

DEPARTMENTAL CONSULTING ARCHEOLOGIST
 ARCHEOLOGICAL ASSISTANCE DIVISION
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I. INTRODUCTION

On November 16, 1990, President Bush signed into law the Native American Graves Protection and Repatriation Act (P.L. 101-601). This law recognizes the rights of Indian Tribes and Native Hawaiian organizations as owners or caretakers of human remains, funerary objects, sacred objects, and objects of cultural patrimony with which they can demonstrate a reasonable biological or cultural affiliation. As part of this recognition, this statute also conveys to such groups the rights to decide disposition or take possession of such items. Throughout the remainder of this document, P.L. 101-601 is referred to as the Graves Protection Act.

Under the Graves Protection Act, Federal agencies and federally funded museums are required to inventory some kinds of cultural items and summarize other kinds that are in the collections they own or control. Following the completion of the summaries and inventories, agencies and museums must notify Indian Tribes or Native Hawaiian organizations that appear to be culturally affiliated of the results. Tribes and Native Hawaiian organizations may then request the repatriation of cultural items and are entitled to those with which they can demonstrate reasonable biological or cultural affiliation.

One of the clearest intentions of the law is the protection of Native American graves and other cultural items through in situ preservation. Therefore, it is important for Federal agencies and Tribes undertaking land-modifying activities on their lands to take special precautions, such as more intensive archeological activities to locate and then avoid unmarked Native American graves and cemeteries. On Federal and Tribal lands,

archeological investigations for planning or research purposes, or other land modifying activities that inadvertently discover such items require the Federal agency or Tribe involved to consult with affiliated or potentially affiliated Native Americans.

The act also stipulates that trafficking in human remains and cultural items is illegal, calling for civil penalties. Furthermore, it authorizes the Secretary of the Interior to administer a grants program to assist museums and Indian Tribes in complying with this law, and requires the Secretary of the Interior to establish a Review Committee to provide advice on carrying out key provisions of the statute. In addition, the statute directs the Secretary to develop regulations in consultation with this Review Committee.

The law has generated a great amount of interest among Native Americans, museum professionals, and Federal agency employees charged with meeting its requirements. The exact means of implementation must await formal regulations; however, these guidelines have been developed and are provided to assist Tribes, museums, and Federal agencies in beginning to implement the law. The guidelines are intended to supplement the statute; material provided in the House and Senate Committee Reports is used to clarify statutory intent on some issues. Anyone using these guidelines is encouraged to read carefully the text of the Graves Protection Act, as well as to become familiar with the Reports.

In general, it will be essential for Tribes, museums, and Federal agencies to work cooperatively. Dialogue between and among these parties will be extremely important. We recommend that the Tribes, museums, and Federal agencies begin to develop channels for constructive dialogue and cooperative actions as soon as possible.

II. PURPOSE AND APPROACH

The purpose of the Native American Graves Protection and Repatriation Act is to protect Native American burial sites and control the removal of human remains, funerary objects, sacred objects, and items of cultural patrimony on Federal, Indian, and Native Hawaiian lands. It also establishes a process by which Federal agencies and federally funded museums must inventory holdings of such remains and objects, and work with Indian Tribes and Native Hawaiian organizations to reach agreements on the repatriation or other disposition of these remains and objects (House Report 101-877:8-9).

The effective implementation approach for this statute will require agreements between Indian Tribes, Federal agencies, and federally funded museums through continuous dialogue. These discussions will lead to a better understanding of the historic and cultural values of remains and objects. Human remains must at all times be treated with dignity and respect, while museums are recognized as serving an important function in educating the public and increasing awareness about the nation's history (Senate Report 101-473:5-6).

The first of two main objectives for this act is to control archeological excavations using the existing Archeological Resources Protection Act permitting process, while encouraging in situ preservation whenever possible and to foster dialogue and agreement. The second objective addresses collections of human remains and certain kinds of objects currently held by Federal agencies or federally funded museums. Essentially, the act requires an inventory process that leads to repatriation or other kinds of disposition agreed upon by Native Americans, agencies, and museums (House Report 101-877:9-10).

Consequently, Federal agencies and federally supported museums must seek consultation with Native American groups actively to address the requirements of this act, and all parties must participate in meaningful dialogue that promotes understanding and solutions.

III. RESPONSIBLE ORGANIZATIONS

Executing the provisions of the Graves Protection Act involves three primary participants: Federal agencies, federally funded museums, and Indian Tribes and Native Hawaiian organizations. This section summarizes the roles of each; the following sections describe the activities that are necessary to carry out statutory provisions. Other potential parties are the Advisory Council on Historic Preservation and the State Historic Preservation Officers, whose roles are normally informal except for rare situations. Nevertheless, they may serve as potential facilitators during negotiations or consultations.

