



YUROK TRIBE

Heritage Preservation Office

HC 67, Box 196, Highway 96 • Hoopa, CA 95546

Phone: (530) 625-4130 • Fax: (530) 625-4841

May 30, 2018

California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105-5200

RE: California Coastal Commission's Draft Tribal Consultation Policy

Ayekwee,

Wah-klew for the opportunity to comment on the most recent version of the California Coastal Commission Draft Tribal Consultation Policy. The Yurok People live along the lower 40 miles of the Klamath River as well as 60 miles of the California Coast as we have since time Immemorial. Coastal resources are a corner stone of Yurok Culture and Spirituality. Our commercial and subsistence use of coastal resources is well documented in both the historical record and the oral history of our people. The Yurok Tribe understands deeply the need for a healthy and vibrant coastal ecosystem to not only the health of the world around us but to the health of our people as well. We are encouraged by the outreach the California Coast Commission has made during the review process for this draft consultation policy. We share in the idea that through better communication between the Tribes and the Commission we can come to joint decisions that benefit all Native Coastal Nations and Californians alike.

Upon thorough review of the draft consultation policy the Yurok Tribe and the Yurok Tribal Heritage Preservation Office support the inclusion of the redlined edits in the attached draft policy. Although, there were many sections that were improved upon we now feel that the additions add to the intent of the document as a whole. The additions to the draft policy will help to strengthen the relationships between Tribes and the Commission, while encouraging meaningful consultation and collaboration. As the Yurok Tribe has managed our coastal resources since time Immemorial, we look forward to being able to share our valuable insight to the commission for future management goals, objectives, and protections measures.

Please feel free to contact us at any time for further discussion.

Wah-klew,

A handwritten signature in black ink, appearing to read 'Frankie Myers', with a long horizontal stroke extending to the right.

Frankie Myers
Tribal Heritage Preservation Officer.

SAN LUIS REY BAND OF MISSION INDIANS

*1889 Sunset Drive • Vista, California 92081
760-724-8505 • FAX 760-724-2172
www.slrmissionindians.org*

May 9, 2018

Mark Delaplaine
Manager
Energy, Ocean Resources
& Federal Consistency Division
California Coastal Commission
45 Fremont Street, Ste. 2000
San Francisco, CA 94105-2219

VIA ELECTRONIC MAIL
Mark.Delaplaine@coastal.ca.gov

**RE: COMMENTS ON THE CALIFORNIA COASTAL COMMISSION'S SECOND
DRAFT TRIBAL CONSULTATION POLICY**

Dear Mr. Delaplaine:

The San Luis Rey Band of Mission Indians (“SLR” or “Tribe”), a Luiseño California Native American tribe traditionally and culturally affiliated with California’s southern coastline from Camp Pendleton through northern San Diego County, has received and reviewed the California Coastal Commission’s (“CCC’s”) Second Draft Tribal Consultation Policy (“Consultation Policy”). The Tribe acknowledges the CCC’s efforts in developing a tribal consultation policy pursuant to both Governor Edmund G. Brown Jr.’s Executive Order B-10-11 and Assembly Bill 52 (Gatto, 2014) (“AB 52”), as a California Lead Agency under the California Environmental Quality Act (“CEQA”). SLR further acknowledges the CCC’s expressed commitment to recognizing California’s brutal history towards its First People and its intention in rectifying the absence the CCC’s invited involvement of California Native Americans and tribal governments in its mission of protecting and preserving California Native American ancestral coastal lands. And lastly, SLR wishes to acknowledge the CCC in its recognition that California Native American tribes who are traditionally and culturally affiliated with the California coast possess unique and valuable traditional knowledge and practices for conserving and managing coastal resources in a manner which is consistent with the spirit and intent of the California Coastal Act (“Coastal Act”).

