NATIVE AMERICAN HERITAGE COMMISSION
915 CAPITOL MALL, ROOM 364
SACRAMENTO, CA 95814
(916) 653-6251
Fax (916) 657-5390
Web Site www.nahc.ca.gov
ds_nahc@pacbell.net

October 5, 2009

TO: Scott Flint, California Department of Fish & Game Renewable Energy Action Team (REAT)

Re: NAHC Guidance for Tribal Consultation Requirements and Advisories of Federal and State Statutes for Consideration for the *Best Management Practices & Guidance Manual: Desert Renewable Energy Projects, Cultural Resources Monitoring & Mitigation Plans for the Mojave and Colorado Desert areas of Southern California*

Introduction

Governor Arnold Schwarzenegger issued Executive Order S-14-08 which requires that 33 percent of the energy in California would come from renewable energy resources by 2020 and expedite the Renewable Portfolio Standard (RPS) of eligible renewable energy resources. This Guidance is to assist federal and state 'lead agencies,' to meet tribal consultation requirements of federal and state statutes and regulations.

The California Native American Heritage Commission (NAHC), placed in the California Natural Resources Agency, is the State Trustee Agency for the protection and preservation of Native American cultural resources pursuant to CA Public Resources Code §21070 and *Environmental Protection Information Center v. Johnson* (1985) 170 Cal App. 3rd 604. , A nine-member Commission, all Native American with a requirement that five members be tribal elders, governs the NAHC. The Commission is appointed by the Governor and ratified by the California Senate. This document is proposed to be helpful to federal and state 'lead agencies, under federal and state environmental laws in providing some practical tools for effective tribal consultation on proposed renewable energy projects. California has the greatest population of American Indian persons, about 330,000, than any other state; about 100,000 are descendants of California's indigenous tribes (please see the 'Map of California Tribal Areas,' **Attachment 1**). There are 109 federally-recognized (by the U.S. Department of the Interior) tribes in California and another 45 Non Federally recognized, but acknowledged as viable tribal governments for the purposes of State of California laws, by the NAHC. While the U.S. Senate never ratified the 18 treaties of 1851-52, with California tribes, there is recognition in state and federal law that California indigenous tribes did own California lands and resources.

Tribal Consultation

Although tribal consultation under the California Environmental Quality Act (CEQA; CA Public Resources Code Section 21000 – 21177) is 'advisory' rather than mandated, the NAHC does request 'lead agencies' to work with tribes and interested Native American individuals as 'consulting parties,' on the list provided by the NAHC in order that cultural resources will be protected. However, the 2006 SB 1059 the state enabling legislation to the Federal Energy Policy Act of 2005, does mandate tribal consultation for the 'electric transmission corridors. This is codified in the California Public Resources Code, Chapter 4.3, and §25330 to Division 15, requires consultation with California Native American tribes, and identifies both federally

recognized and non-federally recognized on a list maintained by the NAHC. Only Native American tribes and interested Native American individuals that are culturally-affiliated to the 'areas' of Potential Effect (APEs)' are listed on the NAHC lists. The Native American Contacts list for the Desert Renewable Energy Projects' Cultural Resources Monitoring & Mitigation Plans (CRMMP) is shown as **Attachment 2** to this document. A draft letter to Native American tribes and interested Native American individuals is shown as **Attachment 3,** for consideration.

The NAHC also is a 'reviewing agency' for environmental documents prepared under the National Environmental Policy Act (NEPA; 42 U.S.C 4321 *et seq*). Also, proposed projects that are subject to the Tribal and interested Native American consultation requirements of the National Historic Preservation Act, as amended (Section 106) (16 U.S.C. 470) consultation with Native American tribes and interested Native American individuals, as consulting parties, is mandatory as part of the Section 4(f) project evaluation. In addition, the provision of the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001-3013) will also apply to this project if Native American human remains are inadvertently discovered during 'ground-breaking' activity of the project, once the project is permitted to construct.