III. A. Indian Tribes and Native Hawaiian Organizations

The definitions of Indian Tribe and Native Hawaiian organization are clear in the statute. The statutory definition of Indian Tribe is:

any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (Sec. 2(7)).

The Bureau of Indian Affairs maintains a list of formally recognized Tribes e. g., Federal Register, Vol 53, No. 250:52829-52835 and this list is regularly augmented. Other Federal agencies also offer benefits specifically to Indians. Most of these agencies have independently derived definitions that include, but extend beyond the list of formally recognized Tribes. For example, the Administration for Native Americans (ANA), a branch of the Department of Health and Human Services established to, among other things, administer a grants program to promote the social and economic development of Native Americans, stipulates that the following organizations are eligible to apply for grants:

Federally recognized Indian tribes; consortia of Indian tribes; incorporated non-Federally recognized tribes; incorporated nonprofit multipurpose community-based Indian organizations; urban Indian centers; public and nonprofit private agencies serving Native Hawaiians; national or regional incorporated nonprofit Native American organizations with Native American community-specific objectives; public and nonprofit private agencies serving native peoples from Guam, American Samoa, Palau, or the Commonwealth of the Northern Mariana Islands; Alaskan Native villages as defined in the Alaska Native Claims Settlement Act, and/or nonprofit village consortia; nonprofit Alaska Native Regional Associations in Alaska with village-specific projects; and nonprofit Alaska Native community entities or tribal governing bodies as recognized by the Bureau of Indian Affairs (Federal Register Vol. 55, No. 168:35413).

This definition and others used by various Federal agencies expand the term "Tribe" beyond the list of those formally recognized by the Bureau of Indian Affairs.

For the purposes of the Graves Protection Act, however, the real issue is whether or not Indian Tribes and Native Hawaiian organizations are able to demonstrate a reasonable linkage or cultural affiliation with specific cultural items, in museums of Federal collections or as yet undiscovered on Federal or Tribal land.

III. A. 1. Cultural Affiliation as Established by the Statute

Section 3 of the Act defines and establishes a hierarchy for cultural affiliation, a condition that must be demonstrated if Tribes are to be consulted with in the case of future excavations or unanticipated discoveries, or if they are to be successful claimants of cultural items in repatriation requests. For human remains and associated funerary objects, affiliation by lineal descent supercedes all other potential claimants. Lineal descent is not defined in Section 2 of the statute or explained in the accompanying Committee reports. For the purposes of these interim guidelines, this term is taken to mean a reasonably established genetic or familiar tie between generations of an extended family, clan, or lineage. For any other items, the group of potential cultural affiliation is the Tribe, both in the statute and in the accompanying Committee reports. 'Cultural affiliation' means that there is a relationship of shared identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group (Sec. 2(2)).

This implies that groups of Native Americans of diverse backgrounds who voluntarily associate together for some purpose or purposes are not viewed as proper claimants under the provisions of the statute. However, the members of such organizations may exercise their rights as part of their Tribe.

For human remains and associated funerary objects, as well as unassociated funerary objects, sacred objects, and items of cultural patrimony for which no lineal descendants can be identified, the statute provides a hierarchy for judging among potentially competing claimants, in the following priority order:

- (1) Indian Tribes or Native Hawaiian organizations on whose Tribal lands the cultural items are discovered;
- (2) Indian Tribes or Native Hawaiian organizations that can show the closest cultural affiliation to the items; and
- (3) if cultural affiliation cannot reasonably be ascertained and if the items are from Federal land formally recognized by the Indian Claims

Commission or the U.S. Court of Claims, proper claimants may be the Indian Tribes recognized as aboriginally occupying the area from which the items were discovered

Regarding (3), if a preponderance of the evidence shows that a different tribe than the one identified as aboriginally occupying the area has a stronger demonstrated affiliation with the cultural items, they would be viewed as proper claimants.

No Tribe needs to establish beyond all doubt that it is a proper claimant. Language such as "reasonable" and "preponderance of the evidence" indicate that the intent of this component of the statute is to obviate a need for total certainty about direct linkages. Many lines of evidence can be used to support and evaluate claims, among their anthropological and archeological information, tradition and oral history, and biological ties or genetics.

III. B. Federally-funded Museums

The Graves Protection Act defines "museum" as follows:

any institution of State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency (Sec. 2(8)).

Some museums serve as the repositories for cultural items that were obtained from Federal or Tribal lands; they may conduct the required inventories or written summaries for Federal agencies or Tribes. Museums are required to conduct inventories or written summaries of all cultural items within their collections regardless of their geographical point of origin.

