

DEPARTMENT OF THE INTERIOR

Office of the Secretary of the Interior

43 CFR Part 10

[NPS-WASO-NAGPRA-19087; PPWOCRADN0-PCU00RP14.R50000]

RIN 1024-AE00

Disposition of Unclaimed Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony

AGENCY: Office of the Secretary, Interior.

ACTION: Final rule.

SUMMARY: This final rule provides procedures for the disposition of unclaimed human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated or discovered on, and removed from, Federal lands after November 16, 1990. It implements section 3(b) of the Native American Graves Protection and Repatriation Act.

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

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SUPPLEMENTARY INFORMATION:

Background

The Secretary of the Interior (Secretary) is responsible for implementation of the Native American Graves Protection and 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 human remains, funerary objects, sacred objects, and objects of cultural patrimony, for which the Act uses the broader term “cultural items” (25 U.S.C. 3001(3)). 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); those rules are now 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).

Section 3(b) of the Act (25 U.S.C. 3002 (b)) explicitly directs the Secretary to publish regulations for the disposition of unclaimed cultural items excavated or discovered on, and removed from, Federal lands after November 16, 1990. When we published the NAGPRA regulations on December 4, 1995, we reserved 43 CFR 10.7 for this purpose.

This rule is limited to Federal lands, as NAGPRA provides that ownership or control of any cultural item excavated or discovered on, and removed from, tribal land after November 16, 1990, is in either a known lineal descendant (for human remains and associated funerary objects) or in the Indian tribe from whose tribal land the cultural items were removed, and does not require the lineal descendant or the Indian tribe to make a claim for the cultural items.

Consultation regarding a proposed rule for § 10.7 began in 2005. On three separate occasions, we consulted with representatives of Indian tribes, Native Hawaiian organizations, museums, and scientific organizations. We also consulted with the Native American Graves

Protection and Repatriation Review Committee (Review Committee) during its scheduled meetings in Albuquerque, NM (November 2005); Washington, DC (April 2007); Phoenix, AZ (October 2007); and Washington, DC (November 2010).

We published a proposed rule on October 29, 2013 (78 FR 64436). Public comment was invited for a 60-day period, ending December 30, 2013. The proposed rule also was posted on the National Park Service's National NAGPRA Program website. The Review Committee commented on the record on the proposed rule at a public meeting on November 6, 2013.

Summary of and Responses to Comments on the Proposed Rule

During the comment period, we received 27 written comments on the proposed rule, contained in 20 separate submissions from 5 Indian tribes, 1 Indian organization, 1 non-federally recognized Indian group, 1 Native Hawaiian organization, 1 museum, 1 scientific organization, 3 Federal entities, 6 individual members of the public, and 1 anonymous commenter. All relevant comments on the proposed rule were considered during the final rulemaking.

Final Rule 43 CFR 10.2 Definition of "Unclaimed Cultural Items"

Comment 1: Four commenters stated that the definition of unclaimed cultural items should include the phrase "as used in § 10.7 of this part."

Our Response: The term "*unclaimed cultural items*" is used only in § 10.7 and therefore the specific reference is not needed.

Comment 2: Three commenters stated that the definition of unclaimed cultural items should be expanded and the difference between the categories of unclaimed cultural items be clarified. One of these commenters added that the definition should provide a timeframe that structures how long cultural items must be held by the Federal agency prior to being classified as unclaimed.

Our Response: We agree. In the final rule, we have revised the definition of unclaimed cultural items and clarified the difference between the categories. We have included a timeframe.

Comment 3: Four commenters stated that the definition of unclaimed cultural items imposes an inappropriate time limit on Indian tribes and Native Hawaiian organizations to make claims for cultural items. One of these commenters added that the definition assumes Federal agencies have been proactive and have provided notice to all potential claimants.

Our Response: A potential claimant may make a claim for unclaimed cultural items at any time prior to transfer or reinterment under this rule. While the rule establishes a timeframe for cultural items to become unclaimed, there is no timeline imposed for Federal agencies to transfer or to reinter cultural items. We feel the timeframes established by the definitions in this final rule strike an appropriate balance between assuring Federal agencies that the NAGPRA process will end at a certain time and granting non-claimant Indian tribes and Native Hawaiian organizations an opportunity to request the transfer of these cultural items.