Cultural Surveys

The California Environmental Quality Act (CEQA) does require that any project that causes a substantial adverse change in the significance of an historical resource, that includes archaeological resources, is a 'significant effect' requiring the preparation of an Environmental Impact Report (EIR) per the California Code of Regulations §15064.5(b)(c)(f) CEQA guidelines). Section 15382 of the 2007 CEQA Guidelines defines a significant impact on the environment as "a substantial, or potentially substantial, adverse change in any of physical conditions within an area affected by the proposed project, including ...objects of historic or aesthetic significance." In order to comply with this provision, the lead agency is required to assess whether the project will have an adverse impact on these resources within the 'area of potential effect (APE)', and if so, to mitigate that effect. The NAHC is of the opinion that the federal standards, pursuant to the above-referenced Acts of the U.S. Congress and the President's Council on Environmental Quality (CSQ; 42 U.S.C. 4371 *et seq*) are similar to and in many cases more stringent with regard to the 'significance' of historic, including Native American items, and archaeological features, including those of Native American origin, than are the provisions of the California Environmental Quality Act (CEQA.) of 1970, as amended. In most cases, federal environmental policy require that any project that causes a substantial adverse change in the significance of an historical resource, that includes archaeological resources, is a 'significant effect' requiring the preparation of an Environmental Impact Statement (EIS). An Environmental Assessment, (EA) prepared under NEPA, defines a significant impact on the environment as "a substantial, or potentially substantial, adverse change in any of physical conditions within an area affected by the proposed project, including ...objects of historic or aesthetic significance." In order for either federal or state 'lead agencies' to comply with this provision, the lead agency is required to assess whether the project will have an adverse impact on these resources within the 'area of potential effect (APE)', and if the project is determined to have an adverse impact on a cultural resources; then, to mitigate that effect of the project. The following are suggestions for ensuring that an adequate 'cultural survey' is done for the CMMP, aware that additional surveys and 'searches' must be done for detailed projects with the Colorado and Mojave Desert sub regions:

1. Review the "Constraints Study of "A Cultural Resource Sensitivity within the California Desert," prepared by Russell L. Kaldenberg, a former Bureau of Land Management (BLM) archaeologist; Russ can be contacted by e-mail at rkaldenberg@asmaffiliates.com;

2. Review the available archaeological files of the Bureau of Land Management (BLM) if available to you; the NAHC is aware that they are extensive;
3. Contact the California Historic Resources Information System (CHRIS), Information Center at the San Bernardino County Museum (Robin Laska, Coordinator; 909-307-0539 or 909-307-2669) for San Bernardino County; and Dr. M.C. Hall, Coordinator; Eastern Information Center at UC Riverside; 951-827-5745, for Riverside County; and David M. Caterino, Coordinator-South Coastal Information Center at San Diego State University, 619-594-5682, for Imperial County; and Dr. Robert Yohe, Coordinator – South San Joaquin Valley Information Center; California State University, Bakersfield, 661-654-2289 for Kern County and the North Antelope Valley. These are all units of the California Office of Historic Preservation, the State Historic Preservation Officer (SHPO), M. Wayne Donaldson (916) 653-7278. In the view of the NAHC, Robin Laska, referred above, will be particularly helpful due to her extensive knowledge of the desert areas of San Bernardino and Riverside counties.
4. Contact the Native American Heritage Commission requesting Sacred Lands File (SLF) searches, from their inventory, separate from that of the CHRIS inventory, established by the California Legislature pursuant to CA Public Resources Code §5097.94(a). The Request Form that may be faxed to the NAHC to 916-657-5390 is shown as **Attachment 4**.

The records searches will determine:

- If a part or the entire APE has been previously surveyed for cultural resources.
- If any known cultural resources have already been recorded in or adjacent to the APE.
- If the probability is low, moderate, or high that cultural resources are located in the APE.
- If a survey is required to determine whether previously unrecorded cultural resources are present.
- If an archaeological inventory survey is required, the final stage is the preparation of a professional report detailing the findings and recommendations of the records search and field survey.
- The final report, Environmental Impact Statement, if required, prepared under NEPA guidelines, containing site forms, site significance, and mitigation measurers should be submitted immediately to the appropriate planning department. All information regarding site locations, Native American human remains, and associated funerary objects should be in a separate confidential addendum, and not be made available for pubic disclosure.

