



LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS TRIBAL HISTORIC PRESERVATION

Division of Historic Preservation

July 25, 2006

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

Dear Archeology Task Force Members:

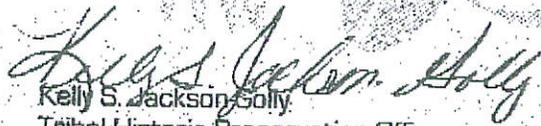
I am writing in regards to the Federal Register notice dated March 14, 2006 and the subsequent consultation meeting held in Minneapolis, Minnesota on June 27, 2006. On behalf of the Lac du Flambeau Band of Lake Superior Chippewa Indians, I submit these additional comments regarding the Policy Statement Regarding Treatment of Burial Sites, Human Remains and Funerary Objects.

Consultation held on June 27, 2006 revealed a need to develop a separate policy that deals specifically with Native American human remains. This policy should include recognition of the unique government to government relationship between federal agencies and Federally Recognized Indian Tribes. The policy as written is an attempt to address "all" human remains and does not include the distinct differences in the current treatment of Native American Human Remains, Burial Sites and Funerary Objects. I have worked with the task force on developing this policy and believe it would be a simple process to redraft a policy that exclusively addresses Native American concerns.

If ACHP is the ethical voice of the regulations, then we look forward to a policy that takes a stand for the humane treatment of our dead and their belongings. This policy as written still contains language that provides for inhumane treatment, scientific study beyond initial identification and lacks in recognizing the unique government to government relationships established in other laws.

We appreciate the opportunity to work with ACHP and the task force and submit these comments for consideration.

Sincerely,


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It is the mission of the Lac du Flambeau Cultural Committee and the Lac du Flambeau Tribal Historic Preservation Office to promote, educate, enhance, identify, encourage, and preserve cultural and traditional activities, materials, and areas for the benefit of future generations.

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

RE: *Comments on Proposed "Policy Statement Regarding Treatment of Human Remains and Grave Goods"*

Dear Archeology Task Force Members:

We are writing in response to the Federal Register Notice dated March 14, 2006, to provide comments on the Advisory Council on Historic Preservation's draft "Policy Statement Regarding Treatment of Burial Sites, Human Remains and Funerary Objects." These comments are respectfully submitted on behalf of our client, the Lac du Flambeau Band of Lake Superior Chippewa Indians.

At the outset, we note that the need for this policy statement has subsided to some degree with the enactment of the Native American Graves Protection and Repatriation Act,¹ ("NAGPRA"), and existence of other federal laws, such as the National Historic Preservation Act,² ("NHPA"). However, we support the notion of guiding principles for the treatment of human remains when other laws do not apply.

The policy attempts to balance the wishes of the scientific community with the needs and legally-protected interests of Native American communities. A policy which addresses the treatment and disposition of Indian remains should be governed by Native American human rights principles. "Human rights and property rights are inextricably linked... the ability to hold property and wield power is essential to the exercise of other basic human rights."³ No cultural practice may be more fundamental to group identity than treatment of the dead because burial practices act as a display of religious belief, respect for human life, and mother earth. "Sanctity of the grave is a universal concept and a matter of human dignity. More than any other group, Native

¹ 25 U.S.C. § 3001-3013

² 16 U.S.C. § 470

³ Angela R. Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act*, 34 Colum. Human Rights L. Rev. 49, 50 (2002).

⁴ *Id.* at 58.

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Americans define themselves through their history and observance of cultural practices. There is a common belief among many Indians that disinterment stops the spiritual journey of the dead causing those spirits to wander and have ill affects on the living, until such time as they are reburied and can resume their spiritual journey.⁵ Native Americans have endured a lengthy and difficult struggle to have their dead treated with the same respect as members of the dominant culture with European heritage.⁶ Native American activists have put forth nearly a century of effort in a civil rights movement on behalf of deceased tribal members, which has culminated in the passage of NAGPRA.⁷ With NAGPRA the status of dead Indians has been elevated from federally owned "archeological resources" to human beings⁸ entitled to have their lives honored through respectful treatment and proper burials. Group ownership and control of cultural property by tribes is a matter of human rights and is in conformance with the federal policy of self-determination. It is essential that these gains are recognized and carried forward into the ACHP policy and any other matter addressing deceased Native Americans. This policy must guarantee respectful treatment of deceased Indians pursuant to the beliefs and customs of the descendant tribes or family members. Alleged scientific necessity should not be balanced against, considered equal to, or superior to, the interests of Native American communities. In addition to our general position, please find comments on the principles, or the lack thereof, below.

Principle 1: Burial sites, human remains and funerary objects should not be knowingly disturbed unless absolutely necessary, and only after the federal agency has fully considered avoidance and/or preservation in place.

Principle 1 is an obvious and important principle, but is ineffectually worded. Particularly because these principles do not hold the force of law and there is past and present desecration of Indian burials, this policy must be worded as strongly as possible. It is unacceptable that the federal government *should* not

⁵ Steve Russell, *Sacred Ground: Unmarked Graves Protection in Texas Law*, 4 Tex F. on C.L. & C.R. 3 (1998).

