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**HUALAPAI CULTURAL HERITAGE
RESOURCES ORDINANCE**

**Approved and Enacted by the
Hualapai Tribal Council,
Resolution No. 13-98,
February 18, 1998**

Summary. This ordinance establishes the Cultural Resources Department of the Hualapai Tribe; defines the Department's powers and duties; delegates authority to the Department and to the Director as head of the Department, including authority to develop rules to carry out this Ordinance; designates the Director to serve as the Hualapai Tribal Preservation Officer for purposes of the National Historic Preservation Act; directs the Department to establish a Hualapai Register of Heritage Places; authorizes appropriations from Tribal funds and establishes a cultural resources revenue account; establishes a clearance requirement for undertakings that may affect cultural resources on Hualapai Tribal lands; prohibits certain kinds of activities that may affect cultural resources; authorizes the establishment of a permit program to control activities that are prohibited unless a permit has been issued; authorizes civil and criminal penalties for the enforcement of this Ordinance; authorizes administrative appeals procedures and judicial review; and provides a limited waiver of sovereign immunity authorizing actions in Tribal Court for injunctive relief (but not for money damages) to ensure that Tribal agencies and enterprises comply with the procedural requirements of the Ordinance.

**HUALAPAI CULTURAL HERITAGE
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PART 1. GENERAL PROVISIONS

- Section 101. Title and Summary
- Section 102. Findings
- Section 103. Policy
- Section 104. Definitions
- Section 105. Severability
- Section 106. Effective Dates

PART 2. CULTURAL RESOURCES PROGRAM ADMINISTRATION

- Section 201. Cultural Resources Department
- Section 202. Director
- Section 203. Delegation of Authority
- Section 204. Cultural Resources Revenue Account
- Section 205. Archaeological Services Branch
- Section 206. Hualapai Tribal Museum
- Section 207. Advisory Team of Elders
- Section 208. Rulemaking Authority and Procedures
- Section 209. Hearings
- Section 210. Public Meetings

PART 3. PROTECTION OF CULTURAL HERITAGE RESOURCES

- Section 301. Hualapai Register of Heritage Places
- Section 302. National Register of Historic Places
- Section 303. Clearance Requirement for Undertakings
- Section 304. Prohibited Activities
- Section 305. Permit Requirements
- Section 306. Exceptions and Waivers
- Section 307. Classes of Permits
- Section 308. Permit Application Procedures
- Section 309. Suspension and Revocation of Permits

PART 4. ENFORCEMENT

- Section 401. Investigations
- Section 402. Notices of Violation
- Section 403. Cease and Desist Orders
- Section 404. Criminal Penalties
- Section 405. Trespass
- Section 406. Civil Penalties
- Section 407. Civil Forfeitures
- Section 408. Referrals to Federal and Other Authorities
- Section 409. Civil Actions in Federal Court

PART 5. APPEALS AND JUDICIAL REVIEW

- Section 501. Petitions for Relief
- Section 502. Administrative Appeal Hearings
- Section 503. Judicial Review
- Section 504. Actions To Perfect the Tribe's Title in Seized Property

PART 1. GENERAL PROVISIONS

Section 101. Title and Summary

(a) This Ordinance may be cited as the "Hualapai Cultural Heritage Resources Ordinance."

(b) This ordinance establishes the Cultural Resources Department of the Hualapai Tribe; defines the Department's powers and duties; delegates authority to the Department and to the Director as head of the Department, including authority to develop rules to carry out this Ordinance; designates the Director to serve as the Hualapai Tribal Preservation Officer for purposes of the National Historic Preservation Act; directs the Department to establish a Hualapai Register of Heritage Places; authorizes appropriations from Tribal funds and establishes a cultural resources revenue account; prohibits certain kinds of activities that may affect cultural resources; authorizes the establishment of a permit program to control activities that are prohibited unless a permit has been issued; authorizes civil and criminal penalties for the enforcement of this Ordinance; authorizes administrative appeals procedures and judicial review; and provides a limited waiver of sovereign immunity authorizing actions in Tribal Court for injunctive relief (but not for money damages) to ensure that Tribal agencies and enterprises comply with the procedural requirements of the Ordinance.

Section 102. Findings

The Tribal Council of the Hualapai Tribe finds and declares that:

(a) The spirit and direction of the Hualapai Tribe are founded upon and reflected in its cultural heritage;

(b) The cultural heritage of the Hualapai Tribe must be preserved as a living part of community life and development and of the spiritual and religious life of the Hualapai Tribe;

(c) Many cultural resources which hold significance for the Hualapai Tribe, both within the boundaries of the Hualapai Indian Reservation and on other lands traditionally used by the Tribe, have been damaged or destroyed, sometimes inadvertently and sometimes intentionally;

(d) Preserving and caring for cultural resources will provide cultural, educational, aesthetic, inspirational, spiritual and economic benefits for current and future generations of the Hualapai Tribe;

(e) In light of the increasing pace of activities and projects that can adversely affect cultural resources (such as economic development projects, sanitation and public health developments, road building and housing construction), present governmental programs, tribal and non-tribal, to preserve the Hualapai Tribe's cultural resources are inadequate and do not ensure that future generations will have a genuine opportunity to appreciate and enjoy the rich heritage of the Hualapai Tribe;

(f) Increased knowledge about Hualapai cultural resources, along with the establishment of better means of identifying and fostering the preservation of cultural resources, will improve the planning processes used by tribal, federal, state and other government agencies and will facilitate the expeditious implementation of economic development projects;

(h) Although the federal and state government agencies have played major roles in cultural resource preservation, and both these levels of government must continue to play their proper roles, it is essential that the Hualapai Tribe expand and accelerate its cultural resource preservation programs and activities;

(i) The Tribal Council possesses the authority to enact legislation to establish programs to preserve cultural resources as an aspect of the inherent sovereignty of the Hualapai Indian Tribe, in accordance with Article V of the Constitution of the Hualapai Indian Tribe;

(j) The inherent sovereignty of Indian tribes to enact legislation for the preservation of cultural resources is recognized in federal law, including statutes such as the Archaeological Resources Protection Act, National Historic Preservation Act, and Native American Graves Protection and Repatriation Act;

(k) Under international human rights law, the Hualapai Tribe has the right to maintain its cultural integrity, and the enactment of tribal legislation to preserve cultural resources is a critical step that the Tribal Council can take to maintain the cultural integrity of the Hualapai Tribe.

Section 103. Policy

It shall be the policy of the Hualapai Tribe to:

(a) Preserve and manage cultural resources in ways that contribute to meeting the social, environmental, spiritual, economic and other needs of present and future generations;

(b) Cooperate with other Indian tribes, federal and state agencies, private organizations and individuals in the preservation and management of cultural resources;

(c) Provide leadership and technical assistance in the preservation, protection, and conservation of cultural resources by building an exemplary cultural resources management program, by sponsoring educational programs for the general public and training programs for tribal employees, by consulting and cooperating with other governmental agencies, and by making contributions to academic journals and other appropriate publications;

(d) Administer cultural resources that are within the jurisdiction or control of the Hualapai Tribe in a spirit of stewardship and for the inspiration of present and future generations;

(e) Recognize, support, and perpetuate the traditional stewardship by Hualapai people of cultural resources which are significant for Hualapai cultural heritage and which are located on lands traditionally used by Hualapai people but not currently within the territorial jurisdiction of the Hualapai Tribe;

(f) With respect to cultural resources that are not within the jurisdiction or control of the Hualapai Tribe but which are significant for Hualapai cultural heritage, to encourage those governmental agencies that do have jurisdiction and other entities that have control to manage such resources in a spirit of stewardship and for the inspiration of present and future generations of Hualapai and non-Hualapai people;

(g) Encourage the preservation and use of historic buildings and structures located within the Hualapai Indian Reservation.

Section 104. Definitions

The following definitions apply for purposes of this Ordinance and rules issued by the Director to carry out this Ordinance. Rules issued by the Director may clarify the definitions in this section and may include definitions for additional terms, *provided* that any such additional definitions shall be generally consistent with the use of such terms in federal cultural resources law and *provided* that any intentional minor differences in the use of such terms shall be explained in the rules.

(a) "Advisory Team of Elders" means the group of Hualapai elders established pursuant to Section 207 of this Ordinance.

(b) "Archaeological resources" means any material remains of human life or activities which are at least 100 years of age and which are of archaeological interest, as further clarified in federal regulations (43 C.F.R. § 7.3(a)); *provided*, for purposes of this Ordinance the term does not include human remains and funerary objects.

(c) "Cultural resource" means any product of human activity or any object or place given significance by human action or belief. Places that may be cultural resources include building and other structures, landforms, archaeological sites, traditional cultural properties, and districts that are eligible, or potentially eligible, for listing on the Hualapai Register of Heritage Places or the National Register of Historic Places. Objects that may be cultural resources include artifacts and other physical remains of human activity, natural objects given significance by human action or belief, human remains and "cultural items" as defined in the Native American Graves Protection and Repatriation Act (funerary objects, sacred objects and objects of cultural patrimony), and archaeological resources. Objects may be eligible for the Hualapai Register of Heritage Places or the National Register of Historic Places if they are in some way connected to a specific place.

(d) "Department" or "CRD" means the Hualapai Tribal Cultural Resources Department created by Section 201 of this Ordinance.

(e) "Director" means the duly appointed Director of the Hualapai Tribal Cultural Resources Department.

(f) "Hualapai Register" means the Hualapai Register of Heritage Places established pursuant to Section 301 of this Ordinance.

(g) "Hualapai traditional use lands" means all lands historically or traditionally used by the Hualapai people, *except* for those lands that are currently within the boundaries of the Hualapai Indian Reservation or otherwise included in the term "Hualapai tribal lands" as used in this Ordinance.

(h) "Hualapai tribal lands" means all lands over which the Hualapai Tribe has jurisdiction, including all land within the exterior boundaries of the Hualapai Indian Reservation and all other Hualapai Indian country, as that term is defined in 18 U.S.C. § 1151.

(i) "Heritage resource" or "heritage property" means any cultural resource or property that has been determined eligible for listing in the Hualapai Register of Heritage Places.

(j) "Indian" or "Indian person" means any enrolled member of a federally-recognized Indian tribe and any other person who is considered an Indian for purposes of the Indian Civil Rights Act (25 U.S.C. § 1301(4)) and criminal jurisdiction under the federal Major Crimes Act (18 U.S.C. § 1153).

(k) "National Register" means the National Register of Historic Places established pursuant to the National Historic Preservation Act and administered by the National Park Service (36 C.F.R. parts 60, 63).

(l) "Repatriation" means the expeditious return to the Hualapai Tribe of human remains, cultural items and other objects possessed or controlled by persons and entities other than the Tribe and its members. In the event that the Hualapai Tribe comes into possession or control of items to which other tribes or individuals have rights of ownership or control, the term also means the expeditious return of such items to such tribes or persons.

(m) "Responsible agency official" means the official of a federal, tribal or state agency who has decision making authority over a particular undertaking proposed, or under consideration, by such an agency.

(n) "Responsible person" means the individual in private capacity or official in a non-governmental organization who has decision making authority over a particular undertaking.

(o) "State Historic Preservation Officer" or "SHPO" means the officer or state government agency charged under state law with responsibility for administering a state historic preservation program.

(p) "Traditional cultural place" or "traditional cultural property" means, as defined by the National Park Service in National Register Bulletin 38, a place that is eligible for the National Register because of its association with cultural practices or beliefs of a living community that are rooted in that community's history and are important in maintaining the continuing cultural identity of the community. As used in this Ordinance this term also includes such a place if it

has been determined eligible for the Hualapai Register regardless of whether or not it has been determined eligible for the National Register.

(q) "Tribal Environmental Review Commission" or "TERC" means the Commission established pursuant to the Hualapai Environmental Review.

(r) "Undertaking" means:

(1) an "undertaking" as defined in the National Historic Preservation Act (16 U.S.C. § 470w(7)): "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including:

"(A) those carried out by or on behalf of a Federal agency;

"(B) those carried out with Federal financial assistance;

"(C) those requiring a Federal permit, license, or approval; and

"(D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency"; and

(2) Any project, activity or program carried out under the authority of, or with permission from, an agency, enterprise or other entity created by the Hualapai Tribe, including any "development" for which a permit is required under the Hualapai Environmental Review Code, regardless of whether or not there is federal agency involvement sufficient to bring the project, activity or program within the coverage of paragraph (1) of this definition, *provided* that the Director, through the issuance of rules, may establish procedures to avoid the application of this term to projects, activities and programs that do not have the potential to result in changes in the character and use of cultural resources.

(3) The Director, through the issuance of rules, may establish that certain kinds of actions are "exempted categories" which generally shall not be treated as "undertakings" for purposes of this Ordinance based on a determination that the potential effects on cultural resources of undertakings within any such category are foreseeable and likely to be minimal. The Director's rules for exempted categories shall include a procedure for determining, for a particular action that fits within an exempted category, whether the particular action may affect cultural resources, and, if such a determination is made, the action shall be treated as an "undertaking." Actions that would otherwise be treated as "undertakings" under paragraph (1) of this definition may be included in exempted categories only to the extent that such treatment is authorized by the Advisory Council on Historic Preservation, through the Council's regulations or pursuant to an agreement between the Council and the Tribe.

Section 105. Severability

If any portion of this Ordinance or the application thereof to any person, court or circumstances is held invalid by a Hualapai or federal court, the invalidity shall not affect other provisions of this Ordinance which can be given effect without the invalid provisions or application and to this end, the provisions of this Ordinance are severable.

Section 106. Effective Dates

The permit requirements in Part 3 of this Ordinance become effective on the date that rules to establish a permit program, issued pursuant to Section 208, become effective. All other provisions of this Ordinance become effective upon enactment by the Tribal Council.

PART 2. CULTURAL HERITAGE RESOURCES PROGRAM ADMINISTRATION

Section 201. Cultural Resources Department

(a) *Establishment.* The Hualapai Tribal Cultural Resources Department (hereafter referred to as "Department" or "CRD") is hereby established, by elevating the subdivision of Tribal Government previously known as the Office of Cultural Resources to the status of a Department.

(b) *Mission.* The Department shall be the Hualapai Tribe's lead agency for the identification, protection, preservation and management of cultural resources within Hualapai tribal lands and Hualapai traditional use lands.

(c) *Programs.* The Department shall develop and administer all programs necessary to achieve the purposes of this Ordinance, consistent with direction from the Tribal Council and Tribal Administration, including programs to:

(1) Advise the Hualapai Tribal Council, the TERC, and other departments, programs, authorities, enterprises, and other instrumentalities of the Hualapai Tribe, federal, state and local government agencies, private organizations and individuals on matters pertaining to the cultural resources in order to achieve the purposes of this Ordinance on Hualapai tribal lands and on Hualapai traditional use lands;

(2) Assume certain functions of the State Historic Preservation Officer on Hualapai tribal lands as provided by agreement with the National Park Service, coordinate with the SHPO with respect to those functions not assumed, and advise the Tribal Council regarding the desirability of assuming additional SHPO functions;

(3) Represent the Tribe in consultations with federal agencies and the SHPO for cultural resources located on Hualapai traditional use lands;

(4) Enter into interagency memoranda of agreement (MOAs) and programmatic agreements (PAs) to facilitate and advance the purposes of this Ordinance;

(5) Compile, update and maintain a cultural resources data base for Hualapai Tribal lands and Hualapai traditional use lands, including but not limited to the development of the Hualapai Register of Heritage Places;

(6) Provide appropriate education to the public (Hualapai and non-Hualapai) regarding the importance of preservation, protection and management of the cultural resources on Hualapai Tribal lands and Hualapai traditional use lands;

(7) Protect Hualapai cultural resources on Hualapai tribal lands by enforcing the prohibitions and administering the permit requirements of Part 3 of this Ordinance;

(8) Seek the repatriation of human remains and cultural items from federal agencies and "museums" (as that term is defined in the Native American Graves Protection and Repatriation Act) and other persons and establish procedures, in consultation with the Advisory Team of Elders, for determining the appropriate disposition of repatriated items;

(9) Manage collections of cultural resources excavated from Hualapai tribal lands and Hualapai traditional use lands; and

(10) Prepare a Cultural Resources and Historic Preservation Plan for the Hualapai Indian Tribe and provide a copy of this Plan to the Tribal Administration and the Tribal Council

on an annual basis, accompanied by a brief report summarizing the Department's accomplishments during the preceding year and issues that merit consideration by the Tribal Administration and the Tribal Council.

(d) *Appropriations and Funding.* This Ordinance authorizes such appropriations from tribal funds as the Tribal Council may from time to time provide. In addition, the Department is authorized to seek and obtain the funds necessary to support the Department's programs from all appropriate sources, and to establish a Cultural Resources Revenue Account pursuant to Section 204 of this Ordinance. Under the supervision of the fiscal accounting department of the Hualapai Tribe, the Director will manage and supervise the Department in the expenditure of funds to achieve its mission and carry programs under this ordinance.

Section 202. Director

(a) *Executive Direction.* The Department shall be supervised by the Director (hereinafter referred to as "Director" or "CRD Director"), who shall be hired and compensated in accordance with Hualapai Tribal Personnel Policies and Procedures. The Director shall report directly to the Hualapai Tribal Administration and Tribal Council.

(b) *Responsibilities.* The Director shall have the overall responsibility for carrying out this Ordinance. Specific responsibilities of the Director shall include, but not be limited to, the following:

(1) Serve as the Hualapai Tribal Preservation Officer for purposes of the National Historic Preservation Act;

(2) Serve as the agent of the Tribe for receiving notice to the Tribe in matters relating to cultural resources and, subject to other provisions of this Ordinance, for signing documents relating to cultural resources, *provided* that the Director shall consult with the Tribal Chairperson to determine whether the express approval of the Tribal Chairperson or the Tribal Council would be necessary or advisable for any particular document which the Director proposes to sign on behalf of the Tribe;

(3) Consult, coordinate, and negotiate agreements with other Hualapai tribal agencies and entities, including but not limited to the TERC, and with state agencies, federal agencies, and agencies of other Indian tribes regarding cultural resources;

(4) Serve as a representative of the Department and, if appropriate, the Tribe in any action in any court or any administrative proceeding involving the validity or enforcement of this Ordinance or involving other legal matters relating to cultural resources;

(5) Review undertakings and administer a permit program pursuant to Part 3 of this Ordinance;

(6) Develop, in consultation with the Advisory Team of Elders, plans and programs to protect and preserve the cultural resources of the Hualapai Tribe;

(7) Seek funding from appropriate sources and negotiate and administer grant and contractual agreements to ensure that the obligations assumed by the Department in such agreements are carried out;

(8) Establish a program to oversee the quality of cultural resources work carried out pursuant to permits issued under Part 3 of this Ordinance and to monitor the quality of

similar work carried out on Hualapai traditional use lands pursuant to permitting authority of other governmental agencies;

(9) Develop and maintain Departmental archives containing records, publications, and other material relating the cultural heritage of the Hualapai Tribe; and

(10) Develop and issue rules and other formal policy statements and guidance documents to carry out this Ordinance, in accordance with Section 208.

Section 203. Delegation of Authority

The Tribal Council hereby delegates to the Department and to the Director the authority necessary to carry out this Ordinance, subject to such review and oversight as the Tribal Council chooses to exercise.

Section 204. Cultural Resources Revenue Account

The Department is authorized, in cooperation with the fiscal accounting department of the Tribe, to establish a Cultural Resources Revenue Account. All revenue from sources such as contracts, cooperative agreements, and grants shall be deposited into this account for disposition in accordance with the terms of such contracts, cooperative agreements, and grants. Revenue from fees, fines, civil penalties, civil forfeitures and other sources under this Ordinance shall be deposited into this account and shall be expended in accordance with Hualapai Tribal budgetary procedures to help achieve the purposes of this Ordinance.

Section 205. Archaeological Services Branch

The Director is authorized to establish an Archaeological Services Branch within the Department to provide or arrange for archaeological services for other departments of tribal government, tribal enterprises, and the private sector, and to charge reasonable fees to cover the costs of providing such services. If, in the Director's judgment, it would be preferable for the Tribal Council to create a separate subdivision of tribal government or some other entity to provide archaeological services, the Director shall provide recommendations to the Tribal Council.

Section 206. Hualapai Tribal Museum

(a) The Director is authorized to develop plans to establish a Hualapai Tribal Museum. The Museum shall be established only after these plans have been developed and presented to the Tribal Council and when secure funding for the Museum's establishment and operation have been identified.

(b) There is hereby established a Museum Development Account into which funds raised for the purposes of development and operation of the Museum shall be deposited. These funds

shall remain available in this account until they are appropriated and expended for the purposes of developing and/or operating the Museum.

(c) Unless otherwise provided by the Tribal Council, the Museum shall be managed by a Curator-Manager, who shall report to the Director, in accordance with Hualapai tribal personnel policies and procedures.

Section 207. Advisory Team of Elders

(a) In carrying out their responsibilities under this Ordinance, the Director and the employees of the Department shall be guided by the wisdom and expertise of an Advisory Team of Elders.

(b) Upon enactment of this Ordinance the Director, in consultation with the members of the Interim Advisory Team of Elders described in paragraph (e) of this section, shall develop:

- (1) A Policy Statement on the Roles and Responsibilities of the Advisory Team of Elders; and
- (2) A Procedure for Appointments to the Advisory Team of Elders.

(c) In addition to such other roles and responsibilities as the Director determines are appropriate for the Advisory Team of Elders, this Team also shall perform a role similar to that performed by a State Review Board under regulations issued by the National Park Service regarding nominations of properties to the National Register of Historic Places. (36 C.F.R. parts 60, 61).

(d) The Policy Statement and Procedure for Appointments shall take effect upon approval by the Tribal Council.

(e) An initial Advisory Team of Elders was established by the Office of Cultural Resources in 1992, with concurrence of the Tribal Council, and this Team shall remain in effect until a new Team is appointed pursuant to the Policy Statement and Procedure for Appointments.

(f) The Policy Statement may include provisions for the payment of compensation to the members of the Advisory Team of Elders for their service to the Tribe in this capacity.

Section 208. Rulemaking and Other Policy Documents

(a) *Rulemaking Authority.* The Director is authorized to issue rules to carry out this Ordinance. For some provisions of this Ordinance, the issuance of rules is mandatory: the Ordinance expressly requires the Director to issue rules, and those provisions cannot be carried out until rules have been issued. In addition, the Director is authorized to issue rules to carry out other provisions of this Ordinance if, in the Director's judgment, rules would be advisable to help clarify the Ordinance and to provide guidance to the affected public.

(b) *Rulemaking Procedure.* The development of rules is intended to be a process in which persons whose interests will be affected by the rules have an opportunity to understand how the rules will affect their interests and to make their views known. The Director is responsible for ensuring that, unless the expedited procedure in paragraph (d) of this section applies, the following steps are taken:

(1) A proposed rule shall be made available to the public, including an explanation of the rule in plain language. A notice of the availability of the proposed rule shall be posted at the office of the Tribal Chairperson and may be published in local newspapers and mailed to persons known to be interested in the rule.

(2) A comment period of forty-five (45) days shall be provided during which interested persons may file written comments on the proposed rule.

(3) A final rule shall be made available to the public, which shall include a summary of comments received and a brief discussion of the Director's response to comments received, although the Director need not respond to every point raised in the comments. A notice of the availability of the final rule shall be posted at the office of the Tribal Chairperson.

(4) A final rule shall be placed on the agenda for a scheduled meeting of the Tribal Council and shall become effective upon approval by the Tribal Council or upon the Council taking no action on the rule for thirty (30) days after the first Council meeting for which the rule was included on the agenda, unless the Council otherwise provides through resolution.

(c) *Additional Procedures for Rulemaking.* The Director may use additional methods to inform the public and seek the views of concerned persons, such as informal community meetings and more formal public hearings. If the Council, through resolution or ordinance, imposes additional procedural requirements that clearly are intended to apply to rulemaking under this Ordinance, the Director shall comply with such requirements.

(d) *Procedures, Standards, Guidelines and Policy Statements.* The Director may develop, adopt, and carry out various kinds of policy and guidance documents other than rules that the Director deems necessary or advisable to carry out this Ordinance. Such document may include procedures, standards, guidelines and policy statements. Unless specifically required by this Ordinance or by other formal action of the Tribal Council, such documents generally do not require Tribal Council approval before taking effect. The Director shall provide a copy of any such document to the Tribal Council.

Section 209. Hearings

The Director is authorized to hold legislative hearings as part of the rulemaking process, administrative hearings on permit applications and appeals, and enforcement hearings on alleged violations of this Ordinance.

(a) *Rulemaking hearings.* In developing rules, the Director may hold a hearing in which Hualapai tribal members and others who may be affected by rules to be developed are given the opportunity to express their views. Notice of rule-making hearings shall be provided at least thirty (30) days prior to the date of the hearing and the text of the proposed rules, with explanatory materials, also shall be made available to the public at least thirty (30) days prior to the date of the hearing.

(b) *Administrative hearings.* When considering whether to approve an application for a permit pursuant to Part 3 of this Ordinance, the Director generally will make the initial decision based upon the written application. The Director is authorized to hold administrative hearings to gather information to be used in making the initial permit decision. The Director shall hold an administrative hearing when an affected party has requested review of a permit decision pursuant to Section 502 of this Ordinance. In an administrative hearing, the burden is on the applicant to demonstrate to the Director that the issuance of a permit would be consistent with the Ordinance and the Department's rules. A written transcript shall not be required, but the applicant shall be entitled to a written decision. The Director shall issue rules establishing procedures for administrative hearings.

Section 210. Public Meetings

The Director is authorized to hold public meetings whenever doing so would help carry out the policies of this Ordinance. Public meetings generally are less formal than public hearings and do not require the preparation of a transcript or other record. Public meetings can be used to encourage community involvement in the rulemaking process or to inform the public about the Hualapai cultural heritage resources program or for any other worthwhile purpose in the judgment of the Director.

PART 3. PROTECTION OF CULTURAL HERITAGE RESOURCES

Section 301. Hualapai Register of Heritage Places

(a) *Creation of the Register.* The Director shall create, expand, maintain and administer a Hualapai Tribal Register of Heritage Places (hereinafter referred to as the "Hualapai Register") comprising places, buildings, districts, objects, and structures significant in Hualapai history, culture, archaeology, engineering, and architecture. The Director shall issue rules to establish criteria for eligibility and procedures for determining eligibility and nominating places to be listed on the Hualapai Register. Eligibility for the Hualapai Register shall not be limited to places that are located on Hualapai Tribal lands but, rather, may also include places located on Hualapai traditional use lands.

(b) *Inventory, Evaluation, and Registration.* The Director shall establish a program to locate, inventory and evaluate cultural resources on Hualapai tribal lands and Hualapai traditional use lands. In accordance with rules issued pursuant to paragraph (a) of this Section, upon a determination that a place is eligible for the Hualapai Register, the Director may formally add the place to the Register or the Director may maintain a separate listing of places that have been determined eligible but have not been formally listed.

(c) *Advisory Team of Elders.* The rules issued by the Director pursuant to paragraph (b) shall include a procedure through which the Director shall consult with the Advisory Team of Elders in determining whether any particular place is eligible for the Hualapai Register and, if it is eligible, whether or not it should be formally listed. The consultations leading up to such determinations may be closed to the public if, in the judgment of the Director or the Advisory Team of Elders, confidentiality is advisable to protect the cultural resources at issue and the traditional uses of such resources by tribal members, *provided* that members of the Tribal Council and persons designated by them may participate in such consultations. In the event of a disagreement between the Director and the Advisory Team of Elders, the Director shall defer to the judgment of the Advisory Team of Elders and issue a determination for the Department .

(d) *Appeals.* A determination by the Director on the eligibility of a place for the Hualapai Register may be appealed pursuant to Section 503.

Section 302. National Register of Historic Places

(a) *Inventory, Evaluation, and Nomination.* The Director shall establish a program to locate, inventory and evaluate cultural resources on Hualapai tribal lands and Hualapai traditional use lands that appear to be eligible for the National Register of Historic Places, and to determine whether such properties should be formally nominated to the National Register. In establishing and carrying out this program, the Director shall consider (1) places that are eligible for ~~the~~ both the Hualapai Register and the National Register, and (2) places that are eligible for the National Register but which are not significant in Hualapai history, culture, archaeology, engineering, and architecture and thus are not eligible for the Hualapai Register.

(b) *Advisory Team of Elders.* The program established by the Director shall include a role for the Advisory Team of Elders similar to that performed by State Review Boards in regulations issued by the National Park Service governing nominations to the National Register (36 C.F.R. part 60).

(c) *Appeals.* Determinations by the Director to nominate a property to the National Register, or not to nominate a property, may be appealed to the Keeper of the National Register in accordance with regulations issued by the National Park Service (36 C.F.R. part 60). Such determinations shall *not* be subject to appeal or judicial review pursuant to Sections 503 and 504 of this Ordinance.

Section 303. Clearance Requirement for Undertakings

(a) *Clearance Requirement.* Before carrying out any undertaking that may affect cultural resources located on Hualapai tribal lands, the responsible agency official or responsible person proposing the undertaking must provide the Director with a reasonable opportunity to review the undertaking and determine the effects the undertaking is likely to have on cultural properties. The undertaking shall not proceed unless and until the Director has given the responsible agency official or responsible person written clearance to proceed. Such written clearance may include mitigation measures, which shall be binding on the responsible agency official or responsible person.

(b) *Relationship to Environmental Review Code.* If the undertaking constitutes "development" under the Hualapai Environmental Review Code, the responsible agency or responsible person proposing the undertaking must apply to the Tribal Environmental Review Commission (TERC) for a permit, pursuant to the requirements of the Environmental Review Code. The TERC will consult with the Director regarding the effects the undertaking is likely to have on cultural resources and will include in the permit any conditions required by the Director.

(c) *Discovery Situations for Development under a TERC Permit.* If cultural resources are discovered during the course of development pursuant to a TERC permit, the TERC will consult with the Director regarding such cultural resources and will include any modification to the permit required by the Director. Depending on the likely effects that the undertaking may have on such cultural resources, the TERC may consider suspending or revoking the permit, subject to the procedural protections of notice and hearing provided in Section 309 of this Ordinance and the judicial review provision of Section 503.

(d) *Procedure.* The Director is authorized to issue rules to carry out the consultation requirement of this Section. In these rules the Director may provide that certain kinds of activities that normally do not adversely affect cultural resources may be excluded from the clearance requirement or may be addressed through programmatic agreements with responsible agencies. In the absence of rules issued by the Director, the procedure for conducting this consultation shall follow the procedure set out in the regulations issued by the Advisory Council on Historic Preservation for the Section 106 consultation process under the National Historic Preservation Act (36 C.F.R. part 800), with the Director performing the role of the SHPO, *provided*, that, as provided in paragraph (a) of this Section, unless and until the Director issues

clearance, the responsible agency official or responsible person cannot lawfully proceed with an undertaking.

(e) *Relationship to Permit Requirements.* The clearance requirement established by this Section is in addition to any permit requirements pursuant to Section 305 of this Ordinance, or pursuant to the Hualapai Environmental Review Code, that may also apply. For many kinds of undertakings it may be necessary to obtain one or more permits under Section 305 in order to gather sufficient information to make final plans for the undertaking and/or to adequately mitigate adverse effects on cultural resources prior to seeking clearance from the Director for the undertaking itself.

(f) *Hearings and Appeals.* If the Director denies clearance for an undertaking, the person or agency proposing the undertaking may request a hearing pursuant to Section 502 of this Ordinance. Any final decision made by the Director is subject to judicial review pursuant to Section 503 of this Ordinance.

Section 304. Prohibited Activities

The prohibitions in this Section apply to cultural resources located on or within Hualapai Tribal lands.

(a) No person or agency shall carry out an undertaking without first obtaining clearance from the Director, or a permit from the Tribal Environmental Review Commission, as the case may be, pursuant to Section 303 of this Ordinance.

(b) No person shall disturb, take, excavate, remove, damage, destroy, desecrate or alter any cultural resource or conduct any investigation relating to any cultural resource, or make an exploratory excavation to determine the presence of any cultural resource without first obtaining a permit from the Director pursuant to this Ordinance, or a permit from the TERC, as the case may be, unless an exemption from the permit requirement applies.

(c) No person shall sell, purchase, exchange, transport, receive, or offer to sell, purchase, exchange or transport any cultural resource in violation of:

- (1) the prohibitions in paragraph (b) of this Section;
- (2) the conditions of any permit issued pursuant to tribal or federal law; or
- (3) any rule, ordinance or other provision of tribal or federal law in effect at the time of the prohibited conduct.

(d) No person shall conduct ethnological or archeological studies without first obtaining a permit pursuant to this Ordinance, unless an exemption applies.

(e) No person who is not a tribal member shall conduct historical, cultural or other research, oral or written, scientific or non-scientific, or make recordings of any kind, regardless of the technology used, without first obtaining a permit pursuant to this Ordinance.

(f) Any person who receives a letter of inquiry from the Director pursuant to Section 401 of this Ordinance shall respond truthfully within the time specified in such letter; any person who gives false information in response to a letter of inquiry is in itself a violation of this Ordinance.

Section 305. Permit Requirements

Any person, other than a person who is exempt from permit requirements by Section 306 of this Ordinance, proposing to visit or inspect cultural resources, undertake cultural resources inventory, alter, collect, excavate, or remove cultural resources or engage in ethnographic research, or to conduct any other activity that would otherwise be prohibited by Section 304, shall apply to the Director for a Hualapai Tribal Cultural Resources Permit, or to the TERC for a Development Permit, as the case may be. As provided in Section 308, the Director shall issue rules to establish permit application procedures.

Section 306. Exceptions and Waivers

(a) The prohibition against, and permit requirement for, visitation of cultural resources shall not apply to enrolled members of the Hualapai Tribe or to Hualapai tribal employees engaged in properly authorized official activities.

(b) The prohibition against, and permit requirement for, alteration, collection, disturbance, excavation or removal of cultural resources or for the conduct of ethnographic research does not apply to:

- (1) Hualapai tribal members engaging in activities directly related to the practice of traditional Hualapai religion or traditional cultural practices.
- (2) Tribal employees engaged in properly authorized official business, relating to cultural resource management approved in accordance with rules and/or guidance documents issued by the Director.

(c) The Director may waive otherwise applicable permit requirements on a case-by-case basis to allow access to cultural resources by traditional practitioners from other Indian tribes.

(d) The Director may waive otherwise applicable permit or clearance requirements on a case-by-case basis in the event of an emergency or natural disaster.

(e) *Persons Not Excepted.* Employees of federal or state agencies are not excepted from the permit requirement. In addition, persons serving as agents for the Hualapai Tribe who are not employees of the Tribe (such as consultants, advisors, and others who provide services under contract), are not exempt from the permit requirements of this Ordinance. Through the issuance of rules, the Director may establish expedited procedures for such persons to obtain permits.

Section 307. Classes of Permits

(a) There shall be four classes of permits.

(1) Class A permits shall be issued for activities involving casual visitation and inspection of cultural resources. Class A permits may also be issued to traditional practitioners who are members of other Indian tribes in the event that such persons choose to apply for a permit rather than to ask the Director for a waiver of the permit requirement.

(2) Class B permits shall be issued for cultural resources inventory activities involving no disturbance of the cultural resources.

(3) Class C permits shall be issued for cultural resources investigations involving alteration, collection, excavation, removal or any disturbance of cultural resources. If expressly authorized, a Class C permit may allow the excavation of human remains. It is the intent of the Tribal Council that the issuance of a Class C permit will eliminate the need for tribal members and tribal employees to obtain a permit from the Bureau of Indian Affairs under the Archaeological Resources Protection Act (ARPA). In issuing rules to establish a program for issuing Class C permits, the Director shall ensure that the tribal permit program is adequate to eliminate, to the extent possible, the otherwise applicable requirement to obtain an ARPA permit and, to the extent that eliminating the ARPA permit requirement is not possible, to expedite compliance with the requirements of ARPA.

(4) Class D permits shall be issued for activities involving research into the cultural resources of the Hualapai Tribe, including ethnographic, historical, cultural or other research. Any form of recording that results from any such research must conform to the terms and conditions of a permit.

(b) Permits shall normally only be issued on a case-by-case basis, except that Indian preference firms may be granted blanket Class B permits. The Director may waive this requirement and issue blanket permits whenever he or she finds that the issuance of a blanket Class B permit would be in the best interests of the Hualapai Tribe.

(c) Permits normally shall not be issued for a period of more than twelve months, except when longer periods are required to allow for the completion of a single project. In rules for permit programs under this Ordinance, the Director is authorized to establish other categories in which a permit may be issued for a period of longer than twelve months.

Section 308. Permit Application Procedures

(a) *Rules.* The Director shall establish procedures for permit applications through the issuance of rules. When such rules have been adopted, the Director may issue a permit to any qualified person, subject to appropriate terms and conditions, and subject to the full payment of any permit fees assessed by the Director.

(b) *Fees.* The rules shall include an appropriate schedule of fees for the various classes of permits, and may provide for the Director to grant a waiver of fees in appropriate cases. The Director shall reconsider the fee schedule on a periodic basis, at least every three years, and may revise the schedule whenever in his or her judgment revisions are warranted, provided that any change in the fee schedule must be accomplished through rulemaking in accordance with Section 208.

(c) *Special Provisions for Class C Permits.* In issuing rules for Class C permits, the Director shall take into consideration the requirements for permits under the Archaeological Resources Protection Act (43 C.F.R. part 7, 25 C.F.R. part 262), in order to ensure that a tribal permit is adequate to eliminate the need for an ARPA permit to the extent possible and, in circumstances in which an ARPA permit is required, to expedite ARPA compliance.

(d) *Hearings and Appeals.* If an application for a permit is granted or denied without a hearing, the applicant or any interested person may request a hearing from the Director pursuant to Section 502. Final decisions made by the Director are subject to judicial review pursuant to Section 503.

(e) *Relationship to Environmental Review Code.* The issuance of any permit pursuant to this Ordinance shall not constitute "development" under the Hualapai Environmental Review Code and shall not require a development permit; rather, the issuance of a permit under this Ordinance, if required for a development project, will be required prior to the consideration of an application for a development permit by the Tribal Environmental Review Commission.

Section 309. Suspension and Revocation of Permits

(a) *Suspension or Revocation for Cause.*

(1) The Director may suspend a permit for cause upon determining that the permit holder has failed to meet a term or condition of the permit or has violated any prohibition of this Ordinance or the rules issued to carry out this Ordinance.

(2) The Director may revoke a permit for cause upon determining that:

- (A) The permit holder has failed to correct the situation that led to the suspension of the permit within the time specified in the notice of suspension;
- (B) The permit holder has been convicted of a criminal violation of this Ordinance or of other tribal or federal law in a matter directly related to the activities covered by the permit;
- (C) A civil penalty has been assessed against the permit holder pursuant to this Ordinance or pursuant to other tribal or federal law in a matter directly related to the activities covered by the permit; or

- (D) The permit holder has engaged in activities that would be grounds for the suspension of a permit, and the permit holder has previously had a permit suspended for cause.

(b) *Suspension or Revocation Without Fault.* The Director may suspend or revoke a permit for reasons not relating to the conduct of the permit holder upon determining that continuation of work under a permit would not be in the best interests of the Hualapai Tribe or would be in conflict with legal requirements or land management policies not in effect when the permit was issued. Such a suspension or revocation is made without liability to the Hualapai Tribe, its employees and agents. Such a suspension or revocation shall not prejudice the ability of the permit-holder to hold or obtain other permits.

(c) *Notice of Hearing.* The Director shall provide written notice to the permit holder of the suspension or revocation, the cause of the suspension or revocation and, in the case of a suspension, the requirements that must be met before the suspension will be lifted. The permit holder may request a hearing before the Director after issuance of the initial decision regarding the suspension or revocation. Such hearing shall be held within 30 days after receipt of the written request, or as soon thereafter as reasonably practical. The Director may affirm, modify or reverse his initial decision based upon the evidence presented at the hearing.

(d) *Effective Date.* Suspension of a permit shall be effective immediately unless a later date is specified in the notice of suspension. Revocation of a permit shall be effective 30 days after issuance of the notice of revocation, unless a later date is specified. If the permit holder requests a hearing, then: (1) an order of suspension shall remain in effect pending the final determination by the Director on appeal, unless the Director in his sole discretion orders otherwise; (2) an order of revocation, if upheld, shall be effective thirty (30) days after the final determination by the Director on appeal.

