Internal Guidance for Management of Tribal Cultural Resources and Consultation
Internal Guidance for Management of Tribal Cultural Resources and Consultation
Volume I: Policy

City of Roseville

July 2020
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MANAGEMENT SUMMARY

In 2018, the City of Roseville determined a need for internal guidance intended to provide consistency and fairness in the manner in which tribes are consulted with prior to and during project construction, to ensure a consistent application of policies for all discretionary projects by the City, and to exercise responsible management and use of public funds.

This guidance document is organized into two parts. First is the City’s position on tribal participation during the project planning and approval process for discretionary projects. This includes both private sector and public (City) projects, which are subject to state and local laws and regulations that are under the jurisdiction of the City. It also includes guidance for City planners on determining when mitigation measures related to Native American participation are warranted under CEQA, standard treatment and mitigation measures that can be used consistently in project planning, and guidance on the City’s use of public funding when conducting consultation.

Second, this guidance document also provides information and guidance for City staff and contractors during the project construction and implementation phases. This includes thresholds for payment for tribal participation, instructions for contractors in the event of an unanticipated discovery, and guidance for City staff in assessing and acting upon unanticipated discoveries.

This guidance document is organized into two sections. Volume I is the City policy and procedures, which was adopted by the City Council on July 15, 2020. Volume II is the implementation manual, which includes templates, forms, and example mitigation measure language. The City will periodically review Volume I to determine if revisions to the City’s policies warrant consideration by the City Council. Volume II is intended to be a living document, and modifications to that volume will not require City Council adoption, as long as those amendments are consistent with the policy in Volume I.
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<td>AB</td>
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<td>CC&amp;Rs</td>
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<td>Most Likely Descendant</td>
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<td>TCR</td>
<td>Tribal Cultural Resources</td>
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<td>UAIC</td>
<td>United Auburn Indian Community of the Auburn Rancheria</td>
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<td>USACE</td>
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1.0 INTRODUCTION

1.1 Regulatory Setting

In recent years, a number of changes have occurred in the regulatory context within which the City operates. These changes occurred at various levels of jurisdiction, including at the city, state, and national levels and in the thresholds and expectations for best professional practices in cultural resources management. Changes have also occurred in terms of the level of involvement by stakeholders in cultural resources, particularly Native American tribes, as well as historical societies and the general public. The relevant laws and regulations include the following.

- Assembly Bill (AB) 52, passed by the California legislature in 2014, amended the California Environmental Quality Act (CEQA) to require early consultation with California Native American tribes when preparing a CEQA document for a specific project. The City, as CEQA lead agency, must offer consultation with tribes that request notification of projects at the initiation of CEQA. The consultation, if initiated, is to determine whether or not Tribal Cultural Resources (TCR), as defined by AB 52, would be affected by the project. Subsequently, an update to the CEQA Guidelines took effect September 27, 2016 that revised Appendix G to the CEQA Guidelines to separate the consideration of tribal cultural resources from cultural and paleontological resources, and to add sample checklist questions.

- Senate Bill (SB) 18 was signed into law in September 2004 and became effective in March 2005. SB 18 (Burton, Chapter 905, Statutes of 2004) requires city and county governments to consult with California Native American tribes early in the planning process with the intent of protecting traditional tribal cultural places. The purpose of involving tribes at the early stage of planning efforts is to allow consideration of tribal cultural places in the context of broad local land use policy before project-level land use decisions are made by a local government. As such, SB 18 applies to the adoption or substantial amendment of general or specific plans. The process by which consultation must occur in these cases was published by the Governor’s Office of Planning and Research through its Tribal Consultation Guidelines: Supplement to General Plan Guidelines (November 14, 2005).

- The regulations implementing Section 106 of the National Historic Preservation Act (NHPA) of 1966 were amended in 2000 and 2004. The amended regulations, found in the Federal Register at 36 CFR Part 800, specify how federal agencies are required to take into account the effects of their undertakings on historic properties. The Section 106 regulations apply to projects in the City when the project would receive federal funding, assistance, licenses, approvals, or permits (such as a Section 404 Clean Water Act permit from the U.S. Army Corps of Engineers [USACE] or funding by the Federal Highway Administration through the California Department of Transportation (Caltrans)). While the City is not a lead agency under Section 106, its projects may be subject to compliance with it.

- Section 5097.5 (a, b & c) of the California Public Resources Code Section states:

   “A person shall not knowingly and willfully excavate upon, or remove, destroy, injure, or deface, any historic or prehistoric ruins, burial grounds, archaeological, rock art, or vertebrate paleontological site, including fossilized footprints, inscriptions made by
human agency, or any other archaeological, paleontological or historical feature, situated on public lands, except with the express permission of the public agency having jurisdiction over such lands. Violation of this section is a misdemeanor. As used in this section, “public lands” means lands owned by, or under the jurisdiction of, the state, or any city, county, district, authority, or public corporation, or any agency thereof.”

- Public Resources Code 5097.9 establishes that no public agency or private party using or occupying public property or operating on public property, under a public license, permit, grant, lease, or contract made on or after July 1, 1977 shall interfere with the free expression or exercise of Native American religion. This code also prohibits damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require.

- Public Resources Code 5097.98 specifies procedures to be followed in the event of the discovery of Native American human remains. This code specifies that the county coroner shall immediately notify the persons believed to be most likely descended from the deceased Native American. It provides that the most likely descendant (MLD) has the right to inspect the site, with permission of the land owner, and provide recommendations for treatment of the remains and grave goods within 48 hours of being granted access to the site. The code also provides procedures in the event that the MLD is unable to be identified or the identified descendants fail to make a recommendation.

- Public Resources Code 5097.99 states that no person shall obtain or possess any Native American artifacts or human remains except as otherwise provided by law. The code further states that unlawful possession of these items is a felony, punishable by imprisonment.

- Health and Safety Code 7050.5 establishes the intentional disturbance, mutilation, or removal of interred human remains a misdemeanor. This code also requires that upon the discovery of human remains outside of a dedicated cemetery excavation or disturbance of land cease until a county coroner makes a report. The code also requires that the county coroner contact the NAHC within 24-hours if he or she determines the remains to be of Native American origin.

In addition, the City is constrained by budgetary factors, coupled with a recent post-recession increase in private-sector development, that have led to the need for mindful expenditures of public funds. Thus, efficiency and consistency in compliance with the above laws and regulations are driving the need to develop standardized guidance for City staff.

### 1.2 History of Tribal Participation in City Projects

Overall, there has been an increased awareness of the importance of early consultation with resource stakeholders as part of project planning, particularly with tribes. There is an increasingly complex tribal consultation process that the City is either directly or indirectly affected by, and which varies from project to project. Typically, tribal consultation involves two classifications of consulting parties: the California Native American Heritage Commission (NAHC) and California Native American Tribes.

The California NAHC is composed of a nine-member governor-appointed advisory body responsible for the identification and cataloging of places of special religious or social significance to Native Americans,
including sacred sites and known Native American graves and cemeteries. The NAHC may serve as a trustee agency under CEQA and is responsible for identifying an MLD for Native American human remains that are unearthed in California. The NAHC may also serve as a mediator between landowners, agencies, and California Native American tribes.

California Native American Tribes (tribes) are defined in Section 21073 of the California Public Resources Code and Chapter 905 of the Statutes of 2004 and apply to both AB 52 and SB 18 tribal consultation. Under the former, the tribes that notified the City in writing of their request to receive notice of all projects subject to CEQA are subject to specific procedures enacted by AB 52. These tribes need not be physically located in or near Roseville but must be traditionally and culturally affiliated with the land currently under the jurisdiction of the City. In addition, California Native American Tribes, including but not limited to those that do not request that the City notice them under AB 52, may be consulted under SB 18. The SB 18 lists of tribal contacts typically provided by the NAHC in response to City requests include a number of tribes in the Roseville region. The City is required to offer consultation to all of the tribes named by the NAHC on its SB 18 list, when SB 18 applies.

With both AB 52 and SB 18 consultation, the culturally affiliated tribes that most often engages the City in consultation during project planning and construction is the United Auburn Indian Community of the Auburn Rancheria (UAIC); however, other culturally affiliated tribes are given equal opportunities to consult with the City. The tribal participation in projects typically occurs in one of two points in the process: 1) during pre-project planning and environmental review under CEQA (AB 52) and/or SB 18; and 2) during unanticipated discoveries that may occur during construction. Often, the former leads to requests for more involvement during project construction and implementation, which must be balanced by the requirements and thresholds of CEQA and other applicable laws and regulations.

1.3 Purpose and Need for Internal Guidance

The need for internal guidance for City staff is based on several factors, including the project-specific regulatory complexity for any given project, the diversity and inevitable turnover of City planning staff and elected officials, and limitations on public funding. Internal City guidance is intended to provide consistency and fairness in the manner in which tribes are consulted with prior to and during project construction, to ensure a consistent application of policies for all discretionary projects by the City, and to exercise responsible management and use of public funds.

Therefore, the City developed the following internal guidance, which is organized into the two phases noted above. Section 2.0 describes the City’s position on tribal participation during the project planning and approval process for discretionary projects. This includes both private sector and public (City) projects, which are subject to state and local laws and regulations that are under the jurisdiction of the City. Section 2.0 also includes guidance for City planners on determining when mitigation measures related to Native American tribal participation are warranted under CEQA, standard treatment and mitigation measures that can be used consistently in project planning, and guidance on the City’s use of public funding when conducting consultation.

Section 3.0 provides information and guidance for City staff and contractors during the project construction and implementation phases. This includes thresholds for payment for tribal participation, instructions for contractors in the event of an unanticipated discovery, and guidance for City staff in assessing and acting upon unanticipated discoveries.

City of Roseville
Internal Guidance
This internal guidance document was developed by the City staff and assembled by a qualified professional who meets Secretary of the Interior’s Professional Qualification Standards for Archaeology codified in 36 CFR Part 61.

This guidance document is organized into two sections. Volume 1 is the City policy and procedures, which was adopted by the City Council on July 15, 2020. Volume II is the implementation manual, which includes templates, forms, and example mitigation measure language. Volume II is intended to be a living document, and modifications to that volume will not require City Council adoption, as long as those amendments are consistent with the policy in Volume 1.

2.0 TRIBAL CONSULTATION DURING PROJECT PLANNING AND APPROVAL

2.1 Coordination with Existing Laws and Confidentiality Requirements

In developing this internal guidance, it is the City’s intent to follow closely the requirements in applicable law. Nothing in this guidance document is intended to conflict with existing law, and where such conflicts may arise, existing law governs. This applies to the statute and guidelines implementing CEQA, the California Public Resources Code, the California Government Code, and the California Health and Safety Code. The City previously developed standard operating procedures for compliance with AB 52 and SB 18, which are provided in Volume II of this guidance document.

With regard to compliance with AB 52, the City’s legal interpretation of the requirements thereof will require tribal consultation when the City is preparing any of the following:

- Initial Study/Negative Declaration
- Initial Study/Mitigated Negative Declaration
- Project or Program Environmental Impact Report
- Supplemental Environmental Impact Report
- Subsequent Environmental Impact Report

It is the City’s interpretation of current state law that tribal consultation is not required under AB 52 for Statutory Exemptions, Categorical Exemptions, consistency determinations, or preparation of Addendum CEQA documents; however, tribes may request receipt of all routing notices as notification of all City projects, regardless of the type of discretionary review, thereby allowing for tribal input on the use of Categorical Exemptions.

With regard to compliance with SB 18, the City’s legal interpretation of the requirements thereof will require tribal consultation when the City is preparing any of the following:

- Adoption or Amendment of a General Plan
- Adoption or Amendment of a Specific Plan
- Dedication of Open Space that Contains Tribal Resources
In the event that an SB 18 action also triggers CEQA review, then both SB 18 and AB 52 consultation are required; however, it is not necessarily the case that an SB 18 action will trigger a CEQA document that is subject to AB 52.

TCRs may or may not manifest as archaeological sites. In some cases, TCRs are viewsheds, plant gathering areas, or other sacred spaces that are not readily identifiable to non-tribal members. In many cases, TCRs also include an archaeological component, such as artifacts, features, and sites (with or without human remains), and these “archaeological TCRs” are more visible to the public, and thus, more likely to be subject to looting or pothunting. Therefore, maintaining confidentiality of the location and nature of archaeological sites and TCRs is of the utmost importance to the City. Similarly, federal and state law recognize this need. As it pertains specifically to CEQA and this internal guidance document, the City shall make best efforts to ensure that information about the location, description, and use of the tribal cultural resources is not included in the environmental document or otherwise disclosed by the City to the public. Such information is protected from public dissemination through an exemption to the California Public Records Act. In addition, although no federal lands currently exist within the City boundaries, dissemination of archaeological site information is also prohibited by Exemption 3 of the federal Freedom of Information Act (5 USC 552), because the disclosure of cultural resources location information is prohibited by the Archaeological Resources Protection Act of 1979 (16 USC 470hh) and Section 304 of the NHPA. Therefore, it is also exempted from disclosure under the Freedom of Information Act.

In light of these requirements for confidentiality, it is the City’s policy to not make publicly available the locations of cultural resources and TCRs, and dissemination of such information will be tightly guarded on a “need to know” basis only. Such circumstances are generally limited to City staff, landowners of property that contain resources, and consultants and engineers who are responsible for designing proposed projects in accordance with these Guidelines.

2.2 Policy of Payment for Consultation

In many areas of California, including the City of Roseville, some tribes have requested payment of public funds for their participation in the early planning stages of City projects. The purpose of this guidance is to clarify what costs the City will pay in the event the City receives a request for payment for participation in a project planning process.

Currently, there are no laws or regulations that require payment to either consulting parties or tribes during project planning activities, consultation, or construction. In fact, “consultation” is defined by Government Code Section 65352.4 as “the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties’ cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party’s sovereignty. Consultation shall also recognize the tribes’ potential needs for confidentiality with respect to places that have traditional tribal cultural significance.”

The City recognizes the importance of providing information, staff time, or contract labor time at no cost to the tribes and expects tribes to provide information to the City at no cost to the City. Additionally, there are numerous California Native American tribes in the region that may ascribe cultural affiliation to the Roseville area and may request consultation or participation in the future. Because different tribes have
different opinions, interpretations, cultural values, and information, it is the City’s intent to consult meaningfully with all California Native American tribes who wish to do so.

Furthermore, because CEQA is founded on consultation with interested parties, commenting agencies, stakeholders, and the public, the City is tasked with consulting with many organizations and individuals regarding all aspects of CEQA review, including biological and wildlife non-profit organizations, professional societies and associations, and members of the public. All voluntarily provide input and information to the City on a wide range of environmental topics covered by CEQA, which is taken into account during the decision-making process for discretionary projects. It has always been the City’s view that meaningful consultation cannot take place if such discussions are couched in financial or contractual relationships between the consulting parties and the public.

In addition, the City recognizes the difference between a “consulting party” (as described above) and a “consultant,” where the City delegates the preparation of environmental documents and supporting technical information to third party consultants, selected according to qualifications, cost, and technical expertise. Use of registered professionals is defined further in Section 15149 of the CEQA Guidelines and does not include consulting parties. Such consultants represent the subject matter being analyzed and do not require concurrence or agreement from other experts in the field to be considered valid for the purposes of CEQA.

The City does not generally compensate any “consulting parties,” including tribes, members of the public, or stakeholders, during project planning and environmental review for: 1) consultation during the City’s project planning process; 2) for information that any consulting tribe or party wishes the City to take into consideration during project planning; and 3) for tribes, members of the public, stakeholders, or other parties to visit or survey project areas to make recommendations to the City.

2.3 Accommodations for the Expression of Religion

The City recognizes the right of all citizens to freely express religion, and the City does not intend to willfully interfere with religious expression by Native American tribes or by any member of the public in implementing this internal guidance or during the environmental review or consultation processes. Therefore, it is the City’s policy to make “reasonable accommodations” for the expression of religion. “Reasonable accommodations” would be evaluated on a case by case basis and may include, but are not limited to:

- Facilitating project area tours during the project planning process;
- Providing privacy for tribal members when visiting TCRs;
- Honoring requests for meetings with tribal members to receive comments verbally, when members do not wish to document comments in writing;
- Temporarily pausing construction activities to accommodate a visit by tribal representatives, when determined by the City to be reasonable and feasible;
- Developing access agreements with tribes to allow for legal visitation of TCRs on City-owned property;
Accommodating voluntary tribal observation during construction when tribal monitoring is not warranted under CEQA;

Offering tribal representatives an opportunity to participate in pre-construction meetings with contractors to express tribal views regarding unanticipated discoveries;

Requiring, as a mitigation measure, tribal monitoring during construction activities where such monitoring is deemed necessary under CEQA;

Developing TCR treatment and reburial methods that are mindful of tribal values and culture;

Providing reasonable opportunity for comment in order for the tribe to provide comments on projects during project planning that is subject to AB 52 and SB 18 consultation; and

Any other accommodation deemed reasonable by the City.

Reasonable accommodations may be rescinded, revoked, or denied in the event of any of the following:

- Cause an unreasonable cost increase or delay that jeopardizes the viability of the project as determined by the City;
- Willful trespass of tribal members or representatives;
- After the City has initiated consultation, failure of a tribe or its representatives to respond to the City in a timely manner or in good faith;
- Any other behavior that is deemed to not be in good faith, as determined by the City.

2.4 Standard Mitigation Measures and Conditions of Approval

The City has developed standard mitigation measures and conditions of approval for discretionary projects under the City’s jurisdiction. Below are descriptions of these measures, including guidance on their applicability and use. Actual example mitigation measure language is provided in Volume II (Implementation Manual).

2.4.1 Avoidance and Preservation in Place

Consistent with Section 21084.3(a) of the Public Resources Code, the City shall, when feasible, avoid damaging effects to any TCR. This can be achieved through several possible scenarios, depending on the project circumstances. Each of the following scenarios represents a different level or strength of protection.

Use of Exclusionary Fencing

Where the City has determined that a TCR is located immediately adjacent to ground-disturbing activity, but where the location of the TCR is not proposed for impact, the City may require the placement of temporary construction fencing to prevent accidental or incidental impacts to the location during construction. This may also be appropriate when the TCR is located within a riparian area that cannot be impacted by the project. The exclusionary fencing must be included on all construction plans, specifications, and bid packages, which must stipulate the timing of the installation and conditions under which fencing is monitored and inspected until removal. This mechanism is appropriate when
construction-related activities could inadvertently impact a site but does not provide long-term management or preservation measures.

**Modification of Project Boundaries**

Where the City has determined that a TCR is located in an area that can be feasibly excluded from the project entirely, it may require that the project be redesigned to avoid the site. This may require either a lot line adjustment, construction perimeter fencing, or other feasible avoidance options. Such a decision would need to occur during the preparation of the CEQA document and could be memorialized as a mitigation measure if agreeable to all parties. This mechanism would allow for avoidance during construction, as well as post-construction, however it would not guarantee preservation of the resource that is no longer within the project boundary.

**Incorporation into Open Space with Deed Restrictions**

For projects that include the planned dedication of open space (which would also require compliance with SB 18), there may exist an opportunity to capture the TCR into the open space, either as currently designed or through a modification to open space boundaries to incorporate the TCR into it. This is common in oak woodland areas, where there tends to be a correlation between oak trees and bedrock mortars, as one example. Open space typically requires that the landowner restrict future development through recording of a deed restriction on the property; any such restrictions are public documents and must not specifically identify the location of TCRs. Moreover, care should be exercised when using deed restrictions, which can be reversed by landowners in the future. Therefore, this option may be better suited for City projects, as opposed to third party developers, unless additional measures can be put into place that ensure the deed restriction is not reversed without the City’s knowledge.

Management of open space may be the responsibility of a homeowner’s association, parks and recreation department, or non-profit preserve manager, all of whom would require knowledge of the resource and its location. Furthermore, because open space areas may allow for public visitation, the use of open space as an avoidance and preservation mechanism must be accompanied by a plan that dictates the activities that are allowed and prohibited within the location of the TCR. These activities may differ between the TCR and that which are allowed in the balance of the open space. In general, management of the protected resource should include, but not be limited to, the same types of activities that apply to deed restrictions, as described below.

**Use of Development Restrictions in Perpetuity**

The strongest method of avoidance and preservation in perpetuity of TCRs is the dedication of a deed restriction or declaration of covenants and restrictions over the site, recorded with the County, to restrict development in perpetuity. The easement may be held either by the City, the County, a non-profit corporation, or a California Native American tribe, as long as the landowner and the easement holder are not the same.

Development restrictions in perpetuity take much longer to negotiate and record, are more expensive due to the funding assurances required (Property Analysis Records and endowments) and are typically more expensive to manage (third party preserve managers and more stringent monitoring and management requirements); however, they are also very difficult to reverse in the future. As such, deed restrictions provide the highest level of assurances that a site will be preserved in perpetuity.

City of Roseville
Internal Guidance
The entity selected for management must be able to demonstrate capability to perform the following actions, as deemed appropriate: fence and gate repair; sign replacement; regular monitoring and associated reporting by a professional archaeologist for damage; erosion control; trash removal; vegetation and weed control; security patrols; vandalism abatement; and removal of trespassers. No signs indicating the presence of tribal cultural resources shall be permitted.

In addition, on a case by case basis, the City should consider prohibiting the following activities within the boundaries of preserved sites, even if such activities are permissible in other areas of larger biological or open space preserves, within which the site may be located:

- Unseasonable watering
- Use of fertilizers, pesticides, biocides, herbicides or other agricultural chemicals
- Use of off-road vehicles and use of other motorized vehicles except on existing roadways
- Agricultural cultivation activity of any kind
- Recreational activities, including, but not limited to, camping, with the exception of the use of a pedestrian trail adjacent to the site boundaries
- Construction, reconstruction, erecting or placement of any building, billboard or sign (except for that which is designed to keep the public out), or any other structure or improvement
- Depositing or accumulation of soil, trash, ashes, refuse, waste, bio-solids or any other materials
- Lighting fires, incendiary devices, or flammable substances
- Planting, introduction, or dispersal of nonnative or exotic plant or animal species (animal grazing is permitted for fire control)
- Filling, dumping, excavating, draining, dredging, mining, drilling, removing, or exploring for or extracting artifacts, minerals, loam, soil, sand, gravel, rock, or other material on or below the surface of the sites, or granting or authorizing surface entry for any of these purposes
- Altering the surface or general topography of the sites, including but not limited to any alterations to habitat, building roads or trails, over paving or otherwise covering the sites with concrete, asphalt or any other impervious material, except for capping, if required and specified in the deed restriction as allowable
- Removing, destroying, or cutting of trees, shrubs, or other vegetation, except as required by law for fire control and prevention or treatment of disease, or as required to maintain public safety
- Mechanical or chemical weed abatement activities (hand and grazing methods are acceptable)
- Manipulating, impounding or altering any natural water course, body of water, or water circulation on the sites, and any activities or uses detrimental to water quality, including but not limited to degradation or pollution of any surface or sub-surface waters
- Engaging in any use or activity that may violate, or may fail to comply with, relevant federal, state, or local laws, regulations, permit conditions, or applicable policies
• Signs indicating the presence of the protected TCR

The above restrictions and management requirements may be stipulated either in the deed restriction document itself, or in a separate Operations & Management Plan.

Finally, deed restrictions are public documents and must not specifically identify the location of TCRs; however, the document must specifically include the conservation of cultural and tribal values.

### 2.4.2 Pre-Project Repatriation Designation

The City may recommend that the landowner or project proponent (if not the City) designate a reburial location on the property for any tribal cultural materials or human remains that may be unearthed during ground-disturbing activities during the project. The location shall be one that will not be subjected to ground-disturbing activities in the future. This location will be documented as a reinternment location by the Native American tribe, and the tribe may file it as such with the NAHC, County, City, and the California Historical Resources Information System. The site of any reburial of Native American human remains shall be kept confidential and not be disclosed pursuant to the California Public Records Act, California Government Code §§ 6254.10, 6254(r). The Placer County Coroner is also responsible for withholding from public disclosure any information related to such reburials, pursuant to the specific exemption set forth in California Government Code § 6254.5(e).

### 2.4.3 Pre-Construction Inspections

In some cases, vegetation, structures, or pavement obscure the ground surface, making identification of archaeological TCRs difficult. When the project description calls for the removal of the material, exposure of the natural soil may reveal evidence of archaeological sites, features, or constituents that were not visible during project planning, which would justify the need for construction monitoring. Conversely, it may indicate that no sites exist below the material, such that monitoring during construction was, in hindsight, not necessary. Therefore, the City may elect to allow tribal representatives an opportunity to perform an inspection during the first week of ground-disturbing activity, in lieu of full-time construction monitoring. The City’s policies regarding payment (Section 2.2) shall apply.

In this event, a minimum of seven calendar days prior to beginning earthwork or other soil disturbance activities, the construction manager should notify the City’s representative of the proposed earthwork start-date, in order to provide the City with time to contact a culturally affiliated tribe. A tribal representative would be invited to inspect the project location, including any soil piles, trenches, or other disturbed areas, within the first five days of ground-breaking activity, at the discretion of the tribe. During this inspection, a meeting of construction personnel is recommended in order to afford the tribal representative the opportunity to provide tribal cultural resources awareness information. In the event that the tribe does not send a representative within the prescribed time frame, then the City is not obligated to re-invite the tribe and activity will proceed.

### 2.4.4 Tribal Monitoring

As part of environmental and CEQA review, tribal consultation may or may not cause the City to determine that TCRs (as defined by Section 21074(a) of the Public Resources Code) may be significantly impacted by a proposed project. In many cases, the City receives requests from tribes for tribal
monitoring, regardless of the CEQA findings. The purpose of this section is to define the thresholds for when tribal monitoring shall be a mitigation measure or condition of approval, and when it should not.

As shown in the flow charts and procedures in Volume II, the City first must determine, through consultation if requested by a tribe, whether or not a TCR is present within the project area. The City will evaluate the information provided by consulting tribes to determine if the information meets the definitions in Section 21074(a)(1) of the Public Resources Code. If not, then the City will next determine if substantial evidence has been provided, pursuant to Section 21074(a)(2) of the Public Resources Code. The City does not recognize the fair argument standard as meeting the definition of substantial evidence under Section 21074(a)(2).

If the City determines that information submitted by a tribe does not meet the legal definitions of a TCR under state law, then the City shall document this finding in the administrative record, CEQA document, and in its termination of consultation (without agreement) letter to the tribe. The City may elect to use the following language as part of the record:

“After reviewing the information provided by the tribe, the City has determined that there is not substantial evidence present to support the notion that Tribal Cultural Resources, as defined in Section 21074(a) of the Public Resources Code, will be impacted by the proposed project; however, we would welcome any input on the contractor awareness training session, should you so desire. In addition, the City will notify the tribe in the unlikely event of an unanticipated discovery of potential Tribal Cultural Resources so that we may consult with you on identification and appropriate treatment, pursuant to applicable state law. The City hereby concludes consultation with the tribe pursuant to Section 21080.3.2(b)(2) of the Public Resources Code.”

However, if the City determines that a TCR is present, then the City next will determine whether or not the TCR will be significantly impacted by the project (see Volume II). The presence (or likely or possible presence) of a TCR within a project area does not, in and of itself, trigger mitigation. Only after the City determines that the TCR will be significantly impacted does the City consider the appropriate type of mitigation. Tribal consultation will assist the City in making the following decisions.

Appropriate mitigation for TCRs must take into account two primary factors. The first is that the proposed mitigation must be appropriate for the nature of the resource being impacted. For example, tribal monitoring during construction would not necessarily be appropriate if the resource is not archaeological in nature, or if the location will be protected from project activity by exclusionary fencing. Tribal monitoring would also not be appropriate for most activities that occur above the ground surface, or those that are located within and would not excavate below areas of documented fill. Tribal monitoring would, however, be appropriate when there is a known or high likelihood that an archaeological TCR will be encountered during ground-disturbing activities. The City should consider whether or not tribal monitoring, if warranted, should be focused only on vegetation removal, ground disturbance to a specific depth, or in only certain portions of the project.

The second factor is that the proposed mitigation must pass the seven tests for mitigation under CEQA (Figure 1). If the City determines that tribal monitoring (or any mitigation measure) is appropriate given the nature of the TCR and project activity, then the City must subject the proposed measure to the seven tests shown in Figure 1.

City of Roseville
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Figure 1. Seven Tests for Mitigation Measures (adapted from Placeworks 2012).
If the City determines that the proposed mitigation of tribal monitoring is both appropriate for the nature of the resource and passes the seven tests for mitigation under CEQA, then the City shall require that as a mitigation measure in the environmental document, pursuant to Section 21082.3(a) of the Public Resources Code. The City should then terminate consultation (with agreement) according to Section 21080.3.2(b)(1) and consider the requirement for payment of tribal monitoring, as described in Section 3.0.

In the event that the City applies the screening methods above to a tribe’s proposal for tribal monitoring and determines that the mitigation is neither appropriate nor allowable under CEQA, then the City shall reject the tribe’s recommendation. In doing so, the City must document the justification for the decision in the administrative record and in the termination of consultation (without agreement) letter to the tribe. The City may consider using part or all of the following response:

“In determining appropriate mitigation for significant impacts to Tribal Cultural Resources, the City considered: 1) recommendations submitted by the tribe during AB 52 consultation under Section 21080.3.2(a) of the Public Resources Code; 2) requirements under Section 15041(a) and 15126.4(a)(3) of the CEQA Guidelines for feasible and mandatory mitigation, respectively; and 3) Section 21082.3 of the Public Resources Code regarding mitigation of significant impacts to Tribal Cultural Resources. After evaluating the information provided by the tribe through consultation, and in consideration of the City’s legal obligations under CEQA and the requirements cited above, the City determined that tribal monitoring during construction will not reduce the impact to TCRs to a level that is Less Than Significant. However, in accordance with Section 21084.3(b), the City determined that appropriate and feasible mitigation will be composed of the following: [insert].

The City hereby concludes consultation with the tribe pursuant to Section 21080.3.2(b)(2) of the Public Resources Code.”

In consideration of the factors above, in general, tribal monitoring would be considered under any of the following circumstances:

- when one or more buried archaeological or known (non-isolate) TCRs is likely in the vicinity, but its specific location is unknown;
- when ground-disturbing activities will come within 100 feet of a recorded Native American archaeological site or TCR; and
- when installing or verifying the placement and integrity of temporary exclusionary (orange barrier or silt) fencing around TCRs that must be avoided.

Mitigation measures that require tribal monitoring must be written with specificity in mind, and must, at minimum:

- specify the exact number of tribal monitors for the project (as these will be paid monitors);
- not name a specific tribe, but reference “a culturally affiliated tribe;”
- clearly define the scope of what should be monitored (e.g., “all ground-disturbing activity for the project,” or “initial vegetation removal only,” or “ground disturbance down to X feet below the surface,” or “all ground-disturbing activity in the [define] area of the project”);
• specify the number of hours’ notice that a tribe is given in advance of the start of monitoring activity (e.g., 72 hours);

• indicate whether or not activity can proceed without a monitor who did not arrive as scheduled, as long as the notification procedures were followed;

• specify the authority of the tribal monitor to halt project activity and for how long (see Section 3.0 for more information); and

• specify the reporting requirements back to the City for reconciliation with the Mitigation Measure Reporting Program (e.g., monitoring logs).

The City further recognizes that there are numerous culturally affiliated tribes with whom it consults, and that the City is not able to hire more monitors than are necessary simply because there is more than one interested tribe. In cases where more than one tribe wishes to monitor, then the City may require that interested tribes alternate monitoring days or projects, in cases where there are multiple project phases or segments.

Finally, monitoring is considered a last resort to minimizing or mitigating significant impacts and is not the default treatment for all projects. Should the City determine that monitoring is not an appropriate mitigation, then the City (with permission from the landowner, if on private property), may extend an opportunity to tribes to visit the project during construction on a volunteer basis, provided that, if required by the landowner, the visitors receive safety training and sign liability release waivers. The City does not have the authority to grant property access to private property over the objections of the landowner.

2.4.5 Capping

In certain cases, the use of capping with natural materials (e.g. certified sterile soils) may be used to effectively bury a TCR or archaeological site to protect it. This could include sites that are located in highly visible areas where public access could otherwise present a risk to the preservation of the site, where existing topography or future grade differentials could cause erosion and stabilization issues, or where there is not sufficient horizontal separation from project activities, but that vertical separation could be achievable. In these scenarios, the use of capping with soil, vegetation, and/or geotextile fabric may be preferred over complete exposure of the site.

If determined appropriate by the City, in consultation with culturally affiliated tribes, temporary protection, as discussed below, may be provided to cemeteries, burials, burial objects, burial soil, sacred objects, sacred sites, and sacred structures within the direct area of impact or exposed by project-related activities during project construction. These procedures may be undertaken where there is the potential for construction activities to damage site, objects, or human remains. In consultation with a City representative, a tribal monitor and qualified archaeologist will demarcate the limits of the area to be capped.

Where capping is considered an appropriate treatment measure, the following guidelines are recommended:

• The culturally affiliated tribe(s) should be afforded an opportunity to review and comment upon the capping plan and monitor its installation.
• The thickness of the soil cap must take into consideration the size and shape of the site, particularly the elevation of above-surface features like bedrock outcrops.

• The methods used to cap the resource must be designed to avoid damage to the resource during the process of installing the cap (such as prohibition of heavy equipment during installation).

• Caps may be covered with vegetation (without invasive root systems) to discourage erosion and unauthorized digging.

• No buildings or structures shall be placed on top of the cap.

• Non-motorized pedestrian paths may be placed over the cap, but only when constructed of natural materials such as bark or pea gravel (i.e., no pavement, brick, imported stone) and only when the entire site is capped by at least 18 inches of soil.

• No signage to indicate the location of a site beneath the cap shall be installed.

• Deed restrictions that limit future use and development in perpetuity should be considered for areas subject to capping.

• As appropriate, the capping should include a combination of layers of culturally sterile and chemically-compatible soil of different colors and/or the layering of cyclone, chain link, or orange barrier fencing to discourage digging.

2.4.6 Project-Specific Public Interpretation and Education

In cases where a significant effect to a TCR will occur and the TCR is deemed significant because of its association with tribal culture, history, religion, or other values, but where the impact by the project is determined to be indirect, or because the qualities that convey the significance of the TCR are not location or materials, interpretation of the TCR for the benefit of the public may be an appropriate mitigation.

This can be achieved through the development of:

• One or more interpretive panels in parks, along trails, or at scenic overlooks (without disclosing the specific locations to the public);

• An educational module for K-12 students;

• Development of an exhibit for the Maidu Museum & Historic Site;

• Creating replicas of artifacts, including the potential for commissioning the creation of cultural items from Native American artisans for museum or educational use; or

• Digital scanning and archiving of sites.

The consultation conducted with the culturally affiliated tribe would determine whether or not one or more of these measures is appropriate for TCRs.
2.4.7  **Covenants, Conditions, and Restrictions**

For residential development projects that may be located in close proximity to known and/or preserved TCRs, the City may elect to require a notice to future property owners of the prohibition of artifact collecting and excavation, without disclosing specific locations of sites. This can be accomplished through Covenants, Conditions, and Restrictions (CC&Rs) that are recorded on each parcel. In such a case, the City may require the following:

“The collecting, digging, disturbance, or removal of any artifact or other prehistoric [precontact] or historic object located in an open space area, conservation easement, a lot subject to a deed restriction, or to any archaeological site that may become unearthed in the future, is prohibited.”

2.4.8  **Tribal Access Agreements**

One of the barriers to traditional use of tribal resources has been private land. Many tribes have not been able to demonstrate a continuum of use of a TCR because the land upon which it is located was claimed or deeded to others. This has resulted in either an inability to use TCRs, or the need to risk trespass in order to do so.

In order for a California Native American tribe to gain access to a TCR (located on City property) for visitation, the City may develop a right-of-access authorization for requesting tribes. The authorization shall specify the terms under which tribal access can be legally achieved and shall define the acceptable and prohibited uses thereof, and appropriate liability waivers.

In the event that a tribe requests access to a TCR that is located on private property, the City may require the landowner to develop an access agreement with a culturally affiliated tribe as part of a CEQA mitigation measure.

2.4.9  **Contractor Awareness Training**

There always remains a possibility that unanticipated discoveries may occur during project construction. For this reason, an archaeological sensitivity training program (Contractor Awareness Training) may be appropriate for both cultural resources and TCRs. In that event the City will develop a program with a focus that is tailored to the type of resources likely to be encountered. For example, a project that involves demolition and replacement of a historic-era building in old Roseville might have a greater potential for the discovery of historic (non-Native American) archaeological materials, and thus, a training program would be developed by a qualified professional archaeologist and not require participation by tribes. However, in cases where the project location is near a natural waterbody or is in an area determined to be sensitive for precontact or Native American resources, then the development of a training program would require input from culturally affiliated tribes.

If deemed necessary by the City, in consultation with a culturally affiliated tribe, sensitivity training should be conducted during a pre-construction meeting for construction supervisors prior to beginning any ground-disturbing project work. The sensitivity training program should provide information about notification procedures when potential archaeological material is discovered, procedures for coordination between construction personnel and monitoring personnel, and information about other treatment or issues that may arise if cultural resources (including human remains) are discovered during project construction. This protocol shall be communicated to all new construction personnel during orientation,
prior to the employee beginning ground-disturbing work on the project, and on a poster that is placed in a visible location inside the construction job trailer.

If the project has the potential to impact TCRs, then tribal input into the program is advised. In this case, the program should include relevant information regarding sensitive tribal cultural resources, including applicable regulations, protocols for avoidance, and consequences of violating state laws and regulations. The program should also describe appropriate avoidance and minimization measures for resources that have the potential to be located on the project site and will outline what to do and whom to contact if any potential TCRs are encountered. The program should also underscore the requirement for confidentiality and culturally appropriate treatment of any find of significance to Native Americans and behaviors, consistent with Native American Tribal values.

2.4.10 Post-Review Discoveries

There always remains the potential for ground-disturbing activities to expose previously unrecorded cultural resources or TCRs, even for projects that do not have known resources present. If subsurface deposits believed to be cultural or human in origin are discovered during construction, then the City must carry out steps to identify, evaluate, and treat the find in accordance with applicable state law. Because this potential exists for all projects that involve ground disturbance, it is recommended that an unanticipated discovery procedure be a required mitigation measure or condition of approval for all projects that will disturb the ground. Specific procedures for addressing discoveries are provided in the following chapter.

2.4.11 Alternative Treatment Measures

Based on the number and type of resources within a project, or based on the construction timing of the project, there may be a need to develop and negotiate certain types of mitigation that are not provided for above. There may also be requests from consulting tribes for methods of identification that may be considered to be non-traditional in mainstream cultural resources management (hereafter, “alternative”). The City, in consultation with appropriate professionals, experts, and tribes, shall be solely responsible for making the decision about whether or not an alternative method is appropriate for City projects. For private projects, where a project applicant objects to an alternative method, the City may opt to require a suitable substitute, as long as it has a similar result or effect. In any case, the City shall not require mitigation when the effects are found under CEQA to be not significant, and any such mitigation must be commensurate with the impact.

However, there are specific types of alternative methods that the City has determined are not appropriate at this time, including:

- Unless mutually agreed to by all culturally affiliated consulting tribe(s) and the City, use of forensic or human remains detection canines for surveys;
- Use of compensatory mitigation (payment of funds in exchange for impacts);
- Any mitigation or treatment that appears to benefit a specific entity, person, or tribe, rather than mitigating for a resource;
Any method that is not proven or accepted by the professional community that would create an undue financial burden on the City or applicant; and

Any other method or treatment that the City deems is not appropriate.

**Controlled Grading**

One example of an alternative method is controlled grading to slowly and carefully remove overburden and allow for less destructive exposure of any cultural constituents. This may be implemented during the excavation of soil that is identified as part of a precontact site. When used specifically for precontact archaeological sites or TCRs, this technique would, by definition, require the use of both an archaeological monitor and a tribal monitor from a culturally affiliated tribe. Because a tribal monitor would be required in this scenario, payment for monitoring is appropriate (see Section 3.0 for policies on payment).

Controlled grading would not be required for soil that is identified as non-cultural formational soil or fill dirt imported to the site that is determined to lack cultural constituents. The determination of the transition from cultural soil to formational soil should be made jointly by the project’s archaeological consultant, City staff, culturally affiliated tribe(s), and geotechnical professionals.

Controlled grading will involve use of a small piece of equipment or a road grader to peel away native soil using shallow cuts made in approximately two-to-five-inch-deep layers. The grading equipment will push the shallow cuts of soil to the outside of the cultural deposit area. This deposited soil may be sampled and screened to ensure adequate detection of any cultural materials that may be present. The monitors will observe and may provide input on the controlled grading process; however, the pace of the grading and the depth of layers to be removed will be directed by the City and implemented by the contractor. The potential exists that discoveries may temporarily suspend the controlled grading process if they are significant and require focused archaeological excavations or other appropriate treatment.

The archaeological monitor and tribal monitor will observe the removal of soil by a backhoe equipped with a flat-edge bucket or follow closely behind the grading equipment and mark any cultural material with pin flags. Each artifact will be recorded to provide horizontal and vertical locational data. If no cultural deposits are encountered, the road grader will continue to make passes until one of two conditions are met (whichever occurs first):

- Grading will continue to a depth of 30 centimeters below the depth of any recorded artifacts, suggesting an end to the potential for cultural deposits; or

- Non-cultural formational soils are encountered that predate any human occupation of this location.

Once the cultural deposit has been completely removed, the controlled grading process will be terminated, and mass grading may proceed.
3.0 TRIBAL PARTICIPATION DURING PROJECT CONSTRUCTION

The intent of tribal consultation during project planning and environmental review is to resolve potential conflicts between projects and resources early in the planning stages. In many cases under the City’s jurisdiction, this has been successful. However, there are circumstances that arise during project construction, such as unanticipated discoveries, that can lead to additional participation by tribes. This section describes the City’s policies and procedures for addressing tribal participation during construction.

3.1 Policy of Payment for Tribal Participation During Construction

If the City determines that tribal monitoring or participation is required as a mitigation measure or condition of approval, then payment is appropriate (payment for non-required tribal observation and for consultation is not; see Section 2.0.). The following policy is intended for both City and private projects under the jurisdiction of the City.

When a mitigation measure of a certified environmental document or a condition of a permit or approval requires tribal monitoring of construction-related activities, the City shall retain the specified number of tribal monitor(s) under contract for the purpose expressed in the mitigation measure using the payment schedule provided further below.

3.1.1 Tribal Monitor

A tribal representative that is paid for his or her participation as a monitor:

- has the Tribe’s authority to make daily decisions on Native American beliefs, wishes or policy, but may consult with other tribal members with authority and/or experience when it does not delay project progress;
- has the Tribe’s authority to consult on their behalf with the Project Archaeologist on the archaeological investigations;
- is required to report to the appropriate tribal members on project progress, activities, finds, problems by whatever methods are appropriate;
- is required to report to the designated job supervisor on a daily basis; and
- has the Tribe’s authority to lodge a formal complaint.

Examples (for the purpose of this section) include Tribal Historic Preservation Officers, Tribal Council Members, and Tribal Monitors. The Maximum Actual Hourly Rate paid for a Tribal Monitor shall be consistent with the most current version of the Caltrans North Region Native American Monitoring Procedures pay rates. The City will revisit the pay schedule with each update of these Guidelines, which may or may not result in a revision.

In addition, the following parameters apply:

- Tribal Monitors shall be compensated only for City-authorized labor spent on the job site and are subject to applicable labor laws with respect to paid rest breaks and unpaid meal periods.
• Tribal monitors shall be provided with a mileage reimbursement, based on the Internal Revenue Service reimbursement rate in effect at the time of travel. Mileage shall be calculated based on the distance between the job site and the main tribal office.

• The City shall not compensate more than one Tribal Monitor per project without prior approval by City staff in advance.

• The City shall not compensate trainees or interns for tribal monitoring.

• The City shall not pay for monitoring of activities that do not involve ground or vegetation disturbance that would have the potential to impact a TCR, as determined through the City’s environmental review and associated consultation process.

• All representatives and monitors must adhere to job site safety protocols.

• Private property owners reserve the right to prohibit entry to private lands.

• The City will identify Tribal Monitors and will discuss Tribal Monitor assignments with culturally affiliated tribes prior to monitoring activities.

• The City shall use a temporary employment agency to handle all employment paperwork, insurance, and employment law compliance; Tribal Monitors shall not be considered employees of the City.

Pay rates for tribal monitoring and participation for private developments (where the City is not the project proponent) may be separately negotiated between the tribe and project proponent. Nothing in these guidelines or in applicable law prohibits a private landowner from separately entering into an agreement with a tribe to provide unrequired monitoring or monitoring at higher rates, so long as doing so does not attempt to circumvent existing laws and consultation processes.

In the event that the City receives a request for tribal monitoring after project approval, which may be just before or during construction, when tribal monitoring was not a mitigation measure or condition of approval, the City shall not pay for tribal monitoring. However, the City will consider requests from interested tribes to visit the project site to observe project activities on a voluntary basis, as long as appropriate safety procedures are followed and a waiver of liability (including proof of workers compensation insurance) is on file with the City.

