

Date: Sat, 29 Jun 91

To: Interested Parties

From: Departmental Consulting Archeologist

Subject: Draft Memorandum with Advice Regarding the
Implementation of the Native American Graves
Protection and Repatriation Act--Request for Comments

We have prepared this draft memorandum to assist Federal agencies, Indian Tribes and Native Hawaiian organizations, and museums that receive Federal fund in implementing the Native American Graves Protection and Repatriation Act. We have attempted to describe the requirements of the statute accurately and to use information from the Committee reports to supplement the language of the statute where additional clarification of intent is helpful. In places we have offered recommendations of actions that should be taken to begin implementation of the statute. Our recommendations are only the best advice that we can provide at this time. They are not regulations or the precursors of regulations in any formal sense.

We have prepared this advice for two reasons. First, since the new statute went into effect, we have been asked and have tried to answer many questions about various aspects of it. We felt that summarizing what we knew and thought about the requirements and implementation of the statute in a single document would help us to answer these questions with consistency and rigor. Frankly, there have been instances in which the statute has been misinterpreted or miscited; we hope this memorandum will prevent these kinds of errors. The second reason for the memorandum is to urge the parties responsible for actions under the law to begin working on some aspects of its implementation.

We also hope that the advice here will help in developing specific, positive applications of the law. We plan to produce a final document for wide circulation to Federal agencies, Indian Tribes and Native Hawaiian organizations, museums, and other interested parties in early July. Please submit any comments that you have on this draft by the close of business, July 3, 1991. Between then and July 10 we shall use the comments to prepare a final memorandum. It is our intention to send the memorandum out by 12 July. We appreciate the time each of you may take to provide input on developing the best possible discussion of the statute and suggestions for beginning implementation. If you have questions or comments, please call Larry Nordby or me at (202) 343-4101, or fax them to us at (202) 523-1547.

ADVISORY MEMORANDUM REGARDING IMPLEMENTATION OF
THE NATIVE AMERICAN GRAVES PROTECTION AND
REPATRIATION ACT OF 1990

DEPARTMENTAL CONSULTING ARCHEOLOGIST
ARCHEOLOGICAL ASSISTANCE DIVISION
NATIONAL PARK SERVICE

26 JUNE 1991--DRAFT

TABLE OF CONTENTS

I. INTRODUCTION

II. PURPOSE OF THE GRAVES PROTECTION ACT AND IMPLEMENTATION
APPROACH UNDER THIS MEMORANDUM

III. RESPONSIBLE ORGANIZATIONS

- A. Indian Tribes and Native Hawaiian Organizations
 - 1. Cultural Affiliation as Established by the Statute
- B. Museums Receiving Federal Funds
- C. Federal Agencies
- D. Secretary of Interior/Departmental Consulting Archeologist
- E. The Native American Graves Protection And Repatriation Review Committee
- F. Potential Consulting Organizations
 - 1. The Advisory Council on Historic Preservation
 - 2. The State Historic Preservation Officers

IV. WHAT IS COVERED: DEFINITIONS OF CULTURAL ITEMS

A. Clarification of Cultural Item Definitions

V. RESPONSIBILITIES AND ACTIVITIES

- A. Repatriation and Related Activities Required of Federal Agencies and Museums Receiving Federal Funds
 - 1. Statutory Requirements Pertaining to Inventory, Summary, Notification, and Repatriation
 - 2. Statutory and Operational Differences Between Federal Agencies and Museums Receiving Federal Funds
 - 3. Flexible Approach
 - 4. Suggested Repatriation Process
 - 5. Disposition
- B. The Role of Indian Tribes, Native Hawaiian Organizations, and Traditional Religious Leaders in Repatriation Activities
- C. Intentional Excavation and Inadvertent Discovery of Native American Remains and Objects
 - 1. Intentional Excavation
 - 2. Inadvertent Discovery
- D. Discussion: The 30-Day Delay Provision and Proactive Memoranda
- E. The Relationship Between the Graves Protection Act Section 3 Provisions and NHPA's 106 Compliance Provisions

VI. CONCLUDING STATEMENT

APPENDIX A. ACHP MEMORANDUM (not included in this draft)

APPENDIX B. STAFF DIRECTIVE 84-5 (not included in this draft)

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 lineal descent 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. The law has generated widespread interest among Native Americans, museum professionals, and Federal agency employees charged with meeting its requirements.

