PROTECTING CALIFORNIA NATIVE AMERICAN SITES DURING DROUGHT AND WILD LAND FIRE EMERGENCIES

A GUIDE TO RELEVANT LAWS AND CULTURAL RESOURCES MANAGEMENT PRACTICES

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STATE OF CALIFORNIA

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Introduction

With California facing its driest year in recorded state history, state lakes, rivers, and reservoirs are at their lowest levels in decades. As a result, Governor Brown declared a drought state of emergency on January 1, 2014. As water levels recede, long submerged Native American cultural sites and cultural items will be exposed. With California's drought emergency will come the increasing threat of wild land fires that are prevalent in California even in years of adequate seasonal rainfall. Wild land fires can severely threaten, damage or destroy Native American sacred places and sites of religious and ceremonial importance. Previous hidden sites may be exposed, making them vulnerable to vandalism.

To be prepared for these events, it is important that California's resources agencies be informed about the laws and best practices regarding the protection of Native American cultural sites and cultural resources. This guide provides information on the protection of Native American cultural resources in the face of California's unprecedented drought as well as best Native American cultural resources management practices before, during, and after a wild land fire.

This guide provides information on the statutes, regulations and executive orders that protect Native American human remains and associated grave goods, religious or ceremonial sites, sacred places, and archaeological sites so that agency staff will know what to do in the event these items are encountered.

Protecting California Native American Cultural Resources: Laws, Definitions and Procedures

The following is a partial listing of federal and state statutes, regulations and executive orders that protect California Native American cultural resources, background information on what cultural resources are and why they are important, and a discussion of procedures and penalties under California law to protect Native American human remains and cultural resources.

- Federal Statutes

  Antiquities Act of 1906 (16 U.S.C. §431)
  Archaeological Resources Protection Act of 1979 (16 U.S.C. § 470 et seq.)
  National Historic Preservation Act of 1966 (16 U.S.C. §470 et seq.)
  Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. § 3001 et seq,)

- California Statutes, Regulations and Executive Orders

  California Environmental Quality Act (Pub. Resources Code §21084.1)
  California Environmental Quality Act Guidelines (Cal. Code Regs. tit. 14, §§ 15064.5 and 15331)
  Public Resources Code sections 5097.9, 5097.94, 5097.97, 5097.99 and 5097.991 (Native American cultural resources)
  California Native American Graves Protection and Repatriation Act (Health & Saf. Code § 8010 et seq.)
  Health and Safety Code section 7050.5 (Removal of Human Remains from Area Other Than a Dedicated Cemetery, Offense; Discovery of Remains)
  Forest Practices Regulations (Cal. Code Regs., tit. 14, §§ 929-929.7; 949-949.7; 969-969.7; 1052; 1092.14 and 1104.1(a)(3)
  Government Code sections 65092, 65351, 65352.3, and 65562.5 (Preparation, Adoption and Amendment of General Plan)
  Civil Code section 815.3 (Entities Authorized to Acquire and Hold Conservation Easements)
  State Historical Building Code (Health and Saf. Code § 18950 et seq.)
  California Executive Order W-26-92

Native American Cultural Resources Defined

- Native American cultural resources are evidence of past peoples and cultures identified by a culturally affiliated tribal representative. They can include villages, ceremonial sites, religious sites, and burial sites.

- The culturally affiliated Native American tribe defines its cultural resources. A tribe sometimes may be the only source of information regarding a cultural site.

- Other sources of information may be archaeological sites recorded in the California Historical Resources Information System (CHRIS) and the Native American Heritage Commission (NAHC) Sacred Lands Inventory.

- Examples of sites in the Sacred Lands Inventory include petroglyphs, pictographs, bedrock mortars, rock art, ceremonial places, burial grounds, and historic structures.

Why Cultural Resources Matter

- They are significant to local Native Americans and represent their tribal cultural values. A strong bond exists between present-day descendants and their sacred places and sites, no matter how small in nature or how old in years.

- They reflect the indigenous human history reaching back more than 10,000 years before the arrival of Europeans.

- They provide factual explanation and illustration of human habitation and life prior to European contact.

- They may be places of religious and ceremonial significance still in use by Native American communities.

