



**Tribal Engagement and  
Technical Assistance**



# Tribal Consultation and Coordination

**Wednesday, February 26, 2020**

**Sacramento, CA**

**Presented by**

**National Indian Justice Center, Inc.**



# Our Mission

Provide a safe, sustainable, integrated and efficient transportation system to enhance California's economy and livability.

## Safety and Health

Provide a safe transportation system for workers and users, and promote health through active transportation and reduced pollution in communities.

## Stewardship and Efficiency

Money counts. Responsibly manage California's transportation-related assets.

## Sustainability, Livability and Economy

Make long-lasting, smart mobility decisions that improve the environment, support a vibrant economy, and build communities, not sprawl.

## System Performance

Utilize leadership, collaboration and strategic partnerships to develop an integrated transportation system that provides reliable and accessible mobility for travelers.

## Organizational Excellence

Be a national leader in delivering quality service through excellent employee performance, public communication, and accountability.

# Our Vision

A performance-driven, transparent and accountable organization that values its people, resources and partners, and meets new challenges through leadership, innovation and teamwork.

Integrity

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Commitment

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Teamwork

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Innovation

## ACKNOWLEDGEMENTS

This training manual was prepared by the National Indian Justice Center, Inc. (NIJC), an Indian owned and operated non-profit corporation with principal offices in Santa Rosa, California, (707) 579-5507. NIJC was created through the combined efforts of those concerned with the improvement of the administration of justice in Indian country and the development of effective governments in Indian country. Financial support was provided by Service Request 4 issued pursuant to Agreement Number 74A098, the Tribal Engagement and Technical Assistance (TE/TA) contract, executed between Caltrans and the National Indian Justice Center (NIJC).

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## **TRIBAL CONSULTATION AND COORDINATION**

### **1. INTRODUCTION TO THIS TRAINING SESSION**

The Caltrans Native American Liaison Branch has contracted the National Indian Justice Center to conduct the Tribal Consultation and Coordination training. The Tribal Consultation and Coordination presentation will offer historic perspective on California tribal governments and communities, discuss the basis of tribal sovereignty and provide the basics of federal consultation and coordination requirements.

The goal is to offer Caltrans Transportation Planners a general understating of the obligation and requirement to conduct federally required consultation and coordination with tribal governments and communities. The objective is to conduct a 1.5 hour workshop delivered in-person and by webinar for Caltrans Transportation Planners as part of the Caltrans Planning Horizons Presentation Series.

### **PURPOSE OF THIS TRAINING MANUAL**

This training session is designed for Caltrans Planning Horizons Series. The target audience for in-person training is for Caltrans Planning Horizons attendees including Caltrans transportation planners. The training session materials includes a companion PowerPoint presentation and a brief handbook.

The longer version can be found at:

### **OBJECTIVES:**

After this training Transportation Planning Staff should be able to:

- Understand historic perspective on California tribal governments and communities.
- Understand the basis of tribal sovereignty.
- Understand the basics of federal consultation and coordination requirements.





## TRIBAL CONSULTATION AND COORDINATION

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NIJC Tribal Consultation and Coordination Handbook will be available to download at: <https://nijc.org/teta-resources.html>



Tribal Engagement and Technical Assistance

# Tribal Consultation and Coordination

Wednesday, February 26<sup>th</sup>, 2020,  
10:00 am - 11:30 am

Presented By:  
Raquelle Myers, J.D.  
National Indian Justice Center, Inc.




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## Agenda

Time	Topic
10:00 a.m.-10:30 a.m.	I. Understanding the Interaction of Tribal, State and Federal Laws
10:30 a.m.-11:00 a.m.	II. California Tribal Cultures - Understanding Historic and Modern Contexts
11:00 a.m.-11:15 a.m.	III. Tribal Consultation and Coordination Requirements and Best Practices
11:15 a.m.-11:30 a.m.	IV. Questions and Answers

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## Introduction

↓ Raquelle Myers, J.D. (*Pomo*)  
↓ *Staff Attorney*, National Indian Justice Center, Santa Rosa, CA

{ Hello!




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## Training Objectives

- ✎ Offer historic perspective on California tribal governments and communities,
- ✎ Discuss the basis of tribal sovereignty
- ✎ Provide the basics of federal consultation and coordination requirements




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## I. Understanding the Interaction of Tribal, State and Federal Laws

After this presentation, participants should be able to:

- Recognize why this training is taking place (because of the need for cooperation among local, state, regional, and Tribal transportation professionals as outlined in law and policy).
- Define tribal sovereignty and jurisdiction and explain how these concepts relate to transportation planning

10:00 a.m.-10:30 a.m.

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## Key Definitions & Concepts of Tribal Sovereignty and Governance Authority

- ✎ "Indian" is a legal term used in treaties, the U.S. constitution, statutes and case law to describe the indigenous people of the U.S.A.
- ✎ The U.S. Supreme court has held that American Indians are a political classification under the law (not a racial or ethnic class).
- ✎ It is common for American Indians to identify first with tribal affiliation and then as American Indian or Native American.
  - ✎ Native American, American Indian, and Indigenous are arguably used based on preference and often used interchangeably.

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### Sovereignty - Defined

- ↳ Sovereignty is the **Right of Self-Governance**.
  - ⌘ It is the right of an entity to make its own laws and to be governed by them.
- ↳ Tribal Sovereignty was initially recognized by the U.S. as a result of having entered into treaties with Tribes.
  - ⌘ The U.S. only negotiates treaties with sovereign entities.
  - ⌘ The U.S. may expand or contracts its recognition of tribal sovereign authority.

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### Sovereignty - Defined

#### Sovereign Immunity

The right to be free from suit; the right not be sued in court.

Cannot be sued because the Sovereign's assets are the assets of the community as a whole.

Note: It's important to know the difference between Sovereignty and Sovereign Immunity.

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### Tribes as Quasi-Sovereign Nations

<h4>↳ Inherent Tribal Sovereign Authority</h4> <ul style="list-style-type: none"> <li>⌘ Possess Inherent Sovereignty by virtue of being.</li> <li>⌘ Subject to Tribal Powers only.</li> </ul>	<h4>↳ Legal Sovereign Status of Tribes</h4> <ul style="list-style-type: none"> <li>⌘ Possess legal sovereign status because of treaty making between tribes and U.S./foreign powers.</li> <li>⌘ Subject to Plenary Power of Congress, Interpretation of law by Federal Courts and some State Powers.</li> </ul>
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## Indian Country Defined

The term "Indian country," as used in this chapter, means:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151

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## Rights of Way

✎ The presence of a Right of Way does not mean that the state has exclusive jurisdiction over the Right of Way.

✎ Rights of Way may be presumed by the state. If the state claims a Right of Way exists, it should produce the documentation showing BIA approval.

✎ The ruling in Hardwick v. U.S. was that the Termination Plans were void.

✎ Rights of Way dating from the Termination Era may be void and/or should be renegotiated.

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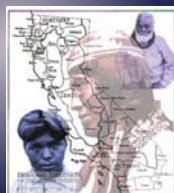
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## California Indian History 101

✎ U.S. Federal Government negotiated 18 Treaties with California Indians setting aside 7.5 million acres of land negotiated from 1850-51

✎ California Land Claims Act of 1851

✎ Resulting in loss of tribal villages and scattered landless Indians in California




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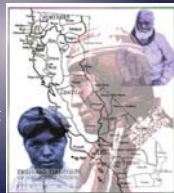
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## California Indian History 101

There are 109 federally recognized tribes in California, more than 30 (possibly as many as 80) that are not federally recognized and very large urban Indian population comprised of non-California Indians.




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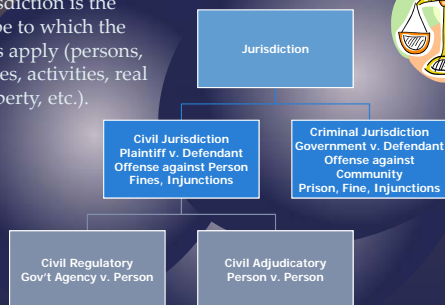
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## Types of Jurisdiction

Jurisdiction is the scope to which the laws apply (persons, places, activities, real property, etc.).




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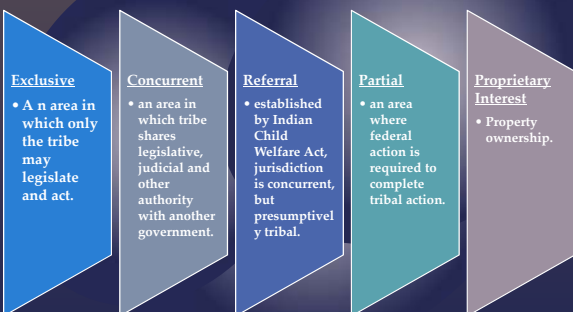
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## Types of Tribal Jurisdiction




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## A Note on Jurisdiction

<u>Civil Jurisdiction</u>	<u>Criminal Jurisdiction</u>
<ul style="list-style-type: none"> <li>• People v. People</li> <li>• Plaintiff v. Defendant</li> <li>• <u>Kramer v. Kramer</u></li> <li>• <u>Estate of Nicole B. Simpson v. O.J. Simpson</u></li> </ul>	<ul style="list-style-type: none"> <li>• Government v. Perpetrator</li> <li>• State (U.S.) v. Defendant</li> <li>• <u>U.S. v. Kagame</u></li> <li>• <u>The People v. O.J. Simpson</u></li> </ul>
<ul style="list-style-type: none"> <li>• Person commits crime against another person</li> </ul>	<ul style="list-style-type: none"> <li>• Person commits crime against the community</li> </ul>
<ul style="list-style-type: none"> <li>• Fine, Injunctions</li> </ul>	<ul style="list-style-type: none"> <li>• Prison, Fine, Injunctions</li> </ul>

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## Federal Tribal Trust Relationship: The Marshall Trilogy

☞ Three foundational decisions authored by Chief Justice John Marshall in the early 1800's.

☞ Why are these cases important?

☞ Reaffirmed the sovereignty of Indian tribes and acknowledged this as predating European arrival.

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## Federal Tribal Trust Relationship: The Marshall Trilogy (cont.)

☞ Marshall used the phrase "domestic dependent nations" to describe the political status of tribes.

☞ These words expressed the fact that tribes, after conquest and through treaty, had agreed to be under the protection of the United States.

☞ The cornerstone of U.S./tribal relationship is mutual consent.

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### Johnson v. McIntosh (1829)

- ⌘ Applied and adopted the Discovery Doctrine into U.S. case law.
- ⌘ Discovery Doctrine gave the U.S. the exclusive right to extinguish the original tribal right of *possession* by purchase or conquest.
- ⌘ Discovery Doctrine only left Tribes with the Right to Use and Occupy the Land.
- ⌘ This theory gave the U.S. Government title to all land as a result of having arrived onto the continent.

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### Johnson v. McIntosh (1829) (cont.)

- ⌘ U.S. Supreme Court held that Indians did not have the power to give (nor could a non-Indian receive from an Indian) title to land upon which Indians lived.
- ⌘ This case served to **protect federal land grants** (federal land patents) which the federal government used to settle the territories.

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### Cherokee Nation v. Georgia (1831)

- ⌘ State of Georgia attempted to apply state law over Cherokee Nation in an effort to "annihilate the Cherokees as a political society."
- ⌘ Cherokee Nation filed suit as a foreign nation directly in U.S. Supreme Court.
- ⌘ U.S. Supreme Court held that Cherokee Nation was not a foreign nation but a Domestic Dependent Nation.

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### Worcester v. Georgia (1832)

- ⌘ They found that case when four missionaries were arrested for being in Cherokee territory without a permit from the governor of Georgia.
- ⌘ All four were convicted and sentenced to hard labor for four years.
- ⌘ The governor extended them all pardons, but two of the four, Samuel Worcester and Elizur Butler, refused to accept them so that the constitutionality of the Georgia law could be tested. Worcester challenged the jurisdiction of Georgia Courts. President Jackson denied the missionaries federal agent status.

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### Worcester v. Georgia (1832) (Cont.)

- ⌘ The Cherokees responded to Georgia's actions by adopting a written constitution. They proclaimed themselves an independent state outside of the jurisdiction of either the federal government or the several states.
- ⌘ The Cherokee constitution was largely patterned after that of the United States, creating a republican government with the Cherokee Nation divided into several districts.

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### Trust Relationship

- ⌘ The federal government owes a responsibility to the tribes.
- ⌘ Initially, this responsibility was described as the relationship of a "guardian to its ward."
- ⌘ Now it is called the Trust Relationship.
- ⌘ Pursuant to the Trust Relationship, the federal government owes a **fiduciary duty** to the tribes to protect their interests in the lands and resources held for their benefit.

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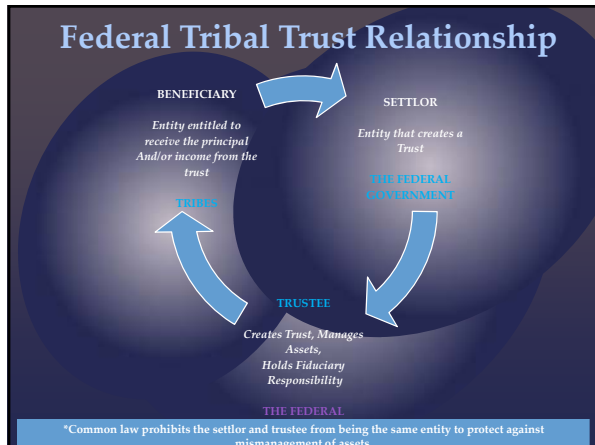
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## II. California Tribal Cultures - Understanding Historic and Modern Contexts

After this presentation, participants should be able to:

- Recognize the historical and legal foundations that shaped tribal governments in California
- Identify historical and modern contexts that shape/influence CA tribal Cultures
- Recognize how tribal culture may impact the way business is conducted, and identify ways in which this may impact transportation planners working in Native American communities

10:30 a.m.-11:00 a.m.

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### Essential Knowledge of California Indians

✎ January 2018, there are 573 federally-recognized American Indian and Alaska Native tribes and villages.

✎ Seven Virginia tribes were added in 2018.

✎ There are 109 federally recognized tribes in California.

✎ California has 20% of all tribes in the nation.

✎ 104 tribes have lands within California and an additional five tribes have lands (Indian Country) in California as well as a neighboring state.

CA  
2010 U.S.  
Census

362,801 AI/AN alone

723,225 AI/AN in combination with another race

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### Essential Knowledge of California Indians

✎ There are 308.7 million people in the United States.

✎ Majority members of tribes located outside of CA are Cherokee (18%); Apache (6%); Navajo (5%); and Choctaw (5%).

✎ Los Angeles has the highest population of AI/AN

✎ As of 2005, only 3% of AI/AN population lived on a reservation or rancheria.

✎ This population includes American Indians that are from California tribes as well as those from tribes from other states.

Country  
2010 U.S.  
Census

2,932,248 are American Indian and Alaska Native (AI/AN) alone

5,220,579 AI/AN in combination with another race

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### Essential Knowledge of California Indians

- ✎ California Indians were subjected to religious, federal, state and local policies that sought to eliminate tribal peoples, culture, and communities.
- ✎ From the conversion practices of the Catholic missionaries to the militias reimbursed for killing Indians, tribal communities in California have survived horrific histories.
- ✎ Federal policies such as the Indian Relocation Act of 1956 targeted Indians residing on reservation lands for relocation for job training programs in large U.S. cities.

California Research Bureau Report CRB-02-014, Early California Laws and Policies Related California Indians, September 2002.

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### Essential Knowledge of California Indians

Generally, California tribal histories are comprised of the following eras:




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### Prior to the Catholic Mission System

- ✎ California was populated by American Indians for at least 19,000 years. Humans in this area dated back to 50,000 years. Tribal origin (creation) stories cite tribal presence since time immemorial.
- ✎ Before European settlement, California had more than 500 "tribelets" speaking about 300 dialects of at least 100 languages. The diversity of dialects required knowledge of multiple languages to engage in social interaction and trade.
- ✎ Tribal food staples included acorn "mush," salmon, deer, elk, and rabbit. Much of the traditional foods of California Indians are scarcely available in the modern era. Plant materials for cultural arts such as basket weaving are heavily damaged by pesticides and are unsafe, inaccessible due to private property rights.




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## Mission System Era

- ↳ In 1769, there were 310,000 Natives prior to the Spanish Missions
  - Around 1900 — 20,000 Indians left in California
  - High death rate, low birth rate attributed to forced labor, diet, disease, living conditions and inadequate sanitation systems.
- ↳ Missions were intended to operate for a limited number of years bringing civilization to the native people. At the end of the mission program, the mission property and operations were to be turned over to the Indian people.
  - Indian people worked 30-40 hours/week within the missions.
  - Products from the Missions included grains, vegetables, dairy products, fruit, wine, beeswax products (i.e., candles), leather tooling (saddles, bridles). The income generated from trade supported the operation of the mission.




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## End of the Mission Era

- ↳ The Mission Period lasted until 1832, when Mexico, having taken over California from Spain 10 years earlier, secularized the missions, and began doling out the vast mission holdings to political favorites, wealthy people, and cronies of the governors of California.
- ↳ These "land grants" were called ranchos, and many of the Indian people living in the missions had little choice but to stay on and work for the new landowners.




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## The Years In Between

- ↳ The years preceding the gold rush and the Mexican American war were a violent period for California Indians.
- ↳ American settlers entered the territory in search of economic opportunities, often at the expense of tribal communities.




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## Bloody Island Massacre

- ↳ In 1847, Andrew Kelsey & Charles Stone bought a herd of longhorns from Salvador Vallejo with grazing rights in what is now Lake County. They used Pomo people to tend to cattle and other needs.
- ↳ Stone and Kelsey took Indians to work in the mines. On the 2<sup>nd</sup> mining expedition, 100 Indians were taken to the mines and only 3 survived and came home due to malaria and a lack of food.
- ↳ Stone & Kelsey bought an additional 1000 cattle (now herd of 2,000) with the gold mining profits. They began planning the next mining expedition with Indian labor. Herd impacted local ecosystem and Indian food.

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## Bloody Island Massacre

- ↳ Accounts of rape of Indian woman and a plan to stop any mining expeditions. Indians killed the two men.
- ↳ They packed up and went around Lake — hiding on Bloody Island. The Army came to meet, Pomo came out of hiding but were slaughtered.
- ↳ 100+ Indians were killed to avenge the death of Stone and Kelsey.




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## Prior to the Gold Rush

Pre-Gold Rush	Gold Rush
<ul style="list-style-type: none"> <li>• <b>Economic Structure</b> <ul style="list-style-type: none"> <li>• A few Spanish landholders controlled Indian workers who tended to mines, animals and fields.</li> <li>• Indians gained basic necessities and wealth through trading, raiding or working.</li> </ul> </li> <li>• <b>Political Structure</b></li> <li>• <b>Social Structure</b> <ul style="list-style-type: none"> <li>• Indians outnumbered non-Indians 10 to 1. Consequently, some villages remained in tact in the Sierra foothills and NW (the richest gold bearing areas in the state). By 1850, whites outnumbered Indians 2 to 1.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• <b>Economic Structure</b> <ul style="list-style-type: none"> <li>• Unlike the Spanish landholders, white gold miners were not solely dependent on Indian labor in the mines.</li> <li>• Native subsistence lifestyles were ending due to the impact upon the environment.</li> <li>• Indians paying for trade goods with an equal weight in gold. Traders created the Digger Ounce using a lead slug that outweighed the standard weights.</li> </ul> </li> <li>• <b>Political Structure</b></li> <li>• <b>Social Structure</b> <ul style="list-style-type: none"> <li>• Indians part of the consumer market, traditions changed from survival arts to commercial crafts.</li> </ul> </li> </ul>

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## Treaty of Guadalupe Hidalgo

### ☞ The Mexican American War 1846-1848

- ☞ Manifest Destiny
- ☞ Dispute over control of Northern Territories and Border at the Rio Grande

### ☞ February 2, 1848 — Treaty of Guadalupe Hidalgo

- ☞ 9 Days Before — Gold discovery at Sutter's Mill
- ☞ Indian citizenship
- ☞ Indian Rights to Land
- ☞ Homestead Act
- ☞ Half of Mexico's Territory ceded to the U.S.
- ☞ Influx of money and land hungry non-Indians.

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## Discovery of Gold in California



☞ In January of 1848, Indian and white workers discovered gold while building Sutter's sawmill in Koloma Nisenan country.

☞ Sutter was the federal Indian subagent.

☞ He indentured the Yalisumni Nisenan Indians and signed a 20-year lease to the Nisenan property with the exclusive right to cultivate the land, cut timber, and build a sawmill and other necessary machinery for the purpose.

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## The Gold Rush

- ☞ From 1848 – 1857, it is estimated that 23.3 million ounces of gold was dug up in California.
- ☞ The value of the gold at 1998 prices would have been \$6.9 billion or \$285/ounce.
- ☞ More than 100 tons of mercury was dug up for use in the gold rush
- ☞ 7,000+ tons of mercury was lost in local rivers during this time. (One *gram* of mercury in a lake violates modern federal health standards.)
- ☞ 250 million cubic meters of mercury laden sediment from the Gold Rush have filled the San Francisco Bay.

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## The Gold Rush and Indian People

- ↳ Forced or Manipulated Mining Employment
  - Working to pay off food, gear paying for trade goods with an equal weight in gold. Earning wages in liquor.
- ↳ From 1848 – 1870s, 10,000+ Indians were indentured, 4000 were children. Boys sold for \$60, girls sold for \$200.
- ↳ Indian miners were resented by white miners because they were a cheap labor force resulting in blatant hostilities.
  - ✧ Indians constituted more than half of the miners in some mines of more than 4000 miners.
  - ✧ Indian women worked in the mines as well.
- ↳ Prostitution by Indian women increased as Indian mining earning power decreased. Forced prostitution was rampant.

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## Termination and Relocation

- ↳ The U.S. Government sought to move Indians off of the Reservation into the Urban Center
- ↳ Through P.L. 280, the U.S. Government sought to end the Federal/Tribal trust relationship.
- ↳ Resulted in loss of land and homelessness.




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## House Concurrent Resolution 108

*(Introduced by Rep. Harrison on June 9, 1953)*

- ↳ In 1953, the House Concurrent Resolution 108 proposed ending Indians status as wards of the United States.
- ↳ A total of 109 Indian Tribes and Bands were terminated within the United States, primarily in Oregon and California, affecting a total of 13,263 individuals or 3% of the total Indian population, with approximately 1,365,801 acres of land was removed from trust status during this period.
- ↳ "In view of the historic policy of Congress favoring freedom for the Indians, we may well expect future Congresses to continue to endorse the principle that 'as rapidly as possible' we should end the status of Indians as wards of the Government and grant them all the rights and prerogatives pertaining to American citizenship.

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### House Concurrent Resolution 108

*(Introduced by Rep. Harrison on June 9, 1953)*

Whereas it is the policy of Congress, as rapidly as possible to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, and to grant them all the rights and prerogatives pertaining to American citizenship; and

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### House Concurrent Resolution 108

*(Introduced by Rep. Harrison on June 9, 1953)*

Whereas the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens:



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### House Concurrent Resolution 108

*(Introduced by Rep. Harrison on June 9, 1953)*

Now, therefore be it

Resolved by the House of Representatives (the Senate concurring), That it is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the **States of California, Florida, New York, and Texas**, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians.

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### California Rancheria Act

- By 1958, through the California Rancheria Act, Public Law 85-671, 44 California tribes were identified for termination, with Congress promising tribes improved roads, water systems, sanitation facilities, and vocational schools before the termination would become effective.
- On July 19, 1983 a U.S. District Court in Tillie Hardwick, et al. v. United States of America, et al. Case #C-79-1710-SW ordered federal recognition of 17 of California's Rancherias. The Hardwick decision restored more terminated tribes than any other single case in California and prompted the majority of the terminated Rancherias to pursue federal restoration.

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### California Rancheria Act

- Of the 46 terminated Rancherias more than 30 have been restored, Coyote Valley didn't need restoration because it is currently recognized, and at least five Rancherias are still trying to restore their federal status.

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### Indian Relocation Act

- In 1956, the Indian Relocation Act (also termed as Public Law 959 or the Adult Vocational Training Program), encouraged Indians to leave the reservations to obtain work in urban areas with no training, no services offered for those living off-reservations (i.e. health), and no support groups (e.g. extended families and relatives) in urban areas. Relocation further broke Indian families apart.
- Poverty was a reason used for removing Indian children from their homes and placing them with more affluent white families.

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## Self-Determination Era

- ↳ After the late 1960s, the Self-Determination Era gave Indian tribes opportunities to manage their own local government and issues.
- ↳ The Self-Determination and Education Act of 1975 (PL-93-638) required federal agencies to permit qualifying tribes and Indian organizations to administer the federal government's Indian programs on the reservations (i.e., education, social services, health clinics, etc.).

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## Self-Determination Era

- ↳ Despite these opportunities to strengthen tribes, the contract process was controlled by the BIA's rules and regulations, which challenged tribal sovereignty.
- ↳ Nonetheless, this was the time of great Indian activism and advancements in education, economic, and religious freedom rights for Indians.

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## Caltrans Supports Indian Self-Determination through application of TERO

Director's Policy (DD-74R2) (12-15-2010)

- ↳ State law expressly encourages and authorizes the Department "to cooperate with federally recognized California Indian tribes on matters of economic development and improvement for the tribes" (Gov. Code §1101 9.8(a)).
- ↳ Tribal employment policies and programs pursuant to a TERO create job opportunities for Native Americans, especially in communities with high unemployment rates. TERO fees are used to support job development and employment programs.

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## Caltrans Supports Indian Self-Determination through application of TERO

### Hiring Preferences

- ↳ DD-74R2 supports highway work conducted on tribal lands and for tribes to utilize Indian hiring preferences in recognition of, and with reference to, Congress' fiduciary responsibility to advance tribal economic development and self-sufficiency.
- ↳ TERO hiring preferences are only available to enrolled members of federally recognized tribes, and the Department cannot favor one tribe over another in implementing a hiring preference.
- ↳ Qualified job applicants will be provided to Department contractors by the tribe's designated TERO representative.

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## Why is CA Indian History important?

- ↳ Understanding the history and diversity among California Indians helps to create a better working relationship with Tribes. Every tribe is different and unique.
- ↳ Therefore, working with a Tribe will depend on a meaningful consultation and addressing the needs of each tribe.
- ↳ Reference Handout in Handbook:
  - ☞ *Source: The 7 Essential Understandings for California Indian History and Culture, Prepared by the California Indian Museum and Cultural Center. Based on those Developed under Montana Office of Public Instruction.*
  - ☞ <https://cimcc.org/wp-content/uploads/2018/07/7-Essential-Support-Booklet-Final.pdf>

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## III. Tribal Consultation and Coordination Requirements and Best Practices

After this presentation, participants should be able to:

- Describe the relationship building essentials
- Recognize federal and state laws/policies for tribal engagement/consultation in regional transportation planning and programming.

10:40 AM- 11:15 AM

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**Developing Partnerships in Transportation  
(The California Model)**

**California Department of Transportation**

**Director's Policy**

Number: DP – 19  
 Effective Date: 08-29-01  
 Supersedes:  
 Title: **Working with Native American  
Communities**

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**POLICY**

- ⌘ When working with Native American communities, the Department of Transportation (Department) acts consistently, respectfully and sensitively.
- ⌘ When there are regulatory, statutory and/or procedural impediments limiting the Department's ability to work effectively and consistently with Native American communities, the Department seeks to resolve such impediments.

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**POLICY (Continued)**

- ⌘ The Department establishes and adheres to Government-to-Government relationships when interacting with federally recognized California Native American Tribes (Tribal Governments).

**The Department:**

- ⌘ Acknowledges these tribes as unique and separate governments within the United States.
- ⌘ Ensures that its programs and activities avoid or minimize adverse impacts to cultural and other resources.
- ⌘ Recognizes and respects important California Native American rights, sites, traditions and practices.
- ⌘ Consults with Tribal Governments prior to making decisions, taking actions or implementing programs that may impact their communities.

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### INTENDED RESULTS

- ↳ When engaging in activities or developing policies that affect Native American tribal rights or trust resources, the Department acts in a knowledge-able, sensitive and respectful manner.
- ↳ Native American communities include lands held in trust by Tribal Governments, communities of non-federally recognized tribes, tribal reservation or Rancheria, Native Americans that are not part of a California tribe living in California.

