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“Tradition is the enemy of progress”

- “Progress” has meant a change in land use and development in CA
- Conversion of land use from the CA Native American stewardship and co-existence to demolitions, excavations and construction
- There are now laws in place in CA that attempt to balance the clash in worldviews about land use planning and development
- These laws focus on consultation with Native American Tribes to strike that balance

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General Plans and Proposed Projects

- There are two key types of land use planning and development that require consultation under the law with Native American Tribes.
- Consultation with Native American Tribes is required by Cities and Counties when developing plans for the physical development of the land through the General Plan process
- Consultation with Native American Tribes is required in the environmental review process for proposed projects through the California Environmental Quality Act

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Private Property - NAHC Duties

- (Pub. Resources Code, § 5097.94, subd. (c))
- Recommend to the Legislature procedures to encourage private property owners to voluntarily preserve and protect cultural resources and allow access to Native Americans
- (Pub. Resources Code, § 5097.94, subd. (k))
- Mediate agreements between landowners and known descendants relating to Native American human burials and associated items

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NAHC Investigations (1/2)

- (Pub. Resources Code, § 5097.97)
- If anyone advises the commission that a proposed action by a public agency:
  - May cause severe or irreparable damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine, or
  - May bar appropriate access by Native Americans,
- The commission shall conduct an investigation as to the effect of the proposed action.
- Only applies to public property.

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## NAHC Investigations (2/2)

- (Pub. Resources Code, § 5097.97)
- Where the commission finds, after a public hearing, that the proposed action would result in such damage or interference, the commission may recommend mitigation measures for consideration by the public agency proposing to take such action.
- If the public agency fails to accept the mitigation measures, and if the commission finds that the proposed action would do severe and irreparable damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, the commission may ask the Attorney General to take appropriate legal action pursuant to subdivision (g) of Section 5097.94 of the Public Resources Code.

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## General Plans

County and city planning

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## General Plans

- (Gov. Code, § 65300)
- Each planning agency shall prepare and the legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning. Chartered cities shall adopt general plans which contain the mandatory elements specified in Section 65302.

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## Required Elements for General Plan

- (Gov. Code, § 65302)
- Land Use
- Circulation (Transportation/Transit)
- Housing
- Conservation
- Open Space
- Noise
- Safety (Fires, Floods, Natural Disasters)
- Environmental Justice

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## Public Comment

- (Gov. Code, § 65352)
- Before a legislative body takes action to adopt or substantially amend a general plan, the planning agency shall refer the proposed action to a long list of potentially interested parties
- Including "a California Native American tribe that is on the contact list maintained by the Native American Heritage Commission and that has traditional lands located within the city's or county's jurisdiction"

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## Notice and Involvement Required

- (Gov. Code, § 65351)
- Cities and Counties are required to provide opportunities for public involvement in the general planning process
- Including, specifically, Native American Tribes

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## Consultation Required

- (Gov. Code, § 65352.3)
- Prior to the adoption or any amendment of a city or county's general plan, the city or county shall conduct consultations with California Native American tribes that are on the contact list maintained by the Native American Heritage Commission for the purpose of preserving or mitigating impacts to tribal cultural resources

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## Consultation Meaning

- (Gov. Code, § 65352.4)
- For purposes of general plan, " '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 with Native American tribes shall be mutually respectful of each party's sovereignty
- Consultation shall recognize the potential needs for confidentiality with respect to places that have traditional tribal cultural significance

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## Confidentiality

- (Gov. Code, § 65352.3, subd. (b))
- The city or county shall protect the confidentiality of information concerning the specific identity, location, character, and use of those places, features and objects

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## Consultation Guidelines

- (Gov. Code, § 65040.2)
- Office of planning and research must prepare guidelines for city and county general plans including for advice for consulting with California Tribes developed with the NAHC
- CA Governor's Office of Planning and Research Website:  
<https://opr.ca.gov/planning/general-plan/guidelines.html>
- Complete Guidelines were last updated 2017
- Tribal Consultation is mentioned in chapter 3
- Tribal Consultation Guidelines separate document updated in 2005

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## Consultation Process

1. City or County is considering Amendment or adoption of a general plan or a specific plan or designation of open space if the open space includes tribal cultural resources. (Gov. Code, § 65352.3, subd. (a)(1));
2. A local government sends proposal information to the NAHC and requests contact information for tribes with traditional lands or places located in geographic area affected by proposed changes. (Gov. Code, § 65562.5).
3. Tribes have 90 days to request consultation. (Gov. Code, § 65352.3, subd. (a)(2)).
4. No statutory limit on how long consultation lasts.

