Comment 1-8

SLR Comments Regarding Proposed Language for TCRs Update to Appendix G

Merri Lopez-Keifer [lopezkeifer@gmail.com]

Sent: Monday, April 04, 2016 5:00 PM
To: CEQA Guidelines@CNRA
Cc: Carmen Mojado [cjmojado@slrmissionindians.org]
Attachments: SLR Comments on Appendix G~1.pdf (80 KB) ; SLR Comment Letter & Attac~1.pdf (127 KB)

Dear Ms. Baugh:

Attached please find a letter from the San Luis Rey Band of Mission Indians regarding the propsoed language for traditional cultural resources update to Appendix G.

Sincerely,

Merri Lopez-Keifer
Chief Legal Counsel
San Luis Rey Band of Mission Indians
(925) 457-3395
lopezkeifer@gmail.com

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SAN LUIS REY BAND OF MISSION INDIANS

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April 4, 2016

Heather Baugh
The California Natural Resources Agency
State of California
1416 Ninth Street, Ste. 1311
Sacramento, CA 95814

VIA ELECTRONIC MAIL
ceqa.guidelines@resources.ca.gov

RE: SAN LUIS REY BAND OF MISSION INDIANS COMMENTS ON PROPOSED LANGUAGE FOR TRIBAL CULTURAL RESOURCES UPDATE TO APPENDIX G OF THE CEQA CHECKLIST GUIDELINES PURSUANT TO AB 52 (GATTO)

Dear Ms. Baugh:

We, the San Luis Rey Band of Mission Indians ("SLR" or "Tribe"), a California Native American tribe that is traditionally and culturally affiliated with San Diego and Riverside counties, appreciate the opportunity to provide comments to the California Natural Resources Agency ("CNRA") on the proposed changes to Appendix G of the California Environmental Quality Act ("CEQA") Guidelines. The intent of the proposed changes is to incorporate the new resource known as "Tribal Cultural Resources" ("TCRs") into Appendix G ("Appendix G Checklist") pursuant to Assembly Bill 52 (Gatto) ("AB 52"). The Tribe is resolute in the preservation and protection of our tribal cultural resources. Our ancestors have inhabited our lands for thousands and thousands of years and our culture is a "living culture." Our native culture must be protected and preserved: past, present and future.

TCRs are not only a new resource under CEQA, but also a new term of art in the protection and preservation of California Native American resources. TCRs are non-renewable resources; once they are destroyed, they are erased from history forever. TCRs may be present on the surface, or may be buried below the surface. TCRs, wherever they are situated on this earth, are invaluable resources to California and to California Native American tribes. They represent tribal values: tangible and non-tangible alike. Therefore, the implementation of TCRs in CEQA and their introduction into the Appendix G Checklist, must be done in a very deliberate, sensitive, and most effective way possible to be successful in both an ideological and practical application. 1.8-1

Although not selected by the Governor's Office of Planning and Research as proposed language for Appendix G, SLR had preferred for TCRs to be placed within their own resource category (see SLR Letter to OPR dated12-18-15). By being placed inside its own resource category, the importance of the resource would be acknowledged and therefore would have been evaluated without the limitations that had been placed on it in the past. Yet, this proposed language was not selected by OPR.

If TCRs will not be given their own resource category, then SLR strongly recommends that the proposed language of CNRA be modified to reflect a change in the order of priority for a Lead Agency's review of a resource's significance and potential adverse impact by the CEQA project. This modification would result in TCRs being evaluated first, followed by archaeological resources and historical resources. In reversing the current proposed order of evaluation, the Checklist would support the legislature's intent in having TCRs evaluated early in the development process through tribal consultation. Prior to the enactment of AB 52, Lead Agencies relied solely upon archaeologist or other professional consultants on a California Native American resource's significance. However, through the enactment of AB 52, the State of California has acknowledged the importance of California's First People and that they are the experts of their resource's significance. Therefore, by placing TCRs first in the review, Lead Agencies will be directed to evaluate a Native American resource differently than it had in the past. The value of consulting with California Native American tribes may be more effectively realized, a goal of AB 52, and the actual resources will have an increase potential to be properly evaluated and considered by the Lead Agency, another goal of AB 52. 1.8-2

