

AB 52

The Local Government Lead Agency Perspective



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Tribal Role in CEQA



- AB52 clarifies the role of Tribes in the CEQA process
 - Tribes are not:
 - ✦ Responsible Agencies
 - ✦ Trustee Agencies
 - ✦ “interested parties”
 - In the CEQA context Tribes are best viewed as co-equal governmental entities

AB52 Recognizes:



- ▶ “...tribal sovereignty and the unique relationship of California local governments and public agencies with California Native American tribal governments...while respecting the interests and roles of project proponents....” (AB52 Section 1(b).)
- ▶ “[T]hat California Native American tribes may have expertise with regard to tribal history and practices”
- ▶ The importance of the incorporation of tribal knowledge about land and TCRs at issue into environmental analysis
- ▶ That a substantial adverse change to a TCR is a significant effect on the environment.

Recognition of Tribal Governmental Status through:



- ▶ Establishing consultation process
- ▶ Respecting interests of tribes and project proponents
- ▶ Respecting confidentiality regarding cultural resources as appropriate
- ▶ Early identification of resources and potential mitigation
 - ▶ Allow for design of project (or alternatives?) to account for cultural resources and related development constraints
- ▶ Reduce delay and avoid conflicts resulting from CEQA process

New CEQA Resource Category: Tribal Cultural Resources



- **Tribal Cultural Resources (TCRs) are either:**
 - Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a tribe that are either:
 - ✦ Included or determined to be eligible for inclusion in the California Register of Historical Resources
 - ✦ Included in a local register of historical resources;
- **OR:**
 - A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1 – taking into account the significance of the resource to a California Native American tribe

Cultural Landscapes



- If meeting the criteria of a TCR, a cultural landscape is a resource “to the extent that the landscape is geographically defined in terms of the size and scope of the landscape” (PRC Sec. 21074(b).)
- Historical and archaeological resources can also be TCRs

Consultation Process



For Projects with NOP or notice of ND/MND filed on or after July 1, 2015.

- Step 1: A tribe files written request for formal notification of proposed projects in its traditionally and culturally affiliated geographic area consultation with potential lead agencies with jurisdiction over that geographic area.
- **NOTE**: Lead agencies should be on the lookout for these requests, which could come in at any time but particularly after the NAHC provides Tribes with the list of potential agencies (on or before July 1, 2016)

Consultation Process



- Step 2: Lead agency provides tribe(s) with notice of a proposed projects within 14 days after:
 - A project application is deemed complete; or,
 - Deciding to undertake the project, when it is the lead agency's own project
- **NOTE: Notice must include:**
 - brief project description
 - the project location
 - lead agency contact

Consultation Process



- **Step 3:** Tribe must respond to lead agency' s notice within 30 days and:
 - Request consultation
 - Designate the tribe' s lead contact person.
 - ✦ If not designated, or if multiple persons are designated, the lead agency should coordinate with the person on the NAHC contact list
- **Step 4:** If tribe requests consultation, the lead agency must initiate consultation within 30 days.

Consultation Process



- **Step 5:** Consultation must be undertaken in good faith by all parties.
 - **Confidentiality** principles carry throughout the process
 - Must be conducted in mutually respectful manner
 - May be an iterative process
 - Project applicants and consultants *may* participate in consultation (Pub. Res. Code Sec. 21080.3.2(d).)
 - ✦ A topic for initial conversation between the lead agency and the tribe?
- **Goals:**
 - Address potential impacts through:
 - ✦ Avoidance by project design?
 - ✦ Mitigation?

Consultation Process



Step 5. Continued:

- Note: consider provisions in any contracts with CEQA consultants including maintaining confidentiality, and preparing confidential appendix (if needed).
- Note: Lead agency should have a specific conversation with the tribe regarding what information, if any, can be disclosed in the CEQA document
 - Section 21082.3(c)(1) requires tribal consent to disclose to be in writing.

Consultation Process



Step 6 – Conclusion of Consultation:

- Consultation concludes when either:
 - Agreement is reached regarding avoidance of mitigation of any significant effect on a TCR; or,
 - When a party concludes in good faith, after reasonable effort, that agreement cannot be reached.
- Query: Is a project proponent that participates in the consultation considered a party that can conclude agreement cannot be reached?

Consultation Process



Step 7: Implementation of the Consultation Results

- Lead agency (staff) must recommend inclusion of any mitigation measures agreed upon in the consultation
 - ✦ Should be included in mitigation, monitoring and reporting program and made fully enforceable (like all other required mitigation)

- If there may be a significant impact on a TCR, CEQA document must discuss:
 - ✦ Whether the project has an impact on an identified TCR; and,
 - ✦ Whether there are feasible alternatives or mitigation measures that avoid or substantially lessen the impact on the identified TCR.

Consultation Process



Step 8: Certification of EIR / adoption of Neg Dec or MND:

- Lead agency can certify EIR (or adopt ND/MND??) for a project with a significant impact on a TCR only if:
 - ✦ Consultation between the tribe and the lead agency has occurred and has concluded (by agreement, or good faith determination that agreement cannot be reached); OR,
 - ✦ Consultation was requested but tribe fails to provide comments or otherwise fails to engage in consultation process; OR,
 - ✦ Lead agency sent the initial notice and tribe does not request consultation within 30 days.

NOTE: Even if there is no consultation, or consultation is concluded without agreement, the lead agency must avoid damaging an TCR.

Consultation Process



Step 8: continued:

NOTE: Lead agency must consider certain mitigations that could avoid or minimize adverse effects (PRC 21084.3):

- ✦ Avoidance and preservation in place
- ✦ Treating TCR with culturally appropriate dignity and:
 - Protecting the cultural character and integrity of the resource
 - Protecting the traditional use of the resource
 - Protecting the confidentiality of the resource
- ✦ Permanent conservation easements or other real property interests
- ✦ Protecting the resource

Consultation Process



- **Step 9: Decision on the Project:**
 - Findings
 - Project decision
 - Conditions of approval

Conclusion



- Lead agencies should be on the lookout for letters from tribes requesting notification of projects
- Build consultation into the CEQA and project review/formulation processes
- Address confidentiality issues with tribe, consultants, and project applicant