

# Chapter 3: Native American Consultation

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# Chapter 3: Native American Consultation

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## 3.1 Introduction

Consideration of Native American spiritual beliefs and cultural values is an important requirement in the development of Caltrans highway projects. This chapter provides Caltrans policies and procedures for complying with various state and federal historic preservation laws, regulations, and guidelines for involving Native Americans in historic preservation decisions. *Requirements for consultation with Native Americans under the Section 106 Programmatic Agreement<sup>1</sup> ([Section 106 PA](#)) are the same as those required under the regulations implementing Section 106.*

The consultation policies and procedures ensure that:

- Native Americans are involved in all aspects of identifying, evaluating and treating Native American historic properties or historical resources<sup>2</sup> and
- Native Americans' recommendations on the treatment of Native American human remains, associated grave artifacts, and sacred objects that may be unearthed by Caltrans activities are given maximum consideration.

Also presented are Caltrans policies and procedures (a) for identifying and treating resources that are not eligible for inclusion in the National Register of Historic Places (NRHP), but are culturally significant, and (b) for providing Native American access to sacred sites and plant gathering areas located within Caltrans right of way. Although any group can be involved in the historic preservation or environmental process, Native Americans are specifically identified in the regulations and policies because of their relationship to archaeological sites, sacred areas and traditional cultural properties.

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<sup>1</sup> *First Amended Programmatic Agreement Among the Federal Highway Administration, the Advisory Council on Historic Preservation, the California State Historic Preservation Officer, and the California Department of Transportation Regarding Compliance with Section 106 of the National Historic Preservation Act as it Pertains to the Administration of the Federal-Aid Highway Program in California*

<sup>2</sup> Historic properties are those that have been listed in or determined eligible for inclusion in the National Register of Historic Places. Historical resources under CEQA are those that are (1) listed in or meet the criteria for inclusion in the California Register of Historical Resources, (2) identified as significant in surveys that meet the standards of the California Office of Historic Preservation, or (3) are resources that are listed in a local register of historical resources by a local government.

Caltrans' historic preservation coordination efforts with Native Americans involve consulting with federally recognized tribes and California Indian traditional cultural leaders, unrecognized groups, and individuals on their concerns regarding Caltrans activities. Simultaneously, these efforts also include identifying other cultural concerns and areas of cultural significance that a proposed project may impact and that may need to be addressed under environmental law. Consultation typically focuses on the identification, evaluation, determination of effects, and treatment of archaeological resources. However, consultation also is necessary to identify areas important to Native Americans that may be unrecognized by people outside the culture. These include sacred sites, plant-gathering areas, and certain historic properties that are referred to as Traditional Cultural Properties (see [Section 4.4.2](#) of this volume, and [National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties](#)). Knowledge of such places is almost always confidential, and their identification and management, therefore, can be problematic and sensitive. Caltrans, through its Environmental, Maintenance, and Right of Way Divisions and Offices, seeks to ensure that Native Americans have access to such sites. Caltrans also seeks Native Americans to monitor archaeological excavations and sometimes construction, and works per State law with Native Americans identified as Most Likely Descendants to develop appropriate treatment of the remains and associated grave artifacts, if Native American human remains are discovered during any Caltrans activities.

### **3.2 Government to Government Relations and Section 106 Consultation**

Federally recognized Indian tribes are sovereign nations with governing rights over their land and their people. The federal government's unique legal relationship with Indian tribes is set forth in the United States Constitution, treaties, statutes, and court decisions. FHWA, as a federal agency, is responsible for maintaining that relationship with tribes, usually defined as government to government, which entails consulting when policies change which may uniquely affect tribes. Caltrans' Directors Policy [Number 19](#) "Working with Native American Communities" echoes the need to respect tribal sovereignty and consulting with tribes on a government level.

The regulations implementing Section 106 cautions that consultation with Indian tribes should be conducted in a manner respectful of tribal sovereignty and sensitive to the concerns and needs of the Indian tribe, and must recognize the government-to-government relationship between the federal government and Indian tribes

[36CFR800.2(c)(2)(ii)(B) and (C)]. Largely this translates to the agency official shall consult with representatives designated or identified by the tribal government.

Under the PA, although FHWA has authorized Caltrans to initiate consultation with Indian tribes, FHWA remains responsible for their government-to-government relationship with Indian tribes.

### 3.3 Background

California was home to an estimated 300,000 to over 700,000 Indians at the beginning of Spanish colonization in 1769. Graphically, [Native California](#) is composed of at least 60 different tribes, grouped into six language families. This general portrayal belies the linguistic evidence that as many as 80 languages, differentiated into an indeterminable large number of dialects, were spoken, and that territorial boundaries were fluid. Lifeways also were varied and closely paralleled the rich environmental resources of the state. Subsistence activities included the gathering of plant and animal foods, hunting, marine and fresh water fishing, and, in some areas, the practice of agriculture. The relative abundance of natural resources allowed for a large Native population, as well as the development of an elaborate ceremonial, religious, and material culture.

Like other Native people in the Western Hemisphere, the Indians of California declined following the entrance of Euro-Americans. Between 1770 and 1900 the Native population fell to 20,000<sup>3</sup>. The collapse and social disruption of Native culture was due primarily to: (1) development of the Mission system (1769-1834), (2) the opening up of land for settlement after the War with Mexico in 1848, (3) the rapid influx of immigrants to California after the discovery of gold in 1848, and (4) exposure to devastating Euro-American diseases.

The 1848 Treaty of Guadalupe Hidalgo at the end of the war between the United States and Mexico did not include any provisions for protecting Indian land title. The United States government initiated attempts to resolve this. However, once the Gold Rush was on and California became a state, the government became less inclined to pursue this issue and, in actuality, circumvented any fair resolution. Almost all California Indians were deprived of protected land title because they were not notified of a provision of the Lands Claim Act of 1851. This provision stated that all lands with

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<sup>3</sup> Shelburne Cook, *The Conflict Between the California Indian and White Civilization*. (Berkeley: University of California Press, 1976)

invalid claims, or claims not presented within two years after the Act, would become public domain; this is what happened to Indian lands in 1853. Lands of certain bands of Mission Indians were protected by early Spanish and Mexican land grants and were retained by those bands.<sup>4</sup>

In 1852, the United States Senate did not ratify eighteen treaties previously negotiated between the U. S. Commissioners charged with negotiating treaties and the 139 California Indians the Commissioners identified as tribal chiefs or headmen of California tribes (see Heizer [1972] for a discussion of the treaties and the “chiefs”)<sup>5</sup>. The treaties would have established a land base for the California Indians and also would have conferred formal recognition to the tribes.

Land that was established for the Indians in the last half of the nineteenth century included reservations established in conjunction with military forts and later by the Four Reservation Act. The military forts were disbanded in 1869, and only three reservations (Hoopa, Tule River, and Round Valley) were created under the Four Reservation Act.<sup>6</sup>

Between 1906 and 1910, funds were provided through a series of appropriation Acts to purchase small tracts of land in the central and northern parts of the state for the landless Indians in those areas, thus establishing the Rancheria System in California. Nearly fifty years later, the federal government attempted to terminate the status of forty-one California rancherias under the Rancheria Act of 1958; thirty-eight were terminated, three were not. Termination was a federal Indian policy in the 1950s and 1960s, designed to end the tribes’ special relationship with the federal government and to subject them to state laws. Tribal land was converted into private ownership, and in most instances sold.<sup>7</sup> In 1967, the newly established California Indian Legal Services sought to reverse, through litigation, the termination of the California

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<sup>4</sup> California Indian Legal Services, Briefing Paper: An Overview of the Historical Factors which have Contributed to the Special Status Problems of California Indians. Prepared for the Honorable Bill Richardson, Chairman, Subcommittee on Native American Affairs, June 9, 1993.