This document has been prepared in order to answer the many questions from various parties that have arisen on implementation procedures and attendant issues, and is offered only as an advisory memorandum for Indian tribes, Federal agencies, and museums receiving Federal funding. The exact means of implementing the statute must await formal regulations developed using the public review process. Consequently, much of the specificity found in regulations has not yet been and cannot be achieved at this time. This memorandum is 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 this memorandum is encouraged to read carefully the text of the Graves Protection Act, as well as to become familiar with the Reports. Under the Graves Protection Act, Federal agencies and museums receiving Federal funds are required to inventory some kinds of cultural items and develop summaries for 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 lineal descent or cultural affiliation. Such items must be repatriated if requested by lineal descendants or culturally affiliated groups. One of the clearest intentions of the law is the protection of Native American graves and other cultural items. This approach encourages avoidance of archeological sites that contain burials or those portions of sites that contain graves through in situ preservation, but may encompass other actions to preserve these remains and items. Therefore, it is advantageous for Federal agencies and Tribes undertaking land-modifying activities on their lands to precede them with as intensive archeological surveys as possible. This will help agencies and tribes 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.

Other provisions of the Act may be summarized as follows: (1) it stipulates that illegal trafficking in human remains and cultural items may result in civil penalties; (2) it authorizes the Secretary of the Interior to administer a grants program to assist museums and Indian Tribes in complying with this law; (3) it requires the Secretary of the Interior to establish a Review Committee to provide advice in carrying out key provisions of the statute; and (4) it directs the Secretary to develop regulations in consultation with this Review Committee.

II. PURPOSE OF THE GRAVES PROTECTION ACT, AND IMPLEMENTATION APPROACH UNDER THIS MEMORANDUM

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 requires that Federal agencies and museums receiving Federal funds 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).

Once cultural affiliation and the right of possession has been demonstrated, Indian tribes or Native Hawaiian organizations normally make the final determination on the disposition of human remains or cultural objects defined by the statute. Many objects found in archeological sites or collections are not covered by the statute, however, and may remain in Federal or museum ownership.

Both the statutory language and the Committee reports create the context for an effective implementation approach. It requires consultations and encourages agreements between Indian Tribes, Federal agencies, and museums receiving Federal funds. The Committee Reports express the hope that these discussions will lead to a better understanding of the historic and cultural values of remains and objects. Although human remains must at all times be treated with dignity and respect, the important role that museums play in educating the public and increasing social awareness about the nation's history is also noted (Senate Report 101-473:5-6).

The implementation process identified in the remaining sections of this advisory memorandum deal primarily with the two major activities called for in the new statute. These are (1) repatriation and associated activities, and (2) care and disposition of cultural items recovered during planned or unanticipated excavations. The format used is first to identify the responsible organizations and other potential participants (Section III); next to explore issues raised by the definitions of cultural items (Section IV); and finally to discuss the activities required of or recommended for Federal agencies, museums receiving Federal funds, and Indian tribes and Native Hawaiian organizations involved in repatriation or excavation activities (Section V).

III. RESPONSIBLE ORGANIZATIONS

Executing the provisions of the Graves Protection Act involves three primary participants: Federal agencies, museums receiving Federal funds, and Indian Tribes and Native Hawaiian organizations. This section summarizes the roles of each, applying the statutory definitions, Committee Reports, and opinions of this office. Additional and more specific information on responsibilities of each organization is given in Section V.

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, generally associated with excavations only. Whenever it is possible to use existing Section 106 consultation networks, they may serve as potential facilitators.

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 Federally 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. These agencies have independently derived definitions that include but extend beyond the list of formally recognized Tribes.