Mitigation

The California Native American Heritage Commission does prefer "avoidance, as defined in the California Code of Regulations §15370; if not possible, the following is recommended:

- The NAHC advises the use of Native American Monitors, also, when professional project proponents employ archaeologists or the equivalent, in order to ensure proper identification and care given cultural resources that may be discovered. This recommendation also applies to Phase I of NEPA and the Initial Study for CEQA. In many cases, only a local tribe(s) or Native American individuals or elders may know the existence of a Native American cultural resources.
- Lack of surface evidence of archeological resources does not preclude their subsurface existence.
- Lead agencies should include in their mitigation plan provisions for the identification and evaluation of accidentally discovered archeological resources, per California Environmental Quality Act (CEQA) §15064.5 (f). In areas of identified archaeological sensitivity, a certified

archaeologist and a culturally affiliated Native American, with knowledge in cultural resources, should monitor all ground-disturbing activities.

- Again, a culturally affiliated Native American tribe may be the only source of information about a Sacred Site/Native American cultural resource.
- Lead agencies should include in their mitigation plan provisions for the disposition of recovered artifacts, in consultation with culturally affiliated Native Americans.

Conclusion

The NAHC hopes that this Guidance is helpful in identifying the *why, how, and the who* of tribal consultation requirements and advisories of federal and state statutes. A general advisory for accomplishing tribal consultation is included as **Attachment 5** for your use.

Please feel free to contact me at (916) 653-6251 if you have any questions.

Sincerely,

Dave Singleton
NAHC

Attachments:

1. Map of California Tribal Lands (Page 5)
2. Native American Contact List for the Mojave and Colorado Desert Areas (Page 6)
3. Draft Letter to Native American Tribes (Page 15)
4. NAHC Sacred Lands File (SLF) Request Form (Page 16)
5. 2005 NAHC Consultation Guidelines (Page 17)

MAP OF CALIFORNIA TRIBAL LANDS

http://www.pacwesttraders.com/map1.html

Native American Contact
Los Angeles, Kern, Inyo, San Bernardino, Riverside, Imperial Counties
October 5, 2009

San Manuel Band of Mission Indians
James Ramos, Chairperson
26569 Community Center Drive
Highland , CA 92346
(909) 864-8933
(909) 864-3724 - FAX
(909) 864-3370 Fax
Serrano

Kitanemuk & Yowlumne Tejon Indians
Delia Dominguez
981 N. Virginia
Covina , CA 91722
(626) 339-6785
Yowlumne
Kitanemuk

Fernandeno Tataviam Band of Mission Indians
William Gonzalaes, Cultural/Environ Depart
601 South Brand Boulevard, Suite 102
San Fernando , CA 91340
rortega@tataaviam.us
(818) 837-0794 Office
(818) 581-9293 Cell
(818) 837-0796 Fax
Fernandeno
Tataviam

San Fernando Band of Mission Indians
John Valenzuela, Chairperson
P.O. Box 221838
Newhall , CA 91322
tsen2u@live.com
(661) 753-9833 Office
(760) 885-0955 Cell
(760) 949-1604 Fax
Fernandeño
Tataviam
Serrano
Vanyume
Kitanemuk

LA City/County Native American Indian Comm
Ron Andrade, Director
3175 West 6th Street, Rm. 403
Los Angeles , CA 90020
(213) 351-5324
(213) 386-3995 FAX

Gabrieleno/Tongva San Gabriel Band of Mission
Anthony Morales, Chairperson
PO Box 693
San Gabriel , CA 91778
(626) 286-1262 -FAX
(626) 286-1632
(626) 286-1758 - Home
(626) 286-1262 Fax
Gabrielino Tongva

Ron Wermuth
P.O. Box 168
Kernville , CA 93238
warmoose@earthlink.net
(760) 376-4240 - Home
(916) 717-1176 - Cell
Tubatulabal
Kawaiisu
Koso
Yokuts

Randy Guzman - Folkes
655 Los Angeles Avenue, Unit E
Moorpark , CA 93021
ndnRandy@gmail.com
(805) 905-1675 - cell
Chumash
Fernandeño
Tataviam
Shoshone Paiute
Yaqui

Tehachapi Indian Tribe
Attn: Charlie Cooke
32835 Santiago Road
Acton , CA 93510
suscol@interx.net
(661) 733-1812
Kawaiisu

Gabrielino Tongva Nation
Sam Dunlap, Tribal Secretary
P.O. Box 86908
Los Angeles , CA 90086
samdunlap@earthlink.net
(909) 262-9351 - cell
Gabrielino Tongva

