



## **Policy Statement Regarding Burial Sites, Human Remains, and Funerary Objects: Explanations and Discussion**

*“The Advisory Council on Historic Preservation is committed to reorienting historic preservation for the good of all. We encourage federal agencies, state and local governments, and the private sector to do their part in implementing the principles advanced in this new policy—and to ensure that the burial areas and sacred objects of our ancestors are treated with the dignity and respect they deserve.”* – Hon. Sara C. Bronin, Chair

**Introduction.** The Advisory Council on Historic Preservation (ACHP) voted unanimously to adopt its new “Policy Statement on Burial Sites, Human Remains, and Funerary Objects” (Burial Policy) on March 1, 2023. The Burial Policy establishes a set of standards and guidelines that federal and state agencies, contractors, and other relevant entities should, at a minimum, seek to implement in order to provide burial sites, human remains, and funerary objects the consideration and protection they deserve.

The Burial Policy was adopted in response to unfortunate and traumatic incidents of disturbance to these sites, remains, and objects, some of which occurred as federal agencies carried out the review of a proposed undertaking pursuant to Section 106 of the National Historic Preservation Act (NHPA). The Burial Policy formally recognizes that the places most often disturbed are those associated with Indian Tribes, Native Hawaiians, Indigenous People, racial and ethnic minorities, and low-income communities. It also acknowledges the impact of climate change on sites, cemeteries, and associated cultural practices, which further threatens their identification and protection.

The ACHP will implement the Burial Policy throughout its work, including its oversight of the Section 106 process, and recommend it to federal agencies and any applicants or developers seeking federal licenses or permits. However, the Burial Policy’s reach is not limited to the federal government; the ACHP encourages state and local governments, nongovernmental institutions, cultural resource management firms, and private developers to adhere to the 13 principles set forth in the Burial Policy.

**How federal agencies can implement the Burial Policy.** The Burial Policy is broadly applicable in all federal historic preservation responsibilities. Federal agencies are encouraged to implement the Burial Policy while completing their Section 106 responsibilities during the identification, evaluation, and treatment of historic properties, and the development and implementation of agreement documents and other program alternatives. However, the principles identified in the Burial Policy speak to a broad range of circumstances and considerations and are not limited to the Section 106 arena. The ACHP encourages federal agencies to tailor implementation of the Burial Policy to their unique mission and authorities in an effort to advance protection of these sites, remains, and objects.

Federal agencies should look to relevant principles and consider:

- Applying the principles as part of their ongoing federal historic property stewardship and cultural resources management actions, including under Sections 106 and 110 of the NHPA; Executive Order 13007: Indian Sacred Sites; Executive Order 14096: Revitalizing Our Nation’s Commitment to Environmental Justice for All; Executive Order 13175: Consultation and Coordination with Tribal

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Governments; as part of their climate change planning and response actions; and as a part of other relevant actions.

- In consultation, develop agency protocol or policy that further details how the agency intends to apply the principles in carrying out their historic preservation responsibilities.
- For Section 106 Programmatic Agreements (PAs) and Memoranda of Agreement (MOAs), work with consulting parties to incorporate and tailor as necessary the ACHP MOA template language regarding the Burial Policy’s principles in unanticipated discovery stipulations for burial sites, human remains, or funerary objects.<sup>1</sup>
- Incorporate the ACHP MOA template language or other references to the Burial Policy’s principles in other relevant Section 106 MOA or PA stipulations (e.g., identification and documentation, avoidance or minimization, consultation or coordination, etc.) or in other Section 106 program alternatives.

**How state and local government agencies can implement the Burial Policy.** While the Burial Policy was developed with a focus on federal agency activities and federal preservation requirements, its principles can be applied when state or local governments have similar stewardship or planning review responsibilities in their jurisdictions. State and local governments may also have opportunities to implement relevant principles from the policy when consulting with federal agencies in the Section 106 review process. The ACHP encourages state and local governments to look to the Burial Policy for best practices in working to preserve and protect burial sites, human remains, and funerary objects.

**How nongovernmental institutions and private developers can implement the Burial Policy.**

Nongovernmental institutions and private developers can play a pivotal role in the protection of burial sites, human remains, and funerary objects. These organizations frequently work across federal, state, and local jurisdictions and the private sector. Through the application of internal guidance documents, codes of ethics, and other operating procedures that align with or adopt the principles contained in the Burial Policy, nongovernmental institutions and private developers, including cultural resources management firms, can support more effective and consistent consideration of these sites, remains, and objects.

**Discussion.** The following explanations are informed by comments and recommendations made by ACHP members and other consulting parties during the development of the Burial Policy. This document is intended to provide ACHP staff, federal agencies, and other interested parties with additional context, guidance, and advice on the interpretation and implementation of each principle.<sup>2</sup>

**Principle 1: Burial sites, human remains, and funerary objects should be treated with dignity and respect in all circumstances regardless of National Register eligibility or the circumstances of the action. This includes, but is not limited to, all times prior to and during consultation, during field surveys, when handling must occur, in documenting and/or reporting, if treatment actions occur, and in all other forms of interaction.**

The presence of human remains or funerary objects can give a location special importance as a burial area, cemetery, historic property,<sup>3</sup> or as a sacred site.<sup>4</sup> Federal agencies and state and local governments

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<sup>1</sup> In implementing the policy, the ACHP recommends that federal agencies include the following template language in unanticipated discovery stipulations in Section 106 Memoranda of Agreement (MOAs) and Programmatic Agreements (PAs): **When applicable, the [Agency] will follow the principles within the ACHP’s Policy Statement on Burial Sites, Human Remains, and Funerary Objects, dated March 1, 2023.** This template statement can be added to a stipulation tailored to the specific circumstances of an individual undertaking. While such a statement is not required, agencies are strongly encouraged to follow the principles in the policy statement and incorporate the reference when consulting to develop new MOAs and PAs; see [Guidance on Agreements Documents](#) (ACHP, n.d.) for additional information.

<sup>2</sup> See ACHP’s [Policy Statement on Burial Sites, Human Remains, and Funerary Objects](#) for more information on the Policy.

<sup>3</sup> Burial sites, human remains, and/or funerary objects should be treated with care and respect regardless of their ability to meet National Register eligibility criteria individually or as part of a larger site, district, TCP, or cultural landscape.

<sup>4</sup> See [Executive Order 13007: Indian Sacred Sites](#) of May 24, 1996, and the 2021 [Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indigenous Sacred Sites](#). Hereafter “Sacred Sites MOU.”

should ensure that the actions of their staff, contractors, volunteers, and any other party under their direct supervision or control demonstrate respect for the beliefs and cultural practices of those who may be associated with the sites, remains, or objects they encounter. Respectful treatment includes all manner of interaction, including, but not limited to, physical handling, written and oral communication, and visual depictions. Prioritizing the use of respectful forms of documentation and communication may minimize harm experienced by associated communities<sup>5</sup> if burial sites, human remains, or funerary objects are identified or impacted.

