

and to adjust applicable deadlines. Therefore, EPA did not consider the use of any voluntary consensus standards.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This action merely proposes to determine that the Memphis TN-AR Nonattainment Area has not attained by its applicable attainment date, and to reclassify the Memphis TN-AR Nonattainment Area as a moderate ozone nonattainment area and to adjust applicable deadlines.

**List of Subjects in 40 CFR Part 81**

Environmental protection, Air pollution control, National parks, Wilderness areas.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: October 9, 2007.

**Russell L. Wright, Jr.,**

*Acting Regional Administrator, Region 4.*

Dated: September 24, 2007.

**Richard E. Greene,**

*Regional Administrator, Region 6.*

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**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:** Proposed rule.

**SUMMARY:** This proposed rule specifies procedures for the disposition of culturally unidentifiable human remains in the possession or control of museums or Federal agencies, thus implementing the Native American Graves Protection and Repatriation Act of 1990 (Act). Publication of this document is intended to solicit comments from Indian tribes, Native Hawaiian organizations, museums, Federal agencies, and members of the public before its publication as a final rule.

**DATES:** Written comments will be accepted through January 14, 2008.

**ADDRESSES:** You may submit comments, identified by the number RIN 1024-AD68, by any of the following methods:

—*Federal rulemaking portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

—*Mail to:* Dr. Sherry Hutt, Manager, National NAGPRA Program, National Park Service, Docket No. 1024-AC84, 1849 C Street, NW., (2253), Washington, DC 20240.

—*Hand deliver to:* Dr. Sherry Hutt, 1201 Eye Street, NW., 8th floor, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Dr. Sherry Hutt, Manager, National NAGPRA Program, National Park Service, 1201 Eye Street, NW., 8th floor, Washington, DC 20240, telephone (202) 354-1479, facsimile (202) 371-5197.

**SUPPLEMENTARY INFORMATION:**

**Authority**

Sections 8(c)(5) and (c)(7) of the Native American Graves Protection and Repatriation Act (Act) (25 U.S.C. 3001 *et seq.*) gives the Review Committee the responsibility for recommending specific actions for developing a process for disposition of culturally unidentifiable human remains and consulting with the Secretary of the Interior (Secretary) in the development of regulations to carry out the Act. Section 13 charges the Secretary with promulgating regulations to carry out the Act. Section 5(1) of the Archaeological Resources Protection Act (16 U.S.C. 470aa-mm) authorizes the Secretary to promulgate regulations providing for the ultimate disposition of archaeological resources and other resources removed under the Act of June 27, 1960 (the Reservoir Salvage Act, as amended, also known as the Archeological and Historic Preservation Act of 1974, 16 U.S.C. 469-469c-1) or the Act of June 8, 1906 (the Antiquities Act of 1906, as amended, 16 U.S.C. 431-433).

**Background**

On November 16, 1990, President George Bush signed into law the Native American Graves Protection and Repatriation Act. The Act addresses the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony. Section 8 of the Act established the Native American Graves Protection and Repatriation Review Committee of seven private citizens to monitor and review implementation of the inventory and identification process and repatriation activities required under the Act. Section 8(c)(5) charged the Review Committee with compiling an inventory of culturally unidentifiable human remains that are in the possession or control of museums or Federal agencies and recommending specific actions for developing a process for disposition of such remains. The inventory of culturally unidentifiable human remains and recommendations regarding their disposition relate only to human remains in the possession or control of museums and Federal agencies and not to human remains that are excavated or removed from Federal or tribal lands after November 16, 1990 under section 3 of the Act.

Current regulations implementing the Act require museums and Federal agencies to retain possession of culturally unidentifiable human remains until final regulations are promulgated or the Secretary recommends otherwise. The disposition of funerary objects associated with culturally unidentifiable human remains is not specifically addressed in the Act. During deliberations over recommendations regarding the disposition of culturally unidentifiable human remains, the Review Committee considered the intrinsic relationship of human remains to associated funerary objects and concluded that nothing in the Act precludes the voluntary disposition of these cultural items by museums or Federal agencies to the extent allowable by Federal law.

