

# Historical Properties Are More Than Meets The Eye: Dealing with Historical Archeology under the regulatory context of Section 106 and CEQA

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Embassy Suites



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# Dealing with Multi-element Cultural Resources under Section 106

Archaeological Excavation at Madison Temple  
Montpelier, Virginia



# *What's in a Phrase?* Cultural Resources



- Man-made constructions or portable objects, or
- Geographic locations of past human activity
- Old enough to have begun to become a part of the fabric of our heritage

# *What's in a Phrase?* Multi-element Cultural Resources

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- ▶ Cultural resources that are made up of more than one element
- ▶ Elements may include any combination of buildings and structures , archaeological remains, or traditional use areas

# The Focus for our Session

Cultural Resources with  
Built Environment and  
Historical Archaeological  
Elements



Well Excavation at the James Fort  
site Jamestown Island, Virginia

# *What's in a Phrase?* Cultural Resources in the Regulatory World

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- ▶ Federal Section 106 program deals with “historic properties”
- ▶ Environmental analyses done under the California Environmental Quality Act deal with “historical resources”

# What's the Section 106 Program?

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- ▶ “Section 106” is a section of the National Historic Preservation Act
- ▶ President Johnson signed the Act in October of 1966
- ▶ Section 106 of the Act simply says that **each Federal agency shall take into account the effect of its actions on significant cultural resources**

# How's the Section 106 Program Administered?

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- ▶ National Historic Preservation Act creates the Advisory Council on Historic Preservation and authorizes the Council to promulgate regulations to implement Section 106 of the Act
- ▶ 36 CFR Part 800 are those implementing regulations
- ▶ California State Historic Preservation Officer acts, in part, as a proxy for the Council in the implementation of the Section 106 program

# What are the Requirements of the Section 106 Program?

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The Section 106 program requires that the Federal Agency

- Decide whether its action is an “undertaking” as defined, and, if so, whether that undertaking has the potential to affect historic properties
- Identify and engage appropriate consulting parties, preferably early in the planning process
- Organize consultation to satisfy steps at 36 CFR §§ 800.4 through 800.6

# What are the Basic Steps in the Section 106 Consultation Process?

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- ▶ Determine Area of Potential Effects (APE) [36 CFR § 800.4(a)]
- ▶ Inventory [36 CFR § 800.4(b)]
- ▶ Evaluation [36 CFR § 800.4(c)]
- ▶ Assess Effects [36 CFR § 800.4(d) through 800.5(b)]
- ▶ Resolve Adverse Effects [36 CFR § 800.6]

# Consultation on Area of Potential Effects



## 36 CFR § 800.4

(a) *Determine scope of identification efforts.* In consultation with the SHPO/THPO, the agency official shall:

(1) Determine and document the area of potential effects, as defined in § 800.16(d);

# Consultation on Area of Potential Effects



## 36 CFR § 800.16

(d) *Area of potential effects* means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

# Inventory Phase Consultation



## **36 CFR § 800.4**

(b) Based on the information gathered under paragraph (a) of this section, and in consultation with the SHPO/THPO and any Indian tribe ... that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take the steps necessary to identify historic properties within the area of potential effects.

