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Draft Contact List Regulations – Summary of Comments Received

On October 23, 2023, the Native American Heritage Commission (NAHC) released draft contact list regulations for a 90-day tribal comment and consultation period. At the January 19, 2024, meeting, the NAHC extended the comment and consultation period to March 1, 2024. During the 120-day tribal comment and consultation period the NAHC conducted four virtual and five in person listening sessions at Redding, Los Angeles, United Auburn Indian Community, Bishop, and Rincon. Additionally, the NAHC engaged in individual consultation sessions with 23 tribes and 1 tribal consortium consisting of 12 tribes. Comments received during these various listening sessions and consultations as well as written comments provided by 35 tribes were compiled and summarized in the following document.

As reflected in the summary of comments, the NAHC received considerable feedback on the purpose of and authority for the draft regulations. Additionally, concerns were raised about whether the regulations, as drafted, created a process for state recognition of non-federally recognized tribes and suggested alternate definitions to better clarify requirements for inclusion on the contact list. Commenters offered additional criteria for inclusion on the contact list as well as suggested evidence in support of that criteria. Several commentators questioned the extent of the NAHC's ability to review the requested information and that the Commission may need to contract with or hire genealogists or ethnographers. Last, questions were raised about how the NAHC will determine the accuracy of information submitted in support of maps and how it will handle situations where maps submitted show overlapping territories.

General

- There is no legal authority for the NAHC to develop the contact list, only that it maintains one. (2 tribes)

- No authority exists that allows the Native American Heritage Commission to draft, adopt, and promulgate regulations of any type.

- There is nothing in state law that defines the "contact list" or provides clear parameters for inclusion on that list.

- The NAHC has failed to provide an economic estimate that tribes may expect to incur to comply with the draft regulations. Likewise, it has no cost estimate for how much the state would be liable for the administration of the draft regulations.

- The laws that created NAHC (AB-4239) and describe NAHC's role in facilitating tribal consultation, (SB-18) only say that NAHC can "identify" the appropriate tribes for consultation. These bills do not say that NAHC can define a California Native American Tribe or make rules that would control a tribe's access to its consultation rights. The proposed regulations would introduce an application process and legal criteria to define a "California Native American Tribe." While these rules do not stem directly from legislative enactment, they would carry the force of law, as they would impact tribes' consultation rights and status. SB-18 allows NAHC to establish "guidelines" and "procedures" for identifying the appropriate tribes for consultation. However, unlike the proposed regulations, guidelines and procedures are meant to serve as internal guidance for agency staff and external parties but are generally not intended to carry the weight of a legal determination that affects a party's rights.

- The intent of these draft regulations appears to be the identification of non-federally recognized California Indian groups that have the legitimacy and capacity to engage in government-to-government consultation. This intent should be clearly stated and addressed in the regulations, so that all California federally recognized tribes have an opportunity to consult with the NAHC on the impact of this goal before the draft regulations are finalized.

- The proposed Contact List Regulations would undermine SB-18's intent to include both federally recognized and unrecognized tribes on the NAHC contact list if unrecognized tribes must undergo an application process that overlaps in criteria and administrative burden with the federal recognition process. Imposing a burdensome and complicated process on tribes does not serve the purpose of SB-18 which, by its title, is explicitly intended to protect traditional tribal cultural places. This purpose cannot be enhanced by creating laws and rules which govern the tribes and their government-to-government relations.

- The Contact List Regulations must not be adopted to be as restrictive as possible solely to avoid the appearance of State recognition that may have arisen by having the Contact List written into statutes that have nothing to do with tribal cultural resources protection, since that would have nothing to do with the protection of tribal cultural resources in local government planning decisions under SB 18, which provides the authority for adopting the Contact List Regulations. The Contact List regulations must, however, clearly show how the criteria for inclusion on the list align with the original intent of SB 18.

The Proposed Draft Contact Regulations, in their present form, show an alignment with the original intent of SB 18.

- The proposed NAHC Contact List Regulations would encroach upon tribal sovereignty by effectively attempting to determine, at a state level, which tribes are sovereign and by mandating certain governance actions for tribes to maintain access to rights of consultation that stem from their sovereignty.

- The creation of the Contact List Regulations after establishing the Contact List raises serious questions as to the arbitrary and capricious nature of the current list.

- The NAHC seems to be taking a legislative role by creating a process that appears to promulgate a tribal state recognition process. In fact, the process contained in Sections 31004 and 31006 is directly adopted from the Federal Acknowledgement Process ("FAP"), including using BIA standards. The proposed process and requirements for inclusion on the Contact feel, look, and function as if the CNRA and the NAHC are attempting to create a State of California Bureau of Indian Affairs. (2 tribes)

- The regulations need to include a statement about the inherent sovereignty of tribes.

- A currently listed entity should not have its status disturbed by these Regulations but should instead be provided with an opportunity to correct any listing criteria deficiency before being found ineligible for inclusion on the contact list. (4 tribes)

- All tribes currently on the contact list should be grandfathered into the new list.

- The NAHC should not grandfather in those tribes and entities currently on the list.

- Do the new Contact List Regulations apply only to non-federally recognized groups, as federally recognized Tribal Nations maintain the right of sovereignty. If so, this should be made clear within the new Regulations to dispel any misconceptions by corresponding agencies engaged in the CEQA, AB-52, AB-275, SB-18 processes, as well as any other related consultation.

- A federally recognized tribe that does not want to be included on the contact list retains a statutory right to consult under AB 52 and SB 18.

- While these Regulations are not intended to establish State recognition of any tribe, based on Sections 31004 - 31007, it appears that the process runs parallel to the BIA Federal Petition guidelines. As such, the NAHC should inquire with the BIA about how this Contact List might impact federal recognition.

- Creation of these Regulations feels like termination as a "state recognized tribe."

- These regulations only impact non-federally recognized tribes and could lead to the elimination of people representing/protecting geographic areas within the State of California. (3 tribes)

- The Contact List Regulations should be no more restrictive than the current process for placement on the list and should reflect the intent of SB 18 which was to be broad enough to protect ancestors from harm that were connected to unaffiliated people. If tribes are organized and care enough about cultural resources that they want to protect, they should be able to do so. (2 tribes)

- We strongly urge the NAHC to place a *moratorium* on use of the existing contact lists to the extent Listed entities are not Federally Recognized Tribes and to stop use of the lists for any purposes by other State agencies to the extent use is not strictly for compliance with Applicable State Laws.

- There should be different lists for federally recognized and non-federally recognized tribes especially when the contact list is used for projects with a federal nexus such as NEPA or NAGPRA as non-federally recognized tribes do not share the same relationship with the federal government as federally recognized tribes. (2 tribes)

- The NAHC's contact list, and any sub-lists for certain geographic areas shared with state and local government agencies, clearly demarcate which tribes are Federally Recognized and should therefore be afforded deference in the various consultation processes.

- The requirement for consultation with non-federally recognized tribes in California, vis a vis the NAHC's contact list, was created for the specific, limited purpose of cultural resource protection. Unfortunately, the use of the contact list over the last 20 years, in state legislation and the use of the contact list by state agencies, offices, and other entities, has resulted an expansion of the specific and limited purpose of the contact list which is now misused to allocate funds for land, housing, water, and other state programs. The proposed regulations must therefore include a more robust preamble explaining the limited purposes for which the contact list should be used and expressly debunking the misperception that inclusion on the contact list equates to some kind of state recognition process.

- Use of the contact list outside of its designated scope of tribal cultural resources protection and consultations, Native American graves protection and repatriation, and determination of most likely descendants should be addressed with the California legislature to avoid the misuse of the contact list. (3 tribes)

- Tribes were provided a copy of the draft Contact List Regulations in October 2023, making the consultation period too short for real dialogue to occur.

- Tribal consultation period should be extended until April 1, 2024. (Coalition of California State Tribes – 17 members and 3 tribes)

<u>Section 31000</u> – Preamble

- Add: "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. CA Pub Res Code Section 21073. (2 tribes)

- Government agencies outside of the NAHC utilize the Contact List for engaging in consultation beyond Tribal Cultural Resources, which must be considered in the preamble. The NAHC produces the only list of Tribal Government contacts in the State of California.

- (a) This section needs to clearly state the specific purposes for which the list will be used.

- (a) Suggest the addition of the word “consultation” to the list of purposes.

- (b) Replace the current language with: “It is the intent of these regulations to support, protect, and uplift the inherent tribal sovereignty of Federally Recognized Tribes and in doing so protect the political status of Federally Recognized Tribes. Deference shall be given to Federally Recognized Tribes in the decision-making processes described in these regulations.”

- (b) Although the section declares this Regulation is not intended to establish a state recognition process, its standards and designations will imbue culturally affiliated groups with a State tribal status and a government-to-government relationship with the State of California and its political subdivisions.

