

OHP CEQA TRAINING FOR TRIBAL NATIONS: A TRIBALLY-FOCUSED POINT OF VIEW

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TODAY'S TRAINING GOAL

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Provide your Tribe with additional resources and an enhanced framework for *increased participation* in CEQA projects for *more successful outcomes* to protect the places and resources you rely upon for your culture, economies and well being as a People.

Topic Areas: CEQA Training for Tribes

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Part I: CEQA Use by Tribes

Part II: AB 52: What Does it Mean and How Will It Be Implemented?

Part III: Role of Tribal Cultural Monitors and Other Tribal Monitoring and the CEQA Feedback Loop

When Will Tribes Interact with CEQA?

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As Much or As Little As Your Tribe Wants!

- Tribal Government Concerns are MORE THAN Cultural!
- LOOK FOR CROSS-OVER ISSUES in Initial Studies/CEQA Appendix G:
Aesthetics, Agriculture, Air Quality, Biological, Cultural, Geology/Soils, Hazards/Hazardous Materials, Hydrology/Water Quality, Land Use/Planning, Minerals, Noise, Population/Housing, Public Services, Recreation, Transportation/Traffic, Utilities/Systems, Climate Change, Others?
- Can be the subjects for your AB 52 consultations;
- Lay Testimony: can be Substantial Evidence when based on reasoned personal observations and reasonable assumptions based on facts;
- Tribes ARE the experts on their cultures (AB 52, NHPA Section 106, AIRFA, etc.).

Why Should Tribes Interact with CEQA?

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- One way to exercise Governmental influence and Self Determination;
- Achieve mitigation meaningful to Tribe; and
- If don't participate, others might do it for you.
- Yet, many tribes still more engaged in NEPA and Section 106 processes than CEQA.

Tribal Input before Draft Environmental Documents - Ground Rules for Engagement Established Here!

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Project Scoping – Request specific Technical Studies/Assessments to be performed and shared in draft form;

Project Description, Purpose & Goals – Too narrow? Piecemealing? Whole of action (off site components, construction and operational impacts, etc.)?

Reasonable Range of Alternatives

- Offsite Locations

- Different Footprints

- Can Tribe Design an Acceptable Alternative (Map / Table);

Avoidance – Direct, Indirect & Cumulative Impacts all of equal concern;

Project Specific Standards – CEQA Guidelines section 15064(d).

How to read an EIR:

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- MMRP/Summary of Impacts and Mitigation
- Alternatives section
- Executive Summary
- Project Description
- Sections on Specific Resource Areas of Concern (e.g. Cultural Resources)
- Related Technical Appendices
- Known Controversial issues/Issues to be resolved
- Get to rest as time allows
- Get comments in on time, in writing, so agency must respond in writing

Signs of Inadequate Impact Analysis

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- ❑ Bad/Old/No data
- ❑ Improper Methodology
- ❑ Un/Under - qualified professionals
- ❑ Nonspecialists drafting EIR text
- ❑ Failure to show work/analysis
- ❑ Data/technical reports not shared or conflict with EIR text
- ❑ Alternatives do not avoid impacts, obviously not feasible, no explanation for elimination or failure to analyze

CEQA and Protecting the Environment

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CEQA Guidelines section 15002(h), when an EIR shows that a project would cause substantial adverse changes in the environment, the governmental agency must respond by one or more of the following methods:

- Changing the proposed project
- Imposing conditions on the approval of the project
- Adopting plans or ordinances to control the broader class of projects
- Choosing an alternative way of meeting the same need
- Disapproving the project
- Finding that changing the project is not feasible
- Finding the unavoidable significant environmental damage is acceptable by adoption of Statement of Overriding Considerations

How does CEQA Define Mitigation?

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CEQA Guidelines section 15370:

- Avoiding the impact by not taking the action or part of the action
- Minimizing impacts by limiting the degree or magnitude of the action and its implementation
- Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment
- Reducing or eliminating the impact over time by preservation and maintenance over the life of the project
- Compensating for the impact by replacing or providing substitute resources or environments

Making Mitigation More Relevant to Tribes

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- Tribally-driven mitigation priorities (Tribal Governments' OWN mitigation priority lists):

Preserve languages; build tribal technical capacity; fund cultural lands repatriation; build cultural centers and programs; co-management of resources; build THPO, cultural department and GIS capacity; synthetic studies and National Register nominations; fund research in historical/ethnographic records; refurbish/bring together existing/orphan collections; build local curation capacity; set up cultural funds; translate Harrington notes; perform regional surveys (i.e. trails); comprehensive corridor/area management plans; acquire cultural conservation easements; tribally-controlled scientific research; writing and publishing own histories, etc.;

- Regional, programmatic approach:

Fund bigger-ticket tribal priorities across several projects, on pro rata basis; Needs tribal and agency leadership (Sunrise Powerlink).

Making Mitigation More Relevant to Tribes

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- CEQA Guidelines section 15040:
 - Nexus (link between nature of impact and project mitigation measure)
 - Proportionality (mitigation must be proportional to impact)

- NOT usually about more additional archaeological research, testing or data recovery;

- Subjects for your AB 52 consultations.

