

NAHC 4/21/23 Meeting

Agenda Item 6(d)

April 13, 2023

To: NAHC Commissioners
From: Chairwoman Miranda

Background

The current NAHC Tribal Consultation Policy was executed in 2016. It's seven (7) years old. Changes in law, best practices, and Commission relationships have shifted and evolved leaving the Policy outdated.

Authority

Governor's Executive Order B-10-11

State and Agency Interest

The Governor prioritizes having good government-to-government relationships with California tribes. Effective and culturally sensitive tribal consultation by State agencies is a crucial function to carrying out their duties. Tribal governments generally base their trust and relationship building with outside government institutions upon their ability to listen, comprehend and provide helpful solutions to assist tribes with their priorities. These are some of the building blocks of good tribal consultation. A good tribal consultation policy can assist agency staff in understanding and being able to execute these important functions of the State.

The NAHC is the only State Commission and Agency comprised of a governing body of Native American members with a mission to assist tribal governments with their most closely held priorities, their culture and heritage. The NAHC is looked to as a leader in fostering respectful, productive and culturally sensitive relationships with tribes. It is crucial the NAHC have a Tribal Consultation Policy that can set the gold standard for tribal consultation in the State of California.

To this Policy at issue, it is due for an update for the following reasons: The Commission's best practices have been expanded concerning tribal consultation. New duties and authorities have been added to the Commission that are not reflected in the Policy. There is a need to specify clear language on a crucial piece of the tribal consultation, confidentiality.

As this is a foundational document for the NAHC as an agency, it should be included within the Strategic Plan as an Appendix or within the body of the document.

Proposed Action

To send the current Tribal Consultation Policy out to the Tribes for comment.

To authorize the Chairperson to begin revisions to the Tribal Consultation Policy per the notes on this document.

To include the Tribal Consultation Policy in the NAHC Strategic Plan.

Native American Heritage Commission Tribal Consultation Policy

Preface

California rightly prides itself on being home to 164 Native American tribes. The 109 federally recognized tribes as well as the 55 non-federally recognized tribes, documented by the Native American Heritage Commission (NAHC), are identified under both California Public Resources Code and Government Code as eligible to be consulted by government agencies for the purpose of protecting their tribal cultural resources.

To strengthen and sustain effective relationships between the State and California's Native American tribes, Governor Edmund G. Brown, Jr. issued Executive Order B-10-11 on September 19, 2011, stating that every state agency and department subject to the Governor's executive control shall encourage communication and consultation with California Native American tribes. Executive Order B-10-11 is of special historical significance to the NAHC as a reiteration of the State's policy to work with tribes.

The NAHC's beginning was the result of demands by California Native Americans to protect sacred places, including burial sites, and other cultural places from vandalism, looting, development, and unconsented scientific research. The Commission and its authorities were established during Governor Brown's first term when he signed AB 4239 (Knox) (Chapter 1332, Statutes of 1976) on September 29, 1976. Since its beginning the mission of the NAHC has remained the protection of Native American cultural places and providing access to those places on public property for ceremonial purposes. These protections in the NAHCs authorizing statute, Public Resources Code section 5097.94, were fought for and won by California's Native Americans by standing up, not only for themselves and future generations, but also for their ancestors cultural and spiritual beliefs. Communication and consultation with California's Native American tribes is crucial to the NAHC in serving its mission, and advocating other State agencies to do the same. Therefore, the Commission sets forth the following policy to implement effective consultation with California Native American tribes to ensure meaningful input into the development of regulations, rules and policies on NAHC matters that may affect tribal communities.

Policy

The NAHC will conduct tribal consultation with California Native American tribes to ensure communication and collaboration regarding:

1. The NAHCs adoption of regulations, policies and programs affecting California
2. Native American tribes;
3. The NAHC's execution of its duties under Public Resources Code 5097.94 and other statutes; and
4. Legislation that may affect California Native American tribes' ability to protect California Native American cultural and sacred sites and burial sites and California

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History on the Commission itself shall be folded into the strategic plan.

Commented [LM3]: Authority for this Policy outside of APA rulemaking

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Native American tribes' access to those cultural resources on public property under the jurisdiction of the NAHC.

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The NAHC will continue to encourage other State and Federal agencies to conduct effective consultation with California tribes for the protection of cultural resources.

