

Chapter 3: Native American Consultation

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Chapter 3: Native American Consultation

3.1 Introduction and Chapter Overview

Native American Tribes hold a special consultative role in the context of federal and state historic preservation compliance due to their unique relationship to archaeological sites, sacred/ceremonial areas, and traditional cultural properties and landscapes. This chapter focuses primarily on consultation with Native American tribes in the context of cultural resources studies conducted for transportation project delivery; however, guidance on early coordination and engagement with tribal governments regarding cultural heritage considerations during planning phases is also addressed, as these are important diplomatic precursors to project level consultations.

There are a number of federal and state laws, regulations, and technical guidance that specify the requirements, expectations, and best practices for consultation with Native American tribes and which serve as the foundation for the procedures presented in this chapter. It is important to recognize that the consultation conducted by Caltrans' Cultural Resources Professionally Qualified Staff (PQS) with designated tribal cultural representatives, during project-level cultural resources studies, is one element of a larger diplomatic relationship among California Native American Tribes, Caltrans, and the State of California that should be understood and observed by all participants during consultation efforts. Exhibit 3.1 presents an annotated list of the key policies, directives, guidance, and laws that pertain to Caltrans' responsibilities for tribal diplomacy and consultation and may serve as a useful reference, in conjunction with the procedures described in this chapter.

Caltrans' Director's Policy 19 (DP-19) (see Exhibit 3.6) establishes the roles and responsibilities of all the department's leaders, managers, and staff for developing and maintaining the broader government-to-government diplomatic relationship with Native American tribes and their communities. The provisions of DP-19 are applicable to everyone who works for Caltrans in any capacity, including contractors, consultants, and subcontractors. In addition to Caltrans' own policy for working with Native American communities, there are a number of higher-level directives that underscore the importance of establishing and maintaining cooperative diplomatic relationships between state agencies and tribal governments and recognizing and respecting tribal government sovereignty. These directives include the California State

Transportation Agency's (CalSTA's) [Tribal Consultation Policy](#), Governor's Executive Order [B-10-11](#), and Governor's Executive Order [N-15-19](#) (see also, Exhibit 3.1). It is important to also acknowledge that the federal government has a unique legal relationship with Indian tribes that is rooted in the United States Constitution, treaties, statutes, and court decisions. All federal agencies, including the Federal Highway Administration (FHWA), are responsible for maintaining the federal government trust relationship with Native American tribes and for consulting about policies and practices that may uniquely affect tribal governments.

In California, the FHWA has assigned, and Caltrans has assumed, all the U.S. Department of Transportation's responsibilities under the National Environmental Policy Act (NEPA) and serves as both the Lead Federal Agency and Federal Agency Official for federal-aid highway projects (See SER Volume 1, Chapter 38 NEPA Assignment). This arrangement is codified in both the NEPA Assignment Memoranda of Understanding ([NEPA MOUs](#)) and the Section 106 Programmatic Agreement ([106 PA](#)). Under these agreements, Caltrans assumes the lead on project-level consultations with Native American tribes. The NEPA MOUs and the Section 106 PA provide program efficiencies and help streamline Caltrans' project delivery processes; however, it is important to note that the requirements for consultation with Native American tribes are not streamlined under these agreements.

In carrying out both its NEPA and Section 106 responsibilities, Caltrans is responsible and accountable for conducting consultation with Native American tribes in a manner that recognizes the federal government-to-government relationship and is respectful of tribal sovereignty. Caltrans' federally assigned responsibilities also apply to all locally sponsored transportation projects that receive federal aid highway funds (commonly known as the [Local Assistance Program](#)). Caltrans oversees all Local Assistance projects to ensure compliance with federal standards under both NEPA and Section 106, including tribal engagement and consultation. Local agencies are encouraged to establish strong working relationships with tribal governments, in cooperation with Caltrans, to promote effective cross-jurisdictional planning and collaboration among all parties and stakeholders. See Sections 3.3 and 3.4, below, for additional discussion regarding consultation roles and procedures in the context of Local Assistance projects.

Project level consultations about the potential effects of transportation on tribal heritage sites, landscapes, and places are most effective and historic preservation outcomes are much improved when strong government-to-government relationships are established and maintained through early, coordinated engagement among tribal governments, Caltrans, and

local agency partners. Caltrans' Headquarters [Tribal Relations](#) staff, along with District representatives, are available to guide and assist all parties to support effective diplomacy, planning, and project delivery efforts.

Given that Native American cultural preservation values emphasize the importance of a 'sense of place' and maintain a preference for cultural sites and landscapes to remain intact and undisturbed, discussions about broader landscape-level preservation of cultural and natural resources are best initiated during earlier planning efforts. As transportation is, in fact, a response to local and regional land use planning decisions, coordination between Caltrans' Planning and Environmental divisions is necessary for the early consideration and preservation of the cultural and natural landscapes that are important to tribal communities.

The FHWA's [Planning and Environmental Linkages \(PEL\) Initiative](#) provides a framework for how Caltrans, tribes, and other agency partners and stakeholders can better engage during planning phases to most effectively incorporate tribal cultural preservation values into regional planning processes. Caltrans PQS have valuable scoping tools and are available to assist Transportation Planning staff in early scoping and planning efforts. PQS may also assist in early engagement with tribal cultural leaders to help integrate California Native American cultural preservation values into early regional planning decisions and visions. Such early planning efforts not only promote better historic preservation outcomes, but also provide for more efficient and effective project delivery processes, as well as better overall diplomatic relationships. Section 3.6 provides additional discussion regarding tribal government diplomacy and early coordination strategies for the protection of cultural sites.

