

A stylized, light-colored illustration of a plant with several leaves and a cluster of small, round buds or flowers, positioned on the left side of the slide against a dark brown background.

# OHP SPONSORED CEQA TRAINING FOR CA NATIVE AMERICANS

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A stylized, monochromatic illustration of a plant with several large, pointed leaves and a cluster of small, round buds or flowers on a thin stem, set against a dark brown background on the left side of the slide.

# AB 52 BACKGROUND & INTENT

Native Americans: California  
Environmental Quality Act

# Pre-AB 52

- Unique tribal history in CA
  - Many tribes/languages, many not FR/terminated
  - Rural/urban, many jurisdictions
- Sacred sites protection subject of California legislative efforts since 2001
  - Glamis Gold Mine and Gregory Canyon Landfill
  - 2 attempts to get tribes into the CEQA
  - Numerous stakeholder discussions and commitments to address tribal concerns
- SB 18 tribes into the State planning law (2004)
- AB 52 (Assemblymember Gatto): Signed by Governor Brown on September 25, 2014
  - [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB52](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB52)

# AB 52 Purposes and Intent

- SB 18 did not cover most development projects that threatened sacred places
- Recent controversial projects Pu'eska Mountain (Luiseño) and Ocotillo Express (Kumeyaay/River Tribes) came to the attention of the legislature
  - Tribal Role Unclear
  - How to treat Tribal Information
  - Archaeological resources vs. Heritage resources
- Formal and consistent role for tribes in CEQA
- Clear consideration of tribal cultural values in resources
- Adds to Public Resources Code: NAHC and CEQA statutes

# AB 52 – Legislative Findings and Intent

## □ Includes:

- That the CEQA process previously did not readily or directly include CA Native American Tribes' 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 CA Native American Tribes 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 – Basic Summary

- 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 (CA Tribe) 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 (*consultation request made*).
  - Timing is prior to determining whether a ND or EIR is required for a project.

# AB 52 – Basic Summary cont.

- In recognition of their governmental status, establish a meaningful consultation process between CA Tribes 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 CA Tribes 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

- 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's happening between July 1, 2015, and July 1, 2016?

# OPR AB 52 Technical Advisory

- Draft is out for review:  
[http://www.opr.ca.gov/docs/DRAFT\\_AB\\_52\\_Technical\\_Advisory.pdf](http://www.opr.ca.gov/docs/DRAFT_AB_52_Technical_Advisory.pdf)
- Deadline was June 1, still accepting comments:  
[Holly.Roberson@opr.ca.gov](mailto:Holly.Roberson@opr.ca.gov)  
[Christopher.Calfee@opr.ca.gov](mailto:Christopher.Calfee@opr.ca.gov)
- Expect final Advisory by July 1, 2015.
- TBD if permanent Advisory.

# CEQA Guidelines Update: Appendix G Checklist

- Draft is out for review:  
[https://www.opr.ca.gov/docs/Discussion\\_Draft\\_Appendix\\_G\\_Questions\\_re\\_Tribal\\_Cultural\\_Resources\\_Nov\\_17\\_2015.pdf](https://www.opr.ca.gov/docs/Discussion_Draft_Appendix_G_Questions_re_Tribal_Cultural_Resources_Nov_17_2015.pdf)
- Deadline for comments was December 18, 2015.
  - OPR hosted 2 workshops and a tribal meeting in December
  - Most tribes are in support of Alternative 3 with amendments
- Next Steps:
  - OPR to finalize its draft and send to State Natural Resources
  - Natural Resources begin the Administrative Rule Making Process
    - Public Review Process
- Deadline for Guidelines update is July 1, 2016.

# AB 52 – Roles of NAHC

- Requires the NAHC to provide each CA Tribe 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.

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# CEQA PARTICIPATION FOR TRIBES

Things to know before you  
undertake Formal Consultation

# Tribal Input before Draft Environmental Documents

## Project Scoping

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

## Project Description, Purpose & Goals

Review this: Qs: Too narrow? Piecemealing? Off site component?, 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;

# How to read an EIR

- Project Description
- MMRP/Summary of Impacts and Mitigation
- Alternatives section
- Executive Summary
- 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

# Signs of Problematic Impact Analysis

- No data/Old data/Bad 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

# How does CEQA Define Mitigation?

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

# Mitigation Elements AB 52

- Uphold existing mitigation preference for historic resources preservation in place (CEQA Guidelines 15126.4)
- Public agencies shall, when feasible, avoid damaging effects to any Tribal Cultural Resources (PRC § 21084.3)
- An substantial adverse change to significance of a Tribal Cultural Resource may be a significant effect on the environment (PRC §21084.2 and PRC §21082.3)

