

# San Manuel Band of Mission Indians

December 18, 2015

Christopher Calfee, Senior Counsel  
Governor's Office of Planning and Research  
1400 Tenth Street  
Sacramento, CA 95814

**Re: Proposed changes to Appendix G of the CEQA Guidelines, and request for formal government to government consultation on OPR's proposed interpretation of Substantial Evidence Standard for Tribal Cultural Resources,**

Dear Mr. Calfee,

This letter is submitted on behalf of the San Manuel Band of Mission Indians, a federally recognized Indian tribe (the "Tribe"). We write to offer our comments on the proposed changes to Appendix G of the CEQA Guidelines as well as request government-to-government consultation pursuant to Executive Order B-10-11 to discuss concerns about the treatment of tribal cultural resources (TCRs) as described in the discussion draft *OPR Draft Technical Advisory: AB 52 and Tribal Cultural Resources in CEQA* that is presently published on the OPR website.

Enclosed for your consideration are our comments on the proposed changes to Appendix G as Exhibit A of the proposed alternatives provided by OPR. Only alternative three captures part of the legislative intent of AB 52, however, we request additional changes as reflected in Exhibit A. Our comments, which have been guided by our overall concern that the changes to Appendix G should reflect the intent of the legislation, to ensure tribal governments and the vital resource information they possess concerning tribal sacred places and tribal cultural resources would be included within the CEQA process in a manner that is meaningful and subject to the same CEQA standards and policies as other resources.

In addition, as you are aware, Executive Order B-10-11 orders state agencies and departments to "permit elected officials and other representatives of tribal governments to provide meaningful input into the development of legislation, regulations, rules, and policies on matters that may affect tribal communities." We are concerned that the discussion draft Advisory, as written, will have serious adverse effects on tribal cultural resources. We understand that the discussion draft Advisory remains a work in progress and that OPR is actively working on revising that draft. As such, we ask OPR to consult with the Tribe on a government-to-government basis regarding revisions to the draft outlined below as well as others that the Tribe feels are of vital importance.

It is well-established that the entirety of what is known today as the state of California was at one time home to Native tribes under their governance. Since the loss of our aboriginal lands, tribes have remained stewards of TCRs and other resources throughout the state. We look forward to working with California on how best to protect the resources that CEQA seeks to protect for the benefit of our respective communities.

Our Tribe supported AB 52, authored by Assemblyman Gatto, because it ensured tribal governments and the vital resource information they possess concerning tribal sacred places and tribal cultural resources would be included within the CEQA process in a manner that is meaningful and subject to the same

CEQA standards and policies as other resources. Additionally the law acknowledges the unique sovereign status of tribes, their expertise concerning these resources, and their relationships to these resources. It is troubling that the discussion draft Advisory proffered by OPR fails to uphold these core principles and provisions in AB 52.

Most importantly, the discussion draft Advisory fails to take into consideration that Tribes are sovereign nations. They have governing bodies and represent communities and cultures that have had a direct association with these resources since time immemorial. These resources are unlike any historical or archaeological resource as they play a vital primary role in the history, identity, spirituality and community value system of tribal nations. We believed this was recognized in AB 52 through the acknowledgement of tribal expertise and the creation of a new and separate resource category of TCRs. The technical advisory should reflect the intent of the law and recognize tribes as cultural resource experts and weigh the evidence put forth by tribes accordingly.

OPR's proposed language granting lead agency discretion in Section 21074(a)(2) of AB 52 will have detrimental effects on the core intentions and statutory language in AB 52. Specifically, we oppose the language on page 5 stating, "... evidence of a fair argument of substantial evidence is insufficient by itself to compel a lead agency to treat something as a tribal cultural resource" and believe this interpretation is based on irrelevant and incomplete case law put forth by certain stakeholder groups seeking to eviscerate the new law and legislative intent. These cases cited in the discussion draft Advisory do not address the treatment of TCRs (a new category of resources created by AB 52) or tribal expertise and how it would be factored into a substantial evidence standard. OPR must exercise extreme caution to not accept the invitation of certain stakeholder groups to stretch cases beyond their specific facts and limited holdings or participate in veiled efforts to rewrite AB 52's legislative history after-the-fact.

