TECHNICAL ADVISORY

AB 52 AND TRIBAL CULTURAL RESOURCES IN CEQA

June, 2017

GOVERNOR'S OFFICE OF PLANNING AND RESEARCH
STATE OF CALIFORNIA

Technical Advisory:

AB 52 and Tribal Cultural Resources in CEQA

(June, 2017)

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I. Purpose

This technical advisory is one in a series of advisories provided by the Governor's Office of Planning and Research (OPR) as a service to professional planners, land use officials and California Environmental Quality Act (CEQA) practitioners. OPR creates and updates technical advisories as needed on current issues in environmental law and land use planning that broadly affect the practice of CEQA and land use planning in California.

The purpose of this technical advisory is to provide guidance to lead agencies regarding recent changes to CEQA requiring consultation with California Native American tribes and consideration of tribal cultural resources. It summarizes the reasons for the legislative changes, and explains the substantive and procedural requirements that go into effect on July 1, 2015. Finally, it summarizes relevant case law, and provides a list of additional resources.

II. Legislative Intent

The legislature added the new requirements regarding tribal cultural resources in Assembly Bill 52 (Gatto, 2014). By including tribal cultural resources early in the CEQA process, the legislature intended to ensure that local and Tribal governments, public agencies, and project proponents would have information available, early in the project planning process, to identify and address potential adverse impacts to tribal cultural resources. By taking this proactive approach, the legislature also intended to reduce the potential for delay and conflict in the environmental review process. ((AB 52 § 1 (b)(7).)[1]

[1] Assembly Bill 52 (Gatto, 2014). Section 1 of the bill states the legislature's intent as follows:
In recognition of California Native American tribal sovereignty and the unique relationship of California local governments and public agencies with California Native American tribal governments, and respecting the interests and roles of project proponents, it is the intent of the Legislature, in enacting this act, to accomplish all of the following:(1) Recognize that California Native American prehistoric, historic, archaeological, cultural, and sacred places are essential elements in tribal cultural traditions, heritages, and identities.(2) Establish a new category of resources in the California Environmental Quality Act called "tribal cultural resources" that considers the tribal cultural values in addition to the scientific and archaeological values when determining impacts and mitigation.(3) Establish examples of mitigation measures for tribal cultural resources that uphold the existing mitigation preference for historical and archaeological resources of preservation in place, if feasible.(4) Recognize that California Native American tribes may have expertise with regard to their tribal history and practices, which concern the tribal cultural resources with which they are traditionally and culturally affiliated. Because the California Environmental Quality Act calls for a sufficient degree of analysis, tribal knowledge about the land and tribal cultural resources at issue should be included in environmental assessments for projects that may have a significant impact on those resources.(5) In recognition of their governmental status, establish a meaningful consultation process between California Native American tribal governments and lead agencies, respecting the interests and roles of all California Native American tribes and project proponents, and the level of required confidentiality concerning tribal cultural resources, at the earliest possible point in the California Environmental Quality Act environmental review process, so that tribal cultural resources can be identified, and culturally appropriate mitigation and mitigation monitoring programs can be considered by the decision making body of the lead agency.(6) Recognize the unique history of California Native American tribes and uphold existing rights of all California Native American tribes to participate in, and contribute their knowledge to, the environmental review process pursuant to the California Environmental Quality Act (Division 13 (commencing with § 21000) of the Public Resources Code).(7) Ensure that local and tribal governments, public agencies, and project proponents have information available, early in the California Environmental Quality Act environmental review process, for purposes of identifying and addressing potential adverse impacts to tribal cultural resources and to reduce

To accomplish those goals, the legislature added or amended the following sections in the Public Resources Code: 21073, 21074, 21080.3.1, 21080.3.2, 21082.3, 21083.09, 21084.2, and 5097.94. These changes are summarized in Section III.

III. Summary of New Requirements for Consultation and Tribal Cultural Resources

The Public Resources Code now establishes that "[a] project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment." (Pub. Resources Code, § 21084.2.)