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Distribution of this list does not relieve any person of statutory responsibility as defined in Section 7050.5 of the Health and Safety Code, Section 5097.94 of the Public Resources Code and Section 5097.98 of the Public Resources Code. and federal NEPA (42 USC 4321-43351), NHPA Sections 106, 4(f) (16 USC 470(f) and NAGPRA (25 USC 3001-3013)
This list is only applicable for contacting local Native Americans with regard to cultural resources for the proposed Cultural Resources Mitigation Plan (CRMP) Guidance from the Native American Heritage Commission (NAHC) for consideration by the Renewable Energy Action Team (REAT), established by Executive Order #S-14-08 and formalized

Native American Contact
Los Angeles, Kern, Inyo, San Bernardino, Riverside, Imperial Counties
October 5, 2009

Ramona Band of Cahuilla Mission Indians
Joseph Hamilton, Chairman
P.O. Box 391670 Cahuilla
Anza , CA 92539
admin@ramonatribe.com
(951) 763-4105
(951) 763-4325 Fax

Colorado River Reservation
Michael Tsosie, Cultural Contact
Route 1, Box 23-B Mojave
Parker , AZ 85344 Chemehuevi
symi@rraz.net
(928) 669-9211
(928) 669-5675 Fax

Twenty-Nine Palms Band of Mission Indians
Darrell Mike, Chairperson
46-200 Harrison Place Chemehuevi
Coachella , CA 92236
tribal-epa@worldnet.att.net
(760) 775-5566
(760) 775-4639 Fax

AhaMaKav Cultural Society, Fort Mojave Indian Tribe
Linda Otero, Director
P.O. Box 5990 Mojave
Mohave Valley , AZ 86440
lindaotero@fortmojave,com
(928) 768-4475
(928) 768-7996 Fax

Joseph R. Benitez (Mike)
P.O. Box 1829 Chemehuevi
Indio , CA 92201
(760) 408-4089 - cell
(760) 347-0488

Morongo Band of Mission Indians
Michael Contreras, Cultural Heritage Prog. Coordinatr
12700 Pumarra Road Cahuilla
Banning , CA 92220 Serrano
mcontreras@monongo-nsn.
(951) 755-5025
(951)201-1866 - cell
(951) 922-0105 Fax

Chemehuevi Reservation
Charles Wood, Chairperson
P.O. Box 1976 Chemehuevi
Chemehuevi Valley , CA 92363
chemehuevit@yahoo.com
(760) 858-4301
(760) 858-5400 Fax

San Manuel Band of Mission Indians
Ann Brierty, Policy/Cultural Resources Department
26569 Community Center. Drive Serrano
Highland , CA 92346
abrierty@sanmanuel-nsn.gov
(909) 864-8933 EXT-3250
(909) 649-1585 - cell
(909) 862-5152 Fax

Fort Mojave Indian Tribe
Tim Williams, Chairperson
500 Merriman Ave Mojave
Needles , CA 92363
(760) 629-4591
(760) 629-5767 Fax

Fort Mojave Indian Tribe
Nora McDowell, Cultural Resources Coordinator
500 Merriman Ave Mojave
Needles , CA 92363
g.goforth@fortmojave.com
(760) 629-4591
(760) 629-5767 Fax

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Native American Contact
Los Angeles, Kern, Inyo, San Bernardino, Riverside, Imperial Counties
October 5, 2009

Big Pine Band of Owens Valley
David Moose, Chairperson
P. O. Box 700 Owens Valley Paiute
Big Pine , CA 93513
bigpinetribaladmin@earthlink.
(760) 938-2003
(760) 938-2942-FAX

Timbisha Shoshone Tribe THPO
Barbara Durham, Tribal Historic Preservation Officer
P.O. Box 206 Western Shoshone
Death Valley , CA 92328
dvdurbarbara@netscape.com
(760) 786-2374
(760) 786-2376 FAX

Bishop Paiute Tribe
William Vega, Chairperson
50 Tu Su Lane Paiute - Shoshone
Bishop , CA 93514
(760) 873-3584
(760) 873-4143

