

**DEPARTMENT OF THE INTERIOR****Office of the Secretary****43 CFR Part 10**

RIN 1024-AD68

**Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains****AGENCY:** Office of the Secretary, Interior.**ACTION:** Final rule with request for comments.

**SUMMARY:** This final rule implements the Native American Graves Protection and Repatriation Act by adding procedures for the disposition of culturally unidentifiable Native American human remains in the possession or control of museums or Federal agencies. This rule also amends sections related to purpose and applicability of the regulations, definitions, inventories of human remains and related funerary objects, civil penalties, and limitations and remedies.

**DATES:** This rule is effective May 14, 2010. Comments must be received by May 14, 2010.

**ADDRESSES:** You may submit comments on this final rule, identified by the number 1024-AD68, by any of the following methods:

- *Federal rulemaking portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail or hand delivery:* Sherry Hutt, Manager, National NAGPRA Program, National Park Service, 1201 Eye Street, NW., 8th Floor, Washington, DC 20005.

**FOR FURTHER INFORMATION CONTACT:** Sherry Hutt, Manager, National NAGPRA Program, National Park Service, 1201 Eye Street, NW., 8th Floor, Washington, DC 20005, Telephone: (202) 354-1479, Fax: (202) 371-5197.

**SUPPLEMENTARY INFORMATION:****Background**

The Native American Graves Protection and Repatriation Act of 1990 (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. Among other things, the Act:

—Established the Native American Graves Protection and Repatriation Review Committee, composed of representatives from museum and scientific organizations and from

Indian tribes and Native Hawaiian organizations (the Review Committee) to monitor and review inventory, identification, and repatriation activities.

- Required the Review Committee to consult with the Secretary of the Interior in developing regulations to implement the Act.
- Charged the Review Committee with compiling an inventory of culturally unidentifiable human remains in museums or Federal agencies and recommending actions for disposition of these remains.

In 1995, during initial development of the regulations to implement the Act, the Department decided to reserve several sections for later development. This decision ensured that development of more complex provisions would not delay implementation of the basic regulations needed to guide compliance with impending deadlines for inventory submissions. We are implementing this long-term publication plan as follows:

- We published the first rules to implement the Act on December 4, 1995 (43 CFR part 10, 60 FR 62158).
- We published rules for assessing civil penalties under the Act on April 3, 2003 (43 CFR 10.12, 68 FR 16354).
- We published rules for new collections and continuing obligations for compliance on March 21, 2007 (43 CFR 10.13, 72 FR 13189).
- We are publishing this rule today.
- We are developing additional rules to cover disposition of unclaimed Native American human remains and cultural items from Federal and Indian lands (future 43 CFR 10.7).

Publication of this rule furthers the Department's goal of publication in phases.

On October 16, 2007, we published in the **Federal Register** the proposed rule to specify procedures for disposition of culturally unidentifiable human remains in the possession or control of museums or Federal agencies. At that time, we invited public comment for a 90-day period, ending on January 14, 2008, and posted the proposed rule on the National NAGPRA Program Web site.

During the comment period, we received 138 written comments from 51 Indian tribes, 19 Indian organizations, 30 museums, 12 museum or scientific organizations, 3 Federal entities, 15 members of the public, and the Review Committee. The comments addressed all sections of the proposed rule. We fully considered all of these comments and this final rule includes extensive revisions that we have made response to the concerns raised by commenters.

As required by the Act, the Review Committee sent comments to the Secretary in 2000, 2003, and 2008. During its January 2008 teleconference, the Review Committee suggested that the Department extend the comment period for the proposed rule or reissue a revised proposed rule for further comment. After the close of the comment period, we worked with the Office of the Solicitor to prepare a draft final rule and preamble responding to comments. The following brief chronology outlines the reviews that have occurred since we developed the rule:

- The Assistant Secretary—Fish and Wildlife and Parks and the Assistant Secretary—Indian Affairs reviewed the draft final rule and considered the recommendations of the Review Committee.
- The Assistant Secretaries determined that the draft final rule and preamble were responsive to comments, and that, given the lengthy comment period, there was no need or basis to extend the comment period or to repropose the rule.
- The Department identified a procedural problem with publication of the final rule relating to the Paperwork Reduction Act, which resulted in additional delays totaling 6 months.
- With the change of administration, the Department's management conducted additional review by the Assistant Secretary—Fish and Wildlife and Parks and the Assistant Secretary—Indian Affairs.

As the preceding summary illustrates, this final rule has undergone extensive review in multiple administrations. Each of these reviews was conducted independently, and both the current and previous administrations agreed that this rule is appropriate for implementation. In addition to the opportunities for comment that we have already offered, we are accepting comments on this rule until May 14, 2010.

The current Assistant Secretary—Fish and Wildlife and Parks and the current Assistant Secretary—Indian Affairs have determined that this final rule and preamble are fully responsive to the comments received on the proposed rule and that the ten-year process of developing the rule, as well as the substantive provisions of the rule, fit well with the Administration's goals of transparency in decision making and open consultation with Indian tribes. Comments to this rule covered myriad issues that have arisen in the 20 years since NAGPRA became law. Although

many of the comments went beyond the scope of this rulemaking, the preamble to this rule provides detailed responses to each of the comments.

In brief, this rule pertains to those human remains, in collections, determined by museums and Federal agencies to be Native American, but for whom no relationship of shared group identity can be reasonably traced, historically or prehistorically, between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group. These individuals are listed on inventories as culturally unidentifiable Native American human remains. The rule requires consultation on the culturally unidentifiable human remains by the museum or Federal agency with Indian tribes and Native Hawaiian organizations whose tribal lands or aboriginal occupancy areas are in the area where the remains were removed. If cultural affiliation still cannot be determined and repatriation achieved, then the Indian tribe or Native Hawaiian organization may request disposition of the remains. The museum or Federal agency would then publish a notice and transfer control to the tribe, without first being required to appear before the Review Committee to seek a recommendation for disposition approval from the Secretary of the Interior. Disposition requests, which do not meet the parameters of the rule, would still require approval from the Secretary, who may request a recommendation from the Review Committee.

Therefore, the Department is issuing this final rule to be effective May 14, 2010.

### Summary of Comments

The proposed rule to specify procedures for the disposition of culturally unidentifiable human remains in the possession or control of museums or Federal agencies was published in the **Federal Register** on October 16, 2007 (72 FR 58582). Public comment was invited for a 90-day period, ending on January 14, 2008. The proposed rule was also posted on the National NAGPRA Program Web site. The Review Committee commented on the proposed rule at its January 8, 2008 public teleconference. In addition, 138 written comments were received during the comment period, representing 51 Indian tribes, 19 Indian organizations, 30 museums, 12 museum or scientific organizations, 3 Federal entities, 15 members of the public, and the Review Committee. Comments addressed all sections of the proposed rule. All comments were fully considered when

revising the proposed rule as a final rulemaking.

### General Comments

#### Authority

*Comment 1:* Fifteen commenters stated that the Department of the Interior does not have the authority to promulgate regulations governing the disposition of culturally unidentifiable human remains and associated funerary objects and that Congressional action is necessary to effect the disposition of such remains and objects. Eleven commenters stated that the Department of the Interior does have authority to promulgate such regulations.

*Our Response:* In section 13 of the Act (25 U.S.C. 3011), Congress explicitly authorized the Secretary of the Interior to promulgate regulations implementing the Act. As an initial matter, consideration of all Native American human remains and associated funerary objects, including those that are culturally unidentifiable, is within the scope of the statute. Section 5 of the Act (25 U.S.C. 3003) requires Federal agencies and museums that have possession or control over holdings or collections of Native American human remains and associated funerary objects to compile an inventory of such items and, to the extent possible based on information possessed by each museum or Federal agency, identify the geographical and cultural affiliation of such items. Congress anticipated that not all items could be geographically or culturally affiliated and, in section 8 of the Act (25 U.S.C. 3006), assigned the role of recommending specific actions for developing a process for the disposition of culturally unidentifiable human remains to the Review Committee. Congress intended that the Review Committee be an advisory committee which makes recommendations to the Secretary (Senate Report 101-473 at 13). An earlier version of the bill that preceded the final version of NAGPRA directed the Review Committee to provide its recommendations regarding the disposition of culturally unidentifiable human remains to the Secretary and to the Congress (H.R. 5237, Section (7)(d), July 10, 1990). However, the provision regarding Congress was ultimately stricken from the version of the bill that was signed into law. The sequence of changes in a statute prior to enactment provides strong evidence of the meaning of the enacted statute (*INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)). It would thus appear that while Congress may have considered limiting the Secretary's authority to promulgate regulations

regarding the disposition of culturally unidentifiable human remains, this restriction was ultimately rejected. This regulation, promulgated in the exercise of Congress' delegated authority, implements many of the Review Committee's recommendations and effectuates the goals of the Act. Even if Congress may not have expressly delegated authority or responsibility to implement a particular provision of the Act or fill a particular gap in the law, it can still be apparent from an agency's generally conferred authority and other statutory directives that Congress would expect the agency to be able to speak with the force of law when the agency addresses ambiguities in the statute or fills a gap in the enacted law (*United States v. Mead*, 533 U.S. 218 (2001)).

*Comment 2:* Five commenters consider the rule to be contrary to the plain language of the Act and against the original intent of Congress.

*Our Response:* Typically, the Congress expects the Federal agency charged with the implementation of a statute to establish the specific process by which the statute's objectives are to be achieved. By regulation, the Department directed each museum and Federal agency to complete "a listing of all culturally unidentifiable human remains and associated funerary objects for which no culturally affiliated present-day Indian tribe or Native Hawaiian organization can be determined" (43 CFR 10.9(d)(2)), and, after considering the Review Committee's recommendations, the Secretary proposed these regulations to address the Congressional silence with respect to procedures for disposition of the culturally unidentifiable human remains and associated funerary objects. Under *Chevron v. Natural Resources Defense Council* (467 U.S. 837 (1984)), if a statute is silent or ambiguous with respect to a particular issue, then deference is accorded to the agency's interpretation of the provisions of the Act so long as the agency's interpretation is not arbitrary, capricious, or manifestly contrary to the statute. As discussed above, the promulgation of regulations for the disposition of culturally unidentifiable human remains and associated funerary objects is consistent with the plain language and intent of the Act. Culturally unidentifiable human remains and associated funerary objects were previously addressed in the regulations promulgated by the Department in December 1995 (60 FR 62134). 43 CFR 10.9(e)(6) requires Federal agencies and museums to provide a list of culturally unidentifiable human remains and

associated funerary objects to the Department and to retain possession of such items pending promulgation of this rule unless legally required to do otherwise or the Secretary recommends otherwise. Promulgation of this rule provides for additional treatment and ultimate disposition of culturally unidentifiable human remains and associated funerary objects, and fills the regulatory gap contemplated by the current regulations.

*Comment 3:* Two commenters stated that Congress intended to allow study of ancient, unaffiliated remains.

*Our Response:* The Act does not draw a distinction between “ancient” and more recent remains. The Act covers historic or prehistoric “Native American” human remains. “Native American” means of, or relating to, a tribe, people, or culture that is indigenous to the United States” (25 U.S.C. 3001(9)). The statute states that the Act shall not be construed to be an authorization for the initiation of new scientific studies of Native American human remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects (25 U.S.C. 3003(b)(2)).

*Comment 4:* One commenter indicated that the proposed rule bypasses the language of the Act as the Review Committee is given the role of making recommendations regarding culturally unidentifiable remains.

*Our Response:* In section 8(c)(5) of the Act (25 U.S.C. 3006(c)(5)), Congress assigned the Review Committee the role of recommending specific actions for developing a process for disposition of culturally unidentifiable human remains. Congress also authorized the Review Committee to consult with the Secretary in the development of regulations to carry out the Act. The Secretary has interpreted the intent of Congress in this section as authorizing the Secretary to promulgate regulations governing the disposition of culturally unidentifiable human remains after considering the Review Committee’s recommendations on these matters. This interpretation is reflected in the Department of the Interior’s regulations at § 10.9(6) which states, “Section 10.11 of these regulations will set forth procedures for disposition of culturally unidentifiable human remains of Native American origin. Museums or Federal Agencies must retain possession of such human remains pending promulgation of § 10.11 unless legally required to do otherwise, or recommended to do otherwise by the Secretary. Recommendations regarding the disposition of culturally unidentifiable

human remains may be requested prior to final promulgation of § 10.11.” Prior to the completion of § 10.11, the Secretary has referred such individual requests to the Review Committee, as authorized under section 8(c)(8) of the Act (25 U.S.C. 3006(c)(8)) (“performing such other related functions as the Secretary may assign to the committee”) and has requested the Review Committee’s advice before making recommendations on the disposition of human remains.

#### Constitutionality

*Comment 5:* One commenter was concerned that compliance with the proposed rule could place a museum in violation of unspecified state statutes.

*Our Response:* NAGPRA is Federal law, and, as such, under the Supremacy Clause of the Constitution (Art. VI, cl. 2; *Lorillard Tobacco Co. v. Reilly*, 533 US 525 (2001)) preempts any state law on the same subject matter. This is especially true in the field of Federal Indian law, where the United States has plenary and exclusive power (U.S. Constitution, Art. I, Sec. 8, cl. 3; *Worcester v. Georgia*, 31 US 515, 6 Pet 515 (1832)). Moreover, in section 7(f) of the Act (25 U.S.C. 3005(f)), Congress specifically provided that “[a]ny museum which repatriates any item in good faith pursuant to this chapter shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this chapter.”

*Comment 6:* Two commenters alleged that the proposed regulations would violate the Establishment Clause of the First Amendment to the Constitution, focusing on a sentence in the preamble to the proposed regulations which suggests that the voluntary repatriation by a museum or Federal agency of funerary objects associated with culturally unidentifiable human remains would be consistent with “customary religious and spiritual beliefs.” The commenters stated that this suggestion demonstrated unconstitutional special treatment for the “creationist viewpoint” of many Indian people and that such beliefs are not evidence of a cultural relationship or cultural affiliation under the Act.

*Our Response:* The commenters have misconstrued and misapplied the sentence in the preamble. First, the use of religious or spiritual beliefs is not being invoked to determine whether a specific group of human remains is Native American. The rule allows a museum or Federal agency to voluntarily repatriate associated funerary objects with human remains

(which it has already determined to be Native American). Considerations of a religious or spiritual belief system are not used to determine the origin of the human remains and are not relevant to such a voluntary determination by the museum or Federal agency. Further, “funerary objects” are defined by both the NAGPRA statute and current regulations as “items that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed intentionally at the time of death or later” (43 CFR 10.2(d)(2)). This definition is taken from the definition of “associated funerary objects” in the Act (25 U.S.C. 3001(3)(A)). The statement referred to by commenters in the preamble to the proposed rule is a recognition that “the death rite or ceremony of a culture” is an inherently spiritual or religious act, whether the belief system involved is traditionally Indian or Christian (also broadly represented in Indian country), or another belief system. Such a recognition in the context of a voluntary action by a museum or Federal agency (to which the commenters did not object) does not constitute support of a particular religious point of view or excessive entanglement with religion in the context of the Establishment Clause (*Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970)).

*Comment 7:* Three commenters stated that the proposed rule, if finalized, would constitute a “taking” by the United States of the property of museums in violation of the Fifth Amendment to the United States Constitution.

*Our Response:* To determine whether a governmental procedure has deprived a party of its rights without due process, the first inquiry must be whether that party has protected property or liberty interests (*American Manufacturing Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 59 (1999), and *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190 (10th Cir. 1999)). Under the common law, however, human remains are not “property” (See, e.g., 2 William Blackstone, Commentaries, 429). Thus, a museum would not have a property interest in culturally unidentifiable human remains that could be “taken,” unless the museum has received the right to possess the remains from a person or entity with authority to confer that right on the museum. The next of kin of the deceased (25 U.S.C. 3001(13)) (see *Whaley v. Tuscola*, 58 F.3d 1111, 1117 (6th Cir. 1995); *Brotherton v. Cleveland*, 923 F.2d 477, 482 (6th Cir. 1991)) and the official governing body of the appropriate Indian tribe or Native Hawaiian organization (25 U.S.C.

3001(13) and (3002(e)) are the only parties who possess such a property right for purposes of the Fifth Amendment. If a museum could prove, therefore, that the human remains were "excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization" (25 U.S.C. 3001(13)), or were remains for which "the governing body of an Indian tribe or Native Hawaiian organization [has] expressly relinquished control" (25 U.S.C. 3002(e)), it may have a property right that could be protected. That is the purpose of the definition of right of possession under the Act (25 U.S.C. 3001(13)), and, to the extent that a museum can prove a right of possession for culturally unidentifiable human remains, that right is protected by § 10.11(c)(1) of the regulations as well as the Constitution.

*Comment 8:* Two commenters asserted that the proposed rule, if finalized, would violate the Equal Protection clause of the Fourteenth Amendment to the United States Constitution. One of these commenters noted that the requirement in § 10.11(b)(2) to consult with "all Indian tribes and Native Hawaiian organizations" with certain connections to land (which, in the commenter's view, would include Indian groups that are not federally-recognized) would violate the Act's insulation from equal protection challenges based on the government-to-government relationship between the United States and federally-recognized Indian tribes. The other commenter asserted that the proposed rule illegally favored one "cultural lineage" over others.

*Our Response:* The first commenter's concern raises an issue common to many of the comments on the proposed rule. When agencies publish proposed and final rules in the **Federal Register** that are amending existing regulations, the agency is only required to publish the portion of the regulations that would change. Unless the agency states otherwise, all portions of existing regulations that are not proposed for change in the notice of proposed rulemaking remain the same, and still apply. Thus, when this proposed rule refers to "Indian tribes," the drafters are using the existing definition of that term, which is not proposed for changes. That definition, at § 10.2(b)(2), only refers to federally-recognized Indian tribes. The drafters of the proposed rule have been very careful to distinguish tribes that are not federally-recognized Indian groups when those

groups are included in a provision of the rule in order to maintain a clear distinction. The only mandatory consultation or disposition in the rule, consistent with the Act, is to Indian tribes (i.e., federally-recognized) or Native Hawaiian organizations. This preference in both the regulations and the statute is based not on "cultural lineage" but on the plenary power of Congress to "regulate commerce \* \* \* with the Indian Tribes" (U.S. Constitution Art. I, Sec. 8, cl. 3), and the unique government-to-government relationship between the United States and Indian tribes (*Morton v. Mancari*, 417 U.S. 535, 551–52 (1974)).

