

4310-70

**DEPARTMENT OF THE INTERIOR**

**Office of the Secretary**

**43 CFR Part 10**

**RIN: 1024-AC84**

**Native American Graves Protection and Repatriation Act Regulations, Disposition of culturally unidentifiable human remains**

**AGENCY:** Department of the Interior

**ACTION:** Proposed rule

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**SUMMARY:** This proposed rule and request for comments relates to one section of regulations implementing the Native American Graves Protection and Repatriation Act of 1990 ("the Act"). This section outlines procedures for the disposition of culturally unidentifiable human remains in the possession or control of museums or Federal agencies. Publication of this section is intended to solicit comments from Indian tribes, Native Hawaiian organizations, museums, Federal agencies, and members of the public prior to its publication in final form.

**DATE:** Written comments will be accepted until *[insert date 90 days from date of publication in the Federal Register]*.

**ADDRESSES:** Comments (2 copies) should be addressed to: Dr. Robert Stearns, Manager, National NAGPRA Program, National Park Service, Docket No. 1024-AC84, 1849 C Street NW-350NC, Washington, DC 20240, or hand deliver comments to room 350, 800 North Capitol Street, Washington DC.

**FOR FURTHER INFORMATION CONTACT:** Dr. Robert Sterns, Manager, National NAGPRA Program, National Park Service, 1849 C Street NW-350NC, Washington, DC 20240. Telephone: 202/343-8161. Fax: 202/343-5260.

**SUPPLEMENTARY INFORMATION:**

On November 16, 1990, President George Bush signed into law the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 *et seq.*), hereafter referred to as the Act. 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 8 established a review committee of seven private citizens to monitor and review the implementation of the inventory and identification process and repatriation activities required under the Act [25 U.S.C. 3006]. Section 8(c)(5) charged the review committee with 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 [25 U.S.C. 3006(c)(5)].

The review committee did not focus on the disposition of culturally unidentifiable human remains during its first five meetings. The majority of the review committee's time was devoted to development of regulations pertaining to the other aspects of the Act. The proposed rule, published May 28, 1993 [Federal Register, vol. 58, no. 102, pages 31122-31134], reserved a section to deal with the disposition of culturally unidentifiable human remains. Some commentators questioned the Secretary's authority to promulgate regulations regarding the disposition of culturally unidentifiable human remains. The preamble to the final regulations published on December 4, 1995, [Federal Register, vol. 60, no. 232, pages 62134-62169], explained that sections 8(c)(5) and (c)(7) of the Act gives the review committee the responsibilities of recommending specific actions for the disposition of culturally unidentifiable human remains and consulting with the Secretary in the development of regulations to carry out the Act. Section 13 of the Act charges the Secretary with promulgating regulations to carry out the Act [25 U.S.C. 3011]. The preamble stated that a draft of any proposed regulations regarding the disposition of culturally unidentifiable human remains would be submitted to the review committee for discussion and recommendations prior to its publication for public comment in the Federal Register.

During its sixth meeting in Phoenix, AZ (January 23-25, 1994), and seventh meeting in Rapid City, SD (May 12-14, 1994), the review committee began to formally solicit comment from Indian tribes, Native Hawaiian organizations, museums, and Federal agencies regarding the disposition of culturally unidentifiable human remains. At its seventh meeting in Albany, NY (November 17-19, 1994), the review committee considered a request from the Robert S. Peabody Museum of Archaeology, Andover, MA, regarding the disposition of specific culturally unidentifiable human remains. The review committee's recommendations, formulated as a letter from the National Park Service to the museum, recommended the disposition of the human remains and associated funerary objects to the Mashpee Wampanoag, a nonfederally recognized Indian group.

The review committee developed its first draft of general recommendations regarding the disposition of culturally unidentifiable human remains at its ninth meeting in Los Angeles, CA (February 16-18, 1995). These draft recommendations were published for public comment in the Federal Register on June 20, 1995 [Federal Register, vol. 60, no. 118, pages 32163-32165]. Copies of the draft were sent to over 3,000 Indian tribes, Native Hawaiian organizations, national museum and scientific organizations, and members of the public. One hundred and twenty-nine written comments were received during the 100-day comment period, representing 16 Indian tribes, 49 museums, 12 Federal agencies, 3 national museum and scientific organizations, and 58 members of the public.

