



United States Department of the Interior

NATIONAL PARK SERVICE
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Washington, D.C. 20240

October 29, 2014

Consultation with Indian Tribes (E.O. 13175) regarding the proposed 36 CFR 79.12

The proposed rule may affect tribes because some particular material remains subject to disposal under the proposed rule may have been removed from Indian lands (per 16 USC 470bb) or may have been removed from lands that tribes consider to be of religious or cultural importance. In some instances, tribes or tribal museums may be eligible to receive particular material remains as part of a disposal.

Pursuant to Executive Order 13175 and DOI Tribal Consultation Policy, we conducted outreach to tribes and Native Hawaiian Organizations, initiated consultation through two letters to tribal leaders, and conducted face-to-face consultation on the proposed 36 CFR 79.12 .

Letter to Tribal Leaders

In July of 2009, we initiated formal consultation with the leaders of 566 Federally-recognized tribes by sending them a draft of the proposed rule and asking for their comments. We received comments from ten tribes and made significant changes to the rule in response to those comments. Three tribes requested additional consultation on this rulemaking and one tribe asked for better tribal notification about this rule so tribes have an opportunity to ask questions. Unfortunately, it was not possible to conduct the requested consultations at the time due to several personnel changes.

Outreach to Intertribal and Native Hawaiian Organizations

Between 2009 and 2013, the process of drafting and publishing 36 CFR 79.12 as proposed stalled due to the absence of a permanent DCA. When the position was filled, the new DCA asked that tribal consultation be re-initiated. In 2012, prior to initiating formal consultation, we conducted outreach to several intertribal organizations and Native Hawaiian organizations to raise awareness of the proposed rule.

2013 Letter to Tribal Leaders and Tribal Consultation

Again in 2013, we initiated formal consultation with 566 Federally-recognized tribes by sending tribal leaders an updated draft of the proposed rule and requesting comments. We received responses from 14 tribes. Also, three tribes requested additional consultation on this rulemaking. We responded to two of the three tribes with offers to consult by teleconference or face-to-face. On May 21, 2013, we consulted via webinar with representatives of the Confederated Tribes of the Umatilla. We also conducted face-to-face consultation with the Hopi Tribe on July 19, 2013. We repeatedly attempted to contact the Cultural Director of the third tribe, but received no response. The following topics were discussed in the responses from the tribes.

Comments Received from Tribes in 2009 and 2013

American Indian Religious Freedom Act. One 2013 comment questioned whether the American Indian Religious Freedom Act (AIRFA, 42 USC 1996 and 1996a) was considered during rulemaking. We considered the effects of AIRFA and find that no provision in AIRFA directly relates to this rule.

Artificial Sites. In 2013, one tribe asked how the reburial of deaccessioned material remains might be undertaken in a way that prevents the creation of a new “artificial” archeological site by depositing material remains outside of their original archeological context. We note that the proposed rule only applies to the actions of the FAO disposing of the material remains and does not specify reburial as a method of disposition available to the FAO, so the question lies outside the scope of this proposed rule.

Authority to Promulgate Rule. In both 2009 and 2013, two tribes asked whether we have the authority to put forward this proposed rule. We note that Section 5 of the ARPA (16 USC 470dd) authorizes the Secretary of the Interior to promulgate regulations regarding the disposition of archeological resources removed from public lands or Indian Lands. The Secretary of the Interior has delegated this authority to the DCA who is located in the NPS.

Burden on Tribes. One 2013 tribal comment expressed concern that deaccessioning may pose an undue burden for tribes in receipt of deaccessioned materials. We note that deaccessioned items are unlikely to pose a significant curatorial burden and that no entity is compelled under this rule to accept items. Tribes may exercise their option to not accept deaccessioned items, or they may make their own determinations on how to treat returned material based on available resources.

Collections Advisory Committee (CAC). In 2009, six tribes commented that a tribal member should be on the CAC. One of those tribes also noted that no members of the CAC should benefit from a disposition. We agreed with these comments and added appropriate language.

Commercial Value. In 2009, one tribe suggested adding conditions on the treatment of material remains after a deaccession, including prohibiting future sale of the objects or any transfer for profit. We revised the proposed language to include a general statement about documenting any conditions of transfer or conveyance.

In 2013, one tribe commented that recipients of deaccessioned material remains should be barred from their future sale. We agreed and added appropriate language in Section 79.12 (n).

