

A NATIVE AMERICAN REPATRIATION GUIDE

Understanding and Implementing NAGPRA
and the Official Smithsonian and other
Repatriation Policies

*Mending
the
Circle*

**A NATIVE AMERICAN
REPATRIATION GUIDE**

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and other Repatriation Policies**

Published by the
**AMERICAN INDIAN RITUAL OBJECT
REPATRIATION FOUNDATION**

463 East 57th Street, New York, NY 10022 • (212) 980-9441

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Library of Congress Catalogue Number: 95-081363
ISBN 0-9648208-0-3
Published in 1996 by the American Indian Ritual Object
Repatriation Foundation, New York, New York.
ISBN 0-9648208-1-1
Revised in 1997

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“Introduction” by Suzan Shown Harjo.

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“The Native American Graves Protection and Repatriation Act” by Jack Trope, Esq.

Excerpts from “Reclaimed Heritage: Repatriation Options
and Process Under NAGPRA” by Rosita Worl.

“Building a Tribal Repatriation Program: Options for Exercising
Sovereignty” by Dean Suagee, Esq.

“Museum Perspectives from Within: A Native View” by B. Lynne Harlan.

“Reflections of a Native Repatriator” by Richard Hill, Sr.

This material was supported by the National Indian Policy Center at
The George Washington University, Washington, DC, which is funded in part by a
grant award number 90NA1101/04 from the Administration for Native Americans,
U.S. Department of Health and Human Services. Reprinted by permission.

ACKNOWLEDGMENTS

Without the hard work of dozens of people *Mending the Circle* would not have been possible.

I would like to thank Jack Trope and Walter Echo-Hawk who recognized the need for this guide. They believed that it would be an important contribution for The American Indian Ritual Object Repatriation Foundation to make in support of repatriation efforts and Native Peoples' struggle for recognition and religious equality.

I extend gratitude to the National Indian Policy Center, Denise Bambi Kraus, *Assistant Director*, and Regis Pecos, *Planning Committee*, for their indispensable participation.

The clarity, and experience, of each contribution can create the standard and interpretative basis for the return home of human remains, grave goods, cultural patrimony and ceremonial material. Thanks to Suzan Shown Harjo, Editorial Consultant, Neal Gantcher, Esq. for legal advice on many aspects of this complicated undertaking, and William Douglas McAdams Inc., for its support in the design and printing of this publication.

The National Museum of the American Indian, the National Museum of Natural History and the National Anthropological Archives extended the use of their photographic archives. I am grateful to the Native people for their permission to use these photographs in order to illustrate the urgency of this national repatriation policy.

Production Coordinator, Rebecca Hill, guided *Mending the Circle* from beginning to end with a confident hand. I thank you Rebecca and staff, for your commitment to quality and your dedication to the American Indian Ritual Object Repatriation Foundation.

ELIZABETH A. SACKLER
Founder and President
The American Indian Ritual Object
Repatriation Foundation

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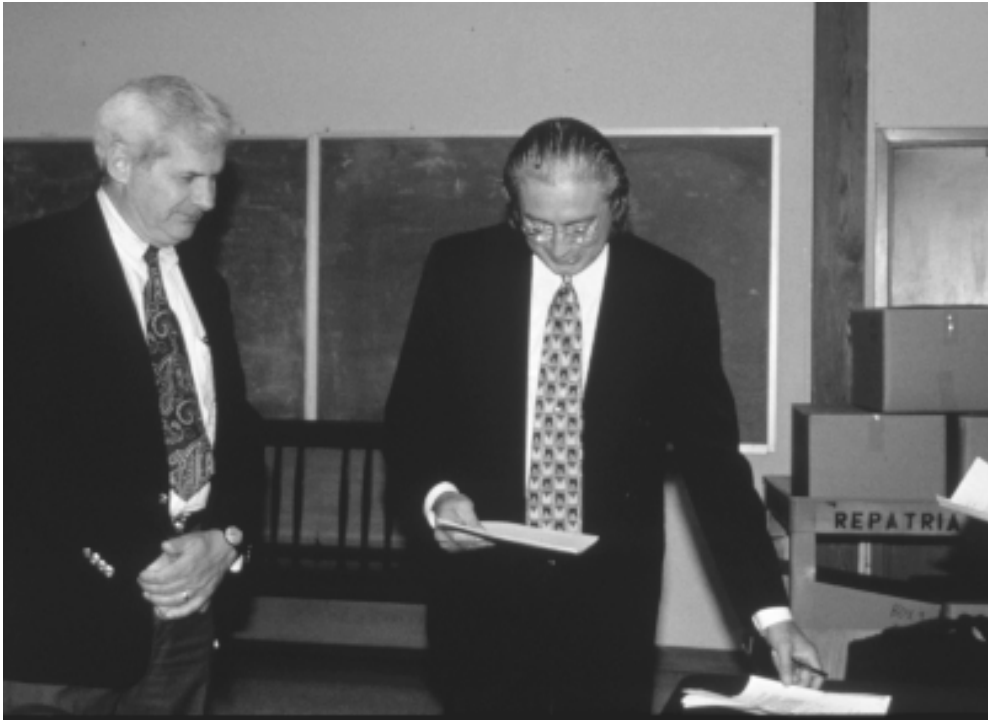
PREFACE

HISTORICALLY, ONE DEFINING PATTERN that characterizes the relationship between indigenous Native people and Non-Indians has been the one-way transfer of Indian property from Native to non-Native hands. This pattern began with New World gold and silver in the time of Columbus; and continued with the relentless acquisition of land, water and other natural resources in the United States during the 1776 to 1900 period. This massive property transfer was not limited to real estate. On the darker side of this pattern, hundreds of thousands of Native dead were taken from North American Indian graves, burial mounds and cemeteries. In addition, movable property, such as cultural objects, sacred objects and cultural patrimony, also left Indian hands by the trainload during this period, including some items which were stolen or improperly sold.

When Congress passed the repatriation provisions of the National Museum of the American Indian Act of 1989 and the Native American Graves Protection and Repatriation Act of 1990, it acted, in small measure, to reverse the historic pattern of one-way property transfers. Both laws provide for the return of Native American human remains and funerary objects to proper Native parties; and NAGPRA also includes other cultural items such as sacred objects and cultural patrimony within its provisions.

Like other national human rights legislation (such as the civil rights statutes which were enacted over a generation ago and are still being implemented, with increasing difficulty, today), Native American repatriation laws will take years to fully implement. This is due not only to the sheer magnitude of American museum collections that have accumulated over the centuries, but also because of the time-consuming, sometimes expensive, and always complex federal repatriation processes. Thus, in the coming months and years Indian Tribes and Native leaders must tread through a myriad of complex statutes, procedures and policies in order to thoroughly accomplish the return of Indian cultural items and the reburial of tribal relatives.

The repatriation process can be complicated from the tribal perspective. It is not unusual for a tribal leader, cultural resource staff person, or traditional tribal member to receive voluminous summaries, inventories or other repatriation forms from museums located hundreds of miles away. Yet, the task of reburying relatives or reclaiming tribal property can be of far-reaching importance to present and future generations. To respond to this challenge, repatriation can require expertise in legal, technical, archival and historical, fund raising, cultural, administrative and political arenas in order to develop and implement appropriate programs and strategies for unique Native Tribes and communities. In my view, a sound working knowledge of



Don Ortner, Acting Director, NMNH and Water Echo-Hawk, NARF-*Pawnee* tribe, reviewing deaccession papers. Remains of *Pawnee* Scouts are in the background. *Pawnee* Repatriation, NMNH, June 6, 1995. Photo courtesy of Jane Beck, Repatriation Office, NMNH, Smithsonian Institution.

these issues will help achieve the fullest measure of the repatriation opportunities and rights which are afforded by federal law and which exist in the private sector. In recent years, museums have spent considerable time educating themselves about federal repatriation laws and developing strategies for implementing the legislation. It is important for Tribes to have that same information level in order for an even playing field to exist.

Mending the Circle intends to serve as a helpful educational tool for Indian Tribes and Native Americans. The American Indian Ritual Object Repatriation Foundation hopes the guide provides a resource of helpful information for Native people who are embarking upon the historic task of developing repatriation policies, strategies and programs. The time is long overdue for America to return to its Native peoples that which is theirs.

On behalf of the Repatriation Foundation Board of Trustees, I am honored to convey our thanks and appreciation to the contributors to *Mending the Circle* and to the Foundation staff for lending their hard work, time and expertise.

WALTER R. ECHO-HAWK, ESQ. (*Pawnee*)
Native American Rights Fund
Trustee, American Indian Ritual Object Repatriation Foundation

INTRODUCTION

by SUZAN SHOWN HARJO (*Cheyenne & Hodulgee Muscogee*)

THE MAJOR POLICY ACHIEVEMENT and the hardest-fought battle in the development of the repatriation laws has been the humanization of Native Peoples—the legal recognition that we, too, have the human right to get buried and stay buried, to recover our people and property from those who want to own them, to worship in the manner and with the objects of our choosing. This publication is intended to guide all concerned with matters of repatriation through the maze of pertinent law, policies and procedures to the opportunities and solutions they offer.

The repatriation laws of 1989 and 1990 were intended to further the policy articulated in the American Indian Religious Freedom Act of 1978, which found, in part, that “laws and policies often deny American Indians access to sacred sites required in their religions, including cemeteries” and “at times prohibit the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies.” The Act declared that “henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right to freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites...” All three laws were intended to provide some small measure of justice for Native Peoples in the modern era for the generational suffering and hardship imposed by policies and practices that outlawed Native religions and violated fundamental rules of human decency.

It is important to know a bit of this history for an appreciation of what led to the need for federal remediation, what formed the backdrop for repatriation efforts and how Native people and materials were collected. The most egregious of these policies were established during the latter half of the past century; their effects will continue to be felt by all involved with repatriations well into the next century, and by Native Peoples aware of history for all of memory. The first of these was the collection of Indian bodies, initially for the study of infectious diseases, by the Army Medical Museum, which was founded in 1862. Museum Curator George A. Otis issued “Circular #2” in 1867, urging field doctors to send “Indian specimens,” stating: “Medical officers will enhance the value of their contributions by transmitting with the specimens the fullest attainable memoranda specifying the locality whence the skulls were derived, the presumed age and sex...”

In January of 1868, U.S. Army Surgeon General Joseph Barnes directed medical officers in Indian country to “augment the collection of Indian crania.” Also in 1868, Otis arranged an exchange with Smithsonian Secretary Joseph Henry, through which the Army Museum would receive osteological remains and give the Smithsonian burial and cultural items, and advertised in newspapers for “crania.” The Army-Smithsonian agreement also built collections at that time in Europe (the Physiological Institute in Berlin, for example) and America, such as the American Museum of Natural History

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in New York, the Field Museum of Natural History in Chicago and the Peabody Museum at Harvard University in Cambridge.

This set in motion a decades-long practice of decapitating Native people, weighing their brains and shipping them as freight to Washington, D.C., for more “study.” The crania were “harvested” from massacre sites, battlefields, prisons, schools, burial grounds (including scaffolds, caves and water, basketry and pottery vessels) and even from hours-old graves. One officer reported waiting “until cover of darkness” and departure of “the grieving family” before “I exhumed the body and decapitated the skull ... which is transmitted forthwith.” Certain officers’ accounts, such as that of the beheading of Apache Chief Mangas Colorado (Red Sleeves), point to the cross-racial comparative aspects of the “study” and leave open the possibility that some Indian people may have been murdered for their heads.

While the Army’s prisoner in 1863, California Volunteer guards woke Colorado, torturing the 72-year-old Chief with heated bayonets and shooting him. When the “dead body fell to the ground,” the officer reported, “I immediately decapitated the head, measured the skull and weighed the brains ... while the skull were smaller, the brain were larger than that of Daniel Webster.” Colorado’s head was scalped, his flesh boiled away and his skull and the “research” documents shipped to headquarters. Two direct descendants of Red Sleeves, Chiracahua sculptors Bob Haozous and his father, the late Allan Houser, recently traced their ancestor’s head to Europe, where it had gone into private hands from the collection of a civilian “scientist” in Pennsylvania, but the trail was lost in Germany.

Complete documentation of the “Indian Crania Study” has not yet surfaced, but the Army transferred some records in 1898 to the Smithsonian, which houses them in its Anthropological Archives. Some 4,500 crania, half of them obtained from the Army in 1898 and 1904, now comprise about one-fourth of the Smithsonian’s National Museum of Natural History collection of Native human remains. Relatives of Modoc Chief Kintpuash (Captain Jack) reported successfully retrieving his skull from the Museum in 1984, prior to enactment of the repatriation laws, from the desk of a resident physical anthropologist who was using it for an ashtray. The Chief had been hanged by the Army in 1873, buried and exhumed in Oregon, exhibited in carnivals throughout the East and “studied” in the Army Medical and Natural History Museums.

The National Museum of Natural History has returned almost 2,500 human remains to some twenty Native Peoples since the 1989 repatriation law. Among these were remains of a few victims of the November 29, 1864 Massacre at Sand Creek of 133 Cheyenne, Arapaho and Kiowa children, women and men. Decapitated and dismembered at the Massacre site, some of the victims’ heads and limbs were freighted to Washington, D.C. for the Army’s “study.” Other body parts, including reproductive organs and fetuses, were displayed by the Colorado Volunteers to cheering audiences at the Denver Theatre as part of its Christmas holiday fare. Many of these remains were turned into jewelry (such as teeth and fingerbone necklaces), scalplock dolls, wall-hangings and other trophies and keepsakes; they and their clothes remain in private and public collections and museums worldwide. Of the Sand Creek victims, only skeletal parts of fewer than one score have been returned to date; no other entities cov-

ered by the laws have admitted to their possession of others, and no private collectors have come forward.

The second category of dehumanizing policies was the long line of religious suppression actions. Throughout the 1800s, it was common military practice to stop Native Peoples from exercising their religions. At the beginning of the 1800s, Congress authorized and appropriated monies for the “Civilization Fund” to re-educate and deculturalize Indians. Christian denominations were given federal funds and franchises on particular Native Peoples for the purpose of conversion to European ways. This practice continued into this century. In 1884, 1894 and 1904, the Secretary of the Interior published *Regulations of the Indian Office*, banning all traditional religious activities, ceremonies and dancing, and mandating the Christian-only/English-only education of Indian children.

The *Regulations* issued on April 1, 1904, under the heading, *Civilization*, imposed stiff imprisonment and starvation sentences for any violation of the “Indian offenses.” Each Bureau of Indian Affairs agent was directed, as the “chief duty,” to “induce his Indians to labor in civilized pursuit.” Agents were directed “to impress upon the minds of their Indians the urgent necessity for a strict compliance with these instructions, and warn them that without this protection they are liable to be looked upon and treated as hostile Indians.” Characterization as a “hostile” was tantamount to a death sentence. Periodically in the latter half of the 1800s and early 1900s, lists of “hostile Indians,” “fomenters of dissent” and “ringleaders” were circulated among the Army and the Indian Police and were used as the justification, for example, for the murders of Lakota Chiefs Sitting Bull and Big Foot, and Cheyenne Chief Black Kettle; the Massacres at Sand Creek, Washita and Wounded Knee; and the quarter-century confinement of Apache Chief Geronimo.

The *Regulations* outlawed the Sun Dance “and all other similar dances and so-called religious ceremonies.” Also outlawed were the “usual practices” of a “so-called ‘medicine man’ (who) operates as a hindrance to the civilization of a tribe,” who “resorts to any artifice or device to keep the Indians under his influence,” who “shall adopt any means to prevent the attendance of children at the agency schools” or who “shall use any of the arts of a conjurer to prevent the Indians from abandoning their heathenish rites and customs.” If convicted of these “offenses” or “any other, in the opinion of the court, of an equally anti-progressive nature,” a religious leader “shall be confined in the agency guardhouse for a term not less than ten days, or until such time as he shall produce evidence satisfactory to the court, and approved by the agent, that he will forever abandon all practices styled Indian offenses under this rule.”

Give-away, honoring and any ceremonies involving any exchange or elimination of property were banned. The *Regulations* particularly note that a defense that “the party charged was at the time a ‘mourner,’ and thereby justified in taking or destroying the property in accordance with the customs or rites of the tribe” was not a “sufficient or satisfactory answer to any of the offenses.” Violations of any offenses under the *Regulations* were used to justify confiscation of sacred objects, funerary items and any cultural or personal property. Agents, soldiers and their families benefited most from this property, which was sold and gifted to other collectors, with some transferred to prominent and

obscure museum, university and other institutional repositories. One example of this is the ledger of Cheyenne Dog Soldier Little Finger Nail, which the officer in charge at Fort Robinson had tried to buy. Little Finger Nail declined and always wore the Dog Soldier Society history book strapped to his body under his clothing. He was later killed by one of the officer's soldiers; the deadly bullet passed through the ledger, which was gifted to the officer's brother, who sold it to one who sold it to another, and it ended up in the American Museum of Natural History, which holds it today.

Writer and poet John Collier, who was the Indian Commissioner under President Franklin D. Roosevelt, recounted in his 1963 memoir, *From Every Zenith*, an incident during the mid-1920s involving Interior officials and an "onslaught on the Indian religions." Commissioner Charles H. Burke and Interior Secretary Hubert Work "invaded the Taos Pueblo's Council, to tell them that they were 'half animals' by virtue of their 'pagan worship' ...the Taos Governor and Council refused compliance with an Indian Bureau order forbidding the withdrawal of Indian boys from school for their tribal religious initiation. The Bureau had them arrested — all the governing body, the old men, of the tribe — and confined in a Santa Fe jail. Judge Neblitt of the United States district Court, to whom (Collier's Indian defense group) took the case, publicly rebuked the Bureau, and ordered, 'Take these men home.'"

As Commissioner, Collier issued his own *Circular* in 1934, warning employees of the Indian Service "against interfering with the religious liberties guaranteed by the Federal Constitution." The *Regulations* were revoked in part in 1935, after more than a half-century of vigorous enforcement. However, many of the same practices continued through the Bureau's cash-and-poverty politics and through Native American self-enforcement, force of habit and historic inhibition. After the New Deal Administrations, in the mid-1940s, U.S. Indian policy reverted to that of assimilation and dislocation, and the numbers of traditional Native religious practitioners and sacred and other lands rapidly diminished over the next two decades.

These laws, policies and practices had authorized and resulted in deaths and physical and spiritual damage of unimaginable, incalculable, inhuman proportions, and in the demise of a great many of the traditional religions and ceremonies of Native Peoples. These policies permitted and encouraged the theft of human remains, funerary items, sacred objects and cultural property, which ended up in private collections globally and in America's museums, places of learning, historical societies, research and scientific institutions, amusement and entertainment centers and agencies of governments of all stripes. Policies and practices intended for protection of antiquities, historic sites and the environment — and those designed for economic and industrial development, weapons testing and the disposal of poisons — compounded the problem on a massive scale, resulting in the desecration and destruction of hundreds of thousands of Native American graves and other holy places.

On November 16, 1990, NAGPRA was signed into law. Within a few months after NAGPRA's approval, in 1991, the National Museum's Trustees adopted its Repatriation Policy. NAGPRA set deadlines for summaries and inventories of collections to be sent to Native Peoples. NAGPRA did not apply to the Smithsonian, but the NAGPRA timelines have been adopted Institution-wide. The 1989 law had estab-

lished a Repatriation Committee for dispute resolution within the National Museum of Natural History.

As difficult as implementation of the repatriation policy and laws may be in the non-Native world, the truly complex issues are being examined by Native Peoples, who must arrive at consensus in matters for which most lack specific historical and ceremonial context. Each detail of repatriation, including whether or not to request repatriation, must be worked out within each family, clan, society or nation. As B. Lynne Harlan's contribution to this publication points out, there are numerous details at the institutional end that may not have been contemplated in these decision-making processes at home.

For all the inartful language and requirements of the laws and the awkwardness of agreements and methods for implementing them, repatriations are taking place with increasing frequency to the general satisfaction of participants. Native Peoples are engaged in the real work and benefits of repatriation—settling the spirits; meeting, remeeting and gaining spiritual knowledge and comfort from sacred beings; and empowering future generations with accessible cultural property, history and images. All involved with these worthy tasks have reason to be grateful for and humbled by the privilege.

Aho.

Visiting *Blackfeet* delegation. Photo by Katherine Fogden, Courtesy of NMAI, Smithsonian Institution.



SECTION I
THE NATIVE AMERICAN
GRAVES PROTECTION
AND REPATRIATION ACT



Repatriated *Northern Cheyenne* remains awaiting reburial. Photo by John Warner, St. Labre Indian School, courtesy of Repatriation Office, NMNH, Smithsonian Institution.

SECTION I

Chapter 1. THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

by JACK TROPE, ESQ.

ON NOVEMBER 16, 1990, the Native American Graves Protection and Repatriation Act (NAGPRA) became law. This law (sections 3001 through 3015 of Volume 25 of the United States Code):

- Establishes procedures and legal standards for the repatriation of human remains, funerary objects, sacred objects and cultural patrimony by federal agencies and certain museums, educational and other institutions, and state and local governments.
- Recognizes certain tribal, Native Hawaiian, and individual rights in regard to burial sites located on federal and tribal lands.

In general, the Act is based upon the unique relationship between Native Americans and the federal government.¹

WHO AND WHAT IS COVERED BY NAGPRA

Indian tribes, Native Hawaiian Organizations and Lineal Descendants

NAGPRA provides various repatriation, ownership and control rights to Native American individuals and families who are the lineal descendants of a deceased Native individual and to Indian tribes and Native Hawaiian organizations.

“Indian tribe” is defined as “any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.”² In the only court case interpreting this provision in NAGPRA to date, a Federal District Court found that this definition includes both tribes recognized by the Secretary of the Interior and other “aggregations” of Indians which have been receiving funds and assistance from other departments of the federal government.³ In addition, an overall reading of the law suggests that any culturally-distinct tribal entity with the authority to decide traditional cultural issues would probably be considered “an Indian tribe” for the purpose of making claims under NAGPRA, even if that tribal entity has joined with other tribes or sub-groups of tribes for the purpose of secular self-governance.⁴

“Native Hawaiian organization” is defined as an organization which:

1. Serves and represents the interests of Native Hawaiians;
2. Has a primary purpose of providing services to Native Hawaiians; and
3. Has expertise in Native Hawaiian Affairs.

The Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai’i Nei are specifically included as Native Hawaiian organizations.⁵

Museums and Federal Agencies

NAGPRA’s repatriation, inventory and summary requirements are obligatory for federal agencies and museums.

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The term “federal agency” includes all federal governmental entities except the Smithsonian Institution, which is the subject of a separate law, the National Museum of the American Indian Act of 1989 (“Museum Act”), as explained below.⁶

The term “museum” means any institution receiving federal funds which possesses or controls Native American cultural items. This definition includes not only those institutions commonly thought of as museums, but also state and local governments, educational and other institutions.⁷

Cultural Items

NAGPRA deals with the issue of ownership and control over Native American “cultural items”. “Cultural items” are defined to include human remains, associated and unassociated funerary objects, sacred objects and objects of cultural patrimony.⁸ The meaning of each of the categories of items is as follows:

1. “Associated funerary objects” includes two categories of objects:

- Objects “reasonably believed to have been placed with individual human remains either at the time of death or later...as part of a death rite or ceremony” where both the human remains and objects are presently in the possession or control of a federal agency or museum. The remains and objects need not be in the possession or control of the same agency or museum—only in the possession or control of *a* museum or agency so that a connection between the objects and remains is possible.
- Objects “exclusively made for burial purposes or to contain human remains.”⁹

2. “Unassociated funerary objects” are those funerary objects which were found with human remains where

- The objects can be related to specific individuals, families or known human remains or to a specific burial site of a culturally affiliated individual; and
- The human remains are not presently in the possession or control of a federal agency or museum.¹⁰

3. “Sacred objects” are those objects which are

- ceremonial in nature, and
- needed by traditional Native American religious leaders for the present day practice of traditional Native American religions. This includes both the use of the objects in ceremonies currently conducted by traditional practitioners and instances where the objects are needed to renew ceremonies that are part of a traditional religion

The definition recognizes that the ultimate determination of continuing sacredness must be made by the Native American religious leaders themselves since they must determine the current ceremonial need for the object.

4. “Cultural patrimony” are those objects which

- Have “ongoing historical, traditional, or cultural importance central to the Native American group or culture itself”¹³, and
- Are the cultural property of a tribe, or a subgroup thereof such as a clan or band, and could not have been sold or given away by an individual.

Congress intended cultural patrimony to refer to items of “great importance” such as Iroquois wampum belts.¹⁴

ITEMS POSSESSED OR CONTROLLED BY MUSEUMS AND FEDERAL AGENCIES

Responsibility of Museums and Federal Agencies to Identify Items

Inventory of Human Remains and Associated Funerary Objects

NAGPRA requires museums and federal agencies to complete item-by-item inventories of human remains and associated funerary objects they own or possess. In conducting the inventories, museums and agencies must consult with Native American governmental and traditional leaders and the NAGPRA Review Committee (see below).¹⁵ The inventories must be completed by November 16, 1995.¹⁶ Extensions may be granted by the Secretary of the Interior for good cause,¹⁷ but the inventory process is not intended to delay any pending actions on repatriation requests.¹⁸

As part of the inventory, the museum or agency is required to identify the geographical origin and cultural affiliation of each item, to the extent possible, based upon information currently within its possession; it must also provide information about how and when the item was acquired by the museum or agency.¹⁹ Museums and agencies are not required to conduct “exhaustive studies and additional scientific research to conclusively determine” cultural affiliation,²⁰ nor is the bill considered to be authorization for such studies.²¹

Museums and agencies must provide notice of culturally affiliated objects they identify in their inventories to culturally affiliated tribes (or Native Hawaiian organizations) “throughout the process”—not merely after completion of the entire inventory.²² Final notice must be sent within six months after the completion of the inventory to all tribes that are reasonably believed to be culturally affiliated with human remains or associated funerary objects owned, held or controlled by the museum or agency.²³

Notices will:

- identify each human remain and associated funerary object;
- state how, when and where it was acquired;²⁴
- provide one list of those remains and objects whose tribal origin is clearly identified;²⁵ and
- provide another list of those remains and objects whose tribal affiliation is not clearly identified, but which are believed to be of a particular tribal origin based upon how, when and where they were acquired.²⁶

A tribal organizational entity that receives, or should have received, notice may request additional background information from the museum regarding these issues.²⁷

The requirement that museums perform this inventory does not depend upon a museum receiving federal funds from the NAGPRA grant program.²⁸

The Museum Act of 1989 places a similar requirement upon the Smithsonian. It requires the Smithsonian, in consultation with Indian tribes and traditional Indian religious leaders, to inventory human remains and funerary objects in its possession or control.²⁹ The requirement extends to both associated and unassociated funerary objects and, in this respect, the inventory requirement placed upon the Smithsonian exceeds that placed upon other federal agencies and museums by NAGPRA.³⁰ The purpose of the inventory is to identify the origins of such remains based upon the best available scientific and historical documentation.³¹ If the tribal origin of remains or objects is identified by a preponderance of the evidence, the Smithsonian must promptly notify the appropriate Indian tribe.³²

Summary of Unassociated Funerary Objects, Sacred Objects and Items of Cultural Patrimony

Museum and agencies must provide summaries of unassociated funerary objects, sacred objects and items of cultural patrimony instead of object-by-object inventories. These summaries must “describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable.”³³

These summaries should have been completed by November 1993. Indeed, many museums and federal agencies have already sent summaries to Indian tribes as required. After a summary is completed, there should be a consultation process with Native American governmental and traditional leaders.³⁴ All tribes and Native Hawaiian organizations are entitled to obtain data from federal agencies and museums pertaining to geographical origin, cultural affiliation and acquisition and accession of the objects in the summaries.³⁵ This information must be requested by the tribal organizations or entities.

As noted earlier, under the Museum Act, the Smithsonian is required to inventory unassociated funerary objects, but it is NOT required to inventory or summarize sacred objects or items of cultural patrimony in its possession or control.

Repatriation or Other Treatment of Cultural Items

Repatriation of Human Remains and Associated Funerary Objects under NAGPRA

NAGPRA requires federal agencies and museums to return human remains and associated funerary objects as quickly as possible in the following instances:

1. Upon request of a direct descendent of the deceased, or
2. Upon request of an Indian tribe or Native Hawaiian organization where the tribe or organization has a “cultural affiliation” with the human remains and associated funerary objects.

In order for “cultural affiliation” to be established...

- it must be determined that it is likely that the remains are those of a member of a particular tribe or group which existed at the time the deceased lived; and
- based on all the circumstances and evidence,³⁶ a reasonable connection (“shared group identity”) must be shown between the present-day tribe or organization making the request and the earlier tribe or group.

Cultural affiliation can be determined by a museum through the inventory process or proven by a tribe or Native Hawaiian organization.³⁷ Many types of evidence can be used to prove cultural affiliation, including “geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.”³⁸

Upon request, federal agencies and museums must provide available documentation to Indian tribes and Native Hawaiian organizations who may be culturally affiliated with certain items.³⁹ Available documentation includes “a summary of existing museum or federal agency records, including inventories or catalogues, relevant studies, or other pertinent data.”⁴⁰

Two exceptions exist to the requirement that human remains and associated funerary objects be “expeditiously returned” after cultural affiliation has been determined:⁴¹

1. Where the remains or objects are “indispensable for completion of a specific scientific study,

the outcome of which would be of major benefit to the United States”, in which case the items must be returned within 90 days after the completion of the study;⁴² and

2. Where more than one tribe, Native Hawaiian organization or descendant makes a claim and the federal agency or museum “cannot clearly determine which requesting party is the most appropriate claimant”.⁴³ In such a case, the federal agency or museum may retain the item until the parties agree or a court decides who should receive the items.⁴⁴

As for human remains and associated funerary objects whose cultural affiliation cannot be determined, the Review Committee created by NAGPRA (see below) will make recommendations, “in consultation with Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups”, as to how these remains and objects will be handled.⁴⁵

Repatriation of Unassociated Funerary Objects, Sacred Objects, and Items of Cultural Patrimony under NAGPRA

There is a four-step process for repatriating unassociated funerary objects, sacred objects and cultural patrimony.

Step 1. Identification of the Item

The claimant must show that the item claimed is either an unassociated funerary object, sacred object or item of cultural patrimony.⁴⁶

Step 2. Cultural Affiliation/Prior Ownership or Control

Cultural affiliation of unassociated funerary objects must be established as described under “*Repatriation of Human Remains and Associated Funerary Objects, under NAGPRA*” (see page 4).⁴⁷

For sacred objects and items of cultural patrimony, either cultural affiliation must be established or the requesting tribe or Native Hawaiian organization must show that the object was previously owned or controlled by the tribe, organization or a member thereof.⁴⁸

In order for an individual to claim a sacred object, that individual must show that he or she is a direct descendant of the person who owned the object.⁴⁹

If a tribe or Native Hawaiian organization is making a claim based upon prior ownership or control by a tribal member rather than by the tribe, the tribe must show that there are no direct descendants of the individual who owned the object(s) or that the descendants have been notified and have failed to make a claim.⁵⁰

Step 3. Right of Possession—Evidence Presented by Claimant

Once it has been determined that a tribe, Native Hawaiian organization or individual has a valid claim for the object, the tribe, organization or individual must present at least some evidence indicating that the federal agency or museum did not have the “right of possession” of the items.⁵¹ “Right of possession” means possession obtained with the voluntary consent of an individual or group that had the right to sell or transfer the object.⁵² In most cases, whether the initial transfer of the item out of tribal control was consensual would probably be governed by tribal law or custom.⁵³

There is only one instance where this definition of “right of possession” would not apply. This would be in the rare case when a lawsuit is brought before the United States Claims Court and the Court finds that an unconstitutional Fifth Amendment taking of private property without just compensation would result from the return of an object. If such a ruling were obtained,

other property laws (federal, state or tribal) would apply to the object(s) in question as if NAGPRA did not exist. It is not expected that this will be a significant problem.

In gathering evidence to make an initial showing that a museum or agency had no right of possession, a claimant should be aware that:

- a. The museum or agency must make available “records, catalogues, relevant studies or other pertinent data” in their possession relating to how the museum or agency obtained the item and who has held it since it left tribal possession⁵⁴, and
- b. Although the statute is not specific in regard to the type of evidence needed, the claimant should consider presenting oral traditional and historical evidence, as well as documentary evidence.

Step 4. Right of Possession: Museum or Agency Burden of Proof

Once the claimant has satisfied Steps 1-3, the burden is shifted in Step 4 to the museum or federal agency. In Step 4 the museum or agency must prove that it has a right of possession in regard to the items in question.⁵⁵ If the museum or agency cannot prove right of possession, the unassociated funerary object, sacred object or item of cultural patrimony must be returned—unless the scientific study or competing claims exceptions discussed earlier apply.

Repatriation of Items under Other Legal Authority

NAGPRA makes clear that its repatriation provisions are not meant to limit the general repatriation authority of federal agencies and museums which may have already existed.⁵⁶ Thus, a museum or agency may repatriate an item without strict compliance with NAGPRA procedures if it would have been legally able to do so prior to NAGPRA.

In addition, as previously noted, a separate law pertains to the Smithsonian Institution.⁵⁷ Under this Museum Act of 1989, upon request by a descendant of the deceased or by a culturally affiliated tribe, the Smithsonian must return human remains and funerary objects associated with those remains as quickly as possible.⁵⁸ Unassociated funerary objects which can be identified “as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe” must also be returned to the tribe upon request.⁵⁹ Sacred objects and cultural patrimony are not covered by the Museum Act.⁶⁰

Alternate Treatment of Cultural Items by Museums or Agencies

If an Indian tribe or Native Hawaiian organization chooses not to immediately repatriate items to which they have a claim, the tribe or organization and the museum or agency may enter into an agreement regarding any Native American objects owned or controlled by the museum or agency.⁶¹ Such an agreement might establish guidelines as to how the museum or agency should “handle” such items. Agencies or museums are not required to enter into such agreements, however.



Wasco-Warm Springs religious leader Larry Dick preparing human remains for shipment. Photo courtesy of Jane Beck, Repatriation Office, NMNH, Smithsonian Institution.

BURIAL SITES ON FEDERAL AND TRIBAL LAND

Procedures Required before Excavation may Occur

Intentional Excavations

Whenever a party intends to excavate a burial site for any purpose:

1. That party must obtain a permit pursuant to the Archeological Resources Protection Act of 1979 (“ARPA”).⁶² An ARPA permit may be issued by the agency managing the land upon which the burial site is located if

- the applicant is qualified,
- the undertaking is designed to advance archeological knowledge in the public interest,
- the resources will remain the property of the United States and be preserved in an appropriate institution, except where NAGPRA provides for tribal ownership or control, and
- the activity is not inconsistent with the applicable land management plan.⁶³

2. If tribal lands are involved, the items may be excavated only after notice to, and consent of, the tribe or Native Hawaiian organization.⁶⁴ Tribal land is defined to include

- all lands within the exterior boundaries of a reservation, whether or not the land is owned by the tribe, Indian individuals or non-Indians,
- all dependent Indian communities, and
- any lands administered for Native Hawaiians pursuant to the Hawaiian Homes Commission Act of 1920, as amended, and the Hawaii Statehood Bill.⁶⁵

3. If federal lands are involved, the items may be excavated only after notice and consultation with the appropriate tribe or Native Hawaiian organization.⁶⁶ “Federal land” is defined as non-tribal land controlled or owned by the United States, including lands selected by, but not yet conveyed to, Alaska Native corporations and groups pursuant to the Alaska Native Claims Settlement Act of 1971.⁶⁷

Inadvertent Discoveries

Where imbedded cultural items have been inadvertently discovered as part of another activity, such as construction, mining, logging or agriculture:

1. The person who has discovered the items must temporarily cease activity and notify

- the responsible federal agency in the case of federal land;
- the appropriate tribe or Native Hawaiian organization in the case of tribal land; or
- the Alaska Native corporation or group in the case of Alaska Native Claims Settlement Act lands still owned by the Federal government which have been selected by, but not yet conveyed to, the Alaska Native corporation or group.⁶⁸

When notice is provided to the federal agency, that agency has the responsibility to promptly notify the appropriate tribe or Native Hawaiian organization.⁶⁹

2. Activity may resume thirty days after the Secretary of the appropriate federal department, the Secretary of the Interior if authority has been delegated or the Indian tribe or Native Hawaiian organization certifies that notice has been received.⁷⁰

The intent of this provision is to “provide for a process whereby Indian tribes and Native Hawaiian organizations have an opportunity to intervene in development activity on Federal or

tribal lands in order to safeguard Native American human remains, funerary objects, sacred objects or objects of cultural patrimony...[and to afford] Indian tribes or Native Hawaiian organizations... 30 days in which to make a determination as to appropriate disposition for these human remains and objects.”⁷¹

Tribal Ownership and Control of Imbedded Cultural Items

Under NAGPRA, Indian tribes, Native Hawaiian organizations or descendants of the deceased will usually have ownership and control over human remains and cultural items which may be discovered or excavated on federal and tribal lands in the future, regardless of whether such discovery or excavation is intentional or inadvertent. Any direct descendant of a buried person has the initial right of ownership or control of that person’s remains and funerary objects associated with the remains.⁷² Where descendants of the human remains and associated funerary objects cannot be determined and in the case of unassociated funerary objects, sacred objects and items of cultural patrimony, NAGPRA establishes the following rules:

1. The tribe or Native Hawaiian organization owns or controls all cultural items discovered on tribal land.⁷³
2. In the case of federal land, the tribe or Native Hawaiian organization with the closest cultural affiliation to the items has ownership or control.⁷⁴ Agreements between tribes regarding disputed items are possible and the NAGPRA Review Committee may serve as a mediator if there is an intertribal dispute.⁷⁵
3. Where cultural affiliation of the items cannot be established, but the objects are discovered on federal land which the Indian Claims Commission or United States Court of Claims has determined to be the aboriginal land of a particular tribe, the tribe which obtained the judgment has the right of ownership and control over the items unless another tribe can show a stronger cultural relationship.⁷⁶

PENALTIES FOR VIOLATION OF NAGPRA AND OTHER MEANS OF ENFORCEMENT

Prohibitions Against Trafficking

1. NAGPRA prohibits all trafficking in Native American human remains for sale or profit unless the remains have been “excavated, exhumed or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization.”⁷⁷ This prohibition applies to human remains wrongfully acquired at any time, whether before or after the enactment of NAGPRA.⁷⁸

2. NAGPRA also prohibits trafficking in funerary objects, sacred objects and items of cultural patrimony obtained in violation of the act.⁷⁹ This provision in NAGPRA applies only to wrongful acquisitions after the date that NAGPRA was enacted (November 16, 1990).⁸⁰ Of course, existing state or federal law involving theft or stolen property would be applicable should an individual or entity have obtained possession of a cultural item by such means before or after the enactment of NAGPRA.⁸¹

3. Violators of the trafficking prohibitions are subject to a fine of up to \$100,000 and up to one year in jail for a first offense and a fine of up to \$250,000 and a maximum of 5 years in jail for subsequent offenses.⁸²

Sanctions against Museums

The Secretary of the Interior may assess civil penalties against museums that do not comply with NAGPRA.⁸³ The amount of the penalties is determined by

1. The archeological, historical or commercial value of the item involved;
2. The economic and non-economic damages suffered by an aggrieved party; and
3. The number of violations.⁸⁴

Enforcement of the Act by a Private Cause of Action in the Courts

An Indian tribe, Native Hawaiian organization or individual or other entity with protected rights under NAGPRA can file a law suit to enforce the provisions of NAGPRA if there is a violation of the Act.⁸⁵ Tribes, organizations and individuals also retain any pre-existing legal rights which they may have possessed before NAGPRA.⁸⁶ If a museum repatriates an item in good faith, however, it cannot be sued if it has made a mistake.⁸⁷

IMPLEMENTATION OF NAGPRA

The NAGPRA Review Committee

The Secretary of the Interior has appointed a NAGPRA Review Committee, as provided for in the Act, to monitor and review the implementation of NAGPRA.⁸⁸ The Review Committee consists of seven members

- Three are Native Americans who have been appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations and traditional Native American religious leaders (the statute requires that at least two of the three be traditional Native American religious leaders)
- Three have been appointed from nominations submitted by national museum organizations and scientific organizations; and
- One person has been chosen from a list compiled by the other six members.⁸⁹

The Review Committee's function is:

1. To monitor the inventory and identification process;⁹⁰
2. Upon request, to make findings relating to the cultural affiliation and return of cultural items and to help resolve disputes between interested parties⁹¹ (the Review Committee may make non-binding findings which may be used as evidence in a court proceeding);⁹²
3. To compile an inventory of culturally unidentifiable human remains and make recommendations as to an appropriate process for their disposition;⁹³ (the Review Committee has in fact issued draft recommendations for comment that take the position that the ultimate decisions about such remains "should rest in the hands of Native Americans");⁹⁴
4. To consult with the Secretary of the Interior in the development of regulations to implement NAGPRA;⁹⁵
5. To make recommendations as to the future care of repatriated cultural items;⁹⁶ and
6. To submit an annual report to Congress.⁹⁷

Grants to Museums, Indian Tribes and Native Hawaiian Organizations

NAGPRA authorizes the Secretary of the Interior to make grants to museums for the compilation of inventories and the summaries.⁹⁸ Tribes and Native Hawaiian organizations may also receive grants to assist them in repatriating cultural items.⁹⁹ In Fiscal Year 1995, \$2.3 million was appropriated for grants to museums, tribes and Native Hawaiian organizations.

Promulgation of Regulations

The Secretary of the Interior is authorized to issue regulations to carry out NAGPRA's provisions.¹⁰⁰ A draft of proposed regulations was published in the Federal Register on May 28, 1993.¹⁰¹ Final regulations have not yet been approved. When they are approved, a supplement describing their specifications will be published.

CONCLUSION

The Native American Graves Protection and Repatriation Act provides Native American people and tribes with the right to recover and exercise control over human remains and various cultural items. Although it will not result in the return of all items that could be returned or the complete protection of all grave sites, it does provide Indian tribes, Native Hawaiian organizations and certain individuals seeking to reclaim their ancestors and heritage, or protect grave sites, with a number of enforceable legal rights. NAGPRA recognizes that Native American human remains and cultural items are the remnants and product of living people, and that descendants have a cultural and spiritual relationship with the deceased. After NAGPRA, human remains and cultural items can no longer be thought of as merely "scientific specimens" or "collectibles." For the first time, the federal government and non-Indian institutions must consider what is "sacred" from an Indian perspective.

ENDNOTES

1. 25 U.S.C. 3010.

2. 25 U.S.C. 3001(7).

3. *Abenaki Nation of Mississquoi v. Hughes*, 20 I.L.R. 3001 (D.Vt. 1992).

4. For example, the Confederated Salish and Kootenai tribes govern the Flathead Reservation jointly. However, the Salish and Kootenai have their own distinct cultures and separate mechanisms for making decisions regarding traditional matters. The most reasonable interpretation of the definition of "Indian Tribe," read in conjunction with the remainder of the statute, would be an interpretation that permits both the Salish and Kootenai to make independent claims under NAGPRA.

5. 25 U.S.C. 3001(11).

6. 25 U.S.C. 3001(4); 20 U.S.C. 80q-9.

7. 25 U.S.C. 3001(8).

8. 25 U.S.C. 3001(3).

9. 25 U.S.C. 3001(3)(A).

10. 25 U.S.C. 3001(3)(B).

11. 25 U.S.C. 3001(3)(C).

12. H.R. Rep. No. 877, 101st Cong., 2nd Sess. (1990), at 14.

13. 25 U.S.C. 3001(3)(D).

14. S. Rep. No. 473, 101st Cong., 2nd Sess. (1990), at 7-8.

15. 25 U.S.C. 3003(b)(1)(A) and (C).

16. 25 U.S.C. 3003(b)(1)(B).

17. 25 U.S.C. 3003(c).

18. See 25 U.S.C. 3009(1-4).

19. 25 U.S.C. 3003(a) and (d)(2).

20. Senate Report 101-473, *supra* note 13, at 12.

21. 25 U.S.C. 3003(b)(2).

22. Senate Report 101-473, *supra* note 13, at 12.

23. 25 U.S.C. 3003(d)(1).

24. 25 U.S.C. 3003(d)(2)(A).

25. 25 U.S.C. 3003(d)(2)(B).

26. 25 U.S.C. 3003(d)(2)(C).

27. 25 U.S.C. 3003(b)(2).

28. 25 U.S.C. 3008(b) permits, but does not require, the Secretary of Interior to make grants to museums to conduct the inventory and summary required by the Act.

29. 20 U.S.C. 809q-9(a)(1).

30. *Id.*; "Funerary object" is defined as "an object that, as part of a death rite or ceremony of a culture, is intentionally placed with individual human remains, either at the time of burial or later." 20 U.S.C. 80q-14(4).

31. 20 U.S.C. 80q-9(a)(2).

32. 20 U.S.C. 80q-9(b).

33. 25 U.S.C. 3004(a) and (b)(1)(A).

34. 25 U.S.C. 3004(b)(1)(B) and (C).

35. 25 U.S.C. 3004(b)(2).

36. 25 U.S.C. 3001(2); House Report 101-877, *supra* note 11, at 14.

37. 25 U.S.C. 3005(a)(1),(4).

38. 25 U.S.C. 3005(a)(4).

39. 25 U.S.C. 3005(d).
40. 25 U.S.C. 3003(b)(2).
41. 25 U.S.C. 3005(a)(1) and the portion of 25 U.S.C. 3005(a)(4) applicable to human remains and associated funerary objects refer only to subsections (b) and (e) of 25 U.S.C. 3005 as exceptions to the repatriation requirement.
42. 25 U.S.C. 3005(b).
43. 25 U.S.C. 3005(e).
44. *Id.* Section 3005(e) also provides that the dispute may be settled “pursuant to the provisions of this Act”. *Id.* This refers to the authority of the Review Committee created by 25 U.S.C. 3006 to “facilitate[e] the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable.” 25 U.S.C. 3006(c)(4). Although any findings of the Committee are admissible in a court proceeding, the Committee has no binding authority upon any of the parties. 25 U.S.C. 3006(d). Thus, while the Committee can certainly play an important role in resolving these disputes, ultimately the disputes must be resolved by agreement or judicial determination.
45. 25 U.S.C. 3006(c)(5) and (e).
46. *See generally* 25 U.S.C. 3005, 3001(3).
47. 25 U.S.C. 3005(a)(2) and (4).
48. 25 U.S.C. 3005(a)(2) and (5).
49. 25 U.S.C. 3005(a)(5)(A).
50. 25 U.S.C. 3005(a)(5)(C).
51. 25 U.S.C. 3005(e).
52. 25 U.S.C. 3001(13).
53. Trope and Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 *Ariz. St. L.J.* 35, 67-68 (1992).
54. 25 U.S.C. 3004(b)(2).
55. 25 U.S.C. 3005(c).
56. 25 U.S.C. 3009(1)(A).
57. 20 U.S.C. 80q-1-80q-15.
58. 20 U.S.C. 80q-9(c).
59. 20 U.S.C. 80q-9(d).
60. The National Museum of the American Indian (“NMAI”) has adopted its own repatriation policy which provides for the repatriation of communally-owned property and sacred objects pursuant to certain criteria. Most of the NMAI, however, consists at present of those Indian remains and cultural objects that were part of the Heye collection in New York prior to the absorption of the Heye collection by the Smithsonian Institution. *See* 20 U.S.C. 80q-2. It does not include the Smithsonian Institution itself, which possesses a large number of cultural items.
61. 25 U.S.C. 3009(1)(B).
62. 25 U.S.C. 3002(c)(1). ARPA is located at 16 U.S.C. 470cc.
63. 16 U.S.C. 470cc(b).
64. 25 U.S.C. 3002(c)(2).
65. 25 U.S.C. 3001(15). The citation for the Hawaiian Homes Commission Act of 1920 is 42 Stat. 108; the Hawaii Statehood Bill is P.L. 86-3.
66. 25 U.S.C. 3002(c)(2).
67. 25 U.S.C. 3001(5).
68. 25 U.S.C. 3002(d)(1).
69. *See* Senate Report 101-473, *supra* note 13, at 10.
70. 25 U.S.C. 3002(d)(1) and (3).
71. Senate Report 101-473, *supra* note 13, at 10; *see also* 136 Cong. Rec. S17176 (daily ed., Oct. 26, 1990) (statement of Senator John McCain, Republican from Arizona).
72. 25 U.S.C. 3002(a)(1).
73. 25 U.S.C. 3002(a)(2)(A).
74. 25 U.S.C. 3002(a)(2)(B).
75. Senate Report 101-473, *supra* note 13, at 9.
76. 25 U.S.C. 3002(a)(2)(C).
77. 18 U.S.C. 1170(a), as amended by section 4(a) of P.L. 101-601; 25 U.S.C. 3001(13).
78. Senate Report 101-473, *supra* note 13, at 11.
79. 18 U.S.C. 1170(b), as amended by section 4(a) of P.L. 101-601.
80. *Id.*
81. 25 U.S.C. 3009(5).
82. 18 U.S.C. 1170(a), as amended by section 4(a) of P.L. 101-601.
83. 25 U.S.C. 3007.
84. 25 U.S.C. 3007(b).
85. 25 U.S.C. 3013.
86. 25 U.S.C. 3009(3) and (4).
87. 25 U.S.C. 3005(f).
88. 25 U.S.C. 3006. The Committee ceases existence 120 days after the Secretary certifies that its work has been completed. 25 U.S.C. 3006(i).
89. 25 U.S.C. 3006(b)(1).
90. 25 U.S.C. 3006(c)(2).
91. 25 U.S.C. 3006(c)(3) and (4).
92. 25 U.S.C. 3006(d). *See also* Senate Report 101-473, *supra* note 13, at 13.
93. 25 U.S.C. 3006(c)(5).
94. 60 Fed. Reg. 32163 (1995).
95. 25 U.S.C. 3006(c)(7).
96. 25 U.S.C. 3006(c)(9).
97. 25 U.S.C. 3006(h).
98. 25 U.S.C. 3008(b).
99. 25 U.S.C. 3008(a).
100. 25 U.S.C. 3011.
101. 58 Fed. Reg. 31121-31134 (1993).

SECTION I

Chapter 2. MUSING ON TWO WORLD VIEWS

by TESSIE NARANJO (*Santa Clara*)

Two different ways of seeing the world come together at meetings of the NAGPRA Review Committee, with tribal members and museum representatives often on opposite sides of the room. Charter member Tessie Naranjo addresses the reasons why Native Americans do not share the assumption behind what museums do.

ONE FALL DAY IN 1991, I received an unexpected phone call from Dr. Francis P. McManamon, chief of the archeological assistance division at the National Park Service. Dr. McManamon introduced himself and began to ask a few questions. Given the reason for his call, I responded in detail.

Several weeks before, the governor of Santa Clara Pueblo had received a letter requesting applications for a position on the review committee for the Native American Graves Protection and Repatriation Act. This letter was forwarded to my office—the Santa Clara cultural preservation program—along with a request from the governor that I respond.

I sent the necessary paperwork and was surprised when Dr. McManamon called requesting additional information. After several questions about my role in the community, he asked would I be willing to serve a five-year term on the committee. I said yes. My world has changed dramatically since that day.

In the course of my involvement with NAGPRA, I have read the statute many, many times. I have had the opportunity to discuss its meaning with a wide range of both traditional Native Americans and non-tribal people. One thing that has struck me is how differently these two groups define relationships.

Traditional Native Americans believe that everyone and everything exist in an integrated and pervasive system of relationships. One resident of Santa Clara Pueblo puts it this way: “We are part of an organic world in which interrelationships at all levels of life are honored. Our relations to the place we live—the land, water, sky, mountains, rocks, animal, plants—is tangible. Our sense of social relationships leads us to respect all who have gone before and all who will follow, our elders as well as our youth.”

Traditional Native Americans see an essential relationship between humans and the objects they create. A pot is not just a pot. In our community, the pots we create are seen as vital, breathing entities that must be respected as all other living beings. Respect for all life elements—rocks, trees, clay—is necessary because we understand our inseparable relationship with every part of our world.

This is why we honor our ancestors and the objects they created. This honoring allows us to remember our past and the natural process of transformation—of breathing, living, dying and becoming one with the natural world. Not even in death are we unrelated.

My understanding of relationships has been hard to reconcile with the non-tribal view. Consider museums. Human remains and cultural items are treated as non-living entities. Unacknowledged are the enduring relationships that traditional Native Americans maintain with their ancestors and their world.

I have come to realize that the staffs of most museums and agencies do not share our basic values and philosophic views. Museums certainly have had a great impact on traditional Native Americans and our perceptions of who we are. But we do not share the assumptions underlying what museums do: collection, preservation, documentation, and exhibition.

This difference in viewpoint surfaces in most of the activities surrounding NAGPRA. Encouragingly, this has led to a growing awareness among all those with a stake in repatriation.

Nowhere is this more apparent than at meetings of the committee. From the very first one—when six members were asked to nominate a seventh—decisions have been by consensus. This is the way of my people and the one with which I am most comfortable. The meetings are often more like open discussions than formal conferences. Decisions are made only after all members, as well as the public, get a chance to air their views. Thus far, all of our decisions have been unanimous.

When the committee held hearings in Hawaii on the remains of Pacific islanders, member Dr. Martin Sullivan, head of the Heard Museum, asked Indians in the group to talk about accepting spiritual testimony. Dr. Sullivan was sincerely trying to understand how we should assess this evidence.

During our Phoenix meeting last year there was animated discussion in which the public questioned the validity of scientific study. Leigh Jenkins, cultural preservation officer for the Hopi, stood up and in a gentle but certain voice talked about how his program works with archeological community to clarify issues about the past.

NAGPRA has brought together two completely different worldviews in a forum where people freely discuss their differences. This relationship, like any human relationship, is sometimes awkward, sometimes caring, and sometimes difficult. But it is a relationship that will continue.

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SECTION I

Chapter 3. BUILDING A TRIBAL REPATRIATION PROGRAM: OPTIONS FOR EXERCISING SOVEREIGNTY

DEAN B. SUAGEE, Esq. (*Cherokee*)



Iroquois delegation. Photo by Janine Jones, courtesy of NMAI, Smithsonian Institution.

THE FOLLOWING is a discussion of how Indian tribes can use their sovereign powers to secure their rights under NAGPRA. There is a spectrum of approaches to the exercise of repatriation rights, ranging from case-by-case pursuit to the creation of comprehensive, pro-active programs. Due to constraints such as limited financial and human resources, the comprehensive, pro-active approach may have to be a long-term objective. This section of *Mending the Circle* is intended to help tribes envision and develop comprehensive repatriation programs while building their capabilities for dealing with repatriation in the here and now in spite of limited funding and staff.

This material was supported by the National Indian Policy Center at The George Washington University, Washington, DC, which is funded in part by grant award number 90NA1101/04 from the Administration for Native Americans, U.S. Department of Health and Human Services. Reprinted by permission.

There are many ways in which tribes can use their sovereign powers to deal with repatriation. We will focus here on two general kinds of tribal governmental action—law-making and institution building. Of course, no Native tribe is forced to establish a repatriation program, and whether to do so is the most basic initial decision for the tribe to make. The first part of this chapter discusses the tribal goals and priorities that might influence this decision. The second part sets out some of the main functions that a program ought to be capable of performing.

Part three focuses on using a tribe’s law-making powers to build a repatriation program, beginning with a discussion of some of the different approaches tribal legislation might take, and some of the substantive legal issues that legislation might address. Then follows an overview of the kinds of tribal institutions that a tribal government might use to fashion a repatriation program; there are suggestions regarding the roles and relationships of the various kinds of tribal institutions in carrying out these functions. Part IV concludes the chapter with some comments on practical considerations in carrying out a tribal repatriation program.

Throughout this chapter, the term “Indian tribe” is intended to include portions of tribes, separate tribes combined under a single government, and “Alaska Native villages,” in accordance with the definition in NAGPRA. When dealing with cultural property, federal courts have upheld the sovereign authority of Indian tribes and Alaska Native villages.¹ The discussion of options for exercising sovereignty assumes that federal agencies, museums and courts, accept this basic legal principle. Since the focus of this section is on the exercise of tribal sovereignty, it does not expressly address the situation of Native Hawaiian organizations. Compelling arguments can be made that the federal government should recognize Native Hawaiians as possessing sovereignty and having the right of self-determination,² but those arguments are beyond the scope of this chapter.

I. FOCUSING ON TRIBAL GOALS AND PRIORITIES

Before tribal leaders commit their tribal government to building a repatriation program, they should give some consideration to just what it is that the tribe hopes to achieve. Tribes have significant rights under NAGPRA, but the existence of these rights is not in itself a compelling reason for each and every tribe to build a comprehensive repatriation program. While many tribes regard the repatriation and reburial of the remains of disinterred ancestors to be a compelling duty, other tribes do not consider reburial appropriate. Some tribes may consider the repatriation of certain items of cultural patrimony to be the highest priority, while others may think it more important to protect the graves of ancestors on tribal lands or on federal lands. There may be differences of opinion within tribes regarding what the priorities should be.

Thus, the first step in building a repatriation program is to decide whether to build a program at all, and the first step in making this decision is to focus on the tribe’s own objectives and priorities. Setting priorities should help a tribe to determine whether it can accomplish its objectives with its existing institutions of government or whether it really should create something new. Some tribes may even find that they can accomplish their priority objectives by letting the leaders of their traditional religious societies do most of the work. In such cases tribal governments may be able to provide significant help to traditional religious leaders through relatively simple measures, such as proclaiming official tribal endorsement of such efforts and providing staff support (See Appendix E for some options already chosen by various tribes).

Tribes that choose to limit their involvement in carrying out the NAGPRA policy should

be aware that, for some aspects of NAGPRA, involvement by the tribal government really is important. For example, if a tribe wants to repatriate items of cultural patrimony, it should be prepared to demonstrate that the items satisfy the statutory definition of cultural patrimony.³ A tribe needs to be prepared to make a similar case if it wants to repatriate sacred objects that were owned or controlled by individual tribal members.⁴

In seeking repatriation, whether on a case-by-case basis or through establishment of a comprehensive tribal program, tribal officials should see NAGPRA as a tool rather than as an end in itself. NAGPRA can be used to support tribal repatriation efforts, but a tribe should design its program to meet its own needs rather than shape its program to fit the statute. Tribal officials also should keep in mind that NAGPRA embodies a number of compromises struck during the federal legislative process. By building their relationships with museums and federal agencies, and by thoughtfully exercising tribal sovereignty, tribes may be able to go beyond the language of the statute, perhaps obtaining repatriation of items that are outside the coverage of NAGPRA.

II. FUNCTIONS OF A TRIBAL REPATRIATION PROGRAM

If a tribe decides that it wants to build a repatriation program, its first step might be to analyze the different kinds of functions that a tribal repatriation program should be able to perform. To secure the repatriation of human remains and “cultural items” covered by NAGPRA from federal agencies and museums a tribal program should be capable of performing several important functions: 1) providing an authoritative source of tribal law and custom relating to repatriation; 2) facilitating involvement by traditional cultural authorities; 3) analyzing information (including summaries and inventories) provided to the tribe by federal agencies and museums; 4) consulting with federal agencies and museums; 5) conducting independent investigations to locate human remains and cultural items that the tribe may want to have repatriated; 6) presenting repatriation requests to federal agencies and museums; 7) advocating the tribe’s claims to certain materials, especially in cases in which other tribes, individuals or institutions make competing claims; 8) determining the proper disposition of items that have been repatriated; 9) resolving intratribal (and intertribal) disputes; and 10) safeguarding human remains and other cultural items that are imbedded in the ground. Each of these functions is discussed below.

Sources of Tribal Law and Custom

NAGPRA defers to tribal law and custom on several key issues. For example, some of the statutory definitions of terms that are used in NAGPRA incorporate Native legal concepts, either directly or implicitly. Two such defined terms are “cultural patrimony” and “right of possession.” As defined in NAGPRA, the term “cultural patrimony” means an object which has “ongoing historical, traditional, or cultural importance to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by an individual.”⁵ If a particular cultural item was considered inalienable common property under written or customary tribal law at the time that the item passed out of tribal possession, such an item is considered “cultural patrimony” under NAGPRA (assuming that it satisfies the other provisions of the definition).

In a similar way, NAGPRA establishes the standard to be applied by a federal agency or museum in response to requests by lineal descendants, tribes or Native Hawaiian organizations for the repatriation of unassociated funerary objects, sacred objects or objects of cultural

patrimony. First the person, tribe or organization making the request must demonstrate that the agency or museum “did not have the right of possession” for the objects requested.⁶ As defined in NAGPRA, “right of possession” means that the present owner must have obtained the object with the voluntary consent of an individual or group that had the authority to sell or give it away.⁷ Whether or not the person or group that made the original transfer had the authority to do so is a question that depends on tribal law at the time the transfer was made.⁸

Despite NAGPRA’s deference to Native legal concepts, a tribe may encounter resistance in particular cases, in part because federal agency or museum officials may not understand Native legal concepts, which may be significantly different from Anglo-American legal concepts. Tribes can use their legislative powers to deal with this situation.

Involvement by Traditional Religious Leaders

Since repatriation involves traditional cultural and religious beliefs and practices, a key function of a tribal program might be to facilitate the involvement of traditional religious leaders and others who are regarded as authorities in matters of traditional religion and culture. NAGPRA uses the term “traditional religious leaders,” and, although the Act does not define this term, it does provide that such persons are entitled to be involved in consultations with museums and federal agencies relating to the repatriation of human remains and cultural items.⁹

This chapter sometimes uses the term “traditional cultural authority” rather than “traditional religious leader.” As defined in regulations issued by the Advisory Council on Historic Preservation this indicates “an individual or group of individuals in an Indian tribe [or] Native Hawaiian organization . . . who is recognized by members of the group as knowledgeable in the group’s traditional history and cultural practices.”¹⁰ Since some persons who are recognized by members of their tribes as authoritative sources of traditional cultural and religious knowledge do not hold themselves out as, and may resist being called “leaders,” the broader term may be more appropriate.