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 lineal descent or cultural affiliation with human remains and 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

'Cultural affiliation' is a key concept for implementing this statute. It is one cornerstone for repatriation requests, and is a condition of Native American consultation rights concerning excavations. Section 2 defines cultural affiliation as:

"a relationship of shared group 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 members of their tribe. Although tribes need not be Federally recognized to be potential claimants, we believe they must have a shared tribal identity that extends backward in time somewhat. Federally recognized tribes would still need to show cultural affiliation with a given set of cultural items.

Section 3 of the Act defines a rank order for establishing cultural affiliation, with cultural items recovered during excavations following the date of enactment. It applies only to planned excavations or unanticipated discoveries. This ranking and its application to the different classes of human remains and cultural objects is as follows:

For human remains and associated funerary objects, affiliation established by lineal descendants takes precedence over affiliation established by all other potential claimants.

Although lineal descent is not defined in Section 2 of the statute or explained in the accompanying Committee reports, we interpret this term to mean a direct genetic or familial tie reasonably established between generations of an extended family, clan, or lineage. This interpretation might extend to families of documented descendants that are not members of Federally recognized tribes.

Consultations regarding any other newly discovered materials entail working with affiliated tribes, vis-a-vis descendants. Applications might include the following considerations:

For human remains and associated funerary objects not claimed by lineal descendants, as well as unassociated funerary objects, sacred objects, and items of cultural patrimony, the statute provides a context for judging among potentially competing affiliated tribes or other entities, in the following priority order:

(1) Indian Tribes or Native Hawaiian organizations on whose Tribal lands the cultural items are discovered;

(1) 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 were recovered from Federal land formally recognized by a final judgment of the Indian Claims Commission or the U.S. Court of Claims as the aboriginal land of some Indian tribe, proper affiliates may be the Indian Tribes recognized as aboriginally occupying the area from which the items were excavated.

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 affiliates.

No Tribe needs to establish beyond all doubt that it is a proper claimant for purposes of repatriation. This also is true for claims of cultural affiliation in situations dealing with newly

discovered materials. As stated in the Senate Committee Report:

The types of evidence which may be offered to show cultural affiliation may include, but are not limited to, geographical, kinship, biological, archaeological, anthropological, linguistic, oral tradition, or historical evidence or other relevant information or expert opinion. The requirement of continuity between present day Indian tribes and materials from historic or prehistoric Indian tribes is intended to ensure that the claimant has a reasonable connection with the materials. Where human remains and funerary objects are concerned, the Committee is aware that it may be extremely difficult, unfair, or even impossible in many instances for claimants to show an absolute continuity from present day Indian tribes to older, prehistoric remains without some reasonable gaps in the historic or prehistoric record. In such instances, a finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of gaps in the record (Senate Report 101-473:9).

Partially in response to the foregoing perspective, many concerns have been voiced about the issue of time depth and its applications to the cultural affiliation issue. Some of these questions are: Are there any properly affiliated claimants for human remains or cultural objects assigned to Paleoindian, Archaic, or other 'extinct' cultures? Is there a limit on the number of generations, centuries, or years that may have elapsed since the materials were deposited and the current repatriation request or involvement in any consultations? How do the issues of different occupation of the same geographical area and implications of temporal depth interact? The statute does not address the issue of "extinct" cultures, chronology, and time depth. Consequently, at this time it is premature to offer any opinion. Regulations developed in a public forum will be needed.

III. B. Museums Receiving Federal Funds

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)).

The issue of how much Federal funding must be received by museums as a requisite for compliance with the Act is unknown and must await regulations development. Many Federal agencies supply financial support to museums, and most museums receive at least some support. The committee reports are silent on this issue.

A more lengthy summary of museum activities is given in Section V; however, two aspects of the work done by museums seem appropriate to mention at this point:

(1). 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 on behalf of Federal agencies or Tribes if these entities request it, however for human remains and cultural items traditionally viewed as Federal property, each agency must ensure that inventories or summaries are done either within each agency structure or by a repository. Under this view, Federal agencies are merely transferring the workload to the museum, not the responsibility.

(2). Museums are required to conduct inventories or written summaries of all cultural items (as defined in Section IV of this memorandum and Section 2 of the statute) within their collections regardless of their means of accession or geographical point of origin. These activities must also be followed by notification of culturally affiliated tribes or Native Hawaiian organizations.

