

CALIFORNIA NATURAL RESOURCES AGENCY

# Initial Statement of Reasons for Regulatory Action

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*Amendments to the State CEQA Guidelines  
Implementing Assembly Bill 52 (Gatto, 2014)  
Regarding Tribal Cultural Resources*

California Natural Resources Agency

2/9/2016



Proposed changes to the sample environmental checklist in Appendix G of the California Environmental Quality Act Guidelines to incorporate tribal cultural resources questions and separate paleontology.

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## I. Introduction

The California Natural Resources Agency (the “Resources Agency”) proposes certain amendments and additions to Appendix G of the Guidelines Implementing the California Environmental Quality Act (Public Resources Code section 21000 *et seq.*) (“CEQA”). Specifically, these amendments implement the Legislature’s directive in Public Resources Code section 21083.09 (enacted as part of Assembly Bill 52 (Chapter 532, Statutes 2014)). That section directs the Resources Agency to:

*[C]ertify and adopt, revisions to the guidelines that update Appendix G of Chapter 3 (commencing with Section 15000) of Division 6 of Title 4 of the California Code of Regulations to do both of the following:*

*(a) Separate the consideration of paleontological resources from tribal cultural resources and update the relevant sample questions.*

*(b) Add consideration of tribal cultural resources with relevant sample questions.*

CEQA generally requires public agencies to review the environmental impacts of proposed projects, and, if those impacts may be significant, to consider feasible alternatives and mitigation measures that would substantially reduce significant adverse environmental effects. Section 21083 of the Public Resources Code requires the adoption of guidelines to provide public agencies and members of the public with guidance about the procedures and criteria for implementing CEQA. The guidelines required by section 21083 of the Public Resources Code are promulgated in the California Code of Regulations, title 14, sections 15000-15387 (the “Guidelines” or “State CEQA Guidelines”). Public agencies, project proponents, and third parties, who wish to enforce the requirements of CEQA, rely on the Guidelines to provide a comprehensive guide on compliance with CEQA. Subdivision (f) of section 21083 requires the Resources Agency, in consultation with the Office of Planning and Research (“OPR”), to certify, adopt and amend the Guidelines at least once every two years.

Notably, OPR is currently considering wider changes to many other portions of the CEQA Guidelines pursuant to the directive in Public Resources Code section 21083(f). Section 21083.09, as noted above, requires the promulgation of changes to Appendix G of the Guidelines specifically addressing tribal cultural resources by July 1, 2016. This proposed regulatory action, therefore, proposes only limited changes to Appendix G specifically implementing AB 52.

The Resources Agency considered reasonable alternatives to the amendments. OPR developed three alternative sets of questions that could respond to the directive in AB 52, and sought public input on those alternatives. Based on that input, OPR developed a proposal for changes which it submitted to the Resources Agency on January 29, 2016. Having considered the alternatives originally developed by OPR, the public input it received, and OPR’s final recommendation, the Resources Agency has determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the

proposed amendments. This conclusion is based on the Resources Agency's determination that the amendments are necessary to implement the Legislature's directive in AB 52. Thus, the amendments add no additional substantive requirements; rather, the Guidelines merely assist lead agencies in complying with CEQA's requirements, as updated in AB 52. The Resources Agency rejected the no action alternative because it would not respond to the Legislature's directive in AB 52.

There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts are due to statutory additions to CEQA and not these proposed amendments.

The Resources Agency also initially determined that the amendments would not have a significant adverse economic impact on business. The Resources Agency has determined that this action would have no impacts on project proponents. However, the Resources Agency is aware that certain of the statutory changes enacted by the Legislature and judicial decisions, described in greater detail below, that are reflected in the amendments could have an economic impact on project proponents, including businesses. Among other things, project proponents could incur additional costs in assisting lead agencies to comply with CEQA's requirement for analysis of tribal cultural resources. However, the amendments to the Guidelines merely reflect those legislative and judicial requirements, and the Resources Agency knows of no less costly alternative. These amendments update the Guidelines to be consistent with AB 52, but do not impose any new requirements. Therefore, these amendments will not have a significant, adverse economic impact on business.

The amendments do not duplicate or conflict with any federal statutes or regulations. CEQA is similar in some respects to the National Environmental Policy Act ("NEPA"), 42 U.S.C. sections 4321-4343. Federal agencies are subject to NEPA, which requires environmental review of federal actions. State and local agencies are subject to CEQA, which requires environmental review before state and local agencies may approve or decide to undertake discretionary actions and projects in California. Although both NEPA and CEQA require an analysis of environmental impacts, the substantive and procedural requirements of the two statutes differ. Most significantly, CEQA requirements for feasible mitigation of environmental impacts exceed NEPA's mitigation provisions. A state or local agency must complete a CEQA review even for those projects for which NEPA review is also applicable, although Guidelines sections 15220-15229 allow state, local, and federal agencies to coordinate review when projects are subject to both CEQA and NEPA. Because state and local agencies are subject to CEQA unless exemptions apply, and because CEQA and NEPA are not identical, guidelines for CEQA are necessary to interpret and make specific provisions of AB 52 and do not duplicate the Code of Federal Regulations.

## II. Initial Statement of Reasons

The Administrative Procedure Act requires that an agency prepare an initial statement of reasons supporting its proposed regulation. (Gov. Code § 11346.2 (b).) Below is a brief background on AB 52, and Appendix G in the CEQA Guidelines. Following that background, OPR's public engagement process and the Natural Resources Agency's rulemaking process is briefly described. Next, this Initial Statement of Reasons explains the purpose and necessity of each proposed change to the Guidelines.

### A. A. Background on AB 52 (Gatto, 2014)

On July 1, 2015 [AB 52](#) (Gatto, 2014) went into effect. (A copy of AB 52 is contained in Attachment A.) According to its author:

[E]xisting laws lack a formal process for tribes to be involved in the CEQA process as tribal governments. CEQA projects that impact tribal resources have experienced uncertainty and delays as lead agencies attempt to work with tribes to address impacts on tribal resources. With this bill, it is the author's intent to "Set forth a process and scope that clarifies California tribal government involvement in the CEQA process, including specific requirements and timing for lead agencies to consult with tribes on avoiding or mitigating impacts to tribal cultural resources."

(Assembly Floor Analysis, August 27, 2014.)

AB 52 established a new category of resources in CEQA called Tribal cultural resources. (Public Resources Code § 21074.)

*"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:*

*(A) Included or determined to be eligible for inclusion in the California Register of Historical Resources.*

*(B) Included in a local register of historical resources as defined in subdivision (k) of Section 5020.1.*

*(2) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1. In applying the criteria set forth in subdivision (c) of Section 5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.*

*(b) 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 the size and scope of the landscape.*

*(c) A historical resource described in Section 21084.1, a unique archaeological resource as defined in subdivision (g) of Section 21083.2, or a "nonunique archaeological resource" as defined in subdivision (h) of Section 21083.2 may also be a tribal cultural resource if it conforms with the criteria of subdivision (a).*

AB 52 also created a process for consultation with California Native American Tribes in the CEQA process. Tribal Governments can request consultation with a lead agency and give input into potential impacts to tribal cultural resources before the agency decides what kind of environmental assessment is appropriate for a proposed project. (Pub. Resources Code § 21080.3.2.) The Public Resources Code now requires avoiding damage to tribal cultural resources, if feasible. If not, lead agencies must mitigate impacts to Tribal Cultural Resources to the extent feasible.

By including tribal cultural resource assessment and Government to Government consultation early in the CEQA process, the Legislature intended to ensure that local and Tribal governments, public agencies, and project proponents would have information available early enough in the project planning process to identify and address potential substantial adverse impact to tribal cultural resources. By taking this proactive approach, the Legislature also intended to reduce the potential for delay and conflicts in the environmental review process. ((AB 52 § 1 (b)(7).)

AB 52 also directed OPR to prepare, and the Resources Agency to adopt, questions regarding tribal cultural resources in the CEQA Guidelines Environmental Checklist Form, found in Appendix G. (Public Resources Code § 21083.09.) The statute also directs OPR to separate the consideration of paleontological resources from tribal cultural resources.

Additional information on the new provisions added by AB 52 is provided in a discussion [draft technical advisory](#) that OPR released in May of 2015. (A copy of the discussion draft technical advisory is included in Attachment B.)

## **B. Background on Appendix G**

The CEQA Guidelines are administrative regulations that implement the California Environmental Quality Act. As regulations, the CEQA Guidelines implement, interpret and make specific the terms in the Public Resources Code. The CEQA Guidelines cannot add new requirements, nor can they remove any requirements found in the statute.

Appendix G in the CEQA Guidelines contains a sample initial study form. The purpose of an initial study is to assist lead agencies in determining whether a project may cause a significant impact on the environment. (State CEQA Guidelines, § 15063.) To help guide that determination, Appendix G asks a series of questions regarding a range of environmental resources and potential impacts. Appendix G's questions are not an exhaustive list of all potential impacts. (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal. App. 4th 1099, 1109-1112 (seasonal reduction of surface flow in local streams may be an impact on the environment, even though that particular impact is not specifically listed in Appendix G).) Appendix G further advises that its environmental checklist is only a *sample* form that can be tailored to address local conditions and project characteristics.

Because CEQA now provides that a project that may cause a substantial adverse change in a Tribal Cultural Resource is a project that may have a significant effect on the environment, changes must be made to the sample environmental checklist form to include questions about tribal cultural resources. The provisions of the statute for avoidance and mitigation of potential effects on tribal cultural resources will not be affected by the CEQA Guidelines Appendix G update process.

## **C. Background on OPR's Development of Proposed Changes to Appendix G Incorporating Tribal Cultural Resources**

As with other CEQA Guidelines updates, prior to the release of a draft, OPR conducted extensive public outreach and coordinated closely with the Native American Heritage Commission and California Office of Historic Preservation. OPR staff presented at over twenty different professional conferences, public workshops with the Native American Heritage Commission, and state and local agency meetings. The purpose of that outreach was to hear from tribes, public agencies, environmental organizations, business interests and others regarding potential changes to Appendix G to implement AB 52. In addition to outreach, in May of 2015, OPR released a discussion draft technical advisory on the procedural requirements of AB 52, and sought public input on that discussion draft. OPR invited public review of the discussion draft technical advisory, met with tribes and stakeholders, and received comment letters with suggestions for improvement.

### **1. Discussion Draft of Changes**

In November of 2015, OPR released a Discussion Draft of Proposed Changes to Appendix G of the CEQA Guidelines Incorporating Tribal Cultural Resources for a thirty-day public review period. (A copy is contained in Attachment C.) That draft included three potential options for changes to Appendix G.

Alternative one in that draft would add one question to Section V (Cultural Resources) of Appendix G. That question would ask if a project would cause a substantial adverse change in the significance of a tribal cultural resource as defined in Public Resources Code section 21074. That option is similar to the format for the existing subdivisions in Section V on historical and archaeological resources.

Alternative two in OPR's draft would ask essentially the same question in the cultural resources section, but paraphrased the definition of tribal cultural resources in the Public Resources Code. It would also change the word formal to dedicated, in subdivision (d) regarding disturbance of human remains outside of cemeteries.

