



Billing Code 4312-EJ

DEPARTMENT OF THE INTERIOR

Office of the Secretary of the Interior

43 CFR Part 10

[NPS-WASO-NAGPRA-11600; PPWOCRADN0-PCU00RP14.550000]

RIN 1024-AD99

Native American Graves Protection and Repatriation Act Regulations

AGENCY: Office of the Secretary, Interior.

ACTION: Final rule.

SUMMARY: This final rule revises regulations implementing the Native American Graves Protection and Repatriation Act for accuracy and consistency.

DATES: The rule is effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Background

The Secretary of the Interior (Secretary) is responsible for implementation of the Native American Graves Protection Repatriation Act (NAGPRA or Act) (25 U.S.C. 3001 *et seq.*), including the issuance of appropriate regulations implementing and interpreting its provisions. NAGPRA addresses the rights of lineal descendants, Indian tribes, and

Native Hawaiian organizations in certain Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony. Pursuant to Section 13 of NAGPRA (25 U.S.C. 3011), the Department of the Interior (Department) published the initial rules to implement NAGPRA in 1995 (60 FR 62158, December 4, 1995), which have been codified at 43 CFR Part 10. Subsequently, the Department published additional rules concerning:

- Civil penalties (68 FR 16354, April 3, 2003);
- Future applicability (72 FR 13189, March 21, 2007); and
- Disposition of culturally unidentifiable human remains (75 FR 12378, March 15, 2010).

Since 1995, minor inaccuracies or inconsistencies in 43 CFR Part 10 have been identified by or brought to the attention of the Department. On April 18, 2012, we published in the **Federal Register** proposed amendments to provide for factual accuracy and consistency throughout 43 CFR Part 10 by revising 43 CFR 10.2(c)(1), 10.2(c)(3), 10.4(d)(1)(iii), 10.5(b)(1)(i), 10.6(a)(2), 10.6(a)(2)(iii)(B), 10.8(e), 10.10 (a)(1)(ii)(B), 10.10(b)(1)(ii)(B), 10.10(c)(2), 10.10(g), 10.11(b)(2)(ii), 10.12(c), 10.12 (i)(3), 10.12(j)(1), 10.12(j)(6)(i), 10.12(k)(1), 10.12(k)(3), 10.13(c)(2), 10.15(c)(1), 10.15 (c)(1)(ii), Appendix A, and Appendix B.

Summary of and Responses to Comments

The proposed rule to revise 43 CFR Part 10 for the purposes of accuracy and consistency was published in the **Federal Register** on April 18, 2012 (77 FR 23196). Public comment was invited for a 60-day period, ending June 18, 2012. The proposed rule also was posted on the National NAGPRA Program Web site. The Native American

Graves Protection and Repatriation Review Committee commented on the proposed rule at a public meeting on May 10, 2012. In addition, 16 written comments on the proposed minor amendments, contained in 19 separate submissions, were received during the comment period from 13 Indian tribes, 2 Indian organizations, 3 Native Hawaiian organizations, 1 museum, 1 museum and scientific organization, 1 Federal entity, 1 individual member of the public, and 1 other organization. All relevant comments on the proposed rule were considered during the final rulemaking. The comments we received that went beyond the scope of the proposed rule will be taken into account during any subsequent review and rulemaking regarding 43 CFR Part 10.

Authority

Comment 1: Ten commenters stated that the proposed rule revises the authority citation for Part 10, and that they oppose this purported revision.

Our Response: The proposed rule did not intend to revise the authority citation for Part 10. Based on the promulgation of 43 CFR 10.11 and related amendments in 2010 (75 FR 12378, March 15, 2010), the authority citation for Part 10 remains 25 U.S.C. 3001 *et seq.*, 16 U.S.C. 470dd(2), and 25 U.S.C. 9, and it is explicitly stated as such in this final rule.

The Mailing Address of the National NAGPRA Program

Comment 2: Seven commenters recommended that the Main Interior Building address currently in the regulations be retained as the mailing address for the National NAGPRA Program because that address is unlikely to change and because access to the internet for purposes of obtaining the current, direct mailing address of the National

NAGPRA Program is not easily or universally accessible, particularly in rural, tribal communities.

