



CALIFORNIA NATIVE AMERICAN HERITAGE COMMISSION
PUBLIC RESOURCES CODE SECTIONS 5097.9, 5097.94 (g), and 5097.97
INVESTIGATIVE REPORT CONCERNING THE
FEATHER RIVER WEST LEVEE PROJECT
SUTTER BUTTE FLOOD CONTROL AGENCY, CEQA LEAD AGENCY
STATE CLEARINGHOUSE NUMBER 2011052062
U.S. ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT, NEPA LEAD
AGENCY
PURSUANT TO THE REQUEST OF THE
UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA
A FEDERALLY RECOGNIZED NATIVE AMERICAN TRIBE

MARCH 19, 2015.

"It is the policy of the state that Native American remains and associated grave artifacts shall be repatriated."

California Public Resources Code section 5097.991

FEATHER RIVER WEST LEVEE PROJECT
State Clearing House Number # 2011052062

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I. Executive Summary

The California Native American Heritage Commission (NAHC) has the duty and authority to take legal action to prevent severe or irreparable damage to Native American sanctified cemeteries, places of worship, religious or ceremonial sites, or sacred shrines¹ located on public property.² This investigative report is for the purpose of assisting the NAHC to determine whether it should take legal action to prevent severe or irreparable damage to any Native American sacred sites located in the area of the Feather River West Levee Project (FRWLP or Project). This investigative report and a scheduled public hearing³ are prerequisites for the NAHC to seek injunctive relief to protect any Native American sacred sites within the FRWLP project area (also "Area of Project Effect" or "APE") from severe or irreparable damage. The NAHC has no interest in impeding the FRWLP, or any public works project for that matter, solely to make a point. The FRWLP should, can and must continue if mitigation measures are taken to eliminate or reduce damage to Native American sacred sites.

This investigation and public hearing were requested by the United Auburn Indian Community of the Auburn Rancheria (UAIC),⁴ a federally recognized tribe,⁵ in order to prevent any future damage to Native American sacred sites within the FRWLP. UAIC has been negotiating with the project sponsor, the Sutter Butte Flood Control Agency (SBFCA), and the federal permitting agency, the U.S. Army Corps of Engineers (USACE), since the summer of 2014 to mitigate damages to Native American cultural resources in the FRWLP and to have Native American human remains and associated grave goods found in the FRWLP returned to UAIC without testing and analysis, among other requests. SBFCA has returned some, but allegedly not all, of the remains and associated grave goods, and agrees that they all should be returned to UAIC under state law. USACE has disputed which artifacts are or are not associated grave goods and has only recently agreed to return associated grave goods after testing and curation. The role of deciding what is or is not an associated grave good or whether they should be tested or

¹ For purposes of simplicity for those unfamiliar with cultural resources, we will refer to such sites as "Native American sacred sites," although a formal declaration by the NAHC that these sites are sacred has not yet occurred.

² See Public Resources Code sections 5097.94 (g) and 5097.97. Section 5097.94 (g) provides that the NAHC has the power and the duty "to bring an action to prevent severe and irreparable damage to, or to assure appropriate access for Native Americans to, a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, pursuant to Section 5097.97."

³ A public hearing in this matter is scheduled for March 20, 2015 at the North Natomas Library, North Natomas Meeting Room, 4660 Via Inglogia, Sacramento, CA 95835 from 9:00 am to 2:00 pm. Colonel Michael Farrell, Commander of the Sacramento District of the USACE, has communicated through correspondence addressed to NAHC Chairman James Ramos that USACE has declined to appear at the hearing. See March 5, 2015 Letter from Colonel Michael Farrell, District Commander, Sacramento District, USACE, to NAHC Chairman James Ramos.

⁴ UAIC Request to Pursue Public Resources Code Section 5097.97, September 15, 2014.

⁵ Federally recognized Native American tribes have certain rights under federal law, such as the right to government-to-government consultation with federal agencies under Section 106, that are specific and limited to them as sovereign governments.

analyzed is a role the NAHC believes USACE does not have in this matter, since the discoveries have occurred on non-federal property, and both SBFCA and USACE agreed to follow state law for discoveries of Native American remains and associated grave goods that were not on federal property.

The implications for levee projects throughout the state, and for Native American tribes whose cultural resources are unearthed by those projects, are enormous. State and local agencies subject to the NAHC's jurisdiction, and not the federal government, own most of the levees,⁶ yet permits from the USACE are required to repair those levees. It is the USACE's role as a permitting agency for levee repairs, and its resultant exercise of dominion and control over Native American human remains and associated grave goods found on non-federal property within those levees, that represent an unwelcome intrusion on the state's policy of repatriating Native American human remains and associated grave goods. The NAHC's only hope at preventing or mitigating future damage to Native American sacred sites within the FRWLP that may contain Native American human remains or associated graves goods is to seek injunctive relief in the courts.

Before seeking injunctive relief, the NAHC must propose mitigation measures to SBFCA in order to protect Native American sacred sites in the FRWLP. SBFCA can either accept or reject the proposed mitigation measures. Legal action by the NAHC would be a last resort if the NAHC and SBFCA were unable to reach an agreement on mitigation measures.⁷ NAHC staff remain hopeful that a mutually agreed upon resolution between UAIC, SBFCA, and USACE is still possible, as negotiations are ongoing and any agreement reached will have implications for other levee repair projects throughout the state. The NAHC is mindful of the fact that SBFCA desires to return all Native American remains and associated grave goods to UAIC, but that USACE has threatened to revoke SBFCA's federal permits if it does so, which would effectively halt work on the FRWLP.

⁶ Feather River West Levee Project Final 408 Permission Environmental Impact State, June 2013, at ES-6.

⁷ See Public Resources Code section 5097.97. Public Resources Code section 5097.97 provides:

In the event that any Native American organization, tribe, group, or individual advises the commission that a proposed action by a public agency may cause severe or irreparable damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, or may bar appropriate access thereto by Native Americans, the commission shall conduct an investigation as to the effect of the proposed action. Where the commission finds, after a public hearing, that the proposed action would result in such damage or interference, the commission may recommend mitigation measures for consideration by the public agency proposing to take such action. If the public agency fails to accept the mitigation measures, and if the commission finds that the proposed action would do severe and irreparable damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, the commission may ask the Attorney General to take appropriate legal action pursuant to subdivision (g) of Section 5097.94.

The FRWLP is a project along a 41-mile stretch of the Feather River to increase flood protection by making improvements to the west levee of the Feather River.⁸ In order to implement the project, SBFCA was required to secure permits from the USACE under Section 404 of the Clean Water Act⁹ (Section 404) and Section 14 of the Rivers and Harbors Act of 1899 as amended¹⁰ (Section 408), among many other federal permits that were required. As a result, environmental impact review of the FRWLP was required under the federal National Environmental Policy Act of 1969 as amended¹¹ (NEPA) in addition to environmental impact review under the California Environmental Quality Act (CEQA).¹² USACE served as the lead agency for NEPA environmental impact review, while SBFCA served as lead agency for CEQA environmental impact review. Under NEPA, USACE was required to consult with the State Historic Preservation Officer (SHPO) to achieve compliance with Section 106 of the National Historic Preservation Act (Section 106).¹³ USACE's interpretation and application of Section 106 and associated regulations has created a point of contention: Who controls the treatment and disposition of Native American remains and associated grave goods found on non-federal property within the FRWLP?

UAIC and the NAHC have maintained that SBFCA and USACE must comply with California law regarding the treatment and disposition of Native American remains and associated grave goods found on non-federal property within the FRWLP. Under

⁸ 76 FR 29216 (May 20, 2011)

⁹ 13 U.S.C. § 1344.

¹⁰ 33 U.S.C. § 408.

¹¹ 42 U.S.C. § 4321 et seq.

¹² Public Resources Code § 21000 et seq.

¹³ 16 U.S.C. § 470f. Section 106 provides:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under part B of this subchapter a reasonable opportunity to comment with regard to such undertaking.

The Section 106 consultation process is governed by regulations at 33 CFR § 800.3 et seq. USACE's regulations implementing Section 106 are at 33 CFR § 325, Appendix C. The Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation are found at 48 FR 44716-44740. Federal regulations governing the curation of federally-owned and administered archaeological collections are at 36 CFR § 79 et seq. The National Park Service is proposing to amend regulations for the curation of federally-owned and administered At least one commentator has questioned whether USACE's regulations implementing Section 106 are valid, arguing, *inter alia*, that the Advisory Council on Historic Preservation did not have statutory authority to delegate rulemaking authority for the implementation of Section 106 to the USACE. See *Note, Engineering Exceptions to Historic Preservation Law: Why the Army Corps of Engineers Section 106 Regulations Are Invalid*, 40 Wm. Mitchell Law Rev. 1580 (2014).

California law, only Most Likely Descendants (MLDs)¹⁴ and landowners of the property where the remains and associated grave goods were found have a role in determining the treatment and disposition of those remains and any associated grave goods, not third parties such as USACE.¹⁵ USACE has maintained control over the treatment and disposition of Native American remains and associated grave goods found in the FRWLP project area, despite the fact that USACE, SBFCA, and the State Historic Preservation Office (SHPO) were signatories to a Section 106 Programmatic Agreement (PA) and a Historic Properties Treatment Plan (HPTP) for the FRWLP that provided that California's laws regarding the treatment and disposition of Native American remains and associated grave goods would be followed for Native American remains and associated grave goods found on non-federal property of the FRWLP.¹⁶ SBFCA, a California joint powers authority,¹⁷ claims ownership of the Project property in

¹⁴ A "Most Likely Descendant" is a person or persons the NAHC believes is most likely descended from a deceased Native American whose remains have been found. See Public Resources Code § 5097.98 (a).

¹⁵ Public Resources Code § 5097.98; *People v. Van Horn* (1990) 218 Cal.App.3d 1378, 1395. Although *Van Horn* involved the refusal of an archaeologist to return associated grave goods from a Native American burial, state law treats associated grave goods from a Native American burial the same as Native American remains. See Public Resources Code section 5097.98 (d)(2) ("Any items associated with the human remains that are placed or buried with the Native American human remains are to be treated in the same manner as the remains, but do not by themselves constitute human remains."). The *Van Horn* court held:

However, while we appreciate defendants' desire to preserve archaeological specimens in general, and these metates in particular, for the benefit of the public at large, the language of section 5097.99, including the references in that section to sections 5097.94 and 5097.98, clearly gives the choice of preservation or reburial to Native Americans, namely descendants of the Native American deceased or members of Native American groups, acting under the supervision of a commission which is controlled by Native Americans.