III. C. Federal Agencies

Except for the Smithsonian Institution, which is covered under a separate statute (Public Law 101-185), all Federal agencies that manage land and/or are responsible for archeological collections from their lands or generated by their activities must comply with the Graves Protection Act. Federal agencies are responsible for (1) producing inventories and written summaries of cultural items in their collections, informing Tribes and Native Hawaiian organizations that may be affiliated with these items of their holdings, and working with Native Americans in order to proactively seek groups to identify in the consultation process; and (2) consulting with Tribes or Native Hawaiian organizations when planned archeological excavations may encounter cultural items or when cultural items are discovered inadvertently on Federal or Tribal lands.

III. D. Secretary of the Interior/ Departmental Consulting Archeologist

The statute assigns Federal governmental responsibility for statute administration, implementation, and operation to the Secretary of the Interior. Specifically, the Secretary must:

- (1) establish a Review Committee of seven persons to monitor and review inventory, identification, and repatriation activities;
- (2) provide reasonable levels of administrative and staff support for the Review Committee; and
- (3) promulgate regulations for implementing the statute

In addition, the Secretary may do the following:

- (1) develop and administer a grants-in-aid program to assist Tribes and museums in repatriation activities;
- (2) review requests from museums for extensions of time to complete inventories of human remains and funerary objects, and to grant temporal extensions upon finding a "good faith" effort;
- (3) assess civil penalties of any museum that fails to comply with the statute or its implementing regulations; and
- (4) assume the review and consultation responsibilities that would normally be required of Federal agencies when Native American cultural items are discovered inadvertently on agency lands.

Staff support for Secretary's responsibilities and for Review Committee activities will be provided by the Departmental Consulting Archeologist (DCA) and the Archeological Assistance Division (AAD) in the National Park Service of the Department of Interior. This office will maintain Committee

files and documents, organize committee meetings and staff committee activities. The DCA will be the Committee's contact person.

In many cases, responsibilities assigned by statute to the Secretary of the Interior are delegated to the DCA, including the following:

- (1) developing the implementing regulations;
- (2) providing guidelines, technical information, training and other programs that will assist all affected parties in meeting their obligations;
- (3) providing administrative and staff support for the committee;
- (4) administering the grants-in-aid-program if one is developed;
- (5) reviewing requests from museums for extensions of time to meet their inventory requirements; and
- (6) making recommendations to the Secretary concerning any of the foregoing issues.

III. E. The Native American Graves Protection and Repatriation Act Review Committee

This Review Committee is established by Section 8 of the statute. It is an advisory committee that makes recommendations to the Secretary of the Interior. The Committee's views do not bind the Federal government, but will be a very important consideration for any action that the Secretary must take. Since the Committee is chartered, its actions are generally subject to Freedom of Information Act requests.

To ensure a fair expression of all views, Committee membership is explicitly stated in the law. Appointment of members is by the Secretary of the Interior from nominations submitted by Indian Tribes, Native Hawaiian organizations, and traditional Native American religious leaders, and from national museum and scientific organizations. Consisting of seven members, the duties of the Committee are to monitor and review inventory, identification and repatriation activities. It may also make findings relating to cultural affiliation and repatriation issues if requested, facilitate the resolution of disputes, consult with parties, and offer suggestions about the care of repatriated materials. The regulations that implement the statute also are to be developed in consultation with the Committee. The Committee also must compile an inventory of items without cultural affiliation held by museums and Federal agencies, and recommend disposition actions. Each year, the Committee is to submit a report to Congress.

Although the statute assigns many important roles to the Committee, most matters concerning repatriation, inventory, and potential agreements attending to excavation are best dealt with locally through agreements negotiated by agencies, museums, and Native Americans. It is anticipated that the Committee's role in consulting and dispute resolution will only be invoked when local agreement is not possible.

The Advisory Council on Historic Preservation

The Advisory Council has no statutory role in carrying out the provisions of the law. The Council's regulations (36 CFR Part 800, "Protection of Historic Properties") implementing Section 106 of the National Historic Preservation Act, however, set forth a consultation process whereby conflicts between the public values of historic preservation and the public need for Federal or Federally assisted projects or programs are resolved. The manner in which Federal agencies meet the requirements of Section 106, including any mitigation measures agreed upon during this consultation process, may be directly affected by agency responsibilities under the Graves Protection Act. Consequently, early coordination and consultation under Section 106 may be of assistance in meeting some of the requirements of the Graves Protection Act where consultation is necessary to reach agreements on how to treat Native American human remains and other cultural items.

The consultation process embodied in the Council's regulations generally involves three principal parties: the Federal agency with jurisdiction over the project or program, the State Historic Preservation Officer (SHPO) representing the state where the project is located, and the Council. Consultation with Native Americans, including Tribes, organizations, and individuals, are specifically required at several points, however, when (1) identifying historic properties (800.4(a)), (2) resolving adverse effects (800.5(e)), or (3) undertakings affect Indian lands (800.1(c)(2)(iii)). In addition, other provisions exist in the Council's regulations providing for participation by Native Americans as interested

persons.