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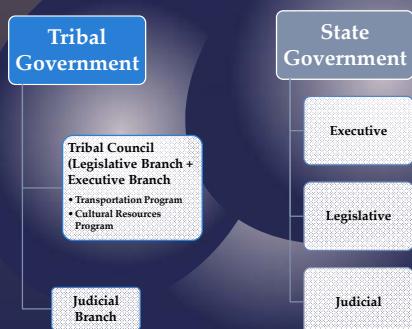
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### Consultation Engages Tribes as Governments




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### Consultation – defined

- ↳ DOT 5301.1, U.S. Department of Transportation (1999)
- ↳ “Consultation” refers to **meaningful and timely discussion** in an understandable language with tribal governments during the development of:
  - regulations,
  - policies,
  - programs,
  - plans, or
  - matters



that significantly or uniquely affect federally recognized American Indian and Alaska Native tribes and their governments.”

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## Consultation Statutes and Regulations

There are many various federal and state statutes that require an agency to engage in consultation and/or coordination with federally recognized tribes that may be impacted by a project funded by those federal or state funds:

- Authorizing Transportation Legislation-FAST Act
- National Environmental Policy Act (NEPA)
- Native American Graves Protection and Repatriation Act (NAGPRA)
- National Historic Preservation Act (NHPA)
- American Indian Religious Freedom Act (AIRFA)

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## Federal Mandates for Tribal Consultation

1996 – Presidential Executive Order  
No. 13007:

Indian Sacred Sites

This action directs Federal agencies to protect tribal sacred sites and accommodate tribal access to them.

Executive Order 13175—Consultation and Coordination with Indian Tribal Governments, November 6, 2000

Establishes regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies with tribal implications. The goals of this order are to strengthen government to government relationships with Indian tribes and to reduce the imposition of unfunded mandates upon local tribes.

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## Federal Mandates for Tribal Consultation

Executive Order B-10-11 (2009)

President Obama, in his November 5, 2009 Memorandum on Tribal Consultation (Federal Register, Vol. 74, No. 215, November 9, 2009), reiterated the directive for public agencies to incorporate tribal consultation into their plans and programs in a timely and meaningful manner.

Executive Order B-10-112 (2010)

At the state level, Governor Edmund G. Brown Jr.'s administration emphasized the importance of tribal-state relations through the creation of the Office of the Tribal Advisor (Executive Order B-10-112) in 2010.

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## California Consultation Mandates

### ↳ SB 18

- ⌘ Requires city and county governments to **consult** with **California Native American tribes** to aid in the protection of traditional **tribal** cultural places through local land use planning. ... and specific plans (defined in Government Code §65450 et seq.).

### ↳ AB 52

- ⌘ Sets forth procedural and substantive requirements for consultation

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## Who should agencies consult with?

- ↳ Unless otherwise directed by the Tribe, correspondence should be addressed to the Tribal Chairperson. Because each Tribe has its own form of government and protocol for how business is to be conducted, there is no singular approach. Tribes differ in their ability to finance leaders, spokespersons or administrative support.

### ↳ For example:

- ⌘ Tribal leaders frequently participate on their own time and money.
- ⌘ Agencies need to be cognizant of this and act accordingly, e.g., be flexible when and where meetings are scheduled.

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## Who should agencies consult with?

- ↳ A meeting with the Tribal Government (most often referred to as the Tribal Council) or its designated representative is usually the most effective way to communicate.

- ↳ Be sure to provide enough time for the Tribal Government to respond, since most Tribal Governments meet once a month, and it may be difficult to put additional items on the agenda if not given enough time.

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### Best Practices for Consultation with California Indian Tribes

- ↳ Tribal governments should be involved in the planning and the decision-making process at the beginning of the project not at the end or when a burial or sacred site is uncovered.
- ↳ Agencies should write and publish consultation procedures for working with tribal governments.
- ↳ **Honor and integrity** should be regarded as vital to the tribal consultation process.
- ↳ Agencies should train staff on the fundamentals of consulting with tribal governments.

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### Best Practices for Consultation with California Indian Tribes

#### Guiding Principles

- 1) • Honest, Open, and Meaningful Conversation
- 2) • Involvement and Support of Tribal and State Leadership
- 3) • Relationship Marked by Mutual Respect and Trust
- 4) • Collaborate on Planning the Consultation Meeting
- 5) • Multiple Contacts that Begin Early in the Process and Continue Throughout

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### 1 Honest, Open, and Meaningful Conversation

- ↳ Includes providing tribes/agencies with necessary information and the time to review it and active listening.
- ↳ Disagreements or limitations do not derail consultation efforts, so both good and bad news can be openly shared and discussed.

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## 2 Involvement and Support of Tribal and State Leadership

- ↳ The active presence of tribal and state leaders contributes to meaningful, informed discussion during consultations and further strengthens the government-to-government relationship by demonstrating the involvement of members with policy-making authority from both the state and tribes.
- ↳ Make sure that the person you are consulting with is designated by the tribal government to speak on behalf of the tribe.

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## 3 Relationship Marked by Mutual Respect and Trust

- ↳ Characterized by transparent, accurate, and open communication and a high degree of accountability.
- ↳ Respecting tribal confidentiality when handling sensitive information (consider including a provision about respecting tribal confidentiality in agreements with consultants and contractors).
- ↳ Understand that the discussion of confidential sacred site locations, burial locations, and tribal practices touches on spiritual matters and would not occur but for the possibility of protecting the tribe's cultural resources; think of how you would want your spiritual beliefs and practices respected and act accordingly.
- ↳ Existence of an agency tribal liaison
- ↳ Adopting a culturally appropriate perspective, underscored by familiarity with a tribe's culture and history.

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## 4 Collaborate on Planning the Consultation Meeting

- ↳ Agree on a venue that maximizes participation and minimizes travel expenses for all parties.
- ↳ Develop an agenda with the tribe in advance, agenda is straightforward
- ↳ To the extent possible, research any issues raised by either side before the meeting
- ↳ Share materials before the meeting

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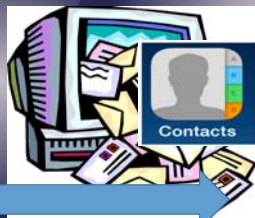
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### 5 Multiple Contacts that Begin Early in the Process and Continue Throughout




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## Tribes and Other Categories

In transportation planning, tribal governments and tribal communities can also be categorized as:

### Environmental Justice

- According to Executive Order No. 12898, "environmental justice" matter is any civil or criminal matter where the conduct or action at issue may involve a disproportionate and adverse environmental or human health effect on an identifiable disabled, low-income, minority, tribal, or indigenous population or community in the United States.

### Priority Populations and Disadvantaged Communities

- Areas disproportionately affected by environmental pollution and other hazards that can lead to negative public health effects, exposure or environmental degradation.
- Areas with concentrations of people that are of low income, high unemployment, low levels of home ownership, high rent burden, sensitive populations, or low levels of educational attainment.

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## Conclusion

- ⌘ Effective and Efficient Consultation = saving time and money.
- ⌘ Early Tribal involvement = positive relationships and smooth and orderly development of projects.
- ⌘ Positive Consultations experiences= future effective consultation.
- ⌘ Good Process will last beyond individuals.
- ⌘ Mutual respect and understanding concerns.

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## Resources

- The Tribal Consultation Protocol Template:
  - ❑ This document was developed using the Karuk Tribe Consultation Policy and Rincon Tribal Consultation Ordinance.

Includes example text and instructions for tailoring the steps to the user's needs.

Main sections include:

- 1) Authority and Purpose
- 2) Definitions
- 3) Guiding Principles
- 4) Objectives of Consultation
- 5) Establishment of Point of Contact
- 6) Consultation Procedure
- 7) Consultation Record
- 8) No Waiver of Sovereign Immunity
- 9) Severability




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## IV. Questions & Answers



11:15 AM- 11:30 AM

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## V. Evaluation

Thank you for viewing the presentation.

Please complete the Evaluation Feedback Survey:



- [https://www.surveymonkey.com/r/caltrans\\_trainingseesionevaluation](https://www.surveymonkey.com/r/caltrans_trainingseesionevaluation)

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# Thank you



<p>Address: National Indian Justice Center 5250 Aero Drive Santa Rosa, CA 95403 Phone: (707) 579-5507 Fax: (707) 579-9019</p>	<p>For further information and assistance in the consultation process, contact the Caltrans Native American Liaison Branch (NALB) at: <a href="mailto:naalb@caltrans.ca.gov">naalb@caltrans.ca.gov</a> The NALB webpage also provides contact information for the Caltrans Districts' Native American Liaisons.</p>
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**Tribal Engagement and  
Technical Assistance**



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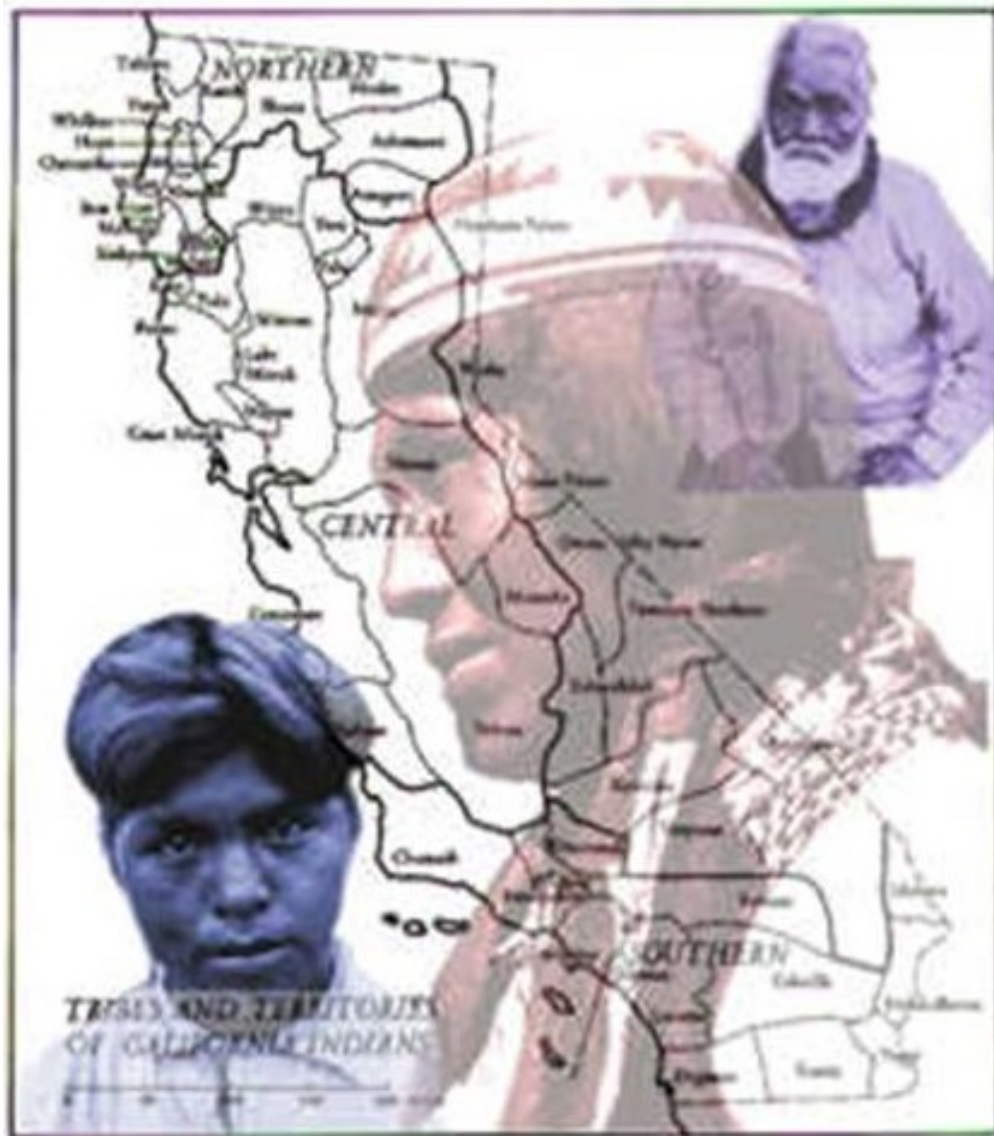
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# **WORKING EFFECTIVELY WITH TRIBAL GOVERNMENTS:**

## **A GUIDEBOOK ON TRIBAL SOVEREIGNTY**



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This Guidebook was developed by the National Indian Justice Center pursuant to grant number Cal/EPA-EJ-09/10-11 from the State of California, Environmental Protection Agency, Environmental Justice Small Grants Program. This Guidebook is designed for use in the Working Effectively with Tribal Governments Training Program or as a stand alone guide.

The contents of this Guidebook reflect the views of the author, who is responsible for the facts and accuracy of the data represented herein. The contents do not necessarily reflect the official views or policies of the State of California or the Environmental Protection Agency. This Guidebook does not constitute a standard, specification or regulation.

The mission of the California Environmental Protection Agency (Cal/EPA) is to restore, protect and enhance the environment, to ensure public health, environmental quality and economic vitality

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The National Indian Justice Center, Inc. founded in 1983, is a non-profit, 100% Indian owned and operated organization. NIJC's primary goals are to provide training and technical assistance to tribal courts, tribal governments, social services, law enforcement and other agencies that work in or with Native American communities throughout the country.

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# **WORKING EFFECTIVELY WITH TRIBAL GOVERNMENTS: A GUIDEBOOK ON TRIBAL SOVEREIGNTY**

## **I. CONCEPTS OF TRIBAL SOVEREIGNTY AND GOVERNMENTAL AUTHORITY**

### **A. Definition of Tribe**

The term “tribe” is commonly used in Indian affairs in two senses, ethnologically and in the legal-political sense. For ethnological purposes, the term “tribe” depends upon a variety of technical considerations, for example, the nature of the social and political organization of its members.

The term tribe has no universal legal definition. In most instances, the question of tribal existence can be resolved by reference to a treaty, statute, executive order or agreement recognizing the Indian tribe in question. In other cases, the definition of the tribe, like many other such generic terms, will depend in part on the context and the purposes for which the term is used. Tribes are generally categorized in one of two ways - federally recognized (listed in the Federal Register) and non-federally recognized. The main legal difference is federally-recognized tribes’ governing bodies have a special relationship with the U.S. Government as political entities, and federal government agencies are required to provide notice to, engage in consultation with, and otherwise interact with federally recognized tribes on a government-to-government basis. Even though a non-federally recognized tribe may have established a governing body, it does not have a special relationship with the U.S. Government. Thus, federal governmental agencies are generally not required to provide notice or engage in consultation with them, but federal agencies adhere to public and environmental justice participation considerations.

### **B. Definition of Indian**

The term “Indian” may be used in an ethnological or in a legal sense. For example, if a person is three-fourths Caucasian and one-fourth Indian, that person would ordinarily not be considered an Indian for ethnological purposes. Yet, legally such a person may be an Indian. Tribal membership as determined by the Indian tribe is considered an exclusive power of the tribe. An important question is whether or not this power requires the tribal government to provide due process protections as mandated in the Indian Civil Rights Act of 1968 when members are disenrolled.

Recognizing the diversity included in the definition of Indian, there is nevertheless some practical value for legal purposes in a definition of Indian as a person meeting two qualifications: (a) that some of the individual’s ancestors lived in what is now the United States before its “discovery” by Europeans, and (b) that the individual is recognized as an Indian by his or her tribe or community.

### **C. Definition of Indian Country**

Indian tribal territory has always held a separate status under federal law. The most commonly used definition of “Indian country” is 18 U.S.C. § 1151, enacted in 1948 as follows:

Except as otherwise provided in sections 1154 and 1156 of this title, the term

“Indian Country,” as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders [sic] of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

This statute is in the federal criminal code section that governs federal crimes in Indian country. The United States Supreme Court has stated that the statute’s definition generally applies also to questions of federal civil jurisdiction and tribal jurisdiction; however, it is not the only definition employed by the U.S. Supreme Court.

#### **D. Tribal Governmental Authority - Source and Scope**

Today, federally-recognized Indian tribes exercise limited “tribal sovereignty” which is the inherent power and authority to govern within the exterior boundaries of Indian territories. It is different from the sovereign powers of states because states derive their sovereignty from the U.S. Constitution. In contrast, tribal sovereignty flows from the existence of tribes as nations formed before the United States Government was established. Indian governmental powers, with some exceptions, are not delegated powers; they are inherent powers of limited sovereignty that has never been extinguished. Chief Justice John Marshall first articulated this doctrine in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). The U.S. Constitution defines explicitly the scope of federal authority and reserves all other authority to the states. It does not, however, discuss the scope of tribal jurisdiction over either internal or external matters. As a result, tribal sovereignty has been chronically subjected to the interpretations of the courts and congressional legislation.

Congress has plenary (broad) legislative power over Indian affairs. In the 1950s, Congress exercised this plenary power to destroy the federal status of some tribes by legislatively “terminating” them. Federal recognition is critical for tribes because; without it, they lack access to federally funded programs and cannot have a land base for housing, economic and community development protected by federal law.

The United States Supreme Court of modern times has found that tribal governments are unique aggregations possessing attributes of sovereignty over both their members and their territory. Powers not limited by federal statute, treaty, and restraints implicit in the protectorate relationship with their dependent status remains with tribal governments. This means that federal governments can increase or decrease tribal sovereignty. Certain implied divestitures of tribal powers have occurred where the tribes’ independence to determine their external relations is deemed inconsistent with their dependent status. For example, by 1831, *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823) and *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) established firmly that Indian tribes impliedly had been divested of the power to alienate (sell) their lands without federal approval and they no longer possess the power to make treaties with foreign nations.

In 1978, the U.S. Supreme Court held in *Oliphant v. Suquamish Indian Tribes*, 435 U.S. 191 (1978), that tribes lacked inherent criminal jurisdiction over non-Indians. Non-Indians cannot be prosecuted in tribal courts. Furthermore, tribal courts are limited in the punishment they can impose on

Indians who violate tribal criminal laws to one-year imprisonment and/or a \$5,000 fine per offense. Because California is a P.L. 280 state, the tribal governments in California may exercise concurrent criminal jurisdiction with the State, which means they share criminal jurisdiction with California. As a practical matter, few California tribes exercise criminal jurisdiction. Historically, tribes in P.L. 280 states have been excluded from accessing federal funding for law enforcement. Criminal jurisdiction in California is changing because of Indian gaming and the loosening federal restrictions on California as a P.L. 280 state.

The extent of tribal civil jurisdiction over non-Indians is not so clear. Tribal governments generally have regulatory and adjudicatory jurisdiction over civil matters arising on trust property (see *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982)). Jurisdiction over civil matters arising on fee land (private) on the reservation and involving non-Indians is evaluated on a case-by-case basis utilizing the test outlined in *Montana v. the United States*, 450 U.S. 544 (1981).

## **E. Fundamental Powers of Indian Tribes**

As limited sovereigns, tribal governments have the authority to create and enforce laws, levy taxes, provide services, determine tribal membership and enter into government-to-government relations with the federal, state, local governments and other tribal governments. Governmental structure varies from tribe to tribe. Many tribes operate under constitutions, and many created pursuant to the Indian Reorganization Act of 1934. Alternatively, other tribes may operate pursuant to resolutions or other governing documents. Although a few tribes may still operate under a traditional system, current federal programs require some form of written governing document that defines basic governmental functions and jurisdiction. Tribes often have their own written laws that address the particular needs of the tribal community. In some instances, such as environmental regulation, tribes may have the same status as a state in their ability to enforce these laws.

Fundamental tribal governmental powers include:

- Power to establish a form of government.
- Power to determine membership.
- Police power (authority to enact and enforce laws).
- Power to administer justice.
- Power to exclude
- Power to charter business organizations

### **1. Power to Establish a Form of Government**

The power to establish a form of government is a basic element of sovereignty. Federal law recognizes that Indian tribes may adopt whatever form of government that accommodates their own practical, cultural or religious needs. Tribes are not required to adopt forms of government patterned after the United States government. Since Indian tribes are not limited by the United States Constitution, they are not subject to its stated principles. However, tribes are subject to the Indian Civil Rights Act of 1968 which provides for the guarantee of certain civil rights to all persons subject to tribal governmental actions.

The constitutions adopted by the majority of tribes following the passage of the Indian Reorganization Act (IRA) were based on boilerplate document models developed by the Bureau of Indian Affairs. It has been held consistently that the exercise of powers pursuant to IRA constitutions is founded not on delegated authority, but a tribe's inherent sovereignty. Some tribes have organized their formal governments pursuant to their inherent sovereignty, outside the IRA framework, and the courts have upheld the validity of such governments, whether or not a written constitution was used. For instance, the Navajo Nation governs without a written constitution.

## **2. Power to Determine Membership**

Indian tribes possess the governmental power to determine tribal membership. Membership is generally a prerequisite for, among other things, the right to vote in tribal elections, hold tribal office, receives tribal resource rights such as grazing and residence privileges on tribal lands and participate in the distribution of possible per capita payments. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Supreme Court found that the Indian Civil Rights Act of 1968 did not require tribes to follow Anglo-American concepts of equal protection and due process in determining their membership, even when the denial of membership rights meant the denial of federal health and education benefits. Eligibility for federal benefits and assistance provided to Indians because of their status as Indians is often based on tribal membership. Depending on the federal statute at issue, this determination may involve a minimum quantum of Indian blood that is higher than the tribal membership provision to qualify for federal benefits. Many problems exist today concerning tribal membership, often times, exacerbated by Indian gaming.

## **3. Police Power**

The authority of Indian tribes to legislate or adopt substantive civil and criminal laws flows from their status as sovereign political entities. This authority includes, but is not limited to, the power to regulate the conduct of individuals within a tribal government's jurisdiction, the power to determine domestic rights and relations, the power to dispose of non-trust property and to establish rules for inheritance, the power to regulate commercial and business relations, the power to raise revenues for the operation of the government through taxation and the power to administer justice through law enforcement and judicial branches. Tribal authority has been limited from time to time by actions of Congress, court decisions and actions of states exercising federally delegated powers. Tribal authority also can be limited by tribal action.

Although federal statutes control most trust or restricted Indian property inheritances, tribal laws prescribing the manner of descent and distribution of such property have been recognized. As an attribute of real property control, tribal authority to regulate land use through zoning has been upheld. Tribal authority to levy taxes has been recognized in a variety of circumstances, including license and use fees, property taxes, sales taxes and mineral extraction or severance taxes.

## **4. Power to Administer Justice**

The maintenance of law and order on a reservation is another element of tribal governmental authority that has been upheld firmly by the courts. Tribal criminal jurisdiction has been limited statutorily in sentencing power over Indians (Indian Civil Rights Act limits fines to



\$5,000 and imprisonment to one year). There has been no tribal court jurisdiction over non-Indians since the Supreme Court ruling in *Oliphant v. Suquamish Indian Tribe* in 1978. Nevertheless, tribes possess broad authority to administer civil regulatory and adjudicatory jurisdiction in Indian country.

Most tribal court systems have borrowed heavily from Anglo-American courts. Many have developed quite extensive rules of procedure and evidence. On the other hand, Indian tribal courts also rely on tribal traditions and often look to informal methods of dispute resolution. Some tribal courts have asserted jurisdiction to review the actions of tribal governing bodies. A few tribes still have “Courts of Indian Offenses,” which are administrative courts established by the Secretary of the Interior rather than by the tribe.

Many tribes have created police departments but mostly outside California. Tribal governments employ police officers with contracted federal funds under the Indian Self Determination Act of 1975, with other federal dollars, and with tribal funds.

In addition to standard governmental functions such as regulating, taxing, and delivering services, tribal governments also act to preserve and protect the tribal culture and the tribal community. Tribal governments are also responsible for the development, management and operation of tribal economic enterprises. Tribal governmental functions include:

- Executive actions (similar to those taken by the governor of a state or the President of the United States).
- Legislative actions (similar to those taken by the state legislature or Congress).
- General government administration (personnel management, budgeting, capital programming, intergovernmental affairs).
- Public safety (police protection, tribal courts, and prosecution, other legal services, fire suppression, emergency medical response).
- Health care (medical services, mental health counseling, dental services, environmental health).
- Public works/engineering/infrastructure development (roads, sewers, water, cable television, facilities management, etc.).
- Planning and community development (comprehensive planning, zoning and land development regulation, environmental protection).
- Education (Headstart, K-12 schooling, remedial schooling, and GED testing, vocational training, higher education, scholarship support).
- Social services (daycare services, recreation services, youth, and elderly services, child welfare and protection services).

## **F. Exclusion**

The power of Indian tribes to exclude persons from their territories has been recognized as an inherent attribute of sovereignty. This exclusionary power is a fundamental means by which Indian tribes can protect their territories against trespassers. The power to exclude persons is not unlimited, however, and non-members who hold valid federal patents to fee lands within the reservation cannot be denied access to their properties. Roads constructed on the reservation with federal funds are required by federal regulation to be kept open to the public. Also, tribes may be required to give access to federal officials providing services to the tribe or its members, and tribes are required to allow state law enforcement officers in P.L. 280 states such as California access for enforcement purposes.

### **G. Tribal Business Organizations**

The power to charter business organizations is another aspect of tribal sovereignty. Indian tribes possess the authority to establish, through a charter or otherwise, business organizations to manage tribal assets. Tribally chartered enterprises hold the same status as the tribe itself for purposes of federal income tax exemptions and sovereign immunity from suit. A tribe can waive such immunity to the extent of the non-trust assets placed in the tribal corporation.

Tribes, like states, can also charter private corporations under tribal law and regulate their activities. The tribally issued corporate charters discussed here should be distinguished from the power of the Secretary of the Interior, under 25 U.S.C. § 477 of the IRA, to issue federal corporate charters to IRA tribes to conduct business. Tribes may waive sovereign immunity as to the assets of such IRA corporations, but tribal assets not held by the corporation remain protected by sovereign immunity.

### **H. Sovereign Immunity**

Indian tribes, like other sovereigns, cannot be sued without an “unequivocally expressed” waiver of sovereign immunity. In the case of tribes, the consent to suit can come from Congress. It is unclear whether tribal consent provisions in business contracts are sufficient, without congressional approval, to allow suit. The U.S. Supreme Court held that a tribe that drafted a contract in which there was an arbitration provision had waived its sovereign immunity for purposes of a state court action to enforce an arbitration award arising out of an alleged breach of an off-reservation contract (*C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001)). Tribal sovereign immunity does not extend to tribal officials acting outside of their official capacity.

### **I. Tribal Civil Jurisdiction Over Non-Indians in Indian Country**

The exercise of tribal jurisdiction over non-Indians has been one of the most controversial issues in Indian affairs during the modern era. In 1978, the Supreme Court held in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that tribes could not exercise criminal jurisdiction over non-Indians unless authorized to do so by Congress. The controversy continues in a slightly different form today as tribes increasingly exercise civil jurisdiction such as taxation and land use control. Federal courts give deference to tribal forums when it comes to ruling on the issue of tribal authority: the determination as to whether tribal jurisdiction exists normally a matter to be decided first by the tribal courts, with federal courts having authority to act in a review capacity.

#### **1. Indian Lands**

Until the U.S. Supreme Court decision in *Nevada v. Hicks*, 533 U.S. 353 (2001), tribes exercised extensive civil jurisdiction over trust land. The basis of the inquiry prior to *Hicks* was the test set out in *Montana v. United States*, 450 U.S. 544 (1981), which required courts to determine whether (1) the non-Indian's conduct was the result of a consensual relationship, or (2) the conduct of the non-Indian threatened or had some direct effect on the political integrity, economic security, health or welfare of the tribe. A tribal cigarette tax for sales to non-Indians on tribal lands was upheld by the Supreme Court, and, in *Merion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the tribe levied a substantial tax on mineral extraction from companies even though they already were paying royalties under mineral leases. Comparing the Tribe to states and cities, the Supreme Court upheld the tax, reasoning that such sovereigns can receive contract payments as landowners and can subsequently levy taxes in their governmental capacities.

