



- Board of Directors
Communications and Legislation Committee

8/20/4213 Board Meeting

8-8

Subject

Express opposition, unless amended, to Assembly Bill 52 (Gatto, D-Silver Lake) – Native Americans: California Environmental Quality Act

Executive Summary

Assembly Bill 52 (AB 52), ([Attachment 1](#)), introduced by Assemblyman Mike Gatto (D-Silver Lake) on December 21, 2012, proposes to amend the California Environmental Quality Act (CEQA) to provide protections for a new category of cultural resources, “tribal cultural resources.” AB 52 also proposes to require a consultation process with potentially affected Native American tribes to identify, evaluate and mitigate impacts on those resources and to determine the appropriate level of CEQA clearance for projects.

Metropolitan’s policy principles, adopted in April 2013, support CEQA modernization that would improve efficiency and reduce the potential for litigation without loss of environmental protection. In its current form, AB 52 would decrease efficiency in the CEQA process and increase the potential for litigation in two ways: (1) it would add a new category of environmental resources to be evaluated for all projects subject to CEQA, without providing objective criteria for lead agencies to identify, evaluate, and mitigate impacts on those resources; and (2) it would add new requirements for direct involvement in the project planning and CEQA process by federally recognized Native American tribes, without specified time lines for this participation and without explicit procedures for conflict resolution. The uncertainties that AB 52 would introduce into project planning, approvals and CEQA clearance have the potential to severely impact environmental clearances for projects and cause indeterminate impacts to project design, costs, schedules and risks of litigation.

Details

Background

During the 2011/2012 legislative session, AB 742 (Lowenthal, D-Long Beach) was introduced on behalf of the Pechanga Band of Luiseño Indians to prohibit a lead agency with jurisdiction over a proposed aggregate mining operation from approving a reclamation plan of a mining operation that is proposed to be constructed within specified distances of a Native American sacred site or an aquifer that is hydrologically connected to the Santa Margarita River without the consent of the tribe whose reservation is nearest the proposed operation. In addition, SB 833 (Vargas, D-San Diego) was introduced on behalf of the Pala Band of Mission Indians to prohibit constructing or operating a solid waste landfill disposal facility in San Diego County if (1) any portion of the disposal facility is located on or within 1,000 feet of the San Luis Rey River or an aquifer that is hydrologically connected to that river, and (2) the disposal facility is located on or within 1,000 feet of a site that is considered sacred or of spiritual or cultural importance to a tribe (in particular, the 308-acre Gregory Canyon Landfill project in San Diego County). Both bills were advanced after substantial environmental clearance and permitting already had been performed by the project proponents. AB 742 failed in committee and SB 833 was ultimately vetoed by the Governor although his veto message recognized the legitimacy of local land-use decisions, but also noted the previous injustices to Native Americans and the importance of giving more weight to their concerns in California.

The purpose of AB 52, as stated in a recent Assembly floor analysis, is “to reform the planning process by bringing tribes into the CEQA process in a manner that will avoid legislation at the eleventh hour to kill a project.”

Existing federal and state laws provide protections for Native American cultural resources such as ceremonial objects, graves, artifacts, and significant archaeological and historical sites. Federal legislation includes the National Historic Preservation Act (16 USC 470f), the Archaeological Resource Protection Act (16 U.S.C. 470bb), and the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001). State legislation protects Native American cemeteries and sacred sites on state lands and on local agency lands located outside the agency’s boundaries (Public Resources Code (PRC) 5097.9) and burial artifacts (PRC 5097.99). CEQA further requires consideration of such resources if they occur on public or private property when they might be adversely affected by a project requiring public agency approval (PRC 21083.2(a)). The CEQA Guidelines provide means for incorporating the protections of state law into the CEQA process by requiring lead agencies to consider the interests of Native American groups, and by requiring coordination with Native Americans and the Native American Heritage Commission for treatment of human burials/remains that are likely to exist within a project impact area (CEQA Guidelines, 14 C.C.R. 15064.5(d); see also Health and Safety Code 7050.5 and PRC 5097.98).

AB 52 would modify CEQA to extend protections to “tribal cultural resources” as identified by federally recognized tribes. Although the term is not defined in AB 52, “tribal cultural resources” may include sites, objects, artifacts, buildings, structures, geographic places, natural features, landscapes, and/or other items or places that represent important cultural practices or traditions of the tribes. Agencies would be required to hold a public hearing before deciding whether any resource qualifies as a “tribal cultural resource.”

AB 52 would also require the Office of Planning of Research to revise the CEQA Guidelines to provide procedures to ensure “meaningful” participation by potentially affected tribes through new PRC section 21097. This section would require a formal consultation process initiated at the earliest phases of project planning and prior to the lead agency’s determination of the appropriate level of CEQA documentation. Consultation would be required to assist the lead agency in determining the presence of “tribal cultural resources” within project boundaries, to evaluate potential impacts on those resources and to identify appropriate mitigation measures, and would extend through project construction and implementation of all applicable mitigation measures; however, tribes are not subject to CEQA and are not obligated to engage in such consultation.