The review committee developed a revised draft of its general recommendations at its eleventh meeting in Billings, MT (June 9-11, 1996). The revised draft recommendations were published for public comment in the Federal Register on August 20, 1996 [Federal Register, vol. 61, no. 162, pages 43071-43073]. Copies of the draft were sent to over 3,000 Indian tribes, Native Hawaiian organizations, national museum and scientific organizations, and members of the public. Forty-nine written comments were received during the 45-day comment period, representing 4 Indian tribes, 26 museums, 4 Federal agencies, 6 national museum and scientific organizations, and 11 members of the public.

The review committee developed draft principles of agreement regarding the disposition of culturally unidentifiable human remains at its fifteenth meeting in Portland, OR (June 25-27, 1998). These revised draft recommendations were published for public comment in the Federal Register on June 23, 1999 [Federal Register, vol. 64, no: 120, pages 33502-33504] and July 29, 1999 [Federal Register, vol. 64, no. 145, pages 41135-41136]. Copies of the draft were sent to over 3,000 Indian tribes, Native Hawaiian organizations, national museum and scientific organizations, and members of the public. Eighty-nine written comments were received during the 70-day comment period, representing 13 Indian tribes, 39 museums, 4 Federal agencies, 5 national museum and scientific organizations, and 22 members

of the public.

While the review committee developed the various drafts of general recommendations, a separate procedure was developed for consideration of case-by-case requests for disposition of , culturally unidentifiable human remains based on a recommendation from the Secretary [43 CFR 10.9(e)(6)]. Twenty-eight requests have been received and all were referred to the review committee for its consideration. Nineteen requests have been made by museums: Robert S. Peabody Museum of Archaeology; Virginia Department of Historic Resources (2); Hood Museum of Art; Baylor University; Oakland Museum; De Anza College; City of Santa Clara; Henry County Historical Society; Minnesota Indian Affairs Council; Office of the Iowa State Archaeologist; California Department of Parks and Recreation; Sonoma State University; Peabody Museum of Archaeology and Ethnology (2); University of Nebraska-Lincoln; California State University-Fresno; New Hampshire Division of Natural Resources; and Washington State Historical Society. Nine requests have been made by Federal agencies: US Army, Fort HunterLiggett; Department of Energy, Fernald Site; National Park Service, Fort Clatsop National Memorial; National Park Service, Carlsbad Caverns National Park; National Park Service, Guadalupe Mountains National Park; US Forest Service, Ocala National Forest; Bureau of Land Management, Eastern Colorado Area Office; Bureau of Land Management, Dakotas Area Office; and National Park Service, Zion National Park. The review committee considered each request as part of its regular meeting agenda and its findings were referred to the National Park Service for action. Responses to each requesting museum or Federal agency were signed by a representative of the Secretary.

Of the 28 requests, the Secretary recommended disposition of culturally unidentifiable human remains in 21 cases.

Five of the 21 recommended dispositions were to Indian tribes that were recognized as aboriginally occupying the area in which the human remains and associated funerary objects were recovered: National Park Service, Carlsbad Caverns National Park; National Park Service, Guadalupe Mountains National Park; U.S. Forest Service, Ocala National Forest; Bureau of Land Management, Eastern Colorado Area Office; and National Park Service, Zion National Park.

Three of the 21 recommended dispositions were to coalitions of Federally recognized Indian tribes: California State University-Fresno; University of Nebraska-Lincoln; and Bureau of Land Management, Dakotas Area Office.

Eleven of the 21 recommended dispositions were to nonfederally recognized Indian groups: Robert S. Peabody Museum of Archaeology; Virginia Department of Historic Resources (2); U.S. Army, Fort Hunter-Liggett; Hood Museum of Art; National Park Service, Fort Clatsop National Memorial; Sonoma State University; Peabody Museum of Archaeology and Ethnology (2); New Hampshire Division of Natural Resources; and Washington State Historical Society. The nonfederally recognized Indian groups included Abenaki Nation of Missisquoi (2), Chinook Indian Tribe, Federated Coast Miwok, Mashpee Wampanoag Indian Tribal Council, Monacan Indian Nation, Nansemond Indian Tribe, Nipmuc Nation, and Salinan Indian Tribal Council. Of these 11, nine included a recommendation that the museum or Federal agency consult with or obtain the consent of local Federally recognized Indian tribes. The two recommendations to the Virginia Department of Historic Resources did not include such a provision.