- (b) Replace the current language with: “These regulations do not establish State of California recognition of or establish a government-to-government relationship with any Native American group analogous to federal recognition of tribes under 25 Code of Federal Regulations, Part 83. Inclusion of a Native American group that is not a Federally Recognized Tribe on the Contact List is not an acknowledgement nor affirmation by the State of California that the Native American group constitutes a formal tribal government and does not confer any rights or privileges to any Native American group beyond the facilitation of cultural resource protection, consultation, and repatriation within the State of California as set forth in the statutes listed above in subsection (a).”

- (b) Disclaimers notwithstanding, the NAHC is assuming the illegal and inappropriate role of state agency for tribal recognition, copying some of the discredited and failing federal acknowledgement process (FAP). The FAP-style process creates inequities and a disproportionate burden upon the under-resourced Unacknowledged tribes and favors the federally recognized tribes and is meant to screen out California Indians when the purpose of the NAHC is to include and gain the cooperation of the Native California people to protect cultural resources.

- (b) While there is statutory authority for consultation with non-federally recognized entities, this does not and should not create a state recognition process and this needs to be strengthened from “intend” to “does not.”

- (b) The following should be inserted at the end of the sentence “nor may inclusion on the "Contact List" be considered as evidence in support of federal acknowledgement.”

- (b) The Regulations should clearly state that there are no State Recognized Tribes, nor a process for State Recognition within California, and this should also be included on notices such as Sacred lands File Searches, the NAHC website, etc. (2 tribes)

- (b) With the information that will be required from Non-Federally Recognized Tribes, to uphold these provisions, it is very apparent this is a 90% "tribal recognition submission" request.

- (b) While this provides, "[t]hose regulations are not intended to establish State of California recognition of any tribe analogous to federal recognition of tribes under 25 Code of Federal Regulations, Part 83." However, the disclaimer is rendered meaningless by the express language (and practical effect) of Section 31001, definition of Historic California Native American Tribe, and Section 31004 Evidence of Native American Affiliation. Under both sections, NAHC would be permitted to make discretionary determinations that commandeer the Federal tribal recognition processes and the enrollment functions of Federally Recognized Tribes. Under both sections, NAHC would establish a state-based, tribal recognition process for non-federally recognized Applicants for inclusion on the list. We do not believe the Applicable State Laws authorize the NAHC to stand-up a state recognition process that would exist in addition to Federal recognition processes available to non-federally recognized groups through the Executive, Congressional and Judicial Branches of the United States. Further, and with all due respect for the Commission and NAHC staff, we lack confidence that NAHC has the resources or expertise to supplant enrollment functions of Federally Recognized Tribes, an exclusive function of tribal self-government and self-determination.

- (b) This section contradicts the current language in the California Code of Regulations, which defines a "State Recognized Native American Tribe" to mean "a non-federally recognized tribe that is listed on the Tribal Contact List maintained by the Native American Heritage Commission" (14 Cal. Code Regs. §4970.01(qq) and the existing use of the term "California Native American tribe" in California State law which is defined in numerous statutes as being on the contact list maintained by the Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004. (4 tribes)

- (b) Revise to read: "These regulations do not establish State of California recognition of any California Native American Tribe. These regulations likewise do not seek to impinge or in any way preempt the sovereign rights of federally recognized California Indian tribes whose names are found on the list of Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, pursuant to section 104 of the Act of November 2, 1994 (Pub. L. 103-454; 108 Stat. 4791, 4792), in accordance with section 83.6(a) of part 83 of title 25 of the Code of Federal Regulations, and in exercise of authority delegated to the Assistant Secretary—Indian Affairs under 25 U.S.C. 2 and 9 and 209 DM 8." (2 tribes)

- Add new subsection: "The purpose of these regulations is to 1) set out the process for identifying those entities that meet the criteria to be included on the Contact List; 2) establish the criteria that Applicants must meet to be included on the Contact List; and 3) set out the limited purposes for which the Contact List may be used to identify entities with an aboriginal tie to certain lands located within the State of California." (2 tribes)

- Add new subsection: "Existing law provides that in order to be empowered to request formal consultation regarding development on a particular piece of land, a California Native American Tribe must be traditionally and culturally affiliated with the geographic area of the proposed development. Such cultural affiliation requires a review of historical records to tie a particular California Native American tribe to the particular land in question." (2 tribes)

- Add new subsection: "Existing law also provides that in order for a California Indian Tribe to be eligible to consult regarding the repatriation of Native American human remains and/or funerary items, it must be able to demonstrate aboriginal ties to the land from which the Native American human remains and/or funerary items were removed, and its members can demonstrate lineal descent from an identifiable earlier groups that inhabited the particular tribal territory. The process of cultural affiliation would be confirmed by the Commission pursuant to AB 275 (Health & Safety Code Section 8012 (j))". (2 tribes)

<u>Section 31001</u> – Definitions

- A definition of "Base Roll" should be included.

- A definition of California Aboriginal Territory is needed along with standards or criteria for determining veracity of the claims. (2 tribes)

- California Aboriginal Territory requires definition such as: "means lands actually and regularly used or occupied by the applicant tribe (or its predecessor) in pre-contact times, as demonstrated by clear and convincing documentary evidence."

- The Regulations should include a definition for "Non-Federally Recognized Tribe."

- Add a new definition: "Genealogical Evidence means reliable evidence that meets the genealogical standard or can be considered as substantial evidence."

- The Regulations should include a definition or standards for the acceptance of genealogical reports, including qualifications of the individual preparing the report.

- Historical Relationship should be defined and include a date because this could be interpreted to mean very recent events including a few months ago. This would allow any group currently listed on the contact list, or wants to be on the contact list who has had even a simple correspondence with the U.S. Govt. They could meet the definition of "and/or a tribe with other evidence of a historical relationship with the United States Government."

- (a) Because federally recognized tribes should not have to apply to be included on the list, revise to: "Applicant" means a non-federally recognized Tribal Entity requesting inclusion on the Contact List. (2 tribes)

- (a) Revise to read: "Applicant" means either a Federally Recognized Tribe, as that term is defined in subsection (g), or a group requesting inclusion on the Contact List, or a "Historic California Native American Tribe" as described in subsection (i).

- (b) Remove this definition.

- (b) The definition should indicate that it only includes "Indian" records as there were Spanish and mixed peoples on the rolls.

- (b) The definition of "California Mission Records" does not state where the California Mission Records Collection is kept.

- (b) Revise to read: "California Mission Record" means the sacramental books, created by the various California Missions, in which records were kept of the aboriginal peoples of California, which include the baptism, marriage, confirmation, burial, and census registers that identify the indigenous ancestors as yndio, indio, indigeno, neofito, or gentile.

- (b) "California Mission Rolls" is too narrow of a term for genealogy purposes. Many Native Americans are found on Mission Rolls, U.S. Indian Census Rolls, Non-population Indian Censuses, and California U.S. State Censuses depending upon their location, homesteads, allotments, etc. at the time of the count. There are other places such as Church Records where some were accounted for, therefore a broader term could be used such as "on any Native Historical Record such as a California Mission Roll, U.S. Indian Census Roll, …." To capture all possibilities.

- (b) People currently living will not be on the California Mission rolls. (2 tribes)

- (g) This is the result of a clear drafting error. The relevant citation is to Section 104 of the Federally Recognized Indian Tribe List Act of 1994 without reference to 25 CFR § 83, and can be rewritten as follows: "Federally Recognized Tribe" means any Indian tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe and is identified on the list of recognized tribes published annually by the Secretary of the Interior pursuant to Section 104 of the Federally Recognized Indian Tribe List Act of 1994."

- (i) The proposed regulations should not include a definition of Historic California Native American Tribe. Use of the word "tribe" in any definition for Listed entities that are not Federally Recognized Tribe will perpetuate disinformation among constituents using the list.

- (i) "Historic California Native American Tribe" has no basis in any federal or state statute or regulation. This term carries a presumption that the group itself is already a tribe regardless of its composition, which could include a "splinter group" of people associated with a federally recognized tribe.

- (i) The NAHC must reconsider use of this phrase as the contact list is not a state recognition process and the NAHC must be careful not to inadvertently create one. Instead, the phrase "culturally affiliated groups" should be used to describe those entities applying for inclusion on the contact list, so they are distinguished from federally recognized tribes.

- (i) Because the word "Tribe" has a specific legal meaning, this definition should not identify California Indian Groups that are not federally recognized as tribes.

- (i) Revise to read: "'Historic California Native American Tribe' means a tribe that was formerly Federal Recognized Tribe; a party to one of the eighteen unratified treaties between California Tribes and the United States drafted between April 1851, and August 22, 1852; a tribe with members on the California Mission Rolls; and /or a tribe with evidence of a historical relationship with the United States Government and/or the State of California."

