Discussion Draft Technical Advisory:

AB 52 and Tribal Cultural Resources in CEQA

(May 2015)

Contents

I. Purpose 2

II. Legislative Intent 2

III. Summary of New Requirements for Consultation and Tribal Cultural Resources 3

A. Definition of Tribal Cultural Resources 4

B. Consultation 5

C. Timing in the CEQA Process and Consultation Steps 6

D. Confidentiality 7

E. Mitigation 8

IV. Updating Appendix G 9

V. Compliance Timeline and Consultation Process Flowchart 10

VI. Bibliography of Resources 11

A. California Government Resources 11

B. Federal Government Resources 11

C. Cases Interpreting Provisions in the Public Resources Code Governing Analysis of Historic Resources 12

I. Purpose

The purpose of this advisory is to provide guidance to lead agencies regarding recent changes to the California Environmental Quality Act requiring consultation with California Native American tribes and consideration of tribal cultural resources. It summarizes the reasons for the legislative changes, and explains the substantive and procedural requirements that go into effect on July 1, 2015. Finally, it summarizes relevant case law, and provides a list of additional resources.

II. Legislative Intent

The legislature added the new requirements regarding tribal cultural resources in Assembly Bill 52 (Gatto, 2014). By ~~including~~ tribal cultural resources early in the CEQA process, the legislature intended to ensure that local and Tribal governments, public agencies, and project proponents would have information available, early in the project planning process, to identify and address potential adverse impacts to tribal cultural resources. By taking this proactive approach, the legislature also intended to reduce the potential for delay and conflicts in the environmental review process. ((AB 52 § 1 (b)(7).)[1]

[1] Assembly Bill 52 (Gatto, 2014). Section 1 of the bill states the legislature's intent as follows:In recognition of California Native American tribal sovereignty and the unique relationship of California local governments and public agencies with California Native American tribal governments, and respecting the interests and roles of project proponents, it is the intent of the Legislature, in enacting this act, to accomplish all of the following:(1) Recognize that California Native American prehistoric, historic, archaeological, cultural, and sacred places are essential elements in tribal cultural traditions, heritages, and identities.(2) Establish a new category of resources in the California Environmental Quality Act called "tribal cultural resources" that considers the tribal cultural values in addition to the scientific and archaeological values when determining impacts and mitigation.(3) Establish examples of mitigation measures for tribal cultural resources that uphold the existing mitigation preference for historical and archaeological resources of preservation in place, if feasible.(4) Recognize that California Native American tribes may have expertise with regard to their tribal history and practices, which concern the tribal cultural resources with which they are traditionally and culturally affiliated. Because the California Environmental Quality Act calls for a sufficient degree of analysis, tribal knowledge about the land and tribal cultural resources at issue should be included in environmental assessments for projects that may have a significant impact on those resources.(5) In recognition of their governmental status, establish a meaningful consultation process between California Native American tribal governments and lead agencies, respecting the interests and roles of all California Native American tribes and project proponents, and the level of required confidentiality concerning tribal cultural resources, at the earliest possible point in the California Environmental Quality Act environmental review process, so that tribal cultural resources can be

(AB 52, § 1(b).) To accomplish those goals, the legislature added or amended the following sections in the Public Resources Code: 21073, 21074, 21080.3.1, 21080.3.2, 21082.3, 21083.09, 21084.2, and 5097.94. These changes are summarized below.

III. Summary of New Requirements for Consultation and Tribal Cultural Resources

The Public Resources Code now establishes that "[a] project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment." (Pub. Resources Code, § 21084.2.)

To help determine whether a project may have such an effect, the Public Resources Code requires a lead agency to consult with any California Native American tribe that requests consultation and is traditionally and culturally affiliated with the geographic area of a proposed project. That consultation must ~~take place~~ prior to the ~~determination~~ of ~~whether~~ a negative declaration, mitigated negative declaration, or environmental impact report is required for a project. (Pub. Resources Code, § 21080.3.1.)

If a lead agency determines that a project may cause a substantial adverse change to tribal cultural resources, the lead agency must consider measures to mitigate that impact. Public Resources Code §20184.3 (b)(2) provides examples of mitigation measures that lead agencies may consider to avoid or minimize impacts to tribal cultural resources.