<sup>5</sup> Robert F. Heizer, *The Eighteen Unratified Treaties of 1851-1852 between the California Indians and the United States Government*. (Berkeley: University of California Archaeological Research Facility, 1972).

<sup>6</sup> Advisory Council on California Indian Policy, *The ACCIP Historical Overview Report: The Special Circumstances of California Indians*. In *Final Reports and Recommendations to the Congress of the United States Pursuant to Public Law 102-416*. (Sacramento:1997)

<sup>7</sup> William C. Canby, Jr., *American Indian Law in a Nut Shell*. (St. Paul: West Publishing, 1988)

rancherias. Twenty-nine of the thirty-eight rancherias have since been restored, either through litigation or legislation.<sup>8</sup>

This brief and incomplete synopsis of the federal government's policy towards California Indians provides a background to the situation today — that in addition to federally recognized land based tribes, there are many California Indian groups and individuals without a land base and/or without federal recognition. In 1994, the Advisory Council on California Indian Policy (ACCIP), composed of representatives of federally recognized, terminated and unacknowledged tribes was established by Public Law 102-416, for the expressed purpose of holding a series of statewide meetings to hear the special concerns of California Indians and to develop recommendations to Congress for ensuring that the needs of California Indians are being met. In September 1997, the ACCIP issued to Congress its final reports and recommendations, which addressed the social, political, and economic status of California Indians.<sup>9</sup>

Many Indians living in urban areas were displaced from other states under the Bureau of Indian Affairs “relocation” program in the 1950s. Through this program, Indians received grant money to leave reservations and seek work in metropolitan centers, which had been perceived as a solution to the reservations’ high rate of unemployment.

According to the 2010 U.S. Census, over 360,000 Native Americans and Alaska Natives reside in California's [58 counties](#); perhaps half these numbers are Indians indigenous to California.

As of 2014, California has 109 federally recognized tribes.

The majority of Indian Trust Land, reservations, and rancherias are located in California's Northwest region, the North Coast Ranges, and in inland Southern California. The California Department of Housing and Community Development's (CDHC) 2004 [Field Directory of the California Indian Community](#) was updated in 2011 by CDHC's California Indian Assistance Program and the Indian Dispute Resolution Services. The Field Directory gives the location of each reservation and rancheria, including land holdings, population, and type of tribal government and representatives, current as of the date of publication. Information on the tribes may change in the interim, so before taking action, confirm who are the tribal leaders and other per-

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<sup>8</sup> Advisory Council on California Indian Policy, The ACCIP Termination Report: The Continuing Destructive Effects of the Termination Policy on California Indians. In Final Reports and Recommendations to the Congress of the United States Pursuant to Public Law 102-416. (Sacramento:1997)

<sup>9</sup> Advisory Council on California Indian Policy, Final Reports and Recommendations to the Congress of the United States Pursuant to Public Law 102-416. (Sacramento:1997)

minent information. A more current update on [tribal leaders](#) and addresses can be viewed on the Department of the Interior, Bureau of Indian Affairs website.

The Headquarters' Cultural Studies Office (CSO) in the Division of Environmental Analysis will distribute updates of the Field Directory to the Districts, as they become available.

## **3.4 Coordination Roles and Responsibilities**

### **3.4.1 Caltrans – Headquarters and Districts**

Headquarters and each of the Districts have staff who are designated specifically to assist in the implementation of Caltrans' Native American policies and to ensure that Caltrans complies with applicable federal and state laws and regulations concerning Native American cultural issues.

#### **3.4.1.1 Headquarters**

The Headquarters statewide Native American Coordinator (NAC) works in the Native American Cultural Studies Branch of Headquarters' CSO (see [Chapter 1 Section 1.3.2](#) of this volume). The NAC is responsible for:

- 1) Assisting the Districts, upon request, in all interactions with the Native American Heritage Commission (NAHC), the Office of Historic Preservation (OHP), also known as the State Historic Preservation Officer (SHPO), and all other public agencies, and
- 2) Providing direction to the Districts on Native American affairs, including transmittal of pertinent legislation and information as it becomes available.

#### **3.4.1.2 Districts**

Each District has a designated District Native American Coordinator (DNAC) in the Environmental unit. The DNAC is responsible for ensuring that Native American consultation regarding cultural resources occurs, either by themselves or by other staff, and that documentation of contacts and consultation for cultural resources is included in environmental documents. Consultation is to occur early in a project's planning stage and continuously throughout the life of a project. Chapter 1 of this volume in Section 1.3.2 [District Native American Coordinator](#) also contains information on the DNAC's responsibilities.

### 3.4.1.3 Transportation Planning Native American Liaisons

Transportation Planning has established a [Native American Liaison Branch](#) in Headquarters and [Native American Liaisons](#) in the ten districts with federally recognized tribes (i.e., all but Districts 7 and 12). The liaisons assist efforts to establish Caltrans' government-to-government relationship with tribes.

### 3.4.2 Native American Heritage Commission

The California Native American Heritage Commission ([NAHC](#)) was established in 1976 by state statute to preserve and protect burial sites and other places of special cultural or spiritual significance to Native Americans. The NAHC, its powers, duties, and responsibilities, are described in California Public Resources Code (PRC) Chapter 1.75 [Sections 5097.91-5097.99](#). Under PRC [5097.95](#), each state and local agency must cooperate with the NAHC in carrying out its duties under this chapter. Caltrans works cooperatively with the NAHC concerning all Caltrans property and projects that may involve burial sites or elements of cultural or religious significance to Native Americans.

The NAHC consists of nine members, of which at least five are elders, traditional people or spiritual leaders. Members are nominated by a Native American organization, tribe or group, and are appointed by the Governor with the advice and consent of the Senate. The Governor appoints the Commission's Executive Secretary. A major responsibility of the NAHC is to identify and maintain a catalogue of places of special religious or social significance to Native Americans, and of known gravesites and cemeteries of Native Americans on private lands.

#### ***NAHC Authority and Responsibilities***

The NAHC is authorized to assist Native Americans in obtaining appropriate access to sacred places on public lands and to aid state agencies in any negotiations with federal agencies for the protection of Native American sacred places on federally-administered lands in California.

Other major responsibilities of the NAHC include:

- Assisting landowners and Native Americans in developing agreements
- Mediating disputes regarding the respectful treatment and disposition of Native American human burials, skeletal remains and associated grave artifacts
- *Designating a Most Likely Descendent when Native American human remains are discovered* (see Section 3.6.3, this chapter).

### 3.4.3 State Historic Preservation Officer

The California State Historic Preservation Officer (SHPO) reviews Historic Property Survey Reports (HPSR) and subsequent Section 106 findings for documentation of effective Native American coordination.

### 3.4.4 Tribal Historic Preservation Officer

The 1992 Amendments to the National Historic Preservation Act (NHPA) provide for a tribe to assume all or any part of the specified functions of the SHPO, if certain criteria are met with respect to tribal lands ([NHPA Section 101\[d\] \[2\]](#)), and to designate a tribal preservation official, commonly called a Tribal Historic Preservation Officer (THPO).

Functions that a tribe may undertake include advising and assisting federal and state agencies in carrying out their historic preservation responsibilities. Procedures for tribal programs will eventually be outlined in 36 CFR 61.8 and 61.9, currently reserved sections in [Part 61](#), Procedures for State, Tribal, and Local Government Historic Preservation Programs.

Tribal lands are all land within the exterior boundaries of any Indian reservation and all dependent Indian communities.

On August 5, 1996, the Secretary of the Interior granted THPO status to the Yurok Tribe. Since then, 27 [California tribes](#) and the [Washoe Tribe](#) of California and Nevada, as of July 2013, have established THPO offices. Caltrans will consult under Section 106 with THPOs on all properties, both tribal and non-tribal within the boundaries of the tribes' reservations. This consultation also serves the consideration of historical resources under California State law on projects with federal involvement.

