

CALENDAR ITEM

61

A Statewide

08/09/16

S Statewide

J. DeLeon

CONSIDER ADOPTION OF A TRIBAL CONSULTATION POLICY

INTRODUCTION:

The Commission has jurisdiction over the beds of more than 120 rivers and sloughs, 40 lakes, and all the ungranted State-owned tidelands and submerged lands along the coast of California, as well as other inland parcels that have been granted to the State. These lands are not only valuable to the public but also to California Native American Tribes. Projects that occur on these lands, access to these lands, and preservation or restoration of these lands are often of interest to California Native American Tribes. Commission staff currently provides notice to California Native American Tribal contacts regarding activities or projects proposed on lands under the Commission's jurisdiction, and Commission staff believes that adopting a tribal consultation policy will provide helpful guidance and consistency in the Commission's interactions with California Native American Tribes.

BACKGROUND AND CONTEXT:

The State of California recognizes the importance of Tribal engagement and consultation, as evidenced by a number of administrative directives and statutory provisions. Executive Order B-10-11, issued by Governor Brown in September 2011, established a Tribal Advisor in the Governor's Office to oversee and implement more effective consultation between the Administration and Tribes, facilitate coordination with State agencies, and review relevant legislative and regulatory proposals. The Executive Order further ordered State agencies to encourage communication and consultation with Tribes, including allowing tribal representatives to provide meaningful input into agencies' activities and decisions.

Assembly Bill 52 (Stats. 2014, ch. 532), enacted in 2014 and effective July 1, 2015, added provisions to the California Environmental Quality Act (CEQA) related to Tribal consultation and consideration of project impacts to Tribal Cultural Resources, including consideration of mitigation and alternatives that may be proposed by the Tribal representative. The Commission regularly acts as a lead agency under CEQA and will need to ensure it complies with the consultation requirements specified in Assembly Bill 52.

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PURPOSE OF THE PROPOSED TRIBAL CONSULTATION POLICY:

The purpose of the policy is to promote and ensure effective consultation between the Commission and Tribes, in recognition of Tribal communities' distinct interests and unique expertise. While Assembly Bill 52 identifies detailed requirements concerning Consultation during the CEQA process, it does not provide for Consultation related to other types of activities or actions on which affected Tribes may wish to consult. The Commission's policy, therefore, is intended to provide a framework of guiding principles and best practices applicable to all Consultation, whether subject to Assembly Bill 52 requirements or otherwise.

Commission staff collaborated internally and with other departments, agencies, and the Governor's Tribal Advisor throughout the fall of 2015 to develop a draft consultation policy that would serve as a platform for discussion and feedback from Tribal governments. On December 15, 2015, Commission staff distributed the draft policy to the Chairpersons of the 109 federally recognized and 46 non-federally recognized Tribes for a 60-day comment period. The draft policy was also posted on the Commission's website for public comment. During this comment period, five Tribes¹ submitted comments and no members of the general public submitted comments.

Based on the comments and suggestions, along with clarification from follow-up contact, Commission staff revised the draft policy and redistributed it to all Tribes on April 22, 2016, with an invitation to attend a May 19, 2016, Consultation meeting on the draft policy in Sacramento. This meeting was attended by the Governor's Tribal Advisor, Commission staff, chairpersons of two Tribes, and a designated staff person from one Tribe. The policy recommended for Commission adoption (Exhibit A) reflects this collaborative process and incorporates the input and suggestions received from the Tribes.

The policy highlights four themes, as follows:

- Mutual education will include the training of Commission staff in collaborative engagement, as well as the provision of information to interested Tribal representatives on the Commission and its leasing, CEQA, and regulatory processes.

¹ North Fork Rancheria of Mono Indians of California, Colorado River Indian Tribes, Federated Indians of Graton Rancheria, Morongo Band of Mission Indians, and Yurok Tribe.

