

OREGON ADMINISTRATION RULES (OARs)

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DIVISION 51 ARCHAEOLOGICAL PERMITS

OAR 736-051-0000 Dispute Resolution Process

(1) OAR 736-051-0000 through 736-041-0050 establish procedures the Oregon Parks and Recreation Department shall use in resolving a dispute over:

- (a) The issuance of an archaeological permit pursuant to ORS 390.235;
- (b) Curation facilities for archaeological objects uncovered pursuant to a permit issued under ORS 390.235;
- (c) The disposition of human remains, associated material objects, or funerary objects as identified in ORS 97.750.

(2) It is the policy of the Oregon Parks and Recreation Department and the Oregon State Historic Preservation Office to use best efforts to protect the confidentiality of information pertaining to the location of archaeological sites that may be disclosed during the dispute resolution process.

Stat. Auth.: ORS 390.124 & ORS 390.240

Stats. Implemented: ORS 390.124 & ORS 390.240

Hist.: PR 6-1994, f. & cert. ef. 4-22-94

OAR 736-051-0010 Definitions

As used in OAR 736-051-0000 through 736-051-0050, unless the context requires otherwise:

- (1) "Arbitration" means a process whereby a neutral third party or panel considers the facts and arguments presented by disputing parties and renders a decision.
- (2) "Mediation" means a process in which a third party assists and facilitates two or more parties to a dispute in reaching a mutually acceptable resolution of the dispute.
- (3) "Negotiation" means an informal process by which an attempt is made by disputing parties to resolve the dispute without the need for mediation or arbitration.
- (4) "Entity with Approval Authority" means, as appropriate to the context, one or more of the following: The Oregon Parks and Recreation Department, an appropriate Indian tribe, the Oregon State Museum of Anthropology, the state agency or local governing body charged with management of the public land in question.
- (5) "Applicant" means a person who is applying for an archaeological permit pursuant to ORS 390.235.
- (6) "Recognized Curatorial Facility" means the Oregon State Museum of Anthropology (OSMA).

- (7) "Alternate Curatorial Facility" can mean one or more of the following:
- (a) The scientific, educational, or Indian tribal institution for whose benefit a permit was issued under ORS 390.905 et seq., if approved by OSMA with the concurrence of the appropriate Indian tribe;
 - (b) An educational facility other than the institution collecting the material, provided the action is approved by the State Board of Higher Education with the concurrence of the appropriate Indian tribe;
 - (c) An educational facility or firm approved by OSMA with the concurrence of the appropriate Indian tribe, and with the requirement that the facility provide an inventory of material to OSMA within six months of collection.
- (8) "Human Remains" has the meaning given that term in ORS 358.905.
- (9) "Funerary Objects" have the meanings given that term in ORS 358.905.
- (10) "Associated Material Objects" has the same meaning as section (9) of this rule.
- (11) "Burial Goods" as found in ORS 309.240 (1)(b), has the same meaning as section (9) of this rule.
- (12) "Sacred Object" has the meaning given that term in ORS 358.905.
- (13) "Qualified Archaeologist" has the meaning given that term in ORS 390.235.
- (14) "Professional Archaeologist" has the meaning given that term in ORS 97.740(6).
- (15) "Archaeological Permit" means the permit issued under ORS 390.235.
- (16) "Archaeological Object" has the meaning given that term in ORS 358.905.
- (17) "Indian Tribe" has the meaning given in ORS 97.740(4).
- (18) "Appropriate Indian Tribe" means the Indian tribe designated by the Commission on Indian Services as having the greatest interest in the subject matter relating to the dispute.

Stat. Auth.: ORS 390.124 & ORS 390.240

Stats. Implemented: ORS 390.124 & ORS 390.240

Hist.: PR 6-1994, f. & cert. ef. 4-22-94

OAR 736-051-0020 Disputes Covered by the Dispute Resolution Process

These rules cover disputes among or between: Entities that have statutory authority to approve or disapprove an archaeological permit, or to approve or disapprove a curatorial facility to house archaeological objects, or to approve or disapprove the disposition of human remains, associated material objects, or funerary objects; and applicants for such permits, facilities or dispositions:

- (1) Disputes may arise among or between approving entities and applicants over the terms, conditions, provisions or for approval or disapproval of an archaeological permit where:
 - (a) An entity with approval authority over an application for a permit withholds that approval;
 - (b) An entity with approval authority disagrees over the terms, conditions or provisions of the permit;
 - (c) The applicant disagrees with the terms, conditions or provisions of the permit as established by an entity with approval authority.