Through consultation with associated communities, including Indian Tribes and Native Hawaiian organizations (NHOs), federal agencies should discuss and, to the fullest extent of the law, seek agreement on what constitutes respectful treatment. Working toward consensus on these considerations is consistent with the intent of the Section 106 process and is best achieved through early and ongoing consultation and collaboration.

**Principle 2: Disturbing or disinterring burial sites, human remains, or funerary objects, when not requested by descendants, associated Indian Tribes or NHOs, or required by applicable law or regulation, should not be pursued unless there are no other alternatives available and only after consultation with descendants or associated communities and fully considered avoidance of impact and preservation in place.**

As a matter of practice and in accordance with applicable law, federal agencies and state and local governments should avoid impacting burial sites, human remains, and funerary objects including areas where there is the known potential for encountering them as they plan and carry out their actions or undertakings. Documentation or study should not be viewed as a justification for the disturbance or removal of such remains or objects without first consulting and seeking agreement with those associated with the site, remains, and/or objects.

When considering the potential to encounter or affect a burial site, human remains, or funerary objects, federal agencies and state and local governments should recognize that the size and makeup of burial sites can vary widely as they are reflective of the many unique cultures and belief systems in the United States and U.S. territories. These sites may do the following:<sup>6</sup>

- be associated with established and ongoing cultural practices.<sup>7</sup>
- require access for associated individuals or communities for ongoing care and maintenance.<sup>8</sup>
- be part of an ongoing culture's lifeways (see discussion under Principle 11 for more information).
- include funerary objects placed before, during, or after the time of death.
- be comprised of individuals or multiple people, including mass graves, or group burials.
- have resulted from events including warfare, slavery, disease, and other circumstances that inadvertently or intentionally limited the cultural continuation of death rites and burial practices.
- take various forms, including cremains, encased human remains, and fluids.
- be physically/culturally inseparable from the surrounding soils, plants, or other landscape features.
- include remains originally below, on, or above the surface of the earth, including water sources.

<sup>5</sup> The term "associated individuals and communities" as used in this document is inclusive of all people in the United States including Indigenous people of the U.S. territories, Indian Tribes, NHOs, and other racial and ethnic groups.

<sup>6</sup> This list reflects comments and contributions from consulting parties and ACHP leadership and is not exhaustive.

<sup>7</sup> "Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature," Article 11, [United Nations Declaration on the Rights of Indigenous Peoples](#). Hereafter "Declaration."

<sup>8</sup> "Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies, the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains," Article 12 of the Declaration.

To determine if a proposed undertaking might disturb and/or the extent of any potential impact to a burial site, human remains, or funerary objects that may result from an agency's actions, the federal agency should consult with and provide deference to the knowledge and expertise of associated communities (see Principles 2 and 3 for more information).

As the Burial Policy advocates, federal agencies should always plan to avoid known or probable locations of burial sites, human remains, and funerary objects altogether. However, when a federal agency's actions are necessary to comply with applicable law or regulation, or determines through consultation that the avoidance of impact is not possible, the agency should minimize disturbance<sup>9</sup> to the maximum extent practical.<sup>10</sup> Accordingly, removal of human remains or funerary objects should only occur when required by law, if repatriation has been requested by associated communities, or when all other alternatives to preserve the site in place have been considered and rejected because they are not possible or appropriate.

**Principle 3: Only through consultation, which includes the early and meaningful exchange of information and a concerted effort to reach consensus, can informed decisions be made about the identification, documentation, National Register eligibility, and treatment of burial sites, human remains, and funerary objects.**

Consultation is the hallmark of the Section 106 process and is foundational to inform the broader decision-making efforts taken by federal agencies and state and local governments. Federal agencies are also directed by Presidential Memoranda<sup>11</sup> and Executive Orders,<sup>12</sup> which set out basic steps, standards, and criteria for Tribal consultation related to agency actions. Additionally, the United Nations Declaration on the Rights of Indigenous Peoples (Declaration) has identified that the right of an individual or associated community to “participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own decision-making instructions,” is a basic human right.<sup>13</sup> These mechanisms all identify minimum standards that can be used by federal agencies and state and local governments to inform their consultation and collaboration efforts to achieve a more mutually beneficial outcome.

Specific to the Section 106 process, federal agencies must make a “reasonable and good faith” effort to identify consulting parties and begin consultation early in project planning, after the federal agency determines it has an undertaking with the potential to affect historic properties and prior to making decisions that would restrict the consideration of alternatives to avoid adverse effects to historic properties. This process is an important tool for Indian Tribes, NHOs, State and Tribal Historic Preservation Officers, and other consulting parties to lend their voice in protecting and maintaining

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<sup>9</sup> Determination of what constitutes a “disturbance” should be defined in consultation and with proper deference provided to the views and opinions of associated communities. Consistent with 36 CFR §800.5(a)(2)(vi), natural deterioration of the remains may be the acceptable or preferred outcome if requested by associated communities during consultation.

<sup>10</sup> If appropriate, preserve the human remains in place. Preservation in place may mean that, to the extent allowed by law, the natural deterioration may be the preferred outcome - See, e.g., 36 CFR § 800.5(a)(2)(vi).

<sup>11</sup> “Tribal consultation is a two-way, Nation-to-Nation exchange of information and dialogue between official representatives of the United States and of Tribal Nations regarding Federal policies that have Tribal implications. Consultation recognizes Tribal sovereignty and the Nation-to-Nation relationship between the United States and Tribal Nations and acknowledges that the United States maintains certain treaty and trust responsibilities to Tribal Nations. Consultation requires that information obtained from Tribes be given meaningful consideration, and agencies should strive for consensus with Tribes or a mutually desired outcome. Consultation should generally include both Federal and Tribal officials with decision-making authority regarding the proposed policy that has Tribal implications. Consultation will ensure that applicable information is readily available to all parties, that Federal and Tribal officials have adequate time to communicate, and that after the Federal decision, consulting Tribal Nations are advised as to how their input influenced that decision-making. All of these principles should be applied to the extent practicable and permitted by law” [Memorandum on Uniform Standards for Tribal Consultation](#), (Executive Office of the President, 2022).

<sup>12</sup> [Executive Order 13175: Consultation and Coordination with Tribal Governments](#); Executive Order 13007: Indian Sacred Sites.

<sup>13</sup> Article 18 of the Declaration.

historic properties, including burial sites, human remains, and funerary objects important to their communities. For consultation to be successful, federal agencies should also recognize and account for other voices that constitute our diverse nation including African Americans,<sup>14</sup> nonfederally recognized Tribes,<sup>15</sup> Indigenous Peoples,<sup>16</sup> other marginalized or low-income communities,<sup>17</sup> and the public.