PART 4. ENFORCEMENT

Section 401. Investigations

The Director is authorized to investigate compliance with permits issued pursuant to this Ordinance and to investigate activities that are being carried out without a permit in possible violation of this Ordinance. As part of an investigation, the Director may serve any person with a letter of inquiry. Any such letter of inquiry shall inform the person to whom it is addressed that: answers must be provided to the Director within 60 days; failure to respond may result in the imposition of civil penalties; information provided may be used in law enforcement proceedings; and giving false information is in itself a violation of this Ordinance.

Section 402. Notices of Violation

(a) If the Director has reason to believe that a violation of this Ordinance has occurred, or is occurring, the Director is authorized to issue a Notice of Violation to the person(s) apparently responsible for the violation. If the apparent violation occurred, or is occurring, on land in which a person other than the alleged violator holds a property interest, a Notice of Violation shall also be issued to the holder of such an interest.

(b) A Notice of Violation shall include:

- (1) a concise statement of facts believed to constitute a violation;
- (2) specific reference(s) to the provision(s) of this Ordinance and/or the rules to carry out this Ordinance allegedly violated;
- (3) the proposed amount of a civil penalty pursuant to Section 406 of this Ordinance (possibly accompanied by a proposal to reduce or waive collection of the amount if the violator takes certain actions to mitigate damage) or a statement that a penalty may be assessed in an amount to be determined after further investigation;
- (4) a statement that the amount of the civil penalty may be doubled if the violation continues to occur after the Notice of Violation has been served on the alleged violator; and
- (5) an explanation of rights to petition for relief, request an administrative hearing, and seek judicial review of any final determination pursuant to Part 5 of this Ordinance.

(c) A Notice of Violation may include a Summons to appear before the Director at an enforcement hearing at a specified time and date. If such a Summons is included it shall advise the alleged violator that failure to appear will constitute a violation of this Ordinance, which may result in the imposition of civil penalties.

(d) A Notice of Violation may be served on an alleged violator by the Director or by an employee of the Department or, at the request of the Director, by a Tribal law enforcement officer.

(e) A Notice of Violation may be served on a permit holder before the Director issues a notice of suspension or revocation of a permit pursuant to Section 309.

Section 403. Cease and Desist Orders

(a) If the Director has reason to believe that an ongoing and continuing violation is occurring, or that there is a substantial likelihood that a violation will occur in the near future, the Director is authorized to petition the Tribal Court for a Cease and Desist Order to prevent the violation from continuing or occurring. The Director's petition shall include a brief statement of facts, according to the Director's information and belief, and a brief explanation of how the alleged facts, if true, constitute a violation of this Ordinance.

(b) The Tribal Court is authorized to issue a Cease and Desist Order upon a showing by the Director that:

- (1) probable cause exists that a violation is occurring, or is likely to occur in the near future; and
- (2) the violation has resulted in, or is likely to result in, damage to cultural resources.

(c) If the petition concerns a violation for which the Director has issued a Notice of Violation, a showing by the Director that the conduct has continued after the Notice of Violation was served on the alleged violator shall be sufficient to establish probable cause that a violation is occurring, or is likely to occur in the near future.

(d) The consideration by the Court of a petition by the Director for a Cease and Desist Order shall not require that notice of the hearing be provided to the alleged violator.

(e) A Cease and Desist Order shall include:

- (1) a concise statement of facts believed to constitute a violation of this Ordinance;
- (2) specific reference(s) to the provision(s) of this Ordinance and/or the rules to carry out this Ordinance allegedly violated;
- (3) a statement that the Tribal Court has determined that there is probable cause to believe that a violation has occurred or is likely to occur in the near future;
- (4) a statement that the alleged violator must Cease and Desist the conduct that constitutes a violation and that failure to comply with the Cease and Desist Order is in itself a violation of this Ordinance;
- (5) the proposed amount of a civil penalty pursuant to Section 406 of this Ordinance (possibly accompanied by a proposal to reduce or waive collection of the amount if the violator takes certain actions to mitigate damage) or a statement that a penalty may be assessed in an amount to be determined after further investigation;
- (6) a statement that the amount of the civil penalty may be tripled if the violation continues to occur after the Cease and Desist Order has been served on the alleged violator; and
- (7) an explanation of rights to petition for relief, request an administrative hearing, and seek judicial review of any final determination pursuant to Part 5 of this Ordinance.

(f) A Cease and Desist Order may be served on an alleged violator by the Director or by an employee of the Department or, at the request of the Director, by a Tribal law enforcement officer.

Section 404. Criminal Penalties

(a) *Tribal Criminal Penalties.* It is a criminal offense for an Indian person to violate any of the prohibitions of Section 304 of this Ordinance or to knowingly counsel, procure, solicit, or employ any other person to violate any of the prohibitions of Section 304. Upon conviction in Tribal Court, such a criminal offense may be punishable by restitution, community service, a fine not to exceed \$5,000, and/or imprisonment for a term not to exceed one year. For the purposes of this Ordinance, each act committed on Hualapai Tribal lands that constitutes a criminal offense shall be considered a separate offense. A person convicted of such an offense may also be subject to civil penalties.

(b) *Federal Criminal Penalties.* Any person who commits an act on Hualapai tribal lands that would be a criminal offense under this Ordinance if committed by an Indian may also be subject to criminal prosecution under federal law.

Section 405. Trespass

Any nonmember of the Hualapai Tribe who violates any prohibition in Section 304 of this Ordinance without having obtained the relevant permit has committed trespass. Nonmember Indians may be subject to prosecution in Tribal Court; non-Indians may be subject to civil actions in federal court; all persons may be subject to civil actions in Tribal Court for damages. Any law enforcement action taken on grounds of trespass may be separate from enforcement actions taken under other provisions of this Ordinance. The circumstances relating to the trespass may be taken into consideration in the event that civil penalties are imposed.

Section 406. Civil Penalties

(a) *Conduct Subject to Civil Penalties.* Individuals who violate the prohibitions in Section 304 of this Ordinance shall be subject to civil penalties, which may be assessed by the Director, in accordance with rules adopted expressly for this purpose. A permit holder who engages in conduct that violates the terms and conditions of his or her permit is considered to violate the prohibitions in Section 304.

(b) *Procedure for Assessing Penalties.* Following the procedure set out in Section 208, the Director shall issue rules for the assessment of civil penalties. In developing these rules, the Director may draw upon the procedures used by the Department of the Interior for assessing civil penalties under the Archaeological Resources Protection Act (43 C.F.R. §§ 7.15, 7.16) and the Native American Graves Protection and Repatriation Act (43 C.F.R. § 10.12). At a minimum, the procedure shall include:

- (1) *Notice of Violation*, in accordance with Section 402 of this Ordinance;
- (2) *Response Period* of at least forty-five (45) days after service of the Notice (or service of the proposed penalty amount if not included in the Notice) for the alleged violator to respond to the Notice of Violation, during which the alleged violator may seek informal discussions with the Director or may file a Petition for Relief pursuant to Section 501;
- (3) *Assessment of Penalty*, by the Director after the expiration of the Response period or after consideration of a Petition for Relief, unless the Director determines that, based on all the available information, no violation has occurred;
- (4) *Notice of Assessment*, which shall be formal notification to the violator of the amount due, how to pay it, and appeal rights pursuant to Part 5 of this Ordinance.

(c) *Penalty Amounts*. Rules to carry out this Section shall include guidelines for the Director to use in assessing civil penalties. The Director shall take appropriate measures to inform the public regarding civil penalties under this Ordinance.

(1) For violations relating to failure to obtain Class A, B, or D permits, the civil penalty amounts may be set at relatively nominal amounts for first time offenders, but shall be at least comparable to the fees that would be charged for such permits. The rules shall provide for penalty amounts to be substantially increased for second and third offenses.

(2) With respect to Class C permits, the Director shall develop a system for determining penalty amounts that reflects consideration of the following factors:

- (A) Costs of restoration and repair of damaged cultural resources and the archaeological or commercial value of cultural resources that are destroyed or otherwise not recovered;
- (B) Enforcement and administrative costs associated with the assessment and collection of the civil penalty;
- (C) Cost of disposition of cultural resources, including as appropriate, cost of curation in perpetuity;
- (D) Costs associated with documentation, testing and evaluation of the cultural resource in order to assess the characteristics of the cultural resource and plan for its restoration; and
- (E) Costs of any additional mitigation measures the Director deems appropriate to implement;
- (F) An amount based on the loss to the Tribe of the use of cultural resources for cultural and religious practices;
- (G) For any second offense, a factor allowing the total penalty amount to be doubled or tripled, in the Director's judgment depending upon the nature of the offense.
- (H) A factor allowing the total amount of the penalty to be doubled in the event that conduct constituting a violation continued after service of a Notice of Violation and tripled if such conduct continued after service of a Cease and Desist Order.

(c) *Referral to Federal Authorities for Civil Penalties*. In lieu of, or in addition to, imposing civil penalties under this Ordinance, the Director may refer matters to federal authorities. Any penalties collected by the federal government and paid to the Hualapai Tribe

(pursuant to 43 C.F.R. § 7.17(c)) shall be deposited in the Cultural Resources Revenue Account established pursuant to Section 204 of this Ordinance.

Section 407. Civil Forfeitures

(a) *Seizure and Forfeiture of Personal Property.* In the event that a Tribal Law Enforcement Officer is present at the scene of any violation of this Ordinance, whether or not in the process of serving a Notice of Violation and/or Cease and Desist Order, the Officer is authorized to seize all items of personal property that apparently have been involved in the violation. Title to such property shall be deemed to vest in the Hualapai Tribe at the time of the commission of the unlawful activity, provided that the Director brings an action in Tribal Court to perfect the Tribe's title and the Tribal Court issues a ruling in favor of the Department. If the former owner is present at the time of seizure, the Officer shall obtain the necessary information to provide such person information on the procedure to seek the return of such property; if not present at the time of seizure, a notice shall be posted and other reasonable steps taken to provide notice to the former owner.

(b) *Action To Perfect the Department's Title in Seized Property.* The Director may file an action in Tribal Court seeking to perfect the Tribe's title to any personal property seized. Any such action shall be considered by the Tribal Court in accordance with Section 504 of this Ordinance. The former owner of seized property shall be referred to as a "claimant." If the Director fails to file such an action within 60 days after the date of seizure, the items of personal property that were seized shall be returned to the claimant. At any time that an action to perfect the Tribe's title in seized property is pending, the Director is authorized to return the seized property to its former owner upon timely payment of any and all related civil penalties that may have been assessed against the violator.

(c) *Use by Department..* Any forfeited property title to which has vested in the Tribe pursuant to an order of the Tribal Court shall be made available for the use of, or disposition by, the Department upon the expiration of the period for filing an appeal in Tribal Court of Appeals. At any time up until the property is made available for the use of the Department, the Director is authorized to return the property to the former owner if any and all civil penalties assessed against the former owner have been paid.

(d) *Seizure under Federal Law.* The Director is authorized to cooperate with federal officials with respect to the forfeiture of items of personal property in connection with violations of the Archaeological Resources Protection Act. Any such items that are transferred to the Tribe (pursuant to 43 C.F.R. § 7.17(c)) shall be made available for the use of, or disposition by, the Department.

(e) *Seizure of Cultural Resources.* Cultural resources located within Hualapai tribal lands are presumed to be the property of the Hualapai Tribe unless tribal customary law provides otherwise. Thus unless a person who has excavated or otherwise removed a cultural resource from its proper setting is the holder of a permit authorizing such action, a presumption arises that a violation of this Ordinance has occurred. In the event that a Tribal Law Enforcement Officer is present at the scene of any apparent violation of this Ordinance at which cultural resources have

been damaged, excavated, or removed from their proper settings, the Officer shall take appropriate steps to protect the cultural resources from further damage, which may include seizing the resources and holding them in police custody.

Section 408. Referrals to Federal and Other Authorities

When, in the judgment of the Director, it would serve the interests of the Hualapai Tribe, the Director is authorized to provide information to, and cooperate with, federal agencies, state agencies, and other Indian tribes in the enforcement of cultural resources laws within Hualapai Tribal lands and Hualapai traditional use lands.

Section 409. Civil Actions in Federal Court

When, in the judgment of the Director, it would serve the interests of the Hualapai Tribe to file a civil action in federal court to seek protection or recognition of the Tribe's rights and interests under federal law relating to cultural resources, the Director shall so advise the Tribal Chairperson. In most circumstances the filing of such an action must be authorized by the Tribal Council. In the event that the Director and the Tribal Chairperson both conclude that the matter is an emergency, the Chairperson is authorized to file such an action on behalf of the Tribe.

PART 5. APPEALS AND JUDICIAL REVIEW

Section 501. Petitions for Relief

A person who has been served with a Notice of Violation which includes a proposed civil penalty may file a Petition for Relief with the Director. The person filing such a Petition may request that no penalty be assessed or that the penalty amount be reduced. The Petition shall include reasons in support of the request. Any such Petition must be filed within forty-five (45) days of the date on which the Notice of Violation was served (or from the date that the penalty amount was proposed, if later). The Director's decision in response to a Petition for Relief shall be conveyed to the Petitioner in the Notice of Assessment issued pursuant to Section 406.

Section 502. Administrative Hearings

(a)*Hearings Before the Director.* The Director is authorized to conduct adjudicatory hearings regarding clearances under Section 303, permit applications under Section 308, suspensions or revocations of permits under Section 309, notices of violation under Section 402, and any other instances in which a hearing is authorized pursuant to this Ordinance or rules issued to implement this Ordinance. Departmental staff designated by the Director will assume responsibility for presenting the Department's case at the hearing. The Tribal Administration may provide legal counsel to assist Departmental staff and/or the Department may provide its own legal counsel. The person whose permit or actions are the subject of the hearing or who has requested the hearing may be represented by legal counsel at that person's own expense.

(b)*Appointment of a Hearing Officer.* In any hearing involving the assessment of a civil penalty, and in any other hearing in which the Department has a direct financial interest, any party to the hearing may require the appointment of a Hearing Officer to conduct the hearing and render a decision. In any other matter, any party may request the appointment of a Hearing Officer, but one will not be appointed as a matter of right. In any hearing in which a Hearing Officer conducts the hearing and renders the decision, the Director may participate in the hearing as a party. In any such case, the decision of the Hearing Officer shall constitute final agency action for the Department.

(d)*Rules.* The Director shall issue rules governing the conduct of administrative hearings. The rules shall specify the steps in the hearing process, identify who may, request a hearing, establish notification requirements and time limits for action on the part of all parties, enumerate documentation requirements, and include any other elements the Director determines are necessary to carry out the purposes of this section. In addition, these rules shall ensure that parties to hearings are afforded administrative due process, including:

- (1) notice of the time and place of the hearing;
- (2) an opportunity to present reasons in support of the ruling that the appellant seeks;
- (3) an unbiased tribunal; and
- (4) a written decision including reasons in support of the decision.

(e) *Coordination with Tribal Environmental Review Commission.* The Director shall consult with the Directors of other Departments of Tribal Government and with the Tribal Environmental Review Commission regarding the establishment of a unified procedure for the appointment of hearing officers and the conduct of administrative hearings. The Director shall submit a report on this issue to the Tribal Administration within one year of the date of enactment of this Ordinance.

Section 503. Judicial Review

(a) *Review of Administrative Hearings.* Any person who participated in an administrative hearing and who is adversely affected by the outcome of the hearing under the rules promulgated pursuant to Section 502 of this Ordinance shall be entitled to review of the action in the Hualapai Tribal Court. Such an appeal must be filed in writing with the Hualapai Tribal Court within thirty (30) days of notification of the decision based on the administrative hearing.

(b) *Review of Decisions without Administrative Hearings.* Any person who is entitled to a hearing before a Hearing Officer shall have a right to judicial review of the original decision in the event that the Director formally decides not to appoint a Hearing Officer or has not appointed a Hearing Officer within sixty (60) days of the date that the request for such appointment was made. Such an appeal must be filed in writing with the Hualapai Tribal Court within thirty (30) days of notification of decision not to appoint a Hearing Officer or within thirty (30) days of the date on which the 60-day period for the appointment of a Hearing Officer expires. In such a case, any person who would be directly and adversely affected by a decision of the Director, or by the judicial modification or reversal of a decision by the Director, may file an appeal with the Tribal Court, in the event that the person entitled to a hearing does not file an appeal, within ten (10) days after the expiration of the time allowed for filing by a person originally entitled to a hearing. In the event the original party files an appeal, any person who could have appealed in his/her own right may participate in the appeal as an intervenor.

(c) *Standards for Review.* The Tribal Court shall review decisions after administrative hearings based on the pleadings and the administrative record. The Court generally shall not make its own inquiry into the facts, but it may in cases in which an appellant was entitled to the appointment of a Hearing Officer and none was appointed. In all cases, the Court may review questions of law on a *de novo* basis. The Court shall not set aside or reverse a decision of the Director or a Hearing Officer unless the Court finds that the decision:

- (1) is not supported by substantial evidence;
- (2) was issued without compliance with the requirements of this Ordinance or rules issued pursuant to this Ordinance;
- (3) is arbitrary and capricious;
- (4) deprived the appellant of any right guaranteed by Article IX of the Constitution of the Hualapai Indian Tribe; or
- (5) deprived the appellant of due process of law or other rights that the appellant may have under the Indian Civil Rights Act (25 U.S.C. 1301-1341).

(d) *Advisory Team of Elders.* In any case arising under this Ordinance, the Tribal Court may seek advice from the Advisory Team of Elders on questions relating to tribal cultural traditions.

(e) *Private Right of Action in Tribal Court.* In any case in which a person or governmental agency subject to this Ordinance, including an agency or instrumentality of the Tribe, has carried out an undertaking without first obtaining clearance from the Director pursuant to Section 303, and the Director has not initiated enforcement by issuing a Notice of Violation or by petitioning the Tribal Court for a Cease and Desist Order, any person who is directly and adversely affected by the violation of the Section 303 clearance requirement may file an action in Tribal Court seeking an Order to enjoin the undertaking and to compel the alleged violator to apply for and obtain clearance from the Director prior to resuming the undertaking. In any such case, the person filing the action shall bear the burden of showing, by a preponderance of the evidence, that a violation of Section 303 has occurred. If the Tribal Court determines that injunctive relief is warranted in such a case, and issues an appropriate Order, action taken by the Director on an application for clearance after the issuance of such an Order by the Tribal Court shall be subject to hearing and judicial review in the same manner as other determinations by the Director.

(f) *Waiver of Sovereign Immunity.* This section of the Ordinance constitutes a limited waiver of tribal sovereign immunity for actions in tribal court against agencies and officers of the Tribe, *provided* that any such actions shall be limited to injunctive relief. This section shall not be construed to authorize an action against the Tribe or its officers contrary to Article XVI, Section 2 of the Constitution of the Hualapai Indian Tribe.

(g) *Tribal Court of Appeals.* A decision by the Tribal Court adjudicating a dispute arising under this Ordinance may be appealed to the Tribal Court of Appeals in accordance with such rules as that Court may prescribe.

Section 504. Actions To Perfect the Tribe's Title in Seized Property.

(a) *Action Filed by the Director.* The Director is authorized to file an action in Tribal Court to perfect the Tribe's title in any property that has been seized pursuant to Section 406 of this Ordinance. Any such action must be filed within 60 days from the date on which the seizure occurred.

(b) *Burden of Proof.* The Director bears the initial burden of establishing probable cause that any item of personal property seized was associated with or involved in unlawful activity. If the Director meets this initial burden, the claimant bears the burden of showing, by a preponderance of the evidence, that the item of personal property is not subject to forfeiture. This burden can be met by disproving probable cause or by establishing innocent ownership of the property.

(c) *Appeals.* A decision by the Tribal Court in a civil forfeiture action under this Ordinance may be appealed to the Tribal Court of Appeals in accordance with such rules as that Court may prescribe.

Hualapai Cultural Resources Ordinance
Enacted February 18, 1998

**HUALAPAI TRIBAL COUNCIL
RESOLUTION NO. 74-2014
OF THE GOVERNING BODY OF THE
HUALAPAI TRIBE OF THE HUALAPAI RESERVATION**

**Rules of the Department of Cultural Resources
Implementing the Hualapai Cultural Heritage Resources Ordinance**

- WHEREAS,** the Hualapai Tribe is a federally recognized Indian Tribe located on the Hualapai Indian Reservation in northwestern Arizona with authority vested in the Hualapai Tribal Council by the Constitution approved March 31, 1991; and
- WHEREAS,** the Hualapai Department of Cultural Resources (HDCR) was established by the Hualapai Cultural Heritage Resources Ordinance (Ordinance), which was enacted in 1998, by Tribal Council Resolution 13-98; and
- WHEREAS,** in the Ordinance, the Tribal Council made a number of findings and adopted a number of policy statements regarding the importance of Hualapai cultural heritage for the well-being of present and future generations of Hualapai people; and
- WHEREAS,** the inherent sovereignty of Indian tribes to enact legislation for the preservation of cultural resources is recognized in federal law, including statutes such as the National Historic Preservation Act, Native American Graves Protection and Repatriation Act, and Archaeological Resources Protection Act; and
- WHEREAS,** in enacting the Ordinance, the Tribal Council exercised the inherent sovereignty of the Hualapai Tribe; and
- WHEREAS,** the Ordinance directs the HDCR to use a rulemaking process to establish certain programs authorized in the Ordinance, including (1) the Hualapai Register of Heritage Places; (2) a review process for proposed undertakings that may affect cultural resources; and (3) a permit program for research relating to cultural resources; and
- WHEREAS,** in June 2013 the HDCR initiated a rulemaking process in which it proposed to establish programs authorized by the Ordinance; and
- WHEREAS,** as authorized in the Ordinance, the final rules also address the formal establishment of a Cultural Advisory Team to draw on the wisdom and knowledge of Hualapai elders and others who hold knowledge of Hualapai cultural heritage; and
- WHEREAS,** following the procedure set out in section 208 of the Ordinance, the Department has completed the process of developing rules and has presented a final rulemaking document for approval by the Tribal Council; and
- WHEREAS,** as authorized in the Ordinance and in section 101(d)(5) of the National Historic Preservation Act (16 U.S.C. § 470a(d)(5)), the final rules anticipate that the Hualapai Tribe may enter into an agreement with the Advisory Council on Historic Preservation (ACHP) to conduct the review of proposed federal undertakings that may affect historic properties pursuant to the Tribe's rules in lieu of the ACHP regulations; and

WHEREAS, as authorized in the Ordinance and in section 4(g)(1) of the Archaeological Resources Protection Act (16 U.S.C. § 470cc(g)(1)), the permit process in part 5 of these final rules governing the excavation of cultural resources will apply to Hualapai tribal members in lieu of the permit requirement under ARPA;

NOW, THEREFORE BE IT RESOLVED that the Hualapai Tribal Council approves the final Rules of the Hualapai Department of Cultural Resources implementing the Cultural Heritage Resources Ordinance; and


BE IT FURTHER RESOLVED that the Director of the Hualapai Department of Cultural Resources is authorized to make corrections and other minor, non-substantive revisions in the Rules without further action by the Tribal Council.

CERTIFICATION

I, the undersigned as Chairwoman of the Hualapai Tribal Council hereby certify that the Hualapai Tribal Council of the Hualapai Tribe is composed of nine (9) members of whom nine (9) constituting a quorum were present at a Regular Council Meeting thereof held on this 7th day of November, 2014; and that the foregoing resolution was duly adopted by the affirmative vote of nine (9) in favor, pursuant to the authority of Article V, Section (a) of the Constitution of the Hualapai Tribe approved March 13, 1991.


Sherry J. Counts, Chairwoman
HUALAPAI TRIBAL COUNCIL

ATTEST:


Ronald Two Bulls, Administrative Assistant
HUALAPAI TRIBAL COUNCIL



Hualapai Department of Cultural Resources

P.O. Box 310

Peach Springs, Arizona 86434

Office: 928.769.2223 FAX: 928.769.2235

October 8, 2014

MEMORANDUM

TO: Members of the Hualapai Tribal Council

FROM: Loretta Jackson-Kelly
Director, Hualapai Department of Cultural Resources

SUBJECT: Rules to Implement the Hualapai Cultural Heritage Resources Ordinance;
Final Rules, Explanatory Paper, and Tribal Council Resolution

This transmits the final rules to implement the Hualapai Cultural Heritage Resources Ordinance. This also transmits a proposed Tribal Council Resolution and an explanatory paper to accompany the final rules. In addition, for convenience, the attached package of documents includes a copy of the Hualapai Cultural Heritage Resources Ordinance.

The Ordinance was enacted in February 1998 (Tribal Council resolution 13-98) to establish a comprehensive program under Tribal law to protect cultural resources within the Hualapai Reservation and to build governmental capacity to advocate for the protection of significant cultural resources outside of the Tribe's territorial jurisdiction. In the Ordinance, the Tribal Council found that "The cultural heritage of the Hualapai Tribe must be preserved as a living part of community life and development."

The Ordinance authorizes the Department of Cultural Resources to develop several programs for the conservation of cultural resources. For some programs, the Ordinance directs the Department to use a rulemaking process, that is, to establish these programs through the adoption of rules. As authorized in the Ordinance, the Department has developed rules to establish the following programs:

- (1) Hualapai Register of Heritage Places;
- (2) a review process for proposed undertakings that may affect cultural resources; and
- (3) a permit program for research relating to cultural resources.

Section 208 of the Ordinance sets out procedures for rulemaking, which the Department has followed in developing the attached final rules. The Department released proposed rules for review and comment in June 2013 and held a community meeting in July 2013. The Department also released an explanatory paper to accompany the proposed rules, as required by subsection 208(b)(1). In response to issues raised during the community meeting, the Department made several changes in the text of the rules. Those changes are explained in the revised explanatory paper, which will be used by the Department as a reference document in carrying out the rules.

Pursuant to the responsibilities assigned to the Director of Department in section 202 of the Ordinance, I hereby request that the Tribal Council adopt the attached resolution expressing approval of the final rules.

Sincerely,


Loretta Jackson-Kelly



RULES

TO IMPLEMENT THE

HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE

October 2014

Hualapai Department of Cultural Resources
P.O. Box 310
Peach Springs, Arizona 86434
Office: 928.769.2223 FAX: 928.769.2235

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MR-Cultural Resource.
CORRESPONDENCE: 10/01/2014
DOCUMENT DATE: 10/01/2014
DISPATCH: 1-27-15
Hualapai Cultural Heritage Resource Ordinance
Rules – October 2014

RULES
IMPLEMENTING THE
HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE

OUTLINE

Part 1. General Provisions

- Section 101. Overview of the Cultural Heritage Resources Ordinance
- Section 102. Cultural Resources Department
- Section 103. Purpose and Scope of These Rules

- Appendix 1-A. Glossary of Key Terms in the Ordinance and Rules
- Appendix 1-B. List of Acronyms

Part 2. Cultural Advisory Team

- Section 201. Authority
- Section 202. Composition of the Advisory Team of Elders
- Section 203. Roles and Responsibilities
- Section 204. Policy on Appointments
- Section 205. Training
- Section 206. Compensation
- Section 207. Operating Procedures

- Appendix 2-A. Excerpts from Federal Regulations
- Appendix 2-B. Excerpts from the Cultural Heritage Resources Ordinance

Part 3. Hualapai Register of Heritage Places

- Section 301. Purpose
- Section 302. Criteria of Eligibility
- Section 303. Considerations for Applying the Criteria
- Section 304. Procedure for Determinations of Eligibility
- Section 305. Preliminary Determinations by the THPO
- Section 306. Determinations by the Advisory Team of Elders
- Section 307. Designation of Areas of Special Tribal Concern
- Section 308. National Register of Historic Places
- Section 309. Community Involvement
- Section 310. Appeals

Part 4. Review of Proposed Undertakings

- Section 401. Purpose and Scope of This Part
- Section 402. Responsibility for Providing Information to the THPO
- Section 403. Initiating a Clearance Request
- Section 404. The Clearance Process
- Section 405. Alternate Process for Federal or Federally-assisted Undertakings
- Section 406. Coordination with Tribal Environmental Review Commission
- Section 407. Coordination with CHRO Permit Requirements
- Section 408. Coordination with Land Use and Development Planning
- Section 409. Programmatic Agreements
- Section 410. Referrals for Professional Services
- Section 411. Legal Effect of THPO Clearance Letter
- Section 412. Post-Clearance Discoveries
- Section 413. Review of Proposed Undertakings that Are Not on Tribal Lands

Appendix 4-A. CHRO Section 303

Appendix 4-B. Exclusions from the Clearance Requirement [Reserved]

Appendix 4-C. Standard Fees for the Archaeological Services Branch [Reserved]

Part 5. Permit Requirements and Application Procedures

Subpart A. General Provisions and Visitation Permits

- Section 501. Purpose and Scope of This Part
- Section 502. Classes of Permits
- Section 503. Procedures that Apply to All Classes of Permits
- Section 504. Exceptions and Waivers
- Section 505. Suspension and Revocation of Permits
- Section 506. Guidance Issued by the Director
- Section 507. Restrictions on Release of Information
- Section 508. Class A Permits – Visiting Cultural Resources Sites

Subpart B. Class B Permits – Non-collection Surveys

- Section 511. Requirements and Exemptions
- Section 512. Information to be Provided by Applicants
- Section 513. Documentation to be Produced
- Section 514. Additional Terms and Conditions
- Section 515. Blanket Permits

Subpart C. Class C. Permits – Excavation and Removal

- Section 521. Requirements and Exemptions
- Section 522. Relationship between Class C Permit and Federal ARPA Permit
- Section 523. Persons Required to Apply for a Class C Permit
- Section 524. Applications for Permits
- Section 525. Terms and Conditions
- Section 526. Documentation to be Produced
- Section 527. Custody of Excavated Archaeological Resources
- Section 528. Native American Human Remains and Cultural Items

Subpart D. Class D Permits – Other Research Relating to Cultural Resources

- Section 531. Requirements and Exemptions
- Section 532. Applications for Permits
- Section 533. Consent of Individual Informants
- Section 534. Processing of Applications by the Department
- Section 535. Terms and Conditions
- Section 536. Documentation to be Produced

Appendix 5-A. Fee schedule for Permits

Appendix 5-B. Standard Terms and Conditions for Permits

Appendix 5-C. Consent of Individual Informants [Reserved]

Appendix 5-D. Fee Schedule for Compensation for Individual Informants [Reserved]

Part 6. Administrative Enforcement and Hearings

- Section 601. Monitoring and Investigations
- Section 602. Notice of Violation
- Section 603. Civil Penalties
- Section 604. Suspension and Revocation of Permits
- Section 605. Administrative Hearings
- Section 606. Judicial Enforcement

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RULES

IMPLEMENTING THE

HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE

PART 1. GENERAL PROVISIONS

Section 101.	Overview of the Cultural Heritage Resources Ordinance
Section 102.	Cultural Resources Department
Section 103.	Purpose and Scope of These Rules

Appendix 1-A.	Glossary of Key Terms in the Ordinance and Rules
Appendix 1-B.	List of Acronyms

Section 101. Overview of the Cultural Heritage Resources Ordinance

The Hualapai Cultural Heritage Resources Ordinance authorizes the establishment of a comprehensive program to exercise stewardship over the cultural resources that are within the territorial jurisdiction of the Hualapai Tribe, to perpetuate the traditional stewardship by Hualapai people of cultural resources on lands traditionally used by Hualapai people but not currently within tribal jurisdiction, and to encourage other governmental agencies and private landowners to manage such cultural resources in a spirit of stewardship. The Ordinance established the Cultural Resources Department of the Hualapai Tribe and gave the Department a mandate to build the comprehensive program envisioned in the Ordinance. The Ordinance lists the Department's powers and duties, and delegates authority to the Department and to the Director as head of the Department, including authority to develop rules to carry out this Ordinance. The Ordinance authorizes the Department to administer a Tribal Historic Preservation Officer (THPO) program for purposes of the National Historic Preservation Act and directs the Department to establish a Hualapai Register of Heritage Places. The Ordinance establishes a clearance requirement for undertakings that may affect cultural resources on Hualapai Tribal lands, prohibits certain kinds of activities that may affect cultural resources, and authorizes the establishment of a permit program to control activities that are prohibited unless a permit has been issued. The permit program encompasses four distinct classes of permits for four different kinds of activities. For enforcement, the Ordinance authorizes civil and criminal penalties, and it authorizes administrative appeals procedures and judicial review. The Ordinance also provides a limited waiver of sovereign immunity authorizing actions in Tribal Court for injunctive relief (but not for money damages) to ensure that Tribal agencies and enterprises comply with the procedural requirements of the Ordinance. The full text of the Ordinance may be obtained from the Department.

Section 102. Cultural Resources Department

(a) Mission. The Ordinance established the Cultural Resources Department and charged the Department with the mission of being the Hualapai Tribe's lead agency for the identification, protection, preservation, and management of cultural resources within Hualapai tribal lands and Hualapai traditional use lands.

(b) Authority and Responsibilities. Section 201 of the Ordinance directs the Department to establish a number of programs in carrying out its mission. Section 202 provides that the Department shall be supervised by a Director and sets out a non-exhaustive listing of the Director's responsibilities, including the authority to develop and issue rules to carry out the Ordinance. Section 203 delegates authority to the Director as necessary to carry out the Ordinance, subject to review and oversight by the Tribal Council. Some provisions of the Ordinance require the Department to issue rules, and those provisions are summarized in section 103 of this part of the rules. Other aspects of the Ordinance do not require rulemaking; rather, the Department simply acts on the basis of its statutory authority.

(c) Information about the Department's Programs. The Department develops guidance documents, standards, and policy statements that provide information about the activities of the Department. Any such documents are for information purposes and do not have the force and effect of law except to the extent authorized by the Ordinance or these rules.

(d) Tribal Historic Preservation Officer. The Hualapai Tribe administers a federally-approved Tribal Historic Preservation Officer (THPO) program pursuant to section 101(d)(2) of the National Historic Preservation Act (NHPA). Section 202(b)(1) of the Ordinance specifies that the Director of the Department shall serve as the Hualapai THPO. During some periods of time, the Tribal Council has, by resolution, designated an individual as THPO other than the Director, and may do so in the future. In these rules, both terms are used, in recognition that the role of the THPO is specified in federal law. When the term "Director" is used, it generally refers to the official with responsibilities under the Ordinance. The term "THPO" is generally used to refer to tribal official responsibilities pursuant to the federal NHPA and the clearance process under section 303 of the Ordinance and part 4 of these rules, which is comparable to the consultation process under NHPA section 106.

(d) Archaeological Services Branch. This is a staff unit within the Department which, as authorized by section 205 of the Ordinance, provides or arranges for archaeological services for other tribal departments, tribal enterprises, and the private sector, and which charges reasonable fees for its services. As an alternative to providing services, this Branch maintains a list of qualified persons and firms that may be retained by entities that need to have archaeological serviced performed.

Section 103. Purpose and Scope of These Rules

Several provisions of the Ordinance direct the Department to create components of the comprehensive cultural resources program through rulemaking. The purpose of these rules is to carry out those provisions of the Ordinance. These rules are divided into several parts, with the intent of making the rules easier for the tribal community and the affected public to use. The parts, which generally correspond to the structure of the Ordinance, are listed below:

- Part 1, "General Provisions," provides an overview of the rules and includes definitions that are applicable to all parts.

- Part 2, “Cultural Advisory Team,” explains the roles and responsibilities of the Cultural Advisory Team, as well as procedures for appointments to the Team.
- Part 3, “Hualapai Register of Heritage Places,” formally establishes this Register, sets out the criteria of eligibility, and describes the process for determinations of eligibility. This part also includes information on the Hualapai program for identifying, evaluating, and nominating places that may be eligible for the National Register of Historic Places.
- Part 4, “Clearance for Proposed Undertakings,” implements section 303 of the Ordinance, which establishes a clearance requirement for any “undertaking” that may affect cultural resources located on Hualapai tribal lands. The section 303 clearance requirement is similar to the review and consultation requirement established by section 106 of the National Historic Preservation Act (NHPA), a law that applies to federal government agencies. Part 4 of these rules also explains the relationship between the section 303 clearance requirement under the Ordinance and the section 106 consultation process under the federal NHPA.
- Part 5, “Permit Requirements and Application Procedures,” sets out the requirements and procedures for four classes of permits, pursuant to several sections in part 3 of the Ordinance. The Ordinance authorizes four classes of permits, and so part 5 of the rules is divided into four subparts. The four classes of permits are as follows:

- Class A – Visiting Cultural Resources Sites
- Class B – Non-collection Surveys
- Class C – Excavation and Removal of Cultural Resources
- Class D – Research Relating to Cultural Resources

The four subparts of part 5 correspond to these classes of permits, with provisions that apply to all classes of permits included in subpart A of the rules.

- Part 6, “Administrative Enforcement,” implements various provisions in the Ordinance that authorize the Department to enforce the Ordinance through administrative mechanisms, including civil penalties for violations. Part 6 also includes procedures for administrative hearings.

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RULES
IMPLEMENTING THE
HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE

APPENDIX 1-A

DEFINITIONS

The following definitions apply for purposes of the Ordinance and rules issued by the Director to carry out the Ordinance. These definitions are reproduced from section 104 of the Ordinance with some slight modifications, *including references to relevant sections of the rules*.

“Archaeological resources” means any material remains of human life or activities which are at least 100 years of age and are of archaeological interest, as further clarified in federal regulations (43 C.F.R. § 7.3(a)); *provided*, for purposes of this Ordinance the term does not include human remains and funerary objects.

“Cultural Advisory Team” means the group of Hualapai citizens established pursuant to Section 207 of the Ordinance and part 2 of these rules.

“Cultural resource” means any product of human activity or any object or place given significance by human action or belief. Places that may be cultural resources include building and other structures, landforms, archaeological sites, traditional cultural properties, and districts that are eligible, or potentially eligible, for listing on the Hualapai Register of Heritage Places or the National Register of Historic Places. Objects that may be cultural resources include artifacts and other physical remains of human activity, natural objects given significance by human action or belief, human remains and "cultural items" as defined in the Native American Graves Protection and Repatriation Act (funerary objects, sacred objects and objects of cultural patrimony), and archaeological resources. Objects may be eligible for the Hualapai Register of Heritage Places or the National Register of Historic Places if they are in some way connected to a specific place.

“Department” or **“CRD”** means the Hualapai Tribal Cultural Resources Department created by Section 201 of the Ordinance. The Department is also known as the Hualapai Department of Cultural Resources or “HDCR.”

“Director” means the duly appointed Director of the Hualapai Department of Cultural Resources.

“Hualapai Register” means the Hualapai Register of Heritage Places established pursuant to Section 301 of the Ordinance.

“Hualapai traditional use lands” means all lands historically or traditionally used by the Hualapai people, *except* for those lands that are currently within the boundaries of the Hualapai Indian Reservation or otherwise included in the term “Hualapai tribal lands” as used in the Ordinance.

“Hualapai tribal lands” means all lands over which the Hualapai Tribe has jurisdiction, including all land within the exterior boundaries of the Hualapai Indian Reservation and all other Hualapai Indian country, as that term is defined in 18 U.S.C. § 1151.

“Heritage resource” or **“heritage property”** means any cultural resource or property that has been determined eligible for listing in the Hualapai Register of Heritage Places.

“Indian” or **“Indian person”** means any enrolled member of a federally-recognized Indian tribe and any other person who is considered an Indian for purposes of the Indian Civil Rights Act (25 U.S.C. § 1301(4)) and criminal jurisdiction under the federal Major Crimes Act (18 U.S.C. § 1153).

“National Register” means the National Register of Historic Places established pursuant to the National Historic Preservation Act and administered by the National Park Service (36 C.F.R. parts 60, 63).

“Repatriation” means the expeditious return to the Hualapai Tribe of human remains, cultural items and other objects possessed or controlled by persons and entities other than the Tribe and its members. In the event that the Hualapai Tribe comes into possession or control of items to which other tribes or individuals have rights of ownership or control, the term also means the expeditious return of such items to such tribes or persons.

“Responsible agency official” means the official of a federal, tribal or state agency who has decision making authority over a particular undertaking proposed, or under consideration, by such an agency.

“Responsible person” means the individual in private capacity or official in a non-governmental organization who has decision making authority over a particular undertaking.

“State Historic Preservation Officer” or **“SHPO”** means the officer or state government agency charged under state law with responsibility for administering a state historic preservation program.

“Traditional cultural place” or **“traditional cultural property”** means, as defined by the National Park Service in National Register Bulletin 38, a place that is eligible for the National Register because of its association with cultural practices or beliefs of a living community that are rooted in that community's history and are important in maintaining the continuing cultural identity of the community. As used in this Ordinance this term also includes such a place if it has been determined eligible for the Hualapai Register regardless of whether or not it has been determined eligible for the National Register.

“Tribal Environmental Review Commission” or **“TERC”** means the Commission established pursuant to the Hualapai Environmental Review.