People v. Van Horn, 218 Cal. App. 3d at 1395.

¹⁶ See Historic Properties Treatment Plan for the Feather River West Levee Project, July 2014, at page 6-6 ("Both ER [Enterprise Rancheria] and UAIC have expressed a strong interest in the protection and preservation of the remains of their ancestors . . . Such remains along with any associated funerary objects would be treated in accordance with state law."); see also Programmatic Agreement Among the U.S. Army Corps of Engineers, Sutter Butte Flood Control Agency, and the California State Historic Preservation Officer Regarding the Feather West Levee Project, Sutter and Butte Counties, California, July 1, 2013 at page 6:

If human remains are present, treatment shall conform to the requirements of state law under California Health and Safety Code Section 7050.5 and Public Resources Code Section 5097.98, unless the discovery occurs on federal land. Discoveries on federal land shall conform to the requirements of the Native American Graves Protection and Repatriation Act (NAGPRA, 25 U.S. Code Section 3001 et seq.), after complying with the requirements of the California Health and Safety Code Section 7050.5, which requires notice to the County Coroner so the coroner may determine if an investigation into the cause of death is required. These legal requirements, as well as appropriate monitoring, will be described in the plan, as indicated in Attachment 2.

¹⁷ See Sutter-Butte Flood Control Agency Joint Exercise of Powers Agreement, December 3, 2007, <http://sutterbutteflood.org/wp-content/uploads/2013/09/SBFCA-JPA-Formation-Agreement.pdf>; First Amendment to the Sutter-Butte Flood Control Agency Joint Exercise of Powers Agreement, July 14, 2009, http://sutterbutteflood.org/wp-content/uploads/2013/09/JPA_Signed-Amendment-1-_8-10-09.pdf; Second

question.¹⁸ The handling, testing and analysis to which USACE has subjected discovered Native American remains and associated grave goods for which UAIC has been designated the MLD have been repugnant to the spiritual beliefs of UAIC. Under California law, such handling, testing or analysis by a third party such as USACE would not be permissible without UAIC's consent.¹⁹ An additional consideration is Public Resources Code section 5097.99,²⁰ which makes possession of Native American human remains except as provided by law or under an agreement pursuant to Public Resources Code sections 5097.98 (l) or 5097.98 punishable as a felony.

The matter of treatment and disposition of Native American remains and associated grave goods found on non-federal property within the FRWLP, if pursued to the fullest extent of the law, implicates issues of state sovereignty and federal preemption of California's laws that allow MLDs and landowners, and not third parties, to determine the treatment and disposition of Native American remains and associated grave goods found on non-federal lands within the state. The NAHC has asked for evidence and testimony on this issue to consider its legal options in this regard. Additional investigation by the NAHC may be necessary, as the USACE's practices regarding the treatment and disposition of Native American remains and associated grave goods on non-federal property within the state may implicate issues of environmental justice²¹ that are beyond the intended scope of this investigative report and the public hearing.

Amendment to the Sutter-Butte Flood Control Agency Joint Exercise of Powers Agreement, September 14, 2011, <http://sutterbutteflood.org/wp-content/uploads/2013/09/11.07.2011-Executed-JPA-Amendment-2.pdf>.

¹⁸ January 16, 2015 Letter from Mike Inamine, Executive Director, SBFCA, to Colonel Michael Farrell, District Commander, U.S. Army Corps of Engineers, Sacramento re Written Objections to Sutter Butte Flood Control Agency Regarding Implementation of Programmatic Agreement for Feather River West Levee Project ("As the landowner of the Project area, SBFCA is subject to California laws that protect cultural resources, and in particular Public Resources Code section 5097.97").

¹⁹ Public Resources Code section 5097.98, subdivision (b) provides that the landowner shall discuss and confer with the descendants all reasonable options regarding the descendants' preferences for treatment. It provides no role for third parties.

²⁰ Public Resources Code section 5097.99 provides in relevant part:

(a) No person shall obtain or possess any Native American artifacts or human remains which are taken from a Native American grave or cairn on or after January 1, 1984, except as otherwise provided by law or in accordance with an agreement reached pursuant to subdivision (l) of Section 5097.94 or pursuant to Section 5097.98.

(b) Any person who knowingly or willfully obtains or possesses Native American artifacts or human remains which are taken from a Native American grave or cairn after January 1, 1988, except as otherwise provided by law or in accordance with an agreement reached pursuant to subdivision (l) of Section 5097.94 or pursuant to Section 5097.98, is guilty of a felony which is punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code.

²¹ The United States Environmental Protection Agency defines "environmental justice" as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations and policies." See <http://www.epa.gov/environmentaljustice/>.

The remainder of Section One of this report includes a description of the FRWLP and SBFCA; a description of the NAHC's mission, duties and enforcement authority; a summary of the UAIC's Request for Investigation and Public Hearing pursuant to Public Resources Code section 5097.97; and the issues to be addressed in this report and at the public hearing as stated in the Notice of Investigation NOI 2015-1 and Notice of Hearing NOH 2015-1.

Section Two of this report details the environmental impact review the FRWLP underwent under both NEPA and CEQA and the efforts SBFCA and USACE made to determine the Native American cultural resources in the FRWLP project area prior to commencing construction and mitigate effects to them.

Section Three of this report chronicles the NAHC's involvement in the FRWLP and post-environmental review efforts by the parties to reach a consensus on mitigation measures for damage to Native American cultural resources within the FRWLP.

Section Four of this report summarizes UAIC's allegations as to past and potential severe and irreparable harm to Native American sacred sites within the FRWLP and SBFCA's response and position in this matter as derived from its submissions for this report. USACE has provided no such submissions.

Section Five of this report addresses evidence regarding whether SBFCA or USACE has a pattern or practice of causing severe or irreparable damage to Native American sacred sites.

A. Description of the Feather River West Levee Project (FRWLP) and the Sutter Butte Flood Control Agency (SBFCA)

The project area of the FRWLP is focused on a corridor along the west levee of the Feather River from Thermalito Afterbay on the north to approximately 4 miles north of the Sutter Bypass on the south.²² The corridor is approximately 41 miles long.²³ The regional setting of the FRWLP is the Sacramento River Flood Control Project (SRFCP), which begins as far north as Redding and extends south to the Sacramento-San Joaquin River Delta.²⁴ The FRWLP is a subset of the Sutter Basin, which is located in north-central California in Sutter and Butte Counties, covers 326 square miles, and is roughly bounded by the Feather River to the east and the Cherokee Canal, the Sutter Buttes, and Sutter Bypass to the west. Floodwaters threatening the basin originate from the Feather River watershed above Colusa Weir.

²² Feather River West Levee Project Final 408 Permission Environmental Impact State, June 2013, at ES-5.

²³ Id.

²⁴ Id.

The primary purpose of the FRWLP is to reduce flood risk for the entire planning area by addressing known levee deficiencies along the Feather River West Levee from Thermalito Afterbay downstream to approximately 4 miles upstream of the confluence with the Sutter Bypass.²⁵ SBFCA's goal is to achieve a minimum of 200-year level of performance for the more urbanized areas with population centers and 100-year level of performance for the remaining more rural agricultural parts of the planning area. A 200-year flood is a flood that has a .5% chance of occurring in any given year. A 100-year flood has a 1% chance of occurring in any given year.²⁶

According to the FRWLP Final Environmental Impact Statement (FEIS), Feather River's past history of flooding is substantial, and the risk of levee failure is real. According to the FEIS, major flood events have occurred along the Feather River in 1955, 1958, 1964, 1986, 1997 and 1998, the most significant of these occurring in 1955, 1986 and 1997.²⁷ Studies conducted by USACE, DWR or SBFCA over the past two decades to evaluate the condition of the levees protecting the planning area have indicated that the levee system is deficient and that the consequences of levee failure from a major flood event would be significant.²⁸ The December 1955 flood, reportedly the most significant flood event along the Feather River, caused major flooding of nearly all of Yuba City as well as flooding in Nicolaus.²⁹

There are several major flood risk-reduction projects being planned or implemented within the SRFCP, of which the FRWLP is one.³⁰

SBFCA was formed in 2007 to address flood risk reduction in the Sutter Basin.³¹ The cities and counties that formed SBFCA include Sutter County, Butte County, the cities of Yuba City, Live Oak, Biggs and Gridley, Levee Districts 1 and 9, and the Sutter County Water Agency.³² In 2010, SBFCA formed an assessment district to raise local funds for levee improvements from property owners, which facilitated SBFCA's advancement of the FRWLP.³³

According to the FRWLP FEIS, the Federal government maintains oversight but has no ownership of or direct responsibilities for performing maintenance of the Federal levee system, except for a few select features that continue to be owned and operated by

²⁵ Id. at ES-10.

²⁶ Id. at ES-9 to ES-10.

²⁷ Id. at ES-7.

²⁸ Id. at ES-7.

²⁹ Id.

³⁰ Id. at ES-9.

³¹ Id.

³² See Sutter-Butte Flood Control Agency Joint Exercise of Powers Agreement, December 3, 2007, http://sutterbutteflood.org/wp-content/uploads/2013/09/JPA_Signed-Amendment-1-8-10-09.pdf

³³ Feather River West Levee Project Final 408 Permission Environmental Impact State, June 2013, at ES-9.

USACE.³⁴ The great majority of levees, channels, and related flood risk management structures are owned, operated, and maintained by the State of California and local levee and reclamation districts as governed by USACE operations and maintenance manuals.³⁵

B. The Native American Heritage Commission's Mission, Duties and Enforcement Authority

The NAHC was created in 1976.³⁶ It consists of nine members appointed by the Governor with the advice and consent of the Senate.³⁷ The executive secretary of the NAHC is also appointed by the Governor.³⁸ The current NAHC Executive Secretary, Judge Cynthia Gomez, also serves as the Governor's Tribal Advisor.³⁹

The NAHC's powers and duties include, but are not limited to:

- Identifying and cataloging places of special religious or social significance to Native Americans, and known graves and cemeteries of Native Americans on private lands;
- Making recommendations relative to Native American sacred places that are located on private lands, are inaccessible to Native Americans, and have cultural significance to Native Americans for acquisition by the state or other public agencies for the purpose of facilitating or assuring access thereto by Native Americans;
- To make recommendations to the Legislature relative to procedures which will voluntarily encourage private property owners to preserve and protect sacred places in a natural state and to allow appropriate access to Native American religionists for ceremonial or spiritual activities;
- To bring an action to prevent severe or irreparable damage to, or assure appropriate access for Native Americans to, a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, pursuant to Section 5097.97;
- To request and utilize the advice and service of all federal, state, local and regional agencies;
- To assist Native Americans in obtaining appropriate access to sacred places that are located on public lands for ceremonial or spiritual activities;

³⁴ Id. at ES-6.

