

Reclamation Manual

Directives and Standards

Subject: Inadvertent Discovery of Human Remains on Reclamation Lands

Purpose: Provides procedures for compliance with Federal statutes when inadvertent (i.e., unplanned) discoveries of human remains occur on Reclamation lands.

Authority: Archeological and Historic Preservation Act of 1974 [(16 U.S.C. § 469-469c) AHPA]; National Historic Preservation Act of 1966, as amended [(16 U.S.C. § 470 et seq.) NHPA]; Archaeological Resources Protection Act of 1979, as amended [(16 U.S.C. § 470aa-470mm) ARPA]; Murder (18 U.S.C. § 1111); Manslaughter (18 U.S.C. § 1112); Illegal Trafficking in Native American Human Remains and Cultural Items (18 U.S.C. § 1170); Native American Graves Protection and Repatriation Act of 1990 [(25 U.S.C. § 3001 et seq.) NAGPRA]; Historic Sites Act of 1935 (49 U.S.C. 303); The Protection of Historic Properties (36 CFR Part 800); Curation of Federally-Owned and Administered Archeological Collections (36 CFR Part 79); Protection of Archaeological Resources (43 CFR Part 7); Native American Graves Protection and Repatriation Act Regulations (43 CFR Part 10); and Managing Museum Property (411 DM 1-3).

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

1. Purpose.

- A. Identify the legal authorities governing the protection and/or disposition of human remains discovered on Reclamation lands;
- B. Ensure Reclamation offices inform special use permit holders, contractors, and employees of their responsibilities to protect and report discoveries of human remains on Reclamation lands;
- C. Establish a set of procedures for contacting the appropriate Reclamation officials when human remains are discovered on Reclamation lands;
- D. Ensure coordination with cultural resources professionals, law enforcement agencies, and Native Americans, as appropriate, when human remains are discovered on Reclamation lands; and
- E. Identify the responsible parties for funding costs related to actions resulting from the discovery of human remains on Reclamation lands.

2. **Background.** Occasionally, natural processes or human activities expose previously unknown human remains on Reclamation lands. Many of these discoveries occur during activities by

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Reclamation personnel, contractors, employees of managing agencies, special use permit holders, and members of the public. How Reclamation must treat these human remains depends on the context in which they are found and their antiquity and cultural affiliation.

3. Jurisdictions.

A. **Land.** Reclamation lands include all Reclamation withdrawn lands, lands which Reclamation has acquired in fee title, lands in which Reclamation has acquired in easement, and lands which Reclamation has leased or rented.

- (1) **Specific to NAGPRA.** For this directive, NAGPRA applies to all withdrawn public lands and private lands which Reclamation has acquired in fee title. When Reclamation holds a lesser interest in private lands, NAGPRA may apply when human remains are discovered or removed pursuant to an action; however, whether or not NAGPRA applies is based on the amount of control transferred by the land owner. In most cases, sufficient legal interest is conveyed on easements and leases for Reclamation to apply NAGPRA. Section 2(f)(1) of the NAGPRA Regulations (43 CFR Part 10) states that:

"Federal lands means any land other than tribal lands controlled or owned by the United States Government . . . 'control,' . . . 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."

The supplemental information published with 43 CFR Part 10 (Section 10.2 page 62139) states the following:

"Whether Federal control of programs . . . is sufficient to apply these regulations to the lands covered by the program depends on the circumstances of the Federal agency authority and on the nature of state and local jurisdiction. Such determinations must necessarily be made on a case-by-case basis. Generally, however, a Federal agency will only have sufficient legal interest to 'control' lands it does not own when it has some other form of property interest in the land such as a lease or easement. The fact that a Federal permit is required to undertake an activity on non-Federal land generally is not sufficient legal interest in and of itself to "control" the land within the meaning of [NAGPRA] In situations when two or more Federal agencies share regulatory or management jurisdiction over Federal land, the Federal agency with primary management authority will generally have control for purposes of implementing [NAGPRA]."

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- (2) **Specific to ARPA.** For this directive, ARPA applies to withdrawn lands and lands held by Reclamation in fee title.
- (3) **Land Use Authorization.** See section 4. Terms and Conditions, subsection V. Application of NAGPRA in Land Use Authorizations.