- (i) This should not be expanded to encompass groups that had a historical relationship with the State of California but lack evidence of a relationship with the Federal Government. A key characteristic of tribal sovereignty has been the government-to-government relationship between tribes and the Federal Government, not State Governments. Indeed, the desire of tribes to exist separate and apart from the jurisdiction of the State is perhaps the most important thread that ties together the history of Indian Law. Moreover, such an expansive definition would unnecessarily increase the odds that this proposed process would certainly be interpreted as a state recognition process.

- (i) Because the contact list is not a state recognition process, the NAHC must be careful not to inadvertently create one. Therefore, we recommend that the term "Culturally Affiliated Group" be used in lieu of "Historic California Native American Tribe" and that he language be revised to read: "'Culturally Affiliated Group' means a group that was a party to one of the eighteen unratified treaties with the United States drafted between April 29, 1851, and August 22, 1852; a group with members on the California Mission Rolls; and/or a group that was at one time federally recognized but was subject to termination in the mid-20th century."

- (i) This definition is too broad. Without a date restriction, evidence can be submitted for contemporary activity. The evidence must be provided prior to 1976, the year of creation of the NAHC, to prevent newly formed groups who have only conducted contemporary activities from being added to the list.

- (i) The definition uses the phrase "formerly Federally Recognized Tribe" but fails to define it. By not defining "formerly Federally Recognized Tribe" the NAHC leaves this open to interpretation. A simple solution would be to tie it to the well understood concept of termination.

- (i) "Historical relationship with the United States Government" should be eliminated from the definition because it is so vague and unbounded that it is essentially meaningless. (2 tribes)

- (i) To show that an entity is a California Native American Tribe they cannot only rely on one criterion. There should be a requirement to show genealogical connection and ties to a village or Mission Rolls as well as the fact that this group functions autonomously and there has been a continuity of government since the 1900s.

- (i) A group should be required to show a connection back to a village site through genealogical research.

- (i) It's important for applicants to be linked to a village or villages within their claimed ancestral homeland. Otherwise, anyone who is on, or has an ancestor on the Mission Rolls is given the opportunity to qualify to be on the Contact List in any area of California. Suggest revise in part to read: "Historic California Native American Tribe" means a tribe that was a formerly Federally Recognized Tribe; a party to one of the eighteen unratified treaties with the United States drafted between April 29, 1851, and August 22, 1852; a tribe with members or ancestors on the California Mission Rolls, or the National Archives in San Bruno, California showing evidence of ancestral lineal descendancy to a specific California tribal village or villages within in their claimed homeland, or can provide certified, or accredited genealogical evidence of ancestral lineal descendancy to a specific California tribal village or villages within in their claimed homeland; and/or a tribe with other evidence of a historical relationship with the United States Government prior to 1950.

- (i) As presently drafted, the definition of "Historical California Native American Tribe" is unclear and could be construed as more onerous than meeting the requirement for previous federal acknowledgement under 25 CFR § 83.12(a) because it does not incorporate the precedents for previous federal acknowledgement available to non-recognized tribes. If this is intended to mean previous federal acknowledgement, then we should look to the existing federal criteria and precedents for the use of that term. Under 25 CFR § 83.1, previous federal acknowledgement means "action by the Federal government clearly premised on identification of a tribal political entity and indicating clearly the recognition of a relationship between that entity and the United States." Under 25 CFR § 83.12(a), evidence of previous federal acknowledgment for a petitioning, non-recognized Indian tribe is comprehensively defined as: "evidence that the United States Government recognized the petitioner as an Indian tribe eligible for the special programs and services provided by the United States to Indians because of their status as Indians with which the United States carried on a relationship at some prior date including, but not limited to, evidence that the petitioner had: (1) Treaty relations with the United States; (2) Been denominated a tribe by act of Congress or Executive Order; (3) Been treated by the Federal Government as having collective rights in tribe lands or funds; or (4) Land held for it or its collective ancestors by the United States." To address these issues and deficiencies, the definition can be rewritten as follows: "Historical California Native American Tribe" means an Indian tribe, band, nation, pueblo, village, or community in California that:

  (1) had treaty relations with the United States, including one of the eighteen unratified treaties with the United States drafted between April 29, 1851, and August 22, 1852;
  (2) has been denominated a Tribe by act of Congress or Executive Order;
  (3) has been treated by the Federal Government as having collective rights in tribal lands or funds;
  (4) has had land held for it or its collective ancestors by the United States, including the allotment of public domain or national forest lands to its individual members;
  (5) had a land claim accepted or consolidated before the Indian Claims Commission;
  (6) has been eligible for the special programs and services provided by the United States to Indian tribes because of an historical relationship with the Federal Government;
  (7) had members on the California Mission Rolls; or
  (8) has been identified in a report prepared by the United States Federal Executive Departments, the Congress, the American Indian Policy Review Commission, or the Advisory Council on California Indian Policy." (4 tribes)

- (i) The definition should be similar to that used by the Office of Federal Acknowledgment for Mission Indian applicants: "The historical Indian tribe includes individuals who are identified as Indians "of the San Juan Capistrano Mission" in the registers of Mission San Juan Capistrano (SJC) before secularization of the Mission in 1834, either by direct reference (such as indio) or by indirect reference (such as the lack of surname or the presence of ethnic identifiers in records for parents or offspring), or who are identified as Indians of Mission SJC on Indian censuses or other historical documents during the early-to-middle 19th century."

- (i) Revise the last part of the definition to read: "…; a tribe with members" who can prove their California Indian ancestry with reliable genealogical evidence; … (2 tribes)

- (i) Revise the last part of the definition to read ….. a tribe whose membership descends from California Native American Indians found in the California Mission Record…."

- (i) The regulations need to address whether tribal non-profits that cannot meet the criterion for inclusion on the Contact List will still be permitted to be on the list and if they fall into one of the four categories whether they be considered a Tribe.

- (i) The term "Historic" should be removed and replaced by "Aboriginal" as "historic" implies post contact, in archaeological terms. Revise to "Aboriginal California Native Tribe."

- (m) Revise to read: "Elected or Appointed Leader" means the individuals serving on the governing body of a tribe in any capacity.

- (n) "Substantial evidence." This should be the standard throughout the regulations and should apply to inclusion and removal from the Contact List.

- (n) In Western jurisprudence, there are only three standards of evidence which are preponderance of the evidence, clear and convincing evidence, and the third one is beyond a reasonable doubt. What is the justification for using the term "substantial evidence?" Is it somewhere between a preponderance and clear and convincing? And would a court of law also know what to do with that term? Is there robust common law construing the term substantial evidence?

- (n) Revise to read: "Substantial Evidence" means enough relevant facts and reasonable inferences from these facts that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Evidence will be considered to have established a fact if it establishes the reasonable validity of the fact. Argument, speculation, unsubstantiated opinion or narrative, or evidence which is clearly erroneous or inaccurate shall not be considered in determining whether there is substantial evidence. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts, as well as tribal traditional knowledge.

<u>Section 31002</u> – Contact List

- The regulations need language that include the necessity, purpose, and use of the Contact List as provided by statute.

- As part of its provision of the contact list to agencies, developers, etc., the NAHC should be required to communicate that in order for a tribal entity to become a consulting party, that tribe must first have requested such status, in writing, to the lead agency and that if a group on the contact list has not so done, then consultation is not appropriate.

- (a) Add a subsection to read: "Use of the Contact List for any purpose other than the purposes set forth in this section is prohibited."

- (a)(2) Propose deletion because unlike the other statutes that expressly refer to the Contact List, the Most Likely Descendants (MLD) statute *does not* mention the "Contact List" and does not require that the MLD be a "tribe." Specifically, Government Code §5097.98(a) provides, "Whenever the commission receives notification of a discovery of Native American human remains from a county coroner pursuant to subdivision (c) of Section 7050.5 of the Health and Safety Code, it shall

immediately notify those persons it believes to be most likely descended from the deceased Native American." Based upon current law, any MLD determination process within the NAHC's purview must be developed separately and should not be part of this proposed rulemaking endeavor for the contact list regulations.

