



Frequently Asked Questions:

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Private-Property Owner Concerns Regarding Cultural and Biological Resources

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PRIVATE-PROPERTY OWNER CONCERNS REGARDING CULTURAL AND BIOLOGICAL RESOURCES FAQs

Idaho Power Company has prepared the following Frequently Asked Questions (FAQs) to address concerns raised by landowners as we seek permission to conduct resource surveys on privately owned lands. While we have tried to be as thorough and accurate as possible, some of the existing regulations are not clear. If you still have questions after you have read the FAQs, we encourage you to talk to the appropriate state and federal agencies.

Cultural Resources

1. What is a cultural resource?

A cultural resource is any evidence of past human activity, including archaeological, traditional, and built environment resources, including but not necessarily limited to buildings, structures, objects, districts, and sites. This includes everything from a single obsidian flake or discarded rusty can up to an entire historic neighborhood or the length of the Oregon Trail. Generally speaking, a cultural resource will be protected by federal or state law when it is significant, 50 years old or older, and in relatively good condition. Not all cultural resources are considered important—see Question 5 below. Cultural resources that are determined to be important are often referred to as “historic properties.”

Some cultural resources protected by federal and state law might not involve structures or artifacts, such as a mountain peak that plays a significant role in a Tribal creation story.

2. What is a historical resource?

A historical resource is a cultural resource from a historic period (an era of history having some distinctive feature), such as the Oregon Trail.

3. What state and federal agencies have authority over cultural and historic resources in Oregon and Idaho?

According to the National Historic Preservation Act (NHPA), all federal agencies are supposed to take into account potential effects to cultural resources from their actions. Each state also has a State Historic Preservation Office (SHPO), that is tasked with ensuring NHPA compliance. The Oregon and Idaho agencies with jurisdiction over cultural resource issues are as follows:

- Oregon Parks and Recreation Department, Heritage Program, State Historic Preservation Office, 725 Summer St NE, Ste C, Salem, OR 97301 or www.oregonheritage.org, (503) 986-0671. Idaho State Historical Society, Idaho State Historical Preservation Office, 210 Main Street, Boise, Idaho, 83702 or www.history.idaho.gov, (208) 334-3861.

Both Idaho and Oregon have laws protecting Native American burials on state and private land. Idaho's laws, (Protection of Graves (Idaho Code §27-501 *et seq.*) and State Historic Society (Idaho Code §67-4111, *et seq.*) <http://legislature.idaho.gov/idstat/TOC/IDStatutesTOC.htm>), prevent the willful disturbance of a cairn or grave or any associated artifacts and human remains except in authorized ways. Public display or selling of funerary object and human remains is also prohibited. The cost of the reinterment of accidentally disturbed burials is partially born by the Idaho State Historical Society. If a burial is to be disturbed, consultation with the Idaho State Historical Society and appropriate tribes is required, and remains will be re-interred. Disturbing a burial is considered a misdemeanor; however, in some cases removal of human remains for sale is a felony, and includes fines up to \$10,000 and prison sentences up to five years. Idaho also has a law protecting caves and caverns from damage, which includes archaeological resources found in caves (§18-7035). Violation of this law is a misdemeanor.

Oregon's law (Oregon Revised Statutes (ORS) 97.740-97.760 [<http://www.leg.state.or.us/ors/097.html>]) is similar to Idaho's except that any discovered remains suspected to be native Indian shall be reported to the state police, the State Historic Preservation Officer, and the appropriate Indian tribe as determined by the Commission on Indian Services. Any person who disturbs native Indian remains or a funerary object is solely responsible for the cost of reinterment, and it must be done under the supervision of an Indian tribe. Violations of the law are usually handled in civil court.

Oregon also has a law (ORS 358.905 through 358.961 [<http://www.leg.state.or.us/ors/358.html>]) which protects sites on, or eligible for listing on, the National Register of Historic Places (NRHP) or which have been determined significant in writing by an Indian tribe on state and private land. The law states that a person cannot knowingly "excavate, injure, destroy or alter an archaeological site or object or remove an archaeological object located on public or private lands in Oregon unless that activity is authorized by a permit issued under ORS 390.235." ORS 390.235 states that permits will be issued by the State Parks and Recreation Department, and only to persons gathering information for the benefit of a recognized scientific or educational institution with a view to promoting the knowledge of archaeology or anthropology, or to a qualified archaeologist. Violation of the law is a Class B misdemeanor. Consultation with the appropriate tribe, determined through consultation with the Oregon Commission of Indian Affairs, is also required for excavation of prehistoric or historic Native American sites.

