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**NOTICE OF PROPOSED RULEMAKING**  
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 736  
PARKS AND RECREATION DEPARTMENT

**FILED**

08/30/2022 11:20 AM  
ARCHIVES DIVISION  
SECRETARY OF STATE

FILING CAPTION: Issuance of archaeological permit process amendments, changes to permit process on public lands

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 09/30/2022 5:00 PM

*The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.*

*A public rulemaking hearing may be requested in writing by 10 or more people, or by a group with 10 or more members, within 21 days following the publication of the Notice of Proposed Rulemaking in the Oregon Bulletin or 28 days from the date the Notice was sent to people on the agency mailing list, whichever is later. If sufficient hearing requests are received, the notice of the date and time of the rulemaking hearing must be published in the Oregon Bulletin at least 14 days before the hearing.*

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NEED FOR THE RULE(S)

Public comment on proposed changes to (OAR) 736-051-0000 to 0090 were open from May 1 to July 1, 2022. A comment received during that time, identified a need to address issuance of a permit for the newly appointed State Physical Anthropologist within the Legislative Commission on Indian Services (LCIS). The position was not in place when proposed rule amendments were initially developed. Based on that comment, 736-051-0080 reflects proposed changes to allow permits to be issued to the State Physical Anthropologist to carryout activities regulated under ORS 97.740 through 97.750 and ORS 358.905 through 390.920.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

ORS 97.750, ORS 192.345, ORS 358.905, ORS 390.235

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

The proposed rule revision does not predict an adverse impact on any particular racial group. Moreover, these revisions also seek to improve tribal considerations and better incorporate tribal concerns.

FISCAL AND ECONOMIC IMPACT:

Proposed amendments to OAR 736-051-0080 are not expected to have fiscal or economic impact.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

1) LCIS and OPRD would likely be the agencies most affected by the proposed amendments. It is not likely that local

governments or members of the public would be economically affected by this rule.

2) The proposed rule revision involves a wide spectrum of Oregon businesses that need archaeology clearance for projects but adverse impacts are predicted to be very small, if any. The impact of service and permit costs would be minimal.

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DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Small businesses were consulted as a part of the original rulemaking to consider broader changes to 736-051.

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WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

A RAC was consulted on the larger proposed amendments to 736-051. This additional rulemaking is reflective of that work and seeks additional comments on proposed changes based on public comment.

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AMEND: 736-051-0080

RULE SUMMARY: The rule amendments more clearly outline the process and required information for application of an archaeological permit. Amendments include list of past and present permits, tribes engaged, contingency plans, and research design. The amendments require more specific information, contact information and review process information. The rule adds a process to authorize the state physical anthropologist to obtain a permit.

CHANGES TO RULE:

736-051-0080

Archaeological Permits: 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 director.¶¶~~

~~(2) The director may issue an archaeological permit to:¶¶~~

~~(a) A person conducting an excavation, examination or gathering of archaeological objects such material 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 objects, sacred objects, and objects of cultural patrimony;¶¶~~

~~(a) Relate both the sensitive nature and imminent threat to human remains, burials, funerary objects, sacred objects, and objects of cultural patrimony;¶¶~~

~~(b) Receive written or oral permission from the most appropriate Indian tribe to clearly understand the location of the proposed work, prior to any potential recovery or collection;¶¶~~

~~(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 and receives written or oral approval for access prior to any potential recovery or collection; and¶¶~~

~~(d) Notify SHPO, and Oregon State Police of the rationale behind the proposed research, giving the theoretical orientation, justification for problem selection, log of any recovery or collection under a permit issued under this~~

section.¶

- (4) An applicand 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 t for an archaeological permit pursuant to ORS 390.235 must submit an application to the director. The application must be complete and include:¶
- (a) A map, such as a USGS 7.5 minute topographic at 1:24,000 scale, that enables the landowner or land managing agency;¶
- (e) A copy of the notice required under ORS 358.950(1), if the excavation is associated wi, SHPO, LCIS, and the appropriate Indian tribe(s) to clearly understand the exact location of the 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 rchaeological investigation;¶
- (b) A research design that explicitly develops the rationale behind the archaeological investigation. The research design supports the applicant's understanding of appropriate archaeological methods, the Director or his or her designee shall determine whether public loretical paradigms, analyses, curation, laws, anticipated results, and, 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 l an understanding of the context of place through time. Tribal coordination will assist the applicant in developing research designs, which includes background information from any pertinent publications, gray literature, informants, tribes, ethnographies, historic properties of religious and cultural significance, traditional cultural properties, known archaeological objects and sites, historic documents or National Register bulletins relevant to the objectives of the archaeological investigation and its location. The research design includes appropriate field and 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, lytical methods to achieve any research objectives based on informed expectations, and is part of the terms of an issued permit;¶
- (c) The name and current contact information of 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.;¶
- (d) The state designated or approved alternate curation facility for archaeological objects, field forms, photographs, and other attendant data from 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 theosed archaeological investigation;¶
- (e) A list of any tribes that the applicant engaged in tribal coordination prior to submitting the archaeological permit application;¶
- (f) A statement from the applicant disclosing any prior state or federal archaeological law violations;¶
- (g) A list of all open archaeological permits issued to the applicant still pending;¶
- (h) A list of any outstanding archaeological permits where terms or conditions have not been satisfied in the time allotted from the past ten years;¶
- (i) As applicable, a contingency plan for any unanticipated discoveries of archaeological objects or sites during any stage of an archaeological site in question is associated with a prehistoric or historic native Indian culture, the applicant shall consult with the investigation or related project or undertaking.¶
- (5) Upon receipt of a complete application, the director shall determine whether the application involves public lands.¶
- (6) After a request is made from SHPO, LCIS will provide the most 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 (s) with approval authority over the archaeological permit application. In the event LCIS is not able to respond within 48 hours, SHPO will designate the most appropriate Indian tribe(s) based on past permits issued in the vicinity.