- (a)(3) Should be removed because the Contact List should be limited to its statutory purposes, which is government consultation under SB 18 and AB 52.
- (b) Not to be made "public" on a website for just anyone to access. Instead, this should read: "The Commission shall provide, upon request, a copy of the Contact List, …"
- (b) The Commission should include information as to why a group was removed from the contact list.
- (b) There should be language added indicating whether a tribe is approved, under review, or in process.
- (c) This language appears to be contradictory in that it is unclear if the list will be updated quarterly or upon the addition or removal of tribes.
- (d) The list should be complete before the first publication. (2 tribes) In the alternative, tribes on the Contact List should remain there until the NAHC completes review of all applications. (2 tribes)
- (d) This section does not make clear the status of currently listed tribes during the transition from the current Contact List to the Contact List to be promulgated under these regulations and suggest inclusion of the following language: "(e) Within one year of the effective date of these regulations, tribes requesting inclusion on the list shall submit an application for inclusion. Tribes that were on the Contact List as of the effective date of these regulations shall continue to maintain their status as listed entities if they submit an application for inclusion within one year of the effective date of these regulations and until the application has been fully adjudicated. Tribes listed on the Contract List as of the effective date of these regulations that do not submit an application for inclusion within one year of the effective date of these regulations will be removed from the list. Once received, the Commission shall have one year during which to approve or deny an application for inclusion."
- (d) permits the NAHC to publish a list that leaves out qualified tribes who have submitted completed applications, based on the NAHC's inability to review applications in a timely manner. There needs to be a process where Tribes who are currently listed, who have submitted complete applications to the NAHC, are not dropped from the list. This isn't to say that we support "grandfathering" as we don't, but we also don't want to be dropped from the list because the NAHC may not be able to handle the influx of numerous complex applications. This could cause many non- Federally Recognized Tribes to lose all standing per SB18 and AB52. If this were to happen, we would lose our standing in coming projects, proposed government policies, policies and projects in the consultation phase and projects underway. This would be a disastrous outcome. We suggest that all tribes with completed applications stay on the list until review and determination of eligibility by the Executive Secretary and subsequently by the Commissioners.
- (d) The one-year deadline by which NAHC is to prepare the Contact List does not seem realistic. Who at NAHC is equipped and knowledgeable enough to substantiate the applications?

- (d) The end of the sentence should be revised to read "become void as of the publication date of the first edition of the Contact List."

- (d) We recommend that all Federally Recognized Tribes in California be automatically included in that first edition of the contact list by adopting the Federal Register List of Federally Recognized Tribes published annually. Given the legal ambiguities and complexities concerning non-federally recognized groups, we recommend the first edition be limited to only Federally Recognized Tribes.

Section 31003 – Application for Inclusion on Contact Lists

- While federally recognized tribes located in California "shall be deemed to have met the criteria for inclusion on the Contact List," they would be required to submit an actual application for inclusion. Rather than deal with federally recognized tribes as sovereigns on equal footing with the State, the Draft Regulations subject federally recognized tribes to an administrative process not based on underlying State law. There is no statutory justification for an administrative process excluding federally recognized sovereigns from government-to-government status, especially when the outcome is to the benefit of non-federally recognized tribes, which do not possess the same retained inherent sovereignty of federally recognized Indian tribes. Furthermore, requiring federally recognized tribes to submit Contact List applications is a waste of limited State resources and time. The NAHC cannot determine that a federally recognized tribe is not eligible for inclusion on the Contact List, begging the question then, why federally recognized tribes must apply in the first instance. The Contact List inclusion process should *begin* with the adoption of the Federal Register List of Federally Recognized Tribes to be automatically included on the Contact List. Tribes would then submit a simple form regarding their specific contact information, much as the NAHC does currently to meet its statutory obligations. This must be done immediately within thirty (30) days of the adoption of the Regulations, and perhaps sooner to avoid liability of "underground regulations." The federally recognized tribes will comprise the base of the Contact List, to which other tribal groups apply for inclusion. (2 tribes)

- Financial support should be available to non-federally recognized tribes to assist them in compiling the voluminous information being requested. (3 tribes)

- The proposed NAHC list application process would undermine tribal sovereignty by requiring tribes to comply with certain governance formalities, such as providing tribal rolls and proof of descendancy, and the passing of "resolutions" on "letterheads" and other actions that have attributes of legality but are or may be meaningless to a tribe itself, because of its inherent right to self-govern by methods and means that are entirely its own.

- Part of the application process should be demonstrating that the tribe has a place to protect ancestors and other related items.

- A non-federally recognized entity must disclose their non-profit or corporate status as part of the application process and that should be noted on the contact list.

- There needs to be language regarding factions that arise from disagreements and election disputes, to not end up with multiple groups of the same "historic tribal entity" on the contact list. There is currently no

language regarding the formation of a new tribal entity or government, creating a loophole for illegitimate tribal entities or governments to form and apply for inclusion on the contact list. (2 tribes)

- The regulations need to require evidence showing that the "tribal entity or government" did not just recently open for business. The tribal entity or government needs to provide sufficient evidence of political authority dating back to historic times. If the current political authority has predecessor political bodies, then a timeline of this succession should be provided such as proof of traditional leadership to democratic leaders that shows a between each political body transition.

- There should be something in place to avoid situations where splinter groups or factions of a tribe are getting on the Contact List based on connections established by the tribe broken off from because if this is not required, it will lead to confusion with local governments for consultation purposes.

- A 501(c)(3) owned by and for indigenous groups should be eligible for inclusion on the contact list.

- There be disqualifications for applicants that (1) operate as a 501c3 and cannot demonstrate government activity, (2) operate solely as a Native American Monitoring Firm, and (3) are a Splinter Group, as defined by Department of Interior's Part 83 of Title 25 of the Code of Federal Regulations (25 CFR Part 83), "Procedures for Federal Acknowledgment of Indian Tribes," to a Tribe that is listed.

- The regulations need to consider tribes that straddle California and a neighboring state. For instance, tribes can be based in California but also have traditional use areas in other states.

- There should be separate sections, describing applications for federally recognized tribes who should automatically be placed on the list and non-federally recognized tribes. (3 tribes)

- The application should contain a warning that providing fraudulent or false information may result in removal from the contact list or dismissal of the application. Additionally, there should be a five-year exclusion from the contact list for providing fraudulent or false information.

- (a) All documents should be provided under penalty of perjury.

- (b) Evidence of functioning as a tribe such as constitution/by-laws/meetings should be required. (4 tribes)

- (b) Acknowledgement by neighboring tribes, who are already on the contact list, or support by surrounding federally recognized tribes should be a requirement. (5 tribes)

- (b)(2) "Aboriginal territory" should be revised to "Traditional use Area."

- (c) A group applying for listing must also be able to identify a designated individual that is thoroughly knowledgeable in the stipulations of AB-275, SB-18 and the CEQA process specific to AB-52. To implement this much needed requirement, it is requested that the NAHC create a merited course that would certify the designated individual nominated by the tribal group seeking to be placed on the

contact list. This participant would be required to pass a final course exam with a minimum 80% overall grade (closed book).

- (c) Any non-federally recognized group applying for listing should provide evidence they have previously established and maintain ongoing dialogue with the NAHC, under their current name, for a minimum of 20 years.

- (c)(4) refers to "[o]ther related information as specified by the Commission." This provision constitutes an open-door invitation for the NAHC to add and/or consider additional and entirely unknown application requirements on an *ad hoc* basis that can effectively invalidate an otherwise fully qualified application.

- (d) The application should not be provided publicly on a website but should be shared upon request.

- (f) Federally recognized tribes and non-federally recognized tribes should be required to submit the same information for inclusion on the contact list.

- (f) exempts federally recognized tribes from any requirement to "submit evidence of Native American Affiliation". This provision is discriminatory on its face and constitutes disparate treatment amongst Native American peoples. The Proposed Regulations offer no justification for exempting roughly 20% of California's Native American population from the burdensome and costly application process and detailing their historical existence, while subjecting the remaining 80% to the proposed process and an uncertain outcome. The California State Constitution provides for equal protection of its citizens. Section 7 of Article 1 states, "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." In this context, that means that *all* California tribes must be treated equally. Those tribes who have gained federal recognition must not be granted greater privileges under these proposed rules, so, if the regulations proceed, federally recognized tribes, too, must be required to meet all the requirements that any other California tribe must meet.

- (f) The Regulations should develop a process for the inclusion of coalitions or confederations of federally recognized tribes and address whether resolutions and maps for each tribe are needed. (3 tribes)

- (g) Revise to read: "'Federally Recognized Tribe' means any tribe located in California and acknowledged by the federal government pursuant to the annual list published under the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. Sec. 5131) in the federal register."

- (h) Add a new subsection because it does not appear as if the NAHC has contemplated the possibility that the inability of non-federally recognized tribes to meet whichever criteria are adopted for inclusion on the Contact List could subject these tribes to losing property interests they hold as a result of being on the list. To that end, non-federally recognized tribes that are currently on the Contact List and hold property interests as a result of being on the list, should be conclusively included on the Contact List as has been proposed for federally recognized tribes. As such, the following language should be added to the draft regulations: "(h) Any tribe that holds either a conservation easement pursuant to Civil Code section 815.3 or a greenway easement pursuant to Civil Code section 816.56 shall be deemed to have met the criteria for inclusion on the Contact List as described in section 31004 and is not required to submit evidence of Native American Affiliation. Prior to inclusion on the Contact List, an easement

holding tribe must submit an application pursuant to subsection (b) and provide documentation sufficient to establish its aboriginal territory as specified in section 31005." In the alternative, the cost of litigating the potential regulatory takings and the effect on the health, safety, and welfare of California Native American members of non-federally recognized tribes that hold easements pursuant to Civil Code sections 815.3 or 816.56 and do not qualify to be on the Contact List under any new criteria be considered in the Statement of Economic Impact section of the draft regulations. The NAHC should consider seeking an Attorney General opinion on whether non-federally recognized tribes that hold property interests on the condition of being on the Contact List would suffer regulatory takings if they were unable to meet the new criteria for being on the Contact List.