#### *Statutory Amendment*

*Comment 9:* Three commenters recommended that Congress consider amending the statute. Two commenters recommended expanding who has a right to claim cultural items under the Act from lineal descendants, Indian tribes, and Native Hawaiian organizations to also include state recognized Indian groups, Indian groups currently seeking Federal acknowledgement, and indigenous groups located beyond the boundaries of the United States. One commenter recommended amending the statute to apply to collections held by the Smithsonian Institution. One commenter recommended that the composition of the Review Committee be changed to ensure a ratio of no less than two Native American members for each non-Native American member.

*Our Response:* Statutory amendments are the exclusive purview of the Congress.

#### *Compliance With Other Statutes and Policies*

*Comment 10:* The preamble of the proposed rule states that the rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. Fifteen commenters projected that the financial burden of consultation and disposition on museums will be "tremendous," "onerous," "impossible," "overwhelming," "ruinous," or "significant." Two commenters predicted that the rule will result in costly litigation. Seven commenters estimated that the cost of implementing the proposed rule will exceed \$100 million per year. One commenter recalled that some museums raised similar financial concerns prior to passage of the Act in 1990, but noted that the claims have never been substantiated in fact. Two commenters recommended that the Department of

the Interior provide detailed cost estimates.

*Our Response:* Costs to comply with this rule will be seen in the costs of consultation and decision-making. Museums and Federal agencies are only required to consult upon receipt of a claim from an Indian tribe or Native Hawaiian organization. In the last five years, there have been approximately 14 requests per year for Review Committee consideration of claims for disposition of culturally unidentifiable Native American human remains. Although there are numerous human remains subject to this rule, it is reasonable to assume that tribes will make requests at a constant rate, given the capacity of tribes to do so. A single claim may involve many human remains from one site, requiring one notice. Absent a claim, a museum or Federal agency may also voluntarily offer to transfer control. The costs of decision making include exchange of information between museums and tribes, and preparation of a notice by a museum. Using current rates of compensation for museum clerical, curator and executive staffs, there is a weighted cost average for their efforts of \$30.00 an hour. Assuming approximately 100 hours of information exchange and six hours to prepare a notice, the cost per claim is less than \$5,000 on average and the annual cost of all claims in a year, subject to this rule, is less than \$100,000. Since there are no deadlines for claims or for offering to transfer control, the required consultations will likely extend over multiple year periods, thus reducing the total cost of consultation in any particular year. Since 1994, Congress has provided grant funds for consultation and repatriation activities of approximately \$2 million dollars per year to account for NAGPRA compliance, including this rule. Since NAGPRA became law in 1990, there have been almost 40,000 Native American human remains accounted for in notices and no indication that a single museum has suffered overwhelming or ruinous consequences from compliance with the law.

There are also cost savings in the reduction of inventory maintenance costs and elimination of the pre-rule need to present matters at Review Committee meetings, which may involve travel costs. Under current regulations, museums and Federal agencies must retain possession of culturally unidentifiable human remains, with all of the attendant curatorial costs estimated in the millions of dollars per year (S. Terry Childs and Karolyn Kinsey, *Costs for Curating Archeological Collections: A*

Study of Repository Fees in 2002 and 1997/1998. National Park Service (2003)). Museums and Federal agencies that wish to effect the disposition of culturally unidentifiable human remains under current regulations must either request a recommendation from the Secretary of the Interior, which involves preparation of materials and presentations before the Review Committee, or request involvement in proceedings before a United States District Court.

*Comment 11:* One commenter requested that the Department of the Interior consider the rule significant under Executive Order 12866 on the grounds that it raises novel legal or policy issues.

*Our Response:* The Office of Management and Budget has determined that this rule is significant under EO 12866.

*Comment 12:* One commenter stated that Federal agencies should be required to conduct review under the National Environmental Policy Act (NEPA) (42 U.S.C. 4321, *et seq.*), for each disposition of culturally unidentifiable human remains, with or without associated funerary objects, under the final rule.

*Our Response:* NAGPRA does not exempt Federal agencies from the requirements of any other statutes that may be applicable, such as NEPA. The appropriate level of NEPA review required would depend on the NEPA procedures of the agency proposing the disposition.

#### *Relationships to Other Sections of These Regulations*

*Comment 13:* One commenter requested clarification as to whether the proposed rule applies to culturally unidentifiable human remains and associated funerary objects excavated or removed from Federal or tribal lands after November 16, 1990.

*Our Response:* Neither the proposed rule nor this final rule apply to culturally unidentifiable human remains and associated funerary objects excavated or removed from Federal or tribal lands after November 16, 1990. This final rule applies to human remains in museum and Federal agency collections for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified. For museums, these human remains may have been acquired either before or after 1990 when the statute was enacted. For Federal agencies, disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony removed from Federal lands after

November 16, 1990 is effected pursuant to section 3 of the Act (25 U.S.C. 3002), and §§ 10.3–10.7 of the existing regulations. Culturally unidentifiable human remains acquired by a Federal agency after November 16, 1990 from other than Federal or tribal lands would be covered by the provisions of this rule.

*Comment 14:* One commenter recommended that the terms “unclaimed” and “culturally unidentifiable” be clearly distinguished.

*Our Response:* There may be some confusion between the terms “culturally unidentifiable” and “unclaimed.” As specified in section 8(c)(5) of the Act (25 U.S.C. 3006(c)(5) and these regulations, “culturally unidentifiable” refers to Native American human remains and associated funerary objects in museum or Federal agency collections for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been determined. “Unclaimed” only refers to Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated or discovered on Federal or tribal lands after November 16, 1990 and not claimed under section 3(a) of the Act (25 U.S.C. 3002(a)). A proposed rule regarding the disposition of unclaimed cultural items is currently under development (43 CFR 10.7).

*Comment 15:* One commenter recommended that unclaimed human remains which can reasonably be associated with a recognized tribe should be returned to that Indian tribe.

*Our Response:* Unclaimed remains are governed under section 3(a) of the Act (25 U.S.C. 3002(a)). A separate proposed rule regarding the disposition of unclaimed cultural items is currently under development (43 CFR 10.7). Please see Comment 14 for a related response.

#### *Development Process*

*Comment 16:* Ten commenters recommended adopting the Review Committee’s 2000 recommendations in lieu of the proposed rule. Three commenters recommended adopting the Review Committee’s 2002 recommendations in lieu of the proposed rule. Five commenters recommended taking the Review Committee’s 2000 and 2002 recommendations into account in revising the proposed rule. Three commenters rejected the Review Committee’s 2000 recommendations.

*Our Response:* There appears to be some confusion regarding the Review Committee’s involvement in the development of the proposed

regulations. Sections 8(c)(5) and (c)(7) of the Act (25 U.S.C. 3006(c)(5) and (c)(7)), authorize the Review Committee to recommend specific actions for developing a process for the disposition of culturally unidentifiable human remains and consulting with the Secretary of the Interior in the development of regulations to carry out the Act. After circulating three drafts for public comment and considering specific case-by-case requests, the Review Committee developed its final recommendations regarding the disposition of culturally unidentifiable human remains in May 2000. These recommendations were reported in detail in the preamble to the 2007 proposed rule. The Review Committee also considered drafts of the proposed rule at its May 31–June 2, 2002 and November 8–9, 2002 meetings. Meeting minutes are available at: <http://www.nps.gov/history/nagpra/REVIEW/meetings/MINUTES.HTM>.

At its November 8–9, 2002 meeting, the Review Committee specifically compared the draft regulatory text with the text of its 2000 recommendations and recommended several changes, most of which, though purely advisory, were reflected in the 2007 proposed rule. The drafters gave full consideration to the Review Committee’s final recommendations regarding the disposition of culturally unidentifiable human remains (2000) as well as to the Review Committee’s review of drafts of the proposed rule on May 31–June 2, 2002 and November 8–9, 2002, and the actual proposed rule on January 8, 2008.

*Comment 17:* Fourteen commenters made general or specific recommendations regarding the establishment or composition of “regional consortia.”

*Our Response:* The concept of “regional consortia” was proposed in the Review Committee’s 2000 final recommendations regarding the disposition of culturally unidentifiable human remains (65 FR 36462). According to the Review Committee, such regional consortia would consist of Federal agencies, museums, Indian tribes, and Native Hawaiian organizations within a given geographic area that would consult together and propose a framework and schedule for the disposition of culturally unidentifiable human remains. The drafters recognize the establishment of such regional consortia as a potentially useful step in arriving at generally applicable disposition agreements. However, the establishment or composition of such consortia are clearly matters to be determined by

those who elect to be participants in a consortium. As a result, the concept was not addressed in the proposed rule. Indian tribes may choose to participate in such regional consortia, but it is not required.

#### Administration

*Comment 18:* One commenter recommended that the National Park Service establish a permanent office to focus specifically on the disposition of the culturally unidentifiable human remains and associated funerary objects. One commenter recommended that the National Park Service establish training for museums and Federal agencies on how to determine cultural affiliation.

*Our Response:* The National NAGPRA Program will continue to provide technical assistance and training to museums, Federal agencies, lineal descendants, Indian tribes, and Native Hawaiian organizations regarding the disposition of culturally unidentifiable human remains and associated funerary objects, as well as other aspects of the Act.

*Comment 19:* Seventeen commenters recommended providing additional funds to museums and Indian tribes to assist in the disposition of culturally unidentifiable human remains.

*Our Response:* All activities required under the proposed rule are eligible for Federal grants authorized under section 10 of the Act. The Review Committee has asked Congress to consider the appropriation of additional funding.

*Comment 20:* One commenter recommended that Federal funds be appropriated to assist Indian tribes with the protection of Indian cemeteries, historic sites, and artifacts during or after an emergency.

*Our Response:* The scope of grants authorized under section 10 of the Act (25 U.S.C. 3008) is limited to assisting museums in conducting the required inventories and identification and to assisting Indian tribes and Native Hawaiian organizations in the repatriation of human remains, funerary objects, sacred objects, or objects of cultural patrimony (25 U.S.C. 3008). Funds for the protection of Indian cemeteries, historical sites, and artifacts are available through other Federal programs.

*Comment 21:* One commenter recommended that the rule address the need to expand existing tribal and family cemeteries.

*Our Response:* The Act addresses the protection of current Native American burial sites on Federal or tribal lands that are inadvertently discovered or intentionally excavated and the repatriation of cultural items in museum

or Federal agency collections or holdings. The Act does not address the creation of new burial sites or the expansion of existing sites.

*Comment 22:* One commenter recommended that forensic audits of all Federal agency inventories be conducted by the General Accounting Office to ensure that this requirement of the Act has been fulfilled.

*Our Response:* The Review Committee has asked Congress to have the Government Accountability Office review Federal compliance with the Act.

*Comment 23:* One commenter recommends that State governments be given the authority to supervise and issue directives to the federally-recognized Indian tribes in returning Native American human remains back to Mother Earth.

*Our Response:* Authorizing State governments to direct the actions of federally-recognized Indian tribes is beyond the Secretary's jurisdiction and inconsistent with both the plenary power of Congress to "regulate commerce \* \* \* with the Indian Tribes" (U.S. Constitution Art. I, Sec. 8, cl. 3), and the unique government-to-government relationship between the United States and Indian tribes (*Morton v. Mancari*, 417 U.S. 535, 551-52 (1974)).

#### Section 10.1(b)(3) Final Determinations

Section 10.1(b)(3) describes decision points throughout the regulations which constitute "final determinations." The proposed rule added one sentence to provide clarification to Federal agencies as to when a determination constitutes "final agency action" as used in the Administrative Procedure Act (5 U.S.C. 704).

*Comment 24:* Eight commenters generally supported this proposed revision with some modification. One commenter recommended revising the section to stipulate that failure to affirmatively respond to a request within a specified time period would be considered a denial of the request for purposes of judicial review, unless the museum or agency extends the time period in writing for good cause and specifies a specific and reasonable timetable. Five commenters recommended clarifying that "an agency denial of such a request is final when the lineal descendant, Indian tribe or Native Hawaiian organization has exhausted any required administrative appeals within the agency. Neither the fact that the Review Committee may review the matter nor the fact that an agency denial is subject to reconsideration upon submission of

new information affects its status as final agency action under the Administrative Procedure Act. After a final agency denial, a lineal descendant, Indian tribe or Native Hawaiian organization may make a new request for repatriation or disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony under the Act on the basis of the findings or recommendations of the Review Committee or new information."

*Our Response:* Congress did not provide that requests would be deemed denied based on a failure to respond. The drafters agree that the language suggested by the five commenters is consistent with case law, but consider that the proposed revision adequately addresses when a determination constitutes a final agency action as used in the Administrative Procedure Act (5 U.S.C. 704). The drafters have also added the text previously proposed in § 10.1(b)(3) into § 10.15(c) to reiterate that the final denial of a request of a lineal descendant, Indian tribe, or Native Hawaiian organization for the repatriation or disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony constitutes final agency action under the Administrative Procedure Act.

#### Section 10.2(e)(1) Definition of Cultural Affiliation

Section 10.2(e)(1) revises the definition of "cultural affiliation" to include "anthropological" evidence. The term, which is specifically included in section 7(a)(4) of the Act (25 U.S.C. 3005(a)(7)), was inadvertently omitted from the previous regulatory text. Two commenters agreed with the proposed revision of the definition of "cultural affiliation."

*Comment 25:* One commenter recommended including the phrase "cultural or geographic relationship" within the list of evidence relevant to determining cultural affiliation in the second sentence of § 10.2(e)(1).

*Our Response:* Both geographical and anthropological (cultural) evidence are already specifically identified as relevant to determining cultural affiliation (25 U.S.C. 3005(a)(4)).

*Comment 26:* One commenter recommended that human remains should not be returned without clear, indisputable physical (archeological) linkage to a present-day Indian tribe or Native Hawaiian organization.

*Our Response:* Archeological evidence is one of several types of relevant information or expert opinion that must be considered in determining whether cultural affiliation can be established (25 U.S.C. 3005(a)(4)).

Culturally affiliation must be “reasonably traced” (25 U.S.C. 3001(2)). Requiring an “indisputable linkage” would be inconsistent with the Act.

*Comment 27:* One commenter recommended including language in § 10.2(e)(1) stipulating that ambiguities in determining cultural affiliation must be resolved in the favor of Indian tribes.

*Our Response:* The Act was enacted for the benefit of Indians, therefore the canon of construction applies that statutes “are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit” (*Yankton Sioux Tribe v. United States Army Corps of Engineers*, 83 F. Supp 2d 1047, 1056 (D.S.D. 2000)). These regulations are subject to the same canon of construction. “The trust relationship and its application to all Federal agencies that may deal with Indians necessarily requires the application of a similar canon of construction to the interpretation of Federal regulations” (*HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000)). This principle of Indian law is so well-established, however, that the drafters consider additional regulatory text unnecessary.

*Comment 28:* One commenter questioned whether the proposed change would impact the American Indian Religious Freedom Act.

*Our Response:* The proposed change revised the regulatory definition of cultural affiliation to reflect the statutory text and has no implications related to the American Indian Religious Freedom Act.

#### *Section 10.2(e)(2) Definition of Culturally Unidentifiable*

Section 10.2(e)(2) defines the term “culturally unidentifiable.”

*Comment 29:* One commenter objected to the term “unidentifiable” given the likelihood that in many cases, cultural affiliation can be determined through additional consultation with Indian tribes. The commenter stated that the term thus places a false sense that there is no existing Native American group legitimately related to prehistoric human beings. Another commenter felt the term limits tribal sovereign rights and misappropriates the Federal trust responsibility to American Indians. Three commenters recommended including separate definitions of “unidentifiable” and “unidentified.”

*Our Response:* Section 8 of the Act (25 U.S.C. 3006) directs the Review Committee to compile an inventory of “culturally unidentifiable” human remains. The drafters recognize that additional considerations (e.g., consultation and disposition as required

by this rule) may result in the determination of cultural affiliation for some of these human remains. Provisions to carry out the repatriation of human remains and associated funerary objects previously determined to be culturally unidentifiable are included at §§ 10.11(b)(6), 10.9(e) and 10.10(b) of the existing regulations, as amended by this rule.

*Comment 30:* One commenter recommended specifying in the definition of “culturally unidentifiable” that such identifications are made through the inventory process.

*Our Response:* The phrase “ \* \* \* through the inventory process” has been added to the end of this definition.

*Comment 31:* Three commenters recommended deleting the phrase “and associated funerary objects” from the definition of culturally unidentifiable.

*Our Response:* While disposition of funerary objects associated with culturally unidentifiable human remains is voluntary, § 10.9(d)(2) of these regulations requires museums and Federal agencies to prepare an inventory of both human remains and associated funerary objects that cannot be identified as affiliated with a particular individual, Indian tribe, or Native Hawaiian organization. The phrase “and associated funerary objects” has been retained.

*Comment 32:* One commenter recommended redefining “culturally unidentifiable” to refer “to human remains for which a relationship of shared group identity cannot be reasonably traced historically or prehistorically between members of present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group.”

*Our Response:* The drafters consider the recommended text less clear than the proposed rule text because it omits reference to associated funerary objects, lineal descendants, and museum and Federal agency collections, all necessary elements of this definition.

*Comment 33:* One commenter recommended including reference in the definition of “culturally unidentifiable” at § 10.2(e)(2) that claims could be made for these human remains based on tribal land, aboriginal land, or cultural relationship.

*Our Response:* The basis for disposition of culturally unidentifiable human remains are set forth at § 10.11(c)(1) of this rule.

*Comment 34:* One commenter was concerned that the proposed definition of “culturally unidentifiable” at § 10.2(e)(2) would require museum staff to make judgment calls without adequate professional expertise.

*Our Response:* Current regulations require museum and Federal agency officials to “prepare a listing of all culturally unidentifiable human remains and associated funerary objects for which no culturally affiliated present-day Indian tribe or Native Hawaiian organization can be determined” (43 CFR 10.9(e)(6)). Completion of this listing was required by November 16, 1995, or a later date specifically determined by the Secretary on a case-by-case basis. Museum and Federal agency officials may wish to retain outside professional expertise to assist in these determinations, but are not required to do so. Museum and Federal agency officials are required to consult with representatives of Indian tribes and Native Hawaiian officials.