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## Open Space

- (Gov. Code, § 65560, subd. (b))
- Open space is defined as any parcel or area of land or water that is essentially unimproved and devoted to open-space use

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## CA Favors Preservation of Open Space

- (Gov. Code, § 65561)
- a) "That the preservation of open-space land ... is necessary not only for the maintenance of the economy of the state, but also for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources
- b) That discouraging premature and unnecessary conversion of open-space land to urban uses is a matter of public interest and will be of benefit to urban dwellers because it will discourage noncontiguous development patterns which unnecessarily increase the costs of community services to community residents"

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## Greenprint — Open Space

- A "greenprint" is a strategic conservation plan that recognizes the economic, social and cultural benefits that open space, including parks and working lands (agriculture), provide communities
- Play on the term "blueprint" commonly used as a building or architectural plan
- CA policy in the law, guidelines and judicial precedents favors conservation and greenspace

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## Consultation with Native Americans on Open Space

- (Gov. Code, § 65562.5)
- If land designated, or proposed to be designated as open space, contains tribal cultural resources, the city or county in which the place, feature, or object is located shall conduct consultations with California Native American tribe(s)
- To determine the level of confidentiality required to protect the specific identity, location, character, or use of the place, feature, or object and for the purpose of developing treatment with appropriate dignity of the place, feature, or object in any corresponding management plan
- Tribe must give notice of wanting consultation

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## California Environmental Quality Act

CEQA

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## The California Environmental Quality Act (CEQA)

- Passed in 1970 responding to National Environmental Policy Act
- Establishes a statewide policy of environmental protection
- California Public Resources Code, Sections 21000 - 21178, and Title 14 CCR, Section 753, and Chapter 3, Sections 15000 – 15387
- The California Environmental Quality Act (CEQA) is California's broadest environmental law

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## CEQA Guidelines

- (Cal. Code Regs., tit. 14, §§ 15000 – 15387)
- Available online at: [govt.westlaw.com/calregs](http://govt.westlaw.com/calregs)
- Administrative regulations governing implementation of the CEQA
- Interpret the requirements in CEQA, as well as court decisions interpreting the statute and practical planning considerations
- Public Resources Code section 21083 requires the Office of Planning and Research and the Natural Resources Agency to periodically update the CEQA Guidelines
- Not very many specific reference to tribal cultural resources in the guidelines

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## CEQA Guideline Definitions

- (Cal. Code Regs., tit. 14, §§ 15350 – 15387)
- These are very helpful definitions of all the terms commonly used in the CEQA Process

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## CEQA Policy

- (Pub. Resource Code, §§ 21000, 21001, 21002)
- To preserve and protect the environment for all citizens
- To take actions and develop standards to ensure long-term environmental preservation
- To deny projects if there are feasible alternatives and mitigation measures that could lessen environmental impact

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## Purposes of CEQA

- (Pub. Resource Code, § 21003.1; Cal. Code Regs., tit. 14, § 15002, subd. (a))
- To provide decision makers with information about the environmental impacts of projects prior to granting approval
- To encourage public to comment on the impacts of projects in their community to minimize impacts by developing project alternatives and mitigation measures

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## Scope of CEQA

- (Pub. Resource Code, § 21080 (a); Cal. Code Regs., tit. 14, § 15002 subds. (b) & (c))
- CEQA only applies to discretionary projects proposed to be carried out or approved by a public agency
- Including, but not limited to, the enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of conditional use permits, and the approval of tentative subdivision maps
- Private action is not subject to CEQA unless it involves government participation