Whether or not they are normally involved in the formal workings of tribal government, traditional cultural authorities generally should have some involvement in their tribe’s repatriation program; tribal officials and staff should consider this in fashioning their programs. In some cases the tribal governments themselves may be prohibited by tribal law from dealing in traditional religious matters; in such cases the traditional societies may be the sole cognizant authority for the tribe. The success of a tribal repatriation program may depend on their inclusion and appropriate role in the program. For example, a tribe may need the testimony of its traditional cultural authorities to make a claim for the repatriation of cultural patrimony.

In some tribes traditional cultural authorities will naturally be involved in the repatriation program, but in other tribes it may require a special effort on the part of the tribal secular leadership to include them. Whether or not tribal political leadership must actively foster involvement by traditional cultural authorities in the inner workings of a tribal repatriation program, the establishment of formal roles for traditional people can enhance their stature for situations in which they are called upon to deal with other institutions of the larger society.

Analyzing Summaries and Inventories

NAGPRA imposes certain responsibilities on museums and federal agencies, including: (1) preparing inventories of human remains and associated funerary objects in their possession; and (2) preparing summaries of unassociated funerary objects, sacred objects, and objects of cultural patrimony.

The summaries were to have been completed no later than November 1993, and many museums and federal agencies have sent summaries to tribes as required. Museums and federal agencies must complete their item-by-item inventories of human remains and associated funerary objects by November 1995. These documents may provide the information tribal peoples need to secure the repatriation of human remains and cultural items. On the other hand, analyzing these documents may be a challenging, possibly overwhelming, task, especially if a tribe's cultural items are now held by numerous museums and federal agencies.

Thus, a tribal repatriation program ought to be able to analyze the summaries and inventories, and manage the information they contain. To some extent these functions might be performed by volunteers or existing tribal employees who are willing to commit some of their "free" time, but for any tribe that wants to take full advantage of NAGPRA, some paid staff devoted to this function may well be a necessity. Such staff could work as part one or more of the tribal governmental institutions discussed in part III of this chapter. The best way to set this up will vary from tribe to tribe, but it is a function that a tribal program must be able to perform.

Consultation with Federal Agencies and Museums

NAGPRA provides that after completion of the summaries, museums and federal agencies are required to engage in "consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders."¹¹ The tribal staff should be able to do this, for such consultation is a vital part of dealing with summaries and inventories. On request, tribes and Native Hawaiian organizations are entitled to have access to "records, catalogues, relevant studies or other pertinent data for the limited purpose of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession" of objects that must be listed on the summaries.¹² Inventories of human remains and associated funerary objects, must be completed "in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders."¹³

Thus, Native tribal and organizational officials, and traditional religious leaders have rights to engage in consultation with museums and federal agencies after the completion of the summaries and before the completion of the inventories. If a tribe wants to take full advantage of NAGPRA, its repatriation program should be equipped to carry these consultations beyond merely reviewing and analyzing documents provided by museums and federal agencies. The consultation process should include reading between the lines and asking probing questions. It might also shade into negotiating agreements with museums and federal agencies that go beyond the requirements of NAGPRA.

Conducting Independent Investigations

A tribe may conduct its own investigations to locate human remains and cultural items. It may question the accuracy of summaries and inventories provided to it, and it may investigate institutions other than those covered by NAGPRA which may possess items that the tribe wants back.

Presenting Repatriation Requests

An inventory prepared by a museum or federal agency may establish that certain human remains and associated funerary objects are culturally affiliated with a particular tribe. A summary may establish cultural affiliation for unassociated funerary objects, sacred objects or



Elizabeth Blackowl, President of the *Pawnee* Tribe witnessing the presentation of a blanket to Arizona Senator John McCain by fellow *Pawnee* Vance Horsechief at a repatriation ceremony, Fort McNair, Washington, DC, June 6, 1995. Photo courtesy of Jane Beck, Repatriation Office, NMNH, Smithsonian Institution.

objects of cultural patrimony. Once cultural affiliation has been established, the tribe has the right to have human remains and cultural items returned, but to take advantage of this right, the tribe must ask.¹⁴ Thus, preparing documents to formally request the repatriation of human remains and cultural items is a function that a tribal repatriation program must be able to perform.

Even when cultural affiliation has been established, a tribe generally will be required to do more than simply request that the items be returned. A tribe can establish a right to the return of cultural patrimony, sacred objects or unassociated funerary objects if it can show that the museum or federal agency does not have a right to possess the items.¹⁵ A tribe is entitled to repatriation of an item of cultural patrimony if it can show that the item is indeed cultural patrimony; it is entitled to repatriation of a sacred item if it can show that the item was owned or controlled by the tribe itself or, if it was owned or controlled by a member of the tribe, that there are no identifiable lineal descendants or that the lineal descendants have been notified and have not made a claim to the item.¹⁶ Thus, the function of presenting repatriation requests to museums and federal agencies should be understood to include demonstrating support for such requests.

Where cultural affiliation has not been established by an inventory or summary, a tribe still has the right to the return of human remains and cultural items if it can show cultural affiliation “by a preponderance of the evidence based on geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historic, or other relevant information or expert opinion.”¹⁷ Thus, where cultural affiliation has not been established by an inventory or summary, the function of presenting a repatriation request will include demonstrating cultural affiliation.

Advocating the Tribe's Claims

Simply presenting repatriation requests to museums and federal agencies may not be enough, even where cultural affiliation has been established. Some museums and federal agencies may be reluctant to comply with NAGPRA policy; most have some practical limits on their ability to respond to repatriation requests. The ability to advocate a tribe's claims may help to expedite responses to repatriation requests.

When a museum or federal agency has arguable grounds for resisting a repatriation request, the tribe must be able to advocate its position. For example, if a tribe asserts that a museum or federal agency does not have a right of possession of certain cultural items, the tribe should be ready to make its case. Similarly, a tribe must be capable of advocating its claim if a competing claim has been filed by another tribe or by one or more lineal descendants. In some cases, advocating a tribe's position may require filing an action in federal court to seek judicial enforcement of the Act.¹⁸

Determining Proper Treatment of Repatriated Items

Even when a tribal program has succeeded in establishing the tribe's right to have certain items repatriated, work remains to be done. The proper treatment of repatriated items may be prescribed by a tribe's religious teachings, or it may be a subject that religious teachings do not address. Through involvement of the traditional cultural authorities, a tribe must decide on the proper treatment of these items. A tribal repatriation program should be capable of facilitating these decisions. In carrying out these decisions, a tribal program should be prepared to consult with the museum or agency that has possession of the items to make arrangements regarding the time, place and manner in which the items should be delivered to tribal representatives. A tribal program may also have to attend to such details as acquiring the use of land for carrying out reburial ceremonies.

Resolving Intratribal (and Intertribal) Disputes

Resolving disputes is a function of tribal repatriation programs that should not be overlooked, and there are many ways in which this function could be approached. There may, for example, be competing claims by different tribes or by lineal descendants within a tribe to certain human remains or cultural items. NAGPRA provides that, in such cases, if the federal agency or museum "cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this chapter or a court of competent jurisdiction."¹⁹

In such cases, the competing claimants may share the belief that letting the agency or museum retain possession is inappropriate. If tribal law provides a mechanism for resolving such competing claims, the claimants could agree to have the agency or museum return the item(s) for dispute resolution under tribal law. A tribal court or independent tribal agency could be empowered to resolve such disputes, possibly with roles for traditional cultural authorities. Alternatively, a tribal governing body could designate an existing traditional forum to resolve such disputes.

Protecting Graves and Imbedded Cultural Items

There is more to NAGPRA than repatriation. NAGPRA is also about protecting Native

American graves, so a tribe might decide to set up its program to deal with both repatriation and graves protection. To discuss these functions adequately would require a separate chapter,²⁰ but some discussion is warranted.

The graves protection provisions in NAGPRA address two kinds of situation: (1) intentional excavation and removal of Native American cultural items and human remains from federal lands or tribal lands;²¹ and (2) the inadvertent discovery of Native American cultural items or human remains on federal lands or tribal lands.²² NAGPRA provides that intentional excavation is a violation of the law unless a permit has been issued by the relevant federal agency pursuant to the Archaeological Resources Protection Act (ARPA).²³ For the most part, the statutory language in NAGPRA simply cross-references the existing federal law, which prohibits the excavation, removal, damage or destruction of “archaeological resources” on federal lands or Indian lands without a permit issued by the relevant federal agency. The term “archaeological resources” includes human remains and other items that fit within NAGPRA’s definition of “cultural items” except that, to be covered by the ARPA definition, an item must be at least 100 years old.²⁴ Thus, the category “cultural items” under NAGPRA includes some items that are not “archaeological resources” under ARPA.

NAGPRA also covers more ground than ARPA within Indian country. By its terms, ARPA applies to “Indian lands” and federal “public lands.” “Indian lands” is defined in ARPA as excluding fee lands,²⁵ while “tribal lands” includes fee lands in NAGPRA.²⁶ One function of a tribal graves protection program might be to prod the Department of the Interior into carrying out ARPA in Indian country in a way that is consistent with NAGPRA.

Except for these differences in the coverage of the two Acts, NAGPRA does not add much to the tribal rights already recognized under ARPA. Under both statutes, the intentional excavation of graves or other covered items violates the law unless an ARPA permit has been issued; a tribe can block the excavation by declining to give its consent to the issuance of a permit.²⁷ A tribal graves protection program under NAGPRA should be able to assert this tribal right, ensuring that no ARPA permits are issued without tribal consent. This could be accomplished by monitoring the permitting actions of the Bureau of Indian Affairs²⁸ or by establishing a parallel tribal permit requirement.

NAGPRA does expand the rights of tribes in protecting graves and other places where “cultural items” are imbedded in federal public lands. Under ARPA, a tribe has the right to receive notice before an ARPA permit is issued,²⁹ while under NAGPRA a tribe has the right to be involved in consultation prior to the issuance of a NAGPRA permit as well as the right to determine the ultimate disposition of any culturally-affiliated items that may ultimately be excavated.³⁰ A tribal graves protection program should be capable of asserting these rights.

NAGPRA also includes provisions relating to the inadvertent discovery of human remains or cultural items on federal lands or tribal lands. If such a discovery is made in the context of a previously permitted activity such as mining, logging or agriculture, the person conducting the activity is required to cease activity in the area and to give notice to the appropriate federal agency or Indian tribe or Native Hawaiian organization.³¹ The person conducting the activity may resume 30 days after the notice has been certified. Thus, a tribal graves protection program should be capable of asserting the tribe’s interests within this 30 day time frame, or the chance to prevent further damage to the discovered site may be lost.

A tribal graves protection program should be designed to take advantage of the tribe's rights under the National Historic Preservation Act (NHPA), particularly the 1992 Amendments.³² Section 106 of the NHPA establishes a consultation process which provides a degree of protection to sites listed on, or eligible for listing on, the National Register of Historic Places. This consultation process is administered by the Advisory Council on Historic Preservation.³³ Places that have religious or cultural importance for Native Peoples, including places where Native American graves are located, may be eligible for the National Register. The 1992 Amendments to the NHPA provide that tribes and Native Hawaiian organizations have a right to be involved in the Section 106 consultation process when a federal action might affect a National Register property (listed or eligible) that they consider to have religious and cultural importance.³⁴

In addition to the Section 106 consultation process, which is triggered by a specific proposed federal action, Section 110 of the NHPA requires each federal agency to establish a preservation program to identify places under the agency's jurisdiction or control that are eligible for the National Register and to ensure that such historic properties are considered in agency planning processes.³⁵ Section 110 requires Federal agencies to consult with Indian tribes and Native Hawaiian organizations in carrying out their preservation programs. Thus, tribes have rights to be consulted both in the context of the project-specific consultation under Section 106 and in the more long-term planning process required by Section 110. A tribal graves protection program under NAGPRA should be capable of asserting these tribal rights under the NHPA. By doing so a tribe may be able to establish long-term working relationships with federal agencies that manage lands on which there are sites that the tribe regards as having religious or cultural importance. A long-term working relationship, built on a foundation of statutory rights, may be the most effective way to protect such places.

III. USING TRIBAL LEGISLATION TO BUILD A PROGRAM

This part of the chapter focuses on ways that tribes can use their law-making powers to build repatriation programs. For example, a tribe may proclaim what the law is. It can also create subdivisions of tribal government and give each subdivision a mandate to carry on certain governmental functions. These functions of tribal legislation, which are discussed below, are of course inter-related.

Options for Proclaiming Tribal Law

NAGPRA defers to tribal law on certain key points, for example, tribal law must be taken into account in the application of key terms such as "cultural patrimony"³⁶ and "right of possession"³⁷ to specific cultural items. The tribal law considered most binding, however, is whatever law was in effect when the item in question left the tribe, individual or group with authority to possess, or have custody over, that item. If such an event occurred before there was any written tribal law on the subject (for many tribes there still may be no applicable written tribal law), the application of these statutory terms will be based on the customary tribal law of the time. A tribe may be able to secure repatriation from museums or federal agencies bound by NAGPRA by simply informing the museum or agency as to what the tribal customary law was at the relevant period of time.

Some museums or federal agencies that may want to keep disputed items in their collections might not give up the items until a tribe has proved its case in federal court. To deal with

such situations, a tribe might enact legislation that codifies the relevant tribal customary law. This may be a rather simple thing to do for those tribes concerned with obtaining the repatriation of a relatively small number of cultural items.

On the other hand, writing all of the relevant tribal customary law into a tribal code might yield legislation with more detail than is really necessary. Furthermore, the traditional cultural authorities who know this body of tribal law may be uncomfortable with the idea of putting it in writing. Then too, codification might be excessively difficult for tribes with complex clan structures and complex customary law regarding clan property. In some cases, tribal customary law may not resolve all the kinds of conflicts that arise, but may provide rules that can be applied in specific cases.

An alternative approach would be to enact tribal legislation which codifies the broad outlines of tribal customary law and gives a mandate to an appropriate tribal entity (an existing or new department or independent agency or traditional forum or commission) to fill in the details. This could be done through administrative rule-making or through the development of a revised tribal code that would be presented to the tribal legislative body for enactment.

A third variation would be to codify the broad principles and mandate the tribal court to fill in the details in deciding specific cases drawing on tribal customary law as well as the codified tribal law. Under this approach, the tribal court could decide the legal issues that arise in repatriation cases on a case-by-case basis. The tribal court could follow the Anglo-American legal tradition of looking to previously decided cases for legal principles to apply to cases that arise and, in so doing, fashion a tribal “common law”.³⁸ Tribal legislation might establish a special division of the tribal court to decide such cases, or it might authorize the tribal court to appoint a special master to hear such cases and recommend decisions to the court. Under either of these approaches, traditional cultural authorities could be directly involved, as judges of the special division, as special masters, or as expert witnesses.

In light of the fact that for some tribes there are now two or more federally recognized tribal entities for what was once a single tribe or nation, it may be advantageous to create intertribal mechanisms for ascertaining the relevant customary tribal law. Such tribes might jointly create a special intertribal court, or they might agree on a process for resolving intertribal disputes through mediation or arbitration.

Conversely, some federally recognized tribes are now comprised of two or more tribes, or portions of tribes, that historically were distinct. Many such “confederated” tribes maintain certain distinctions in the ways they conduct their governmental business and cultural traditions. For such confederated tribes, one function of modern tribal legislation would be to establish a way of determining what the applicable tribal customary law was at the time certain items were alienated from tribal possession, for relevant tribal customary law may predate confederation.

In addition to codifying the relevant customary tribal law, or establishing a process for the law to be proclaimed in the context of specific cases, a tribe might want to address a number of other substantive legal issues through tribal legislation. In light of the fact that lineal descendants have certain rights under NAGPRA, a tribe might want to specify its customary legal principles for determining descent, including clan relationships and familial relationships. A tribe also might consider codifying customary legal principles for determining cultural affiliation with human remains and cultural items. Other subjects which might be addressed in tribal legislation include principles regarding the appropriate care of the dead and the treat-

ment of items of cultural patrimony and sacred objects, although a tribe may prefer to leave these subjects to unwritten customary law.

Given the interplay between graves protection and repatriation in NAGPRA, tribal legislation should include provisions dealing with graves protection. See pp. 29–31 for details.

Overview of Institutional Options

To take full advantage of NAGPRA, tribal officials should analyze the functions to be performed by tribal repatriation programs, and organize their governmental institutions so they can perform these functions most effectively. The kinds of decisions that need to be made include: which functions to assign to existing governmental institutions; how to change the mandate and organization of existing institutions to better perform the assigned functions; and whether any new institutions should be created.

Indian tribes typically use a variety of governmental subdivisions and institutions to carry out the various functions of government. Some of these institutional structures, particularly those that perform a wide range of governmental functions, are necessarily more complex than others. There are some common patterns, but there are also significant differences, some of which are based on cultural differences. There are also innovations to deal with such current issues in Indian country as regulating the environment and high-stakes gaming. The following section discusses some of the institutional issues and options that should be considered in fashioning a tribal repatriation program.

The Tribal Governing Body

This chapter discusses only some of the many varied ways in which tribal governments are structured. For example, some tribes have tribal councils, often called business committees, which are directly involved in all aspects of tribal government, including the three basic kinds of governmental function: the legislative (making laws); the executive (carrying out laws and administering the day-to-day business of government); and the judicial (interpreting laws and resolving disputes). In the larger American society, the federal government and the states typically carry out these different governmental functions with three distinct branches of government, and many tribes have adopted a similar system. Other tribes have established court systems as more-or-less independent branches of government; in these instances tribal councils perform the legislative and executive functions.

Whether they are performed by a single entity (the council) or by two or three separate branches, all three basic kinds of governmental function must be carried out somehow. In building a tribal repatriation program, tribal leaders should consider these three kinds of governmental functions. There is a need to know what the tribal law is with respect to repatriation, there must be a way to carry out tribal law, and there also should be a way to resolve disputes.

Executive Branch Departments or Subdivisions

Council members, Tribal Chairpersons, judges, and other governmental officers are elected or appointed to these leadership positions. In addition, tribes usually employ paid staff workers. Some tribes may also use volunteers to do some kinds of work. As a general practice, paid staff positions are organized into governmental subdivisions, which are often known as “departments.” Depending on the range of governmental programs and functions that any given tribe carries out, there may be such subdivisions or departments as education, health services, social

services, natural resources, water resources, fish and wildlife, utilities, and planning. In many tribes, departments are subdivided into hierarchical organizational structures. Departments are usually subject to direct supervisory control by the executive branch of government, e.g., the chairperson's office, or the tribal council if there is no separate executive branch of government. A department of tribal government may be supervised by a committee of the tribal council; alternatively it may be supervised by the tribal chairperson, subject to review and approval of the department's budget by a committee of the tribal council.

Some kinds of governmental subdivisions may have more independence from the tribal governing body than others. For example, tribal housing authorities are typically set up as distinct entities with their own governing boards. Tribal museums, schools, colleges, and law enforcement agencies also may be cast in this more independent mold. Such entities may be charged with carrying out important governmental functions, while their structure provides them with a degree of independence from tribal politics.

In building a tribal repatriation program, the tribal governing body should look at its existing governmental subdivisions and determine whether one or more of them ought to be assigned responsibilities for carrying out the repatriation program. If no existing subdivision seems well-suited for the task, the governing body should consider creating a new entity or a new subdivision of an existing department. Creating something new, however, may require a greater commitment of funds and other resources than building on to an existing subdivision.

It may make sense for more than one governmental subdivision to play a role in repatriation. For example, a tribal museum may have staff capabilities that make it the best qualified tribal entity for interacting with museums and federal agencies for the return of human remains and cultural items, while a natural resources or planning department may be best qualified to deal with the protection of burial grounds. A tribal college may have the capability to document



Elizabeth Blackowl, President of the *Pawnee* Tribe, signing deaccession papers. Remains of *Pawnee* Scouts are in the background. *Pawnee* repatriation, June 6, 1995. Photo courtesy of Jane Beck, Repatriation Office, NMNH, Smithsonian Institution.

traditional cultural practices and customary law in ways that will be persuasive in administrative hearings and federal courts. While it may make sense for more than one governmental subdivision or other entity created by tribal government to perform a role in a tribal repatriation program, if this approach is taken the tribal governing body should clearly specify the roles of each.

Independent Agencies

While governmental subdivisions are usually subject to direct control by the tribal governing body, some kinds of entities created by tribal governments are subject only to indirect control. Entities at this end of the spectrum are often referred to as independent agencies. The federal government and the states have created independent agencies for a variety of purposes, and, in recent years, the practice of creating such agencies is coming into more widespread use by tribal governments as well. Like other governmental subdivisions, independent agencies typically have some paid staff, but rather than reporting directly to the tribal governing body, the staff report to a board or commission. The people who comprise the board or commission may be appointed by the tribal council or by the tribal chairperson, subject to confirmation by the tribal council. Typically each commissioner serves a term of several years, and the terms may be staggered so that the entire membership is not subject to change with each general election.

Independent agencies carry out a variety of functions, most of which can be sorted into two main categories: (a) regulating activities that affect the public health and welfare or the environment; and (b) providing a forum to resolve disputes without going to court (or as a prerequisite to going to court). Regulatory functions include such things as issuing permits to construct buildings or use land in certain other ways, issuing licenses to control hunting and fishing, and setting standards to protect the environment. Dispute-resolution functions include serving as a forum for administrative hearings when an applicant appeals from the denial of a permit or when an applicant seeks a variance or other special treatment under a land use code. Many independent agencies perform both kinds of function.

Mandates for independent agencies are usually given through legislation enacted by the tribal government. Sometimes the legislative mandate is set out in rather broad language, and an agency is authorized to fill in the details by issuing rules or regulations. The federal and state governments usually draft environmental laws in this way, and it is a practice that is likely to become widespread among the tribes as well. By establishing an “independent” agency, a government, in effect, can regulate itself.³⁹

An independent agency may be a good approach to repatriation for many tribes. One model tribal repatriation law has been developed which features an independent agency comprised both of elected leaders and traditional cultural authorities. This model tribal law is discussed later.

Tribal Courts

Since NAGPRA defers to tribal law and custom on several points of law, tribal courts are likely to play important roles in carrying out the provisions in NAGPRA. In resolving particular disputes, and to the extent that tribal law is not clearly defined, tribal courts will be called on to determine what the relevant tribal law is.

Tribal legislative bodies can enact certain key principles of tribal customary law as part of their tribal code; this, along with the inclusion of traditional cultural authorities in a special division of tribal court, would help make tribal court rulings on tribal customary law more authoritative in the eyes of the non-tribal governmental entities with which tribes must interact in pursuing repatriation. Similarly, the tribal court’s decisions regarding repatriation cases might

have greater stature for non-tribal entities if tribal legislation were to require that pertinent questions of customary law first be decided by an independent agency such as a cultural heritage commission.

Traditional Cultural Authorities

In addition to the formal institutions of government, there are also informal, or less formal, cultural institutions. These less formal institutions may include traditional religious societies and clan-based organizations; some may be the present-day manifestations of traditional ways of carrying out self-government before tribes adopted written constitutions. In some cases, these more-or-less traditional institutions may be personified in a few respected individuals; in other cases, a larger number of people may be involved, but it still may be difficult to separate the cultural institutions from key individuals. The term “traditional cultural authorities” as defined earlier is a useful generic term for these kinds of individuals and institutions.

For many tribes, repatriation is a subject in which the interests of political leaders and traditional cultural authorities converge. In some cases, when dealing with subjects such as repatriation where traditional cultural values and practices have continued importance, traditional cultural authorities may be as or even more important for self-government than the elected leadership. Even when the formal governmental institutions are committed to the repatriation of all the human remains and cultural items to which their tribes have rights of possession, in many tribes these institutions still will need the help of traditional cultural authorities in turning such commitments into reality. Political and religious leaders need to find ways to work together. The following discussion adds model tribal law to the potential means for fostering cooperation we have already suggested.

A Model Tribal Code

The Center for the Study of American Indian Law and Policy at the University of Oklahoma has developed a model tribal repatriation law, the “Cultural Heritage Ordinance,” which has been published together with a brief explanatory article by Rennard Strickland and Kathy Supernaw.⁴⁰ This model tribal law, which was developed to help tribal governments secure their rights and carry out their responsibilities under NAGPRA, features a type of independent agency of tribal government called a “Cultural Heritage Committee.” A tribe planning to enact such a law might consider using the word “commission” rather than “committee,” simply because the former term may give the agency more stature in the eyes of the larger society.

In the model law, the Commission is comprised of five members: two who are elected members of the tribal governing body, two who are traditional religious leaders, and a fifth selected by consensus of the other four members.⁴¹ This format is intended to serve the needs of a tribe in which the elected leadership and the traditional religious leadership are not one and the same. The composition of such a commission and the means of selecting its members should be tailored to the needs of any given tribe that chooses to adopt such an approach. The basic idea, however, should remain fairly constant: the tribal governing body delegates authority to the Commission to carry out a repatriation program and, in setting up the Commission, the tribal governing body includes both political leaders and cultural leaders.

The Commission would be vested by the tribal governing body with a broad range of powers to act on behalf of the tribe, including conducting negotiations and mediations, entering into agreements, determining the proper treatment of repatriated items, hiring and firing of

employees, and recommending that the tribal Attorney General or lawyer pursue legal actions.⁴² The model law would charge the Commission with certain mandatory duties and delegate to it the necessary authority to carry out a range of discretionary powers,⁴³ which roughly correspond to the functions of the tribal repatriation program discussed earlier. The Commission's mandatory duties include making findings, on behalf of the tribe regarding such matters as cultural affiliation and rights of possession for specific cultural items. The Commission's discretionary powers include the authority to issue regulations to carry out the tribal law.

This discussion of the model tribal law should not be taken as an endorsement by this author or by the editors. Indeed, there are some rather obvious shortcomings in the model law. For example, its provisions relating to graves protection do refer to ARPA, but the reference suggests some misunderstanding of the application of that Act.⁴⁴ In addition, the model law totally overlooks the interface between the NHPA and NAGPRA. Nevertheless, the basic concept of the model law—establishing a committee or commission as an independent agency—might work well for many tribes. While this model was developed to serve the needs of tribes in which the governmental leadership and the traditional cultural authorities are different groups of people who do not always get along with each other, as a basic approach it might work just as well for a tribe in which the elected leadership and the traditional cultural authorities get along with each other very well.

III. MAKING A REPATRIATION PROGRAM WORK

The most important part of a successful program may well be the dedication and commitment of the people who work in it. Some tribes have achieved considerable success in obtaining the repatriation of human remains and cultural items—largely because they believe that they must succeed—even without much of a formal program. Their experiences, some of which are chronicled in other chapters of this book, hold many pragmatic lessons for making tribal repatriation programs work. Against the background of those lessons drawn from experience, a few observations are here offered.

Persons involved in carrying out tribal repatriation programs at times may feel somewhat overwhelmed by the law and the regulations. They may feel as though they need training before they can even get started. Training, particularly workshops and the like, can be useful for tribal officials and staff, but it should not be thought of as necessarily accomplished before building a program. Many of the people working for tribes who are now experts in the field are experts because they charged ahead.

A tribal program may need to work with outside experts to make the case for cultural affiliation or to track the chain of possession of certain cultural items in order to challenge a museum's claim of a right of possession. Remember, however, that in many ways carrying out NAGPRA turns on tribal customary law, and this is a body of law that comes from within each tribe. Outside experts can be useful in some situations and they may be necessary in others, but their role should not overshadow the role of the tribe's own experts.

Finally, there are many roles that lawyers can play in helping a tribe with its repatriation program: filing lawsuits in federal court to seek enforcement of rights under the Act; asking the Secretary of the Interior, on behalf of a tribe, to assess civil penalties against violators, and so forth. Lawyers also may perform roles in tribal courts and commissions, advocating for the different sides in disputed cases. Lawyers can help tribes craft their legislation and design their institutions of government. These laws and institutions should serve tribal interests, which may mean limiting the roles of lawyers, for example, when the resolution of certain kinds of disputes is assigned to traditional cultural authorities rather than tribal courts. If tribal lawyers do this part of their job well, they may find that they can fade into the background and let tribal customary law take over.

END NOTES

1. *Chilkat Indian Village v. Johnson*, 870 F.2d 1469 (9th Cir., 1989).
2. See S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 Ga. L. Rev. 309 (1994).
3. 25 U.S.C. §§ 3001(3)(D) (definition) and § 3005(a)(5)(B) (showing required of tribe).
4. 25 U.S.C. § 3001(3)(C) (definition) and § 3005(a)(5)(C) (showing required).
5. 25 U.S.C. § 3001(3)(D).
6. 25 U.S.C. § 3004(c).
7. 25 U.S.C. § 3001(13).
8. This subject is explored in more detail in Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 Ariz. St. L. J. 175 (1992).
9. Traditional religious leaders are entitled to be involved in consultation that must take place prior to the completion of inventories of human remains and associated funerary objects. 25 U.S.C. § 3003(b)(1)(A). Traditional religious leaders are also entitled to be involved in the consultation that is to be conducted after the completion of summaries of unassociated funerary objects, sacred objects, and objects of cultural patrimony. 25 U.S.C. § 3004(b)(1)(B).
10. 36 C.F.R. § 800.2(bb) (as proposed, 59 Fed. Reg. 50403 (Oct. 3, 1994)).
11. 25 U.S.C. § 3004(b)(1)(A).
12. 25 U.S.C. § 3004(b)(2).
13. 25 U.S.C. § 3003(b).
14. 25 U.S.C. § 3005(a)(1), (2).
15. 25 U.S.C. § 3005(c).
16. 25 U.S.C. § 3005(a)(5).
17. 25 U.S.C. § 3005(a)(4).
18. 25 U.S.C. § 3013.
19. 25 U.S.C. § 3005(e).
20. See generally Dean B. Suagee & Karen J. Funk, *Cultural Resources Conservation in Indian Country*, 7 *Natural Resources & Environment*, No. 4, 30 (Spring 1993).
21. 25 U.S.C. § 3002(c).
22. 25 U.S.C. § 3002(d).
23. 16 U.S.C. § 470cc.
24. 167 U.S.C. § 470bb(1). The uniform regulations expand on this definition. See 43 C.F.R. § 7.3(a).
25. 16 U.S.C. § 470bb(4).
26. 25 U.S.C. § 3001(15).
27. 25 U.S.C. § 3002(c)(2); 16 U.S.C. § 470cc(g).
28. See 25 C.F.R. part 262.
29. 16 U.S.C. § 470cc(c); see also the uniform regulations, 43 C.F.R. § 7.7.
30. 25 U.S.C. § 3002(c)(2), (3).
31. 25 U.S.C. § 3002(d).
32. 16 U.S.C. § 470 - 470w-6.
33. 36 C.F.R. part 800.
34. 16 U.S.C. § 470a(d)(6).
35. 16 U.S.C. § 470h-2.
36. 25 U.S.C. § 3001(3)(D).
37. 25 U.S.C. § 3001(13).
38. For one account of the development of tribal common law, see Daniel L. Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992*, 18 *Amer. Indian L. Rev.* 379 (1993).
39. For a discussion of a model tribal environmental review code featuring an independent Environmental Regulatory Commission, see Dean B. Suagee & Christopher T. Stearns, *Indigenous Self-Government, Environmental Protection, and the Consent of the Governed: A Tribal Environmental Review Process*, 5 *Colo. J. Int'l Env'l L. & Pol'y* 59, 89-100 (1994).
40. Rennard Strickland & Kathy Supernaw, *Back to the Future: A Proposed Model Tribal Act to Protect Native Cultural Heritage*, 46 *Ark. L. Rev.* 161 (1993).
41. *Id.* at 165, 177.
42. *Id.* at 178-79, section 105 of the model law.
43. *Id.* at 179-81, section 106 of the model law.
44. *Id.* at 193, section 306 of the model law. The model law does not seem to recognize that ARPA permits may be required prior to authorization by the Bureau of Indian Affairs for activities such as construction, logging and mining. In addition, the section of the model tribal law that refers to ARPA includes no language regarding tribal rights under ARPA on federal public lands. Another apparent flaw in the model law is that it relies on criminal sanctions for enforcement and on civil actions for damages. Since tribes lack criminal jurisdiction over non-Indians, civil penalties may be a more appropriate sanction. (Although the model law uses the term "civil penalties," in fact it only provides for civil actions to recover damages. *Id.* at 199, section 409 of the model law.)

SECTION II
THE SMITHSONIAN
INSTITUTION



George G. Heye holding a dish, Mrs. R. C. Draney holding a canoe prow, and E. S. Robinson. Specimens are from *Bella Coola* Indians, Vancouver, British Columbia. Photo by T. P. O. Menzies, courtesy of NMAI, Smithsonian Institution.

SECTION II

Chapter 1. HISTORY OF THE NATIVE AMERICAN COLLECTIONS

THE NATIONAL MUSEUM OF NATURAL HISTORY

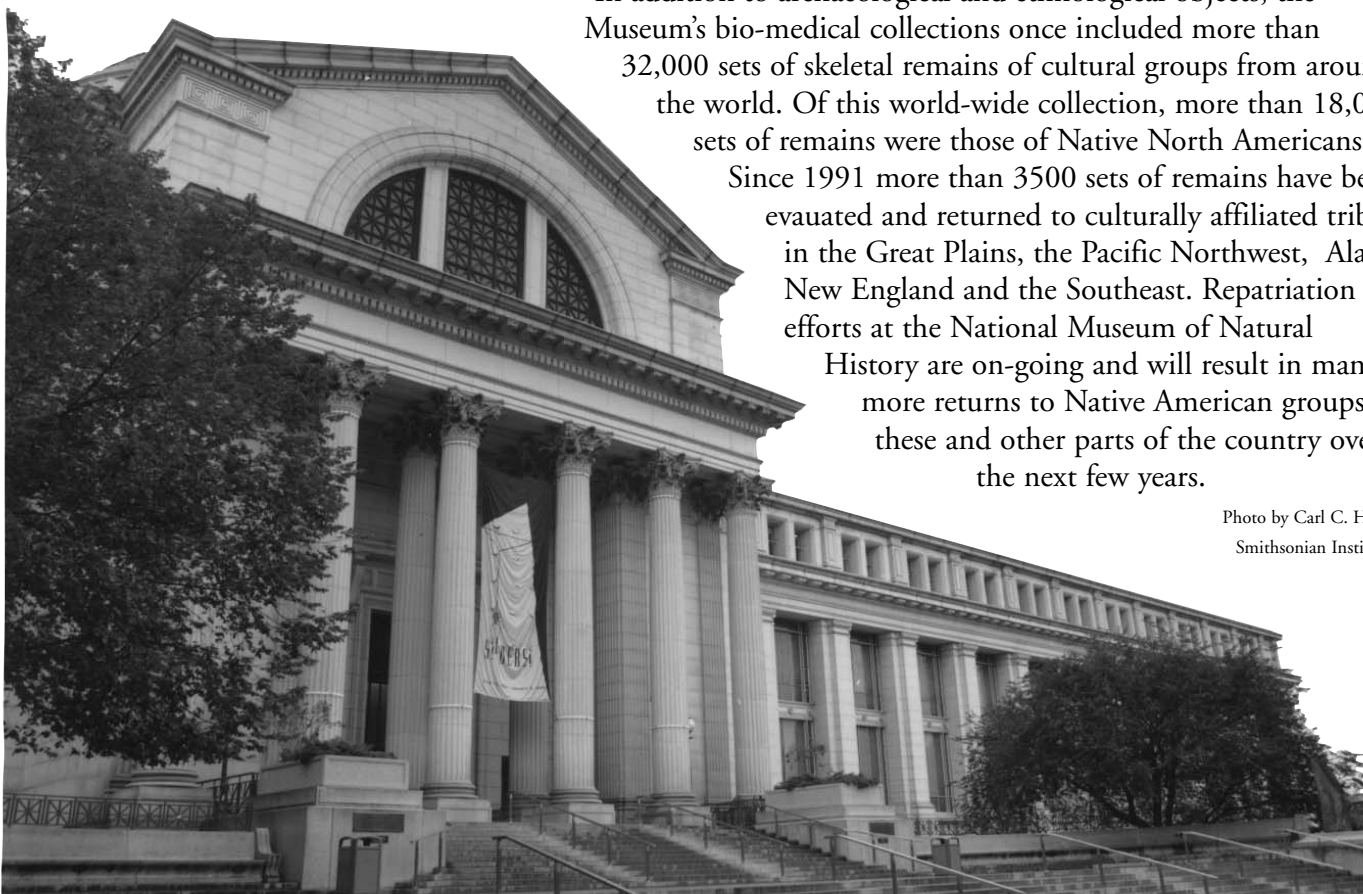
The Smithsonian Institution and the National Museum of Natural History have pioneered in Native American scholarship since the mid-nineteenth century. Since its establishment the National Museum has formed one of the country's most extensive collections of Native American items representing every geographical area and almost every tribal group in the hemisphere. The size and variety of the collections reveal the changing interests and research objectives of a large number of scholars, explorers, and collectors who have worked for the Museum over the last 150 years. The extent and the nature of these collections also reflect earlier social attitudes and scientific practices toward Native peoples that have changed radically in recent years, as evidenced by the passage of repatriation legislation in 1989 and 1990.

The Museum's Department of Anthropology, which includes the National Anthropological Archives and the Human Studies Film Archives, holds more than 4 million items related to Native cultures of the Americas. About 1.4 million of these items are from North America, the bulk of which (1.3 million) are archaeological artifacts from sites ranging in age from 10,000 years ago to recent times. In addition to archaeological objects, the Museum holds almost 100,000 ethnographic objects that have been collected directly from tribal groups since the mid-1800's. Separate collections also include almost 200,000 photographs of American Indian subjects and more than 2 million pages of unpublished materials of Indian ethnography, language, literature, history, and current affairs. Important Native American film footage is held in the film archives.

In addition to archaeological and ethnological objects, the Museum's bio-medical collections once included more than 32,000 sets of skeletal remains of cultural groups from around the world. Of this world-wide collection, more than 18,000 sets of remains were those of Native North Americans.

Since 1991 more than 3500 sets of remains have been evacuated and returned to culturally affiliated tribes in the Great Plains, the Pacific Northwest, Alaska, New England and the Southeast. Repatriation efforts at the National Museum of Natural History are on-going and will result in many more returns to Native American groups in these and other parts of the country over the next few years.

Photo by Carl C. Hansen,
Smithsonian Institution.



THE NATIONAL MUSEUM OF THE AMERICAN INDIAN

The National Museum of the American Indian is home to the collection of the former Museum of the American Indian, Heye Foundation. The collection is one of the finest and most comprehensive collections of Indian cultural materials in the world. The collection, which became part of the Smithsonian in June 1990, was assembled over a 54-year period, beginning in 1903, by George Gustav Heye (1874-1957), a New York banker who traveled throughout North and South America accumulating the collection. Heye was director of New York's Museum of the American Indian from its beginning until 1957. The Heye Foundation's Museum of the American Indian opened to the public in New York City in 1922. The collection has 1 million objects and includes photo archives of about 86,000 prints and negatives.

Repatriation is one aspect of collections management. The museum's repatriation policy, which was adopted by the board of trustees on March 4, 1991, calls for the return, upon request, of human remains, funerary objects, communally owned native property, ceremonial and religious objects and objects transferred to or acquired by the museum illegally to Indian tribes or individuals with tribal or cultural affiliation.

George Gustav Heye Center of the National Museum of the American Indian, Smithsonian Institution. Photo by Roy Gumpel.



SECTION II

Chapter 2. SMITHSONIAN INSTITUTION REPATRIATION PROCEDURES

by TAMARA BRAY, JACKI RAND (*Choctaw*) & Thomas Killion*

OF THE SMITHSONIAN'S more than one dozen museums and numerous research facilities and program offices, only two museums are engaged in ongoing repatriation related activities: the National Museum of Natural History (NMNH) and the National Museum of the American Indian (NMAI). The NMNH and the NMAI are responsible for the care and management of two major collections of materials related to the cultures of Native Peoples from throughout the Western Hemisphere and Hawaii. Consequently, they share a responsibility for the Smithsonian Institution's accountability on the issue of repatriation. This section of the repatriation handbook will describe their respective policies, the legislative history on which each policy is based, and the repatriation process for each museum.

THE NATIONAL MUSEUM OF THE AMERICAN INDIAN

Congress established the National Museum of the American Indian in November 1989 with the National Museum of the American Indian Act (Public Law 101-185). This act transferred ownership of the more than one million objects comprising the George Gustav Heye collection of the Museum of the American Indian, New York City, to the Smithsonian. Part of the Heye collection is now on display at the Alexander Hamilton U.S. Custom House in Manhattan, but most of the objects remain stored at the NMAI Resources Center, Bronx, N.Y. It is anticipated that when its new facility is complete, the NMAI Resources Center will move to Suitland, Maryland. The NMAI museum will open on the Capitol Mall in Washington, D.C. From that time on, objects will be on view there and at the Alexander Hamilton Custom House in New York City.

In addition to establishing the NMAI, P. L. 101-185 mandated the Smithsonian's formulation of repatriation policy and programs. The Act provided for the inventory and return of Native American human remains and associated funerary objects on an Institution-wide basis. However, because NMAI's Board of Trustees has sole authority under the law over its collections, NMAI developed its own repatriation policy, distinct from the Smithsonian. In 1990 the NMAI Board of Trustees adopted a Repatriation Policy, and in 1991 it established a Collections Management Policy, both in accordance with the requirements outlined in P. L. 101-185.

The NMAI established a Repatriation Office in 1993. Its Coordinator reports to the Assistant Director for Cultural Resources, as the principle point of contact within the museum for Native Americans seeking the repatriation of materials. The Repatriation Office tracks each repatriation case from the initial inquiry to the final resolution of the case.

THE NATIONAL MUSEUM OF NATURAL HISTORY

The NMNH Repatriation Office was established in 1991 to carry out the requirements of the NMAI Act (P. L. 101-185) and the amendment to the act passed in 1996. Repatriation at NMNH is intended to be a collaboration whereby museum staff and Native Peoples together determine the disposition of human remains and cultural objects.

*Article prepared by Jacki Rand, Tamara Bray & Thomas Killion.
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Southern Cheyenne leaders Moses Starr, Jr., Nathan Hart and Lucien Twins preparing human remains for the journey back to Oklahoma. Photo by Laurie Minor-Penland, courtesy of the *Smithsonian Runner*.

The repatriation policy of the NMNH covers the following categories of items:

1. Native American human remains of known individuals.
2. Human remains of individuals who are culturally affiliated with contemporary Native American or Hawaiian Peoples.
3. Associated and unassociated funerary objects.
4. Sacred objects.
5. Objects of cultural patrimony; and
6. Objects transferred to or acquired by the NMNH illegally or under circumstances that render the Museum's claim to them invalid.

The repatriation policy of the NMNH is intended to facilitate communication and cooperation between Native community leaders

and the Museum in coming to agreements about the disposition of culturally-affiliated human remains and specific classes of

objects. Reaching agreement requires understanding and patience on both sides, as the laws, in many respects, are quite vague.

One of the primary tasks of the Repatriation Office at the NMNH is to assess the cultural origins of and to inventory collections potentially affiliated with contemporary Native American and Native Hawaiian Peoples in the United States. Another of its principle functions is to respond to requests for information about the Museum's collections or requests for the return of specific remains or culturally-affiliated objects in those collections. Parties making requests for returns are asked to identify themselves and the basis of their claim, to indicate the geographical extent of their claim, and the specific nature of the items they wish returned.

As a part of both the inventory and repatriation request processes, the Repatriation Office prepares a document to be reviewed by anthropologists and others within the NMNH and then submitted to the Secretary of the Smithsonian for final approval. The report provides an assessment of the cultural affiliation of the collections involved, summarizes all relevant details concerning particular cases, and recommends a course of action for the Secretary to follow in light of the legislative mandate. After the institutional review is completed, the report is sent to members and representatives of all culturally-affiliated groups. Following the Native group's review of the report and depending upon the particular circumstances of the case, arrangements may then be made for returns, or meetings may be scheduled for further negotiations. In practice, contacts

and consultations with Native Peoples are initiated well before the inventory reports are completed. Collaboration on repatriation documentation is an objective of the Repatriation Office and is actively supported through internships and short-term visits by Native community scholars.

The NMNH Repatriation Office completed object summaries of ethnographic collections for review by Native groups in 1997. These summaries enable groups to begin the identification of culturally-affiliated sensitive objects in the collections. The NMNH follows the general recommendations developed by the Department of the Interior's Archeological Assistance Division for the production of NAGPRA summaries.

The identification of sacred objects and objects of cultural patrimony subject to repatriation is envisioned as a three-part process:

1. The Repatriation Office generates a preliminary list of objects held by the NMNH related to a particular group. No attempt is made to identify what is sacred or patrimonial at this stage; the Repatriation Office simply establishes that the items are affiliated with a particular group, that the description given in the records matches the object and that the item is still in the possession of the NMNH.

2. Native groups are asked to review these lists and use them either to identify sacred or patrimonial objects of concern or initiate consultations with the Repatriation Office for the purpose of identifying such objects. Native leaders or their representatives may visit the NMNH to view the objects and associated photographs and documents, or museum representatives may travel to the group with photographs and documents.

3. Arrangements are made for returns, recommendations for continued care of collections at the NMNH are obtained, or alternatives with regard to the disposition of specific items or collections are developed.

The intention of the NMNH repatriation program is to generate a greater level of understanding and respect for the traditions and cultural heritage of Native Peoples at the national level through the incorporation of contemporary Native perspectives into the interpretation and presentation of Native Peoples' past and present cultures at the NMNH. Cooperative endeavors to address Native rights and privileges established during the repatriation process promise to strengthen the Native voice at the NMNH, an institution historically committed to understanding and interpreting Native cultures of the Americas and the world.

NMAI AND NMNH REPATRIATION PROCESSES

Native Americans may take the steps outlined in the following sections to initiate repatriation cases at the NMAI and the NMNH. For both museums:

1. Repatriation Offices serve as a point of contact with the Native groups or individuals and both serve as coordinators of the repatriation process.

2. A case usually begins with a Native request for the repatriation of specified materials; the Museums may however begin compiling documentation of materials prior to receiving a request.

3. The phase in which documentation is gathered and a case report developed is the longest part of the process. Museum records are frequently incomplete, scattered, inconsistent, and incorrect. As a result, assembling the relevant information may require a considerable

amount of time and effort. Native Peoples and groups are encouraged to participate in the process, especially in research related to the materials and as advisors to the Museums on appropriate, culturally-prescribed care and handling of materials.

A case report is based on collection-related documentation. Because the research phase is critical to the resolution of a case, Native Peoples are urged to contribute whatever results of their own research they wish to. Claimants might focus their efforts on surveys of relevant archival materials, collectors' field notes, and Museum records, working either independently or with the Repatriation Office. The staff of each Museum will instruct Native researchers in the use of Museum sources. In many instances a case may prompt a community to collect oral histories, review written tribal histories, and explore cultural traditions and protocols. Native research will usually dovetail with the work of the Museum staff and can help to speed the repatriation process considerably.

THE NATIONAL MUSEUM OF THE AMERICAN INDIAN REPATRIATION PROCESS

1. The NMAI views repatriation as a process based on ongoing dialogue. Native Americans may establish contact with the NMAI Office of Repatriation, the central point of contact in repatriation cases, by letter, phone call or personal meeting with the staff. The Repatriation Office will work with all other NMAI programs and departments whose collections, work, or expertise relate to such cases.

An inquiry may be a general question about the Museum's holdings for the tribe, group, or individual, or it may focus on specific items that the claimant believes to be in the Museum's collection. Examples of such collection materials include: human remains; funerary objects; sacred and ceremonial objects; objects that the tribe considers important to the revitalization or perpetuation of its ceremonial practices; cultural property; patrimony; stolen items; and duplicate items or objects of a similar nature that the Museum holds in abundance.

2. The first written response from the Museum will acknowledge the inquiry and provide existing and available written information concerning the holdings in question.

3. The Native representative(s) may then indicate an interest in pursuing the repatriation of a specific object(s).

4. The Repatriation Office will cover expenses related to travel and lodging for one night for one Native representative to visit the collection. The purpose of the trip would be to view the materials in question and to continue conversations with the staff of the Repatriation Office concerning the case. Prior to the visit, the Native representatives might explore opportunities for conducting further research within the collection records, the NMAI archives, and other possible sources of documentation for the materials under consideration for repatriation.

5. At the same time the Repatriation Office will begin to gather information related to the case, including the results of a records search for documentation concerning the objects in question. The Repatriation Office invites, but does not require, Native Peoples to submit to it as part of the case report the results of their independent research efforts, including testimony of elders, medicine people and others with authoritative cultural knowledge. Community decisions concerning sensitive information will be respected and accommodated.

6. The Repatriation Office will coordinate the development of the report which will include the findings of internal records searches and the results of community research efforts. The Repatriation Office will forward the report to the NMAI curatorial committee which is composed entirely of NMAI staff.

7. The curatorial committee will review the report based on the findings of the Repatriation Office and will offer an evaluation of the case. The committee will forward the report and its recommendations to the NMAI Director.

8. The Director and the Smithsonian's Office of the General Counsel will review the record, the report, and the recommendations. The Director will then formulate a final report which he will forward with his recommendations to the NMAI Board of Trustees, Collections Committee.

9. The Collections Committee, made up of both Trustees and non-Trustee members, will evaluate the request and make a recommendation to the Trustees.

10. The Trustees will render a decision to repatriate or not, and the Museum will notify the Native claimant.

11. If repatriation is decided upon, the Repatriation Office will pay for a Native representative to travel to the collection site to escort the remains or materials back to the community. If the tribe is unable to send an escort the Office will pay for a museum staff member to accompany the remains or materials. When the tribe has received notification that its repatriation request has been granted, it is encouraged to communicate with the Repatriation Office staff concerning its recommendations for appropriate handling of the remains or materials in preparation for travel. Tribes, for example, should inform the museum staff if space is needed for ceremonial purposes prior to travel, if the community wishes to provide special materials



Blackfeet delegate and staff member examining material from the museum's collection, September 14, 1994. Photo by Katherine Fogden, courtesy of NMAI, Smithsonian Institution.

in which the remains or materials will be transferred, or if any other special arrangements are required of the museum in the transfer of the remains or materials to the community.

12. If the repatriation request is denied, the NMAI will consider an appeal from the tribe or group.

THE NATIONAL MUSEUM OF NATURAL HISTORY REPATRIATION PROCESS

1. Communication and collaboration is the foundation of the repatriation process at the NMNH. The process is initiated when a tribe establishes contact with the NMNH Repatriation Office by letter, phone call, or personal visit to express an interest in the Museum's holdings. The initial inquiry may be a general request for information about the Museum's holdings pertaining to a particular tribe, Native group, or individual or it may focus on specific items subject to repatriation under the law.

2. The Native group's request for information will be directed to the Repatriation Office's senior staff person who handles requests from its region. This individual becomes the group's "case officer" and serves as its main point of contact within the Museum.

3. The case officer will give the Native group a preliminary computer inventory of the museum's holdings from the region specified in the Native request or identified in the Museum's records as that group's traditional territory. At the NMNH, collections pertaining to Native cultures are under the care of three separate divisions of the Department of Anthropology: the divisions of Ethnology, Archaeology, and Physical Anthropology. While the majority of items in Ethnology have an ascribed cultural affiliation, those in Archaeology and Physical Anthropology usually do not. To make reports as comprehensive as possible records for collections in the latter two divisions are investigated according to the geographic criteria specified by the Native group.

4. Natives groups and individuals may respond to the inventory information by making a formal request for the return of specific human remains or cultural items. Those eligible include family descendants of named individuals, federally recognized Native American tribes, federally recognized Native Alaskan villages, Native Hawaiian organizations, or state recognized Native American tribes.

5. After the Museum receives a formal request for repatriation, the Repatriation Office initiates the more detailed documentation work necessary to establish the cultural affiliation or origins of the items in question. This involves assembling information from biological, geographical, historical (both written and oral), genealogical, archaeological, linguistic, folkloric, ethnological, archival, and other relevant sources.

6. The Repatriation Office invites the Native group or persons to collaborate in the documentation effort and to contribute the results of their own independent or community-based research. Repatriation Office staff can provide Native American representatives with access to collections and museum records, and with basic instruction in the use of museum resources.

7. After all available information has been assembled, a comprehensive report is prepared by the case officer for submission to the Secretary of the Smithsonian Institution. The report reviews the facts of the case and makes recommendations regarding the repatriation status of items in question. The completed report is reviewed within the NMNH before final submission to the Secretary for action.

8. Once the case report has been approved by the Secretary, it is forwarded to the requesting Native group or persons and to any other parties with a declared or potential interest in the case. The case report represents the NMNH's official response to the Native group's request.

9. If a decision to repatriate is made, the Native group or persons then work with the Repatriation Office to arrange the details of the transfer. A waiting period of one month must precede the agreed upon repatriation date to allow all parties sufficient time to review the plans for return. The NMNH makes every effort to accommodate any special requirements of the Native group with respect to preparations and packing for return. The NMNH may cover the travel costs of up to two Native representatives who wish to come to the Museum to assist in preparations for return.

10. As mandated by the NMAI law (PL 101-185) and amended in 1996, the Smithsonian has established a Repatriation Review Committee (RRC) to monitor and review the inventory and identification process at the NMNH. At the request of any affected party, the RRC may review the findings of a particular case or decision made by the Museum. The RRC may also be called upon by the Secretary to assist in the resolution of any disputes that may arise. Any Native group or persons wishing to appeal a decision made by the NMNH may contact the RRC Chairman.

11. Native groups and persons may determine that it is in their best interest to delay a request for the repatriation of remains or objects. A decision to refrain from making a repatriation request at the present time in no way precludes the possibility of submitting a repatriation request at a future date.

For further information, copies of policies, or to initiate an inquiry, Native Americans may write, call, or visit the following offices of the NMAI and the NMNH.

Jim Pepper Henry
Repatriation Manager
Cultural Resources Center
National Museum of the American Indian
Smithsonian Institution
4220 Silver Hill Road
Suitland, MD 20746
(301) 238-6624 ext: 6277

Bill Billeck, Program Manager
Repatriation Office
National Museum of Natural History
Smithsonian Institution
Washington DC 20560
(202) 357-1899

To receive a free copy of the American Indian Sacred Objects, Skeletal Remains, Repatriation and Reburial Resource Guide 1994, mail or fax your name and address to one of these programs:

American Indian Program
Rm5119, MRC 638
National Museum of American History
Smithsonian Institution
Washington, D.C. 20560
Fax: (202) 633-8192

American Indian Museum
Studies Program
Center for Museum Studies
Arts and Industries 2235, MRC 427
Smithsonian Institution
Washington, D.C. 20560
Fax: (202)-357-3346

SECTION III

MUSEUM AND ON-SITE
CONSIDERATIONS



Repatriated *Northern Cheyenne* remains awaiting reburial. Photo by John Warner, St. Labre Indian School, courtesy of Repatriation Office, NMNH, Smithsonian Institution.

SECTION III

Chapter 1. MUSEUM PERSPECTIVES FROM WITHIN: A NATIVE VIEW

by B. LYNNE HARLAN (*Cherokee*), former Collections Manager,
National Museum of the American Indian

MUSEUM COLLECTIONS AND RESEARCH in those collections can be daunting, overwhelming and confusing, for no two museums are exactly alike. The normal difficulties of working with museum collections are compounded by enormous emotional and spiritual issues for Native American researchers. In attempting to address these problems, comprehensive inclusion of the spiritual concerns of Native people and comprehensive knowledge of museums are both needed, and must be pursued as extensively as possible within the limits of time and space.

In this section I will attempt to give the reader a guide to the basic practices common to most museums. I will also explore some approaches to repatriation based on cultural context and protocol, while identifying and addressing potential problems and conflicts. “Museum” is used throughout this section as a blanket term covering the following entities: federal and federally assisted museums, educational institutions, agencies, public collections, historical societies, archives and organizations subject to NAGPRA and bound by professional ethics to address concerns of Native Peoples. “Native Nations” is used in reference to the indigenous people of the Americas and includes Native Nations, Tribes, Pueblos, Alaska Native Villages and Corporations, Rancherias, the Native Hawaiian Nation, and other sovereign groups concerned with repatriation.

Opinions expressed here are the author’s responsibility and are given in the spirit of cooperation with and concern for the success of the repatriation process.

REPATRIATION CLAIMS AND NATIVE RESPONSIBILITIES

Native Nations are responsible for repatriation. Since traditional concerns are their motivating force, all repatriation efforts should be undertaken with the advice of traditional leaders who are knowledgeable in the cultural traditions relevant to materials in museum collections.

Statements by Native Nations defining their groups through oral history, anthropological and historical records and land claims might prove useful in the repatriation process. Establishing geographic distinctions can help to define cultural affiliation with pre-contact cultures of that area. Significant occurrences in tribal history such as removal, stockade and prison confinement, battles and massacres should be noted; affiliated villages, clans, families, ceremonial sites and other meaningful entities should be described. It might also be useful to stress Native sovereignty over and traditional responsibility for the archaeological and ceremonial materials under dispute, as well as for all human remains of the group.

This material was supported by the National Indian Policy Center at The George Washington University, Washington, DC, which is funded in part by grant award number 90NA1101/04 from the Administration for Native Americans, U.S. Department of Health and Human Services. Reprinted by permission.

Native groups should identify and contact others who have an interest in specific cultural materials and who might make claims or counter-claims to repatriated materials. Museums are not required to resolve competing or conflicting claims. It is therefore in the best interest of the Native Nations interested in repatriation to foresee competing claims and to attempt to resolve these issues prior to making formal repatriation requests.

Repatriation to one group does not restrict use of materials by other groups. The Native Nation which successfully repatriates ceremonial or cultural materials is under no obligation to limit access to materials.

Requests for repatriation of human remains should be linked to a specifically named individual, cultural affiliation, geographic affiliation or suspected affiliation. The Native Nation will be faced with decisions regarding the disposition of human remains, the appropriate disposition of those remains, and the financial resources available for repatriation. The tribal perspective toward repatriation is of vital importance to the Museum.

DETERMINING SCOPE OF WORK

Native Nations will determine their own priorities regarding repatriation. The disposition of, community ability to care for, and proposed uses of repatriated materials are all important issues which should be resolved before repatriation is requested.

The bottom line is financial support for repatriation work and research. Many tribes will be unable to accomplish all desired repatriation of materials and reburial of all remains; the more information gathered and the better its organization, the better able the Native group will be to determine just what is feasible.

Museums are responsible for paving the way for repatriation by preparing SUMMARIES and INVENTORIES as required by NAGPRA. A summary states whether or not the museum holds materials specifically related to the Native Nation. Research begins for the Native group with a review of these summaries as to accuracy and detail (specifically numbers and types of objects.) INVENTORY or CATALOGUE are terms used to describe the official museum documentation of collections. These can be detailed or very sketchy and vary from museum to museum and from object to object. If the inventory/catalog is computerized, the researcher can obtain an INVENTORY CODE as well as a copy of the museum's COLLECTIONS MANAGEMENT POLICY and REPATRIATION POLICY AND PROCEDURES, two indispensable tools for deciphering catalog references and museum policy. Other factors to consider when assessing individual museums include previous work with the museum, relevance of materials to repatriation concerns, and access to financial support available for undertaking repatriation research.

Information should be organized by museum location and cross-referenced by type of materials. Research on collections which hold a variety of materials will probably prove useful when investigating smaller claims, so it might pay to begin with the larger collections.

REPATRIATION: COMMUNITY ISSUES

Cultural affiliation is an important determining factor and is essential in the repatriation process. Cultural affiliation can be established through museum documentation and through the traditional history and land claims outlined by the Native group. A museum's official documentation of collections is the first level of information to be relied upon when seeking human remains of named individuals or from specific sites; names of collectors, anthropolo-

gists and archaeologists and others who gathered and studied such materials are often listed in the museum's documents. A file should be maintained to demonstrate a particular individual's interaction with a native community. The same individual may have deposited materials in other institutions. Elders should be consulted regarding significant collectors who may be remembered not only by name but also in the context of the disappearance of specific objects.

The human remains of named individuals listed on inventories or summaries should be verified by Native tradition and history. This is best accomplished by reviewing museum documentation, establishing family histories, (both oral and written), and reviewing tribal, B.I.A., military and other governmental archival records.

After cultural affiliation is established the community must decide whether or not the remains should return to the community. The process of decision making must take into account the community or family financial situation, appropriate reburial, and spiritual concerns regarding the return.

Requests for the return of the remains of named individuals are best made by living descendants or family members, or on their behalf, at their recommendation and under their direction. Families who do not wish to participate in repatriation of those remains should be requested to sign a waiver of familial rights which outlines preferences for final disposition should there be any concerns or questions. To prevent counter-claims, these rights should be held by the designated representative until final disposition.

ASSOCIATED FUNERARY MATERIALS

This category consists of material which relates to the burial, interment or funerary practice including those which were buried directly with remains, those used in place of actual human physical remains (including cremation urns), grave markers, burial scaffolds, and other interment materials and ceremonial markers. Since these materials are often associated with specific burials, documentation may be contained in field notes or original cataloging information.

Materials which are not directly associated with physical remains are eligible for repatriation. Tribal groups should be prepared to answer questions regarding the exhibition, study and final disposition of materials which can be considered funerary materials and are culturally sensitive.

