



PECHANGA INDIAN RESERVATION
Temecula Band of Luiseño Mission Indians

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December 18, 2015

Via Electronic Mail
(ceqa.guidelines@resources.ca.gov)

Holly Roberson, Land Use Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814

RE: Pechanga Tribe Comments on Proposed Changes to Appendix G Incorporating Tribal Cultural Resources

Dear Ms. Roberson,

These comments are submitted on behalf of the Pechanga Band of Luiseño Indians (the "Tribe"), a federally-recognized and sovereign Indian nation. We appreciate the opportunity to provide comments on the proposed changes to Appendix G as the preservation of tribal cultural resources is of paramount concern for the Tribe. The Tribe has previously submitted comments on the CEQA Guidelines in a letter dated October 14, 2015 that we would also like to be included in the record of comments on the CEQA Guidelines Update and the specific Appendix G update pursuant to AB 52. Included herein are the Tribe's overall comments on the specific language OPR has offered concerning the Appendix G checklist, its pivotal role in guiding lead agencies and consultants in proper environmental impact analyses and compliance with AB 52 and the basis for the specific language we are offering concerning the checklist. Our specific suggested language edits concerning the Appendix G Checklist Alternatives contained in the OPR discussion draft dated November 17, 2015 are attached to this letter (see Attachment A).

As a basis for our comments, please take note of the legislative mandates of AB 52 as it relates to the update of Appendix G. Newly added section 21083.09 of the Public Resource Code requires OPR to prepare and develop (on or before July 1, 2016) revisions to Appendix G 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.

Alternatives 1 and 2 Fail to Fulfill the Mandates of AB 52

With respect to both Alternative 1 and 2, these options fall short of the AB 52 mandate and bringing the CEQA Guidelines up to date with new CEQA statutory requirements. First, a simple reference to the code section where Tribal Cultural Resource is defined in the statute does not provide the guidance the CEQA Guidelines are intended to and permitted to provide for entities and individuals responsible for compliance with the provisions. Second, a question that does not provide guidance on how to ascertain the tribal value of the resource, including the role that tribal consultation plays in that query will fail in the complete identification, proper impact analysis and mitigation of the impacts to tribal cultural resources during the CEQA process.

Through our participation on CEQA projects where agencies were obligated to conduct inquiries and analysis on Historic Resources we have seen time and time again how resources are completely and partially overlooked and/or improperly identified and defined when the only guidance on executing this inquiry is a code section from the statute. For example, there are different types of Historical Resources with varying elements to their definitions. We have witnessed that agencies, utilizing the current checklist, which does not explain or break out the types/categories in question format overlook and omit intact present resources because the company/agency/individual putting together the checklist and analysis does not have familiarity with all the categories and how to discern whether they have resources within all the categories of Historic Resources. We have seen the Historic Resources "No Impact" box checked all too often just because there are no significant historic buildings or historic trash sites, without regard to even checking with culturally affiliated communities to see if there are traditional cultural properties (TCPs), another category of Historic Resources that is often overlooked because it requires an element of community consultation not necessarily needed for the other types of Historic Resources. Since Tribal Cultural Resources, like TCPs, are not easily discernable to the naked eye of someone outside of the affiliated community, there will be this extra step of talking with and consulting with the communities that value these resources. We do not want that same type of challenges we have encountered concerning TCPs to present itself with the new tribal cultural resources category.

Further, we believe not only is it within the purview of OPR, but that OPR is obligated to add questions that will assist lead agencies in making the determination of whether there are tribal cultural resources. In particular, we believe the intention of the statutory language of AB 52 is that OPR "update" and add "relevant questions" with respect to tribal cultural resources as it relates to AB 52. This means that where necessary, questions may and should be added concerning the key elements of AB 52 as it relates to the purposes of the checklist. We assert there are straightforward steps in an analysis to figure out whether there is a tribal cultural resource present, whether the project will impact the resource, and to what level it will be impacted. These steps can be incorporated into the checklist form. Since a tribal cultural resource is a physical resource that has value to the affiliated community and will include elements that are not readily visible,

tribal consultation is a key component in ascertaining the tribal value, nature/significance of the resource and therefore, whether there actually IS a tribal cultural resource. In addition, AB 52 mandates that public agencies, if feasible, avoid damaging effects to any tribal cultural resources, and if not, mitigate those resources in a culturally appropriate manner. This also can only be done knowing the value of the resource to the affiliated community through consultation.