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## Project Defined

- (Pub. Resource Code, § 21065; Cal. Code Regs., tit. 14, §§ 15002 subd. (d), and 13578)
- "Project" means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following:
  - a) An activity directly undertaken by any public agency.
  - b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.
  - c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

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## Exemptions

- (Pub. Resource Code, § 21080, subd. (b); Cal. Code Regs. § 15260-15285)
- There are also a number of categorical and statutory exemptions that exempt a project from CEQA unless there is evidence of unusual circumstances indicating that the activity might have significant adverse impacts

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## Consultation Required

- (Pub. Resources Code, § 21080.3.1)
- Declares that California Native American tribes traditionally and culturally affiliated with a geographic area may have expertise concerning their tribal cultural resources
- Requires consultation prior to the release of a CEQA negative declaration, mitigated negative declaration, or environmental impact report for a project
- Sets requirements and timelines for initiating the consultation process.

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## California Tribe Defined

- (Pub. Resources Code, § 21073)
- "California Native American tribe" means a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004 (SB 18)

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## CEQA Process

A summary overview of the environmental review process under CEQA

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## CEQA Review Summary – With Consultation

- Tribe requests notice of all proposed projects within their traditional geographic area
- Project application is submitted to lead agency for preliminary review for completeness
- Application is deemed complete by the lead agency
- The lead agency has 14 days to notify the tribe of the proposed project
- California Native American tribe has 30 days to request consultation
- The consultation process begins within 30 days of tribe's request for consultation
- Initial Study done by lead agency
- Negative Declaration or Environmental Impact Report (EIR) drafted
- Tribal Consultation is ongoing
- Final Negative Declaration or EIR certified
- Tribal consultation concludes
- Project approved (modified or denied)

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## Request for Notice of Proposed Projects

- (Pub. Resources Code, § 21080.3.1)
- The tribe must send a request to the lead agency, in writing, to be formally notified of all proposed projects in the geographic area that is traditionally and culturally affiliated with the tribe
- NOTE: Critical to contact the lead agency to evoke consultation under CEQA

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## NAHC – Lead Agency Contacts Assistance

- (Pub. Resources Code, § 5097.94, subd. (m))
- NAHC is required to provide CA Native American tribes with a list of public agencies that may be lead agencies for purposes of CEQA within the tribe's cultural and traditional geographic area including:
  - The contact information of these public agencies
  - Information on how the tribe may request the public agency to notify the tribe of projects within the jurisdiction of those agencies to request consultation

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## Preliminary Review of Application

- (Cal. Code Regs., tit. 14, § 15060, subd. (a); Reference: Pub. Resources Code, §§ 21080, subd. (b), 21080.2 and 21160)
- Project Application submitted to lead agency
- A lead agency is allowed 30 days to review for completeness applications for permits or other entitlements for use
- While conducting this review for completeness, the agency should be alert for environmental issues that might require preparation of an EIR or that may require additional explanation by the applicant

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## Application is Deemed Complete – Notice to Tribe

- (Pub. Resources Code, § 21080.3.1)
- Once the application is deemed complete the lead agency has 14 days to notify the tribe of a proposed project
- Only if the tribe has requested notice

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## Lead Agency Notice of Proposed Project

- (Pub. Resources Code, § 21080.3.1)
- This notice shall be accomplished by at least one written notification that includes:
  - A brief description of the proposed project;
  - The project's location;
  - The lead agency contact information; and
  - A notification that the tribe has 30 days to request consultation.