Prior to *Hicks*, when an incident arose on trust land, there was no question that the activity had some direct impact on the tribe so as to vest it with civil jurisdiction. Questions of tribal civil jurisdiction mainly arose when the incident occurred on fee land. But the U.S. Supreme Court in *Hicks* held that the status of the land as trust "is only one factor to consider in determining whether regulation of the activities of nonmembers is necessary to protect tribal self-government or control internal relations. It may sometimes be a dispositive factor."<sup>1</sup> This new test makes the question of whether a tribe has civil jurisdiction much more difficult to determine.

## **2. Non-Indian Lands**

The U.S. Supreme Court has substantially impeded tribal authority to regulate non-Indians on fee land (private) inside tribal boundaries. In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the Court held that the tribal court lacked jurisdiction to hear a personal injury suit brought by the non-Indian wife of a deceased tribal member against a contractor doing business with the Tribe. The accident occurred on trust land over which the Tribe and the federal government had granted the State of North Dakota a highway right-of-way. Although the most commonly used definition of Indian country states that a right of way constitutes Indian country, the Supreme Court opted to use a lesser-known and lesser-used definition of Indian Country. In *Bressi v. Ford*, (No. 07-15931, D.C. No. CV-04-00264-JMR) (Aug. 2009), the 9th circuit has reinstated the application of the more commonly used definition of Indian Country which includes right of ways.

The U.S. Supreme Court held in *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001), that the Navajo Nation lacked civil regulatory jurisdiction to assess a hotel occupancy tax on a non-Indian owner of a hotel located on fee land within the reservation, even though the Navajo Nation provided emergency and other services to the hotel. The Court sets out the following language as the basis of a new test: "Exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes."<sup>2</sup> This new test makes it more difficult for tribes to protect the health and safety of their members against the activities of non-Indians.

## **J. Jurisdictional Issues Between the Federal Government/Tribes and the State**

Sometimes questions arise concerning which governmental agency has the authority to regulate a particular activity or parcel of land. Several factors impact this determination in a given situation, such as whether the land is held in fee (private) or held in trust by the federal government. Some key concepts and principles are outlined below.

## **1. Federal Preemption**

The U.S. Constitution outlines basic areas of jurisdiction that belong to the federal government. Any powers not specifically delegated to the federal government are —reserved for the states. If the federal government does have jurisdiction in a particular area, then federal law supersedes state laws. This is known as the “federal preemption doctrine.”<sup>1</sup> It applies in two situations. The first is when Congress intends to legislate exclusively in an area of law, thus occupying the entire field of that law. The second situation arises when enforcing the state law would frustrate the purpose behind the federal legislation. In the area of federal Indian law, because Congress has plenary power over Indian affairs, Congress has clearly indicated an intent to occupy the field. Thus, any state legislation that purports to cover Indian affairs would be preempted by federal laws if there was a conflict between the state and federal laws or regulations.

## **2. Conflicts Between State and Tribal Laws**

Sometimes conflicts arise between state laws and tribal laws, particularly in the area of environmental regulation. Tribes have broad regulatory power over environmental and cultural resources on their lands, and some California tribes have their own environmental codes and cultural preservation ordinances.

For example, a conflict might arise if a non-Indian owned fee land within the reservation or rancheria and wanted to create a garbage disposal site on his or her land. The landowner could obtain the necessary permits from the county and comply with the applicable state laws for garbage disposal sites. But the tribe might have more stringent environmental laws or specific ordinances that address garbage disposal sites that would preclude placing such a site on that parcel, or the site may have cultural significance to the tribe. If the tribe and landowner could not come to an agreement, the situation would be resolved by applying the tests set out by the U.S. Supreme Court in *Montana, Strate v. A-1 Contractors* and *Atkinson Trading Co.* The factors set out in *Montana* to determine a tribe’s authority to regulate non-Indian activities on fee land within the boundaries of the tribe’s land are: (1) whether the non-Indian entered into a consensual relationship with the tribe or its members (such as a contract); or (2) whether the activities of the non-Indian threaten or have some direct effect on the political integrity, economic security or health or welfare of the tribe. The more severe the run-off, or smell, the more likely the impacted tribe would be able to enforce its regulatory authority to control the site.

Another conflict that arises in the regulation of the environment occurs when the tribe and state have different environmental standards. The Tenth Circuit held that the Isleta Pueblo, as a downstream user, could enforce its stricter water quality standards against the City of Albuquerque. (*City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), cert. denied, 118 S.Ct. 410 (1997). See also *State of Montana v. United States Environmental Protection Agency*, 137 F.3d 1135 (9th Cir. 1998) (tribal Clean Water Act regulations upheld over state’s objections.))

## **3. Impact of Public Law 280 on the Analysis**

California is a Public Law 280 (—P.L. 280”) state, which means that state civil “laws of general application”<sup>2</sup> may be applied to civil disputes that arise in California Indian communities. However, courts have held that local ordinances, such as zoning and rent control laws, do not apply to tribal trust lands. In addition, P.L. 280 specifically exempts from state jurisdiction any laws that could potentially result in the

alienation, encumbrance or taxation of any trust property. Pursuant to the U.S. Supreme Court decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), P.L. 280 states have —criminal/prohibitory jurisdiction within Indian country, but tribes maintain —civil/regulatory jurisdiction over their lands and tribal members. The interaction between P.L. 280 and the Supreme Court decisions addressing tribal civil jurisdiction over the activities of non-Indians on fee land require a case-by-case analysis of the facts and circumstances involved in regulatory schemes of either the tribe or the state to determine the scope of jurisdiction each sovereign may assert in a particular situation. Because of the complexities involved, the best solution is for tribal governments and state agencies to enter into MOUs whenever possible to avoid jurisdictional conflicts before they arise.

#### **4. Off-Reservation Issues**

In addition to jurisdictional questions that arise regarding the regulatory authority of activities on tribal lands, there are also questions concerning off-reservation activities. For example, to what extent must tribes address off-reservation impacts of their on-reservation activities, and what responsibilities do state and local agencies have to address off-reservation impacts for tribal communities? The compacts between the Governor of California and the tribes outline parameters for off-reservation impacts of gaming enterprises, and the impacts of non-gaming related activities are normally addressed by tribal environmental law, NEPA or CEQA, depending on the funding, action, project description and jurisdictional boundaries.

## **II. INTRODUCTION TO CONSULTATION WITH TRIBAL GOVERNMENTS**

Assembly Concurrent Resolution (ACR) 185 – Native American Rights (Sept. 2000) reaffirms the State of California’s recognition of the tribal governments of federally-recognized tribes as separate, independent sovereigns; and encourages all state agencies “when engaging in activities or developing policies affecting Native American tribal rights or trust resources to do so in a knowledgeable, sensitive manner that is respectful of tribal sovereignty.”<sup>1</sup> Tribal consultation is the primary means for achieving the goals of ACR 185. Tribal consultation can be an elusive and confusing concept. Most people know little about Indian tribes as governments and the history of American Indians in this nation or the state of California. Tribal consultation may also be confusing because its scope and effectiveness vary concerning the subject matter and the parties involved. In this guidebook, we examine tribal sovereignty to activities and projects that involve the California Environmental Protection Agency (CALEPA), other state agencies, and the tribal groups of California, including the individual members of those tribal groups.

### **A. Questions Concerning Consultation**

Immediately, a nest of questions is unleashed when the issue of tribal consultation is raised. What tribal groups are we talking about? What are federally recognized tribes? Unrecognized tribes? What about individual members of both federally recognized and unrecognized tribes? What about the urban Indians of California? Does CALEPA owe —tribal consultation<sup>1</sup> to urban Indians? Many of these urban Indians are not from tribes indigenous to California but they may be members of federally recognized tribes in other states. To answer these questions we begin by defining —tribal consultation<sup>1</sup> within the context of transportation issues that involve California Indians and CALEPA.

### **B. Tribal Consultation**

Under federal law, federally recognized tribes are self-governing. Simply stated, they can make their own laws and be governed by them. In 1831, the Supreme Court of the United States denominated Indian tribes as domestic, dependent nations.<sup>1</sup> From this declaration of a unique legal status later came federal rules and regulations that have obligated federal agencies to consult with tribes on a government-to-government premise. On November 5, 2009, President Obama issued a memorandum that directs each agency head to submit to the Director of the Office of Management and Budget (OMB), within 90 days after the date of the memorandum, a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175. This plan shall be developed after consultation by the agency with In- Indian tribes and tribal officials as defined in Executive Order 13175. It also directs each agency head to submit to the Director of the OMB, within 270 days after the date of the memorandum, and annually thereafter, a progress report on the status of each action included in its plan together with any proposed updates to its plan.

On June 9, 2010, the federal Environmental Protection Agency released its draft Policy on Consultation in which it defined a four-phase consultation process: (1) Identification Phase, (2) Notification Phase, (3) Input Phase, and (4) Follow up Phase.

Although the draft policy does not define Consultation. Other federal policies often define tribal consultation as follows:

“Consultation. Refers to a meaningful and timely discussion in an understandable language with tribal governments during the development of regulations, policies, programs, plans, or matters that significantly or uniquely affect federally recognized American Indian and Alaska Native tribes and their governments.”<sup>2</sup>

The term “understandable language” should be interpreted to mean language that is non- technical and free from bureaucratic jargon. This definition solicits clear, positive communication that promotes effective collaboration. Often, technical language spiced with bureaucratic jargon is intimidating for those persons who are unfamiliar with the bureaucracy or its relevant legislation. Consultation must be conducted in a comfortable, non-threatening environment.

Other federal statutes and accompanying regulations (i.e., Intermodal Surface Transportation Efficiency Act of 1991, Federal Transportation Equity Act for the 21st Century, National Environmental Policy Act, Native American Graves Protection and Repatriation Act, National Historic Preservation Act, American Indian Religious Freedom Act) provide the basis for recognition of tribal sovereignty through a consultation process. In each statute and implementing regulations these guiding principles must be followed by federal and state agencies and their hires: Tribal governments should be involved in the planning and the decision making process at the beginning of the project not at the end or when burial or sacred site is uncovered.

Agencies should write and publish consultation procedures for working with tribal governments. Honor and integrity should be regarded as vital to the tribal consultation process.

Agencies should train staff on the fundamentals of consulting with tribal governments. Tribal consultation is much more than providing information to the tribes about what an agency is planning to do and to allow tribes to comment. In the guidelines for federal historic preservation programs, the National Park Service provides the following definition of “consultation”:

*Consultation means the process of seeking, discussing, and considering the views of others, and, where feasible seeking agreement with them on how historic properties should be identified, considered and managed. Consultation is built upon the exchange of ideas, not simply providing information.*

Indians view and have experienced “consultation” with federal agencies as a process more aligned with the process of negotiation. Consultation implies a “give and take” dialogue, not just listening to a presentation from an agency that wants to take action on a project on its own terms. Tribal governments must be involved in the process of planning and decision-making of transportation activities that affect their communities. When viewed in this light, tribal consultation not only engages the government-to-government relationship it also brings forth the spirit of environmental justice to Indian

people who for so long, have not had a seat at the planning table for projects that impact the tribal community.

### **C. Federally Recognized and Unrecognized Tribes**

The long-standing government-to-government relationship between the federal government and federally recognized tribes are defined by negotiated treaties, federal statutes, and decisions of the United States Supreme Court. Historically, individual state governments have been hostile to the recognition of Indian tribes as sovereigns. Historical accounts clearly indicate that the early California state legislatures deplored the notion of California Indian tribes as governments and engaged in actions to sabotage the stability of tribal communities.<sup>5</sup> However, in recent years, the tide has changed and tribal governments are recognized as governments by some states. As a result of various state and federal policies and decisions, there are tribal groups in California and elsewhere that are not recognized as sovereigns by federal or state governments. At some point in history, a tribe may have offended federal officials and paid the price by being refused federal recognition. In California, the Ohlone Tribe is not federally recognized because its homeland is San Francisco and one of its contemporary leaders has been aggressive with federal officials in seeking federal recognition. The Wintu Tribe of northern California was deliberately omitted from federally recognition processes. There are a few tribes that were terminated in the 50's<sup>6</sup> which remain terminated and without federal recognition. Some of these groups continue to promote their cultural heritage but cannot participate in the government-to-government relationship with the United States because of their unrecognized status. Occasionally, members of these unrecognized groups find themselves in roles of most likely descendants (MLD's) and interested parties when a transportation project has unearthed a burial or sacred site. Sometimes they may be called upon to act as project monitors.

Presently, there are 109 federally recognized tribes in California, which share common attributes as well as significant differences. Each tribe has its own government, unique history, demographics, and economic development opportunities. In order to effectively consult with California tribes on transportation issues, CALEPA, state employees and contractors must recognize and understand the differences between the various tribal communities and how to work with tribal governments individually to address the needs, priorities and concerns within their districts. In Indian affairs, a consultation cannot be viewed as "one size fits all." Additionally, tribal government officials and their community members must be able to understand and appreciate the operation and policies of CALEPA as it relates to the tribal community. Finally, it is important to understand that Native American communities are not just part of rural California; some rancherias and reservations are located within urban areas.

### **D. Urban Indians**

Urban Indians may not possess legal standing to be considered for a consultation about historic preservation matters concerning archeological sites impacted by transportation projects in the urban areas of California because they may have no ancestral connection to the region. However, there are contemporary transportation issues that may directly impact Urban Indians. Urban Indians should be involved "public participants" in the planning of projects in urban centers.

Public participation provides for public involvement of all citizens (including Native Americans), affected public agencies, representatives of transportation agency employees, freight shippers, providers



of freight transportation services, private providers of transportation, representatives of users of public transit, and other interested parties of the community affected by transportation plans, programs, and projects.

All Native Americans, as individual citizens, regardless of whether they are members of federally-recognized tribes, may contribute to the public participation process. They belong to an ethnic minority, they may be low income and they may be associated with a community-based organization or be among the groups shown above. Within public participation forums, as individuals, they are not representing tribal governments.

Urban Indians are rarely consulted on urban transportation projects because they have not been actively recruited as “public participants.”<sup>l</sup> Contact with urban Indians can be made through Indian centers and urban health care clinics. Many urban Indians frequent these centers and clinics; these are ideal sites in which to initiate outreach to urban Indians. Again, unless the urban Indian has an ancestral connection to the urban area or has been designated as a contact person by a tribal council, they should not be considered representatives of a federally recognized tribal community for tribal consultation purposes but they should be afforded every opportunity engage in the “public participation” process.

#### **E. California Indian Country**

The land base occupied by the federally recognized tribes of California is small when compared to tribes in other states. In California, Indian lands are usually referred to as reservations or rancherias. Legally, there is no distinction between these two terms. Land within a tribal community can be owned in one of several ways, each of which has a distinct legal status. Indian lands can be owned in fee (private ownership/Indian or non-Indian owned) or federal trust (federal control/individual allotment or held in trust for the tribe).

Land held in fee is subject to state and county regulations. It may also be subject to tribal regulations if the land is owned by the tribe or a member of the tribe. If the land is held in federal trust, it means that the federal government holds legal title to the land for the benefit of the tribe or its members. Due to the termination policies, the federal government may also hold legal title to a parcel of land for the benefit of an individual Indian. Federal land is not subject to state laws in California.<sup>7</sup> Federal land does not include land purchased in the public real estate market by an individual Indian; that is private property, held in fee and freely disposable. If that land is changed to federal trust status upon petition by the tribe or its member, then it is no longer held in fee and is no longer freely disposable by the individual member or tribe. It is held in Federal trust.

When a federally recognized tribe communally holds land, individual members may hold “assignments” to parcels of those lands. The terms of an assignment are usually determined by the governing body of the tribe and the assignment may vary greatly in size, duration and scope. An assignment is similar to a lease with the tribe acting as the lessor and the member as the lessee. Federally “allotted” land is federal trust land held for either an individual or a tribe. Under various statutes, particularly the General Allotment (Dawes) Act of 1887 (25 U.S.C. § 331, et seq.), Congress divided reservations into individual allotments of 160-acre parcels and distributed the parcels to heads of Indian households. The allotted parcels were then held in trust for an additional 25 years whereupon they were transferred to fee status. Many of the allotments that transferred to fee status were sold to non-Indians or

lost to the local governmental taxing authority for non-payment of taxes, a liability unknown and unfamiliar to most Native Americans at that time. Although the Indian Reorganization Act of 1934 ended the process of allotment of Indian lands and returned Indian owned allotted parcels to individual trust status, many of the effects of allotment still persist today.

Due to the Allotment Act, 90 million acres of tribal trust lands were sold as “surplus” land to non-Indians. Consequently, many reservations are a “checkerboard”<sup>1</sup> of fee and federal trust lands under both Indian and non-Indian ownership, subject to various exclusive and concurrent jurisdictions. Regulation of these lands is an ongoing issue. For instance, a fee parcel owned by a non-Indian within the boundaries of a reservation is subject to county zoning laws. If the tribe also has zoning and land use regulations, the state and tribal laws may conflict. There are also problems with the fractionalization of allotments. A single border may be owned by several and sometimes hundreds of descendants of the original Indian allottee because wills were not used and the lands ended up with heirs having undivided shares to the original allotment. These Indian land issues are confusing and may polarize discussions between agency representatives and tribal government officials. All parties must come to the table with an awareness of the fundamental issues for a consultation to be productive.

### **III. CONSULTATION AND COORDINATION WITH CALIFORNIA TRIBAL GOVERNMENTS**

Federally recognized tribes are considered sovereign entities but also “domestic, dependent nations.” They are neither foreign nations nor states. Their sovereign status is a consequence of the federal government’s negotiation of treaties with some tribes, as well as federal case law recognizing that tribes are independent political societies predating the U.S. Constitution. Tribes have been recognized by the federal government to be sovereign entities through several instruments including treaties, federal recognition rules and regulations and executive orders. Tribal authority to regulate their internal affairs is very broad, but their jurisdiction over non-tribal members is limited. Tribes can levy taxes, create and enforce laws, engage in economic enterprises, provide for the health and safety of their tribal members and residents of their reservations and engage in any other governmental activities not expressly divested from them either by treaty, federal statute or court decisions. Federally recognized tribes and their governmental officials possess attributes and characteristics of other governments including sovereign immunity from a lawsuit that may only expressly waived by Congress or the tribe. Although tribal governments are not subject to the U.S. Bill of Rights because their sovereignty pre-dates the U.S. Constitution,<sup>8</sup> they are subject to limitations on their governmental authority by the Indian Civil Rights Act of 1968.<sup>9</sup>

In the appendices, the reader will find the state and federal laws, rules, regulations and orders that impact the tribal consultation process. This section examines selected rules and statutes that significantly impact the tribal consultation process relating to transportation issues and CALEPA.

#### **A. CALEPA Policy for Working With California Indian Tribes (CIT-09-01, October 19, 2009)**

This policy provides a framework for Cal/EPA and its Boards, Departments, and Offices (BDOs) to improve and maintain communication and collaboration between Cal/EPA, its BDOs, and California Indian Tribes to further the mission of Cal/EPA.

This policy also provides a commitment to educating appropriate staff, to become informed about the cultural setting of California Indians, their environmental issues and tribal histories, for the purpose of improving Cal/EPA's understanding of and connection to California Indian Tribes.

## **1. Guiding Principles for this Policy**

To improve communication and collaboration, Cal/EPA and its BDOs should, to the extent feasible and legally allowable, be guided by the following principles and best practices. Nothing in this policy shall be construed to prevent Cal/EPA or its BDOs from taking timely action to fulfill their legal obligations to protect the public health and safety, or the environment, or to carry out federally-mandated duties under delegated federal programs. Cal/EPA and its BDOs shall:

1. Acknowledge and respect tribal sovereignty, as defined in this policy.
2. Understand that federally-recognized tribes have a unique relationship with the federal government.
3. Understand the importance of communication and collaboration with California Indian Tribes.
4. Communicate with California Indian Tribes in a manner that is respectful and considerate.
5. Seek to identify and include federally-recognized California Indian Tribes in decision-making processes that affect tribal lands.
6. Seek to identify and include federally-recognized and non-federally recognized California Indian Tribes in decision-making processes that affect cultural resources.
7. Recognize and respect the cultural resources of California Indian Tribes, whether or not on tribal lands.
8. Where appropriate, consider the potential impact of our activities or programs on tribal lands and cultural resources.
9. Encourage collaborative efforts between the California Indian Tribes and federal, state, and local government entities to resolve issues of mutual concern.
10. Promote efforts of California Indian Tribes to develop and expand environmental programs, and to achieve compliance with environmental laws.

The Policy sets forth an Action Plan stating that Cal/EPA and its BDOs will work together to implement the following actions to achieve its guiding principles, to the extent legal and practicable:

1. Establish a Tribal Stakeholder Group (with rotating membership) to discuss environmental issues and projects involving California Indian Tribes. The Tribal Stakeholder Group will include representatives from federally-recognized and non-federally recognized California Indian Tribes. The Tribal Stakeholder Group will meet

with the Secretary of Cal/EPA and the heads of each BDO, or their designees, at least once each calendar year.

2. Designate a tribal liaison within Cal/EPA and within each BDO as a central point of contact for California Indian Tribes.
3. Develop a communication protocol that will be followed by Cal/EPA and its BDOs, and that will promote appropriate collaboration with California Indian Tribes.
4. Establish a process to disseminate public documents, notices, and information to California Indian Tribes, and make these documents readily accessible to tribes that may not have electronic capabilities.
5. Establish a process to conduct meetings, outreach, and workshops at times and in locations that facilitate tribal participation.
6. Provide training to appropriate executive staff, managers, supervisors, and employees on how to implement this policy.
7. Establish a mechanism to obtain relevant and available information, studies and data from California Indian Tribes when conducting research or environmental studies that relate to, or could impact, tribal lands or cultural resources.
8. Assess eligibility of California Indian Tribes for Cal/EPA financial assistance programs such as grants, loans, and scholarships.
9. Upon request by a California Indian Tribe, provide training and technical assistance, and share data, where appropriate.
10. Develop Memorandums of Understanding (MOUs), Memorandums of Agreement (MOAs), or other cooperative agreements with California Indian Tribes on specific projects or subject matters, as appropriate.

**B. California Senate Bill 18 (SB 18) – Protecting California Native American Traditional Tribal Cultural Places**

Senate Bill 18 was signed into law in September 2004. The purpose of SB 18 is to preserve and protect the cultural places of California Native Americans. SB 18 requires local governments to consult with California Native American tribes, both federally recognized and non- federally recognized, to aid in the protection of traditional tribal cultural places through local land use planning and extends to both public and private lands. SB 18 also requires the Governor’s Office of Planning and Research (OPR) to include in the General Plan Guidelines advice to local governments for how to conduct these consultations. For purposes of SB 18, the definition of cultural places include:

- Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine (Public Resources Code §5097.9).

- Native American historic, cultural, or sacred site, that is listed or may be eligible for listing in the California Register of Historic Resources pursuant to Section 5024.1, including any historic or prehistoric ruins, any burial ground, any archaeological or historic site (Public Resources Code §5097.995).

SB 18 requires the OPR to amend the General Plan Guidelines to contain advice to local governments on:

- Consulting with tribes for the preservation of, or the mitigation of impacts to, cultural places.
- Procedures for identifying through the Native American Heritage Commission (NAHC) the appropriate California Native American tribes with whom to consult.
- Procedures for continuing to protect the confidentiality of information concerning the specific identity, location, character, and use of cultural places.
- Procedures to facilitate voluntary landowner participation to preserve and protect the specific identity, location, character, and use of cultural places (Government Code §65040.2(g)).

SB 18 establishes responsibilities for local governments to contact, provide notice, refer plans, and consult with tribes. Prior to the adoption of any amendment of a general plan or specific plan, a local government must notify tribes of the opportunity to conduct consultations for the purpose of preserving or mitigating impacts to cultural places located within the local government's jurisdiction. Tribes will have 90 days from the date of the notice to request consultation, unless otherwise agreed to by the tribe. Prior to the adoption or substantial amendment of a general plan or specific plan, a local government must refer the proposed action to those tribes that are on the NAHC contact list and have traditional lands located within the city or county's jurisdiction. The referral must provide for a forty-five (45) day comment period. The notice must be sent regardless of whether prior consultation has taken place. Local governments must send notice of a public hearing, at least ten (10) days prior to the hearing, to tribes who have filed a written request for such notice. Local governments are required to consult with tribes under two circumstances. First, consultation must be provided to tribes that have requested consultation in accordance with Government Code §65352.3. The purpose of this consultation is to preserve or mitigate impacts to cultural places that may be affected by a general plan or specific plan amendment or adoption. Second, consultation must occur before designating open space in the general plan, if the affected land contains a cultural place and if the affected tribe has requested public notice under Government Code §65092. The purpose of this consultation is to protect the identity of the cultural place and to address appropriate treatment or management of the cultural place.

#### **C. National Historic Preservation Act of 1966 (P.L. 89-665; 16 U.S.C. § 470) [Section 106 Consultation]**

This federal statute was amended in 1992. It addresses the preservation of historic properties, including historical, archaeological and architectural districts, sites, buildings, structures and objects that are eligible for the National Register of Historic Places. In some cases, such properties may be eligible partly or wholly because of historical importance to Native Americans, including traditional religious and

cultural importance. Federal agencies must take into account the impacts of their activities on eligible properties.

In particular, CALEPA must consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by the activities. The consultation process is contained in “Consulting with Indian Tribes in the Section 106 Review Process,” published by the Advisory Council on Historic Preservation (ACHP). The ACHP regulations (set forth in 36 CFS part 800) provide guidance to federal agencies regarding consultation. Some key points of the Section 106 consultation process are summarized in the “Consultation with Indian Tribes” as follows:

Regulations remind Federal agencies that historic properties of religious and cultural significance to an Indian tribe may be located on ancestral, aboriginal, or ceded lands of that tribe. Accordingly, agencies must make a reasonable and good faith effort to identify Indian tribes that attach such significance but may now live at great distances from the undertaking’s area of potential effect.

Federal agencies should be respectful of tribal sovereignty in conducting consultation and must recognize the government-to-government relationship that exists between the federal government and federally recognized Indian tribes.

The regulations also provide for an Indian tribe to enter into an agreement with a federal agency regarding any aspect of tribal participation in the review process. The agreement may provide the Indian tribe with additional participation or concurrence in agency decisions under Section 106 provided that no modification is made to the roles of other parties without their consent.

The “Consultation” publication sets out the steps in the consultation process. Some of the key points include the following:

One of the first steps a federal agency takes is to determine if the undertaking may occur on or affect historic properties on tribal lands and, if so, whether the Indian tribe has assumed the duties of the State Historic Preservation Officer (SHPO) under Section 101 (d)(2) of NHPA. If a tribe has assumed these duties, the federal agency must work with the Tribal Historic Preservation Officer (THPO) in the consultation process.

Tribal participation in the Section 106 process is conducted through the tribe’s official governmental structure. The formal representation, including the designation of the tribal signatory for the tribe, is determined by the tribe in accordance with tribal law, internal structure, and governing procedures. Therefore in the first instance of the 106 process, the government-to-government relationship is invoked between the federal and tribal governments. Other tribal members who wish to participate in the Section 106 process must do so as members of the public and may seek to become consulting parties with the consent of the agency official. However, the views of the Indian tribe are provided only by an officially designated representative of the tribal government.

The agency consults with the tribal designated representative and the SHPO when there is no THPO (Tribal Historic Preservation Officer). If the SHPO withdraws from consultation, the federal agency and the tribal representative may complete the review process. An Indian tribe may enter into an

agreement with the SHPO specifying the SHPO's participation in the Section 106 review process on tribal lands.

A federal agency must make a reasonable and good faith effort to identify Indian tribes that attach religious and cultural significance to historic properties affected by the undertaking. Some tribes may attach such significance to historic properties located on another tribe's lands. The federal agency must consult with them as well. Additionally, environmental justice must be considered in the 106 process.

CALEPA can work with the Native American Heritage Commission to meet its Section 106 consultation requirements. Contact information for the Commission is:

Native American Heritage Commission 915 Capitol Mall, Room 364

Sacramento, CA 95814

Phone: (916) 653-4082

Fax: (916) 657-5390

A 1980 amendment to the Act (P.L. 96-515; 94 Stat. 3000; 16 U.S.C. § 470(a), note) directs the Secretary of the Interior, in cooperation with the American Folklife Center of the Library of Congress, to explore ways to preserve and conserve intangible elements of cultural heritage and to encourage continuation of diverse cultural traditions. (See also 36 C.F.R. part 800, which outlines the consultation process.)

