

NATIVE AMERICAN HERITAGE COMMISSION
NOTICE OF PUBLICATION, REVIEW PERIOD AND TRIBAL CONSULTATION
PERIOD
PROPOSED STATEMENT OF INCOMPATIBLE ACTIVITIES
November 10, 2016

Pursuant to Government Code section 19990 and Section 599.870, Title 2, California Code of Regulations, PLEASE TAKE NOTICE that the Native American Heritage Commission intends to adopt a STATEMENT OF INCOMPATIBLE ACTIVITIES at its January 20, 2017 Commission meeting. The proposed Statement of Incompatible Activities and Supporting Statement of Rationale are attached for employee, public, and tribal review and comment. Section 599.870, subd. (a)(2) of Title 2 of the California Code of Regulations requires the Native American Heritage Commission to “respond in writing to concerns expressed by affected employees and their representatives about the statement during the review period by either making changes to the statement that are responsive to their concerns or informing them why such changes are not being made.”

EMPLOYEE AND PUBLIC COMMENTS

Employee and public comments may be provided in writing **no later than 5:00 pm on December 30, 2016 as follows:**

- a) Email: Terrie L. Robinson, General Counsel, terrie.robinson@nahc.ca.gov.
- b) Fax: Terrie L. Robinson, General Counsel, (916) 373-5471.
- c) Mail: Terrie L. Robinson, General Counsel, Native American Heritage Commission, 1550 Harbor Boulevard, Suite 100, West Sacramento, CA 95691.

TRIBAL CONSULTATION

California Native American Tribes on the SB 18 contact list may request tribal consultation with the NAHC regarding the proposed Statement of Incompatible Activities **to occur no later than 5:00 pm on December 30, 2016** as follows:

- a) Email: Terrie L. Robinson, General Counsel, terrie.robinson@nahc.ca.gov.
- b) Fax: Terrie L. Robinson, General Counsel, (916) 373-5471.
- c) Mail: Terrie L. Robinson, General Counsel, Native American Heritage Commission, 1550 Harbor Boulevard, Suite 100, West Sacramento, CA 95691.

If you have any questions or concerns regarding this process, contact Terrie L. Robinson, General Counsel, Native American Heritage Commission, (916) 373-3710, terrie.robinson@nahc.ca.gov.

NATIVE AMERICAN HERITAGE COMMISSION
PROPOSED STATEMENT OF INCOMPATIBLE ACTIVITIES
STATEMENT OF RATIONALE

Government Code section 19990 requires all state agencies to adopt a Statement of Incompatible Activities. The Native American Heritage Commission (NAHC) has never done so.

The recent increase in the number of NAHC employees and the potential for employees' outside activities that may raise questions among stakeholders as to whether confidential information provided by California Native American tribes may be compromised or whether employees are speaking for or representing the NAHC has necessitated the adoption of a Statement of Incompatible Activities. Because California's Native American tribes entrust the NAHC with confidential information about sacred sites by making submissions to the Sacred Lands Inventory and also provide the NAHC confidential information through tribal consultation, the NAHC seeks to avoid the appearance that confidential information entrusted to the agency may be compromised, inadvertently or otherwise, by employees or volunteers who are engaged in activities that are either not approved by the NAHC or are outside of their employment or relationship with the NAHC.

NATIVE AMERICAN HERITAGE COMMISSION
PROPOSED STATEMENT OF INCOMPATIBLE ACTIVITIES

INTRODUCTION

This document establishes and sets forth the Native American Heritage Commission's (NAHC) policy and rules on incompatible activities under Government Code section 19990. This policy and rules apply to all officers, employees, and volunteers of the NAHC. This policy does not apply to the Executive Secretary and the Commissioners of the NAHC.¹

The NAHC's mission includes protecting Native American sacred sites and burials from irreparable damage,² providing for the treatment and disposition, with appropriate dignity, of Native American human remains,³ ensuring access by California Native Americans to religious and ceremonial sites,⁴ and repatriating Native American human remains from governments and museums to California Native American tribes.⁵