- (2) Disputes may arise over the selection of curatorial facilities to house archaeological objects uncovered on public lands where:
 - (a) An entity that has approval authority over the choice of a recognized or alternate curatorial facility withholds that approval;
 - (b) The applicant disagrees with the choice of a recognized or alternate curatorial facility as made by an entity with approval authority.

- (3) Disputes may arise over the disposition of human skeletal remains, associated material objects, or funerary objects as described in ORS 97.750 where:
 - (a) The appropriate Indian tribe has denied consent within 30 days of the mailing of the request for consent;
 - (b) The professional archaeologist proposing the excavation (or the company or agency the archaeologist represents), disagrees with the terms, conditions or provisions of the Indian tribe's written consent, if any.

Stat. Auth.: ORS 390.124 & ORS 390.240

Stats. Implemented: ORS 97.750 & ORS 390.235

Hist.: PR 6-1994, f. & cert. ef. 4-22-94

OAR 736-051-0030

Informal Dispute Resolution (Negotiation)

- (1) If the permit applicant or an entity with approval authority over an application for a permit objects to the approval or disapproval of a permit or any of its terms, conditions or provisions, it shall notify the State Historic Preservation Office (SHPO) in writing.

- (2) The SHPO shall initiate an informal process by which the disputing parties shall attempt to reach agreement. By mutual agreement, the disputing parties may include the SHPO or other third

parties in this process, but they shall not be compensated. It is recommended that the informal dispute resolution process be completed within 30 days.

(3) At any time, a disputing party can terminate the informal dispute resolution process and submit the dispute to mediation.

Stat. Auth.: ORS 390.124 & ORS 390.240

Stats. Implemented: ORS 390.240

Hist.: PR 6-1994, f. & cert. ef. 4-22-94

OAR 736-051-0040 Mediation

(1) The entities with approval authority in consultation with the staff of the Dispute Resolution Commission (DRC), shall compile and maintain a list of potential mediators.

(2) Within ten calendar days of receipt of a written request to mediate, the SHPO shall provide the disputing parties with a list of at least three potential mediators, including written credentials of each one.

(3) Within ten calendar days of receipt of the list of potential mediators, each disputing party shall notify the SHPO if one or more of the mediators would be acceptable.

(4) Disputing parties may jointly interview potential mediators. All parties shall agree on the choice of mediator within five working days after the list of acceptable mediators is forwarded to SHPO.

(5) The mediator shall assist the disputing parties in preparing for the negotiation. Such preparations shall include:

(a) A statement of the issues to be mediated;

(b) A list of the parties who will participate in the mediation;

(c) An estimated completion date for the mediation process. By mutual consent, deadlines may be established for ending or continuing the mediation process;

(d) A statement of what shall constitute agreement. An understanding of what constitutes agreement shall include adequate time for each disputing party's decision-making body to ratify any tentative agreement reached by the mediator and the disputing parties;

(e) Provisions for protecting confidential information about site location, traditional or sacred practices, or other sensitive information associated with archaeological sites and objects;

(f) Provisions for payment of the mediator's services, if the services are not voluntary;

(g) Any other procedural matters the disputing parties determine need resolution before mediation begins on the substantive issues.

Stat. Auth.: ORS 390.124 & ORS 390.240

Stats. Implemented: ORS 390.240

Hist.: PR 6-1994, f. & cert. ef. 4-22-94

OAR 736-051-0050 Arbitration

(1) If the mediation does not yield a result satisfactory to all parties, the disputing parties shall notify the SHPO in writing, and the dispute shall proceed to arbitration.

(2) The SHPO shall notify each of the following of the need to designate one representative to serve on an arbitration panel:

- (a) The State Historic Preservation Office;
- (b) The Commission on Indian Services;
- (c) The Oregon State Museum of Anthropology;
- (d) The governing bodies of the federally-recognized Indian tribes;
- (e) The Dispute Resolution Commission.

(3) All panel members shall be designated within ten calendar days of receipt of SHPO's notification.