#### **D. Tribal Government Consultation vs. Native American Public Participation**

Pursuant to 23 CFR § 450.104, consultation means that one party confers with another identified party and, prior to taking action(s), considers that party's views. "Tribal consultation" refers to the recognized tribal government or tribal political unit. In 23 CFR §450.208(b), it further states that "[t]he degree of consultation and analysis of the factors should be based on the scale and complexity of many issues, including transportation problems, land use, employment, economic development, environmental and housing and community development objectives..." Consultation issues may also include a tribal government's concern about projects outside its jurisdiction that potentially impact the tribal community or its cultural resources.

In contrast to tribal consultation, public participation provides for public involvement of all citizens (including Native Americans) affected public agencies, representatives of transportation agencies, freight shippers, private providers of transportation, users of public transit and other interested parties of the community affected by transportation plans, programs and projects. All Native Americans as individual citizens can contribute to the public participation process. Within public participation forums, however, they act as individuals, not as officials of tribal governments.

## APPENDIX A

State of California  
California Environmental Protection Agency  
Cal/EPA-019 (New 05/18/05)

### CAL/EPA POLICY MEMORANDUM

SUBJECT:  CAL/EPA POLICY FOR WORKING WITH CALIFORNIA INDIAN TRIBES	NUMBER:  CIT-09-01
	DATE ISSUED:  10/19/09
	EXPIRES:  UNTIL RESCINDED
	CATEGORY:  CALIFORNIA INDIAN TRIBES
REFERENCES:	

#### STATEMENT OF PURPOSE

The mission of the California Environmental Protection Agency (Cal/EPA) is to restore, protect and enhance the environment, to ensure public health, environmental quality and economic vitality.

This policy provides a framework for Cal/EPA and its Boards, Departments and Offices (BDOs) to improve and maintain communication and collaboration between Cal/EPA, its BDOs, and California Indian Tribes to further the mission of Cal/EPA.

This policy also provides a commitment to educate appropriate staff, to become informed about the cultural setting of California Indians, their environmental issues and tribal histories, for the purpose of improving Cal/EPA's understanding of and connection to California Indian Tribes.

#### DEFINITIONS

For purposes of this policy, the following terms shall have the meanings defined below:

**California Indian Tribe:** A federally-recognized California Indian Tribe (as listed on the Federal Register). With respect to cultural resources, a federally-recognized Indian Tribe and a non-federally recognized California Native American Tribe that is on the California Tribal Consultation List maintained by the Native American Heritage Commission (NAHC).

**Tribal Sovereignty:** Refers to the unique political status of federally-recognized Indian tribes. Federally-recognized Indian tribes exercise certain jurisdiction and governmental powers over activities and Tribal members within its territory. Some of these powers are inherent, some have been delegated by the United States, and all are subject to limitations by the United States. Existing limitations are defined through acts of Congress, treaties, and federal court decisions.

**Indian Country [or Tribal Lands]:** Have the same meaning as the term "Indian country" in title 18 United States Code section 1151 (see Statutory References).



**Collaboration:** Refers to California Indian Tribes and Cal/EPA and its BDOs communicating and working together to resolve respective issues of concern and/or mutual interest. This exchange is conducted by respecting the protocols each respective tribe has established for contacting its governing body or its delegated official. This exchange is also conducted through the Governor's appointed Agency Secretary, BDO Chairperson or Executive Director, or their delegated representatives.

## **BACKGROUND**

The Office of the Secretary of Cal/EPA oversees and coordinates the activities of the following six BDOs: the Air Resources Board; the Department of Pesticide Regulation; the Department of Toxic Substances Control; the Integrated Waste Management Board; the Office of Environmental Health Hazard Assessment; and the State Water Resources Control Board.

Cal/EPA and its BDOs understand that protecting California's environment is a major undertaking that involves not only communicating and collaborating with federal and state agencies, local governments, and non-governmental organizations but also communicating and collaborating with California Indian Tribes.

California's environmental regulatory system is a complex framework, with training, compliance assistance, inspection, permitting and enforcement activities carried out by a number of federal, state and local government agencies. In order to fulfill Cal/EPA's mission, it is essential to understand the unique history of California Indian Tribes. By learning about tribal history, environmental issues, and cultural places, we can begin to put into context how the laws, programs and processes that Cal/EPA and its BDO's administer relate to California Indian Tribes.

California has the second largest number of federally-recognized<sup>i</sup> tribes and, according to the 2000 U.S. Census, the largest Native American population in the United States. In California, there are 109 tribes that are recognized by the federal government. There are also indigenous communities which, although they existed prior to the formation of the United States, are not currently recognized as sovereigns by the federal government. At this time, there are 89 non-federally recognized California Indian Tribes of which 72 are engaged in seeking federal recognition. All California Indian Tribes, whether officially recognized by the federal government or not, may have environmental, economic, and public health concerns that are different from the concerns of other Tribes or from the general public. These differences may exist due to subsistence lifestyles, unique cultural beliefs and traditions, and/or specific connections to areas of California that are their ancestral homelands.

Cal/EPA recognizes that actions outside Indian Country may affect the environment, public health or economic well being of California Indian Tribes and its residents, just as the actions within Indian Country may affect the environment, public health or the economy outside those

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<sup>i</sup> 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 eligibility for the programs, services, and other relationships established for the United States for Indians, because of their status as Indians. (See 25 C.F.R. § 83.2.)

borders. Cal/EPA also recognizes that federally-recognized tribes may enact tribal civil regulations that affect natural resources, public health and environmental protection, and that they may assume treatment in the same manner as a state under certain federal environmental laws such as the Clean Water Act and the Clean Air Act.

In addition to working with other federal, state, local governments, and non-governmental organizations, Cal/EPA has an interest in working in collaboration with California Indian Tribes to pursue its mission.

## **GUIDING PRINCIPLES**

To improve communication and collaboration, Cal/EPA and its BDOs should, to the extent feasible and legally allowable, be guided by the following principles and best practices. Nothing in this policy shall be construed to prevent Cal/EPA or its BDOs from taking timely action to fulfill their legal obligations to protect the public health and safety, or the environment; or to carry out federally-mandated duties under delegated federal programs. Cal/EPA and its BDOs shall:

1. Acknowledge and respect tribal sovereignty, as defined in this policy.
2. Understand that federally-recognized tribes have a unique relationship with the federal government.
3. Understand the importance of communication and collaboration with California Indian Tribes.
4. Communicate with California Indian Tribes in a manner that is respectful and considerate.
5. Seek to identify and include federally-recognized California Indian Tribes in decision-making processes that affect tribal lands.
6. Seek to identify and include federally-recognized and non-federally recognized California Indian Tribes in decision-making processes that affect cultural resources.
7. Recognize and respect the cultural resources of California Indian Tribes, whether or not on tribal lands.
8. Where appropriate, consider the potential impact of our activities or programs on tribal lands and cultural resources.
9. Encourage collaborative efforts between the California Indian Tribes and federal, state, and local government entities to resolve issues of mutual concern.
10. Promote efforts of California Indian Tribes to develop and expand environmental programs, and to achieve compliance with environmental laws.

## **ACTION PLAN**

Cal/EPA and its BDOs will work together to implement the following actions to achieve its guiding principles, to the extent legal and practicable:

1. Establish a Tribal Stakeholder Group (with rotating membership) to discuss environmental issues and projects involving California Indian Tribes. The Tribal Stakeholder Group will include representatives from federally-recognized and non-federally recognized California Indian Tribes. The Tribal Stakeholder Group will meet with the Secretary of Cal/EPA and the heads of each BDO, or their designees, at least once each calendar year.
2. Designate a tribal liaison within Cal/EPA and within each BDO as a central point of contact for California Indian Tribes.
3. Develop a communication protocol that will be followed by Cal/EPA and its BDOs, and that will promote appropriate collaboration with California Indian Tribes.
4. Establish a process to disseminate public documents, notices and information to California Indian Tribes, and make these documents readily accessible to tribes that may not have electronic capabilities.
5. Establish a process to conduct meetings, outreach and workshops at times and in locations that facilitate tribal participation.
6. Provide training to appropriate executive staff, managers, supervisors, and employees on how to implement this policy.
7. Establish a mechanism to obtain relevant and available information, studies and data from California Indian Tribes when conducting research or environmental studies that relate to, or could impact, tribal lands or cultural resources.
8. Assess eligibility of California Indian Tribes for Cal/EPA financial assistance programs such as grants, loans and scholarships.
9. Upon request by a California Indian Tribe, provide training and technical assistance, and share data, where appropriate.
10. Develop Memorandums of Understanding (MOUs), Memorandums of Agreement (MOAs), or other cooperative agreements with California Indian Tribes on specific projects or subject matters, as appropriate.

## **DISCLAIMER**

This policy is intended solely for the guidance of employees of Cal/EPA and its BDOs and does not extend to other governmental entities. This policy is not intended, and should not be

construed, to define the legal relationship between Cal/EPA or its BDOs and the California Indian Tribes. This policy is not a regulation, and it does not create, expand, limit, waive, or interpret any legal rights or obligations.

## **STATUTORY REFERENCES**

### Federal

Title 18 United States Code section 1151: “Except as otherwise provided in sections 1154 and 1156 of this title, the term ‘Indian country’, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”

### State

Government Code section 11019.8: “All state agencies, as defined in Government Code section 11000, are encouraged and authorized to cooperate with federally recognized California Indian tribes on matters of economic development and improvement for the tribes.”

Government Code section 65040.12(e): Provides a definition of environmental justice with regard to the Office of Planning and Research as the coordinating agency for environmental justice as: “the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.”

Public Resources Code section 5024.1: Establishes a California Register of Historical Resources as an authoritative guide in California to be used by state and local agencies, private groups, and citizens to identify the state's historical resources and to indicate what properties are to be protected, to the extent prudent and feasible, from substantial adverse change.

Public Resources Code section 5097.9 et seq.: “Non-Interference With Native American Religious Expression: No public agency, and no private party using or occupying public property, or operating on public property, under a public license, permit, grant, lease, or contract made on or after July 1, 1977, shall in any manner whatsoever interfere with the free expression or exercise of Native American religion as provided in the United States Constitution and the California Constitution; nor shall any such agency or party cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require.” This chapter establishes the Native American Heritage Commission, and specifies its powers and duties.

Public Resources Code section 21000 et seq.: California Environmental Quality Act of 1970 (CEQA) declares that it is state policy to "take all action necessary to provide the people of this state with...historic environmental qualities." It further states that public or private projects financed or approved by the state are subject to environmental review by the state. All such projects, unless entitled to an exemption, may proceed only after this requirement has been satisfied. CEQA requires detailed studies that analyze the environmental effects of a proposed project. In the event that a project is determined to have a potential significant environmental effect, the act requires that alternative plans and mitigation measures be considered. CEQA includes historic and archaeological resources as integral features of the environment.

Public Resources Code section 71110: "The California Environmental Protection Agency, in designing its mission for programs, policies, and standards, shall do all of the following: (a) Conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations of the state. (b) Promote enforcement of all health and environmental statutes within its jurisdiction in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations in the state. (c) Ensure greater public participation in the agency's development, adoption, and implementation of environmental regulations and policies. (d) Improve research and data collection for programs within the agency relating to the health of, and environment of, people of all races, cultures, and income levels, including minority populations and low-income populations of the state. (e) Coordinate its efforts and share information with the United States Environmental Protection Agency. (f) Identify differential patterns of consumption of natural resources among people of different socioeconomic classifications for programs within the agency."

#### Questions

Please direct all questions regarding this policy to Cynthia Gomez, the Assistant Secretary of Environmental Justice and Tribal Governmental Affairs, at [cgomez@calepa.ca.gov](mailto:cgomez@calepa.ca.gov) or (916) 323-2559.

\_\_\_\_\_(Original Signed By)\_\_\_\_\_  
LINDA S. ADAMS  
Secretary for Environmental Protection

## APPENDIX B

### California Statutes

- **Health and Safety Code § 7050.5(c)** - Requires a coroner who knows or has reason to believe that human remains are Native American to contact the Native American Heritage Commission by telephone within 24 hours, provided that the human remains are not subject to his or her authority (i.e. they are not part of a criminal investigation).
- **Health and Safety Code § 7052**—Makes it a felony to willfully remove any human remains without the authority of law.
- **California Native American Graves Protection and Repatriation Act (Health and Safety Code §§ 8012-8021)**—Requires any agency or museum that has possession or control over collections of California Native American human remains and associated funerary objects to inventory those items; attempt to identify the geographical location, state cultural affiliation and circumstances surrounding their acquisition; and consult with the tribe(s) believed by the agency or museum to be affiliated with the items, or, if the tribal affiliation cannot be determined, to consult with any tribes that may be affiliated with the objects. If an agency or museum has culturally significant Native American objects that are not funerary in nature, the agency or museum must create a written summary of the objects and consult with California tribes and traditional religious leaders regarding the objects. The agency or museum must provide all available information and documentation regarding the items to any California Indian tribe that so request. These reports must be done in addition to any requirements of the Federal Native American Graves Protection Act. Agencies and museums are required to repatriate the items listed in their inventories or summaries upon the request of a tribe, providing no other tribe or group claims affiliation and the agency or museum is unable to present evidence that they have a right of possession to the requested cultural item. The Act also set up a Repatriation Oversight Commission.
- **Public Resources Code §§ 5097.9-5097.991**—Prohibits any public agency or private party using or occupying public property from interfering with the free exercise of Native American religion or causing severe or irreparable damage to any Native American cemetery, place of worship, religious or ceremonial site or sacred shrine located on public property. Establishes the Native American Heritage Commission and outlines its powers and duties. Allows the Native American Heritage Commission to investigate proposed actions outlined above; suggest mitigation resources are not followed. Establishes the State policy that Native American remains and associated grave artifacts shall be repatriated. Makes it a felony for any person to knowingly or willfully obtain or possess any Native American artifacts or human remains taken from a grave or to remove such artifacts or remains without authority of law.

- **California Environmental Quality Act (“CEQA”; Public Resources Code §21000, et seq.)** - Requires state agencies to regulate the activities of private individuals, corporations and public agencies to prevent environmental harm and protect environmental quality. States that public agencies should not approve projects as proposed if there are feasible alternatives or mitigation measures that would substantially lessen the significant environmental impacts of the project. Local agencies are required to integrate the requirements of CEQA with other planning and environmental review procedures (such as NEPA). Requires agencies to obtain and consider comments from the public regarding the potential environmental impacts of a project as early as possible in the process. Section 21060.5 defines “environmental” as “the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, mineral, flora, fauna, noise, objects of historic or aesthetic significance.”

The lead agency is required to determine whether an environmental impact report, negative declaration or mitigated negative declaration will be required for a project. As part of the determination, the lead agency must assess whether the project may have a significant effect on archaeological resources. If the lead agency so determines, then the environmental impact report must address those resources, and the lead agency may require that reasonable efforts are made to preserve the resources in place or allow them to be left in an undisturbed state. The lead agency can make provisions in the mitigation requirements that include addressing archaeological sites accidentally discovered during construction. By definition, a project that “may cause a substantial adverse changes in the significance of an historical resource is a project that may have a significant effect on the environment.” Historically resources include resources that are listed in a state, national or local historical register, as well as any other resource that the lead agency determines is an historical resource.

CEQA does not apply to projects for the development of a regional transportation improvement program or the state transportation improvement program.



## APPENDIX C

### California State Regulations

1. **14 CCR § 15064.5 - Guidelines for Implementing the California Environmental Quality Act (“CEQA”) - Determining the Significant Impacts to Archaeological and Historic Resources**

This section defines historical resources; requires lead agencies to identify and enforce potential mitigation measures; states that CEQA applies to effects on archaeological sites; requires that, when an initial study of the project identifies the existence of or probable likelihood of Native American human remains within the project, the lead agency shall work with the appropriate tribal governments or people as identified by the Native American Heritage Commission; and requires a coroner to contact the Native American Heritage Commission within 24 hours if Native American human remains are discovered that are not within the jurisdiction of the coroner.

2. **14 CCR § 4852 - California Register of Historical Resources - Types of Historical Resources and Criteria for Listing in the California Register of Historical Resources**

Sets out the criteria for listing of historical resources in the California Register of Historical Resources. (However, the fact that a resource which has cultural significance to one or more tribes is not listed in the Register does not preclude consideration of that resource for purposes of CEQA and the environmental review process generally.)

3. **14 CCR §§ 4970 and 4970.11 - California Department of Parks and Recreation; Off-Highway Vehicle Grant Program Regulations - Definitions; Application Content**

Defines “cultural resources” as those items that “are associated with events that have made a significant contribution to the broad patterns of California’s history and cultural heritage . . . “ States that cultural resources include historical resources.

Requires that applications for planning projects and studies, development and major maintenance projects and resource management projects include completed environmental documents that address environmental impacts of the project or study.

4. **14 CCR § 1037.5 - Department of Forestry Timber Harvesting Plans - Review Teams**

Requires that interdisciplinary review teams be established to review timber harvest plans; states that those teams may include representatives from state agencies, as well as Native Americans. Requires plan reviewers to consider environmental benefits of feasible alternatives and states that the advice of the review team “shall be utilized in determining whether appropriate alternatives have been selected and included in a plan and if implementation of the plan would cause significant damage to natural resources.”

5. **14 CCR § 1052 - Department of Forestry Timber Harvesting Plans - Emergency Notice**



Requires that a copy of the emergency notice be sent to tribes and includes the cutting or removing of trees required for emergency construction or repair of roads as an emergency for which such notice to tribes is required.

6. **20 CCR § 1714 - State Energy Resources Conservation and Development Commission, Site Certification, General Provisions Applicable to Notices and Applications - Distribution of Copies to Public Agencies; Request for Comments**

Requires that notice or applications be sent to any tribal government “having an interest in matters relevant to the site and related facilities proposed in the notice or application.” This requirement applies both to federally-recognized tribes and to non-federally recognized tribes if the non-federally recognized tribal government has requested, in writing, that they receive a copy of the notice or application. States that the commission must solicit comments and recommendations from appropriate tribal governments “regarding the design, operation, and location of the facilities proposed in relation to the environmental quality, public health and safety, and other factors on which they may have expertise.” If the tribe has jurisdiction over some portion of the proposed project, the commission is required to obtain review and comment on the land use and related aspects of the proposed sites and related facilities.

## APPENDIX D

### State Executive Orders and Agency Documents

- **CAL/EPA Policy for Working with California Indian Tribes, CIT-09-01 (October 19, 2009)**

This policy provides a framework for Cal/EPA and its Boards, Departments and Offices (BDOs) to improve and maintain communication and collaboration between Cal/EPA, its BDOs, and California Indian Tribes to further the mission of Cal/EPA.

This policy also provides a commitment to educate appropriate staff, to become informed about the cultural setting of California Indians, their environmental issues and tribal histories, for the purpose of improving Cal/EPA's understanding of and connection to California Indian Tribes.

The Policy sets forth the following guiding principles:

To improve communication and collaboration, Cal/EPA and its BDOs should, to the extent feasible and legally allowable, be guided by the following principles and best practices. Nothing in this policy shall be construed to prevent Cal/EPA or its BDOs from taking timely action to fulfill their legal obligations to protect the public health and safety, or the environment; or to carry out federally-mandated duties under delegated federal programs. Cal/EPA and its BDOs shall:

1. Acknowledge and respect tribal sovereignty, as defined in this policy.
2. Understand that federally-recognized tribes have a unique relationship with the federal government.
3. Understand the importance of communication and collaboration with California Indian Tribes.
4. Communicate with California Indian Tribes in a manner that is respectful and considerate.
5. Seek to identify and include federally-recognized California Indian Tribes in decision-making processes that affect tribal lands.
6. Seek to identify and include federally-recognized and non-federally recognized California Indian Tribes in decision-making processes that affect cultural resources.
7. Recognize and respect the cultural resources of California Indian Tribes, whether or not on tribal lands.
8. Where appropriate, consider the potential impact of our activities or programs on tribal lands and cultural resources.
9. Encourage collaborative efforts between the California Indian Tribes and federal, state, and local government entities to resolve issues of mutual concern.
10. Promote efforts of California Indian Tribes to develop and expand environmental programs, and to achieve compliance with environmental laws.

- **CALTRANS Director's Policy - Working With Native American Communities (No. 19, August 29, 2001)**

States that it is the CALTRANS policy to act "consistently, respectfully and sensitively" when working with tribal communities; that the Department of Transportation "establishes and

adheres to government-to-government relationships when interacting with federally recognized California Native American Tribes (Tribal Governments).” States that “the Department:

- 2Acknowledges these tribes as unique and separate governments within the United States.
- Ensures that its programs and activities avoid or minimize adverse impacts to cultural and other resources.
- Recognizes and respects important California Native American rights, sites, traditions and practices.
- Consults with Tribal Governments prior to making decisions, taking actions or implementing programs that may impact their communities.”

The Policy specifically includes in the definition of “Native American communities” federally recognized and non-federally-recognized tribes as well as individual Indians living off their reservations, regardless of whether they are from a California tribe. The District Directors’ responsibilities under the Policy are to “promote, establish and manage government-to-government relationships between the Department and Tribal Governments.” The Policy applies to all those who work for CALTRANS, including contractors, consultants and subcontractors.

- **CALTRANS Director’s Policy on Environmental Justice (No. 21, November 5, 2001)**

Sets out the CALTRANS policy of ensuring that minority and low-income populations do not suffer disproportionate adverse impacts as a result of transportation projects and providing transportation services equally to all segments of the population. The policy “encourages the public to express its needs and concerns so that transportation decisions better reflect community values and interests.” The policy applies to anyone who works in any capacity for CALTRANS.

- **California Transportation Commission, Regional Transportation Guidelines, Dec. 1999**

In the letter to Regional Transportation Planning Agencies (RTPAs), Chairman Edward B. Sylvester states that the “RTP process shall meet the federal and state requirements to consult with and consider the interests of Indian Tribal Governments in the development of transportation plans and programs, including funding of transportation projects accessing tribal lands through state and local transportation programs.”

- **Supplement to the 1999 Regional Transportation Plan Guidelines, December 2003**

Section D-3 of the Supplement is entitled “Tribal Governmental Issues” and states:

MPOs/RTPAs should consult with all federally recognized Native American Tribal Governments located within their region during the RTP development process. In addition to including Native Americans in the public participation process, MPOs/RTPAs should involve Tribal Governments in the planning and programming issues that may have an impact on tribal communities. Establishing and maintaining government-to-government relations with Federally recognized

Tribal Governments through consultation is separate from, and precedes the public participation process.

This section further notes that the documentation of the consultation process should not be included in the discussions of the public participation process in the planning process. The Supplement states that MPOs/RTPAs should establish relationships with the tribes in their jurisdiction and notes that the initial point of contact for the tribe should be the chairperson for the tribe.

- **Memorandum from Gary R. Winters to District Environmental Office Chiefs, et al. Regarding Native American Monitors (October 2003)**

Native Americans are consulted during the planning phase of a project in which CALTRANS is involved to help identify significant cultural resources that may be impacted by the project and, if such resources are located, mitigation measures are explored. If cultural resources or human remains are exposed during the course of a project, then all activity in the area is stopped until the appropriate action can be determined. The process of employing monitors is separate from the consultation process with tribal governments.

- **Memo from Division of Transportation Planning to District Directors Regarding a Sample Memorandum of Understanding with Tribal Governments (June 19, 2002)**

This Memo and attached sample Memorandum of Understanding (MOU) were created in response to Director's Policy 19, "Working With Native American Communities." The sample MOU is a tool for establishing or maintaining government-to-government relationships with tribal governments.

- **Memo from Division of Transportation Planning to District Deputy Directors for Planning Re. Legal Liaison for Transportation Planning**

Contains an updated liaison agreement for Intergovernmental Review for CEQA issues.

- **Executive Order W-26-92 Re. Preservation of California's Cultural and Historic Resources (April 8, 1992)**

Directs state agencies to administer cultural and historic resources under their control for the benefit of future generations; oversee their policies, plans and programs in a way that preserves and maintains the resources for public benefit; ensure that cultural resource protection is part of land use and capital outlay decisions; and institute procedures to preserve and enhance non-state owned cultural resources. Each state agency is directed to designate an "Agency Preservation Officer" to help implement the preservation policies. Requires each state agency to report to the State Office of Historic Preservation on its progress in completing inventories and management plans for existing cultural and historic resources under its control and directs the Resources Agency and Office of Planning and Research to provide guidance on CEQA compliance.

- **Assembly Concurrent Resolution No. 185 - Native American Tribal Rights (September 18, 2000)**

Reaffirms state recognition of the tribal governments of federally-recognized tribes as separate, independent sovereigns; encourages all state agencies "when engaging in activities or

developing policies affecting Native American tribal rights or trust resources to do so in a knowledgeable, sensitive manner that is respectful of tribal sovereignty.”

- **Memo from the Division of Transportation Planning to District Directors Regarding Native American Transportation Issues (July 25, 2001)**

Outlines suggestions for District Directors on including tribal governments in the transportation planning process.

- **Traffic Operations Program Directive Re. Signing for Indian Reservations and Rancherias (99-03, November 23, 1999)**

Requires that District Directors provide signage for reservations and rancherias in a manner similar to cities and unincorporated communities. Includes a list of all federally-recognized tribes in California alphabetically by county.

- **1999 Annual Report to the California Legislature, California Transportation Commission Vol. I, 2000 Issues (Adopted December 8, 1999)**

Contains a section on “Native American Tribal Transportation Issues” with initiatives taken by the Commission to address tribal transportation needs. Also contains a section on “Strengthening State, Tribal and Regional Government Transportation Partnerships” which outlines tribal concerns discussed at the various regional tribal workshops.

- **Director’s Policy Re. Context Sensitive Solutions (No. 22, November 29, 2001)**

States the Department’s policy to “integrate and balance community, aesthetic, historic, and environmental values with transportation safety, maintenance, and performance goals” by using collaborative, interdisciplinary approaches that involve all stakeholders.

- **Memorandum from Ron Helgeson to the Native American Advisory Committee Environmental Subcommittee Re. IGR/Encroachment Permit Policies (September 10, 2002)**

This memo is in response to questions raised by the Native American Advisory Committee’s Environmental Subcommittee regarding CALTRANS’ obligations for projects that have potentially adverse impacts on culturally sensitive areas for tribes when the project does not directly involve a CALTRANS right-of-way. The memo states that it is the Department’s position that it can only assess impacts and request mitigation if the project either directly or indirectly affects the state highway system. The memo does note, however, that CALTRANS is identified as having expertise in the area of historic and archaeological sites. Thus, when CALTRANS Intergovernmental Review (IGR) coordinators discover a potential impact on tribal cultural resources outside of CALTRANS’ jurisdiction, it is CALTRANS’ policy to notify the lead agency and the tribes of the potential impacts during the CEQA review process.

## APPENDIX E

### Federal Statutes

**1. Native American Graves Protection and Repatriation Act of 1990 (“NAGPRA”; P.L. 101-601; 25 U.S.C. § 3001)**

The Native American Graves Protection and Repatriation Act provides that federal agencies must consult with appropriate Indian tribes or individuals prior to authorizing the intentional removal of Native American human remains, funerary objects, sacred objects and objects of cultural patrimony. The purpose of NAGPRA consultation is to reach agreement as to the treatment and disposition of the specific kinds of “cultural items” as defined in the Act. The Act further provides for consultation pertaining to existing collections to identify and assure disposition of materials in a manner consistent with the desires of lineal descendants or the appropriate tribal authorities.

**2. Civil Rights Act of 1964 (42. U.S.C. § 2000d-2000d(4))**

Title VI of the Civil Rights Act of 1964 states that “no person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.” Title VI bars intentional discrimination as well as disparate impact discrimination (i.e., a neutral policy or practice that has the effect of a disparate impact on protected groups).

**3. National Historic Preservation Act of 1966 (“NHPA”; P.L. 89-665; 80 Stat. 915; 16 U.S.C. § 470) [SECTION 106 CONSULTATION]**

The National Historic Preservation Act of 1966, as amended in 1992, addresses preservation of historic properties, including historical, archaeological and architectural districts, sites, buildings, structures and objects that are eligible for the National Register of Historic Places. In some cases such properties may be eligible partly or wholly because of historical importance to Native Americans, including traditional religious and cultural importance. Federal agencies must take into account effects of their undertakings on eligible properties.

