

CALIFORNIA COASTAL COMMISSION

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July 26, 2018

To: Coastal Commissioners, Native American Tribal Representatives, and Interested Parties

From: John Ainsworth, Executive Director
Alison Dettmer, Deputy Director
Mark Delaplaine, Manager, Energy, Ocean Resources, and Federal Consistency Division

Subject: **Coastal Commission Staff's Final (3rd) Draft Tribal Consultation Policy, Motion and Resolution to Adopt the Policy, and Supplemental Comments and Responses**

I. Background

On September 19, 2011, Governor Edmund G. Brown, Jr. issued Executive Order B-10-11, which reaffirmed his Administration's commitment to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications. The Governor subsequently directed his executive agencies to work towards the development of tribal consultation policies promoting regular and meaningful consultation and collaboration, as well as strengthen the government-to-government relationships between the State and California native tribes that interact with it.

On April 11, 2018, the Coastal Commission held an initial (southern California) public hearing on the Commission's Draft Tribal Consultation Policy (originally dated August 11, 2017). On May 9, 2018, the Commission held a second (northern California) public hearing. Based on comments previously received and Commission input, the Commission staff has twice revised the Draft Policy; the third Draft (**Attachment 1**) is dated July 26, 2018, and is scheduled for consideration and possible adoption at the Commission's August 8, 2018, meeting in Redondo Beach. After the May 9, 2018, Commission meeting, the Commission staff received two additional comment letters, from the Yurok Tribe (dated May 30, 2018) and The San Luis Rey Band of Mission Indians (dated May 9, 2018). This memo responds to those comment letters. The July 26, 2018, Final (3rd) Draft, being published for the August 8, 2018, Commission meeting, will reflect the changes discussed below in the responses to these comments.

Similar to the second Draft, this third Draft is being shown in “tracked changes” mode (i.e., with new language underlined, and deleted language shown in ~~strikeout~~ text). (For this third Draft, only the changes made after the second draft was published are shown in tracked changes mode.)

II. Motion and Resolution

Motion

I move that the Commission adopt the Tribal Consultation Policy pursuant to the staff recommendation.

Staff recommends a YES vote on the foregoing motion. Passage of this motion will result in the Commission’s adoption of the Tribal Consultation Policy.

Resolution

The Commission hereby adopts the Tribal Consultation Policy.

III. Comments and Responses

Previously received, and responded to, drafts, written comments, and responses.

The initial and second drafts, written comments received, and previous staff responses to comments can be found in the reports posted for the April 11, 2018, and May 9, 2018, meetings, and are included in the documents shown at this link:

<https://www.coastal.ca.gov/env-justice/tribal-consultation/>.

Summary of Recent (i.e., post-May 9, 2018) Comments and Responses (These comment letters are attached (**Attachment 2**))

A. Yurok Tribe, Frankie Myers, Tribal Heritage Preservation Officer, letter dated May 30, 2018.

Comment

The Yurok Tribe was generally supportive of the Commission’s Draft Policy and the changes made to date in the revised Drafts.

Response

No response needed.

B. San Luis Rey Band of Mission Indians, Merri Lopez-Keifer, Chief Legal Counsel, letter dated May 9, 2018.

Comment 1

The San Luis Rey Band recommends adding three discussions to the Background section:

- (1) A more substantive explanation/history as to why SB18, the Governor’s Executive Order B-10-11, and AB 52, were promulgated.
- (2) A discussion of the Commission’s past role in outreach (including discussing what lack of protection of coastal resources may have occurred as a result of the Commission not having a Tribal Consultation Policy); and
- (3) A declaration of intent and a plan to move forward in developing respectful relationships/partnerships with Tribes.

Response 1

We do not agree that additional discussion in the document is needed to redress past grievances and policies. While we agree they occurred, they have been sufficiently referenced in the Draft Policies published to date, and are, in fact, the reason the Commission intends to adopt the Tribal Consultation Policy. We are not, therefore, proposing additional changes at this time.

Comment 2

The San Luis Rey Band recommends avoidance of the use of the term “State recognized,” noting that there is no formal process in California by which the state has recognized Tribes, and recommends using the terms “federally-recognized” and “non-federally recognized” to distinguish the two categories.

Response 2

We agree that there is no official State process in California for formally recognizing Tribes. As recommended by the commenter, the phrase “State-recognized” in the first paragraph of the Background is being replaced with “non-federally recognized.”

Comment 3

The San Luis Rey Band requests an explanation of the distinction between “archaeological” and “tribal cultural” resources and requests adding the term “tribal cultural resources” to the list of Coastal Act resources in the third to last paragraph of the Background section of the document.

Response 3

Unlike cities and counties, the Coastal Commission does not have general police powers that allow it to regulate and address any issue affecting the public welfare. Rather, its authority is defined by the Coastal Act, which specifies the types of activities that the agency may regulate and the types of coastal resources that the agency is required to

protect. These are found in Chapter 3 of the Coastal Act (Public Resources Code §§30200 – 30265.5). Under these provisions, the Commission has the authority and duty to regulate development in a manner that protects and/or mitigates impacts to specific resources, including archaeological and paleontological resources (§30244), natural landforms (§§ 30235, 30251, 30253), water quality and biological resources (§§30230, 30231, 30233, 30240), and public access (§§ 30210-30214). When acting on coastal development permits, the Commission may also consider environmental justice, or the equitable distribution of environmental benefits throughout the state (§ 30604(h)).

