

Laura Dean

From: J King [JKing@mdp.state.md.us]
Sent: Friday, May 26, 2006 7:32 AM
To: Tom McCulloch; Laura Dean
Subject: FW: HR Comments

FYI.

From: TFKing106@aol.com [mailto:TFKing106@aol.com]
Sent: Friday, May 26, 2006 8:29 AM
To: J King
Subject: Re: HR Comments

Those were preliminary comments, but I don't have much inclination to write more formal ones, so please use them in any way you like. I'm glad you see some merit in them.

Thanks,

Tom

Thomas F. King, PhD
PO Box 14515, Silver Spring MD 20911
240-475-0595

Recently published: *Doing Archaeology: a Cultural Resource Management Perspective*. Left Coast Press 2005

Upcoming classes (Details at <http://www.swca.com/jsps/training/training.htm>):

Issues in Section 106: An Advanced Seminar, July 18-19 Portland, OR

Section 106 Compliance: An Introduction to Professional Practice. September 19-21, Seattle, WA

Laura Dean

From: J King [JKing@mdp.state.md.us]
Sent: Monday, May 08, 2006 4:06 PM
To: Laura Dean; Tom McCulloch
Subject: FW: [Wac] Fwd: [BRITARCH] Care and Repatriation of Human Remains

fyi

From: TFKing106@aol.com [mailto:TFKing106@aol.com]
Sent: Monday, May 08, 2006 9:07 AM
To: J King
Subject: Re: [Wac] Fwd: [BRITARCH] Care and Repatriation of Human Remains

Hi, Julie -- No, I didn't make it to the SAA; no money, and a scheduling conflict. Re. the HR policy -- well, I started through it with the intention of making a few friendly comments, but the farther I went, the more irritated at it I got, and I ended up sending nothing at all, expecting it, frankly, to sink of its own weight and good riddance. Attached is my markup, just FYI. I'm sorry to be unpleasant about it, but I really think it's pretty sad. It's not that it says anything particularly terrible, just that it doesn't say much at all, but says it over and over and over again. And to me (and understanding that I was the author of the original policy, so perhaps feel some bias), it's been rejiggered to the point of losing all clarity. The original policy articulated a bunch of principles and said the Council would follow them and recommended them to others. Now we have a statement of principles without any indication of what people are supposed to do with them. It's like stating the principle of superposition without saying anything about how therefore one ought to excavate by stratigraphic levels. Perfectly fine principle, but it's left to the imagination what one ought to do with it. What's the point in a policy statement that doesn't state policy?

TK

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Notices

Federal Register

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

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ADVISORY COUNCIL ON HISTORIC PRESERVATION

Advisory Council on Historic Preservation's Draft ``Policy Statement Regarding Treatment of Burial Sites, Human Remains and Funerary Objects''

AGENCY: Advisory Council on Historic Preservation.

ACTION: Request for Public Comments on Advisory Council on Historic Preservation's Draft ``Policy Statement Regarding Treatment of Burial Sites, Human Remains and Funerary Objects''.

SUMMARY: The Advisory Council on Historic Preservation (ACHP) is revisiting its ``Policy Statement Regarding Treatment of Human Remains and Grave Goods,'' adopted in 1988 (1988 Policy). A Task Force composed of ACHP members has drafted a new policy, and invites your views and observations on it. The Task Force will use your comments to finalize the draft policy before presenting it to the full ACHP membership for consideration and possible adoption.

DATES: Submit comments on or before June 28, 2006.

FOR FURTHER INFORMATION CONTACT: Address all comments concerning the draft policy to the Archeology Task Force, Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., Suite 809, Washington, DC 20004. Fax (202) 606-8672. Comments may also be submitted by electronic mail to: archeology@achp.gov. Please note that all responses become

part of the public record once they are submitted to the ACHP. Please refer any questions to Dr. Tom McCulloch at 202-606-8505.

SUPPLEMENTARY INFORMATION:

I. Background

In 1988, the Advisory Council on Historic Preservation (ACHP) adopted the "Policy Statement Regarding Treatment of Human Remains and Grave Goods" (1988 Policy) to serve as a guide for Federal agencies when making decisions about burial sites, human remains, and funerary objects encountered during review of Federal undertakings under Section 106 of the National Historic Preservation Act, as amended, 16 U.S.C. 470f (section 106), and its implementing regulations, 36 CFR part 800. The ACHP adopted the policy to guide Federal agencies at a time when no other national consensus or laws on the treatment of human remains and associated funerary objects existed. While the ACHP's 1988 Policy was a useful document for guiding Federal agency decision making, today it no longer reflects the ACHP's position on the treatment of burial sites, human remains, and funerary objects.