AB 52 would impose an obligation on responsible agencies to determine if the lead agency has significantly engaged in “meaningful consultation” with affected tribes before the responsible agency may act on the project approval.

Impacts on Action Agencies

Metropolitan utilizes the professional services of cultural resource experts to identify and assess the presence of, and impacts on, cultural resources as currently defined under state and federal laws. On the basis of this evaluation, Metropolitan determines the appropriate level of CEQA documentation required for a project and is able to estimate overall project costs and schedules.

AB 52 would introduce a new category of environmental resources that the bill does not define. Identification of those resources would be controlled by tribes who are not required to disclose such information in a timely manner. AB 52 does not restrict identification of “tribal cultural resources” to any specific phase of the project, exposing a constructing agency to consideration of new potentially significant project impacts as new information from the tribes becomes available, including perhaps even during projects. The analysis of a new category of environmental resources at any phase of the project could result in increased project costs that agencies would be unable to control or predict.

Further, AB 52 would impose a consultation requirement on lead agencies but does not establish a consultation obligation on the tribes, which may or may not choose to participate or may or may not participate in a timely manner. The absence of consultation time lines in AB 52 results in project time lines that agencies would be unable to control or predict.

The uncertainties created by AB 52 could lead to disputes about the presence of “tribal cultural resources” in project areas, the significance of impacts on those resources, and appropriate levels of mitigation for those impacts. AB 52 provides no conflict resolution process for differences within or between tribes or for differences between tribes and the lead agency. The appropriate level of CEQA clearance for projects would be subject to consultation with the tribes and their determination of the potential presence of “tribal cultural resources.”

In summary, with the absence of reasonable time lines on tribal participation, objective standards for evaluating tribal claims of sensitive resources, and reasonable requirements for appropriate mitigation other than complete avoidance of tribal cultural resources, AB 52 would impact environmental clearance for projects through increased costs, longer schedules, and risks of litigation. The extent and complexity of those impacts cannot be predicted because of the ambiguities of AB 52 as currently written, but the impacts could be substantial.

Recommended Amendments

Amendments to AB 52 are recommended to reduce uncertainty in planning and environmental clearances for projects; to reduce project costs associated with evaluating environmental resources that are not objectively definable; to minimize overlap and potential conflicts between compliance with new provisions of CEQA and existing federal consultation requirements under Section 106 of the National Historic Preservation Act; to maintain lead agency authority as an independent decision-making body while still providing for meaningful involvement by affected tribes; and to minimize the risk of litigation as a means of enforcing undefined or ambiguous provisions of AB 52. For these reasons, staff recommends the following amendments:

- Defining “tribal cultural resources” on the basis of listing, or eligibility for listing, on the National Register of Historic Places or California Register of Historical Resources, using significance criteria contained in current state and federal regulations (i.e., 36 CFR 60.4 and PRC 5024.1);
- Setting forth defined time frames for each phase of the consultation process;
- Including provisions for the Native American Heritage Commission, at the request of the lead agency, to assist the lead agency in identifying the tribes that might have information regarding “tribal cultural resources” potentially affected by a proposed project, after which the lead agency would invite consultation with those tribes prior to determining if an Environmental Impact Report (EIR) is required for a project;
- Removing provisions for further CEQA review of “tribal cultural resources” that were not known to the lead agency, or to any responsible agency, at the time the lead agency adopted a final EIR, Negative Declaration or Mitigated Negative Declaration;
- Including provisions, for projects subject jointly to CEQA and NEPA, that would allow the CEQA lead agency the option of adopting the federal lead agency’s consultation process and findings as currently established under federal regulations;
- Removing the requirement that all “tribal cultural resources” be treated as “unique archaeological resources” requiring preparation of an EIR for any significant impacts;
- Removing the requirement for responsible agencies to condition project approvals on protection of, or mitigation for, impacts on “tribal cultural resources” that otherwise would be outside those agencies’ regulatory jurisdiction; and
- Defining a conflict resolution process with firm time frames that would allow the lead agency and affected tribes to attempt to resolve disagreements about identification, evaluation and mitigation of impacts on “tribal cultural resources” before resorting to litigation.

Policy

Board-adopted CEQA Modernization Policy Principles (adopted April 2013)

California Environmental Quality Act (CEQA)

CEQA determination for Option #1:

The proposed action is not defined as a project under CEQA because it involves continuing administrative activities, such as general policy and procedure making (Section 15378(b)(2) of the State CEQA Guidelines).

In addition, where it can be seen with certainty that there is no possibility that the proposed action in question may have a significant effect on the environment, the proposed action is not subject to CEQA (Section 15061(b)(3) of the State CEQA Guidelines).

The CEQA determination is: Determine that the proposed action is not subject to CEQA pursuant to Sections 15378(b)(2) and 15061(b)(3) of the State CEQA Guidelines.

CEQA determination for Option #2:

None required

Board Options

Option #1

Adopt the CEQA determination that the proposed action is not subject to CEQA and is categorically exempt and authorize the General Manager to express Metropolitan’s opposition to AB 52 unless amended as described in this board letter.