In particular, federal agencies must consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by the undertaking. The consultation process is outlined in “Consulting with Indian Tribes in the Section 106 Review Process,” published by the Advisory Council on Historic Preservation (ACHP). The ACHP regulations (set forth in 36 CFR part 800) provide guidance to federal agencies regarding consultation. Some key points of the Section 106 consultation process are summarized in the “Consultation with Indian Tribes” as follows:

The regulations remind Federal agencies that historic properties of religious and cultural significance to an Indian tribe may be located on ancestral, aboriginal, or ceded lands of that tribe. Accordingly, agencies must make a reasonable and good faith effort to identify Indian tribes that attach such significance but may now live at great distances from the undertaking’s area of potential effect.

Federal agencies should be respectful of tribal sovereignty in conducting consultation and must recognize the government-to-government relationship that exists between the Federal Government and federally recognized Indian tribes.

The regulations also provide for an Indian tribe to enter into an agreement with a Federal agency regarding any aspect of tribal participation in the review process. The agreement may provide the Indian tribe with additional participation or concurrence in agency decisions under Section 106 provided that no modification is made to the roles of other parties without their consent.

The “Consultation” publication sets out the steps in the consultation process. Some of the key points include the following:

- One of the first steps a Federal agency takes is to determine if the undertaking may occur on or affect historic properties on tribal lands and, if so, whether the Indian tribe has assumed the duties of the State Historic Preservation Officer (SHPO) under Section 101(d)(2) of NHPA. If a tribe has assumed these duties, the Federal agency must work with the Tribal Historic Preservation Officer (THPO) in the consultation process.
- Tribal participation in the Section 106 process is conducted through the tribe’s official governmental structure. The formal representation, including designation of the tribal signatory for the tribe, is determined by the tribe in accordance with tribal law, internal structure, and governing procedures. Other tribal members who wish to participate in the Section 106 process must do so as members of the public and may seek to become consulting parties with the consent of the Agency Official. However, the views of the Indian tribe are provided only by an officially designated representative of the tribal government.
- The agency consults with the tribal designated representative and the SHPO when there is no THPO (Tribal Historic Preservation Officer). If the SHPO withdraws from consultation, the Federal agency and the tribal representative may complete the review process. An Indian tribe may enter into an agreement with the SHPO specifying the SHPO’s participation in the Section 106 review process on tribal lands.
- A Federal agency must make a reasonable and good faith effort to identify Indian tribes that attach religious and cultural significance to historic properties affected by the undertaking. Some tribes may attach such significance to historic properties located on another tribe’s lands. The Federal agency must consult with them as well.

Agencies in California can work with the Native American Heritage Commission to meet their Section 106 consultation requirements. Contact information for the Commission is:

State of California, Native American Heritage Commission  
915 Capitol Mall, Room 364  
Sacramento, CA 95814  
(916) 653-4082

A 1980 amendment to the Act (P.L. 96-515; 94 Stat. 3000; 16 U.S.C. § 470(a), note) directs the Secretary, in cooperation with the American Folklife Center of the Library of Congress, to explore ways to preserve and conserve intangible elements of our cultural heritage and to encourage continuation of diverse cultural traditions. (See also 36 C.F.R. part 800, which outlines the consultation process.)

**4. Archaeological Resources Protection Act of 1979 (P.L. 96-95; 93 Stat. 721; 16 U.S.C. § 470aa)**

The Archaeological Resources Protection Act of 1979 provides for the protection and management of archaeological resources, and specifically requires notification of the affected Indian tribe if archaeological investigations proposed in a permit application would result in harm to or destruction of any location the tribe considers to have religious or cultural importance. The Act directs consideration of the American Indian Religious Freedom Act in the promulgation of uniform regulations for the Act.

**5. National Environmental Policy Act of 1969 (“NEPA”; 42 U.S.C. § 4321, et seq.)**

NEPA declares the national policy to encourage harmony between man and the environment and promote efforts to prevent or eliminate damage to the environment. It requires any project using federal funds to consider social, environmental and economic impacts; public involvement in developing projects; and the use of a systematic interdisciplinary approach at each decision-making stage of federally-funded projects.

**6. Federal-Aid Highway Act of 1970 (23 U.S.C. § 109(h))**

This Act requires the Secretary of the Department of Transportation to promulgate guidelines designed to assure that possible adverse economic, social and environmental effects relating to any proposed federal-aid development project be fully considered.

**7. Intermodal Surface Transportation Efficiency Act of 1991 (“ISTEA”; Pub. L. No. 102-240, December 18, 1991)**

This Act emphasizes early program planning and environmental consideration and encourages public participation be extended into planning efforts. The Act specifically states that Indian tribal governments should be involved in the planning process.

**8. 23 U.S.C. § 128 - Public Hearings**

Under the Federal-Aid Highways section of Title 23 of the U.S. Code, state highway departments must certify that public hearings occurred and that they have considered the economic, social and other impacts of a state highway project.



**9. 23 U.S.C. § 134 - Metropolitan Planning (as amended by TEA-21)**

Under the Federal-Aid Highway section of Title 23 of the U.S. Code, MPO's must consider project strategies that will protect and enhance the environment and include an opportunity for public comment in the planning process for Metropolitan Transportation Improvement Programs and long-range transportation plans.

**10. 23 U.S.C. § 135 - General Requirements for Statewide Planning in the Development of Surface Transportation Systems (as amended by TEA-21)**

Under the Federal-Aid Highway section of Title 23 of the U.S. Code, states must, "at a minimum, consider the . . . concerns of Indian tribal governments having jurisdiction over lands within the boundaries of the state." In addition, long-range transportation plans "shall be developed in consultation with the tribal government and the Secretary of the Interior" with respect to each area of the state in which there is tribal land.

**11. 49 U.S.C. § 303 - Policy on Lands, Wildlife and Waterfowl Refuges, and Historic Sites**

This statute articulates the policy of the federal government that special efforts should be made to preserve historic sites, and states that the Secretary of Transportation shall consult with the Secretary of the Department of Interior, HUD and Agriculture, and with the states in developing transportation plans and programs. The statute also states that the Secretary of Transportation can only approve transportation plans or projects that require the use of land which has historic significance if there is no reasonable alternative to using that land and the project includes all feasible planning to minimize harm to the site.

**12. 49 U.S.C. § 306**

This section of the Transportation Code outlines the responsibilities of the Department of Transportation and the Secretary of Transportation's authority to decide whether a recipient has not complied with applicable Civil Rights statutes or regulations; it requires the Secretary to provide notice of the violation; and it requires necessary action to ensure compliance.

**13. American Folklife Preservation Act of 1976 (P.L. 94-201; 86 Stat. 1129; 20 U.S.C. § 2101)**

The American Folklife Preservation Act of 1976 creates the American Folklife Center in the Library of Congress and directs the Center to preserve and present American folklife through internal and cooperative programs.

## APPENDIX F

### Selected Federal Regulations

**1. 10 CFR Part 1040**

States the requirement that there shall not be discrimination in federally assisted programs.

**2. 23 CFR § 200**

Outlines the FHWA's regulations implementing Title VI of the Civil Rights Act of 1964.

**3. 23 CFR § 450**

Provides regulatory guidance relative to the planning requirements. Section 450.202 states that this section is "applicable to States and any other agencies/organizations which are responsible for satisfying these requirements." Section 450.208 specifically says that one of the factors states must consider in their transportation planning process includes the "concerns of Indian tribal governments having jurisdiction over lands within the boundaries of the State." Subpart B of § 450.210, which deals with coordination, provides as follows:

(a): In addition to coordination required under § 450.208(a)(21) in carrying out the requirements of this subpart, each State, in cooperation with participating organizations (such as MPOs, Indian tribal governments, environmental, resource and permit agencies, public transportation operators) shall, to the extent appropriate, provide for a fully coordinated process including coordination of the following:

. . . (2) Plans such as the statewide transportation plan required under §450.214, with programs and priorities for transportation projects, such as the STIP;

. . . (5) Transportation planning carried out by the State with transportation planning carried out by Indian tribal governments, Federal agencies and local governments, MPOs, large-scale public and private transportation providers, operators of major intermodal terminals and multistate businesses.

Furthermore, § 450.214 requires states, in developing their transportation plans, to "[c]ooperate with the Indian tribal government and the Secretary of the Interior on the portions of the plan affecting areas of the State under the jurisdiction of an Indian tribal government." Section 450.312 requires MPOs whose planning area includes tribal lands, to include the "Indian tribal governments . . . in the development of transportation plans and programs."

Section 450.22 requires the state to submit the entire proposed STIP, along with any amendments, and the state must certify that the transportation planning process is being carried out in accordance with the requirements to consult, cooperate and coordinate with tribal governments and provide an opportunity for the tribal community to engage in the public participation process.

**4. 23 CFR § 633**

Specifies required contract provisions that must be included in all Federal-aid construction contracts, including Title VI and other proscriptions included in Form FHWA 1273 and specifies the types of contracts to which Title VI of the 1964 Civil Rights Act applies.

**5. 23 CFR § 771 - Environmental Impact and Related Procedures**

Provides guidance for the evaluation of social, economic and environmental impacts in project development as well as early and continuing coordination with the public.

**6. 23 CFR § 771.105(f) - FHWA Policy on Title VI**

Expands on 23 CFR § 200.7 and names categories covered, with wording similar to Title VI of the Civil Rights Act of 1964.

**7. 23 CFR § 771.111 - Early Coordination, Public Involvement and Project Development**

States that early coordination with appropriate agencies and the public aids in determining the type of environmental document an action requires, the scope of the document, the level of analysis and related environmental requirements. Says that each state must have procedures approved by the Federal Highway Administration (FHWA) to carry out a public involvement/public hearing program.

**8. 36 CFR Part 800.2(c)**

Implements Section 106 of the National Historic Preservation Act (NHPA) and sets out the guidelines for consultation with tribes.

**9. 40 CFR §§ 1500-1508 - Regulations on Implementing NEPA**

Provides for environmental procedures and document formats into which social and economic impact assessments can be fit.

**10. 49 CFR § 21 - Transportation**

Outlines nondiscrimination in federally-assisted programs of the Department of Transportation; effectuates Title VI of the Civil Rights Act of 1964.

## APPENDIX G

### Selected Executive Orders

1. **Executive Order on Federal Actions to Address Environmental Justice in Minority and Low-Income Populations (E.O. 12898, February 11, 1994; Fed. Reg. Vol. 59, No. 32, Feb. 16, 1994)**  
This Executive Order directs federal agencies to ensure that all programs or activities receiving federal funds that affect human health or the environment do not directly or indirectly discriminate on the basis of race, color or national origin; directs federal agencies to analyze the environmental effects, including health, economic and social effects of federal actions under NEPA; directs federal agencies to provide community input into the NEPA process, including identifying potential mitigation measures and improving community access to meetings; directs the U.S. EPA to assess the environmental effects of projects on minority and low-income communities; and ensures that the public, including minority and low-income communities, has access to public information regarding human health and environmental planning, regulation and enforcement.
2. **Executive Order Re. Protection and Accommodation of Access to Indian Sacred Sites (E.O. 13007, May 24, 1996; Fed. Reg. Vol. 61, No. 104, May 29, 1996)**  
This Executive Order directs all federal agencies with responsibility for managing federal lands, to the extent practicable and permitted by law, to allow access to and ceremonial use of Indian sacred sites by Indian religious practitioners and to avoid adversely affecting the physical integrity and maintain the confidentiality of such sites.
3. **Executive Order Re. Consultation and Coordination with Indian Tribal Governments (E.O. 13175, November 6, 2000; Fed. Reg. Vol. 65, No. 218, November 9, 2000 [Revokes E.O. 13084])**  
One of the main purposes of this order is to “establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications . . . [and] to strengthen the United States government-to-government relationships with Indian tribes.” The order states that each agency shall have an effective process to permit tribal officials to provide “meaningful and timely input . . . in the development of regulatory policies that have tribal implications.”
4. **Executive Order Re. The Protection and Enhancement of Environmental Quality (E.O. 11514, as amended by Executive Order 11991 (1977))**  
Outlines the responsibilities of federal agencies, which includes providing “leadership in protecting and enhancing the quality of the Nation’s environment to sustain and enrich human life.” Says that federal agencies must “monitor, evaluate, and control. . . their agencies’ activities so as to protect and enhance the quality of the environment.” Promotes timely public information and understanding of federal plans, obtaining the views of interested parties and providing public hearings and gathering relevant information.
5. **FHWA Environmental Policy Statement November 1994**

Discusses “working toward a highway system that fits harmoniously within our natural environment and our neighborhoods and communities.” Emphasizes “full involvement of our partners” in planning and project design; “complete integration of environmental concerns” throughout the decision making process; and encourages “active protection and enhancement of our environment.”

6. **FHWA/FTA Policy and Guidance on Public Involvement, December 5, 1994**  
This is a joint transmittal memorandum to associate administrators, etc. outlining FHWA/FTA internal policies on public involvement in transportation decision making.
7. **U.S. Department of Transportation Final Department of Transportation Order to Address Environmental Justice in Minority Populations and Low-Income Populations**  
Outlines procedures for implementing Executive Order 12898.
8. **DOT Order 5301 - Department of Transportation Programs, Policies and Procedures Affecting American Indians, Alaskan Natives, and Tribes, November 16, 1999**  
Contains an extensive listing of relevant laws, policies, definitions, etc. It also expresses the responsibilities of each DOT component toward tribal communities.
9. **Memo Re. Implementing Title VI Requirements in Metropolitan and Statewide Planning (from FTA & FHWA Administrators to Regional Administrators, October 7, 1999)**  
Clarifies Title VI requirements in metropolitan and statewide transportation planning and identifies a series of actions that can be taken to support Title VI compliance and environmental justice goals, improve planning performance and minimize the potential for subsequent correction action and complaints.

## APPENDIX H

### HISTORICAL OVERVIEW OF CALIFORNIA TRIBES

Prior to the arrival of the first Spanish expedition in the mid 1700's, the Indians of California were divided into about 500 separate and distinct bands. They enjoyed the sole use, occupancy and possession of all lands and resources in what is now called California. After the Mexican government removed the Spanish government from California and “freed” the Indians from the Catholic missions, the Indians were then indentured to the huge ranchos created by Mexican land grants to the Mexican elites.

In 1848, the Treaty of Guadalupe Hidalgo, which ended the Mexican-American War, resulted in a large cession of land to the United States, including lands that now comprise the State of California. There were no provisions in the Treaty of Guadalupe Hidalgo for protecting Indian land title in what later became California.

The discovery of gold in California in 1849 thwarted attempts by the United States government to investigate and resolve the Indian title question following the Treaty of Guadalupe Hidalgo, as the influx of thousands of Anglo-Europeans immediately clashed with the Indians and their land claims. Additionally, the admission of California as a state in 1850 increased resistance by the state’s representatives to the Indians’ claims to their aboriginal lands.

However, the United States government recognized that California tribes existed in the 1800's and that they were capable of entering into intergovernmental relations with the United States. Three treaty commissioners were sent from Washington, D.C. in 1851 to negotiate treaties with Indian leaders in California, promising them reservation territories and sovereign nation status in exchange for ceding lands to the United States government. Treaty negotiations ensued, during which time the commissioners met with some 402 Indian leaders representing approximately one-third to one-half of the California tribes.

The California legislature opposed the ratification of the treaties and put pressure on the U.S. Senators from California to do the same. In 1852, the treaties were presented to the United States Senate and rejected in secret session. Because the treaties were rejected in secret session, none of the Indians who negotiated the treaties knew they had been rejected. Contemporaneous with the treaty negotiations, Congress passed the Land Claims Act of 1851, which provided that all lands in California, the claims to which were invalid or not presented within two years of the date of the Act, would pass into the public domain. Because the tribes did not know their treaties had been rejected, they were not aware and were not notified of the need to present their claims. The Indians failed to meet the 1853 deadline. The California Indians, with the exception of certain bands of Mission Indians that were protected in their occupancy by early Spanish and Mexican land grants, became homeless.

One of the first acts of the new California legislature was to pass “An Act for the Government and Protection of Indians,” originally entitled, “An Act relative to the protection, punishment and government of Indians.” Under this 1850 Act, an Indian could be arrested if he was “found loitering and strolling about.” Indians who were found to be “vagrant” under this

Act could be arrested and could be “hired out” to the highest bidder. California Indian children were also enslaved under this Act. Any “white man” could go before a Justice of the Peace and petition to obtain an Indian child for involuntary servitude. All he had to show was that the child was not “obtained” by compulsory means. Typically, the person would kill the parents, and then claim their children for servitude since they were orphans. This situation resulted in a generation of California Indians being forced into involuntary servitude.

The combined results of these various pieces of legislation and the failure of Congress to ratify the treaties were a death sentence for a majority of California Indians. Only a few of those who survived campaigns to remove, eradicate or enslave them in the 1850's found refuge in four authorized reservations to which they were forcibly removed. In 20 years, their numbers were cut in half; by the 1890's the population of Native Californians had been cut by 86%. Throughout the twentieth century, California Indians lived in poverty and continued to endure programs designed to assimilate them, including Indian boarding schools and an Indian Relocation Program that persuaded Indians to leave reservations and move to the urban centers in the 1950's and '60's.

## APPENDIX I

### THE UNIQUE RELATIONSHIP BETWEEN THE U.S. GOVERNMENT AND INDIAN TRIBES

#### A. Federal-Tribal Relations

Federal policy is central to Indian affairs because Congress has broad legislative (plenary) power over Indians, including the authority to decide who is, or is not, recognized officially as an Indian. State control over Indians is preempted by federal power; however, states and tribes can voluntarily assume a government-to-government relationship as long as it does not offend the federal/tribal relationship.

##### 1. Marshall Trilogy

Early comprehensive federal legislation and three Supreme Court decisions shaped early federal Indian law and policy. The Court opinions, written by Chief Justice John Marshall, are referred to as the “Marshall Trilogy.” The first case in the Marshall Trilogy was *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (U.S. Sup. Ct. 1823). In this case, Chief Justice Marshall held that, as the successor to England (the original “discoverer” of the area in question), the United States had acquired the preemptive right to procure Indian land by purchase or conquest according to the Doctrine of Discovery; thus, title obtained earlier in time through a direct grant by an Indian tribe to a private individual could not prevail against title later obtained by means of a fee patent held by the federal government. The tribes were described as “occupants” of the land who lacked the authority to transfer title to others.

The second case in the trilogy, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (U.S. Sup. Ct. 1831), held that the Cherokee Tribe was a “distinct political society,” but not a foreign state within the meaning of Article III of the Constitution. The Court held that tribes were more like “domestic dependent nations” with the relation of the tribe to the federal government like that of a “ward to his guardian.” This case was the first articulation of the trust relationship between tribes and the federal government. It also described tribes as distinct political entities that were neither foreign nations nor states, but rather a hybrid state.

In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (U.S. Sup. Ct. 1832), the U.S. Supreme Court held that state law did not apply in Indian country and that the Cherokee Nation “is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with acts of Congress.” The Court further held that attempts by a state to interfere with the relationship between the federal government and tribes were “repugnant” to the Constitution, laws and treaties of the United States because the federal government has exclusive authority over such relations.

##### 2. Federal Power

The new Constitution lodged broad power in Congress under the Indian Commerce Clause, article I, section 8, clause 3: “The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” (Emphasis supplied.) Thus state control over Indians is preempted by federal power; however, states and tribes can voluntarily assume a government-to-government relationship as long as it does not offend the federal/tribal relationship.



## **B. Basic Elements of Federal Indian Law**

### **1. The Trust Relationship**

Indian tribes are not foreign nations, but constitute “distinct political communities” which the Supreme Court described as “domestic, dependent nations” whose “relation to the United States resembles that of a ward to his guardian.” This language gave rise to the doctrine of federal trusteeship in Indian affairs. One aspect of this relationship is that the federal government owns the legal title to tribal lands in trust, with the tribes being the beneficiaries. Therefore, the federal government must act in the best interests of the tribes with respect to negotiations and other dealings involving trust assets. This sometimes creates a conflict of interest in public works projects.

### **2. Tribal Governmental Status**

Indian tribes are sovereigns, that is, governments, and state law does not apply within reservation boundaries without congressional consent. Because tribal sovereignty pre-dates the U.S. Constitution, tribal governments are not bound by it. They are, however, subject to the Indian Civil Rights Act, described more fully below, which provides some similar protections for those dealing with tribal governments.

### **3. Reserved Rights Doctrine**

Tribal rights, including rights to land and to self-government, are not granted to the tribe by the United States. Rather, under the reserved rights doctrine, tribes retained (“reserved”) such rights as part of their status as prior and continuing sovereigns.

### **4. Canons of Construction**

Courts generally have adopted fundamental rules and principles that govern the interpretation of written documents such as treaties. In legal terminology, these rules and principles are known as “canons of construction.” Those that pertain specifically to Indian law generally have been interpreted to the benefit of tribes. For example, the canons provide that treaties are to be construed broadly in determining the existence of Indian rights, but narrowly when considering the elimination or abrogation of those rights. Most of the special canons of construction dealing with treaty rights have also been applied to agreements, executive orders and statutes dealing with Indians.

### **5. Congress’ Plenary Power**

Congress can abrogate rights established by treaty, or by other documents pursuant to its plenary power. Even the existence of tribes as sovereigns can be, and at times has been, terminated by Congress.

## **C. Early Federal Statutes and Policy**

Federal policies towards tribes have undergone dramatic changes over time, and those policies are reflected in the various statutes that Congress has enacted.

### **1. The General Allotment Act of 1887**

Originally, most tribes owned their reservation land communally. A few treaties before 1887 provided for “allotments,” that is, for some parcels of land to be held by tribal members rather than by the tribe itself.

Then, in 1887 Congress passed the General Allotment Act, or Dawes Act, one of the most significant federal statutes in the field of federal Indian law. The Act delegated authority to the Bureau of Indian Affairs to allot parcels of tribal land to individual Indians - 160 acres to each family head, and 80 acres to each single person over 18 years of age. Each individual allotment remained in trust (exempt from state tax laws and other state laws) for 25 years, al-

though that period could be shortened or extended. After the expiration of 25 years, if an individual Indian owner failed to pay state taxes on the property, the state could sell the property. Tribes lost significant amounts of reservation land to tax sales during the Allotment Era.

Congress enacted the General Allotment Act based on pressure from the states to allow non-Indians to settle on Indian lands. The General Allotment Act accomplished this goal by selling the non-allotted (“surplus”) land to homesteaders. Although the federal government paid compensation to the tribes for the sale of these surplus lands, the primary effect was that Indian land holdings decreased from 138 million acres in 1887 to 48 million acres in 1934, a total loss of 90 million acres. Another result of allotment was that it created a “checkerboard” pattern of ownership by tribes, individual Indians, and non-Indians within a single reservation. This caused serious jurisdiction and management problems that still persist today.

## **2. Assimilation by Social Policy**

The allotment of lands was one of several policies that the federal government implemented during this era for the purpose of assimilating Indians into the larger society. Bureau of Indian Affairs boarding schools were another federal program designed to assimilate Indian children. In the boarding schools, Indian children were not permitted to speak their languages, wear their Native dress or engage in their religious practices and other traditional customs. On reservations, the federal government suppressed Native religious practices, an extreme example being the suppression of the Ghost Dance, resulting in the Wounded Knee Massacre of 1890. The federal government discouraged tribal governments from exercising their governmental authority, so the local BIA superintendent, in effect, governed many reservations. Congress also enacted the Major Crimes Act in 1885, which gave the federal government jurisdiction over certain criminal acts, resulting in a serious erosion of tribal sovereignty and an imposition of non-Indian philosophies of criminal jurisprudence on the tribes.

## **3. Indian Citizenship Act of 1924**

Many Indians had become United States citizens upon receiving allotments or by virtue of special provisions in treaties or statutes. As a means to both provide equity and promote assimilation, all Indians were made United States citizens in 1924.

## **4. The Meriam Report**

The Meriam Report of 1928 set the tone for the reform movement in Indian affairs of the 1930's. This influential study highlighted the failure of the allotment and assimilation policies. The Report publicized the deplorable living conditions on reservations and recommended that Congress: 1) increase funding for health and education on reservations; 2) immediately end allotment; and 3) encourage tribal self-government.

## **5. Indian Reorganization Act of 1934 (IRA)**

Congress passed the Indian Reorganization Act in 1934, which translated into legislation some of the key recommendations of the Meriam Report. A primary thrust of the IRA was to stabilize the tribes' land holdings by providing that the federal government immediately cease allotting Indian lands and extend the trust period for existing allotments. The IRA sought to promote tribal self-government by encouraging tribes to adopt constitutions and to form federally-chartered corporations. The IRA also included a hiring preference for Indians in the BIA, established a revolving loan fund for tribal development, expressly allowed the Secretary of the Interior to accept additional tribal lands in trust, and included other provisions directed toward improving the lives of Indians.

## **D. The Termination Era**

### **1. HCR 108**

House Concurrent Resolution 108 (HCR 108), adopted in 1953, expressed Congress' policy regarding its trust relationship with Indian tribes. That document called for ending such relationships as rapidly as possible.

### **2. Rancheria Act**

Congress terminated the federal trust relationship status of 41 California Indian Rancherias through the Rancheria Act of 1958. These groups were singled out for what has become known as the termination experiment. Termination fundamentally altered the special federal-tribal relationship in that the federal government:

- Either sold tribal lands to third parties (although with compensation to tribal members); transferred the lands to private trusts; or transferred the lands to new tribal corporations organized under state law.
- Discontinued all special federal programs to the tribes and individual Indians (including health and education services).
- Imposed state legislative jurisdiction on the tribes.
- Imposed state judicial authority, except in the area of hunting and fishing rights, which courts determined had not been terminated in the cases of several tribes.
- Ended exemptions from state taxing authority.
- For all practical purposes, ended tribal sovereignty.

Congress has never expressly abandoned HCR 108's termination policy, but the more recent federal self-determination policies have implicitly repudiated termination. Furthermore, Congress or the courts have restored to federal status several terminated tribes, including 21 of the above-mentioned 41 California rancherias as of 1987. Several additional California tribes have since been restored to federal recognition or are otherwise no longer considered terminated.

### **3. Public Law 280**

Public Law 280 ("P.L. 280"), passed in 1953, transferred to the states of California, Minnesota, Nebraska, Oregon, Wisconsin, and in 1958, Alaska, "jurisdiction over offenses committed by or against Indians" in these states "to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . . , and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State . . . ." (18 U.S.C. § 1162(a)). This portion of P.L. 280 is known as the "criminal provision," and it made the General Crimes Act and Major Crimes Act inapplicable in these states.

In addition to transferring most of the criminal jurisdiction to P.L. 280 states, the statute also transferred jurisdiction from the federal government to the specified states over some civil matters. The civil portion of P.L. 280 grants jurisdiction to the states over civil causes of action "to which Indians are parties" that arise in Indian country within the state "to the same extent that such State . . . has jurisdiction over other civil causes of action." This section also provides that state laws of "general application" will apply to Indian reservations in the state in the same manner that those statutes apply to the rest of the state. Courts have interpreted this latter provision to exclude Indian lands from local regulations, such as zoning, rent control and gambling.

Section 1360(b) of the civil provision of P.L. 280 specifically exempts from state regulatory jurisdiction the sale, encumbrance or taxation of tribal lands held in trust by the federal government. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the U.S. Supreme Court held that the language in this section means that states cannot even apply their laws or enforce state court judgments in a way that would result in the alienation, encumbrance or taxation of trust property. The statute also prohibits the state from regulating the use of such trust land if the regulation is inconsistent with any federal treaty, agreement or statute with respect to the land.

P.L. 280 had a devastating impact on tribal infrastructures. Not only were tribes in P.L. 280 states discouraged from developing their regulatory and judicial capacities, these tribes were, and are, often excluded from federal funding sources on which other tribes rely to create and sustain their governmental infrastructures.

#### **E. The “Self-Determination” Era**

The abuses of the termination era led to the reforms of the 1960’s, 1970’s, and 1980’s, just as the IRA was a reaction to the negative impact of the allotment era. This period has been characterized by expanded recognition and application of the powers of tribal self-government by the general exclusion of reservations from state authority.