Section 31004 -Evidence of Native American Affiliation

- Add the following to the title: "of Historic California Native American Tribe."

- Change "Native American" to "California Indian." (2 tribes)

- The law that provides the NAHC authority for the contact list, SB 18, included both federally recognized tribes and non-federally recognized groups, but it noted the legal distinction between the two groups by stating "in recognition of California Native American tribal sovereignty and the unique relationship between California local governments and tribal governments, … and recognized that "[m]any of these historical, cultural, and religious sites are not located within the current boundaries of California Native American reservations and rancherias, and therefore are not covered by the protectionist policies of tribal governments." It is in recognizing and distinguishing between the political affiliation of a federally recognized tribe and culturally affiliated groups that this law does not run afoul of the California constitution which contains provisions prohibiting the State from granting preferential treatment to any group on the basis of race or ethnicity. To adopt a regulatory process that relies on Native American affiliation, requiring multiple officers to provide genealogies and tribal membership base roles, risks violating the State constitution and leaves vulnerable the entire basis for SB 18.

- The NAHC may make cultural affiliation decisions but may not determine which entities are a tribe. Making a cultural affiliation determination can be accomplished by ensuring that a group demonstrates a tie to a California Aboriginal Linguistic Group through verifiable records? These groups have been generally agreed upon and published by linguists and anthropologists since the early 1900s. However, the NAHC must not permit splinter groups that were created from a larger linguistic group to be included on the contact list.

- Evidence of native American affiliation and being a tribal entity are not the same. An entity should be required to show that it functions as a tribe.

- The group seeking inclusion should be required to have an active application for federal recognition on file with the Bureau of Indian Affairs that was submitted within the last five years. This will assist in establishing that the group has the capacity to carry out consultation and that they have functioned as a group historically.

- Due to the expense connected with data collection, forensic research, and collection of oral history the NAHC should provide compensation or grant opportunities to assist in these costs.

- It is imperative that the NAHC retain the services of or establish a staff position for a genealogist certified by the National Genealogical Society, to be exclusively designated for vetting and confirming the genealogy of Non-Federally Recognized Organizations applying for listing on the NAHC Contact List. Implementing this requirement will ensure that the NAHC has taken all measures to ensure that the evidentiary information submitted by the applicants is as true and correct as possible. If necessary, state funds should be allocated to see that the services or positions are funded.

- This section places an unrealistic and potentially impossible burden on non-federally recognized tribes to procure evidence sufficient to satisfy the NAHC of tribal affiliation.

- This appears to be akin to the BIA application for federal recognition. (3 tribes)

- This process is in essence, state recognition. (5 tribes)

- The draft regulations seek information from applicant tribes related to tribal landmarks, historical tribal settlements, traditional tribal knowledge, genealogy, and other information that could potentially be considered confidential by tribal applicants. (see Proposed Draft Contact List Regulations Sections 31004 and 31005). Upon reviewing the draft regulations, we did not see any provisions related to confidentiality for information submitted by applicant tribes. If none of the information submitted by applicants is confidential, that may lead some applicants to withhold information resulting in a determination that the tribe should not be included on the Contact List. On the other hand, if certain information is considered confidential, it should be expressly stated in the draft regulations what type of information will be considered as such. Additionally, there should be an official notice that confidential information has been submitted as part of an application and tribes should be provided with an opportunity to respond.

- (a) Documents submitted must be accompanied by a declaration under penalty of perjury. (3 tribes)

- (b) If officers identified on an application are enrolled in a different tribe that should disqualify the applying entity from being on the contact list. (2 tribes)

- (b) The requirement for all tribal officers to be California Indians also constitutes a particularly glaring intrusion on tribal sovereignty, as it effectively dictates who can hold leadership positions, contradicting a tribe's right to self-governance.

- (b), (c) (1) – (4) should not be included in the criteria. NAHC should not step into the shoes of the United States and/or Federally Recognized Tribes by requiring and evaluating birth/death certificates and genealogical reports of lines of descent from a formerly Federally Recognized Tribe as proof of direct descendancy from a Historic California Native American Tribe. These are Federal recognition and enrollment functions that fall within the exclusive purview of the United States and Federally Recognized Tribes, respectively.

- (b) An additional element that the NAHC failed to include, but that is a critical component by which non-federally recognized tribes should be permitted to establish descendance includes a historic look back over a 40+/- year period to ascertain how a given entity has comported itself, including whether it has outwardly (in the broader community, including regional, statewide, or federal) represented itself as

a tribal entity and/or government. The standards for making any such representation should be low for at least two reasons. First, the NAHC does not have the charge of weeding out tribes, but rather representing and supporting specific tribal interests in California. Second, in light of the fact that the Proposed Regulations would allow a non-federally recognized tribe to establish direct descent from a "Historic California Native American Tribe" simply by demonstrating it is a former federally recognized tribe, it is clear that the NAHC is willing to accept "former" status even in the absence of substantial evidence regarding current status. Stated another way, if a given group can prove former status, the Proposed Regulations would enable it to be on the list even if present day members in no way act as or hold themselves out as a tribe. Obviously, a standard of this nature is contrary to the stated purpose of the Proposed Regulations and creates an unfair and unbalanced pathway for former recognized tribes versus current non-federally recognized tribes that through no fault of their own lack "former" status.

- (b) An Applicant should prove that it has been an organized entity for at least 20 years AND at least two of its Officers are from different families. As such, this should be revised to read: "An Applicant must establish the shared Native American affiliation of its Officers by demonstrating that at least two of its Officers are direct descendants of different families from the same Historic California Native American Tribe as provided in subsection (c) and provide a tribal membership base roll as provided in subsection (d). At least two Tribal Members should be from different families to ensure that one family does not constitute an entity."

- (b) While the draft regulations require the applicant to submit information concerning the "Native American Affiliation of its Officers," there are no provisions requiring that an applicant be organized as a government. There must be a way to designate an official tribal representative through a governmental election process to alleviate people self-identifying as a tribe. We recommend requiring applicants to submit information demonstrating that they are organized as some form of government and how officials are designated.

- (b) Groups seeking Contact List inclusion should be required to demonstrate that they currently function as a government entity and that they have continued to do so. This should include a constitution, a list of members, and evidence of regular meetings and other government processes, including meeting minutes and notes going back at least five years.

- (b) There should be a requirement that more than one person or even more than one family or lineage should be shown to be considered a tribe for the Contact List.

- (b) NAHC should require an applicant to provide information on ceremonies practiced by the group.

- (b) Tribal ID or enrollment cards should be added as acceptable evidence of Native American affiliation of officers.

- (b) This information should be required for all Tribal Leadership or Officers beginning in 1976 to today.

- (b) Proof of descendancy from a historic California tribe should be provided for all members, not just officers. (2 tribes)

- (b) A Tribe should be required to show descendancy of its officers after each election or when officers otherwise change. (2 tribes)

- (c) Revise to read: "In order to prove an Applicant's Officers are direct descendants of a member of a Historical California Native American Tribe, the Applicant must provide certified birth and/or death records, a genealogical report demonstrating the line of descent, or other primary documents, including documents certified or prepared by the Bureau of Indian Affairs and other United States Federal Executive Departments, that clearly link the current Officer to a member of a Historical California Native American Tribe with one or more of the following:

    (1)Evidence of descent from a member of such Historical California Native American Tribe that had treaty relations with the United States, including one of the eighteen unratified treaties with the United States drafted between April 29, 1851, and August 22, 1852; (2) Evidence of descent from a member of such Historical California Native American Tribe that was denominated a Tribe by act of Congress or Executive Order; (3) Evidence of descent from a member of such Historical California Native American Tribe that was treated by the Federal Government as having collective rights in tribal lands or funds; (4) Evidence of descent from a member of such Historical California Native American Tribe who obtained, or who was eligible to obtain, a public domain or national forest allotment, or whose Historical California Native American Tribe had land held for it or its collective ancestors by the United States; (5) Evidence of descent from a member of such Historical California Native American Tribe that had a land claim accepted or consolidated before the Indian Claims Commission; (6) Evidence of descent from a member of such Historical California Native American Tribe that was eligible for the special programs and services provided by the United States to Indian tribes because of an historical relationship with the Federal Government; (7) Evidence of descent from an individual(s) on the California Mission Rolls. (8) Evidence of descent from a member of such Historical California Native American Tribe identified in a report prepared by the United States Federal Executive Departments, the Congress, the American Indian Policy Review Commission, or the Advisory Council on California Indian Policy." (4 Tribes)

- (c) Revise to reflect that descent should be from more than one family to read: "In order to prove an Applicant's Officers are direct descendants of more than one family of a Historic California Native American Tribe, the Applicant must provide certified birth and/or death records or other primary documents that clearly link the current Officer to a member of a Historic California Native American Tribe with one or more of the following:"

- (c) Revise to require satisfaction of a minimum of three of the listed criteria.