To help determine whether a project may have such an effect, the Public Resources Code requires a lead agency to consult with any California Native American tribe that requests consultation and is traditionally and culturally affiliated with the geographic area of a proposed project. That consultation must take place prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report for a project. (Pub. Resources Code, § 21080.3.1.)

If a lead agency determines that a project may cause a substantial adverse change to tribal cultural resources, the lead agency must consider measures to mitigate that impact. Public Resources Code §20184.3 (b)(2) provides examples of mitigation measures that lead agencies may consider to avoid or minimize impacts to tribal cultural resources.

Specific provisions of the new law are described in more detail below.

A. Definition of Tribal Cultural Resources

New section 21074 of the Public Resources Code defines "tribal cultural resources." In brief, a resource is a "tribal cultural resource" if it is either:

(1) Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a tribe that are listed, or determined to be eligible for listing, in the national or state register of historical resources, or listed in a local register of historic resources; or

(2) a resource that the lead agency determines, in its discretion, is a tribal cultural resource.[2]

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the potential for delay and conflicts in the environmental review process.(8) Enable California Native American tribes to manage and accept conveyances of, and act as caretakers of, tribal cultural resources.(9) Establish that a substantial adverse change to a tribal cultural resource has a significant effect on the environment.

[2] Pub. Resources Code, § 21074
(a) "Tribal cultural resources" are either of the following:

When a lead agency chooses to treat a resource as a tribal cultural resource, that determination shall be supported with substantial evidence,[3] applying the criteria in the historical register,[4] and considering the significance of the resource to a California Native American Tribe. (PRC § 5024.1, PRC § 21074). California Native American tribes traditionally and culturally affiliated with the geographic area of a project may have expertise concerning their tribal cultural resources. (PRC § 21080.3.1). Courts will defer to a lead agency's factual determination that a resource is a tribal cultural resource if that decision is supported by substantial evidence in the record.[5]

Evidence that may support such a finding could include, among other evidence, elder testimony, oral history, tribal government archival information, testimony of a qualified archaeologist certified by the relevant tribe, testimony of an expert certified by the Tribal Government, official tribal government declarations or resolutions, formal statements from a certified Tribal Historic Preservation Officer, and historical notes, such as those found in the Harrington Papers and other anthropological records[6].

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(1) Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:
(A) Included or determined to be eligible for inclusion in the California Register of Historical Resources.
(B) Included in a local register of historical resources as defined in subdivision (k) of §5020.1.
(2) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of §5024.1. In applying the criteria set forth in subdivision (c) of §5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.
(b) A cultural landscape that meets the criteria of subdivision (a) is a tribal cultural resource to the extent that the landscape is geographically defined in terms of the size and scope of the landscape.
(c) A historical resource described in §21084.1, a unique archaeological resource as defined in subdivision (g) of §21083.2, or a "nonunique archaeological resource" as defined in subdivision (h) of §21083.2 may also be a tribal cultural resource if it conforms with the criteria of subdivision (a).

[3] Public Resources Code § 21080 (e)(1) states "…substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact."

[4] Pub. Resources Code § 5024.1 (c): A resource may be listed as historical resources in the California Register if it meets any of the following National Register of Historic Places criteria:
(1) Is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage.
(2) Is associated with the lives of persons important in our past.
(3) Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work if an important creative individual or possesses high artistic values.
(4) Has yielded, or may be likely to yield, information important in prehistory or history.

[5] *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal. 4th 1086, 1117; *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 1072.

[6] For example, the Harrington Papers are a collection of linguistic and cultural materials in the National Anthropological Archives housed in the Smithsonian National Museum of Natural History. The collection represents ethnological and linguistic fieldwork in California and with Native people.

