

CEQA and Tribal Consultation: Best Practices For Complying With AB 52's Significant New Requirements

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AB 52 – What Is It?

- **CEQA Analysis:**

- Requires consideration of a project's potential to significantly impact a Tribal Cultural Resource

- **Notice/Consultation:**

- Requires early notice of projects and, if requested by a Tribe, consultation with requesting Tribes to inform the CEQA process



What Is a Tribal Cultural Resource

- AB 52 protects a new class of resources under CEQA
- Tribal Cultural Resources (TCRs):
 - A site, feature, place, cultural landscape, sacred place or object with cultural value to a “California Native American tribe,” that is either on, or eligible for inclusion in, the California Historic Register or a local historic register, or is a resource that the lead agency, at its discretion and supported by substantial evidence, determines should be treated as a Tribal Cultural Resource. PRC § 21074(a)(1-2)
- Tribes: In the Native American Heritage Commission (NAHC) “contact list.” PRC § 21073



AB 52 – Much more than consultation

- Whether or not a Tribe has requested consultation, a CEQA document must disclose and analyze whether the proposed project would cause a substantial adverse change to the TCR and, therefore, have a significant impact on the TCR. PRC §21082.3(b)(1)-(2)
 - A CEQA document must consider feasible alternatives and/or mitigation measures to avoid or minimize an impact on the identified TCR.



TCR Mitigation

- Mitigation measures that could avoid or minimize adverse effects to TCRs must be considered, (unless determined to be infeasible):
 - Avoidance and preservation in place;
 - Treating the TCR with culturally appropriate dignity, which can include protecting the cultural character and integrity of the resource, protecting the traditional use of the resource, and protecting the confidentiality of the resource;
 - 3) Permanent conservation easements or other real property interests;
 - 4) “Protecting the resource” (a phrase which is undefined in the statute)

PRC §21084.3.



Requesting Consultation

- If a Tribe wants to be notified of a project proposed in a geographic area traditionally or culturally affiliated with the Tribe, it must first file a written request with the public agency requesting formal notification. PRC § 21080.3.1(b)
- Once a written request has been submitted by a Tribe, a public agency must provide that Tribe with notice within 14 days after the public agency either determines a project application is complete or, after it decides to undertake its own project. PRC § 21080.3.1(d)



Requesting Consultation

- Tribe(s) must request consultation within 30 days of receipt of the notice, and must designate a lead contact person. If no lead is designated or if multiple persons are designated, the public agency is only required to coordinate with the person listed for the Tribe on the NAHC contact list.
- Failure of a Tribe(s) to respond to the public agency's notice concludes the process, and no consultation is required.
- Practice Tip: Whether or not consultation is requested, nothing in AB 52 precludes a Tribe(s) from participating in the CEQA process in the same manner as a member of the public or public agency: via public comment.



Engaging in Consultation

- If a Tribe requests consultation, the public agency must initiate consultation within 30 days of receiving that request. PRC §21080.3.1(e)
- All parties must undertake consultation in good faith, a process that may include, upon request, the participation of a project applicant and/or the applicant's consultants. PRC § 21080.3.2(d)



Engaging in Consultation

Consultation – “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.” PRC §21080.3.1(b) citing Gov’t Code § 65352.4



Concluding Consultation

- Consultation concludes when either:
 - Agreement is reached regarding recommendations to avoid and/or mitigate any significant effect on a TCR or,
 - A party concludes in good faith, after “reasonable effort,” that agreement cannot be reached.

PRC § 21080.3.2(b)



Confidentiality

- Whether or not a Tribe requests consultation, a public agency has the duty to keep certain information it may discover during the CEQA process confidential, unless it receives the prior consent of the Tribe that provided the information.
 - E.g. the location, description and use of TCRs, as required by PRC § 6254 regarding grave sites and sacred places maintained by NAHC, and PRC § 6254.10 regarding archeological sites.



Confidentiality and Consultation

- If a public agency does publish any information submitted by a Tribe during consultation and/or the CEQA process, it must be published in a confidential appendix, unless the Tribe consents, in writing, to the disclosure of the information. PRC § 21082.3(2)
- A public agency may describe information regarding TCRs “in general terms in the environmental document so as to inform the public of the basis of” a decision” without breaching confidentiality requirements PRC § 21082.3(c)(4)



Approving Projects With TCR Impacts

- Staff must recommend to decision-makers that they include in a CEQA document the mitigation measures agreed upon in a consultation. PRC § 21082.3(e)
- The public agency may only certify an EIR or to adopt a mitigated negative declaration for a project that will have a significant impact on a TCR if:



Approving Projects With TCR Impacts

- Consultation has occurred and has concluded, either by agreement, or good faith determination that agreement cannot be reached;
 - Consultation was requested but the requesting Tribe failed to provide comments or otherwise failed to engage in consultation process; or
 - No consultation was requested after the public agency sent out notice of the project to those Tribes who had formally requested notification.
- PRC § 21082.3(d)



Approving Projects With TCR Impacts

- If substantial evidence demonstrates that a project will cause a significant effect to a TCR but (1) the decision-makers do not include the mitigation measures recommended by the staff in the environmental document; or (2) there are no agreed upon mitigation measures at the conclusion of the consultation; or (3) no consultation has occurred, the public agency must still consider the adoption of “feasible mitigation.” PRC §21082.3(e)
- Thus, even if the decision-maker does not accept the results of consultation, the agency must still adopt feasible mitigation to reduce significant impacts.