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 or controlled by them, 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. In keeping with the view given above regarding museums, Federal agencies are responsible for the inventory, summary, and potential disposition of cultural items in non-Federal repositories.

III. D. Secretary of the Interior

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 along with any rules and regulations for its operations; and (3) promulgate regulations for implementing the statute

In addition, the Secretary may do the following:

(1) develop and administer a grants 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.

Selected Secretarial responsibilities will be delegated to 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.

Many questions have been raised about the grants program referred to in Section 10. Statutory language authorizes the Secretary of the Interior to make grants to museums and tribes. The statute does not create a grants program, leaving program establishment and the options for funding with the Executive branch or Congress. As of this writing, the program has not been officially established, nor has funding been appropriated.

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. We anticipate that information on site locations will remain confidential with respect to any of its actions or deliberations, however.

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 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 are to be developed in consultation with the Committee. The Committee must compile an inventory of culturally unidentifiable human remains that are in the possession or control of each museum and Federal agency, and recommend specific actions for developing a process for disposition of such remains. Each year, the Committee is to submit a report on this disposition process to Congress. Although the statute assigns many important roles to the Committee, which has advisory responsibilities of national scope, most matters concerning repatriation, inventory, and potential agreements attending to excavation are best approached through agreements negotiated by local agency offices, museums, and Native Americans. It is anticipated that the Committee's role in consulting and dispute resolution will only be invoked when such

agreements are not possible.

III. F. Potential Consulting Organizations

Two other potential contributors to negotiations might include the Advisory Council on Historic Preservation and the State Historic Preservation Officers. It is anticipated that these two entities will have a minimal role in dealing with repatriation and related activities. The degree of involvement for excavation activities depends on how appropriate and feasible it is to merge the Section 106 compliance process from the National Historic Preservation Act with Section 3 of the Graves Protection Act. Applications on a case-by-case basis are recommended at this time. Ultimately, any possible integration of the two processes must follow the regulations development process and a policy decision reached following public review.

III. F. 1. 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 FR 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 Council's view of 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.

III. F. 2. 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 museums receiving Federal funds to the repatriation, care, and disposition of human remains and four kinds of cultural items in accordance with the wishes of the culturally affiliated American Indian Tribes and Native Hawaiian organizations. The kinds of remains and the artifacts covered by provisions of the statute are: (1) human remains and associated funerary objects; (2) unassociated funerary objects; (3) sacred objects; and (4) 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 still retain their association with the human remains. It applies to all objects which are stored together as well as objects for which an adequate record exists that permits the reasonable re-creation of an association between the objects and the human remains that they once accompanied. This may include materials located in a different repository from the human remains. Some items from burials may also not have been so placed as part of a death rite.

Unassociated funerary objects are items that are reasonably believed to have been taken from burial sites, but are no longer in association with the human remains of a burial, and there is no adequate existing documentation that will permit reestablishing the specifics of the association. As noted above, 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 associated.

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). 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).

Additional information is supplied by the House Report: The definition of "sacred objects" is intended to include both objects needed for ceremonies currently practiced by traditional Native American religious practitioners and objects needed to renew ceremonies that are part of traditional religions. The operational part of the definition is that there must be "present day adherents" in either instance. (House Report 101-877:14). The key provision in this definition is whether the items are needed to practice or renew traditional religions, with the need determined by a religious leader with adherents, as well as some specificity regarding the objects requested.

Refinement of this definition through the regulation development process will involve defining such terms as "religious leaders," "traditional," and "religious use." For example, some have asked questions such as, "How much time depth is appropriate for a practice or ceremony to be considered 'traditional?'"

Objects of Cultural Patrimony are defined in the statute as having: 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" suggest an application toward ethnographic rather than archeological objects, and we believe that it probably includes few of the latter. 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 Hawaiian organization.

Having reviewed the definitions of human remains and cultural items, it is apparent that many objects in archeological or ethnographic collections are not covered by the statute, because they lack a funerary, ceremonial/religious, or patrimonial context. These objects would be retained in existing repositories with appropriate treatments and care attending the curatorial and conservatorial professions.