Although AB 52 and the California Environmental Quality Act (“CEQA”) require lead agencies to analyze and address impacts to Tribal Cultural Resources when approving projects, CEQA does not expand the Commission’s authority by allowing it to mitigate impacts to resources that are not addressed in the Coastal Act. Rather, when imposing measures to mitigate a project’s significant impacts, all public agencies may exercise only those powers provided by authority independent of CEQA. (Pub. Res. Code § 21004; *Sierra Club v. California Coastal Comm’n* (2005) 35 Cal.4th 839.) Accordingly, the Commission does not have authority to protect a resource simply because it is a Tribal Cultural Resource. However, the Commission anticipates that the great majority of resources that qualify as Tribal Cultural Resources will also qualify as resources that the Commission is authorized and required to protect under Chapter 3 of the Coastal Act. In other words, protection of Tribal Cultural Resources can occur through protection of natural landforms, archaeological and paleontological resources, water quality, biological resources, public access, and other Chapter 3 resources. Thus, we will add a clarification to describe how, in many cases, Tribal Cultural Resources will qualify as archeological, paleontological, visual, biological, or other resources that the Commission is tasked with protecting pursuant to the Coastal Act.

Comment 4

The San Luis Rey Band requests replacing “cultural resources” with “Tribal Cultural Resources” in Definition No. 5.

Response 4

We agree and will make this change.

Comment 5

The San Luis Rey Band states there is no need to define “federally-recognized (or “Tribal sovereignty”), stating that all California Tribes have sovereignty.

Response 5

There are distinctions made in federal law concerning sovereignty as recognized by the federal government. We believe any additional discussions of “cultural sovereignty” would be more confusing than helpful.

Comment 6

The San Luis Rey Band requests replacing “lead agency” with “Commission” in (5)(a)(2) and in footnote 5.

Response 6

We agree to make the change in the footnote; however, there is no need to modify the definition to which the footnote applies because that definition (Definition (5)(a)(2))j is taken directly from CEQA and states “lead agency or the Commission.”

Comment 7

The San Luis Rey Band requests replacing “Traditional Cultural Resources” with “Traditional Cultural Property” in Definition (9).

Response 7

We agree and will make this change.

Comment 8

The San Luis Rey Band requests adding a 12th “Guiding Principle” to include respecting “dignity,” as follows:

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 Tribe¹.

Response 8

We agree and will add this principle (and the footnote below).

Comment 9

The San Luis Rey Band requests two changes to the staff training by the Commission’s Tribal Liaison: (1) changing (reordering) the items listed – with number four (i.e., staff education) listed first; and (2) rewording the previous number one as follows: Change “Principles of tribal sovereignty, lands and jurisdiction” to “Introduction to California tribal sovereignty, traditional tribal lands, and territories.”

Response 9

These listed items were not intended to indicate priority (they are all high priority); however, we will make these changes by listing the fourth item first and making the requested change to the previous first item.

¹ For additional reference to this proposed language, please see Public Resources Code Section 210084(b)(2) and (b)(3).

Comment 10

The San Luis Rey Band requests elaboration of Staff Training, former item 3, which currently reads: “Implementation of and compliance with this Consultation Policy,” to include a more detailed discussion providing additional assurances of confidentiality. The San Luis Rey Band indicates that, to be successful, tribes will need expressed assurances that a Confidentiality Procedures and Protocol will be developed with tribal participation and consultation.

Response 10

We believe the intent of the policy was to provide the requested assurances and commitments; we would suggest addressing this issue by adding the following phrase (underlined) to paragraph VII.5., which addresses Substance of Consultations (note: the paragraph below also reflects several additional, but more minor, clarifying changes being made):

5. Substance of Consultations. As a part of the consultation, the parties may propose mitigation measures or alternatives capable of avoiding or substantially lessening potential impacts to a tribal Cultural Resource. If the Tribe requests consultation regarding alternatives to the project, recommended mitigation measures, or the effects of the project or any alternative, the consultation shall include those topics. The consultation may also include discussion of any other topics of interest to Tribes and/or related to Coastal Act consistency, including issues related to confidentiality procedures or protocols. If the parties agree on any mitigation measures through the consultation, the Commission staff will normally include those measures in its staff recommendation to the Commission.

Comment 11

The San Luis Rey Band requests that Subsection VI.4 be clarified to specify how the Commission would like Tribes to indicate how they want to be consulted, whether the type and manner would be similar to that contemplated under SB18 (in which local governments initiate consultation), or AB52 (in which the Tribes indicate to the Commission their desire to be contacted). The San Luis Rey Band recommends the “one-time”-type (AB52) notification procedure be used.

Response 11

Our intent is to provide, upon adopting this Tribal Consultation Policy, an initial, one-time notification to Tribes requesting that they indicate the type and/or location of Commission activities for which they wish to be contacted, as well as who should be contacted. Once those responses are received, we would consult with those Tribes as outlined in the Draft Policy. In addition, similar to the practice of the State Lands Commission, we would continue to provide notices for major Commission actions to all Tribes that Commission staff believe might wish to provide input, regardless of whether they previously requested to be consulted.

Comment 12

The San Luis Rey Band points out that because information shared under SB18/AB52 consultations with lead agencies and local governments may be confidential, the Commission may be prohibited, or at least limited, as to requesting information shared during those consultations, without express permission from the consulted tribe.

Response 12

We agree with this point, and would add the following underlined phrase in Section VI.4.a. to address it:

Request that the local government submit additional information regarding tribal consultation, as appropriate and to the extent feasible given confidentiality limitations, although failure to do so would not generally be grounds for determining the submittal incomplete.

Comment 13

The San Luis Rey Band requests that the policy be clear that if a Tribe does not undergo consultation under SB18/AB52, the Commission should not interpret this as a statement the Tribe does not wish to consult with the Commission.