3.2 Contractor Guidance for the Response to Unanticipated Discoveries

In the event that project construction activities result in the discovery of previously unknown cultural resources, which may or may not include TCRs, the following procedures generally apply. These procedures may be superseded by equivalent or more effective mitigation measures in the approved CEQA document, or by federal permits and conditions. Therefore, these procedures are intended to serve as guidance when another permit or environmental document is silent on one or more of these issues. Deviation from these procedures may also be warranted, in the event that the discovery is atypical. The City shall exercise discretion in deviating from this guidance. The City may also choose to extend the timelines as stated in the procedures below. Any extension of timelines shall be documented in writing, which may be satisfied by electronic communication.
3.2.1 Initial Pause and Assessment for All Discoveries, Regardless of Cultural Affiliation

In the event of an unanticipated discovery during construction, all ground disturbing work must pause within a 100-foot radius of the discovery, and the construction manager must take reasonable measures to protect the discovery from damage by equipment or personnel. This may include placement of plywood or steel plates over the excavation area (if feasible), or placement of exclusionary fencing. Work may continue on other parts of the project while the following procedures are carried out, but construction personnel are strictly prohibited from disclosing the discovery to the public, which includes posting on social media.

Immediately upon taking reasonable measures to protect the discovery, the construction manager must notify the City’s representative by phone, regardless of the presence of an archaeological or tribal monitor. The City’s representative will immediately coordinate with the monitoring archaeologist (if present) or contact the project archaeologist, or, in the absence of either, contact a qualified professional archaeologist, meeting the Secretary of the Interior’s Professional Qualification Standards for archaeologist.

The professional archaeologist must make a determination, based on professional judgement and supported by substantial evidence, within one business day of being notified, as to whether or not the find represents a cultural resource or has the potential to be a tribal cultural resource. The subsequent actions will be determined by the type of discovery, as described below. These include: 1) a work pause that, upon further investigation, is not actually a discovery and the work pause was simply needed in order to allow for closer examination of soil (a “false alarm”); 2) a work pause and subsequent action for discoveries that are clearly not related to tribal resources, such as can and bottle dumps, artifacts of European origin, and remnants of built environment features; and 3) a work pause and subsequent action for discoveries that are likely related to tribal resources, such as midden soil, bedrock mortars, groundstone, or other similar expressions.

Whenever there is question as to whether or not the discovery represents a tribal resource, the City shall consult with culturally affiliated tribes in making the determination. Whenever a tribal monitor is present, he or she shall be consulted.

3.2.2 Response to False Alarms

If the professional archaeologist determines that the find is negative for any cultural indicators, then work may resume immediately upon notice to proceed from the City’s representative. No further notifications or tribal consultation is necessary, because the discovery is not a cultural resource of any kind. Should tribal representatives or monitors desire to take possession of non-cultural materials, the tribe may execute a voluntary agreement with the property owner to take possession as long as removal has been approved in writing by the property owner (if not the City). In this case, where the find is determined to not be a cultural resource, then the maximum delay to the project activities is expected to be one business day.

If the find represents a paleontological resource, then the City’s representative will notify a professionally qualified paleontologist to address the find separately and notice to resume work at that location cannot occur until authorized by the City’s representative, and the time required to do so is not addressed in this
guidance. Tribal representatives may not remove paleontological materials without permission from the City and property owner (if not the City).

If the find is determined to be a cultural resource, then the procedures below apply.

### 3.2.3 Response to Non-Tribal Discoveries

If a tribal monitor is not present at the time of discovery and the professionally qualified archaeologist determines that the discovery is a cultural resource but is not reasonably associated with Native American culture, then the City shall notify by e-mail any tribes that specifically requested notification of such discoveries, with a description and a photograph of the find. These requests for notification must be provided to the City in writing in advance of a discovery. Notified tribes shall be afforded up to 24 hours (none of which time period may fall on weekends or City holidays) to review the information (which may or may not include a site visit) and determine whether or not the tribe possesses information about the discovery that would differ from the determination made by the professionally qualified archaeologist. If a notified tribe responds within 24 hours to indicate that the find represents a tribal cultural resource, then work may not resume at the location until the City, in consultation with the tribe(s), addresses the find in accordance with CEQA and Section 3.2.4.

If the tribe fails to respond within 24 hours or responds to concur with the archaeologist that the discovery does not constitute a tribal resource, then the archaeologist shall submit to the City, within two business days, a brief plan for evaluating the significance and recommended treatment. The City shall have up to two business days to review and approve the implementation of the plan.

Upon receiving a notice to proceed from the City, the professional archaeologist must complete the evaluation within five business days, unless additional time is granted by the City in light of the nature of the find. The results of the evaluation may be communicated to the City in an email; formal reporting may continue during construction, after the data collection is completed and the City authorizes a notice to resume work at the location.

If the evaluation results in a finding that the discovery is not a historical resource under CEQA, then work may resume at the location of the discovery immediately upon notification of such from the City’s representative. The delay to project construction at that location would be expected to be no more than 10 business days.

If the evaluation results in a finding that the discovery is a historical resource under CEQA, then the professional archaeologist shall immediately implement the treatment specified in the work plan. Work may not resume at the location of the discovery until the City issues a notice to proceed. The amount of delay to the discovery location depends on the nature and extent of the discovery; however, the City shall issue a notice to resume work at that location as soon as data collection is completed by the archaeologist. Formal reporting and analysis may continue during construction, after the City authorizes a notice to resume work at the location.

### 3.2.4 Response to Tribal Discoveries

If the professional archaeologist determines within one business day that the find does represent a cultural resource, and that it is reasonably believed to be associated with Native American culture, or when a notified tribe responds pursuant to the notification process in Section 3.2.3 that the find does, in fact,
represent tribal resources, then the City shall notify by email, within one business day of receiving such information, all culturally affiliated tribes that specifically requested such tribal consultation notification during environmental review and planning. Tribes that did not respond to offers to consult or declined consultation without such request for notification will not be contacted. Each notified tribe will have one business day from the time of notification to request a visit of the discovery location (if so desired). Tribal representatives who wish to visit the location must notify the City’s representative in its response to obtain access and safety information and all non-agency and non-contracted personnel are subject to approval by private property owners. However, it should be noted that while a property owner has the legal right to approve non-agency and non-contracted personnel, the City will not authorize work to resume until appropriate personnel have been approved for entry so that the project conditions can be satisfied. Notified tribes that do not respond or visit the location within one business day may submit comments to the City in writing; however, field visits may or may not be accommodated.

Each visiting tribe will have two business days from the time of the site visit to submit written recommendations to the City for appropriate treatment. Recommendations must be accompanied by supporting information that constitutes substantial evidence for any determination of a TCR. Any recommendations for treatment or mitigation are subject to the process illustrated in Figure 1. Only those recommendations that are determined by the City, as lead agency and engaging in good faith consultation, to be both appropriate and allowable under CEQA would be subject to payment for tribal representatives or monitors.

The City shall have three business days from the close of the two-day comment period to review the information submitted and determine: 1) whether or not the find is subject to state law; 2) whether or not the find represents either a TCR or a historical resource; 3) whether or not the find has been significantly impacted; and if so, then 4) the appropriate treatment. In the absence of substantial evidence or in the case of conflicting tribal comments, the City may elect to exercise one or more of the options specified in Section 21084.3(b), if feasible. Any recommendations submitted by tribes that are not implemented by the City shall be documented in the administrative record with an explanation as to why the recommendations were rejected. If the City determines that the find is either a TCR or a historical resource, then work cannot resume at that location until the resource is treated to the satisfaction of the City, acting as the Lead Agency.

If the City determines that the find is neither a TCR nor a historical resource, then no additional treatment is necessary under state law, and the City’s representative shall issue a notice to proceed with activity at that location. In this case, the maximum delay to project activities is expected to be eight business days.

The amount of delay to the discovery location depends on the nature and extent of the discovery; however, the City shall issue a notice to resume work at that location as soon as possible. If other areas outside of the 100-foot radius of the discovery are available to continue with work, notice to resume work may be given for these locations. Formal reporting or other types of mitigation (such as public interpretation) may continue during construction, after the City authorizes a notice to resume work at the location.

3.2.5 Response to Human Remains Subject to State Law

If it is determined that human remains are found, or remains that are potentially human, then the treatment shall conform to the requirements of state law under California Health and Safety Code Section 7050.5
and Public Resources Code (PRC) Section 5097.98. For the purposes of this project, the definition of remains subject to state law (Section 5097.98) shall apply. This definition states: “(d)(1) Human remains of a Native American may be an inhumation or cremation, and in any state of decomposition or skeletal completeness. (2) Any items associated with the human remains that are placed or buried with the Native American human remains are to be treated in the same manner as the remains, but do not by themselves constitute human remains. “The City understands that Native American tribes ascribe importance to objects and surrounding soil matrix associated with human remains that is broader than what is defined in state law. The City will consider requests from tribes to treat additional objects and matrix in the same manner as human remains and will exercise its discretion in doing so on a case-by-case basis.

If the find includes human remains, or remains that are potentially human (as defined in state law), then the individual making the discovery shall ensure reasonable protection measures are taken to protect the discovery from disturbance (AB 2641, Native American human remains and multiple human remains). The archaeologist shall notify the Placer County Coroner (per Section 7050.5 of the Health and Safety Code). The provisions of Section 7050.5 of the California Health and Safety Code, Section 5097.98 of the California Public Resources Code, and AB 2641 will be implemented. If the Coroner determines the remains are Native American and not the result of a crime scene, then the Coroner will notify the NAHC, which then will designate a Native American MLD for the project (Section 5097.98 of the Public Resources Code). The designated MLD will have 48 hours from the time access to the property is granted to make recommendations concerning treatment of the remains. Further, pursuant to California Public Resources Code Section 5097.98(b), remains shall be left in place and free from disturbance until a final decision as to the treatment and disposition has been made. If the landowner does not agree with the recommendations of the MLD, then the NAHC can mediate (Section 5097.94 of the Public Resources Code). If no agreement is reached, the landowner must rebury the remains where they will not be further disturbed (Section 5097.98 of the Public Resources Code). This will also include either recording the site with the NAHC or the appropriate Information Center, using an open space zoning designation or deed restriction as appropriate, and/or recording a reinterment document with Placer County (AB 2641).

3.3 Policy of Payment for Unanticipated Discovery Response

Under state law (Public Resources Code section 5097.98(a)), where human remains are encountered and the NAHC identifies a MLD, the MLD “may, with the permission of the owner of the land, or his or her authorized representative, inspect the site of the discovery of the Native American human remains and may recommend to the owner or the person responsible for the excavation work means for treatment or disposition, with appropriate dignity, of the human remains and any associated grave goods. The descendants shall complete their inspection and make recommendations or preferences for treatment within 48 hours of being granted access to the site.” The landowner must next discuss and confer with the MLD “all reasonable options regarding the descendants’ preferences for treatment.”

The Public Resources Code (PRC section 5097.98(e)) further provides: “Whenever the commission is unable to identify a descendant, or the descendants identified fail to make a recommendation, or the landowner or his or her authorized representative rejects the recommendation of the descendants and the mediation provided for in subdivision (k) of Section 5097.94, if invoked, fails to provide measures acceptable to the landowner, the landowner or his or her authorized representative shall reinter the human remains and items associated with Native American human remains with appropriate dignity on the property in a location not subject to further and future subsurface disturbance.”

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The Public Resources Code requires that under limited circumstances (e.g., when the MLD fails to make a recommendation, or the landowner rejects the recommendation) the landowner must reinter remains and associated items. It is therefore the City’s policy to cover the reasonable cost of that reinterment when the find occurs on City property. In the event that reinterment applies to projects on non-City (private) property, then the landowner may negotiate the cost separately with the MLD.

In the event of the disturbance of human remains on City-owned property, the City shall be responsible for the reasonable reinterment of remains in a manner that is considered equivalent to the physical condition that the remains were in at the time of discovery, with the intent of restoring the remains to that form. That is, the City is responsible for mitigating direct, physical construction impacts caused by a City project to human remains, consistent with the nexus provisions of CEQA. Any proposal for reburial on City property must first be reviewed and approved by the City to confirm the location does not conflict with current or reasonably foreseeable City improvements, utilities, maintenance, or other City operations.

For the purposes of this section, “remains” is inclusive of associated grave goods, plus any additional objects and matrix the City has agreed to treat in the same manner are human remains. The City will not compensate or reimburse for the processing of remains or reburial using methods that cannot be reasonably ascertained from the discovery. The City is responsible for the reasonable and necessary costs of the disinterment and reinterment process, but not for any cleaning, blessing, data recovery, or other “processing” of the remains, or for any interim storage where the purpose is to provide space for such “processing.” As an example, if the remains were encountered as a cremation, the City will not pay for the cost of reinterring the cremains in wooden boxes or with other materials, as doing so would not be returning them to their original form at the time of discovery. However, the City will make reasonable accommodations of time for the MLD to prepare the cremains in any other manner that is beyond that which the City can compensate. Examples are given below; they are intended for illustrative purposes only and may not represent all potential scenarios encountered. These examples would also provide guidance to the discovery of non-Native American human remains that are not the result of a crime scene. These examples are written based on the assumption that the remains are left in place until the new burial site is prepared, and therefore interim storage is not needed. However, there may be circumstances in which the City determines that interim storage would be needed, such as if the remains need to be removed from the construction site before the new burial site is ready.

### 3.3.1 Scenario 1

In the event of the discovery of cremated or fragmented remains in a discrete concentration, the City will be financially responsible for securing a location free from future disturbance; retaining a tribal representative to oversee or carry out the placement of remains into the reinterment location; transport of the remains to the reinterment site; providing a backhoe and operator to excavate a reinterment location roughly proportional to the dimensions of the concentrations and backfilling after reinterment; and filing of a deed restriction on the location to ensure no future disturbance, as necessary. The City will not be financially responsible for religious ceremony, ritual, or blessing; wrapping, padding, or similar preparation; wooden boxes or vessels; or space for interim storage or processing; however, the City will not willfully interfere with religious expression by Native American tribes, should they wish to provide additional treatment of materials prior to reburial.
3.3.2  **Scenario 2**

In the event of the discovery of cremated or fragmented remains in a dispersed context that are not in a discrete concentration or intact burial, the City will be financially responsible for securing a location free from future disturbance; retaining a tribal representative to oversee or carry out the placement of remains into the reinterment location; transport of the remains to the reinterment site; providing a backhoe and operator to excavate a reinterment location roughly proportional to the volume of material recovered, and backfilling after reinterment; and filing of a deed restriction on the location to ensure no future disturbance, as necessary. The City will not be financially responsible for religious ceremony, ritual, or blessing; wrapping, padding, or similar preparation; wooden boxes or vessels; or space for interim storage or processing; however, the City will not willfully interfere with religious expression by Native American tribes, should they wish to provide additional treatment of materials prior to reburial.

3.3.3  **Scenario 3**

In the event of the discovery of an intact burial (articulated skeleton), the City will be financially responsible for securing a location free from future disturbance; retaining a tribal representative from the MLD to oversee or carry out the placement of remains into the reinterment location in a similar configuration as original burial; transport of the remains to the reinterment site; providing a backhoe and operator to excavate a reinterment location roughly proportional to the dimensions of the burial(s), and backfilling after reinterment; and filing of a deed restriction on the location to ensure no future disturbance, as necessary. The City will not be financially responsible for religious ceremony, ritual, or blessing; wrapping, padding, or similar preparation; wooden boxes or vessels; or space for interim storage or processing; however, the City will not willfully interfere with religious expression by Native American tribes, should they wish to provide additional treatment of materials prior to reburial.

3.3.4  **Scenario 4**

In the event of the discovery of an intact grave with remnants of, or an intact, coffin or container, the City will be financially responsive for securing a location free from future disturbance; if the coffin or container was damaged during the unanticipated discovery, materials and labor to create or provide a replacement coffin or container that is roughly in-kind if requested by the MLD; retaining a tribal representative to oversee or carry out the placement of remains into the coffin or container and into the reinterment location; transport of the remains to the reinterment site; providing a backhoe and operator to excavate a reinterment location roughly proportional to the dimensions of the grave, and backfilling after reinterment; and filing of a deed restriction on the location to ensure no future disturbance, as necessary. The City will not be financially responsible for religious ceremony, ritual, or blessing; wrapping, padding, or similar preparation; or space for interim storage or processing; however, the City will not willfully interfere with religious expression by Native American tribes, should they wish to provide additional treatment of materials prior to reburial.

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1 The original coffin or container may be of religious or other significance to the MLD, and therefore replacement should be offered, but should be a decision of the MLD.
4.0 REFERENCES

Internal Guidance for Management of Tribal Cultural Resources and Consultation

Volume II: Implementation Manual

City of Roseville

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PART A

AB 52 Procedures

July 2020

CITY OF ROSEVILLE
CALIFORNIA
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An Interpretation of AB 52 Native American Consultation Procedures Under CEQA

**Outside of the CEQA Process**

- NAHC assembles master list of all agencies
- Tribe contacts NAHC to request agency contact lists
- NAHC responds to tribe with agency lists
- Tribe sends general consultation request letters to agency, including contact person

**Inside the CEQA Process**

Applicant submits application to CEQA lead agency

- Lead Agency reviews application and determines it Complete (notifies applicant); the CEQA process begins

- Agency notifies tribe’s contact person of project in writing, with map and project description, and notifies the tribe that it has 30 days to respond. Agency is not required to contact tribes that did not request consultation in writing first.

- Within 14 days

**Coordination with Permit Streamlining Act**

- Within 30 days, unless extended by 90 days by mutual consent

Begin Initial Study

- Within 30 days, unless extended by 15 days with applicant consent (total of 45 days)

- File NOI for NOD, MND within 180 days of app complete

- Publish NOP if other issues require an EIR, then follow normal FAS deadlines

- Publish NOD, MND within 180 days of app complete

**Obtain additional 15 day extensions on FAS under FAS**

**Obtain additional 15 day extensions on EIR under EIR**

**Lead agency documents such in the administrative record / CEQA document and proceeds**

- Initial meeting with tribe to present the project

- Does tribe express concern for TCRs in project area?
  - **Yes**
    - Document such in CEQA document and proceed
  - **No**

- Are there TCRs present in the project area?
  - **Yes**
    - Confidential information must be withheld from public distribution
    - What alternatives to avoid TCRs are feasible? (Discussion shall be included in consultation if tribe specifically requests so)
    - Consult on impacts to TCRs
    - What are appropriate mitigation measures?
    - Did parties agree to mitigation measures?
    - Incorporate alternatives considered and mitigation measures into selected CEQA document and MMRP. Become legally enforceable
    - Lead agency documents good faith effort and reasonable effort (documented by its administrative record) and uses its own best judgment on which mitigation measures to implement 3
    - Agency certifies the EIR
  - **No**

- Lead agency initiates consultation within 30 days of receiving request (not within 30 days of the end of response period)

- Tribe responds in writing to indicate desire to consult

- **Within 30 days**

- Observe additional 15-day extensions on FAS under FAS

- Observe additional 15-day extensions on EIR under EIR

- Tribe may consult with other members/elders/experts; Agency/applicant may host project area tours

- Lead agency evaluates evidence for being eligible for CRHR, local registry, or NRHP based on "substantial evidence" and being geographically defined relative to the project area

- Document such in CEQA document and proceed

- Document such in CEQA document and proceed

- Document such in CEQA document and proceed

This draft graphic of the AB52 procedures has been developed by ECORP to assist our clients in understanding and following the new requirements under CEQA for consultation with Native American tribes. It is an ECORP product and is proprietary to ECORP. This is not a legal document and has not been reviewed, or approved by any agency of the State of California.

CEQA – California Environmental Quality Act

CRHR – California Register of Historical Resources

EIR – environmental impact report

NAHC – Native American Heritage Commission

ND/MND – negative declaration/mitigated negative declaration

MMRP – mitigation monitoring and reporting program

TCR – tribal cultural resources

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1 in accordance with 22080.3.1(b)(2), consultation is triggered by a tribe notifying the Lead Agency in writing of its desire to consult. This does not preclude optional tribal consultation with tribes who did not send a general request letter, but in such a case, said consultation does not technically fall under AB 52

2 e.g., preservation and avoidance; protecting cultural character, traditional use, and confidentiality; and use of conservation easements.

3 even absent formal tribal consultation, the CEQA document must still address impacts to TCRs, which should, at minimum, include results of a search of the Sacred Lands File by the NAHC.
Is this a “Project” as defined by CEQA?

- **NO**
  - The action is **not** subject to AB 52 consultation.

- **YES**
  - Is the Project described in a Statutory Exemption?
    - **NO**
      - Is the Project subject to a Categorical Exemption?
        - **NO**
          - Was a Notice of Preparation for an EIR, or a Notice of Intent to Adopt an NRO or MND, published for this project prior to July 1, 2015?
            - **NO**
              - The action is subject to AB 52 consultation.
            - **YES**
              - Is there a reasonable potential to trigger the exception to the exemption for historical resources or unusual circumstances? (consult legal counsel if unsure)
                - **YES**
                  - Consult with requesting tribes to determine if an NOE is the appropriate CEQA document; carry out AB 52 if an IS or EIR will be prepared.
                - **NO**
                  - File the NOE without tribal consultation.
        - **YES**
          - The action is **not** subject to AB 52 consultation.
Is the resource a site, feature, place, cultural landscape, sacred place, or object that is geographically defined relative to the project area, per PRC 21074(a)(1) and 21074(b)?

The resource is not a Tribal Cultural Resource.

Does it otherwise meet the definition of a historical resource under CEQA?

No additional considerations are required relative to cultural or tribal resources.

No additional considerations are required relative to cultural or tribal resources.

field survey, as appropriate

Records Search/Lit Review from California Historical Resources Information System

AB 52 Consultation with tribes

Recognition of a possible or suggested Tribal Cultural Resource with importance to the tribe

Is it listed on a local register of historical resources (S.5020.1(k))?

No, additional considerations are required relative to cultural or tribal resources.

Is it listed on or eligible for the California Register (21074(a)(3)(A))?

It is a Tribal Cultural Resource under CEQA.

Has "substantial evidence" for a TCR been presented?

It is a Tribal Cultural Resource under CEQA.

Analyze impacts to TCRs in the tribal cultural resources section of the CEQA document.

*TCRs that are also listed on a local registry and/or are also eligible for or listed on the California Register also meet the definition of historical resources and therefore, would require addressing in the cultural resources section as well.
Evidence is presented by a tribe to the City to justify a TCR designation, and on the grounds that it is significant to the tribe.

Has a boundary of the geographic extent of the resource within the project area been provided?

When requested, did the tribe provide a boundary?

Without an ability to determine where the resource is located within the project area and in what form, the lead agency does not have sufficient information to determine whether or not a TCR exists and will be impacted.

The expert opinion of the tribe was not supported by fact. Substantial evidence does not exist.

When requested, did the tribe provide a written description?

Ask for a written description of the resource

The expert opinion cannot be verified with fact. Substantial evidence does not exist.

Because the resource is significant to the tribe, can be geographically defined and described, and there is verifiable fact to support it, substantial evidence exists for it to be considered a TCR.

When asked for any data that the tribe feels could support the TCR finding, did they provide it?

Does the data provided make sense, seem legitimate, and is it relevant?

Did a third-party cultural resources professional review the data and find it in good standing?

The expert opinion cannot be verified with fact. Substantial evidence does not exist.

Because the resource is significant to the tribe, can be geographically defined and described, and there is verifiable fact to support it, substantial evidence exists for it to be considered a TCR.

Is there third-party ethnographic information available that supports it?

When requested, did the tribe provide a written description?

Because the resource is significant to the tribe, can be geographically defined and described, and there is verifiable fact to support it, substantial evidence exists for it to be considered a TCR.

Is there any relevant oral history documentation from tribal elders, living or not, that supports it?

When asked for any data that the tribe feels could support the TCR finding, did they provide it?

Does the data provided make sense, seem legitimate, and is it relevant?

Did a third-party cultural resources professional review the data and find it in good standing?

The expert opinion cannot be verified with fact. Substantial evidence does not exist.

Because the resource is significant to the tribe, can be geographically defined and described, and there is verifiable fact to support it, substantial evidence exists for it to be considered a TCR.

Substantial evidence, as defined by PRC 21080: “fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.”
AB 52 Compliance Verification

Project Name: Click here to enter text.

Project Number: Click here to enter text.

Screening Checklist

**Result:** project [☐ is] [☐ is not] subject to AB 52 consultation

**Date determined:** Click here to enter a date.  
**Staff:** Click here to enter text.

**Comments:** Click here to enter text.

Date of Decision to Initiate CEQA: Click here to enter a date.  
**Staff:** Click here to enter text.

(reminder: 14-day notification letters must be sent by Click here to enter a date.)

Review of General Consultation Request Directory

**Date reviewed:** Click here to enter a date.  
**Staff:** Click here to enter text.

The following letters are on file with the City and pertain to this project, and constitute the tribes that will be consulted under AB 52 for this project:

- **Tribe:** Click here to enter text.  
  **Letter date:** Click here to enter a date.

- **Tribe:** Click here to enter text.  
  **Letter date:** Click here to enter a date.

- **Tribe:** Click here to enter text.  
  **Letter date:** Click here to enter a date.

- **Tribe:** Click here to enter text.  
  **Letter date:** Click here to enter a date.

- **Tribe:** Click here to enter text.  
  **Letter date:** Click here to enter a date.

14-day Notification Letters

**Letter date:** Click here to enter a date.  
**Mailed date:** Click here to enter a date.

**Method:** Choose an item.  
**Mailed date is:** Click here to enter text. days past start of CEQA.
30-day response window ends: Click here to enter a date.

Comments: Click here to enter text.

Responses Received from 14-day Notification Letters

| Tribe: Click here to enter text. | Date: Click here to enter a date. Response: Choose an item. |
| Tribe: Click here to enter text. | Date: Click here to enter a date. Response: Choose an item. |
| Tribe: Click here to enter text. | Date: Click here to enter a date. Response: Choose an item. |
| Tribe: Click here to enter text. | Date: Click here to enter a date. Response: Choose an item. |
| Tribe: Click here to enter text. | Date: Click here to enter a date. Response: Choose an item. |

Note: for tribes accepting consultation invitation, initiation must occur within 30 days of receiving the response, not 30 days from the end of the 30-day response period.

Initiation of Consultation

☐ check here if no tribes requested consultation

The following letters were sent to consulting tribes to initiate consultation:

| Tribe: Click here to enter text. | Date: Click here to enter a date. |
| Tribe: Click here to enter text. | Date: Click here to enter a date. |
| Tribe: Click here to enter text. | Date: Click here to enter a date. |
| Tribe: Click here to enter text. | Date: Click here to enter a date. |
| Tribe: Click here to enter text. | Date: Click here to enter a date. |

Consultation
Indicate for each tribe consulted whether or not it requested a discussion on alternatives and whether or not it recommended mitigation measures. Refer to consultation record for details.

**Tribe:** Click here to enter text.  
- [ ] requested alternatives  
- [ ] recommended mitigation measures

**Tribe:** Click here to enter text.  
- [ ] requested alternatives  
- [ ] recommended mitigation measures

**Tribe:** Click here to enter text.  
- [ ] requested alternatives  
- [ ] recommended mitigation measures

**Tribe:** Click here to enter text.  
- [ ] requested alternatives  
- [ ] recommended mitigation measures

---

**Conclusion of Consultation**

**Tribe:** Click here to enter text.  

- Concurrence: [ ] was [ ] was not achieved with the City for the following reason: Click here to enter text.

**Tribe:** Click here to enter text.  

- Concurrence: [ ] was [ ] was not achieved with the City for the following reason: Click here to enter text.

**Tribe:** Click here to enter text.  

- Concurrence: [ ] was [ ] was not achieved with the City for the following reason: Click here to enter text.

**Tribe:** Click here to enter text.  

- Concurrence: [ ] was [ ] was not achieved with the City for the following reason: Click here to enter text.
Concurrence:  □ was   □ was not achieved with the City for the following reason:
Click here to enter text.

Required Mitigation Measures

MM-TCR 1: Click here to enter text.
MM-TCR 2: Click here to enter text.
MM-TCR 3: Click here to enter text.

Consultation Termination Letters

Letter date: Click here to enter a date.        Mailed date: Click here to enter a date.
Method: Choose an item.
An act to amend Section 5097.94 of, and to add Sections 21073, 21074, 21080.3.1, 21080.3.2, 21082.3, 21083.09, 21084.2, and 21084.3 to, the Public Resources Code, relating to Native Americans.

[Approved by Governor September 25, 2014. Filed with Secretary of State September 25, 2014.]

LEGISLATIVE COUNSEL'S DIGEST


Existing law, the Native American Historic Resource Protection Act, establishes a misdemeanor for unlawfully and maliciously excavating upon, removing, destroying, injuring, or defacing a Native American historic, cultural, or sacred site, that is listed or may be eligible for listing in the California Register of Historic Resources.

The California Environmental Quality Act, referred to as CEQA, requires a lead agency, as defined, to prepare, or cause to be prepared, and certify the completion of, an environmental impact report on a project that it proposes to carry out or approve that may have a significant effect on the environment or to adopt a negative declaration if it finds that the project will not have that effect. CEQA also requires a lead agency to prepare a mitigated negative declaration for a project that may have a significant effect on the environment if revisions in the project would avoid or mitigate that effect and there is no substantial evidence that the project, as revised, would have a significant effect on the environment. CEQA requires the lead agency to provide a responsible agency with specified notice and opportunities to comment on a proposed project. CEQA requires the Office of Planning and Research to prepare and develop, and the Secretary of the Natural Resources Agency to certify and adopt, guidelines for the implementation of CEQA that include, among other things, criteria for public agencies to following in determining whether or not a proposed project may have a significant effect on the environment.

This bill would specify that a project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource, as defined, is a project that may have a significant effect on the environment. The bill would require a lead agency to begin consultation with a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project, if the tribe requested to the lead agency, in writing, to be informed by the lead agency of proposed projects in that geographic area and the tribe requests consultation, prior to determining whether a negative declaration, mitigated negative declaration, or environmental impact report is required for a project. The bill would
specify examples of mitigation measures that may be considered to avoid or minimize impacts on tribal cultural resources. The bill would make the above provisions applicable to projects that have a notice of preparation or a notice of negative declaration filed or mitigated negative declaration on or after July 1, 2015. The bill would require the Office of Planning and Research to revise on or before July 1, 2016, the guidelines to separate the consideration of tribal cultural resources from that for paleontological resources and add consideration of tribal cultural resources. By requiring the lead agency to consider these effects relative to tribal cultural resources and to conduct consultation with California Native American tribes, this bill would impose a state-mandated local program.

Existing law establishes the Native American Heritage Commission and vests the commission with specified powers and duties.

This bill would additionally require the commission to provide each California Native American tribe, as defined, on or before July 1, 2016, with a list of all public agencies that may be a lead agency within the geographic area in which the tribe is traditionally and culturally affiliated, the contact information of those agencies, and information on how the tribe may request those public agencies to notify the tribe of projects within the jurisdiction of those public agencies for the purposes of requesting consultation.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. (a) The Legislature finds and declares all of the following:

(1) Current state law provides a limited measure of protection for sites, features, places, objects, and landscapes with cultural value to California Native American tribes.

(2) Existing law provides limited protection for Native American sacred places, including, but not limited to, places of worship, religious or ceremonial sites, and sacred shrines.

(3) The California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) does not readily or directly include California Native American tribes’ knowledge and concerns. This has resulted in significant environmental impacts to tribal cultural resources and sacred places, including cumulative impacts, to the detriment of California Native American tribes and California’s environment.

(4) As California Native Americans have used, and continue to use, natural settings in the conduct of religious observances, ceremonies, and cultural practices and beliefs, these resources reflect the tribes’ continuing cultural ties to the land and their traditional heritages.
Many of these archaeological, historical, cultural, and sacred sites are not located within the current boundaries of California Native American reservations and rancherias, and therefore are not covered by the protectionist policies of tribal governments.

(b) In recognition of California Native American tribal sovereignty and the unique relationship of California local governments and public agencies with California Native American tribal governments, and respecting the interests and roles of project proponents, it is the intent of the Legislature, in enacting this act, to accomplish all of the following:

1. Recognize that California Native American prehistoric, historic, archaeological, cultural, and sacred places are essential elements in tribal cultural traditions, heritages, and identities.

2. Establish a new category of resources in the California Environmental Quality Act called “tribal cultural resources” that considers the tribal cultural values in addition to the scientific and archaeological values when determining impacts and mitigation.

3. Establish examples of mitigation measures for tribal cultural resources that uphold the existing mitigation preference for historical and archaeological resources of preservation in place, if feasible.

4. Recognize that California Native American tribes may have expertise with regard to their tribal history and practices, which concern the tribal cultural resources with which they are traditionally and culturally affiliated. Because the California Environmental Quality Act calls for a sufficient degree of analysis, tribal knowledge about the land and tribal cultural resources at issue should be included in environmental assessments for projects that may have a significant impact on those resources.

5. In recognition of their governmental status, establish a meaningful consultation process between California Native American tribal governments and lead agencies, respecting the interests and roles of all California Native American tribes and project proponents, and the level of required confidentiality concerning tribal cultural resources, at the earliest possible point in the California Environmental Quality Act environmental review process, so that tribal cultural resources can be identified, and culturally appropriate mitigation and mitigation monitoring programs can be considered by the decisionmaking body of the lead agency.

6. Recognize the unique history of California Native American tribes and uphold existing rights of all California Native American tribes to participate in, and contribute their knowledge to, the environmental review process pursuant to the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).

7. Ensure that local and tribal governments, public agencies, and project proponents have information available, early in the California Environmental Quality Act environmental review process, for purposes of identifying and addressing potential adverse impacts to tribal cultural resources and to reduce the potential for delay and conflicts in the environmental review process.
Enable California Native American tribes to manage and accept conveyances of, and act as caretakers of, tribal cultural resources.

Establish that a substantial adverse change to a tribal cultural resource has a significant effect on the environment.

SEC. 2. Section 5097.94 of the Public Resources Code is amended to read:

5097.94. The commission shall have the following powers and duties:

(a) To identify and catalog places of special religious or social significance to Native Americans, and known graves and cemeteries of Native Americans on private lands. The identification and cataloguing of known graves and cemeteries shall be completed on or before January 1, 1984. The commission shall notify landowners on whose property such graves and cemeteries are determined to exist, and shall identify the Native American group most likely descended from those Native Americans who may be interred on the property.

(b) To make recommendations relative to Native American sacred places that are located on private lands, are inaccessible to Native Americans, and have cultural significance to Native Americans for acquisition by the state or other public agencies for the purpose of facilitating or assuring access thereto by Native Americans.

(c) To make recommendations to the Legislature relative to procedures which will voluntarily encourage private property owners to preserve and protect sacred places in a natural state and to allow appropriate access to Native American religionists for ceremonial or spiritual activities.

(d) To appoint necessary clerical staff.

(e) To accept grants or donations, real or in kind, to carry out the purposes of this chapter.

(f) To make recommendations to the Director of Parks and Recreation and the California Arts Council relative to the California State Indian Museum and other Indian matters touched upon by department programs.

(g) To bring an action to prevent severe and irreparable damage to, or assure appropriate access for Native Americans to, a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, pursuant to Section 5097.97. If the court finds that severe and irreparable damage will occur or that appropriate access will be denied, and appropriate mitigation measures are not available, it shall issue an injunction, unless it finds, on clear and convincing evidence, that the public interest and necessity require otherwise. The Attorney General shall represent the commission and the state in litigation concerning affairs of the commission, unless the Attorney General has determined to represent the agency against whom the commission’s action is directed, in which case the commission shall be authorized to employ other counsel. In any action to enforce the provisions of this subdivision the commission shall introduce evidence showing that such cemetery, place, site, or shrine has been historically regarded as a sacred or sanctified place by Native American people and represents a place of unique historical and cultural significance to an Indian tribe or community.
(h) To request and utilize the advice and service of all federal, state, local, and regional agencies.

(i) To assist Native Americans in obtaining appropriate access to sacred places that are located on public lands for ceremonial or spiritual activities.

(j) To assist state agencies in any negotiations with agencies of the federal government for the protection of Native American sacred places that are located on federal lands.

(k) To mediate, upon application of either of the parties, disputes arising between landowners and known descendants relating to the treatment and disposition of Native American human burials, skeletal remains, and items associated with Native American burials.

The agreements shall provide protection to Native American human burials and skeletal remains from vandalism and inadvertent destruction and provide for sensitive treatment and disposition of Native American burials, skeletal remains, and associated grave goods consistent with the planned use of, or the approved project on, the land.

(l) To assist interested landowners in developing agreements with appropriate Native American groups for treating or disposing, with appropriate dignity, of the human remains and any items associated with Native American burials.

(m) To provide each California Native American tribe, as defined in Section 21073, on or before July 1, 2016, with a list of all public agencies that may be a lead agency pursuant to Division 13 (commencing with Section 21000) within the geographic area with which the tribe is traditionally and culturally affiliated, the contact information of those public agencies, and information on how the tribe may request the public agency to notify the tribe of projects within the jurisdiction of those public agencies for the purposes of requesting consultation pursuant to Section 21080.3.1.

SEC. 3. Section 21073 is added to the Public Resources Code, to read:

21073. “California Native American tribe” means a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004.

SEC. 4. Section 21074 is added to the Public Resources Code, to read:

21074. (a) “Tribal cultural resources” are either of the following:

1) Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:

(A) Included or determined to be eligible for inclusion in the California Register of Historical Resources.

(B) Included in a local register of historical resources as defined in subdivision (k) of Section 5020.1.

2) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1. In applying the criteria set forth in subdivision (c) of Section 5024.1 for the purposes of this paragraph, the
lead agency shall consider the significance of the resource to a California Native American tribe.

(b) A cultural landscape that meets the criteria of subdivision (a) is a tribal cultural resource to the extent that the landscape is geographically defined in terms of the size and scope of the landscape.

(c) A historical resource described in Section 21084.1, a unique archaeological resource as defined in subdivision (g) of Section 21083.2, or a “nonunique archaeological resource” as defined in subdivision (h) of Section 21083.2 may also be a tribal cultural resource if it conforms with the criteria of subdivision (a).

SEC. 5. Section 21080.3.1 is added to the Public Resources Code, to read:

21080.3.1. (a) The Legislature finds and declares that California Native American tribes traditionally and culturally affiliated with a geographic area may have expertise concerning their tribal cultural resources.

(b) Prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report for a project, the lead agency shall begin consultation with a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project if: (1) the California Native American tribe requested to the lead agency, in writing, to be informed by the lead agency through formal notification of proposed projects in the geographic area that is traditionally and culturally affiliated with the tribe, and (2) the California Native American tribe responds, in writing, within 30 days of receipt of the formal notification, and requests the consultation. When responding to the lead agency, the California Native American tribe shall designate a lead contact person. If the California Native American tribe does not designate a lead contact person, or designates multiple lead contact people, the lead agency shall defer to the individual listed on the contact list maintained by the Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004. For purposes of this section and Section 21080.3.2, “consultation” shall have the same meaning as provided in Section 65352.4 of the Government Code.

(c) To expedite the requirements of this section, the Native American Heritage Commission shall assist the lead agency in identifying the California Native American tribes that are traditionally and culturally affiliated with the project area.

(d) Within 14 days of determining that an application for a project is complete or a decision by a public agency to undertake a project, the lead agency shall provide formal notification to the designated contact of, or a tribal representative of, traditionally and culturally affiliated California Native American tribes that have requested notice, which shall be accomplished by means of at least one written notification that includes a brief description of the proposed project and its location, the lead agency contact information, and a notification that the California Native American tribe has 30 days to request consultation pursuant to this section.
(e) The lead agency shall begin the consultation process within 30 days of receiving a California Native American tribe’s request for consultation.

SEC. 6. Section 21080.3.2 is added to the Public Resources Code, to read:

21080.3.2. (a) As a part of the consultation pursuant to Section 21080.3.1, the parties may propose mitigation measures, including, but not limited to, those recommended in Section 21084.3, capable of avoiding or substantially lessening potential significant impacts to a tribal cultural resource or alternatives that would avoid significant impacts to a tribal cultural resource. If the California Native American tribe requests consultation regarding alternatives to the project, recommended mitigation measures, or significant effects, the consultation shall include those topics. The consultation may include discussion concerning the type of environmental review necessary, the significance of tribal cultural resources, the significance of the project’s impacts on the tribal cultural resources, and, if necessary, project alternatives or the appropriate measures for preservation or mitigation that the California Native American tribe may recommended to the lead agency.

(b) The consultation shall be considered concluded when either of the following occurs:

(1) The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource.

(2) A party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached.

(c) (1) This section does not limit the ability of a California Native American tribe or the public to submit information to the lead agency regarding the significance of the tribal cultural resources, the significance of the project’s impact on tribal cultural resources, or any appropriate measures to mitigate the impact.

(2) This section does not limit the ability of the lead agency or project proponent to incorporate changes and additions to the project as a result of the consultation, even if not legally required.

(d) If the project proponent or its consultants participate in the consultation, those parties shall respect the principles set forth in this section.

SEC. 7. Section 21082.3 is added to the Public Resources Code, to read:

21082.3. (a) Any mitigation measures agreed upon in the consultation conducted pursuant to Section 21080.3.2 shall be recommended for inclusion in the environmental document and in an adopted mitigation monitoring and reporting program, if determined to avoid or lessen the impact pursuant to paragraph (2) of subdivision (b), and shall be fully enforceable.

(b) If a project may have a significant impact on a tribal cultural resource, the lead agency’s environmental document shall discuss both of the following:

(1) Whether the proposed project has a significant impact on an identified tribal cultural resource.
(2) Whether feasible alternatives or mitigation measures, including those measures that may be agreed to pursuant to subdivision (a), avoid or substantially lessen the impact on the identified tribal cultural resource.

c) (1) Any information, including, but not limited to, the location, description, and use of the tribal cultural resources, that is submitted by a California Native American tribe during the environmental review process shall not be included in the environmental document or otherwise disclosed by the lead agency or any other public agency to the public, consistent with subdivision (r) of Section 6254 of, and Section 6254.10 of, the Government Code, and subdivision (d) of Section 15120 of Title 14 of the California Code of Regulations, without the prior consent of the tribe that provided the information. If the lead agency publishes any information submitted by a California Native American tribe during the consultation or environmental review process, that information shall be published in a confidential appendix to the environmental document unless the tribe that provided the information consents, in writing, to the disclosure of some or all of the information to the public. This subdivision does not prohibit the confidential exchange of the submitted information between public agencies that have lawful jurisdiction over the preparation of the environmental document.

(2) (A) This subdivision does not prohibit the confidential exchange of information regarding tribal cultural resources submitted by a California Native American tribe during the consultation or environmental review process among the lead agency, the California Native American tribe, the project applicant, or the project applicant’s agent. Except as provided in subparagraph (B) or unless the California Native American tribe providing the information consents, in writing, to public disclosure, the project applicant or the project applicant’s legal advisers, using a reasonable degree of care, shall maintain the confidentiality of the information exchanged for the purposes of preventing looting, vandalism, or damage to a tribal cultural resources and shall not disclose to a third party confidential information regarding tribal cultural resources.

(B) This paragraph does not apply to data or information that are or become publicly available, are already in the lawful possession of the project applicant before the provision of the information by the California Native American tribe, are independently developed by the project applicant or the project applicant’s agents, or are lawfully obtained by the project applicant from a third party that is not the lead agency, a California Native American tribe, or another public agency.

(3) This subdivision does not affect or alter the application of subdivision (r) of Section 6254 of the Government Code, Section 6254.10 of the Government Code, or subdivision (d) of Section 15120 of Title 14 of the California Code of Regulations.

(4) This subdivision does not prevent a lead agency or other public agency from describing the information in general terms in the environmental document so as to inform the public of the basis of the lead agency’s or other public agency’s decision without breaching the confidentiality required by this subdivision.
(d) In addition to other provisions of this division, the lead agency may certify an environmental impact report or adopt a mitigated negative declaration for a project with a significant impact on an identified tribal cultural resource only if one of the following occurs:

1. The consultation process between the California Native American tribe and the lead agency has occurred as provided in Sections 21080.3.1 and 21080.3.2 and concluded pursuant to subdivision (b) of Section 21080.3.2.

2. The California Native American tribe has requested consultation pursuant to Section 21080.3.1 and has failed to provide comments to the lead agency, or otherwise failed to engage, in the consultation process.

3. The lead agency has complied with subdivision (d) of Section 21080.3.1 and the California Native American tribe has failed to request consultation within 30 days.

(e) If the mitigation measures recommended by the staff of the lead agency as a result of the consultation process are not included in the environmental document or if there are no agreed upon mitigation measures at the conclusion of the consultation or if consultation does not occur, and if substantial evidence demonstrates that a project will cause a significant effect to a tribal cultural resource, the lead agency shall consider feasible mitigation pursuant to subdivision (b) of Section 21084.3.

(f) Consistent with subdivision (c), the lead agency shall publish confidential information obtained from a California Native American tribe during the consultation process in a confidential appendix to the environmental document and shall include a general description of the information, as provided in paragraph (4) of subdivision (c) in the environmental document for public review during the public comment period provided pursuant to this division.

(g) This section is not intended, and may not be construed, to limit consultation between the state and tribal governments, existing confidentiality provisions, or the protection of religious exercise to the fullest extent permitted under state and federal law.

SEC. 8. Section 21083.09 is added to the Public Resources Code, to read:

21083.09. On or before July 1, 2016, the Office of Planning and Research shall prepare and develop, and the Secretary of the Natural Resources Agency shall certify and adopt, revisions to the guidelines that update Appendix G of Chapter 3 (commencing with Section 15000) of Division 6 of Title 4 of the California Code of Regulations to do both of the following:

(a) Separate the consideration of paleontological resources from tribal cultural resources and update the relevant sample questions.

