

A.R.S. §41-844 AND §41-865 GUIDELINES

Revised November 12, 2009

A.R.S. §41-844 and A.R.S. §41-865 insure that Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony discovered on State lands, and Human Remains and associated objects from private lands, are treated with respect and dignity. These Arizona laws provide that groups having biological relationship or cultural affinity with the Remains have a very significant role in determining the treatment and disposition of these culturally significant materials. At the same time the laws insure that the various other relevant interests are also represented in the decision-making process.

The following information provides additional guidance to individuals and organizations implementing the provisions of A.R.S. §41-844 and A.R.S. §41-865 and the Rules pertaining to these laws. Revised *Guidelines* are prepared as needed.

Designated Agents of the State

Only the Director of the Arizona State Museum is legally authorized to act as an agent of the State in consultations regarding Human Remains, Sacred Objects, and Objects of Cultural Patrimony. The Director has delegated significant aspects of this responsibility to the Coordinator under the Rules for the current legislation. Under some circumstances the Director and Coordinator may also choose to delegate aspects of compliance to personnel representing local governments in order to expedite implementation of the laws. Agreement regarding the specific procedures to be followed in these cases will be subject to consultation with all interested parties.

When a federal undertaking on State or private lands is involved, the federal repatriation statute (PL 101-601 or NAGPRA) and agreements developed solely under that statute do not supercede the requirements of the State laws; a State agreement is needed. Agreements regarding disposition of Remains from State lands or from private lands in Arizona are legally binding under Arizona repatriation statutes only when the Museum is involved in the consultation and the resulting agreement.

Individuals Who Must Report Remains

Reports regarding remains on private lands must be made by landowners or their designated agents. Agents include archaeologists working on private lands if landowners have explicitly delegated this authority. Persons in charge of projects on State lands and lands controlled by the State (county and city jurisdictions) are responsible for reporting Human Remains. This responsibility applies to those in charge of archaeological projects undertaken under State permit.

Reports of Discoveries or Potential Discoveries of Remains

The laws outline procedures for reporting individual discoveries of Human Remains. However, the interests of all concerned may be served by consultation and establishment of agreements specifying treatment and disposition of Human Remains before projects are initiated.

Both ARS §41-844 and §41-865 provide that consultations undertaken regarding Human Remains shall not unreasonably delay projects. On private lands even the 10 working days allocated by law for consultation and recovery is not available when this would delay project activities. Only the landowner or project manager is capable of waiving these limitations. It is not within the legal authority of the Museum to do so.

Prior agreements may help to protect the interest of tribal governments wishing to specify terms of recovery as well as disposition of Remains, although legal constraints still may at times permit the Museum no options other than emergency recovery. Prior agreements may also be useful to the project manager or landowner, in that they may permit projects to proceed with minimal disruption. These agreements are always appropriate when activities affecting objects falling within the protected classes of objects are planned.

Consultations for Archaeological Projects

It is prudent to undertake early consultations regarding the potential to discover Human Remains whenever there is a reasonable expectation that such Remains might be encountered. Prior agreements may establish a commitment to leave in place any Remains encountered. Alternatively, when there is reason to regard disturbance of Remains as inevitable, then provisions may be made regarding the nature of recovery and disposition.

Projects under State Antiquities Permit

An Arizona Antiquities permit, issued by the Arizona State Museum, is required under A.R.S. §41-841 *et seq.* for all archaeological studies on State lands in Arizona, including lands administered by subdivisions of the State such as counties and cities. If there is significant probability that Remains subject to A.R.S. §41-844 will be encountered during permitted activities, a consultation under that statute is recommended. The permit holder is obligated to carry out the provisions of the agreement reached through that consultation upon discovery. In the absence of such an agreement, the permit holder must follow the standard provisions of the A.R.S. §41-844 regarding reporting of discoveries.