Two of the 21 recommended dispositions were to be completed according to applicable state law: Minnesota Indian Affairs Council; and Office of the Iowa State Archaeologist.

Two of the 21 recommended dispositions also included funerary objects that were associated with the culturally unidentifiable human remains: Robert S. Peabody Museum of Archaeology; and Bureau of

Land Management, Dakotas Area Office. In response to a request from the Peabody Museum of Archaeology and Ethnology, the review committee's February 7, 2000, recommendation stated that "the statutory language neither requires nor precludes the committee from making recommendations regarding the disposition of funerary objects associated with culturally unidentifiable human remains. While regulatory provisions require museums and Federal agencies to retain possession of culturally unidentifiable human remains until final regulations are promulgated or the Secretary of the Interior recommends otherwise [43 CFR 10.9(e)(6)], these provisions do not apply to associated funerary objects. A museum may choose to repatriate such items. However, a Notice of Inventory Completion must be published in the Federal Register prior to the disposition [43 CFR 10.12(b)(1)(vi)]."

Twenty of the 21 recommended dispositions authorized the requesting museum or Federal agency to transfer control of the culturally unidentifiable human remains to an Indian tribe or nonfederally recognized Indian group. One of the 21 recommended dispositions authorized the museum to rebury the culturally unidentifiable human remains pursuant to applicable state law: Office of the Iowa State Archaeologist.

To the remaining seven requests the Secretary recommended that the culturally unidentifiable human remains be retained pending completion of the inventory required under §10.9(e)(6) and §10.13: Baylor University; Department of Energy, Fernald Site; Oakland Museum; De Anza College; City of Santa Clara; Henry County Historical Society; and California Department of Parks and Recreation.

After circulating three drafts for public comment and considering 28 specific requests, the review committee developed its final recommendations regarding the disposition of culturally unidentifiable human remains at its nineteenth meeting in Juneau, AK (May 2-4, 2000). The recommendations were published on June 8, 2000 [Federal Register, vol. 65, no. 111, pages 36462-36464].

The review committee recognized that the legislative intent of the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) is expressed by the title of the Act. Repatriation means the return of control over human remains and cultural items to Indian tribes and Native Hawaiian organizations. Specifically, the Act requires: (1) the disposition of all Native American human remains and cultural items excavated on or removed from Federal lands after November 16, 1990 [25 U.S.C. 3002(d)(2)]. Disposition is based on linkages of lineal descent, tribal land, cultural affiliation, or aboriginal land; (2) the repatriation of culturally affiliated human remains and associated funerary objects in Federal agency and museum collections, if requested by a culturally affiliated Indian tribe or Native Hawaiian organization [25 U.S.C. 3005]. Repatriation is based on linkages of lineal descent or cultural affiliation; and (3) the development of regulations for the disposition of unclaimed human remains and objects [25 U.S.C. 3002(3)(b)] and culturally unidentifiable human remains in Federal agency and museum collections [25 U.S.C. 3006]. Although the legal standing of funerary objects associated with culturally unidentifiable human remains is not addressed in NAGPRA, the review committee recognized that the Act does not prohibit the voluntary repatriation of these cultural items by museums or Federal agencies to the extent allowed by Federal law. The review committee considered that the Act acknowledges the legitimate need to return control over ancestral remains and funerary objects to Native people, and the legitimate public interest in the educational, historical, and scientific information conveyed by those remains and objects [25 U.S.C. 3002(3)(b) and 3006(8)(b)]. According to the review committee, while the Act does not always specify repatriation, it is implicit that the process be guided by the rights and needs of Indian tribes and Native Hawaiian organizations.

Regarding culturally unidentifiable human remains, the review committee recognized that Federal agencies and museums must make a determination as to whether Native American human remains in their control are related to lineal descendants, culturally affiliated with a present-day Federally recognized

Indian tribe or a Native Hawaiian organization, or are culturally unidentifiable. This determination must be made in consultation with any appropriate Indian tribes or Native Hawaiian organizations, and through a good faith evaluation of all relevant and available documentation. A determination that human remains are culturally unidentifiable may change to one of cultural affiliation as additional information becomes available through ongoing consultation or any other source. The review committee affirmed that there is no statute of limitations for lineal descendants, Indian tribes, or Native Hawaiian organizations to make a claim. The review committee also recognized that the determination by a Federal agency or museum that human remains are culturally unidentifiable may occur for different reasons. The review committee recommended that there are three categories of culturally unidentifiable human remains. One category includes those for which cultural affiliation could be determined except that the appropriate Native American organization is not Federally recognized as an Indian tribe. A second category includes those which represent an earlier identifiable group, but for which no present-day Indian tribe has been identified by the Federal agency or museum. A third category includes those for which the Federal agency or museum believes that evidence is insufficient to identify an earlier group.

