



November 30, 2016

VIA EMAIL: consultation@bia.gov
Office of the Assistant Secretary- Indian Affairs
Office of Regulatory Affairs & Collaborative Action
1849 C Street, NW
MS 3642
Washington, DC 20240.

RE: Federal Consultation with Tribes Regarding Infrastructure Decision-Making

Honorable Assistant Secretary,

This letter is to provide comments on behalf of the Dry Creek Rancheria, Band of Pomo Indians (“Tribe”) in response to the Fall 2016 Framing Paper and government-to-government consultations that took place in October 2016. I wish to begin our comments by pointing out that it is shocking that no tribal consultations took place in California, which is home to more federally-recognized Indian tribes than any other state. Many California tribes are unable to travel to other parts of the county to participate in such consultations, either due to the amount of time away from tribal duties, or the cost is too great. It is shameful that the BIA believes it conducted consultations with “all” federally-recognized tribes, on the actual topic of Federal Consultation, without bothering to hold a consultation session in California.

That important note aside, we provide the following comments to the Framing Paper which asks for input into two broad categories:

- (1) within the existing statutory framework, what should the federal government do to better ensure meaningful tribal input into infrastructure-related reviews and decisions and the protection of tribal lands, resources, and treaty rights; and
- (2) should new legislation be proposed to Congress to alter that statutory framework and promote those goals.

We believe that tribal governments in California have worked to establish the strongest consultation laws in the Country with regard to planning and permitting local and state projects that may affect off-reservation tribal cultural resources and places. While the laws are not perfect, and will need improvement over time, the passage of Senate Bill 18 in 2003 and Assembly Bill 52 in 2015 give tribal governments a voice in the state and local planning process

that should be replicated at the federal level in the National Environmental Policy Act and the National Historic Preservation Act.

The Tribe asserts that while there is an existing framework for consultation with tribal governments to give input into infrastructure-related reviews and decisions, federal agencies do not appear to comply with the spirit of the laws and regulations that are intended to protect tribal cultural places, features and objects. New legislation could be pursued to amend the National Historic Preservation Act to specifically tailor the statute to encourage and require early tribal consultation and also provide authority for tribal representatives to be viewed as experts with knowledge that can be useful in identifying tribal cultural places so that they can be avoided or if that is not feasible, that culturally-appropriate mitigation measures are incorporated into the project. Mitigation measures could, and often should, include enforceable mitigation agreements that respect tribal cultural values.

Unfortunately, we understand that with the new Trump Administration, and republican control of both houses of Congress, that such legislation is unlikely. Therefore, at a minimum, we hope that existing guidelines and regulations can be revised to incorporate the spirit of these comments so that costly conflicts over inappropriate development, in the wrong location, such as the Dakota Access Pipeline, can be avoided in the future. The Tribe has been effected by ill-planned federal undertakings by the United States Army Corps of Engineers, such when the Tribe's ancestral lands were flooded by the Warm Springs Dam/Lake Sonoma Project, as more fully described below.

Part 1- Tribal Cultural Sites Impacted by Federal Undertaking- Warm Springs Dam

1. The Dry Creek Rancheria, Band of Pomo Indians has historic and prehistoric ties to the area inundated by the Warm Springs Dam/Lake Sonoma Project

Under the waters of Lake Sonoma, along the course of two valleys, now covered by water, lies the ancestral home of the Dry Creek and Cloverdale Pomo. While the term "Pomo" is widely used today for many Indian groups from Sonoma, Mendocino and Lake Counties as a generic cultural name, the term is of non-Indian origin, and refers to the speakers of seven related languages of the Hokan language family. These seven linguistic groups are known as the Northern, Central, Eastern, Northeastern, Southeastern, Southern and Kashia (Southwestern) Pomo. Southern Pomos were a language group occupying two zones, the coastal redwood Gualala River area and the Lower Russian River drainage.

Southern Pomo living in the Dry Creek Valley have been identified as two tribelets, the Mihilakawna and Makahmo Pomo. The principal village of the Mihilakawna, or Dry Creek Pomo, was located about 2 ½ miles downstream from the project area. One or possibly two other tribelets lived in lower portions of the Dry Creek Valley. At the northern part of the project area lived the Makahmo Pomo of the Cloverdale area.

In the late 1800's, as the non-Indian population of Sonoma County increased, they became intolerant of even the few Indians remaining in the area. In 1895, non-Indian residents petitioned the Secretary of the Interior to remove the local Indians to the Round Valley Reservation in Mendocino County. The petition claimed that the Indians in the Russian River

Valley and near Healdsburg and Geyserville were an unbearable burden; however, there is no record that the Secretary acted on the petition. See, Mihilakawna and Makahmo Pomo, People of Lake Sonoma, ACOE Report.

After their lands were taken, families were decimated by killing, slave labor and disease. The Dry Creek Pomo had survived nearly 60 years of disruption, however anthropologists in the early 1900's were astounded that a great deal of tribal cultural knowledge and patterns of life were retained. These early reports generated support for an appropriation that would be used to acquire lands for the use of "homeless Indians" in the Dry Creek area. In 1915, the seventy-five-acre Dry Creek Rancheria was established near Geyserville and is composed of descendants from Southern Pomo tribelets, including the surviving Mihilakawna. In 1921, the 25-acre parcel Cloverdale Rancheria was established, which includes surviving descendants of the Makahmo.

In 1958 the Dry Creek Rancheria refused to accept the terms of the Rancheria Act which would have terminated the federal supervision of the Tribe and protection of the Rancheria lands. The Tribe was composed of individuals who continued to practice traditional religion and harvest traditional foods and materials – despite being pushed out of their traditional lands. Dry Creek women continued to gather sedge, willow and redbud for basketry, which was a well-developed art form that produced items of beauty that were also functional for gathering, transporting, storing, grinding, cooking, carrying babies, and catching game. The Dry Creek Pomo are well known for highly varied basketry techniques, forms, functions and wide ranges in size. Many of the plant materials needed for this fine art were gathered in the Warm Springs dam project area, as described more fully below.