Consultations in the Absence of Data Recovery Requirements

Some projects on private lands are not subject to data recovery requirements. However, landowners are obligated to exercise reasonable care in their activities to protect Remains when there is reasonable expectation that Remains exist. Prior consultation is strongly recommended to expedite such cases.

The Museum does not undertake excavations necessary to discover burial locations. Should Remains be encountered, however, private landowners must notify the Museum and the Museum may assume responsibility for recovery of Remains.

Reporting Uncertain Cases

Landowners and project managers may be unable to determine whether skeletal Remains are human. The Rules require that such cases are to be reported to the Museum prior to disturbance. The Coordinator will determine whether reported Remains are or are not human and at least 50 years old and consequently whether these statutes are applicable.

Cases Initiated by Law Enforcement Personnel

In some cases human Remains that might be evidence of a crime are removed by (or under the supervision of) law enforcement personnel and are subsequently found to be subject to the provisions of these laws. All or most of a burial might be removed before such a determination can be made. Such cases will be treated as unintentional disturbance of Remains. If removal is largely complete before a determination can be made, removal may be completed in order to insure the security of the Remains. Interested parties will be notified later and will participate in determining the ultimate disposition of the Remains.

Cultural Affinity

Under A.R.S. §41-844 and §41-865 Groups having cultural affinity to Remains may include any tribe that has submitted a written claim of affinity or a Group that has cultural affinity in light of all the relevant evidence. It is only when the claimants are unable to agree on appropriate treatment and disposition of the Remains that the Director must make a determination regarding which claimants have the closer affinity to the Remains in question, and proceed according to the wishes of that claimant. In such cases, claimants should provide written evidence supporting their claim to the Director. Such evidence may be drawn from a variety of sources, including oral tradition, ethnographic analogy (contemporary uses of objects similar to those in question), archaeological studies, and historical records.

Affinity and the Group

Cultural affinity means that there is a relationship which can be reasonably traced historically or prehistorically between a present day claimant group and an identifiable earlier group with which Remains were associated, based on the preponderance of the available evidence and allowing for the inevitability of change through time.

Kinship and affinity are not synonymous terms. Under the Arizona laws, kinship is the key factor with respect to relationships between individual persons and Remains, while cultural affinity is the central issue with respect to relationships between cultural groups and Remains. When a specific and traceable close kinship tie can be established between individuals and the individuals represented by Remains, that kinship tie takes precedence over claims of cultural affinity by a group. However, when there is no

traceable biological link between specific Remains and contemporary individuals, the case is decided in terms of the closer cultural affinity of the groups involved.

Elements of Cultural Affinity

Evidence of a group's biological descent from an earlier group can strengthen a claim of cultural affinity, since such descent is usually a strong factor in group self-identification. However, a determination of the closest affinity must also weigh heavily such factors as common religious beliefs and practices (especially with respect to the meaning and use of a disputed object), common language (if known in the case of earlier groups), similar forms of social organization, and comparable social and political institutions. Locational stability may be an element supporting claims of close cultural affinity, but is not a necessary or sufficient condition for establishing close affinity. Other factors may be considered.

Affinity and Right of Possession

It is a basic principal of repatriation law that a legitimate right of possession cannot be obtained without the consent of the groups or individuals traditionally having the authority to alienate them. Such groups or individuals might include religious societies, persons holding specific political or religious office, or whole communities within the Group in which Remains originated.

Acquisition and use of objects by a group that did not create them and that does not have a valid right of possession under the traditions of the group that did create them, even if this use has occurred over a long period of time, does not support a claim of close affinity.

Consultation Process

ARS §41-844 requires that interested parties must consent to any agreement reached regarding treatment and disposition of relevant materials. Should all parties not consent, further negotiation is mandated for a period of up to 6 months, after which the wishes of the groups claiming affinity determine the disposition of Remains.

Scheduling

Consultation meetings are normally scheduled prior to ground disturbance or alternatively within 6 months of the date of discovery of Remains.

