Native American Consultation

Unit 6.4
CAL FIRE Certified Archaeological Surveyor Training
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Key Objectives

• Overview of Native American consultation policy and law for the State of California
• Discuss the concepts of consultation, notification, and information sharing
• Look at Native American consultation under both the *Forest Practice Rules* (FPR) and the *Archaeological Review Procedures for CAL FIRE Projects* (ARP)
What is the State’s Native American Consultation Policy?

The State of California (State) is committed to strengthening and sustaining effective relationships between the State and Native American Tribes in California (Tribes) by identifying areas of mutual concern and working to develop partnerships and consensus. (Recitals to EO B-10-11, September 19, 2011).
Why Does the State’s Native American Consultation Policy Exist?

The State recognizes and reaffirms the inherent right of the Tribes to exercise sovereign authority over their members and territory.

(Recitals to EO B-10-11, September 19, 2011).
Who are California’s Native Americans?

- Ancient immigrants
- Many people, not one
- Cultures rooted in the land
- Oral transmission of culture
Discussions with Native Americans may at times feel a bit awkward or tense. Why?

• Native American history during and after multiple European and Euroamerican conquests has been grim
• Most non-Native Americans in our country don’t really grasp just how grim that history has been
• Many non-Native Americans also don’t appreciate that the consequences of that history are still playing out today
A Few of the Many Ways Native American History Has Been Grim since 1492

- Military conquests
- Enslavement and coerced labor
- Disease
- Religious persecution
- Appropriation of ancestral territory
- Consignment to poor quality reservation lands
- Forcible separation of children from parents to attend Native American boarding school (ca. 1870s to 1970s)
- Loss of entire lifeway
How Are the Consequences of Native American History since 1492 Still Playing out Today?

- Ongoing economic, education, and health disadvantages
- Your project is probably on their appropriated ancestral territory
- You want them to reveal places and information important to their culture
- You want them to consult with you in the way of your culture, not theirs
State Native American Consultation Requirements Have Increased over Time

- **CEQA (1970 to 2014)**
  - ✔ No explicit requirement to routinely consult about projects
  - ✔ Lead or responsible agency only had to consult when IS indicated the existence or “probable likelihood” of Native American human remains
  - ✔ Resource management agencies began to consult anyway

- **Article 14, Forest Practice Rules** (Forest Practice Act projects)
  - ✔ Certified Regulatory Program under CEQA (PRC 21080.5)

- **Archaeological Review Procedures for CAL FIRE Projects**
  - (non-Forest Practice Act projects subject to CEQA)
  - ✔ Agency guidance
State Native American Consultation Requirements Have Increased over Time

- Governor’s Executive Order B-10-11 (September 19, 2011)
  - “… every state agency and department subject to my executive control shall encourage communication and consultation with California Indian Tribes.”
  - Every state agency was to develop its own Native American consultation policy
  - Policies tiered from the executive order were to cover all aspects of each agency’s business which may affect Native American communities, not just cultural resources
State Native American Consultation Requirements Have Increased over Time

• CAL FIRE Native American Tribal Communities Relations Policy (January 18, 2012)
  ✓ “CAL FIRE, at all levels, will act in a knowledgeable, sensitive, and respectful manner when working with tribes to protect cultural resources.”
Native American Consultation under California State Law for CAL FIRE Projects

CEQA (2015 to), What AB 52 (September 25, 2014) Did to CEQA

- How do the AB 52 Amendments to CEQA affect Native American consultation for CAL FIRE projects?
  - Any work under the Forest Practice Rules are not subject to AB 52 amendments
  - Any work under the Archaeological Review Procedures will also probably not be subject to the amendments
  - In the event that a project does require AB 52 consultation, due to the preparation of a negative declaration, mitigated negative declaration, on an EIR, contact a CAL FIRE archaeologist
What is “Consultation” Anyway?

There’s Information Sharing and Then There’s Consultation, Usually in That Order

- Information Sharing
  - Notification letters sent out under the Forest Practice Rules (FPR) and the Archaeological Review Procedures for CAL FIRE Projects (ARP)
  - Discussions to clarify project location, project description, or results of a records search
  - A field visit to review cultural resources found by or on behalf of our agency, or known only to a Native American community
What is “Consultation” Anyway?

There’s **Information Sharing** and Then There’s **Consultation**, Usually in That Order

- **Consultation**
  
  ✓ Actual *consultation* typically involves discussions and negotiations related to the historic preservation of particular cultural resources which are significant under law or significant to a Native American community

  ✓ Actual *consultation* can also involve the negotiation of data gathering parameters (field schedules, personnel, ritual practice) and project implementation parameters (implementation plan, sensitivity training, monitoring, ritual practice)
Effective Native American Consultation Means Building Working Relationships
Where Do I Find CAL FIRE’s Native American Consultation Procedures?

Z’berg-Nejedly Forest Practice Act (PRC § 4511 et seq.)

Forest Practice Rules (FPR) (14 CCR § 895 et seq.)

Article 14 Archaeological and Historical Resource Protection (14 CCR §§ 929, 949, 969 et seq.)

California Environmental Quality Act (PRC § 21000 et seq.)

CEQA Guidelines (14 CCR § 15000 et seq.)