(b) Add consideration of tribal cultural resources with relevant sample questions.

SEC. 9. Section 21084.2 is added to the Public Resources Code, to read:

21084.2. A project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment.
SEC. 10. Section 21084.3 is added to the Public Resources Code, to read:

21084.3. (a) Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource.

(b) If the lead agency determines that a project may cause a substantial adverse change to a tribal cultural resource, and measures are not otherwise identified in the consultation process provided in Section 21080.3.2, the following are examples of mitigation measures that, if feasible, may be considered to avoid or minimize the significant adverse impacts:

1. Avoidance and preservation of the resources in place, including, but not limited to, planning and construction to avoid the resources and protect the cultural and natural context, or planning greenspace, parks, or other open space, to incorporate the resources with culturally appropriate protection and management criteria.

2. Treating the resource with culturally appropriate dignity taking into account the tribal cultural values and meaning of the resource, including, but not limited to, the following:
   (A) Protecting the cultural character and integrity of the resource.
   (B) Protecting the traditional use of the resource.
   (C) Protecting the confidentiality of the resource.

3. Permanent conservation easements or other interests in real property, with culturally appropriate management criteria for the purposes of preserving or utilizing the resources or places.

4. Protecting the resource.

SEC. 11. (a) This act does not alter or expand the applicability of the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) concerning projects occurring on Native American tribal reservations or rancherias.

(b) This act does not prohibit any California Native American tribe or individual from participating in the California Environmental Quality Act on any issue of concern as an interested California Native American tribe, person, citizen, or member of the public.

(c) This act shall apply only to a project that has a notice of preparation or a notice of negative declaration or mitigated negative declaration filed on or after July 1, 2015.

SEC. 12. No reimbursement is required by this act pursuant to Section 6 of Article XIIIB of the California Constitution because a local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act, within the meaning of Section 17556 of the Government Code.
PART B

SB 18 Procedures

July 2020
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An Interpretation of SB 18 Native American Consultation Procedures

City or County decides to adopt or amend a General Plan or Specific Plan

Agency contacts NAHC to request a SB 18 list (see forms at www.nahc.ca.gov)

Within 30 days; often sooner

NAHC responds with list of tribes with contact information

Agency contacts the tribes identified by NAHC and notifies them of the opportunity to consult

90-day response window

Tribe responds in writing to indicate desire to consult

Tribal consultation (no statutory time limit on duration)

Does tribe express concern for sacred lands/sites or cultural places, or confidentiality there-of, in the project area subject to the GP or SP?

Confidential information must be withheld from public distribution

Yes

No

Attempt to develop treatment with appropriate dignity of the cultural place in the GP/SP.

Did parties agree?*

Yes

No

Parties come to a mutual agreement concerning the measures for preservation or mitigation.

Agency, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached concerning appropriate measures of preservation or mitigation.

BOS or CC adopts/amends the SP/GP

45-day Referral
Notice the tribes from the original NAHC list 45 days prior to action on SP/GP

45-day comment period (no consultation)

10-day Referral
Notice the tribes from the original NAHC list, who have requested notice, 10 days prior to action on SP/GP

10 days

*the requirements for concluding consultation (in terms of the requirement to include measures in plans and MMRPs, and in terms of timing relative to the referral noticing) differ from, and are generally less stringent than, that under AB 52. Special care should be taken to ensure thresholds for both AB 52 and SB 18 are met prior to taking final action.
Reconciliation with the Tribal Consultation Guidelines:  
Supplement to General Plan Guidelines  
(November 14, 2005) for Implementing SB 18  
(Governor’s Office of Planning and Research)  

for the  
[PROJECT NAME]

<table>
<thead>
<tr>
<th>Step</th>
<th>OPR Guidelines (GDL) Section and Statutory Reference</th>
<th>Date completed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adoption or amendment of any general plan (GP) or specific plan (SP) is proposed on or after March 1, 2005</td>
<td>GDL Section IV GC § 65352.3 (a)(1)</td>
<td></td>
</tr>
<tr>
<td>Local government sends proposal information to NAHC and requests contact information for the tribes with traditional lands or places located within the geographical areas affected by the proposed changes.</td>
<td>GDL Section IV GC § 65352.3 (a)(2)</td>
<td></td>
</tr>
<tr>
<td>NAHC provides tribal contact information. OPR recommends that the NAHC provide written information as soon as possible but no later than 30 days after receiving a local government’s request.</td>
<td>GDL Section IV</td>
<td></td>
</tr>
<tr>
<td>Local government contacts tribe(s) identified by NAHC and notifies them of the opportunity to consult. Pursuant to Government Code § 65352.3, local government must consult with tribes on the NAHC contact list.</td>
<td>GDL Section IV</td>
<td></td>
</tr>
<tr>
<td>Tribe(s) responds to a local government notice within 90 days, indicating whether or not they want to consult with the local government. Consultation does not begin until/unless a tribe requests it within 90 days of receiving a notice of the opportunity to consult. Tribes can agree to a shorter timeframe (less than 90 days) to request consultation.</td>
<td>GDL Section IV GC § 65352.3 (a)(2)</td>
<td></td>
</tr>
<tr>
<td>Consultation begins, if requested by tribe. No statutory limit on the duration of the consultation. Consultation may continue through planning commission or board of supervisors/city council deliberation on plan proposal.</td>
<td>GDL Section IV</td>
<td></td>
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<tr>
<td>Step</td>
<td>OPR Guidelines (GDL) Section and Statutory Reference</td>
<td>Date completed</td>
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<tr>
<td>Local government continues normal processing of GP/SP adoption or amendment. (CEQA review, preparation of staff reports, consultation, etc. may be ongoing.)</td>
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<tr>
<td>90-day consultation period ends</td>
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<tr>
<td>At least 45 days before local government adopts or substantially amends GP/SP, local government refers proposed action to agencies, including tribe(s). Referral is required regardless of whether or not there has been prior consultation. This does not initiate a new consultation process. This opens a 45-day comment period before approval by board of supervisors/city council.</td>
<td>GDL Section III GC § 65352 (a)(11)</td>
<td></td>
</tr>
<tr>
<td>At least 10 days before public hearing, local government provides notice of hearing to tribes and any other persons who have requested such notice.</td>
<td>GDL Section III GC § 65092</td>
<td></td>
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<tr>
<td>Public hearing of board of supervisors/city council to take final action on the GP/SP.</td>
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STATE OF CALIFORNIA

Tribal Consultation Guidelines

SUPPLEMENT TO GENERAL PLAN GUIDELINES

November 14, 2005

GOVERNOR’S OFFICE OF PLANNING AND RESEARCH
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November 2005

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This document is available on the Internet at http://www.opr.ca.gov/SB182004.html.
Director’s Message

November 14, 2005

The Governor’s Office of Planning and Research (OPR) is proud to announce the publication of this November 2005 Supplement to the General Plan Guidelines. The 2005 Supplement (also known as Tribal Consultation Guidelines) provides advisory guidance to cities and counties on the process for consulting with Native American Indian tribes during the adoption or amendment of local general plans or specific plans, in accordance with the statutory requirements of Senate Bill 18 (Chapter 905, Statutes of 2004). It reflects recent changes to the California Public Records Act which will facilitate this consultation process.

It is our hope that this 2005 Supplement will be useful not only to city and county planning staffs for implementing the provisions of SB 18, but also to local elected officials, planning consultants, landowners, and tribal members who are involved in the general plan process.

In all of its work, OPR attempts to encourage more collaborative and comprehensive land use planning at the local, regional, and statewide levels. These goals are consistent with the goals of Senate Bill 18, which for the first time in the nation, requires cities and counties to consult with Native American tribes when adopting and amending their general plans or specific plans.

The development of this 2005 Supplement would not have been possible without the advice and assistance of many organizations and individuals, whose support OPR acknowledges and appreciates. These organizations and individuals include the Native American Heritage Commission and its staff, the members and representatives of numerous California Native American tribes, many city and county governments, state agency representatives, professional associations and academic institutions. We appreciate their assistance in preparing this 2005 Supplement, including participation at several meetings and public workshops.

OPR met the statutory deadline of March 1, 2005, to publish these guidelines by issuing interim guidelines on March 1. In developing the interim guidelines, OPR consulted with a wide range of stakeholders and experts. We consulted with city and county representatives (planners, legislative staff and legal counsels); tribal representatives and associations; staff of the Native American Heritage Commission (NAHC), including attendance at two NAHC commission meetings; federal agencies with experience in tribal consultation; academic institutions; and professional associations that deal with archaeological and cultural resource protection. In addition, we consulted with numerous tribal liaisons within state government and sought the input of the League of California Cities and the California State Association of Counties.
Based upon this consultation, OPR issued Draft Tribal Consultation Guidelines on February 22, 2005 for public review and comment. OPR conducted a public workshop on February 25, 2005, which was well attended and resulted in a productive discussion of the process envisioned by SB 18, as well as many specific recommendations for improvements to the 2005 Supplement.

In response to requests from many parties for additional time to consult with OPR regarding the 2005 Supplement, OPR continued to reach out to stakeholders for an additional 45 days to ensure that their interests were heard. Between March 1 and April 15, OPR held four meetings throughout the State to receive additional comments. The meetings were held in Klamath, Corning, Sonora, and Temecula. On April 15, OPR published the guidelines reflecting the comments and concerns expressed at those four meetings, as well as written comments received by OPR.

This November edition of the guidelines reflects recent changes to the Public Records Act that exempt from public disclosure certain documents pertaining to Native American cultural places.

We hope that you will find this 2005 Supplement to be an informative guide and a useful tool in the practice of local planning. I invite your suggestions on ways to improve OPR’s General Plan Guidelines and this 2005 Supplement, as OPR continues to refine and update all of its guidance to city and county planning agencies.

Sean Walsh
Director, OPR
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Part A
SB 18 Context and Basic Requirements

Sections I through III of the 2005 Supplement provide background information to familiarize local government agencies with the intent of Senate Bill 18 (Burton, Chapter 905, Statutes of 2004) and the importance of protecting California Native American traditional tribal cultural places. Local governments will be better prepared to enter into consultations with tribes if they have a basic knowledge of tribal concerns and the value of cultural places to tribes. The key provisions of SB 18 are also outlined in table and text form.

I. Introduction

This 2005 Supplement to the 2003 General Plan Guidelines addresses the requirements of SB 18, authored by Senator John Burton and signed into law by Governor Arnold Schwarzenegger in September 2004. SB 18 requires local (city and county) governments to consult with California Native American tribes to aid in the protection of traditional tribal cultural places (“cultural places”) through local land use planning. SB 18 also requires the Governor’s Office of Planning and Research (OPR) to include in the General Plan Guidelines advice to local governments for how to conduct these consultations.

The intent of SB 18 is to provide California Native American tribes an opportunity to participate in local land use decisions at an early planning stage, for the purpose of protecting, or mitigating impacts to, cultural places. The purpose of involving tribes at these early planning stages is to allow consideration of cultural places in the context of broad local land use policy, before individual site-specific, project-level land use decisions are made by a local government.

SB 18 requires local governments to consult with tribes prior to making certain planning decisions and to provide notice to tribes at certain key points in the planning process. These consultation and notice requirements apply to adoption and amendment of both general plans (defined in Government Code §65300 et seq.) and specific plans (defined in Government Code §65450 et seq.). Although SB 18 does not specifically mention consultation or notice requirements for adoption or amendment of specific plans, existing state planning law requires local governments to use the same processes for adoption and amendment of specific plans as for general plans (see Government Code §65453). Therefore, where SB 18 requires consultation and/or notice for a general plan adoption or amendment, the requirement extends also to a specific plan adoption or amendment. Although the new law took effect on January 1, 2005, several of its provisions regarding tribal consultation and notice did not take effect until March 1, 2005.

The General Plan Guidelines is an advisory document that explains California legal requirements for general plans. The General Plan Guidelines closely adheres to statute and case law. It also relies upon commonly accepted principles of contemporary planning practice.

1 California Government Code §65040.2
When the words “shall” or “must” are used, they represent a statutory or other legal requirement. “May” and “should” are used when there is no such requirement. The 2005 Supplement:

- Provides background information regarding California Native American cultural places and tribes.
- Outlines the basic requirements of SB 18.
- Provides step-by-step guidance to local governments on how and when to consult with tribes.
- Offers advice to help local governments effectively engage in consultation with tribes.
- Provides information about preserving, or mitigating impacts to, cultural places.
- Discusses methods to protect confidentiality of information regarding cultural places.
- Presents ways of encouraging voluntary landowner involvement in the preservation of cultural places.

II. Background Information

The principal objective of SB 18 is to preserve and protect cultural places of California Native Americans. SB 18 is unique in that it requires local governments to involve California Native Americans in early stages of land use planning, extends to both public and private lands, and includes both federally recognized and non-federally recognized tribes. This section provides an overview of California Native American cultural places and California Native Americans.

**California Native American Cultural Places**

SB 18 refers to Public Resources Code §5097.9 and 5097.995 to define cultural places:

- Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine (Public Resources Code §5097.9).
- Native American historic, cultural, or sacred site, that is listed or may be eligible for listing in the California Register of Historic Resources pursuant to Section 5024.1, including any historic or prehistoric ruins, any burial ground, any archaeological or historic site (Public Resources Code §5097.995).

These definitions can be inclusive of a variety of places. Archaeological or historic sites may include places of tribal habitation and activity, in addition to burial grounds or cemeteries. Some examples are village sites and sites with evidence (artifacts) of economic, artistic, or other cultural activity. Religious or ceremonial sites and sacred shrines may include places associated with creation stories or other significant spiritual history, as well as modern day places of worship. Collection or gathering sites are specific places where California Native Americans access certain plants for food, medicine, clothing, ceremonial objects, basket making, and other...

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2 Due to a drafting error, SB 18 contains multiple references to Public Resources Code (PRC) §5097.995 which is no longer in existence. In 2004, PRC §5097.995 was amended and renumbered to PRC §5097.993 by Senate Bill 1264 (Chapter 286). Local governments should refer to PRC §5097.993 when looking for PRC §5097.995.

3 Ibid.
crafts and uses important to on-going cultural traditions and identities; these places may qualify as religious or ceremonial sites as well as sites that are listed or eligible for listing in the California Register of Historic Resources.

Native American cultural places are located throughout California because California Native American people from hundreds of different tribes made these lands their home for thousands of years. Due to the forced relocation of tribes by the Spanish, Mexicans, and Americans, most tribes do not currently control or occupy the lands on which many of their cultural places are located. As a result, California Native Americans have limited ability to maintain, protect, and access many of their cultural places.

A number of federal and state laws have been enacted to preserve cultural resources and have enabled some Native American tribes to promote the preservation and protection of their cultural places. The National Historic Preservation Act (NHPA), which established historic preservation as a national policy in 1966, includes a Section 106 review process that requires consultation to mitigate damage to “historic properties” (defined per 36 CFR 800.16(1) as places that qualify for the National Register of Historic Places), including Native American traditional cultural places (TCPs, as described in National Register Bulletin 38) whenever any agency directs a project, activity or program using any federal funds or requiring a federal permit, license or approval (36CFR800.16). The National Environmental Policy Act (NEPA) requires every federal project to include in an Environmental Impact Statement documentation of environmental concerns, including effects on important historic, cultural, and natural aspects of our national heritage. Presidential Executive Order 13007, "Indian Sacred Sites," ensures that federal agencies are as responsive as possible to the concerns of Native American tribes regarding their cultural places. The Archaeological Resources Protection Act (ARPA) makes desecration of Native American cultural places on federal lands a felony.

California state law includes a variety of provisions that promote the protection and preservation of Native American cultural places. A number of these provisions address intentional desecration or destruction of cultural places and define certain of such acts as misdemeanors or felonies punishable by both fines and imprisonment. These include the Native American Historic Resource Protection Act (PRC §5097.995-5097.996), Public Resources Code §5097.99, Penal Code §622.5 and Health and Safety Code §7050.5, §7052. Other provisions require consideration of potential impacts of planned projects on cultural resources, which may include Native American cultural places. Public Resources Code 5097.2 requires archaeological surveys to determine the potential impact that any major public works project on state land may have on archaeological resources. The California Environmental Quality Act (CEQA) requires project lead agencies to consider impacts, and potential mitigation of impacts, to unique archaeological and historical resources. California Executive Order W-26-92 affirms that all state agencies shall recognize and, to the extent possible, preserve and maintain the significant heritage resources of the State. Public Resources Code §5097.9, which mandates noninterference of free expression or exercise of Native American religion on public lands, promotes preservation of certain Native American cultural places by ensuring tribal access to these places.

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4 Ibid.
5 CEQA Statutes at Public Resources Code §21083.2-21084.1; CEQA Guidelines at 14 CCR 15064.5-15360.
While these and other laws permit Native Americans to have some say in how impacts to cultural places could be avoided or mitigated, the laws rarely result in Native American input at early stages of land use planning. Generally, these laws provide protection only to those sites located on public or Native American trust lands and address only the concerns of Native Americans who belong to federally recognized tribes, with no official responsibility to non-federally recognized tribes. The intent of SB 18 is to provide all California Native American tribes, as identified by the NAHC, an opportunity to consult with local governments for the purpose of preserving and protecting their cultural places.

**California Native American Tribes**

SB 18 uses the term, California Native American tribe, and defines this term as “a federally recognized California Native American tribe or a non-federally recognized California Native American tribe that is on the contact list maintained by the Native American Heritage Commission” (NAHC). “Federal recognition” is a legal distinction that applies to a tribe’s rights to a government-to-government relationship with the federal government and eligibility for federal programs. All California Native American tribes, whether officially recognized by the federal government or not, represent distinct and independent governmental entities with specific cultural beliefs and traditions and unique connections to areas of California that are their ancestral homelands. SB 18 recognizes that protection of traditional tribal cultural places is important to all tribes, whether federally recognized or not, and it provides all California Native American tribes with the opportunity to participate in consultation with city and county governments for this purpose. As used in this document, the term “tribe(s)” refers to a California Native American tribe(s).

California has the largest number of tribes and the largest Native American population of any state in the contiguous United States. California is home to 109 federally recognized tribes and several dozen non-federally recognized tribes. According to a 2004 California Department of Finance estimate, the Native American population in California is 383,197.

Tribal governments throughout California vary in organizational forms and size. Some tribes use the government form established under the Indian Reorganization Act of 1934 (25CFR81) with an adopted constitution and bylaws. Other tribes have adopted constitutions and bylaws that incorporate traditional values in governing tribal affairs. Many tribal governments are comprised of a decision making body of elected officials (tribal governing body) with an elected or designated tribal leader. Some tribes use lineal descent as the means of identifying the tribe’s leader. In general, tribal governing bodies and leaders serve for limited terms and are elected or designated by members of the tribe. Tribal governments control tribal assets, laws/regulations, membership, and land management decisions that affect the tribe.
III. Basic Requirements of SB 18

This section provides a brief summary of the statutory requirements of SB 18. Later sections of the Supplement provide additional detail regarding these requirements and offer advice to local governments on how to fulfill the notification and consultation requirements of SB 18. (Please refer to Section IV and Section V of these guidelines for additional information regarding the responsibilities outlined below.)

Responsibilities of OPR

Government Code §65040.2(g) requires the Governor’s Office of Planning and Research (OPR) to amend the General Plan Guidelines to contain advice to local governments on the following:

- Consulting with tribes on the preservation of, or the mitigation of impacts to, cultural places.
- Procedures for identifying through the Native American Heritage Commission (NAHC) the appropriate California Native American tribes with whom to consult.
- Procedures for continuing to protect the confidentiality of information concerning the specific identity, location, character, and use of cultural places.
- Procedures to facilitate voluntary landowner participation to preserve and protect the specific identity, location, character, and use of cultural places.

Responsibilities of Local Governments

SB 18 established responsibilities for local governments to contact, provide notice to, refer plans to, and consult with tribes. The provisions of SB 18 apply only to city and county governments and not to other public agencies. The following list briefly identifies the contact and notification responsibilities of local governments, in sequential order of their occurrence.

- Prior to the adoption or any amendment of a general plan or specific plan, a local government must notify the appropriate tribes (on the contact list maintained by the NAHC) of the opportunity to conduct consultations for the purpose of preserving, or mitigating impacts to, cultural places located on land within the local government’s jurisdiction that is affected by the proposed plan adoption or amendment. Tribes have 90 days from the date on which they receive notification to request consultation, unless a shorter timeframe has been agreed to by the tribe (Government Code §65352.3).6

- Prior to the adoption or substantial amendment of a general plan or specific plan, a local government must refer the proposed action to those tribes that are on the NAHC contact list and have traditional lands located within the city or county’s jurisdiction. The referral must allow a 45 day comment period (Government Code §65352). Notice must be sent

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6 SB 18 added this new provision to state planning law. It applies to any amendment or adoption of a general plan or specific plan, regardless of the type or nature of the amendment. Adoption or amendment of a local coastal program by a city or county constitutes a general plan amendment.
Regardless of whether prior consultation has taken place. Such notice does not initiate a new consultation process.  

- Local governments must send notice of a public hearing, at least 10 days prior to the hearing, to tribes who have filed a written request for such notice (Government Code §65092).  

Under SB 18, local governments must consult with tribes under two circumstances:

- On or after March 1, 2005, local governments must consult with tribes that have requested consultation in accordance with Government Code §65352.3. The purpose of this consultation is to preserve, or mitigate impacts to, cultural places that may be affected by a general plan or specific plan amendment or adoption.

- On or after March 1, 2005, local governments must consult with tribes before designating open space, if the affected land contains a cultural place and if the affected tribe has requested public notice under Government Code §65092. The purpose of this consultation is to protect the identity of the cultural place and to develop treatment with appropriate dignity of the cultural place in any corresponding management plan (Government Code §65562.5).

**Responsibilities of NAHC**

The NAHC is charged with the responsibility to maintain a list of California Native American tribes with whom local governments must consult or provide notices (as required in Government Code §65352.3, §65352, and §65092). The criteria for defining “tribe” for the purpose of inclusion on this list are the responsibility of the NAHC. The list of tribes, for the purposes of notice and consultation, is distinct from the Most Likely Descendent (MLD) list that the NAHC maintains.

Upon request, the NAHC will provide local governments with a written contact list of tribes with traditional lands or cultural places located within a city’s or county’s jurisdiction. These are the tribes that a local government must contact, for purposes of consultation, prior to adoption or amendment of a general plan or specific plan. The NAHC will identify the tribes that must be contacted, based on NAHC’s understanding of where traditional lands are located within the State.

For more information on the NAHC’s roles and responsibilities, contact the NAHC. (See also Part F: Additional Resources)

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7 Government Code §65352 was amended by SB 18 to include tribes among the entities to whom the proposed action must be referred. The term “substantial amendment” has been in the statute for many years and was not modified by SB 18.

8 Government Code §65092 was modified by SB 18 to include certain tribes as “persons” that are eligible to request and receive notices of public hearing. “Person” now includes a California Native American tribe that is on the contact list maintained by the NAHC.
Other Elements of SB 18

In addition to the notice and consultation requirements outlined above, SB 18 amended Government Code §65560 to allow the protection of cultural places in the open space element of the general plan. (See Section X.) Open space is land designated in the city or county open space element of the general plan for one or more of a variety of potential purposes, including protection of cultural places.

SB 18 also amended Civil Code §815.3 and adds California Native American tribes to the list of entities that can acquire and hold conservation easements. Tribes on the contact list maintained by the NAHC now have the ability to acquire, on terms mutually satisfactory to the tribe and the landowner, conservation easements for the purpose of protecting their cultural places. (See Section IX.)
**Process Overview: General Plan or Specific Plan Adoption or Amendment**

As discussed above, SB 18 establishes responsibilities for local government to contact, refer plans to, and consult with tribes. The following table provides an overview of SB 18 requirements related to the adoption or amendment of a general plan or specific plan. All statutory references are to the Government Code (GC).

### Overview of SB 18 Consultation and Notice Requirements

<table>
<thead>
<tr>
<th>Step</th>
<th>OPR Guidelines (GDL) Section and Statutory Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adoption or amendment of any general plan (GP) or specific plan (SP) is proposed on or after March 1, 2005.</td>
<td>GDL Section IV GC §65352.3(a)(1)</td>
</tr>
<tr>
<td>Local government sends proposal information to NAHC and requests contact information for tribes with traditional lands or places located within the geographical areas affected by the proposed changes.</td>
<td>GDL Section IV GC §65352.3(a)(2)</td>
</tr>
<tr>
<td>NAHC provides tribal contact information.</td>
<td></td>
</tr>
<tr>
<td>- OPR recommends that NAHC provide written information as soon as possible but no later than 30 days after receiving a local government’s request</td>
<td></td>
</tr>
<tr>
<td>Local government contacts tribe(s) identified by NAHC and notifies them of the opportunity to consult.</td>
<td>GDL Section IV</td>
</tr>
<tr>
<td>- Pursuant to Government Code §65352.3, local government must consult with tribes on the NAHC contact list.</td>
<td></td>
</tr>
<tr>
<td>Tribe(s) responds to a local government notice within 90 days, indicating whether or not they want to consult with the local government.</td>
<td>GDL Section IV GC §65352.3(a)(2)</td>
</tr>
<tr>
<td>- Consultation does not begin until/unless a tribe requests it within 90 days of receiving a notice of the opportunity to consult.</td>
<td></td>
</tr>
<tr>
<td>- Tribes can agree to a shorter timeframe (less than 90 days) to request consultation.</td>
<td></td>
</tr>
<tr>
<td>Step</td>
<td>OPR Guidelines (GDL) Section and Statutory Reference</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>------------------------------------------------------</td>
</tr>
<tr>
<td>Consultation begins, if requested by tribe. No statutory limit on the duration of the consultation.</td>
<td>GDL Section IV</td>
</tr>
<tr>
<td>− Consultation may continue through planning commission or board of supervisors/city council deliberation on plan proposal.</td>
<td></td>
</tr>
<tr>
<td>Local government continues normal processing of GP/SP adoption or amendment. (CEQA review, preparation of staff reports, consultation, etc., may be ongoing.)</td>
<td></td>
</tr>
<tr>
<td>At least 45 days before local government adopts or substantially amends GP/SP, local government refers proposed action to agencies, including tribe(s).</td>
<td>GDL Section III GC §65352(a)(8)</td>
</tr>
<tr>
<td>− Referral required regardless of whether or not there has been prior consultation.</td>
<td></td>
</tr>
<tr>
<td>− This does not initiate a new consultation process.</td>
<td></td>
</tr>
<tr>
<td>− This opens 45 day comment period before approval by board of supervisors/city council.</td>
<td></td>
</tr>
<tr>
<td>− Referral required on or after March 1, 2005.</td>
<td></td>
</tr>
<tr>
<td>At least 10 days before public hearing, local government provides notice of hearing to tribes and any other persons who have requested such notice.</td>
<td>GDL Section III GC §65092</td>
</tr>
<tr>
<td>Public hearing of board of supervisors/city council to take final action on the GP/SP.</td>
<td></td>
</tr>
</tbody>
</table>

Note: The Permit Streamlining Act (PSA) (GC §65920 et seq.) establishes time limits for public agencies to take action on privately initiated development projects. Some general plan amendments may involve a private applicant for a development project. The PSA does not apply to a project that requires approval by a legislative act, such as a general plan amendment or rezone, even if there is a quasi-judicial approval involved (such as a use permit or subdivision map). Therefore, time limits for project approval under the PSA should not interfere with a local government’s process for consultation.
Part B
When and How to Consult with California Native American Tribes

Sections IV and V of the 2005 Supplement provide step-by-step guidance to local government agencies on how and when to consult with tribes, including when to provide certain types of notices during the planning process. It is very important to review the information in Part C (Pre-Consultation) before undertaking consultation on a general plan or specific plan proposal.

IV. Consultation: General Plan and Specific Plan Adoption or Amendment

Each time a local government considers a proposal to adopt or amend the general plan or specific plan, they are required to contact the appropriate tribes identified by the NAHC. If requested by tribes, local governments must consult for the purpose of preserving or mitigating impacts to cultural places. The following section provides basic guidance to local governments on the notification and consultation requirements in Government Code §65352.3.

What Triggers Consultation?

Government Code §65352.3 requires local governments to consult with tribes prior to the adoption or amendment of a general plan or specific plan proposed on or after March 1, 2005. Local governments should consider the following when determining whether a general plan or specific plan adoption or amendment is subject to notice and consultation requirements:

- In the case of an applicant-initiated plan proposal, if the local government accepts a complete application (as defined in Government Code §65943) on or after March 1, 2005, the proposal is subject to Government Code §65352.3.

- In the case of a general plan or specific plan amendment initiated by the local government, any proposal introduced for study in a public forum on or after March 1, 2005 is subject to Government Code §65352.3. A legislative body must take certain actions to initiate, or propose, a general plan or general plan amendment. These actions must be taken in a duly noticed public meeting, and may include, but are not limited to, any of the following: appropriation of funds, adoption of a work program, engaging the services of a consultant, or directing the planning staff to begin research on the activity.

Under Government Code §65352.3, only if a tribe is identified by the NAHC, and that tribe requests consultation after being contacted by a local government, must a local government consult with the tribe on the plan proposal.

Local governments are encouraged to consult with tribes as early as possible and may, if appropriate, begin consultation even before a formal proposal is submitted by an applicant or initiated by the local government.
Identifying Tribes through the NAHC

Once a local government or private applicant initiates a proposal to adopt or amend a general plan or specific plan, the local government must send a written request to the NAHC asking for a list of tribes with whom to consult. OPR recommends that the written request be sent to the NAHC as soon as possible. Local governments should consider the following points when submitting a request to the NAHC:

- All written requests should be sent to the NAHC via certified mail or by fax.
- Requests to the NAHC should include the specific location of the area that is subject to the proposed action, preferably with a map clearly showing the area of land involved.
- Requests should clearly state that the local government is seeking information about tribes that are on the “SB 18 Consultation List.”
- Contact information for the NAHC:
  Native American Heritage Commission
  915 Capitol Mall, Room 364
  Sacramento, CA 95814
  Phone: 916-653-4082
  Fax: 916-657-5390
  http://www.nahc.ca.gov

A sample form for submitting a request to the NAHC is provided in Exhibit A. The tribal consultation list request form is also available on the NAHC website.

The NAHC will provide local governments with a written contact list of tribes with traditional lands or cultural places located within the local government’s jurisdiction. For each listed tribe, the NAHC will provide the tribal representative’s name, name of tribe, address, and phone number (if available, fax and email address). Although there is no statutory deadline for NAHC to respond to the local government, OPR recommends that the NAHC provide written contact information as soon as possible but no later than 30 days after receiving a written request from the local government.

Contacting Tribes Pursuant to Government Code §65352.3

Once a tribal contact list is received from the NAHC, local governments must contact the appropriate tribe(s) and invite them to participate in consultation. OPR suggests that local governments contact tribes as soon as possible upon receiving the tribal contact list. While the statute does not specify by what means tribe(s) should be contacted, OPR suggests that local governments send a written notice by certified mail with return receipt requested. Sending a written notice does not preclude a local government from also contacting the tribe by telephone, FAX, or e-mail.

Notices should be concise, clear, and informative so that tribes understand what they are receiving. Try to avoid using a standard public notice format to invite a tribe to consult, as most public notices do not contain sufficient information about the proposed action to enable a tribe to
respond. Keep in mind that the purpose of this notice is to invite a tribe to request consultation. Notices sent from a local government to a tribe, inquiring whether consultation is desired, should contain the following information:

- A clear statement of purpose, inviting the tribe to consult and declaring the importance of the tribe’s participation in the local planning process.

- A description of the proposed general plan or specific plan being considered, the reason for the proposal, and the specific geographic area(s) that will be affected by the proposal. Relevant technical documents should be provided with a concise explanation that clearly describes the proposed general plan or specific plan amendment and its potential impacts on cultural resources, if known.

- Maps that clearly detail the geographic areas described in the explanation. Maps should be in a reasonable scale with sufficient references for easy identification of the affected areas.

- The deadline (date) by which the tribe must request a consultation with the local government. By law, tribes have 90 days from the date of receipt of the notice to request consultation (Government Code §65352.3(a)(2)).

- Contact information for representatives of the local government to whom the tribe should respond.

- Contact information for the project proponent/applicant and landowner(s), if applicable.

- Technical reports, including summaries of cultural resource reports and archaeological reports applicable to that tribe’s cultural place(s), if available.

- Information on proposed grading or other ground-disturbing activities, if applicable. (This may be included in the project description.)

Subject to confidentiality procedures, both parties should maintain clear records of communications, including letters, telephone calls, and faxes. Both parties may send notices by certified mail and keep logs of telephone calls and faxes. Any returned or unanswered correspondence should be retained in order to verify efforts to communicate. Documentation of notification and consultation requests should be included in the local government’s public record.

In addition to the above recommendations, local governments may, in cooperation with tribes, develop notification procedures as a part of consultation protocols established in cooperation with a tribal government. Local governments should be aware that some tribes already have consultation protocols. In addition, local governments may adopt policies regarding consultation with a tribal government. (See Section VI.)

**After Notification is Sent to the Tribe**

Once local governments have sent notification, tribes are responsible for requesting consultation. Pursuant to Government Code §65352.3(a)(2), each tribe has 90 days from the date on which they receive notification to respond and request consultation. Some key points to consider include:
• The time period for consultation (undefined) is independent of the time period for tribes to request consultation (90 days).

• Local governments should be aware that tribes may require the entire 90-day period allowed by law to respond to a consultation request. Tribal governing bodies may need to meet to take a formal position on consultation.

• Local governments and tribal governments may consider addressing the method and timing of a tribe’s response to a consultation request in a jointly-developed consultation protocol. *(See Section VI.*)

• At their discretion, tribes can agree to a shorter timeframe (less than 90 days) to respond and request consultation.

• After the information about a proposed plan or plan amendment is received by the tribe, local governments should cooperate to provide any additional pertinent information about the proposed plan or plan amendment that the tribe may request. Local governments may consider extending the 90 day timeframe for the tribe to review the new information and respond accordingly.

• If the tribe does not respond within 90 days or declines consultation, consultation is not required under Government Code §65352.3.

**Conducting Consultation on General Plan or Specific Plan Adoption or Amendment**

Once a tribe requests consultation, consultation for the purpose of preserving or mitigating impacts to cultural places should begin within a reasonable time. Consultation should focus on how the proposed general plan or specific plan amendment or adoption might impact cultural places located on land affected by the plan proposal. The objectives of consultation, according to the legislative intent of SB 18, include:

• Recognizing that cultural places are essential elements in tribal culture, traditions, heritages and identities.

• Establishing meaningful dialogue between local and tribal governments in order to identify cultural places and consider cultural places in local land use planning.

• Avoiding potential conflicts over the preservation of Native American cultural places by ensuring local and tribal governments have information available early in the land use planning process.

• Encouraging the preservation and protection of Native American cultural places in the land use process by placing them in open space.

• Developing proper treatment and management plans in order to preserve cultural places.

• Enabling tribes to manage and act as caretakers of their cultural places.

Consultation is a process in which both the tribe and local government invest time and effort into seeking a mutually agreeable resolution for the purpose of preserving or mitigating impacts to a cultural place, where feasible. Government Code §65352.4 provides a definition of consultation for use by local governments and tribes:
Consultation means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties’ cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party’s sovereignty. Consultation shall also recognize the tribes’ potential needs for confidentiality with respect to places that have traditional tribal cultural significance.

Effective consultation is an ongoing process, not a single event. The process should focus on identifying issues of concern to tribes pertinent to the cultural place(s) at issue – including cultural values, religious beliefs, traditional practices, and laws protecting California Native American cultural sites – and on defining the full range of acceptable ways in which a local government can accommodate tribal concerns.

Items to Consider When Conducting Consultation

The following list identifies recommendations for how local governments and tribes may approach consultation on general plan and specific plan proposals.

- As defined in Government Code §65352.4, consultation is to be conducted between two parties: the local government and the tribe. Both parties to the consultation are required to carefully consider the views of the other.

- Consultation does not necessarily predetermine the outcome of the plan or amendment. In some instances, local governments may be unable to reach agreement due to other state laws or competing public policy objectives.

- Local governments must consult with each tribe who is identified by the NAHC and requests consultation. The NAHC will identify whether there are, in fact, any tribes with whom the local government must consult. One or more tribes may have traditional cultural ties to land within the local government’s jurisdiction and have an interest in preserving cultural places on those lands. Therefore, local governments may have to consult with more than one tribe on any particular plan proposal.

- OPR recommends that local governments consult with tribes one at a time (individually). If multiple tribes are involved and willing to jointly consult, local governments may consult with more than one tribe at a time.

- When a local government first contacts a tribe, its initial inquiry should be made to the tribal representative identified by the NAHC. OPR recommends that a local government department head or other official of similar or higher rank make the initial contact.

- Government leaders of the two consulting parties may consider delegating consultation responsibilities (such as attending meetings, sharing information, and negotiating the needs and concerns of both parties) to staff. Designated representatives should maintain direct relationships with and have ready access to their respective government leaders. These individuals may, but are not required to, be identified in a jointly-developed consultation protocol. (See Section VI.) In addition, the services of other professionals (attorneys,
contractors, or consultants) may be utilized to develop legal, factual, or technical information necessary to facilitate consultation.

- Simply notifying a tribe of a plan proposal is not the same as consultation.⁹
- Local governments should be aware of the potential for vast differences in tribal governments’ level of staffing and other resources necessary to participate in the manner required by Government Code §65352.3 and §65352.4. Some may be able to respond more promptly and efficiently than others. Local governments should keep this in mind if and when developing a consultation protocol with a tribe. (See Section VI.)
- As a part of consultation, local governments may conduct record searches through the NAHC and California Historic Resources Information System (CHRIS) to determine if any cultural places are located within the area(s) affected by the proposed action. Local governments should be aware, however, that records maintained by the NAHC and CHRIS are not exhaustive, and a negative response to these searches does not preclude the existence of a cultural place. A tribe may be the only source of information regarding the existence of a cultural place.
- Local governments should be aware that the confidentiality of cultural places is critical to tribal culture and that many tribes may seek confidentiality assurances prior to divulging information about those sites. (See Section VIII.)
- Tribal consultation should be done face-to-face. If acceptable to both parties, local and tribal governments may wish to define circumstances under which parts of the consultation process can be carried out via conference calls, e-mails, or letters. (See Section VIII.)
- Tribal consultations should be conducted in a setting that promotes confidential treatment of any sensitive information that is shared about cultural places. Consultation should not take place in public meetings or public hearings.
- The time and location of consultation meetings should be flexible to accommodate the needs of both the local government and tribe. Local governments should recognize that travel required for in-person consultation may be time-consuming, due to the rural location of a tribe. Local governments should also take into account time zone changes when setting meeting times. Local governments should offer a meeting location at the city hall, county administrative building, or other appropriate location. Local governments should also be open to a tribe’s invitation to meet at tribal facilities.
- The local government and tribe can agree to mutually invite private landowners to participate in consultation, if both parties feel that landowner involvement would be appropriate.
- Local governments are encouraged to establish a collaborative relationship with tribes as early as possible, prior to the need to consult on a particular general plan or specific plan

⁹ In Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995), the court held that the U.S. Forest Service had not fulfilled its consultation responsibilities under the National Historic Preservation Act by merely sending letters to request information from tribes. The court ruling held that written correspondence requesting consultation with a tribe was not sufficient for the purpose of conducting consultation as required by law, and that telephone calls or more direct forms of contact may be required.
amendment or adoption. Local governments may consider conducting pre-consultation meetings and developing consultation protocols in cooperation with tribes. *(See Section VI.)*

- Both parties should attempt to document the progress of consultation, including letters, telephone calls, and direct meetings, without disclosing sensitive information about a cultural place. Local governments may also want to document how the local government representative(s) fulfilled their obligations under Government Code §65352.3 and §65352.4.

**When is Consultation Over?**

Alan Downer, of the Advisory Council on Historic Preservation, described consultation as “conferring between two or more parties to identify issues and make a good faith attempt to find a mutually acceptable resolution of any differences identified.”

Differences of opinion and of priorities will arise in consultation between local and tribal governments. Whenever feasible, both local and tribal governments should strive to find mutually acceptable resolutions to differences identified through consultation.

When engaging in consultation, local government and tribal representatives should consider leaving the process open-ended to allow every opportunity for mutual agreement to be reached. Some consultations may involve highly sensitive and complex issues that cannot be resolved in just one discussion. Consultation may require a series of meetings before a mutually acceptable agreement may be achieved. Consultation must be concluded prior to the formal adoption or amendment of a general plan or specific plan.

Consultation, pursuant to Government Code §65352.3 and §65352.4, should be considered concluded at the point in which:

- the parties to the consultation come to a mutual agreement concerning the appropriate measures for preservation or mitigation; or

- either the local government or tribe, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached concerning appropriate measures of preservation or mitigation.

**V. Consultation: Cultural Places Located in Open Space**

On and after March 1, 2005, if land designated, or proposed to be designated as open space contains a cultural place, and if an affected tribe has requested notice of public hearing under Government Code §65092, then local governments must consult with the tribe. The purpose of this consultation is to determine the level of confidentiality required to protect the specific identity, location, or use of the cultural place, and to develop treatment with appropriate dignity of the cultural place in any corresponding management plan (Government Code §65562.5). This consultation provision does not apply to lands that were designated as open space before March 1, 2005.

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What Triggers Consultation?

Government Code §65562.5 applies to land that is designated, or proposed to be designated, as open space, on or after March 1, 2005. Local governments must consider several criteria when determining whether consultation is required, prior to designating open space on or after March 1, 2005.

Local governments must first learn whether the land designated, or proposed to be designated, as open space contains a cultural place. The following are methods by which local governments may be informed if a cultural place is located on designated or proposed open space:

- Conduct a record search through the NAHC to learn whether any listed cultural places are located on land proposed to be designated as open space. The local government should provide maps of lands proposed as open space to the NAHC with a request to identify whether there are any cultural places on the property. Because the NAHC’s sacred lands file is confidential, the commission will only divulge the presence or absence of a listed site and will direct the local government to the appropriate tribe(s) for more information.

- Conduct a record search through CHRIS to learn whether any listed cultural places are located on land proposed to be designated as open space. Local governments should enter into agreements with CHRIS information centers to establish procedures and protocols for requesting searches of historical resource records.

- Request that tribes identify the existence of any cultural places on the proposed open space land. Local governments should send a written request to the NAHC asking for a written list of tribes that have traditional cultural ties to the proposed open space. The NAHC will provide tribal contact information. Local governments should contact each tribe on the list provided by the NAHC to learn whether any cultural places are located on the land proposed as open space. Local government should provide the tribe with a sufficiently detailed map of the open space together with a concise notice as to why the tribe is being contacted. (Note: This contact is strictly for the purpose of identifying whether a cultural place is or may be located on the proposed open space land. It does not start consultation with a tribe.)

Local governments should be aware that records maintained by the NAHC and CHRIS are not exhaustive, and a negative response to searches does not preclude the existence of a cultural place. In most instances, and especially because of associated confidentiality issues, it is likely that tribes will be the only source of information regarding certain cultural places.

After a local government learns that a cultural place is or may be located on land designated or proposed to be designated as open space, the local government must notify the appropriate tribes of the opportunity to participate in consultation. The appropriate tribes are those which have: (1) been identified by the NAHC, and (2) requested notice of public hearing from the local government pursuant to Government Code §65092.
Conducting Consultation Regarding Open Space

The purpose of this consultation is to determine the level of confidentiality required to protect the specific identity, location, character, or use of the cultural place and to develop treatment with appropriate dignity of the cultural place in any corresponding open space management plan. The reference to “any corresponding management plan” is not meant to imply that there is such a plan or that the local government must develop such a management plan. This language is intended to encourage consideration of management policies and practices which may be discussed between the local government and tribe and incorporated into a new or existing management plan for the cultural place.

The following are examples of appropriate items to consider and discuss during consultation:

- Encourage tribal involvement in the treatment and management of the cultural place though contracting, monitoring, co-management, and other forms of joint local-tribal participation.
- Tribes may only wish to disclose a sufficient amount of information to protect the site and to allow for the proper treatment and management of the cultural place. *(See Section VIII.)*
- Tribes may wish to have access to cultural places located on open space for gathering, performing ceremonies and/or helping maintain the site.
- Tribes may want to recommend management practices that avoid disturbing or impacting the cultural place.
- Tribes may wish to discourage certain land uses (e.g. recreation) within the open space that could adversely impact the cultural place. Local governments may be asked to consider appropriate land uses in the open space designation that would avoid direct impacts to the cultural place.

The designation of open space, as provided in Government Code §65562.5, may but does not always, involve amending the general plan. In some jurisdictions, designation of open space may occur through rezoning of land from one zone designation to an open space zone designation, without the need for a general plan amendment. However, for proposals to designate open space that require a general plan or specific amendment, the local government should consider the above recommendations as well as the recommendations outlined in Section IV of these guidelines.

When is Consultation Over?

Please refer to Section IV for additional information regarding the meaning of consultation.
Part C
Pre-Consultation

Section VI provides advice to local governments that is intended to help them more effectively engage in consultation with tribes. This part of the 2005 Supplement provides information that may help local governments establish working relationships with tribes prior to entering into the required consultation pursuant to Government Code §65352.3 and §65562.5.

