

Administrative Draft



CALIFORNIA DEPARTMENT OF TRANSPORTATION, 2020.

LOCAL DEVELOPMENT – INTERGOVERNMENTAL REVIEW
(LD-IGR) PROGRAM

GUIDE FOR TRIBAL DEVELOPMENT PROJECTS



Contents

I. INTRODUCTION	3
II. CALTRANS LOCAL DEVELOPMENT-INTERGOVERNMENTAL REVIEW (LD-IGR)	4
III. TRIBAL GOVERNMENTS IN CALIFORNIA	5
IV. THE SOVEREIGNTY OF TRIBES	7
V. ENHANCING WORKING RELATIONSHIPS WITH TRIBAL GOVERNMENTS (CONSULTATION)	8
VI. CONTRACTING WITH FEDERALLY RECOGNIZED TRIBAL GOVERNMENTS	10
VII. CALTRANS NATIVE AMERICAN LIAISONS AND COORDINATORS	12
VIII. COORDINATING COMMENTS ON TRIBAL GAMING AND LARGE-SCALE DEVELOPMENT PROJECTS, INCLUDING FEE-TO-TRUST APPLICATIONS	13
IX. TERMS AND DEFINITIONS	15
1. Bureau of Indian Affairs (BIA)	15
2. Coordination	15
A relationship that has.....	15
3. Consultation	15
5. Federally Recognized Tribal Government (Tribe)	15
6. Local Development-Intergovernmental Review (LD-IGR) Program	16
7. Reservation	16
8. Tribal Trust Land	16
9. Tribal Sovereignty	16
Is the concept of the inherent authority of indigenous tribes to govern themselves within the borders of the United States. For the purposed of the LD-IGR guide, tribal sovereignty refers to the.....	16
10. Tribal Lands Held in Fee	17
11. Non- Federally Recognized Tribal Governments and Communities in California	17
12. Tribal Employment Rights Ordinance (TERO)	17
13. AB-52 Native Americans: California Environmental Quality Act	18
14. Director’s Policy 19 – August 29, 2001	18
15. Tribal Transportation Facility	18
X. IMPORTANT STATUTES, REGULATIONS, AND EXECUTIVE ORDERS	19
Federal	19
State	20

I. INTRODUCTION

As owner and operator of the State Highway System (SHS), Caltrans, through the Local Development-Intergovernmental Review (LD-IGR) Program, has the responsibility and authority to engage in environmental and transportation review of proposed local development; to identify potential adverse impacts to the SHS resulting from such development; and, to participate, when appropriate, in determining mitigation for the impacts identified.

Local jurisdictions (e.g., cities and counties) with the authority to approve proposed local development projects are jurisdictions that are largely subject to the same state statutory and regulatory framework as Caltrans.

Federally recognized tribal governments (tribes) are independent sovereignties and, generally, are not subject to state law. Caltrans is granted broad authority to protect and maintain the SHS, consistent with state laws, policies and procedures. However, tribal projects with the potential to impact the SHS may be subject to state and federal laws, requirements, and/or standards for the portion of the project affecting the SHS. Additionally, gaming compacts between the state and tribes may require the tribes to prepare a tribal Environmental document for a gaming facility.

To that end, this document incorporates information that is not only geared to specific tribal LD-IGR activities, it also includes additional information intended to aid in establishing and maintaining good working relationships with tribes.

II. CALTRANS LOCAL DEVELOPMENT-INTERGOVERNMENTAL REVIEW (LD-IGR)

The LD-IGR program reviews projects that may have the potential to impact the SHS. These projects are referred to Caltrans from several sources.

1. When a project developer applies for a permit from a county or city, the local agency is required to review the associated environmental documents and direct the document for comment to Caltrans if the project may have any potential impact to the SHS.
2. Tribes are advised to work directly with Caltrans when developing a project that may impact the SHS or require an encroachment permit. Early coordination with Caltrans is key to successfully navigating the process. Tribes are encouraged to contact the Caltrans [District Native American Liaison \(DNAL\)](#) who can then arrange a meeting with the appropriate Caltrans staff who would be reviewing the project. This may include reviewing for an [encroachment permit](#) or through the LD-IGR review process. Caltrans staff will work with the tribe's planners, engineers, or consultants to help guide the process to comply with all requirements for the encroachment permit or address other concerns. It is particularly important that District Environmental staff are consulted to help identify potential environmental issues early. Tribes are encouraged to work with Caltrans early and often to minimize the possible need for design plan changes due to unexpected or unknown requirements.