# Making Mitigation Relevant to Tribes

- Subjects for your AB 52 consultations.
  - NOT usually about more additional archaeological research, testing or data recovery;
- Be Creative
  - Co-management of resources;
  - Fund 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;

# Actions Outside of Basic Administrative Process

- For critical issues, consider:
  - Bringing on Additional Tribal Consultants/Experts:  
archeologist, ethnographer, geologist, planner/engineer
  - Elevating the issue:
    - Get planners/decision makers out on site
    - Meet with elders/tribal cultural experts
    - Meeting with Applicant Management
    - Meeting with Consultant Management
    - Meeting at Highest Government Levels
    - Meeting Face-to-Face with Decision makers
  - Meeting Facilitation
  - Dispute Resolution as an option: Mediation

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# AB 52 PROVISIONS

Consultation

Project Discussions

Building the CEQA Record

# AB 52 – Consultation Definition

- 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.

# AB 52 – Consultation Topics

## 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).

# Consultation Prep – Step 1: Information Gathering

- 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

- 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.)

# 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.

# Consultation Best Practices

- Before Begin Discussions: Devise a protocol or **Consultation Agreement**
  - Define terms and topics (PRC 21080.3.2(a))
  - Make clear any definitions, rules, processes, schedules or interested party goals
  - Respect time systems and decision making processes
  - Who will document consultation and where will it live in environmental document/confidential appendix
- Landowner/Applicant involvement okay, but mutually agree on details beforehand
- Execute Confidentiality Agreement
  - Clearly mark and identify confidential information

# Consultation Best Practices

- Understand leadership/decision makers/representatives. PRC 21080.3.1(b) Name contact person for tribe. Agency liaison(s) recommended.
- Lead Agency may need to consult with more than one tribe - traditionally and culturally affiliated tribes
  - Cultural Affiliation is a showing of a cultural relationship between the tribe and the specific geographic area at issue. Based on geographical, kinship, archeological, linguistic, oral tradition, historical evidence, and other expert opinion – NAHC may assist here, but tribes can work out together.
- Get comments in on time, in writing, so agency must respond in writing

# Consultation Best Practices

- Relationship building with Lead Agencies
  - Get to know your elected decision makers
  - Support of all levels of Tribal Government
  - Resource Limitations for both governments
  - Understanding Agency pressures/objective constraints
  - Consistent contact people
  - Know Agency Ordinances, General Plans, Goals and Policies
  - Build creative agreements/protocol/participation arrangements/ordinances/SOPs

# AB 52 – Consultation Conclusion

- 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

- OPR's Tribal Consultation Guidelines (November 2005):  
[http://www.opr.ca.gov/s\\_localandtribalintergovernmentalconsultation.php](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](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 – Project Approval

- 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 CA tribe 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 – Project Approval cont.

- 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.

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# AB 52 PROVISIONS

## Tribal Cultural Resources

# Tribal Cultural Resource (TCR) Definition

- 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.

# “Cultural Values”

## Cultural Significance

- Principles or standards of behavior; what is important in life
  - Central/Vital to the way a community defines itself
  - Analogy of heritage resources for Americans (flag, thanksgiving)
- Fact-based case by case inquiry
  - Community importance
    - Village site, ceremonial, sacred, historical importance, cultural importance
- Book Resource: *Places That Count* by Tom King

# Traditional Cultural Properties

- 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](http://ohp.parks.ca.gov/?page_id=1069)





# Substantial Evidence

## CEQA Guidelines Section 15384

*(a) "Substantial evidence" as used in these guidelines means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency. Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence.*

*(b) Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.*

# Cultural Landscape Definition

- 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.

- 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.