- (c) Revise to require that more than one criterion be met and that (4) should be required.

- (c) The criteria to show Native American affiliation should include descent from an original allottee.

- (c) There should be a minimum number of tribal council members or officers required.

- (c) Any evidence of prior enrollment and records obtained during that enrollment cannot be considered as supporting evidence of the Applicant's separate and independent Native American Affiliation.

- (c) Proof of lineal descent of officers should be required to be shown by genealogy, including records obtained from county recorders such as birth, death, and marriage to establish a parent to child connection to a historic California Indian ancestor or village. U.S. and California census records should be used as a secondary source to substantiate sparse evidence.

- (c) The NAHC should not accept Certificates of Degree of Indian Blood or 1928 California Indian Census Rolls as these are unreliable, and the BIA does not accept CDIB for proof of Indian ancestry.

- (c) DNA evidence should not be permitted to show descendancy.

- (c)(1) NAHC should seek guidance from genealogists specifically knowledgeable in documenting the lineal descent of California Indians to better understand these databases and genealogical proof standards.

- (c)(1) Tracing genealogy to an ancestral village site is the only proven method to authenticate tribal ancestry and this information should be made public.

- (c)(1) The NAHC should consider the addition of a certified genealogist as a staff member to assist the Executive Secretary in evaluating the evidence provided by applicants.

- (c)(3) should be changed from evidence of descent from an individual(s) on the "California Mission Rolls" to any "Native Historical Record."

- (c)(3) Add the following: "that shows evidence of ancestral lineal descendancy to a specific California tribal village or villages within their claimed homeland. Such evidence may include an accredited, or certified genealogical report demonstrating the line of descent. It's important for applicants to be linked to a village or villages within their claimed ancestral homeland. Otherwise, anyone who is on, or has an ancestor on the Mission Rolls is given the opportunity to qualify to be on the Contact List in any area of California."

- (c)(3) The "California Mission Rolls" cannot be a timeline or date benchmark for the revised California Tribal Contact List because the California Mission records were created and the property of the nations of Spain and Mexico. ln 1850, when California was Congressionally admitted to the United States of America, the Spanish and Mexican "Mission Rolls" (records) then became property of the Catholic Church in California. These records, created by the Franciscan Friars, for Spanish and Mexican administrative use pre-date the United States occupation of California and cannot be applied as state or federal ancestry judgement. These Mission-era records are currently intended for internal California Tribal use for genealogic research, not for government timeline benchmarks or government applied standards.

- (c)(3) The California Indian Census Rolls should not be the only records considered. The NAHC should also permit the use of birth, death, and baptism records. (3 tribes)

- (c)(3) The use of Mission Rolls is controversial because individuals were captured and taken to missions which makes it difficult to connect persons alive today to indigenous ancestors in what in now

California. Instead of relying on these documents, the regulations should require descent from villages, tribe-lets, families, and clans.

- (c)(3) Not all California Tribes were connected to missions so other records should be considered such as Indian Claims Court, 1929 Judgment Rolls, 1928 Baker Rolls, 1950 Roll, 1971 California Judgment Roll, 1970s land claim settlements. (8 tribes)

- (c)(3) A Pre-1976 roll of a Historic California Native American Tribe should be included as evidence of Native American Affiliation.

- (c)(3) The 1928 Rolls and 1968 Indian Court of Claims should only be considered as additional evidence after descent is established through genealogy. (1 tribe)

- (c)(3) Add early 1900 censuses to the list of permissible evidence to show a historical connection.

- (c)(3) Descent from an allottee should be included in the criteria.

- (c)(4) This appears to create a loophole to permit tribes currently on the Contact List to remain there by virtue of interacting with the Federal government within the last few years, or even the last few months.

- (c)(4) Tribes that can document at least 40 years of inter-governmental relations with local, state, or federal governments should be considered "established tribes" and placed on the contact list so long as they represent some MLD's.

- (c)(4) As drafted, historic could mean contemporary "relationships" such as inviting non-federally recognized tribal groups to consult as interested parties in consultations pursuant to Section 106 of the National Historic Preservation Act. How many contacts must a tribal group have to be considered a "relationship?" Use of the term "historical" could also result in what the Federal Acknowledge Regulations define as "splinter groups" and which those Regulations cabin by requiring them to have existed prior to 1900.

- (c)(4) Historical relationship is not defined. What is the timeframe? 5 years? 100 years? This should be better defined because this could be a little as six months. (2 tribes)

- (c)(4) Add to the end: "prior to 1950."

- (c)(4) A "historical" relationship should be post-contact.

- (c)(4) There should be a requirement that a tribe be "historic and continuous" in that a group should be required to show that it has been in existence for at least 20 to 30 years and that there has been continuity, not a recently created tribe.

- (c)(4) Length of time as a tribe or entity should not be included because historical forces and disparity in resources made it so that these groups could not necessarily function as a tribe 20 to 30 years ago.

- (c)(4) Groups should be required to show that they function as a government by supplying a constitution and by-laws, membership criteria, election results and that they are not recently created. A group should be required to show continuity of government from traditional leadership to the present.

- (c)(4) Showing a historic federal relationship alone is not enough. There should also be a requirement of proof of lineal ancestry. Without a lineal decadency requirement, it would permit groups that have been around for three or four decades to be on the Contact List, even if they are not lineally descended from a historic tribe. If not, this would be a loophole to allow groups on the Contact List that are not Native.

- (c)(4) At the early age of California statehood, the federal government had limited official contact with native peoples so reliance on a federal relationship is not the most accurate. The NAHC should consider records of California Indian Land Claims litigation of the 1850s to show connection to current individuals.

- (c)(4) The Regulations should include historical relationships with Spain and Mexico.

- (c)(4) Historical relationships with the State of California should be considered. (3 tribes)

- (c)(4) California Assembly Joint Resolutions should be considered valid proof of a government-to-government relationship with said tribal entity or government and satisfy this requirement.

- (c)(4) Evidence of a historical relationship with federally recognized tribes should be part of the criteria.

- (c)(4) This should be revised to require evidence of a historic and enduring relationship with the United States Government.

- (c)(4) Historical relationship with the United States Government needs clarification. For instance, formally enrolled persons could attempt to use documents from the tribe they used to belong to establish this relationship, which should not be permitted.

- Create new subsection: "(e) Applicants comprised of splinter groups from Federally Recognized Tribes are ineligible for inclusion on the Contact List. An Applicant shall be considered a splinter group if its Officers and/or its membership rolls consist primarily of individuals who are or were at one time enrolled members of a Federally Recognized Tribe."

- Suggest the addition of a new subsection (e) "The Applicant must also prove that it operates as a tribal government, with these types of evidence, as follows: • A written description of the basis of your tribal government organization, such as a Constitution and Bylaws, Tribal Ordinance, or Articles of Association, submitted in the form of a tribal resolution. The evidence submitted must be duly adopted, ratified, dated, and signed by the entity officially authorized to act on behalf of the tribal membership, such as the Tribal Council, Chief, Chairperson, President, or Captain, as appropriate. o The NAHC also recognizes that there may be many variations in the ways tribes are organized and operate, such as custom and tradition. If that is the case, please provide a written description of how your tribe is organized and carries out its governmental functions.• Evidence of a tribal roll and a description of the requirements to be a tribal member • Certified election results for current tribal council members and their terms of office • Certification by the tribal council that it adheres to its requirements for tribal

membership • Evidence of tribal government activities, such as certified, signed, and dated meeting minutes, signed and dated council resolutions, or any government actions or decisions made by the tribe. Evidence that your tribe is acknowledged as claiming its aboriginal territory by the surrounding community, including by other tribes • Evidence that your tribe has consultation relationships with Federal, State and/or local government agencies for the purpose of tribal cultural resources protection, documented through documents that include, but are not limited to, letters, tribal resolutions, references in environmental documents, consultation agreements, tribal consultation policies, and legislative resolutions.• Evidence of tribal cultural resource community activities undertaken by the tribe."

Section 31005 – California Aboriginal Territory

- This section must be expanded to include a public hearing process, including a disclosure of the territories as the NAHC understands them to exist, and a robust consultation and commenting process for tribal governments.