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- Mutual respect in all interactions between Commission staff and California Native American Tribes will recognize the time and effort invested by all parties and further the goal of finding mutually agreeable resolutions to protect tribal cultural resources.
- Outreach will provide ample opportunity for communication to take place early in the planning process such that there is enough time to consider the protection of resources of interest to California Native American Tribes when developing alternatives to proposed projects.
- Timely notice and information sharing will allow sufficient time for Tribal representatives to consult with their Tribal governments prior to providing comments on proposed projects and development, submitting questions, or voicing concerns to the Commission.

OTHER PERTINENT INFORMATION:

1. This activity is consistent with Strategy 3.2 of the Commission's Strategic Plan to commit to early and meaningful coordination and collaboration with California Native American Tribes.
2. Adoption of the Tribal Consultation Policy is not a project as defined by CEQA because it is an organizational or administrative action that will not result in direct or indirect physical changes in the environment.

Authority: Public Resources Code section 21065 and California Code of Regulations, title 14, section 15378, subdivision (b)(5).

EXHIBIT:

- A. Tribal Consultation Policy

RECOMMENDED ACTION:

It is recommended that the Commission:

AUTHORIZATION:

1. Adopt the Commission Tribal Consultation Policy.
2. Direct Commission staff to take whatever action is necessary or appropriate to implement and adhere to the policy.

CALIFORNIA STATE LANDS COMMISSION

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California State Lands Commission Tribal Consultation Policy

Preface

The California State Lands Commission (Commission) serves the people of California in the stewardship of the lands, waterways, and resources entrusted to its care through protection, preservation, restoration, and economic development. The Commission is committed to sustainable public land management and balanced resource protection for the benefit of current and future generations. California Native American Tribes (Tribes) and tribal communities have sovereign authority over their members and territory. Native American heritage, including Tribal cultural resources and practices, has remained resilient throughout California's past, adding to the State's rich cultural legacy and diversity, and should be preserved.

The Commission recognizes that Tribes have used many of the lands, waterways, and resources, which may be affected by actions taken by the Commission, to support their cultures and ways of life for millennia, and that these Tribes and their members have unique and valuable knowledge and practices for conserving and using these resources sustainably. Even on lands not under direct tribal jurisdiction, such as the submerged lands and school lands under the Commission's management jurisdiction, Tribes have maintained a constant presence on the landscape and remain stewards of lands and resources in areas of tribal interest. The Commission will approach its interactions with Tribes with due respect for and recognition of the sovereign rights, power, and authority of tribal governments.

The Commission has developed this Tribal Consultation Policy to ensure effective, meaningful, and mutually beneficial coordination and communication, and with this policy extends an official standing invitation to Tribes to participate in Consultations regarding proposed activities on lands and waterways under the Commission's jurisdiction. While this policy serves as the Commission's primary means of implementing Executive Order B-10-11 and Tribal Consultation requirements under the California Environmental Quality Act (CEQA), and is meant to facilitate a positive, cooperative process with Tribes for engaging in government-to-government Consultations, the Commission also seeks and encourages collaborative working relationships with Tribes on issues, programs, and projects not requiring formal Consultation.

Commission Organization

The Commission is an independent, quasi-legislative state agency with jurisdiction and administration authority over approximately 4 million acres of ungranted tide and submerged lands and the beds of navigable rivers, streams, lakes, bays, estuaries, inlets, and straits. The Commission also manages several hundred thousand acres of lands granted by Congress to support California's public schools. Its members include the Lieutenant Governor, the State Controller and the Governor appointed State Director of Finance. The Commission's Executive Officer and Commission staff are responsible for the necessary research, analysis, and coordination on proposed activities and for presenting a recommendation to the Commission for consideration; however, all Commission decisions are made at properly noticed public meetings. Recognizing the importance of its relationship with Tribal governments and the need for an appropriate level of representation, the Commission has designated a Tribal Liaison within the Executive Office as the primary point of contact within the Commission for Tribal communications. The Tribal Liaison is authorized to conduct Consultation and advise the Commission as to the recommendations agreed on during Consultation prior to the Commission's final consideration and action on a proposed activity. The Tribal Liaison will ensure the Consultation process and outcomes, including when the consulting parties are not able to reach agreement, are documented for the Commission to consider, and Tribes may provide comments or concerns directly to the Commission either in writing or in person at a public meeting.