- Note: On Projects that must be opposed.

Other Tools/Flags for Important Places

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- Native American Heritage Commission (NAHC)
 - Sacred Lands File: Form – get ahead of projects
 - Public Lands, Public Resources Code section 5097.9 :

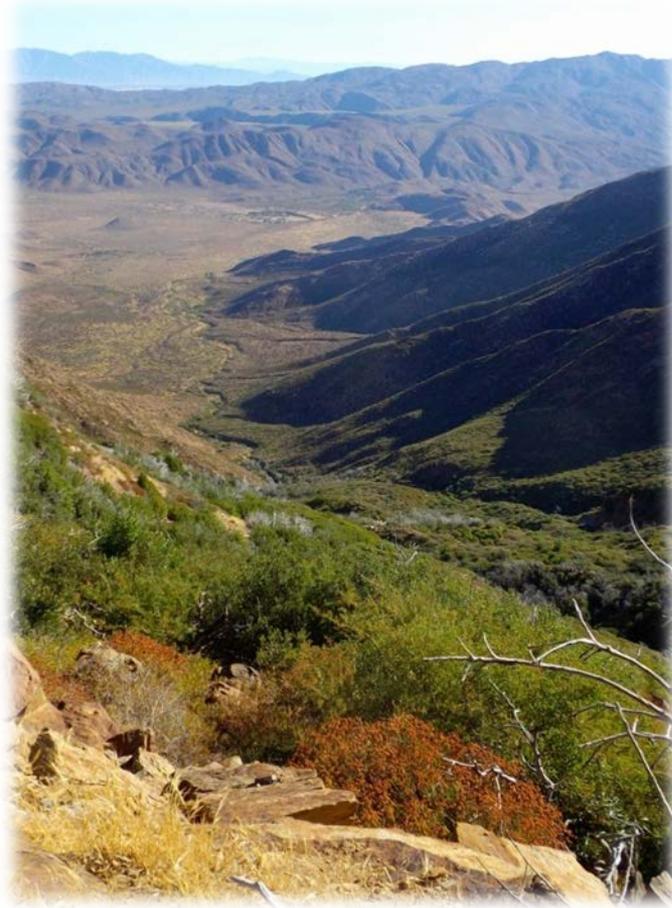
No public agency or private party on *public property* shall interfere with the free expression or exercise of Native American religion. Nor shall such party cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site or sacred shrine on *public property* except on a clear and convincing showing that the public interest and necessity so require.

Public Resources Code section 5097.97:

When NAHC is notified of such proposed action, it shall conduct an investigation. Where it finds, after a public hearing, that such result would occur, it may recommend mitigation measures for consideration by the agency. If the agency fails to accept the mitigation, and the Commission finds severe and irreparable damage would occur, it may ask for legal action by the Attorney General.

Case Study: Other Tools/Flags for Important Places: Kwaaymii Cottonwood Trail National Register Nomination

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Actions Outside of Basic Administrative Process

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- For critical issues, consider:
 - Elevating the issue:
 - Meeting with Applicant Management
 - Meeting with Consultant Management
 - Meeting at Highest Government Levels
 - Meeting Face-to-Face with Decision makers
 - Get them out on site, meeting with elders
 - Dispute Resolution as an option:
 - Facilitation
 - Mediation

Litigation . . . and Beyond

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- Exhaustion of Remedies (MMRP issues as potential exception);
- Very short statute of limitations – usually 30 days;
- Code of Civil Procedure section 1021.5 (private attorney general) fees/costs for prevailing party
 - Important right affecting public interest?
 - Success on one or more causes of action?
- Legislative remedy? Voter initiative?

Where Archaeology Can Help

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Archaeology often addresses Prehistoric Resources, which are but one type of Tribal Cultural Resource:

- Evidence of tribal interaction with the area;
- May contain valuable technical information, tools;
- Helpful in documentation, compare 1970s to present levels of expected documentation;
- Systemic approach for recordation, synthesis, regional landscapes; and
- Archaeologist can be powerful ally with agency, applicant and important Team member.

Where Archaeology Alone can be Insufficient

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- Issue: Tribal Cultural Resources often are other than archaeology: burials, grave goods, burial soils; religious, ritual or ceremonial items and places; plants and animals of cultural significance; landforms, geology, clays, pigments of cultural importance; intangibles and places of phenomena, etc.;
- Archaeologists, construction crews, planners and attorneys (and others) usually untrained;
- Information may be restricted within the Tribe;
- Different tribes (and tribal members) may have different views;
- Relationship of CRM firm with applicant can decrease quality of work.

Feather River West Levee Project— Archaeological Approach Insufficient (2014)

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Setting the Stage for AB 52

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- CEQA DOES consider Social Impacts!

Social or economic impacts may lead to physical changes to the environment that are significant. CEQA guidelines sections 15064(e), 15131(a);

Social or economic effects of a physical change to the environment may be considered in determining whether that physical change is significant. CEQA Guidelines sections 15064(e), 15131(b);

If a project may cause significant impacts to a particular community or sensitive group, the alternatives and mitigation analysis should address ways to reduce or eliminate those impacts. CEQA Guidelines section 15041(a); and

The lead agency should discuss and develop mitigation in a process that is accessible to the public and the affected community.

