirements of these regulations regarding discoveries shall apply whether or not a discovery is duly reported.

(c) *Ceasing Activity.* If the discovery occurred in connection with an on-going activity on Federal or Tribal lands, the person, in addition to providing the notice described above, shall stop the activity in the area of the discovery and make a reasonable effort to protect the human remains or cultural items discovered.

(d) *Federal lands.* Upon receipt of such a notification with respect to Federal lands, the responsible Federal agency official shall:

- (1) immediately certify receipt of the notification;
- (2) take immediate steps, if necessary, to secure and protect discovered human remains and cultural items, including, as appropriate, stabilization or covering;

(2) notify within one working day the known Indian Tribe or Tribes likely to be culturally affiliated with the discovered human remains or cultural items, and, if known, the present-day Indian Tribe which aboriginally occupied the area and any other Indian Tribe that is reasonably known to have a relationship to the human remains or cultural items. The notice shall include pertinent information as to kind of material, condition, and the circumstances of the discovery;

(3) Initiate consultation on the discovery pursuant to § 10.5 of these regulations.

(e) *Resumption of Activity.* The activity that resulted in the inadvertent discovery may resume thirty (30) days after certification by the notified Federal agency or Indian Tribe of receipt of the notice of discovery if the resumption of the activity is otherwise lawful. The activity may also be resumed, if otherwise lawful, at any time that a written, binding agreement is executed between the necessary parties that adopts a recovery plan for the removal, treatment, and disposition of the human remains or cultural items in accordance with their ownership.

(f) *Indian Tribes.* Indian Tribes that are notified or otherwise become aware of a discovery of human remains or cultural items on their Tribal lands should take appropriate steps to assure that the human remains or cultural items are protected and disposed of in accordance with their ownership as described below.

(g) Federal agency officials should coordinate their responsibilities under this section with their emergency discovery responsibilities under Section 106 of the National Historical Preservation Act (16 U.S.C. 470f), 36 CFR 800 (11) and the Archeological and Historic Preservation Act (16 U.S.C. 469 (a-c)).

§ 10.5 Consultation

Consultation as part of the discovery or excavation of human remains or cultural remains on Federal lands shall be conducted in accordance with the following requirements.

(a) *Consulting Parties.* Federal agency officials shall consult with officials and known lineal descendants and traditional religious leaders of Indian Tribes:

(1) that are, or are likely to be, culturally affiliated with human remains and cultural items;
and

(2) on whose aboriginal lands the planned activity will occur or where the discovery has been made.

(b) *Initiation of consultation.* Upon receiving notice of or otherwise becoming aware of an inadvertent discovery or planned activity that has resulted or may result in the excavation or discovery of human remains and cultural items on Federal lands, the responsible Federal agency official shall, as part of the procedures described in § 10.3 and § 10.4 above, take appropriate steps to establish the likely cultural affiliation of the objects pursuant to § 10.14 of these regulations, and, thereafter, notify in writing the Indian Tribe or Tribes that are likely to be culturally affiliated with them, and, if known, the lineal descendants of the deceased individual. The Federal agency official shall also notify any present-day Indian Tribe which aboriginally occupied the area and other Indian Tribes that may have a relationship to the human remains and cultural items. The consultation shall seek to identify traditional religious leaders who should also be consulted and seek to identify, where applicable, lineal descendants and Indian Tribes related to the human remains and cultural items.

(c) *Provision of Information.* During the consultation process, as appropriate, the Federal agency official shall provide the following information in writing to officials of Indian Tribes that are or are

likely to be culturally affiliated with human remains and cultural items excavated or discovered on Federal lands:

(1) a list of all Indian Tribes that are being, or have been, consulted regarding the particular human remains and cultural items;

(2) an indication that additional documentation used to identify cultural affiliation will be supplied upon request.

(d) *Requests for Information.* During the consultation process, Federal agency officials shall request, as appropriate, the following information from Indian Tribes that are, or are likely to be, culturally affiliated with excavated or discovered human remains and cultural items:

(1) name and address of the Indian Tribe official to act as representative in consultations related to particular human remains and cultural items;

(2) names and appropriate methods to contact lineal descendants who should be contacted to participate in the consultation process;

(3) names and appropriate methods to contact any traditional religious leaders who should be consulted regarding the collections;

(4) recommendations on how the consultation process should be conducted; and

(5) kinds of cultural items that the Indian Tribe considers likely to be unassociated funerary objects, sacred objects or objects of cultural patrimony.