#### *Section 10.2(g) Definition of Disposition*

Section 10.2(g)(5) provides a definition of disposition and identifies procedures to effectuate this process in various situations.

*Comment 35:* One commenter recommended deleting the phrase “with or without associated funerary objects” from § 10.2(g)(iii).

*Our Response:* While disposition of funerary objects associated with culturally unidentifiable human remains is voluntary, the Secretary recommends that museums and Federal agencies engage in such transfers whenever Federal or State law would not otherwise preclude them. The phrase has been retained.

*Comment 36:* Four commenters recommended revisions to the definition of “disposition” at § 10.2(g)(5) to provide museums and Federal agencies with the option of retaining possession and control of culturally unidentifiable human remains. One commenter recommended inserting the phrase “or other mutually acceptable alternative” after “transfer or control.”

*Our Response:* Section 8(c)(5) of the Act (25 U.S.C. 3006(c)(5)) directs the Review Committee to recommend specific actions for developing a process for disposition of culturally unidentifiable human remains. In its 2000 recommendations, the Review Committee specified three types of appropriate disposition solutions, including transfer of control based on the recovery of the human remains from a particular Indian tribe or Native Hawaiian organization’s tribal land or aboriginal land or on a relationship of shared group identity between the human remains and an Indian group which is not federally-recognized (65 FR 36463, June 8, 2000). The governing body of an Indian tribe or Native

Hawaiian organization is free to relinquish control of human remains or negotiate “other mutually acceptable alternatives” (25 U.S.C. 3002(e)).

*Comment 37:* Five commenters recommended reviewing the term “control” as it relates to the term “repatriate,” and to consider language that holds a museum or Federal agency harmless if a right of possession comes to light after disposition has been effected.

*Our Response:* The term “control” means having a legal interest in human remains, funerary objects, sacred objects, or objects of cultural patrimony sufficient to lawfully permit the museum or Federal agency to treat the objects as part of its collection for purposes of these regulations whether or not the human remains, funerary objects, sacred objects or objects of cultural patrimony are in the physical custody of the museum or Federal agency (43 CFR 10.2(a)(3)(ii)). The Act and these regulations provide that any museum which repatriates or effects the disposition of Native American human remains in good faith pursuant to the Act and these regulations shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with these provisions (25 U.S.C. 3005(f)).

#### Section 10.2 Other Definitions

*Comment 38:* One commenter recommended defining “nonfederally-recognized Indian group” in § 10.2.

*Our Response:* The Act requires a museum or Federal agency to repatriate Native American cultural items upon receipt of a valid claim from a lineal descendant, Indian tribe, or Native Hawaiian organization. The latter three terms are defined at § 10.2(b)(1), (b)(2), and (b)(3), respectively. We have chosen to clarify by using the term “not federally-recognized” for any Indian group that does not meet the definition in § 10.2(b)(2).

*Comment 39:* Three commenters indicated that the proposed rule is inconsistent with the Ninth Circuit’s opinion in *United States v. Bonnichsen* (357 F.3d 962 (9th Cir. 2004)).

*Our Response:* The Court’s opinion in *Bonnichsen* addressed whether the remains of “Kennewick Man” constituted Native American remains within the Act’s definition of that term. The proposed rule does not affect the definition of “Native American.” The proposed rule only applies after a determination is made, consistent with applicable law, that the human remains or associated funerary objects are Native American.

*Comment 40:* Seven commenters recommended inserting the phrase “Native American” before each occurrence of “human remains” throughout the regulations.

*Our Response:* Since the drafters did not propose to modify the definition of “human remains” at § 10.2(d)(1), the meaning of the term throughout these regulations remains “the physical remains of a human body of a person of Native American ancestry.”

*Comment 41:* One commenter recommended including a definition of “preponderance of the evidence.”

*Our Response:* Determinations within the Act are based on standard rules of civil procedure. Museums and Federal agencies are initially required to determine by a reasonable belief if human remains and associated funerary objects are culturally affiliated with an Indian tribe or Native Hawaiian organization (25 U.S.C. 3003(d)(2)). Thereafter, human remains and associated funerary objects must be expeditiously repatriated where an Indian tribe or Native Hawaiian organization can demonstrate cultural affiliation by the preponderance of the evidence (25 U.S.C. 3005(a)(4)). The preponderance of the evidence generally means that a decision maker must be persuaded that the evidence is sufficient to make it more likely than not that the fact the claimant seeks to prove is true.

#### Section 10.9(e)(2) Content of Notice of Inventory Completion

Section 10.9(e)(2) details the contents of notices of inventory completion. Additional text was proposed at § 10.9(e)(2)(v) to clarify that such notices must include information regarding culturally unidentifiable human remains, with or without associated funerary objects, that may be transferred under § 10.11.

*Comment 42:* One commenter recommended deleting the phrase “with or without associated funerary objects” from § 10.9(e)(2)(v).

*Our Response:* While disposition of funerary objects associated with culturally unidentifiable human remains is voluntary, the Secretary recommends that museums and Federal agencies engage in such transfers whenever Federal or State law would not otherwise preclude such transfers. The phrase has been retained.

*Comment 43:* One commenter recommended replacing the phrase “that may be transferred under § 10.11” at the end of § 10.9(e)(2)(v) with “that are subject to disposition under § 10.11.”

*Our Response:* The recommended change is consistent with the language in section 8(c)(5) of the Act (25 U.S.C.

3006(c)(5)) and § 10.2(g)(5)(iii) of these regulations. The regulations have been changed as suggested.

*Comment 44:* Two commenters recommended that the listing of culturally unidentifiable human remains and associated funerary objects specify whether they are: (1) Those for which cultural affiliation could be determined but that the appropriate Indian group is not federally-recognized as an Indian tribe; (2) those that represent an identifiable earlier group, but for which no present-day Indian tribe has been identified by the museum or Federal agency; and (3) those for which the museum or Federal agency believes that evidence is insufficient to identify an earlier group. Another commenter specifically recommended that these categories should not be used.

*Our Response:* The suggested categories of culturally unidentifiable human remains are derived from the Review Committee’s 2000 recommendations (65 FR 36463). However, the Review Committee recommendations did not make any distinction regarding disposition of any of the three categories. The three categories were not used in the proposed rule and no comments were received recommending different dispositions on that basis.

*Comment 45:* Two commenters recommended that the inventory or notice of inventory completion include a “record of origin” or “basis of reasoning” for determining that human remains are Native American and culturally unidentifiable.

*Our Response:* The contents of the inventory (10.9(d)) and notice of inventory completion (43 CFR 10.9(e)) apply only to human remains already determined to be “Native American” under 43 CFR 10.2(d)(1) and the Act. The inventory includes a summary of the evidence used to determine cultural affiliation. By definition in 43 CFR 10.2(e)(2), remains for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified through the inventory process are considered culturally unidentifiable and, thus, do not require a further basis of reasoning when included on the notice of inventory completion as culturally unidentifiable.

#### Section 10.9(e)(5) Additional Documentation

Section 10.9(e)(5) directs museums or Federal agencies to supply additional available documentation upon the request of an Indian tribe or Native Hawaiian organization. Additional text was proposed for inclusion in

§ 10.9(e)(5)(ii) to clarify that such documentation when supplied by a Federal agency or to a Federal agency shall be considered a public record subject to disclosure except when exempted under applicable law, such as the Freedom of Information Act and the Privacy Act. Further, as required by section 5(b)(2) of the Act (25 U.S.C. 3003(b)(2)), neither a request for such documentation nor any provisions of the regulations shall 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.

*Comment 46:* Six commenters recommended deleting § 10.9(e)(5)(A) and (e)(5)(B) on the grounds that they create a seemingly impossible conundrum, would severely hinder the scientific study of ancient remains, and are “an obvious attempt to end-run Congressional intent and a Federal court ruling in the long-fought Kennewick Man case.” One commenter recommended including language confirming that “studies or other means of acquiring or preserving information are not prohibited, but NAGPRA cannot be used as the authorization for them” or “additional study may be authorized, requested, or otherwise developed as part of the consultation and affiliation process.” One commenter recommended adding a new paragraph to read as follows: “In consultation with the tribes identified in § 10.11(b)(2), the museum or Federal agency may undertake additional documentation of human remains and associated funerary objects prior to their transfer under § 10.11(c). This documentation shall be completed within two years of an offer to transfer culturally unidentifiable human remains unless the consulting tribes agree that additional time (beyond two years) is needed.” Eleven commenters recommended including language specifying that “culturally unidentifiable human remains that have not yet been repatriated should be treated with great respect and should not be subject to any further scientific research or used for teaching purposes.” One commenter recommended that museums and Federal agencies should upgrade their testing to include total DNA, not just patrilineal DNA.

*Our Response:* The language in this section is drawn directly from the Act and thus clearly represents Congressional intent.

*Comment 47:* Fifteen commenters generally supported this section. One commenter requested clarification as to

whether a museum or Federal agency is required to provide additional documentation upon request of an Indian group that is not federally-recognized.

*Our Response:* The Act stipulates that a museum or Federal agency must supply additional available documentation upon request by an Indian tribe or Native Hawaiian organization (25 U.S.C. 3003(b)(2)). This requirement does not apply to requests from an Indian group that is not federally-recognized.

A museum or Federal agency may be required to supply such documentation under other applicable law and is encouraged to voluntarily do so if not otherwise required.

*Comment 48:* Nine commenters recommended including language that this section is not meant to preclude the withholding from the public of information that is specifically exempted from disclosure under applicable law.

*Our Response:* The drafters have added language to clarify that some information may be exempt from disclosure under applicable law, such as the Freedom of Information Act (5 U.S.C. 552), Privacy Act (5 U.S.C. 552a), Archaeological Resources Protection Act (16 U.S.C. 470hh), and National Historic Preservation Act (16 U.S.C. 470w–3), and any other legal authority exempting such information from public disclosure.

#### *Section 10.9(e)(6) Removing Retention Requirement*

Section 10.9(e)(6) is rewritten to remove the last three sentences that required a museum or Federal agency to retain possession of culturally unidentifiable human remains pending promulgation of § 10.11.

*Comment 49:* Three commenters recommended deleting the phrase “with or without associated funerary objects” from § 10.9(e)(6).

*Our Response:* The phrase occurs twice in this paragraph. The first sentence refers to associated funerary objects that are in the possession or control of a museum or Federal agency. The last sentence refers to items that are subject to disposition under § 10.11. The phrase “with or without associated funerary objects” is used throughout the regulations to indicate that disposition of such items, though encouraged, is not required. Usage of the term in the last sentence of this section is thus appropriate. The phrase “with or without” has been replaced with “and” in the first sentence to make it clear that associated funerary objects must be included in the inventory of culturally

unidentifiable human remains provided to the Manager, National NAGPRA Program.

*Comment 50:* One commenter recommended revising the text in § 10.9(e)(6) to require a museum or Federal agency to provide the listing of culturally unidentifiable human remains in its possession or control to both the Manager, National NAGPRA Program and the Departmental Consulting Archeologist.

*Our Response:* A separate program to administer some of the Secretary of the Interior’s responsibilities to implement the Act was established in 2000. The Departmental Consulting Archeologist is no longer responsible for those duties, as reflected in a technical amendment to the regulations published in the **Federal Register** on September 30, 2005 (70 FR 57177).

*Comment 51:* One commenter recommended that the inventory of culturally unidentifiable human remains provided to the Manager, National NAGPRA Program and the Review Committee pursuant to § 10.9(e)(6) also be made available to all interested parties. One commenter considered the Review Committee’s publicly accessible database to provide sufficient notice to all Indian tribes to determine their interest in submitting a claim.

*Our Response:* Current regulations require museums and Federal agencies to provide a listing of all culturally unidentifiable human remains and associated funerary objects to the manager, National NAGPRA Program, who will make this information available to the Review Committee. The Culturally Unidentifiable Native American Human Remains Database is publicly posted at <http://64.241.25.6/CUI/index.cfm>. Although museums and Federal agencies are required to consult with Indian tribes and Native Hawaiian organizations in preparing the list, the Database is the primary means by which lineal descendants, Indian tribes, and Native Hawaiian organizations learn that a museum or Federal agency has determined particular human remains to be culturally unidentifiable.

*Comment 52:* One commenter recommended clarifying whether the requirement at § 10.9(e)(2)(v) that notices of inventory completion must describe human remains, with or without associated funerary objects, that are culturally unidentifiable applies only after promulgation of the final rule.

*Our Response:* Current regulations require publication of a notice of inventory completion prior to the repatriation of culturally affiliated human remains and associated funerary

objects (43 CFR 10.9(e)(2)). The Secretary has also required publication of a notice of inventory completion prior to the disposition of culturally unidentifiable human remains, with or without associated funerary objects. The proposed text formalizes as regulation the administrative notice requirement for culturally unidentifiable human remains, with or without associated funerary objects. This rule will have no effect on museums and Federal agencies that previously published notices for disposition of culturally unidentifiable human remains, with or without associated funerary objects, pursuant to a recommendation from the Secretary.

#### Section 10.9 Other General Comments

*Comment 53:* Two commenters stated that the proposed rule puts museums in the position of determining whether human remains and associated funerary objects are “Native American.”

*Our Response:* Under the Act, museums and Federal agencies already have the role and responsibility of determining what constitutes “Native American” cultural items in their possession or control. While the statute contemplates consultation on this determination and other topics related to cultural items, the final determination is the museum or Federal agency’s alone. Challenges to such determinations may be raised as disputes before the Review Committee or litigated in a U.S. District Court.

*Comment 54:* Two commenters requested clarification as to who is responsible for determining the geographic or cultural affiliation of Native American human remains and associated funerary objects.

*Our Response:* The statute (25 U.S.C. 3003(a)) and current regulations (43 CFR 10.9(a)) are clear that each museum or Federal agency that has possession or control over holdings or collections of human remains and associated funerary objects must compile an inventory of such objects, and, to the fullest extent possible based on information possessed by the museum or Federal agency, must identify the geographical and cultural affiliation of each item. While these decisions must be made in consultation with Indian tribes and Native Hawaiian organizations, the museum or Federal agency is responsible for identifying the geographical and cultural affiliation of each item.

*Comment 55:* One commenter recommended that current inventories of culturally unidentifiable human remains be reevaluated in light of *U.S. v. Bonnicksen* (357 F.3d 962 (9th Cir. 2004)).

*Our Response:* The proposed rule does not change the definition of “Native American” or “human remains.” To come within the scope of the Act, a Federal agency or museum must make a threshold determination that the culturally unidentifiable remains or funerary objects are Native American before they may include culturally unidentifiable human remains or funerary objects with which they are associated in the inventories that are submitted to the Review Committee pursuant to § 10.9(d)(2).

*Comment 56:* One commenter recommended that the regulations reaffirm that Federal agencies, like museums, must comply with the inventory, consultation, and repatriation requirements of the Act.

*Our Response:* Like museums, Federal agencies must comply with the summary, inventory, consultation, notice, and repatriation process of the Act and the regulations.

*Comment 57:* Seven commenters requested a clear and explicit explanation of how the proposed rule takes into account the potential interests of the public in scientific research and education.

*Our Response:* The issue of scientific research is specifically addressed by Congress. Section 5(b)(2) of the Act states that “[Documentation] does not mean, and this Act shall not be construed to be an authorization for the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.” The rule repeats this language at § 10.9(5)(ii).

*Comment 58:* Eight comments recommended that Indian tribes and Native Hawaiian organizations should have the primary role in determining whether human remains are “culturally unidentifiable.”

*Our Response:* Museum and Federal agency officials, in consultation with Indian tribes and Native Hawaiian organizations, are required to determine the cultural affiliation of all Native American human remains and associated funerary objects in their possession or control (43 CFR 10.9).

#### Section 10.11 Disposition of Culturally Unidentifiable Human Remains

This new section fulfills the Secretary’s responsibility to promulgate regulations under sections 8(c)(5) and 13 of the Act (25 U.S.C. 3006(c)(5) and 3011) and 25 U.S.C. 9 regarding the process for the disposition of culturally unidentifiable human remains. The Department of the Interior developed

this section after full and careful consideration of the Review Committee’s recommendations and other relevant legislation and policy.

*Comment 59:* Thirty-two commenters generally supported this section. Twenty-four commenters generally opposed this section. One commenter recommended retaining the term “disposition” in the title of this section.

*Our Response:* The term has been retained.

*Comment 60:* One commenter recommended removing any timelines or deadlines from this section.

*Our Response:* The proposed rule includes only two deadlines. Section 10.11(b)(1) requires that the museum or Federal agency official initiate consultation within ninety days of receiving a request from an Indian tribe or Native Hawaiian organization to transfer control of culturally unidentifiable human remains or, absent such a request, before making any offer to transfer control of culturally unidentifiable human remains. Section 10.11(d)(2) requires the manager of the National NAGPRA Program to update and make accessible the Review Committee’s inventory of culturally unidentifiable human remains within 30 days of publishing a notice of inventory completion for culturally unidentifiable human remains. Both deadlines seem reasonable and necessary for the effective implementation of this section.

*Comment 61:* The preamble to the proposed rule specifically requested comments regarding the meaning of the term “cultural relationship” which is used in Section 3 of the Act (25 U.S.C. 3002) as a basis for the disposition of Native American human remains, funerary objects, sacred objects or objects of cultural patrimony excavated or removed from Federal or tribal land after 1990 (25 U.S.C. 3002(a)(2)(C)(2)), and was included in the proposed rule as a basis for consultation (43 CFR 10.11(b)) and disposition (43 CFR 10.11(c)) of culturally unidentifiable human remains. Only four commenters offered specific recommendations on how the term should be defined. One proposed a definition that is indistinguishable from that of cultural affiliation—“a relationship that exists between federally-recognized tribes and earlier Native American groups with which those federally-recognized tribes have a relationship of shared group identity.”

*Our Response:* As a matter of regulatory drafting, different terms should not be accorded the same meaning when this can be avoided.