- 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

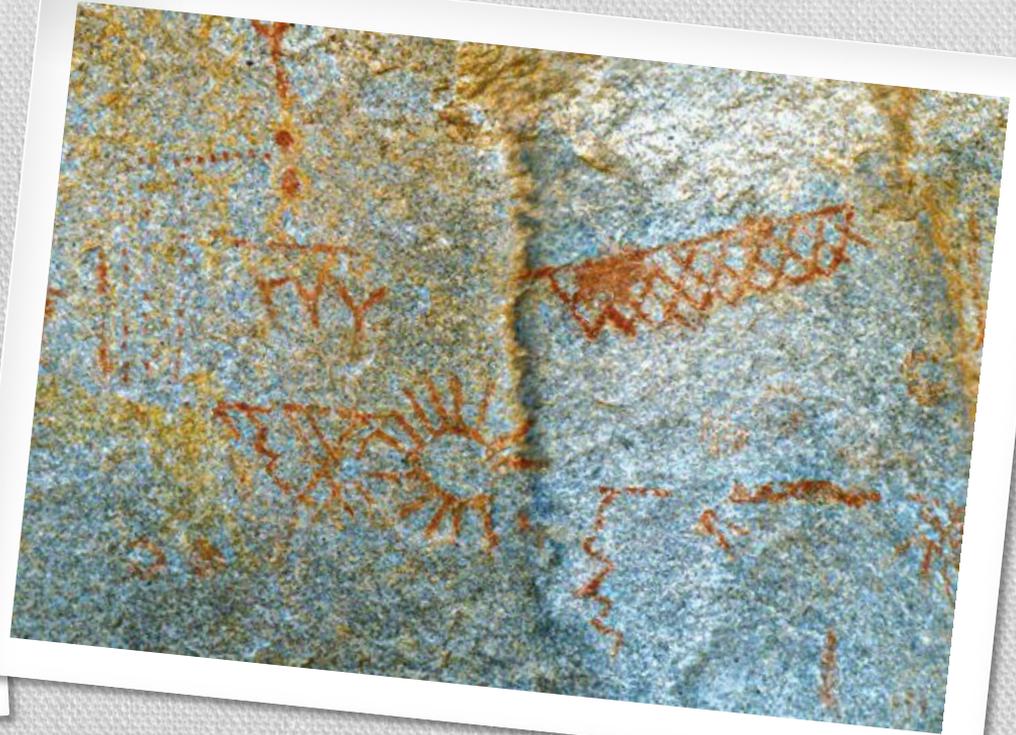
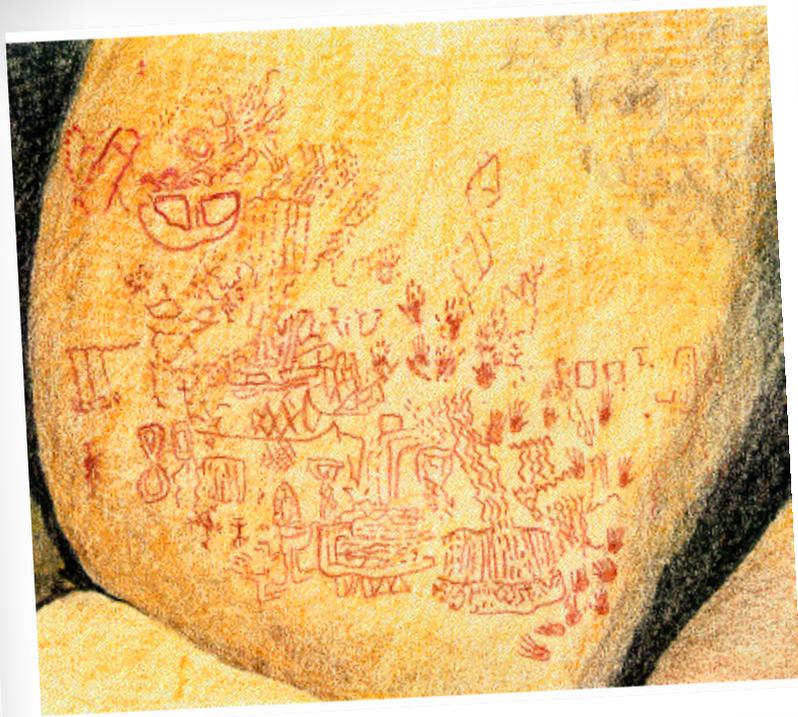
- Advisory Council on Historic Preservation, Native American Traditional Cultural Landscapes and the Section 106 Review Process (July 2012):  
<http://www.achp.gov/natl-qa.pdf>
- Advisory Council on Historic Preservation, Native American Traditional Cultural Landscapes Action Plan (November 2011):  
[http://www.achp.gov/na\\_culturallandscapes.html](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.

- 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](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](http://ohp.parks.ca.gov/pages/1071/files/106Checklist_Details.pdf)

# AB 52 Examples of Mitigation

- (1) Avoidance and preservation of the resources in place
- (2) Treat the resource with *culturally appropriate dignity* taking into account the tribal values and meaning of the resource, including, but not limited to, protecting:
  - Cultural character and integrity
  - Traditional use (example of Luiseno timepiece)
  - Confidentiality
- (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 – any level of protection not above



# California Pictograph Examples

Culturally Appropriate Mitigation: Example of Calendar Rock

# Where Archaeology Can Help

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

- 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 may have different views;
- Relationship of CRM firm with applicant can decrease quality of work.

# Influence Significance and Integrity Determinations

## 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:

## 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