



*Preserving America's Heritage*

March 31, 2015

Ms. Alicia E. Kirchner  
Chief, Planning Division  
U.S. Army Corps of Engineers  
Sacramento District  
1325 J Street  
Sacramento, CA 95814-2922

Ref.: Resolution of Adverse Effects for Eight Prehistoric Archaeological Sites  
Feather River West Levee Project, Contract C  
Sutter and Butte Counties, California

Dear Ms. Kirchner:

The Advisory Council on Historic Preservation (ACHP) has been contacted by the United Auburn Indian Community (UAIC) regarding the resolution of adverse effects from the Feather River West Levee Project (FRWLP) to a number of archaeological sites encountered as post-review discoveries during a phase of the undertaking implemented in 2014. UAIC has objected to the archaeological data recovery being carried out and has proposed that the entire archaeological assemblage recovered from the sites be considered human remains and associated grave goods. The tribe has requested that the archaeological assemblage not be subject to further analysis of any kind and should be turned over to the tribe for appropriate reburial. In response, the Corps has indicated that it is obliged, in order to comply with Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations, "Protection of Historic Properties" (36 CFR 800), to accomplish some aspects of the analysis associated with the data recovery agreed to for resolution of adverse effects to these archaeological sites. In considering this disagreement, the ACHP would like to offer a number of observations regarding the requirements of Section 106 as they relate to this undertaking, the importance of tribal concerns regarding the presence, significance, and treatment of human remains in archaeological sites, and the potential to use alternative mitigation to resolve adverse effects in cases like this.

A central issue in the dispute is the Corps' belief that it is obligated to carry out data recovery in order to resolve the adverse effect of the undertaking because the archaeological sites have been determined eligible under Criterion D for inclusion in the National Register of Historic Places (National Register). As part of the Section 106 review, it is important that federal agencies consider carefully the criteria of eligibility that are applicable for each of the historic properties identified in the Area of Potential Effects (APE) of the undertaking. The significance and characteristics that make a historic property eligible under each criterion of eligibility should inform the federal agency's assessment of effects and the consultation to develop appropriate resolution of adverse effects. A federal agency, however, is not required to ensure that the resolution of adverse effects specifically addresses each criterion of eligibility applicable for an historic property that is adversely affected; nor that it even specifically addresses each historic property adversely affected.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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Rather, the appropriate resolution of adverse effects is that set of measures which consulting parties agree upon. Further, the ACHP's Section 106 Archaeology Guidance (available online at [www.achp.gov/archguide](http://www.achp.gov/archguide)) clarifies that human remains, associated funerary objects, and the sites where they are found possess values beyond their importance as sources of information about the past. Thus, federal agencies should be aware that even when a property has been determined eligible for the National Register only under Criterion D, the special nature of burials, which are widely recognized in law and practice as having special qualities, may also possess a value to living groups that extends beyond the interests of archaeological research. Burial sites may be considered properties of traditional religious and cultural significance to Indian tribes or Native Hawaiian Organizations, which could make such sites eligible for the National Register under other criteria of eligibility in addition to Criterion D. Further, data recovery is not the only option to resolve adverse effects to an archaeological site found eligible under Criterion D. The ACHP is supportive of the use of reasonable alternative mitigation strategies that may not include archaeological data recovery and may not even focus directly on the historic properties that are affected or the locations or time periods represented by historic properties affected by an undertaking. This is particularly the case when alternative mitigation strategies are found to be appropriate by the consulting parties.

The UAIC, determined to be "Most Likely Descendent" (MLD) associated with the human remains by the California Native American Heritage Commission (NAHC), has concluded, based on oral history and ethno-historical information, that the burial practices of their ancestors often included cremation of the deceased with items of material culture that resulted in dispersal of fragmentary human remains and associated funerary objects throughout middens associated with their ancestral village sites. From the UAIC's perspective, the entire archaeological assemblage from each archaeological site and the soil matrix should be considered burial related and the archaeological sites should be considered cemeteries. Accordingly, the UAIC have requested that the Corps return all human remains and the entire archaeological assemblage to the tribes without any analysis or further disturbance. The Corps has turned over approximately one-half of the archaeological assemblage, prior to analysis, from the excavated sites, consisting of the portion not found in excavation unit levels in which human remains have been identified as well as excavation unit levels above and below such levels. The Corps, however, believes that it is obligated to follow through on some level of analysis for the remaining portion of the archaeological assemblages from the data recovery excavations in order to resolve the adverse effects of the undertaking to those sites because they were determined eligible under Criterion D.

