



White Paper

CEQA Practice Advisory- Tribal Cultural Resources and Consultation Assembly Bill 52 (Chapter 532, Statutes of 2014)

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Introduction

Although Native American tribes sometimes are involved in the implementation of California Environmental Quality Act (CEQA) by state and local lead agencies, until now tribes have not had a formal and consistent role in the environmental review process. Consequently, tribal cultural resources, sacred places, and Native American traditions often have been overlooked or marginalized under CEQA.

To remedy these problems, Assembly Bill (AB) 52 (Chapter 532, Statutes of 2014) establishes a formal consultation process for California tribes as part of the CEQA and equates significant impacts on "tribal cultural resources" with significant environmental impacts (new Public Resources Code [PRC] Section 21084.2). Although AB 52 becomes law on January 1, 2015, it only applies to projects that have a notice of preparation or notice of negative declaration/mitigated negative declaration filed on or after July 1, 2015. The latter is the date on which it takes effect in practice.

According to the AB 52 statement of legislative intent, tribes may have expertise in tribal history and "tribal knowledge about land and tribal cultural resources at issue should be included in environmental assessments for projects that may have a significant impact on those resources." The legislative intent also makes clear that CEQA analyses must consider tribal cultural resources, including "the tribal cultural values in addition to the scientific and archaeological values when determining impacts and mitigation."



Summary of Requirements

Definition of Tribe. New PRC **Section 21074** defines a "California Native American Tribe" to mean a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission (NAHC). This definition is broader than the concept of a "federally recognized tribe" that is typically used in implementing with various federal laws, including the National Environmental Policy Act (NEPA).

Definition of a Tribal Cultural Resource. New PRC **Section 21074** defines a "tribal cultural resource" as any of the following under its subsections (a) through (c):

- (a) (1) Sites, features, places, and objects with cultural value to descendant communities or cultural landscapes that are any of the following:
 - (A) Included in the California Register of Historical Resources.
 - (B) Included in a local register of historical resources as defined in subdivision (k) of Section 5020.1.
 - (C) Deemed to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1.
- (2) Sacred places, including, but not limited to, Native American sanctified cemeteries, places of worship, religious or ceremonial sites, or sacred shrines that meet either of the following criteria:
 - (A) Listed on the California Native American Heritage Commission's Sacred Lands File pursuant to Section 5097.94 or 5097.96 and a California Native American tribe has submitted sufficient evidence to the lead agency demonstrating that the sacred places are of special religious or cultural significance to the California Native American tribe or contain known graves and cemeteries of California Native Americans.
 - (B) Listed or determined pursuant to criteria set forth in subdivision (g) of Section 5024.1 to be eligible for listing in the California Register of Historical Resources.
- (b) A cultural landscape that meets the criteria of subdivision (a) is a tribal cultural resource to the extent that the landscape is geographically defined in terms of the size and scope of the landscape.
- (c) A historical resource described in Section 21084.1, a unique archaeological resource as defined in subdivision (g) of Section 21083.2, or a "nonunique archaeological resource" as defined in subdivision (h) of Section 21083.2 also may be a tribal cultural resource if it conforms with the criteria of subdivision (a).

Duties of the Native American Heritage Commission. AB 52 amends PRC **Section 5097.94** to expand the duties of NAHC by requiring it "To provide each federally recognized California Native American tribe on or before July 1, 2016, with the following:

- A list of all public agencies that may be a lead agency pursuant to [CEQA] within the geographic area with which the tribe is traditionally and culturally affiliated,
- The contact information of those public agencies, and
- Information on how the tribe may request the public agency to notify the tribe of projects within the jurisdiction of those public agencies for the purposes of requesting consultation pursuant to Section 21080.3.1."

Formal Tribal Consultation Requirements. New PRC **Section 21080.3.1** states "... Native American tribes traditionally and culturally affiliated with a geographic area may have expertise concerning their tribal cultural resources that may inform the lead agency in its identification and determination of the significance of tribal cultural resources" and therefore establishes the following requirements for consultation.