In 1994, the Review Committee began to formally solicit comments from Indian tribes, Native Hawaiian organizations, museums, and Federal agencies regarding the disposition of culturally unidentifiable human remains. The Review Committee developed its first draft of recommendations regarding the disposition of culturally unidentifiable human remains and associated funerary objects in February 1995. These draft recommendations were published for

public comment in the **Federal Register** (60 FR 32163, June 20, 1995). Copies of the draft were sent to over 3,000 Indian tribes, Native Hawaiian organizations, museums, Federal agencies, national museum and scientific organizations, and members of the public. One hundred and twenty-nine written comments were received during the 100-day comment period, representing 16 Indian tribes, 49 museums, 12 Federal agencies, 3 national museum and scientific organizations, and 58 members of the public.

Based on the comments received, a revised draft of recommendations regarding the disposition of culturally unidentifiable human remains and associated funerary objects was developed in June 1996. The revised draft recommendations were published for public comment in the **Federal Register** (61 FR 43071, August 20, 1996). Copies of the draft were sent to over 3,000 Indian tribes, Native Hawaiian organizations, museums, Federal agencies, national museum and scientific organizations, and members of the public. Forty-nine written comments were received during the 45-day comment period, representing 4 Indian tribes, 26 museums, 4 Federal agencies, 6 national museum and scientific organizations, and 11 members of the public.

In June 1998, the Review Committee developed draft principles of agreement regarding the disposition of culturally unidentifiable human remains. The draft principles of agreement were published for public comment in the **Federal Register** on two different occasions (64 FR 33502, June 23, 1999 and 64 FR 41135, July 29, 1999). Copies of the draft were sent to over 3,000 Indian tribes, Native Hawaiian organizations, museums, Federal agencies, national museum and scientific organizations, and members of the public. Eighty-nine written comments were received during the 70-day comment period, representing 13 Indian tribes, 39 museums, 4 Federal agencies, 5 national museum and scientific organizations, and 22 members of the public.

While the Review Committee developed the draft of general recommendations, a separate procedure was developed for consideration of case-by-case requests for disposition of culturally unidentifiable human remains and associated funerary objects based on a recommendation from the Secretary [43 CFR 10.9(e)(6)]. Forty-one case-by-case requests were received and all were referred to the Review Committee for consideration. Twenty-six requests were made by museums

and 15 requests were made by Federal agencies. The Review Committee considered each request as part of its regular meeting agenda and recommendations were referred to the National Park Service for action. Responses to each requesting museum or Federal agency were signed by a representative of the Secretary as required by § 10.9(e)(6).

Of the 41 requests, the Secretary's representative recommended disposition of culturally unidentifiable human remains in 33 cases. Nine of the 33 recommended dispositions were to Indian tribes based on the recognition of their aboriginal occupation of the area in which the human remains and associated funerary objects were recovered, 8 were to coalitions including federally recognized Indian tribes, 11 were to non-federally recognized Indian groups, and 5 were to be completed according to applicable State law.

Eleven of the 33 recommended dispositions also included funerary objects that were associated with the culturally unidentifiable human remains. In response to one of the requests, the representative of the Secretary provided a recommendation on February 7, 2000 that stated "the statutory language neither requires nor precludes the committee from making recommendations regarding the disposition of funerary objects associated with culturally unidentifiable human remains. While regulatory provisions require museums or federal agencies to retain possession of culturally unidentifiable human remains until final regulations are promulgated or the Secretary recommends otherwise, these provisions do not apply to associated funerary objects. A museum may choose to repatriate such items. However, a Notice of Inventory Completion must be published in the **Federal Register** before the disposition."

Of the 41 requests made regarding the disposition of culturally unidentifiable human remains, in eight cases the Secretary's representative recommended that the culturally unidentifiable human remains be retained pending completion of the inventory required under 43 CFR 10.9.

After circulating three drafts for public comment and considering the specific case-by-case requests, the Review Committee developed its final recommendations regarding the disposition of culturally unidentifiable human remains in May 2000. The recommendations were published on June 8, 2000 (65 FR 36462).