Protecting Native American Human Remains

The following actions must be taken immediately upon the discovery of skeletal remains at any site other than a dedicated cemetery. Note that, for purposes of California law, human remains of a Native American may be in the form of an inhumation or a cremation and in any state of decomposition or skeletal completeness. Any items that are placed or buried with Native American human remains are to be treated in the same manner as the remains, but they do not by themselves constitute human remains. (Pub. Resources Code § 5097.98(d)).

- Procedures under Health and Safety Code Section 7050.5 When Human Remains are Discovered

  - Stop work immediately at the site of the discovery and/or any nearby area reasonably suspected to overlie adjacent remains. Contact the County Coroner.

  - Protect the discovery site from any additional subsurface disturbance. The Coroner will have two working days to determine if the remains are subject to his or her authority as part of a crime.
  - If the Coroner determines that the remains are that of a Native American, the Coroner must contact the NAHC within 24 hours.

➢ NAHC Procedures Under Public Resources Code Section 5097.98 When Native American Human Remains Are Discovered

- The NAHC will immediately notify the person or tribe it believes to be the most likely descendant of the deceased Native American.

- The most likely descendant has 48 hours from being granted access to the site to inspect the site and make recommendations to the landowner or the landowner's representative for the treatment or disposition, with appropriate dignity, of the Native American human remains and any associated grave goods.

- The landowner shall ensure that the immediate vicinity where the Native American human remains are located, is not damaged or disturbed by further development activity, according to generally accepted cultural or archaeological standards or practices, until the landowner has *discussed and conferred* with the most likely descendant their recommendations, taking into account the possibility of multiple human remains, if applicable.

  > *"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 confidentiality of information provided to the other.*

- If the landowner does not accept the most likely descendant's recommendations, either party may request mediation by the NAHC pursuant to Public Resources Code section 5097.94(k). If the mediation fails, the landowner shall reinter the human remains and any associated grave items with appropriate dignity on the property, protecting the site from any further and future subsurface disturbance as specified by the law.

- Only by mutual agreement between the landowner and the most likely descendant can Native American human remains and any associated grave goods be reinterred in a location other than the property where they were discovered.

- Third parties, e.g., archaeologists, cannot authorize the destructive or non-destructive testing of Native American human remains or associated grave goods.

- If the NAHC is unable to identify a descendant, or the most likely descendant does not make recommendations within 48 hours of being allowed access to the site, the landowner or his or her authorized representative shall reinter the remains and any associated grave items with appropriate dignity on the property in a location not subject to further and future subsurface disturbance as specified by law. The landowner shall protect the site by doing one or more of the following:

  - ✓ Record the site with the NAHC or other appropriate CHRIS Information Center.

  - ✓ Utilize an open space or conservation zoning designation or easement.

  - ✓ Record a document titled "Notice of Reinterment of Native American Remains" with the county in which the property is located. The document shall include a legal description of the property, the name of the owner of the property, and the owner's acknowledged signature, in addition to any other information required by law. The document shall be indexed as a notice under the name of the owner.

Protecting Archaeological Sites, Ceremonial Places, and Cultural Items

If Native American cultural resources, including archaeological sites, are inadvertently discovered, the first consideration must be protecting them in place undisturbed.

While the treatment and disposition of Native American human remains and associated grave items are addressed by California codes, as noted above, other Native American cultural items, or artifacts, that may be uncovered by drought conditions are not. Culturally affiliated tribes should be consulted regarding recommendations for the treatment and disposition of any cultural items that may be discovered as the result of receding water levels or wild land fires.

The following California statutes protect Native American cultural sites, provide access to sites by Native Americans for ceremonial purposes, mitigate impacts to cultural sites on public lands, and provide penalties for the willful destruction of Native American cultural sites.

Public Resources Code Section 5097.99 (Possession of Native American Artifacts or Human Remains)

Anyone knowingly or willfully obtaining or possessing Native American artifacts or human remains taken from a grave or cairn on or after January 1, 1984, unless authorized under Public Resources Code sections 5097.94 or 5097.98, is guilty of a felony.