ORGANIZING RESEARCH

The use of NAGPRA-required summaries and inventories can be daunting and overwhelming. A defined system of conducting research based on access to resources facilitates research. Computer databases are the most effective method for organizing information but old fashioned catalog cards still work well. A systematic search of summaries for named individuals and known and suspected culturally-affiliated human remains is essential before beginning any repatriation work.

MUSEUMS

The primary goal of most museums is to preserve and exhibit the materials and information about those materials in their collections. This mission is considered more important than other responsibilities and is often the justification for most collections activities. Storage and retrieval, environmental management, conservation and research are all procedures used to accomplish this goal. Museums operate under a complex system of records management, professional protocol

and cultural interpretation; they are now also challenged with the responsibility of reaching a common ground with Native communities regarding the very heart of those responsibilities.

OFFICE OF THE REGISTRAR

The Registrar and the registration department of the museum are responsible for maintaining the intellectual integrity of the collections. This office maintains its own records, which are not part of the official archival record of the museum; these records include current working files regarding the ACQUISITION or ACCESSION of objects and information regarding LOANS, exhibitions and other internal museum-object movement. It is also responsible for clarifying inconsistent documentation.

The primary responsibility of the Registrar is to maintain the official catalog of collections. This office is therefore very important in terms of official information regarding the status of collections, research on the collections and background information on the history of objects. This is the office to approach for access to these materials when questions arise or when the native researcher wants to see lists of culturally related materials which are on LOAN to other museums.

RECORDS OF THE MUSEUM

A museum generally has documentation regarding the origin of the materials it holds and the process by which the materials were ACCESSIONED. It is important to note collectors' names as well as such aids to identification as archaeological site names and numbers, collecting or scientific expedition names, and exhibition interpretation history found in this documentation, even if the relevance of this information is not immediately apparent. The collections management policy outlines the museum's process for accepting materials into and removing materials from its collections. The ACCESSION NUMBER is given to the object upon acceptance into the collection; it can also be the object's catalog number, but if these numbers differ, both should be used when referring to an object. The term "de-accession" is used to indicate the process whereby an object is removed from a museum collection.

Museums often maintain several types of collections. The PERMANENT COLLECTION is the material accepted for long term care because it is compatible with the mission of the museum. Less valuable and more transitory objects such as educational tools and exhibition props will not be found in the permanent collection catalogue, as they have not gone through the formal accession process.

Official records documenting the work of the museum are maintained by the ARCHIVES. The names of donors, archaeologists and other professionals involved in collecting, analyzing or interpreting museum materials will be included in these records. Museums also maintain documents pertaining to archaeological or other scientific expeditions' fieldnotes and expenditures, museum purchases and gifts to it, museum publications, employment records, maps and official correspondence of the museum. Cataloging and cross referencing of materials, as well as their storage, care and handling are included in "maintenance." Archives research is essential and appointments for access to archives should be scheduled well in advance. Archives allow only pencils and paper and often have restrictions regarding the photocopying of sensitive records or fragile materials.

Collectors information can be also be found in professional societies' publications. Directories and registers contain biographical information on individual anthropologists, ethnographers, archaeologists and other academicians and should be consulted to determine the

archive most likely to contain the appropriate professional papers. Many of these publications also contain information relating to museum collections.

CONSERVATION

Conservation focuses on preserving the physical object. However for Native Peoples physical care is balanced with spiritual concerns and practices. This difference in viewpoint may create problems for museum staff. Conflicts with the professional training of most conservators arise, for example, when Native precepts encourage the natural deterioration process or when those precepts call for materials to return to the earth. Many practices of the Native community can be beneficial to the conservation of collections, and meetings with the conservation and collections staff should be held to determine a method of care that accommodates both Native and museum practice.

Conservation can offer solutions to concerns over storage and transportation of repatriated materials; it might also present potential long-term problems. Museums often use plastic bags and air tight enclosures for materials, a practice which can be seen as unacceptable. Freezing, treating with insecticides and cleaning with chemicals are also common museum procedures. Native researchers should protect themselves from potential hazards by using vinyl gloves while handling collections. ALL REPATRIATED MATERIALS SHOULD BE CHECKED FOR SURFACE CONTAMINENTS PRIOR TO REPATRIATION.

REPATRIATION/COLLECTIONS RESEARCH

Scheduling for repatriation research is done through the repatriation coordinator for the museum. If the museum does not have a repatriation coordinator, the COLLECTIONS MANAGER should be consulted to schedule an appointment. Collections research is most important work and is therefore of the highest concern to the museum. Museums usually need several days of preparation for an effective research visit, so advance appointments are strongly recommended if you want to see everything.

Tribal research should begin with a physical survey of the museum collection to determine what can reasonably be accomplished and to develop a work schedule. Next, images of objects and such information as their catalog, accession and lot number should be noted. Often the description of an object as stated in a museum catalog is inaccurate according to traditional beliefs and concepts (the Native group is not obligated to divulge sensitive information). In such cases the museum's information should be used to reference the object in repatriation claims. The Native researcher should provide a way to record images of collections for the tribe's own use. Cameras and video recorders provide images accurate enough for identification but not suitable for publication. The researcher should inspect the equipment prior to travel and be proficient in its use prior to the trip to the museum. Adequate supplies of film, batteries, pencils, paper, and money for copies should be taken and replenished as necessary.

WORK WITH COLLECTIONS

Working with collections is time consuming, dirty, and often uncomfortable, especially when conducted in poorly lit, crowded spaces. Collections are often stored in cramped, awkward conditions. Typical storage techniques include bagging fragile materials in plastic, boxing sets of materials (such as regalia, clothing, pottery shards, fragmented objects, etc.), and rolling textiles,

robes and other large pieces in storage drawers or on open shelving. The Native researcher should allow the museum staff to handle objects while he or she records information and images, except in the case of ceremonial or sacred materials, which must be directed by the appropriate spiritual leader. The museum should be appraised of sensitive materials and the Native researcher should request that access to these materials be restricted until repatriation is resolved.

The EXHIBITION DEPARTMENT is responsible for designing, developing and maintaining the museum's exhibitions and can provide a schedule of current and upcoming exhibitions. The Native researcher should note whether tribal materials are being considered for or are already on view; if such materials are considered inappropriate for exhibit, the researcher should request that they not be exhibited until repatriation is resolved.

The PHOTOGRAPHY DEPARTMENT maintains collections and historic photos. The researcher, having obtained an inventory of these photos, should review them for detail and accuracy. Research in historic photos is time consuming, and the cost of reproductions is high. The Native researcher should request restrictions on exhibition of photographs that are inappropriate for public viewing.

TRADITIONAL CARE AND HANDLING ISSUES

Human Remains

Issues regarding burial safety and solitude after reburial

Among the issues to consider in the choice of sites for burial or reburial of human remains are proximity to the community, safety, security, relative solitude, cultural protocol, and costs. Community cemeteries are obvious choices for reburial if use of those areas is considered appropriate by the community members concerned. Other options include state and national parks with historic cemeteries, county historic cemeteries and remote locations on tribal lands. Materials which might attract the attention of pothunters should remain confidential and those burials with large amounts of funerary material should not be included in public information sources.

Issues of access to information

Information regarding arrangements for transportation of repatriated human remains should remain confidential. Tribal officials should however prepare written statements giving information regarding press access to tribal individuals, ceremonial undertakings during repatriation proceedings, and photographs of repatriated materials. Press releases including tribal statements should be prepared by the museum's office of public relations for distribution prior to repatriation.

Issues of transportation of human remains

The transportation of human remains is a sensitive issue; the advice of traditional spiritual leaders and others knowledgeable in ceremonial practice should be sought before decisions regarding the issue are made.

Budget is a determining factor in most repatriation transportation. Options include air, train, commercial freight, fine art, and rental truck transportation. Air transportation usually necessitates individual(s) escorting the remains from the museum. Crated remains must often be checked-in at the airport several hours before the flight. Costs vary among airlines. Trucks, vans or professional moving companies must also be secured to transport remains from museum to airport and from airport to home. Museum registration staff can usually recommend the best moving service in the area.

Railroad transportation is less costly than air and in some areas much more convenient. Amtrak offers car rentals, coach accommodations, freight shipping and individual tickets. Transportation from the museum is still necessary and overnight accommodations are usually required for the Native escort(s). The lower cost of this option offers the possibility of participation by several people.

Commercial fine-art transportation of remains and materials may save money because no one need go to the museum to facilitate such moves. Contract fine-art couriers, who can usually be secured through the museum's registration staff, will pack and crate as per tribal specifications and then provide door-to-door transportation. Nevertheless, if the budget allows, common practice dictates that someone escort the materials from origin to final destination.

Rental trucks offer the best opportunity for several members of the Native community to escort materials; they also allow maximum freedom in the handling and care of remains, free from the external concerns of other commercial options. Rental trucks come in a variety of sizes and can be secured in most locations for round-trip or one-way returns. Individuals escorting rental trucks should travel in separate vehicles to carry personal effects, support materials, (food, water, blankets, etc.) and to provide security and backup in case of emergencies or unforeseen problems. In the event of automotive trouble or accidents the "chase car" can go for help without leaving materials unattended. Round trips give the escorts an opportunity to secure appropriate accommodations for the return trip and to assess travel conditions.

Materials For Use In Reburial

Materials used by museums usually contain plastics and metals which do not decompose naturally and which are easily acquired. Native teams can use natural materials such as acid-free tissue, cardboard and paper, instead of plastic and metal. They can also use glue as a substitute for metal screws and nails (easily located with metal detectors). Blankets or cotton muslin can replace plastic bags or sheeting. More economical alternatives for packing ceremonial materials include standard cardboard boxes from moving companies and re-usable footlockers from an army surplus store.

The Native group's crating and packing plan depends on the final disposition of associated funerary materials. The less intact and the more difficult to recover the reburied materials are, the less attractive they will be to pot-hunters.

NATIVE CONCERNS AND POSSIBLE SOLUTIONS

Spiritual Needs

Good planning can help to accommodate the spiritual needs of Native Peoples. Even though all ceremonial needs may not be known until the collections have been viewed and identified, preplanning will certainly make on-site decisions easier.

The use of vegetal materials in collections

Many museums have strict regulations concerning the security and physical protections of objects. For example, the use of herbal, vegetal and other organic materials is forbidden in most collections storage areas because of potential hazards such as pests and mold. Nevertheless, a variety of methods such as the use of jars or other containers which can be covered by fine brass wire mesh and sealed to prevent pests, and the freezing of materials to kill pests can make the use of such materials acceptable to the museum. Removal of those materials in a

timely fashion would allow the museum staff to monitor the materials and participate vicariously in the Native community's observance of a tribal visitation. The use of smoke or smudge causes many levels of concern. Fire is always undesirable in collections storage and smoke discolors collections. Nevertheless, smoke can be used in collections storage areas if the building maintenance staff is notified and smoke detection and suppression systems are overridden. Ash collection and extinction of fire must also be guaranteed. Individual collections can be aerated through archival quality materials such as blueboard, tissue and cotton muslin which provide protection from surface staining. If fire detection systems do not allow for this activity, alternatives include theatrical or auditorium facilities designed to accommodate similar practice in performances. These areas can be closed to the public during tribal use. Staff offices or lounge facilities, patios or balconies, or other museum facilities can serve these purposes and also provide security. Removal of objects from their usual museum facilities raises the concern that outside hazards might be introduced to general collections storage areas upon the return of the objects. Security of the collections from theft or damage in uncontrolled areas and the need for privacy are also issues for consideration.

The Native researcher has a daunting but worthy task; a task best achieved through careful planning. Not all museum experiences are positive, but all afford the opportunity to regain our collective traditions and to lay claim to our future.



Paul Bender and Martin Sullivan of The Heard Museum and John PrettyOnTop and Norman Dawes TwoLeggings of the *Crow* Tribe, signing a transfer agreement to enable repatriation of a *Crow* medicine hoop from the museum to the tribe, August 11, 1993, Phoenix, Arizona. Photo by Gloria A. Lomahaftewa, courtesy of The Heard Museum.

GUIDE TO “OBJECT WORKSHEET”

The “Object Worksheet” pertains to individual items or groups of items held in museums. It is designed to help researchers organize and record information obtained from museum archives, registrars, or other sources. It may also serve as a convenient summary for the researcher’s own records.

- 1. Museum address:** Correspondence must go to the museum’s correspondence address which may not be the same as its street address. It will be helpful to note both addresses if indeed there are two.
- 2. Contact name and title:** Correspondence is most effective when addressed to a particular individual by name and title (Registrar, Head Archivist, Collections Manager, Repatriation Coordinator, etc.).
- 3. Catalogue number and accession number:** In most museums, information about a particular object will be coded with that object’s unique “Catalog Number.” This inventory number is assigned to an object when it enters the museum collection, and is sometimes called an “Accession Number.” Occasionally the Accession Number is not the same as the Catalog Number; this form provides two blanks for that reason. The Native researcher can request information from the registrar using Catalog Numbers as listed on a NAGPRA summary or inventory, or he/she might ask to review museum holdings related to a particular tribe or geographical area, noting Catalog Numbers of items of interest as he/she goes along.
- 4. Photographs:** Museum records files often include photographs of cataloged objects. These photographs and their negative numbers should be noted. The Native researcher’s own photographs of the materials can be cross-referenced here as well.
- 5. Object description:** The description of the object should include a brief title (moccasin, headdress, drum, etc.) and a short list of the distinguishing features of that object (color, design). Materials, especially sensitive or fragile ones such as feathers should also be noted.
- 6. Materials and dimensions:** Measurements of each object can be useful for identification purposes, and are especially important in repatriation work when planning for the return of an object. Packing crate dimensions and subsequent storage space requirements are considerations.
- 7. Insecticides and other hazardous materials:** Before handling materials in museum storage areas, and certainly before repatriating those materials, it is important to know whether they have been treated with pesticides, arsenic, or other substances potentially harmful to people or to nearby objects.
- 8. Collector information:** Information about how an item came to be in the museum’s collection is usually found in the accession records. Individuals identified as the “donor” or the “collector” should be noted, and cross-checked in the museum’s archives whenever possible.

OBJECT WORKSHEET

Museum: _____

Address: _____

Contact Name/Title: _____

Telephone/Fax: _____

Collections Information compiled by: _____ Date: _____

Catalog/Object Number: _____

Accession Number (if different): _____

Other: _____

Photograph Number: _____

Negative Number: _____

Object Description: _____

Materials: _____

Dimensions: _____

Treated with Pesticides or other Hazardous Materials? _____

Collector Information: _____

Other Information: _____

GUIDE TO “COLLECTOR INFORMATION WORKSHEET”

Names of and biographical information pertaining to individual collectors or donors listed in museum records may provide leads for locating other prospects for repatriation. For example, a donor or collector listed in the archives of one museum might very well have collected for or given to other institutions. It is also possible that he or she might still have a private collection or might know the whereabouts of other objects of interest to the researcher. Knowing something of the collector's biography can help a Native group locate materials gathered in one area but subsequently scattered.

- 1. Collector's name:** Include all names, relevant titles, aliases and nicknames.
- 2. Collector's association with Native Peoples:** Collector's past or present titles or positions (Reservation Agent, Missionary, Anthropologist, U.S. Army Scout, etc.) and dates of service in that capacity.
- 3. Records indicating collecting activity:** The kinds and locations of museum or archival records consulted by the Native researcher should be noted, as well as references for further research.
- 4. Collector's association with museums or institutions:** List all other museums, universities, etc. with which the collector associated. The records of these institutions might be investigated by the researcher at a later date.

COLLECTOR INFORMATION WORKSHEET

Collector's Name: _____

Collector's Association with Native Peoples: _____

Dates of Collecting: _____

Records Indicating Collecting Activity: _____

Collector's Association with Museum(s) or Institution(s): _____

Other Information: _____

SECTION IV
THE PRIVATE SECTOR



James G. Swan, a collector of Indian artifacts, in his Port Townsend office, 1891.
From the Photo Collection of the Washington State Historical Society, Tacoma.

SECTION IV

Chapter 1.

ABOUT THE AMERICAN INDIAN RITUAL OBJECT REPATRIATION FOUNDATION

by ELIZABETH SACKLER, President, A.I.R.O.R.F.

BACKGROUND

In the United States of America, First Amendment rights are celebrated and taught as a keystone of Democracy. First Americans of this land, however, have never enjoyed the freedom that other Americans do and are continually struggling with the federal government and with racism in order to worship and live a traditional way of life.

In the spring of 1991, the Hopi and Navajo Nations asked Sotheby's auction house in New York City to remove three ceremonial masks (two Kachinas and a Yebeiche) from Sotheby's annual "Fine American Indian Arts" auction. Sotheby's chose to ignore the requests, responding that they were not bound by the new Native American Graves Protection and Repatriation Act of 1990. The Hopi and Navajo's dismay at Sotheby's refusal was nationally covered by the media.

On May 21, 1991, I went to the auction and purchased the three masks in order to return them. Since I had bid successfully, state and federal law recognized me as the "owner" of the masks, but I knew I was not. I was merely a conduit for their return home. My father, who passed away in 1987, had been a collector of Asian antiquities. I grew up around collections and museums. It seemed clear to me that the material the Hopi and the Navajo requested to be returned did not belong on the art market.

That event was the beginning of my sincere commitment to the repatriation of traditional Native American ceremonial material that is inappropriately displayed and sold on the art market. I did not realize that I was opening a door into a new world for myself, as well as opening a door through which gusts of new wind would blow throughout this country.

The *New York Times* headline read, "Buyer Vows to Return Masks to Indians." The media reported my statements: "There is a distinction between that which is sacred to a living culture and [fine] 'art.' Sacred objects should not be bought and sold." As a result of my actions, I found myself on the receiving end of letters of enthusiastic support and gratitude from Native and non-Native people alike.

Non-Natives call sacred emissaries of life's spirit "masks." Some dealers and auction houses who are aware that the sale of certain items is painful and sacrilegious, nevertheless participate in the exploitation of the American Indian people.

I began the American Indian Ritual Object Repatriation Foundation when I realized that an opportunity existed for an intercultural partnership addressing issues of exploitation of Native Peoples by the art market. The letters and phone calls I received clearly indicated that people were eager to participate in the righting of wrongs. NAGPRA has set standards in the public sector, and provides the framework and inspiration for a major change in the private sector and marketplace. I believe that the majority of collectors are respectful and truly inter-

ested in culture and history. Their integrity provides for the possibility of a transformation from naive exploitation to respectful behavior. This transformation is accomplished through education and intercultural communication. Cultural bridge-building is what the American Indian Ritual Object Repatriation Foundation is about.

The Foundation's mission is to assist in the repatriation of ceremonial materials; improving intercultural relationships and ridding the art market of inappropriate sales are a natural outgrowth of our work. When collectors learn why the purchase of certain items is inappropriate and why Indian people take offense at the sale and commercial trade of certain items, I believe they will honor the Peoples they so admire and be selective about their purchases.

The dominant culture of the United States is riddled with trinkets and collectibles. Television and magazines encourage people to buy anything they can get their hands on. Our economy is based on amassing.

Cornel West, renowned Professor of Religion at Harvard University, has said that "we are enacting more and more a paradigm of market morality in which one understands oneself as living to consume, which in turn creates a market culture where one's communal and political identity is shaped in the adoration and cultivation of images... as opposed to character [and] discipline..."¹

There are those collectors who are interested primarily in investment and who are so obsessed with collecting that they may have difficulty modifying their behavior and often condemn moral and ethical restrictions with rationalizations. NAGPRA demands a halt to what the public has been taught: to get as much as they can, to be first, to make it as big as they can, and hold it as long as they can and not let anybody near it. NAGPRA, in effect, says: Now you must let go. NAGPRA offers opportunities for people to grow and to be respectful of one another. Legislation has demanded a change. The American Indian Ritual Object Repatriation Foundation works to bring those standards and a new moral code to the private sector.

Spoils of War

"Fine American Indian Art," as the art market chooses to refer to all materials created by Indigenous Peoples of this continent, including artifacts and ceremonial objects, is currently replete with spoils of war/conquest and stolen grave goods. Auction houses and dealers rarely provide provenance information for the Indian art they sell. The resistance is due presumably to lack of information, the questionable origin of material or its inappropriateness for sale.

Often, the description of collections or provenance information that does exist about Indian art is enough to raise one's eyebrows. Provenance has been proudly attributed to cavalry Captains and Majors. Children's moccasins, saddle-throws and Ghost Dance shirts from the late 19th century are still offered for sale by dealers and auction houses, but the question of ownership of spoils of war is now being examined, at least internationally.

Collectors may not know that the sale or purchase of "stolen property" does not establish legitimate title. Under United States law a thief, for example, cannot pass title of a stolen object. Almost without exception, the transfer of stolen property to a good-faith purchaser does not create title.² Collectors of Indian art today need to demand answers

from dealers, galleries and auction houses about the items they are buying. Sovereign Native Nations might want to consider examining legal interpretations of ownership of spoils of war.

NAGPRA prohibits the trafficking of Native American human remains unless they have been “excavated, exhumed or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization.”³ The United States has placed a ban on the export of material removed without permission from federal land, but does not prohibit the export of art and artifacts sold on the art market. Due to this loophole, entire collections have been transported over international borders since the passage of NAGPRA. Legislation prohibiting the private export of Indigenous material is essential to the protection of Native culture. Repatriation Committees and Preservation Officers might want to consider holding discussions about this problem.

Historians and anthropologists acknowledge the effects of the pillaging of the Americas. Hans Koning wrote in *The Conquest of America*, “...it is the Europeans and their descendants who are still sitting pretty on all that loot and on the mountain of skulls. It was the looting of America that paid for the Industrial Revolution” (p. 137). Looting and grave-robbing are finally under intense public scrutiny. Arguments rage among governments, lawyers, dealers, auction houses, museum directors and curators, collectors, historians, and archaeologists⁴ about the ownership of spoils of war and illegally acquired artifacts.

The Indian art market should be held to high standards. The lack of sensitivity shown by the art market to the living cultures of the Americas ignores the continuing connection of these cultures to their art and artifacts, and severely damages intercultural relationships within the United States.



Kwakiutl masks, part of surrendered potlatch material from convicted *Kwakiutl* who were given suspended sentences if they promised to stop potlatching. Photo by Rev. V. S. Lord, courtesy of the Royal British Columbia Museum, Victoria, B.C. (PN11637).

Repatriation

The cultural importance of repatriation of Native American artifacts is twofold.

It offers anthropologists, museum personnel, and others involved with museum and institutional collections additional education about the collections for which they are or have been responsible. For Native Peoples, repatriation offers renewal and re-culturalization with the return of ancestral remains and ceremonial material that have been away from home too long.

NAGPRA has already affected the ways in which museum exhibitions are created for the public. NAGPRA demands that we confront our country's history of conquest, genocide and racism. NAGPRA offers an opportunity to review and acknowledge, to change and to heal. Repatriation provides a chance for Native and non-Native Peoples to communicate in new ways.

There are people who believe that American Indian materials are the cultural patrimony of the United States. I disagree. Three years ago, a collector of Native American art asked me, "Don't you understand that repatriation interferes with the protection that museums offer our national patrimony so it won't come into harm's way and won't disintegrate?" I responded, "If you use another set of eyes, smothering certain items with plastic in airless storage vaults is harmful. Disintegration in nature perpetuates life's circle. Protection from physical disintegration is the interference."

Another attitude that is often voiced by collectors and dealers is that repatriated material will just be sold and end up back on the art market. There are a number of possible responses to this remark including, "It is theirs to do with as they choose." But in any event, this has not been my experience. For example, the Repatriation Foundation returned three False Face Masks to the Tonawanda Band of the Seneca Nation. Those masks had been in the possession of a collector who decided to return them to their people. Since November of 1993, the masks have been cleansed and returned to their traditional use.

The repatriation law and movement have raised new questions in the non-Native American world. Collections are not merely accession numbers, inventories, and summaries. This is a time for everyone to do a little soul searching and examine what repatriation is about. It is not only about collections. It is not only about legislation. Repatriation is about people and living cultures. What is sacred? What is ownership? Who owns what? What can be bought and sold? The answers to these questions have been assumed by the dominant culture for a very long time. It is time now for those questions to be addressed from the "non-dominant" point of view: the spiritual and moral point of view as well as the legal one.

THE REPATRIATION FOUNDATION

The American Indian Ritual Object Repatriation Foundation is an intercultural partnership supporting the rights of Native Peoples by assisting in the repatriation of ceremonial material to the Nations, entities, or individuals to whom they belong.

The foundation assists in repatriation by: 1) acting as a conduit by returning ceremonial materials donated to the Foundation from private collections. Donors are eligible to



Butterfly Maiden Kachina
by Clark Tenakhongva, Hopi.

receive tax deductions, as allowable by law; 2) acting as a liaison for Native Peoples and museums when so requested; 3) networking information about NAGPRA, sales, and private sector repatriation strategies; and 4) communication with dealers, auction houses, collectors and the general public (through magazine articles and interviews with the media) about the importance of repatriation and ethics in the art market.

To achieve our goals we are in contact with tribal representatives and Native advisors. We ensure that every item donated to the Foundation for return goes to its nation of origin, the clan, society, or individual as we are advised by Tribal representatives. We are in touch regularly with Tim McKeown, NAGPRA Program Leader at the National Park Service.

We are a non-federally funded, public, non-profit organization committed to forging new paths and creating new models. We are not a grant giving institution and we do not purchase ceremonial items or artifacts. Upon formation, the Board of Trustees determined that purchasing objects supports the art market; our mission is not to participate in the marketplace but to transform it. Although we are not directly involved with the repatriation of ancestral remains or grave goods, we can provide information and direct people to appropriate or relevant individuals and/or institutions. For more information see the following chapter, "Strategies and Procedures For Repatriation of Materials From the Private Sector."

CONCLUSIONS

At the time of this writing (Summer 1995), the first NAGPRA deadline requiring federally funded institutions to compile and distribute summaries of their collections has passed, and the second deadline requiring the submission of inventories to Native Nations is fast approaching. The repatriation movement's impact on museum exhibitions, school curriculums, Hollywood, art magazines, dealers and auction houses has been, for the most part, positive.

Communications between Native Nations and auction houses have begun, and the removal of grave goods from Sotheby's auction block actually took place this May. Christie's Tribal Arts Department now refuses to auction masks, wampum, and other material known to be sensitive, and is eager to be educated. Art magazines and newspapers are eager to publish articles about repatriation and looting. It is too soon to tell whether or not the black market will benefit, but the continuing education of collectors and the public is certain to raise awareness about the unacceptability of possessing certain objects. A few private galleries continue unacceptable practices, such as separating historic Indian ledgers to sell individual drawings, or fencing, buying and selling stolen pots and masks for thieves and other unscrupulous individuals who exploit Native Peoples. Overall, the Indian Art market this year is uncertain with regard to sensitive and historic material.

In *Creativity is Our Tradition*, Rick Hill wrote: "The role of tradition in Indian art is a poorly understood concept. Tradition is commonly thought to be a style, a technique or form of expression that is tied to the past. To Indians it is dynamically expanding, a way of thinking passed on from our ancestors to which we are bound to add our own distinctive patterns... Our past was never static. Our present is unique in Indian history. Our future depends upon how effectively generations to come will advance our characteristic ways of thinking."⁵

The sale of contemporary Native American art, pottery, jewelry, rugs and paintings is an important economic resource for Native Peoples. For example, the famous Santa Fe Indian Market has expanded to an additional plaza, and the Eight Northern Pueblos Market is experi-

encing healthy summer crowds. This busy activity reaffirms the nature of contemporary Native artists and their contributions to an ethically based American Indian art market. At the same time repatriation returns ceremonial materials, contemporary Indian art can enjoy the vitality of the marketplace. These two activities are not mutually exclusive; in fact, repatriation revitalizes Native cultures and inspires future generations of Native artists.



Cow Kachina by Clark Tenakhongva, Hopi.

1. bell hooks and Cornel West, *Breaking Bread*, South End Press, Boston, MA; 1991, p.95.

2. See for example, Richard Perez-Pena, "Guggenheim Presses Case on Ownership of a Stolen Painting," *The New York Times* (December 27, 1993), p. B1.

3. Trope and Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 Ariz. St. L.J. 35, p. 73 (1992).

4. Steven Vincent, "Who Owns Art?" *Art & Auction* (January, 1995).

5. Rick Hill. *Creativity Is Our Tradition: Three Decades of Contemporary Indian Art at the Institute of American Indian Art*. (New Mexico: Institute of American Indian Art Press, 1992).

SECTION IV

Chapter 2. STRATEGIES AND PROCEDURES FOR THE REPATRIATION OF MATERIALS FROM THE PRIVATE SECTOR

by KATE MORRIS

ART AUCTION HOUSES, dealers, private collectors, corporations and other non-federally funded institutions are not bound by the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA). They have not been required to notify Native Nations¹ of potentially repatriable materials in their collections. Nonetheless, Native Nations regularly learn of materials in these kinds of collections that they would like to have returned. Though private sector individuals and institutions are under no legal obligation to repatriate these materials, there have been a number of occasions in which they have done so.

This chapter describes specific instances in which individuals and corporations have been encouraged to return sacred objects to tribes. In particular, this chapter relates the experiences of the Repatriation Foundation in developing strategies and procedures for the repatriation of objects from the private sector. Examples of returned materials include unassociated funerary objects, ceremonial objects, and objects of cultural patrimony. Human remains will not be discussed in this chapter because there are federal and state laws which apply to human remains in the private sector. See Jack Trope's discussion in Chapter One, "NAGPRA: Prohibitions Against Trafficking" (Page 8).

PRIVATE COLLECTIONS

The market for Native American art has only recently been driven by high prices and a desire to own high status material. Accordingly, individuals who have owned these objects for more than a few years probably bought them for less materialistic reasons—out of appreciation for the object's beauty, or in response to a genuine interest in Native American peoples and cultures. As collectors have become more informed about the sensitive nature of certain materials, many have initiated the return of objects in their possession. This has been especially true in cases involving ceremonial materials.

When Private Collectors Offer to Repatriate Materials

The Repatriation Foundation has found that, after the publication of articles favoring repatriation (for example, in *The New York Times*, *Reader's Digest*, *Art & Antiques*), there is an increase in the number of phone calls from private collectors asking whether or not items in their possession should be returned.

1. The term "Native Nations" is intended to include Indian tribes, Alaska Native villages and corporations, and Native Hawaiian organizations. The term "tribe" is also occasionally used for the sake of simplicity. It is also intended to be inclusive of the above-named entities, as well as traditional clans and societies.

When the staff receives such an inquiry, we ask that the individual send a photograph and background information regarding the object(s) in question to the Foundation. We then forward this information to members of our Provenance Committee (made up of Native leaders, scholars and elders across the country), who make recommendations about which tribe/clan/individuals should be contacted. If the tribe/clan/individual requests repatriation of the object in question, the Repatriation Foundation can do one of two things:

1. The American Indian Ritual Object Repatriation Foundation can act as a liaison, introducing the individual collector to Nation representatives, and assisting in the transfer of material directly from the collector to the Native Nation or individual. In these cases there is almost infinite flexibility in the manner in which the transfer can be completed.
2. The American Indian Ritual Object Repatriation Foundation can act as a conduit, legally and physically accepting title and possession of an object from a donor, and then transferring title and possession to the tribe/clan/individual. In these cases, the donor signs a Deed of Gift, transferring title of the object to the Repatriation Foundation. The president of the Repatriation Foundation also signs this deed, expressing the intent of the Repatriation Foundation to return the item, naming the tribe/clan/individual that will receive it (see Appendix K, p. 150). When the Repatriation Foundation transfers title of the material to the tribe/clan/individual, the receiving entity also must sign the Statement of Transfer, stating that the object will not be re-sold (see Appendix K, p. 151). Note that the Deed of Gift records a monetary value of the transferred object. Although it may be offensive to place a monetary value on ceremonial material, a certifiably appraised value (discussed below) is required by law if the donor of the object wishes to receive a tax deduction for his/her donation.

Requesting the Return of Items in Private Collections

The Repatriation Foundation has conducted an informal survey of private collectors of Native American objects, questioning them about incentives for repatriating items in their possession. Most who were interviewed stated that the initial contact from a tribe requesting the return of an item will set the tone for all subsequent negotiations.

Whether a Native Nation chooses to contact a collector directly or requests the assistance of the Repatriation Foundation, the Foundation recommends the following course of action:

Step One: Formal Letter

A Native Nation initiating a repatriation request should consider writing a formal letter to the collector. (Initially, phone calls are not recommended.) This letter is best written by a tribal officer or designated repatriation representative. The more official this person and his/her request is, the better.

The initial request letter serves as an introduction, informing the collector of a tribe's interest in a particular object. The Native Nation should assume that the individual collector knows nothing at all about repatriation. Assuming also that the collector acted in good faith in acquiring the objects originally, the letter might explain why a particular item is being sought for return. The initial contact letter should not be too long, or contain so much information that it overwhelms the collector.

Lastly, the initial contact letter should clearly identify either the Repatriation Foundation or a representative of the Native Nation whom the collector can contact directly with a response to the request.

Step Two: Following Up With Respect to the Initial Approach Letter

The second contact with a collector (especially if he/she has responded to the first letter) can be less formal. It might include a phone call or a letter offering to send more detailed information about repatriation. The Repatriation Foundation can provide copies of many newspaper articles that favorably describe repatriation cases, as well as copies of eloquently stated arguments for repatriation that have been printed.

Step Three: Further Negotiations

As negotiations ensue, Native Nations may want to explain to the collector some of the many options for, and benefits of, repatriation. These are listed below.

Using Tax Deductions As Incentives

Most private sector entities (corporations, businesses, and individuals, including dealers and collectors) that decide to return materials to Native Nations are eligible to receive tax deductions on those donations. The dollar amount of the deduction itself is determined by a number of factors, including the appraised value of the items, the contribution base (adjusted gross income) of the donor, and the kind of organization or individual that receives the donation.

In every case, it is the responsibility of the donors to determine what deduction they will claim on their income taxes. However, Native Nations might want to know something about the process of claiming tax deductions on donations, in order to better negotiate with potential donors.

The first step in the process involves the determination of “fair market value” of the material. A certified appraiser must be hired to determine the value of the object. Again, because the donor is solely responsible for all matters related to claiming a deduction, he/she is also responsible for hiring (and paying) an appraiser. The recipient cannot, by law, provide an appraiser, and probably should not even recommend one. If asked, a Native organization might provide the name and address of an appraisers association, such as the American Society of Appraisers or Appraisers Association of America.

Once the dollar value of the material has been established, the percentage of that amount that a donor can claim as a deduction is determined by three things: 1) the donor’s contribution base or adjusted gross income; 2) the kind of organization or individual that will receive the donation; and 3) the express charitable purpose of the receiving organization. Other factors may be considered, but they change from year to year as the tax code is amended (see Appendix N, p. 154).

If a Native group or individual does not wish to use the Repatriation Foundation as a conduit, it will have to provide potential donors with information about what kind of organization will receive the donation. The Native group or organization will need to provide a tribal government, a public charity, private operating foundation, or private non-operating foundation as defined by the Internal Revenue Code. (Internal Revenue Service Publication 78 lists all of the recognized public charities in the United States.) Again, the dollar amount of the allowable deduction will be determined by the non-profit status of the organization receiving the material, and by the “exempt purpose” of that organization (exactly what the organization was designed to do). For example, tribal governments may accept gifts or bequests for “exclusively public purposes.” On the other hand, though a community health service may have public charity status, the receipt of communal or ceremonial items probably is outside its stated purpose. In this case, the donor might be granted a smaller tax deduction than if the “exempt purpose” of the recipient organization were directly involved with ceremonial objects.

The American Indian Ritual Object Repatriation Foundation is a public charity that is designed specifically to act as a conduit for the return of ceremonial materials to Native Nations. As a result, potential donors may be more likely to repatriate materials through the Repatriation Foundation than directly to a Native Nation because it is a simplified process. Further, potential donors are likely to receive the maximum tax deduction allowable by law when they donate material directly to the Repatriation Foundation.

Alternatives to Outright Donation of Materials to Native Nations

In some cases, private individuals and corporations have been reluctant to donate objects directly to Native Nations. The private sector collectors interviewed by the Repatriation Foundation reported that their principle concern is for the physical care of repatriated objects. In some cases, Native Nations may wish to repatriate items with the intent to re-bury, dismantle, or allow them to decompose naturally. The Native American Graves Protection and Repatriation Act recognizes and affirms the rights of Native Nations to make these decisions regarding repatriated materials. Private collectors, however, may be unwilling to return objects that they know will be destroyed. Also of concern to private collectors is the possibility that a repatriated object will be re-sold, or that a single individual or Nation might restrict the access of other Native Peoples to the material.

In cases in which a private sector entity has been reluctant to return materials directly to Native Nations, creative compromises have been made. The following are examples of these arrangements.

Alternative One: Donation to Tribal Museum

In 1992 the Institute for American Indian Arts in Santa Fe (IAIA) contacted the Repatriation Foundation about eleven Anasazi pots that had been on loan to its museum. IAIA had declined the owners' offer to donate the pots to the museum, however, both parties wanted to see the pieces returned to Native Peoples. The Repatriation Foundation arranged for the final donation of all eleven pots to the Southern Ute Indian Cultural Center, where they are accessible to the many descendants of the Anasazi.

Alternative Two: Joint Custody—Tribes and Museums

The Arizona State Museum and the Gila River Pima-Maricopa Nation have entered into a kind of partnership to care for an entire collection of Gila River area materials. The collection was offered as a donation to the museum by a private collector, but the museum recommended that the materials be given instead to the Nation. The donor was concerned about the Nation's long-term commitment to care for the objects, so he proposed joint ownership between the Nation and the Arizona State Museum. Ultimately, the collection was deposited in the museum, which will assume permanent responsibility for conservation and curation. When the Nation's cultural center is built, the collection will be made available in its entirety as a foundation for the Nation's museum.

Alternative Three: Trade / Replication of Objects / Gifts

In 1992 the Wounded Knee Survivors Association requested the return of a collection of objects taken from the Wounded Knee Massacre site to a small library in Barre, Massachusetts. Because the library did not receive federal funds, and was therefore not bound by NAGPRA, the Board of Directors was resistant to returning the substantial collection. In particular, the library

Board stated that they were “reluctant to repatriate items that were likely to be reburied.” During the negotiations between the library and the Wounded Knee Survivors Association, it was suggested that the original items be replaced in the library with replicas made by traditional Lakota artists (see Appendix M, p. 153). In effect, the Wounded Knee Survivors Association offered to trade sacred for non-sacred objects. The *Indian Trader* quoted Wounded Knee Survivors Association lawyer Mario Gonzalez as saying, “This way everyone will win. We would get the originals, the Indians would get employment and the museum will get duplicates.” Both sides have agreed on the repatriation of the entire collection of objects, and funding for the duplication project is being sought from the National Endowment for the Arts.

In similar situations, tribes might also enlist the support of Native contemporary artists in offering artworks in thanks for the return of sacred or communally-owned objects.

CORPORATE COLLECTIONS

Many large corporations amass collections of artworks, both as interior decorations and as investments. Corporations have traditionally collected works by European and contemporary artists, but a few have collections of Native American materials. Tribes may wish to consult the *Art News International Directory of Corporate Art Collections* (see Appendix O, p. 156) for general information on corporate collections.

The initial contact with private corporations holding materials that a tribe wishes to have returned follows the same procedure as in the initial contact with private collectors. Like private collectors, corporations may receive tax deductions for their donations. Further, good public relations have always been of concern to businesses, and the potential for good press may provide incentive for private corporations to repatriate objects in their collections. Because some corporations consider Native materials as both investment and decoration, a tribal offer to create duplicates or replacements by Native artists, as discussed above, may be especially effective.

NATIVE MATERIALS AT AUCTION

Auctions have been and continue to be the central component of the Native American art market. Each year there are 40-50 major “tribal arts” auctions, and at least as many smaller

Descendants of *Cheyenne* Chief Dull Knife also known as Morning Star, who led their exodus from Indian Territory (now Oklahoma) to their Montana homeland in 1878, came to NMNH to participate in repatriation ceremonies. Pictured from left to right are Rosie Eagle Feather, Beatrice Small, Martha Wolfname and Annie Brady. Photo by Chip Clark, courtesy of the *Smithsonian Runner*.



auctions involving Native American materials. These auctions generate as much as \$10 million in annual sales. Fortunately, the larger auctions are lavishly advertised, providing tribes an opportunity to learn of the imminent auction of objects they may wish to have returned.

Monitoring the Auction Market

General announcements and advertising for auctions of Native American materials can be found in many local newspapers, antiquities publications and trade journals. The most complete listings and advertisements are located in *The Indian Trader* and *American Indian Art Magazine*, both of which are available by subscription. In addition, large auction houses such as Sotheby's, Christie's, Skinner, and Butterfield and Butterfield publish catalogs in advance of their major auctions. Though these catalogs are generally expensive (\$30), they can be ordered in advance (see Appendix P, p. 157) and are far more informative than advertisements placed in magazines. In addition, when buying a major auction catalog, either in advance or on the day of a sale, one can request that a follow-up report on the auction be sent to the person who purchases the catalog. These "Sale Results" list exactly what was sold, and for what price. They do not, however, identify the buyers. Summary information about major and minor auctions (after the fact) also can be found in *American Indian Art Magazine* (see Appendix Q, p. 158): Harmer Johnson's "Auction Block" column lists the highest prices paid at auction during the auction season and sometimes identifies an unusual trend or occurrence. Rarely does this column list what did **not** sell.

Requesting the Removal of an Object in Advance of the Auction

Because negotiations for the removal of an object from auction are time-consuming and often involve many parties, it is imperative that such a request be made as much in advance of the auction as possible. Whether a Nation chooses to contact an auction house directly or requests the assistance of the Repatriation Foundation, the Foundation recommends the following course of action:

Step One: Formal Letter to the Auction House

A letter should serve to inform the auction house that a tribe objects to the potential sale of an item. The most effective request is one that is generated from an official tribal entity—either a tribal officer or appointed committee. The letter might include newspaper and magazine articles pertaining to the removal of objects from previous auctions. Copies of such articles and case studies are available on request from the Repatriation Foundation.

Step Two: Formal Letter to the Consignors

Though the auction house will generally consult the consignors (sellers) of the specific object, it is a good idea for the tribe to write a separate letter to the consignors stating their position. This letter will need to be sent in care of the auction house, as the house will generally not give out consignors' names, but are under obligation to forward any related correspondence to them.

Step Three: Negotiations

Once negotiations ensue, Native Nations may wish to enlist the aid of legal counsel and/or the assistance of a liaison group, such as the Repatriation Foundation.

Requesting the Return of Materials From Auction Houses

Objects that go unsold at an auction are returned by the auction house to the original consignors. At this point, negotiations for the repatriation of these items follow much the same course as described in the section, "Objects in Private Collections." The main difference is that correspondence may have to continue to be forwarded by the auction house if the consignor(s) wish to remain anonymous.

Repatriation of Objects at Auction: A Case Study

In the Spring of 1993, the American Indian Ritual Object Repatriation Foundation received the advance catalog for Sotheby's "Fine American Indian Art" auction of May 25, 1993. Among the objects slated for auction were four False Face Masks. Repatriation Foundation President Elizabeth Sackler brought the matter to the attention of the Chairman of the Haudenosaunee Standing Committee, who in turn informed Sotheby's of the sacred nature of the False Face Masks consigned for auction. Though the Haudenosaunee requested that Sotheby's remove the Masks from the sale, the auction house declined to do so, and the auction took place on May 25. Four representatives of the Haudenosaunee Standing Committee attended the auction and, as the Masks came on the block, the representatives walked silently down the aisle and sat in the fourth row. The Masks went unsold.

Through Sotheby's, the Repatriation Foundation contacted the consignors of the False Faces to propose that the Masks be repatriated to the Seneca. The consignors of three of the Masks agreed, stating that they wished to remain anonymous, but would donate the Masks to the Repatriation Foundation in order that they be returned. On November 10, 1993 custody of three False Face Masks was transferred to the American Indian Ritual Object Repatriation Foundation. Ten days later, fifteen members of the Haudenosaunee Nations, along with members of the Native and non-Native press, Repatriation Foundation staff and members of the curatorial staff of the National Museum of the American Indian looked on as Tonawanda Chief Emerson Webster received the Masks on behalf of his Seneca Band.

NATIVE MATERIALS OFFERED FOR SALE BY DEALERS

Procedures for requesting the return of objects from dealers or traders are basically the same as those concerning private collectors. However, because dealers are primarily interested in profit, they often propose to sell the objects in question to the Native Nation. Nations may consider this option; however, the American Indian Ritual Object Repatriation Foundation and many Nations have adopted policies not to buy sacred material under any circumstances. Doing so supports the "market" for these materials.

Negotiating a trade for non-sacred materials or contemporary artworks such as those discussed in the "Private Collectors" section may be effective with some dealers. Again, there are pros and cons of participating in the market in this way.

Dealers and Traders: A Case Study

In October of 1993, Denise Vigue, Director of the Oneida Nation Museum, learned that Sherwoods Spirit of America, "dealers in antique firearms, American Indian art, and Americana," was offering for sale a large number of False Faces. With the support of her Nation's Council,

Ms. Vigue called the President of Sherwoods, Michael Kokin, and requested the return of the Masks. Mr. Kokin claimed that he could not afford to donate such a large amount of material, but offered the Oneida a discount on the purchase of the False Faces.

The Repatriation Foundation assisted the Oneida Nation in explaining to Mr. Kokin both the importance of repatriation and the possibility of receiving a tax deduction for such a donation. (See letter from Ms. Sackler to Mr. Kokin, Appendix S, p. 162.)

In early 1994, representatives of the Oneida Nation flew to Beverly Hills to meet with the dealer. Mr. Kokin was still interested in selling the Masks to the Nation, offering a further discount, which he would call a donation to the Museum and for which he would receive a tax deduction. The Oneida again refused to pay for the False Faces, and again explained to Mr. Kokin that it would be inappropriate for them to buy what they consider sacred.

A few weeks later, Mr. Kokin informed the Oneida Nation that he had “disposed” of the Masks in question, though it is unclear whether or not he sold them.

CONCLUSIONS

With all four entities discussed above—private collectors, corporations, auction houses, and dealers—strategies must take into account the motivations of the individual or group in possession of the object. For instance, it has been mentioned that tax deductions are incentives to some individuals but not to others. Offering to provide a replacement for a requested item may be effective, especially when the donors’ particular interest in the material—*aesthetic, romantic, monetary, historic, or sentimental*—is understood.

It has been the Repatriation Foundation’s experience that education is the most important part of the process of requesting the return of an object. In most cases, the simple act of informing an individual or institution that a tribe has a legitimate interest in the repatriation of an object is enough to engender favorable negotiations. Tribal repatriation committees might wish to establish and distribute guidelines for collectors and auction houses, informing them of what materials the tribe considers inappropriate to sell. Like most museums, private individuals and corporations desire good relations with Native Peoples; much can be gained from an optimistic approach and good-faith communications.

Involvement of Donors

Once the return of an object has been agreed upon, the tribe might want to consider including the donor in some kind of repatriation ceremony. This gesture can vary from a small ceremony concurrent with the signing of a Deed of Gift (Appendix K, p. 150), to an invitation to the donor to attend or participate in a reintroduction ceremony.

Publicity

The Repatriation Foundation has found that the value of publicity cannot be underestimated. Bad publicity, or the threat of generating it, is a tool that should be used sparingly. More often, the potential for good publicity (especially with respect to auction houses, corporations and dealers) is a motivating factor in the return of Native property. The cause of repatriation itself has been furthered when people have been willing to share their repatriation experiences with the press. The more the general public has been made aware of the issues surrounding repatriation, the better the climate has been for seeking the return of Native materials.

SECTION V
PERSONAL VIEWPOINTS



Yakama Nation Council member Clifford Moses preparing human remains for shipment. Photo courtesy of Jane Beck, Repatriation Office, NMNH, Smithsonian Institution.

SECTION V

Chapter 1. REFLECTIONS OF A NATIVE REPATRIATOR

by RICHARD HILL, Sr. (*Tuscarora*) Special Assistant, National Museum of the American Indian and Lecturer in Native American Studies, State University of New York at Buffalo.

THIS YEAR MARKS THE TWENTIETH ANNIVERSARY of my involvement in the repatriation movement. I started before most Indians had even heard the word repatriation. I was a young research assistant at the Buffalo and Erie County Historical Society and the only Indian the museum had ever hired.

My first published essay was about repatriation. Three things made me uncomfortable with the Indian exhibitions in the Buffalo museum. First, Indians were presented only in the past tense, as if they had disappeared after 1776. Next, the sacred medicine masks were openly displayed. I noticed that non-Indian visitors often made fun of the faces, not knowing, or disregarding, their religious significance. But the most disturbing of all was that the bones of an Indian were on display to show how Archaic Indians buried their dead. I would stand and look at those bones, feeling guilty and ashamed, yet angry at the same time. Children would come to view the bones, not with a sense of respect, but with a morbid curiosity, like that of people who view a car wreck, looking for the dead.

I realized that it was my job to seek a resolution. I finally was able to convince the director that we should remove the bones and masks from the exhibition and reinstall the entire hall, working with a Native advisory committee. The remains have since been reburied on a reservation and the masks have been loaned to local Iroquois communities for ritual use.

I have also been on the other side, unable to get anyone to rebury some remains that were returned by a county historical society. Those remains in search of reburial caused great discomfort to the Indians who worked at the Indian museum that held them. I have been in the unique position of helping to negotiate the return of sacred objects that had been in a museum for nearly a century, only to see many of them destroyed by a fire at the home of the Indian to whom the objects were given. I am still bothered by the lack of follow-through by my own people.

The return of the sacred wampum to the Iroquois became my focus because of what they represent in terms of our own identity and belief systems. After a century of effort by many people, the wampum have been restored to the Grand Council at the Six Nations Council at Onondaga. The wampum belts remain locked up in vaults off the reservation, but the Chiefs now have access to them. They have been placed on view in the longhouses and people have recounted what they know about their message.

The impact of their return remains to be seen as the Six Nations is currently torn apart over the issues of cigarettes, gasoline, and gambling. The power of the messages of these sacred documents remains hidden. How the Iroquois handle their spiritual responsibility now rests in their own hands. Only a handful of people can interpret the message of the belts. It is hoped that the Iroquois will concentrate on just that before it is too late. With the passage of each

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elder, the knowledge base gets smaller. With each passing month, fewer young Iroquois survive to hear those messages. The museum has done its part. Now, the Iroquois have to do theirs.

The Zuni Pueblo people have been caught in the middle of the repatriation movement. They, like most Indians, are opposed to the desecration of the graves of their ancestors. Like most Indians, the Zuni believe that there is another journey after death and that disturbing the grave disrupts that journey. However, unlike most other Indians, the Zuni do not want the remains of their ancestors returned for reburial. While most museums now use the Zuni as an example of the lack of consensus on the Indian side about repatriation, the reality is the Zuni are deeply concerned over the dead. Their reality is that they do not have a reburial ceremony. They do not know what clan the dead belong to, what family should take charge, or that the bodies are even Zuni. In short, they have no cultural mechanism in place to address the reburial.

The Zuni tell the museums that, since the museums desecrated the grave, the responsibility for the proper care of the dead is theirs, not that of the Zuni. Recently, I became aware of the head of a Zuni Bow Priest that is part of the National Museum of the American Indian collection. The Indian people on staff objected to having to work with this head on the shelf. The NMAI has been in the process of returning the 500 remains that we have located, but when we asked the Zuni what to do about the head, they responded that it is the museum's responsibility to show proper respect for the head and they did not want it back. Despite the national movement toward repatriation, the Zuni dead will remain in museums. The difficulty will be to resolve how a museum can show "proper" respect for remains that belong in the ground, not on a museum shelf. By the same token, we must accept the decision of the Zuni and together seek further resolution.

Regarding sacred objects, the Zuni have a very different point of view. On May 30, 1978, the Zuni Tribal Council, while recognizing that the traditional religious leaders have authority in this area, requested that museums and collectors assist in the return of special sacred and religious items and in their proper handling. The special focus of their efforts has been the recovery of the twin War God images, known as Ahayu:da, from museum collections. Through surveys and correspondence, the Zuni have been able to locate nearly all of the missing War Gods. The Zuni also sought a more respectful handling of sacred material by the museum professionals and took the time to explain their case. It should not be forgotten, however, that their claim to the War Gods carried the weight of the fact that the FBI was involved in the return of a War God that was placed on auction in New York City. The Zuni, as with most Native claimants, pursued the idea that such religious items are community property, belonging to the entire community, and therefore could not be removed from the community without the agreement of all.

To the Zuni, all communally owned objects must have been removed illegally as the elders never consented to their removal. It appeared that many items were taken from individual shrines. Even items sold by individual Indians may need special handling while in the possession of non-Indians. Not all objects of cultural identity are sacred to the Zuni.

In the Southwest, cultural protocol is deeply ingrained within the community, but the conduct of individual Indians has always been under the scrutiny of the elders. During the early years of the Institute of American Indian Arts in Santa Fe, NM, young Native American artists were encouraged to look at tribal objects in museums for inspiration. These young artists quickly saw that sacred symbols, objects of power and eagle feathers were important to the cultural identity of their people. The young painters began to use the imagery of the past in their contemporary work. The problem came when they began to attach eagle feathers to their paint-

ings and sculptures, recalling a sacred process of their ancestors. Many of the traditional Pueblo people objected, as they saw it as a misuse of the eagle feather. The debate became very intense and culminated with the Pueblos removing the feathers from the art work themselves.

Today, you will hardly ever see any contemporary Native artist use an eagle feather in his/her art, for such use is considered inappropriate. The federal migratory bird protection laws also have impacted on the Indian arts. Kachina doll carving had been controversial within the communities of the Southwest to begin with. Most of the Pueblos objected to their sale to non-Indians, while the Hopi and the Navajo did not seem to have a problem with carving them for sale or with the use of Kachina images in contemporary painting and sculpture. Those that did carve Kachinas for sale tried to make them as “authentic” as possible, to increase their salability. This meant that feathers of birds of prey, as used in ceremonies on the reservation, would be attached to the carvings made for sale.

The federal authorities began to crack down and such Kachinas in craft shops were confiscated as they violated federal law on the use of such feathers. The artists began to use brightly colored feathers in the place of the real feathers. Others began to carve the feather to look like the original, rather than use an incorrect feather. Today, Kachina carving has become more realistic and intricate, advancing the art form and increasing the price. It also pushed up the price of older Kachinas that were on the market, but were made before the federal laws that restrict the use of feathers from protected birds. This is why dealers can still sell historic objects with eagle, hawk, owl or waterbird feathers, provided the object was made before the law took effect.

It will be interesting to see how the Pueblos handle the issue of repatriation of Kachinas. Will something made for sale at Indian Market in Santa Fe and donated by the buyer to a museum be subject to repatriation? Will private collectors offer their prized Kachinas back to the communities from where they originated without compensation? Will the Pueblos’ elders step forward and work with the young artists of today to ensure that their cultural protocols are respected and that art work that offends a community ethic is not created, rather than censor the work after the fact?

In 1978, from a cave on the Hopi Reservation in Arizona, Jimmie Lee Hinton and Randall Morris stole four carved figures representing the Corn Mother, her husband and daughter and Dawn Woman. These objects were created for these shrines as part of the Hopi religious expression. They sold the stolen objects to rancher Eugene Pyle for \$1,600. The loss of the objects has

caused a generation of young Hopi males to go without rites-of-passage ceremonies. The thieves and the rancher now claim that they suffered bad luck as a result of the theft and that the figures have been chopped up and burned. No laws can bring back those sacred figures. No money can compensate the Hopi for their loss. However, the desire of collectors to own what is sacred for others will continue. Indian religious beliefs will forever be under stress as long as other people desire to possess what they should not have.

It is best to look at the entire repatriation movement over the last century in order to see that this is not a new political movement and understand that many cases of repatriation occurred prior to federal law. What follows is a historical chronology of major cases and actions that have impacted on the return of sacred objects.

Crow Mother Kachina by Clark Tenakhongva, Hopi





Office of the Department of Ethnology at the National Museum, c. 1890.
Photo courtesy of the National Anthropological Archives, Smithsonian Institution.

A CHRONOLOGY OF REMOVAL AND REPATRIATION

1837 to 1841. Ethnological museums emerged in Europe as a distinct idea, becoming a full scale museum movement in the 1870s. The Smithsonian Institution began to collect Native material in earnest in 1863 with an announced intention of “extending and completing its collections” on races of the Americas as “many articles are of a perishable nature, and the tribes themselves are passing away or exchanging their own manufacture for those of the white race.” The stated desire was for a full series of American skulls that were to be procured “without offense to the living.”

1882. Theodore Baker published, *On the Music of the North American Savages*, as the first publication of ethnomusicology. Native materials were referred to as “artificial curiosities” and entered the collections of the aristocratic and wealthy connoisseurs as “cabinets of curiosities.” The Indian was often depicted as the Vanishing American, doomed to disappear in the face of progress.

1885. The Canadian Government banned the potlatch but the courts were generally unwilling to enforce the statutes. The actual ban read: “Every Indian or other person who engages in or assists in celebrating the Indian festival known as the ‘Potlatch’ or in the Indian dance known as the ‘Tamanawas’ is guilty of a misdemeanor, and shall be liable to imprisonment for a term of not more than six nor less than two months in any gaol [jail] or other place of confinement; and any Indian or other person who encourages, either directly or indirectly, an Indian or Indians to get such a festival or dance, or to celebrate the same, or who shall assist in the celebration of same is guilty of a like offense, and shall be liable to the same punishment.”

1891. Onondaga Chief Thomas Webster sold four wampum belts (Hiawatha, George Washington Covenant, Sighting of the First Palefaces, Chaplain) in his possession to General Henry B. Carrington, U.S. Indian Census Agent, for \$75. Carrington later sold the belts to

Dr. Oliver Crane, who in turn sold them to John B. Thatcher, mayor of Albany for \$500 in 1893. For his actions, as wampum were considered communal property of the Onondaga Nation, Chief Webster was removed from office in 1897.

1894. US Office of the Interior published “Regulations of the Indian Office,” outlawing traditional religious ceremonies. This document was published again in 1904.

1899. The Onondaga Nation and the State of New York filed suit against collector John Boyd Thatcher seeking the return of the sacred wampum belts in his possession. They lost their case, Judge Hiscock ruling that the wampum were “curiosities and relics of time and condition and confederation which has ceased to exist.” In 1907, a lawsuit to return the wampum was dismissed by a New York State judge. The court ruled, in effect, that the Confederacy no longer existed and that Thomas Webster was not holding the wampum in trust for the Nation, and therefore had the right to sell them. In 1909, the New York State legislature passed the Wampum Law that bestows upon themselves the title of “Wampum Keeper,” and claims the right to any wampum once in the possession of any Iroquois, past, present or future. The State University was empowered to keep the wampum and began to acquire dozens of belts. Thatcher’s widow donated the four belts that were the center of the lawsuit to the State Museum in 1927. The wampum belts were eventually returned to the Onondaga Nation on October 21, 1989.

1906. The Federal Antiquities Act made it illegal to remove objects of antiquity from federal lands, including Indian reservations, without permission from the federal government. This Act did not protect Indian burials. Indian remains and objects in graves were viewed as property of the federal government. As a result, the federal agencies that oversaw Indian lands came into possession of thousands of Indian remains and funerary items.

1913. Canadian Indian Agent William M. Halliday began prosecution of Northwest Coast Indians for performing Potlatch ceremonies. Indian protests, as well as those of noted scholars, fell on deaf ears. For the next five years Indians were arrested, prosecuted, fined and jailed. The Indians were offered acquittals if they agreed not to perform any more ceremonies.

1921. Dan Cranmer held a large potlatch at Village Island that resulted in the arrest of 29 Indians. This time, the Indian agent demanded that the Indians surrender all “coppers, masks, head dresses, Potlatch [sic] blankets and boxes and all other parafanalia [sic] used solely for Potlatch purposes.” Over 450 items were confiscated and shipped east to the National Museum in Ottawa. 35 pieces were sold to George Heye of the Museum of the American Indian in New York City for \$291. Some of the Indians received compensation for their articles that were sold. About 100 objects were donated to the Royal Ontario Museum in Toronto.

1927. Marius Barbeau, noted anthropologist, described Northwest Coast objects: “It is really surprising that there still are things available, considering the number of collectors afield, the high prices offered, the need of Indians for money, and the facilities for disposing of objects through the curio stores at Prince Rupert.”

1930. Franz Boas, anthropologist, described a potlatch that he witnessed and noted a significant difference from those he had seen 45 years earlier. The host speaker described that in former times the distribution of meat was done in bowls carved in the shape of a bear, but the bowls were no longer used because “they are in the museums in New York and Berlin.”

1952. The Native Brotherhood lobbied successfully to have the Canadian government

rescind the potlatch laws, allowing for the restoration of these rituals. Museums had been securing the remaining objects and there was a real fear that the Potlatch was an endangered ritual.

1960. The U.S. Reservoir Salvage Act allowed for the development of salvage archeology to recover “relics and specimens” from construction sites, to be deposited in museums. This is when many of the current collections of ancient Indian objects began to grow in museums across the country.

1967. Kwakiutl Indians began to negotiate in earnest with the National Museum of Canada for the return of their potlatch materials. After many years of negotiations, it was agreed that two Native museums—The U’Mista Cultural Society and the Nuyumbalees Society—would house the returned materials for safekeeping. When those museums, under Native control, opened in 1979, the potlatch materials were in their possession.

