



Legal and Practical Considerations Regarding Cultural Resources and AB 52

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*This presentation does not constitute legal advice.
Recipients of this information are encouraged to seek legal counsel, as appropriate.*



Speakers

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Overview

- ◆ Federal Regulatory Context
- ◆ State Regulatory Context and AB 52
- ◆ Coordination of Consultation
- ◆ Tips and Tools



Federal Regulatory Context

- Nature of the Federal Undertaking
 - NEPA
 - Sometimes overlooked is the fact that there is a much broader scope of resources that NEPA must consider, in comparison to NEPA's companion law, Section 106 of the National Historic Preservation Act (NHPA)
 - NEPA and Section 106 NHPA are two separate statutory obligations
 - Section 404, 408 Authorizations and Section 7, 10
 - Triggers Section 106 NHPA



Federal Regulatory Context

- Section 106 of the National Historic Preservation Act
 - Requires Federal agencies to take into account the effects of their undertakings on historic properties.
 - Consult
 - Inventory the Area of Potential Effects
 - Evaluation of Significance
 - only “historic properties” (significant, eligible for NRHP are given further consideration)
 - Determine Effect
 - Resolve Adverse Effect
 - MOA/PA



State Regulatory Context

◆ State/Local Regulations

- CEQA (mini-NEPA)
- Water Quality – 401, 1602
- Central Valley Flood Protection Board
- LMA approvals

◆ Public Resources Code

- Specifies procedures to follow where human remains or grave goods are found during project work
- Native American Heritage Commission identifies Most Likely Descendant tribe
- Property owner confers with MLD on disposition of remains
- Differences from federal law in definitions of burials, e.g., NAGPRA



State Regulatory Context

◆ California Environmental Quality Act (CEQA)

- Analyze, publicize and mitigate for significant environmental impacts
- Identify historical resources, tribal cultural resources, and identify mitigation measures
- Historical resources tend to be a broader set of cultural resources than those considered under Section 106 (CRHR)
- As a practical matter, unique archaeological resources = historical resources under CEQA
- Tribal cultural resources are new to CEQA, via AB 52



AB 52: Purpose/Requirements

1. Amended CEQA to mandate early tribal consultation *prior to and during* CEQA review

- ✓ Cannot release an environmental document until consultation, if requested, has been initiated [PRC 21080.3.1(b)]
- ✓ Cannot certify environmental document until consultation, if initiated, has concluded [PRC 21082.3(d)].
- ✓ With “California Native American tribes”
 - Not necessarily physically located near your project
 - Not necessarily the same groups as for Section 106 or SB 18, because:
 - » Only with those tribes who have formally requested, in writing, notification on CEQA projects under AB 52 (= “general notification”)
 - » How you identify tribes and initiate consultation is opposite of pre-AB 52



Purpose/Requirements

2. Introduced new resource to CEQA: Tribal Cultural Resources (TCRs)

- TCR is defined sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:
 - Included or determined to be eligible for inclusion in the CRHR; or
 - Included in a local register of historical resources; or
 - A resource determined by the lead agency, in its discretion and supported by substantial evidence, and considering the stated importance to the tribe, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1 (=CRHR)
- Some special considerations...



Special Considerations

- ◆ Tribes, not archaeologists, are the experts
- ◆ A cultural landscape must be geographically defined in terms of the size and scope of the landscape
- ◆ A TCR may also be considered a historical resource under CEQA
- ◆ Not necessarily visible or archaeological (e.g., viewsheds)



Purpose/Requirements

3. Significant impact on TCR = significant effect on environment

- This may dictate the type of CEQA document needed (EIR vs. MND)
 - Cannot release an environmental document until consultation, if requested, has been initiated [PRC 21080.3.1(b)]
 - If you are already doing an EIR for other reasons, technically, you CAN release an NOP before you know the impacts to TCRs



Purpose/Requirements

4. Requires formal *conclusion* to consultation

- The consultation shall be considered concluded when either of the following occurs:
 - (1) The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource; or
 - (2) A party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached.
- ✓ Cannot certify environmental document until consultation, if initiated, has concluded [21082.3(d)].



Purpose/Requirements

5. Effective July 1, 2015 for all projects subject to CEQA, except for projects where:

- Notices of Preparation for EIRs, or Notices of Intent to adopt NDs or MNDs were *published* before July 1



Implementation and Compliance Issues

- ◆ Categorical exemptions
- ◆ Issues with request letters and responses
- ◆ TCRs without consultation
- ◆ Notices of Preparation
- ◆ Substantial evidence and significant impacts
- ◆ Different types of EIRs



Coordinated Consultation

◆ Environmental review and permitting requires consultation with:

- State Historic Preservation Officer
- Advisory Council on Historic Preservation (sometimes)
- Historic preservation associations
- Landowners and stakeholders
- Local, state, and federal agencies
- Native American tribes



Regulatory Context

Regulatory Context	Agency	Tribes	When Applies	Party Initiating Contact	Reaction	Timing	Schedule
Section 106 NHPA	Federal	Federally-recognized	Prior to issuance of a permit, license, or funding	Federal Agency	Proactive	Tends to be later in the process, post-CEQA	No timeframes
Senate Bill 18	Local (Cities/Counties)	California Native American Tribes	Prior to General Plan and Specific Plan adoptions or amendments	Local Agency	Proactive	Tends to be earlier in the process, in conjunction with CEQA	90 day window to initiate, followed by CC/BOS noticing
Public Comment: CEQA	State/Local	Any member of the public	CEQA	Tribes	Reactive	Near the end of CEQA, after the draft environmental document has been released to the public	Initial Study: 30 calendar days EIR: 45 calendar days
Public Comment: NEPA	Federal	Any member of the public	NEPA (note, this often occurs in conjunction with Section 106)	Tribes	Reactive	Near the end of NEPA, after the draft environmental document has been released to the public	EA: 30 calendar days EIS: 45 calendar days
Assembly Bill 52	State/Local	California Native American Tribes	CEQA	Tribes	Proactive	Earliest point in the process, at the start of CEQA	14 days from start; 30 day response window; 30 day initiation window; then no time frames



Tips and Tools

– Conflicts and challenges:

- Timeline: plan for the unexpected
- Confidentiality
- USACE "mitigation" obligation v. tribal desire to re-bury
- Conflict between state and federal law
- Discretion and negotiation in mitigation
- Emotional issues associated with burials

– Solutions:

- Early coordination
- Documentation
- Relationship building
- Leveraging technology for early identification
- NEPA in lieu of Section 106 (special procedures apply)



Questions?

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