Setting the Stage for AB 52

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□ Environmental Justice:

Government Code section 65040.12(e): Fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation and enforcement of environmental laws, regulations and policies.

California Attorney General, *“Environmental Justice at the Local and Regional Level, Legal Background”* (2012)

http://oag.ca.gov/sites/all/files/agweb/pdfs/environment/ej_fact_sheet.pdf

Summary Part I: CEQA Use by Tribes

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- Lead Agency defers to its or applicants' external CRM consultants and legal counsel – lack of internal technical knowledge and leadership to push back on applicants;
- Archeologists design mitigation packages of interest to archaeologists only or agency uses overly narrow significance or impact definitions;
- Cumulative impacts to landscapes, property types and tribes not being analyzed or mitigated; and
- Need for Sensitivity Training: Desert not “full of bones,” Desert is final resting place of ancestors.
- Tribes and their resources were overlooked, marginalized or ignored. Result: AB 52
- **Questions?**

Part II: AB 52 (Gatto, LA)

Sacred Sites/Tribal Cultural Resources

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- Signed by Governor Brown on September 25, 2014, bill text: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB52
- California sacred sites protection has been a topic of intense legislative efforts since 2001 (precursor to SB 18 (tribes and planning))
- Original catalysts included Gregory Canyon (Pala) and Indian Pass (Quechan)
- And more recent controversial projects, Pu'eska Mountain (Pechanga) and Ocotillo Express (Kumeyaay/River Tribes)
- Adds to Public Resources Code: NAHC and CEQA statutes
- Formal and consistent role for tribes in CEQA

AB 52 – Basic Summary

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- Specifies that a project that may cause a substantial adverse change in the significance of a Tribal Cultural Resource (TCR) is a project that may have a significant effect on the environment.
- Requires a lead agency to consult with a federally or state recognized California Native American Tribe (CNAT) that is *traditionally and culturally affiliated with the geographic area* of the proposed project. Uses NAHC SB 18 consultation definition and contact list.
- If the Tribe requested to the lead agency in writing to be informed by the lead agency of such proposed projects (*notification request* made);
- And the tribe requests consultation prior to determining whether a ND or EIR is required for a project (*consultation request* made).

AB 52 – Basic Summary cont.

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- In recognition of their governmental status, establish a meaningful consultation process between CNATs and lead agencies so that TCRs can be identified, and culturally appropriate mitigation and mitigation monitoring programs can be considered by the decision making body of the lead agency;
- Enable CNATs to manage and accept conveyances of, and act as caretakers of, TCRs;
- Puts specific tasks on OPR, tribes, lead agencies and NAHC to achieve these goals.

AB 52 – Implementation Dates

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- Applies to projects that have a NOP or Notice of ND or MND filed on or after July 1, 2015.
- Requires OPR to revise on or before July 1, 2016, the Guidelines to:
 - Separate the consideration of paleontological resources from TCRs;
 - Add consideration of TCRs;
 - With relevant sample questions to Appendix G for both.
- So, what happens between July 1, 2015, and July 1, 2016?

OPR AB 52 Technical Advisory

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- Draft is out for review:
http://www.opr.ca.gov/docs/DRAFT_AB_52_Technical_Advisory.pdf
- Deadline was June 1, still accepting comments:
Holly.Roberson@opr.ca.gov,
Christopher.Calfee@opr.ca.gov
- Expect final Advisory by July 1, 2015.
- TBD if permanent Advisory.

Two Step Process – Step 1

Request for Formal Notification

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- Tribes need to let agencies know they are out there and they have a general interest in consulting during the CEQA process and receiving project notices.
- NAHC sent sample letter to Tribes, available at:
<http://nahc.ca.gov/2015/06/implementation-of-ab52-sample-letters-request-for-formal-notification-and-request-for-consultation/>
- Don't let perfect be enemy of good enough: Don't wait for complete agency list to get started.

Two Step Process – Step 2

Request for Consultation on Specific Project

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- NAHC sent sample letter to Tribes, available at:
<http://nahc.ca.gov/2015/06/implementation-of-ab52-sample-letters-request-for-formal-notification-and-request-for-consultation/>
- Agency must send notice to tribe within **14 days** of determining an application for project is complete or decision by public agency to undertake a project;
- Tribe must respond within **30 days** of receipt of formal notification and request consultation and designate a lead contact person;
- Lead agency shall *begin* the consultation process within **30 days** of receiving the CNAT's request for consultation (and prior to determination of type of environmental document, at beginning of Initial Study process?).

AB 52 – Roles of NAHC

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- Requires the NAHC to provide each CNAT on or before July 1, 2016, with a list of all public agencies that may be a lead agency within the tribe's geographic area, the agencies' contact information, and information on how the tribe may request those public agencies to notify the tribe of projects within the agencies' jurisdiction for the purposes of requesting consultation.
- Shall assist lead agencies in identifying the CNATs that are traditionally and culturally affiliated with project area.