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## Designated Lead Tribal Contact Person

- (Pub. Resources Code, § 21080.3.1)
- When responding to the lead agency, the tribe shall designate a lead contact person
- If the tribe does not designate a lead contact person, or designates multiple lead contact people, the lead agency shall defer to the individual listed on the contact list maintained by the Native American Heritage Commission

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## Request for Consultation

- (Pub. Resources Code, § 21080.3.1)
- The California Native American tribe requests consultation in writing, within 30 days of receipt of the formal notification

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## Consultation Begins

- (Pub. Resources Code, § 21080.3.1)
- The lead agency shall begin the consultation process within 30 days of receiving a California Native American tribe's request for consultation

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## Consultation Meaning

- (Pub. Resources Code, § 21080.3.1; Gov Code, § 65352.4)
- Same as for general plan
- “ ‘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 with Native American tribes shall be mutually respectful of each party’s sovereignty
- Consultation shall recognize the potential needs for confidentiality with respect to places that have traditional tribal cultural significance

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## CEQA Eligibility Determination

- (Cal. Code Regs., tit. 14, § 15060, subd. (c); Reference: Pub. Resources Code, §§ 21080, subd. (b), 21080.2 & 21160)
- Once an application is deemed complete, a lead agency must determine whether an activity is subject to CEQA before conducting an initial study
- An activity is not subject to CEQA if:
  1. The activity does not involve the exercise of discretionary powers by a public agency;
  2. The activity will not result in a direct or reasonably foreseeable indirect physical change in the environment; or
  3. The activity is not a project as defined in Section 15378 [definition].

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## Review for CEQA Exemption

- (Cal. Code Regs., tit. 14, § 15061; Reference: Pub. Resource Code, §§ 21080, 21080.9, 21080.10, 21084, 21108, 21151, 21152 & 21159.21)
- Once a lead agency has determined that a project subject to CEQA, they shall determine whether the project is exempt from CEQA
- A project is exempt from CEQA if:
  1. The project is exempt by statute
  2. The project is exempt pursuant to a categorical exemption
  3. The activity is covered by the commonsense exemption that CEQA applies only to projects which have the potential for causing a significant effect on the environment
  4. The project will be rejected or disapproved by a public agency
  5. The project is exempt pursuant to the provisions of for certain exempt agricultural housing, affordable housing, and residential infill projects

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## Notice of Exemption (optional)

- (Cal. Code Regs., tit. 14, § 15062; Reference: Pub. Resource Code, § 21108)
- When a public agency decides that a project is exempt from CEQA and the public agency approves or determines to carry out the project, the agency may, file a notice of exemption.
- The notice shall be filed, if at all, after approval of the project
- The filing of a Notice of Exemption and the posting on the list of notices start a 35 day statute of limitations period on legal challenges to the agency’s decision that the project is exempt from CEQA.
- If a Notice of Exemption is not filed, a 180 day statute of limitations will apply.

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## Exemptions from EIR

- (Pub. Resources Code, § 21080, subs. (c) and (d)).
- Exemptions from the EIR are allowed if:
  - there is no evidence significant effects, or
  - the effects can be mitigated (clearly and completely), or
  - the project is statutorily exempt from CEQA,
- (Pub. Resources Code, § 21074, subd. (c); Cal. Code Regs., tit. 14, § 15300.2 (f)).
- A categorical exemption may not be used if the tribal cultural resource in question is also an historical resource.

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## Formal Review

- (Cal. Code Regs., tit. 14, § 15060 subd. (b))
- The lead agency shall begin the formal environmental evaluation of the project after accepting an application as complete and determining that the project is subject to CEQA.

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## Initial Study

- (Cal. Code Regs., tit. 14, § 15063; Reference: Pub. Resource Code, § 21080(c), 21080.1, 21080.3, 21082.1, 21100 & 21151)
- The lead agency shall conduct an initial study to determine if the project may have a significant effect on the environment
- An initial study shall contain in brief form:
  1. A description of the project including the location of the project;
  2. An identification of the environmental setting;
  3. An identification of environmental effects by use of a checklist, matrix, or other method,
  4. A discussion of ways to mitigate the significant effects identified, if any;
  5. An examination of whether the project would be consistent with existing zoning, plans, and other applicable land use controls;
  6. The name of the person or persons who prepared or participated in the initial study
- Any person may submit any information in any form to assist a lead agency in preparing an initial study.