Comments on Section I: Background

SLR recognizes and appreciates the CCC’s acknowledgement of California’s tragic and violent history suffered by the First People of California– from the early colonization of the Spanish, the occupation and forced servitude of the Mexican government, the atrocities of the California Gold Rush, the massacres suffered under state and federally –funded genocide, and California’s *Act for the*

Government and Protection of Indians in 1850: California Native Americans lost their lives, their culture, their language, the security of their communities, the safety of their persons and their families, their lands, and their livelihoods¹. This history has been missing from not only public school textbooks, but also in how state government agencies have treated the traditional and cultural knowledge of its California native people and tribal governments upon generation, upon generation, upon generation.

In 2011, Governor Edmund G. Brown Jr. issued Executive Order B-10-11. The Executive Order required that *all* state agencies and departments under the Executive Branch were to develop Native American consultation policies and, for the first time, would be required to conduct outreach activities to solicit meaningful input from tribal governments regarding potential legislation, regulations, rules, and policy matters that may impact tribal governments. An opportunity to consult with the agencies and departments under the Executive Branch provided an opportunity for tribes to discuss matters with agencies such as the CCC, Caltrans, the California Natural Resources Agency, and the Department of Food and Agriculture, agencies that had not been previously incorporated into SB 18. Executive Order B-10-11 also declared that the, “State and the Tribes are better able to adopt and implement mutually-beneficial policies when they cooperate and engage in meaningful consultation; and ... the State is committed to strengthening and sustaining effective government –to-government relationships between the State and Tribes by identifying areas of mutual concern and working to develop partnerships and consensus.” The Executive Order further ordered that, “every state agency and department subject to [the Governor’s] executive control shall encourage communication and consultation with California Indian Tribes. Agencies and departments shall permit elected officials and other representatives of tribal governments to provide meaningful input into the development of legislation, regulations, rules, and policies on matters that may affect tribal communities.”

Although *Section I. Background* discusses SB 18, Executive Order B-10-11 and AB 52 and addresses the violent and genocidal history of California, SLR would recommend to the CCC to review what it has drafted and revise it to provide a more substantive explanation as to why SB 18, the Executive Order and AB 52 came about, the CCC’s role of in the past in its outreach of coastal California Native American tribes and people and its potential negative impact to the protection of tribal cultural resources, and its intent and plan in moving forward in developing respectful relations and partnerships with coastal California Native American tribes.

Furthermore, there were two specific portions of this section that should be modified. Contained in the first sentence of the first paragraph of this section, the phrase “state-recognized” is used. This is a term of art used in other state governments, but not in California. There currently is no policy or

¹ Governor Brown’s Proclamation for Native American Day (2016), “The contact between these first Californians and successive waves of newcomers over the three succeeding centuries was marked by the utter devastation of the native peoples, their families and entire way of life. The colonial regimes of Spain and Mexico through disease and enforced servitude cut the indigenous population by more than half. Then the Gold Rush came, and with it, a wave of new diseases and wanton violence which reduced the Native population again, this time by more than 80 percent. The newborn State of California actually paid for the killing of Native peoples and tolerated or encouraged policies of warfare, slavery and relocation that left no tribe intact.”

legislative procedure for a California Native American tribe to be “state-recognized.” Instead, SLR recommends that this phrase be deleted and the CCC either (1) remove the phrase “federally- and state-recognized” and leave in place the term of art “California Native American Tribes,” or (2) remove the phrase “state-recognized” and put in its place “non-federally recognized.” In utilizing the term of art “California Native American Tribe” only, without raising distinction between two types of tribal governments in California, the CCC would be in conformity with existing California statutes applying consultation requirements to both types of tribes². As the CCC acknowledges, the history of California is particularly brutal, especially along the California coastal communities, and because of its early laws³, California acknowledges and consults with both non-federally and federally recognized tribal governments without distinction in terminology when dealing with the protection and preservation of tribal cultural resources. The final comment SLR has to this particular section, is the Tribe’s support of the CCC in its recognition that traditional ecological knowledge is consistent and in-line with the mission of the CCC and the Coastal Act itself. However, SLR directs the CCC’s attention to paragraph 8 of this section. It is imperative that the CCC recognize the difference between archaeological resources and tribal cultural resources, and that they must be considered as separate resources, as they are treated as different resources in CEQA, and therefore, SLR respectfully requests that “tribal cultural resources” be inserted into the first sentence prior to the word “archaeological.”