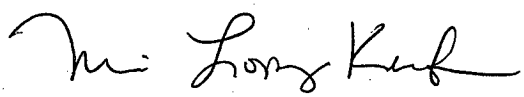
Lead Agencies must learn, through practical application, that information shared by California Native American tribal governments, should not be pitted against those of the archaeologist or other professional consultant, but that the information provided by the tribal governments to be superior resources of information and knowledge that may compliment that of the scientific information provided by the compensated consultant. There is no denying that an archaeologist may be able to provide information to the lead agency regarding known locations of TCRs; however, it is only through the tribal consultation that meaning, or significance, may be given to those resources. In placing the evaluation of a TCR as the first resource to be weighed and considered, a preference and priority is established. 1.8-3

Moreover, SLR recommends that paleontological resources should be completely removed from Section V, Cultural Resources. Instead, paleontological resources should be placed within Section VI, Geology and Soils. Such change has been incorporated by Lead Agencies throughout the state, including but not limited to, the City and County of San 1-8.4

Francisco and the City of Vista. Paleontology does not belong with Cultural Resources (TCRs, Archaeological and Historical Resources) and/or Tribal Cultural Resources and should be placed within the resource section most applicable to its review and protections, Geology and Soils.

The San Luis Rey Band of Mission Indians, above all else, wishes for the successful implementation of AB 52: through more effective and respectful government-to-government consultations to a more respectful analysis of a tribal cultural resource based on tribal values and knowledge. SLR appreciates the opportunity to provide our comments to the California Natural Resource Agency on its responsibility to update Appendix G. Thank you for protecting our invaluable California Native American tribal cultural resources.

Sincerely,



Merri Lopez-Keifer
Chief Legal Counsel
San Luis Rey Band of Mission Indians

cc: Mel Vernon, SLR Captain
Carmen Mojado, SLR Secretary of Government Relations

Enclosure: Attachment A

SAN LUIS REY BAND OF MISSION INDIANS

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December 18, 2015

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

VIA ELECTRONIC MAIL
ceqa.guidelines@resources.ca.gov

RE: SAN LUIS REY BAND OF MISSION INDIANS COMMENTS ON DISCUSSION DRAFT OF PROPOSED CHANGES TO APPENDIX G OF THE CEQA CHECKLIST GUIDELINES INCORPORATING TRIBAL CULTURAL RESOURCES PURSUANT TO AB 52 (GATTO)

Dear Ms. Roberson:

We, the San Luis Rey Band of Mission Indians ("SLR" or "Tribe"), a California Native American tribe that is traditionally and culturally affiliated with San Diego and Riverside counties, appreciate the opportunity to provide comments to the Governor's Office of Planning and Research ("OPR") on the proposed changes to Appendix G of the California Environmental Quality Act ("CEQA") Guidelines. The intent of the proposed changes is to incorporate the new resource known as "Tribal Cultural Resources" ("TCRs") into Appendix G ("Appendix G Checklist") pursuant to Assembly Bill 52 (Gatto) ("AB 52"). The Tribe is resolute in the preservation and protection of our tribal cultural resources. Our ancestors have inhabited our lands for thousands and thousands of years and our culture is a "living culture." Our native culture must be protected and preserved: past, present and future.

TCRs are not only a new resource under CEQA, but also a new term of art in the protection and preservation of California Native American resources. TCRs are non-renewable resources; once they are destroyed, they are erased from history forever. TCRs may be present on the surface, or may be buried below the surface. TCRs, wherever they are situated on this earth, are invaluable resources to California and to California Native American tribes. They represent tribal values: tangible and non-tangible alike. Therefore, the implementation of TCRs in CEQA and their introduction into the Appendix G Checklist, must be done in a very deliberate, sensitive, and most effective way possible to be successful in both an ideological and practical application.

