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February 16, 2010

Mr. Roger A. Knowlton
Outdoor Recreation Planner
Partnerships/Grants
US Department of the Interior
National Park Service, Midwest Region
601 Riverfront Drive
Omaha, Nebraska 68102-4226

Dear Mr. Knowlton:

I realize that the deadline has passed for comments on the treatment plan for the presumed burial near First Street Cemetery in Waco. However, after reviewing recent amendments to the Texas Health and Safety Code, I have a few additional comments that pertain not only to the grave in question, but also to other work in and around the cemetery. Please accept these comments in accordance with Stipulation IV of the MOA (Dispute Resolution).

1) As I noted in my earlier comments on the treatment plan, the MOA states that such plans "...shall follow sections of the Texas Health and Safety Code [THSC] that pertain to abandoned cemeteries and graves." I cited Subsection 711.010(a) of the THSC, which states that an order issued by the state registrar or the state registrar's designee is necessary to exhume remains from an abandoned cemetery.

I neglected to note that Subsection 711.010(a) was amended by HB2927 in September, 2009 (before the MOA was finalized). As amended, Subsection 711.010(a) states:

The owner of property on which an unknown cemetery is discovered or on which an abandoned cemetery is located may not construct improvements on the property in a manner that would further disturb the cemetery until the human remains interred in the cemetery are removed under a written order issued by the state registrar or the state registrar's designee under Section 711.004(f) and under an order of a district court as provided by this section.

Therefore, I would expect that, in addition to the written order from the state registrar, a court order will be obtained if the decision is made to exhume the presumed grave (and/or any other graves associated with the ongoing construction project).

2) As I noted in previous comments, the filing to register the unmarked/lower section of First Street Cemetery (the location of the ongoing construction projects) as an “abandoned or unknown” cemetery was submitted in April of 2009 and recorded by the county clerk of McLennan County in May of 2009.¹ The MOA recognizes that the cemetery is an abandoned cemetery. The MOA is to be implemented in accordance with state law, and since the THSC is very specific about the procedure for exhuming graves in abandoned cemeteries, I would like to know if any graves were exhumed in First Street Cemetery during the period of time between the finalization of the MOA and the present. If so, I would like to know if orders from the state registrar and a district court were obtained prior to any such exhumations.

3) In my comments on the treatment plan, I argued that the idea (advocated by the City) that the cemetery was de-dedicated by the 1968 court order is inconsistent with Chapter 711 of the THSC because graves are still present on the property. I neglected to note that Subsection 711.035(g) of the THSC, as amended by HB2927 in September 2009, clarifies the definition of a dedicated cemetery:

Property is considered to be dedicated cemetery property if:

(1) *one or more human burials are present* on the property;
[emphasis mine]

That burials are present in the lower section of First Street Cemetery where the current construction projects are being undertaken is indisputable. In fact, the burials in this section are part of the reason the cemetery is considered a historic property eligible for the National Register of Historic Places. Therefore, it follows that all of First Street Cemetery is a dedicated cemetery and should be recognized as such. Subsection 711.035(f) of the THSC states:

Dedicated cemetery property shall be used exclusively for cemetery purposes until the dedication is removed by court order or until the maintenance of the cemetery is enjoined or abated as a nuisance under Section 711.007.

Consequently, it would seem that the section of the cemetery affected by the ongoing construction projects would need to be formally de-dedicated in

¹ Despite the fact that the MOA recognizes the unmarked/lower section of the cemetery as an abandoned cemetery, Mark Wolfe, Executive Director of the THC, has claimed that this section of the cemetery should not be classified as an abandoned or unknown cemetery: “*At the time you filed your notice, May 5, 2009, the cemetery was neither ‘abandoned’ nor ‘unknown.’ The cemetery was rediscovered in May 2007, and the Commission issued an Antiquities Permit to AAG to ensure that the legal requirements for the removal of the remains were observed*” (Wolfe to Griggs, personal communication, June 8, 2009). By this logic, any cemetery that is rediscovered is no longer “abandoned or unknown.” State law requires that abandoned or unknown cemeteries be recorded with a county clerk. At the time I made my filing, there was no time limit to submit such a filing. The fact that the THC issued permits to exhume graves at the cemetery does not preclude compliance with Subsection 711.011(a), which requires that a filing be submitted.

accordance with state law before work continues on the projects. I would request that the NPS provide a legal opinion on this matter.

4) When I last checked, the McLennan County tax appraisal website did not classify the lower portion of First Street Cemetery as a cemetery. I have heard that the City is leasing this portion of the cemetery to the Texas Department of Public Safety. Such use of the cemetery, if substantiated, would seem to violate Subsection 711.035(f) of the THSC since the lease is presumably not for cemetery purposes. I would request that the NPS provide a legal opinion on this matter.

To conclude, in this letter and my previous comments on the treatment plan, I have raised numerous concerns relating to compliance with state law at First Street Cemetery. I have raised these concerns not only because the MOA is to be implemented in accordance with state law, but also because I believe that compliance with state law is necessary to ensure the preservation of First Street Cemetery and other historic cemeteries in Texas. I look forward to hearing from you.

Sincerely,

John Griggs, Ph.D.