

AB 52

CLE CEQA Practice
Guidance & Case Law

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In 20 Minutes!!!

- 1. Tribal Interests in CEQA
- 2. Tribal Cultural Resource in CEQA
 - Precedent, definition, existing resources, considerations
 - Tribal values
 - Landscapes
 - Sacred places
- 3. How to do Tribal Consultation in CEQA
 - Basis and Definition
 - Best practices
 - Completion

Tribal History & Life Ways

- Tribes lived on and with most of land we know today as the United States.
- Tribal worldview and life ways
 - Connectedness and union of life
 - Respect and honor
- Land ownership world view different than western culture
 - Communal
- Historical trauma from removal
- Places/Resources are the very identity of the people
 - Continuation or revitalization
 - Change may not be negative or prohibited
 - Must be carefully considered because of the significance to tribal identity

Legal History and Basis

- American Indian Religious Freedom Act (1978)
- President Clinton E.O. 13007 on Indian Sacred sites (1996)
- NAGPRA (1990)
- ARPA (1979)
- National Historic Preservation Act (1996) aka Section 106
 - Federal Advisory Council on Historic Preservation
 - Traditional Cultural Properties NRB 38 (not law, but courts have held violate ACHP Regs if don't follow)
 - National Register of Historic Places

Legal History and Basis

- State Public Resources Code
 - 5097.97 Sacred sites public property
 - 5097.98 Human Remains
 - 5097.96 SLF
 - 5097.993 Misdemeanor destroy archeology public prop
- SB 18 (California Government Code)
 - SB 18 Guidelines on Tribal Consultation at:
http://www.opr.ca.gov/s_localandtribalintergovernmentalconsultation.php
- California Register of Historical Resources
 - State Historic Resources Commission (SHRC)
- Traditional Cultural Properties in CEQA

What is a TCR? (PRC 21074)

- Subdivision (a) (1) Sites, features, places, cultural landscapes, sacred places and objects with cultural value to a CNAT that are either of the following:
 - Included or determined eligible for CA Register
 - Included in local register

- (2) Any resource determined by the CEQA lead agency in its discretion to be significant and supported by substantial evidence

Use criteria CA Register

In applying Register criteria **shall consider tribal significance**

Community Value (Bulletin 38)

Tribal expertise and knowledge

(AB 52 Leg Intent; PRC 21080.3.1(a))

“Cultural Values”

Cultural Significance

- Values: Your principles or standards of behavior; what is important in life
- Central to a way a community defines itself
- Vital to maintaining the community sense of identity and respect
- Infringement may be deeply offensive
- Project by project fact based inquiry

Only Tangible Resources Covered

Tribes may view cultural properties broader than what is protected by either federal statutory or international law

For CEQA must have a property referent
rock, river, gathering area, geophysical place

However the attributes that give such resources significance such as their association with historical events oral history, customs and traditions, often are intangible in nature.

Such attributes should not be ignored in evaluating and managing the resources.

The resources and their intangible attributes of significance must be considered together

Tribal Cultural Landscapes

- **Tribal Cultural Landscape (Yurok):** Any place in which a relationship, past or present, exists between a spatial area, resource, and an associated group of indigenous people whose cultural practices, beliefs, or identity connects them to that place.
- **Cultural landscape (NPS Bulletin 36)** - a geographic area (including both cultural and natural resources and the wildlife or domestic animals therein), associated with a historic event, activity, or person or exhibiting other cultural or aesthetic values.
 - Four general types of cultural landscapes, not mutually exclusive: historic sites, historic designed landscapes, historic vernacular landscapes, and ethnographic landscapes.

Ethnographic Landscape (NPS)

Ethnographic landscape - a landscape containing a variety of natural and cultural resources that associated people define as heritage resources. Examples are contemporary settlements, sacred religious sites, and massive geological structures. Small plant communities, animals, subsistence and ceremonial grounds are often components.

- Can be large or small
- Broader scope relatedness, district, culturescape,
- Encompass community worldview

CEQA

Cultural Landscape Boundaries

A cultural Landscape that meets the criteria of subdivision (a) is a tribal cultural resource *to the extent* that the landscape is *geographically defined* in terms of size and scope of the landscape

- Define the size and the scope

- Based on substantial evidence

- Boundaries may not match project boundaries or APEs

Resource Considerations

- Significance and effects discussions (PRC 21080.3.2(a))
- Direct and Indirect Impacts
 - View sheds important element
 - Example of calendar rock
- Alternatives (PRC 21080.3.2(a))
- Cumulative Impacts
- CEQA standards and constraints are still present
 - Substantial Adverse Change
 - Project impacts
 - Feasible mitigation
- Enlist assistance of anthropologists and ethnographers to research, gather information, interview communities

NPS Bulletin

Landscape planning

- Recommendations generally involves the following steps (along w/tribal consultation):
 - historical research);
 - inventory and documentation of existing conditions;
 - site analysis and evaluation of integrity and significance;
 - development of a cultural landscape preservation approach and treatment plan;
 - development of a cultural landscape management plan and management philosophy;
 - the development of a strategy for ongoing maintenance;
 - and preparation of a record of treatment and future research recommendations.

