PECHANGA INDIAN RESERVATION
Temecula Band of Luiseño Mission Indians

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June 2, 2015

Ms. Holly Roberson, Esq.
Land Use Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814

RE: Pechanga Tribe Comments on AB 52 Draft Technical Advisory

Dear Ms. Roberson,

These comments are being submitted on behalf of the Pechanga Band of Luiseño Indians, a federally-recognized Indian tribe and sovereign nation. We greatly appreciate the opportunity to participate in the drafting of this important Technical Advisory ("Advisory"), which will guide lead agencies, tribes and project applicants in their AB 52 compliance responsibilities pending the release of the AB 52 CEQA guidelines in July 2016.

We first want to thank OPR for preparing this draft Advisory. We agree that it is important to have compliance guidance available as soon as possible as the substantive and procedural requirements for AB 52 go into effect on July 1, 2015. This initial draft is a good starting point. In these comments we offer and request amendments to clarify the law, and offer practical guidance to those who will be utilizing the Advisory and ensure this Advisory conforms with the intention of the bill. We strongly urge OPR to approach the revision of this Advisory through the lens of agency staff and practitioners because those are the individuals who will rely on this Advisory. We hope that our comments herein are beneficial and will assist OPR in its preparation of a useful and balanced Advisory to assist the parties responsible for compliance.

Our comments are based upon our practical experiences over the past several decades in our mission to protect the cultural resources of the *Payómkawichum* and upon our direct involvement on a number of pieces of State legislation concerning tribal cultural resources, including SB 18, amendments to the Public Records Act concerning confidentiality of sacred places, amendments to the State human remains law, and as one of the tribal technical advisors on Assemblyman Gatto's AB 52 legislation. Through many years of relationship building with a myriad of lead agencies in the State, as well as natural resources policy makers, we have learned best practices and approaches to cultural resources preservation and protection. It is in this collaborative spirit that we provide the comments below.

To begin, our first comment is that the draft Advisory should include some background on AB 52 before addressing the more substantive discussion of its provisions. The Purpose section as currently drafted seems to presume that the reader has an understanding of what AB 52 amended in the California Environmental Quality Act ("CEQA"). However, in our discussions with lead agencies regarding the changes, it is clear that many agencies are not versed in the new mandates. We have even encountered some agency representatives that were not aware of AB 52. The draft Advisory states that one purpose is to summarize the reasons for the legislative changes as well as explain the substantive and procedural requirements. Part of any discussion concerning the reasons for these legislative changes necessarily includes a background on the need for the legislation as well as pertinent pieces of the State legislative

history concerning the subject matter. As such, we strongly urge including an Introduction section to lay the foundation for those agencies and their staff who are not very familiar with the reasons for the legislation as well as the substantive significant changes that AB 52 brings to CEQA. For consideration, we provide the following introductory language:

Introduction

On September 25, 2014, the Governor signed AB 52, legislation that amends the California Environmental Quality Act. This landmark legislation requires tribal consultation by cities, counties, and other CEQA lead agencies and an evaluation of a new environmental category, "tribal cultural resources." Because of the unique legal status of tribal governments, these amendments recognize tribes' inherent interest in their culturally affiliated resources and sacred places that may be impacted by CEQA projects.

The new statutory provisions set forth a government-to-government process between a tribe and a lead agency, rather than simply including tribal interests as members of the public. For the first time since its original adoption, CEQA now sets forth a specific consultation process with both procedural and substantive provisions for CEQA lead agencies to consult with California Native American tribes concerning potential impacts to tribal cultural resources. This new mandate comes with responsibilities for both lead agencies and the tribes and provides a unique opportunity for both parties to work collaboratively at the earliest stages of environmental review in order to obtain essential information for environmental assessments, including identification and evaluation of potential impacts to tribal cultural resources, alternatives that may lessen those impacts and appropriate mitigation for tribal cultural resources.

In addition, AB 52 introduces a new category of resources called tribal cultural resources ("TCRs"), which acknowledge and take into account the resources' tribal values rather than focusing purely on the scientific or academic value of the resources. Further, the addition of the TCR category as well as the tribal consultation process acknowledges these resources are essential elements to tribal cultures, traditions and identity. AB 52 codifies the State's recognition that tribes may have expertise regarding their histories and cultural practices that is essential to a thorough and compliant environmental assessment under CEQA. Additionally, and of key import, AB 52 presents the opportunity for better planning, allowing lead agencies to meet CEQA's preferred outcome for such resources: preservation in place.