Response 13

The intent of the policy is, in part, to avoid any such assumptions and to assure that Commission staff will develop the necessary awareness and relationships that will assure such avoidance.

Comment 14

The San Luis Rey Band requests that VI.5.(e), Written Notice to Tribes, include the following underlined language:

(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;

Response 14

We agree and will make this change.

Comment 15

The San Luis Rey Band requests changing “should” to “shall” where the policy indicates that Commission staff should notify a Tribe of project modifications.

Response 15

Due to the ongoing and fluid nature of the Commission staff's review process, it would not be feasible to notify tribes of each and every project modification. Some independent judgment will need to be exercised with respect to this concern. We recommend retaining the word "should," but with the understanding and expectation that *significant* changes will be communicated to Tribes whenever feasible.

Comment 16

The San Luis Rey Band reiterates with respect to Section VII. Tribal Consultation, the request articulated in Comment 11 above concerning how the Commission will engage in consultation.

Response 16

See Response 11 above.

Comment 17

The San Luis Rey Band requests that records of consultation be provided to Tribes, so they may comment, and if warranted, modify, records of consultation. The San Luis Rey Band also reiterates here, as stated previously, the need for such records to be kept confidential.

Response 17

The Commission staff is not in the practice of sharing its internal staff records of its communications with outside entities, in a manner that would enable such entities to modify those records. However, the staff does agree it will share any tribal consultation record with the consulting Tribe upon request, and will accept any comments from that Tribe as to the Tribe's opinion as to its accuracy. The staff also intends to maintain the record in a confidential manner sufficient to protect it from disclosure (unless a Tribe consents to such disclosure). A phrase will be added, as requested by the San Luis Rey Band, to assure this understanding.

Comment 18

The San Luis Rey Band points out that Section VIII, Dispute Resolution, may present a Tribe with a dilemma, forcing public disclosure of information that a Tribe may need or wish to remain confidential. The San Luis Rey Band recommends that the Commission explore ways in which such confidentiality would not be breached, such as through discussing such disputes in a private meeting or communication with the Commission.

Response 18

We agree with and understand the concern articulated. Given the variety of circumstances under which disputes might arise, procedures for resolving such disputes will need to be considered on a case-by-case basis rather than through this Draft Policy. We will explore ways in which this concern could be alleviated in a manner that adequately protects Tribal confidentiality while still complying with state laws regarding open, public meetings.

Attachments

1. Third Draft, Tribal Consultation Policy
2. Comments letters, Yurok Tribe and San Luis Rey Band of Mission Indians

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Date: July 26, 2018

To: Coastal Commissioners, California Native American Tribes, and Interested Persons

From: California Coastal Commission Staff

Subject: **THIRD DRAFT**, Tribal Consultation Policy

I. BACKGROUND

In recent years, the State of California and the Federal government have adopted a number of executive orders, statutes, guidance documents, and other policy directives intended to improve communications between public agencies and federally- and ~~state~~non-federally-recognized California Native American Tribes (Tribes) and to protect Tribal cultural resources.

It is important to recognize that the entirety of the State's Coastal Zone was originally indigenous territory that likely has cultural significance at some level or another. Long before the coastal areas were colonized by white settlers, each coastal area had significance to the local indigenous communities. This significance is part of the State's history, which is full of centuries of land theft, suppression, and aggression, pushing indigenous people from coastal (and other) regions early in the colonization and settlement of the State. For decades, even after native people were already excluded from coastal areas by settlers and state and federal officials, expressions of indigenous culture, religion and values led to aggression and persecution, including periods of genocide. Tribes were forced to abandon many coastal areas.

Once genocidal policies were finally tempered, Tribes were still not safe to use traditional areas along the coast, and Tribal communities had to endure Tribal children being taken from families and forced to attend boarding schools. These are some factors that have led to over a century of suppression of knowledge about Tribal cultural areas.

California is home to the largest number of Tribes in the contiguous United States, with the federal government (through the Department of the Interior, Bureau of Indian Affairs (BIA)) currently recognizing 109 California Tribes, and with the State of

California (through the Native American Heritage Commission (NAHC)) currently acknowledging 55 additional California Tribes and tribal communities. Efforts to improve communication and coordination with Tribes include federal and state laws and guidance documents promoting or requiring tribal consultation in local government planning processes (e.g., the preparation and adoption of general plans), and environmental review document practices (e.g., environmental impact analysis under the California Environmental Quality Act (CEQA) and the National Environmental Protection Act (NEPA)). For example, the state Legislature passed AB 52 in 2014, which sets forth tribal consultation requirements for lead agencies that prepare certain environmental documents pursuant to CEQA.¹

In addition, on September 19, 2011, Governor Brown issued Executive Order B-10-11, stating “that it is the policy of this Administration that every state agency and department subject to my executive control shall encourage communication and consultation with California Indian Tribes.” Under this order, on November 20, 2012, the California Natural Resources Agency (CNRA) adopted a Tribal Consultation Policy to govern and ensure effective communication and government-to-government consultation between Tribes and CNRA and its constituent departments that are under executive control.

The Commission recognizes the importance of these state actions and of tribal consultation, and it recognizes that adoption of its own tribal consultation process would be fully consistent with and complementary to the nature of the Commission’s goals, policies, and mission statement. The Commission further believes its mission would be well-served by a more clearly articulated set of procedures to improve such communications. Moreover, the Commission acknowledges Tribal sovereignty and understands that California’s Tribes and their members have long served as stewards of the state’s important coastal resources, and possess unique and valuable knowledge and practices for conserving and managing these resources in a sustainable manner, and in a manner consistent with the spirit and intent of the Coastal Act.