##### **1. Legislative Acts**

Indian Civil Rights Act of 1968 (ICRA) - Because tribes pre-date the U.S. Constitution, tribal governments are not subject to the Bill of Rights. This fact came to the attention of Congress in the 1960's, and they passed the ICRA. The purpose of the ICRA was to afford basic civil rights protections to those who interact with tribal governments. The ICRA applies to all people, not just tribal members. Although ICRA includes many of the same protections as the Bill of Rights, it does not contain all of them. For example, while tribes must allow criminal defendants the right to counsel, the tribe does not have to pay for public defenders.

Public Law 93-638 - Indian Self-Determination and Education Assistance Act of 1975, as amended - The purpose of this Act is to promote maximum Indian participation in the government and education of Indian people; to improve and perpetuate the government-to-government relationship between Indian tribes and the United States; and to strengthen tribal control over federal funding and program management. The Act allows tribes to contract with the federal government to obtain direct funding and oversight over certain federal programs that are “for the benefit of Indians because of their status as Indians.”

Indian Child Welfare Act of 1978 (ICWA) - Congress recognized the disproportionate removal of Indian children from their families, often due to differences in cultural norms between Indian communities and non-Indian social service workers. ICWA requires higher burdens of proof for the removal of Indian children and specific placement preferences for Indian children placed outside of their homes.

American Indian Religious Freedom Act of 1978 (AIRF) - AIRF explicitly recognizes the importance of traditional Indian religious practices and directs all federal agencies to ensure that their policies do not abridge the free exercise of Indian religions.

Indian Health Care Improvement Act, Amendments of 1988 - The Indian Health Care Amendments of 1988 recognized that eligibility for health care benefits under the Indian Health Care Improvement Act must be extended to all California Indians, regardless of whether or not they are members of a federally-recognized tribe.

Indian Gaming Regulatory Act of 1988 (IGRA) - The Indian Gaming Regulatory Act sets out the parameters of gaming on tribal lands. The land on which the gaming occurs must

be federal trust land, and each tribe operating a gaming facility that includes “Class III” gaming must have a compact with the state in which the gaming facility is located. IGRA also prohibits the Department of the Interior from taking land into trust for the purpose of Indian gaming after 1988. Only a specific act of Congress can circumvent this provision.

## **2. Judicial Action**

Below are summaries of some of the more significant cases that were decided by the Supreme Court since the 1970's:

*Bryan v. Itasca County*, 426 U.S. 373 (1976). Public Law 280 does not confer authority upon states to tax Indians or Indian property on reservations.

*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Indian Civil Rights Act of 1968 did not grant jurisdiction to federal courts for a civil action by a tribal member against the tribe; such cases must proceed in tribal forums, including tribal courts.

*California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083 (1987). Public Law 280 state cannot regulate gambling operations in Indian country if such activity is not in violation of the “State’s public policy.” P.L. 280 states have criminal/prohibitory jurisdiction while tribes retain civil/regulatory jurisdiction.

*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Indian tribes cannot exercise criminal jurisdiction over non-Indians.

*Montana v. United States*, 450 U.S. 544 (1981). Sets out the test for determining tribal civil jurisdiction over non-Indians as follows: 1) whether the non-Indian entered into any consensual relationship with the tribe or one of its members; or 2) whether the non-Indian’s activity threatened or had some direct effect on the political integrity, economic security, or health or welfare of the tribe.

*Strate v. A-1 Contractors*, 520 U.S. 438 (1997). The Fort Berthold Tribal Court lacked jurisdiction to hear a personal injury suit arising out of a car accident that occurred on the reservation because the state had a right-of-way to use and maintain the highway, which the Court held was not “Indian country” for purposes of tribal adjudicatory jurisdiction. This ruling was based on several factors, including: 1) the Tribe expressly reserved no right to exercise dominion or control over the right of way when the right of way was granted; 2) the Tribe received compensation from the State for the right of way; and 3) the Tribe consented to the State’s use, so long as it was maintained as part of the State’s highway.

*Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001). The Navajo Nation hotel occupancy tax on a hotel owned by a non-Indian located on fee land within the exterior boundaries of the reservation was invalid, despite the fact that the Tribe provided services, such as fire protection, to the hotel.

*Nevada v. Hicks*, 533 U.S. 353 (2001). Tribal court lacks jurisdiction to adjudicate a federal civil rights claim based on the actions of a state game warden while executing a search warrant on trust land.

*Bressi v. Ford*, (No. 07-15931, D.C. No. CV-04-00264-JMR) (2009). The 9th Circuit Court held Officers’ operation of the roadblock was purely a tribal endeavor; therefore, sovereign immunity barred Bressi’s § 1983 and *Bivens* actions. See *United States v. Oregon*, 657 F.2d 1009, 1013 n.8 (9th Cir. 1981) (“[Sovereign immunity] extends to tribal officials when acting in their official capacity and within their scope of authority.”). The court also held that Bressi’s malicious prosecution claim under the Federal Tort Claims Act failed because there was an independent prosecutorial decision to pursue the complaint against Bressi. In this decision, the court applies the definition of Indian Country that includes Right of Ways.

*Arizona Dept. of Transportation v. Blaze Construction Co.*, 526 U.S. 32, 119 S.Ct. 957 (1999). The State of Arizona could impose a "transaction privilege tax" on an Indian construction company that was under contract with the Bureau of Indian Affairs for the construction of roads on various tribal lands in Arizona, despite the fact that all of the construction occurred in Indian country. The company was incorporated under the laws of the Blackfeet Tribe of Montana and owned by a Blackfeet tribal member. None of the construction occurred on the Blackfeet Reservation, so the Court held that the company was the equivalent of a non-Indian enterprise.

*Cass Co., MN v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 118 S.Ct. 1904 (1998). State and local governments may impose ad valorem (property) taxes on Indian lands sold to non-Indians and later reacquired by the tribe (while in fee status).

*Inyo County, California, et al. v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*, 538 U.S. 701 (2003). Tribe does not qualify as a "person" who may sue under 42 U.S.C. §1983.

#### **F. Tribes and the Federal Trust Relationship**

Congress has special authority over Indian affairs under the Indian Commerce Clause of the Constitution (art. I, § 8, cl. 3), which allows the national legislature "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian Tribes" (emphasis supplied). Today, following the Supreme Court's 1973 decision in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), the Indian Commerce Clause, along with the power to make treaties, is seen as the principal basis for broad federal power over Indians. The concept of a special federal power over Indian affairs is a basic notion in Indian law and policy.

Congressional power over Indians is often described as "plenary," the literal meaning of which is "absolute" or "total." The phrase "plenary power," however, is misleading; congressional power is broad, but it is subject to procedural and constitutional limitations. Further, exercises of authority from Congress by administrative officials are limited sharply in many respects, often by various applications of the trust duty.

The trust relationship has proved to be dynamic and ongoing, evolving over time. One question that constantly arises is whether the trust relationship is permanent. Different eras have provided different answers to these questions. At the turn of the 20th century the trust relationship was seen as short term and transitory. Indian land was to be protected for a brief transition period while Indians were assimilated into the "mainstream." The trust relationship was seen as the basis for congressional power to pass legislation breaking up tribal landholdings into individual allotments.

More recently, the view has broadened. The trust relationship now is seen as a doctrine that helps support progressive federal legislation enacted for the benefit of Indians, such as the modern laws dealing with child welfare, Indian religion, tribal environmental regulations and tribal economic development. The trust relationship also controls contemporary interpretations of treaties and statutes.

#### **G. Indian Gaming Regulatory Act**

The Indian Gaming Regulatory Act of 1988 (18 U.S.C. § 1166, et seq., "IGRA") sets out the parameters of gaming on tribal lands. The land on which the gaming occurs must be federal trust land, and each tribe operating a gaming facility that includes "Class III" gaming must have a compact with the state in which the gaming facility is located. IGRA also prohibits the

Department of the Interior from taking land into trust for the purpose of Indian gaming after 1988. Only a specific act of Congress can circumvent this provision.

Pursuant to IGRA, the State of California and 63 California tribes have entered into gaming compacts. One of the stated purposes of the compacts is to “evidence the goodwill and cooperation of the Tribe and State in fostering a mutually respectful government-to-government relationship that will serve the mutual interests of the parties.” (Tribal-State Gaming Compact, Section 1.0.) The compacts recognize that tribal gaming enterprises will have certain off-reservation impacts. In order to address these impacts, tribes are required to adopt ordinances outlining the preparation and circulation of environmental impact reports. Tribes are required to incorporate, to the extent possible, the policies and purposes of the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA). Before a tribe may begin construction of a gaming project, it must assess whether the project will have any significant adverse impacts on the off-reservation environment and make a good faith effort to mitigate them. (Tribal-State Gaming Compact, Section 10.8.1 and 10.8.2.)

### Footnotes

1. See *Cherokee Nation V. Georgia* 30 U.S. (5 Pet.) 1, 8L. Ed.25 (1831).
2. See Appendix A for DOT5301.1.
3. See Appendix B.
4. See Appendix C.
5. Johnston-Dodds, Kimberly, Early California Laws and Policies Related To California Indians, California Research Bureau, CRB-02-014.
6. Indian termination was a federal policy of the 1950's that called for the elimination of certain tribes as governments, their land converted to private individual ownership and an offer to individual terminated Indians to participate in the Indian relocation program.
7. California is a "Public Law 280 state." This means that the State of California has extensive criminal and some civil jurisdiction over Indians on tribal lands in this state. However, the state cannot enforce any law or levy any taxes that could result in the alienation, encumbrance or sale of tribal trust land (see generally 28 U.S.C. § 1360(b) and Section IIID(3) below). Although the land is not subject to state or local laws, the people who live on the land are subject to state criminal laws in California.
8. See *Talton v. Mayes*, 163 U.S. 376,165. Ct. 986, 41L. Ed. 196. (1896).
9. See Indian Civil Rights Act of 1968, 25 U.S.C. §§1301-1303. Supplement to General Plan Guidelines, Draft Tribal Consultation Guidelines for Public Review (Feb. 2005). This is the term used in the legislation. By using this term, the legislature excluded women, as well as any man who was not Anglo-European.



## General Principles of Sovereignty and Trust Responsibility

### Working Effectively with Tribal Governments

(This training session and companion materials were developed by National Indian Justice Center pursuant to a grant from CALEPA.)

## Sovereignty - Defined

- Sovereignty is the Right of Self-Governance
- It is the right of an entity to make its own laws and to be governed by them.
- It's important to know the difference between Sovereignty and Sovereign Immunity.
  - **Sovereign immunity is the right to be free from suit; the right not be sued in court.**
  - **"Sovereign" cannot be sued because the Sovereign's assets are the assets of the community as a whole.**

## Treaty-making process

- For a treaty to become valid after it is signed by U.S. and tribal government representatives, it must be sent back to Washington D.C. and approved or ratified by Congress.
- Only 374 treaties have been ratified by Congress. Of the 374 treaties, all have been violated in some form by the U.S.



## Sovereign Status of Indian Tribes

- Tribal Sovereignty was initially recognized by the U.S. as a result of having entered into treaties with Tribes.
  - The U.S. only negotiates treaties with sovereign entities.
  - The U.S. may expand or contract its recognition of tribal sovereign authority.

## California Indian History 101

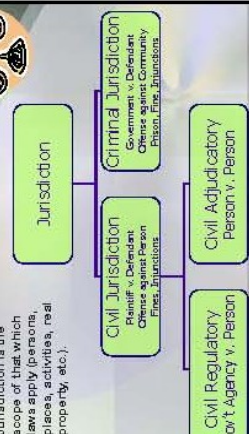
- 18 Treaties with California Indians setting aside 7.5 million acres of land negotiated from 1850-51
- California Land Claims Act of 1851
  - Resulting in loss of tribal villages and scattered landless Indians in California
- There are 108 federally recognized tribes in California + very large urban Indian population

## Tribal Sovereign Status

- **Inherent Tribal Sovereign Authority**
  - Possess inherent Sovereignty by virtue of being.
  - Subject to Tribal Powers only.
- **Legal Sovereign Status of Tribes**
  - Possess legal sovereign status because of treaty making between tribes and U.S./foreign powers.
  - Subject to Plenary Power of Congress, Interpretation of law by Federal Courts and some State Powers.

## Types of Jurisdiction

Jurisdiction is the scope of that which laws apply (persons, places, activities, real property, etc.).



## Johnson v. McIntosh (1829)

- This case applied and adopted the **Discovery Doctrine** into U.S. case law.
- Discovery Doctrine **gave the U.S. the exclusive right to extinguish the original tribal right of possession by purchase or conquest.**
- Discovery Doctrine only left Tribes with the **Right to Use and Occupy the Land.**
- This theory gave the discovering Government title to all land as a result of having arrived onto the continent.
- U.S. Supreme Court held that Indians did not have the power to give (nor could a non-Indian receive from an Indian) title to land upon which Indians lived.
- This case served to protect federal land grants (federal land patents) which the federal government used to settle the territories.

## Cherokee Nation v. Georgia (1831)

- State of Georgia attempted to apply state law over Cherokee Nation in an effort to "annihilate the Cherokees as a political society."
- Cherokee Nation filed suit as a foreign nation directly in U.S. Supreme Court.
- U.S. Supreme Court held that Cherokee Nation was not a foreign nation but a **Domestic Dependent Nation**



### Worcester v. Georgia (1832)

- Two missionaries were sentenced to 4 years hard labor by state of Georgia for residing in Cherokee Nation without a license and without taking oath to support the Georgia Constitution and laws.
- Worcester challenged the jurisdiction of Georgia Courts.
- U.S. Supreme Court held that Indian nations were distinct, independent political communities in which state law has no effect.**
- President Jackson purportedly said Marshall has made his decision, now let him enforce it. No mechanism in place to enforce. South Carolina tries to leave the Union. Jackson begs Georgia to let missionaries go. Missionaries pardoned in 1833.

### Trust Relationship

- The federal government owes a responsibility to the tribes.
- Initially this responsibility was described as the relationship of a "guardian to its ward."
- Now it is called the Trust Relationship.
- Pursuant to the Trust Relationship, the federal government owes a fiduciary duty to the tribes to protect their interests in the lands and resources held for their benefit.

### Trust Relationship

- A legal trust comes to an end. The Trust Relationship will end only when the tribes cease to exist (legally or otherwise).

Trustee = all federal branches of government

Beneficiary = Tribes and their Members

Real lands and resources held in trust for tribes or their members



### Criminal Jurisdiction

1881	U.S. v. McBratney	Allowed Colorado to assert jurisdiction over Non-Indian v. Non-Indian crime committed on reservation, without action by Congress
1883	Ex Parte Crow Dog	Tribes retain exclusive jurisdiction over Indian v. Indian crimes. Murder of one Indian by another Indian. Tribe opted for traditional punishment (filling shoes-of-victim).
1885	Major Crimes Act	Exclusive Federal Jurisdiction over enumerated crimes. Case law allows concurrent jurisdiction.

### Criminal Jurisdiction

1886	U.S. v. Kagama	Hopla challenged Major Crimes jurisdiction. Guardian-wardship power.
1887	General Allotment Act	Break up of Indian Country. Loss of 90 million acres.
1896	Talton v. Mayes	5th Am. Of U.S. Bill of Rights does not apply to Cherokee Nation such that a grand jury is required. Finds that Tribal authority is from inherent source not federal power.

### Criminal Jurisdiction

1800	Lone Wolf v. Hitchcock	Ruled that treaties could be amended if Congress deems it in their best interests. Establishes primary power of Congress.
1978	Oliphant v. Suquamish	Non-Indian assaults tribal officer and resists arrest includes high speed chase during Chief Seattle Days Celebration on reservation. Court held that tribe had no inherent sovereignty to assert criminal jurisdiction over Non-Indians without an explicit act of Congress.
1988	Indian Civil Rights Act	Congress adopts ICRA to ensure that Tribal Governments do not violate certain civil rights.
1978	U.S. v. Wheeler	The Double Jeopardy Clause of the U.S. Constitution does not bar federal prosecution under the Major Crimes Act of an Indian defendant following earlier conviction in tribal court of lesser included offense arising from the same act.

### Criminal Jurisdiction

1990	Duro v. Rhin	Non-member Indian fires a gun killing a Non-member Indian child. Duro flees to Chief U.S. Attorney's jurisdiction. Tribe attempts to assert jurisdiction based upon tribal law regarding unlawful firing of a firearm. Duro fights tribal jurisdiction. U.S. Supreme Court held that tribe cannot assert criminal jurisdiction over Non-member Indians, leaving jurisdiction void.
1991	Congress' Duro fix	Tribal leaders lobby Congress and get an amendment to the Major Crimes Act passed that allows tribes to assert jurisdiction over all Indians.
2004	U.S. v. Lara	Plaintiff is a Native American. Tribe asserts jurisdiction over the crime. Congress passed a law that allows tribes to assert jurisdiction over all Indians. The Tribal Government is charged with the prosecution of the crime. The Tribal Government is charged with the prosecution of the crime. The Tribal Government is charged with the prosecution of the crime.

### Civil Jurisdiction

1959	Williams v. Lee	State court lacks subject matter jurisdiction over dispute between Indian and Non-Indian arising on reservation. Test set forth below.
1981	U.S. v. Montana	Test to determine Civil Regulatory jurisdiction over a non-Indian on non-Indian owned lands within reservation. Case law post-Montana allowed regulatory jurisdiction if only one of the prongs were met. States only need meet #1.
1982	Mertin v. Jearula	Tribe has civil jurisdiction over non-Indians on Indian land and regulatory powers over non-Indian land within Indian country.



### Montana Test for Tribal Civil Regulatory Jurisdiction

1. Is there a consensual relationship between the non-Indian and the Tribe? *(day in court, or other dealings)* OR
2. Does the Non-Indian's activity threaten or have a direct impact upon:
  - a. Economic Security of the Tribe,
  - b. Political Integrity of the Tribe, OR
  - c. Health, Safety or Welfare of the Tribe.

### Termination and Relocation

- The U.S. Government sought to move Indians off of the Reservation into the Urban Center
- Through P.L. 280, the U.S. Government sought to end the Federal/Tribal trust relationship
- Resulted in loss of land and homelessness



28 U.S.C. § 1360. State civil jurisdiction in actions to which Indians are parties.  
(P.L. 280 Civil Provisions)

State or Territory of	Indian Country affected
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

28 U.S.C. § 1360. State civil jurisdiction in actions to which Indians are parties.  
(P.L. 280 Civil Provisions)

- (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto, or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

Public Law 280: Criminal Provisions § 1162. State jurisdiction over offenses committed by or against Indians in the Indian country:

- (a) Each of the States or Territories listed in the following table shall have **jurisdiction over offenses committed by or against Indians** in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

#### State or Territory of

Alaska	Indian Country affected All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

P.L. 280 Civil Provisions: 28 U.S.C. § 1360. State civil jurisdiction in actions to which Indians are parties.

- (a) Each of the States or Territories listed in the following table shall have jurisdiction over **civil causes of action between Indians or to which Indians are parties**, which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.

28 U.S.C. § 1360. State civil jurisdiction in actions to which Indians are parties.  
(P.L. 280 Civil Provisions)

- (c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band or community in the exercise of any authority which it may possess shall, **if not inconsistent with any applicable civil law of the State**, be given full force and effect in the determination of civil causes of action pursuant to this section.

§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country:  
(Public Law 280: Criminal Provisions)

- (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; **or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.**



**Cabazon v. California (1987)**

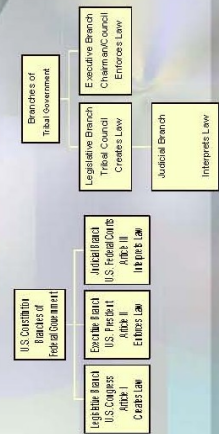
- California sought to apply its laws governing the operation of bingo games to bingo games operated by the Cabazon and Morongo Bands of Mission Indians.

- Riverside County also sought to apply its ordinances regulating bingo and card games to the tribal gaming operations.
- U.S. Supreme Court held that although state law may be applied to tribal Indians on their reservations if Congress has expressly consented, Congress has not done so here either by P.L. 280 or by the Organized Crime Control Act of 1970.

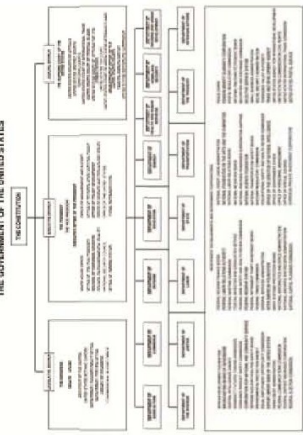
## Indian Gaming Regulatory Act

- IGRA was passed by Congress in 1988 as a response to the Cabazon case.
- IGRA provides for establishment of or requires:
  - All Indian gaming must occur on trust lands;
  - National Indian Gaming Commission oversees enforcement;
  - Gaming classes I, II, III and allocation of regulatory authority between tribe and state;
  - Tribal Gaming Ordinances to regulate operations, use of revenues, audits, contractors, licensing of employees;
  - Off-reservation environmental impact statements prior to gaming;
  - Tribal-State Compacts for Class III gaming activity

## Government-to-Government



THE GOVERNMENT OF THE UNITED STATES



## Michigan Trails in Marquette



**§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country: (Public Law 280: Criminal Provisions)**

- (c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

**Cabazon v. California (1987)**

- The State of California attempted to apply a law from its criminal code governing gaming under the assumption that P.L. 280 would allow state criminal law to apply to Indians on reservations.
- The U.S. Supreme Court found that the law was not "Criminal/Prohibitory" but the statute was rather "Civil/Regulatory" in nature.
  - *If the intent of a state law is generally to prohibit certain conduct, it falls within P.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and P.L. 280 does not authorize its enforcement on Indian lands.*

## Civil Regulatory v. Criminal Prohibitory

What sort of jurisdiction may the States assert?

## Intent of the Law

Conduct/Act

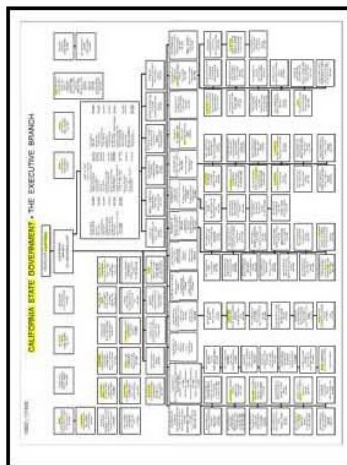
<b>Prohibitory</b>	<b>Regulatory</b>
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(gen'y, criminal law) (gen'y, civil regulatory)

	<b>State Juris if act violates state public policy</b>	<b>Tribal Juris if tribal laws consistent w/ State Law</b>
1. <b>Indian Child Welfare Act</b>		
2. <b>Indian Gaming Regulatory Act</b>		
3. <b>Indian Civil Rights Act</b>		
4. <b>Indian Land Consolidation Act</b>		
5. <b>Indian Self-Determination Act</b>		
6. <b>Indian Reorganization Act</b>		
7. <b>Indian Trust Fund Reform Act</b>		
8. <b>Indian Water Rights Act</b>		
9. <b>Indian Energy Development Act</b>		
10. <b>Indian Health Care Act</b>		
11. <b>Indian Education Act</b>		
12. <b>Indian Housing Act</b>		
13. <b>Indian Labor Relations Act</b>		
14. <b>Indian Tax Act</b>		
15. <b>Indian Environmental Protection Act</b>		
16. <b>Indian Cultural Heritage Act</b>		
17. <b>Indian Archaeological Resources Act</b>		
18. <b>Indian Historic Preservation Act</b>		
19. <b>Indian Language Acquisition Act</b>		
20. <b>Indian Arts and Crafts Act</b>		
21. <b>Indian Religious Freedom Act</b>		
22. <b>Indian Tribal Justice Act</b>		
23. <b>Indian Tribal Courts Act</b>		
24. <b>Indian Tribal Police Act</b>		
25. <b>Indian Tribal Fire Department Act</b>		
26. <b>Indian Tribal Public Works Act</b>		
27. <b>Indian Tribal Social Services Act</b>		
28. <b>Indian Tribal Health Insurance Act</b>		
29. <b>Indian Tribal Elder Care Act</b>		
30. <b>Indian Tribal Youth Services Act</b>		
31. <b>Indian Tribal Substance Abuse Treatment Act</b>		
32. <b>Indian Tribal Domestic Violence Prevention Act</b>		
33. <b>Indian Tribal Child Support Enforcement Act</b>		
34. <b>Indian Tribal Family Violence Prevention Act</b>		
35. <b>Indian Tribal Adult Protective Services Act</b>		
36. <b>Indian Tribal Child Welfare Act</b>		
37. <b>Indian Tribal Juvenile Justice Act</b>		
38. <b>Indian Tribal Probation Act</b>		
39. <b>Indian Tribal Parole Act</b>		
40. <b>Indian Tribal Prison Act</b>		
41. <b>Indian Tribal Corrections Act</b>		
42. <b>Indian Tribal Law Enforcement Act</b>		
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	<b>State Juris if act violates state public policy</b>	<b>Tribal Juris if tribal laws consistent w/ State Law</b>
1. <b>Indian Child Welfare Act</b>		
2. <b>Indian Gaming Regulatory Act</b>		
3. <b>Indian Civil Rights Act</b>		
4. <b>Indian Land Consolidation Act</b>		
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## Modern Tribal Governance

- Tribal Constitution
- Legislative Process and Record
- Code of Laws, Ordinances, Resolutions
- Consistency establishes the community standard
- Cooperation and collaboration

## EPA Statutes and The Role of Tribal Governments in Managing Reservation Environments

## Statutes that Provide Treatment as State (TAS) Status for Tribes:

- The Clean Air Act (CAA)
- The Clean Water Act (CWA)
- Water Quality Standards and 401 Certification
- National Pollution Discharge Elimination System (NPDES) Permits
- 404 Dredge and Fill Permits
- Sewage Sludge Management Program
- The Safe Drinking Water Act (SDWA)
- Public Drinking Water System Supervision (PWSS) Program
- Underground Injection Control (UIC) Program
- The Toxic Substances Control Act (TSCA)
- Lead (Pb) Program
- The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)

## TAS Simplification Rule

Indian tribes applying for Program Authorization (Tribal Approval) under the Act.

- The Act requires that a tribe must first be recognized as a sovereign nation by the federal government.
- The tribe must have a governing body that is capable of carrying out the functions of the particular Act (inclusion of maps, previous experience, etc.); and
- The tribe must be capable of carrying out the functions of the particular Act (inclusion of maps, previous experience, etc.); and
- EPA Regional Office Review and Approval of Tribal TAS Application.

## To Obtain Treatment as a State:

- A tribe must be federally recognized;
- A tribe must possess a governing body carrying out substantial duties and powers;
- A tribe must possess civil regulatory jurisdiction to carry out the functions it seeks to exercise (i.e., the tribe must be capable of carrying out the functions of the particular Act (inclusion of maps, previous experience, etc.); and
- EPA Regional Office Review and Approval of Tribal TAS Application.

## Process to Obtain TAS:

1. Submit Application for TAS pursuant to a specific EPA statute;
2. Upon acceptance of a complete application, 30 day comment period;
3. EPA Review;
4. Proposed Findings of Fact (if needed);
5. Final Decision.
6. If a Tribe has obtained TAS under one of the statutes, it may only need to supply additional information unique to obtaining TAS under a different EPA statute.

## What does TAS mean to Tribes?

- Regulatory Program Authorization;
- Jurisdiction to enforce the Acts that provide TAS status for tribes; and
- Eligibility for grants and program approvals available to states

## Pursuant to Clean Air Act TAS Statute\*, Tribes May:

- Qualify for an EPA air program grant (called a section 105 grant) that has a reduced matching requirement. For states, the matching requirement is 50%. However, for tribes, the matching requirement is 10% in subsequent years. In rare instances, EPA may waive the match requirement based on demonstrated financial hardship.
- Qualify to administer a Clean Air Act program that applies throughout the reservation, even to lands that are owned by non-Indians. A Tribal regulatory program approved under the Clean Air Act would also be enforceable (against pollution sources) by EPA and citizens, as well as by the Tribe.
- Qualify to be treated as an "affected State" under the operating permits program, i.e., receive notice and an opportunity to comment when neighboring States issue permits to facilities having the potential to impact tribal lands.