Our Response: The rule revises the mailing address for the National NAGPRA Program in §§ 10.2(c)(3), 10.12(c), and 10.12(i)(3) by removing an indirect address and replacing it with the website address where the National NAGPRA Program's current, direct mailing address can always be found. The intent of this revision is to improve communications with the National NAGPRA Program. Communications that are not received in a timely manner could adversely affect the treatment of a NAGPRA grant request, a response to a NAGPRA civil penalty notice, or a request to the Review Committee. By referring the public to the National NAGPRA Program website, the address of the National NAGPRA Program will remain current. Furthermore, the Department believes that reducing the risk of untimely communications outweighs the inconvenience of limitations on access to the Internet, as any change in the National NAGPRA Program's address will be infrequent. Telephone access to the National NAGPRA Program for inquiries related to the National NAGPRA Program's mailing address is also always available.

Terminology

Comment 3: Nine commenters recommended that the term "human remains" not be shortened to "remains" and that "associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony" not be shortened to "objects."

Our Response: The proposed rule shortened the term "human remains" to "remains" and shortened "associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony" to "objects" in §§ 10.4(d)(1)(iii), 10.5

(b)(1)(i), 10.6(a)(2)(iii)(B), 10.8(e), 10.10(c)(2), and 10.15(c)(1)(i). Although the Department believes that, in context, “remains” clearly means “human remains” and “objects” clearly means “associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony,” and although NAGPRA uses these shortened forms as well (see 25 U.S.C. 3002 (a)), we agree with these comments and the final rule does not shorten these terms, but instead uses the terms “human remains,” “associated funerary objects,” unassociated funerary objects,” “sacred objects,” and “objects of cultural patrimony” as appropriate.

The Secretary of the Interior’s Authority to Delegate the Secretary’s Responsibilities under NAGPRA

Comment 4: Seven commenters stated that the proposed rule revises the Secretary of the Interior’s authority to delegate the Secretary’s responsibilities under NAGPRA.

Our Response: The rule is not intended to revise the Secretary of the Interior’s existing authority to delegate the Secretary’s responsibilities under NAGPRA.

Comment 5: Seven commenters recommended that responsibilities throughout 43 CFR Part 10 remain with political appointees to ensure that these duties are supervised at the highest level in the Department.

Our Response: Consistent with Departmental policy, the Secretary delegated to the Manager of the National NAGPRA Program the responsibility for managing the operations of the National NAGPRA Program. Likewise, the Secretary delegated to the National NAGPRA Program the responsibility for providing staff to support the Assistant Secretary for Fish and Wildlife and Parks, who has the delegated responsibility

(in consultation with the Office of the Solicitor) to investigate allegations of a museum's failure to comply with the requirements of NAGPRA and assess civil penalties against museums that have failed to comply with NAGPRA. In 2005, the Department amended Part 10 to reflect the Secretary's delegations of authority to the Manager of the National NAGPRA Program and the Assistant Secretary for Fish and Wildlife and Parks (70 FR 57177, September 30, 2005). The revisions to §§ 10.12(c) and 10.12(i)(3) reflect the Secretary's delegation to the National NAGPRA Program of staffing responsibilities on civil penalties.

Comment 6: One commenter recommended that the Secretary order the Assistant Secretary for Fish and Wildlife and Parks to consult with the Assistant Secretary for Policy, Management, and Budget or the Director of the Office of Native Hawaiian Relations on regulations to carry out NAGPRA, in addition to the Assistant Secretary for Indian Affairs.

Our Response: The Secretary's discretion to order the Assistant Secretary for Fish and Wildlife and Parks to consult with the Assistant Secretary for Policy, Management, and Budget or the Director of the Office of Native Hawaiian Relations on regulations to carry out NAGPRA is beyond the scope of this rule.

Rights and Claims of Lineal Descendants in Cultural Items Excavated or Discovered on Federal or Tribal Lands after November 16, 1990

Comment 7: One commenter stated that the amendments proposed in §§ 10.5(b)(1)(i) and 10.6(a)(2) constructively diminish the rights and claims of lineal descendants to cultural items, and require a more thorough examination and discussion

than the comment period allowed. The commenter thus recommended that the amendment of those sections be stayed.