“Undertaking” means:

(1) an “undertaking” as defined in the National Historic Preservation Act (16 U.S.C. § 470w(7)): “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including:

“(A) those carried out by or on behalf of a Federal agency;

“(B) those carried out with Federal financial assistance;

“(C) those requiring a Federal permit, license, or approval; and

“(D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency”; and

(2) Any project, activity or program carried out under the authority of, or with permission from, an agency, enterprise or other entity created by the Hualapai Tribe, including any “development” for which a permit is required under the Hualapai Environmental Review Code, regardless of whether or not there is federal agency involvement sufficient to bring the project, activity or program within the coverage of paragraph (1) of this definition, *provided* that any activity listed as an exempt activity in Appendix 4-B of the rules shall not be treated as an undertaking unless, pursuant to that Appendix section 401(c) of the rules, the Director determines that the activity should be treated as an undertaking.

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RULES
IMPLEMENTING THE
HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE

PART 1. GENERAL PROVISIONS

APPENDIX 1-B. ACRONYMS

ACHP –	Advisory Council on Historic Preservation
ARPA –	Archaeological Resources Protection Act
ASB –	Archaeological Services Branch
CHRO –	Cultural Heritage Resources Ordinance
CRD –	Cultural Resources Department, is also known as the Hualapai Department of Cultural Resources or “HDCR.”
CFR –	Code of Federal Regulations
HDCR –	Hualapai Department of Cultural Resources; see also “CRD”
MOA –	Memorandum of Agreement
NAGPRA –	Native American Graves Protection and Repatriation Act
NEPA –	National Environmental Policy Act
NHPA –	National Historic Preservation Act
NPS –	National Park Service
SHPO –	State Historic Preservation Officer
TERC –	Tribal Environmental Review Commission
THPO –	Tribal Historic Preservation Officer

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RULES
IMPLEMENTING THE
HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE

PART 2. CULTURAL ADVISORY TEAM

Section 201.	Authority
Section 202.	Composition of the Hualapai Cultural Advisory Team
Section 203.	Roles and Responsibilities
Section 204.	Policy on Appointments
Section 205.	Training
Section 206.	Compensation
Section 207.	Operating Procedures

Appendix 2-A. Excerpts from Federal Regulations

Appendix 2-B. Excerpts from the Cultural Heritage Resources Ordinance

Section 201. Authority

(a) Authority for this Part of the Rules. The Hualapai Cultural Heritage Resources Ordinance calls for the Director of the Department of Cultural Resources to establish an Advisory Team of Elders. In these Rules, the name of this entity has been changed to “Hualapai Cultural Advisory Team.” Section 207 of the Ordinance provides that, in carrying out their responsibilities, the Director and the employees of the Department shall be guided by the wisdom and expertise of the Advisory Team. That section also says that the Director shall develop:

- (1) A Policy Statement on the Roles and Responsibilities of the Advisory Team; and
- (2) A Procedure for Appointments to the Advisory Team.

The Ordinance states that the Policy Statement and Procedure for Appointments will take effect upon approval by the Tribal Council. The Policy Statement is incorporated into this part of the Rules as section 203, and the Procedure for Appointments is section 204.

(b) Authority of the Hualapai Cultural Advisory Team. The Advisory Team provides assistance to the Department of Cultural Resources and the Tribal Historic Preservation Officer in:

- (1) carrying out the Hualapai Cultural Heritage Resources Ordinance (the “Ordinance”); and
- (2) fulfilling the responsibilities of the Tribal Historic Preservation Officer (THPO) as specified in federal regulations issued by the National Park Service (NPS) and by the Advisory Council on Historic Preservation (ACHP), as well as in agreements between the Tribe and NPS.

The Policy Statement in section 203 of these Rules includes references to certain provisions of the Ordinance and the federal regulations. Excerpts from the Ordinance and the federal regulations are attached in an Appendix to this Policy Statement.

(c) Clarification of Terms. Section 202(b)(1) of the Ordinance specifies that the Director serves as the Tribal Historic Preservation Officer, although the Tribal Council has, at certain times, designated an individual other than the Director to serve as THPO and may do so in the future. In this part of these Rules, both terms are used: the term “THPO” is used for functions that will be performed by the THPO in the event that a person other than the Director is designated as THPO.

Section 202. Composition of the Cultural Advisory Team

The Cultural Advisory Team consists of two classes of members: Core members and Associate members. Individuals are appointed to serve in either capacity in accordance with section 204 of these Rules. The Core members of the Team are responsible for carrying out the roles and responsibilities set out in this part. The number of Core members may vary from time to time; the THPO will strive to identify seven (7) persons to serve in this capacity and to maintain the Core Team at this size. The THPO or Core members may call on an Associate member to assist in matters in which the member’s knowledge would be helpful. There is no limit to the number of persons who may serve as Associate members.

Section 203. Roles and Responsibilities

The Cultural Advisory Team performs a number of roles in helping to carry out the tribal law and the federal regulations, including:

- (a) Contributing their wisdom and expertise relating to cultural and spiritual matters;
- (b) Helping to establish the Hualapai Register of Heritage Places;
- (c) Serving as the review board for the National Register of Historic Places;
- (d) Providing advice in repatriation matters; and
- (e) Serving as expert witnesses in Tribal Court.

Each of these roles is described in more detail below.

(a) Wisdom and Expertise. The Advisory Team will be a source of wisdom and expertise to help guide the Director and Staff of the Cultural Resources Department in carrying out the Ordinance. The Advisory Team will be available for consultation with the Director and Staff in developing plans and programs to protect and preserve the cultural resources of the Hualapai Tribe. See Ordinance sections 202(b)(6), 207(a).

(b) National Register of Historic Places. The Ordinance says that the Advisory Team will perform the role of a State Review Board as set out in the NPS regulations. Ordinance section 207(c), referring to NPS regulations codified at 36 C.F.R. parts 60 and 61. The NPS regulations, 36 C.F.R. section 61.4(f)(6), set out the responsibilities of a Review Board as follows:

- (1) Providing advice to the THPO on the full range of Historic Preservation Fund-supported activities ...;
- (2) Reviewing and making recommendations on National Register nomination proposals;
- (3) Participating in the review of appeals to National Register nominations; and
- (4) Performing such other duties as may be appropriate.

The role of a Review Board in reviewing and making recommendations on National Register nominations is set out in 36 C.F.R. sections 60.6, 60.10, and 60.11. The role of the Review Board in appeals of nominations is set out in 36 C.F.R. section 60.12. The NPS regulations also state, in 36 C.F.R. section 61.4(f)(1), that a majority of the members of a Review Board must meet the professional qualification standards established by the Secretary of the Interior and, at a minimum, must include at least one member meeting professional qualifications standards for history, prehistoric or historic archeology, and architectural history, although a Tribe may request a waiver of this requirement. The THPO will ensure that the Advisory Team, in performing its role in the federal historic preservation program, has access to professional expertise appropriate for matters under consideration.

(c) Hualapai Register of Heritage Places. Section 301 of the Ordinance gives the Director of the Cultural Resources Department a mandate to develop a Hualapai Register of Heritage Places. The Hualapai Register is separate from the National Register, although many places will be eligible for both. The process for developing the Hualapai Register is described in part 3 of these Rules. The task of developing the Hualapai Register is being carried out by the THPO. The THPO needs to be able to draw upon the wisdom of the Advisory Team in applying the criteria of eligibility for the Hualapai Register. Section 301(c) of the Ordinance sets out four responsibilities of the Advisory Team with respect to the Hualapai Register:

- (1) consult with the Director in determining eligibility;
- (2) consult with the Director in determining whether to formally list a property;
- (3) help decide whether such consultations should be closed to the public; and
- (4) in the event of a disagreement between the Director and the Advisory Team regarding whether a property is eligible or should be formally listed, the Advisory Team makes the decision.

(d) Repatriation. Section 201(c)(8) of the Ordinance gives the Director of the Department of Cultural Resources a mandate to seek the repatriation of human remains and cultural items from federal agencies and museums, pursuant to the federal Native American Graves Protection and Repatriation Act (NAGPRA). The Director may draw upon the wisdom and expertise of the Advisory Team in determining the appropriate disposition of any items repatriated pursuant to NAGPRA.

(e) Tribal Court. Section 503(d) of the Ordinance says that in any matter arising in Tribal Court involving the Ordinance, the Tribal Court may seek advice from the Advisory Team on questions relating to tribal cultural traditions.

Section 204. Policy on Appointments

(a) Eligibility. Any Hualapai Tribal member who possesses knowledge of Hualapai traditions and cultural heritage is eligible for appointment to the Advisory Team. There is no minimum age requirement. Rather, the most important qualification is that a candidate possesses traditional knowledge.

(b) Volunteering to Serve. Any Hualapai Tribal member may volunteer to serve on the Advisory Team. In addition, the THPO may seek out particular individuals and ask them to volunteer. In deciding whether to seek the participation of particular individuals, the THPO will be guided by the desirability of having Team members with knowledge of the full range of Hualapai cultural traditions, including knowledge of particular places that hold religious, spiritual, and cultural importance. The willingness of some individuals to serve as Associate members will help to supplement the knowledge of Core Team members.

(c) Appointment Process. The THPO will discuss the roles and responsibilities of the Advisory Team with each individual who has volunteered to serve. These roles and responsibilities are described in section 203 of these Rules, and include matters relating to the Hualapai Register of Heritage Places and the National Register of Historic Places. The THPO will also determine whether the volunteer wishes to serve in the capacity of a Core member or an Associate member. When the THPO is satisfied that a volunteer qualifies with respect to Hualapai cultural traditions, the THPO will document the volunteer's qualification for possible appointment to the Advisory Team.

(1) Initial Appointment of Core Team. When the Team is first established, the THPO will develop a list of nominees. After consultation with the THPO and the staff of the Department, the Director will prepare a list of persons appointed as Core members of the Cultural Advisory Team. The appointment process is final when the list of appointments is confirmed by the Tribal Council.

(2) Appointment of Associate Members. The THPO may recommend to the Director that a volunteer be appointed as an Associate Member of the Advisory Team. The Director is authorized to appoint persons to serve in this capacity. The Director will maintain a list of persons appointed to serve as Associate Members of the Advisory Team and will provide an updated list to the Tribal Council on an annual basis.

(3) Replacement of Core Members. In the event that it becomes necessary to replace one or more Core Team members, the THPO will recommend, the Director will appoint, and the Council will have the power to confirm the appointment.

(d) Term of Office and Removal. Members of the Advisory Team shall serve as long as they are willing and able to do so. The Team's Operating Procedures shall specify a process through which an individual who has stopped participating may be removed from the Team by the Core Team members or by the Director.

Section 205. Training

The THPO will arrange for training for the Advisory Team on the federal historic preservation program and on the program created by the Hualapai Cultural Heritage Resources Ordinance.

Section 206. Compensation

Each Core member of the Advisory Team may be compensated for attendance at any meeting. Any Associate member who has been asked to attend a Core Team meeting may receive compensation in the same amount. The amount of compensation will be determined on an annual basis by the Director, in accordance with a policy statement to be adopted pursuant to section 208(d) of the Ordinance.

Section 207. Operating Procedures

The Core members of the Advisory Team will adopt written procedures for the conduct of its meetings. The Director of the Department of Cultural Resources will help the Team to develop and adopt their written procedures. After approval by the Team, the Director will issue these Operating Procedures pursuant to section 208(d) of the Ordinance.

RULES
IMPLEMENTING THE
HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE

APPENDIX 2-A

**EXCERPTS FROM FEDERAL REGULATIONS
ISSUED BY THE NATIONAL PARK SERVICE**

NOTE: The Policy Statement on the Roles and Responsibilities of the Cultural Advisory Team of, which is included in Part 2 of the Rules to implement the Hualapai Cultural Heritage Resources Ordinance, includes references to several sections of the Ordinance and to regulations issued by the National Park Service. This Appendix provides relevant sections of the federal regulations.

**STATE REVIEW BOARD DUTIES
EXCERPTS FROM THE CODE OF FEDERAL REGULATIONS, 36 C.F.R. PARTS 60, 61**

Part 60 of the C.F.R. is captioned "National Register of Historic Places." A number of provisions in Part 60 include references to the State Review Board. Part 60 has not been revised since the National Historic Preservation Act was amended in 1992 to authorize tribes to establish Tribal Historic Preservation Officer (THPO) programs and take over functions that would otherwise be performed by the SHPO.

Section 60.3 Definitions

(o) State Review Board. The State Review Board is a body whose members represent the professional fields of American history, architectural history, historic architecture, prehistoric and historic archeology, and other professional disciplines and may include citizen members. In States with approved State historic preservation programs the State Review Board reviews and approves National Register nominations concerning whether or not they meet the criteria for evaluation prior to their submittal to the NPS.

Section 60.6 Nominations by the State Historic Preservation Officer under approved State Historic Preservation programs

Section 60.6 sets out the process for nominations by a SHPO. Subsections (j), (k), and (l) set out the role of the State Review Board in such nominations, and these three subsections are reproduced below. (While subsections (a) through (g) include numerous references to the State Review Board, it is really only (j), (k), and (l) that say what the State Review Board does.)

(j) Completed nomination forms or the documentation proposed for submission on the nomination forms and comments concerning the significance of a property and its eligibility for the National Register are submitted to the State Review Board. The State Review Board shall review the nomination forms or documentation proposed for submission on the nomination forms and any comments concerning the property's significance and eligibility for the National Register.

The State Review Board shall determine whether or not the property meets the National Register criteria for evaluation and make a recommendation to the State Historic Preservation Officer to approve or disapprove the nomination.

(k) Nominations approved by the State Review Board and comments received are then reviewed by the State Historic Preservation Officer and if he or she finds the nominations to be adequately documented and technically, professionally, and procedurally correct and sufficient and in conformance with National Register criteria for evaluation, the nominations are submitted to the Keeper of the National Register of Historic Places, National Park Service, United States Department of the Interior, Washington, D.C. 20240. All comments received by a State and notarized statements of objection to listing are submitted with a nomination.

(l) If the State Historic Preservation Officer and the State Review Board disagree on whether a property meets the National Register criteria for evaluation, the State Historic Preservation Officer, if he or she chooses, may submit the nomination with his or her opinion concerning whether or not the property meets the criteria for evaluation and the opinion of the State Review Board to the Keeper of the National Register for a final decision on the listing of the property. The opinion of the State Review Board may be the minutes of the Review Board meeting. The State Historic Preservation Officer shall submit such disputed nominations if so requested within 45 days of the State Review Board meeting by the State Review Board or the chief elected local official of the local, county or municipal political subdivision in which the property is located but need not otherwise do so. Such nominations will be substantively reviewed by the Keeper.

Section 60.10 Concurrent State and Federal nominations

(b) When a portion of the area included in a Federal nomination is not located on land under the ownership or control of the Federal agency, but is an integral part of the cultural resource, the completed nomination form shall be sent to the State Historic Preservation Officer for notification to property owners, to give owners of private property an opportunity to concur in or object to the nomination, to solicit written comments and for submission to the State Review Board pursuant to the procedures in s 60.6.

(c) If the State Historic Preservation Officer and the State Review Board agree that the nomination meets the National Register criteria for evaluation, the nomination is signed by the State Historic Preservation Officer and returned to the Federal agency initiating the nomination. If the State Historic Preservation Officer and the State Review Board disagree, the nomination shall be returned to the Federal agency with the opinions of the State Historic Preservation Officer and the State Review Board concerning the adequacy of the nomination and whether or not the property meets the criteria for evaluation. The opinion of the State Review Board may be the minutes of the State Review Board meeting. The State Historic Preservation Officer's signed opinion and comments shall confirm to the Federal agency that the State nomination procedures have been fulfilled including notification requirements. Any comments received by the State shall be included with the letter as shall any notarized statements objecting to the listing of private property.

Section 60.11 Requests for nominations.

(c) If the nomination form appears to be adequately documented and if the property appears to meet the National Register criteria for evaluation, the State Historic Preservation Officer shall comply with the notification requirements in Section 60.6 and schedule the property for presentation at the earliest possible State Review Board meeting. Scheduling shall be consistent with the State's established priorities for processing nominations. If the nomination form is adequately documented, but the property does not appear to meet National Register criteria for

evaluation, the State Historic Preservation Officer need not process the nomination, unless so requested by the Keeper pursuant to s 60.12.

(d) The State Historic Preservation Officer's response shall advise the applicant of the property's position in accord with the State's priorities for processing nominations and of the approximate date the applicant can expect its consideration by the State Review Board. The State Historic Preservation Officer shall also provide notice to the applicant of the time and place of the Review Board meeting at least 30 but not more than 75 days before the meeting, as well as complying with the notification requirements in s 60.6.

(e) Upon action on a nomination by the State Review Board, the State Historic Preservation Officer shall, within 90 days, submit the nomination to the National Park Service, or, if the State Historic Preservation Officer does not consider the property eligible for the National Register, so advise the applicant within 45 days.

Section 60.14 Changes and revisions to properties listed in the National Register.

(b) Relocating properties listed in the National Register.
* * *

(3) Any such proposal with respect to the new location shall follow the required notification procedures, shall be approved by the State Review Board if it is a State nomination and shall continue to follow normal review procedures.

Section 60.15 Removing properties from the National Register.

(g) The State Historic Preservation Officer may elect to have a property considered for removal according to the State's nomination procedures unless the petition is on procedural grounds and shall schedule it for consideration by the State Review Board as quickly as all notification requirements can be completed following procedures outlined in s 60.6, or the State Historic Preservation Officer may elect to forward the petition for removal to the Keeper with his or her comments without State Review Board consideration.

(h) Within 15 days after receipt of the petitioner's notification of intent to pursue his removal request, the State Historic Preservation Officer shall notify the petitioner in writing either that the State Review Board will consider the petition on a specified date or that the petition will be forwarded to the Keeper after notification requirements have been completed. The State Historic Preservation Officer shall forward the petitions to the Keeper for review within 15 days after notification requirements or Review Board consideration, if applicable, have been completed.

STATE REVIEW BOARD QUALIFICATIONS EXCERPT FROM 36 C.F.R. PARTS 61

Part 61 of 36 C.F.R. is captioned "Procedures for State, Tribal, and Local Government Historic Preservation Programs." Part 61 has been revised somewhat since the enactment of the 1992 Amendments to the National Historic Preservation Act, but provisions relating to tribal programs have not yet been issued as final rules. Section 61.4 sets out the basic requirements for state programs, and subsection 61.4(f) sets out the requirements for State Review Boards.

Section 61.4 State Programs

(f) Unless State law provides for a different method of appointment, the SHPO must appoint an adequate and qualified State historic preservation Review Board (Review Board).

(1) All Review Board members must have demonstrated competence, interest, or knowledge in historic preservation. A majority of Review Board members must meet “the Secretary of the Interior’s (Historic Preservation) Professional Qualifications Standards” which are part of the larger “Secretary’s Standards and Guidelines for Archeology and Historic Preservation.” The members meeting “the Secretary’s (Historic Preservation) Professional Qualifications Standards” must include at a minimum, one individual meeting “the Secretary’s (Historic Preservation) Professional Qualifications Standards” for history, one individual meeting “the Secretary’s (Historic Preservation) Professional Qualifications Standards” for prehistoric archeology or historic archeology, and one individual meeting “the Secretary’s (Historic Preservation) Professional Qualifications Standards” for architectural history. One person may meet the Standards for more than one required discipline. The other Review Board members, if any, who comprise the majority that meets “the Secretary’s (Historic Preservation) Professional Qualifications Standards” may represent, subject to the SHPO’s selection, any of the disciplines that those “Standards” describe.

(2) The Secretary will consider proposals from a SHPO for a minimum required Review Board composition that differs from the requirement that paragraph (f)(1) of this section specifies, if the proposal addresses better an appropriate balance of historic property, customer or constituent, and historic preservation needs in that State.

(3) When a required Review Board position becomes vacant, the SHPO must fill the vacancy in a timely manner. In the interim, the SHPO must ensure that the Review Board has access to advice from appropriately qualified individuals. A lapse of more than one year in filling the vacancy is cause for review, comment, and appropriate action by the Secretary.

(4) The Review Board must meet as often as is necessary to complete its work in a timely fashion but no less often than once a year.

(5) The Review Board must adopt written procedures governing its operations consistent with the provisions of this section and related guidance that the National Park Service issues.

(6) Review Board responsibilities include, but are not limited to, the following:

- (i) Providing advice to the SHPO on the full range of Historic Preservation Fund-supported activities, that section 101 (b)(3) of the Act describes;
- (ii) Reviewing and making recommendations on National Register nomination proposals;
- (iii) Participating in the review of appeals to National Register nominations; and
- (iv) Performing such other duties as may be appropriate.

RULES
IMPLEMENTING THE
HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE

APPENDIX 2-B

**EXCERPTS FROM THE HUALAPAI
CULTURAL HERITAGE RESOURCES ORDINANCE**

NOTE: The Policy Statement on the Roles and Responsibilities of the Cultural Advisory Team, which is included in Part 2 of the Rules to implement the Hualapai Cultural Heritage Resources Ordinance, includes references to several sections of the Ordinance. This Appendix provides relevant sections of the tribal law. The order in which excerpts are printed here corresponds to the order in which references are made to the Ordinance in the Policy Statement. The Ordinance uses the term “Advisory Team of Elders,” and that term is used in the excerpts that follow. In the rulemaking process, the Department decided to use the term “Cultural Advisory Team” in the rules.

1. Wisdom and Expertise

Section 202(b)(6)

(b) *Responsibilities.* The Director [of the Cultural Resources Department] shall have the overall responsibility for carrying out this Ordinance. Specific responsibilities of the Director shall include, but not be limited to, the following:

* * *

(6) Develop, in consultation with the Advisory Team of Elders, plans and programs to protect and preserve the cultural resources of the Hualapai Tribe;

Section 207. Advisory Team of Elders

(a) In carrying out their responsibilities under this Ordinance, the Director and the employees of the Department shall be guided by the wisdom and expertise of an Advisory Team of Elders.

2. National Register of Historic Places

Section 207(c).

(c) In addition to such other roles and responsibilities as the Director determines are appropriate for the Advisory Team of Elders, this Team also shall perform a role similar to that performed by a State Review Board under regulations issued by the National Park Service regarding nominations of properties to the National Register of Historic Places. (36 C.F.R. parts 60, 61).

3. Hualapai Register of Heritage Places

Section 301. Hualapai Register of Heritage Places

(a) *Creation of the Register.* The Director shall create, expand, maintain and administer a Hualapai Tribal Register of Heritage Places (hereinafter referred to as the "Hualapai Register") comprising places, buildings, districts, objects, and structures significant in Hualapai history, culture, archaeology, engineering, and architecture. The Director shall issue rules to establish criteria for eligibility and procedures for determining eligibility and nominating places to be listed on the Hualapai Register. Eligibility for the Hualapai Register shall not be limited to places that are located on Hualapai Tribal lands but, rather, may also include places located on Hualapai traditional use lands.

(b) *Inventory, Evaluation, and Registration.* The Director shall establish a program to locate, inventory and evaluate cultural resources on Hualapai tribal lands and Hualapai traditional use lands. In accordance with rules issued pursuant to paragraph (a) of this Section, upon a determination that a place is eligible for the Hualapai Register, the Director may formally add the place to the Register or the Director may maintain a separate listing of places that have been determined eligible but have not been formally listed.

(c) *Advisory Team of Elders.* The rules issued by the Director pursuant to paragraph (b) shall include a procedure through which the Director shall consult with the Advisory Team of Elders in determining whether any particular place is eligible for the Hualapai Register and, if it is eligible, whether or not it should be formally listed. The consultations leading up to such determinations may be closed to the public if, in the judgment of the Director or the Advisory Team of Elders, confidentiality is advisable to protect the cultural resources at issue and the traditional uses of such resources by tribal members, *provided* that members of the Tribal Council and persons designated by them may participate in such consultations. In the event of a disagreement between the Director and the Advisory Team of Elders, the Director shall defer to the judgment of the Advisory Team of Elders and issue a determination for the Department.

(d) *Appeals.* A determination by the Director on the eligibility of a place for the Hualapai Register may be appealed pursuant to Section 503.

4. Repatriation

Section 201. Cultural Resources Department

(c) *Programs.* The Department shall develop and administer all programs necessary to achieve the purposes of this Ordinance, consistent with direction from the Tribal Council and Tribal Administration, including programs to:

* * *

(8) Seek the repatriation of human remains and cultural items from federal agencies and "museums" (as that term is defined in the Native American Graves Protection and Repatriation Act) and other persons and establish procedures, in consultation with the Advisory Team of Elders, for determining the appropriate disposition of repatriated items.

5. Tribal Court

Section 503. Judicial Review

* * *

(d) *Advisory Team of Elders.* In any case arising under this Ordinance, the Tribal Court may seek advice from the Advisory Team of Elders on questions relating to tribal cultural traditions.

RULES

IMPLEMENTING THE

HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE

PART 3. HUALAPAI REGISTER OF HERITAGE PLACES

Section 301.	Purposes
Section 302.	Criteria of Eligibility
Section 303.	Considerations for Applying the Criteria
Section 304.	Procedure for Determinations of Eligibility
Section 305.	Determinations by the THPO
Section 306.	Review by the Cultural Advisory Team
Section 307.	Designation of Areas of Special Tribal Concern
Section 308.	National Register of Historic Places
Section 309.	Community Involvement

Section 301. Purposes

The Hualapai Register of Heritage Places is an inventory of places, buildings, districts, objects, and structures significant in Hualapai history, culture, archaeology, engineering, and architecture. The Hualapai Register is separate from the National Register of Historic Places, although many places that are eligible for the Hualapai Register may also be eligible for the National Register. The main purpose of the Hualapai Register is to provide recognition for places that are important to the Hualapai people and to maintain an inventory of such places, as determined pursuant to tribal law and without any need to provide documentation on such places to any federal agency. Another important purpose is to be prepared to respond to proposed activities that threaten the integrity Heritage Places by documenting their importance before such activities are proposed.

Section 302. Criteria of Eligibility

The quality of significance in Hualapai heritage is present in places, buildings, districts, objects, structures, and landscapes that:

(1) Are associated with important events or patterns of events in the development and survival of Hualapai culture. The consideration of this criterion should incorporate a broad and inclusive perspective, which includes various kinds of knowledge of historical events, such as those that are recognized in Hualapai oral traditions, events that have been documented in historical or archival records, events that pertain to local and familial histories, and events that are associated with the development of Hualapai traditional ecological knowledge;

(2) Are associated with the lives of persons (including supernatural or non-human entities) who are significant in the development and survival of Hualapai culture;

(3) Embody the distinctive characteristics of a type, period, or method of creation; represent the work of a master; possess high artistic values; or represent a significant and distinguishable whose components may lack individual distinction; or

(4) Have yielded, or may be likely to yield, important information about the development and survival of Hualapai culture. In evaluating this criterion, "important information" may be interpreted as

including information that is in addition to western scientific knowledge, including information about the development of Hualapai oral traditions or traditional ecological knowledge.

Section 303. Considerations for Applying the Criteria

Eligibility for the Hualapai Register is not limited to places that are located on Hualapai Tribal lands but, rather, may also include places located on Hualapai traditional use lands. Places at which Hualapai human remains or funerary objects are located are normally eligible for the Hualapai Register. Places that include features commonly known as petroglyphs are normally eligible for the Hualapai Register anywhere within Hualapai Tribal lands or traditional use lands in that such petroglyphs presumptively meet one or more of the four criteria. Places at which archeological resources other than petroglyphs are located may be eligible but must be evaluated for one or more of the four criteria. If a site containing archaeological resources has been evaluated for eligibility for the National Register and has been determined to not be eligible, it may nevertheless be eligible for the Hualapai Register.

Section 304. Procedure for Determinations of Eligibility

(a) Inventory Program. The Tribal Historic Preservation Officer (THPO) conducts a program to locate, inventory and evaluate cultural resources on Hualapai tribal lands and Hualapai traditional use lands. (In the event that the position of THPO is held by an individual other than the Director, this function will be performed by the THPO.) The THPO oversees the preparation of documentation on places that are being evaluated for eligibility, which may be done in consultation with the Cultural Advisory Team in making determinations. The program for identifying and evaluating places for the Hualapai Register is both pro-active and re-active. Some places are considered because of their significance in Hualapai heritage regardless of whether there is any planned development or other activity that presents a threat to such places. Other places are considered as they are brought to the attention of the THPO in the context of reviewing proposed developments pursuant to the Ordinance or, if there is a proposed federal agency action, pursuant to section 106 of the National Historic Preservation Act.

(b) Confidentiality. The analysis and consultation leading up to such determinations is normally closed to the public, especially if, in the judgment of the THPO, confidentiality is advisable to protect the cultural resources at issue and the traditional uses of such resources by tribal members. If the consultations are kept confidential, any member of the Tribal Council or a designated representative may participate. As provided in the Ordinance, the THPO may establish a list of places that have been determined eligible for the Hualapai Register but which are not formally listed in order to restrict access to information about such places and reduce the risk of damage to them. The THPO will seek the advice of the Cultural Advisory Team in determining whether or not any particular place should be formally listed, or whether a determination of eligibility should be kept on the confidential list.

Section 305. Determinations by the THPO

The THPO will make a determination of whether a place is eligible for that Hualapai Register. Each such determination will be subject to review by the Cultural Advisory Team. The THPO may also make a determination on whether each such place is eligible for the National Register of Historic Places.

Section 306. Review by the Cultural Advisory Team

On a periodic basis, the THPO will provide the Cultural Advisory Team with information on the determinations of eligibility that have been made. In the event of a disagreement between the Director and the Cultural Advisory Team regarding eligibility for the Hualapai Register, then, in accordance with

CHRO section 301, the THPO will defer to the judgment of the Advisory Team. If the THPO has made a preliminary determination that a place is also eligible for the National Register, the THPO shall discuss this during consultation regarding eligibility for the Hualapai Register and will seek the advice of the Cultural Advisory Team on whether such property should be nominated to the National Register. Any such nominations will be processed in accordance with section 308 of these Rules.

Section 307. Designation of Areas of Special Tribal Concern

For places within Hualapai Tribal Lands, the THPO may recommend that an area containing one or more significant heritage place be designated an “Area of Special Tribal Concern” in the Tribe’s Land Use and Development Plan,” as authorized by section 404 of the Hualapai Environmental Review Code. Any person may contact the THPO and suggest that a particular place be evaluated for eligibility.

Section 308. National Register of Historic Places

The THPO conducts a program to locate and inventory cultural resources on Hualapai tribal lands and Hualapai traditional use lands and to evaluate such resources for eligibility for the National Register of Historic Places, and to determine whether any such property should be formally nominated to the National Register. The THPO shall prepare and process nominations in accordance with federal regulations codified at 36 C.F.R. part 60, with the THPO performing the role specified in those regulations for the state historic preservation officer. Any property for which the THPO has prepared nomination forms may be presented to the Cultural Advisory Team, which shall perform the role of a “state review board” in accordance with the federal regulations codified at 36 C.F.R. part 60, if the performance of such a role is appropriate for any such nomination. The THPO will make arrangements for the Team of Elders to have technical assistance as appropriate for the property under consideration. Reference in this section to the federal regulations codified at 36 C.F.R. part 60 is not intended to require strict adherence to those regulations; rather, the THPO is authorized to interpret those regulations with an appropriate degree of flexibility. The nomination of a place to the National Register, or the failure to nominate a place, may be appealed to the National Park Service as provided in federal regulations codified at 36 C.F.R. part 60.

Section 309. Community Involvement.

Any person may recommend that the THPO consider a particular place for inclusion in either the Hualapai Register or the National Register, or both. Persons interested in proposing such nominations are encouraged to consult with staff of the Department. With respect to proposed National Register nominations, documentation should be in the format used by the National Park Service.

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RULES
IMPLEMENTING THE
HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE

PART 4. REVIEW OF PROPOSED UNDERTAKINGS

Section 401.	Purpose and Scope of This Part
Section 402.	Responsibility for Providing Information to the THPO
Section 403.	Initiating a Clearance Request
Section 404.	The Clearance Process
Section 405.	Alternate Process for Federal or Federally -assisted Undertakings
Section 406.	Coordination with Tribal Environmental Review Commission
Section 407.	Coordination with CHRO Permit Requirements
Section 408.	Coordination with Land Use and Development Planning
Section 409.	Programmatic Agreements
Section 410.	Referrals for Professional Services
Section 411.	Legal Effect of THPO Clearance Letter
Section 412.	Post-Clearance Discoveries
Section 413.	Review of Proposed Undertakings that Are Not on Tribal Lands

Appendix 4-A. CHRO Section 303

Appendix 4-B. Exclusions from the Clearance Requirement [Reserved]

Appendix 4-C. Standard Fees for the Archaeological Services Branch [Reserved]

Section 401. Purpose and Scope of This Part

(a) The Legal Requirement under Tribal Law. This part implements the clearance requirement set out in section 303 of the CHRO. The complete text of section 303 is reprinted in Appendix 4-A. The clearance requirement is set out in subsection 303(a), which states:

Before carrying out any undertaking that may affect cultural resources located on Hualapai tribal lands, the responsible agency official or responsible person proposing the undertaking must provide the Director with a reasonable opportunity to review the undertaking and determine the effects the undertaking is likely to have on cultural properties. The undertaking shall not proceed unless and until the Director has given the responsible agency official or responsible person written clearance to proceed. Such written clearance may include mitigation measures, which shall be binding on the responsible agency official or responsible person.

(b) Role of THPO; Clarification of Terms. Section 303 charges the Director with responsibility for issuing clearances, and section 202(b)(1) of the Ordinance specifies that the Director serves as the Tribal Historic Preservation Officer. The clearance process, like the NHPA section 106

process, is a function of the THPO. In this part, the term “THPO” is used to make clear that clearance is a function that the THPO performs.

(c) Undertakings that Are Covered. This clearance requirement applies to any undertaking proposed by a governmental agency (federal, tribal, state, or a subdivision of a state) as well as any undertaking proposed by a private person. Since most Hualapai Tribal Lands are held in trust for the Tribe, a proposed undertaking will usually require the approval or involvement of a tribal government agency, including, in most cases, the permit process administered by the Tribal Environmental Review Commission (TERC). Even if there is no tribal government action, however, if an undertaking may affect cultural resources on Hualapai Tribal Lands, the section 303 clearance requirement applies. Any proposed action that is included in the list of “exempted categories” in Appendix 4-B shall not be treated as an undertaking unless the Director makes a determination in writing that the proposed action will be treated as an undertaking; any such written determination must include a statement of reasons.

(d) Cultural Resources that Are Covered. The section 303 clearance requirement applies to all cultural resources, not just historic properties (those eligible for the National Register) or heritage properties (those eligible for the Hualapai Register). There are many places within Tribal Lands where there may be cultural resources that have not yet been identified as such, or where the cultural resources have not yet been evaluated for eligibility. Before the THPO can issue clearance under section 303, reasonable and good faith efforts must be made to identify and evaluate cultural resources that may be affected. These rules establish a process for gathering the information that the THPO needs before making a decision.

(e) What “Clearance” Means. The section 303 clearance requirement means that a proposed undertaking that would affect cultural resources is unlawful unless the THPO has authorized the undertaking to proceed.

(f) Relationship of Clearance to Requirements under Federal Law. The clearance process is designed to ensure that undertakings on Hualapai tribal lands meet the requirements of applicable federal cultural resources laws, including the National Historic Preservation Act (NHPA), Archaeological Resources Protection Act (ARPA), and Native American Graves Protection and Repatriation Act (NAGPRA). With respect to NHPA, the THPO is responsible for making sure that effects on historic properties are considered and that adverse effects are resolved in ways that are acceptable. The term “historic properties” means those that are listed on the National Register of Historic Places and those places that are eligible for the National Register. If any cultural resources that would be affected by a proposed undertaking are not eligible for either the Hualapai Register or the National Register, then, in most instances, the THPO will grant clearance. If the undertaking has the potential to affect archaeological resources, mitigation may be required even if the resources are not eligible for either Register. Damage to or destruction of archaeological resources on Indian lands is prohibited by ARPA. If such resources must be removed from the ground to avoid damage from an undertaking, then a permit under ARPA is generally required, or a class C permit under the Ordinance and part 5 of these rules, or both. (As explained in part 5, for tribal members and employees, the class C permit requirement applies in lieu of ARPA.) Clearance under section 303 will generally be coordinated with ARPA and the permit requirements of tribal law. In some cases, there may not be enough information about cultural resources that may be affected by a proposed undertaking and an ARPA permit, and/or a class C permit, may need to be issued prior to clearance in order to evaluate archaeological resources. Similarly, clearance will always be subject to compliance with NAGPRA in the event that Native American human remains or cultural items are discovered after clearance has been granted.

(g) Relationship of Clearance to Other Requirements under Tribal Law. The clearance process is typically coordinated with the permit process administered by the Tribal Environmental Review Commission (TERC), as discussed in section 405. Applicants are advised that a permit may be needed under Part 5 of these Rules to produce enough information for the THPO to make a decision on clearance. The THPO will not be able to grant clearance until the necessary information has been provided, and applicants should take this into account when developing time lines for their proposed undertakings.

(h) Review of Proposed Undertakings that Are Not on Tribal Lands. For proposed federal and federally-assisted undertakings that are not on Tribal lands, the Department represents the Tribe in the review of in accordance with NHPA section 106 process as implemented through the regulations of the Advisory Council on Historic Preservation. Such proposed undertakings are not subject to the clearance requirement of section 303 of the Ordinance and, as such, are not subject to this part of these Rules. Section 413, however, does provide some guidance on how the Department will proceed in the review of such proposed undertakings.

Section 402. Responsibility for Providing Information to the THPO

The applicant for clearance is generally responsible for developing the information that the THPO needs in order to make a decision on an application for clearance. The applicant should follow any relevant guidance document(s) issued by the THPO to ensure that the information developed meets the needs of the THPO. In most instances, the applicant will be expected to provide at least the information developed through a non-collection survey, and prior to conducting such a survey the applicant will need a class B permit under part 5 of these rules. The applicant is encouraged to consult with the THPO for guidance and clarification as needed. Information that has been developed in accordance with the “Secretary of the Interior’s Standards and Guidelines for Archeology and Historic Preservation” (as amended and annotated by the National Park Service) will be acceptable by the THPO. The “Standards and Guidelines” are available at: www.cr.nps.gov/local-law/arch_stnds_0.htm.

Section 403. Initiating a Clearance Request

(a) Cultural Resources Clearance Request. The steps in the clearance process, as described in this section and section 404, generally correspond to the steps in the NHPA section 106 process, as set out in the ACHP regulations. The THPO is authorized, in certain cases, to allow some steps to be skipped. To initiate the process, the applicant completes a Cultural Resources Clearance Request form, files the form with the Cultural Resources Department, and makes arrangements to consult with the Archaeological Services Branch (or other representative of the Department designated by the Director) to determine information needs and level of effort appropriate for the clearance request. At this step, an authorized representative of the Department may determine that the proposed action for which clearance is sought is subject to a programmatic agreement that has been executed pursuant to section 409 of these rules, or that the development of a new programmatic agreement would be an appropriate alternative to processing the clearance request pursuant to this section. In addition, if the clearance is sought for a proposed federal or federally-assisted undertaking and the Advisory Council on Historic Preservation and the Hualapai Tribe have entered into an agreement to follow these tribal rules rather than the ACHP rules but the responsible federal agency official prefers to proceed under the ACHP, the THPO may authorize the undertaking to be reviewed under the ACHP rules. Any authorization to proceed with clearance using an alternative to the process set out in this section must be signed by the THPO.

(b) Preliminary Determinations and Recommendations. After the initial review of the Cultural Resources Clearance Request, the ASB will make a preliminary determination of the area of potential effects, which may be revised in light of additional information. The ASB may also make one of the following recommendations:

- (1) If the proposed undertaking is located within or would otherwise affect a designated Tribal Historic District or an Area of Special Tribal Concern, the ASB will consult with the THPO, and the THPO may determine that it would be appropriate to skip to the step of assessing effects in subsection 404(b).
- (2) If the proposed undertaking is subject to a programmatic agreement pursuant to section 409, the ASB will so advise the applicant.
- (3) If the proposed undertaking is subject to an exclusion listed in Appendix 4-B, the ASB will so advise the applicant and the THPO will provide the applicant with a letter attesting to the exclusion. Any such exclusion remains subject to the requirements for post-clearance discoveries in section 412.
- (4) If the proposed undertaking is in an area that has previously been disturbed and the undertaking is not likely to cause additional disturbance to cultural resources, the ASB will consult with the THPO, and the THPO may determine to issue clearance, subject to the post-clearance discovery provisions in section 412.
- (5) If the proposed undertaking is located within an area which has previously been surveyed and the proposed undertaking would not cause any new impacts to cultural resources, the ASB may recommend the THPO issue clearance based on existing information. In such a case the ASB will prepare a clearance document for THPO signature.
- (6) If the proposed undertaking is located within an area which has previously been surveyed, but the proposed undertaking would result in impacts to cultural resources not addressed in the previous survey, the ASB will recommend new field work and will specify the parameters for new field work. The ASB will also consult with the THPO to determine whether some level of effort is appropriate to determine if cultural resources other than archeological resources may be affected, including traditional cultural properties. Such additional level of effort may involve referral of the matter to the Cultural Advisory Team or interviews with one or more member(s) of the Team. The additional work will typically require the applicant to obtain either a class B permit or a class D permit, or both.
- (7) If the proposed undertaking is located within an area which has not previously been surveyed, the ASB will provide guidance to the applicant on the requirements for conducting a survey. Such a survey will generally require a class B permit pursuant to part 5 of these Rules, and may also require a class D permit.