Fiscal Impact: None

Business Analysis: None

Option #2

Take no position on AB 52.

Fiscal Impact: None

Business Analysis: None

Staff Recommendation

Option #1

	8/8/2013
Linda Waade Deputy General Manager, External Affairs	Date
	8/9/2013
Jeffrey Kightlinger General Manager	Date

Attachment 1 – Assembly Bill 52 (amended May 30, 2013)

Ref# ea12626316

AMENDED IN ASSEMBLY MAY 30, 2013

AMENDED IN ASSEMBLY APRIL 19, 2013

AMENDED IN ASSEMBLY APRIL 8, 2013

AMENDED IN ASSEMBLY MARCH 19, 2013

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL**No. 52**

**Introduced by Assembly Member Gatto
(Principal coauthor: Assembly Member Alejo)**

December 21, 2012

An act to amend ~~Section~~ *Sections 21080.3, 21083, 21083.2, and 21104* of, and to add Sections 21073, 21074, 21083.09, 21084.2, 21084.3, and 21097 to, the Public Resources Code, relating to Native Americans.

LEGISLATIVE COUNSEL'S DIGEST

AB 52, as amended, Gatto. Native Americans: California Environmental Quality Act.

Existing law, the Native American Historic Resource Protection Act, establishes a misdemeanor for unlawfully and maliciously excavating upon, removing, destroying, injuring, or defacing a Native American historic, cultural, or sacred site, that is listed or may be eligible for listing in the California Register of Historic Resources.

The California Environmental Quality Act, referred to as CEQA, requires a lead agency, as defined, to prepare, or cause to be prepared, and certify the completion of, an environmental impact report on a project that it proposes to carry out or approve that may have a significant effect on the environment or to adopt a negative declaration

if it finds that the project will not have that effect. CEQA also requires a lead agency to prepare a mitigated negative declaration for a project that may have a significant effect on the environment if revisions in the project would avoid or mitigate that effect and there is no substantial evidence that the project, as revised, would have a significant effect on the environment. CEQA requires the lead agency to provide a responsible agency with specified notice and opportunities to comment on a proposed project. *CEQA defines "unique archaeological resource" for the purposes of CEQA.* CEQA requires the Office of Planning and Research to prepare and develop, and the Secretary of the Natural Resources Agency to certify and adopt, guidelines for the implementation of CEQA that include, among other things, criteria for public agencies to following in determining whether or not a proposed project may have a significant effect on the environment.

The bill would specify that a project having a potential to cause a substantial adverse change in the significance of a tribal resource, as defined, to be a project that may have a significant effect on the environment. The bill would require a lead agency to make best efforts to avoid, preserve, and protect specified Native American resources. The bill would require the lead agency to undertake specified actions if a project may adversely affect tribal cultural resources, ~~or a tribal reservation or rancheria.~~ *The bill would additionally define "unique archaeological resource" to include archaeological artifacts, objects, or sites, including those that are tribal cultural resources.* The bill would require the office to revise the guidelines to include *among the* criteria for determining whether a proposed project has a significant effect on the environment ~~to include the~~ effects on tribal cultural resources, including sacred places, ~~or a tribal reservation or rancheria community.~~ The bill would require the office to prepare and develop, and the secretary to certify and adopt, revisions to the guidelines relating to the identification and treatment of tribal cultural resources. By requiring the lead agency to consider these effects relative to Native Americans *and to conduct additional consultations*, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

- 1 SECTION 1. The Legislature finds and declares all of the
2 following:
- 3 (a) California had the largest aboriginal population in North
4 America before contact with non-Native Americans. Yet, California
5 Native American tribes suffered the greatest losses from
6 termination, removal, and assimilation policies, including the loss
7 of a majority of their lands and tribal cultural resources, including
8 sacred places. This devastation debilitated tribal religious practices
9 and cultural identity, and threatened the survival of California
10 Native Americans.
- 11 (b) Spiritual integrity, community identity, political sovereignty,
12 and governance processes are intertwined in the lifeways and
13 identity of the California Native American tribes.
- 14 (c) California Native American tribes possess original natural
15 rights, from time immemorial, recognized in over 200 years of
16 federal jurisprudence, the Federal Constitution, federal and state
17 laws and administrative policies, and state actions, including,
18 tribal-state agreements.
- 19 (d) Included in these original natural rights is the right of tribal
20 governments to enact their own laws and be governed by them
21 and to engage in their own cultural and spiritual practices. It is a
22 fundamental obligation of each generation of California Native
23 Americans to cherish and protect these rights for their children
24 and for generations to come.
- 25 (e) California Native Americans have used, and continue to use,
26 natural settings in the conduct of spiritual practices, religious
27 observances, ceremonies, and cultural uses and beliefs that are
28 essential elements in tribal communities. Tribes consider these
29 sacred and cultural places, used by generations, as vital to their
30 existence, well-being, and identity.
- 31 (f) In addition to the lingering effects of historic termination,
32 removal, and assimilation policies, the continued loss of tribal
33 cultural resources, including sacred places and tribal lands in the
34 past 200 years, has caused further debilitating impacts on the

1 religious practices, cultural traditions, tribal identity, and
2 self-governance rights of California Native American tribes.