Big Pine Band of Owens Valley THPO
Bill Hellmer, Tribal Historic Preservation Officer
P.O. Box 700 Paiute
Big Pine , CA 93513
amargosa@aol.com
(760) 938-2003
(760) 938-2942 fax

Fort Independence Community of Paiute
Carl Dahlberg Chairperson
P.O. Box 67 Paiute
Independence , CA 93526
stephanie@fortindependence.
(760) 878-2126
(760) 878-2311- Fax

Walker River Reservation
Genia Williams, Chairperson
P.O. Box 220 Northern Paiute
Schurz , NV 89427
775-773-2306
775-773-2585 - Fax

Lone Pine Paiute-Shoshone Reservation
Richard Button, Chairperson
P.O. Box 747 Paiute
Lone Pine , CA 93545 Shoshone
admin@lppsr.org
(760) 876-1034
(760) 876-8302 Fax

Bishop Paiute Tribe THPO
Theresa Stone-Yanez
50 Tu Su Lane Paiute - Shoshone
Bishop , CA 93514
theresa.stone@bishoppaiute.or
(760) 873-3584, Ext 250
(760) 937-0351 -cell
(760) 873-4143 - FAX

Lone Pine Paiute-Shoshone Reservation
Sanford Nabahe, Tribal Administrator
P.O. Box 747 Paiute
Lone Pine , CA 93545 Shoshone
lorjoseph@lppsr.org
(760) 876-1034
(760) 876-8302 fax

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Native American Contact
Los Angeles, Kern, Inyo, San Bernardino, Riverside, Imperial Counties
October 5, 2009

Morongo Band of Mission Indians
Robert Martin, Chairperson
11581 Potrero Road Cahuilla
Banning , CA 92220 Serrano
Robert_Martin@morongo.org
(951) 849-8807
(951) 755-5200
(951) 922-8146 Fax

Serrano Nation of Indians
Goldie Walker
6588 Valaria Drive Serrano
Highland , CA 92346
(909) 862-9883

Fort Mojave Indian Tribe
Esadora Evanston, Environmental Coordinator
500 Merriman Ave Mojave
Needles , CA 92363
region9epa@ftmojave.com
(760) 326-1112
(760) 629-4591
(760) 629-5767 Fax

Ernest H. Siva
Morongo Band of Mission Indians Tribal Elder
9570 Mias Canyon Road Serrano
Banning , CA 92220 Cahuilla
(951) 849-4676
siva@dishmail.com

MOAPA Paiute Band of the Moapa Reservation
Attn: Cultural Resources Department
P.O. Box 56 Paiute
Moapa , NV 89025
(702) 865-2787
(702) 865-2875 - FAX

Las Vegas Paiute Tribe
Attn: Cultural Resources Department
1 Paiute Drive Paiute
Las Vegas , NV 89106
(702) 386-3926
(702) 383-4019 - FAX

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Native American Contact
Los Angeles, Kern, Inyo, San Bernardino, Riverside, Imperial Counties
October 5, 2009

Cabazon Band of Mission Indians
David Roosevelt, Chairperson
84-245 Indio Springs Parkway Cahuilla
Indio , CA 92203-3499
(760) 342-2593
(760) 347-7880 Fax

Augustine Band of Cahuilla Mission Indians
Mary Ann Green, Chairperson
P.O. Box 846 Cahuilla
Coachella , CA 92236
(760) 369-7171
760-369-7161

Los Coyotes Band of Mission Indians
Francine Kupsch, Spokesperson
P.O. Box 189 Cahuilla
Warner , CA 92086
loscoyotes@earthlink.net
(760) 782-0711
(760) 782-2701 - FAX

Torres-Martinez Desert Cahuilla Indians
Diana L. Chihuahua, Cultural Resources Coordinator
P.O. Boxt 1160 Cahuilla
Thermal , CA 92274
dianac@torresmartinez.org
760) 397-0300, Ext. 1209
(760) 272-9039 - cell (Lisa)
(760) 397-8146 Fax

Torres-Martinez Desert Cahuilla Indians
Mary Resvaloso, Chairperson
PO Box 1160 Cahuilla
Thermal , CA 92274
mresvaloso@torresmartinez.or
(760) 397-0300
(760) 397-8146 Fax

