

BLUE LAKE RANCHERIA

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www.bluelakerancheria-nsn.gov

June 9, 2015

Terrie L. Robinson, General Counsel
Cynthia Gomez, Executive Secretary
Native American Heritage Commission sent via email

Holly Roberson
Office of Planning & Research
Sacramento sent via email

RE: Blue Lake Rancheria comments on rule making process for AB 52

Greetings:

This letter summarizes the Tribe's formal comments on the rule making process and implementation for AB 52, as presented verbally to the Native American Heritage Commission (NAHC) staff (Robinson and Gomez) at the May 14, 2015 public noticed workshop held in Redding; unfortunately, Ms. Roberson from OPR was unable to attend this meeting. Attachment 1 evidences my authority to speak on behalf of Blue Lake Rancheria as acknowledged by Tribal Chairperson Claudia Brundin. The session was tape recorded and I maintained notes from which the following summary is partly derived.

The Tribe supports the arguments made by the Wiyot Tribe (comments to OPR dated 5/1/15) and the Karuk Tribe (comments to OPR dated 5/31/15) that the definition of Traditional Cultural Resources (TCR) needs to acknowledge not only historic connections, but modern and future connections to cultural landscapes and traditional resource areas (e.g., fishing places, gathering areas) that are best managed by applying tribal traditional ecological knowledge (TEK). Such places may meet the definition of "Traditional Cultural Places" (per National Register Bulletin 38), in that the site or broader landscape area is a place "rooted in history" (e.g., as referenced in the anthropological literature) and "important to the on-going identity" of the culturally affiliated community; or the qualities and characteristics of certain areas or landscapes today meet the tribally defined conditions for places formerly used ("historically rooted"), but are no longer preserved, have lost their integrity, or are inaccessible. For the Wiyot peoples, restoration of native culturally significant landscapes (e.g., Spartina eradication for Humboldt Bay marshlands; removal of European beach grass and replacement with native dune species) will become increasingly important for continuation of tribal traditions and customs in the face of global and local climatic change. The definition of TCR needs to include environmental resources important to current and future generations, and Tribes need to be recognized as the experts in determining what constitutes a TCR for purposes of CEQA.

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Attachment 2 is a summary of the process developed and employed by the Blue Lake Rancheria THPO in collaboration and consultation with the two other Wiyot area tribes (Wiyot Tribe, Bear River Band of the Rohnerville Rancheria) for early review of CEQA projects over the past 3.5+ years; the County of Humboldt and cities of Eureka and Arcata are the key local governments responsible for CEQA compliance for lands within the Tribes' respective mapped areas of concern for ancestral resources (outside tribal lands). I believe this process will be of potential use as a model for other tribes and lead agencies under AB 52. While these steps might not be appropriate for every CEQA lead agency, every tribe, or every project, it does provide an example of how true partnerships can form between agencies and tribes. It is our belief that this has been made possible by the fact that these agencies recognize that tribes, and only tribes, are the experts on tribal resources. We hope that the rules for AB 52 support that expertise and provide clear guidelines on how it should be communicated to and accepted by CEQA lead agencies.

Sincerely,

A handwritten signature in blue ink that reads "Janet P. Eidsness". The signature is written in a cursive style and is positioned above the typed name.

Janet P. Eidsness, M.A.
Tribal Heritage Preservation Officer (THPO)
Blue Lake Rancheria

Attachments (2)

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Attachment 1



May 5, 2015

To: Native American Heritage Commission, Cynthia Gomez, Executive Secretary

Re: Designated Authority to Speak on Behalf of Blue Lake Rancheria Tribe of California

Dear Ms. Gomez, NAHC staff and Commissioners:

Janet P. Eidsness, Tribal Historic Preservation Officer (THPO) for the Blue Lake Rancheria Tribe of California, is authorized to speak on the Tribal Council's behalf with regard to Tribal Consultations on the MLD Regulations, AB 52 Implementation, and the NAHC Consultation Policy per the Notice of Public Hearing/Workshop scheduled for 5/14/15 in Redding.

Sincerely,

A handwritten signature in blue ink that reads "Claudia Brundin". The signature is written in a cursive style.