B. Antiquity and Cultural Affiliation.

- (1) All discovered human remains should be treated initially as a crime scene (e.g., a possible murder, an ARPA violation, or illegal trafficking under 18 U.S.C. §1170) with cultural resources professionals and the appropriate law enforcement authorities being brought in to assist in the determination of antiquity and manner of death (i.e., homicide, suicide, natural, accidental, or undetermined). To the maximum extent possible, the human remains should be protected from further damage. If practicable and if the remains are not from a clearly modern context, they should be permanently protected in place. In some cases, legal requirements and land management needs may require the removal of human remains.
- (2) In cases where the human remains are clearly from an archaeological context, NAGPRA and ARPA apply if the human remains are Native American. Only ARPA applies if the human remains are not Native American but are determined to be of "archaeological interest," as defined in Protection of Archaeological Resources (43 CFR Part 7). If the context is modern, indeterminate, or mixed between several contexts in which modern is one, Reclamation must ensure proper coordination with law enforcement personnel and, when appropriate, with Native Americans as specified in section 3 of NAGPRA.
- (3) NAGPRA does not specify a minimum age for human remains under its jurisdiction and applies only to human remains of Native Americans as defined in 43 CFR Part 10.2(d). Non-Native American human remains over 100 years old from public lands are covered by ARPA and shall be allowed maximum protection under that statute. However, when a claim of affiliation is received from a lineal descendant, Reclamation may determine that Non-Native American human remains are no longer of archaeological interest under specified circumstances [43 CFR Part 7.3(5)]. Under United States common law, the next of kin have the right to hold and protect the disposition of their ancestors. Therefore, these remains are not considered property and disposition will go to the lineal descendants.

4. **Discovery Clause.** The following clause must be included in all use authorization instruments:

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The [grantee, licensee, permittee, lessee, etc.] shall immediately provide an oral notification to Reclamation's authorized official of the discovery of human remains on Reclamation land. The [grantee, licensee, permittee, lessee, etc.] shall forward a written report of their findings to Reclamation's authorized official within 48 hours by certified mail. The [grantee, licensee, permittee, lessee, etc.] shall cease activity, stabilize, and protect such discoveries until authorized to proceed by [Reclamation's authorized official]. Protective and mitigative measures specified by [Reclamation's authorized official] shall be the responsibility of the [grantee, licensee, permittee, lessee, etc.].

Note: Reclamation's authorized official is determined at the local level, usually the Contracting Officer. Once notified, the authorized official will take on the responsibilities as assigned to the "discoverer" in paragraph 5A below.

5. **Responsibilities.** See the Responsibilities Flowchart (Appendix 1) also.
 - A. **Discoverer.** Any person who knows, or has reason to believe, that he/she has discovered human remains must contact the Regional Director (RD), or the RD's designee, immediately by telephone, or in person, followed with *written* confirmation of the discovery within 48 hours.
 - B. **RD/RD's Designee.** The RD/RD's designee, is considered the "federal agency official" as defined in 43 CFR Part 10.2(a)(2). This individual will:
 - (1) **Secure and Protect the Remains.** Immediately provide for the protection and security of the human remains.
 - (2) **Notify Cultural Resources Professional.** Immediately notify the appropriate cultural resources professional.
 - (3) **Notify Law Enforcement.** Immediately notify the appropriate law enforcement agency.
 - (a) **Federal Bureau of Investigation (FBI).** Notify the FBI when:
 - (i) Human remains appear to be from a potentially modern context,
 - (ii) The context cannot be determined, or

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- (iii) Illegal trafficking in Native American human remains or a criminal violation of ARPA is suspected.
- (b) **Exceptions to Notifying the FBI.** The exceptions to notifying the FBI are when:
 - (i) The office has a law enforcement agreement with another agency (for criminal acts, not NAGPRA), or
 - (ii) The discovery was made on a Reclamation easement (i.e., on state or private land) in conjunction with a Reclamation action.
- (c) **Local Law Enforcement.** Notify local law enforcement personnel when:
 - (i) Human remains appear to be from a modern context,
 - (ii) The context cannot be determined, or
 - (iii) Concurrent jurisdiction applies and the State law requires local law enforcement involvement.
- (4) **Notify Indian Tribe(s).** If the human remains are Native American, then, as soon as possible, but no later than 3 working days after receipt of the written confirmation the human remains are Native American [see 43 CFR Part 10.4(d)(1)(iii)], the RD/RD's designee shall notify by telephone or in person, with written confirmation, the Indian tribes likely to be affiliated with the discovered human remains (e.g., lineal descendant, culturally affiliated Indian tribe, Indian tribe with other cultural relationship, and Indian tribe that aboriginally occupied area). This notification shall include pertinent information as to kinds of human remains, an estimated number of individuals present, their estimated ages (i.e., adult, juvenile, infant), and their estimated sex (if possible to determine) as well as condition and circumstances of discovery.
- (5) **Consult.** If the human remains are Native American, consult with known lineal descendants and Indian tribal officials according to 43 CFR Part 10.5.
- (6) **Comply With Appropriate Laws.** Comply with appropriate cultural resources law; e.g., section 3(a) of AHPA, section 4 of ARPA, NAGPRA, section 106 of the NHPA, or State law, as appropriate.

