U.S. Department of Transportation
Federal Highway Administration

Memorandum

HRC-08

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ACTION								
INFO							✓	

Subject: Application of NAGPRA to FHWA

Date: MAR 28 1995

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FILE

From: Chief Counsel

Reply to Attn. of: HCC-31

To: Mr. James Thomason
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This is in response to your separate requests for a legal opinion discussing the requirements of the Native American Grave Protection and Repatriation Act (NAGPRA) and its application to Federal Highway Administration (FHWA) programs. Specifically, you asked (1) whether NAGPRA's site protection requirements apply to Federal-aid projects and (2) whether FHWA can fund costs incurred by States to repatriate items that were acquired by State DOTs in connection with Federally-funded highway projects. The short answers are, respectively, that NAGPRA's site protection applies only to Federal-aid projects located on tribal, Native Hawaiian, or Federal lands, and that FHWA may not participate in repatriating items acquired in connection with a now-completed project but may participate with respect to ongoing and future projects. These conclusions are set forth in detail below.

Congress passed the NAGPRA in 1990. P.L. 101-601, 104 Stat. 3048, codified at 25 U.S.C. §§ 3001-3013. The Act is based upon the theme of respect for Native American remains and contains two main goals: (1) to protect Native American burial sites and stop the removal of human remains and funerary and sacred objects from the burial sites, and (2) to facilitate the return of these items to the Native American people wherever possible. 1990 U.S.C.C.A.N. 4367-4369. The Act's protection applies to Native Hawaiian Organizations and Alaska Native Villages in addition to Indian tribes.[1]

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[1] "Indian tribe" is defined as "any tribe, band, nation, or other organized group or community of Indians . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 3001(7).

NAGPRA's site protection component took effect November 16, 1990. It protects human remains and associated objects in two situations: (1) planned excavations for the purposes of discovery, study, or removal and (2) inadvertent discovery. Criminal penalties are available for those profiting from items acquired in violation of the Act. 18 U.S.C. § 1170. For planned excavations, NAGPRA requires the excavator to first obtain a permit pursuant to the Archaeological Resources Protection Act and to consult in advance with the lineal descendants or tribe that has the closest cultural affiliation to the remains. On tribal lands, consent of the tribe rather than consultation is required. In the case of inadvertent discovery, NAGPRA automatically halts the activity connected with the discovery (construction is specifically listed as an example of such activity) and requires the agency to make a "reasonable effort" to protect the items. 25 U.S.C. § 3002(d)(1). Notice of the discovery must then be given to the appropriate land management agency or to the relevant tribe. Activity may resume thirty (30) days after certification that the notice was received. NAGPRA also controls the disposition of the excavated or discovered remains and objects through a priority list governing ownership and control. See 25 U.S.C. § 3002(a).

An important limitation on NAGPRA's site protection measures is that they only apply to remains and objects located on tribal, Native Hawaiian, or Federal lands. The statute defines "federal lands" as "any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971." 25 U.S.C. § 3001(5). The question has arisen whether FHWA "controls" the land on which Federal-aid projects are built so as to invoke NAGPRA's site protection requirements. FHWA's position is that NAGPRA does not apply in the normal Federal-aid situation; i.e., where the State owns both the right-of-way and the highway and is responsible for operation and maintenance. FHWA takes no property interest, and has extremely limited contractual interests, in Federal-aid right-of-way. The Federal government never has "control" of the land in this situation. See, e.g., South Carolina State Highway Dept. v. Barnwell, 58 S.Ct. 510, 513 (1938). The exception would be where the excavation or inadvertent discovery takes place on land that was transferred to the State under 23 U.S.C. § 317, since the Federal government retains a reversionary property interest in that situation.

Congress did not explain the meaning of Federal "control" of land in the Statute. The legislative history merely refers repeatedly to "federal land" which suggests some sort of Federal property interest was intended. This is the conclusion that was reached by the United States District Court for the District of Vermont when it looked at the precise issue of the meaning of Federal

"control" of land for the purpose of NAGPRA applicability in Abenaki Nation of Mississquoi v. Hughes, 806 F. Supp. 234 (1992). In that case, which concerned an Army Corps of Engineers' permit approving expansion of a hydroelectric project, the court stated:

> Plaintiffs urge a broad construction of "control" to include the Corps' regulatory powers under the CWA and its involvement in devising and supervising the mitigation plan. Such a broad reading is not consistent with the statute, which exhibits no intent to apply the Act to situations where Federal involvement is limited as it is here to the issuance of a permit. To adopt such a broad reading of the Act would invoke its provisions whenever the government issued permits or provided federal funding pursuant to statutory obligations.

Id. at 252 (footnotes omitted). The District Court's decision in Abenaki was affirmed by the United States Court of Appeals for the Second Circuit. Abenaki Nation of Mississquoi v. Hughes, 990 F.2d 729 (1993) (per curiam). Since Federal-aid highway funding involves even less "control" over State action than the regulatory Corps of Engineers' program at issue in Abenaki, we would expect the courts to reject NAGPRA challenges to Federal-aid highway projects as well.

The Department of the Interior (delegated to the National Park Service (NPS)) is charged with writing implementing regulations for the NAGPRA. A Notice of Proposed Rulemaking (NPRM) was published on May 28, 1993, at 58 Fed. Reg. 31122. The Final Rule is expected to be issued in the spring of 1995. Although FHWA did not formally comment on the NPRM during the comment period, the Office of the Chief Counsel recently discussed the need for clarity in this issue with the NPS. We believe that the preamble to the Final Rule will note that mere Federal funding or permitting does not create the Federal "control" necessary for NAGPRA to apply.

The second component of NAGPRA provides for repatriation of objects and remains that are in the possession of Federal agencies or museums that receive Federal funds (regardless of the date of acquisition). The NAGPRA gave agencies and museums five (5) years to inventory Native American remains and funerary objects in their possession or control. Once the inventory is complete, the current lineal descendent or tribe associated with the items must be identified and notified where possible. The items must then be repatriated to the appropriate Indian tribe or individual upon request.

The repatriation requirements do not effect FHWA since we do not possess or control any remains or funerary objects. However, the question has arisen whether FHWA may fund repatriation costs

incurred by the States, on the theory that some items may have been acquired by the State in connection with Federal-aid highway projects. Presumably, the States are aware that NAGPRA authorizes the Secretary of the Interior to make grants to assist museums with these costs. 25 U.S.C. § 3008(b). However, for costs in excess of NAGPRA grants, FHWA simply does not have the statutory authority to fund repatriation-related expenses arising from completed projects. On the other hand, for an on-going project, the costs associated with inventory, identification, and repatriation could be reimbursed under Title 23 as an environmental mitigation expense, which is considered part of the cost of construction. See 23 CFR 771.105(d).

Theodore A. McConnell

Attachment