The statutory language of the NHPA and the Section 106 implementing regulations prescribe specific actions federal agencies must take in regard to federally recognized Indian Tribes and NHOs including the following:

- Seek out and invite any Indian Tribes or NHOs that might attach religious and cultural significance to historic properties in the area of potential effects (APE) to consult on a proposed undertaking.<sup>18</sup>
- Consult with any Indian Tribe or NHO that attaches religious and cultural significance to such historic properties.<sup>19</sup>
- Gather information from **any** Indian Tribe or NHO to assist in identifying properties which **may be** of religious and cultural significance to them and **may be** eligible for the National Register.<sup>20</sup>
- Recognize that properties of traditional religious and cultural importance to an Indian Tribe or NHO may be determined eligible for inclusion on the National Register.<sup>21</sup>
- Recognize the government-to-government relationship between the federal government and Indian Tribes and consult with the representatives designated or identified by the Tribal government.<sup>22</sup>
- Recognize that consultation on a government-to-government level with Indian Tribes cannot be delegated to nonfederal entities, such as applicants and contractors.<sup>23</sup>
- Solicit the views of Indian Tribes and NHOs in a manner sensitive to their governmental structures.<sup>24</sup>

Where appropriate, federal agencies should develop consultation protocols with Indian Tribes or NHOs to tailor how consultation between those parties may be carried out. Such agreements are often not project-specific but instead may be more general and focused on the relationship between the agency and the Indian Tribe or NHO. This type of agreement can cover all aspects of the consultation process with the Tribe or NHO and could grant an Indian Tribe or NHO additional rights to participate or concur in agency decisions in the Section 106 process beyond those specified in the regulations.<sup>25</sup> Additionally, many

<sup>14</sup> “Including descendants in research and interpretation is contingent upon building a positive relationship with the community,” (National Trust for Historic Preservation African American Cultural Heritage Action Fund, 2018, 8). Hereafter “Engaging Descendant Communities” (NTHP-AACHAF, 2018).

<sup>15</sup> “In carrying out Section 106, a federal agency may invite state-recognized tribes or tribes with neither federal nor state recognition to participate in the review process as “additional consulting parties” based on a “demonstrated interest” in an undertaking’s effects on historic properties,” [Guide to Working with Non-Federally Recognized Tribes in the Section 106 Process](#) (ACHP, 2018); also see 36 CFR §§ 800.2(c)(5) and 800.3(f)(3).

<sup>16</sup> “The Indigenous populations in Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau may have important information to contribute, Ibid; see 36 CFR §§ 800.3(e)-(f).

<sup>17</sup> “If there is a golden rule to the preservation of cemeteries and burial grounds, it is to be aware that our diverse country is home to a wide variety of burial customs,” Lynette Strangstad, *Preservation of Historic Burial Grounds* (National Trust for Historic Preservation, 2003).

<sup>18</sup> 36 CFR § 800.2(a)(4) and 36 CFR § 800.3(c).

<sup>19</sup> 54 U.S.C. § 302706(b) and 36 CFR § 800.2(c)(2)(ii)(D).

<sup>20</sup> 36 CFR § 800.4(a)(4) (emphasis added), 54 U.S.C. § 302706(b); this includes burial sites, human remains, and funerary objects.

<sup>21</sup> 54 U.S.C. § 302706(a).

<sup>22</sup> 36 CFR § 800.2(c)(2)(ii)(C).

<sup>23</sup> “...federal agencies cannot unilaterally delegate their Tribal consultation responsibilities to an applicant nor presume that such discussions substitute for federal agency Tribal consultation responsibilities,” [Limitations on the Delegation of Authority by Federal Agencies to Initiate Tribal Consultation under Section 106 of the National Historic Preservation Act](#) (ACHP, 2011).

<sup>24</sup> 36 CFR § 800.4(a)(4); “Recognizing past injustice, while upholding Tribal treaty and reserved rights, and respecting Tribal and Indigenous communities, cultures, and values will assist Agencies in developing collaborative processes that are more equitable and inclusive of Indigenous Peoples and their knowledge systems,” [Guidance for Federal Departments or Agencies on Indigenous Knowledge](#) (Executive Office of the President Office of Science and Technology Policy [OSTP] and Council on Environmental Quality [CEQ], 2022). Hereafter “Indigenous Knowledge (OSTP and CEQ, 2022).”

<sup>25</sup> See [Types of Agreement Documents in Section 106](#) (ACHP, 2018) and 36 CFR § 800.2(c)(2)(ii)(E).

Indian Tribes have existing protocols that federal agencies can utilize to inform ongoing or future actions related to burial sites, human remains, and funerary objects.<sup>26</sup>

**Principle 4: To the maximum extent possible, decision making should give deference to the treatment requests of descendants or associated communities. Where known, and in accordance with applicable law, cultural practices of the descendants or associated communities should be followed if burial sites, human remains, or funerary objects may be encountered, are inadvertently identified, impacted, or must be disinterred.**

Any plan for the disinterment, housing, treatment, transport, recordation, or repatriation of burial sites, human remains, or funerary objects should be discussed and developed by the federal agency or the state or local government through consultation prior to the action occurring and in a manner that prioritizes the requests and expertise of associated communities. The associated community should be asked if they have any established protocols or any existing cultural practices that should be followed or adhered to, to the extent allowable by law.<sup>27</sup> While many situations involving the possible treatment of or impacts to burial sites, human remains, or funerary objects require the development of plans on a case-by-case basis, there are several actions that can be taken to potentially accommodate the treatment requests of associated communities, including the following:

- Contracting with associated communities. Frequently, cultural information is not known or shared outside of a community. Contracting with the associated community may allow decision making to be better informed by the people to whom these sites are most significant.<sup>28</sup>
- Providing cultural sensitivity training for all staff who might interact with burial sites, human remains, or funerary objects. Consider working with associated communities to develop or administer the training. Extending training opportunities to applicants and contractors is also recommended.<sup>29</sup>
- Informing staff and applicants. Agencies should ensure that staff and applicants are versed in agency policy and the preferences of any associated communities.
- Developing culturally appropriate protocols. Developing mutually acceptable actions, including housing, handling, transportation, documentation standards, and how sensitive information would be identified and managed, among others, can help ensure proper deference is provided, particularly when associated communities are not present in the field.
- Consulting early and consistently. During the scoping stage for proposed projects, while alternatives and project areas are being determined, associated communities can provide expertise and knowledge that can inform agency actions to help avoid impacting important locations. Early coordination also provides an opportunity to learn about the preferences and practices of associated communities.
- Acknowledging historical context and past injustice. Understanding that each group of people has had different experiences is critical for agencies to collaborate and engage effectively. Agencies should acknowledge the history of the department or agency they represent, and the federal government broadly. Further, they should recognize that at times, western science has been used as a tool to oppress Indian Tribes, Native Hawaiians, enslaved Africans and their descendants, and other Indigenous Peoples.<sup>30</sup>

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<sup>26</sup> See [Eastern Band of Cherokee Indians Tribal Code, Chapter 70, Skeletal Remains and Burial Site Preservation](#).

<sup>27</sup> In a Section 106 review, the federal agency is responsible for making findings and determinations and making the final decision regarding a proposed undertaking, potentially including treatment actions related to burial sites, human remains, and funerary objects. In doing so, the federal agency must make a reasonable and good faith effort to seek agreement through consultation with associated communities before making its decision on the undertaking.

<sup>28</sup> Many Indian Tribes and other associated communities have databases that contain information relevant to them that could inform federal decision making in a manner that results in a more accurate assessment of these locations.

<sup>29</sup> See [Early Coordination with Indian Tribes During Pre-Application Processes: A Handbook](#) (ACHP, 2018).