Since 1988, new, and changes to existing, Federal laws and regulations have been enacted that affect how human remains and funerary objects are considered and treated. These laws and regulations reflect in part an evolving recognition in law and practice for the special nature of burial sites, human remains, and funerary objects. Native Americans, in large part, framed the public discussion leading to these changes because of what they viewed as a long history of disrespectful treatment and unnecessary disturbance of the remains of their ancestors. This discussion has broadened as all Americans consider the recovery and treatment of human remains in contemporary, modern contexts, such as at the site of the World Trade Center after September 11, 2001.

The 1988 Policy also predates the 1992 amendments to the National Historic Preservation Act (NHPA) and subsequent revised ACHP regulations to implement these amendments. Two of the most significant 1992 amendments to the NHPA (1) affirm that properties of traditional religious and cultural significance to an Indian tribe or Native Hawaiian organization (NHO) can be considered eligible for the National Register of Historic Places, and (2) require Federal agencies to consult, during the Section 106 process, with any Indian tribe or NHO that attaches religious and cultural significance to these properties.

In 1990, Congress passed the Native American Graves Protection and Repatriation Act (NAGPRA). NAGPRA recognizes the interest and rights of Federally-recognized Indian tribes, Native Hawaiian Organizations and lineal descendants in burial sites located on Federal and tribal land and, with its implementing regulations, mandates the process to be followed if it becomes necessary to excavate Native American or Native Hawaiian human remains and funerary objects found on these lands. NAGPRA also establishes a mechanism for the repatriation of Native American and Native Hawaiian cultural items to lineal descendants and culturally affiliated Indian tribes and NHOs.

In addition, Executive Order 13007 (May 24, 1996) requires Federal land managing agencies to accommodate religious practitioners in access to and ceremonial use of Native American sacred sites. It also calls on Federal agencies to avoid adversely affecting the physical integrity of such sacred sites to the extent practicable permitted by law, and not

clearly inconsistent with essential agency functions.

In 2004, the ACHP Chairman formed an Archeology Task Force to review its archeology policies and guidance. In 2005, the ACHP members voted unanimously to direct the Task Force to revisit the 1988 Policy. On September 1, 2005, the Task Force moved forward with a request for comment through publication of a set of Working Principles in the Federal Register (70 FR 52066-52068). The ACHP sent this same request for comments directly to all Indian tribes, Native Hawai'ian Organizations, SHPOs, THPOs, and professional archeological and preservation organizations. A total of 76 comments were received at the December 2, 2005, close of the comment period. These comments are posted on the ACHP's Web site at <http://www.achp.gov>.

Based on the comments received, the Task Force concluded that the 1988 Policy should be revised. The Task Force then carefully considered the comments in preparing this draft "Policy Statement Regarding Burial Sites, Human Remains, and Funerary Objects" (the draft text is found at the end of this notice). This proposed draft of the ACHP's revised human remains policy is now subject to review, including consultation with Federally-recognized Indian tribes. Please provide

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comments on it on or before June 28, 2006.

II. Explanatory Notes on the Draft Policy

Goals of the policy statement

This policy is designed to accomplish several tasks in the context of Section 106 review.

First, this policy offers leadership in resolving how to treat burial sites, human remains, and funerary objects in a respectful and sensitive manner while acknowledging the public interest in the past.

Second, this policy provides guidance to Federal agencies in situations where Federal or State law does not prescribe how burial sites, human remains, and funerary objects are to be handled. Many Federal undertakings, for example, take place on non-Federal and non-tribal land, including privately-owned land, where NAGPRA does not apply.

Third, 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. The policy is not bound by geography, ethnicity, nationality, or religious belief. It applies to the treatment of all burial sites, human remains, and funerary objects encountered during the Section 106 process.

Finally, this policy is designed 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.

Scope and Applicability

As the draft policy advocates, Federal agencies should, at the earliest point possible in project development[TFK1], plan to avoid burial sites, human remains, and funerary objects altogether[TFK2]. When avoidance is not a reasonable course of action, the agency should minimize

disturbance to such sites, remains, and objects. The Federal agency should consider removal of the human remains or funerary objects only when these or other alternatives that leave the remains in place cannot be reasonably implemented. It is important to understand that to be considered under section 106, the burial site must be a historic property, meaning either listed on or eligible for inclusion on the National Register of Historic Places. This policy applies throughout the Section 106 process, including during the identification of those historic properties^[TFK3].