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identified, and culturally appropriate mitigation and mitigation monitoring programs can be considered by the decisionmaking body of the lead agency.(6) Recognize the unique history of California Native American tribes and uphold existing rights of all California Native American tribes to participate in, and contribute their knowledge to, the environmental review process pursuant to the California Environmental Quality Act (Division 13 (commencing with § 21000) of the Public Resources Code).(7) Ensure that local and tribal governments, public agencies, and project proponents have information available, early in the California Environmental Quality Act environmental review process, for purposes of identifying and addressing potential adverse impacts to tribal cultural resources and to reduce the potential for delay and conflicts in the environmental review process.(8) Enable California Native American tribes to manage and accept conveyances of, and act as caretakers of, tribal cultural resources.(9) Establish that a substantial adverse change to a tribal cultural resource has a significant effect on the environment.

These new rules apply to projects that have a notice of preparation for an environmental impact report or negative declaration or mitigated negative declaration filed on or after July 1, 2015. Specific provisions of the new law are described in more detail below.

A. Definition of Tribal Cultural Resources

New § 21074 of the Public Resources Code defines "tribal cultural resources." In brief, in order to be considered a "tribal cultural resource," a resource must be either:

(1) listed, or determined to be eligible for listing, on the ~~national, state, or local register of historic resources, or~~

~~(2)~~ a resource that the lead agency chooses, in its discretion, to treat as a tribal cultural ~~resource.~~[2]

~~In the latter instance,~~ the lead agency must determine that the resource meets the criteria for listing in the ~~state register of historic resources~~[3]. In ~~applying those criteria,~~ a lead agency must

[2] Pub. Resources Code, § 21074
(a) "Tribal cultural resources" are either of the following:

(1) Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:

(A) Included or determined to be eligible for inclusion in the California Register of Historical Resources.

(B) Included in a local register of historical resources as defined in subdivision (k) of §5020.1.

(2) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of §5024.1. In applying the criteria set forth in subdivision (c) of §5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.

(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 §21084.1, a unique archaeological resource as defined in subdivision (g) of §21083.2, or a "nonunique archaeological resource" as defined in subdivision (h) of §21083.2 may also be a tribal cultural resource if it conforms with the criteria of subdivision (a).

[3] Pub. Resources Code § 5024.1 (c): A resource may be listed as an historical resources in the California Register if it meets any of the following National Register of Historic Places criteria:
(1) Is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage.
(2) Is associated with the lives of persons important in our past.

consider the value of the resource to the tribe. For example, in considering the criterion that a resource is "associated with the lives of persons important in our past," a lead agency would ask whether the resource is associated with the lives of persons important to the *relevant tribe's* past. That determination must be supported with substantial evidence.[4] Note that because the statute gives lead agencies discretion regarding how to treat non-listed resources, evidence of a fair argument is insufficient by itself to compel a lead agency to treat it as a tribal cultural resource if the lead agency determines otherwise. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal. 4th 1086, 1117 ("'the fair argument standard does not govern …' an agency's determination of whether a building qualifies as a 'historical resource'") (quoting *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 1072).)

B. Consultation

Public Resources Code § 21080.3.1(a) defines "consultation" with a cross-reference to Government Code § 65352.4, which applies when local governments consult with tribes on ~~certain planning documents~~. That section states:

> "consultation" means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance. (Gov. Code, § 65352.4.)

OPR's *Tribal Consultation Guidelines* provide further explanation of what "consultation" means.[5] For example, the *Guidelines* explain that consultation "is a process in which both the

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(3) Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work if an important creative individual or possesses high artistic values.
(4) Has yielded, or may be likely to yield, information important in prehistory or history.

[4] Public Resources Code § 21080 (e) defines "substantial evidence" to mean "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." Notably, new § 21080.3.1(a) states: "The Legislature finds and declares that California Native American tribes traditionally and culturally affiliated with a geographic area may have expertise concerning their tribal cultural resources."