Public Resources Code Section 5097.94 (NAHC Power To Seek Injunctive Relief to Protect or Provide Access to Native American Sacred Sites on Public Property)

The NAHC has the power to bring an action to prevent sever and 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 Public Resources Code section 5097.97. If the court finds that severe and irreparable damage will occur or that appropriate access will be denied, and appropriate mitigation measures are not available, it shall issue an injunction, unless it finds on clear and convincing evidence that the public interest and necessity require otherwise.

Public Resources Code Section 5097.97 (NAHC Investigation of Potential Damage to or Denial of Access to Native American Sacred Site on Public Property)

In the event that any Native American organization, tribe, group, or individual advises the NAHC 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 by Native Americans, the NAHC shall conduct an investigation as to the effect of the proposed action. If the NAHC finds, after a public hearing, that the proposed action would result in irreparable damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine on public property, the NAHC may ask the Attorney General to take appropriate legal action pursuant to subdivision (g) of Public Resources Code section 5097.94.

The Native American Historic Resources Protection Act (Public Resources Code Sections 5097.993 and 5097.994)

California law protects Native American cultural sites and cultural items from wanton destruction. Any person who unlawfully and maliciously excavates or damages a native American historic, cultural, or sacred site that is listed or eligible for listing on the California Register of Historic Places may be found guilty of a misdemeanor if the act was committed with specific intent to vandalize, deface, destroy, steal, convert, possess, collect or sell a Native American historic, cultural or sacred artifact, art object, inscription, feature or site, and may be sentenced to up to one year in jail and a fine not to exceed $10,000. Persons convicted of these charges may also face up to $50,000 in civil penalties.

Government Code Section 6254, Subdivision (r) (Exemption of Records of Native American Graves, Cemeteries and Sacred Places from Disclosure Under the Public Records Act)

The Public Records Act exempts from disclosure records of Native American graves, cemeteries, and sacred places and the records of Native American places, features and objects described in Public Resources Code section 5097.9 and 5097.993 maintained by, or in the possession of, the Native American Heritage Commission, another state agency, or a local agency.

Government Code Section 6254.10 (Exemption of Records Related to Archaeological Site Information Maintained by Various Resources Agencies)

The Public Records Act exempts disclosure of records that relate to archaeological site information and reports maintained by, or in the possession of, the Department of Parks and Recreation, the State Historical Resources Commission, the State Lands Commission, the Native American Heritage Commissions, another state agency, or a local agency, including the records that the agency obtains through a consultation process between a California Native American tribe and a state or local agency.

The NAHC recommends that agencies create guidelines in consultation with Native American tribes to address the protection of these records.

Cultural Resources Management Guidelines and Best Practices In the Event of Wild Land Fire

With California's drought emergency there is a threat of increased wild land fires. Wild fires can severely threaten, damage or destroy Native American sacred places, and sites of religious and ceremonial importance, as well as expose previously hidden sites, making them vulnerable to vandalism. This section is intended to provide fire suppression agencies the tools needed to collaborate with California tribes in the protection of their fragile cultural resources in the event of a wild land fire. Before and during a wild land fire, tribes and their tribal fire departments can provide California Department of Forestry and Fire Protection (CAL FIRE) and other fire suppression organizations with information and guidance to prevent and/or minimize damage to their cultural resources.

California Native American tribes, especially those that have wild land fire suppression capability, have expressed concerns that they lack the authority during a wild land fire to protect their cultural resources. This is in part due to the limitations imposed on tribes by the National Fire Program, which provides funding from the U.S. Department of the Interior to CAL FIRE for fire suppression services on California reservations and rancherias (with the exceptions of the Hoopa and Tule River reservations), giving CAL FIRE authority for fire suppression activities on California reservations and rancherias.

The information provided here resulted from discussions between tribes, Native American fire fighters, and CAL FIRE archaeologists. It is intended to provide tribes more control of the protection of their cultural resources during wild land fire operations and have tribes prioritize certain areas of their cultural territories and recommend protocols and methodologies during wild land fires to CAL FIRE and other fire suppression organizations in order to provide for the protection of Native America sacred sites.