The review committee recommended the importance of documentation. Documentation is required for inventory completion and determinations of cultural affiliation by Federal agencies and museums [25 U.S.C. 3003(5)(b)(2)]. Documentation should be prepared in accordance with standards such as those outlined in 43 CFR 10.9(c) and 10.14. Documentation must occur within the context of the consultation process. The review committee observed that additional study of culturally unidentifiable human remains and associated funerary objects is not prohibited if the parties (Federal agencies, museums, lineal descendants, Indian tribes, and Native Hawaiian organizations) in consultation agree that such study is appropriate. The review committee confirmed that once inventories have been completed, the Act may not be used to require new scientific studies or other means of acquiring or preserving additional scientific information from human remains and associated funerary objects [25 U.S.C. 3003(b)(2)]. With the exception of information exempted from the Freedom of Information Act, documentation prepared in compliance with the Act is a public record.

The review committee proposed three guidelines for the disposition of culturally unidentifiable human remains. First, respect must be the foundation for any disposition of culturally unidentifiable human remains. Human remains determined to be culturally unidentifiable are no less deserving of respect than those for which cultural affiliation has been established. Second, since human remains may be unclaimed, or determined to be culturally unidentifiable for different reasons, there will be more than one appropriate disposition (repatriation) solution. Examples of appropriate repatriation solutions include the return of human remains that are determined to be culturally unidentifiable that were recovered from tribal land; human remains that are determined to be culturally unidentifiable that were recovered from the aboriginal land of an Indian tribe; or human remains, that are culturally unidentifiable but for which there is a relationship of shared group identity with a nonfederally recognized Native American group. Third, a Federal agency or museum may also seek the recommendation of the review committee for the disposition of culturally unidentifiable human remains based on other criteria than those listed above.

The review committee proposed two models for the disposition of culturally unidentifiable human remains. The first model involved the joint recommendations by Federal agencies, museums, and claimants. Repatriation of culturally unidentifiable human remains may proceed in those cases where all the relevant parties have agreed in writing that the statutory requirements have been met; and that the guidelines listed above have been followed. The review committee noted that, in cases that met these criteria, it had already recommended disposition of culturally unidentifiable human remains in cases that met these criteria for both museums and Federal agencies.

The second model involved the joint recommendations of regional consortia. The review

committee recognized that historical and cultural factors, and therefore issues concerning the definition and disposition of culturally unidentifiable human remains, vary significantly across the United States. For example, issues in the Southeast, where most Indian tribes were forcibly removed during the 19th Century, are very different from those in the Southwest where many Indian tribes remain on their ancestral lands. Similarly, issues in the Northeast and California differ significantly from those in the Great Plains. Therefore, the review committee recommended that regional solutions be developed that would best fit regional circumstances. The review committee recommended a process in which Indian tribes and Native Hawaiian organizations define regions within which the most appropriate solutions for disposition of culturally unidentifiable human remains might be determined. Within each region, the appropriate Federal agencies, museums, Indian tribes, and Native Hawaiian organizations would consult together and propose a framework and schedule to develop and implement the most appropriate model for their region. Regional consultation meetings may be open to other parties with a legitimate interest in disposition, with the consent of the appropriate Federal agencies, museums, Indian tribes, and Native Hawaiian organizations. Dispositions agreed upon through regional consultation meetings would be made by the appropriate Federal agencies, museums, and Indian tribes. If a disposition agreement could not be reached through regional consultation meetings, the dispute could be brought before the review committee. Any proposed regional disposition agreement would have to meet all statutory requirements as well as the guidelines listed above.

Lastly, the review committee requested that the Secretary of the Interior develop a draft proposed rule [43 CFR 10.11] based on these recommendations that the review committee could consider at its next meeting. Following review by the committee, the proposed rule will be published for additional public comment in the Federal Register. Also at the Juneau meeting (May 2-4, 2000), the review committee briefly considered a draft of what regulations implementing these principles might look like. This proposed rule is based on that earlier draft.