Disposition. In 2009, one tribe asked for a statement that tribes have complete ownership and control once material remains are conveyed to them. Another tribe noted that material remains for possible disposition from Indian lands should include material remains from tribal historic territories. In response, we drafted new paragraphs to add a method for disposition of material remains excavated or removed from Indian lands pursuant to 43 CFR 7.13(b) and a method to convey material remains to Federally-recognized tribes which were excavated or removed from public lands of religious or cultural importance pursuant to 43 CFR 7.7(b)(1). This provision is limited to Federal land because of the limited scope of ARPA.

One 2013 comment asked why material remains could not simply be returned to the place from where they were taken, or returned to tribes. We responded that we intend, where possible, to maintain the public use and benefit of deaccessioned material remains. We note that there are several avenues, specified in 79.12 (f) and 79.12 (g), by which tribes or tribal institutions can receive material remains deaccessioned under this proposed rule.

Destruction. In 2009, two tribes commented on destruction, one saying that destruction should only apply to badly damaged objects or those destroyed for analysis and the other saying that destruction is not an appropriate method of disposition. We determined that destruction may be appropriate for some material remains on a case-by-case basis and should be retained as a final option.

In 2013, one tribe asked for specific procedures to be written on the destruction of material remains. We intend for this method to be flexible such that an appropriate method is selected based on the material of which the object is made. We intend that methods of destruction are determined by the FAO with advice from appropriate subject matter experts on a case-by-case basis and should follow professional museum standards and procedures.

Indian Lands. In 2013, two tribes asked that we amend the definition of Indian lands. Congress defines Indian lands in ARPA Section 3 (16 USC 470bb); any changes lie outside our authority.

Another tribe stated that all material remains removed from its lands should be returned to the tribe. ARPA and other Federal laws and regulations govern title and disposition of excavated material remains. We have no authority to change such laws and regulations. As noted above, we added 36 CFR 79.12 (d) after the 2009 tribal consultation to ensure that tribes have priority to receive material remains excavated from their lands under ARPA.

Insufficient Archeological Interest. In 2009 and 2013, ten tribes were concerned about how “insufficient archeological interest” will be determined. One 2009 comment asked for tribal input

on determining “archeological interest.” In response, we added tribal inclusion on the Collections Advisory Committee and strengthened notification of tribes about pending dispositions.

Seven tribes expressed concern that objects of insufficient archeological interest may have cultural or other kinds of significance for tribes and others. To address this, we inserted the phrase “cultural significance” into paragraph 12(e)(3). We note that the proposed rule provides opportunities for consultation with tribes about cultural significance and other important issues. Finally, the term “archeological interest” is defined in 43 CFR 7.3(a)(1), and provides the basis upon which FAOs make disposition decisions.

Two tribes asked who will make a determination of insufficient archeological interest, and how such a determination will be made. 36 CFR 79 clearly places responsibility for long-term management of collections with the FAO (36 CFR 79.4(c)). The FAO determines disposition in consultation with experts and stakeholders, and the considered advice of the Collections Advisory Committee. Additional procedures for determining that archeological resources are no longer of archeological interest are available in 43 CFR 7.33(c).

Lack of Provenience Information. In 2009, two comments asked for objective standards and procedures to determine lack of provenience information. We noted that proposed dispositions of this type will occur on a case-by-case basis and require careful examination of the evidence at hand by professionals, making uniform standards very difficult to develop.

Lack of Physical Integrity. In response to two 2013 tribal comments, we rewrote paragraph 12(b)(2) to more broadly reflect the kinds of accidents or disasters that might render material remains to a condition where they would be of “insufficient archeological interest.”

Native American Graves Protection and Repatriation Act (NAGPRA). In both 2009 and 2013, tribes expressed concern that human remains, particularly those subject to NAGPRA, not be included in dispositions. We strengthened the relevant language in the 2013 draft and reiterate that material remains subject to NAGPRA may not be deaccessioned under this proposed rule. Furthermore, a disposition may not proceed unless an FAO determines that objects to be deaccessioned are not subject to NAGPRA.

One comment received in 2013 suggested that human remains not be included in the definition of material remains. The definition is derived from Section 3 of ARPA (16 USC 470bb); we do not have authority to make such a change.