- Prior to determining whether a negative declaration, mitigated negative declaration, or environmental impact report is required for a project, the lead agency shall begin consultation with a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project if:
 - (1) The California Native American tribe requested to the lead agency, in writing, to be informed by the lead agency through formal notification of proposed projects in the geographic area that is traditionally and culturally affiliated with the tribe, and
 - (2) The California Native American tribe responds, in writing, within 30 days of receipt of the formal notification and requests the consultation.
- To expedite the requirements of this section, NAHC shall assist the lead agency in identifying the California Native American tribes that are traditionally and culturally affiliated with the project area.
- Within 14 days of determining that an application for a project is complete or a decision by a public agency to undertake a project, the lead agency shall provide formal notification to the designated contact of, or a tribal representative of, traditionally and culturally affiliated California Native American tribes that have requested notice, which shall be accomplished by means of at least one written notification notice that includes a brief description of the proposed project and its location as well as the lead agency contact information, and a notification statement that the federally recognized California Native American tribe has 30 days to request consultation pursuant to this section.

- The lead agency shall begin the consultation process within 30 days of receiving a California Native American tribe's request for consultation.

Treatment of Mitigation Measures and Alternatives. New PRC **Section 21080.3.2** provides that as part of the consultation process, parties could propose mitigation measures. If the California Native American tribe requests consultation to include project alternatives, mitigation measures, or significant effects, the consultation would be required to cover those topics. The consultation will be considered concluded when either of the following happens:

- (1) The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource.
- (2) A party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached concerning appropriate measures to be taken that would mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource.

New **Section 21082.3** provides that any mitigation measures agreed upon during this consultation "shall be recommended for inclusion in the environmental document and in an adopted mitigation monitoring program" if determined to avoid or lessen a significant impact on a tribal cultural resource. If a project "may have a significant impact on a tribal cultural resource," the environmental document would be required to discuss both of the following:

- (1) Whether the proposed project has a significant impact on an identified tribal cultural resource.
- (2) Whether feasible alternatives or mitigation measures, including those measures that may be agreed to [during consultation], avoid or substantially lessen the impact on the identified tribal cultural resource.

This section provides that information submitted by a California Native American tribe during consultation is to be kept confidential and not included in the public review draft of the CEQA document without consent of the tribe. It goes on to specify that it does not prohibit the confidential sharing of information among the lead agency, a California Native American tribe, and the applicant.

Limitations on Certification of Environmental Impact Report (EIR) or Adoption of Negative Declaration. Subsection **21082.3(d)** will limit the ability of the lead agency to "certify an environmental impact report or adopt a mitigated negative declaration for a project with a significant impact on an identified tribal cultural resource" to those situations where one of the following occurs:

- (1) The consultation process between the federally recognized California Native American tribe and the lead agency has occurred as provided in Sections 21080.3.1 and 21080.3.2 and concluded pursuant to subdivision (b) of Section 21080.3.2.

- (2) The federally recognized California Native American tribe has requested consultation pursuant to Section 21080.3.1 and has failed to provide comments to the lead agency, or otherwise failed to engage, in the consultation process.
- (3) The lead agency has complied with subdivision (c) of Section 21080.3.1, and the federally recognized California Native American tribe has failed to request consultation within 30 days.

Further, if the mitigation measures recommended by the staff of the lead agency as a result of the consultation process are not included in the environmental document or if there are no agreed upon mitigation measures at the conclusion of the consultation or if consultation does not occur, and if substantial evidence demonstrates that a project will cause a significant effect to a tribal cultural resource, the lead agency must "evaluate and select" feasible mitigation pursuant to Section 21084.3.

Examples of Mitigation for Impacts to Tribal Cultural Resources. New **Section 21084.3** lists examples of mitigation measures that may be considered, when feasible, to mitigate impacts on tribal cultural resources:

- (1) Avoidance and preservation of the resources in place, including, but not limited to, planning and construction to avoid the resources and protect the cultural and natural context; or planning greenspace, parks, or other open space to incorporate the resources with culturally appropriate protection and management criteria.
- (2) Treating the resource with culturally appropriate dignity and taking into account the tribal cultural values and meaning of the resource, including, but not limited to, the following:
 - (A) Protecting the cultural character and integrity of the resource.
 - (B) Protecting the traditional use of the resource.
 - (C) Protecting the confidentiality of the resource.
- (3) Permanent conservation easements or other interests in real property, with culturally appropriate management criteria for the purposes of preserving or using the resources or places.
- (4) Protecting the resource.