[5] Since 2004, cities and counties have had to consult with California Native American Tribes before adoption or amendment of a general plan, specific plan or designation of open space. (Gov. Code, § 65352.4., "Senate Bill 18" (Burton, Chapter 905, Statutes of 2004).) The Tribal Consultation Guidelines explain those requirements in detail. The new requirements in the Public Resources Code do not change those ongoing responsibilities. In instances in which the

tribe and local government invest time and effort into seeking a mutually agreeable resolution for the purpose of preserving or mitigating impacts to a cultural place, where feasible." (At p. 15.) It further states:

> Effective consultation is an ongoing process, not a single event. The process should focus on identifying issues of concern to tribes pertinent to the cultural place(s) at issue – including cultural values, religious beliefs, traditional practices, and laws protecting California Native American cultural sites – and on defining the full range of acceptable ways in which a local government can accommodate tribal concerns. (At p. 16.)

The new provisions in the Public Resources Code enumerate topics that may be addressed during consultation, including tribal cultural resources, the potential significance of project impacts, the type of environmental document that should be prepared, possible mitigation measures and project alternatives. (Pub. Resources Code, § 21080.3.2(a).)

C. Timing in the CEQA Process and Consultation Steps

The new provisions in the Public Resources Code proscribe specific steps and timelines governing the notice and consultation process.

Those steps are summarized below and in the graphic entitled Compliance Timeline and Consultation Process Flowchart in Section V.

1) The Native American Heritage Commission will provide each tribe with a list of all public agencies that may be lead agencies under 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 consultation. This list must be provided on or before July 1, 2016. (Pub. Resources Code, § 5097.94 (m).)

2) If a tribe wishes to be notified of projects within its traditionally and culturally affiliated area, the tribe must submit a written request to the relevant lead agency. (Pub. Resources Code, § 21080.3.1 (b).)

3) Within 14 days of determining that a project application is complete, or to undertake a project, the lead agency must provide formal notification, in writing, to the tribes that have requested notification of proposed projects as described in step 2, above. That notice must include a

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requirements of both the Government Code and the Public Resources Code apply to a project, while there may be substantial overlap, the lead agency must ensure that it complies with the requirements of both statutes.

description of the project, its location, and must state that the tribe has 30 days to request consultation.

4) If it wishes to engage in consultation on the project, the tribe must respond to the lead agency within 30 days of receipt of the formal notification described in step 3, above. The tribe's response must designate a lead contact person. If the tribe does not designate a lead contact person, or designates multiple people, the lead agency shall defer to the individual listed on the contact list maintained by the Native American Heritage Commission.

5) The lead agency must *begin* the consultation process with the tribes that have requested consultation within 30 days of receiving the request for consultation.

6) Consultation concludes when either: 1) the parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource, or 2) a party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached. (Pub. Resources Code, § 21080.3.2 (b)(1) & (2).) ~~Note that consultation can also be ongoing throughout the CEQA process.~~

D. Confidentiality

Under existing law, environmental documents must not include information about the location of an archeological site or sacred lands or any other information that is exempt from public disclosure pursuant to the Public Records Act. (Cal. Code Regs. § 15120(d); *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 220).[6] Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects are also exempt from disclosure. (Pub. Resources Code, §§ 5097.9, 5097.993.) This exclusion reflects California's strong policy in favor of protecting Native American artifacts. Confidential cultural resource inventories or reports generated for environmental documents should be maintained by the lead agency under separate cover and shall not be available to the public. (*Clover Valley* at 221, citing Governor's Office of Planning and Research, Cal. Tribal Consultation Guidelines, (Nov. 14, 2005 supp. p. 27).)

[6] In *Clover Valley*, the trial court denied petitions for writ of mandate challenging a city's approval of a subdivision project. Revisions to the project included transferring prehistoric Native American artifacts for preservation. The city prepared a recirculated draft environmental impact report to analyze the revised project. The locations and specific characteristics of the cultural resources were not described. The city provided additional information briefly describing the characteristics of the cultural resources, the project's effects on them, and planned mitigation measures. The Court of Appeal affirmed the trial court's ruling, holding that the additional information did not require recirculation because the changes were not significant in light of disclosure restrictions pertaining to cultural resources. (Gov. Code, § 6254(r); Pub. Resources Code, §§ 5097.9, 5097.993; Cal. Code Regs., (d)).