VI. Preparing for Consultation

As discussed above, Government Code §65352.3 requires consultation during the process of amending or adopting general plans or specific plans. In addition, Government Code §65562.5 requires consultation to determine the proper level of confidentiality to protect and treat a cultural place with appropriate dignity, where such places are located on lands to be designated as open space. Before engaging in consultation in either of these cases, local governments may want to consider developing relationships with tribes that have traditional lands within their jurisdiction. Although not required by law, these pre-consultation efforts may develop a foundation for a mutually respectful and cooperative relationship that helps to ensure more smooth and effective communication in future consultations.

Local governments may wish to consider the following when undertaking pre-consultation meetings:

- Contact the NAHC to obtain a list of all appropriate tribes with whom to pre-consult. Because this list may be revised over time by the NAHC, local governments should periodically request updated contact lists.

- Contact the NAHC and CHRIS to learn if any historical or cultural places are located within the city’s or county’s jurisdiction. (Note that the NAHC and CHRIS have different procedures for searching information about cultural sites. See Part F for more information about each organization and how to contact them. As previously noted, NAHC and CHRIS records pertaining to cultural places are not exhaustive, and a negative response to these searches does not preclude the existence of a cultural place.)

- Invite each tribal government’s leaders to meet with local government leaders for the purpose of establishing working relationships and exchanging information about respective governmental structures, practices, and processes. Pre-consultation meetings may include discussion about community goals, planning priorities, and how cultural places play a role in the tribal culture.

- Hold informational workshops or meetings with the tribe(s) to discuss the general plan process, the existing general plan, and any contemplated amendments. Local governments should not expect or ask a tribe to share confidential information in a meeting with other tribes or the general public.

- Ask tribes whether they have existing consultation protocols.
Develop a consultation protocol that addresses how a cooperative relationship can be maintained and how future consultations should be conducted. Some tribes may already have established protocols through working with other agencies, such as state and federal entities, that can be used as models.

If a tribe and local government decide to develop a consultation protocol, both parties should suggest topics that they believe will facilitate consultation. The following are examples of items that may be appropriate to discuss and include in a jointly-developed consultation protocol:

- Representative(s) from each consulting party who will be designated to participate in consultations and manage the information resulting from the consultations.
- Key points in the consultation process when elected government leaders may need to be directly involved in consultation.
- Method(s) of contact preferred by the tribal government and additional tribal representatives that the local government should contact regarding a proposed action.
- Procedures for giving and receiving notice, including method and timing.
- Preferred method(s) of consultation. While in-person consultation is recommended, it may be acceptable to both parties that certain aspects of consultation occur through conference calls, e-mails, or letters.
- Preferred locations of consultation meetings.
- The tribe’s willingness to participate in joint consultation, should a specific site be of interest to more than one tribe.
- Procedures to allow tribal access to the local government’s consultation records.
- Procedures for maintaining accurate, up-to-date contact information.

Over time, the initial approach to consultation may need to be updated. Both parties should be open to identifying and agreeing on changes to their consultation protocol.
Part D
Preservation, Mitigation, Confidentiality, and Landowner Participation

Sections VII through IX provide advice to local governments for considering issues such as appropriate means to preserve, or mitigate impacts to, cultural places; methods to protect the confidentiality of cultural places; and ways to encourage the participation of landowners in voluntary preservation efforts.

VII. Preservation of, or Mitigation of Impacts to, Cultural Places

Government Code §65352.3 requires local governments to conduct consultations with tribes (when requested) for the purpose of “preserving or mitigating impacts” to California Native American cultural places. In the course of adopting or amending a general plan or specific plan, local governments may be informed of the existence of a cultural place within the affected area. Should a tribe request consultation to discuss any impacts to the cultural place, local governments should consider a variety of factors when participating in the consultations, including: the history and importance of the cultural place, the adverse impact the local government action may have on the cultural place, and options for mitigating impacts of the proposal to the cultural place.

When participating in consultations, it is important that local governments consider that, because of philosophical differences, mitigation will not always be viewed as an appropriate option to protect cultural, and often irreplaceable, places. Many tribes may determine that impacts to a cultural place cannot be mitigated; that the only appropriate treatment may be to preserve the cultural place without impact to its physical or spiritual integrity. Of course, this is not to say that tribes will not engage in discussions regarding mitigation of impacts to their cultural places, but local governments should consider the vastly different perspectives that tribes may have. What a local government may consider to be acceptable treatment under current environmental, land use, and cultural resource protection laws, may not be considered by a tribe to be acceptable treatment for a sacred or religious place.

The following is a discussion of preservation and mitigation, as mentioned in Government Code §65352.3. Local governments should check with their legal counsels to identify any other legal obligations to preserve or mitigate impacts to Native American cultural resources.

What are Preservation and Mitigation?
Preservation is the conscious act of avoiding or protecting a cultural place from adverse impacts including loss or harm. Mitigation, on the other hand, is the act of moderating the adverse impacts that general plan or specific plan adoption or amendment may have on a cultural place.
While local governments should strive to help preserve the integrity of, access to, and use of cultural places\textsuperscript{11}, mitigation may often be achieved through a broad range of measures:

- Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- Rectifying the impact by repairing, rehabilitating, or restoring the impacted cultural place.
- Reducing or eliminating the impact over time through monitoring and management of the cultural place.

Other methods of mitigation may include:

- Designation of open space land in accordance with Government Code §65560(b).
- Enhancement of habitat or open space properties for protection of cultural place.
- Development of an alternate site suitable for tribal purposes and acceptable to the tribe.
- Other alternative means of preserving California Native American cultural features, where feasible.

It is important that local governments consider that mitigation measures may largely differ depending on customs of a particular tribe, the characteristics and uses of a site or object, the cultural place’s location, and the importance of the site to the tribe’s cultural heritage. Where a cultural place is affected by a proposed general or specific plan adoption or amendment, consultations with tribes should focus on preserving, or mitigating the impacts to, that specific cultural place.

**Seeking Agreement Where Feasible**

Although Government Code §65352.3(a) requires consultation for the purpose of preserving or mitigating against the adverse impacts that a general plan or specific plan adoption or amendment may have on a cultural place, there is no requirement to preserve a cultural place or adopt mitigation measures, if agreement cannot be reached. Under the definition of “consultation” within Government Code §65352.4, local governments and tribes are required to carefully consider each other’s views and are required to seek an agreement, “where feasible.” For the purposes of Government Code §65352.4, agreements should be considered “feasible” when capable of being accomplished in a successful manner within a reasonable time taking into account economic, environmental, social and technological factors.\textsuperscript{12} If, after conducting consultations in good faith and within the spirit of the definition, the tribe or local government cannot reach agreement on preservation or mitigation of any impact to a California Native American cultural place, neither party is required to take any action under Government Code §65352.3(a).

\textsuperscript{11} Cultural Places referring to places, features, and objects under Government Code §65352.3(a) and described in Government Code §§5097.9 and 5097.995.

\textsuperscript{12} See State of California General Plan Guidelines, Governor’s Office of Planning & Research, Glossary, page 261.
Monitoring and Management

During consultations, local governments should consider the involvement of tribes in the ongoing treatment and management of cultural places, objects, or cultural features through a specific monitoring program, co-management, or other forms of participation.

Where a cemetery, burial ground, or village site may be present, the planning of treatment and management activities should address the possibility that California Native American human remains may be involved when protecting cultural features. Local governments should consider working with tribes to develop an appropriate plan for the identification and treatment of such discoveries in accordance with Public Resources Code §5097.98.

Private Landowner Involvement

During consideration of a proposed general plan adoption or amendment, a local government may discover or be informed of a cultural place that exists on privately owned land within an affected area. In such an instance, local governments should first contact the appropriate tribe or tribes to offer consultations and determine an acceptable level of landowner involvement. Local governments should be aware that there may be some occasions where a tribe may prefer to maintain strict confidentiality without the inclusion of a private, third party landowner.

If a tribe is interested in involving the landowner in preservation or mitigation activities, the local government should consider facilitating such involvement. It is important that local governments and tribes understand that there is no statutory requirement to include private landowners under the government-to-government consultations requirements of Government Code §65352.3(a). However, because landowner participation is encouraged, local governments may consider suggesting the following methods to facilitate landowner involvement:

- Suggesting that the tribe contact the private landowner directly to facilitate discussions between the tribe and landowner.
- Offering to contact the private landowner directly on behalf of the tribe.
- Suggesting that the private landowner be included as a party to the consultations.

VIII. Confidentiality of Information

Protecting the confidentiality of California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places is one of the most important objectives of SB 18. This is clearly evidenced by SB 18’s legislative intent as well as its statutory additions and amendments which address the issue of confidentiality and requires “each city and county to protect the confidentiality of information concerning” cultural places.13 By maintaining the confidentiality of a cultural place, including its location, traditional uses, and characteristics, local governments can help assure tribes of continued access and use of these cultural places, in addition to aiding in the preservation of a cultural place’s integrity. However, local governments should take into consideration other state and federal laws which may impose conflicting public policy priorities or requirements.

13 See SB 18 §1(b)(3), (Burton, Ch. 905, Stat. 2004); Govt. Code §§ 65040.2(g)(3), 65352.3, 65352.4, and 65562.5.
Public Disclosure Laws
The California Public Records Act (Government Code §6250 et. seq.) and California’s open meeting laws applying to local governments (The Brown Act, Government Code §54950 et. seq.) both have implications with regard to maintaining confidentiality of California Native American cultural place information. Local governments are encouraged to carefully consider these laws in greater detail, and adopt or incorporate these recommendations into their own confidentiality procedures in order to avoid the unintended disclosure of confidential cultural place information.

The California Public Records Act (CPRA)
Subject to specified exemptions, the CPRA provides that all written records maintained by local or state government are public documents and are to be made available to the public, upon request. Written records include all forms of recorded information (including electronic) that currently exist or that may exist in the future. The CPRA requires government agencies to make records promptly available to any citizen who asks, unless an exemption applies.

The CPRA contains two exemptions which aid in the protection of records relating to Native American cultural places. Amended in October of 2005 for broad application, these exemptions now permit any state or local agency to deny a CPRA request and withhold from public disclosure:

1) “records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in Section 5097.9 and 5097.993 of the Public Resources Code maintained by, or in the possession of, the Native American Heritage Commission, another state agency, or a local agency” (GC § 6254(r)); and

2) “records that relate to archaeological site information and reports maintained by, or in the possession of, the Department of Parks and Recreation, the State Historical Resources Commission, the State Lands Commission, another state agency, or a local agency, including the records that the agency obtains through a consultation process between a California Native American tribe and a state or local agency” (GC § 6254.10).

With these two CPRA exemptions in place, information related to Native American cultural places is specifically protected from mandatory public disclosure. Such protections are intended to facilitate the free exchange of information between Native American tribes and California local governments when conducting tribal consultations. Even with this protection, however, it is important for local governments to understand that some tribes may withhold information during consultations due to conflicts with their cultural beliefs and practices. Local governments and Native American tribes should discuss such issues early in consultations, or during pre-consultation, so that each has an understanding of what information can and cannot be divulged. Additionally, it is important for all parties to recognize that a legislative body of a city or county must have access to certain information in order to make an informed decision regarding the given plan adoption or amendment.
The Brown Act
The Brown Act governs the legislative bodies of all local agencies within California. It requires that meetings held by these bodies be “open and public.” Under this Act, no local legislative body may take an action in secret, nor will the body’s action be upheld if it is in violation of California’s open meeting laws. The Brown Act defines a “meeting” as a gathering of a majority of the members of a applicable body to hear, discuss, or deliberate on matters within the agency’s or board’s jurisdiction.

While the Brown Act does contain some exceptions for “closed meetings,” none of these exceptions would allow the quorum of a local legislative body to participate in tribal consultations within a closed meeting. Should a local legislative body participate in confidential tribal consultations, it is important that they do so as an advisory committee with less than a quorum, so as to not invoke the Brown Act’s requirements of public participation (see Government Code §54952(b)). Otherwise, the Brown Act will require that the consultations be held in public, thereby defeating the purpose of confidentiality, or, alternatively, any decisions made by the quorum of the body within a closed meeting would be rendered invalid.

In order to efficiently conduct tribal consultation meetings, in addition to maintaining confidentiality at all times, local governments are encouraged to develop procedures in advance that would designate a committee or agency in charge. In doing so, local governments should consider the problems associated with elected official participation within tribal consultations, and should tailor their procedures accordingly.

Public Hearings
General plan amendments, specific plan amendments, and the adoption of a general or specific plan each require both a planning commission and a city council or board of supervisors to conduct public hearings. The decision to approve or deny these proposals must be based in reason and upon evidence in the record of the public hearing. When addressing an adoption or amendment involving a cultural place, elected officials will need to be apprised of the cultural site implications in order to make informed decision. However, to maintain the confidentiality of this cultural place information, local governments and tribes, during consultations, should agree on what non-specific information may be disclosed during the course of a public hearing. Additionally, local governments should avoid including any specific cultural place information within CEQA documents (such as Environmental Impact Reports, Negative Declaration, and Mitigated Negative Declarations) or staff reports which are required to be available at a public hearing. In such cases, confidential cultural resource inventories or reports generated for environmental documents should be maintained under separate cover and shall not be available to the public.

Additional Confidentiality Procedures
Additionally, local governments should consider the following items when considering steps to be taken in order to maintain confidentiality:

- Local governments should develop “in-house” confidentiality procedures.
• Procedures should be established to allow for tribes to share information with local government officials in a confidential setting.

• Only those tribal designees, planning officials, qualified professional archaeologists, and landowners involved in the particular planning activity should obtain information about a specific site.

• Participating landowners should be asked to sign a non-disclosure agreement with the appropriate tribe prior to gaining access to any specific site information.

• Local governments should not include detailed (confidential) information about cultural places in any of its public documents.

• Possible procedures to require local government to notify participating tribes and landowners whenever records containing specific site information have been requested for public disclosure.

Local governments should also keep in mind that the terms for confidentiality may differ depending upon the nature of the site, the tribe, the local government, the landowner, or who proposes to protect the site. Local governments should collaborate with tribes to develop informational materials to educate landowners regarding the cultural sensitivity of divulging site information, explaining the tribe’s interest in maintaining the confidentiality and preservation of a site. Landowners should be informed of criminal penalties within the law for the unlawful and intentional destruction, degradation or removal of California Native American cultural or spiritual places located on public or private lands (Public Resources Code §5097.995).14

Confidentiality Procedures for Private Landowner Involvement

In order to successfully preserve or mitigate impacts to a California Native American cultural place, local governments and tribes may find it necessary or advantageous to involve private landowners early in the consultation process. Often, landowners may not be aware that a cultural place exists on their property, or alternatively, may not realize that the site has become subject to a general plan adoption or amendment. Due to the confidential nature of certain information involved, local governments should consider working with tribes to adopt procedures that would balance the value of landowner involvement with the need for cultural place confidentiality. Local governments and California Native American tribes may wish to consider the following procedures that would inform and potentially involve landowners in the consultation process, without compromising the confidentiality of a cultural place:

• Local governments, at the request of a tribe, may consider contacting a landowner directly and, without disclosing the exact location or characteristics of the site, inform the landowner of the existence of a culturally significant place on their property. A local government may consider inquiring as to whether the landowner would be willing to further discuss the matter directly with the appropriate tribal representative under a non-disclosure agreement.

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14 Due to a drafting error, SB 18 contains multiple references to Public Resources Code (PRC) §5097.995 which is no longer in existence. In 2004, PRC §5097.995 was amended and renumbered to PRC §5097.993 by Senate Bill 1264 (Chapter 286). Local governments should refer to PRC §5097.993 when looking for PRC §5097.995.
• Local governments may consider giving the landowner’s contact information to a tribe so that the tribe may contact the landowner directly. Discussion about conservation easements is an example of a case in which a tribe and landowner may wish to meet without the direct participation of the local government.

• Local governments may also consider informing a landowner of the ability of landowners to access CHRIS for cultural resource information specific to their land. Local governments should keep in mind that the CHRIS system does not contain a catalog of every cultural place within California.
IX. Procedures to Facilitate Voluntary Landowner Protection Efforts

In addition to their own consultation with tribes, local governments may help facilitate landowner participation in preserving and protecting cultural places. While each city and county should develop its own policies on landowner participation, general strategies for encouraging landowner awareness of and participation in cultural place protection may include:

- Collaborating with local tribes to offer cultural awareness and other educational events for landowners.
- Encouraging landowner participation in discussions about appropriate preservation and mitigation measures.
- Promoting the use of conservation easements and other private conservation efforts.

It should be noted that SB 18 does not require landowners to dedicate or sell conservation easements for the purpose of cultural place preservation. Neither are local governments required to play a direct role in any private conservation activity. Government Code §65040.2(g), however, does require OPR to recommend procedures to facilitate voluntary landowner participation in the preservation and protection of cultural places.

Landowner Education and Participation

Public workshops, seminars, and other educational sessions may provide forums for tribal representatives to share tribal and cultural information and discuss general protection concerns with landowners. These sessions may build cultural awareness, develop landowner understanding of the importance of cultural places, and also encourage further dialogue between tribes and landowners. These sessions should generally inform landowners of the importance of cultural places and should not compromise the confidentiality of a specific cultural place.

Local governments may also encourage landowner participation in discussions about preserving or mitigating impacts to a cultural place located on a landowner’s private property. (See Section VII and Section VIII for further information.)

Private Conservation Efforts

Although local governments are not required to play a direct role in any private conservation activity, they can promote the use of conservation easements and other conservation programs to protect cultural places. Local governments may consider adoption of a policy to encourage voluntary landowner participation in protection programs. Local governments may also develop and distribute informational materials about potential incentives for private conservation efforts, such as Mills Act tax credits or the tax benefits of donating or selling conservation easements.

A conservation easement is a voluntary agreement between a landowner and an authorized party (including a tribe pursuant to Civil Code 815.3(c)) that allows the easement holder to limit the type or amount of development on the property while the landowner retains title to the land. The landowner is compensated for voluntarily giving up some development opportunities. The easement is binding upon successive owners of the land. It is common for a conservation
An easement to be recorded against the property as a way to inform future purchasers of the existence of an easement. Granting of a conservation easement may qualify as a charitable contribution for tax purposes.

Should a landowner choose to sell a conservation easement, the landowner should first consult with all tribes affiliated with the land on which the easement is proposed. It is also recommended that tribes hold conservation easements only within their areas of cultural affiliation.

As an alternative to conservation easements, local governments may also promote private preservation of cultural places through the use of Memoranda of Understanding (MOU). As a direct agreement between a landowner and tribe, a MOU allows a tribe and landowner to agree on appropriate treatment of cultural places located on the landowner’s private property and may give certain privileges to tribes, such as access to perform ceremonial rituals. MOUs may also be used to facilitate co-management by tribes, landowners, and conservation organizations. For example, if a conservation easement established for wildlife protection also contains a cultural place, the landowner, conservation entity, and tribe could agree on co-management (in the MOU) that protects both the habitat and cultural place.
Part E
Open Space

Section X provides information for incorporating the protection of cultural places into the open space element of the general plan.

X. Open Space for the Protection of Cultural Places

SB 18 amended Government Code §66560 to include open space for the protection of cultural places as an allowable purpose of the open space element. Local governments may, but are not required to, consider adopting open space policies regarding the protection of cultural places. Local governments may wish to consider the following when and if they develop such policies:

• Limiting the types of land uses allowed in an open space designation in order to protect the cultural place from potentially harmful uses.
• Facilitating access to tribes for maintenance and traditional use of cultural places.
• Protecting the confidentiality of cultural places by not disclosing specific information about their identity, location, character, or use.
• Giving developers incentives to protect cultural places through voluntary measures.
• Incorporating goals for protection of cultural places in open space that is also part of a regional habitat conservation and protection program, for example, a local or regional Habitat Conservation Plan (HCP) or Natural Community Conservation Program (NCCP).
• Reviewing and conforming other elements of the general plan that deal with conservation of natural and cultural resources to the open space element.

The development of open space policies for the protection of cultural places should be done in consultation with culturally-affiliated tribes. It is important to note that the importance of cultural places is not solely rooted in the land or other physical features or objects related to the land on which the cultural place is located. The sense of “place” is often as important as any physical or tangible characteristic. It may be important to a tribe to preserve a certain non-material aspect of a cultural place, such as views or vantage points from or to the cultural place. Cultural interpretation and importance of the place to the tribe should be taken into consideration, in addition to any potential archaeological importance of the place. With this in mind, local governments should be prepared to consider creative solutions for preservation and protection of cultural places.

Neither Government Code §65560(b)(5) nor Government Code §65562.5 mandate local review or revision of the existing open space element of the general plan to inventory and/or protect cultural places. However, local governments should consider doing so in future updates of or comprehensive revisions to the open space element.
Part F Additional Resources

XI. Additional Resources

In addition to the information provided in the 2005 Supplement to the *General Plan Guidelines*, local governments may wish to investigate additional resources that can provide more detailed information about Native American people, cultural places, tribal governments, consultation, confidentiality, conservation easements, and other issues related to SB 18. Sources of additional information include federal and state government agencies that have previous experience with tribal consultations, colleges and universities, private organizations and foundations, and the literature and web sites associated with these groups. Although it is not intended to be a comprehensive list, some potentially useful resources are included below.

It is important that local governments keep in mind that Native American tribes are often the best source of information concerning a cultural place's location and characteristics. Local governments are encouraged to seek this information, if available, directly from the tribes themselves.

**State Agencies**

**California Native American Heritage Commission (NAHC)**
The NAHC is the state commission responsible for advocating preservation and protection of Native American human remains and cultural resources. NAHC maintains confidential records concerning places of special religious or social significance to Native Americans, including graves and cemeteries and other cultural places. The NAHC reviews CEQA documents to provide recommendations to lead agencies about consulting with tribes to mitigate potential project impacts to these sites.

The NAHC maintains a list of California tribes and the corresponding contacts that local governments should use for the purpose of meeting SB 18 consultation requirements.

The NAHC web site also provides a number of links to information about federal and state laws, local ordinances and codes, and cultural resources in relation to Native Americans.

Native American Heritage Commission
1556 Harbor Blvd.
West Sacramento, CA 95691
916-373-3710
916-373-5471 - Fax
http://www.nahc.ca.gov
California Office of Historic Preservation (OHP)
California Historical Resources Information System (CHRIS)
Pursuant to state and federal law, the California Office of Historic Preservation (OHP) administers the California Historical Resources Information System (CHRIS). The CHRIS is organized by county and managed by regional information centers (posted on the OHP website). These CHRIS centers house records, reports, and other documents relating to cultural and archaeological resources, and provide information and recommendations regarding such resources on a fee-for-service basis. Local governments may enter into agreements with CHRIS information centers to establish procedures and protocols for requesting searches of historical resource records.

The OHP also provides assistance to local governments to encourage direct participation in historic preservation. OHP provides technical assistance to local governments including training for local commissions and review boards, drafting of preservation plans and ordinances, and developing archaeological and historical surveys.

Office of Historic Preservation
P.O. Box 942896
Sacramento, CA 94296-0001
Phone: (916) 653-6624
Fax: (916) 653-9824
http://www.ohp.parks.ca.gov

California Department of Conservation
Division of Land Resource Protection (DLRP)
The DLRP works with landowners, local governments, and researchers to conserve productive farmland and open spaces.

California Department of Conservation
Division of Land Resource Protection
801 K Street, MS 18-01
Sacramento, CA 95814-3528
Phone: (916) 324-0850
http://www.consrv.ca.gov/DLRP/index.htm

California Department of Housing and Community Development
California Indian Assistance Program (CIAP)
The California Indian Assistance Program’s primary role is to assist tribal governments with obtaining and managing funds for community development and government enhancement. CIAP’s 2004 Field Directory of the California Indian Community is a good reference for California Native American tribes, including location of Indian lands, federal recognition status of tribes, history of laws affecting tribes, and other programs and agencies involved in tribal relationships.
California Department of Transportation (DOT)  
Native American Liaison Branch  
The California DOT administers most of its projects with some federal funding and is therefore subject to Section 106 consultation requirements under NHPA. The department has a Native American Liaison Branch (NALB), with headquarters in Sacramento and Native American Liaisons in each of its twelve districts. The NALB web site contains policy statements and links to other useful resources.

Office of Regional and Interagency Planning  
Native American Liaison Branch  
1120 N Street, MS 32  
Sacramento, CA 95814  
Phone: (916) 651-8195  
Phone: (916) 654-2389  
Fax: (916) 653-0001  
http://www.dot.ca.gov/hq/tpp/offices/orip/na/native_american.htm

Federal Agencies  
Federal Highway Administration – AASHTO (American Association of State Highway and Transportation Officials) Center for Environmental Excellence  
The AASHTO Center for Environmental Excellence provides a web site designed to provide tools for Section 106 of the National Historical Preservation Act (NHPA) tribal consultation. This site contains documents and links to web sites that address key aspects of tribal consultation relevant to SB 18. Information also includes federal, tribal, and state policies and protocols, case law, and best practices as implemented by federal and state agencies and tribes.  
http://environment.transportation.org/environmental_issues/tribal_consultation/overview.htm

U.S. Army Corps of Engineers  
The U.S. Army Corps of Engineers has lasting and positive relations with many tribal governments. The “Tribal Affairs and Initiatives” section of their web site provides information regarding the U.S. Army Corps of Engineers’ approach to tribal consultation and preservation of cultural resources.  
USDA Forest Service
The Forest Service has extensive experience in consulting with Native American tribes. The Forest Service’s Forest Service National Resource Book on American Indian and Alaska Native Relations is an excellent resource book on tribal beliefs and practices, tribal consultation, and laws affecting Native Americans. The Forest Service’s Report of the National Tribal Relations Program Implementation Team (June 2003) reviews relationships between the Forest Service and tribes, identifying pervasive problems and concerns and making recommendations to improve the effectiveness of the program at maintaining long-term collaborative relationships with tribal governments.

USDA Forest Service
Regional Office of Tribal Relations
Sonia Tamez
1323 Club Drive
Vallejo, CA 95492
Phone: (707) 562-8919
www.r5.fs.fed.us

USDA National Sustainable Agriculture Information Service (ATTRA)
The ATTRA provides information and other technical assistance to farmers, ranchers, Extension agents, educators, and others involved in sustainable agriculture in the United States. The ATTRA publication, Conservation Easements, Resource Series (2003), provides an overview of what holding and selling conservation easements entail.

ATTRA - National Sustainable Agriculture Information Service
PO Box 3657
Fayetteville, AR 72702
Phone: (800) 346-9140
Fax: (479) 442-9842
http://attra.ncat.org/

USDA Natural Resources Conservation Service (NRCS)
The mission of the NRCS is to address natural resource conservation on private lands. The website contains links to various conservation technical resources and to additional contact information for area offices and service centers.

California NRCS State Office
430 G Street #4164
Davis, CA 95616-4164
Phone: (530) 792-5600
Fax: (530) 792-5610
http://www.ca.nrcs.usda.gov/

U.S. Department of Interior – Bureau of Indian Affairs
The Bureau of Indian Affairs (BIA) is responsible for the administration and management of 55.7 million acres of land held in trust by the United States for American Indians, Indian tribes, and Alaska Natives. Developing forestlands, leasing assets on these lands, directing agricultural
programs, protecting water and land rights, developing and maintaining infrastructure, and economic development are all agency responsibilities. The BIA web site includes links to other federal agencies, inter-tribal organizations, environmental organizations, and cultural resources.

Bureau of Indian Affairs
Phone: (202) 208-3710

U.S. Department of Interior – Bureau of Land Management
The Bureau of Land Management manages 261 million acres of land and has staff whose duties include coordination and consultation with Native Americans. The Bureau publishes *Native American Coordination and Consultation, Manual Section 8160 with Handbook H-8160-1*. The handbook is devoted to providing general guidance for tribal consultation, and can be found online at: http://www.blm.gov/nhp/efoia/wo/handbook/h8160-1.html.

Bureau of Land Management
California State Office
2800 Cottage Way, Suite W-1834
Sacramento, CA 95825-1886
Phone: (916) 978-4400
Phone: (916) 978-4416
TDD: (916) 978-4419
http://www.ca.blm.gov/

U.S. Department of Interior- National Park Service
The following National Park Service web site specifically focuses on cultural resource preservation. The site includes links to tools for cultural resource preservation, different areas of cultural resource protection and different offices of the National Park Service that handle cultural preservation issues. Included among these offices is the American Indian Liaison Office, the web site of which contains a number of information resources that are potentially useful to local governments learning how to consult with Native American tribes on land use policy.

http://www.cr.nps.gov

U.S. Department of Interior – Office of Collaborative Action and Dispute Resolution
This web site provides links to federal agencies’ policies on tribal consultation:

Colleges and Universities
Humboldt State University
The Center for Indian Community Development (CICD)
The CICD primarily focuses on Indian language education, but also acts in the capacity of a liaison between Native American tribes and the community. The CICD includes a cultural resource facility where information about Native American burial grounds and cultural resource monitoring can be found. The CICD offers useful publications on tribal governments and cultural approaches to environmental protection of Native American lands on its web site.
University of California, Los Angeles
American Indian Studies Center (AISC)
The AISC has spent a number of years conducting research on issues affecting Native American Indian communities. The center has sponsored conferences on issues including California tribes, repatriation, federal recognition, and Indian gaming. The AISC offers a number of publications on issues ranging from Contemporary Native American Issues and Native American Politics to Native American Theater and Native American Literature.

UCLA American Indian Studies Center
3220 Campbell Hall
Los Angeles, CA 90095-1548
Phone: (310) 825-7315
Fax: (310) 206-7060
http://www.aisc.ucla.edu/

University of California, Los Angeles School of Law
Native Nations Law and Policy Center (NNLPC)
The mission of NNLPC at UCLA Law is to support Native nations throughout the United States, with a special focus on California tribes, in developing their systems of governance and in addressing critical public policy issues and to apply the resources of state-supported education together with tribal expertise to address contemporary educational needs for California Tribes. The Research and Publications division secures grants, carries out research, and sponsors conferences and roundtables drawing together scholars, tribal leaders, and federal/state policy-makers.

UCLA School of Law
P.O. Box 951476
Los Angeles, CA 90095-1476
Phone: (310) 825-4841
http://www.law.ucla.edu/students/academicprograms/nativenations/nnlapc.htm

Private Organizations and Foundations
American Farmland Trust (AFT)
Since its founding in 1980, the AFT has helped to achieve permanent protection for over a million acres of American farmland. The AFT focuses its strategies on protecting land through publicly funded agricultural conservation easement programs and encouraging conservation practices in community planning and growth management.
Inter-Tribal Council of California, Inc. (ITCC)
The key role of the Inter-Tribal Council of California (ITCC) is to assist in bridging relationships between California tribal governments and other organizations, including local government agencies. The ITCC offers workshops on Native American cultural proficiency and tribal governments for the purpose of educating non-Native Americans on how to effectively communicate with tribal governments, in addition to other training and technical assistance. The ITCC is experienced in assisting the development of Memoranda of Understanding and Agreement, protocols, and educational outreach materials.

Inter-Tribal Council of California, Inc.
2755 Cottage Way, Suite 14
Sacramento, CA  95825
Phone: (916) 973-9581
Fax: (916) 973-0117

Land Trust Alliance (LTA)
The Land Trust Alliance promotes voluntary land conservation by offering training, conferences, literature, reports, and other information on land conservation. The LTA has several publications discussing conservation techniques. Their web site addresses different conservation options for landowners and includes questions and answers about conservation easements, land donation, and bargain sale of land.

Land Trust Alliance
1331 H Street NW, Suite 400
Washington D.C.  20005-4734
Phone: (202) 638-4725
Fax: (202) 638-4730
http://www.lta.org/conserve/options.htm

Native American Land Conservancy
The Native American Land Conservancy is a nonprofit corporation formed for the conservation and preservation of Native American sacred lands.

Native American Land Conservancy
Kurt Russo, Executive Director
PO Box 1829
Indio, CA 92202
Phone: (800) 6770-6252
The Nature Conservancy (TNC)
The Nature Conservancy is a non-profit organization that works with communities, businesses, and individuals to preserve lands with natural and cultural resources.

The Nature Conservancy
4245 North Fairfax Drive, Suite 100
Arlington, VA 22203-1606
http://nature.org/

Southern California Tribal Chairmen's Association (SCTCA)
The Southern California Tribal Chairmen's Association (SCTCA) is a multi-service non-profit corporation established in 1972 for a consortium of 19 Federally recognized Indian tribes in Southern California. The Primary goals and objectives of SCTCA are the health, welfare, safety, education, culture, economic and employment opportunities for its tribal members. A board of directors comprised of tribal chairpersons from each of its member tribes governs SCTCA.

Southern California Tribal Chairmen's Association
Denis Turner
Executive Director
Phone: (760) 742-8600 x100
http://www.sctca.net/

Trust for Public Land (TPL)
The Trust for Public Land (TPL) is a national, nonprofit, land conservation organization that conserves land for people to enjoy as parks, community gardens, historic sites, rural lands, and other natural places, ensuring livable communities for generations to come. Since 1972, TPL has worked with willing landowners, community groups, and national, state, and local agencies to complete more than 2,700 land conservation projects in 46 states, protecting nearly 2 million acres.

Trust for Public Land National Office
116 New Montgomery St., 4th Floor
San Francisco, CA 94105
Phone: (415) 495-4014
Fax: (415) 495-4103
http://www.tpl.org
Exhibit A: Sample Request to the NAHC for Tribal Contact Information

LOCAL GOVERNMENT
TRIBAL CONSULTATION LIST REQUEST
NATIVE AMERICAN HERITAGE COMMISSION
1556 HARBOR BLVD.
WEST SACRAMENTO, CA 95691
916-373-3710
916-373-5471 - Fax

Project Title: ________________________________

Local Government/Lead Agency: ___________________________ Contact Person: ___________________________

_________________________________________ Phone: ___________________________

Street Address: __________________________ Fax: ___________________________

   ____ General Plan Amendment  ____ Specific Plan Amendment

   ____ Pre-planning Outreach Activity

Project Description:

NAHC Use Only

Date Received: ________________

Date Completed ________________

Native American Tribal Consultation lists are only applicable for consulting with California Native American tribes per Government Code Section 65352.3.
SB 18, Burton. Traditional tribal cultural places.

(1) Existing law establishes the Native American Heritage Commission and authorizes the commission to bring an action to prevent severe and irreparable damage to, or assure appropriate access for Native Americans to, a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property.

Existing law authorizes only specified entities or organizations, including certain tax-exempt nonprofit organizations, and local government entities to acquire and hold conservation easements, if those entities and organizations meet certain conditions.

This bill would include a federally recognized California Native American tribe or a nonfederally recognized California Native American tribe that is on the contact list maintained by the Native American Heritage Commission, among those entities and organizations that may acquire and hold conservation easements, as specified.

(2) Existing law requires the Office of Planning and Research to implement various long range planning and research policies and goals that are intended to shape statewide development patterns and significantly influence the quality of the state's environment and, in connection with those responsibilities, to adopt guidelines for the preparation and content of the mandatory elements required in city and county general plans.

This bill would require that, by March 1, 2005, the guidelines contain advice, developed in consultation with the Native American Heritage Commission, for consulting with California Native American tribes for the preservation of, or the mitigation of impacts to, specified Native American places, features, and objects. The bill
would also require those guidelines to address procedures for identifying the appropriate California Native American tribes, for continuing to protect the confidentiality of information concerning the specific identity, location, character, and use of those places, features, and objects, and for facilitating voluntary landowner participation to preserve and protect the specific identity, location, character, and use of those places, features, and objects. The bill would define a California Native American tribe that is on the contact list maintained by the Native American Heritage Commission as a "person" for purposes of provisions relating to public notice of hearings relating to local planning issues.

(3) Existing law requires a planning agency during the preparation or amendment of the general plan, to provide opportunities for the involvement of citizens, public agencies, public utility companies, and civic, education, and other community groups, through public hearings and any other means the city or county deems appropriate.

This bill would require the planning agency on and after March 1, 2005, to refer the proposed action to California Native American tribes, as specified, and also provide opportunities for involvement of California Native American tribes. The bill would require that, prior to the adoption or amendment of a city or county's general plan, the city or county conduct consultations with California Native American tribes for the purpose of preserving specified places, features, and objects that are located within the city or county's jurisdiction. The bill would define the term "consultation" for purposes of those provisions. By imposing new duties on local governments with respect to consultations regarding the protection and preservation of California Native American historical, cultural, and sacred sites, the bill would impose a state-mandated local program.

On and after March 1, 2005, this bill would include open space for the protection of California Native American historical, cultural, and sacred sites within the definition of "local open-space plan" for purposes of provisions governing the preparation of the open-space element of a city and county general plan.

(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. (a) The Legislature finds and declares all of the following:

(1) Current state law provides a limited measure of protection for California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places.

(2) Existing law provides limited protection for Native American sanctified cemeteries, places of worship, religious, ceremonial sites, sacred shrines, historic or prehistoric ruins, burial grounds,
archaeological or historic sites, inscriptions made by Native Americans at those sites, archaeological or historic Native American rock art, and archaeological or historic features of Native American historic, cultural, and sacred sites.

(3) Native American places of prehistoric, archaeological, cultural, spiritual, and ceremonial importance reflect the tribes' continuing cultural ties to the land and to their traditional heritages.

(4) Many of these historical, cultural, and religious sites are not located within the current boundaries of California Native American reservations and rancherias, and therefore are not covered by the protectionist policies of tribal governments.

(b) In recognition of California Native American tribal sovereignty and the unique relationship between California local governments and California tribal governments, it is the intent of the Legislature, in enacting this act, to accomplish all of the following:

(1) Recognize that California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places are essential elements in tribal cultural traditions, heritages, and identities.

(2) Establish meaningful consultations between California Native American tribal governments and California local governments at the earliest possible point in the local government land use planning process so that these places can be identified and considered.

(3) Establish government-to-government consultations regarding potential means to preserve those places, determine the level of necessary confidentiality of their specific location, and develop proper treatment and management plans.

(4) Ensure that local and tribal governments have information available early in the land use planning process to avoid potential conflicts over the preservation of California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places.

(5) Enable California Native American tribes to manage and act as caretakers of California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places.

(6) Encourage local governments to consider preservation of California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places in their land use planning processes by placing them in open space.

(7) Encourage local governments to consider the cultural aspects of California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places early in land use planning processes.

SEC. 2. Section 815.3 of the Civil Code is amended to read:

815.3. Only the following entities or organizations may acquire and hold conservation easements:

(a) A tax-exempt nonprofit organization qualified under Section 501(c)(3) of the Internal Revenue Code and qualified to do business in this state which has as its primary purpose the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition or use.

(b) The state or any city, county, city and county, district, or other state or local governmental entity, if otherwise authorized to acquire and hold title to real property and if the conservation easement is voluntarily conveyed. No local governmental entity may condition the issuance of an entitlement for use on the applicant’s granting of a conservation easement pursuant to this chapter.

(c) A federally recognized California Native American tribe or a nonfederally recognized California Native American tribe that is on
the contact list maintained by the Native American Heritage Commission to protect a California Native American prehistoric, archaeological, cultural, spiritual, or ceremonial place, if the conservation easement is voluntarily conveyed.

SEC. 3. Section 65040.2 of the Government Code is amended to read:

65040.2. (a) In connection with its responsibilities under subdivision (l) of Section 65040, the office shall develop and adopt guidelines for the preparation and content of the mandatory elements required in city and county general plans by Article 5 (commencing with Section 65300) of Chapter 3. For purposes of this section, the guidelines prepared pursuant to Section 60459 of the Health and Safety Code shall be the guidelines for the housing element required by Section 65302. In the event that additional elements are hereafter required in city and county general plans by Article 5 (commencing with Section 65300) of Chapter 3, the office shall adopt guidelines for those elements within six months of the effective date of the legislation requiring those additional elements.

(b) The office may request from each state department and agency, as it deems appropriate, and the department or agency shall provide, technical assistance in readopting, amending, or repealing the guidelines.

(c) The guidelines shall be advisory to each city and county in order to provide assistance in preparing and maintaining their respective general plans.

(d) The guidelines shall contain the guidelines for addressing environmental justice matters developed pursuant to Section 65040.12.

(e) The guidelines shall contain advice including recommendations for best practices to allow for collaborative land use planning of adjacent civilian and military lands and facilities. The guidelines shall encourage enhanced land use compatibility between civilian lands and any adjacent or nearby military facilities through the examination of potential impacts upon one another.

(f) The guidelines shall contain advice for addressing the effects of civilian development on military readiness activities carried out on all of the following:

(1) Military installations.
(2) Military operating areas.
(3) Military training areas.
(4) Military training routes.
(5) Military airspace.
(6) Other territory adjacent to those installations and areas.

(g) By March 1, 2005, the guidelines shall contain advice, developed in consultation with the Native American Heritage Commission, for consulting with California Native American tribes for all of the following:

(1) The preservation of, or the mitigation of impacts to, places, features, and objects described in Sections 5097.9 and 5097.995 of the Public Resources Code.

(2) Procedures for identifying through the Native American Heritage Commission the appropriate California Native American tribes.

(3) Procedures for continuing to protect the confidentiality of information concerning the specific identity, location, character, and use of those places, features, and objects.

(4) Procedures to facilitate voluntary landowner participation to preserve and protect the specific identity, location, character, and use of those places, features, and objects.

(h) The office shall provide for regular review and revision of the guidelines established pursuant to this section.
SEC. 4. Section 65092 of the Government Code is amended to read:

65092. (a) When a provision of this title requires notice of a public hearing to be given pursuant to Section 65090 or 65091, the notice shall also be mailed or delivered at least 10 days prior to the hearing to any person who has filed a written request for notice with either the clerk of the governing body or with any other person designated by the governing body to receive these requests. The local agency may charge a fee which is reasonably related to the costs of providing this service and the local agency may require each request to be annually renewed.

(b) As used in this chapter, "person" includes a California Native American tribe that is on the contact list maintained by the Native American Heritage Commission.

SEC. 5. Section 65351 of the Government Code is amended to read:

65351. During the preparation or amendment of the general plan, the planning agency shall provide opportunities for the involvement of citizens California Native American Indian tribes, public agencies, public utility companies, and civic, education, and other community groups, through public hearings and any other means the city or county deems appropriate.

SEC. 6. Section 65352 of the Government Code is amended to read:

65352. (a) Prior to action by a legislative body to adopt or substantially amend a general plan, the planning agency shall refer the proposed action to all of the following entities:

(1) A city or county, within or abutting the area covered by the proposal, and a special district that may be significantly affected by the proposed action, as determined by the planning agency.

(2) An elementary, high school, or unified school district within the area covered by the proposed action.

(3) The local agency formation commission.

(4) An areawide planning agency whose operations may be significantly affected by the proposed action, as determined by the planning agency.

(5) A federal agency if its operations or lands within its jurisdiction may be significantly affected by the proposed action, as determined by the planning agency.

(6) A public water system, as defined in Section 116275 of the Health and Safety Code, with 3,000 or more service connections, that serves water to customers within the area covered by the proposal. The public water system shall have at least 45 days to comment on the proposed plan, in accordance with subdivision (b), and to provide the planning agency with the information set forth in Section 65352.5.

(7) The Bay Area Air Quality Management District for a proposed action within the boundaries of the district.

(8) On and after March 1, 2005, a California Native American tribe, that is on the contact list maintained by the Native American Heritage Commission, with traditional lands located within the city or county's jurisdiction.

(b) Each entity receiving a proposed general plan or amendment of a general plan pursuant to this section shall have 45 days from the date the referring agency mails it or delivers it in which to comment unless a longer period is specified by the planning agency.

(c) (1) This section is directory, not mandatory, and the failure to refer a proposed action to the other entities specified in this section does not affect the validity of the action, if adopted.

(2) To the extent that the requirements of this section conflict with the requirements of Chapter 4.4 (commencing with Section 65919), the requirements of Chapter 4.4 shall prevail.

SEC. 7. Section 65352.3 is added to the Government Code, to read:
65352.3. (a) (1) Prior to the adoption or any amendment of a city or county's general plan, proposed on or after March 1, 2005, the city or county shall conduct consultations with California Native American tribes that are on the contact list maintained by the Native American Heritage Commission for the purpose of preserving or mitigating impacts to places, features, and objects described in Sections 5097.9 and 5097.995 of the Public Resources Code that are located within the city or county's jurisdiction.

(2) From the date on which a California Native American tribe is contacted by a city or county pursuant to this subdivision, the tribe has 90 days in which to request a consultation, unless a shorter timeframe has been agreed to by that tribe.

(b) Consistent with the guidelines developed and adopted by the Office of Planning and Research pursuant to Section 65040.2, the city or county shall protect the confidentiality of information concerning the specific identity, location, character, and use of those places, features, and objects.

SEC. 8. Section 65352.4 is added to the Government Code, to read:

65352.4. For purposes of Section 65351, 65352.3, and 65562.5, "consultation" means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance.

SEC. 9. Section 65560 of the Government Code is amended to read:

65560. (a) "Local open-space plan" is the open-space element of a county or city general plan adopted by the board or council, either as the local open-space plan or as the interim local open-space plan adopted pursuant to Section 65563.

