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Mr. Roger A. Knowlton
Outdoor Recreation Planner
Partnerships/Grants
US Department of the Interior
National Park Service, Midwest Region
601 Riverfront Drive
Omaha, Nebraska 68102-4226

Dear Mr. Knowlton:

The following are my comments on the proposed treatment plan to address a possible burial that was found during work at the First Street Cemetery:

1) The MOA states that treatment plans "...shall follow sections of the Texas Health and Safety Code [THSC] that pertain to abandoned cemeteries and graves." Subsection 711.010(a) of the THSC states:

The owner of property on which an unknown cemetery is discovered or on which an abandoned cemetery is located may not construct improvements on the property in a manner that would further disturb the cemetery until the human remains interred in the cemetery are removed under a written order issued by the state registrar or the state registrar's designee under Section 711.004(f).

The proposed treatment plan does not indicate if the City has obtained a written order issued by the state registrar or the state registrar's designee under Section 711.004(f). Such notification should be provided to comply with the terms of the MOA.

2) The presumed grave in question lies outside the surveyed/recognized boundaries of First Street Cemetery. Subsection 711.011(a) of the THSC states:

A person who discovers an unknown or abandoned cemetery shall file notice of the cemetery with the county clerk of the county in which the cemetery is located. The notice must contain a legal description of the land on which the unknown or abandoned cemetery was found and describe the approximate location of the cemetery and the evidence of the cemetery that was discovered.

Newly adopted state legislation advocated by the THC (HB 2927) amends the definition of a cemetery in the THSC to include "...any other area containing one or more graves."

If the determination is made that the archaeological feature presumed to be a grave is in fact a grave, I would expect that the THC would seek a legal opinion concerning whether the grave is considered to be part of First Street Cemetery or whether it constitutes a separate abandoned or unknown cemetery. If it is determined that the grave constitutes a separate abandoned cemetery, I would expect that notice of an abandoned cemetery will be filed with the county clerk of McLennan County. If it is determined that the grave falls within First Street Cemetery (the historic property), the map attached to the MOA showing the boundary of the historic property should be modified to include the grave site.

3) The treatment plan indicates that the presumed grave was found during excavations for a utility line. The *Waco Tribune-Herald* reports: "What appears to be an infant-size casket was discovered in the path of a three-phase electrical power line the city of Waco wants to run underground to serve *Knox Hall*" (<http://www.wacotrib.com/news/Another-newly-discovered-grave-obstructing-Texas-Ranger-Museum-expansion.html>). The MOA states that the plan shall follow the Council's "Policy Statement Regarding Treatment of Burial Sites, Human Remains and Funerary Objects..." Principle 4 of the policy statement states: "Burial sites, human remains and funerary objects should not be knowingly disturbed *unless absolutely necessary*." While the treatment plan presents convincing arguments relating to the logistical need to exhume the burial, it does not address the broader issue of whether it is "absolutely necessary" to remodel Knox Hall (assuming the news report about the purpose of the utility line is correct). Do the THC and NPS consider that that it is absolutely necessary to remodel Knox Hall? Additionally, given that Knox Hall lies within the boundaries of First Street Cemetery, have the THC and NPS considered the possibility that additional graves will be encountered as trenching continues?

4) The treatment plan is signed by the representative of a private firm, but was presumably prepared by the City: "After consulting with the THC, the City presents the following treatment plan for your review and approval." The treatment plan states: "...First Street Cemetery has had its dedication removed by a court action in 1968..." This statement is inconsistent with comments made by the THC's legal counsel (Joe Thrash) in the state attorney general's office. In an email to Dr. James Bruseth dated April 2, 2008, Mr. Thrash wrote: "While there was an attempt to remove the dedication, I think it was probably void since the graves were not removed." In testimony to the Texas House of Representatives Culture, Recreation and Tourism Committee on October 28, 2008, Mr. Thrash stated that the dedication status of the cemetery was in "legal limbo." Based on Mr. Thrash's statements, the dedication status of the cemetery is unclear.

The MOA is to be implemented in compliance with state laws. Subsection 711.035(f) states: "Dedicated cemetery property shall be used exclusively for

cemetery purposes until the dedication is removed by court order or until the maintenance of the cemetery is enjoined or abated as a nuisance under Section 711.007.” Until the dedication status of the cemetery is clarified by a formal legal opinion, it is not possible to argue that the ongoing construction projects at First Street Cemetery are in compliance with state law as required by the MOA.

