

Facilities, Construction and Property Practice Group

May 12, 2016

AALRR Alert



AB 52 and Tribal Cultural Resources in CEQA

David D. Boyer
Cerritos
562.653.3200
dboyer@aalrr.com

Terry T. Tao
Cerritos
562.653.3200
ttao@aalrr.com

Scott J. Sachs
Cerritos
562.653.3200
ssachs@aalrr.com

Stephen M. McLoughlin
Cerritos
562.653.3200
smcloughlin@aalrr.com

David A. Soldani
Fresno
559.225.6700
dsoldani@aalrr.com

A recent addition to the California Environmental Quality Act (“CEQA”) is the Native American Historic Resource Protection Act (AB 52), which is intended to minimize conflict between Native American and development interests. AB 52 adds “tribal cultural resources” (“TCR”) to the specific cultural resources protected under CEQA, and requires lead agencies to notify relevant tribes about development projects. It also mandates lead agencies to consult with tribes if requested, and sets the principles for conducting and concluding the required consultation process.

AB 52 applies to all projects on or after July 1, 2015, for which a lead agency has issued a notice of preparation of an environmental impact report (“NOP”) or notice of intent to adopt a negative declaration or mitigated negative declaration (“NOI”). Many lead agencies are already receiving notices from the California Native American Heritage Commission demanding compliance with AB 52. If not already familiar with AB 52 and its requirements, now is the

time to become acquainted with this new law.

New Category of Resources

Under AB 52, lead agencies must now evaluate, just as they do for other historical and archeological resources under CEQA, a project’s potential impact to a TCR. A TCR is defined as a site, feature, place, cultural landscape, sacred place or object with cultural value to a California Native American tribe, which may include non-unique archeological resources previously subject to limited review under CEQA. “California Native American tribes” are all tribes (federally recognized or not) on the “contact list” maintained by the California Native American Heritage Commission. If substantial evidence demonstrates that a project may cause a substantial adverse change to a tribal cultural resource, AB 52 provides that the project may have a significant effect on the environment. AB 52 also contains a list of potential mitigation measures, including a preference for preservation in place, which must be considered by a lead

agency, unless it determines that the measure is infeasible.

It is critical to understand that TCR may not be located near a tribe’s traditional geographical “home.” Therefore, lead agencies should avoid making assumptions about which tribes could be affected by a project. The California Native American Heritage Commission can provide information on which tribes might be traditionally and culturally affiliated with a geographic area.

Consultation with Tribes

Where a tribe requests in writing that a public agency inform it of proposed projects, the lead agency must notify the tribe within 14 days of determining that a project application is complete or deciding

-->“AB 52 applies to all projects on or after July 1, 2015, for which a lead agency has issued a notice of preparation of an environmental impact report (“NOP”) or notice of intent to adopt a negative declaration or mitigated negative declaration (“NOI”).”

to undertake a project (i.e., no later than 14 days after releasing the NOP or NOI). Note that there is no consultation requirement for filing a notice of exemption (“NOE”).

If within 30 days of notification, the tribe responds in writing requesting consultation, then the lead agency must begin the consultation process with the tribe within 30 days of receiving that written request. It is important to note that notices from the California Native American Heritage Commission do not constitute the requisite written tribal request that initiates the AB 52 consultation process.

The Office of Planning and Research’s (“OPR”) “Tribal Consultation Guidelines” provide further explanation of the meaning of “consultation.”¹ For example, the Guidelines explain that consultation “is a process in which both the tribe and local government invest time and effort into seeking a mutually agreeable resolution for the purpose of preserving or mitigating impacts to a cultural place, where feasible.” It further provides:

“Effective consultation is an ongoing process, not a single event. The process should focus on identifying issues of concern to tribes pertinent

to the cultural place(s) at issue – including cultural values, religious beliefs, traditional practices, and laws protecting California Native American cultural sites – and on defining the full range of acceptable ways in which a local government can accommodate tribal concerns.”

The new provisions in AB 52 enumerate topics that may be addressed during consultation, including tribal cultural resources, the potential significance of project impacts, the type of environmental document that should be prepared, possible mitigation measures and project alternatives, including those recommended by the tribe.

During consultation, lead agencies must also follow certain confidentiality requirements concerning the tribal cultural resources at issue. Specifically, absent written consent by a tribe, any information – not just documents– submitted by a tribe during this process may not be included in the environmental document or otherwise disclosed to the public by the lead agency or by any other public agency. This new provision is consistent with the California Public Records Act (i.e., Gov. Code, §§ 6254, subd.(r) and 6254.10).

Consultation ends when 1) the lead agency agrees to incorporate the mitigation requested by the tribe into the CEQA document (if a significant effect exists), or 2) the tribe or the lead agency, acting in good faith and

after reasonable effort, concludes that agreement cannot be reached. If no agreement is reached, the lead agency must so state in the environmental document and must still consider feasible mitigation based on the standards in the statute.

An environmental impact report, mitigated negative declaration or negative declaration for a project with a significant impact on an identified tribal cultural resource cannot be certified or adopted unless one of the following occurs:

- The consultation process between the tribe and the lead agency has concluded;
- The tribe requested consultation but failed to provide comments or otherwise failed to engage in consultation; or
- The lead agency provided notice of the project to a tribe and the tribe failed to request consultation within the 30 day deadline.

Mitigating Adverse Changes to Tribal Cultural Resources

Mitigation measures agreed upon during consultation must be recommended for inclusion in the environmental document. AB 52 also identifies mitigation measures that may be considered to avoid significant impacts if there is no agreement on appropriate mitigation. Recommended measures include:

¹Since 2004, cities and counties have had to consult with California Native American tribes before adoption or amendment of a general plan, specific plan or designation of open space. (Gov. Code, § 65352.4.) “The Tribal Consultation Guidelines” explain those requirements in detail. The new requirements in CEQA do not change those ongoing responsibilities. In instances in which the requirements of both the Government Code and CEQA apply to a project, while there may be substantial overlap, the lead agency must ensure that it complies with the requirements of both statutes.

- Preservation in place;
- Protecting the cultural character and integrity of the resource;
- Protecting the traditional use of the resource;
- Protecting the confidentiality of the resource; and
- Permanent conservation easements with culturally appropriate management criteria.

Updating Appendix G

AB 52 directs OPR to develop proposed updates to the sample initial study checklist in Appendix G of the CEQA Guidelines to do both of the following: (a) separate the consideration of paleontological resources from tribal cultural resources and update the relevant sample questions, and (b) add consideration of tribal cultural resources with relevant sample questions. The Natural Resources Agency must complete its regulatory process for adoption of the proposed updates by July 1, 2016.

Conclusion

AB 52 contains several important changes to CEQA. Environmental documents must now consider tribal cultural resources in their analyses, and additional consultation requirements will apply to many projects. Lead agencies and other project proponents should be aware of these new requirements.