2. The Lake Sonoma Project Caused Irreparable Harm to Dry Creek Pomo Lands and Important Cultural Resources

In 1962 Congress passed the Flood Control Act of 1962 that authorized the Lake Sonoma Project. The planned construction of the Warm Springs Dam and Lake Sonoma required the disturbance or destruction of 122 areas associated with the history of human use of the project area. A total of 61 sites in the project area were identified as having significant prehistoric Pomo cultural values. Eight known places were locations where important plants were regularly collected by Indian people for traditional uses. Two trails passed through the project area in prehistoric times, and their routes formed the basis for roads that have been constructed since then.

Within the project area, the 61 prehistoric Indian use areas included 10 with house pits, 5 hunting blinds, 2 chert quarries, and eleven locations with petroglyphs. The earliest calculated date of use in the project area is 2770 BC. Although these sites were used since the earliest times, and the Dry Creek Pomo language dialect was still in use when the Warm Springs Dam project was initiated, little could be done to prevent the Lake Sonoma Project from moving forward. The Dry Creek Pomo culture and the tribal ties to the Dry Creek Valley had survived despite great hardship, but the Warm Springs Dam would soon drown these important tribal areas for many generations.

While preparing the Final Environmental Impact Statement (EIS) required for the project, ethnohistorical research revealed published literature relating to the region of the dam site,

including unpublished reports and archival collections in California and Washington, D.C. However, the “Final EIS for the Warm Springs Dam and Lake Sonoma Project” was published in November 1973 with only the most cursory analysis of impacts on cultural and archaeological sites. Instead, recommendations were made to conduct further studies to determine the full scope of impacts to these important cultural places.

After pressure by Dry Creek and other Pomo tribes, an additional report on the findings of this research was completed in October 1974 (Bean & Hirtle, 1974). The study included contacts with present and past inhabitants of the area to obtain information on the location and identification of Native American archaeological and historical resources. The final report was released in July 1975 (Theodoratus, et al., 1975).

a. The Native American Advisory Council

The additional studies prepared by the Army Corps of Engineers and the National Park Service indicated that in addition to Pomo cemeteries, graves and archaeological sites, the area supported important cultural plant species that were still used by Pomo people. Not only were there archaeological sites that showed past Pomo use of the area, but the plants were still being used by Dry Creek Pomos. The sedgebeds were still being tended by Pomo basketweavers. Elder Pomo women – who had revived the fine art of basketry, were passing it on to younger generations. These cultural bearers worked with Kathleen Smith, Dry Creek Pomo, to record traditions and history of the area that would be submerged.

A Native American Advisory Council (“Advisory Council”) was established to document and preserve information about the plants found in the project area. Members of the Advisory Council included: Lucy Smith, JoAnn Dempsey, Kathleen Smith, Laura Somersal, June Dollar, Myrtle Hurtado, Mabel McKay, Alfred Elgin, Grant Smith and Elsie Allen. Many of the Advisory Council members were past and present members of the Dry Creek Rancheria and were integral in documenting, protecting and continuing the important cultural traditions of the Tribe.

The Advisory Council sought to preserve some of the plants of cultural significance by replanting them in another location where they would be available to Native basketweavers. To accomplish this goal, the plants needed to be moved to a place where they could thrive in streamside wetlands, in numbers that would allow the plants to propagate and be in an area accessible to elders and other cultural practitioners. Termed “ethnobotanical mitigation,” a plan was developed to move valuable plant resources that would be destroyed by the rising waters of the proposed Warm Springs dam.

Another role of the Advisory Council was to protect burials of Native American human remains that were located during archaeological surveys conducted by ACOE and the NPS. The process of locating, exhuming and reburying ancestors was a difficult task, but it was made easier through the cooperation of the Advisory Council and on-site tribal monitors to assist as remains were found. June Dollar served as a “Native American Observer” for the Advisory Council and she helped ensure that Native American human remains were treated in a manner that was culturally appropriate. She continued to work in this capacity for the Dry Creek Rancheria until her she passed away several years ago.

A third role of the Advisory Council was to determine the appropriate treatment of the numerous petroglyphs that would be destroyed by the waters. As stated above, eleven petroglyph locations were identified in the project area and required preservation. The Advisory Council determined that the most appropriate treatment for the petroglyphs was relocation or burial. At the time these decisions were made, commitments were made by the ACOE that there would someday be an interpretive center where interpretive tours could be given to educate the public about Pomo history and culture.

In an attempt to save historically important information, a cultural resource mitigation and management plan was prepared by the San Francisco District of the Army Corps of Engineers. The plan was approved by the California State Historic Preservation Officer (SHPO), the Department of the Interior, and the Advisory Council on Historic Preservation. Vital to the plan was a research program – and a contract to carry out this research was issued in 1978 to Sonoma State University Academic Foundation, Inc. The work was done by anthropologists and other specialists from four California universities and several private firms, with the advice of the Warm Springs Native American Advisory Council.

3. The Warm Springs Dam and Lake Sonoma Project is Built -- But Commitments to Properly Manage Cultural Resources Are Not Implemented

In 1983 the dam was completed and closed, and the waters began to rise. The valley was fully drowned by 1985 to create what is now known as Lake Sonoma. In 1985, a Proposed Draft Cultural Resources Management Plan was completed for the Lake Sonoma area, but it was never implemented due to a lack of funding by the ACOE. After continued concerns about ongoing impacts to cultural sites, a Revised Draft of Proposed Cultural Resources Management Plan was completed in 2001, but again, it was not implemented by the ACOE.

While some of the cultural features were moved, human remains were reburied and important cultural use sites were inundated, nothing has broken the tie between the Dry Creek Pomo and their ancestral lands. The passing time only proves that the ACOE does not have the ability to fund or implement a comprehensive preservation program that is needed at Lake Sonoma. The Dry Creek Rancheria can care for the lands around Lake Sonoma; it has a tribal population that can return to the area to help maintain it, and it can develop interpretive programs that can generate revenues while also educating the public about the area. There is no better entity that could provide stewardship to this important resource, and the Tribe continues to press for greater input into the management of the Warm Springs Dam and Visitor's Center.

Part 2. California Preservation Laws-Background

1. The "Native American Heritage Commission" Statute, NAGPRA and Cal-NAGPRA

In 1982 California passed the California Native American Historical, Cultural and Sacred Sites Act (California Act), which established a process for handling the discovery of Native American remains on state and private lands. The legislation stated that upon discovery of human remains, the activity that lead up to the discovery must cease and the county coroner must

be notified. If the remains are of a Native American, the coroner then notifies the Native American Heritage Commission (NAHC). The NAHC then notifies those persons mostly likely to be descended from the Native American remains. Thereafter, the descendants may, with the permission of private landowners, inspect the site and recommend to the owner or the person responsible for the excavation means for treating or disposing of the remains and associated grave goods.