(4) By consensus, the panel shall:

- (a) Choose a chair who shall be responsible for scheduling arbitration sessions, notifying all parties with standing in the dispute, and convening the arbitration session; and
- (b) Establish the procedural framework for the arbitration.

(5) The issues to be arbitrated are limited to those which could not be resolved by the mediation process.

(6) Any party that declines to participate in the mediation or arbitration process waives its right to approve the permit application, or to set terms, conditions or provisions on the approval of the permit application.

(7) The decision of the arbitration panel may be appealed pursuant to ORS 36.365.

Stat. Auth.: ORS 390.124 & ORS 390.240

Stats. Implemented: ORS 390.240

Hist.: PR 6-1994, f. & cert. ef. 4-22-94

Archaeological Permits

OAR 736-051-0060 Application for Archaeological Permit

(1) OAR 736-051-0060 through 736-051-0090 establish procedures the Director of the Parks and Recreation Department shall use in issuing archaeological permits on public and private lands.

(2) It is the policy of the Oregon Parks and Recreation Department (OPRD) and the Oregon State Historic Preservation Office (SHPO) that information pertaining to the location of archaeological sites, cairns, burials, human remains, funerary objects, sacred objects or objects of cultural patrimony is confidential information that will be disclosed only as required by law.

Stat. Auth.: ORS 390.235(1)(d)

Stats. Implemented: ORS 390.235

Hist.: PR 1-1995, f. & cert. ef. 1-3-95

OAR 736-051-0070 Definitions

As used in OAR 736-051-0060 through 736-051-0090 unless the context requires otherwise:

(1) "Alter" means to disturb or remove any part of an archaeological site or a feature within an archaeological site.

(2) "Applicant" means the person who is applying for an archeological permit pursuant to ORS 390.235.

(3) "Appropriate Indian Tribe" means the Indian tribe designated by the Commission on Indian Services as having the greatest interest in the permit application.

(4) "Archaeological Site" means a geographic locality in Oregon, including but not limited to submerged and submersible lands and the bed of the sea within the state's jurisdiction, that contains archaeological objects and the contextual associations of the objects with:

(a) Each other; or

(b) Biotic or geological remains or deposits. Examples of archaeological sites include but are not limited to shipwrecks, lithic quarries, house pit villages, camps, burials, lithic scatters, homesteads and townsites.

(5) "Archaeological Object" means an object that:

(a) Is at least 75 years old;

(b) Is part of the physical record of an indigenous or other culture found in the state or waters of the state; and

(c) Is material remains of past human life or activity that are of archaeological significance including, but not limited to, monuments, symbols, tools, facilities, technological by-products and dietary by-products.

- (6) "Archaeological Permit" means the permit issued under ORS 390.235.
- (7) "Artifact" means the same as "Archaeological Object".
- (8) "Associated Material Objects" means the same as "Funerary Object".
- (9) "Burial Goods", as found in ORS 390.240(1)(b), means the same as "Funerary Objects".
- (10) "Curatorial Facility" means either a:
- (a) "Recognized" curatorial facility, which is the Oregon State Museum of Anthropology (OSMA); or
 - (b) "Alternate" curatorial facility, which is defined as follows:
 - (A) The scientific, educational, or Indian tribal institution for whose benefit a permit was issued, if approved by OSMA with the concurrence of the appropriate Indian tribe; or
 - (B) An educational facility other than the institution collecting the material, provided the action is approved by the State Board of Higher Education with the concurrence of the appropriate Indian tribe; or
 - (C) An educational facility or firm approved by OSMA with the concurrence of the appropriate Indian tribe, and with the requirement that the facility provide a material inventory to OSMA within six months of collection.
- (11) "Excavate" means to break the ground surface to remove any artifact or to remove an embedded artifact, feature or non-artifactual material in an archaeological site for the purposes of performing anthropological research.
- (12) "Exploratory Excavation" means digging into or otherwise disturbing the earth to determine whether or not an archaeological site exists at the excavation.
- (13) "Funerary Objects" means any artifacts or objects that, as part of a death rite or ceremony of a culture, are reasonably believed to have been placed with the individual remains either at the time of death or later.
- (14) "Human Remains" means the physical remains of a human body, following death, including, but not limited to bones, teeth, hair, ashes or mummified or otherwise preserved soft tissues of an individual.
- (15) "Object of Cultural Patrimony" means:
- (a) An object having ongoing historical, traditional or cultural importance central to the native Indian group or culture itself, rather than property owned by an individual native Indian, and which, therefore, cannot be alienated, appropriated or conveyed by an individual regardless of whether or not the individual is a member of the Indian tribe. The object shall have been considered inalienable by the native Indian group at the time the object was separated from such group;
 - (b) Does not mean unassociated arrowheads, baskets or stone tools for portions of arrowheads, baskets or stone tools.