Although the bill was signed into law in September 2014, the substantive provisions of AB 52 did not become effective immediately. Rather, these new rules apply to projects that have a notice of preparation for an environmental impact report, negative declaration or mitigated negative declaration filed on or after July 1, 2015. The substantive categories of the bill can be broken down into four major components: (1) Consultation, both procedural requirements and substantive requirements; (2) Tribal Cultural Resources; (3) Mitigation; and (4) Confidentiality. It is also important to note there are new substantive considerations concerning significant impacts, when a CEQA document may be certified or adopted and what findings/elements are to be included in a CEQA document concerning tribal cultural resources. Each is described below in more detail.

In addition to adding an introductory section to the Advisory, we have suggestions for clarifying the other sections in the Advisory as well, which comments are provided below. Please note, specific recommended language revisions are provided (strikeouts are deletions; underlines are additions), in addition to narrative comments.

Purpose Section

The purpose of this advisory is to provide guidance to lead agencies regarding the significant recent changes to the California Environmental Quality Act, which includes a requirement for direct ~~requiring~~ government-to-government consultation with California Native American tribes, a recognition that tribes may have expertise regarding their culture and history and the consideration of the tribal values inherent in cultural resources that provide a complete understanding of their nature and the significance of the potential impacts. In addition, the amendments create a new category of resources, Tribal Cultural Resources, which must be addressed at the beginning stages of the environmental review process. This advisory ~~It~~ summarizes the reasons for the legislative changes, ~~and~~ explains the substantive and procedural requirements that ~~go into effect on~~ become effective as of July 1, 2015, and provides guidance on how lead agencies and project applicants can meet their new mandates. Finally, the advisory ~~it~~ summarizes relevant case law, and provides a list of additional resources to further assist lead agencies in their compliance with AB 52.

Section on Legislative Intent

With regard to the Legislative Intent section, it is our belief that it would be more effective and helpful to lead agencies for Section 1 of the bill to be included in the main text and woven throughout the document, when applicable, to provide a complete understanding of the purpose and application of the intent, rather than as a standalone footnote. The bill's legislative intent provides a good, solid summary of the main reasons behind the amendments and provides insight as to how the statutory sections should be carried out. As a footnote, they risk losing much of their purpose and persuasiveness. In addition, a practitioner, such as a city or county planner, pressed for time and looking for direct guidance will likely elect to skim or skip over footnotes. In fact, it appears much of this Advisory is actually footnoted. It seems inappropriate when most of that content is key substantive information. We urge that most, if not all, of the footnotes be moved into the document's main text and written out in a manner that conforms to the legislative intent and which is user-friendly for agency staff.

For example, early consultation is a cornerstone of the bill. Early consultation is mentioned in this section and the footnote, but it should also be referenced and explained in the Consultation section itself with regard to the bill language that states specifically, "Prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report for a project, the lead agency shall *begin* consultation with a California Native American tribe..." (Section 21080.3.1(b)). We understand there may not be a desire to include language from the bill verbatim throughout this Advisory, but this is a vital point that is crucial to the proper execution of the statute. It deserves to be written out and explained with a reference back to the legislative intent concerning obtaining information from tribes at the earliest possible point. We further suggest the following language to more clearly state the legislative intent of AB 52:

Two key reasons that AB 52 was drafted and enacted was to provide sacred places CEQA consideration and protections and to clarify the role and process by which tribes are involved in the CEQA environmental review process. For far too long, even with the passage of SB 18, there was project and after project in California that did not consider the tribe's information and value of the resources they have a cultural affiliation with in CEQA environmental assessments. This was because tribes were not given formal or fair opportunities to contribute such information or because this information once received was not given the same credibility and consideration as information from archeological consultants. The California legislature amended CEQA through Assembly Bill 52 (Gatto, 2014), which amendments were designed to specifically address significant gaps in the protection and preservation of tribal cultural resources. In addition to the new category

of resources to be considered during environmental review, the consultation mandate is intended to establish early communication between tribes and lead agencies, as well as project applicants.