4. *What authority does a federal agency (e.g., Bureau of Land Management) have to require Idaho Power to conduct a cultural and historic resource survey on private property?*

The authority to require Idaho Power to conduct a cultural and historic resource survey on private property comes from both the National Historic Preservation Act and the National Environmental Policy Act (NEPA). These laws require that a federal agency take into account the effects of their "undertakings" on cultural resources. In this case, the federal agencies are permitting the overall construction of Idaho Power's transmission line and some, such as the Bureau of Land Management (BLM), are assigning rights-of-way. These activities are the federal agency undertaking. The courts have interpreted this to mean that federal agencies have the right

to require the inventory, assessment, and mitigation of impacts to cultural resources as required by law, even if the project is on private property.

5. *What is the National Register and how is something added?*

The National Register of Historic Places (NRHP) is a list of cultural and historic resources that are deemed important in our Nation's history and prehistory. The list is maintained by the Keeper of the National Register (Keeper), a department within the National Park Service. Examples of listed sites in Oregon include: the Oregon Trail; the Baker Natatorium; the Sumpter Valley Dredge; the Oregon Short Line Depot in Ontario; the Vale Grand Opera House; the Administration Building, Eastern Oregon State College; the Pendleton Post Office and Court House; and the Heppner Hotel. Examples of listed sites in Owyhee County, Idaho include: the Camas and Pole Creeks Archeological District; Our Lady Queen of Heaven Church near Oreana; and Bernard's Ferry near Murphy.

To be listed on the NRHP, a cultural or historic resource needs to have integrity (to be in good enough shape to reflect its importance) and meet one of four criteria: A) association with a significant historic event; B) association with a significant historic person; C) have artistic, architectural, or engineering value or be a part of a larger, significant grouping; and, D) have data or have the potential to have data important in archaeological or historic research. Discovered resources go through an evaluation process to determine if they meet one or more of the criteria and if they have sufficient integrity. Federal agencies are tasked with this process, but a site or building can be nominated by anyone. The information on a site determination is reviewed by SHPO. If an agency and a SHPO don't agree, then a third party, either the Advisory Council on Historic Preservation or the Keeper review the information and make a final determination. If a site is determined eligible for the NRHP, then it can be listed by completing a nomination form and submitting that to the Keeper. Most agencies don't take this final step, because the process can be time consuming and expensive and a site eligible for nomination is afforded the same protection as a site that is actually listed.

6. *If Idaho Power finds a cultural or historical resource on my property, does this give others the right to come onto my property?*

The presence of a cultural resource does not automatically give anyone the right to come onto someone's property.

7. *What rights do the tribes have if a Native American cultural or historical resource is found on my property?*

In Oregon, tribes must be consulted with prior to excavation of a prehistoric site on private property. On private property in both Idaho and Oregon, tribes must be consulted with on the reburial of any discovered Native American human remains and associated funerary goods. In Oregon, the tribe also has the right to direct the reburial.

8. *If Idaho Power finds a cultural or historical resource on my property, what are my obligations as a land owner? Do I have to do anything to protect the resource? How could future actions I may propose on my property be affected? Could the discovery limit my use of my land?*

Whether and to what extent a cultural or historical resource found on private land is protected by federal or state law depends on the specific facts (e.g., the type of artifact or resource identified, the location of the resources, etc.). Idaho Power encourages landowners with specific questions about this issue to contact the state agencies listed in Question 3 above.

As a general matter, federal law does not impose protections or limits on disposal of cultural resources on private property, so long as there is no Federal involvement (e.g., federal money, license, or other activity). Under state and local laws, however, cultural resources identified on private land may be protected, which may require a landowner to take certain steps in order to comply with those laws. For example, Oregon law prohibits any impacts to certain cultural resources without a permit (ORS 358.905 – 358.961). In addition, Idaho and Oregon both have laws protecting Native American burials, and those protections do extend to burials located on private property.