Because of the unique nature of tribal cultural resources, we believe it is well within the mandate of AB 52 for OPR to provide more complete questions concerning tribal cultural resources beyond a simple reference to the statute section. Since these are the primary elements to discern whether there is a tribal cultural resource, OPR must include language in the questions or elsewhere in the checklist regarding ascertaining the tribal value of the resources and ensuring that consultation with the affiliated community actually occurs for these purposes. As drafted, subsection (e) of both Alternatives 1 and 2 do not guide the preparer in complying with the tribal consultation component or the tribal value component of the definition and analysis of tribal cultural resources. Again, these elements are essential to analyzing whether a TCR exists and the potential impacts thereto by the project. Having over 35 years of experience in preservation efforts we know that consideration of tribal cultural resources and their tribal values is complex and cannot be addressed with a simple code section reference. While we understand the overall goal of OPR is to revise the Appendix (both under the CEQA Guidelines revisions and AB 52) to make it more streamlined, the Tribe is concerned that too simplistic of an approach will result in overlooking the essential elements and components of a tribal cultural resource and result in the failure to properly implement AB 52.

Only Alternative 3 Separates the Consideration of Paleontological Resources from Tribal Cultural Resources

As noted by Dr. Fisk during the public workshop hosted by OPR on December 11, 2015, the separation of paleontological and tribal cultural resources has not been effected simply by adding a different section letter before both. As Dr. Fisk so aptly pointed out, paleontological resources are not cultural resources, nor are geologic features either cultural or paleontological in nature. Thus, we support Dr. Fisk's suggestion that paleontological resources be contained in a separate section, while geologic features should be considered under the existing Geology section of Appendix G.

Alternative 3 with Modifications More Accurately Reflects the Mandates of AB 52

We agree with OPR's inclusion of the introductory paragraph language in the tribal cultural resources category of Alternative 3. We agree that a simple paragraph setting forth the role of consultation and tribal information is permissible in the checklist and key to identification of tribal cultural resources and ensuring compliance with AB 52. The Tribe appreciates the inclusion of this paragraph to provide context and guidance for the user, especially regarding the tribal

consultation requirement. We also agree that breaking out tribal cultural resources in a stand-alone resource category is the most simple and straight-forward way to ensure these resources are identified and analyzed properly, not confused with the processes to identify other types of resources, and to ensure that the purpose and role of the tribal consultation is fulfilled.

With respect to Alternative 3, we believe that with the attached edits, both the mandate and intent of AB 52 can be met by providing appropriate guidance to those using the Appendix. Our proposed edits emphasize the importance of tribal consultation, as the statute requires tribal input in determining the level of environmental review necessary, the identification of tribal cultural resources, whether there are adverse impacts to such resources and how to avoid or appropriately mitigate such impacts. We have also provided some additional edits to the relevant questions, including questions that we believe will guide the user through the proper analysis and information gathering required by AB 52.

With regard to the specific language edits, we offer these for a few reasons. First, we believe the language offered stating that tribal information “may assist” a lead agency is misleading and could steer an agency into a path of thinking it does not have to consider the information since it may or may not assist them. In fact, tribal information must be considered as does all information presented to a lead agency during the CEQA process, but now even more so as the tribal government status and particular affiliation with these resources has been recognized by AB 52. In addition, the California Supreme Court in the *Newhall* case just upheld the lower court’s determination that tribal information and testimony should be considered in an environmental assessment. Yes, this information may not necessarily equal the exact finding, but it must be considered. We believe the key to be highlighted with this language is actually this exact point - that tribal information is to be considered. We re-worded that sentence as such. Second, we agree with OPR’s inclination to highlight the agency obligation to the resources regardless of whether consultation occurs. However, we have offered wording for the later part of the paragraph that would make this clearer and ties it to the statutory language and intent.

Third, we re-worded letter (c) in Alternative 3 to capture the intent of AB 52 concerning the consideration of tribal values. Specifically, the consideration of the tribal value of the resources is not something that happens as a footnote or AFTER one has assessed whether the resource meets the criteria of set forth in §5024.1(c). Pursuant to AB 52, the tribal value is to be analyzed and factored equally with the criteria. Otherwise, there is no difference between a Historic Resource evaluation and a Tribal Cultural Resource evaluation. The tribal value is a key element in deciding whether you have a tribal cultural resource, the significance of it, and the extent of impacts to it.

Adding a Checkbox for Tribal Consultation in Appendix G

In addition, we suggest that a checkbox for initiating tribal consultation be included in the Environmental Checklist Form located between the section entitled, “Environmental Factors

Potentially Affected” and the “Determination” section with the 5 checkboxes concerning effects and the type of environmental document. This would be one to two sentences with checkboxes that could look something like:

- Tribal Consultation has begun pursuant to Public Resources Code §21080.3.1. If not, do not check box, and briefly state why: _____.

