

February 24, 2010 Cultural Properties Act and Deaccession Process

January 21, 2010

Alan "Mac" Watson, Chairman
Cultural Properties Review Committee
C/O Historical Preservation Division
407 Galisteo Street, Ste. 250
Santa Fe, NM 87503

Re: Opinion Request—Cultural Properties Act and Deaccession Process

Dear Mr. Watson:

You have requested our advice regarding the New Mexico Cultural Properties Review Committee's ("Committee" or "CPRC") role in the disposition of archaeological materials. It is our understanding that the Committee issues permits to public and private entities that wish to conduct excavation projects on state lands. According to your letter: "In one recent case, the CPRC approved an archaeological excavation permit under the requirements stipulated ...that recovered archaeological materials other than funerary objects and human remains be curated at the Museum of Indian Arts and Culture." It is our understanding that there were many archaeological materials[1] found at this site and they were provided to the Museum of Indian Arts and Culture. However, "the Board of Regents, Museum of New Mexico, voted to deaccession, or remove ...[some of the materials] from the [collection of the] Museum of Indian Arts and Culture." These materials were then reburied, on behalf of the Pueblo of Tesuque, at the excavation site. Your letter asks: (1) can materials be removed from state control through a deaccession process? (2) if the Committee issues a permit under the presumption that items will be kept at a state museum, is the institution obligated to do so? (3) can the Committee issue a permit with a condition that the Committee's approval is required prior to deaccession? (4) can the Committee issue a permit with an alternative storage location? (5) can the Committee promulgate a rule that will allow the Committee to authorize the disposition of items on a case-by-case basis?

Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us at this time, we conclude that materials may be removed from state control through a deaccession process. The governing board of the Museum of Indian Arts and Culture may remove materials from state control through deaccession, regardless if the Committee issued a permit with the expectation or condition that the materials remain at the institution. The Committee, however, has statutory authority governing the collection of archaeological materials and thus is authorized to designate the Museum of Indian Arts and Culture or choose an alternative storage repository institution as the storage location. Finally, the Committee has rule-making authority and may promulgate a rule to further clarify these matters.

The Committee is a state commission made up of nine members who have professional backgrounds in history, architecture and archaeology. See NMSA 1978, Section 18-6-4 (2005). The Cultural Properties Act, in relevant part, reads: [The Committee] may issue...permits...for the collection...of objects...where such objects are located on **state lands**...to institutions which the committee may deem to be properly qualified ... subject to such...regulations as the committee may prescribe...provided...that all specimens so collected shall be the property of New Mexico....” NMSA 1978, § 18-6-5(O) (1986) (emphasis added); see also 4.10.8.15. C NMAC. Therefore, the Committee has the power to issue a permit with a condition that the archaeological materials are provided to the Museum of Indian Arts and Culture, which “serves as the repository for archaeological materials collected from state land.” 4.10.8.7.U NMAC; 4.10.8.19 NMAC.

The Committee, however, also has the authority to designate another “qualified” institution. See N.M. Att’y Gen. Advisory Letter to Dr. Estevan Rael-Galvez from Assistant Attorney General Sonny Swazo (May 15, 2007); see also 4.10.8.19.A.2 NMAC (“If the applicant proposes another repository, the applicant shall append a copy of the curation agreement with that facility to the application along with an explanation of the purpose of using a facility other than the museum of New Mexico as a repository.”). The Committee has promulgated a rule explaining that another qualified institution can “qualify to be a custodian ... [but] the repository shall meet the U.S. secretary of interior standards in 36 CFR 79.” 4.10.8.19.A(3) NMAC. The federal code defines repository as a “facility such as a museum, archeological center, laboratory or storage facility managed by a university, college, museum, other educational or scientific institution, a Federal, State or local Government agency or Indian tribe that can provide professional, systematic and accountable curatorial services on a long-term basis.” 36 CFR 79.4(j).

Therefore, “items collected from an archaeological investigation on state land are to be deposited with a facility that is capable of managing and preserving the items on a long-term basis in accordance with professional curation standards....” N.M. Att’y Gen. Advisory Letter to Dr. Estevan Rael-Galvez from Assistant Attorney General Sonny Swazo (May 15, 2007). The Cultural Properties Act and accompanying rules appear to be based on the proposition that museums: (1) meet the required standards; (2) the materials were found on state land and belong to the taxpayers; and (3) museums provide an avenue for permanent scientific study and scholarship for current and future generations.