The National Association of Tribal Historic Preservation Officers provides a [THPO contact list](#) based on information from the [National Park Service](#).

### 3.4.5 Federally Recognized Tribes

Tribes acknowledged by the federal government to have a government-to-government relationship with the United States and have specific responsibilities, powers, limitations and obligations, are referred to as *federally recognized tribes*. Federal agencies must consult with these Indian tribes regarding properties of traditional religious and cultural importance. A list of federally recognized tribes is published nearly annually in the Federal Register, and the Bureau of Indian Affairs [Office of Indian Services Tribal Leaders Directory](#) regularly updates this list on its webpage.

### 3.4.6 Bureau of Indian Affairs

The Bureau of Indian Affairs (BIA) is responsible for the administration and management of lands held in trust by the United States for American Indians, Indian tribes, and Alaska Natives. In California, lands held in trust, generally are the rancherias and reservations, the Washoe Tribes' Woodsford Community (Alpine County), and casino lands.

When an archaeological investigation is planned on a reservation or rancheria, the BIA is involved in issuing permits, unless the reservation or rancheria has adopted regulations that do not require BIA involvement.

The BIA will issue any Archaeological Resources Protection Act (ARPA) permits needed for any planned archaeological excavation or inadvertent discovery of human remains on non-tribal land within the exterior boundaries of a reservation or rancheria, as outlined in the Native American Graves Protection and Repatriation Act (NAGPRA).

### 3.4.7 Most Likely Descendants

When a county coroner contacts the NAHC upon the discovery of human remains likely to be Native American, the NAHC designates a Most Likely Descendent, who is either an individual(s) or a tribe. *Caltrans confers with the Most Likely Descendent on the respectful treatment and disposition of remains* discovered during any of its activities.

### 3.4.8 Traditional Cultural Leaders

Traditional cultural leaders are Native Americans who are acknowledged by their tribe, group, or community as having traditional knowledge of their culture and ancestral area.

### 3.4.9 Consulting Parties

The SHPO, Indian tribes, local governments and applicants for federal assistance, permits, licenses, and other approvals are entitled to actively participate as consulting parties during Section 106 process. Other individuals and organizations with a demonstrated interest in the project (e.g., "the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.") may participate as consulting parties in the Section 106 process. However, their participation is subject to approval by the responsible federal agency.

### **3.4.10 Native American Monitor**

The Native American Monitor is a liaison between Caltrans and the local Native American community, with whom Caltrans may contract on a project-by-project basis. The Monitor participates and obtains firsthand knowledge of archaeological excavations and construction in areas (as agreed upon in consultation) that are known to have cultural sensitivity or have the potential for cultural sensitivity. The Native American Monitor should be knowledgeable about his or her culture and its traditions, and be familiar with archaeological practices, as well as federal and state laws and regulations regarding Native American cultural concerns.

## **3.5 Laws, Regulations and Guidance**

This section summarizes the federal and state laws that specifically relate to Native American concerns.

### **3.5.1 Federal Laws, Regulations, and Orders**

#### ***National Historic Preservation Act, as Amended***

The 1992 amendments to the National Historic Preservation Act (NHPA) enhance the recognition of tribal governments' roles in the national historic preservation program, including adding a member of an Indian tribe or Native Hawaiian organization to the Advisory Council on Historic Preservation (ACHP).

The NHPA amendments:

- Clarify that properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined eligible for inclusion in the NRHP.
- Reinforce the provisions of the Council's regulations that require the federal agency to consult on properties of religious and cultural importance.

The 1992 amendments also specify that the ACHP can enter into agreement with tribes that permit undertakings on tribal land and that are reviewed under tribal regulations governing Section 106.

Regulations implementing the NHPA ([36 CFR 800](#)) state that a federal agency (Federal Highway Administration [FHWA] and Caltrans acting on its behalf) must consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking, *regardless of location*. For any federal undertaking that occurs on or affects historic properties on tribal lands, the THPO, or

if a THPO is not designated, the tribal representative, are signatories, along with FHWA – and if participating, the SHPO and/or the ACHP – to any Section 106 Memorandum of Agreement.

**Section 4(f) – U.S. Department of Transportation Act**

Section 4(f) of the U.S. Department of Transportation Act of 1966 and the federal regulations that implement Section 4(f), [23 CFR 774](#), apply to historic properties that are listed or determined eligible for inclusion in NRHP. This also includes any properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization that are NRHP listed or eligible. See [Chapter 2](#) of this volume, Section 2.4.8 for a discussion of Section 4(f).

**National Environmental Policy Act**

The National Environmental Policy Act (NEPA) requires agencies to consider both positive and negative effects of their actions on the environment, including consideration of the broader cultural environment beyond historic properties and beyond place. This includes consideration of social cohesion, relation of community to patterns of local land use, social institutions, behavior, community values, lifeways, and beliefs and would include Native American concerns in these categories.

**Archaeological Resources Protection Act of 1979**

The Archaeological Resources Protection Act of 1979 ([ARPA](#)) and implementing [regulations](#) require landholding federal agencies to notify federally recognized Indian tribes before a permit is issued for archaeological excavation on sites of religious or cultural importance to them in national parks, wildlife refuges, or forests, or on Indian lands.

Federally recognized tribes must be notified *30 days before issuing a permit* for excavations on public land; upon request, the Federal land manager must meet with them in those 30 days to discuss their concerns. On Indian lands, Indian tribe or individual *consent must be obtained before the permit is granted*.

Uniform rules and regulations were published by the Departments of the Interior ([43 CFR 7](#)), Agriculture ([36 CFR 296](#)), and Defense ([32 CFR 229](#)), and the Tennessee Valley Authority ([18 CFR 1313](#)) in the January 6, 1984 *Federal Register*. Similar regulations were published for implementing ARPA on Indian lands ([25 CFR 262](#)) in the December 13, 1993 *Federal Register*.

The regulations also state that the federal agency also may notify any other Native American group known by the agency to consider the sites to be of cultural or religious importance. The intentional excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony from federal lands and tribal lands must follow both the requirements of ARPA and the Native American Graves Protection and Repatriation Act (NAGPRA). The BIA will issue any ARPA permits needed for excavation on private lands within the exterior boundaries of Indian reservations. Caltrans must obtain the appropriate permits whenever excavation is planned on federal or Indian Lands. Chapter 5 of this volume, [Section 5.11](#) contains more information on ARPA and other permits and the process for obtaining them.

### ***The Native American Graves Protection and Repatriation Act of 1990***

The Native American Graves Protection and Repatriation Act ([NAGPRA](#)) became effective November 16, 1990. NAGPRA addresses the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to human remains and certain cultural items with which they are affiliated. The Act directs federal agencies and museums to identify, in consultation with Native Americans, the cultural affiliation of Native American human remains and associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony, in holdings or collections under their possession (i.e., physical custody) or control (i.e., having sufficient legal interest). Ultimately, the intent is to repatriate the human remains and other cultural items to the appropriate lineal descendants or tribe.

### ***Right to Ownership***

The Act also statutorily establishes Native American right to ownership of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony which are excavated or discovered on Federal or tribal lands after November 16, 1990. A Review Committee, also established by the Act, determines the disposition of either unclaimed or unaffiliated human remains or cultural items, and reviews disputed claims. The committee includes three Native Americans, three scientific/museum representatives, and one general member. The legislation forbids the participation of federal employees on the Committee.

### ***NAGPRA Regulations***

The regulations ([43 CFR 10](#)) for carrying out the Act were initially published in the *Federal Register* on December 4, 1995. Since then the Department of Interior published additional rules for reserved sections and most recently, republished in the *Federal Register* on May 9, 2013, the regulations to include the additional rules and

address minor inaccuracies and inconsistencies noticed over the years. The regulations establish definitions and the consultation procedures for lineal descendants, Indian tribes, Native Hawaiian organizations, museums and Federal agencies to follow to carry out the Act.