## **SECTION-BY-SECTION:**

### *Section 10.11*

This section carries out section 8(c)(5) of the Act regarding the disposition of culturally unidentifiable human remains.

Subsection (a) defines "culturally unidentifiable human remains" as human remains for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified pursuant to the inventory process outlined at §10.9. Human remains are defined at §10.2(d)(1) as the physical remains of the body of a person of Native American ancestry. The review committee recognized several subdivisions of this broader category. While these distinctions help clarify the nature of various culturally unidentifiable human remains and associated funerary objects, neither the review committee nor these regulations use them to prescribe a specific disposition for any of the various subcategories. The general definition has been used in the regulatory text. Pursuant to section 11(1)(A) of the Act, nothing in this regulation shall be construed to limit the authority of any Federal agency or museum to transfer control of culturally unidentifiable human remains or associated funerary objects to Indian tribes or Native Hawaiian organizations.

Subsection (b) concerns the list of culturally unidentifiable human remains and associated funerary objects. Section 8(c)(5) of the Act directs the review committee to compile an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum. The review committee discussed the structure of this inventory at its December 10-12, 1998

meeting in Santa Fe, NM. The review committee's inventory summarizes information provided by museums and Federal agencies in their inventories including: the number of human remains and associated funerary objects; state and county in which the human remains and associated funerary objects were recovered; the earlier group of which the human remains and associated funerary objects are thought to have belonged; and the date range during which the human remains and associated funerary objects are thought to have been originally interred. The term "list" has been used in this subsection to distinguish the review committee's "inventory" of culturally unidentifiable human remains and associated funerary objects from the "inventories" submitted previously by museums and Federal agencies.

Section 8(g)(2) of the Act requires the Secretary of the Interior to provide reasonable administrative and staff support necessary for the deliberations of the review committee. One of those duties has been compilation of the list of culturally unidentifiable human remains and associated funerary objects. The list is compiled from the inventories submitted by museums and Federal agencies pursuant to §10.9(e)(6) and §10.13. Each museum and Federal agency is provided with a copy of the list of culturally unidentifiable human remains and associated funerary objects from their institution for verification prior to submission of the list to the review committee. The list presently includes information on 35,651 human remains and 352,620 associated funerary objects from 176 museums and Federal agencies. Subsection (b)(1) would require the Secretary to provide the completed list to the review committee within [xxx] of issuance of this final rule. Subsection (b)(2) would require the Secretary, upon review and approval of the review committee, to make the list accessible to all Indian tribes, Native Hawaiian organizations, nonfederally recognized Indian groups, museums, and Federal agencies. Comment is requested from Indian tribes, Native Hawaiian organizations, museums, and Federal agencies regarding the most appropriate method for making the list accessible.

Subsection (c) concerns consultation. Upon receipt of a request for disposition of culturally unidentifiable human remains and associated funerary objects from an Indian tribe or Native Hawaiian organization, the museum or Federal agency must initiate consultation with Indian tribe officials and traditional religious leaders representing other potential claimants. Consultation may be initiated with a letter, but should be followed-up by telephone or face-to-face dialogue. During the consultation process, the museum or Federal agency must provide all consulting parties with a written list of all Indian tribes and Native Hawaiian organizations that are being, or have been, consulted regarding the particular human remains and associated funerary objects. The museum or Federal agency must provide all consulting parties with a written list of any nonfederally recognized Indian groups that are known to have a relationship of shared group identity with the particular human remains and associated funerary objects. The museum or Federal agency must also provide all consulting parties with a written indication that the inventory and additional documentation regarding the particular human remains and associated funerary objects will be supplied upon request. The Secretary may make grants for the purpose of assisting Indian tribes, Native Hawaiian organizations, and museums to consult regarding the disposition of culturally unidentifiable human remains and associated funerary objects.

Subsection (d) establishes three alternative processes for the disposition of culturally unidentifiable human remains.

Subsection (d)(1) establishes four priority categories for the voluntary transfer of control of culturally unidentifiable human remains and associated funerary objects to Indian tribes or Native Hawaiian organizations.