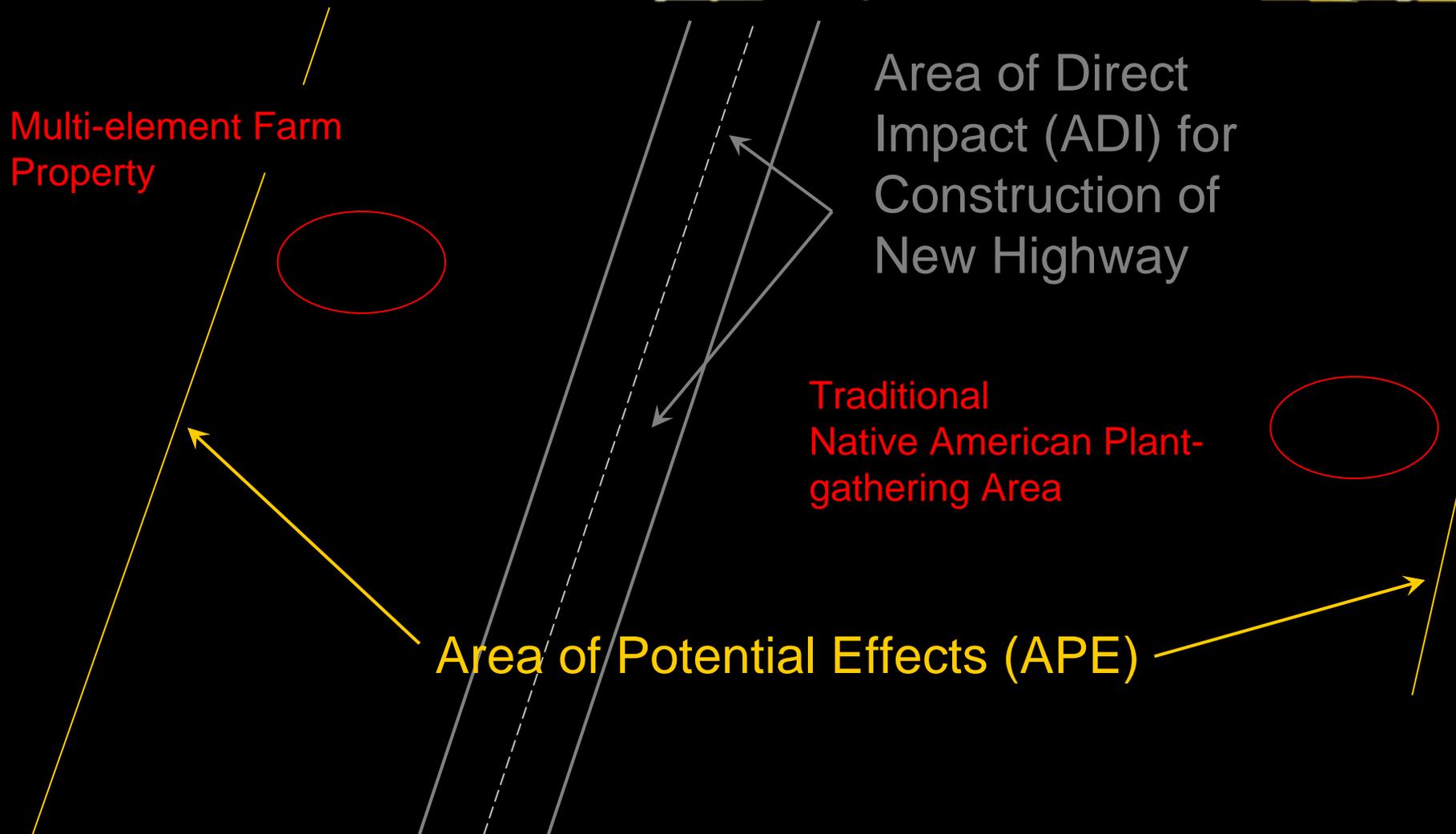
# Inventory Phase Consultation



## **36 CFR § 800.4**

(b)(1) *Level of effort.* The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. ...

# Standard Professional Practice for Inventory Phase Fieldwork



# The Multi-element Farm Property

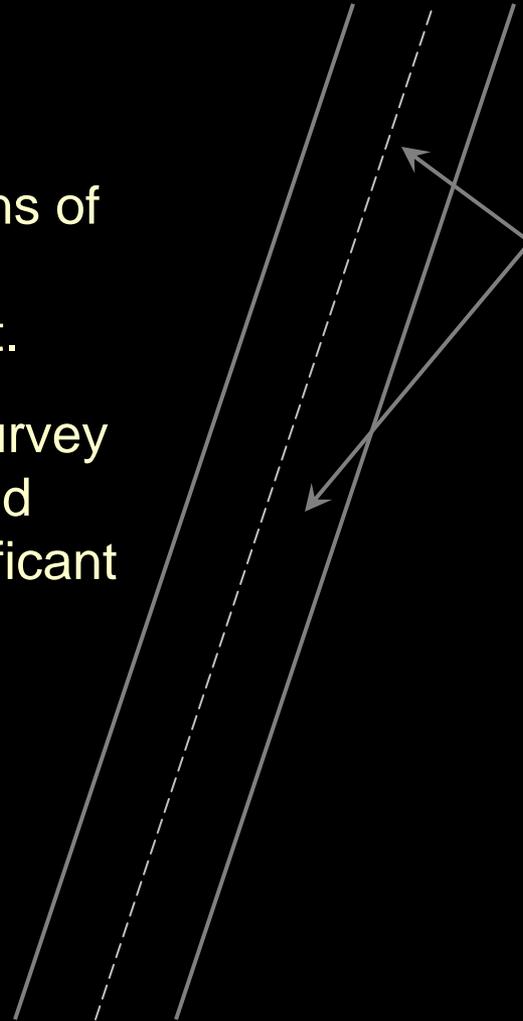
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Distillery site  
Mount Vernon, Virginia