The Native American Graves Protection and Repatriation Act (NAGPRA) was enacted by Congress on November 16, 1990. The NAGPRA requires federal agencies, institutions, and museums that receive federal funding to complete an inventory of Native American human remains, funerary objects, sacred objects and objects of cultural patrimony and let tribes know what they have in their possession. Indian tribes and lineal descendants may then seek to repatriate their descendants and culturally related items for proper treatment or reburial per tribal law and custom. Unfortunately, California did not pass a similar statute for another 11 years after the passage of federal legislation to handle human remains and sacred objects in the possession of state and local control.

In 2001, AB 978, authored by then Assembly member Steinberg, enacted the California NAGPRA (Cal-NAGPRA), establishing the State process for repatriating Native American human remains and cultural items that are currently in the possession of any college, state, or local agency or any museum that receives public funding. This law required such entities to complete inventories of human remains and culturally significant objects by January 2003, then begin notifying and repatriating those items to the appropriate tribal groups. With the passage of AB 978, California established a similar process already established with NAGPRA for repatriating Native American remains in the possession of state and local institutions.

It is important to note that implementation of both the NAGPRA and the Cal-NAGPRA continue to be slow, and as a result there is a “curation crisis” because too many Native American human remains and items of cultural patrimony are being stored in museum facilities rather than being returned to their culturally-affiliated tribes for culturally appropriate treatment. The NHPA and its implementing regulations should be amended to include the option of returning all remains and cultural items to the culturally-affiliated tribes rather than holding them in curation facilities to be lost or forgotten forever.

Recommendation: As with State “projects”, all federal undertakings should include an option of a “first-right of refusal” for all Native American human remains or cultural items that are unearthed during construction of a project with federal permits.

2. Cultural Sites Still Impacted by Development

After the passage of the NAHC Statute and Cal-NAGPRA, there was a period of great conflict between tribes and project proponents because while the Tribes were now notified when Native American human remains were found during construction, little was being done to prevent the destruction of cultural sites and to avoid cutting into burial grounds. It was decided by California tribes at that time that new legislation was needed to require consultation at the

earliest planning stages to allow for traditional tribal cultural sites and burial sites to be better protected from development.

After several attempts to amend the California Environmental Quality Act (the state version of NEPA) to provide tribal governments with a veto over projects that would negatively impact tribal cultural sites and places, tribal leaders united around seven (7) principles that must be included in proposed legislation. Any bill must meet the following requirements:

1. Acknowledge and respect a Tribe's cultural and spiritual values and rights.
2. Provide the earliest possible notice to Tribes.
3. Provide meaningful consultation with Tribes.
4. Protect confidentiality of site records.
5. The Tribe determines the importance of the place.
6. Tribal partnership in management and protection.
7. Include a process for acquisition or conservation of cultural places.

The small size and isolation of most reservations and rancherias has left California Indian tribes with no control over most traditional tribal cultural sites. California's many unrecognized tribes also suffer because their sovereignty is not acknowledged by the federal government and they have no trust lands. However, all tribes in California have a unique historical tie to their aboriginal lands and cultural resources, regardless of their status.

3. SB 18- Amendment to State General Planning Law

Senate Bill 18, signed into law in September 2004, requires cities and counties to notify and consult with California Native American Tribes about proposed local land use planning decisions for the purpose of protecting traditional tribal cultural places. Although California Tribes lost many of their rights to aboriginal lands, the cultural and archaeological sites associated with historic tribal life are still there. Often, plans are made for development on or near ancestral or historic sites of significance to California Indian tribes. SB 18 was intended to involve culturally-affiliated tribes in the general planning process so that information can be shared to protect these places in local planning documents.

Starting March 1, 2005, cities and counties must send general plan amendment proposals to those California Native American Tribes that are on the Native American Heritage Commission's (NAHC) contact list and have traditional lands located within the city or county's jurisdiction. If requested, the cities and counties must also conduct consultations, with culturally-affiliated tribes prior to adopting or amending their general and specific plans. The purpose of this process is to allow the tribal people who have knowledge of an area to share information about historic and cultural sites at an early stage of planning, to mitigate potential impacts to these important places.

To help local officials meet these new obligations, SB 18 required the Governor's Office of Planning and Research (OPR) to amend its General Plan Guidelines to include advice to local governments on how to consult with California Native American Tribes. SB 18 requires that the California Native American Heritage Commission ("NAHC") establish a tribal contact list that includes both federally-recognized and non-federally recognized tribes. The local governments

must obtain the contact information for affiliated tribes in the local area to provide them with notice of the general plan amendment. Because California has over 50 non-federally recognized tribes, the establishment of criteria for those eligible for notice and consultation is of relevance and concern for those tribes.

Early planning consultation can help reduce inadvertent discoveries if handled properly. This can result in projects that are better-suited for the proposed location. The cultural history of a place can, and should, be considered in the planning process. SB 18 now requires this important element to be included in the general planning process. It is hoped that the process will provide some measure of protection for these irreplaceable resources.

Recommendation: As with state and local projects, federal undertakings can require tribal notification with culturally-affiliated tribes at the earliest possible planning stages so that the design of the proposed undertaking benefits from early and comprehensive tribal consultation. Tribal people can help project proponents avoid cultural resources or find ways to mitigate impacts through mutual agreements.

4. AB 52- New Category for Protection in CEQA

On September 25, 2014, the Governor signed AB 52, legislation that amends the California Environmental Quality Act (“CEQA”). This landmark legislation requires tribal consultation by cities, counties and other CEQA lead agencies, and an evaluation of a new CEQA category, “tribal cultural resources.” The CEQA now recognizes that California Native American tribes have an inherent interest in, and unique knowledge of, tribal cultural resources and sacred places that may be impacted by projects that require CEQA review.