Comment 4: One commenter stated that the definition of “disposition” in § 10.2(g)(5) should be changed to include disposition of unclaimed cultural items.

Our Response: We agree. In this final rule, we have added a new paragraph at §10.2(g)(5)(iv).

Comment 5: One commenter stated that a notice under § 10.6(c) is only required upon “proposed disposition,” and not upon the determination of an Indian tribe entitled to priority of custody. Therefore, publication of a notice under § 10.6(c) cannot be a determining factor in the definition of unclaimed cultural items.

Our Response: A notice under § 10.6(c) is not dependent on an actual claim but is dependent on the existence of a potential claimant. Under section 3(a) of the Act (25 U.S.C.

3002(a)), ownership or control of cultural items is transferred to the Indian tribe or Native Hawaiian organization which “upon notice, states a claim...” The notice required by § 10.6(c) precedes a claim from an Indian tribe or Native Hawaiian organization and is dependent only upon the identification of one or more Indian tribes or Native Hawaiian organizations or lineal descendants as a potential claimant. Furthermore, that notice is the only communication to the public during the disposition process. Consequently, publication of a notice under § 10.6(c) is an appropriate factor for determining when cultural items become unclaimed.

Comment 6: One commenter stated that reasonableness is not a criterion for transfer of custody under the disposition process established in § 10.6. The definition at § 10.2(h)(2)(ii) should read: “No Indian tribe with priority of custody has been identified.”

Our Response: We believe, as a general matter, that Federal agencies should use reasonable efforts in complying with the requirements of NAGPRA. In addition, section 3(a)(2)(C) of the Act (25 U.S.C. 3002 (a)(2)(C)) explicitly states that the cultural affiliation of cultural items is established using a reasonableness standard.

Final Rule § 10.7(b)(1) Federal Agencies Must Report Unclaimed Cultural Items to the Manager, National NAGPRA Program

Comment 7: One commenter stated that the term “has” is better defined by adding “possession or control” after it.

Our Response: A Federal agency does not have “possession” or “control” of cultural items that are excavated or discovered on, and removed from, Federal lands after November 16, 1990, as the terms “possession” and “control” are defined in § 10.2. Instead, the Federal agency acts as caretaker or temporary custodian for these cultural items.

Comment 8: One commenter stated that the phrase “a list of the items” should be replaced with “a list of currently held items.” The commenter also suggested that “the nature” of unclaimed items be better explained.

Our Response: The sentence introducing § 10.7(b)(1) in this final rule (previously § 10.7(a)(1)) states the unclaimed cultural items on the list are items that the Federal agency “has.” We believe that the use of the present tense in the introductory sentence makes clear that the reporting requirement refers to unclaimed cultural items currently held by the Federal agency. The required description of “the nature of the unclaimed cultural items” is the same as the current requirement in a notice under 43 CFR 10.6(c). The purpose of both documents is the same – to provide information adequate to allow lineal descendants, Indian tribes, or Native Hawaiian organizations to determine their interest in the cultural items under these regulations.

Comment 9: One commenter stated that there is nothing in the statute that allows the National NAGPRA Program to create and maintain an inventory of cultural items that have been removed from Federal lands after 1990, unclaimed or otherwise. The commenter suggested that Federal agencies should convey periodic notices of the existence of unclaimed cultural items to potential claimants but not report those items to the National NAGPRA Program.

Our Response: Section 3(b) of the Act (25 U.S.C. 3002(b)) directs the Secretary to promulgate regulations for the disposition of unclaimed cultural items in consultation with the Native American Graves Protection and Repatriation Review Committee and other interested parties. The Review Committee recommended that the National NAGPRA Program maintain a database of unclaimed cultural items. We have included the Review Committee’s recommendation in this final rule. The list of unclaimed cultural items submitted to the National NAGPRA Program promotes transparency in the disposition of unclaimed cultural items by

providing information adequate to allow lineal descendants, Indian tribes, or Native Hawaiian organizations to determine their interest in cultural items under these regulations.

Comment 10: Seven commenters stated that the list of unclaimed cultural items should include additional information. Suggestions included the specific site of removal, the specific types of cultural items, the names of those consulted on the cultural items, and any potential claimants. One of these commenters added that the list of unclaimed cultural items should identify which items have potential claimants and which items have no identified potential claimants.