3 (g) To uphold California Native American tribes' original natural
4 rights with regard to religious practices, cultural traditions, tribal
5 identity, and self-governance, it is essential that the natural setting
6 and essential integrity of these tribal cultural resources be protected
7 and the sacred places be preserved.

8 (h) Traditional tribal lands were diminished to reservations and
9 rancherias that exist today in California with local governments,
10 state lands, federal lands, and privately owned lands located
11 adjacent to, and in the vicinity of, tribal government reservations
12 and rancherias. The land use decisions concerning lands adjacent
13 to, and in the vicinity of, California Native American reservations
14 and rancherias affect those tribal communities in terms of
15 environmental impacts and tribal self-governance rights.

16 (i) The California Environmental Quality Act does not readily
17 or directly solicit, include, or accommodate California Native
18 American tribes' concerns and issues, which has resulted in
19 significant environmental impacts to tribal cultural resources,
20 including sacred places and tribal government reservations and
21 rancherias, leaving them unanalyzed and unmitigated. The result
22 has been significant and unmitigated cumulative impacts to those
23 resources and California Native American reservations and
24 rancherias to the detriment of those communities and California's
25 environment.

26 (j) California Native American tribes are experts concerning
27 their culturally affiliated resources, tribal history, and practices
28 concerning those resources. Tribal knowledge about the land and
29 the resources should be included in environmental assessments
30 pursuant to state environmental laws for projects that have a
31 potentially significant impact or effect on those resources.

32 (k) State environmental law should not only take into account
33 the scientific or archaeological value of cultural resources, but also
34 the tribal cultural values, tribal interpretations, and culturally
35 appropriate treatment when decisions are made concerning whether
36 or how to approve a project that may significantly impact or ~~effect~~
37 *affect* those places and resources.

38 SEC. 2. Section 21073 is added to the Public Resources Code,
39 to read:

1 21073. "Native American tribe" means a federally recognized
2 Indian tribe located in California.

3 SEC. 3. Section 21074 is added to the Public Resources Code,
4 to read:

5 21074. (a) "Tribal cultural resource" means a resource that is
6 any of the following:

7 (1) A resource listed in, or determined to be eligible for listing
8 in, the California Register of Historical Resources, a local register
9 of historical resources, as defined in subdivision (k) of Section
10 5020.1, ~~or a tribal register of historic resources.~~

11 (2) A resource deemed to be significant pursuant to subdivision
12 (g) of Section 5024.1.

13 (3) A resource deemed by the lead agency *after a public hearing*
14 *to be a tribal cultural resource based upon substantial evidence*
15 *presented to the lead agency.*

16 (b) Tribal cultural resources include, but are not limited to, sites,
17 features, places, or objects with cultural value to descendant
18 communities, traditional ~~culture~~ *cultural* properties, or tribal
19 cultural landscapes consistent with the guidance of the federal
20 National Park Services' Advisory Council on Historic Preservation.

21 (c) A tribal cultural resource may also be a historic resource or
22 a unique archaeological resource.

23 (d) A tribal cultural resource does not include a resource
24 demonstrated by clear and convincing evidence to be historically
25 or culturally not significant.

26 SEC. 4. Section 21080.3 of the Public Resources Code is
27 amended to read:

28 21080.3. (a) Prior to determining whether a negative
29 declaration or environmental impact report is required for a project,
30 the lead agency shall consult with all responsible agencies ~~and~~,
31 trustee agencies, *and affected Native American tribes*. Prior to that
32 required consultation, the lead agency may informally contact any
33 of those agencies *or tribes*.

34 (b) In order to expedite the requirements of subdivision (a), the
35 Office of Planning and Research, upon request of a lead agency,
36 shall assist the lead agency in determining the various responsible
37 agencies and trustee agencies, for a proposed project. In the case
38 of a project described in subdivision (c) of Section 21065, the
39 request may also be made by the project applicant.

6

1 ~~SEC. 4.~~

2 *SEC. 5.* Section 21083 of the Public Resources Code is
3 amended to read:

4 21083. (a) The Office of Planning and Research shall prepare
5 and develop proposed guidelines for the implementation of this
6 division by public agencies. The guidelines shall include objectives
7 and criteria for the orderly evaluation of projects and the
8 preparation of environmental impact reports and negative
9 declarations in a manner consistent with this division.

10 (b) The guidelines shall specifically include criteria for public
11 agencies to follow in determining whether or not a proposed project
12 may have a "significant effect on the environment." The criteria
13 shall require a finding that a project may have a "significant effect
14 on the environment" if one or more of the following conditions
15 exist:

16 (1) A proposed project has the potential to degrade the quality
17 of the environment, curtail the range of the environment, or to
18 achieve short-term, to the disadvantage of long-term, environmental
19 goals.