Comments on Section II. Definitions

SLR has reviewed *Section II. Definitions*, and the Tribe’s overriding concern regarding this section involves the definition of “Cultural Resources.” As had been previously discussed, in CEQA cultural resources are categorized as historical, archaeological and paleontological resources. The definition provided by the Consultation Policy for “Cultural Resources,” however, mirrors that of the definition provided in CEQA for “Tribal Cultural Resources.”⁴ Consistency of understanding and application of such important terms, such as tribal cultural resource in a California government agency’s tribal consultation policy, between two government entities is paramount to a successful relationship. Therefore, SLR requests and recommends that the Consultation Policy be modified, in its entirety, to replace the phrase “cultural resource(s)” when referring to resources of California Native American interest, with the phrase “tribal cultural resource.”

SLR concurs with the removal of the definition for “Indian Country or Tribal Lands,” on the basis of relevancy as it relates to the successful implementation of the Coastal Act and/or the CCC’s jurisdiction and authority over reservation lands that are held in trust by the federal government for the benefit of a federally-recognized tribal government. For those same reasons, SLR does not find it

² SB 18 (Burton, 2004) was the first time the term, “California Native American tribe” was used and defined in California law. According to the *Governor’s Office of Planning and Research Supplemental Guidelines to SB 18 (2005)*, “All California Native American tribes, whether officially recognized by the federal government or not, represent distinct and independent governmental entities with specific cultural beliefs and traditions and unique connections to areas of California that are their ancestral homelands. See also AB 52 (Gatto, 2014).

³ *Early California Laws and Policies Related to California Indians*, Kimberly Johnston-Dodds, September 2002

⁴ California Public Resources Code Section 21704.

relevant for the CCC to include a definition of “Federal Recognition” or “Tribal Sovereignty” if there is not a similar definition being provided for “Non-Federal Recognition” or “Cultural Sovereignty.” In regards to the removing the definition for federal recognition, SLR opines that the main term of art, “California Native American Tribe” has been sufficiently defined, and therefore it is not relevant to include an additional definition of federal recognition. In regards to defining tribal sovereignty, the definition should not be inclusive of only federally recognized tribes, but in order to be relevant to the consultation requirements of Executive Order B-10-11 and AB 52, it should acknowledge that non-federally recognized tribes have “cultural sovereignty⁵.” Meaning that when it comes to the protection and preservation of tribal cultural resources and ancestral burials, non-federally recognized tribes should be treated as sovereigns of their cultural beliefs and their tribal cultural resources, just as SB 18 and AB 52 are applied. Therefore, when it comes to the protection and preservation of tribal cultural resources and ancestral burials and burial grounds, all of which may be located along the California coast, all California Native American tribes have sovereignty.

In regards to SLR’s recommendations for language modifications to this section, SLR directs the CCC’s attention to subsection 5(a)(2). In this particular portion of definition for (tribal) cultural resources, SLR recommends that wherever “lead agency” appears, that Commission and/or CCC be put in its place. This comment would also necessarily include the reference to “lead agency” within footnote 5⁶. In addition, subsection 9 also appears to need to be revised to state, “Traditional Cultural Property,” and not Traditional Cultural Resource.

Comments on Section III. Guiding Principles

The CCC’s guiding principles clearly state the CCC’s intention and desire to establish and maintain respectful, meaningful and effective relationships and means of communication with California Native American tribes. And although the CCC has provided eleven (11) guiding principles to which it intends to frame the implementation of the Consultation Policy, the Tribe respectfully recommends the adoption of one additional guiding principle. SLR requests that the CCC adopt the following additional guiding principle:

12. To treat the resource(s) with culturally appropriate dignity by taking into account the tribal cultural values and meaning of the resource to the consulting California Native American tribe⁷.

