

State of California - The Resources Agency DEPARTMENT OF PARKS AND RECREATION		MANUAL
DEPARTMENTAL NOTICE		Operations
No. 2007- 05		
SUBJECT Native American Consultation Policy & Implementation Procedures		CHAPTER 0400 Cultural Resources (old DOM 1600)
ISSUED November 16, 2007	EXPIRES When incorporated	REFERENCE The Cultural Resources sections of Old DOM 1600 & the Resource Management Directives (1979)

DPR 375 (Rev. 10/2001)(Word 6/25/2002)

WHEN APPLICABLE, ENTER THE NUMBER AND DATE OF THIS DEPARTMENTAL NOTICE IN THE MARGIN OF THE MANUAL PAGE, ADJACENT TO THE SECTION(S) AFFECTED BY IT.

This Departmental Notice has been re-created for transmittal in electronic format. The original notice was signed by Theodore Jackson, Jr. – Deputy Director for Park Operations.

The purpose of this Departmental Notice is to set forth the Department’s policy for consultation with Native California Indians^{*1} regarding activities that affect matters relating to their heritage, sacred sites, and cultural traditions. This Departmental Notice is effective immediately and until incorporated into the Department Operations Manual (DOM).

See “Definitions of Key Terms” for definitions used in this Departmental Notice.

LEGAL AUTHORITY

The Department is required, by state and federal laws and regulations, to protect and preserve Native American resources within the State Park System. Departmental policy also provides specific guidelines, stated in the Resource Management Directives concerning the involvement of Native California Indian groups in all plans and practices that have impacts on the Native American resources under the Department’s stewardship. The Federal laws related to Native American resources that may apply to the Department include: The National Historic Preservation Act (NHPA) (16 U.S.C. § 470 et seq.); The National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. § 4321 et seq.); the Archaeological Resources Protection Act (ARPA) (16 U.S.C. § 470aa et seq.); Executive Order No. 13007, 61 Fed. Reg. 26771 (May 24, 1996) regarding Indian Sacred Sites; the Archaeological and Historic Preservation Act (16 U.S.C. § 469 et seq.); the Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001 et seq.); and the American Indian Religious Freedom Act (42 U.S.C. 1996). State laws and regulations related to Native American resources that may apply to the Department include: The California Environmental Quality Act (CEQA) (Cal. Pub. Resources Code §21000 et seq.); Native American Historical, Cultural, and Sacred Sites (Cal. Pub. Resources Code § 5097 et seq.); Historical Resources (Cal. Pub. Resources Code § 5020 et seq.); Preservation of Significant Archaeological Resource Areas and Associated Artifacts (Cal. Pub. Resources Code § 5079.60 et seq.); Removal, Destruction, Mutilation of Human Remains (Cal. Health & Saf. Code § 7050.5 et seq.); Destruction of Archaeological Sites and Caves (Cal. Pen. Code §§ 622

¹ The intent of the Department’s policy is to consult with both federally and non-federally recognized tribes or groups of Native California Indian people, which, in this Departmental Notice, may be referred to as ‘tribe’ or ‘group’. Additionally, the Department recognizes that some tribal territories cross present international and state boundaries. It is the intent of the Department to include such tribes in consultation regarding activities within such geographic areas.

½ & 623); Investigation, Excavation and Preservation of Historic or Prehistoric Ruins (Cal. Wat. Code § 234); Government Code Sections regarding disclosure of archaeological site information (Cal. Gov. Code §§ 6253, 6254, & 6254.10.); and Title 14, California Code of Regulations § 4307 regarding Geological Features; and Governor's Executive Order No. W-26-92 [management of significant heritage resources under jurisdiction of state agencies] April 8, 1992. Within the Department see Resource Management Directives #50, #52, and #71. Recent legislation regarding disclosure of information and consultation by local governments with Native California Indian tribes can also be found in Civil Code Section 815.3; Government Code Sections 65040.2, 65092, 65351, 65352, 65352.3, 65352.4, 65560, and 65562.5 (also known as Senate Bill No. 18 (2003-2004 Regular Session)).

BACKGROUND

Since at least 1979, with the issuance of the Department's Resource Management Directives, it has been the informal guidance of California State Parks to strive for open communication and ongoing consultation with Native California Indians on matters relating to their heritage, sacred sites and cultural traditions. This Departmental Notice is intended to establish a process of consultation between Native California Indian tribes and California State Parks by clearly defining the circumstances under which consultation should occur and the process of such consultation including the timing of consultation with project development, the negotiation process, or when to consider consultation 'concluded' with regard to a specific issue.

NATIVE AMERICAN CONSULTATION POLICY

The Department recognizes its special responsibility as the steward of many sites of cultural and spiritual significance to living Native peoples of California. Therefore, it is the policy of California State Parks to engage in open, respectful, ongoing consultation with appropriate Native California Indian tribes or groups in the proper management of areas, places, objects or burials associated with their heritage, sacred sites and traditional cultural properties or cultural traditions in the State Park System.