(b) "Open-space land" is any parcel or area of land or water that is essentially unimproved and devoted to an open-space use as defined in this section, and that is designated on a local, regional or state open-space plan as any of the following:

(1) Open space for the preservation of natural resources including, but not limited to, areas required for the preservation of plant and animal life, including habitat for fish and wildlife species; areas required for ecologic and other scientific study purposes; rivers, streams, bays and estuaries; areas adjacent to military installations, military training routes, and restricted airspace that can provide additional buffer zones to military activities and complement the resource values of the military lands; and coastal beaches, lakeshores, banks of rivers and streams, and watershed lands.

(2) Open space used for the managed production of resources, including but not limited to, forest lands, rangeland, agricultural lands and areas of economic importance for the production of food or fiber; areas required for recharge of ground water basins; bays, estuaries, marshes, rivers and streams which are important for the management of commercial fisheries; and areas containing major mineral deposits, including those in short supply.

(3) Open space for outdoor recreation, including, but not limited to, areas of outstanding scenic, historic and cultural value; areas particularly suited for park and recreation purposes, including access to lakeshores, beaches, and rivers and streams; and areas which serve as links between major recreation and open-space reservations, including utility easements, banks of rivers and
(4) Open space for public health and safety, including, but not limited to, areas which require special management or regulation because of hazardous or special conditions such as earthquake fault zones, unstable soil areas, flood plains, watersheds, areas presenting high fire risks, areas required for the protection of water quality and water reservoirs and areas required for the protection and enhancement of air quality.

(5) Open space for the protection of places, features, and objects described in Sections 5097.9 and 5097.995 of the Public Resources Code.

SEC. 10. Section 65562.5 is added to the Government Code, to read:

65562.5. On and after March 1, 2005, if land designated, or proposed to be designated as open space, contains a place, feature, or object described in Sections 5097.9 and 5097.995 of the Public Resources Code, the city or county in which the place, feature, or object is located shall conduct consultations with the California Native American tribe, if any, that has given notice pursuant to Section 65092 for the purpose of determining the level of confidentiality required to protect the specific identity, location, character, or use of the place, feature, or object and for the purpose of developing treatment with appropriate dignity of the place, feature, or object in any corresponding management plan.

SEC. 11. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution for certain costs that may be incurred by a local agency or school district because in that regard this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

However, notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains other costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.
PART C

Mitigation Measure Language

July 2020
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EXAMPLE MITIGATION MEASURE LANGUAGE

Section 2.4 of Volume I of the guidance document presents standard mitigation measures and conditions of approval that can be used by the City in CEQA documentation for projects. Section 2.4 provides general purpose and intent, thresholds, limitations, exclusions, and general parameters for such standard measures and conditions. Following are examples of actual mitigation measure language that are designed to be incorporated into CEQA documents and Mitigation Monitoring and Reporting Programs; however, modifications to these measures and conditions may be required to fit project-specific dynamics and to address the responsibilities for certain actions (which differ between City and private projects). As long as any such modifications do not conflict with the guidance in Volume I, then such modifications will be considered appropriate and not subject to additional review and approval outside of the project’s CEQA process.

Use of Exclusionary Fencing

Prior to ground-disturbing activities commencing, the contractor shall install high-visibility temporary exclusionary fencing around site [number]. A photograph of the installed fencing and a map indicating the photo point shall be submitted to the City as proof of compliance. Fence installation shall be monitored by a qualified professional archaeologist and, for tribal cultural resources, a culturally affiliated tribal monitor, and inspected at least once per month during active construction to ensure integrity of the fence line. Once all construction equipment and personnel have vacated the project area, the exclusionary fencing may be removed. The contractor shall provide the City with a brief letter report from the qualified archaeologist confirming that the fence was installed, monitored, and removed in compliance with this measure.

Incorporation into Open Space with Deed Restrictions

Prior to [recording of the final map OR to issuance of building permits or improvement plans], the property owner shall record a deed restriction over site [name or number] to restrict development in the future. The area included in the deed restriction shall be delineated by a qualified professional archaeologist and described by a licensed surveyor prior to recording. Because archaeological site locations are restricted from public distribution, the deed restriction shall cite an “environmentally sensitive area.” A copy of the recorded deed restriction that includes the site shall be provided to the City for retention in a confidential project file as proof of compliance. The qualified professional archaeologist shall submit a copy of the deed restriction to the North Central Information Center of the California Historical Resources Information System and shall copy the City on this correspondence.

Use of Development Restrictions in Perpetuity

Prior to [recording of the final map OR to issuance of building permits or improvement plans], site [name or number] shall be protected in perpetuity by a conservation easement or declaration of covenants and restrictions, or an equally effective restrictive mechanism, recorded with the County of Placer, which prohibits the conversion of the open space designation over the site into one that allows development. The area included in the conservation easement shall be delineated by a qualified professional archaeologist and described by a licensed surveyor prior to recording. Because
archaeological site locations are restricted from public distribution, the conservation easement shall cite an “environmentally sensitive area” and “cultural, natural, and/or environmental values.”

Management in perpetuity shall be the responsibility of a qualified third-party preserve manager through implementation of an agency-approved operations and management plan that shall include but is not limited to the following measures, as deemed appropriate and stipulated in either the restrictive instrument or operations and management plan: fence and gate repair; sign replacement; regular monitoring and associated reporting by a professional archaeologist for damage; erosion control; trash removal; vegetation and weed control; security patrols; vandalism abatement; and removal of trespassers. Any signage indicating the presence of a cultural resource shall be discussed between the City, tribes, or other interested parties and must not conflict with state law regarding disclosure of archaeological site location information.

A copy of the recorded conservation easement that includes the site shall be provided to the City for retention in a confidential project file as proof compliance. The qualified professional archaeologist shall submit a copy of the deed restriction to the North Central Information Center of the California Historical Resources Information System and shall copy the City on this correspondence.

**Repatriation Location Designation**

If tribal cultural resources are discovered during construction activities, ground-disturbing activities shall cease and the property owner shall identify a location to accommodate reburial of any tribal cultural resources (as defined in Section 21074 of the Public Resources Code) or human remains (as defined in Section 5097.98 of the Public Resources Code). The location selected shall be under the control of the property owner, in an area not planned for future disturbance, and can accommodate the recording of a deed restriction, should the reburial location be utilized for the project. A copy of a map showing the reburial location shall be filed with the City for proof of compliance prior to construction and shall remain confidential. A deed restriction over the reburial location need not be filed with the County until materials have been reburied at the selected location. If the reburial location is not utilized for the project, then no further documentation or deed restrictions are required.

In the event that human remains or tribal cultural resources are encountered, the consultation and evaluation process in Mitigation Measure [XX] for the management of unanticipated discoveries shall be followed. Upon conclusion of that process, the Construction Manager shall rebury specified materials in the location selected for reburial, at the City’s direction and discretion. The City shall reserve the right to dictate the nature, methods, and timing of the reburial.

Within 30 days of the reburial, and consistent with Section 5097.98(e) of the Public Resources Code, the location of the reburial shall be further recorded by a qualified professional on a DPR 523 Series Primary Record and Location Map and submitted to the North Central Information Center of the California Historical Resources Information Center [5097.98(e)(1)], Native American Heritage Commission, and a reinterrment record filed with the County [5097.98(e)(3)]. A copy of the confidential record and transmittal to each repository shall be provided to the City as proof of compliance within 30 days of recording.
Pre-Construction Inspections

A minimum of seven days prior to beginning earthwork or other soil disturbance activities, the Construction Manager shall notify the City of the proposed earthwork start-date, in order to provide the City representative sufficient time to contact the [tribe name]. A tribal representative shall be invited to, at its discretion, voluntarily inspect the project location, including any soil piles, trenches, or other disturbed areas, within the first five days of ground-breaking activity. Construction activity may be ongoing during this time. Should the tribe choose not to perform a field visit within the first five days, construction activities may continue as scheduled, as long as the notification was made.

Tribal Monitoring

The Construction Manager shall retain one tribal monitor to monitor all vegetation clearing and removal, and all initial surface grading of the project area, down to \([X#]\) feet below the surface. Tribal monitoring is not required below \([X#]\) feet, during above-surface construction activities, or when excavating or re-excavating imported fill or soil which has already been previously disturbed as part of the construction project.

The tribal monitor shall have the authority to temporarily pause ground disturbance within 100 feet of the discovery for a duration long enough to examine potential tribal cultural resources that may become unearthed during the activity. If no tribal cultural resources are identified, then construction activities shall proceed and no agency notifications are required. In the event that a tribal cultural resource is identified, the unanticipated discovery procedures in Mitigation Measure \([XX]\) shall be implemented.

The tribal monitor shall maintain daily monitoring logs, which shall be submitted to the City no later than the conclusion of the monitoring as proof of compliance.

Unpaid Tribal Observation

A minimum of seven days prior to beginning earthwork or other soil disturbance activities, the Construction Manager shall notify the City of the proposed earthwork start-date, in order to provide the City representative sufficient time to contact the [tribe name]. A tribal representative shall be invited to, at its discretion, voluntarily observe any or all ground-disturbing activities during construction. The tribe shall be provided 72 hours to accept or decline observation. All tribal observers shall be required to comply with all job site safety requirements and shall sign a waiver of liability prior to entering the job site. Should the tribe choose not to observe any or all of the activity, the City shall deem the mitigation measure completed in good faith without tribal observation as long as the notification was made and documented.

Capping

Site [number or name] shall be capped to protect and preserve subsurface archaeological deposits identified within the project area, as described in this measure, and in consultation with a qualified professional archaeologist. Capping design may include a combination of geotextile fabric, culturally-sterile soil, or other barriers or restrictions to prevent accidental or unauthorized excavation in the future. Only fill material that is approved by the consulting tribe and City may be used. The City shall provide the consulting tribe with a list of any proposed fill or capping material prior to any capping activity for approval; such approval shall not be unreasonably withheld. All parties will work diligently to cap the
site as quickly as possible. The capping specifications shall be demarcated on the project construction plans and approved by the City prior to issuance of improvement plans, grading permits, or building permits, and prior to commencement of ground-disturbing activities.

The capping shall be monitored by a qualified professional archaeologist and culturally affiliated tribal monitor. Within 30 days of the conclusion of the capping activity, the property owner shall record a deed restriction or other type of development restriction (approved by the City) over the capped site to restrict disturbance in the future. Prior to recording, the proposed boundaries of the restriction shall be subject to City review. Because archaeological site and tribal resource locations are restricted from public distribution, the restriction shall cite an “environmentally sensitive area.” A copy of the recorded restriction that includes the site shall be provided to the City for retention in a confidential project file as proof compliance. The qualified professional archaeologist shall submit a copy of the restriction and updated site record documenting the capping to the North Central Information Center of the California Historical Resources Information System and shall copy the City on this correspondence.

Public Interpretation and Education

Interpretive Panels, Museum Exhibits, and/or Websites.

The Project Proponent shall ensure that the precontact context of the project area will be interpreted for the benefit of the general public through the development and installation of [X #] interpretive panel(s), developed in consultation with the [tribe(s)]. The panel(s) that shall be incorporated into publicly accessible areas of the project, or in a locale amenable to the City and consulting tribe(s). The proposed location of the panel, as well as conceptual layouts of the panel, shall be developed by a qualified professional and submitted to the City no later than 30 days prior to the initiation of construction. The City will submit the conceptual layout to the [tribe name]. The project construction may proceed during subsequent review and approval. The [tribe name] shall have 60 days to provide comments to the City; this period may commence after the initiation of construction. Upon the close of the 60-day comment period, the City will forward any comments received to the qualified professional for incorporation, as deemed appropriate by the City. The final design of the panel is subject to review and approval by the City. A PDF of the final panel(s), a photograph of the installed panel(s), and a map showing the location of the panel(s) shall be submitted by the contractor or qualified professional to the City within 60 days of installation, as proof of compliance. This information may be tied to a website, with provisions for long-term maintenance of the website.

If requested by a [tribe(s)], the City may extend the timeframes in this measure, which shall be documented in writing (electronic communication may be used to satisfy this measure).

Educational Lesson Plans

The Project Proponent shall ensure that the precontact context of the project area and its relationship to contemporary descendant communities will be interpreted for the benefit of the general public through the development of a lesson plan to be made available for use by K–8 schools in Roseville and, if the tribe chooses, for the [tribe’s] educational system. The intent and content of the educational plan will be created in consultation with tribes or other interested parties, as identified through consultation. The proposed outline of the lesson plan shall be developed by a qualified professional and submitted to the City no later than 30 days prior to the initiation of construction. The City will submit the conceptual
outline to the [tribe name]. The project construction may proceed during subsequent review and approval. The [tribe name] shall have 60 days to provide comments to the City; this period may commence after the initiation of construction. Upon the close of the 60-day comment period, the City will forward any comments received to the qualified professional for incorporation, as deemed appropriate by the City. The final design of the lesson plan is subject to review and approval by the City. A PDF of the completed lesson plan shall be provided to the City and made available to schools and educators through a link on the City’s website or other appropriate distribution method, as approved by the City.

If requested by a [tribe(s)], the City may extend the timeframes in this measure, which shall be documented in writing (electronic communication may be used to satisfy this measure).

**Covenants, Conditions, and Restrictions**

Notification of the restrictions on artifact collection and digging shall be included in a restrictive type of covenant recorded on each parcel, as follows: “The collecting, digging, disturbance, or removal of any artifact or other prehistoric or historic object located in an open space area, conservation easement, a lot subject to a deed restriction, or to any archaeological site that may become unearthed in the future, is prohibited.” The form and language of the covenant shall be provided by the Project Proponent to the City for approval prior to execution or recordation. A copy of the recorded or executed covenant shall be provided by the Project Proponent to the City as proof of compliance within 30 days of the sale of each lot subject to this restriction.

**Tribal Access Agreement**

Prior to the recording of open space that contains tribal cultural resources, the [Tribe] shall be invited by the landowner, in coordination with the City, to execute a tribal access agreement to allow for permitted access to the tribal cultural resource referred to as [name or number]. The Project Proponent shall provide a copy of the executed agreement to the City for retention in a confidential project file as proof of compliance. Any restrictive document filed over open space containing the site (conservation easement, declaration of covenants and restrictions, or deed restriction) and its associated management plan (if applicable) must allow for the implementation of the access agreement.

Within 45 days of the invitation, should the tribe decline entering into the agreement, or should the parties fail to come to agreement on the terms of access, the City will deem the effort completed in good faith without execution of an agreement, and the management of the resource shall be dictated exclusively by the terms and conditions of the restrictive document and/or project conditions of approval.

**Contractor Awareness Training**

The Construction Manager shall ensure that a Contractor Awareness Training Program is delivered to train equipment operators about cultural resources and tribal cultural resources. The program shall be designed to inform construction personnel about: federal and state regulations pertaining to cultural resources and tribal cultural resources; the subsurface indicators of resources that shall require a work stoppage; procedures for notifying the City of any occurrences; and project-specific requirements; and enforcement of penalties and repercussions for non-compliance with the program.

The training shall be prepared by a qualified professional archaeologist and reviewed by City for approval, and may be provided in an audio-visual format, such as a DVD. The Construction Manager
shall provide culturally affiliated tribes that consulted on the project [tribe name] the option of attending the initial training in person and/or providing additional materials germane to the unanticipated discovery of tribal cultural resources for incorporation into the training.

The training program shall be required for all construction supervisors, forepersons, and operators of ground-disturbing equipment, and all personnel shall be required to sign a training roster and display a hard hat sticker that is visible to City inspectors. The construction manager is responsible for ensuring that all required personnel receive the training. The Construction Manager shall provide a copy of the signed training roster to the City as proof of compliance.

**Post-Review Discovery Procedures**

If subsurface deposits believed to be cultural or human in origin, or tribal cultural resources, are discovered during construction, all work shall halt within a 100-foot radius of the discovery, and the Construction Manager shall immediately notify the City of Roseville Development Services Director by phone. The Construction Manager shall also immediately coordinate with the monitoring archeologist or project archaeologist and (if present) tribal monitor, or, in the absence of either, contact a qualified professional archaeologist, meeting the Secretary of the Interior’s Professional Qualification Standards for archaeology and subject to approval by the City, to evaluate the significance of the find and develop appropriate management recommendations. All management recommendations shall be provided to the City in writing for the City’s review and approval. If recommended by the qualified professional and approved by the City, this may include modification of the no-work radius.

The professional archaeologist must make a determination, based on professional judgement and supported by substantial evidence, within one business day of being notified, as to whether or not the find represents a cultural resource or has the potential to be a tribal cultural resource. The subsequent actions will be determined by the type of discovery, as described below. These include: 1) a work pause that, upon further investigation, is not actually a discovery and the work pause was simply needed in order to allow for closer examination of soil (a “false alarm”); 2) a work pause and subsequent action for discoveries that are clearly not related to tribal resources, such as can and bottle dumps, artifacts of European origin, and remnants of built environment features; and 3) a work pause and subsequent action for discoveries that are likely related to tribal resources, such as midden soil, bedrock mortars, groundstone, or other similar expressions.

Whenever there is question as to whether or not the discovery represents a tribal resource, culturally affiliated tribes shall be consulted in making the determination. Whenever a tribal monitor is present, the monitor shall be consulted.

The following processes shall apply, depending on the nature of the find, subject to the review and approval of the City:

- **Response to False Alarms**: If the professional archaeologist determines that the find is negative for any cultural indicators, then work may resume immediately upon notice to proceed from the City’s representative. No further notifications or tribal consultation is necessary, because the discovery is not a cultural resource of any kind. The professional archaeologist shall provide written documentation of this finding to the City.
• **Response to Non-Tribal Discoveries:** If a tribal monitor is not present at the time of discovery and a professional archaeologist determines that the find represents a non-tribal cultural resource from any time period or cultural affiliation, the City shall be notified immediately, to consult on a finding of eligibility and implementation of appropriate treatment measures, if the find is determined to be a Historical Resource under CEQA, as defined in Section 15064.5(a) of the CEQA Guidelines. The professional archaeologist shall provide a photograph of the find and a written description to the City of Roseville. The City of Roseville will notify any [tribe(s)] who, in writing, requested notice of unanticipated discovery of non-tribal resources. Notice shall include the photograph and description of the find, and a tribal representative shall have the opportunity to determine whether or not the find represents a tribal cultural resource. If a response is not received within 24 hours of notification (none of which time period may fall on weekends or City holidays), the City will deem this portion of the measure completed in good faith as long as the notification was made and documented. If requested by a [tribe(s)], the City may extend this timeframe, which shall be documented in writing (electronic communication may be used to satisfy this measure). If a notified tribe responds within 24 hours to indicate that the find represents a tribal cultural resource, then the Response to Tribal Discoveries portion of this measure applies. If the tribe does not respond or concurs that the discovery is non-tribal, work shall not resume within the no-work radius until the City, through consultation as appropriate, determines that the site either: 1) is not a Historical Resource under CEQA, as defined in Section 15064.5(a) of the CEQA Guidelines; or 2) that the treatment measures have been completed to its satisfaction.

• **Response to Tribal Discoveries:** If the find represents a tribal or potentially tribal cultural resource that does not include human remains, the [tribe(s)] and City shall be notified. The City will consult with the tribe(s) on a finding of eligibility and implement appropriate treatment measures, if the find is determined to be either a Historical Resource under CEQA, as defined in Section 15064.5(a) of the CEQA Guidelines, or a Tribal Cultural Resource, as defined in Section 21074 of the Public Resources Code. Preservation in place is the preferred treatment, if feasible. Work shall not resume within the no-work radius until the City, through consultation as appropriate, determines that the site either: 1) is not a Historical Resource under CEQA, as defined in Section 15064.5(a) of the CEQA Guidelines; or 2) not a Tribal Cultural Resource, as defined in Section 21074 of the Public Resources Code; or 3) that the treatment measures have been completed to its satisfaction.

• **Response to Human Remains:** If the find includes human remains, or remains that are potentially human, the construction supervisor or on-site archaeologist shall ensure reasonable protection measures are taken to protect the discovery from disturbance (AB 2641) and shall notify the City and Placer County Coroner (per § 7050.5 of the Health and Safety Code). The provisions of § 7050.5 of the California Health and Safety Code, § 5097.98 of the California Public Resources Code, and Assembly Bill 2641 shall be implemented. If the Coroner determines the remains are Native American and not the result of a crime scene, the Coroner will notify the Native American Heritage Commission (NAHC), which then will designate a Native American Most Likely Descendant (MLD) for the project (§ 5097.98 of the Public Resources Code). The designated MLD will have 48 hours from the time access to the property is granted to make recommendations concerning treatment of the remains. Public Resources Code § 5097.94
provides structure for mediation through the NAHC if necessary. If the landowner does not agree with the recommendations of the MLD, the NAHC can mediate (§ 5097.94 of the Public Resources Code).

If no agreement is reached, the landowner must rebury the remains in a respectful manner where they will not be further disturbed (§ 5097.98 of the Public Resources Code). This will also include either recording the site with the NAHC or the appropriate Information Center; using an open space or conservation zoning designation or easement; or recording a reinternment document with the county in which the property is located (AB 2641). Work shall not resume within the no-work radius until the City, through consultation as appropriate, determines that the treatment measures have been completed to its satisfaction.

**Controlled Grading**

The Construction Manager shall retain a qualified professional archaeologist, subject to the approval of the City, to monitor controlled grading activities. A minimum of seven days prior to beginning earthwork or other soil disturbance activities, the Construction Manager shall notify the City of the proposed earthwork start-date, in order to provide the City representative sufficient time to contact the [tribe name] to monitor the controlled grading of the area shown on confidential map [#], which is on file with the City.

Under the observation of a tribal monitor and qualified archaeologist, the contractor shall use either a small piece of equipment or observe the removal of soil by a backhoe equipped with a flat-edge bucket to peel away native soil using shallow cuts made in approximately two- to five-inch-deep layers. The grading equipment will push the shallow cuts of soil to the outside of the cultural deposit area and random samples may be screened to ensure adequate detection of any cultural materials that may be present. In the event that cultural materials or human remains are exposed, the procedures for unanticipated discoveries in Mitigation Measure [XX] shall apply.

Grading shall continue to a depth of 30 centimeters below the depth of any recorded artifacts, suggesting an end to the potential for cultural deposits, or when non-cultural formational soils are encountered that predate any human occupation of this location, as determined by the qualified professional archaeologist. Following this, the controlled grading process will be terminated and mass grading may proceed, subject to the review and approval by the City.

Controlled grading is not required for soil that is identified as non-cultural formational soil or fill dirt imported to the site.
1. **Purpose.** It is the purpose of this Right-of-Access Authorization (“Authorization”) to protect historic properties and cultural resources managed by the City of Roseville (“City”) while allowing reasonable access to federally-recognized and/or California Native American tribes (“Tribe”) for the purpose of visitation.

2. **Tribe.** This Authorization is hereby granted by the City of Roseville to the following Tribe and its employees, members, and authorized representatives:

   [Tribe name]
   [Tribe Recognition/Registration Number and Jurisdiction (US or CA)]
   [Address]
   [Phone number]

   This Authorization is not transferrable.

3. **Sites.** This Authorization pertains specifically to cultural resources identified on the confidential cultural resources map as site numbers:

   [site number]
   [site number]

   Passage through the areas designated as Open Space (including Conservation Easement areas and Passive Open Space) along existing trails and access roads is permissible for the purpose of accessing the Sites named above. Access to other cultural resources or areas without existing public access, or restricted from public access by the property owner, is prohibited, unless specified in another Authorization.

4. **Duration.** This Authorization for access for the period beginning [start date] and ending [end date].

   The Tribe shall provide at least ____ hours’ notice to the City prior to visitation while this Authorization is in effect. Notice shall be provided to the following:

   [City staff name]
   [Phone number]
   [email address]
Visitation is limited to the hours between dawn and dusk only.

5. Terms and Conditions. To ensure that visitation does not conflict with the agency-mandated management plans and preservation requirements, and does not create a hazard to human health or safety of visitors or adjacent residents, only passive visitation to the Sites identified in this Authorization is authorized, and no other activities, including but not limited to the following, shall be permitted:

A) Use of off-road vehicles and use of any other motorized vehicles except on existing roadways.

B) Agricultural cultivation activity of any kind.

C) Recreational activities, including, but not limited to, camping.

D) Construction, reconstruction, erecting or placement of any building, billboard or sign, or any other structure or improvement of any kind.

E) Depositing or accumulation of soil, trash, ashes, refuse, waste, bio-solids or any other materials.

F) Lighting fires, incendiary devices, or flammable substances.

G) Use of, or visitation by, animals, either domestic, pastoral, or otherwise.

H) Planting, introduction, or dispersal of non-native or exotic plant or animal species.

I) Filling, dumping, excavating, draining, dredging, mining, drilling, removing or exploring for or extracting artifacts, minerals, loam, soil, sand, gravel, rock or other material on or below the surface.

J) Altering the surface or general topography, including but not limited to any alterations to habitat, building roads or trails, or otherwise covering the ground surface.

K) Removing, destroying, or cutting of trees, shrubs, or other vegetation.

L) Manipulating, impounding or altering any natural water course, body of water or water circulation, and any activities or uses detrimental to water quality, including but not limited to degradation or pollution of any surface or sub-surface waters.

M) Engaging in any use or activity that may violate, or may fail to comply with, relevant federal, state, or local laws, regulations, or policies.

6. Costs and Liabilities. The Tribe is solely responsible for the cost of visitation under the terms of this Authorization and agrees to assume all risks associated with such visitation, including but
not limited to property damage and bodily injuries, including death, from any act, omission, condition or other matter related to or occurring on or about the Sites.


In consideration of being granted a temporary right of access to the Sites for purpose of passive visitation only and for no other purpose, the Tribe, on its behalf and on behalf of its members, officers and each of the persons accessing the Site under this Authorization, as well as their heirs, administrators, personal representatives and assigns:

A. Hereby releases, waives, discharges and covenants not to sue the City of Roseville and its officers, agents, employees and volunteers, and the owners and maintainers of the Site for any and all loss or damage, and any claim or demands therefor on account of injury arising out of or related to visiting the Site.

B. Hereby acknowledges that walking on the trails or unimproved land has inherent risks attendant thereto and involves the risk of serious injury and/or death and/or property damage and voluntarily assumes that risk.

C. Hereby agrees to protect, defend, indemnify and hold harmless the City of Roseville and its officers, agents, employees, volunteers and insurers from any claims, of whatever nature that may arise out of or relate to visiting the Site.

D. Hereby agrees that this Release and Waiver of Liability, Assumption of Risk and Indemnity provision extends to all acts of negligence by the City of Roseville, its officers, agents, employees, or volunteers, or the owners and maintainers of the Site, and is intended to be as broad and inclusive as is permitted by the laws of the City, county and State in which the visitation is conducted and that if any portion thereof is held invalid, the Tribe agrees that the balance shall, notwithstanding, continue in full legal force and effect.

E. Acknowledges and agrees that this release applies to all claims for injuries, damages or losses to the Tribe and its members, officers and each of the persons accessing the Site under this Authorization, real or personal, whether those injuries, damages, or losses are known or unknown, foreseen or unforeseen, or patent or latent, that the Tribe and/or its members, officers and each of the persons accessing the Site under this Authorization may have against City in connection with the visit, and further hereby waives application of California Civil Code Section 1542 on behalf of the Tribe and its members, officers and each of the persons accessing the Site under this Authorization.

I certify that I have read the following provisions of California Civil Code Section 1542:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his settlement with the debtor.”
And indicate that fact by placing my initials here: ______

8. The City may terminate this Authorization any time by mailing a notice in writing to the Tribe that the Authorization is terminated. Said Authorization shall then be deemed terminated, and the Tribe shall have no further right of access to the Sites.

9. This Authorization shall not be amended, modified, or otherwise changed unless in writing and signed by both parties hereto.

10. This Authorization constitutes the entire understanding and agreement of the parties and supersedes all previous and/or contemporaneous understanding or agreement between the parties with respect to all or any part of the subject matter hereof.

11. This Authorization and all matters relating to it shall be governed by the laws of the State of California and any action brought relating to this Authorization shall be held exclusively in a state court in the County of Sacramento.

12. The person or persons executing this Authorization on behalf of the parties hereto warrants and represents that he/she/they has/have the authority to execute this Authorization on behalf of their entity and has/have the authority to bind their party to the performance of its obligations hereunder.

City of Roseville:

BY: ______________________________________

NAME: ___________________________________

TITLE: ___________________________________

DATE: ___________________________________

Tribe:

______________________________
[NAME OF TRIBE]

I have carefully read this entire Right-of-Access Authorization and understand its terms and their legal significance. The waiver, release and indemnification contained in this document is freely and voluntarily given with the understanding that right to legal proceeding against the
City is knowingly given up in return for allowing the Tribe and its members to visit the Sites identified in this Authorization. My signature is intended not only to bind the Tribe, but also its members, officers and each of the persons accessing the Site under this Authorization, as well as their heirs, administrators, personal representatives and assigns. No oral representations, statements or inducements apart from this written agreement have been made.

BY: ________________________________

NAME: ______________________________

TITLE: ______________________________

DATE: ______________________________
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PART D

General Reference Material

July 2020
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CONSULTATION WITH INDIAN TRIBES IN THE SECTION 106 REVIEW PROCESS: A HANDBOOK

December 2012
An independent federal agency, the Advisory Council on Historic Preservation (ACHP) promotes the preservation, enhancement, and productive use of our nation’s historic resources and advises the President and Congress on national historic preservation policy. It also provides a forum for influencing federal activities, programs, and policies that affect historic properties. In addition, the ACHP has a key role in carrying out the Administration’s Preserve America initiative.

Milford Wayne Donaldson, of Sacramento, California, is chairman of the 23-member council, which is served by a professional staff with offices in Washington, D.C. For more information about the ACHP, contact:

Advisory Council on Historic Preservation
1100 Pennsylvania Avenue NW, Suite 803
Washington, D.C. 20004
Phone: 202-606-8503
Web site: www.achp.gov
Consultation with Indian Tribes in the Section 106 Review Process:
A Handbook

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Acknowledgements:

Office of Native American Affairs staff wishes to thank the members of the United South and Eastern
Tribes (USET) Culture & Heritage Committee, Tribal Historic Preservation Officers, and the members of
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Office of Native American Affairs
Advisory Council on Historic Preservation
June 2012
I. About This Handbook

Many different statutes, regulations, executive orders, and federal policies direct federal agencies to consult with Indian tribes including the National Historic Preservation Act (NHPA), 16 U.S.C. Section 470f). Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties and provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on those undertakings. The ACHP has issued the regulations implementing Section 106 (Section 106 regulations), 36 CFR Part 800, “Protection of Historic Properties.” The NHPA requires that, in carrying out the Section 106 review process, federal agency must consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by the agency’s undertakings.

The ACHP offers this handbook as a reference for federal agency staff responsible for compliance with Section 106. Tribal Historic Preservation Officers (THPOs) and tribal cultural resource managers may also find this handbook helpful. Readers should have a basic understanding of the Section 106 review process as this document focuses only on Section 106 tribal consultation. It is not a source for understanding the full breadth of Section 106 responsibilities, such as consulting with State Historic Preservation Officers (SHPOs), involving the public, or consulting with Native Hawaiian organizations (NHOs).

This handbook will be periodically updated by the ACHP when new information is obtained or laws or policies change. Agencies should also supplement this document with their own agency-specific regulations, directives, policies, and guidance pertaining to tribal consultation. Federal agencies should also be aware that many Indian tribes have their own statutes, regulations, and policies that apply to undertakings on tribal lands.

In addition, federal agency staff may refer questions on the Section 106 review process, and the requirements to consult with Indian tribes within this process, to their agency’s Federal Preservation Officer (FPO).

Finally, agency staff may obtain assistance from the ACHP in understanding and interpreting the requirements of Section 106, including tribal consultation. For general information on the requirements of Section 106, access the ACHP website at http://www.achp.gov.

For additional questions about tribal consultation, contact:

Office of Native American Affairs
Advisory Council on Historic Preservation
1100 Pennsylvania Ave., NW
Room 803
Washington, DC  20004
native@achp.gov

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1 For information on the requirements to consult with NHOs, visit http://www.achp.gov
II. Federal Government Consultation with Indian Tribes

A. The Government-to-Government Relationship between the United States and Indian Tribes

The federal government’s unique relationship with each and every Indian tribe is embodied in the U.S. Constitution, treaties, court decisions, federal statutes, and executive orders. This relationship is deeply rooted in history, dating back to the earliest contact between colonial and tribal governments. As the colonial powers did, the United States acknowledges federally recognized Indian tribes as sovereign nations; thus, their interaction takes place on a “government-to-government” basis.

Legally, there is a distinction between Indian tribes who are federally recognized and those who are not. Federal recognition signifies that the U.S. government acknowledges the political sovereignty and Indian identity of a tribe and from that recognition flows the obligation to conduct dealings with that tribe’s leadership on a “government-to-government” basis. When federally recognized tribes speak of “government-to-government” consultation, they are often referring to consultation between a designated tribal representative and a designated representative of the federal government.

Executive Order 13175 (2000), Consultation and Coordination with Tribal Governments lists as one of its purposes “to strengthen the United States’ government-to-government relationships with Indian tribes....” Thus, the government-to-government consultation process continues to embody the unique relationship between the United States and Indian tribes.

Federal agency staff responsible for carrying out tribal consultation should be familiar with the history of the relationship between the U.S. government and Indian tribes because that history may influence the context of consultation.

B. The Federal Trust Responsibility Toward Indian Tribes

The federal government’s trust responsibility emanates from the Constitution, Indian treaties, statutes, case law, executive orders, and the historic relationships between the federal government and Indian tribes. It applies to all federal agencies. Each agency defines the scope of its own trust responsibility towards tribes.

This trust responsibility is rooted, in large part, in the treaties through which Indian tribes ceded large portions of their aboriginal lands to the United States in return for promises to protect tribal rights as self-governing nations within the reserved lands (reservations) and certain reserved rights (i.e. aboriginal hunting, fishing, and gathering rights) to resources outside of those reserved lands.

Trust responsibility is legally construed in different forms, depending on the context in which it is invoked and includes: full fiduciary, which arises in the context of federal agency management of tribal assets; the “Indian canons of statutory construction,” by which ambiguities in legislation dealing with tribal issues are to be construed liberally in favor of tribes; and, general, which is fulfilled by a federal agency’s compliance with general regulations and statutes.

Each agency defines the scope of its trust responsibility to Indian tribes. The ACHP’s trust responsibility is to ensure that its regulations implement the requirements of Section 106 of the National Historic Preservation Act and that such regulations incorporate the procedural requirement that federal agencies consult with Indian tribes that attach religious and cultural significance to historic properties that may be affected by their undertakings.
Questions regarding your agency’s trust responsibility to Indian tribes should be directed to your tribal liaison/Native American coordinator or office of general counsel. The ACHP neither defines such a scope for others nor advises agencies on this issue.

C. Legal Requirements and Directives to Consult with Indian Tribes

1) Statutes

A number of federal statutes require federal agencies to consult or coordinate with Indian tribes. This section will address only those applicable in the areas of historic preservation, natural resource protection, and cultural resource protection. It is useful to be familiar with these various statutory requirements not only to ensure compliance, but also to explore opportunities to maximize consultation opportunities. For instance, if a project requires compliance with both the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA), it may be helpful to carry out consultation in a comprehensive manner by including discussions about historic properties and natural resources in the same meetings. (Note: The ACHP regulations at 36 CFR. Section 800.8 set out principles and requirements for coordinating or combining NHPA and NEPA procedures.)

In addition, federal agencies should talk with interested Indian tribes as early in the planning process as possible to identify any special legal authorities that carry additional requirements for consultation or consideration, such as a treaty that reserves certain tribal rights that could be impinged upon by a proposed project.

Historic Preservation, Natural Resource Protection, and Cultural Resource Protection Statutes

The following are broad summaries of key federal historic preservation, natural resource protection, and cultural resource protection statutes that require agencies to consult with Indian tribes or accommodate tribal views and practices. This is not an exhaustive list of requirements, nor does it imply that each of these statutes is applicable to each proposed project.

- Amended in 1992, the National Historic Preservation Act of 1966 (NHPA) is the basis for tribal consultation in the Section 106 review process. The two amended sections of NHPA that have a direct bearing on the Section 106 review process are:
  - Section 101(d)(6)(A), which clarifies that properties of religious and cultural significance to Indian tribes may be eligible for listing in the National Register of Historic Places; and
  - Section 101(d)(6)(B), which requires that federal agencies, in carrying out their Section 106 responsibilities, consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking.

The Section 106 regulations incorporate these provisions and reflect other directives about tribal consultation from executive orders, presidential memoranda, and other authorities.

- Section 106 requires federal agencies to consider the effects of their undertakings on historic properties and to provide the ACHP an opportunity to comment. Also known

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2 A list of federal authorities that require tribal consultation was compiled by an interagency working group and is available on the ACHP’s webpage at www.achp.gov.
as the Section 106 review process, it seeks to avoid unnecessary harm to historic properties from federal actions. The procedure for meeting Section 106 requirements is defined in the Section 106 regulations, 36 CFR. Part 800, “Protection of Historic Properties.”

The Section 106 regulations include both general direction regarding tribal consultation and specific requirements at each stage of the review process. (Section 106 is discussed more fully in the next section, “Consultation with Indian Tribes under Section 106 of NHPA.”)

For more information about the NHPA and the ACHP’s regulations, visit www.achp.gov

- **The National Environmental Policy Act of 1969 (NEPA)** requires the preparation of an environmental impact statement (EIS) for any proposed major federal action that may significantly affect the quality of the human environment. While the statutory language of NEPA does not mention Indian tribes, the Council on Environmental Quality (CEQ) regulations and guidance do require agencies to contact Indian tribes and provide them with opportunities to participate at various stages in the preparation of an environmental assessment or EIS. CEQ has issued a Memorandum for Tribal Leaders encouraging tribes to participate as cooperating agencies with federal agencies in NEPA reviews.

- **The American Indian Religious Freedom Act of 1978 (AIRFA)** establishes the policy of the federal government “to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including, but not limited to, access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”

- **The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA)**, Section 3(c) requires federal land-managing agencies to consult with federally recognized Indian tribes prior to the intentional removal or excavation of Native American human remains and other cultural items as defined in NAGPRA from federal lands.
  - On tribal lands, planned excavation requires the consent of the appropriate Indian tribe (43 CFR § 10.3).

In instances where a proposed project that is funded or licensed by a federal agency may cross federal or tribal lands, it is the federal land managing agency that is responsible for compliance with NAGPRA. Detailed information about NAGPRA and its implementing regulations is available at the National Park Service (NPS) National NAGPRA Web site.

2) Executive Orders
In many instances, presidential executive orders apply to agencies on an agency-wide or program-wide basis rather than on a project-by-project basis. However, staff responsible for working or coordinating with Indian tribal governments should be familiar with the applicable executive orders and act in accordance with the intent of the directives. Several of the orders specific to consultation with federally recognized Indian tribes include:

3 Available at http://www.achp.gov/regs-rev04.pdf
4 Available at http://ceq.hss.doc.gov/nepa/regs/ceq/1506.htm
5 Available at http://ceq.hss.doc.gov/nepa/regs/ej/justice.pdf
6 Available at http://ceq.hss.doc.gov/nepa/regs/cooperating/cooperatingagenciesdistributionmemo.html
7 Available at http://www.cr.nps.gov/nagpra/
Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments” (2000), directs federal agencies to respect tribal self-government and sovereignty, tribal rights, and tribal responsibilities whenever they formulate policies “significantly or uniquely affecting Indian tribal governments.” The executive order applies to all federal agencies other than those considered independent federal agencies, encouraging “meaningful and timely” consultation with tribes, and consideration of compliance costs imposed on tribal governments when developing policies or regulations that may affect Indian tribes.

Executive Order 13007, “Indian Sacred Sites” (1996), applies to all federally owned lands except “Indian trust lands.” It encourages land managing agencies to:

- accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners; and
- avoid adversely affecting the physical integrity of such sites.

Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” (1994), is designed to focus federal attention on the environmental and human health conditions in minority communities and low-income communities. It is also designed to promote non-discrimination in federal programs substantially affecting human health and the environment.

- Section 6-606 of the order states that, “each federal agency responsibility set forth under this order shall apply equally to Native American programs.”
III. Consultation with Indian Tribes in the Section 106 Process

Consultation means 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 process. (36 CFR Section 800.16 (f)).

Consultation constitutes more than simply notifying an Indian tribe about a planned undertaking. The ACHP views consultation as a process of communication that may include written correspondence, meetings, telephone conferences, site visits, and e-mails.

The requirements to consult with Indian tribes in the Section 106 review process are derived from the specific language of Section 101(d)(6)(B) of NHPA. They are also based on the unique legal relationship between federally recognized Indian tribes and the federal government embodied in the U.S. Constitution, treaties, court decisions, federal statutes, and executive orders.

Agencies are required to consult with Indian tribes at specific steps in the Section 106 review process. A common misunderstanding is that tribal consultation is only required for undertakings on tribal lands, when, in fact, consultation is also required for undertakings that occur off tribal lands. Tribal consultation for projects off tribal lands is required because the NHPA does not restrict tribal consultation to tribal lands alone and those off tribal lands may be the ancestral homelands of an Indian tribe or tribes, and thus may contain historic properties of religious and cultural significance to them.

A. Role of the Tribal Historic Preservation Officer (THPO) in the Section 106 Process

NHPA’s 1992 amendments include provisions for Indian tribes to assume the responsibilities of the State Historic Preservation Officer (SHPO) on tribal lands, and establish the position of a Tribal Historic Preservation Officer (THPO). The Section 106 regulations use the term “THPO” to mean the Tribal Historic Preservation Officer under Section 101(d)(2) of the NHPA. Tribal lands are defined in the NHPA and the ACHP’s regulations (36 CFR Part 800) as, 1) all lands within the exterior boundaries of any Indian reservation; and 2) all dependent Indian communities.

As the tribal counterpart to the SHPO, the THPO may assume some or all of the duties for historic preservation on tribal lands that the SHPO performs on private, state, or federal lands. These responsibilities may include maintaining an inventory of historic properties under its jurisdiction and assisting federal agencies in the review of federal undertakings.

THPOs have been delegated authority by the Secretary of the Interior to serve as the historic preservation officer for tribal lands; however, they may not have been designated by their tribal governments to function as the sole point of contact for federal undertakings on and off tribal lands. Therefore, agencies should contact both the tribal governmental leaders and the THPO prior to formal initiation of Section 106 consultation in order to determine the appropriate point(s) of contact.

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8 The National Park Service (NPS) administers the national THPO program and maintains an up-to-date listing of all tribes who have established 101(d)(2) Tribal Historic Preservation Officers and the contact information of their Tribal Historic Preservation Officers, available at www.nps.gov/history/hps/tribal/thpo.htm

9 The U.S. Supreme Court decision in Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998) held that “dependent Indian communities” refers to a limited category of Indian lands that are neither reservations nor allotments and that must satisfy two requirements: first, they must have been set aside by the federal government for the use of the Indians as Indian land; second, they must be under federal superintendence.
Under the Section 106 regulations, a THPO who has assumed Section 106 review functions is subject to the time frames set forth in the Section 106 regulations for responding to requests to review an agency’s Section 106 findings and determinations for undertakings on or affecting tribal lands. Failure of a THPO to respond when there is such a time frame permits an agency to proceed with its finding or determination, or to consult with the ACHP in the THPO’s absence in accordance with the Section 106 regulations. Subsequent involvement by the THPO is not precluded, but the agency is not required to reopen a finding or determination that a THPO failed to respond to in a timely manner earlier in the process.

Once a tribe has established a THPO, the SHPO may still participate in consultation for undertakings on tribal lands if: 1) the THPO requests SHPO participation; 2) the undertaking takes place on tribal lands but affects historic properties located off tribal lands; or 3) a non-tribal member who owns lands within the exterior boundaries of a reservation requests that the SHPO participate in Section 106 consultation. This provision, located at Section 101(d)(2)(D)(iii) of NHPA and in the Section 106 regulations at 36 CFR Section 800.3(c)(1), is intended to provide a property owner an opportunity to include the SHPO in the consultation if that property owner feels that his/her interests in historic preservation may not necessarily be represented by the THPO. This inclusion of the SHPO in the consultation does not, however, replace the role of the THPO, who still participates fully and retains its Section 106 role.

B. Role of the THPO: Off Tribal Lands

The THPO’s role for federal undertakings off tribal lands (in other words, on non-tribal lands such as private, state, or federal lands) is different from its role on its own tribal lands. If the proposed undertaking’s area of potential effect (APE) is located outside of the tribal lands it oversees, the THPO does not supplant the jurisdiction or have the same rights as the SHPO, but rather may serve as the official representative designated by his/her tribe to represent its interests as a consulting party in Section 106 consultation.

C. When there is no THPO

For proposed undertakings on or affecting the tribal lands of an Indian tribe that has not assumed THPO responsibilities, the federal agency carries out consultation with that tribe’s designated representative in addition to—and on the same basis as—consultation with the SHPO. The tribe retains the same consultation rights regarding agency findings and determinations, and to execute a Memorandum of Agreement (MOA) or Programmatic Agreement (PA), as it would if it had a THPO.

For proposed undertakings off tribal lands, a tribe designates who will represent it in consultation regarding historic properties of religious and cultural significance to it. A tribe that does not have a THPO has the same rights to be a consulting party as tribes that do have THPOs when the proposed federal undertaking is not on or affecting tribal lands.

D. Regulatory Principles and General Directions for Section 106 Tribal Consultation

The procedures for meeting Section 106 requirements are defined in the Section 106 regulations, “Protection of Historic Properties” (36 CFR Part 800). Under the NHPA, “historic properties” are defined as those properties that are listed on the National Register of Historic Places, or are eligible for such listing.