Alternative three in OPR's draft would create a new section, outside of Section V (Cultural Resources) containing questions only related to tribal cultural resources. Those questions spelled out the full definition of tribal cultural resources, mirroring the language in Public Resources Code section 21074. Those questions would also include detailed lead-in language referencing the procedural consultation requirements.

During the public comment period, OPR held two workshops, one for the public and one for Tribal Leadership, as well as a Tribal webinar for staff working for Tribal Governments. The comment period on OPR's draft closed on December 18, 2015. OPR received thirty-eight comments from Tribal Governments, cultural resource management practitioners, archaeologists, paleontologists, the business community, and lead agencies and local governments.

Comments on the proposal largely addressed the amount of detail that should appear in the Appendix G questions. On the one hand, some comments favored the minimalist approach in OPR's alternative one (simply cross-referencing the statutory definition of tribal cultural resources). Those comments suggested



that too much detail in the Appendix G questions might create confusion and complicate the CEQA process.

Other comments, however, suggested that lead agencies are not consistent in their approach to tribal cultural resources, and further that some lead agencies do not understand how tribal cultural resources may have value that is different from historic and archeological resources. Accordingly, those comments suggested that additional detail regarding tribal cultural resources was both appropriate and necessary.

Comments from Tribal Governments also expressed concern that if the new question regarding tribal cultural resources were a subset of the broader cultural resources section in the sample environmental checklist, lead agencies might rely solely on archaeologists and not properly take into account tribal expertise.

## **2. OPR's Recommended Changes**

Having reviewed and considered the comments that it received on the discussion draft, OPR developed a final recommendation that it transmitted to the Resources Agency on January 29, 2016 (See copy in Attachment D.) The recommendation balances the competing interests expressed in the public comments while implementing the specific direction in AB 52 to ensure that the checklist is clear, concise, and complete. As described in greater detail below, the recommendation contains the following:

- Proposed additions to the introductory language in the section of Appendix G entitled, "Evaluation of Environmental Impacts." Those additions would refer to the procedural requirement for tribal consultation in Public Resources Code section 21080.3.1. It also refers to other sources of information regarding tribal cultural resources, including the California Historical Resources Information Systems as managed by the California Office of Historic Preservation, and the Sacred Lands File, as maintained by the California Native American Heritage Commission.
- Proposed revision to subdivision (d) of Section V (Cultural Resources) to replace the word "formal" with the word "dedicated" to conform to existing language regarding cemeteries elsewhere in the Public Resources Code and in the Health and Safety Code.
- Proposed addition of subdivision (e) to Section V (Cultural Resources) adding a question regarding tribal cultural resources. That question mirrors the statutory definition in Public Resources Code section 21074. It is broken into two subparts to assist lead agencies in determining whether there may be a potentially significant impact to such resources, as they are defined in CEQA (i.e., that they are either on or eligible for the state historical register or included in a local register of historic properties, or are resources that a lead agency chooses to treat as a tribal cultural resource).

## **3. Suggestions Not Incorporated**

OPR's transmittal to the Resources Agency explained that certain suggestions were not chosen for inclusion in its recommendation.

First, some Tribal Governments recommended language asking whether a project would potentially disturb any resource or place defined in Public Resources Code section 5097.9 et seq. (Native American Historical, Cultural and Sacred Sites). That suggestion was not incorporated for two reasons. First, the suggestion would exceed the scope of analysis of tribal cultural resources required by the Public

Resources Code. The Sacred Lands File contains resources that may or may not be tribal cultural resources, as defined for CEQA purposes in Public Resources Code section 21074. Instead, OPR recommends that the addition to the section on “Evaluation of Environmental Impacts” include a reference to the Sacred Lands File as a source of information that may inform the lead agency’s analysis of potential impacts.

Second, some comment letters, particularly from tribal governments, favored the approach in alternative three, which created a new section called Tribal Cultural Resources. Those letters suggested that if tribal cultural resources were in the same section as archeological or historical resources, that lead agencies might only consult with archeologists and historic resources experts, but not tribes. OPR disagrees.

The environmental checklist in Appendix G is separated into broad categorical headings. Tribal cultural resources are a type of cultural resource, separate from historical and archaeological resources. As stated above, each line on the checklist is a separate analysis of a separate resource. Keeping the category as a broad category with distinct subsets sets tribal cultural resources apart sufficiently to meet the direction of the statute. Moreover, as discussed below, in the proposed addition to the instructions entitled Evaluation of Environmental Impacts, indicate the value of tribal consultation in filling out the checklist appropriately.

Third, some comments from business interests suggested that the new question for tribal cultural resources should consist only of a cross-reference to the statutory definition. That suggestion was not incorporated because it does not provide sufficient guidance to lead agencies. The statutory definition of tribal cultural resources is complex, including two circumstances in which a resource is a tribal cultural resource. Public Resources Code section 21074 (a) lists resources that must be treated as tribal cultural resources, while Public Resources Code section 21074 (b) indicated when a lead agency may use its discretion to determine that a resource is a tribal cultural resource. This important distinction merits two sub-questions in the checklist.

Instead of the minimal approach, OPR recommends keeping tribal cultural resources in the Cultural Resources section and explaining it in detail. This approach is consistent with the recommendation made by the business community, but expands on the definition by quoting the statutory definition to show the two different paths to recognition of a resource as a tribal cultural resource for analysis of potential impacts to the resource. This is consistent with the tribal government preference for the more specific language found in alternative three.

Fourth, some paleontologists and Tribal Governments commented that paleontology should be in a completely separate section of Appendix G from tribal cultural resources. Specifically, they recommended removing it from Section V (Cultural Resources) because paleontology is the study of flora and fauna pre-human history, and therefore is not cultural. Many comments suggested moving paleontology to the Geology and Soils section. For example, “In San Francisco, we have moved this question to the Geology and Soils section. We find this placement suitable, given the relationship of a site's paleontological sensitivity to soil conditions.” (Comment letter from the City and County of San Francisco. 12/22/2015) As noted above, however, OPR is currently considering larger updates to Appendix G as part of a comprehensive update to the CEQA Guidelines. Rather than risk confusing lead agencies and practitioners

with multiple updates to Appendix G, OPR proposes to defer further changes related to paleontology to the comprehensive update.

The environmental checklist is a sample document. It is a tool that lead agencies may use, but they can also create their own checklist. Several local governments, for example, the City and County of San Francisco, have already moved paleontology in their checklist. If paleontology moves out of the cultural resources section in the comprehensive update, that does not prohibit lead agencies from updating their own checklist at an earlier date. In proposing a question regarding tribal cultural resources in a subdivision of Section V that is separate from the subdivision related to paleontology, OPR has fulfilled the legislative direction of AB 52 to separate Tribal cultural resources and paleontological resources.

## **D. Economic Impact Analysis**

### **Introduction**

Per Gov. Code section 11346.3(b)(1), the Agency has prepared the following Economic Impact Analysis for the proposed changes to Appendix G of the CEQA Guidelines.

This package proposes limited changes to Appendix G of the CEQA Guidelines. Appendix G is a sample environmental checklist form, designed to assist lead agencies in carrying out an environmental analysis under CEQA (Public Resources Code § 21000 *et seq.*). Specifically, Appendix G poses questions about how a project may potentially affect a series of potential resource areas including, among others, air quality, biological resources, etc. Appendix G does not purport to include every possible environmental impact. Lead agencies may, moreover, tailor the checklist form as they see fit. (CEQA Guidelines § 15063(f).) Assembly Bill 52 (Chapter 532, Statutes 2014), hereafter AB 52, added new substantive and procedural requirements to CEQA regarding the analysis of tribal cultural resources. It also required the Natural Resources Agency to update Appendix G with appropriate sample questions addressing tribal cultural resources. This proposed rulemaking contains those updates to Appendix G. These changes do not add any new requirements. Therefore, the proposed regulatory changes have no economic impact.

Notably, the Governor's Office of Planning and Research, which developed these changes, conferred with the Department of Finance regarding potential economic impacts of the proposal. According to the Department of Finance, it "appears that there would not be fiscal or economic impacts from the proposed regulations. The statute (AB 52) that directs OPR to add items on Tribal Cultural resources seems to have enough details to be self-implementing, and the proposed regulations merely remind people going through the CEQA process to comply with those existing requirements. As there would be no additional work needed as a result of the checklist addition, there would be no cost or benefit associated with the proposal." (Email communication, Department of Finance Chief Economist to OPR Staff, November 20, 2015.)

### **Background and Existing Requirements**

The Public Resources Code contains requirements regarding analysis of cultural resources. The California courts have previously determined that CEQA requires analysis and mitigation of impacts to historical and archeological resources, some of which may also be related to California Native American tribes, independent of the AB 52 amendments to the Public Resources Code. (See e.g. Pub. Resources Code, § 21004 (“a public agency may use discretionary powers ... for the purpose of mitigating or avoiding a significant effect on the environment”), *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 207 (approval of project conditioned on redesign to protect prehistoric Native American artifacts) (*Clover Valley*); *People v. Van Horn* (1990) 218 Cal.App.3d 1378, 1384 (conducting archaeological survey for Environmental Impact Report revealed ancient grave containing skeletons and artifacts dating from pre-colonial times).) The new law created a definition of tribal cultural resources and changed CEQA such that a project with an effect that may cause a substantial adverse change in the significance of tribal cultural resources is a project that may have a significant effect on the environment. (Pub. Resources Code § 21084.2.) AB 52 further added Public Resources Code section 21083.09 requiring OPR to develop and the Resources Agency to adopt additional questions in the CEQA Guidelines, Appendix G, to address tribal cultural resources. The detailed procedural requirements in the law are self-implementing.

### **Business Impact**

The Resources Agency is aware that certain requirements that AB 52 added to the Public Resources Code, and that are related to but are not created by this proposed action, may potentially have an economic impact on business. Among other things, project proponents could incur costs in assisting lead agencies to comply with the requirement for analysis of tribal cultural resources and consultation if properly requested. On the other hand, by clarifying the scope and timing of tribal consultation in the CEQA process, the provisions added by AB 52 may reduce current uncertainty and delays experienced by project proponents and lead agencies. (See, Assembly Floor Analysis of AB 52, August 27, 2014.) The proposed amendments to the Guidelines do not add to those requirements

### **Cost savings to businesses**

Additionally, this proposed action may reduce the costs of environmental review to lead agencies and project applicants by directing them to sources of information regarding potential tribal cultural resources, including consultation with Tribal Governments traditionally and culturally affiliated with the proposed project area. Moreover, the proposed changes may reduce compliance costs by clarifying which tribal cultural resources must be studied in a CEQA analysis and by standardizing the initial study checklist form. Early identification and appropriate mitigation of tribal cultural resources can save time and money during the project development process by avoiding inadvertent discoveries of gravesites or other tribal cultural resources, which could affect construction timelines.

The proposed action would add a new statement related to tribal consultation in the Evaluation of Environmental Impact section of Appendix G. Doing so creates three potential procedural and practical benefits. It may help lead agencies avoid a procedural error in CEQA by inadvertently neglecting consultation. The addition might also potentially protect tribal cultural resources, which have value to a California Native American tribe and which may help prevent costly litigation over project impacts.