The Review Committee recognized that the legislative intent of the Act is expressed by its title: the protection of Native American graves and repatriation [of Native American cultural items]. Specifically, the Review Committee found that the Act requires (1) the disposition of all Native American human remains and cultural items excavated on or removed from Federal lands after November 16, 1990, with disposition based on linkages of lineal descent, tribal land, cultural affiliation, or aboriginal land; (2) the repatriation of culturally affiliated human remains and associated funerary objects in Federal agency and museum collections, if requested by a culturally affiliated Indian tribe or Native Hawaiian organization, with repatriation based on linkages of lineal descent or cultural affiliation; and (3) the development of regulations for the disposition of unclaimed human remains and objects and culturally unidentifiable human remains in Federal agency and museum collections. Although the treatment of funerary objects associated with culturally unidentifiable human remains is not addressed in the Act, the Review Committee recognized that the Act does not prohibit the voluntary repatriation of these cultural items by museums or Federal agencies to the extent allowed by Federal law.

Museums or Federal agencies must determine whether Native American human remains in their control are related to lineal descendants, culturally affiliated with a present-day federally recognized Indian tribe or Native Hawaiian organization, or are culturally unidentifiable. This determination must be made in consultation with all appropriate Indian tribes or Native Hawaiian organizations, as described in 43 CFR 10.9(b), and through a good faith evaluation of all relevant and available documentation. A determination that human remains are culturally unidentifiable may change to a determination of cultural affiliation as additional information becomes available through ongoing consultation or any other source. The Review Committee finds no statute of limitations in the Act for lineal descendants, Indian tribes, or Native Hawaiian organizations to make a claim, and a museum or Federal agency's determination that human remains are culturally unidentifiable may occur for different reasons.

#### **Categories of Culturally Unidentifiable Human Remains**

The Review Committee's recommendations identified three categories of culturally unidentifiable

human remains: (1) those for which cultural affiliation could be determined but that the appropriate Native American 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.

#### Documentation

Documentation is required for inventory completion and determinations of cultural affiliation by museums or Federal agencies and should be prepared in accordance with the standards outlined in 43 CFR 10.9(c) and 10.14. Documentation must occur within the context of the consultation process. The Review Committee proposed that additional study of culturally unidentifiable human remains and associated funerary objects is not prohibited if the appropriate parties in consultation agree that such study is appropriate. The Review Committee confirmed that once inventories have been completed, the Act may not be used to require new scientific studies or other means of acquiring or preserving additional scientific information from human remains and associated funerary objects.

#### Disposition

The Review Committee proposed three guidelines for the disposition of culturally unidentifiable human remains.

1. Respect must be the foundation for any disposition of culturally unidentifiable human remains. Human remains determined to be culturally unidentifiable are no less deserving of respect than those for which cultural affiliation has been established.

2. Because there may be different reasons for human remains being unclaimed or determined to be culturally unidentifiable, there may be more than one appropriate disposition solution. Examples of appropriate disposition solutions include the return of human remains that are determined to be culturally unidentifiable that were removed from tribal land; human remains that are determined to be culturally unidentifiable that were recovered from the aboriginal land of an Indian tribe; or human remains that are culturally unidentifiable but for which there is a relationship of shared group identity with a non-federally recognized Native American group.

3. A museum or Federal agency may also seek the recommendation of the

Review Committee for the disposition of culturally unidentifiable human remains based on criteria other than those listed above.

The Review Committee proposed two models for determining the disposition of culturally unidentifiable human remains. The first model involved the joint recommendations by claimants and museums or Federal agencies. Disposition of culturally unidentifiable human remains may proceed in those cases where all the relevant parties have agreed in writing that the inventory requirements have been met and that the Review Committee's guidelines for respectful treatment, recognition of alternative disposition solutions, and the use of the Review Committee for disposition recommendations have been followed. The Review Committee noted that it had already recommended disposition of culturally unidentifiable human remains in cases that met the three guidelines.

The second model involved the joint recommendations of regional consortia. The Review Committee recognized that historical and cultural factors, and therefore issues concerning the definition and disposition of culturally unidentifiable human remains, vary significantly across the United States. Therefore, the Review Committee recommended that regional solutions be developed that would best fit regional circumstances. The Review Committee recommended a process in which Indian tribes and Native Hawaiian organizations define regions within which the most appropriate solutions for disposition of culturally unidentifiable human remains might be determined. Within each region, the appropriate Federal agencies, museums, Indian tribes, and Native Hawaiian organizations would consult together and propose a framework and schedule to develop and implement the most appropriate model for their region. Dispositions agreed upon through regional consultation meetings would be made by the appropriate Federal agencies, museums, and Indian tribes. If a disposition agreement could not be reached through regional consultation meetings, the matter could be brought before the Review Committee. Any proposed regional disposition agreement would have to meet the Review Committee's three guidelines for disposition.