³⁵ Id. This is especially noteworthy given that public lands owned by the State of California are subject to the jurisdiction of the NAHC. See Public Resources Code §§ 5097.9, 5097.94 (g), and 5097.97.

³⁶ Stats. 1976, c.1332, p. 6031, § 2.

³⁷ See Public Resources Code § 5097.91

³⁸ Id.

³⁹ http://tribalgovtaffairs.ca.gov/About_Us/Biography.html

- To assist state agencies in any negotiations with agencies of the federal government for the protection of Native American sacred places that are located on federal lands;
- To mediate, upon application of either of the parties, disputes arising between landowners and known descendants relating to the treatment and disposition of Native American human burials, skeletal remains, and items associated with Native American burials; and
- To assist interested landowners in developing agreements with appropriate Native American groups for treating or disposing, with appropriate dignity, of the human remains and any items associated with Native American burials.⁴⁰

The NAHC may also refer enforcement actions to the Attorney General pursuant to Public Resources Code section 5097.99 to secure the return of Native American artifacts or remains taken from a Native American grave or cairn after January 1, 1987 except as provided for by law.⁴¹

Public Resources Code section 5097.98 provides the process by which MLDs and landowners determine the treatment and disposition of Native American remains and associated grave goods. When the NAHC receives notification of the discovery of Native American human remains from a county coroner pursuant to subdivision (c) of Section 7050.5 of the Health and Safety Code, it notifies the persons it believes to be most likely descended from the deceased Native American. The descendants may, with the permission of the owner of the land or his or her authorized representative, inspect the site of the discovery of the Native American remains and may recommend to the owner or the person or the persons responsible for the excavation works means for treatment or disposition, with appropriate dignity, of the human remains and any associated grave goods. The descendants shall complete their inspection and make recommendations or preferences for treatment within 48 hours of being granted access to the site.⁴²

Upon the discovery of Native American remains, the landowner shall ensure that the immediate vicinity, according to generally accepted cultural or archaeological standards or practices, where the Native American human remains are located, is not damaged or disturbed by further development activity until the landowner has discussed and conferred with the MLDs regarding their recommendations, if applicable, taking into account the possibility of multiple human remains. The landowner shall discuss and confer with the MLDs all reasonable options regarding the MLDs preferences for treatment. The MLDs' preferences for treatment may include the following: (A) The nondestructive removal and analysis of human remains and items associated with Native

⁴⁰ Public Resources Code § 5097.94.

⁴¹ Public Resources Code § 5097.99; *People v. Van Horn* (1990) 218 Cal. App. 3d 1378.

⁴² Public Resources Code § 5097.98 (a).

American remains; (B) Preservation of Native American human remains and associated items in place; (C) Relinquishment of Native American human remains and associated items to the MLDs for treatment; or (D) Other culturally appropriate treatment. The parties may mutually agree to extend discussion, taking into account the possibility that additional or multiple Native American human remains are located in the project area, providing a basis for additional treatment measures.⁴³

“Conferral” and “discuss and confer” means the meaningful and timely discussion and careful consideration of the views of each party in a manner that is cognizant of all parties’ cultural values, and where feasible, seeking agreement. Each party shall recognize the other’s needs and concerns for the confidential of information provided to the other.⁴⁴

Human remains of a Native American may be an inhumation or cremation, and in any state of decomposition or skeletal completeness. Any items associated with the human remains that are placed or buried with the Native American human remains are to be treated in the same manner as the remains, but do not by themselves constitute human remains.⁴⁵

When the NAHC is unable to identify a descendant, or the descendants identified fail to make a recommendation, or the landowner or his or her authorized representative rejects the recommendation of the descendants and the mediation provided for by the NAHC, if invoked, fails to provide measures acceptable to the landowner, the landowner or his or her authorized representative shall reinter the human remains and items associated with Native American human remains with appropriate dignity on the property in a location not subject to further and future subsurface disturbance. To protect the site, the landowner shall do one or more of the following: (1) Record the site with the NAHC or the appropriate Information Center; (2) Utilize an open-space or conservation zoning designation or easement; (3) Record a document titled “Notice of Reinterment of Native American Remains” with the county in which the property is located.⁴⁶

The California Legislature made a policy choice that Native American remains and associated grave artifacts shall be repatriated.⁴⁷ California’s laws on this subject reflect that the California Legislature left to Native Americans ultimate control over the treatment and disposition of Native American remains and associated grave artifacts and “created the presumption that all remains should be reburied without any discussion of their value to the scientific community.”⁴⁸

⁴³ Public Resources Code § 5097.98 (b).

⁴⁴ Public Resources Code § 5097.98 (c).

⁴⁵ Public Resources Code § 5097.98 (d).

⁴⁶ Public Resources Code § 5097.98 (e).

⁴⁷ Public Resources Code § 5097.991.

⁴⁸ See Bowman, The Reburial of Native American Skeletal Remains: Approaches to the Resolution of a Conflict, 13 Harv. Envtl. L. Rev. 147, 199 (citing Manuel Medeiros [former Solicitor General for the State of

C. The United Auburn Indian Community's Request for Investigation and Public Hearing Pursuant to Public Resources Code Sections 5097.9, 5097.94 (g), and 5097.97

On September 15, 2014, UAIC Chairman Gene Whitehouse sent a letter to NAHC Executive Secretary Cynthia Gomez requesting that the NAHC formally investigate concerns regarding the treatment and disposition of human remains and funerary objects for the FRWLP. Chairman Whitehouse stated that the letter was "formal notice advising the NAHC that a proposed action by SBFCA and USACE may cause severe or irreparable damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, or may bar appropriate access thereto by Native Americans" and requested that the NAHC conduct an investigation as to the effect of the proposed action.⁴⁹ The letter stated that if SBFCA and USACE failed to agree to a proposed plan under review regarding the treatment and final disposition of human remains and funerary objects, then UAIC's recommendation would be that the NAHC seek the legal opinion of the commissions (presumably the Commissioners) and ultimately the Attorney General's Office.⁵⁰

The investigation and public hearing were delayed in order to allow UAIC, SBFCA and USACE to continue negotiations to reach an agreement as to the treatment and disposition of Native American human remains and funerary objects, but to no avail. UAIC renewed its request for an investigation and hearing on January 9, 2015.⁵¹ The matter was placed on the NAHC's January 17, 2015 public meeting agenda, at which time Mike Inamine, Executive Director of SBFCA, and Melodi McAdams, Cultural Resources Associate for UAIC, made comments to the Commissioners prior to the Commissioners convening in closed session. No NAHC action was taken at that time.

D. Notice of Investigation/Notice of Public Hearing, Submissions of the Parties and Issues Before the NAHC

On February 27, 2015, NAHC General Counsel Terrie L. Robinson issued Notice of Investigation Number NOI 2015-1 and Notice of Public Hearing Number NOH 2015-1 advising UAIC, SBFCA, and USACE that the NAHC would commence an investigation of and public hearing on the FRWLP to determine if the FRWLP will result in severe or irreparable damage to a Native American sanctified cemetery, place of worship, religious

California], Treatment of Ancient Native American Burials: The State of Law in California, in *Symposium Proceedings: Law, Public Policy and the Management of Cultural Properties* 7, 15 (1987).

⁴⁹ September 15, 2014 Letter from Chairman Gene Whitehouse, UAIC, to NAHC Executive Secretary Cynthia Gomez re Request to Pursue PRC 5097.97.

⁵⁰ Id.

⁵¹ January 9, 2015 Letter from Chairman Gene Whitehouse, UAIC, to NAHC Executive Secretary Cynthia Gomez re Request to Pursue PRC 5097.97.

or ceremonial site, or sacred shrine located on public property.⁵² In consideration of the NAHC's ongoing role pursuant to Public Resources Code section 5097.94 (k) in mediating the dispute regarding the treatment and disposition of Native American remains and associated grave goods removed from the FRWLP project area, the notice also stated that the parties, their representatives, or interested parties could submit evidence regarding the unlawful taking or possession of Native American artifacts or remains from the FRWLP project area that might be in violation of Public Resources Code section 5097.99, which the Commission may consider for referral to the Attorney General's Office for prosecution.⁵³

The notice stated that the investigation and hearing would address the following issues:

1. Whether the property encompassing the FRWLP project area is, in whole or in part, under the NAHC's jurisdiction pursuant to Public Resources Code section 5097.9;
2. Whether the property encompassing the FRWLP project area includes a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine on public property that has been historically regarded as a sacred or sanctified place by Native American people and represents a place of unique historical and cultural significance to an Indian tribe of community, and whether the NAHC should formally declare any sites within the FRWLP area as such;
3. Whether any action taken or to be taken in furtherance of the FRWLP poses a risk of severe and irreparable harm to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine on public property, including, but not limited to, adherence to and enforcement of the July 1, 2013 Programmatic Agreement among the U.S. Corps of Army Engineers (sic), the Sutter Butte Flood Control Agency, and the California State Historic Preservation Officer Regarding the Feather River West Levee Project, Sutter and Butte Counties; and the July 2014 Resource Specific Treatment Plan for Five Prehistoric Archaeological Sites in the Feather River West Levee Project, Contract C, in violation of Public Resources Code section 5097.98 and CEQA Guidelines section 15064.5, subdivisions (d) and (e);
4. What mitigation measures, if any, would reduce or eliminate the risk of severe and irreparable harm to any such site; and
5. Whether SBFCA or the Corps has a pattern or practice of causing severe and/or irreparable harm to Native American sanctified cemeteries, places of worship, religious or ceremonial sites, sacred shrines, Native American

⁵² February 27, 2015 NAHC Public Resources Code sections 5097.9, 5097.94(g) and 5097.97 Notice of Investigation and Notice of Public Hearing on March 20, 2015 regarding the Feather River West Levee Project (NAHC NOI 2015-1; NAHC NOH 2015-1).