Effects of Fire on Native American Cultural Resources

- Fire destroys wooden structures and fixtures, discolors and causes severe cracking and disintegration of stone masonry and sandstone, breaks obsidian artifacts, carbonizes or oxidizes ceramic items, chars or destroys bone and other organic material, and scorches petroglyphs and pictographs.

- In addition to fire directly damaging or destroying cultural resources, other factors can also be very damaging, such as erosion and run-off caused by the fire, destruction of plant material in the soils, falling trees, harsh fire

retardant chemicals, the movement of hoses during fire suppression activities, and especially the use of heavy equipment on the fire lines.

- Destruction of plant material that may be used for "gathering" purposes, including the removal of pollinating plant species, is also damaging to Native American cultural resources.

- Heat, intense flames and smoke all cause damage to vulnerable cultural resources.

- Looting and theft of artifacts can also occur following a fire.

Cultural Resources Management Guidelines

- Pre-Fire Educational Activities

  - The tribe may identify tribal representatives to consult in case of a fire, including contact information, for CAL FIRE and other fire organizations to use in advance of a fire.

  - Affected tribes may determine how fires will affect cultural resources and recommend tactics, suppression methodology, or operation methods to use that will best protect their cultural resources.

  - Tribal representatives may present information to CAL FIRE and other fire suppression units about their resources, including cultural significance, and which areas require extra consideration during a fire.

  - Tribal fire departments may provide a Fire Map/Protection Plan that identifies and prioritizes Culturally Sensitive Areas/Zones (CSA/Zs), recognizing the confidential nature of the site locations, describing the appropriate fire management protocols, which may include color-coded "flagging," and identifying areas to avoid during a fire to preserve cultural resources.

- Pre-Fire Prevention and Planning Guidelines

  - Pre-fire planning guidelines may be created by tribes to prioritize CSA/Zs and recommend operation protocols to CAL FIRE and other fire agencies in order to minimize wild land fire damage to cultural resources. Such protocols may include using minimally invasive fire suppression methods, identifying zones of cultural sensitivity while maintaining the confidentiality of site locations, and recommending

appropriate fire suppression measures (such as the use of alternative methods to heavy equipment) in order to protect and preserve as many cultural resources as possible.

- As part of a pre-fire cultural resources management strategy, tribes may survey their tribal territory to identify the type of fuel surrounding the area and recommend steps to reduce damage to cultural resources, including fuel reduction projects to reduce the fuel load in areas surrounding cultural resources in order to create a buffer. Methods may include mechanical thinning to remove highly flammable trees and vegetation as well as prescribed burning.

- When the above pre-fire activities occur in a known Native American cultural area, a representative designated by the culturally affiliated tribe should approve them.

- Vegetation that is a contributing element to an area's cultural importance should not be removed.

- Slash piles should be burned in an area away from cultural resource sites.

➢ <u>During the Fire: Operational Guidelines</u>

- <u>Presence of Tribal Representatives During Fire Suppression Activities</u>

  A tribal representative should always be present during all fire suppression activities described here to advise on the treatment and care of cultural resources. Ideally, the tribal representative or team leader should be a member of the local fire response team and be knowledgeable about the Native American community's needs and concerns. Typically, the best policy lies with a minimalist strategy. The less activity in an area, the less likely it is that cultural resources will be damaged.

- The use of Minimum Impact Suppression Tactics (MIST) may be recommended by tribes for use by CAL FIRE and other fire suppression organizations. This is a standard used by many federal fire suppression units.

- In the CSA/Zs, tribes may recommend the use of hand tools as opposed to the use of heavy equipment; the latter can cause considerable damage to cultural resources. Other methods recommended may include

building a fire line by hand instead of using a dozer. Heavy equipment, like dozers, can easily destroy the natural environment as well as any cultural resources present and can leave trails where they did not exist before, creating a new area of exposure.

- Tribes may determine a standard color and marking strategy to identify sensitive areas during fire suppression and restoration phases. Standards for color-coding are already available to fire-fighting units.

  - ✓ Yellow and black-striped flagging is a signal for wildlife hazards like hornets or bees.

  - ✓ Use a specific color to mark safety zones and escape routes.

