United States Department of the Interior

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WASHINGTON, D.C. 20240

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Memorandum

To: Solicitor

From: Assistant Secretary - Indian Affairs /s/ Kevin Gover

Subject: Ownership of Archeological Collections Recovered from Indian Trust Lands Under Permits Issued Pursuant to the Antiquities Act of 1906

BACKGROUND

Beginning in 1906, the collection or excavation of archeological materials from lands owned or controlled by the federal government required a permit issued under the Antiquities Act of 1906 (Attachment 1). This law is still in effect, though most archeological permits are now issued under the Archeological Resources Protection Act of 1979 (16 U.S.C. 470) [ARPA].

ARPA distinguishes "public lands" from "Indian lands," and its implementing regulations acknowledge that archeological resources recovered from Indian lands are the property of the Indian landowner(s). The Antiquities Act does not distinguish Indian lands from other lands "owned or controlled" by the federal government, and both the Act and its implementing regulations, 43 CFR Part 3 (Attachment 2), are silent about the ownership of archeological materials recovered under the Act. Instead, they require that such materials be permanently preserved in public museums.

On April 22, 1988, the Assistant Secretary for Fish Wildlife and Parks issued a memorandum (Attachment 3) regarding the ownership and disposition of archeological collections recovered pursuant to the Antiquities Act. It reemphasized key requirements in 43 CFR Part 3, as follows:

(1) that such collections be permanently preserved in a public museum ("museum" defined in Footnote #1 of the memorandum);

(2) that such collections may not be removed from a public museum without the written authority of the **Secretary of the Smithsonian** (highlighting ours), and then only to another public museum where *it must be accessible to the public* (emphasis ours); and

(3) that when a public museum housing such a collection ceases to exist, the collection reverts to the **national collections** and must be placed in the proper national depository.

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The memorandum also noted legal counsel advice that collections recovered from lands owned or controlled by the Department of the Interior "are the **property of the Department**, and remain subject to the Act and 43 CFR Part 3, unless otherwise noted in a specific Antiquities Act permit."

QUESTIONS

We have the following questions about the applicability of this advice to collections taken under Antiquities Act permits from Indian lands.

1. May collections made under the Antiquities Act from Indian trust lands in fact be considered national property?

Discussion

Because the Antiquities Act applies only to lands owned or controlled by the federal government, it assumes that collections recovered from such lands would already be national property. The memorandum narrows this by declaring collections recovered from lands owned or controlled by the Department to be the property of the Department. Delegation of authority further narrows administrative responsibility for these collections to the respective land managing agencies. As it now stands, the BIA is responsible for collections from Indian trust lands.

Since the Act does not distinguish Indian lands from other federal lands, it also assumes collections removed from Indian lands to be national property. This is not, however, consistent with established practice, where real property, but not personal property is under federal control, in the sense that it is held in trust for the beneficial use of its Indian owner. Archeological materials are considered to be personal property, hence are directly owned by the Indian landowner. In fact, the implementing regulations for ARPA acknowledge that archeological collections from Indian lands are the property of the Indian landowner. The federal government has been treating collections made from Indian lands since 1979 as the property of the Indian landowner.

In the memorandum, legal counsel argues that while Indian landowners were not required to give their consent under the Antiquities Act (actually, landowner consent *was* required under 25 CFR Part 132 [later Part 261] as of 1974), they did consent to the ultimate disposition of archeological collections when they agreed, directly or implicitly, to the issuance of an Antiquities Act permit. Agreeing to the "ultimate disposition" mandated by the Act (permanent preservation in a public museum), however, would not necessarily require surrendering *ownership* of a collection It would only require surrendering possession.

Implications

From the standpoint of an Indian landowner, the difference between surrendering ownership and surrendering possession is functionally insignificant. In either case, the collection stays in a museum, beyond the landowner's control. Nonetheless, it is important to many Indian tribes that archeological remains from their lands be perceived of as theirs.

From a BIA administrative standpoint, the question of whether it is the federal government or the Indian landowner who actually owns collections removed from Indian lands is extremely significant. If the federal government is the owner, the BIA, having administrative responsibility, would:

(1) have to inventory and put BIA property numbers on the contents of all such collections now in museums. This would be an enormous and expensive task because it involves literally millions of artifacts. It also feeds back into the perceptual issue of Indian ownership. Putting property numbers on the artifacts would be very offensive to tribes who, probably rightly, still think of the material as theirs.

(2) be responsible for assuring that the museums in which the collections are housed meet the standards in 36 CFR Part 79. This could well include bearing some or all of he cost of upgrading storage areas within a museum or of moving a collection to another museum.

(3) be responsible for inventory, notification (to tribes), determination of cultural affiliation, and repatriation of human remains and cultural items covered under the Native American Graves Protection and Repatriation Act (NAGPRA) [NAGPRA items collected under Antiquities Act permits may be returned to Indian tribes or descendants instead of remaining permanently in a public museum]. The remains of over 5000 Indian individuals plus thousands of cultural items are included in the collections in question.

If the federal government is not the owner of the collections, the BIA's administrative responsibility would be more one of oversight. Since Antiquities Act permits had to identify the public museum in which the materials to be collected would be permanently housed, it would appear that the museum named agreed to take responsibility (with no expectation of federal funding assistance) for the care of those materials. The BIA's role, then, would be to:

(1) maintain an inventory of the collections made from Indian lands under Antiquities Act permits that are in museums housing such collections. This could include assisting museums with the costs of preparing these inventories.

(2) make certain that the conditions under which the museum is housing these collections meet the standards in 36 CFR Part 79. The BIA would not be obliged to bear any of the cost for the upgrading of facilities. The BIA would more likely remove collections from museums that do not achieve the standards.

(3) relocate collections from public museums that do not provide the BIA with inventories of collections that came from Indian lands under Antiquities Act permits, or that are unable to achieve the standards in 36 CFR Part 79 in housing those collections.

Public museums, in this case, would:

(1) be responsible for cataloguing collections they hold that came from Indian lands under Antiquities Act permits, and for supplying the BIA with inventories of the contents of these collections.

(2) be fully responsible for meeting the standards in 36 CFR Part 79 in their housing of these collections.

(3) be fully responsible for inventory, notification (to tribes), determination of cultural affiliation, and repatriation of human remains and cultural items covered under the Native American Graves Protection and Repatriation Act (NAGPRA).

2. What does the authority accorded the Secretary of the Smithsonian in 43 CFR Part 3 imply about ultimate administrative responsibility for collections made under the Antiquities Act?

Discussion

As noted above, the implementing regulations (43 CFR 3) for the Antiquities Act require the approval of the Secretary of the Smithsonian Institution in order to move collections made under the Act from one public museum to another. They also require that collections made under the Act be placed in the proper national depository (which, at the time the regulations were promulgated, would have been the Smithsonian), should the public museum in which they are housed cease to exist. These would seem to imply that the administrative responsibility for the collections rests with the Smithsonian Institution, not the federal agencies who own or control the lands from where the collections came.

Implications

If the Secretary of the Smithsonian is administratively responsible for collections made under the Antiquities Act from Indian lands, it would be up to the Smithsonian to assure that (1) such collections are being housed in accordance with the standards in 36 CFR 79 (by either moving the collection or funding the upgrading of facilities), and (2) items covered by NAGPRA in those collections are processed in compliance with NAGPRA. The BIA would have no formal role with respect to these collections.

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