SAA
SOCIETY FOR AMERICAN ARCHAEOLOGY

June 26, 2006

Mr. John Fowler
Executive Director
Advisory Council on Historic Preservation
1100 Pennsylvania Avenue #809
Washington, DC 20004

Re: Society for American Archaeology's (SAA) Comments on the Advisory Council on Historic Preservation's (ACHP) draft *Policy Statement Regarding Treatment of Burial Sites, Human Remains and Funerary Objects*

Dear Mr. Fowler:

On behalf of SAA, I would like to thank the ACHP for this opportunity to comment on the ACHP Task Force on Archaeology's draft (Federal Register, March 14, 2006) revision of the 1988 Human Remains Policy. As we noted in earlier communications with the Task Force, SAA agrees that the existing Policy needs to be updated, and is pleased to provide the attached comments.

SAA is an international organization that, since its founding in 1934, has been dedicated to research about and interpretation and protection of the archaeological heritage of the Americas. With more than 7,000 members, the Society represents professional archaeologists in colleges and universities, museums, government agencies, and the private sector. SAA has members in all 50 states as well as many other nations around the world.

The new Policy will have a far-reaching impact on archaeology within the Section 106 process. As such, it is crucial that it reflect the appropriate balance between the concerns of all stakeholders. SAA recognizes the Task Force's hard work on this issue, and very much appreciates the openness of the process and the diligence of the Task Force in seeking out the views of all interested communities.

Yours Truly,

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Comments of the
Society for American Archaeology Committee on Repatriation
Concerning the ACHP Draft Burial Policy

I. General Points

In developing a new Burial Policy, the Advisory Council has undertaken a difficult task with many complex and interrelated facets. Within the constrains of applicable law, the policy must—at once—recognize the legitimate concerns of Indian people and other descendant communities while accommodating broader public and important scientific interest in the past. Although many of our comments emphasize our particular concerns with the current draft's treatment of scientific interests, we want to be quite clear we seek not to diminish the consideration of traditional interests, but rather to contribute to achieving an appropriate balance.[1]

With this letter we provide extensive comments with the hope they will assist the task force in improving the policy. We first present our concerns in relatively general terms and then provide more detailed, section-by-section comments, and finally a set of suggested revisions to the wording of the principles.

A. *Balance.*

1. *The policy must reflect a balance of the broader public and scientific interests in the past with the more specific interests of Native American and other potentially descendent groups.* The draft policy appropriately includes extensive language about Indian sensitivities and values. However, the current draft contains only negligible reference to other values. What appears to be *the only* explicit reference to broader interests is in the explanatory notes: "to treat burial sites, human remains, and funerary objects in a respectful and sensitive manner while acknowledging the public interest in the past." Even here, the meaning of "public interest" is subject to broad interpretation.

2. *While being responsive to the concerns of Indian people, the ACHP policy must also comport with the NHPA's mandate to promote preservation of the Nation's irreplaceable cultural heritage.* The draft policy's failure to explicitly recognize broader public interests in preservation and knowledge-building is particularly notable since the preservation of knowledge for the public benefit is among the central purposes of the National Historic

[1] SAA led the scientific community in developing the compromise language represented in the Native American Graves Protection and Repatriation Act and helped form the coalition of scientific and Native American organizations that strongly supported NAGPRA's enactment. Since that time, we have consistently urged our members always to work toward its effective and timely implementation .

Preservation Act.[2] For example, NHPA 1(b)(4) states: "the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans" and (1)(b)(6) states "the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development."

3. *The policy must also take into account that it applies to unmarked burial sites other than those of American Indians, such as historical African-American, Civil War-era, and others, as well as burials representing crime scenes.*

B. *Conflation of Consultation and Decision-making.*

While this policy is intended to serve as a "guide for Federal agencies when making decisions about burial sites, human remains, and funerary objects" under the Section 106 process, this document seems to conflate "consultation" and "decision-making". The law and the regulation require agencies to consult with all tribes ascribing religious and cultural significance to a historic property that may be affected by a federal undertaking. Consultation is defined as the process of "seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them." But agency decision-making involves far more than just consultation. The draft policy professes to provide guidance for decision-making, but it ignores much of the range of competing interests and issues agency officials must consider in actually making decisions.