⁵³ Id.

remains or associated grave goods or a pattern or practice of taking and/or possession of Native American remains or artifacts in violation of Public Resources Code section 5097.9, 5097.94(g), and/or 5097.99.⁵⁴

The Notice was sent to the following tribes:

- Berry Creek Rancheria of Maidu Indians
- Enterprise Rancheria of Maidu Indians
- Greenville Rancheria of Maidu Indians
- KonKow Valley Band of Maidu
- Mechoopda Tribe of Chico Rancheria
- Mooretown Rancheria of Maidu Indians
- Strawberry Valley Rancheria
- Tsi-Akim Maidu
- Susanville Indian Rancheria
- Washoe Tribe of Nevada and California⁵⁵

II. FRWLP Environmental Impact Review

Because of the state and federal permits required, the FRWLP was subject to both federal environmental impact review under NEPA and state environmental impact review under CEQA. Under those circumstances, both the federal and state lead agencies for environmental impact review usually produce a joint environmental impact review document – a joint NEPA/CEQA document. For purposes of brevity, the FRWLP NEPA/CEQA environmental impact review will be summarized for relevance to the Native American cultural resources at issue and this discussion may make reference to one or both environmental review documents, the Environmental Impact Statement (EIS) under NEPA review, and the Environmental Impact Report (EIR) under CEQA review.

A. Notice of Preparation

SBFCA filed its CEQA Notice of Preparation of an Environmental Impact Report (NOP) on May 20, 2011,⁵⁶ formally initiating the CEQA environmental review process. On July 15, 2011, NAHC analyst Katy Sanchez acknowledged the NAHC's receipt of the NOP via letter to Ingrid Norgaard, SBFCA, in care of ICF International (ICF), the consultant

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ This and other references to FRWLP's CEQA environmental documents are from the State Clearinghouse's website, <http://www.ceqanet.ca.gov>, under the State Clearinghouse number assigned to the FRWLP, 2011052062.

for SBFCA for this project. In the letter the NAHC recommended the following, among other recommendations (excerpted in part):

- Contact the appropriate regional archaeological Information Center for a record search. The record search will determine:
 - If a part or all of the area of the project effect (APE) has been previously surveyed for cultural resources.
 - If any known cultural resources have already been recorded on 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.
- Contact the Native American Heritage Commission for:
 - A Sacred Lands File Check. **USGS 7.5 minute quadrangle name, township, range and section required.**
 - A list of appropriate Native American contacts for consultation concerning the project site and to assist in the mitigation measures. **Native American Contacts list attached.**
- Lack of surface evidence of archaeological resources does not preclude their subsurface existence.
 - Lead agencies should include in their mitigation plan provisions for the identification and evaluation of accidentally discovered archaeological 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.
 - Lead agencies should include in their mitigation plan provisions for the disposition of recovered artifacts, in consultation with culturally affiliated Native Americans.
 - Lead agencies should include provisions for the discovery of Native American human remains in their mitigation plan. Health and Safety Code §7050.5, CEQA §15064.5(e), and Public Resources Code §5097.98 mandates the process to be followed in the event of an accidental discovery of any human remains in a location other than a dedicated cemetery.⁵⁷

⁵⁷ July 15, 2011 Letter from Katy Sanchez, Analyst, to Ingrid Norgaard, SBFCA, c/o ICF International re: SCH#2011025062 Sutter Basin Feasibility Study and Feather River West Levee Project Sutter and Butte Counties.

Mike Aviña of ICF sent a letter to the NAHC dated February 23, 2012 stating that ICF wanted to enlist the help of the Native American community in identifying cultural resources that may be affected by the FRWLP, noting that, because the project would require ground-disturbing construction, "identification of cultural resources early in the environmental review process is critical."⁵⁸ ICF requested that the NAHC perform a search of the NAHC's Sacred Lands File to find any Native American cultural resources within the FRWLP and provided meridian, township, range and section coordinates for the search. The letter concluded by stating "SBFCA would like to identify cultural resources in advance so they may be avoided where feasible," and asked for the most current Native American contact lists for Sutter and Butte counties via email.⁵⁹

NAHC Environmental Specialist Debbie Pilas-Treadway sent a letter dated March 22, 2012 to Mike Aviña stating that a record search of the Sacred Lands File failed to indicate the presence of Native American cultural resources in the immediate project area, but that the absence of specific site information in the Sacred Lands File does not indicate the absence of cultural resources in any project area. The letter provided a list of Native American individuals/organizations that might have knowledge of cultural resources in the project area and the recommendation that everyone on the list be contacted, as the list should provide a starting place in locating areas of potential adverse impact in the proposed project area.⁶⁰

Mr. Aviña sent a letter dated September 28, 2012 to the tribes from the list provided by Ms. Pilas-Treadway in which he requested information about cultural resources so that they could be identified in advance of any activity that might affect them, in order to protect and avoid them to the extent feasible.⁶¹ The recipient tribes included Enterprise Rancheria of Maidu Indians, Berry Creek Rancheria of Maidu Indians, Greenville Rancheria of Maidu Indians, KonKow Valley Band of Maidu, Butte Tribal Council, Maidu Cultural and Development Group, Maidu Nation, Mechoopda Indian Tribe of Chico Rancheria, Tsi-Akim Maidu, UAIC, Mooretown Rancheria of Maidu Indians, Strawberry Valley Rancheria, Cortina Indian Rancheria of Wintun Indians, Cachil DeHe Band of Wintun Indians (Colusa Rancheria), and the Paskenta Band of Nomlaki Indians.⁶²

⁵⁸ February 23, 2012 Letter from Mike Aviña, Associate, ICF International, to Katy Sanchez, Native American Heritage Commission.

⁵⁹ Id.

⁶⁰ March 22, 2012 Letter from Debbie Pilas-Treadway, NAHC Environmental Specialist, to Mike Aviña, ICF International, re Feather River West Levee Project, Sutter and Butte County.

⁶¹ September 28, 2012 Letters from Mike Aviña to Native American tribes re Sutter Butte Flood Control Agency, Feather River West Levee Project.

⁶² Id.

B. Draft Environmental Impact Statement/Environmental Impact Report
(DEIS/DEIR)

The State Clearinghouse of the Governor's Office of Planning and Research received SBFCA's Draft EIS/EIR (DEIS/DEIR) on December 27, 2012. The Draft EIS/EIR stated that Enterprise Rancheria and Mooretown Rancheria responded to SBFCA's September 28, 2012 letter requesting cultural resources information and requested the opportunity to review cultural resources finds and technical documents.

The DEIS/DEIR stated that ICF cultural resources staff conducted a pedestrian survey of the project area during the spring and summer of 2012 during which they visited previously identified resources and recorded previously unidentified resources. Evaluation of affected resources was still in progress.⁶³

The DEIS/DEIR discussed "Effect CR-1: Effects on Identified Archaeological Sites Resulting from Construction of Levee Improvements and Ancillary Facilities" as an effect that might result from project Alternative 1. The discussion of Effect CR-1 included the following:

Identified prehistoric resources contain midden (habitation debris), human burials, hearths (charred remains from cooking) and lithic debris (remains from manufacture of stone tools). Deposits with these constituents often have data potential for archaeological research, which strives to describe human adaptations and their changes over time and to construct meaningful explanations for these changes. Because material in these sites may be useful for this purpose, it is likely that many of these sites have significance within the meaning of 14 CCR §4852(b) (4) (data potential). Furthermore, because many of these resources are expansive (each in excess of 30 meters across), they are likely to contain some portion of the deposit with sufficient integrity to yield meaningful data (14 CCR §4852[c]).⁶⁴

The discussion further noted that this effect could materially impair the resources under CEQA and result in significant effects under Section 106. Mitigation Measure CR-MM-1, discussed below, was stated as a means of reducing these effects and to address management steps necessary under Section 106 to resolve significant effects by attempting to avoid or minimize those effects or to recover consequential information where avoidance would not be feasible.⁶⁵

Mitigation Measure CR-MM-1 was stated as follows:

⁶³ Feather River West Levee Project Draft EIS/EIR, December 2012, at p. 3.17-6.

⁶⁴ Id. at 3.17-9.

⁶⁵ Id. at 3.17-10.

Mitigation Measure CR-MM-1: Perform Field Studies, Evaluate Identified Resources and Determine Effects, and Development Treatment to Resolve Significant Effects

Prior to the completion of the final environmental impact statement/final environmental impact report (FEIS/FEIR), SBFCA and USACE will complete the following mitigation and management steps to satisfy Section 106 (subject to revision based on coordination with SBFCA counsel).

- SBFCA and USACE will ensure that an inventory and evaluation report for cultural resources is completed within all areas of the right-of-way where effects on archaeological resources may occur.
- The work will be led or supervised by cultural resources specialists who meet the Secretary of the Interior's professional qualification standard provided in 36 CFR Part 61.
- Inventory methods will include pedestrian surveys and probabilistic subsurface sampling through excavation with augurs or hand excavating units where feasible.
- Identified resources and newly identified resources will be mapped and described on DPR forms. Mapping will be performed by recording data points with GPS hardware through which data can be imported and managed digitally. Mapping of previously identified resources will be limited to updates of existing records where necessary to describe the current boundaries of the resource.
- For all identified resources, SBFCA and USACE will perform an evaluation to determine if they qualify as historic properties per the criteria provided in 36 CFR Part 60.4.
- The recorded resources and the resource evaluations will be summarized in an inventory and evaluation report (unless testing is required to complete the evaluation, as described below).
- SBFCA and USACE will make a finding of effect; a significant effect will occur if the project would alter, directly or indirectly, the qualities that make a resource eligible for listing in the NRHP (36 CFR Part 800.5[a][1]).
- Where necessary, USACE and SBFCA will conduct test excavation to support the evaluation and finding of effect. Test excavation is typically performed to retrieve a suitable sample of material to determine the constituents and integrity of the resource. Test excavation will be conducted in consultation with SHPO and other relevant parties. Test excavation will follow a testing plan developed in consultation with SHPO, either for the specific resource or as part of the treatment methods developed pursuant to the programmatic agreement that USACE is preparing in consultation with SHPO.

- For all resources subject to significant effects, USACE and SBFCA will implement treatment in consultation with SHPO and other relevant parties such as Native American stakeholders and the public.