Just as early planning and coordination with tribal governments is a critical part of diplomacy and the protection of cultural sites and landscapes, so too is the focused tribal outreach, consultation, and coordination that occurs for cultural resources studies during the project delivery process, which is the focus of this chapter. As stipulated in the Section 106 PA, consultation with Native American Tribes shall commence early in the project planning process in order to identify and discuss relevant preservation issues, resolve concerns about the confidentiality of information on historic properties, and allow adequate time for the consideration of such concerns. Caltrans PQS have the responsibility to ensure that consultation continues with tribes throughout the environmental review process. Sections 3.3 and 3.4, below, discuss the roles, responsibilities, and procedures for achieving compliance and professional standards of conduct for consultation with California Native American Tribes.

The policies and procedures described in this chapter are intended to ensure that regulatory requirements are observed and that the views expressed by culturally affiliated Native American tribal governments are actively sought and considered during the transportation project delivery. The objective is to promote successful transportation and historic preservation outcomes by fostering meaningful tribal input and participation in Caltrans' environmental and cultural resources studies and supporting Caltrans' diplomatic engagement with tribal governments.

3.2 Legal and Regulatory Context

Caltrans prepares cultural resources studies to comply with Section 106 of the National Historic Preservation Act ([NHPA](#)), CEQA and PRC 5024. Caltrans has a Section 106 Programmatic Agreement¹ ([106 PA](#)) and a PRC 5024 Memorandum of Understanding² ([5024 MOU](#)) that implement alternate procedures for compliance with Section 106 and PRC 5024. The attachments to the 106 PA and 5024 MOU provide general guidance that Caltrans follows to comply with CEQA and other pertinent historic preservation laws, regulations, and guidelines.

Chapter 1 of the SER Volume II discusses the full range of applicable historic preservation laws. Chapter 2 discusses the general regulatory context of cultural studies work. This chapter focuses on information relevant to Caltrans' responsibilities for consultation with Native American tribes. Exhibit 3.1 highlights the key policies, directives, guidance, and laws that pertain to Caltrans' responsibilities for tribal diplomacy and consultation and may serve as a useful reference, in conjunction with the procedures described in this chapter.

3.3 Organizational Roles and Responsibilities

3.3.1 Caltrans' Headquarters Tribal Relations

There are two primary functional divisions at Caltrans Headquarters that are responsible for engaging and consulting with Native American tribes on statewide policies and practices that may affect tribal communities: (1) the Native American Cultural Studies Branch (NACS) is in the

¹ First Amended Programmatic Agreement Among the Federal Highway Administration, the Advisory Council on Historic Preservation, the California State Historic Preservation Officer, and the California Department of Transportation Regarding Compliance with Section 106 of the National Historic Preservation Act as it Pertains to the Administration of the Federal-Aid High-way Program in California.

² 2015 Memorandum of Understanding between the California Department of Transportation and the California State Historic Preservation Officer Regarding Compliance with Public Resources Code Section 5024 and Governor's Executive Order W-26-92.

Headquarters Cultural Studies Office (CSO), in the Division of Environmental Analysis (DEA), within the Project Delivery Program; and (2) the Native American Liaison Branch (NALB) is in the Office of Race and Equity in the [Division of Planning and Modal Programs](#). Both the NACS and the NALB function to support Caltrans' overall consultation and diplomatic efforts with California tribal governments, and regularly coordinate and communicate with one another, as well as with District counterparts, on matters of planning and environmental overlap as they relate to the concerns and interests of tribal communities.

3.3.1.1 Headquarters Native American Cultural Studies Branch (NACS) – Environmental/ Project Delivery

The NACS Branch addresses statewide programs and policies related to Caltrans' consultation with California Native American tribes about potential effects of transportation development on tribal cultural heritage. The NACS Branch provides advice, training, and guidance for districts, tribal governments, local agency partners, and other stakeholders regarding the regulatory requirements, policies, and best practices for effective consultation during transportation project development. The NACS Branch works directly with Native American tribes, either to establish or maintain diplomatic working relationships, or as requested by districts or tribes, to facilitate planning or project delivery efforts. The NACS Branch monitors and evaluates pertinent state and federal legislation and regulations, disseminates that information to the districts, and seeks to ensure that Caltrans is in compliance with such laws.

As the Statewide Native American Coordinator, the NACS Branch Chief works with a number of functional units within Caltrans to promote an integrated and consistent approach to addressing tribal historic and cultural preservation issues in transportation. The NACS Branch Chief is the primary liaison for Caltrans tribal matters with a number of external state and federal agency partners, including the Governor's Tribal Liaison, the California Native American Heritage Commission (NAHC), the California State Historic Preservation Officer (SHPO), the Advisory Council on Historic Preservation (ACHP), and the FHWA.

3.3.1.2 Headquarters Native American Liaison Branch (NALB) – Transportation Planning

The NALB focuses on programs and policies related to tribal transportation planning, mobility, and safety issues affecting tribal communities and provides funding sources and technical assistance for tribal governments to address tribal transportation planning needs. The NALB coordinates Tribal Employment Rights Ordinance (TERO) matters and can assist and direct all

formal tribal government inquires to Caltrans. The NALB is responsible for administering Caltrans' Native American Advisory Committee ([NAAC](#)), which meets quarterly to ensure that Caltrans executive leadership receives direct input and advice from the California Indian community on issues pertaining to all modes of transportation in California. The NALB Branch Chief also works with a number of functional units within Caltrans to address the planning and capacity needs of tribal communities and also serves as a primary liaison with external agency partners.