AB 52 – Legislative Findings and Intent

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- Includes:
 - That the CEQA process previously did not readily or directly include CNATs' knowledge and concerns which resulted in significant environmental impacts to TCRs and sacred places, including cumulative impacts to the detriment of tribes and the environment;
 - Establishes a new category of resources in CEQA called TCRs that considers tribal cultural values *in addition to* scientific and archaeological values when determining significance, impacts and mitigation;
 - Recognizes that CNATs may have expertise with regard to their tribal history and practices and that such knowledge should be included in environmental documents for projects that may have a significant impact on such resources.

AB 52 – TCR Definitions

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- Defines TCRs in new PRC section 21074 in CEQA as:
 - 1) Sites, features, places, cultural landscapes, sacred places, and objects *with cultural value* to a CNAT that are either a) *included or determined eligible for inclusion* in the California Register and b) included in a local register of historical resources;
 - or 2) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria and shall consider the significance of the resource to a CNAT;
 - or 3) A cultural landscape meeting 1 or 2 above to the extent that the landscape is *geographically defined* in terms of the size and scope of the landscape;
 - or 4) A historical resource, a unique archaeological resource or a nonunique archaeological resource if it meets 1 or 2 above.

Traditional Cultural Properties are historic properties too

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- 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/nrb38/>
 - TCP as a type of significance attaching to a type of historic property type like a site or a district.
 - Value determined by the community itself.

- CA SHPO, Technical Assistance Series #6 (on website) and #7 (being revised), apply NPS Bulletin 15 guidance which states that properties of Traditional Cultural Value can be eligible under NRHP Criterion A and references Bulletin 38 TCP guidance:
http://ohp.parks.ca.gov/?page_id=1069

Cultural Landscape Definition

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- NPS defines Cultural Landscapes as: ". . . a geographic area, including both cultural and natural resources and the wildlife or domestic animals therein, associated with an historic event, activity, or person, exhibiting other cultural or aesthetic values."
- This definition is relevant because Cultural Landscapes are specifically called out in AB 52's definition of tribal cultural resources: "Sites, features, places, *cultural landscapes*, sacred places, and objects with cultural value to a California Native American tribe . . ." (*italics added*).
- Cultural Landscapes have been recognized by NPS since 1983, and responsibilities for their preservation are equal to other historic resources.

Cultural Landscapes cont.

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- Per NPS, there are four kinds of Cultural Landscapes: Historic Designed Landscapes, Historic Vernacular Landscapes, Historic Sites and Ethnographic Landscapes.
- Ethnographic Landscapes are defined as "a landscape containing a variety of natural and cultural resources that associated people define as heritage resources."
- Examples are contemporary settlements, religious sacred sites and massive geological structures. Small plant communities, animals, subsistence and ceremonial grounds are often components.
- Thus, like TCPs, it is the *associated people* who define the resource and its significance. This is wholly consistent with the intent of AB 52 and the introduction of the category of TCRs to CEQA.

Cultural Landscapes cont.

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- According to NPS Preservation Brief #36: Protecting Cultural Landscapes, the preservation planning process for Cultural Landscapes should involve: historical research; inventory and documentation of existing conditions; site analysis and evaluation of integrity and significance; development of a cultural landscape preservation approach and treatment plan; development of a cultural landscape management plan and management philosophy; development of a strategy for ongoing maintenance; and, preparation of a record of treatment and future research or recommendations.
- This may help inform treatment of Ethnographic Cultural Landscapes as well.

Select Cultural Landscape Guidance

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- Advisory Council on Historic Preservation, Native American Traditional Cultural Landscapes and the Section 106 Review Process (July 2012):
<http://www.achp.gov/natl-qa.pdf>

- Advisory Council on Historic Preservation, Native American Traditional Cultural Landscapes Action Plan (November 2011):
http://www.achp.gov/na_culturallandscapes.html

- U.S. Department of the Interior, National Parks Service, Protecting Cultural Landscapes: Planning, Treatment and Management of Historic Landscapes, ("Preservation Brief 36"):
<http://www.nps.gov/tps/how-to-preserve/briefs/36-cultural-landscapes.htm>

Select Cultural Landscape Guidance cont.

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- U.S. Department of the Interior, National Parks Service, Guidelines for the Treatment of Cultural Landscapes:

<http://www.nps.gov/tps/standards/four-treatments/landscape-guidelines/index.htm>

- California OHP, Sustainable Preservation: California's Statewide Historic Preservation Plan, 2013-2017:

http://ohp.parks.ca.gov/pages/1069/files/sustainablepreservation_californiastateplan_2013to2017.pdf

- California OHP, Detailed Recommendations for Section 106 Consultation Submittals (2013):

http://ohp.parks.ca.gov/pages/1071/files/106Checklist_Details.pdf

AB 52 – Consultation Topics

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- Consultation must include:
 - If CNAT requests consultation on alternatives, mitigation measures or significant effects, consultation shall include those topics

- Consultation may include:
 - Mitigation measures, including those capable of avoiding or substantially lessening potential significant impacts to a TCR
 - Alternatives that would avoid significant impacts to a TCR
 - Type of environmental review necessary, significance of the TCR, significance of the project's impacts, appropriate measures for preservation or mitigation that the CNAT recommends

- ✓ Consulting parties themselves will determine case-specific topics (not cookbook approach).