To satisfy the requirements of CEQA, SBFCA will also evaluate identified resources to determine if they are historical resources (State CEQA Guidelines §15064.5[a]), unique archaeological resources under CEQA (PRC §21083.2[g]), and/or eligible for local registers.

SBFCA will determine if the project will result in significant effects on historic properties, historical resources, or unique archaeological sites. A significant effect will be found if the project would result in one or more of the following:

- Demolish or materially alter the qualities that make the resource eligible for listing in the CRHR (State CEQA Guidelines §15064.5[b] [2] [A], [C]).
- Demolish or materially alter the qualities that justify the inclusion of the resource on a local register or its identification in a historical resources survey that meets the requirements of PRC §5024.1(g), unless SBFCA establishes by a preponderance of the evidence that the resources is not historically or culturally significant (State CEQA Guidelines §15064.5[b] [2] [B]).
- Alter, directly or indirectly, the qualities that make a resource eligible for listing in the NRHP (36 CFR Part 800.5[a] [1]).
- Demolish or materially impair the qualities that allow a resource to qualify as a unique archaeological site (PRC §21083.2).

For all resources qualifying as unique archaeological resources, historical resources, or historic properties that will be subject to significant effects, SBFCA will develop treatment methods. Such treatment will consist of the following, listed in order of the priority that SBFCA must follow under CEQA.

- Preservation in place will occur where feasible, through methods such as redesign of relevant facilities to avoid destruction or damage to eligible cultural resources, capping resources with fill, or deeding resources into conservation easements.
- Data recovery excavations will be conducted by qualified cultural resources specialists to retrieve the information that makes the resource eligible for CRHR or NRHP listing or that qualifies the site as a unique archaeological resource or a local register-eligible resource. If data recovery through excavation is the appropriate mitigation, a data recovery plan which makes provisions for adequately recovering the scientifically consequential information from and about the resource, will be prepared and adopted prior to any excavation being undertaken. Such studies will be deposited with the

relevant CHRIS center. The data recovery plan will specify the basis for the significance of the resource and methods for retrieving the consequential information from the site. After completion of excavation, SBFCA will synthesize the findings into a data recovery report describing the findings and will deposit the report at the relevant CHRIS center.

The treatment plan will identify treatment methods that are proposed by SBFCA and which measures are proposed by other public entities. The plan will also specify the basis for selecting a particular mitigation measure. Treatment need not be completed before the FEIS/FEIR is prepared, but the evaluation of effects and selection of treatment will be summarized in the FEIS/FEIR.

If preservation in place of archaeological sites that qualify as historical resources or unique archaeological resources is not feasible in light of costs, logistics, technological considerations, or location of the find, and the extent to which preservation of the find is consistent or inconsistent with the design and objectives of the FRWLP, SBFCA will include a discussion in the treatment plan describing why the selected mitigation serves the interests protected by CEQA better than preservation in place.

SBFCA currently estimates that data recovery may be necessary for all archaeological sites that may be affected by the project alternatives, because construction is constrained to existing levees and the vicinity; the durable nature of existing flood control works makes avoidance of cultural resources potentially infeasible. Data recovery thus serves the environmental protection goals of CEQA by ensuring that valuable information that would otherwise be lost will be retained to the extent feasible. Potential resource-specific treatments are identified in Appendix I, Table I-4.

Construction will also be monitored, and discovery of human remains will be treated as prescribed under Mitigation Measures CR-MM-2 and CR-MM-3, below.⁶⁶

The DEIS/DEIR discussed “Effect CR-3: Potential to Disturb Human Remains” across three project alternatives and the proposed mitigation measures for each project alternative. The DEIS/DEIR stated that the ground-disturbing work required to construct the proposed levee improvements could inadvertently damage and disturb human remains before they could be discovered. It was stated that slurry cutoff walls could disturb human remains at depths where they could not be identified, even during monitoring. The mitigation measures proposed could reduce, but not eliminate, the severity of the

⁶⁶ Id. at 3.17-10 – 3.17.12.

effect of the FRWLP on burials, and for that reason, the effect of the FRWLP on human remains would be significant and unavoidable.⁶⁷

The mitigation measure posed for Effect CR-3, CR-MM-3, was to “monitor culturally sensitive areas during construction and follow state and federal laws governing human remains if such resources [were] discovered.” The following actions were to be taken, as listed:

- If human remains are discovered as part of the deposit or in isolation, work will cease in the immediate vicinity and within the radius necessary to avoid further disturbance. SBFCA, USACE, and the contractors will coordinate with the county coroner and NAHC to make the determinations and perform the management steps prescribed in California Health and Safety Code §7050.5 and PRC §5097.98. This coordination requires the following steps:
 - The county coroner will be notified so that he/she may determine if an investigation regarding the cause of death is required. If the coroner determines that the remains are of prehistoric Native American origin, the coroner will notify the NAHC.
 - Upon notification, the NAHC will identify the most likely descendant (MLD), and the MLD will be given the opportunity to reinter the remains with appropriate dignity. If the NAHC fails to identify the MLD or the parties cannot reach agreement as to how to reinter the remains as described in PRC § 5097.98(e), the landowner will reinter the remains at a location not subject to further disturbance. SBFCA and USACE will ensure the protections prescribed in PRC § 5097.98(e) are performed, such as the use of conservation easements and recording of the location with the relevant county.
- If Native American human remains are discovered on Federal land, work in the immediate vicinity will cease, and SBFCA and USACE will contact the relevant representative of the Federal agency where the remains were discovered, as prescribed by 25 USC § 3002(d) (NAGPRA). After notification from the relevant agency representative and treatment of the remains as required under NAGPRA, work may continue. Disposition of the remains will follow ownership priority described in NAGPRA (25 USC § 3002[a]).
- SBFCA and USACE will include an overview of the potential for encountering human remains and an overview of this mitigation measure in the training performed under Mitigation Measure CR-MM-2.⁶⁸

The DEIS/DEIR also discussed Effect CR-2, “Potential to Disturb Unidentified Archaeological Sites,” noting that the footprint for the proposed project alternatives was

⁶⁷ Id. at 3.17-14.

⁶⁸ Id. at 3.17-15.

sensitive for buried and obscured archaeological sites that could not always be identified in advance of construction.⁶⁹ It further notes that, “because of the intensity of farming in the historic era, surface manifestations for prehistoric sites may have been obscured by cultivation, leaving portions of the site below grade with no visible indication above ground,” and that “[b]uried sites may contain human remains in addition to archaeological debris.”⁷⁰ While mitigation measures were available to minimize this effect of the FRWLP, the DEIS/DEIR noted that the mitigation measure proposed, CR-MM-2, would not ensure that the effect would be avoided, and it would be significant and unavoidable.⁷¹

The proposed mitigation measure for this effect, CR-MM-2, was stated as follows:

Mitigation Measure CR-MM-2: Implement a Cultural Resources Discovery Plan, Provide Related Training to Construction Workers, and Conduct Construction Monitoring

Prior to ground-disturbing construction, FRWLP proponents will include a cultural resources discovery plan in the contract conditions of the construction contractor, incorporating the following actions to be taken in the event of the inadvertent discovery of cultural resources.

- An archaeological monitor will be present to observe construction at geographic locations that are sensitive for unidentified cultural resources. Such locations will consist of construction areas near identified cultural resource(s) sites (within a 200-foot radius around the known boundaries of identified resources) and where ground-disturbing construction will occur within 1,500 feet of major water features.
- In the event of an archaeological resource discovery, work will cease in the immediate vicinity of the find, based on the direction of the archaeological monitor or the apparent distribution of cultural resources if no monitor is present. A qualified archaeologist will assess the significance of the find and make recommendations for further evaluation and treatment as necessary.
- Discovered resources will be mapped and described on DPR forms. Mapping will be performed by recording data points digitally with GPS hardware.
- SBFCA will evaluate identified resources to determine if they are unique archaeological sites or historical resources. In consultation with SHPO, USACE will evaluate identified resources to determine if they are historic properties. Test excavations will be performed where necessary to support evaluation. Evaluation and treatment will follow standards and order of priority described above for

⁶⁹ Id. at 3.17-13.

⁷⁰ Id.

⁷¹ Id.

Mitigation Measure CR-MM-1, with the exceptions of timing. Discoveries may occur after the FEIS/FEIR and thus need not be described in that document.

- If human remains are discovered as part of the deposit, SBFCA, USACE, and the contractors will coordinate with the county coroner and NAHC to make the determinations and perform the management steps prescribed in California Health and Safety Code Section 7050.5 and PRC §5097.98.
- If Native American human remains are discovered on Federal land, work in the immediate vicinity will cease, and SBFCA and USACE will contact the relevant representative of the Federal agency where the remains were discovered, as prescribed in 25 USC § 3002(d) (NAGPRA). After notification from the relevant agency representative and treatment of the remains as required under NAGPRA, work may continue. Disposition of the remains will follow the ownership priority described in NAGPRA (25 USC §3002[a]).

SBFCA and USACE will develop a list of cultural resources staff who can respond to cultural resources discoveries and SBFCA and USACE will also develop training materials for construction workers regarding management direction following discoveries. The staff list and training materials will be provided to the supervisory field staff. SBFCA and USACE, or their archaeological consultant, will conduct training for construction workers that provides an overview of cultural resources identification and this mitigation measure.⁷²

C. Native American Tribal Consultation

The only reference to tribal consultation in the preparation of the DEIS/DEIR is the inquiry sent by ICF to tribes based on NAHC coordination and correspondence received from Mooretown Rancheria and Enterprise Rancheria.⁷³

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⁷² Id. at 3.17-13 to 3.17-14.

⁷³ Id. at 6-2.