3.3.2 Caltrans District Tribal Relations

Tribal relations staff based in the Districts include both the District Native American Coordinators (DNACs) who focus on cultural resources studies and potential effects of transportation projects on tribal heritage; and the District Native American Liaisons (DNALs) who focus on transportation planning. The DNACs and DNALs coordinate with one another, as well as with their headquarters counterparts, on matters of overlapping interest as it relates to Caltrans' work with tribal communities.

3.3.2.1 District Native American Coordinators (DNACs) – Environmental/Project Delivery

DNACs are the District counterparts to the Headquarters' NACS Branch and, therefore, serve as key points of contact in each of the twelve Districts for tribal cultural, environmental, and historic preservation considerations, all of which intersect with a wide variety of functional areas and processes within Caltrans. While the duties of a DNAC may vary among districts, the role of a DNAC is to generally to establish and maintain effective working relationships with local tribal cultural leaders and representatives and to facilitate communications and coordination among the District's various functional units, as well as external partners, on matters that affect tribal communities. The DNAC coordinates closely with the Headquarters NACS Branch and stays apprised of current regulatory and policy trends and provides advice and expertise to District leaders and managers in addressing local tribal historic preservation issues in the District. The DNAC supports project level cultural and archaeological studies and assists with the more complex consultation scenarios under the Section 106 PA, 5024 MOU and CEQA. DNACs may also coordinate with their transportation planning counterparts, the DNALs to facilitate Caltrans' tribal government diplomacy and to promote the consideration tribal cultural preservation issues during early regional planning processes.

3.3.2.2 District Native American Liaisons (DNALs) – Transportation Planning

As the District counterparts to the NALB, the DNALs coordinate with and provide technical assistance and access to funding sources for local tribal governments to engage in regional transportation planning efforts to address mobility and safety issues for tribal communities. DNALs have been assigned for all Districts except for Districts 7 and 12. For Districts with no DNALs, all internal and external inquiries regarding District tribal relations and policies should be directed to the DNAC or to the Headquarters NACS or NALB.

3.3.2.2 Caltrans PQS

As described in Attachment 1 of the 106 PA, the term PQS refers to Caltrans staff who meet the Secretary of the Interior’s Professional Qualifications Standards in the appropriate historic preservation discipline. For Native American cultural studies, the PQS is typically a project archaeologist and/or DNAC who is responsible for conducting or overseeing cultural resources investigations in support of Caltrans’ environmental compliance obligations for transportation project delivery. Consultation with California Native American tribes and careful documentation of project decisions and outcomes related to that consultation are key responsibilities of the project’s PQS. The PQS, unless otherwise designated, serves as the primary point of contact for tribal consulting parties regarding project level cultural resources inventories, evaluations, and resolutions of adverse effects.

In coordination with the Caltrans PQS, other personnel and/or contractors and consultants may engage with tribal representatives during the course of project activities; however, the PQS is the responsible party for all project level consultations with tribes and is the primary liaison for communicating project information and Department decisions to the tribal consulting parties and representatives regarding potential effects to tribal cultural heritage.

The coordination and consultation that the Caltrans PQS conduct with Native American tribes is one element of Caltrans’ larger diplomatic relationship with its tribal partners, and the PQS represents the department in accordance with DP-19 when working with tribal communities.

3.3.2.3 Caltrans Local Assistance PQS

For locally sponsored projects that receive federal funding (known as Local Assistance projects), Caltrans serves in a federal agency oversight role (per [NEPA Assignment](#)) and is responsible for ensuring the project sponsor (local agency) complies with federal environmental compliance requirements, including Section 106 consultation with tribes. The local agency/project sponsor

is responsible for conducting the Section 106 consultations with tribal consulting parties for its projects. As Caltrans serves in the federal agency oversight role, the Caltrans Local Assistance PQS is responsible for overseeing the local agency's cultural studies and may be invited to participate in consultations for Local Assistance projects and/or may provide direction and guidance to local agencies and tribes on federal historic preservation compliance requirements, as needed or requested (see also Section 3.4.3.1).

3.3.2.4 Cultural Resources Management Consultants/Contractors

At the direction of the Caltrans PQS, cultural resources management consultants are often retained under contract to conduct certain aspects of a cultural resources investigation. Such work by cultural resources consultants often entails direct communications and logistical coordination with tribal representatives regarding project activities; it is, however, important to underscore that consultation with Native Americans and all decisions regarding the conduct of the cultural resources investigation are the full responsibility of the Caltrans PQS. Any communications between a cultural resources consultant and a tribal consulting party should be carefully directed and overseen by the Caltrans PQS to avoid any misinformation regarding the nature of a project and/or decisions regarding the treatment of resources. Cultural resources consultants are expected to conduct themselves in accordance with DP-19 regarding working with tribal communities, which applies to everyone who works for Caltrans in any capacity, including all contractors, consultants, and subcontractors.