Finally, the additions may allow projects to move forward with more certainty and less potential delay from unanticipated discovery of tribal cultural resources during construction.

The language of the proposed questions in Appendix G that detail the two ways that a lead agency can find that a resource is a tribal cultural resource, are intended to provide a clear record of the basis for the determination that a project may or may not have a potentially significant impact on a tribal cultural resource. This additional clarity will be beneficial because lead agencies, tribal governments, and project applicants will all know that tribal cultural resources are a new, distinct resource in CEQA with the same protections as any other type of resource and the two specific ways to find that a tribal cultural resource is potentially impacted by a project.

For these reasons, the Resources Agency has determined that the amendments included in this proposed action may reduce the costs of environmental review to lead agencies and project applicants.

## **Alternatives**

The Resources Agency considered reasonable alternatives to the amendments. OPR developed three alternative sets of questions that could respond to the directive in AB 52, and sought public input on those alternatives. Based on that input, OPR developed a proposal for changes which it submitted to the Resources Agency on January 29, 2016. Having considered the alternatives originally developed by OPR, the public input it received, and OPR's final recommendation, the Resources Agency has determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed amendments. This conclusion is based on the Resources Agency's determination that the amendments are necessary to implement the Legislature's directive in AB 52. Thus, the amendments add no additional substantive requirements; rather, the Guidelines merely assist lead agencies in complying with CEQA's requirements, as updated in AB 52. The Resources Agency rejected the no action alternative because it would not respond to the Legislature's directive in AB 52. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts are due to statutory additions to CEQA and not these proposed amendments.

### **1. Analysis under Gov. Code section 11346.3(b)(1)(A): the creation or elimination of jobs within the state.**

For the reasons stated in the introduction, there will be no creation or elimination of jobs within the state as a result of this regulation. The underlying statute is self-implementing. Any creation of new jobs or the elimination of jobs within the state will be the result of the statute and not these regulations.

### **2. Analysis under Gov. Code section 11346.3(b)(1)(B): the creation of new businesses or the elimination of existing businesses within the state.**

For the reasons stated in the introduction, there are no businesses that will be created by this proposed regulation. The proposed changes are to an optional, sample checklist. The underlying statute is self-implementing. Any creation of new businesses or the elimination of existing businesses within the state will be the result of the statute and not these regulations.

**3. Analysis under Gov. Code section 11346.3(b)(1)(C): the expansion of businesses currently doing business within the state.**

For the reasons stated in the introduction, any expansion of existing businesses currently doing business within the state, such as cultural resource management firms, will be a result of the statute and not these regulations.

**4. Analysis under Gov. Code section 11346.3(b)(1)(D): the benefits of the regulation to the health and welfare of California residents, worker safety, and the state's environment.**

For the reasons stated in the introduction, the benefits from the additional checklist statement and questions stem from the form of the checklist, but the requirements to analyze whether there are potentially significant impacts to tribal cultural resources and for lead agencies to consult with Tribal Governments, if requested, come directly from the statute.

Therefore, the estimated benefits of the regulation to the health and welfare of California residents, worker safety, and the state's environment, if any, are not quantifiable, and are the result of the statute, not the proposed regulation. The proposed regulation merely clarifies the statute in the sample environmental checklist form.

### III. Explanation and Necessity of the Proposed Amendments to Appendix G

The following sets forth the specific purposes, necessity and related information regarding each proposed change to Appendix G.

#### A. Proposed Addition to “Evaluation of Environmental Impacts”

##### 1. Specific Purposes of the Amendment

The amendment to the beginning of Appendix G under Evaluation of Environmental Impacts would add a statement regarding the significance of tribal consultation, a citation to the procedural requirements for request of tribal consultation, and mention of available state resources to help inform a lead agency’s awareness of potential tribal cultural resources in the project area.

The proposed text states:

**10. Tribal consultation, if requested as provided in Public Resources Code Section 21080.3.1, must begin prior to release of a negative declaration, mitigated negative declaration, or environmental impact report for a project. Information provided through tribal consultation may inform the lead agency’s assessment as to whether tribal cultural resources are present, and the significance of any potential impacts to such resources. Prior to beginning consultation, lead agencies may request information from the Native American Heritage Commission regarding its Sacred Lands File, per Public Resources Code sections 5097.9 and 5097.94, as well as the California Historical Resources Information System administered by the California Office of Historic Preservation.**

The proposed addition to the section entitled “Evaluation of Environmental Impacts” in Appendix G implements AB 52 direction to update Appendix G to “[a]dd consideration of tribal cultural resources....” Specifically, the intent of this addition is to help lead agencies comply with the procedural requirements of AB 52 to consider information from tribal consultation in the impact analysis of the sample environmental checklist.

The first sentence in the proposed addition accomplishes two goals. First, it provides a reference to section 21080.3.1, which includes the detailed requirements on tribal consultation. Particularly because some planners tend to rely on the Appendix G checklist, rather than look to the Public Resources Code, this cross-reference will assist lead agencies in identifying new procedural requirements. Second, that sentence restates the requirement from section 21080.3.1 that consultation commence before the lead agency releases a mitigated negative declaration, negative declaration, or draft environmental impact report for public review. (Pub. Resources Code § 21080.3.1 (b).)The second sentence in the proposed addition states that tribal consultation may assist a lead agency in determining whether tribal cultural resources are present, and the significance of any potential impacts to such resources. The intent of this sentence is to indicate to lead agencies that not only is consultation a procedural requirement, but it may also provide information that will be helpful in filling out the environmental checklist.

The third sentence in the proposed addition refers to additional sources of information regarding tribal cultural resources. It also indicates that lead agencies may seek out that information prior to commencing consultation. This clarification is important because many tribes request that lead agencies provide any information they have from the Native American Heritage Commission regarding its Sacred Lands File, and the California Historical Resources Information System administered by the California Office of Historic Preservation. Obtaining that information early in the process may help minimize the time needed in actual consultation.

## **2. Necessity**

The Legislature directed OPR and the Resources Agency to develop changes to Appendix G related to tribal cultural resources. (Pub. Resources Code, § 21083.09 (“Add consideration of tribal cultural resources with relevant sample questions”).) Tribal consultation pursuant to Public Resources Code 21080.3.1, the Native American Heritage Commission’s Sacred Lands File, and the California Historical Resources Information System administered by the California Office of Historic Preservation may all provide information that will assist the lead agency’s consideration of tribal cultural resources.

According to the Legislature’s intent for the new law, “Because the California Environmental Quality Act calls for a sufficient degree of analysis, tribal knowledge about the land and tribal cultural resources at issue should be included in environmental assessments for project that may have a significant impact on those resources.” (AB 52 § 1(b)(7).) Government to government consultation, if requested, is an opportunity for lead agencies to receive that tribal knowledge in order to conduct an initial study of potentially significant impacts to this new type of resource under CEQA.

There are existing state laws and cases that protect information about sensitive sites. AB 52 built on that body of law. Under existing state law, environmental documents must not include information about the location of an archeological site or sacred lands or any other information that is exempt from public disclosure pursuant to the Public Records Act. (Cal. Code Regs. §15120(d).) Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects are also exempt from disclosure. (Pub. Resources Code §§ 5097.9, 5097.993.)

The changes in AB 52 provide additional specific requirements to protect the confidentiality of tribal cultural resources and information exchanged through consultation. (Pub. Resources Code section 21082.3(c).) Tools for maintaining the confidentiality of information exchanged during consultation include the use of a confidential appendix. (See: *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 220). This reflects California’s policy in favor of protection of Native American artifacts. Confidential cultural resource inventories or reports generated for environmental documents should be maintained by the lead agency under separate cover and shall not be made available to the public. (*Clover Valley* at 221, citing Governor’s Office of Planning and Research, Cal. Tribal Consultation Guidelines, (Nov. 14, 2005, sup. P. 27).)

## **3. Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency’s Reasons for Rejecting Those Alternatives**

The Resources Agency considered reasonable alternatives to the amendments and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is



proposed or would be as effective as, and less burdensome to affected private persons than, the proposed amendments. This conclusion is based on the Resources Agency’s determination that the proposed amendments are necessary to implement the Legislature’s directive in AB 52 in a manner consistent with existing statutes and case law, and that the proposed amendments add no new substantive requirements. Appendix G is a sample checklist that lead agencies are free to customize. (State CEQA Guidelines § 15063(f).) The Resources Agency rejected the no action alternative because it would not achieve the objectives of the amendments. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

#### **4. Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed amendments do not add any substantive requirements, and so will not result in an adverse impact on businesses in California. The Public Resources Code contains requirements regarding tribal consultation, as well as analysis and mitigation of impacts to tribal cultural resources. The intent of the proposed amendments to Appendix G is to reduce the costs of environmental review to lead agencies and project applicants by directing them to sources of information regarding potential tribal cultural resources, including consultation with Tribal Governments traditionally and culturally affiliated with the proposed project area.

### **B. Proposed Revision to Section V, Subdivision (d) (cemeteries)**

The purpose of this revision is to conform section d) of the Cultural Resources category in the initial study checklist to language in section 7050.5 of the Health and Safety Code.

The proposed text change is as follows:

#### **V. CULTURAL RESOURCES**

Would the project:

[...]

d) Disturb any human remains, including those interred outside of ~~formal~~ **dedicated** cemeteries?

#### **1. Specific Purposes of the Amendment**

The purpose of this amendment is to conform the questions in Section V. Cultural Resources, to the language regarding cemeteries in other parts of the Health and Safety Code. The proposed change to section V, subdivision (d) deletes the word “formal” and inserts the word “dedicated” with reference to human remains found outside of cemeteries. Many Native American burials occurred outside of dedicated cemeteries. This change makes the wording consistent with the relevant provisions of law

## **2. Necessity**

Section 21083.09 of the Public Resources Code directed OPR to develop, and the Resources Agency to adopt, changes to the environmental study sample checklist. The amendment is also necessary to ensure that the language of the checklist is consistent with relevant statutory definitions.

## **3. Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives**

The Resources Agency considered reasonable alternatives to the amendments and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed amendments. This conclusion is based on the Resources Agency's determination that the proposed amendments are necessary to implement the Legislature's directive in AB 52 in a manner consistent with existing statutes and case law, and that the proposed amendments add no new substantive requirements. Appendix G is a sample checklist that lead agencies are free to customize. (State CEQA Guidelines § 15063(f).) The Resources Agency rejected the no action alternative because it would not achieve the objectives of the amendments. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

## **4. Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed amendments do not add any substantive requirements, and so will not result in an adverse impact on businesses in California. The Public Resources Code contains requirements regarding tribal consultation, as well as analysis and mitigation of impacts to tribal cultural resources. The intent of the proposed amendments to Appendix G is to reduce the costs of environmental review to lead agencies and project applicants by directing them to sources of information regarding potential tribal cultural resources.

# **C. Proposed Addition to Section V, Subdivision (e) (tribal cultural resources)**

## **1. Specific Purposes of the Amendment**

The proposed addition of a new subdivision (e) to Section V (cultural resources) adds tribal cultural resources as a subcategory of cultural resources to the Appendix G initial study sample checklist. This proposed change implements the directive in AB 52 to "[a]dd consideration of tribal cultural resources with relevant sample questions." (Pub. Resources Code § 21083.09(b).) Proposed Subdivision (e) tracks the definition of tribal cultural resources in Public Resources Code section 21074, which indicates two circumstances in which something would be considered a tribal cultural resource. This detailed breakdown of the definition will create a better record of the basis of the agency's analysis with regard to tribal cultural resources.