Subsection (d)(1)(i) stipulates that first priority would be to the Indian tribe or Native Hawaiian organization on whose tribal land the human remains or associated funerary objects were recovered. This category parallels the provisions in section 3(a)(2) of the Act regarding the disposition of cultural items

from tribal land after November 16, 1990. Section 2(15) of the Act defines tribal land to include: (1) all lands within the exterior boundaries of any Indian reservation; (2) all dependent Indian communities; and (3) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act and section 4 of Public Law 86-3. Human remains and associated funerary objects recovered from tribal land prior to November 16, 1990 are generally under the control of the Bureau of Indian Affairs, although they may be in the possession of another Federal agency or museum.

Subsection (d)(1)(ii) stipulates that second priority would be to the Indian tribe that is recognized as aboriginally occupying the area in which the human remains and associated funerary objects were recovered. Aboriginal occupation may be recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or by treaty, act of Congress, or executive order. This category parallels the provisions of section 3(a)(2)(C) of the Act regarding the disposition of cultural items from Federal or tribal land after November 16, 1990. The Act specifically identified final judgments of the Indian Claims Commission and the United States Court of Claims as two sources of information regarding aboriginal occupation. The preamble to the final rule explained that other sources of information regarding aboriginal occupation should also be consulted [Federal Register, vol. 60, no. 232, page 62140]. Certain treaties, acts of Congress, and executive orders also identify areas aboriginally occupied by Indian tribes. Maps of the territory covered by all United States treaties were originally published in the 18th Annual Report of the Bureau of American Ethnology [Government Printing Office, 1899] and are available online at <http://memory.loc.gov/ammem/amlaw/lwss-ilc.html>. Treaties signed prior to the establishment of the United States between the various colonial governments and Indian tribes may also be used to identify areas aboriginally occupied by Indian tribes.

Subsection (d)(1)(iii) stipulates that third priority would be to the Indian tribes and Native Hawaiian organizations with a cultural relationship to the region in which the human remains and associated funerary objects were recovered or, for human remains and associated funerary objects lacking geographic affiliation, a cultural relationship to the region in which the museum or Federal agency is located. This category is similar to provisions of section 3(a)(2)(C)(2) of the Act regarding the disposition of cultural items from Federal or tribal land after November 16, 1990. However, while the provisions of section 3(a)(2)(C)(2) require a cultural relationship between an Indian tribe and cultural items, this subsection requires a cultural relationship between an Indian tribe or Native Hawaiian organization and the region in which the human remains and associated funerary objects were either recovered or are currently located. Comment is requested from Indian tribes, Native Hawaiian organizations, museums, and Federal agencies regarding the meaning of the term "cultural relationship."

Subsection (d)(2) establishes a process for the voluntary transfer of control of culturally unidentifiable human remains and associated funerary objects to a nonfederally recognized Indian group, or reinterment of culturally unidentifiable human remains and associated funerary objects according to State or other law. Such dispositions may be carried out upon receipt of a recommendation from the Secretary. The Secretary will only consider such recommendations following written notification of all Indian tribes and Native Hawaiian organizations stipulated in subsection (d)(1).

Subsection (d)(3) stipulates that a Federal agency or museum may choose to retain possession or control of culturally unidentifiable human remains and associated funerary objects.

Subsection (e) stipulated the notification requirements regarding the disposition of culturally unidentifiable human remains and associated funerary objects. Subsection (e)(1) requires that transfer of control or reinterment of culturally unidentifiable human remains and associated funerary objects may not occur prior to publication of a notice of inventory completion in the Federal Register as described in §10.9. Subsection (e)(2) requires that within three years of issuance of this final rule, museums and



Federal agencies notify the appropriate Indian tribes and Native Hawaiian organizations of culturally unidentifiable human remains and associated funerary objects they intend to retain in their possession or control. A copy of this notification must also be sent to the Manager, National NAGPRA Program, who will publish a summary of the information in the Federal Register.

Subsection (f) stipulates that any person who wishes to contest actions taken by museums or Federal agencies regarding the disposition of culturally unidentifiable human remains and associated funerary objects is encouraged to do so through informal negotiations to achieve a fair resolution of the matter. The Review Committee may facilitate the informal resolution of such disputes that are not resolved by good faith negotiation pursuant to §10.17.

Subsection 10.9(e)(5) of the final regulations directs museums and Federal agencies to supply additional available documentation upon the request of an Indian tribe or Native Hawaiian organization. Additional text would be added to this subsection clarifying that such documentation should be considered a public record except when exempted under privacy rules and policies, such as the Freedom of Information Act [5 U.S.C. 552]. Further, pursuant to section 5(B)(2) of the Act, neither a request for such documentation nor any provisions of the regulations may be construed as authorizing the initiation of new scientific studies of such human remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.

