



**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.

## 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

## Introduction

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

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Hello!



## 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



## 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.

### 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.

## 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.

## 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.**

## Tribes as Quasi-Sovereign Nations

### ⌘ 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.

## 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.

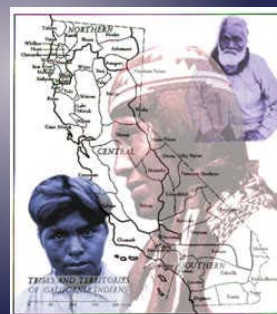
18 U.S.C. § 1151

## 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.

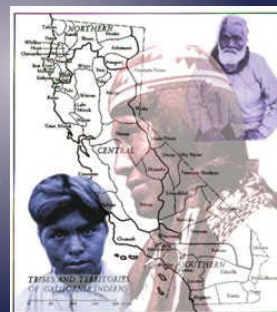
## California Indian History 101

- ⌘ 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



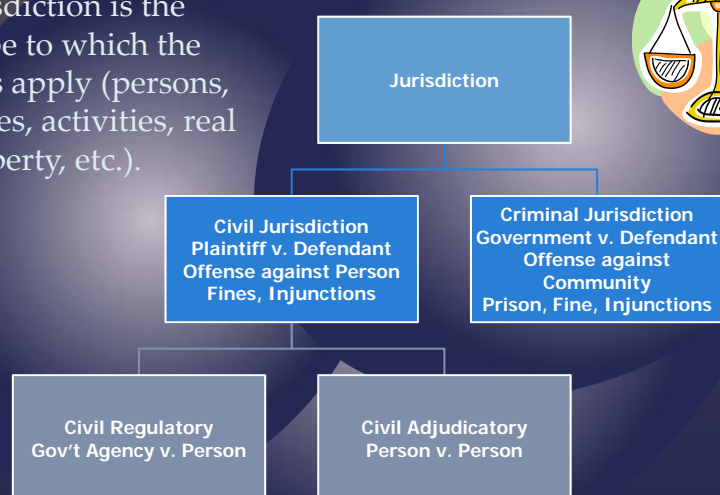
## California Indian History 101

⌘ 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.



## Types of Jurisdiction

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



## Types of Tribal Jurisdiction

### Exclusive

- A n area in which only the tribe may legislate and act.

### Concurrent

- an area in which tribe shares legislative, judicial and other authority with another government.

### Referral

- established by Indian Child Welfare Act, jurisdiction is concurrent, but presumptivel y tribal.

### Partial

- an area where federal action is required to complete tribal action.

### Proprietary Interest

- Property ownership.

## A Note on Jurisdiction

### Civil Jurisdiction

- People v. People
- Plaintiff v. Defendant
- Kramer v. Kramer
- Estate of Nicole B. Simpson v. O.J. Simpson
- Person commits crime against another person
- Fine, Injunctions

### Criminal Jurisdiction

- Government v. Perpetrator
- State (U.S.) v. Defendant
- U.S. v. Kagama
- The People v. O.J. Simpson
- Person commits crime against the community
- Prison, Fine, Injunctions



## 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.

## 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.

## 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.

## 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.

## 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)

- ⌘ 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.

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

- ⌘ The Cherokee 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.

## 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

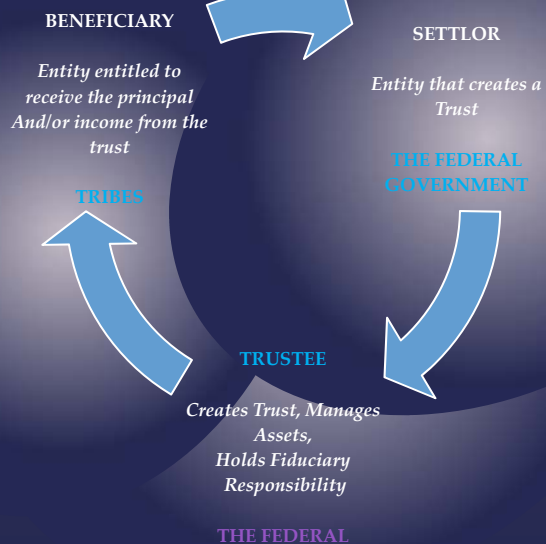
& A legal trust comes to an end only when the tribes cease to exist (legally or otherwise).

Trustee = all federal branches of government

*Res (lands and resources held in trust for Tribes or their members)*

Beneficiary = Tribes and their Members

## Federal Tribal Trust Relationship



\*Common law prohibits the settlor and trustee from being the same entity to protect against mismanagement of assets.