(16) "Person" means an individual, a partnership, a public or private corporation, an unincorporated association or any other legal entity. "Person" includes any subsidiary subcontractor, parent company or other affiliate. Business entities are considered affiliates when one controls or has the power to control the other or when both are controlled directly or indirectly by a third person.

(17) "Private Lands" means lands within the State of Oregon owned by a person, except "Private lands" does not include federal lands or nonfederal public lands, or any lands the title to which is:
(a) Held in trust by the United States for the benefit of any Indian tribe or individual;
(b) Held by an Indian tribe or individual subject to a restriction by the United States against alienation.

(18) "Public Lands" means any lands owned by the State of Oregon, a city, county, district or municipal or public corporation in Oregon.

(19) "Qualified Archeologist" means a person who has the following qualifications:
(a) A post-graduate degree in archaeology, anthropology, history, classics or other germane discipline with a specialization in archaeology, or a documented equivalency of such a degree;
(b) Twelve weeks of supervised experience in basic archaeological field research, including both survey and excavation and four weeks of laboratory analysis or curating; and
(c) Has designed and executed an archaeological study, as evidenced by a Master of Arts or Master of Science thesis, or report equivalent in scope and quality, dealing with archaeological field research.

(20) "Recognized Educational Institution" means:
(a) An accredited member of a state system of higher education; or
(b) An accredited academic or higher education institution with an accredited program in anthropology.

(21) "Recognized Scientific Institution" means a chartered museum, organization or society with a commitment to the scientific method.

(22) "Removal" means taking any artifact or non-artifactual remains on, imbedded in, or under the surface of the ground.

(23) "Sacred Object" means an archaeological object or other object that:
(a) Is demonstrably revered by any ethnic group, religious group or Indian tribe as holy;
(b) Is used in connection with the religious or spiritual service or worship of a deity or spirit power; or
(c) Was or is needed by traditional native Indian religious leaders for the practice of traditional native Indian religion.

Stat. Auth.: ORS 390.235(1)(d); Stats. Implemented: ORS 358.920 & ORS 390.235
Hist.: PR 1-1995, f. & cert. ef. 1-3-95; PR 1-1997, f. & cert. ef. 3-31-97; PRD 1-1999, f. 3-2-99, cert. ef. 3-3-99

OAR 736-051-0080 Process for Applying for an Archaeological Permit on Public Lands

- (1) A person may not excavate or alter an archaeological site on public lands, make an exploratory excavation on public lands to determine the presence of an archaeological site, or remove from public lands any material of an archaeological, historical, prehistorical or anthropological nature without first obtaining a permit issued by the State Parks and Recreation Department.
- (2) A person who is considering a ground-disturbing project on public lands should contact the appropriate Tribe to inquire about the presence of archaeological sites and objects in the project area.
- (3) An archaeological permit may be issued to:
 - (a) A qualified archaeologist in the employ of a person conducting an excavation, examination or gathering of archaeological objects for the benefits of a recognized scientific or educational institution with a view to promoting the knowledge of archaeology or anthropology;
 - (b) A qualified archaeologist to salvage archaeological objects from unavoidable destruction; or
 - (c) A qualified archaeologist sponsored by a recognized institution of higher learning, private firm or an Indian tribe as defined in ORS 97.740.
- (4) A person who desires an archaeological permit pursuant to ORS 390.235 must submit an application to the Oregon Parks and Recreation Director or his or her designee. The application must be complete and be accompanied by:
 - (a) A map that clearly shows the location of the proposed work that enables the landowner or land managing agency, SHPO and the appropriate Indian tribe to clearly understand the location of the proposed action;
 - (b) A resume(s) or vita(s) for the person(s) in direct charge of field work. The resume or vita must demonstrate that the person(s) meets or exceeds the qualifications listed in OAR 736-051-0080(3);
 - (c) A research design that explicitly develops the rationale behind the proposed research, giving the theoretical orientation, justification for problem selection, logic and procedures for the research strategy. The design must define the universe of study, establish realistic minimal expectations and a realistic schedule of research and provide justified recovery procedures;
 - (d) The name, address and phone number of the landowner or land managing agency;
 - (e) A copy of the notice required under ORS 358.950(1), if the excavation is associated with a prehistoric or historic American Indian archaeological site;
 - (f) A curation facility for archaeological objects uncovered during the project.
- (5) Upon receipt of a complete application, the Director or his or her designee shall determine whether public lands, as defined in OAR 736-051-0070(16), are involved.
- (6) In consultation with the Commission on Indian Services, the SHPO shall identify the appropriate tribe to be mailed copies of the complete archaeological permit application.