The Council's Executive Director recently issued a memorandum to the State Historic Preservation Officers and Federal Preservation Officers on the relationship between Section 106 and the Graves Protection Act. Developed in consultation with the DCA, it is included as Appendix A to these interim guidelines.

The State Historic Preservation Officers

While the law does not assign a formal, statutory function to these officials, as the representatives of the States in the national historic preservation program they can play key roles in assisting others to help meet the provisions of the Graves Protection Act. For example, they may assist Federal agencies or recipients of Federal assistance in identifying Native American groups that should be consulted with under the statute, they are a central source of information on prior and ongoing projects in their states that may be subject to Graves Protection Act provisions, and they may curate or be responsible for the curation of cultural items subject to the statute. Potential roles played by the State Historic Preservation Officers also are discussed in Appendix A.

IV. WHAT IS COVERED: DEFINITIONS OF CULTURAL ITEMS

The Graves Protection Act commits Federal agencies and federally supported museums to the repatriation, care, and disposition of human remains and two groups of four other kinds of cultural items in accordance with the wishes of the culturally affiliated American Indian Tribes and Native Hawaiian organizations:

- (1) human remains and associated funerary objects; and
- (2) unassociated funerary objects, sacred objects, and items of cultural patrimony

With the exception of human remains, each of the foregoing kinds of cultural items is defined within Section 2 of the statute. Although this document restates and provides operational refinements of these definitions, it is incumbent upon Federal agencies, museums, and American Indian and Native Hawaiian organizations to study the definitions provided in the statute. Further refinements may be forthcoming in the final regulations.

IV. A. Clarification of Cultural Item Definitions

Human remains are not defined in the statute, and consequently all Native American human remains are covered. One of the definitions in the statute is the term "burial site." There is some operational confusion among archeologists because some refer to human remains as a "burial." The statute defines burial site as:

any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as part of the death rite or ceremony of a culture, individual human remains are deposited (Sec.2).

This definition emphasizes the place from which remains were taken, and is not synonymous with human remains. This means that whether or not Native American human remains came from a burial site, such remains are covered by the statute. In other words, isolated human bones which may have been disturbed from a burial site are still subject to the provisions of this statute.

Associated funerary objects are objects reasonably believed to have been placed with human remains as part of a death rite or ceremony. The use of the term "associated" refers to the fact that these materials are still retained in association with the human remains in a museum or other repository, and that there has been no post-removal separation of the funerary objects from the human remains.

Unassociated funerary objects are items which are reasonably believed to have been taken from burial sites, but are no longer in association with the human remains of the burial. When human remains can be re-associated with funerary objects in a different repository through adequate documentation, the human remains and the funerary objects should be considered together in consultations concerning their treatment or potential repatriation.

Sacred objects are defined in the statute as:

specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents (Sec.2).

The key provision in this definition is whether the objects are needed to practice traditional religions. Further language in this area is supplied by the Senate Committee Report:

There has been some concern expressed that any object could be imbued with sacredness in the eyes of a Native American, from an ancient pottery shard to an arrowhead. The Committee does not intend this result...the primary purpose of the object is that the object must be used in a Native American religious ceremony in order to fall within the protections afforded by the bill (Senate Report 101-473:7).

Objects of Cultural Patrimony have:

ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual...(Sec.2).

The key provision in this definition is whether the property was of such central importance to the tribe or group that it was owned communally. The potential vagueness of this term again produced comment by the Senate Committee:

The Committee intends this term to refer to only those items that have such great importance to an Indian tribe or to the Native Hawaiian culture that they cannot be conveyed, appropriated or transferred by an individual member. Objects of Native American cultural patrimony would include items such as Zuni War Gods, the Wampum belts of the Iroquois, and other objects of a similar character and significance to the Indian tribe as a whole (Senate Report 101-473:7-8).

In contrast to its more general usage, these comments concerning "objects of cultural patrimony" exclude from this category most but not all items found in archeological collections. On the other hand, some items found in museums or collections of Federal agencies might have been inadvertently acquired from individuals with no rights of alienation or possession. These must be repatriated if requested by a culturally affiliated tribe or Native Hawaiians organization.

V. RESPONSIBILITIES AND ACTIVITIES

There are two basic sets of overall activities required by the new statute. These are (1) repatriation, a complex set of activities that are described herein; and (2) treatment, care, and disposition of cultural items recovered on Federal or tribal lands, either by intentional excavations or by inadvertent discovery after the date of enactment. The remainder of this section discusses the nature of and processes attending to each of these activities.