NAGPRA only applies to FHWA when a Federal-aid project is located on tribal or Federal lands. Since FHWA does not control or possess any collections, the repatriation provisions of NAGPRA for collections obtained prior to 1990 do not apply to FHWA. Caltrans, however, is working with universities on repatriation of human remains and associated items recovered from collections generated by Caltrans activities. Most of the collections with human remains are those obtained prior to 1976. After 1976, Caltrans worked with Most Likely Descendants pursuant to California law on the respectful treatment and disposition of human remains. For on-going or future projects, FHWA will reimburse costs associated with inventory, identification, and repatriation as an environmental mitigation expense.

### ***American Indian Religious Freedom Act of 1978***

In 1978, the U. S. Senate and House of Representatives recognized that the passage of laws meant to conserve and preserve natural species and resources unintentionally impinged on the free exercise of religion for Native Americans. These laws limited Native Americans' access to sacred sites and prohibited the use and possession of sacred objects necessary to practice their religion. The House and Senate passed a joint resolution which states that, “. . . henceforth, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites”.

From this joint resolution, came the American Indian Religious Freedom Act of 1978 ([AIRFA](#)) [P.L. 95-341] and [Amendments](#) of 1994 [P.L. 103-334]. AIRFA states, “it shall be the policy of the United States 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.”

### ***Executive Order 12898 –Environmental Justice***

This [Executive Order 12898](#) (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations from 1994) directs federal agencies to develop an agency-wide environmental justice strategy that identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. The Executive Order (E.O.) created an Interagency Working Group to offer consistent guidance to federal agencies in developing the administration, interpretation, enforcement, and research of an environmental justice strategy to encourage cooperation and coordination among the agencies conducting research, and to hold public meetings for the purpose of fact finding, receiving public comments, and conducting inquiries concerning environmental justice. The E.O. directs federal agencies to use existing data systems and develop cooperative agreements with state, local, and tribal governments in order to share information and to avoid unnecessary duplication of efforts.

FHWA and Caltrans acting on its behalf are required to consult and coordinate with federally recognized Indian Tribes on issues addressed in the E.O.

### ***Executive Order 13007 - Indian Sacred Sites***

President Clinton signed [E.O. 13007](#) on May 24, 1996, ordering federal agencies managing federal lands to implement procedures to:

- Accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners
- Avoid adversely affecting the physical integrity of such sacred sites
- Ensure that reasonable notice is provided of any proposed action that may restrict future access or use or could adversely affect the sites

The agencies were to report to the President any necessary changes to facilitate meeting these requirements and any procedures identified to facilitate consultation with appropriate Indian tribes and religious leaders and the expeditious resolution of disputes relating to adverse agency action on such sites on Federal lands. Two elements of the E.O. that are considered problematic: (1) the definition of a sacred site as a “narrowly delineated”, i.e., small, bounded location, and (2) the requirement that tribal leaders tell the land agency about the site, at the risk of alienating the tribe’s traditional practitioners. See also the ACHP’s publication, “The Relationship Between [Executive Order 13007 Regarding Indian Sacred Sites and Section 106.](#)”

### ***Executive Order 13175 – Consultation and Coordination***

On November 6, 2000, President Clinton signed [Executive Order 13175](#) regarding consultation and coordination with Indian tribal governments that directs federal agencies to establish meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications; strengthen the United States government-to-government relationships with Indian tribes; and reduce the imposition of unfunded mandates upon Indian tribes. Executive Order 13175 supersedes Executive Order 13084 (1998) previously signed by President Clinton.

### ***Executive Memorandum on Tribal Consultation***

On November 5, 2009, President Obama issues a [Memorandum on Tribal Consultation](#) on Tribal Consultation that tasked executive departments and agencies with creating detailed plans of actions that they will take to implement the policies and directives of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.

### ***U.S. Department of Transportation (USDOT) Order 5301.1***

U.S. Transportation Secretary Rodney E. Slater signed [USDOT Order 5301](#) (Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes) on November 16, 1999. The Order calls on agencies of the U.S. DOT to build more effective working relationships with Native American tribal governments and to provide increased opportunities for Native Americans to participate in transportation programs. The stated purpose of the Order is “[T]o ensure that programs, policies and procedures administered by the DOT are responsive to the needs and concerns of American Indians, Alaska Natives, and tribes.”

### ***U.S. Department of Transportation Tribal Consultation Plan***

In response to President Obama’s Memorandum on Tribal Consultation, the USDOT established the Department’s [plan of actions](#). In the plan the USDOT lists actions they will take to foster meaningful government-to-government relations, improve existing tribal programs, ensure meaningful tribal input into future tribal transportation programs, ensure the USDOT’s uniform and effective delivery of tribal programs throughout the country, assist in implementing tribal infrastructure projects, assist tribal members in developing transportation capacities, and assist efforts to coordinate national tribal infrastructure policy and programs within the Federal government.

### 3.5.2 Federal Guidelines Relating to Native Americans

This section summarizes federal guidelines specifically as they relate to Native American concerns.

#### ***Advisory Council on Historic Preservation Guidance***

*Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* (2008)

This [Handbook](#) incorporates new and previous ACHP guidance on the requirements under Section 106 to consult with Indian tribes that attach religious and cultural significance to historic properties that may be affected by a federal undertaking. The guidance provides a brief synopsis of the meaning of government-to-government relationships and the relevant federal statutes pertaining to historic preservation, natural resource protection and cultural resource protection, expands upon the role of THPOs in the Section 106 process, and outlines the principles established in the regulations for consultation. Guidance on conducting consultation or on consultation in general, and specific references to consultation during the Section 106 review process's four steps (initiation, identification, assessment, and resolution) is provided in a "commonly asked questions and answer" format. The distinctions, and similarities, of the Section 106 process "on" tribal lands and "off" tribal lands are discussed. Tools and tips for successful consultation also are presented.

*Treatment of Archaeological Properties, A Handbook (Part II, Section IV and Part III, Section XII)* [1981]

Although dated, this Handbook still is cited and is the "foundation" for ACHP archaeology guidance, which now is provided on the [ACHP Archaeology Guidance](#) webpage.

In the review of projects involving archaeological properties, the ACHP ensures that all due consideration is given for any non-archaeological historical or cultural values the property may represent. For example, if an archaeological property also is valuable to a local community for cultural reasons, appropriate weight to this value will be given in decision making (Part II, Section IV). This guidance also notes that archaeological excavations should "relate positively to non-archaeological concern with the area and its archaeological properties," including religious and other cultural concerns of Native Americans (Part III, Section XII). Directly impacting a site is an adverse effect that often is mitigated by data recovery. Part II, Section X outlines other circumstances to consider in addition to a data recovery program when resolving Adverse Effects. This includes situations when the property is "known or thought to

have historic, cultural, or religious significance to a community, neighborhood, or social or ethnic group that would be impaired by its disturbance” (B)(3)(d). Part III, Section X underscores the need to make a systematic effort to find and consult with appropriate representatives when a demonstrable ethnic affinity exists between recovered human remains and living groups.

*Protecting Historic Properties: A Citizen's Guide to Section 106 Review (2010)*

This [Citizen's Guide](#) explains the Section 106 review process, who and what is involved, and how citizens can involve themselves in the review and influence decisions about federal projects that affect properties they value.

The guidance explains the process for becoming a "consulting party," other than those specifically named in the regulations, namely the SHPO, THPO, tribes, local governments, and applicants for federal assistance, permits, licenses, and other approvals. As noted earlier in this chapter, other individuals and organizations with a demonstrated interest in the project may participate in Section 106 review as consulting parties "due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties."