In 2009, several tribes asked for revisions to other Sections of 36 CFR 79 to include consultation with tribes and to align the regulations with NAGPRA. We determined that these requests are outside the scope of our task to develop proposed regulations on disposition, but recognized the need for such revisions.

Notifications. In 2009, one tribe noted that tribal notifications of a pending disposition should be more specific. We revised the proposed language to be more specific about who should receive notification of a pending disposition.

In 2013, three comments expressed concern over which tribes, per 79.12(f)(8), should be notified of a pending determination of disposition because of historical or aboriginal ties to the land from which the material remains were removed. In response, we rewrote the relevant paragraph to be more inclusive. The paragraph requires FAOs to notify tribes that consider the land from which a collection was removed to have religious or cultural importance. They must also notify tribes from whose aboriginal lands a collection was removed.

Objection to a Determination of a Disposition. In 2009, one tribe asked if objections to a final determination of a disposition sent to the DCA will be a burden on the DCA, if the DCA has the necessary expertise to consider the objection, and how the DCA will assure neutrality during decision-making when the DCA's office is involved in drafting this proposed rule. The DCA has considerable experience in arbitrating difficult decisions regarding the preservation and management of archeological resources, will consult with appropriate experts as needed, and will be cognizant of this concern in the event of any disputes over a disposition.

Practical management authority. One tribe asked about the applicability of the proposed rule to collections for which agencies are "unaware of the authority under which they were collected". We reply that these regulations are applicable to all collections for which agencies are authorized by statute or regulation to manage or control. Where such authority is unknown, agencies should establish it --per 79.12(a)(1) and (h)(1)-- before attempting to deaccession it.

Priority Order for Methods of Disposition (79.12(gg)). In 2013, one tribe expressed the need for a disposition method that gave priority to tribal entities in receiving deaccessioned items. The tribe

further commented that if there was a priority order, it needed to be specified for the sake of clarity. We removed the priority order of disposition specified in a previous version of the proposed rule that was sent to leaders of Federally-recognized tribes in 2009. This was done in response to comments received during outreach to Tribes and Native Hawaiian organizations in 2013. The FAO, in consultation with subject matter experts, tribes, and other stakeholders, must determine the most appropriate method of disposition. We stipulate that destruction may be considered only after all other options are exhausted.

Pre-existing Terms and Conditions Effecting the Disposition of Material Remains. In 2013, one tribe expressed concern that in some cases long-term curation was specified as one of the terms of a Memorandum of Agreement (MOA) to resolve adverse effects under NHPA Section 106. We respond that FAOs must, on a case-by-case basis, review the terms under which material remains were originally accessioned to determine if a deaccession would violate an MOA or other instrument, such as the terms of a permit, Interagency Agreement, or Memorandum of Understanding.

Reburial. In 2009 and 2013, six tribes noted that reburial should be an accepted method of disposition. We determined that conveyance of material remains to a tribe does not preclude reburial. Once material remains are conveyed to a tribe, they are no longer Federal property and may be disposed of through reburial.

Redundancy and Sampling. In 2009, one tribe asked if there is a peer-accepted procedure to determine a representative sample of overly redundant material remains. We did not know of

such a procedure, but revised the section to provide more direction on sampling. Two tribes expressed concern that the determination of overly redundant may be subjective. Another tribe noted that future analytical techniques may require redundancy for statistical purposes. We revised the relevant section to emphasize that decisions about redundancy and sampling must be made on a case-by-case basis with due consideration to the archeological context and other factors.

Sensitive Information. In 2009, one tribe suggested that restricted information, as stipulated in Section 9(a) of ARPA, should be transferred to tribes about any material remains that are deaccessioned. We did not change the proposed language since section 9 of ARPA allows for exceptions.

Tribal Consultation. One tribe in 2013 noted that numerous Federal agencies cooperated in drafting the proposed rule, but tribes were only consulted afterwards. We note that the drafting and consultation process for this proposed rule was carried out in accordance with Department of the Interior Departmental Manual Part 318: Federal Register Documents, Executive Order 13175, and DOI's 2010 Tribal Consultation Policy. We have worked to share the proposed rule with tribes and to respond to comments and requests for consultation well in advance of its publication in the Federal Register.

Wording Changes. During both the 2009 and 2013 consultations, tribes made suggestions about specific changes to wording in the draft proposed rule. We considered each of these on a case-by-case basis and made changes where they were justified.