

NATIVE AMERICAN HERITAGE COMMISSION

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**NAHC Consultation Guidelines**

April 7, 2005

In order to further the goals of protecting Native American cultural features and the recognition of California Native Americans' interest in preserving and protecting those features through consultation, the Native American Heritage Commission recommends the establishment of a cooperative relationship between appropriate tribal governments and Agency or Department officials that considers and respects the views of all participants and acknowledges the goal of developing mutually acceptable cultural feature protection strategies.

Consultation should be viewed as "the right to have a seat at the table, a chance to persuade the responsible ... official to do the right thing."¹

For many Agency or Department officials, consulting with Native American tribes will be a new experience that draws upon little from prior experience. There are cultural differences that need to be respected throughout the process. Indian people may be more accustomed to an oral tradition rather than a written tradition, potentially making what and how things are said during consultation mean far more than the written documents or agreements that will result from the consultation. All tribes, whether federally recognized or non-federally recognized, should be regarded as unique and independent governmental entities with traditions and hierarchical structures that must be recognized and respected. Appropriate tribal protocols should be followed when approaching tribal governments. More than one tribe may have a cultural affiliation with the proposed project area; agency officials should be prepared to hold concurrent consultation sessions if a combined consultation format is not acceptable to the tribes.

Agency officials must be aware that the consultation process is in no way intended to affect, diminish or reduce the sovereign status of any California Native American tribe.

The following are recommendations for Agency or Department use in initiating the consultation process with tribes.

1. Before the need for consultation arises, the following strategies are recommended:

- Agencies or Departments should designate an official with principal responsibility for carrying out consultation activities. Agencies or Departments should seek to appoint a designee with knowledge of California Native American culture who has direct access to Agency or Department decision-makers.
- Agencies or Departments should obtain from the NAHC the lists of appropriate tribes with potential for interest in property within the Agency or Department's jurisdiction.

¹ Professor Dean Suagee, "Historical Storytelling and the Growth of Tribal Historic Preservation Programs," 17 *Natural Resources and Environment* 86, 88 (2002).

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- Agencies or Departments should complete a records search on the area of potential effect with the California Historic Resource Inventory System (CHRIS) and the Native American Heritage Commission's Sacred Lands File. The results of such searches should be shared with the tribe during the request for consultation, including the likelihood that cultural features might be present, thus demonstrating the Agencies or Departments' awareness that sensitive cultural features may be present that could be threatened by the proposed project or activity. The lack of recorded archeological or cultural/sacred resources should not be presumed to preclude the existence of cultural features within the area of potential effect.
- The Agency or Department designee should serve as the primary contact for consultation with tribes in order to facilitate the development of an on-going working relationship between the appropriate tribal governments and the Agency or Department.
- Agencies or Departments should never assign their consultation responsibilities to a contractor or developer.
- Agency officials should initiate contact directly with the tribe's officially chosen leader (e.g. chairperson, spokesperson, captain, etc.) to ask if tribal consultation protocols are already in place. Such protocols may specify cultural resource contacts within the tribe, procedures, time limits, restrictions, etc.
- If protocols are not available, the Agency or Department should seek assistance from tribal officials to identify the appropriate procedures to follow in meeting the tribe's consultation needs.
- Development of mutually agreed-upon protocols may result in more effective consultation efforts with individual tribes.
- Either the Agency or Department or the tribe may request revisions to the protocols with prior notice.

2. Consultation is intended to address the preservation and mitigation of impacts to California Native American historic, cultural, or sacred sites, as are defined in Public Resources Code 5097.9 and Public Resources Code 5097.993, including sites that are listed or may be eligible for listing in the California Register of Historic Resources, historic or prehistoric ruins, burial grounds, any archaeological, prehistoric or historic Native American rock art, any archaeological, prehistoric or historic features, inscriptions made by Native Americans at such a site, places of worship, sacred or ceremonial sites, and sacred shrines on public and private properties. The process is focused on identifying issues of concern to Native American tribes, including cultural values, religious beliefs, traditional practices and legal rights of Indian people, and on defining the full range of acceptable alternatives.