(c) Determination of Whether a Permit Is Required. The Director of the Department will review the preliminary determinations and recommendations of the ASB and make a determination as to whether any permits will be required under part 5 of these Rules prior to conducting the work required to generate the information needed to act on the Cultural Resources Clearance Request.

(d) Notice of Pending Clearance Request. After determining the need (if any) for permits, the THPO will post notice at the Cultural Resources Department and Tribal Office of receipt of a Clearance Request, with a tentative schedule for processing the request. The notice will identify the proposed undertaking for which the Clearance Request was filed, but need not disclose the exact location if, in the judgment of the THPO the disclosure of precise information might increase the risk of harm to cultural resources. The notice will provide information on how interested persons may provide input into the Clearance process, including the option of requesting to be a consulting party.

(e) Identification of Consulting Parties. The applicant (whether a governmental agency, other kind of entity, or individual) will always be treated as a consulting party. The THPO will review the Clearance Request and the preliminary determinations and recommendations of the ASB and make a determination as to whether it would be helpful to invite any other governmental agencies or other entities or individuals to participate in the clearance process as consulting parties. The THPO will review any requests that may be received in response to the notice in paragraph (d). The THPO has sole discretion in determining which agencies, entities and individuals to invite to be consulting parties, provided, that the ACHP may be a consulting party on its own initiative if the proposed undertaking would affect a property listed on or eligible for the National Register. In addition, in the event of an undertaking that would affect a property listed on or eligible for the National Register on land that is not held in Indian trust status, if the landowner so requests, the THPO will invite the Arizona State Historic Preservation Officer to be a consulting party in accordance with the ACHP regulations. 36 C.F.R. § 800.3(c)(1). All invitations will be confirmed in writing; if an invitation is declined, the THPO will follow up with a letter confirming that the invitation was made and declined.

Section 404. The Clearance Process

(a) Engaging the Consulting Parties. The THPO will initiate contact with all of the consulting parties and inquire about the level of involvement each such party prefers. A meeting will normally be held, but communication by phone and email may be acceptable.

(b) Identification of Historic Properties and Other Cultural Resources. At this step the applicant conducts the fieldwork as directed by ASB, or arranges to have the fieldwork done. The ASB and THPO will be available for consultation during this step. Consulting parties, if there are any, may be involved in helping to conduct the fieldwork, if authorized by the THPO. When the ASB has determined that the documentation is adequate, the THPO will make a proposed finding on whether cultural resources will be affected by the undertaking and, if so, whether any such cultural resources should be treated as eligible for the Hualapai Register or the National Register. If the THPO makes a finding that no cultural resources will be affected by the undertaking, the THPO will post notice of any such “no effect” notice in the Tribal Office and the Cultural Resources Department. If no objection is filed with the THPO within thirty (30) days, the THPO will issue clearance. If any consulting party files an objection within thirty (30) days, the THPO will proceed to the assessment of adverse effects under subsection 404(c). If any person other than a consulting party files an objection to a “no effect” finding within thirty (30) days, the THPO has sole discretion to decide whether to proceed to subsection 404(c) or to reject the objection. The rejection of an objection will be communicated in writing to the person or entity who filed the objection. Such a rejection is subject to judicial review pursuant to subsection 303(f) of the Ordinance, provided that a complaint seeking judicial review must be filed in Tribal Court within ten (10) days of service of the THPO’s decision rejecting the objection. The THPO may issue clearance at any time after ten (10) days has passed since serving notice of rejection of an objection.

(c) Assessment of Adverse Effects. When the field work has been completed and a report has been submitted to the ASB, the ASB will arrange for consultation with the THPO, the applicant, consulting parties, and other appropriate persons or agencies as may be determined by the THPO. The purpose of this step is to determine whether the proposed undertaking is likely to result in adverse effects on a cultural resource that is listed on or eligible for either the National Register or the Hualapai Register. The consulting parties shall consider the effects on any characteristic of such a property for which it has been determined to be significant, including characteristics that had not been evaluated prior to the clearance process. If the THPO determines that there will be adverse effects, the consulting parties will move on to the next step. If the THPO makes a finding of “no adverse effects” on cultural resources, the

THPO will post notice of any such finding in the Tribal Office and the Cultural Resources Department. If no objection is filed with the THPO within thirty (30) days, the THPO will issue clearance. If any consulting party files an objection within thirty (30) days, the THPO will proceed to the resolution of adverse effects under subsection 404(d). If any person other than a consulting party files an objection to a “no adverse effect” finding within thirty (30) days, the THPO has sole discretion to decide whether to proceed to subsection 404(d) or to reject the objection. The rejection of an objection will be communicated in writing to the person or entity who filed the objection. Such a rejection is subject to judicial review pursuant to subsection 303(f) of the Ordinance, provided that a complaint seeking judicial review must be filed in Tribal Court within ten (10) days of service of the THPO’s decision rejecting the objection. The THPO may issue clearance at any time after ten (10) days has passed since serving notice of rejection of an objection.

(d) Resolution of Adverse Effects. At this step, the consulting parties will formulate measures to avoid, minimize, or mitigate the adverse effects that have been identified. The THPO has sole discretion to determine whether proposed measures are adequate. If the THPO makes such a determination, the THPO will issue clearance with the mitigation measures specified. The clearance will be issued in duplicate with a signature line for the applicant, and will not become effective until the applicant agrees to the specified terms. If the THPO decides not to issue clearance, or the applicant declines to agree to terms specified in a clearance document, the applicant may file an appeal pursuant to section 605 of these rules.

Section 405. Alternate Process for Federal or Federally-assisted Undertakings

(a) Use of Hualapai rules in Lieu of the Federal Rules. If the Advisory Council on Historic Preservation and the Hualapai Tribe have entered into an agreement to conduct the review of federal and federally-assisted undertakings pursuant to the Tribe’s rules in lieu of the regulations issued by the Advisory Council on Historic Preservation, 36 C.F.R. part 800, then the applicant will initiate the clearance process pursuant to section 404 of these rules. If the Tribe and the Advisory Council have not entered into such an agreement, compliance with CHRO section 303 may be accomplished for federal and federally-assisted undertakings through compliance with the regulations issued by the Advisory Council. 36 C.F.R. part 800, as modified by this section.

(b) Direct action by a Federal Agency. When an undertaking is proposed by a federal agency, the responsible agency official shall consult with the THPO to determine whether to proceed in accordance with these rules or to proceed in accordance with the standard process under regulations issued by the Advisory Council. Even if the Tribe and the Advisory Council have entered into an agreement to use the Tribe’s rules, the process in the Advisory Council’s regulations may be used with prior authorization by the THPO. The standard process, 36 C.F.R. part 800, subpart B, includes four basic steps:

- (1) Initiation of the process;
- (2) Identification of historic properties;
- (3) Assessment of adverse effects; and
- (4) Resolution of adverse effects.

The agency official shall contact the THPO at the step of initiating the section 106 process. Each step of the standard section 106 process (subpart B of the ACHP regulations) shall be taken in consultation with the THPO, unless the THPO advises the agency official that consultation at a particular step will not be necessary. The agency official will advise the THPO if the proposed undertaking is subject to any

alternative to the standard section 106 process (subpart B of the ACHP regulations), such as a programmatic agreement or alternate procedures.

(c) Involvement of SHPO for Undertakings Not on Trust Land. In the event of a federal or federally-assisted undertaking on land that is not held in federal Indian trust status that would affect a property listed on or eligible for the National Register, if the landowner so requests, the THPO will invite the Arizona State Historic Preservation Officer to be a consulting party, as required by the NHPA and the ACHP regulations. 16 U.S.C. § 470a(d)(2)(d)(iii); 36 C.F.R. § 800.3(c)(1). If the SHPO so requests, the review of such a proposed undertaking will be conducted in accordance with the ACHP regulations.

(d) Hualapai Register. The section 303 clearance requirement applies to places that are eligible for both the Hualapai Register and the National Register. Since the NHPA section 106 process is not designed for the purpose of identifying properties that are eligible for, or listed on, the Hualapai Register of Heritage Places, the federal agency official should consult with the THPO at the first step in the section 106 process to determine appropriate steps for identifying and evaluating properties that may be eligible for the Hualapai Register.

(e) Federally-assisted Undertakings. When the involvement of a federal agency in an undertaking is limited to providing funding and/or granting a legally required authorization, but the proponent of the undertaking is a private person or a non-federal entity (e.g., an applicant for federal assistance or authorization), the applicant may take the lead in contacting the THPO and performing the steps needed for securing section 303 clearance. The THPO will advise the application on whether to follow the Tribe's rules in lieu of the Advisory Council's; even if there is an agreement with the Advisory Council to follow the Tribe's rules, the THPO may authorize the use of the Advisory Council's regulations as modified by these rules. The applicant may take the lead regardless of whether the agency has authorized applicants to take the lead for NHPA section 106 compliance pursuant to 36 C.F.R. § 800.2(c)(4). The THPO may determine, on a case-by-case basis, that there is still a need for government-to-government consultation with the federal agency.

(f) Finding of No Historic Properties Affected. A "No Historic Properties Affected" finding by a federal agency official (pursuant to 36 C.F.R. § 800.4) does not fulfill the section 303 clearance requirement unless the THPO has concurred in writing.

(g) Finding of No Adverse Affect. A "No Adverse Affect" finding by a federal agency official (pursuant to 36 C.F.R. § 800.5) does not fulfill the section 303 clearance requirement unless the THPO has concurred in writing.

(h) Failure to Resolve Adverse Effects. If the NHPA section 106 process reaches the step of "Resolution of Adverse Effects" (pursuant to 36 C.F.R. § 800.6) but the federal agency official and the THPO do not sign a memorandum of agreement, termination of the consultation process by the federal official and requesting the Advisory Council to comment (pursuant to 36 C.F.R. § 800.7) does not fulfill the section 303 clearance requirement. As provided in subsection 303(f) of the Ordinance, if the THPO declines to issue clearance for an undertaking, the applicant for clearance may file an administrative appeal pursuant to section 502. Administrative appeals are governed by section 605 of the rules.

Section 406. Coordination with Tribal Environmental Review Commission

CHRO Section 303(b) provides that if a proposed undertaking would also be "development" subject to the permit requirement under the Hualapai Environmental Review Code, the Tribal

Environmental Review Commission (TERC) will consult with the Director prior to issuing the TERC permit. The TERC permit must include any conditions that the THPO specifies. In other words, the CHRO section 303 clearance process normally takes place within the context of the TERC permit process. An applicant for a TERC permit may choose to initiate the process of seeking section 303 clearance pursuant to these rules before beginning the TERC permit process. Informal discussions with the THPO and ASB may be helpful in determining the level of effort that will be needed for identification and evaluation of cultural resources in order to carry out the steps of assessment of adverse effects and resolution of adverse effects.

Section 407. Coordination with CHRO Permit Requirements

If the area of potential effects for a proposed undertaking has previously been surveyed and determined by the THPO not to include cultural resources that are eligible for either the National Register or the Hualapai Register, the THPO will generally be able to issue clearance without further investigation. In most cases, however, some additional investigation will be needed before clearance can be issued. Such additional investigation will typically require a non-collection cultural resources inventory, which normally requires a Class B permit pursuant to CHRO section 307, and may also require interviews with elders, which requires a class D permit. A cultural resource inventory involving removal of any cultural resources requires a class C permit and, if the cultural resources to be removed are “archaeological resources” as defined in ARPA, an ARPA permit will generally be required (except for tribal members and duly authorized tribal government employees after the effective date of these Rules). In many cases, clearance can be issued on the basis of information collected through a class B permit, subject to the post-clearance discovery conditions set out in section 412 of these Rules. As provided in section 404(c) of these Rules, the Director will determine whether any permits under part 5 are required.

Section 408. Coordination with the Tribe’s Land Use and Development Plan

The Hualapai Environmental Review Code calls for the adoption of a Tribal Land Use and Development Plan (“Development Plan”). The Development Plan will identify areas in which certain kinds of development are encouraged as well as “Areas of Special Tribal Concern.” The Cultural Resources Department will assist the Planning Department in developing the Development Plan with a view to reducing the likelihood of adverse effects on cultural resources in areas that are designated for development. Some areas designated for development might be treated as exclusions from the clearance requirement, subject to post-clearance discovery requirements. Areas where there are especially important cultural resources may be designated “Areas of Special Tribal Concern” in which the TERC permit process is subject to additional requirements.

Section 409. Programmatic Agreements

A department of tribal government, a tribal enterprise, or a federal agency may negotiate a programmatic agreement with the Department to provide for an alternative method for the issuance of clearance letters. There is no standard format for such a programmatic agreement. A programmatic agreement shall not take effect until it has been signed by the Director. In addition, a proposed federal or federally-assisted undertaking may be subject to a programmatic agreement entered into prior to the effective date of these Rules. Any such programmatic agreement is presumed to have continuing validity unless specifically terminated by the THPO.

Section 410. Referrals for Professional Services

As authorized by section 205 of the Ordinance, the Archaeological Services Branch (ASB), a staff unit within the Cultural Resources Department, provides assistance to other departments of tribal government, tribal enterprises, and the private sector in obtaining the services of qualified archaeologists and other cultural resources professionals. The ASB will maintain a list of such professionals for referral purposes. At the discretion of the Director, the ASB may provide services to tribal government departments and enterprises, and charge reasonable fees for such services. The ASB will maintain a schedule of fees for services, as approved by the Director.

Section 411. Legal Effect of THPO Clearance Letter

A clearance letter issued pursuant to this part fulfills the requirements of section 303 of the Ordinance, provided that the applicant for clearance has signed the letter accepting its terms and conditions. The holder of a clearance letter is presumed to be in compliance with the Ordinance, provided that all terms and conditions of the clearance letter are being met. A clearance letter does not necessarily indicate compliance with any requirement of federal law or regulations, except that, if the Hualapai Tribe and the ACHP have entered into an agreement follow these Rules in lieu of the ACHP rules, then a clearance letter does indicate compliance with NHPA section 106.

Section 412. Post-Clearance Discoveries

(a) Notice. In the event of post-clearance discovery of any cultural resources at the site of an undertaking, the holder of the clearance letter is responsible for notifying the Department by telephone immediately following the discovery, with written confirmation within 24 hours. Notice shall be provided in accordance with directions in the clearance letter.

(b) Federal Laws. Such a discovery may be subject to federal law, such as the Archaeological Resources Protection Act or the Native American Graves Protection and Repatriation Act. The Department can provide assistance in determining whether any such federal laws are applicable.

(c) Additional Mitigation Measures. In the event of such a discovery, the THPO may direct that additional mitigation measures be adopted prior to resuming the undertaking.

Section 413. Review of Proposed Undertakings that Are Not on Tribal Lands.

As provided in section 201(c)(3) of the Ordinance, the Department represents the Tribe in consultations with federal agencies and the State Historic Preservation Officer regarding cultural resources on Hualapai traditional use lands, including the NHPA section 106 process. When the Department has been in contact with a federal agency or an applicant for a federal license, approval, or funding, the Director will determine whether it has sufficient information about the location of the proposed undertaking to engage in consultation. If there is a need to develop information, the Director will inform the agency or applicant that the Department will not be able to effectively participate in consultation unless the identified need is met. The Department may make arrangements with the agency or applicant to address the need for information by contracting for the services of the ASB, including payment of expenses as well as staff time. In order to reduce the transaction costs of entering into such

contracts, the Director may establish a fee schedule for the review of undertakings, which may be adopted as a policy statement as authorized by subsection 208(d) of the Ordinance. Such a fee schedule may be adopted for certain kinds of proposed undertakings and may include the rates used to calculate compensation for staff time. If the Director does establish a fee schedule, for convenience, it should be included with these rules as Appendix 4-C.

RULES

IMPLEMENTING THE

HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE

APPENDIX 4-A

CULTURAL HERITAGE RESOURCES ORDINANCE, SECTION 303

Section 303. Clearance Requirement for Undertakings

(a) *Clearance Requirement.* Before carrying out any undertaking that may affect cultural resources located on Hualapai tribal lands, the responsible agency official or responsible person proposing the undertaking must provide the Director with a reasonable opportunity to review the undertaking and determine the effects the undertaking is likely to have on cultural properties. The undertaking shall not proceed unless and until the Director has given the responsible agency official or responsible person written clearance to proceed. Such written clearance may include mitigation measures, which shall be binding on the responsible agency official or responsible person.

(b) *Relationship to Environmental Review Code.* If the undertaking constitutes "development" under the Hualapai Environmental Review Code, the responsible agency or responsible person proposing the undertaking must apply to the Tribal Environmental Review Commission (TERC) for a permit, pursuant to the requirements of the Environmental Review Code. The TERC will consult with the Director regarding the effects the undertaking is likely to have on cultural resources and will include in the permit any conditions required by the Director.

(c) *Discovery Situations for Development under a TERC Permit.* If cultural resources are discovered during the course of development pursuant to a TERC permit, the TERC will consult with the Director regarding such cultural resources and will include any modification to the permit required by the Director. Depending on the likely effects that the undertaking may have on such cultural resources, the TERC may consider suspending or revoking the permit, subject to the procedural protections of notice and hearing provided in Section 309 of this Ordinance and the judicial review provision of Section 503.

(d) *Procedure.* The Director is authorized to issue rules to carry out the consultation requirement of this Section. In these rules the Director may provide that certain kinds of activities that normally do not adversely affect cultural resources may be excluded from the clearance requirement or may be addressed through programmatic agreements with responsible agencies. In the absence of rules issued by the Director, the procedure for conducting this consultation shall follow the procedure set out in the regulations issued by the Advisory Council on Historic Preservation for the Section 106 consultation process under the National Historic Preservation Act (36 C.F.R. part 800), with the Director performing the role of the SHPO, *provided*, that, as provided in paragraph (a) of this Section, unless and until the Director issues clearance, the responsible agency official or responsible person cannot lawfully proceed with an undertaking.

(e) *Relationship to Permit Requirements.* The clearance requirement established by this Section is in addition to any permit requirements pursuant to Section 305 of this Ordinance, or pursuant to the Hualapai Environmental Review Code, that may also apply. For many kinds of

undertakings it may be necessary to obtain one or more permits under Section 305 in order to gather sufficient information to make final plans for the undertaking and/or to adequately mitigate adverse effects on cultural resources prior to seeking clearance from the Director for the undertaking itself.

(f) *Hearings and Appeals.* If the Director denies clearance for an undertaking, the person or agency proposing the undertaking may request a hearing pursuant to Section 502 of this Ordinance. Any final decision made by the Director is subject to judicial review pursuant to Section 503 of this Ordinance.

RULES
IMPLEMENTING THE
HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE

APPENDIX 4B.
EXCLUSIONS FROM THE CLEARANCE REQUIREMENT

[RESERVED]

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RULES
IMPLEMENTING THE
HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE

APPENDIX 4-C
STANDARD FEES FOR THE
ARCHAEOLOGICAL SERVICES BRANCH

[RESERVED]

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RULES

IMPLEMENTING THE

HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE

PART 5. PERMIT REQUIREMENTS AND APPLICATION PROCEDURES

Subpart A. General Provisions and Visitation Permits

- Section 501. Purpose and Scope of this Part
- Section 502. Classes of Permits
- Section 503. Procedures that Apply to All Classes of Permits
- Section 504. Exceptions and Waivers
- Section 505. Suspension and Revocation of Permits
- Section 506. Guidance Issued by the Director
- Section 507. Restrictions on Release of Information
- Section 508. Class A Permits – Visiting Cultural Resources Sites

Subpart B. Class B Permits – Non-collection Surveys

- Section 511. Requirements and Exemptions
- Section 512. Information to Provided by Applicants
- Section 513. Documentation to be Produced
- Section 514. Additional Terms and Conditions
- Section 515. Blanket Permits

Subpart C. Class C. Permits – Excavation and Removal

- Section 521. Requirements and Exemptions
- Section 522. Relationship between Class C Permit and Federal ARPA Permit
- Section 523. Persons Required to Apply for a Class C Permit
- Section 524. Applications for Permits
- Section 525. Terms and Conditions
- Section 526. Documentation to be Produced
- Section 527. Custody of Excavated Archaeological Resources
- Section 528. Native American Human Remains and Cultural Items

Subpart D. Class D Permits – Other Research Relating to Cultural Resources

- Section 531. Requirements and Exemptions
- Section 532. Applications for Permits
- Section 533. Consent of Individual Informants
- Section 534. Processing of Applications by the Department
- Section 535. Terms and Conditions
- Section 536. Documentation to be Produced

Appendices to Part 5

- Appendix 5-A. Fee Schedule for Permits
- Appendix 5-B. Standard Terms and Conditions for Permits
- Appendix 5-C. Consent of Individual Informants [Reserved]
- Appendix 5-D. Fee Schedule for Compensation for Individual Informants [Reserved]

SUBPART A. GENERAL PROVISIONS AND VISITATION PERMITS

Section 501.	Purpose and Scope of This Part
Section 502.	Classes of Permits
Section 503.	Procedures that Apply to All Classes of Permits.
Section 504.	Exceptions and Waivers
Section 505.	Suspension and Revocation of Permits
Section 506.	Guidance Issued by the Director
Section 507.	Restrictions on Release of Information
Section 508.	Class A Permits – Visiting Cultural Resources Sites

Section 501. Purpose and Scope of This Part

The Ordinance authorizes the Director of the Department of Cultural Resources to issue permits for four classes of activities relating to cultural resources. The four classes are discussed in section 502. Section 304 of the Ordinance makes it unlawful to carry out any activity for which a permit is required without obtaining a permit from the Director. This part implements several sections of the Ordinance relating to the four classes of permits, including sections 305, 306, 307, 308, and 309. Since there are four classes of permits, referred to by the letters A, B, C, and D, this part of the Rules is divided into four subparts. Subpart A includes provisions applicable to all permits and provisions applicable to class A permits. Subparts B, C, and D pertain to permit classes B, C, and D, respectively.

Section 502. Classes of Permits

Section 307 of the Ordinance provides that there shall be four classes of permits:

Class A – casual visitation and inspection of cultural resources by persons who are neither members of the Hualapai Tribe nor Hualapai tribal employees engaged in authorized official activities;

Class B – cultural resource inventory activities that involve no collection or disturbance of cultural resources;

Class C – cultural resource investigations involving alteration, collection, excavation, removal or disturbance of cultural resources. This class of permit may include, if expressly authorized, excavation of human remains;

Class D – other activities involving research into the cultural resources, including ethnographic, historical, cultural or other research.

Section 503. Procedures and Requirements that Apply to All Classes of Permits

(a) **Application Forms.** Applicants for all classes of permits must provide information to the Department of Cultural Resources using the form provided by the Department appropriate for the class of permit sought. On request, staff of the Department will assist the applicant in determining the class of permit and the information needed to process the application. The Director may authorize other agencies and departments of tribal government to provide forms to applicants.

(b) Application Fees. The fee schedule for permit applications is set out in Appendix 5-A to this part of the Rules. A permit application will not be processed unless the applicable fee is paid.

(c) Principal Investigator. The application for a class B, C, or D permit must identify a principal investigator (PI) who is qualified to carry out the work proposed in the permit. If the work requires expertise in a field for which the Secretary of the Interior has established professional qualification standards, the PI will normally be required to meet the applicable standards, provided that the Director may grant a waiver from this requirement. For a class A permit, a PI is not required.

(d) Archaeological Services Branch. All applications for permits will be processed by the Archaeological Services Branch (ASB). When an application has been submitted and the applicable fee paid, the staff of the ASB will review the application to ensure that all required information has been provided and that the applicant is qualified to receive a permit. The ASB will complete its review within the time frame specified in this Part for the particular class of permit, *provided* that, if the ASB is not able to complete its review within that time frame, the ASB staff will consult the Director regarding an extension of the time frame and, if the Director approves of an extension, ASB will notify the applicant of the extended date on which the review will be completed. After its review, the ASB will either prepare a permit for signature by the Director, or will prepare a letter to the applicant, for signature of the Director, stating that the application has been denied and giving the reason(s) for such denial.

(e) Terms and Conditions of Permits. Standard terms and conditions to be included in each class of permit are set out in Appendix 5-B. (Some of the terms and conditions in Appendix 5-B are taken from various sections of Part 5 of these Rules; other terms and conditions are adopted pursuant to subsection 208(d) of the Ordinance. The latter category of terms and conditions may be revised by the Director through the subsection 208(d) process without using the rulemaking process in subsection 208(b).) The ASB staff or the Director may also include additional conditions as may be appropriate for a particular permit. Failure to comply with each and every condition included in a permit is a violation of these Rules, and may lead to suspension and/or revocation of the permit, as well as other penalties under the Ordinance.

(f) Jurisdiction of the Hualapai Nation. As a condition of obtaining a permit, all persons who are not tribal members shall agree to be subject to the jurisdiction of the Hualapai Nation for all purposes relating to the permit and compliance with the Ordinance and the rules implementing the Ordinance. The permit application form will advise the applicant of this condition, and the signature of an applicant on the application form shall be deemed evidence of the applicant's consent to this condition. This consent will be confirmed upon issuance of the permit – the applicant will be required to sign the permit and that signature will constitute consent with respect to all persons who are included in the permit.

(g) Decision by Director. The decision whether or not to issue a permit will be made by the Director after the ASB staff has completed its review. In the event that the ASB staff has not completed its review within an extension of the time frame, as provided in paragraph (c), the Director may make a decision on the permit application without receiving the ASB staff work.

(h) Areas of Special Tribal Concern. If the application request is for a cultural resource site(s) within a designated Area of Special Tribal Concern, an application for a permit must be reviewed by the THPO prior to being considered by the Director. The THPO may recommend denial of the permit, or may recommend that the permit only be granted if the applicant is accompanied by a member of the Department of Cultural Resources staff.

(i) Reasons for Denial. The Director shall deny an application for a permit if the applicant has not signed the application, or otherwise declined to consent to tribal jurisdiction. The Director may deny an application if:

- (1) the ASB staff has recommended against granting the permit, based on staff interactions with the applicant, or in light of a record of previous violation(s) of permit conditions on Hualapai or other Indian lands, or on federal, state, or private lands;
- (2) the Director has reason to believe that the work to be performed would not be of an acceptable quality, which may be based on information from other permitting agencies;
- (3) the applicant seeks access to an area which has not been surveyed or for which HDCR does not have adequate information regarding cultural resources that may be present and the area is one in which the Director determines that the interests of the Tribe would be better served by using HDCR staff to conduct the initial survey;
- (4) for a permit relating to a cultural resource site(s) within a designated Area of Special Tribal Concern, if the THPO has recommended against granting the permit or if the THPO has recommended granting the permit only if a Department of Cultural Resource employee is present and no CRD employee is available for the time period for which the permit is requested; or
- (5) the Director determines that it would better serve the interests of the Tribe for HDCR staff to perform the work proposed in the permit application.

Section 504. Exceptions and Waivers

(a) Exceptions Authorized in the Ordinance. Section 306 of the Ordinance exempts Hualapai tribal members and authorized tribal employees engaged in official activities from the requirement for a class A permit for visiting cultural resources sites. Hualapai tribal members engaged in activities directly related to the practice of traditional Hualapai religion or traditional cultural practices are exempt from the permit requirements for class C (alteration, collection, disturbance, excavation, or removal) and class D permits (other cultural resources research including ethnographic research). Tribal employees engaged in properly authorized official business relating to cultural resources management approved in accordance with these rules and/or guidance documents issued by the Director are also exempt from the requirements for class C and D permits. The Director may issue letters clarifying these exemptions on a case-by-case basis.

(b) Additional Exception. Qualified employees of the Department are not required to obtain a class B permit for a non-collection survey. Qualified consultants retained by the Department are not eligible for this exception, but the Director may grant a class B permit in the terms of a contract for services, and will not charge a fee for such a permit.

(c) Waivers. On a case-by-case basis, the Director may grant a waiver of an otherwise applicable permit requirement to allow access to cultural resources by traditional practitioners from other Indian tribes. The Director may also grant a waiver on a case-by-case basis in the event of emergency or natural disaster. Any waiver granted shall be in writing.

(d) Persons Not Excepted. Employees of federal or state agencies are not excepted from any permit requirement. Except as provided in paragraph (b) of this section, persons working for the Hualapai Tribe in a capacity other than as an employee (e.g., consultants, advisors) are not excepted. The Director may issue standing permits to such non-excepted persons to allow for the performance of official or contractual duties without need for issuing permits on a case-by-case basis. Such a standing permit may

provide for waiver of otherwise applicable application fees. A standing permit may be memorialized in an agreement, which may waive or revise any conditions that would otherwise apply.

Section 505. Suspension and Revocation of Permits

(a) Suspension for Cause. The Director may suspend a permit for cause upon a determination that the permit holder has failed to meet a term or condition of the permit, has violated any prohibition of the Ordinance, or has violated any applicable provision of the rules implementing the Ordinance. In making such a determination, the Director may rely on information provided by staff of the Department or Tribal law enforcement officers, as well as on information gathered pursuant to administrative enforcement procedures.

(b) Revocation for Cause. As authorized by section 309(a) of the Ordinance, the Director may revoke a permit for cause upon making a determination that:

- (1) The permit holder has failed to correct the situation that led to suspension of the permit within the time frame specified in the notice of suspension;
- (2) The permit holder has been convicted of a criminal violation of this Ordinance or of other tribal or federal law in a matter directly related to the activities covered by the permit;
- (3) A civil penalty has been assessed against the permit holder pursuant to this Ordinance or pursuant to other tribal or federal law in a matter directly related to the activities covered by the permit; or
- (4) The permit holder has engaged in activities that would be grounds for suspension of the permit and the permit holder has previously had a permit suspended for cause.

(c) Suspension or Revocation without Fault. Section 309(b) of the Ordinance authorizes the Director to suspend or revoke a permit “for reasons not relating to the conduct of the permit holder upon determining that the continuation of work under a permit would not be in the best interest or the Hualapai Tribe or would be in conflict with legal requirements or land management policies not in effect when the permit was issued.”

(d) Notice and Service. The Director shall provide written notice of suspension or revocation of a permit by certified mail, return receipt requested. A duplicate of the notice may be served on the permit holder by staff of the Department or a Tribal law enforcement officer. The notice shall state the reason for the suspension or revocation and, in the case of a suspension, the requirements that must be met in order to have the permit reinstated. The notice shall state the effective date of the suspension or revocation, inform the permit holder of the right to request a hearing, briefly explain the procedure for requesting an appeal, and state a deadline for making such a request.

(e) Hearings. A permit holder may request a hearing after having been served with notice of suspension or revocation of a permit. A request for a hearing must be filed by the expiration of the deadline stated in the notice, which shall be no less than ten (10) business days from the date of service of the notice. Any such hearing shall be conducted by the Director pursuant to procedures in part 7 of these rules. After conducting such a hearing, the Director may affirm, modify, or reverse the initial decision.

(f) Effective Dates. Suspension or revocation of a permit shall be effective immediately unless a later date is specified in the notice. If a hearing has been requested on suspension of a permit, the suspension will remain in effect pending the hearing, unless the Director, in his/her sole discretion, determines otherwise.

Section 506. Guidance Issued by the Director

The Director may issue guidance documents for the various classes of permits, as authorized by section 208(d) of the Ordinance. Any such guidance documents do not have the force of law, except to the extent that they are incorporated into these rules through the rulemaking process. The Director may also make use of guidance documents developed by federal agencies with expertise in cultural resources matters, including guidance documents issued under the authority of the Secretary of the Interior.

Section 507. Restrictions on Release of Information

(a) Intellectual Property. Except as provided in paragraph (c) of this section, any and all reports generated through work performed pursuant to any permit shall be the intellectual property of the Hualapai Tribe, to be held in the custody of HDCR, in accordance with the standard terms and conditions set out in Appendix 5-B. Copies of such reports shall not be distributed to anyone other than the permit holder and individuals who assisted in performing the work until release of the information has been authorized by the THPO. If the THPO determines that it would be advisable to maintain the confidentiality of certain information in a report in order to reduce the risk of damage to a cultural resource or to maintain the privacy of traditional cultural or religious practices, the THPO may either direct a report be revised to remove sensitive information, or may choose to redact certain portions of a report before it is released. A class A permit does not authorize or require the production of a report; holders of class A permits, however, are subject to the restriction in paragraph (b) of this section.

(b) Photographs, Maps, GPS Data, and Similar Information. In addition to reports, a permit generally does not authorize a permit holder to release photographic records, drawings, sketches, maps, GPS data, other locational data, or similar information regarding cultural resources whether or not such photographs are included in a report, without prior approval of the Department unless such permission is specifically noted in the terms and conditions of the permit.

(c) Special Terms. An applicant may request a special term in a class B permit to provide that a report produced by the applicant will be the property of, an entity other than or in addition to the Tribe. The Director has discretion to include such a term in a permit. Any such report shall nevertheless not be distributed until it has been approved for release by the THPO.

(d) Publications. Any document produced for publication that incorporates or relies on information acquired pursuant to a permit must be submitted to the Director for approval prior to publication. Such approval shall not be withheld except in cases in which the Director determines that certain information must be withheld in order to preserve confidentiality regarding the location of cultural resources or to maintain privacy of traditional cultural or religious practices, or for similar reasons. Denial of approval will be conveyed in a written decision supported by reasons, and is subject to appeal pursuant to part 7 of these rules. Any publication in any media, print or electronic, without approval by the Director is a violation of these rules.

Section 508. Class A Permits – Visiting Cultural Resources Sites

(a) General. Any person, other than one who is exempt as set out in paragraph (b), who wants to visit or inspect a cultural resource site must first obtain a permit. The application form must be filed with the Archaeological Services Branch, which will normally act on an application within two business days.

The applicant must be an adult (at least 18 years of age), provided that minors may be included in a permit if accompanied by an adult. A permit application may cover more than one adult, provided that one adult shall be the principal applicant and that each adult to be covered sign the application and, by the act of signing, acknowledge awareness of and responsibility for compliance with terms and conditions. Permits are signed by the Director, or, if the Director has delegated authority in writing, may be signed by an authorized employee within the ASB.

(b) Exemptions. As provided in section 306(a) of the Ordinance, enrolled members of the Hualapai Tribe are exempt from the Class A permit requirement. Tribal employees engaged in properly authorized official activities are also exempt. In addition, no permit is required for any person to visit cultural resources that are open to the public (e.g., historic buildings used as tribal offices) or to inspect cultural resources from places that are accessible to the public (e.g., viewing cultural landscapes from public highways).

(c) Specificity. The permit application will specify the particular cultural resource site(s) that the applicant wishes to visit. The ASB staff can assist the applicant in identifying cultural resource site(s) with sufficient specificity to process a permit application.

(d) Standard Conditions. The permit application form will include the standard conditions set out in Appendix 5-B of these Rules. For class A permits, the key points of the applicable standard conditions are: (1) consent to tribal jurisdiction (consent by the applicant on behalf of all persons in the applicant's party, including minors); and (2) certification by the applicant to an understanding of the importance of cultural resources for the Hualapai Nation and an agreement to respect the cultural practices of tribal members, including the need for privacy.

(e) Additional Conditions. The ASB staff may recommend and the Director (or authorized designee) may impose additional conditions appropriate for the specific permit, such as a restriction on the days and times at during which the site(s) may be visited, or a requirement to be accompanied by a member of the Department of Cultural Resources staff.

(f) Other Permit Requirements. ASB staff will advise the applicant if any other tribal permit is required to visit the sites covered by a class A permit.

SUBPART B. CLASS B PERMITS – NON-COLLECTION SURVEYS

Section 511.	Requirements and Exemptions
Section 512.	Information to be Provided by Applicants
Section 513.	Documentation to be Produced
Section 514.	Additional Terms and Conditions
Section 515.	Processing of Permit Applications by the Department
Section 516.	Blanket Permits [Reserved]

Section 511. Requirements and Exception

(a) Covered Activities. Except as provided in paragraph (b), any person seeking a permit to conduct a non-collection survey of cultural resources shall file an application with the ASB. Any survey in which cultural resources are not removed and in which the surface of the earth is not disturbed is regarded as a “non-collection” survey. Any survey that includes excavation, shovel-testing, or coring is *not* treated as a “non-collection” survey and is subject to a class C permit. Documentation of cultural resources, through photography, mapping, or field notes, is permissible under a class B permit as long as the cultural resources are not removed or otherwise disturbed.

(b) Exception to the Permit Requirement. Employees of the Department of Cultural Resources who have been individually certified by the Director as qualified to perform a non-collection survey are exempt from the requirement to obtain a class B permit. All such surveys conducted by such employees shall conform to the standard terms and conditions set out in Appendix 5-B. Qualified consultants retained by the Department are not eligible for this exception, but the Director may grant a class B permit in the terms of a contract for services, and will not charge a fee for such a permit.

(c) Relationship to Requirements under BIA Regulations. BIA regulations implementing the Archaeological Resources Protection Act (ARPA) provide that, for any person who would not be exempt from the requirement to obtain an ARPA permit for the excavation and removal of archaeological resources, if such a person proposes to conduct an archaeological investigation on Indian lands that does not involve excavation and removal of archaeological resources, such a person must first (1) ask the tribe with jurisdiction whether there is any requirement under tribal law to apply for a permit, license, or other authorization; and (2) provide documentation to the BIA and ask whether an ARPA permit is required. 25 C.F.R. § 262.3(b). A class B permit should be provided to the BIA regional office as evidence of authorization under tribal law to conduct the proposed investigation and to provide information for BIA to use in determining whether an ARPA permit is required. If an application for a class B permit is denied, the Director may provide a copy of the denial to the BIA regional office.

Section 512. Information to be Provided by Applicants

(a) Principal investigator. The permit application will name the principal investigator (PI) and any other individual(s) responsible for conducting the survey. The PI shall meet the minimum professional qualifications specified in the Secretary of the Interior’s professional qualifications standards, for archaeology or other appropriate discipline. On request of an applicant, the Director may grant an applicant a waiver from certain aspects of these qualifications, but only if the THPO concurs in the waiver.

(b) Location of Area to be Surveyed. The permit application will specify the area to be covered by a non-collection survey.

(c) Research Design. An application for a class B permit will include a research design appropriate to the objectives for which the inventory is to be used. As a general practice, the research design for a class B permit need not be elaborate, but should be commensurate with the size and complexity of the proposed project. The applicant should consult with staff of the ASB prior to filing the application for assistance in defining the research design; the ASB may be able to offer standard language that has been used for similar permits. Even where the objectives of the inventory are limited, such as describing the permissible footprint of construction activities in order to avoid archaeological sites, it is nevertheless important to consult with ASB staff in order that the proposed inventory can be informed by the ongoing historic preservation planning being conducted by the Department. Staff within the Department may have information that is more current than information obtained through literature or records reviews, particularly with respect to traditional cultural properties.

(d) Dissemination of Results. Any report, publication, or other dissemination of result of the research is subject to the requirements of section 507 of these rules.

Section 513. Documentation to be Produced

(a) Records and Supporting Documentation. All cultural resources encountered during the performance of work conducted under a class B permit must be adequately and professionally documented, using the HDCR site recording form (which will be made available to the permittee in both paper and digital formats). In addition, any associated documentation, such as maps, photographs, and GPS and GIS data, must be provided to HDCR for their records in digital format (unless otherwise agreed upon as a special condition).

(b) Report to the THPO. In addition to any report prepared for use of the agency or person that applied for the permit, the holder of a class B permit will prepare a report for the use of the THPO which shall provide information to identify:

- (1) evidence on the surface of a site containing archaeological resources;
- (2) a site that is likely to contain archaeological resources in light of correlation between the site and ethnographic information or oral traditions; and
- (3) any site that should be evaluated for eligibility for the National Register and/or Hualapai Register.