- The State should consider meeting with federally-recognized tribes on a regional basis with the goal of facilitating sessions so the tribal governments themselves designate and agree to their aboriginal territories, including compromises and agreements for geographical areas that may be overlapping or in dispute. The NAHC would then use these designations in its work.

- Revise section to: "California Tribal Traditional Use Area" and use this term throughout the regulations as the word territory often leads to a territorial mindset and can lead to confusion and misunderstanding by lead agencies that do not understand traditional tribal protocols or intertribal relationships.

- The NAHC should consider the use of "geographic areas of traditional and cultural affiliation" like in AB 52.

- If a group is considered a Historical California Tribe based solely on their descent from individuals represented in California Mission Rolls, the regulations need to limit mission-based identifies to the immediate scope of the mission itself and not permit these groups to assert larger aboriginal territories of a group that is descended from a group that was a signatory to one of the unratified treaties.

- There should be two categories of aboriginal territory:

  Category 1: Direct Descent [if there is overlap with neighboring Tribal communities, descended Tribes are listed as primary contacts]
  1. Genealogical records listing an originating village or rancheria

  Category 2: Social Ties [no living descendants, may have overlap with neighboring Tribal communities]
  2. Proof of village association with the Historic California Native American Tribe
  3. Historic Pre-1900 Land Records listing members of applicant's community

- Proposed section 31005 identifies the required documentation for confirming an applicant's aboriginal territory. These requirements, particularly including "[e]vidence supporting the boundaries of the map", such as written tribal history, historical landmark and tribal settlement references, traditional knowledge, treaties, scholarly articles, and genealogical and archaeological reports (§31005(2)), place an undue and

unjust burden on the typically smaller, underfunded, and understaffed non-federally recognized tribes to present evidence that oftentimes is no longer even available, either in documentary form or via tribal traditional knowledge.

- The draft regulations give the NAHC sole authority to identify the territory or boundaries of federally recognized tribes for the purpose of tribal consultation. This can be remedied by allowing neighboring tribes the opportunity to participate in the process and by relying on a trained, neutral arbiter such as an Administrative Law Judge to resolve any remaining disputes.

- Instead of a resolution, documents should be accompanied by a declaration under penalty of perjury. (2 tribes)

- The Regulations should use the Federal Communications Commission shapefiles related to the 2.5 GHz Band Plan should be used to determine aboriginal territory. In order to determine whether spectrum was available in the area, the FCC created Rural Tribal Land Maps which reflect this information.

- Section 31005 fails to provide a distinct process for Federally Recognized Tribes and instead combines aboriginal territory into the application process in Sections 31006 and 31007. We recommend the NAHC adopt a specific process for Federally Recognized Tribes that provides appropriate deference to a Federally Recognized Tribe's assertion of its aboriginal territory while also setting up a dispute resolution mechanism for when multiple Federally Recognized Tribes disagree on a particular aboriginal territory.

- NAHC was established with the vital mission of preventing irreparable damage to sacred sites. Implementing a formal territorial mapping process would help the State of California identify areas not subject to tribal consultation obligations (which would be more convenient to develop), but it would diminish NAHC's ability to fulfill its mandate to protect tribal cultural sites by reducing the number of tribes consulted. Given the importance of its mission, NAHC should aim to involve the widest array of tribes in consultation, rather than narrowing the number of tribes consulted by imposing burdens that many tribes may be unable to meet. The proposed regulations would undermine NAHC's core mission by favoring the state's interests at the expense of federally unrecognized tribes, who are most vulnerable to exclusion from the list.

- The Regulations should detail what kind of map the NAHC will require and whether tribes will have the option to submit in GIS or another format.

- The Regulations should address the level of detail required for a map to be sufficient.

- Because it will take a significant amount of time for NAHC staff to review all of the information that will be received in connection with submission of maps, it is suggested that this process be started before the regulations are in place.

- (1)(A) The map should be an overlay in that a larger area would indicate traditional territory with a smaller area delineated for consultation. (3 tribes)

- (1)(A) Some tribes may try to claim a larger territory based on travel to areas outside their traditional territory for ceremonies or trade. NAHC needs to be able to address lack of true cultural affiliation with an area by requesting that a tribe revise its map or make modifications on its own.

- (2) An applicant should be required to submit evidence of actual use versus having a name for a geographic feature or location. (3 tribes)

- (2) The Regulations privilege non-Native, academic, "expert" sources over traditional tribal knowledge; NAHC is dismissive of Native testimony and sources.

- (2) The subsection lists eight types of evidence that may be submitted but only requires "one or more" form of evidence to provide such support. We recommend revising this provision to require "two or more" forms of evidence to support the boundaries of an applicant's territory. Our concern is that one of the types of evidence is tribal traditional knowledge, which can be embellished or inaccurately reported. Requiring two or more types of evidence would not only alleviate this concern but also serve to bolster the applicant's claim of aboriginal territory.

- (2) The Commission should defer to federally recognized tribes' determinations of their territory and should not require documentation in support. (2 tribes)

- (2) Federally recognized tribes should only be required to provide supporting documentation or traditional knowledge when multiple federally recognized tribes have a dispute regarding concurrent claims to a specific territorial overlap. (2 tribes)

- (2) Revise to read: "Clear and convincing evidence supporting the boundaries of the map described in subsection (a)(1) of this section, and establishing that the lands were regularly and consistently used by the Applicant and/or its predecessor in pre-contact times, including one or more of the following: (i) a written description of tribal history; (ii) historical references to tribal landmarks; (iii) historical references to tribal settlements; (iv) tribal traditional knowledge, including oral histories, folklore and stories; (v) treaties; (vi) scholarly articles; (vii) genealogical reports; or (vii) archaeological reports. Evidence as set forth in (iv) must be corroborated by written documentation, as detailed in (i)-(iii) and (v)-(vii)."

- (2) Aboriginal Territory should have the same burden of proof requirements as genealogy. If the NAHC does not rely on tribal traditional knowledge for genealogical ties to a Historic California Native American Tribe, then the NAHC should not use tribal traditional knowledge for ties to an aboriginal territory. Aboriginal Territory ties should be validated by records.

- (2) Add: (ix) academic linguistic publications, reports, or letters.

- (2)(iii) If the elders who either passed down the stories or whose history was documented have since died, how can a tribe verify this information. Also, there are concerns that not all the information provided is confidential under state laws regarding disclosure and tribes may be hesitant to submit that information.

- (2)(iii) To help prevent future conflicts, the Commission should consider providing notification in the case where overlapping boundaries exist or when a new tribe applying to be on the contact list is in the area of a tribe currently on the list. (2 tribes)

- (2)(iii) There should be notification when territory overlaps or NAHC should make available for public review a map with an outline of the overlapping area without identifying features.

- (2)(iii) Tribes sharing territory should be given advance notice of applications coming up on the agenda separate from the regular notice given to the general public.

- (2)(iv) Tribal traditional knowledge should be weighted equally or greater than western evidence.

<u>Section 31006</u> – Application Review Process

- The draft Regulations should include further narrative, pertaining to NAHC internal process and oversight for substantiating submission documentation. Including information on who will be a part of the overview process to ensure false narratives are addressed appropriately. There are many California contracted academics that review evidence in a prejudice or bias interpretation.

- The NAHC needs to hire certified genealogists to review documentation received with applications. (3 tribes) This should be a 4–5-person team at the beginning of the process and 2-3 people should be retained to conduct this work after the first contact list is established.

- NAGPRA regulations require notification of other tribes in the area, and it would be helpful if NAHC informed tribes when another tribe in the area is being considered for inclusion on the contact list so that they can provide input. (2 tribes)

- (a) We recommend requiring a subject matter expert be part of the Executive Secretary review process to assist in making these determinations and recommendations. Additionally, there should be a provision that allows the Executive Secretary to recuse him or herself in the event there is a conflict of interest in which case another member of the Commission may perform this role.

- (a) In reviewing an application, the Executive Secretary should be required to consult with Commission staff having relevant historical, ethnographic, or anthropological expertise.

- (a) This subsection fails to establish a timeline by which the Executive Secretary must reach a determination of whether an application is either complete or incomplete. Absent specific deadlines for the initial determinations, the NAHC could effectively enact a permanent hold on otherwise valid and worthy applications.

- (a) We object to the review process being conducted initially and solely by anyone who does not have expertise in Native American studies, California Native American history, California Native American ethnography, Native American anthropology, or Federal Indian law. This expertise is crucial to understanding the difficulties of providing evidence of being a tribe in light of California's sordid history with tribal terminations, allotments, genocide, and more. Although the current Executive Secretary may have such expertise, there is no guarantee that future Executive Secretaries will. In order to weigh the evidence presented, the people reviewing the applications must actually understand the evidence being presented. We recommend the adoption of a review process that begins with a staff level review of applications by staff who have expertise in the areas listed above, with the staff making a

recommendation to the Executive Secretary and determining whether there is substantial evidence of proof of the criteria provided. The Executive Secretary should then either accept or reject the recommendation, with reasons given, and with a right of appeal to the entire Commission. The Commission's decision should be, in turn, considered a final decision of the agency and subject to judicial review by a person for mandate in State court.