Goal 3 says this policy is not intended to recommend a specific outcome but "rather focuses thinking on what Section 106 participants need to consider in reaching decisions." However, essentially the only interests the draft policy explicitly recognizes (and thus implies should be considered) are the views of tribes and other descendant communities. Clearly, the views of these stakeholders must always be an important consideration, but this policy must consider other interests as well. The views of researchers and others with an interest in increasing and preserving knowledge of the past for public benefit are not sufficiently acknowledged nor accommodated.

The draft's wording of one of the principles illustrates the conflation of consultation with decision making. "The Federal agency official is responsible for making decisions ... based on consultation and appropriate documentation." But as a matter of public policy, decisions must be based on the official's careful weighing of many, sometimes conflicting, issues: the impacts on the human environment, costs, the public benefit, the agency's mission, and myriad other

[2] Notably, this mandate is also consistent with the Historical and Archaeological Data Preservation Act.

federal laws and regulations that require an agency to take, or to refrain from taking, certain actions. Decision-making is a process of balancing many factors. The brief, oblique statement about "public interest in the past" fails to recognize the enormous scientific importance of burial sites, human remains and funerary objects, whether pre-contact or post-contact, as they relate to increasing knowledge about the past. The policy should acknowledge the need for agencies to consider these important scientific values in their decision-making ***along with*** the importance of the views of other consulting parties.

C. ***Requirement for Basic Documentation. SAA believes it is essential that the policy mandate basic archaeological documentation of excavated human remains to professional archaeological standards.***

1. The present wording of Principle 5 not only allows for the possibility that decisions reached during consultation will result in no professional documentation (recordation in the language of the draft policy) of excavated human remains but seems to emphasize, and hence prejudice, an outcome toward one requiring no documentation. A failure to acquire basic archaeological documentation of human remains and funerary objects appears to fly in the face of the fundamental purposes of NHPA cited above. Such documentation is essential to preserve valuable information that is to be lost as a consequence of a Federal undertaking.

2. Second, basic archaeological documentation is essential to identify the interested parties to any NHPA consultation with respect to the remains.

   a) In the first instance, some graves may be crime scenes for which jurisdiction must legally be passed to the appropriate law enforcement authorities. This is not always self evident and could easily be missed if there is no effort to get basic archaeological documentation of the remains.

   b) If the graves are not Native American, the responsible agency officials will need to identify the appropriate groups to engage in consultation.

   c) Even if the graves are Native American, basic archaeological documentation of the graves is necessary to identify the cultural affiliation or potential cultural affiliations of the human remains, thereby greatly assisting the consultation process. Furthermore information on age and sex may be needed so the proper ceremonies can be performed if the remains are reinterred.

3. Third, NPS has taken the position in Congressional testimony that basic archaeological documentation is required for any project operating under an ARPA permit, which is required by NAGPRA for work on Federal and Indian

lands.[3] Indeed, the draft policy says "Although early and meaningful consultation is critical to the success of the Section 106 process, at no time may agreements reached through Section 106 consultation contravene applicable Federal, tribal, State, or local law." ARPA says one of the conditions of issuing an ARPA permit is that "the activity is undertaken for the purpose of furthering archaeological knowledge in the public interest." This condition cannot be met if basic professional archaeological documentation is not accomplished.

4. Finally, it is a basic tenet of archaeological ethics that archaeologists *must* document to professional archaeological standards those remains and objects they excavate.

5. However, SAA does agree that beyond obtaining necessary forensic information and basic archaeological documentation, the level of further scientific study or analysis (including any consumptive analysis) is an appropriate subject of consultation, once appropriate parties have been identified and especially depending on identification of a culturally affiliated tribe.

6. The language of the draft policy further muddies the issue of documentation through the argument it offers to justify not doing basic documentation, i.e., because it "may be so abhorrent to the descendants of the dead." However, the draft's treatment of the concept of "descendants" is deeply problematic, as is discussed below. The draft policy's treatment of concept of "descendant" is, in fact, so broad as to potentially deem all modern Indian people to be descendants of all deceased Native Americans dating earlier than first European contact (see Principle 4: "*The policy recognizes that Native Americans are descendants of aboriginal occupants of this country.*") In this case, then, the number of potential consulting parties is so large as to preclude the possibility in practice of even basic documentation (because some consulting parties will object).