III. TRIBAL GOVERNMENTS IN CALIFORNIA

California is home to 110 federally recognized tribes and approximately 80 non-recognized tribes. While both federally recognized and non-federally recognized tribes have distinct organizational structures and cultures, for the purposes of this guide, LD-IGR will address those developments under the jurisdictions of federally recognized tribes, or tribal entities that are recognized as having a government-to-government relationship with the United States, with the responsibilities, powers, limitations, and obligations attached to that designation. The reason for this distinction is that Federally recognized tribes have the right and authority to regulate activities on their respective lands. Non-federal tribal governments (as defined in [California PRC 21073](#)) may, however, be consulted under state historic preservation law during environmental reviews of individual projects that have the potential to affect cultural resources of tribal significance within the SHS. It is also Caltrans' practice to invite non-federal tribal governments to participate in project reviews under federal historic preservation law. Tribal projects with a potential to impact the state highway system (under either the LD-IGR or Encroachments process) would be subject to state and federal laws, requirements, and/or standards. Such projects may, therefore, also involve consultation with non-federal tribal governments as part of the environmental review and cultural resources investigation process for the portions of projects affecting the SHS.

Of the 58 counties in the state, 32 have at least one federally recognized tribe within their boundaries. Of the 12 Caltrans Districts, 10 have at least one federally recognized tribe within their boundaries. The SHS transects, abuts, or is near most tribal lands in California.

Approximately fifty percent of the federally recognized tribes operate gaming facilities, as provided for by the Indian Gaming Regulatory Act (IGRA) (1988). Gaming operations have led to increased development of additional economic enterprises, as well as projects for housing and enhanced health and social services for tribal members.

Tribes without gaming operations are also expanding their members' housing and health and social services as resources become available.

Increasingly, tribes are undertaking economic development and their requisite transportation requirements, both on and off tribal land. It is important that Caltrans and local jurisdictions work closely with the tribes early in the planning process. Please see [Director's Policy DP-19](#), Working with Native American

Communities, which directs Caltrans' policy to establish and adhere to government-to-government relationships when interacting with tribes.

IV. THE SOVEREIGNTY OF TRIBES

Tribes possess inherent sovereignty, meaning that the sovereignty originates from within the tribe and is not granted to tribes by any outside government or entity. A tribe's sovereignty can be affected only by an express act of the U.S. Congress (or in the case of an ambiguous statute, an interpretation by the U.S. Supreme Court).

It is important to note that not all laws and policies aimed at governing the relationship between the U.S. Government, states, and tribes – often referred to as Indian Law or federal Indian law – affect all tribes in the same way.

The exercise of tribal jurisdiction, or a tribe's ability to create and enforce laws, for example, varies from state to state and tribe to tribe. California courts have limited civil jurisdiction, which means the courts can hear some civil matters while others are under the exclusive jurisdiction of the federal courts or the tribes.

The variances in federal Indian law and the exercise of tribal jurisdiction emphasize the importance of partnering with each tribe individually. While some tribes in California may share cultural backgrounds, each tribe in California is a separate, sovereign and political entity.

V. ENHANCING WORKING RELATIONSHIPS WITH TRIBAL GOVERNMENTS (CONSULTATION)

California's policies and priorities related to State-Tribal Government Relations:

In 2011, Governor Brown issued [Executive Order B-10-11](#) regarding State and Tribal government relations declaring, "Every state agency and department, subject to the governor's executive control, shall encourage communication and consultation with California Indian Tribes." The Executive Order further states that, "Agencies and departments shall permit elected officials and other representatives of tribal governments to provide meaningful input into the development of legislation, regulations, rules, and policies on matters that may affect tribal communities."

In 2019, Governor Newsom reaffirmed the principles of government to government consultation codified in Executive Order B-10-11 and additionally issued a [Formal Apology](#) to California Tribes for atrocities committed by the State of California in the early days of statehood. Governor Newsom has established and convened a [Truth and Healing Council](#) through [Executive Order N-15-19](#) to provide a venue for California Native Americans to clarify the record and provide their historical perspective. The Truth and Healing Council is responsible for examining the historical relationship between California Native Americans and the State from the Native perspective.

There are several steps that Districts may take to develop good government-to-government relationships with tribes. Federal consultation differs from state-to-tribe consultation. A variety of laws, policies and regulations define what consultation is, and how it may differ.