The regulations provide both overall direction as well as specific requirements regarding consultation at each step of the Section 106 review process. The Section 106 regulations at 36 CFR Section 800.2(c)(2)

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10 Available at http://www.achp.gov/regs-rev04.pdf
outline the following important principles and general directions to federal agencies regarding consultation with tribes:

- The agency shall ensure that consultation provides the Indian tribe a reasonable opportunity to identify its concerns about historic properties; advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance to them; articulate its views on the undertaking’s effects on such properties; and participate in the resolution of adverse effects.

- Tribal consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and plan how to address concerns about confidentiality of information obtained during the consultation process.

- Historic properties of religious and cultural significance to an Indian tribe may be located on ancestral (also referred to as aboriginal) homelands, or on officially ceded lands (lands that were ceded to the U.S. government by the tribe via treaty). In many cases, because of migration or forced removal, Indian tribes may now be located far away from historic properties that still hold such significance for them. Accordingly, the regulations require that agencies make a *reasonable and good-faith effort*\(^\text{11}\) to identify Indian tribes that may attach religious and cultural significance to historic properties that may be affected by the undertaking, even if tribes are now located a great distance away from such properties and undertakings.

- The agency official shall ensure that consultation under the Section 106 review process is respectful of tribal sovereignty in conducting consultation and must recognize the government-to-government relationship that exists between the federal government and federally recognized Indian tribes.

- An Indian tribe may enter into an agreement with a federal agency regarding any aspect of tribal participation in the review process. The agreement may specify a tribe’s geographic area of interest, types of projects about which they wish to be consulted, or provide the Indian tribe with additional participation or concurrence in agency decisions under Section 106 provided that no modification is made to the roles of other parties without their consent.

The Section 106 regulations recognize an Indian tribe’s sovereign authority regarding proposed undertakings on or affecting its tribal lands in several ways. The regulations require the federal agency to provide the THPO, as appropriate,\(^\text{12}\) an opportunity to review, and thus to concur with or object to, agency findings and determinations. The regulations also require federal agencies to invite the THPO (or designated tribal representative, if the tribe has not assumed THPO duties) to sign a Memorandum Of Agreement (MOA) as well as a Programmatic Agreement (PA). If the THPO/tribe terminates consultation, the ACHP must provide comment to the head of the agency rather than execute an agreement without the tribe.

While the Section 106 regulations are fairly prescriptive in nature, they only direct agencies on what to do and at which stages of the process to engage in consultation. They do not provide direction on how to

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\(^{11}\) Tips on how to fulfill this requirement are provided under the heading “How do I identify tribes that must be invited to consult,” at Section V(A)(3) of this handbook.

\(^{12}\) Note that the regulations clarify that THPOs and those tribes that do not have a 101(d)(2) THPO have the same rights in the process for undertakings on or affecting tribal lands, for purposes of Section 106. The difference is whether the SHPO participates. Where there is a THPO, the SHPO only participates in consultation if the THPO invites the SHPO to participate, if an undertaking on tribal lands affects a historic property off tribal lands, or if a non-tribal member who owns a parcel within the exterior boundaries of the reservation so requests. For undertakings on tribal lands where there is no THPO, the agency consults with both the designated tribal official and the SHPO.
carry out consultation. Thus, the following questions and answers are intended to clarify the most common questions and issues regarding tribal consultation under the Section 106 review process.
V. General Questions and Answers

The following list of questions is meant to address general issues that commonly arise in the Section 106 review process, typically before an agency begins the review process or very early in the process. Section V addresses questions that might arise at each step of the Section 106 review process.

1) When are federal agencies required to consult with Indian tribes?

The 1992 amendments to NHPA require federal agencies, in carrying out the Section 106 review process, to consult with Indian tribes when a federal undertaking may affect historic properties of traditional religious and cultural significance to them. An “undertaking” means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out by or on behalf of a federal agency; those carried out with federal financial assistance; or those requiring a federal permit, license or approval. This requirement applies to all undertakings regardless of whether they are located on or off tribal lands.

2) Which Indian tribes must be consulted?

Federally recognized tribes that attach religious and cultural significance to historic properties that may be affected by undertakings must be consulted. Federal agencies must make “a reasonable and good faith” effort\(^\text{13}\) to identify each and every such Indian tribe and invite them to be consulting parties. This includes Indian tribes that no longer reside in a given area but may still have ancestral ties to an area. Many Indian tribes were removed from their homelands, while others traditionally moved from place to place. Consequently, an Indian tribe may very well attach significance to historic properties located in an area where they may not have physically resided for many years. If an Indian tribe that may attach significance to a historic property that may be affected by the undertaking has not been invited by the agency to consult, the tribe may request in writing to be a consulting party. The NHPA and the Section 106 regulations require that the agency grant consulting party status to such a tribe.

3) How would I know if an Indian tribe is federally recognized?

Consult the list maintained by the U.S. Department of the Interior’s Bureau of Indian Affairs (BIA).\(^\text{14}\) The list is regularly published in the Federal Register. Another way to determine if a tribe is federally recognized is to contact BIA headquarters in Washington, D.C. or one of the BIA regional offices throughout the United States.

4) If there are no federally recognized Indian tribes in the state where the project is located, does the agency still have to consult with any tribes?

Even when there are no federally recognized Indian tribes with tribal lands in the state where the project is located, the agency must still make a reasonable and good faith\(^\text{15}\) effort to identify and consult with any Indian tribes that attach religious and cultural significance to historic properties that may be affected by the undertaking. The circumstances of history may have resulted in an Indian tribe now being located a great distance from its ancestral homelands and places of importance. Therefore, agencies are required to

\(^{13}\) Tips on how to fulfill this requirement are provided under the heading “How do I identify tribes that must be invited to consult,” at Section V(A)(3) of this handbook.

\(^{14}\) Available at http://library.doi.gov/internet/native.html

\(^{15}\) Tips for fulfilling this requirement are provided under the heading “How do I identify tribes that must be invited to consult,” at Section V(A)(3) of this handbook.
identify Indian tribes that may attach religious and cultural significance to historic properties in the area of the undertaking, even if there are no tribes near the area of the undertaking or within the state.

5) What is the federal agency’s responsibility to consult with state recognized Indian tribes or tribes who have neither federal nor state recognition?

Under the Section 106 regulations at 36 CFR Section 800.2(c)(5), a federal agency may invite such groups to participate in consultation as “additional consulting parties” based on a “demonstrated interest” (discussed below) in the undertaking’s effects on historic properties. However, the term “Indian tribe” as it appears in the NHPA refers only to federally recognized Indian tribes, which includes Alaska Native Villages and Village and Regional Corporations. In other words, only federally recognized Indian tribes that attach religious and cultural significance to historic properties that may be affected by the proposed undertaking have a statutory right to be consulting parties in the Section 106 process.

The question of inviting non-federally recognized tribes to participate in consultation can be both complicated and sensitive and thus deserves careful consideration. For example, some tribes may not be federally recognized but may have ancestral ties to an area. Other non-federally recognized tribes may have lost their recognition as a result of federal government actions in the 1950s to terminate relationships with certain tribes. In other cases, such as in California, the situation is complicated because there are more than 100 federally recognized tribes and more than 100 non-federally recognized tribes; again, the result of historical circumstances.

While non-federally recognized tribes do not have a statutory right to be consulting parties in the Section 106 process, the agency may invite them to consult as an “additional consulting party” as provided under the ACHP’s regulations at 36 CFR Section 800.2(c)(5), if they have a “demonstrated interest.” The agency should consider whether the non-federally recognized tribe can meet the threshold of a “demonstrated interest”—for example, whether the tribe can demonstrate it has ancestral ties to the area of the undertaking, or that it is concerned with the effects of the undertaking on historic properties for other reasons. In some cases, members of a non-federally recognized tribe may be direct descendants of indigenous peoples who once occupied a particular Native American site to be affected by the undertaking, or they might be able to provide the federal agency with additional information regarding historic properties that should be considered in the review process.

The inclusion of non-federally recognized groups in consultation may raise objections from some federally recognized tribes. Yet, there are other tribes who routinely support the invitation of non-recognized tribes into consultation, recognizing their interests as well.

The ultimate decision on whether to consult with non-federally recognized tribes, however, rests with the federal agency. The decision should be given careful consideration and made in consultation with the SHPO (or if on or affecting tribal lands, with the THPO or designated tribal official). In addition, the federal agency may elicit input on the question from any federally recognized Indian tribes that are consulting parties. If the agency decides that it is inappropriate to invite non-federally recognized tribes to consult as “additional consulting parties,” those tribes can still provide their views to the agency as members of the public under 36 CFR Section 800.2(d).

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16 During the “Termination Period” of the 1950s, Congress ended the federal government’s relationship with more than 100 tribes in an attempt to assimilate members of Indian tribes into the broader society. Many, but not all, tribes regained their recognition. Some Indian tribes, however, are still seeking restoration of their federal recognition. For more information on this topic, visit www.epa.gov/indian

17 For more information about Indian tribes in California, their history, and a list of federally and state recognized tribes, visit the California Native American Heritage Commission website at http://ceres.ca.gov/nanc
6) The federal agency believes a state recognized tribe should be included in the consultation process, but the federally recognized tribes object. How should the agency proceed?

It is important to remember that the federal agency ultimately makes the decision regarding the involvement of other consulting parties, including non-federally recognized tribes. However, reasonable objections raised by any parties should always be considered.

Not granting consulting party status to parties that have a demonstrated interest in the affected historic properties (see 36 CFR Section 800.2(d)) is legally allowable but may not be consistent with the spirit and intent of the Section 106 process. The Section 106 process is intended to provide both the public and certain individuals or groups with the opportunity to provide their views so that the federal agency can make an informed decision. Because non-federally recognized tribes may have information that assists the Section 106 process, consulting with them may enhance the agency’s decision-making process.

Rather than denying a party the opportunity to participate in consultation, there may be ways in which every party can be accommodated. For instance, separate consultation meetings can be held, with information and views shared amongst all the consulting parties, as appropriate. However, there may be instances where an Indian tribe’s leadership is only willing to share sensitive information with the federal agency (as part of the government-to-government relationship) and not with the other consulting parties, including other tribes. If confidentiality concerns are foreseeable, the federal agency should have a plan in place for how to handle these concerns in accordance with applicable law as the Section 106 process moves forward. Such a plan would also provide parties with clear expectations on how these issues will be handled. The issue of confidentiality is a very important one in Section 106 tribal consultation and is discussed in greater detail at Section V(B)(4) of this handbook.

7) What are appropriate consultation methods for individual undertakings?

The consultation process must provide an Indian tribe a reasonable opportunity to identify its concerns about historic properties; advise on the identification and evaluation of historic properties, including those of religious and cultural significance to the tribe; articulate views on the undertaking’s effects on such properties; and participate in the resolution of adverse effects. (See 36 CFR Section 800.2(c)(2)(ii)(A).

Once it has accepted the agency’s invitation to consult, the tribal leadership may find it acceptable for consultation to take place between the agency and designated tribal staff, such as the THPO or, if the tribe has not established a THPO, the cultural resource officer, for instance. In some cases tribal leadership may want to remain directly involved in the consultation process as well.

Face-to-face meetings or on-site visits may be the most practical way to conduct consultation. In all cases, consultation should be approached with flexibility that respects the tribe’s role within the overall project planning process and facilitates its full participation.

A federal agency and an Indian tribe may enter into an agreement in accordance with the Section 106 regulations at 36 CFR Section 800.2(c)(2)(ii)(E) regarding how Section 106 consultation will take place. Such agreements can cover all potential agency undertakings, or apply only to a specific undertaking. They can establish protocols for carrying out tribal consultation, including how the agency will address tribal concerns about confidentiality of sensitive information. Such agreements also can cover all aspects of the Section 106 process, provided that no modification is made in the roles for other parties to the Section 106 process without their consent. Determining the types of undertakings and the potential geographic project areas on which a tribe wants to be consulted, and how that consultation will take place can lead to tremendous efficiencies for both the federal agency and the Indian tribe. Filing such
agreements with both the appropriate SHPO and the ACHP is required per 36 CFR Section 800.2(c)(2)(ii)(E), and can eliminate questions about tribal consultation when either the SHPO or the ACHP is reviewing a proposed undertaking.

Documentation of consultation is important because it allows consulting parties to more accurately track the stages of the Section 106 process. Federal agencies should document all efforts to initiate consultation with an Indian tribe or tribes, as well as documenting the consultation process once it has begun. Such documentation, in the form of correspondence, telephone logs, e-mails, etc., should be included in the agency’s official Section 106 record. Agencies should also keep notes so that the consultation record documents the content of consultation meetings, site visits, and phone calls in addition to information about dates and who participated. Doing so allows agencies and consulting parties to review proceedings and correct any errors or omissions, thus facilitating better overall communication. Keeping information confidential can present unique challenges (see Section V(B)(4) of this handbook.

8) Can a federal agency pay for expenses that facilitate consultation with Indian tribes?

Yes, the ACHP encourages federal agencies to take the steps necessary to facilitate tribal participation at all stages of the Section 106 process. These steps may range from scheduling meetings in places and at times that are convenient for Indian tribes, to paying travel expenses for participating tribal representatives. Indeed, agencies are strongly encouraged to use available resources to help overcome financial impediments to effective tribal participation in the Section 106 process. Likewise, if a tribe has consented (in advance and in writing) to allow an applicant for federal assistance or federal permit to carry out tribal consultation, the applicant is encouraged to use available resources to facilitate and support tribal participation. However, federal agencies should not expect to pay a fee to an Indian tribe or any consulting party to provide comments or concurrence in an agency finding or determination.

9) Can a federal agency pay a fee to an Indian tribe for services provided in the Section 106 process?

Yes, though it should be noted that while the ACHP encourages agencies to utilize their resources to facilitate consultation with Indian tribes, this encouragement is not a legal mandate; nor does any portion of the NHPA or the ACHP’s regulations require an agency or an applicant to pay for any form of tribal involvement.

However, during the identification and evaluation phase of the Section 106 process when the agency or applicant is carrying out its duty to identify historic properties that may be significant to an Indian tribe, it may ask a tribe for specific information and documentation regarding the location, nature, and condition of individual sites, or even request that a survey be conducted by the tribe. In doing so, the agency or applicant is essentially asking the tribe to fulfill the duties of the agency in a role similar to that of a consultant or contractor. In such cases, the tribe would be justified in requesting payment for its services, just as is appropriate for any other contractor. Since Indian tribes are a recognized source of information regarding historic properties of religious and cultural significance to them, federal agencies should reasonably expect to pay for work carried out by tribes. The agency or applicant is free to refuse just as it may refuse to pay for an archaeological consultant, but the agency still retains the duties of obtaining the necessary information for the identification of historic properties, the evaluation of their National Register eligibility, and the assessment of effects on those historic properties, through reasonable methods.

10) What specific activities might be reimbursed?

Examples of reimbursable costs may include those costs associated with expert consultants to identify and evaluate historic properties as outlined in the immediately preceding answer. This may include field visits
to provide information about specific places or sites, monitoring activities, research associated with historical investigation, documentation production costs, and related travel expenses.

For more information, see “Fees in the Section 106 Review Process” on the ACHP Web site.\footnote{Available at http://www.achp.gov/regs-fees.html}

11) Aside from applicable federal statutes, are there specific tribal laws the agency must comply with for undertakings on tribal lands?

The agency should be aware that the sovereign status of Indian tribes on their tribal lands may dictate other obligations and requirements in addition to those outlined in Section 106 and other federal laws. Many tribes have developed their own statutes, regulations, and policies that may apply to undertakings on their own lands and federal agency officials, staff, applicants, and contractors must comply with them as applicable. Inquiring about such legal requirements early in the planning process demonstrates a respect for tribal sovereignty.

12) If a proposed undertaking is on tribal lands, but the tribe has not assumed THPO duties, does the agency consult with the tribe’s designated representative and the SHPO?

Yes, the agency carries out consultation with the non-THPO Indian tribe regarding undertakings on or affecting that tribe’s lands in addition to—and on the same basis as—consultation with the SHPO. If the SHPO withdraws from consultation, the agency and the tribal representative may complete the review process with any other consulting parties. While the SHPO may participate in consultation, the tribe maintains the same rights of consultation for agency findings and determinations, and the same rights to be signatories to MOAs and PAs that would apply on their tribal lands, as it would if it had a THPO.

Be aware that some Indian tribes may not wish to consult with the SHPO, thus, requiring the agency to approach consultation with flexibility and understanding. In fact, some tribes may not welcome the SHPO to meetings or site visits on tribal lands, and they are within their rights to do so. However, the agency will still be responsible for carrying out consultation with the SHPO.

13) Can Indian tribes, as well as federal agencies, request ACHP involvement in the Section 106 review process?

Yes. Any party, including Indian tribes, may request that the ACHP review the substance of any federal agency’s finding, determination, or decision or the adequacy of an agency’s compliance with the Section 106 regulations.

An Indian tribe may request that the ACHP enter the Section 106 review process for any number of reasons, including concerns about the identification, evaluation or assessment of effects on historic properties of religious and cultural significance to them. It may also request ACHP involvement in the resolution of adverse effects or where there are questions about policy, interpretation, or precedent under Section 106 The ACHP has discretion in determining whether to become involved in the process.

14) Does the ACHP have a policy on the treatment of burials that are located on state or private lands (and thus not subject to the disinterment provisions of NAGPRA)?

Yes. On February 23, 2007, the members of the Advisory Council on Historic Preservation unanimously adopted its revised “Policy Statement Regarding the Treatment of Burial Sites, Human Remains and Funerary Objects.” This policy is designed to guide federal agencies in making decisions about the
identification and treatment of burial sites, human remains, and funerary objects encountered in the Section 106 process in various instances including those where federal or state law does not prescribe a course of action. The policy is not exclusively directed toward Native American burials, human remains or funerary objects, but those would be included under the policy. In accordance with Section 106, the policy does not recommend a specific outcome from the consultation process, but rather focuses on issues and perspectives that federal agencies ought to consider when making their Section 106 decisions. The policy is available at http://www.achp.gov/docs/hrpolicy0207.pdf
V. Consultation with Indian Tribes for Proposed Undertakings Off—and On—Tribal Lands

As noted earlier in the handbook, under the NHPA, tribal consultation is required for all federal undertakings, regardless of whether the undertaking’s Area of Potential Effect (APE) includes federal, tribal, state, or private lands so long as the undertaking may affect historic properties of religious and cultural significance to an Indian tribe. However, different Section 106 consultation requirements do exist, depending on whether the proposed undertaking may affect non-tribal, or tribal, lands.

This section outlines tribal consultation requirements for proposed undertakings that will occur:

- “off” tribal lands (in other words, on non-tribal land such as federal, state, or private lands outside tribal lands);
- “on” or affecting tribal lands. Tribal lands are defined in the NHPA and the Section 106 regulations (36 CFR Part 800) as all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.19
  - Where the required steps are the same both off and on (or affecting) tribal lands, a single response is provided.

This section of the handbook is presented to correspond with the Section 106 review process’s four steps of initiation, identification, assessment, and resolution.

A. Initiation of the Section 106 Process

1) How would I know if historic properties of traditional religious and cultural significance to Indian tribes may be affected by the proposed undertaking?

Unless such properties have already been identified and the information is readily available, you probably will not know in advance. As with any undertaking that might affect historic properties, you must determine whether the proposed undertaking is generically the kind that might affect historic properties assuming such properties are present. Therefore, if the undertaking is the kind of action that might affect places such as archaeological sites, burial grounds, sacred landscapes or features, ceremonial areas, or plant and animal communities, then you should consult with Indian tribes that might attach significance to such places. Please note that this list of examples is not all-inclusive, as the histories, cultures, and traditions of Indian tribes vary widely. It is through consultation with Indian tribes themselves that such properties can be properly identified and evaluated.

2) If a federal undertaking will not occur on or affect historic properties on tribal lands, is the agency still required to identify Indian tribes and invite them to consult?

Yes, NHPA requires consultation with Indian tribes that may attach religious and cultural significance to historic properties that may be affected by the proposed undertaking, regardless of the location of the proposed undertaking. At this stage of the process, the federal agency identifies any Indian tribes that

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19 The U.S. Supreme Court decision in Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998) held that “dependent Indian communities” refers to a limited category of Indian lands that are neither reservations nor allotments and that must satisfy two requirements: first, they must have been set aside by the federal government for the use of the Indians as Indian land; second, they must be under federal superintendence.
might attach religious and cultural significance to historic properties that may exist in the proposed undertaking’s Area of Potential Effect (APE), and invites them to consult.

3) How do I identify the Indian tribes that must be invited to consult?

a) Off Tribal Lands

Identification of Indian tribes that must be invited to consult could entail a number of initiatives. For instance, it might be useful to check with other federal agencies and their cultural resource specialists in the state or region for a list of tribes with whom they have consulted in past Section 106 reviews. The SHPO and Indian tribes in the region might also be able to suggest which tribes to contact. Other sources for such information may include ethnographies, local histories, experts at local universities, and oral accounts.

While we cannot vouch for their accuracy, certain websites may be useful references as part of a broader agency effort to identify relevant Indian tribes. The National Park Service maintains the Native American Consultation Database (NACD), which may be helpful in identifying Indian tribes with an interest in an area. Other Internet sources include MAPS: GIS Windows on Native Lands, Current Places, and History, which provides maps on current and ancestral locations of Indian lands, and the Library of Congress Indian Land Cessions document Web site, which has information on historic Indian land areas.

National and regional intertribal organizations, such as the National Congress of American Indians, the United South and Eastern Tribes, the National Association of Tribal Historic Preservation Officers, the Michigan Anishinaabek Cultural Preservation and Repatriation Alliance, and the Affiliated Tribes of Northwest Indians may also be able to provide assistance in identifying tribes with ancestral connections to an area.

Keep in mind that identification of Indian tribes with ancestral connections to an area is not a “one stop shopping” endeavor in which any single source can be depended upon to fulfill the agency’s legal responsibilities. Agency officials should bear in mind that while Internet sources are convenient and can be useful, their informational content may be incomplete.

Once the agency has identified a tribe or tribes that may attach religious and cultural significance to any historic properties that may exist in the APE, the agency must invite them to consult.

Finally, it is important to remember that documentary or other sources of information that do not clearly support a tribe’s assertions should not be used to deny a tribe the opportunity to participate in consultation. A common misunderstanding is that an Indian tribe needs to document its ties to historic properties in the area of the undertaking. Instead, the NHPA requires agencies to consult with any federally recognized Indian tribe that attaches religious and cultural significance to a historic property. It stands to reason that the best source for determining what historic properties have significance for a tribe

20 Available at http://www.cr.nps.gov/nacd/
21 Available at http://www.kstrom.net/isk/maps/mapmenu.html
22 Available at http://www.memory.loc.gov/ammem/amlaw/lwss-ilc.html
26 Official Web site at http://www.macpra.org
would be the experts designated by the tribe to determine the tribe’s own interest. Such experts might include elders, traditional practitioners, tribal historians, the THPO or tribal cultural resource staff. The tribe will designate the appropriate tribal representative(s) to represent its interests in the Section 106 consultation process.

b) On Tribal Lands

Undertakings on tribal lands that are carried out by a federal agency, that use federal funds, or that require federal approval/licensing/permitting are also subject to Section 106 review. The federal agency will consult with the THPO, or, if the tribe has not assumed THPO duties, with its cultural resource officer, or another designated tribal official. The tribe may also wish to have one or more representative of its tribal government directly involved in the consultation process.

It may be easy to assume that because the proposed undertaking is located on tribal lands, there is no need to identify additional Indian tribes that may attach religious and cultural significance to historic properties within the APE. However, the responsibility for the agency to identify additional tribes that may attach religious and cultural significance to any historic properties within the APE applies even when an undertaking is on tribal land. Therefore, the suggestions given above in part (a) of this question are also applicable here.

The need to identify tribes that may attach significance to sites within an APE on another tribe’s lands is rooted in history. When the U.S. government established Indian reservations, it often set boundaries where they did not previously exist. Many tribes were removed to reservations far from their traditional homelands and relocated onto the homelands of other tribes. In other instances, territories that were shared by several tribes became the reservation of one exclusively. The end result is the possibility that an undertaking on Tribe A’s tribal lands (within the exterior boundaries of its reservation) may contain historic properties that hold religious and cultural significance for Tribe B and Tribe C, as well.

Therefore, the agency carrying out, or providing the funding or approval/licensing/permitting, for the undertaking on Tribe A’s tribal lands still has a responsibility to identify any other tribes that may attach religious and cultural significance to historic properties within the proposed undertaking’s APE and invite them to consult. Accordingly, it may be necessary to consult with each tribe individually and to do so off the reservation where the undertaking is proposed.

4) Who initiates the consultation process with an Indian tribe?

Consultation with an Indian tribe or tribes should be initiated by the agency official through a letter to the leadership of each tribe, with a copy going to each tribe’s THPO, or for a tribe without a THPO, its cultural resource officer. Indian tribes are sovereign nations and their leaders must be shown the same respect and formality given to leaders of other sovereign nations. Since tribal elections often result in changes in leadership, agency officials should contact the tribe prior to executing the letters in order to ascertain that the correspondence is correctly addressed to the appropriate points of contact. It is helpful to follow up such correspondence with direct telephone communication to ensure the letter has been received.

If the agency official has correspondence from tribal leadership designating a person or position within the tribe to act on the tribe’s behalf in the Section 106 process, the agency may initiate consultation

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28 As defined in Section 800.2 of the ACHP regulations, an agency official is one who has jurisdiction over the undertaking and takes legal and financial responsibility for Section 106 compliance.
accordingly. It is good practice, in this instance, to send a copy of all correspondence to tribal leadership as well.

5) Can applicants for federal permits or contractors hired by the agency initiate and carry out tribal consultation?

No, federal agencies cannot unilaterally delegate their responsibilities to conduct government-to-government consultation with Indian tribes to non-federal entities. It is important to remember that Indian tribes are sovereign nations and that their relationship with the federal agency exists on a government-to-government basis. For that reason, some Indian tribes may be unwilling to consult with non-federal entities associated with a particular undertaking. Such non-federal entities include applicants for federal permits or assistance (which would include any contractors hired by the applicant), as well as contractors who are not government employees but are hired to perform historic preservation duties for a federal agency. In such cases, the wishes of the tribe for government-to-government consultation must be respected, and the agency must carry out tribal consultation for the undertaking.

However, if an Indian tribe agrees in advance, the agency may rely, where appropriate, on an applicant (or the applicant’s contractor), or the agency’s own historic preservation contractor to carry out day-to-day, project-specific tribal consultation. In order to ensure that the tribe, the agency, and the applicant or contractor all fully understand that the tribe may request the federal agency to step in and assume consultation duties if problems arise, the agency should obtain the tribe’s concurrence with the agency’s delegation in writing.

Even when an Indian tribe agrees to consult with an applicant, the federal agency remains responsible for ensuring that the consultation process is carried out properly, meeting the letter and spirit of the law, as well as resolving any issues or disputes. Therefore, any agreement between the agency and an Indian tribe documenting the tribe’s willingness to consult with a non-federal entity should contain a provision that explains the agency’s responsibility to assume consultation responsibilities at the tribe’s request. The government-to-government relationship requires that the federal agency is ultimately responsible for tribal consultation.

6) What are the consultation responsibilities for undertakings that involve more than one federal agency?

The Section 106 regulations at 36 CFR Section 800.2 (a)(2) provide that, if more than one agency is involved in an undertaking, some or all of the agencies may designate a lead federal agency who will act on their behalf to fulfill their collective responsibilities under Section 106, including tribal consultation. Those agencies that do not designate a lead agency remain individually responsible for their Section 106 compliance; thus, they each would need to initiate and carry out tribal consultation duties for their Section 106 compliance for their undertaking.

B. Identification of Historic Properties

1) Does the federal agency consult with Indian tribes to carry out identification and evaluation of historic properties?

a) Off Tribal Lands

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29 An applicant may be a state agency, local government, organization, or individual seeking federal assistance, permits, licenses, and other approvals.
Yes, the agency consults with Indian tribes to carry out identification efforts and to evaluate the National Register eligibility of identified properties for proposed undertakings located off tribal lands.

Many agencies assume that agency or contract archaeologists can identify which properties are of significance to which Indian tribes when they conduct archaeological surveys. However, unless an archeologist has been specifically authorized by a tribe to speak on its behalf on the subject, it should not be assumed that the archaeologist possesses the appropriate expertise to determine what properties are or are not of significance to an Indian tribe. The appropriate individual to carry out such a determination is the representative designated by the tribe for this purpose. Identification efforts may include site visits to assist in identifying these types of properties.

The Section 106 regulations state that the agency official shall acknowledge that Indian tribes possess special expertise in assessing the National Register eligibility of historic properties that may possess religious and cultural significance to them (36 CFR § 800.4(c)(1)).

The agency should provide Indian tribes with the same information that is provided to the SHPO during consultation, including information on buildings and other standing structures that may be affected by the proposed undertaking. A common assumption is that Indian tribes are not interested in historic buildings and structures. However, a federal agency should not assume to know what is of significance to a particular tribe unless it has been advised by that tribe. For instance, there may be a historic school in the path of a proposed undertaking. The school might have originally served as an Indian boarding school in its early history and may be of significance to a tribe or tribes.

b) On Tribal Lands

The same points made regarding “off tribal lands” above, apply on tribal lands. In addition, on tribal lands, the agency consults with that tribe’s THPO, or other tribal official designated for this purpose. The tribe may also involve other tribal experts that assist the THPO in both the identification and evaluation of the National Register eligibility of any historic properties. When a tribe has a THPO, the SHPO does not participate in the Section 106 process for proposed undertakings on tribal lands. The few exceptions to this rule occur when the THPO invites the SHPO to participate; when an undertaking on tribal lands affects a historic property located off tribal land; and when a non-tribal member who owns land in fee simple within the exterior boundaries of the tribe's reservation so requests. In those limited instances, the SHPO participates in consultation in addition to the THPO.

If the tribe has not assumed THPO responsibilities, the agency will carry out identification and evaluation in consultation with both the tribe’s cultural resource officer (and any other parties designated by the tribe for this purpose) and the SHPO. In this situation, the tribal cultural resource officer (or other such designated tribal official) has the same rights as a THPO would have in eligibility determinations.

As noted in Section V(A)(3) above, it is possible that the APE for a proposed federal undertaking on one tribe's lands may contain historic properties that are of religious and cultural significance to other tribes. To continue the hypothetical model introduced in Section V(A)(3), a proposed undertaking is located on Tribe A’s tribal lands. Once the agency has identified the other tribes that may attach significance to historic properties within the APE and invited them to consult, the agency must determine the best way to afford those tribes an opportunity to participate in the identification and evaluation of any such historic properties. In such cases, it is the prerogative of Tribe A, in keeping with its status as a sovereign nation, whether to grant access to the APE within its tribal lands to other consulting parties. If Tribe A decides not to grant access, the agency must still consult with the other tribes in order to provide them a reasonable opportunity to identify their concerns about historic properties, advise on the identification and evaluation of historic properties, articulate their views on the undertaking’s effects on such properties, and
participate in the resolution of adverse effects. Accordingly, it may be necessary to consult with each tribe individually and to do so off the reservation.

In such cases, concerns may arise about confidentiality and protection of sensitive information that may be provided to the federal agency by one or more of the consulting parties. This issue is a very important one in Section 106 tribal consultation and is discussed in greater detail in Section (V)(B)(4) of this handbook.

2) How can I identify historic properties that may possess traditional religious and cultural significance to Indian tribes and determine their National Register eligibility?

The identification of those historic properties that are of traditional religious and cultural significance to a tribe must be made by that tribe’s designated representative as part of the Section 106 consultation process. This is true regardless of whether the proposed undertaking is off or on tribal lands.

3) What are Traditional Cultural Properties?

The term “Traditional Cultural Property” (TCP) is used in the National Park Services (NPS) Bulletin 38, entitled “Guidelines for Evaluating and Documenting Traditional Cultural Properties.” That bulletin explains how to identify a property “that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that a) are rooted in that community’s history, and b) are important in maintaining the continuing cultural identity of the community.” For a TCP to be found eligible for the National Register, it must meet the existing National Register criteria for eligibility as a building, site, structure, object, or district. TCPs are defined only in NPS guidance and are not referenced in any statute or regulation, and refer to places of importance to any community, not just to Indian tribes. Therefore, this terminology may be used when an agency is considering whether any property is eligible for the National Register.

Within the Section 106 process, the appropriate terminology for sites of importance to Indian tribes is “historic property of religious and cultural significance to an Indian tribe.” Unlike the term TCP, this phrase appears in NHPA and the Section 106 regulations. It applies (strictly) to tribal sites, unlike the term TCP. Furthermore, Section 101(d)(6)(A) of the NHPA reminds agencies that historic properties of religious and cultural significance to Indian tribes may be eligible for the National Register. Thus, it is not necessary to use the term TCP when considering whether a site with significance to a tribe is eligible for the National Register as part of the Section 106 process. The NPS Bulletin 38 guidelines are helpful, however, in providing an overview of how National Register criteria are applied.

Another issue with the term TCP is that Bulletin 38 has sometimes been interpreted as requiring an Indian tribe to demonstrate continual use of a site in order for it to be considered a TCP in accordance with Bulletin 38. This requirement could be problematic in that tribal use of a historic property may be dictated by cyclical religious or cultural timeframes that do not comport with mainstream conceptions of “continuous” use; while in many other cases, tribes have been geographically separated from and/or denied access to historic properties of religious and cultural significance to them. It is important to note that under the NHPA and the Section 106 regulations, the determination of a historic property’s religious and cultural significance to Indian tribes is not tied to continual or physical use of the property.

4) What procedures should be followed if an Indian tribe does not want to divulge information to the federal agency regarding places of traditional religious and cultural significance?

Available at http://www.cr.nps.gov/nr/publications/bulletins/nrb38/nrb38%20introduction.htm
Many Indian tribes have belief systems that require the location and even the existence of traditional religious and cultural properties not be divulged. It is thus vital that the federal agency work with tribes to identify sensitive locations while respecting tribal desires to withhold specific information about such sites. The ACHP’s regulations at 36 CFR Section 800.4(b)(i) state, in part, that “[t]he agency official shall take into account any confidentiality concerns raised by Indian tribes during the identification process.”

The NHPA and the Section 106 regulations also provide a vehicle for protecting information that an Indian tribe has disclosed for the purpose of identification and evaluation in the Section 106 process. Section 304 of the NHPA (16 U.S.C. 470w-3(a)) and the regulations at 36 CFR Section 800.11(c)(1) provide that an agency, after consultation with the Secretary of the Interior, “shall withhold from disclosure to the public” information about the location, character, or ownership of a historic property when the agency and the Secretary determine that the disclosure of such information may cause a significant invasion of privacy; risk harm to the historic property; or, impede the use of a traditional religious site by practitioners. After such a determination, the Secretary of the Interior will determine who, if anyone, may have access to the information for purposes of the NHPA.

One important caveat: the Section 304 confidentiality provisions only apply to properties that have been determined eligible for the National Register. Thus, it is possible that information disclosed prior to an eligibility determination may not be protected. Therefore, the ACHP suggests that agencies and Indian tribes contact National Register staff for guidance regarding the amount of information and detail needed to make a determination of eligibility when such information might be at risk of disclosure. It may be possible for a tribe to share just enough information for the agency to identify the existence of a site and make a determination of eligibility without compromising the site or the tribe’s beliefs. Such information might include general aspects of the historic property’s attributes, i.e., that an important yearly ceremony takes place in a certain general location, that quiet is required in an area where spirits reside, that visual impacts will impede the ability to properly perform a required ritual, or that important ceremonial harvesting activities must occur at a particular place, time, or under certain conditions. However, if there are questions about the adequacy of such information in making determinations of eligibility, the National Register staff should be consulted.

Issues of confidentiality and sensitivity of information require flexibility and cooperation among the consulting parties. There may be situations where a tribe is only willing to share information with the federal agency and not with the other non-federal consulting parties. This can challenge the traditional Section 106 process where the federal agency also consults with the SHPO to determine eligibility of properties off tribal lands or on tribal lands where the tribe has not assumed THPO responsibilities. In such cases, it is recommended that the agency promptly talk with the ACHP or the National Register staff about how to resolve such a situation.

5) Is the federal agency required to verify a tribe’s determination of significance with archaeological or ethnographic evidence before making a National Register eligibility determination?

No. The agency is not required to verify a tribe’s determination that a historic property is of religious and cultural significance to the tribe. The ACHP regulations at 36 CFR 800.4(c)(1) state, in part, that “[t]he agency official shall acknowledge that Indian tribes…possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.” The National Register considers the information obtained from a tribe’s recognized expert to be a valid line of evidence in
considering determinations of significance. For additional guidance on making eligibility determinations, the agency should consult with the staff of the National Register. 31

6) Does the federal agency need to obtain an Indian tribe’s concurrence with the agency’s determination of National Register eligibility?

a) Off Tribal Lands

No. The agency does not need to obtain an Indian tribe’s concurrence with eligibility determinations when the undertaking is not on tribal lands or the affected property is not on tribal lands. The agency only needs the concurrence of the SHPO for a determination and, absent such concurrence, the matter goes to the Keeper of the National Register for final resolution. The federal agency must acknowledge, however, that Indian tribes possess special expertise in assessing the eligibility of historic properties that may be of significance to them, as required in the Section 106 regulations at 36 CFR Section 800.4(c)(1).

Also, if an Indian tribe disagrees with the federal agency’s determination of eligibility, the Indian tribe may, per the Section 106 regulations at 36 CFR 800.4(c)(2), ask the ACHP to request that the federal agency obtain a formal eligibility determination from the Keeper of the National Register.

b) On Tribal Lands

On tribal lands, the THPO (or the tribe’s designated official) have rights of concurrence on National Register eligibility determinations. If the agency and the THPO/tribal official do not agree on a site’s eligibility, the ACHP regulations at 800.4(c)(2) state that the agency shall obtain a determination of eligibility from the Keeper of the National Register.

7) Once the required identification and evaluation efforts are completed, does the federal agency need to consult with an Indian tribe in reaching a finding that there are no historic properties that will be affected by the undertaking, or that there are historic properties present but the undertaking will have no effect on them?

a) Off Tribal Lands

Despite the requirements for tribal consultation up to this point in the process, the agency does not need to consult with an Indian tribe in reaching a finding that there are no historic properties present, or that the proposed undertaking will not affect an identified historic property. However, the agency must provide notification and documentation supporting its finding on these questions to any consulting Indian tribe.

If a consulting tribe disagrees with the agency’s finding, it should immediately contact the ACHP and request that the ACHP object to the finding, per CFR 800.4(d)(1)(iii). If, upon the review of the finding, the ACHP also objects to the finding, the ACHP may provide its opinion to the agency official, and, if the ACHP determines the issue warrants it, to the head of the agency. The regulations stipulate that if the ACHP objects to a finding, it must do so within 30 days of the agency’s issuance of that finding.

b) On Tribal Lands

On tribal lands, a finding of no historic properties present or no historic properties affected requires the agency to provide the THPO (or designated tribal official, if the tribe has not assumed THPO duties)

31 Contact information for National Register headquarters in Washington, D.C., available at http://www.cr.nps.gov/nr/about.htm#contactus
documentation of this finding. The agency also provides this documentation to other consulting parties. Upon receipt of an adequately documented finding, the THPO/tribe has 30 days to object. If the THPO/tribe does not object within 30 days, the agency’s Section 106 responsibilities have been fulfilled. If the THPO/tribe does object to the finding, the agency shall either consult with the THPO/tribe to resolve the disagreement, or forward the finding to the ACHP and request that it be reviewed. When the agency makes such a request, it is also required to concurrently notify all consulting parties of the request and make the request and documentation available to the public. The ACHP then has 30 days to review the finding and provide the agency official, and, if the ACHP determines the issue warrants it, the head of the agency, with the ACHP’s opinion regarding the finding.

C. Assessment of Adverse Effects

1) Which parties does the federal agency consult with to apply the criteria of adverse effect to historic properties within the APE?

a) Off Tribal Lands

The agency consults with the SHPO and Indian tribes in applying the criteria of adverse effect to historic properties within the APE. Again, federal agencies must recognize the special expertise of Indian tribes to determine the religious and cultural significance of historic properties to them per 36 CFR 800.4(c)(1), and 36 CFR 800.5(a) requires that agencies apply the criteria of adverse effect in consultation with Indian tribes. Therefore, in assessing how a proposed undertaking might affect historic properties of religious and cultural significance to tribes located off tribal lands, federal agencies need to consider the views of tribes.

b) On Tribal Lands

On tribal lands, the agency consults with the THPO (or the designated tribal representative and the SHPO if the tribe has not assumed THPO duties)—and with any other Indian tribe that attaches religious and cultural significance to identified historic properties within the APE—in applying the criteria of adverse effect to historic properties, as is required by 36 CFR 800.5(a).

2) When proposing a finding of “no adverse effect,” does the federal agency consult with Indian tribes?

a) Off Tribal Lands

No, the agency consults with the SHPO in proposing a finding of “no adverse effect,” but notifies consulting parties such as Indian tribes, and provides them with documentation supporting that finding. The agency is encouraged, but not required, to seek the concurrence of Indian tribes that attach religious and cultural significance to the historic property subject to the finding.

b) On Tribal Lands

The agency consults with the THPO (or designated tribal official and the SHPO if the tribe has not assumed THPO duties) in proposing a finding of “no adverse effect,” and provides other consulting parties with documentation supporting that finding, as described above.

3) What happens if an Indian tribe disagrees with a finding of “no adverse effect”?

a) Off Tribal Lands
If a consulting Indian tribe disagrees with a proposed agency finding of “no adverse effect,” it must specify the reasons for its objection in writing within 30 days of receipt of the agency’s issuance of the proposed finding. Once a timely written objection is received, the agency must either consult with the objecting tribe to resolve the disagreement or request ACHP review of the “no adverse effect” finding, per 36 CFR 800.5(c)(2)(i). The agency must concurrently notify all other consulting parties that it has requested ACHP review of the finding.

Consulting Indian tribes can make a direct request to the ACHP to review the finding, specifying, in writing and within the 30 day review period, the reasons for its objection, per 36 CFR 800.5(c)(2)(iii).

After review of the objection, the ACHP may provide its opinion to the agency official, and, if the ACHP determines the issue warrants it, to the head of the agency. The regulations stipulate that if the ACHP objects to a finding on its own initiative, it must do so within 30 days of receipt of the agency’s issuance of that finding.

b) On Tribal Lands

If the THPO (or designated tribal official if the tribe has not assumed THPO duties) disagrees with a finding of “no adverse effect” within the 30 day review period, the THPO notifies the agency in writing that it disagrees and specifies the reasons for the disagreement like any other consulting party. Once a timely written objection is received, the agency must either consult with the THPO to resolve the disagreement or request ACHP review of the “no adverse effect” finding. The agency must concurrently notify all other consulting parties that it has requested ACHP review of the finding.

Consulting parties have the same rights to disagree with a “no adverse effect” finding on tribal lands as they do off tribal lands. Should another Indian tribe that is a consulting party (i.e., a tribe who attaches religious and cultural significance to a historic property located on another tribe’s lands) object to a finding of “no adverse effect,” that tribe may, just as in the case for non-tribal lands (above), file an written objection with the federal agency within the 30 day review period. Again, once a timely written objection is received from any consulting party, the agency must either consult with the objecting tribe to resolve the disagreement or request ACHP review of the “no adverse effect” finding, per 36 CFR 800.5(c)(2)(i). The agency must concurrently notify all other consulting parties that it has requested ACHP review of the finding.

Just as is the case off tribal lands, consulting Indian tribes can also make a direct request to the ACHP to review the finding, specifying, in writing and within the 30 day review period, the reasons for its objection, per 36 CFR 800.5(c)(2)(iii).

Regardless of whether the THPO (or designated tribal official) or a consulting party makes the objection to the agency finding, the ACHP’s response is the same: after review of the finding, the ACHP may provide its opinion to the agency official, and, if the ACHP determines the issue warrants it, to the head of the agency. The regulations stipulate that if the ACHP objects to a finding on its own initiative, it must do so within 30 days of receipt of the agency’s issuance of that finding.

D. Resolution of Adverse Effects

1) Which parties does the federal agency consult with to develop and evaluate alternatives or modifications to the undertakings to avoid, minimize, or mitigate adverse effects?

a) Off Tribal Lands
The agency consults with the SHPO, Indian tribes, and other consulting parties at this phase of the Section 106 process. The agency must provide project documentation to all consulting parties and invite the ACHP into consultation. Any consulting party may request ACHP participation in consultation to facilitate the resolution of adverse effects.

In fact, the Section 106 regulations at 36 CFR Section 800.2(b) stipulate that the ACHP may enter into the consultation at any point in the Section 106 process without invitation when it determines that its involvement is necessary to ensure that the purposes of Section 106 are met. As specified in Appendix A to 36 CFR Part 800, the ACHP may elect to enter the consultation if, among other things, an undertaking presents issues of concern to Indian tribes.

**b) On Tribal Lands**

On tribal lands, the process and requirements are the same as for proposed undertakings off tribal lands, except that agency consults with the THPO (or designated tribal official and SHPO if the tribe has not assumed THPO duties), and other consulting parties. Again, the agency should continue to be cognizant of any confidentiality issues—see the discussion of confidentiality at Section V(B)(4) of this handbook.

