

*Copy from Carole  
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**STATE OF NEW MEXICO EXECUTIVE DEPARTMENT POLICY**  
**REGARDING TRIBAL CONSULTATION ON THE PROTECTION OF SACRED**  
**PLACES AND REPATRIATION**

**1. PURPOSE.**

Pursuant to Executive Order No. 2005-03, the following Executive Department Policy is adopted to provide the framework for an effective tribal consultation process regarding the Protection of Sacred Places and Repatriation to assure that tribal governments have a sufficient, ongoing and meaningful opportunity for productive participation in the State's planning and decision-making processes. The State of New Mexico's Executive Departments acknowledge and affirm the government-to-government relationships with Tribes, Pueblos and Nations, and commit to an active, affirmative process of (1) identifying and seeking input from and conducting meaningful consultation with tribal governments and their duly authorized tribal organizations, agencies and departments; and (2) considering tribal interests as a necessary and integral part of the State's decision-making process.

**2. DEFINITIONS.**

A. Cultural Items are defined to include:

- (1) *Funerary Objects* – means any objects that, as a part of a culture's funerary process or ceremony, are reasonably believed to have been placed with individual human remains either at the time of death, the time of burial or later, including other items exclusively made for burial purposes or to contain human remains; and both the human remains and objects are presently in a state agency or museum's possession or control or located on state or federal land;
- (2) *Sacred Objects* – means ceremonial objects that are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents; and
- (3) *Object of Cultural Heritage* – means an object having ongoing historical, traditional or cultural importance to a Tribe or culture itself, rather than property that an individual Native American owns, and which, therefore, said individual cannot alienate, appropriate or convey regardless of whether or not the individual is a tribal member, and such object shall have been considered inalienable by such Tribe at the time the object was separated from such group.

B. Cultural Property – means a structure, place, site or object having historic, archaeological, scientific, architectural or other cultural significance.

C. Executive Departments – means the Energy, Minerals and Natural Resources Department; the Environment Department; the Department of Cultural Affairs; the Department of Game and Fish; the General Services Department;

the Interstate Stream Commission; the Office of the State Engineer; the Department of Transportation and their adjunct and administratively attached agencies.

- D. Human Burial or Human Remains – means a human body or human skeletal remains and includes any funerary objects, material object or artifact buried, entombed or sepulchered with that human body or skeletal remains.
- E. Major State Action – means a significant activity performed or approved by an Executive Department that will occur on state, tribal or federal lands that could substantially alter the social, cultural or economic character of a Tribe, Pueblo or Nation's community. Significant activity includes projects partially or entirely financed with state funds, a land-use or construction project that could substantially change the way land or buildings are used or developed, or the adoption of an Executive Department program that involves a group of concerted actions to implement a specific policy or plan. Significant activity does not include projects occurring on private lands or state trust lands. Significant activity also does not include minor, ordinary, day-to-day or routine maintenance activity performed by an Executive Department, unless those activities could substantially affect a Native American burial or Native American human remains, cultural items, cultural property or sacred places or if those activities involve cultural properties protected under NMSA 1978, § 18-6-8.1 (1986).
- F. Sacred Places – means places or areas needed by traditional Native American religious leaders for the present day adherents' practice of traditional Native American religions.
- G. Tribes, Pueblos, and Nations – includes Acoma Pueblo, Cochiti Pueblo, Isleta Pueblo, Jemez Pueblo, Laguna Pueblo, Nambe Pueblo, Picuris Pueblo, Pojoaque Pueblo, Sandia Pueblo, San Felipe Pueblo, San Ildefonso Pueblo, San Juan Pueblo, Santa Ana Pueblo, Santa Clara Pueblo, Santo Domingo Pueblo, Taos Pueblo, Tesuque Pueblo, Zia Pueblo, Zuni Pueblo, the Jicarilla Apache Nation, the Mescalero Apache Tribe and the Navajo Nation.