The FHWA, in consultation with the SHPO, and if on tribal land, in consultation with the THPO or tribe, decides who will be a consulting party. How to contact the ACHP and what to do when an agency is out of compliance with Section 106 is also included in the guide.

The FHWA provides an overview of consultation in its "[Section 106 Tribal Consultation Q&A](#)."

***National Park Service Guidance***

*Archaeology and Historic Preservation: Secretary of the Interior's Guidelines for Archaeological Documentation*

The [Archaeology and Historic Preservation Standards and Guidelines](#) stress that archaeological documentation needs to be "responsive to the concerns of local groups (e.g., Native American groups with ties to specific properties)." Archaeological research designs should provide for appropriate ethnographic research and consultation and should consider concerns expressed previously during identification and evaluation phases. If coordination with local or other interested groups had not previously occurred, the research design "should anticipate the need to initiate appropriate con-

tacts and provide a mechanism for responding to sensitive issues, such as the possible uncovering of human remains or discovery of sacred areas."

These guidelines can also be found in the *Federal Register*, vol. 48, No. 190, Thursday, September 29, 1983, pp. 44734-44737.

***National Register Bulletin 15: Guidelines for Applying the National Register Criteria for Evaluation Bulletin 15 (Revised 1991)***

[National Register Bulletin 15](#) contains guidance for assessing significance and integrity when evaluating a cultural resource's NRHP eligibility. Prehistoric archaeological sites are most often eligible for inclusion in the NRHP under Criterion D (information potential). Archaeological sites and other places significant to Native Americans also can be determined eligible for the NRHP under any of the other three criteria. For example, properties may have significance under Criterion A if they are associated with events, or series of events, significant to the cultural traditions of the community, under Criterion B if they are associated with individual Native Americans who made a specific important contribution to history or important mythological figures, or under Criterion C if the property demonstrates distinctive characteristics of a type, period or method of construction or possesses high artistic values, such as a petroglyph or pictograph site.

Religious properties (Criteria Consideration [a]) usually are not considered eligible for inclusion in the NRHP to avoid any "judgment by government about the validity of any religion or belief." These properties can be determined eligible, however, if they meet the requirements of Criterion Consideration (a), given in Bulletin 15, in addition to meeting one of the four NRHP Criteria *and* possessing integrity.

A Native American religious property can be eligible under Criterion A (Events) if it is significantly associated with traditional cultural values. A property or natural feature important to a traditional culture's religion and mythology is eligible if its importance has been ethnohistorically documented and if the associations are not so diffuse that the physical resource cannot be defined adequately. An example of this type of historic resource could be a natural feature from which a particular group is believed to have originated. Another criterion for which a Native American religious site could be eligible is association with a person important in religious history (Criterion B), if that significance has scholarly, secular recognition, or is important in another historic context, or if it can yield *important* information about the religious practices of a cultural group or other historic themes. Other Criteria Considerations,

as listed in Bulletin 15, could apply to places significant to Native Americans. Please refer to Bulletins 15 and 38 (mentioned below) for further discussion.

***National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties***

[National Register Bulletin 38](#) contains guidance for assessing significance in a historic property type called a Traditional Cultural Property or Place (TCP). Many Native Americans prefer “place” because “property” connotes ownership, a concept that is often antithetical to cultural beliefs. A TCP is generally defined as a place that is eligible for inclusion in the NRHP because it is associated with cultural practices or beliefs that are rooted in a community’s history, and are important in maintaining the cultural identity of that community. TCPs are associated with any kind of community: ethnic (e.g., a Jewish community in Florida), religious (e.g., Mormons), etc. Most identified to date are Native American sacred sites.

Often the community can only identify a TCP, or by certain members of the community, that ascribe significance to it, as there are often no associated physical characteristics that can be identified by the uninitiated.

A TCP must be a place, i.e., a physical location. Although intangible attributes are considered, purely intangible attributes are not TCPs. Evaluating and assessing the integrity of a TCP involves looking at the property through the eyes of the community that values it. The presence of a TCP does not need to be known prior to efforts to identify historic properties, since factors such as private acquisition, acculturation, or colonization might have restricted access to and knowledge of such places through time. Field visits may jog memories resulting in the identification of a place that meets the definition of a TCP.

<p>A TCP is eligible for the National Register if:</p> <ul style="list-style-type: none"><li>• it meets at least one of the four evaluation criteria;</li><li>• has integrity; <i>and</i></li><li>• is at least 50 years old, unless it is exceptionally significant.</li></ul>
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A place that is not eligible for inclusion in the NRHP as a TCP may still be a place with cultural significance ascribed to it by a community and would be considered under other laws, such as NEPA or PRC [5097.9](#). Intangible values such as religious values and lifeways still require consideration under other statutes, such as AIRFA.

### 3.5.3 California State Law, Executive Order, and Policy Statements

#### ***Public Resources Code (PRC) 5097.9***

The primary California state law guiding Caltrans Native American policies and practices is Chapter 1.75 of the PRC, [5097.9-5097.991](#), *Native American Historical, Cultural and Sacred Sites*. This law discusses the NAHC and its power, roles and responsibilities, mentioned earlier in the chapter. It also requires cooperation of state and local agencies with the Commission in carrying out its duties and prohibits a public agency from interfering with the free expression or exercise of Native American religion or causing severe or irreparable damage to any Native American “sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine” unless shown to be necessary for the public interest. The NAHC has the power to bring an action against a public agency if it appears that their actions will result in such damage.

Native American burials often are unmarked and thus disturbed during earth moving activities. Activities frequently undertaken by Caltrans are restricted in location so that avoidance of burials is difficult if not impossible. In the event that human remains, including isolated, disarticulated bones or fragments, are discovered during any Caltrans activity, whether it is during maintenance, construction, or an archaeological investigation, certain steps must be taken, following the provisions of [Health and Safety Code 7050.5](#) and PRC [5097.98](#), and/or PRC [5097.94](#) as provided below.

It is a felony to obtain or possess Native American artifacts or human remains from a grave or burial cairn except as otherwise provided by law or in accordance with an agreement reached pursuant to PRC 5097.94 or PRC 5097.98.

#### ***PRC 5097.94***

Under PRC [5097.94](#) the NAHC also assists landowners in developing agreements with appropriate Native American groups for the respectful treatment and disposition of human remains. If such an agreement is desirable, the NAHC will provide a list of *all* Most Likely Descendants to be consulted regarding the agreement. All the Most Likely Descendants attest to this agreement by affixing their signatures to it. In the absence of such an agreement, the NAHC designates a Most Likely Descendent after the remains are discovered, and the steps outlined in PRC Section 5097.98 are followed.

**PRC 5097.98**

Under PRC [5097.98](#), the NAHC immediately designates a person or persons it believes to be the most likely descended from the deceased. Within 48 hours of being granted access to the site, the most likely descendent recommends means for treating and disposing with appropriate dignity, the human remains and associated items. If the NAHC does not identify the descendent, or the descendent does not make a recommendation, or the landowner does not accept the recommendation, and any mediation attempted fails to provide the landowner acceptable measures, the landowner must re-inter the remains on the property in an area not subject to further disturbance, and record the site with the NAHC or appropriate Information Center, and the appropriate county.

**PRC 5099.991**

PRC [5097.991](#) Repatriation of Native American remains and associated grave artifacts simply states that *“It is the policy of the state that Native American remains and associated grave artifacts shall be repatriated.”*

Caltrans is in the process of repatriating human remains and associated items found in its curated collections. Since the mid 1970s, the wishes of the Most Likely Descendants for the treatment and disposition of human remains and associated burial items have been followed, and it is unlikely that any human remains have been retained. If human remains are discovered, however, in these collections, the remains will be repatriated.