Examples of such steps would be regularly scheduled meetings with tribal partners or creation of local working groups (Caltrans/tribe/city/county) to address non-tribal project effects on cultural sites or other off-reservation impacts of importance to tribes. Other topics of concern could include potential impacts to the SHS caused by a proposed tribal development. Cities and counties may have other jurisdictional issues and concerns to discuss.

Consultation/Coordination with tribes regarding tribal transportation planning and programming concerns or needs also enhances our ability to resolve issues early to minimize unexpected delays and/or conflicts during later project delivery processes.

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments dated November 6, 2000 outlines federal requirements for consultation with tribal governments and is a basis for enhancing working relationships with tribal governments. Executive Order 13175 outlines policies for establishing regular and meaningful collaboration with tribal officials. For more information and the full official text visit the Federal Register [website](https://www.federalregister.gov/). **Link:** <https://www.federalregister.gov/>

23 USC 134 and 23 USC 135 establish requirements for consultation with tribes through the statewide and metropolitan planning and programming processes. Such requirements do not mean, however, that every meeting attended, or every project discussed with a tribe is “consultation.”

Each tribe has its own way of conducting official business. The District director will be apprised and will contact the tribal chairperson to determine how the tribe would like to formally consult with Caltrans. The District director will promote, establish and manage government-to-government relationships between the Department and Tribal Governments. The District director will direct District activities with the Native American Liaison Branch coordination efforts.

The consultation process for each tribe should be documented and include the following information: with whom and through what specific procedures is formal consultation to take place, as well as how to communicate with the tribe over day-to-day interactions.

Tribal leaders are not always compensated for the time they spend in their leadership role for the tribe. Some take on leadership roles on a volunteer basis or as a full-time job. Caltrans needs to be cognizant of the circumstances and act accordingly. For example, flexibility in scheduling meetings – when and where – is important and beneficial to both the tribe and Caltrans.

It is important to remember that tribal governments have institutional and bureaucratic challenges to overcome much like state government agencies. Tribal councils and committees may meet daily or as infrequently as once a month or quarterly. These factors should be considered in consultation with tribes. Supplying ample time for them to respond to documents or comments as part of consultation and coordination.

VI. CONTRACTING WITH FEDERALLY RECOGNIZED TRIBAL GOVERNMENTS

Prior to 2005, state law (Government Code) did not specify that Caltrans was authorized to enter into contracts with federally recognized tribal governments. The lack of clarity in the law was a barrier to Caltrans' ability to engage in comprehensive mitigation negotiations when it was determined that traffic impacts would result from tribal project development. Tribes sponsored legislation to clarify the matter.

Effective January 1, 2005 California Streets & Highways (S&H) Code, §94, was amended (SB 1189) to authorize Caltrans to make and enter into contracts with tribes for activities related to on-reservation or off-reservation cultural resource management and environmental studies. §94 further authorized Caltrans to enter into contracts for off-reservation traffic impact mitigation projects on or connecting to the SHS. Contracting for off-reservation traffic impact mitigation is subject to several conditions, if applicable.

It is understood that §94 cannot require a tribe to enter into an agreement with Caltrans. §94 simply enables Caltrans to enter into a contract with a tribe when one is warranted.

Mitigation agreements with tribes contain standard contract language; except, a tribe may incorporate a provision of limited waiver of sovereign immunity, which may identify specific conditions under which the tribe will agree that Caltrans can pursue legal remedies should a breach of contract occur on the tribe's part.

Likewise, a tribe may reserve all of its rights to enforce terms and conditions of an agreement with Caltrans should a breach of contract occur on Caltrans' part.

To be an enforceable agreement, an agreement with a federally recognized tribe must contain a limited waiver of sovereign immunity. The tribe may reserve the rights to enforce terms and conditions against Caltrans, but only to the extent allowed under California law. For instance, they cannot enforce the agreement in tribal court as California law does not provide a waiver of the state's immunity from being sued in tribal court.

Districts must contact Caltrans Headquarters, Legal Division, when considering entering into agreements with a tribe. The Headquarters Legal Division is experienced in helping negotiate and draft agreements as well as working with attorneys that represent a tribe.

Likewise, the Headquarters Native American Liaison Branch is available to participate in the negotiating process, as are the District Native American Liaisons.