Subsection 10.9(e)(6) of the final regulations directs museums and Federal agencies to retain possession of culturally unidentifiable human remains pending promulgation of §10.11. This requirement would be deleted.

### *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 proposed rule to the address noted at the beginning of this rulemaking. The NPS will review all comments and consider making changes to the rule based upon analysis of the comments.

Copies of this proposed rule may be obtained by submitting a request to the Manager, National NAGPRA Program, National Park Service, at the address noted at the beginning of this rulemaking. Commentors wishing the National Park Service to acknowledge receipt of their comments must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No 1024-AC84." The postcard will be date stamped and returned to the commentor.

### Drafting Information

This proposed rule was prepared by Dr. C. Timothy McKeown in consultation with the Native American Graves Protection and Repatriation Review Committee as directed by section 8(c)(7) of the Act.

### Regulatory Planning and Review

This rule has been reviewed by the Office of Management and Budget under Executive Order

12866.

This rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State; local, or tribal governments or communities

This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

This rule does not alter the budgetary effects or entitlements, grants, user fees, or loan programs, or the rights or obligations of their recipients.

This rule does not raise novel legal or policy issues.

#### Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

#### Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule will not: (1) have an annual effect on the economy of \$100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State, local or tribal government agencies, or geographic regions; or (3) have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

#### Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local or tribal governments, or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

#### Takings

In accordance with Executive Order 12630, the rule does not have significant takings implications. A takings implication assessment is not required. Museums are only required to repatriate human remains, funerary objects, sacred objects, or objects of cultural patrimony for which they can not prove right of possession [25 U.S.C. 3005(c)]. This rule applies to museums that fail to comply with the administrative provisions of the Act.

#### Federalism

In accordance with Executive Order 12612, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. A Federalism Assessment is not required.

### Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and does not meet the requirements of sections 3(a) and 3(b) of the order.

### Paperwork Reduction Act

The collection of information contained in this rule has been submitted to the Office of Management and Budget for approval as required by 44 U.S.C. 3501 *et seq.* The collection of this information will not be required until it has been approved by the Office of Management and Budget. Public reporting burden for this collection of information is expected to average 20 hours for the exchange of summary/inventory information between a museum and an Indian tribe and six hours per response for the notification to the Secretary of the Interior, including time for reviewing instruction, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collected information. Send comments regarding this burden estimate or any other aspects of this collection of information, including suggestions for reducing the burden, to Information Collection Officer, Attn: Docket No 1024-AC84, National Park Service, Department of Interior Building, 1849 C Street NW, Room 3317, Washington D.C. 20240, and the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Desk Officer for the Department of the Interior, Washington, D.C. 20503.

### National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment.

### Clarity of this Regulation

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite comments on how to make this rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (A "section" appears in bold type and is preceded by the symbol "§" and a numbered heading; for example, §10.11 Disposition of culturally unidentifiable human remains.) (5) Is the description of the rule in the "Supplementary Information" section of the preamble helpful in understanding the proposed rule? What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW, Washington, DC 20240. You may also e-mail the comments to: [Exsec@os.doi.gov](mailto:Exsec@os.doi.gov)

List of Subjects in 43 CFR Part 10

Administrative practice and procedure, Graves, Hawaiian Natives, Historic preservation, Indians-claims, Museums, Reporting and record keeping requirements.

In consideration of the foregoing, 43 CFR Subtitle A is proposed to be amended as follows.

## **§10.11 Disposition of culturally unidentifiable human remains.**

(a) *General.* This section carries out section 8(c)(5) of the Act regarding the process for disposition of culturally unidentifiable human remains. Culturally unidentifiable human remains are human remains for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified pursuant to the inventory process outlined at §10.9. Nothing in this regulation shall be construed to limit the authority of any Federal agency or museum to transfer control of culturally unidentifiable human remains or associated funerary objects to Indian tribes or Native Hawaiian organizations.

(b) *List of culturally unidentifiable human remains and associated funerary objects.* (1) Within [xxx] of issuance of this final rule, the Secretary of the Interior must provide the review committee with a list of culturally unidentifiable human remains and associated funerary objects that are in the possession or control of Federal agencies and museums. This list must be derived from the inventories submitted by each Federal agency and museum pursuant to §10.9(e)(6) and §10.13.