1970. The American Indian Student Association of the University of Minnesota submitted a proposal to the National Science Foundation for excavation of a pioneer cemetery. Their intent was to draw attention to the existing double standard by which non-Natives morally vindicated the desecration of Indian graves in the interest of science.

1971–77. The State of California declared a moratorium on the excavation of all Indian burial sites that had been abandoned for less than two hundred years.

1971. James Nasion became one of the first Indians to write about repatriation in an article in *Western Museum Quarterly*, titled “Museums and American Indians: An Inquiry into Relationships”.

1972. The Governor ordered the State Historical Society of Iowa to remove Indian remains from exhibition after Indians picketed the museum.

March 1973. The Museum of Anthropology at the University of Michigan returned ancient Indian remains for reburial, including one of the oldest (2,000 years) from the Great Lakes area.

1974. As part of their efforts to achieve the return of religious objects, the Six Nations Council of Chiefs issued a statement that forbade the sale of such religious objects as Wampum beads, False Faces, Corn Husk Faces, Turtle Rattles, Gourd Rattles, Pumpkin Rattles, Snow Snakes, Condolence Canes, and recordings of religious songs, to non-Native Americans.

1975. The Buffalo and Erie County Historical Society returned several thousand wampum beads to the Onondaga Nation. They also loaned 45 sacred medicine masks to the traditional Longhouse people for use in ceremonies.

1976. The Union of Ontario Indians performed a citizen’s arrest of archeologist Walter Kenyon, who was excavating a Neutral Indian grave. They charged him with failing to comply with the provisions of the Cemeteries Act, and committing an indignity to human remains. Eventually it was agreed that the human remains would be reburied and the materials removed from the graves were divided between the Royal Ontario Museum and the Woodland Indian Museum, a Native-run cultural center.

1977. In a special issue of *Museum News* that focused on Museum-Indian relationships, Jerry Brody, director of the Maxwell Museum of Anthropology at the University of New Mexico, fueled the fires of fear, as he said: “This attitude of wanting to keep the more sacred items to themselves may go further. The Indians may some day want everything back, everything with religious connotations—and it would be to burn them, because they are defiled.

It constitutes a real moral issue for museums: Who has the right to these objects?" (Museum News, May/June 1977)

August 1978. The American Indian Religious Freedom Act (PL 95-341) was a joint resolution that turned out to be one of the biggest disappointments in federal-Indian relations. It required a study of existing federal laws, policies and practices to identify where such may infringe on the free exercise of Indian religions. The American Indian Law Center and the Native American Rights Fund were retained by several federal agencies to survey cases where federal policy inhibits the free expression of Indian religions. They found that federally-funded museums that held Native religious objects often refused to provide access to those collections for religious purposes and that the display of religious objects was a desecration to the Indian beliefs. Many recommendations of that study have never been enacted and few changes had been made in the laws that restrict Indian religious freedom until the current federal repatriation laws. There is currently a move to amend this Act to provide real protection of sacred sites and religious rights of Indians.

1978. Four Hopi Taalawtumsi, the most sacred carved figures, were stolen from Second Mesa, AZ. The case received national publicity through an article in *Newsweek* in 1983, bringing the issue of repatriation to public attention. The idols were sold to a collector for \$1600, who, in fear of being caught with them, later chopped them up and burned them in 1980-81. Reporters for the *Arizona Republic* investigated the case and published an article on March 14, 1993. They reported that two of the people involved in the theft died tragically and the other three have suffered sickness and bad luck. The collector, Eugene Pyle of Oakland, Oregon, dismissed any connection between the theft and bad luck: "Supernatural powers are the work of the devil. I believe in God and I go to church every Sunday. I don't see God endorsing these things." (The Curse of the Taalawtumsi, " Paul Brinkley-Rodgers and Richard Roberston, *The Arizona Republic*, No 301, March 14, 1993.) After a 13 year investigation, no one was charged with any crime.

1979-1980. The National Museum of Canada returned potlatch materials that had been removed in 1922 to the Kwakiutl.

1979. The Archeological Resources Protection Act Amendments broadened the definition of archeological resources and stiffened the penalties for looting of sites on federal lands. Indian remains became referred to as "archeological resources," and were considered property of the U.S. The act affirmed the Native right to consent to excavations and removal of such resources on Indian lands.

August 1979. President Carter's American Indian Religious Freedom Act Report was delivered to the Secretary of the Interior. That report mapped out ideas that are still being debated—Indians' view of communal property; museum possession of religious objects as severe restriction on Indian religious freedom; federal museums obligation to consult with Indians on exhibition, labeling, conservation and storage of sacred objects; the necessity for putting an end to trafficking in stolen objects, and so forth.

1980. The North American Indian Museum Association assisted the Zuni in negotiations with the Smithsonian regarding the return of the Ahayu:da (War Gods). The Zuni have been successful in the recovery of nearly all of the War Gods thought to exist (38 are reported to now be in use in a concrete house with open roofs protected with barbed wire to discourage a

new round of thefts). Since 1978, the Zuni have sought the return of 67 War Gods. The War Gods had become popular collectors' items in the 1920s and 1930s as part of a modern art movement that honored so-called "primitive" art, especially among the surrealists. The Zuni have used the US Justice Department to recover War Gods that were placed on auction, maintaining that, as communal property, the only way for the War Gods to leave the community was by theft. Auction houses have become aware of the issue: "There is no market for Zuni War Gods anymore," said Bernard de Grunne of Sotheby's. "They are simply too much trouble to handle." ("Quiet Effort to Regain Idols May Alter Views of Indian Art," Roberto Suro, *The New York Times*, August 13, 1990)

1980. Chicago art dealer Meryl Platt sold three stolen Hopi masks to collectors, who in turn donated them to the Art Institute of Chicago and received an inflated tax deduction based upon Platt's certification of value. The FBI confiscated the masks and returned them to the Hopi. Platt pleaded guilty to felony tax evasion and embezzlement charges, but only received a \$1,000 fine.

1981. Two collections of Indian burial material were re-interred at the request of the Native American Heritage Commission of California. 840 human remains were reburied. In opposition to the idea of reburial of the grave materials, the Committee for the Preservation of Archeological Collections was formed (eventually having 300 members); it successfully filed suit to stop the reburial of the artifacts.

1981. The American Association of Museums published the "Museum Trusteeship" document containing ethical standards for the treatment of Native American collections.

May 21, 1981. The National Congress of American Indians adopted a resolution that criticized the federal government for not acting on proposed regulations for the American Indian Religious Freedom Act and, in effect, making the law "a nullity."

1982. The National Park Service announced its "Guidelines for the Disposition of Archaeological and Historical Human Remains," suggesting consultation with Indians on sensitive issues of scientific, cultural and religious values.

1983. Five ritual objects were stolen from the Museum of the American Indian as the market demand for sacred Indian objects actually increased with all the public outcry for repatriation. Although charges were never filed, Indian artifact dealers Christopher Selser and the ACA American Indian Art Gallery of New York were implicated in the press.

1984. The National Museum of American History (NMAH) published a comprehensive bibliography on repatriation. Five Modoc remains were returned to their descendants from the Smithsonian.

March 24, 1985. In a letter to the editor of *The New York Times*, Michael Bush, executive director of the American Indian Community House in New York City, called upon the Museum of the American Indian either to provide access to Indians to their own cultural patrimony, or "give it back to the Indians."

1985. The Smithsonian notified 225 federally recognized tribes of the Indian remains in their collection with an inventory and letter explaining methods of storage and public access. In four years, only 16 tribes requested additional information on the collections.

March 1985. Judge C. Lenton Sartain of the 20th Judicial District Court ruled that 18th century artifacts uncovered on private land were the property of the Tunica-Biloxi tribe of Louisiana. Leonard Charrier, a self-described "treasure hunter," lost his bid for the right to

possess or receive compensation for the two and one-half tons of artifacts he uncovered from 1967 to 1970 at Tunica burials. In 1975, the state had assumed the position of the landowners in Charrier's suit, claiming that "in the absence of lawful heirs" the state represented the interests of the public. The Tunica-Biloxi tribe intervened in 1981, claiming title to the collection as buried materials of their ancestors, who lived at the site from 1731 to 1764. The state supported their position. The Appeals Court upheld the decision in November of 1986. A year later the human remains from that site were reburied, and the tribe broke ground for a museum to house the objects.

1986. The National Museum of Natural History (NMNH) established an American Indian program to serve as an outreach to Indian communities and to encourage research and programming by and about Indian peoples. Requests for materials from the Smithsonian began with the Zuni; since that time, 120 requests have been received by NMNH.

1986. Senator John Melcher (D-MT) introduced S.2952, the Native American Museum Claims Commissions Act or "The Bones Bill," to provide a forum for Indians and museums to resolve disputes over human remains and sacred objects. His bill did not require repatriation. The bill was eventually defeated due to strong opposition from museums.

September 26, 1986. The National Congress of American Indians, during its annual convention in Phoenix adopted a resolution that "rejects the federal laws which define Indian and Native burial sites, human remains and grave goods as 'archeological resources' and which permit the continued curation, storage and display of these sacred materials in museums, universities and other institutions. Federal laws must be changed to reflect Indian and Native religious and cultural rights to determine the treatment and disposition of these materials."

December 1986. *Anthropology Newsletter* aired various sides of what became known as the Archeologist's dilemma—support science and be depicted as "ghoulish exploiters," or support Indian wishes and "sacrifice valuable scientific information." Randall H. McGuire of the State University of New York Binghamton noted that Indian remains are treated differently from others: "Usually when a coroner ascertains remains to be non-Indian, they and any materials that accompany them are reburied in a recognized cemetery...Indian remains in the same situation are almost always turned over to archaeologists for study and curation." James Schoenwetter of Arizona State saw a different inequity—a preference for Indian claimants: "The Indian claim of privileged access to the property and its disposition is based on racial, not kin or cultural, affiliation. However, the archaeologist's claim is based on the proposal that the cultural heritage benefit of the archeological collection is greater for American citizens in general than it is for American Indians."

January 13, 1987. Arizona State University held a conference, "The Role of Tribal Governments in Public Archeology," to bring together archeologists and Indians in an attempt to show that legislation was not necessary to regulate the handling of Indian remains.

February 1987. Real estate developer AMREP agreed to rebury five Anasazi Indian remains and the thousands of objects associated with them at the request of the Sandia Pueblo in New Mexico.

March 1987. The Smithsonian Institution (SI) returned two War Gods to the Zuni that had been removed by Smithsonian anthropologists James Stevenson and Frank Cushing a century before.

May 1987. The Larsen Bay Tribal Council (Kodiak Island, Alaska) passed a resolution calling for return of ancestral remains and associated materials from the National Museum of Natural History.

1987. The Museum of New Mexico formed a Committee on Sensitive Materials that worked with the existing Native American Advisory Committee to develop a proactive policy by which the museum would contact tribes regarding their collections.

August 1987. The National Congress of American Indians held meetings to allow Indians to comment on the proposed policy of the U.S. Forest Service on the protection of Indian burial sites and the reburial of Indian remains from regions 8 and 9, covering all federal lands east of the Mississippi, and lands in Minnesota, Iowa, Michigan, Arkansas, Louisiana, Oklahoma, and Texas.

November 1987. Smithsonian Institution Secretary Robert Mc. Adams wrote in *Smithsonian Magazine* (Vol. 18, No. 8): "Assuming (as is surely implied by the Smithsonian's charter) that scholarly research and public education are valid ends of public policy, how does a line get drawn around either ancestry or sacredness as a preeminent principle?" Adams had previously stated that "we have an obligation to return the Indian skeletal remains in our collection to tribal descendants." He opposed returning remains where no direct relationship could be established.

1988. The American Association of Museums (AAM) published its "Policy Regarding the Repatriation of Native American Ceremonial Objects and Human Remains."

1988. The North Dakota State Historical Society decided to return Indian remains for reburial, but the North Dakota Ethics Preservation Council sought a court injunction to stop the repatriation on the grounds that the remains contribute to knowledge of history.

1988. The University of Vermont decided to return ancient Abenaki Indian remains for reburial, provided the Abenaki Tribe would purchase a site specifically for the reburial.

1988. A judge ordered the Glenbow Museum to remove an Iroquois medicine mask from an exhibition at the request of the Mohawk Nation.

May 1988. Indians from various tribes gathered in Uniontown, KY to rebury some of the 1200 Indian remains that were unearthed by ten men who were charged with illegally disturbing the Indian burial ground. The state passed a law making the desecration of an Indian grave a felony.

May 8, 1988. Eleven sacred wampum belts were returned from the Museum of the American Indian in New York City to the Six Nations Council of Chiefs in Ontario.

September 1988. Auctioneer Charles Brevard of Baltimore, MD returned three 1880s eagle feather headdresses to the Blackfeet, after learning that they are considered sacred.

1988. The Pawnee Tribe of Oklahoma represented by the Native American Rights Fund (NARF) started official action to repatriate all dead Pawnee Indians and funerary items.

January 1989. The Pawnee of Oklahoma released preliminary report of the Nebraska State Historical Society's holdings as part of their repatriation attempts.

1989. Under the auspices of Senator John McCain (R-AZ), Director Michael J. Fox of The Heard Museum in Phoenix and Executive Director Suzan Shown Harjo of the National Congress of American Indians convened the "Dialogue on Museum and Native American Relations," comprised of representatives of museum and scientific communities and Native Nations.

1989. The FBI seized a stolen Hopi mask at an antiques fair in New York. It was one of

60 ceremonial objects stolen in the 1960s. The mask was part of a display organized for the Museum of American Folk Art by Santa Fe dealer Joshua Baer, who had sold the stolen mask to a Connecticut collector for \$75,000. Baer claimed that the mask was sold by Hopi elders in 1980 and that Indians in the Southwest had a scam going on “whereby a member of a tribe sells an artifact, waits several months and then reports it as stolen. The article is returned to the tribe, then sold again.” (Interview in *Maine Antique Digest*, Dec. 1989)

1989. The Field Museum of Chicago adopted a repatriation policy and returned remains of Indians to tribes.

1989. The American Anthropology Association formed a Commission on Native American Remains. The commission included JoAllyn Archambault and Alfonso Ortiz, anthropologists who are Indians. Their statement included the following assessment of anthropology: “Human remains are to be treated with respect. Respect can include careful curation and a recognition that valuable anthropology, historical, and medical information can be obtained through analysis. Remains have important value to the science of humanity. . . This information has provided a more realistic understanding of the human past and has benefit for everyone. . . Concerned descendant communities should be involved in the decision making process.” The Commission opposed federal legislation on the issue, maintaining it would destroy local solutions and “perpetuate the stereotype of THE American Indian rather than respecting tribal distinctiveness and local options.” They also expressed a fear that tribal museums would be impacted negatively and that Native professionals were “deprived of opportunity to contribute to the proposed law.”(Report by Nancy Lurie, Milwaukee Public Museum, n.d.)

May 1989. The Office of Public Affairs of the Smithsonian published an information statement on their Native American collections to address the main questions that had surfaced. It stated that remains were in their collection, that human remains were needed for scientific and medical research, that remains of named individuals would be returned to their descendants if requested, that there were three cases of repatriation, and that 166 Indian remains were on exhibit. It concluded with a report on the negotiations over the collections of the Museum of the American Indian.

May 23, 1989. Nebraska Gov. Kay Orr signed a law requiring the Nebraska public museums to return Indian remains to appropriate Native American Tribal governments. This was the first general statute requiring repatriation.

May 26, 1989. The Blackfeet Tribe in Montana conducted a reburial ceremony for sixteen remains that the Smithsonian’s National Museum of Natural History had returned to the Blackfeet nine months earlier.

June 5, 1989. James Rosse, vice president and provost of Stanford University, announced that the University would return 550 Indian remains to the Ohlone People, requesting a “specific period for scholarly analysis before reburial.” Stanford also decided to protect the 50 known Indian archeological sites on their own campus, some dating back 5,000 years.

1989. The University of Minnesota agreed to return the remains of nearly 1,000 Indians to comply with a 1981 state law requiring repatriation of Indian remains. Six bills were submitted in the U.S. Congress to deal with repatriation.

November 28, 1989. The National Museum of the American Indian Act (PL 101-185) was signed into law after the historic agreement between Indian and Smithsonian representatives

to include a repatriation provision. The Act called for the return of human remains from the Smithsonian, as well as a national advisory committee and \$1 million for fiscal year 1991 to carry out the inventory of the human remains and associated funerary objects.

January 1990. The “Report of the Dialogue on Museum and Native American Relations” was presented to Congress in a Capitol Hill Press conference sponsored by Senator Inouye (D-HI) and Senator McCain (R-AZ).

1990. The Science Museum of Minnesota returned 68 Indian remains and associated materials to the Minnesota Indian Affairs Council for reburial as required by state law. The Museum was one of the first in the country to establish an Indian Advisory Committee.

May 14, 1990. At a Senate Select Committee on Indian Affairs hearing, Tom Livesay of the AAM testified that proposed repatriation legislation provided vague definitions, were costly to investigate, placed the burden of proof on museums, conflicted with the fiduciary responsibility of museums and did not include museums on the review committee to resolve disputes. He also stated that museums should be “research facilities and educators of the public while respecting the human rights of native peoples and of all people that enter our doors.”

June 1990. The Missouri Historical Society decided to return a collection of incomplete skeletons that “had little ability to yield information of any value,” to the American Indian Center of Mid-America in St. Louis. (“Success Stories,” by Evan Roth, *Museum News*, Jan/Feb 1991)

1990. Frank Talbot, director of the National Museum of Natural History, sent 1,500 letters to Native Nations and organizations to solicit nominations for the five-person advisory committee mandated by the 1989 law to monitor the Smithsonian’s repatriation process.

June 1990. *Prehistoric Antiques* published a legislative alert (Weidner Publishing, Vol. X, No. 2 1/2) that encouraged its readers to write to Senators to protest S. 1980, the repatriation bill: “Thousands of people have spent their entire lives legally collecting and preserving artifacts. If this bill passes the way it is written, you are potentially making felons of these people... It is not safe to assume that all of the items will be retained or reburied!! If some are resold, what is to prevent their re-repatriation, or their re-re-repatriation?... Treat the bill as if you owned a million dollars worth of Native American Cultural patrimony that you paid your own money for (legally of course).”

July 17, 1990. At a House Interior and Insular Affairs Committee hearing on HR 5237, repatriation legislation Ray Thompson of the Arizona State Museum delivered the American Association of Museums (AAM) position for 400 museums that held Native collections, testifying that a national standard conflicted with a case-by-case approach preferred by Indians and that inventories would cost museums \$60 million.

July 31, 1990. AAM President Edward Able, Jr. expressed AAM’s opposition to S. 1980, stating that it would create an adversarial relationship between Indians and museums, leading to more litigation. He testified that instead of requiring museums to provide proof of ownership, the bill should require Native groups to provide proof that the objects in question were taken without their consent; that museums should receive just compensation for the property they are forced to return under this law; and that the Smithsonian should not be exempt. He said the bill, “would cause irreparable damage to the mission of museums to provide the public with knowledge of the richness of Native American culture and contribu-

tions Native American have made, and continue to make to our nation. We also believe that ultimately the interests of Native Americans will not be well served, as vagueness of definitions regarding standing (to submit claims), the possibility of improper returns, and thus the potential loss of irreplaceable patrimony.” After the Senate Select Committee on Indian Affairs approved the measure, the AAM strategy was to: (1) stress positive relationships and educational benefits to Indians; (2) stress cases of “proper disposition of materials;” (3) stress complexity and harm to the museum because of requirements, costs, time and conflicts with concepts of fiduciary responsibilities.

September 1990. The Omaha of Nebraska began to receive the first of more than two hundred objects to be repatriated from the Peabody Museum of Archeology and Ethnology of Harvard University. Fearful for their future, the Omaha had “loaned” the objects to the Museum for safekeeping.

October 1990. Smithsonian Institution Secretary Robert Mc. Adams wrote an editorial in the *Smithsonian Magazine* (Vol. 21, No. 7) recognizing the political reality of repatriation. Although characterizing repatriation as an unquestionable loss to science, he recognized that Indians have an “elementary, overriding right” to bury their dead. Adams brought the common museum concerns to the forefront by questioning the legal concept of “cultural patrimony”. He found value in the idea that communal property cannot be legitimately removed, but acknowledged that individuals and collectors may have not been cognizant of legal title transfer issues in the past. He concluded: “We need to recognize American Indians not primarily as involuntary, deceased suppliers of some of our greatest collections, but as a living, growing part of the culturally diverse streams the Smithsonian exists to serve. And we can best serve Indians by actively seeking out ways to make available our material and human resources for community building and strengthening.”

October 27, 1990. The Arizona State Museum adopted a Repatriation Policy that stated, “certain objects of sacred, ceremonial, and cultural patrimony are not appropriately held in museums and that for museums to retain them is inimical to the spirit of respect, understanding, and cooperation...”

November 1990. The Native American Graves and Repatriation Act (NAGPRA) became law (PL 101-601) mandating the preparation of collections inventories and the notification of tribal groups regarding museum holdings that may be subject to repatriation. The Act recognizes the human rights of Indians, offers equal protection for the religious rights of Indians and will mitigate the negative impact of the loss of sacred objects sustained in the past. In effect, the Act is a restoration of the property rights of Indians, in terms of communal objects, and ends a pattern of one-way transfers of objects from Indian hands to non-Indian institutions. The Act will increase public knowledge about Indians because, for the first time ever, there will be a systematic review of what are sacred objects and why they are sacred, and how they should be handled. Museums will learn more about the cultural world views of contemporary Indians. The Smithsonian is specifically exempted from the law.

Winter 1990. The *NARF Legal Review* stated that NAGPRA “revolutionized federal policy concerning Native American human remains. For the first time, Congress has accepted the principle that Indian people are entitled to the return of their ancestors’ remains and of the items buried with them. Finally, Congress has mandated that cultural objects stolen from

tribes must be returned when asked for, and has recognized that Indian people are not simply the objects of anthropological study, but a people with their own culture and customs that must be accorded the respect that they deserve.” (*NARF Legal Review*, Vol. 16, No. 1. Winter 1990, Boulder, CO.)

March 5, 1991. The National Museum of the American Indian (NMAI) announced a progressive Repatriation Policy that recognizes “all Native materials, including human remains, funerary objects, ceremonial and religious objects and communally-owned property, together with all culturally-specific information, must be treated as the sole property of the affected Native American culturally-affiliated group and with the utmost respect.” In addition to the return of sacred objects, human remains, funerary objects, communally-owned objects and objects acquired illegally, the NMAI will also consider the return of objects that are held in abundance. The NMAI was not included in either the 1989 or the 1990 repatriation laws, so its own policy governs the museum.

April 1991. A letter from Smithsonian Institution Secretary Mc. Adams stated that the material from Larsen Bay should be repatriated. Skeletal remains were returned in September, 1991 and there was a reburial ceremony at Larsen Bay the following month.

May 20, 1991. The AAM Committee on Museums and Native American Collaboration held its first meeting, co-chaired by NMAI Program Director Richard Hill and Heard Museum Director, Martin Sullivan. Its charge was:

1. expeditiously recommending specific, practical, educational activities, publications, projects and programs;
2. advising, organizing, planning and implementing, with the staff of AAM and others, projects and programs that further the charge of the committee;
3. advising AAM editorial staff on the content of publications;
4. maintaining a network of informed people who are able to offer advice on future AAM policy decision.

May 1991. Elizabeth Sackler purchased three ceremonial masks of the Hopi and Navajo for \$39,050 at auction in New York City with the intent of returning them to the Indians who had protested the Sotheby’s sale. As a result, Sackler established the American Indian Ritual Object Repatriation Foundation, making tax benefits a possibility for collectors who donate sacred objects to the foundation, as a way of recouping their investment. The foundation pledged to work to repatriate the objects to their rightful Indian owners. The Dineh Spiritual and Cultural Society wrote to Sotheby’s, “any sale of sacred paraphernalia of Native Americans [is] highly disrespectful and a major assault on the destruction of Native American religion.” (“Indian Leaders Battle Auction of Sacred Items,” Amei Wallach, *New York Newsday*, NY, NY., May 22, 1991)

August 2, 1991. Secretary of the Interior Manuel Lujan signed the Charter of the NAGPRA Review Committee; this charter outlines NAGPRA’s duties as monitoring the inventory and identification process; reviewing the identity or cultural affiliation or the return of items at the request of any affected party; facilitating the resolution of disputes; compiling an inventory of unidentified human remains and a process for their disposition; consulting with Indian tribes and museums; consulting on implementing regulations; submitting an annual progress report to Congress. Appointed to the Review Committee were Rachel Craig (Inupaiq), Dan Monroe,

Tessie Naranjo (Santa Clara Pueblo), Martin Sullivan, William Tallbull (Northern Cheyenne) and Philip Walker.

August 27, 1991. In a significant display of unity, a jointly signed letter was sent to the Department of the Interior by the leaders of the American Anthropological Association, American Association of Museums, Archeological Institute of America, American Association of Physical Anthropologists, American Association of Universities, Association of American Indian Affairs, National Conference of State Historic Preservation Officers, National Trust for Historic Preservation, Native American Rights Fund, Society for American Archeology, National Congress of American Indians, Preservation Action, and the Society of Professional Archeology. The letter requested, on behalf of the organizations most affected by NAGPRA, funds in the federal budget for fiscal year 1993 for the inventory process, quick establishment of the Review Committee and quick development by the National Park Service of the regulations for the Act.

November 25, 1991. The FBI declined to prosecute anyone connected with the theft of a Hopi ceremonial mask that was confiscated in New York in 1989 and returned to the Hopi after a two-year investigation. Two Hopis, who were believed to have stolen and then sold the mask, had since died.

January 1992. The Smithsonian returned 144 associated funerary objects to Larsen Bay.

Feb 7–9, 1992. The Canadian Task Force on Museums and First Peoples held a national conference to present its findings and seek non-legislative solutions to repatriation and representation. Their report, “Turning the Page: Forging New Partnerships between Museums and First Peoples,” suggested cooperative relationships and rejected legislative solutions.

February 1992. The San Ildefonso Pueblo asserted ownership of a 15th century ceramic pot that the New Mexico State District Court had awarded to the non-Indian who found it. The non-Indian claimed the pot as “abandoned property” that was found in a cave in White Rock Canyon. The Pueblo prevailed.

April 3, 1992. After protests by Native American groups, the Dickson Mound Museum of Illinois was closed on orders of Governor Jim Edgar. It was the last public museum displaying remains of ancient Indians.

April 14, 1992. The Heard Museum returned to the Hopi a ceremonial War Shield that had been stolen twenty years earlier. It was reported to be the first time that The Heard repatriated an object to Indians. The Museum returned this sacred object directly to the religious society, rather than to the tribal government. The museum decided to return the shield after two years of negotiations and an investigation by the FBI.

September 11, 1992. The NMAI Board of Trustees approved the return of nine potlatch objects to the Kwakiutl of British Columbia. These objects had been confiscated by the Royal Canadian Mounted Police in 1921, as the Canadian government had banned the potlatch in 1884.

December 2–6, 1992. The NMNH Repatriation Office sponsored a symposium on the Larsen Bay materials at the American Anthropology Association conference in San Francisco.

December 7, 1992. The General Counsel of the Smithsonian issued a memorandum concurring with the NMAI Trustees that the Institution’s Repatriation Review Committee does not have jurisdiction over the new museum (NMAI). The 1989 Act clearly gave “sole authority” to dispose of collections to the NMAI Board of Trustees.

December 8, 1992. Draft Four of the NAGPRA regulations were distributed to AAM members for comment. At the time of printing of this publication, the Interior Department regulations required by the 1990 NAGPRA were not published as a final rule.

December 21, 1992. The Repatriation Review Committee of the Smithsonian informed tribal leaders that requests for information could be addressed to the Repatriation Office and explained that their jurisdiction included sacred objects as well as human remains.

March 23, 1993. Cecil Antone of the Gila River Pima-Maricopa Indian Committee representing the Keepers of the Treasures (a national organization of Indian and Native Hawaiian cultural preservation programs), the National Congress of American Indians, National Indian Education Association, Menominee Tribe, Seminole Tribe and Metlakatla Indian Community of Alaska testified before the House Interior Appropriations Subcommittee requesting that \$10 million be added to the National Historic Preservation Act funding for grants to Indian tribes and \$10 million added for tribes and museums for implementation of NAGPRA. The Native American Rights Fund, American Association of Museums, Association of American Universities, Society for American Archeology, Society for Historical Archeology, and the National Conference of State Historic Preservation Officers supported that same request.

October 1993. The NMAI Trustees repatriated 87 sacred objects to the Pueblo of Jemez. The religious leadership of the Pueblo, which remained a traditional theocracy, negotiated the terms of the repatriation, including the selection of one item, a War Shield, permitted to be photographed and published.

Symbolizing the repatriation of 86 objects, a ceremonial shield was passed from the hands of Ray Gonyea, NMAI repatriation manager, and Clara Sue Kidwell, assistant director for cultural resources at NMAI (far left), to the delegation of leaders from the Pueblo of *Jémez* on October 27, 1992. The delegation included, from left, behind table, Frank Fragua, leader of a traditional medicine society; William Whatley, tribal archaeologist; War Captain Randolph Padilla; Gov. Paul Tosa; photographer George Toya; War Chief Pete Toya; Traditional Leader Frank Loretto; Stuart Gachupin, first lieutenant governor; and Frank Gachupin, traditional leader. Photo by Pamela Dewey, courtesy of NMAI.



SECTION VI. APPENDICES



Shoshone-Bannock delegation Hobby Hevewah, Corbin Harney, and Diane Yupe viewing ethnographic objects at the Smithsonian's Museum Support Center. Photo courtesy of Jane Beck, Repatriation Office, NMNH, Smithsonian Institution.

Appendix A.

NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

104 STAT 3048¹

PUBLIC LAW 101-601

101st Congress

An Act

Nov. 16, 1990
[H.R. 5237]

To provide for the protection of Native American graves, and for other purposes.

Native
American

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

Graves
Protection
and
Repatriation
Act.

SECTION 1. SHORT TITLE.

This Act may be cited as the “Native American Graves Protection and Repatriation Act.”

Hawaiian
Natives
Historic
preservation.
25 USC 3001
note
25 USC 3001.

SEC. 2. DEFINITIONS.

For purposes of this Act, the term-

(1) “burial site” means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited.

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

(3) “cultural items” means human remains and-

(A) “associated funerary objects” which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.

(B) “unassociated funerary objects” which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, 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.

(C) “sacred objects” which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and

(D) “cultural patrimony” which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

104 STAT. 3049

¹References to *Statutes-At-Large* pagination of this law are provided as a marginal note at the top of each new *Statutes* page.

(4) “Federal agency” means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution.

(5) “Federal lands” means any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971.

(6) “Hui Malama I Na Kupuna O Hawai‘i Nei” means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaii by that name on April 17, 1989, for the purpose of providing guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues.

(7) “Indian tribe” means any tribe, band, national, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(8) “museum” means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency.

(9) “Native American” means of, or relating to, a tribe, people, or culture that is indigenous to the United States.

(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 which-

(A) serves and represents the interests of Native Hawaiians,

(B) has as a primary and stated purpose the provision of service to Native Hawaiians, and

(C) 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) “Office of Hawaiian Affairs” means the Office of Hawaiian Affairs established by the constitution of the State of Hawaii.

(13) “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 to cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as applied in section 7(c), result in a Fifth Amendment taking by the United States as determined by the United States Claims Court pursuant to 28 U.S.C. 1491 in which event the “right of possession” shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

(14) “Secretary” means the Secretary of the Interior.

(15) “tribal land” means-

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

(B) all dependent Indian communities;

(C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3.

SEC. 3. OWNERSHIP.

(a) NATIVE AMERICAN HUMAN REMAINS AND OBJECTS.-The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after the date of enactment of this Act shall be (with priority given in the order listed)-

(1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or

(2) in any case in which such lineal descendants cannot be ascertained, and in the case of unasociated funerary objects, sacred objects, and object of cultural patrimony-

(A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;

Claims.

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

(C) if the cultural affiliation of the objects cannot be reasonably ascertained and if 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 some Indian tribe-

(1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or

(2) if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects that the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.

Regulations

104 STAT. 3051

(b) UNCLAIMED NATIVE AMERICAN HUMAN REMAINS AND OBJECTS.-Native American cultural items not claimed under subsection (a) shall be disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee established under section 8, Native American groups, representatives of museums and the scientific community.

(c) INTENTIONAL EXCAVATION AND REMOVAL OF NATIVE AMERICAN HUMAN REMAINS AND OBJECTS.-The international removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only if-

(1) such items are excavated or removed pursuant to a permit issued under section 4 of the Archaeological Resources Protection Act of 1979 (93 Stat. 721; 16 U.S.C. 470aa et seq.) which shall be consistent with this Act;

(2) such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization;

(3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b); and

(4) proof of consultation or consent under paragraph (2) is shown.

(d) INADVERTENT DISCOVERY OF NATIVE AMERICAN REMAINS AND OBJECTS.- (1) Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after the date of enactment of this Act shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands, if known or readily ascertainable, and, in the case of lands that have been selected by an Alaska Native Corporation or group organized pursuant to the Alaska Native Claims Settlement Act of 1971, the appropriate corporation or group. If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection. Following the notification under this

subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, the activity may resume after 30 days of such certification.

(2) The disposition of and control over any cultural items excavated or removed under this subsection shall be determined as provided for in this section.

(3) If the Secretary of the Interior consents, the responsibilities (in whole or in part) under paragraphs (1) and (2) of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary with respect to any land managed by such other Secretary or agency head.

(e) RELINQUISHMENT.—Nothing in this section shall prevent the governing body of an Indian tribe or Native Hawaiian organization from expressly relinquishing control over any Native American human remains, or title to or control over any funerary object, or sacred object.

104 STAT. 3052

SEC. 4. ILLEGAL TRAFFICKING.

(a) ILLEGAL TRAFFICKING.—Chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new section:

“§ 1170. Illegal Trafficking in Native American Human Remains and Cultural Items

“(a) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains as provided in the Native American Graves Protection and Repatriation Act shall be fined in accordance with this title, or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 5 years, or both.

“(b) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both.”.

(b) TABLE OF CONTENTS.—The table of contents for chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new item:

“1170. Illegal Trafficking in Native American Human Remains and Cultural Items.”.

Museums.
25 USC
3003

SEC. 5. INVENTORY FOR HUMAN REMAINS AND ASSOCIATED FUNERARY OBJECTS.

(a) IN GENERAL.—Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item.

(b) REQUIREMENTS.—(1) The inventories and identifications required under subsection (a) shall be—

(A) completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders;

(B) completed by not later than the date that is 5 years after the date of enactment of this Act, and

(C) made available both during the time they are being conducted and afterward to a review committee established under section 8.

(2) Upon request by an Indian tribe or Native Hawaiian organization which receives or should have received notice, a museum or Federal agency shall supply additional available documentation to supplement the information required by subsection (a) of this section. 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 acquisition and accession of Native American human remains and associated funerary objects subject to this section. Such term does

104 STAT. 3053

not mean, and this Act shall not be construed to be an authorization for, the initiation of new scientific studies for such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains or objects.

(c) EXTENSION OF TIME FOR INVENTORY.-Any museum which has made a good faith effort to carry out an inventory and identification under this section, but which has been unable to complete the process, may appeal to the Secretary for an extension of the time requirements set forth in subsection (b)(1)(B). The Secretary may extend such time requirements for any such museum upon a finding of good faith effort. An indication of good faith shall include the development of a plan to carry out the inventory and identification process.

(d) NOTIFICATION.- (1) If the cultural affiliation of any particular Native American human remains or associated funerary objects is determined pursuant to this section, the Federal agency or museum concerned shall, not later than 6 months after the completion of the inventory, notify the affected Indian tribes or Native Hawaiian organizations.

(2) The notice required by paragraph (1) shall include information-

(A) which identifies each Native American human remains or associated funerary objects and the circumstances surrounding its acquisition;

(B) which lists the human remains or associated funerary objects that are clearly identifiable as to tribal origin; and

(C) which lists the Native American human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with that Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects culturally affiliated with the Indian tribe or Native Hawaiian organization.

Federal Register publication.

(3) A copy of each notice provided under paragraph (1) shall be sent to the Secretary who shall publish each notice in the Federal Register.

(e) INVENTORY.-For the purposes of this section, the term "inventory" means a simple itemized list that summarizes the information called for by this section.

25 USC 3004.

SEC. 6. SUMMARY FOR UNASSOCIATED FUNERARY OBJECTS, SACRED OBJECTS, AND CULTURAL PATRIMONY.

Museums

(a) IN GENERAL.-Each Federal agency or museum which has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of such objects based upon available information held by such agency or museum. The summary shall describe the scope of the collection, kinds of objects, included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable.

(b) REQUIREMENTS.- (1) The summary required under subsection (a) shall be-

(A) in lieu of an object-by-object inventory;

(B) followed by consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders; and

104 STAT. 3054

(C) completed by not later than the date that is 3 years after the date of enactment of this Act.

(2) Upon request, Indian Tribes and Native Hawaiian organizations shall have access to records, catalogues, relevant studies or other pertinent data for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American objects subject to this section. Such information shall be provided in a reasonable manner to be agreed upon by all parties.

25 USC 3005.

SEC. 7. REPATRIATION.

(a) REPATRIATION OF NATIVE AMERICAN HUMAN REMAINS AND OBJECTS POSSESSED OR CONTROLLED BY FEDERAL AGENCIES AND MUSEUMS.- (1) If, pursuant to section 5, the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organi-

zation is established, then the Federal agency or museum, upon the request, of a known lineal descendant of the Native American or of the tribe or organization and pursuant to subsections (b) and (e) of this section, shall expeditiously return such remains and associated funerary objects.

(2) If, pursuant to section 6, the cultural affiliation with a particular Indian tribe or Native Hawaiian organization is shown with respect to unassociated funerary objects, sacred objects or objects of cultural patrimony, then the Federal agency or museum, upon the request of the Indian tribe or Native Hawaiian organization and pursuant to subsections (b), (c) and (e) of this section, shall expeditiously return such objects.

(3) The return of cultural items covered by this Act shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items.

(4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 5, or the summary pursuant to section 6, or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (e) and in the case of unassociated funerary objects, subsection (c), such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.

(5) Upon request and pursuant to subsections (b), (c) and (e) sacred objects and objects of cultural patrimony shall be expeditiously returned where-

(A) the requesting party is the direct lineal descendant of an individual who owned the sacred object;

(B) the requesting Indian tribe or Native Hawaiian organization can show that the object was owned or controlled by the tribe or organization; or

(C) the requesting Indian tribe or Native Hawaiian organization can show that the sacred object was owned or controlled by a member thereof, provided that in the case where a sacred object was owned by a member thereof, there are no identifiable lineal descendants of said member or the lineal descendants, upon notice, have failed to make a claim for the object under this Act.

104 STAT. 3055

(b) SCIENTIFIC STUDY.-If the lineal descendant, Indian tribe, or Native Hawaiian organization requests the return of culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.

(c) STANDARD OF REPATRIATION.-If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this Act and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession, then such agency or museum shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

(d) SHARING OF INFORMATION BY FEDERAL AGENCIES AND MUSEUMS.-Any Federal agency or museum shall share what information it does possess regarding the object in question with the known lineal descendant, Indian tribe, or Native Hawaiian organization to assist in making a claim under this section.

(e) COMPETENT CLAIMS.-Where there are multiple requests for repatriation of any cultural item and, after complying with the requirements of this Act, the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this Act or by a court of competent jurisdiction.

(f) MUSEUM OBLIGATION.-Any museum which repatriates any item in good faith pursuant to this Act shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this Act.

SEC. 8. REVIEW COMMITTEE

(a) ESTABLISHMENT.-Within 120 days after the date of enactment of this Act, the Secretary shall establish a committee to monitor and review the implementation of the inventory and identification process and repatriation activities required under sections 5, 6 and 7.

(b) MEMBERSHIP.-

- (1) The Committee established under subsection (a) shall be composed of 7 members.

(A) 3 of whom shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders with at least 2 of such persons being traditional Indian religious leaders;

(B) 3 of whom shall be appointed by the Secretary from nominations submitted by national museum organizations and scientific organizations; and

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

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(2) The Secretary may not appoint Federal officers or employees to the committee.

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

(4) Members of the committee established under subsection (a) shall serve without pay, but shall be reimbursed at a rate equal to the daily rate for GS-18 of the General Schedule for each day (including travel time) for which the member is actually engaged in committee business. Each member shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5, United States Code.

(c) RESPONSIBILITIES.-The committee established under subsection (a) shall be responsible for-

(1) designating one of the members of the committee as chairman;

(2) monitoring the inventory and identification process conducted under sections 5 and 6 to ensure a fair, objective consideration and assessment of all available relevant information and evidence;

(3) upon the request of any affected party, reviewing and making findings related to-

(A) the identity or cultural affiliation of cultural items, or

(B) the return of such items;

(4) facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable;

(5) compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains;

(6) consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the committee affecting such tribes or organizations;

(7) consulting with the Secretary in the development of regulations to carry out this Act;

(8) performing such other related functions as the Secretary may assign to the committee; and

(9) making recommendations, if appropriate, regarding future care of cultural items which are to be repatriated.

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

(e) RECOMMENDATIONS AND REPORT.-The committee shall make the recommendations under paragraph (c)(5) in consultation with Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups.

(f) ACCESS.-The Secretary shall ensure that the committee established under subsection (a) and the members of the committee have reasonable access to Native American cultural items under review and to associated scientific and historical documents.

(g) DUTIES OF SECRETARY.-The Secretary shall-

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- (1) establish such rules and regulations for the committee as may be necessary, and
- (2) provide reasonable administrative and staff support necessary for the deliberations of the committee.

(h) ANNUAL REPORT.-The committee established under subsection (a) shall submit an annual report to the Congress on the progress made, and any barriers encountered, in implementing this section during the previous year.

(i) TERMINATION.-The committee established under subsection (a) shall terminate at the end of the 120-day period beginning on the day the Secretary certifies, in a report submitted to Congress, that the work of the committee has been completed.

Museums.

25 USC 3007.

SEC. 9. PENALTY.

(a) PENALTY.-Any museum that fails to comply with the requirements of this Act may be assessed a civil penalty by the Secretary of the Interior pursuant to procedures established by the Secretary through regulation. A penalty assessed under this subsection shall be determined on the record after opportunity for an agency hearing. Each violation under this subsection shall be a separate offense.

(b) AMOUNT OF PENALTY.-The amount of a penalty assessed under subsection (a) shall be determined under regulations promulgated pursuant to this Act, taking into account, in addition to other factors-

- (1) the archaeological, historical, or commercial value of the item involved;
- (2) the damages suffered, both economic and noneconomic, by an aggrieved party, and
- (3) the number of violations that have occurred.

Courts.

(c) ACTIONS TO RECOVER PENALTIES.-If any museum fails to pay an assessment of a civil penalty pursuant to a final order of the Secretary that has been issued under subsection (a) and not appealed or after a final judgement has been rendered on appeal of such order, the Attorney General may institute a civil action in an appropriate district court of the United States to collect the penalty. In such action, the validity and amount of such penalty shall not be subject to review.

(d) SUBPOENAS.-In hearings held pursuant to subsection (a), subpoenas may be issued for the attendance and testimony of witnesses and the production of relevant papers, books, and documents. Witnesses so summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States.

25 USC 3008.

SEC. 10 GRANTS.

(a) INDIAN TRIBES AND NATIVE HAWAIIAN ORGANIZATIONS.-The Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations for the purpose of assisting such tribes and organizations in repatriation of Native American cultural items.

(b) MUSEUMS.-The Secretary is authorized to make grants to museums for the purpose of assisting the museums in conducting the inventories and identification required under sections 5 and 6.

25 USC 3009.

SEC. 11. SAVINGS PROVISIONS.

Nothing in this Act shall be construed to-

- (1) limit the authority of any Federal agency or museum to-
 - (A) return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations, or individuals, and
 - (B) enter into any other agreement with the consent of the culturally affiliated tribe or organization as to the disposition of, or control over, items covered by this Act;
- (2) delay actions on repatriation requests that are pending on the date of enactment of this Act;
- (3) deny or otherwise affect access to any court;
- (4) limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; or
- (5) limit the application of any State or Federal law pertaining to theft or stolen property.

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- 25 USC 3010. **SEC. 12. SPECIAL RELATIONSHIP BETWEEN FEDERAL GOVERNMENT AND INDIAN TRIBES.**
This Act reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.
- 25 USC 3011. **SEC. 13. REGULATIONS.**
The Secretary shall promulgate regulations to carry out this Act within 12 months of enactment.
- 25 USC 3012. **SEC. 14. AUTHORIZATION OF APPROPRIATIONS.**
There is authorized to be appropriated such sums as may be necessary to carry out this Act.
- 25 USC 3013. **SEC. 15. ENFORCEMENT.**
Courts. The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this Act and shall have the authority to issue such orders as may be necessary to enforce the provisions of this Act.

Approved November 16, 1990.

LEGISLATIVE HISTORY—H.R. 5237:

HOUSE REPORTS: No. 101-877 (Comm. on Interior and Insular Affairs).

CONGRESSIONAL RECORD, Vol. 136 (1990):

Oct. 22, considered and passed House.

Oct. 25, considered and passed Senate; passage vitiated.

Oct. 26, reconsidered and passed Senate, amended.

Oct. 27, House concurred in Senate amendments.

Appendix B. SAMPLES OF SUMMARIES

HUALAPAI COLLECTIONS IN THE HEARD MUSEUM		
Catalogue no.: NA-SW-WA-B-33	Object name: Plaque	
Made by/in: Agnes T. Topoji; Hualapai; Hualapai Reservation		
Date acquired:	How acquired: Gift	Accession no.: 2319
Key words: coiled; willow?; cottonwood?; martynia		
Dimensions: diameter 10 5/8 inches	height: 1 inch	
Catalogue no.: NA-SW-WA-B-36	Object name: Plaque	
Made by/in: Agnes Topoji; Hualapai; Hualapai Reservation		
Date acquired:	How acquired: Gift	Accession no.: 2319
Key words: coiled; willow?; cottonwood?; martynia		
Dimensions: diameter 12 3/8 inches	height: 3/4 inch	
Catalogue no.: NA-SW-HV-Q-1	Object name: Cradleboard	
Made by/in: Alma Fielding; Havasupai; Hualapai		
Date acquired: 11/12/1971	How acquired: Gift	Accession no.: 1295
Key words: handmade; root; wicker; cotton; modern;		
Dimensions:		
Catalogue no.: NA-SW-WA-B-5	Object name: Basket	
Made by/in: Alma Fielding; Walapai		
Date acquired: 04/22/1970	How acquired: Purchase	Accession no.: 1108
Key words: twined		
Dimensions: diameter: 10 7/8 inches		
Catalogue no.: NA-SW-AP-B-87	Object name: Basket	
Made by/in: Apache; Walapai; Havasupai		
Date acquired:	How acquired: Unknown	Accession no.: 990
Key words: coiled on rod foundation; willow; martynia		
Dimensions: diameter 7 15/16 inches	height 2 3/4 inches	
Catalogue no.: NA-SW-WA-B-45	Object name: Basket	
Made by/in: Berneice Watsonomi; Hualapai		
Date acquired:	How acquired: Gift	Accession no.: 2319
Key words: diagonal twining; squawberry twigs; bark; willow		
Dimensions: length 21 13/16 inches	width: 22 13/16 inches	height: 11 1/8 inches

Catalogue no.: NA-SW-WA-B-49	Object name: Burden basket
Made by/in: Berneice Watsonomi; Hualapai	
Date acquired:	How acquired: Gift Accession no.: 2319
Key words: guiva weave; plain twining; squawberry twigs	
Dimensions: diameter 12 1/8 inches	length 17 13/16 inches
Catalogue no.: NA-SW-WA-B-55	Object name: Basket
Made by/in: Berneice Watsonomi; Hualapai	
Date acquired:	How acquired: Gift Accession no.: 2319
Key words: diagonal twining; plain twining; squawberry twigs; bark; willow	
Dimensions: diameter 21 5/16 inches	height 18 13/16 inches
Catalogue no.: NA-SW-WA-B-51	Object Name: Winnowing basket
Made by/in: Berneice Watsonomi; Walapai	
Date acquired:	How acquired: Gift Accession no.: 2319
Key words: plain twining; squawberry twigs; bark; willow	
Dimensions: diameter 20 13/16 inches	height 3 inches
Catalogue no.: NA-SW-WA-B-52	Object name: Footed fruit basket
Made by/in: Berneice Watsonomi; Walapai	
Date acquired:	How acquired: Gift Accession no.: 2319
Key words: plain twining; squawberry twigs; bark	
Dimensions: diameter 10 1/8 inches	height 6 7/16 inches
Catalogue no.: NA-SW-WA-B-53	Object Name: Basket
Made by/in: Big Rosie; Walapai	
Date acquired:	How acquired: Gift Accession no.: 2319
Key words: plain twining; squawberry twigs; bark; guiva weave	
Dimensions: diameter 8 7/16 inches	height 4 15/16 inches
Catalogue no.: NA-SW-WA-B-56	Object name: Basket
Made by/in: Big Rosie; Walapai	
Date acquired:	How acquired: Gift Accession no.: 2319
Key words: plain twining; squawberry twigs; bark; willow	
Dimensions: diameter 15 3/8 inches	height 9 7/16

Appendix C. SAMPLES OF TRIBAL RESPONSE LETTERS

Page Two
NAGPRA
1990 P.L.#101-601

Therefore, the Hualapai Tribe is requesting further information from your agency/museum that can assist our project in determining priorities of reviewing collections. Our goals are to develop and establish a working relationship with your agency/museum and the consultation process to review of the available information.

The Repatriation Project to solicit concerns and Tribal Museum.

If you have any questions, please contact Loretta Jackson at (602) 769-2216. Thank you.

Sincerely,

Delbert Havatone, Chairman
HUALAPAI TRIBAL

- attachments:
1 copy Hualapai Tribe
(Repatriation Project)
1 copy Hualapai Tribe
(Policy Statement)
1 copy Havasupai Tribe
(Policy Statement)

The Great Spirit created Man and Woman in his own image. In doing so, both were created as equals. Both depending on each other in order to survive. Great respect was shown for each other; in doing so, happiness and contentment was achieved then, as it should be now. The connecting of the Hair makes them one person; for happiness or contentment cannot be achieved without each other. The Canyons are represented by the purples in the middle ground, where the people were created. These canyons are Sacred, and should be so treated at all times. The Reservation is pictured to represent the land that is ours, treat it well.

Delbert Havatone
Chairman



HUALAPAI NATION
OFFICE OF THE CHAIRMAN
P.O. Box 179 • Peach Springs, Arizona 86434 • (602) 769-2216

February 09, 1995

The Heard Museum
Martin Sullivan, Director

22 East Monte Vista Road
Phoenix, Arizona 85004-1480

Dear Martin Sullivan, Director:

The Hualapai Tribe has been contacted by federal agencies and museums from around the United States over the past two years regarding summaries and inventories of possible Hualapai/PAI ancestral human remains and sacred objects in compliance with the 1990 Public Law #101-601, the Native American Graves Protection and Repatriation Act (NAGPRA).

The Hualapai Tribe's Cultural Resources Program is authorized to carry out the responsibilities of the "Repatriation Project". The Project Director, Loretta Jackson oversees the project and ensures implementation of the goals and objectives. Susan Rocha, the Researcher for this project conducts and coordinates initial contacts with museums in research efforts. Ronald Susanyatame, assistant to the project director, will officiate actual repatriations of ancestral remains.

This document and attached resolutions contain official notice that the Hualapai Tribe & Havasuw Baaja (Havasupai Tribe) entered into an agreement that all PAI affiliated ancestral remains and objects will be of our concern. Currently the Hualapai Tribe is working under a Park Service Grant to conduct consultations with tribal elders within the Peach Springs community to scope the concerns and issues for possible future repatriations.

The Reservation is our heritage and the heritage of our children yet unborn. Be good to our land and it will continue to be good to us. The Sun is the symbol of life, without it nothing is possible - plants don't grow - there will be no life - nothing. The Sun also represents the dawn of the Hualapai people. Through hard work, determination and education, everything is possible and we are assured bigger and brighter days ahead. The Tracks in the middle represent the coyote and other animals which were here before us. The Green around the symbol are pine trees representing our name Hualapai - PEOPLE OF THE TALL PINES -

Louise Benson
Vice Chairperson

Millard F. Rogers, Jr.
November 9, 1993
Page 2

- Recorded as Oneida.
- Recorded as Iroquois, found or acquired in Madison, Oneida, Chenango, Oswego, Lewis or Herkimer counties of New York.
- Acquired from Oneida Nation Members.
- Recorded as Iroquois with no further documentation.

Summaries and inventories in accordance with the following:

- **Human Remains and
- **Unassociated Funerary
- **False Face masks
- **Cornhusk masks
- **Turtle shell rattles
- **Gourd rattles
- **Wampum strings
- **Medicine bundles

The standard procedure is:

1. Summary or description of items by Oneida Officials
2. On-site review and photographing of items
3. Review of items by religious leaders
4. If necessary, formation of a Oneida committee
5. Notification of material to be reviewed
6. Compliance with applicable laws
7. Necessary actions

If you need any information, please contact the Oneida Indian Nation of New York.

ONEIDA INDIAN NATION



ONEIDA NATION TERRITORY, VIA ONEIDA, NEW YORK
November 9, 1993

Mr. Millard F. Rogers
Director
Cincinnati Art Museum
Eden Park
Cincinnati, OH 45202-1596

Dear Mr. Rogers:

Thank you for your recent letter, which states that you may have materials in your collections relating to our Nation that are subject to the provisions of the Native American Graves Protection and Repatriation Act. As you requested, the names and addresses for the Nation's designated liaisons, and procedures for the consultation process are as follows:

Perry Ground, Museum Curator
Shako:wi Cultural Center
Oneida Indian Nation
Box 1
Oneida, NY 13421
(315)-363-1424

Liza Obomsawin
Oneida Indian Nation
223 Genesee Street
Oneida, NY 13421
(315)-361-6300

These individuals should be contacted directly regarding summaries, inventories, and consultations. Further, they will be responsible for contacting any lineal descendants of individuals (identified by the Museums and other Federal Agencies) whose remains, funerary objects or sacred objects are included in a summary or inventory. Also, after an initial review of a Museum or Federal Agency holding collections of Oneida items or remains, they will contact traditional religious leaders for consultation on that collection if necessary.

The Oneida Indian nation of New York will be working in conjunction with other members of the Haudenosaunee (Iroquois) Confederacy but retains the right to act independently of any individual or committee appointed. Therefore, the Oneida Nation would request that Museums and Federal Agencies directly contact the designated liaisons with summaries and inventories that include objects or remains:

Business Address
PO Box 1 • Vernon, NY 13476
(315) 829-3090 • Fax (315) 829-3141

Appendix D. NAGPRA REVIEW COMMITTEE

PURPOSE: Monitor and review the implementation of the inventory and identification process and repatriation activities required under sections 5, 6 and 7 of the Native American Indian Graves Protection and Repatriation Act.

AUTHORITY: Section 8 of Public law 101-601, November 16, 1990.

TERMS: Three or Six years

MEMBER	TERM EXPIRES	NOMINATING SOURCE
DR. JAMES BRADLEY Archlink 55 Park Street Charlestown, Massachusetts 02129 Tel.: (508) 749-4490 Fax: (508) 749-4495	June, 2003	American Association of Museums
DR. ARMAND MINTHORN, CHAIR Confederated Tribes of the Umatilla Indian Reservation P.O. Box 638 Pendleton, OR 97801 Tel.: (541) 276-3165 Fax: (541) 276-3095 <i>traditional religious leader</i>	June, 2003	Confederated Tribes of the Umatilla Indian Reservation
DR. GARRICK BAILEY Department of Anthropology University of Tulsa 600 South College Tulsa, Oklahoma 74104 Tel: (918) 631-3026 Fax: (918) 631-2540	November, 2006	American Association of Museums
DR. JOHN O'SHEA Museum of Anthropology University of Michigan Ann Arbor, MI 48109-1079 Tel.: (313) 763-5759 Fax: (313) 763-763-7783 email: joshea@umich.edu	June, 2003	Society for American Archaeology, American Museum of Natural History, LA County Natural History Museum, Peabody Museum, Harvard University, P.A. Hearst Museum, UC Berkeley
MR. LAWRENCE H. HART Route 1, Box 3130 Clinton, OK 73601 Tel.: (405) 323-5320 Fax: (405) 323-6225 <i>traditional religious leader</i>	September, 2001	Cheyenne and Arapaho Tribes Forest County Potawatomi Community
MS. VERA K. METCALF Bering Straits Foundation 157 Seppala Foundation P.O. Box 1008 Nome, Alaska 99762 Tel: (907) 443-2985 Fax: (907) 443-2985	June, 2004	Concurrence of six committee members
DR. ROSITA WORL Sealaska Heritage Institute One Sealaska Plaza, Suite 201 Juneau, Alaska 99801 Tel: (907) 463-4844 Fax: (907) 586-9293	November, 2006	Huna Heritage Foundation

Appendix E.

EXCERPTS FROM RECLAIMED HERITAGE: REPATRIATION OPTIONS AND PROCESS UNDER NAGPRA

by ROSITA WORL (*Tlingit*)

THERE IS NO HISTORICAL MODEL on which Indian Peoples might draw to initiate the repatriation process and to re-integrate sacred and cultural objects into their societies. The primary legal guides for these complex tasks are NAGPRA and the repatriation policies and procedures adopted by the National Museum of the American Indian (NMAI) and the National Museum of Natural History (NMNH). Tribal members can be informed about NAGPRA through local tribal papers or newsletters. Some tribes have already initiated informational campaigns for their members, by outlining NAGPRA and its basic objectives in articles and reviews, and instituting informational meetings or workshops focusing on the legislation. Other tribes have elected to begin the process at the local or community level, followed by region-wide meetings.

To Repatriate or Not to Repatriate

Decisions on repatriation vary among tribes. For example, the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) adopted a policy to repatriate and re-inter all human remains, associated and unassociated funerary objects which have been identified as originating from lands within the CTUIR's boundaries. The Zuni, on the other hand, have concluded that they will not seek repatriation of human remains in museum collections, but they have taken the position that the remains may not be exhibited to the public.

The final disposition of repatriated objects may be a consideration for some tribes in determining whether they should pursue repatriation claims. A number of different options exist. Objects may be returned to religious leaders, to specific social groups, such as clans, for their traditional use, or to an individual or lineal descendant who can demonstrate legitimate claims to them. In these instances, the tribe assumes no further responsibility for the repatriated objects unless it should adopt legislation prohibiting the removal of cultural properties from its territorial jurisdiction. Tribes may also bury repatriated associated and unassociated funerary objects. This resolution may be difficult for some tribes who are no longer certain that their burial sites are secure from trespassers and "pot hunters." Should this be the case, it may be necessary to explore alterna-

tive measures to ensure the safety and protection of funerary objects. Some tribes, for example, may seek repatriation and elect to store their objects in a central repository or tribal museum. If a tribe does not have a museum, another possibility may be for the tribe to secure legal title to cultural properties as allowed under NAGPRA and then attempt to develop an agreement with a specific museum to place these objects within its care. Should tribes elect to store their repatriated objects in a safe and secure repository or a museum, they may wish to draw up stipulations to ensure that these institutions accommodate their needs and cultural practices.

Tribes who wish to ensure perpetual ownership of their cultural properties may wish to consider the adoption of a statute that expressly prohibits the removal and sale of sacred and cultural objects from tribal ownership. The Chilkat Indian Village of Klukwan adopted a tribal ordinance (Attachment A) that forbids the removal of significant cultural properties from the village without the permission of the tribal council. A recent tribal court decision involving attempts to sell clan objects upheld the right of the tribe to enforce this ordinance (Chilkat Indian Village, *IRA v. Michael R. Johnson, et al.* No 90-01).

Repatriation Committee

Repatriation decisions are multiple and complex, and the tasks may involve considerable time commitments. Tribes may therefore wish to have a specific decision-making body—a sub-committee of the council, a separate committee or working group—to focus solely on repatriation issues. Tribal councils which include religious leaders in their membership may retain direct policy oversight if the tribe so desires. In any case, religious leaders or individuals who are intimately familiar with the tribe's religious ideologies and practices, as well as individuals who are knowledgeable about the broader traditions, values and customs of the tribe, are essential to the working unit and are able to analyze and define the role and function of objects within their cultural context. If a tribe has a museum, it will be helpful to have a museum-trained staff member on the working committee, as museums do not necessarily categorize objects in the same manner as Native American societies.

"This material was supported by the National Indian Policy Center at The George Washington University, Washington, DC, which is funded in part by grant award number 90NA1101/04 from the Administration for Native Americans, U.S. Department of Health and Human Services. Reprinted by permission."

For example, to guide the initial development of their work, a repatriation committee of Southeast Alaska Indians drafted a Mission Statement and identified broad goals. The statement and goals were then submitted at two region-wide meetings to the participants for their consideration and use in their local communities. The Mission Statement outlines a vision and basic tenets that other tribes may wish to consider as they formulate their repatriation policies and process (see Attachment B).

One of the primary functions of the repatriation committee and religious leaders will be to identify and to offer information that will prove that an object is a funerary object, a sacred object or an item of cultural patrimony. While funerary objects are fairly self-evident, the identification of sacred objects may be more complex. This task may be especially difficult for those tribes whose religions were suppressed, and where tribal custom deems the divulging of crucial information to be inappropriate or forbidden. Tribes and religious leaders will have the ultimate responsibility and decision in defining sacredness and the current need for the objects. There is no standard or uniform definition of "sacred" that can be universally applied to classify and identify sacred objects. Lawyers may assist in determining whether the statutory criteria to substantiate traditional religious significance and use in a religious ceremony are met. However, it cannot be over-emphasized that religious leaders will be the ultimate authority in defining "sacred."