AB 52 – Consultation Definition

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- Consultation has the same meaning as provided in Government Code section 65352.4 (SB 18):
 - 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;
 - Shall be conducted in a way that is mutually respectful of each party's sovereignty;
 - Shall recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance.

Consultation Prep –

Step 1: Information Gathering

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- Develop your own protocol (Blue Lake Rancheria):
 - In house tribal records search (own confidential database);
 - Consult with knowledgeable tribal elders;
 - Predict TRC sensitivity (may include consulting trusted, locally-experienced *consultants*);
 - Conduct cursory field visits (may include lead planner and landowner/agent, not formally recorded but noted in correspondence with agency, better sense of land uses, disturbances, project footprints, etc.);
 - Request IC letter reports on individual project;
 - Request soil, groundwater, percolation, boring data/reports (fill, clays, changes to landscape over time).

Consultation Prep –

Step 2: TCR Identification

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- Develop your own protocol (Blue Lake Rancheria):
 - Formal Cultural Resource Identification Studies (trusted , locally-experienced *consultants*, develop research design, vertical and horizontal APE, with trained tribal monitors for all field work, compensated and as a project condition by agency, THPOs visit and comment)
 - Inadvertent Discovery Protocol (only where development occurs – not transactional approval only; if known or suspected ancestral human remains, state law controls (Health & Safety Code section 7050.5 and Public Resources Code section 5097.98)
 - Construction Monitoring and Plan (field monitoring as a project condition, consider formal Tribal Monitoring Plan, Burial Treatment Plan, Tribal Cultural Resources Treatment Plan, etc.)

Consultation Protocol

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- Tribes and agency develop own protocols (Blue Lake Rancheria):
 - Tribal members or staff maintain tribal consultation record;
 - Tribe identifies culturally-sensitive information and other shared information that shall be protected from disclosure;
 - Agency staff responsible for meeting coordination, and to provide requested information about project and agency consultation record;
 - If staff-level consultation completed to satisfaction of Planning Director and Tribal Official, they report to Agency and Tribal electeds respectively;
 - If agreement cannot be reached, then electeds will appoint two members from each party to seek agreement, then letter will be sent to agency by Tribal Chair to document outcomes.

AB 52 – Consultation Outcomes

- Any mitigation measures agreed upon in consultation shall be recommended for inclusion in the environmental document and in an adopted MMRP and shall be fully enforceable.

- If project may have a significant impact on a TCR, the lead agency's environmental document shall discuss:
 - Whether the proposed project has a significant impact on an identified TCR; and
 - Whether feasible alternatives or mitigation measures, including agreed-upon measures, avoid or substantially lessen the impacts on the TCR.

AB 52 – Consultation Conclusion

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- Consultation shall be considered concluded when either of the following occurs:
 - The parties agree to measures to mitigate or avoid a significant effect on a TCR;
 - A party, acting in *good faith* and *after reasonable effort*, concludes mutual agreement cannot be reached.

Select Consultation Guidance

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- OPR's Tribal Consultation Guidelines (November 2005):
http://www.opr.ca.gov/s_localandtribalintergovernmentalconsultation.php
- ACHP, Office of Native American Affairs, various consultation guidance:
<http://www.achp.gov/nap.html>
- NATHPO, Tribal Consultation: Best Practices in Historic Preservation (May 2005):
http://www.nathpo.org/PDF/Tribal_Consultation.pdf
- Governor Brown Executive Order B-10-11 (2011) and recent state agency guidance:
<http://gov.ca.gov/news.php?id=17223>

AB 52 - Confidentiality

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- Any information submitted by a CNAT during the environmental review process *shall not be included* in the environmental document or *otherwise disclosed* by the lead agency or other public agency without tribal consent;
- Publication of such information in a confidential appendix is possible; the information shall also be described in main environmental document in general terms during public review comment period so as to inform the public of the basis of the decision;
- Does not prohibit the confidential exchange of submitted information between public agencies that have lawful jurisdiction over preparation of the environmental document.

AB 52 – Confidentiality cont.

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- The confidential exchange of information submitted by CNATs regarding TCRs during the environmental review process among the lead agency, the project applicant and the project applicant's agent is not prohibited;
- Unless the CNAT providing the information consents in writing to public disclosure, the project applicant and its legal advisors, *using a reasonable degree of care, shall maintain the confidentiality* of the information exchanged for the purposes of preventing looting, vandalism or damage to TCRs and *shall not make disclosures to third parties*;

AB 52 – Confidentiality cont.

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- Does not apply to the following (applicant obligations):
 - Data or information that are, or become, publicly available;
 - Are already in the lawful possession of the project applicant before the provision of the information by the CNAT;
 - Are independently developed by the applicant or its agents;
 - Are lawfully obtained by the applicant from a third party that is not a lead or public agency or CNAT.

Confidentiality, CEQA and Tribes

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- *Does not affect or alter* existing PRA or CEQA sections on confidentiality (Government Code Sections 6254(r), 6254.10; CEQA Guidelines Section 15120(d)).

- When encounter? Consultation, administrative record, public hearings, in field.

- CEQA Guidelines:
Section 15120(d): Documents prepared during CEQA related to archaeological sites and sacred lands shall not be disclosed.