(c) Failure to Comply. Failure to supply the documentation required by this section may result in denial of future permit applications. In addition, if the permittee's failure imposes an undue burden on HDCR staff to obtain and enter the data, a civil penalty may be assessed on the permittee, as provided in section 603 of these Rules.

Section 514. Additional Terms and Conditions

In addition to the standard terms and conditions all classes of permits, additional terms and conditions applicable to class B permits are set out in Appendix 5-B. The Director may also include special terms or conditions in a class B permit, either at the request of an applicant or based on recommendations by the ASB.

Section 515. Processing of Permit Applications by the Department

The ASB will normally act on an application within fifteen business days. Permits are signed by the Director, or, if the Director has delegated authority in writing, may be signed by an authorized employee within the ASB.

Section 516. Blanket Permits. [RESERVED]

SUBPART C. CLASS C. PERMITS – EXCAVATION AND REMOVAL

Section 521.	Requirements and Exemptions
Section 522.	Relationship between Class C Permit and Federal ARPA Permit
Section 523.	Persons Required to Apply for a Class C Permit
Section 524.	Applications for Permits
Section 525.	Terms and Conditions
Section 526.	Documentation to be Produced
Section 527.	Custody of Excavated Archaeological Resources
Section 528.	Native American Human Remains and Cultural Items

Section 521. Requirements and Exemptions

(a) Covered Activities. Unless exempted under subsection (b), a class C permit is required for any activity in which cultural resources are excavated or otherwise removed from Hualapai tribal land. This includes surveys in which there is any disturbance of the surface of the earth such as shovel-testing or coring, with the intent to determine the presence or absence of cultural resources at the location covered by a permit. A class C permit is also required for the excavation or removal of human remains and cultural items associated with human remains.

(b) Exemptions. Hualapai tribal members and tribal employees are subject to the permit requirement of CHRO section 305, unless exempted under CHRO section 306(b), which provides:

The prohibition against, and permit requirement for, alteration, collection, disturbance, excavation or removal of cultural resources ... does not apply to:

- (1) Hualapai tribal members engaging in activities directly related to the practice of traditional Hualapai religion or traditional cultural practices.
- (2) Tribal employees engaged in properly authorized official business, relating to cultural resource management approved in accordance with rules and/or guidance documents issued by the Director.

Tribal employees are NOT exempt from the CHRO permit requirement except as provided in the Rules. Employees of the Department of Cultural Resources, if authorized in writing by the Director, are not required to have a permit. Employees of other tribal departments who meet the Secretary of the Interior's "Standards and Guidelines for Professional Qualifications" may apply to the Director for exemption from the permit requirement. The Director is authorized to issue exemptions to such persons on a case-by-case basis, provided that any such exemption must be in writing and shall be limited to a defined area and duration, and shall include written provisions to ensure that compliance with applicable requirements of federal law is documented through means other than a permit.

Section 522. Relationship between Class C Permit and Federal ARPA Permit

(a) Covered Activities. The activity that can be authorized by a tribal class C permit for the excavation and removal of cultural resources is, for the most part, the same kind of activity that normally requires a permit pursuant to the federal Archaeological Resources Protection Act (ARPA). 16 U.S.C. §§ 470aa – 470mm. Permits for the excavation and removal of archaeological resources on federal lands and Indian lands are authorized by section 4 of ARPA; section 6 of ARPA prohibits excavating, removal,

damaging, or destroying archaeological resources on federal lands and Indian lands unless a permit has been issued, or an exemption from the permit requirement applies. The term “cultural resources” as used in the Ordinance is broader than the term “archaeological resources” as used in ARPA. For purposes of the class C permit program, however, the Department anticipates that items to be excavated pursuant to class C permits will correspond to items that would normally be covered by ARPA permits.

(b) Exemptions under ARPA. ARPA provides an exemption for tribes from the ARPA permit requirement for the excavation and removal of archaeological resources located on tribal trust lands; ARPA also exempts tribal members from the permit requirement if there is a tribal law regulating the excavation and removal of archaeological resources on Indian lands under the tribe’s jurisdiction. 16 U.S.C. § 470cc(g)(1). The Hualapai CHRO is such a tribal law, and, accordingly, Hualapai tribal members are not subject to the ARPA permit requirement [*as of the date that these rules implementing the class C permit program become legally in effect*]. If the excavation or removal of cultural resources by a tribal employee has been authorized pursuant to these rules, then that tribal employee is covered by the Tribe’s exemption from the ARPA permit requirement. See 25 C.F.R. § 262.4(c)(2). Persons who work for the Tribe in a capacity other than as an employee, are not covered by the Tribe’s exemption from the ARPA permit requirement. 25 C.F.R. § 262.4(c)(3).

(c) Prohibited Acts under ARPA. Exemption from the requirement for a permit under ARPA for excavation or removal does not exempt any person from otherwise applicable prohibitions under ARPA, including but not limited to the prohibition of damage to or destruction of archaeological resources. 16 U.S.C. § 470ee.

(d) Tribal Consent to ARPA Permits. Under federal law, the issuance of an ARPA permit on Hualapai tribal land requires the consent of the Tribe. For a person who is subject to both the class C permit requirement under the Ordinance and the ARPA permit requirement, tribal consent for purposes of ARPA is demonstrated through the issuance of a class C permit.

(e) Application of ARPA on Federal “Public” Lands. For purposes of ARPA, any parcel of land to which the United States holds fee title, but which is not held in trust for the Tribe (or for an individual Indian), is “public land,” even if such land is within the boundaries of the Hualapai Reservation. 16 U.S.C. § 470bb(3). As such, the excavation and removal of archaeological resources from such land requires the issuance of an ARPA permit from the federal land managing agency, unless an exemption applies. The exemption for the Tribe and for tribal members described in subsection 522(b) does not apply to such public land.

Section 523. Persons Required to Apply for a Class C Permit.

(a) Tribal Officials and Employees. Officials and employees of the Hualapai Nation who conduct excavation and removal of archaeological resources on tribal trust land will not need a permit under ARPA if they have been issued a permit under this section of these Rules, or if the excavation or removal is otherwise authorized under these rules without the issuance of a permit.

(b) Tribal Consultants, Advisors, and Other Agents. Regulations issued by the BIA clearly state that consultants, advisors, and others serving by contractual agreement as agents for Indian tribes are not covered by the statutory exemption for tribes from the ARPA permit requirement for the excavation and removal of archaeological resources located on tribal trust lands. 25 C.F.R. § 262.4(c)(3). BIA regulations do provide, however, that permit documents issued by an Indian tribe may double as (or serve as support documents for) ARPA permit documents issued by BIA “if they demonstrate that the

provisions for permit issuance in [25 C.F.R. part 262] and 43 C.F.R. part 7 have been met and they are attached to a Department of Interior permit form.” It is the intent of these rules that permit documents issued by the Department will meet the requirements of the federal regulations.

(c) Tribal Members. Tribal members proposing to engage in activities that are subject to the requirement for a class C permit are required to apply for such a permit unless they are covered by one of the two exceptions authorized in section 306(b) of the Ordinance (quoted in section 520 of these rules): (1) traditional Hualapai religion or traditional cultural practices; or (2) tribal members who are also tribal employees engaged in properly authorized official business relating to cultural resource management.

(d) Other Persons. All other persons are required to obtain a class C permit prior to engaging in any activity that is prohibited by the Ordinance unless a class C permit has been issued.

Section 524. Applications for Permits

(a) Information Required. Each application for a permit shall include:

(1) The nature and extent of the work proposed, including how and why it is proposed to be conducted, proposed period of performance, location maps, and proposed outlet for public written dissemination of the results. *Dissemination of results is subject to the requirements of section 507 of these rules.*

(2) The name and address of the individual(s) responsible for conducting the proposed work, institutional affiliation, if any, and evidence of education, training, and experience in accord with the minimal qualifications listed in paragraph (b) of this section.

(3) The name and address of the individual(s), if different from the individual(s) named in paragraph (b)(2) of this section, proposed to be responsible for carrying out the terms and conditions of the permit.

(4) Evidence of the applicant's ability to initiate, conduct, and complete the proposed work, including evidence of logistical support and laboratory facilities.

(5) The name of the university, museum, or other scientific or educational institution in which the applicant proposes to store copies of records, data, photographs, and other documents derived from the proposed work, and all collections in the event the Department of Cultural Resources, acting on behalf of the Hualapai Tribe, does not wish to take custody or otherwise dispose of the archaeological resources. Applicants shall submit written certification, signed by an authorized official of the institution, or willingness to assume curatorial responsibility for the collections, if applicable, and/or the records, data, photographs, and other documents derived from the proposed work.

(6) In the event that the work proposed to be performed pursuant to a permit would be located on federal lands within the Hualapai Reservation, the permit application shall also include the information required by uniform regulations implementing ARPA. 43 C.F.R. § 7.6(b)(5).

(b) Qualifications. The application must name the Principal Investigator (PI) and include information to enable the Director to determine that the applicant is appropriately qualified, as evidenced by training, education, and/or experience, and possesses demonstrable competence in archaeological theory and methods, and in collecting, handling, analyzing, evaluating, and reporting archaeological data, relative to the type and scope of the work proposed, and also meets the following minimum qualifications:

- (1) A graduate degree in anthropology or archaeology, or equivalent training and experience;
- (2) The demonstrated ability to plan, equip, staff, organize, and supervise activity of the type and scope proposed;

(3) The demonstrated ability to carry research to completion, as evidenced by timely completion of these, research reports, or similar documents;

(4) Completion of at least 16 months of professional experience and/or specialized training in archaeological field, laboratory, or library research, administration, or management, including at least 4 months experience and/or specialized training in the kind of activity the individual proposes to conduct under authority of a permit; and

(5) Applicants proposing to engage in historical archaeology should have had at least one year of experience in research concerning archaeological resources of the historic period. Applicants proposing to engage in prehistoric archaeology should have had at least one year of experience in research concerning archaeological resources of the prehistoric period.

(6) In the event that the PI does not meet all the qualifications set out in this subsection, if the applicant can demonstrate that the PI meets the applicable provisions of the Secretary of the Interior's Standards and Guidelines for Professional Qualifications the Director is authorized to determine that the applicant is qualified.

(c) Arrangements for Curatorial Facilities. The application must include:

(1) Evidence that any university, museum, or other scientific or educational institution proposed in the application as the repository possesses adequate curatorial capability for safeguarding and preserving the archaeological resources and all associated records; and

(2) Certification by the applicant that, unless the Director has instructed otherwise pursuant to section 527, not later than 90 days after the date the final report is submitted to the Department, the following will be delivered to the appropriate official of the approved university, museum, or other scientific or educational institution, which shall be named in the permit: all artifacts, samples and collections resulting from work under the requested permit, and copies of records, data, photographs, and other documents resulting from work conducted under the requested permit.

(d) Insurance. The applicant must provide verification of liability insurance sufficient to cover damages related to personal injury or death, as well as to collections, data, and other records.

(e) Processing of Applications by the Department. Applications for class C permits will be processed in accordance with section 503 of these rules. The ASB will review each application and advise the applicant as to whether it is considered to be complete. After providing such notice to the applicant, the ASB will endeavor to process the application and provide recommendations to the Director within fifteen (15) days.

Section 525. Terms and Conditions

All standard terms and conditions for class C permits as set out in Appendix 5-B are hereby incorporated into each such permit. Special terms or conditions in Appendix 5-B are incorporated if so indicated by the Director. The Director also has authority to include terms or conditions in addition to those set out in Appendix 5-B.

Section 526. Documentation to be Produced

(a) Records and Supporting Documentation. All cultural resources encountered during the performance of work conducted under a class C permit must be adequately and professionally documented, using the HDCR site recording form (which will be made available to the permittee in both paper and digital formats). In addition, any associated documentation, such as maps, photographs, and

GPS and GIS data, must be provided to HDCR for their records in digital format (unless otherwise agreed upon as a special condition). No documentation produced in conjunction with the permitted work may be released to the public or disseminated in any manner except in accordance with section 507 of these rules.

(b) Reports to HDCR. The permittee shall submit reports to the HDCR as specified in the terms and conditions of the permit, which will normally include a draft final report and a final report, and may include one or more preliminary reports.

(c) Failure to Comply. Failure to supply the documentation required by this section may result in denial of future permit applications. In addition, if the permittee's failure imposes an undue burden on HDCR staff to obtain and enter the data, a civil penalty may be assessed on the permittee, as provided in section 603 of these Rules.

Section 527. Custody of Excavated Archeological Resources

As recognized by ARPA and section 7.13 of the ARPA rules, archaeological resources excavated or removed from Indian lands remain the property of the tribe with ownership rights. Accordingly, the Director may instruct the holder of a class C permit to deliver excavated resources to other than to the curatorial facility described in the permit. Under federal rules governing the curation of archaeological resources, 36 C.F.R. § 79.4, associated records that are prepared or assembled in connection with survey, excavation, or other study are considered to be part of the collection of archaeological resources. The Director may include associated records in the scope of instructions to deliver other than to the curatorial facility described in the permit.

Section 528. Native American Human Remains and Cultural Items

(a) Intentional Excavation. A class C permit may authorize the excavation and removal of human remains and/or cultural items (whether or not the cultural items are associated with human remains), but only if the permit includes a term expressly authorizing such excavation. Applicants who anticipate the need for such express authorization should request such a term in their applications. In the event of an inadvertent discovery associated with a permit that does not include express authorization to excavate human remains and/or cultural items, the Director is authorized to issue an amendment to the permit in an expeditious manner, taking into consideration of applicable requirements of the federal Native American Graves Protection and Repatriation Act (NAGPRA).

(b) Inadvertent Discoveries. In the event of an inadvertent discovery of Native human remains and/or cultural items, whether or not in conjunction with excavation authorized by a class C permit, legal requirements of NAGPRA become applicable. Any person who knows or has reason to know that he or she has inadvertently discovered human remains and/or cultural items as defined in NAGPRA must immediately provide notice by telephone to the Department, with written confirmation. If the inadvertent discovery occurred in connection with an on-going activity on tribal lands, the person who made the discovery and all other persons responsible for the on-going activity must stop the activity in the area of the inadvertent discovery and make a reasonable effort to protect the human remains and/or cultural items.

(c) Determination of Proper Treatment. After any inadvertent discovery of human remains and/or cultural items, the Director will consult with the parties involved in the discovery to determine an appropriate course of action, which may include reburial pursuant to subsection (e). The Director will

also seek guidance from the Cultural Advisory Team. If the human remains do not appear to be Native American, or there appears to be evidence that the site may be a crime scene, tribal or federal law enforcement officers will be notified. If the Director decides to authorize excavation and removal, custody shall be determined in accordance with subsection (d).

(d) Custody. NAGPRA provides that the highest priority for the right to take custody of Native American human remains and associated funerary objects removed from tribal lands is vested in the lineal descendant(s), if any are known. The Department will make a good faith effort to determine whether there are any known lineal descendants, including consultation with the Cultural Advisory Team of Elders. If there are no known lineal descendant(s), then the right to take custody is vested in the Tribe. In the case of Hualapai tribal lands, an inadvertent discovery of Native American human remains may be culturally affiliated with a different tribe, and the Department will make good faith efforts to consult with such other tribes as may be warranted by a particular case. In response to a formal request from another tribe, the Director may issue a decision transferring custody to such tribe, provided that the Director posts notice of any such decision in the Tribal office and provided further that any such decision shall be subject to judicial review in Tribal Court.

(e) Reburial. The Department will be responsible for managing the reburial process for any human remains and/or cultural items that are reburied.

**SUBPART D. CLASS D PERMITS – OTHER RESEARCH
RELATING TO CULTURAL RESOURCES**

Section 531.	Requirements and Exemptions
Section 532.	Applications for Permits
Section 533.	Consent of Individual Informants
Section 534.	Processing of Applications by the Department
Section 535.	Terms and Conditions
Section 536.	Documentation to be Produced

Section 531. Requirements and Exemptions

(a) Permit Requirements. A class D permit is required for any research relating to the cultural heritage of the Hualapai Tribe, including, but not limited to, cultural resources located on Hualapai tribal lands and cultural resources located elsewhere but subject to the control of the Hualapai Tribe, if the research involves obtaining information from (1) documents on file with the Department of Cultural Resources or another entity of Tribal Government; (2) Hualapai tribal members; or (3) examination of cultural resources located at museums and curatorial facilities but subject to the control of the Hualapai Tribe.

(b) Exemptions. No permit is required for research relying on published sources or information that is generally available to the public and not involving research described in paragraph (a).

(c) Conduct Not Considered “Research.” Conversations with Hualapai tribal members do not constitute “research” unless a non-tribal member is seeking information with the intent to produce a report or other document for possible publication. Making field notes or recording a conversation will be considered evidence of such intent. The requirements of this subpart are intended to protect the collective intellectual property rights of the Hualapai Tribe in its traditional knowledge regarding the Tribe’s cultural heritage. The requirements of this subpart are not intended to infringe upon freedom of speech, association, or the press.

Section 532. Applications for Permits.

Applicants for class D permits must provide information on a form provided by the Department of Cultural Resources in accordance with section 503 of these rules. Each application for a class D permit will include a statement of how the proposed research will benefit the Hualapai Tribe. If the permit is sought in connection with a request for clearance for a proposed undertaking pursuant to part 4 of these rules, it may be sufficient to describe the benefits to the Hualapai Tribe that would be realized by allowing the proposed undertaking to proceed.

Section 533. Consent of Individual Informants; Compensation.

(a) Informed Consent. For any class D permit that involves the seeking of information from Hualapai Tribal members, the permittee will be required to obtain informed consent from each such informant prior to conducting an interview. The Department will provide the permittee with a form to be

used in documenting such consent. It is a violation of these rules to conduct an interview with a Hualapai Tribal member without first obtaining written informed consent.

(b) Compensation. The Department will develop a schedule of the fees that are appropriate for payment to informants as compensation for their services, in recognition of the traditional knowledge held by informants. The Department will develop this fee schedule in consultation with the Cultural Advisory Team, using the process for adoption of policy statement in subsection 208(d) of the Ordinance. The form developed by the Department for use in obtaining informed consent from informants will include a reference to the fee schedule. An informant may agree to provide information without compensation, but such an agreement must be expressly noted on the consent form. Unless explicitly provided otherwise in the terms of a permit, the permittee will provide funds to the Department and the Department will disburse payments to informants.

Section 534. Processing of Applications by the Department.

Applications for class D permits will be processed by the Archaeological Service Branch in accordance with section 503 of these rules. The ASB will normally consult with the Cultural Advisory Team in reviewing such permit applications. The ASB will proceed expeditiously, but, in light of consultation with the Cultural Advisory Team, there is no fixed time frame for processing class D permit applications.

Section 535. Terms and Conditions.

Class D permits are subject to the standard terms and conditions in Appendix 5-B, as well as any additional conditions that the Director determines to be appropriate for particular permits.

Section 536. Documentation to be Produced.

All documentation generated pursuant to a class D permit is subject to the restrictions on the release of information stated in section 507 of these rules. As provided in the standard terms and conditions, the holder of a class D permit shall submit a draft final report to the Department and, after receiving comments from the Department, shall submit a final report. The permittee must also provide to the Department, upon request, digital copies of photographs, maps, field notes, and other documentation related to the project authorized by the permit. The permit will specify the timeframe for submitting such reports, and may also specify requirement for one or more interim reports.

RULES
IMPLEMENTING THE
HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE

APPENDIX 5-A
FEE SCHEDULE FOR PERMITS

Class A Permit:

The standard fee is twenty-five dollars (25).

Class B, C, or D permit:

The standard fee for a class B, C, or D permit is comprised of a base charge of one hundred dollar (\$100), plus an additional charge to account for the staff time required for monitoring permit activities and reviewing work products. The additional charge may determined by the Director based on the recommendation from the Archaeological Services Branch; alternatively, the additional charge may be negotiated between the applicant and the Archaeological Services Branch.

Waiver:

The Director may waive the fee for any permit upon a determination that it would serve the interests of the Hualapai Tribe to do so.

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RULES
IMPLEMENTING THE
HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE

APPENDIX 5-B.

STANDARD TERMS AND CONDITIONS FOR PERMITS

A. Terms and Conditions Applicable to All Permits

1. The standard conditions and special conditions attached to any permit apply to all persons who are authorized to engage in conduct allowed by the permit, including minors. The permittee may be held responsible for the conduct of other persons included in a permit.
2. The permittee consents to the regulatory and civil adjudicatory jurisdiction of the Hualapai Tribe for all purposes relating to the permit.
3. The permittee acknowledges that the preservation of its cultural heritage is a matter of great importance for the Hualapai Tribe. The Tribe's cultural heritage is manifested in many kinds of cultural resources, some of which are used by Hualapai individuals in conducting cultural practices. Some cultural resources may include elements of the natural world such as plants, animals, minerals, or landscape features, and some cultural resources may include aspects that are intangible. In carrying out activities authorized by a permit, the permit holder will respect the cultural practices of tribal members, including the need for privacy.
4. Failure to comply with each and every condition included in a permit is a violation of the Rules implementing the Hualapai Cultural Heritage Resources Ordinance. Such a violation may lead to suspension and/or revocation of the permit, as well as other penalties under the Ordinance.
5. A permit does not authorize a permittee (or any person within the permittee's party) to make or release photographic records, drawings, sketches, maps, GPS data, other locational data, or similar information regarding cultural resources without prior approval of the Department unless such permission is authorized in a special condition of the permit.
6. Unless provided otherwise in a special term, any report or similar document generated through work performed pursuant to any permit shall be the intellectual property of the Hualapai Tribe, to be held in the custody of HDCR. Copies of such reports shall not be distributed to anyone other than the permittee and individuals who assisted in performing the work until release of the information has been authorized by the Director. If the Director determines that it would be advisable to maintain the confidentiality of certain information in a report in order to reduce the risk of damage to a cultural resource or to maintain the privacy of traditional cultural or religious practices, the Director may either direct that the report be revised to remove sensitive information, or may choose to redact certain portions of a report before it is released.
7. Any document produced for publication that incorporates or relies on information acquired pursuant

to a permit must be submitted to the Director for approval prior to publication. Such approval may be withheld order to preserve confidentiality regarding the location of cultural resources or to maintain privacy of traditional cultural or religious practices, or for similar reasons. Denial of approval will be conveyed in a written decision supported by reasons, and is subject to appeal pursuant to part 7 of the Rules implementing Hualapai Cultural Heritage Resources Ordinance. Any publication in any media, print or electronic, without approval by the Director is a violation of the Rules.

B. Additional Conditions Applicable to Class B, C, and D Permits

The following conditions are applicable to class B, C, and permits, except as otherwise noted. Certain conditions relating to excavation, curation, or disposition of cultural resources are not applicable to class B or D permits, and certain conditions applicable to both class B and C permits are not applicable to class D permits.

1. Additional Standard Conditions Applicable to Class B, C, and D Permits

- a. Each permit is subject to all applicable provisions of the Hualapai Cultural Heritage Resources Ordinance and the Rules implementing that Ordinance, which are made a part hereof.
- b. Each permittee and permit are subject to all other Federal and Tribal laws and regulations applicable to the Hualapai Tribal lands and resources.
- c. Each permit shall not be exclusive in character, and shall not affect the ability of the Hualapai Tribe to use, lease or permit the use of lands subject to the permit for any purpose.
- d. A permit may not be assigned.
- e. A permit may be suspended or terminated for breach of any condition or for management purposes at the discretion of the Director, upon written notice.
- f. Each permit is issued for the term specified in the permit.
- g. Permits issued for a duration of more than one year must be reviewed annually by the Director and the permittee.
- h. The permittee must obtain all other required permit(s) to conduct the specified project.
- i. Archeological project design, literature review, development of the regional historic context framework, site evaluation, and recommendations for subsequent investigations must be developed with direct involvement of an archeologist who meets the Secretary of the Interior's Standards for Archeology and Historic Preservation; fieldwork must be generally overseen by an individual who meets the Secretary of the Interior's Standards for Archeology and Historic Preservation. (NOTE: Not applicable to class D permits.)
- j. The permittee shall immediately request that the Director make a modification to accommodate any change in an essential condition of the permit, including individuals named and the nature, location, purpose, and time of authorized work, and shall without delay notify the Director of any other changes affecting the permit or regarding information submitted as part of the application for the permit. Failure to do so may result in permit suspension or revocation.

- k. A permittee may request permit extension, in writing, at any time prior to expiration of the term of the permit, specifying a limited, definite amount of time required to complete permitted work.
- l. Any correspondence about this permit or work conducted under its authority must cite the permit number. Any publication of results of work conducted under the authority of this permit must cite the permit number and acknowledge the Hualapai Department of Cultural Resources.
- m. The permittee shall submit a copy of any published journal article and any published or unpublished report, paper, and manuscript resulting from the permitted work (apart from those required by the permit (items 15.q. and s. in the permit form), to the Director and, if applicable, the appropriate official of the approved curatorial facility (item 12 in the permit form).
- n. Prior to beginning any fieldwork under the authority of a permit, the permittee, following the Hualapai Tribe's policies and procedures, shall contact the Tribal office responsible for administering the lands involved to obtain further instructions. (NOTE: Not applicable to class D permits.)
- o. A permittee may request a review, in writing to the official concerned, of any disputed decision regarding inclusion of specific terms and conditions or the modification, suspension, or revocation of this permit, setting out reasons for believing that the decision should be reconsidered.
- p. A permittee shall not be released from requirements of a permit until all outstanding obligations have been satisfied, whether or not the term of the permit has expired. A permittee may be subject to civil penalties for violation of any term or condition of a permit.
- q. A permittee shall submit a preliminary report to the Director within a timeframe established by the Director, which shall be no later than 6 weeks after the completion of any episode of fieldwork, setting out what was done, how it was done, by whom, specifically where, and with what results, including maps, GPS data, an approved site form for each newly recorded archeological site, and the permittee's professional recommendations, as results require. If other than 6 weeks, the timeframe shall be specified in a Special Permit Condition (item 16.p. in the permit form). Depending on the scope, duration, and nature of the work, the Director may require progress reports, during or after the fieldwork period or both, and as specified in a Special Permit Condition (item 16.r. in the permit form).
- r. A permittee shall submit a clean, edited draft final report to the Director for review to insure conformance with standards, guidelines, regulations, and all stipulations of the permit. The schedule for submitting the draft shall be determined by the Director.
- s. A permittee shall submit a final report to the Director not later than 180 days after completion of fieldwork. Where a fieldwork episode involved only minor work and/or minor findings, a final report may be submitted in place of the preliminary report. If the size or nature of fieldwork merits, the approving official may authorize a longer timeframe for the submission of the final report as specified in a Special Permit Condition (item 16.q. in the permit form). (NOTE: Not applicable to class D permits.)
- t. Two copies of the final report, a completed NTIS Report Documentation Page (SF-298), available at <http://www.ntis.gov/pdf/rdpform.pdf>, and a completed NADB-Reports Citation Form, available at http://www.cr.nps.gov/aad/tools/nadbform_update.doc, will be submitted to

the Director. (NOTE: Not applicable to class D permits.)

- u. The permittee agrees to keep the specific location of sensitive resources confidential. Sensitive resources include threatened species, endangered species, rare species, archeological sites, caves, fossil sites, minerals, commercially valuable resources, traditional cultural properties, and sacred ceremonial sites.
- v. Unless otherwise instructed by the Director, a permittee shall deposit all artifacts, samples and collections, as applicable, and original records, data, photographs, and other documents (or clear copies, if previously authorized by the Director), resulting from work conducted under this permit, with the curatorial facility named in the permit (item 12 in the permit form) not later than 90 days after the date the final report is submitted to the approving official. Not later than 180 days after the final report is submitted, the permittee shall provide the Director with a catalog and evaluation of all materials deposited with the curatorial facility, including the facility's accession and/or catalog numbers. (NOTE: Not applicable to class B or D permits.)
- w. A permittee shall provide the Director with a confirmation that museum collections described in the permit (item 15.v. in the permit form) were deposited with the approved curatorial facility, signed by an authorized curatorial facility official, stating the date materials were deposited, and the type, number and condition of the collected museum objects deposited at the facility. (NOTE: Not applicable to class B or D permits.)
- x. A permittee shall not publish, without the approving official's prior permission, any locational or other identifying archeological site information that could compromise the Tribe's or the Federal Government's protection and management of archeological sites.
- y. For excavations, the permittee shall consult the OSHA excavation standards which are contained in 29 CFR §1926.650, §1926.651 and §1926.652. For questions regarding these standards contact the local area OSHA office, OSHA at 1-800-321-OSHA, or the OSHA website at <http://www.osha.gov>. (NOTE: Not applicable to class B or D permits.)
- z. Special permit conditions attached to this permit are made a part hereof.

2. Special Permit Conditions for Class B, C, and D Permits

The conditions listed below may be made to apply to a class C permit, in the discretion of the Director. In addition, special conditions may be developed or negotiated on a case-by-case basis.

- a. A permittee shall allow the Director and Tribal field officials, or their representatives, full access to the work area specified in this permit at any time the permittee is in the field, for purposes of examining the work area and any recovered materials and related records.
- b. A permittee shall cease work upon discovering any human remains and shall immediately notify the Director. Work in the vicinity of the discovery may not resume until the Director has given permission. (NOTE: Not applicable to class D permits.)
- c. A permittee shall backfill all subsurface test exposures and excavation units as soon as possible after recording the results, and shall restore them as closely as reasonable to the original contour. (NOTE: Not applicable to class D permits.)

- d. A permittee shall not use mechanized equipment in a designated or proposed area of special tribal concern unless authorized by the Director or a designee in additional specific conditions associated with this permit. (NOTE: Not applicable to class D permits.)
- e. A permittee shall take precautions to protect livestock, wildlife, the public, or other users of the Tribal lands from accidental injury in any excavation unit. (NOTE: Not applicable to class D permits.)
- f. A permittee shall not conduct any flint knapping or lithic replication experiments at any archeological site, aboriginal quarry source, or non-site location that might be mistaken for an archeological site as a result of such experiments. (NOTE: Not applicable to class D permits.)
- g. A permittee shall perform the fieldwork authorized in this permit in a way that does not impede or interfere with other legitimate uses of the Tribal lands, except when the Director specifically provides otherwise.
- h. A permittee shall restrict vehicular activity to existing roads and trails unless the authorized officer provides otherwise.
- i. A permittee shall keep disturbance to the minimum area consistent with the nature and purpose of the fieldwork. (NOTE: Not applicable to class D permits.)
- j. A permittee shall not cut or otherwise damage living trees unless the Director gives permission. (NOTE: Not applicable to class D permits.)
- k. A permittee shall take precautions at all times to prevent wildfire. A permittee shall be held responsible for suppression costs for any fires on Tribal lands caused by the permittee's negligence. A permittee may not burn debris without the Director's specific permission. (NOTE: Not applicable to class D permits.)
- l. A permittee shall conduct all operations in such a manner as to prevent or minimize scarring and erosion of the land, pollution of the water resources, and damage to the watershed. (NOTE: Not applicable to class D permits.)
- m. A permittee shall not disturb resource management facilities within the permit area, such as fences, reservoirs, and other improvements, without the Director's approval. Where disturbance is necessary, the permittee shall return the facility to its prior condition, as determined by the Director.
- n. A permittee shall remove temporary stakes and/or flagging, which the permittee has installed, upon completion of fieldwork. (NOTE: Not applicable to class D permits.)
- o. A permittee shall clean all camp and work areas before leaving the permit area. A permittee shall take precautions to prevent littering or pollution on Tribal lands, waterways, and adjoining properties. Refuse shall be carried out and deposited in approved disposal areas.
- p. A permittee shall submit the preliminary report within thirty (30) days of completion of any episode of fieldwork, unless otherwise specified in the permit.

- q. A permittee shall submit the final report within ninety (90) days after completion of fieldwork, unless otherwise specified in the permit.
- r. A permittee shall submit progress reports every six (6) months over the duration of the project, unless otherwise specified in the permit.
- s. Additional special permit conditions may be attached to any permit.

D. Additional Conditions Applicable to Class D Permits

For any class D permit that involves the seeking of information from Hualapai Tribal members, the following conditions apply.

1. **Informed Consent.** The permittee will be required to obtain informed consent from each such informant prior to conducting an interview. Such consent may be documented using a form provided by the Department. The permittee acknowledges that it is a violation of these rules to conduct an interview with a Hualapai Tribal member without first obtaining written informed consent.
2. **Compensation.** The permittee will compensate each informant in accordance with a schedule of the fees developed by the Department, unless the informant agrees to provide information without compensation. Any such an agreement must be expressly noted on the consent form. Unless explicitly provided otherwise in a special term of the permit, the permittee will provide funds to the Department and the Department will disburse payments to informants.

RULES
IMPLEMENTING THE
HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE

APPENDIX 5-C
CONSENT OF INDIVIDUAL INFORMANTS

[RESERVED.]

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RULES
IMPLEMENTING THE
HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE

APPENDIX 5-D
FEE SCHEDULE FOR COMPENSATION FOR INFORMANTS

[RESERVED.]

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RULES

IMPLEMENTING THE

HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE

PART 6. ADMINISTRATIVE ENFORCEMENT

Section 601.	Monitoring and Investigations
Section 602.	Notice of Violation
Section 603.	Civil Penalties
Section 604.	Suspension and Revocation of Permits
Section 605.	Administrative Hearings
Section 606.	Judicial Enforcement

Section 601. Monitoring and Investigations

(a) Monitoring. The Director will make arrangements for monitoring each permit issued for compliance with the terms and conditions included in the permit. Monitoring may include site visits by Cultural Resources Department Staff and/or other tribal employees of departments or agencies with appropriate expertise. A site investigation may be conducted in response to information brought to the attention of the Department by any person.

(b) Letter of Inquiry. As part of an investigation, the Director may serve any person with a Letter of Inquiry. Any such letter will inform the person to whom it is addressed that: (1) written response to all questions in the letter must be provided to the Planning Department within thirty (30) days; (2) failure to respond will be treated as a violation of the Ordinance; (3) that providing false information will be considered a violation of the Ordinance; and (4) any violation of the Ordinance may result in the assessment of civil penalties.

(c) Warning Letter. When the Director has information indicating that a violation of the Ordinance may be taking place, or that a violation may take place in the near future, as an alternative to serving a Letter of Inquiry, the Director may serve a Warning Letter on any person associated with a possible violation of the Ordinance. A Warning Letter will not require a response, but rather, will serve to bring the requirements of the Ordinance and these rules to the attention of the person on whom it is served.

Section 602. Notice of Violation

(a) Issuance and Content. If the Director has reason to believe that a violation of the Ordinance has occurred, is occurring, or that there is a substantial likelihood that a violation will occur in the near future, the Director may issue a Notice of Violation to the person(s) apparently responsible for the violation. The Notice of Violation will be addressed to the person(s) believed to be responsible for the apparent violation and will include a summary of the alleged violation(s). If the apparent violation

occurred, or is occurring, on land in which a person other than the alleged violator holds a property interest, a Notice of Violation shall also be issued to the holder of such an interest. The content of the Notice shall conform to the requirements of section 402 of the Ordinance, and shall include at least the following:

- (1) a concise statement of facts believed to constitute a violation;
- (2) specific reference(s) to the provision(s) of this Ordinance and/or the rules to carry out this Ordinance allegedly violated;
- (3) the proposed amount of a civil penalty pursuant to Section 406 of this Ordinance (possibly accompanied by a proposal to reduce or waive collection of the amount if the violator takes certain actions to mitigate damage) or a statement that a penalty may be assessed in an amount to be determined after further investigation;
- (4) a statement that the amount of the civil penalty may be doubled if the violation continues to occur after the Notice of Violation has been served on the alleged violator; and
- (5) an explanation of rights to petition for relief, request an administrative hearing, and seek judicial review of any final determination pursuant to Part 5 of this Ordinance.

(b) Summons and Notice of Hearing. A Notice of Violation may include a Summons to appear before the Director at an enforcement hearing at a specified time and date. If such a Summons is included it shall advise the alleged violator that failure to appear will constitute a violation of the Ordinance, which may result in the imposition of civil penalties. If a Summons is not included with the Notice of Violation, a Summons may be issued at a later date.

(c) Violation in Connection with Permitted Activity. A Notice of Violation may be served on a permit holder prior to the issuance of a Notice of Suspension a permit pursuant to Section 309 of the Ordinance, in order to give the permit holder an opportunity to take corrective action. If the Director has made a determination that grounds exist for immediate suspension of a permit, the Director may issue a Notice of Violation at the same time as a Notice of Suspension of a Permit.

(d) Service. A Notice of Violation may be served on an alleged violator by the Director or by an employee of the Department or, at the request of the Director, by a Tribal law enforcement officer. If the person responsible for the alleged violation is not present on the site, the notice shall be prominently posted on the site and a reasonable effort will be made to provide service by certified mail.

Section 603. Civil Penalties

(a) Authority. Section 406 of the Ordinance authorizes the Director to assess civil penalties on individuals who violate any of the prohibitions in section 304 of the Ordinance, including any permit holder who violates the terms and conditions of a permit.

(b) Procedure for Assessing Penalties. The procedure for assessment of civil penalties includes the following steps:

- (1) *Notice of Violation.* The assessment of a civil penalty begins with the issuance by the Director of a Notice of Violation, in accordance with Section 402 of the Ordinance and section 603 of these rules. The Notice of Violation may include a proposed penalty amount, or the Director may serve a separate Notice of Proposed Penalty Amount.

- (2) *Response Period.* Any person on whom a Notice of Violation is served shall have a response period of forty-five (45) days after service of the Notice of Violation (or service of the Notice of Proposed Penalty Amount if not included in the Notice) for the alleged violator to respond to the Notice of Violation, during which the alleged violator may seek informal discussions with the Director or may file a Petition for Relief pursuant to Section 501 of the Ordinance and subsection 603(d) of these rules. The Director has discretion to grant a reasonable extension of the forty-five day period for response to the Notice.
- (3) *Response by Alleged Violator.* During the response period, the person on whom the Notice of Violation has been served may: (A) agree to pay the proposed penalty amount; (B) request informal discussions with the Director; or (C) file a petition for relief in accordance with subsection 603(d) of these rules.
- (4) *Assessment of Penalty.* The Director shall take into consideration all of the available information, including any information contained in a Petition for Relief, and, taking into consideration the penalty amount factors in subsection (c) of this section, the Director shall determine the amount of the penalty to be assessed. This determination may be made after the expiration of the Response period or, if a Petition for Relief has been filed, the Director need not wait for the expiration of the response period. If the Director determines that, based on all the available information, no violation has occurred, the Director shall so notify the person served with the Notice of Violation, and no penalty shall be assessed.
- (5) *Notice of Assessment.* The Director shall serve a written Notice of Assessment on the person determined to be responsible for the violation. Service may be in person or by registered or certified mail (return receipt requested). The Notice of Assessment shall include: (A) the penalty amount; (B) directions on how to pay it; (C) a statement of the facts and conclusions from which it was determined that a violation occurred; (D) the basis for determining the penalty amount assessed and any offer that may be made to reduce or waive the penalty; and (E) notification of appeal rights pursuant to Part 5 of the Ordinance and section 605 of these rules. If the civil penalty process has culminated in a Settlement Agreement pursuant to subsection (e), the Notice of Assessment shall include a copy of the Settlement Agreement; in such cases, the statement of facts and conclusions (item (C)) and the basis for determining the penalty amount (item (D)) may be abbreviated.

(c) **Penalty Amount Factors.** In determining the amount of a civil penalty, the Director shall take into consideration the factors set out in this subsection.

- (1) For violations relating to failure to obtain Class A, B, or D permits, the civil penalty amounts for first time offenders shall be twice the amount of the applicable permit fee, *provided* that the Director may reduce the penalty to the actual permit fee upon a determination that the violation was not willful. For a second offense, the penalty amount shall be four times the applicable permit fee, and for a third offense, the penalty amount shall be six times the permit fee. If actual damage to a cultural resource site has occurred, the violation shall be treated as a violation of the requirement for a class C permit. For a violation of the requirement for a class D permit, the penalty amount shall include an amount to provide compensation to any Hualapai informants in accordance with the fee schedule provided for in section 533 of these rules, and may also include an amount to provide an appropriate share to the Tribe of any profits derived from publications or other work products.