Claudia Brundin, Tribal Chairperson
Blue Lake Rancheria

Attachment 2

CEQA Review and Comment by Wiyot Area THPOs – Case Study Best Practices Blue Lake Rancheria Tribal Comments on AB 52 Consultation Steps

By Janet P. Eidsness, THPO Blue Lake Rancheria
June 8, 2015

These comments are based on relevant experience (3.5 years) consulting under CEQA with local governments (county of Humboldt, cities of Eureka and Arcata) by the Tribal Historic Preservation Officers (THPOs) designated by the three Wiyot area tribes (Blue Lake Rancheria, Bear River Band of the Rohnerville Rancheria, Wiyot Tribe) to identify and protect what is now defined as “tribal cultural resources” (TCR) per AB 52. Notably, the three THPOs work cooperatively, exchanging information and discussing concerns and recommendations, to ideally provide unified, joint recommendations to lead agencies for individual projects or actions. Local governments and other agencies have agreed to our unified comments and recommendations pursuant to CEQA, incorporating them as project conditions and mitigation measures.

Each tribe respects the sovereignty of the other tribes in this working relationship. Over the past 10 years, each tribe has built capacity through its THPO agreements with NPS and annual HPF funding for maintaining tribal databases and cooperating and consulting with various agencies about TCR in each tribe’s respective ancestral area and tribal lands. Each tribe has its own self-identified and mapped area of concern for TCR (developed for the THPO applications) that includes a large area of overlap among the three that is referred to as the Wiyot ancestral homeland. This overlapping area of concern is focused around Humboldt Bay in Humboldt County, includes the incorporated cities of Eureka and Arcata, and is characterized by the densest population, and highest number of existing and proposed developments, projects and actions regulated under CEQA in the County. Each THPO program has its own confidential database containing site record forms and survey reports obtained from the Information Center (IC of CHRIS), mapped site locations in hard copy or GIS formats, plus key ethnographies, historic maps, tribal elder interviews, etc. employed for conducting independent in-house record searches.

I believe our experience provides a “best practices” model useful for local governments and tribes to consult pursuant to AB 52. However, these best practices are only possible after many years of hard work and trust building where the Tribes have earned recognition as the sole experts on tribal resources. In return, we work with lead agencies to provide feedback and reasonable mitigation measures where appropriate. Outlined below are the consultation steps we have operationalized with key CEQA local government lead agencies in our traditionally and culturally affiliated geographic areas. It needs to be recognized that these steps might not be appropriate for every CEQA lead agency, every tribe, or every project; however, it does provide an example of how true partnerships can form between local governments and tribes. It is our belief that this has been made possible by the fact that these agencies recognize that tribes, and only tribes, are the experts on tribal resources. We hope that the rules for AB 52 support that expertise and provide clear guidelines on how it should be communicated to and accepted by CEQA lead agencies.

1. Mapped Traditionally & Culturally Affiliated Areas. Each Tribe has submitted a detailed map to the County showing their respective geographical ancestral areas of concern for TCR. The County has digitized these in a GIS format for the three Wiyot area tribes, as well as other participating tribes in the County (Yurok, etc.). Such mapping enables the County to efficiently determine and direct CEQA "Project Referrals" to the respective and appropriate THPOs for review and comment. The Wiyot area THPOs review and comment on all CEQA Project Referrals received for their respective areas of concern (for Blue Lake, 100-150/year). In addition to Humboldt County unincorporated areas, the cities of Eureka and Arcata are fully within the three tribes' mapped areas of concern.
2. Local Governments Initial Notice and Request for Comments. Project Referrals (Humboldt County examples) are brief, standardized forms (2 or more pages) for each CEQA project that are either surface or electronically mailed to the THPOs. Each includes date of transmittal and date comments requested by (typically, 10 day turnaround), assigned planner contact information, a brief description of the proposed project including type of action or permit being requested (e.g., from subdivisions, lot line adjustments, Coastal Development Permits for Coastal Zone projects, etc.), and its location including helpful maps (USGS, aerial views, development plans).
3. THPO Review of Project Referrals. The Wiyot area THPOs review the Project Referrals, confer with each other (regular meetings, email and phone), and typically respond individually in writing. The following steps outline this process and the range of comments, information requests and recommendations. These steps focus initially on identifying known or potential TCR that may be significantly impacted by the CEQA project or action, and commenting on what we consider to be an acceptable level of effort for identifying cultural resources on a project-by-project basis.