<sup>30</sup> Indigenous Knowledge (OSTP and CEQ, 2022); see also “All interpretation begins in research, and when discussing the history of enslavement, museum and historic site professionals do themselves and visitors a disservice by not involving descendants in research. Without their voices, research lacks depth, humanity and credibility, and institutions continue to perpetuate the exploitative practices of the past” “Engaging Descendant Communities” (NTHP-AACHAF, 2018, 8).

**Principle 5: The Indigenous Knowledge held by an Indian Tribe, NHO, or other Indigenous Peoples is a valid and self-supporting source of information. To the fullest extent possible, deference should be provided to the Indigenous Knowledge and expertise of Indian Tribes, NHOs, and Indigenous Peoples in the identification, documentation, evaluation, assessment, and treatment of their burial sites, human remains, and funerary objects.**

The ACHP applies the term “Indigenous Knowledge,” for purposes of Section 106 reviews, to the information or knowledge held by Indian Tribes and NHOs used for identifying, documenting, evaluating, assessing, and resolving adverse effects to historic properties of religious and cultural significance to them.<sup>31</sup> Indigenous Knowledge is often specific to an Indian Tribe, NHO, or Indigenous People and may exist in a variety of forms.<sup>32</sup> Federal agencies and state and local governments often lack the expertise to appropriately consider and apply this knowledge. As a result, consultation and collaboration with Indian Tribes, NHOs, and Indigenous Peoples is critical to ensuring that Indigenous Knowledge is considered and applied in a manner that respects Tribal sovereignty and achieves mutually beneficial outcomes for Tribal and Indigenous communities.<sup>33</sup>

Federal agencies should understand at the outset that Indigenous Knowledge is frequently used by Indian Tribes and NHOs to identify historic properties of religious and cultural significance to them in the Section 106 review process. Indigenous Knowledge is recognized as a valid form of evidence for inclusion in federal policy, research, and decision making and does not require other forms of knowledge for validation or support.<sup>34</sup> In other words, a federal agency should not request a Tribe provide written documentation corroborating the Tribe’s statements.

The inclusion of Indigenous Knowledge is a critical component in the Section 106 process.<sup>35</sup> Including Indian Tribes or NHOs early on in project planning and continuing to consult with them at every step in the process as required in the regulations, will help provide federal agencies with the information necessary to carry out the Section 106 process. It should also be noted that the Section 106 regulations recognize that the passage of time, changing perceptions of significance, or incomplete prior evaluations of cultural resources may require the reevaluation of project areas for the presence of historic properties.<sup>36</sup> This is a particularly important when considering places of significance to Tribes and NHOs because past identification and evaluation efforts may not have included consultation or the Indigenous Knowledge held by Indian Tribes and NHOs.<sup>37</sup>

Agencies should not initiate consultation with an assumption that an Indian Tribe or NHO will share its knowledge with the agency. The NHPA does not require any Indian Tribe or NHO to provide federal agencies with Indigenous Knowledge simply because it may be valuable information in the context of Section 106 decisions. In requesting Indigenous Knowledge, federal agencies should be respectful of an

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<sup>31</sup> Although the term “Indigenous Knowledge” is not defined in the NHPA or the Section 106 implementing regulations, its role in the Section 106 process is necessitated by the requirement, at 36 CFR Section 800.4(c)(1), that agency officials acknowledge that Indian Tribes and NHOs possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them. Indigenous Knowledge is an integral part of that special expertise. TK and 106 (ACHP, 2021).

<sup>32</sup> See [Traditional Knowledge and the Section 106 Process: Information for Federal Agencies and Other Participants](#) (ACHP, 2021) [hereafter “TK and 106 (ACHP, 2021)”] and Indigenous Knowledge (OSTP and CEQ, 2022) for a discussion on what constitutes Indigenous Knowledge in the Section 106 process and federal decision making more broadly.

<sup>33</sup> Indigenous Knowledge (OSTP and CEQ, 2022).

<sup>34</sup> “Indigenous Knowledge is a valid form of evidence for inclusion in Federal policy, research and decision making. Indigenous Knowledge and other forms of knowledge do not depend on each other for validation, and each system can support the insights of the other,” Indigenous Knowledge (OSTP and CEQ, 2022).

<sup>35</sup> “Where Federal statutes require Agencies to consider information and make informed decisions, Agencies should consult and collaborate with Tribal Nations and Indigenous Peoples to include Indigenous Knowledge in decision making,” Indigenous Knowledge (OSTP and CEQ, 2022).

<sup>36</sup> 36 CFR § 800.4(c)(1).

<sup>37</sup> TK and 106 (ACHP, 2021).

Indian Tribe's or NHO's authority to disclose or withhold such information.<sup>38</sup> Any effort to solicit and incorporate Indigenous Knowledge should be an inclusive process that empowers the Indian Tribe or NHO to determine if, and how, their knowledge may be included in the agency's process. Agencies should discuss plans for direct engagement with Indian Tribes and NHOs and ensure sustained engagement throughout the development or implementation of an activity. Agencies should only engage with knowledge holders designated by Tribal leadership.<sup>39</sup>

**Principle 6: Burial sites, human remains, and funerary objects are important in and of their own right. They may also constitute or be part of a sacred site and may include or incorporate several possible elements of historic significance including religious and cultural significance. The integrity of burial sites, human remains, and funerary objects is best informed by those who ascribe significance to them.**

Individual and collective burial places can reflect and represent the cultural values and practices of the past that help instruct us about who we are as a people.<sup>40</sup> For associated communities, the burial sites of their ancestors also represent important locations that may have an ongoing role in their beliefs and lifeways and may only be known by those who are part of that culture or belief system. Federal agencies should seek to inform any identification and documentation efforts, determination of National Register eligibility, assessment of effects, and treatment actions in consultation with associated communities.<sup>41</sup> Consulting with associated communities is essential to properly inform any evaluation of the significance and integrity of these locations.

The Section 106 regulations require federal agencies to acknowledge the special expertise of Indian Tribes and NHOs in evaluating and, by extension, identifying historic properties of religious and cultural significance to them, which may include burial sites, human remains, and funerary objects.<sup>42</sup> Federal agencies should also be aware that historic properties of religious and cultural significance to an Indian Tribe may be located on ancestral, aboriginal, or ceded lands.<sup>43</sup> In many cases, because of migration or forced removal, Indian Tribes may now be located far away from historic properties that still hold significance for them. Accordingly, the regulations require that federal agencies make a reasonable and good faith effort to identify Indian Tribes that may attach religious and cultural significance to historic properties that may be affected by the undertaking,<sup>44</sup> even if Indian Tribes are now located a great

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<sup>38</sup> "Article 19 is particularly relevant to the use and integration of traditional knowledge in Section 106 decision making. It states that governments 'shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative and administrative measures that may affect them,'" TK and 106 (ACHP, 2021).

<sup>39</sup> Indigenous Knowledge, (OSTP and CEQ, 2022); Article 31 of the Declaration states that "indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions...They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions." Working with Indigenous Peoples, governments "shall take effective measures to recognize and protect the exercise of these rights."