5) In apparent contradiction to the legal advice provided by the THC’s legal counsel, THC Executive Director Mark Wolfe has written (personal communication, Wolfe to Griggs, June 8, 2009; available upon request) that the 1968 court order is still in effect:

As you are also well aware, a court order authorizing removal of the remains was obtained by the City in 1968. It is unclear whether the City contacted the old Department of Health at that time. It is clear that the City had legal authority to remove the remains at that time, and there is nothing to indicate that the authority granted by the order of the court has lapsed or expired.

If the THC considers that the 1968 court order is still valid and that exhumations for the ongoing construction projects are being conducted pursuant to the order, I would suggest that *all* graves in the lower half of the cemetery must be exhumed to achieve compliance with the order. Maps and plats prepared by the City for the 1968 court case clearly show that the lower section of First Street Cemetery (the location chosen for Fort Fisher Park) was to be abated and the upper section was to be renovated. Copies of some of the maps and plats at the following URLs:

http://www.firststreetcemetery.org/-Renovation_Plats.html
http://www.firststreetcemetery.org/Park_boundary_map.html

The 1968 judgment also refers to areas of exhumation and renovation:

The City of Waco has prepared an extensive plan for the development of said cemeteries and the property adjacent thereto for public purposes and said plan has been funded. Said plan provides that said cemeteries [City, Masonic and I.O.O.F cemeteries of First Street Cemetery] will be specifically platted for their orderly development and that the disinterment and relocation of the interred bodies and/or grave markers will be carried out under the direction and supervision of a licensed undertaker.¹ That disinterment of the bodies interred in said cemeteries and interment according to said plan is necessary for the orderly development of said cemeteries and

¹ If it was understood in the 1968 court order that graves were to be exhumed under “the direction and supervision of a licensed undertaker,” and THC elects to cite the court order as justification for the exhumation of graves, shouldn’t a licensed undertaker be present to comply with the terms of the order?

in correcting the offensive condition which now prevails in said cemeteries.²

Moreover, the judgment in the 1968 case clearly indicates that all (not some) bodies in the lower section of the cemetery were to be removed:

It is, therefore, ORDERED, ADJUDGED and DECREED that the City of Waco, applicant herein, shall proceed to disinter and re-inter said graves or the contents therein and remove and relocate markers within said cemeteries and such work shall be done without cost or expense to the families or heirs of the deceased.

Obviously, removal of all the graves from the lower section is not desirable from an archaeological/historical perspective, but this would seem to be necessary outcome if the THC seeks to justify exhumations based on the 1968 court order.

In sum, there is confusion at the THC with regard to the dedication status of the cemetery and the validity of the 1968 court order, and this confusion precludes compliance with state law. The THC's legal counsel admits that the dedication status is unclear, while the executive director states that the court order is not only valid, but that THC is authorized to issue permits for exhumations to continue fulfilling the 1968 court order. Yet while the court order was designed to clear burials from the entire lower section of the cemetery, Mr. Wolfe seeks to reinterpret the ruling to allow for piecemeal exhumations that suit current objectives. And perhaps the greatest irony is this; while the 1968 court order called for the exhumation of graves for the purpose of de-dedicating the cemetery, Mr. Wolfe suggests that graves can be exhumed under the court order to complete construction projects...so that the cemetery can be "re-dedicated."

6) In compliance with Subsection 711.011(a) of the THSC, I submitted in April of 2009 a filing with the county clerk of McLennan County to declare the cemetery an abandoned cemetery under Texas law. That filing has been accepted and recorded. The designation of the cemetery as an abandoned cemetery is consistent with the MOA which, as noted above, states that treatment plans concerning discoveries of graves "shall follow the Texas Health and Safety Code that pertain to abandoned cemeteries and graves." Importantly, abandoned cemeteries are considered dedicated cemeteries under state law:

[N]o particular instrument or ceremony is required to dedicate a tract of land to cemetery purposes. Its actual use as such is sufficient. (Quote in Texas Attorney General Opinion No. JC-0235 from Damon v. State, 52 S.W.2d 368, 370 (Tex. Comm'n App. 1932), June 22, 2000.)

² The stated purpose of the 1968 court was to correct the "offensive condition" of the cemetery. If the THC justifies exhumations under the assumption that the 1968 court order is valid, are we also to assume that THC concurs with the purpose of the order?

To conclude, I request that the THC seek a formal opinion from the state attorney general regarding the dedication status of the cemetery and the validity of the 1968 court order to demonstrate transparency and a commitment to comply with state law as required by the MOA. In the event that the THC will not seek a formal opinion, I would request that the THC provide to the consulting parties a statement detailing the THC's current position regarding the dedication status of the cemetery and the validity of the 1968 court order.

Sincerely,

John Griggs, Ph.D.