**2) What happens if agreement is reached on how to resolve adverse effects?**

**a) Off Tribal Lands**

If agreement is reached, the agency, SHPO and consulting parties, including Indian tribes, develop a Section 106 memorandum of agreement (MOA) or programmatic agreement (PA) outlining how the adverse effects will be addressed.

**b) On Tribal Lands**

The agency and the THPO (or designated tribal official and the SHPO, if the tribe has not assumed THPO duties) and consulting parties develop an MOA or a PA outlining how the adverse effects will be addressed (the decision to prepare a PA requires the agency to invite the ACHP to participate). The agency must invite the THPO/tribe to be a signatory to an MOA or PA. 36 CFR 800.2(c)(2)(ii)(F) provides that an Indian tribe that has not assumed THPO duties may notify the agency in writing that it is waiving its rights to execute an MOA for undertakings on its tribal lands.

**3) Is the federal agency obligated to invite an Indian tribe to be a signatory or a concurring party to an MOA or PA?**

**a) Off Tribal Lands**

No, the agency may, but is not required to, invite an Indian tribe to become a signatory or concurring party when the undertaking or affected historic properties are not on tribal lands. A signatory to an MOA or PA possesses the same rights with regard to seeking amendments to or terminating the agreement as all other signatories, which include the agency official, the SHPO, and the ACHP, if participating. Those that sign as a concurring party do not have such rights to amend or terminate the MOA or PA. Refusal by an Indian tribe to become a signatory or concurring party to an MOA or PA for an undertaking on non-tribal lands, however, does not invalidate it. Certainly, agencies are encouraged to invite Indian tribes that attach religious and cultural significance to affected historic properties to sign the agreement. If a tribe is assuming review or other responsibilities under the MOA or PA, the agency should consider inviting the tribe to become a signatory.
b) On Tribal Lands

MOAs and PAs for undertakings on tribal lands require that the THPO (or the designated tribal official if the tribe has not assumed THPO duties) be a signatory, with the same rights to seeking amendments to or terminating the agreement as all other signatories. The agency and the signatories may invite other consulting parties to be signatories or sign as concurring parties. Those that sign as a concurring party do not have such rights to amend or terminate the MOA or PA. 36 CFR 800.2(c)(2)(ii)(F) provides that an Indian tribe that has not assumed THPO duties may notify the agency in writing that it is waiving its rights to execute an MOA for undertakings on its tribal lands.

4) What happens if agreement is not reached on how to resolve adverse effects?

a) Off Tribal Lands

If agreement is not reached, the agency, the SHPO, or the ACHP (if participating), may terminate consultation. Other consulting parties, including Indian tribes, may decline to participate, but they cannot terminate consultation. After consultation is terminated, the ACHP prepares its formal comments to the head of the agency, who must consider the ACHP’s comments in reaching a final decision. Per the Section 106 regulations at 36 CFR Section 800.7 (c), the ACHP must provide an opportunity for the agency, all consulting parties, and the public to provide their views to the ACHP during the time in which the comments are being developed. When the ACHP issues comments, it means the full ACHP membership issues the comments, not the ACHP staff. In addition to providing the comments to the head of the agency, the ACHP shall provide copies of those comments to each of the consulting parties. Once the head of the agency has received the ACHP’s comments, he or she is required to prepare a summary of his or her final decision regarding the proposed federal undertaking that contains both the rationale for its decision as well as evidence that it had considered the ACHP’s comments when making that decision. In addition, the agency must provide copies of this summary to all consulting parties.

b) On Tribal Lands

If the agency and the THPO (or designated tribal official, if the tribe has not assumed THPO duties) fail to agree, the agency must invite the ACHP to join the consultation.

The THPO/tribe may determine that further consultation will not be productive and terminate consultation. The THPO/tribe must then notify the agency and other consulting parties of the determination and the reasons for terminating. The ACHP must then issue its comments to the head of the agency when the THPO/tribe terminates consultation because the federal agency and the ACHP cannot execute an agreement without the THPO/tribe for undertakings on or affecting historic properties on tribal lands. The procedure for the development of the ACHP’s comments and the requirements to provide copies of both ACHP comments and the agency’s summary of its final decision to consulting parties is identical to that explained in answer A) (above) for undertakings affecting historic properties off tribal lands.

5) When an undertaking takes place or affects historic properties on tribal lands, can a Section 106 agreement be concluded between the federal agency and the Indian tribe when the SHPO opts out of consultation, even though the designated tribal representative is not a THPO?

Yes, an agreement can be concluded in this circumstance because such a tribe has the same rights as a THPO, per 36 CFR 800.2(c)(2)(i)(B). An Indian tribe may reach agreement with a federal agency on the terms of a Section 106 agreement (MOA or PA). Execution of the agreement by a designated tribal
representative and the agency (along with filing the agreement with the ACHP), and agency compliance with the terms of the agreement, would complete the Section 106 process.

VI. Consultation Tools

While federal authorities direct agencies to consult and coordinate with Indian tribes on proposed actions, little guidance exists on how to carry out such consultation. On a national level, such guidance is general because of the differences between federal agencies, Indian tribes, and local circumstances.

Agreements

The Section 106 regulations at 36 CFR Section 800.2©(2)(ii)(E) provide for agreements between federal agencies and Indian tribes that tailor how consultation will be carried out. Such agreements are not project-specific but, instead, are more general and are focused on the relationship between an agency and an Indian tribe. An agreement can cover all aspects of the consultation process and could grant an Indian tribe additional rights to participate or concur in agency decisions in the Section 106 process beyond those specified in the regulations. The only restriction on the scope of such agreements is that the role of other parties in the process may not be modified without their consent.

A common misunderstanding is that such agreements are required before an agency and a tribe can enter into Section 106 consultation for individual undertakings. In fact, consultation agreements are not required but are meant to facilitate consultation.

A number of federal agencies have entered into such agreements with Indian tribes as a means not only to ensure that consultation would be carried out to the satisfaction of both parties but also as a workload management tool. Agreements can outline the areas of a state or region in which a tribe has an interest or the types of undertakings that might not require consultation with the tribe.

If an Indian tribe agrees in advance to such delegation, an agreement with the tribe would be the vehicle through which an agency could delegate the day-to-day consultation and coordination with the tribe to an applicant. The agreement itself illustrates recognition of the government-to-government relationship between the federal agency and an Indian tribe. However, absent prior agreement by a tribe, an agency cannot delegate its government-to-government consultation responsibilities to an applicant.

The negotiation process to develop an agreement with an Indian tribe does not require participation by any other parties outside of the agency (there may be other entities within the agency, such as the agency’s office of legal counsel that must participate). These agreements are, in fact, between the federal government and a sovereign nation. Therefore, unless the tribe agrees, it would be inappropriate to invite another party to participate. The only requirements for such agreements under the ACHP’s regulations are that:

- the role of other parties is not modified without their consent; and
- the agreement is filed with both the ACHP and appropriate SHPO.

Summits and Meetings

Some agencies have hosted summits with Indian tribes and continue to do so on a regular basis. These meetings provide a means for agencies to share information about proposed undertakings and for Indian

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32 An applicant may be a state agency, local government, organization, or individual seeking federal assistance, permits, licenses, and other approvals.
tribes to voice their views and talk with agency personnel. They also serve to develop trust and build relationships.

Some agencies host annual or regular meetings with Indian tribes to ensure that the consultation relationships are working and to address any outstanding issues. These gatherings are separate from Section 106 consultation meetings. They provide a forum for airing more general concerns, a means for recharging the relationship, and an opportunity to meet new agency personnel and tribal representatives.

**Guidance Materials and Training**

Many agencies have published or are currently developing various guidance materials for their staff and leadership on consultation with Indian tribes. Most of these materials are intended to serve as department or agency-wide guidance.

Training is also extremely useful in that it ensures that both federal agencies and Indian tribes have a common understanding of legal requirements, organizational structures, decision-making, and other important mechanics of the consultation relationship. Training can also address cultural issues to help foster greater mutual understanding. Some agencies have hosted joint training sessions, while others require new personnel to receive training specific to their new duties. For instance, the ACHP has an internal requirement to train all staff and members regarding tribal consultation within the Section 106 process.

On-line training resources are also becoming more prevalent. The ACHP played a large role, along with several other departments and agencies,33 in the development of the “Working Effectively With Tribal Governments” on-line training program that is available through the U.S. Office of Personnel Management’s GoLearn website. 34 This course provides content useful to all federal employees, including information essential to understanding the unique political status of federally recognized Indian tribes, an overview of federal Indian law and policies, and cultural information that can increase the quality of cross-cultural communications. Other agencies have developed agency specific on-line training, such as the course that the Federal Emergency Management Agency (FEMA) has developed for its employees on working with Indian tribes.

**VII. Principles and Tips for Successful Consultation**

The key to success in any consultation relationship is building trust, having common goals, and remaining flexible. There is no “one size fits all” model for consultation with Indian tribes—all tribes are unique, and different undertakings present different challenges. There are, however, central principles that should be kept in mind when conducting tribal consultation and this final section of the Tribal Consultation Handbook provides helpful tips on how to put them into practice.

**Respect is Essential**

- Be respectful of tribal sovereignty.

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33 Other federal departments and agencies involved in the development of the “Working Effectively With Tribal Governments” on-line training course include the Environmental Protection Agency, the Department of Justice, the Department of Interior, the U.S. Forest Service, the Small Business Administration, the General Services Administration, the Department of Health and Human Services and the Department of Energy.

34 Available at: http://www.golearn.gov
• Become aware of tribal conventions and protocols and follow them; respect tribal customs.

• Dress respectfully. Do not wear shorts, short skirts, sleeveless shirts, or shirts with plunging necklines to meetings. Check with your tribal contact as to appropriate dress for site visits or tribal events.

• Do not take photographs without obtaining permission first.

• Behavior you may perceive as normal may be insulting or offensive to others. For example, some tribes consider pointing one’s finger to be offensive, and consider a gentle handshake a sign of respect instead of a sign of weakness. Consider native perspectives and values. When in doubt, ask respectfully.

• Tribal leaders have many duties; be aware of this fact and do not demand that everyone adhere to your deadline. Instead, explain why your deadline exists, who set it, and why it is important. Above all, strive to be as flexible as possible. Look for ways to work cooperatively, because this is your undertaking and consultation is your responsibility.

• Be sensitive to time and costs. A tribe’s lack of human and financial resources may impede its representatives’ ability to respond quickly or travel to meetings. Make an effort to facilitate and support consultation with available agency resources.

• Do not voice your opinion on what is best for the tribe; that is for tribal leaders to determine.

• Be mindful of the significance of history. The history of U.S. government relations with Indian tribes may color current perceptions and attitudes and cause distrust or suspicion. Take the time to learn about the unique history of the tribe you are consulting with.

**Communication is Key**

• Communicate with tribal representatives directly whenever possible—do not rely solely on letters. Follow up written correspondence by phone or in person. Create documentation of your communications, such as notes on the content of discussions, keep phone logs, etc.

• Do not expect quick answers. Tribal officials may need time to consult with others, including tribal councils or the head of the tribal government. Make sure you understand the timelines for tribal decision-making.

• Do not assume silence means concurrence; it could signal disagreement. Always verify views with the official tribal representative.

• Always ask tribal representatives about their preferred way of doing business and any specific tribal protocols for meetings. Be aware that the cultural norms of tribal citizens may be different from yours, and that each of the more than 560 Indian tribes has a unique culture and heritage.

• Do not assume everyone is the same. For example, traditional cultural authorities may sometimes have perspectives that differ from those of their tribal governments. It is important to listen to all consultation participants, but also to be sure that you understand the position of the elected tribal leadership on every issue.
● Develop points of contact through the tribal government. Do research ahead of time to find out whom you will be consulting with and their tribal positions, then make the effort to get to know them. Tribal governments may consist of elected leadership (tribal leader, tribal council, tribal courts), traditional leaders (treaty councils, tribal elders, spiritual leaders), and tribal administration (program managers, administrators, and staff).

● Be mindful of appropriate behaviors—be sure to demonstrate respect to tribal leaders just as you would to a leader of a foreign nation. Always show deference toward tribal elders and allow them plenty of time to speak first. Do not interrupt or raise your voice. Learn by observation and by talking to others. Again, when in doubt, ask respectfully.

**Consultation: Early and Often**

● Make sure you identify and initiate consultation with tribes at the *start* of the planning process for your agency’s undertaking.

● Suggest a process for consultation and discuss it with the tribes. Collaborate in a way that accommodates tribal protocols and schedules. The ACHP regulations at 36 CFR Section 800.2(c)(2)(ii)(E) provide for agreements with tribes that set out procedures for Section 106 consultation and can address tribal concerns about confidentiality of information.

● Consider establishing an on-going working group that can provide continuity for future undertakings by your agency.

● Focus on partnerships rather than on project-by-project coordination.

● Remember to document all correspondence, follow-up telephone calls, consultation meetings and visits to project sites and reservations. Be sure to include the content of your communications in your documentation.

● Find out if the tribal leadership wants to receive additional copies of all the consultation materials and documentation that you are providing to the tribe’s designated representative (THPO, or cultural resources staff person) as part of your consultation.

● Ask tribal representatives to keep you up-to-date on any changes to tribal postal or email addresses and contact information for new tribal leadership.

**Effective Meetings are a Primary Component of Successful Consultation**

● Develop an understanding of the tribe’s decision-making process and get to know its decision makers.

● Offer to go on-site with traditional authorities. Some people may be uncomfortable relying solely on maps, and site visits may stimulate consideration of alternatives.

● Do not create expectations or make commitments that you are unable or unwilling to fulfill. Before entering into consultation, be certain that what you are negotiating is supported by the Office of General Counsel or Solicitor of your agency, and anyone else who will need to review and approve your position.
• Do not set your own meeting agenda without consulting with tribal representatives to learn what they expect the process and substance to be. Tribes may have their own ways of conducting meetings.

• Inform tribal representatives in advance of the meeting’s goal and what needs to be accomplished in the time you have, so that participants can stay focused. Like you, tribal representatives are there to work and accomplish results.

• Give plenty of notice beforehand so that tribal representatives have adequate time to prepare. Provide participants with maps, hotel information, a list of all attendees, an agenda, and most importantly, complete project documentation.

• Speak to tribal members by phone beforehand so that you know who will be attending the meeting. Allow tribes to send as many representatives as they wish, but explain any limitations that your agency may have with funding travel.

• Check if anyone has special needs. Some tribal elders may need special accommodations.

• Offer the tribal participants the opportunity to make an opening or welcoming statement.

• Make sure you invite tribal representatives to sit at the table with you, and introduce all participants with their proper titles. Check with your tribal contact beforehand so you know if certain officials or elders should be introduced and acknowledged first.

• Review your agency’s mission and operations at the start of the meeting. Do not assume that everyone knows how your agency functions or is familiar with all of the programs it oversees.

• Take accurate notes during the meeting, or, if the tribe agrees in advance, arrange for meetings to be recorded (it is still advisable to take notes to avoid problems should a recording be lost or damaged). It is important to document not only that you have consulted with the tribe, but the substance of the meeting and the views and concerns expressed by the tribe, as well. Be sensitive to the issue of confidentiality, which may require that you switch the recorder off, or to omit certain sensitive information from your notes if the tribe so requests. Documenting meeting content ensures that participants can later review and correct any inaccuracies, and also provides the agency with a solid consultation record.

• Remember that consent by one tribal member does not necessarily mean consent by the tribe. Make sure that the tribe’s governing body has approved final decisions.

• Be prepared on the issues and be open to tribal perspectives.

Conclusion

We hope this handbook has been helpful. If needed, you may obtain further assistance from the ACHP in understanding and interpreting the requirements of Section 106, including tribal consultation. For general information, please visit the ACHP web site at www.achp.gov.
MEETING THE “REASONABLE AND GOOD FAITH” IDENTIFICATION STANDARD
IN SECTION 106 REVIEW

The regulations implementing Section 106 of the National Historic Preservation Act (“Protection of Historic Properties,” 36 CFR Part 800) require federal agencies to identify historic properties within the Area of Potential Effects (APE) that may be affected by their undertakings. Section 800.4(b)(1) of these regulations states that federal agency officials shall make a “reasonable and good faith effort” to identify historic properties.

The ACHP is regularly asked how to determine when an adequate identification effort has been made—that is, at what point a federal agency has made a reasonable and good faith effort to determine whether historic properties are located within an undertaking’s APE, which is the “geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist.” Answering this question requires an understanding of what the ACHP’s regulations say regarding the identification of historic properties.

Prior to beginning the identification stage in the Section 106 process, the regulations (36 CFR § 800.4) require the federal agency to do the following:

- Determine and document the APE in order to define where the agency will look for historic properties that may be directly or indirectly affected by the undertaking;
- Review existing information on known and potential historic properties within the APE, so the agency will have current data on what can be expected, or may be encountered, within the APE;
- Seek information from others who may have knowledge of historic properties in the area. This includes the State Historic Preservation Officer (SHPO)/Tribal Historic Preservation Officer (THPO) and, as appropriate, Indian tribes or Native Hawaiian organizations who may have concerns about historic properties of religious and cultural significance to them within the APE.

Following these initial steps, the regulations (36 CFR § 800.4(b)(1)) set out several factors the agency must consider in determining what is a “reasonable and good faith effort” to identify historic properties. They call for the agency official to “take into account past planning, research and studies; the magnitude and nature of the undertaking and the degree of federal involvement; the nature and extent of potential effects on historic properties; and the likely nature and location of historic properties within the APE. The Secretary of the Interior’s standards and guidelines for identification provide guidance on this subject. The agency official should also consider other applicable professional, state, tribal, and local laws, standards, and guidelines. The regulations note that a reasonable and good faith effort may consist of or include “background research, consultation, oral history interviews, sample field investigation, and field survey.”
When asked to provide its advisory opinion (pursuant to 36 CFR § 800.2(b)(2)) on the adequacy of a specific identification effort, the ACHP will evaluate the agency’s efforts in light of these factors and the following criteria.

1. **The identification effort is reasonable** when it is logically designed to identify eligible properties that may be affected by the undertaking, without being excessive or inadequate in light of the factors cited above. While it may be appropriate in some circumstances to identify all historic properties in the APE, it is important to note that the regulations do not require identification of all properties. A reasonable identification plan is one that includes the following:

   - Documentation of the horizontal and vertical extent of the APE that accounts for direct and indirect effects;
   - An explanation of how the factors cited above inform the content and intensity of the identification plan. This could include information on past work in the area, scope of federal involvement in the undertaking, and the undertaking’s magnitude and anticipated effects on any historic properties that might exist in the APE;
   - A review of existing information on historic properties within the APE, including information about possible historic properties not yet identified;
   - A cognizance of applicable professional, state, tribal, and local laws, standards, and guidelines;
   - A familiarity with methodologies used in other historic property surveys in the area that have been effective in terms of time and cost;
   - A clear description of the steps that will be taken during field investigations, during the analysis of field results, and in the subsequent reporting and consultation, to determine the presence or absence of historic properties within the APE.

2. **The identification effort is carried out in good faith** when it is fully implemented by or on behalf of the federal agency. An identification plan that is appropriate to the nature and scale of the undertaking is carried out in good faith when it meets the following criteria:

   - The plan is carried out in consultation with, as appropriate, the SHPO, THPO, and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to historic properties within the APE;
   - Is initiated in a timely manner that allows for appropriate analysis and reporting, with adequate time for review by the consulting parties;
   - Is carried out by a qualified individual or individuals who meet the Secretary of the Interior’s qualification standards and have a demonstrated familiarity with the range of potentially historic properties that may be encountered, and their characteristics;
   - Acknowledges the special expertise possessed by Indian tribes and Native Hawaiian organizations in assessing the eligibility of historic properties that may possess religious and cultural significance to them (regardless of whether or not such tribes and organizations meet the Secretary’s qualification standards);
   - Is fully supported by adequate funding and other necessary resources, and
   - Is not compromised by lack of integrity or omission, such as manipulating or ignoring evidence.

Note that the regulations require that a reasonable and good faith effort to identify historic properties include some level of effort—at a minimum, a review of existing information on historic properties that are located or may be located within the APE (36 CFR § 800.4(a)(2)). Such an effort may consist of one or more methodologies and should be designed so that the federal agency can ensure that it produces enough information, in enough detail, to determine what the undertaking’s effects will likely be on historic properties.
It is also important to keep in mind what a reasonable and good faith identification effort does not require:

- The “approval” of a SHPO/THPO or other consulting party. The ACHP, SHPO/THPO and other consulting parties advise and assist the federal agency official in developing its identification efforts, but do not dictate its scope or intensity.
- Identification of every historic property within the APE. One of the reasons the ACHP’s regulations contain a post-review discovery provision (36 CFR § 800.13) is that a reasonable and good faith effort to identify historic properties may well not be exhaustive and, therefore, some properties might be identified as the project is implemented.
- Investigations outside of, or below, a properly documented APE. The Section 106 process does not require that the agency search for all historic properties in a given area. Because the APE defines the geographic limits of federal agency responsibility for purposes of Section 106 review, identification efforts are carried out within its boundaries.
- Ground verification of the entire APE. In many cases, areas can be considered to have a certain probability of containing historic properties based on current knowledge. This or similar characterizations can be used to justify where within the APE most identification efforts will or should be targeted. Predictive models that have been tested and found to be reasonably efficient can also assist federal agencies to meet the “reasonable and good faith” identification standard.

In sum, the Section 106 regulations require federal agencies to make a “reasonable and good faith effort” to identify historic properties that may be affected by their undertakings. The regulations set out several factors that need to be considered in making the effort both reasonable in terms of intensity and scale, and carried out in good faith through its development and execution. The ACHP’s online archaeology guidance provides further detailed discussion on how these factors can be applied to archaeological sites to ensure Section 106 identification plans are adequate and appropriate to a given situation (http://www.achp.gov/archguide/). The ACHP’s professional staff is also available to assist agencies, SHPOs/THPOs, consultants, and contractors in interpreting the reasonable and good faith standard when questions or disputes arise.
Guidelines for Evaluating and Documenting
Traditional Cultural Properties
The mission of the Department of the Interior is to protect and provide access to our Nation’s natural and cultural heritage and honor our trust responsibilities to tribes.

This material is partially based upon work conducted under a cooperative agreement with the National Conference of State Historic Preservation Officers and the U.S. Department of the Interior.

Cover photographs:

Many traditional cultural properties are used for practical purposes by those who value them. This sedge preserve in northern California, for example, is tended and harvested by Pomo Indian basketmakers as a vital source of material for making their world famous baskets. The preserve was established at Lake Sonoma by the U.S. Army Corps of Engineers. (Richard Lerner)

This bedrock mortar in central California plays an essential role in processing Black Oak acorns. (Theodorus Cultural Research)
NATIONAL REGISTER
BULLETIN

GUIDELINES FOR EVALUATING
AND DOCUMENTING
TRADITIONAL CULTURAL PROPERTIES

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U.S. DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
NATIONAL REGISTER, HISTORY AND EDUCATION
NATIONAL REGISTER OF HISTORIC PLACES

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I. INTRODUCTION

WHAT ARE TRADITIONAL CULTURAL PROPERTIES?

The National Register of Historic Places contains a wide range of historic property types, reflecting the diversity of the nation's history and culture. Buildings, structures, and sites; groups of buildings, structures or sites forming historic districts; landscapes; and individual objects are all included in the Register if they meet the criteria specified in the National Register's Criteria for Evaluation (36 CFR 60.4). Such properties reflect many kinds of significance in architecture, history, archaeology, engineering, and culture.

There are many definitions of the word "culture," but in the National Register programs the word is understood to mean the traditions, beliefs, practices, lifeways, arts, crafts, and social institutions of any community, be it an Indian tribe, a local ethnic group, or the people of the nation as a whole.\(^1\) One kind of cultural significance a property may possess, and that may make it eligible for inclusion in the Register, is traditional cultural significance. "Traditional" in this context refers to those beliefs, customs, and practices of a living community of people that have been passed down through the generations, usually orally or through practice. The traditional cultural significance of a historic property, then, is significance derived from the role the property plays in a community's historically rooted beliefs, customs, and practices. Examples of properties possessing such significance include:

- a location associated with the traditional beliefs of a Native American group about its origins, its cultural history, or the nature of the world;
- a rural community whose organization, buildings and structures, or patterns of land use reflect the cultural traditions valued by its long-term residents;
- an urban neighborhood that is the traditional home of a particular cultural group, and that reflects its beliefs and practices;
- a location where Native American religious practitioners have historically gone, and are known or thought to go today, to perform ceremonial activities in accordance with traditional cultural rules of practice; and
- a location where a community has traditionally carried out economic, artistic, or other cultural practices important in maintaining its historic identity.

A traditional cultural property, then, can be defined generally as one that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community. Various kinds of traditional cultural properties will be discussed, illustrated, and related specifically to the National Register Criteria later in this bulletin.

\(^1\) For a detailed definition, see Appendix I.

Numerous African Americans left the South to migrate to the Midwest. The A.M.E. Church (on left) and District No. 1 School remain in Nicodemus Historic District in Nicodemus, Kansas, which was declared a National Historic Landmark by the Secretary of the Interior in 1976. (Clayton B. Fraser for the Historic American Buildings Survey)
PURPOSE OF THIS BULLETIN

Traditional cultural values are often central to the way a community or group defines itself, and maintaining such values is often vital to maintaining the group's sense of identity and self respect. Properties to which traditional cultural value is ascribed often take on this kind of vital significance, so that any damage to or infringement upon them is perceived to be deeply offensive to, and even destructive of, the group that values them. As a result, it is extremely important that traditional cultural properties be considered carefully in planning: hence it is important that such properties, when they are eligible for inclusion in the National Register, be nominated to the Register or otherwise identified in inventories for planning purposes.

Traditional cultural properties are often hard to recognize. A traditional ceremonial location may look like merely a mountaintop, a lake, or a stretch of river; a culturally important neighborhood may look like any other aggregation of houses, and an area where culturally important economic or artistic activities have been carried out may look like any other building, field of grass, or piece of forest in the area. As a result, such places may not necessarily come to light through the conduct of archeological, historical, or architectural surveys. The existence and significance of such locations often can be ascertained only through interviews with knowledgeable users of the area, or through other forms of ethnographic research. The subtlety with which the significance of such locations may be expressed makes it easy to ignore them; on the other hand it makes it difficult to distinguish between properties having real significance and those whose putative significance is spurious. As a result, clear guidelines for evaluation of such properties are needed.

In the 1980 amendments to the National Historic Preservation Act, the Secretary of the Interior, with the American Folklife Center, was directed to study means of:

- preserving and conserving the intangible elements of our cultural heritage such as arts, skills, folklife, and folkways...

...and to recommend ways to:

- preserve, conserve, and encourage the continuation of the diverse traditional prehistoric, historic, ethnic, and folk cultural traditions that underlie and are a living expression of our American heritage. (NHPA 502; 16 U.S.C. 470a note)

The report that was prepared in response to 502, entitled Cultural Conservation, was submitted to the President and Congress on June 1, 1983, by the Secretary of the Interior. The report recommended in general that traditional cultural resources, both those that are associated with historic properties and those without specific property referents, be more systematically addressed in implementation of the National Historic Preservation Act and other historic preservation authorities. In transmitting the report, the Secretary directed the National Park Service to take several actions to implement its recommendations. Among other actions, the Service was directed to prepare guidelines to assist in the documentation of intangible cultural resources, to coordinate the incorporation of provisions for the consideration of such resources into Departmental planning documents and administrative manuals, and to encourage the identification and documentation of such resources by States and Federal agencies.

This bulletin has been developed as one aspect of the Service's response to the Cultural Conservation report and the Secretary's direction. It is intended to be an aid in determining whether properties thought or alleged to have traditional cultural significance are eligible for inclusion in the National Register. It is meant to assist Federal agencies, State Historic Preservation Officers (SHPOs), Certified Local Governments, Indian Tribes, and other historic preservation practitioners who need to evaluate such properties when nominating them for inclusion in the National Register or when considering their eligibility for the Register as part of the review process prescribed by the Advisory Council on Historic Preservation under 106 of the National Historic Preservation Act. It is designed to supplement other National Register guidance, particularly How to Apply the National Register Criteria for Evaluation and Guidelines for Completing National Register of Historic Places Forms. It should be used in conjunction with these two Bulletins and other applicable guidance available from the National Register, when applying the National Register Criteria and preparing documentation to support nominations or determinations that a given property is or is not eligible for inclusion in the Register.

This Bulletin is also responsive to the American Indian Religious Free-
dom Act (AIRFA) of 1978, which requires the National Park Service, like other Federal agencies, to evaluate its policies and procedures with the aim of protecting the religious freedoms of Native Americans (Pub. L. 95-341). Examination of the policies and procedures of the National Register suggests that while they are in no way intended to be so interpreted, they can be interpreted by Federal agencies and others in a manner that excludes historic properties of religious significance to Native Americans from eligibility for inclusion in the National Register. This in turn may exclude such properties from the protections afforded by 106, which may result in their destruction, infringing upon the rights of Native Americans to use them in the free exercise of their religious. To minimize the likelihood of such misinterpretation, this Bulletin gives special attention to properties of traditional cultural significance to Native American groups, and to discussing the place of religion in the attribution of such significance.

The fact that this Bulletin gives special emphasis to Native American properties should not be taken to imply that only Native Americans ascribe traditional cultural value to historic properties, or that such ascription is common only to ethnic minority groups in general. Americans of every ethnic origin have properties to which they ascribe traditional cultural value, and if such properties meet the National Register criteria, they can and should be nominated for inclusion in the Register.

This Bulletin does not address cultural resources that are purely "intangible"—i.e. those that have no property referents—except by exclusion. The Service is committed to ensuring that such resources are fully considered in planning and decision making by Federal agencies and others. Historic properties represent only some aspects of culture, and many other aspects, not necessarily reflected in properties as such, may be of vital importance in maintaining the integrity of a social group. However, the National Register is not the appropriate vehicle for recognizing cultural values that are purely intangible, nor is there legal authority to address them under 106 unless they are somehow related to a historic property.

The National Register lists, and 106 requires review of effects on, tangible cultural resources—that is, historic properties. However, the attributes that give such properties significance, such as their association with historical events, often are intangible in nature. Such attributes cannot be ignored in evaluating and managing historic properties; properties and their intangible attributes of significance must be considered together.

This Bulletin is meant to encourage its users to address the intangible cultural values that may make a property historic, and to do so in an evenhanded way that reflects solid research and not ethnocentric bias.

Finally, no one should regard this Bulletin as the only appropriate source of guidance on its subject, or interpret it rigidly. Although traditional cultural properties have been listed and recognized as eligible for inclusion in the National Register since the Register's inception, it is only in recent years that organized attention has been given to them. This Bulletin represents the best guidance the Register can provide as of the late 1980s, and the examples listed in the bibliography include the best known at this time. It is to be expected that approaches to such properties will continue to evolve. This Bulletin also is meant to supplement, not substitute for, more specific guidelines, such as those used by the National Park Service with respect to units of the National Park System and those used by some other agencies, States, local governments, or Indian tribes with respect to their own lands and programs.

It is notable that most of these examples are unpublished manuscripts. The literature pertaining to the identification and evaluation of traditional cultural properties, to say nothing of their treatment, remains a thin one.

These sandbars in the Rio Grande River are eligible for inclusion in the National Register because they have been used for generations by the people of Sandia Pueblo for rituals involving immersion in the river's waters. (Thomas F. King)
ETTHNOGRAPHY, ETHNOHISTORY, ETHNOCENTRISM

Three words beginning with "ethno" will be used repeatedly in this Bulletin, and may not be familiar to all readers. All three are derived from the Greek ethnos, meaning "nation;" and are widely used in the study of anthropology and related disciplines.

Ethnography is the descriptive and analytic study of the culture of particular groups or communities. An ethnographer seeks to understand a community through interviews with its members and often through living in and observing it (a practice referred to as "participant observation").

Ethnohistory is the study of historical data, including but not necessarily limited to, documentary data pertaining to a group or community, using an ethnographic perspective.

Ethnographic and ethnohistorical research are usually carried out by specialists in cultural anthropology, and by specialists in folklore and folklife, sociology, history, archeology and related disciplines with appropriate technical training.

Ethnocentrism means viewing the world and the people in it only from the point of view of one's own culture and being unable to sympathize with the feelings, attitudes, and beliefs of someone who is a member of a different culture. It is particularly important to understand, and seek to avoid, ethnocentrism in the evaluation of traditional cultural properties. For example, Euroamerican society tends to emphasize "objective" observation of the physical world as the basis for making statements about that world. However, it may not be possible to use such observations as the major basis for evaluating a traditional cultural property. For example, there may be nothing observable to the outsider about a place regarded as sacred by a Native American group. Similarly, such a group's belief that its ancestors emerged from the earth at a specific location at the beginning of time may contradict Euroamerican science's belief that the group's ancestors migrated to North America from Siberia. These facts in no way diminish the significance of the locations in question in the eyes of those who value them; indeed they are irrelevant to their significance. It would be ethnocentric in the extreme to say that "whatever the Native American group says about this place, I can't see anything here so it is not significant" or "since I know these people's ancestors came from Siberia, the place where they think they emerged from the earth is of no significance." It is vital to evaluate properties thought to have traditional cultural significance from the standpoint of those who may ascribe such significance to them, whatever one's own perception of them, based on one's own cultural values, may be. This is not to say that a group's assertions about the significance of a place should not be questioned or subjected to critical analysis, but they should not be rejected based on the premise that the beliefs they reflect are inferior to one's own.

EVALUATION, CONSIDERATION, AND PROTECTION

One more point that should be remembered in evaluating traditional cultural properties—as in evaluating any other kind of properties—is that establishing that a property is eligible for inclusion in the National Register does not necessarily mean that the property must be protected from disturbance or damage. Establishing that a property is eligible means that it must be considered in planning Federal, federally assisted, and federally licensed undertakings, but it does not mean that such an undertaking cannot be allowed to damage or destroy it. Consultation must occur in accordance with the regulations of the Advisory Council (36 CFR Part 800) to identify, and if feasible adopt, measures to protect it, but if in the final analysis the public interest demands that the property be sacrificed to the needs of the project, there is nothing in the National Historic Preservation Act that prohibits this.

This principle is especially important to recognize with respect to traditional cultural properties, because such properties may be valued by a relatively small segment of a community that, on the whole, favors a project that will damage or destroy it. The fact that the community as a whole may be willing to dispense with the property in order to achieve the goals of the project does not mean that the property is not significant, but the fact that it is significant does not mean that it cannot be disturbed, or that the project must be foregone.

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3 For a detailed discussion of the qualifications that a practitioner of ethnography or ethnohistory should possess, see Appendix II.
Traditional cultural properties, and the beliefs and institutions that give them significance, should be systematically addressed in programs of preservation planning and in the historic preservation components of land use plans. One very practical reason for this is to simplify the identification and evaluation of traditional cultural properties that may be threatened by construction and land use projects. Identifying and evaluating such properties can require detailed and extensive consultation, interview programs, and ethnographic fieldwork as discussed below. Having to conduct such activities may add considerably to the time and expense of compliance with 106, the National Environmental Policy Act, and other authorities. Such costs can be reduced significantly, however, by early, proactive planning that identifies significant properties or areas likely to contain significant properties before specific projects are planned that may affect them, identifies parties likely to ascribe cultural value to such properties, and establishes routine systems for consultation with such parties.

The Secretary of the Interior’s Standards for Preservation Planning provide for the establishment of “historic contexts” as a basic step in any preservation planning process be it planning for the comprehensive survey of a community or planning a construction project. A historic context is an organization of available information about, among other things, the cultural history of the area to be investigated, that identifies “the broad patterns of development in an area that may be represented by historic properties” (48 FR 44717). The traditions and traditional lifeways of a planning area may represent such “broad patterns,” so information about them should be used as a basis for historic context development.

The Secretary of the Interior’s Guidelines for Preservation Planning emphasize the need for organized public participation in context development (48 FR 44717). The Advisory Council on Historic Preservation’s Guidelines for Public Participation in Historic Preservation Review (ACHP 1988) provide detailed recommendations regarding such participation. Based on these standards and guidelines, groups that may ascribe traditional cultural values to an area’s historic properties should be contacted and asked to assist in organizing information on the area. Historic contexts should be considered that reflect the history and culture of such groups as the groups themselves understand them, as well as their history and culture as defined by Euroamerican scholarship, and processes for consultation with such groups should be integrated into routine planning and project review procedures.
III. IDENTIFYING TRADITIONAL CULTURAL PROPERTIES

Some traditional cultural properties are well known to the residents of an area. The San Francisco Peaks in Arizona, for example, are extensively documented and widely recognized as places of extreme cultural importance to the Hopi, Navajo, and other American Indian people of the Southwest, and it requires little study to recognize that Honolulu's Chinatown is a place of cultural importance to the city's Asian community. Most traditional cultural properties, however, must be identified through systematic study, just as most other kinds of historic properties must be identified. This section of the Bulletin will discuss some factors to consider in identifying traditional cultural properties.  

ESTABLISHING THE LEVEL OF EFFORT

Any comprehensive effort to identify historic properties in an area, be the area a community, a rural area, or the area that may be affected by a construction or land-use project, should include a reasonable effort to identify traditional cultural properties. What constitutes a "reasonable" effort depends in part on the likelihood that such properties may be present. The likelihood that such properties may be present can be reliably assessed only on the basis of background knowledge of the area's history, ethnography, and contemporary society developed through preservation planning. As a general although not in-
variable rule, however, rural areas are
more likely than urban areas to con-
tain properties of traditional cultural
importance to American Indian or
ethnic and other traditional neighbor-
hoods.

Where identification is conducted as part of planning for a construction or land-use project, the appropriate
level of effort depends in part on
whether the project under consider-
ation is the type of project that could
affect traditional cultural properties.
For example, as a rule the rehabilita-
tion of historic buildings may have
relatively little potential for effect on
such properties. However, if a reha-
bilitation project may result in dis-
placement of residents, "gentrification"
of a neighborhood, or other sociocul-
tural impacts, the possibility that the
buildings to be rehabilitated, or the
neighborhood in which they exist,
may be ascribed traditional cultural
value by their residents or others
should be considered. Similarly, most
day-to-day management activities of a
land managing agency may have little
potential for effect on traditional cul-
tural properties, but if the manage-
ment activity involves an area or a
kind of resource that has high signifi-
cance to a traditional group—for ex-
ample, timber harvesting in an area
where an Indian tribe’s religious prac-
titioners may continue to carry out tra-
ditional ceremonies—the potential for
effect will be high.

These general rules of thumb aside,
the way to determine what constitutes
a reasonable effort to identify tradi-
tional cultural properties is to consult
those who may ascribe cultural signifi-
cance to locations within the study
area. The need for community partici-
pation in planning identification, as in
other forms of preservation planning,
cannot be over-emphasized.

BACKGROUND RESEARCH

An important first step in identifying
such individuals and groups is to
conduct background research into
what is already recorded about the
area’s history, ethnography, sociol-
y, and folklife. Published and un-
published source material on the his-
toric and contemporary composition
of the area’s social and cultural
groups should be consulted; such
source material can often be found in
the anthropology, sociology, or
folklife libraries of local universities
or other academic institutions. Pro-
fessional and nonprofessional stu-
dents of the area’s social and cultural
groups should also be consulted—for
example, professional and avocational
anthropologists and folklorists who
have studied the area. The SHPO and
any other official agency or organiza-
tion that concerns itself with matters
of traditional culture—for example, a
State Folklorist or a State Native
American Commission—should be
contacted for recommendations about
sources of information and about
groups and individuals to consult.

MAKING CONTACT

Having reviewed available back-
ground data, the next step is to con-
tact knowledgeable groups and indi-
viduals directly, particularly those
groups that are native to the area or
have resided there for a long time.
Some such groups have official repre-

CONTACTING TRADITIONAL COMMUNITIES AND GROUPS

An early step in any effort to iden-
tify historic properties is to consult
with groups and individuals who
have special knowledge about and in-

Federal agencies and others have found a variety of ways to contact
knowledgeable parties in order to identify and evaluate traditional cul-
tural properties. Generally speaking, the detail and complexity of the
methods employed depend on the nature and complexity of the prop-
ties under consideration and the effects the agency’s management or
other activities may have on them. For example:

• The Black Hills National Forest designated a culturally sensitive engi-
neer to work with local Indian tribes in establishing procedures by
which the tribes could review Forest Service projects that might affect
traditional cultural properties;

• The Air Force sponsored a conference of local traditional cultural au-
thorities to review plans for deployment of an intercontinental missile
system in Wyoming, resulting in guidelines to ensure that effects on
traditional cultural properties would be minimized.

• The New Mexico Power Authority employed a professional cultural
anthropologist to consult with Native American groups within the
area to be affected by the Four Corners Power Project.

• The Ventura County (California) Flood Control Agency consulted with
local Native American groups designated by the State Native Ameri-
can Heritage Commission to determine how to handle human remains
to be exhumed from a cemetery that had to be relocated to make way
for a flood control project.

• The Utah State Historic Preservation Officer entered into an agreement
with the American Folklife Center to develop a comprehensive over-
view of the tangible and intangible historic resources of Grouse Creek,
a traditional Mormon cowboy community.

• The Forest Service contracted for a full-scale ethnographic study to de-
terminate the significance of the Helkau Historic District on California’s
Six Rivers National Forest.
sentatives—the tribal council of an Indian tribe, for example, or an urban neighborhood council. In other cases, leadership may be less officially defined, and establishing contact may be more complicated. The assistance of ethnographers, sociologists, folklorists, and others who may have conducted research in the area or otherwise worked with its social groups may be necessary in such cases, in order to design ways of contacting and consulting such groups in ways that are both effective and consistent with their systems of leadership and communication.

It should be clearly recognized that expertise in traditional cultural values may not be found, or not found solely, among contemporary community leaders. In some cases, in fact, the current political leadership of a community or neighborhood may be hostile to or embarrassed about traditional matters. As a result, it may be necessary to seek out knowledgeable parties outside the community’s official political structure. It is of course best to do this with the full knowledge and cooperation of the community’s contemporary leaders; in most cases it is appropriate to ask such leaders to identify members of the community who are knowledgeable about traditional cultural matters, and use these parties as an initial network of consultants on the group’s traditional values. If there is serious hostility between the group’s contemporary leadership and its traditional experts, however, such cooperation may not be extended, and efforts to consult with traditional authorities may be actively opposed. Where this occurs, and it is necessary to proceed with the identification and evaluation of properties—for example, where such identification and evaluation are undertaken in connection with review of an undertaking under 106—careful negotiation and mediation may be necessary to overcome opposition and establish mutually acceptable ground rules for consultation. Again, the assistance of anthropologists or others with training and experience in work with the community, or with similar communities, may be necessary.

FIELDWORK

Fieldwork to identify properties of traditional cultural significance involves consultation with knowledgeable parties, coupled with field inspection and recordation of locations identified as significant by such parties. It is often appropriate and efficient to combine such fieldwork with surveys to identify other kinds of historic properties, for example archeological sites and properties of architectural significance. If combined fieldwork is conducted, however, the professional standards appropriate to each kind of fieldwork should be adhered to, and appropriate expertise in each relevant discipline should be represented on the study team. The kinds of expertise typically needed for a detailed ethnographic study of traditional cultural properties are outlined in Appendix II. Applicable research standards can be found in Systematic Fieldwork, Volume 2: Ethnographic Analysis and Data Management. (Werner and Schoepfle 1986)

CULTURALLY SENSITIVE CONSULTATION

Since knowledge of traditional cultural values may not be shared readily with outsiders, knowledgeable parties should be consulted in cultural contexts that are familiar and reasonable to them. It is important to understand the role that the information being solicited may play in the culture of those from whom it is being solicited, and the kinds of rules that may surround its transmittal. In some societies traditional information is regarded as powerful, even dangerous. It is often believed that such information should be transmitted only under particular circumstances or to particular kinds of people. In some cases information is regarded as a valued commodity for which payment is in order, in other cases offering payment may be offensive. Sometimes information may be regarded as a gift, whose acceptance obligates the receiver to reciprocate in some way, in some cases by carrying out the activity to which the information pertains.

It may not always, or even often, be possible to arrange for information to be sought in precisely the way those being consulted might prefer, but when it is not, the interviewer should clearly understand that to some extent he or she is asking those interviewed to violate their cultural norms. The interviewer should try to keep such violations to a minimum, and should be patient with the reluctance that those interviewed may feel toward sharing information under conditions that are not fully appropriate from their point of view.

Culturally sensitive consultation may require the use of languages other than English, the conduct of
community meetings in ways consistent with local traditional practice, and the conduct of studies by trained ethnographers, ethnohistorians, sociologists, or folklorists with the kinds of expertise outlined in Appendix II. Particularly where large projects or large land areas are involved, or where it is likely that particularly sensitive resources may be at issue, formal ethnographic studies should be carried out, by or under the supervision of a professionally qualified cultural anthropologist.

FIELD INSPECTION AND RECORDATION

It is usually important to take knowledgeable consultants into the field to inspect properties that they identify as significant. In some cases such properties may not be discernible as such to anyone but a knowledgeable member of the group that ascribes significance to them; in such cases it may be impossible even to find the relevant properties, or locate them accurately, without the aid of such parties. Even where a property is readily discernible as such to the outside observer, visiting the property may help a consultant recall information about it that he or she is unlikely to recall during interviews at a remote location, thus making for a richer and more complete record.