The primary responsibility for Native American consultation is vested in the District Superintendent in each park district. This Departmental Notice outlines nine primary areas where consultation is appropriate, but other areas for this type of dialogue may include aspects of park operations such as visitor use, interpretation, facility maintenance, special events, prescribed burning, and resource management. District Superintendents will annually report to the Department Preservation Officer a summary of consultations with local Native California Indian tribes that occurred in their districts. This information will be compiled in the Annual Report on Historic Preservation Activities, which is submitted by the Department to the Office of Historic Preservation (see Departmental Notice 2004-2).

Prior to implementing projects or policies that may have impacts to Native California Indian sites within the State Park System, the Department will actively consult with local Native California Indian tribes regarding the protection, preservation and/or mitigation of cultural sites and sacred sites in the State Park System. Consultation between local Native California Indian tribes and California State Parks is required in the following nine areas of activity: 1) acquisition of properties where cultural sites are present; 2) during the General Plan process and/or development of Management Plans; 3) planning, design, and implementation of capital outlay

and other public works and development projects; 4) issues of concern identified by the tribes; 5) plant and mineral gathering by Native people; 6) access to Native California Indian ceremonial sites; 7) archaeological permitting; 8) mitigation of vandalism and development of protective measures at Native California Indian sites; and 9) when using the Native voice in presenting the story of Native California Indian people in park units.

CONSULTATION PROCESS AND PROCEDURE OUTLINE

Guiding Thought: Consultation is a process in which both the Native California Indian tribe and California State Parks invests time, effort, and understanding to seek a mutually respectful resolution for the purpose of preserving or mitigating impacts to a cultural place, site, object or human burial where feasible.

A. California State Parks initiates contact with Native California Indian tribes:

1. When a project area has been identified in one or more of the nine different areas of activity described above, District personnel shall request, and obtain, from the Native American Heritage Commission (NAHC) the Native American Consultation List for the effected area (the District should regularly coordinate with the NAHC to maintain an accurate list).
2. District personnel shall then contact each group or tribe listed for the appropriate area requesting a consultation. Written notice should be used (in some circumstances by certified mail with return receipt requested) – but this does not preclude contact in person, by telephone, FAX, or e-mail. Personal follow up contact to any of the above methods is highly encouraged to increase successful information sharing and understanding.

In the event written notice is used, such notices should be concise, clear, and informative to ensure understanding by all parties, and contain the following information:

- a. A clear statement of the purpose of the consultation, inviting the Native California Indian tribe to consult and re-enforcing the importance of the tribe's participation in working to identify, protect and preserve their heritage and traditions.
- b. A narrative description of the proposed activity, project, acquisition area, or General Plan. In the case of vandalism, the site of the crime and extent of damage.
- c. Maps clearly showing detail of the geographic area(s) described in the narrative. Maps should be of reasonable scale with sufficient references for easy identification of the affected area(s).
- d. The deadline (date) by which California State Parks requests the tribe to agree to consultation with District personnel. The tribe shall have 90 days from the date of the notice to request consultation.
- e. Contact information of representatives of California State Parks to whom the tribe should respond.
- f. Technical reports, including summaries of cultural resources reports and archaeological reports applicable to the area, if available.

- g. Information on proposed or potential grading or other ground-disturbing activities, if applicable (this may be included in the project description).
3. Subject to confidentiality procedures, it is advised that the District and the tribe maintain clear records of communications, including letters, telephone calls, faxes, and e-mails. Both parties may send notices by certified mail and keep logs of telephone calls, faxes and e-mails. A file of returned or unanswered correspondence shall be retained by the District in order to verify efforts to communicate. Documentation of notification and consultation request will be included in the California State Parks public record (with the exception of any sensitive, confidential elements pursuant to laws and regulations; litigation holds or on-going investigations that may preclude such public release).
4. California State Parks shall provide additional information about the proposed project, General Plan, or event, if available, if so requested by the tribe. In the event new information is discovered regarding a proposed project, California State Parks may consider extending the 90-day timeframe for the tribe to review the new information and respond accordingly.
5. If the tribe does not respond within the 90 days or declines consultation, consultation will be considered waived. However, both parties will retain the right to re-open consultation efforts at a later date if warranted.

B. Native California Indian tribe initiates contact with California State Parks:

1. If a Native California Indian tribe requests consultation for the purpose of identifying, preserving, protecting cultural sites, traditional cultural properties, sacred sites, or gathering areas; mitigating impacts to cultural resources; or entry for gathering certain plants or minerals, the consultation shall begin within a reasonable period of time, but no later than 90 days from the request for consultation. The goals of such consultation include:
 - a. For all parties to recognize cultural places that are essential elements of Native California Indian tribal culture, traditions, heritages and identities.
 - b. To establish meaningful dialogue between California State Parks and local Native California Indian tribal governments in order to identify and take into consideration cultural places on State park lands.
 - c. To avoid potential conflicts over the preservation of Native California Indian cultural places by ensuring that both California State Parks and tribal governments have information available early in the land use planning process.
 - d. To encourage the preservation and protection of Native California Indian cultural places on State park land by avoiding them or developing appropriate management for them in project planning, design and development when possible and minimizing both primary and secondary impacts.
 - e. To facilitate the development of proper treatment and management plans to preserve Native California Indian cultural places.
 - f. To enable Native California Indian tribes to enter into cooperative agreements with California State Parks to act as caretakers of their cultural places.

