



SOCIETY FOR AMERICAN ARCHAEOLOGY

December 3, 2002

Jose Sepulveda
Division Administrator
Federal Highway Administration
330 West Broadway
Frankfort KY 40601

John Baxter
Division Administrator
FHWA
575 North Pennsylvania Street, Room 254
Indianapolis IN 46204

Dear Mr. Sepulveda and Mr. Baxter:

The Society for American Archaeology (SAA) appreciates the opportunity to participate as a consulting party, for the purposes of Section 106 of the National Historic Preservation Act, in discussions concerning the Louisville-Southern Indiana Ohio River Bridges Project. As you may know, SAA is an international organization that, since its founding in 1934, has been dedicated to the research, interpretation, and protection of the archaeological heritage of the Americas. With almost 7000 members, the Society represents professional archaeologists in colleges and universities, museums, government agencies, and the private sector. SAA members include professional archaeologists from every state in the U.S., as well as from many countries around the world.

Although we do not generally participate as consulting parties in individual Section 106 undertakings, we do occasionally request participation if we feel that a particular undertaking raises important issues of policy or practice that may affect archaeology in the United States. The currently proposed Section 106 compliance process for the Louisville-Southern Indiana Bridges Project raises a number of such issues.

SAA commends FHWA's efforts to involve Indian tribes that ascribe religious and cultural significance to historic properties that may be affected by the undertaking, and we also applaud the agency's expressed desire to preserve in-place archaeological sites, especially those containing human remains, to the maximum extent possible. There are several problematic stipulations in the draft MOA sections on archaeology, however.

Stipulation C5, for example, states that "Human remains and associated grave goods believed to be of Native American/Indian Tribe origin, shall be treated in accordance with the following stipulations. Other remains shall be treated in accordance with State and local burial laws." We would argue that FHWA cannot exempt this project from applicable State and local laws, including those regarding the disposition of human remains; whatever process is finally established for treatment of human remains must be consistent with both Kentucky and Indiana state laws.

Stipulation C6 places extreme limitations on scientific study of any human remains that may be encountered in the course of the project. Reburial without any analysis is described as the preferred treatment. No analyses requiring invasive techniques or destruction of even minute quantities of bone will be permitted under any circumstances. FHWA will not permit even standard, nondestructive measurements and other descriptive analyses unless compelling research questions are identified, but reburial is required to take place within 24 hours, which would not be enough time to complete the analyses, much less prepare a "definitive, justified, and compelling" research design.

Although this stipulation purports to be in accordance with the Advisory Council on Historic Preservation's policy on the treatment of human remains, it in fact establishes a process that is not consistent with that policy. The Advisory Council's policy recognizes both the value of scientific studies of human remains and grave goods and the rights of descendants to determine the disposition of their ancestors, and it creates a balance. That balance is missing in Stipulation C6, which is heavily weighted against any analyses, and there is no process defined for determining whether any current day Native American groups may reasonably be considered descendants of any human remains encountered in the course of this project.

The Policy Interpretation Memorandum for the Advisory Council's 1988 policy on treatment of human remains and grave goods defines "descendants" as "any group, community, or organization that may be related culturally or by descent to the deceased persons." The area of potential effect for the Louisville-Southern Indiana Bridges Project has been occupied by a variety of human groups over a very long period of time. It is certainly possible that some burials within this area could be determined to be "related culturally" or perhaps even by descent to one or more of the Native American tribes who have asked to be consulting parties for this project, but this is a determination

that would have to be made on a case by case basis if burials are found. FHWA's approach in the MOA of treating a number of culturally unrelated groups as if they were all culturally related to all prehistoric burials in the area of potential effect is inconsistent with the ACHP policy and with case law concerning repatriation of human remains in general.

We understand the practical value of the recommendation in the interpretive memorandum that "it is seldom fruitful to argue with someone's claim to be descended from a given group of deceased individuals. . . . if someone claims to be descended from the person represented by a set of human remains, this claim should be honored to the extent of consulting with putative descendants about how the remains should be disposed of." But consultation, as the Advisory Council's regulation at 36 CFR 800.16(f) points out, simply means the process of seeking, discussing, and considering the views of others. The agency's decision about how to balance any competing views, as revealed by the consultation process, should be based on evaluation of the evidence.

The Advisory Council's policy on the treatment of human remains envisions a balance between the value of science and the wishes of descendants. The Council's interpretive memorandum notes that "the rigor and thoroughness with which the justification for a given research topic should be set forth" depends on the intrusiveness of the analysis. We would argue that the same standard should apply to the demonstration of cultural relationship. If the degree of curtailment of scientific studies is limited, the rigor and thoroughness of the demonstration of cultural relationship can be much less. In the draft MOA for this project, FHWA is proposing to eliminate scientific studies; in this situation, it is incumbent upon the agency to demonstrate with some rigor and thoroughness that this decision is based on the wishes of actual lineal or culturally related descendants.

A central goal of the National Historic Preservation Act is the mitigation of loss of information consequent to the land disturbance resulting from a federal action. Such mitigation requires basic documentation of objects and remains that are excavated. Thus, it is SAA's position that all archaeological work done in anticipation of a federal undertaking should meet accepted professional standards, including those analyses that are necessary for basic documentation of the human remains and grave goods prior to reburial. If FHWA proposes to limit or omit standard analyses, they should do so only as a result of consultations with descendants of the deceased -- either lineal descendants or those with a demonstrable cultural relationship. Tribes that attach religious and cultural significance to historic properties have met the standard established in 36 CFR part 800 to be consulting parties for the purposes of Section 106, but they have not demonstrated that they are descendants of the deceased. Unless the preponderance of the evidence indicates that such descendants can be identified, FHWA should complete scientific studies as provided in the ACHP policy.

Sincerely,

/s/

Robert L. Kelly, Ph.D.
President

cc: John Ballantyne, FHWA-KY
Technical Services Team Leader and
Louisville Bridges Project Coordinator