3.3.3 Federal Agency Roles

The federal government has a unique legal relationship with Indian tribes that is rooted in the United States Constitution, treaties, statutes, and court decisions. In California, FHWA has assigned, and Caltrans has assumed, responsibilities to serve as both the Lead Federal Agency and Federal Agency Official on behalf of FHWA for all federal-aid transportation projects in California. FHWA remains responsible for maintaining its own federal government trust relationship with Native American tribes and for consulting about federal policies and practices that may uniquely affect tribal governments. In accordance with the Section 106 PA, Caltrans serves in the Federal Agency Official role and is responsible for conducting consultations with Native American tribes about its projects in a manner that recognizes the federal government-to-government relationship and is respectful of tribal sovereignty.

When Caltrans projects occur on federal government lands (e.g., BLM, US Forest Service, BIA) or on tribal lands held in trust by the federal government, consultation with tribal nations must occur in coordination with the federal land-owning agency.

When a cultural resources investigation is planned on a tribal trust lands (lands held in trust by the federal government), the BIA is responsible for issuing permits, unless the reservation or rancheria has adopted regulations that do not require BIA involvement.

When Caltrans projects require federal permits (e.g., Army Corps of Engineers, NOAA/NMFS, etc.), Section 106 compliance is required, and corresponding tribal consultation documentation will need to be completed, even if there is no federal aid highway funding for the project, as the issuance of a federal permit triggers a federal nexus.

3.3.4 Key Tribal Governments and Representatives

3.3.4.1 Federally Recognized Tribes

Federally Recognized Tribes are those tribes acknowledged by the federal government to have a government-to-government relationship with the United States and have specific responsibilities, powers, limitations, and obligations. There is a statutory requirement to consult with federal Indian tribes under the NHPA. A list of federally recognized tribes is published nearly annually in the Federal Register, and the BIA, Office of Indian Services, maintains a [Tribal Leaders Directory](#) on its webpage.

3.3.4.2 Tribal Historic Preservation Officer (THPO)

The 1992 Amendments to the NHPA provided for federal tribes to assume all or any part of the specified functions of the SHPO, if certain criteria are met with respect to tribal lands ([NHPA Section 101\[d\] \[2\]](#)), and to designate a tribal preservation official, commonly called a Tribal Historic Preservation Officer (THPO). The California Office of Historic Preservation (OHP) maintains a current [THPO contact list](#).

THPOs may advise and assist agencies in carrying out their historic preservation responsibilities and serve as a tribe's cultural representative/key point of contact for project level cultural resources studies and consultations. Within the boundaries of tribal trust lands, Caltrans consults with THPOs under Section 106 of the NHPA on effects to all historic properties, both tribal and non-tribal.

3.3.4.3 California Native American Heritage Commission (NAHC)

The NAHC was established in 1976 by state statute to preserve and protect burial sites and other places of special cultural or spiritual significance to Native Americans. The NAHC, its powers, duties, and responsibilities, are fully described in California Public Resources Code (PRC) Chapter 1.75 Sections 5097.91-5097.99 (see also, Exhibit 3.1).

A key responsibility of the NAHC, as it relates to Caltrans' work, is maintaining a contact list of the culturally affiliated California Native American Tribes with whom Caltrans may consult as part of its cultural resources investigations conducted for transportation project delivery. Another important role of the NAHC for Caltrans' work is to identify and maintain a catalogue of places of special religious or social significance to Native Americans, as well as known gravesites and cemeteries of Native Americans on private lands. This catalogue, known as the Sacred Lands File (SLF), assists agencies and departments in identifying potential tribal cultural concerns within a project area. Lastly, the NAHC is also responsible for the designation of a Most Likely Descendent (MLD) when Native American human remains are discovered during project activities (see Section 3.4.10 for discussion regarding the discovery of human remains). Caltrans relies on the NAHC to designate the appropriate MLDs with whom Caltrans may consult regarding the appropriate treatment and disposition of Native American ancestral remains.

3.3.4.4 California Native American Tribe

The term, California Native American Tribe, is defined in the California Public Resources Code [Section 21073](#) as a "Native American tribe located in California that is on the contact list maintained by the California Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004." Caltrans relies on the contact list maintained by the NAHC to identify the culturally affiliated California Native American Tribes with whom Caltrans should consult for its projects and transportation planning efforts. Caltrans consults with all 'California Native American Tribes' regardless of federal recognition status.

3.3.4.5 Tribal Cultural Representative

In the context of cultural resources investigations, Caltrans is required to consult with tribal representatives who are designated or identified by a consulting tribal government. A Tribal Cultural Representative is a general term to refer the individual(s) designated or identified by the tribal leadership to represent the tribe during project level cultural resources consultations

with Caltrans' project PQS. A tribe's designated Cultural Representative serves as the key point of contact for the tribe on all matters related to the identification and treatment of tribal heritage sites during project cultural resources investigations. The Tribal Cultural Representatives may also help coordinate the participation of designated Tribal Experts on behalf of the tribe or may serve as a designated Tribal Expert themselves. Although THPOs commonly serve as the designated Cultural Representative for federally-recognized tribes, a tribe's project Cultural Representative may not always be a THPO and may hold other roles or positions within a tribe, including traditional cultural leader, tribal elder, cultural resources or environmental planning professional, or tribal government official. It is important that Caltrans Districts engage with the tribal government leadership to obtain a proper designation of the tribe's Cultural Representative or key point of contact for project cultural resources consultations and tribal heritage considerations.

