Advisory Council On Historic Preservation

The Old Post Office Building
1100 Pennsylvania Avenue, NW, #809
Washington, DC 20004

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MEMORANDUM

To: State Historic Preservation Officers
Federal Historic Preservation Officers

From: Executive Director Robert D. Bush

Subject: Information on the relationship between Section 106 of the National Historic Preservation Act and the Native American Graves Protection and Repatriation Act

What is the purpose of this Memorandum?

This Memorandum is issued in response to questions that have been raised about a potential relationship between the Section 106 process and provisions of the Native American Graves Protection and Repatriation Act (hereafter the Graves Protection Act). Specifically, concerns have been expressed to the Council about how the Graves Protection Act may affect consultation carried out under Section 106, and whether the Section 106 process can be used to meet some of the requirements of the Graves Protection Act.

What is the Native American Graves Protection and Repatriation Act?

In November, 1990, the Native American Graves Protection and Repatriation Act (P.L. 101-601; 104 Stat. 3048) was signed into law. In brief, the Graves Protection Act sets forth a process for the return to American Indians, Native Hawaiians, and Native Alaskans, upon request, certain human remains and other cultural items presently held by Federal agencies or Federally assisted museums or other institutions. The law also gives these Native American individuals and groups a formal role in decisions about activities carried out on Federal and tribal lands that may affect archaeological resources of importance to Native Americans.

The Graves Protection Act contains provisions covering the intentional removal and inadvertent discovery of human remains and other cultural items from Federal and tribal lands, clarifies the ownership of human remains and other cultural items recovered from Federal or tribal lands, sets forth a process for repatriation of human remains and other cultural items, and prescribes penalties for illegally trafficking in them. (The Graves Protection Act defines "cultural items" as a) human remains, b) funerary objects "reasonably believed to have been" associated with human remains or, "by a preponderance of the evidence," a specific burial site, c) sacred religious objects, and d) cultural patrimony, defined as material remains of "historical, traditional, or cultural importance to the Native American group or culture itself...." "Unassociated" funerary objects were, according to the accompanying Senate Select Committee report accompanying the Graves Protection Act, specifically excluded from the protections afforded by the bill.)

The law directs the Secretary of the Interior to issue regulations implementing this act by mid-November 1991, and to establish a committee to oversee compliance with the Act by mid-March, 1991.

How does the Graves Protection Act relate to Section 106?

The Graves Protection Act relates to and in turn will affect the Section 106 process in three primary ways.

A. Archaeological Investigations: The first way the Graves Protection Act relates to Section 106 is in its requirements that Federal agencies and non-Federal users of Federal lands formally consult with the appropriate Native American groups regarding the treatment and disposition of human remains and other cultural items recovered during archaeological investigations conducted on Federal lands. These native groups must consent to the excavation and removal of these items from tribal lands. Thus, archeological data recovery and similar mitigative actions developed pursuant to Section 106 must also meet Graves Protection Act requirements when they occur on Federal or tribal lands.

Under the Act, excavation of human remains and other cultural items from Federal or tribal lands requires a permit under the Archaeological Resources Protection Act (ARPA), along with evidence of consultation with the "appropriate" tribe regarding the treatment and disposition of any human remains and other cultural items that may be encountered. On tribal lands, the "appropriate" tribe must give its consent to excavation and removal of the materials. These requirements must be met even though a plan for data recovery or other investigations is developed through the Section 106 process.

B. Discovery Situations: The second way the Graves Protection Act will affect Section 106 review is when cultural items are discovered during implementation of a project. The Council's regulations (800.11) encourage agencies to develop a plan for dealing with unexpected discoveries of archaeological materials during a project. In the absence of a plan, the regulations provide for expedited review by the SHPO and Council, or alternatively, by the Secretary of the Interior under the provisions of the Archeological and Historic Preservation Act (P.L. 93-291) where that law applies. The Council's regulations do not require the work on the project to halt while mitigation measures are developed and executed.

Under the Graves Protection Act, the inadvertent discovery of human remains and other cultural items during a land-disturbing activity requires cessation of the activity. The person conducting the activity must take "reasonable" protection measures, notify the Secretary of the Interior or Federal agency with management authority over the land (and the relevant Indian tribe if on tribal lands) that the discovery has occurred, receive a formal acknowledgement of the notification (called "certification" in the Act), and wait 30 days prior to resuming the activity. Disposition of the newly discovered human remains or other cultural items must be resolved in accordance with the ownership provisions of the Act.