# *Inventorying Historical Archaeological Elements in the ADI*

- Routine pedestrian survey
- Subsurface survey in portions of ADI where depth of ground disturbance may exceed 3 ft.
- More focused subsurface survey in the vicinity of buildings and structures that may be significant *and* may be subject to destruction



Area of Direct Impact (ADI) for Construction of New Highway

# Inventoried Historical Archaeological Elements outside the ADI

Multi-element Farm Property



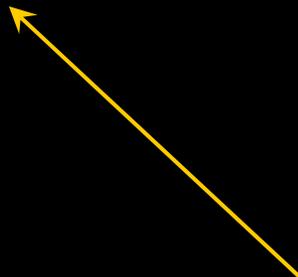
Subsurface survey in the vicinity of buildings and structures outside the ADI may be appropriate when historical archaeological elements may

- ▶ Provide the context relative to which an unremarkable resource becomes significant
- ▶ Provide information value
- ▶ Provide interpretative value

Traditional Native American Plant-gathering Area



Area of Potential Effects (APE)



# Evaluation Phase Consultation



## **36 CFR § 800.4**

(c)(1) *Apply National Register criteria.* In consultation with the SHPO/THPO and any Indian tribe ... the agency official shall apply the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. ...

# Evaluation Phase Consultation

Separate application of the National Register Criteria (36 CFR § 60.4) is requisite for each constituent element of a multi-element resource



Excavation of brick walkway  
Colonial Williamsburg, Virginia

# Evaluation Phase Consultation



## Potential Outcomes of Individual Element Evaluations

- ★ Element is individually eligible for the National Register
- ★ Element lacks individual distinction but contributes to the National Register eligibility of built environment elements
- ★ Element lacks individual distinction and does not contribute to the National Register eligibility of other cultural resource elements

# Effects Assessment Consultation

Begin effects Assessment



No historic properties affected →



Historic properties affected



Apply criteria of adverse effect



No adverse effect with conditions →



No adverse effect →



Adverse effect



Negotiate agreement



# Consultation to Resolve Adverse Effects



## 36 CFR § 800.6

(a) *Continue consultation.* The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties.

# Consultation to Resolve Adverse Effects



*Treatment of Historical Archaeological Elements in the ADI* for elements that are

- Individually eligible for the National Register
- Lack individual distinction but contribute to the National Register eligibility of built environment elements
- Ineligible individually and do not contribute to the National Register eligibility of built environment elements

# Consultation to Resolve Adverse Effects

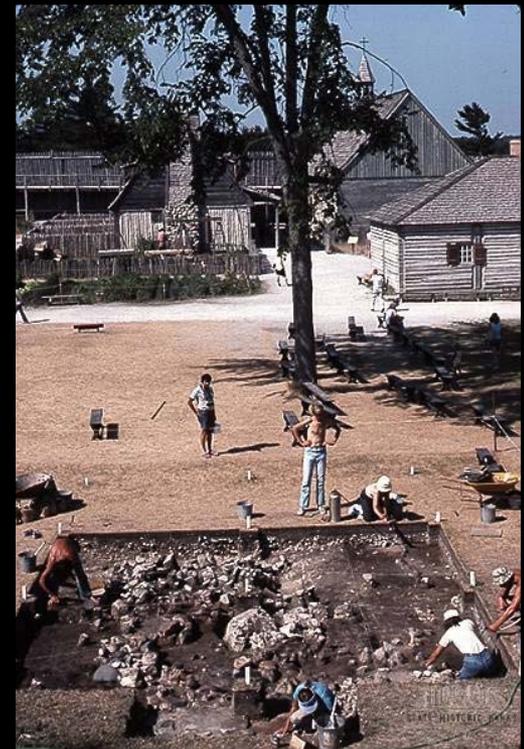
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## *Treatment of Historical Archaeological Elements outside the ADI*