Three (3) alternatives were presented by OPR for suggested incorporation of TCRs in the Appendix G Checklist. SLR believes that the proposed language in Alternative 3 best meets the legislative intent and specific statutory language of AB 52. We find Alternative 1 to be ineffectual in meeting and incorporating the legislative intent of AB 52. We find Alternative 2, although more effective than Alternative 1, deficient in establishing the importance of the evaluation of TCRs and the expertise California Native American tribes have on their living culture. Therefore, SLR opines that Alternative 3 serves TCRs the best and provides all the necessary context for successful AB 52 implementation into the Appendix G Checklist. However, although SLR believes Alternative 3 best meets the legislative intent of AB 52, we firmly believe that additional modifications are necessary. These modifications are reflected in Attachment A.

Moreover, placing TCRs into their own resource category, as suggested in Alternative 3, best sets TCRs apart from archaeological and historical resources, and a purely archaeological and/or scientific based analysis as to whether California Native American resources will be negatively impacted by a proposed CEQA action. By being placed inside its own resource category, the importance of the resource is acknowledged and therefore must be evaluated without the limitations that had been placed on it in the past. For instance, if no known archaeological resources were to be impacted, or if those resources were to be defined and asserted by an archaeologist and/or consultant, to be "insignificant," then it often became an unsurmountable burden of proof for a California Native American tribe to persuade a Lead Agency that a TCR may be impacted by the proposed project. Lead Agencies often would assert that because no "known" arcaheologicl resourcses were within the confines of the CEQA project site, then a tribe's concern regarding "subsurface TCRs" would fall on deaf ears and not be fairly considered by the Lead Agency. In fact, creating a separate resource category, and not simply adding an additional subsection to the current Checklist in Section V, TCRs and tribal expertise, through Tribal Consultation, will be given a seat at the table in assisting a Lead Agency in determining whether a TCR will be adversely impacted by a CEQA project. Setting TCRs apart correctly places the "expertise" of and on the resource and a project's potential negative impact on those resources with the California Native American tribes, and not solely on a non-tribal value analysis.

Additionally, Alternative 3 is preferred by SLR because of its inclusion of an introductory paragraph stressing the legal necessity for tribal consultation to occur very early in project scoping and even before the agency has come to preliminary conclusions regarding the potentially significant effects of a project in the checklist questions. It is imperative that a Lead Agency weighs and considers the potential adverse impact a project may have on a TCR, whether it be on the surface or below the surface, before they determine the type of

environmental review will be necessary. It is imperative that a Lead Agency, if said agency is not fortunate to consult with a tribal government, know that they still have a statutory responsibility to evaluate the potential adverse impact to TCRs. SLR believes that Alternative 3, with the included modifications, will best achieve this goal.

If, however, OPR is not inclined to adopt a new section of resource review for TCRs, as is the preference of SLR, then in the alternative, SLR's secondary preference would be for a significant revision of Alternative 2. This secondary preference can be found in Attachment B. The most notable revision would be to reverse the order of priority for a Lead Agency's review of a resource's significance and potential adverse impact by the CEQA project. Prior to the enactment of AB 52, Lead Agencies relied solely upon archaeologist or other professional consultants on a California Native American resource's significance. However, through the enactment of AB 52, the State of California has acknowledged the importance of California's First People and that they are the experts of their resource's significance. Therefore, by placing TCRs first in the review, Lead Agencies will be directed to evaluate a Native American resource differently than it had in the past. The value of consulting with California Native American tribes may be more effectively realized, a goal of AB 52, and the actual resources will have an increase potential to be properly evaluated and considered by the Lead Agency, another goal of AB 52. Lead Agencies must learn, through practical application, that information shared by California Native American tribal governments, should not be pitted against those of the archaeologist or other professional consultant, but that the information provided by the tribal governments may instead compliment that of the scientific information provided by the compensated consultant. Archaeologist do contribute to much of the knowledge about where resources have been known to be located; however, it is only through the tribal consultation that meaning, or significance, may be given to those resources. In placing the evaluation of a TCR as the first resource to be weighed and considered, a preference and priority is established.