The Confederated Tribes of the Umatilla Indian Reservation adopted a comprehensive Policy and Procedure Manual for the Repatriation of Ancestral Human Remains and Funerary Objects (Attachment C). Tribes may find their guideline a useful example in that it provides a model as to how tribes may elect to handle this component of NAGPRA. It also outlines how to respond to federal agencies relating to newly discovered human remains and funerary objects on federal lands.

Region-wide or Centralized Tribal Approach to Repatriation

A number of tribes are comprised of sub-groups, such as clans or reservation-based social units, that may actually claim ownership or trusteeship of objects subject to repatriation. In the interest of cost-effectiveness and to ensure a greater number of successful returns without competing claims or formal protests from sub-units of a tribe, a region-wide or centralized repatriation approach or effort may be the most prudent method to implement NAGPRA. If the legitimate property holder and the governing council are not one and the same, the property holder may agree and request that the tribe or administrative body seek repatriation on its behalf. Traditional entities may not be equipped with the administrative capabilities to initiate and conduct the repatriation process. For example, the Douglas Indian Association (DIA), a tribal government in Southeast Alaska representing the Tlingit Indians of that area, has a standard resolution that they forward to museums stating they will initiate repatriation claims on behalf of their clans and clan houses. The DIA submitted a repatriation request on behalf of the Yanyeyidi Clan of the Taku

Tlingit. Its claim was published in the Federal Register on July 7, 1994. It also adopted a statute that states that within their jurisdiction traditional property laws shall govern the ownership of cultural properties.

Role of Traditional and Academic Scholars

Museums and institutions holding objects subject to NAGPRA have the responsibility of reviewing and assessing repatriation requests and supporting evidence in compliance with the full mandate of NAGPRA. It can be assumed that museums and other institutions will vary in how vigorously they support or resist repatriation claims. Some museums have already demonstrated a cooperative and collaborative approach, while others have illustrated a less than enthusiastic response. It is in the best interest of tribes that museums initiate a careful review process to ensure that objects are returned to their legitimate owners. Museums are expected to utilize anthropologists and other experts and to draw from the body of scholarly and anthropological literature to assess repatriation claims.

Traditional leaders are assumed to have a broad understanding and knowledge of their religious and cultural practices, and they may be able to develop clear and cogent claims for repatriation of their objects. However, tribes should also be familiar with the scholarly material and information that museums will use to evaluate repatriation claims, for the ultimate burden of proof rests with tribal claimants.

Some tribes are fortunate in having members who are anthropologists or other scholars involved in the museum field. Such specialists are trained analytically and objectively to describe and document the significance of objects and their role and function in their culture, and to compile the supporting evidence and documentation according to NAGPRA requirements. In addition they are probably able to prepare reports on the tribe's religious system, social organization, and traditional property laws, all aids in substantiating repatriation claims for sacred objects or objects of cultural patrimony. Some tribes have developed collaborative relationships with anthropologists or other scholars who are recognized as academic experts regarding their culture and history; these outside specialists may also be able to assist with this process. NAGPRA clearly states that tribes have the authority to define sacredness, but sufficient evidence in support of the tribe's definition is needed to convince the museum officials who will be assessing repatriation requests.

Some tribes may see the value of employing academic experts to support their claims while others may be resistant to utilizing scholarly experts. Whatever the tribe decides on this matter, it will be asked to describe its religious ideologies and practices in some detail. Tribes may however request and ensure that the information they present to substantiate their claims be protected or kept confidential as their sacred and intellectual property. Whether or not tribes elect to use academic experts, they

must be assured that their requests meet the standards of reviews and assessments of museum officials or of other experts should a legal resolution be necessary.

Relationship With Museums

Comfortable working relationships with museums holding tribal collections can ease the repatriation process, and the earlier these relationships are established the better for all concerned. Advising the museum of the repatriation process the tribe intends to implement and obtaining the museum's repatriation procedures and policies are good initial steps. Tribes and Native Hawaiian organizations that have had previous experience working with museums in reclaiming human remains and objects subject to repatriation offer the following advice gleaned from their experience: (1) it is important to identify the "decision-makers" within museums to maximize efficiency; (2) decisions made by museums are more useful when written and not limited to verbal communication; (3) clarity of meaning in verbal and written exchanges is essential to avoid any misunderstandings; (4) copies of major correspondence should also be sent to the NAGPRA Program Office at the National Park Service in Washington, D.C.

Internal Resolution of Disputes

A Review Committee was created under NAGPRA primarily to facilitate the resolution of disputes. The Review Committee's findings are non-binding, but they are admissible in any court proceeding filed pursuant to NAGPRA. Tribes may choose to implement their own procedure for settling internal disputes or to submit such disputes to their tribal courts, rather than bringing them to an external body.

In order to avoid internal competing claims, the Central Council of the Tlingit and Haida Indian Tribes of Alaska established a "Tribal Register." The internal register is widely distributed among the Southeast Alaska tribes, organizations and members. It seeks to inform the various entities and clans when one of the tribes or tribal members is initiating a repatriation claim on behalf of a clan or tribal member. The intent is to avoid competing claims and to resolve those that do arise before going to an external body or to court.

Attachment A.

CHILKAT INDIAN VILLAGE

ARTIFACTS ORDINANCE May 12, 1976

No person shall enter onto the property of the Chilkat Indian Village for the purpose of buying, trading for, soliciting the purchase of, or otherwise seeking to arrange a removal of artifacts, clan crests, or other traditional Indian art work owned or held by members of the Chilkat Indian Village or kept within the boundaries of the real property owned by the Chilkat Indian Village, without first requesting and obtaining permission to do so from the Chilkat Indian Village Council.

No traditional Indian artifacts, clan crests, or other Indian art works of any kind may be removed from the Chilkat Indian Village without the prior notification of and approval by the Chilkat Indian Council.

Attachment B.

SOUTHEAST ALASKA INDIAN REPATRIATION STATEMENT AND GOALS

MISSION STATEMENT

As one of the means to ensure the survival and enhancement of the traditional cultures of the Southeast Alaska Indians in perpetuity, the Southeast Indians—through our respective tribes or the Tlingit and Haida Central Council/Sealaska Corporation acting on behalf of tribes—shall seek the return and protection of all objects allowed under the provisions of the Native American Graves Protection and Repatriation Act for the rightful clans and owners under our own traditional laws.

GOALS

1. To ensure all Tribes understand NAGPRA.
2. To identify those Tribes (including the Tsimpshians of Metlakatla) who intend to pursue the repatriation of objects on behalf of the clans in their communities.
3. To develop a cooperative agreement between the Tlingit and Haida Central Council/Sealaska and the tribes to pursue the repatriation of objects under NAGPRA.
4. To delineate the respective roles of all the Southeast entities that will be involved in the implementation of NAGPRA.
5. To identify Clan leaders (shaadeihani) and/or Clan and House stewards (hitsaati).
6. To compile an inventory of sacred objects and objects of cultural patrimony.
7. To develop a statement of significance for each category of objects (i.e. masks, Chilkat Blankets, clan hats, etc.) that substantiates that they are sacred or objects of cultural patrimony to support the repatriation request.
8. To identify acceptable repositories where repatriated items can be held in trust if clan facilities are not available.
9. To pursue the formal adoption of legal and traditional means to ensure that these objects shall forever remain in the possession of the rightful owners.
10. To pursue funding to implement NAGPRA.

Attachment C.

**THE CONFEDERATED TRIBES OF THE
UMATILLA INDIAN RESERVATION**

*Policy and Procedure Manual for the Repatriation of
Ancestral Human Remains and Funerary Objects*

May 19, 1993 (revised July 6, 1994)

INTRODUCTION:

On November 16, 1990, President George Bush signed into law P.L. 101-601, the Native American Graves Protection and Repatriation Act (NAGPRA).

The NAGPRA requires all Federal agencies, all Museums which receive Federal funding and Universities to conduct summaries and inventories for the purpose of identifying all Native American human remains, associated and unassociated funerary objects, sacred objects and objects of cultural patrimony, for the ultimate purpose of returning such remains and objects to Indian Tribes for repatriation.

The NAGPRA also requires that these summaries and inventories be conducted in consultation with Indian Tribes. The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) have conducted previous repatriation activities. Since the passage of the NAGPRA, the CTUIR have developed an understanding that the NAGPRA has the potential to create a multitude of social, financial, legal and administrative threats to the CTUIR.

The historical fact that the CTUIR have never had a tradition of unearthing ancestral human remains, and due to the social, legal and political chronicles surrounding the passage of the NAGPRA, have both compelled the CTUIR to develop fundamental policies and procedures to guide the Board of Trustees in the decision-making process regarding the NAGPRA and repatriation activities. In response to the NAGPRA and the potential threats to the CTUIR, the following policies have been adopted by the Board of Trustees for use in the decision-making process for the NAGPRA and all repatriation activities involving the CTUIR.

**1. TRIBAL POLICY - AMERICAN INDIAN
RELIGIOUS FREEDOM ACT**

On August 11, 1978, the Congress of the United States enacted Public Law 95-41 (92 Stat. 469), known as the "American Indian Religious Freedom Act", which provides "on or after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred

objects, and the freedom to worship through ceremonial and traditional rites." It is the policy of the CTUIR to support this act.

2. TRIBAL POLICY - ACCESS TO SACRED SITES

The Board of Trustees shall take such actions as it deems necessary to ensure that Tribal members are granted access to sacred sites.

**3. TRIBAL POLICY - PROTECTION OF INDIAN
GRAVES**

Oregon Revised Statutes 97.740 through 97.760 provide for the protection of Indian graves. It is the policy of the CTUIR to support enforcement of this statute. ORS 97.750 provides:

(a) If such action is necessary to protect the burial from imminent destruction, and upon prior notification to the State Historic Preservation Office and to the appropriate Indian tribe in the vicinity of the intended action, a professional archaeologist may excavate a Native Indian cairn or grave and remove resource objects and human remains for subsequent re-interment under the supervision of the Indian tribes.

(b) Except as provided in subsection (1) of this section, any proposed excavation by a professional archaeologist of a Native Indian cairn or grave shall be initiated only after prior written notification to the State Historic Preservation Office and with the prior written consent of the appropriate Indian tribe in the vicinity of the intended action. Failure of a tribe to respond to a request for permission within 30 days of its mailing shall be deemed consent. All resource objects and human remains removed during such an excavation shall, following scientific study, be re-interred at the archaeologist's expense under the supervision of the Indian tribe.

(c) In order to determine the appropriate Indian tribe under this section and ORS 97.745, a professional archaeologist or other person shall consult with the Commission on Indian Services which shall designate the appropriate tribe.

(d) It is the intent of this Policy and Procedure Manual to provide a mechanism for expeditiously determining whether or not written consent for an excavation shall be given pursuant to ORS 97.750(2).

4. PROCEDURES FOR OBTAINING CONSENT

A request for consent to excavate pursuant to ORS 97.750 shall be presented to the Cultural Resources Protection Program (CRPP) of the Department of Natural Resources (DNR) for the CTUIR. The CRPP shall direct and coordinate appropriate representatives, employees and, or professionals under contract of the CTUIR to conduct an investigation of the matter and make a formal written report

to the CTUIR's Cultural Resources Commission within 20 days recommending whether or not to grant consent to the excavation, and if consent is granted, what, if any conditions should be imposed on the excavation. Such conditions shall include the option of the CTUIR to perform the excavation in full or in part and any other survey or preliminary work in full or in part, under contract with the requesting party.

5. TRIBAL POLICY - NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

The Native American Graves Protection and Repatriation Act (NAGPRA) provides for the protection of Native American graves and for the return and repatriation of human remains, associated and unassociated funerary objects, sacred objects and objects of cultural patrimony. It is the policy of the CTUIR to support the enforcement, implementation and administration of the NAGPRA. Specific CTUIR policies regarding the NAGPRA are as follows:

(a) The Cultural Resources Commission of the CTUIR is vested with the authority to administer the provisions of the NAGPRA. The Cultural Resources Commission shall administer NAGPRA related issues using the NAGPRA and the regulations developed by the National Park Service as the planning instrument for the CTUIR on all NAGPRA related activities. The Cultural Resources Commission shall coordinate all repatriation activities with the Board of Trustees, the Office of General Council and the CRPP for the CTUIR.

(b) The CRPP shall assist the Cultural Resources Commission in developing administrative strategies regarding Tribal consultation with federal agencies and others, regarding the proper handling and disposition of human remains, associated and unassociated funerary objects, sacred objects and objects of cultural patrimony.

(c) The Cultural Resources Commission shall in consultation with the Board of Trustees, and the Tribal attorney, initiate administrative and or legal action to enforce the provisions of the NAGPRA.

(d) The Cultural Resources Commission with the assistance of the CRPP, shall identify Tribal and non-Tribal lands suitable for repatriation activities. Any lands so acquired shall be administered by the DNR.

(e) The Cultural Resources Commission is authorized and encouraged to negotiate memoranda of agreement with other tribes regarding protocol on repatriation activities. The Cultural Resources Commission is also authorized to negotiate memoranda of agreement with private landowners, local, state and federal agencies regarding the availability and suitability of setting-aside lands suitable for repatriation activities. The final authority to sign any such agreement rests with the Board of Trustees.

(f) It is a policy of the CTUIR to repatriate and reinter all human remains, associated and unassociated funerary objects which have been identified to have originated from ancestral burial sites within the CTUIR's ceded lands.

(g) It is a policy of the CTUIR to require all federal agencies, museums, universities and colleges, and or any other entity, public or private, to comply with the provisions of the NAGPRA. All human remains, sacred objects, associated and unassociated funerary objects and objects or cultural patrimony must be documented in a summary or in an inventory in conjunction with the repatriation of any such human remains or objects. The CTUIR will not accept any human remains or objects for repatriation without documentation.

(h) It is a policy of the CTUIR to solicit full participation of the General Council in all NAGPRA related issues.

6. STANDARDS AND PROCEDURES FOR THE DISCOVERY AND HANDLING OF ANCESTRAL HUMAN REMAINS

(a) Applicability:

The procedures describe the necessary steps to be followed in the discovery and subsequent handling of ancestral human remains found within the CTUIR's ceded lands or lands within the possessory and usage area of the Cayuse, Walla Walla and Umatilla Tribes. The intent of these procedures is to ensure that such remains are treated with dignity at all times and, when applicable, are accorded appropriate handling as specified by a Tribal representative.

As a guiding principle, the CTUIR recognize and reaffirm the belief that Native American ancestral human remains hold paramount religious significance to many contemporary Sahaptin-speaking peoples of the Columbia Plateau. To better protect and enhance our traditional cultural values, the CTUIR establish the following policies:

(1) All encountered human remains are to be treated as Native American until available evidence indicates otherwise.

(2) Preference shall be given to the preservation of ancestral human remains "in-situ".

(3) The repatriation of ancestral human remains will occur as expeditiously as possible and in the same location whence the remains came.

Preservation in situ is not always feasible, therefore alternative protective measures must be implemented and carded out in a manner consistent with the recommendations of the CTUIR. Given the complexity of each potential discovery, ample opportunity must be given to the CTUIR to participate in or oversee any identification or removal procedure immediately thereafter from the time of discovery.

(b) Procedures regarding the Discovery of Human Remains

(1) All suspected in-situ human remains and or burials that have been exposed as a result of adverse impact or disturbance, must be reported immediately to the Cultural Resources Commission, the Board of Trustees, the Umatilla Tribal Police Department, the Oregon State Police and the appropriate Medical Examiners Office by the CRPP. If the discovery occurs on state or federal lands, a detailed letter or report from the agency with administrative jurisdiction over such lands shall be requested.

(2) In the event that suspected remains are endangered due to adverse impacts or other occurrences, then interim protective measures shall be developed and implemented.

(3) The Cultural Resources Commission and the Board of Trustees shall be notified by the CRPP regarding opportunities to inspect any burial site and ancestral human remains.

(4) Coordinated efforts to inspect burial sites and or ancestral human remains, should include members of the Board of Trustees, members of the Cultural Resources Commission, appropriate law enforcement personnel, land managers, archaeologist, and or anthropologist, and CTUIR cultural resources staff. The CRPP shall ensure that all law enforcement agencies with jurisdiction and the appropriate Medical Examiner are informed of any planned inspection of a burial site.

(5) Burial inspections shall determine if the skeletal remains are human, and if human, if the remains are modern or ancient. Burial inspection procedures shall be limited to non-destructive observational analysis by a qualified physical anthropologist. The inspection procedure will terminate if the remains are determined to be of modern origin, and possibly under the jurisdiction of a law enforcement agency. The inspection team shall also determine evidence of desecration or violations of applicable statutes such as the NAGPRA or the Archeological Resources Protection Act (ARPA). If there is evidence of NAGPRA or ARPA violations, the team shall thoroughly document the violation using the best available investigative techniques.

(6) If the discovery is determined not to be within the jurisdiction of law enforcement, then the inspection team shall determine, using the best available evidence, if the human remains are Native American or non-Native American in origin. The inspection procedure will terminate if the inspection team determines that the remains are non-Native American. If the inspection team deter-

mines that the remains are of Native American origin, the inspection team shall initiate interim measures to secure the site until a formal plan is developed by the Cultural Resources Commission and the CRPP.

(7) No parts of human remains, including associated (or unassociated) funerary objects or artifacts, shall be handled, removed, collected or photographed without direct supervision and approval of the CRPP or as otherwise authorized in writing by the Cultural Resources Commission or the Board of Trustees.

(8) If human remains and or burials are discovered in-situ during the course of any ground disturbing activity, the activity is to be halted until an on-site inspection is completed.

(9) If planned construction and or ground disturbing activities is such that destruction of the exposed remains is imminent, emergency removal and exhumation procedures shall be developed and implemented immediately.

(10) If ancestral human remains and or burials are discovered in-situ during the course of an archeological excavation, excavation activities shall cease and the Cultural Resources Commission shall be notified. Once the inspection team has concluded its inspection, and if conditions favor preservation in-situ, the Cultural Resources Commission shall develop a plan for reinterment. If conditions do not favor preservation in-situ, then the remains may be exhumed pursuant to a plan developed by the Cultural Resources Commission.

(c) Procedures for the Analysis of Human Remains

(1) Once any human remains are determined to be Native American, in all cases, the CTUIR reserve the right to reburial without scientific study, however when deemed appropriate, the CTUIR will allow human remains to undergo limited non-destructive observational analysis by a qualified physical anthropologist.

(2) In all cases, the CTUIR reserve the right to the re-burial of associated funerary objects without scientific study.

(3) In all cases, prior permission for scientific study shall be obtained in writing from the Cultural Resources Commission or the Board of Trustees.

(4) No methods of study shall be employed that diminishes the integrity of the remains or associated funerary objects.

(5) A reasonable effort shall be made to retain all organic materials contained in, or on the surface of any human bone or associated funerary object for the purposes of reburial.

(d) Procedures for the Reinterment of Human Remains

(1) The CTUIR reserve the right to reburial of any ancestral remains and or funerary objects without prior notification.

(2) The Cultural Resources Commission in conjunction with the CRPP shall upon notification that ancestral human remains have been discovered, develop the appropriate plan to reinter the human remains.

(3) The Cultural Resources Commission shall determine if there are any known relatives to the ancestral remains. If there are no known relatives, the Cultural Resources Commission shall promulgate a summary of the discovery, seeking participation of the General Council. The Cultural Resources Commission shall post the summary at the Tribal Office, the Longhouse, and the General Council Office. The summary shall include a brief description of the discovery and also invite members of the Board of Trustees, the General Council and traditional leaders from the community to meet with the Cultural Resources Commission in a worksession. The worksession shall focus on the details of the reinterment. A plan shall be drafted by the CRPP at the conclusion of the worksession.

(4) Whenever possible, reinterment shall occur at the original location of discovery. All information regarding the existence of known burials should be safeguarded and not announced publicly.

(5) The CRPP shall provide the administrative support for Cultural Resources Commission activities.

7. DEFINITIONS

(1) "Adverse effect" means a reasonable likelihood of more than moderate adverse consequences for cultural resources in any given site or area, the determination of which is based on (1) the context of a proposed action or development; (2) the intensity of a proposed action, including the magnitude and duration of an impact and the likelihood of its occurrence; (3) the relationship between a proposed action and other similar actions which are individually insignificant but which may have a cumulatively significant impact; and (4) proven mitigation measures which the proponent of an action will implement as part of the proposal to reduce otherwise significant effects to an insignificant level.

(2) "Ancestral burial site" or "Burial Site" means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which there was intentionally deposited, as part of the death rites or ceremonies of a culture, the remains of a deceased indi-

vidual or individuals. All Ancestral burial sites shall also be considered sacred sites and be defined as a "Protected site".

(3) "Ancestral human remains" or "Human Remains" means the physical remains, articulated or unarticulated bones and bone fragments, artifacts, and the surrounding soil matrix where decomposition has occurred of any deceased human remains that are reasonably believed to be of Native American, or any deceased human individual of historic or prehistoric origin that is known, or has been identified, through available evidence, as Native American.

(4) "Board of Trustees" means the Board of Trustees of the Confederated Tribes of the Umatilla Indian Reservation or their successors.

(5) "Ceded area" means that area ceded to the United States by the Umatilla, Cayuse and Walla Walla Tribes in the Treaty of June 9, 1855.

(6) "Consultation" unless used otherwise in this Manual, means the formal, direct face-to-face contact with the CTUIR by any governmental agency or private entity. Such contact or "consultation" is for the specific purpose of seeking Tribal participation as required by Federal or State Statutes.

(7) "Cultural Resources Protection Program (CRPP)" means the program and staff of the Department of Natural Resources created to protect, preserve and enhance cultural resources important to the membership of the Confederated Tribes of the Umatilla Indian Reservation.

(8) "DNR" means the Department of Natural Resources for the Confederated Tribes of the Umatilla Indian Reservation.

(9) "Cultural Resources Studies" means actions conducted to determine if cultural resources are present in an area that would be affected by a proposed use or development. Cultural Resources Studies may include but not be limited to: archival research, surface surveys, subsurface testing, mitigation/data recovery and ethnographical/ethnohistoric research.

(10) "Cumulative Effects" means the combined effects of two or more activities. The effects may be related to the number of individual activities, or to the number of repeated activities on the same piece of ground. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.

(11) "Funerary objects" means any artifact or material -

(a) which was intentionally placed with a deceased individual, either at the time of burial or at some subsequent time thereafter, as part of the death rites or ceremonies of a culture, and

(b) which has been identified, through available evidence, as having been removed from a burial site.

(12) "General Council" means the entire membership of the Confederated Tribes of the Umatilla Indian Reservation

over the age of 18 years, or as otherwise defined by the Confederated Tribes Constitution and By-Laws.

(13) “Genetic descendent” means any person or persons known, or reliably assumed to have a relationship to a specified human individual or group of individuals.

(14) “Ground Disturbing Activity” means any activity that disturbs the surface of the ground, such as construction, digging, logging, farm practices on uncultivated soil, dredging, drilling, filling and mining.

(15) “Human remains” means the physical remains of any deceased human individual.

(16) “Indian” means, unless otherwise specified, a member of The Confederated Tribes of the Umatilla Indian Reservation, or any other person of Indian blood who is a member of a federally recognized Indian tribe or any other person on the Reservation who is recognized by the community as an Indian, including a Canadian Indian or an Alaska native.

(17) “In situ” means any undisturbed intact human remains or portions thereof, including burial sites, in their original depositional setting at the time of burial. In situ shall also mean the undisturbed intact artifacts which form a part of an archaeological site.

(18) “Lineal Descendant” means any person(s), that can demonstrate lineal and/or familial descentance of a person or human remains, or objects which are subject to the NAGPRA. A lineal descendant may use charts, records, archival materials, documented oral histories, documented ethnographic information, and any other documentation which aids in establishing descentance.

(19) “Mitigation” means the use of any or all of the following actions: (1) Avoiding the impact altogether; (2) Minimizing impacts by limiting the degree or magnitude of the action and its implementation; (3) Rectifying the impact by repairing, rehabilitating, or restoring the affected cultural resources and or environment; or (4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(20) “Museum collections” means any private, local, state, or federal agency, including institutions of higher education which has control or possession of Tribal cultural resources.

(21) “Native American” has that same meaning given for “Indian”.

(22) “Native American Graves Protection and Repatriation Act” or NAGPRA has the same meaning as that within P.L. 101-601 (25 U.S.C. 3001-3013)

(23) “Objects of Cultural Patrimony” means an object having ongoing historical, traditional, or cultural importance central to the Tribal people who currently comprise the Umatilla, Cayuse and Walla Walla cultures, rather than property owned by an individual Tribal member, and which therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Umatilla, Cayuse, Walla Walla or any other tribe and such object shall have been considered inalienable by the Umatilla, Cayuse, or Walla Walla tribes at the time the object was separated from the Confederated Tribes.

(24) “Post-depositional disturbance” means any disturbance by natural or man-made processes that alters or degrades the integrity of a known or potential site.

(25) “Reburial” means the physical replacement of disinterred human remains and or funerary objects into the ground at its original location, or at other specified locations deemed appropriate by the Confederated Tribes.

(26) “Reinterment” means the ritual aspect of reburial that is conducted under strict cultural rules of practice by a traditional religious practitioner.

(27) “Repatriation” means the physical return of any cultural item or artifact, including human remains, to its place of origin.

(28) “Reservation” means all lands within the external boundaries of the Umatilla Indian Reservation of Oregon as defined by the Treaty of June 9, 1855.

(29) “Sacred Objects” means specific ceremonial objects which are needed by Tribal members for the practice of traditional Indian religions by present day adherents.

(30) “Undertaking” means any project, activity, program or development or change in land use that can result in changes in the character or use of a cultural resource, if any such cultural resource(s) is located in the area of potential effects. For federal undertakings, the project, activity or program must be under the direct or indirect jurisdiction of a federal agency or licensed or assisted by a federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements (36 CFR 800.2(o)).

Appendix F.

SUBCHAPTER XIII NATIONAL MUSEUM OF THE
AMERICAN INDIAN

PUBLIC LAW 101-185

101st Congress

§. 80q. Findings

The Congress finds that—

(1) there is no national museum devoted exclusively to the history and art of cultures indigenous to the Americas;

(2) although the Smithsonian Institution sponsors extensive Native American programs, none of its 19 museums, galleries, and major research facilities is devoted exclusively to Native American history and art;

(3) the Heye Museum in New York, New York, one of the largest Native American collections in the world, has more than 1,000,000 art objects and artifacts and a library of 40,000 volumes relating to the archaeology, ethnology, and history of Native American peoples;

(4) the Heye Museum is housed in facilities with a total area of 90,000 square feet, but requires a minimum of 400,000 square feet for exhibition, storage, and scholarly research;

(5) the bringing together of the Heye Museum collection and the Native American collection of the Smithsonian Institution would—

(A) create a national institution with unrivaled capability for exhibition and research;

(B) give all Americans the opportunity to learn of the cultural legacy, historic grandeur, and contemporary culture of Native Americans;

(C) provide facilities for scholarly meetings and the performing arts;

(D) make available curatorial and other learning opportunities for Indians; and

(E) make possible traveling exhibitions to communities throughout the Nation;

(6) by order of the Surgeon General of the Army, approximately 4,000 Indian human remains from battlefields and burial sites were sent to the Army Medical Museum and were later transferred to the Smithsonian Institution;

(7) through archaeological excavations, individual donations, and museum donations, the Smithsonian Institution has acquired approximately 14,000 additional Indian human remains;

(8) the human remains referred to in paragraphs (6) and (7) have long been a matter of concern for many Indian tribes, including Alaska Native Villages, and Native Hawaiian communities which are determined to provide an appropriate resting place for their ancestors;

(9) identification of the origins of such human remains is essential to addressing that concern; and

(10) an extraordinary site on the National Mall in the District of Columbia (U.S. Government Reservation No. 6) is reserved for the use of the Smithsonian Institution and is available for construction of the National Museum of the American Indian.

SOURCE (Pub. L. 101-185, Sec. 2, Nov. 28, 1989, 103 Stat. 1336.)

§ 80q-1. National Museum of the American Indian

(a) Establishment

There is established, within the Smithsonian Institution, a living memorial to Native Americans and their traditions which shall be known as the “National Museum of the American Indian”.

(b) Purposes

The purposes of the National Museum are to—

(1) advance the study of Native Americans, including the study of language, literature, history, art, anthropology, and life;

(2) collect, preserve, and exhibit Native American objects of artistic, historical, literary, anthropological, and scientific interest;

- (3) provide for Native American research and study programs; and
- (4) provide for the means of carrying out paragraphs (1), (2), and (3) in the District of Columbia, the State of New York, and other appropriate locations.

SOURCE (Pub. L. 101-185, Sec. 3, Nov. 28, 1989, 103 Stat. 1337.)

§ 80q-2. Authority of Board of Regents to enter into an agreement providing for transfer of Heye Foundation assets to the Smithsonian Institution

The Board of Regents is authorized to enter into an agreement with the Heye Foundation, to provide for the transfer to the Smithsonian Institution of title to the Heye Foundation assets. The agreement shall—

- (1) require that the use of the assets be consistent with section 80q-1(b) of this title; and
- (2) be governed by, and construed in accordance with, the law of the State of New York.

The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over any cause of action arising under the agreement.

SOURCE (Pub. L. 101-185, Sec. 4, Nov. 28, 1989, 103 Stat. 1337.)

§ 80q-3. Board of Trustees of the National Museum of the American Indian

(a) In general

The National Museum shall be under a Board of Trustees with the duties, powers, and authority specified in this section.

(b) General duties and powers

The Board of Trustees shall—

- (1) recommend annual operating budgets for the National Museum to the Board of Regents;
- (2) advise and assist the Board of Regents on all matters relating to the administration, operation, maintenance, and preservation of the National Museum;
- (3) adopt bylaws for the Board of Trustees;
- (4) designate a chairman and other officers from among the members of the Board of Trustees; and
- (5) report annually to the Board of Regents on the acquisition, disposition, and display of Native American objects and artifacts and on other appropriate matters.

(c) Sole authority

Subject to the general policies of the Board of Regents, the Board of Trustees shall have the sole authority to—

- (1) lend, exchange, sell, or otherwise dispose of any part of the collections of the National Museum, with the proceeds of such transactions to be used for additions to the collections of the National Museum or additions to the endowment of the National Museum, as the case may be;
- (2) purchase, accept, borrow, or otherwise acquire artifacts and other objects for addition to the collections of the National Museum; and
- (3) specify criteria for use of the collections of the National Museum for appropriate purposes, including research, evaluation, education, and method of display.

(d) Authority

Subject to the general policies of the Board of Regents, the Board of Trustees shall have authority to—

- (1) provide for restoration, preservation, and maintenance of the collections of the National Museum;
- (2) solicit funds for the National Museum and determine the purposes to which such funds shall be applied; and
- (3) approve expenditures from the endowment of the National Museum for any purpose of the Museum.

(e) Initial appointments to Board of Trustees

(1) Membership

The initial membership of the Board of Trustees shall consist of—

- (A) the Secretary of the Smithsonian Institution;

- (B) an Assistant Secretary of the Smithsonian Institution appointed by the Board of Regents;
- (C) 8 individuals appointed by the Board of Regents; and
- (D) 15 individuals, each of whom shall be a member of the board of trustees of the Heye Museum, appointed by the Board of Regents from a list of nominees recommended by the board of trustees of the Heye Museum.

(2) Special rule

At least 7 of the 23 members appointed under subparagraphs (C) and (D) of paragraph (1) shall be Indians.

(3) Terms

The trustee appointed under paragraph (1)(B) shall serve at the pleasure of the Board of Regents. The terms of the trustees appointed under subparagraph (C) or (D) of paragraph (1) shall be 3 years, beginning on the date of the transfer of the Heye Foundation assets to the Smithsonian Institution.

(4) Vacancies

Any vacancy shall be filled only for the remainder of the term involved. Any vacancy appointment under paragraph (1)(D) shall not be subject to the source and recommendation requirements of that paragraph, but shall be subject to paragraph (2).

(f) Subsequent appointments to Board of Trustees

(1) Membership

Upon the expiration of the terms under subsection (e) of this section, the Board of Trustees shall consist of—

- (A) the Secretary of the Smithsonian Institution;
- (B) an Assistant Secretary of the Smithsonian Institution appointed by the Board of Regents; and
- (C) 23 individuals appointed by the Board of Regents from a list of nominees recommended by the Board of Trustees.

(2) Special rule

- (A) (FOOTNOTE 2) least 12 of the 23 members appointed under paragraph (1)(C) shall be Indians. (FOOTNOTE 2) So in original. Probably should be “At”.

(3) Terms

The trustee appointed under paragraph (1)(B) shall serve at the pleasure of the Board of Regents. Except as otherwise provided in the next sentence, the terms of members appointed under paragraph (1)(C) shall be 3 years. Of the members first appointed under paragraph (1)(C)—

- (A) 7 members, 4 of whom shall be Indians, shall be appointed for a term of one year, as designated at the time of appointment; and
- (B) 8 members, 4 of whom shall be Indians, shall be appointed for a term of 2 years, as designated at the time of appointment.

(4) Vacancies

Any vacancy shall be filled only for the remainder of the term involved.

(g) Quorum

A majority of the members of the Board of Trustees then in office shall constitute a quorum.

(h) Expenses

Members of the Board shall be entitled (to the same extent as provided in section 5703 of title 5, United States Code, with respect to employees serving intermittently in the Government service) to per diem, travel, and transportation expenses for each day (including travel time) during which they are engaged in the performance of their duties.

SOURCE (Pub. L. 101-185, Sec. 5, Nov. 28, 1989, 103 Stat. 1337.)

§ 80q-4. Director and staff of the National Museum

(a) In general

The Secretary of the Smithsonian Institution shall appoint—

- (1) a Director who, subject to the policies of the Board of Trustees, shall manage the National Museum; and
- (2) other employees of the National Museum, to serve under the Director.

(b) Offer of employment to Heye Foundation employees

Each employee of the Heye Museum on the day before the date of the transfer of the Heye Foundation assets to the Smithsonian Institution shall be offered employment with the Smithsonian Institution—

- (1) under the usual terms of such employment; and
- (2) at a rate of pay not less than the rate applicable to the employee on the day before the date of the transfer.

(c) Applicability of certain civil service laws

The Secretary may—

- (1) appoint the Director, 2 employees under subsection (a)(2) of this section, and the employees under subsection (b) of this section without regard to the provisions of title 5, United States Code, governing appointments in the competitive service;
- (2) fix the pay of the Director and such 2 employees without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title, relating to classification and General Schedule pay rates; and
- (3) fix the pay of the employees under subsection (b) of this section in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of such title, relating to classification and General Schedule pay rates, subject to subsection (b)(2) of this section.

SOURCE (Pub. L. 101-185, Sec. 6, Nov. 28, 1989, 103 Stat. 1339.)

§ 80q-5. Museum facilities

(a) National Museum mall facility

The Board of Regents shall plan, design, and construct a facility on the area bounded by Third Street, Maryland Avenue, Independence Avenue, Fourth Street, and Jefferson Drive, Southwest, in the District of Columbia to house the portion of the National Museum to be located in the District of Columbia. The Board of Regents shall pay not more than 2/3 of the total cost of planning, designing, and constructing the facility from funds appropriated to the Board of Regents. The remainder of the costs shall be paid from non-Federal sources.

(b) National Museum Heye Center facility

- (1) Lease of space from GSA

(A) Terms

Notwithstanding section 490(j) of title 40, the Administrator of General Services may lease, at a nominal charge, to the Smithsonian Institution space in the Old United States Custom House at One Bowling Green, New York, New York, to house the portion of the National Museum to be located in the city of New York. The lease shall be subject to such terms as may be mutually agreed upon by the Administrator and the Secretary of the Smithsonian Institution. The term of the lease shall not be less than 99 years.

(B) Reimbursement of Federal buildings fund

The Administrator of General Services may reimburse the fund established by section 490(f) of title 40 for the difference between the amount charged to the Smithsonian Institution for leasing space under this paragraph and the commercial charge under section 490(j) of title 40 which, but for this paragraph, would apply to the leasing of such space. There are authorized to be appropriated to the Administrator such sums as may be necessary to carry out this subparagraph for fiscal years beginning after September 30, 1990.

- (2) Construction

(A) Museum facility

The Board of Regents shall plan, design, and construct a significant facility for the National Museum in the space leased under paragraph (1).

(B) Auditorium and loading dock facility

The Administrator of General Services shall plan, design, and construct an auditorium and loading dock in the Old United States Custom House at One Bowling Green, New York, New York, for the shared use of all the occupants of the building, including the National Museum.

(C) Square footage

The facilities to be constructed under this paragraph shall have, in the aggregate, a total square footage of approximately 82,500 square feet.

- (3) Repairs and alterations

After construction of the facility under paragraph (2)(A), repairs and alterations of the facility shall be the responsibility of the Board of Regents.

(4) Reimbursement of GSA

The Board of Regents shall reimburse the Administrator for the Smithsonian Institution's pro rata share of the cost of utilities, maintenance, cleaning, and other services incurred with respect to the space leased under paragraph (1) and the full cost of any repairs or alterations made by the General Services Administration at the request of the Smithsonian Institution with respect to the space.

(5) Cost sharing

(A) General rules

The Board of Regents shall pay 1/3 of the costs of planning, designing, and constructing the facility under paragraph (2)(A) from funds appropriated to the Board of Regents. The remainder of the costs shall be paid from non-Federal sources.

(B) Responsibilities of New York City and State

Of the costs which are required to be paid from non-Federal sources under this paragraph, the city of New York, New York, and the State of New York have each agreed to pay \$8,000,000 or an amount equal to 1/3 of the costs of planning, designing, and constructing the facility under paragraph (2)(A), whichever is less. Such payments shall be made to the Board of Regents in accordance with a payment schedule to be agreed upon by the city and State and the Board of Regents.

(C) Limitation on obligations of Federal funds

Federal funds may not be obligated for actual construction of a facility under paragraph (2)(A) in a fiscal year until non-Federal sources have paid to the Board of Regents the non-Federal share of such costs which the Board of Regents estimates will be incurred in such year.

(6) Designation

The facility to be constructed under paragraph (2)(A) shall be known and designated as the "George Gustav Heye Center of the National Museum of the American Indian".

(c) Museum Support Center facility

The Board of Regents shall plan, design, and construct a facility for the conservation and storage of the collections of the National Museum at the Museum Support Center of the Smithsonian Institution.

(d) Minimum square footage

The facilities to be constructed under this section shall have, in the aggregate, a total square footage of at least 400,000 square feet.

(e) Authority to contract with GSA

The Board of Regents and the Administrator of General Services may enter into such agreements as may be necessary for planning, designing, and constructing facilities under this section (other than subsection (b)(2)(B)). Under such agreements, the Board of Regents shall transfer to the Administrator, from funds available for planning, designing, and constructing such facilities, such amounts as may be necessary for expenses of the General Services Administration with respect to planning, designing, and constructing such facilities.

(f) Limitation on obligation of Federal funds

Notwithstanding any other provision of this subchapter, funds appropriated for carrying out this section may not be obligated for actual construction of any facility under this section until the 60th day after the date on which the Board of Regents transmits to Congress a written analysis of the total estimated cost of the construction and a cost-sharing plan projecting the amount for Federal appropriations and for non-Federal contributions for the construction on a fiscal year basis.

SOURCE (Pub. L. 101-185, Sec. 7, Nov. 28, 1989, 103 Stat. 1339.)

§ 80q-6. Custom House office space and auditorium

(a) Repairs and alterations

The Administrator of General Services shall make such repairs and alterations as may be necessary in the portion of the Old United States Custom House at One Bowling Green, New York, New York, which is not leased to the Board of Regents under section 80q-5(b) of this title and which, as of November 28, 1989, has not been altered.

(b) Authorization of appropriation

There is authorized to be appropriated to the Administrator of General Services \$25,000,000 from the fund established pursuant to section 490(f) of title 40 to carry out this section and section 80q-5(b)(2)(B) of this title.

SOURCE (Pub. L. 101-185, Sec. 8, Nov. 28, 1989, 103 Stat. 1341.)

§ 80q-7. Audubon Terrace

(a) In general

The Board of Regents shall—

(1) assure that, on the date on which a qualified successor to the Heye Foundation at Audubon Terrace first takes possession of Audubon Terrace, an area of at least 2,000 square feet at that facility is accessible to the public and physically suitable for exhibition of museum objects and for related exhibition activities;

(2) upon written agreement between the Board and any qualified successor, lend objects from the collections of the Smithsonian Institution to the successor for exhibition at Audubon Terrace; and

(3) upon written agreement between the Board and any qualified successor, provide training, scholarship, technical, and other assistance (other than operating funds) with respect to the area referred to in paragraph (1) for the purposes described in that paragraph.

(b) Determination of charges

Any charge by the Board of Regents for activities pursuant to agreements under paragraph (2) or (3) of subsection (a) of this section shall be determined according to the ability of the successor to pay.

(c) Definition

As used in this section, the terms “qualified successor to the Heye Foundation at Audubon Terrace”, “qualified successor”, and, “successor” mean an organization described in section 501(c)(3) of title 26, and exempt from tax under section 501(a) of title 26, that, as determined by the Board of Regents—

(1) is a successor occupant to the Heye Foundation at Audubon Terrace, 3753 Broadway, New York, New York;

(2) is qualified to operate the area referred to in paragraph (1) for the purposes described in that paragraph; and

(3) is committed to making a good faith effort to respond to community cultural interests in such operation.

SOURCE (Pub. L. 101-185, Sec. 9, Nov. 28, 1989, 103 Stat. 1342.)

§ 80q-8. Board of Regents functions with respect to certain agreements and programs

(a) Priority to be given to Indian organizations with respect to certain agreements

In entering into agreements with museums and other educational and cultural organizations to—

(1) lend Native American artifacts and objects from any collection of the Smithsonian Institution;

(2) sponsor or coordinate traveling exhibitions of artifacts and objects; or

(3) provide training or technical assistance; the Board of Regents shall give priority to agreements with Indian organizations, including Indian tribes, museums, cultural centers, educational institutions, libraries, and archives. Such agreements may provide that loans or services to such organizations may be furnished by the Smithsonian Institution at minimal or no cost.

(b) Indian programs

The Board of Regents may establish—

(1) programs to serve Indian tribes and communities; and

(2) in cooperation with educational institutions, including tribally controlled community colleges (as defined in section 1801 of title 25), programs to enhance the opportunities for Indians in the areas of museum studies, management, and research.

(c) Indian Museum Management Fellowships

The Board of Regents shall establish an Indian Museum Management Fellowship program to provide stipend support to Indians for training in museum development and management.

(d) Authorization of appropriations

There is authorized to be appropriated \$2,000,000 for each fiscal year, beginning with fiscal year 1991, to carry out subsections (b) and (c) of this section.

SOURCE (Pub. L. 101-185, Sec. 10, Nov. 28, 1989, 103 Stat. 1342.)

§ 80q-9. Inventory, identification, and return of Indian human remains and Indian funerary objects in possession of Smithsonian Institution

(a) Inventory and identification

The Secretary of the Smithsonian Institution, in consultation and cooperation with traditional Indian religious leaders and government officials of Indian tribes, shall—

- (1) inventory the Indian human remains and Indian funerary objects in the possession or control of the Smithsonian Institution; and
- (2) using the best available scientific and historical documentation, identify the origins of such remains and objects.

(b) Notice in case of identification of tribal origin

If the tribal origin of any Indian human remains or Indian funerary object is identified by a preponderance of the evidence, the Secretary shall so notify any affected Indian tribe at the earliest opportunity.

(c) Return of Indian human remains and associated Indian funerary objects

If any Indian human remains are identified by a preponderance of the evidence as those of a particular individual or as those of an individual culturally affiliated with a particular Indian tribe, the Secretary, upon the request of the descendants of such individual or of the Indian tribe shall expeditiously return such remains (together with any associated funerary objects) to the descendants or tribe, as the case may be.

(d) Return of Indian funerary objects not associated with Indian human remains

If any Indian funerary object not associated with Indian human remains is 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, the Secretary, upon the request of the Indian tribe, shall expeditiously return such object to the tribe.

(e) Interpretation

Nothing in this section shall be interpreted as—

- (1) limiting the authority of the Smithsonian Institution to return or repatriate Indian human remains or Indian funerary objects to Indian tribes or individuals; or
- (2) delaying actions on pending repatriation requests, denying or otherwise affecting access to the courts, or limiting any procedural or substantive rights which may otherwise be secured to Indian tribes or individuals.

(f) Authorization of appropriations

There is authorized to be appropriated \$1,000,000 for fiscal year 1991 and such sums as may be necessary for succeeding fiscal years to carry out this section.

SOURCE (Pub. L. 101-185, Sec. 11, Nov. 28, 1989, 103 Stat. 1343.)

§ 80q-10. Special committee to review inventory, identification, and return of Indian human remains and Indian funerary objects

(a) Establishment; duties

Not later than 120 days after November 28, 1989, the Secretary of the Smithsonian Institution shall appoint a special committee to monitor and review the inventory, identification, and return of Indian human remains and Indian funerary objects under section 80q-9 of this title. In carrying out its duties, the committee shall—

- (1) with respect to the inventory and identification, ensure fair and objective consideration and assessment of all relevant evidence;
- (2) upon the request of any affected party or otherwise, review any finding relating to the origin or the return of such remains or objects;
- (3) facilitate the resolution of any dispute that may arise between Indian tribes with respect to the return of such remains or objects; and
- (4) perform such other related functions as the Secretary may assign.

(b) Membership

The committee shall consist of five members, of whom—

- (1) three members shall be appointed from among nominations submitted by Indian tribes and organizations; and

(2) the Secretary shall designate one member as chairman. The Secretary may not appoint to the committee any individual who is an officer or employee of the Government (including the Smithsonian Institution) or any individual who is otherwise affiliated with the Smithsonian Institution.

(c) Access

The Secretary shall ensure that the members of the committee have full and free access to the Indian human remains and Indian funerary objects subject to section 80q-9 of this title and to any related evidence, including scientific and historical documents.

(d) Pay and expenses of members

Members of the committee shall—

(1) be paid the daily equivalent of the annual rate of basic pay payable for grade GS-18 of the General schedule under section 5332 of title 5; and

(2) be entitled (to the same extent as provided in section 5703 of such title, with respect to employees serving intermittently in the Government service) to per diem, travel, and transportation expenses; for each day (including travel time) during which they are engaged in the performance of their duties.

(e) Rules and administrative support

The Secretary shall prescribe regulations and provide administrative support for the committee.

(f) Report and termination

At the conclusion of the work of the committee, the Secretary shall so certify by report to the Congress. The committee shall cease to exist 120 days after the submission of the report.

(g) Nonapplicability of Federal Advisory Committee Act

The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the committee.

(h) Authorization of appropriations

There is authorized to be appropriated \$250,000 for fiscal year 1991 and such sums as may be necessary for succeeding fiscal years to carry out this section.

SOURCE (Pub. L. 101-185, Sec. 12, Nov. 28, 1989, 103 Stat. 1344.)

§ 80q-11. Inventory, identification, and return of Native Hawaiian human remains and Native Hawaiian funerary objects in possession of the Smithsonian Institution

(a) In general

The Secretary of the Smithsonian Institution shall—

(1) in conjunction with the inventory and identification under section 80q-9 of this title, inventory and identify the Native Hawaiian human remains and Native Hawaiian funerary objects in the possession of the Smithsonian Institution;

(2) enter into an agreement with appropriate Native Hawaiian organizations with expertise in Native Hawaiian affairs (which may include the Office of Hawaiian Affairs and the Malama I Na Kupuna O Hawai'i Nei) to provide for the return of such human remains and (FOOTNOTE 1) funerary objects; and (FOOTNOTE 1) So in original. Probably should be “and”.

(3) to the greatest extent practicable, apply, with respect to such human remains and funerary objects, the principles and procedures set forth in sections 80q-9 and 80q-10 of this title with respect to the Indian human remains and Indian funerary objects in the possession of the Smithsonian Institution.

(b) Definitions

As used in this section—

(1) the term “Malama I Na Kupuna O Hawai'i Nei” means the nonprofit, Native Hawaiian organization, incorporated under the laws of the State of Hawaii by that name on April 17, 1989, the purpose of which is to provide guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues; and

(2) the term “Office of Hawaiian Affairs” means the Office of Hawaiian Affairs established by the Constitution of the State of Hawaii.

SOURCE (Pub. L. 101-185, Sec. 13, Nov. 28, 1989, 103 Stat. 1345.)

§ 80q-12. Grants by the Secretary of the Interior to assist Indian tribes with respect to agreements for the return of Indian human remains and Indian funerary objects

(a) In general

The Secretary of the Interior may make grants to Indian tribes to assist such tribes in reaching and carrying out agreements with—

(1) the Board of Regents for the return of Indian human remains and Indian funerary objects under section 80q-9 of this title; and

(2) other Federal and non-Federal entities for additional returns of Indian human remains and Indian funerary objects.

(b) Authorization of appropriations

There is authorized to be appropriated \$1,000,000 for fiscal year 1991 and such sums as may be necessary for succeeding fiscal years for grants under subsection (a) of this section.

SOURCE (Pub. L. 101-185, Sec. 14, Nov. 28, 1989, 103 Stat. 1345.)

§ 80q-13. Grants by the Secretary of the Interior to assist Indian organizations with respect to renovation and repair of museum facilities and exhibit facilities

(a) Grants

The Secretary of the Interior may make grants to Indian organizations, including Indian tribes, museums, cultural centers, educational institutions, libraries, and archives, for renovation and repair of museum facilities and exhibit facilities to enable such organizations to exhibit objects and artifacts on loan from the collections of the Smithsonian Institution or from other sources. Such grants may be made only from the Tribal Museum Endowment Fund.

(b) Indian organization contribution

In making grants under subsection (a) of this section, the Secretary may require the organization receiving the grant to contribute, in cash or in kind, not more than 50 percent of the cost of the renovation or repair involved. Such contribution may be derived from any source other than the Tribal Museum Endowment Fund.

(c) Tribal Museum Endowment Fund

(1) Establishment

There is established in the Treasury a fund, to be known as the “Tribal Museum Endowment Fund” (hereinafter in this subsection referred to as the “Fund”) for the purpose of making grants under subsection (a) of this section. The Fund shall consist of (A) amounts deposited and credited under paragraph (2), (B) obligations obtained under paragraph (3), and (C) amounts appropriated pursuant to authorization under paragraph (5).

(2) Deposits and credits

The Secretary of the Interior is authorized to accept contributions to the Fund from non-Federal sources and shall deposit such contributions in the Fund. The Secretary of the Treasury shall credit to the Fund the interest on, and the proceeds from sale and redemption of, obligations held in the Fund.

(3) Investments

The Secretary of the Treasury may invest any portion of the Fund in interest-bearing obligations of the United States. Such obligations may be acquired on original issue or in the open market and may be held to maturity or sold in the open market. In making investments for the Fund, the Secretary of the Treasury shall consult the Secretary of the Interior with respect to maturities, purchases, and sales, taking into consideration the balance necessary to meet current grant requirements.

(4) Expenditures and capital preservation

Subject to appropriation, amounts derived from interest shall be available for expenditure from the Fund. The capital of the Fund shall not be available for expenditure.

(5) Authorization of appropriations

There is authorized to be appropriated to the Fund \$2,000,000 for each fiscal year beginning with fiscal year 1992.

(d) Annual report

Not later than January 31 of each year, the Secretary of the Interior, in consultation with the Secretary of the Treasury, shall submit to the Congress a report of activities under this section, including a statement of—

(1) the financial condition of the Fund as of the end of the preceding fiscal year, with an analysis of the Fund transactions during that fiscal year; and

(2) the projected financial condition of the Fund, with an analysis of expected Fund transactions for the six fiscal years after that fiscal year.

SOURCE (Pub. L. 101-185, Sec. 15, Nov. 28, 1989, 103 Stat. 1345.)

§ 80q-14. Definitions

As used in this subchapter—

(1) the term “Board of Regents” means the Board of Regents of the Smithsonian Institution;

(2) the term “Board of Trustees” means the Board of Trustees of the National Museum of the American Indian;

(3) the term “burial site” means a natural or prepared physical location, whether below, on, or above the surface of the earth, into which, as a part of a death rite or ceremony of a culture, individual human remains are deposited;

(4) the term “funerary object” means an object that, as part of a death rite or ceremony of a culture, is intentionally placed with individual human remains, either at the time of burial or later;

(5) the term “Heye Foundation assets” means the collections, endowment, and all other property of the Heye Foundation (other than the interest of the Heye Foundation in Audubon Terrace) described in the Memorandum of Understanding between the Smithsonian Institution and the Heye Foundation, dated May 8, 1989, and the schedules attached to such memorandum;

(6) the term “Heye Museum” means the Museum of the American Indian, Heye Foundation;

(7) the term “Indian” means a member of an Indian tribe;

(8) the term “Indian tribe” has the meaning given that term in section 450b of title 25;

(9) the term “National Museum” means the National Museum of the American Indian established by section 80q-1 of this title;

(10) the term “Native American” means an individual of a tribe, people, or culture that is indigenous to the Americas and such term includes a Native Hawaiian; and

(11) the term “Native Hawaiian” means a member or descendant of the aboriginal people who, before 1778, occupied and exercised sovereignty in the area that now comprises the State of Hawaii.

SOURCE (Pub. L. 101-185, Sec. 16, Nov. 28, 1989, 103 Stat. 1346.)

Sec. 80q-15. Authorization of appropriations

(a) Funding

There is authorized to be appropriated to the Board of Regents to carry out this subchapter (other than as provided in sections 80q-5(b)(1)(B), 80q-6, 80q-8, 80q-9, 80q-10, 80q-12, and 80q-13(c)(5) of this title)—

(1) \$10,000,000 for fiscal year 1990; and

(2) such sums as may be necessary for each succeeding fiscal year.

(b) Period of availability

Funds appropriated under subsection (a) of this section shall remain available without fiscal year limitation for any period prior to the availability of the facilities to be constructed under section 80q-5 of this title for administrative and planning expenses and for the care and custody of the collections of the National Museum.

SOURCE (Pub. L. 101-185, Sec. 17, Nov. 28, 1989, 103 Stat. 1347.)

Appendix G.

NMAI REPATRIATION POLICY STATEMENT

NATIONAL MUSEUM OF THE AMERICAN INDIAN POLICY STATEMENT ON NATIVE AMERICAN HUMAN REMAINS AND CULTURAL MATERIALS

I. *Preamble*

In November 1989, the National Museum of the American Indian Act became law. Public Law 101-185 provided for the transfer to the Smithsonian Institution of title to the assets of the Museum of the American Indian, Heye Foundation. The National Museum of the American Indian (hereinafter “Museum”), established by the Act, has a Board of Trustees which, subject to the general policies of the Smithsonian Board of Regents, has the sole authority to lend, exchange, sell, or otherwise dispose of any part of the collections of the Museum; purchase, accept, borrow, or otherwise acquire artifacts and other objects for addition to the collections of the Museum; and to specify criteria for use of the collections of the Museum for appropriate purposes, including research, evaluation, education, and method of display. Integral to the fulfillment of that is the affirmation that:

- Native American cultures and the collections that reflect those American Indian, Alaska Native and Native Hawaiian cultures provide a context for and constitute a rich part of the activities of the museum.
- The goal of the Museum’s repatriation policy is to support the continuation of ceremonial and ritual life among Native American peoples, to foster and support the study by Native Americans of their own traditions, and to forge consensus among the Museum and Native American communities while accounting for and balancing the interest of each.
- The wishes of Native American peoples with respect to human remains and funerary objects of their own ancestors must be honored.
- The wishes of Native American peoples with respect to access to and treatment and use of ceremonial and religious materials needed in the practice of their religion must be granted.
- The Native American community must have broad access to and use of information pertaining to collection materials to insure that informed decisions can be made regarding the treatment and disposition of Native American materials.
- All Native American materials, including human remains, funerary objects, ceremonial and religious objects, and communally-owned property, together with all culturally-specific information, must be treated as the sole property of the affected Native American culturally-affiliated group and with the utmost respect by scholars and interpreters of those cultures, whether in collections research, scientific study, exhibitions, or educational programs.
- Respect for Native American peoples and cultures and principles of law prohibit the retention of Native American materials that were acquired by or transferred to the National Museum of the American Indian illegally or under circumstances that invalidate the Museum’s claim to them.
- The Museum has, as one of its highest priorities the expeditious implementation of its repatriation policy. To carry out this policy, there must be continuous dialogue between the Museum and Native American peoples to assure that all viewpoints and beliefs are considered in its implementation.
- With respect to Native American peoples beyond the borders of the United States, this policy shall be carried out in accordance with the following procedures and applicable treaties and international agreements.

This policy describes the National Museum of the American Indian policy and procedure for: (1) the repatriation of Native American human remains and funerary objects; (2) the objects of religious, ceremonial, and historical importance to Native American peoples, communally-owned tribal property, and other property acquired by or transferred to the Museum illegally; and (3) the treatment and display of Native American materials.

II. *Background*

Over the years, a set of principles has evolved within the federal policy regarding Native American religious freedom and the treatment and the repatriation of cultural materials. Certain of those principles, pertaining to human remains and funerary objects, were codified into law by Public Law 101-185. The National Museum of the American Indian is committed to a policy that extends the principles of the law to other categories of Native American objects, namely, ceremonial and religious materials and communally-owned Native property.

The initial focus of all repatriation requests involves the nature of the material in question and the circumstances of its acquisition by the Museum. Each repatriation request carries with it unique facts, circumstances, and legal and ethical considerations. Thus, each request of necessity must be reviewed individually within the Museum's overall policy framework.

III. *Policy*

The National Museum of the American Indian is committed to the disposition, in accordance with the wishes of culturally-base Native Americans, of (i) Native American human remains of known individuals; (ii) human remains of individuals who can be identified by tribal or cultural affiliation with contemporary Native American peoples; (iii) funerary objects; (iv) communally-owned Native American property; (v) ceremonial and religious objects; and (vi) objects transferred to or acquired by, or hereafter transferred or acquired by, the Museum illegally or under circumstances that render invalid the Museum's claim to them. Considerations associated with each type of material follow.

A. Human remains. The Museum will repatriate any human remains that are reasonably identified as being those of a particular individual or of an individual culturally affiliated with a particular American Indian tribe or Native Hawaiian organization, upon the request of living descendants of the individual or of the particular tribe or organization. In addition, the Museum will repatriate to an appropriate descendant, tribe, or organization, upon request, any other Native American remains found to have been transferred to the Museum or otherwise acquired by the Museum illegally or under circumstances that would render invalid its claim to them. Remains excavated pursuant to lawfully-issued permits under the Antiquities Act of 1906 will be deemed to have been acquired under color of law, but subject to repatriation if individually or tribally identifiable.

B. Funerary objects. The Museum will repatriate any funerary objects associated with human remains, to be repatriated in accordance with paragraph A. above, including any funerary object which is a surrogate for a deceased person. With respect to funerary objects not associated with human remains, with the exception of surrogates addressed above, the Museum will repatriate to a particular American Indian tribe or Native Hawaiian organization, upon request, any funerary object that is reasonably identified as having been removed from a specific burial site culturally affiliated with that tribe or organization. In addition, the Museum will repatriate any other funerary objects found to have been acquired by or transferred to the Museum illegally or under circumstance that would render invalid the Museum's claim to them.

C. Communally-owned Native American property. The Museum recognizes that it holds in its collections certain objects that are communally-owned property of an American Indian tribe, Native Hawaiian organization, or Native American group itself, rather than property owned by an individual Native American person. If such property belonged to an entire tribe, organization, or group, or was held for communal purposes and could not have been legally alienated, transferred, or conveyed by an individual Native American, the Museum's claim to it is invalid, and such items will be repatriated upon request according to the procedures established herein.

D. Ceremonial and religious objects. This category of materials consists of objects that are needed by Native American religious leaders for the practice of traditional Native American religions, including the purpose of ceremonial renewal. Because objects regarded as ceremonial and religious by any given tribe may vary substantially from the objects so regarded by other tribes, this category of objects does not lend itself to a fixed set of guidelines. Thus, in keeping with the American Indian Religious Freedom Act, each request must be considered on a case-by-case basis in consultation with Native American traditional religious leaders and practitioners. The Museum will seek the counsel of other tribal elders, members of the governing bodies and other representative of the tribe making the request, and any other individuals who can provide relevant information to the specific request at hand.

E. Objects acquired illegally. The Museum will repatriate upon request to an appropriate American Indian tribe, Native Hawaiian organization, or Native American group any material acquired by or transferred to the Museum illegally or under circumstances that render invalid the Museum's claim to them. Each request for materials so acquired will be considered on a case-by-case basis and take into account all relevant evidence submitted by the particular tribe, organization, or group and available to the Museum.

F. Duplicate or abundant objects. When the Museum has duplicate material, numerous similar objects in its collection, or an abundance of a certain type of material, and a Native American, American Indian tribe, Native Hawaiian organization, or Native American group that is culturally affiliated with the material requests its repatriation, the Museum will consider disposition.

IV. Procedures

All repatriation decisions are made by the Museum Board of Trustees upon advice of the Collections Committee.