THPO Information Gathering Steps (Initial Comments on Project Referrals):

- (a) In-house Tribal Records Search. First, each THPO conducts an in-house records search to determine if known or potential TCR are located on or near the project area. Findings are shared among the THPOs, especially noting occasional mapping discrepancies and whether recorded sites have been field confirmed and their conditions assessed in recent years (updated record forms).
- (b) Consult with Knowledgeable Tribal Elders. Each THPO program has established a process for consulting with knowledgeable tribal elders and members about TCRs (e.g., Culture Committee, Tribal Council, etc.). Information they provide inform the THPO about potential or known TCRs located in or near specific CEQA projects under review.
- (c) Predict TCR Sensitivity. The THPOs consider the relative sensitivity for unrecorded TCRs on the project area based on distribution and types of known TCRs. In some cases, experienced and knowledgeable local archaeologists are consulted by the THPOs. In addition, two of the current Wiyot area THPOs have extensive regional archaeological experience. The THPOs may formally comment on the predicted TCR sensitivity, with reference to the anticipated depth and width of anticipated project ground disturbance (vertical and horizontal area of potential effects).
- (d) Conduct Cursory Field Visits. For projects generally less than five acres in size and predicted to be TCR sensitive, the THPOs may request field visits arranged and accompanied by the lead planner and the landowner or agent for purposes of conducting a cursory archaeological survey and better judging the project area's sensitivity. Such

cursory surveys are not formally recorded at the IC or with the County, but are noted in correspondence between the THPOs and lead planner. In a few instances, such THPO field inspections have resulted in identification of unrecorded TCR (archaeological sites), whereupon a more complete cultural resources survey by a local professional consultant is recommended. Cursory exams are especially important to understanding past and present land uses and related disturbances, which is important to refining predictions of archaeological sensitivity. Cursory exams are often focused on the footprints of proposed ground disturbing activities (e.g., building foundations, septic systems, underground utilities). Such exams are typically requested where the record searches infer the likelihood of a recorded TCR on or adjacent to the project area, or its geographic setting is similar to that of known TCRs (e.g., south-facing, near access to bay shore, sloughs, rivers, creeks or springs, major trending ridgelines).

- (e) Request Project Specific Information Center (IC) Letter Reports to Lead Agencies. The THPOs often request copies of the non-confidential IC records search findings obtained by the lead agency for individual projects. Such reports serve as a check of the tribe's respective databases, which are updated at the ICs every few years. The IC system is considered to have the most up-to-date records.
- (f) Request Soils Data. Often requested are copies of any existing records documenting subsurface conditions, such as soil boring maps and logs, groundwater studies, percolation tests, hazmat studies, etc. This is especially important for projects located in Eureka along the waterfront and around the bay margin, where a century plus of fill, land reclamation activities (e.g., bay dredgings to extend shoreline, historic diking and draining of salt marshes to convert to ranching, etc.) and development (roads, cities, industrial and residential areas, etc.) have radically changed the landscape.

THPO Recommendations for TCR Identification

- (a) Formal Cultural Resource Identification Studies. When a project area is known or has a high potential for TCRs (per above), the THPOs may recommend a formal cultural resources study be required before the CEQA file is completed. THPOs recommend trusted, locally experienced consultants to perform the studies, and they participate in developing the research design while taking into account the cultural sensitivity, nature of anticipated TCRs, project components and especially, the vertical (depth) and horizontal extents of project ground disturbances. Subsurface testing (e.g., shovel probes, augering, backhoeing) may be recommended during the field identification studies, primarily to determine presence or absence of sites that are obscured by surface conditions (e.g., landscaping, pavement) or buried (especially when the vertical APE is deep). Trained tribal representatives monitor all field projects involving archaeological excavation, as recommended by the THPOs, compensated by the applicant, and made a project condition by the lead agency. THPOs usually visit the field project, and always comment on the adequacy of field methods, findings, their significance as TCRs, anticipated project effects, and mitigation measures for protecting and preserving salient associated tribal cultural values.
- (b) Inadvertent Archaeological Discovery Protocol. THPOs acknowledge that TCR can best be protected through the consultation process (CEQA mitigation measures) when a TCR is identified early and through initial screening (above), as opposed to inadvertent TCR discovery during construction. In the latter case, avoidance of impacts to TCR is unlikely

(project redesign) since project plans are finalized and approved, and construction is underway. However, all projects involving ground disturbances are recommend to be formally conditioned by a standard Inadvertent Archaeological Discovery Protocol developed by the THPOs with the respective local governments (see below). Such projects typically include those where no Wiyot TCR are known per record searches, cursory site inspections by THPOs or formal project-specific cultural resources studies yielded negative findings, available soils data are insufficient to determine if ground disturbing actions will be completely confined to known areas of fill, and/or the areas are predicted to be TCR sensitive. Where the CEQA project involves only a legal recording transaction with no new development (e.g., lot line adjustments), this protocol is not recommended since no ground disturbance is proposed.