- Judicial Interpretation:
Clover Valley Foundation v. City of Rocklin (2011)197 Cal.App.4th 200: OPR counsels local agencies to avoid including specific cultural place location within CEQA documents or staff reports available at public hearings. Under separate cover and/or *in camera*.

Other Confidentiality and Tribes

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- California Public Records Act:

Government Code section 6254.10

Records relating to archaeological site information and reports in the possession of state or local agency including those obtained through a consultation process.

Government Code section 6254(r)

Records of Native American graves, cemeteries and sacred places and records of places, features and objects maintained by or in possession of state or local agencies.

- CHRIS data is confidential and may only be accessed by a select group of persons, including tribes with MOAs with the Information Center:

http://ohp.parks.ca.gov/pages/1068/files/chris_statement_of_qualifications.pdf

- Agreed upon Reburial locations: NAHC SLF, CHRIS, county recorder? Pros/cons. Make developer enter into Nondisclosure / Confidentiality Agreement?

AB 52 – Project Approvals

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- Lead Agency may certify or adopt an environmental document for a project with a significant impact on a TCR only if one of the following occurs:
 - A consultation has occurred and concluded (resulting in agreement or not in agreement);
 - The CNAT has requested consultation but failed to provide comments, or otherwise failed to engage in the consultation process; or
 - The lead agency has notified the tribe regarding the opportunity to consult and the tribe failed to request consultation within 30 days.

AB – 52 Approvals

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- AB 52 Goals
 - Achieve more agreements between tribes and lead agencies;
 - Protect more TCRs.

- Consulting parties themselves will determine case-specific avoidance and mitigation options (not a check-the-box exercise).

AB 52 – Project Approvals cont.

54

- If the mitigation measures recommended by the staff of the lead agency as a result of the consultation process are not included in the environmental document; or
- If there are no agreed upon mitigation measures at the conclusion of consultation; or
- If consultation does not occur; and
- If substantial evidence demonstrates that a project will cause a significant effect to a TCR, the lead agency shall consider feasible mitigation.

AB 52 – Project Approvals cont.

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- Public agencies shall, when feasible, avoid damaging effects to any TCR.

- Lists examples of mitigation measures that, if feasible, may be considered to avoid or minimize the significant adverse effects (when no agreement):
 - Avoidance and preservation in place;
 - Planning greenspace, parks or open space with culturally appropriate protection and management criteria;
 - Treating the resource with culturally appropriate dignity taking into account tribal cultural values including: 1) protecting its character and integrity, 2) protecting traditional use, and 3) protecting its confidentiality;
 - Permanent conservation easements or other real property interests *with appropriate management criteria* (long term management plan and funding?);
 - Protecting the resource.

AB 52 – Miscellaneous Provisions

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- Does not limit the ability of a CNAT or the public to submit information to the lead agency or participate during CEQA on any issue of concern as an interested tribe, person, citizen or member of the public.
- Does not limit the ability of the lead agency or project proponent to incorporate changes and additions to the project as a result of consultation, even if not legally required.
- Section not intended and may not be construed to limit the protection of religious exercise to the fullest extent permitted under state and federal laws.
- Does not alter or expand the applicability of CEQA concerning projects occurring on tribal reservations or rancherias.

Influence Significance and Integrity Determinations

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Archaeologists:

- In situ
- Museum quality
- Intact, undisturbed
- Isolates unimportant
- Adequate sample, rest is redundant

Tribes:

- May not be in “original” location, “disturbed” okay, “associated” without arbitrary criteria
- May not need to be intact
- Natural decay may be okay
- May be individual artifact or component
- May show indications of individual artisan

Influence CRM/CEQA Process:

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Current Practice:

- CHRIS Search
- Initial Pedestrian Survey
- Traditional Archaeological Testing
- Can arise during Acquisition, Constraints, Planning and Project Stages

Better Practice:

- THPO database, NAHC SLF, old maps search
- Tribal Monitor/Representative on Initial Survey
- Noninvasive Testing Tools: GPR, Geoarchaeology, Historic Human Remains Detection Canines, historical and current aerial photography, LiDAR
- Assessment of impacts to your Tribal Community: build relevant Dream Team
- At very start of project and before draft EIR published

AB 52 – Open Issues?

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- Where in the CEQA document and appendices will information on TCRs and tribal values live and who will be drafting these sections?
- When would the situation arise in which the environmental document did not include staff's recommendations?
- How can lead agency elected officials directly meet and consult with Tribal electeds without violating the Brown Act?
- If the lead agency and tribe come to agreement, how should that agreement best be memorialized?
- What is the remedy if the lead agency fails to consult?

AB 52 – Open Issues?

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- Will there be any ongoing responsibility for the NAHC to update and maintain the agency list for tribes or is this just a one-time-deal for the NAHC?
- Will there be any effort by the NAHC to update the list of SB 18 tribes and what is the process for inclusion there anyway?
- Is the Governor budgeting enough to the NAHC to implement the bill?
- In the TCR definition, might "isolates" be considered features and/or objects with cultural value?
- Will The Mills Act be revised to provide archaeological and tribal cultural resource properties the tax benefits accorded historical structures in California?