A. Inventory. The policy outlined above requires the Museum to have in place efficient procedural mechanisms to respond to repatriation requests. The National Museum of the American Indian will prepare an inventory of religious and ceremonial objects, funerary items, and all other cultural materials covered by those policy. The steps of such inventories are as follows:

1. Using the best available scientific and historical information, the Museum will identify the origin of human remains, funerary objects, and other objects covered by this policy.
2. Identification will be based on a reasonable belief standard.
3. The inventories will be made available to all affected American Indian tribes and Native Hawaiian organizations at the earliest opportunity.
4. The Museum will include in its inventories items that are not positively identifiable as being associated with a particular American Indian tribe or Native Hawaiian organization but, given the totality of the information about the materials, make it more likely than not that the item once belonged to that American Indian tribe or Native Hawaiian organization or that the human remains are culturally affiliated with that group.

B. Consultation. During the inventory process and following its completion, the Museum will consult widely with Native American peoples. The Museum will disclose all relevant information pertaining to collection objects identified in the inventories, and curatorial staff will be available to respond to additional requests for information. Physical access to materials will be provided, as requested. In addition, a special area will be made available for Native American peoples to view or otherwise inspect their culturally affiliated materials. Every effort will be made to reach agreement through informal consultation and cooperation. Where issues remain after good faith discussions, those pertaining to human remains, funerary objects and other objects covered by this policy will be referred to a Special Review Committee established by the Board of Trustees.

C. Claimants. Claims for materials may be submitted by descendants and those who can demonstrate a cultural affiliation to the materials. This group of claimants includes, but is not limited to, Native American tribal, religious, ceremonial and Hawaiian organizational leaders. If the Museum is uncertain about cultural affiliation of the party requesting the materials, the Museum may request information about affiliation. If a request is made by one Native American group for the return of materials that the Museum believes may be more closely affiliated with another Native American group, the Museum will advise both parties of the request. All parties with a demonstrable interest will be invited to join in the negotiation and decision-making process. Where competing claims exist that cannot be resolved through informal consultation, the parties will submit the dispute to the Board of Trustees.

D. Burden of Proof. The initial burden of proof with respect to any repatriation request shall be on the requesting individual or tribe to establish, on a reasonable basis, a connection to material in question. This connection may be lineal descent, tribal affiliation, and/or cultural affiliation. In some cases, this burden can be satisfied by reference to the Museum's inventory which shall, wherever possible, identify descent, tribal origin, and/or cultural affiliation. Where the inventory is inconclusive or cannot determine affiliation, the requesting party may satisfy its burden through evidence of geography, descent, kinship, archaeology, anthropology, linguistics, folklore, oral tradition, historical patterns of ownership and/or control, and other relevant information or expert opinion.

For human remains and funerary objects, once cultural affiliation has been satisfactorily established, the requesting party has met its burden of proof and the material shall be repatriated or otherwise disposed of in accordance with the wishes of the affiliated individual or tribe.

In the case of ceremonial and religious materials, the claimant must show that the materials are needed by traditional Native American religious leaders for the practice of traditional Native American religions. For communally-owned Native American property, the requesting party must show that the material has an ongoing historical, traditional, or cultural relevance important to the Native American group or culture itself, rather than property

owned by an individual Native American, and which, therefore, could not have been properly alienated, appropriated, or conveyed by any individual at the time the object was separated from such group. Once a claimant has satisfactorily established its case, and the Board of Trustees has affirmed its claim, the claimant is entitled to the material.

E. Special Review Committee on repatriation. The Board of Trustees, upon being notified by the Museum Director or the American Indian or Native Hawaiian claimant that the discussions concerning repatriation have reached an impasse, shall, within fifteen days, constitute a Special Review Committee to review the nature of the controversy, to examine the evidence presented by the parties in dispute, and present its findings and recommendations to the Collections Committee within thirty (30) days. The Collections Committee shall then review the findings and recommendations of the Special Review Committee and shall, within fifteen (15) days, submit a recommended course of action to the Board of Trustees for its consideration in accordance with the provisions of Public Law 101-185, Section 5(C) (B), *Sole Authority*.

F. Access and technical assistance. The Museum recognizes that certain items in its collections are needed by traditional Native American religious leaders for the practice of Native American religions. The Museum is committed to a policy of repatriation of these and other cultural materials. Where repatriation is not requested, or where a repatriation agreement is not reached, the Museum is committed to a policy of mutual and shared access and use of these materials, as culturally appropriate. Access and use, in the form of availability of materials for examination or for loan, will be within the purview of the collections management policy developed by the Collections Committee.

The Museum also is committed to a policy of offering American Indian tribes and Native Hawaiian organizations to which materials are repatriated, technical assistance in the care, preservation, use, and disposition of materials. Such assistance may encompass advice to tribal museums and training programs, where requested. Where repatriated materials may be altered or destroyed because of their sacred or traditional nature and function, the Museum shall obtain permission from the Native American owners prior to conducting any destructive analysis or documenting the existence of materials through reproduction or graphic representation.

V. Treatment, Care and Exhibition

The National Museum of the American Indian will develop and adopt a collections management policy that describes detailed procedures for accession, deaccession, gifts, exhibition display, handling, access, and many other aspects of collections management. That policy must respect and accommodate the cultural and religious sensitivities surrounding the Museum's collections. The museum will develop its detailed collections procedures in accordance with the policy that culturally-specific information, data, documentation, reproduction and depictions— whether contained or transmitted in written, audio, visual or computer form—are the sole property of the affiliated group, and its consent regarding treatment, care and exhibition of its cultural materials must be obtained prior to decisions being made. The following collections management principles will guide the formulation and implementation of the collections management policy.

A. Exhibition and display. Religious and ceremonial objects shall be exhibited or displayed only with the consent of the culturally affiliated group. Before displaying religious, ceremonial, or potentially sensitive material as part of exhibitions or public programs, curators shall consult with interested and concerned parties and shall consider and be guided by their views in determining the method of display. Planning of exhibitions—format and content—shall be done in consultation with Native American representatives of the tribe and/or culture involved to assure historical and cultural accuracy in the presentation of all information and materials, and to avoid desecration, insensitive treatment, and inappropriate interpretation of religious or ceremonial materials.

B. Curation. Curation and care of cultural materials shall be done in accordance with the highest standards of museum practices and consultation with the views of an appropriate representative from culturally-affiliated groups, particularly where culturally and religiously sensitive materials are involved. If an American Indian tribe, Native Hawaiian organization, or Native American group requests that the Museum retain custody of religious, ceremonial, communally-owned, or other tribal property eligible for repatriation, they shall inform the curator and other appropriate staff regarding permissible methods of handling, care, and protection of such articles.

C. Access. Access to the collections for viewing, study, the performance of ceremonies, and for other purposes of Native American people shall be allowed to the maximum extent. Facilities will be constructed within the Museum and/or under its auspices, as appropriate, for the purpose of conducting ceremonies. Public access to the collections for research, study, or viewing purposes may be restricted if such access offends the religious or cultural practices of Native American peoples.

D. Outreach. Education constitutes an essential purpose of the Museum. Through the loan and exchange of cultural materials and travelling exhibitions the Museum will endeavor to make its collections more widely available to American Indian communities and to present contemporary expressions on an ongoing basis. Provisions shall be made to furnish materials and information to Native American people through, but not limited to, the application of telecommunications and other technologies. The museum also is committed to training Native American people in museology by developing a full curriculum of programs at all levels—senior management, administration, curatorial, technical, fellowships support, and security.

E. Acquisitions. Objects will not be acquired by gift, purchase, or exchange unless the provenance is complete and consistent with principles of law and policy established by the Museum and the Smithsonian Board of Regents. In its acquisitions practices the Museum endorses and abides by the principles of the UNESCO Convention and the American Indian Religious Freedom Act. The Museum will consult with all concerned parties before acquiring materials that may be culturally or religiously sensitive. Further, the Museum will not accept archaeological materials unless they have been excavated in compliance with appropriate international agreements, negotiated tribal agreements, federal laws and guidelines, and such other state and local laws as may be applicable.

Title to all objects acquired for the permanent collections shall be obtained free and clear. As a general rule, the Museum must not accept gifts with restrictions as to use or future disposition. The Museum may, however, permit exceptions to this policy for materials that are religiously or culturally sensitive and where the donor imposes restrictions on access, display, research, treatment, storage, or care. Under exceptional circumstances, and with approval of the Board, the Director may accept objects with restrictions or limitations, provided that the condition shall be stated clearly in the instrument of conveyance and made part of the records.

Whenever an item of cultural property covered by this policy shall be offered or gifted to the Museum, or whenever it shall come to the attention of the Museum that such item is or is about to be placed on the market for sale, trade, or exchange, the Director shall notify the appropriate American Indian tribe, Native Hawaiian organization, or Native American group of known circumstances. To the extent feasible, and upon the request of the culturally-affiliated tribe or group, the Museum will coordinate efforts with the tribe or group to recover or obtain a treatment-and-care agreement, as appropriate.

NMNH REPATRIATION POLICY STATEMENT

GUIDELINES FOR REPATRIATION, NATIONAL MUSEUM OF NATURAL HISTORY, SMITHSONIAN INSTITUTION

Amended 1997

by Gillian Flynn and Thomas Killion

I. INTRODUCTION

The National Museum of Natural History (NMNH) recognizes the right of Native peoples to the return of human remains and objects specified in the National Museum of the American Indian Act (NMAI). The Repatriation Office was established to implement the statutory requirements of the NMAI Act, as amended. The Repatriation Office was established to implement the statutory requirements of the NMAI Act. This law and its amendment assert the right of Native American and Native Hawaiian peoples to determine the disposition of culturally affiliated¹ human remains, funerary objects, sacred objects, and objects of cultural patrimony now in the collections of the Smithsonian Institution. Repatriation at the NMNH is intended to be a collaborative process, in which both staff and Native peoples become involved in determining the future of human remains and cultural objects.

One of the primary tasks of the Repatriation Office at the NMNH is to inventory and assess the cultural origins of collections potentially affiliated with contemporary Native American and Hawaiian peoples in the United States. Another of its principle functions is to respond to requests for information and/or requests for the return of human remains, funerary objects, sacred objects, and objects of cultural patrimony affiliated with Native groups.

The repatriation program at the NMNH looks toward the future and the possibility that this process will begin to generate a greater level of understanding and respect for the traditions and cultural heritage of Native Americans at the national level. This understanding can only come by incorporating contemporary Native perspectives into the interpretation and presentation of Native people's past and present cultural realities at NMNH. Cooperative endeavors to address Native rights and concerns established during the repatriation process hold the promise of strengthening the Native voice at the National Museum of Natural History, an institution historically committed to understanding and interpreting Native cultures of the Americas and the world.

II. THE NATIONAL MUSEUM OF THE AMERICAN INDIAN ACT AND ITS AMENDMENT

The NMAI Act, 20 U.S.C. Section 80q, (PL 101-185), passed in 1989, mandated that the Smithsonian Institution inventory, document and, if requested, repatriate culturally affiliated human remains and funerary objects to federally recognized Native American tribes. No deadline for was given for Native groups to make a claim. The 1989 NMAI Act did not address the disposition of sacred objects and objects of cultural patrimony but was amended in 1996 to include those objects.

The NMAI Act amendment (PL 104-278) addresses repatriation issues not previously addressed in the original NMAI Act. It establishes deadlines for the distribution of summaries and inventories of Smithsonian collections to tribes. It requires summaries of unassociated funerary objects, sacred objects and objects of cultural patrimony to be completed and submitted to Native American groups by December 31, 1996. Inventories for human remains and associated funerary objects are to be completed and submitted to Native groups by June 1, 1998. Definitions used by the NMNH for these remains and objects follow the language of NAGPRA, 25 U.S.C. Section 3001 (PL 101-601), passed in 1990, and are discussed in more detail below (see: Section VI. Items Potentially Subject To Repatriation). The amendment also adds two Native American traditional religious leaders to the Repatriation Review Committee.

III. IMPLEMENTATION OF THE SUMMARY AND INVENTORY PROCESSES

In accordance with the law, the NMNH is producing summaries of unassociated funerary objects, sacred objects, and objects of cultural patrimony and inventories of human remains and associated funerary objects and is reporting its findings to culturally affiliated Native groups. Native American and Hawaiian groups will receive information on the type and number of human remains and objects currently held by the NMNH.

Summaries of Ethnographic Collections

The NMNH completed the summary of its ethnographic collections and submitted them to Native groups in February 1997. These summaries should enable Native groups to begin the identification of culturally-affiliated objects present in the collections. Because of the difficulty in identifying what objects may be funerary, sacred or patrimonial, the summaries included all Native American objects in the ethnographic collections that are known to be held by the NMNH. No attempt was made to determine what objects were funerary, sacred, or patrimonial. Such determinations will be developed in a collaborative manner with tribes. In addition to listings of all objects potentially affiliated with Native groups, the summaries of ethnographic collections include descriptions of the acquisition history of the objects based on the available accession and catalog records. Additional reports were developed of objects for which the cultural affiliation information is unclear and these lists were presented to all tribes.

Inventories of Physical Anthropology and Archeology Collections

The NMNH is required to produce inventories of human remains and objects in its collections and submit them to tribes by June 1, 1998. Inventory reports will be based on geographic location and will be distributed to tribes who currently reside in or once had traditional territories in those geographic locations. Because of the difficulty in identifying what objects may be funerary, sacred or patrimonial, the inventories will include all Native American human remains and objects in the collections that are known to be held by the NMNH. No attempt will be made to verify cultural affiliation. The reports will be a starting point for consultations on collections. It is during the consultation process that a comprehensive review of all accession information will be undertaken. Verification of cultural affiliation of the human remains and objects and determinations about the funerary, sacred or patrimonial nature of objects will be developed in a collaborative manner with tribes.

IV. INITIATING A CONSULTATION

Communication and collaboration with Native groups is the foundation of the repatriation process at the NMNH. Upon receiving summaries of ethnographic collections or inventories of physical anthropology and archeology collections, Native groups are asked to review the lists and use them to either identify human remains and objects of concern or initiate consultations with the Repatriation Office for the purpose of identifying culturally affiliated remains and objects.

The requesting party may have access to collection documentation at any time during the repatriation process. In addition, Native groups may conduct independent research. Collaborative arrangements with the Repatriation Office for the purpose of gathering information are encouraged. Such collaborative efforts may include work with Native community scholars and traditional experts, internships, and other types of informal research arrangements. Resources and support for such arrangements are not part of the regular operating budget of the Repatriation Office, but the Repatriation Review committee (see Section X) will, to the extent possible, assist in supporting tribal visits.

Repatriation Office staff can provide Native American representatives with access to the collections, associated photographs and museum records and offer instruction on the use of museum resources. The policy of the Repatriation Office is to make information on the origin and identify of requested objects available to the requesting group as early in the repatriation process as possible.

Native groups are invited to make appointments to view the collections in the care of the NMNH. As has long been the practice at the NMNH, suggestions from Native groups regarding the display and care of collections are welcome. Decisions about implementing such suggestions will be made on a case by case basis. Telephone inquiries and appointments for visits to the museum can be made by calling the Repatriation Office. In order to ensure that a Repatriation Office staff member will be available, appointments for visits should be made at least two weeks in advance. Requests can be sent to:

Repatriation Office, MRC 138
Department of Anthropology
National Museum of Natural History
10th and Constitution Ave., NW
Washington, DC 20560
(202) 357-1899

V. INITIATING A REPATRIATION REQUEST

Upon receiving information about the NMNH's collections, a Native American group may wish to make a request for repatriation. This process officially begins with a letter to the Repatriation Office at the address above requesting the return of specific remains or objects subject to repatriation under the law. Parties making requests for repatriation are asked to identify themselves and the basis of their claim (see Section VI: Who May Make A Request), to indicate the geographical extent of their claim, and to specify the types of material they are interested in receiving more information about, i.e., human remains, funerary objects, sacred objects, or objects of cultural patrimony. Upon receipt of a written request from a lineal descendant or a recognized group's leaders, the individual's and/or group's standing as a qualified requesting party is reviewed.² If the party is qualified, a case file is established and a joint effort is initiated to investigate the claim.

The Repatriation Office staff person assigned to a particular repatriation case is the contact person for the Native group that initiated the claim. He or she is responsible for the documentation of the human remains or objects in question, the distribution of the case report resulting from this process, and the handling of the arrangements for the actual return.

The request process results in the production of a report which provides an assessment of the cultural affiliation of the collections involved, summarizes all relevant details concerning the requested material, and recommends a course of action for the Secretary to follow in light of the legislative mandate. Documentation to determine the cultural affiliation of remains or objects considers biological, geographical, historical (both written and oral), genealogical, archeological, linguistic, folkloric, ethnological, and archival information, expert opinion, or any other relevant sources of information. The report is reviewed within the NMNH and submitted to the Secretary of the Smithsonian through the General Counsel and Provost for final approval. After the institutional review is completed, the report is sent to members and representatives of culturally affiliated groups. The case report represents the NMNH's official response to a group's repatriation request.

VI. WHO MAY MAKE A REQUEST

Requests for the repatriation of Native American human remains and cultural objects may be made by: (i) lineal descendants of named individuals; (ii) federally recognized Native American tribes; (iii) federally recognized Native Alaskan villages; (iv) Native Hawaiian organizations; and in certain cases, (v) state recognized Native American tribes.

Descendants of Named Individuals

The closest living descendants of named individuals whose remains are currently held by the NMNH may make a request for the return of those remains. An accurate family genealogy must be provided.

Federally Recognized Native American Tribes

A federally recognized Native American tribe is defined as any tribe, band, nation, organized group or community of Native Americans, including Native Alaskan village, or regional or village corporation (as defined in the Alaskan Native Claims Settlement Act), which is recognized as eligible for the special programs and services provided by the United States to them because of their status as Native Americans.

Native Hawaiian Organizations

A Native Hawaiian organization is any organization which serves and represents the interests of Native Hawaiians, has a primary and stated purpose to provide services to Native Hawaiians, and has expertise in Native Hawaiian affairs. This definition shall include the State of Hawaii Office of Hawaiian Affairs and the Hui Malama I Na Kapuna O Hawai'i Nei.

State Recognized Native American Tribes

Requests from state recognized tribes will be reviewed on a case by case basis.

VII. ITEMS POTENTIALLY SUBJECT TO REPATRIATION AT THE NMNH

The categories of materials that a requesting group may claim are: (i) human remains of known individuals; (ii) culturally affiliated human remains; (iii) associated and unassociated funerary objects; (iv) sacred objects; (v) objects of cultural patrimony; and (vi) objects transferred to or acquired by the NMNH illegally or under circumstances that render invalid the Museum's claim to them. See also Section VIII: Criteria For Repatriation.

Named Individuals

The NMNH shall repatriate, upon request, any human remains of known identity to the closest living descendant of the named individual. The repatriation of named individuals to living descendants is an ongoing policy at the NMNH established prior to the enactment of the NMAI Act and requests for the return of named individuals are given the highest priority.

Culturally Affiliated Human Remains

The NMNH shall repatriate, upon request, human remains that have been identified as being culturally affiliated with a particular Native American group or Native Hawaiian organization.

Associated and Unassociated Funerary Objects

The NMNH shall repatriate, upon request, any funerary object that, as part of a death rite or ceremony of a culture, is reasonably believed to have been intentionally placed with an individual of known affiliation at the time of death or later, to the living descendants of a named individual, or to the culturally affiliated Native American group of Native Hawaiian organization.

Associated funerary object shall mean a funerary object removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe where the NMNH has in its collection the human remains with which the funerary object was originally placed or knows the location of the associated human remains based on NMNH accession records.

Unassociated funerary object shall mean a funerary object removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe where the NMNH does not have in its collection the human remains with which the funerary object was originally placed, nor does the museum know their location.

Sacred Objects

The NMNH shall repatriate, upon request, any specific ceremonial object that is needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.

Objects of Cultural Patrimony

The NMNH shall repatriate, upon request, cultural objects that have an on-going historical, traditional, or cultural importance central to the culturally affiliated Native American group. Such objects, by definition, cannot be alienated, appropriated or conveyed by any individual, regardless of whether or not that individual was a member of a Native American tribe or Native Hawaiian organization. Such objects shall have been considered inalienable by the Native American group at the time the objects were separated from the group.

Objects Acquired Illegally

In accordance with long-standing Smithsonian policy³, the NMNH may repatriate, upon request, any materials acquired by or transferred to the NMNH illegally or under circumstances that render invalid the Museum's claim to them. Each request for materials so acquired will take into account all relevant evidence submitted by a requesting party. It will also take into account information about acquisition that the NMNH has available in its accession records.

VIII. CRITERIA FOR REPATRIATION

In order for human remains and cultural objects to be repatriated, the requested material must fall into one of the categories of Section VII: Items Potentially Subject to Repatriation at the NMNH. The requesting group must be culturally affiliated with the human remains and objects being requested. With regard to unassociated funerary objects, sacred objects and objects of cultural patrimony, the requesting party may also be required to present evidence that the NMNH does not have right of possession to the material.

Cultural Affiliation

For the repatriation to occur, a relationship must exist between a claimant and the requested material. This

relationship can be lineal descent or cultural affiliation. In many cases, the evidence of affiliation may be indicated by collections records which can contain information on cultural affiliation. Affiliation can also be established through the documentation process. The requesting party may also provide evidence of cultural affiliation based upon biological, geographical, historical (both written and oral), genealogical, archaeological, linguistic, folkloric, ethnological and archival information, expert opinion, or any other relevant information. It must be shown by a preponderance of evidence that the materials requested are culturally affiliated with the requesting party.

*Right of Possession*⁴

The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from a Native group with the voluntary consent of an individual or group that had the authority to alienate the object at the time it was acquired gives the right of possession of that object to the NMNH. If a culturally affiliated group seeking repatriation of an unassociated funerary object, sacred object or object of cultural patrimony presents evidence which, standing alone before the introduction of evidence to the contrary, would support a finding that the NMNH did not have right of possession of the object, the NMNH shall return such object unless it can prove that it has right of possession. If the museum and the claimants should disagree over whether their respective burdens have been proven, the Repatriation Review Committee may be called upon to facilitate the resolution of the dispute.

IX. MULTIPLE OR COMPETING REQUESTS

The NMNH often receives multiple or competing requests for the return of culturally affiliated remains or objects. Responsibility for the actual transfer and final disposition of remains and materials often presents a challenge to communities, requiring difficult and sometimes protracted negotiations within and between groups to arrive at a consensus regarding such disposition. It is NMNH policy to encourage all affiliated or potentially affiliated groups to reach a mutually acceptable solution and to propose a unified position to the museum. The NMNH will consult with all claimants but will not interfere with the internal political or religious affairs of Native groups nor compel a solution. If requesting parties fail to reach a resolution, the Repatriation Review Committee can be asked to review the case.

X. REPATRIATION REVIEW COMMITTEE

The Repatriation Review Committee was established under the NMAI Act. Committee members were selected from nominations from Native groups, museums, and the academic community. Five committee members were appointed in March 1990 with five year terms which were renewed in 1995 by the Secretary of the Smithsonian. An additional two members will be appointed in 1997 to expand committee membership to include two traditional Native American religious leaders. The committee was established to monitor and review the inventory, identification, and return of human remains, funerary objects, sacred objects, and objects of cultural patrimony. The committee's purposes is to ensure that fair and objective consideration and assessment of all relevant evidence with respect to inventory and identification has been made by the Smithsonian. They may, upon request of any affected party, review any findings relating to the origin or the return of human remains and cultural objects. They may also assist the Secretary of the Smithsonian in facilitating the resolution of any dispute between groups or between a group and the Institution with regard to the disposition of collections that may arise.

The Chairman of the Review Committee, Professor Russell Thornton, can be reached at the following address:

Department of Anthropology
University of California, Los Angeles
Los Angeles, CA 90024
(310) 825-7080

XI. NOTIFICATION

The Repatriation Office makes every attempt to ensure that all parties with a potential interest in the collections under consideration are aware of the NMNH's intent to repatriate. Once the recommendations for a return have been agreed upon, a notification must be placed in local newspapers, tribal newsletters, and other news media having effective distribution and a one month waiting period must take place to allow any interested parties to contact the museum. The notification process is designed to ensure that all other parties with a potential interest in

the return are informed of the pending action and have an opportunity to obtain further information or consult with the NMNH prior to the repatriation of the collection. The goal of the Repatriation Office is to ensure a broad dissemination of the information and to initiate arrangements for a return only after a consensus has been reached within the group about the manner of the return and the representatives to be involved.

XII. ARRANGEMENTS FOR RETURNS

Once an agreement has been reached by the requesting party and the NMNH regarding the disposition of the human remains or objects, arrangements may be made for a return. These arrangements shall include a mutually convenient date for the return.

Within the limits of available funds, the Repatriation Review Committee will cover the costs of bringing two representative of the group the NMNH to prepare the remains and objects in question for repatriation. This coverage would generally include transportation, hotel accommodations, and meals for two days of round trip travel and a day visit to the museum. All arrangements for NMNH sponsored travel must be made by the NMNH or expenses cannot be covered.

XIII. INTERNATIONAL REQUESTS

The scope of current repatriation laws (NMAI, as amended and NAGPRA) is restricted to Native groups residing in the United States and its territories. Efforts are made to coordinate requests for returns from groups in Canada and Mexico whose membership occupies both sides of the international border, with their United States counterparts. Repatriation decisions for groups other than these must await international agreements, unless the materials in question are found to have been acquired illegally or under circumstances which render the NMNH's claim of title invalid.

XIV. ALTERNATIVES TO REPATRIATION

In addition repatriation of culturally affiliated human remains and objects, Native American groups may wish to examine alternatives to repatriation or reburial. Native groups may wish to allow human remains or objects to be retained by the NMNH under the existing policies of access and curation, or may wish to consider museum retention with tribal input on care and preservation.

Native groups may determine that it is in their best interest to delay a request for the repatriation of remains or objects. Any decision by a tribe or Native group not to make a repatriation request at the present time in no way precludes the possibility of making a request for a return at a future date.

Prepared by:
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Thomas W. Killion, Program Manager
Repatriation Office, Department of Anthropology, NMNH

Approved by: Office of the Provost
Smithsonian Institution
September 8, 1997

NOTES:

1. Because the NMAI Act does not define cultural affiliation, it is NMNH policy to use the definition provided in Native American Graves Protection and Repatriation Act (NAGPRA). NAGPRA defines cultural affiliation as a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group.

2. Standing, for these purposes, means that the party requesting the materials falls within the categories of persons or groups eligible under the NMAI Act to file a repatriation claim. In addition, if a claimant is acting on behalf of a tribe, there must also be proof that such person has the authority to represent the tribe. If there is doubt about a party's standing, the NMNH may request additional written documentation to clarify the relationship of the requesting party to the materials in question.

3. The Smithsonian Institution Policy on Museum Acquisition was adopted by the Smithsonian Institution Board of Regents in 1973.

4. Because NMAIA does not define "right of possession," it is the NMNH policy to use the definition from NAGPRA. Under NAGPRA, "right of possession" is defined as possession obtained with the voluntary consent of an individual or group that had the authority of alienation.

THE REPATRIATION PROCESS AT THE NATIONAL MUSEUM OF NATURAL HISTORY

1. Communication and collaboration is the foundation of the repatriation process at the NMNH. The process is initiated when a federally or state recognized tribe establishes contact with the NMNH Repatriation Office by letter, phone call, or personal visit to express an interest in the Museum's holdings. The initial inquiry may be a general request for information about the Museum's holdings pertaining to a particular tribe or may focus on specific items subject to repatriation under the law.

2. The Native group's request for information will be directed to the senior staff person in the Repatriation Office handling requests from their region. This individual becomes the group's main point of contact within the Museum.

3. The senior staff person will provide a preliminary computer inventory of the Museum holdings from the region specified by the tribe or identified in the records as affiliated with that tribe. At the NMNH, the collections pertaining to Native cultures are under the care of the Department of Anthropology. Within Anthropology, the collections are maintained in three separate divisions: Ethnology, Archaeology, and Physical Anthropology. While the majority of items in Ethnology have an ascribed cultural affiliation, those in Archaeology and Physical Anthropology typically do not. To be as comprehensive as possible in reporting, the records for collections in the latter two divisions are searched by geographic criteria specified by the tribe rather than by group name(s).

4. A tribe or group may respond to the inventory information presented by making a formal written request for the return of specific human remains or cultural items. Requests for the repatriation of items subject to return under the law may be made by family descendants of named individuals, federally recognized Native American tribes, federally recognized Native Alaskan villages, Native Hawaiian organizations, or state recognized Native American tribes.

5. Upon receipt of a formal request for repatriation, the senior staff person initiates the more detailed documentation work that is undertaken to establish or verify the cultural affiliation or origins of the items in question. This involves assembling all relevant information that bears on the question of cultural affiliation, which may include biological, geographical, historical (both written and oral), genealogical, archaeological, linguistic, folkloric, ethnological, archival, and any other relevant sources of information.

6. The Repatriation Office invites the Native group to collaborate in the documentation effort and contribute the results of their own independent or community-based research. Repatriation Office staff can provide Native American representatives with access to collections and museum records, and basic instruction in the use of museum resources.

7. After all the available information has been assembled, a comprehensive report is prepared by the senior staff person for the Secretary of the Smithsonian Institution. The facts of the case are reviewed and recommendations are made regarding the repatriation status of the items in question. The completed report is reviewed within the NMNH before being submitted to the Secretary for action.

8. When the case report is approved by the Secretary, it is forwarded to the requesting tribe and any other parties with a declared or potential interest in the case. The case report represents the NMNH's official response to the tribe's request.

9. If a decision to repatriate is made, the tribe then works with their principal contact person at the Museum to make arrangements for the return and work out the details of the transfer. A waiting period of one month must precede the agreed upon repatriation date to allow all concerned parties sufficient time to review the plans for return. The NMNH makes every effort to accommodate any special requirements of the tribe with respect to preparations and packing for return. The NMNH may cover the travel costs of up to two tribal representatives who may wish to come to the Museum to assist in the preparation of the collections for return.

10. As per the guidelines of the NMAI Act, the Smithsonian has established an independent, external Repatriation Review Committee (RRC) to monitor and review the inventory and documentation process at the Museum. This committee consists of five individuals, three of whom were nominated by the Native community. At the request of any affected party, the RRC may review the findings of a particular case or decision made by the Museum. The Committee may also be called upon by the Secretary to assist in the resolution of any disputes that may arise. Any tribe wishing to appeal a final decision made by the NMNH may contact the Chairman of the Repatriation Review Committee.

11. Native groups and organizations may determine that it is in their best interest to delay a request for the repatriation of remains or objects. Any decision by a tribe to refrain from making a repatriation request at the present time in no way precludes the possibility of submitting a repatriation request at a future date.

Appendix I.

NMNH REPATRIATION REVIEW COMMITTEE

(Updated Sept. 4, 1996)

THE SMITHSONIAN INSTITUTION'S NATIVE AMERICAN REPATRIATION REVIEW COMMITTEE

The Native American Repatriation Review Committee was established under the National Museum of the American Indian Act (Public Law 101-185). The Committee consists of five members, four of whom were appointed from nominations submitted by Native groups.¹ The Committee members were appointed in March of 1990 by the Secretary of the Smithsonian. The Committee was established to monitor and review the inventory, identification, and return of human remains and funerary objects. The Committee's responsibilities were later expanded to include sacred objects, and objects of cultural patrimony. The duties of the Committee are advisory. Specifically, the Committee's purpose is to ensure that fair and objective consideration and assessment of all relevant evidence with respect to inventory and identification has been made by the Repatriation Office of the National Museum of Natural History (NMNH). Upon the request of any affected party, the Committee may review any findings relating to the origin or the return of human remains and cultural objects. The Committee may also assist the Secretary of the Smithsonian in facilitating the resolution of any dispute that may arise with respect to the return of such remains or objects. Thus, if any Native American group or Native Hawaiian organization finds that a decision of the NMNH Repatriation Office regarding a specific request is unacceptable, the group or organization may request the Committee to review the matter and make an independent recommendation to the Secretary of the Smithsonian.

The Review Committee meets at least twice annually to monitor and review the progress of the Repatriation Office at the National Museum of Natural History. It may meet on other occasions to consider specific issues. The Committee may also monitor NMNH informational meetings, make presentations at workshops, and attend repatriation ceremonies.

The Chairman of the Repatriation Review Committee is Russell Thornton, Professor of Anthropology at UCLA. His address is:

Professor Russell Thornton
Department of Anthropology
341 Haines Hall, Box 951553
University of California
Los Angeles, CA 90025-1553
Phone: (310) 825-7080
FAX: (310) 206-7833

The other members of the Review Committee are Roger Anyon, Cultural Resources Consultant; Lynne Goldstein, Professor, Michigan State University; Andrea Hunter (Committee Vice-Chair), Assistant Professor, Northern Arizona University; Christy Turner II, Professor, Arizona State University. A brief biographical sketch of each of the five members of the Committee follows.

ROGER ANYON

Roger Anyon has twenty five years experience in archaeology, cultural resources, and historic preservation in Europe and North America. His MA is from the University of New Mexico. From 1985 through 1996, he lived and worked at the Pueblo of Zuni in New Mexico where he was Director of the Zuni Archaeology Program and the Zuni Heritage and Historic Preservation Office. Anyon was also instrumental in implementing the Zuni Museum Project during this period, as well as being heavily involved in the repatriation activities of the Zuni Tribe, in particular the highly successful campaign for the repatriation of Zuni War Gods. From 1992 to 1995, Anyon served as a member of the Society for American Archaeology Executive Board, and from 1990 to 1992, as Chair of the Society for American Archaeology Task Force to Develop Better Relations between Archaeologists and Native Americans. In addition to his publications on archaeology, Anyon has authored numerous papers on the protection of cultural resources, repatriation and Native American/archaeologist relations. He is presently a cultural resources consultant based in Tuscon, Arizona.

LYNNE GOLDSTEIN

Lynne Goldstein is Professor and Chair of the Department of Anthropology at Michigan State University. From 1975 until Fall 1996, she taught at the University of Wisconsin-Milwaukee. She received her Ph.D. in 1976 from

Northwestern University and her research interests include Eastern U.S. archaeology, mortuary analysis, settlement patterning, quantitative analysis, and public policy-related issues. She has published papers and monographs in all of these areas, with the majority of her publications concentrating on the Late Woodland and Mississippian periods of Wisconsin and Illinois. Her recent field work has focused on the Aztalan site in Wisconsin, as well as the distinctive Effigy Mound culture. From 1990 through 1992, she directed a mortuary project in California: excavations of the historic Russian cemetery at Fort Ross. Some professional activities include: Editor of *American Antiquity* (1996–1999); Secretary of the Society for American Archaeology (1987–1991); Chair of the Society for American Archaeology's Task Force on Repatriation (1990–1995); Board of Curators of the State Historical Society of Wisconsin (1988–1996); Panel for a National Dialogue on Museum/Native American Relationships (Heard Museum, 1989–90); and Wisconsin's Burial Sites Preservation Board (1987–present). Goldstein has been active in public education, including a weekly radio broadcast on Wisconsin Public Radio, and two popular books, *Prehistoric Indians of Wisconsin* and *A Guide to Common Prehistoric Projectile Points in Wisconsin*.

ANDREA A. HUNTER

Andrea Hunter is half Osage and grew up on the Osage Reservation located in north central Oklahoma. She received a B.A. in Anthropology from the University of Colorado-Boulder, and an M.A. and Ph.D. in Anthropology from the University of Missouri-Columbia. Hunter is currently an Assistant Professor in the Department of Anthropology and the Director of the Laboratory of Paleoethnobotany at Northern Arizona University, Flagstaff. Although relocated in the Southwest, her archaeological and paleoethnobotanical research emphasis has focused on the Osage Tribe in Missouri. Hunter is currently preparing an edited volume on the Osage at the time of European contact. While at the University of Missouri, she was instrumental in organizing a symposium on repatriation that brought together Osage tribal members, archaeologists, physical anthropologists, and Native American lawyers to publicly discuss the issue.

RUSSELL THORNTON

Russell Thornton is Professor of Anthropology at UCLA. He has taught previously at the University of Pennsylvania, the University of Minnesota and the University of California-Berkeley. He received his Ph.D. in sociology from Florida State University in 1968 and has done post-doctoral work at Harvard University and the University of Southern California. From 1979–84, he held a Research Scientist Career Development Award from the National Institute of Mental Health. Born and raised in Oklahoma, Russell Thornton is a registered member of the Cherokee Nation of Oklahoma. His honors include a Chancellor's Distinguished Professorship at the University of California-Berkeley, and a Chancellor's Distinguished Lecture at the University of California-Irvine. He has published five books and over 50 articles and book chapters. His published articles have appeared in the *American Sociological Review*, *Anthropology Journal of Sociology*, *American Anthropologist*, *Current Anthropology*, *American Journal of Physical Anthropology*, *Ethnology*, *Ethnohistory*, *Ethnicity*, *Administrative Science Quarterly*, and *American Indian Quarterly*. His books include *We Shall Live Again* (Cambridge University Press, 1986); *American Indian Holocaust and Survival* (University of Oklahoma Press, 1987); and *The Cherokees: A Population History* (University of Nebraska Press, 1990).

CHRISTY G. TURNER II

Christy Turner has been a Regents' Professor in the Department of Anthropology at Arizona State University since 1992. He received his Ph.D. in Anthropology in 1967 from the University of Wisconsin-Madison. He was Assistant and Associate Dean at the Arizona State University Graduate College from , Australia, Polynesia, Alaska, Southwest U.S., North and South America. He has reported in more than 150 articles and books dealing mainly with the peopling of the Americas and the Pacific Basin, dental anthropology, Southwest rock art, origin of anatomically modern humans, and taphonomy of Anasazi cannibalism.

1. Under the NMAI amendment (PL 104-278) Repatriation Review Committee membership is currently being expanded to include two traditional Indian religious leaders. The selection process should be completed in late 1997.

Appendix J. REVIEW COMMITTEE PROCEDURES

CHARTER AND RULES OF OPERATION NATIVE AMERICAN REPATRIATION REVIEW COMMITTEE SMITHSONIAN INSTITUTION (*Updated 2003*)

The official designation of the Committee is the Native American Repatriation Review Committee, hereinafter referred to as the "Committee."

The Committee is composed of seven (7) members appointed by the Secretary of the Smithsonian in accordance with the provisions of the National Museum of the American Indian Act (Public Law 101-185) and its amendment (P.L.104-278). The purpose of the Committee is to serve in an advisory capacity to the Secretary in matters concerning the repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony.

This document sets out the charter and rules of operation of this committee. The document is organized into seven sections:

- I. Term of Committee Activity and Duties of Committee Members
- II. Conflict of Interest Guidelines
- III. Reimbursement of the Committee
- IV. Meetings of the Committee
- V. Functions of the Committee
- VI. Rules of Evidence
- VII. Amendments to the Charter and Rules of Operation

I. Term of Committee Activity and Duties of Committee Members

As of January 1, 2003, the term of appointment for Committee members shall be four (4) years, with the option of one term renewal, but all appointments shall terminate upon the termination of the Committee. Any vacancy on the Committee shall be filled in the same manner as the original appointment. The term of appointment for officers shall be one (1) year, renewable annually. Members and officers serve at the pleasure of the Secretary and may be dismissed prior to the expiration of their terms.

Given its objectives, scope, and purposes, as specified by the National Museum of the American Indian Act, the Committee is expected to continue into the foreseeable future, for the life of the repatriation process. The Committee shall cease to exist 120 days from the day the Secretary of the Smithsonian Institution certifies, in a report submitted to Congress, that the work of the Committee has been completed. The Committee reports to the Secretary, Smithsonian Institution, Washington, D. C. 20560, through the Director, National Museum of Natural History (NMNH). The Secretary's "designee", where indicated, is the Director of the NMNH.

The Committee serves as an independent advisory body. The Committee's findings are solely advisory, and, in disputed cases, the final, binding decision is made by the Secretary after reviewing all the evidence and the recommendations of the Committee. The Committee does not have supervisory responsibilities for Smithsonian staff or activities, nor does it speak for the Institution. No Committee member is authorized to speak on behalf of the Smithsonian Institution and/or the Repatriation Review Committee without the prior approval of the Smithsonian Secretary's "designee" and/or all the members of the Repatriation Review Committee.

COMMITTEE CHAIR

The Committee Chair will be elected annually, at the fall meeting and by a simple majority vote of Committee members. The responsibilities of the Chair include:

1. Presiding at Committee meetings.
2. Scheduling of regular and special Committee meetings, in cooperation with the Smithsonian.
3. Setting the agenda of Committee meetings, in cooperation with the Smithsonian.

4. Overseeing the preparation and review of the minutes of the Committee's meetings, in cooperation with the Smithsonian.
5. Overseeing the Committee's expenditures, in cooperation with the Smithsonian.
6. Transmitting Committee reports, annual or other, decisions on disputed cases, and Committee decisions in the review of findings.
7. Acting as liaison and spokesperson for the Committee in its relations with the Secretary of the Smithsonian Institution, the Director of the National Museum of Natural History, the Smithsonian Institution's repatriation offices, Committee support personnel, Native American groups, consultants and other outside groups and individuals.
8. Performing other duties as assigned by the Secretary of the Smithsonian or the Secretary's designee.

COMMITTEE VICE CHAIR

The Committee Vice-Chair will be elected annually, at the fall meeting, by a simple majority vote of Committee members. In absence of the Chair, or in the event of the Chair's death or incapacitation, the Vice-Chair shall automatically become Chair until a successor is elected.

VOTING PROCEDURES

Unless otherwise stated a simple majority vote is required for approval of an action or choice by the Committee. All Committee members have voting rights, except as limited in Section II.

Committee members may vote in any one of three ways:

1. Vote for
2. Vote against
3. Abstention

During the actual voting procedure, a member may not explain his/her vote. A member may move to reconsider a vote; such a reconsideration requires majority approval. The Committee will designate a non-Committee member as the teller of the vote. The teller must consult with the Committee in all questions regarding voting procedures. The regular method of voting on an action or choice is by show of hands.

Voting by written ballot is used whenever a secret vote is requested by any Committee member. The teller will distribute, collect, and count the ballots, and report the vote to the Chair. One other Committee member participates in counting the ballots. The result is then announced by the Chair and entered into the minutes.

In certain instances with the consent of the majority of the Committee, voting may be done by mail ballot or may be conducted by phone.

YEARLY REPORTS

As part of its activities, the Committee will submit yearly written reports to the Secretary of the Smithsonian Institution through the Secretary's designee. The reports will summarize Committee activities during the year, including a statement of cases considered by the Committee and their disposition, and any other matter it wishes to bring to the attention of the Secretary. The report shall be submitted not later than three months after the end of the fiscal year.

II. *Conflict of Interest*

The Committee expects its members to hold themselves to the highest ethical standards. Although the members of the Committee were selected for their expertise and position, there are circumstances in which a Committee member may appear to have a conflict of interest. In such circumstances, the Committee member shall not participate in the discussion or vote on the specific case. It is the responsibility of each Committee member to examine each claim for potential conflict of interest and, should such a conflict arise or be suspected, to declare the potential conflict. Circumstances that may precipitate a conflict of interest include resolution of disputes or requests for review where

any one or more of the following apply:

1. The Committee member or a member of his/her immediate family is the individual or a member of the specific tribal group, nation, or institution directly making the claim.
2. The Committee member or a member of his/her immediate family is being paid by the individual, tribal group, nation, or institution directly or indirectly making the claim, or in some way has a financial interest in the outcome of the claim (pay received from the Smithsonian for serving as a member of the Committee is not included in any of these categories).
3. The Committee member or a member of his/her immediate family has a direct and current academic or research association with the collection in question.

Although the Committee member cannot discuss, be present in the discussion, or vote in a decision where any of the above circumstances hold, the member may assist the group or institution in the preparation of written materials or comments for submission to the Committee. However, the member shall not directly communicate orally or in writing with the Committee with respect to the person or the group making the claim.

Any member who believes there may be a conflict of interest, for any reason herein specified or not, is expected to identify the potential conflict and allow the remaining Committee to judge as to the propriety of the member continuing to participate in the case(s) in question.

In those circumstances in which the Committee is reviewing completed case reports or consulting with Native American groups or individuals, other museums, or federal agencies, the above restrictions may not apply. The determination of a conflict of interest in these instances will be decided on the basis of a majority Committee vote. The Committee shall consider the question of conflict of interest each time such activities are undertaken.

When a member, either by his/her own declination or by a vote of the Committee, is restricted from participating in the resolution of a dispute or the review of a finding owing to a conflict of interest, a written statement of the reason for the exclusion must be appended to the Committee's report on the particular dispute or review and included in the Committee's yearly report

III. *Reimbursement and Support of Committee*

Funding for the work of the Committee is provided by Federal appropriation to the National Museum of Natural History. Members of the Committee, shall be paid at a rate equal to the daily rate for GS-18 of the General Schedule, or its equivalent, for each day for which the member is actually engaged in official Committee business, including travel time.

While away from their homes or regular places of business in the performance of authorized services for the Committee, members shall be allowed to claim authorized travel expenses, including per diem in lieu of subsistence, according to official rates for federal employees, provided that required receipts and documentation are presented in a timely manner and that such expenses have not already been paid directly by the Smithsonian Institution on the members' behalf.

Such business must be authorized in advance by the Secretary or his designee. The reimbursement for time and/or expenses cannot be paid without advance written authorization. Members will also be reimbursed at the GS-18 rate, or its equivalent, but without expenses, for time before official meetings in reading and other preparation, on the basis of one preparation day for each official day in meeting. Allowance for more advance preparation time will be at the discretion of the Secretary or his designee.

Administrative and secretarial staff support for the Committee shall be provided by the Smithsonian Institution, consistent with the Committee's defined duties and available funds. The Committee shall be independent of, but work in close cooperation with, the Institution so as to complement and not duplicate the staffing and work of the Institution.

IV. Meetings of the Committee

Committee meetings will be held at least biannually, in the fall and spring at the Smithsonian Institution. These meetings will be used to conduct regular activities associated with the Committee's mandate. Additional regular meetings may be scheduled at the Smithsonian Institution during the year, if necessary. Meetings may be held elsewhere than the Smithsonian Institution if the Committee deems such meetings necessary in order to carry out its mandated tasks.

A quorum for meetings and other business consists of five (5) Committee members. Meetings also will include participation by a representative of the Smithsonian Institution. Unless otherwise stated, the Committee will operate under Robert's Rules of Order.

All meetings shall be convened by the Secretary or his designee in close consultation with the Chair of the Committee and at times of mutual convenience to the Smithsonian Institution and the Committee.

Minutes shall be kept of all official meetings, hearings, and fact-finding meetings of the Committee. These shall be available for review by the Smithsonian and the Committee.

V. Functions of the Committee

The duties of the Committee as set forth below are advisory. Specifically, the Committee's responsibilities shall be to (as stated in P.L. 101-185 and P.L. 104-278):

1. Ensure, with respect to the inventory and identification, fair and objective consideration and assessment of all relevant evidence;
2. Review, upon request of any affected party or otherwise, any finding relating to the origin or the return of such remains or objects;
3. Facilitate the resolution of any dispute that may arise between Indian tribes and between tribes and the Institution with respect to the return of such remains or objects; and;
4. Perform such other related functions as the Secretary may assign.

MONITORING ROLE (with respect to responsibility # 1 above)

The monitoring role of the Committee shall insure a fair and objective consideration and assessment of all relevant evidence during inventory and identification of remains and objects; and assessment of the timeliness of inventory, identification, and return of remains and funerary objects, sacred objects, and objects of cultural patrimony.

Inventory of Remains and Objects

Inventory procedures of the Institution shall be monitored and assessed, at least annually, to determine effectiveness and timeliness. They include:

1. General inventory and summary of human remains, funerary objects, sacred objects, and objects of cultural patrimony.
2. Inventory of collections initiated as a response to tribal requests for return.

Inventory assessments of the Institution's repatriation units will be based on:

1. Biannual reports which shall include:
 - a. Brief statements on all active cases.
 - b. Indications of outside concern on the progress of specific cases.

- c. A summary report on all cases

The biannual report must be received by Committee members at least two weeks prior to the biannual Committee meeting.

2. Oral reports made by Smithsonian staff at the biannual Committee meetings.
3. Other communications from the Smithsonian, as initiated by the Institution or requested by the Committee.

Identification of Remains and Objects

Smithsonian notification of tribes regarding the identification of culturally affiliated remains and/or objects shall be monitored and assessed, at least biannually.

Evidence used to determine cultural affiliation of remains and/or objects shall be monitored and assessed, at least annually, through:

1. Examination of the methods and criteria used by the Smithsonian.
2. Examination of the qualifications of outside expert consultants and the methods and criteria used by these consultants.

Questions or comments of Committee members regarding evidence may be addressed in writing to the Chair, or advanced at a duly called Committee meeting.

Return of Remains and Objects

Arrangements and timeliness for the return of remains and/or objects shall be monitored and assessed by:

1. The Institution shall document each concluded case with a completed case report and all associated decisions stemming therefrom, which will be shared with the Committee.
2. Each completed case report will be considered by the Committee at the next biannual meeting.
3. After the return of remains and objects the Committee may contact tribal representatives for their opinions about the return arrangements, timeliness, and resolution of the case.

Smithsonian Institution Operations

The charter of the Committee specifically does not include:

1. Determining the inventory priorities or process.
2. Overseeing or supervising the staff, operations, budget, or expenditures of the Smithsonian.

Staffing and funding shall be monitored only as a function of the Committee's oversight role of Smithsonian procedures and effectiveness.

All basic case documentation is done by the Smithsonian Institution. The Institution will keep the Committee fully informed of the progress of its work through biannual reports, correspondence, and briefings at regular meetings. Case reports and any Institutional review of case reports will also be provided to the Committee.

REVIEW OF FINDINGS (with respect to responsibility # 2)

The Committee shall, upon the request of any affected party or otherwise, review any finding relating to the origin or the return of such remains or funerary objects, sacred objects, or objects of cultural patrimony. This mandate of the Committee is interpreted as follows:

Anyone, including the Committee itself, can request that the Committee review a finding made by the Smithsonian. This is interpreted to mean a decision resulting from the completed case report after institutional review.

The person making the request for review should make the request in writing to the Secretary or his designee, indicating the basis for their request. The Secretary will forward copies of the request, with his recommendation for action, to each Committee member and relevant Smithsonian office or official.

The Committee will discuss the request for review no later than the next regularly scheduled meeting. If the Committee decides that a further review of the finding(s) is warranted, it will request authorization from the Secretary to proceed with a formal review.

At a minimum, the Committee may decide to base its review on:

1. The original finding, as well as the case report and associated documentation.
2. Documentation, evidence, or statements presented by the individual or group requesting the review.

Additional information will be requested if there is a Committee consensus that the materials presented are insufficient for it to make a determination. The Committee may request any or all of the following:

1. That affected parties on any or all sides come before the Committee to answer questions about the case.
2. That consultants be hired to prepare additional reports addressing key issues in the dispute.
3. That consultants be invited to come before the Committee to answer questions in an attempt to clarify issues.
4. That the affected parties prepare additional materials based on questions presented by the Committee.

The Committee's recommendations to the Secretary will be based on a majority vote and will be submitted to the Secretary in writing. If the Committee vote is not unanimous, a written statement of the minority opinion(s) may be included with the recommendation. The final determination on the review of a finding rests with the Secretary.

The Committee will review such other matters as requested by the Secretary.

DISPUTE RESOLUTION (with respect to responsibility # 3)

The facilitation of the resolution of disputes within and between Native American groups and individuals with respect to the return of human remains and objects is part of the Committee's mandate. The Committee is invoked by the Secretary for dispute resolution in the following instances:

1. When requested in the course of arriving at an institutional decision on a case with more than one claimant.
2. Once the decision is made relating to the return of human remains and objects that is subsequently disputed by one or more Native American groups or lineal descendants.
3. Whenever necessary to facilitate the resolution of disputes among Native American groups or lineal descendants relating to the return of human remains and funerary objects, sacred objects, or objects of cultural patrimony.

Procedures for consideration of disputes follow those detailed above for review of findings. A report on each

dispute considered by the Committee that reflects majority vote and minority opinion (if appropriate) will be submitted in writing to the Secretary with the understanding that the Secretary will distribute copies of the full report to all affected parties. The final decision on the dispute rests with the Secretary.

APPOINTMENT OF CONSULTANTS

A consultant is anyone hired to gather evidence or render an expert opinion on a case. All consultants will be hired with the approval of the Secretary or the Secretary's designee.

Any three Committee members may recommend that a consultant be hired. The Committee may provide a list of possible consultants.

VI. Rules of Evidence

The Committee, in conformance with Public Law 101-601, will subscribe to the following definition of **cultural affiliation**:

Section 2 (2): "Cultural affiliation" means that there is a relationship of shared group identity, which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.

Cultural affiliation is a relative concept. It can be ascertained using a variety of different kinds of evidence. Multiple lines of evidence will be used in most circumstances to assess affiliation. In some cases, only one line of evidence may be available. In some instances a single line of evidence for cultural affiliation may be found adequate.

Cultural affiliation may be ascertained by the following kinds of evidence, listed alphabetically: (a) anthropological, (b) archaeological, (c) biological, (d) expert opinion, (e) folkloric, (f) geographical, (g) historical, (h) kinship, (i) linguistic, (j) oral tradition, (k) sociological, or (l) other relevant information.

The strength or power of the claim for repatriation will be assessed by the persuasiveness of the evidence, which should include some sense of time, form, and genealogical relationships.

The Secretary shall ensure that the members of the Committee have full and free access to: (a) the human remains and funerary objects subject to section 11 of P.L. 101-185 and other cultural items subject to NMNH repatriation policy, which follows P.L. 101-601, and to (b) any related evidence, including scientific and historical documents.

VII. Amendments to the Charter and Rules of Operation

Any amendment to the above Charter and Rules of Operation can be made by unanimous consent of the Committee and with approval by the Secretary or his designee.

Appendix K. DEED OF GIFT / STATEMENT OF RETURN

American Indian Ritual Object Repatriation Foundation

463 East 57th Street, New York, NY 10022
PHONE (212) 980-9441 • FAX (212) 421-2746

Deed of Gift

Donor _____

Address _____

_____ Telephone () _____

I hereby unconditionally give, transfer, assign, and deliver all of my and my heirs' rights, title, and interests (including copyrights, trademarks, related rights and/or literary rights) in and to the item(s) described below to the American Indian Ritual Object Repatriation Foundation ("AIRORF") as an unrestricted gift, and any and all copyrights, trademarks, related rights and/or literary rights in and to said item(s). I affirm that I own said item(s) and that to the best of my knowledge I have good and complete right, title and interest to give (including all copyright, trademark, related interests and/or literary rights), as aforesaid.

Signature of Donor _____ Date _____

ITEM	CONDITION	APPRAISED VALUE

AIRORF gratefully acknowledges receipt of the Deed of Gift and the item(s) set forth herein. In accepting this donation, AIRORF pledges to use its good offices and reasonable best efforts to repatriate the item(s) to _____ in accordance with requested ceremonial requirements. AIRORF will also transfer any copyrights, trademarks, related rights and/or literary rights with respect to the said item(s) to the aforesaid Tribe, as may be applicable.

Elizabeth A. Sackler, *President* _____ Date _____

American Indian Ritual Object Repatriation Foundation
AIRORF is a non-profit, non-federally funded organization chartered by the Board of Regents of the Education Department of the State of New York. Donations are tax deductible to the extent provided under the applicable law, but it is the donor's responsibility to secure the appraisals required by law to support the value of the gift.

Appendix L

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American Indian Art Magazine, Spring 1994

Legal Briefs

Ron McCoy
Tax Deductions for Donated Art

Back in 1913 the Sixteenth Amendment to the Constitution of the United States — granting Congress the power “to lay and collect taxes on incomes” — went into effect. And ever since, folks have been trying to figure out how to get around its effects.

For many years one of the most common taxpayer stratagems for achieving this goal relied upon engaging in a bit of philanthropy which aided both the giver of a gift and its recipient. This involved enumerating allowable deductions based on fair market value attached to works of art donated to museums and other eligible institutions. The value of these gifts was used to reduce the amount of taxable income (and the liabilities arising from it). After a recent hiatus donors of American Indian art may once again obtain tax deductions by donating works of art to museums and certain other institutions.

Beginning in 1917 the federal government bestowed its blessing upon the practice of taxpayers taking what is known as the charitable benefits deduction. The charitable benefits deduction works this way. You owe the government money in the form of taxes on your income. Few people willingly contribute to the Internal Revenue Service, though there is no choice other than running the risk of incurring some fearsome penalties. However, if your income happened to be less than the figure on the bottom on the tally sheet you would owe less money. The charitable benefits deduction provides a legitimate way of shrinking your total taxable income without actually losing money. Instead of paying the full amount of taxes for which you are initially liable to the government, you elect to offset the amount of income by presenting a gift to an eligible institution. In terms of American Indian art you might, for example, donate an 1870s-era Lakota war shirt to a museum. The monetary value of the war shirt is subtracted from your income, thereby reducing your tax liability.

The basic idea of the charitable benefits deduction made sense to Congress for many years,

the general feeling being that the cost-to-benefits ratio ultimately worked out for the public good. In other words, the amount of money which did not find its way into the U.S. Treasury’s coffers as a result of this practice was more than compensated for by the benefits the public as a whole experiences by obtaining access to otherwise sequestered material.

And so things went until 1986, when Congress decided to yet again reform the federal income tax code. Arguably, the most important task legislators faced involved locating additional sources of revenue for the government. One of the ways the politicians accomplished this difficult task was in making considerable noise about “closing the loopholes” and “eliminating tax breaks.” Believing it had located a slayable dragon, Congress virtually eliminated the charitable benefits deduction. I say “virtually eliminated” because the deduction was not actually abolished. But instead of deducting the true value of an object, a donor could now claim only the actual cost he or she paid for the piece.

This tinkering with the existing tax structure is definitely not what art collectors had in mind. What donors wanted was what they had since 1917: an opportunity to claim an appreciated property deduction. Say you purchased that 1870s-era Lakota war shirt in 1984 for \$20,000 and the piece is worth \$30,000 today. An IRS deduction of the \$20,000 you originally paid is okay, but a deduction of the shirt’s \$30,000 fair market value is a decidedly more alluring prospect, since you remove from your income column not only the \$20,000 you paid ten years ago but the \$10,000 appreciation acquired by the shirt in the intervening decade.

Such practices disappeared in 1987, when the new tax code took effect and abolished the appreciated property deduction for art. As a result, the relationship between collectors of American Indian art and museums cooled. The museums looking for additions to collections and the collectors from whom such additions might

come remained cordial enough, but the donors' well so heavily relied upon by museums pretty much dried up.

Then, in 1991, Congress backtracked by opening a brief window of opportunity for collectors eager to take advantage of the possibilities afforded by an appreciated property deduction. Until June 30, 1992 donors once again availed themselves of appreciated property deductions. So many collectors rushed to take advantage of this limited-time offer that it was revealed in a report on National Public Radio in January 1992 that during the previous year, the Smithsonian Institution's National Gallery of Art accepted more gifts of paintings than in the previous four years combined; donation to New York's Museum of Modern Art soared by four hundred percent; and those to its Metropolitan Museum of Art skyrocketed by eight hundred percent.

The story today is that the window Congress opened in 1917, shut in 1986, reopened in 1991 and slammed shut in 1992 now swings wide yet again.

Put succinctly, collectors of American Indian art may take appreciated property deductions for their donations to institutions declared eligible for such gifts by the IRS. What, exactly, are you able to deduct? The work of art's full, fair market value. (The law is retroactive to June 30, 1992; for gifts of stocks, bonds and real estate the retroactivity provision goes back to January 1, 1992.) In order to qualify for a full, fair market value deduction you must hold the piece for more than a year.

If you find these prospects of interest, definitely consult with the person who prepares your federal income tax forms, because certain restrictions apply. For example, if you claim a value of \$5,000 or more on the donated object you must obtain an appraisal from a qualified appraiser. That means someone without any financial interest in the piece, a person whose claim to expertise will withstand rigorous investigation. An appraisal of value by the person from whom you obtained the piece would likely trigger alarm bells with the IRS. Typically, you might seek out a member of the Appraisers Association of America or some other similarly prestigious body. By the way, fair market value does not mean what a dealer says the object sold for last week or might sell for this afternoon but a price established by a public auction sale within the past six months (or sometimes, lacking an example in this time period, the previous year).

Further, should the work's value exceed \$20,000, the appraisal could well end up on the agenda at a meeting of the IRS's Art Advisory Panel in Washington, D.C. I have not researched

the penalties involved in perpetrating fraud upon the IRS but it doesn't require a degree in nuclear physics to assume that they are probably stiff enough to change the quality of life as you now know it.

By the way, anyone contemplating donating American Indian art which incorporates parts of endangered species can continue dreaming because such objects have no fair market value since it's illegal to traffic in them. (See "Legal Briefs: Feathers" in *American Indian Art Magazine*, 16(3):20.)

The best course of action, if you feel you might be a candidate for an appreciated property deduction, is to visit with your accountant, locate a qualified appraiser untainted by association with previous art world shenanigans, and seek a conservative yet reasonable evaluation of the work's fair market value.

You might also wish to talk this over with the IRS. But be forewarned: I opted for that course while preparing this column (by dialing their toll-free advice number, (1-800-829-1040), only to be informed that, sure enough, a donation of a work of art to a museum could be taken — but only if the value attached to the donation was reduced by the amount of appreciation. (No wonder the IRS takes the position that it is not liable for advice dispensed by its employees.)

In point of fact, the federal government has once again embraced the idea that the public benefit gleaned from encouraging appreciated value deductions of works of art ultimately rebounds to the benefit of all. How long Congress will be so disposed, given the dwindling number of sources for substantial amounts of revenue, remains an open question. But for now, the good news greeting collectors of American Indian art and the museums which display such works is that appreciated value deductions are back.