Our Response: NAGPRA excludes lineal descendants from the list of possible owners of sacred objects or objects of cultural patrimony excavated or discovered on Federal or tribal lands after November 16, 1990 (25 U.S.C. 3002 (a)). The current regulation at § 10.5(b)(1)(i), by contrast, includes lineal descendants among the possible owners of these two categories of cultural item when they are, or might be, excavated or discovered on Federal lands after November 16, 1990. The provision in the statute governs. The revision to § 10.5(b)(1)(i) in this rule makes the regulation consistent with the statute. NAGPRA also provides that ownership or control of human remains and associated funerary objects excavated or discovered on Federal or tribal lands after November 16, 1990 is, in the first instance, with the lineal descendants of the deceased Native American irrespective of the assertion of a claim (25 U.S.C. 3002 (a)). The current regulation at § 10.6(a)(2), by contrast, makes a lineal descendant's right to control the disposition of such human remains and associated funerary objects contingent on the lineal descendant making a claim. The revision to § 10.6(a)(2) in this rule makes the regulation consistent with the statute.

Typographical Error

Comment 8: One commenter pointed out a typographical error in the spelling of “NAGPRA” in the proposed amendment of § 10.2(c)(3).

Our Response: This typographical error is corrected in the final rule.

Section 10.2(c)(1) Definition of “Secretary”

The proposed rule will amend the definition of *Secretary* to reflect Departmental delegations of the Secretary of the Interior’s authority under NAGPRA.

Comment 9: One commenter stated that the Secretary could possibly delegate a single responsibility under NAGPRA to multiple designees, and thus recommended that the words “a designee” be changed to “designees.”

Our Response: The rule does not expand or limit the Secretary’s authority to delegate NAGPRA responsibilities. The words “a designee” mean any designee to whom the Secretary delegates any of the Secretary’s responsibilities under NAGPRA.

Section 10.4(d)(1)(iii) Inadvertent Discoveries

In order to facilitate the process of consultation with known lineal descendants of a deceased Native American whose human remains and associated funerary objects were recovered from Federal or tribal lands after November 16, 1990, as required under § 10.5 (b)(1)(i) of the current regulations, the rule will add such known lineal descendants to the list of parties to be notified of an inadvertent discovery of human remains and associated funerary objects.

Comment 10: Five commenters asserted that the proposed rule suggests that a lineal descendant be notified of the inadvertent discovery of cultural items that are not human remains and associated funerary objects. Seven commenters asserted that the proposed rule implies that lineal descendants can be “culturally affiliated” with Native American human remains and funerary objects, even though cultural affiliation is a function of shared group identity and not kinship.

Our Response: The Department believes that both the current regulations and this rule are clear in requiring that the parties to be notified of an inadvertent discovery are only those who have, or are likely to have, ownership or control of the inadvertently discovered cultural items in question. NAGPRA clearly states that ownership or control in lineal descendants of cultural items recovered from Federal or tribal lands after November 16, 1990 is restricted to human remains and associated funerary objects (25 U.S.C. 3002 (a)(1)); there is no requirement that lineal descendants of a deceased Native American individual be notified of the inadvertent discovery of an object belonging to any category of cultural item other than human remains and associated funerary objects. We have added text to the rule to clarify that the required notice to known lineal descendants of an inadvertent discovery is limited to human remains and associated funerary objects.

Comment 11: One commenter suggested changing the second sentence in the proposed rule from “this notification must be by telephone with written confirmation” to “this notification must be by telephone followed by written confirmation.”

Our Response: This comment goes beyond the scope of this rule because there was no change proposed for that sentence.

Section 10.5(b)(1)(i) Consultation

The rule revises the subject-matter of a consultation with known lineal descendants of a deceased Native American individual when an activity on Federal lands after November 16, 1990 has resulted in, or is likely to result in, the excavation or discovery of cultural items. As NAGPRA excludes lineal descendants from the list of possible owners of sacred objects or objects of cultural patrimony excavated or

discovered on Federal lands after November 16, 1990 (25 U.S.C. 3002 (a)), the rule limits the scope of the required consultation with a known lineal descendant of a deceased Native American individual to human remains and associated funerary objects. Thus, the revision to § 10.5(b)(1)(i), makes the regulation consistent with the statute.