#### Inventory

Section 8(c)(5) of the Act directs the Review Committee to compile an inventory of culturally unidentifiable human remains that are in the possession or control of museums or

Federal agencies. The scope of this inventory was expanded to include both culturally unidentifiable human remains and funerary objects with which they are associated by § 10.9(d)(2).

The Review Committee's inventory summarizes information provided by museums or Federal agencies in their inventories. This includes:

1. The number of human remains and associated funerary objects under their control;
2. State and county from which the human remains and associated funerary objects were removed;
3. The earlier group to which the human remains and associated funerary objects are thought to have belonged;
4. The date range during which the human remains and associated funerary objects are thought to have been originally interred; and
5. The date when custody of the human remains and associated funerary objects was either transferred to an Indian tribe, Native Hawaiian organization, or non-federally recognized Indian group or they were reinterred.

Section 8(g)(2) of the Act requires the Secretary to provide reasonable administrative and staff support necessary for the deliberations of the Review Committee. One of those duties has been compilation of the Review Committee's inventory of culturally unidentifiable human remains and associated funerary objects. The Review Committee's inventory was compiled from the inventories submitted by museums or Federal agencies under 43 CFR 10.9(e)(6). Each museum and Federal agency had an opportunity to verify the Review Committee's inventory of culturally unidentifiable human remains and associated funerary objects from their institution for verification before submission of the final inventory to the Review Committee. The Review Committee's inventory is posted at <http://www.cr.nps.gov/nagpra/onlinedb/index.htm> and presently includes information on 118,348 human remains and 846,187 associated funerary objects from 614 museums or Federal agencies.

#### Section-by-Section Analysis

##### *Section 10.1 Purpose and Applicability*

Paragraph 10.1(b)(3) provides 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).

### Section 10.2 Definitions

Section 10.2 provides definitions of terms used throughout Part 10.

Paragraph 10.2(e) provides additional clarification to the definition of cultural affiliation. 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 was determined are referred to as culturally unidentifiable.

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

### Section 10.9 Inventories

Paragraph 10.9(e)(2) details the contents of notices of inventory completion. Additional text to clarify that such notices include information regarding culturally unidentifiable human remains and associated funerary objects to be transferred or reinterred under 43 CFR 10.11 is proposed for addition.

Paragraph 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 to clarify that such documentation 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, is proposed for addition. Further, as required by section 5(B)(2) (Inventory For Human Remains and Associated Funerary Objects) of the Act, 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.

Paragraph 10.9(e)(6) is rewritten to remove the last three sentences that provide direction to museums and Federal agencies pending promulgation of § 10.11.

### 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 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.

Paragraph (b) concerns consultation. The drafters recognize that as a result of consultation a museum or Federal agency may revise its determination regarding the cultural affiliation of human remains and associated funerary objects. Notification and repatriation of human remains and associated funerary objects that are determined to be culturally affiliated with an Indian tribe or Native Hawaiian organization must be completed following provisions of 43 CFR 10.9(e) and 10.10(b).

Paragraph (c) establishes three choices for the disposition of culturally unidentifiable human remains. The processes outlined in paragraphs (c)(1) and (c)(2) are mandatory. The process outlined in paragraph (c)(3) and (c)(4) are voluntary but recommended.

Paragraph (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 three priority categories outlined below.

A museum or Federal agency can obtain right of possession to Native American human remains by several means. Section 2(13) of the Act stipulates that the original acquisition of Native American human remains and associated funerary objects that 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. Further, section 3(e) of the Act states that nothing in section 3 of the Act shall prevent the governing body of an Indian tribe or Native Hawaiian organization from expressly relinquishing control over any Native American human remains, or title to or control over any funerary object or sacred object.