Consultation is intended to accommodate religious considerations, rather than endorse them. The courts have ruled that consultation regarding issues of Native American religious importance is not a violation of the Establishment Clause of the U.S. Constitution.²

Effective consultation comes from the development of relationships that are ongoing and sustained. Improved relations with tribes can improve the effectiveness of consultation. A critical factor in the process is the understanding that consultation, in all forms, is an ongoing process rather than a single event.

² 113 Yale Law Journal, 1623, Page 2.

General requirements:

- Consultation is defined in Government Code Section 65352.4 as the “meaningful and timely process of seeking, discussing, and considering carefully the views of others...” Consultation involves conduct that is mutually respectful of all parties, recognizes all parties’ cultural values, incorporates the parties’ needs for confidentiality, and seeks agreement on the resolution of the concerns raised.
- Consultation should be done prior to the public review process and as early as possible.
- Consultation should be done face-to-face whenever possible and should not take place in a public forum.
- When an Agency or Department first seeks to consult on a project, its initial inquiry should be made to the tribe’s officially chosen leader. A department head or higher should make the initial request.
- Once the tribe has agreed to consult, consultation should take place between the Agency or Department’s designee(s) and a tribal representative(s) who has been identified through a letter from the tribe’s presiding officer or a Tribal Council resolution.
- Agency or Department officials should be cognizant of the fact that most tribes were relocated to isolated locations, far from city centers, busy highways, and from their territories of cultural affiliation. Travel required for consultation may be time-consuming and, in the case of tribes along the Colorado River, may involve changes in time zones. Agency or Department officials should seek to accommodate the tribe’s schedules and to share the burden of travel.
- Agency or Department officials should be aware that the confidentiality of many Native American cultural features is critical to tribal culture and that many tribes will seek confidentiality assurances prior to divulging information about those sites.

Conducting consultation:

- Consultation should be viewed as a process, rather than a single event and an Agency or Department should be prepared to continue consultation throughout the duration of a project
- Simply notifying a tribe is not the same as consultation. A 1995 federal court ruling held that written correspondence requesting consultation with a tribe was not sufficient for the purpose of conducting consultation as required by law, but that telephone calls or more direct forms of contact may be required. 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.
- Agency or Department officials should begin consultation with tribes at the earliest point possible in the project planning process
- All attempts to contact a tribe regarding consultation should be well documented, including letters, telephone calls, and direct meetings. Any returned or unanswered correspondence should be retained in order to verify the Agency or Department’s efforts to communicate. Documentation of notification and consultation requests should be included in the Agency or Department’s public record.
- Agency or Department officials should be aware that tribes may require a significant period of time to respond to a consultation request.
 - Often tribal councils meet only once a month; all formal positions taken by the tribe will usually require approval of the tribal council.

- Agency or Department officials should be aware of the potential for vast differences in tribal governments' capabilities (especially between federally-recognized and non-federally-recognized tribes), different tribes' staffing capabilities, and resources. Some may be able to respond more promptly and efficiently than others.
- Agency or Department officials should be sensitive to the fact that many tribes are subject to numerous demands on their small staffs, including requirements of the federal, state, and Agency or Department.
- Consultation requests should include a clear statement of purpose, explaining the reason for the request and declaring the importance of the tribe's participation in the project planning process. The request should specify the location of the project area of potential effect.
- Consultation requests should provide as much detail about the proposed plan as possible, presented in layman's terms, including maps of the affected area and a description of the nature of anticipated impacts. Failure to disclose pertinent information may provide grounds for a legal challenge to the Agency or Department's plan.
- Consultation should involve listening to tribal concerns with the goal of accommodating Native American religious practices.³
- Consultation should produce enforceable results that reflect the efforts made to achieve a mutually agreeable outcome.
- All aspects of the consultation process should be documented, including how the agency reaches a final decision.
- Upon conclusion of consultation, the Agency or Department should notify all consulting tribes of the proposed decision, specifically discussing the basis for the decision, the relationship to tribal concerns, and outlining the process for tribes to challenge the draft plan prior to its final approval.

