

## Laura Dean

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**From:** ArcheolAP.Project  
**Sent:** Tuesday, August 01, 2006 7:09 AM  
**To:** Laura Dean  
**Subject:** FW: Comments on Proposed Human Remains Policy

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**From:** Camille.Mittelholtz@dot.gov [mailto:Camille.Mittelholtz@dot.gov]  
**Sent:** Fri 7/28/2006 5:24 PM  
**To:** ArcheolAP.Project  
**Subject:** Comments on Proposed Human Remains Policy

Attached are the Department of Transportation's comments. Thank you for the opportunity to comment.  
<<human remains FR notice comment.doc>>

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Department of Transportation Comments on Draft Policy Statement Regarding  
Treatment of Human Remains and Grave Goods

This represents comments from the U.S. Department of Transportation on the draft ACHP policy regarding the treatment of human remains and grave goods, 71 FR 13066.

1. Additional explanation or clarification is requested for Section II of the supplementary information on the policy, the fourth goal of the policy statement: to “guide Federal agencies as they proceed with undertakings that have the potential to encounter and/or disturb burial sites, human remains, and funerary objects.” It is important for the ACHP to clearly explain the purpose and goals of the policy to ensure the value of its full implementation. While it is understood that the policy applies to the “tasks in the context of Section 106 review,” it would be useful to clarify that the policy is equally applied to addressing questions of whether burial sites are present within an undertaking’s area of potential effect, in the manner in which a burial site is assessed for its National Register of Historic Places eligibility, and when a Federal agency is considering whether or not a burial site must be disturbed.

In particular, the ACHP should encourage that this policy be considered in deciding whether or not a burial site must be disturbed. A decision to avoid disturbance would likely preclude the necessity for an agency to (a.) disturb a burial site while identifying historic properties or in order to evaluate a resource’s National Register eligibility, or (b.) resolve an adverse effect to a burial site by exhumation and reburial. Equally, a decision to proceed with identifying historic properties in a manner that would confirm or disconfirm the presence of a burial site could disturb a burial site. Federal agencies need the flexibility to decide on a case-by-case basis whether or not actions they take in the context of Section 106 review may or may not disturb a burial site. This draft guidance is equally valuable to consider in making that decision.

It follows then that additional clarification may be appropriate where, under the scope and applicability of this policy under Section II, it is the ACHP policy to request that Federal agencies avoid burial sites, human remains, and funerary objects altogether. The ACHP should clarify that where burial sites, human remains, or funerary objects may be encountered, but are not known to be present, that it is the ACHP’s policy that a Federal agency has the flexibility either to enact or avoid enacting steps to inventory or evaluate a portion of the APE for the presence of historic properties, even if that decision may result in the disturbance of a burial site, human remains, or funerary objects. It may be useful to provide clarification of “avoidance” both in the context of the supplementary information while referencing Principles 1 and 6 as well as in the separate discussions of those two Principles.

2. Principle 6 would provide that “The Federal agency official is responsible for making decisions regarding avoidance or treatment of burial sites, human remains and funerary objects based on consultation and appropriate documentation. In reaching a decision, the Federal agency official must comply with applicable Federal, tribal State or local law.” The discussion notes that although consultation is meaningful to the success of the Section 106 process, agreements must not contravene other applicable laws. DOT recommends that this discussion also note that efforts should be made to coordinate consultation and compliance with requirements of the other laws. This is consistent with provisions of 36 CFR 800.2(a)(4), 800.2(d)(3) and 800.8, and efforts under SAFETEA-LU, Vision-100 and Executive Order 13274 to streamline transportation decision making while ensuring stewardship of resources.
3. Additional discussion for Principle 6 could also clarify and improve an understanding of the relationship between the Federal agency decision regarding avoidance or treatment of burial sites, human remains and funerary objects and “appropriate documentation” to consider. The principle underscores the role of consultation as well. There is relationship between documentation, and more importantly the actions that lead to documentation and the policy directive that early and meaningful consultation occur before a decision regarding avoidance or treatment. Documentation may result in the identification and invitation to consult for parties not previously involved up to that point in the Section 106 review. In addition, deciding the level of effort for documentation, while tied to National Register eligibility, also must consider issues relevant to the identification of consulting parties because consultation with those parties will be an important consideration in Federal agency decision making. The ACHP policy should clarify that documentation should include as appropriate such basic information as the number of burial sites, funerary objects (or whether present or not), and human remains identified, whether presently disturbed, partially disturbed, or undisturbed, and possibly the age and sex of human remains.
4. Principle 7 would provide that “Federal agencies shall, after meaningful consultation, develop plans for the treatment of human remains and funerary objects that may be discovered. We recommend that the ACHP further clarify what Principle 7 means regarding the phrase “may be discovered.” The phrase “may be discovered” is more inclusive and applies to a broader range of activities and actions than “discoveries.” The discussion of this principle appears to narrow the application of planning to “ACHP’s Post-review discovery provision” unnecessarily. Yes, it is clearly appropriate to urge Federal agencies to plan for “inadvertent discoveries” but shouldn’t the ACHP policy also urge agencies to develop plans that provide guidance during the Section 106 review, when resources that might have burials, human remains, or funerary objects may be involved? Good planning need not be only limited to what happens after the Section 106 review has been completed. We note that principle 3 would encourage early and meaningful consultation, but an explicit encouragement of early planning would also be useful.

We recommend that additional clarification on this policy state the potential benefits to a Federal agency for having developed such plans. The Principle 7 discussion cites a provision of NAGPRA where the presence of a plan allows actions to occur without first instituting a 30 day waiting period. The ACHP should clarify that by having such plans in place, Federal agencies may accrue a variety of benefits including (1) improved relationships with descendant consulting parties, (2) greater predictability and understanding of the Federal agency decision making process and its procedures, and (3) more timely responses that should reduce the threats to burial sites, human remains, and funerary objects from damage from vandalism and natural erosion processes.

We offer these comments for consideration in finalizing the draft ACHP policy on the treatment of burial sites, human remains, and funerary objects. If you have questions on these comments, please contact Owen Lindauer at (202) 366-2655, email [Owen.Lindauer@fhwa.dot.gov](mailto:Owen.Lindauer@fhwa.dot.gov) or Camille Mittelholtz at (202) 366-4861, email [Camille.Mittelholtz@dot.gov](mailto:Camille.Mittelholtz@dot.gov)