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To: CEQA Guidelines@CNRA
Subject: AB52 comments

Comments on the Discussion Draft Technical Advisory: AB 52 and Tribal Cultural Resources in CEQA (May 2015)

C. 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).)

Comment: The requesting Tribe must also define what their “traditional and cultural affiliated area” is on a map and in writing. If they do not, the agency will not know what Tribal area their project is in and who to send letters to. The agency would then have to mail project letters to all the Tribes and interested individuals in the state that wish to consult. This would be a considerable work load and cost.

E. Mitigation

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:

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(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.)

Comment: If the project will have a significant adverse impact on a Tribal cultural resource, these mitigation options allow the agency to not have substantial impacts – they can avoid, protect, or preserve. How is that a mitigation for substantial impacts? If the project will substantially harm a Tribal resource, the agency cannot preserve or protect the site. Early consultation will help in project planning to avoid TCRs, but avoidance and protection are not always possible. That is when real mitigation measures are necessary. There should be some creative options provided in the guidance that will provide some benefits to the Tribe when avoidance is not feasible.

For example, if a habitat restoration project or setback levee is going to destroy an entire site, how can the agency implement any of these mitigation measures? Some actionable mitigation measures would be more useful. How about the agency must pay for an ethnographer to conduct oral interviews with elders documenting the Tribal value and practices at the site and giving that to the Tribe for posterity? Or, if the project must destroy one site, purchasing a conservation easement on another culturally important site and preserving it in place of the damaged one. If the impacts are to culturally important plants or animals the agency must replant culturally important plants after the project construction is done. If the project impacts the habitat of a Tribally important animals, that habitat must be replaced at the site or elsewhere. There are a lot

of possible mitigations that are real and actionable that could lessen the severity of some impacts. These guidelines should provide some of these operational mitigation measures instead of describing avoidance and preservation in seven different ways. E.2 (c) is redundant. There is a whole section on confidentiality.

Further comments on mitigation:

Usually archaeological sites are considered eligible for the California Register based on Criterion 4 : has yielded or is likely to yield information important in prehistory or history. If all Native American archaeological sites are considered TCRs by Tribes, then Tribes may wish that no data recovery or scientific work be done. There needs to be a balance between Tribal interests and archaeological and scientific interests. Part of this is because archaeological scientific evidence from a site can provide the “substantial evidence” that is required to show the site is a TCR, (2) *A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant.* If Criterion 4 is effectively disregarded for archaeological sites because the TCR concept take precedence, it may cause conflict resulting in the loss of the required substantial evidence needed for the agency to determine its significance as a TCR. Without the archaeological work, an agency may determine there is not substantial evidence to determine the site is a TCR.

Archaeological work is also useful for determining ethnic or Tribal affinity. The NAHC has determined where the Tribal boundaries are based on information that is only known to that agency. There is no transparency on how this is determined. Tribal people were mobile in the past. Territories overlapped and some Tribes traveled into other Tribes territory for trading and other events; archaeological work can help ascribe ethnic affinity to sites, especially in disputed or overlapping areas.

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