This change also complies with the requirement in AB 52 to update Appendix G to separate paleontology from Tribal cultural resources because it creates separate questions about tribal cultural resources and paleontological resources on separate lines of the checklist. (Pub. Resources Code §21083.09(a).)

Proposed new subdivision (e) strikes a balance between the competing interests expressed in public input on OPR's discussion draft. For example, Tribal Governments commented on the importance of recognizing tribal expertise in the assessment of tribal cultural resources. Subdivision (e)(1) states that a resource must have cultural value to a California Native American Tribe. Subdivision (e)(2) states that in applying the historical register criteria, lead agencies must consider the significance of the resource to the tribe.

Business groups, on the other hand, raised concern about the complexity of any new additions. Because in practice many planners look only to the CEQA Guidelines, simply citing provisions in the Public Resources Code may not provide adequate guidance to lead agencies<sup>1</sup>. This proposal provides guidance to help lead agencies determine whether there is a potentially significant impact to a tribal cultural resource, and provides a citation to the statutory definition for additional detail. Yet, this proposal is far less detailed than some comments proposed.

## **2. Necessity**

The Legislature directed OPR and the Resources Agency to develop changes to Appendix G related to tribal cultural resources. (Pub. Resources Code, § 21083.09 ("Add consideration of tribal cultural resources with relevant sample questions").) The proposed subdivision (e) (tribal cultural resources), therefore, implements the Legislature's directive to add sample questions regarding the consideration of tribal cultural resources.

## **3. Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives**

The Resources Agency considered reasonable alternatives to the amendments and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed amendments. This conclusion is based on the Resources Agency's determination that the proposed amendments are necessary to implement the Legislature's directive in AB 52 in a manner consistent with existing statutes and case law, and that the proposed amendments add no new substantive requirements. Appendix G is a sample checklist that lead agencies are free to customize. (State CEQA Guidelines § 15063(f).) The Resources Agency rejected the no action alternative because it would not achieve the objectives of the amendments. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

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<sup>1</sup> Business groups included a letter from the California Chamber of Commerce, signed by a coalition of organizations including twenty-nine businesses and associations of industry and local governments.

**4. Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed amendments do not add any substantive requirements, and so will not result in an adverse impact on businesses in California. The Public Resources Code contains requirements regarding tribal consultation, as well as analysis and mitigation of impacts to tribal cultural resources, where feasible. The intent of the proposed amendments to Appendix G is to reduce the costs of environmental review to lead agencies and project applicants by directing them to sources of information regarding potential tribal cultural resources.

## IV. Bibliography

### A. Template Letter: California Native American Tribe to Lead Agency requesting to be on AB 52 notice list

(Courtesy of the California Native American Heritage Commission).

[Tribal Government Letterhead]

<Date>

<Lead Agency Address>

RE: California Environmental Quality Act Public Resources Code section 21080.3, subd. (b) Request for Formal Notification of Proposed Projects Within the \_\_\_\_\_ Tribe's Geographic Area of Traditional and Cultural Affiliation

Dear < >:

As of the date of this letter, in accordance with Public Resources Code Section 21080.3.1, subd. (b), <Tribe Name>, which is traditionally and culturally affiliated with a geographic area within your agency's geographic area of jurisdiction, requests formal notice of and information on proposed projects for which your agency will serve as a lead agency under the California Environmental Quality Act (CEQA), Public Resources Code section 21000 et seq.

Pursuant to Public Resources Code section 21080.3.1, subd. (b), and until further notice, we hereby designate the following person as the tribe's lead contact person for purposes of receiving notices of proposed projects from your agency:

Name

Title

Address

Phone Number

Cell Phone Number

Fax Number

Email Address

We request that all notices be sent via certified U.S. Mail with return receipt. Following receipt and review

of the information your agency provides, within the 30-day period proscribed by Public Resources Code section 21080.3.1, subd. (d), the <Tribe Name> may request consultation, as defined by Public Resources Code section 21080.3.1, subd. (b), pursuant to Public Resources Code section 21080.3.2 to mitigate any project impacts a specific project may cause to tribal cultural resources.

If you have any questions or need additional information, please contact our lead contact person listed above.

Sincerely,

<Name>

<Title>

CC: Native American Heritage Commission

Available at: Available at: <http://nahc.ca.gov/wp-content/uploads/2015/06/Request-for-Formal-Notification-of-Proposed-CEQA-Projects-.pdf>

## **B. Template Letter: Lead Agency to California Native American Tribe providing notice and offering consultation**

(Courtesy of OPR)

*Sample Letter- Lead Agency Notification to California Native American Tribes re: project application and consultation under AB 52.*

*Instructions: Please remove all highlights after filling in the blanks. Please erase these instructions from your letter.*

< Date >

[Lead Agency Letterhead]

FROM: <NAME OF LEAD AGENCY TRIBAL CONTACT/ PROJECT LEAD>

RE: Tribal Cultural Resources under the California Environmental Quality Act, AB 52 (Gatto, 2014). Formal Notification of determination that a Project Application is Complete or Decision to Undertake a Project, and Notification of Consultation Opportunity, pursuant to Public Resources Code § 21080.3.1 (hereafter PRC).

Dear < MAIL MERGE: TRIBAL CONTACT TITLE, TRIBAL CONTACT LAST NAME>:

The <Lead Agency > has determined that a project application is complete for the <Name of Project> OR  
The <Lead Agency > has decided to undertake the following project: <Name of Project>.

Below please find a description of the proposed project, a map showing the project location, and the name of our project point of contact, pursuant to PRC § 21080.3.1 (d).

< Description of the Proposed Project>

<Project Location>

<Lead Agency Point of Contact>

Pursuant to PRC § 21080.3.1 (b), you have 30 days from the receipt of this letter to request consultation, in writing, with the <Lead Agency>.

Very Respectfully,

<Name>

<Title>

Available at: [https://www.opr.ca.gov/s\\_ab52.php](https://www.opr.ca.gov/s_ab52.php)

## C. **Template Letter: California Native American Tribe to Lead Agency requesting consultation**

(Courtesy of the California Native American Heritage Commission).

Sample letter from a California Indian tribe, as defined in Chapter 905 of the Statutes of 2004, to a lead agency requesting consultation pursuant to Assembly Bill 52 (Gatto, 2014), Public Resources Code Section 21080.3.1, subs. (b), (d) and (e).

[Tribal Government Letterhead]

<Date>

<Lead Agency Address>

RE: Formal Request for Tribal Consultation Pursuant to the California Environmental Quality Act (CEQA), Public Resources Code section 21080.3.1, subs. (b), (d) and (e) for <Project Name>, <City and/or County>.

Dear < >:

This letter constitutes a formal request for tribal consultation under the provisions of the California Environmental Quality Act (CEQA) (Public Resources Code section 21080.3.1 subdivisions (b), (d) and (e)) for the mitigation of potential project impacts to tribal cultural resource for the above referenced project. <Tribe name> requested formal notice and information for all projects within your agency's geographical jurisdiction on <date of letter> and received notification on < date of lead agency response> regarding the above referenced project. Attached please find copies of those letters.

<Tribe name> requests consultation on the following topics checked below, which shall be included in consultation if requested (Public Resources Code section 21080.3.2, subd. (a)):

\_\_\_\_\_ Alternatives to the project

\_\_\_\_\_ Recommended mitigation measures

\_\_\_\_\_ Significant effects of the project

<Tribe name> also requests consultation on the following discretionary topics checked



below (Public Resources Code section 21080.3.2, subd. (a):

\_\_\_\_\_ Type of environmental review necessary

\_\_\_\_\_ Significance of tribal cultural resources, including any regulations, policies or standards used by your agency to determine significance of tribal cultural resources

\_\_\_\_\_ Significance of the project's impacts on tribal cultural resources

\_\_\_\_\_ Project alternatives and/or appropriate measures for preservation or mitigation

that we may recommend, including, but not limited to:

(1) Avoidance and preservation of the resources in place, pursuant to Public Resources Code section 21084.3, including, but not limited to, planning and construction to avoid the resources and protect the cultural and natural context, or planning greenspace, parks or other open space, to incorporate the resources with culturally appropriate protection and management criteria;

(2) Treating the resources with culturally appropriate dignity taking into account the tribal cultural values and meaning of the resources, including but not limited to the following:

- a. Protecting the cultural character and integrity of the resource;
- b. Protection the traditional use of the resource; and
- c. Protecting the confidentiality of the resource.

(3) Permanent conservation easements or other interests in real property, with culturally appropriate management criteria for the purposes of preserving or utilizing the resources or places.

(4) Protecting the resource.

Additionally, <Tribe name> would like to receive any cultural resources assessments or other assessments that have been completed on all or part of the project's potential "area of project effect" (APE), including, but not limited to:

1. The results of any record search that may have been conducted at an

Information Center of the California Historical Resources Information System (CHRIS), including, but not limited to:

- A listing of any and all known cultural resources have already been recorded on or adjacent to the APE;
- Copies of any and all cultural resource records and study reports that may have been provided by the Information Center as part of the records search response;
- If the probability is low, moderate, or high that cultural resources are located in the APE.
- Whether the records search indicates a low, moderate or high probability that unrecorded cultural resources are located in the potential APE; and
- If a survey is recommended by the Information Center to determine whether previously unrecorded cultural resources are present.

2. The results of any archaeological inventory survey that was conducted, including:

- Any report that may contain site forms, site significance, and suggested mitigation measures.

All information regarding site locations, Native American human remains, and associated funerary objects should be in a separate confidential addendum, and not be made available for public disclosure in accordance with Government Code Section 6254.10.

3. The results of any Sacred Lands File (SFL) check conducted through Native American Heritage Commission. The request form can be found at [http://www.nahc.ca.gov/slf\\_request.html](http://www.nahc.ca.gov/slf_request.html). USGS 7.5-minute quadrangle name, township, range, and section required for the search.

4. Any ethnographic studies conducted for any area including all or part of the potential APE; and

5. Any geotechnical reports regarding all or part of the potential APE.

We would like to remind your agency that CEQA Guidelines section 15126.4, subdivision (b)(3) states that preservation in place is the preferred manner of mitigating impacts to archaeological sites. Section 15126.4, subd. (b)(3) of the CEQA Guidelines has been interpreted by the California Court of Appeal to mean that “feasible preservation in place must be adopted to mitigate impacts to historical resources of an archaeological nature unless the lead agency determines that another form of mitigation is available and provides superior mitigation of impacts.” *Madera Oversight Coalition v. County of Madera* (2011) 199 Cal.App.4th 48, disapproved on other grounds, *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439.

<Tribe name> expects to begin consultation within 30 days of your receipt of this letter. Please contact <Tribe name> ‘s lead contact person identified in the attached request for notification.