In making final decisions about disinterment and treatment, the Federal agency should consult with those who have an interest in the effects of the undertaking on the historic property. Federal agencies should use the consultation process effectively to arrive at mutually satisfactory outcomes. Consultation, defined in the ACHP's regulations as "seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 review process," is the hallmark of the Section 106 process. To meet the regulations' "reasonable and good faith" requirement^[TFK4], consultation must begin in the earliest stages of an undertaking, after the Federal agency determines it has an undertaking and prior to decisions about project design, location, or scope.

When the Federal agency decides that human remains or funerary objects must be disturbed, they should be removed completely, with respect and dignity, and dealt with according to the plan developed by the Federal agency, in consultation with others. Under this policy, treatment options may range from immediate repatriation or reburial upon removal from the ground to detailed scientific study. This policy does not endorse any specific treatment, and does not take a position against scientific study of human remains when it is determined to be appropriate after consultation and consideration of other legal authorities that may prescribe a specific outcome.

Relationship of Policy Statement to NAGPRA and Other Federal, Tribal, State, or Local Laws

As policy, its^[TFK5] principles and their implementation do not, in any way, change, modify, detract or add to applicable laws including, but not limited to, NAGPRA.

This policy applies to all Federal agencies whose undertakings are subject to review under Section 106 of the NHPA. While Section 106 requires agencies to seek agreement with consulting parties on measures to avoid, minimize, or mitigate adverse effects to historic properties, Section 106 does not prescribe or require a specific outcome. However, in many cases, Federal agencies will find that other Federal, tribal, State, or local laws exist concerning burial sites, human remains, and funerary objects that may be applicable and prescribe a specific outcome. The Federal agency must identify and, as applicable, follow these laws.

For undertakings on Federal and tribal land that encounter Native American or Native Hawai'ian human remains and funerary objects, NAGPRA applies. It is important to reiterate here that the ^[TFK6]NAGPRA applies. It is important to reiterate here that the NHPA and NAGPRA are separate and distinct laws, with separate and distinct implementing regulations and categories of parties that must be consulted, and that compliance with one law does not mean or equal compliance with the other.

Discussion of Principles[TFK7]

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[TFK8] and/or preservation in place.

Discussion: As a matter of practice, Federal agencies should avoid[TFK9] burial sites, human remains, and funerary objects as they carry out their undertakings. Avoidance means ensuring that the burial site is not physically disturbed[TFK10].

If avoidance is not possible, Federal agencies, during consultation, should consider whether there are active steps they may take or implement to preserve the burial sites in place, perhaps through the intentional covering of the affected area, placement of markers, or granting of restrictive or other protective easements. In many cases, preservation in place may mean that the locations of burial sites, human remains, and funerary objects should, to the extent allowed by law not be publicly disclosed. Alternatively, consultation may reveal that preservation in place is not the preferred outcome or treatment. Natural deterioration may be the acceptable or preferred treatment.

Principle 2: Participants in the Section 106 process shall[TFK11] treat all burial sites, human remains and funerary objects with dignity and respect, which is determined through meaningful consultation.

Discussion: Dignity and respect are important concepts. Through meaningful consultation, descendants, culturally affiliated groups, descendant communities, and other parties consulting under Section 106 should discuss and define what constitutes dignity and respect.

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

Discussion: Consultation is at the heart of the Section 106 process. As noted above, consultation involves ``seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the

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Section 106 review process." The regulations of the ACHP require that the Federal agency identify consulting parties early in the Section 106 process. Consulting parties include the State Historic Preservation Officer; the Tribal Historic Preservation Officer; Indian tribes and Native Hawai'ian organizations; representatives of local governments; applicants for Federal assistance, permits, licenses, and other approvals; and/or any additional consulting parties[TFK12], including individuals and organizations with a demonstrated interest in the undertaking 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.

The Federal agency must consult with Federally-recognized Indian tribes on a government-to-government basis. Government-to-government consultation recognizes the unique legal relationship of the Federal government with tribal governments as set forth in the Constitution of the United States[TFK13], treaties, statutes, court decisions, and executive orders and memoranda[TFK14].

Federal agencies should review the ACHP publication ``Consulting

with Indian Tribes in the Section 106 Process" for guidance. The National Association of Tribal Historic Preservation Officers has also published a document titled "Tribal Consultation: Best Practices in Historic Preservation," found at <http://www.nathpo.org>, designed to

assist Federal agencies when preparing for government-to-government consultation with Federally-recognized tribes.