20 (2) The possible effects of a project are individually limited but
21 cumulatively considerable. As used in this paragraph,
22 "cumulatively considerable" means that the incremental effects of
23 an individual project are considerable when viewed in connection
24 with the effects of past projects, the effects of other current projects,
25 and the effects of probable future projects.

26 (3) The environmental effects of a project will cause substantial
27 adverse effects on human beings, either directly or indirectly.

28 (4) A proposed project may have a significant effect on a tribal
29 cultural resource, including a sacred place, or a tribal reservation
30 or rancheria community.

31 (c) The guidelines shall include procedures for determining the
32 lead agency pursuant to Section 21165.

33 (d) The guidelines shall include criteria for public agencies to
34 use in determining when a proposed project is of sufficient
35 statewide, regional, or areawide environmental significance that
36 a draft environmental impact report, a proposed negative
37 declaration, or a proposed mitigated negative declaration shall be
38 submitted to appropriate state agencies, through the State
39 Clearinghouse, for review and comment prior to completion of the

1 environmental impact report, negative declaration, or mitigated
2 negative declaration.

3 (e) The Office of Planning and Research shall develop and
4 prepare the proposed guidelines as soon as possible and shall
5 transmit them immediately to the Secretary of the Natural
6 Resources Agency. The Secretary of the Natural Resources Agency
7 shall certify and adopt the guidelines pursuant to Chapter 3.5
8 (commencing with Section 11340) of Part 1 of Division 3 of Title
9 2 of the Government Code, which shall become effective upon the
10 filing of the adopted guidelines. However, the guidelines shall not
11 be adopted without compliance with Sections 11346.4, 11346.5,
12 and 11346.8 of the Government Code.

13 (f) The Office of Planning and Research shall, at least once
14 every two years, review the guidelines adopted pursuant to this
15 section and shall recommend proposed changes or amendments
16 to the Secretary of the Natural Resources Agency. The Secretary
17 of the Natural Resources Agency shall certify and adopt guidelines,
18 and any amendments to the guidelines, at least once every two
19 years, pursuant to Chapter 3.5 (commencing with Section 11340)
20 of Part 1 of Division 3 of Title 2 of the Government Code, which
21 shall become effective upon the filing of the adopted guidelines
22 and any amendments to the guidelines. However, guidelines may
23 not be adopted or amended without compliance with Sections
24 11346.4, 11346.5, and 11346.8 of the Government Code.

25 ~~SEC. 5.~~

26 *SEC. 6.* Section 21083.09 is added to the Public Resources
27 Code, to read:

28 21083.09. On or before January 1, 2015, the Office of Planning
29 and Research shall prepare and develop, and the Secretary of the
30 Natural Resources Agency shall certify and adopt, revisions to the
31 guidelines that do all of the following:

32 (a) Provide guidance on the implementation of Sections 21084.2
33 and 21084.3.

34 (b) Provide advice developed in consultation with the Native
35 American Heritage Commission, Native American tribes, related
36 to tribal cultural resources, including sacred places, for all of the
37 following:

38 (1) The preservation and protection of, or culturally appropriate
39 ~~mitigation to~~ *measures to mitigate significant impacts to*, tribal
40 cultural resources.

8

1 (2) Procedures for the protection of the confidentiality of
2 information concerning the specific identity, location, character,
3 and use of tribal cultural resources.

4 (3) Procedures to facilitate the voluntary participation of
5 landowners to preserve and protect the specific identity, location,
6 character, and use of tribal cultural resources.

7 (4) Procedures to facilitate the identification of, and culturally
8 appropriate treatment of, tribal cultural resources.

9 (c) Revising Appendix G of Chapter 3 (commencing with
10 Section 15000) of Division 6 of Title 14 of the California Code of
11 Regulations to do both of the following:

12 (1) Separate the consideration of paleontological resources
13 from cultural resources and update the relevant sample questions.

14 (2) Add consideration of tribal cultural resources, including
15 sacred places, with relevant sample questions.

16 *SEC. 7. Section 21083.2 of the Public Resources Code is*
17 *amended to read:*

18 21083.2. (a) As part of the determination made pursuant to
19 Section 21080.1, the lead agency shall determine whether the
20 project may have a significant effect on archaeological resources.
21 If the lead agency determines that the project may have a significant
22 effect on unique archaeological resources, the environmental
23 impact report shall address the issue of those resources. An
24 environmental impact report, if otherwise necessary, shall not
25 address the issue of nonunique archaeological resources. A negative
26 declaration shall be issued with respect to a project if, but for the
27 issue of nonunique archaeological resources, the negative
28 declaration would be otherwise issued.

29 (b) If it can be demonstrated that a project will cause damage
30 to a unique archaeological resource, the lead agency may require
31 reasonable efforts to be made to permit any or all of these resources
32 to be preserved in place or left in an undisturbed state. Examples
33 of that treatment, in no order of preference, may include, but are
34 not limited to, any of the following:

35 (1) Planning construction to avoid archaeological sites.