D. UAIC's Comments on the DEIS/DEIR⁷⁴

UAIC sent comments on the DEIS/DEIR dated February 12, 2013⁷⁵. UAIC stated that it was “very disheartening to find that our previous consultation efforts were not included in the Native American Consultation Sections of the report.” It stated that UAIC met with USACE and ICF on two occasions to share resource location maps and was still waiting to complete a site visit to known resources. UAIC stated that more than one village site within the APE had been disclosed and consulted on with both ICF and USACE, and that certain archaeological features had been described as still being present and visible in the project area and below levees. UAIC wanted both ICF and USACE to include in the DEIS/DEIR a record consultation with UAIC and provide UAIC any cultural resources reports that had or would have been prepared for the project.⁷⁶ UAIC expressed its concern regarding the possibility for discovery of previously unidentified cultural resources and/or subsurface human remains and requested any archaeological reports or environmental documents in order to comment on potential impacts and proposed mitigation measures related to cultural resources.⁷⁷

UAIC made the following points for consideration in developing the scope and choosing the alternative for the DEIS/DEIR, as follows:

- The UAIC recommends that projects within the DEIS/DEIR FRWLP jurisdiction be designed to incorporate known cultural sites into open space or other protected areas;
- The UAIC would like the opportunity to provide Tribal representatives to monitor project if excavation and data recover are required for prehistoric cultural sites, or in cases where ground disturbance is proposed at or near sensitive cultural resources;

⁷⁴ The NAHC did not comment on the FRWLP DEIS/DEIR, nor was it listed as a potential trustee agency for purposes of reviewing the DEIS/DEIR. See FRWLP DEIS/DEIR at 1-28. For purposes of CEQA, the NAHC is a trustee agency for Native American cultural resources. See *Environmental Protection Information Center v. Johnson*, (1995) 170 Cal.App.3d 604, 626:

CEQA provides that agencies evaluating a project for its environmental impact consult with all agencies having jurisdiction over affected natural resources, including archaeological sites. (§21080.4; Guidelines, §15086.) The commission has that jurisdiction, and is specifically listed in appendix B to the [CEQA] Guidelines as a public agency with specific expertise regarding places of religious significance to Native Americans, including archaeological sites and burial grounds.

Id.

⁷⁵ February 13, 2012 Letter from Gene Whitehouse, Chairman, UAIC, to Alicia E. Kirchner, Chief, Planning Division, USACE, Sacramento District. The date on the letter was erroneously stated as February 13, 2012 instead of February 13, 2013.

⁷⁶ Id.

⁷⁷ Id.

- The UAIC is interested in receiving cultural materials from prehistoric sites where excavation and data recovery has been performed;
- The UAIC would like to receive copies of environmental notices and documents for projects within the jurisdiction of the DEIS/DEIR FRWLP.⁷⁸

UAIC also stated that if human remains were discovered, California Health and Safety Code section 7050.5 states that no further disturbance shall occur until the county coroner has made the necessary finding as to origin. If the remains were found to be of Native American origin, UAIC noted that the NAHC would notify an MLD, who would be responsible for recommending the appropriate disposition of the remains and any grave goods at that time.⁷⁹

E. Notice of Determination and Final Environmental Impact Statement/Environmental Impact Report (FEIS/FEIR)

The first of many Notices of Determination based on the Final EIR (FEIR) was received by the State Clearinghouse on April 13, 2013. The description and discussion of the cultural resources effects changed from the DEIS/DEIR. Deletions were in ~~strikeout~~, additions were underlined.

For “Effect CR-1: Effects on Identified and CRHR-eligible Archaeological Sites Resulting from Construction of Levee Improvements and Ancillary Facilities,” SBFCA concluded that preservation in place was not feasible:

SBFCA has assessed the feasibility of preserving these sites in place as required under CEQA Guidelines §15126.4(b)(3). This analysis is provided in the site descriptions in Appendix I, Section 1.4.1. Because levee improvement work or future activity within operations and maintenance corridors may disturb these sites[,] preservation in place is not feasible. Relocation of proposed levees to uplands in a manner that would avoid cultural resources is not feasible because of the substantial investment in existing facilities and the environmental and economic cost of acquiring new right of way and constructing setback levees. Preservation in place through the use of methods in CEQA Guidelines §15126.4(b)(3)(B) is not feasible because placement of these sites into protected easements would preclude necessary levee repair and landside operations and maintenance. Capping sites with sterile soil would create an obstruction to proposed and future levee improvements and maintenance work.⁸⁰

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ Id. at 3.17-11 – 3.17.13.

As a result, the mitigation measure was revised to “Mitigation Measure CR-MM-1: ~~Perform Field Studies, Evaluate Identified Resources and Determine Effects, and Develop Treatment to Resolve Significant Effects~~ Data Recovery to Retrieve Information Useful in Research” to include the following:

Mitigation Measure CR-MM-1: ~~Perform Field Studies, Evaluate Identified Resources and Determine Effects, and Develop Treatment to Resolve Significant Effects~~ Data Recovery to Retrieve Information Useful in Research

Prior to data recovery SBFCA will prepare a brief data recovery plan that describes how SBFCA will perform the following steps (CEQA Guidelines §15126.4(B)(3)[c]). Prior to the completion of the final environmental impact statement/final environmental impact report (FEIS/FEIR), SBFCA will perform the following steps to retrieve the material associated with these sites that is useful in research:

- Data recovery excavations will be performed to retrieve a sample of the affected portion of these sites, in order to retrieve scientifically important material. Excavation will be conducted in arbitrary levels, and material removed will be divided and screened through a combination of ¼” and 1/8” mesh screens, so as to capture both the gross cultural constituents and the finer materials that can only be captured in fine mesh. Excavation will be conducted in 10-centimeter levels so that the horizontal association of different cultural materials is recorded. Removed material will be segregated by type and bagged with labels noting their horizontal and vertical location relative to an established datum point. The datum point will be recorded in the field with GPS to at least 10-centimeter horizontal and vertical accuracy.
- Faunal material (animal bone) will be segregated and studied by a qualified faunal analyst to identify the species pursued, relative abundance and diversity of different species present, and the manner in which the prey were processed by prehistoric occupants.
- Obsidian glass will be retrieved and studied through both X-ray fluorescence (a method that allows the source of the obsidian to be identified) and obsidian hydration (a method that allows approximate determination of the time when the material was subject to human modification).
- Soil samples will be retrieved, with their horizontal and vertical location recorded, for flotation analysis (a method of separating light organic material such as fine plant remains from the deposit, in order to identify plant species pursued by prehistoric populations).
- Because some of the resources subject to treatment contain human remains, provisions for such remains are necessary. If human remains are discovered in these deposits during data recovery, the county coroner will be contacted as required in California Health and Safety Code Section 7050.5. After the

coroner confirms the remains are of prehistoric origin, the NAHC will be contacted and given the opportunity to identify a most likely descendant (MLD). The MLD will be given the opportunity to reinter the remains with appropriate dignity. If the NAHC fails to identify the MLD or if the parties cannot reach agreement as to how to reinter the remains as described in California PRC Section 5097.98(e), the landowner will reinter the remains at a location not subject to further disturbance. SBFCA will ensure the protections prescribed in California PRC Section 5097.98(e), are performed.

- If in the course of data recovery excavations, it is determined that, contrary to available evidence, the resource lacks integrity, data recover excavations will cease.
- After completion of data recovery excavations SBFCA will prepare a data recovery report and summarize the results of these studies relative to regional research questions in the data recovery report. The report will be filed with the relevant information center of the CHRIS. SBFCA will also store the recovered material (other than human remains) at an appropriate facility for curation. ~~and USACE will complete the following mitigation and management steps to satisfy Section 106 (subject to revision based on coordination with SBFCA counsel).~~⁸¹

The remaining actions that were previously part of this mitigation measure in the DEIS/DEIR were stricken from the FEIR.

For “Effects CR-2: Potential to Disturb Unidentified Archaeological Sites,” the FEIR noted that SBFCA did not at that time have rights of entry for the entire footprint of the proposed alternative, and that these inaccessible areas were sensitive for archaeological sites that had not yet been identified through surveys.⁸² Because these sites may have been obscured by the deposition of sediment or the intensity of farming activity, surface manifestations of prehistoric sites may have been obscured by cultivation. Therefore, it was possible that some archaeological sites would not be identified in advance of construction because they are buried and obscured.⁸³

The following was added to the discussion:

In addition to the portions of the project where survey has not been feasible, ancillary facilities such as PG&E utilities may also be affected. Once all PG&E utility work has been identified, proposed relocations and other activities will be screened to determine if they fall within the areas previously surveyed for the presence of cultural resources in support of the EIR/EIS. In the event there are areas proposed for ground

⁸¹ Id. at 3.17-13 – 3.17.14.

⁸² Id. at 3.17-16.

⁸³ Id.

disturbance that fall outside of the EIR/EIS cultural survey area, a site-specific environmental review will be required to ensure that impacts to cultural resources are avoided. The review should consist of one or more of the following: literature review, records search and pedestrian survey. The precise method of review of each facility relocation will be decided in consultation with a PG&E Cultural Resources Specialist. If CRHR-eligible resources occur in the footprint of PG&E utility work[,] these activities may contribute to significant effects on cultural resources associated with the project.⁸⁴

The Mitigation Measure CR-MM-2 was revised to include the following:

Mitigation Measure CR-MM-2: Complete Surveys Prior to Construction, Implement a Cultural Resources Discovery Plan, Provide Related Training to Construction Workers, and Conduct Construction Monitoring.

SBFCA will complete the following management steps for currently inaccessible areas once rights of entry have been obtained:

- SBFCA will complete an inventory and evaluation report for cultural resources, including archaeological resources.
- The work will be led or supervised by cultural resources specialists who meet the Secretary of the Interior's professional qualification standards provided in 36 CFR Part 61.
- All newly identified resources will be mapped and described on DPR forms. Mapping will be completed by recording data points with GPS hardware through which data can be imported and managed digitally. Mapping of previously identified resources will be limited to updates of existing records where necessary to describe the current boundaries of the resource.
- SBFCA will evaluate the eligibility of identified resources for listing on the CRHR and determine if these resources can feasibly be preserved in place, or if data recovery following Mitigation Measure CR MM-1, above, is appropriate. The methods of preservation in place shall be considered in the order of priority provided in CEQA Guidelines § 15126.4(b)(3).⁸⁵

The only substantive revision made to the discussion of "Effect CR-3: Potential to Disturb Human Remains" was the deletion of USACE as having shared responsibility with SBFCA for certain measures, such as retaining a qualified archaeologist to monitor areas of sensitivity for previously unidentified archaeological resources and human remains, among other measures.⁸⁶

⁸⁴ Id. at 3.17-16 - 3.17-17.

⁸⁵ Id. at 3.17-17.

⁸⁶ Id. at 3.17-18.