EXAMPLE: Inadvertent Archaeological Discovery Protocol developed by Blue Lake, Bear River and Wiyot THPOs with City of Eureka (2014):

If archaeological resources are encountered during construction activities, all onsite work shall cease in the immediate area and within a 50 foot buffer of the discovery location. A qualified archaeologist will be retained to evaluate and assess the significance of the discovery, and develop and implement an avoidance or mitigation plan, as appropriate. For discoveries known or likely to be associated with Native American heritage (prehistoric sites and select historic period sites), the Tribal Historic Preservation Officers (THPOs) for the Bear River Band of Rohnerville Rancheria, Blue Lake Rancheria, and Wiyot Tribe are to be contacted immediately to evaluate the discovery and, in consultation with the project proponent, City of Eureka, and consulting archaeologist, develop a treatment plan in any instance where significant impacts cannot be avoided. Prehistoric materials may include, but are not limited to, obsidian or chert flakes, tools, locally darkened midden soils, groundstone artifacts, shellfish or faunal remains, and human burials. Historic archaeological discoveries may include, but are not limited to, 19th century building foundations; structural remains; or concentrations of artifacts made of glass, ceramic, metal or other materials found in buried pits, old wells or privies.

Should known or suspected Native American skeletal remains or burials be inadvertently discovered, the provisions of Section 7050.5 of the California Health & Safety Code and Section 5097.98 of the Public Resources Code shall apply (see at <http://www.nahc.ca.gov/profguide.html>).

- (c) Construction Monitoring and Plan. Field monitoring of ground-disturbing project activities in areas considered sensitive for a buried TCR by a Tribal Representative and/or locally experience archaeological consultant may be recommended to the CEQA lead agency as a project condition by the THPOs. Usually, a formal Monitoring Plan is also requested to be made a project condition and is developed jointly by the archaeologist in consultation with the THPOs with pertinent information provided by the applicant and lead agency, as appropriate.

Expectations for Tribal Consultation under AB 52

Under AB 52 when TCR are identified during CEQA initial review (Project Referrals), the Tribes expect to enter into more formal government-to-government consultation (joint or individual, per tribal leadership direction) for purposes of (1) describing the cultural value of the

TCR to the culturally affiliated California Native American tribe (significance evaluation); (2) assessing significant effects on TCR; and (3) resolving effects through consideration of project alternatives if the Tribe so requests, redesign to avoid impacts, or other preservation or mitigation measures the Tribe may recommend. Per AB 52, any mitigation measures agreed upon in consultation shall be recommended for inclusion in the CEQA document (negative declaration, mitigated negative declaration, or environmental impact statement) and in an adopted mitigation monitoring program if determined to avoid or lessen the impact, and shall be fully enforceable. Consultation is concluded when either the parties agree to measures to mitigate or avoid a significant effect to a TCR, if a significant effect exists, or a party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached.

Government-to-Government Consultation and the Brown Act: What We Learned From SB 18 Tribal Consultations

The Brown Act is recognized by Blue Lake Rancheria and other tribes as being an impediment to true government-to-government consultations as mandated by SB 18 (2003) and referenced in OPR's *Tribal Consultation Guidelines* (see http://www.opr.ca.gov/docs/011414_Updated_Guidelines_922.pdf) . Under the Brown Act (http://en.wikipedia.org/wiki/Brown_Act), meetings between the tribal leadership (e.g., Tribal Council) and the local government leadership (e.g., County Board of Supervisors) cannot be convened as confidential, closed sessions where the general public is excluded. The Wiyot area tribes have worked with the County of Humboldt to establish draft SB 18 procedures as outlined in the County's protocol.

- Tribal members or tribal staff will be responsible for maintaining the tribal consultation record and updating tribal contact information.
- The Tribe will identify culturally sensitive information and other shared information that shall be protected from public disclosure per various State and Federal laws.
- County staff will be responsible for coordination with the tribes, including setting up meetings, providing notices of public meetings, provide requested information from the County relevant to the consultation process and maintaining the County's consultation record.
- If staff-level consultation is completed to the satisfaction of both the Planning Director and Tribal Official, the Planning Director (or designee) would report to the Board of Supervisors on the outcomes, and the Tribal planning official would report to their Tribal Council on the outcomes. A letter documenting the outcomes and notifying the Tribe that consultation is concluded will be sent by the Planning Director to the Tribal Chair.
- If agreement cannot be reached from staff-level consultation, then the Board of Supervisors shall appoint two members of the Board to an ad hoc SB 18 Tribal Consultation committee, and they will meet with Tribal Council members to seek agreement on how to preserve or mitigate impacts to Cultural Places, including Native American historic, cultural or sacred sites. If an agreement is reached between all parties, then a letter documenting the agreement and the consultation of the SB 18 consultation will be sent by the County to the Tribal Chair (reference 5/5/15 SB 18 tribal notice, Humboldt County Planning & Building Department).