36 (2) Deeding archaeological sites into permanent conservation
37 easements.

38 (3) Capping or covering archaeological sites with a layer of soil
39 before building on the sites.

1 (4) Planning parks, greenspace, or other open space to
2 incorporate archaeological sites.

3 (c) To the extent that unique archaeological resources are not
4 preserved in place or not left in an undisturbed state, mitigation
5 measures shall be required as provided in this subdivision. The
6 project applicant shall provide a guarantee to the lead agency to
7 pay one-half the estimated cost of mitigating the significant effects
8 of the project on unique archaeological resources. In determining
9 payment, the lead agency shall give due consideration to the in-kind
10 value of project design or expenditures that are intended to permit
11 any or all archaeological resources or California Native American
12 culturally significant sites to be preserved in place or left in an
13 undisturbed state. When a final decision is made to carry out or
14 approve the project, the lead agency shall, if necessary, reduce the
15 specified mitigation measures to those which can be funded with
16 the money guaranteed by the project applicant plus the money
17 voluntarily guaranteed by any other person or persons for those
18 mitigation purposes. In order to allow time for interested persons
19 to provide the funding guarantee referred to in this subdivision, a
20 final decision to carry out or approve a project shall not occur
21 sooner than 60 days after completion of the recommended special
22 environmental impact report required by this section.

23 (d) Excavation as mitigation shall be restricted to those parts of
24 the unique archaeological resource that would be damaged or
25 destroyed by the project. Excavation as mitigation shall not be
26 required for a unique archaeological resource if the lead agency
27 determines that testing or studies already completed have
28 adequately recovered the scientifically consequential information
29 from and about the resource, if this determination is documented
30 in the environmental impact report.

31 (e) In no event shall the amount paid by a project applicant for
32 mitigation measures required pursuant to subdivision (c) exceed
33 the following amounts:

34 (1) An amount equal to one-half of 1 percent of the projected
35 cost of the project for mitigation measures undertaken within the
36 site boundaries of a commercial or industrial project.

37 (2) An amount equal to three-fourths of 1 percent of the
38 projected cost of the project for mitigation measures undertaken
39 within the site boundaries of a housing project consisting of a
40 single unit.

10

1 (3) If a housing project consists of more than a single unit, an
2 amount equal to three-fourths of 1 percent of the projected cost of
3 the project for mitigation measures undertaken within the site
4 boundaries of the project for the first unit plus the sum of the
5 following:

6 (A) Two hundred dollars (\$200) per unit for any of the next 99
7 units.

8 (B) One hundred fifty dollars (\$150) per unit for any of the next
9 400 units.

10 (C) One hundred dollars (\$100) per unit in excess of 500 units.

11 (f) Unless special or unusual circumstances warrant an
12 exception, the field excavation phase of an approved mitigation
13 plan shall be completed within 90 days after final approval
14 necessary to implement the physical development of the project
15 or, if a phased project, in connection with the phased portion to
16 which the specific mitigation measures are applicable. However,
17 the project applicant may extend that period if he or she so elects.
18 Nothing in this section shall nullify protections for Indian
19 cemeteries under any other provision of law.

20 (g) As used in this section, "unique archaeological resource"
21 means an archaeological artifact, object, or site about which it can
22 be clearly demonstrated that, without merely adding to the current
23 body of knowledge, there is a high probability that it meets any of
24 the following criteria:

25 (1) Contains information needed to answer important scientific
26 research questions and that there is a demonstrable public interest
27 in that information.

28 (2) Has a special and particular quality such as being the oldest
29 of its type or the best available example of its type.

30 (3) Is directly associated with a scientifically recognized
31 important prehistoric or historic event or person.

32 (4) *Is a tribal cultural resource.*

33 (h) As used in this section, "nonunique archaeological resource"
34 means an archaeological artifact, object, or site which does not
35 meet the criteria in subdivision (g). A nonunique archaeological
36 resource need be given no further consideration, other than the
37 simple recording of its existence by the lead agency if it so elects.

38 (i) As part of the objectives, criteria, and procedures required
39 by Section 21082 or as part of conditions imposed for mitigation,
40 a lead agency may make provisions for archaeological sites

11

1 accidentally discovered during construction. These provisions may
2 include an immediate evaluation of the find. If the find is
3 determined to be a unique archaeological resource, contingency
4 funding and a time allotment sufficient to allow recovering an
5 archaeological sample or to employ one of the avoidance measures
6 may be required under the provisions set forth in this section.
7 Construction work may continue on other parts of the building site
8 while archaeological mitigation takes place.

9 (j) This section does not apply to any project described in
10 subdivision (a) or (b) of Section 21065 if the lead agency elects
11 to comply with all other applicable provisions of this division.
12 This section does not apply to any project described in subdivision
13 (c) of Section 21065 if the applicant and the lead agency jointly
14 elect to comply with all other applicable provisions of this division.

15 (k) Any additional costs to any local agency as a result of
16 complying with this section with respect to a project of other than
17 a public agency shall be borne by the project applicant.