<sup>40</sup> "[Guidelines for Evaluating and Registering Cemeteries and Burial Places](#)" National Register Bulletin, Volume National Register Bulletin, Volume 41 (National Park Service [NPS], U.S. Department of the Interior [DOI], 1992).

<sup>41</sup> "Furthermore, although those who were formerly enslaved are now ancestors long gone, their descendants still have much to contribute to the research process in the present day. The rubric promotes a changed practice in cultural institutions, enabling public historians to work alongside descendants to research the past and tell compelling stories about enslaved people, incorporating essential family oral histories, long dismissed as unreliable sources by many academic historians... data must be supplemented by the oral histories and other materials, such as genealogical records and family heirlooms that the descendant communities possess, to render whole a valuable and shared integral component of American history," "Engaging Descendant Communities" (NTHP-AACHAF, 2018, 4); see Guide to Working with Non-Federally Recognized Tribes in the Section 106 Process (ACHP, 2018); 36 CFR §§ 800.2(c)(5) and 3(f)(3); see Principle 5 of this document for more information.

<sup>42</sup> See 36 CFR § 800.4(c)(1) and TK and 106 (ACHP, 2021).

<sup>43</sup> 36 C.R § 800.2(c)(2)(ii)(D).

<sup>44</sup> 36 CFR § 800.3(f)(2).



distance away from such properties and undertakings.<sup>45</sup>

For Indian Tribes, NHOs, and other Indigenous Peoples, burial locations are frequently considered to be sacred sites due to their ongoing role in their lifeway, language, and family structure.<sup>46</sup> Consistent with Executive Order 13007: Indian Sacred Sites, federal agencies should, through consultation, implement procedures that seek to accommodate access to and ceremonial use of Indian sacred sites, avoid adversely affecting the physical integrity of such sites, and maintain confidentiality of sensitive information relating to the site when managing federal lands. It is important to note that a sacred site may not meet the National Register criteria as a historic property and that, conversely, a historic property may not constitute a sacred site. However, where an undertaking may affect a historic property that is also considered by an Indian Tribe to be a sacred site, including burial sites, the federal agency should consider access to and ceremonial use of the property consistent with Executive Order 13007 when applicable in the course of the Section 106 review process.<sup>47</sup> Agencies must also be aware that sacred sites often occur within a larger landform or are connected through physical features or ceremonies to other sites or a larger sacred landscape. These broader areas and connections should be accounted for when seeking to understand the context and significance of sacred sites.<sup>48</sup>

**Principle 7: Burial sites, human remains, and funerary objects are frequently associated with cultural practices, sacred sites, Indigenous Knowledge, and other forms of culturally sensitive actions and/or information unique to a people. Maximum effort should be taken to limit the disclosure of confidential or sensitive information through all available mechanisms including, but not limited to, the proper handling and labeling of records, limiting documentation to necessary information, and through the application of existing law.**

As a federal agency carries out its historic preservation responsibilities, it may find that some kinds of information about historic properties is sensitive and if released, risk harm to the properties, and therefore should be protected from public disclosure. As provided in Section 304 of the NHPA, there could be several reasons an agency must not release information about the location, character, or ownership of historic properties. For example, withholding information may help prevent looting or disturbance of a site, or it may help protect the continued use of a site or area by traditional religious practitioners.<sup>49</sup> Other federal laws or regulations may also authorize or require the withholding of information about cultural resources. Federal agencies should utilize available mechanisms to limit disclosure of confidential or culturally sensitive information in the course of their duties.

Appropriately managing sensitive information is of the utmost importance. The release of information that could cause harm or threaten the ongoing cultural practices or beliefs associated with those places or objects should be avoided to the fullest extent of the law. Federal agencies should seek to develop transparent and effective protocols and processes that enable associated communities to share sensitive information with full awareness of the legal protections that could protect against its disclosure.

The agency official should address concerns raised about confidentiality during the Section 106 review process pursuant to 36 CFR § 800.11(c). In recognizing the importance of protecting sensitive information, the Section 106 implementing regulations state that:

- Consultation should commence early in the planning process in order to identify and discuss relevant issues and resolve concerns about the confidentiality of information on historic properties.<sup>50</sup>

<sup>45</sup> 36 CFR § 800.2(c)(2)(ii); see also [Consultation with Indian Tribes in the Section 106 Process: The Handbook](#), (ACHP, 2021).

<sup>46</sup> Sacred Sites MOU (2021).

<sup>47</sup> See Executive Order 13007: Indian Sacred Sites of May 24, 1996, and [The Relationship Between Executive Order 13007 Regarding Indian Sacred Sites and Section 106](#), (ACHP, 2018).

<sup>48</sup> Sacred Sites MOU (2021).

<sup>49</sup> [Frequently Asked Questions on Protecting Sensitive Information About Historic Properties Under Section 304 of the NHPA](#) (ACHP, 2016). Hereafter "Section 304 and the NHPA (ACHP, 2016)."

<sup>50</sup> 36 CFR § 800.2(c)(2)(ii)(A).

- Federal agencies should recognize that an Indian Tribe or NHO may be reluctant to divulge specific information regarding the location, nature, and activities associated with sites.<sup>51</sup>
- Consultation with Indian Tribes and NHOs should be conducted in a manner sensitive to the concerns and needs of the Indian Tribe or NHO.<sup>52</sup>

Additionally, federal agencies should recognize the wide range of information that Tribes, NHOs, and Indigenous Peoples may deem sensitive. At the same time, Indigenous Knowledge is relevant and essential to many federal decision-making processes, so it is of critical importance for federal employees to have a solid understanding of how to navigate public disclosure laws to identify how sensitive Indigenous Knowledge may be protected. In collecting or working with any Indigenous Knowledge, the federal agency should be cognizant of several factors, including the following:

- How and what Indigenous Knowledge might be needed to inform or influence the decision-making process at hand?
- What sensitivity concerns may exist for that Indigenous Knowledge?
- What legal protections exist to protect against the disclosure of Indigenous Knowledge?<sup>53</sup>
- Do both the source of the Indigenous Knowledge as well as the receiving entity have a common understanding and expectation of how that Indigenous Knowledge will be treated and incorporated?

**Principle 8: The federal Indian boarding school system directly targeted American Indian, Alaska Native, and Native Hawaiian children in the pursuit of a policy of cultural assimilation that coincided with territorial dispossession. In partnership with the historic preservation community, federal agencies should seek to implement the recommendations identified in the Department of the Interior’s *Federal Indian Boarding School Investigative Report* by supporting community-driven identification, documentation, interpretation, protection, preservation, reclamation, and co-management of burial sites, human remains, and funerary objects across that system, including marked and unmarked burial areas, and supporting repatriation where appropriate.**

The intentional targeting and removal of American Indian, Alaska Native, and Native Hawaiian children to achieve the goal of forced assimilation of Indian people was both traumatic and violent.<sup>54</sup> Based on initial research, the Department of the Interior (DOI) found that hundreds of Indian children died throughout the federal Indian boarding school system. Many of those children were buried in unmarked or poorly maintained burial sites far from their Indian Tribes, Alaska Native Villages, the Native Hawaiian Community<sup>55</sup>, and families, often hundreds, or even thousands, of miles away.<sup>56</sup>

Descendants’ preferences for the possible disinterment or repatriation of the remains of children discovered in marked or unmarked burial sites across the federal Indian boarding school system vary widely and should be prioritized.<sup>57</sup> Depending on the religious and cultural practices of an Indian Tribe,

<sup>51</sup> 36 CFR § 800.4(a)(4).

