



## WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 5

TO: MEMBERS OF THE STUDY COMMITTEE ON THE PRESERVATION OF BURIAL SITES

FROM: Anna Henning, Senior Staff Attorney and Amber Otis, Staff Attorney

RE: Federal Law Regarding Preservation of Cultural Resources

DATE: September 23, 2016

At the September 8, 2016 meeting of the Study Committee on the Preservation of Burial Sites, study committee members requested information regarding federal laws relating to the committee's charge. Various federal laws relate to historic preservation. The three laws that are arguably most directly related to the study committee's charge include: the National Historic Preservation Act (NHPA); the Archaeological Resources Preservation Act (ARPA); and the Native American Graves Protection and Repatriation Act (NAGPRA). This Memo provides an overview of relevant provisions of each of those acts.

Of the three federal laws discussed below, NHPA has the broadest applicability, because it applies to federally funded projects, including projects on private, state, or local land. In contrast, NAGPRA and ARPA apply only to resources located on federal or tribal land.

### **NATIONAL HISTORIC PRESERVATION ACT**

NHPA was originally enacted in 1966. Among other provisions, NHPA authorizes the Secretary of the Interior to expand and maintain a National Register of Historic Places; specifies responsibilities of federal agencies with respect to historic property that is owned or controlled by those agencies; provides for a historic preservation fund; establishes an advisory council on historic preservation; provides special protections for historic lighthouses; and provides for funding for state and local preservation programs. Most relevant to the study committee's charge, NHPA requires federal agencies to take specified steps, summarized below, to address potential adverse effects on property that is eligible to be included on the National Register of Historic Places.

## **Eligibility Criteria for National Register of Historic Places**

The National Park Service establishes criteria for evaluating property for inclusion in the National Register of Historic Places. Specifically, to be eligible, a district, site, building, structure, or object must have the quality of significance in American history, architecture, archaeology, engineering, or culture, and it must possess integrity of location, design, setting, materials, workmanship, feeling, and association. In addition, the district, site, building, structure, or object must fit in one of the following categories:

- Be associated with events that have made a significant contribution to the broad patterns of our history.
- Be associated with the lives of persons significant in our past.
- Embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction.
- Has yielded, or may be likely to yield, information important in prehistory or history.

Generally, cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years are not eligible for inclusion on the National Register. However, there are exceptions to those general exclusions. For example, an exception applies to cemeteries that derive their primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events. [36 C.F.R. s. 60.4.]

Generally, property may not be included on the National Register if the owner of the property objects to that inclusion or designation. [54 U.S.C. s. 302105 (b).] The law also includes a process for removing a property from the National Register in certain circumstances. [36 C.F.R. s. 60.15.]

## **Required Actions to Avoid Adverse Effects**

For any project, activity, or program that is federally implemented, approved, or funded, Section 106 of NHPA requires the federal agency with direct or indirect jurisdiction over the undertaking to take effects on historic property “into account.”<sup>1</sup> In this context, “historic

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<sup>1</sup> Section 106 specifically applies to any federal “undertaking,” defined to mean a project, activity, or program that is funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including: those carried out by or on behalf of the federal agency; those carried out with federal financial assistance; those requiring a federal permit, license, or approval; and those subject to state or local regulation administered pursuant to a delegation or approval by a federal agency. [54 U.S.C. s. 300320.] In some cases, federal courts have narrowed

property” includes all property that is either included on or **eligible to be included** on the National Register of Historic Places. [54 U.S.C. ss. 300308 and 306108.]

Section 106 could be characterized as establishing procedural requirements rather than substantive standards regarding how federal undertakings should proceed when they may affect cultural resources. Briefly, a federal agency must first conduct a review to assess whether a project may have an adverse effect on a historic property. In this context, “effect” means an alteration to the characteristics of a historic property that make the property eligible for inclusion on the National Register. Under NHPA, an effect may be “adverse” in a relatively broad set of circumstances. Specifically, an “adverse effect” is found when an alteration to the property’s characteristics would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association. Examples of adverse effects enumerated in the law include changes in the character or setting of the property and introduction of incompatible visual, atmospheric, or audible elements. [36 C.F.R. ss. 800.5 and 800.16 (i).]

These “Section 106 reviews” are conducted in consultation with a state’s historic preservation officer and, where applicable, with officials of federally recognized Indian tribes. The agency’s findings regarding any adverse effects are reviewed by the Advisory Council on Historic Preservation, which must provide the agency with an opinion as to whether the agency correctly applied the adverse effect criteria.<sup>2</sup> [36 C.F.R. ss. 800.3 and 800.5 (c) (3).]

If an adverse effect is identified, an agency must continue its consultation with state and tribal historic preservation officers, and, in some cases, the Advisory Council on Historic Preservation, to develop and evaluate alternatives or modifications to the undertaking that avoid, minimize, or mitigate adverse effects on historic properties. To the extent permitted under a confidentiality provision, the agency also must make information available to the public and provide an opportunity for public comment. [36 C.F.R. s. 800.6 (a).]