The priority ownership categories in Section 3(a) of the Act served as a reasonable model for the proposed priority categories for disposition of culturally unidentifiable human remains. Control of human remains excavated or discovered under section 3 of the Act can be based on lineal descent, tribal land, aboriginal land, and cultural relationship, as well as cultural affiliation. However, it was necessary to make several changes to the priority ownership categories in Section 3(a) of the Act to accommodate the disposition of culturally unidentifiable human remains. The drafters request comments

from Indian tribes, Native Hawaiian organizations, museums, Federal agencies, and other interested persons regarding the appropriateness of using the priority structure in determining the disposition of culturally unidentifiable human remains.

Paragraph (c)(1)(i) stipulates that first priority would be to the Indian tribe or Native Hawaiian organization on whose tribal land, at the time of recovery, the human remains were recovered. This category parallels the provisions in section 3(a)(2) of the Act regarding the disposition of cultural items from tribal land after November 16, 1990. This provision would apply to sites considered to be tribal land at the time the original excavation or removal occurred.

Paragraph (c)(1)(ii) stipulates that second priority would be to the Indian tribe or tribes that are recognized as aboriginally occupying the area in which the human remains were recovered. Aboriginal occupation may be recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or by treaty, act of Congress, or executive order. This category is based on the provisions of section 3(a)(2)(C) of the Act regarding the disposition of cultural items from Federal or tribal land after November 16, 1990. The Act specifically identified final judgments of the Indian Claims Commission and the United States Court of Claims as two sources of information regarding aboriginal occupation. Certain treaties, acts of Congress, and executive orders also identify areas aboriginally occupied by Indian tribes. Maps of the territory ceded by all 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-ic.html>. Treaties signed before the establishment of the United States between the various colonial governments and Indian tribes may also be used to identify areas aboriginally occupied by Indian tribes.

Paragraph (c)(1)(iii) stipulates that third priority would be to Indian tribes and Native Hawaiian organizations with a cultural relationship to the region from which the human remains were removed or, for human remains lacking geographic affiliation, a cultural relationship to the region in which the museum or Federal agency with control over the human remains is located. This category is similar to provisions of section 3(a)(2)(C)(2) of the Act regarding

the disposition of cultural items from Federal or tribal land after November 16, 1990. However, while the provisions of section 3(a)(2)(C)(2) require a cultural relationship between an Indian tribe and cultural items, this paragraph requires a cultural relationship between an Indian tribe or Native Hawaiian organization and the region from which the human remains either were removed or are currently located. Nearly 70 percent of the 110,565 culturally unidentifiable human remains for which geographical information was provided were recovered from the same state in which the possessing museum or Federal agency is located. The majority of the 7,783 human remains lacking provenience information are likewise presumed to have been recovered from the immediate vicinity of the repository in which they are currently located.

Paragraph (c)(1)(iv) stipulates that if it can be shown by a preponderance of the evidence that a different Indian tribe or Native Hawaiian organization has a stronger cultural relationship with the human remains than the Indian tribe or Native Hawaiian organization specified in (c)(1)(ii) or (c)(1)(iii), the Indian tribe or Native Hawaiian organization that has the strongest demonstrated cultural relationship would have priority, if upon notice, such Indian tribe or Native Hawaiian organization states such a claim. This provision is similar to the caveat in section 3(a)(2)(C)(2) of the Act regarding the disposition of cultural items from Federal or tribal land after November 16, 1990. The drafters request comments from Indian tribes, Native Hawaiian organizations, museums, Federal agencies, and other interested persons regarding the meaning of the term "cultural relationship."

Paragraph (c)(2) provides notice that any disposition of human remains excavated or removed from "Indian lands" as defined by the Archaeological Resources Protection Act (ARPA) must also comply with the provisions of that statute and its implementing regulations. "Indian lands" means "lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except for any subsurface interests in lands not owned or controlled by an Indian tribe or Indian individual" [16 U.S.C. 470bb(4)].

Paragraph (c)(3) establishes a process for the voluntary transfer of control of culturally unidentifiable human remains that are not transferred under provisions of paragraph (c)(1) to a non-federally recognized Indian group, or reinterment of culturally unidentifiable human remains according to State or

other law. Such dispositions may be completed upon receipt of a recommendation from the Secretary or authorized representative. The Secretary will only consider recommending such dispositions with the written consent of all Indian tribes identified in paragraph (c)(1) and (c)(2), in order to ensure that the rights of federally recognized Indian tribes and tribal members are protected. The Secretary's recommendation regarding the disposition of culturally unidentifiable human remains or associated funerary objects to a non-federally recognized Indian group does not indicate Federal recognition of the group's status as an Indian tribe or the existence of a government-to-government relationship.