The Federal agency should consider that, in cases where human remains and/or funerary objects must be disturbed, final disposition may involve the identification of additional consulting parties. These potential consulting parties should be identified and included in consultation as early as possible.

The NHPA, the ACHP's regulations, and Presidential Executive Orders set out basic standards and criteria for many of the steps in the consultation process, including:

- How to identify consulting parties (36 CFR 800.3);
- Appropriate documentation needed to support consultation and determine an outcome (what to talk about) (36 CFR 800.11);
- The affirmative obligation to seek consulting parties (36 CFR 800.2(a)(4));
- Federal agency responsibilities for making final decisions (36 CFR 800.2(a));
- That properties of traditional religious and cultural importance to an Indian tribe or NHO may be determined to be eligible for inclusion on the National Register (16 U.S.C. 470a(d)(6)(A));
- The Federal agency has a responsibility to consult with any Indian tribe or NHO that attaches religious and cultural significance to such historic properties (16 U.S.C. 470a(d)(6)(B)); and
- Recognizing the sovereign status of Indian tribes. Executive Order 13175 (November 6, 2000) "Consultation and Coordination with Indian Tribal Governments" requires Federal agencies to engage tribes in a government-to-government context.

Principle 4: The policy recognizes that Native Americans are descendants of aboriginal occupants of this country. Federal agencies shall^[TFK15] 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^[TFK16] conduct consultation with Indian tribes on a government-to-government basis, as required by law.

Discussion: This principle reiterates^[TFK17] requirements found in existing Federal law, regulation and Executive Orders, and is consistent with positions that the ACHP has taken over the years to facilitate enfranchisement and promote broad participation in the Section 106 process.

Principle 5: When human remains or funerary objects must be disinterred, they should be removed carefully, respectfully and in a manner developed in consultation^[TFK18].

Discussion: "Careful" disinterment means that when human remains and grave goods must be disinterred, those doing the work should have, or be supervised by people having, appropriate expertise in disinterment techniques of human remains to ensure that in excavating a burial the material is kept as intact as possible and pieces are not

left behind.

Depending on agreements reached through the Section 106 consultation process, disinterment may or may not include field recordation, such as field sketches, and the recording of an individuals' age at death, sex, stature, and evidence of disease or trauma. In some instances, such recordation may be so abhorrent to the descendants of the dead that it may be inappropriate to carry it out. Such alterations to standard procedure should be negotiated on a case-by-case basis in the consultation process.

The word "respectfully" is self-explanatory: when working with human remains, the Federal agency official should maintain an appropriate deference for the dead and their descendants and descendant communities. The official should also maintain respect for the customs and beliefs of those who may be descended from the deceased, and try to avoid unnecessary conflict with them.

Questions to be addressed in the consultation process may include but not be limited to:

- What kinds of ceremonies (if any) should be performed?;
- Who should remove/handle the remains?;
- What should the remains be placed in?
- What kinds of field analyses, if any, should be performed?
- Should the remains be photographed in situ?;
- Should the remains be cleaned?; and
- What kind of arrangements should be made for disposition of the remains and funerary objects?

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^[TFK19].

Discussion: Encountering burial sites, human remains or funerary objects during the initial efforts to identify historic properties is not unheard of. The ACHP's regulations (at 36 CFR 800.1(c)) state that the Federal agency official may conduct or authorize "nondestructive planning activities before completing compliance with section 106, provided such actions do not restrict the subsequent consideration of alternatives to avoid minimize, or mitigate the undertaking's adverse effects on historic properties^[TFK20]."

For purposes of section 106, identification efforts should result in an assessment that can be independently evaluated and used to make informed judgments about whether there are properties within the Area of Potential Effect that are listed in or eligible for listing in the National Register of Historic Places. This would typically include basic information on the history and historical importance of the property, its horizontal and vertical boundaries, and its basic nature, condition, and what qualifies it for the

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National Register. Hopefully, only a very small sample of the site will require investigation to make such determinations. 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 National

Register eligibility can be made.

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. For undertakings on Federal lands that may encounter burial sites, human remains, and funerary objects regardless of ethnic affiliation but at least 100 years old, the agency is subject to the provisions of the Archeological Resources Protection Act (ARPA). ARPA permits are required for any archeological investigations conducted on Federal land. Further, NAGPRA requires the issuance of an ARPA permit prior to any disturbance of Native American or Native Hawaiian burials protected by NAGPRA.

