



STATE OF WASHINGTON

**DEPARTMENT OF ARCHAEOLOGY & HISTORIC PRESERVATION**

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June 12, 2006

Dr. Tom McCulloch  
Advisory Council on Historic Preservation  
1100 Pennsylvania Avenue NW, Suite 809  
Washington, DC 20004

ATTN: Archaeology Task Force  
RE: Policy Statement Regarding Treatment of Human Remains

Dear Dr. McCulloch ;

The Department of Archaeology and Historic Preservation is providing comments on the proposed ACHP revisit of the 1988 *ACHP Policy Statement regarding Treatment of Human Remains and Grave Goods*. We believe it is critical for the ACHP to undertake a robust review and reworking of the Policy Statement. As now written in draft form the proposed principles do not provide a clear, consistent and legally sound policy for federal agencies and other participants in the Section 106 process. We hope that the following comments will enable a revised draft to have more concrete guidance and policies.

In our state we have experienced a landscape of emotional turmoil in tribal communities, lost construction jobs, bitter divisions in local communities along religious and racial lines, multimillion dollar lawsuits that drag on for years, a heightened fundamentalist versus science/education divide, and a tragic and avoidable loss to all involved. This could be prevented with a set of clear and specific of guidelines for federal agencies to follow that incorporate and balance the needs of tribes, local residents and the scientific community.

As we have previously noted, in our state, the lack of a well developed, specific, workable, understandable, and balanced approach to the treatment of human remains has resulted in huge losses. The estimated financial costs of this problem is staggering: Kennewick Man Case; \$2 million; Blaine; \$22 million; Station Camp \$6 million; WSDOT Graving Dock; \$200 million. The total in Washington State alone is over \$260 million dollars in the last decade with no end in sight.

Beside this loss of public money the result of a failure to have a clear, consistent, and legally sound policy resulted in rulings from the US District Court and the US Ninth Circuit Court of Appeals (*Bonnichsen v US*; otherwise known as the Kennewick Man Case) that perpetuated a contentious relationship between the scientific community and tribal leaders.

In order to prevent project delays and protracted discussions that fail to achieve an outcome desired by any of the parties, ACHP must establish a meaningful set of meaningful of protocols. This will prevent an on-going patchwork of conflicting and confusing approaches to difficult issues.

The Principles as articulated in the 1988 document and the recent publication in the Federal Register do not establish the clarity needed in an emotionally and culturally complex environment. The federal agency needs to have a clear and workable plan for addressing the treatment of human remains in a professional and sensitive manner. The Principles as proposed continue to have no substantive content. The concepts of 'Respect, Early Meaningful Consultation, and Avoidance' can all be incorporated into more substantial Principles. These should reflect the existing requirements of Section 106 in balance with the professional standards that public service and the profession of archaeology requires.

We believe the principles should substantively address the following issues:

- First, we believe it is important for the ACHP to recognize that regardless of specific cultural, religious, or scientific interests, the consulting parties need the ability to be able to document to a legal and forensic standard the number, completeness, and specific details of any human remains discovery and to accomplish that quickly.

As the Kennewick Man Case demonstrated with the incident of the missing femur head, the failure to have a legally definable forensic inventory and accounting of the discovered remains can result in the loss of an individual's remains as well as spawning criminal investigations and disputes over the missing remains that continue for years.

The continuing view that academic and scientific research stands in direct opposition to cultural and religious needs falsely simplifies the problem. It needlessly creates an either/or problem that makes further discussion problematic. We believe the failure of federal agencies to properly address the minimum documentation standards has created an environment where we have serious problems with even identifying how many individuals are involved in a discovery situation.

As the recent Blaine case in Seattle Federal Court demonstrated, our department has yet to receive a from USDA Rural Development a complete accounting of the exact number of human remains some 7 years later. We are still waiting to receive an accounting of the number of the human remains from the FHWA/WSDOT Graving Dock Project in Port Angeles, Washington. The failure of federal agencies to require a forensic accounting of the remains results in a widely varying number of remains being reported in the media. All parties are at a disadvantage if the legally responsible parties have no documentation of the discovery and no inventory to determine if any are lost, misplaced, or stolen.

- Second, we believe it is important for the ACHP to recognize and detail the relationship between Section 106 and existing federal, tribal, and state laws that address burials, archaeological resources and their legal intersection.

While Native American Graves Protection and Repatriation Act (NAGPRA) applies to federal and Indian lands specific state law in Washington requires the SHPO to have a decision on the treatment of any Native American remains on private or nonfederal lands subject to Section 106. Tribes and others tend to confuse, and mistakenly merge NAGPRA and the National Historic Preservation Act (NHPA), as the WSDOT Graving Dock and other projects have demonstrated. Any policy needs to state clearly when NAGPRA can be used, and if it doesn't apply, who owns the artifacts/items of cultural patrimony and who has the authority for their disposition. This direction is crucial for agencies supplying federal funds or permits to private property owners.

- Third, the ACHP needs to recognize and discuss the conflict between a tribe's cultural and religious needs for privacy and the intense media, and public interest in discoveries involving public lands or public funding along with the professional interests of the scientific community.

As the Kennewick Man Case demonstrated, intense public interest both nationally and internationally ranged from continuing news articles, multiple books, TV segments, magazine feature stories and web pages. This scrutiny requires the responsible federal agency and the consulting parties to balance tribal concerns for privacy with the public and media interest in any discovery. Further, the expenditure of public dollars for archaeological work requires that some type of deliverable be returned to the public.

- Fourth, the topic of scientific and professional interest in human remains and archaeological investigation needs to be addressed. The culture war of science versus religion and the resulting emotional debates need to be confronted in a manner that provides a venue for this conflict to be addressed short of the courts.

Clearly, as the court ruled in the Kennewick Man Case, the requests of professional's scientists cannot be arbitrarily denied. Professional archaeologists and other researchers have a potential interested party status when human remains are discovered. Providing clearer guidance as to what minimum types of information needs to be provided to the public, and what kinds of scientific research should be considered (non-invasive? conducted within certain timeframes?), will help prevent situations where the courts make the final ruling on scientific study rather than all parties coming to a compromise through negotiations led by the federal government.

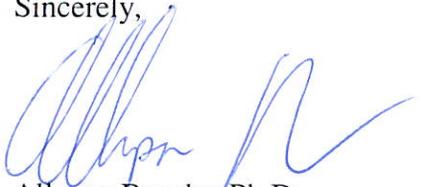
In closing we believe it is important to clearly establish that federal agencies have a responsibility to establish a legally sound program for any human remains discovered during any project undertaking. Federal agencies should be required to ensure that:

- Human remains are secured and protected for further damage, loss or un-permitted disturbance;
- Human remains are documented so the consulting parties will have a full understanding of the nature of the discovery and its completeness and potential alternatives for treatment;

- All parties are given specific timelines and clear lines of authority on decisions regarding the treatment of the individual;
- All parties are provided an opportunity to review any proposed treatment plan; and
- Tribal governmental consultation occurs along with accommodations for tribal religious and cultural needs;
- Law enforcement requirements are addressed;
- All work conforms with existing statutory legal protections for the human remains;
- The need for scientific research and public dissemination of educational material is adequately addressed.
- Tribes are provided an opportunity to assist with creating models of scientific inquiry that are culturally sensitive and responsive.

We look forward to further discussions and please feel free to contact us. We would be happy to work with you on the development of a set of policies that give all parties more specific direction towards a more meaningful resolution to these difficult situations.

Sincerely,



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