

**Guidance on the Native American Graves Protection and Repatriation Act (NAGPRA)
43 CFR part 10**

10.1(d) Duty of care.

These regulations require a museum, Federal agency, or DHHL to care for, safeguard, and preserve any human remains or cultural items in its custody or in its possession or control. A museum, Federal agency, or DHHL must:

- (1) Consult with lineal descendants, Indian Tribes, or Native Hawaiian organizations on the appropriate storage, treatment, or handling of human remains or cultural items;
- (2) Make a reasonable and good-faith effort to incorporate and accommodate the Native American traditional knowledge of lineal descendants, Indian Tribes, or Native Hawaiian organizations in the storage, treatment, or handling of human remains or cultural items; and
- (3) Obtain free, prior, and informed consent from lineal descendants, Indian Tribes, or Native Hawaiian organizations prior to allowing any exhibition of, access to, or research on human remains or cultural items. Research includes, but is not limited to, any study, analysis, examination, or other means of acquiring or preserving information about human remains or cultural items. Research of any kind on human remains or cultural items is not required by the Act or these regulations.

Referenced in:

Subpart C – Repatriation of Human Remains or Cultural Items by Museums or Federal Agencies

§10.9(c) *Step 3-Consult on cultural items.* ... Consultation must address identification of:
[\(iv\) The duty of care](#) under § 10.1(d) for unassociated funerary objects, sacred objects, or objects of cultural patrimony.

§10.10(c) *Step 3-Consult on human remains or associated funerary objects.* ... Consultation must address identification of:
[\(iv\) The duty of care](#) under § 10.1(d) for human remains or associated funerary objects.

Subpart B – Protection of Human Remains or Cultural Items on Federal or Tribal Lands

§10.4(b) *Plan of action.* Before a planned activity or after a discovery [on Federal or Tribal lands], the Federal agency or DHHL must approve and sign a plan of action and must provide a copy to all consulting parties. At minimum, the written plan of action must include: ...
[\(v\) The duty of care](#) under §10.1(d) for any human remains or cultural items...

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Frequently asked questions about §10.1(d) Duty of care.

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17. Who is responsible for ensuring the duty of care requirements are met or for getting consent from Indian Tribes or NHOs?
18. What if there is disagreement between consulting parties on the duty of care?
19. Why don’t these regulations just prohibit exhibition, access, or research entirely?
20. Where did this duty of care language come from?

1. What is the duty of care requirement?

Section 10.1(d)(1) requires museums and Federal agencies to consult on the appropriate storage, treatment, or handling of human remains or cultural items.

Section 10.1(d)(2) requires museums and Federal agencies to make a reasonable and good-faith effort to incorporate and accommodate the specific requests made by consulting parties.

Section 10.1(d)(3) requires museums and Federal agencies to obtain consent from consulting parties prior to any exhibition of, access to, or research on human remains or cultural items.

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2. Why is consent required?

As the purpose of the Act and these regulations is to facilitate the disposition or repatriation of human remains or cultural items from museums or Federal agencies to lineal descendants, Indian Tribes, or NHOs, all the above entities have interests in the human remains or cultural items until the repatriation or disposition process is complete. To protect these interests, it is appropriate that museums and Federal agencies obtain consent from lineal descendants, Indian Tribes, or NHOs before conducting activities that might physically or spiritually harm human remains or cultural items. (See Final Rule [paragraph 149.](#))

3. Is the term “research” synonymous with the term “analysis?”

Yes. The regulation text describes analysis as a form of research: [10.1\(d\)\(3\)](#) Research includes, but is not limited to, any study, analysis, examination, or other means of acquiring or preserving information about human remains or cultural items. Research of any kind on human remains or cultural items is not required by the Act or these regulations.

“Research” equates to the term “scientific study” in the Act and means any study, analysis, examination, or other means of acquiring or preserving information. “Research” includes any activity to generate new or additional information beyond the information that is already available. For example, “research” might mean osteological analysis of human remains, physical inspection or review of collections to gather specific information, examination or segregation of comingled material (such as soil or faunal remains), or the rehousing of collections. “Research” is not required to identify the number of individuals or cultural items, or to determine cultural affiliation. (See Final Rule [paragraph 460.](#))

4. Is consent required to inventory a holding or collection?

This depends on what actions a museum or Federal agency intends to take “to inventory” and if that includes allowing access to or research on the human remains or associated funerary objects. **Consent is not required** to compile an itemized list of human remains and associated funerary objects or to initiate consultation with potentially culturally affiliated Indian Tribes or NHOs. **Consent is required** prior to allowing access to or research on human remains or associated funerary objects. See the discussion of “research” above.