AB 52 provides that California Native American tribes have a unique legal status as aboriginal tribal governments and that it is the State’s policy to consult and coordinate with such tribes wherever possible to ensure that important and irreplaceable tribal cultural resources are avoided or protected. The new provisions set forth a government-to-government process between a tribe and a lead agency, as opposed to resorting to including tribal comments as simply members of the public. This new mandate comes with responsibilities for both lead agencies and tribal governments and provides an opportunity for both parties to work collaboratively at the earliest stages of environmental review to identify and evaluate potential impacts to tribal cultural resources, as well as find alternatives that may lessen those impacts.

In addition, AB 52 introduces a new category of resources called “tribal cultural resources (“TCR’s), which acknowledges and considers the resources’ tribal cultural value rather than focusing only on the scientific or academic value of the resources. AB 52 codifies the State’s recognition that California Native American tribes may have specific knowledge regarding the location and importance of tribal cultural resources that is essential to a thorough and sufficient environmental assessment under CEQA. AB 52 presents an opportunity for lead agencies to gain access to this additional layer of information in time to meet CEQA’s preferred outcome for such resources: preservation in place.

Although the bill was signed into law in September 2014, the substantive provisions of AB 52 did not become effective immediately. Rather, the new rules apply to projects that have a

notice of preparation for an environmental impact report, negative declaration or mitigated negative declaration filed on or after July 1, 2015. The substantive categories of the bill can be broken down into four major components: (1) Consultation, with both procedural requirements and substantive requirements; (2) Tribal Cultural Resources; (3) Mitigation; and (4) Confidentiality. It is also important to note there are new substantive considerations concerning significant impacts, when a CEQA document may be certified or adopted and what findings/elements are to be included in a CEQA document concerning tribal cultural resources.

AB 52 was drafted and enacted to: 1) provide sacred places CEQA consideration and protections, and 2) clarify the role of, and process by which tribes are involved in the CEQA environmental review process. For far too long (and even after the passage of SB 18), projects in California are approved without consideration of the impact on traditional tribal cultural resources, thereby resulting in their destruction. The failure of CEQA to identify tribal cultural sites resulted mainly from a lack of opportunity for tribes to inform project proponents about the location of known or potentially significant sites, and a lack of opportunities to propose reasonable mitigation measures that could prevent such impacts. The California legislature amended CEQA through AB 52, intending to specifically address these significant gaps in the protection and preservation of tribal cultural resources.

In addition to establishing a new category of resources to be considered during environmental review, the consultation mandate is intended to establish early communication between tribes and lead agencies, as well as project applicants.

Recommendation: As with state and local projects, federal undertakings can require tribal notification with culturally-affiliated tribes at the earliest possible planning stages so that the design of the proposed undertaking benefits from early and comprehensive tribal consultation. Tribal people can help project proponents avoid cultural resources or find ways to mitigate impacts through mutual agreements. This consultation should occur even when a project will fall into a categorical exclusion from NEPA, a nationwide permit or other streamlined process.

Part 3. Recommendations for Federal Consultation Regarding Infrastructure Decision-Making

While it is unfortunate that the Federal consultation regarding infrastructure decision-making failed to provide a session in California where tribal leaders could have presented this information personally, we feel that it is important to highlight efforts to educate the public and develop laws that change the dynamic between tribal governments, project proponents and lead permitting agencies. The main obstacle to overcome with new legislation that addresses these same problems on a federal level is the element of *timing*. Tribal governments must have clear notice of all projects planned in their aboriginal areas as at the earliest possible time.

1. National Environmental Policy Act (NEPA)

The National Environmental Policy Act is the primary Federal law to ensure that environmental information is available to public officials before decisions are made on Federal agency actions that affect the environment. The statutory mandate of NEPA provides that, before an agency takes a major Federal action “significantly affecting the quality of the human environment,” it must prepare an environmental impact statement (EIS). 42 U.S.C. § 4332. NEPA is implemented through binding regulations promulgated by the Council on Environmental Quality (CEQ), for which each Federal agency must adopt implementing procedures. 40 C.F.R. parts 1500–1508.

CEQ regulations establish a screening process for determining whether the impacts of a proposed federal action would be significant and thus whether an EIS is required.

Recommendation:

- If NEPA is triggered by a federal undertaking the federal permitting agency **MUST** provide an adequate and meaningful opportunity for tribal consultation -- even if there is a FONSI, no change in land use, or categorical exclusion under the CEQ regulations
- The CEQ regulations must be updated to reflect the new requirements just as the California CEQA and General Plan Guidelines were updated to require active efforts and compliance with consultation requirements
- There should be no circumstance where a federal permit is issued for an infrastructure development, without prior notice to tribal governments and an opportunity for tribal consultation. In California, we have learned that with so many projects being built at one time, tribal governments are the best experts as to which projects will actually or potentially impact a tribal cultural place, and if so, how to mitigate any damage, if possible.

NEPA processes can trigger further requirements to comply with complementary Federal law, like NHPA, described below. 40 C.F.R. § 1502.25. CEQ and the Advisory Council on Historic Preservation (ACHP) have jointly published a guidance document, *NEPA AND NHPA: A HANDBOOK FOR INTEGRATING NEPA AND SECTION 106* (March 2013). Federal agencies would improve the integration of Tribal concerns regarding sacred spaces into the NEPA process if they were to follow that guidance. They might also look at the California General Plan Guidelines and AB 52 Technical Advisory to find ways to ensure that lead agencies are able to adequately prepare project applicants for tribal consultation outcomes.

Federal Agencies should be able to contact the BIA to determine which tribal governments might be culturally-affiliated with a particular federal undertaking. With that list, the lead agency is certainly able to work with the project proponent to develop a notice to the appropriate tribal governments to 1) notify them of the proposed project, 2) identify the area of concern for the project, both at a specific and general level, 3) provide a timeframe for tribal input or request for consultation, and 4) to conduct a meaningful and respectful consultation where tribal views are respected. We have provided a PowerPoint presentation which provides a

detailed description of how meaningful and productive consultation can take place. (See attachment)

2. National Historic Preservation Act (NHPA)

The National Historic Preservation Act is the primary federal statute establishing policies and authorizing programs to support the preservation of places that are significant in American history. Many places that Tribes regard as sacred are also of historic significance. The NHPA references three different types of Tribal sites or resources that trigger Tribal consultation and coordination, and either consideration and mitigation of any adverse impacts or full protection of these resources. These are tribal sacred places, tribal historic properties (which includes applicable tribal sites), and tribal cultural resources.

