



American Cultural Resources Association
1744 Washington Ave Ext. Rensselaer, NY 12144
(518) 283-0534, (518) 283-6276 Fax
www.acra-crm.org

January 17, 2007

Archaeology Task Force
Advisory Council on Historic Preservation
1100 Pennsylvania Avenue NW, Suite 809
Washington D.C. 20004

Re: Comments Regarding The Advisory Council on Historic Preservation's Draft "Policy Statement Regarding Treatment of Burial Sites, Human Remains, and Funerary Objects" (Federal Register Vol. 71, No. 49, March 14, 2006)

Dear Archaeology Task Force:

The American Cultural Resources Association (ACRA) is pleased to have the ongoing opportunity of offer comments on the Council's Draft Policy on Burial Sites, Human Remains, and Funerary Objects as part of the Council's initiative on archaeology. ACRA appreciates the opportunity to work directly with the Council's Archaeology Task Force, and we look forward to our continued participation in this process. ACRA has provided comments on the Council's Policy during the early phases of this process. The current comments are a follow up to our earlier submittals.

Our greatest concern focuses on three critical themes: The need for consistent consultation with all parties, the need for the Council to provide guidance for conflicts with state laws, particularly in the case of cemeteries, and the absence of practical guidance or examples in the policy. Our current comments focus principally on how these issues are addressed in the revised policy.

As noted in our earlier comments, as practitioners of the Section 106 process we note that the cornerstone of 36CFR 800 is consultation with a wide range of parties. Such consultation is particularly important for projects involving human remains. We fully support the notion of broad consultation during the Section 106 process and we encourage the fair and uniform application of the principles of consultation without favoritism offered to any single group.

ACRA is pleased to see the shift in **Principle 1**. As noted in our earlier comments, we feel that all "descendant communities and other interested parties," must be consulted. The revised discussion of Principle 1 does not focus on any single group, this wording is helpful in making the policy more inclusive. However, given the very precise delineation of how consultation with Native Americans should proceed as defined in revised Principles 2 and 3, ACRA recommends that the Council offer stronger guidance to federal agencies for the purpose of identifying other descendant communities in Principle 1. Additionally, as practitioners of the Section 106 consultation process, ACRA encourages the Council to offer operational examples of the principles.

The newly defined **Principle 2** combines ideas expressed in several previously defined Principles. While ACRA agrees wholeheartedly that consultation is “the hallmark of the Section 106 process” we would seek to have other descendant communities better defined. The Principle now provides Federal agencies with very specific guidelines for government to government consultation, without offering any guidance on less well represented groups.

With regard to the newly defined **Principle 3**, ACRA feels that all descendant communities have special expertise that they can bring to consultation. Federal law already specifies relationships with Native American and Native Hawaiian groups, this Principles seems to reinforce existing statuses.

Principle 4 provides a good example of where state law may come in conflict with federal Policy and the Council should offer some specific examples of guidance. Our membership notes that agencies often interpret federal laws, including Section 106, differently, and that while the NRHP criteria of eligibility are uniform, their application varies by state. It is likely that agencies will interpret this Policy differently as well. Generally, ACRA members engaged in the Section 106 process are assisting clients who have no vested interest in disputes over human remains. As a consultant community charged with providing advice to clients, the consistent application of laws is essential. The current Policy does not provide this consistency, except to offer the advice of following the Section 106 process. As a general guideline, providing agencies with more concrete examples would help to foster consistency in the process.

The discussion of **Principle 5** implies that analysis of human remains is optional, and in general, the wording implies that analysis is a negative outcome. ACRA would prefer to see language that encourages the analysis of remains while noting that such analysis is negotiated on a case by case basis. While we do not advocate dictating particular forms of analysis, we would prefer to see the Council provide a range of analytic outcomes for consideration directly in the Policy. The absence of strong wording regarding analysis will likely result in agencies opting out of analysis even if no objections to the practice are raised.

While **Principle 6** notes that state and local laws must be followed, it provides for no guidance on how to balance laws that may be in conflict with the policy. As was noted in our previous comments, the *implementation* of Section 106 is often accomplished on the state and local level, this absence of guidance is troubling. Please see our previous comments regarding the need for clear guidance on this issue.

The Council cannot legislate state burial laws, and ACRA does not advocate this position. Rather, we would prefer to see the Council acknowledge, with examples, the potential conflicts between state laws and the Policy and we strongly encourage the Council to provide federal and state agencies with working parameters that will guide them through a decision making process. Simply noting that state or local laws would trump the Policy does not provide a local decision maker with the resources to consider more creative solutions to these difficult problems. In addition, ACRA encourages the Council to consider a provision in the Principles that would urge protection of historic cemeteries and burials even if they are not designated historic properties.

ACRA has no comments on **Principle 7**.

Principle 8 still seems to favor Native Americans/Native Hawaiians over other potential descendant communities. To ensure that human remains found in an archaeological context are not presumptively assumed to be Native American/Native Hawai’ian, we strongly suggest some wording—or perhaps another policy—that ensures consideration is given to other outcomes by examining the human remains themselves, and knowing of their context and age. We continue to suggest the following potential change in wording:

In cases where the disposition of human remains and funerary objects is not legally prescribed, Federal agencies should proceed following a hierarchy that acknowledges the rights of lineal descendants, and then other descendant communities including Indian tribes, Native Hawai’ian Organizations, and other organizations or ethic groups, as suggested by the age, context, and physical attributes of the human remains.

Overall, the Principles as outlined make an effective basis for the policy revision, and we believe that the future development of these principals will clarify the repatriation and consultation process to be conducted under Section 106.

Thank you again for allowing us to comment on this issue. We look forward to continuing to work with the Council.

Yours sincerely,

A handwritten signature in cursive script that reads "Karen S. Hartgen". The signature is written in dark ink and is positioned below the typed name.

Karen S. Hartgen
President