Federal law also provides examples of potential sources of tribal knowledge. For example, the federal Native American Graves Repatriation Act recognizes the following types of evidence of cultural affiliation: geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion. (43 C.F.R. § 10.14 (d).) Similarly, the Tenth Circuit discussed tribal knowledge in the *Pueblo of Sandia* case. Specifically, the court in *Pueblo of Sandia* observed that the affidavit of a tribal elder and religious leader which listed religious practices and alluded to sacred sites, minutes of a working group meeting that showed a site was used for ceremonial, religious, and medicinal purposes, and an anthropologists' report on a tribe's religious and cultural affiliation with a site that noted ceremonial paths and herbs uses, were all forms of evidence. (*Pueblo of Sandia v. United States* (1995) 50 F.3d 856.)

B. Consultation

Public Resources Code § 21080.3.1(a) defines "consultation" with a cross-reference to Government Code § 65352.4, which applies when local governments consult with tribes on certain planning documents. That section states:

> "consultation" means 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. (Gov. Code, § 65352.4.

OPR's SB 18 *Tribal Consultation Guidelines* provide further explanation of what "consultation" means.[7] For example, the *Guidelines* explain that consultation "is a process in which both the tribe and local government invest time and effort into seeking a mutually agreeable resolution for the purpose of preserving or mitigating impacts to a cultural place, where feasible." (At p. 15.) It further states:

> Effective consultation is an ongoing process, not a single event. The process should focus on identifying issues of concern to tribes pertinent to the cultural place(s) at issue – including cultural values, religious beliefs, traditional practices, and laws protecting California Native American cultural sites – and on defining the full range of acceptable ways in which a local government can accommodate tribal concerns. (At p. 16.)

The new provisions in the Public Resources Code enumerate topics that may be addressed during consultation. If the California Native American Tribe requests consultation regarding alternatives to the project, recommended mitigation measures, or significant effects, the consultation shall include those topics. (Pub. Resources Code, § 21080.3.2(a).)

C. Timing in the CEQA Process and Consultation Steps

The new provisions in the Public Resources Code proscribe specific steps and timelines governing the notice and consultation process.

Those steps are summarized below and in the graphic entitled Compliance Timeline and Consultation Process Flowchart in Section V.

[7] Since 2004, cities and counties have had to consult with California Native American Tribes before adoption or amendment of a general plan, specific plan or designation of open space. (Gov. Code, § 65352.4., "Senate Bill 18" (Burton, Chapter 905, Statutes of 2004).) The Tribal Consultation Guidelines explain those requirements in detail. The new requirements in the Public Resources Code do not change those ongoing responsibilities. In instances in which the requirements of both the Government Code and the Public Resources Code apply to a project, while there may be substantial overlap, the lead agency must ensure that it complies with the requirements of both statutes.

1) The Native American Heritage Commission will provide each tribe with a list of all public agencies that may be lead agencies under CEQA within the geographic area with which the tribe is traditionally and culturally affiliated, the contact information of those public agencies, and information on how the Tribe may request consultation. This list must be provided on or before July 1, 2016. (Pub. Resources Code, § 5097.94 (m).)

2) If a tribe wishes to be notified of projects within its traditionally and culturally affiliated area, the tribe must submit a written request to the relevant lead agency. (Pub. Resources Code, § 21080.3.1 (b).) The Native American Heritage Commission website includes a sample template for an AB 52 notice list request letter from a California Native American tribe to a lead agency.

3) Within 14 days of determining that a private project application is complete, or to undertake a public agency project, the lead agency must provide formal notification, in writing, to the tribes that have requested notification of proposed projects as described in step 2, above. The 14 day notification must include a description of the project, its location, and must state that the tribe has 30 days to request consultation. OPR's AB 52 website includes a sample template for an AB 52 notice letter from a lead agency to a California Native American tribe.

4) If it wishes to engage in consultation on the project, the tribe must respond to the lead agency within 30 days of receipt of the formal notification described in step 3, above. The tribe's response must designate a lead contact person. If the tribe does not designate a lead contact person, or designates multiple people, the lead agency shall defer to the individual listed on the contact list maintained by the Native American Heritage Commission. The NAHC website includes a sample template for an AB 52 response letter from a California Native American tribe to a lead agency and other implementation resources for tribal governments and lead agencies.

5) The lead agency must *begin* the consultation process with the tribes that have requested consultation within 30 days of receiving the request for consultation.

