

GETTING A LEAD AGENCY TO AGREE ABOUT A TCR AND CONSEQUENCES OF DISAGREEMENT

NATIVE AMERICAN HERITAGE
COMMISSION PUBLIC HEARING /
AB 52 TRAINING

APRIL 20, 2017

Courtney Ann Coyle, Attorney at Law

Outline

2

- How to Read an EIR
- Why Written Comments can be Important
- CEQA record vs. Consultation record
- Second Generation Barriers
- Substantial Evidence and Tribes
- Tribes and CEQA Mitigation
- Effective Tribal Testimony
- Role of Tribal Monitoring
- Litigation Considerations

How to read an EIR (Hint: not cover to cover!)

3

- MMRP/Summary of Impacts and Mitigation
- Project Description
- Sections on Specific Resource Areas of Concern (e.g. Cultural Resources, Visual/Aesthetics)
- Technical Appendices related to those sections
- Alternatives section
- Cumulative impacts section
- Known Controversial issues/Issues to be resolved
 - Get to rest as time allows
 - The problem of boilerplate

Some signs of Inadequate Analysis

4

- Bad/Old/No data/Improper Methodology
- Un/Under - qualified professionals
- Nonspecialists drafting EIR text
- Lead Agency defers to applicants' CRM consultants and legal counsel – lack of internal technical knowledge, experience and leadership

Some signs of Inadequate Analysis

5

- ❑ 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
- ❑ Merely says “consultation is ongoing” or “outreach initiated” or lists contacts in a chronology

Why written comments are important

6

- Get comments in on time, in writing, so agency must respond in writing
- Ask for comment period extension (formal/informal)
- Tribe's comments can trigger recirculation of the draft environmental document, which means more time:
 - New substantial effect from project
 - Substantial increase in severity of effect
 - New feasible alternative or mitigation measure
- Prior EIR fundamentally inadequate, public review not meaningful
- Written comments and responses form part of the administrative record, which becomes important if there is disagreement

What is a CEQA administrative record?

7

- ❑ CEQA admin record defined at PRC section 21167.6(e) shall include *but is not limited to*:
 - Project application materials
 - Staff reports and related documents
 - Written testimony or documents submitted to agency
 - Any transcript or minutes of proceedings to advisory or decision bodies
 - All notices and responses to NOP
 - Proposed decisions or findings submitted by any party

What is a CEQA administrative record?

8

- Documentation of final agency decision, FEIR and all documents cited or relied on in the findings or in a statement of overriding considerations
- Any other written materials relevant to agency's compliance including the Initial Study, draft environmental documents released for public review, copies of studies or other documents relied upon in the environmental document and made available to the public during environmental review or included in agency's files on the project and *all internal agency communications, including staff notes and memoranda related to the project*

AB 52 Consultation record

9

- ❑ But tribes often convey information verbally and during consultations and field visits
- ❑ “Oral information is of no use to us”
- ❑ Cold read: What does the paper trail look like?
- ❑ Will Consultation record = CEQA record?
- ❑ CEQA already has *potential* for live testimony, declaration and depositions
- ❑ Consultation as two way street: agency may need to make summaries, work with tribe to discuss any (real or perceived) consultation or evidence gaps, *mutual* accommodation

Watch for second generation barriers

10

- ❑ Must provide specific maps
- ❑ Tribal elder evidence must be corroborated
- ❑ Tribal perspectives don't belong in EIR
- ❑ Must provide all information within 30 day response to consultation period
- ❑ CRM firm conducts consultation
- ❑ No NOPs (old projects)
- ❑ Overuse of exemptions or ministerial actions
- ❑ Rush to close consultation – should never be a surprise

Relevant Authority

11

- CEQA Guidelines update (Sept. 2016): Tribal Cultural Resources are separate category from Cultural Resources with their own questions in CEQA Guidelines Appendix G, as updated per AB 52
- AB 52: Tribes have expertise with regard to their tribal history and practices; and because CEQA calls for a sufficient degree of analysis, tribal knowledge about the land and TCRs at issue should be included in environmental documents
- See also, 36 CFR section 800.4(a)(4): Tribes have special expertise in identifying historic properties
 - Informs identification, integrity, significance, eligibility and mitigation of TCRs and structure and content of CEQA document

How tribes submit substantial evidence to identify and evaluate TCRs

12

- Letters and other written correspondence
- During meetings or in the field (agreed upon written summaries)
- Videos, tapes
- Interviews
- Historical records, papers, accounts (i.e., Harrington)
- Anthropologist, Ethnologist, Archaeologist testimony *informed by tribal input*

How tribes submit substantial evidence

13

- Tribal Council Resolutions
- THPO or Preservation Office/Committee comment or correspondence
- Maps, graphics – self-generated or other
- Local, Tribal, California and National Register or DPR form data
- Reference to regional grey literature, studies, etc.

How tribes submit substantial evidence

14

- Governor of Pueblo provided information to Forest Service that canyon was of great religious and cultural significance; Affidavit of Tribal Elder and religious leader that listed several religious practices and alluded to several sacred sites (*Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995))
- Dumma Tribal Government submitted comment letter that mitigation measure requiring further analysis of historical resource after project approved inappropriate (*Madera Oversight Coalition, Inc. v. County Of Madera*, 100 Cal.App.4th 48 (2011))

Confidential Record

15

- *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*.