As we interpret the law, these more stringent provisions must be met when carrying out any of the approaches set forth in 36 CFR Part 800.11. However, it is possible that under the Department of the Interior's eventual implementing regulations for the Act, agreements between Federal agencies and Native American groups could provide for alternate mechanisms for dealing with discovery situations and establish a different time frame than the 30-day delay.

C. Curation of Archaeological Remains: In general the Council's policy has been to ensure that, except for human remains and associated grave goods, artifacts and records resulting from data recovery carried out under Section 106 are professionally curated (in accordance with 36 CFR 79 or other appropriate standards). In accordance with the policy statement on the treatment of human remains adopted by the Council in 1988, reburial of human remains is the preferred alternative, but justified scientific studies may take place. Decisions on curation, study and reburial are reached through the Section 106 consultation process.

In most cases, the Graves Protection Act allows the affiliated Native American group to decide upon the appropriate treatment; analysis, curation or reburial are merely three such treatments. Only those materials "indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States" can be retained following a repatriation request for "human remains and objects possessed or controlled by Federal agencies and museums." However, such remains must also be repatriated within 90 days of that study's completion if so requested.

What does the Graves Protection Act say about repatriation?

The Graves Protection Act contains provisions for the return of human remains and other cultural items held by Federal agencies and museums that receive Federal support (other than the Smithsonian Institution, which is covered by another law), to the appropriate Native American groups or descendants upon their request. To achieve this end, the Graves Protection Act also sets forth timetables for completion of inventories of human remains and other cultural items held, and for conveyance of the inventory to the relevant Native American organizations. It also authorizes the Secretary of the Interior to provide grants to Native American organizations and museums to assist in inventory and repatriation.

The Graves Protection Act sets forth several criteria for determining the Native American ownership of human remains and other cultural items, depending on a number of factors, including whether such remains are those recovered from archaeological excavations or inadvertently discovered, or that are presently in museums or in the possession of Federal agencies. Such remains must be returned upon an appropriate claimant's request. In short, the lineal descendants have first rights to human remains and associated funerary artifacts; absent such claimants, the tribe or organization presently controlling the land where the remains were found has priority over the remains and other cultural items. Such rights will in turn accrue to the tribe or organization with the closest cultural affiliation if other claimants are not present.

Will repatriation require Section 106 compliance?

It is unlikely that the repatriation provisions of the Graves Protection Act will have any Section 106 implications, unless the human remains and other cultural items are part of a National Register-listed or eligible site on Federal or tribal lands. This reasoning is based on the definition of "historic property" in the Council's regulations (36 CFR Part 800.2(e)), where only "artifacts, records, and remains that are related to and located within such properties" are considered part of a National Register listing or eligibility determination. In those instances where Federal agencies believe repatriation actions might be subject to Section 106 consideration (e.g., National Park units that are listed in their entirety in the National Register), programmatic agreements could be developed to handle any Section 106 consultation expeditiously prior to repatriation.

Until the Department of the Interior issues its regulations for compliance with the Graves Protection Act, can the Section 106 process be used to satisfy its provisions?

To the extent that the two laws overlap, Federal agencies could use the consultation process embodied in the Council's regulations to meet both the requirements. However, Federal agencies must ensure that the stricter requirements of the Graves Protection Act are met.

The Council's regulations (36 CFR 800) set forth a consultation process for determining appropriate treatments of historic properties that will be affected by Federal or Federally assisted projects and programs. Consultation with Native Americans, including tribes, organizations, and individuals, are specifically required at several points; for example, when identifying historic properties (800.4(a)), when resolving adverse effects (800.5(e)), and when undertakings affect Indian lands (800.1.(c)(2)(iii)). In addition, other provisions exist in the regulations that provide for participation by Native Americans as interested persons. For example, Native Americans, upon request, must be invited to participate when an undertaking may affect historic or traditional cultural properties of value to an Indian tribe on non-Indian lands (800.1.(c)(2)(iii)).

Similarly, the Graves Protection Act requires consultation to determine appropriate treatments of human remains and other cultural items. Under the Graves Protection Act, consultation with appropriate Native American organizations must occur when human remains and other cultural items will be removed intentionally from Federal or tribal lands, when such items are inadvertently discovered during an undertaking, and for purposes of museum inventory leading to repatriation.