AB 52 does not limit the ability of a California Native American tribe to participate as an interested tribe, person, citizen, or member of the public on CEQA reviews. Also, it specifically does not expand the applicability of CEQA to projects located on Native American tribal reservations or rancherias.

CEQA Guidelines to Be Amended. New PRC **Section 21083.09** requires the Office of Planning and Research and the Natural Resources Agency to amend Appendix G of the CEQA Guidelines by January 1, 2016 to separate the consideration of paleontological resources from tribal cultural resources and to add consideration of tribal cultural resources to the sample questions.

Integrating AB 52 into CEQA Practice

Process

- Contact NAHC (and review agency records for notice requests) at the beginning of the Initial Study process to identify the California Native American tribes to contact for the project, and the tribal contact person(s).
- Contact the tribal representatives as soon as they are identified during the Initial Study process. The 14-day period identified in PRC Section 21080.3.1 is not intended to be separate from the time during which an Initial Study is being prepared.
- When more than one tribe is involved, the lead agency will be undertaking concurrent consultations. Tribal consultations and any negotiations about the contents of the CEQA document should be conducted individually if more than one tribe is involved. The lead agency is not obligated under AB 52 to attempt to reconcile differences if tribes disagree about their preferred mitigation for any shared Tribal Cultural Resources (TCR). Such a problem will need to be handled diplomatically.
- Provide time in the schedule for the 30-day period for tribe(s) to respond to the lead agency's solicitation. A proposed Mitigated Negative Declaration (MND) or a Draft EIR cannot be released for public review before the tribe(s) has had the opportunity to request consultation.
- Provide time in the schedule for consultation between the tribe(s) and the lead agency. If the tribe(s) does not request consultation, then this time will not be needed. Removing time from the schedule is easier than adding it once the CEQA process is under way.
- If the tribe(s) requests consultation, do not release an MND for public review until consultation between the tribe(s) and the lead agency is completed and mitigation measures acceptable to the tribe(s) are incorporated into the MND and the related Mitigation Monitoring or Reporting Program (MMRP).
- If the tribe(s) requests consultation, do not release a Draft EIR for public review until either:
 - (1) The consultation is completed without mutual agreement about mitigation measures, the Draft EIR analyzes impacts on TCRs, and the Draft EIR includes mitigation measures from the list in Section 21084.3.
 - (2) The consultation is completed, and the Draft EIR includes the mutually agreed upon mitigation measures or alternatives.

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Determinations and Mitigation

- NAHC's Sacred Lands File will take on greater significance as an authoritative source of identified TCRs.
- If a tribe asserts that the project may have a significant effect on a TCR, this assertion raises a "fair argument" requiring preparation of an EIR. Avoiding an EIR would require the lead agency to successfully negotiate mitigation that the tribe accepts as reducing the effect on the TCR to a less than significant level.
- The lead agency is required to include agreed-upon mitigation measures in the MND or Draft EIR, along with the related MMRP.
- The lead agency could decide not to implement the mitigation measures in a Final EIR but must still include feasible mitigation pursuant to PRC Section 21084.3. Those measures would be reflected in the MMRP.

Conclusion

The new provisions introduced by AB 52 should go a long way to bringing tribal concerns into the CEQA process. Once state and local lead agencies begin to implement the consultation provisions of the new law, tribes should have more opportunities to participate and have their views reflected in the resultant EIRs and Negative Declarations. As a result, tribal cultural resources should be more consistently evaluated and mitigated. Although the law's requirements may initially seem complicated, once new CEQA Guidelines are written, lead agencies will get familiar with the statutory and regulatory provisions. They be able to routinely integrate the provisions into their established CEQA procedures.

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