(e) *Written Plan of Action.* The consultation should result in a written plan, approved and signed by the Federal agency official. Indian Tribe official(s) and other parties may sign as appropriate. At a minimum, the plan of action should document the following:

(1) the kinds of objects to be considered as cultural items as defined in § 10.2 (b) of these regulations;

(2) the specific information used to determine cultural affiliation pursuant to §10.14 of these regulations;

(3) the treatment, care, and handling of human remains and cultural items recovered;

(4) the archeological recording of the human remains and cultural items recovered;

(5) the kinds of analysis for each kind of object;

(6) any steps to be followed to contact Indian Tribe officials at the time of excavation of specific human remains or cultural items;

(7) the kind of traditional treatment, if any, to be afforded the human remains or cultural items;

(8) the nature of reports to be prepared; and

(9) the disposition of human remains and cultural items in accordance with their ownership.

(f) *Programmatic Agreements.* Whenever possible, Federal agencies should enter into programmatic agreements with appropriate Indian Tribes that are culturally affiliated with specific human remains or cultural items and have claimed, or are likely to claim, those human remains or cultural items excavated or discovered on Federal lands. These agreements should address all Federal agency land management activities that could result in the excavation or discovery of human remains or cultural items. Consultation should lead to the establishment of a process for effectively implementing the requirements of these regulations regarding standard consultation procedures, the establishment of cultural affiliation consistent with procedures in this section, and the treatment and disposition of human remains or cultural items. The agreements, or the correspondence related to the effort to reach agreements, shall constitute proof of consultation as required by these regulations.

(g) *Traditional Religious Leaders.* The Federal agency official shall be cognizant that Indian Tribe officials may need to confer with traditional religious leaders prior to reaching agreements.

§ 10.6 Ownership.

(a) *Priority of Ownership.* Subject to the limitations of § 10.15, the ownership or control of human remains and cultural items excavated or discovered on Federal or Tribal lands after November 16, 1990, is, pursuant to Section 3 (a) of the Act, by order of priority:

(1) in the case of human remains and associated funerary objects, in the lineal descendant of the deceased individual as determined pursuant to § 10.14 (b);

(2) in cases where a lineal descendant cannot be ascertained or no claim is made, and with respect to unassociated funerary objects, sacred objects, and objects of cultural patrimony:

(i) in, where applicable, the Indian Tribe on whose Tribal land the human remains or cultural items were discovered;

(ii) in the Indian Tribe that has the closest cultural affiliation with the human remains or cultural items as determined pursuant to § 10.14 (c); or

(iii) in circumstances in which the cultural affiliation of the human remains and cultural items cannot be ascertained and the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of an Indian Tribe:

(A) in the Indian Tribe aboriginally occupying the Federal land on which the objects were discovered, or

(B) if it can be shown by a preponderance of the evidence that a different Indian Tribe has a stronger cultural relationship with the human remains and cultural items, in the Indian Tribe that has the strongest demonstrated relationship.

(b) The ownership of human remains or cultural items and other provisions of the Act apply to all planned excavations and inadvertant discoveries made after November 16, 1990, including those made before the effective date of these regulations.

(c) *Final Notice, Claims and Disposition with Respect to Federal Lands.* Upon determination of the lineal descendant(s) or Indian Tribe that appears to own particular human remains or cultural items excavated or discovered on Federal lands, the responsible Federal agency official shall, subject to the notice required herein and the limitations of § 10.15, transfer ownership or control of the objects to the Indian Tribe or lineal descendants in accordance with appropriate procedures, which shall respect traditional customs and practices. Prior to any such disposition by a Federal agency official, the Federal agency official shall publish a general notice of the proposed disposition in a newspaper of general circulation in the area in which the human remains or cultural items were excavated or discovered. The notice shall provide information as to the nature and cultural affiliation, of the human remains and cultural items and shall solicit further claims to ownership. The notice shall be published at least two times at least a week apart, and the transfer shall not take place until at least thirty (30) days after the publication of the second notice to allow time for any additional claimants to come forward. If additional claimants do come forward and the Federal agency official cannot clearly determine which claimant is the proper recipient, the Federal agency shall not transfer ownership or control of the objects until such time as the proper recipient is determined pursuant to these regulations.