Furthermore, SLR respectfully requests that OPR further modify Appendix G by adding a check box for TCRs in the Checklist Form in the introductory section ENVIRONMENTAL FACTORS POTENTIALLY AFFECTED. SLR also supports, as suggested by the Santa Ynez Band of Chumash Indians and the Pechanga Band of Luiseno Indians, that adding a question at the end of the start of the Checklist Form would be incredibly useful in flagging a potential statutory requirement to consult with California Native American tribal governments. SLR suggests the following be added to the front page:

> 11. Tribal Consultation has begun pursuant to Public Resources Code § 21080.3.1. If not, do not check box, and briefly state why such consultation has not begun.

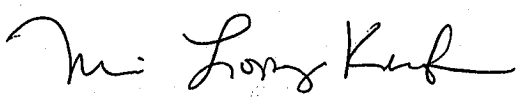
In order to best and most effectively implement AB 52 successfully, then this type of guidance

must be given on page one of the Checklist, not simply included in the resource category later in the Checklist. Providing this additional prompt will assist Lead Agencies greatly in complying with the new requirements of TCR evaluation and Tribal Consultation through the enactment of AB 52.

And last but not least, SLR believes that paleontological resources should be completely removed from Section V, Cultural Resources. Instead, paleontological resources should be placed within Section VI, Geology and Soils. Such change has been incorporated by Lead Agencies throughout the state, including but not limited to, the City and County of San Francisco and the City of Vista. Paleontology does not belong with Cultural Resources (TCRs, Archaeological and Historical Resources) and/or Tribal Cultural Resources and should be placed within the resource section most applicable to its review and protections, Geology and Soils.

The San Luis Rey Band of Mission Indians, above all else, wishes for the successful implementation of AB 52: through more effective and respectful government-to-government consultations to a more respectful analysis of a tribal cultural resource based on tribal values and knowledge. SLR appreciates the opportunity to provide our comments to OPR on its responsibility to update Appendix G. Thank you for protecting our invaluable California Native American tribal cultural resources.

Sincerely,



Merri Lopez-Keifer
Chief Legal Counsel
San Luis Rey Band of Mission Indians

cc: Mel Vernon, SLR Captain
Carmen Mojado, SLR Secretary of Government Relations

Enclosures: Attachment A & B

ATTACHMENT A

Alternative 3

TRIBAL CULTURAL RESOURCES.

Information submitted through consultation with a California Native American Tribe ~~that has requested such consultation may~~ is to be considered by ~~assist~~ a lead agency in determining what type of environmental document should be undertaken, identifying tribal cultural resources, 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,~~ However, regardless of whether tribal consultation occurs or is completed, substantial adverse changes to a tribal cultural resource are to be identified, assessed and mitigated. Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource.

1) 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:

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?

~~c) 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?~~

c) After considering the significance of the resource to a California Native American Tribe and applying the criteria in Public Resources Code §5024.1(c), a resource is determined by the lead agency, in its discretion and supported by substantial evidence, to be a tribal cultural resource?

2) Would the Project:

a) Potentially disturb any human remains, including those interred outside of dedicated cemeteries (see Cal. Public Resources Code, Ch. 1.75, §5097.98 and Health and Safety Code §7050.5(b))?

b) Potentially disturb any resource or place defined in Public Resources Code §5097.9 et seq (Native American Historical, Cultural and Sacred Sites)?

ATTACHMENT B

V. CULTURAL RESOURCES

Would the project:

a) Cause a substantial adverse change to Tribal Cultural Resources- a site, feature, place, cultural landscape, sacred place, or object with cultural value to a California Native American Tribe (Public Resources Code § 21074), including subsurface Tribal Cultural Resources, that is:
   (1) listed or determined eligible for listing on the California register of historical resources,
   (2) listed on a local historical register, or
   (3) after considering the significance of the resource to a California Native American Tribe and applying the criteria in Public Resources Code §5024.1(c), is deemed by the lead agency to be a Tribal Cultural Resource?
b) Cause a substantial adverse change in the significance of an archaeological resources pursuant to § 15064.5?
c) Cause a substantial adverse change in the significance of a historical resource as defined in § 15064.5?
d) Potentially disturb any human remains, including those interred outside of formal dedicated cemeteries (see Public Resources Code, Ch. 1.75, § 5097.98, and Health and Safety Code § 7050.5(b))?