(7) As soon as practicable, but generally not to exceed two working days, the SHPO shall mail copies of the complete application to the appropriate Indian tribe, if any, the land managing agency, Commission on Indian Services, Oregon State Museum of Anthropology, and the applicable local government planning department.

(8)(a) Before issuing a permit, the Director or his or her designee shall contact the appropriate Indian tribe, if any, the landowner or head of the land managing agency, the Director of the Oregon State Museum of Anthropology at the University of Oregon State Museum of Anthropology at the University of Oregon, the appropriate local planning commission, and the Commission on Indian Services;

(b) Notification shall consist of mailing the complete application and its attachments to appropriate state and local entities and the appropriate Indian tribe. The notification shall solicit comments, recommendations for conditions, or objections to the application. Notification letters shall include a highlighted confidentiality statement. Responses to the solicitation must be received within 30 calendar days of the date of the letter. SHPO shall send copies of all responses to the applicant;

(c) If the archaeological site in question is associated with a prehistoric or historic native Indian culture, the applicant shall consult with the appropriate Indian tribe during the 30 day period. At a minimum, consultation shall consist of meeting(s) satisfactory to the tribal governing body and/or its designee, and shall include discussion of the proposed work, archaeological permit terms or conditions, tribal monitoring of the archaeological and project work, contingency plans for discovery of remains and artifacts during both archaeological work and project development, and curation of artifacts;

(d) If an entity listed in subsection (a) of this section makes any objection or requests a condition to the application, the applicant shall contact the entity and attempt to resolve the issue. If the objection or request for condition is resolved by the applicant and the entity, they shall notify the SHPO in writing of the resolution. If the applicant and the entity cannot resolve the objection or request for condition within the 30 calendar days allowed for comment on the permit application, the Director or his or her designee shall determine what effect, if any, the objection or proposed condition shall have on the permit application.

(9)(a) Notwithstanding the provisions of section (8) of this rule, any person or entity who discovered an archaeological or historic site or burial during construction may request an expedited consultation process. The request may be granted whenever the Director or his or her designee, in consultation with the parties listed in subsection (8)(a) of this rule, determines that the 30 day consultation period provided in subsection (8)(b) of this rule will result in extreme economic hardship to the person or entity making the request, or an undue risk to public health, life or safety, or an undue threat to the site or burial. Examples of situations creating undue risk to public health, life or safety include hazardous material spills, breach of regional flood control facilities, and pipeline failures.

(b) If the Director or his or her designee determines that an expedited consultation process is warranted, the following procedures apply:

(A) The applicant shall contact the Director or his or her designee by telephone and/or facsimile to provide the information described in sections (4) and (7) of this rule;

(B) During the following 48 hours (excluding Saturday, Sunday, and any legal or tribal holidays), the Director or his or her designee shall consult by telephone and/or facsimile with the persons or entities described in section (8) of this rule. If the head of the land managing agency or the tribal governing body of the appropriate Indian tribe objects in writing to an expedited review, the Director or his or her designee will not proceed with the expedited review;

(C) The applicant may proceed with approval from the Director or his or her designee, to be followed by written notice as provided in section (12) of this rule.