V. A. Repatriation and Related Activities

As in much of this statute, consultation between Federal agencies, federally funded museums, and appropriate Native American groups is a critical component of activities leading to repatriation. The statute places the paramount responsibility for compliance upon Federal agencies and federally funded museums. In order to initiate this process, agencies and museums must first identify appropriate American Indian tribes or Native Hawaiian organizations who have an interest in various components of their collections. This is because activities preceding repatriation are to be executed in consultation with these groups. Once contact has been made, the statute requires each Federal agency or federally funded museum to carry out the following actions: (1) inventory human remains and associated funerary objects, (2) summarize unassociated funerary objects, sacred objects, and items of cultural patrimony, (3) notify groups of their findings, and (4) return to lineal descendants or culturally affiliated tribes or Native Hawaiian organizations requested cultural items.

V. A. 1. Repatriation Activities Required of Federal Agencies and Federally Funded Museums

Within five years of enactment, Federal agencies and federally funded museums must complete an inventory of human remains and associated funerary objects. Consultations with Indian tribes, Native Hawaiian Organizations, and traditional religious leaders are needed throughout the inventory process. One of the first steps in the inventory process should be to identify likely Native American and Native Hawaiian affiliates for the items to be inventoried. Agencies and museums are encouraged to give considerable attention to this task, recognizing that current proximity between tribes and the locations where materials were recovered are not the sole measure of potential affiliation and that traditional religious leaders are as

important an inclusion as secular tribal governments.

One key factor for Federal agencies and federally supported museums will be in identification of Federal agency responsibilities for items curated by museums. For example, many museums retain collections obtained from agency projects or programs, where the identity of either the lead agency or the agency owning the materials is unclear. This issue should be resolved prior to or early during the inventory process.

Agencies must initiate contacts with museums that retain Federal collections, and must examine in-house records for agency operated repositories. Federally owned and operated repositories are considered parts of Federal agencies under the statute. As such, they are not eligible for grants, nor can they obtain extensions of time for completing their inventories. This is an important distinction, since agencies probably will need to increase the allocation of resources to carry out this obligation.

Federally-funded museums, on the other hand, will have access to any grants program that may be established under the statute. The purpose of this program is to assist them in completing their inventories. Requirements for the grants program will be identified during the regulation writing process; however, museums holding collections that are Federal property may be able to apply for grants to inventory such materials.

Museums also can request an extension from the Secretary of the Interior if their inventories are incomplete after five years. Extensions of time for the inventories may be granted if the museums can show what the statute defines as a "good-faith effort", at minimum, a plan. If museums do not comply with the law, they face civil penalties that may be assessed by the Secretary of Interior.

Many archeological collections that are the responsibility of Federal agencies are in the care of museums. These non-federal museums must be contacted during the documentation and inventory process, and agreement reached between museums and agencies as to who will conduct the work and who will be responsible for contacting Native American groups. Museums should contact agencies regarding collections that may be the responsibility of the Federal agency, even though the agency fails to contact them. It is recommended that when there is a Federal responsibility, the Federal agency contact and consult with the Native American group.

Cultural items under scientific study also must be returned expeditiously upon request, unless by affiliated Native American groups these items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States (Sec. 7(b)). In any case, these items must be returned within 90 days of the completion of this any specific such scientific study.

Until final regulations are available, Federal agencies and museums must be certain that repatriated materials are returned to the proper claimant group, a procedure that demands adequate documentation. Statutory provisions protect museums that have acted in good faith from lawsuits brought by competing claimants or other parties, no such protection is offered to Federal agencies. The regulations developed by the Secretary will provide additional guidance pertaining to disposition. No repatriation of cultural items should proceed without the formal notification of potentially affiliated tribes or Native Hawaiian organizations and the Secretary as required in Section 5(d). This guidance is provided to ensure that all potentially competing claimants or other parties are aware of the possible repatriation.

V. A. 2. The Inventory Process

The first step in this process is to establish a means of consulting with appropriate Indian tribes, Native Hawaiian Organizations, or traditional religious leaders. Museums and agencies may wish to form a consultation group of interested parties for each of the various accessions or components of their collections. Once these groups are established, tasks include:

- (1) develop a repatriation plan. This plan will assist agencies in meeting their responsibilities under the statute. Such a document will be essential to plan for funding needed to accomplish the inventory and justify grant proposals. The development of such a plan is cited in the statute as one means of justifying an extension of time for inventory completion. The scope of the Repatriation Plan may be quite variable, based either on portions of the collection or an agency's entire holdings.

- (2) conduct the inventory. The statute defines an inventory as an itemized list. Inventory listings should contain enough descriptive information to summarize the cultural items being listed. The listing also should

summarize the documentation available about each item. "Documentation" means an examination of agency records, any accession records or catalogues, studies, or other materials that might have a bearing on the (1) geographic origin, (2) cultural affiliation, and (3) the basic facts concerning the acquisition of these items. Although it is expected that conducting the inventory will probably be primarily either an agency or museum function, the law states that either the consulting Native American groups or the Review Committee may have broad access to the documentation during this process. The initiation of studies to acquire new scientific information is not part of the inventory.