Good Faith in consultation

16

- Forest Service failed to provide affidavits of anthropologist and elder to SHPO in a timely fashion prior to SHPO concurrence and had represented to SHPO that Pueblo had not disclosed evidence of TCP (*Pueblo of Sandia v. U.S.*, 50 F.3d 856 (10th Cir. 1995))
- Sheer volume of contacts, pro forma reticals of law, failure to meet with Tribal Government when requested, and imposing deadlines of its own choosing did not support a finding of consultation by BLM (*Quechan Tribe v. U.S. Depart. of Interior*, 755 F.Supp.2d 1104 (9th Cir. 2010))

Good Faith in consultation

17

- Forest Service researched historic sites on its own, communicated several times with tribe over a period of time, and excluded another site of tribal importance from project (*Muckleshoot Indian Tribe v. United States*, 177 F.3d 800 (9th Cir. 1999))(Note: Court ruled against U.S. on other grounds)
 - Look for adequate information and adequate time being provided by agency
 - More than a general request for Tribe to gather its own information about sites and disclose it at public meetings or to staff
 - Two way street: both parties need to understand the “culture” of the other – not just tribes changing practices

How does CEQA Define Mitigation?

18

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

General Mitigation Measure Adequacy

19

Signs of Adequacy:

- Avoid
- Minimize
- Reduce
- Compensate
- Enforceable
- “Shall”

Questionable:

- Comply with existing regulations
- Preserve already existing area
- Deferred mitigation (study in blooming season, after the fact cultural survey)
- Strive to
- Encourage
- “Should”

Gold Standard Mitigation Measures

20

- **Why?** State objective of measure
- **What?** How identified, designed, performance studies
- **Who?** Identify the agency, organization or individual responsible
- **Where?** Specific location of the measure in environmental document and in field
- **When?** Schedule for implementation
- **What if?** Contingent mitigation/process if original measure not working as planned

Making TCR Mitigation Relevant to Tribes

21

- Tribally-driven mitigation priorities (Tribal Governments' OWN mitigation priority lists) may include:
 - Preserve languages
 - Build tribal technical capacity
 - Fund cultural lands repatriation
 - Build cultural centers and programs
 - Co-management of resources
 - Build THPO, cultural department, GIS capacity
 - Synthetic studies and California/National Register nominations
 - Fund research in historical/ethnographic records

Making TCR Mitigation Relevant to Tribes

22

- ❑ Tribally-driven mitigation priorities cont.:
 - Refurbish/bring together existing/orphan collections
 - Build local curation capacity
 - Set up cultural preservation funds
 - Translate Harrington, other notes/papers
 - Perform regional surveys (i.e. trails, river corridors)
 - Comprehensive corridor/area management plans
 - Acquire cultural conservation easements
 - Tribally-controlled scientific research
 - Writing and publishing own histories, etc.

Making TCR Mitigation Relevant to Tribes

23

- 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 archaeological research, testing or data recovery which is typical of standard archaeological mitigation measures (See FRWLP March 2015 ACHP letter on alternative or creative mitigation)**
 - KEY TAKE AWAYS: TCR framework DIFFERENT than framework for archaeological identification, integrity, significance, eligibility, and mitigation – This needs to be carried through entire CEQA process

 - All proper subjects for your AB 52 consultations

 - Note: On Projects that must be opposed

Effective Public Testimony

24

- Prepare, Prepare, Prepare!
- Time limits (organized presentation, ceding time)
- Methods for protecting confidential information
- Roles for Government, Cultural Leaders and Staff, Consultants, and Legal
- Technical considerations
- Discipline with press
- Public support can help
- Not first time electeds have seen you

Actions Outside the Basic Administrative Process

25

Elevate 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
- Bring in NAHC, SHPO, ACHP – consider group discussions – no one filtering tribes' perspectives

Dispute Resolution:

- Facilitation
- Mediation – NAHC or private mediator

Role of Tribal Monitoring

26

- Make the agency monitor better
- Halt or alter the project
- Get your Tribe to (or back 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

Monitoring and CEQA Feedback Loop

27

- 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, can be way to get AB 52 when prior project preceded AB 52

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

Litigation . . . and Beyond

28

- Exhaustion of Remedies, status of the record (MMRP issues as potential exception)
- No CEQA police
- Very short statute of limitations – usually 30 days
- CEQA remedies, PRC section 21168.9

Litigation . . . and Beyond

29

- Mandatory settlement meeting, PRC Section 21167.8
- Voluntary mediation, PRC section 21167.9
- 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?
- Potential allies?
- Legislative remedy?

QUESTIONS?

30

COURTNEY ANN COYLE ATTORNEY AT LAW

HELD-PALMER HOUSE
1609 SOLEDAD AVENUE
LA JOLLA, CA USA 92037-3817

TELEPHONE: 858-454-8687
E-MAIL: COURTCOYLE@AOL.COM
FACSIMILE: 858-454-8493