No California Native American tribal government is exactly the same: how the government is structured, determination of citizenship or membership, or their traditional cultural values, for example. Each tribe has their own individual history, each have had different experiences on the treatment and

⁵ “California State Law provides the means for both federally-recognized and non-federally recognized tribes to protect their respective tribal cultural resources.” Native American Heritage Commission, *Tribal Consultation Policy* (2015).

⁶ In footnote 4 (page 4), a spelling error appears to be present with the word “interactive.”

⁷ For additional reference to this proposed language, please see Public Resources Code Section 21084.3(b)(2) and (b)(3).

development of their traditional lands, and each have their own desire to educate the public of their ancestors' occupation of the land prior to European, Mexican and American conquest. Therefore, the CCC should take into account the cultural values and meaning of the tribal cultural resource or traditional cultural property of the consulting California Native American tribe and treat those resources with culturally appropriate dignity.

Comments on Section V. Commission Staff Training

This section dealt mainly with the Tribal Liaison's responsibilities in educating and training CCC staff for a successful implementation of the Consultation Policy. SLR commends the CCC in its foresight in providing for such an important element in its Consultation Policy. SLR also concurs with the CCC on including in the second draft of the Consultation Policy subsection 4 – educating staff about California history and its native population. SLR respectfully requests that subsection 4 be elevated to subsection 1 in prioritizing the efforts of the Tribal Liaison. In regards to subsection 1, SLR respectfully requests that it be modified to read:

2. Introduction to California tribal sovereignty, traditional tribal lands and territories.

It is essential for those who will be interacting and/or consulting with California Native American tribal governments, on behalf of the CCC, to be cognizant of the intricacies surrounding California tribal sovereignty, and the fundamental foundations of where tribes once lived prior to colonialism and/or the genocide of California native people versus where tribal people and governments may live today. This type of introduction to the complexities of communicating with California Native American tribes for CCC staff would be invaluable and best assist the CCC in implementing a successful and effective tribal consultation policy.

In addition, SLR strongly recommends that in regards to current subsection 3 – *implementation of and compliance with this Consultation Policy* – that an additional subsection should be created that addresses how staff should collaborate with consulting California Native American tribes on developing Confidentiality Procedures and Protocols. It is vital, as the California legislature learned after enacting SB 18, that in order for California Native Americans and tribal governments to share sensitive information outside of their tribe and with another government entity, a commitment to keeping all information shared by the tribe must be subject to strict confidentiality. And although the CCC's intent to keep all communications shared during consultation confidential, as provided in Guiding Principle number 8, those specific statutes that were listed in the Consultation Policy have limited statutory protections and will not cover all potential information shared with the CCC, such as ceremonial, spiritual, and cultural practices and the meanings behind them to the tribe. In order to have a successful consultation policy, SLR and other California Native American tribes will need expressed assurances

that a Confidentiality Procedures and Protocol will be developed with tribal participation and consultation.

Comments on Section VI. Tribal Communication

In *Section VI.- Tribal Communication* several subsections are presented: Purpose, Procedures, Tribal Contact List, Contacting Tribes for Commission Activities, Written Notice to Tribes and Changes to Proposed Actions. The Tribe supports the CCC in its expressed purpose of this section. However, SLR respectfully requests that an additional mechanism for successful and effective communication be included: a commitment to maintain confidential information shared through tribal consultation. Establishing a confidential means of communication and maintaining the confidentiality of information shared by the tribal government is key to a successful consultation policy in SLR's experience. Therefore, SLR respectfully requests that a commitment to maintain confidential information shared through tribal consultation be included as an additional mechanism and be incorporated into subsection 1 – *Purpose*.