§ 10.7 [Reserved-Disposition of Unclaimed Human Remains and Cultural Items]

Subpart C-Human Remains and Cultural Items in Museums and Federal Collections

§ 10.8 Summaries

(a) *General.* This section implements Section 6 of the Act. Under Section 6, each museum or Federal agency that has possession or control over collections which may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony is to provide a summary of these collections based upon available information held by the museum or Federal agency. The purpose of the summary is to provide information about the collections to lineal descendants and culturally affiliated Indian Tribes that may wish to request repatriation of such objects. The summary serves in lieu of an object-by-object inventory of these collections, although, if an inventory is available, it may be substituted.

(b) For each collection or portion of a collection, the summary shall include: an estimate of the number of objects in the collection or portion of the collection; a description of the kinds of objects included; reference to the means, date(s), and location(s) in which the collection was acquired, where readily ascertainable; and information relevant to identifying lineal descendants, if available, and cultural affiliation.

(c) *Completion.* Summaries shall be completed not later than November 16, 1993.

(d) *Consultation.*

(1) Consulting Parties. Museum and Federal agency officials shall consult with:

(i) lineal descendants, when known or claimed on the basis of the traditional kinship system, of individuals whose unassociated funerary objects or sacred objects are likely to be subject to the summary provisions of these regulations; and

(ii) officials and traditional religious leaders identified by Indian Tribes:

(A) from whose Tribal lands unassociated funerary objects, sacred objects, or objects of cultural patrimony originated;

(B) from whose aboriginal lands unassociated funerary objects, sacred objects, or objects of cultural patrimony originated; and

(C) that are, or are likely to be, culturally affiliated with unassociated funerary objects, sacred objects, or objects of cultural patrimony.

(2) Initiation of Consultation. Museum and Federal agency officials shall begin summary consultation no later than the completion of the summary process.

(3) Provision of Information. During summary consultation, museums and Federal agency officials shall provide copies of the summary to lineal descendants, when known, and to officials and traditional religious leaders. Upon request, museum and Federal agency officials shall provide Indian Tribes with 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 objects covered by the summary. This information may be requested at any time and shall be provided in a reasonable manner to be agreed upon by all parties. The Review Committee shall also be provided access to such materials.

(4) Requests for Information. During the summary consultation, museum and Federal agency officials shall request, as appropriate, the following information from Indian Tribes that are, or are likely to be, culturally affiliated with their collections:

(i) name and address of the Indian Tribe official to act as representative in consultations related to particular objects;

(ii) names and appropriate methods to contact any lineal descendants, if known, of individuals whose unassociated funerary objects or sacred objects are included in the summary;

(iii) names and appropriate methods to contact traditional religious leaders who should be consulted regarding the collections;

(iv) recommendations on how the consultation process should be conducted; and

(v) kinds of cultural items that the Indian Tribe considers to be sacred objects or objects of cultural patrimony.

(e) *Notification.* Repatriation of unassociated funerary object, sacred objects, or objects of cultural patrimony to lineal descendants or culturally affiliated Indian Tribes as determined pursuant to § 10.10 (a) of these regulations, shall not proceed prior to submission of an object-by-object list of the objects being requested and a notice of intent to repatriate to the Departmental Consulting Archeologist. The object-by-object description shall include, if available:

- (1) accession and catalogue entries for each object;
- (2) information related to the acquisition of each object, including the name of the person or organization from whom the object was obtained, if known;
- (3) the date the object was acquired,
- (4) the place the object was acquired, i.e., name or number of site, county, state, and Federal agency administrative unit, if applicable;
- (5) the means of acquisition, i.e., gift, purchase, excavation, etc.;
- (6) the antiquity of the objects, if known;
- (7) a description of each object, including dimensions, materials, and photographic documentation, if culturally appropriate;
- (8) a summary of the evidence used to determine the cultural affiliation of the objects pursuant to § 10.14 of these regulations.