Section on Consultation and Tribal Cultural Resources

As you know, AB 52 made significant changes to CEQA and now requires additional consideration and steps for lead agencies in assessing, reviewing and approving a project in their jurisdiction. Thus, this "Summary" section of the advisory is key to providing accessible guidance to lead agencies for compliance with AB 52 pending release of the full guidelines in 2016. The Summary is broken down into five major sub-sections: 1) Definition of Tribal Cultural Resources; 2) Consultation; 3) Timing and Consultation Steps; 4) Confidentiality; and 5) Mitigation. The Tribe agrees that these five topics are the keystones of AB 52. As such, we suggest that the subsections actually be stand-alone sections and not grouped under the umbrella of Consultation and Tribal Cultural Resources. The organization of this section should be accessible and user-friendly and include more substantive language to provide agencies with the guidance necessary for accurate compliance. For example, a practitioner in this field will want to turn to a topical section, such as this, to obtain guidance on execution of those provisions pertaining to that subject matter. Yes, mitigation examples should be included, but this section should also explain that mitigation measures are a key aspect of consultation and project approval and how that is carried out through discussions, agreements and recommendations of the planning staff. There is also a component that requires mitigation measures to be fully enforceable. All these things should be under the mitigation section, rather than scattered over multiple sections. A practitioner will not have the time to put together legislative intent subsections with multiple substantive sections of the statute to inform a complete picture of how the statutory language is to be carried out.

In this vein, we offer 4 stand-alone sections: (1) *Consultation* on its own or Consultation with two subsections, one entitled *consultation process* and the other entitled *substantive provisions of consultation*; (2) *tribal cultural resources;* (3) *confidentiality;* and (4) *mitigation.* Of course there may be some overlap and this should also be included and explained.

We suggest this Advisory be drafted through the eyes of a practitioner in city, county or tribal governments that will be using it like a reference document, opening to certain sections, rather than reading it cover to cover each time. An additional suggestion is to place the prepared flowchart attached to the Advisory in the body of the Consultation procedural section and take the opportunity to explain important key elements along with a visual aid. For example, when iterating the step concerning the lead agency providing formal notice to the tribe, we think it is important to actually say that there are statutory requirements for what is to be included in this notice and then possibly go on to state the purpose is to provide as much information as possible early in the process in order to begin an open and informed dialogue to identify potential impacts and solutions to address them before the assessment process is well underway. These types of explanations will be extremely helpful to practitioners rather than a citation or hyperlink to a code section. We are not against using the hyperlinks; however, they are not as helpful if the sentence to which they are linked does not give a meaningful description/explanation of the content contained in the hyperlink or if the practitioner is utilizing a paper copy of the Advisory. Again, we cannot state enough that city and county planners have many responsibilities and projects and will just not be able to look up every footnote, citation, and/or hyperlink as many lawyers are used to doing in the course of their work.

In addition, we suggest that paragraphs one (starting with, "The Public Resources Code now establishes...") and three (beginning with, "If a lead agency determines...") be added to the Mitigation section as these two paragraphs are addressed in this component of the amendments and as currently placed, provide no context for the reader. The second paragraph (beginning with, "To help determine...") should be included in the Consultation section as it relates to that provision of the new amendments.

Also, the third full paragraph on Page 3 only gives a small piece of the picture concerning mitigation.

Rather than the lead agency considering mitigation on their own using the examples, it is key to point out that one of the main purposes of the consultation process is to discuss mitigation measures. The examples provided in AB 52 are first and foremost intended to be used as tools to guide the consultation discussion concerning this topic. In fact whether an agreement on mitigation can be reached is a core component of the threshold for conclusion of consultation. As such, it should be made clear that a lead agency must begin their consideration of potential mitigation with the tribe during the consultation process. It is only if the consultation process does not yield agreed upon mitigation measures that the lead agency, on its own, will consider the mitigation examples and make the necessary findings. To illustrate, Section 21080.3.2(a) states, "As a part of the consultation pursuant to Section 21080.3.1, the parties may propose mitigation measures, including, but not limited to, those recommended in Section 21084.3, capable of avoiding or substantially lessening potential significant impacts to a tribal cultural resource or alternatives that would avoid significant impacts to a tribal cultural resource." In addition, Section 21082.3(a) states, "Any mitigation measures agreed upon in the consultation conducted pursuant to Section 21080.3.2 shall be recommended for inclusion in the environmental document and in an adopted mitigation monitoring and reporting program, if determined to avoid or lessen the impact pursuant to paragraph (2) of subdivision (b), and shall be fully enforceable." Therefore, the mitigation examples may assist and inform the consultation discussions, but are not intended to be used by the lead agency without engaging in tribal consultation regarding them.

Further, the mitigation examples are offered for use by the lead agency if no tribe opted to participate in the CEQA or if the consultation fails to identify agreed upon mitigation. Section 21080.3.2(e) states, "If the mitigation measures recommended by the staff of the lead agency as a result of the consultation process are not included in the environmental document or if there are no agreed upon mitigation measures at the conclusion of the consultation or if consultation does not occur, and if substantial evidence demonstrates that a project will cause a significant effect to a tribal cultural resource, the lead agency shall consider feasible mitigation pursuant to subdivision (b) of Section 21084.3." This distinction should be made more clearly in the Advisory as well.

The sentence on page 3 in the second full paragraph that reads, "That consultation must *take place* prior to the determination of whether a negative declaration, mitigated negative declaration, or environmental impact report is required for a project" (emphasis added) does not reflect the ongoing nature of consultation. We request that it be changed to, "That consultation must ~~take place~~ *begin* prior to the determination of whether a negative declaration, mitigated negative declaration, or environmental impact report is required for a project" (emphasis added). This change will conform this sentence to the flow chart and language in the bill.

Section on Tribal Cultural Resources

This section is particularly important because unlike the tribal consultation definition and associated elements which have existed in the State planning law for almost 10 years (SB 18), this concept of tribal cultural resources may be new to many of the city and county planners responsible for ensuring their agency's compliance with this section. We offer that even if these concepts are not new to tribes and seasoned planners, what will be new for everyone is the fact that they can no longer leave this portion of the assessment solely in the hands of archaeological consultants. Rather, the lead agency – not a consultant – must consult with tribes on whether these resources are present, what those resources are, and what type of treatment is appropriate for the resources. Moreover, it should be noted that archaeologists often do not have the qualifications or authority to speak on behalf of the tribe or about their tribal cultural values. Other qualified entities will also need to be sought to inform and author those portions of the environmental documents. As such, a clear understanding of the definition is imperative for lead agency staff. We also note that the full definition of a TCR should be included in the body of the Advisory, rather than as a footnote for the same reasons identified above.

In addition, it appears there is a misunderstanding regarding the intention of the statute here with regard to the consideration of the tribal value of the resources in the environmental assessment. The purpose of

establishing this new category of resources is to capture the tribal resources, especially sacred places, that may not have been clearly eligible to some for CEQA consideration under the categories of "unique archaeological resources" or "historic resources" because they either did not have archaeological components or because the tribal value was not taken into consideration to meet the criteria for Historic Resources. As such, the consideration of the tribal value of the resource is key to the entire purpose of this category of resources. It is meant to be applied in both sections (1) and (2) of Section 21074, not just section (2). If not so considered, then the entire purpose of this new category of resources is defeated. This is further evidenced by the first sentence of the definition of tribal cultural resources that states, "Tribal cultural resources" are either of the following: (1) Sites, features, places, cultural landscapes, sacred places, and objects *with cultural value* to a California Native American tribe that are either of the following (Section 21074(a)) (emphasis added)). As such, to ensure the Advisory correctly references the law, the sentence beginning with "In the latter instance,..." should be stricken.

The Advisory includes a footnote to the criteria for historic register eligibility. Lead agencies, however, are going to be looking for guidance as to what types of resources can be historic resources and this necessarily includes an explanation that is beyond a simple reference to the Register criteria. There are entire federal bulletins and advisories that provide guidance for practitioners concerning how to apply the criteria for eligibility. One of the problems presently in CEQA, and one of the problems this bill is intended to remedy, is that often the agencies and their historic resources consultants do not conduct the necessary research to determine whether a resource meets the criteria or to fully consider *all four* criteria during evaluation. They do not make an inquiry as to whether there are resources beyond historic buildings and archaeology that may meet the criteria, like ethnographic landscapes and traditional cultural properties, for example. Since ethnographic landscapes and traditional cultural properties are quite often the types of resources with tribal values and of concern to tribes, they are directly relevant to an advisory on how to comply with AB 52. Many of these resources fall squarely within landscapes and traditional cultural properties, and the Advisory should point out that these are the types of resources agencies should be identifying and evaluating for compliance with AB 52. In fact, the AB 52 definition of TCRs includes landscapes and sacred places. Any advisory on what is a historic resource therefore necessarily should include an explanation and/or note about how landscapes and traditional cultural properties are types of historic resources that may be Register eligible, if they meet the criteria. To not include this information would be to ignore the main purpose of the TCR category, which is to include resources that have tribal values. We also recommend inclusion of references to pertinent federal bulletins concerning application of the criteria and evaluation for landscapes and traditional cultural properties.[1]

Lastly, with regard to the discussion on the fair argument test that is referenced at the top of page 5, the applicability to tribal cultural resources is presently unknown and is not a settled issue in case law or elsewhere. It is not accurate to say, "evidence of a fair argument is insufficient by itself to compel a lead agency to treat it as a tribal cultural resource if the lead agency determines otherwise". There is no case law we are aware of that contains this holding, and certainly the ones cited in the draft Advisory do not involve tribal cultural resources. Yes, there are cases concerning historic buildings, but those did not involve sacred places with religious value or tribal cultural resources that hold an importance integral to a tribe's identity and status as a sovereign nation. We request that this discussion be removed from the advisory or that it be clearly stated that the applicability of the fair argument standard is not a settled issue with regard to sacred places and tribal cultural resources.

Section on Substantive Provisions of Consultation

We suggest the following edit to the first sentence: "Public Resources Code § 21080.3.1(a) defines "consultation" with a cross-reference to Government Code § 65352.4 (SB 18, Traditional Tribal Cultural Places),..." We believe adding in the reference specifically to SB 18 will assist agency staff as most are

[1] For example, NRB 38 at http://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf and NPS Preservation Brief 36 on Landscapes at http://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf.

familiar with the consultation requirements of SB 18 and know it by that reference, rather than the Government Code section.

In addition, we suggest making it clear that once consultation has been requested, that it is a pre-requisite to project approval under AB 52. We believe it is very important to reinforce this new requirement with lead agencies because before the amendments, CEQA did not mandate consultation with tribes or the public generally. As such, agencies need to understand clearly what the mandates are under the new amendments so that project approvals are not subject to collateral attack, and more importantly, so that the foremost purpose of the new law is met.

Relative to the final paragraph in this section that states, "The new provisions in the Public Resources Code enumerate topics that may be addressed during consultation,..." We suggest rewording this sentence to clarify that the new provisions in the Public Resources Code enumerate topics to be addressed if the tribe requests and topics that are encouraged to be addressed in order to fulfill the other requirements in the bill. As noted in Section 21080.3.2, "If the California Native American tribe requests consultation regarding alternatives to the project, recommended mitigation measures, or significant effects, the consultation shall include those topics." And although the next sentence in the legislation states "consultation may include....," it is our understanding the word "may" exists to give latitude to the consultation parties while pointing them to topics that will enable fulfillment of the other substantive sections in the bill. We fear that this "may" could be construed to mean the above is an optional list of topics. In our experience, due to time constraints, an agency wants to know exactly what they are required to do and by when. If this sentence in the Advisory is worded with a "may" it could be misinterpreted as an optional piece rather than its intended function, which is to provide a framework to fulfill the required components in the bill. For example, the "significance of tribal cultural resources" is a topic for which it is crucial to include a tribal discussion element. Without the tribe's input regarding the cultural values these resources hold, how will an agency be able to determine the nature of the resources, whether they are significant, how to possibly preserve the resources, and craft appropriate mitigation taking into account their tribal values? Also, we believe a discussion between the tribes and the lead agency concerning the type of environmental review necessary is also a topic that *must* be discussed during consultation, as evidenced by Section 21080.3.1(b) of the bill. This section states that tribal consultation is to begin *prior* to the release of a negative declaration, mitigated negative declaration, or environmental impact report for a project. This language is specifically worded with this timing to allow for consultation concerning the level of environmental review that is necessary given the amount and types of resources present.