Definitions

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 the Commission and 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. (Gov. Code, sec. 65352.4.). In order to ensure Consultation reflects the official positions of the Tribal government, Consultation occurs with the Tribal Chair/Council or individual(s) designated in writing by the Chair/Council.

Proposed Activity includes any Commission activity that may have a significant impact on Tribal Interests. The Commission will seek Tribal input to determine whether an impact should be considered significant. For purposes of this Policy, the Commission will consider: (a) the adoption of regulations of statewide or regional importance; (b) establishment and implementation of significant policies; (c) acquisition, sale, or exchange of real property interests; (d) property/land management decisions; and (e) approval of permits or leases involving new facilities or substantial modification to existing facilities when the Commission is the lead agency under CEQA.¹

¹ When the Commission is a responsible agency under CEQA, the lead agency would be the entity responsible for conducting consultation.

State lands means all property owned, managed, or subject to the Commission's jurisdiction or oversight, including public trust resources and mineral interests.

Tribal Interests means (a) "Tribal cultural resources," as defined in section 21074 of the Public Resources Code; (b) Tribal practices including, but not limited to, tribal ceremonies, hunting, fishing, and resource collection; (c) fish, wildlife, and plant resources; (d) water; (e) Tribal lands and other landscapes, and vistas visible from a Tribe's ancestral territory.

California Native American Tribe includes a Native American Tribe located in California that is on the contact list maintained by the California Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004 [SB 18].

Policy

The Commission recognizes that Tribes offer both unique expertise regarding Tribal resources and continuing deep interests in the protection of Tribal culture, which are integral to preserving California's Tribal heritage. Therefore, the Commission invites Tribes to consult with the Commission regarding proposed activities that may affect Tribal interests. The Commission commits to respecting the dignity of Tribes and tribal communities and making a good faith, reasonable effort to understand and consider tribal interests on State lands and involving resources under the Commission's jurisdiction. These consultations, whether they occur as formal government-to-government Consultation or as informal coordination at the staff level, are meant to foster long-term partnerships with Tribes and serve as opportunities to educate the Commission about Tribal cultural resources and help find alternatives or measures to prevent or mitigate further loss of those resources and values.

The Commission anticipates the majority of its Consultations will occur where there are proposed activities that may have a significant impact on Tribal Interests and the Commission is the lead agency under CEQA. CEQA provides specific requirements including timing of Consultation, the Consultation process, and examples of mitigation measures² which the Commission will follow; this policy is meant to supplement these provisions for CEQA Consultations and provide additional guidance, procedures, and commitments for other Consultations not covered by the CEQA provisions.

The Commission also recognizes there are circumstances when coordination and dialogue would be mutually beneficial to address a particular issue or concern, program, or project even when formal Consultation (as defined above) is not required or desirable. This coordination may be at the staff or member level rather than at the chair or council member level and is appropriate for simple inquiries, coordination on ongoing processes or programs, projects of mutual interest, or other topics. For informal meetings, Commission staff with appropriate expertise and of a comparable level of authority to the Tribal representative will be assigned. These meetings will be referred to as *coordination meetings* and may be one-time or at regular intervals depending on the

² Sections 21073, 21074, 21080.3.1, 21080.3.2, 21082.3, 21083.09, 21084.2, and 21084.3 added to CEQA pursuant to Assembly Bill 52 (Gatto, Stats. 2014, Ch. 532)

need and mutual agreement of the Tribe and Commission. These coordination meetings are valuable venues for clarifying respective responsibilities and jurisdictions, sharing data or reaching agreement on data collection. These coordination meetings also provide opportunities for Tribes to provide input on development of policies or programs.

Whether undertaking formal Consultation or informal coordination, the Commission and its staff will observe the following Policy Guidelines. These Guidelines incorporate the following themes of education, respect, confidentiality, communication, and timeliness.