⁶ Angela R. Riley, *supra*, at 53. Author explains that first, the mistreatment of Indian dead in the United States was a sick curiosity by Europeans (and/or and European descendents) who viewed Indian "trinkets" and bodies as keepsakes or mementos of a vanishing people and way of life. Then the mistreatment extended beyond individual curiosity seekers and profiteers to become officially sanctioned by the U.S. government when the U.S. Army was ordered to recover Indian skulls and body parts for scientific study and comparison to White crania. The federal policy of mistreatment became law when the Antiquities Act of 1906 was passed converting Indian remains on federal lands federal property, allowing them to be displayed in public museums.

⁷ Steve Russell, *supra*, at 4.

⁸ *Id.* at 7.

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knowingly disturb burial sites and human remains, rather they *shall not* knowingly do so. There is no definition of what constitutes an absolute necessity. An implication of this principle is that it is "ok" to disturb some human remains. The remains prone to disturbance are those in unmarked graves, which are most likely to be Native American due to cultural custom, forced migration, or confinement to reservations. Therefore, this statement must go farther than suggesting consideration of preservation or avoidance. It would be preferable if the language stated that federal agencies *shall* engage in avoidance or preservation in place as primary goals before resorting to alternatives, which may be undertaken only after meaningful consultation.

Principle 2: Participants in the Section 106 process shall treat all burial sites, human remains and funerary objects with dignity and respect, which is determined through meaningful consultation.

Principle 2 is a necessary statement. As alluded to in the discussion, respect must be culturally defined. Additionally, a description of meaningful consultation would be the best practice to ensure federal agencies achieve that goal. Meaningful consultation may be defined as the following:

- 1) Agency official review of all known information within an area of potential effect;
- 2) Identification of Native American communities or other interest groups, whether or not they are physically located in the area of potential effect;
- 3) Disclosure of all information to interested groups upon identification of the groups and prior to initiating interaction, in the form of a written compilation consisting of:
 - a) The project plan,
 - b) Scope of the project,
 - c) The area of potential effect, including a physical address, legal description and maps,
 - d) The proposed alternatives,
 - e) The cost analysis for the project and each alternative, and
 - f) Any other relevant information;
- 4) Identification of Consulting Partners from potential interest groups;

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- 5) Direct interaction with well-informed participants of Consulting Partners including correspondence, *and* face-to-face meetings, *and* telephone conferences *and* interviews with:
 - a) THPO's or tribal leaders,
 - b) Elders,
 - c) Historians,
 - d) Spiritual or cultural leaders, or
 - e) Any other persons with significant relevant knowledge;
- 6) Multiple interactions at various venues, including, but not limited to, near the tribe's or interest group's location, near the area of potential effect, near the local and/or regional Federal agency office, or at the Federal agency office in Washington D.C.;
- 7) Preparation for, and conduct at, face-to-face meetings shall include, but not be limited to:
 - a) Gathering and dissemination of contact information of participants on behalf of the federal agency and all Consulting Partners,
 - b) Determination of location, date, time, and facilitator, providing a written notice of the same to all participants, followed by telephone or e-mail confirmation,
 - c) Identification of topics, agenda preparation and timely transmission of written agenda to all participants,
 - d) A pre-assembly "meet and greet" period or event,
 - e) A welcome invocation or spiritual ceremony, as appropriate,
 - f) Discussion of topics and communication of ideas, including, but not limited to, desires or concerns with regard to the project, options or alternatives, mitigation of impacts, mitigation funding or other relevant matters,
 - g) Plan for the next meeting, including date and time, rotation of facilitators and locations, identification of goals, preparation and distribution of agenda; and
- 8) Documentation to the project files of all consultation activities undertaken.

Principle 3: Federal agencies are responsible for early and meaningful consultation throughout the Section 106 process.

Principle 3 is a welcome statement. As previously noted, a description of meaningful consultation is fundamental to achievement of that goal.

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Principle 4: The policy recognizes that Native Americans are descendants of aboriginal occupants of this country. Federal agencies shall consult with Indian tribes and Native Hawaiian organizations that attach religious and cultural significance to burial sites, human remains, and associated funerary objects, and be cognizant of their expertise in, and religious and cultural connection to, them. Federally recognized tribes are sovereign nations and Federal agencies shall conduct consultation with Indian tribes on a government-to-government basis, as required by law.

Principle 4 is absolutely crucial. First, the declarations of this principle reflect the mandates of federal law, which too often are overlooked or viewed as discretionary. Second, it acknowledges the federal policy of self-determination by recognizing that tribes' or Native Hawaiian organizations' history, traditions, customs and beliefs should be determinative of whether burial sites, human remains or funerary objects are of religious or cultural significance. Finally, this statement places the appropriate emphasis on the fact that Indian tribes are sovereign nations, which by law are entitled to more significant communication and input in this process, specifically through the form of government-to-government consultation. Federally-recognized Indian tribes' beliefs and ideas must be respected and given deference over other groups, including scientists and archeologists.