Our Response: The proposed rule required that the list include a description of the place of discovery and the nature of the unclaimed cultural items, and these requirements are retained in this final rule at § 10.7(b)(1). We agree that information on consultation efforts under 43 CFR 10.5 could be useful for purposes of disposition of cultural items. In response to these comments, this final rule requires that the list include a summary of consultation efforts under § 10.5. A summary of consultation efforts inherently will include the identification of potential claimants. We have qualified that the description of the place of discovery or excavation, and removal, should generally protect any sensitive information.

Comment 11: Three commenters questioned the date of the reporting requirement for Federal agencies to submit a list of unclaimed cultural items to the National NAGPRA Program. One of these commenters added that it would be difficult for Federal agencies to track when reports were required, as cultural items might have varying reporting deadlines. Two of these commenters added that the requirement should be shortened and lists should be submitted within one year or 90 days after excavation or discovery and removal.

Our Response: By adding to the definition of unclaimed cultural items the specific circumstances under which cultural items become unclaimed in this final rule, we adjusted the dates for submitting a list of unclaimed cultural items to the Manager of the National NAGPRA Program. For those cultural items that meet the definition of unclaimed cultural items on the effective date of the regulation, the list must be submitted within one year. We feel this provides Federal agencies with sufficient time to prepare this list. For items that meet the definition of unclaimed cultural items after the effective date of the regulation, the list must be submitted within one year after the cultural items meet the definition. This allows for Federal agencies to submit lists of unclaimed cultural items at regular intervals. To simplify the reporting requirements, a Federal agency could submit a list of all unclaimed cultural items that met the definition for unclaimed cultural items during the previous year and still be compliant with the regulation.

For example, under the definition at § 10.2 (h)(2)(ii), if a Federal agency:

obtains cultural items from Federal lands on...	...and cannot reasonably identify any Indian tribes or Native Hawaiian organizations or lineal descendants as a potential claimant by...	...then a list of the unclaimed items must be submitted by...
January 19, 2016	January 19, 2018	January 19, 2019
May 23, 2016	May 23, 2018	May 23, 2019
October 16, 2016	October 16, 2018	October 16, 2019
December 5, 2016	December 5, 2018	December 5, 2019

In this example, a list submitted on January 18, 2019, of all unclaimed cultural items that met the definition during calendar year 2018 would satisfy the requirements of this final rule.

Alternately, under the definition at § 10.2 (h)(2)(i), if a Federal agency:

obtains cultural items from Federal lands on...	...and publishes a notice under § 10.6(c) after determining the lineal descendant, Indian tribe, or Native Hawaiian organization that appears to be entitled to ownership or control on...	...and no Indian tribe or Native Hawaiian organization submits a claim, or no lineal descendant responds to the notice by...	...then a list of the unclaimed items must be submitted by...
January 19, 2016	January 18, 2018	January 18, 2019	January 18, 2020
May 23, 2016	May 22, 2018	May 22, 2019	May 22, 2020
October 16, 2016	October 15, 2018	October 15, 2019	October 15, 2020
December 5, 2016	December 4, 2018	December 4, 2019	December 4, 2020

In this example, a list submitted on January 17, 2020, of all unclaimed cultural items that met the definition during calendar year 2019 would satisfy the requirements of this final rule.

Comment 12: Five commenters stated that the National NAGPRA Program should be required to post the lists submitted by Federal agencies to its website.

Our Response: The National NAGPRA Program publishes information on summaries, inventories, and notices on its website, and will publish similar information for these lists.

Final Rule § 10.7(b)(2) Federal Agencies Must Care for Unclaimed Cultural Items Consistent with the Federal Curation Regulations at 36 CFR Part 79

Comment 13: Seven commenters requested an expansion of the language in the proposed rule, including adding language directly from 36 CFR part 79 in the text of § 10.7. Some of these commenters noted that some cultural items under NAGPRA do not fit within the definitions established by 36 CFR part 79.

Our Response: This final rule requires Federal agencies to care for and manage all unclaimed cultural items under NAGPRA in a manner consistent with but not pursuant to 36 CFR part 79. Even unclaimed cultural items that do not fit the definitions of 36 CFR part 79

must be provided with the same level of care and management as those items that are covered by 36 CFR part 79. There is no need to include the text at 36 CFR part 79 in this final rule.