Policy Guidelines

- **Education**

Tribes and the Commission have great potential to serve as resources for one another. Tribes have an abundance of knowledge regarding the values of natural resources, locations of Tribal cultural resources, and impacts to these resources caused by development. As such, Tribes offer special expertise that can enhance the Commission's ability to protect resources under its care.

The Commission began managing State lands in 1938 and can offer substantial knowledge regarding the balancing of competing uses of those lands. A combination of Tribal knowledge of the State's resources and the Commission's skills in balancing competing uses will be far more effective for preserving Tribal Interests than either one alone. Additionally, the Commission is committed to the sharing of information and perspectives to foster mutual understanding of each other's role in managing and providing stewardship, management, and traditional ecological knowledge of the landscape now under the Commission's jurisdiction, as well as the Commission's responsibilities in the leasing and management of State lands and resources, review under CEQA, and rulemaking.

- **Respect**

In order for Consultations to be effective, the parties must respect one another. The Commission recognizes Tribes and tribal communities as sovereign governments with legitimate interests in State lands, respects each Tribe's unique environmental, cultural, and spiritual interests in State lands and resources, and seeks to collaborate with Tribes to find mutual long-term solutions to address the varying needs of each party. As part of fostering mutual respect, the Commission will follow several best practices, including: 1) engaging in an early effort to identify potential areas of concern to the Tribe; 2) making contact early in the process and continuing throughout; 3) fostering ongoing relationships with relevant Tribal staff; 4) committing to providing full, candid information; 5) maintaining an open and flexible agenda; 6) ensuring Consultation occurs with individuals that have sufficient knowledge and authority; and 7) demonstrating that the Commission has incorporated or responded to information gathered during Consultation.

- **Confidentiality**

Preserving California's Tribal heritage requires the consulting parties to protect culturally significant places and objects from disturbance, theft, and vandalism. In order to avoid these threats, the parties will sometimes need to maintain the confidentiality of information regarding the locations of sacred sites and artifacts, as well as other sensitive information. The Commission and its staff recognize this need and will ensure that the locations of sensitive resources and sites remain confidential as provided by Public Resources Code section 21082.3 subdivision (c). During Consultation, Commission staff will proactively ask Tribes whether there is information that should be kept confidential; Tribes should also inform Commission staff of their need to maintain confidentiality.

- **Communication**

Open communication between the Commission and Tribes is essential. Accordingly, the Commission and its staff will strive to accommodate the needs of each Tribe that wishes to consult, including assisting Tribes overcome impediments to effective participation in Consultation processes. This could include scheduling meetings at times and locations that are most convenient for the Tribes, to the extent feasible. The Commission believes that face-to-face communication is ideal for Consultation but will accommodate Tribes who cannot attend consultations in person. Moreover, Commission staff will make a good faith, reasonable effort to personally participate in Consultation, rather than employ outside consulting firms. The Commission's staff will actively seek advice from consulting Tribes about how to best accommodate their needs and ensure effective Consultation. To ensure effective communication, when a Tribe has provided information, comments, or opinions via letter prior to Consultation, Commission staff will respond prior to an in-person meeting when feasible to do so.

In general, Commission staff will seek to arrange a *pre-consultation meeting* to provide the Tribe with an overview of the project, and to jointly discuss and strive to agree on specific methods for Consultation prior to consulting on substantive issues. While initial and periodic meetings with leadership are important, particularly to set out the mutual goals and approach to solving challenges, Consultation will usually involve many levels of staff both for the Commission and for the Tribe, and all participants are expected to adhere to both the Policy and agreements made by leadership at the beginning of a specific Consultation. Therefore, discussion of specific Consultation "ground-rules" and methods will include who should be present at the Consultation meetings, the Tribe's preferences for providing and receiving communications, a meeting format for the Consultation process, and whether there are any barriers to Tribal participation. These discussions or subsequent meetings may include the joint development of a Consultation schedule, with meeting intervals and locations, and preliminary topics for discussion. Additionally, while the Commission strives to achieve resolution of all concerns through Consultation, recognizing the Tribes as partners arriving at mutual agreement, it acknowledges this may not always be possible. Consultation would therefore conclude either when mutual agreement is reached or when the consulting parties jointly agree that agreement is impossible. In such cases, any unresolved issues

will be documented and presented to the Commission prior to any formal Commission action.