The reason for including this has been explained above. Consultation is necessary for figuring out whether there are tribal cultural resource and the extent of the impacts to those resources. These resource identification steps of the process are also related to the determination of the type of environmental document that will be prepared. This is evidenced by the language in AB 52 requiring tribal consultation to begin prior to the release of a negative declaration, mitigated negative declaration or environmental impact report for a project. This additional checkbox would be an element that would help ensure compliance with the timing and intent of this section of AB 52 that is such an integral part of the goal and purposes of the Appendix G checklist. If tribal consultation has not begun, the agency can simply state the reason here – for example, “Because no tribe has requested consultation.” This component is not meant to highlight anything negative about the process of any particular agency, but is simply here as a part of the record building and to ensure compliance concerning these necessary mandates of AB 52. In addition, we believe that the “Environmental Factors Potentially Affected” list must be updated to include “Tribal Cultural Resources.”

In closing, although the Guidelines are intended to provide guidance and are not binding like statutory language, the fact is they are given “great weight” by courts and are utilized by the majority of the agencies as the baseline and definitive guidance on complying with CEQA. In virtually every single environmental document the Tribe has reviewed over the past decades the exact checklist that is offered by the State is utilized and relied upon for the analysis, findings and conclusions in the CEQA documents. To ensure compliance with AB 52 and proper judicial review of actions taken under CEQA, the Guidelines, including this Appendix G checklist must incorporate all the components of AB 52, including direction on how to ascertain whether there is a tribal cultural resource and ensuring that the tribal consultation component is carried out pursuant to the statute and for the purposes of informing the environmental review and the analysis of impacts to tribal cultural resources.

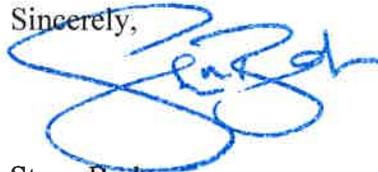
The Tribe would like to thank OPR for offering an opportunity to provide comments on the proposed revisions to Appendix G. We would also like to acknowledge OPR's recent efforts to solicit input from California tribes. The Tribe understands that OPR has limited staff and a large mandate to fill. In the future, however, we ask that tribal consultation and outreach occur well in advance of the comment due date. Tribes were only provided two business days between the Tribal Leaders meeting on December 16th and the comment deadline of December 18th. This

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limits the ability of tribes to provide insightful and meaningful comments on a topic of vital importance to tribal communities.

We look forward to working with OPR on future drafts of Appendix G. Thank you for taking the time to review our comments. Should you have any questions, please contact Michele Hannah, Deputy General Counsel at (951) 770-6179 or mhannah@pechanga-nsn.gov or Laura Miranda at lmiranda@pechanga-nsn.gov.

Sincerely,



Steve Bodmer
General Counsel

Enclosure

cc: Assemblyman Mike Gatto
John Laird, Secretary for Natural Resources Agency
Pechanga Tribal Council
Laura Miranda, Esq., Attorney for the Pechanga Tribe
Paula Treat

Attachment A
Pechanga Band of Luiseño Indians Comment
12/18/15

Alternative 3

TRIBAL CULTURAL RESOURCES.

Information submitted through consultation with a California Native American Tribe that has requested such consultation may be considered by assist a lead agency in determining what type of environmental document should be undertaken, identifying tribal cultural resources, determining whether the project may adversely affect tribal cultural resources, and if so, how such effects may be avoided or mitigated. Whether or not consultation has been requested, However, regardless of whether tribal consultation occurs or is completed, substantial adverse changes to a tribal cultural resource are to be identified, assessed and mitigated. Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource.

Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
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1) Would the project cause a substantial adverse change in a site, feature, place, cultural landscape, sacred place, or object, with cultural value to a California Native American Tribe, which is any 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?

~~e) Determined by the lead agency, in its discretion and supported by substantial evidence, to be a tribal cultural resource, after applying the criteria in Public Resources Code §5024.1(c), and considering the significance of the resource to a California Native American Tribe?~~

c) After considering the significance of the resource to a California Native American Tribe and applying the criteria in Public Resources Code §5024.1(c), a resource is determined by the lead agency, in its discretion and supported by substantial

evidence, to be a tribal cultural resource?

2) Would the Project:

a) Potentially disturb any human remains, including those interred outside of dedicated cemeteries (see Cal. Public Resources Code, Ch. 1.75, §5097.98 and Health and Safety Code §7050.5(b))?

b) Potentially disturb any resource or place defined in Public Resources Code §5097.9 et seq (Native American Historical, Cultural and Sacred Sites)?