

How To Be an Effective Partner during CEQA Tribal Consultation

Presented by

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Training Overview

This training is designed to assist Lead Agencies in their understanding of the nature of Tribal Cultural Resources (TCRs), how to effectively avoid or mitigate impacts to TCRs, and how to partner with Tribes during consultation required by the Assembly Bill 52 amendments to the California Environmental Quality Act (CEQA).

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History of CEQA and Tribes

- CEQA, which was passed in 1970, requires Lead Agencies to identify impacts on the environment that would result from the implementation of a proposed Project within their jurisdiction.
- In 2014, Assembly Bill 52 was approved as an amendment to CEQA, which henceforth required efforts be made to consult with affiliated Tribal communities regarding potential impacts to a new category of resources known as Tribal Cultural Resources (TCR).
- Prior to this amendment, the only cultural resources considered under CEQA were archaeological resources and Tribes were not a part of the CEQA process during the prior 44 years of application.

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Goals of AB52

- To include California Native American Tribes' knowledge and concerns in the planning process
 - To recognize Tribes as Governments, including both non-Federally-recognized Tribes and Federally-recognized Tribes
 - To require consultation with Tribes at earliest point in planning
 - To establish the "Tribal Cultural Resources" category in CEQA
 - To require appropriate levels of effort during archaeological investigations, informed by Tribal consultation
- To redesign projects to avoid cultural resources
- Mitigating impacts in culturally appropriate ways when avoidance is truly infeasible

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A New Reality

- While the amendments were a very positive thing for Tribes and their resources, both Lead Agencies and Tribes found themselves in unfamiliar territory
 - The language in AB52 that outlines the consultation process was (and is) vague and generically relies on a good faith effort
 - Lead Agencies did not have much experience working with Tribes, Federally-recognized Tribes were more experienced working with Federal Agencies, and non-Federally recognized Tribes did not have much experience in general
 - Lead Agencies did not have awareness of Tribal Cultural Resources and Tribes were not used to having the ability to speak to cultural resources beyond archaeological resources
 - All parties were suddenly subjected to a much larger workload but had few resources (i.e. staff) to put toward it

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Early Days of Consultation

- As a result of the increased workload, which few people were experienced to handle, the early days of consultation were rocky!
- Some Tribes struggled meeting the requirement to send the initial letter to the agency to consult on Projects within their jurisdiction
 - The Native American Heritage Commission had a hard time compiling a complete list of agencies in such a short time
- Some Tribes struggled to respond to the sudden influx of notices
 - San Manuel created an entire position just for CEQA consultation
- Some agencies simply did not consult with Tribes
 - Initially, some agencies were not prepared to implement this new process
 - Lack of notices for projects in developed areas where they felt there was nothing left to preserve (confusing TCRs with archaeological resources)
 - Lack of response from Tribes was mistaken for lack of interest
- Some agencies sought to streamline process and mitigation/conditions, but many attempts have not been successful
 - Not all Tribes are the same! They value different things, their protocols around treatment and preservation differ, and they are independent from one another – they are sovereign!

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Tribes and Sovereignty

- Tribes are sovereign nations made up of cultural groups that are the indigenous people of what is now known as the USA.
 - There are hundreds of different culture groups, all with distinct customs and traditions, many of which are tied to the preservation of, and access to, their ancestral lands.
- Tribes have a long history of, and inherit right to, self-governance.
 - For some Tribes, the right to self-govern is recognized by the Federal government. In California, there are 110 Federally-recognized Tribes. Other Tribes do not have Federal recognition, but non-Federally recognized Tribes in California (over 80) are included in State processes just like Federally-recognized Tribes, including CEQA consultation.
- Each Tribal Government has it's own unique structure and process. Consultation is handled by people from all different backgrounds and reporting processes vary.
 - A Tribe may have archaeologists or legal staff who report to a culture board or committee, or even Tribal leadership. Consultation could even be handled directly by a Tribal leader.
 - At San Manuel, we have archaeologists on staff who handle consultation, though all staff efforts are guided by a group of cultural advisors within the community.
- Each Tribe has different ways of defining and delineating Tribal Cultural Resources and different protocols for how they are to be treated or preserved. Even within a Tribe, these definitions and protocols can even be dependent on the location and/or nature of a Project. 7

You Consultation May Vary

Due to the uniqueness of projects, TCRs, and Tribes, not all consultations under CEQA are the same

- Project timeline is impacted by number of Tribes consulting
- The location of the project area determines level of cultural sensitivity
- The type of project can determine the nature and level of a Tribe's concerns
- The type of TCR within a project footprint and needed avoidance/mitigation can impact costs and timeline

However, if all parties act in good faith, then the process is efficient and effective at avoiding or mitigating impacts to TCRs

Roles and Responsibilities

Lead Agency:

- Initiator – submits initial notice
- Communicator – stays engaged with consulting Tribes
- Facilitator – works with all consulting Tribes, applicant, etc. to ensure an agreeable solution is found. Ensures all parties act in good faith.
- Enforcer – makes final decisions, including final determination of TCRs, and enforces adopted mitigation/conditions

Tribal Government:

- Requestor – responds to initial notice
- Consulting Party – requests and reviews project information
- Subject Matter Expert – identifies present and potential TCRs, identifies concerns about additional investigations needed to ascertain the presence/absence of unknown TCRs, presents culturally-appropriate treatment of TCRs (i.e. clever mitigation), etc.