V. RESPONSIBILITIES AND ACTIVITIES

There are two basic sets of activities required by the new statute. These are (1) repatriation and associated activities; and (2) treatment, care, and disposition of cultural items recovered on Federal or Tribal lands, either by intentional excavations or by inadvertent discovery following 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 Required of Federal Agencies and Museums Receiving Federal Funds

As in much of this statute, consultation between Federal agencies, museums receiving Federal funds, and appropriate Native American groups is a critical component of all activities associated with repatriation. Much of this consultation will probably involve individual agency or museum accessions on a case-by-case basis. These accessions may range in size from a single item to thousands of items, and the existing quality of documentation is similarly variable. The statute states that whatever decisions are made in addressing repatriation requests and inventory are based on the available documentation; however, museums and Federal agencies will need time to assemble documentation in some cases, and apply it to the human remains and cultural items in their holdings. In other cases museums and Federal agencies may have adequate documentation and cultural items can be expeditiously returned upon request from a group that is able to demonstrate cultural affiliation.

These various factors create the need for a flexible system that permits expeditious repatriation of individual accessions as soon as the inventory, or portion of the inventory that is related to particular items of interest, is completed. We recommend that consultations and other communications related to inventories, written summaries, and repatriation requests occur at the local level. Individual museums and agency offices responsible for collections containing cultural items should consult with Native Americans concerning the particular items with which they may be affiliated.

V. A. 1. Statutory Requirements Pertaining to Inventory, Summary, and Notification

Within five years of enactment, Federal agencies and museums receiving Federal funds must each complete an inventory of human remains and associated funerary objects that they hold or control. These inventories are to be done in consultation with tribal government and Native Hawaiian organization officials, and traditional religious leaders. Both during and after these inventories, it shall be available to the Review Committee. The inventories must be followed by notifications of affiliated tribes within six months of completion.

Within three years of enactment, Federal agencies and museums receiving Federal funds must complete written summaries of unassociated funerary objects, sacred objects, and objects of cultural patrimony that they hold or control. These are to be followed by consultation with tribal government or Native Hawaiian organizations and traditional religious leaders. Upon request, access to this information shall be provided to Indian tribes and Native Hawaiian organizations.

Museums receiving Federal funds and Federal agencies must repatriate materials upon request by a culturally affiliated group under certain

circumstances. These are described in Section V.A.4 of this memorandum.

V. A. 2. Statutory and Operational Differences Between Federal Agencies and Museums Receiving Federal Funds

In many ways the Graves Protection Act views these two kinds of entities as interchangeable, but there are some differences, keeping in mind that the Act views any Federally owned museum or repository as an agency.

Agencies

Agencies should initiate contacts with museums that retain Federal collections, and should examine in-house records for agency operated repositories. Since federally owned and operated repositories are considered parts of Federal agencies under the statute, 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 shift or increase their allocation of resources to carry out this obligation.

Defining the Federal interest in collections held by non-Federal repositories is of considerable importance to agencies. In some collections resulting from multi-agency projects, this process would entail identification of the agency who traditionally has managed or owned the material, generally through consultations between collaborating agencies and the repository. Early resolution of such potential ambiguities will help identify Federal interests. Federal agencies uncertain of their responsibilities for archeological collections should consult 36 FR 79, especially Section 79.3.

Another issue at the interface of Federal agency and museum relationships involves who is responsible for initiating consultations, inventories, notification, and disposition. We have noted some disagreement on this issue. Some Federal agencies view themselves as the party of primary responsibility, since potential disposition of Federal property is involved. Others wish to convey the challenges of dealing with these cultural items to the administration of the non-Federal repository where they are located. Museums sometimes do not wish to wait for Federal agencies to start addressing their legal responsibilities under the statute, because they fear that delays will result in a museum being unable to meet statutory deadlines or other requirements and being subject to civil penalties.

This is a complex issue, but we believe that since these materials are Federal property, it is primarily the agency responsibility to comply. Agencies may transfer the work load, but not the responsibility to comply under such situations. We believe that this implies that Federal agencies should initiate consultation with Native American groups that are likely to be affiliated with cultural items in collections for which they are responsible. These consultations should be undertaken in close coordination with any museum(s) that hold the items being discussed.