NHPA section 106 establishes a review process for all Federal and Federally assisted actions, requiring agencies to consider the effect of licensing any undertaking and opening the review process to comment by the Advisory Council on Historic Preservation. 54 U.S.C. § 306108. Tribes are generally limited to the implementation of section 106 to seek protection for off-reservation tribal cultural sites. For this reason, the NHPA and the section 106 process are vital procedures for tribal cultural preservation and the protection of sacred, cultural, and traditional sites and resources.

Unfortunately, the Section 106 process is viewed as an obstacle to permitting and consequently it is put off until the very end of the entitlement process. By pushing consultation to the end of the process, the federal agencies create a major conflict between tribal governments and project proponents. If tribal governments could provide input at the *beginning* of a proposed project, tribal cultural places or the treatment of these places, features and/or objects could be better protected. Moreover, we can also assume that projects could move quicker through the construction phases because tribal input was given at the beginning of the project, and hopefully the project can be designed to accommodate the issues or areas of concern that is raised in the consultation process.

The process could be more effective in avoiding initial adverse impacts to Tribal sacred places if Federal agencies were to faithfully fulfill their responsibilities under the existing statutory language and implementing regulations. However, the CEQ regulations and ACHP Guidelines may need to be amended to reflect earlier consultation to allow for productive outcomes.

a. Historic Properties

As amended in 1992, NHPA section 102(d)(6) expressly states that places “of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register” and that in carrying out its responsibilities under section 106, “a Federal agency *shall consult* with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance” to a property that is eligible for the National Register. 54 U.S.C. § 302706 (emphasis added). This statutory language establishes both a duty on the part of Federal agencies to consult with Tribes in the

section 106 process and a Tribal right to be consulted. This statutory language is implemented through numerous provisions in the ACHP regulations which should be updated to reflect modern concerns and best practices for tribal consultation. Training is essential for lead agencies, as we have seen in California where all 58 counties have received training and can request additional training through the Governor's Office of Planning and Research (which could be viewed as a State equivalent of the ACHP).

National Park Service (NPS) regulations also establish a process for determinations of eligibility for the National Register. 36 C.F.R. Part 63. In practice, however, identification and evaluation often takes place within the section 106 process, during the step captioned "Identification of historic properties." 36 C.F.R. § 800.4(c). The NPS regulations should be updated to reflect modern concerns and best practices for tribal consultation. The NPS should be obtaining training from tribal people regarding best practices, as opposed to solely working with licensed archaeologists.

b. Traditional Cultural Properties

Many Tribal sacred places are eligible for the National Register as "traditional cultural properties" (TCPs), a kind of historic property that is the subject of an NPS guidance document. *National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties* (hereinafter "*Bulletin 38*"). As explained in *Bulletin 38*, a TCP is an historic property that is:

eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community.

Bulletin 38 provides some important guidance on applying the National Register criteria to places that hold religious and cultural significance for a tribe, and it includes oral history and traditions and broad definitions that include a Tribe's own cultural conceptions of what is important to the Tribe. In addition, a TCP may be eligible for the Register because, through ethnographic or ethnohistorical research techniques, it has the potential to yield important information. This criterion often makes archaeological sites eligible, due to the information that can be derived through archaeological excavation, but conducting interviews with elders is also an acceptable way of developing information. Most Tribes will be opposed to excavations because it is counter to the concept of preservation, and there are other ways to identify a tribal cultural site that do not require test pits or boring into the soil.

One of the major problems with California's CEQA, as with the NHPA was that many archaeologists and other professionals employed by project proponents may not be able to identify tribal resources for lack of training or familiarity with the sites and resources. It is that specific reason why SB 18 and AB 52 were drafted to elevate tribal experts who have the pertinent knowledge and training to determine a site location and its significance. The reliance on non-Indian archaeologists has led to costly litigation and disputes over development on tribal cultural sites for many decades. Tribal experts are willing and able to work with project planners

to help identify areas that should be avoided and they can also ensure that the most appropriate treatment plans are in place to mitigate damage during construction.

Further, as we have seen with the Dakota Access Pipeline, NHPA reviews for Tribal cultural resources are based on studies or surveys done decades ago by non-Indian staff employed by infrastructure companies. We assert that tribal consultation and updated information should be required for any federal undertaking. Federal agencies must monitor compliance with section 106 at the earliest stages of infrastructure project and provide for stringent requirements that Tribal entities, like THPOs, be included in the project's initial scoping and review.

Recommendation: As with state and local projects, federal undertakings can require tribal notification with culturally-affiliated tribes at the earliest possible planning stages so that the design of the proposed undertaking benefits from early and comprehensive tribal consultation. Tribal people can help project proponents avoid cultural resources or find ways to mitigate impacts through mutual agreements. This consultation should occur even when a project will fall into a categorical exclusion from NEPA, a nationwide permit or other streamlined process. Traditional tribal knowledge can be vital to identifying a site and developing appropriate treatment plans for them.

c. Clean Water Act

Various provisions of the Clean Water Act (CWA) require that Federal agencies consider actions relating to water resources, and to minimize the effect of activities. For example, Section 404(b)(1) requires that the Secretary of the Army, through the Army Corps of Engineers, follow EPA Guidelines when discharges of dredged or fill material affect U.S. waters. 40 C.F.R. § 230.2. These include making determinations about the cumulative impacts of discharges (40 C.F.R. § 230.11(g)), minimizing impacts to human use (40 C.F.R. 230.76), and minimizing effects to unique habitats, plants and animal populations, and endangered species (*Id.*).

The Guidelines serve as strong instructions to the Army Corps and to all applicants for a section 404 permit as to what must be included in an application and an EIS. The EPA has authority to revisit the Guidelines to require additional considerations of effects on human impacts, such as to cultural resources, and cumulative impacts.

The EPA should review the Guidelines, which have not been amended recently to broaden the potential adverse impact on human use to include tribal use of traditional or cultural sites, including adverse impacts altering important landscapes. In fact, California recently adopted a new Traditional Tribal Cultural Use beneficial use designation that will be implemented by the California Water Quality Control Board.