The Commission’s mission is to protect, maintain, and, where feasible, enhance and restore, the resources of California’s coast and ocean for present and future generations, through careful planning and regulation of environmentally-sustainable development, rigorous use of science, strong public participation, education, and effective intergovernmental coordination. Consistent with this mission, the Commission values and encourages expressions of traditional ecological knowledge.

In partnership with coastal cities and counties, the Commission plans and regulates the use of land and water in the coastal zone, in a manner protecting public access and recreation, lower cost visitor accommodations, archaeological and paleontological resources,

¹ The Commission is rarely a lead agency that prepares environmental documents subject to AB 52’s consultation requirements. However, the law still provides useful background to guide the Commission’s Tribal Consultation Policy.

terrestrial and marine habitat protection, visual resources, landform alteration, agricultural lands, commercial fisheries, and coastal water quality. In many cases, Tribal Cultural Resources will qualify as archeological, paleontological, visual, biological, or other resources that the Commission is tasked with protecting pursuant to the Coastal Act.

Where land is being placed in Trust (or subsequent activities on those lands trigger “CZMA” review,”² the Tribe (and not the area’s local government) would be the primary partner with the Commission for planning and resources protection purposes. Central to the Commission’s mission is the goal of maximizing public participation in the Commission’s decision-making processes. The Commission believes establishing this Tribal Consultation Policy (Consultation Policy) will improve government-to-government dialogue with the Tribes, improve public participation, and provide a more specific process than currently exists for the Commission to work cooperatively, communicate effectively, and consult with Tribes for the mutual benefit of protecting coastal resources.

The Commission is also currently engaged in a separate, but nevertheless related and parallel, process involving formulation of an “Environmental Justice” policy, pursuant to Government Code Section 65040.12, which was enacted in 2016 under AB 2616 (Burke), and which amended the Coastal Act to provide legislative direction to the Commission to consider environmental justice in its decision-making processes. Information concerning that effort can be found on the Commission’s website at: <https://www.coastal.ca.gov/env-justice/>.

II. DEFINITIONS

For purposes of this policy, the following terms shall mean or be referred to as defined below:

1. Action (or “Commission Action”): Means a discretionary action taken by the Commission that may have an impact on Tribal Interests, Resources or Rights. (“Tribal interests” may include other governmental interests besides cultural and natural resources.) These actions include, but are not limited to:

a. Actions on Local Coastal Programs (LCPs) and LCP amendments.

b. Actions on Coastal Development Permits, including locally-issued permits that were appealed to the Commission (Note: These actions include determinations (called “substantial issue” determinations) regarding whether to conduct de novo reviews on appeals of local government-issued coastal development permits.³)

² “CZMA review” refers to activities under the federal Coastal Zone Management Act (CZMA), proposed, permitted, and or funded by federal agencies. These reviews are also described as “federal consistency reviews.”

³ Note that the Commission is only authorized to consider impacts to Tribal Interests in the “substantial issue” phase of a permit appeal if those issues were raised in the appeal itself.

c. Actions on consistency determinations and certifications submitted under the Coastal Zone Management Act.

d. Adoption of guidelines on issues of regional or statewide interest.

e. Actions on other regulatory and planning documents, including, but not limited to Long Range Development Plans (LRDPs) by colleges and universities, Port Master Plans (PMPs), and Public Works Plans (PWPs).

f. Adoption of regulations.

2. California Native American Tribe (or simply “Tribe”): Means either a federally-recognized California Tribal government listed on the most recent notice of the Federal Register or a non-federally recognized California Tribe on the California Tribal Consultation List maintained by the California Native American Heritage Commission.

3. Communication: Refers to the dissemination, exchange or sharing of information between the Commission and its staff and California Native American Tribes.

4. Consultation: Means the meaningful and timely process of seeking, discussing, and considering carefully the views of Tribes, in a manner that is cognizant of all parties’ cultural values and, where feasible, seeking agreement. Consultation between government agencies and 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. (Government Code section 65352.4.)⁴

5. Tribal Cultural Resources:

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.

⁴ Consultation should not be viewed as a “one-time, one-meeting activity,” but rather an iterative process. Moreover, the Commission should conduct an independent review and not rely on other agencies’ conclusions.

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

(2) A resource determined by the CEQA lead agency or the Commission, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in Public Resources Code Section 5024.1(c). In applying these criteria, the lead agency shall consider the significance of the resource to a California Native American tribe.⁵

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 Public Resources Code Section 21084.1, a unique archaeological resource as defined in Public Resources Code Section 21083.2(c), or a “nonunique archaeological resource” as defined in Public Resources Code Section 21083.2(h) may also be a tribal cultural resource if it conforms to the criteria of subdivision (a).

6. Federal Recognition: Refers to acknowledgement by the federal government that a Tribal government and Tribal members constitute a Tribe with a government-to-government relationship with the United States, and is eligible for the programs, services, and other relationships established for the United States for Indians, because of their status as Indians. (United States Code of Federal Regulations, Title 25, section 83.2)

7. Tribal Interests: Include, but are not limited to: (a) Tribal Cultural Resources; or (b) fish, wildlife, plant, water, or similar natural resources. These interests may include other governmental interests besides cultural and natural resources.

8. Tribal Sovereignty: Refers to the governmental status of federally recognized Tribes, which dictates that State and local governments interact with Tribes on a government-to-government basis. Federally recognized Tribes exercise jurisdiction and governmental authority over Tribal lands and have the inherent authority to govern themselves.

