

*“Request for Public Comments on Advisory Council’s Draft Policy Statement Regarding Treatment of Burial Sites, Human Remains and Grave Goods.”*

The Texas SHPO always promotes preservation of all human graves in place if at all possible and we encourage consultation with Native American tribe whenever Native American remains need to be exhumed. We do however have the following comments with regard to the draft policy:

1) In Texas, the majority of the graves found in association with federal undertakings are not Native American interments as the “policy” seems to imply. The vast majority of the graves we deal with are Black, Hispanic or Anglo--historic cemeteries. Additionally, at least 40-50% of the isolated burials found, are found under emergency conditions when a grave is discovered during an ongoing construction project. Federal authorizations to begin construction have already occurred and the undertakings are already underway. In those cases, there is usually no reasonable possibility that "alternatives" to exhumation will be possible regardless of whether it is a historic or prehistoric grave. Under this policy everything would have to be stopped to begin direct consultations through the federal agency. We have a hard enough time getting construction crews to stop work and report such discoveries now, and we are concerned that we may never see them report such finds, if we're talking about 60 or 90 days worth of consultation over alternatives that most-likely will not be feasible. We suggest the policy be amended to address emergency discoveries and to reflect the complications associated with historic cemeteries.

2) We are uneasy with the policy’s references to "federal agency" responsibilities to consider all alternatives to exhumation. In our experience most federal agencies have a hard enough time conforming to common 106 problems, much less consulting with all parties and the tribes over potential alternatives to exhumations. We believe most federal agencies will not seriously consider alternatives; instead they will pass on those responsibilities to the SHPO and expect us to perform their duties. Then, they will blame us for all associated delays in the process.

3) How will the policy affect existing PA’s and MOA’s with federal agencies and their state counterparts (such as PA’s with FHWA and State DOT offices)? Will the policy allow the parties to proceed, after due consideration of alternatives, without formal consultation and a determination by the federal agency, even if the PA or MOA doesn't specifically discuss consultation over alternatives to exhumations? Or, is it possible that this policy would render an existing PA or MOA null and void with regard to burials and mandate direct consultation with the federal agency and require their formal response?

4) We believe definitions for terms such as “Disturbance” need rethinking and rewording.

*--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))*

This is an overly broad statement that suggests any disturbance is an adverse effect. How is “indirectly” defined here? How can you have an adverse effect if burials sites generally are not eligible for the NRHP? Even most cemeteries are not NRHP eligible.