Section on the Procedural Requirements of Tribal Consultation (Timelines for Steps)

Consultation is an ongoing process, as OPR's guidance under SB 18 has made clear. AB 52 requires even higher consultation standards than those contained in SB 18. To truly ensure that the express legislative intent of AB 52 is met, consultation should continue to occur during the entire environmental review process. We note that even if the parties successfully come to agreement regarding avoidance or mitigation measures for a given project, in our experience there can be changes made up to and just before final project approval that could change or effect those agreements. As such, it is vitally important to keep the consultation door open until final action on the project occurs.

To that end, in the last sentence of this section, we suggest the following edit: "Note that consultation should ~~can~~ also be ongoing throughout the CEQA process."

Furthermore, for additional clarification, we recommend the following addition to step 5: "The lead agency must *begin* the consultation process with the tribes that have requested consultation within 30 days of receiving the request for consultation. This consultation must begin prior to determination of the type of environmental review required for the project."

Section on Confidentiality

One of the common struggles that tribes have concerning protection of their cultural resources is maintaining confidentiality regarding their location and nature, despite existing State law that exempts the disclosure of cultural resources (Government Code §§6254(r), 6254.10 (California Public Records Act) and CEQA Guidelines 15120(d)). In fact, when we engage in SB 18 consultation that includes the project applicant or their representative, we may require them to sign a non-disclosure agreement to ensure that our confidential information is not shared. Since there is language in the law specifically allowing the project applicants, at the agreement of the tribes and the lead agency, to be privy to government-to-government consultations, we strongly urge OPR to include language so that agencies can ensure that project applicants are aware of and comply with these confidentiality laws. This piece is presented in the Advisory as an exception to the rule prohibiting disclosure. Instead, we believe it would be clearer if it is explained as a component or condition of the parties agreeing to disclose confidential information to the applicant. As such, we request the third paragraph on page 8 be revised as follows, "~~Second, an exception to the general rule prohibiting disclosure is that the~~ The lead agency and the tribe may elect to share confidential information regarding tribal cultural resources with the project applicant and its agents. In that case, the project applicant is responsible for keeping the information confidential...."

We request the last sentence in the third paragraph on Page 8 of the Advisory be amended as follows, "Additionally, information that is already publically available, developed by the project applicant, or lawfully obtained from a third party that is not the tribe, lead agency, or another public agency may be disclosed during the environmental review process, provided such disclosure does not violate existing law." Such laws are enumerated above and should also be included in the Advisory.

In addition, access to and confidentiality of information obtained through the California Historic Resources Information System (CHRIS) is strictly regulated. The CHRIS is comprised of historical resources information that is confidential and may only be accessed by a select group of persons, as well as tribes if they have a memorandum of agreement with the Information System for such access.[2] Further, the Office of Historic Preservation's website may offer additional guidance and can be accessed at http://ohp.parks.ca.gov (accessed May 29, 2015).

Section on Mitigation Measures

In addition to our earlier comments on the Mitigation section, we wanted to provide additional comments, focusing particularly on tribal cultural values and how to include such values in properly crafted mitigation measures. Specifically, the sample mitigation and treatment section in AB 52 regarding tribal cultural resources states, "Treating the resource with culturally appropriate dignity taking into account the tribal cultural values and meaning of the resource, including, but not limited to, the following...." (Section 21084.3(b)(2).) To help understand how to treat TCRs with culturally appropriate dignity, we offer the following examples and suggestions for OPR's consideration.

The Pechanga Tribe works closely with over 80 different lead agencies on a near daily basis. Our experience with each agency is different and through our experiences, we have learned key best practices that help ensure the protection and preservation of our irreplaceable tribal cultural resources. We know, through experience in working with archaeologists, ethnographers and other natural resources experts, that the Tribe is the best source of knowledge, information and expertise when it comes to its history, culture and determining appropriate mitigation for its tribal cultural resources. We are thankful that AB 52 finally adds into CEQA an acknowledgement of that expertise. This is of key importance not only in the identification of the resources, but with regard to analyzing the nature and extent of the impacts as

[2] Here is a link to the CHRIS Information Center Rules of Operation Manual, which clarifies who can access confidential information and under what circumstances. http://ohp.parks.ca.gov/pages/1069/files/ic%20operations%20manual%209-26-08%20amendment%203.pdf (accessed May 29, 2015).

well as determining culturally appropriate treatment of the resource so they retain the actual values that are important to the tribal community. Utilizing a purely western oriented approach to resource mitigation results in these tribal values being missed or incorrectly evaluated and thus destroyed or disturbed unnecessarily.