Comment 12: Seven commenters proposed retaining the language in the current regulation because not consulting with a known lineal descendant of an individual who owned a sacred object that has been recovered from Federal lands after November 16, 1990, on the disposition of such object might result in a taking of property by the United States without compensation, in violation of the Fifth Amendment of the U.S. Constitution.

Our Response: Under NAGPRA, Congress has provided that the ownership of a specific ceremonial object needed by a traditional Native American religious leader for the practice of traditional Native American religion by present-day adherents, which is recovered from Federal land after November 16, 1990, is in the Indian tribe or Native Hawaiian organization having the closest cultural affiliation with the object and stating a claim for such object (25 U.S.C. 3002(a)(2)(B)). The Department believes that, under the criteria in Executive Order 12360, this rule does not have significant takings implications.

Section 10.6(a)(2) Custody

Under NAGPRA, the right of control of the disposition of Native American human remains and associated funerary objects recovered from Federal or tribal lands after November 16, 1990, is automatically in the lineal descendants of the deceased Native American individual whenever such lineal descendants can be ascertained (25 U.S.C. 3002(a)). Such right of control is not claim-dependent. The rule eliminates the

requirement in the current regulation that lineal descendants of a Native American individual, whose human remains and associated funerary objects were recovered from Federal or tribal lands after November 16, 1990, state a claim for such human remains and funerary objects. Thus, the revision to § 10.6(a)(2), makes the regulation consistent with the statute.

Comment 13: Seven commenters recommended that a provision be included to allow for the disposition to Indian tribes or Native Hawaiian organizations of human remains and associated funerary objects where a known lineal descendant declines to exercise the right of control of the disposition of the human remains and associated funerary objects of the deceased Native American.

Our Response: As noted above, NAGPRA only allows a tribe or Native Hawaiian organization to have custody over human remains and associated funerary objects of a deceased Native American if a lineal descendant cannot be ascertained. Congress did not provide for transfer of control upon failure of a lineal descendant to “exercise a right of control,” and consideration of such is beyond the scope of this rulemaking.

Comment 14: Five commenters asserted that the proposed rule wrongly suggests that lineal descendants must be located concerning the ownership or control of cultural items other than the human remains and associated funerary objects of a deceased Native American.

Our Response: The rule, read together with § 10.6(a)(1) and section 3(a) of NAGPRA (25 U.S.C. 3002(a)), requires that lineal descendants be identified only with respect to the right of control of the disposition of human remains and associated funerary objects of a deceased Native American individual. We have added text to the rule to

clarify that, with respect to recoveries from Federal lands, the priority of right of control of human remains and associated funerary objects defaults to a culturally affiliated Indian tribe or Native Hawaiian organization only where the lineal descendants of the deceased Native American cannot be ascertained, but that, with respect to other cultural items recovered from Federal lands, the priority of ownership is, in the first instance, in the culturally affiliated Indian tribe or Native Hawaiian organization.

Section 10.8(e) Using Summaries to Determine Affiliation

Lineal descendants of a deceased Native American whose unassociated funerary objects or individually-owned sacred object are in a museum or Federal agency collection have standing to request the repatriation of these cultural items. The rule replaces the word “individuals” used to denote such lineal descendants with the statutory term “lineal descendants.”

Comment 15: Five commenters asserted that the proposed rule wrongly suggests that lineal descendants may be affiliated with objects of cultural patrimony.

Our Response: The rule merely changes the word “individuals” to “lineal descendants.” Even under the current regulations, “individuals” are not eligible to be affiliated with objects of cultural patrimony. Nonetheless, we have added text to the rule to clarify that the information documented in the summary is used to determine, “as appropriate,” the lineal descendants, Indian tribes, and Native Hawaiian organizations with which the cultural items in the summary are affiliated.

