

# Native American Rights Fund

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June 27, 2006

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

Re: Comment on Draft "Policy Statement Regarding Treatment of Human Remains"

Dear Archeology Task Force Members:

I am writing in response to the Federal Register Notice dated March 14, 2006, to provide comments on the Advisory Council on Historic Preservation's "Policy Statement Regarding Treatment of Burial Sites, Human Remains and Funerary Objects." These comments are respectfully submitted on behalf of my client, the Working Group on Culturally Unidentified Native American Human Remains ("Working Group"). The Working Group is composed of prominent Native American leaders who are experienced in grave protection and repatriation issues under NAGPRA and similar state laws, and who are especially concerned about the proper classification, treatment and disposition of unknown Native American dead (i.e., that category of Native American dead whose next-of-kin or cultural affiliation are currently unknown).<sup>1</sup>

Because the fate of unknown Native American dead is likely to be impacted by the ACHP's policy statement, I previously submitted Working Group comments through a letter to the Archeological Task Force dated November 4, 2005. I would like to adopt and incorporate those comments as part of this letter. We also have additional comments on the current policy statement published in the above Federal Register notice which we would like to share with the Task Force.

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<sup>1</sup> Working Group members include: Wallace Coffey, Past President of the Comanche Nation; Suzan Shown Harjo, Cheyenne & Hodulgee Muscogee and President, The Morning Star Institute; G. Peter Jemison, Seneca Nation NAGPRA Representative and Member of the Advisory Council on Historic Preservation; Dr. James Riding In, Historian and Repatriation Consultant to the Pawnee Nation; and Mervin Wright, Jr, Environmental Director of the Pyramid Lake Paiute Tribe. Ho'oipokalaena 'auao, former Chairwoman, Native American Rights Fund; Kunani Nihipali, Hui Malama and NARF Board of Directors. Since Mr. Jemison is also a member of the ACHP, he will of course have his own independent comments on this matter in that capacity.

At the outset, we commend the Task Force for the current version of the policy statement, which we find to be much improved. However, we respectfully request that the ACHP withdraw this policy statement altogether. When the ACHP issued its existing policy statement, there was no federal repatriation law. Today, that is not the case. NAGPRA is the policy statement of the United States on matters of repatriation. Finalization of an ACHP policy statement is unnecessary, potentially harmful and needlessly encouraging of the animosities that Congress resolved for the most part in the balance it struck in crafting NAGPRA.

If the ACHP goes forward with this policy statement, our recommendations are the following. Our primary recommendation, beyond those which we previously submitted, is to broaden the consultation provisions of the policy to include traditional Native American religious leaders as mandated in the American Indian Religious Freedom Act, 25 USCA 1996, Pub. L. 95-341 ("AIRFA"). The ACHP policy should fully incorporate the consultation requirements of Section 2 of AIRFA which, among other things, directs:

the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures *in consultation with native traditional religious leaders to determine changes necessary to preserve Native American religious cultural rights and practices.* (emphasis added).

Given the subject matter of the proposed ACHP policy, it is clearly appropriate to extend consultation to "native traditional religious leaders" under AIRFA. However, the current commentary for Principles 3 and 4 of the policy expresses an intent to consult only with Indian tribes on a "government-to-government" basis. It is our view that traditional religious leaders within the meaning of AIRFA are included in the federal-tribal government-to-government relationship and covered by NAGPRA, but we also urge that the ACHP specifically avoid any confusion or misunderstanding on the matter. The ACHP should cite AIRFA and specify that consultation should be expressly extended to native traditional religious leaders, as well.

We are pleased that the policy correctly "is mindful of the values reflected in the guarantee of a burial for every person as expressed in the laws of every State." Federal Register Notice at 13070. Those universal values and legal guarantees are fully supported by the state-by-state legal authorities cited in the Working Group's letter of November 4, 2005, which we mentioned above and incorporate here. Those values and authorities in every jurisdiction which uniformly guarantee a burial to every person, however, warrant far more consideration in the policy. In particular, those statutory guarantees require that the policy also guarantee the eventual reinterment of every disinterred human remain. We recommend the inclusion in Principle 7 of the following phrase in order to bring the ACHP policy into line with that universal, mainstream body of law: "including a plan and timetable for the eventual reinterment of every human remain." We also point out that the states recognize relatives and even friends of the deceased as persons with standing regarding disposition of the deceased person. We urge the ACHP to

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persons with standing regarding disposition of the deceased person. We urge the ACHP to include in its policy the broadest recognition of the rights of the living persons who would speak for the deceased.

Finally, the Working Group recognizes the role of the ACHP as a watchdog with respect to the consultation standards of other federal entities and projects with a federal nexus. As such, we urge the ACHP to conduct the broadest consultation on this policy, including on the question of whether there should be a policy, in light of the law that is now in place in this area. We point out that the public meetings the ACHP has scheduled are public meetings and are not consultations. We urge the ACHP to set an example of the highest consultation standard and to duly notice and invite consultation with tribal representatives and with Native traditional religious leaders on this policy.

Thank you for our opportunity to provide Working Group comments on the policy proposed by the ACHP. Please do not hesitate to contact me or any member of the Working Group if we may be of further assistance in this important matter which affects the proper treatment and disposition of known and unknown Native American dead.

Sincerely,



Walter R. Echo-Hawk  
Attorney for the Working Group

cc: Members of the Working Group