



American Cultural Resources Association

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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 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 ongoing opportunity to work directly with the Council's Archaeology Task Force, and we look forward to our continued participation in this process. ACRA has previously 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 and they are drawn from a broad spectrum of the ACRA membership. In addition, ACRA members attended the Council's Forum on the Policy at the SAA meetings in San Juan and some comments reply to the Council's responses offered in the session.

Our membership has a wide range of experience in the application of the Section 106 consultation process as it relates to human burials. As practitioners of the 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.

As noted in our original comments, no area of the Council's responsibilities is more complex than the issue of human remains and associated grave goods. The subject arouses strong emotions and has the potential to create polarized positions of the type that are only too familiar today in our wider culture. The chief dichotomy is often expressed as that between a secularist "scientific" worldview, and a religious or "spiritual" one. The former view, at its most extreme, sees human remains as essentially another type of archaeological resource to be studied in whatever way seems appropriate to extract from them information about the human past. The latter view, at its most extreme, sees human remains as inviolable entities falling completely outside other categories of material from the past, and therefore not to be subjected to any form of human disturbance or invasive investigation.

As with all extreme positions, we believe that these views are held by only a small number of those with an interest in this matter. There is a large and, we believe, a growing middle ground on which discussion and agreement is possible. This centrist position must take into account all values that people attach to the treatment of the dead. These values include science, politics, and emotion, and they are applicable to all members of society regardless of race or affiliation.

The situation is made more difficult by the fact that, until the relatively recent past, variations of the scientific worldview have been imposed by the dominant culture on groups who did not share it. These groups, particularly Native Americans and people of African descent, often held more closely to the second viewpoint, but were unable to have their voices heard. Disrespectful and cavalier treatment of human remains has undoubtedly occurred against the wishes of those with strong ties to those remains. It is not hard to understand that there are issues of power and racism embedded deep within this issue.

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The reflexive concern in the archaeological community has been that its reasonable and legitimate interests in furthering understanding of the human story, through the scientific examination of human remains, will be overlooked in an over-zealous interest in following the wishes of groups having, or claiming affinity with, the remains. We say this not because that has necessarily been the general experience in reality, but rather to make explicit some of the feelings that remain associated with this topic.

With regard to the specifics of the draft Policy, there is a general consensus in the ACRA community that the Policy as written is helpful and necessary. We feel that a few key issues require clarification. ACRA offers two general comments on the draft Policy, followed by specific discussions of the Principles.

While the Council members present at the SAA Forum in San Juan stressed that the Policy was not intended to favor Native American burials over “descendant communities and other interested parties,” the actual wording of the Policy emphasizes Native American remains repeatedly. Virtually all ACRA members (and the entire audience at the SAA Forum) were confused by who the policy covered with regard to Non-Native American organizations. ACRA would prefer to see better definitions offered of descendant communities and, more specifically, ACRA recommends that the Council offer stronger guidance to federal agencies for the purpose of identifying these communities. Second, as practitioners of the Section 106 consultation process, ACRA encourages the Council to offer operational examples of the principles. Examples of situations where more specific wording would improve the interpretation of the Policy are offered below.

The four goals of the Policy are delineated in Section II. ACRA agrees that leadership is a key issue in this arena, since many agencies are currently confused regarding the disposition and treatment of human remains and their associated grave goods. As a document intended to offer guidance on the Section 106 process, the Policy is intended to help federal agencies. In practice, however, the *implementation* of Section 106 is often accomplished on the state and local level. While the Policy is careful to note that “the Federal Agency must identify and, as applicable, follow [local or state] laws”, it does not provide the local decision maker with a framework for balancing the principles offered in the Policy against the often unclear language proffered in some state cemetery laws. This issue goes to the very definition of a cemetery versus that of a historic property. While the third general policy statement notes that “[The Policy] applies to the treatment of all burial sites, human remains, and funerary objects encountered during the Section 106 process,” this assertion is not entirely correct. The Policy goes on to note that a cemetery must qualify as a historic property to qualify for consideration during the Section 106 process. Most historic cemeteries encountered during the Section 106 process are specifically exempted from consideration as historic properties (First criteria consideration). Thus, historic cemeteries, while often locally or regionally important, are specifically not historic properties and would be exempted from consideration under the Policy.

This inherent conflict between the definition of historic properties and historic cemeteries is demonstrated in practice when a Section 106 undertaking identifies both historic and Native American cemeteries. While the Native American cemeteries are generally granted protection as eligible historic properties (usually under Criterion D) even if no descendant community (local or non-local) is present, the historic cemeteries, unless they qualify under an exemption, are not considered historic properties and are thus not protected during the process. This exemption results in a tension between local residents, agencies, descendant communities, and sometimes Native Americans. A state representative of the Department of Transportation, for example, is forced to say at a public meeting that he they cannot offer any protection to a local, family cemetery with 200 plus years of burials, while a single Native American burial must be avoided or fully removed. The notion that the federal government endorses this as respectful treatment of the historic burials does not sit well in many local communities.