The new provisions in the Public Resources Code include additional rules governing confidentiality during tribal consultation. (Pub. Resources Code, §21082.3(c).)

First, information submitted by a California Native American tribe during the environmental review process may not be included in the environmental document or disclosed to the public without the prior written consent of the tribe. Consistent with current practice, confidential information may be included in a confidential appendix. A lead agency may exchange information confidentially with other public agencies that have jurisdiction over the environmental document. (Pub. Resources Code, § 21082.3 (c)(1).) This confidentiality protection extends to a tribe's comment letter on an environmental document. A lead agency can summarize tribal comment letters in general way, while still maintaining confidentiality consistent with the holding in *Clover Valley.*

Second, an exception to the general rule prohibiting disclosure is that the lead agency and the tribe may share confidential information regarding tribal cultural resources with the project applicant and its agents. In that case, the project applicant is responsible for keeping the information confidential, unless the tribe consents to disclosure in writing, in order to prevent looting, vandalism, or damage to the cultural resource. The project applicant must use a reasonable degree of care to protect the information. Additionally, information that is already publically available, developed by the project applicant, or lawfully obtained from a third party that is not the tribe, lead agency, or another public agency may be disclosed during the environmental review process. (Pub. Resources Code, § 21082.3(c)(2).)

Third, the new law does not affect any existing cultural resource or confidentiality protections. (Pub. Resources Code, § 21082.3 (c)(3).)

Fourth and finally, the lead agency or another public agency may describe the information in general terms in the environmental document. This is so that the public is informed about the basis of the decision, while confidentiality is maintained. (Pub. Resources Code, § 21082.3(c)(4).) The decision in *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200 provides a useful description of how a lead agency may balance the need for confidentiality with disclosure obligations under CEQA.

E. Mitigation

Public agencies shall, when feasible, avoid damaging effects to any Tribal cultural resource. (Pub. Resources Code, §21084.3 (a).)

If the lead agency determines that a project may cause a substantial adverse change to a tribal cultural resource, and measures are not otherwise identified in the consultation process, new provisions in the Public Resources Code describe mitigation measures that, if determined by the lead agency to be feasible, may avoid or minimize the significant adverse impacts. (Pub. Resources Code, § 21084.3 (b).) Examples include:

> (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 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 utilizing the resources or places
>
> (4) Protecting the resource (*Ibid*.)