- (2) For a violation of the requirement to obtain a class C permit, and for any violation of the terms and conditions of a class C permit, the Director shall determine a penalty amount after taking into consideration factors listed in this section. In applying these factors, the Director may refer to guidance documents issued by federal agencies with relevant expertise and may also consult with personnel of such agencies, and with personnel of other tribal or state government agencies. The penalty amount factors are:
- (A) Costs of restoration and repair of damaged cultural resources and the archaeological or commercial value of cultural resources that are destroyed or otherwise not recovered;
 - (B) Enforcement and administrative costs associated with the assessment and collection of the civil penalty;
 - (C) Cost of disposition of cultural resources, including as appropriate, cost of curation in perpetuity;
 - (D) Costs associated with documentation, testing and evaluation of the cultural resource in order to assess the characteristics of the cultural resource and plan for its restoration; and
 - (E) Costs of any additional mitigation measures the Director deems appropriate to implement;
 - (F) An amount based on the loss to the Tribe of the use of cultural resources for cultural and religious practices;
 - (G) For any second offense, the total penalty amount may be doubled or tripled, in the Director's judgment depending upon the nature of the offense.
 - (H) In the event that conduct constituting a violation continued after service of a Notice of Violation, the penalty amount may be doubled, and, if such conduct continued after service of a Cease and Desist Order, the penalty amount may be tripled. The Director shall exercise judgment in applying this factor, taking into consideration the nature of the offense.

(d) **Petition for Relief.** After having been served with a Notice of Proposed Penalty Amount, the alleged violator may file with the Director a Petition for Relief, in which the alleged violator may either:
(1) state that no violation has occurred and ask the Director to withdraw the Notice of Violation; or
(B) propose that the penalty amount be reduced or waived, setting forth reasons in support of such a request. Reasons for requesting reduction or waiver of the penalty may be based on the following factors:

- (1) Agreement by the person being assessed a civil penalty to return to the Director cultural resources removed from tribal lands;
- (2) Agreement by the person being assessed a civil penalty to assist the Director in an activity to preserve, restore, or otherwise contribute to the protection and study of cultural resources;
- (3) Agreement by the person being assessed a civil penalty to provide information which will assist in the detection, prevention, or prosecution of violations of the Ordinance or these rules;
- (4) Demonstration of hardship or inability to pay, provided that this factor shall only be considered when the person being assessed a civil penalty has not been found to have previously violated the Ordinance or these rules;
- (5) Determination that the person being assessed a civil penalty did not willfully commit the violation;
- (6) Determination that the proposed penalty would constitute excessive punishment under the circumstances;
- (7) Determination of other mitigating circumstances appropriate to consideration in reaching a fair and expeditious assessment.

(e) **Settlement Agreement.** At any point in the process the Director is authorized to enter into a Settlement Agreement with the alleged violator, specifying a penalty amount and/or mitigation measures to be taken by the violator. Such a Settlement Agreement may be enforced in Tribal Court, but the terms of such an Agreement shall not be subject to judicial review.

(f) **Referral to Federal Authorities for Civil Penalties.** In lieu of, or in addition to, imposing civil penalties under this Ordinance, the Director may refer matters to federal authorities. Any penalties collected by the federal government and paid to the Hualapai Tribe (pursuant to 43 C.F.R. § 7.17(c)) shall be deposited in the Cultural Resources Revenue Account established pursuant to Section 204 of the Ordinance.

Section 604. Suspension and Revocation of Permits

(a) **Reasons for Suspension and Revocation of Permits.** Section 309 of the Ordinance authorizes the Director to suspend or revoke a permit.

- (1) *Suspension for cause.* The Director may suspend a permit for cause upon determining that the permit holder has failed to meet a term or condition of the permit or has violated any prohibition of the Ordinance or the rules issued to carry out the Ordinance.
- (2) *Revocation for cause.* The Director may revoke a permit for cause upon determining that:
 - (A) The permit holder has failed to correct the situation that led to the suspension of the permit within the time specified in the notice of suspension;
 - (B) The permit holder has been convicted of a criminal violation of this Ordinance or of other tribal or federal law in a matter directly related to the activities covered by the permit;
 - (C) A civil penalty has been assessed against the permit holder pursuant to this Ordinance or pursuant to other tribal or federal law in a matter directly related to the activities covered by the permit; or
 - (D) The permit holder has engaged in activities that would be grounds for the suspension of a permit, and the permit holder has previously had a permit suspended for cause.
- (3) *Suspension or Revocation Without Fault.* The Director may suspend or revoke a permit for reasons not relating to the conduct of the permit holder upon determining that continuation of work under a permit would not be in the best interests of the Hualapai Tribe or would be in conflict with legal requirements or land management policies not in effect when the permit was issued.

(b) **Procedure ; Right to Hearing.** A decision to suspend or terminate a permit will be made by the Director based on information obtained through monitoring and/or investigation. The Director will provide written notice of such a decision to the permit holder, by personal service if possible or by certified mail return receipt requested. The notice will inform the permit holder of the reason(s) for suspension or revocation; the effective date of such suspension or revocation; and the right to request a hearing before the decision becomes final. If the permit holder requests a hearing, the Director shall serve notice of the date of the hearing, which will be conducted in accordance with section 605 of these rules.

If the permit holder does not request a hearing, the Director's decision will become final agency action in accordance with the terms of the notice.

Section 605. Administrative Hearings.

(a) Authority. Section 502 of the Ordinance authorizes the Director to conduct administrative hearings for the purpose of making or reviewing decisions in a variety of contexts.

(b) Decisions Subject to a Right to a Hearing before the Director. The Ordinance provides for a right to a hearing before the Director in the following situations:

- (1) Clearance pursuant to section 303 of the Ordinance and Part 4 of these rules;
- (2) Permit application pursuant to section 309 of the Ordinance and Part 5 of these rules;
- (3) Notice of Violation pursuant to section 402 of the Ordinance and section 602 of these rules;
- (4) Any other instance in which a hearing before the Director is authorized in the Ordinance or these rules.

(c) Decisions Subject to Hearing Conducted by a Hearing Officer. The Ordinance provides that in the context of the assessment of civil penalties, and in any other hearing in which the Department has a direct financial interest, any party to the hearing may ask for the appointment of a Hearing Officer to conduct the hearing and render a decision, and the Director is required to grant such a request. In other circumstances, a party to the hearing may ask the Director to appoint a Hearing Officer, and the Director has the discretion to grant such a request, but there is no right to a Hearing Officer. In any case in which the hearing is conducted by a Hearing Officer, the decision by the Hearing Officer will constitute final action for the Department.

(d) Procedures for Hearings before the Director. Hearings conducted by the Director are informal. Such hearings will usually take place after the Director has issued a written decision. The decision will inform the person who is the subject of the decision of the right to an administrative appeal. In the context of a civil penalty, the Director's decision will be a Notice of Assessment, and the explanation of the right to a hearing will include the right to ask for the appointment of a hearing officer. The written decision will set a deadline of thirty (30) days in which a notice of appeal may be filed with the Director, and will state that: a notice of appeal must be in writing, must identify the "Appellant" by name and contact information, and must include a brief statement of the reason(s) for asking the Director to reconsider the decision. The Director's written decision will also advise that no particular form is required for a notice of appeal, but rather that a letter to the Director will be sufficient, and that the notice of appeal must be hand delivered to the Department or mailed by certified mail return receipt requested. If a notice of appeal is received within the 30-day deadline, the procedures for the hearing will be as follows:

- (1) *Notice of Hearing.* The Director will issue a notice setting a date, time, and place for the hearing, which shall be at least seven (7) and not more than thirty (30) days after the date of the Notice of Hearing. The Director may have informal communications with the appellant to determine a convenient date and time for the hearing. The Notice shall be posted in the Department and in the Tribal Council building, and shall include information regarding requests to intervene.
- (2) *Request to Intervene.* Any person may file a request to intervene with the Director at any time prior to the hearing, stating the reason(s) for wanting to participate in the hearing, including a statement of how the Director's decision (either the initial decision or a decision

after the hearing) would or might substantially affect the person's interests. A request to intervene may be filed by a tribal government agency or enterprise. The request must include a promise to abide by any confidentiality restrictions that the Director determines to be advisable to prevent harm to cultural resources.

- (3) *Decision on Request to Intervene.* At any time prior to the commencement of the hearing the Director will rule on any request to intervene. Such requests will be granted if the Director determines that interests of the person or entity filing the request are likely to be substantially affected by the Director's decision. The person seeking intervention bears the burden of persuading the Director on this point. The ruling on a request to intervene will be in writing but may simply be a notation on the request. The ruling will be conveyed to the person filing the request and to the appellant by any convenient means, including handing out copies of the ruling at the beginning of the hearing.
- (4) *Decision on Whether to Open the Hearing.* Prior to the commencement of the hearing, the Director will make a determination of whether it will be limited to the parties (Department, appellant, and intervenor(s), if any) or open to the public. If open to the public, any person in attendance may be asked to sign an agreement to preserve confidentiality of information discussed in the hearing. Failure to comply with a confidentiality agreement constitutes a violation of these rules.
- (5) *Record of the Hearing.* The Director will arrange for an audio recording to be made of any hearing and will ensure that a transcript can be prepared if needed for judicial review.
- (6) *Hearing Presentations.* The Director will assign staff of the Department to make an oral presentation summarizing the Director's initial decision, possibly with assistance from legal counsel for the Department. The appellant will then have the opportunity to make an oral presentation, which may be supplemented with written materials. The appellant may be represented by legal counsel at the appellant's expense. Any intervenor will then be given the opportunity to make a presentation, which may be with assistance of legal counsel at the intervenor's expense. During and after the presentations, the Director may ask questions of any person in attendance, but no party will have a right to cross-examine any other party.
- (7) *Decision by Director.* The Director may announce a decision at the close of the meeting or may take the matter under advisement. In either case, the Director will issue a written decision within seven (7) days after the hearing. The written decision will include information on the right to seek judicial review in Tribal Court, including an explanation of the deadline for filing any such claim for judicial review.

(e) **Procedures for Hearings Conducted by a Hearing Officer.** In any case in which a Hearing Officer is appointed, the Hearing Officer will issue a Notice of Hearing as described in subsection (d)(1) of this section, except that the Notice need not announce a date, time and place for the hearing. The Notice shall include a statement that the Hearing Officer will be presiding over the hearing, and that all documents should be filed with the Department but clearly marked for the attention of the Hearing Officer. The Notice of Hearing will set a firm deadline for the receipt of any request to intervene. After that deadline has passed, the Hearing Officer will rule on any request to intervene, applying the same standard as in subsection (d)(3), and will convey any such ruling(s) to the person(s) requesting to intervene, and to the Department and appellant. The Hearing Officer will then convene an informal conference among the parties to discuss procedures and scheduling. After the informal conference, the Hearing Officer will issue a Procedural Order and a Scheduling Order. The Procedural Order will specify

the procedures that will be used in the hearing, which shall at least conform to the requirements for a hearing conducted by the Director but which may include additional procedural measures. The Scheduling Order will set out the relevant dates, including any deadlines for filing written statements prior to the hearing. After the hearing, the Hearing Officer will issue a written decision within thirty (30) days, which shall include reasons in support of the decision and shall advise the parties regarding rights to seek judicial review.

Section 606. Judicial Enforcement.

In addition to administrative enforcement mechanisms, there are also a number of ways to enforce the Ordinance through Tribal Court. Such mechanisms do not require rulemaking. They are noted in this section of the rules for the convenience of public.

(a) Cease and Desist Order. Section 403 of the Ordinance authorizes the Director to petition Tribal Court for a Cease and Desist Order in to halt an ongoing violation or prevent a violation from occurring.

(b) Criminal Penalties. Section 404 of the Ordinance provides that certain actions are criminal offenses that may be prosecuted in Tribal Court. In addition, actions that are violations of the Ordinance may also constitute violations of federal law.

(c) Trespass. Section 405 of the Ordinance provides that nonmembers of the Hualapai Tribe who violate a prohibition in section 304 may have committed trespass, and may be subject to an action in Tribal Court.

(d) Civil Forfeiture. Section 407 of the Ordinance authorizes Tribal law enforcement officers to seize items of personal property that are apparently involved in a violation of the Ordinance. In the event of such seizure, the Section 504 of the Ordinance authorizes the Director to file an action in Tribal Court to perfect title to such property in the Tribe for use of the Department. The person from whom such an item was seized has a right to seek the return of the property, in accordance with section 504.

(e) Referral to Federal Authorities. Section 408 and the Ordinance authorizes the Director to refer matters to federal authorities for enforcement under federal law.

(f) Private Right of Action. Section 503(e) of the Ordinance authorizes any person who is directly and adversely affected by a violation of clearance requirement of section 303 of the Ordinance, which is not subject to enforcement action by the Director, to file an action in Tribal Court for injunctive relief to compel compliance with the law.



. RULES

TO IMPLEMENT THE

HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE

EXPLANATORY PAPER

TO ACCOMPANY THE FINAL RULES

October 2014

Hualapai Department of Cultural Resources
P.O. Box 310
Peach Springs, Arizona 86434
Office: 928.769.2223 FAX: 928.769.2235

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RULES
TO IMPLEMENT THE
HUALAPAI CULTURAL HERITAGE RESOURCES ORDINANCE
EXPLANATORY PAPER FOR RULEMAKING

October 2014

SUMMARY

The Hualapai Cultural Heritage Resources Ordinance (the “Ordinance” or “CHRO”) was enacted by the Tribal Council in 1998 to establish a comprehensive program under Tribal law to protect cultural resources within the Hualapai Reservation and other lands under the Tribe’s jurisdiction. In addition, the Tribal Council sought to build the governmental capacity to advocate for the protection of cultural resources that are significant for the Tribe but are beyond the Tribe’s territorial jurisdiction.

The Ordinance established the Hualapai Department of Cultural Resources (“HDCR” or “Department”) within the Tribal Government. The Ordinance designated the Director of the HDCR to serve as Tribal Historic Preservation Officer (THPO); authorized the creation of a Hualapai Register of Heritage Places; established a clearance requirement for proposed undertakings that might affect cultural resources on Hualapai Tribal lands; authorized the establishment of a permit program to control access to, and research relating to, cultural resources on Tribal lands; authorized a range of enforcement mechanisms, including civil and criminal penalties; authorized administrative appeals and judicial review; and created a limited private right of action in Tribal Court to ensure that Tribal governmental agencies and enterprises comply with the procedural requirements of the Ordinance.

Some of the provisions of the Ordinance did not go into effect until the Department developed rules to carry out the statutory language. The Ordinance sets out the procedure that the Department must use in developing the rules. The Department took those procedural steps and developed rules, which were made available for public review and comment in June 2013. As required by the Ordinance, the Department also prepared a paper that explained the proposed rules. This is a revised version of that Explanatory Paper, which includes commentary on certain provisions in the rules that have been changed from the language in the proposed rules. This Explanatory Paper is intended for use as a reference in implementing the Ordinance.

WRITTEN COMMENTS: When the HDCR published notice that it had developed proposed rules to implement the Ordinance, the HDCR invited written comments on the proposed rules. No written comments were received. The HDCR also held a community meeting to explain the proposed rules and to respond to questions. The community meeting was held on July 18, 2013, at the Hualapai Cultural Center. The final rules incorporate several changes that were made in response to discussions during the community meeting. While the adoption of final rules marks the conclusion of the rulemaking process, the HDCR nevertheless will accept written comments that are based on experience in the implementation of the rules, including comments that recommend making changes in the rules. Written comments may be filed by mail to:

Director
Hualapai Department of Cultural Resources
P.O. Box 310
Peach Springs, AZ 86434

Phone: (928) 769-2223

Comments may also be delivered to the Hualapai Cultural Center, 880 W. Route 66.

AUTHORSHIP: The primary author of these rules and the Explanatory Paper is Dean Suagee, Hobbs, Straus, Dean & Walker, LLP, with substantial input and direction from Loretta Jackson-Kelly, Director, Hualapai Department of Cultural Resources, and other HDCR staff members, including Dawn Hubbs and Peter Bungart.

OUTLINE OF THE EXPLANATORY PAPER

- I. Introduction
 - A. Rulemaking to Implement the CHRO
 - B. What the Term “Cultural Resources” Means
 - C. Reasons for Having a Cultural Resources Program
- II. Explanation of the Rules for the Cultural Heritage Resources Ordinance
 - A. Summary of the Cultural Heritage Resources Ordinance
 - B. Overview of the Rules
 - C. Detailed Discussion of the Rules
 - Part 1. General Provisions
 - Part 2. Cultural Advisory Team
 - Part 3. Hualapai Register of Heritage Places
 - Part 4. Review of Proposed Undertakings
 - Part 5. Permit Requirements and Application Procedures
 - Subpart A. General Provisions and Visitation Permits
 - Subpart B. Class B Permits – Non-collection Surveys
 - Subpart C. Class C Permits – Excavation and Removal
 - Subpart D. Class D Permits – Other Research Relating to Cultural Resources
 - Part 6. Administrative Enforcement and Hearings
- III. Federal Cultural Resources Laws that Apply on Indian Lands
 - A. National Historic Preservation Act of 1966 (NHPA)
 - 1. Governmental agencies with roles in historic preservation
 - 2. “Historic properties” and the National Register
 - 3. Traditional cultural properties
 - 4. Properties of traditional religious and cultural importance
 - 5. The Section 106 process
 - 6. Coordination with the National Environmental Policy Act (NEPA).
 - B. Archaeological Resources Protection Act of 1979 (ARPA)
 - 1. Permits and prohibitions
 - 2. Indian lands – permit requirements and exemptions
 - 3. Federal lands – notice to tribes
 - 4. Interface with National Historic Preservation Act
 - C. Native American Graves Protection and Repatriation Act (NAGPRA) of 1990
 - 1. Human remains and “cultural items”
 - 2. Lands that are covered by NAGPRA
 - 3. Intentional excavations
 - 4. Inadvertent discoveries
 - 5. Custody
 - D. Other Laws

Addendum: Reference Materials available on the Internet

I. INTRODUCTION

The Hualapai Cultural Heritage Resources Ordinance (the “Ordinance” or “CHRO”) was enacted by the Tribal Council in 1998 to establish a comprehensive program under Tribal law to protect cultural resources within the Hualapai Reservation and other lands under the Tribe’s jurisdiction. Resolution No. 13-98 (Feb. 18, 1998). Some of the provisions of the Ordinance did not go into effect until the Hualapai Department of Cultural Resources (“HDCR” or “Department”) developed rules to carry out the statutory language. Section 208 of the Ordinance sets out procedural steps that the Department is required to follow in rulemaking, including making proposed rules available for public review and comment. In June 2013, the Department announced that its proposed rules were available, and a notice was published in the Tribal newsletter *Gamyu* on July 3, 2013. A community meeting was held on July 18, 2013. After considering input received during the community meeting, the Department made certain revisions in the proposed rules. A final version of the rules has been approved by the HDCR Director and has been submitted to the Tribal Council for approval.

This Explanatory Paper is intended to help members of the Hualapai Tribe and other persons understand the rules that have been adopted to carry out various provisions of the Ordinance. This Paper was originally prepared to explain the proposed rules, and to provide background information on the framework of federal laws that apply to cultural resources. This revised version of the Explanatory Paper includes an explanation of changes that were made in response to comments made during the community meeting. (No written comments were received on the proposed rules.) This version of the Explanatory Paper will be used as a reference document by the Department in carrying out the final rules and will be available to other tribal departments, the tribal community, and the public to help people understand the final rules.

A. Rule making to Implement the Cultural Heritage Resources Ordinance.

The terms “rules” and “regulations” are used to describe documents developed by a governmental agency to add details to a law enacted by a legislative body. (In administrative law, the term “rules” and the term “regulations” mean pretty much the same thing.) The basic idea is that for certain kinds of subjects, the legislative body makes the basic policy decisions in the legislation and then authorizes an agency in the executive branch of government to fill in the details through the process known as “rulemaking.” The Hualapai Tribal Council took this approach in enacting the Ordinance, which includes several provisions that do not go into effect until the Department develops rules to carry out the statutory language.

When federal agencies carry out rulemaking, a federal law known as the Administrative Procedure Act requires certain procedural steps to ensure that those who would be affected by federal rules have the opportunity to get notice and file comments as part of the rulemaking process. State government agencies are subject to similar state laws. The basic policy reason for requiring structured opportunities for input from the public is that, unlike elected representatives in legislative bodies, government agencies are not directly accountable to the voters.

The CHRO authorizes the Department to carry out rulemaking following procedural steps set out in the CHRO that are modeled on the procedures used by federal agencies. When federal agencies do rulemaking, they are governed by the federal Administrative Procedure Act, 5 U.S.C. § 553, and they may also be subject to any additional requirements that Congress sets out in legislation specific to a particular agency. The basic federal process requires publication of a proposed rule in the *Federal Register*, a period of at least 30 days for public review and comment, and, after consideration of comments received,

publication of a final rule in the *Federal Register*. Agencies may also take optional steps to enhance the opportunities for the affected public to participate in the rulemaking process, such as by holding hearings. With the proposed rule and with the final rule, the agency must include an explanation of the rule and the statutory authority for issuing the rule. The explanatory portion of a federal rulemaking document is commonly known as the “preamble.” In the final rulemaking document, the preamble must include a discussion of comments received and responses to those comments. After the agency publishes its final rule, the text of the rule is published in the *Code of Federal Regulations* (“C.F.R.”). The preamble is not published in the C.F.R. A preamble is, nevertheless, helpful to clarify any ambiguities that may exist in the text of the rules, and to explain the agency’s interpretations of its statutory authority. Both the C.F.R. and the *Federal Register* are available online at a web site maintained by the Government Printing Office, the GPO Federal Digital System: www.gpo.gov/fdsys/search/home.action.

While the Hualapai Nation has not enacted its own Administrative Procedure Act, the Cultural Heritage Resources Ordinance does set out the procedural steps that the Department must take in developing rules. The required procedural steps are:

- (1) A proposed rule must be made available to the public for review and comment, and the proposed rule must be accompanied by an explanation of the rule;
- (2) The comment period must be at least 45 days;
- (3) The final rule must be prepared, taking into consideration and responding to the comments that are filed;
- (4) The final rule must be filed with Tribal Council.

This Explanatory Paper was originally prepared as the required explanation of proposed rules to implement certain provisions of the Ordinance. Although no written comments were received, certain changes have been made from the proposed rules in response to discussions in the community meeting, and those changes are discussed in this edition of the Explanatory Paper. The provisions of the Ordinance that are implemented through the rules are discussed later in this Explanatory Paper, at II.A. Briefly, the provisions of the Ordinance addressed in this rulemaking are:

Advisory Team of Elders, Ordinance § 207.
Hualapai Register of Heritage Places, Ordinance § 301.
Review of proposed undertakings by the THPO, Ordinance § 303.
Permits for certain classes of activities affecting cultural resources, Ordinance § 308.
Civil penalties, Ordinance § 406.
Administrative appeal hearings, Ordinance § 502.

B. What the Term “Cultural Resources” Means

The term “cultural resources” is widely used to describe several kinds of places and things that were made by human beings or that are significant because of human action or belief. There is no standard definition in federal law. The CHRO does include a definition of the term “cultural resources.” As defined in the CHRO, the term means:

“any product of human activity or any object or place given significance by human action or belief. Places that may be cultural resources include buildings and other structures, landforms, archaeological sites, traditional cultural properties, and districts that are eligible, or potentially eligible, for listing on the Hualapai Register of Heritage Places or the National Register of Historic Places. Objects that may be cultural resources include artifacts and other physical remains of human activity, natural objects given significance by human action or belief, human remains and

"cultural items" as defined in the Native American Graves Protection and Repatriation Act (funerary objects, sacred objects, and objects of cultural patrimony), and archaeological resources. Objects may be eligible for the Hualapai Register of Heritage Places or the National Register of Historic Places if they are in some way connected to a specific place."

While there is no standard federal definition, some federal agencies have defined the term in guidance documents. For example, the National Park Service (NPS), which has a lead role in several of the federal cultural resources statutes, defines the term as follows:

"an aspect of a cultural system that is valued by or significantly representative of a culture or that contains significant information about a culture. A cultural resource may be a tangible entity or a cultural practice. Tangible cultural resources are categorized as districts, sites, buildings, structures, and objects for the National Register of Historic Places and as archeological resources, cultural landscapes, structures, museum objects, and ethnographic resources for NPS management purposes."

NPS-28: Cultural Resource Management Guideline, Appendix A: Glossary.

That NPS guidance document uses five categories for the various kinds of cultural resources: archaeological resources, cultural landscapes, structures, museum objects, and ethnographic resources. NPS-28, Ch. 1, section B.1.

Some of the terms that are included within the term "cultural resources" do have definitions in federal law. For example, the term "archeological resources" is defined in the Archeological Resources Protection Act (ARPA); the term "historic properties" is defined in the National Historic Preservation Act (NHPA); and the term "cultural items" is defined in the Native American Graves Protection and Repatriation Act (NAGPRA). These three federal statutes are discussed below in section III of this Explanatory Paper.

Cultural resources are important for many reasons. One main reason is that they help to preserve the collective identities of human populations. The cultural identity for which a specific cultural resource holds significance may be a particular Indian tribe, such as the Hualapai Nation, or a particular ethnic group. Cultural identity associated with some particular resources may be regional or national in scope. Many cultural resources have significance for more than one particular group, or for a particular group as well as for the American people as a whole. For example, many locations within the Grand Canyon have significance for many Indian tribes and also have national and international significance. Another reason that cultural resources are important is that they can help us to learn about the past – they provide us with information about ancient human populations, about the ways in which human cultures have developed over time, and about possible connections between ancient and present-day cultures.

Some cultural resources are more significant than others. Some hold religious and cultural importance for the Hualapai people. Some hold religious and cultural importance for the people of other Indian tribes. Some are of national significance, for example, because these resources are associated with historic events of national significance. Some cultural resources may be less significant. In many cases, such as where cultural resources are present at a site at which a development project is planned, a decision must be made regarding how to mitigate adverse effects to the cultural resources. If the resources are archaeological sites, mitigation may involve excavation to remove the resources and make a detailed record of the site. For some kinds of cultural resources, mitigation through archaeological excavation may not be acceptable, for example, if the cultural resources include the graves of ancestors or places where medicine plants are gathered for religious purposes.

C. Reasons for Having a Cultural Resources Program

There are several reasons for establishing a cultural resources program under tribal law. Some of the basic reasons are to establish a legal process for:

- (1) determining which cultural resources hold such significance that they really ought to be preserved;
- (2) deciding what kind of mitigation is appropriate when cultural resources may be adversely affected by development projects; and
- (3) drawing on the wisdom of tribal elders in helping to make such decisions.

Another set of reasons for establishing a cultural resources program under tribal law has to do with tribal sovereignty. There is a network of federal laws that are concerned with cultural resources, and the three main federal statutes all recognize that Indian tribal governments have inherent sovereignty in the general subject matter of cultural resources. These three main federal laws – the National Historic Preservation Act (NHPA), the Archaeological Resources Protection Act (ARPA), and the Native American Graves Protection and Repatriation Act (NAGPRA) – establish a framework in which tribal governments can exercise their sovereign powers in ways that have support from, and recognition by, the federal government. The Hualapai Cultural Heritage Resources Ordinance was enacted with a view to making the most of the federal recognition of tribal sovereignty reflected in NHPA, ARPA, and NAGPRA. In light of the fact that the CHRO builds on the foundation of these federal laws, some explanation of the federal laws should be helpful for understanding the tribal law. Part III of this Explanatory Paper discusses these three federal laws in some detail. Readers who are not familiar these federal laws may want to read part III before reading part II. In any case, part III is intended to serve as a kind of reference document on NHPA, ARPA, and NAGPRA.

II. EXPLANATION OF THE RULES FOR THE CULTURAL HERITAGE RESOURCES ORDINANCE

This part of the Explanatory Paper is divided into three main headings: (A) Summary of the Cultural Heritage Resources Ordinance; (B) Overview of the Rules; and (C) Detailed Discussion of the Rules. Under heading (C) the discussion is broken down further under sub-headings that correspond to the various parts of the rules.

A. Summary of the Cultural Heritage Resources Ordinance

The Hualapai Cultural Heritage Resources Ordinance authorizes the establishment of a comprehensive program to exercise stewardship over the cultural resources that are within the territorial jurisdiction of the Hualapai Tribe, to perpetuate the traditional stewardship by Hualapai people of cultural resources on lands traditionally used by Hualapai people but not currently within tribal jurisdiction, and to encourage other governmental agencies and private landowners to manage such cultural resources in a spirit of stewardship. The full text of the Ordinance may be obtained from the Department. An overview is presented below.

The Ordinance is structured in five parts. Part 1 – General Provisions – includes findings, policy, and definitions. Part 2 – Cultural Resources Program Administration – established the Cultural Resources Department of the Hualapai Tribe and gave the Department a mandate to build the comprehensive program envisioned in the Ordinance. Part 2 also sets out the Department's powers and duties, including the responsibility for administering a Tribal Historic Preservation Officer (THPO) program for purposes

of the National Historic Preservation Act. Section 203 delegates authority to the Department and to the Director as head of the Department, including authority to develop rules to carry out the Ordinance. Some of the other provisions in part 2 include section 205, which authorizes the Archaeological Services Branch within the Department; section 206, which authorizes the Department to make plans for a Tribal Museum; section 207, which authorizes the Advisory Team of Elders; section 208, which sets out the procedural requirements for rulemaking; and section 209, which sets out procedural requirements for hearings.

Part 3 of the Ordinance – Protection of Cultural Heritage Resources – provides specific statutory authority for several programs. Section 301 directs the Department to establish a Hualapai Register of Heritage Places, which is intended to be comparable to, but separate from, the National Register of Historic Places. Section 302 directs the Department to develop a program to inventory, evaluate, and nominate properties for the National Register of Historic Places. Section 303 of the Ordinance establishes a clearance requirement for proposed undertakings that may affect cultural resources on Hualapai Tribal lands, a requirement that applies whether or not the undertaking involves federal agency action. This clearance requirement is comparable to, but different from, the review process that applies to proposed federal undertakings pursuant to section 106 of the National Historic Preservation Act and the regulations of the Advisory Council on Historic Preservation (ACHP). (The ACHP regulations are discussed briefly below under the heading “Part 4 – Review of Proposed Undertakings” and in more detail in part III of this Explanatory Paper).

Section 304 prohibits certain kinds of activities that may affect cultural resources unless conducted pursuant to a permit, or otherwise exempted. Section 307 authorizes the establishment of a permit program to control activities that are prohibited unless a permit has been issued. The permit program encompasses four distinct classes of permits for four different kinds of activities, as discussed under the next heading. Section 308 sets out procedural requirements for permit applications, and section 309 provides for the possible suspension or revocation of permits.

Part 4 of the Ordinance – Enforcement – authorizes a range of administrative enforcement mechanisms, including civil penalties as set out in section 406. Section 407 authorizes the seizure and civil forfeiture of personal property used in committing a violation of the Ordinance.

Part 5 of the Ordinance – Appeals and Judicial Review – is intended to ensure that the Department treats people with basic fairness and to provide opportunities to challenge decisions made by the Department. Section 502 sets out the basic requirements for administrative hearings. Section 503 authorizes judicial review in Tribal Court of certain kinds of decisions made by the Director. This section also provides a limited waiver of sovereign immunity authorizing actions in Tribal Court for injunctive relief (but not for money damages) to ensure that Tribal agencies and enterprises comply with the procedural requirements of the Ordinance. Section 504 provides for a procedure in Tribal Court through which a person whose personal property has been seized can seek to have the property returned.

B. Overview of the Rules

Several provisions of the Ordinance direct the Department to create parts of the comprehensive cultural resources program through rulemaking. In particular, section 301 directs the Department to use rulemaking to create the Hualapai Register of Heritage Places, including the development of criteria of eligibility and procedures for determinations of eligibility. Section 303 authorizes the Department to use rulemaking to develop a procedure for the review of proposed undertakings. This section also provides that, until such a procedure is adopted, the Department shall conduct the review process using the

procedure in the regulations of the Advisory Council on Historic Preservation implementing the section 106 process, i.e., 36 C.F.R. part 800. Section 308 directs the Department to use rulemaking to establish procedures governing the four classes of permits described in section 307, and section 308 provides that the permit program does not become legally effective until the Department has issued rules. The main purpose of the rules is to carry out these and related provisions of the Ordinance.

The rules are divided into six parts, with the intent of making the rules easier for the tribal community and the affected public to use. The parts of the rules, which generally correspond to the structure of the Ordinance, are listed below.

- Part 1, “General Provisions,” provides an overview of the rules and includes provisions such as definitions that are applicable to all parts.
- Part 2, “Cultural Advisory Team,” explains the roles and responsibilities of the Cultural Advisory Team, as well as procedures for appointments to the Team. The Department notes that the Ordinance uses the term “Advisory Team of Elders.” In discussions during the community meeting, a consensus emerged that it would be preferable to change this term to “Cultural Advisory Team.” One reason for this change was that it was difficult to settle on a definition of “elder,” and it became apparent that the most important factor for serving on this team is not so much age as knowledge of cultural traditions of the Hualapai people.
- Part 3, “Hualapai Register of Heritage Places,” formally establishes this Register, sets out the criteria of eligibility, and describes the process for determinations of eligibility. This part also includes information on the Hualapai program for identifying, evaluating, and nominating places that may be eligible for the National Register of Historic Places.
- Part 4, “Review of Proposed Undertakings,” implements section 303 of the Ordinance, which establishes a clearance requirement for any “undertaking” that may affect cultural resources located on Hualapai tribal lands. The section 303 clearance requirement is similar to the review and consultation requirement established by section 106 of the NHPA, which applies to federal and federally-assisted undertakings. Part 4 of these rules also explains the relationship between the section 303 clearance requirement under the Ordinance and the section 106 consultation process under the NHPA.
- Part 5, “Permit Requirements and Application Procedures,” sets out the requirements and procedures for four classes of permits, pursuant to several sections in part 3 of the Ordinance. The Ordinance authorizes four classes of permits, and so part 5 of the rules is divided into four subparts. The four classes of permits are as follows:
 - Class A – Visiting Cultural Resources Sites
 - Class B – Non-collection Surveys
 - Class C – Excavation and Removal of Cultural Resources
 - Class D – Other Research Relating to Cultural ResourcesThe four subparts of part 5 of the rules correspond to these classes of permits, with provisions that apply to all classes of permits included in subpart A of the rules.
- Part 6, “Administrative Enforcement and Hearings,” implements various provisions in the Ordinance that authorize the Department to enforce the Ordinance through administrative mechanisms, including civil penalties for violations. This part also sets out rules for conducting administrative hearings and for enforcing the law.

C. Detailed Discussion of the Rules

Each of the six parts of the rules is discussed in more detail below. The discussion includes explanatory comments for changes that were made from the proposed version of the rules as published in June 2013. As previously noted, although no written comments were received, a number of issues were discussed in the community meeting in July 2013.

Part 1. General Provisions

Part 1 includes three sections and two appendices. Section 101 provides an overview of the Hualapai Cultural Heritage Resources Ordinance. Section 102 describes the Hualapai Department of Cultural Resources, including its overall mission and its authority under the Ordinance. Section 102 also notes that the Department administers a Tribal Historic Preservation Officer (THPO) program pursuant to the NHPA. Under federal law, the Hualapai THPO performs a prominent role in the NHPA section 106 process in accordance with the regulations of the Advisory Council on Historic Preservation.

Section 102 also describes the Archaeological Services Branch (ASB), which is a staff unit within the Department. The ASB has the expertise for conducting archaeological surveys for a variety of purposes, including developing information for the THPO to use in deciding whether to grant clearance for a proposed undertaking. The ASB is authorized to charge fees for its services. In light of the fact that a survey and report prepared by ASB will generally be required before the THPO can grant clearance, the Department anticipates that applicants for clearance may object to the level of effort required by the ASB, in effect suggesting that the ASB is creating work for ASB staff. To alleviate such concerns, the ASB maintains a list of private firms with the qualifications for performing archaeological work on tribal lands. Applicants are not required to procure survey services from the ASB. As provided in part 5, however, there may be instances in which the Department will want to conduct a survey in-house, such as when an area has not yet been surveyed but the Department has reason to believe that the area contains cultural resources of significance to the Hualapai people.

Section 103 summarizes the purpose and scope of the proposed rules, including a summary of each part of the rules.

There are two appendices to part 1. Appendix 1-A sets out definitions of key terms used in the Ordinance and the rules. Appendix 2-A is a list of acronyms. The Department believes that putting the definitions and acronyms in appendices will make it easier for people to become familiar with the key terms and acronyms.

Section 104 of the Ordinance provides that rules issued by the Director may clarify the definitions in that section and may include definitions for additional terms, *provided* that any such additional definitions shall be generally consistent with the use of such terms in federal cultural resources law and *provided* that any intentional minor differences in the use of such terms shall be explained in the rules. Appendix 1-A incorporates the definitions from section 104 of the Ordinance, with some minor changes in wording.

Part 2. Cultural Advisory Team

Section 207 of the Ordinance charges the Director of the Department with establishing an Advisory Team of Elders. Through discussions in the community meeting on the proposed rules, the

Director decided to change the name of this entity to the Hualapai Cultural Advisory Team (herein sometimes referred to as the “Advisory Team”). The reason for this change is that the key qualification for serving on the Advisory Team is knowledge of Hualapai cultural traditions, and some people may be qualified to serve without being elders.

The Ordinance gives the Director a mandate to develop two documents: (1) a policy statement on the roles and responsibilities of the Advisory Team; and (2) a procedure for appointments to the Advisory Team. The Ordinance does not require these two documents to be developed through the rulemaking process, but it does require approval by the Tribal Council. The Department believes that, in light of the importance of the Advisory Team in various aspects of the cultural resources program, it will be helpful for these documents relating to the Advisory Team to be integrated into the rules implementing the Ordinance. Since the Department is not required to use the rulemaking process in developing these documents, however, the Department may decide to make future revisions in this part without use of the rulemaking process. Any such changes would be subject to approval by the Tribal Council.

Part 2 consists of seven sections and two appendices. Section 201 summarizes the statutory authority of the Department for the establishment of the Advisory Team, and also briefly describes the role of the Advisory Team. Section 202 explains that the Advisory Team consists of two classes of members: “core members” and “associate members.” Core members are responsible for carrying out the duties set out in section 203; associate members are people known to have knowledge of particular matters or places. The core members will call on one or more of the associate members when their particular knowledge would be helpful.

Section 203 sets out the roles and responsibilities of the Advisory Team. These include helping the Department in deciding whether or not a property is eligible for the Hualapai Register of Heritage Places (as authorized in the Ordinance and created in accordance with part 3 of the rules) or the National Register of Historic Places (as authorized by the National Historic Preservation Act and implemented through rules issued by the National Park Service). With respect to the National Register, the duties of the Advisory Team include performing a role similar to that of a State Review Board as set out in NPS regulations. With respect to the Hualapai Register, in the event of a disagreement between the Director and the Advisory Team over whether a property is eligible, the Advisory Team has the authority to make the determination. The Advisory Team also provides guidance to the Department regarding the appropriate treatment of any human remains or cultural items with respect to which the Hualapai Tribe has the right of custody pursuant to the Native American Graves Protection and Repatriation Act. The Advisory Team may also be called upon by the Tribal Court for advice on questions relating to Hualapai cultural traditions.

Section 204 is the policy on appointments to the Advisory Team. Basically, any tribal member who has knowledge of Hualapai traditions and cultural heritage can volunteer to serve. There is no minimum age requirement to be considered eligible for the Advisory Team; rather, the key qualification is knowledge of Hualapai traditions and cultural heritage. In addition to volunteers, the THPO can ask such people to serve. The THPO will develop a list of people to serve as core members and present this list of nominees to the Tribal Council. The THPO will strive to identify seven people to serve in this capacity. Appointments become final when approved by the Tribal Council, as provided in section 204 of the rules.

This section also provides that the THPO will nominate individuals to serve as associate members of the Advisory Team, and such appointments will become final when approved by the Director. (This provision in the rules anticipates that, in the future, the positions of THPO and Director will be filled with two different individuals, unlike at present in which the Director also serves as THPO.) There is no

specific number of people who may be appointed to serve as associate members. The basic idea is that individuals who are qualified to serve as associate members of the Advisory Team should be encouraged to do so. Associate members will be called upon when a matter arises for which it would be helpful for the Department to have access to their particular knowledge.

Once appointed to the Advisory Team, members will serve as long as they are willing and able. The Advisory Team will develop its own Operating Procedures, with help from the Director as provided in section 207 of the rules. The Operating Procedures shall include a process by which the Core Members of the Advisory Team may remove a member who has stopped participating.

Section 205 of the rules says that the THPO will arrange for training for the Advisory Team. Section 206 says that members of the Advisory Team will be compensated for attending meetings, and that any associate member who has been asked to attend a meeting may be compensated. The amount of compensation is to be determined by the Director on an annual basis, subject to approval by the Tribal Council.

Appendix 2-A is a compilation of excerpts from the federal regulations that are relevant to the functions of the Advisory Team. Appendix 2-B is a compilation of excerpts from the Ordinance that are relevant to the functions of the Advisory Team.