18 (l) Nothing in this section is intended to affect or modify the
19 requirements of Section 21084 or 21084.1.

20 ~~SEC. 6:~~

21 *SEC. 8.* Section 21084.2 is added to the Public Resources Code,
22 to read:

23 21084.2. (a) A project may have a significant effect on the
24 environment if the project has the potential of causing a substantial
25 adverse change in the significance of a tribal cultural resource.

26 (b) Because Native American tribes may have expertise in
27 identifying, interpreting, and determining significance of tribal
28 cultural resources and whether an impact of a proposed project to
29 a tribal cultural resource is significant, the lead agency shall consult
30 with the relevant Native American tribes in making a determination
31 pursuant to subdivision (a).

32 ~~SEC. 7:~~

33 *SEC. 9.* Section 21084.3 is added to the Public Resources Code,
34 to read:

35 21084.3. If the lead agency determines that a project will have
36 a significant effect on places, features, and objects described in
37 Section 5097.9 or 5097.995 and listed in the California Native
38 American Heritage Commission Sacred Lands File pursuant to
39 Section 5097.993 or 5097.994, the lead agency shall make its best

12

1 effort to ensure that these resources be avoided, preserved, and
2 protected in place or left in an undisturbed state.

3 ~~SEC. 8.~~

4 *SEC. 10.* Section 21097 is added to the Public Resources Code,
5 to read:

6 21097. (a) If a Native American tribe notifies a lead agency
7 prior to the commencement of the public review period established
8 by Section 21091, or if the lead agency determines pursuant to
9 Section 21084.3, that a project may adversely affect a tribal cultural
10 resource, including a sacred place, or a tribal reservation or
11 rancheria and that the tribe wishes to consult to resolve the
12 potentially adverse impacts, the lead agency shall engage in early
13 consultation with the affected tribe before or during the
14 environmental review process. The lead agency shall provide to
15 the affected tribe copies of any environmental document and its
16 technical reports. The affected tribe may request the Native
17 American Heritage Commission, the State Office of Historic
18 Preservation, and other relevant agencies or entities to participate
19 in the consultation process and to seek mutually agreeable methods
20 of avoiding or otherwise resolving the potential adverse effects.
21 As part of the consultation process, the parties may propose
22 mitigation measures capable of avoiding or substantially lessening
23 potential impacts to a tribal cultural resource, including a sacred
24 place, ~~or a tribal reservation or rancheria.~~ Any binding agreement
25 reached in this consultation shall be incorporated as mitigation
26 measures in the final environmental document.

27 (b) If no agreement is reached pursuant to subdivision (a), or if
28 an affected tribe identifies significant effects on a tribal cultural
29 resource, including a sacred place, or the affected tribe's reservation
30 or rancheria during the public comment period, the environmental
31 document shall include both of the following analyses:

32 (1) Whether the proposed project has a significant impact on
33 an identified tribal cultural resource, including a sacred place, ~~or~~
34 ~~a tribal reservation or rancheria.~~

35 (2) Whether the alternatives or mitigation measures proposed
36 by the parties pursuant to subdivision (a) or during the public
37 comment period avoid or substantially lessen the impact to the
38 identified cultural resource, including a sacred place, or a tribal
39 reservation or rancheria.

13

1 (c) (1) Any information, including, but not limited to, the
2 location, nature, and use of the place, feature, site, or object that
3 is submitted by an affected tribe regarding a tribal cultural resource,
4 including a sacred place, may not be included in the environmental
5 impact report or otherwise disclosed by the lead agency or any
6 other public agency to the public without the prior consent of the
7 tribe that provided the information. The submitted information
8 shall be published in a confidential appendix to the environmental
9 document. This subdivision is not intended, and may not be
10 construed, to prohibit the confidential exchange of the submitted
11 information between public agencies that have lawful jurisdiction
12 over the preparation of the environmental document.

13 (2) This subdivision does not affect or alter the application of
14 subdivision (r) of Section 6254 of the Government Code.

15 (d) The lead agency and any responsible agency for the proposed
16 project may issue a permit for a project with a significant impact
17 on an identified tribal cultural resource, including a sacred place,
18 ~~or a tribal reservation or rancheria~~ only if one of the following
19 occurs:

20 ~~(1) Mitigation measures agreed to pursuant to subdivision (a)~~
21 ~~have been incorporated into the final environmental document.~~

22 ~~(2) The affected tribe accepts the mitigation measures proposed~~
23 ~~in the draft or final environmental document.~~

24 *(1) Meaningful consultation between the affected Native*
25 *American tribes and the lead agency has occurred pursuant to*
26 *Section 65352.4 of the Government Code and Sections 21080.3*
27 *and 21104. The lead agency has given major consideration to*
28 *preventing impacts to tribal cultural resources and has*
29 *demonstrated best efforts to protect and preserve sacred places*
30 *in a culturally appropriate manner with dignity so as not to further*
31 *debilitate tribal religious practices, traditions, and identities.*

32 ~~(3)~~

33 (2) The affected tribe has received notice of, and has failed to
34 comment on, the proposed mitigation measures during the comment
35 period established in Section 21091 and any public hearing required
36 by or held pursuant to this division.