(3) Notify the affiliated Indian Tribes or Native Hawaiian organizations. Agencies or museums must notify affiliated groups of the inventory results within 6 months of inventory completion. This notification must identify each set of human remains and associated funerary objects, and known tribal origin. Additionally, this notice must specify which items are probably associated with a tribe or Native Hawaiian organization, if reasonable evidence exists. A copy of the notice must be sent to the Secretary of the Interior who will publish it in the Federal Register.

V. A. 3. Summary of Unassociated Funerary Objects, Sacred Objects, and Items of Cultural Patrimony

Each Federal agency or museum may summarize in writing rather than provide an object-by-object inventory of unassociated funerary objects, sacred objects, and items of cultural patrimony. Consultation with tribal officials, Native Hawaiian Organization officials, and religious leaders must follow the completion of the summary. This summary must be submitted within 3 years of enactment, and includes the following information: scope of collection, kinds of objects included, reference to geographic location, means and period of acquisition, and cultural affiliation. There is no provision for a time extension for the completion of summaries.

V. B. The Roles of Indian Tribes, Native Hawaiian Organizations In Repatriation Activities and Traditional Religious Leaders.

Indian tribes, Native Hawaiian organizations, and traditional religious leaders may take an active role throughout the repatriation process or they may choose to await notification from museums and/or agencies of their findings. One active role would be to identify museums or Federal agencies that might have ownership, stewardship, or management of tribal cultural items, and express an interest in consulting about items in these collections are of interest. Another activity would be to begin to assemble documentation that will help establish a valid claim to cultural items. Examples of the kinds of evidence are oral or traditional evidence, biological, archeological, or anthropological material, or legal documents pertaining to the Indian Claims Commission or the Federal Court of Claims.

Another activity would be to identify any other potential claimant tribes or organizations. If any are found, the tribes should attempt to resolve the claims issue. The statute states that a preponderance of the evidence will establish the strongest relationship between a tribe and any affiliated cultural items if cases are brought into court. In dealing with this issue, potential competing claimants should attempt to resolve it in conjunction with the definitions of cultural affiliation supplied by the statute.

Tribes and Native Hawaiian organizations have a role in consulting with Federal agencies and museums, who will be seeking guidance initially on what materials are of interest to individual tribes. The statute clearly calls for early interaction and continual consultation throughout the process. Tribes are to be provided with access to information regarding collections at any time during or after the inventory. Indian tribes and Native Hawaiian organizations may request access to materials, or copies of additional information from museums or agencies throughout the repatriation process. In considering making such requests, these groups should keep in mind that inventories will be an ongoing and time consuming process. Tribes and Native Hawaiian organizations should try to work cooperatively with agencies and museums throughout the process.

Native American groups who are dissatisfied with any of the negotiations with museums, federal agencies, or other Native American groups may contact the Native American Graves Protection and Repatriation Act Review Committee. One of the Committee's functions is to facilitate resolution to such disputes.

V. B. 1. Repatriation

Under the provisions of this statute, repatriation is the return of human remains and other cultural items to the Native American groups affiliated with them. Except for rare situations wherein documentation of a

collection provides clear information, repatriation must follow the inventory and identification process. The minimal legal and/or technical information that must be provided in order to effect a repatriation action includes:

- (1) identifying the relevant cultural items in an agency's or a museum's collection;
- (2) identification of potential claimant Native American groups for each item or groups of items;
- (3) the notification of potential Native American claimants.

Once Indian tribes or Native Hawaiian organizations have been notified, the statute stipulates no specific time requirement for tribal responses to agencies or museums about claims for repatriation or disposition of cultural items. Theoretically, years could pass once a Native American group is contacted. However, the statute only requires repatriation for those items which meet the definitions and are requested by affiliated tribes. Tribes and Native Hawaiian organizations may elect not to have items returned. The statute provides for relinquishment of claims if the affiliated group wishes.

Agencies or museums may still care for unclaimed items in accordance with curatorial and museum standards under the following conditions: (1) there is no response from the Tribe or Native Hawaiian organization, which were notified; (2) the Tribe or Native Hawaiian organization, acknowledge the contact, but do not request anything; (3) The Tribe or Native Hawaiian organization, relinquishes its ownership rights to material; or (4) the Tribe or Native Hawaiian organization and the agency or museum reach an agreement that the agency or museum will continue to curate the items. In any event, all materials must be treated with dignity and respect at all times. Exhibitory of human remains, objects of cultural patrimony, and sacred objects is discouraged unless the appropriate Native American group seeks such treatment. The regulations will identify ways to dispose of any items not claimed under the provisions of this statute.