<sup>52</sup> 36 CFR § 800.2(c)(2)(ii)(C).

<sup>53</sup> See [Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites: Policy Review Report](#) (2013), Section 304 and the NHPA (ACHP, 2016), and Section 9 of the [Archaeological Resources Protection Act](#) for examples.

<sup>54</sup> “Indian boarding schools, and the policies that created, funded, and fueled their existence, were designed to assimilate American Indian, Alaska Native, and Native Hawaiian children into non-Native culture by stripping them of their cultural identities, often through physical, sexual, psychological, industrial, and spiritual abuse and neglect.” [S.1723 - Truth and Healing Commission on Indian Boarding School Policies Act](#), 6).

<sup>55</sup> The term “Native Hawaiian Community” is specific to the DOI and DOI’s Federal Indian Boarding School Initiative Report.

<sup>56</sup> Newland, Bryan, [Federal Indian Boarding School Initiative Investigative Report](#) (Assistant Secretary –Indian Affairs, U.S. Department of the Interior, 2022). Hereafter “DOI Boarding School Report (Newland, 2022)”; “...many of the American Indian and Alaska Native children who died while attending Indian boarding schools or neighboring hospitals were buried in unmarked graves or off campus cemeteries.” [S.1723 - Truth and Healing Commission on Indian Boarding School Policies Act](#), 7).

<sup>57</sup> “Tribal preferences for the possible disinterment or repatriation of remains of children discovered in marked or unmarked burial sites across the Federal Indian boarding school system vary widely. Depending on the religious and cultural practices of an Indian Tribe, Alaska Native Village, or the Native Hawaiian Community, it may prefer to disinter or repatriate any remains of

Alaska Native Village, or the Native Hawaiian Community, they may prefer to disinter or repatriate any remains of a child discovered across the federal Indian boarding school system for return to the child's home territory or to leave the child's remains undisturbed in its current burial site. Moreover, some burial sites contain human remains or parts of remains of multiple individuals or human remains that were relocated from other burial sites, thereby preventing Tribal and individual identification.

Federal agencies should seek to support the Federal Indian Boarding School Initiative investigation through community-driven identification, documentation, interpretation, protection, preservation, reclamation, and co-management of burial sites, human remains, and funerary objects. Federal agencies should also seek to protect burial sites and enable potential repatriation or disinterment of remains of children, consistent with federal, state, and Tribal law, including the Native American Graves Protection and Repatriation Act (NAGPRA), and in coordination with proper authorities.<sup>58</sup>

**Principle 9: The legacies of colonization, including cultural assimilation, forced relocation, and slavery, have led to an uneven awareness of where and why practitioners are likely to encounter burial sites, human remains, and funerary objects across the United States and its territories. The historic preservation community has a key role in expanding public education to support greater awareness of and consideration for the histories and lifeways of Indian Tribes, Native Hawaiians, enslaved Africans and their descendants, and Indigenous Peoples including recognizing and respecting the historical trauma that these groups and individuals may experience.**

The location and significance of burial sites, human remains, and funerary objects varies and is often unique to a people. In some circumstances, burial sites and funerary objects are known only to their descendants or associated communities. However, this knowledge is not always comprehensive; may not be consistently recorded, particularly in a manner that is readily transferrable for the purposes of federal decision making; may only reside with select individuals; and is frequently considered to be sensitive.<sup>59</sup>

Legacies of occupation and colonization abruptly altered many of the cultural practices of Indigenous People and African Americans through forced assimilation and relocation, enslavement, warfare with the United States Government, and the introduction of disease, among other dynamics.<sup>60</sup> As a result, the location of burial areas and the method of burial were often controlled by external parties, were confined to remote areas, and/or were rarely documented.<sup>61</sup> Thus, such locations infrequently appear on historical maps or in other records. In many cases, including as a result of segregation and the Federal Indian

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a child discovered across the Federal Indian boarding school system for return to the child's home territory or to leave the child's remains undisturbed in its current burial site," Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> TK and ACHP (ACHP, 2021).

<sup>60</sup> "The United States directly targeted American Indian, Alaska Native, and Native Hawaiian children in the pursuit of a policy of cultural assimilation that coincided with Indian territorial dispossession," DOI Boarding School Report (Newland, 2022); "...all Indian Tribes have undergone some manner of displacement, whether they have seen their homelands whittled down to small reservations or have lost their lands and status through the federal policies of removal and termination...the effects of removal persist and continue to affect Tribal participation in the Section 106 process," [The Indian Removal Era and Section 106 Tribal Consultation: Information Paper](#) (ACHP, 2019, 1); "assimilation processes, such as the Indian Boarding School Policies, were adopted by the United States Government to strip American Indian, Alaska Native, and Native Hawaiian children of their Indigenous identities, beliefs, and languages to assimilate them into non-Native culture through federally funded and controlled Christian-run schools, which had the intent and, in many cases, the effect, of termination, with dire and intentional consequences on the cultures and languages of Indigenous peoples." S.1723 - Truth and Healing Commission on Indian Boarding School Policies Act, 2).

<sup>61</sup> "Mexican American history is often overlooked and is not well recorded," [UT-Austin Researchers Work to Protect Historic Mexican American Cemetery](#) (The Daily Texan, 2021); "African-American cemetery sites were often confined to remote areas or marginal property and they frequently were not provided the same sort of state or local maintenance support or assistance as predominantly white cemeteries. As a result, many jurisdictions are unaware of the existence of these historic sites." [African American Burial Grounds Preservation Program](#), Senate Report (United States Senate Committee on Energy and Natural Resources, December 12, 2022).

Boarding School Initiative, among other situations, these practices continued into the 20th century.<sup>62</sup> For example, Federal Indian policy resulted in the separation (both physically and intellectually) of Indigenous Peoples from the places they are connected to, severing relationships with lands, waters, and social systems, which are all critical elements of Indigenous Knowledge. These policies systematically served to assimilate and displace Native people and eradicate Native cultures.<sup>63</sup>

These communities continue to experience the impacts of intergenerational trauma resulting from the legacies of these federal policies,<sup>64</sup> including impacts on their social, cultural, spiritual, mental, and physical wellbeing.<sup>65</sup> Disturbing the burial areas or remains of ancestors or family members can have traumatic and compounding effects to the social and emotional welfare of associated individuals and communities and should be avoided to the maximum extent allowable by law.<sup>66</sup> The ACHP encourages federal agency and state and local governments to avoid disturbing or disinterring burial sites and human remains.