If Federal agencies so choose, the "normal" 106 process that leads to binding agreements on how to treat historic properties could be used to reach agreements under the Graves Protection Act on how to treat Native American human remains and other cultural items that may be encountered as a result of a project on Federal or tribal lands. The specific provisions of the Graves Protection Act could presumably be addressed in the consultation stage of the Section 106 process, with agreements reached on:

- the specific Native American organizations with a proprietary interest in any human remains and other cultural items that may be recovered;

- the kinds of artifacts that will be considered to be cultural items as defined in the Graves Protection Act, including associated and unassociated funerary objects, sacred objects, or objects of cultural patrimony;

- the kinds of analysis and curation to which the material will be subjected, along with a schedule for any disposition of the material; and/or

- a specific course of action to be taken should human remains and other cultural items be encountered unexpectedly during a project.

We envision that such discussions would include the Agency, the SHPO, the Council (if participating), the Native Americans, the licensee or permittee (if applicable), and, as data recovery would likely be the proposed treatment in most such situations, the project (and/or agency) archaeologist. These discussions could lead to an agreement forming the basis for the ARPA permit required by the Graves Protection Act, and could be incorporated (directly or by reference) into the Section 106 documentation.

Because the regulations implementing the Graves Protection Act have not yet been developed, there are numerous questions over interpretation of the law that remain to be answered. It is quite possible that these will engender litigation in the short term. Agencies and SHPOs should be wary of using the Section 106 process as a substitute for meeting any of the specific requirements of the Graves Protection Act, because the Act creates rights for certain parties that go beyond their consultative role under the Section 106 process. As a Federal statute, the rights and obligations set forth in the Graves Protection Act must be honored in any arrangement embodied in an agreement resulting from the Section 106 procedure. In the final analysis, the responsibility for complying with the Graves Protection Act rests on the Federal agency, not the SHPO or the Council.

Are certain actions under the Graves Protection Act (e.g., issuance of ARPA permits, repatriation, inventory of collections for possible repatriation purposes, and grants to tribes or museums to facilitate inventory and repatriation) likely to be considered to be undertakings as defined in the Council's regulations, and thus subject to Section 106 review?

In general, most actions under the Graves Protection Act are not likely to have the potential to affect properties listed in or eligible for inclusion in the National Register of Historic Places as defined in the Council's regulations, or have been explicitly exempted from Section 106 review (i.e., issuance of ARPA permits). As noted above, only in those rare instances when individual objects proposed for repatriation meet the National Register criteria, or *in situ* remains contained in an eligible site will be repatriated, would Section 106 apply.

How does the Graves Protection Act relate to the Council's policy on treatment of human remains, particularly with regard to reburial?

The Council policy on the treatment of human remains and grave goods is generally consistent with the aims of the Graves Protection Act, but the Council will re-examine this policy in the coming months. Revision is probable because of the broad consequences of the Graves Protection Act. However, in the interim, the current policy will continue to be applied. Briefly, this policy states:

"In general, human remains and grave goods should be reburied in consultation with the descendants of the dead; ... [however], Prior to reburial, scientific studies should be performed as necessary to address justified research topics; ... Where scientific study is offensive to the descendants of the dead, and the need for such study does not outweigh the need to respect the concerns of such descendants, reburial should occur without prior study. Conversely, where the scientific research value of human remains or grave goods outweighs any objections that descendants may have to their study, they should not be reburied, but should be retained in perpetuity for study." The provisions of the Graves Protection Act go beyond the policy statement by creating specific rights for Native Americans that underscore the special values inherent in archaeological sites containing burials and other cultural items. The Graves Protection Act gives Native Americans a variety of options for claiming and disposing of these remains and other items, and reburial is only one such alternative.

Summary

Unlike Section 106 of the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act gives certain individuals and affiliated groups considerable decision-making authority in cases of intentional excavation and removal, inadvertent discovery, and possible repatriation of certain types of Native American cultural items, including human remains. As such, while we recommend that ongoing Section 106 consultation and actions under the Graves Protection Act be coordinated to the greatest extent possible, Federal agencies, State Historic Preservation Officers, the Council, and other consulting or interested parties should take special care to be responsive to the concerned parties' rights and responsibilities under the Graves Protection Act.

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If additional questions arise on Section 106 implications, please contact Thomas M. McCulloch, Office of Program Review and Education, at (202) 786-0505. For general information on the Native American Graves Protection and Repatriation Act, please contact Dr. Francis P. McManamon, Departmental Consulting Archeologist, Department of the Interior, National Park Service, at (202) 343-4101.