<Name

<Title>

<Address>

<Telephone number>

<Email address>

Sincerely,

<Name>

<Title>

cc: Native American Heritage Commission

Available at: <http://nahc.ca.gov/wp-content/uploads/2015/06/Request-for-Formal-Tribal-Consultation.pdf>

**D. Tribal Consultation Guidelines – Supplement to General Plan Guidelines**

[https://www.opr.ca.gov/docs/011414\\_Updated\\_Guidelines\\_922.pdf](https://www.opr.ca.gov/docs/011414_Updated_Guidelines_922.pdf)

## **E. Senate Bill 18 (Chapter 905, Statutes of 2004).**

### **Legislative Counsel's Digest**

SB 18, Burton. Traditional tribal cultural places.

(1) Existing law establishes the Native American Heritage Commission and authorizes the commission to bring an action to prevent severe and irreparable damage to, or assure appropriate access for Native Americans to, a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property.

Existing law authorizes only specified entities or organizations, including certain tax-exempt nonprofit organizations, and local government entities to acquire and hold conservation easements, if those entities and organizations meet certain conditions.

This bill would include a federally recognized California Native American tribe or a nonfederally recognized California Native American tribe that is on the contact list maintained by the Native American Heritage Commission, among those entities and organizations that may acquire and hold conservation easements, as specified.

(2) Existing law requires the Office of Planning and Research to implement various long range planning and research policies and goals that are intended to shape statewide development patterns and significantly influence the quality of the state's environment and, in connection with those responsibilities, to adopt guidelines for the preparation and content of the mandatory elements required in city and county general plans.

This bill would require that, by March 1, 2005, the guidelines contain advice, developed in consultation with the Native American Heritage Commission, for consulting with California Native American tribes for the preservation of, or the mitigation of impacts to, specified Native American places, features, and objects. The bill would also require those guidelines to address procedures for identifying the appropriate California Native American tribes, for continuing to protect the confidentiality of information concerning the specific identity, location, character, and use of those places, features, and objects, and for facilitating voluntary landowner participation to preserve and protect the specific identity, location, character, and use of those places, features, and objects. The bill would define a California Native American tribe that is on the contact list maintained by the Native American Heritage Commission as a "person" for purposes of provisions relating to public notice of hearings relating to local planning issues.

(3) Existing law requires a planning agency during the preparation or amendment of the general plan, to provide opportunities for the involvement of citizens, public agencies, public utility companies, and civic, education, and other community groups, through public hearings and any other means the city or county deems appropriate.

This bill would require the planning agency on and after March 1, 2005, to refer the proposed action to California Native American tribes, as specified, and also provide opportunities for involvement of California Native American tribes. The bill would require that, prior to the adoption or amendment of a

city or county's general plan, the city or county conduct consultations with California Native American tribes for the purpose of preserving specified places, features, and objects that are located within the city or county's jurisdiction. The bill would define the term "consultation" for purposes of those provisions. By imposing new duties on local governments with respect to consultations regarding the protection and preservation of California Native American historical, cultural, and sacred sites, the bill would impose a state-mandated local program.

On and after March 1, 2005, this bill would include open space for the protection of California Native American historical, cultural, and sacred sites within the definition of "local open-space plan" for purposes of provisions governing the preparation of the open-space element of a city and county general plan.

(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed \$1,000,000 statewide and other procedures for claims whose statewide costs exceed \$1,000,000.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

**The people of the State of California do enact as follows:**

**SECTION 1. (a) The Legislature finds and declares all of the following:**

(1) Current state law provides a limited measure of protection for California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places.

(2) Existing law provides limited protection for Native American sanctified cemeteries, places of worship, religious, ceremonial sites, sacred shrines, historic or prehistoric ruins, burial grounds, archaeological or historic sites, inscriptions made by Native Americans at those sites, archaeological or historic Native American rock art, and archaeological or historic features of Native American historic, cultural, and sacred sites.

(3) Native American places of prehistoric, archaeological, cultural, spiritual, and ceremonial importance reflect the tribes' continuing cultural ties to the land and to their traditional heritages.

(4) Many of these historical, cultural, and religious sites are not located within the current boundaries of California Native American reservations and rancherias, and therefore are not covered by the protectionist policies of tribal governments.

(b) In recognition of California Native American tribal sovereignty and the unique relationship between California local governments and California tribal governments, it is the intent of the Legislature, in enacting this act, to accomplish all of the following:

(1) Recognize that California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places are essential elements in tribal cultural traditions, heritages, and identities.

(2) Establish meaningful consultations between California Native American tribal governments and California local governments at the earliest possible point in the local government land use planning process so that these places can be identified and considered.

(3) Establish government-to-government consultations regarding potential means to preserve those places, determine the level of necessary confidentiality of their specific location, and develop proper treatment and management plans.

(4) Ensure that local and tribal governments have information available early in the land use planning process to avoid potential conflicts over the preservation of California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places.

(5) Enable California Native American tribes to manage and act as caretakers of California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places.

(6) Encourage local governments to consider preservation of California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places in their land use planning processes by placing them in open space.

(7) Encourage local governments to consider the cultural aspects of California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places early in land use planning processes.

**SECTION 2. Section 815.3 of the Civil Code is amended to read:**

815.3. Only the following entities or organizations may acquire and hold conservation easements:

(a) A tax-exempt nonprofit organization qualified under Section 501(c)(3) of the Internal Revenue Code and qualified to do business in this state which has as its primary purpose the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition or use.

(b) The state or any city, county, city and county, district, or other state or local governmental entity, if otherwise authorized to acquire and hold title to real property and if the conservation easement is voluntarily conveyed. No local governmental entity may condition the issuance of an entitlement for use on the applicant's granting of a conservation easement pursuant to this chapter.

(c) A federally recognized California Native American tribe or a nonfederally recognized California Native American tribe that is on the contact list maintained by the Native American Heritage Commission to

protect a California Native American prehistoric, archaeological, cultural, spiritual, or ceremonial place, if the conservation easement is voluntarily conveyed.

**SECTION. 3. Section 65040.2 of the Government Code is amended to read:**

65040.2. (a) In connection with its responsibilities under subdivision (l) of Section 65040, the office shall develop and adopt guidelines for the preparation and content of the mandatory elements required in city and county general plans by Article 5 (commencing with Section 65300) of Chapter 3. For purposes of this section, the guidelines prepared pursuant to Section 50459 of the Health and Safety Code shall be the guidelines for the housing element required by Section 65302. In the event those additional elements are hereafter required in city and county general plans by Article 5 (commencing with Section 65300) of Chapter 3, the office shall adopt guidelines for those elements within six months of the effective date of the legislation requiring those additional elements.

(b) The office may request from each state department and agency, as it deems appropriate, and the department or agency shall provide, technical assistance in readopting, amending, or repealing the guidelines.

(c) The guidelines shall be advisory to each city and county in order to provide assistance in preparing and maintaining their respective general plans.

(d) The guidelines shall contain the guidelines for addressing environmental justice matters developed pursuant to Section 65040.12.

(e) The guidelines shall contain advice including recommendations for best practices to allow for collaborative land use planning of adjacent civilian and military lands and facilities. The guidelines shall encourage enhanced land use compatibility between civilian lands and any adjacent or nearby military facilities through the examination of potential impacts upon one another.

(f) The guidelines shall contain advice for addressing the effects of civilian development on military readiness activities carried out on all of the following:

- (1) Military installations.
- (2) Military operating areas.
- (3) Military training areas.
- (4) Military training routes.
- (5) Military airspace.
- (6) Other territory adjacent to those installations and areas.



(g) By March 1, 2005, the guidelines shall contain advice, developed in consultation with the Native American Heritage Commission, for consulting with California Native American tribes for all of the following:

(1) The preservation of, or the mitigation of impacts to, places, features, and objects described in Sections 5097.9 and 5097.995 of the Public Resources Code.

(2) Procedures for identifying through the Native American Heritage Commission the appropriate California Native American tribes.

(3) Procedures for continuing to protect the confidentiality of information concerning the specific identity, location, character, and use of those places, features, and objects.

(4) Procedures to facilitate voluntary landowner participation to preserve and protect the specific identity, location, character, and use of those places, features, and objects.

(h) The office shall provide for regular review and revision of the guidelines established pursuant to this section.

**SECTION. 4. Section 65092 of the Government Code is amended to read:**

65092. (a) When a provision of this title requires notice of a public hearing to be given pursuant to Section 65090 or 65091, the notice shall also be mailed or delivered at least 10 days prior to the hearing to any person who has filed a written request for notice with either the clerk of the governing body or with any other person designated by the governing body to receive these requests. The local agency may charge a fee which is reasonably related to the costs of providing this service and the local agency may require each request to be annually renewed.

(b) As used in this chapter, "person" includes a California Native American tribe that is on the contact list maintained by the Native American Heritage Commission.

**SECTION. 5. Section 65351 of the Government Code is amended to read:**

65351. During the preparation or amendment of the general plan, the planning agency shall provide opportunities for the involvement of citizens California Native American Indian tribes, public agencies, public utility companies, and civic, education, and other community groups, through public hearings and any other means the city or county deems appropriate.

**SECTION. 6. Section 65352 of the Government Code is amended to read:**

65352. (a) Prior to action by a legislative body to adopt or substantially amend a general plan, the planning agency shall refer the proposed action to all of the following entities:

(1) A city or county, within or abutting the area covered by the proposal, and a special district that may be significantly affected by the proposed action, as determined by the planning agency.

(2) An elementary, high school, or unified school district within the area covered by the proposed action.

(3) The local agency formation commission.

(4) An area-wide planning agency whose operations may be significantly affected by the proposed action, as determined by the planning agency.

(5) A federal agency if its operations or lands within its jurisdiction may be significantly affected by the proposed action, as determined by the planning agency.

(6) A public water system, as defined in Section 116275 of the Health and Safety Code, with 3,000 or more service connections, that serves water to customers within the area covered by the proposal. The public water system shall have at least 45 days to comment on the proposed plan, in accordance with subdivision (b), and to provide the planning agency with the information set forth in Section 65352.5.

(7) The Bay Area Air Quality Management District for a proposed action within the boundaries of the district.

(8) On and after March 1, 2005, a California Native American tribe, that is on the contact list maintained by the Native American Heritage Commission, with traditional lands located within the city or county's jurisdiction.

(b) Each entity receiving a proposed general plan or amendment of a general plan pursuant to this section shall have 45 days from the date the referring agency mails it or delivers it in which to comment unless a longer period is specified by the planning agency.

(c) (1) This section is directory, not mandatory, and the failure to refer a proposed action to the other entities specified in this section does not affect the validity of the action, if adopted.

(2) To the extent that the requirements of this section conflict with the requirements of Chapter 4.4 (commencing with Section 65919), the requirements of Chapter 4.4 shall prevail.

**SECTION 7. Section 65352.3 is added to the Government Code, to read:**

65352.3. (a) (1) Prior to the adoption or any amendment of a city or county's general plan, proposed on or after March 1, 2005, the city or county shall conduct consultations with California Native American tribes that are on the contact list maintained by the Native American Heritage Commission for the purpose of preserving or mitigating impacts to places, features, and objects described in Sections 5097.9 and 5097.995 of the Public Resources Code that are located within the city or county's jurisdiction.

(2) From the date on which a California Native American tribe is contacted by a city or county pursuant to this subdivision, the tribe has 90 days in which to request a consultation, unless a shorter timeframe has been agreed to by that tribe.