AB 52 – Open Issues?

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- During joint environmental documents, how will the timing of the AB 52 process work with the timing of NEPA and NHPA section 106 consultation?
- How do CEQA exemptions fit into policy goals? (SB 1395 (2006) vetoed)
- Some things might be appropriate for CEQA Guidelines but other aspects might be more appropriate for OPR technical guidance document?
- Should Tribe inform agency of self-identified geographical area of interest? Current vs. Traditional area? Hard vs. Feathered? Pros/Cons?
- How best to handle overlapping areas of concern? Disagreements between tribes regarding preferred mitigation?

AB 52 – Open Issues?

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- How are lead agencies getting informed about bill implementation?
- 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? (Post-bill historic building caselaw applies to TCRs?)

OPR AB 52 Technical Advisory

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- Some issues with draft OPR Technical Advisory:
 - Purpose clarity;
 - Confidentiality clarity;
 - Flowchart: consultation may continue after EIR release – key issue when project changes may occur up to and including final hearing/approval;
 - More robust federal and state guidance available;
 - More robust and applicable CEQA case list available;
 - Intersection with Native American Historical, Cultural and Sacred Sites PRC sections;
 - Need guidance on best practices during year without Guidelines update (practitioner perspective).

Summary Part II: AB 52 Implementation

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- Landmark legislation, long time coming;
- Tribes must be proactive and participate in the revised CEQA process to secure the full benefits of the new law;
- Early technical guidance and experience could quickly establish best practices.
- **Questions?**

Part III: Role of Native Monitors and Other Tribal Monitoring of Projects, CEQA Feedback Loop

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- Cultural Monitoring
 - Importance in CEQA feedback loop
 - Last step after tribal involved in planning and project review

- Other Monitoring by Tribes
 - Often underutilized

Cultural Monitoring

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- What your Tribal Council tells you!
- Not project archaeologist.
- Looking for items of tribal cultural value, ceremonial sites, sacred places, ancestral remains/grave goods, TCPs, cultural landscapes, etc.
- Ensuring work being done in culturally-appropriate manner and in accordance with agreed-upon protocols, project description and design, and mitigation measures.
- Monitors can play role in lab, reports, DPR site forms and Historical Register eligibility determinations – not just in the field!

Role of Native Monitors

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- Not clearly defined in CEQA or CRM
- Native American Heritage Commission (NAHC)
Guidelines for Monitors
- Society for California Archaeology (SCA)
Sourcebook on Native American Monitors

Role of Native Monitors cont.

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- SCA Guidelines for Archaeologists Working with Monitors
- Talk to More Experienced Monitors
- Forms:
 - Daily Monitoring Forms
 - Tribal Records
 - Personal Records
 - If it's not on or in the record it didn't happen
- “Why Monitoring Not Necessarily a Good Idea,” Tom King
<http://crmplus.blogspot.com/2011/01/tribal-monitoring.html>

Monitoring as Condition of Project Approval

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- Is it really mitigation?
- Negotiate before project approval and include:
 - Authority to halt work
 - Within certain area plus buffer
 - Specify number (i.e., one for each construction heading, piece of machinery, lab work, etc.)
 - Role in evaluating and recording finds, appropriate treatment
 - Compensation of monitors by applicant: ACHP “Fees in the Section 106 Review Process” (regulations do not obligate federal agencies or applicants to pay for consultation, however, if they seek information or documentation in their reasonable good faith effort to identify historic properties that it would normally seek from professional contractor or consultant, should expect to pay for work product):

<http://www.achp.gov/regs-fees.html>

Tools for Field

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- Project MMRP
- Project Technical Reports/Maps
- Other Project-Related Documents
- Project BMPs/Inspections
- Chain-of-Command Names and Numbers
- Camera
- Appropriate treatment items
- Tribe's standardized protocols/preferences/policies

Cultural Monitoring Purpose

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- Baseline Documentation

- Implementation Monitoring

How Construction Proceeding: slow down, thinner slices

How Archaeology Proceeding: wet screen, segregate soils, additional monitors

- Results Monitoring -> Reopen CEQA?

- Document your recommendations and how responded to (or not)

Role of Native Monitors

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- Some things can be handled in field;
- Others need direction from elders, culture committee, etc.;
- Others need Tribal Council direction;
- Some may need MLD direction;
- Regular updates to Tribal Council are key.

Find and Use Your Voice!

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- Data Recovery: Field Adjustments are Possible
- Bone Identification: Immediately and Use the Coroner's Rep
- Populating and Updating DPR forms – not just for archaeologists:
 - The site forms must reference the context for the potential tribal cultural values to the underlying properties to provide for the full evaluation of the site, now and in the future.
 - This can be done by including such references at sections A5, A10 and A13 the DPR forms.

Find and Use Your Voice cont.