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- (7) **Ensure Proper Disposition of Human Remains.**
- (a) **Native American Human Remains.** For Native American human remains that are not the subject of criminal cases, disposition shall be in accordance with the implementing regulations of NAGPRA, 43 CFR Part 10.6(a).
 - (b) **Non-Native American Human Remains.** A good faith attempt shall be made to identify the descendants of all non-Native American human remains with disposition going to the appropriate lineal descendants. If descendants are not found and the human remains are more than 100 years, then the human remains will be retained by Reclamation in accordance with the standards established in Curation of Federally-Owned and Administered Archeological Collections (36 CFR Part 79) and Managing Museum Property (DM-411). When descendants are not found and the human remains are less than 100 years old and are not the subject of a criminal investigation, then disposition shall be according to applicable State law.
- (8) **Establish a Record of Discovery.** Within 5 working days after the written notification of the discovery, a written documentation of the discovery with copies of any correspondence should be sent to the regional cultural resources professional and Federal Preservation Officer (D-5300). All documentation, records, and reports on the discovery shall be kept on file at the appropriate Reclamation office.
- C. **RD's Designee's.** Upon receipt of a written confirmation of the discovery of human remains, the RD's designee shall notify the RD of the discovery by the next working day. The notification shall include a brief description of the discovery circumstances, steps taken to protect the human remains and associated objects, names of notified law enforcement personnel, and recommendations for further action.
- D. **Cultural Resources Professional.** One of Reclamation's cultural resources professionals should be onsite as soon as is practicable in order to meet notification requirements and, when appropriate, to assist in law enforcement investigations to ensure coordination with the correct law. This individual will:
- (1) **Identify Human Remains.** Identify whether skeletal remains are human and are Native American in origin or arrange to have a human osteologist make such a determination. This level of confirmation is necessary since persons untrained in North American archaeology and human osteology are unable to definitively identify Native American human remains.

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- (2) **Provide Written Confirmation.** Provide written confirmation to the RD/RD's designee that the skeletal remains are human and/or Native American within 48 hours of when they are identified as such.
 - (3) **Determine Cultural Context.** Identify a cultural context, if possible, to the discovered human remains.
 - (4) **Assist Law Enforcement Officials.** Assist law enforcement officials when violations of ARPA, NAGPRA (see Illegal Trafficking in Native American Human Remains and Cultural Items 18 U.S.C. § 1170), or State laws occur, documenting all activities in writing.
 - (5) **Assist RD/RD's Designee.** Advise and assist the RD/RD's designee, in complying with Federal cultural resources law; e.g., section 3(a) of AHPA, section 4 of ARPA, NAGPRA, section 106 of the NHPA, or State law, as appropriate.
 - (6) **Submit ARPA Documentation.** When necessary, fill out a site form and write an archaeological discovery/excavation report.
- E. **Law Enforcement.** Law enforcement personnel are responsible for the disposition of recent human remains in criminal cases that are not linked to cultural resources violations (i.e., ARPA or trafficking).
6. **Cost Responsibility.** Costs related to activities covered in this directive should generally be charged to the project or activity responsible for the inadvertent discovery. When human remains are disturbed or exposed by natural or reservoir erosion, unintentionally by members of the public engaged in lawful activities, or through activities where the responsible party is unknown, Reclamation is considered the responsible party. If it is the office's intent to recover NAGPRA associated costs, then appropriate language should be included in repayment contracts, temporary construction contracts, recreation agreements, operation and maintenance agreements, and other types of contract or agreement instruments.