To compile an itemized list, museums and Federal agencies must identify the number of individuals in a reasonable manner based on the information available. No additional study or analysis is required to identify the number of individuals. If human remains are present in a holding or collection, the number of individuals is at least one. (See Final Rule [paragraph 499.](#))

For example, if a museum wished to have a skilled individual, such as an osteologist, analyze its collection to identify the scientific minimum number of individuals, the museum must first obtain consent from lineal descendants, Indian Tribes, or NHOs. Until that consent is obtained, the museum must rely on the information available (previous inventories, catalog cards, accession records, visual inspection, etc.) to identify consulting parties, conduct consultation, update the inventory, and submit a notice of inventory completion. (See Final Rule [paragraph 152.](#))

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5. Is consent required before updating an inventory for human remains that were previously submitted in an inventory?

As noted in the question above, **consent is not required** to compile an itemized list of human remains and associated funerary objects or to initiate consultation with potentially culturally affiliated Indian Tribes or NHOs. **Consent is required** prior to allowing access to or research on human remains or associated funerary objects.

6. I have an inventory project that is ongoing. Do I need to stop my project until I get consent to continue?

This depends on what the “inventory project” entails and if that includes allowing access to or research on the human remains and associated funerary objects. **Consent is not required** to compile an itemized list of human remains and associated funerary objects and to initiate consultation with potentially culturally affiliated Indian Tribes or NHOs. **Consent is required** prior to allowing access to or research on human remains or associated funerary objects.

For both Question 5 and 6: If an inventory of human remains and associated funerary objects was previously prepared, the first requirement for updating an inventory is to initiate consultation under §10.10(b) Step 2-Initiate consultation. Under §10.10(c) Step 3 – Consult, consultation should address identification of the duty of care under 10.1(d), including consent from consulting parties for any additional research on or analysis of the human remains or associated funerary objects to complete the inventory.

7. Should I create an itemized list from existing museum documents, invite lineal descendants, Indian Tribes, and NHOs to consult, and then seek permission from consulting parties for further assessments (i.e., determining the number of individuals)?

Yes. If a museum or Federal agency wishes to conduct research (or analysis or study) in order to complete the inventory, the museum or Federal agency should seek consent to do so during consultation. If an Indian Tribe or NHO wishes certain research or analysis be conducted prior to completing the inventory, the Indian Tribe or NHO should convey that request during consultation.

8. Can I conduct research or analysis to complete the inventory if no consulting parties respond?

No. Until consulting parties respond, the museum or Federal agency may not be required to consult under paragraph (d)(1) or collaborate under paragraph (d)(2) of § 10.1. However, until consulting parties respond, the museum or Federal agency must not allow any exhibition of, access to, or research on human remains or cultural items as doing so may be subject to a failure to comply with the requirements of these regulations. If a museum or Federal agency wished to conduct research to include a specific scientific study of human remains or cultural items, it

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could do so by following the requirements for a stay of repatriation under §§ [10.9\(i\)\(3\)](#) or [10.10\(j\)\(3\)](#). (See Final Rule [paragraph 149](#).)

9. How can we meet the deadline to update an inventory by January 10, 2029, if we must first consult and then get consent before analyzing the human remains and associated funerary objects?

Museums and Federal agencies are required to act under § 10.10 within certain timelines, and those timelines are required even if there is no response from a lineal descendant, Indian Tribe, or NHO to an invitation to consult. A museum or Federal agency must initiate consultation **prior** to completing or updating an inventory under § 10.10, but if there is no response to the invitation to consult, the museum or Federal agency must complete or update the inventory by the deadlines required under § 10.10(d) and submit a notice of inventory completion under § 10.10(e). As the Department noted in 1995 for the first deadline to complete an inventory in 1995 if there is no response after repeated attempts to contact Tribal officials by telephone, fax, and mail, the museum or Federal agency official may be required to complete the inventory without consultation to meet the regulatory deadline. The Department suggested museum and Federal agency officials document attempts to contact Tribal officials to demonstrate good faith compliance with these regulations and the Act. (1995 Final Rule, 60 FR 62151). (See Final Rule [paragraph 445](#).)