The notice of intent to repatriate shall summarize the object-by-object description in sufficient detail so as to enable other individuals or Indian Tribes to determine their interest in the claimed objects. It shall include information that identified each particular set of claimed unassociated funerary objects, sacred objects or objects of cultural patrimony and the circumstances surrounding its acquisition, describes the objects that are clearly identifiable as to tribal origin. It shall also describe the objects that are not clearly identifiable as being culturally affiliated with a particular Indian Tribe, but which, given the totality of circumstances surrounding acquisition of the objects, are likely to be culturally affiliated with a particular Indian Tribe. The Departmental Consulting Archeologist shall publish the notice of intent to repatriate in the *Federal Register*.

§ 10.9 Inventories

(a) *General.* This section implements Section 5 of the Act. Under Section 5, each museum or Federal agency that has possession or control over holdings or collections of human remains and associated funerary objects is to compile an inventory of such items, and, to the fullest extent possible based on information possessed by the museum or Federal agency, identify the geographical and cultural affiliation of each item. The purpose of the inventory is to facilitate repatriation by providing clear descriptions of human remains and associated funerary objects and establishing the cultural affiliation between these objects and present-day Indian Tribes. Museums and Federal agencies are encouraged to undertake inventories on those portions of their collections for which information is readily available or about which Indian Tribes have expressed special interest. Early focus on these parts of collections will result in repatriations that may serve as models for other inventories.

(b) *Consultation.*

(1) Consulting Parties. Museum and Federal agency officials shall consult with:

(i) lineal descendants, when known or claimed on the basis of the traditional kinship system, of individuals whose remains and associated funerary objects are likely to be subject to the inventory provisions of these regulations; and

(ii) officials and traditional religious leaders identified by Indian Tribes:

(A) from whose Tribal lands human remains and associated funerary objects originated;

(B) from whose aboriginal lands human remains and associated funerary objects originated; and

(C) that are, or are likely to be, culturally affiliated with human remains and associated funerary objects.

(2) Initiation of Consultation. Museum and Federal agency officials shall begin inventory consultation no later than the point in the inventory process at which the cultural affiliation of human remains and associated funerary objects is being investigated actively.

(3) Provision of Information. During inventory consultation, museums and Federal agency officials shall provide the following information in writing to lineal descendants, when known, and to officials and traditional religious leaders.

(i) a list of all Indian Tribes that are, or have been, consulted regarding the particular human remains and associated funerary objects;

(ii) a general description of the conduct of the inventory;

(iii) the projected time frame for conducting the inventory; and

(iv) an indication that additional documentation used to identify cultural affiliation will be supplied upon request.

(4) Requests for Information. During the inventory consultation, museum and Federal agency officials shall request, as appropriate, the following information from Indian Tribes that are, or are likely to be, culturally affiliated with their collections:

(i) name and address of the Indian Tribe official to act as representative in consultations related to particular human remains and associated funerary objects;

(ii) names and appropriate methods to contact any lineal descendants of individuals whose remains and funerary objects are or are likely to be included in the inventory;

(iii) names and appropriate methods to contact traditional religious leaders who should be consulted regarding the collections;

(iv) recommendations on how the consultation process should be conducted; and

(v) kinds of cultural objects that the Indian Tribe reasonably believes to have been made elusively for burial purposes or to contain human remains of their ancestors.

(c) *Required Information.* The following documentation shall be included, if available, for all inventories:

(1) accession and catalogue entries, including the accession/catalogue entries of human remains with which funerary objects were associated;

(2) information related to the acquisition of each object, including the name of the person or organization from whom the object was obtained, if known;

(3) the date the object was acquired,

(4) the place the object was acquired, i.e., name or number of site, county, state, and Federal agency administrative unit, if applicable;

(5) the means of acquisition, i.e., gift, purchase, excavation, etc.;

(6) the antiquity of the human remains and associated funerary objects, if known;

(7) a description of each set of human remains or associated funerary objects, including dimensions, materials, and photographic documentation, if appropriate;

(8) a summary of the evidence used to determine the cultural affiliation of the human remains or objects pursuant to § 10.14 of these regulations.