D. ***Descendants and Cultural Affiliation. The draft policy relies heavily on NAGPRA but unnecessarily varies from it in several important ways. Most importantly it appears to designate all Indian people as descendants of specific prehistoric people.***

1. The discussion of principle 8 appears to define "descendants" as generally

[3] Referring to the relationship between NAGPRA Section 3 excavations and ARPA, the testimony says: "The use of contemporary, professional scientific archeological methods and techniques is required. Proper professional recording, examination, interpretation, and reporting of the results of the excavation or removal must be carried out by the responsible agency before any disposition of the remains occurs Statement of Katherine H. Stevenson, Associate Director, Cultural Resource Stewardship and Partnerships, National Park Service, Department of the Interior, Before the House Committee on Resources, Concerning H.R. 2893, June 10, 1998)."

having some biological or cultural relationship, while at the same time making specific reference to NAGPRA. NAGPRA discusses descendants only in terms of lineal descendants, which is to say named individuals whose specific descendants can be traced to the present. For consistency and clarity, the policy should use "descendant" only to mean lineal descendant as defined in NAGPRA.

2. This same discussion claims, incorrectly, to have adopted language from NAGPRA for a hierarchy of "ownership or control" of human remains or funerary objects (The draft policy states "In NAGPRA, the 'ownership or control' of human remains and associated funerary objects lie with the following in descending order:"). While the draft's text is superficially similar to NAGPRA's section 3 hierarchy, what is glossed in the draft policy as "Tribe aboriginally occupying the land" effectively broadens enormously NAGPRA's much more restrictive statement. In NAGPRA Section 3(a), relationship based on aboriginal lands *only* applies to aboriginal occupants who have been established by a final judgment of the Indian Claims Commission or the US Court of Claims. This is a critical omission as aboriginal lands can otherwise be so broad (as well as being a-historical) as to be impossible to implement. It has the additional defect of being relevant only to Native American graves, when the policy must address all classes of graves.

3. Furthermore, NAGPRA readily admits there are human remains whose ownership or control cannot be established, namely, "unclaimed" human remains under Section 3b and "culturally unidentifiable" human remains under Section 8c. However, the implication of the draft policy statement is that all human remains can be linked to one of the three categories of descendants or descendant communities under its hierarchy supposedly adopted from NAGPRA. This assumption is clearly unwarranted and needs to be reconsidered.

E. ***Not all relevant human remains are Native American. The policy's consideration must be broadened to adequately account for encountering human remains in Federal undertakings that are not those of Indian people, including those that are of forensic importance. This will require some substantial revision of the draft policy. (It should be recalled that the original identification of Kennewick Man was as an Anglo-American).***

1. The policy should indicate that broad consultation on treatment and disposition should follow scientific determination of the basic facts. If there is any chance the remains are relatively recent, then forensic considerations must, at least initially, take precedence. (Of course, we recognize the circumstances of some burials and the burial accompaniments will often make this determination easy.)

2. Throughout the draft, the reliance on NAGPRA as a model makes sense with respect to Native American graves but often makes less sense when applied to other sorts of graves.

3. The ACHP policy, which applies to modern, post-contact, and pre-contact burial sites of all types, needs to speak in more general terms than NAGPRA to the handling of burials, regardless of ethnicity, and to the ways human remains and funerary objects can be dealt with respectfully within the larger framework of all interests at stake and the ACHP's role in implementing the purposes of the NHPA.

F. ***The policy should encourage agencies to carefully consider the appropriateness of parties seeking to be involved in consultation.*** Broad consultation is a legal requirement and necessary to acquire sufficient knowledge to achieve an appropriate outcome. However, because consultation is used in decision-making it should be recognized that not all comments should be given equal weight. (For example, note the claim by the Asatru Folk Assembly for the remains of Kennewick Man.) One must have some principles to accord variable weight to opinions and to the appropriateness of including potential consulting parties. With respect to Native American graves, the logic of NAGPRA dictates the views of culturally affiliated tribes should be given more weight than those of others. This should be incorporated into the policy, with incorporation by reference of NAGPRA's specific language to ensure consistency. In addition, the appropriateness of archaeologists and physical anthropologists as consulting parties should be explicitly recognized.[4]

G. ***The draft policy states avoidance of graves is the preferred option for Federal undertakings. Although we understand the sentiment underlying this statement, it could be used to categorically preclude all federally funded investigations of archaeological sites that are not related to the mitigation of adverse impacts of construction projects, but whose primary purpose, instead, is to enrich our knowledge of the past, even if such investigations are deemed appropriate upon a full consultation with interested parties.***

II. Specific Comments

A. *Calls for Respectful Treatment of Human Remains.*

The repeated calls for respectful treatment of human remains are unnecessary. While archaeologists and physical anthropologists readily accept an ethical and moral obligation to treat human remains with dignity and respect, the draft

[4] "*Additional consulting parties*. Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties (36 CFR 800.2(c)(5)."

policy's acknowledgement of this requirement is appropriate. However, its repetition seems to imply professional archaeologists would not treat remains respectfully without this direction.