9. *Who will Idaho Power notify of its finding? Specific agencies and notification processes? Can you keep the information confidential?*

The lead agency, in this case the BLM, will be notified of any findings. Other land management agencies will be informed of sites discovered on lands they manage. The lead agency will then consult with any other applicable agency, such as the Forest Service about sites on lands they manage, and the appropriate SHPO over eligibility and treatment issues. Land management agencies maintain records for the sites they manage, and the SHPOs maintain files with site records and inventory and data recovery reports for the entire state, including records for sites on private property. Most of this information is confidential and exempt from the Freedom of Information Act. Access to the information is provided only to “qualified researchers,” or archaeologists and historians that meet requirements outlined by the Secretary of the Interior. These requirements include an advanced degree (Master’s or PhD) in anthropology, archaeology, or related discipline, and a minimum level of experience in the field. They must also have a legitimate research issue to access the information.

10. *How are the data treated?*

In both Idaho and Oregon, data in the form of site records, reports, etc. are stored in SHPO repositories and with appropriate land managing agencies.

If data recovery is required, Idaho Power’s consultants may conduct excavations in which artifacts are collected. The consultant will retain the artifacts as long as needed to complete the

analysis and report. In Oregon, artifacts are required to be turned over to a SHPO designated repository. Idaho Power will pay all associated fees with accession and permanent curation of the artifacts.

Most artifacts recovered from private property in Idaho (unless associated with a burial) belong to the land owner. After analysis (which can take several years to complete), the artifacts will be returned. The landowner, however, can choose to donate them to a university or the Idaho State Historical Society. Artifacts from public (state and federal) lands in the Idaho portion of this project would be stored in a SHPO repository in Boise. In both cases, Idaho Power will be responsible for paying fees associated with the accession and permanent curation of the collections.

Most site specific information is exempt from the Freedom of Information Act, and is only made available to “qualified researchers,” or archaeologists and historians that meet requirements outlined by the Secretary of the Interior. These requirements include an advanced degree (Master’s or PhD) in anthropology, archaeology, or related discipline, and a minimum level of experience in the field. They must also have a legitimate research issue to access the information. Although a qualified researcher can access site information, they cannot automatically access the site without land owner permission.

11. As a project proponent, if Idaho Power finds a cultural or historical resource on my land, can you impact it? If so, will Idaho Power be required to do mitigation, and what is that?

Whether Idaho Power’s project can impact a particular cultural resource will depend on the type of resource and other factors. For example, if the cultural resource is deemed not eligible to the National Register, then it can be impacted (affected) without mitigation. However, if the site *is* determined to be eligible for listing on the NRHP, then some sort of mitigation is required. The mitigation is based on what makes the site eligible for the NRHP. For example, if a site is important for its archaeological value (Criterion D) then mitigation is usually controlled excavation designed to recover the important information. If the site is eligible for its engineering or artistic value (Criterion C) then detailed, large-format photography and engineering drawings are made (this process is often referred to as HABS/HAER, or the Historic American Building Survey/Historic American Engineering Record, and copies of the documentation are also stored in the National Archives). If the site is eligible for its association with an important event or person (Criterion A or B), then mitigation might take the form of, a pamphlet, or book written for the general public. For some sites, such as the Oregon Trail, the setting of the trail, or the wild and undeveloped nature of the land around the trail, is considered important, and mitigation might take the form of locating transmission line structures to make them less noticeable. Mitigation plans are developed through consultation with the appropriate SHPO office and any interested parties that have an interest or stake in the property. This includes groups and individuals such as Native American tribes, the Oregon-California Trails Association, or any interested land owner.

Biological Resources

1. *What is a biological resource?*

For purposes of this project, biological resources include plant and wildlife species that have the potential to occur, or do occur, within the proposed right-of-way or easement.

2. *What types of surveys will Idaho Power conduct?*

Surveys will tend to focus on sensitive species; these are species that are listed by federal agencies and/or the state, are protected by existing regulations (e.g., Bald and Golden Eagle Protection Act), or are identified in an agency resource or land management plan. Surveys will be conducted by walking and reviewing the areas with the potential to support the targeted species. Plant and wildlife species that are observed during the surveys will be noted (biologists will note the number of individuals, relative health, what the animal is doing, etc.) and mapped and the ability of the area to support potentially occurring species will also be noted. Aerial surveys may also be conducted for certain species. For example, helicopters would be used to identify greater sage-grouse leks where appropriate. Botanists and wildlife biologists may access survey areas using all-terrain vehicles or pick-up trucks.