(d) *Documents.* Two separate documents shall comprise the inventory:

(1) a listing of all human remains and associated funerary objects that are identified as being culturally affiliated with one or more present-day Indian Tribes. The list must indicate for each item or set of items whether cultural affiliation is clearly determined or likely; and

(2) a listing of all human remains and associated funerary objects for which no culturally affiliated present-day Indian tribe can be determined.

(e) Notification.

(1) If the inventory results in the identification or likely identification of the cultural affiliation of any particular human remains or associated funerary objects, the museum or Federal agency, not later than six (6) months after completion of the inventory, shall send culturally affiliated Indian Tribes the inventory of culturally affiliated human remains and a notice of inventory completion that summarizes the results of the inventory.

(2) The notice of inventory completion shall summarize the contents of the inventory in sufficient detail so as to enable the recipients to determine their interest in the inventoried items. It shall include information that identifies each particular set of human remains or associated funerary objects and the circumstances surrounding its acquisition, describes the human remains or associated funerary objects that are clearly identifiable as to cultural affiliation, and describes the human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with an Indian Tribe, but which, given the totality of circumstances surrounding acquisition of the human remains or associated objects, are identified as likely to be culturally affiliated with a particular Indian Tribe.

(3) If the inventory results in a determination that the human remains are of an identifiable individual, the Museum of Federal agency official shall convey this information to the Indian tribe of which the deceased was a member, and, if known, shall so notify any lineal descendant of the deceased individual.

(4) The notification of inventory completion and a copy of the inventory shall also be sent to the Departmental Consulting Archeologist. These submissions shall be sent in both printed hard copy and electronic formats. Information on the proper format for electronic submission and

suggested alternatives for museums unable to meet these requirements are available from the Departmental Consulting Archeologist.

(5) Upon request by an Indian Tribe that has received or should have received notice of inventory results as described above, a museum or Federal agency shall supply additional available documentation to supplement the information provided with the notice. For these purposes, the term "documentation" means a summary of existing museum or Federal agency records including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding the acquisition and accession of human remains and associated funerary objects.

(6) In the event that the inventory results in a determination that the museum or Federal agency has possession of or control over human remains or associated funerary objects that cannot be identified as affiliated with a particular Indian Tribe, the museum or Federal agency shall provide the Department Consulting Archeologist notice of this result and a copy of the list of culturally unidentifiable human remains and associated funerary objects. The Departmental Consulting Archeologist shall make this information available to members of the Review Committee.

(7) The Departmental Consulting Archeologist shall publish notices of inventory completion received from Museums and Federal agencies in the *Federal Register*.

(f) *Completion.* Inventories shall be completed not later than November 16, 1995. Any museum that has made a good faith effort to complete its inventory, but which will be unable to complete the process by this deadline, may request an extension of the time requirements from the Secretary. An indication of good faith efforts shall include, but not necessarily be limited to, the initiation of active consultation and documentation regarding the collection and the development of a written plan to carry out the inventory process. Minimum components of an inventory plan are: a definition of the

steps required; the position titles of the persons responsible for each step; the planned schedule of implementation of the plan; and a description of the efforts proposed to obtain the funding required to implement the plan.

§10.10 Repatriation.

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

(1) Criteria. If the following criteria are met for unassociated funerary objects, sacred objects, or objects of cultural patrimony, a museum or Federal agency will expeditiously repatriate the objects upon request pursuant to Section 7 of the Act:

(A) The object meets the definitions established §§ 10.2 (b) (4),(5) or (6) of these regulations;

(B) The cultural affiliation of the object is established pursuant to § 10.14 of these regulations through the summary, consultation, and notification procedures.

(C) The known lineal descendant or Indian Tribe presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum does not have a right of possession to the objects as defined below.

(D) The agency or museum is unable to present evidence to the contrary proving that it does have a right of possession as defined below.

(E) None of the specific exceptions listed below apply.

(2) Right of Possession. For purposes of these regulations, "right of possession" means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object, or object of cultural patrimony from an Indian Tribe with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession to that object.

(3) Notification. A requested repatriation shall take place within ninety (90) days of receipt, provided that it may not occur until at least thirty (30) days after publication of the notice of repatriation in the *Federal Register* as described in § 10.8 of these regulations.