Part 3. Hualapai Register of Heritage Places

Part 3 of the rules sets out the framework for establishing the Hualapai Register of Heritage Places, in accordance with section 301 of the Ordinance. The Hualapai Register is separate from the National Register of Historic Places, although many places that are eligible for the Hualapai Register may also be eligible for the National Register.

Part 3 consists of seven sections. Section 301 describes the purposes of the Hualapai Register. As stated in section 301:

The main purpose of the Hualapai Register is to provide recognition for places that are important to the Hualapai people and to maintain an inventory of such places, as determined pursuant to tribal law and without any need to provide documentation on such places to any federal agency. Another important purpose is to be prepared to respond to proposed activities that threaten the integrity of Heritage Places by documenting their importance before such activities are proposed.

Section 302 sets out the criteria of eligibility for the Hualapai Register, and specifically states that the Register may include places on Hualapai traditional use lands as well as those on Hualapai tribal lands. There are four criteria of eligibility, which are adapted from the criteria for the National Register. As stated in section 302:

The quality of significance in Hualapai heritage is present in places, buildings, districts, objects, structures, and landscapes that:

- (1) Are associated with important events or patterns of events in the development and survival of Hualapai culture. The consideration of this criterion should incorporate a broad and inclusive perspective, which includes various kinds of knowledge of historical events, such as those that are recognized in Hualapai oral traditions, events that have been documented in historical or archival records, events that pertain to local and familial histories, and events that are associated with the development of Hualapai traditional ecological knowledge;

- (2) Are associated with the lives of persons (including supernatural or non-human entities) who are significant in the development and survival of Hualapai culture;
- (3) Embody the distinctive characteristics of a type, period, or method of creation; represent the work of a master; possess high artistic values; or represent a significant and distinguishable entity whose components may lack individual distinction; or
- (4) Have yielded, or may be likely to yield, important information about the development and survival of Hualapai culture. In evaluating this criterion, "important information" may be interpreted as including information that is in addition to western scientific knowledge, including information about the development of Hualapai oral traditions or traditional ecological knowledge.

The Department notes that these criteria specifically include "landscapes," a term that is not explicitly included in the National Register criteria. While landscapes may be historic "districts" and, as such, are implicitly included in the National Register criteria, given the importance of landscapes in Hualapai culture, the Department determined that landscapes should be explicitly included. The Department recognizes that the inclusion of landscapes involves issues which may be difficult to resolve in certain cases, such as the delineation of boundaries for a culturally significant landscape.

Section 303 sets out "considerations" for applying the criteria. The concept of such "considerations" is borrowed from the federal regulations for the National Register, but the specifics in section 303 are quite different from the considerations of the federal rules. Section 303 says that places where Hualapai human remains or funerary objects are located are normally eligible, and that petroglyphs are normally eligible. Archaeological sites that have been evaluated for eligibility for the National Register and determined to not be eligible, may nevertheless be eligible for the Hualapai Register.

Section 304 says that the THPO conducts a program to identify, inventory, and evaluate places that may be eligible for the Hualapai Register and to prepare documentation and consult with the Advisory Team in making determinations of eligibility. This section also includes provisions for keeping information confidential in order "to protect the cultural resources at issue and the traditional uses of such resources by tribal members." One means for preserving confidentiality is for the THPO to maintain "a list of places that have been determined eligible for the Hualapai Register but which are not formally listed in order to restrict access to information about such places and reduce the risk of damage to them."

Section 305 says that the THPO will normally make the determination of whether a place is eligible for the Hualapai Register. A determination of eligibility for the Hualapai Register will be subject to review by the Advisory Team as provided in section 306. In the event of a disagreement over the eligibility of a place for the Hualapai Register, the Advisory Team has the final say, in accordance with section 301 of the Ordinance. This process has been changed somewhat from the way it was presented in the proposed rules. As proposed, the THPO would have made a preliminary determination of eligibility for the Hualapai Register, which would not take effect until after consultation with the Advisory Team. The Department believes that the revised process will allow for eligibility determinations to be made more expeditiously, and that review by the Advisory Team is consistent with the Ordinance.

Section 307 says that the THPO may recommend that an area containing one or more places that are eligible for the Hualapai Register should be formally designated an "Area of Special Tribal Concern" in the Tribe's Land Use and Development Plan, as authorized by the Hualapai Environmental Review Code.

Section 308 describes the Hualapai program for identifying and compiling an inventory of places that may be eligible for the National Register, evaluating such places for eligibility, and determining

whether such places should be formally nominated to the National Register. The THPO has the lead responsibility for carrying out this program. This section provides that the Advisory Team may be called upon to perform the role that a “state review board” performs for state historic preservation officer programs, and that the THPO will make arrangements for the Advisory Team to have the technical assistance they need to perform that function. A sentence has been added at the end of section 308 referring to the regulations issued by the National Park Service for the process to appeal nominations to the National Register. This sentence appeared in section 310 of the proposed rules; that section, as discussed below, is not included in the final rules.

Section 309 says that any person can recommend that a particular place be considered for either the Hualapai or the National Register.

As proposed, section 310 said that determinations by the THPO regarding eligibility for the Hualapai Register are subject to judicial review in Tribal Court pursuant to section 503 of the Ordinance. Section 301 of the Ordinance provides that determinations of eligibility for the Hualapai Register “may be appealed pursuant to Section 503.” Section 503 of the Ordinance governs judicial review of decisions by the Director of the Department, and, while this section of the Ordinance is expressly concerned with other kinds of decisions, the language of section 301(d) means that decisions regarding eligibility are subject to review in Tribal Court, in accordance with the standards for review in section 503(c). The Department believes that the instances in which someone seeks review of a determination of eligibility for the Hualapai Register will be few, that any such challenges can be adequately addressed in Tribal Court, and that there is no need to address this issue in the rules.

Part 4. Review of Proposed Undertakings

Part 4 sets out the procedures for the review and clearance of proposed undertakings on Tribal lands pursuant to section 303 of the Ordinance. This part consists of thirteen sections and three appendices.

Section 401, “Purpose and Scope of This Part,” includes eight subsections. Subsection (a) sets out the key language of section 303 of the Ordinance. This part uses of the term “Tribal Historic Preservation Officer (THPO)” rather than “Director” as the tribal official who is authorized to issue clearances. At the present time, the Director is the THPO. As the various programs of the Department of Cultural Resources develop over time, it may become desirable for the Department to make the position of THPO a full-time position separate from the Director. The use of the term “THPO” in this part is intended to specify that clearance is a function assigned to the THPO. Subsection (c) explains the coverage of the clearance requirement, which applies to any undertaking proposed by any governmental agency as well as to undertakings proposed by private persons. Subsection (d) explains that the clearance requirement applies to all cultural resources on Tribal Lands, not just those that have been determined eligible for the National Register or the Hualapai Register. Subsection (e) explains what the word “clearance” means – that a proposed undertaking that would affect cultural resources is unlawful unless the THPO has given clearance. Subsection (f) explains the relationship of section 303 clearance to the requirements of federal cultural resources laws. Subsection (g) explains the relationship of the clearance requirement to other requirements under Hualapai tribal law. Subsection (h) notes that, since the clearance requirement in the Ordinance does not apply to proposed federal or federally-assisted undertakings that are not on Tribal lands, Part 4 of the rules does not apply to such undertakings, although, in section 413, some guidance is provided on how the Department engages in the review of such undertakings to advocate for the interests of the Tribe.

Section 402 explains that the applicant for clearance is responsible for providing the information that the THPO needs in order to make a decision on the request for clearance.

Sections 403, 404 and 405 set out the procedural steps that will apply to requests for clearance. Sections 403 and 404 set out the process that the Department intends to be the standard. Section 405 sets out an alternative process which, as discussed below, may apply instead of section 404 when the proposed undertaking is “federal or federally-assisted.”

Section 403 is the first step, in which the applicant files a Cultural Resources Clearance Request form with the Department and makes arrangements to consult with the Department’s Archaeological Services Branch (ASB). The ASB reviews the application in light of the information that the ASB has on file regarding cultural resources that could be affected by the proposed undertaking and makes some recommendations regarding the level of effort needed to have enough information to process the Clearance Request. For the most part, these recommendations will be a function of how much information the Department already has about the area that would be affected by the proposed undertaking. If the Department already has enough information about cultural resources to know that none would be affected by an undertaking, clearance may be issued without requiring more information to be developed. This in turn, will be a function, at least to some extent, of whether the location has been the subject of the inventory program described in section 304 of these rules.

Based on the ASB recommendations, the Director will determine whether one or more permits under part 5 of the rules will be needed in order to produce the information needed to process the Clearance Request. If a permit is required, the applicant is generally responsible for payment of the applicable application fee for the permit. If the work covered by the permit is performed for the applicant by a qualified consultant, or by staff of the Department, the applicant is generally responsible for the cost of the work.

After the THPO has determined whether a permit is required, the Department will then post a notice that the Clearance Request has been received, which will include information on how interested persons can provide input into the clearance process. Subsection 403(e) sets out the final step of the initiation phase of the clearance process – identification of consulting parties. The THPO has discretion to determine which governmental entities and persons to include in the clearance process as consulting parties, except that there are two instances in which the THPO does not have discretion. One is when the Advisory Council on Historic Preservation chooses to be a consulting party for a proposed undertaking that would affect a property listed on or eligible for the National Register. The other is when a proposed undertaking would affect a historic property on land that is not held in Indian trust status – in such a situation, if the landowner so requests, the THPO will invite the State Historic Preservation Officer to be a consulting party.

Section 404 sets out the basic steps in the clearance process. These steps generally correspond to the steps in the NHPA section 106 process for federal or federally-assisted undertakings: (a) engaging the consulting parties; (b) identification of historic properties and other cultural resources; (c) assessment of adverse effects; and (d) resolution of adverse effects. The process in section 404 applies whether or not there is a federal or federally-assisted undertaking. The clearance requirement under section 303 of the tribal law applies to both kinds of undertakings, even though the NHPA section 106 requirement only applies if there is federal agency action (including funding).

Subsections 404(b) and 404(c) both authorize the THPO to make a finding that can bring the Clearance process to a close and result in the issuance of a Clearance by the THPO. In subsection 404(b),

the THPO can make a finding that no cultural resources will be affected by the undertaking. In subsection 404(c), the THPO can make a finding of “no adverse effects” on cultural resources. In either case, the THPO must post notice of the finding in the Tribal Office and the Cultural Resources Department and allow thirty (30) days in which any person may file an objection. In either case, if no objection is filed within 30 days, the THPO will issue clearance. The 30-day period for filing an objection is modeled on the federal regulations for the NHPA section 106 process. If a consulting party objects, the process moves on to the next step. If a person other than a consulting party objects, the THPO has discretion whether to move on to the next step or reject the objection. If the THPO rejects an objection, the person who filed it will have ten days in which to file a complaint in tribal court seeking judicial review, but the THPO can issue clearance ten days after rejecting an objection, regardless of whether a complaint is filed (unless, of course, the Tribal Court issues an order directing the THPO not to grant Clearance).

Subsection 404(d) sets out the step in the process for the resolution of adverse effects. Under subsection 404(d), the consulting parties can suggest measures to avoid, minimize, or mitigate adverse impacts, but the ultimate decision-making authority is vested in the THPO. This step differs from the ACHP regulations in that the THPO has authority to decide what measures will be required. Under the ACHP regulations, the federal action agency is required to provide the ACHP the opportunity to comment, but the agency is not obligated to adopt the ACHP’s recommendations. Rather, the ACHP regulations call for the negotiation of a memorandum of agreement (MOA), or, for some kinds of undertakings, a programmatic agreement (PA), but the federal action agency is not obligated to sign such an agreement. In the event that that a proposed undertaking would result in adverse effects and there is no agreement, the federal agency can proceed with the undertaking, but must first follow the procedure set out in section 800.7 of the ACHP regulations.

Section 405 sets out the alternate process for federal or federally-assisted undertakings. Section 101(d)(5) of the NHPA authorizes the Advisory Council on Historic Preservation (ACHP) to enter into an agreement with any Indian tribe to conduct the NHPA section 106 process pursuant to the tribal rules in lieu of the ACHP rules. The Department has initiated discussions with the ACHP on the option of entering into such an agreement, and subsections 403(a) and 405(a) of the rules anticipate that the Tribe may enter into such an agreement. Subsection 403(a) provides that if such an agreement is in place, the federal agency will initiate the NHPA section 106 process pursuant to sections 403 and 404 of the rules. If no such agreement is in place, then the federal agency will proceed under section 405, which basically incorporates the standard process for the review of undertakings under the rules of the ACHP. Even if an agreement with the ACHP is in place, subsection 403(a) of the rules leaves open the option, on a case-by-case basis, to proceed with the review of the undertaking under the ACHP rules and section 405 of the tribal rules, if the federal agency official so requests and the THPO approves. In effect, the rules have been written with the intent that the tribal process under sections 403 and 404 of the Rules will become the standard, but the Department recognizes that some federal agency applicants may simply prefer to follow the process under the ACHP rules, and this would be allowable on a case-by-case basis.

Section 406 takes note of the fact that some activities that are “undertakings” subject to the clearance requirement of the Cultural Heritage Resources Ordinance are also development activities that are subject to review under the rules issued by the Tribal Environmental Review Commission (TERC) pursuant to the Hualapai Environmental Review Code.

Section 407 discusses the relationships between clearance under part 4 of the rules and the requirements for permits under part 5 of the rules.

Section 408 discusses coordination of the clearance process with the Tribe's Land Use and Development Plan, which is authorized by the Hualapai Environmental Review Code. Coordination can expedite the review process by designating areas for development where little damage to cultural resources is likely and by treating areas where important cultural resources are known to be located as "Areas of Special Tribal Concern."

Section 409 authorizes the use of a "programmatic agreement" (PA) between the Cultural Resources Department and one or more other tribal agencies and/or federal agencies. This concept, which is also used in the ACHP regulations, is intended to provide a simplified way of issuing clearance in appropriate cases. The Department intends to look to the ACHP regulations (36 C.F.R. § 800.14) for guidance in determining when a PA might be appropriate. In the proposed rules, this section would have provided that the approval of the Cultural Advisory Team would have been required for a PA to take effect. In the final rules, the Department decided to delete that requirement. The Department anticipates that it will seek advice from the Cultural Advisory Team when negotiating a PA, but to make approval a requirement could operate as a disincentive to using the PA mechanism.

Section 410 says that the Archaeological Services Branch of the Department will assist applicants for clearances by providing referrals to qualified professionals. In some cases, the ASB may also provide services to other tribal agencies and enterprises, on a fee for service basis.

Section 411 describes the legal effect of a Clearance Letter.

Section 412 addresses the possibility of post-clearance discoveries of cultural resources. The Clearance Letter will include specific instructions for the applicant in the event of such a discovery. The Department notes that the clearance process as set out in the proposed rules is designed to allow for the expeditious issuance of a Clearance Letter based on the amount of information that it is practicable to obtain, often without doing subsurface testing. There will likely be situations in which cultural resources are discovered in the ground after the Department has issued a Clearance Letter. In such cases, the activity must stop in the immediate area of the discovery so that the Department can evaluate the discovery. This also applies if the clearance was issued in the context of a permit issued by the Tribal Environmental Review Commission.

Section 413 provides guidance on the process that the Department will use in reviewing proposed federal and federally-assisted undertakings that are not on tribal lands. Such proposed undertakings are not subject to the clearance requirement in section 303 of the Ordinance. The Department, however, frequently does advocate for the Tribe's interests.

Appendix 4-A is a reprint of section 303 of the Ordinance. This statutory language is included in the rules for convenience.

Appendix 4-B, "Exclusions from the Clearance Requirement," is reserved for development in the future. Some kinds of activities may be exempted from the clearance requirement. Section 303(d) of the Ordinance authorizes the Director to exclude certain kinds of actions that normally do not adversely affect cultural resources. If in the future the Department does adopt a list of exempted categories, it will do so using the rulemaking process in accordance with subsection 208(b) of the Ordinance.

Appendix 4-C, "Standard Fees for the Archaeological Services Branch," will include fee schedules for use in making arrangements for the Department to develop information about cultural resources when such information is needed for the review of a proposed undertaking and an applicant or a

governmental agency chooses to retain the services of the Department to develop the information. This fee schedule will be adopted as a policy statement, pursuant to subsection 208(d) of the Ordinance.

Part 5. Permit Requirements and Application Procedures

Section 304 of the Ordinance, which is captioned “Prohibited Activities,” makes it unlawful to carry out certain kinds of activities relating to cultural resources unless a permit has been issued by the Cultural Resources Department. Several other sections in part 3 of the Ordinance authorize the basic framework for a system through which the Department will issue such permits. The relevant sections of the Ordinance include: 305 – Permit Requirements; 306 – Exceptions and Waivers; 307 – Classes of Permits; 308 – Permit Application Procedures; and 309 – Suspension and Revocation of Permits. Part 5 of the rules is intended to carry out these sections of the Ordinance and bring the permit system into operation.

As provided in section 307 of the Ordinance, there are to be four classes of permits, for the following categories of activities:

Class A – casual visitation and inspection of cultural resources by persons who are neither members of the Hualapai Tribe nor Hualapai tribal employees engaged in authorized official activities;

Class B – cultural resource inventory activities that involve no disturbance of cultural resources;

Class C – cultural resource investigations involving alteration, collection, excavation, removal or disturbance of cultural resources. This class of permit may include, if expressly authorized, excavation of human remains;

Class D – other activities involving research into the cultural resources, including ethnographic, historical, cultural, or other research.

In light of these four classes of permits, part 5 of the rules is divided into four subparts. Subpart A includes provisions that are applicable to all classes of permits plus provisions for class A permits. The other subparts – B, C, and D – correspond to those classes of permits. In this Explanatory Paper, each subpart is discussed in turn.

Subpart A. General Provisions and Visitation Permits

Class A permits are for visiting sites where cultural resources are located. The application process for a class A permit is fairly simple, and the Department has decided to write subpart A so that it includes provisions that are applicable to all classes of permits. Additional requirements for particular classes of permits are set out in the other subparts.

Subpart A consists of seven sections. Section 501 describes the purpose and scope of part 5 of the rules. Section 502 describes the four classes of permits.

Section 503 describes procedures and requirements that are generally applicable to all classes of permits. The process begins with filling out a form that can be obtained from the Department, designed to ensure that the applicant provides the Department with all the information needed to process the

application. Subsection 503(c) sets out a requirement that an application for a class B, C, or D permit must identify a Principal Investigator (PI), and says that a PI is not required for a class A permit.

Application forms for all classes of permits are to be filed with the Department's Archaeological Services Branch (ASB), along with the applicable fee as specified in Appendix 5-A. The decision to publish the fee schedule in an appendix is intended to make it easier for the Department to revise the fee schedule in the future in light of experience. As provided in subsection 308(b) of the Ordinance, to make changes in the fee schedule for permits, the Department is required to use the rulemaking process in accordance with subsection 208(b) of the Ordinance.

Subsection 503(e) says that the standard terms and conditions for each class of permit are set out in Appendix 5-B. Some of the conditions in Appendix 5-B are regulatory requirements established by various sections in part 5 of the rules, and are repeated in the Appendix for convenience. Some conditions in the Appendix are standards that have been adopted by the Department pursuant to section 208(d) of the Ordinance, and, as such, those conditions may be revised by the Department without going through the rulemaking process. Additional conditions may be imposed on particular permits, if determined to be appropriate in the Director's judgment. Additional conditions may also be negotiated by an applicant based on concerns or issues that are of special concern to the applicant.

Subsection 503(f) explicitly provides that the application for a permit constitutes agreement by the applicant to be subject to the jurisdiction of the Hualapai Nation for all purposes relating to the permit, and that this agreement applies to all persons who will be acting under the supervision of the applicant if the permit is issued. Section 102 of the Ordinance says that the legal authority for its enactment by the Tribal Council is the Tribe's inherent sovereignty. While the Department believes that the Tribe's inherent sovereignty provides all the legal foundation needed for the enactment of the Ordinance and the issuance of rules by the Department, the explicit acceptance of the Tribe's jurisdiction by permit applicants provides an additional basis for tribal civil regulatory jurisdiction over persons who are not tribal members in accordance with rulings by the U.S. Supreme Court, specifically the "consensual relations" exception to the "general proposition" announced by the Court in *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

Subsection 503(g) says that it is the Director of the Department who makes the ultimate decisions on permit applications. Subsection 503(h) is intended to address the issue of a permit application for an activity within a designated "Area of Special Tribal Concern." The Hualapai Environmental Review Code authorizes the designation of such areas in the Tribal Land Use and Development Plan, although, as of the date of adoption of these rules, no such areas have as yet been so designated.

Subsection 503(i) sets out allowable reasons for denying a permit application. Two of the allowable reasons, clauses (3) and (5), authorize the Director to deny a permit application on a determination that it would better serve the interests of the Tribe to have the work performed in-house by HDCR staff. Clause (3) is concerned with applications to conduct research in areas that have not previously been surveyed; under this clause, the Department essentially reserves a right, on behalf of the Tribe, to conduct the initial survey. Clause (5) reserves a right, on behalf of the Tribe, to deny a permit and do the work in-house even if it is not an initial survey.

Section 504 sets out exceptions to the requirement to apply for a permit, as authorized by section 306 of the Ordinance. Subsection 504(b) is an additional exemption – qualified employees of the Department are exempt from the class B permit requirement. While this exemption is not explicitly stated in the Ordinance, the Director has determined that such an exemption is consistent with the Ordinance –

since such employees are exempt from the requirement to obtain a class C permit for excavation and removal of cultural resources, the Director has determined that it would be superfluous to require such employees to obtain a permit for non-collection surveys. Subsection 504(b) also provides that, for qualified consultants retained by the Department, the Director may include a class B permit within the contract for services, and will not charge a fee for such a permit.

Subsection 504(d) explicitly states that employees of federal and state agencies are not exempt, and, except for consultants employed by the Department, neither are persons who work for the Tribe in a capacity other than as an employee. This statement is based on section 306(e) of the Ordinance, which also says that the rules may provide for expedited procedures for such persons. Rather than establish detailed expedited procedures, the rules provide that the Director may issue “standing” permits to such non-excepted persons to allow for the performance of official or contractual duties without need for issuing permits on a case-by-case basis. The rules also say that a standing permit may be memorialized in an agreement, which may waive or revise any conditions that would otherwise apply, including application fees.

Section 505 provides that permits can be suspended or revoked. Four causes for revocations are set out. The Ordinance also provides that the Director may suspend or revoke a permit even if the permit holder is not at fault, as authorized in section 309(b) of the Ordinance. The Director must provide notice of suspension or revocation and provide the opportunity for a hearing.

Section 506 notes that the Director may issue guidance documents to help explain the four classes of permits. Subsection 208(d) of the Ordinance authorizes the Director to issue such guidance documents. Section 506 also says that the Director may endorse guidance documents issued under the authority of the Secretary of the Interior.

Section 507 states that for any permit for which a report will be produced, one of the standard conditions is that any such report is the intellectual property of the Hualapai Tribe, to be held in the custody of the Department, and shall not be released for distribution without prior approval of the THPO. The policy reason for this term is to exercise an appropriate level of control over sensitive information relating to cultural resources, including traditional cultural knowledge. Subsection (c) authorizes the Director to approve a special term requested by an applicant specifying that a report will be the property of another entity. Subsection (b) also provides that the release of photographs is not authorized without prior approval of the Department so stated in the terms of a particular permit.

Section 508 sets out the regulatory provisions that apply specifically to class A permits. Applications are to be filed with the ASB, which will normally process applications within two days. In addition to the statutory exemption for tribal members and tribal employees engaged in official duties, this section provides that no permit is required to visit cultural resources that are accessible to the public. This exemption is based on the Director’s authority in subsection 208(a) of the Ordinance to use rulemaking to clarify the legal requirements.

Subpart B. Class B Permits – Non-collection Surveys

Subpart B consists of five sections. Section 511 sets out the general requirement to obtain a permit prior to conducting a non-collection survey and clarifies the difference between the class B permit program and the class C permit program. In keeping with section 504, subsection 511(b) establishes an exemption for employees of the Cultural Resources Department. This exemption is based on the Director’s authority under section 208(a) of the Ordinance to clarify the legal requirements through

rulemaking. While the Ordinance could be read to require HDCR employees to obtain permits for such surveys, such a requirement would interfere with the Department's mission of protecting cultural resources. This section also provides that, for qualified consultants retained by the Department, the Director may include a class B permit within the contract for services, and will not charge a fee for such a permit.

Subsection 511(c) explains the relationship between the Tribe's class B permit and the requirements of the BIA's regulations implementing the Archaeological Resources Protection Act (ARPA), as codified at 25 C.F.R. part 262. It should be noted that, while the ARPA permit requirement does not apply to non-collection surveys, the BIA regulations nevertheless require any person who is not exempt from the ARPA permit requirement to ask the tribe with jurisdiction if it has a permit requirement that applies and provide documentation to the BIA. Subsection 511(c) recommends that a person who obtains a class B permit from the Department should provide a copy of the permit to the BIA regional office in order to document compliance with the tribal law; doing so will document compliance with the BIA regulations.

Section 512 sets out the information that the applicant for a class B permit is required to provide to the ASB. The basic requirement is that the Principal Investigator must meet the professional qualification standards established by the Secretary of the Interior. While a non-collection survey does not authorize archaeological excavation, the information produced from a non-collection survey will often lead to a decision by the Director to issue clearance for an undertaking based on a finding that there is little likelihood that cultural resources are present at the site of a proposed undertaking. Accordingly, even though a class B permit does not authorize excavation, it is important for the person conducting the survey to be qualified to judge the likelihood that cultural resources are present at the site, or, more specifically, to make an informed judgment on whether archaeological resources are imbedded in the ground.

Section 513 sets out requirements for documentation to be provided to the Department reporting on the findings of the non-collection survey, using HDCR site recording forms. In addition to the applicant's purpose for seeking a permit, the Department uses information produced by non-collection surveys in expanding its inventory of cultural resources and in identifying properties that should be evaluated for the Hualapai Register and/or the National Register.

Section 514 incorporates by reference the additional terms for class B permits set out in Appendix 5-B, and also authorizes the Director to include special terms or conditions for a particular permit. Such special terms or conditions may be requested by the applicant or proposed by the Director.

Section 515 describes how the Department will process permit applications, and says that class B permits will normally be processed in fifteen days.

Section 516 is reserved for future development. Section 307(b) of the Ordinance authorizes the Director to issue "blanket" permits for class B permits to "Indian preference firms" and to waive the limitation to Indian preference firms and issue blanket permits "whenever he or she finds that the issuance of a blanket Class B permit would be in the best interests of the Hualapai Tribe." This draft would not implement this authority. If after some experience with granting class B permits, the Department determines that it would be useful to have this authority in the rules, the rules can be amended.

Subpart C. Class C Permits – Excavation and Removal

Class C permits under the Ordinance will authorize essentially the same kind of activities that are authorized by permits issued under the federal Archeological Resources Protection Act (ARPA). ARPA is discussed in some detail in part III of this Explanatory Paper. ARPA prohibits excavating, removing, damaging, or destroying archaeological resources on Indian lands and federal lands without a federal permit. Violators are subject to criminal punishment or civil penalties. ARPA provides an exemption from the permit requirement for Indian tribes on their own Indian lands. ARPA also provides an exemption from the permit requirement for tribal members if a tribe has a law regulating the excavation and removal of archaeological resources on Indian lands under the tribe's jurisdiction. The Hualapai Cultural Heritage Resources Ordinance is such a tribal law. The Department's interpretation of the exemption for tribal members is that this exemption is not applicable to Hualapai tribal members until the rules for class C permits are issued in final form and are legally in effect – the Ordinance does not actually regulate the excavation and removal of archaeological resources until the permit rules take effect.

Subpart C consists of eight sections. Section 521 explains the coverage of the class C permit requirement, which, in addition to the archaeological excavation of cultural resources, also includes any survey in which the surface of the earth is disturbed in the search for cultural resources, including shovel-testing and coring. In addition, the excavation of human remains and associated cultural items requires a class C permit. Subsection 521(b) includes a quotation of language in section 306(b) of the Ordinance authorizing exemptions from the class C permit requirement and explains how the exemption for certain tribal employees will be implemented.

Section 522 explains the relationship between the class C permit program under the Ordinance and the federal permit program under ARPA. Subsection 522(b) explains the scope of exemptions under federal law for tribal employees and tribal members. Section 4(g) of ARPA provides:

(1) No permit shall be required under this section or under the Act of June 8, 1906 (16 U.S.C. 431), for the excavation or removal by any Indian tribe or member thereof of any archaeological resource located on Indian lands of such Indian tribe, except that in the absence of tribal law regulating the excavation or removal of archaeological resources on Indian lands, an individual tribal member shall be required to obtain a permit under this section.

(2) In the case of any permits for the excavation or removal of any archaeological resource located on Indian lands, the permit may be granted only after obtaining the consent of the Indian or Indian tribe owning or having jurisdiction over such lands. The permit shall include such terms and conditions as may be requested by such Indian or Indian tribe.

Subsection 307(a)(3) of the Ordinance expresses the intent of the Hualapai Tribal Council, in accordance with subsection 4(g)(1) of ARPA, to eliminate the ARPA permit requirement as it otherwise applies. Subsection 307(a)(3) of the Ordinance states:

It is the intent of the Tribal Council that the issuance of a Class C permit will eliminate the need for tribal members and tribal employees to obtain a permit from the Bureau of Indian Affairs under the Archeological Resources Protection Act (ARPA). In issuing rules to establish a program for issuing Class C permits, the Director shall ensure that the tribal permit program is adequate to eliminate, to the extent possible, the otherwise applicable requirement to obtain an ARPA permit and, to the extent that eliminating the ARPA permit requirement is not possible, to expedite compliance with the requirements of ARPA.

When the rules for class C permits are issued in final form and become legally effective, the Ordinance will be a “tribal law regulating the excavation or removal of archaeological resources on Indian lands” as provided for in ARPA. While exempt from the ARPA permit requirement, tribal members are subject to the permit requirements of the Ordinance unless exempted under section 306(b) of the Ordinance, which is quoted in section 521(b) of the rules, as noted above.

Subsection 522(b) of the rules interprets the exemption for tribal employees from the ARPA permit requirement as follows:

If the excavation or removal of cultural resources by a tribal employee has been authorized pursuant to these rules, then that tribal employee is covered by the Tribe’s exemption from the ARPA permit requirement. *See* 25 C.F.R. § 262.4(c)(2). Persons who work for the Tribe in a capacity other than as an employee, are not covered by the Tribe’s exemption from the ARPA permit requirement. 25 C.F.R. § 262.4(c)(3).

Tribal employees who are also tribal members are not exempt from the CHRO permit requirement, even though they are exempt from the ARPA permit requirement.

Subsection 522(c) explains that the exemption from the requirement for a permit under ARPA for excavation or removal does not exempt any person from otherwise applicable prohibitions under ARPA. Thus, any person who is exempt from the ARPA permit requirement may nevertheless be subject to federal criminal or civil penalties for causing damage to or destruction of archaeological resources.

Subsection 522(d) makes it clear that, for a person who is subject to both the tribal permit requirement and the ARPA permit requirement, the issuance of a tribal permit is evidence of tribal consent for issuance of an ARPA permit.

Subsection 522(e) clarifies that any federal lands within the Hualapai Reservation are subject to the provisions of ARPA governing federal “public” lands, rather than the ARPA provisions governing Indian lands.

Section 523 clarifies who is required to apply for a permit, with particular reference to tribal members, tribal employees, and other persons who work for the Tribe in a capacity other than as an employee.

Section 524 sets out the information that is required to be provided in applications for permits. Subsection 524(a) is adapted from language in the federal uniform regulations implementing ARPA, specifically 43 C.F.R. § 7.6(b). The language in the rules has been taken verbatim from the ARPA regulations except for two differences: (1) in subsection 524(a)(1) the statement “Dissemination of results is subject to the requirements of section 507 of these rules” has been added; and (2) in subsection (a)(5) (which corresponds to subsection 7.6(b)(6) in the ARPA rules), the clause “the Department of Cultural Resources, acting on behalf of the Hualapai Tribe” has been inserted in place of “the Indian owners.” One paragraph from this section of the ARPA rules, subsection 7.6(b)(5), is not incorporated into this section of the tribal rules, although a cross-reference to that subsection is provided in subsection 524(a)(6) of the rules. That subsection of the ARPA regulations applies to archaeological resources excavated from federal lands, which, under ARPA are presumed to be the property of the federal government. The Ordinance applies to all lands within the boundaries of the Reservation, including federal lands. If a permit is sought for a site on federal public lands within the Reservation boundary, the

federal permitting agency (most likely the BIA) is likely to require the permit application to comply with the referenced subsection of the ARPA regulations.

Subsection 524(b) sets out the qualifications for permit applicants. The text in this subsection is based on section 7.8(a)(1) of the federal ARPA rules. Subsections (b)(1) through (b)(5) are taken verbatim from the ARPA rules, except that the term “Principal Investigator” has been added. The PI and the applicant will generally be the same person. Subsection (b)(6) has been added to specifically incorporate the Secretary of the Interior’s Standards and Guidelines for Professional Qualifications, the wording of which is somewhat different from the wording of the ARPA rules. The differences in wording do not appear to be substantive, although the Secretary’s Standards and Guidelines may be subject to interpretation.

Subsection 524(c) addresses issues relating to arrangements with a curatorial facility to accept cultural resources. These provisions have been adapted from subsections 7.8(a)(6) and (7) of the ARPA rules, with some modifications to reflect that the decision on whether or not to make use of such facilities will be made by the Department after the authorized research is completed. As recognized in ARPA, and as noted in section 527 of the rules, all archaeological resources that are excavated from tribal lands are the property of the Tribe. As such, the Tribe has the ultimate right to determine whether such resources are to be deposited in a curatorial facility. Nevertheless, the permit applicant must include such arrangements in the permit application.

The Department notes that while section 524 of the rules is adapted from the ARPA rules, some provisions of the ARPA rules have not been incorporated. For the record, certain provisions in subsection 7.7(a) of the federal ARPA rules that are *not incorporated* into the tribal rules are as follows:

(2) The proposed work is to be undertaken for the purpose of furthering archaeological knowledge in the public interest, which may include but need not be limited to, scientific or scholarly research, and preservation of archaeological data;

(3) The proposed work, including time, scope, location, and purpose, is not inconsistent with any management plan or established policy, objectives, or requirements applicable to the management of the public lands concerned;

(4) Where the proposed work consists of archaeological survey and/or data recovery undertaken in accordance with other approved uses of the public lands or Indian lands, and the proposed work has been agreed to in writing by the Federal land manager pursuant to section 106 of the National Historic Preservation Act (16 U.S.C. 470f), paragraphs (a)(2) and (a)(3) shall be deemed satisfied by the prior approval.

The Department believes that these provisions from the ARPA rules, which are based federal law, need not be incorporated into these rules.

Subsection 524(e) says that applications for class C permits will be processed in accordance with section 503 of these rules. The ASB will review each application, advise the applicant as to whether it is considered to be complete, and endeavor to process the application and provide recommendations to the Director within fifteen (15) days.

Section 525 incorporates all standard terms and conditions in Appendix 5-B into each permit, authorizes the Director to incorporate special terms and conditions, and also authorizes the Director to craft additional terms and conditions for a particular permit.

Section 526 sets out requirements for recording information about cultural resources that are encountered while performing work under a permit. This section also provides that the requirements for reports to be prepared pursuant to a class C permit will be specified in the terms and conditions of each permit and will normally include both a draft final report and a final report. For some permits, one or more preliminary reports will be required, such as for permits that include multiple sites or for which the work is done in phases. This section also notes that the release of information based on the permitted work is subject to the requirements set out in section 507 of the rules.

Section 527 of the rules notes that, under federal law, all archaeological resources that are excavated from the Tribe's trust lands are the property of the Tribe. As such, the Tribe has the ultimate right to determine whether such resources are to be deposited in a curatorial facility. The Department interprets the term "archaeological resources" to include associated records that are part of a collection, as defined in federal rules governing the curation of archaeological resources. 36 C.F.R. § 79.4.

With respect to cultural resources that may be excavated from lands within the Hualapai Reservation that are not held in federal Indian trust status, the Department takes the position that any such resources are also the property of the Tribe. With respect to cultural resources that are "cultural items" as defined in the Native American Graves Protection and Repatriation Act (NAGPRA), federal law recognizes that the Tribe has the right to take custody of such items, except when are known lineal descendants (whose rights take precedence). This point is implicit in the definition of "tribal land," which includes all land within the exterior boundaries of any Indian reservation. With respect to archaeological resources that are not "cultural items" as defined in NAGPRA, the Tribe's assertion of ownership is supported by the United Nations Declaration on the Rights of Indigenous Peoples, including but not limited to Article 11, which provides:

"Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature."

Section 528 addresses the excavation and removal of human remains. Subsection 307(a)(3) of the Ordinance provides that a class C permit may authorize the excavation and removal of human remains, but only if the permit includes express authorization. Accordingly, subsection 528(a) of the rules says that any such excavation requires express authorization as a term in the permit.

Section 528 also addresses the interface between the class C permit and the federal law known as the Native American Graves Protection and Repatriation Act (NAGPRA), which includes requirements for the intentional excavation of Native American human remains and cultural items as well requirements for inadvertent discoveries. As discussed in more detail in part III.C of this Explanatory Paper, NAGPRA says that when a person makes an inadvertent discovery of Native American human remains or cultural items on tribal lands, the person making the discovery must cease the activity that resulted in the discovery, provide notice to the appropriate tribal official, and make a reasonable effort to protect the human remains and/or cultural items that were discovered. If a decision is ultimately made to excavate the remains and/or cultural items, NAGPRA also provides that such excavation requires a permit pursuant to ARPA and that any such ARPA permit cannot be issued without the consent of the tribe. Neither the statutory language of NAGPRA nor the implementing rules acknowledges that ARPA provides an exemption from the permit requirement for a tribe itself or for tribal members if the tribe has its own law regulating the subject matter. (In other words, NAGPRA requires an ARPA permit for two situations in

which ARPA itself does not require a permit.) As discussed earlier, the Ordinance is such a tribal law regulating the subject matter. Accordingly, the Department takes the position that an ARPA permit is not required if the excavation is done pursuant to the Ordinance, either under a class C permit or by an employee of the Department exempt from the permit requirement. In the event that excavation authorized by a class C permit unexpectedly encounters human remains, subsection 528(a) authorizes the Director to issue an amendment to the permit in an expeditious manner, taking into consideration applicable requirements of NAGPRA (without specific reference to the ARPA permit issue). The intent of this provision is to provide the Department with the means to avoid unnecessary delays when the Department has determined that the appropriate course of action is excavation and prompt reburial.

The inadvertent discovery provisions of NAGPRA are addressed in subsection 528(b) of the rules. This subsection incorporates relevant language from the federal NAGPRA rules, 43 C.F.R. § 10.4. Basically, a person making such a discovery is required to provide notice by phone to the Department and to take reasonable efforts to protect the site. Department employees may provide guidance on appropriate protective measures.

Subsection 528(c) authorizes the Director to make the determination as to the treatment of discovered human remains and/or cultural items. Section 503 of the Ordinance does not expressly provide for judicial review of such decisions.

Subsection 528(d) addresses the issue of who has the right to take custody of human remains and/or cultural items that are excavated from tribal lands. Under NAGPRA, lineal descendants, if there are any, have the highest priority. The NAGPRA rules do not impose requirements on the responsible tribal official for ensuring the ultimate disposition of any such items is done in accordance with NAGPRA – rather, the NAGPRA rules say that the tribal official “may” do so. 43 C.F.R. § 10.4(e). In subsection 528(d), the Department obligates itself to make good faith efforts to identify any lineal descendants so that they can exercise their rights to take custody. In subsection 528(d) the Department also obligates itself to make good faith efforts to identify other tribes that may have a stronger claim of cultural affiliation with discovered human remains and cultural items. Such efforts are not required by the NAGPRA rules, but the Department believes that requests from other tribes ought to be given serious consideration. The Department’s understanding of the hierarchy of rights set out in NAGPRA at 25 U.S.C. § 3002(a) is that, if there are no known lineal descendants, the tribe on whose tribal lands the items were found has the right to take custody. The statutory language does not provide for the possibility that a different tribe might assert that it has a stronger claim of cultural affiliation. A provision in rules issued by the BIA that are supplemental to the uniform rules implementing ARPA, 25 C.F.R. § 262.8(a), does not appear to be consistent with the Department’s interpretation of the statute on this point, in that subsection 262.8(a)(2)(iii) does allow for a claim of a tribe asserting stronger cultural affiliation to prevail over the tribe on whose tribal lands the items were found. The Department believes that the BIA rules are in error on this point.