This column does not offer legal advice, nor should it be relied upon for such advice. Anyone who needs such advice should consult an attorney or, in the case of financial matters, a certified public accountant. Suggestions or comments relating to the column should be sent to the author in care of this magazine.

Appendix M. CORPORATE COLLECTIONS OF NATIVE AMERICAN ART

- ALCAN Aluminium, Montreal, Quebec
American National Insurance Company, Galveston
Architects Design Group, Orlando
Arizona Bank, Phoenix
Arnold & Porter, Attorneys at Law, Washington
Atlantic Richfield Company, Los Angeles
AVCO Financial Services, Irvine
Bank of America Nevada, Las Vegas
Band of California, San Francisco
Bank of Montreal, Montreal
Boise-Cascade, Boise
Bumper Development Corporation, Calgary
Canadian National Railway Company, Montreal
The Chase Manhattan Bank, N.A., New York
Cigna Corporation, Philadelphia
Cincinnati Bell, Inc., Cincinnati
Citicorp/Citibank, N.A., New York
Coca-Cola Company, Atlanta
Consolidated-Bathurst Inc, Montreal
Continental Bank, Chicago
Coopers and Lybrand, Detroit
Crestar, Richmond
Crown Life Insurance Company, Toronto
Dayton-Hudson Corporation, Minneapolis
Deere and Company, Moline
Enron Corporation, Houston
Favell Corporation, Klamath Falls
Fayette Bank and Trust Company, Uniontown
Fortis Benefits Insurance Company, Kansas City
The Great-West Life Assurance Co, Winnipeg
Gulf States Paper Corporation, Tuscaloosa
Hiram Walker, Inc, Windsor
Hyatt Regency Bethesda, Bethesda
Inland Associates, Inc, Olathe
International Minerals & Chemical Corp. Northbrook
Iroquois Brands, Ltd, Greenwich
Kaiser Permanente, Sacramento
KeyCorp, Albany
Kraft General Foods, White Plains
John Labatt Limited, London
Ladner Downs, Vancouver
Leanin' Tree, Inc., Boulder
Lewis and Roca, Phoenix
McDonald Systems of Australia, Sydney
Mesa Inc., Amarillo
Microsoft Corporation, Redmond
Minnesota Mutual Life Insurance Company, St. Paul
Mobil Corporation, New York
National Bank of Alaska, Anchorage
Neiman-Marcus, Dallas
Nestle Foods, Purchase
Northern Trust Company, Chicago
Norwest Bank Omaha, N.A., Omaha
Nova, An Alberta Corporation, Calgary
Novacor Chemicals (Canada) Ltd., Sarnia
Oppenheimer & Company Inc, New York
Opus Corporation, Minneapolis
Otero Savings and Loan Association, Colorado Springs
Pacific Bell, San Ramon
Patterson-Schwartz & Associates, Wilmington
KPMG Peat Marwick, Philadelphia
Phillip Morris Companies Inc, New York
Phillips Petroleum Company, Bartlesville
Phoenix Double Tree Suites, Phoenix
Phoenix Newspapers, Inc, Phoenix
Port Authority of New York & New Jersey, New York
Prudential Insurance Company of America, Newark
Rodale Press, Inc, Emmaus
Rothmans of Pall Mall Canada, Don Mills
SAFECO Insurance Company, Seattle
Salt River Project, Phoenix
Security Pacific Corporation, Los Angeles
Sheraton Seattle Hotel and Towers, Seattle
SmithKline Beecham Corporation, Philadelphia
SmithKline Beecham, Middlesex
South Florida Savings, Ft. Lauderdale
Southeast Bank, N.A., Miami
Stone Jessup, P.C., Tulsa
Taylor Machine Works, Louisville
Texas Commerce Bancshares, Houston
Toronto Dominion Bank, Toronto, Ontario
U.S. West, Englewood
United Missouri Bancshares, Inc, Kansas City
United States Tobacco Company, Nashville
Valley National Bank of Arizona, Phoenix
Wells Fargo Bank, Los Angeles
Westinghouse Electric Corporation, Pittsburgh

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Appendix N. **AUCTION INFORMATION**
(Updated 2003)

AMERICAN INDIAN ART MAGAZINE
7314 East Osborn Drive
Scottsdale, AZ 85251

BUTTERFIELD
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San Francisco, California 94103
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www.ebayliveauctions.com

CHRISTIE'S
53 Old Santa Fe Trail
New York, NY 10022
(212) 546-1000
www.christies.com

EBAY
www.ebay.com

SKINNER
357 Main Street
Bolton, Massachusetts 01740
(978) 779-6241
www.skinnerinc.com

THE INDIAN TRADER
311 Aztec Ave.
Gallup, New Mexico 87305
(505) 722-6694

HAUDENOSAUNEE RECLAIM THEIR HERITAGE

Sacred Masks Go Back to Tribe

By Amei Wallach

STAFF WRITER

THEY ARE COUNTRY PEOPLE, these upstate New York Indians of the Haudenosaunee, the tribal name for the Iroquois confederacy. They are sitting around a large table, carefully passing around three carved wooden masks, touching, examining, quietly conferring and joshing one another about how they can improvise the essential sacred ritual of fire and homecoming to empower these masks, here in the middle of midtown Manhattan.

"Maybe we should burn the furniture," someone laughs. But the furniture is steel and glass, here in the offices of The American Indian Ritual Object Repatriation Foundation. The group of 20 Indians, representing five of the six Haudenosaunee nations are here on the eve of Thanksgiving to celebrate an awe-struck and precedent-setting moment of triumph. For the first time in decades of trying, they have rescued from the commercial market some of the sacred

masks that they view, not as objects, but as living spirits. The three masks that Elizabeth Sackler, founder of Repatriation Foundation, returned to them, in a simple Coke-and-cookies ceremony on Monday night, are masks of the False Face Society. And if this week's trip to the National Museum of the American Indian in the Bronx is also successful, the masks are only the first of the sacred materials that will be returned to them.

"They were taken from our elders; they are alive today and have been since the beginning of time," says Chief Emerson Webster. "It just makes me happy that someone agrees these three are sacred and belong to us and gave them back."

The most recent story of the three False Face masks begins last May, when Peter Jemison, an artist

Please see MASKS on Page 101

Masks Returned

MASKS from Page 65

who is chairman of the Haudenosaunee standing committee on burial rules and regulations, and a small group of Haudenosaunee, having failed to persuade Sotheby's to withdraw four False Face Masks from sale, showed up at the auction. When the first mask was held up for bidding to begin, the Indians filed silently to the front of the auction house. None of the masks sold.

"When we sat down, the auctioneer said, 'We do sell crucifixes,' in a low tone," remembers Jemison.

But Sackler knew well that to American Indians, sacred masks are hardly objects, like crosses, but living ancestors. She had first encountered this fierce belief when Sotheby's tried to sell Kachina masks over the protests of the Hopi in May of 1991. Sackler bought the masks and formed the Repatriation Foundation to facilitate the return of other sacred materials. So after last summer's auction, she contacted lawyers for the collectors who had tried to sell the masks, and commenced the negotiations that prompted the owner of three of the masks to donate them to the foundation in return for a tax deduction. And on Monday, her 10-year-old son, Michael Sackler-Berner, watched as she and Webster signed the document returning the masks to the Haudenosaunee. "I'm signing, folks. It's happening, they're coming back to you," she announces.

Now there is the strange, acrid smell of smoke from the patio. And afterwards, Philip Thompson, a Seneca Nation elder in a blue baseball cap with "Washington, D.C." on it, says, "These will be medicine back home. They got the power; I just gave them the power out there."

Lynn Harlan, a Cherokee who is collections manager at the Museum of the American Indian, had already

spent the day with this delegation, going over materials at the museum's research branch. Under the federal 1990 Repatriation Act, museums had until Nov. 16 of this year to prepare lists of tribal materials in their collections so Indians can determine what they want to examine for possible return. As a Cherokee, Harlan is trying to care for sacred objects in the museum's collection in traditional ways — but how do you present a mask with sage, and not attract cockroaches?

"If you ask any Haudenosaunee how to care for their things, they always say: 'Send them home,' " she says. "We feel ceremonial materials are our relatives, part of our tribes. It would be the same as me taking Michael from Liz and her coming to take him back. These are members of our families."

There are more than 200 False Face Masks at the National Museum, and thousands of other sacred objects. In its new incarnation as a Smithsonian Museum, half the staff of the useum is American Indian. In the bad old days, the director invited collectors like Dick Cavett to prowl the stacks and make an offer on things to buy. Now, Ray Gonyea, a Seneca, is repatriation coordinator at the museum. The message is the museum is ready to set a precedent returning countless numbers of objects to over 300 tribes.

"The whole frame of mind of the community has changed," Gonyea says at the museum the next day. "I think it's a sign of the times. There was civil rights legislation, affirmative action. People are looking at each other differently; as equals, as people. I've been in the museums for thirty years, and I remember in the old days nobody would even listen."

And back at the Repatriation Foundation on Monday night, a door opens, spilling light onto 57th street, and the Haudenosaunee emerge, carrying a cardboard carton. And suddenly there's a whoop, a war-whoop in the movies. Only nobody's at war: this is pure triumph. ■

American Indian Ritual Object Repatriation Foundation

February 25, 1994

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Mr. Michael D. Kokin
Sherwood's Spirit of America
325 N. Beverly Drive
Beverly Hills, CA 90210

Dear Mr. Kokin,

I had an opportunity to meet Denise Vigue from the Oneida Nation in Washington, D.C. a few weeks ago at a Repatriation Seminar sponsored by the National Museum of the American Indian. She recently wrote to us regarding her communications with you about the lot of eight masks which are up for sale at Sherwood's Spirit of America.

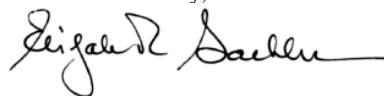
I write to you now to introduce the American Indian Ritual Object Repatriation Foundation and our availability as a liaison and conduit for circumstances such as these. It is the mission of the Foundation to repatriate sacred materials to Native peoples. As a non-profit foundation, Provisionally Chartered by the State of New York with the 501(c)3 IRS status, we are able to offer to donors and contributors tax deductions allowable by law.

Denise has expressed to us your interest in seeing the masks returned to the Oneida. I extend to you the opportunity to take the advantages that a donation to us would offer you, and with our assurance that they will be returned to the Oneida. In part, I formed this foundation to assist in the repatriation of sacred ceremonial materials whose presence in the art market is painful and sacrilegious to those peoples to whom they once belonged. Indeed, it is also inappropriate for them to pay for them.

I am enclosing a November 1993 article in *New York Newsday* which reported our successful return of three masks to the Seneca and would like to point out that the owners of the masks requested confidentiality – in fact all correspondence and deeds of gift were signed by an agent. Collectors often prefer anonymity. However, I can assure you that stories of successful private repatriation, such as this, are much sought by newspapers and media. They are “feel-good” stories and there are not many around these days. If you decide to return the masks through the Foundation I am certain that reporters would be eager to interview you. Setting a standard and being an exemplary model for an art market whose values and ethical standards have been questioned, is a wonderful opportunity.

Enclosed are our brochure, a copy of our deed of gift for your information, and the *NewsDay* article about the Seneca masks. If you are interested in taking this route, please do not hesitate to call me or Kate Morris, our Outreach Coordinator.

Sincerely,



Elizabeth Sackler
President

Encl
cc: Denise Vigue



Appendix Q. A BRIEF GUIDE TO MUSEUMS ORGANIZATION, COLLECTIONS, RECORDS, AND MISTAKES

A basic understanding of how museums and similar institutions work is needed in order to identify and recover materials under P.L. 101-601. However, organizations differ from one another in many ways. In addition, the practices associated with acquiring and maintaining collections have changed through time, even within single institutions. This short summary attempts to outline some of the terms and distinctions associated with museum organization and collections management.

KINDS OF ORGANIZATIONS

Most organizations that report possession of materials covered by NAGPRA will fall into one of several basic types:

Institutional Setting

MUSEUMS

Museums are multi-functional, and tend to include not just collections management but also public programs and research efforts. The relative emphasis given these activities varies. Museums include:

Private Museums, which may range from small organizations preserving single private collections to very large endowed institutions;

Museums in Educational Institutions, which may be administered by universities, colleges, or (very rarely) private secondary schools;

Government Museums, which include the Smithsonian Institution but also many state and local establishments.

REPOSITORIES

Repositories are usually associated with government agencies, serving entirely to maintain collections and having little or no direct involvement in public programs.

OTHER

Some other kinds of organizations — for example, libraries — have through the years acquired materials subject to repatriation under NAGPRA. Sometimes these organizations have transferred materials to museums or repositories for repatriation, since they feel that they lack the information and expertise needed to conduct repatriation independently.

Focus The subject focus of an organization may be:

Art, with and without a specific focus on Native American arts;

Anthropology, emphasizing either archaeological or ethnographic materials;

Natural History, emphasizing natural sciences but often including a strong anthropological focus;

History, often including Native American collections of both prehistoric and historic origin.

Implications

The structure, priorities, policy, procedures, and approach of museums and repositories are shaped by their functions and institutional settings. Therefore, each of the kinds of organizations described above will be different experiences for tribal representatives involved in repatriation consultations. In addition, the size of museums can greatly affect the interaction that can be expected as well as the kinds of collections that will be encountered. An anthropology museum, for example, often houses large collections of archaeological materials that have been inventoried in groups according to research categories. An art museum seldom contains collections of this kind, and all objects are normally individually catalogued.

MUSEUM STAFF

Museum staffs include a variety of specialties. Those of most immediate interest to tribal representatives include:

Directors, who are responsible for overall management of the institution;

Executive or administrative committees or boards, which exist in many museums to advise the director; normally made up of members of the professional staff;

Trustees or regents, members of boards legally responsible for many museums and similar institutions; trustees are more common in private institutions, while regents are typically associated with educational institutions;

Curators, professional staff, not all of whom are actually engaged in curating collections; many curators specialize in areas such as research, exhibit development, and so forth;

Registrars, who are responsible for collections record-keeping; these individuals will have an important role in repatriation activities;

Conservators, who are specialists in the preservation of objects and records; and

Repatriation coordinators, a new title normally drawn from the ranks of existing institutional curators, who work with the various parts of the museum involved in repatriation and try to insure that museum compliance and communication between the museum and tribal representatives proceeds smoothly and effectively.

OWNERSHIP OF COLLECTIONS

NAGPRA establishes guidelines for determining whether institutions have valid ownership of collections in their possession. These relate to the validity of the original alienation of the property and, therefore, to the kind of object in question. NAGPRA also establishes classes of ownership that are subject to this statute: materials from federal and tribal lands, and materials “owned” by organizations receiving federal funding are covered.

However, underlying these distinctions are others that will affect any tribe making repatriation claims. Some organizations “own” all or almost all of the material in their collections; other organizations hold large collections of material that are the property of other organizations or even of individuals.

The Arizona State Museum, for example, has many objects that are the property of the State of Arizona; these are the collections regarded as “owned” by ASM. However, many of our collections are held in repository status for some other organization. Federal and local agencies use ASM and similar institutions as repositories, as do a number of tribal governments. While federal and local agencies that use museums as repositories have usually entered into formal agreements about the relationship between the agencies and the museums, tribal governments often have not.

KINDS OF COLLECTIONS

Collections are organized differently at every institution. The following are categories that frequently identify significant groups or materials within the overall institutional collection. Supporting any of these materials may be a highly variable assemblage of documentation regarded as collections records, rather than collections in themselves.

Source Identifiers

Terms that identify the source of materials curated by institutions include:

Ethnographic: obtained from living individuals or groups; not obtained through archaeological methods such as excavation or surface collection;

Contemporary: very recent materials usually identified separately from ethnographic collections only in art museums; anthropological museums would include very recent materials in ethnographic collections;

Archaeological: obtained by archaeological methods such as excavation or surface collection;

Historic: associated with a period during which there was direct contact with European cultures;

Protohistoric: associated with a period during which there was indirect influence from European cultures, without significant direct contact;

Prehistoric: associated with periods prior to any influence from European cultures.

All of these terms are related to the **provenience** or **provenance** of an object, the place and time where the object was originally found, excavated, or obtained. Provenience information will often be critically important in making NAGPRA claims.

Kind of Material

Institutional collections take many forms, and are not made up entirely of artifacts. The following list summarizes some major categories of collections:

A **library** includes published materials and sometimes unpublished materials;

Archives: may or may not be included within libraries; archives contain unpublished materials other than objects, including:

Documents, which normally may not include anything available in published form; includes field records of both ethnographic and archaeological research as well as letters, institutional non-research records, and so forth;

Tapes and records: sound recordings of music, interviews with individuals or groups, and so forth, on tape or in some other format; institutions may not be certain of content of many of these if they are in a native language, so cataloging information may be sketchy; and

Photographic archives, which include negatives, prints, and slides that may date back to the very early days of photography showing native individuals and groups, activities, and settlements; archeological excavations in progress; objects from the collections; events in the history of the institution; individuals associated with the institution.

Object collections, which incorporate collections that may be:

Osteological, normally referring only to human remains;

Faunal, principally osteological (composed of skeletal material) but confined to remains of non-human species; and

Artifactual, the man-made objects most commonly thought of as elements in museum collections, and those that are of direct concern in NAGPRA consultations.

Curatorial Classification and Processes

Curators classify collections according to their function in the institution and according to the kinds of records maintained. Materials that could be subject to repatriation could be found in a variety of different classifications. There is some variation in terminology, but the following identifies some common terminology.

Catalogued collections are those that have some special individual significance and are individually itemized and recorded. In some institutions, virtually all collections are “catalogued,” while in organizations having large archaeological collections much of the material is usually found in a different class of material that is inventoried in significantly less detail.

Research collections are usually those obtained from archaeological undertakings and inventories and maintained in groups rather than as individual objects. These objects are seldom of interest for exhibit purposes, but may include many items subject to repatriation. Most sherds (broken pottery), lithics (stone objects), and many other items can be found in this type of curatorial class.

Teaching collections represent a relatively small amount of material used for routine educational purposes, and probably selected for lack of special research value.

Type collections are carefully selected to represent typical examples of significant types of objects, for example pottery types.

Loan collections (whether loaned to or from a particular institution) represent a special kind of problem for repatriation. Especially in the past, parts of single collections were often sent to a variety of institutions under “permanent loan” arrangements, without expectation that they would ever be returned to the original organization.

Survey collections are confined to materials collected on the surface of the ground, and normally consist of relatively small quantities of fragmentary objects.

COMMON MUSEUM TERMS

Accessioning is the process of inventorying material that is in the possession of the museum on a long-term basis. It normally does not presume ownership of those materials, but is simply a record-keeping process.

Curation refers to the overall process of caring for collections of all kinds.

Analysis is easily the most misunderstood word in repatriation consultations; it does not necessarily imply any destructive activities, but refers to any process used to find out more about an object, whether harmless or destructive.

Inventory is sometimes almost indistinguishable from accessioning, on the one hand, and analysis, on the other. It is associated with record-keeping objectives rather than detailed study, as in the case of the inventories to be submitted to tribes by museums under NAGPRA.

Loan, as previously suggested, can become an odd term in the hands of museum personnel, indicating a short-term use of material outside the organization for exhibit or research, short-term storage of material pending permanent donation by a collector or other institution, or permanent removal of objects to another institution. Some materials “loaned” by American museums to their European counterparts before the turn of the century, for example, were destroyed by World War II bombing raids in Europe many decades after the initial loans.

CONDITION OF RECORDS AND COLLECTIONS

It is often assumed that all museums have good records on everything in their collections, accurately identifying the function of the object, its physical characteristics, place of origin, how the object was acquired, legal ownership of land if obtained from excavations, permit records for archaeological collections, documentation of legal transfer if material was donated or purchased, and so forth. Regrettably this is not true.

Many institutions holding collections are very old, and standards of research and curation have changed enormously over the years. Materials acquired recently are accompanied by all of the expected information, and more. Materials acquired in the past may be only marginally documented.

In many cases, publications or museums records indicate that material was once in the care of the organization, but is now “lost,” “transferred,” “disposed of,” “loaned,” or otherwise sent to some unknown location, long ago. In such cases, it may never be possible to locate the material in question.

Appendix R

**American Association of Museums
FORUM: Native American Collections and Repatriation
October, 1992**

Written for museum personnel, and described by the American Association of Museums as follows:

Reviews those portions of NAGPRA that most directly affect museums. This Forum also examines issues that will impact collections management of Native American materials long after compliance has been achieved: consultation with Native American groups, documentation, access, care, display, and more.

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Washington, D.C. 20042-4002
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Appendix S.

NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REGULATIONS

PART 10

Subpart A. Introduction

Sec. 10.1 Purpose and applicability.

10.2 Definitions.

***Subpart B. Human Remains, Funerary Objects, Sacred Objects,
or Objects of Cultural Patrimony from Federal or Tribal Lands***

10.3 Intentional archeological excavations.

10.4 Inadvertent discoveries.

10.5 Consultation.

10.6 Custody.

10.7 Disposition of unclaimed human remains, funerary objects, sacred objects, or objects of cultural patrimony. [Reserved]

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

10.8 Summaries.

10.9 Inventories.

10.10 Repatriation.

10.11 Disposition of culturally unidentifiable human remains. [Reserved]

10.12 Civil penalties. [Reserved]

10.13 Future applicability. [Reserved] Subpart D—General

10.14 Lineal descent and cultural affiliation.

10.15 Repatriation limitations and remedies.

10.16 Review committee.

10.17 Dispute resolution.

Appendix-A to Part 10—Sample summary.

Appendix-B to Part 10—Sample notice of inventory completion.

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

Subpart A. INTRODUCTION

Sec. 10.1 Purpose and Applicability.

(a) Purpose.

These regulations carry out 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). These regulations develop a systematic process for determining the rights of lineal descendants and Indian tribes and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated.

(b) Applicability.

(1) These regulations pertain to the identification and appropriate disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony that are:

- (i) In Federal possession or control; or
 - (ii) In the possession or control of any institution or State or local government receiving Federal funds; or
 - (iii) Excavated intentionally or discovered inadvertently on Federal or tribal lands.
- (2) These regulations apply to human remains, funerary objects, sacred objects, or objects of cultural patrimony which are indigenous to Alaska, Hawaii, and the continental United States, but not to territories of the United States.
- (3) Throughout these regulations are decision points which determine their applicability in particular circumstances, e.g., a decision as to whether a museum “controls” human remains and cultural objects within the meaning of the regulations, or, a decision as to whether an object is a “human remain,” “funerary object,” “sacred object,” or “object of cultural patrimony” within the meaning of the regulations. Any final determination making the Act or these regulations inapplicable is subject to review pursuant to section 15 of the Act.

Sec. 10.2 Definitions.

In addition to the term Act, which means the Native American Graves Protection and Repatriation Act as described above, definitions used in these regulations are grouped in seven classes: Parties required to comply with these regulations; Parties with standing to make claims under these regulations; Parties responsible for implementing these regulations; Objects covered by these regulations; Cultural affiliation; Types of land covered by these regulations; and Procedures required by these regulations.

(a) Who must comply with these regulations?

- (1) *Federal agency* means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution as specified in section 2 (4) of the Act.
- (2) *Federal agency official* means any individual authorized by delegation of authority within a Federal agency to perform the duties relating to these regulations.
- (3) *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, funerary objects, sacred objects, or objects of cultural patrimony and receives Federal funds.
 - (i) The term “*possession*” means having physical custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony with a sufficient legal interest to lawfully treat the objects as part of its collection for purposes of these regulations. Generally, a museum or Federal agency would not be considered to have possession of human remains, funerary objects, sacred objects, or objects of cultural patrimony on loan from another individual, museum, or Federal agency.
 - (ii) The term “*control*” means having a legal interest in human remains, [[Page 62159]] funerary objects, sacred objects, or objects of cultural patrimony sufficient to lawfully permit the museum or Federal agency to treat the objects as part of its collection for purposes of these regulations whether or not the human remains, funerary objects, sacred objects or objects of cultural patrimony are in the physical custody of the museum or Federal agency. Generally, a museum or Federal agency that has loaned human remains, funerary objects, sacred objects, or objects of cultural patrimony to another individual, museum, or Federal agency is considered to retain control of those human remains, funerary objects, sacred objects, or objects of cultural patrimony for purposes of these regulations.
 - (iii) 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 aid in the form of funds. Federal funds provided for any purpose that 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 for the purpose of these regulations.
- (4) *Museum official* means the individual within a museum designated as being responsible for matters relating to these regulations.

(5) *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 Native Hawaiian organization, or of any State or political subdivision thereof that discovers human remains, funerary objects, sacred objects or objects of cultural patrimony on Federal or tribal lands after November 16, 1990.

(b) Who has standing to make a claim under these regulations?

(1) *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 or Native Hawaiian organization or by the common law system of descentance to a known Native American individual whose remains, funerary objects, or sacred objects are being claimed under these regulations.

(2) *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. The Secretary will distribute a list of Indian tribes for the purposes of carrying out this statute through the Departmental Consulting Archeologist.

(3) (i) *Native Hawaiian organization* means any organization that:

(A) Serves and represents the interests of Native Hawaiians;

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

(C) Has expertise in Native Hawaiian affairs.

(ii) The term *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. Such organizations must include the Office of Hawaiian Affairs and *Hui Malama I Na Kupuna 'O Hawai'i Nei*.

(4) *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 these regulations.

(c) Who is responsible for carrying out these regulations?

(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

National Park Service,

PO Box 37127

Washington, DC 20013-7127.

(d) What objects are covered by these regulations?

The Act covers four types of Native American objects. The term *Native American* means of, or relating to, a tribe, people, or culture indigenous to the United States, including Alaska and Hawaii:

(1) *Human remains* means the physical remains of a human 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, as defined below, must be considered as part of that item.

(2) *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 Native Hawaiian organization 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. For purposes of completing the summary requirements in Sec. 10.8 and the inventory requirements of Sec. 10.9:

(i) *Associated funerary objects* means those funerary objects for which the human remains with which they were placed intentionally are also in the possession or control of a museum or Federal agency. Associated funerary objects also means those funerary objects that were made exclusively for burial purposes or to contain human remains.

(ii) *Unassociated funerary objects* means those funerary objects for which the human remains with which they were placed intentionally are not in the possession or control of a museum or Federal agency. Objects that were displayed with individual human remains as part of a death rite or ceremony of a culture and subsequently returned or distributed according to traditional custom to living descendants or other individuals are not considered unassociated funerary objects.

(3) *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 [[Page 62160]] present-day adherents. While many items, from ancient pottery sherds 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. The term *traditional religious leader* means a person who is recognized by members of an Indian tribe or Native Hawaiian organization as:

(i) Being responsible for performing cultural duties relating to the ceremonial or religious traditions of that Indian tribe or Native Hawaiian organization, or

(ii) Exercising a leadership role in an Indian tribe or Native Hawaiian organization based on the tribe or organization's cultural, ceremonial, or religious practices.

(4) *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 or Native Hawaiian organization 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 or Native Hawaiian organization as a whole.

(e) What is cultural affiliation?

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. Cultural affiliation is established when the preponderance of the evidence—based on geographical, kinship, biological, archeological, linguistic, folklore, oral tradition, historical evidence, or other information or expert opinion — reasonably leads to such a conclusion.

(f) What types of lands do the excavation and discovery provisions of these regulations apply to?

(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,” as used in this definition, refers to those lands not owned by the United States but 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 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; or
- (ii) Comprise dependent Indian communities as recognized pursuant to 18 U.S.C. 1151; or
- (iii) 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 (Pub.L. 86-3; 73 Stat. 6).
- (iv) Actions authorized or required under these regulations will not apply to tribal lands to the extent that any action would result in a taking of property without compensation within the meaning of the Fifth Amendment of the United States Constitution.

(g) **What procedures are required by these regulations?**

- (1) *Summary* means the written description of collections that may contain unassociated funerary objects, sacred objects, and objects of cultural patrimony required by Sec. 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, funerary objects, sacred objects, or objects of cultural patrimony found under or on the surface of Federal or tribal lands pursuant to section 3 (c) of the Act.
- (4) *Inadvertent discovery* means the unanticipated encounter or detection of human remains, funerary objects, sacred objects, or objects of cultural patrimony found under or on the surface of Federal or tribal lands pursuant to section 3 (d) of the Act.

***Subpart B.* HUMAN REMAINS, FUNERARY OBJECTS, SACRED OBJECTS, OR OBJECTS OF CULTURAL PATRIMONY FROM FEDERAL OR TRIBAL LANDS**

Sec. 10.3 Intentional archeological excavations.

(a) **General.**

This section carries out section 3 (c) of the Act regarding the custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony that are excavated intentionally from Federal or tribal lands after November 16, 1990.

(b) **Specific Requirements.**

These regulations permit the intentional excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony from Federal or tribal lands only if:

- (1) The objects are excavated or removed following the requirements of the Archaeological Resources Protection Act (ARPA) (16 U.S.C. 470aa *et seq.*) and its implementing regulations. Regarding private lands within the exterior boundaries of any Indian reservation, the Bureau of Indian Affairs (BIA) will serve as the issuing agency for any permits required under the Act. For BIA procedures for obtaining such permits, see 25 CFR part 262 or contact the Deputy Commissioner of Indian Affairs, Department of the Interior, Washington, DC 20240. Regarding lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Pub. L. 86-3, the Department of Hawaiian Home Lands will serve as the issuing agency for any permits required under the Act, with the Hawaii State Historic Preservation Division of the Department of Land and Natural Resources acting in an advisory capacity for such issuance. Procedures and requirements for issuing permits will be consistent with those required by the ARPA and its implementing regulations;
- (2) The objects are excavated after consultation with or, in the case of tribal lands, consent of, the appropriate Indian tribe or Native Hawaiian organization pursuant to Sec. 10.5;
- (3) The disposition of the objects is consistent with their custody as described in Sec. 10.6; and
- (4) Proof of the consultation or consent is shown to the Federal agency official or other agency official responsible for the issuance of the required permit.

(c) Procedures.

(1) The Federal agency official must take reasonable steps to determine whether a planned activity may result in the excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony from Federal lands. Prior to issuing any approvals or permits for activities, the Federal agency official must notify in writing the Indian tribes or Native Hawaiian organizations that are likely to be culturally affiliated with any human remains, funerary objects, sacred objects, or objects of cultural patrimony that may be excavated. The Federal [[Page 62161]] agency official must also notify any present-day Indian tribe which aboriginally occupied the area of the planned activity and any other Indian tribes or Native Hawaiian organizations that the Federal agency official reasonably believes are likely to have a cultural relationship to the human remains, funerary objects, sacred objects, or objects of cultural patrimony that are expected to be found. The notice must be in writing and describe the planned activity, its general location, the basis upon which it was determined that human remains, funerary objects, sacred objects, or objects of cultural patrimony may be excavated, and, the basis for determining likely custody pursuant to Sec. 10.6. The notice must 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, funerary objects, sacred objects, or objects of cultural patrimony that may be excavated, and the proposed disposition of any excavated human remains, funerary objects, sacred objects, or objects of cultural patrimony. Written notification should be followed up by telephone contact if there is no response in 15 days. Consultation must be conducted pursuant to Sec. 10.5.

(2) Following consultation, the Federal agency official must complete a written plan of action (described in Sec. 10.5(e)) and execute the actions called for in it.

(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 Sec. 10.3 (c)(2) and Sec. 10.5. Compliance with these regulations does not relieve Federal agency officials of requirements to comply with section 106 of the National Historic Preservation Act (16 U.S.C. 470 *et seq.*).

(4) If an Indian tribe or Native Hawaiian organization receives notice of a planned activity or otherwise becomes aware of a planned activity that may result in the excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony on tribal lands, the Indian tribe or Native Hawaiian organization may take appropriate steps to:

- (i) Ensure that the human remains, funerary objects, sacred objects, or objects of cultural patrimony are excavated or removed following Sec. 10.3 (b), and
- (ii) make certain that the disposition of any human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently as a result of the planned activity are carried out following Sec. 10.6.

Sec. 10.4 Inadvertent discoveries.

(a) General.

This section carries out section 3 (d) of the Act regarding the custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony that are discovered inadvertently on Federal or tribal lands after November 16, 1990.

(b) Discovery.

Any person who knows or has reason to know that he or she has discovered inadvertently human remains, funerary objects, sacred objects, or objects of cultural patrimony on Federal or tribal lands after November 16, 1990, must provide immediate telephone notification of the inadvertent discovery, with written confirmation, 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 inadvertent discoveries apply whether or not an inadvertent discovery is duly reported. If written confirmation is provided by certified mail, the return receipt constitutes evidence of the receipt of the written notification by the Federal agency official or Indian tribe official.

(c) Ceasing activity.

If the inadvertent discovery occurred in connection with an on-going activity on Federal or tribal lands, the person, in addition to providing the notice described above, must stop the activity in the area of the inadvertent discovery and make a reasonable effort to protect the human remains, funerary objects, sacred objects, or objects of cultural patrimony discovered inadvertently.

(d) Federal lands.

(1) As soon as possible, but no later than three (3) working days after receipt of the written confirmation of notification with respect to Federal lands described in Sec. 10.4 (b), the responsible Federal agency official must:

(i) Certify receipt of the notification;

(ii) Take immediate steps, if necessary, to further secure and protect inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony, including, as appropriate, stabilization or covering;

(iii) Notify by telephone, with written confirmation, the Indian tribes or Native Hawaiian organizations likely to be culturally affiliated with the inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony, the Indian tribe or Native Hawaiian organization which aboriginally occupied the area, and any other Indian tribe or Native Hawaiian organization that is reasonably known to have a cultural relationship to the human remains, funerary objects, sacred objects, or objects of cultural patrimony. This notification must include pertinent information as to kinds of human remains, funerary objects, sacred objects, or objects of cultural patrimony discovered inadvertently, their condition, and the circumstances of their inadvertent discovery;

(iv) Initiate consultation on the inadvertent discovery pursuant to Sec. 10.5;

(v) If the human remains, funerary objects, sacred objects, or objects of cultural patrimony must be excavated or removed, follow the requirements and procedures in Sec. 10.3 (b) of these regulations; and

(vi) Ensure that disposition of all inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony is carried out following Sec. 10.6.

(2) *Resumption of activity.* The activity that resulted in the inadvertent discovery may resume thirty (30) days after certification by the notified Federal agency of receipt of the written confirmation of notification of inadvertent discovery if the resumption of the activity is otherwise lawful. The activity may also resume, if otherwise lawful, at any time that a written, binding agreement is executed between the Federal agency and the affiliated Indian tribes or Native Hawaiian organizations that adopt a recovery plan for the excavation or removal of the human remains, funerary objects, sacred objects, or objects of cultural patrimony following Sec. 10.3 (b)(1) of these regulations. The disposition of all human remains, funerary objects, sacred objects, or objects of cultural patrimony must be following Sec. 10.6.

(e) Tribal lands.

(1) As soon as possible, but no later than three (3) working days after receipt of the written confirmation of notification with respect to Tribal lands described in Sec. 10.4 (b), the responsible Indian tribe official may:

(i) Certify receipt of the notification;

(ii) Take immediate steps, if necessary, to further secure and protect inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony, including, as appropriate, stabilization or covering;

(iii) If the human remains, funerary objects, sacred objects, or objects of cultural patrimony must be excavated or removed, follow the requirements and procedures in Sec. 10.3 (b) of these regulations; and

(iv) Ensure that disposition of all inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony is carried out following Sec. 10.6.

(2) *Resumption of Activity.* The activity that resulted in the inadvertent discovery may resume if otherwise lawful after thirty (30) days of the certification of the receipt of notification by the Indian tribe or Native Hawaiian organization.

(f) Federal agency officials.

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. 470 (f) *et seq.*), 36 CFR 800.11 or section 3 (a) of the Archeological and Historic Preservation Act (16 U.S.C. 469 (a-c)). Compliance with these regulations does not relieve Federal agency officials of the requirement to comply with section 106 of the National Historical Preservation Act (16 U.S.C. 470 (f) *et seq.*), 36 CFR 800.11 or section 3 (a) of the Archeological and Historic Preservation Act (16 U.S.C. 469 (a-c)).

(g) Notification requirement in authorizations.

All Federal authorizations to carry out land use activities on Federal lands or tribal lands, including all leases and permits, must include a requirement for the holder of the authorization to notify the appropriate Federal or tribal official immediately upon the discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony pursuant to Sec. 10.4 (b) of these regulations.

Sec. 10.5 Consultation.

Consultation as part of the intentional excavation or inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony on Federal lands must be conducted in accordance with the following requirements.

(a) Consulting parties.

Federal agency officials must consult with known lineal descendants and Indian tribe officials:

- (1) from Indian tribes on whose aboriginal lands the planned activity will occur or where the inadvertent discovery has been made; and
- (2) from Indian tribes and Native Hawaiian organizations that are, or are likely to be, culturally affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony; and
- (3) from Indian tribes and Native Hawaiian organizations that have a demonstrated cultural relationship with the human remains, funerary objects, sacred objects, or objects of cultural patrimony.

(b) Initiation of consultation.

(1) Upon receiving notice of, or otherwise becoming aware of, an inadvertent discovery or planned activity that has resulted or may result in the intentional excavation or inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony on Federal lands, the responsible Federal agency official must, as part of the procedures described in Sec. 10.3 and Sec. 10.4, take appropriate steps to identify the lineal descendant, Indian tribe, or Native Hawaiian organization entitled to custody of the human remains, funerary objects, sacred objects, or objects of cultural patrimony pursuant to Sec. 10.6 and Sec. 10.14. The Federal agency official shall notify in writing:

- (i) any known lineal descendants of the individual whose remains, funerary objects, sacred objects, or objects of cultural patrimony have been or are likely to be excavated intentionally or discovered inadvertently; and
- (ii) the Indian tribes or Native Hawaiian organizations that are likely to be culturally affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony that have been or are likely to be excavated intentionally or discovered inadvertently; and
- (iii) the Indian tribes which aboriginally occupied the area in which the human remains, funerary objects, sacred objects, or objects of cultural patrimony have been or are likely to be excavated intentionally or discovered inadvertently; and
- (iv) the Indian tribes or Native Hawaiian organizations that have a demonstrated cultural relationship with the human remains, funerary objects, sacred objects, or objects of cultural patrimony that have been or are likely to be excavated intentionally or discovered inadvertently.

(2) The notice must propose a time and place for meetings or consultation to further consider the intentional excavation or inadvertent discovery, the Federal agency's proposed treatment of the human remains, funerary objects, sacred objects, or objects of cultural patrimony that may be excavated, and the proposed disposition of any intentionally excavated or inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony.

(3) The consultation must seek to identify traditional religious leaders who should also be consulted and seek to identify, where applicable, lineal descendants and Indian tribes or Native Hawaiian organizations affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony.

(c) Provision of information.

During the consultation process, as appropriate, the Federal agency official must provide the following information in writing to the lineal descendants and the officials of Indian tribes or Native Hawaiian organizations that are, or are likely to be, affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently on Federal lands:

- (1) A list of all lineal descendants and Indian tribes or Native Hawaiian organizations that are being, or have been, consulted regarding the particular human remains, funerary objects, sacred objects, or objects of cultural patrimony;
- (2) An indication that additional documentation used to identify affiliation will be supplied upon request.

(d) Requests for information.

During the consultation process, Federal agency officials must request, as appropriate, the following information from Indian tribes or Native Hawaiian organizations that are, or are likely to be, affiliated pursuant to Sec. 10.6 (a) with intentionally excavated or inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony:

- (1) Name and address of the Indian tribe official to act as representative in consultations related to particular human remains, funerary objects, sacred objects, or objects of cultural patrimony;
- (2) Names and appropriate methods to contact lineal descendants who should be contacted to participate in the consultation process;
- (3) Recommendations on how the consultation process should be conducted; and
- (4) Kinds of cultural items that the Indian tribe or Native Hawaiian organization considers likely to be unassociated funerary objects, sacred objects, or objects of cultural patrimony.

(e) Written plan of action.

Following consultation, the Federal agency official must prepare, approve, and sign a written plan of action. A copy of this plan of action must be provided to the lineal descendants, Indian tribes and Native Hawaiian organizations involved. Lineal descendants and Indian tribe official(s) may sign the written plan of action as appropriate. At a minimum, the plan of action must comply with Sec. 10.3 (b)(1) and document the following: [[Page 62163]]

- (1) The kinds of objects to be considered as cultural items as defined in Sec. 10.2 (b);
- (2) The specific information used to determine custody pursuant to Sec. 10.6;
- (3) The planned treatment, care, and handling of human remains, funerary objects, sacred objects, or objects of cultural patrimony recovered;
- (4) The planned archeological recording of the human remains, funerary objects, sacred objects, or objects of cultural patrimony recovered;
- (5) The kinds of analysis planned for each kind of object;
- (6) Any steps to be followed to contact Indian tribe officials at the time of intentional excavation or inadvertent discovery of specific human remains, funerary objects, sacred objects, or objects of cultural patrimony;
- (7) The kind of traditional treatment, if any, to be afforded the human remains, funerary objects, sacred objects, or objects of cultural patrimony by members of the Indian tribe or Native Hawaiian organization;
- (8) The nature of reports to be prepared; and
- (9) The disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony following Sec. 10.6.

(f) Comprehensive agreements.

Whenever possible, Federal agencies should enter into comprehensive agreements with Indian tribes or Native Hawaiian organizations that are affiliated with specific human remains, funerary objects, sacred objects, or

objects of cultural patrimony and have claimed, or are likely to claim, those human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently on Federal lands. These agreements should address all Federal agency land management activities that could result in the intentional excavation or inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony. Consultation should lead to the establishment of a process for effectively carrying out the requirements of these regulations regarding standard consultation procedures, the determination of custody consistent with procedures in this section and Sec. 10.6, and the treatment and disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony. The signed agreements, or the correspondence related to the effort to reach agreements, must constitute proof of consultation as required by these regulations.

(g) Traditional religious leaders.

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

Sec. 10.6 Custody.

(a) Priority of custody.

This section carries out section 3 (a) of the Act, subject to the limitations of Sec. 10.15, regarding the custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently on Federal or tribal lands after November 16, 1990. For the purposes of this section, custody means ownership or control of human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently in Federal or tribal lands after November 16, 1990. Custody of these human remains, funerary objects, sacred objects, or objects of cultural patrimony is, with priority given in the order listed:

- (1) In the case of human remains and associated funerary objects, in the lineal descendant of the deceased individual as determined pursuant to Sec. 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 the Indian tribe on whose tribal land the human remains, funerary objects, sacred objects, or objects of cultural patrimony were discovered inadvertently;
 - (ii) In the Indian tribe or Native Hawaiian organization that has the closest cultural affiliation with the human remains, funerary objects, sacred objects, or objects of cultural patrimony as determined pursuant to Sec. 10.14 (c); or
 - (iii) In circumstances in which the cultural affiliation of the human remains, funerary objects, sacred objects, or objects of cultural patrimony cannot be ascertained and the objects were discovered inadvertently 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 human remains, funerary objects, sacred objects, or objects of cultural patrimony were discovered inadvertently, or
 - (B) If it can be shown by a preponderance of the evidence that a different Indian tribe or Native Hawaiian organization has a stronger cultural relationship with the human remains, funerary objects, sacred objects, or objects of cultural patrimony, in the Indian tribe or Native Hawaiian organization that has the strongest demonstrated relationship with the objects.

(b) Custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony

and other provisions of the Act apply to all intentional excavations and inadvertent 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, Indian tribe, or Native Hawaiian organization that under these regulations appears to be entitled to custody of particular human remains, funerary objects, sacred objects,

or objects of cultural patrimony excavated intentionally or discovered inadvertently on Federal lands, the responsible Federal agency official must, subject to the notice required herein and the limitations of Sec. 10.15, transfer custody of the objects to the lineal descendant, Indian tribe, or Native Hawaiian organization following appropriate procedures, which must respect traditional customs and practices of the affiliated Indian tribes or Native Hawaiian organizations in each instance. Prior to any such disposition by a Federal agency official, the Federal agency official must publish general notices of the proposed disposition in a newspaper of general circulation in the area in which the human remains, funerary objects, sacred objects, or objects of cultural patrimony were excavated intentionally or discovered inadvertently and, if applicable, in a newspaper of general circulation in the area(s) in which affiliated Indian tribes or Native Hawaiian organizations' members now reside. The notice must provide information as to the nature and affiliation of the human remains, funerary objects, sacred objects, or objects of cultural patrimony and solicit further claims to custody. The notice must be published at least two (2) times at least a week apart, and the transfer must 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 entitled to custody, the Federal agency must not transfer custody of the objects until such time as the proper recipient is determined pursuant to these [[Page 62164]] regulations. The Federal agency official must send a copy of the notice and information on when and in what newspaper(s) the notice was published to the Departmental Consulting Archeologist. Sec. 10.7 Disposition of unclaimed human remains, funerary objects, sacred objects, or objects of cultural patrimony. [Reserved] Subpart C—Human remains, funerary objects, sacred objects, or objects of cultural patrimony in museums and Federal collections

Sec. 10.8 Summaries.

(a) General.

This section carries out section 6 of the Act. Under section 6 of the Act, 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 must complete 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 or Native Hawaiian organizations 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. Federal agencies are responsible for ensuring that these requirements are met for all collections from their lands or generated by their actions whether the collections are held by the Federal agency or by a non-Federal institution.

(b) Contents of summaries.

For each collection or portion of a collection, the summary must 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 or portion of the collection was acquired, where readily ascertainable; and information relevant to identifying lineal descendants, if available, and cultural affiliation.

(c) Completion.

Summaries must be completed not later than November 16, 1993.

(d) Consultation.

(1) *Consulting parties.* Museum and Federal agency officials must consult with Indian tribe officials and traditional religious leaders:

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

(B) That are, or are likely to be, culturally affiliated with unassociated funerary objects, sacred objects, or objects of cultural patrimony; and

(C) From whose aboriginal lands unassociated funerary objects, sacred objects, or objects of cultural patrimony originated.

(2) *Initiation of consultation.* Museum and Federal agency officials must begin summary consultation no later than the completion of the summary process. Consultation may be initiated with a letter, but should

be followed up by telephone or face-to-face dialogue with the appropriate Indian tribe official.

(3) *Provision of information.* During summary consultation, museum and Federal agency officials must provide copies of the summary to lineal descendants, when known, and to officials and traditional religious leaders representing Indian tribes or Native Hawaiian organizations that are, or are likely to be, culturally affiliated with the cultural items. A copy of the summary must also be provided to the Departmental Consulting Archeologist. Upon request by lineal descendants or Indian tribe officials, museum and Federal agency officials must provide lineal descendants, Indian tribe officials and traditional religious leaders 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. Access to this information may be requested at any time and must be provided in a reasonable manner to be agreed upon by all parties. The Review Committee also must be provided access to such materials.

(4) *Requests for information.* During the summary consultation, museum and Federal agency officials must request, as appropriate, the following information from Indian tribes and Native Hawaiian organizations 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) Recommendations on how the consultation process should be conducted, including:
 - (A) 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;
 - (B) Names and appropriate methods to contact any traditional religious leaders that the Indian tribe or Native Hawaiian organization thinks should be consulted regarding the collections; and
- (iii) Kinds of cultural items that the Indian tribe or Native Hawaiian organization considers to be sacred objects or objects of cultural patrimony.

(e) Museum and Federal agency officials must document the following information

regarding unassociated funerary objects, sacred objects, and objects of cultural patrimony in their collections and must use this documentation in determining the individuals, Indian tribes, and Native Hawaiian organizations with which they are affiliated:

- (1) Accession and catalogue entries;
- (2) Information related to the acquisition of unassociated funerary object, sacred object, or object of cultural patrimony, including:
 - (i) the name of the person or organization from whom the object was obtained, if known;
 - (ii) The date of acquisition,
 - (iii) The place each object was acquired, i.e., name or number of site, county, state, and Federal agency administrative unit, if applicable; and
 - (iv) The means of acquisition, i.e., gift, purchase, or excavation;
- (3) A description of each unassociated funerary object, sacred object, or object of cultural patrimony, including dimensions, materials, and photographic documentation, if appropriate, and the antiquity of such objects, if known;
- (4) A summary of the evidence used to determine the cultural affiliation of the unassociated funerary objects, sacred objects, or objects of cultural patrimony pursuant to Sec. 10.14 of these regulations.

(f) Notification.

Repatriation of unassociated funerary objects, sacred objects, or objects of cultural patrimony to lineal descendants, culturally affiliated Indian tribes, or Native Hawaiian organizations as determined pursuant to Sec. 10.10 (a), must not proceed prior to submission of a notice of intent to repatriate to the Departmental Consulting Archeologist, and publication of the notice of intent to repatriate in the **Federal Register**. The notice of intent to repatriate must describe the unassociated funerary objects, sacred objects, or objects of cultural patrimony being claimed in sufficient detail so as to enable other individuals, Indian tribes or Native

Hawaiian organizations to determine their interest in the claimed objects. It must include information that identifies each claimed unassociated funerary object, sacred object, or object of cultural patrimony and the circumstances surrounding its acquisition, and describes the objects that are clearly identifiable as to cultural [[Page 62165]] affiliation. It must also describe the objects that are not clearly identifiable as being culturally affiliated with a particular Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding acquisition of the objects, are likely to be culturally affiliated with a particular Indian tribe or Native Hawaiian organization. The Departmental Consulting Archeologist must publish the notice of intent to repatriate in the **Federal Register**. Repatriation may not occur until at least thirty (30) days after publication of the notice of intent to repatriate in the **Federal Register**.

Sec. 10.9 Inventories.

(a) General.

This section carries out section 5 of the Act. Under section 5 of the Act, each museum or Federal agency that has possession or control over holdings or collections of human remains and associated funerary objects must compile an inventory of such objects, and, to the fullest extent possible based on information possessed by the museum or Federal agency, must 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 and Native Hawaiian organizations. Museums and Federal agencies are encouraged to produce inventories first on those portions of their collections for which information is readily available or about which Indian tribes or Native Hawaiian organizations have expressed special interest. Early focus on these parts of collections will result in determinations that may serve as models for other inventories. Federal agencies must ensure that these requirements are met for all collections from their lands or generated by their actions whether the collections are held by the Federal agency or by a non-Federal institution.

(b) Consultation.

(1) *Consulting parties.* Museum and Federal agency officials must consult with:

- (i) Lineal descendants of individuals whose remains and associated funerary objects are likely to be subject to the inventory provisions of these regulations; and
- (ii) Indian tribe officials and traditional religious leaders:
 - (A) From whose tribal lands the human remains and associated funerary objects originated;
 - (B) That are, or are likely to be, culturally affiliated with human remains and associated funerary objects; and
 - (C) From whose aboriginal lands the human remains and associated funerary objects originated.

(2) *Initiation of consultation.* Museum and Federal agency officials must begin inventory consultation as early as possible, no later in the inventory process than the time at which investigation into the cultural affiliation of human remains and associated funerary objects is being conducted. Consultation may be initiated with a letter, but should be followed up by telephone or face-to-face dialogue.

(3) *Provision of information.* During inventory consultation, museums and Federal agency officials must provide the following information in writing to lineal descendants, when known, and to officials and traditional religious leaders representing Indian tribes or Native Hawaiian organizations that are, or are likely to be, culturally affiliated with the human remains and associated funerary objects.

- (i) A list of all Indian tribes and Native Hawaiian organizations 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 must request, as appropriate, the following information from Indian tribes and Native Hawaiian organizations

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) Recommendations on how the consultation process should be conducted, including:
 - (A) Names and appropriate methods to contact any lineal descendants of individuals whose remains and associated funerary objects are or are likely to be included in the inventory; and
 - (B) Names and appropriate methods to contact traditional religious leaders who should be consulted regarding the human remains and associated funerary objects.
- (iii) Kinds of cultural objects that the Indian tribe or Native Hawaiian organization reasonably believes to have been made exclusively for burial purposes or to contain human remains of their ancestors.

(c) Required information.

The following documentation must be included, if available, for all inventories completed by museum or Federal agency officials:

- (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:
 - (i) the name of the person or organization from whom the object was obtained, if known;
 - (ii) The date of acquisition,
 - (iii) The place each object was acquired, i.e., name or number of site, county, state, and Federal agency administrative unit, if applicable; and
 - (iv) The means of acquisition, i.e., gift, purchase, or excavation;
- (3) A description of each set of human remains or associated funerary object, including dimensions, materials, and, if appropriate, photographic documentation, and the antiquity of such human remains or associated funerary objects, if known;
- (4) A summary of the evidence, including the results of consultation, used to determine the cultural affiliation of the human remains and associated funerary objects pursuant to Sec. 10.14 of these regulations.

(d) Documents.

Two separate documents 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 or Native Hawaiian organizations. The list must indicate for each item or set of items whether cultural affiliation is clearly determined or likely based upon the preponderance of the evidence; and
- (2) A listing of all culturally unidentifiable human remains and associated funerary objects for which no culturally affiliated present-day Indian tribe or Native Hawaiian organization can be determined.

(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 with one or more Indian tribes or Native Hawaiian organizations, the museum or Federal agency, not later than six (6) months after completion of the inventory, must send such Indian tribes or Native Hawaiian organizations the inventory of culturally affiliated human remains, including all information required [[Page 62166]] under Sec. 10.9 (c), and a notice of inventory completion that summarizes the results of the inventory.
- (2) The notice of inventory completion must summarize the contents of the inventory in sufficient detail so as to enable the recipients to determine their interest in claiming the inventoried items. It must identify each particular set of human remains or each associated funerary object and the circumstances surrounding its acquisition, describe the human remains or associated funerary objects that are clearly identifiable as to cultural affiliation, and describe the human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with an Indian tribe or Native Hawaiian organization, 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 or Native Hawaiian organization.

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

(4) The notice of inventory completion and a copy of the inventory must also be sent to the Departmental Consulting Archeologist. These submissions should be sent in both printed hard copy and electronic formats. Information on the proper format for electronic submission and suggested alternatives for museums and Federal agencies unable to meet these requirements are available from the Departmental Consulting Archeologist.

(5) Upon request by an Indian tribe or Native Hawaiian organization that has received or should have received a notice of inventory completion and a copy of the inventory as described above, a museum or Federal agency must 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) If the museum or Federal agency official determines that the museum or Federal agency has possession of or control over human remains that cannot be identified as affiliated with a particular individual, Indian tribes or Native Hawaiian organizations, the museum or Federal agency must provide the Departmental 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 must make this information available to members of the Review Committee. Section 10.11 of these regulations will set forth procedures for disposition of culturally unidentifiable human remains of Native American origin. Museums or Federal agencies must retain possession of such human remains pending promulgation of Sec. 10.11 unless legally required to do otherwise, or recommended to do otherwise by the Secretary. Recommendations regarding the disposition of culturally unidentifiable human remains may be requested prior to final promulgation of Sec. 10.11.

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

(f) Completion.

Inventories must 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 must include, but not necessarily be limited to, the initiation of active consultation and documentation regarding the collections 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; a schedule for carrying out the plan; and a proposal to obtain the requisite funding.

Sec. 10.10 Repatriation.

(a) Unassociated funerary objects, sacred objects, and objects of cultural patrimony.

(1) *Criteria.* Upon the request of a lineal descendant, Indian tribe, or Native Hawaiian organization, a museum or Federal agency must expeditiously repatriate unassociated funerary objects, sacred objects, or objects of cultural patrimony if all the following criteria are met:

(i) The object meets the definitions established in Sec. 10.2 (b) (4), (5) or (6); and

(ii) The cultural affiliation of the object is established:

(A) through the summary, consultation, and notification procedures in Sec. 10.14 of these regulations; or

- (B) by presentation of a preponderance of the evidence by a requesting Indian tribe or Native Hawaiian organization pursuant to section 7(c) of the Act; and
- (iii) The known lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the museum or Federal agency does not have a right of possession to the objects as defined in Sec. 10.10 (a)(2); and
- (iv) The agency or museum is unable to present evidence to the contrary proving that it does have a right of possession as defined below; and
- (v) None of the specific exceptions listed in Sec. 10.10 (c) apply.

(2) *Right of possession.* For purposes of this section, “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 or Native Hawaiian organization 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.* Repatriation must take place within ninety (90) days of receipt of a written request for repatriation that satisfies the requirements of Sec. 10.10 (a)(1) from a culturally affiliated Indian tribe or Native Hawaiian organization, provided that the repatriation may not occur until at least thirty (30) days after publication of the notice of intent to repatriate in the **Federal Register** as described in Sec. 10.8.

(b) Human remains and associated funerary objects.

(1) *Criteria.* Upon the request of a lineal descendant, Indian tribe, or Native Hawaiian organization, a museum and Federal agency must expeditiously repatriate human remains and associated funerary objects if all of the following criteria are met:

- (i) The human remains or associated funerary object meets the definitions established in Sec. 10.2 (b)(1) or (b)(3); and
- (ii) The affiliation of the deceased individual to known lineal descendant, present day Indian tribe, or Native Hawaiian organization: [[Page 62167]]
 - (A) has been reasonably traced through the procedures outlined in Sec. 10.9 and Sec. 10.14 of these regulations; or
 - (B) has been shown by a preponderance of the evidence presented by a requesting Indian tribe or Native Hawaiian organization pursuant to section 7(c) of the Act; and
- (iii) None of the specific exceptions listed in Sec. 10.10 (c) apply.

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

(c) Exceptions.

These requirements for repatriation do not apply to:

- (1) Circumstances where human remains, funerary objects, sacred objects, or objects of cultural patrimony are indispensable to the completion of a specific scientific study, the outcome of which is of major benefit to the United States. Human remains, funerary objects, sacred objects, or objects of cultural patrimony in such circumstances must 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, funerary objects, sacred objects, or objects of cultural patrimony and the museum or Federal agency, after complying with these regulations, cannot determine by a preponderance of the evidence which requesting party is the most appropriate claimant. In such circumstances, the museum or Federal agency may retain the human remains, funerary objects, sacred objects, or objects of cultural patrimony until such time as the requesting parties

mutually agree upon the appropriate recipient or the dispute is otherwise resolved pursuant to these regulations or as ordered by a court of competent jurisdiction; or

(3) Circumstances where a court of competent jurisdiction has determined that the repatriation of the human remains, funerary objects, sacred objects, or objects of cultural patrimony in the possession or control of a museum would result in a taking of property without just compensation within the meaning of the Fifth Amendment of the United States Constitution, in which event the custody of the objects must be as provided under otherwise applicable law. Nothing in these regulations must prevent a museum or Federal agency, where otherwise so authorized, or a lineal descendant, Indian tribe, or Native Hawaiian organization, from expressly relinquishing title to, right of possession of, or control over any human remains, funerary objects, sacred objects, or objects of cultural patrimony.

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

(d) Place and manner of repatriation.

The repatriation of human remains, funerary objects, sacred objects, or objects of cultural patrimony must be accomplished by the museum or Federal agency in consultation with the requesting lineal descendants, or culturally affiliated Indian tribe or Native Hawaiian organization, as appropriate, to determine the place and manner of the repatriation.

(e) The museum official or Federal agency official must inform the recipients

of repatriations of any presently known treatment of the human remains, funerary objects, sacred objects, or objects of cultural patrimony with pesticides, preservatives, or other substances that represent a potential hazard to the objects or to persons handling the objects.

(f) Record of repatriation.

(1) Museums and Federal agencies must adopt internal procedures adequate to permanently document the content and recipients of all repatriations.

(2) The museum official or Federal agency official, at the request of the Indian tribe official, may take such steps as are considered necessary pursuant to otherwise applicable law, to ensure that information of a particularly sensitive nature is not made available to the general public.

(g) Culturally unidentifiable human remains.

If the cultural affiliation of human remains cannot be established pursuant to these regulations, the human remains must be considered culturally unidentifiable. Museum and Federal agency officials must report the inventory information regarding such human 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 culturally unidentifiable 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.

Sec. 10.11 Disposition of culturally unidentifiable human remains. [Reserved]

Sec. 10.12 Civil penalties. [Reserved]

Sec. 10.13 Future applicability. [Reserved]

Subpart D. General

Sec. 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 or Native Hawaiian organizations and human remains, funerary objects, sacred objects, or objects of cultural patrimony in museum or Federal agency collections or excavated intentionally or discovered inadvertently from Federal lands. They may also be used by Indian tribes and Native Hawaiian organizations 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 or Native Hawaiian organization or by the common law system of descent 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 or Native Hawaiian organization and an identifiable earlier group. All of the following requirements must be met to determine cultural affiliation between a present-day Indian tribe or Native Hawaiian organization and the human remains, funerary objects, sacred objects, or objects of cultural patrimony of an earlier group:

- (1) Existence of an identifiable present-day Indian tribe or Native Hawaiian organization with standing under these regulations and the Act; and
- (2) Evidence of the existence of an identifiable earlier group. Support for this requirement may include, but is not necessarily limited to evidence sufficient to:
 - (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 [[Page 62168]]
 - (iii) Establish the existence of the earlier group as a biologically distinct population; and
- (3) Evidence of the existence of a shared group identity that can be reasonably traced between the present-day Indian tribe or Native Hawaiian organization and the earlier group. Evidence to support this requirement must establish that a present-day Indian tribe or Native Hawaiian organization has been identified from prehistoric or historic times to the present as descending from the earlier group.

(d) A finding of cultural affiliation

should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record.

(e) Evidence.

Evidence of a kin or cultural affiliation between a present-day individual, Indian tribe, or Native Hawaiian organization and human remains, funerary objects, sacred objects, or objects of cultural patrimony must 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.

(f) Standard of proof.

Lineal descent of a present-day individual from an earlier individual and cultural affiliation of a present-day Indian tribe or Native Hawaiian organization to human remains, funerary objects, sacred objects, or objects of cultural patrimony must be established by a preponderance of the evidence. Claimants do not have to establish cultural affiliation with scientific certainty.

