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Underground surprises: When You Find Human Remains or Culturally Significant Artifacts on Your Construction Site, Stop, Call and Preserve



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Construction

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When preparing for an archeological dig, New Hampshire state archeologist Richard Boisvert once succinctly stated: “If we knew what was there, we wouldn’t have to dig.”

Because we don’t know what is there, contractors often stumble upon artifacts, ancient burial grounds, cemeteries and human remains while in the midst of a construction project. Because federal regulations protect culturally significant items that are uncovered, and often state regulations regarding any remains uncovered also apply, contractors should immediately stop work, contact the landowner, have the owner contact the appropriate authorities and then preserve the site until the authorities can arrive to offer a plan.

While that is not what either owners or contractors wish to do here, because of the delay and inconvenience, we will briefly discuss the statutes that govern such discoveries and then suggest some best practices of what to do if you make such a discovery, along with the civil and criminal penalties that can apply if you don’t follow the law. We will also offer a few proactive steps that can be taken to minimize risk.

Federal Statutes

As a result of the publicity surrounding the Dakota Access pipeline, more people have become more aware of the federal statutory scheme for the protection of graves, remains and cultural artifacts.

The Native American Graves Protection and Repatriation Act was passed in 1990 to provide a process for the return of Native American cultural items such as human remains, funerary objects, sacred objects and other culturally significant objects to Native Americans. NAGPRA only applies to federal and tribal lands. However, tribal lands are defined as including private land within a reservation. If such remains or objects are discovered on tribal or federal lands, work must stop, the appropriate federal agency must be alerted and arrangements must be made for the repatriation of such items.

The most used enforcement tool for the protection of cultural resources on public lands under the federal statutory scheme, however, is the Archaeological Resources Protection Act. An ARPA violation can be either a felony or misdemeanor, depending on severity and there can also be civil penalties. A first-time violation can result in a year in jail and a \$20,000 fine, and a second violation can result in a \$100,000 fine and five years in jail.

Prohibited acts under ARPA include excavating, removing or damaging an archaeological resource, which can happen during the construction process. Under ARPA, “archaeological resource” is defined as “any material remains of human life or activities which

are at least 100 years of age, and which are of archaeological interest” and “archaeological interest” means “capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics through the application of scientific or scholarly techniques” While ARPA was originally passed to regulate legitimate archeological digs, it has been expanded, and the penalties for violations are quite severe.

Additionally, the National Historic Preservation Act of 1966 states that any project funded with federal money must be reviewed to determine if the construction will have an adverse effect on historical or archeological resources of a burial ground or cemetery or any eligible cultural resource listed on or eligible for the National Historic Register.

State Statutes

Most states have statutes that require contractors to report the discovery of remains or cultural artifacts as well.

For instance, in Illinois, if human remains are found, the contractor must contact the county coroner within 48 hours. The coroner’s office will determine if the findings are less than 100 years old. If they are less than that amount, the coroner retains jurisdiction and will determine what, if anything, needs to be done.

If the findings are over 100 years old, the Illinois Historic Preservation Agency takes over. The IHPA considers prehistoric mounds formations to be grave markers and protected sites. Some states require that inadvertent disturbing of a cemetery site requires the contractor to restore the grave immediately.

Best Practices Before Construction Begins

First, the construction contract should require (as the AIA201 does) the contractor to immediately stop work and report to the proper authorities the discovery of human remains, grave sites or cultural artifacts. Even if the contract does not directly discuss this issue, work should stop immediately before costly damage is done.

Second, a determination should be made whether the project is located on federal land, as defined by the statutes. In such cases, the authorities may require a plan and procedures for the work to avoid damage to culturally significant items or the involvement with the federal authorities or Native American groups.

Even if the property is not on federal lands, an analysis should be made before the project begins as to whether the project is located in an archaeologically sensitive area. Such an analysis requires a review of historical books and records. If there is reason to believe archaeological artifacts may be present on the site, some limited subsurface testing can be done to determine if there are fragments of archaeologically significant items.

In such situations, it would be best practice to have an Archaeological Monitoring Plan for the project. Such a plan should set forth the architectural sensitivity of the site, a plan for detailed phase I testing, detailed monitoring procedures and the possible involvement of authorities in the process. The plan should also provide guidance as to what to do to preserve any discoveries.

Conclusion

Journalist and author Jim Bishop defined archaeology as “the peeping Tom of the sciences.” He explained: “It is the sandbox of men who care not where they are going; they merely want to know where everyone else has been.”

Since owners and contractors care very much about where they are going, and that the discovery of remains and artifacts can materially delay that trip, it is important for each project to consider the issues raised in this article.

The most important immediate action is to stop the work, contact the authorities and preserve the site and remains and artifacts found by the contractor. If nothing else, think of how happy Indiana Jones would have been.

This article also was published on Law360.com; it can be accessed [here](#) (subscription required).