To demonstrate, we often provide the following example of why cultural values are important in determining mitigation. The Tribe was involved in preserving a boulder feature with a rock art panel in Riverside County. The rock art on the boulder is not simply an artistic rendering, but serves as an actual, functioning calendar if the sun is able to reach the rock throughout the year. This feature was not initially identified by the project archaeologists during their walkover investigations, but was discovered by the Tribe's representative monitors. In addition, the archaeologists on the project did not know it was a calendar rock; rather, our Tribe provided that information. The original design to protect the feature included a direct carve out of the development so the feature was preserved in a small open space with a minimal buffer zone around it, but with access to the feature. Once the Tribe pointed out that the 2-story houses next to it would block the sunlight, thus rendering the purpose and use of the feature meaningless, the engineers and planners were able to come up with a plan that shifted the 2-story homes to another part of the development and restricted the buildings in that area to single story units. These revisions preserved not only the physical feature itself, but also the *cultural value* of the resource. This outcome is an excellent example of mitigation considered in a culturally appropriate manner, and in proper consultation with the Tribe. As such, it is important that this section not only contain a restatement of the examples of mitigation, but it should also contain language explaining what culturally appropriate mitigation is with an example or two like the one above.

This section also provides an opportunity for OPR to cite back to the legislative intent to explain the importance of including tribal values in the project mitigation measures. The Legislative Intent Section 1(b)(2) that states, "Establish a new category of resources in the California Environmental Quality Act called "tribal cultural resources" that considers the tribal cultural values in addition to the scientific and archaeological values when determining impacts and mitigation." We urge this to be done in order to provide clear guidance to agencies concerning how to propose and craft mitigation for tribal cultural resources during the environmental review.

Section on Updating Appendix G

For clarification, we suggest revisions to the following sentence in the second paragraph of this section. "Because the environmental checklist in Appendix G is a *sample* and not mandatory, the lead agencies need not wait for the Appendix G update before updating their own ~~procedures~~ procedural documents and checklist."

We also recommend that lead agencies incorporate a second question, in addition to the one identified in the Advisory to further address the potential for impacts to Native American human remains on projects. By way of suggestion, this second question could read "*Disturb any human remains, including those interred outside of formal cemeteries?*" Although this question is included in the Cultural Resources Section of Appendix G, often planners and consultants only address the potential for impacts to historic or other culture groups' remains in an archaeological context. The inclusion of this question in the TCR Section would allow for analysis of impacts to Native American remains, which are generally not in specific cemeteries or other known locations, by the tribes as experts of their aboriginal territory and religious practices.

In closing, thank you for your consideration of these comments. We look forward to working closely with OPR on fine-tuning this Technical Advisory to help tribes and lead agencies during this first critical year of compliance with AB 52. What happens during the initial months of implementing this new law will set the stage and likely become referenced and accepted practices, as well as providing the groundwork for the forthcoming AB 52 CEQA Guidelines. As there are many new substantive and procedural requirements added by this landmark legislation, we recognize the importance of accurate and balanced

guidance concerning its implementation. We do not desire this legislation to cause unnecessary burdens on our local and state agencies, additional litigation in California, or unfair obligations on development. We do, however, want to ensure tribal governments are given a timely, fair and meaningful ability to participate in these land use decisions that affect our communities and our sovereignty as First Nations in this State. We care about the ability to have meaningful discussions about these resources, which include our expertise. Not only are these resources of vital importance to the identity of our communities, but these resources are part of the history of the State of California and inform our future as a population striving for balanced and just land use policies.

Finally, if the purpose of the Advisory is to be utilized even after the CEQA Guidelines are in place it is important that the time be taken to craft a fair and balanced document that is consistent with the intent of the law, even if that means it will not be available on July 1, 2015. We are available to discuss these comments with you and look forward to hearing from you concerning our requests.

Sincerely,

Mark Macarro
Tribal Chairman

cc: Assemblyman Mike Gatto
Chris Calfee, Governor's Office of Planning and Research
Paula Treat