### 3. POLICY.

- A. Instances Requiring Tribal Consultation – Where there is a reasonable likelihood that a Major State Action may affect a Native American burial or Native American human remains, cultural items, cultural property or sacred places, the Executive Department proposing such Major State Action shall notify potentially affected Tribes, Pueblos, and Nations.
- B. Information Executive Departments Shall Utilize to Determine When to Notify Tribes, Pueblos or Nations – In evaluating whether an Executive Department should notify a Tribe, Pueblo or Nation that a proposed Major

State Action may affect Native American burial or human remains, cultural items, cultural property, or sacred places, an Executive Department shall, at a minimum:

- (1) Review the State Register of Registered Cultural Properties and any relevant sections thereof, that the Department of Cultural Affairs maintains; and
- (2) Review any additional information Tribes, Pueblos and Nations may provide to the Department of Cultural Affairs that is relevant to the proposed Major State Action; and
- (3) Review any additional information Tribes, Pueblos and Nations may provide directly to the Executive Department regarding Native American human burial or human remains, cultural items, cultural property and/or sacred places.

In addition, Tribes, Pueblos and Nations shall strive to notify relevant Executive Departments of any Native American burial or human remains, cultural items, cultural property or sacred places that they seek to protect to the extent said Tribes, Pueblos and Nations are comfortable with disclosing such information.

- C. Initial Notification of Potential Tribal Consultation – An Executive Department or a Tribe shall initiate the Tribal Consultation process as early as possible to afford a meaningful period for a Tribal Consultation to occur. The process shall begin with the Executive Department's written notification to the potentially affected Tribes, Pueblos and Nations or in response to the Tribe, Pueblo, or Nation's written request to the Executive Department. The Initial Notification shall contain a reasonable description of the location and the proposed Major State Action. A Tribe, Pueblo or Nation's failure to respond to the Initial Notification of Potential Tribal Consultation within the time period the Executive Department establishes shall not be deemed the Tribe, Pueblo or Nation's acquiescence to the proposed Major State Action; provided, that if at the end of the allotted time period for a Tribe, Pueblo or Nation to respond, the Executive Department then attempts one additional notification, orally or in writing, and if the Tribe, Pueblo or Nation still does not respond, the Executive Department shall document these attempts and forward the information to the Indian Affairs Department and the Executive Department may then proceed with the proposed Major State Action and shall be deemed to have made reasonable attempts for Tribal Consultation and the Tribe, Pueblo or Nation shall not claim that consultation failed to occur. The Executive Department must make a good faith effort to notify, initiate and engage in tribal consultation. Moreover, an Executive Department cannot delegate its responsibility to notify potentially affected Tribes, Pueblos and Nations and to engage in tribal consultation to the Indian Affairs Department or any other entity. Unless otherwise agreed upon by the Tribes, Pueblos and

Nations and the Executive Departments, generally published notices and letters indicating that an Executive Department is contemplating a Major State Action and that interested parties may comment shall not be deemed sufficient notice to the potentially affected Tribes, Pueblos and Nations.