6) Consultation concludes when either: 1) the parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource, or 2) a party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached. (Pub. Resources Code, § 21080.3.2 (b)(1) & (2).) Note that consultation can also be ongoing throughout the CEQA process.

D. Confidentiality

Under existing law, environmental documents must not include information about the location of an archeological site or sacred lands or any other information that is exempt from public disclosure pursuant to the Public Records Act. (Cal. Code Regs. § 15120(d); *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 220).[8] Native American graves,

[8] In *Clover Valley*, the trial court denied petitions for writ of mandate challenging a city's approval of a subdivision project. Revisions to the project included transferring prehistoric Native American artifacts for preservation. The city prepared a recirculated draft environmental impact report to analyze the revised project. The locations and specific characteristics of the cultural resources were not described. The city provided additional information briefly describing the characteristics of the cultural resources, the project's effects on them, and

cemeteries, and sacred places and records of Native American places, features, and objects are also exempt from disclosure. (Pub. Resources Code, §§ 5097.9, 5097.993.) This exclusion reflects California's strong policy in favor of protecting Native American artifacts. Confidential cultural resource inventories or reports generated for environmental documents should be maintained by the lead agency under separate cover and shall not be available to the public. (*Clover Valley* at 221, citing Governor's Office of Planning and Research, Cal. Tribal Consultation Guidelines, (Nov. 14, 2005 supp. p. 27).)

The new provisions in the Public Resources Code include additional rules governing confidentiality during tribal consultation. (Pub. Resources Code, §21082.3(c).)

First, information submitted by a California Native American tribe during the environmental review process may not be included in the environmental document or disclosed to the public without the prior written consent of the tribe. Consistent with current practice, confidential information may be included in a confidential appendix. A lead agency may exchange information confidentially with other public agencies that have jurisdiction over the environmental document. (Pub. Resources Code, § 21082.3 (c)(1).) This confidentiality protection extends to a tribe's comment letter on an environmental document. A lead agency can summarize tribal comment letters in a general way, while still maintaining confidentiality consistent with the holding in *Clover Valley Foundation v. City of Rocklin* (2011) 197Cal.App.4th 200.

Second, an exception to the general rule prohibiting disclosure is that the lead agency and the tribe may agree to share confidential information regarding tribal cultural resources with the project applicant and its agents. In that case, the project applicant is responsible for keeping the information confidential, unless the tribe consents to disclosure in writing, in order to prevent looting, vandalism, or damage to the cultural resource. The project applicant must use a reasonable degree of care to protect the information. Additionally, information that is already publically available, developed by the project applicant, or lawfully obtained from a third party that is not the tribe, lead agency, or another public agency may be disclosed during the environmental review process. (Pub. Resources Code, § 21082.3(c)(2).)

Third, the new law does not affect any existing cultural resource or confidentiality protections. (Pub. Resources Code, § 21082.3 (c)(3).)

Fourth and finally, the lead agency or another public agency may describe the information in general terms in the environmental document. This is so that the public is informed about the basis of the decision, while confidentiality is maintained. (Pub. Resources Code, § 21082.3(c)(4).) The decision in *Clover Valley* provides a useful description of how a lead agency may balance the need for confidentiality with disclosure obligations under CEQA.

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planned mitigation measures. The Court of Appeal affirmed the trial court's ruling, holding that the changes were not significant in light of disclosure restrictions pertaining to cultural resources. (Gov. Code, § 6254(r); Pub. Resources Code, §§ 5097.9, 5097.993; Cal. Code Regs., (d)).

E. Mitigation

Public agencies shall, when feasible, avoid damaging effects to any Tribal cultural resource. (Pub. Resources Code, §21084.3 (a).)