Following the beginning of consultation, Federal agencies should immediately begin to address the need to inventory and develop written summaries of cultural items for which they are responsible. Obviously, agencies must work closely with museums that hold their collections to initiate and carry out these activities.

Federally-funded museums

Museums will have access to any grants program that may be established under the statute in order to assist them in completing their inventories. Requirements for the grants program will be identified during the regulation writing process. Museums holding collections that are Federal agency responsibilities may be able to apply for grants to inventory such materials. Museums also may request an extension from the Secretary of the Interior if their inventories are incomplete after five years. Extensions of time for the inventories may only be granted if the museums can show what the statute defines as a "good-faith effort," at minimum, a plan for complying with the statute; however, the presence of a plan will not guarantee an extension. If museums do not comply with the law, they face civil penalties that may be assessed by the Secretary of Interior. Finally, Section 7(f) provides that any museum which repatriates any item in good faith pursuant to this Act shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this Act. No such protection is offered to Federal agencies.

V. A. 3. A Flexible Process

The variable sizes of accessions for cultural items and the diverse quality of documentation suggest that implementation flexibility is needed. Another factor is the difficulty for museums and Federal agencies in identifying all potential affiliates with which to consult prior to knowing the items comprising an inventory. Often, not enough specificity is known about either the tribe or the human remains or associated items. We recommend that agencies and museums develop a broad strategy consisting of the following elements:

1. identify lineal descendants or affiliated groups as specifically as possible through consultation or using extant documentation
2. consult with the individuals or groups on what is planned,
3. begin the inventories and written summaries.

Expansion of the foregoing outline provides a suggested operational approach. Although what is presented is a step-by-step approach, some cultural items might move through the steps more rapidly than others. Examples might be items of particular interest to a lineal descendent, or a specific collection of objects of interest to a documented culturally affiliated group. The recommended steps are: (1) consultation, (2) inventory, (3) notification, and (4) disposition and repatriation.

Consultation

Agencies and museums should first identify appropriate American Indian Tribes, Native Hawaiian organizations, known lineal descendants, and traditional religious leaders that have an interest in various components of their collections, because activities associated with repatriation should be executed in consultation with these groups. Although often it may seem difficult to identify potential culturally affiliated groups given the level of documentation for an accession, agencies and museums are encouraged to expend considerable attention to this task, recognizing that the current proximity between tribes and the locations where materials were recovered is not the sole measure of potential affiliation and that traditional religious leaders and known lineal descendants are as important an inclusion in consultations as secular tribal governments.

If feasible, museums and agencies may wish to form a consultation group of interested parties for each of their various accessions or different parts of collections. Ultimately, agencies could develop data bases linking affiliated groups with cultural items from certain areas. The Inventory Process Once contact has been initiated, inventory tasks might include:

- (1) Develop an inventory plan.

This plan will assist agencies or museums in meeting their responsibilities under the statute. Such a document would help 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 inventory plan may be quite variable, based either on portions of the collection or the entire holdings of a museum or agency.

- (2) Conduct the inventory.

The statute defines an inventory as an itemized list. Inventory listings should contain enough descriptive information to describe the cultural items being listed. The listing also should describe 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 (a) geographic origin, (b) cultural affiliation, and (c) 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 the Review Committee may have access to the documentation during this process; however, information on site location that could lead to looting or vandalism should not be released. The initiation of studies to acquire new scientific information is not required as part of the inventory.

Develop a written summary.

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.

Notification

Agencies or museums must formally 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. This one-time notification process is different from the interactive and hopefully frequent consultation process, since it involves a wider audience than any group developed during consultation. Finally, if requested, information discovered during the inventory shall be made available to Indian tribes or Native Hawaiian organizations.

The statute does not require the same formal notification procedures following the completion of the written summary. Consultation with Tribal and Native Hawaiian organization officials and traditional religious leaders is required. Presumably, these consultations should take place between agencies and museums and the tribes, Native Hawaiian organizations or lineal descendants identified as having likely cultural affiliation with some of the items covered by the written summaries.