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- ❑ Note: Each step above can be across many years and multiple CEQA documents, CRM firms and/or monitors, so do your homework before getting out in the field to monitor:
 - Talk to Prior Monitors
 - Read Prior Technical Reports
 - Review any site records, updates
 - Understand/have copy of CEQA or internal enviro reports
 - Read Tribal, NAHC or SHPO Correspondence, etc.
 - Ask the CRM firm and Lead Agency to provide these
 - Advance site visit – lay of the land

Other Monitoring by Tribe

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- **Monitoring can be MORE than cultural monitoring!**

- When approving a project with mitigation measures, agency must adopt a mitigation monitoring or reporting program for each measure. Public Resources Code section 21081.6
 - Do you trust agency and applicant to do it alone?

 - Wording of the mitigation measures matter.

 - Tribes can have formal or informal roles.

 - Draft conditions of project approval that allow for modification or addition of measures if MMRP reveals particular measure is ineffective.

Do-able Monitoring

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- Photo points (with GPS)
- Video/Audio recordings
- Simple transects
- Comparisons of control and project areas
- Monitoring agency/third party monitoring

Baseline: What's there before?

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□ Document:

- Stream you think may get polluted
- Special site you think may get damaged
- Plant community or animal habitat you think may be degraded
- Noise level you think may be exceeded
- Induced impacts to area (cairns at Sugarloaf)

Implementation Monitoring

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- Are construction specifications being followed?
- Is the project footprint different than proposed? Vertical and horizontal impacts established?
 - Consider requesting a Tribal Construction Monitor
 - Someone who can read the plans
- Is monitoring being undertaken as specified?
- Are project conditions being followed?
- Is mitigation/project working as planned?
- Are any promises being broken?

Effectiveness/Results Monitoring

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- Will impacts be greater than predicted?
- Will greater effects take place than claimed?
- Goals won't be reached?
- What remedies or other actions can be taken?

Consider

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- Will the monitoring results matter emotionally? Legally?
- Can you get agency or third party buy in that your methods are valid in advance?
- How simple might the monitoring be?
- How stark might the monitoring results be for the public, media, courts or agency to care about?

Consider

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- Can you count on a person or a few key people to do the monitoring?
- How can the monitoring be funded, as condition of project approval?
- Can you make the commitment to assemble and display the results for effective outcomes?
- Do you have a plan for launching, implementing and following through on the monitoring?

Tribal Monitoring Can

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- ❑ Make the agency monitor better
- ❑ Halt or alter the project
- ❑ Get your Tribe to the table
- ❑ Improve mitigation
- ❑ Elevate your Tribe's credibility
- ❑ Engage those who monitor in a powerful way
- ❑ Help with litigation
- ❑ Prevent false claims on the next project

Case Studies: Padre Dam – Power of Native Monitoring (2010)

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Monitoring and CEQA Feedback Loop

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- Continuing duty to mitigate: PRC section 21002.1(b) Public agency shall mitigate or avoid significant effects of projects it carries out or approves.

- Caselaw relates primarily to deleting or ignoring mitigation – not revising measures. Why so few cases?
 - Once project approved, no one paying attention?
 - Stakeholders resolve through negotiation, mediation or settlement?
 - More cases to come into pipeline because of reductions in planning and specialty staff and code enforcement?

Monitoring and CEQA Feedback Loop cont.

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- Deletion of Measure: generally not advised without
 - Revisiting the continuing need for the measure
 - Stating the reasons for deletion
 - Supporting it with substantial evidence
 - Passage of time alone does not render measure inoperative

- Ignoring Measure not advised,
 - Especially if it was agency's own measure
 - "Mitigating conditions are not mere expressions of hope."

- Interpreting Measure may be okay as long as agency:
 - Interprets the conditions agency imposes in a reasonable manner consistent with agency's intent at the time the condition was enacted
 - It imposes no new or adverse environmental impacts
 - May/not need public hearings

Monitoring and CEQA Feedback Loop cont.

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- Change of Mitigation Measure:
 - Is there a legitimate reason to change the mitigation measure and is this supported with substantial evidence?
 - Can the parties agree? Or is further environmental review required?

- Change to the Project:
 - If there a discretionary change in the project after approval, agency must consider whether further CEQA review is required.

- Spectrum for Further Environmental Review:
 - Addendum (no public review), Supplemental EIR (no cum. analysis change), Subsequent EIR (same public review as prior EIR)
 - Courts not often reached this point
 - Heavily fact and circumstance driven

Practice tip: Put triggers into measures allowing for modification of mitigation or additional mitigation, “If/then”

Summary Part III: Tribes and Monitoring

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- Participating only in Tribal Cultural Monitoring may be insufficient to have meaningful impact;
- Tribe must get involved in projects as early as general planning levels and project scoping efforts;
- Try and develop a tribal framework to support tracking of MMRP and operational monitoring; and
- Remember that project approval of disfavored project may not be end of Tribal involvement and opportunities.

In Conclusion:

- Tribal Involvement Early In CEQA Process *plus*
- Putting Tribal Values and Priorities into Project Planning, Design and *Mitigation, plus*
- Trained, Informed, and Empowered Cultural Monitors with *other* Tribal Monitoring of Project,
- Can make it very worthwhile for tribe to participate in CEQA.

Better results for tribe

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- Tribal cultural values being better taken into account,
- More protection of tribally important places,
- Mitigation that benefits tribes, and
- Better outcomes in the field and community for everyone.
- **Questions?**

THANK YOU!

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