9. Traditional Cultural Resource Property. A Traditional Cultural Property (TCP) is a property that is eligible for inclusion in the National Register of Historic Places (NRHP) based on its associations with the cultural practices, traditions, beliefs, lifeways, arts, crafts, or social institutions of a living community. TCPs are rooted in a traditional community’s history and are important in maintaining the continuing cultural identity of the community.

⁵ This definition should be interpreted to mean that the Commission lead agency will consider this significance in consultation with the affected tribe(s).

The cultural practices or beliefs that give a TCP its significance are, in many cases, still observed at the time a TCP is considered for inclusion in the NRHP. Because of this, it is sometimes perceived that the practices or beliefs themselves, not the property, make up the TCP. While the beliefs or practices associated with a TCP are of central importance, the NRHP does not include intangible resources. The TCP must be a physical property or place - that is, a district, site, building, structure, or object.

III. GUIDING PRINCIPLES

The Commission seeks to establish and maintain a respectful and effective means of communicating and consulting with Tribes and will seek in good faith to:

1. Communicate and consult with Tribes and seek tribal input regarding the identification of potential issues, possible means of addressing those issues, and appropriate actions, if any, to be taken by the Commission.
2. Assess the potential impact of proposed Commission Actions on Tribal Interests and ensure, to the maximum extent feasible, that tribal concerns are considered before such Actions are taken, such that impacts are avoided, minimized, or mitigated in conformity with Coastal Act and other applicable legal requirements.
3. Provide timely and useful information relating to such proposed Actions that may affect Tribal Interests.
4. Communicate with and engage with Tribes at the earliest possible stage in the review and decision-making processes.
5. Communicate with Tribes in a manner that is considerate and respectful.
6. Provide Tribes with meaningful opportunities to respond and participate in decision-making processes that affect Tribal Interests.
7. Acknowledge and respect [Tribal](#) Cultural Resources regardless of whether those resources are located on or off Tribal lands.
8. Acknowledge and respect both the confidential nature of information concerning cultural practices, traditions, beliefs, tribal histories, and Tribal lands, and legal protections of the confidentiality of certain tribal cultural information (e.g., Gov. Code §§ 6254(r), 6254.10, Pub. Res. Code § 21082.3(c)).⁶ The Commission will take all

⁶ Gov. Code § 6254. Except as provided in Sections 6254.7 and 6254.13, this chapter does not require the disclosure of any of the following records: ...

(r) Records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in Sections 5097.9 and 5097.993 of the Public Resources Code maintained by, or in the possession of, the Native American Heritage Commission, another state agency, or a local agency.

lawful and necessary steps to ensure confidential information provided by a Tribe is not disclosed without the prior written permission of the Tribe.

9. Encourage collaborative and cooperative relationships with Tribes in matters affecting coastal resources.

10. Acknowledge and seek ways to accommodate the limited financial and staffing resources of Tribes and the Commission to ensure effective communication and consultation, including taking advantage of any joint consultation opportunities as discussed on page 15.

11. Identify and recommend means to remove procedural impediments to working directly and effectively with Tribes.

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 Tribe.⁷

IV. TRIBAL LIAISON

1. The Executive Director of the Commission will assign a Tribal Liaison for the Commission. The Tribal Liaison will:

- a. Advise the Executive Director on policy matters relating to tribal affairs.
- b. Coordinate: (i) the training of Commission staff with regard to tribal affairs; (ii) the work of Regional Tribal Liaisons; and (iii) the Commission's tribal communication and consultation efforts.
- c. Maintain the Commission's Tribal Contact List.
- d. Respond to inquiries from, and participate in consultations with, Tribes.

Gov. Code § 6254.10. Nothing in this chapter requires disclosure of records that relate to archaeological site information and reports maintained by, or in the possession of, the Department of Parks and Recreation, the State Historical Resources Commission, the State Lands Commission, the Native American Heritage Commission, another state agency, or a local agency, including the records that the agency obtains through a consultation process between a California Native American tribe and a state or local agency

Pub. Res. Code § 21082.3(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

⁷ See Pub. Res. Code § 21084.3(b)(2), (3) for context of the meaning of this language.

2. The Executive Director of the Commission will also assign staff members as Regional Tribal Liaisons. The Commission's goal is for each of the Commission's six district offices to have a Regional Tribal Liaison, who will assist the Commission's Tribal Liaison and serve as the primary point of contact for Tribes in that District.

V. COMMISSION STAFF TRAINING

The Tribal Liaison shall oversee the training of Commission staff with respect to:

1. Educating staff about the history of land theft, genocide, and other mistreatment of Native Americans by the state and federal governments.

~~1.2.~~ Introduction to California Principles of tribal sovereignty, traditional tribal lands, and territories; jurisdiction.

~~2.3.~~ Laws and regulations relating to the protection of Cultural Resources, including confidentiality of information regarding Cultural Resources.

~~3.4.~~ Implementation of and compliance with this Consultation Policy.

~~4. Educating staff about the history of land theft, genocide, and other mistreatment of Native Americans by the state and federal governments.~~

VI. TRIBAL COMMUNICATION

1. **Purpose.** The Commission seeks to establish effective mechanisms for: (a) providing information to Tribes regarding proposed Commission Actions that may affect Tribal Interests; (b) seeking information and input from Tribes; (c) soliciting the collaboration, cooperation, ~~or~~ and participation of Tribes; (d) assuring Tribes the Commission will protect confidential information communicated through consultation; and ~~(e)~~ offering or seeking consultation with affected Tribes.