Agua Caliente Band of Cahuilla Indians
Richard Milanovich, Chairperson
5401 Dinah Shore Drive Cahuilla
Palm Springs , CA 92262
lfreogoz@aguacaliente-nsn.gov
(760) 325-3400
(760) 325-0593 Fax

Fort Yuma Quechan Indian Nation
Mike Jackson, Sr., President
PO Box 1899 Quechan
Yuma , AZ 85366
qitpres@quechantribe.com
(760) 572-0213
(760) 572-2102 FAX

Willie Pink
48310 Pechanga Road Luiseno
Temecula , CA 92592
wjpink@hotmail.com
(909) 936-1216
Prefers e-mail contact

Santa Rosa Band of Mission Indians
John Marcus, Chairman
P.O. Box 609 Cahuilla
Hemet , CA 92546
srtribaloffice@aol.com
(951) 658-5311
(951) 658-6733 Fax

Agua Caliente Band of Cahuilla Indians THPO
Patricia Tuck, Tribal Historic Perservation Officer
5401 Dinah Shore Drive Cahuilla
Palm Springs , CA 92264
ptuck@aguacaliente-nsn.gov
(760) 699-6907
(760) 699-6800
(760) 699-6924- Fax

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Native American Contact
Los Angeles, Kern, Inyo, San Bernardino, Riverside, Imperial Counties
October 5, 2009

Ewiiaapaayp Tribal Office
Robert Pinto, Chairperson
4054 Willows Road Kumeyaay
Alpine , CA 91901
wmicklin@leaningrock.net
(619) 445-6315 - voice
(619) 445-9126 - fax

Kwaaymii Laguna Band of Mission Indians
Carmen Lucas
P.O. Box 775 Diegueno -
Pine Valley , CA 91962
(619) 709-4207

La Posta Band of Mission Indians
Gwendolyn Parada, Chairperson
PO Box 1120 Diegueno
Boulevard , CA 91905
(619) 478-2113
619-478-2125

Torres-Martinez Desert Cahuilla Indians
Ernest Morreo
PO Box 1160 Cahuilla
Thermal , CA 92274
maxtm@aol.com
(760) 397-0300
(760) 397-8146 Fax

Manzanita Band of Kumeyaay Nation
Leroy J. Elliott, Chairperson
PO Box 1302 Kumeyaay
Boulevard , CA 91905
(619) 766-4930
(619) 766-4957 Fax

Ewiiaapaayp Tribal Office
Will Micklin, Executive Director
4054 Willows Road Kumeyaay
Alpine , CA 91901
wmicklin@leaningrock.net
(619) 445-6315 - voice
(619) 445-9126 - fax

Campo Kumeyaay Nation
Monique LaChappa, Chairperson
36190 Church Road, Suite 1 Kumeyaay
Campo , CA 91906
MLaChappa@campo-nsn.gov
(619) 478-9046
(619) 478-5818 Fax

Morongo Band of Mission Indians
Robert Martin, Chairperson
11581 Potrero Road Cahuilla
Banning , CA 92220 Serrano
Robert_Martin@morongo.org
(951) 849-8807
(951) 755-5200
(951) 922-8146 Fax

Kumeyaay Cultural Heritage Preservation
Paul Cuero
36190 Church Road, Suite 5 Diegueno/ Kumeyaay
Campo , CA 91906
chairman@campo-nsn.gov
(619) 478-9046
(619) 478-9505
(619) 478-5818 Fax

Cocopah Museum
Jill McCormick, Tribal Archaeologist
County 15th & Ave. G Cocopah
Sommerton , AZ 85350
culturalres@cocopah.com
(928) 530-2291 - cell
(928) 627-2280 - fax

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Tule River Indian Tribe
Ryan Garfield, Chairperson
P.O. Box 589 Yokuts
Porterville , CA 93258
chairman@tulerivertribe-nsn.
(559) 781-4271
(559) 781-4610 FAX

Tejon Indian Tribe
Kathy Morgan, Chairperson
2234 4th Street Yowlumne
Wasco , CA 93280 Kitanemuk

Kern Valley Indian Council
Robert Robinson, Historic Preservtion Officer
P.O. Box 401 Tubatulabal
Weldon , CA 93283 Kawaiisu
brobinson@mchsi.com Koso
(760) 378-4575 (Home) Yokuts
(760) 549-2131 (Work)