Where the property in question has religious significance or supernatural connotations, it is particularly important to ensure that any visit is carried out in accordance with appropriate modes of behavior. In some cases, ritual purification is necessary before a property can be approached, or spirits must be propitiated along the way. Some groups forbid visits to such locations by menstruating women or by people of inappropriate ages. The taking of photographs or the use of electronic recording equipment may not be appropriate. Appropriate ways to approach the property should be discussed with knowledgeable consultants before undertaking a field visit.

To the extent compatible with the cultural norms of the group involved, traditional cultural properties should be recorded on National Register of Historic Places forms or their equivalent. Where items normally included in a National Register nomination or request for a determination of eligibility cannot be included (for example, if it is culturally inappropriate to photograph the property), the reasons for not including the item should be explained. To the extent possible in the property’s cultural context, other aspects of the documentation (for example, verbal descriptions of the property) should be enhanced to make up for the items not included.

If making the location of a property known to the public would be culturally inappropriate, or compromise the integrity of the property or associated cultural values (for example, by encouraging tourists to intrude upon the conduct of traditional practices), the “Not for Publication” box on the National Register form should be checked; this indicates that the reproduction of locational information is prohibited, and that other information contained in the nomination will not be reproduced without the permission of the nominating authority. In the case of a request for a determination of eligibility in which a National Register form is not used, the fact that the information is not for publication should be clearly specified in the documentation, so that the National Register can apply the same controls to this information as it would to restricted information in a nomination.

RECONCILING SOURCES

Sometimes an apparent conflict exists between documentary data on traditional cultural properties and the testimony of contemporary consultants. The most common kind of conflict occurs when ethnographic and ethnohistorical documents do not identify a given place as playing an important role in the tradition and culture of a group, while contemporary members of the group say the property does have such a role. More rarely, documentary sources may indicate that a property does have cultural significance while contemporary sources say it does not. In some cases, too, contemporary sources may disagree about the significance of a property.

Much of the significance of traditional cultural properties can be learned only from testimony of the traditional people who value them, like this old man being interviewed in Truk. (Micronesia Institute)

5 For general instructions on the completion of National Register documentation, see How to Complete the National Register of Historic Places Form.

6 Section 304 of the National Historic Preservation Act provides the legal authority to withhold National Register information from the public when release might "create a substantial risk of harm, theft, or destruction." For detailed guidelines concerning restricting access to information see the National Register bulletin entitled, Guidelines for Restricting Information About Historic and Prehistoric Resources.
Where available documents fail to identify a property as culturally significant, but contemporary sources identify it as such, several points should be considered.

(a) Ethnographic and ethnohistorical research has not been conducted uniformly in all parts of the nation; some areas are better documented than others simply because they have been the focus of more research.

(b) Ethnographic and ethnohistorical documents reflect the research interests of those who prepared them; the fact that one does not identify a property as culturally important may reflect only the fact that the individual who prepared the report had research interests that did not require the identification of such properties.

(c) Some kinds of traditional cultural properties are regarded by those who value them as the loci of supernatural or other power, or as having other attributes that make people reluctant to talk about them. Such properties are not likely to be recorded unless someone makes a very deliberate effort to do so, or unless those who value them have a special reason for revealing the information—for example, a perception that the property is in some kind of danger.

Particularly because properties of traditional cultural significance are often kept secret, it is not uncommon for them to be "discovered" only when something threatens them—for example, when a change in land-use is proposed in their vicinity. The sudden revelation by representatives of a cultural group which may also have other economic or political interests in the proposed change can lead quickly to charges that the cultural significance of a property has been invented only to obstruct or otherwise influence those planning the change. This may be true, and the possibility that traditional cultural significance is attributed to a property only to advance other, unrelated interests should be carefully considered. However, it also may be that until the change was proposed, there simply was no reason for those who value the property to reveal its existence or the significance they ascribe to it.

Where ethnographic, ethnohistorical, historical, or other sources identify a property as having cultural significance, but contemporary sources say that it lacks such significance, the interests of the contemporary sources should be carefully considered. Individuals who have economic interests in the potential development of an area may be strongly motivated to deny its cultural significance. More subtly, individuals who regard traditional practices and beliefs as backward and contrary to the best contemporary interests of the group that once ascribed significance to a property may feel justified in saying that such significance has been lost, or was never ascribed to the property. On the other hand, of course, it may be that the documentary sources are wrong, or that the significance ascribed to the property when the documents were prepared has since been lost.

Similar consideration must be taken into account in attempting to reconcile conflicting contemporary sources. Where one individual or group asserts that a property has traditional cultural significance, and another asserts that it does not or where there is disagreement about the nature or extent of a property's significance, the motives and values of the parties, and the cultural constraints operating on each, must be carefully analyzed.

In general, the only reasonably reliable way to resolve conflict among sources is to review a wide enough range of documentary data, and to interview a wide enough range of authorities to minimize the likelihood either of inadvertent bias or of being deliberately misled.

Authorities consulted in most cases should include both knowledgeable parties within the group that may attribute cultural value to a property and appropriate specialists in ethnography, sociology, history, and other relevant disciplines.7

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7 For excellent examples of studies designed in whole or in part to identify and evaluate traditional cultural properties based on both documentary sources and the testimony of consultants, see Bean and Vane 1978; Carroll 1983; Johnston and Budy 1983; Stoffle and Dobyns 1982, 1983; Theodoratus 1979.
IV. DETERMINING ELIGIBILITY: STEP BY STEP

Whether a property is known in advance or found during an identification effort, it must be evaluated with reference to the National Register Criteria for Evaluation (36 CFR Part 60) in order to determine whether it is eligible for inclusion in the Register. This section discusses the process of evaluation as a series of sequential steps. In real life of course, these steps are often collapsed into one another or taken together.

STEP ONE: ENSURE THAT THE ENTITY UNDER CONSIDERATION IS A PROPERTY

Because the cultural practices or beliefs that give a traditional cultural property its significance are typically still observed in some form at the time the property is evaluated, it is sometimes perceived that the intangible practices or beliefs themselves, not the property, constitute the subject of evaluation. There is naturally a dynamic relationship between tangible and intangible traditional cultural resources, and the beliefs or practices associated with a traditional cultural property are of central importance in defining its significance. However, it should be clearly recognized at the outset that the National Register does not include intangible resources themselves. The entity evaluated must be a tangible property—that is, a district, site, building, structure, or object. The relationship between the property and the beliefs or practices associated with it should be carefully considered, however, since it is the beliefs and practices that may give the property its significance and make it eligible for inclusion in the National Register.

Construction by human beings is a necessary attribute of buildings and structures, but districts, sites, and objects do not have to be the products of, or contain, the work of human beings in order to be classified as properties. For example, the National Register defines a “site” as “the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself possesses historic, cultural, or archeological value regardless of the value of any existing structure.” Thus a property may be defined as a “site” as long as it was the location of a significant event or activity, regardless of whether the event or activity left any evidence of its occurrence. A culturally significant natural landscape may be classified as a site, as may the specific location where significant traditional events, activities, or cultural observances have taken place. A natural object such as a tree or a rock outcrop may be an eligible object if it is associated with a significant tradition or use. A concentration, linkage, or continuity of such sites or objects, or of structures comprising a culturally significant entity, may be classified as a district.

In considering the eligibility of a property that contains no observable evidence of human activity, however, the documentary or oral evidence for the association of the property with traditional events, activities or observances should be carefully weighed and assessed. The National Register discourages the nomination of natural features without sound documentation of their historical or cultural significance.

STEP TWO: CONSIDER THE PROPERTY’S INTEGRITY

In order to be eligible for inclusion in the Register, a property must have “integrity of location, design, setting, materials, workmanship, feeling, and association” (36 CFR Part 60).

In the case of a traditional cultural property, there are two fundamental questions to ask about integrity. First, does the property have an integral relationship to traditional cultural practices or beliefs; and second, is the condition of the property such that the relevant relationships survive?

INTEGRITY OF RELATIONSHIP

Assessing the integrity of the relationship between a property and the beliefs or practices that may give it significance involves developing some understanding about how the group that holds the beliefs or carries out the practices is likely to view the property. If the property is known or likely to be regarded by a traditional cultural group as important in the retention or transmittal of a belief, or to the performance of a practice, the property can be taken to have an integral relationship with the belief or practice, and vice-versa.

For example, imagine two groups living along the shores of a lake. Each group practices a form of baptism to mark an individual’s acceptance into the group. Both carry out baptism in the lake. One group, however, holds that baptism is appropriate in any body of water that is available; the lake happens to be available, so it is used, but another lake, a river or creek, or a swimming pool would be just as acceptable. The second group regards baptism in this particular lake as essential to its acceptance of an individual as a member. Clearly the lake is integrally related to the second group’s practice, but not to that of the first.

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6 See How to Apply the National Register Criteria for Evaluation for discussion of property types.

7 See How to Complete the National Register Form.
INTEGRITY OF CONDITION

Like any other kind of historic property, a property that once had traditional cultural significance can lose such significance through physical alteration of its location, setting, design, or materials. For example, an urban neighborhood whose structures, objects, and spaces reflect the historically rooted values of a traditional social group may lose its significance if these aspects of the neighborhood are substantially altered.

In some cases a traditional cultural property can also lose its significance through alteration of its setting or environment. For example, a location used by an American Indian group for traditional spirit questing is unlikely to retain its significance for this purpose if it has come to be surrounded by housing tracts or shopping malls.

A property may retain its traditional cultural significance even though it has been substantially modified, however. Cultural values are dynamic, and can sometimes accommodate a good deal of change. For example, the Karuk Indians of northwestern California continue to carry on world renewal rites, ancient ceremonies featuring elaborate dances, songs, and other ritual activities, along a stretch of the Klamath River that is now the site of a highway, a Forest Service Ranger Station, a number of residences, and a timber cutting operation. Specific locations important in aspects of the ceremony remain intact, and accommodation has been reached between the Karuk and other users of the land. The State Department of Transportation has even erected “Ritual Crossing” signs at locations where the Karuk religious practitioners cross the highway, and built shallow depressions into the roadway which are filled with sand in advance of the ceremony, so the feet of the practitioners need not be profaned by contact with man-made macadam. As this example shows, the integrity of a possible traditional cultural property may be considered with reference to the views of traditional practitioners; if its integrity has not been lost in their eyes, it probably has sufficient integrity to justify further evaluation.

Some kinds of traditional cultural significance also may be retained regardless of how the surroundings of a property may be changed. For example, the First African Baptist Church Cemetery in Philadelphia, re-discovered during archeological work in advance of highway construction in 1985, has considerable cultural significance for the congregation that traces descent from those interred in the Cemetery, and for Philadelphia’s African American community in general, even though its graves had been buried under fill and modern construction for many decades.

It should also be recalled that even if a property has lost integrity as a possible traditional cultural property, it may retain integrity with reference to some other aspect of significance. For example, a property whose cultural significance has been lost through disturbance may still retain archeological deposits of significance for their information content, and a neighborhood whose traditional residents no longer ascribe significance to it may contain buildings of architectural importance.

STEP THREE:
EVALUATE THE PROPERTY WITH REFERENCE TO THE NATIONAL REGISTER CRITERIA

Assuming the entity to be evaluated is a property, and that it retains integrity, it is next necessary to evaluate it against the four basic National Register Criteria set forth in the National Register regulations (36 CFR Part 60). If the property meets one or more of the criteria, it may be eligible; if it does not, it is not eligible.10

CRITERION (A):
ASSOCIATION WITH EVENTS THAT HAVE MADE A SIGNIFICANT CONTRIBUTION TO THE BROAD PATTERNS OF OUR HISTORY.

The word “our” in this criterion may be taken to refer to the group to which the property may have traditional cultural significance, and the word “history” may be taken to include traditional oral history as well as recorded history. For example, Mt. Tonaachaw on Moen Island in Truk, Federated States of Micronesia, is in the National Register in part because of association with oral traditions about the establishment of Trukese society.

“Events” can include specific moments in history of a series of events reflecting a broad pattern or theme.

10 For general guidelines, see How to Apply the National Register Criteria for Evaluation.
For example, the ongoing participation of an ethnic or social group in an area's history, reflected in a neighborhood's buildings, streetscapes, or patterns of social activity, constitutes such a series of events.

The association of a property with significant events, and its existence at the time the events took place, must be documented through accepted means of historical research. The means of research normally employed with respect to traditional cultural properties include ethnographic, ethnohistorical, and folklore studies, as well as historical and archeological research. Sometimes, however, the actual time a traditional event took place may be ambiguous; in such cases it may be impossible, and to some extent irrelevant, to demonstrate with certainty that the property in question existed at the time the traditional event occurred. For example, events recounted in the traditions of Native American groups may have occurred in a time before the creation of the world as we know it, or at least before the creation of people. It would be fruitless to try to demonstrate, using the techniques of history and science, that a given location did or did not objectively exist in a time whose own existence cannot be demonstrated scientifically. Such a demonstration is unnecessary for purposes of eligibility determination; as long as the tradition itself is rooted in the history of the group, and associates the property with traditional events, the association can be accepted.

CRITERION (B):
ASSOCIATION WITH THE LIVES OF PERSONS SIGNIFICANT IN OUR PAST.

Again, the word “our” can be interpreted with reference to the people who are thought to regard the property as traditionally important. The word “persons” can be taken to refer both to persons whose tangible, human existence in the past can be inferred on the basis of historical, ethnographic, or other research, and to “persons” such as gods and demigods who feature in the traditions of a group. For example, Tahquitz Canyon in southern California is included in the National Register in part because of its association with Tahquitz, a Cahuilla Indian demigod who figures importantly in the tribe’s traditions and is said to occupy an obsidian cave high in the canyon.

CRITERION (C)(1):
EMBODIMENT OF THE DISTINCTIVE CHARACTERISTICS OF A TYPE, PERIOD, OR METHOD OF CONSTRUCTION.

This subcriterion applies to properties that have been constructed, or contain constructed entities—that is, buildings, structures, or built objects. For example, a neighborhood that has traditionally been occupied by a particular ethnic group may display particular housing styles, gardens, street furniture or ornamentation distinctive of the group. Honolulu’s Chinatown, for example, embodies the distinctive cultural values of the City’s Asian community in its architecture, landscaping, signage, and ornamentation.

CRITERION (C)(2):
REPRESENTATIVE OF THE WORK OF A MASTER.

A property identified in tradition or suggested by scholarship to be the work of a traditional master builder or artisan may be regarded as the work of a master, even though the precise identity of the master may not be known.

CRITERION (C)(3):
POSSESSION OF HIGH ARTISTIC VALUES.

A property made up of or containing art work valued by a group for traditional cultural reasons, for example a petroglyph or pictograph site venerated by an Indian group, or a building whose decorative elements reflect a local ethnic groups distinctive modes of expression, may be viewed as having high artistic value from the standpoint of the group.

11 Note: Criterion (C) is not subdivided into subcriteria (1), (2), etc. in 36 CFR Part 60.4. The subdivision given here is only for the convenience of the reader.

In Trukese tradition, the Tonaachaw Historic District was the location to which Sowukachaw, founder of the Trukese society, came and established his meetinghouse at the beginning of Trukese history. The mountain, in what is now the Federated States of Micronesia, is a powerful landmark in the traditions of the area. (Lawrence E. Aten)
CRITERION (C)(4): REPRESENTATIVE OF A SIGNIFICANT AND DISTINGUISHABLE ENTITY WHOSE COMPONENTS MAY LACK INDIVIDUAL DISTINCTION.

A property may be regarded as representative of a significant and distinguishable entity, even though it lacks individual distinction, if it represents or is an integral part of a larger entity of traditional cultural importance. The larger entity may, and usually does, possess both tangible and intangible components. For example, certain locations along the Russian River in California are highly valued by the Pomo Indians, and have been for centuries, as sources of high quality sedge roots needed in the construction of the Pomo's world famous basketry.

Although the sedge fields themselves are virtually indistinguishable from the surrounding landscape, and certainly indistinguishable by the untrained observer from other sedge fields that produce lower quality roots, they are representative of, and vital to, the larger entity of Pomo basketmaking. Similarly, some deeply venerated landmarks in Micronesia are natural features, such as rock outcrops and groves of trees; these are indistinguishable visually (at least to the outside observer) from other rocks and trees, but they figure importantly in chants embodying traditional sailing directions and lessons about traditional history. As individual objects they lack distinction, but the larger entity of which they are a part—Micronesian navigational and historical tradition—is of prime importance in the area's history.

CRITERION (D): HISTORY OF YIELDING, OR POTENTIAL TO YIELD, INFORMATION IMPORTANT IN PREHISTORY OR HISTORY.

Properties that have traditional cultural significance often have already yielded, or have the potential to yield, important information through ethnographic, archeological, sociological, folkloric, or other studies. For example, ethnographic and ethnohistorical studies of Kaho'olawe Island in Hawai'i, conducted in order to clarify its eligibility for inclusion in the National Register, have provided important insights into Hawai'ian traditions and culture and into the history of twentieth century efforts to revitalize traditional Hawai'ian culture.

Similarly, many traditional American Indian village sites are also archeological sites, whose study can provide important information about the history and prehistory of the group that lived there. Generally speaking, however, a traditional cultural property's history of yielding, or potential to yield, information, if relevant to its significance at all, is secondary to its association with the traditional history and culture of the group that ascribes significance to it.

Many traditional cultural properties look like very little on the ground. The small protuberance in the center of this photo, known to residents of the Hanford Nuclear Reservation in Washington State as Goose Egg Hill, is regarded by the Yakima Indians of the area as the heart of a goddess who was torn apart by jealous compatriots. They scattered her pieces across the landscape, creating a whole complex of culturally significant landforms. (Thomas F. King)

CONSIDERATION A: OWNERSHIP BY A RELIGIOUS INSTITUTION OR USE FOR RELIGIOUS PURPOSES.

A “religious property,” according to National Register guidelines, requires additional justification (for nomination) because of the necessity to avoid any appearance of judgement by government about the merit of any religion or belief.” Conversely, it is necessary to be careful not to allow a similar judgement to serve as the basis for determining a property to be ineligible for inclusion in the Register. Application of this criteria consideration to traditional cultural properties is fraught with the potential for ethnocentrism and discrimination. In many traditional societies, including most American Indian societies, the clear distinction made by Euroamerican society between religion and the rest of culture does not exist. As a result, properties that have traditional cultural significance are regularly discussed by those who value them in terms that have religious connotations. Inyan Karan Mountain, for example, a National Register property in the Black Hills of South Dakota, is sig-

12 How to Complete the National Register Form.
significant in part because it is the abode of spirits in the traditions of the Lakota and Cheyenne. Some traditional cultural properties are used for purposes that are definable as religious in Euroamerican terms, and this use is intrinsic to their cultural significance.

Kootenai Falls on the Kootenai River in Idaho, part of the National Register-eligible Kootenai Falls Cultural Resource District, has been used for centuries as a vision questing site by the Kootenai tribe. The Helkau Historic District in northern California is a place where traditional religious practitioners go to make medicine and commune with spirits, and Mt. Tonaachaw in Truk is an object of spiritual veneration. The fact that such properties have religious connotations does not automatically make them ineligible for inclusion in the Register.

Applying the “religious exclusion” without careful and sympathetic consideration to properties of significance to a traditional cultural group can result in discriminating against the group by effectively denying the legitimacy of its history and culture. The history of a Native American group, as conceived by its indigenous cultural authorities, is likely to reflect a kind of belief in supernatural beings and events that Euroamerican culture categorizes as religious, although the group involved, as is often the case with Native American groups, may not even have a word in its language for “religion.” To exclude from the National Register a property of cultural and historical importance to such a group, because its significance tends to be expressed in terms that to the Euroamerican observer appear to be “religious” is ethnocentric in the extreme. In simplest terms, the fact that a property is used for religious purposes by a traditional group, such as seeking supernatural visions, collecting or preparing native medicines, or carrying out ceremonies, or is described by the group in terms that are classified by the outside observer as “religious” should not by itself be taken to make the property ineligible, since these activities may be expressions of traditional cultural beliefs and may be intrinsic to the continuation of traditional cultural practices. Similarly, the fact that the group that owns a property—for example, an American Indian tribe—describes it in religious terms, or constitutes a group of traditional religious practitioners, should not automatically be taken to exclude the property from inclusion in the Register. Criteria Consideration A was included in the Criteria for Evaluation in order to avoid allowing historical significance to be determined on the basis of religious doctrine, not in order to exclude arbitrarily any property having religious associations. National Register guidelines stress the fact that properties can be listed in or determined eligible for the Register for their association with religious history, or with persons significant in religion, if such significance has “scholarly, secular recognition.” The integral relationship among traditional Native American culture, history, and religion is widely recognized in secular scholarship. Studies leading to the nomination of traditional cultural properties to the Register should have among their purposes the application of secular scholarship to the association of particular properties with broad patterns of traditional history and culture. The fact that traditional history and culture may be discussed in religious terms does not make it less historical or less significant to culture, nor does it make properties associated with traditional history and culture ineligible for inclusion in the National Register.

CONSIDERATION B: RELOCATED PROPERTIES.

Properties that have been moved from their historically important locations are not usually eligible for inclusion in the Register, because “the significance of (historic properties) is embodied in their locations and settings as well as in the (properties) themselves” and because “one basic purpose of the National Register is to encourage the preservation of historic properties as living parts of their communities.” This consideration is relevant but rarely applied formally to traditional cultural properties; in most cases the property in question is a site or district which cannot be relocated in any event. Even where the property can be relocated, maintaining it on its original site is often crucial to maintaining its importance in traditional culture, and if it has been moved, most traditional authorities would regard its significance as lost.

Where a property is intrinsically portable, however, moving it does not

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13 How to Complete the National Register Form.

14 For example see U.S. Commission on Civil Rights 1983; Michaelson 1986.

15 How to Complete the National Register Form.
Some traditional cultural properties may be moveable, like this traditional war canoe still in use in the Republic of Palau. (Papua Historic Preservation Officer)

destroy its significance, provided it remains “located in a historically appropriate setting.”16 For example, a traditionally important canoe or other watercraft would continue to be eligible as long as it remained in the water or in an appropriate dry land context (e.g., a boathouse). A property may also retain its significance if it has been moved historically.17 For example, totem poles moved from one Northwest Coast village to another in early times by those who made or used them would not have lost their significance by virtue of the move. In some cases, actual or putative relocation even contributes to the significance of a property. The topmost peak of Mt. Tonaachaw in Truk, for example, is traditionally thought to have been brought from another island; the stories surrounding this magical relocation are parts of the mountains cultural significance.

In some cases it may be possible to relocate a traditionally significant property and still retain its significance, provided the property’s “historic and present orientation, immediate setting, and general environment” are carefully considered in planning and executing the move.18 At Lake Sonoma in California, for example, the U.S. Army Corps of Engineers relocated a number of boulders containing petroglyphs having artistic, archaeological, and traditional cultural significance to protect them from inundation. The work was done in consultation with members of the local Pomo Indian tribe, and apparently did not destroy the significance of the boulders in the eyes of the tribe.19

CONSIDERATION C: BIRTHPLACES AND GRAVES.

Birthplaces and graves of famous persons are not usually eligible for inclusion in the Register as such. If the birthplace or gravesite of a historical person is significant for reasons other than its association with that person, however, the property can of course be eligible.20 Thus in the case of a traditional cultural property, if someone’s birth or burial within the property’s boundaries was incidental to the larger traditional significance of the property, the fact that it occurred does not make the property ineligible. For example, in South Texas, the burial site of Don Pedro Jaramillo, a well documented folk healer who practiced at the turn of the century, has for more than seventy years been a culturally significant site for the performance of traditional healing rituals by Mexican American folk healers. Here the cultural significance of the site as a center for healing is related to the intangible belief that Don Pedrito’s spirit is stronger there than in other places, rather than to the fact of his burial there.

On the other hand, it is possible for the birth or burial itself to have been ascribed such cultural importance that its association with the property contributes to its significance. Tahquitz Canyon in southern California, for example, is in a sense the traditional “birthplace” of the entire Cahuilla Indian people. Its status as such does not make it ineligible; on the contrary, it is intrinsic to its eligibility. Mt. Tonaachaw in Truk is according to some traditions the birth-

16 How to Complete the National Register Form.
17 How to Complete the National Register Form.
18 How to Complete the National Register Form.
19 How to Complete the National Register Form.
20 How to Complete the National Register Form.
place of the culture hero Souwooniris, whose efforts to organize society among the islands of Truk Lagoon are the stuff of Trukese legend. The association of his birth with the mountain does not make the mountain ineligible; rather, it contributes to its eligibility.

CONSIDERATION D: CEMETERIES.

Cemeteries are not ordinarily eligible for inclusion in the Register unless they "derive (their) primary significance from graves of persons of transcendent importance, from age, from distinctive design values, or from association with historic events." Many traditional cultural properties contain cemeteries, however, whose presence contributes to their significance.

Tahquitz Canyon, for example, whose major significance lies in its association with Cahuilla traditional history, contains a number of cemeteries that are the subjects of great concern to the Cahuilla people. The fact that they are present does not render the Canyon ineligible; on the contrary, as reflections of the long historical association between the Cahuilla and the Canyon, the cemeteries reflect and contribute to the Canyon's significance. Thus the fact that a traditional cultural property is or contains a cemetery should not automatically be taken to render it ineligible.

CONSIDERATION E: RECONSTRUCTION.

A reconstructed property—that is, a new construction that ostensibly reproduces the exact form and detail of a property or portion of a property that has vanished, as it appeared at a specific period in time—is not normally eligible for inclusion in the Register unless it meets strict criteria. The fact that some reconstruction has occurred within the boundaries of a traditional cultural property, however, does not justify regarding the property as ineligible for inclusion in the Register. For example, individuals involved in the revitalization of traditional Hawaiian culture and religion have reconstructed certain religious structures on the island of Kahoʻolawe; while the structures themselves might not be eligible for inclusion in the Register, their construction in no way diminishes the island's eligibility.

CONSIDERATION F: COMMEMORATION.

Like other properties, those constructed to commemorate a traditional event or person cannot be found eligible for inclusion in the Register based on association with that event or person alone. The mere fact that commemoration is involved in the use or design of a property should not be taken to make the property ineligible, however. For example, traditional meetinghouses in the Republic of Palau, included in the National Register, are typically ornamented with "story boards" commemorating traditional events; these derive their design from traditional Palauan aesthetic values, and thus contribute to the cultural significance of the structures. They connect the structures with the traditional history of the islands, and in no way diminish their cultural, ethnographic, and architectural significance.

CONSIDERATION G: SIGNIFICANCE ACHIEVED WITHIN THE PAST 50 YEARS.

Properties that have achieved significance only within the 50 years preceding their evaluation are not eligible for inclusion in the Register unless "sufficient historical perspective exists to determine that the property is exceptionally important and will continue to retain that distinction in the future." This is an extremely important criteria consideration with respect to traditional cultural values. A significance ascribed to a property only in the past 50 years cannot be considered traditional.

As an example, consider a mountain peak used by an Indian tribe for communication with the supernatural. If the peak has been used by members of the tribe for many years, or if it was used by members of the tribe in prehistory or early history, it may be eligible, but if its use has begun only within the past 50 years, it is probably not eligible.

17 How to Complete the National Register Form.
22 How to Complete the National Register Form.
23 How to Complete the National Register Form.
24 How to Complete the National Register Form.

Several hundred persons visit this shrine to Don Pedrito Jaramillo, curandero (faith healer), yearly to seek his healing spirit. (Curtis Tunnell, Texas Historical Commission)
Tahquitz Canyon, in southern California, is included in the National Register because of its association with the traditions of the Cahuilla Indians. The ancestors of the Cahuilla came into this world from a lower one at the beginning of time, and an evil spirit, named Tahquitz, is believed to live in the upper reaches of the canyon. (Thomas F. King)

The fact that a property may have gone unused for a lengthy period of time, with use beginning again only recently, does not make the property ineligible for the Register. For example, assume that the Indian tribe referred to above used the mountain peak in prehistory for communication with the supernatural, but was forced to abandon such use when it was confined to a distant reservation, or when its members were converted to Christianity. Assume further that a revitalization of traditional religion has begun in the last decade, and as a result the peak is again being used for vision quests similar to those carried out there in prehistory. The fact that the contemporary use of the peak has little continuous time depth does not make the peak ineligible; the peak's association with the traditional activity reflected in its contemporary use is what must be considered in determining eligibility.

The length of time a property has been used for some kinds of traditional purposes may be difficult to establish objectively. Many cultural uses may have left little or no physical evidence, and may not have been noted by ethnographers or early visitors to the area. Some such uses are explicitly kept from outsiders by members of the group ascribing significance to the property. Indirect evidence and inference must be weighed carefully, by or in consultation with trained ethnographers, ethnohistorians, and other specialists, and professional judgements made that represent one's best, good-faith interpretation of the available data.
V. DOCUMENTING TRADITIONAL CULTURAL PROPERTIES

GENERAL CONSIDERATIONS

Generally speaking, documentation of a traditional cultural property, on a National Register nomination form or in eligibility documentation, should include a presentation of the results of interviews and observations that systematically describe the behavior, beliefs, and knowledge that are germane to understanding the property's cultural significance, and an organized analysis of these results. The data base from which the formal nomination or eligibility determination documents are derived should normally include appropriate tape recordings, photographs, field notes, and primary written records.

Obtaining and presenting such documentation can present special challenges, however. First, those who ascribe significance to the property may be reluctant to allow its description to be committed to paper, or to be filed with a public agency that might release information about it to inappropriate people. Second, documentation necessarily involves addressing not only the physical characteristics of the property as perceived by an outsider observer, but culturally significant aspects of the property that may be visible or knowable only to those in whose traditions it is significant. Third, boundaries are often difficult to define. Fourth, in part because of the difficulty involved in defining boundaries, it is important to address the setting of the property.

THE PROBLEM OF CONFIDENTIALITY

Particularly where a property has supernatural connotations in the minds of those who ascribe significance to it, or where it is used in ongoing cultural activities that are not readily shared with outsiders, it may be strongly desired that both the nature and the precise location of the property be kept secret. Such a desire on the part of those who value a property should of course be respected, but it presents considerable problems for the use of National Register data in planning. In simplest terms, one cannot protect a property if one does not know that it is there.

The need to reveal information about something that one’s cultural system demands be kept secret can present agonizing problems for traditional groups and individuals. It is one reason that information on traditional cultural properties is not readily shared with Federal agencies and others during the planning and environmental review of construction and land use projects. However concerned one may be about the impacts of such a project on a traditional cultural property, it may be extremely difficult to express these concerns to an outsider if one’s cultural system provides no acceptable mechanism for doing so. These difficulties are sometimes hard for outsiders to understand, but they should not be underrated. In some cultures it is sincerely believed that sharing information inappropriately with outsiders will lead to death or severe injury to one’s family or group.

As noted above, information on historic properties, including traditional cultural properties, may be kept confidential under the authority of 304 of the National Historic Preservation Act. This may not always be enough to satisfy the concerns of those who value, but fear the results of releasing information on, traditional cultural properties. In some cases these concerns may make it necessary not to nominate such properties formally at all, or not to seek formal determinations of eligibility, but simply to maintain some kind of minimal data in planning files. For example, in planning deployment of the MX missile system in Wyoming, the Air Force became aware that the Lakota Indian tribe in the area had concerns about the project’s impacts on traditional cultural properties, but was unwilling to identify and document the precise locations and significance of such properties. To resolve this problem, Air Force representatives met with the tribe’s traditional cultural authorities and indicated where they wanted to construct the various facilities required by the deployment; the tribe’s authorities indicated which of these locations were likely to present problems, without saying what the nature of the problems might be. The Air Force then designed the project to minimize use of such areas. In a narrow sense, obviously, the Air Force did not go through the process of evaluation recommended by this Bulletin; no specific properties were identified or evaluated to determine their eligibility for inclusion in the National Register. In a broader sense, however, the Air Force’s approach represents excellent practice in the identification and treatment of traditional cultural prop-

For details regarding maintaining confidentiality, see Guidelines for Restricting Information About Historic and Prehistoric Resources.
properties. The Air Force consulted carefully and respectfully with those who ascribed traditional cultural significance to properties in the area, and sought to accommodate their concerns. The tribe responded favorably to this approach, and did not take undue advantage of it. Presumably, had the tribe expressed concern about such expansive or strategically located areas as to suggest that it was more interested in impeding the deployment than in protecting its valued properties the Air Force would have had to use a different approach.

In summary: the need that often exists to keep the location and nature of a traditional cultural property secret can present intractable problems. These must be recognized and dealt with flexibly, with an understanding of the fact that the management problems they may present to Federal agencies or State Historic Preservation Officers may pale into insignificance when compared with the wrenching cultural conflicts they may present to those who value the properties.

DOCUMENTING VISIBLE AND NON-VISIBLE CHARACTERISTICS

Documentation of a traditional cultural property should present not only its contemporary physical appearance and, if known, its historical appearance, but also the way it is described in the relevant traditional belief or practice. For example, one of the important cultural locations on Mt. Tonaachaw in Truk is an area called "Neepisaram," which physiologically looks like nothing but a grassy slope near the top of the mountain. In tradition, however, it is usually fruitless, and of little or no relevance to the eligibility of the property involved for inclusion in the National Register, to try to relate this sort of traditional time to time as measured by Euroamerican history. Traditional "periods" should be defined in their own terms. If a traditional group says a property was created at the dawn of time, this should be reported in the nomination or eligibility documentation; for purposes of National Register eligibility there is no need to try to establish whether, according to Euroamerican scholarship or radiocarbon age determination, it really was created at the dawn of time.

The second period that is often relevant to a traditional property is its period of use for traditional purposes. Although direct, physical evidence for such use at particular periods in the past may be rare in the case of properties used by non-American groups, it is usually possible to fix a period of use, at least in part, in ordinary chronological time. Establishing the period of use often involves the weighing of indirect evidence and inference. Interviews with traditional cultural authorities are usually the main sources of data, sometimes, supplemented by the study of historical accounts or by archeological investigations. Based on such sources of data it should be possible at least to reach supportable inferences about whether generations before the present one have used a property for traditional purposes, suggesting that it was used for such purposes more than fifty years ago. It is seldom possible to determine when the traditional use of property began, however—this tends to be lost, as it were, in the mists of antiquity.

BOUNDARIES

Defining the boundaries of a traditional cultural property can present considerable problems. In the case of the Helkau Historic District in northern California, for example, much of the significance of the property in the eyes of its traditional users is related to the fact that it is quiet, and that it presents extensive views of natural landscape without modern intrusions. These factors are crucial to the medicine making done by traditional religious practitioners in the district. If the boundaries of the district were defined on the basis of these factors, however, the district would take in a substantial portion of California's North coast Range. Practically speaking, the boundaries of a property like the Helkau District must be defined more narrowly, even though this may involve making some rather arbitrary decisions. In the case of the Helkau District, the boundary was finally drawn along topographic lines that included all the locations at which traditional practitioners carry out medicine-making and similar activities, the travel routes between such locations, and the immediate viewing area that surrounds this complex of locations and routes.

In defining boundaries, the traditional uses to which the property is put must be carefully considered. For example, where a property is used as the Helkau District is used, for contemplative purposes, views are important and must be considered in boundary definition. In an urban district significant for its association with a given social group, boundaries might be established where residence or use by the group ends, or where such residence or use is no longer reflected in the architecture or spatial organization of the neighborhood. Changes in boundaries through time should also be taken into consideration.

For example, archeological evidence may indicate that a particular cultural practice occurred within particular boundaries in the past, but the practice today may occur within dif-

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26 Except, perhaps, by some of the more esoteric subfields of cosmology and quantum mechanics.
different boundaries perhaps larger, perhaps smaller, perhaps covering different areas. The fact that such changes have taken place, and the reasons they have taken place, if these can be ascertained, should be documented and considered in developing a rationale for the boundaries identified in the nomination or eligibility documentation.

**DESCRIBING THE SETTING**

The fact that the boundaries of a traditional cultural property may be drawn more narrowly than they would be if they included all significant viewsheds or lands on which noise might be intrusive on the practices that make the property significant does not mean that visual or auditory intrusions occurring outside the boundaries can be ignored. In the context of eligibility determination or nomination, such intrusions if severe enough may compromise the property’s integrity. In planning subsequent to nomination or eligibility determination, the Advisory Council’s regulations define “isolation of the property from or alteration of the character of the property’s setting” as an adverse effect “when that character contributes to the property’s qualification for the National Register” (36 CFR 800.9(b)(2)). Similarly, the Council’s regulations define as adverse effects “introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting” (36 CFR 800.9(b)(3)).

To assist in determining whether a given activity outside the boundaries of a traditional cultural property may constitute an adverse effect, it is vital that the nomination form or eligibility documentation discuss those qualities of a property’s visual, auditory, and atmospheric setting that contribute to its significance, including those qualities whose expression extends beyond the boundaries of the property as such into the surrounding environment.

*Individual structures can have traditional cultural significance, like this Yapese men’s house, used by Yapese today in the conduct of deliberations on matters of cultural importance. (Yap State Historic Preservation Office)*
COMPLETING REGISTRATION FORMS

The following discussion is organized with reference to the National Register of Historic Places Registration Form (NPS 10-900), which must be used in nominating properties to the National Register. To the extent feasible, documentation supporting a request for a determination of eligibility should be organized with reference to, and if possible using, the Registration Form as well. Where the instructions given in the National Register bulletin entitled How to Complete the National Register Registration Form, are sufficient without further discussion, this is indicated.

1. Name of Property
   The name given a traditional cultural property by its traditional users should be entered as its historic name. Names, inventory reference numbers, and other designations ascribed to the property by others should be entered under other names/site number.

2. Location
   Follow How to Complete the National Register Registration Form, but note discussion of the problem of confidentiality above.

3. Classification
   Follow How to Complete the National Register Registration Form.

4. State/Federal Agency Certification
   Follow How to Complete the National Register Registration Form.

5. National Park Service Certification
   To be completed by National Register.

6. Function or Use
   Follow How to Complete the National Register Registration Form.

7. Description
   Follow How to Complete the National Register Registration Form as applicable. It may be appropriate to address both visible and non-visible aspects of the property here, as discussed under General Considerations above; alternatively, non-visible aspects of the property may be discussed in the statement of significance.

8. Statement of Significance
   Follow How to Complete the National Register Registration Form, being careful to address significance with sensitivity for the viewpoints of those who ascribe traditional cultural significance to the property.

9. Major Bibliographical References
   Follow How to Complete the National Register Registration Form. Where oral sources have been employed, append a list of those consulted and identify the locations where field notes, audio or video tapes, or other records of interviews are housed, unless consultants have required that this information be kept confidential; if this is the case, it should be so indicated in the documentation.

10. Geographical Data
    Follow How to Complete the National Register Registration Form as applicable, but note the discussion of boundaries and setting under General Considerations above. If it is necessary to discuss the setting of the property in detail, this discussion should be appended as accompanying documentation and referenced in this section.

11. Form Prepared By
    Follow How to Complete the National Register Registration Form.

Accompanying Documentation
   Follow How to Complete the National Register Registration Form, except that if the group that ascribes cultural significance to the property objects to the inclusion of photographs, photographs need not be included. If photographs are not included, provide a statement explaining the reason for their exclusion.
VI. CONCLUSION

The National Historic Preservation Act, in its introductory section, establishes that “the historical and cultural foundations of the Nation should be preserved as a living part of our community life in order to give a sense of orientation to the American people” (16 U.S.C. 470(b)(2)). The cultural foundations of America’s ethnic and social groups, be they Native American or historical immigrant, merit recognition and preservation, particularly where the properties that represent them can continue to function as living parts of the communities that ascribe cultural value to them. Many such properties have been included in the National Register, and many others have been formally determined eligible for inclusion, or regarded as such for purposes of review under 106 of the Act. Federal agencies, State Historic Preservation Officers, and others who are involved in the inclusion of such properties in the Register, or in their recognition as eligible for inclusion, have raised a number of important questions about how to distinguish between traditional cultural properties that are eligible for inclusion in the Register and those that are not. It is our hope that this Bulletin will help answer such questions.

FEDERAL STANDARDS AND
GUIDELINES

Advisory Council on Historic Preservation and National Park Service

Advisory Council on Historic Preservation

National Park Service
1983 Archeology and Historic Preservation; Secretary of the Interior's Standards and Guidelines. 48 FR 44716-42.

National Park Service

National Park Service
National Register bulletins:
How to Apply the National Register Criteria for Evaluation
How to Complete the National Register Registration Form
Guidelines for Restricting Information About Historic and Prehistoric Resources

PROFESSIONAL
TECHNICAL MANUALS

Bartis, P.

Langanese, L.L. and Celya Frank

Stoffle, R.W., M.C. Jake, M.J. Evans and P.A. Bunte

Werner, O. and M. Schoepfle

EXAMPLES

Bean, Lowell J. and Sylvia B. Vane (eds.)

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National Park Service  

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Woods C.M.  

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OTHER

Association on American Indian Affairs  

Loomis, O.H.  

Michaelson, Robert S.  

U.S. Commission on Civil Rights  

U.S. Department of the Interior  

Walker, Deward E., Jr.  

White, D.R.M. (ed.)  
A DEFINITION OF "CULTURE"

Early in this Bulletin a shorthand definition of the word "culture" is used. A longer and somewhat more complex definition is used in the National Park Service's internal cultural resource management guidelines (NPS-28). This definition is consistent with that used in this Bulletin, and may be helpful to those who require further elucidation of the term. The definition reads as follows:

"Culture (is) a system of behaviors, values, ideologies, and social arrangements. These features, in addition to tools and expressive elements such as graphic arts, help humans interpret their universe as well as deal with features of their environments, natural and social.

Culture is learned, transmitted in a social context, and modifiable. Synonyms for culture include "lifeways," "customs," "traditions," "social practices," and "folkways." The terms "folk culture" and "folklife" might be used to describe aspects of the system that are unwritten, learned without formal instruction, and deal with expressive elements such as dance, song, music and graphic arts as well as storytelling."
When seeking assistance in the identification, evaluation, and management of traditional cultural properties, agencies should normally seek out specialists with ethnographic research training, typically including, but not necessarily limited to:

I. Language skills: it is usually extremely important to talk in their own language with those who may ascribe value to traditional cultural properties. While ethnographic fieldwork can be done through interpreters, ability in the local language is always preferable.

II. Interview skills, for example:
- The ability to approach a potential informant in his or her own cultural environment, explain and if necessary defend one's research, conduct an interview and minimize disruption, elicit required information, and disengage from the interview in an appropriate manner so that further interviews are welcome; and
- The ability to create and conduct those types of interviews that are appropriate to the study being carried out, ensuring that the questions asked are meaningful to those being interviewed, and that answers are correctly understood through the use of such techniques as translating and back-translating. Types of interviews normally carried out by ethnographers, one or more of which may be appropriate during evaluation and documentation of a traditional cultural property, include:
  - semi-structured interview on a broad topic;
  - semi-structured interview on a narrow topic;
  - structured interview on a well defined specific topic; open ended life history/life cycle interview; and
  - genealogical interview.

III. Skill in making and accurately recording direct observations of human behavior, typically including:
- The ability to observe and record individual and group behavior in such a way as to discern meaningful patterns; and
- The ability to observe and record the physical environment in which behavior takes place, via photography, mapmaking, and written description.

IV. Skill in recording, coding, and retrieving pertinent data derived from analysis of textural materials, archives, direct observation, and interviews.
Proficiency in such skills is usually obtained through graduate and post-graduate training and supervised experience in cultural anthropology and related disciplines, such as folklore/folklife.
X. APPENDIX III LIST OF NATIONAL REGISTER BULLETINS

The Basics

How to Apply National Register Criteria for Evaluation *
Guidelines for Completing National Register of Historic Places Form
  Part A: How to Complete the National Register Form *
  Part B: How to Complete the National Register Multiple Property Documentation Form
Researching a Historic Property *

Property Types

Guidelines for Evaluating and Documenting Historic Aids to Navigation *
Guidelines for Identifying, Evaluating and Registering America’s Historic Battlefields
Guidelines for Evaluating and Registering Historical Archeological Sites
Guidelines for Evaluating and Registering Cemeteries and Burial Places
How to Evaluate and Nominate Designed Historic Landscapes *
Guidelines for Identifying, Evaluating and Registering Historic Mining Sites
How to Apply National Register Criteria to Post Offices *
Guidelines for Evaluating and Documenting Properties Associated with Significant Persons
Guidelines for Evaluating and Documenting Properties That Have Achieved Significance Within the Last Fifty Years
Guidelines for Evaluating and Documenting Rural Historic Landscapes *
Guidelines for Evaluating and Documenting Traditional Cultural Properties *
Nominating Historic Vessels and Shipwrecks to the National Register of Historic Places

Technical Assistance

Contribution of Moved Buildings to Historic Districts; Tax Treatments for Moved Buildings; and Use of Nomination Documentation in the Part I Certification Process
Defining Boundaries for National Register Properties *
Guidelines for Local Surveys: A Basis for Preservation Planning *
How to Improve the Quality of Photographs for National Register Nominations
National Register Casebook: Examples of Documentation *
Using the UTM Grid System to Record Historic Sites

The above publications may be obtained by writing to the National Register of Historic Places, National Park Service, 1849 C Street, NW, Washington, D.C. 20240. Publications marked with an asterisk (*) are also available in electronic form on the World Wide Web at www.cr.nps.gov/nr, or send your request by e-mail to nr_reference@nps.gov.