- ★ Counter to standard professional practice
- ★ Document and evaluate to conclude any phasing under 36 CFR §§ 800.4 (b) and (c)
- ★ Negotiate for data recovery excavation and public interpretation of data recovery results as treatment measures to mitigate for adverse effects to a property's visual integrity

# Toward a More Holistic Historic Preservation Perspective

Colonial Michilimackinac  
Mackinaw City, Michigan



# CEQA & (Historical) Archeological Resources

A thick, horizontal yellow brushstroke underline that spans the width of the text above it, with a slightly textured, hand-painted appearance.

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www.crossfire.com

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**Godzilla versus the bureaucracy**

# Four General Legislative Principles of CEQA

Information – Identification – Prevention -  
Disclosure

Substantive Mandate, CEQA not just procedural  
Public agencies **must** deny approval of projects  
with significant environmental effects if “there  
are feasible alternatives or mitigations  
measures” that can substantially lessen or avoid  
those effects

PRC § 21002



# CEQA applies to Discretionary projects

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- ⌘ **Project:** any activity which may cause either a direct or indirect physical change in the environment
- ⌘ Whole of the action which has potential in resulting in either “direct” or reasonably foreseeable indirect physical change
- ⌘ Project segmenting is not permitted

PRC Sec. 21065; CEQA Guidelines 15378(a)

# Brief General overview of CEQA Process



CEQA begins with :

Phase 1: Preliminary Review whether an  
Exemption might apply

Phase 2: Initial Study

Phase 3: **EIR** or **ND** or **MND**

Completes CEQA process



# Two - Part Test

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⌘ Lead Agency has to determine whether there is a **significant impact** to an historic resource by a project

Question 1: is resource "historically significant"  
(§15064.5)

Question 2: would project cause a "substantial adverse change" in its significance

# Historical Resources



- ⌘ Historical Resources are part of the “environment” (PRC § 21060.5)
- ⌘ CEQA requires that **public agencies** consider the **effects** of their **actions** on **historical resources** **eligible** for listing in the **California Register of Historical Resources**.

# So, What does CEQA say is a Historical Resource then?

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- ⌘ The term historical resource is given a very broad definition PRC 21084.1:
- ⌘ A project that may cause a substantial adverse change in the **significance of an historical resource** is a project that may have a significant effect on the environment.

# Historical Resource defined by CEQA PRC 21084.1:

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- ⌘ Are ones that are **listed in, or determined eligible**, for listing in the California Register;
- ⌘ Are Historical Resources included in a **local register** as defined in subdivision (k) of Section 5020.1, or deemed **significant pursuant** to criteria set forth in subdivision (g) of Section 5024.1, presumed to be historically or culturally significant, unless preponderance of evidence demonstrates that the resource is no longer historically or culturally significant;
- ⌘ The fact that a resource is **not** listed in, or determined to be eligible for listing in, the California Register, not included in a local register of historical resources, or not deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1 shall not preclude a lead agency from determining whether the resource may be a historical resource for purposes of this section.

# CEQA Guidelines §15064.5

## Historical Resource Definition

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- ⌘ Listed of eligible for listing on Cal. Register
- ⌘ Included in a local register or identified as; significant in a historical resource survey shall be presumed to be historically or culturally significant unless preponderance of evidence demonstrates resource is no longer significant;
- ⌘ The fact that a resource is not listed, or determined eligible for listing in the Cal. Register, not included in a local register, or identified in an historical resources survey, does not preclude a lead agency from determining that the resource may be a historical resource as defined in PRC 5020.1(j) or 5024.1.

# CEQA Guidelines §15064.5 continued

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- ⌘ Any object, building, structure, site, area, place, record, or manuscript which a lead agency determines to be historically significant or significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military, or cultural annals of California **may** be considered to be an historical resource, provided the lead agency's determination is supported by substantial evidence in light of the whole record. Generally, a resource shall be considered by the lead agency to be "historically significant" if the resource meets the criteria for listing on the California Register of Historical Resources.