First, the *Valley Advocates* case referenced on pages 5 and 12 of the Advisory represents the view of one district court. The Advisory completely failed to cite *Architectural Heritage Association v. County of Monterey* (2004) 122 Cal.App.4th 1095, which has a contravening opinion that the fair argument *does apply* to the identification of historic buildings. And as neither case deals with TCRs, at best, it can only be said there may be a split opinion in the district courts of whether a fair argument may be employed to identify historic buildings. As TCRs and historic buildings are completely separate categories with completely separate treatment, this interpretation is inapplicable to the implementation of AB 52. AB 52 specifically created a new class of resources called TCRs separate and apart from archaeological sites and historic buildings exactly because the policy, standards and practices of CEQA in those areas were *inappropriate for TCRs* and failed to adequately identify, consider or protect them.

Second, the *L Street* and *Berkeley Hillside Preservation* cases, summarily referenced in the Advisory on page 12, were decided and published *after* AB 52 was overwhelmingly approved by the state legislature. Again, neither case contributes to the implementation of AB 52 as neither case turned on a factual situation that is applicable to tribes or the new category of TCRs as legislated in AB 52: *L Street* dealt with an historic building and *Berkeley* dealt with exceptions to an exemption for a large new home which says little if anything about how to approach evidentiary standards for TCRs relative to negative declarations, mitigated negative declarations or environmental impact reports under AB 52.

To put forth this interpretation will eviscerate the law, devalue the evidence from tribal governments that the law sought to promote, and position tribal governments as rivals against the consultants of lead agencies and applicants. There is a serious risk that lead agencies will conclude that a valuable tribal cultural resource is NOT a TCR, even where the tribe provides evidence of a fair argument that there is

Christopher Calfee, Senior Counsel

December 18, 2015

Page | 3

substantial evidence of a TCR. The tribe's only recourse will be litigation, which is the same position tribes were in prior to AB 52.

We supported AB 52 so that tribes would now be able to utilize the same standards and provisions of CEQA, including a fair argument of substantial evidence. This standard of proof is the standard that is applied to other resources in CEQA. It should be the standard for tribes and their information. California tribes have already been displaced and removed from the lands to which they have ongoing aboriginal ties. Tribes must not be forced to comply with a higher standard to ensure avoidance, mitigation and legal protections under CEQA.

We appreciate OPR releasing the discussion draft Advisory for public comment. This was a positive step. However, the Tribe wishes to exercise its right to government-to-government consultation to discuss how best to address removing the paragraph on page 5 regarding *Berkeley Hills* and instead emphasizing those parts of the bill and its legislative intent related to tribal expertise and the new category of TCRs.

Thank you for your time and consideration of this crucial and important issue to tribal sovereignty and self-determination.

Sincerely,



Vincent Duro,  
Vice Chairman

cc: Michael Martinez, Office of the Governor  
Assemblyman Mike Gatto  
Ken Alex, Director, Governor's Office of Planning and Research  
John Laird, Secretary of Natural Resources  
Cynthia Gomez, Executive Director, Native American Heritage Commission

## Exhibit A

Below are our recommended amendments to the proposed changes to Appendix G and “Alternative 3” as proposed by OPR.

1. Add a new question 11 in the following form:

Consultation pursuant to AB52 with California Native American Tribes: List the California Native American Tribes that requested consultation and indicate the status of consultation?

2. Changes requested to Alternative 3:

### Alternative 3

#### TRIBAL CULTURAL RESOURCES.

Information submitted through consultation with a California Native American Tribe that has requested such consultation may shall 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, would 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<br>Significant<br>Impact | Less Than<br>Significant with<br>Mitigation<br>Incorporated | Less Than<br>Significant<br>Impact | No<br>Impact             |
|--|--------------------------------------|---|------------------------------------|--------------------------|
| <u>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:</u> | <input type="checkbox"/>             | <input type="checkbox"/>                                    | <input type="checkbox"/>           | <input type="checkbox"/> |
| <u>a) Determined by a California Native American Tribe, through consultation pursuant to AB 52, to have cultural value?</u>  | <input type="checkbox"/>             | <input type="checkbox"/>                                    | <input type="checkbox"/>           | <input type="checkbox"/> |
| <u>a) b) Included or determined to be eligible for inclusion in the California Register of Historical Resources?</u>   | <input type="checkbox"/>             | <input type="checkbox"/>                                    | <input type="checkbox"/>           | <input type="checkbox"/> |

b) c) Included in a local register of historical resources?

d) Included in the Native American Heritage Commission's Sacred Lands File?

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(e), and considering the Significance of the resource to a California Native American Tribe?

e) 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)?