Paragraph (c)(4) stipulates that a museum or Federal agency may transfer control of funerary objects that are associated with culturally unidentifiable human remains following the provisions of paragraphs (c)(1), (c)(2), and (c)(3). This provision is consistent with customary religious and spiritual beliefs that link the disposition of funerary objects with the human remains with which they were intentionally placed. The Secretary recommends that museums and Federal agencies transfer all funerary objects associated with culturally unidentifiable human remains unless such a transfer is otherwise prohibited under law.

#### **Compliance With Other Laws**

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

This document is not a significant rule and has not 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) This rule does not raise 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 requirements to consult with Indian tribes and Native Hawaiian organizations are minimal and do 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 12612)*

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

##### *Civil Justice Reform (Executive Order 12988)*

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

### *Paperwork Reduction Act*

The collection of information contained in this rule has been submitted to the Office of Management and Budget for approval as required by 44 U.S.C. 3501 *et seq.* The collection of this information will not be required until approved by the Office of Management and Budget. Public reporting burden for this collection of information is expected to average 20 hours for the exchange of summary or inventory information between a museum and an Indian tribe and 6 hours per response for the notification to the Secretary, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collected information. Send comments regarding this burden estimate or any other aspects of this collection of information, including suggestions for reducing the burden, to Information Collection Officer, Attn: Docket No. 1024-AC84, National Park Service, Department of Interior Building, 1849 C Street, NW., Room 3317, Washington, DC 20240, and the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Desk Officer for the Department of the Interior, Washington, DC 20503.

### *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 516 DM 2, Appendix 1.10, "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."

### *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 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.

### *Clarity of Rule*

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

### **Drafting Information**

This proposed rule was prepared by Dr. C. Timothy McKeown in consultation with the Native American Graves Protection and Repatriation Review Committee as directed by section 8(c)(7) of the Act, and Jennifer Lee and Jerry Case, WASO Regulations Program, National Park Service.

### **Public Participation**

It is the policy of the Department of the Interior, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comments regarding this proposed rule to the address noted at the beginning of this rulemaking. We also request comments from Indian

tribes, Native Hawaiian organizations, museums, Federal agencies, and other interested persons regarding:

1. The meaning of the term "cultural relationship;" and
2. The appropriateness of using the priority structure in determining the disposition of culturally unidentifiable human remains.

Copies of this proposed rule may be obtained by submitting a request to the Manager, National NAGPRA program, National Park Service, at the address noted at the beginning of this rulemaking. Commentors wishing the National Park Service to acknowledge receipt of their comments must submit those comments with a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No 1024-AD68." The postcard will be date stamped and returned to the commentor.

### **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.

### **List of Subjects in 43 CFR Part 10**

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

In consideration of the foregoing, 43 CFR Part 10 is proposed to be amended as follows:

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

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

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

2. In § 10.1 revise paragraph (b)(3) to read as follows:

#### **§ 10.1 Purpose and applicability.**

\* \* \* \* \*

(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).

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 which 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.

\* \* \* \* \*

(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) 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 identifiable as to cultural affiliation;

(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 may be transferred under § 10.11.

(3) \* \* \*

(4) \* \* \*

(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 geographical origin, cultural affiliation, and basic facts surrounding the acquisition and accession of human remains and associated funerary objects.

(ii) Documentation supplied under this paragraph is considered a public

record except as exempted under relevant laws. 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 such remains and objects.

(6) If the museum or Federal agency official determines that the museum or Federal agency has possession of or control over human remains, with or without associated funerary objects, that cannot be identified as affiliated with a lineal descendent, Indian tribes, or Native Hawaiian organizations, the museum or Federal agency must provide the Manager, National NAGPRA Program notice of this result and a copy of the list of such 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.

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

(ii) Absent such a request, 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;

(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; and

(iii)(A) With a cultural relationship to the region from which the human remains and associated funerary objects were removed; or

(B) In the case of human remains and associated funerary objects lacking geographic affiliation, with a cultural relationship to the region in which the museum or Federal agency repository is located.