It is important to note that Native American cemeteries are usually considered historic properties eligible under criterion D of the NRHP. Criterion D specifies that a property is eligible because “it has yielded, or may be likely to yield, information important to history or prehistory.” Thus, Native American cemeteries are eligible not because they are important to the Native American community, but rather, because they “may yield information.” The basis for the designation as a historic property has no emotional basis, rather, it is grounded in a scientific principle.

ACRA members have observed that in an effort to circumvent the conflict between the eligibility of Native American cemeteries and the non-eligibility of historic cemeteries, some SHPO's have begun to designate historic cemeteries as eligible properties under Criterion D due to their potential to yield information. From the scientific perspective, any cemetery could be said to have this potential, and thus, it is not difficult to make this argument on a local level. Other states have opted to apply the criteria considerations rigorously. The divergent interpretation of federal law results in significant confusion on the local level, since projects crossing state lines may have different interpretations of the same law. This mixed message with regard to the application of the law is precisely what the Council seeks to avoid. Clear guidance could help resolve these conflicts.

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.

Finally, several ACRA members have inquired regarding the likelihood of policy adoption. As a general inquiry, ACRA is curious as to how many agencies plan to adopt this policy, and how does the Council plan to encourage adoption of the policy?

Principle 1-Avoidance is defined here as "not physically disturbed." The interpretation of physically disturbed varies from state to state. In some instances, avoidance may be defined as paving over a burial site, while in other states, this practice would be considered by definition as disturbance. This 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.

Principle 2-Our comments focus only on the discussion. A definition of descendants, culturally affiliated groups, and descendant communities should be offered. Most readers of the draft policy did not understand who could be included in these groups, and in the case of non-Native American groups, ACRA members uniformly expressed the opinion that these communities were often not properly consulted, identified, or included in the process. Additional comments related to this Principle are offered in the discussion of Principle 8.

Principle 3-ACRA members are routine practitioners of the Section 106 process. As such, 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 offered for Principle 3 provides an example of the potential language bias of the Policy. The discussion provides numerous examples of how an agency should consult with Native Americans, but it offers minimal guidance regarding how to identify other "interested parties and descendant communities." It would be helpful for the Council to offer examples of these types of communities so that agencies not accustomed to this form of consultation have examples of the diversity of this pool of individuals and groups. Specifically, while Native Americans are identified directly, other groups claiming ethnic and/or genetic affiliation are not included on the list of potential consulting parties.

Principle 4-ACRA feels strongly that proper and meaningful consultation with Native Americans early in the Section 106 process is essential.

Principle 5-This Principle establishes that in some cases it may be necessary to disinter human remains. The discussion of this Principle begins with the premise that analysis of human remains is optional. 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. Paragraph 2 of the discussion notes that “standard procedures” for recording burials exist, but it does not delineate these procedures. 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.

Principle 6-The general themes of this Principle are discussed above.

Principle 7-No comment.

Principle 8-The discussion of Principle 8 would instruct Federal agencies to follow the NAGPRA hierarchy for new burial discoveries in cases where Federal, State, or Local laws do not apply. The hierarchy described in NAGPRA only includes tribes because the act applies only to Native American remains. Following the NAGPRA hierarchy for burial discoveries on lands not subject to the requirements of Federal, State or Local law is appropriate in cases where the remains are known to be Native American. However, there will be cases where the remains are known to be of another ancestry and it is inappropriate to give tribes priority in determining the disposition of these remains.

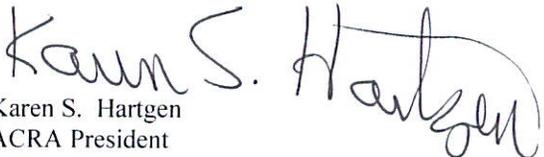
Two suggestions for rewording are offered. Either, the Council should develop another Principle that governs Non Native American and Non-Hawaiian remains, or Principle 8 could be reworded as follows: In cases where the disposition of human remains and funerary objects is not legally prescribed, Federal agencies should proceed according to the wishes of lineal descendants. If no lineal descendants can be identified and the remains are determined to be Native American, the agency should proceed following a hierarchy that acknowledges the rights of the Tribe or Native Hawaiian Organization with the closest cultural affiliation; and then the Tribe or Native Hawaiian Organization aboriginally occupying the land, or Tribe or Native Hawaiian Organization with the closest “cultural relationship” to the material. If the remains are determined to be other than Native American, the agency should acknowledge the rights of the appropriate descendant community.

Examples of appropriate descendant communities offered by ACRA members included: the local Hispanic community in Arizona, Los Descendientes del Presidio de Tucson, the Catholic Church, and the Mormon Community in Utah. Potentially, any denomination could be consulted in the case of a historic cemetery. Veterans groups may also represent a potential interested parties.

Overall, the Principles as outlined in the Federal Register 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.

Sincerely yours,


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