V. A. 4. Suggested Repatriation Process

We believe the following perspective on repatriation actions to be consistent with the Standard of Repatriation stated in Section 7(c) of the Act. With respect to human remains and associated funerary objects, the Act provides that where (1) the cultural affiliation of the material with the requesting tribe or individual has been established by the museum or Federal agency as part of its inventory process or (2) cultural affiliation has been clearly proven by the requesting party, the material must be expeditiously returned to the requesting lineal descendent or tribe. In the event that research essential to the national interest is being conducted on such materials, return can be delayed until the research has been completed.

Museums and agencies are not required to repatriate unassociated funerary objects, sacred objects, and objects of cultural patrimony unless the claimant can demonstrate all of the following: (a) the objects conform to the definition for an unassociated funerary object, sacred object, or object of cultural patrimony; (b) cultural affiliation exists for these kinds of items; (c) sacred objects were in the claimant's ownership or control; and (d) uncontested evidence presented by the claimant exists that would establish a right of possession to such object.

Once these four issues are satisfied, the Federal agency or museum must return the object if it agrees that the object is properly classified and agrees that it has no right of possession. If museums or agencies disagree with the claimant regarding the classification with respect to the application of the statutory definition, or has evidence that convey to them the right of possession, no return is required. Disputes can then be resolved with the help of the Review Committee or in court.

As is implied

by the foregoing, a key factor in determining ownership is the right of possession. This is defined in Section 2 of the statute as:

"possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession to that object....The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or native Hawaiian organization is deemed to give right of possession to those remains. Cultural items under scientific study also must be returned expeditiously upon request by affiliated Native American groups unless 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))."

We expect that the regulations will supply some examples of studies of this type. In any case, these items must be returned within 90 days of the completion of any such specific such scientific study.

V. A. 5. 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 culturally affiliated Indian Tribes and Native Hawaiian organizations have the final word for items covered by the statute.

Section 11 (1) (b) provides for the possibility that dialogue between agencies, museums, and culturally affiliated Native Americans 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 the Tribe 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.

Another issue relating to disposition is the administrative aspect of deaccessioning materials and the legal requirements surrounding disposition of Federal property. Generally, museums and Federal agencies have their own processes for deaccession or disposition of property. These processes may not incorporate repatriation, however. Although attempts to create a single process for use by Department of Interior bureaus are underway, any final unifying process remains in the future.

Aside from the prohibitions against illegal 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. B. The Roles of Indian Tribes, Native Hawaiian Organizations and Traditional Religious Leaders In Repatriation Activities

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 that are of interest.

A second activity would be to begin to assemble documentation to help establish a valid claims to cultural items. Examples of these kinds of evidence are oral or traditional evidence, linguistic, 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, which will be seeking guidance initially on what materials are of interest to individual tribes. We recommend early interaction and frequent consultation. Indian Tribes and Native Hawaiian organizations may request access to materials once they have been notified that the inventory or the portion of an inventory for items they are particularly concerned about, is complete.

Native American groups that 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.

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 although the regulations may set a time limit for these responses. The statute only requires repatriation for those items that 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.

We presume that agencies or museums will continue to care for unclaimed cultural items in accordance with curatorial and museum standards as well as with dignity and respect. Some examples might include when: (1) there is no response from the Tribe or Native Hawaiian organization that was notified; (2) the Tribe or Native Hawaiian organization acknowledges the contact, but do not request anything; (3) the Tribe or Native Hawaiian organization relinquishes its ownership rights to the 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. The regulations will identify ways to dispose of any items not claimed under the provisions of this statute that the agency or museum does not wish to retain.

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

This section of the memorandum discusses human remains and cultural items removed from Federal or Tribal lands after November 16, 1990. 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, including research. This term also applies to undertakings and developments that 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. For example, this might include the excavation of a Puebloan trash mound into which burials were later placed.

Federal agencies are encouraged strongly to precede undertakings with comprehensive archeological survey work designed to discover the locations of cultural items during the early stages of project planning whenever possible. This is because 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.