Comment 14: One commenter suggested that, in addition to 36 CFR part 79, unclaimed cultural items should be cared for in accordance with a Plan of Action if one was prepared under § 10.5(e).

Our Response: As long as there is no conflict with this final rule, a Plan of Action prepared under § 10.5(e) related to the care and management of unclaimed cultural items that is consistent with 36 CFR part 79 and already in place may still be used.

Final Rule § 10.7(b)(3) Federal Agencies Must Consider and Respect the Traditions of Identified Potential Claimants to the Maximum Extent Feasible

Comment 15: Three commenters stated that there should be respect for cultural practices of potential claimants to unclaimed cultural items.

Our Response: We agree, and in the final rule we clarified that the potential claimants referenced in this section are the potential claimants listed in a notice of intended disposition.

Comment 16: Five commenters stated that the word “feasible” was vague and should be replaced with “permitted under law.”

Our Response: There are no applicable laws that require consideration or respect of potential claimants to unclaimed cultural items. The suggested wording is more restrictive and could result in less consideration for the traditions of potential claimants. We believe that the word “feasible” provides Federal agencies with appropriate discretion to respect the desires of potential claimants listed in a notice of intended disposition, and better aligns with the existing requirements at § 10.5(e)(7).

Final Rule § 10.7(c) Federal Agencies May Transfer Control of Unclaimed Cultural Items

Comment 17: Five commenters approved of the process for transferring control of unclaimed cultural items to other Indian tribes or Native Hawaiian organizations. One of these commenters suggested concurrence with any disposition plan should be required from any non-claiming Indian tribes. One of these commenters suggested that tribal laws or customs of the Indian tribe with the closest cultural relationship to the unclaimed cultural items should be followed. One of these commenters suggested the word “another” before Indian tribe or Native Hawaiian organization should not be used and “an” should be substituted.

Our Response: The transferee of unclaimed cultural items will have the right to control the disposition of the cultural items, as no potential claimant will have made a claim. Consequently, we have specified in this final rule that the transfer of cultural items is conditioned on the transferee agreeing to accept transfer and treat the cultural items according to the transferee’s own laws and customs. Also, in this final rule we have specified that the transferee in question is an Indian tribe or Native Hawaiian organization that is not an Indian tribe or Native Hawaiian organization with a potential claim to the unclaimed cultural items.

Comment 18: Three commenters stated that transfer should be allowed to Indian groups that are not federally recognized, and that § 10.7 should include the same authority to transfer as applied to culturally unidentifiable human remains in 43 CFR 10.11(c)(2)(ii)(A).

Our Response: Because this was not proposed, including non-federally recognized Indian groups among the potential transferees of cultural items is beyond the scope of this final rule. This comment will be considered during any proposed revision of these regulations in their entirety.

Final Rule § 10.7(d) Federal Agencies May Reinter Unclaimed Human Remains or Funerary Objects

Comment 19: One commenter stated that reinterment should be noted as satisfactory for the requirement to care and manage cultural items consistent with 36 CFR part 79.

Our Response: Title 36 CFR part 79 does not address reinterment. Under this final rule, the requirement to care for and manage unclaimed cultural items consistent with 36 CFR part 79 does not impinge on, or otherwise affect, the discretion of a Federal agency to transfer or reinter cultural items for which it acts as caretaker or temporary custodian.

Comment 20: Three commenters stated that the draft rule unfairly emphasized reinterment and precluded options for other disposition strategies, including cooperative curation agreements or future claims. One of these commenters also felt allowing reinterment violates tribal rights as established in the Act in section 11 (25 U.S.C. 3009).

Our Response: This final rule provides a Federal agency with the discretion to transfer or reinter unclaimed cultural items. It does not require either of these actions. Also, this final rule is consistent with sections 3(e) and 11(1)(B) of the Act (25 U.S.C. 3002(e) and 3009(1)(B), respectively). In order to take the actions under sections 3(e) and 11(1)(B) of the Act, an Indian tribe or Native Hawaiian organization must first have control of the cultural items in question.

Comment 21: Five commenters stated that the draft rule should put more emphasis on reinterment and require Federal agencies to justify not reintering unclaimed cultural items. One of these commenters suggested that Federal agencies should use field documentation procedures and immediately rebury any human remains discovered on Federal land.