(7) The SHPO shall provide the complete application to entities with approval authority for review.

(a) Entities with approval authority have 30 calendar days from the date SHPO sends the application to respond with their approval, approval with conditions, or objection. No response within 30-days means no conditions or objections were submitted to SHPO. SHPO shall send copies of all responses to the applicant.

(b) Before issuing a permit, SHPO shall review any conditions to be added to the issued permit, or objections received from entities with the applicant and the entity, they shall notify the SHPO in approval authority.

(c) At the request of any tribe writing of the resolution. If the approval authority over a permit applicant and the entity cannot resolve the objection or request for condition with the applicant, the applicant shall continue to coordinate with them during 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, curation, inadvertent discovery contingency plans during the archaeological investigations, of section (8) of this rule, any person or entity on any associated project design or development.

(8) Any person who discovered an archaeological or historic site or burial during construction object, site, human remains, burial, historic cemetery, funerary object, sacred object, or object of cultural patrimony, may request an expedited consultation process. The request for 48-hour permit review. The director may be granted whenever the Director or his or her designee determines the request upon a determination, in consultation with the parties listed in subsection (8)(a) of this rule, determines entities with approval authority, 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 permit review period of this rule will result in an undue risk to public health, life or safety, or an undue threat to the archaeological object, site, human remains, burial, funerary object, sacred object, or object of cultural patrimony. 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) Examples of creating undue threat to an archaeological object, site, human remains, burial, historic cemetery, funerary object, sacred object, or object of cultural patrimony include: erosion, susceptibility to theft, prolonged exposure to the elements, and proposed construction related activities.

(a) If the director determines that an expedited review request 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 to send out to entities with approval authority for review.

(B) During the following 48 hours (excluding Saturday, Sunday, and any legal state, federal, or tribal holidays), the Director or his or her designee shall consult by telephone and/or facsimile with the entities with approval authority may respond to the permit application with their approval, approval with conditions, or entities described in section (8) of this rule. If the head of the land managing agency or the tribal governing body of object. No response within 48 hours means the entity with approval authority did not condition or object. If any entity with the appropriate Indian tribal authority 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 when the permit is issued.

(e) For the 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 including burials, human remains, funerary objects, sacred objects, or any objects of cultural patrimony, expedited 48-hour permit reviews are only available if 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 prior compliance review by appropriate Indian tribe(s), and SHPO has

occurred.¶

(c) The summary abatement of unsafe or dangerous condition where the 48-hour review delay constitutes an imminent and serious threat to public safety shall be allowed before the permit is issued with prior notification to the director and the tribes identified by LCIS.¶

~~(109)~~ After considering the application, maps, research design, ~~vita and all comments,~~ and recommendations for conditions, or objections received by entities with approval authority during consultation, the ~~D~~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~~61, and ~~ORS 390.235 to 390.240~~.¶

~~(110)~~ 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 excav~~ation~~. The applicant and entities with approval authority will receive a copy of the approved signed permit from the director.¶

(11) All work under a permit issued by the director shall be suspended in the event human remains, funerary objects, sacred objects, or objects of cultural patrimony are encountered during the investigation, 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 including post-fieldwork curation processing. For such discoveries, the permit holder must contact the LCIS, appropriate Indian tribe(s), Oregon State Police, and SHPO.¶

(12) The director, in coordination with appropriate Indian tribe(s), may amend an archaeological permit where:¶

(a) An applicant may request one amendment to an archaeological permit.¶

(b) An amendment request may address anything in an issued permit, with the exception ~~by~~ of first class mail.¶

~~(13) Disputed~~ methods. ¶

~~(c) An amendments request 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 obj~~ddressing permit deadlines and deliverables may be extended for no more than a one-year period. ¶

(d) An amendment requesting a change in responsibility over an issued permit must be signed by both the current and proposed applicant. If either the proposed or current applicant is not available, the amendment requestor must contact the director to determine if a new permit is needed.¶

(e) The directs or sacred objects are encountered during an excavation will send amendment requests for a 10-day review to entities with approval authority.

Statutory/Other Authority: ORS 390.235, 390.240

Statutes/Other Implemented: ORS 390.235