Section 10.10(g)(2)(ii) The Review Committee’s Responsibility for Recommending Specific Actions for Developing a Process for the Disposition of Culturally Unidentifiable Human Remains Not Now Covered by § 10.11 of these Regulations

Under NAGPRA, Congress tasked the Secretary with promulgating regulations to carry out the Act (25 U.S.C. 3011), and assigned the Review Committee the responsibility of consulting with the Secretary in the development of those regulations (25 U.S.C. 3006 (c)(7)), including recommending specific actions for developing a process for the disposition of culturally unidentifiable Native American human remains that are in the possession or control of each Federal agency and museum (25 U.S.C. 3006 (c)(5)). A rule on the disposition of culturally unidentifiable human remains to Indian tribes and Native Hawaiian organizations from whose tribal or aboriginal lands the human remains were removed was promulgated in 2010, and is presently codified at 43 CFR 10.11. This rule clarifies that the Review Committee still is responsible for recommending specific actions for developing a process for the disposition of such culturally unidentifiable Native American human remains not addressed by the 2010 rule.

Comment 16: Two commenters question why, under the proposed rule, the Review Committee is charged with recommending specific actions for developing a process for the disposition of culturally unidentifiable Native American human remains not addressed by the 2010 rule. One of these commenters recommends that the current rule at § 10.10(g) be removed entirely. The other commenter stated that there are problems inherent in § 10.11, that these problems have yet to be addressed, and that not addressing these problems has left the entire process of disposition of culturally unidentifiable human remains unresolved. The commenter urged the Review Committee not to issue further recommendations on the disposition of culturally unidentifiable human remains until these difficulties are resolved.

Our Response: Under NAGPRA, the Review Committee has the authority and the responsibility to recommend specific actions for developing a process for the disposition of any culturally unidentifiable Native American human remains that are in the possession or control of each Federal agency and museum (25 U.S.C. 3006(c)(5)). In the 2010 rule, the Secretary incorporated Review Committee recommendations with respect to the disposition of certain categories of culturally unidentifiable human remains. As for the disposition of culturally unidentifiable human remains not addressed in the 2010 rule, the Review Committee, by statute, is still responsible for recommending specific actions. Also under NAGPRA, the Secretary has the authority to assign the Review Committee any function related to any of the Review Committee's responsibilities (25 U.S.C. 3006 (c)(8)), which may include recommending specific actions for developing a process for the disposition of culturally unidentifiable Native American human remains not addressed by the 2010 rule.

Changes from the Proposed Rule

Based on the preceding comments and responses, the drafters have made the following changes to the proposed rule language:

- Section 10.2(c)(iii). We have corrected a typographical error in the spelling of “NAGPRA.”
- Section 10.4(d)(1)(iii). We have used, as appropriate, the specific terms for the categories of “cultural items” used in NAGPRA and the NAGPRA term “cultural items.” In addition, we have added text to clarify that the required notice to known lineal descendants of an inadvertent discovery is limited to human remains and associated funerary objects. We have also explicitly stated that such

notification is to “known lineal descendants of a deceased Native American individual whose human remains and associated funerary objects were inadvertently discovered.”

- Section 10.5(b)(1)(i). We have used, as appropriate, the specific terms for the categories of “cultural items” used in NAGPRA.
- Section 10.6(a)(2). We have added text to clarify that, with respect to recoveries from Federal lands, the priority of right of control of human remains and associated funerary objects defaults to a culturally affiliated Indian tribe or Native Hawaiian organization only where the lineal descendants of the deceased Native American cannot be ascertained, but that, with respect to other cultural items recovered from Federal lands, the priority of ownership is, in the first instance, in the culturally affiliated Indian tribe or Native Hawaiian organization.
- Section 10.6(a)(2)(iii)(B). We have used, as appropriate, the specific terms for the categories of “cultural items” used in NAGPRA and the NAGPRA term “cultural items.”
- Section 10.8(e). We have used, as appropriate, the specific terms for the categories of “cultural items” used in NAGPRA. In addition, we have added text to clarify that the information documented in the summary is used to determine, “as appropriate”, the lineal descendants, Indian tribes, and Native Hawaiian organizations with which the cultural items in the summary are affiliated.
- Section 10.10(c)(2). We have used, as appropriate, the specific terms for the categories of “cultural items” used in NAGPRA and the NAGPRA term “cultural items.”