Section 404(c) of the CWA gives EPA a veto over the site for discharge of dredged or fill material when the EPA determines there is a likely adverse effect. The EPA may also prohibit or otherwise restrict the specification of a site about any existing or potential disposal site before a permit application has been submitted to or approved by the Corps or a state. Therefore, EPA may exercise the section 404(c) authority before a permit is applied for, while an application is

pending, or after a permit has been issued, and we believe EPA should consider exercising this authority where tribal consultation is inadequate or did not occur.

Recommendations:

- The EPA should modify the definition of “unacceptable adverse effect” at 40 CFR 231.2(e) to broaden “recreation areas” to include areas used by Indian tribes with traditional and cultural resources and historic properties.
- The process of issuing Nationwide permits should be amended to include adequate time for tribal consultation.
- Pending Nationwide permits should be withdrawn and republished for tribal input.
- The EPA should establish a new beneficial use category for Traditional Tribal Cultural Uses as adopted by the California Water Resources Control Board.

Conclusion

The Dry Creek Rancheria continues to be concerned about the unnecessary problems that are created by unfettered development that has no regard for the impacts to tribal people. Like all people, Dry Creek Rancheria Tribal Members want to have good jobs, earn a respectable living, get an education, and live in a healthy environment with access to clean drinking water. We believe that with cooperation and early consultation, tribal governments can help protect not only their tribal cultural legacy, but make the community a better place to live. We hope that you consider our suggestions to look at California’s laws and you may contact me at (916) 442-9906 or michelle@lapenalaw.com if you have any questions about this letter.

Sincerely,

Michelle LaPena

Michelle LaPena
Attorney for Dry Creek Rancheria

TRIBAL CONSULTATION UNDER AB 52: REQUIREMENTS AND BEST PRACTICES

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Native American Heritage Commission



Presentation Outline

- Goals of Tribal Consultation (AB 52 or Otherwise) for Planning
- AB 52 Tribal Consultation Procedural Requirements
- AB 52 Tribal Consultation Substantive Requirements
- NAHC's Proposed AB 52 Tribal Consultation Best Practices
- Five Most Important Things Agencies Should Know About AB 52

Goals of Tribal Consultation (AB 52 or Otherwise) for Planning

- Get needed information in order to preserve the options of avoidance of cultural resources or preservation in place early in the planning process.
- Build working relationships with tribes that are traditionally and culturally affiliated to the project area or to your agency's geographic area of jurisdiction.
- Avoid inadvertent discoveries of Native American burials and work with tribes in advance to determine treatment and disposition if burials are inadvertently discovered.
 - Statutory and CEQA Guidelines procedures for inadvertent discoveries of Native American burials differ from CEQA tribal consultation regarding impacts to cultural resources – only option upon impasse with a tribe is to reinter the remains on the property in an area without further subsurface disturbance. (Pub. Resources Code § 5097.98, subd. (e); Cal. Code Regs., tit. 14, § 15064.5, subd. (e)(2)).

AB 52 Tribal Consultation Procedural Requirements

- Prerequisites for AB 52 Tribal Consultation
 - Applies to any project for which a Notice of Preparation, Notice of Mitigated Negative Declaration or Notice of Negative Declaration is filed on or after July 1, 2015. (Stats. 2114, ch. 532, § 11 (c)).
 - A tribe that is traditionally and culturally affiliated to the geographic area where a project is located must have requested that the lead agency in question provide, in writing, notification to the tribe of projects in the tribe's area of traditional and cultural affiliation. (Pub. Resources Code § 21080.3.1 (b)).

AB 52 Tribal Consultation Procedural Requirements

- Timeline and Notice Requirements: Five Steps
- Step One: Tribe Requests Notification
 - In order to participate in AB 52 tribal consultation, a tribe must request, in writing, to be notified by lead agencies through formal notification of proposed projects in the geographic area with which the tribe is traditionally and culturally affiliated. (Pub. Resources Code § 21080.3.1, subd. (b)).
 - Without this request, there is no requirement that a lead agency engage in AB 52 tribal consultation.
 - Failure to request notification does not preclude non-AB 52 tribal consultation (more on this later).

AB 52 Tribal Consultation Procedural Requirements -- Timeline and Notice

- Step Two: Notification by Lead Agency
 - Within 14 days of determining that an application for a project is complete or of a decision by a public agency to undertake a project, a lead agency must provide formal notification to the designated contact or tribal representative of traditionally and culturally affiliated California Native American tribes that have requested notice (Step One). (Pub. Resources Code § 21080.3.1, subd. (d)).

AB 52 Tribal Consultation Procedural Requirements -- Timeline and Notice

- Step Two (cont'd): This notice shall be accomplished by at least one written notification that includes:
 - A brief description of the proposed project;
 - The project's location;
 - The lead agency contact information; and
 - Notification that the tribe HAS 30 DAYS TO REQUEST CONSULTATION. (Pub. Resources Code § 21080.3.1, subd. (d)).

AB 52 Tribal Consultation Procedural Requirements – Timeline and Notice

- Step Three: Tribe Requests Consultation
 - The tribe must respond, in writing, within 30 days of receipt of the formal notification and request consultation.
 - When responding to the lead agency, the tribe shall designate a lead contact person.
 - If the tribe does not designate a lead contact person or designates multiple lead contact persons, the lead agency shall defer to the person listed on the contact list maintained by the NAHC for SB 18 consultation. (Pub. Resources Code § 21080.3.1, subd. (b)).

AB 52 Tribal Consultation Procedural Requirements – Timeline and Notice

- Step Four: Lead Agency Begins Consultation
 - The lead agency shall begin the consultation process within 30 days of receiving a California Native American tribe's request for consultation and prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report. (Pub. Resources Code § 21080.3.1, subds. (b) & (e)).
 - For purposes of AB 52, “consultation” shall have the same meaning as provided in SB 18 (Govt. Code Section 65352.4). (Pub. Resources Code § 21080.3.1, subd. (b)).

AB 52 Tribal Consultation Procedural Requirements – Timeline and Notice

- Step Five: Conclusion of Consultation
 - Consultation is concluded when either of the following occurs:
 - The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists to a tribal cultural resource; or
 - A party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached. (Pub. Resources Code § 21080.3.2, subd. (b)).