Principle 5: When human remains or funerary objects must be disinterred, they should be removed carefully, respectfully and in a manner developed in consultation.

Principle 5 appears neutral, but acts to elevate scientific interests to a status of equal or greater importance than the human rights and property rights of Indian tribes. The discussion notes that careful disinterment means archeologists should remove the remains and scientifically document the evidence. Although there is acknowledgement that recordation may be abhorrent to some cultures, it still gives archeologists the green light by stating that "alterations to standard procedure" should be negotiated on a case-by-case basis. This is not acceptable. The presumption encompassed in this principle is that grave digging and desecration of human remains is the norm, when the opposite, sanctity of the grave, is true. All humans are entitled to a decent burial and, for many cultures, that includes certain ceremonies or handling of the dead. The standard approach should be to leave the remains where and as they are, with recordation allowed only on a negotiated case-by-case basis. Unless the remains are unclaimed, cultural and religious beliefs should be the guiding principles during disinterment. Finally, negotiation on a case-by-case basis to have remains spared

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from recordation procedures is a step backward for Indian tribes who have a distinct legal relationship with the federal government. Indian tribes are entitled to consultation on a government-to-government basis, which should mean their beliefs and desires are placed before other interests.

Principle 6: 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.

Principle 6 acknowledges that federal officials must comply with applicable law, but we would like to see the importance of legal compliance stressed and the inclusion of language requiring "meaningful" consultation. Compliance with the NHPA and the NAGPRA are mandatory, but sometimes agency officials unfamiliar with the law treat the legal requirements as optional. The issue could be addressed by adding a statement that federal agency failure to comply with applicable laws can result in Advisory Council participation and oversight of cases and federal agency policies and procedures or legal challenges. Consultation under Section 106 requires consideration of alternate views and, if feasible, seeking an agreement. If the goal of the policy is protection, then it would be more effective if meaningful consultation and agreements with consulting partners were obligatory rather than discretionary. As suggested throughout our comments, a listing of the conduct constituting meaningful consultation would provide clarity. The discussion section addresses identification of historic qualities through traditional invasive archeological methods. The text should designate non-invasive techniques including consultation with tribal elders, ground penetrating radar, magnetometry, resistivity, and conductivity, and advocate their uses first, while providing for traditional archeological methods only when necessary to make further determinations. If protection and appropriate treatment is the objective, it is better to err on the side of caution.

Principle 7: Federal agencies shall, after meaningful consultation, develop plans for the treatment of human remains and funerary objects that may be discovered.

Principle 7 strikes the correct balance between federal agency authority and the need to engage in consultation to determine an appropriate outcome.

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Principle 8: 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, Indian tribes, Native Hawaiian Organizations and other descendent communities.

Principle 8 concedes that federal agency officials should acknowledge descendants' rights, but does not require acknowledgement. If there are identifiable biological or cultural ties, the descendants' views should be recognized.

Additional Needed Principles

There is the glaring absence of some very important concepts: mitigation, financial responsibility and confidentiality. First, the policy fails to address the need for mitigation. If a disturbance must occur on a historic property mitigation is required under the NHPA, but it should also be stressed here. Instead there is discussion of data recovery, which is an adverse affect. The policy should account for the fact that affluence plays a role in the treatment of human remains, burials and funerary objects. Secondly, money affects consultation and mitigation. Most Indian tribes are under funded and must choose between providing basic necessities to their membership and trying to preserve their culture and identity. The policy should strongly recommend setting aside funds in each project budget for face-to-face meetings to ensure meaningful consultation. This simple approach could make all the difference in protection and preservation efforts. Additionally, the policy should recommend project budgets designate a funding for mitigation efforts. Too often, tribes are the sole bearers of the costs of mitigation or repatriation, or worse, they are unable to do so because of financial constraints.

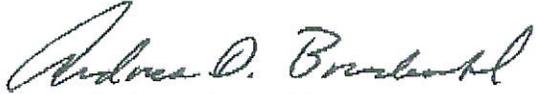
Finally, the policy should include a nondisclosure provision to protect remains and to create a better relationship with tribal consulting partners. Preferably, a nondisclosure provision would state that the federal agency is authorized to withhold information regarding the nature and location of any human remains, burials, or funerary objects if release of such information would create a risk of harm or destruction and disclosure shall only be made to facilitate the project and for protection of the resources when disclosure does not create undue risk of harm.

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Thank you for the opportunity to comment and for your consideration of these remarks. Please do not hesitate to contact us for further discussion if we may be of assistance.

Sincerely,

BROWN & LaCOUNTE, LLP


Andrea D. Brendemuehl

cc: Victoria Doud, President
Tribal Council
Kelly Jackson-Golly, Historic Preservation