The NAHC holds a unique position of trust with California's Native American tribes. As the holder of the California Sacred Lands Inventory⁶ and confidential information⁷ provided by California Native Americans and California Native American tribes regarding Native American graves, cemeteries, sacred places, religious and ceremonial sites, and records of Native American places, features and objects,⁸ the NAHC has an interest in avoiding even the appearance that this unique position of trust, and the confidentiality upon which it is based, has been compromised by its officers, employees or volunteers. Because of this unique position of trust, the NAHC has an interest in ensuring that its officers, employees and volunteers do not speak or appear to speak on behalf of the NAHC without prior approval, do not represent in their official capacities opinions or positions

¹ In an opinion of the Attorney General, the Attorney General concluded that Government Code section 19990, in providing for the adoption of an incompatible activities statement by an appointing authority for "employees under its jurisdiction," does not authorize the adoption of an incompatible activities statement for the "appointing power." (82 Ops.Cal.Atty.Gen. 120 (1999).)

² Pub. Resources Code § 5097.94, subd. (g); 5097.97.

³ Health & Saf. Code § 7050.5; Pub. Resources Code § 5097.98.

⁴ Pub. Resources Code §§ 5097.9, 5097.94, subd. (g).

⁵ Health & Saf. Code § 8010 et seq.; Pub. Resources Code § 5097.94, subd. (n).

⁶ Pub. Resources Code §§ 5097.94, subd. (a), 5097.96.

⁷ Gov. Code §§ 6254, subd. (r), 6254.10; Evid. Code § 1040.

⁸ See Pub. Resources Code §§ 5097.9, 5097.94, subd. (a), 5097.96, 5097.98, subd. (c), and 5097.993.

that are in conflict with or compromise the mission of the NAHC, and do not engage in outside employment that could reasonably be substantiated to have resulted solely from employment or volunteering with the NAHC and/or access to confidential information entrusted by California Native American tribes to the NAHC.

POLICY

It is the policy of the NAHC to comply fully with all the provisions of Government Code section 19990 governing incompatible activities and to incorporate it, and the activities listed therein, in this Statement of Incompatible Activities. This policy also sets forth additional incompatible activities specific to the NAHC. This policy sets forth only incompatible activities and does not include all legal provisions with which officers, employees and volunteers must comply.

DEFINITIONS

“Confidential Information” includes, but is not limited to, information provided in confidence to the NAHC by California Native American tribes during tribal consultation, submissions to the Sacred Lands Inventory, and the location of Native American sites, features and objects described in Public Resources Code sections 5097.94, subd.(a), 5097.96, 5097.98, subd. (C), and 5097.993.

“Confidential information” also includes non-public information obtained by the NAHC pursuant to its investigatory functions and/or subpoena power, and all information maintained by the NAHC that is exempt from disclosure under Government Code sections 6254(r) and 6254.10, the attorney-client privilege, the attorney work product exemption, the California Evidence Code, and any other provisions of federal or state law. For purposes of this Statement, information provided by California Native American tribes to the NAHC is presumed to be confidential unless otherwise stated.

“Officers” and “employees,” for purposes of this Statement, include all officers and employees of the NAHC who are subject to the state civil service system.

APPLICABLE STATUTE LISTING INCOMPATIBLE ACTIVITIES

I. Government Code Section 19990

A state officer or employee shall not engage in any employment, activity, or enterprise which is clearly inconsistent, incompatible, in conflict with, or inimical to his or her duties as a state officer or employee.

Each appointing authority shall determine, subject to the approval of the department [California Department of Human Resources, or CalHR], those activities which, for employees under its jurisdiction, are inconsistent, incompatible, or in conflict with their duties as state officers or employees. Activities and enterprises deemed to fall in these categories shall include, but not be limited to, all of the following:

- (a) Using the prestige or influence of the state or the appointing authority for the officer's or employee's private gain or advantage or the private gain of another.
- (b) Using state time, facilities, equipment or supplies for private gain or advantage.
- (c) Using, or having access to, confidential information available by virtue of state employment for private gain or advantage or providing confidential information to persons to whom issuance of this information has not been authorized.
- (d) Receiving or accepting money or other consideration from anyone other than the state for the performance of his or her duties as a state officer or employee.
- (e) Performance of an act in other than his or her capacity as a state officer or employee knowing that the act may later be subject, directly or indirectly to the control, inspection, review, audit, or enforcement by the officer or employee.
- (f) Receiving or accepting, directly or indirectly, any gift, including money, or any service, gratuity, favor, entertainment, hospitality, loan, or any other thing of value from anyone who is doing or seeking to do business of any kind with the officer's or employee's appointing authority or whose activities are regulated or controlled by the appointing authority under circumstances from which it could reasonably be substantiated that the gift was intended to influence the officer or employee in his or her official duties or was intended as a reward for any official actions performed by the officer or employee.

- (g) Subject to any other laws, rules, or regulations as pertain thereto, not devoting his or her full time, attention, and efforts to his or her state office or employment during his or her hours of duty as a state officer or employee.

The department [CalHR] shall adopt rules governing application of this section. The rules shall include provision for notice to employees prior to the determination of proscribed activities and for appeal by employees from such a determination and from its application to an employee. Until the department adopts rules governing the application of this section, as amended in the 1985-86 Regular Session of the Legislature, existing procedures shall remain in full force and effect.

If the provisions of this section are in conflict with a memorandum of understanding reached pursuant to [Gov. Code] Section 3517.5, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

NAHC-SPECIFIC INCOMPATIBLE ACTIVITIES

The activities listed below are specifically found to be incompatible, inconsistent, or in conflict with the duties of the officers, employees and volunteers of the NAHC. These activities do not necessarily include all activities that may be prohibited under the authority of Government Code section 19990 or by other statutes, administrative rules, or regulations governing the conduct of state officers and employees.

I. Outside Employment

No outside employment activity or outside enterprise shall be engaged in by any officer, employee, or volunteer of the NAHC which might result in, or create the appearance of resulting in, any of the following:

- (a) Identifying oneself as an officer, employee or volunteer of the NAHC in outside employment or enterprises for pay, either orally or in written materials, without the prior approval of the NAHC.
- (b) Lecturing or teaching on one's own time on the basis of experience, general knowledge, or specific knowledge gained while an officer, employee or volunteer of the NAHC. "Specific knowledge" includes, but is not limited to:
 - a. Political conflict between California Native American tribes.

- b. Confidential information as defined in this Statement.
- c. NAHC legal strategy.
- (c) Entering into or engaging in any partnership, joint venture, profit-sharing, employment or other business arrangement with law firms or solo legal practitioners, environmental consulting firms, real estate developers, cultural resources management firms, or California Native American tribes.
- (d) Entering into or engaging in any partnership, joint venture, profit-sharing, employment or other business arrangement with any entity that has a matter pending before the NAHC pursuant to Public Resources Code sections 5097.94, subd. (g) and 5097.97, or is adverse to, or represents an entity that is adverse to or potentially adverse to the NAHC in a potential or pending legal proceeding.
- (e) Accepting employment as a consultant on environmental documents promulgated pursuant to the California Environmental Quality Act (CEQA) (Public Resources Code § 21000 et seq.) or the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 et seq.) or as a cultural resources monitor.
- (f) Providing any service for compensation other than state salary to a local agency that is or could be a lead agency under CEQA or NEPA, a California Native American tribe, a project applicant under CEQA, or a landowner on whose property Native American human remains have been found.
- (g) Speaking, or appearing to speak, on behalf of the NAHC without the prior approval of the Executive Secretary.
- (h) Accepting employment that could reasonably be substantiated to have resulted solely from employment with the NAHC and/or access to confidential information entrusted by California Native American tribes to the NAHC.
- (i) Engaging in the practice of law regarding, or providing legal advice or training regarding, statutes enforced by the NAHC for compensation other than state salary.