AB 52 Tribal Consultation Procedural Requirements -- Confidentiality

- AB 52 requires that any information – not just documents – submitted by a California Native American tribe during the environmental review process shall not be included in the environmental document or otherwise disclosed by the lead agency or any other public agency to the public consistent with Gov. Code Sections 6254, subd.(r) and 6254.10. (Pub. Resources Code § 21082.3, subd. (c)(1)).

AB 52 Tribal Consultation Procedural Requirements -- Confidentiality

- Unless the tribe agrees, in writing, to public disclosure, the project applicant or the project applicant's legal advisors, using a reasonable degree of care, shall maintain the confidentiality of the information exchanged for the purposes of preventing looting, vandalism or damage to a tribal cultural resource and shall not disclose the information to a third party. (Pub. Resources Code § 21082.3, subd. (c)(2)(A)).
- The confidential exchange of information regarding tribal cultural resources submitted by the tribe between the lead agency, the tribe, the project applicant, or the project applicant's agent is not prohibited. (Id.)

AB 52 Tribal Consultation Procedural Requirements -- Confidentiality

- CEQA Guidelines Section 15120, subd. (d), states that no document prepared for public examination shall include information about the location of sacred sites – doesn't protect the information from other forms of public disclosure. (Cal. Code Regs., tit. 14, §15120, subd. (d)).

AB 52 Tribal Consultation Procedural Requirements -- Confidentiality

- AB 52's confidentiality provisions DO NOT APPLY TO DATA OR INFORMATION THAT IS:
 - Already publicly available.
 - Already in the lawful possession of the project applicant before it was provided by the tribe.
 - Independently developed by the project applicant or the project applicant's agents.
 - Lawfully obtained by a third party. (Pub. Resources Code § 21082.3, subd. (c)(2)(B))

AB 52 Tribal Consultation Procedural Requirements – Compared to SB 18's

- Who the law applies to:
 - SB18: All California tribes that are on the Native American Heritage Commission contact list and local governments that adopt or amend general plans or specific plans or create open space designations. (Gov. Code § 65352.3, subd. (a)(1), § 65562.5).
 - AB 52: All California tribes that are on the Native American Heritage Commission contact list and all CEQA lead agencies. (Pub. Resources Code § § 21074, 21080.3.1, subd. (b)).
- What the law applies to:
 - SB18: Adoption or amendment of general plans or specific plans or open space designations. (Gov. Code § 65352.3, subd. (a)(1); § 65562.5).
 - AB 52: All CEQA projects for which an NOP, Notice of Mitigated Negative Declaration or Notice of Negative Declaration is filed or issued after July 1, 2015. (Stats. 2015, ch. 532, § 11(c))

AB 52 Tribal Consultation Procedural Requirements – Compared to SB 18's

- What triggers the law:
 - SB 18: Amendment or adoption of a general plan or a specific plan or designation of open space. A local government sends proposal information to the NAHC and requests contact information for tribes with traditional lands or places located in geographic area affected by proposed changes. (Gov. Code § 65352.3, subd. (a)(1); § 65562.5).
 - AB 52: Letters from tribes requesting notification by lead agency of projects in their areas of traditional or cultural affiliation. (Pub. Resources Code § 21080.3.1, subd. (b)).

AB 52 Tribal Consultation Procedural Requirements – Compared to SB 18's

- How does tribal consultation begin and when?
 - SB 18:
 - Local government contacts tribes about opportunity to consult.
 - Tribes have 90 days to request consultation. (Gov. Code § 65352.3, subd. (a)(2)).
 - AB 52
 - Lead agency contacts tribes that have requested notification of projects within 14 days of an application being complete or the lead agency's decision to undertake a project.
 - Tribes have 30 days to request consultation. (Pub. Resources Code § 21080.3.1, subd. (d)).
- How long does tribal consultation last?
 - SB 18: No statutory limit.
 - AB 52: No statutory limit, but the environmental documents cannot be released until consultation has been initiated. (Pub. Resources Code §21080.3.1, subd. (b)). Environmental documents for a project with a significant impact on an identified tribal cultural resource cannot be certified until consultation, if initiated, has concluded. (Pub. Resources Code § 21082.3, subd. (d)(1)).

AB 52 Tribal Consultation Procedural Requirements – Compared to SB 18's

- How does consultation end?
 - SB 18 and AB 52: Consultation is concluded when:
 - Parties reach mutual agreement concerning appropriate measures for preservation or mitigation; or
 - Either party, acting in good faith or after reasonable effort, concludes that mutual agreement cannot be reached concerning appropriate measures of preservation or mitigation. (Pub. Resources Code § 21082.3, subd. (b); Governor's Office of Planning and Research, Tribal Consultation Guidelines, Supplement to General Plan Guidelines, p. 18 (Nov. 14, 2005)).

AB 52 Tribal Consultation Substantive Requirements

- Mandatory Topics of Consultation (If requested by tribe):
 - Alternatives to the project.
 - Recommended mitigation measures.
 - Significant effects.
- Discretionary Topics of Consultation:
 - The type of environmental review necessary.
 - The significance of tribal cultural resources.
 - The significance of the project's impacts on the tribal cultural resources; and
 - If necessary, project alternatives or appropriate measures for preservation or mitigation that the tribe may recommend. (Pub. Resources Code § 21080.3.2, subd. (a)).

AB 52 Tribal Consultation Substantive Requirements

- An EIR, MND or ND for a project with a significant impact on an identified tribal cultural resource cannot be certified or adopted unless one of the following occurs:
 - The consultation process between the tribe and the lead agency has concluded;
 - The tribe requested consultation but failed to provide comments or otherwise failed to engage in consultation;
 - The lead agency provided notice of the project to a tribe and the tribe failed to request consultation within the 30 day deadline. (Pub. Resources Code § 21082.3, subd. (d)).

AB 52 Tribal Consultation Substantive Requirements

- If mitigation measures agreed upon and recommended by staff are not included in the environmental document or if there are no agreed upon mitigation measures, the lead agency shall consider feasible mitigation measures pursuant to subdivision (b) of Section 20184.3. (Pub. Resources Code § 21082.3, subd. (e)).