- Section 10.15(c)(1)(i). We have used, as appropriate, the specific terms for the categories of “cultural items” used in NAGPRA.

Compliance with Other Laws, Executive Orders and Department Policy

Regulatory Planning and Review (Executive Orders 12866 and 13563).

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act.

The Department of the Interior certifies that this rule 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:

- a. Does not have an annual effect on the economy of \$100 million or more.
- b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local or tribal government agencies, or geographic regions.
- c. Does not 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 (Executive Order 12630).

Under the criteria in section 2 of Executive Order 12630, this rule does not have significant takings implications. A takings implication assessment is not required. No taking of property will occur as a result of this rule.

Federalism (Executive Order 13132).

Under the criteria in section 1 of Executive Order 13132, this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement. A Federalism summary impact statement is not required.

Civil Justice Reform (Executive Order 12988).

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation with Indian Tribes (Executive Order 13175 and Department Policy).

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and tribal sovereignty. In accordance with the Presidential Memorandum entitled “Government to Government Relations with Native American Tribal Governments” (59 FR 22951, April 29, 1994); Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, Nov. 9, 2000); the President’s Memorandum for the Heads of Executive Departments and Agencies on the Implementation of Executive Order 13175 (Nov. 5, 2009); and the Secretary of the Interior’s Order No. 3317 – Department of the Interior Policy on Consultation With Indian Tribes (Dec. 1, 2011); we have consulted with federally recognized Indian tribes on this rule both before publication of the proposed rule and during the public comment period. Tribal comments have been addressed to ensure this rule only amends the 43 CFR Part 10 regulations to correct minor inaccuracies or inconsistencies.

Paperwork Reduction Act.

The Office of Management and Budget has approved the information collection requirements in 43 CFR part 10 and assigned OMB Control Number 1024-0144. This rule does not contain any new information collections that require OMB approval under the Paperwork Reduction Act. An agency may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act.

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 is not required because the rule is covered by a categorical exclusion under 43 CFR 46.210(i): “Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.” We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under the National Environmental Policy Act.

Effects on the Energy Supply (Executive Order 13211).

This rule is not a significant energy action under the definition in Executive Order 13211. A statement of Energy Effects is not required.

Drafting Information

The proposed rule and this final rule were prepared by staff of the National NAGPRA Program, National Park Service; Office of Regulations and Special Park Uses, National Park Service; and Office of the Solicitor, Division of Parks and Wildlife and Division of Indian Affairs, Department of the Interior. This final rule was prepared in consultation with the Native American Graves Protection and Repatriation Review Committee under NAGPRA (25 U.S.C. 3006(c)(7)).

List of Subjects in 43 CFR Part 10

Administrative practice and procedure, Hawaiian Natives, Historic preservation, Indians-claims, Indians-lands, Museums, Penalties, Public lands, Reporting and recordkeeping requirements.

In consideration of the foregoing, the NPS amends 43 CFR Part 10 as follows:

PART 10—NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REGULATIONS

1. The authority for Part 10 continues to read as follows:

Authority: 25 U.S.C. 3001 *et seq.*, 16 U.S.C. 470dd(2), 25 U.S.C. 9.

2. Amend § 10.2 by revising paragraphs (c)(1) and (c)(3) to read as follows:

§ 10.2 Definitions.

* * * * *

(c) * * *

(1) *Secretary* means the Secretary of the Interior or a designee.

* * * * *

(3) *Manager, National NAGPRA Program* means the official of the Department of the Interior designated by the Secretary as responsible for administration of matters relating to this part. Communications to the Manager, National NAGPRA Program should be sent to the mailing address listed on the National NAGPRA Contact Information Web site, <http://www.nps.gov/nagpra/CONTACTS/INDEX.HTM>.

* * * * *

3. Amend § 10.4 by revising paragraph (d)(1)(iii) to read as follows:

§ 10.4 Inadvertent discoveries.