In subsection 4 – *Contacting Tribes for Commission Activities* – SLR requests that the CCC provide clarification on how it would like California Native American tribes to notice the CCC that they would like to be consulted on CCC activities within their tribe's traditional territories⁸. For instance, is the CCC proposing to contact the tribal governments, like cities and counties are required to under SB 18, or is the CCC proposing that the tribal governments provide one (1) "one-time" notice to the CCC stating that they would like to consult with the CCC on all CCC activities within their traditional territory, similar to what tribal governments are required to do under AB 52? This subsection and the following section, Section VII, unfortunately do not present a clear expectation by the CCC on how the tribes will be able to consult with the CCC tribal liaison and/or staff within the time limitations for each of the potential CCC permit and/or review activities. SLR recommends that the CCC adopt a similar notice policy as provided for in AB 52, specifically that the tribe provide the CCC with a one-time notice, informs the CCC on whom to contact and how, the CCC provides notices and/or requests to consult to on the particular CCC activity with the appropriate response time-allotment (depending on the particular CCC activity) and detail of activity, and if the tribal government responds in accordance with the terms of the notice (depending on the particular type of CCC activity), then the consultation shall occur. It is the belief of SLR that this recommendation appears to reconcile the intents and processes outlined in subsection 4 most effectively.

⁸ SLR acknowledges that Executive Order B-10-11 does not prescribe the mechanism of how to best "notice" tribes on consulting with tribal governments. In practice, however, most agencies under the Executive Branch have provided written notice to California Native American tribes of policies and/or projects and providing such notices to all necessary tribes via the NAHC Contact List. The expressed response times vary by agency and type of project to be consulted on, in SLR's experience.

In regards to SLR’s recommendations for language modifications to this section, SLR directs the CCC’s attention to subsection 4(a)(1) and footnote 8 on page 9. As a point of clarification, SB 18 applies to not only general plans, but also specific plans and amendments thereto to both. Moreover, SB 18 consultations, like AB 52 consultations, are confidential communications between the city, county, lead agency and the consulting California Native American tribe. The tribe is the holder of the confidential information and any information shared during those consultations cannot and should not be shared with any other federal, state, or local agency without the express permission of the consulting tribe. Therefore, SLR concurs that the CCC should ascertain whether tribal consultation was conducted during an SB 18 or AB 52 review of the project; however, the Tribe must also stress that (1) under no circumstances should the CCC be requesting another agency to share confidential information provided to it by a California Native American tribe without the expressed permission of the tribal government, and (2) that the CCC not assume that if a tribal government did not consult under SB 18 or AB 52, that it does not wish to consult with the CCC regarding the proposed activity.

In subsection 5 – *Written Notice to Tribes* – the CCC provides how consultation notices will be given to the California Native American tribes. In subsection 5(e), the Consultation Policy states that the written notice will, among other things, “[o]ffer to consult with the Tribe regarding the proposed Action, its anticipated impacts on Tribal Interests, and potential ways to minimize or mitigate these impacts, before the Commission takes an Action.” SLR supports this subsection of the Consultation Policy, but respectfully recommends that additional language be incorporated into the statement acknowledging the CCC’s commitment considering the tribal cultural values and meaning of the resource of the consulting California Native American tribe, as recommended in SLR’s comments to *Section III – Guiding Principles*. Therefore, SLR respectfully requests that the following language replace the current language of subsection 5(e):

Offer to consult with the Tribe regarding the proposed Action, its anticipated impacts on Tribal Interests, and potential ways to minimize or mitigate these impacts while taking into account the tribal cultural values and meaning of the resource to the consulting California Native American tribe, before the Commission takes an Action.

And lastly, in regards to subsection 6 – *Changes to Proposed Activities* – SLR acknowledges the reasonableness in the CCC’s desire to only contact the tribe if there are substantially changed circumstances; however, it is not reasonable to use non-binding language in requiring notice to be given. SLR therefore requests that the word “should” – which is found in both sentences of this subsection – be changed to the word “shall.” Otherwise, the Consultation Policy may become the cause of a trust violation between the California Native American tribe and the CCC, a result neither governmental entity desires.