At times, consulting Tribes and Commission staff may conduct joint Consultations to use limited resources most efficiently and ensure effective dialogue and communication when there are sufficient issues in common to warrant joint Consultation. Joint Consultation could involve other federal, state, and/or local government agencies, or more than one Tribe, or both. Joint Consultation would occur only by mutual agreement of all parties, and Tribes may request the Commission provide individual formal Consultation at any time. Commission staff will also seek to participate in any meetings between Tribal representatives and other California Natural Resources Agency staffs to discuss topics of interest and ways to improve tribal Consultation processes, upon mutual agreement of those involved.

- **Timeliness**

Commission staff will ensure that Tribes receive timely notice of projects under consideration and responses to Consultation requests. For Consultation related to CEQA projects, staff will follow the requirements identified in the CEQA Consultation provisions (section 21080.3.1). For proposed activities not subject to the CEQA Consultation provisions (such as policies, regulations, or property decisions), Commission staff will begin Consultation as early in the planning process as is feasible once sufficient information is gathered about the scope of the activity and its possible effect on tribal interests by sending a letter to the Tribe's Chairperson or other identified contact person. For inquiries or coordination initiated by a Tribe, Commission staff will strive to provide an acknowledgement and/or preliminary response within 10 days by telephone or email, and will discuss any further time frames or consultation expectations jointly with the requesting party.

Commission staff will strive to provide early notice to Tribes when there is reasonable reason to believe that Tribes will want to engage in Consultation, and will provide a minimum of 30 days for Tribes to review and respond. Extensions may be given where feasible and not precluded by other legal requirements. Again, Tribes are also welcome to request coordination meetings or formal Consultation without waiting for notice from the Commission. At times, Tribes may become aware of an activity taking place or proposed on State lands before the Commission or its staff are aware of that activity; in these cases, communication from Tribes becomes all the more important.

During emergencies (for example, but not limited to, oil spills, bluff collapse, fire, flood), there may be insufficient time to provide notice before taking action. Nonetheless, Commission staff will strive to engage Tribes within 48 hours, when possible, to collaborate for solutions to emergencies on State lands.

Analysis of project impacts may require extensive review. Accordingly, the Commission will strive to accommodate Tribes' needs for information and provide adequate time to review these materials. This may include delivery of information through hardcopy, disc, internet, or other media and scheduling meetings as necessary. Commission staff will

discuss these issues with Tribes to ensure effective Consultation and meet any particular needs of consulting Tribes.

Parties' Rights

Nothing in this policy shall be deemed to limit or expand the rights, duties, sovereignty, or jurisdiction of any Tribe or the Commission. While the Consultation process described by this policy aims to increase coordination, communication, and the ability to find favorable mutual solutions, the process cannot be expected to result in the resolution of all issues. Therefore, inherent in this policy is the right of the Commission and Tribes to elevate an issue of importance to any decision-making authority of another entity, including, where appropriate, the highest levels of state and Tribal government.

Contact Information

The Commission's Executive Officer has a designated Tribal Liaison. The Tribal Liaison's role is to ensure that the Commission fulfills the commitments in this policy and complies with applicable Tribal Consultation requirements by engaging Tribes, responding to inquiries and Consultation requests, and reporting Tribes' interests and recommendations to Commission decision-makers and staff.

If you would like to request Consultation or learn about the Commission, please contact the Tribal Liaison at tribal.liaison@slc.ca.gov or State Lands Commission, Tribal Liaison, 100 Howe Avenue Suite 100 South, Sacramento, CA 95825 or (916) 574-1800, or www.slc.ca.gov.