*Comment 62:* Three other commenters recognized that from its context in

section 3 of the Act the term “cultural relationship” connotes a weaker connection than “cultural affiliation,” but differed on how the former connection should be proved. Two commenters recommended that the same types of evidence applicable to showing cultural affiliation—“geographical, kinship, biological, archeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion” [25 U.S.C. 3005(a)(4)]—should also be used to determine cultural relationship, but at some standard less than the preponderance of the evidence. Another commenter specified additional evidence that should be considered in determining cultural relationship, including habitation, tribal history, migration and creation stories, and evidence from tribal elders.

*Our Response:* The drafters note that all of the specified types of evidence for “cultural relationship” are already subsumed under the broader categories identified in the Act for “cultural affiliation.”

*Comment 63:* Three commenters generally supported using “cultural relationship” as a basis for disposition of culturally unidentifiable human remains. Seven commenters recommended that “cultural relationship” be defined prior to finalization of the rule. Four commenters recommended finalizing the rule with a section reserved to define “cultural relationship” at a later date. One commenter recommended that the Review Committee be tasked with developing a definition of “cultural relationship.” Thirteen commenters recommended not defining “cultural relationship” by regulation, instead allowing museums, Federal agencies, Indian tribes, and Native Hawaiian organizations to interpret the term on a case-by-case basis. Nineteen commenters recommended removing “cultural relationship” from the priority structure entirely.

*Our Response:* The diversity of opinion regarding the meaning of “cultural relationship” convinced the drafters to remove it as a required criterion for consultation and disposition of culturally unidentifiable human remains in § 10.11(b) and § 10.11(c).

#### *Section 10.11(a) General Intent*

Paragraph (a) states the general intent of § 10.11.

*Comment 64:* One commenter recommended it be made explicit that the rule only applies to human remains determined to be “Native American.”

*Our Response:* Section 10.11(a) has been changed to read: “This section implements section 8(c)(5) of the Act (25 U.S.C. 3006(c)(5)) and applies to human remains previously determined to be Native American pursuant to § 10.9, but for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified.”

#### *Section 10.11(b) Consultation*

Paragraph (b) establishes procedures for consultation regarding the disposition of culturally unidentifiable human remains.

*Comment 65:* Six commenters recommended making it very clear that the appropriate disposition of culturally unidentifiable human remains can only occur within the framework of consultation and collaboration.

*Our Response:* Section 10.11(b) is intended to provide such a framework.

*Comment 66:* Six commenters were concerned that the initial listing of culturally unidentifiable human remains and associated funerary objects was completed without consultation.

*Our Response:* Inventory preparation under § 10.9 required consultation with lineal descendants and Indian tribal officials and traditional religious leaders (1) from whose tribal lands the human remains and associated funerary objects originated; (2) that are, or are likely to be, culturally affiliated with human remains and associated funerary objects; and (3) from whose aboriginal lands the human remains and associated funerary objects originated. Failure to consult with all of the above-referenced parties constitutes a failure to comply with the requirements of the Act and may result in assessment of a civil penalty under § 10.12(b)(1)(vii). It is anticipated that consultation as required in § 10.11(b) will result in determinations that some human remains and associated funerary objects previously determined to be culturally unidentifiable are actually culturally affiliated with an Indian tribe or Native Hawaiian organization.

*Comment 67:* Four commenters considered the consultation requirements at § 10.11(b) to be impractical, burdensome, likely to cause irreparable damage to the strong, highly productive collaborative relationships between Indians and the scientific community, and likely to lead to rushed decisions regarding disposition of culturally unidentifiable human remains. Six commenters recommended including additional guidance on how to conduct meaningful consultation. One commenter requested clear guidelines on exactly when a particular consultation process reaches a definitive

conclusion. Five commenters recommended including a definition of “consultation” consistent with House Report 101–877.

*Our Response:* Consultation is a critical component of implementing this section and the Act as a whole. The committee report accompanying the Act (House Report 101–877 (October 15, 1990)) defined consultation as “a process involving the open discussion and joint deliberations with respect to potential issues, changes, or actions by all interested parties.” Consultation is not defined in the Act itself. These regulations require museums and Federal agencies to initiate consultation within ninety days of receipt of a request from an Indian tribe or Native Hawaiian organization, or before any offer to transfer control of culturally unidentifiable human remains and associated funerary objects. Required consultation would generally conclude once control of the culturally unidentifiable human remains, with or without associated funerary objects, has been transferred to the Indian tribe or Native Hawaiian organization.

#### *Section 10.11(b)(1) When To Consult*

Section 10.11(b)(1) identifies when museums and Federal agencies must initiate consultation regarding the disposition of culturally unidentifiable human remains and associated funerary objects.

*Comment 68:* Two commenters recommended that § 10.11(b)(1) provide clear guidelines for the circumstances under which a museum or Federal agency must initiate consultation. One commenter recommended that a museum or Federal agency’s obligation to initiate consultation be triggered only by receipt of a claim. One commenter asked whether a Federal agency should invite consultation if no claim is received from a federally-recognized Indian tribe or Native Hawaiian organization. One commenter recommended that there be clear guidelines on exactly when the consultation process may conclude.

*Our Response:* This paragraph requires a museum or Federal agency official to initiate consultation regarding the disposition of culturally unidentifiable human remains and associated funerary objects in two separate instances. Consultation must be initiated within ninety days of receipt of a request from an Indian tribe or Native Hawaiian organization to transfer control. Absent such a request, consultation must also be initiated before the museum or Federal agency makes any offer to transfer control. Required consultation would generally

conclude once the control and possession of the culturally unidentifiable human remains, with or without associated funerary objects, has been transferred to the Indian tribe or Native Hawaiian organization.

#### *Section 10.11(b)(2) Who To Consult*

Section 10.11(b)(2) identifies who must be consulted regarding the disposition of culturally unidentifiable human remains and associated funerary objects.

*Comment 69:* Three commenters recommended that consultation not be required with all of the Indian tribes and Native Hawaiian organizations specified at § 10.11(b)(2), in part because Indian tribes and Native Hawaiian organizations will be inundated with requests to consult.

*Our Response:* The drafters have removed the requirement to consult with Indian tribes and Native Hawaiian organizations with a cultural relationship to the region from which the human remains and associated funerary objects were removed (43 CFR 10.11(b)(2)(iii)). Museums and Federal agencies were already required to consult with Indian tribes and Native Hawaiian organizations from whose tribal lands or aboriginal lands the human remains and associated funerary objects were removed in preparing their initial inventories (43 CFR 10.9(b)).

*Comment 70:* One commenter recommended that the Department compile a list of Native Hawaiian organizations that should be consulted regarding disposition of culturally unidentifiable human remains.

*Our Response:* Contact information is available for some Native Hawaiian organizations from two sources within the Department of the Interior. The National Park Service, National NAGPRA Program maintains the Native American Consultation Database (<http://home.nps.gov/nacd/>). The Department of the Interior, Office of Hawaiian Relations maintains the Native Hawaiian Organization List (<http://www.doi.gov/ohr/>). Other sources should also be considered.

*Comment 71:* One commenter considered inclusion of treaties, acts of Congress, and Executive Orders at § 10.11(b)(2)(ii), along with final determinations of the Indian Claims Commission and the U.S. Court of Claims to be a fair and equitable way of identifying aboriginal lands. Three commenters recommended deleting treaties, acts of Congress, and Executive Orders as a basis for determining aboriginal lands. One commenter considered the cited documents too limiting, and recommended adding the

“testimony of experts.” One commenter requested clarification as to who determines whether or not a specific tribe was the aboriginal occupant of an area.

*Our Response:* While Section 3(a)(2)(C) of the Act (25 U.S.C. 3002(a)(2)(C)) identifies only a final judgment of the Indian Claims Commission or United States Court of Claims as the basis for determining aboriginal lands, the drafters intend to include the full range of relevant and authoritative governmental determinations in this section to provide additional evidence relating to an Indian tribe or Native Hawaiian Organization (or, possibly, an Indian group that is not federally-recognized) with the closest connection to the culturally unidentifiable human remains. These include final judgments of the Indian Claims Commission and the United States Court of Claims, as well as treaties, Acts of Congress, or Executive Orders. Treaties signed before the establishment of the United States between the various colonial governments and Indian tribes may be used to identify areas aboriginally occupied by Indian tribes. Maps of the territory ceded under United States treaties were originally published in the 18th Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution, 1896–1897 (Government Printing Office, 1899) and are available online at <http://memory.loc.gov/ammem/amlaw/lwss-iloc.html>. Judgments of the Indian Claims Commission are available at <http://digital.library.okstate.edu/icc/index.html>. The drafters note that pursuant to provisions of the Indian Claims Commission Act, compromises (settlements) have the same effect of final judgments of the Indian Claims Commission ((605 Stat. 1060, 25 U.S.C. 70a *et seq.*)).

*Comment 72:* Two commenters recommended including a mechanism at § 10.11(b)(2) requiring notification of Indian groups that are not federally-recognized or foreign based groups that may have a shared group identity with culturally unidentifiable human remains.

*Our Response:* The Act and regulations require museums and Federal agencies to consult with lineal descendants, Indian tribes, and Native Hawaiian organizations. Museum and Federal agencies may consult or provide notification to foreign based groups or Indian groups that are not federally-recognized as well.

*Comment 73:* One commenter considered the § 10.11(b)(2)(iii) requirement to consult with Indian

tribes and Native Hawaiian organizations with a cultural relationship to the region from which culturally unidentifiable human remains and associated funerary objects were removed to be reasonable and appropriate. Three commenters recommended deleting the requirement. Two commenters recommended defining the term “region.” One commenter recommended clarifying the term “lacking geographic affiliation.” One commenter recommended including provisions to incorporate study results, particularly of the age of the human remains, and the results of consultation.

*Our Response:* The diversity of opinion regarding the meaning of “cultural relationship” convinced the drafters to remove it as a required criteria for consultation regarding the disposition of culturally unidentifiable human remains in § 10.11(b)(2)(iii).

*Comment 74:* Five commenters recommended that Indians must not be viewed as simply one voice among many, but as the primary voice in determining the disposition of culturally unidentifiable human remains.

*Our Response:* These regulations require museum and Federal agency officials to make certain decisions regarding the disposition of culturally unidentifiable human remains. While the regulations require that these decisions are made in consultation with Indian tribes and Native Hawaiian organizations, the responsibility for making the decision remains with the museum or Federal agency official. Indian tribes and Native Hawaiian organizations assume sole responsibility for disposition once the museum or Federal agency transfers control of culturally unidentifiable human remains.

*Comment 75:* Two commenters requested clarification as to whether the requirements of § 10.11(b)(1) and (b)(2) were independent of each other.

*Our Response:* The two sections are related. Section 10.11(b)(1) specifies when consultation must begin: either within 90 days of receipt of a request to transfer control or, absent such a request, before any offer to transfer control. Section 10.11(b)(2) specifies who must be consulted in either situation.

#### *Section 10.11(b)(3) Information Provided*

Section 10.11(b)(3) outlines the information that museum or Federal agency officials must provide to all consulted Indian tribes and Native Hawaiian organizations.

*Comment 76:* One commenter recommended revising § 10.11(b)(3) to clarify that the specified information must be provided to all Indian tribes and Native Hawaiian organizations with which the museum or Federal agency is consulting “or should have consulted.”

*Our Response:* Refusing to provide the specified information to one of the Indian tribes identified in § 10.11(b)(2) would constitute a failure to comply under § 10.12(b)(vii).

*Comment 77:* Two commenters suggested that § 10.11(b)(3) require museums and Federal agencies to send information as part of consultation to Indian groups that are not federally-recognized. Two commenters questioned the legal basis for requiring a museum or Federal agency to provide a list of Indian groups that are not federally-recognized that are known to have a relationship of shared group identity with the particular human remains and associated funerary objects.

*Our Response:* In the two sections of the Act that impose mandatory priorities for control or disposition of human remains (25 U.S.C. 3002 and 3005), Congress limited the recipients to federally-recognized Indian tribes (in addition to lineal descendants and Native Hawaiian organizations) in recognition of the government-to-government relationship between such tribes and the United States. In expanding the possible recipients of culturally unidentifiable human remains, with or without associated funerary objects, the Secretary followed the lead of Congress both in assuring that such cultural items went to the Indian group that had the closest cultural connection to the items, even if that group is not federally-recognized, and in maintaining the priority position of the government-to-government relationship, by not making such a disposition mandatory. In keeping with the voluntary nature of such disposition, consultation with Indian groups that are not federally-recognized is at the discretion of the museum or Federal agency.

*Comment 78:* One commenter recommended that the Secretary provide a list of Indian groups that are not federally-recognized to facilitate the consultation efforts of museums and Federal agencies.

*Our Response:* Museums and Federal agencies are not required to consult with Indian groups that are not federally-recognized. However, they may wish to consult with Indian groups that are not federally-recognized, particularly if such groups are known to have a relationship of shared group identity with culturally unidentifiable

human remains and associated funerary objects in the possession or control of the museum or Federal agency. Section 10.11(b)(3)(ii) requires museums and Federal agencies to provide consulted Indian tribes and Native Hawaiian organizations with a list of any Indian groups that are not federally-recognized and is known to have a relationship of shared group identity with such human remains and associated funerary objects in order to facilitate consultation regarding appropriate disposition. Thus, the museum or Federal agency, and not the Secretary, would possess the list of such groups on a case by case basis.

*Comment 79:* One commenter suggested that the Secretary require a museum or Federal agency to state its reasoning for consultation with an Indian group that is not federally-recognized.

*Our Response:* Because the regulations do not require such consultation, they do not require a museum or Federal agency to provide the basis for such consultation. However, under § 10.11(b)(4)(iv), the museum or Federal agency must request the names and addresses of Indian groups that are not federally-recognized during consultation with relevant Indian tribes or Native Hawaiian organizations. An appropriate subject for the consultation in the context of such a request would be the reason why the museum or Federal agency needs to consult with those groups.

*Comment 80:* One commenter suggested rewording § 10.11(b)(3)(ii) to remove the passive voice and clarify that the subject list is of the “Indian groups that are not federally-recognized that the museum or Federal agency knows shares” a group identity with the particular human remains and associated funerary objects.

*Our Response:* The drafters agree that, generally, any such knowledge would be within the museum or Federal agency, but prefer to leave the requirement in the passive voice to allow for other sources, such as the general literature.

*Comment 81:* One commenter requested clarification in § 10.11(b)(3)(ii) of what is a legitimate Indian group that is not federally-recognized and what makes such a group “known.”

*Our Response:* Consultation with Indian groups that are not federally-recognized is not required by the Act or these regulations. Museums and Federal agencies are required to provide consulted Indian tribes and Native Hawaiian organizations with a list of any Indian groups that are not federally-recognized that are known to have a

relationship of shared group identity with particular human remains and associated funerary objects. Determinations as to whether such a relationship of shared group identity exists may be done on a case-by-case basis relying upon the types of evidence outlined at § 10.14 of these regulations.

#### *Section 10.11(b)(4) Information Requested*

Section 10.11(b)(4) outlines the information that museum and Federal agency officials must request from consulted Indian tribes and Native Hawaiian organizations.

*Comment 82:* One commenter was concerned that § 10.11(b)(4)(iii) gives Indian tribes and Native Hawaiian organizations complete authority to determine the criteria to be used in identifying groups of human remains and associated funerary objects for consultation.

*Our Response:* Museum and Federal agency officials are required to request temporal and/or geographic criteria to be used to identify groups of human remains and associated funerary objects for consultation. Additional criteria may also be used to identify the focus of consultation.

*Comment 83:* Two commenters were concerned that § 10.11(b)(4)(v) gives Indian tribes and Native Hawaiian organizations authority to single-handedly and unilaterally determine the consultation schedule and process.

*Our Response:* Museum and Federal agency officials are required to request consultation schedules and process preferences from Indian tribes and Native Hawaiian organizations. The consultation schedule and process that is actually used will depend on other factors as well.

#### *Section 10.11(b)(5) Disposition Proposals*

Section 10.11(b)(5) directs museum and Federal agency officials to seek to develop a proposed disposition for culturally unidentifiable human remains and associated funerary objects that is mutually agreeable to the parties and consistent with this part.

*Comment 84:* Six commenters recommended revising § 10.11(b)(5) to require the museum or Federal agency official to develop a proposed disposition for culturally unidentifiable human remains and associated funerary objects that is mutually agreeable to the parties specified in § 10.11(b)(2). One commenter recommended that the museum or Federal agency official should consider proposed dispositions developed by and mutually agreeable to the parties specified in § 10.11(b)(2).

One commenter recommended that this paragraph address what would happen if the parties do not agree on a proposed disposition. One commenter recommended that if no agreement is reached, the museum or Federal agency should be able to determine disposition in good faith and be protected from liability.

*Our Response:* This paragraph strongly encourages museum and Federal agency officials to seek to develop proposed dispositions that are mutually agreeable to the parties specified in § 10.11(b)(2). It is recognized that the interests of the various parties may differ and that obtaining a mutually agreeable proposal is beyond the ability of any single party.

*Comment 85:* One commenter recommended revising § 10.11(b)(5) to clarify that disposition of funerary objects associated with culturally unidentifiable human remains is advised but not required.

*Our Response:* Section 10.11(c)(5) which has been renumbered as § 10.11(c)(4) clarifies that a museum or Federal agency may transfer control of funerary objects that are associated with culturally unidentifiable human remains and that the Secretary recommends that museums and Federal agencies engage in such transfers whenever Federal or State law would not otherwise preclude transfers.

*Comment 86:* One commenter recommended revising § 10.11(b)(5) to establish a basis for determining the right of claim or strength of relationship among the parties specified in § 10.11(b)(2).

*Our Response:* The priority of claim is established by § 10.11(b)(2). A claim for culturally unidentifiable human remains made by an Indian tribe or Native Hawaiian organization from whose tribal land, at the time of the excavation or removal, the human remains were removed has a higher priority than a claim made by an Indian tribe that is recognized as aboriginally occupying the area from which the human remains were removed.

*Comment 87:* One commenter was concerned that limiting agreement in § 10.11(b)(5) to only those parties identified in § 10.11(b)(2) will vitiate the careful consideration of evidence required by the Act and leave the door wide open to transfers of control to groups with no significant relationship to the human remains.