37 ~~(4)~~

38 (3) The lead agency determines that there is no legal or feasible
39 way to accomplish the ~~projects~~ *project's* purpose without causing
40 a significant effect upon the sacred place, that all feasible

14

1 mitigation or avoidance measures have been incorporated, and ~~that~~
2 ~~there is an overriding environmental, public health, or safety reason~~
3 ~~based on substantial evidence presented by the lead agency that~~
4 ~~the project should be approved~~ *that specific overriding economic,*
5 *legal, social, technological, or other benefits of the project*
6 *outweigh the significant effects on the environment.* These findings
7 may be made only after the lead agency provides 30 days' notice
8 of hearing to the affected tribe and an opportunity for the affected
9 tribe to review and comment on the proposed finding.

10 (e) If an agreement is not reached pursuant to subdivision (a)
11 and if it can be demonstrated that a project will cause significant
12 effect to a tribal cultural resource, including a sacred place, ~~or a~~
13 ~~tribal reservation or rancheria~~, the lead agency may require all
14 reasonable efforts to be made to treat the tribal cultural resource,
15 including a sacred place, ~~or a tribal reservation or rancheria~~ in a
16 culturally sensitive manner. Examples of culturally sensitive
17 treatment include, but are not limited to, the following:

18 (1) Planning construction to avoid those resources or places.

19 (2) Deeding resources or places into permanent conservation
20 easements.

21 (3) Planning parks, greenspace, or other open space to
22 incorporate those resources or places.

23 (4) Adopting culturally appropriate mitigation measures that
24 take into account the tribal value and meaning of the resource or
25 place.

26 (f) In determining the presence of tribal cultural resources,
27 including sacred places, ~~or a tribal reservation or rancheria~~
28 ~~community~~, the lead agency shall use the most current and
29 up-to-date technology, research, and resources including, but not
30 limited to, tribal, local, state, and national registers, the Native
31 American Heritage Commission Sacred Lands File, mapping and
32 Geographic Information System data, current cultural resources
33 reports, foot surveys, ethnographic assessment, noninvasive study
34 techniques, and information submitted by an affected tribe. The
35 lead agency shall make all reasonable efforts and complete the
36 research and identification efforts prior to the release of the draft
37 environmental document and, in any case, no later than the
38 finalization of the environmental document.

39 (g) This section is not intended, and may not be construed, to
40 do either of the following:

15

1 (1) Prohibit any person or entity from seeking any damages or
2 injunction authorized by law.

3 (2) Limit consultation between the state and tribal governments,
4 existing confidentiality provisions, or the protection of religious
5 exercise to the fullest extent permitted under state and federal law.

6 *SEC. 11. Section 21104 of the Public Resources Code is*
7 *amended to read:*

8 21104. (a) Prior to completing an environmental impact report,
9 the state lead agency shall consult with, and obtain comments
10 from, each responsible agency, trustee agency, *affected Native*
11 *American tribes*, any public agency that has jurisdiction by law
12 with respect to the project, and any city or county that borders on
13 a city or county within which the project is located unless otherwise
14 designated annually by agreement between the state lead agency
15 and the city or county, and may consult with any person who has
16 special expertise with respect to any environmental impact
17 involved. In the case of a project described in subdivision (c) of
18 Section 21065, the state lead agency shall, upon the request of the
19 applicant, provide for early consultation to identify the range of
20 actions, alternatives, mitigation measures, and significant effects
21 to be analyzed in depth in the environmental impact report. The
22 state lead agency may consult with persons identified by the
23 applicant who the applicant believes will be concerned with the
24 environmental effects of the project and may consult with members
25 of the public who have made a written request to be consulted on
26 the project. A request by the applicant for early consultation shall
27 be made not later than 30 days after the determination required by
28 Section 21080.1 with respect to the project.

29 (b) The state lead agency shall consult with, and obtain
30 comments from, the State Air Resources Board in preparing an
31 environmental impact report on a highway or freeway project, as
32 to the air pollution impact of the potential vehicular use of the
33 highway or freeway.

34 (c) A responsible agency or other public agency shall only make
35 substantive comments regarding those activities involved in a
36 project that are within an area of expertise of the agency or that
37 are required to be carried out or approved by the agency. Those
38 comments shall be supported by specific documentation.

16

1 ~~SEC. 9.~~

2 *SEC. 12.* This act does not alter or expand the applicability of
3 the California Environmental Quality Act (Division 13
4 (commencing with Section 21000) of the Public Resources Code)
5 for projects occurring on Native American tribal reservations or
6 rancherias.

7 ~~SEC. 10.~~

8 *SEC. 13.* No reimbursement is required by this act pursuant to
9 Section 6 of Article XIII B of the California Constitution because
10 a local agency or school district has the authority to levy service
11 charges, fees, or assessments sufficient to pay for the program or
12 level of service mandated by this act, within the meaning of Section
13 17556 of the Government Code.