(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 non-federally recognized Indian groups that are known to have a relationship of shared group identity with the particular human remains and associated funerary objects; and

(iii) An 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 tribe 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/or 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 non-federally recognized Indian groups that 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 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;

(ii) The Indian tribe or tribes that are recognized as aboriginally occupying 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; or

(iii) The Indian tribe and Native Hawaiian organization with:

(A) A cultural relationship to the region from which the human remains were removed, or

(B) For human remains lacking geographic affiliation, a cultural relationship to the region in which the museum or Federal agency with control over the human remains is located.

(iv) If it can be shown by a preponderance of the evidence that another Indian tribe or Native Hawaiian organization has a stronger cultural relationship with the human remains than an entity specified in paragraph (c)(1)(ii) or (c)(1)(iii) of this section, the Indian tribe or Native Hawaiian organization that has the strongest demonstrated cultural relationship, if upon notice, the Indian tribe or Native Hawaiian organization claims the human remains.

(2) 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.

(3) 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, upon receiving a recommendation from the Secretary or authorized representative:

(i) Transfer control of culturally unidentifiable human remains to a non-federally recognized Indian group, or

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

(4) The Secretary may make a recommendation under paragraph (c)(3) of this section only with the written consent of all Indian tribes and Native Hawaiian organizations stipulated in paragraphs (c)(1) and (c)(2) of this section.

(5) 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.

(d) Notification. (1) Disposition of culturally unidentifiable human remains and associated funerary objects under paragraph (c) may not occur until at least thirty (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 of culturally unidentifiable human remains and associated funerary objects accessible to Indian tribes, Native Hawaiian organizations, non-federally recognized Indian groups, 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 is encouraged to do so through informal negotiations to achieve a fair resolution of the matter. The Review Committee may facilitate the informal resolution of such disputes that are not resolved by good faith negotiation 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:



A. Revising paragraphs (b)(ii), (iii), and (iv), and

B. Adding paragraph (b)(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 under § 10.13, whichever deadline is applicable, has not notified culturally affiliated Indian tribes and Native Hawaiian organizations; or

\* \* \* \* \*

(ix) Does not offer to transfer control of culturally unidentifiable human remains for which it cannot prove right of possession under § 10.11.

\* \* \* \* \*

Dated: October 2, 2007.

**David M. Verhey,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. E7-20209 Filed 10-15-07; 8:45 am]

**BILLING CODE 4310-70-P**

**DEPARTMENT OF HOMELAND SECURITY**

**Federal Emergency Management Agency**

**44 CFR Part 67**

[Docket No. FEMA-B-7740]

**Proposed Flood Elevation Determinations**

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Proposed rule.

**SUMMARY:** Comments are requested on the proposed Base (1 percent annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed in the table below. The purpose of this notice is to seek general information and comment

regarding these proposed regulatory flood elevations. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents, and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

**DATES:** Comments are to be submitted on or before January 14, 2008.

**ADDRESSES:** The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community are available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA-B-7740, to William R. Blanton, Jr., Chief, Engineering Management Section, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**FOR FURTHER INFORMATION CONTACT:** William R. Blanton, Jr., Chief, Engineering Management Section, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**SUPPLEMENTARY INFORMATION:** The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are

made final, and for the contents in these buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

*Administrative Procedure Act Statement.* This matter is not a rulemaking governed by the Administrative Procedure Act (APA), 5 U.S.C. 553. FEMA publishes flood elevation determinations for notice and comment; however, they are governed by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and do not fall under the APA.

*National Environmental Policy Act.* This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

*Regulatory Flexibility Act.* As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601-612, a regulatory flexibility analysis is not required.

*Executive Order 12866, Regulatory Planning and Review.* This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

*Executive Order 13132, Federalism.* This proposed rule involves no policies that have federalism implications under Executive Order 13132.

*Executive Order 12988, Civil Justice Reform.* This proposed rule meets the applicable standards of Executive Order 12988.

**List of Subjects in 44 CFR Part 67**

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

**PART 67—[AMENDED]**

1. The authority citation for part 67 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

**§ 67.4 [Amended]**

2. The tables published under the authority of § 67.4 are proposed to be amended as follows: