

16TH CALIFORNIA INDIAN LAW ASSOCIATION CONFERENCE

A TRIBALLY-FOCUSED POINT OF VIEW ON AB 52 IMPLEMENTATION

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AB 52 – Open Issues?

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- How are lead agencies getting informed about bill implementation?
- Where in the CEQA document and appendices will information on TCRs and tribal values live and who will be drafting these sections?
 - Get Scope of Work for environmental document and CV for person who will draft TCR section
 - Get administrative draft of TCR and Alternatives sections for review and comments before draft is released to the public
 - Consider *timely* submitting tribal technical report – consider public executive summary with detail in confidential technical section

AB 52 – Open Issues cont.?

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- When would the situation arise in which the environmental document did not include staff's recommendations?
- How can lead agency elected officials directly meet and consult with Tribal electeds without violating the Brown Act?
- If the lead agency and tribe come to agreement, *how* should that agreement best be memorialized and *when* should that agreement occur?
 - Any mitigation measures agreed upon in consultation shall be recommended for inclusion in the environmental document and in an adopted MMRP and shall be fully enforceable.

AB 52 – Open Issues cont.?

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- What if tribe not sent required notification letter?
- What is the remedy if the lead agency fails to consult?
- Overuse of CEQA exemptions to evade policy goals? (SB 1395 (2006) vetoed)
- Does AB 52 apply to future environmental documents for approved projects, i.e., addenda, supplemental EIRs, subsequent EIRs?
- Does AB 52 apply to old draft EIRs that have never been approved? (i.e., Napamu)

Example - Napamu

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AB 52 – Open Issues cont.?

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- ❑ Will there be any ongoing responsibility for the NAHC to update and maintain the agency list for tribes or is this just a one-time-deal for the NAHC?
- ❑ Will there be any effort by the NAHC to update the list of SB 18 tribes and what is the process for inclusion there anyway?
- ❑ Is the Governor budgeting enough to the NAHC to implement the bill?
- ❑ In the TCR definition, might "isolates" or natural resources ("noncultural" items) be considered features and/or objects with cultural value?
- ❑ Will The Mills Act be revised to provide archaeological and tribal cultural resource properties the tax benefits accorded historical structures in California?

AB 52 – Affiliation?

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- Cultural Affiliation is a showing of a cultural relationship between the tribe and the specific geographic area at issue. Based on geographical, kinship, archaeological, linguistic, oral tradition, historical evidence, and other expert opinion.
- Should Tribe inform agency of self-identified geographical area of interest? Current vs. Traditional area? Hard vs. Feathered boundaries?
- How best to handle overlapping areas of concern? Disagreements between tribes regarding preferred mitigation and treatment? Tribal forum shopping?

Influencing Identification, Significance, Integrity and Impact Evaluations & Determinations

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Archaeologists:

- In situ
- Museum quality
- Intact, undisturbed
- Isolates unimportant
- Adequate sample, rest is redundant

Tribes:

- May not be in “original” location, “disturbed” okay, “associated” without arbitrary criteria
- May not need to be intact
- Natural decay may be okay
- May be individual artifact or component
- May show indications of individual artisan

Influencing CRM/CEQA Process:

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Current Practice:

- CHRIS Search
- Initial Pedestrian Survey
- Traditional Archaeological Testing
- Can arise during Acquisition, Constraints, Planning and Project Stages

Better Practice:

- THPO database, NAHC SLF, old maps search
- Tribal Monitor/Representative on Initial Survey
- Noninvasive Testing Tools: GPR, Geoarchaeology, Historic Human Remains Detection Canines, historical and current aerial photography, LiDAR
- Assessment of impacts to your Tribal Community: build relevant Dream Team
- At very start of project and before draft EIR published

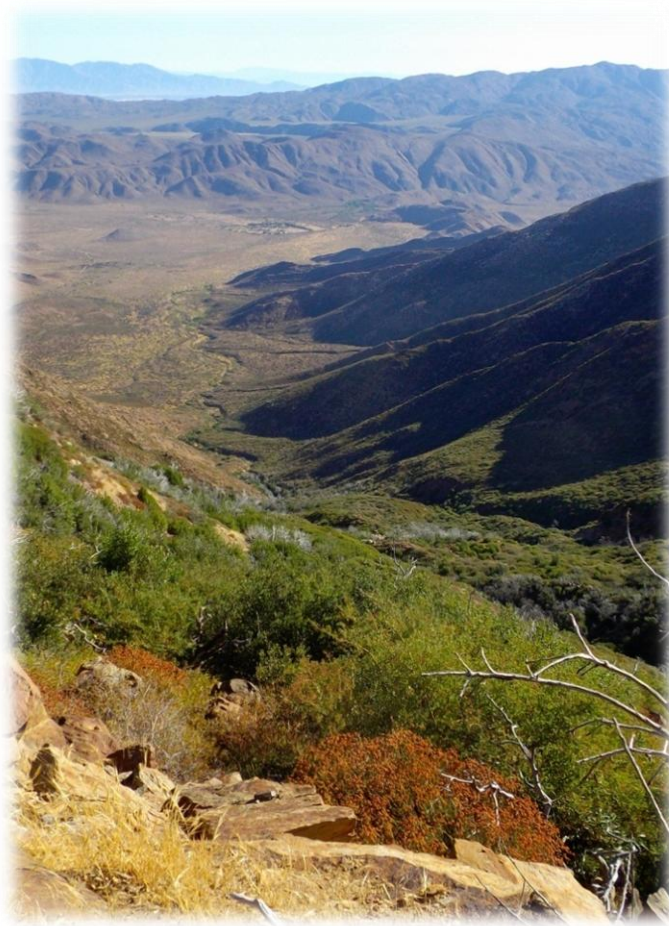
AB 52 – TCR Identification?

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- Field of Battle - a moving target:
 - Still not a “site”
 - Lack of continuous use
 - Look to ACHP guidance and NPS publications
- Provide sensitivity maps?
- Proactively list sites on NAHC’s SLF?
- Tribal-initiated California and National Register nominations?

Case Study: Flags for Important Places: Kwaaymii Cottonwood Trail National Register Nomination

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AB 52 – TCR Identification?

- Will Fair Argument apply to TCR identification or just impacts analysis?
 - Post-bill case law states F.A. does not govern an agencies' determination on whether a *building* qualifies as an historic resource. BUT....
 - Line of cases deals with *buildings*, not TCRs
 - PRC 21080.3.2(a) requires agencies to consult on the type of environmental review
 - PRC 21074(a)(2) requires that for discretionary TCRs lead agency shall consider significance to tribe(s)
- Supreme Court petition for review in **Friends of the Willow Glen Trestle v. City of San Jose, et al. [S237378]**

What is Substantial Evidence?

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- CEQA Guidelines Section 15384. **Substantial Evidence**

(a) "Substantial evidence" as used in these guidelines means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency. Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence.

(b) Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.

- 36 CFR section 800.4(a)(4): *Tribes have special expertise in identifying historic properties.*

How can tribes submit substantial evidence to identify TCR?

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- Letters and other written correspondence (emails okay)
- Meeting notes, field summaries, minutes
- Videos, tapes
- Interviews
- Historical records, papers, accounts (i.e., Harrington)
- Anthropologist, Ethnologist, Archaeologist testimony informed by tribal input

How can tribes submit substantial evidence cont.?

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- Tribal Council Resolutions
- THPO or Preservation Office/Committee comment or correspondence
- Tribal Historic Register data
- Maps, graphics

How can tribes submit substantial evidence cont.?

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- Governor of Pueblo provided information to Forest Service that canyon was of great religious and cultural significance; Affidavit of Tribal Elder and religious leader that listed several religious practices and alluded to several sacred sites (*Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995))
- Dumma Tribal Government submitted comment letter that mitigation measure requiring further analysis of historical resource after project approved inappropriate (*Madera Oversight Coalition, Inc. v. County Of Madera*, 100 Cal.App.4th 48 (2011))

What does Preservation in Place mean?

- *Playa Vista* cases (2007, 2011) EIR failed to discuss preservation in place – rush to data recovery
- Whose values being preserved and how:
 - Archaeological (CEQA Guidelines section 15126.4 four methods including capping and building tennis courts upon site) *versus*
 - Tribal (PRC section 21084.3(b) which omits some methods and specifically adds treating the resource with culturally appropriate dignity)
- CA Supreme Court petition for hearing in **Center for Biological Diversity v. California Department of Fish and Wildlife S236776 (Newhall Ranch)** – pre AB 52 case

OPR AB 52 Technical Advisory

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- Some issues with draft OPR Technical Advisory:
 - Purpose clarity
 - Confidentiality clarity
 - Flowchart: consultation may continue after EIR release – key issue when project changes may occur up to and including final hearing/approval
 - More robust federal and state guidance and case examples available

OPR AB 52 Technical Advisory cont.

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- More issues with draft OPR Technical Advisory not addressing:
 - Intersection with Native American Historic Resources Protection Act and CalNAGPRA
 - Need guidance on best practices (practitioner perspective)
 - Guidance on tribal substantial evidence

AB 52 and Joint CEQA – NEPA Documents and Processes

- Deferred identification and mitigation allowed under NHPA can be a problem in CEQA where deferred identification, study and mitigation disfavored
- During joint environmental documents, how will the timing of the AB 52 process work with the timing of NEPA and NHPA section 106 consultation?
- State law on burials and associated burial items is more specific and tribe-friendly than federal law (discussed in detail below)
- State law on preservation-in-place and mitigation is stronger than NEPA and NHPA (discussed in detail below)
- Should joint documents defer to more stringent California standards?
- Does deferring important issues to later NHPA section 106 review harm tribes?

Feather River West Levee Project— Archaeological Approach Insufficient

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- Upon discovery of the remains, the landowner shall insure that the immediate vicinity, according to generally accepted **cultural** or archaeological standards or practices, is not damaged by further development activity until the landowner has discussed and conferred with the MLD regarding their recommendations and **taking into account the possibility of multiple human remains**

- The landowner shall discuss and confer with the descendants all reasonable options regarding the descendants' preferences for treatment which may include the following:
 - The nondestructive removal and analysis of human remains and associated items
 - Preservation of the remains and associated items in place
 - Relinquishment of the remains and associated items to the descendants for treatment
 - Other culturally appropriate treatment

Coroner Notifications, PRC section 5097.98 (revised 2010)

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- The parties may also mutually agree to extend discussions, taking into account the possibility that additional or multiple human remains are located in the project area providing a basis for additional treatment measures
- Conferral or discuss and confer means the meaningful and timely discussion and careful consideration of the views of each party, in a manner that is cognizant of all parties cultural values, and where feasible, seeking agreement
- Each party shall recognize the other's needs and concerns for confidentiality of information provide to the other

Repatriation, PRC section 5097.991 (added 1991)

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- *People v. Van Horn* (1990) 218 Cal.App.4d 1378
In dispute about whether burial related objects were to be treated as grave goods by Indians or scientific objects by archaeologists, statute clearly gives the choice of preservation or reburial to Native Americans and the Legislature did not intend to give archaeologists any statutory powers with respect to Native burials
- It is the policy of the state that Native American remains and associated grave artifacts *shall be repatriated* (1991)

PRC section 5097.98 (revised 2010)

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- Human remains of a Native American may be an inhumation or cremation and in any state of decomposition or skeletal completeness
- Any items associated with the human remains that are placed or buried with the Native American human remains are to be treated in the same manner as the remains, but do not by themselves constitute human remains
 - Reaches: cremations, partial remains, those that are *ex situ* as well as burial soils and offerings

PRC section 5097.99 (updated 2011)

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- No person shall obtain or possess any Native American artifacts or human remains taken from a grave or cairn except as otherwise provided for by law or through agreement
- Any person who knowingly or willfully obtains, possesses or intends to sell or dissect them is guilty of a felony punishable by imprisonment pursuant to Penal Code section 1170(h)

Federal-State Projects

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Follow March 2015 guidance from Advisory Council on Historic Preservation in Feather River West Levee Project:

- When human remains are encountered on non-federal or non-tribal land during review or implementation of projects subject to NHPA Section 106, the federal agencies involved should consider the obligations of project proponents under state law as well as their own obligations to comply with state law regarding the treatment and disposition of human remains

Federal-State Projects cont.

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- The ACHP is supportive of the use of reasonable alternative mitigation strategies that may not include archaeological data recovery and may not even focus directly on the historic properties that are affected or the locations or time periods represented by historic properties affected by an undertaking. This is particularly the case when alternative mitigation strategies are found to be appropriate by the consulting parties
- Be sure Programmatic Agreement cites to state laws for burials, ceremonial sites, etc.

Making Mitigation More Relevant to Tribes

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- Tribally-driven mitigation priorities (Tribal Governments' OWN mitigation priority lists):

Preserve languages; build tribal technical capacity; fund cultural lands repatriation; build cultural centers and programs; co-management of resources; build THPO, cultural department and GIS capacity; synthetic studies and National Register nominations; fund research in historical/ethnographic records; refurbish/bring together existing/orphan collections; build local curation capacity; set up cultural funds; translate Harrington notes; perform regional surveys (i.e. trails); comprehensive corridor/area management plans; acquire cultural conservation easements; tribally-controlled scientific research; writing and publishing own histories, etc.;

- Regional, programmatic approach:

Fund bigger-ticket tribal priorities across several projects, on *pro rata* basis; Needs tribal and agency leadership

Making Mitigation More Relevant to Tribes cont.

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- CEQA Guidelines section 15040:
 - Nexus (link between nature of impact and project mitigation measure)
 - Proportionality (mitigation must be proportional to impact)
- NOT usually about more archaeological research, testing or data recovery
- Subjects for your AB 52 consultations
- Note: **On Projects that must be opposed**

Example: Indian Pass – ATCC

Need to look beyond archaeology (late 90s)

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Summary

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- Landmark legislation, “game changer”, long time coming
- Early technical guidance and experience could quickly establish best practices (or not), need for tribes and not consultants to define those
- Tribes must be proactive and participate in the revised CEQA process to secure the full benefits of the new law, can be customized to suit tribe, lead agency and resources at issue

QUESTIONS?

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