When undertakings encounter burial sites, human remains, or funerary objects on State and private lands, State burial laws may apply. Burial laws vary from State to State and the Federal agency must identify and follow these laws when they apply. Section 106 agreement documents should take into account the requirements of any of these applicable laws.

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

Discussion: the ACHP's Post-review discovery provision (36 CFR Sec. 800.13) requires the Federal agency to carry out several actions: "make reasonable efforts to avoid, minimize, or mitigate adverse effects to such properties;" notify consulting parties within 48 hours (including tribes and NHOs that might attach religious and cultural significance to the affected property) of the agency's proposed course of action; take into account comments received within a new 48 hour period, and then "carry out appropriate actions." The ACHP's regulations provide the option of reaching an agreement on how to handle these in the future prior to any discovery.

NAGPRA prescribes a specific course of action when Native American and Native Hawaiian human remains and funerary objects are discovered on Federal lands in the absence of a plan: cessation of the activity, protection of the material, notification of various parties, consultation on a course of action and its implementation, and then proceed with the activity. 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."^[TFK21]

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.

Discussion: Under the ACHP's regulations, "descendants" are not consulting parties by right^[TFK22]. However, Federal agencies should recognize a biological or cultural relationship and invite that individual or organization to be a consulting party under the ACHP's regulations at 36 CFR 800.3(f)(3)). When Federal or state law does not direct disposition of human remains or funerary objects, or when there is disagreement among claimants, the process set out in NAGPRA may be instructive. In NAGPRA, the "ownership or control" of human remains and associated funerary objects lie with the following in descending order:

- Specific lineal descendants; then
- Tribe on whose Tribal lands the items were discovered; then
- Tribe with the closest cultural affiliation; and then
- Tribe aboriginally occupying the land, or Tribe with the closest "cultural relationship" to the material.

Definitions Used for the Principles:

- Burial Site: Any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited (25 U.S.C. 3001.2(1)).
- Consultation: The process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 review process (36 CFR 800.16(f))[TFK23].
- Consulting parties: Persons or groups the Federal agency consults with during the Section 106 process. They may include the State Historic Preservation Officer; the Tribal Historic Preservation Officer; Indian tribes and Native Hawaiian organizations; representatives of local governments; applicants for Federal assistance, permits, license, and other approvals; and/or any additional consulting parties (based on 36 CFR 800.2(c)). Additional consulting parties may include individuals and organizations with a demonstrated interest in the undertaking 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)(6)).
- Disturbance: Disturbance of burial sites will constitute an adverse effect under Section 106. An adverse effect occurs when "an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, setting, materials, workmanship, feeling, or association" (36 CFR 800.5(a)(1))[TFK24].
- Federal land: Lands under a Federal agency's control. Mere Federal funding or permitting of a project does not turn an otherwise non-Federal land into land (see *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234 (D. Vt. 1992), *aff'd*, 990 F. 2d 729 (2d Cir. 1993) (where the court found that a Clean Water Act permit issued by the U.S. Army Corps of Engineers did not place the relevant land under Federal "control" for NAGPRA purposes).
- Funerary objects: "items that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed intentionally at the time of death or later with or near individual human remains" (25 U.S.C. 3001(3)(B)).
- Historic property: "Any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. It includes artifacts, records, and remains that are related to and located within such properties, and it includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register of Historic Places criteria" (36 CFR 800.16(1))[TFK25].
- Human remains: The physical remains of a human body. The term does

not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained,

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such as hair made into ropes or nets (see 43 CFR 10.2(d)(1)).

--Indian Tribe: ``An Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation, as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians" (36 CFR 800.16(m))[TFK26].

--NAGPRA: The Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.)

--Native Hawai'ian: Any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai'i (36 CFR 800.16(s)(2)).

--Native Hawaiian Organization: Any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians (36 CFR 800.16(s)).

--Policy statement: A formal statement, endorsed by the full ACHP membership, representing the membership's collective thinking about what to consider in reaching decisions about select issues, in this case, human remains and funerary objects encountered in undertakings on Federal, tribal, state, or private lands. Such statements do not have the binding force of law.

--Preservation in place: Taking active steps to ensure the preservation of a property[TFK27].

--Treatment: Under Section 106, ``treatments" are measures developed and implemented through Section 106 agreement documents to avoid, minimize, or mitigate adverse effects to historic properties.