\*See CAA Part 3, Subpart 4

### Clean Water Act

- **WQS and 401 Certifications**
  - Identify surface waters that the tribe proposes to establish water quality standards for;
  - In addition to the application requirements, tribes must show that they have jurisdiction to regulate the surface water quality over the resources that they seek to regulate, including resources on non-Indian owned fee lands.
    - Generally, achieved through the application of the ruling in *U.S. v. Montana* (Montana Test analysis).

### Pursuant to CWA/WQS TAS Status, Tribes May:

- Become eligible to seek the disapproval of the WQS, those that are established under water bodies, water quality criteria to protect those listed and an end-gadget policy consistent with 40 CFR 131.12.
  - A tribe's WQS would establish water quality goals for specific water bodies and the regulatory criteria for water quality based on the tribe's water quality and
  - Tribes may disapprove of the standards, a tribe in violation of proposed standards, in the then applicable for the tribe, to EPA for approval. Upon EPA approval, tribal WQS would apply to the reservation water covered by the tribe's application.
  - Tribes may disapprove of the standards, a tribe in violation of proposed standards, in the then applicable for the tribe, to EPA for approval. Upon EPA approval, tribal WQS would apply to the reservation water covered by the tribe's application.
- Become eligible for some other regulatory decision.
  - Tribes may disapprove of the standards, a tribe in violation of proposed standards, in the then applicable for the tribe, to EPA for approval. Upon EPA approval, tribal WQS would apply to the reservation water covered by the tribe's application.
- Tribes may disapprove of the standards, a tribe in violation of proposed standards, in the then applicable for the tribe, to EPA for approval. Upon EPA approval, tribal WQS would apply to the reservation water covered by the tribe's application.

### TAS Status Pursuant to the Safe Drinking Water Act (SDWA):

- **In addition to the application requirements, tribes must submit:**
  - a description of the locations of the public water systems the tribe proposes to regulate;
  - A description of the existing, or proposed, agency of the Indian tribe that will assume primary enforcement responsibility, including a description of the relationship between owners/operators of the public water systems and the agency (40 CFR 142.76(d)(6)).

### Pursuant to the SDWA TAS:

- Tribes may be approved for funding for and exercise of primary enforcement responsibility (or "primacy");



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**[Http://www.nijc.org](http://www.nijc.org)**

# The Tribal Consultation Protocol Template

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**This document was developed using the Karuk Tribe Consultation Policy and Rincon Tribal Consultation Ordinance**

<https://nijc.org/tct-toolkit.html>



# **DRAFT TRIBAL CONSULTATION PROTOCOL TEMPLATE**

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# DRAFT TRIBAL CONSULTATION PROTOCOL TEMPLATE

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**This Tribal Consultation Protocol Template, developed pursuant to a grant from the California Consumer Protection Foundation, is designed for California Tribes to tailor to fit their own consultation efforts, resources and timelines. We suggest that Tribes use the sections below as a minimum. SECTION HEADERS are in place along with “Instructions” and *suggested language*, as needed. Instructions should be deleted during the tailoring of the Template.**

**This template was developed using the Karuk Tribe Consultation Policy and Rincon Tribal Code §2.800 Tribal Consultation Ordinance.**

## **1. AUTHORITY AND PURPOSE**

**Instructions:** State the Constitutional Article that provides the **authority** to the Tribal Council or Governing Body to develop and adopt this protocol, ordinance, or policy.

State the **purpose** of this protocol, ordinance, or policy. The purpose of the Ordinance is to establish guidance for federal and state agencies that request consultation with the Tribe. In this provision, the Tribe may establish whether the protocol, ordinance or policy is guidance subject to negotiation or is a mandate for federal and state agencies.

## **2. DEFINITIONS**

*[The following definitions are recommended.]*

- (a) **“Bi-lateral Government-to-Government Consultation”** means authorized individuals of the Tribe meet directly with the Agency in an effort to reach an agreement on a proposed regulation, rule, policy, program, project, plan, property decision, or other activity that would affect the resources, properties, cultural practices, and those persons under the jurisdiction of the Tribe.
- (b) **“Agency”** means any state or federal agency, government, department, or corporation operating subject to federal or state statutes or regulations that obligate them to consult with federally recognized Tribes.
- (c) **“Coordination Meetings”** means on-going discussions between the Tribe and a Agency related to any proposed regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity of the Agency.
- (d) **“Multi-lateral Government-To-Government Consultation”** means meetings between multiple Tribal governments with the Agency when policies or programs with broad application throughout Indian Country are being developed and/or

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modified by the Agency.

- (e) **“Off Reservation Consultation”** means any consultation that the Agency deems necessary held outside the boundaries of the Tribe’s Reservation.
- (f) **“Sensitive Information”** means any information an authorized individual of the Tribe deems to be confidential.
- (g) **“Consultation”**
  - a. Consultation is *“the process of seeking, discussing, and seriously considering the views of the Tribe, and reaching an agreement with the Tribe on the development, implementation or mitigation of regulations, rules, policies, programs, projects, plans, property decisions, inspections, and activities that may affect Tribal sovereignty, resources, properties, cultural practices, and those persons under Tribal jurisdiction.”*
  - b. For broad decisions, such as development or modification of federal policies that affect all Indian Nations similarly, the Tribe may accept invitations to participate in “Multi-lateral Tribal Consultations.”
  - c. For ongoing processes, for example water quality monitoring programs, the Tribe may seek regular meetings at an agreed upon interval. These meetings will be defined as “Coordination Meetings.” Coordination Meetings will serve to clarify how the Tribe and the Agency will continue to consult in order to reach an agreement or end result of the proposed regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity that may have an effect on tribal resources, properties cultural practices, and/or those persons under Tribal jurisdiction. Coordination meetings will serve as a forum for sharing data or making agreements to share responsibilities about data collection. Coordination meetings will be used as an opportunity for the Tribe to provide input on processes; such as development of agency, government, department, or corporation plans. Coordination meetings will usually involve Tribal staff but may involve Tribal Council or other Tribal decision makers.
  - d. For other decisions, particularly but not limited to activities with a direct effect on Tribal sovereignty, resources, properties, cultural practices, and those persons under Tribal jurisdiction, the Tribe may demand “Bi-

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lateral Government-to-Government consultation” whenever a proposed regulation, rule, policy, program, project, plan, property decision, inspection, or activity will clearly have a significant and direct effect on Tribal sovereignty, resources, properties, cultural practices, and/or those persons under Tribal jurisdiction.

## **3. GUIDING PRINCIPLES**

**Instructions:** This section outlines the roles of the tribe and state/federal agency(ies) and guidelines for communication between the them.

This Ordinance is intended to be consistent with the body of federal law pertaining to Tribal consultation and to provide clear direction on what actions are necessary to satisfy consultation with the Tribe.

Consultation is the formal process of cooperation, negotiation, and mutual decision-making between two or more sovereigns.

### 1) Agency Responsibilities

- a) Federal or State agencies have the obligation of seeking out Tribal input and providing opportunities for meaningful consultation. This requires more than public participation efforts such as sending letters, notices, and copies of documents to Tribe and requesting comments. Where many public participation opportunities exist for a set period time, consultation with the Tribe is ongoing and continuous. Federal agencies must make concerted efforts to provide Tribal involvement in decision-making and follow the consultation procedure in order to fulfill any consultation requirements. It is important to understand that the Tribe may elect not to participate in consultation or may decide to limit their consultation as necessary.

### 2) Participant Roles

- a) Meaningful consultation requires that the Tribe and the Agency understand their respective roles in the decision-making process. The Tribe and an Agency must understand the legal underpinnings of the government-to-government relationship and the obligations of the federal trust relationship. Tribal governments must understand the policy decision-making authority of the Agency and national politics of the federal or state decision that drive the consultation. An Agency will benefit from an understanding of the Tribes’ unique culture, perspective,

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governmental infrastructure, and resources.

## **3) Communication**

- a) Communication between the Agency and Tribe will facilitate the decision-making process. Regular consistent communication is essential to meaningful and informed consultation.

## **4. OBJECTIVES OF CONSULTATION**

**Instructions:** This section outlines the legal and decision-making objectives for the tribe and an Agency. It also includes a list of best practices for consulting with the tribe.

- 1) The objectives to be met by persons participating in a government-to-government consultation process, include, but are not limited to, the following:
  - a) Ensure that the authorized individuals of the Tribe have notice of, and understand, the technical and legal issues necessary to make informed policy decisions;
  - b) Ensure Agency compliance with trust obligations as well as other applicable federal or state laws and policies affecting Tribal rights, resources, culture, religion, subsistence, and commerce;
  - c) Improve policy level decision-making of the Tribal Council and the agency;
  - d) Achieve bi-lateral decision-making of the Tribal Council and the agency;
  - e) Ensure the protection of Tribal rights, resources, culture, religion, and economy;
  - f) Ensure compliance with Tribal laws and policies;
  - g) Provide an opportunity for the Tribe to express views and concerns about the issue;
  - h) Develop and achieve mutual decisions through a complete understanding of technical and legal issues; and
  - i) Improve the integrity of federal/state-Tribal decisions.
- 2) Consultation best management practices for an Agency include:

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- a) Advance notice from the Agency to the Tribe of any new policy, regulations, rule, program or other activity;
- b) Communication with the Tribe, beginning early in the planning process and continuing throughout the project;
- c) Multiple venues for consultation;
- d) Formal and informal meetings;
- e) The existence of a Tribal liaison;
- f) The Agency's fostering of a relationship with Tribal Council and Tribal staff;
- g) An early effort of identifying potential areas of concern for the Tribe;
- h) Full and candid information provided to the Tribe prior to the first meeting (in the consultation request letter and at the pre-consultation meeting);
- i) An open-ended and flexible agenda (no surprises or hidden agendas);
- j) Facilitators for the sessions, alternating between the Agency and the Tribe, or an agreed upon third party;
- k) A successful result viewed as partners arriving at an agreement, although reaching an agreement is not an end in itself;
- l) Tribal views and concerns are taken into account and implemented;
- m) Agreed upon measures are in place and enforceable;
- n) Implementation of a feedback mechanism;
- o) Tribal participation in the development of agendas for ongoing consultation meetings or coordination meetings; and,
- p) Any other best practices that the Agency and the Tribe agree upon.

## **5. ESTABLISHMENT OF POINT OF CONTACT**

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**Instructions:** This section states the point of contact for consultation and the method for choosing an alternate point of contact.

The Chairperson of the Tribe is the official point of contact for government-to-government consultation unless Tribal Council chooses to designate an alternative point of contact by issuing a written statement signed by Chairperson of the Tribe.

**Insert POC Information:**

*Name*

*Position*

*Employer*

*Address*

*City, State Zip*

*Phone*

*Fax*

*Email*

## **6. CONSULTATION PROCEDURE**

**Instructions:** This section defines the detailed steps for conducting government-to-government consultation between the tribe and the agency(ies). Note that the timelines should be adjusted to fit your tribe's staffing and other resources.

Tribal Council establishes the following procedure for consultation. An agency or other entity wishing to participate in consultation with the Tribe must adhere to the following procedure unless an alternative process is approved, in writing, by the Tribal Council.

1) Request for Consultation and Advance Notice

- a) Early in the planning process, any Agency that seeks to develop or implement any regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity that may affect Tribal sovereignty or the Tribe's right to self-government, Tribal resources, properties, cultural practices, and/or those persons under Tribal jurisdiction must request consultation and provide advance notice to the Tribe. An Agency can do this by sending a letter and attachments requesting consultation or providing notice to the Tribal Chairperson.

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- b) This letter must include: a draft or overview of and need for the policy, rule, regulation, program or project, its scope and impact, any applicable maps of the project area, and a summary describing how the proposed regulation, rule, policy, program, project, plan, property decision, inspection, or activity may affect Tribal sovereignty, resources, properties, cultural practices, and/or those persons under Tribal jurisdiction. This letter must include a contact person, timeline of the project, and any other relevant information to assist the Tribe in determining if consultation is in the best interest of the Tribe.
- c) Within *[7 to 30 (tailor this number based upon tribal staffing resources and the availability of mail services if the tribe is located in a rural area)]* days after receiving the letter requesting consultation, the Tribal Council will designate an authorized individual of the Tribe who will then respond to the Agency that the Tribe would like to schedule a pre-consultation meeting.
- d) If an Agency fails to request consultation on the development of any regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity that the Tribe believes may affect Tribal resources, properties, cultural practices, and/or those persons under Tribal jurisdiction, the Tribe may take the initiative to request consultation. In this event, the Tribe expects a response from the Agency within *[7 to 30 (tailor this number based upon tribal staffing resources)]* days of the receipt of the request.

## 2) Pre-Consultation Meeting

- a) Before the Agency moves past the scoping stage of a project, it must participate in a pre-consultation meeting with the Tribe. This meeting will involve authorized Tribal staff who will be responsible for briefing the Tribal Council before the consultation meeting takes place. Tribal Council members may be involved in this pre-consultation meeting.
- b) In this meeting the Agency should prepare a review packet that presents the proposed regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity of the Agency. The Agency must discuss the need for the proposed regulations, rule, policy, program, project or plan and how it may affect Tribal sovereignty, resources, properties, cultural practices, and/or those persons under Tribal jurisdiction.
- c) At a minimum this review packet must also include:



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- i) Who the responsible agency is, the nature of its involvement, and an agency contact person with his/her address, phone, and e-mail
  - ii) Project description, including size and configuration of the proposed action, total acreage, what is known about past and current land use, and the type and extent of the proposed ground disturbance, the location (street address if available);
  - iii) A copy of the current plans;
  - iv) Maps that clearly identify the location., including a copy of the a 7.5" USGS map;
  - v) Clearly defined Area of Potential Effects (APE) for both direct and indirect (visual, audible, atmospheric changes) effects, to be described verbally and drawn on a map;
  - vi) Information on any previous studies and recorded archaeological sites resources within the APE;
  - vii) Sharp, clear photographs of the project area, including views from different perspectives. All photos should be clearly labeled and keyed to the map indicating location and direction of the view;
  - viii) The program, plan or project schedule or timeline.
- d) The Agency must present any technical and legal issues to the Tribal Council or their designee. The Agency will ensure that the Tribal Council or their designee understand the proposed regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity of the Agency.
- e) The Tribal advisors and staff will brief Tribal Council by providing opinions and recommendations. If the Tribal Council determines that it is in the best interest of the Tribe then the authorized Tribal advisor or staff will reach out to the Agency within 30 days to initiate a consultation meeting.

## **3) Consultation Meeting**

- a) The Agency must arrange with the Tribal Chairperson a time, place, and agenda for the consultation meeting.

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- b) After the Agency and Tribal Chairperson have made arrangements for a consultation meeting the Agency must confirm the Consultation Meeting with Tribal Chairperson **7 days prior** to the arranged date. Confirmation can be in the form of a phone call, email, or any other approved correspondence by Tribal Chairperson.
- c) The Agency must call the Tribal Chairperson **24 hours** prior to the arranged meeting date to provide adequate notice and confirmation of the meeting to the Tribe. This notice must include the Agency's representative's name, contact information, and expected time of arrival.
- d) The Agency must prepare a review packet for the Tribal Council similar to the review packet required in the pre-consultation meeting and any additional information that will be necessary for the Tribal Council to reach an agreement.
- e) The Consultation Meeting must also address the following:
  - i) A discussion of any barriers to Tribal participation such as timing, financing, and/or location. The Agency must provide funds for off reservation consultation, if necessary;
  - ii) A discussion of any sensitivities regarding sacred sites affected by the project;
  - iii) A discussion of any technical or legal issues;
  - iv) A mutually agreed upon format for process;
  - v) Development of a Consultation calendar or an agreed upon meeting interval to ensure that enough meetings are planned for adequate meaningful consultation. The Consultation calendar or meeting intervals should take into account the Agency's statutory or regulatory obligations pertinent to the decision; availability of Tribal Council members and staff; and time to gather all necessary information required.
- f) The Agency will ensure that the Tribal Council understands the proposed regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity of the Agency.

# **DRAFT TRIBAL CONSULTATION PROTOCOL TEMPLATE**

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- g) Agreements with Agency shall be authorized by Tribal Council [by Tribal Council resolution or letter;.
  - h) Prior to authorizing any agreement, the Tribal Council shall ensure that such agreement: (1) does not contain any provisions that in any way diminish or waive any trust obligation of the Federal Government; (2) does not contain any provisions that waive tribal sovereign immunity, in full or in part; (3) clearly sets forth the expectations of the Tribe for the roles and services to be performed by the Agency with respect to such agreement; and (4) is consistent with established Tribal goals and priorities.
- 4) Ongoing Consultation Meetings (if necessary) or Coordination Meetings
- a) Consultation meetings should continue pursuant to the agreed upon Consultation Calendar or meeting interval until an agreement is reached or until the Tribe and Agency decide that an agreement is possible. Some consultation meetings may be in formal settings, while other may include field trips to project locations as needed. Informal meetings between staff, sub-groups, or sub-committees may be formed on an ad hoc basis as needed and agreed upon by Tribal Council.
  - b) All ongoing Consultation Meetings and Coordination Meetings require the Agency to confirm the meeting with Tribal Council one week prior to the arranged date. Confirmation can be in the form of a phone call, email, or any other approved correspondence by Tribal Council.
  - c) The Agency must call the Tribal Chairperson or their designee 24 hours prior to the arranged meeting date to provide adequate notice and confirmation of the meeting to the Tribe. This notice must include the Agency's representative's name, contact information, and expected time of arrival.
- 5) Provide the Tribe with a Consultation Summary Report
- a) The Agency shall provide the Tribe with a detailed report that provides a review of the government-to-government consultation process and all consultation activities after an agreement has been authorized by the Tribal Council and approved by resolution.
  - b) This Consultation Summary Report may be used by Tribal Council without the consent of the Agency for any Tribal business matter; including but not limited to Tribal meetings.

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## 6) Certification of Completed Consultation

- a) At the end of the government-to-government consultation process, the Tribe will offer a *[Tribal resolution or letter]* certifying that consultation was completed in compliance with this policy or not. In the event that the Tribe deems that the Agency failed to consult properly, a letter from the Tribe will explain this failure and be shared with the director or executive authority of the Agency.

## 7) Emergency Consultation Process

- a) Consultation should be conducted with advance notice to avoid any devastating impacts to tribal resources. Should an Agency require consultation with a tribe in an emergency situation in which notice cannot be provided 7 to 30 days in advance, the Agency needs to contact the Tribal Chairperson immediately and provide a summary of the actions and potential impacts. The Tribal Chairperson will meet with the Tribal Council and stakeholders to determine if the Tribe can participate in an emergency consultation. Action steps will follow the steps set forth above but with immediate and shortened timelines as mutually agreed upon.

## **7. CONSULTATION RECORD**

**Instruction: This section defines which types of notes and other media will serve as the consultation record, who may possess the consultation record, and how the tribe's sensitive information will be handled.**

Meeting notes, minutes, shared documents, and any recorded audio or video files shall be maintained in common between the Tribe and the Agency. Any sensitive information provided by the Tribe shall remain confidential or be returned to the Tribe upon request; unless otherwise agree to, in writing, by the Tribal Council.

## **8. NO WAIVER OF SOVEREIGN IMMUNITY**

**Instruction: This section expressly states that the tribe does not waive sovereign immunity for this ordinance or protocol.**

Nothing in the *[Ordinance/Protocol]* shall be deemed or construed to be a waiver, in full or in part, of the Tribe's sovereign immunity from unconsented suit.

## **9. SEVERABILITY**

# **DRAFT TRIBAL CONSULTATION PROTOCOL TEMPLATE**

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**Instruction: This section establishes that if a provision is held to be unconstitutional, then that provision may be severed from the rest of the ordinance/protocol.**

If any provision of this ordinance/protocol shall be held unconstitutional pursuant to the tribal constitution or invalid by a court of competent jurisdiction, only the invalid provision or language shall be severed and the remaining provision and language of this ordinance shall remain in full force and effect.

# Consultation with Indian Tribal Governments Template

Agency Name Here

Date

Any Other Information

## How to Use this Template

This document is designed to give Metropolitan Planning Organizations (MPOs) a convenient framework to create a comprehensive Indian Tribal Government outreach and consultation policy for the Regional Transportation Plans (RTP), Transportation Improvement Program (TIP), and other planning documents and projects. 23 CFR 450.316 outlines that the MPO shall develop a documented process that outlines roles, responsibilities, and key decision points for consulting with Indian Tribal Governments. Instructive text is given in regular text while example text is in italicized text. The following template may be edited as the MPO deems necessary.

## Policy for Consultation with Federally Recognized Indian Tribal Governments

**Consultation Statement.** The purpose of this statement is to set out the purpose, manner, goals, vision, or all of the above for tribal consultation on the RTP or other planning documents as appropriate. The statement need not be long, but it should be clear and concise.

Example from BCAG:

*Consultation is the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values, and where feasible, seeking agreement.*

### Introduction

If desired, the MPO may include an introductory paragraph about consultation. It may include a brief history of the MPO's consultation within the Indian Tribal Government(s) or highlight any important activities. Consultation with federally recognized Indian Tribal governments is mandated by Federal and State law. It is also good planning practice and leads to better planning outcomes that are better accepted by the community. In addition, MPOs should engage with non-federally recognized Tribes as appropriate.

### Requirement to Consult

It is advisable to recite the sections of federal law that require consultation with federally recognized Indian Tribal Governments. This practice emphasizes the importance of consultation to decision-makers and the public.

Below is some sample language from BCAG:

*The United States Department of Transportation (U.S. DOT) Order 5301.1 ensures that programs, policies, and procedures administered by the U.S. DOT are responsive to the needs and concerns of Native American Tribal Governments. This Order provides a very thorough overview of the various federal regulations and Executive Orders on this subject. This Order is available at:*

*<http://environment.fhwa.dot.gov/guidebook/vol2/5301.1.pdf>*

*US Code Title 23 Sec 135 (e and f) generally state that Tribal government concerns should be considered in developing planning documents. Specifically, the applicable provisions concerning the documented process from the U.S.DOT joint FHWA/FTA planning regulations at 23 CFR 450.316 state:*

*(c) When the MPO includes Indian Tribal lands, the MPO shall appropriately involve the Indian Tribal government(s) in the development of the metropolitan transportation plan and the TIP.*



*(e) MPOs shall, to the extent practicable, develop a documented process(es) that outlines roles, responsibilities, and key decision points for consulting with Indian Tribal governments and agencies, ...which may be included in the agreement(s) developed under §450.314.*

Here is also some further sample language from Madera CTC:

*Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (November 6, 2000), establishes regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies with tribal implications. The goals of this order are to strengthen government to government relationships with Indian tribes and to reduce the imposition of unfunded mandates upon local tribes.*

It is also good to include some language about AB 52 (2014), which mandated consultation on Tribal Cultural Resources as part of the CEQA process if the Tribe has requested consultation on projects. This requirement means that not only must the MPO consult on the RTP or RTIP in general, it must consult on specific projects if the project is within the identified ancestral lands of the Tribe. It is also good planning practice to extend the consultation requirement to other planning documents (see below) and to more agencies than just the MPO. In short, agencies should consult with Tribes whenever a policy has the potential to impact Tribes.

### **Federally Recognized Tribes**

Include general information about federally recognized Tribes. This generally includes a list of federally recognized Tribes and a bit about what a federally recognized Tribes are. This list is important because it establishes who the MPO works with. It is also important to note that the Agency should engage with non-federally recognized Tribes as appropriate on matters that may affect them.

Below you will find some language adapted from BCAG about federally recognized Tribes:

*A contact list of California Native American Tribes that are both federally and non-federally recognized is maintained by the Native American Heritage Commission. There are five federally recognized Tribes in [County Name] including:*

- *[Include list of Tribes]*

*Federal recognition is a legal distinction that applies to a Tribe's right to a government-to-government relationship with the federal government and eligibility for federal programs.*

*All California Native American Tribes are distinct and independent governmental entities with specific cultural beliefs and traditions and unique connections to areas of California that are their ancestral homelands.*

*Federal and state law require local agencies to consult with federally recognized Tribal governments prior to making transportation decisions, taking actions, or implementing*

*programs that may impact their communities. This activity is separate from, and precedes the public participation process. Protocol should be flexible and dynamic with respect to initiation of communication and discussion format. More than one Tribe may have an affiliation with the area of consideration. Individual consultation may be necessary if a combined consultation format is not preferred by the Tribal Government. Determining the degree and adequacy of consultation will vary depending on a number of factors including the scope of proposed activities, whether the activity is short-term or long-term, the cultural or political sensitivity of the issue at hand, and the number of potential stakeholders.*

*The Agency intends to consult with Native American Tribal Governments on activities that may impact their communities. Although consultation is not mandated for non-federally recognized Tribes, this does not preclude the Agency from consulting with local Tribes when plans or activities might impact cultural values or the community.*

## Consultation

There are some basic principles about consultation that agencies should be aware of when they consult with Tribes. It is important to set out what consultation is and how the agency plans to approach consultation. Knowing this helps agency staff and Indian Tribal governments understand the agency's expectations for consultation.

Please see the text from Butte County Association of Governments (BCAG) below for some sample text:

*The Executive Director is the designated Agency official with principal responsibility for the agency's implementation of consultation requirements. At the appropriate time in the planning phase, contact shall be initiated directly with the Tribal Chair to inquire as to protocols in place such as cultural resource contacts, procedures, time limits, and restrictions affecting communication. Development of mutually agreed-upon protocols may result in more effective consultation efforts with individual Tribes. Consultation should be done face-to-face whenever possible.*

*Consultation is a process, not a single event, and communication should continue until the project or plan is complete. Notification of Tribes is not the same as consultation. Sufficient time should be provided in a request for consultation in order to allow the Tribal Council to take official action. Consultation requests should include a clear statement of purpose, explaining the reason for the request and declaring the importance of the tribe's participation in the planning process. The request should specify the location of the area of potential effect addressed by the proposal. All aspects of the consultation process should be documented, including how the lead agency reaches a final decision.*

In addition, the 2017 RTP Guidelines for MPOs have more extensive language on when and how to consult. This language, found in Section 4.9, can be easily added to this section to expand

upon any aspect that the MPO considers necessary. The RTP Guidelines can be found at [http://www.dot.ca.gov/hq/tpp/offices/orip/rtp/index\\_files/2017RTPGuidelinesforMPOsr.pdf](http://www.dot.ca.gov/hq/tpp/offices/orip/rtp/index_files/2017RTPGuidelinesforMPOsr.pdf). For convenience, the main text is reproduced here:

*During the development of the RTP, Tribal Government consultation can be described as the meaningful and timely process of seeking, discussing, and considering carefully the views of leaders of federally recognized Tribal Governments and, where feasible, seeking agreement on important matters. The MPO can do this by sharing information and conducting meetings with leaders of the federally recognized Tribal Governments during the preparation of the RTP prior to taking action(s) on the plan and by making sure to consider input from the tribe as decisions are made. Consultation should be conducted in a way that is mutually respectful of each party's sovereignty. Tribal Government coordination is the comparison of the MPOs transportation plans, programs, projects and schedules with similar documents prepared by the tribe. The MPO needs to ensure consistency with tribal plans and the RTP.*

*Currently there are 109 federally recognized tribes in California. The federally recognized Tribal Governments hold inherent power of limited sovereignty and are charged with the same responsibility as other governmental authorities. In addition, California is home to the largest Native American population in the country, including non-federally recognized tribes, and urban Indian communities.*

*When the MPO region includes California Indian Tribal Lands (reservations, Rancherias, and allotments) the MPO shall appropriately involve the federally recognized Native American Tribal Government(s) in the development of the RTP. The MPO should also seek input even from tribes that are not federally recognized or from other "interested parties" that may have a background and/or history of Native American culture within the region. In addition, AB 52 mandates that agencies must consult with tribes regarding impacts to Tribal Cultural Resources as an impact under CEQA.*

*The MPO should include a discussion of consultation, coordination and communication with federally recognized Tribal Governments when the tribes are located within the boundary of an MPO/RTPA. The MPO should establish a government-to-government relationship with each tribe in the region. This refers to the protocol for communicating between the MPOs and the Tribal Governments as sovereign nations. This consultation process should be documented in the RTP. The initial point of contact for Tribal Governments should be the Chairperson for the tribe.*

*The MPO should develop protocol and communication methods for outreach and consultation with the Tribal Governments. However these protocol and communication methods should be re-evaluated if the agencies are un-successful in obtaining a response during the development of the RTP.*

*It is important to ensure that efforts in establishing channels of communication are documented in the RTP. For further information and assistance in the consultation process, contact the Caltrans Native American Liaison Branch (NALB) at: <http://dot.ca.gov/hq/tpp/offices/ocp/nalb>. The NALB webpage also provides contact information for the Caltrans Districts' Native American Liaisons.*

*As mentioned above, California is home to many non-federally recognized tribes as well as Native Americans living in urban areas. MPOs should involve the Native American communities in the public participation processes. Establishing and maintaining government-to-government relations with federally recognized Tribal Governments through consultation is separate from and precedes the public participation process.*

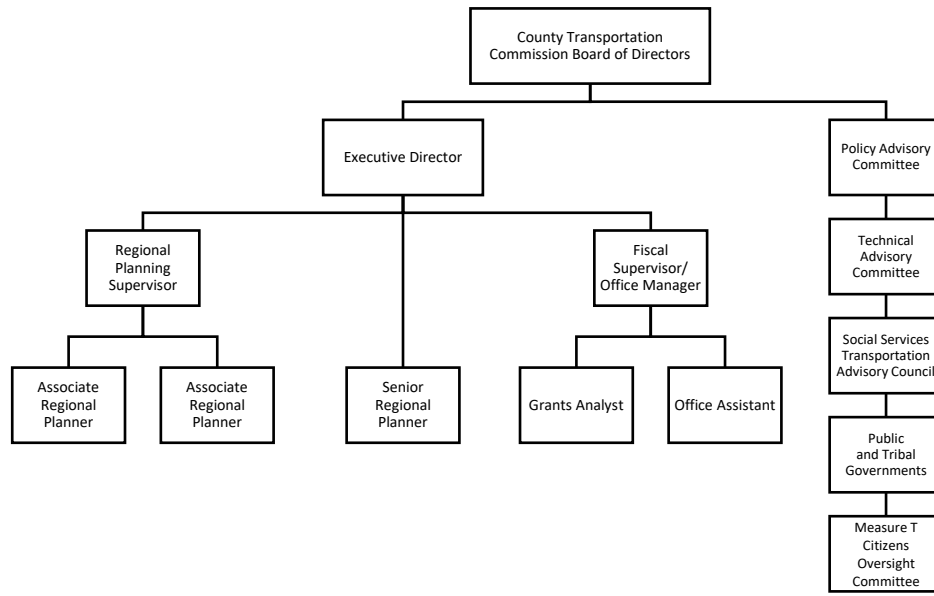
## Agency Organizational Structure

The MPO may be interested in explaining the organization of the agency as well as the various advisory committees the MPO convenes. This explanation helps Indian Tribal governments know how the MPO is organized and whom they should contact if there are any questions or concerns. It is advisable to invite Indian Tribal governments to participate in pertinent committees, such as the agency board or a technical or policy advisory committee, and to document the involvement of any Indian Tribal government(s) on the committee(s).