3.3.4.6 Tribal Expert

A Tribal Expert is a tribal representative who has been deemed by the tribe to possess Tribal Traditional Knowledge (TTK), as defined in the California Health and Safety Code [8012\(p\)](#), and has been designated by a consulting tribal government's leadership to contribute tribal cultural expertise and/or to conduct stewardship activities, on behalf of the tribe, to assist Caltrans' investigations of tribal heritage resources or for tribal stewardship/oversight of Caltrans' activities in areas identified as having cultural or natural sensitivity to the tribal community. Caltrans relies on the consulting tribal government leadership to appoint Tribal Expert(s) who may best represent the cultural heritage and stewardship interests of the tribal community when contributing tribal knowledge and expertise. Decisions regarding the participation of a Tribal Expert are an outcome of either formal government-to-government consultation or formal Section 106 consultation between a tribal government and Caltrans. In accordance with Caltrans' applicable fiscal and acquisition authorities, Caltrans provides compensation to Tribal Experts in the same manner it would procure expert opinions or services from other specialized sources; however, it is important to acknowledge that this arrangement is born out of a diplomatic relationship between two government entities and does not represent a for-profit, client/customer business relationship. See Section 3.4.7 for more discussion on the integration of TTK and the participation of Tribal Experts. See also Exhibit 3.4 for more information on compensation methods for Tribal Expertise.

3.3.4.7 Most Likely Descendants

The designation of a Most Likely Descendant (MLD), is an outcome of the processes and procedures that must be followed under the California Public Resources Code [5097.98](#), when human remains are identified during project field activities. The specific procedures to be followed when human remains are encountered are detailed in Section 3.4.10 of this chapter. Tribes are granted MLD status when they are designated by the NAHC to be most likely to have ancestral ties to the remains. In some instances, multiple tribes may be designated MLDs together for a project by the NAHC. Caltrans confers with the representatives of the designated MLD tribe(s) on the respectful treatment and disposition of ancestral human remains, if unearthed or discovered during project activities, and seeks to accommodate the recommendations of MLD tribes to the fullest extent feasible.

3.4 Procedures for Native American Consultation During Project Delivery

Caltrans PQS are responsible for seeking, discussing, and considering the views of Native American tribes, and seeking agreement with them when carrying out Caltrans' historic preservation compliance responsibilities. As consulting parties, tribal governments have the opportunity to convey their interests and concerns to Caltrans to help inform Caltrans' decision-making and to promote a course of action they would like to see taken.

Caltrans' consultation efforts must provide Native American tribes a reasonable opportunity to identify their concerns about important resources, advise on the identification and evaluation of cultural resources (including those of traditional religious and cultural importance), articulate their views on the project's effects to such resources, and participate in the resolution of adverse effects. Caltrans' policy is to act in a manner that facilitates effective and timely consultation with culturally affiliated tribes.

It should be recognized and acknowledged that, due to exclusion from privately held lands and significant urbanization of the landscape over time, tribal descendants and cultural leaders may not always have direct knowledge of locations of tribal heritage sites and resources within a given project area. Reconnecting culturally affiliated tribes with information about their ancestral heritage is another important aspect of the consultation process.

3.4.1 Project Screening Under the Section 106 PA/PRC 5024 MOU.

Under the Section 106 PA and the PRC 5024 MOU (Stipulations VII and Attachments 2), certain classes of projects have been identified that may have little or no potential to affect historic properties, and following appropriate screening, may be determined exempt from any further Section 106 or PRC 5024 review. Such projects are referred to as Screened Undertakings. Although Screened Undertakings generally involve activities that have little or no potential to affect historic properties, the screening process *may* include contacting culturally affiliated tribes who may have concerns within a project area. Districts and tribal governments are encouraged to jointly review the screening process and classes of screened undertakings identified in Attachment 2 of the PA and MOU to further clarify when or if there may be tribal concerns regarding certain activities for which consultation would be warranted.

3.4.2 Timing and Initiation of Consultation

3.4.2.1 Begin Environmental

The federal and state historic preservation laws that govern the cultural resources investigation process and associated Native American consultation requirements (Section 106, PRC 5024, and CEQA/AB-52) are not triggered until there is a programmed and funded transportation project. The programming and funding milestone occurs when a project is approved by the California Transportation Commission ([CTC](#)), after which the environmental review and project delivery processes may begin (Exhibit 3.2: Project Development Timeline/Consultation Chart). Within Caltrans, the term, *Begin Environmental*, marks the point at which technical environmental studies, including cultural resources investigations, are authorized to begin for a programmed/funded project. It is at this time that Caltrans PQS may initiate outreach to tribal governments and tribal cultural leaders regarding their potential concerns about the project. This initial outreach to tribes is a fundamental first step in the overall effort to identify, evaluate, and address project-specific effects to tribal cultural properties and is one of the first orders of business upon initiating environmental reviews and cultural resources investigations and consultation under historic preservation laws.

3.4.2.2 Responsibilities for Ongoing Project Consultation

Caltrans PQS have the responsibility to ensure that consultation with tribes continues throughout the project delivery process whenever tribes express a concern about an undertaking or about cultural properties that may be affected by an undertaking. Minimally, such consultation should occur at key milestones in the project delivery process. Other

circumstances, which would warrant notifications and consultations with interested tribes include: (1) when there are changes to a project's APE; (2) when previously unknown tribal heritage resources or sensitive areas are identified within or adjacent to the APE; and/or (3) when a project has been shelved or unshelved from the project delivery process. Transparency and communication about a project's status and actions are key elements of the consultation process. See also, Section 3.4.12 regarding the importance of documenting project communications and consultation decisions.