(b) *Human Remains and Associated Funerary Objects.*

(1) *Criteria.* If the following criteria are met for human remains and associated funerary objects, the museum or Federal agency will expeditiously repatriate the remains and objects.

(A) The remains or associated funerary object meets the definitions established in § 10.2 (b) 1 or 3.

(B) The cultural affiliation of the deceased individual to known lineal descendant or present day Indian Tribe has been reasonably traced by the standards set forth in § 10.14 through the inventory and consultation process.

(C) None of the specific limitations and exceptions listed below apply.

(2) *Notification.* A requested repatriation shall take place within ninety (90) days of receipt, provided that it may not occur until at least thirty (30) days after publication of the notice of inventory completion in the *Federal Register* as described in § 10.9 of these regulations.

(c) *Exceptions.* These requirements for repatriation shall not apply to:

(1) circumstances where human remains or cultural items are indispensable to the completion of a specific scientific study commenced prior to receipt of a request for repatriation, the outcome of which is of major benefit to the United States. Human remains and cultural items in such circumstances shall be returned no later than ninety (90) days after completion of the study; or

(2) circumstances where there are multiple requests for repatriation of human remains or cultural items and the museum or Federal agency, after complying with these regulations, cannot clearly determine which requesting party is the proper recipient. In such circumstances, the museum or Federal agency shall retain the human remains and cultural items until such time as the requesting parties agree upon their recipients or the dispute is otherwise resolved pursuant to these regulations or as ordered by a court of competent jurisdiction; or

(3) circumstances where the repatriation of human remains and cultural items in the possession or control of a museum would result in a taking of property within the meaning of the Fifth Amendment of the United States Constitution in which event the ownership or custody of the objects shall be as provided under otherwise applicable law. Nothing in these regulations shall prevent a museum or Federal agency, where otherwise so authorized, or a lineal descendant or Indian Tribe, from expressly relinquishing title to, right of possession of, or control over any human remains or cultural items.

(4) circumstances where the repatriation is not consistent with other repatriation limitations identified in § 10.15 of these regulations.

(d) *Place and Manner of Repatriation.* The repatriation of human remains and cultural items shall be accomplished by the museum or Federal agency in consultation with the requesting lineal descendants or culturally affiliated Indian Tribe, as appropriate, to determine the place and manner of the repatriation.

(e) *Record of Repatriation.* Museums and Federal agencies shall adopt internal procedures adequate to permanently document the content and recipients of all repatriations.

(f) *Unaffiliated Human Remains.* If the cultural affiliation of human remains cannot be established pursuant to these regulations, the remains shall be considered unaffiliated. Museum and Federal agency officials shall report the inventory information regarding such remains in their holdings to the Departmental Consulting Archeologist who will transmit this information to the Review Committee. The Review Committee is responsible for compiling an inventory of unaffiliated human remains in the possession or control of each museum and Federal agency, and, for recommending to the Secretary specific actions for disposition of such human remains.

§ 10.11 [Reserved-Disposition of Culturally Unidentifiable Human Remains]

§ 10.12 [Reserved-Civil Penalties]

§ 10.13 [Reserved-Future Applicability]

Subpart D-General

§ 10.14 Lineal Descent and Cultural Affiliation.

(a) *General.* This section identifies procedures for determining lineal descent and cultural affiliation between present-day individuals and Indian Tribes and human remains and cultural items in museum or Federal agency collections or discovered or excavated from Federal lands. They may also be used by Indian Tribes with respect to Tribal lands.

(b) *Criteria for Determining Lineal Descent.* A lineal descendant is an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian Tribe to a known Native American individual whose remains, funerary objects, or sacred objects are being requested under these regulations. This standard requires that the earlier person be identified as an individual whose descendants can be traced.

(c) *Criteria for Determining Cultural Affiliation.* "Cultural affiliation" means a relationship of shared group identity that may be reasonably traced historically or prehistorically between a present-day Indian Tribe and an identifiable earlier group. All of the following requirements must be met in order to determine cultural affiliation between a present-day Indian Tribe and the human remains and cultural items of an earlier group:

(1) existence of an identifiable present-day Indian Tribe.