Our Response: This final rule provides a Federal agency with the discretion to reinter unclaimed human remains or funerary objects according to applicable interment laws or policy. Requiring a Federal agency to immediately rebury human remains or funerary objects removed from Federal land contradicts section 3(a) of the Act (25 U.S.C. 3002(a)).

Comment 22: Two commenters stated that reinterment should require the concurrence of any potential claimants or consulting Indian tribes and Native Hawaiian organizations and any reinterment should be done in accordance with the tribal laws and customs of the potential claimants. One of these commenters felt any application of state law in reinterment should be restricted.

Our Response: An Indian tribe or Native Hawaiian organization that has been identified as a potential claimant in a notice of intended disposition but has not made a claim does not control the right of disposition of human remains or funerary objects. The concurrence of such potential claimants or consulting Indian tribes and Native Hawaiian organizations with a proposed reburial of unclaimed human remains or funerary objects, and the conduct of the reburial in accordance with their laws and customs, are not legally required. Moreover, requiring a Federal agency to obtain the concurrence of the potential claimants very likely would be infeasible where there are multiple such Indian tribes or Native Hawaiian organizations, each having different laws and customs. However, this rule does not preclude a Federal agency from consulting with any potential claimant on the proposed reinterment of unclaimed human remains or funerary objects and on having the reburial conducted in accordance with their laws and customs. As for restricting the application of State law to the reinterment of unclaimed human remains or funerary objects, we have eliminated altogether the provision in the proposed rule allowing for the offer of human remains or funerary objects for disposition according to State or other law or policy.

Final Rule § 10.7(e) Federal Agencies Must Follow Certain Requirements Prior to Transferring Control or Reinterring under Paragraphs (c) and (d)

Comment 23: Seven commenters stated that any notice related to the transfer or reinterment of unclaimed cultural items should be published in the Federal Register, either in addition to or in place of a notice in a newspaper. Three of these commenters suggested posting the notices to the National NAGPRA Program website in addition to other forms of notice.

Our Response: We believe that requiring notices to be published in newspapers is consistent with other notice requirements currently required under the regulations at § 10.6 implementing section 3 of the Act (25 U.S.C. 3002). This comment will be considered during any proposed revision of these regulations in their entirety. In light of technological changes since the promulgation of § 10.6, we have provided a second form of notice of proposed transfer of cultural items or reinterment of unclaimed human remains or funerary objects through postings on the National NAGPRA Program's website.

Comment 24: One commenter stated that the notice should include the previous determination of the Indian tribe or Native Hawaiian organization with priority of custody, if any (e.g., aboriginal land determination), and not only the "affiliation, if any, of the unclaimed cultural items."

Our Response: In response to this comment, the final rule requires that the notice include a summary of consultation efforts under § 10.5. A summary of consultation efforts inherently will include the identification of any potential claimants.

Comment 25: One commenter stated that a newspaper with general circulation "in the area in which each potential claimant now resides" is impractical. Disposition could possibly be to all Indian tribes or NHOs with standing under the Act.

Our Response: In the case where potential claimants have been identified, the locations of the newspapers where a notice of proposed transfer or reinterment is published under this final

rule are identical to the locations of the newspapers where a notice of intended disposition was published under § 10.6(c). In the case of cultural items for which no potential claimant could be identified, the location where a notice of proposed transfer or reinterment is published is only the area in which the cultural items were excavated or discovered, and removed, as there are no potential claimants for these cultural items.

Comment 26: One commenter stated that there was no process provided if an Indian tribe or Native Hawaiian organization asserts priority of ownership or control under section 3(a) of the Act and § 10.6 . If the claim is determined to be valid, disposition would occur under § 10.6(c) and not under § 10.7, as the cultural items would no longer be unclaimed.

Our Response: If an Indian tribe or Native Hawaiian organization states a valid claim for cultural items appearing in a notice of proposed transfer or reinterment under § 10.7, the cultural items are no longer unclaimed. As the Federal agency will no longer have the discretion to proceed with a transfer or reinterment under this final rule, the disposition of these cultural items will proceed under § 10.6(c). If the valid claim is from an Indian tribe or Native Hawaiian organization already listed in a notice of intended disposition, and if there are no competing claims, the Federal agency will transfer the right of control over the cultural items to the claimant. If the valid claim is from an Indian tribe or Native Hawaiian organization not already listed in a notice of intended disposition, the Federal agency will follow the notice provision under § 10.6(c) prior to any transfer.