The language below comes from the Madera County Transportation Commission's (MCTC) Tribal consultation policy and includes a helpful chart of the MPO's organization:

*The Commission is organized into a Board of Directors supported by the Policy Advisory Committee and the Technical Advisory Committee. The Commission staff includes an Executive Director; a Fiscal Supervisor; a Planning Supervisor; three Regional Planners; a Grants Analyst; and an Office Assistant. There is currently one standing committee - the Social Services Transportation Advisory Council (SSTAC) which reports through the Technical Advisory Committee. The relationship between the Board, its staff and the committees is illustrated in Figure 1 and discussed in more detail below.*

*The Technical Advisory Committee (TAC) includes the County Road Commissioner, County Planning Director, City Engineer, City Planning Director, City Administrator, and one representative from Caltrans District 06. The Tribes [name Tribes specifically] and other tribal governments are also invited to participate in the monthly TAC meetings. The TAC reviews staff work conducted pursuant to the Overall Work Program; advises the Commission and PAC on transportation issues; and makes recommendations on planning and programming actions to be taken by the Commission. TAC review is generally focused upon the technical merits of various transportation issues coming before the Commission. Staff consults with tribal governments as it relates to transportation planning issues and initiates consultation with the tribal governments at the government to government level.*



## Agency Activities

Include subsections about the various activities that the agency undertakes that could relate to Indian Tribal governments. These activities are important in supporting the development of the transportation services in the planning area. There should be a statement about engaging with Indian Tribal governments on an ongoing basis, emphasizing that it is not a one-time occurrence.

Example of Statement on Ongoing Consultation:

*The Agency consults with Tribal Governments on an ongoing basis and not only on individual projects. The Agency strives to keep open channels of communication with Tribes to facilitate better relationships and better reflecting Tribes' viewpoints and needs in our planning documents and projects.*

Additional Examples from BCAG and MCTC:

Example:

*To support the development of the following documents, the Agency will consult with Federal Land Management Agencies and Federally Recognized Native American Tribal Governments in preparation of planning studies and programs affecting the agency and Tribe:*

- *Initiate consultation by letter from the executive director or his/her designee to the agency and tribal chairperson.*
- *Offer to meet to discuss the agency and tribal needs and concerns regarding impacts within their jurisdiction prior to the beginning of preparation of*

*documents. If the agency, tribal chairperson and/or their representatives elect not to meet, send a copy of the draft report for their review.*

- Consult with agency and tribal governments while developing the RTP, addressing agency and tribal concerns regarding impacts within their jurisdiction and again prior to adoption of the RTP.*
- Invite representatives of the agency and tribe to public meetings.*

Planning Documents

**Planning Documents, Studies, Transportation Improvement Programs, Plans, and Other Documents**

- Federal Transportation Improvement Program (FTIP)*
- State Transportation Improvement Program (STIP)*
- Regional Transportation Improvement Program (RTIP)*
- Regional Transportation Plan / Sustainable Communities Strategy (RTP/SCS)*
- Overall Work Program (OWP)*
- Final Reports that have come out of the Caltrans Transportation Planning Grant Program such as the Central California Tribal Transportation Environmental Justice Collaborative Project (2010).*

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**Transit studies, unmet transit needs hearing, transit needs assessment**

*Consult with the tribal governments on transit needs in their area:*

- Initiate consultation and invitation to the unmet transit needs hearing by letter from the executive director or his/her designee to tribal chairperson with copies to the CEO, Administrator, and Cultural Department representatives.*
- Offer to meet to discuss the tribe’s transit needs and concerns.*
- Outreach to members of the tribe through local newspapers, Native American newsletters, tribal events, or trust lands meeting places.*

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## Grant Programs and Funding

### **Grant Programs: Federal Transit Administration Transit Grant Programs, etc.**

*Coordinate with the tribal governments to provide information and technical assistance on grant programs administered by the MPO, RTPA, or other agencies:*

- *Initiate consultation by letter from the executive director or his/her designee to the tribal chairperson with copies to the Tribal Administrator, and Cultural Department representatives.*
- *Provide notice of each grant and its application deadlines.*
- *Invite representatives of the tribe to training or public meetings regarding the grants.*
- *Coordinate between the tribe and MPO or RTPA member agencies.*

*Consult with and consider the interests of the tribal government.*

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### **Tribal Transportation Program (TTP) – Highway Trust Fund Planning and Programming**

*Coordinate amongst planners and engineers in local agencies and tribes:*

- *Offer to meet to discuss the tribe's needs and concerns when contacted by the tribal representatives.*
- *Provide assistance in TTP planning.*
- *Coordinate with federal entities as requested by the tribe.*
- *Collaborate on funds awarded to the Tribe through the Active Transportation Program.*

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## Contacting the MPO

### **Agency Contact Information**

*Please refer to Agency's website for the current Agency Staff contact regarding Federal Land Management Agencies and Federally Recognized Native American Tribal*



Governments consultation: <http://www.maderactc.org/projects/consultation-with-federal-land-management-agencies-and-federally-recognized-native-american-tribal-governments/>

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## Other Sections

There are other potential sections that could be added to the RTP Tribal outreach section. Such sections could include MPO or RTPA contact lists, any agency policies on how they conduct meetings, a schedule of the planning products they have, how the planning products relate to each other, and any other explanations of transportation planning. If the Tribes so desire, they could also permit the MPO or RTPA to include Tribal plans or procedures in the outreach and consultation plan.

## Non-Federally Recognized Tribes

It is advisable to add a section about non-federally recognized Tribes. Many MPOs and RTPAs have non-federally recognized Tribes that are active in transportation, and some partner with federally recognized Tribes to leverage funding and engage in consultation. It's important to tailor any statement about non-federally recognized Tribes to the unique situation in each MPO and RTPA planning area.

*There are several non-federally recognized Tribes in California that are active in transportation issues. Federal law does not require government-to-government consultation on projects with non-federally recognized Tribes; however, California law AB-52 requires consultation on Tribal Cultural Resources under CEQA. In addition, non-federally recognized Tribes are generally considered a minority group, and federal executive orders require consultation with minority or disadvantaged groups. In particular, Presidential Executive Order 12898 about Environmental Justice places special emphasis on coordination with these groups. The Agency has procedures for coordination with minority and disadvantaged groups in its Public Participation Policy (see link URL here: [insert URL]).*



# Tribal Transportation Tool

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- This inventory tool will serve as a central location for gathering and organizing Tribal Transportation Plans for your district.
- In an effort to supplement the “Native American Tribal Consultation and Coordination” section found in Regional Planning’s guidelines for MPOs we have included all Californian tribes district by district.
- Through the gathering of Tribal Plans and documents in one central location, the identification of collaboration opportunities can be improved and can help facilitate conversations between MPOs and RTPAs and tribal governments.
- The District Native American Liaison can be a source of assistance to complete the inventory tool and to update any contact / tribal transportation information within the tool.
- To view the spreadsheet, [click here](#).



## Historic Preservation Considerations in Transportation and Land Use Planning<sup>1</sup>

### 1. Federal Highway Administration Planning-Environmental Linkages (PEL) Initiative:

The PEL initiative is a collaborative and integrated approach to transportation decision-making that 1) considers environmental, community, and economic goals early in the transportation planning process, and 2) uses the information, analysis, and products developed during planning to inform the environmental review process. Substantial amount of useful guidance on the PEL website, including historic preservation planning guidance.

**Link:** [https://www.environment.fhwa.dot.gov/env\\_initiatives/pel.aspx](https://www.environment.fhwa.dot.gov/env_initiatives/pel.aspx)

### 2. Transportation Research Board, National Cooperative Highway Research Program: *Coordination of Section 106 and Long-Range Transportation Planning* (July 2014):

This report is the result of a research project conducted by the National Cooperative Highway Research Program (NCHRP) and focuses on how state DOTs and MPOs may incorporate historic preservation considerations into their long-range transportation planning processes through the development of plans that identify historic properties and consider tribal, state, and local historic preservation goals.

**Link:** [http://onlinepubs.trb.org/onlinepubs/nchrp/docs/NCHRP25-25\(87\)\\_FR.pdf](http://onlinepubs.trb.org/onlinepubs/nchrp/docs/NCHRP25-25(87)_FR.pdf)

### 3. *Effective Practices for Considering Historic Preservation in Transportation Planning and Early Project Development* (2009):

Described as the first concerted effort to compile in one document descriptions of best practices for considering historic preservation factors during transportation systems planning and early project development. This project also examines how state departments of transportation (DOT) effectively engage historic preservation agencies and organizations, and Federally recognized tribes, during planning and the initial stages of project development.

**Link:** [http://onlinepubs.trb.org/onlinepubs/archive/NotesDocs/25-25\(49\)\\_FR.pdf](http://onlinepubs.trb.org/onlinepubs/archive/NotesDocs/25-25(49)_FR.pdf)

<sup>1</sup> January 2020: This document is periodically revised. Please contact the Native American Cultural Studies Branch for the most current version.

**4. Advisory Council on Historic Preservation (ACHP) Guidance, *Early Coordination with Indian Tribes During Pre-Application Processes, A Handbook* (October 2019):**

Similarly, to PEL, the focus of this guidance is intended to improve the consideration and protection of historic properties during *early Planning* stages, prior to approvals and funding, to ultimately foster a more efficient and effective Section 106 review process.

**Link:** [https://www.achp.gov/sites/default/files/documents/2019-10/EarlyCoordinationHandbook\\_102819\\_highRes.pdf](https://www.achp.gov/sites/default/files/documents/2019-10/EarlyCoordinationHandbook_102819_highRes.pdf)

**5. ACHP “Preserve America” Initiative**

Preserve America is a federal initiative that encourages and supports community efforts to preserve and enjoy our priceless cultural and natural heritage. The goals of the program include a greater shared knowledge about the nation’s past, strengthened regional identities and local pride, increased local participation in preserving the country’s cultural and natural heritage assets, and support for the economic vitality of our communities. What this may look like in terms of tribal heritage designations has many possibilities and will vary according to rural versus urban tribal communities and sentiments.

**Link:** <https://www.achp.gov/preserve-america>

**6. ACHP Policy Statement: Archaeology, Heritage Tourism, and Education (August 15, 2008):**

Policy that is intended to foster public understanding and appreciation of archaeological resources through heritage education programs and, where appropriate, heritage tourism initiatives while encouraging their conservation for future generations in a spirit of stewardship. This document may be helpful when engaging with local planning partners and non-preservation professionals.

**Link:** <https://www.achp.gov/digital-library-section-106-landing/achp-policy-statement-archaeology-heritage-tourism-and>

**7. ACHP Measuring Economic Impacts of Historic Preservation (September 2013).**

A report to the Advisory Council on Historic Preservation that is intended to identify reliable indicators for measuring the economic impact of historic preservation over time. Examines the economic costs and benefits of historic preservation to society using a variety of metrics, including jobs, property values, heritage tourism, environmental measurements, and more.

**Link:** <https://www.achp.gov/sites/default/files/guidance/2018-06/Economic%20Impacts%20v5-FINAL.pdf>

**8. National Park Service *Secretary of the Interior's Standards and Guidelines Preservation Planning* (June 2001).**

NPS Standards for planning outline a process that determines when an area should be examined for historic properties, how to evaluate the significance of properties, and how such properties should be treated. Basic principles of these guidelines promote avoidance/preservation in place when feasible; more effective preservation planning requires early identification of properties; public and tribal participation is key to broad acceptance of preservation planning decisions.

**Link:** [https://www.nps.gov/history/local-law/arch\\_stnds\\_1.htm](https://www.nps.gov/history/local-law/arch_stnds_1.htm)

**9. CA Office of Historic Preservation, *Technical Assistance Series No. 14: Drafting Effective Historic Preservation Ordinances* (Rev. 2005)**

OHP Technical Assistance Bulletin #14 is intended to assist California's local governments in creating or revising a historic preservation ordinance. This document is also helpful when reviewing or working with existing ordinances. It identifies key issues that all communities must deal with when drafting or revising an ordinance and discusses various approaches to each of these key issues, thus allowing each community to craft an ordinance that best fits their own preservation goals and local conditions. The below link is to OHP's *Local Government Assistance* webpage on which there is a link to Bulletin #14 and numerous other helpful resources for local governments on historic preservation planning.

**Link:** [http://ohp.parks.ca.gov/?page\\_id=1072](http://ohp.parks.ca.gov/?page_id=1072)

**10. SANDAG *Intraregional Tribal Transportation Strategy* (January 2018)**

This document is a good example of Agency-Tribe Collaborations in which tribal governments have a voice in Transportation Planning decisions. The focus is on transportation, mobility, funding, etc.; however, there is some discussion of cultural resources awareness in early transportation planning processes.

**Link:** [https://www.sandag.org/uploads/publicationid/publicationid\\_4480\\_23377.pdf](https://www.sandag.org/uploads/publicationid/publicationid_4480_23377.pdf)

**11. ACHP *Native American Traditional Cultural Landscape Action Plan* (November 2011)**

Large scale historic properties of significance to Indian tribes across the United States are increasingly threatened by development. Larger/landscape scale resources often experience "death by a million cuts" by multiple small projects. Establishing local/regional historic values and priorities early in the planning process helps address potential effects to indigenous landscapes, whether through better avoidance or through advance mitigation planning, which tends to provide for more community engagement and more meaningful historic preservation outcomes. The ACHP has developed an action plan and other guidance to encourage the early involvement of tribes and ensure that traditional cultural landscapes are considered early in land management and project planning decisions. The following link provides access to the Action Plan, as well as several other sources on the topic of indigenous landscapes.

**Link:** <https://achp.gov/indian-tribes-and-native-hawaiians/traditional-cultural-landscapes>

## 12. 23 CFR Part 450 – APPENDIX A: Linking Transportation Planning and NEPA Processes

Despite this statutory emphasis on transportation planning, the environmental analyses produced to meet the requirements of the NEPA of 1969 (42 U.S.C. 4231 *et seq.*) have often been conducted de novo, disconnected from the analyses used to develop long-range transportation plans, statewide and metropolitan Transportation Improvement Programs (STIPs/TIPs), or planning-level corridor/subarea/feasibility studies. When the NEPA and transportation planning processes are not well coordinated, the NEPA process may lead to the development of information that is more appropriately developed in the planning process, resulting in duplication of work and delays in transportation improvements. **The purpose of Appendix A** is to change this culture, by supporting congressional intent *that statewide and metropolitan transportation planning should be the foundation for highway and transit project decisions*. The information in Appendix A is intended for use by State departments of transportation (State DOTs), metropolitan planning organizations (MPOs), and public transportation operators to clarify the circumstances under which transportation planning level choices and analyses can be adopted or incorporated into the process required by NEPA.

**Link:** <https://www.govinfo.gov/app/details/CFR-2004-title23-vol1/CFR-2004-title23-vol1-part450>

### More Information:

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# Resources

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- **Caltrans Resources:**
- *Regional Planning Handbook 2017:*  
<https://www.dropbox.com/s/drin87n61ao7f0x/Final%202017%20RPH%2011.9.17.pdf?dl=0>
- *Statewide Local Development-Intergovernmental Review Program Guide: Tribal Development Projects*  
<https://dot.ca.gov/-/media/dot-media/programs/transportation-planning/documents/guide-tribal-development-projects-a11y-.pdf>
- **FHWA Successes in Stewardship Newsletter:**
- *Tribal Case Studies Highlight Effective Intergovernmental Partnerships*  
[https://www.environment.fhwa.dot.gov/Pubs\\_resources\\_tools/publications/newsletters/sep13nl.aspx](https://www.environment.fhwa.dot.gov/Pubs_resources_tools/publications/newsletters/sep13nl.aspx)
- **Section 106 Tribal Agreements:**
- *Strengthening Government-to-Government Partnerships and Accelerating Project Delivery*  
[https://www.environment.fhwa.dot.gov/Pubs\\_resources\\_tools/publications/newsletters/jun19nl.aspx](https://www.environment.fhwa.dot.gov/Pubs_resources_tools/publications/newsletters/jun19nl.aspx)
- **FHWA Resource Center:**
- *In Their Own Light: A Case Study in Effective Consultation*  
[https://www.fhwa.dot.gov/resourcecenter/teams/environment/tribal\\_consult.pdf](https://www.fhwa.dot.gov/resourcecenter/teams/environment/tribal_consult.pdf)
- *Improving Transportation Project Development & Environmental Reviews Through Collaborative Problem Solving*  
[https://www.environment.fhwa.dot.gov/Pubs\\_resources\\_tools/resources/documents/InteragencyWkshop\\_finalreport.aspx](https://www.environment.fhwa.dot.gov/Pubs_resources_tools/resources/documents/InteragencyWkshop_finalreport.aspx)
- *Tribal Transportation Improvement Program*  
<https://flh.fhwa.dot.gov/programs/ttp/planning/ttip.htm>
- **Other Resources:**
- *Tribal Consultation Toolkit Template and Flowchart*  
<https://nijc.org/tct-toolkit.html>
- *National Cooperative Highway Research Program (NCHRP) 25-25 Task 79 study on Successful Practices for Effective Tribal Consultation*  
[http://onlinepubs.trb.org/onlinepubs/nchrp/docs/NCHRP25-25\(79\)\\_FR.pdf](http://onlinepubs.trb.org/onlinepubs/nchrp/docs/NCHRP25-25(79)_FR.pdf)

- *Strategies for Resolving Intergovernmental Conflicts: A Local Official's Guide to Intergovernmental Conflict Resolution*  
[https://www.ca-ilg.org/sites/main/files/file-attachments/2008\\_-\\_conflict\\_resolution\\_guide.pdf](https://www.ca-ilg.org/sites/main/files/file-attachments/2008_-_conflict_resolution_guide.pdf)
- *Tribal Consultation Process for San Diego Forward: Communication, Cooperation, and Coordination*  
[https://www.sdfoward.com/pdfs/RP\\_final/AppendixG-TribalConsultationProcessforSanDiegoForward-CommunicationCooperationandCoordination.pdf](https://www.sdfoward.com/pdfs/RP_final/AppendixG-TribalConsultationProcessforSanDiegoForward-CommunicationCooperationandCoordination.pdf)
- *Getting to know Native Land—An Education Guide by Native Land 2019*  
[https://native-land.ca/wp/wp-content/uploads/2019/03/teacher\\_guide\\_2019\\_final.pdf](https://native-land.ca/wp/wp-content/uploads/2019/03/teacher_guide_2019_final.pdf)
- *Tribal Consultations Guidelines—Supplement to General Plan Guidelines 2005*  
[https://www.parks.ca.gov/pages/22491/files/tribal\\_consultation\\_guidelines\\_vol-4.pdf](https://www.parks.ca.gov/pages/22491/files/tribal_consultation_guidelines_vol-4.pdf)
- *EPA Policy on Consultation and Coordination with Indian Tribes, May 4, 2011*  
<https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>
- **Government to Government Models of Cooperation Between States and Tribes**  
<https://www.ncsl.org/research/state-tribal-institute/models-of-cooperation-between-states-and-tribes.aspx>
- **Video Resources:**
- *California Indian Genocide and Resilience | Bioneers*  
<https://youtu.be/qUCCysmBONG>
- *History of Native California*  
<https://youtu.be/T-azcPugmKQ>



## Evaluation Training Tool

[https://www.surveymonkey.com/r/caltrans\\_trainingseesionevaluation](https://www.surveymonkey.com/r/caltrans_trainingseesionevaluation)

**Please provide your evaluation for the presenter(s), materials, registration process, and training facility provided by the National Indian Justice Center (NIJC) pursuant to Agreement Number 74A098, the Tribal Engagement and Technical Assistance (TE/TA) agreement between Caltrans and NIJC.**

1. Date of Training:

Date / Time

|            |    |    |   |        |
|------------|----|----|---|--------|
| MM/DD/YYYY | hh | mm | - | ↑<br>↓ |
|------------|----|----|---|--------|

2. Training

Training Session Name:

Trainer 1:

Trainer 2:

Trainer 3:

Trainer 4:

Trainer 5:

Location:

City/Town

State/Province

ZIP/Postal Code

## DEMOGRAPHICS

3. What is the first letter of your last name?

4. What is the first letter of your first name?



5. What is the two-digit month you were born? (For example, if you were born in January, input 01)

6. What is your gender?

- ☐ Male
- ☐ Female
- ☐ Non-binary/third gender
- ☐ Prefer not to say
- ☐ Prefer to self-describe

7. Are you a/an...

- ☐ Indian - Member or descendant of recognized Tribe
- ☐ Indian - Member or descendant of a non-recognized Tribe
- ☐ Non-Indian
- ☐ No Response
- ☐ Other (please specify)

8. Are you an employee of ...

- ☐ Tribal Government
- ☐ Federal Government
- ☐ State Government
- ☐ Private Corporation
- ☐ Non-Profit Corporation
- ☐ Self-employed
- ☐ Unemployed
- ☐ No Response
- ☐ Other (please specify)

9. Please check the statement that best applies.

- ☐ I am taking this course in person.
- ☐ I am taking this course online.
- ☐ Other (please specify)

## EVALUATION OF TRAINING

10. TRAINER(S)

|                                                                                           | Strongly agree        | Agree                 | Neutral               | Disagree              | Strongly disagree     |
|-------------------------------------------------------------------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| The trainer(s) presentation of the training content was clear and effective.              | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| The trainer(s) displayed a clear understanding of the subject matter.                     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| The trainer(s) arranged the concepts to make the most effective use of the allotted time. | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| The trainer(s) stimulated discussion and was responsive to participants.                  | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Overall, I am satisfied with Trainer 1:                                                   | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Overall, I am satisfied with Trainer 2:                                                   | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Overall, I am satisfied with Trainer 3:                                                   | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

## 11. APPLICATION POTENTIAL OF PROFESSIONAL LEARNING INVENTORY:

|                                                                                                       | Strongly Disagree     | Disagree              | Neutral               | Agree                 | Strongly Agree        |
|-------------------------------------------------------------------------------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| As a result of the training, I substantially increased my knowledge of this topic.                    | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| As a result of the training, I developed new skills.                                                  | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| The training has affected some of my attitudes concerning this topic area.                            | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| I am motivated to put this training into practice in my job.                                          | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| I have already made a plan with a co-worker to use this training.                                     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| There is at least one co-worker who will be supportive of applying my new skills into practice.       | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| I will have sufficient opportunities in my job to practice the new ideas/skills/techniques in my job. | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| I am very confident that I will use the training on the job.                                          | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| I will have the time to review materials and make an implementation plan.                             | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| During the training, I was thinking of ways I could apply the training content to my job.             | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| This training will help me to continue learning in this topic area.                                   | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Overall, I am satisfied with this training.                                                           | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

## 12. EFFECTIVENESS OF METHODS

The trainer(s) made effective use of the following presentation styles to illustrate the key points of the training.  
(Note: Trainings do not need to contain all of the following training methods to be effective):

- ☐ Lecture
- ☐ Facilitated Discussion
- ☐ Small-Group Breakouts
- ☐ Role Plays
- ☐ Case Examples
- ☐ Technology (videos, PowerPoint, etc.)
- ☐ Handouts

Other (please specify)

## 13. How easy was the pre-registration process?

- ☐ Very easy
- ☐ Easy
- ☐ Neutral
- ☐ Difficult
- ☐ Very difficult

## 14. Overall, how would you rate the quality of your pre-registration experience?

- ☐ Very positive
- ☐ Positive
- ☐ Neutral
- ☐ Negative
- ☐ Very negative

15. If you attended the training session on-site, please answer the following questions (1-6).

For each question, please check the box under the number that best represents your assessment of the training staff and training facility, using the scale of 1 = strongly disagree and 5 = strongly agree.

|                                                                                                   | Strongly agree        | Agree                 | Neutral               | Disagree              | Strongly disagree     |
|---------------------------------------------------------------------------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| Staff was courteous, efficient, and professional                                                  | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Staff was knowledgeable and offered assistance                                                    | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Staff delivered services on time and as promised                                                  | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| The training facility treated my/our group with respect and a sense of value during the training. | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| The location was convenient and easy to find.                                                     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| The meeting room and training facility were clean, adequate, and comfortable.                     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

16. If you attended the training session online, please answer the following questions (1-4).

For each question, please check the box under the number that best represents your assessment of the training staff and training facility, using the scale of 1 = strongly disagree and 5 = strongly agree.

|                                                                                              | Strongly agree        | Agree                 | Neutral               | Disagree              | Strongly disagree     |
|----------------------------------------------------------------------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| Staff was courteous, efficient, and professional                                             | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Staff was knowledgeable and offered assistance                                               | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Technical support was provided if needed                                                     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| The online staff treated my/our group with respect and a sense of value during the training. | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

17. Overall, how would you rate your online experience?

- ☐ Excellent
- ☐ Very Good
- ☐ Good
- ☐ Fair
- ☐ Poor
- ☐ Not applicable
- ☐ Other (please specify)

18. Did you experience any technical problems?

- ☐ None – my microphone and speakers worked fine
- ☐ Problem with my microphone (I could not be heard)
- ☐ Problem with my speakers (I could not hear the presentation)
- ☐ Display problem – with the quality of images
- ☐ Display problem – could not see the presentation
- ☐ Other (please specify)

### 19. OPEN-ENDED QUESTIONS

What were the most important things you learned today?

Was there any subject matter that you found confusing? If so, please provide specific examples:

Please provide two examples of how you will apply what you have learned in this training/online course to your job:

Suggestions for improving this training:

Suggestions for areas you would like to learn more about:

Suggestions for next steps:

Thank you for completing our survey. Your feedback is greatly appreciated!