VII. CALTRANS NATIVE AMERICAN LIAISONS AND COORDINATORS

The Native American Liaison Branch (NALB) Office of Regional and Interagency Planning, Division of Transportation Planning (DOTP), was created in 1999 to serve as Caltrans' ombudsperson(s) for Native American issues and to serve as the initial contact for Native American issues, among which may need to be directed to the Legal Division. The Native American Liaison Branch is now housed within the Office of State Planning in DOTP.

NALB also serves as liaison among tribes, Caltrans, federal agencies, other state agencies, and local and regional agencies for the purpose of helping to establish and maintain government-to-government working relationships with tribes and to provide information, training, and facilitation services related to issues affecting Native American communities.

Positions were created within Districts to address Native American issues, as well. Liaisons within the Districts perform various functions, depending upon the Native American population, number of tribes, nature and extent of tribal activities, and nature and extent of Caltrans' projects. They assist in the Districts' LD-IGR effort, as well as many other planning functions in coordination with tribal governments.

It should be noted that each Caltrans District also has a District Native American Coordinator (DNAC) position, which serves as a liaison to tribal governments in the context of project delivery and environmental review for programmed/funded projects. DNACs consult with tribal governments under state and federal historic preservation laws to address the identification and treatment of tribal cultural heritage sites that may be affected by transportation projects. DNACs also work proactively with tribal governments, as well as with Planning counterparts, to assist with scoping and assessing cultural sensitivity during early planning phases to promote avoidance and preservation. DNACs can also assist in tribal outreach and communications regarding sensitive tribal cultural heritage issues in the context of transportation project development. Refer to the following website. Link: <https://dot.ca.gov/programs/environmental-analysis/cultural-studies/native-american-cultural-studies>

The NALB and District Native American liaisons and coordinators are to be included in the copy distribution list for LD-IGR correspondence between Caltrans and tribes pertaining to proposed projects. Further, please send a copy of District LD-IGR correspondence addressed to other agencies that pertains to tribal development, to Lonora Graves, Chief, Native American Liaison Branch, MS-32, at Headquarters, or via email at Lonora.Graves@dot.ca.gov.

VIII. COORDINATING COMMENTS ON TRIBAL GAMING AND LARGE-SCALE DEVELOPMENT PROJECTS, INCLUDING FEE-TO-TRUST APPLICATIONS

The fee-to-trust application transfers land into federal trust status only. The intent or purpose of the transfer, i.e. land use conversion or development, is an entirely different process and not part of the fee-to-trust transfer.

When coordinating comments adhere to the following process:

1. If the proposed project is for a gaming, or a large-scale non-gaming development, the Governor's Office of Legal Affairs (GOLA) will review the District's comment letter in draft (Word document) five (5) days prior to the lead agency's due date. Please note that if the date indicated on a "yellow sheet" for sending draft comments to the GOLA differs from the 5-day deadline, please use the date on the "yellow sheet."
 - a. Email your draft comment letter to the current Governor's Office of Legal Affairs Tribal Contact.

The GOLA will respond to your office before the due date if it has questions or wants to provide revisions to your comment letter. Otherwise, go forward with your comment letter to the lead agency.

2. When you send comments to the lead agency, please also send a copy of the letter to each of the following:

State Clearinghouse

Email: state.clearinghouse@opr.ca.gov

Therese Hickey, California Department of Justice

Email: Therese.Hickey@doj.ca.gov

Brandon Walker, Caltrans HQ Legal

E-mail: Brandon.Walker@dot.ca.gov

Lonora Graves, Caltrans Native American Liaison Branch Chief

Email: Lonora.graves@dot.ca.gov

Sarah Allred, Caltrans Native American Cultural Studies Branch Chief

Email: Sarah.allred@dot.ca.gov

Christian Bushong, Caltrans LD-IGR Branch Chief

Email: Christian.Bushong@dot.ca.gov

Christopher Nicholas, Caltrans LD-IGR

Email: Christopher.Nicholas@dot.ca.gov

Tribal Chairperson (if Tribe is not the lead agency)

- 3. Never send “no comment” letters or emails.**

IX. TERMS AND DEFINITIONS

1. Bureau of Indian Affairs (BIA)

The agency within the Department of the Interior that is delegated the responsibility to administer and oversee trust responsibilities of the United States in Indian affairs. BIA often coordinates or provides information to our District and HQ Native American Liaisons.

2. Coordination

A relationship that has communication and dialogue between the Caltrans BIA, Indian tribes involving leadership or staffs to increase cooperation between the two parties and the effectiveness of their relationship

3. Consultation

A relationship that is established on a government-to-government basis that is either mandated by state or federal law. Consultation is intended to be in good faith, establish communication whether on-going or intermittent, and to support and respect a tribe's sovereign right.