III. Text of the Draft Policy

The following is the text of the draft policy:

Policy Statement Regarding Treatment of Burial Sites, Human Remains and Funerary Objects

Preamble: When burial sites, human remains, or funerary objects, will be or are likely to be encountered in a project subject to review under Section 106 of the National Historic Preservation Act (Section 106), parties consulting under Section 106 should adhere to the following principles. The treatment and disposition of burial sites, human remains, and funerary objects are a human rights concern to many individuals, tribes, and descendant communities. Accordingly, while frequently the remains encountered in Section 106 review are of significance to Indian tribes and Native Hawai'ian organizations, this policy applies to the treatment of all burial sites, human remains, and funerary objects in the context of compliance with Section 106. This policy is mindful of the values reflected in the guarantee of a burial

for every person as expressed in the laws of every State. This policy does not modify, add or detract from the requirements of applicable Federal, tribal, State or local law, such as the Native American Graves Protection and Repatriation Act (NAGPRA).

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

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

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

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 descendant communities. (End of text of the draft policy)

Authority: 16 U.S.C. 470j.

Dated: March 8, 2006.

John M. Fowler,
Executive Director.

[FR Doc. 06-2390 Filed 3-13-06; 8:45 am]

BILLING CODE 4310-K6-M

[TFK1]“Development” can be interpreted to mean actual implementation of an action. Suggest “planning” or some other word making it clear it should be done REALLY early.

[TFK2]Suggest you clarify to mean “avoid impact on” or “impact to.” Simple physical avoidance is often not sufficient, and the notion that it’s a cure-all leads to dumb policies like the Forest Service’s “flag and avoid.”

[TFK3]These two sentences seem misplaced; don’t have anything to do with the apparent purpose of the paragraph.

[TFK4]Cite where this requirement appears in the regs with reference to consultation. I think most people think of this standard only with reference to identification.

[TFK5]What “its” refers to here is unclear.

[TFK6]Spelling error. Creative, though.

[TFK7]It’s not clear how these principles relate to the policy. As I recall, the old policy said the Council would follow the principles, and recommended them to everybody else. Something to that effect ought to be inserted up front in the policy. Otherwise the principles just float.

[TFK8]of impact

[TFK9]sic

[TFK10]Simple-minded. One can avoid bulldozing a burial site and leave it entirely exposed to looting, or erosion, or induced development. The archaeological community tends to be dumb enough to see “avoidance” as the Prime Directive, but the Council should show more brainpower.

[TFK11]Can you use “shall” in a piece of non-binding guidance?

[TFK12]You should cut “additional consulting parties, including... Otherwise, when you diagram the sentence you’re saying that consulting parties include consulting parties.

[TFK13]I don’t think you can say that the Constitution sets forth a requirement for government-to-government consultation. It simply reserves to the Federal Government the right and obligation to treat with tribes.

[TFK14]This may not be the place to do it, but somebody’s got to clarify the fact that this doesn’t mean pointless exchanges of paperwork, and that tribal consultation with non-federal parties like applicants and their contractors is not a mortal sin. Particularly since discouraging such consultation in an environment of small and overworked agency and tribal staffs leads inevitably to meaningless exchanges of paperwork.

[TFK15]sic

[TFK16]sic

[TFK17]It sure does. And elsewhere in this document, too.

[TFK18]With?

[TFK19]Seems like you’ve said that about three times now.

[TFK20]How does this follow from or elaborate upon Principle 6?

[TFK21]Assuming the plan meets the standards for a Plan of Action under the NAGPRA regs.

[TFK22]I’d rephrase this; it almost seems to discourage recognizing them as consulting parties. Something like “...regulations, agencies are not invariably required to recognize “descendants” as formal consulting parties.”

[TFK23]As in the regs, you should reference the Secretary’s Standards here.

[TFK24]That’s not a definition of disturbance; it’s a definition of adverse effect. You ought to define the things you’re defining. And are you saying that any adverse effect constitutes disturbance (which I suppose is arguable, if a bit counterintuitive), or only what the words actually say, that disturbance is an adverse effect?

[TFK25]It would be nice, but I suppose too adventurous, to clarify here the fact that this statutory language does not somehow preclude the TCPs of non-Indian, non-Hawai’ian groups from eligibility for the Register.

[TFK26]Leaving non-recognized tribes to fend for themselves. Surely this policy should note that non-recognized tribes are entitled to be consulted, just like any other group of citizens, and that they may have special consultation needs that should be addressed under EO 12898

[TFK27]Wait wait wait... Look at the NHPA definition of “preservation.” It makes this definition meaningless. You really need a real definition here.