(2) Upon the review and approval of the review committee, the Secretary of the Interior must make the list of culturally unidentifiable human remains and associated funerary objects accessible to Indian tribes, Native Hawaiian organizations, nonfederally recognized Indian groups, museums, and Federal agencies.

(c) *Consultation.* (1) Upon receipt of a request for disposition of culturally unidentifiable human remains and associated funerary objects from an Indian tribe or Native Hawaiian organization, the museum and Federal agency must initiate consultation with Indian tribe officials and traditional religious leaders:

(i) From whose tribal lands the human remains and associated funerary objects originated;

(ii) From whose aboriginal lands the human remains and associated funerary objects originated;

(iii) From Indian tribes and Native Hawaiian organizations with a cultural relationship to the region in which the human remains and associated funerary objects originated or, for human remains and associated funerary objects lacking geographic affiliation, a cultural relationship to the region in which the museum or Federal agency is located.

(2) Consultation may be initiated with a letter, but should be followed up by telephone or face-to-face dialogue.

(3) The museum or Federal agency official must provide the following information in writing to all of the Indian tribes and Native Hawaiian organizations that are being consulted:

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

(ii) a list of any nonfederally recognized Indian groups that are known to have a relationship of shared group identity with the particular human remains and associated funerary objects; and

(iii) an indication that the inventory and additional documentation regarding the particular human remains and associated funerary objects will be supplied upon request.

(d) *Disposition of culturally unidentifiable human remains and associated funerary objects.* (1) A Federal agency or museum may transfer control of culturally unidentifiable human remains and associated funerary objects voluntarily to, with priority given in the order listed:

(i) the Indian tribe or Native Hawaiian organization on whose tribal land the human remains or associated funerary objects were recovered;

(ii) the Indian tribe that is recognized as aboriginally occupying the area in which the human remains and associated funerary objects were recovered. Aboriginal occupation may be recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or a treaty, Act of Congress, or Executive Order; or

(iii) the Indian tribes and Native Hawaiian organizations with a cultural relationship to the region in which the human remains and associated funerary objects were recovered or, for human remains and associated funerary objects lacking geographic affiliation, a cultural relationship to the region in which the museum or Federal agency is located.

(2) A Federal agency or museum may transfer control of culturally unidentifiable human remains and associated funerary objects to a nonfederally recognized Indian group, or reinter culturally unidentifiable human remains and associated funerary objects according to State or other law, upon receipt of a recommendation from the Secretary. Such recommendations will only be considered following the written notification of all Indian tribes and Native Hawaiian organizations stipulated in subsection (d)(1).

(3) A Federal agency or museum may choose to retain possession or control of culturally unidentifiable human remains and associated funerary objects.

(e) *Notification.* (1) Disposition of culturally unidentifiable human remains and associated funerary objects pursuant to subsection (d)(1) or (d)(2) may not occur prior to publication of a notice of inventory completion in the Federal Register as described in §10.9.

(2) Within three years of issuance of this final rule, museums and Federal agencies that choose to retain possession or control of culturally unidentifiable human remains and associated funerary objects pursuant to subsection (d)(3) must notify all Indian tribes and Native Hawaiian organizations stipulated in subsection (d)(1) of their decision. This notification must specify the number the human remains and associated funerary objects that will be retained. A copy of this notification must also be provided to the Manager, National NAGPRA Program, who will publish a summary of information from these notifications in the Federal Register.

(f) *Disputes.* Any person who wishes to contest actions taken by museums or Federal agencies regarding the disposition of culturally unidentifiable human remains and associated funerary objects is encouraged to do so through informal negotiations to achieve a fair resolution of the matter. The Review Committee may facilitate the informal resolution of such disputes that are not resolved by good faith negotiation pursuant to §10.17. In addition, the United States District Courts have jurisdiction over any action brought that alleges a violation of the Act.

43 CFR 10.9(e)(5). Add to the end of the subsection: "Such documentation should be considered a public record except as exempted under relevant laws, such as the Freedom of Information Act [5 U.S.C. 552] and the Privacy Act [5 U.S.C. 552a]. Neither a request for such documentation nor any provisions of these regulations may be construed as authorizing the initiation of new scientific studies of such human remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects."

43 CFR 10.9(e)(6). Delete everything after the first sentence.

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Assistant Secretary for Fish and Wildlife and Parks

Date