Federal, Tribal, state, and local officials and other subject matter experts providing public education and technical assistance in historic preservation have an important role to play both in raising awareness about these histories and their impact on where burial areas, human remains, and funerary objects may be encountered, and in creating resources to help others do the same. The ACHP encourages federal agencies and state and local governments, in collaboration with associated communities, to create additional understanding of and opportunities for associated communities to identify and protect their burial sites, human remains, and funerary objects. These efforts may include site protection and enhancement, providing access to associated individuals or communities, conducting additional research, or a number of

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<sup>62</sup> “Beginning with slavery and continuing through the Jim Crow era, African Americans were often restricted in where they could bury their loved ones. Local laws segregated burial grounds by race,” *Ibid*; see [S.3667 - African-American Burial Grounds Preservation Act \(introduced\)](#); see the [DOI Boarding School Report](#) (Newland, 2022); “Mexicans weren’t necessarily allowed to be buried in white cemeteries...In some cases I’ve seen where there’s a white cemetery, and then right next to it is the Mexican section or the Black section...[or] just a completely different cemetery,” [‘This Is Sacred Ground’: Austinites And Researchers Seek To Restore Mexican-American Cemeteries In Montopolis](#) (KUT 90.5, 2021).

<sup>63</sup> Indigenous Knowledge (OSTP and CEQ, 2022).

<sup>64</sup> *Ibid*; “the general lack of public awareness, accountability, education, information, and acknowledgment of the ongoing and direct impacts of the Indian Boarding School Policies and related inter-generational trauma persists, signaling the overdue need for an investigative Federal commission to further document and expose assimilation and termination efforts to eradicate the cultures and languages of Indigenous peoples implemented under Indian Boarding School Policies (pages 12-13)”. [S.1723 - Truth and Healing Commission on Indian Boarding School Policies Act](#).

<sup>65</sup> Sacred Sites MOU (2021); “the longstanding intended consequences and ramifications of the treatment of American Indian, Alaska Native, and Native Hawaiian children, families, and communities because of Federal policies and the funding of Indian boarding schools continue to impact Native communities through intergenerational trauma, cycles of violence and abuse, disappearance, health disparities, substance abuse, premature deaths, additional undocumented physical, sexual, psychological, industrial, and spiritual abuse and neglect, and trauma”. [S.1723 - Truth and Healing Commission on Indian Boarding School Policies Act](#), 10).

<sup>66</sup> “Desecration and disturbance of burial sites is not a victimless crime. The consequences of these actions not only include property damage, but can also result in emotional trauma to relatives and friends of the deceased, as well as to descendant communities” ([Historic African American Cemeteries, Maryland Commission on African American History & Culture](#), (Maryland Historical Trust, 2022, 24); “Traditional Hawaiian belief maintains that it is the kuleana (responsibility) of the living to care for and to protect 'ohana (family) burial sites and to pass on this knowledge and responsibility to the next generation. These practices assure that living Native Hawaiians will always provide perpetual care and protection to their ancestors, thereby maintaining the integrity of the family. Central to the physical and spiritual well-being of Native Hawaiians is the inheritance of mana from their ancestral past. In turn, the k...puna (ancestors) care for and protect the living, affirming the interdependent relationship between them and living descendants, where each cares for and protects the other,” *Native Burials: Human Rights and Sacred Bones* (Edward Halealoha, 2000); “[The cemetery] is sacred ground to us [Mexican Americans], from our ancestors...The site is difficult to access, making it hard for people to visit and maintain...has long had problems with people dumping trash...It’s sad to see because it looks as if it’s been neglected and dismissed, especially with the development that’s right next to it...Those are families and families’ history and legacies and relatives that are buried there. Those are stories that need to be told,” [‘This Is Sacred Ground’: Austinites And Researchers Seek To Restore Mexican-American Cemeteries In Montopolis](#) (KUT 90.5, 2021).

other targeted efforts. Identifying appropriate actions should be done in collaboration with associated communities.

**Principle 10: Access to and/or repatriation of burial sites, human remains, and funerary objects should be enabled through fair, transparent, and effective mechanisms developed in conjunction with descendant communities to the fullest extent of the law.**

Having access to a location, including the ability to conduct cultural practices or perpetuate Indigenous Knowledge, can contribute to the significance of a Traditional Cultural Place (TCP),<sup>67</sup> a sacred site, or historic property and may be necessary to retain the integrity of these locations. The care for and access to these locations may also be part of an ongoing cultural practice or may serve to revitalize traditions or customs, among other purposes, that are important to an associated community.<sup>68</sup> Federal agencies should seek to enable access to and protection of burial sites, human remains, and/or funerary objects through the development of protocols, co-stewardship or co-management agreements, and other mechanisms as part of their ongoing management functions.<sup>69</sup> Efforts to increase access and protection of these sites should be pursued in consultation with the associated communities and in a manner that does not inadvertently disclose sensitive information.

Associated communities may also seek to have human remains or funerary objects relocated or returned for several reasons. Repatriation is of particular concern to Indian Tribes, NHOs, and other Indigenous Peoples whose ancestors are frequently located in locations no longer under their control or ownership.<sup>70</sup> Consistent with NAGPRA, DOI's Boarding School Initiative, and the United Nations Declaration on the Rights of Indigenous Peoples (Declaration), the ACHP fully supports federal agency efforts to prioritize repatriation of human remains and funerary objects.<sup>71</sup> The Declaration expressly recognizes Indigenous Peoples' rights to practice, access, and revitalize culture including the right to the repatriation of their human remains.<sup>72</sup> The Declaration also states that Indigenous Peoples have the right to revitalize their cultural traditions and customs including the right to maintain, protect, and develop past, present, and future manifestations of their cultures, such as burial sites and ceremonies, among other aspects.<sup>73</sup>

While the Declaration is not legally binding, federal agencies can look to it for policy guidance in carrying out their Section 106 responsibilities. Because the Declaration was developed with input from Indigenous Peoples around the world, it stands as a guide to what is important to Indigenous Peoples,

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<sup>67</sup> A TCP is a building, structure, object, site, or district that may be eligible for inclusion in the National Register for its significance to a living community because of its association with cultural beliefs, customs, or practices that are rooted in the community's history and that are important in maintaining the community's cultural identity, National Register Bulletin, Volume 38 Draft Update (NPS, 2022). TCPs differ from a "sacred site" and a "historic property of religious and cultural significance" in several ways. Most notably, a TCP is a type of significance that any individual or group can ascribe to a location whereas the ability to designate a location as a "sacred site" under E.O. 13007 or to ascribe "religious and cultural significance" per 36 CFR Part 800 are exclusive to Indian Tribes and NHOs. See the Sacred Sites MOU (2021); E.O. 13007, and Sacred Sites and Section 106 for more information.

<sup>68</sup> The Declaration, like other human rights instruments, recognizes rights to religion and culture. Article 25 states more specifically: "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands."

<sup>69</sup> See [Early Coordination with Indian Tribes During Pre-Application Processes](#) (ACHP, 2018) and [Secretarial Order 3403: Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters](#).