III. NAHC Involvement and Post-Environmental Impact Review Actions

A. Execution of a Programmatic Agreement Among USACE, SBFCA, and the State Historic Preservation Officer (SHPO) Regarding the FRWLP, Sutter and Butte Counties

On July 1, 2013, USACE, SBFCA and the SHPO executed a Programmatic Agreement (PA) for the FRWLLP. Neither UAIC nor Enterprise Rancheria, both of which were listed as concurring parties, signed the PA as concurring parties.

Stipulation I(A)(4) addresses SBFCA's role regarding technical cultural resources management work :

SBFCA assumes responsibility for the contracting and supervision of technical cultural resources management work performed to satisfy the stipulation of this Agreement and Section 106 of the NHPA. SBFCA understands that all substantive management decisions and completion of Section 106 milestones are subject to the review, approval, and ultimate discretion of the Corps.⁸⁷

Stipulation I (B) governs conflicts with other Agreement documents:

It is possible that a conflict may arise between this Agreement and other agreement documents that govern associated undertakings. The Corps shall endeavor to avoid conflicts with other agreement documents, but in the event of a direct conflict, the Corps shall determine which standards govern and how to proceed. For the Project, SBFCA will only be responsible for implementing the terms of this Agreement.⁸⁸

Stipulation IV (E) addresses resolution of adverse effects:

For all identified historic properties that would be adversely affected by the project, the Corps and SBFCA shall develop treatments to resolve adverse effects. Treatment may consist of avoidance, documentation, data recovery excavations, preservation in place, or other methods identified by the Corps. The Corps may use treatment methods provided in the Plan or may develop, in consultation with the SHPO, interested Native American tribes, or other stakeholders as appropriate, property-specific treatment. If treatment methods described in the Plan are

⁸⁷ July 1, 2013 Programmatic Agreement Among the U.S. Army Corps of Engineers, Sutter Butte Flood Control Agency, and the California Historic Preservation Officer Regarding the Feather River West Levee Project, Sutter and Butte Counties, California (PA) at 2.

⁸⁸ Id.

adequate, the Corps may simply refer to those methods in the inventory report, finding of effect document, or stand-alone treatment plan and incorporate them by reference without repeating the full text of the relevant treatment methods.⁸⁹

Stipulation IV (G) addressed consultation with Native American individuals and organizations:

The Corps has consulted with the Native American community during the development of this Agreement document. During management milestones, such as completion of inventory reports, resource evaluations, findings of effect, and development and implementation of treatment, the Corps shall consult with the Native American individuals and organizations that may attach cultural significance to resources affected by relevant undertakings. The Corps will consider the results of these consultations and attempt to incorporate and follow suggestions regarding management of cultural resources.⁹⁰

Stipulation V (A) addressed workforce training and construction monitoring:

1. The Corps or qualified archaeologists retained by SBFCA will provide training to construction personnel regarding proper procedure and conduct in the event that archaeological materials are encountered during construction. This training will cover both the identification of resources that may be encountered during construction and procedures to be followed in the event of a discovery.
2. SBFCA shall conduct monitoring of construction where the Corps, in consultation with the SHPO, determines it is necessary to ensure that identified resources are protected or where there is a high sensitivity for previously unidentified resources. These determinations will be described in each phase or activity-specific inventory report and the plan.⁹¹

Stipulation V (B) addressed discovery procedures for resources encountered during construction:

1. If cultural resources are discovered during construction, all construction shall immediately stop within 100 ft. (30 m) of the discovery, the location of the discovery will be marked for avoidance, and efforts will be made to prevent inadvertent destruction of the find. The contractor must notify the Corps and SBFCA (if no Corps or SBFCA representatives are on location). The Corps shall determine whether the discovery is a potential NRHP-eligible resource per the criteria in 36 CFR Section 60.4. If the Corps determines that the

⁸⁹ Id. at 4.

⁹⁰ Id. at 5.

⁹¹ Id.

- discovery is not a potentially NRHP-eligible resource, the discovery will be documented and construction may proceed at the direction of the Corps.
2. If the Corps determines that human remains have not been encountered, that the discovery is not an isolated find, and that the discovery may be eligible for the NRHP, the Corps will notify the SHPO and other relevant parties within 48 hours of the discovery. Notification should include a description of the discovery, the circumstances leading to its identification, and recommendations for further action. Where feasible, the notification will also include a tentative NRHP-eligibility discussion per 36 CFR Section 60.4 and a finding of effect per 36 CFR Section 800.5(a)(1). If the resources cannot be evaluated based upon available evidence (for example, where test excavation is required), the Corps shall include a plan of action for further technical work necessary to determine the eligibility of the resource and make a finding of effect per 36 CFR Section 800.5(a)(1). Treatment shall be implemented where necessary to resolve adverse effects on inadvertently discovered historic properties. If treatment is necessary to resolve adverse effects, SBFCA and the Corps shall consult with Native American individuals and organizations that attach cultural significance to the relevant historic properties and with the SHPO prior to the implementing treatment. The SHPO shall have 15 calendar days to review findings of effect and treatment plans submitted under this stipulation, when treatment is selected from the attached historic property treatment plan. When new treatment methods are developed, review shall follow Stipulation IV (F) above.
 3. If human remains are present, treatment shall conform to the requirements of state law under California Health and Safety Code Section 7050.5 and Public Resources Code Section 5097.98, unless the discovery occurs on federal land. Discoveries on federal land shall conform to the requirements of the Native American Graves Protection and Repatriation Act (NAGPRA, 25 US Code Section 3001 et seq.), after complying with the requirements of California Health and Safety Code Section 7050.5, which requires notice to the County Coroner so the coroner may determine if an investigation into the cause of death is required. These legal requirements, as well as appropriate monitoring, will be described in the plan, as indicated in Attachment 2.⁹²

Stipulation IV (B) addressed curation standards:

The Corps shall ensure that materials and records resulting from the activities prescribed in this Agreement are curated in accordance with 36 CFR Part 79, except where state law and regulations, including, but not limited to, California Public Resources Code Sections 5097.98 and 5097.991 for Native American human remains and associated grave goods discovered on non-federal land,

⁹² Id. at 5-6.

require different treatment. Non-burial associated archaeological materials removed from private land shall be subject to the control of the landowner. Additionally, the disposition of any abandoned shipwrecks and archaeological sites and historic resources on state lands under the jurisdiction of the California State Lands Commission (CSLC) shall be determined by CSLC as provided by California Public Resources Code Section 6313. The Corps will ensure that, to the extent permitted by applicable laws and regulations, the views of the appropriate Native American descendant group(s) are taken into consideration when decisions are made about the disposition of Native American archaeological materials and records.⁹³

B. Designation of UAIC as MLD for FRWLP in Sutter County

The NAHC received its first Request for Assistance from the Sutter County Coroner on May 2, 2014 to designate a MLD for Native American remains found on the FRWLP. UAIC was designated as the MLD for the Sutter County portion of the FRWLP on May 21, 2014 and has served as MLD for all subsequently discovered Native American remains in the Sutter County portion of the FRWLP since.

IV. Allegations of the United Auburn Indian Community

UAIC's allegations are comprehensive, detailed, and best represented by UAIC.⁹⁴ Although SBFCA submitted relevant documents, it did not provide a formal submission due to the shortness of time. A summary of UAIC's allegations follows.

A. NAHC Jurisdiction and Existence of a Sanctified Burial Ground or Cemetery in FRWLP Project Area

UAIC states that the FRWLP project area has been divided into four Contract Areas: A, B, C and D, with Contract Area A located at the southern end of the project and Contract D at the northern end.⁹⁵ According to UAIC, the design for Contract C began in 2013 and continues into 2015 with hydroseeding.⁹⁶ Improvements include the construction of cutoff walls, seepage berms, levee geometry corrections, and wet and dry utility modifications.⁹⁷ The property and easements in Contract C are owned by SBFCA and will be transferred to the Department of Water Resources (DWR) and the State of California,

⁹³ Id. at 6-7.

⁹⁴ UAIC's submission included numerous references to archaeological site locations and other confidential documents that are exempt from public disclosure under Government Code section 6254(r) and 6254.10.

⁹⁵ March 9, 2014 UAIC Submission in Support of Public Hearing and Investigation NAHC NOI 2015-1, NAHC NOH 2015-1 at 3 (hereinafter "UAIC Submission").

⁹⁶ Id.

⁹⁷ Id.

according to SBFCA representatives and DWR tribal liaison Anecita Agustinez.⁹⁸ In its confidential submission, UAIC has provided a map with ten areas within the FRWLP project area that it requests be designated as a sanctified cemetery, ceremonial site or sacred place⁹⁹ and reserves the right to have additional sanctified cemeteries, ceremonial sites or sacred places designated should additional evidence or discoveries coming to light.¹⁰⁰

UAIC states that knowledgeable UAIC Tribal Monitors state that the properties they've identified are sacred sites because of the existence of certain cultural items and associated grave goods.¹⁰¹ In its submission, UAIC provides a detailed description of Miwok and Nisenan burial practices and how many of the burials unearthed on this project reflect such practices.¹⁰² UAIC describes in detail a particular cultural landscape, which encompasses the project area, and its cultural significance to UAIC and the Nisenan-Miwok people.¹⁰³ UAIC maintains that burial areas and ceremonial-ancestral places have been historically regarded as sacred and sanctified places by UAIC's people.¹⁰⁴ The NAHC should decide whether to formally declare the ten sites as sanctified cemeteries, places of worship, religious or ceremonial sites, or sacred shrines.

B. Return of Human Remains and Cultural Items Recovered from a Sanctified Cemetery, Place of Worship, Religious or Ceremonial Site, or Sacred Shrine

UAIC notes SBFCA's January 16, 2015 objection to the implementation of the PA and SBFCA's agreement with UAIC's request not to curate the collection and to immediately return it for reburial. UAIC also alleges that USACE has expressed the opinion on conference calls and at meetings that state law does not apply.¹⁰⁵ UAIC states that, according to tribal tradition, everything at the site was dedicated to burials and is an associated grave good, and, under state law, neither archaeological analysis nor curation is an option.¹⁰⁶ UAIC urges that the landowner comply with state law and that the USACE step aside on this issue.¹⁰⁷ USACE provided a list of cultural items provided to representatives of USACE, ICF, Far Western Anthropological Research Group, and SBFCA in May of 2014 prior to the development of the draft BTP, HPMP and HPTP and states that they are the types of associated grave goods currently being held by SBFCA.

⁹⁸ Id.

⁹⁹ Id.

¹⁰⁰ Id. at p. 4.