Surveys will primarily be conducted 250-feet on either side of the proposed centerline of the transmission line, 50-feet on either side of the proposed centerline of a road, and 250-feet around the perimeter of a proposed staging or fly yard (the proposed yard will also be surveyed). Some agencies require that project-related facilities and activities be located specific distances from certain species and/or their habitats; in these cases, surveys may extend beyond the distances described above. Examples include requirements to avoid Washington ground squirrel burrows or minimum distances to golden eagle nests.

3. *What species do you expect to find and how will you survey for them?*

Idaho Power is currently working with the Bureau of Land Management, U.S. Forest Service, Oregon Department of Fish and Wildlife, U.S. Fish and Wildlife Service; and National Oceanic and Atmospheric Administration Fisheries Division to identify (1) potentially occurring species of concern within the survey areas; (2) where they could potentially occur along the proposed and alternative routes; and (3) survey protocols that identify specific survey methods, when surveys should be conducted, and what data should be collected. At this time, we do not anticipate any surveys that would result in ground disturbance or access beyond short-term to parcels of land.

Because of the wide variety of plant communities and land uses throughout the project area, there are numerous plant and wildlife species that may occur within the project area. Species-specific surveys will not be conducted for every potentially occurring species; however, all observed species will be recorded and mapped. Potentially occurring species of concern are identified at:

Bureau of Land Management - Oregon:

www.blm.gov/or/districts/vale/plans/valermph.php

Bureau of Land Management - Idaho:

www.blm.gov/id/st/en/fo/owyhee/planning0/planning.html

U.S. Forest Service:

www.fs.fed.us/r6/uma/blue_mtn_planrevision/documents.shtml

U.S. Fish and Wildlife Service:

www.fws.gov/oregonfwo/species/

National Oceanic and Atmospheric Administration Fisheries Division:

www.nwr.noaa.gov/Species-Lists.cfm

Oregon Department of Agriculture

www.oregon.gov/ODA/PLANT/CONSERVATION/index.shtml

Oregon Department of Fish and Wildlife

www.dfw.state.or.us/wildlife/diversity/species/sensitive_species.asp

Idaho Department of Fish and Game

fishandgame.idaho.gov/cdc/cwcs_pdf/appendix%20b.pdf

General Oregon Information

orbic.pdx.edu/documents/2010-rte-book.pdf

4. What state and federal agencies have authority over biological resources in Oregon and Idaho?

U.S. Fish and Wildlife Service (USFWS) and National Oceanic and Atmospheric Administration (NOAA) Fisheries Division

The federal Endangered Species Act (ESA) protects species whose survival is recognized (listed) as endangered or threatened. The NOAA Fisheries Division and the USFWS share responsibility for implementing ESA requirements. NOAA Fisheries has jurisdiction to implement ESA requirements for anadromous (salmonid) species that migrate from the ocean to freshwater for

spawning and rearing. The USFWS has the same jurisdiction with respect to freshwater species, plants, and animals. Authority under the ESA includes listing decisions, designating critical habitat, developing recovery plans, and regulating “take” of a listed species. A *take* means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct” 16 U.S.C. 1532(19).

Bureau of Land Management (BLM)

It is the BLM’s policy to comply with the following stipulations:

- Conserve federally listed and proposed threatened or endangered species and the habitats on which they depend.
- Ensure that actions requiring authorization or approval by the BLM are consistent with the conservation needs of special status species (SSS) and do not contribute to the need to list any SSS, either under provisions of the ESA or other provisions of BLM’s policy.

U.S. Forest Service (USFS)

Similar to the BLM, the USFS identifies special status species (SSS) for lands they manage, ensures actions subject to their approval do not lead to the listing of any SSS, or result in the decline of a species protected by the Endangered Species Act.

Oregon Department of Agriculture (ODA)

Makes sensitive plant species determinations (ORS 564.100). ODA is also charged with implementing Oregon endangered species act with respect to plant species (ORS 469.171 – 469.192).