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## Initial Study Results

- (Cal. Code Regs., tit. 14, § 15063, 15070, ; Reference: Pub. Resource Code, §§ 21080, subd. (c), 21080.1, 21080.3, 21082.1, 21100 & 21151)
- The lead agency determines:
  - (1) An EIR is required If that there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial, or
  - (2) A negative declaration is required if there is no substantial evidence that the project or any of its aspects may cause a significant effect on the environment



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## Environmental Impact Reports - Purpose

- (Pub. Resource Code, § 21002.1.; Cal. Code Regs., tit. 14, § 15003)
- The environmental impact report requirement is the heart of CEQA
- It informs the public of the environmental impact of a proposed project
- The purpose of an environmental impact report is to
  - Identify the significant effects on the environment of a project,
  - Identify alternatives to the project, and
  - Indicate the manner in which those significant effects can be mitigated or avoided



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## What is an Environmental Impact Report?

- (Cal. Code Regs., tit. 14, § 15002 subd. (f))
- An environmental impact report (EIR) is the public document used by the governmental agency to analyze the significant environmental effects of a proposed project, to identify alternatives, and to disclose possible ways to reduce or avoid the possible environmental damage
- To see the requirements for an EIR see California Code of Regulations title 14 sections 15120 – 15132



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## EIR Fast Track – Skip Initial Study

- (Cal. Code Regs., tit. 14, § 15060 subd. (d) & 15063; Reference: Pub. Resources Code, §§ 21080, subd. (b), 21080.2 & 21160)
- If the lead agency can determine that an EIR will be clearly required for a project, the agency may skip further initial review of the project and begin work directly on the EIR process
- In the absence of an initial study, the lead agency shall still focus the EIR on the significant effects of the project and indicate briefly its reasons for determining that other effects would not be significant or potentially significant



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## Certification of the Final EIR

- (Cal. Code Regs., tit. 14, § 15002 subd. (f)); Pub. Resources Code, §§ 21082.1, 21100 & 21151)
- Prior to approving a project, the lead agency shall certify that:
  1. The final EIR has been completed in compliance with CEQA;
  2. The final EIR was presented to the decision-making body of the lead agency and that the decision-making body reviewed and considered the information contained in the final EIR prior to approving the project; and
  3. The final EIR reflects the lead agency's independent judgment and analysis.



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## Consultation Process Ending

- (Pub. Resources Code, § 21080.3.2)
- Parties reach mutual agreement concerning appropriate measures for preservation or mitigation; or
- Either party, acting in good faith or after reasonable effort, concludes that mutual agreement cannot be reached concerning appropriate measures of preservation or mitigation.

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## Approval of Project

- (Cal. Code Regs., tit. 14, § 15092; Pub. Resources Code, §§ 21002, 21002.1, 21081 & 21159.26)
- After considering the final EIR and in conjunction with making findings, the lead agency may decide whether or how to approve or carry out the project
- A public agency shall not decide to approve or carry out a project unless either:
  1. The project as approved will not have a significant effect on the environment, or
  2. The agency has:
    - A. Eliminated or substantially lessened all significant effects on the environment where feasible as shown in findings, and
    - B. Determined that any remaining significant effects on the environment found to be unavoidable are acceptable due to overriding concerns.

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## Appeal of Lead Agency Decisions

- (Pub. Resources Code, § 21083 & 21167; Cal. Code Regs., tit. 14, §§ 15061, 15074, 15090, & 15185)
- There may be an administrative appeal process adopted for your area pursuant to Public Resources Code section 21083
- All decisions in the CEQA Process made by non-elected officials may be appealed to the elected decision-making body
- Other decisions made by the lead agency can be challenged in court
- Relevant sections of the Public Resources Code include: 21167-21167.6

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## NAHC Legal Action

- (Pub. Resources Code, § 5097.94, subd. (g))
- NAHC can bring a legal action (lawsuit) against a public agency to prevent severe and irreparable damage to or assure appropriate access for Native Americans to an area of tribal cultural significance
  - If the court finds damage will occur or access denied and mitigation measures are not available, it shall issue an injunction (order stopping the public agency action) unless the court makes a finding that public interest and necessity require otherwise
  - NAHC shall have legal representation by the Attorney General or other counsel
  - NAHC shall introduce evidence that the place has tribal cultural significance

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