V. B. 2. Disposition

The statute encourages consultation concerning potential disposition, as well as pursuing collaborative agreements for access, use, care, and treatment of cultural items, but it is clear that Indian tribes and Native Hawaiian organizations have the controlling interest. Section 11 (1) (b) provides for the possibility that dialogue between interested parties may result in treatments that recognize Native American ownership yet provide for curation, display, and/or research on some tribal cultural items. An example of such agreements might be the transfer of ownership to a tribe, followed by the selection of specific items by tribes for ceremonial use or reinterment, followed in turn by the loan of the remaining objects to the same repository. Under such an arrangement, materials on loan to the repository from the Native American group might not ever leave the repository. The Native American Graves Protection and Repatriation Act Review Committee may assist in agreement negotiation, or provide recommendations for care, treatment, or access to materials if asked.

Aside from the prohibitions against trafficking in Native American human remains and cultural items that pertain to all persons and are identified in Section 4 of this statute, there are no constraints placed upon Native American groups regarding the use, access, treatment, or care of repatriated cultural items.

V. C. Intentional Excavation and Inadvertent Discovery of Native American Remains and Objects

Human remains and other cultural items removed from Federal or Tribal lands after November 16, 1990 are discussed in this portion of the guideline. These materials are dealt with in Section 3 of the statute and are discussed either as the result of intentional excavation or inadvertent discovery.

V. C. 1. Intentional Excavation

The use of this term in the statute is synonymous with planned archeological activities such as research, including survey. This term also applies to activities which cannot avoid particular sites and thus require excavations that may encounter human remains and associated funerary objects at potential but unspecified locations within those sites. The inclusion of such situations with intentional excavations strongly encourages Federal agencies are encouraged strongly to plan undertakings with comprehensive archeological survey work designed to discover the locations of cultural items during the early stage of project planning whenever possible. Discovery of unanticipated cultural items during project execution may be

followed by a 30-day delay under the inadvertent discovery section of the statute. This archeological survey work should be coupled with an increased effort to identify Indian tribes and Native Hawaiian organizations, including traditional religious leaders, who might have an affiliation with materials likely to be disturbed.

This section of the statute calls for removal of human remains and cultural objects items only under the following conditions: (1) pursuant to Archaeological Resources Protection Act permits; (2) following consultation with tribes in all cases or evidence of attempts to consult on Federal lands, and the documented consent of appropriate tribes in the case of tribal lands; (3) under ownership, control, and disposition provisions stipulated in this statute. Regarding the issue of whether Federal agencies or employees are required to hold ARPA permits under the Graves Protection Act, there is nothing in the statute that would modify existent Federal regulations for issuance of such permits (36 CFR Part 7, Federal Register, Vol. 49, No. 4:1029-1030). These regulations do not require permits for Federal employees working in conjunction with their agency duties.

Operationalizing this process requires interaction between the appropriate Native American group, and Federal agency well in advance of project execution. Regardless of whether from Federal or tribal lands, materials recovered would be the property of the appropriate Indian tribe or Native Hawaiian organization, and the guidelines for inventory, summary, and disposition presented earlier in this document would apply.

Under Section 106 of the National Historic Preservation Act, Federal agencies are required to "take into account" the effects of their projects and programs on properties on or eligible for the National Register of Historic Places, and then provide the Council a reasonable opportunity to comment on the undertaking. The Section 106 consultation process noted previously in this paper is used to determine appropriate treatments for historic properties that will be affected by Federal or Federally assisted projects and programs. When Federal or Federally projects and programs will affect historic properties of value to Native Americans, whether or not they are located on tribal lands, the Council's regulations (36 CFR 800) require that they be consulted at various steps in the consultation process.

The Graves Protection Act also requires consultation to determine appropriate treatments of human remains and other cultural items. The statute's requirements that Federal agencies, or through the agencies 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 and tribal lands, however, while a compliment to the Section 106 consultation process, is not a substitute for compliance with Section 106. Likewise, 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.

As stated in the Council's memorandum (Appendix A), 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 can be addressed in the consultation stage of the Section 106 process, with agreements reached on:

- (1) the specific Native American organizations with an ownership interest in any human remains and other cultural items that may be recovered;
- (2) 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;
- (3) 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
- (4) a specific course of action to be taken should human remains and other cultural items be encountered unexpectedly during a project.

Such discussions and any formal agreement must include the Federal agency and the appropriate Tribe of Native Hawaiian organization. In order to coordinate any conditions to this agreement with Section 106 requirements, these parties may wish to include in the discussions the SHPO, the Council (if participating), and the licensee or permittee (if applicable). These discussions could lead to an agreement that forms the basis for any ARPA permit that may be required and could be incorporated (directly or by reference) into the Section 106 documentation .