Include in the Environmental Document

- If a project may have a significant impact on a TCR the lead agency's environmental document shall discuss both of the following:
 - *Whether the proposed project has a significant impact on an identified TCR*
 - *Whether feasible alternatives or mitigation measures, including those measures that may be agreed to avoid or substantially lessen the impact on the identified TCR*

Sacred Places

- **SB 18 Definition:** Public Resources Code §5097.9 and 5097.993 to define cultural places:
 - Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine (PRC §5097.9).
 - Native American historic, cultural, or sacred site, that is listed or may be eligible for listing in the California Register of Historic Resources pursuant to Section 5024.1, including any historic or prehistoric ruins, any burial ground, any archaeological or historic site (Public Resources Code §5097.993)
- Differences in the usage of the word “sacred”

Resource Categories

Not Mutually Exclusive

PRC 21074: Historic resource, unique archaeological resource or a nonunique archaeological resource may also be a TCR if it conforms with criteria in subdivision (a). Examples:

A TCR may be a historic resource

A TCR may be a nonunique archaeological resource

A TCR may be a historic resource and a unique archaeological resource

- An substantial adverse change to significance of a Tribal Cultural Resource is a significant effect on the environment (PRC §21084.2 and PRC §21082.3)
- Public agencies shall, when feasible, avoid damaging effects to any Tribal Cultural Resources (PRC § 21084.3)
- Uphold existing mitigation preference for historic resources – preservation in place (CEQA Guidelines 15126.4)

CEQA Consultation

- Consultation is going to be the key to balancing effects of present/western land use principles with TCRs
- SB 18 Guidelines: Effective consultation is an ongoing process, not a single event. The process should focus on identifying issues of concern to tribes pertinent to the cultural place(s) at issue – including cultural values, religious beliefs, traditional practices, and laws protecting California Native American cultural sites – and on defining the full range of acceptable ways in which a local government can accommodate tribal concerns

What is CEQA Consultation?

- Consultation shall have the same meaning as provided in Cal Govt Code Sec. 65352.4 (SB 18)
 - Consultation means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance.

Consultation Considerations

Best Practices

Many of these taken from the SB 18 Guidelines

- 1. Carry out and fulfill elements in Consultation definition
 - Early discussions, disclosure of information/documents earliest times in process
- 2. Do not treat simply like a procedure or a check box
- 3. Government-to-Government
- 4. Good Faith and Reasonable Effort
- 5. Devise a protocol, agreements, definitions. Make clear any rules, processes, schedules or goals. Strive for consistency of team. Respect time systems. Define terms and topics (PRC 21080.3.2(a))

Consultation Considerations

Best Practices

- 6. May need to consult with more than one tribe - traditionally and culturally affiliated tribes
 - Cultural Affiliation is a showing of a cultural relationship between the tribe and the specific geographic area at issue. The relationship is based on geographical, kinship, archeological, linguistic, oral tradition, historical evidence, and other expert opinion
- 7. Consult with one tribe at a time
- 8. First contact important. From agency department head. Relationship building. Building bridges across cultural divides. Communicate clearly.
- 9. Understand leadership/decision makers/representatives. PRC 21080.3.1(b) Name contact person for tribe. Agency liaison(s) recommended.

Consultation Considerations

Best Practices

- 9. Notification is not Consultation. Simply notifying a tribe of a plan proposal is not the same as consultation.
- 10. Each tribe is different. Resources, govt organization, culture and customs. Develop consultation protocols that are flexible.
- 11. Records searches not exhaustive. E.g. CHRIS, NAHC SLF
- 12. Consultations should not be conducted in public
- 13. In-person consultation recommended

Consultation Considerations

Best Practices

- 14. Flexible and accommodating on times and locations for meetings. Local governments should also be open to a tribe's invitation to meet at tribal facilities.
- 15. Landowner/Applicant involvement okay, but mutually agree on details beforehand
- 16. Collaborative relationships encouraged
- 17. Document the progress of the Consultation
- 18. Consultation does not predetermine outcome. Agency and tribal concern on this.

When CEQA Consultation is Over?

- Consultation **Concluded** when either occurs (PRC 21080.3.2(b)):
 - Parties agree to MMs or avoid a significant effect on TCR
 - A party, after acting in good faith and after reasonable effort concludes that mutual agreement cannot be reached
- Lead agency may certify or adopt an EIR, MND with a significant impact on a TCR ONLY if (PRC 21082.3(d)):
 - Consultation has occurred and concluded
 - Tribe request consultation but failed to provide comments or otherwise failed to engage in consultation
 - Agency has complied with formal notification process and tribe has failed to request consultation within 30 days

Relationship and Consultation may continue

- Conservation easements, conveyances and management/treatment agreements
 - Long term relationship between tribes, agencies, landowners
- Access to property
- Caretakers/resource stewards
- Acceptable uses
- Recording and Confidentiality

**Above all REALTIONSHIP BUILDING AND
UNDERSTANDING of tribal concerns**

...End of 20 Minutes!!

Questions?