* * * * *

(d) * * *

(1) * * *

(iii) Notify any known lineal descendants of a deceased Native American individual whose human remains and associated funerary objects were discovered of such discovery, and, with respect to a discovery of human remains, associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony, notify the Indian tribes or Native Hawaiian organizations likely to be culturally affiliated with the cultural items, the Indian tribe or Native Hawaiian organization that aboriginally occupied the area, and any other Indian tribe or Native Hawaiian organization known to have a cultural relationship to the cultural items. This notification must be by telephone with written confirmation and must include information about the kinds of human remains, associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony, their condition, and the circumstances of their discovery;

* * * * *

4. Amend § 10.5 by revising paragraph (b)(1)(i) to read as follows:

§ 10.5 Consultation.

* * * * *

(b) * * *

(1) * * *

(i) Any known lineal descendants of the deceased Native American individual whose human remains and associated funerary objects have been or are likely to be excavated intentionally or discovered inadvertently; and

* * * * *

5. Amend § 10.6 by revising the introductory text of paragraph (a)(2) and paragraph (a)(2)(iii)(B) to read as follows:

§ 10.6 Custody.

(a) * * *

(2) When a lineal descendant of a deceased Native American individual cannot be ascertained with respect to the human remains and associated funerary objects, and with respect to unassociated funerary objects, sacred objects, and objects of cultural patrimony:

* * * * *

(iii) * * *

(B) If a preponderance of the evidence shows that a different Indian tribe or Native Hawaiian organization has a stronger cultural relationship with the human remains, associated funerary objects, unassociated funerary objects, sacred objects, or

objects of cultural patrimony, in the Indian tribe or Native Hawaiian organization that has the strongest demonstrated relationship with the cultural items.

* * * * *

6. Amend § 10.8 by revising the introductory text of paragraph (e) to read as follows:

§ 10.8 Summaries.

* * * * *

(e) *Using summaries to determine affiliation.* Museum and Federal agency officials must document in the summary the following information. They must use this information in determining, as appropriate, the lineal descendants of a deceased Native American individual with whom unassociated funerary objects and sacred objects are affiliated, and the Indian tribes and Native Hawaiian organizations with which unassociated funerary objects, sacred objects, or objects of cultural patrimony are affiliated:

* * * * *

7. Amend § 10.10 by revising paragraphs (a)(1)(ii)(B), (b)(1)(ii)(B), (c)(2), and (g) to read as follows:

§ 10.10 Repatriation.

(a) * * *

(1) * * *

(ii) * * *

(B) By presentation of a preponderance of the evidence by a requesting Indian tribe or Native Hawaiian organization under section 7(a)(4) of the Act; and

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(B) Has been shown by a preponderance of the evidence presented by a requesting Indian tribe or Native Hawaiian organization under section 7(a)(4) of the Act; and

* * * * *

(c) * * *

(2) Circumstances where there are multiple requests for repatriation of human remains, associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony and the museum or Federal agency, after complying with this part, cannot determine by a preponderance of the evidence which competing requesting party is the most appropriate claimant. In these circumstances, the museum or Federal agency may retain the cultural items in question until the competing requesting parties agree upon the appropriate recipient or the dispute is otherwise resolved pursuant to these regulations or by a court of competent jurisdiction; or

* * * * *

(g) *Culturally unidentifiable human remains.* If the cultural affiliation of human remains cannot be established under this part, the human remains must be considered culturally unidentifiable.

(1) Museum and Federal agency officials must report the inventory information regarding these human remains in their holdings to the Manager, National NAGPRA Program, who will send this information to the Review Committee.

(2) The Review Committee will:

(i) Compile an inventory of culturally unidentifiable human remains in the possession or control of each museum and Federal agency; and

(ii) Recommend to the Secretary specific actions for disposition of any human remains not already addressed in § 10.11.

8. Amend § 10.11 by revising paragraph (b)(2)(ii) to read as follows:

§ 10.11 Disposition of culturally unidentifiable human remains.

* * * * *

(b) * * *

(2) * * *

(ii) From whose aboriginal lands the human remains and associated funerary objects were removed. Aboriginal occupation for purposes of this section may be recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or by a treaty, Act of Congress, or Executive Order.