(b) Consistent with the guidelines developed and adopted by the Office of Planning and Research pursuant to Section 65040.2, the city or county shall protect the confidentiality of information concerning the specific identity, location, character, and use of those places, features, and objects.

**SECTION. 8. Section 65352.4 is added to the Government Code, to read:**

65352.4. For purposes of Section 65351, 65352.3, and 65562.5, "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.

**SECTION 9. Section 65560 of the Government Code is amended to read:**

65560. (a) "Local open-space plan" is the open-space element of a county or city general plan adopted by the board or council, either as the local open-space plan or as the interim local open-space plan adopted pursuant to Section 65563.

(b) "Open-space land" is any parcel or area of land or water that is essentially unimproved and devoted to an open-space use as defined in this section, and that is designated on a local, regional or state open-space plan as any of the following:

(1) Open space for the preservation of natural resources including, but not limited to, areas required for the preservation of plant and animal life, including habitat for fish and wildlife species; areas required for ecologic and other scientific study purposes; rivers, streams, bays and estuaries; areas adjacent to military installations, military training routes, and restricted airspace that can provide additional buffer zones to military activities and complement the resource values of the military lands; and coastal beaches, lakeshores, banks of rivers and streams, and watershed lands.

(2) Open space used for the managed production of resources, including but not limited to, forest lands, rangeland, agricultural lands and areas of economic importance for the production of food or fiber; areas required for recharge of ground water basins; bays, estuaries, marshes, rivers and streams which are important for the management of commercial fisheries; and areas containing major mineral deposits, including those in short supply.

(3) Open space for outdoor recreation, including, but not limited to, areas of outstanding scenic, historic and cultural value; areas particularly suited for park and recreation purposes, including access to lakeshores, beaches, and rivers and streams; and areas which serve as links between major recreation and open-space reservations, including utility easements, banks of rivers and streams, trails, and scenic highway corridors.

(4) Open space for public health and safety, including, but not limited to, areas which require special management or regulation because of hazardous or special conditions such as earthquake fault zones, unstable soil areas, flood plains, watersheds, areas presenting high fire risks, areas required for the protection of water quality and water reservoirs and areas required for the protection and enhancement of air quality.

(5) Open space for the protection of places, features, and objects described in Sections 5097.9 and 5097.995 of the Public Resources Code.

**SECTION. 10. Section 65562.5 is added to the Government Code, to read:**

65562.5. On and after March 1, 2005, if land designated, or proposed to be designated as open space, contains a place, feature, or object described in Sections 5097.9 and 5097.995 of the Public Resources Code, the city or county in which the place, feature, or object is located shall conduct consultations with the California Native American tribe, if any, that has given notice pursuant to Section 65092 for the purpose of determining the level of confidentiality required to protect the specific identity, location, character, or use of the place, feature, or object and for the purpose of developing treatment with appropriate dignity of the place, feature, or object in any corresponding management plan.

**SECTION 11. No reimbursement is required by this act pursuant to**

Section 6 of Article XIII B of the California Constitution for certain costs that may be incurred by a local agency or school district because in that regard this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

However, notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains other costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars (\$1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

## V. Attachment A – Assembly Bill 52 (Gatto, 2014)

### Legislative Counsel's Digest

AB 52, Gatto. Native Americans: California Environmental Quality Act.

Existing law, the Native American Historic Resource Protection Act, establishes a misdemeanor for unlawfully and maliciously excavating upon, removing, destroying, injuring, or defacing a Native American historic, cultural, or sacred site, that is listed or may be eligible for listing in the California Register of Historic Resources.

The California Environmental Quality Act, referred to as CEQA, requires a lead agency, as defined, to prepare, or cause to be prepared, and certify the completion of, an environmental impact report on a project that it proposes to carry out or approve that may have a significant effect on the environment or to adopt a negative declaration if it finds that the project will not have that effect. CEQA also requires a lead agency to prepare a mitigated negative declaration for a project that may have a significant effect on the environment if revisions in the project would avoid or mitigate that effect and there is no substantial evidence that the project, as revised, would have a significant effect on the environment. CEQA requires the lead agency to provide a responsible agency with specified notice and opportunities to comment on a proposed project. CEQA requires the Office of Planning and Research to prepare and develop, and the Secretary of the Natural Resources Agency to certify and adopt, guidelines for the implementation of CEQA that include, among other things, criteria for public agencies to following in determining whether or not a proposed project may have a significant effect on the environment.

This bill would specify that a project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource, as defined, is a project that may have a significant effect on the environment. The bill would require a lead agency to begin consultation with a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project, if the tribe requested to the lead agency, in writing, to be informed by the lead agency of proposed projects in that geographic area and the tribe requests consultation, prior to determining whether a negative declaration, mitigated negative declaration, or environmental impact report is required for a project. The bill would specify examples of mitigation measures that may be considered to avoid or minimize impacts on tribal cultural resources. The bill would make the above provisions applicable to projects that have a notice of preparation or a notice of negative declaration filed or mitigated negative declaration on or after July 1, 2015. The bill would require the Office of Planning and Research to revise on or before July 1, 2016, the guidelines to separate the consideration of tribal cultural resources from that for paleontological resources and add consideration of tribal cultural resources. By requiring the lead agency to consider these effects relative to tribal cultural resources and to conduct consultation with California Native American tribes, this bill would impose a state-mandated local program.

Existing law establishes the Native American Heritage Commission and vests the commission with specified powers and duties.

This bill would additionally require the commission to provide each California Native American tribe, as defined, on or before July 1, 2016, with a list of all public agencies that may be a lead agency within the geographic area in which the tribe is traditionally and culturally affiliated, the contact information of those

agencies, and information on how the tribe may request those public agencies to notify the tribe of projects within the jurisdiction of those public agencies for the purposes of requesting consultation.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

The People Of The State Of California Do Enact As Follows:

**Section 1.**

(a) The Legislature finds and declares all of the following:

(1) Current state law provides a limited measure of protection for sites, features, places, objects, and landscapes with cultural value to California Native American tribes.

(2) Existing law provides limited protection for Native American sacred places, including, but not limited to, places of worship, religious or ceremonial sites, and sacred shrines.

(3) The California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) does not readily or directly include California Native American tribes' knowledge and concerns. This has resulted in significant environmental impacts to tribal cultural resources and sacred places, including cumulative impacts, to the detriment of California Native American tribes and California's environment.

(4) As California Native Americans have used, and continue to use, natural settings in the conduct of religious observances, ceremonies, and cultural practices and beliefs, these resources reflect the tribes' continuing cultural ties to the land and their traditional heritages.

(5) Many of these archaeological, historical, cultural, and sacred sites are not located within the current boundaries of California Native American reservations and rancherias, and therefore are not covered by the protectionist policies of tribal governments.

(b) In recognition of California Native American tribal sovereignty and the unique relationship of California local governments and public agencies with California Native American tribal governments, and respecting the interests and roles of project proponents, it is the intent of the Legislature, in enacting this act, to accomplish all of the following:

(1) Recognize that California Native American prehistoric, historic, archaeological, cultural, and sacred places are essential elements in tribal cultural traditions, heritages, and identities.

(2) 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.

(3) Establish examples of mitigation measures for tribal cultural resources that uphold the existing mitigation preference for historical and archaeological resources of preservation in place, if feasible.

(4) Recognize that California Native American tribes may have expertise with regard to their tribal history and practices, which concern the tribal cultural resources with which they are traditionally and culturally affiliated. Because the California Environmental Quality Act calls for a sufficient degree of analysis, tribal knowledge about the land and tribal cultural resources at issue should be included in environmental assessments for projects that may have a significant impact on those resources.

(5) In recognition of their governmental status, establish a meaningful consultation process between California Native American tribal governments and lead agencies, respecting the interests and roles of all California Native American tribes and project proponents, and the level of required confidentiality concerning tribal cultural resources, at the earliest possible point in the California Environmental Quality Act environmental review process, so that tribal cultural resources can be identified, and culturally appropriate mitigation and mitigation monitoring programs can be considered by the decision making body of the lead agency.

(6) Recognize the unique history of California Native American tribes and uphold existing rights of all California Native American tribes to participate in, and contribute their knowledge to, the environmental review process pursuant to the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).

(7) Ensure that local and tribal governments, public agencies, and project proponents have information available, early in the California Environmental Quality Act environmental review process, for purposes of identifying and addressing potential adverse impacts to tribal cultural resources and to reduce the potential for delay and conflicts in the environmental review process.

(8) Enable California Native American tribes to manage and accept conveyances of, and act as caretakers of, tribal cultural resources.

(9) Establish that a substantial adverse change to a tribal cultural resource has a significant effect on the environment.

## **Section 2**

Section 5097.94 of the Public Resources Code is amended to read:

5097.94.

The commission shall have the following powers and duties:

(a) To identify and catalog places of special religious or social significance to Native Americans, and known graves and cemeteries of Native Americans on private lands. The identification and cataloguing of known graves and cemeteries shall be completed on or before January 1, 1984. The commission shall notify landowners on whose property such graves and cemeteries are determined to exist, and shall identify the Native American group most likely descended from those Native Americans who may be interred on the property.

(b) To make recommendations relative to Native American sacred places that are located on private lands, are inaccessible to Native Americans, and have cultural significance to Native Americans for acquisition by the state or other public agencies for the purpose of facilitating or assuring access thereto by Native Americans.

(c) To make recommendations to the Legislature relative to procedures which will voluntarily encourage private property owners to preserve and protect sacred places in a natural state and to allow appropriate access to Native American religionists for ceremonial or spiritual activities.

(d) To appoint necessary clerical staff.

(e) To accept grants or donations, real or in kind, to carry out the purposes of this chapter.

(f) To make recommendations to the Director of Parks and Recreation and the California Arts Council relative to the California State Indian Museum and other Indian matters touched upon by department programs.

(g) To bring an action to prevent severe and irreparable damage to, or assure appropriate access for Native Americans to, a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, pursuant to Section 5097.97. If the court finds that severe and irreparable damage will occur or that appropriate access will be denied, and appropriate mitigation measures are not available, it shall issue an injunction, unless it finds, on clear and convincing evidence, that the public interest and necessity require otherwise. The Attorney General shall represent the commission and the state in litigation concerning affairs of the commission, unless the Attorney General has determined to represent the agency against whom the commission's action is directed, in which case the commission shall be authorized to employ other counsel. In any action to enforce the provisions of this subdivision the commission shall introduce evidence showing that such cemetery, place, site, or shrine has been historically regarded as a sacred or sanctified place by Native American people and represents a place of unique historical and cultural significance to an Indian tribe or community.

(h) To request and utilize the advice and service of all federal, state, local, and regional agencies.

(i) To assist Native Americans in obtaining appropriate access to sacred places that are located on public lands for ceremonial or spiritual activities.

(j) To assist state agencies in any negotiations with agencies of the federal government for the protection of Native American sacred places that are located on federal lands.

(k) To mediate, upon application of either of the parties, disputes arising between landowners and known descendants relating to the treatment and disposition of Native American human burials, skeletal remains, and items associated with Native American burials.