Culturally appropriate mitigation for a Tribal cultural resource is different than mitigating impacts to archeological resources and appropriate mitigation measures should be identified through consultation with the tribal government. If the lead agency determines that a project may cause a substantial adverse change to a tribal cultural resource, and measures are not otherwise identified in the consultation process, new provisions in the Public Resources Code describe mitigation measures that, if determined by the lead agency to be feasible, may avoid or minimize the significant adverse impacts. (Pub. Resources Code, § 21084.3 (b).) Examples include:

> (1) Avoidance and preservation of the resources in place, including, but not limited to, planning and construction to avoid the resources and protect the cultural and natural context, or planning greenspace, parks, or other open space, to incorporate the resources with culturally appropriate protection and management criteria.
>
> (2) Treating the resource with culturally appropriate dignity taking into account the tribal cultural values and meaning of the resource, including, but not limited to, the following:
>
> > (A) Protecting the cultural character and integrity of the resource
> >
> > (B) Protecting the traditional use of the resource
> >
> > (C) Protecting the confidentiality of the resource
>
> (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 (*Ibid.*)

IV. Updating Appendix G

The statute directs OPR to develop, and the California Natural Resources Agency to adopt, proposed updates to the sample initial study checklist in Appendix G of the CEQA Guidelines to do both of the following: (a) separate the consideration of paleontological resources from tribal cultural resources and update the relevant sample questions, and (b) add consideration of tribal cultural resources with relevant sample questions.

As noted above, the substantive and procedural requirements added in AB 52 went into effect on July 1, 2015. Because the environmental checklist in Appendix G is a *sample* checklist and not mandatory, lead agencies need not wait for the Appendix G update before updating their own procedures.

In January 2016, OPR transmitted a draft update to Appendix G of the CEQA Guidelines related to tribal cultural resources to the California Natural Resources Agency. On June 3, 2016 the agency

released a revised proposal to include tribal cultural resources in Appendix G. Up to date information can be found here: http://resources.ca.gov/ceqa/.

On September 27, 2016 the Office of Administrative Law endorsed/approved the suggested changes. Appendix G now contains a statement in the Environmental Checklist Form at the beginning of Appendix G regarding notice and consultation between lead agencies and California Native American Tribes. Appendix G also has a new section called Tribal Cultural Resources, which asks two questions related to the presence of tribal cultural resources. One question asks whether there is a potential adverse change in the significance of a listed tribal cultural resource, and the other asks whether there is a substantial adverse change in the significance of a resource determined by a lead agency to be a tribal cultural resource. In making the second determination, a lead agency must use its discretion while supporting the decision with substantial evidence, applying the criteria of the historic register, and taking into account the significance of the resource to a California Native American Tribe. Consultation with California Native American Tribes is a key way to obtain the information necessary to understand the significance of the resource.

Appendix G contains the following prompt for lead agencies to consider whether the substantive and procedural requirements for consultation with tribal governments have been followed in accordance with the changes to CEQA made by AB 52.