IV. Updating Appendix G

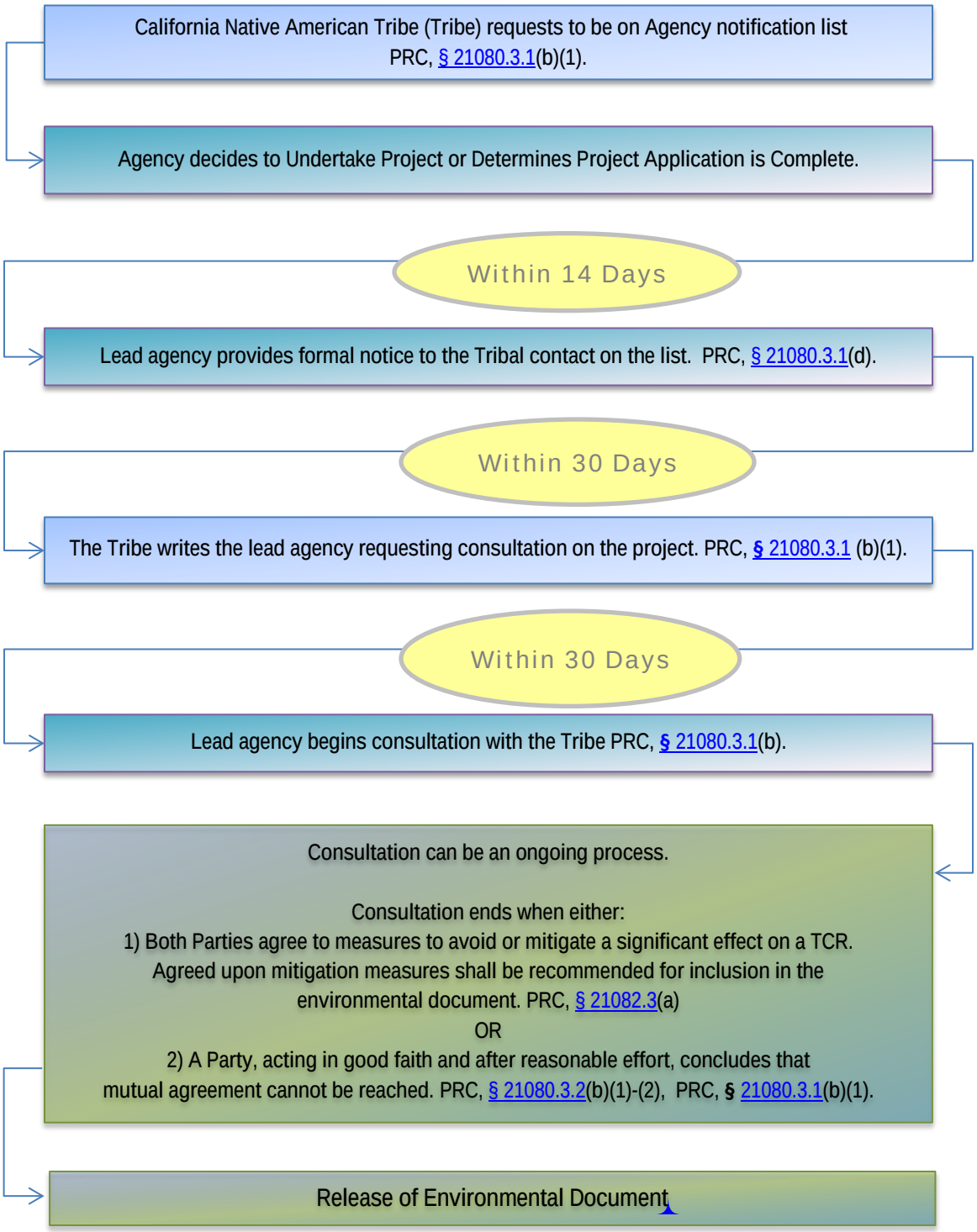
The statute directs OPR to develop proposed updates to the sample initial study checklist in Appendix G of the CEQA Guidelines to do both of the following: (a) separate the consideration of paleontological resources from tribal cultural resources and update the relevant sample questions, and (b) add consideration of tribal cultural resources with relevant sample questions. The Natural Resources Agency must complete its regulatory process for adoption of updates on or before July 1, 2016.

As noted above, the substantive and procedural requirements added in AB 52 go into effect on July 1, 2015. Because the environmental checklist in Appendix G is a *sample* and not mandatory, lead agencies need not wait for the Appendix G update before updating their own procedures.

In this interim period, OPR suggests that lead agencies consider asking the following question in their environmental documents:

> *Would the project cause a substantial adverse change in the significance of a tribal cultural resource as defined in Public Resources Code 21074?*

V. Compliance Timeline and Consultation Process Flowchart



VI. Bibliography of Resources

A. California Government Resources

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B. Federal Government Resources

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<http://www.nps.gov/nr/publications/bulletins/pdfs/nrb36.pdf> (as of Feb. 17, 2015).

U.S. Department of the Interior, National Parks Service, Guidelines for Evaluating and Documenting Traditional Cultural Properties (1990, revised 1998) ("Bulletin 38")

<http://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf> (as of Feb. 17, 2015).

C. Cases Interpreting Provisions in the Public Resources Code Governing Analysis of Historic Resources

Clover Valley Foundation v. City of Rocklin (2011) 197 Cal.App.4th 200 [holding that CEQA does not require a lead agency to disclose confidential information regarding the location and nature of cultural resources sites and that a lead agency need only provide a general description of those resources and mitigation measures in an EIR]

Citizens for the Restoration of L Street v. City of Fresno (2014) 229 Cal.App.4th 340 (holding that the fair argument standard does not apply to a lead agency's discretionary determination of whether a non-listed building or district is an historical resource for purposes of CEQA) (see also *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039)]