4. Encroachment Permit

An encroachment is defined in the Streets and Highways Code as any structure, object, or special event, which is in, under, or over any portion of the highway. An encroachment permit must be obtained for all proposed activities for placement of encroachments in, under, or over SHS right-of-way. An encroachment permit is issued by Caltrans and is permissive in authority for the permittee to enter the SHS right-of-way to construct the approved facilities or conduct specified activities. Permitted activities range from single-family residential driveway connections to multi-million-dollar construction projects.

5. Federally Recognized Tribal Government (Tribe)

Refers to the tribal government and tribal members of any tribe, band, pueblos, nation, or other organized group or community including Alaska Native village or regional or village corporation (as defined in or established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 et seq.) that is acknowledged by the federal government to constitute a tribe with

a government-to-government relationship with the U.S. and eligible for the programs, services, and other relationships established by the U.S. for Indians because of their status as Indians. (U.S. Department of Transportation Order DOT 5301.1 dated November 16, 1999.)

6. Local Development-Intergovernmental Review (LD-IGR) Program

Caltrans' internal program that reviews public and private planning and development activity approved by the public agencies and tribal governments. If such activity has the potential to impact the SHS, Caltrans recommends improvements that either eliminate or reduce it to a level of insignificance.

7. Reservation

Lands that are generally under tribal trust land that is federally protected under the jurisdiction of that tribal government. Land inside the geographic boundary may or may not be held in trust for a tribe. Land inside the reservation boundaries may also be held in fee by a tribe, tribal members, or individuals and companies with no relationship to the tribe.

8. Tribal Trust Land

Tribal trust land is owned by the United States in trust for a tribe, band, community, group, or pueblo of Indians subject to federal restrictions against alienation or encumbrance. This means that the United States owns the property and has set aside tribal trust property for the exclusive use of a tribe. The BIA has a federal trust responsibility to ensure that the land use is for the benefit of the tribe. Projects on these lands are not under the jurisdiction of the local land use agency (e.g., county).

9. Tribal Sovereignty

Is the concept of the inherent authority of indigenous tribes to govern themselves within the borders of the United States. For the purposes of the LD-IGR guide, tribal sovereignty refers to the Tribal sovereignty is the concept of the inherent authority of indigenous tribes to govern themselves within the borders of the United States. For the purposes of this LD-IGR guide, tribal sovereignty refers to the unique legal status of federally recognized Indian tribes as set forth in the United States Constitution, treaties, federal statutes, executive orders, and court decisions which

establish these tribes as domestic dependent nations. These tribes exercise inherent sovereign powers over their members and territory unless explicitly removed by Congress. (U.S. Department of Transportation Order DOT 5301.1 dated November 16, 1999)

10. Tribal Lands Held in Fee

Lands owned by a tribe but not taken into trust by BIA. Fee simple absolute land means that there are no restrictions on the ownership. Fee simple land can be on or off a reservation. Individual tribal members as well as the tribe can hold it. The difference between a fee simple land and trust property is that a fee simple land can be bought and sold to any individual without the consent of the BIA. Individual tribal members, non-tribal members, and the tribe can hold land in fee.

11. Non- Federally Recognized Tribal Governments and Communities in California

When addressing a broad range of legal issues, funding, services, and consultation requirements, the United States Government distinguishes between federally recognized tribal governments and other Native American tribal governments and communities. The State of California and its local jurisdictions, under numerous circumstances, recognize non-federally recognized tribal governments and communities; in particular, for consultation purposes regarding Native American historical and cultural significance. The California Native American Heritage Commission provides a listing of these tribal governments and communities. California does not have a government-to-government relationship with non-federally recognized tribes.

12. Tribal Employment Rights Ordinance (TERO)

Outlined in Deputy Directive DD-74-R2, the TERO establishes Caltrans' authority to work with federally recognized tribes in regard to employment and economic development for the tribe when Caltrans is the lead agency. A TERO is a legislative act adopted by a federally recognized tribe that establishes an Indian hiring preference and a fee for projects within a reservation or tribal trust lands. DD-74-R2 encourages Caltrans Districts to honor TEROs.

