

National NAGPRA Webinar on the 10.11 Regulations  
April 19, 2010

New rule is final on May 14, comments can be submitted until then but they won't change the finality of the rule.

There have been 82 disposition agreements for approx. 4,000 individuals under recommendation from the Review Committee (RC)/Secretary

Under 10.9, museums/agencies (M/A) developed lists of affiliated and CUI remains, the list was developed in consultation with tribes. Consultation should have included tribal and aboriginal lands. {But new regs expand definition of aboriginal land}

Under 10.11, based on previous consultation, the M/A identifies the HR from:

- Tribal lands

- Aboriginal lands

- Other or unknown locations

Remains from tribal or aboriginal lands (T/A lands) get moved into Notices of Inventory Completion (NICs)

Tribal lands include lands w/in reservation boundaries, including allotments, dependent communities, and land administered for the benefit of Native Hawaiians. There are maps with this information on the National NAGPRA website.

Aboriginal occupation is a "fact-dependent" determination. You could get facts from judgments of the ICC, treaties, Acts of Congress, and Executive Orders. Treaties and Acts of Congress are available on the [thomas.loc.gov](http://thomas.loc.gov) (Thomas, Library of Congress) website.

Consultation must begin within 90 days of a request or a museum moving forward with a disposition absent a request. THERE ARE NO NEW OBLIGATIONS TO CONSULT if a M/A did work under 10.9. {This appears to contradict the regs, which require consultation once a tribe requests control from a M/A}

Once a NIC is published, if a tribe contacts a M/A, that tribe "moves to the top of the list" [of tribes to receive control]

If consultation leads to additional information that can lead to an affiliation, then M/A can submit an amended inventory and new NIC. This has happened for about 5000 sets of remains since 2005. {This would be problematic if a NIC has already been published. It would involve an amended NIC for the remains--perhaps just a subset of remains--already published in a NIC that is based on T/A land}

If a M/A enters consultation the M/A must provide:

- List of tribes consulted or to be consulted

- List of groups with relationship to remains

- Copy of original inventory

The M/A must request:

- Contact information for designated representatives

- Areas of temporal/geographic interest

## Other interested tribes/groups

As of May 14, there will be three new types of notices

10.11(c)(1)(i) for tribal lands

10.11(c)(1)(ii) for aboriginal lands

10.11(c)(2) for other tribes, request from groups (non-federally recognized tribes) or reinterments by M/A

Affirmative obligations of M/A:

To compile an inventory under 10.9

To publish NICs

To consult and respond to requests by tribes

Consultation must also occur under 10.13, continuing obligations

*Must* offer to transfer control of remains from T/A land

*May* offer to transfer control for federally recognized tribes who do not have T/A ties if the tribes with T/A ties do not claim them after NIC is published, or for non-recognized groups or M/A reinterments with recommendation of the Secretary.

Not covered or changed by 10.11:

Obligation to consult under original inventory

Govt. to govt. relationship

Right to retain collections for which museum can prove right of possession

Cultural items covered in a summary

What's left to cover under 10.15 regulations (not yet promulgated)

Culturally affiliated remains published in NICs but still in M/A collections

Culturally unidentifiable remains published in NICs but still in M/A collections

Culturally unidentifiable remains from unknown locations, from non-T/A lands, which are not published in NICs and are still in collections

Entire set of regulations (43CFR10) will be under programmatic review. As review proceeds, we will see notices regarding new rules proposed rules, technical amendments, etc.

END OF FORMAL TRAINING, BELOW ARE THE ANSWERS DURING Q&A

If there is no info on the remains but they are Native American, they will still be held by M/A.

If remains don't come from T/A lands, then M/A may offer to transfer through a request to the RC/Secretary but there will be a process developed for them under 10.15.

If an NIC is published but there is no claim and another federally recognized tribe asks for them, the M/A can refuse the request or offer the remains to the other tribe.

There is not time limit for publishing an NIC without a claim, but museums would be wise to do so b/c consultation requirements if you get a request could be lengthy/expensive. {But the M/A will have to consult anyway once it gets a request for transfer}

A M/A can go to the RC when it has request from locations other than T/A land, or for disposition to a non-federally recognized group or for reinterment by M/A

Can tribes make group claims? Yes, that it not changed, just like other joint requests or aboriginal land with many tribes. Just one tribe has to be federally recognized. A M/A must not transfer to a consortium but just to federally recognized tribes UNLESS there is a request to the Secretary for disposition to a consortium of non-federally recognized groups.

Specificity of location is not necessary as long as an M/A knows the remains are from within T/A lands

Existing 10.12 regs require transfer of control w/in 90 days if receive written request. If M/A doesn't transfer w/in 90 days, it can be subject to civil penalties. {This is wrong; it applies only to summary items. This claim by Hutt is clarified by Simpson (counsel) near the end of the Q&A.}

Definition of "dependent Indian community" is on National NAGPRA website, but also decided by courts so there's a certain "fluidity" to it. {Definition is NOT on website}

List of facts for aboriginal lands may include final judgments of the ICC, treaties, Acts of Congress, Executive Orders but could also use other sources "by all means" {this is going beyond the 10.11 regs but is suggested in the preamble}

Museums must publish NICs based on T/A land even if there are not claims {but there is no time table for this}

If M/A publishes a NIC and no one claims the remains and the M/A gets a claim by a different tribe, a new NIC is published and that acts as a way of notifying the tribe(s) in the original NIC so they can object if they want. Should send a letter and copy of new NIC to make sure that tribe(s) in original NIC are aware.

Written request from tribes triggers the "90 day rule." {not correct; clarified later}

Can use oral history, tribal traditions, and other expert opinion in determining aboriginal land. Can also use withdrawn treaties as well as treaties with the British or under the Articles of Confederation b/c M/A will just be using them to establish locations of tribes, not what was agreed to {Only some of these items are listed in the regs, others are not and are only included in the preamble}

NICs use location as the means of determining disposition to try to make disposition to groups with some cultural ties to the remains. {location only determines geographic, not cultural affiliation for CUI}

Who pays disposition costs? Figure that out during consultation over who will receive control. Can use repatriation grant \$\$ from National NAGPRA, but there will not be additional grants available to assist with a larger number of grant requests. {under statute grants can only be made for repatriations, not dispositions}

If two or more tribes submit competing requests for control, then M/A must resolve this or take it to RC. If a joint request, then transfer to all.

90 days after request, M/A must initiate consultation. The 90 day rule under 10.10 does not apply. The 90 days under 10.11 only requires the M/A to initiate consultation.

Fact-based decision on what is/constitutes aboriginal land. {but how would some categories of acceptable information meet a “fact-based” standard under Daubert?}