Comments on Section VII. Tribal Consultation

Similar to the last section, *Section VII – Tribal Consultation* – is presented in several subsections: Initiation of Consultation; Preparing for a Consultation; Time, Place, and Manner of Consultation; Commission Staff Representation at Consultations; Substance of Consultations; Informal Staff-to-Staff Meetings; Joint Consultation; Limitations of the Consultation Policy and Reporting and Record-keeping. SLR concurs with a majority of this subsection and respects the CCC’s clear directive on how it would like for tribal consultations to be initiated and completed. SLR’s overriding concern with this subsection of the Consultation Policy is the same overriding concern we expressed in *Section VI – Tribal Communication*. Namely, what does the CCC envision to occur for its consultation notice system to be successful? Will the tribal governments need to provide the CCC with a one-time request to be noticed and consulted about CCC activities, similar to AB 52, or will the CCC be providing the tribal governments on the NAHC Contact List with a notice and request to consult similar to that required in SB 18? This is a fundamental question that must be answered with as much clarity as possible. The expectation must be expressed without ambiguity and presented with clear and specific language. Once this question is answered, in the manner described above, then the subsections of this Section and of Section VI should be reviewed and modified, if necessary, to provide consistency in intent and application and void of any potential conflicts or inconsistencies.

In regards to subsection 9 – *Reporting and Record-keeping*, SLR’s concerns lay in the CCC’s ability to keep not only confidential records to the satisfaction of the California Native American tribes it consults with, but also accurate records of consultation. To resolve these concerns, SLR recommends that in addition to the CCC staff keeping records of all tribal consultations, it also provide those records to the tribes for concurrence in the accuracy of the meeting notes and to allow for modification of the notes if deemed necessary and appropriate by the tribe. In addition, SLR requests that an additional phrase be added to the end of subsection 9(a) expressly stating that “Commission staff shall keep records of all consultations with Tribes *and those records shall be kept confidential.*”

Comments on Section VIII. Dispute Resolution Process

Given the CCC’s limitations under the Brown Act, SLR understands why the CCC would prefer the protocol for dispute resolution under subsection 3. Subsection 3 states that if the consulting tribe does not believe that CCC staff (first the district or unit staff, then the Tribal Liaison, and finally the Executive Director) has satisfactorily considered their concerns during consultation, then the tribe can take their concerns directly the Commission itself during a public hearing. SLR does not find this to be a reasonable solution for all circumstances. If the tribe’s concerns are merely procedural, then yes, it may be a reasonable end-solution for dispute resolution. If, however, it is dealing with a tribe’s cultural values and/or oral history to a particular location and the staff’s unwillingness to apply culturally appropriate mitigation measures, the CCC would be requiring the tribe’s to share confidential information to the Commission in a public forum. Such requirement appears to be in direct contradiction

and violation of the intent of tribal consultation under Executive Order B-10-11 and AB 52 to their core. Therefore, in those circumstances where in order to resolve a dispute a California Native American tribe may have with CCC staff and the tribe may need to share confidential information, the Commission will have to provide a confidential means of hearing the tribe's concerns, such as an *ex parte* session, while at the same time complying with the Brown Act. SLR respectfully requests that this additional procedure be explored and included within this particular subsection of the Consultation Policy.

In conclusion, the San Luis Rey Band of Mission Indians appreciates the opportunity provided by the California Coastal Commission to provide the Tribe's comments and recommendations for modifications on the Second Draft of the Tribal Consultation. We look forward to developing a positive and mutually respectful relationship with the California Coastal Commission. And lastly, we thank the California Coastal Commission in its commitment to protect and preserve our sacred tribal cultural resources.

Respectfully,

A handwritten signature in black ink, appearing to read "Merri Lopez-Keifer". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

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