Section 3 calls for removal of human remains and cultural items only under the following conditions: (1) pursuant to an Archaeological Resources Protection Act (ARPA) permit; (2) after consultation with Tribes, or evidence of attempts to consult, in cases involving 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. ARPA Permits and the Graves Protection Act Regarding the issue of whether Federal employees are required to hold ARPA permits under the Graves Protection Act, there is nothing in the statute that would modify existing Federal regulations for issuance of such permits (e.g., 43 FR Part 7). These regulations do not require permits for Federal employees working in conjunction with their agency duties, nor do they require that contractors hold them. Agencies must ensure, however, that the investigations are carried out according to the requirements imposed upon archeological work by ARPA.

Some have asked whether excavation of inadvertently discovered sites might be identified as an activity as part of an ARPA permit, and whether permit issuance would thus "create" a planned excavation scenario. Although this may ultimately be possible using the regulations, we believe it is premature to recommend this practice.

The Graves Protection Act requires consultation to determine appropriate treatments of human remains and other cultural items. The requirement 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 archeological 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 meet Graves Protection Act requirements when they occur on Federal or tribal lands.

The specific provisions of the Graves Protection Act that should be addressed in the consultation stage of the Section 106 process, with agreements reached on:

- (1) the specific Native American organizations with cultural affiliation 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 cultural items will be subjected, along with a schedule for any disposition of the items; 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 or 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 by reference into the Section 106 documentation.

As is apparent from much of the preceding discussion, the National Historic Preservation Act, the Archeological Resources Protection Act, the American Indian Religious Freedom Act, and attendant implementation regulations currently on the books must be evaluated during the development of Graves Protection Act regulations.

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 (Section 3(d)).

This section thus requires that activity in the area shall cease, although activities may continue elsewhere in the project area. 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. We believe that the statute identifies preservation of the cultural items in situ is the preferred orientation when possible. 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 FR 800.11) encourage agencies to develop a plan for dealing with unexpected discoveries of archeological materials during a project.

Appendix A provides some of the details. Inadvertent discoveries also require that agencies follow either the Advisory Council's procedures or those established for P.L. 93-291 to prevent the loss of important

scientific information. This latter approach is described in N.P.S. Staff Directive 84-5, included as Appendix B.

V. D. Discussion: The 30-Day Delay Provision and Proactive Memoranda

The statute requires a 30-day response period following an accidental discovery. Many Federal agencies have questioned whether or not this period could be modified through consulting and reaching a proactive agreement with affiliated Indian tribes or Native Hawaiian organizations, normally on a case-by-case basis.

Such hypothetical memoranda would identify the nature of the undertaking and methods of treatment, handling, and disposition of cultural items that might be encountered. Moreover, they would delineate procedures to streamline the notification, consultation, and agency or tribal response process. Because of the unequivocal nature of the statutory language, we view this approach as unlikely.

If feasible, this approach would be based on language found in the accompanying Committee Reports:

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).

Finally, Section 11 (1) (B) might offer the potential for entering into proactive Memoranda with respect to inadvertent discovery situations, but its application will require the force 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)

To restate, we believe that this approach is unlikely. A second hypothesized approach for dealing with the 30-day delay provision is to utilize the ARPA permitting process, as discussed previously. Under such circumstances, consultations would lead to an agreement document, and the conditions of the agreement stipulated in an ARPA permit, which then becomes an instrument that helps to demonstrate consultation, streamline notification and response time, and identify care, treatment, and disposition.

V. E. The Relationship Between the Graves Protection Act Section 3 Provisions and 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 statutory differences that preclude merging the two consultation processes and agreement documents. 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 organizations. Under the Graves Protection Act, there is no direct 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. Section 3 of the Graves Protection Act 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

This memorandum has attempted to summarize the Graves Protection Act and draw statutory intent from the Committee reports. It also has attempted to integrate the many comments and answer questions submitted by museums, Federal agencies, and Native Americans concerning the statute. Many of these suggestions and the issues that they raise cannot be answered outside of a public forum that is normally developed during the regulations development process. We also have attempted to suggest some of the directions that regulations may take. 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 statute.