(c) For purposes of this section, "extreme economic hardship" means a quantifiable and verifiable expenditure or fiscal loss that is unreasonable for the requestor to bear under the circumstances, including but not limited to the following:

(A) The importance of the project or non-archaeological use that would be delayed during the consultation period;

(B) The additional costs that would be incurred during the consultation period;

(C) The total cost of the project;

(D) The degree to which expedited consultation could achieve the same protection of the site as consultation over the standard 30 day permit application review period;

(E) Whether the requestor reasonably could have avoided the additional costs by anticipating the need for a permit and consultation at an earlier time.

(10) After considering the application, maps, research design, vita and all comments, recommendations for conditions, or objections received by entities with approval authority during consultation, the Director or his or her designee may issue the permit without conditions, issue the permit with conditions or deny the permit. The permit does not relieve the applicant of compliance with other federal or state requirements, including, but not limited to, ORS 97.740 to 97.760, ORS 358.905 to 358.955, and ORS 390.235 to 390.240.

(11) For purposes of this rule, no permit shall be effective without the approval of the state agency or local governing body charged with management of the public land on which the excavation is to be made, and without the approval of the appropriate Indian tribe.

(12) The applicant and all parties defined in ORS 390.235(1)(f) shall be notified of the Director's decision by first class mail.

(13) Disputes among or between applicants and entities with approval authority shall be resolved pursuant to OAR 736-051-0000 through 736-051-0050.

(14) The permit issued by the Department shall be reviewed and may be suspended or revoked if human remains, funerary objects or sacred objects are encountered during an excavation.

Stat. Auth.: ORS 390.235 & ORS 390.240

Stats. Implemented: ORS 390.235

Hist.: PR 1-1995, f. & cert. ef. 1-3-95

OAR 736-051-0090 Process for Applying for an Archaeological Permit on Private Lands

(1) A person may not knowingly and intentionally excavate, injure, destroy or alter an archeological site or object or remove an archeological object from private lands in Oregon unless that activity is authorized by a permit issued pursuant to this rule:

(a) Permits on private lands will not be required for exploratory excavation to determine the presence of an archaeological site;

(b) The provisions of this rule do not apply to a person who unintentionally discovers an archaeological object that has been exposed by the forces of nature and retains the object for personal use, except for sacred objects, human remains, funerary objects or objects of cultural patrimony;

(c) Collection of an arrowhead from the surface of private land is permitted if collection can be accomplished without the use of any tool.

(2)(a) It is strongly recommended that anyone considering a development project on private lands on previously undisturbed ground contact the SHPO and the appropriate Tribe(s) to determine whether archaeological sites and objects are likely to be present in the project area. This contact will reduce the chance that the project will be delayed due to discovery of an archaeological site;

(b) SHPO shall coordinate, along with the governing bodies of the Oregon Tribes and the CIS, joint efforts to create and disseminate informational materials that will be distributed to local governments, federal and state agencies, and permitting authorities on the requirements of ORS Chapters 97, 358 and 390, and these rules.

(3) A person who desires an archaeological permit to excavate or remove objects on private lands pursuant to ORS 358.920(1)(a) and 390.235 must submit a request to the Oregon State Parks and Recreation Director or his or her designee:

(a) The application must be complete and meet the requirements of the public lands rule section OAR 736-051-0080(4). In addition, an application for an archaeological permit on private lands must be accompanied by a copy of the landowner's written permission pursuant to ORS 358.920(5), and a written statement concerning the disposition of any recovered artifacts not covered by ORS 359.920(4)(b);

(b) The The archaeological permit process for private lands is the same as that found in OAR 736-051-0080(6), (7), (8), (9), (10), (12) and (14) relating to permits on public lands. The SHPO must be satisfied that reasonable concerns of the appropriate Tribe(s) have been addressed by the applicant.

(4) Upon receipt of an application, the Director or his or her designee may contact the landowner to verify the written permission, location and activities of the proposed activity.

(5) Unless authorized by ORS 97.750, an archaeological permit on private lands shall not be issued if the activity includes burials, funerary objects, or human remains.

(6) If an applicant disputes the permit conditions, or the Director's denial of a permit, the dispute shall be resolved pursuant to OAR 736-051-0000 through 736-051-0050.

Stat. Auth.: ORS 390.235 & ORS 390.240
Stats. Implemented: ORS 390.235
Hist.: PR 1-1995, f. & cert. ef. 1-3-95