The Act generally is silent on the Committee’s authority over materials once they are provided to a museum or repository institution.[2] Instead, the Board of Regents for the Museum of New Mexico (“MNM”), which oversees the Museum and other certain state repositories, has statutory authority to “exercise trusteeship over the collections of the museum” and “hold title to all property for museum use.” NMSA 1978, § 18-3-3 (C),(D) (1991). The MNM Board may “adopt such rules...as may be necessary to carry out the provisions of this section.” Id. § 18-3-3 (M). The Museum, in conjunction with MNM, has promulgated a rule that provides: “Title to all objects acquired for the permanent collections shall be obtained free and clear and without restrictions as to use or future disposition.” 4.51.27.8.E NMAC. It further provides: “Museums must be free to improve

the quality of their holdings through occasional sale, exchange or disposal of collection items. Objects from the museum of New Mexico collections will be deaccessioned only if they have lost their authenticity, physical integrity or usefulness for museum purposes.” 4.51.29.8 NMAC. Finally, the rule provides that the MNM Board or the Museum Director must sign off on the deaccession of all materials valued above a certain nominal value. 4.51.29.F. NMAC.

When the legislature expressly authorizes a certain act to be done in a prescribed manner, it is limited to be done in that manner and all other modes are excluded. See Bettini v. City of Las Cruces, 82 N.M. 633, 635, 485 P.2d 967 (1971). The legislature has granted the Committee authority governing the provision of archeological materials to repository institutions, but granted the MNM Board authority governing whether its repository institutions retain or dispose of these items. The Committee cannot promulgate a rule that overrides the statutory structure. See Public Serv. Co. of N.M. v. New Mexico Envtl. Improvement Board, 89 N.M. 223, 227 549 P.2d 638 (Ct. App. 1976).[3] Therefore, the Committee is authorized to designate a museum or alternative storage repository institution, but the MNM Board may remove materials through deaccession, regardless if the Committee issued the permit with the expectation, or condition, that the materials remain at the institutions.

According to your letter, “in some cases, the permanent curation of materials recovered from state lands is unnecessary or will create storage problems for the designated curation facility.” It appears the Committee has several options under its current rule-making authority regarding the issuance of permits that may help clarify this matter. See NMSA 1978, Section 18-6-5(O) (1986) (the Committee has the authority to issue permits for the collection of items of “antiquity or general scientific interest”). The Committee could promulgate a rule defining the statutory term “antiquity or general scientific interest” and exclude certain items. The permittee would not be required to provide the excluded items to a repository institution. In addition, the Committee currently issues permits regarding survey and inventory, test excavation, excavation, unmarked human burial excavation and mechanical excavation. See 4.10.8 NMAC (“Permits to Conduct Archaeological Investigation on State Land”); 4.10.8.9 NMAC. These permits are broken down into subcategories such as site-specific or annual permit. The Committee could promulgate a rule for another subset of permit—one for culturally sensitive materials. The rule could be written in a tailored manner in order to help clarify the process of how materials are to be provided in these circumstances. Cf. 4.51.11.7(A) (Museum’s definition of “culturally sensitive materials”).[4]

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,
Zachary Shandler
Assistant Attorney General

Cc: Albert J. Lama, Chief Deputy Attorney General
Maggie Coffey-Pilcher, DCA counsel
Shelley Tisdale, MIAC Director
Eric Blinman, OAS, Director

[1] It is our understanding that the materials at dispute were kiva associated items and not human burials/associated funerary objects, and thus fell in between the rubric of established archaeological statutes. See Native American Graves Protection and Repatriation Act, 25 U.S.C. §§3001-3013 (2006); NMSA 1978, 18-6-11.2 (1989).

[2] See NMSA 1978, § 18-6-5(O) (1986) (discusses how a repository institution may loan materials to another qualified institution).

[3] The Committee's current ability to impose "permit stipulations" covers circumstances of potential trespass on land, pollution of water resources and discover of unmarked human burials. 4.108.14 NMAC. While there is reference to certain discretionary "special" stipulations, an interpretation of this authority to create a larger role in the deaccession process would likely be vulnerable to legal challenge as an ultra vires action.

[4] The rule could also require the permittee to complete a proper documentation and assessment of the materials thirty days prior to delivering them to the repository institution.