AB 52 Implementation Schedule

- By July 1, 2016, the NAHC must provide all Tribes on its contact list with a list of all public agencies that may serve as a lead agency for projects within the geographic area within which the Tribe is traditionally and culturally affiliated, and instructions on how to request that public agencies notify the Tribes about projects for the purposes of requesting consultation. PRC § 5097.94(m).
- By July 1, 2016, the Office of Planning and Research must propose new CEQA Guidelines to separate the consideration of paleontological resources from TCRs in the sample questions contained in Appendix G to the CEQA Guidelines and update the relevant sample questions. PRC §21083.09.



Thank you for attending.

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Integrating AB 52 into CEQA Practice

- Contact NAHC (and review agency records for notice requests) at the beginning of the Initial Study process to identify the California Native American tribes to contact for the project, and the tribal contact person(s).
- Contact the tribal representatives as soon as they are identified during the Initial Study process.
- When more than one tribe is involved, the lead agency will be undertaking concurrent consultations. Tribal consultations and any negotiations about the contents of the CEQA document should be conducted individually if more than one tribe is involved.
- Provide time in the schedule for the 30-day period for tribe(s) to respond to the lead agency's solicitation.
- Provide time in the schedule for consultation between the tribe(s) and the lead agency. If the tribe(s) does not request consultation, then this time will not be needed. Removing time from the schedule is easier than adding it once the CEQA process is under way.



Integrating AB 52 into CEQA Practice

- If the tribe(s) requests consultation, do not release an MND for public review until consultation between the tribe(s) and the lead agency is completed and mitigation measures acceptable to the tribe(s) are incorporated into the MND and the related Mitigation Monitoring or Reporting.
- If the tribe(s) requests consultation, do not release a Draft EIR for public review until either:
 - The consultation is completed without mutual agreement about mitigation measures, the Draft EIR analyzes impacts on TCRs, and the Draft EIR includes mitigation measures from the list in Section 21084.3.
 - The consultation is completed, and the Draft EIR includes the mutually agreed upon mitigation measures or alternatives.



What is Needed in a Notice?

- Lead Agency must provide tribe(s) with a notice of a proposed project 14 days after:
 - A project application is deemed complete, or
 - Deciding to under take the project when it is the agency's own project.
- Notice must include:
 - Brief description of the project
 - Project Location
 - Lead agency contact
- Addressing Notices
 - Address notices to tribal leader
 - cc tribal staff



Set Up Effective Consultation

- Make sure it is the “right” venue
- Have an Agenda
 - Should include decision makers at the table
 - Work out in advance with tribal partners
 - Research issues prior to meeting
 - Share materials in advance
- Process
 - Respect tribal sovereignty and confidentiality (one tribe at a time)
 - Introductions at beginning of meeting – recognize leaders in the room.
 - Protocol for requesting input should be formal:
 - First - tribal leaders
 - Second - tribal designees
 - Third – open forum
- Follow up
 - Note takers are important
 - Document all areas where agreement was AND was not reached
 - Solidify agreements for plans of action and deadlines at conclusion of meeting
 - Identify follow the appropriate persons to continue dialog
 - Have follow up meeting(s) if necessary



Consultation Topics

- Mandatory
 - Alternatives to the project
 - Mitigation measures
 - Significant effects
- Discretionary topics
 - Type of environmental review
 - Significance of TCRs
 - Significance of project impacts on TCRs



When & How Does Consultation End?

- Parties reach mutual agreement concerning appropriate measures for preservation of TCRs mitigation, or
- Either party, acting in good faith or after reasonable effort, concludes that mutual agreement cannot be reached concerning appropriate measures for preservation of TCRs mitigation.
- After Consultation:
 - Follow up with all parties to see what went right and what could be improved in the process
 - Continue dialogue through project implementation



Determinations and Mitigation

- NAHC's Sacred Lands File will take on greater significance as an authoritative source of identified TCRs.
- If a tribe asserts that the project may have a significant effect on a TCR, this assertion raises a "fair argument" requiring preparation of an EIR. Avoiding an EIR would require the lead agency to successfully negotiate mitigation that the tribe accepts as reducing the effect on the TCR to a less than significant level.
- The lead agency is required to include agreed-upon mitigation measures in the MND or Draft EIR, along with the related MMRP.
- The lead agency could decide not to implement the mitigation measures in a Final EIR but must still include feasible mitigation pursuant to PRC Section 21084.3. Those measures would be reflected in the MMRP.



Best Practices

- Consider including in contracts with consultants provisions for maintaining confidentiality
- Include the consultation process outcomes in appropriate CEQA and project documents:
 - Findings
 - Project approval
 - Conditions of approval