B. ***Eligibility***

The background section notes the NHPA amendments. However, the amendments only say that places of religious and cultural significance *may* be eligible for listing on the National Register. Graves and cemeteries are still largely excepted from being eligible. The policy needs explicitly to address these eligibility issues.

C. ***Preamble.***

1. The preamble needs to include the concepts of the value of scientific study and of agency decision-making as a process of balancing competing views and issues.

2. In the Preamble, references to "human rights" and the "guarantee of a burial for every person" appear to be an attempt to bias the outcome of decisions reached under the policy, when the intent of the policy should be to reach balanced decisions taking into account all of the relevant interests and concerns. We would recommend either deleting the 2nd and 4th sentences of the preamble or deleting the 3rd and 4th and adding a sentence after the 2nd that quotes directly from NHPA. The sentence would say: "It is also the case that 'the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans'."

D. ***Principle 1.***

1. Because the policy states avoidance of graves is the preferred option for Federal undertakings, it could be used to categorically preclude all federally funded or permitted investigations of archaeological sites whose primary purpose is to enrich our knowledge of the past. We suggest modifying the principle to restrict this directive to Section 106 undertakings associated with construction or other development or federal alienation of the land.

2. It is not clear what is to be avoided, whether the location of each specific burial or the site as a whole containing burials.

3. In the discussion of Principle 1 (pg 13067) at the end of the section there are two sentences reading "Alternatively, consultation may reveal that preservation in place is not the preferred outcome or treatment. Natural deterioration may be the acceptable or preferred treatment." We are concerned

about the potential impacts of these sentences in light of the stated policy of the NHPA to preserve irreplaceable cultural heritage.

E. ***Principle 2.***

End the principle after the word "respect." Consultation on what constitutes respect can be encouraged but need not be mandated.

F. ***Principle 5:***

In recognition of the breadth of things agency decision making must consider, we recommend changing this principle to acknowledge the need to carefully consider input from consulting parties while also acknowledging the importance of ensuring that any excavation and handling are in accordance with accepted professional archaeological practices that are consistent with NHPA's policies of protecting the cultural heritage and preserving knowledge.

G. ***Principle 6:***

1. In recognition of the need for balance in agency decision-making, we recommend changing this principle to acknowledge the diverse issues that must inform any decision about handling burials uncovered in the Section 106 process.

2. In the discussion of Principle 6, the last sentence of the second paragraph (page 13069) should be eliminated. This sentence reads, "While it is impossible to define a point applicable in all instances at which testing ends and archeological data recovery begins, a rule of thumb is that adequate testing has been done when a decision about the National Register eligibility can be made."

   a) First, this sentence isn't necessary in the discussion of treatment of burial sites.

   b) Second, stating there is only a need for enough testing to determine whether the site is eligible means one frequently does not have enough information to adequately determine the scope of excavation (including definition of site boundaries and estimated densities of features and artifacts) if that is the agreed mitigation. All too often a site is known to be eligible, but we do not have adequate information to estimate, for example, how many houses or graves are in the site. The agency has inadequate information to develop a realistic scope of work for a request for proposal, and potential contractors have inadequate information to understand the amount of work an excavation will require. Inadequate testing will also produce insufficient information to accurately inform descendent groups and other stakeholders of what might be encountered

during a data recovery, which can lead to unnecessary anguish and a loss of trust, among other avoidable results. In the Secretary of the Interior's Guidelines for Historic Preservation or another appropriate place, it needs to be stated that an agency should not only gather enough information to determine eligibility but it should also gather enough information to accurately estimate the scope of work should a mitigative excavation be required.

H. ***Principle 7.***

The discussion states "Adherence to Principle 7 causes new discoveries to be 'intentional excavations' under NAGPRA because a plan has already been developed, and can be immediately acted upon without the mandated 30 day cessation of work for 'inadvertent discoveries.'" We support the principle's recommendation that there be consultation and development of a plan prior to excavation and recognize this will often allow work to proceed as "intentional excavations." However, despite the best planning, there may be unanticipated discoveries of human remains, or discoveries of human remains whose special character indicates the 106 consultation process already effected was not adequate (for example, remains appear to be culturally affiliated to unanticipated and unconsulted parties).