3.4.2.3 Timing Considerations for Compliance with Assembly Bill 52 (AB 52)

As most Caltrans projects receive federal-aid transportation funding, as well as state funding, Caltrans often serves as both the federal and state lead agency for its projects. It is common practice for both Section 106 and CEQA/AB 52 consultations to be conducted in tandem, when applicable. Although the spirit and intent of Section 106 and AB 52 are essentially the same in terms of good faith consultation with Native American tribes and the consideration of unique tribal knowledge and expertise, there are some timing and procedural considerations under AB 52 that Caltrans PQS should take into account when initiating consultation efforts for projects.

Consultation with California Native American Tribes under AB 52/CEQA applies only to projects for which a tribe has requested in writing that the agency consult with them *and* the level of environmental documentation is above a Categorical Exemption (CE). In order to determine if a tribe has made such a request in writing for a given area, contact the DNAC, the NACS, or the NALB, as they all maintain the list of California Native American Tribes who have submitted written requests for consultation under AB 52 for each District.

If a tribe has made a request in writing to Caltrans to be consulted under AB 52, the administrative procedures (Pub. Resources Code § 21080.3.1, subd. (d)) state that the lead agency is responsible to formally notify the tribe *within 14 days* of determining that an application for a project is complete, or of a decision by a public agency to undertake a project. For Caltrans, this notification requirement is triggered by the *Begin Environmental* milestone, upon the initiation of environmental review.

In some instances, the circumstances or scope of a project may change in a manner that would elevate the project's environmental documentation requirements to above a CE. Notifications to Native American tribes should occur within 14 days of determining that the environmental documentation for a project will be elevated to above a CE.

Under AB 52 (PRC § 21080.3.1, subd. (d)), tribal governments have 30 days to respond to an agency in writing to confirm receipt of the agency's notification and to confirm their desire to consult about a project. The lead agency must begin the consultation process within 30 days of receiving a California Native American tribe's request for consultation *and* prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report. (Pub. Resources Code § 21080.3.1, subds. (b) & (e)).

Consultation under AB 52 is considered concluded when the parties agree to measures to mitigate or avoid a significant effect to a tribal cultural resource; *or* a party acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached pursuant to PRC § 21080.3.2, subd. (b).

3.4.3 Factors Affecting Consultation Roles

The nature of project funding, permitting, land ownership, and the type of environmental documentation required for a given project are relevant to tribal consultation responsibilities under state and federal historic preservation laws, as they determine which parties have jurisdiction. It is important to identify these jurisdictional factors early so that consultation roles are clearly understood by all parties.

3.4.3.1 Consultation Roles for Local Assistance Projects

For locally sponsored projects that receive federal funding (known as [Local Assistance](#) projects), Caltrans serves in a federal agency oversight role (pursuant to the NEPA Assignment 326 and 327 MOUs) and is responsible for ensuring the project sponsor (i.e., local agency) complies with all federal requirements, including Section 106 consultation with tribes. In such cases, the local agency/project sponsor is responsible for conducting the Section 106 consultations with tribal consulting parties for its projects. As Caltrans serves in the federal oversight role, Caltrans' Local Assistance PQS may participate in the consultations, alongside the local agency, for Local Assistance projects and may provide direction and guidance to local agencies and tribes on federal historic preservation compliance requirements, as needed or requested. Furthermore, as the project sponsor and lead agency under CEQA, the local agency is responsible for consultation with tribes under AB 52 ([PRC 21080.3.1](#)). Districts are advised to assist and support local agencies in establishing positive and effective working relationships with local tribal partners and to seek opportunities to include local agency representatives in tribal engagement efforts to foster tribal diplomacy and collaboration at the local agency level. See also, Section 3.6 below regarding tribal government diplomacy and early coordination.

3.4.3.2 Section 106 versus Government-to-Government Consultation Roles

For all federal-aid transportation projects, the FHWA (and the Army Corps of Engineers, when applicable) retain their own government-to-government consultation responsibilities with Indian tribes outside the project-specific Section 106 process. As stipulated in the Section 106 PA, nothing shall limit the ability of tribes to consult directly with any of the other parties to the PA (FHWA, Army Corps of Engineers, ACHP, SHPO) when they have a concern about an undertaking or about historic properties that may be affected by an undertaking. If a tribal request for government-to-government consultation with FHWA (or the Army Corps of Engineers, if applicable) comes to Caltrans, Caltrans is responsible for informing FHWA (or applicable Army Corps of Engineers District) immediately. Caltrans may participate in such federal government-to-government consultations, if requested; otherwise, Caltrans remains responsible for carrying out the remainder of responsibilities under the Section 106 PA that are not the subject of federal government-to-government consultations.

Discussions between Caltrans and tribal governments that occur outside the context of a programmed, funded project, may not be defined as consultation under state or federal historic preservation laws; however, as described elsewhere in this chapter, discussions between Caltrans and California Native American Tribes outside the confines of a specific project scenario are strongly encouraged and may be characterized as early coordination and/or government-to-government diplomacy between Caltrans and tribal governments. See Section 3.6 for more discussion regarding Caltrans' larger tribal government diplomatic responsibilities and early coordination with tribes on the protection of tribal heritage.