Tubatulabals of Kern Valley
Donna Begay, Tribal Chairwoman
P.O. Box 226 Tubatulabal
Lake Isabella , CA 93240
(760) 379-4590
(760) 379-4592 FAX

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This list is only applicable for contacting local Native Americans with regard to cultural resources for the proposed Cultural Resources Mitigation Plan (CRMP) Guidance from the Native American Heritage Commission (NAHC) for consideration by the Renewable Energy Action Team (REAT), established by Executive Order #S-14-08 and formalized

Augustine Band of Cahuilla Mission Indians
Karen Kupcha
P.O. Box 846 Cahuilla
Coachella , CA 92236
(760) 369-7171
916-369-7161

Quenchan Indian Nation
Bridget Nash-Chrabascz, THPO
P.O. Box 1899 Quechan
Yuma , AZ 85366
b.nash@quechantribe.com
(928) 920-6068 - CELL
(760) 572-2423

Ah-Mut-Pipa Foundation
Preston J. Arrow-weed
P.O. Box 160 Quechan
Bard , CA 92222 Kumeyaay
(928) 388-9456

ahmut@earthlink.net

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Native American Contact
Los Angeles, Kern, Inyo, San Bernardino, Riverside, Imperial Counties
October 5, 2009

Cahuilla Band of Indians
Luther Salgado, Sr.
PO Box 391760 Cahuilla
Anza , CA 92539
tribalcouncil@cahuilla.net
915-763-5549

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DRAFT LETTER TO NATIVE AMERICAN TRIBES AND INTERESTED NATIVE AMERICAN INDIVIDUALS ELIGIBLE FOR TRIBAL CONSULTATION UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA), THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) AND SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT

DATE:
ADDRESS OF TRIBE OR INDIVIDUAL:

SUBJECT: Re: Tribal Consultation pursuant to NEPA, CEQA, NEPA, NHPA SECTION 106 OR OTHER STATE OR OTHER FEDERAL ACT, EXECUTIVE ORDER

SALUTATION: DEAR _____:

THIS IS AN INVITATION TO CONSULT ON PROPOSED DEVELOPMENT PROJECTS AT LOCATIONS WITH WHICH YOU HAVE TRIBAL CULTURAL AFFILIATION PURSUANT TO ONE OR MORE OF THE ABOVE REFERENCED FEDERAL OR STATE STATUTES. THE PURPOSE OF THE CONSULTATIONS IS TO ENSURE THE PROTECTION OF NATIVE AMERICAN CULTURAL RESOURCES ON WHICH THE PROPOSED UNDERTAKING MAY HAVE AN IMPACT.

IN THE TRIBAL CONSULTATION PROCESS, EARLY CONSULTATION IS ENCOURAGED IN ORDER TO PROVIDE FOR FULL AND REASONABLE PUBLIC INPUT FROM NATIVE AMERICAN GROUPS AND NATIVE AMERICAN INDIVIDUALS, AS CONSULTING PARTIES, ON POTENTIAL EFFECT OF THE DEVELOPMENT PROJECTS AND TO AVOID COSTLY DELAYS.

FURTHER, WE UNDERSTAND THAT MUCH OF THE CONTENT OF THE CONSULTATION WILL BE CONFIDENTIAL AND WILL INCLUDE, BUT NOT BE LIMITED TO, THE RELATIONSHIP OF PROPOSED PROJECT DETAILS TO NATIVE AMERICAN CULTURAL HISTORIC ROPERTIES, SUCH AS BURIAL SITES, KNOWN OR UNKNOWN, ARCHITECTURAL FEATURES AND ARTIFACTS, CEREMONIAL SITES, SACRED SHRINES , CULTURAL LANDSCAPES INCLUDING TRADITIONAL BELIEFS AND PRACTICES, SOME OF WHICH MAY MEET THE CRITERIA UNDER BOTH THE NATIONAL HISTORIC PRESERVATION ACT 'SECTION 106 ARCHAEOLOGICAL GUIDANCE' (as of 01/01/2009) AND CEQA GUIDELINES §15064.5.