  - ✓ It will be important to make flagging effective depending on conditions and geographic factors, for example, greater use of flags for night time or thicker forest; flag the areas that contain priority cultural resources so that fire lines created are at optimal position and minimally invasive methods will be employed.

  - ✓ Remove unnecessary flags to avoid confusion between multiple crews when and if a fire line is rerouted.

- Positioning fire trucks in close proximity to areas of high-risk cultural resources before a fire starts is another recommended tactic.

- Where feasible, building a pond as a source of water in a predetermined area to facilitate the use of aircraft water relief has been found helpful in suppressing many wild land fires; however, crews must work with tribal representatives to ensure that cultural resources are not impacted.

- Use local rivers or lakes for water resources accessible by helicopter, with the approval of the tribe or landowner.

- Use of fire retardants/foam agents

  - ✓ Can be used on/around cultural resources, subject to tribal advice, to determine if the fire retardant is harmful to the specific type of cultural resource.

- ✓ The use of soil and water can be used in fire lines to cool down the fire and make items, like a tree stump, less likely to catch fire.

- Fire Wraps

  - ✓ Vulnerable resources may be wrapped in or surrounded by fire resistant material to create barriers between them and the fire.

- Fire Lines

  - ✓ Use fire lines to break fuel lines leading up to cultural resources.

  - ✓ Clean fire line to mineral soil to prevent the spread of fire through fuel, such as dead roots.

  - ✓ Use existing trails (like cattle trails or gravel roads) as fire lines, where possible.

  - ✓ Various types of fire lines include hand-built fire lines, natural, retardant, wet, scratch, and cat lines

- Burial of Cultural Resources

  - ✓ By burying the cultural resources at least 10 cm below the surface, the severity of fire damage can be significantly reduced.

➢ Post-Fire: Restoration and Cleanup Practices

- Conduct a post-site evaluation to determine:

  - ✓ The post-fire effects on the surrounding area;

  - ✓ If cultural resources were damaged;

  - ✓ How plant species were affected.

- Create a future plan that will better protect cultural resources and prevent post-fire impacts.

- Disguise heritage sites to protect against looting and loss of heritage site value.

- Consult the Burned Area Rehabilitation (BAR) Guidebook on how to stabilize the affected area immediately after the fire.

- Assess the Pre-Fire Plan's success, cooperation between parties, and appropriate use of material.

➢ Example of Cultural Resources Management Best Practices in the Event of Fire

- Identification of Native American Cultural Resources by CAL FIRE Archaeologists

✓ After notification of a fire incident, CAL FIRE archaeologists have taken on the role of identifying Native American archaeological sites that may have been threatened during a wild land fire. These archaeologists have then operated in the field during the fire to flag sites and keep fire equipment and fire suppression activities from damaging archaeological sites. To identify threatened sites prior to a fire, CAL FIRE archaeologists have done the following:

- Completed archaeological site records searches at the appropriate California Historical Resources Information System (CHRIS) regional archaeological records information center to identify threatened recorded archaeological sites;

- Completed a Sacred Lands Inventory search through the NAHC, at which time an NAHC staff member has provided the CAL FIRE archaeologist with contact information for the tribe or the individual California Native American who submitted the site for listing;

- Contacted the tribes or individuals provided by the NAHC and collaborated with them to identify the locations of threatened sites.

- Contacted the culturally affiliated tribes and individuals on the CAL FIRE Native American contacts list to see if they may be able to provide additional information.