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9. Amend § 10.12 by:

A. Revising paragraph (c).

B. Revising paragraph (i)(3).

C. Adding introductory text to paragraph (j).

D. Revising paragraph (j)(1), adding introductory text to paragraph (j)(6), and revising paragraph (j)(6)(i).

E. Revising paragraphs (k)(1) and (k)(3).

The revisions and additions read as follows:

§ 10.12 Civil penalties.

* * * * *

(c) *How to notify the Secretary of a failure to comply.* Any person may file an allegation of failure to comply. Allegations are to be sent to the NAGPRA Civil Penalties Coordinator, National NAGPRA Program, at the mailing address listed on the National NAGPRA Contact Information website,

http://www.nps.gov/nagpra/CONTACTS/INDEX.HTM. The allegation must be in writing, and should:

(1) Identify each provision of the Act with which there has been a failure to comply by a museum;

(2) Include facts supporting the allegation;

(3) Include evidence that the museum has possession or control of Native American cultural items; and

(4) Include evidence that the museum receives Federal funds.

* * * * *

(i) * * *

(3) *File a petition for relief.* You may file a petition for relief within 45 calendar days of receiving the notice of assessment. A petition for relief is to be sent to the NAGPRA Civil Penalties Coordinator, National NAGPRA Program, at the mailing

address listed on the National NAGRPA Contact Information website,
<http://www.nps.gov/nagpra/CONTACTS/INDEX.HTM>. Your petition may ask the
Secretary not to assess a penalty or to reduce the penalty amount. Your petition must:

- (i) Be in writing and signed by an official authorized to sign such documents; and
- (ii) Fully explain the legal or factual basis for the requested relief.

* * * * *

(j) *How you request a hearing.* You may file a written, dated request for a hearing on a notice of failure to comply or notice of assessment with the Departmental Cases Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 405 South Main Street, Suite 400, Salt Lake City, UT 84111. You must also serve a copy of the request on the Solicitor of the Department of the Interior personally or by registered or certified mail (return receipt requested) at the address specified in the notice.

(1) Your request for a hearing must:

- (i) Include a copy of the notice of failure to comply or the notice of assessment;
- (ii) State the relief sought;
- (iii) State the basis for challenging the facts used as the basis for determining the

failure to comply or fixing the assessment; and

(iv) State your preferred place and date for a hearing.

* * * * *

(6) *Hearing Administration.* Hearings must take place following the procedures in 43 CFR Part 4, Subparts A and B.

(i) The administrative law judge has all powers accorded by law and necessary to preside over the parties and the proceedings and to make decisions under 5 U.S.C. 554-557.

* * * * *

(k) * * *

(1) Either you or the Secretary may appeal the decision of an administrative law judge by filing a Notice of Appeal. Send your Notice of Appeal to the Interior Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 800 North Quincy Street, Suite 300, Arlington, VA 22203, within 30 calendar days of the date of the administrative law judge's decision. The notice must be accompanied by proof of service on the administrative law judge and the opposing party.

* * * * *

(3) You may obtain copies of decisions in civil penalty proceedings instituted under the Act by sending a request to the Interior Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 800 North Quincy Street, Suite 300, Arlington, VA 22203. Fees for this service are established by the director of that office.

* * * * *

10. Amend § 10.13 by revising paragraph (c)(2) to read as follows:

§ 10.13 Future applicability.

* * * * *

(c) * * *

(2) The list of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs is published in the **Federal Register** as required by section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a-1 (2006)).

* * * * *

11. In § 10.15, revise paragraph (c)(1) to read as follows:

§ 10.15 Limitations and remedies.

* * * * *

(c) * * *

(1) A person’s administrative remedies are exhausted only when the person has filed a written claim with the responsible Federal agency and the claim has been duly denied under this part. This paragraph applies to both:

(i) Human remains, associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony subject to Subpart B of this part; and

(ii) Federal collections subject to Subpart C of this part.

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Appendices A and B to Part 10 [Removed]

12. Remove Appendices A and B to Part 10.

Dated: May 1, 2013

Rachel Jacobson
Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

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