2. **Procedures.** The communication procedures set forth in this section are intended to serve as the Commission's standard method for communicating with Tribes regarding proposed Commission Actions. Any Tribe may submit to the Commission a written request to institute an alternative process, including the designation of either an alternative contact person for the Tribe (i.e., someone other than those listed on the Consultation list provided by the NAHC) or additional contact persons. The Commission will make a good faith effort to work with Tribes requesting such alternative processes; provided, however, that Commission staffing resources may make it difficult or impractical to fully implement all such requests.

3. **Tribal Contact List.** In continuing coordination with the NAHC and the Governor's Office of the Tribal Advisor, the Commission's Tribal Liaison will

maintain and update a Tribal Contact List to be comprised of Tribes that appear on the NAHC's California Tribal Consultation List.

4. **Contacting Tribes For Commission Actions.** During its review of plans, development proposals, or other activity to be the subject of a Commission Action,⁸ Commission staff in the District office or Commission unit proposing or reviewing the proposed Action will use the procedures below to determine whether and when to contact the Tribes identified on the NAHC's California Tribal Consultation List that have expressed written interest, either to the Commission directly or to the NAHC, in being consulted on Commission Actions on particular matters or in specific geographic areas. Time permitting, the Commission staff will also attempt to contact any other Tribes or Tribal organizations that Commission staff has reason to know may have an interest in the Action; however, those contacts would be outside the scope of this formal Tribal Consultation Policy. If warranted, Commission staff will notify the NAHC of the Proposed Action and request a list of interested Tribes, and where also warranted, obtain the results of an NAHC Sacred Lands Files check. Notice to the NAHC will include a brief description of the nature and location of the proposed Action and a map or description of the area, if available. For all types of Commission Actions, notification of interested Tribes and initiation of consultation, if requested, shall occur as early as possible in the review process. The timing and process for consultation concerning the various types of Actions by the Commission shall be as follows:

a. For **planning matters** (Local Coastal Program (LCP), Public Works Plan (PWP), Long Range Development Plan (LRDP), Port Master Plan (PMP), or any amendment to such plan), the following procedures shall be used:

- (1) Upon receipt of such a plan for certification, and prior to determining whether the plan was "properly submitted" (pursuant to, e.g., 14 Cal. Code Regs, §§ 13520, 13553, 13354, 13365, and 13628), review the submittal to determine the degree to which the local government preparing the plan consulted with Tribes regarding Cultural Resource effects pursuant to AB 52 (applicable if local government is lead agency for CEQA review) and/or SB 18 (specifically applicable for general plan, including land use plan, submittals).⁹ Request that

⁸ Unless consultation is legally required (e.g., in unusual circumstances where AB 52 applies because the Commission is a lead agency preparing an environmental impact report pursuant to CEQA), Actions with no or de minimis potential for cultural resource impacts are exempt from these consultation procedures. Examples of such circumstances could include exemption determinations, de minimis waivers, or CDPs for improvements to or redevelopment of structures within existing developed footprints where little or no grading is involved.

⁹ SB 18 requires local governments adopting and amending general plans to notify, consult with, and consider the comments of Tribes concerning the need to protect traditional tribal cultural places. Also, see the corresponding guidelines adopted by the Governor's Office of Planning and Research (OPR) November 14, 2005, Tribal Consultation Guidelines.

the local government submit additional information regarding tribal consultation, as appropriate [and to the extent feasible given confidentiality limitations](#), although failure to do so would not generally be grounds for determining the submittal incomplete.

Promptly notify affected Tribes in the manner they have requested and initiate consultation if any of the following circumstances apply: a) consultation is appropriate given the nature of the proposed plan and its potential for impacts on Tribal Interests; b) Commission staff has reason to know that particular Tribes may have an interest in the Action (e.g., Commission staff has previously worked with a Tribe on concerns in the geographic area); c) any Tribe(s) expressed unresolved concerns about the Action's impacts on Tribal Interests during a local review process or requests consultation with the Commission for the Action; or d) a Tribe has specifically requested that the Commission notify it of this type of Action—e.g., all Actions in this location or of this type.

- (2) Regardless of whether the Commission engages in consultation as described above, provide written public notice to all interested Tribes in accordance with standard Commission notice procedures for upcoming hearings. Where feasible, schedule the item for the hearing in a location convenient to the project site in order to facilitate maximum participation by affected Tribes.
- (3) Include in staff recommendations to the Commission a summary of the results of any local government and/or Commission staff consultations described in this Tribal Consultation Policy, with sensitivity to the Tribal confidentiality needs as described in this Policy, and with publicly available summaries of identified concerns included only if the affected Tribes agree to such disclosure in writing.

b. For **permitting matters** (i.e., review of Coastal Development Permits (CDPs), appeals of locally-issued Coastal Development Permits, and Notices of Impending Development (NOID)), the following procedures shall be used:

(1) **CDP applications:**

- (A) For **coastal development permit applications** submitted directly to the Commission, prior to deeming the application “filed” (pursuant to 14 Cal. Code Regs, § 13056), review the project's locally-issued CEQA compliance documents to determine whether they included Tribal Consultation and consideration of Cultural Resource effects.

(2) Appeals:

(A) For **appeals** of locally-issued coastal development permit applications, review the local government file to determine, if possible, whether the local government engaged in Tribal Consultation. Given the short statutory deadlines for Commission review of appeals, any necessary consultation may need to occur more quickly and be less formal than in other instances. In addition, the Commission is only authorized to consider impacts to Tribal Interests in the “substantial issue” phase of a permit appeal if those impacts were raised in the appeal itself.