**Health and Safety Code 7050.5**

If any human remains are discovered or recognized, Health and Safety Code [7050.5](#) requires that no further excavation or disturbance occur in the area and that the county coroner be called immediately. Within 24 hours of notification, the coroner calls the NAHC if the remains are known to be or thought to be Native American. Section 3.7.4 describes the process Caltrans uses when human remains are discovered.

**Health and Safety Code 7054(c)**

[Health and Safety Code 7054\(c\)](#) states that any person who deposits human remains in any place other than a cemetery is guilty of a misdemeanor. This law does not apply to the reburial of Native American human remains under an agreement between the landowner and the Most Likely Descendent developed pursuant to PRC 5097.94(1) or under PRC 5097.98.

### ***California Native American Graves Protection and Repatriation Act of 2001***

[Cal NAGPRA](#), as codified in the California Health and Safety Code Sections 8010-8021 and 8025-8030, provides for the repatriation of human remains and cultural items in the possession or control of a state or local agency or museum to California Indian tribes. As defined by this law, the term “California Indian tribes” includes non-federally recognized groups as entities that have standing under this law. The Act outlines inventory, summary and repatriation processes similar to the federal NAGPRA, establishes penalties and enforcement procedures for not complying, and establishes the Repatriation Oversight Commission.

### ***Executive Order B-10-11***

On September 19, 2011 Governor Brown signed [Executive Order B-10-11](#) which established the position of the Governor’s Tribal Advisor in the Office of the Governor to implement effective government to government consultation between the governor and tribes and ordered state agencies and department to engage in communication and consultation with California Indian tribes, which for the purposes of this order included federally recognized tribes and other California Native Americans. Additionally, the order also states that the Office of the Governor will meet regularly with elected tribal officials, and that state agencies and departments are to permit tribal governments to provide meaningful input into the development of legislation, regulations, rules and policies on matters that may affect tribal communities.

### ***California State Transportation Agency November 2013 Draft Tribal Consultation Policy***

In response to Executive Order B-10-11, the California State Transportation Agency (CalSTA)<sup>10</sup> created a [draft policy](#) which endorses government to government communication with Tribes with a strong emphasis on fostering mutual respect among all parties. Five guiding principles were identified with input from Tribes-collaboration, communication, education; process and timely notice-to facilitate effective consultation practices and promote cooperation and efficiencies relative to tribal consultation. The principles embrace meaningful dialogues, open and respectful communication, education in the way of training of agency’s departments’ staff, transparent processes, and adequate advance notices of a request for consultation or meetings. For purposes

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<sup>10</sup> CalSTA was created during the reorganization of the Executive Branch of State government and seven transportation related agencies were placed under it, effective July 1, 2013.

of this policy, the terms “Tribe”, “California Indian Tribe,” and “tribal” include all Federally Recognized Tribes and other California Native Americans.

### **Caltrans’ Director’s Policy 19**

In 2001, Caltrans Director Morales signed [DP 19](#), *Working with Native American Communities*, which stated that Caltrans will act consistently, respectfully and sensitively when working with all Native Americans in California and will work to remove regulatory, statutory and procedural impediments to do so. Caltrans is also to consult with tribes when making decisions, taking actions or implementing programs that may impact their communities.

## **3.6 Caltrans Native American Cultural Resources Policies**

Caltrans cultural resources policy is to exercise all practical means to avoid, and if avoidance is not possible, to minimize adverse effects of transportation projects upon significant cultural resources. It also is Caltrans policy to avoid, or minimize, adverse effects to resources identified as important to the Native American community that may not be eligible for the NRHP but are important to maintaining the Native American culture. Such resources include plant or other gathering locations

Pursuant to the NHPA and Section 106 regulations, Caltrans consults with Indian tribes, other Native American groups and individuals, and traditional cultural leaders who are likely to have knowledge or concerns with historic properties in Caltrans right-of-way. Under PRC 5097, Caltrans works with the NAHC in its efforts to protect sacred sites, ensure Native Californians access to sacred sites, and provide for the respectful treatment of human remains and associated grave artifacts. FHWA and Caltrans also ensure that the appropriate Native Americans are consulted concerning sacred items or items of cultural patrimony as provided for in part by NAGPRA, prior to curating the rest of an archaeological collection. FHWA and Caltrans also ensure that Indian tribes and other Native Americans as appropriate are consulted per NAGPRA for excavations on federal or tribal lands. Caltrans policy is based on these laws.

To implement these policies, efforts to identify Native American concerns are conducted early in the planning stages of a project to ensure that Native American cultural values are considered.

Caltrans policy regarding different aspects of Native American involvement is outlined below according to subject. Implementation of these policies is addressed in Section 3.7.4, Procedures.

### 3.6.1 Consultation

It is Caltrans policy to consult with Indian tribes and other Native American groups and individuals on any proposed Caltrans project that may potentially affect historic properties or “cultural resources of interest to Native Americans.” See Section 3.1 for a definition of historic properties and historical resources, and [Exhibit 3.1](#) for definitions of consultation. “Cultural resources of interest to Native American” include resources that may not be eligible for inclusion in the NRHP or that would be considered historical resources under CEQA but are important to Native Americans in maintaining their culture. A location where plants used for food, basket materials, or medicinal purposes are gathered is an example of such a resource. The project area may be of known archaeological or Native American cultural sensitivity; however, the lack of known resources does not supersede the need for consultation.

Cultural Studies staff are encouraged to establish long term relationships with Indian tribes, groups, and individuals to establish mutual trust, provide for effective and efficient communication, and to better address concerns regarding projects, particularly those with short time frames.

Consultation, meaning conferring, begins early in, and continues throughout, the life of the project. Chapter 2 provides more detail on involving Indian tribes in the Section 106 PA process from the initial step of gathering information and developing the APE to consultation through the Resolution of Adverse Effects steps. Caltrans staff can consult with Indian tribes on developing and documenting an APE and should seek consistency with any pertinent guidance provided by tribes. Caltrans staff must consult with Indian tribes and other Native Americans through the identification, evaluation, findings and assessment of effects, including establishment of ESAs for a finding of No Adverse Effects, and resolution of adverse effects on properties which they may attach religious and cultural significance. Indian tribes and other Native Americans are also consulted during any review process for reevaluation, and during the reevaluation itself.

### 3.6.2 Monitors

As outlined in Division of Environmental Analysis Chief Gary R. Winters November 4, 2003 memo, it is [Caltrans policy](#) to have Native American monitoring in the following circumstances:

- During all Caltrans archaeological excavations at prehistoric or historic Native American sites, including Extended Phase I, Phase II and Phase III studies
- During construction or related activities at known site locations or in areas where there is a high probability that there may be a buried archaeological site based on the geomorphology of the area

### 3.6.3 Human remains/associated artifacts

On federal or tribal land, Caltrans complies with provisions of NAGPRA regarding the treatment and disposition of human remains and associated funerary objects when encountered during the course of an archaeological excavation or any ground disturbing activity. On state land, Caltrans confers with the Most Likely Descendent per PRC 5097.98 regarding the treatment and disposition of human remains and associated grave artifacts when encountered during the course of an archaeological excavation or any ground disturbing activity.

The NAHC maintains a Sacred Lands Inventory. All burials, reburials, and sacred, religious, or ceremonial sites should be recorded on the Sacred Lands Inventory Form, which is submitted to the NAHC. The template is available online at the Caltrans Division of Environmental Analysis (DEA) [Standard Environmental Reference Volume 2](#) website under Cultural Resources Templates.

### 3.6.4 Sacred Items/Items of Cultural Patrimony

Caltrans will follow the provisions of NAGPRA regarding the treatment of sacred items or items of cultural patrimony.