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Id. at p. 6; Confidential Attachments A and B.

¹⁰⁵ Id. at p. 7.

¹⁰⁶ Id.

¹⁰⁷ Id.

C. Unlawful Possession of Native American Human Remains, Burial Soils and Associated Grave Artifacts

As stated above, UAIC states that SBFCA, at the request of USACE, continues to retain objects and soil they claim are not associated grave goods.¹⁰⁸ During a March 5, 2015 conference call to address SBFCA's objection letter, USACE agreed to ultimately return all material but insisted on scientific analysis that could take several years and thereby further delay repatriation.¹⁰⁹ SBFCA has indicated that it is willing to return the material before the March 20 hearing.¹¹⁰ On November 6, 2014, Far Western Anthropological Research Group, Inc. provided their inventory of the material that remain in the trailer, and it included 7,837 entries for objects, or groups of objects, that remain in its possession.¹¹¹ Based on the "count" associated with each entry, UAIC states that at least 243,555 associated grave artifacts remain in Far Western's possession.¹¹²

UAIC states that, according to its traditional beliefs, the FRWLP, by damaging and removing burials, burial soils and associated grave artifacts from the sites they've submitted for declaration as sacred sites, has transgressed their spiritual beliefs, and that handling, testing, and analyzing their cultural items will also transgress their spiritual beliefs.¹¹³

D. Severe and Irreparable Harm

UAIC states that the FRWLP has caused severe and irreparable harm to ancestors and current Tribal members in a variety of ways.¹¹⁴ The legal standard for seeking injunctive relief is to prevent a proposed action of a public agency that may cause severe or irreparable damage to a Native American sanctified cemetery, place of worship, or religious or ceremonial site or sacred shrine located on public property.

UAIC states that the 2016 phase of the FRWLP is scheduled to go through an area that UAIC's oral histories record as being two to three times more densely population than the area around Yuba City that was affected by the 2014 work.¹¹⁵ Additionally, UAIC states that irreparable damage would continue if the project were allowed to continue as proposed, with a slurry wall, pipeline, and a railroad crossing for Contract B, among other potential damage in Contract A.¹¹⁶ UAIC states, "Our professional staff and Tribal Monitors have concluded that direct and significant impacts from construction would

¹⁰⁸ Id. at 9.

¹⁰⁹ Id.

¹¹⁰ Id.

¹¹¹ Id.

¹¹² Id.

¹¹³ Id.

¹¹⁴ Id. at 11.

¹¹⁵ Id. at 18.

¹¹⁶ Id. at 21.

effectively result in total destruction of the yet-to-be-properly identified and considered by the agencies, which is a prehistoric archaeological district and cultural landscape.¹¹⁷

E. Proposed Mitigation Measures

UAIC submitted thirteen¹¹⁸ proposed mitigation measures it states are reasonable and have been applied else to other California properties either through the CEQA process, settlement or NAHC action, in UAIC's words:

1. Require the agencies to respect the Tribe's authority to make determinations about what is sacred, cultural, or burial-associated, rather than allowing archaeologists to make these determinations in the field. All authority to determine what is sacred for our Indian community is the responsibility for our members.
2. All ancestral remains, objects, and soil removed from the burial grounds must be repatriated to the Tribe without delay and reburied with dignity as close as possible to the original site, with no scientific analysis.
3. Pedestrian Surveys must occur with UAIC Tribal Monitors to locate, interpret, and document sanctified cemeteries, places of worship, religious or ceremonial sites, sacred shrines, archaeological sites and cultural resources for Contracts A and B to assure resource preservation and inform management decisions for future FRWLP ground disturbing activities. Surveys must be conducted using non-invasive, non-destructive methods of analysis and burial exploration. This could include such technologies as trained forensic dogs, aerial and terrestrial ground penetrating radar, review of historic aerial maps, etc. Costs to be borne by SBFCA.
4. Rebuild damaged relationships between Indian tribes and state and federal agencies by requiring SBFCA's and USACE's employees and consultants to complete a mandatory sensitivity training conducted by UAIC prior to any future field deployment and paid for by SBFCA.
5. Since vandalism, theft, and looting and opportunistic damage continue to be a threat, consultation must occur regarding the transport, storage, materials, security, and equipment time for the treatment of any ancestral remains and grave goods which cannot be avoided on any phase of the Project.
6. An evaluation of the burial grounds, known village areas, TCPs and Sacred – Sites present at FRWLP should have been done during the historic property identification phase by a professional ethnographer satisfactory to UAIC – not required as after-the-fact mitigation for the harms incurred. Such reports should be undertaken now before any other phase of the Project is started.

¹¹⁷ Id.

¹¹⁸ Id. at p. 21.

7. A Tribal Cultural Resources Evaluation Report should be produced by an entity approved by UAIC. This report would have beneficial uses including: helping to better assess cumulative impacts on this and other projects, assisting in educating other project applicants and CRM firms as to what UAIC and potentially other Nisenan-Miwok groups expect an adequate tribal cultural resource analysis to look like in an environmental documents, and educating tribal members and youth on its tribal cultural survival and heritage beliefs. It also could be one way in which the Tribe and SBFCA could ask forgiveness of those who have been disturbed so that their disruption may not be in vain. Therefore, it could also contain "Lessons Learned," to identify the pitfalls and best practices for such a large complex linear project like the FRWLP.
8. Nomination of the archaeological district and cultural landscape at issue to the California and National Registers of Historic Places should occur without delay. Such nomination to be prepared by an entity acceptable to UAIC and paid for by the agencies.
9. A Tribal Monitoring Program should be drafted in consultation with the Tribe, whereby qualified Tribal Monitors participate in all survey and ground disturbing work at FRWLP regardless of whether Project archaeologists are present. Tribal Monitors should be compensated at a negotiated rate for their time and given all necessary authority in their field to perform their jobs, including the ability to stop work. The agencies and their consultants must commit to noninterference with the Monitors and their Tribes.
10. Alternatives such as levee setbacks and stability and seepage berms must be considered prior to the next phase of construction and micro-siting. Other design options must be aggressively pursued prior to any further Project work and within a transparent process that involves the UAIC.
11. Compensatory mitigation to the Tribe should be granted. Compensatory mitigation is authorized pursuant to CEQA (CEQA Guidelines section 15370) and CEQ Regulations (40 CFR 1508.20). It can involve restoration of a previously-existing cultural resource area, the enhancement of an existing cultural area's functions, the establishment (i.e., creation) of a new cultural area, or, in some cases, the preservation of an existing cultural area. Compensatory mitigation also could include mitigation banking on reservation lands, in-lieu fee program mitigation, permittee-responsible mitigation on and offsite as well as funds for acquisition and repatriation of other sensitive cultural lands in addition to other priorities of the Tribe to help repair and sustain its cultural health.
12. SBFCA, USACE, and their contacts must apologize to UAIC in writing for the harm caused by their actions during FRWLP and must commit to better communication and consultation on all aspects of the Project.
13. An emergency operations and maintenance plan must be developed in consultation with UAIC that addresses respectful site stewardship during

project operation into the future to help minimize future cumulative impacts and re-desecrations.

V. Pattern or Practice of the Sutter Butte Flood Control Agency and/or the U.S. Army Corps of Engineers of Causing Severe and/or Irreparable Damage to Native American Sacred Sites

No tribes have alleged that SBFCA has a pattern or practice of causing severe or irreparable damage to Native American sacred sites. The NAHC has received information that USACE may not be consistent across California districts in requiring testing and analysis of Native American associated grave goods found on non-federal property. In another matter, the Sacramento District Office of USACE failed to address exposed remains resulting from unpermitted work on a levee for which the office was considering granting an after-the-fact permit.

A. San Luis Rey Band of Mission Indians, 2012

In 2012, a project for which the Los Angeles division of the USACE issued a permit resulted in the discovery of Native American remains on private property for which the San Luis Rey Band of Mission Indians (SLR) was named MLD by the NAHC. SLR maintained the position that all Native human remains and cultural items recovered from the site, other than historic period trash, should be considered Native American human remains or associated grave goods and should not be subject to testing or analysis beyond sorting, visual inspection, and limited description. SLR requested repatriation of all cultural items recovered from the site. USACE proposed to the Advisory Council on Historic Preservation (ACHP) to honor SLR's determination and treat all cultural items recovered as burial related and requested to amend the Data Recovery Plan. Although the SHPO and ACHP were not convinced that sufficient justification was provided for the determination that all cultural items recovered were burial related, they both agreed to the Corps' request to honor SLR's request.¹¹⁹

B. Wilton Rancheria, 2014

Work performed on a levee on private property by a reclamation district within Wilton Rancheria's area of cultural affiliation resulted in a Native American sacred site being damaged. USACE had not provided any required permit for the work and stated that FEMA had been responsible for Section 106 compliance. Wilton Rancheria was named MLD for the Native American remains found at the site, and USACE was planning to

¹¹⁹ August 12, 2012 Letter from Charlene Dwin Vaughn, Assistant Director, Federal Permitting, Licensing and Assistance Section, Office of Federal Agency Programs, ACHP, to Therese Bradford, Chief, South Coast Branch, Los Angeles District, USACE. This letter includes confidential information about archaeological sites and Native American sacred sites and is exempt from disclosure under Government Code sections 6254(r) and 6254.10

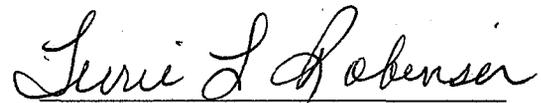
grant an “after-the-fact” permit to the reclamation district for the work that had been done, but without requiring any effort by the landowner to protect the Native American remains found. NAHC staff contacted Lisa Gibson in the Sacramento District Office on or about July 25, 2014 to voice NAHC’s opposition to any such permit being granted while nothing was being done to protect the remains and the site. The NAHC contacted the landowner, who agreed to work with Wilton Rancheria to protect the remains and site, but no resolution has occurred yet. Wilton Rancheria has requested the NAHC’s assistance in this matter.

C. Other Tribes

At the time of publication, a third tribe’s cultural resources director was conferring with the tribe’s Tribal Council about submitting evidence on the issue of whether USACE has a pattern or practice of causing severe or irreparable damage to Native American sacred sites. The evidence pertains to a site in Butte County.

Respectfully submitted,


Cynthia Gomez
Executive Secretary


Terrie L. Robinson
General Counsel