3. Procedures to identify tribes through the NAHC.

Consultation requires communicating directly with tribes. The NAHC's role is to facilitate consultation and to provide assistance to tribes and an Agency or Department. The NAHC will provide contact information for all culturally affiliated tribes, including those with overlapping territories.

- When Agency or Department projects are first proposed, the Agency or Department should send written requests to the NAHC asking for a list of appropriate tribes in their area for consultation. The Native American Heritage Commission will provide the Agency or Department with a list of appropriate California Native American tribes comprised of federally-recognized and non-federally recognized tribes found on the NAHC's consultation list. The appropriate groups will be those that have a cultural affiliation to a specific geographic area.
- Requests should include the specific location of the area proposed for development.

³ 113 Yale Law Journal 1623, page 12

4. Consultation to address appropriate methods of treatment and management of cultural features.

- An Agency or Department should not ask tribes to prioritize sites for the purpose of protection.
- An Agency or Department should be prepared to consider a broad range of mitigation options, including avoidance, development of habitat and open space properties, or alternative means of preserving Native American cultural features intact whenever possible.
- An Agency or Department should be prepared to discuss tribal involvement in the treatment and management of cultural features through monitoring, co-management, and other forms of participation.
- The planning of treatment and management activities should address the possibility that Native American human remains may be involved when protecting cultural features. An Agency or Department should work with the tribe to identify and plan for appropriate treatment of such discoveries, in accordance with Public Resources Code Section 5097.98.

5. Procedures to protect confidentiality.

- Any information submitted by tribes must remain confidential and exempt from public disclosure laws, to the extent authorized by law.
- Procedures must be established to allow for tribes to share information with Agency or Department officials in a confidential setting, rather than requiring discussion in a public meeting.
- Agencies or Departments should develop their own “in-house” confidentiality procedures.
- Any documents or portions of reports specifically detailing the cultural feature or area proposed for protection by the tribe through an open space designation must be kept confidential.
- Only those tribal designees, Agency or Department officials, qualified archaeologists, and land managers involved in the particular planning activity may obtain information about a given site.
- The consulting parties may wish to develop their own criteria for the limited release of confidential information related to the site.
- Anyone requesting confidential site information from the Agency or Department should first provide identification and sign a nondisclosure agreement in conformance with existing law, and, if necessary, establish their “need to know.” Disclosure to any second parties must also be prohibited under terms of the nondisclosure agreement.

Terms for confidentiality may differ depending upon the nature of the site, the tribe, the Agency or Department’s mission, or who proposes to protect the site. The Agency or Department should collaborate with tribes to develop informational materials for field managers regarding the cultural sensitivity of divulging site information, explaining the tribe’s interest in maintaining the confidentiality and preservation of a site. Land managers should be informed that Public Resources Code Section 5097.993 establishes criminal penalties for the unlawful and intentional destruction, degradation, or removal of Native American cultural or spiritual places located on public or private lands.

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Miscellaneous

- Agencies or Departments are encouraged to adopt policies or procedures, in consultation with the appropriate tribe(s), to protect Native American cultural features, to protect the confidentiality of information exchanged between the tribe and the Agency or Department regarding cultural features, to provide penalties for the unauthorized disclosure of confidential information, and for appropriate treatment and management of Native American cultural features.
- Agencies or Departments should consider development of preservation plans for cultural features within their jurisdictions in accordance with established cultural resource protection standards.
- The Agency or Department's representative should be encouraged to attend Tribal Council or tribal planning meetings, where appropriate and when invited, in order to become familiar with tribal government operations and to facilitate relationship building.
- Consultation may include discussion of mitigation measures, including the preferred alternative of avoidance, as recommended in Section 15370 of the CEQA Guidelines.
- When the consulting tribe finds mitigation banking to be an acceptable form of mitigation for the loss of gathering/collecting areas, an Agency or Department may wish to consider land banking that fosters the development of permanently protected gathering and collection areas through transplantation, irrigation, or other means.
- Appropriate tribal governments and the Agency or Department should consider the benefits of recording protected sites with NAHC or CHRIS system, with designation to indicate that the site is Native American. Burial sites or sites of a sacred or spiritual value should be listed with the NAHC; sites of historic or prehistoric nature should be listed with the CHRIS.