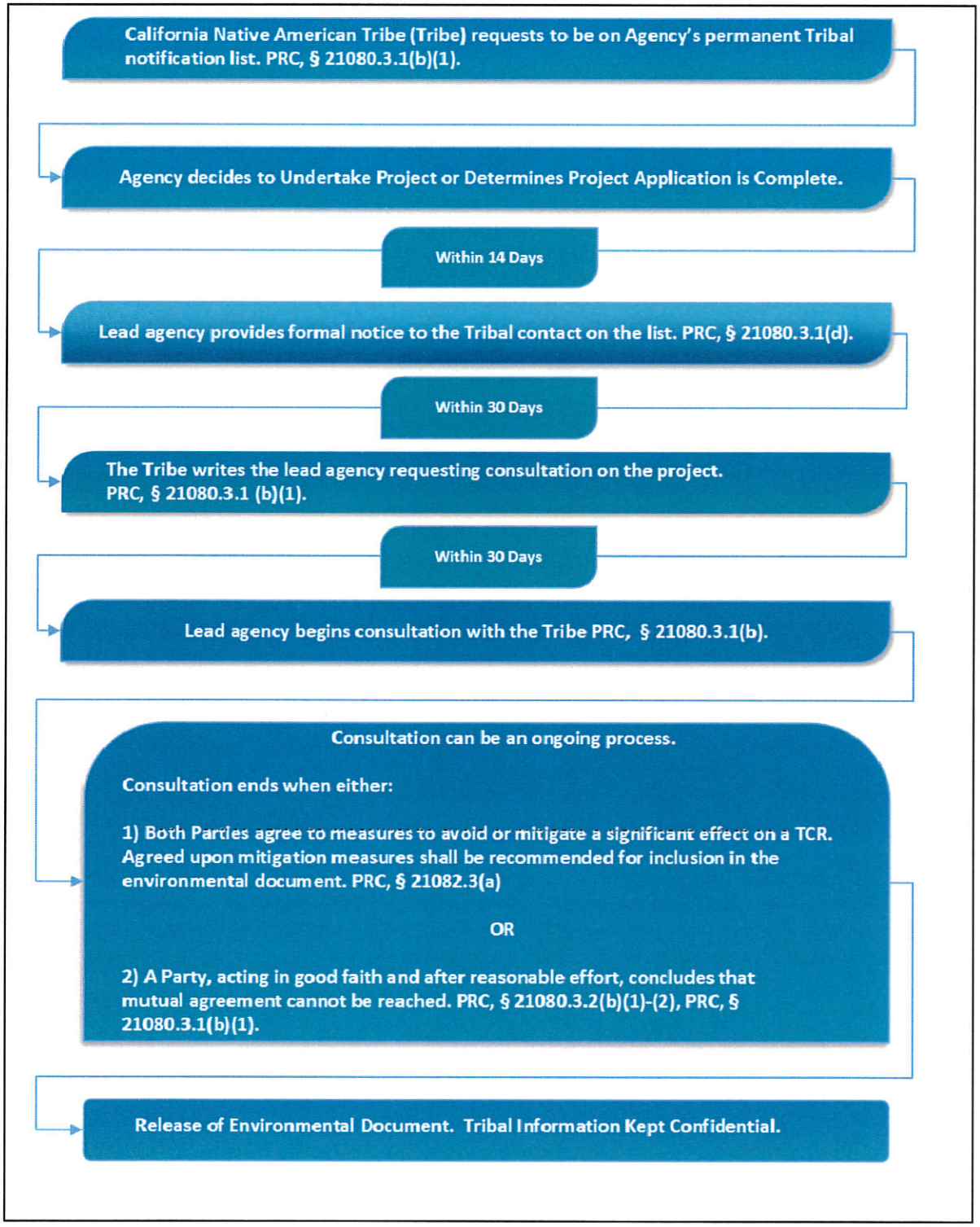
> 11. Have California Native American tribes traditionally and culturally affiliated with the project area requested consultation pursuant to Public Resources Code section 21080.3.1? If so, has consultation begun?
>
> Note: Conducting consultation early in the CEQA process allows tribal governments, lead agencies, and project proponents to discuss the level of environmental review, identify and address potential adverse impacts to tribal cultural resources, and reduce the potential for delay and conflict in the environmental review process. (See Public Resources Code section 21083.3.2.) Information may also be available from the California Native American Heritage Commission's Sacred Lands File per Public Resources Code section 5097.96 and the California Historical Resources Information System administered by the California Office of Historic Preservation. Please also note that Public Resources Code section 21082.3(c) contains provisions specific to confidentiality.

Appendix G of the CEQA Guidelines now contains the following questions:

> XVII. TRIBAL CULTURAL RESOURCES
>
> a) Would the project cause a substantial adverse change in the significance of a tribal cultural resource, defined in Public Resources Code section 21074 as either a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American tribe, and that is:
>
> > i) Listed or eligible for listing in the California Register of Historical Resources, or in a local register of historical resources as defined in Public Resources Code section 5020.1(k), or
> >
> > ii) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Public Resources

Code Section 5024.1. In applying the criteria set forth in subdivision (c) of Public Resource Code Section 5024.1, the lead agency shall consider the significance of the resource to a California Native American tribe.

V. Compliance Timeline and Consultation Process Flowchart



VI. Bibliography of Resources

A. California Government Resources

Assembly Bill No. 52 (2013- 2014 Reg. Sess.) <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB52> (as of Feb. 17, 2015).