Final Rule § 10.7(a) The Secretary Has the Authority to Promulgate the Rule on Unclaimed Cultural Items

Comment 27: Two commenters suggested moving the statement on the purpose of this rule from the end of the rule to the beginning of the rule.

Our Response: We agree. Proposed rule § 10.7(e) has been renumbered § 10.7(a) in this final 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:

- § 10.2(g)(5)(iv). This section specifies that disposition of unclaimed cultural items is established under § 10.7 of these regulations.
- § 10.2(h)(2)(i). This section specifies that cultural items are unclaimed under the following circumstances: the Federal agency publishes a notice of intended disposition, and the agency has not received any claim from an Indian tribe or Native Hawaiian organization, or any response from a lineal descendant to the notice within one year of publishing the notice.
- § 10.2(h)(2)(ii). This section specifies that cultural items are unclaimed under the following circumstances: the Federal agency knows, or has reason to know, that cultural items have been excavated or discovered on, and removed from Federal lands; for two years, the Federal agency has tried to reasonably identify any Indian tribe or Native Hawaiian organization, or a lineal descendant, as a potential claimant, and at the end of the two-year period, the Federal agency cannot reasonably identify an Indian tribe or Native Hawaiian organization, or a lineal descendant, as a potential claimant.
- § 10.7(a) of the proposed rule has been renumbered § 10.7(b) in this final rule.
- § 10.7(a)(1) has been renumbered § 10.7(b)(1) in this final rule. This section specifies that the list of unclaimed cultural items must include a summary of consultation efforts under § 10.5, and adjusts the deadline for submitting a list of unclaimed cultural items.

For those cultural items that meet the definition of unclaimed cultural items on the effective date of the regulation, a list of items must be submitted within one year. For items that meet the definition of unclaimed cultural items after the effective date of the regulation, a list of items must be submitted within one year of the cultural items becoming unclaimed.

- § 10.7(a)(3) has been renumbered § 10.7(b)(3) in this final rule. This section specifies that the potential claimants who are referenced are the potential claimants listed in a notice of intended disposition.
- § 10.7(b) of the proposed rule has been renumbered § 10.7(c) in this final rule. This section specifically identifies the Indian tribe or Native Hawaiian organization to which control may be transferred under this rule as an Indian tribe or Native Hawaiian organization that does not have a potential claim to the cultural items. Also, this section specifies that such transfer is conditioned on the transferee agreeing to accept transfer and treat the cultural items according to the transferee's own laws and customs.
- § 10.7(c) of the proposed rule has been renumbered § 10.7(d) in this final rule. This section specifies that, under this rule, any reinterment of unclaimed human remains or funerary objects by the Federal agency must be according to applicable interment laws. Also, the provision in the proposed rule regarding the offer of human remains or funerary objects for disposition according to State or other law has been eliminated.
- § 10.7(d) of the proposed rule has been renumbered § 10.7(e) in this final rule.
- § 10.7(d)(3) has been renumbered § 10.7(e)(3) in this final rule. This section specifies that the Manager of the National NAGPRA Program will post information received from

the Federal agency under § 10.7(e)(2) of this rule, on the National NAGPRA Program's website.

- § 10.7(e) has been renumbered § 10.7(a) in this final rule.

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 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.*). This rule only pertains to the disposition of cultural items in the custody of a Federal agency for which potential claimants have chosen not to take ownership or control, or when no

potential claimants have been identified. Thus, this rule does not constitute a significant economic burden.

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 (UMRA)

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)

This rule does not effect a taking of private property or otherwise have takings implications under Executive Order 12630. 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 evaluated this rule and determined that it has a potential effect on federally recognized Indian tribes. The rule was developed in consultation with the Native American Graves Protection and Repatriation Review Committee, which includes members nominated by

Indian tribes and traditional religious leaders. Formal consultation with the Review Committee was held on November 16-17, 2005, in Albuquerque, NM; on April 19-20, 2007, in Washington, DC; on October 15-16, 2007, in Phoenix, AZ; on May 15-16, 2008, in De Pere, WI; on October 30-31, 2009, in Sarasota, FL; and on November 18-19, 2010, in Washington, DC. Also, the Review Committee had an opportunity to comment on the proposed rule following publication, which it did at a public meeting on November 6, 2013, in Mt. Pleasant, MI.