The agreements shall provide protection to Native American human burials and skeletal remains from vandalism and inadvertent destruction and provide for sensitive treatment and disposition of Native American burials, skeletal remains, and associated grave goods consistent with the planned use of, or the approved project on, the land.

(l) To assist interested landowners in developing agreements with appropriate Native American groups for treating or disposing, with appropriate dignity, of the human remains and any items associated with Native American burials.

(m) To provide each California Native American tribe, as defined in Section 21073, on or before July 1, 2016, with a list of all public agencies that may be a lead agency pursuant to Division 13 (commencing with Section 21000) within the geographic area with which the tribe is traditionally and culturally affiliated, the contact information of those public agencies, and information on how the tribe may request the public agency to notify the tribe of projects within the jurisdiction of those public agencies for the purposes of requesting consultation pursuant to Section 21080.3.1.



### **Section 3**

Section 21073 is added to the Public Resources Code, to read:

21073.

“California Native American tribe” means a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004.

### **Section 4**

Section 21074 is added to the Public Resources Code, to read:

21074.

(a) “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:

(A) Included or determined to be eligible for inclusion in the California Register of Historical Resources.

(B) Included in a local register of historical resources as defined in subdivision (k) of Section 5020.1.

(2) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1. In applying the criteria set forth in subdivision (c) of Section 5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.

(b) 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 the size and scope of the landscape.

(c) A historical resource described in Section 21084.1, a unique archaeological resource as defined in subdivision (g) of Section 21083.2, or a “nonunique archaeological resource” as defined in subdivision (h) of Section 21083.2 may also be a tribal cultural resource if it conforms with the criteria of subdivision (a).

### **Section 5**

Section 21080.3.1 is added to the Public Resources Code, to read:

21080.3.1.

(a) The Legislature finds and declares that California Native American tribes traditionally and culturally affiliated with a geographic area may have expertise concerning their tribal cultural resources.

(b) 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 that is traditionally and culturally affiliated with the geographic area of the proposed project if: (1) the California Native American tribe requested to the lead agency, in writing, to be informed by the lead agency through formal notification of proposed projects in the geographic area that is traditionally and culturally affiliated with the tribe, and (2) the California Native American tribe responds, in writing, within 30 days of receipt of the formal notification, and requests the consultation. When responding to the lead agency, the California Native American tribe shall designate a lead contact person. If the California Native American tribe does not designate a lead contact person, or designates multiple lead contact people, the lead agency shall defer to the individual listed on the contact list maintained by the Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004. For purposes of this section and Section 21080.3.2, “consultation” shall have the same meaning as provided in Section 65352.4 of the Government Code.

(c) To expedite the requirements of this section, the Native American Heritage Commission shall assist the lead agency in identifying the California Native American tribes that are traditionally and culturally affiliated with the project area.

(d) Within 14 days of determining that an application for a project is complete or a decision by a public agency to undertake a project, the lead agency shall provide formal notification to the designated contact of, or a tribal representative of, traditionally and culturally affiliated California Native American tribes that have requested notice, which shall be accomplished by means of at least one written notification that includes a brief description of the proposed project and its location, the lead agency contact information, and a notification that the California Native American tribe has 30 days to request consultation pursuant to this section.

(e) The lead agency shall begin the consultation process within 30 days of receiving a California Native American tribe’s request for consultation.

## **Section 6**

Section 21080.3.2 is added to the Public Resources Code, to read:

21080.3.2.

(a) 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. 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. The consultation may include discussion concerning the type of environmental review necessary, the significance of tribal cultural resources, the significance of the project’s impacts on the tribal cultural resources, and, if necessary, project alternatives or the appropriate measures for preservation or mitigation that the California Native American tribe may recommend to the lead agency.

(b) The consultation shall be considered concluded when either of the following occurs:

(1) The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource.

(2) A party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached.

(c) (1) This section does not limit the ability of a California Native American tribe or the public to submit information to the lead agency regarding the significance of the tribal cultural resources, the significance of the project's impact on tribal cultural resources, or any appropriate measures to mitigate the impact.

(2) This section does not limit the ability of the lead agency or project proponent to incorporate changes and additions to the project as a result of the consultation, even if not legally required.

(d) If the project proponent or its consultants participate in the consultation, those parties shall respect the principles set forth in this section.

## **Section 7**

Section 21082.3 is added to the Public Resources Code, to read:

### **21082.3.**

(a) 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.

(b) If a project may have a significant impact on a tribal cultural resource, the lead agency's environmental document shall discuss both of the following:

(1) Whether the proposed project has a significant impact on an identified tribal cultural resource.

(2) Whether feasible alternatives or mitigation measures, including those measures that may be agreed to pursuant to subdivision (a), avoid or substantially lessen the impact on the identified tribal cultural resource.

(c) (1) Any information, including, but not limited to, the location, description, and use of the tribal cultural resources, that is submitted by a California Native American tribe during the environmental review process shall not be included in the environmental document or otherwise disclosed by the lead agency or any other public agency to the public, consistent with subdivision (r) of Section 6254 of, and Section 6254.10 of, the Government Code, and subdivision (d) of Section 15120 of Title 14 of the California Code of Regulations, without the prior consent of the tribe that provided the information. If the lead agency publishes any information submitted by a California Native American tribe during the consultation or environmental review process, that information shall be published in a confidential appendix to the environmental document unless the tribe that provided the information consents, in writing, to the disclosure of some or all of the information to the public. This subdivision does not prohibit the confidential exchange of the submitted information between public agencies that have lawful jurisdiction over the preparation of the environmental document.

(2) (A) This subdivision does not prohibit the confidential exchange of information regarding tribal cultural resources submitted by a California Native American tribe during the consultation or environmental review process among the lead agency, the California Native American tribe, the project applicant, or the project applicant's agent. Except as provided in subparagraph (B) or unless the California Native American tribe providing the information consents, in writing, to public disclosure, the project applicant or the project applicant's legal advisers, using a reasonable degree of care, shall maintain the confidentiality of the information exchanged for the purposes of preventing looting, vandalism, or damage to a tribal cultural resources and shall not disclose to a third party confidential information regarding tribal cultural resources.

(B) This paragraph does not apply to data or information that are or become publicly available, are already in the lawful possession of the project applicant before the provision of the information by the California Native American tribe, are independently developed by the project applicant or the project applicant's agents, or are lawfully obtained by the project applicant from a third party that is not the lead agency, a California Native American tribe, or another public agency.

(3) This subdivision does not affect or alter the application of subdivision (r) of Section 6254 of the Government Code, Section 6254.10 of the Government Code, or subdivision (d) of Section 15120 of Title 14 of the California Code of Regulations.

(4) This subdivision does not prevent a lead agency or other public agency from describing the information in general terms in the environmental document so as to inform the public of the basis of the lead agency's or other public agency's decision without breaching the confidentiality required by this subdivision.

(d) In addition to other provisions of this division, the lead agency may certify an environmental impact report or adopt a mitigated negative declaration for a project with a significant impact on an identified tribal cultural resource only if one of the following occurs:

(1) The consultation process between the California Native American tribe and the lead agency has occurred as provided in Sections 21080.3.1 and 21080.3.2 and concluded pursuant to subdivision (b) of Section 21080.3.2.

(2) The California Native American tribe has requested consultation pursuant to Section 21080.3.1 and has failed to provide comments to the lead agency, or otherwise failed to engage, in the consultation process.

(3) The lead agency has complied with subdivision (d) of Section 21080.3.1 and the California Native American tribe has failed to request consultation within 30 days.

(e) 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.

(f) Consistent with subdivision (c), the lead agency shall publish confidential information obtained from a California Native American tribe during the consultation process in a confidential appendix to the environmental document and shall include a general description of the information, as provided in paragraph (4) of subdivision (c) in the environmental document for public review during the public comment period provided pursuant to this division.

(g) This section is not intended, and may not be construed, to limit consultation between the state and tribal governments, existing confidentiality provisions, or the protection of religious exercise to the fullest extent permitted under state and federal law.

## **Section 8**

Section 21083.09 is added to the Public Resources Code, to read:

21083.09.

On or before July 1, 2016, the Office of Planning and Research shall prepare and develop, and the Secretary of the Natural Resources Agency shall certify and adopt, revisions to the guidelines that update Appendix G of Chapter 3 (commencing with Section 15000) of Division 6 of Title 4 of the California Code of Regulations to do both of the following:

(a) Separate the consideration of paleontological resources from tribal cultural resources and update the relevant sample questions.

(b) Add consideration of tribal cultural resources with relevant sample questions.

## **Section 9**

Section 21084.2 is added to the Public Resources Code, to read:

21084.2.

A project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment.

## **Section 10**

Section 21084.3 is added to the Public Resources Code, to read:

21084.3.

(a) Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource.

(b) If the lead agency determines that a project may cause a substantial adverse change to a tribal cultural resource, and measures are not otherwise identified in the consultation process provided in Section 21080.3.2, the following are examples of mitigation measures that, if feasible, may be considered to avoid or minimize the significant adverse impacts:

(1) Avoidance and preservation of the resources in place, including, but not limited to, planning and construction to avoid the resources and protect the cultural and natural context, or planning greenspace, parks, or other open space, to incorporate the resources with culturally appropriate protection and management criteria.

(2) 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:

(A) Protecting the cultural character and integrity of the resource.

(B) Protecting the traditional use of the resource.

(C) Protecting the confidentiality of the resource.

(3) Permanent conservation easements or other interests in real property, with culturally appropriate management criteria for the purposes of preserving or utilizing the resources or places.

(4) Protecting the resource.

#### **Section 11**

(a) This act does not alter or expand the applicability of the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) concerning projects occurring on Native American tribal reservations or rancherias.

(b) This act does not prohibit any California Native American tribe or individual from participating in the California Environmental Quality Act on any issue of concern as an interested California Native American tribe, person, citizen, or member of the public.

(c) This act shall apply only to a project that has a notice of preparation or a notice of negative declaration or mitigated negative declaration filed on or after July 1, 2015.

#### **Section 12**

No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because a local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act, within the meaning of Section 17556 of the Government Code.

## **VI. OPR Discussion Draft Technical Advisory: AB 52 and Tribal Cultural Resources in CEQA**

[https://www.opr.ca.gov/docs/DRAFT\\_AB\\_52\\_Technical\\_Advisory.pdf](https://www.opr.ca.gov/docs/DRAFT_AB_52_Technical_Advisory.pdf)

## VII. Attachment C – OPR Discussion Draft of Changes to Appendix G of the CEQA Guidelines

### Introduction

The Governor’s Office of Planning and Research is pleased to invite public input on this update to the Guidelines Implementing the California Environmental Quality Act (CEQA Guidelines) to address tribal cultural resources. This update implements the Legislature’s directive in Public Resources Code section 21083.09 (enacted as part of Assembly Bill 52 (Chapter 532, Statutes 2014)) to add tribal cultural resources to the sample initial study form found in Appendix G of the Guidelines.

This document provides background on AB 52, Appendix G, and an explanation of the three alternatives put forth as draft questions about Tribal Cultural Resources for inclusion in the initial study form, as well as information about effective public comment.