Oregon Department of Fish and Wildlife (ODFW)

The mission of the ODFW is to protect and enhance Oregon’s fish and wildlife and their habitats for use and enjoyment by present and future generations. The department is charged by statute (ORS 496.012) to manage the state’s wildlife species to prevent serious depletion of any indigenous species, and to provide the optimum recreational and aesthetic benefits for present and future generations of Oregon. ODFW is charged with implementing Oregon’s endangered species act with respect to fish and wildlife species (ORS 469.171 – 469.192).

Idaho Department of Fish and Game (IDFG)

The IDFG does regulate game and non-game species as allowed per the legislature. However, they generally do not have regulatory authority over sensitive species that occur on private lands. The department does act in an advisory nature to county and municipal governments.

5. If Idaho Power finds a biological resource on my property, does this give others the right to come onto my property?

Identification of a biological resource does not convey any rights to others to access your property.

6. If Idaho Power finds biological resources on my property, what are my obligations as a land owner? Do I have to do anything to protect the resource? How could future actions I may propose on my property be affected? Could the discovery limit my use of my land? What rights do the regulatory agencies have if you find a sensitive species on my property?

Whether and to what extent a biological resource found on private land is protected by federal or state law depends on the specific facts (e.g., the exact species identified.). Idaho Power encourages landowners with specific questions about this issue to contact the state agencies listed in Question 4 above.

As a general matter, Section 9 of the federal Endangered Species Act (ESA) makes it unlawful for any person to *take* a federally threatened or endangered fish or animal without authorization. Plant species are not subject to *take* prohibitions or penalties. A *take* means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct” 16 U.S.C. 1532(19). If federally listed wildlife species are identified on your property, you are prohibited from “taking” them. However, any ESA-listed species on private property is already protected by the “take” prohibition, regardless of whether the landowner is aware of it. The fact that Idaho Power or anyone else conducts a survey identifying the presence of a protected species does not change the application of the law. In other words, ignorance of the species’ presence does not make it okay to “take” the species without authorization from USFWS and/or NOAA Fisheries Division.

Section 7 of the federal ESA requires federal agencies (in this case the BLM and USFS) to ensure that any action they undertake will not jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat that has been designated for a listed species. Federal agencies comply with this directive by formally consulting with the appropriate Service (NOAA Fisheries or USFWS). The consultation process results in a “biological opinion” or “bi-op” which describes the probable impact on a listed species and may include measures to reduce adverse impacts. Because Idaho Power has applied for authorizations from the BLM and USFS for the Project, the decision to issue an authorization is a federal action and does trigger consultation with the USFWS and/or NOAA Fisheries. The result of the consultation may result in restrictions on federal lands and requests that Idaho Power implement protection measures on private lands. ***The permitting process would not require that an individual landowner implement protection measures or otherwise restrict land use.*** However, Idaho Power may negotiate these on an individual basis with landowners where appropriate. Mitigation/protection measures do not always have to be on the same property as the impact.

Whether state laws protecting biological resources extend to private lands is extremely species-specific. While Oregon’s ESA does not directly require landowners to take particular actions to protect threatened or endangered species on private land, some species or circumstances may result in biological resource protection measures that extend to private land. The IDFG may make recommendations to county and municipal governments that may be included, at the permitting entities (BLM’s) discretion, in conditional use permits or other authorizations. IDFG

does not directly regulate activities on private lands with the exception of game (hunting) laws (which apply regardless of ownership).

7. *Who will Idaho Power notify of its finding? Specific agencies and notification processes? Can you keep the information confidential?*

The collected information will be provided to the BLM for its use in preparing the Environmental Impact Statement. The information will also be provided to the Oregon Department of Energy – Energy Facility Siting Council as part of Idaho Power’s Application for Site Certificate. All collected information will be available to the public with a few exceptions. Some agencies may restrict the release of sensitive species data (e.g., location and number of individuals) to the general public.

Other agencies are participating in the permitting processes and it is expected that they will also have access to the data. These may include IDFG, ODFW, USFWS, and county and municipal governments.

Idaho Power is not able keep the information confidential because Idaho Power is required to submit the information to the appropriate agencies to support the permitting processes.