*Our Response:* Museum and Federal agency officials are free to consult with any party that may help inform the development of a proposed disposition. However, the parties identified in § 10.11(b)(2) must be consulted and the

museum or Federal agency official should, at a minimum seek to develop a proposed disposition for culturally unidentifiable human remains and associated funerary objects that is mutually agreeable to the parties.

*Comment 88:* One commenter recommended revising § 10.11(b)(5) to indicate that a museum or Federal agency and involved Indian parties should be free to reach any agreement as to disposition that is permitted by all applicable laws.

*Our Response:* Museum and Federal agency officials may be bound by other Federal, state, or local ordinances regarding the disposition of culturally unidentifiable human remains and associated funerary objects in their possession or control. Section 10.11(b)(5) stipulates that all such agreements must be consistent with these regulations at a minimum.

#### *Section 10.11(b)(6) Determinations of Lineal Descent or Cultural Affiliation*

Section 10.11(b)(6) stipulates that the notification and repatriation provisions of §§ 10.9(e) and 10.10(b) apply if human remains and associated funerary objects previously determined to be culturally unidentifiable are actually culturally affiliated with an Indian tribe or Native Hawaiian organization.

*Comment 89:* One commenter recommended that the language in § 10.11(b)(6) be clarified to indicate that the notification and repatriation provisions would also apply if consultation resulted in the identification of a lineal descendant. One commenter recommended rephrasing the section for clarity.

*Our Response:* The text has been revised with additional text indicating that the notification and repatriation provisions would apply if consultation resulted in the identification of a lineal descendant.

*Comment 90:* One commenter objected to what he considered a presumption in § 10.11(b)(6) that skeletal materials that have not been identified with a cultural group can never be correctly identified.

*Our Response:* The drafters anticipate that the consultation process will result in decisions that human remains and associated funerary objects previously determined to be culturally unidentifiable are actually culturally affiliated with Indian tribes and Native Hawaiian organizations. This paragraph makes it clear that the notification and repatriation requirements of § 10.9(e) and § 10.10(b) apply when a determination of cultural affiliation is made.

#### *Section 10.11(c) Disposition*

Paragraph(c) establishes a priority listing and procedures for the disposition of culturally unidentifiable human remains.

*Comment 91:* The preamble to the proposed rule specifically requested comments regarding the appropriateness of using a priority structure in determining the disposition of culturally unidentifiable human remains. The priority structure proposed in § 10.11(c) was based on the similar priority structure in section 3 of the Act. Sixteen commenters generally supported use of the proposed priority structure. Nine commenters objected to use of any priority structure based on criteria other than lineal descent or cultural affiliation.

*Our Response:* The Review Committee is responsible for recommending specific actions for developing a process for disposition of culturally unidentifiable human remains (25 U.S.C. 3006 (c)(5)). Since 1992, the Review Committee has recommended the disposition of specific culturally unidentifiable human remains based on their removal from the aboriginal land of an Indian tribe, their shared group identity with an Indian group that is not federally-recognized, and reburial pursuant to otherwise applicable state burial law. The Review Committee's recommendations in these cases have been reviewed by the Secretary of the Interior and generally endorsed. Such dispositions are clearly within the Secretary's authority under current regulations. The proposed rule would simply authorize museums and Federal agencies to effect such dispositions to Indian tribes and Native Hawaiian organizations without direct reliance upon the Secretary.

*Comment 92:* Three commenters recommended that the "priority structure" should not be the only factor for determining the disposition of either culturally affiliated or culturally unidentifiable human remains, such as agreements between Indian tribes regarding disposition.

*Our Response:* Agreements between a Federal agency or museum and culturally affiliated Indian tribes or Native Hawaiian organizations regarding the disposition of, or control over, Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony are specifically authorized by section 11(1)(B) of the Act (25 U.S.C. 3009(1)(B)). Agreements regarding the return of culturally unidentifiable human remains and associated funerary objects to Indian tribes, Native Hawaiian

organizations, or individuals are also authorized by section 11(1)(A) of the Act (25 U.S.C. 3009(1)(A)). The drafters have added a new subsection at § 10.11(c)(2)(i) to facilitate such voluntary dispositions.

*Comment 93:* One commenter urged inclusion of guidelines clearly specifying the level of effort that will be required to determine if culturally unidentifiable human remains fit the proposed priority categories.

*Our Response:* Guidelines specifying the level of effort necessary to determine the applicability of these, or other definitions within the regulations, are already provided by the statute and regulations. For instance, determinations regarding the cultural affiliation of human remains, or the lack thereof, are to be made, to the extent possible, based on information possessed by a museum or Federal agency (25 U.S.C. 3003(a)). New scientific studies of such remains and associated funerary objects, or other means of acquiring or preserving additional scientific information from such remains and objects, are not required by the statute (25 U.S.C. 3003(b)(2)).

*Comment 94:* One commenter urged consideration of a single unified effort to specifically identify and map tribal and aboriginal lands.

*Our Response:* Maps of tribal land, Indian Claims Commission decisions, and treaty areas are currently posted at: <http://www.nps.gov/history/nagpra/>.

*Comment 95:* Three commenters were concerned that assigning disposition of culturally unidentifiable human remains to a particular culture group might result in some skeletal remains being transferred to a group to which they do not belong, including some of European, African, and Asian ancestry.

*Our Response:* All museums and Federal agencies were required to compile inventories of human remains and associated funerary objects. Each museum and Federal agency was responsible for determining if the human remains and associated funerary objects were Native American in the first instance. Human remains that were not identified as Native American were not to be included on the inventory. Museums and Federal agencies that wish to amend a previous decision may do so pursuant to § 10.13(e).

#### *Section 10.11(c)(1) Required Offers to Transfer Control*

Section 10.11(c)(1) requires a museum or Federal agency to offer to transfer control of culturally unidentifiable human remains for which it cannot prove right of possession to Indian

tribes or Native Hawaiian organizations according to two priority categories.

*Comment 96:* One commenter recommended that the “offer to transfer control” referred to in § 10.11(c)(1) must be developed in consultation with Indian tribes and Native Hawaiian organizations.

*Our Response:* Any offer to transfer control must be developed in consultation with the Indian tribes and Native Hawaiian organizations identified in § 10.11(b)(2).

*Comment 97:* Two commenters recommended that museums and Federal agencies should not be required to initiate efforts to transfer control of culturally unidentifiable human remains absent a request from an Indian tribe or Native Hawaiian organization with the right to make such a claim.

*Our Response:* Under § 10.11(b)(1)(i), a museum or Federal agency official must initiate consultation regarding the disposition of culturally unidentifiable human remains and associated funerary objects within 90 days of receipt of a request from an Indian tribe or Native Hawaiian organization to transfer control of such items. Absent such a request, the museum or Federal agency official may voluntarily offer to transfer control, in which case they must initiate consultation prior to making such an offer.

*Comment 98:* Nine commenters supported the proposed provision in § 10.11(c)(1) requiring that a museum or Federal agency offer to transfer culturally unidentifiable human remains to certain classes of Indian tribes unless it can prove that it has the right of possession to the remains. Seven commenters generally opposed the same provision, claiming that museums and Federal agencies should not have to prove that right to keep their collections.

*Our Response:* The opportunity for a museum or Federal agency to assert that it has the right of possession to culturally unidentifiable human remains is consistent with the provisions in § 10.15 of the regulations concerning repatriation of culturally affiliated human remains and the intent of Congress to recognize such a right as an exception to repatriation of human remains under section 7 of the Act (25 U.S.C. 3003)). The Secretary believes that it is appropriate to recognize that right as an exception for these remains as well.

*Comment 99:* One commenter questioned the use of the term “right of possession” with respect to human remains, stating that one person cannot own another person, alive or dead.

*Our Response:* Although the use of this term, as well as the term “culturally unidentifiable” is sensitive, Congress used both of these terms with specific meanings and consequences in the Act, so they must be used in the regulations with respect to those same meanings and consequences.

*Comment 100:* Eight commenters stated that proving right of possession to culturally unidentifiable human remains would be “impossible” since only a culturally affiliated Indian tribe can grant consent.

*Our Response:* Under NAGPRA, “the original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains” (25 U.S.C. 3001(13)). Further, “the governing body of an Indian tribe or Native Hawaiian organization [may] expressly relinquish \* \* \* control over any Native American human remains” acquired pursuant to the ownership provisions of the Act (25 U.S.C. 3002(e)). Thus, Congress has defined the right of possession for these cultural items, and the Secretary cannot change that definition. The Secretary does note, however, that the “full knowledge and consent of the next of kin” would bring freely donated organs and other body parts within the right of possession. Furthermore, the exception listed at § 10.10(c)(3) applies to the requirements of § 10.11(c)(1).

*Comment 101:* Four commenters requested that the final rule be very clear that the burden of proof for the right of possession of culturally unidentifiable human remains is on the museum or Federal agency.

*Our Response:* The Secretary agrees that the burden of proof is on the museum or Federal agency, and that, as the proposed and final rule states, if a museum or Federal agency “is unable to prove that it has right of possession”, it must offer to transfer the remains, with or without associated funerary objects (25 U.S.C. 3005(c)) upon receipt of a request.

*Comment 102:* Three commenters stated that a museum or Federal agency should be presumed to have the legal right of possession to its collection, unless shown to be otherwise. The commenters asserted that such a presumption would be consistent with the treatment of archaeological resources as property of the United States under the Archaeological Resources Protection Act (ARPA) and

with state laws relating to property rights and private ownership of human remains and artifacts taken from private property. Culturally unidentifiable human remains should be retained by museums and Federal agencies in the public trust.

*Our Response:* Congress specifically chose to change the ownership presumption in ARPA when it enacted NAGPRA, as evidenced by the requirement for a museum or Federal agency to prove that it has the right of possession to culturally affiliated human remains under section 7 of NAGPRA. With respect to state property laws and presumptions of ownership, NAGPRA is Federal law, and, as such, under the Supremacy Clause of the Constitution (Art. VI, cl. 2; *Lorillard Tobacco Co. v. Reilly*, 533 US 525 (2001)) would preempt any state law on the same subject matter. This is especially true in Indian affairs, where the United States has plenary and exclusive power (Art. I, Sec. 8, cl. 3; *Worcester v. Georgia*, 31 US 515, 6 Pet 515 (1832)).

*Comment 103:* Two commenters recommended excluding human anatomical collections used by medical schools for training.

*Our Response:* Though not excluded from the inventory provisions, medical schools that receive Federal funds would not be required to repatriate Native American human remains obtained with the voluntary consent of an individual or group that had authority of alienation.

*Comment 104:* Six commenters supported the provision at § 10.11(c)(1)(i) requiring museums and Federal agencies to offer to transfer control of culturally unidentifiable human remains to the Indian tribe or Native Hawaiian organization from whose tribal land, at the time of excavation or removal, the human remains were removed. One commenter objected to the provision since it may force a museum or Federal agency to transfer human remains to an Indian tribe or Native Hawaiian organization with which they are not culturally affiliated.

*Our Response:* Disposition of human remains, funerary objects, sacred objects, and objects of cultural patrimony to Indian tribes based on criteria other than cultural affiliation was clearly anticipated by Congress. Section 3(a)(2)(A) of the Act (25 U.S.C. 3002(a)(2)(A)), which was used as the model for the proposed provision, specifically authorizes disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated or discovered on tribal lands

after November 16, 1990 to the Indian tribe or Native Hawaiian organization in control of that tribal land. Significantly, under section 3 of the Act, ownership or control based on tribal land is given a higher priority order than cultural affiliation. The drafters consider disposition of culturally unidentifiable human remains to the Indian tribe or Native Hawaiian organization from whose tribal land, at the time of excavation or removal, the human remains were removed, to be reasonable and appropriate.

*Comment 105:* One commenter recommended revising § 10.11(c)(1)(i) to require an offer to transfer control of culturally unidentifiable human remains to the Indian tribe or Native Hawaiian organization on whose tribal land the remains were originally buried, and not just to the Indian tribe or Native Hawaiian organization from whose tribal land the remains were excavated.

*Our Response:* The concept of tribal land as used in these regulations applies to all lands which are currently within the exterior boundary of any Indian reservation, comprise a dependent Indian community, or are administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act (25 U.S.C. 3001 (15)). Human remains that were buried on tribal land which was subsequently transferred to another party are likely to be of relatively recent age, making it very likely that a lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization can be determined.

*Comment 106:* One commenter requested clarification of what constitutes “tribal lands” in Oklahoma.

*Our Response:* “Tribal lands” are defined at § 10.2(f)(2) and include all lands which (1) Are within the exterior boundaries of any Indian reservation including, but not limited to, allotments held in trust or subject to a restriction on alienation by the United States; (2) comprise dependent Indian communities; or (3) are administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act. Given the diversity of Indian land ownership, the determination of whether a particular parcel or area is “tribal lands” for purposes of this definition is made on a case-by-case basis, consistent with case law developed by the Supreme Court and other Federal courts, for example, *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). That determination is especially difficult in certain parts of the United States, such as Oklahoma and California.

*Comment 107:* Five commenters supported the provision at § 10.11(c)(1)(ii) requiring museums and Federal agencies to offer to transfer control of culturally unidentifiable human remains to the Indian tribe or tribes from whose aboriginal land the human remains were removed. Two commenters opposed such returns that are not based on cultural affiliation.

*Our Response:* Disposition of human remains, funerary objects, sacred objects, and objects of cultural patrimony to Indian tribes based on criteria other than cultural affiliation was clearly anticipated by Congress. Section 3(a)(2)(C) of the Act (25 U.S.C. 3002(a)(2)(C)), which was used as the model for the proposed provision, specifically authorizes disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated or discovered on aboriginal lands after November 16, 1990 to the Indian tribe that aboriginally occupied the area in which the cultural items were discovered. Consistent with the terms of the statute, the drafters consider disposition of culturally unidentifiable human remains to the Indian tribe or tribes that are recognized as aboriginally occupying the area from which the human remains were recovered to be reasonable and appropriate given that often the designation of culturally unidentifiable is due to a lack of information occasioned by less than optimal collection practices.

*Comment 108:* One commenter recommended changing the phrase “Indian tribe or tribes that are recognized \* \* \*” in § 10.11(c)(1)(ii) to “Indian tribe that is recognized \* \* \*” One commenter requested clarification as to whether this provision would apply to an Indian group that is not federally-recognized.

*Our Response:* The drafters included both the singular and plural forms of the term “Indian tribe” to acknowledge that many United States treaties were signed by representatives of more than one Indian tribe. Regardless, when interpreting a statute words importing the singular include and apply to several persons, parties, or things (1 U.S.C. 1). When Federal agencies publish proposed and final rules in the **Federal Register** that amend existing regulations, the agency only publishes the portion of the regulations that would change. Unless the Federal agency states otherwise, all portions of existing regulations that are not proposed for change in the notice of proposed rulemaking remain the same, and still apply. Thus, when this final rule refers to “Indian tribes”, the drafters are using

the existing definition of that term, for which no change was proposed. That definition, at § 10.2(b)(2), only refers to federally-recognized Indian tribes. The drafters of the final rule were very careful to use the term “Indian group that is not federally-recognized” when those groups were included in a provision to try to keep the distinction clear.

*Comment 109:* One commenter objected to authorizing the use of more than a final judgment of the Indian Claims Commission or United States Court of Claims to determine aboriginal land in § 10.11 (c)(1)(ii).

*Our Response:* While section 3 (a)(2)(C) of the Act (25 U.S.C. 3002 (a)(2)(C)) identifies only a final judgment of the Indian Claims Commission or United States Court of Claims as the basis for determining aboriginal lands, the drafters intend to include the full range of relevant and authoritative governmental determinations in this section. To provide additional evidence relating to an Indian tribe or Native Hawaiian Organization (or, possibly, an Indian group that is not federally-recognized) with the closest connection to the culturally unidentifiable human remains. These include final judgments of the Indian Claims Commission and the United States Court of Claims, as well as treaties, Acts of Congress, or Executive Orders. Treaties signed before the establishment of the United States between the various colonial governments and Indian tribes may be used to identify areas aboriginally occupied by Indian tribes based on the acknowledgement of the validity of these treaties by the United States. Maps of the territory ceded under United States treaties were originally published in the 18th Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution, 1896–1897 (Government Printing Office, 1899) and are available online at <http://memory.loc.gov/ammem/amlaw/lwss-iloc.html>. Judgments of the Indian Claims Commission are available at <http://digital.library.okstate.edu/icc/index.html>. The drafters note that pursuant to provisions of the Indian Claims Commission Act, settlements have the same effect as final judgments of the Indian Claims Commission (605 Stat. 1060, 25 U.S.C. 70a *et seq.*).

*Comment 110:* One commenter recommended provisions be included to resolve conflicts over dispositions based on aboriginal lands pursuant to § 10.11(c)(1)(ii).

*Our Response:* Section 10.11(e) addresses the resolution of disputes regarding the disposition of culturally

unidentifiable human remains and associated funerary objects, including disputes regarding identification of aboriginal lands.

*Comment 111:* Three commenters recommended that determinations of aboriginal occupation should not be limited to the sources outlined in § 10.11(c)(1)(ii), but should be defined at the discretion of the Native communities and/or based on the “testimony of experts.” One commenter recommended including provisions recognizing final judgments of other Federal courts.

*Our Response:* The drafters intend to include the full range of relevant and authoritative governmental determinations in this section. These may include final judgments from Federal Courts, including the United States Court of Claims, Museum and Federal agency officials may also consider other information, such as expert testimony, but are not required to do so.

*Comment 112:* One commenter generally supported the disposition of culturally unidentifiable human remains based on “cultural relationship.” Eleven commenters raised concerns about using “cultural relationship” as the basis for disposition of culturally unidentifiable human remains.

*Our Response:* As noted in the response to comment 63 above, the diversity of opinion regarding the meaning of “cultural relationship” convinced the drafters to remove it as a required criterion for consultation and disposition of culturally unidentifiable human remains.

*Comment 113:* One commenter was concerned that some museums might urge Indian tribes and Native Hawaiian organizations to accept human remains to which they may not have any ancestral connection in order to prevent turning over such human remains to groups with more attenuated “cultural relationships.”