### Background on AB 52 (Gatto, 2014)

On July 1, 2015 [AB 52](#) (Gatto, 2014) went into effect. According to its author:

[E]xisting laws lack a formal process for tribes to be involved in the CEQA process as tribal governments. CEQA projects that impact tribal resources have experienced uncertainty and delays as lead agencies attempt to work with tribes to address impacts on tribal resources. With this bill, it is the author's intent to "Set forth a process and scope that clarifies California tribal government involvement in the CEQA process, including specific requirements and timing for lead agencies to consult with tribes on avoiding or mitigating impacts to tribal cultural resources."

(Assembly Floor Analysis, August 27, 2014.)

AB 52 established a new category of resources in the California Environmental Quality Act called Tribal Cultural Resources. (Public Resources Code § 21074.)

*“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:*

*(A) Included or determined to be eligible for inclusion in the California Register of Historical Resources.*

*(B) Included in a local register of historical resources as defined in subdivision (k) of Section 5020.1.*

*(2) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1. In applying the criteria set forth in subdivision (c) of Section 5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.*



AB 52 also created a process for consultation with California Native American Tribes in the CEQA process. Tribal Governments can request consultation with a lead agency and give input into potential impacts to tribal cultural resources before the agency decides what kind of environmental assessment is appropriate for a proposed project. The Public Resources Code now requires avoiding damage to tribal cultural resources, if feasible. If not, lead agencies must mitigate impacts to Tribal Cultural Resources to the extent feasible.

AB 52 also directed the Governor's Office of Planning and Research (OPR) to prepare, and the California Natural Resources Agency to adopt, questions regarding Tribal Cultural Resources in the CEQA Guidelines Environmental Checklist Form, found in Appendix G. (Public Resources Code § 21083.09.) The statute also directs OPR to separate the consideration of paleontological resources from Tribal Cultural Resources.

Additional information on the new provisions added by AB 52 is provided in a [draft Technical Advisory](#) that OPR released in May 2015.

## Background on Appendix G

The CEQA Guidelines are administrative regulations that implement the California Environmental Quality Act. As regulations, the CEQA Guidelines implement, interpret and make specific the terms in the Public Resources Code. The CEQA Guidelines cannot add new requirements, nor can they remove any requirements found in the statute.

Appendix G in the CEQA Guidelines contains a sample initial study form. The purpose of an initial study is to assist lead agencies in determining whether a project may cause a significant impact on the environment. (State CEQA Guidelines, § 15063.) To help guide that determination, Appendix G asks a series of questions regarding a range of environmental resources and potential impacts. Appendix G's questions are not an exhaustive list of all potential impacts. (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal. App. 4th 1099, 1109-1112 (seasonal reduction of surface flow in local streams may be an impact on the environment, even though that particular impact is not specifically listed in Appendix G).) Appendix G further advises that its environmental checklist is only a *sample* form that can be tailored to address local conditions and project characteristics.

Because CEQA now provides that a project that may cause a substantial adverse change in a Tribal Cultural Resource is a project that may have a significant effect on the environment, changes must be made to the sample environmental checklist form to include questions about tribal cultural resources. The provisions of the statute for avoidance and mitigation of potential effects on tribal cultural resources will not be affected by the CEQA Guidelines Appendix G update process.

## Explanation of the Alternatives

Since Governor Brown signed AB 52, OPR has engaged in intensive outreach to California Native American Tribes, local governments, CEQA practitioners and others. Through participation in workshops and conferences, OPR has solicited informal input into the possible content of this CEQA Guidelines update. That input suggested a range of approaches for new questions to Appendix G. Some suggested

only minimal changes, while others suggested that, because some lead agencies may not be familiar with the full breadth of tribal cultural resources, the new Appendix G questions should be very detailed.

To encourage a robust public process and thorough consideration of different interests, this document presents three alternative sets of draft Appendix G questions regarding tribal cultural resources. Each of these three options include tribal cultural resources and separate out paleontological resources, as required by statute, but they do so in increasingly detailed ways.

Alternative one is minimal; it merely cites the definition of Tribal Cultural Resources in the Public Resources Code, and asks the preparer of the checklist to indicate what level of potential impact a proposed project might have to that resource. Alternative one adds tribal cultural resources to the existing Cultural Resources section, which also includes historical, paleontological, and archaeological resources as separate and individual questions.

Alternative two paraphrases the definition of Tribal Cultural Resources, rather than simply providing a citation to the Public Resources Code. Doing so makes clear that a variety of objects and places may be tribal cultural resources. It also changes the description of cemeteries from formal to dedicated, in accordance with Public Resources Code, Ch. 1.75, § 5097.98, and Health and Safety Code § 7050.5(b). The checklist continues to ask a separate question regarding paleontology. These changes would also occur within the broader umbrella of the Cultural Resources section of Appendix G.

Alternative three contains the most detail. It includes introductory language for context, similar to the agricultural resources and air quality sections of Appendix G. The introductory text refers to procedural requirements related to consultation. It also provides the definition of Tribal Cultural Resources, separated to indicate sources of authority for such resource. Alternative three creates a new section of Appendix G, titled Tribal Cultural Resources.

These three alternatives present a range of possible options, though there are certainly others. If there are other options that OPR should consider, please feel free to submit your suggestions. Further, in reviewing the options presented, please let us know if terms are confusing, whether these questions will result in any unintended consequences, and whether there are additional resources that would be helpful in implementation.

## How Can I Provide Input?

We hope that you will share your thoughts and expertise in this effort to update Appendix G.

Input may be submitted electronically to [ceqa.guidelines@resources.ca.gov](mailto:ceqa.guidelines@resources.ca.gov). While electronic submission is preferred, suggestions may also be mailed or hand delivered to:

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

Please submit all suggestions before **December 18, 2014 at 5:00 p.m.** Once the comment period closes, OPR will review all written input and revise the proposal as appropriate. Once OPR finalizes the draft, it

will submit the draft to the Natural Resources Agency, which will then commence a formal rulemaking process. Once the Natural Resources Agency adopts the changes, they undergo review by the Office of Administrative Law.

Please note, the update to Appendix G to add consideration of tribal cultural resources is separate from two other pending updates to the CEQA Guidelines (a comprehensive update and an update regarding transportation analysis). We ask that you focus comments on these potential questions in Appendix G. Future activity on the other CEQA Guidelines updates will be announced through the CEQA Guidelines listserv and on OPR's website.

### **Tips for Providing Effective Input**

OPR would like to encourage robust engagement in this update process. We expect that participants will bring a variety of perspectives. While opposing views may be strongly held, discourse can and should proceed in a civil and professional manner. To maximize the value of your input, please consider the following:

- In your comment(s), please clearly identify the specific issues on which you are commenting. If you are commenting on a particular word, phrase, or sentence, please provide the page number and paragraph citation.
- Explain why you agree or disagree with OPR's proposed changes. Where you disagree with a particular portion of the proposal, please suggest alternative language.
- Describe any assumptions and support assertions with legal authority and factual information, including any technical information and/or data. Where possible, provide specific examples to illustrate your concerns.
- When possible, consider trade-offs and potentially opposing views.
- Focus comments on the issues that are covered within the scope of the proposed changes. Avoid addressing rules or policies other than those contained in this proposal.
- Consider quality over quantity. One well-supported comment may be more influential than one hundred form letters.
- Please submit any comments within the timeframe provided.

**Alternative 1**

**V. CULTURAL RESOURCES. Would the project:**

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
a) Cause a substantial adverse change in the significance of a historical resource as defined in § 15064.5?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b) Cause a substantial adverse change in the significance of an archaeological resources pursuant to § 15064.5?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c) Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d) Disturb any human remains, including those interred outside of formal cemeteries?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b><u>e) Cause a substantial adverse change in the significance of a Tribal Cultural Resource as defined in Public Resources Code § 21074?</u></b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Alternative 2**

**V. CULTURAL RESOURCES. Would the project:**

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
a) Cause a substantial adverse change in the significance of a historical resource as defined in § 15064.5?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b) Cause a substantial adverse change in the significance of an archaeological resources pursuant to § 15064.5?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c) Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d) Potentially disturb any human remains, including those interred outside of <del>formal</del> <b>dedicated</b> cemeteries <b>(see Public Resources Code, Ch. 1.75, § 5097.98, and Health and Safety Code § 7050.5(b)).</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b><u>e) Cause a substantial adverse change in the significance of a site, feature, place, cultural landscape, sacred place, or object with cultural value to a California Native American Tribe that is</u></b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

listed or determined eligible for listing on the California register of historical resources, listed on a local historical register, or otherwise determined by the lead agency to be a tribal cultural resource.

Alternative 3

**VI. TRIBAL CULTURAL RESOURCES.**

Consultation with a California Native American Tribe that has requested such consultation may assist a lead agency in determining whether the project may adversely affect tribal cultural resources, and if so, how such effects may be avoided or mitigated. Whether or not consultation has been requested, would the project cause a substantial adverse change in a site, feature, place, cultural landscape, sacred place, or object, with cultural value to a California Native American Tribe, which is any of the following:

	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
a) <u>Included or determined to be eligible for inclusion in the California Register of Historical Resources?</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b) <u>Included in a local register of historical resources</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c) <u>Determined by the lead agency, in its discretion and supported by substantial evidence, to be a Tribal Cultural Resource, after applying the criteria in Public Resources Code § 5024.1(c), and considering the significance of the resource to a California Native American Tribe?</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

## VIII. Attachment D – Proposed Changes to Appendix G of the CEQA Guidelines

### Proposed Language for Tribal cultural resources Update to Appendix G

Having reviewed and considered the comments, we recommend the following changes to Appendix G.

1. Add a statement regarding tribal consultation to the beginning of Appendix G under EVALUATION OF ENVIRONMENTAL IMPACTS, which provides guidance on completing the checklist and environmental analysis:

[...]

**10. Tribal consultation, if requested as provided in Public Resources Code Section 21080.3.1, must begin prior to release of a negative declaration, mitigated negative declaration, or environmental impact report for a project. Information provided through tribal consultation may inform the lead agency’s assessment as to whether tribal cultural resources are present, and the significance of any potential impacts to such resources. Prior to beginning consultation, lead agencies may request information from the Native American Heritage Commission regarding its Sacred Lands File, per Public Resources Code sections 5097.9 and 5097.94, as well as the California Historical Resources Information System administered by the California Office of Historic Preservation.**

2. Changes to the language of Section V to include Tribal cultural resources, with proposed additions in **Bold and Underline.**

#### V. CULTURAL RESOURCES

Would the project:

- a) Cause a substantial adverse change in the significance of a historical resource as defined in § 15064.5?
- b) Cause a substantial adverse change in the significance of an archaeological resource pursuant to § 15064.5?
- c) Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?
- d) Disturb any human remains, including those interred outside of ~~formal~~ **dedicated** cemeteries?

**e) Cause a substantial adverse change in the significance of a tribal cultural resource, defined in Public Resources Code section 21074 as either:**

**1) a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American Tribe, that is listed or eligible for listing on the California Register of Historical Resources, or included in a local register of historical resources as defined in Public Resources Code section 5020.1(k), or**

**2) a resource determined by a lead agency, in its discretion and supported by substantial evidence, to be significant according to the historical register criteria in Public Resources Code section 5024.1 (c), and considering the significance of the resource to a California Native American tribe.**