When claims are made for items that were discovered prior to enactment of the statute but are now under the control of the State, the law requires that these claims be treated as if the discovery occurred at the time of the claim. Therefore, the consultation meeting will be scheduled within 6 months of the date of the claim.

The Participants

The Director of the Arizona State Museum has legal responsibility for coordinating the implementation of these laws. The Coordinator is the member of the

Museum's professional staff appointed by the Director to assist in coordinating the implementation of these laws; the Coordinator normally schedules and then chairs consultation meetings. The Coordinator is not an interested party but encourages those who are interested parties to reach agreement and clarifies questions regarding the legal process.

The Interested Parties are those individuals identified by statute as having a legitimate interest in the treatment and disposition of Remains, Sacred Objects, and Objects of Cultural Patrimony and, within the constraints of the law, the right to participate in decisions regarding these classes of material. With respect to Native American Remains, federally recognized tribes are the appropriate consulting parties, in the absence of persons with specific evidence of direct kinship to the Remains. In addition, landowners, land managers, and project managers are considered interested parties.

Other Individuals and Organizations

Other individuals and organizations are normally not interested parties as defined by the statute. They are, however, free to attend to the extent that space is available and also to speak to the meeting.

Decision Records and Agreements

The results of a consultation may be documented through a record of decision or an agreement. A record of decision is a memorandum issued by the Coordinator or Director that summarizes the terms of discovery, treatment and disposition agreed upon by interested parties. An agreement is a similar memorandum but must be signed by the interested parties before becoming effective.

Up to 6 months are allowed after the date of the initial consultation meeting for continued negotiation, should all interested parties present fail to reach agreement at that meeting. Only after that 6 month period has elapsed may tribal governments or other legitimate claimants assert a unilateral demand for repatriation of items despite the absence of an agreement between all interested parties.

Should claimants be unable to agree on appropriate treatment and disposition of Remains, the Director shall make a determination regarding the group having the closest affinity to the deceased, and shall proceed according to the wishes of that group.

Modification of Agreements

Participants may terminate an agreement at any time. However, it is normally expected that agreements will be binding upon the parties unless there are circumstances that could not be reasonably expected when the agreement was developed. If all of the interested parties agree that modification is desirable the Coordinator will convene a meeting and assist in developing a revised agreement.

Classes of Material

The following are the classes of materials subject to repatriation under one or both Arizona statutes:

Human Remains and Associated Objects

Both A.R.S. §41-844 and §41-865 apply to the protection of Human Remains and associated objects.

Human Remains are normally cremated or unburned human skeletal elements, although in some cases Remains recovered in dry caves include Remains of hair and tissue. Those covered by these laws are only those that are at least 50 years old.

A.R.S. §41-844 (M) (1) defined "funerary object" as:

... an object discovered in proximity to Human Remains and intentionally buried or interred with the Remains.

This is further defined in the *Rules Implementing the Arizona Antiquities Act* as follows:

... any objects discovered in proximity to Human Remains and thought to have been deposited with the Human Remains at the time of interment.

Tribal Patrimony and Sacred Ceremonial Objects

A.R.S. §41-844 also extends the protection of the law to objects in two additional classes of items, objects of tribal patrimony and sacred ceremonial objects.

National or Tribal Patrimony

A.R.S. §41-844 (M) (5). states that Objects of National or Tribal Patrimony are:

... inalienable items of historical or cultural significance to tribal groups.

Other clarification of the meaning of the term in question is provided in the federal law, P.L. 101-601 (1) (1) (D), which refers to:

...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.

This is further clarified by *Senate Report 101-473: Providing for the Protection of Native American Graves and the Repatriation of Native American Remains and Cultural Patrimony*, which defines Objects of Cultural Patrimony as follows (page 7):

An object with significant historical, traditional or cultural importance and which is central to the culture of an Indian tribe or to Native Americans. The Committee intends this term to refer to only those items that have such great importance to an Indian tribe or to the Native Hawaiian culture that they cannot be conveyed, appropriated or transferred by an individual member. Objects of Native American cultural patrimony would include items such as Zuni War Gods, the Wampum belts of the Iroquois, and other objects of a similar character and significance to the Indian tribe as a whole.