(2) evidence of the existence of an identifiable earlier group. Evidence to support this requirement must:

(i) establish the identity and cultural characteristics of the earlier group,

(ii) document distinct patterns of material culture manufacture and distribution methods for the earlier group, or

(iii) establish the existence of the earlier group as a biologically distinct population.

(3) evidence of the existence of a shared group identity that can be reasonably traced between the present-day Indian Tribe and the earlier group. Evidence to support this requirement must establish that a present-day Indian Tribe has been identified from prehistoric or historic times to the present as descending from the earlier group.

(d) *Evidence.* Evidence of a kin or cultural affiliation between a present-day individual or Indian Tribe and human remains and cultural items shall be established by using the following types of evidence: geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion.

(e) *Standard of proof.* Lineal descent of a present-day individual from an earlier individual and cultural affiliation of a present-day Indian Tribe to human remains and cultural items shall be established by a preponderance of the evidence. Claimants do not have to establish cultural affiliation with scientific certainty.

§10.15 Repatriation Limitations and Remedies.

(a) *Failure to Claim Prior to Repatriation.* Any person who fails to make a timely claim for disposition or repatriation of human remains and cultural items subject to Subpart C of these regulations, or, with respect to Federal lands, Subpart B of these regulations, prior to the repatriation or transfer of the items shall be deemed to have irrevocably waived any right to claim such human remains or cultural items pursuant to these regulations or the Act. For these purposes, a "timely claim" shall mean the filing of a written claim with a responsible Federal agency or museum official prior to the time the particular human remains or cultural items at issue are duly repatriated or disposed of to a claimant by a museum or Federal agency pursuant to these regulations. If there is more than one claimant, the human remains and/or cultural items shall be held by the responsible museum or Federal agency or person having custody thereof pending resolution of the claim. Any person who has custody of such human remains or cultural items and does not claim entitlement to them shall place the objects in the custody of the responsible museum or Federal agency for retention until the question of ownership is resolved.

(b) [Reserved-Failure to Claim Where no Repatriation or Disposition has Occurred].

(c) *Exhaustion of Remedies.* No person shall be considered to have exhausted his or her administrative remedies with respect to the repatriation or disposition of human remains or cultural items subject to Subpart B of these regulations, or, with respect to Federal lands, Subpart C of these regulations, until such time as the person has filed a written claim for repatriation or disposition of the objects with the responsible museum or Federal agency and the claim has been denied.

§ 10.16 Review Committee

(a) *General.* The Review Committee shall advise the Secretary on matters relating to these regulations, including, but not limited to, monitoring the performance of museums and Federal agencies in carrying out their responsibilities, facilitating and making recommendations on the resolution of disputes as described further in § 10.17, and compiling a record of culturally unidentifiable human remains that are in the possession or control of museums and Federal agencies and recommending actions for their disposition.

(b) *Recommendations.* Any recommendation or other action of the Review Committee is advisory only and shall not be binding on any person. Any records and findings made by the Review Committee may be admissible as evidence in actions brought by persons alleging a violation of the Act.

§ 10.17 Dispute Resolution

(a) *Formal and Informal Resolutions.* Any person who wishes to contest actions taken by museums, Federal agencies, or Indian Tribes with respect to the repatriation and disposition of human remains and cultural items is encouraged to do so through informal negotiations in order to achieve a fair resolution of the matter. The Review Committee may assist in this regard as described below. In addition, the United States District Courts have jurisdiction over any action brought that alleges a violation of the Act.

(b) *Review Committee Role.* The Review Committee may facilitate the informal resolution of disputes relating to these regulations among interested parties that are not resolved by good faith negotiations. Review Committee actions may include convening meetings between parties to disputes, making advisory findings as to contested facts, and making recommendations to the Secretary as to the proper resolution of disputes consistent with these regulations and the Act.

- 10.18 [Reserved-Sample Summary]
- 10.19 [Reserved-Sample Inventory]
- 10.20 [Reserved-Sample Notice of Inventory Completion]
- 10.21 [Reserved-Sample Memorandum of Understanding Repatriation]
- 10.22 [Reserved-Sample Memorandum of Understanding Intentional Excavation]