<sup>70</sup> "Articles 11, 12, 13, 14, 15, and 31 recognize that Indigenous Peoples have a right to their distinctive cultures generally, as well as to their languages, religions, traditional knowledge, and repatriation of human remains and ceremonial objects. To the extent that U.S. policy historically sought to eradicate Indigenous Peoples' cultures, and currently offers few remedial or ongoing protections in the realm of cultural rights, the Declaration can provide important standards," [Project to Implement the United Nations Declaration on the Rights of Indigenous Peoples Tribal Implementation Toolkit](#) (Native American Rights Fund, Colorado Law, and UCLA Law School, 2021); see discussion in Principles 8 and 9 of this document for additional information.

<sup>71</sup> See Declaration articles 8, 11, 12, 15, 18, 25, and 31; see [Section 106 and the U.N. Declaration on the Rights of Indigenous Peoples: General Information and Guidance](#) (ACHP, 2018).

<sup>72</sup> See Article 12 of the Declaration.

<sup>73</sup> See Article 11 of the Declaration.

above and beyond basic human rights. In its 2008 policy statement on its relationship with NHOs,<sup>74</sup> the ACHP clarified that the Section 106 implementing regulations “set the minimum standards for federal agency interactions with its preservation partners.” This clarification applies to all preservation partners. The ACHP suggests that federal agencies and state and local governments consider the Declaration a reference to help inform the outreach, consultation, and consideration of the associated communities’ input, which in turn may work to increase the appropriate protection of, access to, and/or repatriation of burial sites, human remains, or funerary objects.<sup>75</sup>

**Principle 11: Human remains and funerary objects may be relocated or removed from a location by or at the request of descendant communities for a variety of reasons. The continued presence of human remains or funerary objects may not be essential to the ongoing significance and integrity of a site or its relevance to a broad theme in history. The historic significance and integrity of such sites are best determined in consultation with lineal descendants and/or associated communities.**

Associated communities, including Indian Tribes and NHOs, are increasingly requesting that federal agencies and state and local governments relocate or return human remains or funerary objects for a variety of reasons, including from Federal Indian Boarding Schools, as a part of an ongoing cultural practice, or to reclaim control over their ancestors and funerary objects.

For many people the locations where their ancestors reside are frequently considered to be sacred sites, Traditional Cultural Places, or historic properties. Depending on the role that the deceased individual(s) and/or funerary object(s) have in their culture, the burial site may continue to be significant and may retain integrity even after human remains or funerary objects have been removed.<sup>76</sup> When evaluating burial sites during the course of a Section 106 review, the federal agency should consult with, recognize, and provide deference to the knowledge and expertise of the associated community in its decision making.

**Principle 12: Climate change can impact the burial sites, sacred sites, cemeteries, and associated cultural practices significant to Indian Tribes, NHOs, and other groups of people. Climate plans should be developed in consultation and should include mechanisms to support the advanced identification and protection or treatment of these locations.**

Climate change poses a unique risk to all burial sites, human remains, and funerary objects including those that are sacred sites, may be located in a cemetery, are connected to ongoing cultural practices, or are part of a larger landscape. These impacts may result from sea level rise, extended drought, increased severity of invasive species, severe storm events, or extreme wildfire, among other examples, all of which have the potential to affect or destroy these sites, remains, and objects.<sup>77</sup>

When a federal agency develops climate change planning documents it should seek to consult with stakeholders to proactively identify locations of concern and review available mechanisms to preserve or protect burial sites, human remains, and funerary objects, recognizing that natural deterioration may be a

<sup>74</sup> [ACHP Policy Statement on the ACHP’s Interaction with Native Hawaiian Organizations](#) (ACHP, 2008).

<sup>75</sup> [ACHP Plan to Support the United Nations Declaration on the Rights of Indigenous Peoples](#) (ACHP, 2013); “The Declaration, which is grounded in widespread consensus and fundamental human rights values, should be a benchmark for all relevant decision-making by the federal executive, Congress, and the judiciary, as well as by the states of the United States,” S. James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), [The Situation of Indigenous Peoples in the United States of America](#), U.N. Doc. A/HRC/21/47/Add.1 (Aug. 30, 2012).

<sup>76</sup> [“Guidelines for Evaluating and Registering Cemeteries and Burial Places”](#) National Register Bulletin, Volume 41 (NPS, DOI, 1992); “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard,” Article 25 of the Declaration.

<sup>77</sup> See [“Cultural Resources Climate Change Strategy”](#) (NPS, DOI, n.d.), and [“Climate Impacts to Indian Tribe and Native Hawaiian Sacred Sites and Historic Properties: Plan for ACHP Actions”](#) (ACHP, 2022).

contributing quality of a property of religious and cultural significance to an Indian Tribe or NHO.<sup>78</sup> Having knowledge pertaining to the location or importance of significant places, preferred treatment options, and/or transparent consultation and coordination protocols can help ensure the preservation of these places during emergencies or as part of ongoing federal historic property management responsibilities. Federal agencies should also review climate-related planning and adaptation grant opportunities to ensure that cultural resources and historic properties (including burial sites, human remains, and funerary objects) are included as eligible categories.<sup>79</sup>

Many Tribal, state, and local governments are also in the position to proactively identify and protect these sites, remains, or objects. Consistent with their relevant mission and authorities, these governments should seek to incorporate consideration of burial sites, human remains, and funerary objects into their climate change planning and response actions to the maximum extent practicable.

**Principle 13: Respectful consideration of burial sites, human remains, and funerary objects may require additional assistance from consulting parties to properly identify, document, evaluate for National Register eligibility, and/or conduct treatment actions. If a federal agency requests or relies on an Indian Tribe, NHO, or other party to carry out activities that are the federal agency's responsibility under the NHPA, the Indian Tribe, NHO, or other consulting party should be reimbursed or compensated.**

Understanding where burial sites, human remains, and funerary objects are located oftentimes requires the knowledge or expertise of associated communities to properly identify and evaluate these locations. The very basis of what constitutes a burial site or funerary object, their defining characteristics, boundaries, and proper protocols associated with interacting and recording them, is expertise frequently known only to associated communities. As such, consistent with Principle 3, federal agencies should conduct early and robust consultation that works to integrate the knowledge and understanding of those who attribute significance to the sites, remains, or objects into the agencies' decision making.

Consistent with ACHP guidance,<sup>80</sup> when the federal agency, or in some cases, the applicant, seeks the views and advice of any consulting party in fulfilling its legal obligation to consult with them, for instance in a Section 106 review, the agency or applicant is not required to pay that party for providing its views. However, both within and beyond the Section 106 context, where appropriate and consistent with applicable agency fiscal and acquisition authorities, federal agencies should consider compensating associated individuals or groups in a manner that allows them to fully participate and inform any identification, documentation, evaluation, or mitigation actions related to burial sites, human remains, or funerary objects. If a party is asked by a federal agency to do more than respond to the agency's findings and determinations, then it should be compensated for its efforts.

*June 30, 2023*

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<sup>78</sup> 36 CFR 800.5(a)(2)(vi).

<sup>79</sup> Tribal and NHO Climate Plan (ACHP, 2022, 3).

<sup>80</sup> See [Guidance on Assistance to Consulting Parties in the Section 106 Review Process.](#)