Sec. 10.15 Repatriation limitations and remedies.

(a) Failure to claim prior to repatriation.

- (1) Any person who fails to make a timely claim prior to the repatriation or transfer of human remains, funerary objects, sacred objects, or objects of cultural patrimony is deemed to have irrevocably waived any right to claim such items pursuant to these regulations or the Act. For these purposes, a “timely claim” means the filing of a written claim with a responsible museum or Federal agency official prior to the time the particular human remains, funerary objects, sacred objects, or objects of cultural patrimony at issue are duly repatriated or disposed of to a claimant by a museum or Federal agency pursuant to these regulations.
- (2) If there is more than one (1) claimant, the human remains, funerary object, sacred object, or objects of cultural patrimony may 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, funerary objects, sacred objects, or objects of cultural patrimony and does not claim entitlement to them must place the objects in the custody of the responsible museum or Federal agency for retention until the question of custody is resolved.

(b) Failure to claim where no repatriation or disposition has occurred. [Reserved]

(c) Exhaustion of remedies.

No person is considered to have exhausted his or her administrative remedies with respect to the repatriation or disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony 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 duly denied following these regulations.

(d) Savings provisions.

Nothing in these regulations can be construed to:

- (1) Limit the authority of any museum or Federal agency to:
 - (i) Return or repatriate human remains, funerary objects, sacred objects, or objects of cultural patrimony to Indian tribes, Native Hawaiian organizations, or individuals; and
 - (ii) Enter into any other agreement with the consent of the culturally affiliated Indian tribe or Native Hawaiian organization as to the disposition of, or control over, human remains, funerary objects, sacred objects, or objects of cultural patrimony.
- (2) Delay actions on repatriation requests that were pending on November 16, 1990;
- (3) Deny or otherwise affect access to court;
- (4) Limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; or
- (5) Limit the application of any State or Federal law pertaining to theft of stolen property.

Sec. 10.16 Review committee.

(a) General.

The Review Committee will advise Congress and the Secretary on matters relating to these regulations and the Act, 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 Sec. 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, finding, report, or other action of the Review Committee is advisory only and not 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.

Sec. 10.17 Dispute resolution.

(a) Formal and informal resolutions.

Any person who wishes to contest actions taken by museums, Federal agencies, Indian tribes, or Native Hawaiian organizations with respect to the repatriation and disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony is encouraged to do so through informal negotiations to achieve a fair resolution of the matter. The Review Committee may aid 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 disputing parties or to the Secretary as to the proper resolution of disputes consistent with these regulations and the Act.

Appendix A to Part 10

SAMPLE SUMMARY

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

Before November 17, 1993

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

Dear Sir/Madame Chair:

I write to inform you of collections held by our museum which may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony that are, or are likely to be, culturally affiliated with your Indian tribe or Native Hawaiian organization. This notification is required by section 6 of [[Page 62169]] the Native American Graves Protection and Repatriation Act.

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

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

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

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

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

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

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

Sincerely,

Museum Official
Major Museum

Appendix B to Part 10

SAMPLE NOTICE OF INVENTORY COMPLETION

The following is an example of a Notice of Inventory Completion published in the **Federal Register**.

NATIONAL PARK SERVICE

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

AGENCY: National Park Service, Interior.

ACTION: Notice.

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

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

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

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

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

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

Dated: July 21, 1994

Francis P. McManamon, Departmental Consulting Archeologist, Chief, Archeological Assistance Division.

[Published: August 1, 1994] George T. Frampton, Jr., Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 95-29418 Filed 12-1-95; 8:45 am]

Appendix T.

NATIONAL MUSEUM OF THE AMERICAN INDIAN ACT AMENDMENTS OF 1996

SEC. 1. SHORT TITLE: REFERENCES.

- (a) Short Title.—This Act may be cited as the “National Museum of the American Indian Act Amendment of 1996”.
- (b) References. Whenever in this Act an amendment or repeal is expressed in terms of an amendment to or repeal of a section or other provision, the reference shall be considered to be made to a section or other provision of the National Museum of the American Indian Act (20 U.S.C. 80q et seq.).

SEC. 2. BOARD OF TRUSTEES.

Section 5(f)(1)(B) (20 U.S.C. 80q-3(f)(1)(B)) is amended by striking “an Assistant Secretary” and inserting “a senior official”.

SEC. 3. INVENTORY.

- (a) In General.—Section 11(a) (20 U.S.C. 80q-9(a)) is amended—
 - (1) by striking “(1)” and inserting “(A)”;
 - (2) by striking “(2)” and inserting “(B)”;
 - (3) by inserting “(1)” before “The Secretary”; and
 - (4) by adding at the end the following new paragraphs:
“

(2) The inventory made by the Secretary of the Smithsonian Institution under paragraph (1) shall be completed not later than June 1, 1998.

“(3) For purposes of this subsection, the term ‘inventory’ means a simple, itemized list that, to the extent practicable, identifies, based upon available information held by the Smithsonian Institution, the geographic and cultural affiliation of the remains and objects referred to in paragraph (1).”

- (b) Authorization of Appropriations.—Section 11(f) (20 U.S.C. 80q-9(f)) is amended by striking “to carry out this section” and inserting “to carry out this section and section 11A”.

SEC. 4. SUMMARY AND REPATRIATION OF UNASSOCIATED FUNERARY OBJECTS, SACRED OBJECTS, AND CULTURAL PATRIMONY.

The National Museum of the American Indian Act (20 U.S.C. 80q et seq.) is amended by inserting after section 11 the following new section:

“SEC. 11A. SUMMARY AND REPATRIATION OF UNASSOCIATED FUNERARY OBJECTS, SACRED OBJECTS, AND CULTURAL PATRIMONY.

“(a) Summary.—Not later than December 31, 1996, the Secretary of the Smithsonian Institution shall provide a written summary that contains a summary of unassociated funerary objects, sacred objects, and objects of cultural patrimony (as those terms are defined in subparagraphs (B), (C), and (D), respectively, of section 2(3) of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001(3)), based upon available information held by the Smithsonian Institution. The summary required under this section shall include, at a minimum, the information required under section 6 of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3004).

“(b) Repatriation.—Where cultural affiliation of Native American unassociated funerary objects, sacred objects, and objects of cultural patrimony has been established in the summary prepared

pursuant to subsection (a), or where a requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion, then the Smithsonian Institution shall expeditiously return such unassociated funerary object, sacred object, or object of cultural patrimony where—

“(1)—the requesting party is the direct lineal descendant of an individual who owned the unassociated funerary object or sacred object;

“(2)—the requesting Indian tribe or Native Hawaiian organization can show that the object was owned or controlled by the Indian tribe or Native Hawaiian organization; or

“(3)—the requesting Indian tribe or Native Hawaiian organization can show that the unassociated funerary object or sacred object was owned or controlled by a member thereof, provided that in the case where an unassociated funerary object or sacred object was owned by a member thereof, there are no identifiable lineal descendants of said member or the lineal descendants, upon notice, have failed to make a claim for the object.

“(c) Standard of Repatriation.—If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony pursuant to this Act and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Smithsonian Institution did not have the right of possession, then the Smithsonian Institution shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

“(d) Museum Obligation.—Any museum of the Smithsonian Institution which repatriates any item in good faith pursuant to this Act shall not be liable for claims by an aggrieved party or for claims of fiduciary duty, public trust, or violations of applicable law that are inconsistent with the provisions of this Act.

“(e) Statutory Construction.—Nothing in this section may be construed to prevent the Secretary of the Smithsonian Institution, with respect to any museum of the Smithsonian Institution, from making an inventory or preparing a written summary or carrying out the repatriation of unassociated funerary objects, sacred objects, or objects of cultural patrimony in a manner that exceeds the requirements of this Act.

“(f) Native Hawaiian Organization Defined.—For purposes of this section, the term ‘Native Hawaiian organization’ has the meaning provided that term in section 2(11) of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001(11)).”.

SEC. 5. SPECIAL COMMITTEE.

Section 12 (20 U.S.C. 80q-10) is amended—

(1) in the first sentence of subsection (a), by inserting “and unassociated funerary objects, sacred objects, and objects of cultural patrimony under section 11A” before the period; and

(2) in subsection (b)—

(A) in the matter preceding paragraph (1), by striking “five” and inserting “7”;

(B) in paragraph (1)—

(i) by striking “three” and inserting “4”; and

(ii) by striking “and” at the end;

(C) by redesignating paragraph (2) as paragraph (3); and

(D) by inserting after paragraph (1) the following:

“(2) at least 2 members shall be traditional Indian religious leaders; and”.

Appendix U

NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT INTERIM RULES

REGULATIONS—CIVIL PENALTIES

DEPARTMENT OF THE INTERIOR
Office of the Secretary
RIN 1024-AC48

Summary: This interim rule relates to one section of regulations implementing the Native American Graves Protection and Repatriation Act of 1990 (“the Act”). This section outlines procedures for assessing civil penalties upon museums that fail to comply with applicable provisions of the Act. Comments on this rule are requested.

Dates: Effective Date: This interim rule becomes effective on February 12, 1997. This interim rule will remain in effect until final regulations are adopted through general notice and comment rulemaking. However, written comments on this interim rule are solicited from Indian tribes, Native Hawaiian organizations, museums, Federal agencies and members of the public. Comments will be taken into account in developing a final rule. The Departmental Consulting Archeologist will accept written comments until April 14, 1997.

Addresses: Comments (2 copies) should be addressed to: Departmental Consulting Archeologist, Archeology and Ethnography Program, National Park Service, Docket No. 1024-AC48, Box 37127, Washington, D.C. 20013-7127, or hand deliver comments to room 210, 800 North Capital Street, Washington, D.C. 20001.

For further information contact: Dr. Francis P. McManamon, Departmental Consulting Archeologist, Archeology and Ethnography Program, National Park Service, Box 37127, Washington, DC 20013-7127. Telephone: 202-343-4101. Fax: 202-523-1547.

SUPPLEMENTARY INFORMATION:

Background: On November 16, 1990, President George Bush signed the Act into law. The Act addresses the rights of lineal descendants, Indian Tribes, and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony with which they are affiliated. Section 13 of the Act requires the Secretary of the Interior to promulgate regulations to carry out provisions of the Act. Final regulations implementing the Act were published in the **Federal Register** on December 4, 1995 (60 FR 62158). The final regulations had five sections reserved for later publication. This interim rule includes one section that was reserved in the final regulations. Section 10.12 develops procedures for assessing civil penalties upon museums that fail to comply with provisions of the Act. This section does not apply to Federal agencies. However, Federal agencies are subject to enforcement actions by aggrieved parties under section 15 of the Act.

SECTION-BY-SECTION ANALYSIS

Section 10.12

Section 9 of the Act authorizes the Secretary of the Interior to assess a civil penalty against any museum that fails to comply with the requirements of this Act. This section defines procedures for assessing those civil penalties.

A “museum” is defined at 43 CFR 10.2 (a)(3) as any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and possesses or has control over Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony as defined in

43 CFR 10.2 (d). The phrase “receives Federal funds” is defined at 43 CFR 10.2 (a)(3)(iii) to mean 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 that 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 part of a state or local government or private university, and the state or local government or private university received Federal funds for any purpose, the museum is considered to receive Federal funds for purpose of these regulations. Although Federal agencies are not considered “museums” for purposes of civil penalties under this section, civil actions may be taken against Federal agencies to compel compliance with the Act in the United States District Courts under section 15 of the Act.

Section 9(b) of the Act identifies some of the criteria to be used by the Secretary in determining the amount of the civil penalty to be assessed. The Secretary has consulted the Native American Graves Protection and Repatriation Review Committee which has recommended that the Secretary use a two stage approach to implementing these criteria. They recommend an initial assessment based upon the sum of three factors:

- (1) an amount equal to .25% of the museum’s annual budget, or \$5,000, whichever is less;
- (2) damages suffered by any aggrieved party or parties, including, but not limited to, the costs of attorney and expert witness fees, investigations, and administrative expenses incurred by the aggrieved parties to compel compliance with the Act; and
- (3) the importance of the human remains, funerary objects, sacred object, or object of cultural patrimony to performing traditional practices by the aggrieved party or parties. The review committee recognizes that this initial assessment, and in particular that portion based upon the museum’s annual budget, might be considered overly modest by some, but emphasizes that civil penalties should be used to ensure compliance instead of simply imposing large penalty amounts. The review committee considers .25% of the museum’s annual budget, or \$5,000, whichever is less, an amount sufficient to compel compliance without inflicting undue damage, particularly on small institutions. We believe that a monetary standard is useful as it will lessen the need to make more difficult assessment determinations based on archeological, historical, and commercial value. As the law allows for establishment of civil penalties based on other factors as the Secretary considers appropriate, this formula will further the goals of the legislation. We have therefore adopted it. The review committee also recommended assessment of a subsequent penalty amount of \$100 per day after the date of the final administrative decision that the museum continues not to comply with the Act. We have also adopted this recommendation. In addition to the above factors, the commercial value of any human remains, funerary object, sacred object, or object of cultural patrimony may be assessed on any museum that, after November 16, 1990, sells or otherwise transfers such object in violation of the Act. The review committee also recommends that the Secretary double the penalty amount for subsequent failures to comply. We have included the number of violations that have occurred as a criterion in determining the penalty amount. The Secretary gave the review committee’s recommendations careful consideration in developing the procedures outlined in this interim rule.

The administrative procedures for providing notice, holding a hearing, appealing an administrative decision, and issuing a final administrative decision are patterned after the procedures currently used in assessing civil penalties under the Archaeological Resources Protection Act. As a matter of general policy, the Secretary does not intend to institute civil penalty actions under this section for violations which occurred before the effective date of these regulations if the museum in question made a good faith effort to comply with the basic requirements of the Act.

Administrative Procedures Act

The Secretary of the Interior has determined under 5 U.S.C. 553 (b)(B) and 318 DM 6.4 (B)(1) that it is not in the public interest to delay the effective date of this regulation to accommodate notice and comment procedures. There are three reasons for this decision:

- (a) The requirements that the Act places upon museums as outlined in section 10.12 (b)(1) of these regulations are generally known and were established by statute in 1990 or by regulation in 1995;
- (b) Section 9 of the Act clearly outlines the limits of the Secretary's discretion in enforcing provisions of the Act; and
- (c) The administrative procedures for appealing the levy of a penalty as outlined in section 10.12 (e) through (l) closely imitate those already used under the Archaeological Resources Protection Act.

The civil penalty provisions of the Act are intended to assist in the protection and appropriate repatriation of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony that are of extreme importance to lineal descendants, Indian tribes and Native Hawaiian organizations. Loss of such items causes irreparable injury to the lineal descendants, Indian tribes, and Native Hawaiian organizations entitled to their repatriation under the terms of the Act. Delaying implementation of the enforcement procedures of this section to accommodate notice and comment procedures will likely result in further losses or in an inability to remedy, to the extent feasible, losses which have already occurred.

Public Participation

It is the policy of the Department of the Interior, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comments regarding this interim rule to the address noted at the beginning of this rulemaking. The National Park Service will review comments and consider making changes to the rule based upon an analysis of the comments.

If you wish the National Park Service to acknowledge receipt of your comments you must submit with those comments, a self-addressed, stamped postcard that includes the following statement: "Comments to Docket No. 1024-AC48." The Departmental Consulting Archeologist will date stamp the postcard and return it to you. The Departmental Consulting Archeologist will consider comments received on or before April 14, 1997 before taking action on a final rule and may change the interim rule contained in this notice in light of the comments received.

Drafting Information

This interim rule was prepared by Dr. Francis P. McManamon (Departmental Consulting Archeologist, National Park Service), Dr. C. Timothy McKeown (NAGPRA Team Leader, National Park Service), and Lars Hanslin (Senior Attorney, Office of the Solicitor), in consultation with the Native American Graves Protection and Repatriation Review Committee as directed by section 8 (c)(7) of the Act.

Paperwork Reduction Act

This interim rule does not contain collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995.

Compliance with other laws

This rule was reviewed by the Office of Management and Budget under Executive Order 12866. The Department of the Interior determined that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 USC 601 et seq.). The civil penalties are expected to be assessed on only a very small number of museums that have failed to comply with the Act. Civil penalty amounts will be calculated to ensure compliance and not as retribution.

The National Park Service has determined and certifies pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 et seq., that this proposed rule will not impose a cost of \$100 million or more in any given year on local, State, or tribal governments or private entities.

The National Park Service has determined that this interim rule will not have a significant effect on the quality of the human environment, health and safety because it is not expected to:

- (a) Increase public use to the extent of compromising the nature and character of the area or causing physical damage to it;

- (b) Introduce non-compatible uses which compromise the nature and characteristics of the area, or cause physical damage to it;
- (c) Conflict with adjacent ownerships or land uses; or
- (d) Cause a nuisance to adjacent owners or occupants.

Based on this determination, this interim rule is categorically excluded from the procedural requirements of the National Environmental Policy Act (NEPA) by Departmental regulations in 516 DM 6 (49 FR 21438). As such, neither an Environmental Assessment (EA) nor an Environmental Impact Statement (EIS) has been prepared.

List of subjects in 43 CFR Part 10

Administrative practice and procedure, Hawaiian Natives, Historic preservation, Indians—Claims, Museums, Reporting and record keeping requirements.

In consideration of the foregoing, 43 CFR Subpart A is amended as follows:

PART 10—NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT REGULATIONS

- 1. The authority citation for Part 10 continues to read as follows: Authority: 25 U.S.C. 3001 *et seq.*
- 2. Part 10 is amended by adding Sec. 10.12 to read as follows:

Sec. 10.12m Civil Penalties.

(a) *The Secretary's authority to assess civil penalties.*

The Secretary is authorized by section 9 of the Act to assess civil penalties on any museum that fails to comply with the requirements of the Act. As used in this section, “failure to comply with requirements of the Act” also means failure to comply with applicable portions of the regulations set forth in this part. As used in this section “you” refers to the museum or the museum official designated responsible for matters related to implementation of the Act.

(b) *Definition of “failure to comply”.*

- (1) Your museum has failed to comply with the requirements of the Act if it:
 - (i) After November 16, 1990, sells or otherwise transfers human remains, funerary objects, sacred objects, or objects of cultural patrimony in violation of the Act, including, but not limited to, an unlawful sale or transfer to any individual or institution that is not required to comply with the Act;
 - or
 - (ii) After November 16, 1993, has not completed summaries as required by the Act; or
 - (iii) After November 16, 1995, or the date specified in an extension issued by the Secretary, whichever is later, has not completed inventories as required by the Act; or
 - (iv) After May 16, 1996, or six months after completion of an inventory under an extension issued by the Secretary, whichever is later, has not notified culturally affiliated Indian tribes and Native Hawaiian organizations; or
 - (v) Refuses to repatriate human remains, funerary object, sacred object, or object of cultural patrimony to a lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization pursuant to the requirements of the Act; or
 - (vi) Repatriates human remains, funerary object, sacred object, or object of cultural patrimony before publishing a notice in the **Federal Register** as required by the Act.

- (2) Each violation will constitute a separate offense.

(c) *How to notify the Secretary of a failure to comply.*

- (1) Any person may bring an allegation of failure to comply to the attention of the Secretary.
- (2) The Secretary may take the following steps upon receiving such an allegation:
 - (i) Review the alleged failure to comply;
 - (ii) Identify the specific provisions of the Act which allegedly have not been complied with;
 - (iii) Determine if the institution of a civil penalty action is in the public interest in the circumstances; and
 - (iv) If appropriate, estimate the proposed penalty.

(d) *How the Secretary determines the penalty amount.*

- (1) The penalty amount will be .25% of your museum's annual budget, or \$5,000, whichever is less, and, such additional sum as the secretary may determine is appropriate after taking into account:
 - (i) The archeological, historical, or commercial value of the human remains, funerary object, sacred object, or object of cultural patrimony involved including, but not limited to, consideration of their importance to performing traditional practices; and
 - (ii) The damages suffered, both economic and non-economic, by the aggrieved party or parties including, but not limited to, the costs of attorney and expert witness fees, investigations, and administrative expenses related to efforts to compel compliance with the Act; and
 - (iii) The number of violations that have occurred.
- (2) An additional penalty of \$100 per day after the date the final administrative decision takes effect if your museum continues to violate the Act.
- (3) The Secretary may reduce the penalty amount if there is:
 - (i) A determination that you did not willfully fail to comply; or
 - (ii) An agreement by you to mitigate the violation, including, but not limited to, payment of restitution to the aggrieved party or parties; or
 - (iii) A demonstration of hardship or inability to pay, provided that this factor will only apply when you have not been previously found to have failed to comply with the regulations in this part; or
 - (iv) A determination that the proposed penalty would constitute excessive punishment under the circumstances.

(e) *How the Secretary notifies you of a failure to comply.*

- (1) If the allegations are verified, the Secretary serves you with a notice of failure to comply either by personal delivery or by registered or certified mail (return receipt requested). The notice includes:
 - (i) A concise statement of the facts believed to show a failure to comply;
 - (ii) A specific reference to the provisions of the Act and/or the regulations in this part that you have allegedly not complied with;
 - (iii) The amount of the proposed penalty, including any initial proposal to mitigate or remit where appropriate, or a statement that the Secretary will serve notice of a proposed penalty amount after ascertaining the damages associated with the alleged failure to comply; and
 - (iv) Notification of the right to file a petition for relief as provided in this section below, or to await the Secretary's notice of assessment and to request a hearing. The notice will also inform you of your right to seek judicial review of any final administrative decision assessing a civil penalty.
- (2) The Secretary also sends a copy of the notice of failure to comply to:
 - (i) Any lineal descendant of a known Native American individual whose human remains or cultural items are in question; and
 - (ii) Any Indian tribes or Native Hawaiian organizations that are, or are likely to be, culturally affiliated with the human remains or cultural items in question.

(f) *Actions you may take upon receipt of a notice.*

If you are served with a notice of failure to comply, you may:

- (1) Seek informal discussions with the Secretary;
- (2) File a petition for relief. You may file a petition for relief with the Secretary within 45 calendar days of receiving the notice of failure to comply (or of a proposed penalty amount, if later). Your petition for relief may request the Secretary to assess no penalty or to reduce the amount. Your petition must be in writing and signed by an official authorized to sign such documents. Your petition must set forth in full the legal or factual basis for the requested relief.
- (3) Take no action and await the Secretary's notice of assessment; or (4) Accept in writing or by payment the proposed penalty, or any mitigation or remission offered in the notice. If you accept the proposed penalty or mitigation or remission, you waive the notice of assessment and the right to request a hearing.

(g) *How the Secretary assesses the penalty.*

- (1) The Secretary assesses the civil penalty when the period for filing a petition for relief expires, or upon completing the review of any petition filed, or upon completing informal discussions, whichever is later.
- (2) The Secretary considers all available information, including information provided during the process of assessing civil penalties or furnished upon further request by the Secretary.
- (3) If the facts warrant a conclusion that you have not failed to comply, the Secretary notifies you that you will have no penalty assessed.
- (4) If the facts warrant a conclusion that you have failed to comply, the Secretary may determine a penalty according to the standards in paragraph (d) of this section.
- (5) The Secretary notifies you of the penalty amount assessed by serving a written notice of assessment, either in person or by registered or certified mail (return receipt requested). The notice of assessment includes:
 - (i) The facts and conclusions from which the Secretary determined that you have failed to comply;
 - (ii) The basis for determining the penalty amount assessed and/or any offer to mitigate or remit the penalty; and
 - (iii) Notification of the right to request a hearing, including the procedures to follow, and to seek judicial review of any final administrative decision assessing a civil penalty.

(h) *How you request a hearing.*

- (1) You may file a written, dated request for a hearing on a notice of assessment with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203-1923. You must enclose a copy of the notice of failure to comply and a copy of the notice of assessment. Your request must state the relief sought, the basis for challenging the facts used as the basis for determining the failure to comply and fixing the assessment, and your preference as to the place and date for a hearing. You must serve a copy of the request upon the Solicitor of the Department of the Interior personally or by registered or certified mail (return receipt requested) at the address specified in the notice of assessment. Hearings will take place following procedures set forth in 43 CFR part 4, subparts A and B.
- (2) Your failure to file a written request for a hearing within 45 days of the date of service of a notice of assessment waives your right to a hearing.

(i) *Hearing appearance and practice.*

- (1) Upon receiving a request for a hearing, the Hearings Division assigns an administrative law judge to the case, gives notice of assignment promptly to the parties, and files all pleadings, papers, and other documents in the proceeding directly with the administrative law judge, with copies served on the opposing party.
- (2) Subject to the provisions of 43 CFR 1.3, you may appear by representative, or by counsel, and may participate fully in those proceedings. If you fail to appear and the administrative law judge

determines this failure is without good cause, the administrative law judge may, in his/her discretion, determine that this failure waives your right to a hearing and consent to the making of a decision on the record.

(3) Departmental counsel, designated by the Solicitor of the Department, represents the Secretary in the proceedings. Upon notice to the Secretary of the assignment of an administrative law judge to the case, this counsel must enter his/her appearance on behalf of the Secretary and files all petitions and correspondence exchanges by the Secretary and the respondent which become part of the hearing record. Thereafter, you must serve all documents for the Secretary to his/her counsel.

(4) Hearing administration.

(i) The administrative law judge has all powers accorded by law and necessary to preside over the parties and the proceedings and to make decisions under 5 U.S.C. 554–557.

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

(iii) Unless you file a notice of appeal described in the regulations in this part, the administrative law judge's decision constitutes the final administrative determination of the Secretary in the matter and takes effect 30 calendar days from this decision.

(iv) In this hearing, the amount of civil penalty assessed will be determined in accordance with paragraph (d) of this section, and will not be limited by the amount assessed by the Secretary or any offer of mitigation or remission made by the Secretary.

(j) How you appeal a decision.

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

(2) Upon receiving this notice, the Director, Office of Hearings and Appeals, appoints an ad hoc appeals board to hear and decide an appeal. To the extent they are not inconsistent with the regulations in this part the provision of the Department of Hearings and Appeals Procedures in 43 CFR part 4, subparts A, B, and G apply to such appeal proceedings. The appeal board's decision on the appeal must be in writing and takes effect as the final administrative determination of the Secretary on the date it is rendered, unless otherwise specified in the decision.

(3) You may obtain copies of decisions in civil penalty proceedings instituted under the Act by sending a request to the Director, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203-1923. Fees for this service are established by the Director of that Office.

(k) The final administrative decision.

(1) When you have been served with a notice of a failure to comply and have accepted the penalty as provided in the regulations in this part, the notice constitutes the final administrative decision;

(2) When you have been served with a notice of assessment and have not filed a timely request for a hearing as provided in the regulations in this part, the notice of assessment constitutes the final administrative decision.

(3) When you have been served with a notice of assessment and have filed a timely request for a hearing as provided in these regulations in this part, the decision resulting from the hearing or any applicable administrative appeal from it constitutes the final administrative decision.

(l) How you pay the penalty.

(1) If you are assessed a civil penalty, you have 45 calendar days from the date of issuance of the final administrative decision to make full payment of the penalty assessed to the Secretary, unless you have filed a timely request for appeal with a court of competent jurisdiction.

(2) If you fail to pay the penalty, the Secretary may request the Attorney General to institute a civil action to collect the penalty in the U.S. District Court for the district in which your museum is located. Where the Secretary is not represented by the Attorney General, the Secretary may start civil action directly. In these actions, the validity and amount of the penalty will not be subject to review by the court.

(3) Assessing a penalty under this section is not a waiver by the Secretary of the right to pursue other available legal or administrative remedies.

Dated: November 5, 1996.

George T. Frampton, Jr.,

Assistant Secretary for Fish and Wildlife and Parks.

SECTION VII
SUPPLEMENT 1



Allan Houser, *Chiricahua Apache* sculptor, working on a clay sculpture circa 1985.
Photograph by Kay V. Wiest, courtesy of the Institute of American Indian Arts, Santa Fe, NM.

SUPPLEMENT I

NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

IMPLEMENTING REGULATIONS (AND 1996 MUSEUM ACT AMENDMENTS)

by JACK F. TROPE, Esq.

THE FOLLOWING TEXT is a summary of those parts of the Native American Graves Protection and Repatriation Act (NAGPRA) regulations and the National Museum of the American Indian (Museum Act) amendments which clarify, amplify or modify the provisions of the original Acts. Regulations implementing NAGPRA became effective on January 3, 1996¹ and are found on pages 169–189 (Appendix V). The Museum of the American Indian Act Amendments of 1996 were signed into law by President Clinton on October 9, 1996,² and are found on pages 190-191 (Appendix W). Finally, the interim rule regarding civil penalties for NAGPRA is found on pages 192-199 (Appendix X). These additional regulations were issued on January 13, 1997³ and may be revised in the future.

Information on the original statutes (NAGPRA and the Museum Act) may be found in Section I, Chapter 1 and Section II, Chapter 2 of *Mending the Circle*. In order to obtain a full understanding of the Federal laws governing repatriation and graves protection, it is necessary to refer to both the original chapter and this supplement.

THE NAGPRA REGULATIONS

Who and what is covered by NAGPRA

Indian Tribes, Native Hawaiian Organizations and Lineal Descendants

The regulations (see Appendix V) make it clear that lineal descendancy can be traced not only through the common law system used by Federal and state courts, but “by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization.”⁴

According to the regulations, an “Indian tribe” is one which appears on a specific list to be distributed through the Departmental Consulting Archeologist;⁵ the term is not otherwise defined. Although at least one court has interpreted the term in NAGPRA more broadly, this list has generally included only those tribes commonly thought of as “federally-recognized”, as well as Alaska Native corporations.⁶

The commentary to the regulations indicates that bands, clans and other sub-groups should make NAGPRA claims through an Indian tribe, rather than directly.⁷

Museums and Federal Agencies

The definition of “museum” in the regulations makes it clear that any museum that has received funds from a Federal agency after November 16, 1990 is covered by NAGPRA. This is true even if the museum in question has not itself received Federal funding but is part of a larger unit which has received such funds. Thus, for example, if a museum is part of a local government which has received Federal funds since 1990, the museum is covered by NAGPRA even if the museum itself has not directly received Federal funds.⁸ Contracts for purchase of goods or service (procurement contracts) are not considered to be Federal funding for the purposes of NAGPRA, however.⁹

The regulations specify that “possession or control” of an object by a museum or Federal agency means having a “sufficient legal interest to lawfully treat the object as part of its collection”; most items on loan would not be included in that definition.¹⁰ This raises the question of whether long-term loans to museums or agencies (e.g., 99 year loans), which are essentially loans in name only, are covered by NAGPRA. Ultimately, this issue will probably be resolved by the courts.

CULTURAL ITEMS

Human remains

The regulations make clear that body parts that were freely given or naturally shed by an individual (e.g., hair made into ropes) are not considered human remains. Furthermore, if human remains are incorporated into other cultural items covered by NAGPRA, it is the cultural affiliation of the non-human item, not that of the human remains, which governs repatriation.¹¹

Funerary objects

In addition to objects placed with human remains, as stated in the statute itself, objects placed near human remains as part of a death rite or ceremony are also covered by NAGPRA according to the new regulations. This provision reflects the variations in tribal funerary practices. The revisions also clearly recognize rock cairns, funeral pyres and other customary depositories for human remains which may not fall within the ordinary definition of a grave site.¹² Finally, the regulations make clear that items which were displayed with human remains as part of a death rite or ceremony, but which were returned or distributed to living descendants according to traditional custom, are not considered to be funerary objects.¹³

Sacred objects

The regulations reaffirm the definition of sacred objects as including those needed by “traditional religious leaders” for the renewal of ceremonies¹⁴ by present-day practitioners of traditional Native religions.¹⁵ “Traditional religious leader,” a critical term in NAGPRA, is defined as a person “recognized by members of an Indian tribe or Native Hawaiian organization” as “responsible for performing cultural duties relating to the ceremonial or religious traditions”, or exercising “a leadership role... based on the tribe or organization’s cultural, ceremonial or religious practices.”¹⁶

ITEMS POSSESSED OR CONTROLLED BY MUSEUMS AND FEDERAL AGENCIES

Responsibility of Museums and Federal Agencies to identify items

Inventory of human remains and associated funerary objects

Although inventories were to be completed by November 16, 1995, extensions have been granted by the Department of the Interior to 58 museums.¹⁷ To be granted an extension, the museums had to show that they had begun active consultation and documentation, and had developed written plans to carry out their inventories prior to the legal deadline. These plans included step-by-step descriptions of the inventory process, job titles for those responsible, schedules for completion and proposals for raising necessary funds.¹⁸

Those museums granted extensions must first inventory those parts of their collections “for which information is readily available or about which Indian tribes or Native Hawaiian organizations have expressed special interest.”¹⁹ During the inventory process they must consult with lineal descendants and Indian tribal officials and traditional religious leaders from any tribe or Native Hawaiian organization which is likely to be culturally affiliated with the remains and objects, or on whose lands the remains and funerary objects originated. This includes both land currently administered by a tribe and aboriginal land no longer under tribal jurisdiction.²⁰

Consultation should commence no later than the time when cultural affiliation is being considered and must be by telephone or face-to-face, not merely by mail.²¹ Museums and Federal agencies have no obligation to pay the traveling expenses of tribes or Native individuals with whom they are consulting, however.²² Museums and Federal agencies must provide to tribes, Native Hawaiian organizations and traditional religious leaders representing tribes the following:

1. a list of people and tribes to be consulted,
2. a description of how and when the inventory will be conducted,
3. an indication that additional documentation for the purpose of identifying cultural affiliation is available.²³

Museums are instructed to ask tribes to designate specific tribal representatives for consultation and identify such individuals as lineal descendants and traditional religious leaders so that museums can consult with them. Tribes will also be asked to recommend how best to contact these individuals. Museums should also obtain information from tribes regarding items which may have been made exclusively for burial purposes or to contain human remains (both of which are considered associated funerary objects under NAGPRA).²⁴

Museum and Federal agency inventories must include the following information and documentation:

1. a list of items which are clearly determined or likely to be culturally affiliated with one or more Indian tribes or Native Hawaiian organizations,²⁵
2. accession and catalogue entries,

3. information relating to acquisition, including, if known, the name of the person from whom an item was obtained and the date, place and means of acquisition,
4. a description of the remains or objects, and
5. a summary of the evidence used to determine cultural affiliation.²⁶

In addition, a notice of inventory completion which summarizes the results of the inventory must be sent with the inventory to any person or entity with whom the objects are likely to be culturally affiliated.²⁷

The regulations also clarify that lineal descendants must be notified when the remains of a known individual are identified.²⁸

Summary of unassociated funerary objects, sacred objects and items of cultural patrimony

Like those regulating inventories, rules regarding summaries²⁹ require face-to-face or telephone contact. This consultation must begin no later than the completion of the summary process. The regulations also specify that the museum or Federal agency must request information about tribal contacts, lineal descendants and traditional leaders and seek to determine what kinds of cultural items are considered sacred objects or objects of cultural patrimony.³⁰ They further require that the summaries provide documentation regarding accession and acquisition.³¹

Although the summaries were to be completed by 1993, the consultation provisions of the regulations remain relevant to ongoing consultation which should continue for as long as necessary. Summaries are considered an initial exchange of information prior to consultation, and not the end product of the consultation process.³²

Repatriation or other treatment of cultural items

Repatriation of human remains and associated funerary objects under NAGPRA

The regulations specify that to establish “cultural affiliation” there must be an identifiable present-day Indian tribe or Native Hawaiian organization which can be shown to have descended from an earlier group whose identity can be established by such factors as its cultural characteristics, its production and distribution of material items and its biological distinctiveness.³³

A finding of cultural affiliation is based upon an overall evaluation of the evidence, and should not be precluded solely because of gaps in the record. A finding of affiliation is warranted when the evidence shows that affiliation is more likely than not.³⁴ It need not be established with scientific certainty. The determination of cultural affiliation in an inventory should be based upon information within the current possession of the museum or agency; repatriation is not to be delayed pending additional scientific research.³⁵

A Federal agency or museum may take steps which are authorized by otherwise applicable law to ensure that sensitive information is not made available to the general public.³⁶ However, NAGPRA does not include a provision specifically exempting records generated by Federal agencies from discovery under the Freedom of Information Act. Thus, it may be advisable not to record certain sensitive information in writing.³⁷

The regulations require repatriation within 90 days of a valid request, provided that a notice of inventory completion must be published in the *Federal Register* at least 30 days prior to repatriation.³⁸ The museum or agency must inform the claimant of any treatment to the remains or objects which may represent a hazard to individuals or the objects.³⁹

There is no time limit for submitting a repatriation claim.⁴⁰ However, a claim is waived if it is made after a valid repatriation of human remains or cultural items has already taken place.⁴¹

Finally, the regulations add an exception to repatriation where a court of competent jurisdiction determines that such return would result in the taking of private property without just compensation. The Fifth Amendment to the Constitution of the United States states that no person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation. The museum itself may not invoke the Fifth Amendment; it must seek a court determination of the issue.⁴² If a court decides that the Fifth Amendment would be violated, existing property laws, rather than NAGPRA, govern the repatriation.⁴³ This is an exception not recognized by the statute itself. The statute explicitly applies the Fifth Amendment exception to the requirement for speedy return of unassociated funerary objects, sacred objects and cultural patrimony; it does *not* apply it to human remains and associated funerary objects.⁴⁴

The regulations indicate that the NAGPRA Review Committee will recommend to the Secretary of the Interior specific actions for disposition of human remains whose cultural affiliation cannot be determined.

A section of the regulations has been reserved for that purpose and draft recommendations have been published.⁴⁵ Museums and Federal agencies are currently required by the regulations to submit lists of unaffiliated human remains and associated funerary objects to the Review Committee.⁴⁶

Correction to original chapter: In the original chapter, it was indicated that NAGPRA requires the Review Committee to make recommendations on unaffiliated human remains and associated funerary objects (see p. 17). Although the Review Committee has recommended that it be authorized to make recommendations on unaffiliated associated funerary objects⁴⁷, the statute currently refers only to unaffiliated human remains.

Repatriation of unassociated funerary objects, sacred objects and items of cultural patrimony under NAGPRA

The provisions discussed under the previous section (with the exception of the sections on “unaffiliated” human remains and associated funerary objects) are fully applicable to the repatriation of unassociated funerary objects, sacred objects and cultural patrimony. Otherwise, the regulations essentially restate the statute and are consistent with the four-step process as laid out in this part of the original chapter (see pp. 13-14).

Other authority to repatriate

Although the original statute and the regulations say that NAGPRA is not intended to limit the pre-existing repatriation authority of Federal agencies and museums⁴⁸, the regulations require publication of notices in the *Federal Register* before repatriation of cultural items and civil penalties may be imposed upon those who violate this provision.⁴⁹ There is no effort to harmonize these two seemingly contradictory provisions.⁵⁰

BURIAL SITES ON FEDERAL AND TRIBAL LAND

Procedures required before excavation may occur

1. The regulations clarify that only the Bureau of Indian Affairs may issue Archeological Resources Protection Act permits for excavations on tribal land. The Department of Hawaiian Home Lands (with the advice of the Hawaii State Historic Preservation Division of the Department of Land and Natural Resources) is the issuing authority in the case of lands administered for Native Hawaiians.⁵¹
2. The regulations provide that NAGPRA does not apply to tribal lands “to the extent that any action would result in a taking of property without compensation within the meaning of the Fifth Amendment of the United States Constitution.”⁵² This exception to the application of the Act on tribal lands is inconsistent with the statute itself. The “Fifth Amendment takings” exception in NAGPRA is found in the “right of possession” definition⁵³, a definition which applies only to repatriation of remains and objects which are in the possession of museums or Federal agencies and not to the issue of the excavation of cultural items which are still imbedded on tribal lands.

In addition, in its commentary to the regulations, the Department of the Interior states that tribally-owned lands outside the boundaries of a reservation which are not dependent Indian communities are considered to be Federal lands if they are held in trust by the United States for the Indian tribe. They are not covered by NAGPRA if they are held in fee by the Indian tribe.⁵⁴

3. The regulations spell out in detail the notice and consultation that is required in the case of excavations on Federal lands. Before approval or permits are issued, written notice must be sent proposing a time and a place for meetings and consultation. The notice must describe the planned activity, its location, the basis for believing that excavation may occur and the government’s proposed treatment and disposition of the objects which are to be excavated.

This notice must be sent to:

- any known lineal descendants;
- Indian tribes and Native Hawaiian organizations that are likely to be culturally affiliated with the items at the site;
- any Indian tribe which originally occupied the area where the activity is taking place; and
- any Indian tribe or Native Hawaiian organization that may have a cultural relationship with the items imbedded in the ground.⁵⁵

Written notification should be followed by telephone contact if there is no response within 15 days of the notice.⁵⁶

At the consultation, the Federal officials must provide a list of all lineal descendants, Indian tribes and Native Hawaiian organizations that have been consulted, and information stating that additional documentation on cultural affiliation is available if requested.⁵⁷

The Federal officials must seek to identify traditional religious leaders (although tribal officials are under no obligation to identify traditional religious leaders), lineal descendants and culturally affiliated Indian tribes and Native Hawaiian organizations, as well as methods for contacting lineal descendants, obtain the name and address of the tribal contact person, obtain recommendations on how the consultation process should be conducted, and identify the kinds of objects that may be considered unassociated funerary objects, sacred objects and cultural patrimony.⁵⁸

Again, the Federal agency or museum may take steps to ensure that sensitive information is not made available to the general public, but it should be noted that NAGPRA is not exempt from the Freedom of Information Act (see p. 206).

Following consultation Federal agencies are required to develop written action plans which include:

- the kinds of objects considered cultural items,
- the planned care, handling and treatment (including traditional treatment) of cultural items,
- the planned archeological recording and analysis of items and reports to be prepared,
- information regarding how tribes will be consulted at the time of excavation, and
- the information used to determine ultimate custody of the items and how items will be transferred in accordance with that determination.⁵⁹

The regulations also encourage the development of comprehensive agreements between Indian tribes, Native Hawaiian organizations and Federal agencies which would “address all Federal agency land management activities that could result in the intentional excavation or inadvertent discovery” of NAGPRA items, and establish processes for consultation and determination of custody, treatment and disposition of such items.⁶⁰

The commentary to the regulations indicates that one goal of NAGPRA is preservation of the sites themselves, and that this should be considered whenever possible.⁶¹ However, “in situ” preservation is not required by NAGPRA or the regulations except in the case of intentional excavations on tribal lands where the required tribal consent has not been obtained.

Inadvertent discoveries

Any person who has reason to know that he or she has inadvertently discovered human remains, funerary objects, sacred objects or cultural patrimony must immediately notify by telephone the responsible Federal official in the case of Federal lands, or tribal official in the case of tribal lands.⁶² Telephone notification must be followed by written confirmation. This requirement must be included in Federal leases and permits.⁶³

In the case of Federal lands, the Federal official has three working days to

1. certify receipt of the notification,
2. take steps to secure and protect the items, and
3. provide notice to the Indian tribes and Native Hawaiian organizations specified in the above section.

The notice must include information regarding the types of items discovered, their condition and the circumstances of their discovery.⁶⁴

The activity which resulted in the inadvertent discovery may resume prior to the 30 day period specified in the statute if a written agreement on a recovery plan is executed by the Indian tribe or Native Hawaiian organization and the Federal agency prior to the expiration of the 30 day period.⁶⁵

Consultation is to proceed in a manner similar to that specified in the section on intentional excavations above (see p. 207).⁶⁶

Tribal ownership and control of cultural items to be excavated

Before transferring ownership or control of imbedded cultural items to lineal descendants, tribes or Native Hawaiian organizations, the Federal agency must publish at least two general notices of the proposed disposition one week apart in a newspaper circulated in an area where the members of the tribe or organization reside. The notices must provide information on the nature and affiliation of the remains and objects and seek additional custody claims, if any. Transfer may not take place until 30 days after the second notice. If competing claimants come forward, the proper recipient must be determined in accordance with the statutory

preferences.⁶⁷ The transfer of items must take place using appropriate procedures which respect traditional customs and practices.⁶⁸

Unlike the repatriation requirement, there are no time limits placed upon the transfer of excavated items to the appropriate claimant. Indeed, the notice provisions and the written plan requirements build a significant delay into the process, beyond the 30 days contemplated by the NAGPRA statute itself, during which various types of recording and analysis can occur. It is conceivable that this will give rise to a legal dispute in a case where the ownership or control of the items to be excavated is clear and the claimant wants immediate return of the items without analysis.

Coordination with other laws

NAGPRA is only one of three important laws meant to protect certain sites. The regulations make clear that compliance with NAGPRA does not constitute compliance with the requirements of section 106 of the National Historic Preservation Act and the Archeological and Historic Preservation Act,⁶⁹ although the Federal agency official should seek to coordinate consultation and any development of agreements that may take place as a result of the implementation of the three laws.

PENALTIES FOR VIOLATION OF NAGPRA AND OTHER MEANS OF ENFORCEMENT

Prohibitions against trafficking

There are no regulations on trafficking.

Sanctions against museums

Interim regulations (see Appendix W) establish a comprehensive scheme for imposing sanctions against museums who fail to comply with NAGPRA. Failure to comply with NAGPRA is defined to include:

1. the transfer of NAGPRA items by a covered institution or agency, after November 16, 1990, to an individual or agency not required to comply with NAGPRA,
2. failure to complete summaries by November 16, 1993,
3. failure to complete inventories by November 16, 1995 or the date of any extension,
4. failure to notify culturally affiliated tribes within six months of the completion of an inventory,
5. wrongful refusal to repatriate, and
6. repatriation before publishing a notice in the Federal Register.⁷⁰

Any person may bring a charge of a violation to the Secretary of the Interior or his designee. The Secretary then decides whether to review the charge, institute a civil penalty action and estimate a proposed penalty.⁷¹ The penalty set by the regulations is 1/4 of 1% of the museum's budget or \$5,000, whichever is less, plus an additional sum to be determined. There is also an ongoing penalty of \$100/per day if the violation continues. The penalty may be decreased if the failure to comply is not intentional, the museum has agreed to make restitution to the aggrieved party, there is a showing of hardship (in the case of a first offense), or the penalty would be excessive punishment under the circumstances.⁷²

A notice to a museum of non-compliance must include a summary of facts indicating a failure to comply, reference to the sections in the Act or regulations that have been violated, the amount of the proposed penalty, and notice of the museum's right to have the case reviewed.⁷³

A notice of failure to comply is also sent to lineal descendants of a known Indian individual whose remains or items are in question, as well as to Indian tribes or Native Hawaiian organizations likely to be culturally affiliated with such remains or objects.⁷⁴

A museum which receives a notice may seek informal discussions with the Secretary of the Interior, file a petition for relief with the Secretary within 45 days, take no action and await a final assessment of penalty, or accept the proposed penalty.⁷⁵

Where the proposed penalty has not been accepted, the Secretary may formally assess the penalty at any time after the 45 day period for filing a petition has elapsed. If a penalty is assessed, the notice of assessment will include the facts and conclusions upon which the penalty is based, disclosure of how the amount was determined, and information about the museum's right to seek a hearing within 45 days of the notice.⁷⁶

Hearings take place before an Administrative Law Judge (ALJ). A museum may appear by representative or counsel, with the Solicitor representing the Department of the Interior. The ALJ's decision may be appealed to an appeals board appointed by the Interior Office of Hearings and Appeals. Any final decision on sanctions may be appealed through the Federal court system.⁷⁷

Civil penalties must be paid within 45 days of a final administrative decision.⁷⁸

Since the civil penalties section is an interim rule, it is possible that some of these provisions will change when the final rule is adopted.

When a repatriation claim is denied

Once a written claim has been submitted to a museum or agency and is denied, the claiming party has the option of directly going to court or seeking a review of the denial by the NAGPRA Review Committee.⁷⁹ The Review Committee can facilitate settlement of the dispute, but its findings are non-binding, although they may be used as evidence in any subsequent court proceeding.⁸⁰

IMPLEMENTATION OF NAGPRA

The NAGPRA review committee

Although the regulations do not provide specific procedures for dispute resolution by the Committee,⁸¹ guidelines have been developed by the Committee which can be obtained from the (Interior) Departmental Consulting Archeologist.⁸²

Grants to museums, Indian Tribes and Native Hawaiian Organizations

The National Park Service has continued to make grants to Indian tribes in an amount not to exceed \$75,000 for documentation purposes and not to exceed \$15,000 for the actual repatriation of remains or objects. Grant applications are generally due in December of each year. \$2.29 million was appropriated for tribal and museum grants in fiscal year 1997.⁸³

MUSEUM ACT AMENDMENTS OF 1996

The ostensible purpose of the Museum Act amendments of 1996 was to impose repatriation, inventory and summary requirements similar to NAGPRA upon the Smithsonian Institution. For the most part, this is what the amendments have done. The amendments extend the repatriation and summary requirements of the Museum Act to sacred objects and cultural patrimony based on standards similar to NAGPRA (although they are in subtle ways different, see p. 211). The amendments also establish a December 31, 1996 deadline for the completion of the summary and a June 1, 1998 deadline for the inventory.⁸⁴ However, in some respects, the amendments are potentially inconsistent with the original Museum Act and NAGPRA which may cause confusion.

For example, the original Museum Act provided for the repatriation of unassociated funerary objects to Indian tribes simply upon a showing of cultural affiliation.⁸⁵ The 1996 amendments subject the repatriation of these objects to the "right of possession rule"⁸⁶ (see p. 13 for definition of "right of possession"), yet do not repeal the original section allowing for repatriation simply upon a showing of cultural affiliation. The amendments also require a summary of unassociated funerary objects, but do not repeal the original requirement that an inventory of these objects be done.⁸⁷ While the new amendment could be read consistently with the original Act—a summary of unassociated funerary objects is required by December 31, 1996 and an inventory is required by June 1, 1998—it is unlikely that this was intended.

Further confusion may arise in the case of Native Hawaiians. The 1989 Act left repatriation of human remains up to negotiated agreements between the Office of Hawaiian Affairs, Hui Malama I Na Kupuna O Hawai'i Nei and the Smithsonian, but indicated that the principles of repatriation pertaining to Indian tribes should apply to the greatest extent practicable.⁸⁸ The new repatriation section on unassociated funerary objects, sacred objects and object of cultural patrimony fully applies to Native Hawaiians.⁸⁹ Depending upon what agreements have been reached, particularly in the case of unassociated funerary objects, the implementation of the original section may or may not be consistent with the new requirements. Of course, the Smithsonian may still voluntarily comply with any negotiated agreements which are more expansive than the new amendments.⁹⁰ However, the judicial enforceability of any agreement more expansive than the 1996

amendments is unclear. The amendments also create the confusing situation in which repatriation of human remains and associated funerary objects is governed by a negotiated agreement, but repatriation of other objects is controlled by a specific legal standard.

In addition, there are subtle differences between the repatriation section of the 1996 Museum Act amendments and the NAGPRA sections from which it was derived. These reflect some confusion in the NAGPRA statute, as well as confusion in the Museum Act, as amended. Under NAGPRA, unassociated funerary objects are repatriated (subject to the right of possession rules) when they have been identified as culturally affiliated through the summary process⁹¹ or based upon tribal proof of cultural affiliation.⁹² In the case of sacred objects and cultural patrimony, repatriation occurs (again, subject to right of possession rules) when cultural affiliation is shown pursuant to a summary⁹³ or upon a tribal showing that the sacred object or item of cultural patrimony was previously owned or controlled by the tribe or a member thereof (subject to the rights of the lineal descendants of such a member).⁹⁴ This last section of NAGPRA does not mention cultural affiliation. The Museum Act amendments require repatriation of unassociated funerary objects, sacred objects and cultural patrimony (subject to right of possession rules) if cultural affiliation is shown through the summary or based upon tribal proof of cultural affiliation *and* the items were previously owned or controlled by the tribe or its members.⁹⁵ Thus, the Museum Act provision, based upon the somewhat inconsistent NAGPRA provisions, appears (perhaps inadvertently) to establish a two step requirement for repatriation of unassociated funerary objects, sacred objects and cultural patrimony, as opposed to the one step “variable” approach of NAGPRA.

Finally, the 1996 Museum Act amendments do not define “sacred objects” and “cultural patrimony.” It is probably that the NAGPRA definitions were assumed. However, because the NAGPRA definitions are in some respects narrow and have been controversial, the meaning of these terms in the context of the Museum Act may be disputed. Moreover, there is only one definition of “funerary object” in the Museum Act,⁹⁶ rather than separate definitions for “associated” and “unassociated” funerary objects, even though the new amendments make this distinction an important one.

ENDNOTES

1. 43 C.F.R. Part 10 published at 60 Fed.Reg. 62133-62169 (1995).
2. P.L. 104-278.
3. 43 C.F.R. 10.12 published at 62 Fed.Reg. 1819-1823 (1997).
4. 43 C.F.R. 10.2(b)(1); 43 C.F.R. 10.14(b).
5. 43 C.F.R. 10.2(b)(2). The (Interior) Departmental Consulting Archeologist is the official designated in the regulations as responsible “for the administration of matters relating to these regulations.” 43 C.F.R. 10.2(c)(3).
6. List in possession of author. But see *Abenaki Nation of Missiquoi Indians v. Hughes*, 805 F.Supp. 234 (D.Vt. 1992), aff’d 990 F.2d 729 (2nd Cir. 1993) (finding that definition is meant to include other “aggregations” of Indians which have been receiving funds and assistance from other departments of the Federal government.)
7. 60 Fed.Reg. 62139 (1995).
8. 43 C.F.R. 10.2(a)(3)(iii).
9. 60 Fed.Reg. 62135 (1995).
10. 43 C.F.R. 10.2(a)(3)(i) and (ii).
11. 43 C.F.R. 10.2(d)(1).
12. 43 C.F.R. 10.2(d)(2).
13. 43 C.F.R. 10.2(d)(2)(ii).
14. 43 C.F.R. 10.2(d)(3).
15. 25 U.S.C. 3001(3)(C).
16. 43 C.F.R. 10.2(d)(3).
17. See “Museums take time with repatriation”, *Indian Country Today* (December 23-30, 1996). It is unknown how many museums may have failed to comply with the requirement and never sought an extension.
18. 43 C.F.R. 10.9(f).
19. 43 C.F.R. 10.9(a). This was a requirement applicable to all inventories. Obviously, it is currently relevant only to those who have been granted extensions since any museum not receiving an extension should have already completed its entire inventory.
20. 43 C.F.R. 10.9(b)(1).
21. 43 C.F.R. 10.9(b)(2).
22. 60 Fed.Reg. 62150 (1995).
23. 43 C.F.R. 10.9(a)(3).
24. 43 C.F.R. 10.9(b)(4).
25. 43 C.F.R. 10.9(d). This is a modification from the NAGPRA statute. The statute specified the preparation of two different cultural affiliation lists—one where cultural affiliation is clearly determined, one where it is likely. 25 U.S.C. 3003(d)(2)(B) and (C). The reason stated for combining the lists in the regulations is that both categories of items “are considered to be culturally affiliated..., [and] there is no practical reason to separate the lists.” 60 Fed.Reg. 62152 (1995).
26. 43 C.F.R. 10.9(c).
27. 43 C.F.R. 10.9(e)(1). This notice must identify each set of human remains and associated funerary objects, the circumstances of acquisition and separately describe the items that are clearly identifiable as culturally affiliated and those that are likely to be culturally affiliated.
28. 43 C.F.R. 10.9(e)(3).
29. 43 C.F.R. 10.8(d) and (e).
30. 43 C.F.R. 10.8(d)(2) and (4).
31. 43 C.F.R. 10.8(e).
32. 60 Fed.Reg. 62140, 62148 (1995).
33. 43 C.F.R. 10.14(c).
34. 43 C.F.R. 10.14(d) and (f).
35. *Id.*; 60 Fed.Reg. 62156 (1995).

36. 43 C.F.R. 10.10(f).
37. 60 Fed.Reg. 62154 (1995). The Freedom of Information Act is codified at 5 U.S.C. 552.
38. 43 C.F.R. 10.10(b)(2). On its face, the latter requirement would appear to delay repatriation until inventories are completed, which was not the intent of NAGPRA. In practice, however, the Department of the Interior has been publishing notices of partial inventory completion covering only the items to be repatriated. Thus, this provision does not appear to have unduly delayed repatriation in practice. Indeed, in the commentary to the regulations, a recommendation that repatriation be suspended during the preparation of the inventories was specifically rejected. 60 Fed.Reg. 62152 (1995).
39. 43 C.F.R. 10.10(e).
40. 60 Fed.Reg. 62155 (1995). (Secretary rejected recommendation that a time limit be placed on repatriation claims in the regulations because time limits were “discussed by Congress when the bill was being considered but were not included in the Act. Inclusion of such time limits in the regulations would contradict Congressional intent.”)
41. 43 C.F.R. 10.15(a).
42. 60 Fed.Reg. 62154 (1995).
43. 43 C.F.R. 10.10(c)(3).
44. 25 U.S.C. 3001(13). Since the common law has historically found that there is no property interest in human remains and associated funerary objects, it may be unlikely that claims of violation of the Fifth Amendment could successfully be claimed in the case of such items. Thus, the additional regulatory exemption may not actually result in fewer repatriations. See Trope and Echo-Hawk, “The Native American Graves Protection and Repatriation Act: Background and Legislative History”, 24 *Ariz.St.L.J.* 35, 47-48 (1992).
45. 43 C.F.R. 10.10(g); 43 C.F.R. 10.11 (reserved); 60 Fed.Reg. 32163-32165 (1995).
46. 43 C.F.R. 10.9(e)(6).
47. 60 Fed.Reg. 32163 (1995).
48. 25 U.S.C. 3009(1)(A); 43 C.F.R. 10.15(d)(1)(i).
49. 43 C.F.R. 10.8(f), 10.10(a)(3), 10.10(b)(2) and 10.12(b)(1)(vi) (the latter is an interim regulation on civil penalties).
50. If, for example, an item is covered by NAGPRA but the museum or Federal agency could have repatriated the item prior to NAGPRA, does the Federal agency or museum need to follow NAGPRA procedures? As a practical matter, most museums and agencies will probably choose to follow NAGPRA procedures in all cases to protect themselves against claims of improper repatriation.
51. 43 C.F.R. 10.3(b)(1).
52. 43 C.F.R. 10.2(f)(2)(iv).
53. 25 U.S.C. 3001(13).
54. 60 Fed.Reg. 62142 (1995).
55. 43 C.F.R. 10.3(c)(1), 43 C.F.R. 10.5(b)(1) and (2). The regulations refer to aboriginal occupancy without linking this concept to a final judgment of the Indian Claims Commission or United States Court of Claims as does the NAGPRA section on tribal ownership and control, 25 U.S.C. 3002(a)(2)(C). Moreover, the commentary to the regulations states that sources of information other than the Claims Commission and Court of Claims “should also be consulted”. 60 Fed.Reg. 62140 (1995). Since the use of aboriginal land in its broadest sense seems to be intended, this will increase the number of tribes which must receive notice and be consulted in this process.
56. 43 C.F.R. 10.3(c)(1).
57. 43 C.F.R. 10.5(c).
58. 43 C.F.R. 10.5(b)(3), (d) and (g).
59. 43 C.F.R. 10.5(e).
60. 43 C.F.R. 10.5(f).
61. 60 Fed.Reg. 62141, 62146 (1995).
62. 43 C.F.R. 10.4(b).
63. 43 C.F.R. 10.4(g).
64. 43 C.F.R. 10.4(d). In the case of tribal lands, the tribe may (but is not required to) certify receipt of the notice, take steps to secure and protect the items and ensure proper distribution of the items if excavated. 43 C.F.R. 10.4(e).
65. 43 C.F.R. 10.4(d)(2).
66. 43 C.F.R. 10.4(d)(1)(iv).
67. 43 C.F.R. 10.6(c).
68. 43 C.F.R. 10.6(c).
69. 16 U.S.C. 470(f) and 16 U.S.C. 469 (a-c) respectively.
70. 43 C.F.R. 10.12(b).
71. 43 C.F.R. 10.12(c).
72. 43 C.F.R. 10.12(d).
73. 43 C.F.R. 10.12(e)(1).
74. 43 C.F.R. 10.12(e)(2).
75. 43 C.F.R. 10.12(f).
76. 43 C.F.R. 10.12(g) and (h)(2).
77. 43 C.F.R. 10.12(i) and (j).
78. 43 C.F.R. 10.12(l)(1). A final decision can occur if the museum accepts the proposed penalty, the deadline passes for an appeal or a final decision is rendered by the appeals process. 43 C.F.R. 10.12(k).
79. 43 C.F.R. 10.15(c), 10.17(a).
80. 43 C.F.R. 10.16(b).
81. See 43 C.F.R. 10.17.
82. 60 Fed.Reg. 62157 (1995).
83. Grant materials in possession of author.
84. 20 U.S.C. 80q-11A; 20 U.S.C. 80q-9 (a) (2).
85. 20 U.S.C. 80q-9(d).
86. 20 U.S.C. 80q-11A(c).
87. Compare 20 U.S.C. 80q-11A(a) with 20 U.S.C. 80q-9 (a) and 20 U.S.C. 80q-11(a)(1).
88. 20 U.S.C. 80q-11(a)(2) and (3).
89. 20 U.S.C. 80q-11A(b) and (c).
90. 20 U.S.C. 80q-11A(e).
91. 25 U.S.C. 3005 (a) (2).
92. 25 U.S.C. 3005 (a) (4).
93. 25 U.S.C. 3005 (a) (2).
94. 25 U.S.C. 3005 (a) (5).
95. 20 U.S.C. 80q-11A (b).
96. 20 U.S.C. 80q-14(4).