### 3.6.5 Avoidance of Traditional Cultural Properties

Where feasible, it is Caltrans policy to avoid cultural resources that are of value to Native Americans. Caltrans will make every effort to avoid burial areas, as well as sacred, religious or ceremonial sites. Where such sites cannot be avoided, Caltrans must identify Native American concerns, and agreement sought on the appropriate treatment.

### 3.6.6 Access to Sacred Sites

The NAHC 1979 report to the Legislature succinctly stated, "Equally important (as burials) to California Indians are those places of traditional, spiritual or social im-

portance (such as prayer sites, ceremonial sites and shrines), areas important in folklore and legend, or areas attributed with special or unique powers of sacredness. To ensure that Native American culture is not lost, it is essential for Indians to have continued access to traditional sacred places, many of which are located on lands now owned by non-Indians or are under control of various public authorities."

Pursuant to PRC [5097.9](#) and where feasible and appropriate, Caltrans ensures Native American access to such sites described above when they are located on Caltrans-owned land or are traversed by a State highway.

### **3.6.7 Access to Gathering Sites**

Caltrans has a program to identify gathering locations within and adjacent to the Caltrans right-of-way and a policy to prohibit herbicides in these areas. Caltrans Maintenance, where possible, is willing to work out trimming plans that will assist in stimulating the necessary plant growth. Each District has Landscape Specialists who can work with DNACs and local Native Americans to discuss gathering and issue permits. This program undergoes an annual review process resulting in an Annual Vegetation Control Plan.

Native Americans gathering for religious purposes or for basket weaving materials may be issued either a Consent Letter or an encroachment permit. The appropriate Maintenance Area Superintendent Office issues a Consent Letter if only one day for gathering is requested. When gathering for more than one day is requested, the district permit office may require an encroachment permit. For additional information and requirements, see the Encroachment Permits Manual, [Section 508.11](#).

### **3.6.8 Confidentiality**

Native Americans often are reluctant to reveal the location of a sacred or traditionally important site out of concern that the revelation may bring harm to that site or to the person who revealed the site's location, or would reveal the location of a scarce and precious resource to a competing interest. For instance, some basketweavers do not reveal the location of their gathering locations even to other basketweavers.

State and federal laws provide for protecting the confidentiality of this information, and productive consultation is dependent on maintaining this confidentiality. Therefore, if at all possible within the restraints of a given project, Districts need to develop innovative and flexible approaches to identify areas that should be avoided, without the requirement for complete location information. Environmental staff need to work with design engineers on approaches that would successfully avoid these sensitive

locations. If this is not possible, Districts must make every effort to ensure the confidentiality of obtained information is only disclosed on a "need to know" basis, including the exact locations of burials, or sacred, ceremonial or religious places.

Section 304 of the NHPA states that federal agencies can withhold from public disclosure information on the location, character, or ownership of a historic resource if that disclosure may cause a significant invasion of privacy, risk harm to the resource, or would impede the use of a traditional religious site by practitioners. When that information is developed to comply with Sections 106 or 110(f) of the NHPA, the Secretary of the Interior must consult with the ACHP concerning disclosure and who may or may not have access to that information.

Records maintained or in the possession of the NAHC or state and local agencies that are exempt from public disclosure include those that contain information on Native American graves, cemeteries, and sacred places, and records that relate to archaeological site information, including records obtained during consultation with Native Americans ([California Government Code 6254\(r\) and 6254.10](#)).

### **3.6.9 Possession, Curation, and Display of Artifacts**

It is Caltrans' policy *not* to obtain human remains and associated grave artifacts, sacred objects or objects of cultural patrimony. *Human remains and associated grave artifacts recovered from state lands are respectfully treated and disposed of according to the wishes of the Most Likely Descendent*, whether the human remains and associated artifacts are discovered during fieldwork or post-fieldwork in the laboratory or during construction.

On private lands and upon consideration of the Most Likely Descendant's recommendations, the landowner determines the respectful treatment and disposition of the human remains and associated grave artifacts.

Following NAGPRA regulations, the custody of human remains and funerary objects discovered on federal or tribal lands goes to the known lineal descendent(s), or if lineal descendants are not known, in a specified order of priority. In order of priority, custody is with the:

- 1) Indian tribe, if discovered on tribal land
- 2) Tribe that can show the closest cultural affiliation
- 3) Indian tribe aboriginally occupying the land

4) Tribe that can show a stronger cultural relationship

As defined in the NAGPRA regulations, the appropriate tribe determines the treatment and disposition of the human remains. This usually is outlined in a pre-excavation Action Plan that was developed as a result of consultation.

It is Caltrans' policy to ensure that the appropriate traditional cultural leaders and groups determine the treatment and disposition of sacred objects and objects of cultural patrimony, as defined by NAGPRA. Although not covered by state law, sacred objects and objects of cultural patrimony, and the collections of which they are a part, will not be accepted for curation by curational facilities subject to NAGPRA regulations. Caltrans, therefore, repatriates sacred objects and objects of cultural patrimony. The custody of sacred objects and objects of cultural patrimony recovered from federal or tribal lands follows the order of priority specified above, and their treatment and disposition also is outlined in a NAGPRA Action Plan.

For all other cultural artifacts retrieved during Caltrans excavations, it is Caltrans' policy to ensure that the collections are properly curated following the federal curation regulations ([36 CFR 79](#)) for collections obtained from federal land under an ARPA permit, and following the State Historical Resources Commission's [guidelines](#) for all other collections. Caltrans will consult with appropriate Native American groups regarding such curation plans, as outlined in [36 CFR 800](#). Caltrans seeks public, private, or Native American-maintained repositories that provide secure permanent storage and ready access to users.

Caltrans will not display disinterred skeletal remains, grave artifacts, or other objects that Native Americans regard as traditionally sacred.

The appropriate Native American group must grant approval for the use of any photographs and detailed drawings of human skeletal remains, associated grave goods or sacred objects prior to their public display, or use for interpretive or reporting purposes. *The documentation of human remains should be included as a separate appendix to the main body of a report and should not be available for public distribution unless there is a scientific or cultural interest and when the Native Americans agree to publication.*

### 3.7 Procedures

Use the following procedures to:

- Comply with state and federal laws, regulations and guidelines regarding Native American cultural concerns
- Ensure Native American participation in the Section 106 process
- Identify cultural resources within Caltrans right of way that Caltrans will seek to protect

The procedures include those for consultation, hiring monitors, and discovery of human remains during any Caltrans activities.

District Cultural Resources staff or the District Native American Coordinator generally handles Native American coordination rather than Caltrans consultants. This avoids putting the consultant in a position of having to justify the Caltrans project or having to speak for Caltrans on issues of a sensitive nature. A consultant, however, is not precluded from coordination if district staff judge this to be appropriate.

For all projects that have the potential to affect resources of concern to Native Americans, the DNAC ensures that the NAHC is notified of the proposed project by providing information either by submitting the Native American Contacts List Request form, or by letter if more detail is necessary, with a Project Location map attached. The template is available online at the DEA [Standard Environmental Reference Volume 2](#) website under Cultural Resources Templates.

The NAHC will refer to the Sacred Lands Inventory file and notify the District within 10 working days of receipt if they have a record of a sacred land within the proposed project's Area of Potential Effects (APE); the NAHC also will provide a list of Native American contacts for consultation regarding cultural assessments of the project area. Depending on the preference of your district's NAHC program analyst, this exchange may be conducted by email, mail, or FAX.

Caltrans' efforts to consult with Native Americans and the results of that consultation must be summarized in the Section 106 documents used to document identification, evaluation, or treatment of archaeological sites or Traditional Cultural Properties.

### 3.7.1 Consultation

Consultation means that FHWA or Caltrans acting on its behalf confers with the tribes and interested persons on the proposed project and its potential for impacts on cultural resources within the project APE. Caltrans communicates any changes in the project APE to the tribes and interested persons. If some time has passed, contact the consulting parties again to see if any new information is available. Changes to the project and passage of time may require renewed consultation.