Also, that discussion refers to cessation of the activity. Does this mean all excavation or only disturbance of specific burials? Perhaps this principle should acknowledge that even with advance planning for the prospect of uncovering human remains unanticipated circumstances may arise and need to be addressed.

I. ***Principle 8.***

Since this principle specifically references NAGPRA as a model, it should reflect the importance of cultural affiliation in that statute. At the same time, the wide range of burials that might be encountered (Indian, African American, Historic, etc.) indicates broader wording is appropriate, based on assessment of the closeness of relationship of descendant communities and of the other interests at stake. This would not interfere with NAGPRA's applicability to burials falling under its purview.

J. ***Principle 9***

We recommend adding a Principle acknowledging the role of the ACHP's burial policy in carrying out the mandates and goals of the National Historic Preservation Act and the Historic and Archaeological Data Preservation Act (as noted in 36 CFR 800). Implementation of the policy must be consistent with those mandates and goals, and Federal agencies should be reminded of their obligations to ensure NHPA principles govern agency actions and decision-

making under this policy.

K. ***Definitions***

NAGPRA is invoked repeatedly throughout the draft policy, although the actual wording of NAGPRA is misstated in places. In the interest of consistency and accuracy, we recommend simply incorporating by reference NAGPRA's definitions where applicable. NAGPRA's definitions of "lineal descendant," "cultural affiliation," and Section 3 hierarchy should be incorporated precisely as written in NAGPRA, if reproduced within the policy.

III. Proposed Revisions to Principles

Principle 1.

Current draft language: 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.

Proposed language: Burial sites, human remains and funerary objects should not be knowingly disturbed in the course of a Section 106 development project unless absolutely necessary, and only after the Federal agency has fully considered the interests and concerns of all relevant stakeholders.

Principle 2.

Current draft language: 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.

Proposed language: Participants in the Section 106 process should treat all burial sites, human remains and funerary objects with dignity and respect, giving due consideration to the input received through meaningful consultation.

Principle 3.

Current draft language: Federal agencies are responsible for early and meaningful consultation throughout the Section 106 process.

Proposed language: The Federal agency is responsible for early and meaningful consultation throughout the Section 106 process. Consultation should involve appropriate stakeholders, including descendant communities and other groups expressing a demonstrable and legitimate interest in the burial site, human remains, and funerary objects at issue.

Principle 4.

Current draft language: 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.

Proposed language: The policy recognizes Native American groups may ascribe religious and cultural significance to burial sites, human remains, and associated funerary objects of the aboriginal occupants of this country. The Federal agency should be cognizant of those interests. The agency shall conduct consultation with Federally recognized Indian tribes on a government-to-government basis, as required by law.

Principle 5.

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

Proposed language: When human remains or funerary objects are disinterred, they should be removed carefully, respectfully and in a manner informed by consultation and accepted professional archaeological practices.

Principle 6.

Current draft language: 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.

Proposed language: The Federal agency official is responsible for making decisions regarding avoidance or treatment of burial sites, human remains and funerary objects based on consultation, appropriate professional archaeological documentation and recordation, evaluation of competing interests, compliance with applicable laws, and other public policy issues.

Principle 7.

Current draft language: Federal agencies shall, after meaningful consultation, develop plans for the treatment of burial sites, human remains and funerary objects that may be discovered.

Proposed language: The Federal agency should, after meaningful consultation, develop plans for the treatment of burial sites, human remains and funerary objects that may be discovered.

Principle 8.

Current draft language: In cases where the disposition of human remains and funerary objects is not legally prescribed, Federal agencies should proceed allowing a hierarchy that acknowledges the rights of lineal descendants, Indian tribes, Native Hawaiian Organizations and other descendant communities.

Proposed language: In cases where the disposition of human remains and funerary objects is not legally prescribed, the Federal agency should consider both the closeness of relationship of descendant groups and other consulting parties (including lineal descendants and culturally affiliated groups), and the importance to the public interest in preserving heritage and increasing knowledge about the past.

Principle 9.

Proposed language: The policy acknowledges that the preservation of irreplaceable heritage is in the public interest. The Federal agency should consider the importance of preserving heritage and associated knowledge in its implementation of Section 106 activities, consistent with the purposes of the National Historic Preservation Act. Any decision-making should take into account the balance of interests of all stakeholders affected by the undertaking.