*Our Response:* The drafters have removed the term “cultural relationship” as a basis for disposition under § 10.11(c)(1). Consultation may result in a determination that human remains and associated funerary objects previously determined to be culturally unidentifiable are actually culturally affiliated with an Indian tribe or Native Hawaiian organization (43 CFR 10.11(b)(6)).

*Comment 114:* One commenter recommended that an Indian tribe’s decision regarding the disposition of culturally unidentifiable human remains should not be contingent upon

the agreement of other lower priority claimants.

*Our Response:* Under § 10.11(c)(1), a request to transfer control of culturally unidentifiable human remains from an Indian tribe or Native Hawaiian organization from whose tribal land, at the time of excavation or removal, the human remains were removed is given priority and is not contingent upon any agreement with another Indian tribe that is recognized as aboriginally occupying the area from which the human remains were removed.

*Comment 115:* One commenter considered the Review Committee’s case-by-case consideration of requests for disposition of culturally unidentifiable human remains to be working well and to be superior to the proposed system.

*Our Response:* Under current regulations (43 CFR 10.9(e)(6)), museums must retain possession of culturally unidentifiable human remains unless legally required to do otherwise or recommended to do otherwise by the Secretary. For over a decade, the Secretary has given full consideration to the Review Committee’s case-by-case deliberations in deciding to make such a recommendation. These regulations were developed with this case-by-case experience in mind, as well as after careful consideration of the Review Committee’s 2000 final recommendations. Dispositions involving Indian groups that are not federally-recognized or reinterment according to State or other law will still require a recommendation from the Secretary, who may request the Review Committee’s advice.

#### *Section 10.11(c)(2) Voluntary Dispositions*

Section 10.11(c)(3) (renumbered as § 10.11(c)(2)) establishes a process for the voluntary disposition of culturally unidentifiable human remains that are not transferred under provisions of § 10.11(c)(1).

*Comment 116:* Four commenters stated that the claims to culturally unidentifiable human remains, with or without associated funerary objects, by a federally-recognized Indian tribe must take priority over any other group.

*Our Response:* The Secretary agrees. To ensure that the rights of federally-recognized Indian tribes are protected, a museum or Federal agency may only transfer control of culturally unidentifiable human remains, with or without associated funerary objects, to an Indian group that is not federally-recognized after full consultation with relevant federally-recognized Indian

tribes, with no objection of any of those tribes, and upon receiving a recommendation from the Secretary. Such Indian groups that are not federally-recognized would be identified through consultation with all relevant federally-recognized Indian tribes. The Secretary considers that these provisions adequately respect and protect the sovereignty and rights of federally-recognized tribes.

*Comment 117:* Seven commenters were concerned that any disposition to Indian groups that are not federally-recognized was voluntary and that the proposed rule would not force a museum or Federal agency to transfer control of culturally unidentifiable human remains, with or without associated funerary objects, to an Indian group that is not federally-recognized to which the cultural items are clearly culturally connected.

*Our Response:* In the two sections of the Act that impose mandatory priorities for control or disposition of human remains (Sections 3 and 7), Congress limited the recipients to federally-recognized Indian tribes (in addition to lineal descendants and Native Hawaiian organizations) in recognition of the government-to-government relationship between such tribes and the United States. In expanding the universe of possible recipients of culturally unidentifiable human remains, with or without associated funerary objects, the Secretary followed the lead of Congress both in assuring that such cultural items went to the Indian group that had the closest cultural connection to the items, even if that group is not federally-recognized, and in maintaining the priority of the government-to-government relationship, by not making such a disposition mandatory to an Indian group that is not federally-recognized.

*Comment 118:* Eleven commenters were concerned that the provision in § 10.11(c)(3) for voluntary disposition of culturally unidentifiable human remains, with or without associated funerary objects, to an Indian group that is not federally-recognized would put a museum or Federal agency in the position of determining whether a particular entity is a “valid” Indian group that is not federally-recognized, which the commenters asserted that a Federal agency or museum lacks the authority to make. Some of the commenters requested that the Secretary define “an Indian group that is not federally-recognized.”

*Our Response:* Section 10.11(c)(3) has been renumbered as § 10.11(c)(2). The proposed and final rules do not require

a museum or Federal agency to make such a determination. Rather, during consultation, the museum or Federal agency supplies relevant federally-recognized Indian tribes and Native Hawaiian organizations with “a list of any Indian groups that are not federally-recognized that are *known to have* a relationship of shared group identity with the particular human remains and associated funerary objects” (43 CFR 10.11(b)(3)(ii) (emphasis added), i.e., those groups that would be culturally affiliated with the human remains and associated funerary objects if the group was recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. Then, the museum or Federal agency requests from the federally-recognized Indian tribe or Native Hawaiian organization “the names and addresses of other \* \* \* Indian groups that are not federally-recognized that should be included in the consultations.” (43 CFR 10.11(b)(4)(iv)). Thus, the museum or Federal agency must only identify on its own any Indian groups that are not federally-recognized that the museum or Federal agency knows have a relationship of shared group identity with the culturally unidentifiable human remains and associated funerary objects. The museum or Federal agency can rely on the relevant federally-recognized Indian tribe or Native Hawaiian organization for identification of any other relevant groups. A definition of “Indian group that is not federally-recognized” is not, therefore, needed.

*Comment 119:* Two commenters suggested that Indian groups that are not federally-recognized should be required to submit a claim for culturally unidentifiable human remains, with or without associated funerary objects, through, or in association with, a federally-recognized tribe.

*Our Response:* To ensure that the rights of federally-recognized Indian tribes are protected, a museum or Federal agency may only transfer control of culturally unidentifiable human remains, with or without associated funerary objects, to an Indian group that is not federally-recognized after full consultation with relevant federally-recognized Indian tribes, with no objection from any of those Indian tribes following consultation, and upon receiving a recommendation from the Secretary. Such Indian groups that are not federally-recognized would be identified through consultation with all relevant federally-recognized Indian tribes. The Secretary considers that these provisions adequately respect and

protect the sovereignty and rights of federally-recognized tribes. The commenters’ suggestion might work in some areas of the country, but would be less effective in other areas, for example, California and parts of the eastern United States where the number of Indian groups that are not federally-recognized far exceeds the number of federally-recognized Indian tribes.

*Comment 120:* One commenter was concerned that the consultation with, and possible transfer of control to, Indian groups that are not federally-recognized would be used by those groups as leverage for Federal recognition. Another commenter considers requiring each museum and Federal agency to prepare and distribute a list of Indian groups that are not federally-recognized inconsistent with the Federal acknowledgement process.

*Our Response:* Congress specifically stated in the Act that it “reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government,” (25 U.S.C. 3010), which would include an Indian group that is not federally-recognized. The preamble to the proposed rule clearly stated, and this preamble again emphasizes, that “the Secretary’s recommendation regarding the disposition of culturally unidentifiable human remains or associated funerary objects to an Indian group that is not federally-recognized does not indicate Federal recognition of the group’s status as an Indian tribe or the existence of a government-to-government relationship” (72 FR 58586). Finally, the Federal acknowledgement process addressed in 25 CFR part 83 is detailed and rigorous, and it is highly unlikely, especially given the disclaimers from both Congress and the Secretary, that consultation with, or possible transfer of control to, an Indian group that is not federally recognized would satisfy any of the criteria required in that process.

*Comment 121:* One commenter was concerned that transfer of control of culturally unidentifiable human remains, with or without associated funerary objects, to unaffiliated Indian tribes or to Indian groups that are not federally-recognized would preclude future transfer of human remains to affiliated tribes and thereby cause injury to museums and Federal agencies.

*Our Response:* In section 7(f) of the Act (25 U.S.C. 3005), Congress specifically provided in that “[a]ny museum which repatriates any item in good faith pursuant to this chapter shall

not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this chapter.” To ensure that the rights of federally-recognized Indian tribes are protected, a museum or Federal agency may only transfer control of culturally unidentifiable human remains, with or without associated funerary objects, to an Indian group that is not federally-recognized after full consultation with relevant federally-recognized Indian tribes, with no objection of any of those tribes, and upon receiving a recommendation from the Secretary. Such Indian groups that are not federally-recognized would be identified through consultation with all relevant federally-recognized Indian tribes. The Secretary considers that these provisions adequately respect and protect the sovereignty and rights of federally-recognized tribes.

*Comment 122:* One commenter suggested that Indian groups that are not federally-recognized, Indian regional organizations, and Indian national organizations should be able to make a claim for culturally unidentifiable human remains, with or without associated funerary objects, when no federally-recognized Indian tribe does so.

*Our Response:* In the two sections of NAGPRA that impose mandatory priorities for control or disposition of human remains (Sections 3 and 7), Congress intentionally limited the recipients to federally-recognized Indian tribes (in addition to lineal descendants and Native Hawaiian organizations) in recognition of the government-to-government relationship between such tribes and the United States. In expanding the universe of possible recipients of culturally unidentifiable human remains, with or without associated funerary objects, the Secretary followed the lead of Congress in making sure that such cultural items went to the Indian group that had the closest cultural connection to the items, even if that group is not federally-recognized. In recognition of the importance of that cultural connection, and of tribal sovereignty, the Secretary has not expanded the definition or the scope of the parties that are eligible to make claims to include regional and national Indian organizations. The ultimate disposition of culturally unidentifiable human remains, with or without associated funerary objects, control of which is not transferred under these regulations, is outside the scope of these regulations and reserved for § 10.15(b).

*Comment 123:* Twelve commenters generally supported the inclusion in the proposed rule of the disposition of culturally unidentifiable human remains, with or without associated funerary objects, to Indian groups that are not federally-recognized. Thirteen commenters generally opposed the proposal to allow for disposition of culturally unidentifiable human remains, with or without associated funerary objects, to Indian groups that are not federally-recognized.

*Our Response:* As noted in the Review Committee’s 2000 Recommendations, and reflected in the preamble of the proposed rule, one of the categories of culturally unidentifiable human remains is those remains “for which cultural affiliation could be determined except that the appropriate Indian organization is not federally-recognized as an Indian tribe” (65 FR 36462, 36463 (2000)). In attempting to find a solution for the disposition of this category of human remains, the Secretary considered the overall intent of Congress in section 7 of the Act (25 U.S.C. 3005) to return control of Native American human remains in the possession of museums and Federal agencies to persons or entities with the closest cultural connection to those remains. While a mandate for return of control to Indian groups that are not federally-recognized would be contrary to the terms of NAGPRA and to the government-to-government relationship between the United States and federally-recognized Indian tribes, nothing in the Act prohibits the voluntary transfer of human remains, with or without associated funerary objects, to “culturally affiliated” Indian groups that are not federally-recognized, with appropriate safeguards for the rights of federally-recognized Indian tribes.

*Comment 124:* Seven commenters were concerned that disposition of culturally unidentifiable human remains, with or without associated funerary objects, to Indian groups that are not federally-recognized would be voluntary and recommended that any such disposition should be (1) addressed through regional tribal consultation; and (2) brought before the Review Committee.

*Our Response:* To ensure that the rights of federally-recognized Indian tribes are protected, a museum or Federal agency may only transfer control of culturally unidentifiable human remains, with or without associated funerary objects, to an Indian group that is not federally-recognized after full consultation with relevant federally-recognized Indian tribes, with no objection from any of those tribes,

and upon receiving a recommendation from the Secretary. Although, in respect of tribal sovereignty and the government-to-government relationship, the Secretary cannot mandate that museums and Federal agencies consult only on a regional basis, tribes may make arrangements for such consultations. In the past, the Secretary has referred requests for the disposition of culturally unidentifiable human remains to the Review Committee, under section 8(c)(8) of the Act (25 U.S.C. 3006(c)(8)) (“performing such other related functions as the Secretary may assign to the committee”) and requested the Review Committee’s advice before making recommendations on the disposition request. In formulating his or her recommendation concerning a disposition to an Indian group that is not federally-recognized, the Secretary will decide, on a case-by-case basis, whether the advice of the Review Committee would be useful, and, if so, will seek that advice.

*Comment 125:* Three commenters objected to the proposed provision in § 10.11(c)(3)(ii) that provides authority for voluntary reinterment under state law of culturally unidentifiable human remains, with or without associated funerary objects, stating that such reburial by non-tribal people would be considered inappropriate by tribal leaders and members.

*Our Response:* Section 10.11(c)(3)(ii) has been renumbered as § 10.11(c)(ii)(B). The Secretary notes that any such reinterment would only occur after full consultation with relevant federally-recognized Indian tribes, with no objection from any of those tribes, and upon receiving a recommendation from the Secretary under § 10.11(c)(3).

*Comment 126:* One commenter suggested that the final rule should include a disposition process that involves consultation with regional consortia and appropriate state agencies, citing the California law providing for repatriation to federally-recognized Indian tribes and Indian groups that are not federally-recognized (Health and Safety Code 8010, et seq.). Another commenter encouraged museums and Federal agencies to work with state officials since they are the most responsive to local needs and issues.

*Our Response:* Although, in respect of tribal sovereignty and the government-to-government relationship, the Secretary cannot mandate that museums and Federal agencies consult on a regional basis, tribes may make arrangements for such consultations. California, Iowa, New Mexico, and several other states have put in place or are considering state processes similar

to NAGPRA. Federal agencies and museums are encouraged to consult with their appropriate state agencies, especially if they propose to voluntarily transfer control to an Indian group that is not federally-recognized under § 10.11(c)(2)(ii)(A) or reinter culturally unidentifiable human remains, with or without associated funerary objects, pursuant to state law under § 10.11(c)(2)(ii)(B).

*Comment 127:* One commenter stated that, if culturally unidentifiable human remains, with or without associated funerary objects, are not claimed, the remains should continue to be in the care of the museum or Federal agency, without precluding future repatriation.

*Our Response:* In such a situation, the museum or Federal agency may, under the final rule, transfer control of the remains, with or without the funerary objects, to an Indian group that is not federally-recognized, reinter them under state law, or enter into an agreement with a federally-recognized Indian tribe for other disposition. The ultimate disposition of culturally unidentifiable human remains, with or without associated funerary objects, control of which is not transferred under these regulations, is outside the scope of these regulations and reserved for Section 10.15(b).

*Comment 128:* One commenter recommended clarification that once all efforts to transfer control to an Indian tribe, Native Hawaiian organization, or an Indian group that is not federally-recognized have been exhausted, the museum or Federal agency should reinter culturally unidentifiable human remains at their place of discovery.

*Our Response:* Under § 10.11(c)(2)(ii)(B), museums and Federal agencies may reinter culturally unidentifiable human remains upon receiving a recommendation from the Secretary or authorized representative.

#### *Section 10.11(c)(4) Secretary's Recommendation*

Section 10.11(c)(4) (renumbered as § 10.11(c)(3)) stipulated that the Secretary may make a recommendation under § 10.11(c)(3) (renumbered as § 10.11(c)(2)) only with the written consent of all Indian tribes and Native Hawaiian organizations stipulated in § 10.11(c)(1).

*Comment 129:* Three commenters supported the § 10.11(c)(4) language requiring the written consent of all Indian tribes and Native Hawaiian organizations stipulated in §§ 10.11(c)(1) and (c)(2) before the Secretary can make a recommendation under § 10.11(c)(3). Seven commenters stated that § 10.11(c)(4) of the proposed

rule would create an unfair burden on both federally-recognized Indian tribes that are not interested in a disposition and Indian groups that are not federally-recognized that may lack the resources to meet the requirement of obtaining the consent of all relevant federally-recognized Indian tribes before a museum or Federal agency may transfer control of culturally unidentifiable human remains to an Indian group that is not federally-recognized. Some of the commenters suggest that the final rule require that the museum or Federal agency make a good faith effort to consult with all of the relevant federally-recognized tribes, and, if no federally-recognized tribe has objected, then the disposition to the "culturally affiliated" Indian group that is not federally-recognized should be permitted to go forward.

*Our Response:* The Secretary agrees with these commenters, and has revised the final rule to incorporate their suggestions. Sections 10.11(c)(2), (c)(3), and (c)(4) have been renumbered as § 10.11(c)(6), (c)(2), and (c)(3) respectively.

*Comment 130:* Four commenters stated that § 10.11(c)(4) of the proposed rule unduly restricts the flexibility of museums and Federal agencies by requiring that they receive a recommendation from the Secretary before transferring control of culturally unidentifiable human remains, with or without associated funerary objects, to an Indian group that is not federally-recognized or reinterment of the remains under State law.

*Our Response:* Congress enacted NAGPRA in furtherance of the government-to-government relationship with federally-recognized Indian tribes. Also in furtherance of that relationship, the Secretary has the obligation to ensure that the rights of those tribes under the statute and under these regulations are fully supported. Therefore, in the case of a proposed disposition to an Indian group that is not federally-recognized or a proposed reinterment under State law, the recommendation of the Secretary is needed to make sure that the museum or Federal agency has consulted with the relevant federally-recognized Indian tribes and none of the tribes have objected. This is also consistent with the current practice that the Review Committee and the Secretary have developed for disposition (even to federally-recognized tribes) of culturally unidentifiable human remains.

*Comment 131:* One commenter recommended that the Secretary only authorize reburial pursuant to State law after the museum or Federal agency has

attempted in good faith to transfer control of the culturally unidentifiable human remains to an affiliated Indian group that is not federally-recognized.

*Our Response:* A museum or Federal agency may voluntarily transfer control of culturally unidentifiable human remains to an Indian group that is not federally-recognized or reinter culturally unidentifiable human remains according to state or other law only after receiving a recommendation from the Secretary or authorized representative. The Secretary will consider evidence related to both options prior to making such a recommendation.

*Comment 132:* One commenter requested that the Secretary offer a process for seeking the recommendations of the Review Committee concerning proposed dispositions.

*Our Response:* Under section 8(c) of the Act (25 U.S.C. 3006(c)), the Review Committee is charged with reviewing and making findings concerning the return of cultural items upon the request of any party and with facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable. The process for bringing requests and disputes before the Review Committee is found on the National NAGPRA Web site at <http://www.nps.gov/history/nagpra/REVIEW/Procedures.htm>. In addition, § 10.11(e) specifically identifies the Review Committee as a possible forum to assist in the informal resolution of disputes regarding the disposition of culturally unidentifiable human remains and associated funerary objects.