3.4.4 Identifying Potential Tribal Consulting Parties

Although federally recognized tribes hold a special consultative role under federal historic preservation law, Caltrans consults with all [California Native American Tribes](#) regardless of their federal recognition status. Caltrans relies on the list of California Native American Tribes, maintained by the California NAHC, to identify federally- and non-federally recognized, culturally affiliated tribal governments with whom Caltrans must consult concerning potential effects to tribal heritage resources.

Upon the initiation of the Begin Environmental milestone, Caltrans submits requests to the NAHC to obtain current tribal government contact information for new transportation projects, as well as for older projects for which renewed tribal consultation efforts may be appropriate due to the passage of time. A search of the SLF database that is maintained and administered

by the NAHC is typically requested along with a current tribal government contact list. Requests for regional contact lists and SLF searches may be submitted to the NAHC using the [Sacred Lands File & Native American Contacts List Request Form](#) and following the directions on their website. A response from the NAHC typically includes tribal government contacts for the county(ies) in which a project is located, as well as the results of the SLF database search. A positive result from a SLF search is not necessarily an indicator that a historic property/historical resource is located within a given project area. As the NAHC does not disclose the specific locations of tribal Sacred Lands, any positive findings from SLF search require direct consultation with the designated culturally affiliated tribes in order to better understand the nature of the sacred resource relative to a proposed project's area of potential effects or project area limits.

In some instances, discrepancies may be noted between the list provided by the NAHC and the tribal government contact lists maintained by Caltrans as part of their government-to-government relations with tribes. If such discrepancies are identified, the NAHC should be notified to clarify the accuracy of the contact information, if possible, or contact the NACS Branch for assistance.

Using the tribal contact information obtained from the NAHC, the Caltrans Project Archaeologist and/or DNAC are responsible for inviting culturally affiliated tribes to participate as consulting parties in the cultural resources investigation process whenever tribes express a concern about an undertaking or about historic properties that may be affected by an undertaking. As the Section 106 PA and the 5024 MOU both stipulate that Caltrans must consult with the representatives that are designated or identified by the tribal government, it is important that Caltrans staff engage with the tribal government leadership to obtain a proper written designation of the point(s) of contact who are authorized to represent the tribe during project level cultural resources consultations with Caltrans.

Tribal organizations or persons who are *not* on the NAHC's tribal contact list may participate in the environmental review process as members of the public and may provide input and comments as part of the public review and comment periods associated with the project. As indicated in Stipulation V of the 106 PA, and in the Section 106 regulations, certain individuals and organizations *with a demonstrated interest* in the undertaking may also participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties. In such cases, in consultation with the SHPO and the FHWA, Caltrans may identify other consulting

parties, not listed on the NAHC's tribal contact list if they have a demonstrated interest in a project or a cultural resource.

3.4.5 Communicating Project Information to Tribes

Initial project-level outreach to potential tribal consulting parties should clearly and concisely convey all pertinent information about the proposed transportation project, including location/mapping, scope/description, schedule information, and other relevant details. Recognizing the time and resource limitations that many tribes and tribal organizations may experience, project-level communications should enable tribes to quickly assess potential cultural resources concerns for the project area.

It is recommended, particularly during initial project outreach efforts, that multiple modes of communication be employed, including letters, emails, and phone calls; however, it is important that Districts work directly with tribal consulting parties to determine their preferred modes of communication for project-specific consultations and coordination during the cultural studies process. Multiple attempts may be necessary to contact tribes and establish consulting party status during initial project outreach. The importance of documenting these and other communications throughout the project delivery process is detailed in Section 3.4.12, below.

3.4.6 Consultation on the Identification and Treatment of Tribal Historic Properties

Culturally affiliated Native American Tribes have a legal right under federal and state historic preservation laws to participate as consulting parties if they attach religious or cultural significance to sites and resources that may be affected by a transportation project. In this context, Caltrans PQS are responsible for seeking, discussing, and considering the views of Native American tribes, and seeking agreement with them when carrying out Caltrans' historic preservation compliance responsibilities. As consulting parties, tribal governments have the opportunity to convey their interests and concerns to Caltrans to help inform Caltrans' decision-making and to promote a course of action they would like to see taken. Consultation with tribes is the responsibility of Caltrans PQS and may not be delegated to consultants.

Caltrans' consultation efforts must provide Native American tribes a reasonable opportunity to identify their concerns about important resources, advise on the identification and evaluation of cultural resources (including those of traditional religious and cultural importance), articulate their views on the project's effects to such resources, and participate in the resolution of

adverse effects. Caltrans' policy is to act in a manner that facilitates effective and timely consultation with culturally affiliated tribes.

3.4.7 Integration of Tribal Traditional Knowledge and Expertise

In addition to their role as formal consulting parties, culturally affiliated Native American tribes may also participate in or contribute to Caltrans' cultural resources investigations to assist Caltrans in fulfilling its obligations under historic preservation law. Caltrans recognizes the unique knowledge and expertise that Native American tribes possess about their ancestral lands and encourages the integration of TTK, along with archaeological and archival sources of information, into its cultural resources studies that involve tribal heritage sites and resources. TTK is defined in the California Health and Safety Code [8012\(p\)](#) as, "knowledge systems embedded and often safeguarded in the traditional culture of California Indian tribes and lineal descendants, including, but not limited to, knowledge about ancestral territories, cultural affiliation, traditional cultural properties and landscapes, culturescapes, traditional ceremonial and funerary practices, lifeways, customs and traditions, climate, material culture, and subsistence. Tribal traditional knowledge is expert opinion."