Objects cannot be designated as "inalienable" or "property of the group" after the fact if historically and prehistorically they were treated as disposable personal property.

Sacred Ceremonial Object

A.R.S. §41-844 (M) (6) defines a sacred ceremonial object as:

... an object traditionally utilized in religious observances.

This protected class of objects may include not only portable objects, but those architectural features that were made and used principally for religious purposes. Shrines, some kivas, and portions of platform mound complexes might fall within this category.

Sacred objects do not include materials that might be designated as "sacred" after the fact, but restricts the material to be considered under this provision to those objects that have traditionally been used in specific traditional ceremonies. *Senate Report 101-473: Providing for the Protection of Native American Graves and the Repatriation of Native American Remains and Cultural Patrimony* again provides important clarification of the accepted meaning of the relevant terms (page 7):

The Committee received comments regarding the ambiguity surrounding the term "sacred," in particular when that term is used in reference to Native American religious practices. There has been concern expressed that any object could be imbued with sacredness in the eyes of a Native American, from an ancient pottery shard to an arrowhead. The Committee does not intend this result.

Standards for Documentation of Human Remains

Documentation of Remains

The Museum is accountable for disposition and treatment of Remains and therefore requires documentation to satisfy the requirements of this legal accountability. In addition, some tribes have specifically requested these data in order to insure that reburial can reproduce as nearly as possible the conditions of the original burial. The rules for both ARS §41-844 and §41-865 therefore require documentation of Remains.

Documentation requirements identified in the Rules include both inventory of Remains and associated objects and information pertinent to establishing cultural affinity and associations of these Remains and objects. Detail must be sufficient to identify individual items and the specific contexts from which they were removed, and to document the condition of all individual items. Representatives of tribal governments

claiming Remains should be asked to confirm in writing that the material represented in the inventory was received in the stated condition.

Inventory and documentation of Human Remains:

For Human Remains, documentation will follow the guidelines for inventory established in "Standards" (Buikstra and Ubelaker 1994) or in the ASM field inventory and documentation package. This will include a bone by bone inventory of the Remains, information on age and sex with documentation on the methods of assessment used, and morphometric data appropriate to basic documentation efforts. These data can be submitted in hard copy or electronic form. The electronic data, if available, should be a tab-delimited ASCII file with clear explanation of the sequence and coding of data provided in hard copy.

Inventory and documentation of associated objects:

For associated objects, documentation will include standard information on material, form, style, dimensions, and description of each object or group of objects. This documentation must include explicit statement of which objects were associated with which individual sets of Human Remains.

Documentation of specific contexts:

Contextual information must include clear identification of the archaeological site from which the burials were excavated, a site map indicating the intrasite location of all burial features which were excavated, and feature maps of each burial locus showing clearly the position of the Human Remains and of the associated objects relative to one another. The circumstances of excavation (date, personnel, permit, etc.) should also be reported.

Documentation of faunal collections:

The ASM requires all collections of animal bone recovered in the course of activity to be examined for the presence of Human Remains. Such examination must be conducted by an analyst or analysts with sufficient training in human osteology and zooarchaeology to reliably distinguish between fragments of human bone and animal bone. Any Human Remains identified as a result of this review must be documented and are subject to repatriation under the terms of the burial agreement.

Transfer of Human Remains and Associated Objects to the Arizona State Museum

In cases where Human Remains and associated objects are transferred to the Arizona State Museum, regardless of the planned duration of possession by the Museum, the required inventory and documentation will be submitted to the Museum at the time of transfer.

All materials will be packaged in standard cardboard boxes with lids or cover flaps. Only paper and cardboard will be used in packaging the Remains and objects. Each box will be clearly marked with the site designation, feature designation, and list of contents.