Conclusion

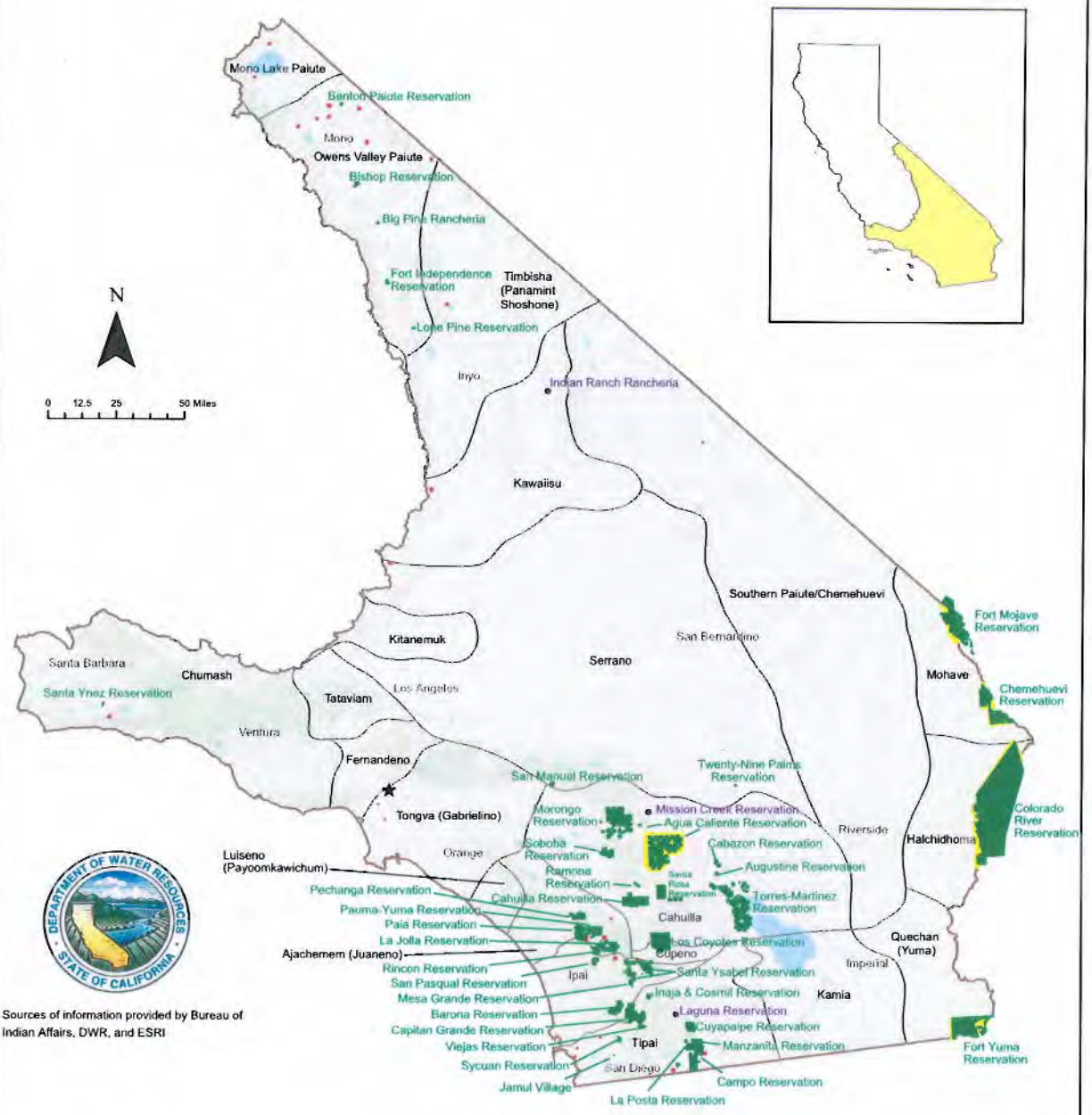
It will take the coordinated and concerted efforts of tribes, resources agencies, and fire suppression agencies to protect California Native American human remains and cultural resources from the effects of drought and fire. It is our intention that this guide provides the tools to accomplish such protection.

Any questions or concerns about this guide should be directed to Rob Wood at the Native American Heritage Commission, nahc@pacbell.net, (916) 373-3710.

California Indian Tribal Homelands and Trust Lands Map

California Department of Water Resources

Southern Region Office



Sources of information provided by Bureau of Indian Affairs, DWR, and ESRI

Legend

- California Tribal/Cultural Areas
- Indian land currently held in Trust by the United States Government
- Historical location of Indian land which was once held in Trust for a Terminated Tribe and/or the location of a landless Federally Recognized Tribe
- Indian land currently held in Trust by the United States Government and known as a Public Domain Allotment
- Indian land currently held in Trust by the United States Government but resides in the Nevada or Arizona Jurisdiction

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