Caltrans can initiate consultation by various means for instance, by letter, telephone call, and personal visit or by a semi-annual notice. If there is no response to the initial contact, a telephone call or personal visit should be made. The amount of effort to consult should reflect the scope of the project and the degree of cultural sensitivity of the project APE. A phone call may be adequate. Other projects may involve more intensive and extensive consultation. The Districts should consider contracting with an ethnographer, if it appears appropriate to do so, if the project is complex or there are Native American issues.

Below is an example of one type of consultation record:

<b>CONSULTATION LOG (DISTRICT-HWY-PM [EA])</b>				
<b>Date</b>	<b>Type of Communication</b>	<b>Name / Representing</b>	<b>Caltrans Representative</b>	<b>Comments</b>
	Phone conversation, Face to face, FAX, email, etc.	Name, Name of tribe or group, position (representative, tribal chair, etc.)	Name, position	Describe who contacted whom and provide a brief explanation of what was discussed, transmitted, etc.

Successful consultation with tribal leaders, traditional leaders or elders often requires personal visits. A field review of high sensitivity project areas with representatives from the local Native American community may be necessary. In general, these reviews enhance the District's sensitivity to traditional values and land use practices, as well as sensitivity to features that are not readily apparent to the archaeologist or documented in the historic or ethnographic literature.

When consulting, Caltrans staff shall keep in mind cultural events that may be occurring throughout the year, as well the need for tribal groups to meet and discuss any information provided them or requested from them. These activities may delay a response. Also many tribal members or Native American consultants work on tribal

business with Caltrans and other agencies in addition to their regular occupations, and cannot respond within short time frames that agencies have frequently tried to impose on them.

Districts should strive to develop optimal relationships by talking to tribal leaders and other Native American groups and individuals and establish with them how best to consult. Each tribe, group, or individual has different protocols for interacting with agencies. These efforts, although perhaps extensive or intensive in the short run, should ultimately develop a good trust relationship and smooth the way for both Caltrans and the tribe and other consulting parties in future consultations.

Consultation means communicating to the Native Americans the purpose of the project, archaeological survey results, proposed excavations, and excavation results. Their concerns regarding historic properties or other cultural resources in the project area are solicited. Efforts should be made to work around their concerns if confidentiality is an issue, as discussed in Section 3.6.8. Caltrans provides documents upon request.

A summary of consultation must be included, or referenced if confidentiality is an issue, in Historic Property Survey Reports, subsequent 106 documents, and environmental documents as appropriate. The consultation log provided on the previous page may be used as the basics of the summary.

### **3.7.2 Obtaining a Monitor**

The need for a monitor is identified during consultation with the affected Native American community. The Native American community and Caltrans confer on who is to monitor and serve as a liaison with Caltrans. It is [Caltrans policy](#) that the number of monitors present at any one time does not exceed the actual need as determined by the activit(ies) being monitored. If multiple communities are interested in monitoring, then a way to share the monitoring effort, for example alternate days, needs to be identified.

### **3.7.3 Hiring a Monitor**

Note: The processes described in this section are administrative, so all hyperlinks are only accessible to Caltrans staff on the Caltrans intranet.

Three methods have been identified for contracting for Native American monitors, although none are perfect for the purpose, and each have limitations. Efforts are ongoing to rectify these problems. Ideally, contracts would be directly with the monitor

or with a Native American entity acting as prime. Alternatively, the monitors have been included as sub-contractors on the archaeological or construction contracts.

### ***CAL-Card Process***

A third way, provided that the cost and need limitations are met, is through the CAL-Card process, or absent a credit card mechanism, the process referred to variously as the U-5000, U-5, or non-credit card process. Of the two processes, i.e., the CAL-Card process or the non-credit card process, it is expected that the latter is more applicable unless the entity has a credit card issued from this program. The similarity between the CAL-Card and the non-credit card processes, is that the services, plus taxes, for either cannot total more than \$4999.99. The difference is that under the CAL-Card, the services can be of a repetitive nature as long as they do not exceed \$5,000 per fiscal year with the same vendor (i.e., individual or entity) for the same service (e.g., monitoring). Under the non-credit card process, the contracted services are for a single transaction, and the projected value of the service does not exceed \$5,000 or more in two fiscal years. If these limitations are not met, the formal service contract process (i.e., the ADM-360 process, see below) must be followed (Note: Do not split a service or transaction to meet these limitations as this circumvents the contracting process, and if discovered, would jeopardize the availability of this option for this use). The Caltrans Division of Procurements and Contracts CAL-Card Resources intranet website contains more information for Caltrans employees.

### ***Formal Service Contract Process***

The DNAC or project archaeologist initiates the formal service contract process by submitting a Service Contract Request to the district's contract unit ([ADM-0360](#)). Unless the requested contract is with a federally recognized tribe, a non-competitively bid justification ([ADM-3007](#)) is included in the ADM-0360 (ADM-3007) is included in the ADM-360 package. Currently, Caltrans has a non-competitive bid authorization and advertising exemption for contracting with federally recognized tribes for activities associated with environmental activities that include monitoring archaeological excavations and construction, when appropriate. CSO is pursuing with Headquarters Division of Procurement and Contracts a request for an exemption from competitive bid and advertising for contracts with other Native Americans. But until this is awarded, the non-competitively bid justification needs to be included in the contract request.

Costs should be charged to the project for which the Monitor is hired.

### **Monitoring Agreement**

The job description, procedures, and expectations may be outlined in a monitoring agreement. The Monitoring Agreement includes as appropriate:

- Chain of command
- Glossary of terms used if necessary
- Locations to be monitored (include a map)
- Rate of hourly pay, mileage and per diem if appropriate
- Number of days prior to a monitoring start date needed for notification of that start date
- Statement whether the notification will be in writing (preferable)
- Actions to be taken if the designated monitor does not show up when requested
- Notation that the appropriate laws will be followed in the event that human remains are unearthed
- Reference to [Caltrans Director's Policies](#) and Deputy [Directives](#) on Workplace Violence (DP-18-R1), a Drug-Free Workplace (DD-08-R3), and Sexual Harassment (DD-49-R4).

The DNAC or lead project person approves any timesheets and travel expense claims submitted by the monitor, and submits the documents to the accounting office, ensuring payment in a timely fashion. As with all contractors, unsatisfactory performance is documented and reported to the District Environmental Branch Chief (EBC).

#### **3.7.4 Human Remains/Associated Artifacts**

The following steps must be followed to comply with PRC 5097.98 when human remains, including disarticulated bone, are encountered during an archaeological excavation, construction, maintenance or encroachment permit work on state owned land:

- Caltrans shall cease work in the vicinity of the human remains.
- The lead person on the project (for instance, field director, resident engineer, maintenance supervisor, or permit engineer) ensures that the EBC or DNAC is immediately contacted.
- The lead person, EBC or DNAC telephones the [County Coroner](#) and the NAHC. Although the Coroner has the ultimate responsibility to contact the NAHC, Caltrans calls the NAHC at this time to provide information on the discovery, and to assure the NAHC that appropriate action is being taken. The Coroner may or may not inspect the remains. If the Coroner inspects the remains and determines that the remains are not Native American and/or determines they are a result of

wrongful death, the Coroner may take possession of the remains for further inquiry, release them to next of kin, or order the body to be reinterred. After the above action has been taken, work may resume on the excavation project.

- If the Coroner determines that the remains are Native American, the Coroner notifies the NAHC of the findings. The NAHC immediately notifies the Most Likely Descendent.
- The Most Likely Descendent inspects the remains and makes a recommendation to the lead person on the treatment of remains and associated grave goods.
- The lead person ensures that the recommendations are followed. After the appropriate actions are taken, the excavation work may resume.