#### *Section 10.11(c)(5) Voluntary Transfer of Associated Funerary Objects*

Section 10.11(c)(5), which has been renumbered as § 10.11(c)(4), clarifies that a museum or Federal agency may voluntary transfer control of funerary objects that are associated with culturally unidentifiable human remains.

*Comment 133:* Twenty-two commenters stated that the disposition of culturally unidentifiable associated funerary objects should be mandatory. Three commenters indicated that sufficient legal authority and congressional intent exist to require the mandatory disposition of culturally unidentifiable associated funerary objects. Three commenters stated that disposition of culturally unidentifiable associated funerary objects should be

mandatory because different treatment of such objects is contrary to American common law and Indian funeral traditions. One commenter stated that disposition of such objects should be mandatory because some institutions will not voluntarily transfer objects. One commenter supported the disposition of funerary objects associated with culturally unidentifiable human remains on a voluntary basis. Three commenters recommended deleting § 10.11(c)(5) and amending § 10.11(c)(1) to read, “A museum or Federal agency that is unable to prove that it has right of possession, as defined at 10.11(a)(2) [sic], to culturally unidentifiable human remains and associated funerary objects must offer to transfer control of the human remains and associated funerary objects to Indian tribes and Native Hawaiian organizations in the following priority order \* \* \*”.

*Our Response:* Consideration of all Native American human remains and associated funerary objects, including those that are culturally unidentifiable, is within the scope of the statute. In section 13 of the Act (25 U.S.C. 3011), Congress delegated authority to the Secretary of the Interior generally to promulgate regulations carrying out the Act and carrying the force of law. In section 8(c)(5) of the Act (25 U.S.C. 3006(c)(5)), Congress assigned the role of recommending specific actions for developing a process for disposition of culturally unidentifiable human remains to the Review Committee. Congress did not indicate the same intent regarding culturally unidentifiable associated funerary objects. Mandatory disposition for this category of items raises right of possession and takings issues that are not clearly resolved in the statute or the legislative history. American common law generally recognizes that human remains cannot be owned. The common law regarding associated funerary objects that are not culturally identifiable is not well established. According to the committee report accompanying the Senate NAGPRA bill, the Senate Committee on Indian Affairs intended that the legal framework regarding right of possession would operate in a manner consistent with general property law (S. Report 101–473 at 8). Considering the lack of precedent in the common law and Congress’ direction to develop a process only with respect to culturally unidentifiable human remains, the Secretary does not consider it appropriate to make the provision to transfer culturally unidentifiable associated funerary objects mandatory.

*Comment 134:* Seven commenters recommended deleting § 10.11(c)(5) on the grounds that the Secretary does not have authority to address funerary objects associated with culturally unidentifiable human remains.

*Our Response:* Section 10.11(c)(5) has been renumbered as § 10.11(c)(4). In section 13 of the Act (25 U.S.C. 3011), Congress delegated authority to the Secretary of the Interior generally to promulgate regulations carrying out the Act and carrying the force of law. Consideration of all Native American human remains and associated funerary objects, including those that are culturally unidentifiable, is within the scope of the statute. Section 5 of the Act (25 U.S.C. 3003) requires Federal agencies and museums that have possession or control over holdings or collections of Native American human remains and associated funerary objects to compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item. Regulations promulgated in 1995 initially addressed culturally unidentifiable associated funerary objects to which there was no public objection. 43 CFR 10.9(e)(6) required museums and Federal agencies to provide notice and a copy of the list of culturally unidentifiable human remains and associated funerary objects to the National Park Service which in turn made this information available to the Review Committee. Congress anticipated that not all items would be geographically or culturally affiliated and, in section 8(c)(5) of the Act (25 U.S.C. 3006(c)(5)), assigned the role of recommending specific actions for developing a process for disposition of culturally unidentifiable human remains to the Review Committee. Congress intended that the Review Committee be an advisory committee which makes recommendations to the Secretary (S. Rep. No. 101–473 at 13). In section 8(c)(7) of the Act (25 U.S.C. 3006(c)(7)), Congress also authorized the Review Committee to consult with the Secretary in the development of regulations to carry out the Act. As part of its recommendations under section 8(c)(5) of the Act (25 U.S.C. 3006(c)(5)), the Review Committee addressed funerary objects associated with culturally unidentifiable remains and recommended their transfer along with the associated remains. This regulation, promulgated in the exercise of Congress’ delegated authority, implements many of the Review Committee’s recommendations made pursuant to

section 8(c)(5) and 8(c)(7) and effectuates the goals of the Act. Even if Congress may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap, it can still be apparent from an agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to address ambiguities in the statute or fill a gap in the enacted law, even one about which Congress may not have actually had an intent as to a particular result (*U.S. v. Mead*, 533 U.S. 218 (2001)). In addition, 25 U.S.C. 9 authorizes the Secretary to make “such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs.” Because NAGPRA is Indian law (*Yankton Sioux Tribe v. United States Army Corps of Engineers*, 83 F. Supp 2d 1047, 1056 (D.S.D. 2000)), the Secretary may promulgate any regulations needed to implement it under the broad authority to supervise and manage Indian affairs given by Congress (*United States v. Eberhardt*, 789 F.2d 1354, 1360 (9th Cir. 1986)).

*Comment 135:* Two commenters objected to the “required” disposition of funerary objects associated with culturally unidentifiable human remains.

*Our Response:* The subsection addressing this category of objects, § 10.11(c)(4), does not require disposition. The proposed text states, “A museum or Federal agency may also transfer control of funerary objects that are associated with culturally unidentifiable human remains. The Secretary recommends that museums and Federal agencies engage in such transfers whenever Federal or State law would not otherwise preclude them” (emphasis added).

*Comment 136:* One commenter requested clarification on whether it is discretionary for museums and Federal agencies to make disposition of culturally unidentifiable associated funerary objects.

*Our Response:* Subsection 10.11(c)(4) does not mandate the transfer of culturally unidentifiable associated funerary objects. This provision is voluntary and any decision to transfer such objects is based on the discretion of the museum or Federal agency.

#### *Section 10.11(c) Other Issues*

*Comment 137:* Two commenters suggested the establishment of national or regional repositories, controlled by Indian tribes, where culturally unidentifiable human remains that are unclaimed may be voluntarily reinterred.

*Our Response:* The Secretary cannot mandate that Indian tribes enter into such arrangements. Indian tribes may make arrangements for such repositories on their own.

*Comment 138:* Two commenters recommended that the statutory exemptions to repatriation be explicitly identified in this section.

*Our Response:* Section 10.10(c) of these regulations stipulates four exceptions to repatriation, including circumstances where (1) Human remains and funerary objects are indispensable to the completion of a specific scientific study, the outcome of which is of major benefit to the United States; (2) there are multiple requests for repatriation of the human remains and associated funerary objects and the museum or Federal agency cannot determine by a preponderance of the evidence which requesting party is the most appropriate claimant; (3) a court of competent jurisdiction has determined that the repatriation would result in a taking of property without just compensation within the meaning of the Fifth Amendment of the United States Constitution; and (4) the repatriation is not consistent with other repatriation limitations identified in § 10.15. The drafters intend that each of these exemptions also apply to claims made for the disposition of culturally unidentifiable human remains, and additional text has been included at § 10.11(c)(5) to that effect.

*Comment 139:* Three commenters recommended addressing the recourse available to museums and Federal agencies if they cannot transfer control of culturally unidentifiable human remains.

*Our Response:* Section 10.15(b) of these regulations has been reserved to address situations where no claim has been made.

#### *Section 10.11(d) Notification*

Paragraph (d) establishes procedures to ensure that Indian tribes, Native Hawaiian organizations, Indian groups that are not federally-recognized, museums, and Federal agencies are notified of intended dispositions of culturally unidentifiable human remains and associated funerary objects.

*Comment 140:* One commenter recommended adding a provision to document the final disposition of culturally unidentifiable human remains.

*Our Response:* Section 10.10(f) directs museums and Federal agencies to adopt internal procedures adequate to permanently document the content and recipients of all repatriations.

*Comment 141:* One commenter recommended clarifying that the notice requirement for culturally unidentifiable human remains would commence after consultation (43 CFR 10.11(b)) and determination (43 CFR 10.11(c)).

*Our Response:* Section 10.11(d) stipulates that disposition of culturally unidentifiable human remains pursuant to § 10.11(c) may not occur until at least thirty days after publication of a notice of inventory completion. Section 10.11(b)(1) stipulates that the museum or Federal agency official must initiate consultation within ninety days of receipt of a request for disposition or, absent such a request, before any offer to transfer control of culturally unidentifiable human remains.

*Comment 142:* One commenter recommended lengthening the notification time period from 30 to 60 or 90 days to allow Indian tribes and Native Hawaiian organizations to respond before disposition occurs.

*Our Response:* The thirty day (minimum) period following publication of a notice of inventory completion during which other lineal descendants, Indian tribes, or Native Hawaiian organizations may claim human remains and associated funerary objects has been in effect since 1996 (43 CFR 10.10(b)(2)). No Indian tribe or Native Hawaiian organization recommended this change.

*Comment 143:* One commenter requested clarification of how the Review Committee database of culturally unidentifiable human remains and associated funerary objects will be made “accessible” to Indian tribes, Native Hawaiian organizations, Indian groups that are not federally-recognized, museums, and Federal agencies.

*Our Response:* The Culturally Unidentifiable Native American Inventories Database is available at: <http://64.241.25.6/CUI/index.cfm>.

*Comment 144:* Five commenters recommended revising the Review Committee’s inventory as follows: (1) Create and include an online tutorial on how to use the database; (2) include fields in the main table to discern whether the repository is reporting on a museum or Federal agency collection; (3) update the existing contact information, and list contact information for each Federal Agency NAGPRA Contact; (4) add search functions to the database to search/sort by keyword e.g. “Hohokam”; (5) add search functions to the database so that it is possible to search/sort by county; (6) add search functions to the database so that it is possible to search/sort by

date; (7) separate the collection history, age/culture, and associated funerary object fields for clarity; (8) link the database to the notices of inventory completion and notices of intent to repatriate. Two commenters recommended that the original paperwork supporting a published notice of inventory completion be posted on the Web site as part of the Review Committee’s inventory.

*Our Response:* The National NAGPRA Program will consider implementing these recommendations.

#### *Section 10.11(e) Disputes*

Section 10.11(e) clarifies that disputes regarding the disposition of culturally unidentifiable human remains may be resolved through informal negotiations, with the assistance of the Review Committee, or before a United States District Court.

*Comment 145:* One commenter asked for clarification of what is meant by “informal negotiations.”

*Our Response:* While the Review Committee is specifically charged with facilitating the resolution of disputes, the Committee also stated that disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums should be resolved at the lowest organizational level and at the earliest time possible and strongly encourages the use of alternative methods of dispute resolution (Native American Graves Protection and Repatriation Review Committee Dispute Procedures, September 2006).

*Comment 146:* One commenter recommended that the Review Committee only attempt to facilitate disputes regarding the disposition of culturally unidentifiable human remains when requested by all involved parties.

*Our Response:* Under the Review Committee’s Dispute Procedures, the decision to involve the Review Committee in a dispute is made only after all involved parties have been contacted. Disputing parties are under no obligation to participate in Review Committee meetings. Review Committee recommendations are purely advisory.

*Comment 147:* One commenter recommended that the Review Committee’s existing policies and procedures be formalized into this final regulation.

*Our Response:* The Review Committee’s Dispute Procedures are posted at: [http://www.nps.gov/history/nagpra/REVIEW/Dispute\\_procedures.0609.pdf](http://www.nps.gov/history/nagpra/REVIEW/Dispute_procedures.0609.pdf). Formalization of these procedures as regulations would likely limit the ability

of the Review Committee to generate unique and innovative resolutions on a case-by-case basis.

*Comment 148:* One commenter asked for clarification as to whether the proposal would give binding legal force to Review Committee advisory opinions. One commenter asked for clarification as to whether the proposal would allow lawsuits by any aggrieved person against museums ad infinitum.

*Our Response:* Review Committee findings and recommendations are purely advisory in nature. However, any records and findings made by the Review Committee relating to the identity or cultural affiliation of human remains, funerary objects, sacred objects, or objects of cultural patrimony may be admissible in actions brought before a Federal court (25 U.S.C. 3006(d)). While neither Congress nor the Secretary can stop anyone from filing a lawsuit, in section 7(f) of the Act (25 U.S.C. 3005), Congress specifically provided in that “[a]ny museum which repatriates any item in good faith pursuant to this chapter shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this chapter.”

*Section 10.12(b) Definition of “Failure to Comply”*

Revisions to this section clarify the definition of “failure to comply” in the context of the possible assessment of civil penalties.

*Comment 149:* Fourteen commenters generally supported the proposed text at § 10.12(b)(1)(ix) to allow for the assessment of civil penalties for failure of a museum to offer to transfer control of culturally unidentifiable human remains for which it cannot prove right of possession under § 10.11. Two commenters generally opposed the proposed text. One commenter urged that no civil penalty should be imposed on a museum for failing to offer to transfer human remains when no group has requested a transfer.

*Our Response:* The drafters consider the recommendation concerning the inadvisability of civil penalties when no Indian tribe or Native Hawaiian organization has requested a transfer to be reasonable because, absent a claim, the regulations do not specify when a museum must offer to transfer control of culturally unidentifiable human remains to Indian tribe and Native Hawaiian organizations. Section 10.12(b)(ix) has been revised to read “Upon receipt of a claim consistent with § 10.11(c)(1), refuses to offer to transfer control of culturally unidentifiable

human remains for which it cannot prove right of possession.”

*Comment 150:* Four commenters requested clarification in § 10.12(b)(1)(ix) that the burden of proof for right of possession of culturally unidentifiable human remains rests with the museum or Federal agency.

*Our Response:* The burden of proof is on the museum or Federal agency, and that, as the proposed and final rule states, if a museum or Federal agency “is unable to prove that it has right of possession”, it must offer to transfer the remains, with or without associated funerary objects (43 CFR 10.11(c)(1)).

*Comment 151:* One commenter recommended revising § 10.12 to mandate that Federal agencies comply with the Act and its regulations.

*Our Response:* Section 9 of the Act (25 U.S.C. 3007) authorizes the Secretary to assess civil penalties only against museums.

*Comment 152:* Two commenters recommended adding another type of failure to comply at § 10.12(b) for museums that refuse to provide additional available documentation upon the request of an Indian tribe or Native Hawaiian organization that received notice or should have received notice and an inventory under § 10.9(e)(1) and (e)(2).

*Our Response:* Section 5(b)(2) of the Act (25 U.S.C. 3003(b)(2)), requires that a museum or Federal agency supply additional available documentation upon request by an Indian tribe or Native Hawaiian organization which receives or should have received notice. Refusing to provide the specified information to one of the Indian tribes identified in § 10.11(b)(2) would constitute a failure to comply under § 10.12(b)(vii).

**Changes to 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(e)(2). We have added text to clarify that determinations of cultural affiliation are made “through the inventory process.” Section 10.9(e)(2)(v). We revised the text to clarify that the notice of inventory completion must describe those human remains, with or without associated funerary objects, that are culturally unidentifiable but that “are subject to disposition under § 10.11.”
- Section 10.9(e)(5)(ii). We added text to provide examples of the type of Federal legal authority that exempt disclosure of Federal documentation to the public.

- Section 10.9(e)(6). We deleted text to make it clear that while disposition of funerary objects associated with culturally unidentifiable human remains is voluntary, museums and Federal agencies must provide notice and a list of such objects to the Manager, National NAGPRA Program.

- Section 10.11(a). We revised the text to clarify that this section applies to human remains previously determined to be Native American pursuant to § 10.9, but for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified.

- Section 10.11(b)(2)(iii). We deleted this section that required consultation with all Indian tribes or Native Hawaiian organizations with a cultural relationship to the region from which culturally identifiable human remains were removed or, in the case of human remains lacking geographic affiliation, to the region in which the museum or Federal agency repository is located. The diversity of opinion regarding the meaning of “cultural relationship” convinced the drafters to remove the term as a required criterion for consultation.

- Section 10.11(b)(6). We added text to this paragraph to clarify that the notification and repatriation provisions of §§ 10.9(e) and 10.10(b) apply if human remains previously determined to be culturally unidentifiable are actually related to a lineal descendant.

- Section 10.11(c)(1)(iii). We deleted this section that required a museum or Federal agency that is unable to prove it has right of possession to culturally unidentifiable human remains to offer to transfer control of such remains to the Indian tribe or Native Hawaiian organization with a cultural relationship to the region from which culturally identifiable human remains were removed or, in the case of human remains lacking geographic affiliation, to the region in which the museum or Federal agency repository is located. The diversity of opinion regarding the meaning of “cultural relationship” convinced the drafters to remove the term as a required criterion for disposition of culturally unidentifiable human remains.

- Section 10.11(c)(1)(iv). We deleted this section that required a museum or Federal agency that is unable to prove it has right of possession to culturally unidentifiable human remains to offer to transfer control of such remains to the Indian tribe or Native Hawaiian organization with a stronger cultural relationship with the human remains than an entity specified in § 10.11(c)(1)(ii) or (c)(1)(iii). The

diversity of opinion regarding the meaning of “cultural relationship” convinced the drafters to remove the term as a required criterion for disposition of culturally unidentifiable human remains.

- Section 10.11(c)(2). We moved and renumbered this paragraph as § 10.11(c)(6).

- Section 10.11(c)(3)(i) (renumbered as § 10.11(c)(2)(i)). We added text to allow a museum or Federal agency to voluntarily transfer control of culturally unidentifiable human remains to Indian tribes or Native Hawaiian organizations other than those specified in § 10.11(c)(1). The change is consistent with statutory requirements that nothing in the Act shall be used to limit the authority of any Federal agency or museum to return or repatriate Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony to Indian tribes, Native Hawaiian organizations, or individuals (25 U.S.C. 3009(1)(A)).

- Section 10.11(c)(4) (renumbered as § 10.11(c)(3)). We revised this provision to remove the requirement that all relevant Indian tribes and Native Hawaiian organizations must consent to a proposed disposition to an Indian group that is not federally-recognized or to a proposed reinterment under State law and to require instead that the museum or Federal agency prove to the Secretary that it has consulted with the relevant Indian tribes and Native Hawaiian organizations and none of them has objected. This change was prompted by comments on the proposed rule and the Secretary’s effort to be sensitive to concerns of Indian tribes that may be culturally prohibited from discussing or possessing human remains.