Implementation of the Policy

The Implementation of this Policy rests on the following foundations:

1. A common understanding of what tribal consultation is and a definition of "California Native American Tribe";
2. Advocacy for early communication and collaboration to ensure that the consultation is meaningful;
3. Confidentiality of tribal consultation communications and documents to the fullest extent of the law;
4. Providing information to the other State and Federal agencies to encourage consultation with California Native American tribes; and
5. Performing periodic review and reconsideration of this Policy.

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1. Definition of "California Native American Tribe" and "Tribal Consultation"

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"California Native American Tribe" shall mean a California Native American tribe on the list maintained by the NAHC for purposes of tribal consultation under Chapter 905, California Statutes of 2004.

California State Law provides the means for both federally-recognized and non-federally recognized tribes to protect their respective cultural resources. There are 109 federally recognized tribes, as independent sovereign nations with unique political status have a government-to-government relationship with the federal government. The additional 55 tribes are not recognized by the federal government and are not afforded the privilege of the government-to-government relationship with the federal government.

For purposes of this Policy, the NAHC adopts the definition of tribal consultation as follows:

"Consultation" means the meaningful and timely process of seeking, discussing and carefully considering the views of others for the purposes, where feasible, of seeking agreement. Consultation between government agencies and Native American Tribes shall be conducted in a way that is mutually respectful of each party's cultural point-of-view. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance.

2. Early Communication and Collaboration

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The NAHC will endeavor to begin any tribal consultation process at the earliest possible time to ensure that any input received can inform and affect the policy, regulation, rule, legislation, or

execution of NAHC duties about which the tribal consultation has been convened. To that end, the NAHC will provide in advance and make readily accessible any documents regarding the topic of consultation, and will in collaboration with the Tribe being consulted, prepare a consultation meeting agenda that addresses the Tribe's concerns in a manner that is respectful of the Tribe's time.

If the NAHC initiates consultation it will, at **the earliest possible time** identify California Native American tribes with which to consult and allow for a **reasonable amount of time to respond** to a request for consultation. A **minimum of thirty days will be given for notices of consultation**, when feasible. The NAHC will be responsible for coordinating a time for consultation to take place at a location that will facilitate the broadest tribal participation possible. The NAHC will consult with tribal elected officials and if other tribal representatives attend, if such tribal representatives have been delegated the authority to speak on behalf of the tribe for the purposes of consultation. The NAHC will ensure its representatives are duly authorized to speak on behalf of the NAHC.

If the tribe initiates consultation, **the NAHC will coordinate with the Tribe for a mutual agreeable date, time, location**. The tribe will be responsible for developing the agenda, and providing the materials. An **agenda, pertinent materials, documentation, and other relevant information** will need to be submitted to the NAHC prior to setting a date for the consultation meeting.

This Policy, and any amendments or revisions made thereto, shall be posted on the NAHCs website and shall be available in writing upon request.

After the NAHC's adoption of this Policy, the NAHC will conduct periodic tribal consultation on this Policy and revise it as needed to make it more effective.

3. Confidentiality of Tribal Consultation Communications and Documents to the Fullest Extent of the Law

The NAHC appreciates the sensitive nature of tribal consultation on issues regarding tribal cultural resources and tribal access to public property for ceremonial purposes. For that reason, the NAHC, if requested will conduct tribal consultation with each Tribe individually to discuss sensitive issues for that respective tribe. The NAHC will protect to the fullest extent of the law, communications and documents exchanged during tribal consultation. Any information deemed not protected by confidentiality will be clearly communicated to the tribal representative during tribal consultation.

4. Provide information to other State and Federal agencies to encourage consultation with California tribes.

To facilitate consultation, the NAHC encourages government agencies to contact the Commission for a review of its Sacred Lands File, which records culturally sensitive sites submitted to the NAHC by tribes. The NAHC also encourages agencies to contact the NAHC for lists of California Native American tribes that may be traditionally and culturally affiliated to project areas to consult on avoiding and mitigating impacts to tribal cultural resources. A tribe,

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in many cases, may be the only source of information about sensitive sites within any particular project area.

5. **Periodic Review of this Policy**

After adoption, the NAHC will conduct a periodic review of this Policy and revise it as needed to make it more effective.

For more information about or any questions about this Policy, please contact the NAHC at (916) 373-3710 or by email, NAHC@NAHC.ca.gov.

On behalf of the Native American Heritage Commission and after a year of consultation with tribes and the public, this policy has been adopted on July 15, 2016 at a regularly scheduled Commission meeting.

Commented [LM13]: It's been 7 years since this policy has been updated. Changes in law, best practices, and Commission relationships have shifted and evolved. This document is due for revisions as it is one of the core Commission documents governing NAHC interactions with tribes.