When is Consultation Concluded? When engaging in consultation, both California State Parks and Native California Indian tribal representatives should consider leaving the process

open-ended to allow ample opportunity for mutual agreement to be reached. Some consultations will involve highly sensitive and complex issues that cannot be resolved in a short period of time. Consultation may require a series of meetings before a mutually acceptable agreement may be achieved. One method of efficient consultation would be to schedule quarterly meetings for on-going dialogue.

While consultation may be on-going, with regard to any individual project, consultation should be considered concluded at the point in which:

- The parties to the consultation come to a mutual resolution concerning the appropriate measures for preservation or mitigation; or
- Either California State Parks or the tribe, acting in good faith and after reasonable effort, concludes that the parties are at an impasse and resolution cannot be reached concerning the appropriate measure(s) of preservation or mitigation.

When a mutual resolution is reached, a Memorandum of Agreement² may be written and the project will proceed implementing the measures agreed upon.

If an impasse is declared, written documentation of all efforts and alternatives shall be forwarded to the Departmental Preservation Officer (DPO) for review. The Department Preservation Officer may recommend mitigation or preservation measures for the project, alternatives to the project, abandonment of the project, or proceeding with the project as planned and shall forward such recommendation with the reasons therefore, along with all documents, to the Director for the final decision regarding the project.

DEFINITIONS OF KEY TERMS USED IN THIS DEPARTMENTAL NOTICE

“Consultation” means the timely and active process of seeking, discussing, and considering the views of the participants to obtain a mutually respectful resolution for the treatment of heritage sites, objects, or human remains.

“Cultural sites” are those places or areas where gathering, ceremonies, everyday living, or burial of the dead would occur. A village site would be an example; however other types of places may also be identified by the tribe.

“Gathering area” means any area where traditional food, plants, or other natural materials that are used in a traditional practice by a Native California Indian group are gathered, collected, assembled, or maintained.

“Native American Consultation List” means the list developed and maintained by the NAHC pursuant to Government Code Section 65352.3 – as outlined in the Governor’s Office of Planning and Research’s *Tribal Consultation Guidelines – Supplement to General Plan Guidelines, November 14, 2005*, that identifies for local governments California Native American

² For large, complex projects, the Department recommends the parties execute a Memorandum of Agreement detailing the agreed upon measure(s) of preservation or mitigation. However, a Memorandum of Agreement may not be necessary for smaller, less complex projects where the documentation of the consultation process is sufficient.

groups to be notified or consulted about proposed local land use planning decisions for the purpose of protecting traditional cultural places and sacred.

“Department Preservation Officer” means the Department Director or designee assigned to coordinate State Park cultural preservation activities. Currently this position is held by the chief of the Archaeology, History and Museums Division (Governor’s Executive Order No. W-26-92 [management of significant heritage resources under jurisdiction of state agencies] April 8, 1992).

“Native California Indian group” means a California Indian tribe, band or nation recognized by the NAHC.

“Project”, for the purposes of this Departmental Notice, is any activity that has potential to cause an adverse effect on Native American archaeological and ethno-historical sites, objects or burials.

“Traditional Cultural Property” is as defined in National Register Bulletin #38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*: “A traditional cultural property...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.”

“Sacred Sites” are places of spiritual/religious significance to a tribe where religious ceremonies are practiced or which are central to their origins as a people; but sacred sites may also include those areas where California Native people gather food, medicine, or materials for cultural purposes. It is always up to the tribe to determine whether or not a site is sacred. A list of Sacred Sites is maintained by the NAHC - that office will provide a contact person who is qualified to discuss any sacred site issues in an identified project area.

Other Key Terms Not Included – Provided for Clarification

“Most Likely Descendent (MLD)” means the Native California Indian group or person(s) that the Native American Heritage Commission designates as most likely descended from ancestral Native Americans in an area or region of California (Cal. Pub. Resources Code § 5097.94a & 5097.98). The MLD List is not distributed by the NAHC. Groups or people on this list would only be contacted to develop agreements with regard to specific human burials or grave goods discovered during the course of a project.

“Native American monitor” means a person who is hired to monitor archaeological resources during a project. Preference for these positions should be given to California Native Americans culturally affiliated with the project area. The monitor should be familiar with local ancestral California Native American village sites and cultural practices, and follow the “Guidelines for Monitors/Consultants of Native American Cultural, Religious and Burial Sites” (approved Sept. 13, 2005) prepared by the NAHC (available on their website www.nahc.ca.gov/guidelines4mon.html).

QUESTIONS

If you have questions regarding this notice, its implementation, interpretation, application or deviation, contact the Cultural Resources Programs Supervisor, Archaeology, History and Museums Division, John Foster at (916) 4529, or JFost@parks.ca.gov.

Theodore Jackson Jr.
Deputy Director
Park Operations