10. What if the Tribe agrees to additional research or analysis but we will need more time to complete the inventory as requested by the consulting parties?

An extension of the deadline to complete or update an inventory may be requested by any museum that has made a good faith effort to complete or update its inventory. We have added to the requirements for an extension the written agreement of consulting parties to the request. If a museum will need an additional 1 or 5 or even more years to complete or update its inventory, it can only do so by first engaging in meaningful and effective consultation with lineal descendants, Indian Tribes, and NHOs. With these changes to the regulations, we hope to provide a clear path to repatriation where lineal descendants, Indian Tribes, and NHOs, rather than museums and Federal agencies, can define what expeditious repatriation means. (See Final Rule [paragraph 429](#).)

11. Is consent required to move a holding or collection to a new location?

It depends on the reason for moving the holding or collection. If the move is to care for, safeguard, and preserve the human remains or cultural items, consent is not necessarily required. But a museum or Federal agency should carefully evaluate its intended move process and examine the risks to the care and safety of a collection in its current location versus moving it to a new location, remembering that moving also incurs risks to care and safety of the holding or collection.

In some cases, the facts of a particular move may warrant obtaining consent. For example, if certain cultural items should not be stored in the same space as human remains, yet during the move, the entire collection will have to be placed on the same truck or in the same storage

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container for a few days, the logistics of the move may cause cultural or spiritual harm to the collection. Alternately, if an Indian Tribe covered a holding or collection ceremonially in a certain cloth, and the logistics of the move require removing the cloth, consent should be obtained before removing the cloth. However, in either example, if the holding or collection is in imminent physical danger, the move may be necessary without first obtaining consent.

If a museum or Federal agency moves a holding or collection without consent from lineal descendants, Indian Tribes, or NHOs, it should be sure to make a record of how it determined that the move was in the best interest of the holding or collection, specifically in its care, safety, or preservation. If a museum or Federal agency moves a holding or collection without consent, it would be a good practice to at least inform the lineal descendants, Indian Tribes, or NHOs of the move and the justification.

12. Does our museum need to remove all human remains and potential cultural items from exhibit?

This depends on your record of consultation and the type of item on exhibit. If, through consultation, an Indian Tribe agreed to putting an object in an exhibit, no action is required. If, during past consultation, an Indian Tribe requested that the museum remove certain objects from exhibit, but the museum refused to do so, the museum should remove or cover the objects as soon as possible. If the museum has human remains or cultural items in an exhibit but has never consulted on the human remains, objects, or general content of the exhibit, the museum should prioritize removal or covering of any human remains and funerary objects in particular. The museum should also initiate consultation on the human remains and funerary objects as quickly as possible to determine the preferred treatment of consulting parties. If a museum has known sacred objects or objects of cultural patrimony on exhibit and has not consulted on those objects, the museum should remove or cover the objects until consultation can be conducted and consent can be given. For other objects that may or may not be cultural items, the museum should carefully review information about the objects and initiate consultation with Indian Tribes or NHOs to determine if the objects are cultural items. If immediate removal of human remains or cultural items is not possible, covering using screens, temporary walls, curtains, vinyl paneling, or other means of obscuring the human remains or cultural items would suffice for temporary purposes pending consultation and obtaining consent. Temporarily closing an entire gallery or exhibition, depending on the contents and ability to limit viewing, may be necessary but is not required if the human remains or cultural items can be protected from view in some other way.

13. How do we request consent if we haven't identified consulting parties?

For purposes of the duty of care paragraph, the lineal descendants, Indian Tribes, or NHOs are those identified as consulting parties under §§ 10.4(b)(1), 10.9(b)(1), and 10.10(b)(1): Consulting parties are any lineal descendant and any Indian Tribe or NHO with potential cultural affiliation. If a museum or Federal agency cannot identify any consulting parties for specific human remains or cultural items, the duty of care requirement still applies. Until consulting parties are identified, the museum or Federal agency may not be required to consult under paragraph (d)(1) or collaborate under paragraph (d)(2) of § 10.1. Until consulting parties are identified, the museum or Federal agency must not allow any exhibition of, access to, or research on human remains or