AB 52 Tribal Consultation Best Practices

- Goals of AB 52 Tribal Consultation Should Be:
 - To discuss mandatory and discretionary topics requested by tribe, particularly significance of tribal cultural resources, avoidance, preservation in place, and/or mitigation measures;
 - To achieve resolution on those topics; and
 - If resolution is not possible, to document why and what efforts were made.
- What AB 52 Tribal Consultation Should Not Be:
 - An information exchange in order to discuss mandatory and discretionary topics – information needed to conduct AB 52 tribal consultation should be gathered in advance.
 - Remember – EIR, MND or ND for a project with a significant impact on an identified tribal cultural resource cannot be certified until tribal consultation, if requested and engaged in, is completed.

AB 52 Tribal Consultation Best Practices

- Before you begin:
 - Understand that tribes expect to be respectfully engaged and expect their proposals to be thoughtfully considered, even if not expressed in technical language.
 - Understand that the discussion of confidential sacred site locations, burial locations, and tribal practices touches on spiritual matters and would not occur but for the possibility of protecting the tribe's cultural resources; think of how you would want your spiritual beliefs and practices respected and act accordingly.
 - Understand that tribes don't want to be persuaded to accept your preconceived plans; they want to be involved in the planning.
 - Under no circumstances should you issue an ultimatum to a tribe. Tribal consultation is not an "accommodation" to a tribe; it's the law.

AB 52 Tribal Consultation Best Practices

- Do your research before the determination to undertake a project or before an application is complete.
- Request Sacred Lands Inventory and CHRIS searches to find out the cultural resources in your proposed project area.
- Request an AB 52 list of culturally affiliated tribes -- research:
 - Current tribal leadership (The Governor's Office of the Tribal Advisor has published a California Tribal Directory)
 - Area of traditional and cultural affiliation
 - Newspaper articles and other indicia of tribes' concerns about your project
 - Other projects about which your agency has consulted the tribe and how the consultation process went

AB 52 Tribal Consultation Best Practices

- Do your research (cont'd):
 - Review ethnographic studies to determine possible village sites, sacred sites and/or burials not indicated on the Sacred Lands Inventory or CHRIS.
 - Document confidential tribal cultural resource information already possessed by the lead agency, applicant and applicant's counsel.
 - Review previous geotechnical and archaeological reports, as well as any relevant prior environmental documents for the project site.
 - Consult with culturally affiliated tribes about cultural resources in advance of AB 52 tribal consultation to find out what cultural resources may be affected by your project. Make sure tribes understand that this is NOT AB 52 consultation.

AB 52 Tribal Consultation Best Practices

- Before sending formal notification of projects:
 - Review the SB 18 Consultation Guidelines on the OPR website.
 - Double check within your agency and with consultants to be sure you have all of the requests for notification received from tribes.
 - Since avoidance of damaging effects to tribal cultural resources, if feasible, is required, be prepared to consider avoidance or explain why it isn't feasible. Be prepared to consider preservation in place or explain why it isn't feasible.
 - Be prepared to discuss all mandatory and discretionary topics of consultation. Get all the necessary information needed to do so to avoid using AB 52 consultations as information exchanges.

AB 52 Tribal Consultation Best Practices

When sending AB 52 tribal consultation notices:

- Make it clear that the notice is for AB 52 consultation, not any other kind of consultation
- Include the statutorily required information in your notice: Brief project description, project's location, lead agency contact information, notice that tribe has 30 days to request consultation.
- Send your notice return receipt requested to document when it was received.

AB 52 Tribal Consultation Best Practices

- When sending consultation notices:
 - Include confidentiality provisions of Public Resources Code section 21082.3, subd. (c).
 - Include lead agency's policy on discretionary determinations of significance of tribal cultural resources.
 - Send more than one consultation notice.
 - Ask responding tribes to be specific as to which mandatory and discretionary topics they want to discuss and incorporate those topics in your consultation agenda.
 - Seek the tribe's agreement upon the consultation agenda in advance of beginning consultation.

AB 52 Tribal Consultation Best Practices

- Consultation
 - Keep consultation government-to-government. Tribal representatives should be members of the tribal government or representatives with written designation to speak on behalf of the tribe.
 - Know who will be representing the tribe and follow protocol for meeting with government officials, i.e., know their titles and use them, introduce all participants, explain who they represent and why they are present. Agree on one person to lead the meeting and keep the agenda on track.
 - Respect tribal sovereignty and confidentiality. Consult with one tribe at a time unless tribes agree otherwise, and do so in a private place with only the necessary participants present.
 - Do not share one tribe's confidential information with another. Be able to explain why those who are present need to know confidential information.

AB 52 Tribal Consultation Best Practices

- Consultation (cont'd):
 - Document in real time:
 - Consultation topics discussed and resolution, if any.
 - Confidential information received from tribe and the form in which it was received.
 - Whether subsequent consultation sessions will be needed and what topics will be discussed.
 - Agree on the next consultation agenda and what additional information, if any, is needed before the next consultation session.
- Conclusion of Consultation
 - If agreement was reached on mitigation measures, inform tribe that the mitigation measures will be recommended for inclusion in the environmental document, but that doesn't mean they will be included.
 - Document all areas on which agreement was reached or not reached.
 - If consultation is unilaterally concluded, be able to document that requirements for doing so have been met.

AB 52 Tribal Consultation Best Practices

- After Consultation
 - Review with lead agency staff, consultants and consulting tribes what worked, what didn't, and how consultation can be improved.

Five Most Important Things for Agencies to Know About AB 52

- Unless a tribe requests notification of projects in their area of traditional and cultural affiliation, there is no AB 52 consultation obligation with them.
- Lead agencies have an affirmative duty to use reasonable care to protect confidential information received from tribes through consultation, with exceptions.
- An environmental document cannot be released until consultation with tribes that have sent notification and consultation requests has been initiated.

Five Most Important Things for Agencies to Know About AB 52

- An EIR, MND or ND for a project with a significant impact on an identified tribal cultural resource cannot be certified or adopted until AB 52 tribal consultation, if requested, has concluded.
- If mitigation measures are agreed upon with a tribe, the measures must be recommended for inclusion in the environmental document.

Thank You!

- Questions?
 - Contact Terrie Robinson, NAHC General Counsel, terrie.robinson@nahc.ca.gov, (916) 373-3716
 - Contact Rob Wood, NAHC Analyst and designated “Mr. AB 52,” rob.wood@nahc.ca.gov, (916) 373-3711
 - Check our website, nahc.ca.gov, for future guidance on AB 52 best practices