II. Gifts

An NAHC officer, employee or volunteer may not receive or accept any gift, including money, any service, gratuity, favor, entertainment, hospitality, loan, or any other thing of value, from any person or entity who is or is seeking to contract with or perform services for the NAHC, is seeking the intervention of the NAHC, has a matter pending before the NAHC, has been or could be identified as a Most Likely Descendant, or is under investigation by or subject to enforcement, compliance, or other legal actions or proceedings brought by the NAHC, under circumstances from which it reasonably could be substantiated that the gift was intended to influence the officer, employee or

volunteer in his or her official duties or was intended as a reward for any official action performed by the officer, employee or volunteer.

III. Misuse of Position

The following acts shall be considered misuse of one's position and incompatible activities:

- (a) Providing confidential information to persons to whom the issuance of such information is likely to be detrimental to the NAHC.
- (b) Disclosing confidential information provided to the NAHC by one California Native American tribe to a different California Native American tribe without advance written consent.
- (c) Involving one's self in political conflicts between two or more California Native American tribes or giving the appearance that the NAHC has sided with any California Native American tribe in intertribal political conflicts unrelated to cultural resources.
- (d) Recommending the services of any cultural monitor or cultural monitoring company.
- (e) Accepting, taking or converting to one's own use products of any kind developed in the course of one's work for the NAHC or as a result of work performed for the NAHC. Academic articles written by interns or law school externs for academic credit are excepted.
- (f) Using status with the NAHC to solicit directly or indirectly business or future employment of any kind.

IV. Judicial Proceedings

An NAHC employee, officer or volunteer shall not provide written or oral evidentiary statements contrary to adopted findings or decisions of the NAHC in any lawsuit or adjudicatory proceeding in which the NAHC:

- (a) Is a party;
- (b) Has made a determination pursuant to the California Native American Graves Protection and Repatriation Act, Health and Safety Code section 8010 et seq.

except such statements may be provided if: (1) the officer, employee or volunteer is responding to a subpoena and is under oath or the officer, employee or volunteer is otherwise legally obligated to provide testimony or written statements or other documents; or (2) the officer, employee, or volunteer is pursuing administrative or legal action against the NAHC.

NOTICE AND FILING

A copy of this statement shall be given to each future and currently serving officer, employee and volunteer of the NAHC. All NAHC officers, employees and volunteers are required to read and sign the NAHC Statement of Incompatible Activities:

- When they start work with the NAHC;
- When they are promoted within the NAHC.
- When the NAHC Statement of Incompatible Activities is amended.

A signed copy shall be returned to the Executive Secretary by each officer, employee and volunteer.

PROCEDURE FOR DETERMINING INCOMPATIBLE ACTIVITIES; APPEAL

Where an actual or potential conflict arises, or where an officer, employee or volunteer is faced with an activity that may be deemed inconsistent, incompatible, or in conflict with his or her NAHC duties, he or she shall notify the Executive Secretary. On receipt of any notification of a potential or actual conflict, the Executive Secretary or his or her designee will investigate and determine whether the activity is in fact proscribed. If the officer, employee or volunteer disagrees with the Executive Secretary's determination, he or she may appeal that determination to the NAHC for a final determination. The appeal procedure provided does not preclude any grievance or complaint procedure provided for in accordance with any applicable memorandum of understanding.

CONFLICT WITH MEMORANDA OF UNDERSTANDING

If the provisions of this Statement of Incompatible Activities are in conflict with a memorandum of understanding reached pursuant to Government Code Section 3517.5, the memorandum of understanding shall be controlling.

PENALTY FOR VIOLATION OF INCOMPATIBLE ACTIVITIES STATEMENT

An officer, employee or volunteer may be subject to disciplinary action for violation of any of the policies contained in this Statement of Incompatible Activities. The severity of any adverse action taken will depend on the adverse consequences to the NAHC and the State caused by such actions.

CERTIFICATION

The following certification is to be signed and submitted by officers, employees and volunteers to comply with the Statement of Incompatible Activities:

I have read the foregoing Statement of Incompatible Activities and I agree to abide by it. I understand that I may be subject to disciplinary action for engaging in any of the listed types of activities during the time I am employed with or volunteer with the Native American Heritage Commission.

Employee Signature

Date

Typed or Printed Name

Job Title and Position Number

Supervisor Signature

Date