Subsection 528(e) addresses the subject of reburial. In essence, the Department obligates itself to develop and administer a reburial program.

Subpart D. Permits for Other Research relating to Cultural Resources

Subpart D governs class D permits as authorized by section 307(a)(4) of the Ordinance. A class D permit is required for research into the cultural heritage of the Hualapai Tribe that is not covered by a class B or class C permit. As stated in the Ordinance, a class D permit is required for “activities involving research into the cultural resources of the Hualapai Tribe, including ethnographic, historical, cultural or

other research.” The Ordinance also states, “Any form of recording that results from any such research must conform to the terms and conditions of a permit.”

Subpart D consists of six sections. Section 531 describes the kinds of research that are subject to the requirement to obtain a class D permit. This section limits the application of this requirement to research that involves obtaining information from:

- (1) documents on file with the Department or another entity of Tribal Government;
- (2) Hualapai tribal members; or
- (3) examination of cultural resources located at museums or curatorial facilities but subject to the control of the Hualapai Tribe.

Subsection 531(b) also states that no permit is required for research that relies on published research or information that is generally available to the public. Subsection 531(c) clarifies that casual conversations with Hualapai Tribal members are generally not considered to be research. The Department believes the limits on the scope of the class D permit as set out in this section will help to make the class D permit workable.

Section 532 says that an application for a class D permit must include a statement of how the proposed research will benefit the Hualapai Tribe.

Section 533 provides that, for research involving interviews of tribal members, the researcher will be required to obtain the informed consent of each such informant before conducting an interview. The Department will provide a form to use in documenting informed consent. This section also provides that informants will generally be paid for their services, in accordance with a fee schedule to be developed by the Department in consultation with the Cultural Advisory Team.

Section 534 describes how applications will be processed by the Department, and section 535 incorporates by reference the terms and conditions in Appendix 5-B.

Section 536 provides that all documentation produced pursuant to a class D permit is subject to restrictions on release stated in section 507 of the rules.

There are four appendices to part 5 of the rules. Appendix 5-A is the schedule of fees for various classes of permits. Subsection 308(b) of the Ordinance provides that the fee schedule should be reviewed and revised on a periodic basis, and that changes are to be made using the rulemaking process in subsection 208(b) of the Ordinance. Appendix 5-B sets out standards terms and conditions for permits. Some of the terms and conditions in this Appendix are requirements established in part 5 of the rules, and, as such, can only be changed through the rulemaking process; terms and conditions that are not specified in part 5 may be revised through the adoption of a policy statement pursuant to subsection 208(d) of the Ordinance. Appendix 5-C is a statement of consent by individual informants which will be incorporated into a form to be developed by the Department. Appendix 5-D is reserved at this time for future use for a fee schedule for compensation for individual informants. Appendices 5-C and 5-D may be revised if need be as policy statements.

Part 6. Administrative Enforcement

Part 6 implements provisions of Part 4 of the Ordinance which authorize the Department to use a variety of administrative tools for enforcement. This part also includes provisions for conducting

administrative hearings governing enforcement measures and for the review of decisions made by the Director. The administrative enforcement mechanisms authorized by the Ordinance generally do not require the Department to issue rules for implementation, except with respect to civil penalties as authorized by section 406 of the Ordinance. The rules in this part are intended to provide enough information for applicants and the public to understand administrative enforcement without having to refer back to the language of the Ordinance.

Part 6 consists of six sections. Section 601 states that the Department will make arrangements to monitor permits for compliance with permits that have been issued. The Director may issue a Letter of Inquiry as part of an investigation; failing to respond to a Letter of Inquiry and providing false information are violations, as specified in section 304(f) of the Ordinance. The Director may issue a Warning Letter to be sure that a person is aware of the requirements of the Ordinance and the rules. While the issuance of a "Warning Letter" is not explicitly authorized by the Ordinance, it is implicitly authorized by the Director's rulemaking authority in section 208(a).

Section 602 describes how the Director can issue a Notice of Violation if there is reason to believe that a violation has occurred, is occurring, or is likely to occur in the near future.

Section 603 sets out the process for assessing civil penalties on persons who violate the Ordinance or the rules. Section 406 of the Ordinance sets out the minimal procedural requirements for assessment of civil penalties, and also says that, in rulemaking, the Director may draw upon the procedures used by the Department of the Interior for assessing civil penalties under the Archaeological Resources Protection Act (43 C.F.R. §§ 7.15, 7.16) and the Native American Graves Protection and Repatriation Act (43 C.F.R. § 10.12). Section 603 of the rules incorporates some language adapted from those sources, including the factors that may be considered in reducing or waiving a penalty, which are adapted from the ARPA regulations. Section 406(c) of the Ordinance says: "Rules to carry out this Section shall include guidelines for the Director to use in assessing civil penalties. The Director shall take appropriate measures to inform the public regarding civil penalties under this Ordinance." The issuance of rules, including this Explanatory Paper, is a first step in providing information to the public.

Section 604 describes the Director's authority to suspend or revoke a permit. As required by subsection 309(c) of the Ordinance, subsection 604(b) of the rules provides that a person whose permit is suspended or revoked has the right to request a hearing before the decision becomes final.

Section 605 governs administrative hearings as authorized by section 502 of the Ordinance. Subsection 605(b) lists the kinds of decisions that are subject to review in an administrative hearing conducted by the Director. Subsection 605(c) explains that in hearings involving the assessment of civil penalties, and in any other matter in which the Department has a direct financial interest, any party to the hearing may ask for the appointment of a hearing officer as a matter of right; in any other case, a person may request the appointment of a hearing officer, but any such request is subject to the discretion of the Director. The reason for appointment of a Hearing Officer in the context of civil penalties is that administrative due process requires an impartial tribunal, and, since the Department receives the money paid for civil penalties, the Director would not be impartial.

Subsection 605(d) sets out the procedures that will be used by the Director in conducting hearings. Such hearings will be informal. The procedural steps set out in this subsection are intended to ensure that persons whose interests are affected by such hearings are afforded due process. Any person who believes his or her interests are likely to be substantially affected by the Director's decision may file a request to intervene.

Subsection 605(e) sets out the process that will be used when a hearing officer is appointed. In essence, this subsection provides for the hearing officer to fashion procedures on a case-by-case base, after holding an informal meeting with the parties. The procedures and schedule will be set out in an order issued by the hearing officer. At a minimum, the hearing officer will follow the procedures that apply to hearings conducted by the Director, although additional procedural steps may also be used.

Section 606 sets out a list of enforcement mechanisms authorized in the Ordinance that do not require rulemaking for implementation. These mechanisms are listed in the rules for convenience.

III. Federal Cultural Resources Laws that Apply on Indian Lands

There are several federal laws relating to cultural resources that apply on Hualapai tribal lands. The three major federal laws are the National Historic Preservation Act (NHPA), the Archaeological Resources Protection Act (ARPA), and the Native American Graves Protection and Repatriation Act (NAGPRA). These federal laws apply whether or not a tribal government has enacted its own laws on the same subjects, although, with respect to NHPA and ARPA, how they apply can be shaped to some extent by tribal law. This part of this Explanatory Memorandum provides some background information on these three main federal cultural resources laws.

In each of these three federal laws, Congress has recognized that Indian tribal governments have sovereign authority over the subject matter covered by the federal law. One of the practical reasons for exercising tribal sovereignty over cultural resources is to shape the way the federal laws are carried out, in part, by using institutions of tribal government to help carry out and enforce the federal laws. Another reason for developing the institutional capability to administer a cultural resources program is that these federal laws create opportunities for Indian tribes to engage in consultation with federal agencies regarding cultural resources that hold significance for a tribe but which are not located on tribal lands.

The NHPA is discussed first because it is the federal law that established a procedural requirement for federal agencies to consider the affects of their action on historic properties, because the Hualapai Nation has already taken major steps to assume responsibilities under this statute, and because one of the main reasons for developing rules to carry out the Ordinance is to establish procedures to review actions that may affect cultural resources when there is no federal action to trigger review under the NHPA. Some discussion of ARPA and NAGPRA is also necessary because the rules also address issues related to these federal laws.

A. National Historic Preservation Act of 1966 (NHPA)

The National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 – 470x-6, is the main federal law for establishing a national program for the preservation of “historic properties.” This federal law created the framework for tribal historic preservation programs. Accordingly, this Explanatory Paper discusses the NHPA in some detail. Major provisions relating to Indian tribes were included in amendments enacted in 1992.

1. Governmental agencies with roles in historic preservation.

The national historic preservation program involves roles for federal government agencies, as well as for state, local, and tribal governments. For most aspects of the national program, the National Park Service (NPS) is the lead agency, acting under the authority of the Secretary of the Interior. All federal agencies are required to have a preservation program to identify, evaluate, and manage historic properties under their jurisdiction and control.

The NHPA also created the Advisory Council on Historic Preservation (“Advisory Council” or “ACHP”), a federal agency with authority to review and comment on proposed federal undertakings that affect historic properties. NPS provides financial assistance to state historic preservation officers (SHPOs) for statewide preservation programs. The review process overseen by the ACHP is based on section 106 of the Act, 16 U.S.C. § 470f, and is often referred to as the “section 106 process.” The process is carried out pursuant to regulations issued by the ACHP, codified at 36 C.F.R. part 800. The regulations and numerous guidance documents are available on the ACHP website: www.achp.gov.

The section 106 process is discussed in more detail below, in section III.A.5 of this Explanatory Paper. The regulations created a prominent role in the process for the SHPOs. Amendments to the NHPA enacted in 1992 authorize Indian tribes to establish tribal historic preservation officers (THPOs) and perform functions within their reservations that the SHPOs perform elsewhere in their states, including a comparable role in the section 106 process. NHPA § 101(d)(2); 16 U.S.C. § 470a(d)(2). To take over functions that would otherwise be performed by the SHPO, a tribe's THPO program must be approved by NPS. The Hualapai Tribe has an approved THPO program, and was one of the first tribes to receive NPS approval. Approved THPO programs receive financial assistance from NPS.

2. "Historic properties" and the National Register.

The terms "historic property" and "historic resource" share the same definition in the NHPA:

any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register [of Historic Places], including artifacts, records, and material remains related to such property or resource.

The National Register of Historic Places is an inventory of "districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture." The National Register is administered by the National Park Service (NPS). Regulations setting out the criteria of eligibility for the National Register are codified in 36 C.F.R. part 60, specifically at section 60.4. There are four basic criteria for eligibility. A property may qualify for the National Register if it:

- (a) is associated with events that have made a significant contribution to the broad patterns of our history;
- (b) is associated with the lives of persons significant in our past;
- (c) embodies the distinctive characteristics of a type, period, or method of construction; represents the work of a master; possesses high artistic values; or represents a significant and distinguishable entity whose components may lack individual significance; or
- (d) has yielded, or may be likely to yield, information important in history and prehistory.

To be eligible for the National Register, a property needs to meet at least one of the four criteria. In addition to the criteria for eligibility, section 60.4 of the regulations also specifies seven "criteria considerations" that set some limits on the eligibility of certain kinds of properties. For example, a property that has achieved historic significance within the past 50 years is generally not eligible. NPS has issued a number of guidance documents on various kinds of historic properties. Available at: www.cr.nps.gov/nr/publications/.

There are two ways in which a property may be determined to be eligible for the National Register. One way is to be nominated to National Register. Nominations are made by the SHPO or by a federal agency (for sites under the jurisdiction or control of the agency). See 36 C.F.R. §§60.5, 60.6, 60.9. For sites within an Indian reservation where the tribal government has a THPO, nominations are made by the THPO instead of the SHPO. If there is a dispute over whether a property is eligible (or about issues such as how to draw the boundaries of a National Register site), the ultimate decision is made by an official in NPS known as the Keeper of the National Register.

The other way in which a site may be determined to be eligible for the National Register is when the site is identified and evaluated in the context of the NHPA section 106 review process. In the NHPA section 106 process, the federal agency that is proposing an undertaking must take a number of procedural

steps, as provided in the Advisory Council's regulations. One of the steps is to identify properties in the area of potential effects that may be eligible for the National Register and to evaluate them for eligibility. The section 106 process is discussed below, in section III.A.5 of this Explanatory Paper.

3. *Traditional cultural properties.*

Places that hold religious or cultural importance to Indian tribes may be eligible for the National Register. Many such places fit within a category of historic properties known as "*traditional cultural properties*" (TCPs), a term coined by NPS in a guidance document first published in 1990. As defined by NPS in the guidance document *National Register Bulletin 38*, a TCP is a property that is:

eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that

- (a) are rooted in that community's history, and
- (b) are important in maintaining the continuing cultural identity of the community.

National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (first issued in 1990, revised 1998) (hereinafter "*Bulletin 38*"), available at www.cr.nps.gov/nr/publications/bulletins/nrb38/htm.

A TCP need not be characterized by some physical evidence of human activity, but rather may be a place in which the natural environment is relatively undisturbed. While there must be an identifiable place, the cultural values that invest a place with historic significance may be intangible, and oral tradition is usually important in evaluating the historic significance of TCPs. While the living community that gives a TCP its significance need not be an Indian tribe, attention to TCPs has grown in recent years as an increasing number of tribes have become engaged in historic preservation.

4. *Properties of traditional religious and cultural importance.*

The 1992 NHPA Amendments added new statutory language regarding properties that hold religious and cultural importance for Indian tribes. This new statutory language states, in part:

- (A) Properties of traditional religious and cultural importance to an Indian tribe ... may be determined to be eligible for inclusion on the National Register.
- (B) In carrying out its responsibilities under section 106, a Federal agency shall consult with any Indian tribe ... that attaches religious and cultural importance to properties [that are eligible for the National Register].

NHPA § 101(d)(6); 16 U.S.C. § 470a(d)(6). The statutory language also refers to Native Hawaiians; this Explanatory Paper omits references to Native Hawaiians, since such issues are not relevant to the implementation of Hualapai Tribal legislation.

The statutory language of NHPA section 101(d)(6) can be seen as an endorsement of the NPS practice of treating tribal traditional cultural properties as eligible for the National Register, although the statutory language does not use the term "traditional cultural properties" (TCPs). It should also be noted that a site does not need to be a TCP, as defined by NPS, to hold religious and cultural importance for a tribe; rather, a site that holds religious and cultural importance for a tribe may be eligible for the National Register without being a TCP.

The “(B)” clause in the statutory language quoted above is particularly important because it makes it a requirement of federal law for agencies to engage a tribe in the section 106 process when a proposed federal or federally-assisted undertaking might affect a historic property that holds religious and cultural importance for the tribe. This requirement applies regardless of where the historic property is located. It does not matter that the historic property is beyond the boundaries of a tribe’s reservation. This statutory requirement is implemented through the ACHP regulations, as discussed below. In recent years the Hualapai THPO has been involved in many consultations with federal agencies regarding possible effects on historic properties that hold religious and cultural importance for the Tribe.

5. The Section 106 process and the ACHP regulations.

Section 106 requires each federal government agency that has jurisdiction over a proposed federal or federally-assisted undertaking to take into account the effect of the undertaking on any property that is listed on, or eligible for, the National Register. Section 106 also says that the agency is required to afford the Advisory Council on Historic Preservation the opportunity to comment on the proposed undertaking. An “undertaking” is a project, activity, or program that: the agency proposes to carry out itself; will be carried out with financial assistance from the agency; or can only be carried out if the agency grants a permit, license, or other approval.

The section 106 process is governed by regulations issued by the Advisory Council, codified at 36 C.F.R. part 800. The process consists of a number of steps, which the federal agency official takes in consultation with other “consulting parties.” While consultation occurs at each step, the agency with jurisdiction over the proposed undertaking is responsible for each of the determinations that must be made at the various steps in the process. In most cases, the Advisory Council does not participate directly, leaving the SHPO or THPO to perform the role of advising the federal agency. There are, however, numerous points at which the SHPO, THPO, or other consulting parties can ask the Advisory Council to become involved, and the Advisory Council can become involved on its own initiative. Compliance with the Advisory Council regulations fulfills the agency’s statutory duty to afford the Advisory Council the opportunity to comment on an undertaking.

The basic steps in the process are: initiation of the process; identification of historic properties; assessment of adverse effects; resolution of adverse effects. These steps are briefly discussed here. The regulatory requirements are set out in 36 C.F.R. §§ 800.3, 800.4, 800.5, 800.6.

a. Initiating the process, section 800.3.

The process begins when the federal agency determines that a proposed undertaking has the potential to affect historic properties. At this first step, initiating the process, the agency must notify the SHPO; if the undertaking would affect historic properties within a reservation where the tribe has a THPO, the agency must notify the THPO. The agency must also make a reasonable and good faith effort to identify tribes that might attach religious and cultural significance to historic properties in the area of potential effects, and the agency must invite any such tribe to be a consulting party.

b. Identification of historic properties, section 800.4.

The second step in the process is the identification of historic properties. This step consists of several component parts, including: (a) determining the scope of effort that is required; (b) identifying properties that are listed on or known to be eligible for the National Register as well as properties that have not yet been evaluated for eligibility; (c) evaluating historic significance, including determining

eligibility; and (d) determining whether historic properties may be affected by the undertaking. All of these components are carried out by the agency official in consultation with the SHPO and/or THPO.

The scope of identification efforts will vary according to factors such as the geographic scope of the project and how much information already exists about historic properties within that area. Determining the scope of efforts begins with determining and documenting the “area of potential effects” (APE), a key concept for carrying out the section 106 process.

The effort to review existing information includes determining whether the area has previously been surveyed for archaeological resources. If so, any potentially eligible archaeological sites may have already been identified; if no such survey has been done, then one will probably be needed. Similarly, if an undertaking might affect a TCP that has been identified but not yet evaluated for the National Register, there may be a need to conduct interviews with elders and others who hold traditional knowledge. For some undertakings, such as those that would affect a large geographic area, a phased approach to identification and evaluation may be acceptable, particularly in projects in which component parts of a project could be relocated to avoid or minimize adverse effects. In other words, if delaying the efforts to identify and evaluate historic resources would not foreclose the opportunity to move a component of a project if necessary to avoid or mitigate effects, then a phased level of effort may be appropriate.

This step includes applying the National Register criteria of eligibility to the properties that have been identified and making a determination for each such property on whether it is eligible for the Register. Sites that have been evaluated previously may need to be evaluated again in light of new information, such as information provided by tribes that may not have been known to federal governmental officials or the SHPO/THPO during the earlier evaluation.

There is no specific time frame for concluding the step of identifying historic properties. If the area of potential effects includes TCPs or other historic places that hold religious and cultural importance for tribes that have not been previously documented and evaluated for National Register eligibility, a reasonable and good faith effort to complete this step in the process may take a considerable amount of time.

This step concludes with a determination by the federal agency official either that historic properties may be affected or that none will be. If historic properties may be affected, then the process moves on to the next step, the assessment of adverse effects. If the agency official makes a “no effect” determination, the agency must document the determination, provide the documentation to the SHPO and/or THPO, notify all consulting parties, and make the documentation available to the public. When the federal agency makes such a finding of “no historic properties affected,” the SHPO and/or THPO, and the Advisory Council have 30 days to file an objection. At this point, if the Advisory Council disagrees with finding, it can provide its opinion to the agency. The agency is not required to change its finding but, if it does not, it must prepare a written explanation of its decision including evidence that it did consider the Council’s opinion.

c. Assessment of adverse effects, section 800.5.

If the federal agency official determines that historic properties will be affected, the next step is to determine whether the effects will be adverse. The federal agency official applies the criteria of adverse effect to historic properties in the area of potential effects, in consultation with the SHPO and/or THPO and any tribe that attaches religious significance to identified historic properties. The criteria of adverse effect are stated in rather broad terms. An effect is considered adverse if the undertaking:

may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register.

Thus, for example, if during the step of identifying and evaluating historic properties, a property listed on the National Register as an archaeological site is determined to also be eligible as a TCP, then an effect that would diminish the integrity of the property as a TCP would be adverse. If a property is eligible for the Register because of its importance to a tribe, including but not limited to importance as a TCP, then the tribe may be uniquely qualified to assess adverse effects on those characteristics of the property.

If the federal agency finds that the effects will be adverse, then the process moves on to the next step – resolution of adverse effects. If, on the other hand, the federal agency makes a “finding of no adverse effect,” then the process ends at this step, at least in most cases. As with the identification step, the ACHP regulations establish a 30-day review period in which the SHPO, THPO, any consulting party, or ACHP can disagree with such a finding. If the ACHP provides a written opinion to the agency, then the agency must consider the ACHP opinion and, if the Agency does not revise its initial finding, then it must prepare a written explanation of its decision, including evidence that it considered the ACHP opinion.

d. Resolution of adverse effects, section 800.6.

If the agency official finds that the effects will be adverse, the next step is “to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.” Like the other steps in the process, this step is required to be taken in consultation with the SHPO and/or THPO and other consulting parties, including any tribes that consider affected historic properties to hold religious and cultural significance. The ACHP must be notified, and it may decide to enter the process at this step, in its discretion. There is an appendix to the ACHP regulations which sets out criteria that the ACHP will use in deciding whether to become involved. Criterion (4) in that appendix applies to undertakings that present “issues of concern to Indian tribes or Native Hawaiian organizations.” The SHPO and/or THPO, and any other consulting party may request the ACHP to participate.

The objective of this step is to reach an agreement on acceptable measures to resolve the adverse effects. If an agreement is reached it is recorded in a Memorandum of Agreement (MOA) which includes stipulations on what measures are to be taken and which agencies are responsible for carrying them out. Reaching agreement on the terms of an MOA involves professional judgment regarding ways to avoid, minimize, or mitigate adverse effects. For federal undertakings within the Hualapai Reservation, an MOA cannot be concluded unless the THPO signs the MOA.

e. Programmatic agreements (PA), section 800.14.

In a variety of circumstances, the section 106 process may be concluded with a programmatic agreement (PA) rather than an MOA, particularly situations that are regional in scope and those for which all of the effects on historic properties cannot be fully determined before approval of the undertaking. A PA can only be applied to tribal lands if the tribe is a signatory. In cases where a tribe has a THPO, the

THPO may sign the PA either for the tribe or in addition to the tribe. For a proposed PA affecting historic properties that are on tribal lands but to which one or more tribes attach religious and cultural importance, the regulations include requirements to consult with such other tribes.

f. Failure to resolve adverse effects, section 800.7.

If no agreement is reached, the final step in the process is to document the failure to resolve adverse effects. The NHPA does not authorize the Advisory Council to block an agency from going ahead with an undertaking that will result in adverse effects on a historic property. Rather, even if the Advisory Council tells the agency that it should not go ahead, the agency can proceed. In such a situation, however, the NHPA does empower the Advisory Council to raise the decision to the level at which it must be made by a political appointee. The statutory basis for this is NHPA section 110, which imposes a requirement that, if the undertaking would result in adverse effects and there is neither an MOA nor a PA, then the agency can only proceed if the decision to do so is made by the head of the agency. The ACHP regulations include procedural steps for ensuring that this requirement is met.

6. Coordination with the National Environmental Policy Act (NEPA).

The section 106 process is, in some ways, similar to the federal review process required by the National Environmental Policy Act (NEPA). 42 U.S.C. §§ 4321 – 4347. NEPA requires every federal agency to prepare an “*environmental impact statement*” (EIS) before going ahead with any proposed federal action that would result in a significant impact on the quality of the human environment. The process of preparing an EIS is governed by regulations issued by the President’s Council on Environmental Quality (CEQ), codified at 40 C.F.R. parts 1500 – 1508. If an EIS is prepared, the agency’s decision based on the EIS is called a “*record of decision*” (ROD). For the vast majority of proposed federal agency actions that have the potential to cause environmental impacts, an EIS is not prepared. Rather, under the CEQ regulations, agencies usually prepare a kind of less-detailed document known as an “*environmental assessment*” (EA) to determine whether the proposed federal action would be likely to cause significant environmental impacts and thus require an EIS. If the EA supports a conclusion that the impacts will not be significant, the responsible federal official signs a document known as a “*finding of no significant impact*” (FONSI), and an EIS is not required.

One of the key similarities between NHPA and NEPA is that both statutes are triggered by proposed actions by federal agencies. While the two statutes use different terms – NEPA uses the term “federal action” and NHPA uses the term “federal or federally-assisted undertaking” – there is much overlap between these two terms. In most cases, a proposed action that triggers NEPA is also an undertaking for purposes of NHPA, and the federal agency must consider whether it has the potential to affect historic properties.

In light of the overlap between NHPA and NEPA, the Advisory Council’s regulations encourage agencies to coordinate the section 106 process with the NEPA process, while recognizing that section 106 is a separate requirement. 36 C.F.R. § 800.8. This section provides that the process and documentation used for compliance with NEPA – whether the NEPA documentation consists of an EA and FONSI or an EIS and ROD – can be used for compliance with NHPA section 106, but only if the agency notifies SHPO/THPO and the Council in advance that it intends to do so. In the event that NEPA documents are used for section 106 purposes, the regulations set out standards that must be met. 36 C.F.R. § 800.8(c)(1). In essence, the conditions are designed to ensure that efforts to identify historic properties and assess the effects of the proposed undertaking are carried out in a manner consistent with the ACHP regulations,

including consultation with the SHPO and/or THPO and any tribe that attaches religious and cultural significance to any historic property that might be affected.

B. Archaeological Resources Protection Act of 1979 (ARPA)

The Archaeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. §§ 470aa – 470mm, applies to “archaeological resources” that are located on Indian lands and federal lands. As defined in the statute, the term “archaeological resources” means, in part, “any material remains of past human life or activities which are of archaeological interest ...” The statute leaves it to the agencies charged with writing regulations to clarify what the phrase “of archaeological interest” means. The statute also lists certain kinds of objects that are considered archaeological resources if they are found in an archaeological context, including: “pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of” the listed items. The statute specifically states that no item is to be treated as an archaeological resource unless it is at least 100 years of age. The regulations referred to in the statutory definition are “uniform” regulations issued by the Departments of Agriculture, Defense, and Interior and the Tennessee Valley Authority. (The Department of the Interior edition is published in the Code of Federal Regulations at 43 C.F.R. part 7; substantively identical editions are published in two other titles of the C.F.R.: 18 C.F.R. part 1312 – TVA; 36 C.F.R. part 296 – Agriculture. Citations in this Explanatory Paper are to the DOI edition.). The regulatory definition of archaeological resource is published at 43 C.F.R. section 7.3.

1. Permits and prohibitions.

ARPA protects archaeological resources by requiring a permit to excavate or otherwise remove them from the ground, and by making it a violation of federal law to excavate, remove, damage or destroy archaeological resources without a permit. Violators may be subject to criminal penalties, including imprisonment; violators may also be assessed civil penalties based on the cost of restoration and repair of damaged resources and the archaeological or commercial value of resources that are destroyed or not recovered. If civil penalties are assessed for a violation on Indian lands, the money collected in payment of a penalty is transferred from the federal agency to the Indian landowner (i.e. the tribe for tribal lands), along with any items forfeited. See 43 C.F.R. § 7.17(c). A person who holds a permit may be subject to civil penalties for violating the terms and conditions of the permit.

2. Indian lands – permit requirements and exemptions.

On Indian lands, the Bureau of Indian Affairs (BIA) is the agency that issues the permits, which are subject to consent of the tribal government and must include any terms and conditions requested by the tribe. (Permits on individually-owned Indian trust lands are also subject to consent of the Indian landowner(s), but, since there are no individually-owned Indian trust lands within the Hualapai Reservation, issues relating to such lands are not discussed in this Explanatory Paper.) On tribal trust lands, the tribe itself is exempt from the permit requirement, and regulations issued by the Bureau of Indian Affairs provide that this exemption includes certain tribal government employees, provided that certain procedural requirements are met. 25 C.F.R. § 262.4. In addition, tribal members are exempt from the permit requirement if there is a tribal law regulating the excavation or removal of archaeological resources on its tribal lands.

As discussed earlier in this Explanatory Paper, the Department takes the position that the CHRO is not a law “regulating the excavation or removal of archaeological resources” until the HDCR issues

rules to implement Class C permits, and therefore, until such rules are issued, tribal members do need an ARPA permit. While the Tribal law exempts Tribal members from the ARPA permit requirement for excavation and removal, the Department takes the position that other prohibitions under ARPA continue to apply to Tribal members, including the prohibition against damaging or destroying archaeological resources. *See* section 522(c) of the rules.

3. Federal lands – notice to tribes.

On federal lands, when a federal agency is considering an application for an ARPA permit, if the work to be authorized by the permit might result in harm to, or destruction of, an Indian religious or cultural site, then, at least 30 days before issuing the permit, the agency must provide notice to any tribe that considers the site to have religious or cultural importance. 43 C.F.R. § 7.7. By having a cultural resources program, the Hualapai Tribe can use this requirement of federal law to advocate for the protection of religious and cultural sites on federal land.

4. Interface with National Historic Preservation Act.

As discussed above, section 106 of the NHPA established a review process for proposed federal undertakings that might affect historic properties. The act of issuing an ARPA permit is expressly exempted from the requirements of NHPA section 106. 16 U.S.C. § 470cc(i). In some circumstances, though, the two statutes overlap. In many cases, archaeological work pursuant to an ARPA permit must be carried out during the NHPA section 106 process in order to determine whether a site is eligible for the National Register. In other cases, NHPA section 106 process may lead to an agreement that mitigating the adverse impacts to a historic property will include archaeological work pursuant to an ARPA permit.

C. Native American Graves Protection and Repatriation Act (NAGPRA) of 1990

The Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001 – 30013, 18 U.S.C. § 1171, is the federal law concerned with Native American human remains and cultural items and the rights of descendants, Indian tribes, and Native Hawaiian organizations in such remains and items. (Although NAGPRA includes numerous provisions relating to Native Hawaiians, the rights and interests of Native Hawaiians are not discussed in this Explanatory Paper.) NAGPRA was enacted after years of legislative advocacy by tribal representatives and their supporters, driven in large part by the widely held belief that the graves of tribal ancestors should not be disturbed and, in cases in which they have been disturbed, the human remains and funerary objects should be returned to descendants for reburial or other religiously prescribed treatment. The basic purposes of the statute are to declare that tribes and individual lineal descendants have rights in the remains of their ancestors and in certain kinds of cultural property and to establish procedures for vindication of these rights. Many of the statutory provisions of NAGPRA have been implemented through regulations issued by the National Park Service. 43 C.F.R. part 10. The National NAGPRA website, maintained by NPS, presents a great deal of information about NAGPRA: <http://www.nps.gov/nagpra/>.

NAGPRA applies in three different contexts: (1) repatriation of items from the collections of federal agencies and museums to tribes and to lineal descendants where known; (2) protection of burial sites and “cultural items” located on federal lands and “tribal lands”; and (3) trafficking in Native American human remains and cultural items. The statutory provisions relating to repatriation are set out, for the most part, in 25 U.S.C. §§ 3003, 3004, and 3005; graves protection in 25 U.S.C. § 3002; and illegal trafficking in 18 U.S.C. § 1170.

In this Explanatory Paper, the discussion of NAGPRA is limited to graves protection, because, for purposes of the proposed rules for implementing the Hualapai Cultural Heritage Resources Ordinance, it is the graves protection provisions of NAGPRA that are the most relevant. The graves protection provisions of NAGPRA apply to intentional excavations and inadvertent discoveries on federal lands and on tribal lands.

1. Human remains and "cultural items."

NAGPRA covers sites that contain Native American cultural items. Cultural items are defined as human remains, funerary objects, sacred objects and objects of cultural patrimony. These kinds of items are generally included within the definition in ARPA for "archaeological resources" if they are at least 100 years of age and found in an archaeological context. The ARPA term "archaeological resources" is, however, much broader than the NAGPRA term "cultural items" – there are many kinds of archaeological resources that usually are not also cultural items for purposes of NAGPRA. Some examples include pottery and basket fragments, arrowheads and other projectiles, camp sites, fire pits, and the remains of structures, although such items may be cultural items for purposes of NAGPRA if they are found in the context of a burial site.

The term "human remains" is not defined in the statutory language of NAGPRA, but is defined in the regulations as "the physical remains of a person of Native American ancestry." 43 C.F.R. § 10.2(d)(1). (The regulatory definition also elaborates on some nuances of the term.) Funerary objects are "objects that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later..." 25 U.S.C. § 3001(3)(A) and (B). The regulations make clear that objects placed *near* human remains as part of a death rite or ceremony are covered by NAGPRA, as well as those placed *with* human remains. In addition, the regulations clearly recognize rock cairns, funeral pyres, and other customary depositories for human remains which may not fall within the ordinary definition of a grave site. This is consistent with the definition of "burial site" in the statute which includes "any natural or prepared location, whether below, or, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited." 25 U.S.C. § 3001(1).

The terms "sacred object" and "cultural patrimony" are defined rather narrowly in NAGPRA. A sacred object is an object that is "needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents." An object of "cultural patrimony" is one that has "ongoing historical, traditional, or cultural importance central to the Native American group or culture itself" and which "cannot be alienated, appropriated, or conveyed by any individual." Objects that fit these definitions are not often found buried in the ground; rather, for purposes of NAGPRA, sacred objects and object of cultural patrimony are more typically the subject of repatriation claims from the collections of museums and federal agencies.

2. Lands that are covered by NAGPRA.

The graves protection provisions of NAGPRA apply to federal lands and "tribal lands." The term "tribal lands" is defined to include "all lands within the exterior boundaries of any Indian reservation" as well as "all dependent Indian communities." The Department takes the position that all lands held in trust for the Hualapai Tribe outside the boundary of the contiguous part of the Tribe's reservation are nevertheless "tribal lands" for purposes of NAGPRA, in accordance with the U.S. Supreme Court's ruling in *Oklahoma Tax Commission v. Citizen Band Potawatomie Indian Tribe*, 498 U.S. 505 (1991). In that case the Court ruled that land held in trust for a tribe qualified as a reservation even though it had not been formally declared as such.

Certain provisions of NAGPRA apply somewhat differently on “federal lands” than on “tribal lands.” The statutory language does not explicitly address issues that may arise regarding “federal lands” that are located within the exterior boundaries of an Indian reservation and, as such, are also “tribal lands.” In the statutory definition, “federal lands” means “any land other than tribal lands which are controlled or owned by the United States ...” (Emphasis added.) In light of this statutory definition, the Department takes the position that “federal lands” located within the exterior boundaries of an Indian reservation are to be treated as “tribal lands” for purposes of NAGPRA.

3. *Intentional excavations.*

The excavation of Native American human remains from federal lands or tribal lands is not lawful unless a permit has been issued pursuant to ARPA. NAGPRA imposes some procedural requirements for the issuance of such a permit in addition to the requirements under ARPA. See 43 C.F.R. §§ 10.3, 10.5.

On *federal lands*, the federal agency must provide notice to any Indian tribe that is likely to be culturally affiliated with the discovered items and must engage in consultation with any such tribe(s). Any known lineal descendants must also be notified and invited to the consultation. After consultation, the federal agency official must prepare a written plan of action, which includes, among other things, the planned disposition of the items to be excavated, in accordance with the principles set out in NAGPRA for determining what tribe or individual has the right to take custody. The information used to determine custody must also be included in the written plan of action.

On *tribal lands*, a permit for excavation cannot be issued without the consent of the governing tribe. The ARPA permit is issued by the BIA, pursuant to 25 C.F.R. Part 262.

4. *Inadvertent discoveries.*

When buried human remains or cultural items are inadvertently discovered on tribal or federal lands as part of another activity, such as construction, mining, logging or agriculture, the activity must cease in the area of the discovery, and the person who made the discovery must make a reasonable effort to protect the discovered items. The regulations add some details to the requirements of the statute. See 43 C.F.R. §§ 10.4, 10.5.

When an inadvertent discovery occurs on *tribal lands*, the person making the discovery must notify the responsible tribal official. The activity that resulted in the discovery must cease, and may resume 30 days later if otherwise lawful. The regulations allow for some discretion on the part of the tribal official in how to respond to the discovery. If a decision is made that the items must be excavated, the excavation must proceed as an intentional excavation. The Hualapai Cultural Heritage Resources Ordinance specifies, in section 202, that the Director of the HDCR shall serve as the agent of the Tribe for receiving any such notice.

When an inadvertent discovery has occurred on *federal lands*, the person who has discovered the items must temporarily cease activity and notify the responsible federal official, who, in turn, must notify any tribe(s) likely to be culturally affiliated with the discovered items. The activity that resulted in the discovery must cease, and may resume 30 days later if otherwise lawful. (The activity may resume sooner if the culturally affiliated tribe(s) sign an agreement.) The federal agency official must engage in consultation with appropriate tribes, leading to a written plan of action, including a determination of the right of custody. If the federal agency official determines that the items must be excavated, it is treated as an intentional excavation, and is subject to the ARPA permit requirement.

5. Custody

The statute sets out an order of priorities for determining who has the right to take custody of human remains and cultural items that are excavated from tribal lands and federal lands. The regulations provide guidance on how federal agencies are to make these determinations for items removed from federal lands. *See* 43 C.F.R. § 10.6. For human remains and associated funerary objects, the highest priority runs with known lineal descendants, both on tribal lands and on federal lands. For items removed from tribal lands, the statute expressly provides that, if there are not any known lineal descendants, the tribe on whose lands the human remains and/or cultural items are located has the right to custody. In the event that Native American human remains or cultural items found on tribal lands are, in fact, culturally affiliated with a tribe other than the tribe with jurisdiction over the reservation, NAGPRA leaves it entirely to the discretion of the governing tribe whether to give custody of the excavated items to the other tribe.

D. Other Laws

The discussion of federal laws in this Explanatory Paper is not intended to be exhaustive. The summaries of the three laws that are covered are not intended to address every detail. In addition, there are a number of other federal laws that sometimes come into play, such as the American Indian Religious Freedom Act of 1978 (AIRFA), Pub. L. No. 95-341 (codified in part at 42 U.S.C. § 1996); the Antiquities Act of 1906, Pub. L. No. 59-209 (16 U.S.C. §§ 431, 432, 433); and the federal statutory provision governing the U.S. Department of Transportation commonly known as “section 4(f),” 49 U.S.C. § 303 (previously codified at 49 U.S.C. § 1653(f)).

Another set of statutory provisions briefly noted here concern lands within the National Forests. These seven statutory sections were enacted as part of the act of Congress captioned the Food, Conservation, and Energy Act of 2008, but more commonly known as the “2008 Farm Bill.” Pub. L. No. 110-246, title VIII (codified at 25 U.S.C. §§ 3051 – 3057). These statutory sections authorize the Forest Service to: allow reburial of Native American human remains and cultural items on National Forest lands; temporarily close areas within the National Forest System from public access to protect the privacy of tribal activities for traditional and cultural purposes; provide trees and other forest products to tribes free of charge for traditional and cultural purposes; and withhold sensitive information from disclosure under the Freedom of Information Act.

This Explanatory Paper also does not attempt to address issues involving Arizona state statutes, which are not generally applicable to Hualapai tribal lands. In some instances, however, Arizona state statutes are applicable to places outside the Hualapai Reservation that hold religious and cultural importance for the Tribe. One example is the Arizona statute regarding discoveries of “any archaeological, paleontological or historical site or object” on lands owned or controlled by the state or state agency or political subdivision, a statute that expressly covers “human remains, funerary objects, sacred ceremonial objects [and] objects of national or tribal patrimony.” A.R.S. § 41-844 (www.azleg.state.az.us/ArizonaRevisedStatutes.asp?Title=41). This is but one example. The reason for mentioning this example is simply to acknowledge that there is a body of state legislation that may sometimes be relevant to the Tribe’s concerns.

ADDENDUM: REFERENCE MATERIALS AVAILABLE ON THE INTERNET

Federal Laws and Regulations, Generally – Government Printing Office

Federal laws enacted by Congress and codified in the United States Code, the Code of Federal Regulations, and the *Federal Register* are available online at a web site maintained by the Government Printing Office, the GPO Federal Digital System:

www.gpo.gov/fdsys/search/home.action.

Advisory Council on Historic Preservation

The ACHP regulations (36 C.F.R. part 800) and numerous guidance documents are available on the ACHP website:

www.achp.gov.

National Park Service

NPS has issued a number of guidance documents on various kinds of historic properties. Available at:

www.cr.nps.gov/nr/publications/.

Information about the Native American Graves Protection and Repatriation Act is available on the National NAGPRA website, maintained by NPS:

<http://www.nps.gov/nagpra/>.

Arizona Unmarked Burials Law

A.R.S. § 41-844:

www.azleg.state.az.us/ArizonaRevisedStatutes.asp?Title=41.