Senate Bill No. 18 (2003-2004 Reg. Sess.) <http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0001-0050/sb_18_bill_20040930_chaptered.html> (as of Feb. 17, 2015).

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California Department of Transportation, Native American Liaison Web Site (2007) <http://dot.ca.gov/hq/tpp/offices/ocp/nalb/> (as of Feb. 17, 2015).

B. Federal Government Resources

Executive Order 13175, 65 Federal Register 67249 (Nov. 9, 2009) regarding Consultation and Coordination with Indian Tribal Governments <http://www.whitehouse.gov/the-press-office/memorandum-Tribal-consultation-signed-president> (as of Feb. 17, 2015).

Executive Order 13007, 61 Federal Register 26771 (May 24, 1996), regarding Tribal Sacred Sites <http://www.achp.gov/EO13007.html> (as of Feb. 17, 2015).

U.S. Department of the Interior, National Parks Service, Guidelines for Evaluating and Registering Archeological Properties (2000) ("Bulletin 36") <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb36.pdf> (as of Feb. 17, 2015).

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/pdfs/nrb38.pdf> (as of Feb. 17, 2015).

Advisory Council on Historic Preservation, Working With §106 Web Site (Feb. 13, 2015) <http://www.achp.gov/work106.html> (as of Feb. 17, 2015).

C. Selected California Cases

Berkeley Hillside Preservation v. City of Berkeley (2015) 60 Cal. 4th 1086, 1117 [holding that an agency's factual determination of whether unusual circumstances exist is reviewed under the substantial evidence standard, and favorably citing the holding in *Valley Advocates*].

Citizens for the Restoration of L Street v. City of Fresno (2014) 229 Cal.App.4th 340 [holding that the fair argument standard does not apply to a lead agency's discretionary determination of whether a non-listed building or district is an historical resource for purposes of CEQA]

Madera Oversight Coalition, Inc. v. County of Madera (2011) 199 Cal.App.4th 48 [holding that the phrase "preservation in place is the 'preferred manner' of mitigating impacts to archaeological sites" means that feasible preservation in place must be adopted to mitigate impacts to historical resources of an archaeological nature unless the lead agency determines that another form of mitigation is available and provides superior mitigation of impacts. Preservation in place maintains the relationship between artifacts and the archaeological context. Preservation may also avoid conflict with religious or cultural values of groups associated with the site. (Cal. Code Regs. § 15126.4(b)(3)(A)). Overuled in part on other grounds.]

Clover Valley Foundation v. City of Rocklin (2011) 197 Cal.App.4th 200 [holding that CEQA does not require a lead agency to disclose confidential information regarding the location and nature of cultural resources sites and that a lead agency need only provide a general description of those resources and mitigation measures in an EIR.]

Valley Advocates v. City of Fresno (2008) 160 Cal.App.4th 1039) [holding that the substantial evidence standard of review applies to an agency's determination of whether a building that is not listed, or eligible for listing, in a historic register qualifies as an historical resource, and further holding that once a lead agency determines the resource to be an historical resource, the fair argument standard applies to the question of whether the proposed project may cause a substantial adverse change in the significance of that historical resource].

D. Selected Federal Cases

Pueblo of Sandia v. United States (1995) 50 F.3d 856 [Federal case regarding traditional cultural properties under the National Historic Preservation Act and the National Environmental Policy Act, including an example of a reasonable and good faith effort at consultation between a lead agency and a tribe. This case includes a discussion on cumulative impact analysis and a reasonable range of alternatives analysis under NEPA and Section 106 of the NHPA. This case recognizes as evidence the affidavit of a tribal elder and religious leader.]

Muckleshoot Indian Tribe v. United States Forest Service (1999) 177 F. 3d 800 [Federal case regarding traditional cultural properties under the National Historic Preservation Act and the National Environmental Policy Act, including a discussion of how adequate mitigation for a tribally significant historic property may be different than mitigation for an historic resource. This case includes examples of tribal evidence