- D. Participants in the Tribal Consultation – Consultation partners must be government representatives with the authority to negotiate on behalf of their respective governments.
- E. Response to the Initial Notification of Potential Tribal Consultation – The Executive Department shall establish a reasonable time period in the written Notification of Potential Tribal Consultation for a Tribe, Pueblo or Nation to respond and to complete the Tribal Consultation that affords both adequate time for a Tribe, Pueblo or Nation to review and comment on the Executive Department's proposed Major State Action, as well as sufficient time for the Executive Department to negotiate with the Tribe, Pueblo or Nation, given the proposed Major State Action's nature and scope. In establishing such time frame, the Executive Department shall be cognizant of the Tribe, Pueblo or Nation's cultural values, administrative structure and other matters that may affect its ability to participate in the tribal consultation process. In addition, adequate time must be allowed for the Executive Department and Tribe, Pueblo or Nation to discuss the Major State Action's potential cultural, social and physical impact. Tribes, Pueblos and Nations are encouraged to use their best efforts to inform the Executive Department if they do not wish to consult on the proposed Major State Action.
- F. Tribal Consultation Process - Upon determining that a formal Tribal Consultation process is required, the participants in the Tribal Consultation shall first develop an appropriate consultation plan for the specific proposed Major State Action at issue. Such plan shall allow the affected Tribes, Pueblos or Nations a reasonable opportunity to identify concerns, articulate views on the Major State Action's anticipated effects on Tribal interests and allow the Tribes, Pueblos or Nations the ability to negotiate with the Executive Department to minimize or resolve these anticipated effects. Each Tribal Consultation process shall afford sufficient time and access so the Tribes, Pueblos or Nations may provide input before the Executive Department makes a final decision regarding the proposed Major State Action. The original time period for responding to a written Notification of Potential Tribal Consultation and for conducting the formal Tribal Consultation process may be enlarged by mutual agreement of the Tribes, Pueblos or Nations and the Executive Department, if necessary. The results of the Tribal Consultation process shall address the discovery, treatment, care, preservation, disposition or repatriation of Native American human remains, cultural items and cultural property and access to sacred places, consistent with state and federal law.

- G. Disclosure of Information during Tribal Consultation Process – There is no simple measure of the sufficiency of Tribal Consultation participants' efforts; however, during the Tribal Consultation process, the following information shall be identified:
- (1) Identification of anticipated impact, harm or disruption a proposed Major State Action could cause;
  - (2) Alternatives that would reduce or eliminate potential harm or disruptions;
  - (3) Completeness and appropriateness of the process used for the Tribes, Pueblos and Nations consulted;
  - (4) Nature of the issues raised during Tribal Consultation;
  - (5) Intensity of concern expressed;
  - (6) Relative productivity of the Tribal Consultation; and
  - (7) Any need for further consultation.
- H. Confidentiality of Information Shared during Tribal Consultation Process – To the extent permitted by the laws of the State of New Mexico, including, but not limited to the New Mexico Public Records Act, the Inspection of Public Records Act, the Open Meetings Act, and the Cultural Properties Act, each Executive Department shall protect and exhibit a high degree of respect and sensitivity regarding confidential information that the Tribes, Pueblos and Nations provide, including, but not limited to, information about sacred places and practices.
- I. Respectful Treatment of Native American Human Remains – If a Major State Action unexpectedly exposes Native American human remains in unmarked burial grounds, the full protections of state law shall be afforded, and appropriate and respectful treatment and disposition thereof shall be extended, as provided by NMSA 1978, § 18-6-11.2 (1989) and 4.10.11.11 NMAC.

#### 4. MISCELLANEOUS.

- A. Amendment – This Policy may be amended upon the mutual consent of all parties to this Agreement.
- B. Vested Property Interests – Nothing in this Policy shall be construed to require a taking of vested property interests. Nor shall this Policy be construed to impair enforceable rights to the use of state or federal lands that have been granted to third parties through government action.
- C. Limitations – This Policy is intended to improve the government-to-government relationship between Tribes, Pueblos and Nations and Executive Departments and is not intended to, nor does it create any right, benefit or legal responsibility, substantive or procedural, enforceable at

law or equity by any party against the State of New Mexico, its agencies, departments, boards, commissions, officers, employees or any person. Further, this Policy shall not be construed or applied, nor is it intended, to diminish, limit or waive any administrative or legal remedies available to a Tribe, Pueblo or Nation for challenging a Major State Action. Lastly, all applicable laws and regulations shall supersede this Policy, including any statutory or regulatory requirements or deadlines.

APPROVED AND ADOPTED this 3<sup>rd</sup> day of MARCH,  
2005:

By:   
GOVERNOR BILL RICHARDSON