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TCRs: What Are They?

Tribal Cultural Resources (TCRs) are defined as “sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American Tribe” ... so what does this mean?

- Tangible: archaeological sites, features, and artifacts; ancestors and associated grave goods; cultural plants and gathering areas; water sources; geographical features/landmarks; etc.
- Intangible: Sacred landscapes tied to stories, historical events, uses, etc.; places of power; places of Creation; traditional lifeways (language, ceremony, weaving, etc.)

Agency partners sometimes struggle to understand TCRs that are intangible, either completely or in part, and it can lead to poor decisions by lead agencies when it comes to final determinations of TCRs

- Tribal Cultural Resources are not easy to understand because those who are not of the community are not meant to fully understand them.
- Please trust and believe your Tribal partners when they identify a TCR for you during the planning process – they are the only subject matter experts who can!

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TCRs: How Do We Protect Them?

Protection of tangible TCRs requires:

- Tribes to identify the exact area (depth, width, height) that needs to be avoided, as well as what “avoidance” means – in other words, from a cultural standpoint, what allowances can be made (i.e. minor grading for a parking lot, non-destructive green space, etc.)?
- An avoidance footprint, combined with allowances/non-allowances, that is something that can feasibly be avoided without jeopardizing the applicant’s ability to complete a Project
- Lead Agencies who are willing to require applicants redesign Projects to avoid TCRs when it is feasible to do so

Protection of intangible TCRs

Protecting intangible TCRs is less straightforward – this is an especially important conversation to have with your Tribal partner!

- Tribes still must identify areas of concern, allowances/non-allowances, etc., but avoidance solutions may still require some creativity. Worst case scenario, you may have a Project that will impact a TCR due to the nature of the TCR; there is no feasible way to avoid or mitigate impacts, and therefore requires an EIR.
- This is highly resource and project-specific - work closely with your Tribal partner!

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Tribal Monitoring

- Oftentimes during consultation, agencies will encourage Tribes to monitor Project construction. Tribal Monitoring is appropriate in certain circumstances, but it is important to note that:
 - It cannot replace a proper cultural resources identification effort (i.e. archaeological investigations, Tribal consultation, etc.)
 - It should never be a substitute for actions that would proactively preserve and protect resources
- In short, Tribal Monitoring does not proactively identify tangible resources during planning and it does not equip any party to avoid resources, as they are disturbed during construction and must be removed

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Mitigation/COAs

- Mitigation/COAs must address inadvertent discoveries
 - MMs must require the drafting of a treatment plan to deal with inadvertent discoveries that is reflective of the rest of mitigation
 - These materials should be reburied on site or, if any consulting Tribe disagrees with reburial, stored in a curation facility meeting CA guidelines
 - nothing should be taken by one of many consulting Tribes without agreement from all consulting Tribes
 - Tribes that decline to monitor, but who are concerned about inadvertent discoveries, must be included in discovery conversations and decisions
- Mitigation/COAs cannot violate CA Health and Safety Code
 - Do not include measures naming Most Likely Descendent for inadvertent discoveries of human remains – the Native American Heritage Commission decides this
 - Do not include measures outlining treatment/disposition of human remains beyond CA Health and Safety Code provisions – the Most Likely Descendent decides this

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What Can You Do?

- Before further consultation:
 - Create an internal process that includes template forms, project trackers, timelines for consultation, etc.
 - One FAQ is what a permissible timeline is to move on when you have not been able to reach a Tribal partner – it's up to the Agency to decide!
 - Create this process, especially the section on timelines, in consultation with you Tribal partners. Transparency is important!
 - Get to know your Tribal partners
 - every community is different and understanding their values will help you during consultation
- During consultation:
 - Work closely with your Tribal partners throughout the process and trust their input regarding the presence and treatment of TCRs
 - Take your role in the preservation of their history and culture seriously – TCRs may be just one item on a checklist, but to Tribes, they are everything
 - Remember that the lead agency is responsible for holding the applicant to task

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Questions and Answers



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THANKS YOU FOR ATTENDING!

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