- (a) It is recommended that the regulations clearly state whether the applicant has a burden of production, a burden of persuasion, or both. The applicant should be given advance notice of a staff recommendation to deny the application and opportunity to cure with the provision of additional evidence.

- (a)(1) Revise to read: "Upon receipt of an application, the Executive Secretary shall provide notice of the application to any Federally Recognized Tribe located within the aboriginal territory claimed by the Applicant."

- (b) To determine whether submitted documents are authentic, revise to read: "Upon determining that the application is complete, the Executive Secretary shall contact an ethnographer to determine authenticity of all evidence provided. Once authenticity is established, the Executive Secretary shall:"

- (b) A paragraph should be added to read: "Provide each federally recognized Tribe with potentially overlapping aboriginal territory with a copy of the application, evaluation and recommendation at least 90 days prior to issuance of notice of a public hearing on the application, and invite each such Tribe to submit comments supporting, opposing or otherwise commenting on the application."

- (b)(1) fails to address whether and under what conditions the Executive Secretary's recommendations will be made available to and discussed with the applicant (and others?) prior to submission to the Commissioners. This omission is perhaps even more troubling because proposed subsection 31006(d)(2) recognizes the applicant's right to be informed and provided with a copy of an incompleteness evaluation, but apparently the same courtesies are not deemed worthy of being extended to applicants with respect to the substantive merits of the Executive Director's response to the application itself.

- (b)(1) By granting the authority to evaluate the merits of an application and request additional from an applicant, requires the Executive Secretary to exercise judgment that is beyond purely administrative tasks, taking decision making power away from the Commission and putting it into the hands of one person who may not, by statute, exercise discretionary authority. This section must be revised to ensure that the Commission is making these determinations.

- (b)(2) The procedures for the public hearing should not be sprung upon applicants *ad hoc,* or at the last minute, but should be developed and shared with the public as part of the Proposed Regulations. This would ensure that the same procedures are applied in all hearing contexts, and that a lack of advance notice regarding key hearing processes does not become an issue or otherwise result in entirely avoidable due process violations.

- (b)(2) Revise to read: "Provide the Applicant, and any Federally Recognized Tribe receiving notice of the application under this section, a copy of the evaluation and recommendation along with the procedures for the public hearing on the application."

- (b)(4) Revise to read: "Provide the Applicant, and any Federally Recognized Tribe receiving notice of the application under this section, at least 30 days to file a response to the Executive Secretary's evaluation and recommendation."

- (c) should indicate that once a Tribe has submitted additional information and if the NAHC then asks for additional information, the Tribe has another 60 days to comply.

- (c)(3) The NAHC should reconsider the 6-month wait to resubmit an application after it has been determined to be incomplete as this will be overwhelming for NAHC staff to thoroughly conduct the review and vetting of the applications and associated evidentiary information from numerous applicants. For this reason, the wait time should be extended to a year.

- (d) There should not be an appeal of final notices of incomplete applications. We recommend striking all language referring to such appeals in Sections 31006 and 31007. Whether or not an application is complete is really a ministerial issue, rather than a substantive determination. Moreover, the proposed regulations already provide Applicants an opportunity to submit additional materials and/or to apply again after a certain window from when their application is deemed incomplete. Accordingly, such an appeals process is unnecessary and would be an inefficient use of the NAHC's time and very limited resources.

- (d)(2) This subsection fails to identify a timeline by which the Executive Secretary must "[p]rovide the Applicant with a copy of the [incompleteness] evaluation." As drafted, the evaluation process could extend indefinitely, ostensibly while the evaluation is being prepared, but at great risk and potential harm to the applicant held hostage. At minimum, the Executive Secretary should be required to provide the evaluation ten (10) days prior to the hearing.

- (d)(2) appears to have an erroneous reference to the public hearing. It is unclear why subsection (b), which is limited to the Final Notice of Incomplete Application, would refer to a "public hearing on the application." This reference, along with that set forth in (d)(3), should refer only to an "Incomplete Application."

- (d)(5) limits the Commission's ability to review the Executive Secretary's determination that an application is incomplete and does not permit the Commission to make a final determination on inclusion on the contact list. This provision shifts decision-making authority away from the Commission to the Executive Secretary who does not have the power to exercise such discretion. As such, this sub section should be revised to rectify this issue.

<u>Section 31007</u> – Public Hearing Procedures

- We object to a public hearing process. Such a process would be far more onerous for non-federally recognized tribes that may not have access to legal counsel. Furthermore, it would be far more onerous than the process for federal acknowledgement, which has far more at stake than does the Contact List – the extension of the federal government trust relationship and protection of tribal sovereignty. To expect such an exacting process would precipitously narrow the number of non-federally recognized tribes able to participate and would support the argument that the process is de facto a process of State recognition.

- These processes should be applicable not only to applications and removals, but also for cultural affiliation determinations and decisions.

- (a) The concern with the proposed process is the span of time between NAHC public hearings, as it does not take into consideration the fact that these cases require immediate action. Therefore, it is requested that in the event that a decision for removal form the Contact List must be considered, a Special Meeting must be held within 7 days of identifying the Non-Federally Recognized Organization discrepancy or failure to meet the criteria as described in Section 31009 of the NAHC Contact List Regulations regarding Involuntary Removal. We understand that this can be challenging for both NAHC Commissioners and staff, although allowing a party to continue after they have been outed, only impacts the true tribes seeking to preserve their cultural resources and protect their ancestors from desecration. It is our hope that the review and vetting of the initial applications are thorough, so that these later situations of Involuntary Removal can be avoided.

- (a) There needs to be a process where certain personal information is redacted from public view to help prevent identity theft. Examples could include but not limited to birthdays, or mothers' maiden names.

- (b)(1) This provision should be revised to require that scheduling of the public hearing be arranged at a time mutually agreeable to the applicant and the NAHC.

- (b)(1) Interested Federally Recognized Tribes should be given direct notice of the public hearings under Section 31007 and guaranteed an opportunity to participate and testify. We recommend that any notice provided to a Federally Recognized Tribe also include a copy of the NAHC's evaluation and recommendations as well as the public hearing procedures.

- (e) Revise to read: "The Commission will consider the evidence presented at the public hearing to reach a decision and such decision shall be made by majority vote of the Commissioners during the public hearing at which the evidence is presented or at a subsequent public hearing to which the application or removal was continued pursuant to section 31007(d). Commission decisions on any application, or removal from the Contact List shall be supported with Substantial Evidence."

- (e) For determinations of aboriginal territory, the standard should not be substantial evidence aka fair evidence but should be clear and convincing.

- (h) Recommend that a Tribe with a denied application may reapply any time after a minimum of 270 days (9 months) and is informed by the NAHC the date from which the re-application date starts. The impact of being removed from the NAHC Contact List is highly problematic, so it seems fair that a Tribe be able to reapply in less than a year.

- (h) If a group fails to fulfill or meet the minimum number of required criteria, there should be an appeal process. So that the NAHC is not bombarded with numerous requests for appeals from the same group, it is recommended that one appeal may be filed every three or five years.

<u>Section 31009</u> – Involuntary Removals

- Agencies should be immediately notified when a group has been removed or is being considered for removal by the Commission. This should include agencies that have previously consulted with the group for SB 18/AB 52. (2 tribes)

- (a) Removal should be specific to cases including, but not limited to, providing fraudulent information; inactivity; misrepresentation of the groups' listing as "State Recognized", as well as issues of misuse of the group's listing status when consulting with lead agencies.

- (a) Engaging in fraud should be a disqualification for being on the Contact List.

- (a) Inactivity, such as failure to respond to NAHC request for updated contact information should be grounds for removal from the contact list.

- (a) Additional grounds for removal should include being a "bad actor" in dealing with Most Likely Descendant determinations and processes and failing to respond to NAHC communications.

- (a)(2) Submitting materially false information about aboriginal territory should be a ground for removal from the contact list.

- (b)(5) In the event a challenge is considered persuasive by the NAHC Commissioners to deny an application, there must be due process for a tribe whose application is challenged. Tribes must be able to defend themselves and be given time to examine any and all discourse submitted to the NAHC Commissioners, or Executive Secretary that is used as a challenge against them.

- (c) Federally Recognized Tribes must also be provided with notice of any involuntary removals from the contact list.

- (e) This should be changed to not require substantial evidence for removal, but that removal should occur when a lack of substantial evidence for inclusion has come to light.

- (e) "Lists." The regulations need to clarify if there is more than one list that will be created from this information. Also, consider indicating on the list whether the tribe is federally or non-federally recognized.