# How does CEQA define archeological resources?

⌘ CEQA discusses two types of archeological resources:

⊠ a “unique archaeological resource”

⊠ an archeological resource that qualifies as a “historical resource”



What is an archeological resource that is an "historical resource"?



An archeological resource that is:

- 1) listed or determined eligible for listing on the California Register of Historical Resources
- 2) listed in a "local register of historical resources"
- 3) listed in an "historical resource survey"

# How is an archeological resource determined to be an historical resource?



Generally an archeological resource is determined to be an historical resource due to its eligibility for listing to the California Register because of its scientific information value or Criterion D

“Has yielded, or may be likely to yield information important in prehistory and history”

# Can an archeological resource be eligible to the CRHR under Criterion other than D?

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⌘ Yes. An archeological resource can be eligible to the CRHR under Criterion

- ⊗ A association with events that have made a significant contribution to the broad patterns of history
- ⊗ B association with the lives of historically important persons
- ⊗ C association with the characteristics of type, period, region, or method of construction

# How to assess whether an archeological resource can yield information important in (prehistory) and history:



- ⌘ Archaeological Resource Management Reports. OHP. 1989
- ⌘ Guidelines for Archaeological Research Designs. OHP. 1991
  
- ⌘ Reports components should include:
  - ☑ Objectives
  - ☑ Study area or Area of Potential Effect (APE)
  - ☑ (Prehistoric) & historic setting
  - ☑ Research design
  - ☑ Description of methodology for field investigation
  - ☑ Curation arrangements

# EVALUATION

- ⌘ What **context** and **property type** does the resource represent?
- ⌘ What **criteria** apply?
- ⌘ What is its **significance**?
- ⌘ Does it have the expected **character-defining features** for its type?
- ⌘ Is it a **contributor** to a **district**?
- ⌘ Does it possess the **integrity** characteristics for its property type within the defined context?  
**Multiple contexts/multiple periods of Significance?**

# What is a “unique archaeological resource”?



An archeological resource that:

- 1) contains information needed to answer important scientific research questions
- 2) has a special and particular quality such as being the oldest of its type
- 3) is directly associated with a prehistoric or historic event or person

# What is a significant adverse effect to an archeological resource?

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- ⌘ The “significance” of the resource must be “materially impaired”
- ⌘ “materially impaired” = “demolishes or materially alters in an adverse manner those physical characteristics ...that convey its historical significance that justify its inclusion in” the CRHR or local register of historical resources
- ⌘ Generally, for archeological resources,

Significant adverse effect = destruction of scientific data

# Mitigation



⌘ A lead agency shall identify potentially feasible measures to mitigate significant adverse changes in the significance of an historical resource. The lead agency shall ensure that adopted measures to mitigate or avoid significant adverse changes are fully enforceable through permit conditions, agreements, or other measures. (CEQA Guidelines § 15064.5 (4))

# Not appropriate Mitigation :

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⌘ Archeological Monitoring as a mitigation is typically not a preferred mitigation for archeological resources

⌘ Why?



⌘ It may put the resource at risk to project impacts before appropriate archeological intervention can occur

# Are You Grading or Excavating?





# Mitigation in General

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- ⌘ Avoid
- ⌘ Minimize
- ⌘ Rectify
- ⌘ Reduce over time
- ⌘ Compensate
- ⌘ Restricting demolition or alteration of significant historic structures or sites
- ⌘ Removing or relocating significant archeological or cultural resources that will be disturbed by a project
- ⌘ Restoration of a historical structure affected by a project



# Specific Mitigation Measures for Impacts to Minimize Significant Effects on Historical Resources

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Preservation in place maintaining relationship between artifacts and archeological context such as :

Avoidance

Incorporation of sites within parks, open space

Conservation easements.

Data recovery, when it is the only feasible mitigation

(CEQA Guidelines § 15126.4 (b))



What then is adequate mitigation for an adverse effect?

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Responsible mitigation should require preparation of a research design and testing plan in advance of the project.

⌘ **Why?**

⌘ To identify the scientifically important information and recover it, in a timely manner & without risk to preventable project impacts



**If there is evidence in the record that an archeological resource may be affected by a project, a mitigation measure applicable to accidental discovery is not appropriate.**

# Contact Information

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