Provision for Disposition of Remains

Consultation agreements may require that Remains be curated or that they be reburied. In many cases Remains must be turned over to representatives of tribal governments for reburial.

Reburial Responsibilities

These laws serve as protection of the right of Native American groups to practice their religious beliefs without impediment created or facilitated by the State. However, the State does not carry out specific activities mandated by those beliefs or require others to do so. Therefore the Museum does not undertake reburial, except in the course of some individual Museum projects, or require archaeologists to do so as a condition of legal compliance.

Burial Locations

When tribes assume responsibility for Remains they are not responsible for further reporting to the Museum regarding disposition of those Remains unless they are reburied on State or private lands in Arizona. The tribe assumes all responsibility for the protection of Remains after reburial, as specified in the law, unless the tribe makes alternative arrangements.

Prohibition of Sale

Once Remains are repatriated, they are entirely under the legal control of the successful claimants, who may dispose of them as they wish except that they remain subject to prohibition of sale under both State and federal statutes. Any individual offering repatriated materials for sale is subject to criminal prosecution under both State and federal (if the material was returned to tribal or federal lands) statutes.

Failure of the Claimants to Take Possession of Remains

If claimants fail to take possession of Remains within one year of the date when those Remains are both legally and physically available for repatriation, the Remains will be curated at the Arizona State Museum. The Remains may be reclaimed at a later date, or may remain in the collections of the Arizona State Museum if no subsequent claim is made.

Repatriation of Remains from Historic Cemeteries

A.R.S. §41-844 and §41-865 do not specifically address the repatriation of Human Remains and associated objects from historic cemeteries more than 50 years old in which some individual graves are unmarked. Whenever there is adequate identification of the deceased, such cases should be handled under existing provisions for relocation of marked graves. However, in some cases treatment and disposition of Remains will fall under the repatriation statutes. A.R.S. §41-844 and §41-865 exist, first, to insure that Human Remains will be treated with dignity and respect. Second, the laws exist to insure that the religious freedom of the deceased and of those living groups that have cultural

affinity with the Remains is protected. The following disposition is consistent with these principles:

1) When the identity of individual Remains can reasonably be determined, surviving family shall have priority in determining the treatment and disposition of Remains.

2) Human Remains and associated objects from burial places established and created by individual families should be repatriated to those families, even if the individual identities of Remains cannot be established, because a kinship relationship with individual Remains can be presumed.

3) When a cemetery is known to have been established by an organization that continues to maintain similar cemeteries, and when groups claiming affinity wish to have the Remains reburied, the Remains and associated objects should be repatriated to the organization originally entrusted with the Remains or its successor organization. Such organizations are expected to conform to the requirement that the Remains be treated with dignity and respect, and with concern for the wishes of those having cultural affinity with the Remains.

4) When an unmarked historic cemetery is discovered and the organization or group that established that cemetery no longer exists, treatment and disposition of Remains will be decided through negotiation between groups claiming cultural affinity and other interested parties as specified in the law. If groups claiming affinity cannot reach agreement within 6 months, treatment and disposition will be decided through a determination of the group having the closest affinity to the Remains.

Publication

Archaeologists are free to present information to the archaeological profession and to the public, but must treat Human Remains with dignity and respect when presenting such information. The need to protect sites through limiting public knowledge of locations should also be considered whenever releasing information.

In addition, sensitivity to tribal concerns is strongly recommended when dealing with the public media. The tendency of some representatives of the press to sensationalize archaeological discoveries may lead to situations that are undesirable to all participants in the process; careful attention to accuracy is important in all discussions with media representatives.

Taking, displaying, or publishing photographs of Remains is normally regarded as inappropriate. In cases where such action is desired, requests for such action should be submitted to the participants and the Coordinator on agency letterhead. Responses from participants should be submitted on letterhead with signature of an authorized representative.