The ACHP's "Policy Statement Regarding Treatment of Burial Sites, Human Remains, and Funerary Objects," states that human remains should not be knowingly disturbed unless absolutely necessary. If circumstances require that they must be disturbed, the remains should be removed carefully, respectfully, and in a manner developed in consultation with the consulting parties, including those who ascribe significance to the remains. In a case such as this, when human remains and associated funerary objects are dispersed throughout midden remains, the recovery can become extremely difficult. In reaching decisions about appropriate treatment measures, federal agencies should weigh a variety of factors, including the significance of the historic property, its value and to whom, and associated costs and project schedules. Since mitigation decisions are reached through consultation and represent the broader public interest, they should be considered appropriate so long as they are legal, feasible, and practical. By considering alternatives to data recovery, the federal agencies can address how the community or the general public will benefit from the expenditure of public funds for preservation treatments.

At the request of UAIC, and as provided for by state law, following the issuance of an investigative report on March 19, 2015, and a public hearing on March 20, 2015, the NAHC has determined that a geographical area identified as the "Wollock Prehistoric Archaeological District and Cultural Landscape," which includes the archaeological sites identified as post-review discoveries adversely affected by the FRWLP, constitutes a sanctified cemetery and associated resources as defined in Public Resources Code

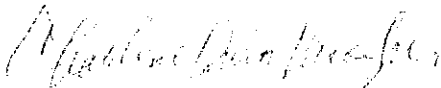
(PRC) Sections 5097.97, 5097.94(g), 5097.9. The NAHC has also determined that if an agreement regarding appropriate treatment and disposition of the human remains and associated funerary material pursuant to state law is not reached between the Corps, the project proponent, and the UAIC by April 6, 2015, the NAHC will proceed with seeking injunctive relief pursuant to PRC 5097.94(g) and applicable statutes. It is apparent that the project proponent, the Sutter Butte Flood Control Agency (SBFCA), is a public agency carrying out a project on public land and thus subject to state law regarding treatment of human remains and the decisions of NAHC. The ACHP would like to remind the Corps that when human remains are encountered on non-federal or non-tribal land during review or implementation of projects subject to Section 106 review, the federal agencies involved should consider the obligations of project proponents under state law as well as their own obligations to comply with state law regarding the treatment and disposition of human remains.

It is clear that the FRWLP is a very important project intended to address public safety concerns, and its implementation should not be delayed unreasonably. We understand that the project proponent and the Corps do not believe that there are alternatives to the proposed methods for repairing and enhancing the levees that would enable avoidance of archaeological sites like the ones adversely affected in Contract C of the FRWLP. However, considering the significance of the sites to the UAIC and other tribes in the region, the Corps should reevaluate the alternatives for future phases of the project. Based on the information provided to us, a number of proposals for alternative mitigation in addition to or in place of data recovery have been considered including: (1) analysis of other archaeological site assemblages already in curation from nearby locations; (2) ethnohistoric / ethnographic study of these types of sites and their importance, to further clarify eligibility under other criteria; (3) development of future methods of identification and treatment for these types of sites that involve the tribes earlier and more directly in the review process. These are all reasonable proposals for resolving the adverse effect of the undertaking, which the Corps and consulting parties should give serious consideration to.

Finally, as the NAHC has suggested that all the archaeological sites determined to be adversely affected in Contract C of the FRWLP are part of a sanctified cemetery that extends throughout a proposed "Wollock Prehistoric Archaeological District and Cultural Landscape," the ACHP encourages the Corps to consider focusing on a resolution of adverse effects that further explores the relationship of the archaeological sites in the APE for the undertaking to such a property, and the tribal beliefs and burial practices that are the foundation of such an extensive property. The Corps should consider the criteria of eligibility that may be applicable, and protocols that may be appropriate for treatment of archaeological sites containing human remains when they cannot be avoided during implementation of future phases of the undertaking.

Should you have any questions or wish to discuss this matter further, please contact John T. Eddins, PhD at 202-517-0211, or by e-mail at [jeddins@achp.gov](mailto:jeddins@achp.gov).

Sincerely



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