13. AB-52 Native Americans: California Environmental Quality Act

AB-52 (Gatto, 2014) outlines a lead agency's responsibility for consulting with a Native American tribe that traditionally or culturally is affiliated with the geographic area to comply with CEQA during project environmental review. Where substantive adverse changes may occur, consultation is required, however consultation may be required regardless if of adverse changes. From an LD-IGR perspective, when reviewing local development projects where Caltrans is not a lead or responsible agency, it may be prudent to notify the lead agency through the commenting process if the local development project would fall within one of the Native American tribe's culturally or historically significant geographic areas. This AB-52 definition is for reference purposes and does not recommend LD-IGR involving itself in AB-52 related processes.

14. Director's Policy 19 – August 29, 2001

Director's Policy 19, titled Working with Native American communities, outlines established responsibilities and policy when interacting with Native American tribes on issues that affect the tribes. Director's Policy 19 sets a standard for the respectful and sensitive interactions with Native American tribes. LD-IGR coordinators are strongly encouraged to coordinate with their Native American Liaison in their District or at Headquarters when engaged in activities that may impact Native American communities. For the full official text and content, please refer to Caltrans' [Native American Liaison Branch website](#). Refer to the following website. **Link:** <https://dot.ca.gov/programs/transportation-planning/state-planning/nalb>

15. Tribal Transportation Facility

A tribal transportation facility means a public highway, road, bridge, trail, transit system, or other approved facility that is located on or provides access to tribal land and appears on the National Tribal Transportation Facility Inventory (NTTFI) described in 23 U.S.C. 202(1).

X. IMPORTANT STATUTES, REGULATIONS, AND EXECUTIVE ORDERS

Federal

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.*

Title 18 United States Code section 1151: The United States Code defines “Indian Country” as “(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.”

Title 25 United States Code section 3001, et seq.: The Native American Graves Protection and Repatriation Act (NAGPRA) requires consultation, for federally land - owning agencies, regarding the treatment and disposition of specific cultural items (human remains, funerary objects, sacred objects, and cultural patrimony) prior to intentional excavation or removal of Native American human remains, during the inventory of human remains, and to determine place and manner of delivery.

Title 54 USC Section 306108 Section 106: The National Historical Preservation Act requires “the head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.”

Title 36 CFR Part 800: These regulations detail procedures on how Federal Agencies shall meet the requirement of Section 106. National Historic Preservation Act details procedures on how Federal agencies shall meet these statutory responsibilities. The Section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic resources.

State

Executive Order B-10-11: Recognizes and reaffirms the inherent right of Native American Tribes to exercise sovereign authority over their members and territories, establishes the Governor's Tribal Advisor position within the Governor's Office, reaffirms the state's commitment to working with tribes, and encourages communication and consultation with tribes.

Executive Order N-15-19: Reaffirms and incorporates by reference the principles outlined in EO B-10-11, which requires that Governor's Tribal Advisor and the Administration to engage in government-to-government consultation with California Native American tribes regarding policies that may affect tribal communities.

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.” This may include, but is not limited to, providing information on programs available to assist tribes, providing technical assistance on preparation of grants and applications for public or private funds, conducting meetings and workshops, or any other reasonable steps that could assist tribes in becoming economically self-sufficient.

Government Code section 65352.4: “‘Consultation’ means 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. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance.”.

Health & Safety Code section 7050.5: “In the event of discovery or recognition of any human remains in any location other than a dedicated cemetery, there shall be no further excavation or disturbance of the site or any nearby area reasonably suspected to overlie adjacent remains until the coroner of the county in which the human remains are discovered has determined. If the coroner recognizes the human remains to be those of a Native American or has reason to believe that they are those of a Native American he or she shall contact, by telephone within 24 hours, the Native American Heritage Commission.”

Public Resources Code section 5024.1: Establishes a California Register of Historical Resources, that acts, “...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 21073-74, 21080.31 et seq.: (AB 52) Prior to the release of a negative declaration, a mitigated negative declaration, or an environmental impact report for a project, the CEQA lead agency is required to consult with California Native American Tribes that are traditionally and culturally affiliated with the geographic area of the proposed project. If the tribe requested notification and requested consultation for a project, the California Environmental Quality Act (CEQA) evaluates effects of the project on tribal cultural, historic, or unique archaeological resources as environmental impacts.

Other helpful guidance:

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

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)

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)

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

NCHRP Report: *Integrating Tribal Expertise into Processes to Identify, Evaluate, and Record Cultural Resources*, March 2020.

Link: <http://www.trb.org/Main/Blurbs/180505.aspx>