ENCLOSED IS A PACKET OF THE PROPOSED DEVELOPMENT INCLUDING INFORMATION AND APPROPRIATE MAPS FOR YOUR REVIEW. WE WISH TO SCHEDULE A CONSULTATION MEETING WITH YOU INDIVIDUALLY, OR IN A GROUP SESSION, WHICHEVER YOU PREFER. WE WILL CALL YOU NEXT WEEK TO SEE WHICH DATES AND TIME ARE BEST FOR THE CONSULTATION.

SINCERELY,
GOVERNMENT REPRESENTATIVE/AGENT

Additional Information

California Native Americans
Cultural Resources
Strategic Plan
Commissioners
Federal Laws and Codes
State Laws and Codes
Local Ordinances and Codes
Additional Information

Return to CNAHC Home Page

Sacred Lands File & Native American Contacts List Request

NATIVE AMERICAN HERITAGE COMMISSION
915 Capitol Mall, RM 364
Sacramento, CA 95814
(916) 653-4082
(916) 657-5390 – Fax
nahc@pacbell.net

Information Below is Required for a Sacred Lands File Search

Project:_____

County_____

USGS Quadrangle

Name_____

Township _____ Range _____ Section(s) _____

Company/Firm/Agency:

_____

Contact Person: _____

Street Address: _____

City: _____Zip:_____

Phone: _____

Fax: _____

Email: _____

Project Description:

NATIVE AMERICAN HERITAGE COMMISSION
915 CAPITOL MALL, ROOM 364
SACRAMENTO, CA 95814
(916) 653-4082
Fax (916) 657-5390
Web Site www.nahc.ca.gov

NAHC Consultation Guidelines
April 7, 2005

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

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

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

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

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

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

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

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

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

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

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

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

<u>General requirements:</u>

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[2] 113 Yale Law Journal, 1623, Page 2.

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

<u>Conducting consultation:</u>

- Consultation should be viewed as a process, rather than a single event and an Agency or Department should be prepared to continue consultation throughout the duration of a project
- Simply notifying a tribe is not the same as consultation. A 1995 federal court ruling held that written correspondence requesting consultation with a tribe was not sufficient for the purpose of conducting consultation as required by law, but that telephone calls or more direct forms of contact may be required. In *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995), the court held that the U.S. Forest Service had not fulfilled its consultation responsibilities under the National Historic Preservation Act by merely sending letters to request information from tribes.
- Agency or Department officials should begin consultation with tribes at the earliest point possible in the project planning process
- All attempts to contact a tribe regarding consultation should be well documented, including letters, telephone calls, and direct meetings. Any returned or unanswered correspondence should be retained in order to verify the Agency or Department's efforts to communicate. Documentation of notification and consultation requests should be included in the Agency or Department's public record.
- Agency or Department officials should be aware that tribes may require a significant period of time to respond to a consultation request.
    - Often tribal councils meet only once a month; all formal positions taken by the tribe will usually require approval of the tribal council.

- Agency or Department officials should be aware of the potential for vast differences in tribal governments' capabilities (especially between federally-recognized and non-federally-recognized tribes), different tribes' staffing capabilities, and resources. Some may be able to respond more promptly and efficiently than others.
- Agency or Department officials should be sensitive to the fact that many tribes are subject to numerous demands on their small staffs, including requirements of the federal, state, and Agency or Department.

- Consultation requests should include a clear statement of purpose, explaining the reason for the request and declaring the importance of the tribe's participation in the project planning process. The request should specify the location of the project area of potential effect.
- Consultation requests should provide as much detail about the proposed plan as possible, presented in layman's terms, including maps of the affected area and a description of the nature of anticipated impacts. Failure to disclose pertinent information may provide grounds for a legal challenge to the Agency or Department's plan.
- Consultation should involve listening to tribal concerns with the goal of accommodating Native American religious practices.[3]
- Consultation should produce enforceable results that reflect the efforts made to achieve a mutually agreeable outcome.
- All aspects of the consultation process should be documented, including how the agency reaches a final decision.
- Upon conclusion of consultation, the Agency or Department should notify all consulting tribes of the proposed decision, specifically discussing the basis for the decision, the relationship to tribal concerns, and outlining the process for tribes to challenge the draft plan prior to its final approval.

3. Procedures to identify tribes through the NAHC.

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

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

[3] 113 Yale Law Journal 1623, page 12

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

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

5. Procedures to protect confidentiality.

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

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

Miscellaneous

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