## Relationship between Tribes and States

- ⌘ States have no authority over tribal governments unless expressly authorized by Congress.
- ⌘ In California, Public Law 280 grants California criminal and some civil jurisdiction in Indian Country.
- ⌘ Federally recognized tribes possess both the right and the authority to regulate activities on their lands (territory) independently from state government control.
- ⌘ While federally recognized tribes generally are not subordinate to states, they can have a government-to-government or contractual relationship with states.

## 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.



## 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

## 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

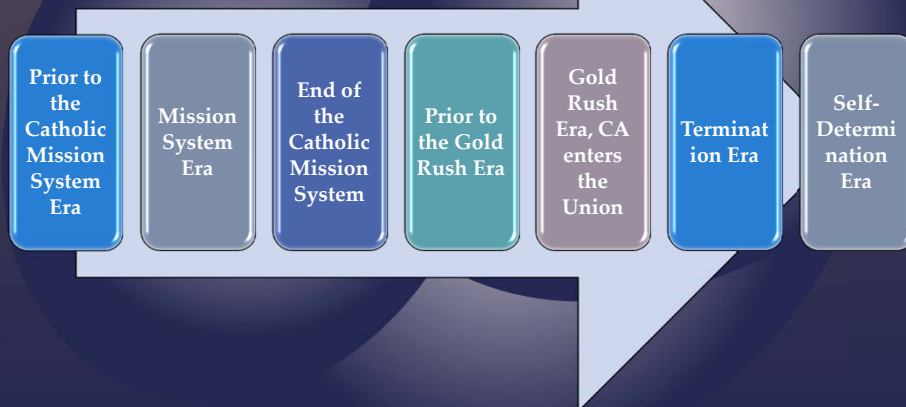
## Essential Knowledge of California Indians

- ⌘ 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.

## Essential Knowledge of California Indians

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





## 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.



## 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.



## 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.



## 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.



## 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.

## 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.



## 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 intact 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>

## 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.

## 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.

## 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.

## 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.

## 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.





## 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.

## 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

## 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:



## 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.



## 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.

## 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.

## 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.

## 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.).

## 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.

## 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.

## 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.

## 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>

### 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

#### 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**

## 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.

## 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:

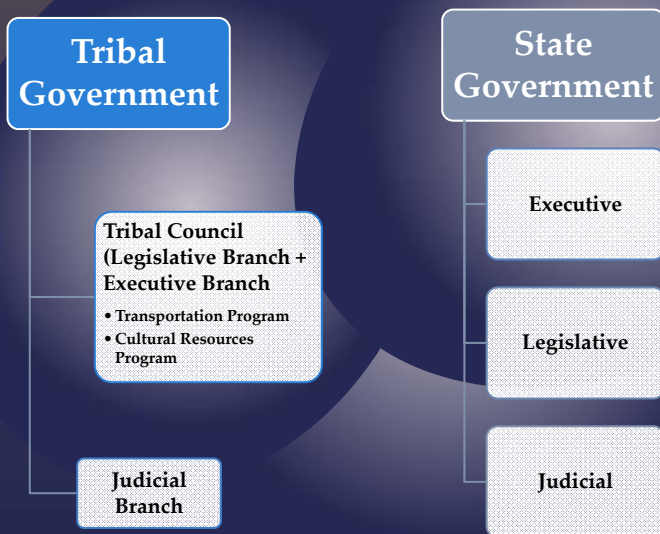
- ⌘ Acknowledges these tribes as unique and separate governments within the United States.
- ⌘ Ensures that its programs and activities avoid or minimize adverse impacts to cultural and other resources.
- ⌘ Recognizes and respects important California Native American rights, sites, traditions and practices.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



## INTENDED RESULTS

- ⌘ When engaging in activities or developing policies that affect Native American tribal rights or trust resources, the Department acts in a knowledgeable, 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.

## Consultation Engages Tribes as Governments



## 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.”

## 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)



## 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.

(c) NHC 2015

## 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.

## 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

## 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.

## 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.

## 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.

## 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

### 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.

## 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.

## 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.

#### 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

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





## 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.

## 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.

## Resources

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

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

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

## IV. Questions & Answers



11:15 AM- 11:30 AM



## V. Evaluation

Thank you for viewing the presentation.



Please complete the Evaluation Feedback Survey:

- [https://www.surveymonkey.com/r/caltrans\\_training\\_session\\_evaluation](https://www.surveymonkey.com/r/caltrans_training_session_evaluation)



## Thank you



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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/ncp/nalb>.

The NALB webpage also provides contact information for the Caltrans Districts' Native American Liaisons.



**Tribal Engagement and  
Technical Assistance**