- Section 10.11(c)(5) (renumbered as § 10.11(c)(4)).

- Section 10.11(c)(5). We added this new section to clarify that the exemptions to repatriation listed at § 10.10(c) also apply to dispositions of culturally unidentifiable human remains under § 10.11(c)(1).

- Section 10.12(b)(1)(ix). We added text to clarify that upon receipt of a claim consistent with § 10.11(c)(1), a museum refuses to offer to transfer control of culturally unidentifiable human remains for which it cannot prove right of possession, will be considered to have failed to comply with the Act. Absent a claim, the regulations do not specify when a museum must offer to transfer control of culturally unidentifiable human remains to Indian tribes and Native Hawaiian organizations.

- Section 10.15(c). We inserted text previously proposed for inclusion in § 10.1(b)(3) into this paragraph to reiterate that the final denial of a request of a lineal descendant, Indian tribe, or Native Hawaiian organization for the repatriation or disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony constitutes a final agency action under the Administrative Procedure Act.

#### **Compliance With Other Laws and Executive Orders**

##### *Regulatory Planning and Review (Executive Order 12866)*

This document is a significant rule and has been reviewed by the Office of Management and Budget under Executive Order 12866.

(1) 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.

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

(3) This rule does not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights or obligations of their recipients.

(4) OMB has determined that this rule raises novel legal or policy issues.

##### *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.*). The requirement to consult with Indian tribes and Native Hawaiian organizations is minimal, as very few small entities have collections of Native American human remains that would subject them to this rule. Of those having Native American human remains, the collections are small. Small entities can transfer those human remains to large museums having NAGPRA obligations and they can benefit from the published decisions of large museums. Thus, this rule does not constitute a significant economic burden. This rule will require the disposition of only those Native American human remains for which the controlling entity cannot prove right of possession (25 U.S.C. 3005).

##### *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 (Executive Order 12630)*

In accordance with Executive Order 12630, the rule does not have significant takings implications. A takings implication assessment is not required. This rule will require the disposition of only those Native American human remains for which the controlling museum or Federal agency cannot prove right of possession [25 U.S.C. 3005(c)].

##### *Federalism (Executive Order 13132)*

In accordance with Executive Order 13132, the rule does not have sufficiently significant federalism implications to warrant the preparation of a Federalism Assessment. This final rule will not substantially and directly affect the relationship between the Federal and State governments. To the extent that State and local governments have a role in NAGPRA activities, this final rule will not affect that role. A Federalism Assessment 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.

### *Paperwork Reduction Act*

The Office of Management and Budget has approved the information collection requirements associated with this rule under OMB Control No. 1024-0144.

The public reporting burden for the collection of information for § 10.11 is expected to average 20 hours per year, for those costs within the scope of the Paperwork Reduction Act, as follows:

(1) Ten state and local museums producing notifications and information requests to Indian tribes and Native Hawaiian organizations at 30 minutes for each museum, a total of 5 hours;

(2) Four private museums producing notifications and information requests to Indian tribes and Native Hawaiian organizations at 30 minutes for each museum, a total of 2 hours.

(3) Response by Indian tribes and Native Hawaiian organizations to requests for information from museums, 16 responses (14 to non-Federal museums and 2 to Federal museums) at 48 minutes per response for a total of 13 hours.

The reporting burden includes time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collected information. Comments regarding this burden estimate or any other aspects of this collection of information, including suggestions for reducing the burden, may be sent to the address in the **ADDRESSES** section and to: Information Collection Officer, Attn: Docket No. 1024-0144, National Park Service, Department of Interior Building, 1849 C Street NW., Room 3317, Washington, DC 20240.

### *National Environmental Policy Act*

This rule does not constitute a major Federal action significantly affecting the quality of the human environment and can be categorically excluded under 43 CFR 46.210(i), "Policies, directives, regulations, and guidelines that are of an administrative, financial, legal, technical, or procedural nature and 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. Any NEPA review required for a disposition of culturally unidentifiable human remains by a Federal agency will be conducted by that agency under its NEPA procedures.

### *Government-to-Government Relationship With Indian Tribes*

In accordance with the President's memorandum of April 29, 1994, "Government to Government Relations with Native American Tribal Governments" [59 FR 22951], Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments" [65 FR 218], and 512 DM 2, "Departmental Responsibilities for Indian Trust Resources," this rule has a potential effect on federally-recognized Indian tribes. The proposed rule was developed in consultation with the Native American Graves Protection and Repatriation Review Committee, which includes members nominated by Indian tribes. The Review Committee consulted with Indian tribes in the development of the Review Committee's recommendations regarding the disposition of culturally unidentifiable human remains that form the basis of this proposed rule. The Review Committee, at the direction of the Secretary of the Interior, consulted with tribal representatives regarding its recommendations on February 16-18, 1995, in Los Angeles, CA; June 9-11, 1996, in Billings, MT; June 25-27, 1998, in Portland, OR; and May 2-4, 2000, in Juneau, AK. Tribal representatives were also consulted regarding draft text for these regulations at Review Committee meetings on May 2-4, 2000, in Juneau, AK; May 31-June 2, 2002, in Tulsa, OK; and November 8-9, 2002, in Seattle, WA. Consultation between tribal representatives and the Department also occurred during the public comment period for the proposed rule. In addition to comments from tribes that we received through members of the Review Committee and at Review Committee meetings, we received comments from tribes on the proposed rule in training sessions and in initial consultations on the draft rule that we are preparing for 43 CFR 10.7. We will conduct ongoing consultation with tribes on the implementation of this and other NAGPRA regulations through semiannual Review Committee meetings, outreach and training events approximately twenty times annually, and formal consultation sessions on further amendments to the regulations.

### *Public Availability of Comments*

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment

to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

### *Drafting Information*

The proposed rule was prepared in consultation with the Native American Graves Protection and Repatriation Review Committee as directed by section 8(c)(7) of the Act. The principal contributors to this final rule are C. Timothy McKeown and Sherry Hutt of the National NAGPRA Program, National Park Service; Carla Mattix and Stephen Simpson of the Office of the Solicitor, U.S. Department of the Interior; Jennifer Lee, Office of the Director, National Park Service and Philip Selleck, Chief, Regulations and Special Park Uses, National Park Service.

### **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, 43 CFR part 10 is amended as follows:

### **PART 10—NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REGULATIONS**

■ 1. The authority for part 10 is revised 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 § 10.1 by revising the section heading and paragraph (b)(3), and adding paragraph (c) to read as follows:

#### **§ 10.1 Purpose, applicability, and information collection.**

\* \* \* \* \*

(b) \* \* \*

(3) Throughout this part are decision points which determine how this part applies in particular circumstances, e.g., a decision as to whether a museum "controls" human remains and cultural objects within the meaning of the regulations, or a decision as to whether an object is a "human remain," "funerary object," "sacred object," or "object of cultural patrimony" within the meaning of the regulations. Any final determination making the Act or this part inapplicable is subject to review under section 15 of the Act. With respect to Federal agencies, the final denial of a request of a lineal descendant, Indian tribe, or Native Hawaiian organization for the repatriation or disposition of human

remains, funerary objects, sacred objects, or objects of cultural patrimony brought under, and in compliance with, the Act and this part constitutes a final agency action under the Administrative Procedure Act (5 U.S.C. 704).

(c) The information collection requirements contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned control number 1024-0144. A Federal 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.

■ 3. Amend § 10.2 by revising paragraph (e) and adding paragraph (g)(5) to read as follows:

**§ 10.2 Definitions.**

\* \* \* \* \*

(e)(1) What is *cultural affiliation*? Cultural affiliation means that there is a relationship of shared group identity that can be reasonably traced historically or prehistorically between members of a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group. Cultural affiliation is established when the preponderance of the evidence—based on geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical evidence, or other information or expert opinion—reasonably leads to such a conclusion.

(2) What does *culturally unidentifiable* mean? Culturally unidentifiable refers to human remains and associated funerary objects in museum or Federal agency collections for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified through the inventory process.

\* \* \* \* \*

(g) \* \* \*

(5) *Disposition* means the transfer of control over Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony by a museum or Federal agency under this part. This part establishes disposition procedures for several different situations:

(i) Custody of human remains, funerary objects, sacred objects, and objects of cultural patrimony excavated intentionally from, or discovered inadvertently on, Federal or tribal lands after November 16, 1990, is established under § 10.6.

(ii) Repatriation of human remains, funerary objects, sacred objects, and

objects of cultural patrimony in museum and Federal agency collections to a lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization is established under § 10.10.

(iii) Disposition of culturally unidentifiable human remains, with or without associated funerary objects, in museum or Federal agency collections is established under § 10.11.

■ 4. Amend § 10.9 by revising paragraphs (e)(2), (5), and (6) to read as follows:

**§ 10.9 Inventories.**

\* \* \* \* \*

(e) \* \* \*

(2) The notice of inventory completion must:

(i) Summarize the contents of the inventory in sufficient detail so as to enable the recipients to determine their interest in claiming the inventoried items;

(ii) Identify each particular set of human remains or each associated funerary object and the circumstances surrounding its acquisition;

(iii) Describe the human remains or associated funerary objects that are clearly culturally affiliated with an Indian tribe or Native Hawaiian organization and identify the Indian tribe or Native Hawaiian organization;

(iv) Describe the human remains or associated funerary objects that are not clearly identifiable as culturally affiliated with an Indian tribe or Native Hawaiian organization, but that are likely to be culturally affiliated with a particular Indian tribe or Native Hawaiian organization given the totality of circumstances surrounding acquisition of the human remains or associated objects; and

(v) Describe those human remains, with or without associated funerary objects, that are culturally unidentifiable but that are subject to disposition under § 10.11.

\* \* \* \* \*

(5) Upon request by an Indian tribe or Native Hawaiian organization that has received or should have received a notice and inventory under paragraphs (e)(1) and (e)(2) of this section, a museum or Federal agency must supply additional available documentation.

(i) For purposes of this paragraph, “documentation” means a summary of existing museum or Federal agency records including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographic origin, cultural affiliation, and basic facts surrounding the acquisition and

accession of human remains and associated funerary objects.

(ii) Documentation supplied under this paragraph by a Federal agency or to a Federal agency is considered a public record except as exempted under relevant laws, such as the Freedom of Information Act (5 U.S.C. 552), Privacy Act (5 U.S.C. 552a), Archaeological Resources Protection Act (16 U.S.C. 470hh), National Historic Preservation Act (16 U.S.C. 470w-3), and any other legal authority exempting the information from public disclosure.

(iii) Neither a request for documentation nor any other provisions of this part may be construed as authorizing either:

(A) The initiation of new scientific studies of the human remains and associated funerary objects; or

(B) Other means of acquiring or preserving additional scientific information from the remains and objects.

(6) This paragraph applies when a the museum or Federal agency official determines that it has possession of or control over human remains or associated funerary objects that cannot be identified as affiliated with a lineal descendant, Indian tribe, or Native Hawaiian organization. The museum or Federal agency must provide the Manager, National NAGPRA Program notice of its determination and a list of the culturally unidentifiable human remains and any associated funerary objects. The Manager, National NAGPRA Program must make this information available to members of the Review Committee. Culturally unidentifiable human remains, with or without associated funerary objects, are subject to disposition under § 10.11.

\* \* \* \* \*

■ 5. Add § 10.11 to read as follows:

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

(a) *General.* This section implements section 8(c)(5) of the Act and applies to human remains previously determined to be Native American under § 10.9, but for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified.

(b) *Consultation.* (1) The museum or Federal agency official must initiate consultation regarding the disposition of culturally unidentifiable human remains and associated funerary objects:

(i) Within 90 days of receiving a request from an Indian tribe or Native Hawaiian organization to transfer control of culturally unidentifiable human remains and associated funerary objects; or

(ii) If no request is received, before any offer to transfer control of culturally unidentifiable human remains and associated funerary objects.

(2) The museum or Federal agency official must initiate consultation with officials and traditional religious leaders of all Indian tribes and Native Hawaiian organizations:

(i) From whose tribal lands, at the time of the removal, the human remains and associated funerary objects were removed; and

(ii) From whose aboriginal lands the human remains and associated funerary objects were removed. 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.

(3) The museum or Federal agency official must provide the following information in writing to all Indian tribes and Native Hawaiian organizations with which the museum or Federal agency consults:

(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 Indian groups that are not federally-recognized and are known to have a relationship of shared group identity with the particular human remains and associated funerary objects; and

(iii) An offer to provide a copy of the original inventory and additional documentation regarding the particular human remains and associated funerary objects.

(4) During consultation, museum and Federal agency officials must request, as appropriate, the following information from Indian tribes and Native Hawaiian organizations:

(i) The name and address of the Indian tribal official to act as representative in consultations related to particular human remains and associated funerary objects;

(ii) The names and appropriate methods to contact any traditional religious leaders who should be consulted regarding the human remains and associated funerary objects;

(iii) Temporal and geographic criteria that the museum or Federal agency should use to identify groups of human remains and associated funerary objects for consultation;

(iv) The names and addresses of other Indian tribes, Native Hawaiian organizations, or Indian groups that are not federally-recognized who should be included in the consultations; and

(v) A schedule and process for consultation.

(5) During consultation, the museum or Federal agency official should seek to develop a proposed disposition for culturally unidentifiable human remains and associated funerary objects that is mutually agreeable to the parties specified in paragraph (b)(2) of this section. The agreement must be consistent with this part.

(6) If consultation results in a determination that human remains and associated funerary objects previously determined to be culturally unidentifiable are actually related to a lineal descendant or culturally affiliated with an Indian tribe or Native Hawaiian organization, the notification and repatriation of the human remains and associated funerary objects must be completed as required by § 10.9(e) and § 10.10(b).

(c) *Disposition of culturally unidentifiable human remains and associated funerary objects.* (1) A museum or Federal agency that is unable to prove that it has right of possession, as defined at § 10.10(a)(2), to culturally unidentifiable human remains must offer to transfer control of the human remains to Indian tribes and Native Hawaiian organizations in the following priority order:

(i) The Indian tribe or Native Hawaiian organization from whose tribal land, at the time of the excavation or removal, the human remains were removed; or

(ii) The Indian tribe or tribes that are recognized as aboriginal to the area from which the human remains were removed. 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.

(2) If none of the Indian tribes or Native Hawaiian organizations identified in paragraph (c)(1) of this section agrees to accept control, a museum or Federal agency may:

(i) Transfer control of culturally unidentifiable human remains to other Indian tribes or Native Hawaiian organizations; or

(ii) Upon receiving a recommendation from the Secretary or authorized representative:

(A) Transfer control of culturally unidentifiable human remains to an Indian group that is not federally-recognized; or

(B) Reinter culturally unidentifiable human remains according to State or other law.

(3) The Secretary may make a recommendation under paragraph

(c)(2)(ii) of this section only with proof from the museum or Federal agency that it has consulted with all Indian tribes and Native Hawaiian organizations listed in paragraph (c)(1) of this section and that none of them has objected to the proposed transfer of control.

(4) A museum or Federal agency may also transfer control of funerary objects that are associated with culturally unidentifiable human remains. The Secretary recommends that museums and Federal agencies transfer control if Federal or State law does not preclude it.

(5) The exceptions listed at § 10.10(c) apply to the requirements in paragraph (c)(1) of this section.

(6) Any disposition of human remains excavated or removed from Indian lands as defined by the Archaeological Resources Protection Act (16 U.S.C. 470bb (4)) must also comply with the provisions of that statute and its implementing regulations.

(d) *Notification.* (1) Disposition of culturally unidentifiable human remains and associated funerary objects under paragraph (c) of this section may not occur until at least 30 days after publication of a notice of inventory completion in the **Federal Register** as described in § 10.9.

(2) Within 30 days of publishing the notice of inventory completion, the National NAGPRA Program manager must:

(i) Revise the Review Committee inventory of culturally unidentifiable human remains and associated funerary objects to indicate the notice's publication; and

(ii) Make the revised Review Committee inventory accessible to Indian tribes, Native Hawaiian organizations, Indian groups that are not federally-recognized, museums, and Federal agencies.

(e) *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 should do so through informal negotiations to achieve a fair resolution. The Review Committee may facilitate informal resolution of any disputes that are not resolved by good faith negotiation under § 10.17. In addition, the United States District Courts have jurisdiction over any action brought that alleges a violation of the Act.

■ 6. Amend § 10.12 by revising paragraphs (b)(1)(ii), (iii), and (iv) and adding paragraph (b)(1)(ix) to read as follows:

**§ 10.12 Civil penalties.**

\* \* \* \* \*

(b) \* \* \*  
(1) \* \* \*

(ii) After November 16, 1993, or a date specified under § 10.13, whichever deadline is applicable, has not completed summaries as required by the Act; or

(iii) After November 16, 1995, or a date specified under § 10.13, or the date specified in an extension issued by the Secretary, whichever deadline is applicable, has not completed inventories as required by the Act; or

(iv) After May 16, 1996, or 6 months after completion of an inventory under an extension issued by the Secretary, or 6 months after the date specified for completion of an inventory under § 10.13, whichever deadline is applicable, has not notified culturally affiliated Indian tribes and Native Hawaiian organizations; or  
\* \* \* \* \*

(ix) Upon receipt of a claim consistent with § 10.11(c)(1), refuses to offer to transfer control of culturally unidentifiable human remains for which it cannot prove right of possession.  
\* \* \* \* \*

■ 7. Amend § 10.15 by revising paragraph (c) to read as follows:

**§ 10.15 Limitations and remedies.**  
\* \* \* \* \*

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

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

(ii) Federal lands subject to subpart C this part.

(2) A Federal agency's final denial of a repatriation request constitutes a final agency action under the Administrative Procedure Act (5 U.S.C. 704). As used in this paragraph, "repatriation request" means the request of a lineal descendant, Indian tribe, or Native Hawaiian organization for repatriation or disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony brought under the Act and this part.  
\* \* \* \* \*

Dated: March 4, 2010.

**Thomas L. Strickland,**

*Assistant Secretary for Fish and Wildlife and Parks.*

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