(3) For both CDPs and appeals:

(A) Promptly notify affected Tribes in the manner they have requested and initiate consultation if any of the following circumstances apply: a) consultation is appropriate given the nature of the proposed development and its potential for impacts on Tribal Interests; b) Commission staff has reason to know that particular Tribes may have an interest in the Action (e.g., Commission staff has previously worked with a Tribe on concerns in the geographic area); c) any Tribe(s) expressed unresolved concerns about the Action’s impacts on Tribal Interests during a local review process; or d) a Tribe has specifically requested that the Commission notify it of this type of Action—e.g., all Actions in this location or of this type.

(B) Provide written Public Notice to all interested Tribes in accordance with standard Commission notice procedures for upcoming hearings. Where possible, schedule the item for the hearing in a location that is closest to the project site, or within the city or county limits of the LCP item, in order to facilitate maximum participation by affected Tribes.

(C) Include in staff recommendations to the Commission a summary of the results of any local government or Commission staff consultations described in this Tribal Consultation Policy, with sensitivity to the Tribal confidentiality needs as described in this Policy, and with summaries of identified concerns included only if the affected tribes agree to such disclosure in writing.

(4) For NOIDs

(A) For NOIDs received by Commission staff pursuant to PWP or LRDPs, use the same procedures as above; however, given the short statutory deadlines for Commission review of notices of impending development (generally 30 working days total), any necessary consultation may need to occur more quickly and be less formal than in other instances.

c. For **federal consistency** reviews (under the Coastal Zone Management Act)¹⁰, the following procedures shall be used:

(1) Projects and Plans Carried out by Federal Agencies

- (A) Review consistency determinations submitted by federal agencies to determine the extent of federal agency consultation with both federally and non-federally recognized Tribes. This review should include (but not be limited to) federal agency consultation pursuant to National Environmental Policy Act (NEPA) guidance for Tribal Consultation, National Historic Preservation Act (NHPA) Section 106 (36 CFR Part 800), and Advisory Council for Historic Preservation (ACHP) guidance for Consulting with Indian Tribes in the Section 106 Review process.
- (B) If a federal agency has only consulted with federally-recognized Tribes, determine, through coordination with the California Native American Heritage Commission (NAHC), the California State Office of Historic Preservation (OHP), and/or any known Tribal Historic Preservation Officers (THPOs) or representative of potentially affected Tribes, which, if any, non-federally recognized Tribes may attach cultural significance to areas potentially affected by the federal project or plan.
- (C) Notify all interested Tribes as early as possible in the review process and initiate consultation, if requested.
- (D) Provide written Public Notice to all interested Tribes in accordance with standard Commission notice procedures for upcoming hearings.
- (E) Include in staff recommendations to the Commission a summary of the results of any consultations described above.

(2) Projects Permitted or Funded by Federal Agencies

- (A) Review submittals by applicants for federal permits, or applicants by state or local governments for federal funding (i.e., consistency certifications) to determine whether any CEQA documents were prepared, and if so, the extent of Tribal Consultation pursuant to AB 52.
- (B) If no CEQA documents were prepared, but NEPA documents were prepared (or are in the process of being prepared) by the permitting or funding agencies, follow the consultation steps outlined in Section 4.c.(1)(A) above.

¹⁰ 16 U.S.C. Section 1456, with implementing regulations at 15 CFR Part 930.

- (C) Notify all interested Tribes as early as possible in the review process and initiate consultation, if requested.
- (D) Provide written Public Notice to all interested Tribes in accordance with standard Commission notice procedures for upcoming hearings.
- (E) Include in staff recommendations to the Commission a summary of the results of any such consultation.

d. For **other** actions, if it is unclear which procedure is most appropriate for a different type of Commission Action, or if more than one of the above procedures are combined, contact the Commission's designated Tribal Liaison for further guidance.

5. **Written Notice to Tribes.** Once a list of potentially affected Tribes has been compiled, and when a Tribe has specifically requested written notice, Commission staff in the District or unit reviewing the proposed Action will send written notice to the potentially interested Tribes. The written notice will:

a. Be sent to the Tribal Chairperson or other person listed on the Consultation List provided by NAHC, the appointed Tribal Historic Preservation Officer, or any other Tribal officials or employees identified by the Tribe as lead contacts pursuant to Section VI(2) of this Policy. If the Tribe does not clearly designate one or more lead contact people, or if it designates too many contact people for the Commission to feasibly communicate with, the Commission may defer to the individual listed on the Consultation List maintained by the NAHC.

b. Be sent in a timely manner to ensure an opportunity to provide input at the earliest possible stage in the review and decision-making process. Whenever feasible, the Commission will seek to provide notice within 14 days of determining that an application for a proposed Action is complete or otherwise beginning its formal review process for the Action.

c. Be drafted and sent separately from any general public notice;

d. Include a brief description of the proposed Action; a map or description of the location or region potentially affected by the proposed Action;

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

f. Provide Commission contact information for obtaining further information and for initiating consultation.

g. Request that the Tribe respond within 30 days of receiving the Commission's notice, or sooner if feasible or required due to legal deadlines for Commission Action.

6. **Changes to Proposed Activities.** If, after providing notice to Tribes, there are substantially changed circumstances that could affect Tribal Interests in a manner not contemplated when the original notice was sent, Commission staff in the District or program proposing or reviewing the Action should issue a supplemental notice to affected Tribes. If legal deadlines do not permit formal notice, informal notice should be provided to the extent feasible.

VII. TRIBAL CONSULTATION

1. **Initiation of Consultation.** Consultations may be initiated by either a Tribe or the Commission.

a. All requests by a Tribe for consultation must be submitted in writing to the Tribal Liaison(s) identified in Attachment 1. The request for consultation should indicate if a one-on-one meeting is preferred, or if it is acceptable to schedule a consultation meeting with other affected Tribes present. Upon receipt of a request for consultation, the Commission shall provide the Tribe with a written acknowledgement that it has ~~accept~~received the request.

b. All requests by the Commission for consultation will be made in writing to the chairperson of the Tribe, or its designated representative.