If the consultation process is successful, the agency may execute a memorandum of agreement with the relevant state and tribal historical preservation officers regarding the approach to be taken. The Advisory Council on Historic Preservation must also be a signatory to a memorandum of agreement if it participated in the consultation process. The agency may also invite other parties to be signatories to the memorandum of agreement. [36 C.F.R. s. 800.6 (b).]

If the consultation process is terminated before an agreement is reached, the next steps differ depending on which party ended the consultation. If the federal agency, a tribal historic preservation officer, or the Advisory Council on Historic Preservation terminates the consultation, then the council shall prepare comments, which must include various parties’

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the breadth of projects and activities that fall within the scope of that statutory definition. [See, e.g., *National Mining Association v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003) (holding that Section 106 does not apply to projects requiring state approval pursuant to delegated federal authority).]

<sup>2</sup> The Advisory Council on Historic Preservation is an independent federal agency. Its 23 members include various agency secretaries, tribal representatives, historic preservation experts, and others. [54 U.S.C. s. 304101.]

views. If a state historic preservation officer terminates the consultation, then the federal agency and the council may execute a memorandum of agreement without the state historic preservation officer's involvement. [36 C.F.R. s. 800.7.]

### **ARCHAEOLOGICAL RESOURCES PRESERVATION ACT**

Enacted in 1979, ARPA provides protections for archaeological resources and sites located on specified federal and tribal lands. Among other goals, ARPA's stated purpose is to "secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands...." [16 U.S.C. s. 470aa (b).] For purposes of ARPA, "archaeological resources" means any material remains of human life or activities which are at least 100 years of age and of archaeological interest. "Material remains" means physical evidence of human habitation, occupation, use, or activity, including the site, location, or context in which such evidence is situated. [16 U.S.C. s. 470bb (1); 43 C.F.R. s. 7.3 (a).]

ARPA requires any person seeking to excavate, remove, damage, or otherwise alter or deface an archaeological resource on federal or Indian lands (or attempt any of those actions) to obtain a permit from the Secretary of the Interior. The Secretary of the Interior generally may issue such a permit if the Secretary finds all of the following:

- The applicant is qualified to carry out the permitted activity.
- The activity is undertaken for the purpose of furthering archaeological knowledge in the public interest.
- The archaeological resources which are excavated or removed from public lands will remain the property of the United States, and such resources and copies of associated archaeological records and data will be preserved by a suitable university, museum, or other scientific or educational institution.
- The activity pursuant to such permit is not inconsistent with any management plan applicable to the public lands concerned.

[16 U.S.C. ss. 470cc and 470ee (a).]

However, no such permits may be granted for an archaeological resource located on Indian land unless the relevant Indian tribe consents to the permit. In addition, if a permit issued under this section may result in harm to, or destruction of, any religious or cultural site, then the Secretary of the Interior must notify any Indian tribe which may consider the site as having religious or cultural importance before issuing a permit. [16 U.S.C. s. 470cc (c).]

"Site of religious or cultural importance" means a location which has traditionally been considered important by an Indian tribe because of a religious event which happened there or because the site: contains specific natural products which are of religious or cultural importance; is believed to be the dwelling place of, the embodiment of, or a place conducive to communication with spiritual beings; contains elements of life-cycle rituals, such as burials and

associated materials; or has other specific and continuing significance in Indian religion or culture. [43 C.F.R. s. 7.32 (a).]

### **NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT**

NAGPRA was enacted in 1990. Section 3 of NAGPRA is most relevant to the study committee's charge. It applies to both intentional excavations and inadvertent discoveries of "human remains, funerary objects, sacred objects, or objects of cultural patrimony" on federal or tribal lands. [43 C.F.R. s. 10.2 (d).] For purposes of NAGPRA, a burial site is a "funerary object." The act defines "burial site" to mean "any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited." [25 U.S.C. s. 3001 (1).] "Human remains" is defined to mean the physical remains of the body of a person of Native American ancestry. [43 C.F.R. s. 10.2 (d) (1).]

Briefly, NAGPRA requires federal agencies to consult with Indian tribes whenever archaeological investigations encounter, or are expected to encounter, Native American cultural items, or when such items are unexpectedly discovered on federal or tribal lands. After a federal agency has completed specified consultation requirements, the agency must prepare, approve, and sign a written plan of action. A copy of the plan of action must be provided to lineal descendants and Indian tribes involved. Those lineal descendants and Indian tribes may sign the written plan of action, as appropriate. Such plans must include specified information, including, for example, plans for handling and disposition of human remains, funerary objects, or sacred objects. [43 C.F.R. s. 10.5 (e).]

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