V. C. 2. Inadvertent Discovery

The intention of this section of the statute is to deal with cultural items not anticipated, but discovered, uncovered, or disturbed during undertakings on Federal or Tribal lands. This includes situations such as finding human remains or other cultural items in areas where no sites were anticipated or discovered during archeological surveys done as part of project planning (i.e., buried sites not visible from surficial examination). If cultural items are discovered during such activities as construction, logging, mining, or agriculture, this law requires agencies or non-Federal users to:

cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice (to the appropriate Federal agency or Tribal official)...Upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, the activity may resume after 30 days of such certification."

This section thus requires that activity in the area shall cease, although the project may continue elsewhere. Once notification has been received by the agency or Tribe, the consultation described above in V. C. 1. and Section 3(C) of the statute must occur and be documented. Preservation of the cultural items in situ as the preferred orientation in such cases. Regarding notification, if the project is on Federal lands the notice must be provided to the appropriate agency, as well as the appropriate Native American groups. If it is on tribal lands, the appropriate Indian tribe must be notified. Upon certification that notification has been received, the activity may proceed following a 30 day delay.

The Council's regulations (36 CFR 800.11) encourage agencies to develop a plan for dealing with unexpected discoveries of archaeological materials during a project. Appendix A provides some of the details.

V. D. Discussion: The 30-Day Delay Provision and Proactive Memoranda
The statute implies that the 30-day period is mandatory, although regulations may permit a shorter cessation of activity if a proactive Memorandum of Understanding is in place prior to project initiation. Such memoranda would identify the nature of the undertaking and identify methods of treatment, handling, and disposition of cultural items that might be encountered. Moreover, it would delineate clearly procedures to streamline the notification, consultation, and agency or tribal response process. It also would allow for Native American ceremonial, ritual, or other activity attending the discovery of any human remains or cultural items.

Although the statute mandates a 30 day delay, the reports accompanying the statute provide the following expansion or intent.

An Indian tribe or Native Hawaiian organization may, after notification, determine the appropriate disposition of any remains or objects found on these lands. Under this notification process, an Indian tribe may determine the appropriate disposition of any remains or objects without significant interruption of the activity. "The Committee intends this section to provide for a process whereby Indian tribes and Native Hawaiian organizations have an opportunity to intervene in development activity on Federal or tribal lands in order to safeguard Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony. Under this section, Indian tribes and Native Hawaiian organizations would be afforded 30 days in which to make a determination as to the appropriate disposition for these human remains or objects. The Committee does not intend this section to operate as a bar to the development of Federal or tribal lands on which human remains or objects are found. Nor does the Committee intend this section to significantly interrupt or impair development on Federal or tribal lands...(Senate Report 101-473)

Section 11 (1) (B) seems offer the to potential for entering into proactive Memoranda with respect to inadvertent discovery situations, but its application may require the development of regulations.

Section 11(1)(B) preserves the right of all parties to enter into other mutually agreeable arrangements than those provided for in this Act. The Committee encourages all sides to negotiate in good faith and attempt to come to agreements, where possible, which would keep certain items available to all those with legitimate interests (House report 101-877, pg. 16)

The Relationship Between the Graves Protection Act's Inadvertent Discovery Provisions and the NHPA's Section 106 Compliance Provisions

The Section 106 consultation process offers an operational template for addressing similar issues under the Graves Protection Act, as well as an opportunity to initiate a consultation process. However, there are major statutory differences that preclude completely merging the two consultation

processes.

Section 106 consultations entail the Advisory Council on Historic Preservation, the State Historic Preservation Officer, Federal agencies, and Native American tribal governments, and as appropriate, traditional religious leaders. Rarely, they may involve museums or repositories. The Graves Protection Act inadvertent discovery consultations involve Federal agencies and Indian tribes or Native Hawaiian organization. Under the Graves Protection Act, there is no necessary consultation role for the Advisory Council or the State Historic Preservation Officer.

Section 106 applies to work done using Federal funds or requiring Federal permits or licenses. The Graves Protection Act's inadvertent discovery provision applies only to Federal or tribal lands. Thus, there is no specific applications link between these two statutes. Appendix A provides additional detail.

Also, as previously noted, repatriation is not an undertaking as defined by the Advisory Council's procedures, except under very rare circumstances wherein objects to be repatriated are listed on the National Register of Historic Places.

VI. CONCLUDING STATEMENT

All Federal agencies, all federally funded museums, and all Indian tribes and Native Hawaiian organizations are encouraged to collaborate in developing creative and mutually respectful solutions to the challenges posed by this important piece of legislation. Regardless of whether dealing with materials once viewed as in Federal ownership or museum stewardship, all citizens of the United States have an interest in this important component of national patrimony.