Formal consultation with Indian tribes began on November 15, 2005, in Albuquerque, NM, and continued on April 18, 2007, in Washington, DC, and on October 14, 2007, in Phoenix, AZ. We have fully considered tribal and Review Committee comments in the final rule.

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.

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 Department amends 43 CFR part 10 as follows:

PART 10—NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REGULATIONS

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

Authority: 16 U.S.C. 470dd; 25 U.S.C. 9, 3001 et seq.

2. Amend § 10.2 by adding paragraph (g)(5)(iv) and paragraph (h) to read as follows:

§ 10.2 Definitions.

* * * * *

(g) * * *

(5) * * *

(iv) Disposition of unclaimed human remains, funerary objects, sacred objects, or objects of cultural patrimony is governed by § 10.7.

(h) *Unclaimed cultural items* means Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony:

(1) That have been excavated or discovered on, and removed from, Federal lands after November 16, 1990, and

(2) Whose disposition under 25 U.S.C. 3002(a) and § 10.6 of this part has not occurred because either:

(i) Within one year after publication of a notice under § 10.6(c) of this part, no Indian tribe or Native Hawaiian organization has sent a written claim for the cultural items to the appropriate Federal agency, or no lineal descendant has responded to a notice for human remains and associated funerary objects; or

(ii) Within two years after knowing or having reason to know that cultural items were excavated or discovered, and removed, the appropriate Federal agency could not reasonably identify any Indian tribe or Native Hawaiian organization or lineal descendant as a potential claimant.

3. Add § 10.7 to read as follows:

§ 10.7 Disposition of unclaimed human remains, funerary objects, sacred objects, or objects of cultural patrimony.

(a) This section carries out section 3(b) of the Act (25 U.S.C. 3002(b)) regarding unclaimed cultural items.

(b) A Federal agency that has unclaimed cultural items (human remains, funerary objects, sacred objects, or objects of cultural patrimony) must:

(1) Submit a list of the items to the Manager, National NAGPRA Program that describes the general place of discovery or excavation, and removal; the nature of the unclaimed cultural items; and a summary of consultation efforts under § 10.5 of this part. This list must be received by December 5, 2016, or within 1 year after the cultural items have become unclaimed under § 10.2(h), whichever is later;

(2) Care for and manage unclaimed cultural items consistent with the regulations at 36 CFR part 79; and

(3) To the maximum extent feasible, consider and respect the traditions of any potential claimants listed in a notice under § 10.6(c) concerning the unclaimed cultural items, including, but not limited to, traditions regarding housing, maintenance, and preservation.

(c) Subject to paragraph (e) of this section, a Federal agency that has unclaimed cultural items may, upon request, transfer them to an Indian tribe or Native Hawaiian organization that is not a potential claimant and agrees:

(1) To accept transfer; and

(2) To treat them according to the laws and customs of the transferee.

(d) Subject to paragraph (e) of this section, a Federal agency that has unclaimed human remains or funerary objects may reinter them according to applicable interment laws.

(e) Before a Federal agency makes a transfer or reinterment under paragraphs (c) or (d) of this section, it must:

(1) Submit the list required under paragraph (b)(1) of this section to the Manager, National NAGPRA Program; and

(2) Publish a notice of the proposed transfer or reinterment in a newspaper of general circulation in the area in which the unclaimed cultural items were excavated or discovered, and removed, and, if applicable, in a newspaper of general circulation in the area in which each potential claimant now resides.

(i) The notice must explain the nature of the unclaimed cultural items, summarize consultation efforts under § 10.5, and solicit claims under the priority of ownership or control in section 3(a) of the Act (25 U.S.C. 3002(a)) and § 10.6.

(ii) The notice must be published at least two times at least a week apart.

(iii) The transfer or reinterment may not take place until at least 30 days after publication of the second notice to allow time for any claimants under the priority of ownership or control in section 3(a) of the Act and § 10.6 to come forward.

(3) Send to the Manager, National NAGPRA Program a copy of the notice published under paragraph (d)(2) of this section and information on when and in what newspaper(s) the notice was published. The National NAGPRA Program will post information from published notices on its website.

Dated: October 21, 2015

Michael Bean

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

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