Archaeological Review Procedures for CAL FIRE Projects (ARP) (Agency Guidance)
Native American Consultation under the Forest Practice Rules

Three different procedures under the FPR, slight variations on the same theme

- Plan preparation (Timber Harvest Plans, Non-industrial Timber Management Plans)
- Emergency Notice of 3 Acres or More
- Emergency Notices of Less Than 3 Acres
Native American Consultation under the Forest Practice Rules

Consultation for **Plan Preparation**

- Notification of plan preparation (10-day response period prior to plan submission)
- Notification of newly identified cultural resources (15-day response period prior to close of public comment)
- Documentation of consultation in Confidential Archaeological Addendum (CAA)

So Where Does Actual Consultation Occur?
Native American Consultation under the Forest Practice Rules

The Mechanics of Notification, *Who exactly do I notify?*

- Start with CAL FIRE’s Native American Contact List (http://www.fire.ca.gov/resource_mgt/archaeology/downloads/NativeAmericanContactsList.pdf)
  
  - Contacts are listed by county
  - First contact for each county is NAHC
  - CAL FIRE encourages project managers to notify all of the contacts listed for the county or part of the county of the plan or project area
  - Note the date at the top of the list when you access it
ALAMEDA COUNTY (ALL)

NATIVE AMERICAN HERITAGE COMMISSION
1550 Harbor Blvd., Room 100
West Sacramento, CA 95691
(916) 373-3710
FAX (916) 373-5471
Attn.: Ms. Gayle Totton  gayle.totton@nabc.ca.gov

Indian Canyon Mission Band of Cotoxamans
Ann Marie Sayers, Chairperson
P.O. Box 28
Hebster, CA 95624
Tribal Affiliation: Ohlone, Cotoxamans
(811) 627-4238

The Ohlone Indian Tribe
Andrew A. Galvan
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Fremont, CA 94539
Tribal Affiliation: Ohlone, Bay Miwok, Plains Miwok, Patwin
Office: (510) 882-6527
chefinyo@jpl.com

Trini Marine Ranch Family
Rannona Guthroy, Representative
37128 Cedar Blvd., Newark, CA 94560
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Washten Tribe of Nevada and California*
Nail Maritinez, Chairman
Darrel Cruz, Tribal Historic Preservation Officer
919 Highway 395 South
Gardnerville, NV 89410
Tribal Affiliation: Washoe
(775) 265-8400  *(775) 265-2254 Fax

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Native American Consultation under the Forest Practice Rules

The Mechanics of Notification, **Who exactly do I notify?**

The **Native American Heritage Commission**
- Nine member commission appointed by the governor
- Preserves and ensures access to Native American sacred sites and burials
- Provides guidance and facilitates negotiations on the disposition of Native American human remains and burial items
- Maintains an inventory of Native American sacred sites located on public lands (**Sacred Lands Files**)
Native American Consultation under the Forest Practice Rules

The Mechanics of Notification, What Do I Write into the Notifications?

- Article 14 prescribes the minimum content of notifications that must be sent out under both the Plan Preparation and Emergency Notice of 3 Acres or More procedures
Native American Consultation under the Forest Practice Rules

The Mechanics of Notification, What Do I Write into the Notifications?

Content of Notification of Plan Preparation, an Example

• A request for information on Native American resources that a Native American community may know about and wish avoided
• Information on plan location
• A statement that RPF is the point of contact for responses
• Information on the time available to Native Americans for response
Native American Consultation under the Forest Practice Rules

The Mechanics of Notification, What Do I Write into the Notifications?

Content of Notification of Plan Preparation, an Example (cont’d.)

• A statement that Native Americans can participate in the plan review process via written comments before the close of the public comment period
• A statement that resources locations will be kept confidential
• A statement that a CAA will be prepared and be made available to Native Americans, at the agency’s discretion
Native American Consultation under the Forest Practice Rules

The Mechanics of Notification, What Do I Write into the Notifications?

- Sample notification letters both for Article 14 of the FPR and for the ARP are found on CAL FIRE’s website.

(http://calfire.ca.gov/resource_mgt/archaeology-sample_letters)
Native American Consultation under the Forest Practice Rules

Consultation for Plan Preparation

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Native American Consultation under the Forest Practice Rules

Consultation for **Emergency Notice of 3 Acres or More**

- Notification of emergency notice preparation (7-day response period prior to plan submission)
- Documentation of consultation in Confidential Archaeological Letter (CAL)
Native American Consultation under the Forest Practice Rules

Consultation for Emergency Notice of Less Than 3 Acres

- Send copy of the Emergency Notice of Less Than 3 Acres to Native Americans
- No administrative record specific to Native America consultation
Native American Consultation under the Archaeological Review Procedures

Same Song, Different Verse

- Project notification and information gathering (30-day response period)
- Notify Native Americans about the discovery of previously unidentified cultural resources in the project area
- Administrative Record for consultation in Archaeological Survey Report (ASR)
Cultural Resources Discovery and Native American Consultation

Post-review Discovery under the FPR
(14 CCR §§ 929.3, 949.3, 969.3)

- Notification of CAL FIRE, RPF, LTO, and timberland owner
- No timber operations within 100’ of newly found cultural resource until plan submitter and CAL FIRE agree to protection measures
- Minor deviation to plan is filed
- CAL FIRE consults with Native Americans on proposed minor deviation
Cultural Resources Discovery and Native American Consultation

Post-approval Discovery under the ARP (Foster and Pollack 2010:17 and 18)

- Halt project work within 100’ of newly found cultural resource
- Notify CAL FIRE Archaeologist
- CAL FIRE consults with landowners and Native Americans
- CAL FIRE Archaeologist evaluates discovery and develops protection measures
- CAL FIRE Archaeologist records discovery, and documents discovery and protection measures in project administrative record
Discovery of Human Remains and Native American Consultation

• Who to contact first when human remains turn up (after your immediate supervisor)
  ✓ Your CAL FIRE archaeologist
  ✓ The Landowner

• HSC 7050.5 Process
  ✓ Secure the area of the discovery
  ✓ Contact the county coroner

• PRC 5097.98 Process
  ✓ NAHC designates MLD
  ✓ Consultation between MLD and landowner with CAL FIRE archeologist assist
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Questions?