2. **Preparing for a Consultation.** For a consultation to be effective, prior to holding the consultation Commission staff in the District or unit reviewing the proposed Action should take reasonable steps to work with the Tribe's representatives to:

- a. understand the Tribe's current and historical relationship to the resources that may be affected by the proposed Action;
- b. understand the Tribe's government structure and decision-making process;
- c. identify key issues and concerns;
- d. identify the participants in the consultation;
- e. determine an appropriate location and time for the consultation; and
- f. understand the Tribe's concerns over culturally sensitive information.

3. **Time, Place, and Manner of Consultations.** Whenever feasible and consistent with applicable legal deadlines, the Commission will seek to commence consultations within 30 days after receipt of a written request for consultation from the Tribe. The Commission

staff will pursue in-person consultations when feasible given the timing, funding, and travel constraints of the Tribes and the Commission staff. When feasible, the Commission staff will seek to arrange in-person consultations at the Tribe's offices, or Commission District offices. The Commission staff will work with Tribes, on a case-by-case basis, to determine the appropriate form and manner of consultation. Prior to any consultation, the Commission staff will provide the Tribes with documentation about the proposed Action. In addition, the Commission staff shall make a good faith effort to inform the Tribe in writing of the names and positions of those who will represent the Commission staff during the consultation.

4. Commission Staff Representation at Consultations. The Commission's consultation process is designed to facilitate direct communication between tribal decision makers and the Commission staff bringing recommendations for Commission consideration. Tribes involved in Consultation shall receive written notice of any subsequent Commission hearings where matters that were the subject of Consultation will be decided by the Commission. Tribes will be encouraged to attend or submit written comments to the Commission concerning Commission staff recommendations. Tribes will also be encouraged to notify the Tribal Liaison if a Tribe believes a staff recommendation has not fairly characterized the results of the Consultation. While the Commission staff will consider any Tribal comments in making its recommendation, the Commission retains ultimate authority with respect to all Commission Actions.

5. Substance of Consultations. As a part of the consultation, the parties may propose mitigation measures or alternatives capable of avoiding or substantially lessening potential impacts to a Tribal Cultural Resource ~~or alternatives that would avoid impacts to a tribal Cultural Resource~~. If the Tribe requests consultation regarding alternatives to the project, recommended mitigation measures, or the effects of the project or any alternatives, the consultation shall include those topics. The consultation may also include discussion of any other topics of interest to Tribes and/or related to Coastal Act consistency, including issues related to confidentiality procedures or protocols. If the parties agree on any mitigation measures through the consultation, the Commission staff will normally include those measures in its staff recommendation to the Commission.

6. Informal Staff-to-Staff Meetings. At times, both Tribes and the Commission staff may seek to pursue informal discussions and negotiations concerning a proposed Commission Action. The Commission encourages informal meetings, and nothing in this policy shall be construed to prohibit or otherwise inhibit the Commission staff and a Tribe from pursuing such meetings. In addition, if a Tribe wishes to consult with Commission staff about a potential violation of the Coastal Act of which it has knowledge, it may contact the Tribal Liaison, who will coordinate with Commission enforcement staff to arrange appropriate consultation.

7. Joint Consultation. To conserve limited tribal, federal, state, and local government resources, the Commission will participate in joint consultations with: (a) other federal, state, or local government agencies when all parties agree and there are sufficient issues in

common to warrant a joint consultation; or (b) more than one Tribe when all parties agree and there are sufficient issues in common to warrant a joint consultation.

8. Limitations of the Consultation Policy. The Coastal Act, Permit Streamlining Act, and other state and federal law impose various deadlines on Commission Actions. The Commission will strive to conduct tribal consultation, as outlined in this Consultation Policy, within these statutory deadlines; however, the Commission often does not have the authority to modify statutory deadlines for Commission Actions and may, therefore, need to consult in a different manner or timeframe in cases where the Commission must act quickly pursuant to statutory deadlines. Additionally, to the extent that any state, federal, or other applicable law requires the Commission to consult with Tribes in a manner that conflicts with the procedures outlined in this Consultation Policy, the Commission will follow the requirements of that law rather than the procedures in this Policy. This Consultation Policy is not intended to and does not create, expand, limit, or waive any legal rights or obligations of the Commission, a Tribe, or any other party.

9. Reporting and Record-keeping.

a. Commission staff shall keep records of all consultations with Tribes and those records shall be kept confidential to the fullest extent required by law.

b. Commission staff shall not include in any publicly available report prepared pursuant to this Consultation Policy confidential culturally sensitive information received from a Tribe unless the Tribe consents to such disclosure in writing.

VIII. DISPUTE RESOLUTION PROCESS

1. If a Tribe is dissatisfied with how a district or unit of the Commission has conducted the consultation process, it may contact the Tribal Liaison at the contact locations shown on the following pages.

2. The Tribal Liaison shall review any complaints submitted pursuant to this section and work with Commission staff and the Tribe to ensure the issue is resolved to the parties' mutual satisfaction. If the Tribal Liaison is unable to resolve the issue, the Tribal Liaison shall refer the matter to the Executive Director or a designee at an appropriate level of authority.

3. If a Tribe believes the Commission staff has not been responsive to its concerns, the Tribe is encouraged to make its concerns known to the Commission during the public hearing on the matter or during Commission meeting times set aside each day of Commission meetings for public statements about items not on the agenda, or in writing to the Commissioners.

Attachment – Commission Staff Tribal Liaison List and Contact Information



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

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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