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cultural items as doing so may be subject to a failure to comply with the requirements of these regulations. If a museum or Federal agency wished to conduct a specific scientific study of human remains or cultural items, it could do so by following the requirements for a stay of repatriation under §§ 10.9 or 10.10. After following the requirements of these regulations, nothing would preclude a museum or Federal agency from exhibiting, allowing access to, or conducting research on collections that are not subject to the Act or, after disposition or repatriation, reaching an agreement with the requesting lineal descendant, Indian Tribe, or NHO on access to, exhibition of, or research on human remains or cultural items that have been repatriated. (See Final Rule [paragraph 149.](#))

14. Is consent required before testing for or removal of hazardous substances?

Testing or removal of hazardous substances should be a part of consultation on human remains or cultural items, specifically under the duty of care requirements in § 10.1(d). We cannot require testing for or removal of hazardous substances or who should pay for that testing or removal as there is no such requirement in the Act. We can and do require information about hazardous substances be shared, but only when a museum or Federal agency knows about the presence of any potentially hazardous substances. (See Final Rule [paragraph 443.](#))

15. Do the duty of care requirements apply after sending a disposition or repatriation statement?

Yes. Regardless of the disposition or repatriation statement, a museum or Federal agency is obligated to exercise a duty of care for human remains or cultural items in its custody or in its possession or control under § 10.1(d) and to defer to lineal descendants, Indian Tribes, and NHOs. We cannot require museums or Federal agencies pay for care or physical transfer. A museum or Federal agency must consult with a requestor on custody and physical transfer after a disposition or repatriation statement is sent. Nothing under the Act or these regulations allow a museum or Federal agency to dictate any action after a disposition or repatriation statement is sent. (See Final Rule [paragraph 358.](#))

16. Can I exhibit, access, or research a collection of human remains or cultural items if it is on loan from another institution?

We have intentionally included “custody” in the duty of care requirement to ensure all Native American human remains and cultural items are cared for, safeguarded, and preserved until the disposition and repatriation processes are complete. However, the inclusion of museums or Federal agencies with “custody” is not intended to limit the ability of the museum or Federal agency with possession or control of the human remains or cultural items from carrying out its responsibilities under this paragraph or these regulations. (See Final Rule [paragraph 117.](#))

Even where a collection is loaned to another institution, the loaning entity is still required to comply with all the requirements of the Act and these regulations. Under these regulations, if the entity that holds the loaned collection meets the definition of a museum, it would also have to comply with certain requirements for the loaned collection and any other human remains or

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cultural items in its custody, including a duty of care and reporting obligations. (See Final Rule [paragraph 284.](#))

17. Who is responsible for ensuring the duty of care requirements are met or for getting consent from Indian Tribes or NHOs?

As noted in the question above, a museum or Federal agency is responsible for the duty of care for human remains or cultural items in its custody or in its possession or control. The responsibilities for consulting, accommodating requests, or getting consent will depend on the relationship between the entity with custody and the entity with possession or control. Outside of these regulations, repository agreements, loan agreements, or other documents might assist museums and Federal agencies in determining their respective responsibilities. We note that Federal agencies and their repositories must still care for and manage collections that are covered by the provisions of [36 CFR part 79](#) (see Final Rule [paragraph 115.](#))

18. What if there is disagreement between consulting parties on the duty of care?

When consultation on the duty of care does not result in consensus, agreement, or mutually agreeable alternatives, the consultation record must describe the concurrence, disagreement, or nonresponse of the consulting parties. (See Final Rule [paragraph 124.](#))

19. Why don't these regulations just prohibit exhibition, access, or research entirely?

The Act expressly acknowledges the possibility of scientific study, thus we cannot remove reference to “scientific study” or research from these regulations. The delay in repatriation for conducting a scientific study applies to all “Native American cultural items,” which are defined in the Act as human remains, associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony ([25 U.S.C. 3005\(b\)](#)). As any elimination or restriction of [25 U.S.C. 3005\(b\)](#) would require an act of Congress, we cannot remove the reference to “scientific study” entirely or remove § 10.9(i)(3). (See Final Rule [paragraph 159.](#))

20. Where did this duty of care language come from?

The history of this duty of care requirement can be found in the preamble to the Final Rule: In preparing these final regulations, we looked at not only the comments we received on the proposed regulations but also to the legislative and regulatory history and to input from the Review Committee on these issues. (See Final Rule [paragraph 143.](#))