Research conducted by the National Cooperative Highway Research Program titled, [Integrating Tribal Expertise into Processes to Identify, Evaluate, and Record Cultural Resources](#), provides insight on how unique tribal perspectives and expertise may inform the requirements and intent of the Section 106 process for surface transportation projects. According to the study, key elements of the successful integration of TTK are rooted in the development of strong government-to-government trust relationships and collaborative, meaningful approaches that create capacity for tribal participation.

All federal and state guidance, policies, and directives regarding consultation and diplomatic engagement with tribes, as referenced in this chapter, indicate that departments and agencies have a responsibility to create capacity for tribal participation in their programs. Under the Governor's [Statement of Administration Policy on Native American Ancestral Lands](#), every State agency, department, board and commission subject to the governor's executive control is encouraged to seek opportunities to support California tribes' co-management and access to natural lands that are within a California tribe's ancestral land and under the ownership of control of the state of California, as well as to work cooperatively with California tribes that are interested in acquiring natural lands in excess of State needs.

3.4.7.1 Participation of Tribal Experts

To ensure that TTK is properly integrated into its cultural studies and/or to accommodate tribal cultural/natural stewardship concerns, Caltrans may seek specialized expert services from a tribe's designated Tribal Expert, above and beyond the exchanges of consultation, in the same manner it may procure specialized expert opinions or services from other sources.

A Tribal Expert is designated by the consulting tribal government leadership to contribute tribal cultural expertise, including tribal stewardship activities, on behalf of the tribe, to assist Caltrans' investigations of tribal heritage resources or for tribal stewardship/oversight of Caltrans activities in areas identified as having cultural or natural sensitivity to the tribal community. Decisions regarding the participation of a Tribal Expert are an outcome of the formal consultation process that occurs between the tribal government and Caltrans during federal and state historic preservation compliance processes or during government-to-government consultations with Caltrans Districts or Headquarters. In accordance with Caltrans' applicable fiscal and acquisition authorities, the department provides compensation to Tribal Experts in the same manner it would procure expert opinions or services from other specialized sources. It is important to acknowledge that this arrangement is born out of a diplomatic decision between two government entities and does not represent a for-profit, client/customer business relationship. Exhibit 3.4 provides additional guidance on compensation methods for Tribal Expertise.

As tribal expertise is unique to the culturally affiliated tribes, Caltrans relies on tribal government leaders to appoint the Tribal Expert(s) who may best represent the cultural heritage and stewardship interests of the local/regional tribal community. Only those representatives who have been designated by the leadership of a consulting California Native American Tribe will be able participate as a Tribal Expert in Caltrans' project specific cultural resources studies or in tribal stewardship/oversight activities. Caltrans PQS staff should seek guidance from tribal government leadership as to the degree of decision-making authority a designated Tribal Expert may have to act or speak on behalf of the tribe during cultural studies. Caltrans views the designated Tribal Expert as a tribe's trusted envoy who gains firsthand exposure to cultural studies and other activities to ensure the tribe's cultural heritage interests are being properly considered in an ethical and respectful manner and who can translate their observations directly to their tribal leadership and tribal community. The designation of a Tribal Expert is rooted in Caltrans' diplomacy and consultation with culturally affiliated tribes as it relates to effects to tribal cultural/natural heritage from transportation developments.

3.4.7.2 Activities Conducted by Tribal Experts

The kinds of activities that may be conducted by a Tribal Expert, above and beyond consultation, are variable depending on the nature of the resources and the scope of a project and its effects. Such activities may include, but are not limited to:

- Participation in cultural resources fieldwork (e.g., pedestrian archaeological/cultural surveys, archaeological excavations, cultural monitoring);
- Participation in archaeological laboratory processing/preparations or specialized analyses;
- Research activities (such as conferring with tribal elders, documenting oral history/ethnohistory, or similar data gathering efforts); and/or
- Written contributions applying TTK perspectives to the identification and evaluation of tribal heritage resources.
- Participating in tribal land stewardship/monitoring during maintenance or construction activities in areas of tribal cultural/environmental sensitivity.

Exhibit 3.3 (Consultation and Tribal Expertise) provides more details on the various activities conducted by Tribal Experts and the distinctions between consultation and tribal expertise.

3.4.7.3 Consultation on Tribal Monitoring

Monitoring by designated tribal representatives is the most common form of Tribal Expert participation during Caltrans' cultural resources studies and/or during other project activities. As described above, decisions regarding the participation of a Tribal Expert, including Tribal Monitoring, are an outcome of the formal consultation process that occurs between a tribal government and Caltrans during federal and state historic preservation compliance processes and/or during government-to-government consultations between a tribe and Caltrans. Tribal Monitoring is appropriate when there is some degree of cultural or environmental sensitivity related to a project activity that is of concern to a California Native American tribe that is consulting with Caltrans. It is important to note that, tribal cultural concerns include landscapes and natural/biological resources, as well as cultural sites; therefore, tribal views about cultural sensitivity and the need for monitoring may not conform to traditional historic preservation-based assessments of cultural or archaeological sensitivity.

Decisions to monitor should take into account the unique knowledge and expertise that tribes possess about their ancestral lands and the need to consider TTK, along with archaeological and archival sources of information, when determining cultural sensitivity. As defined in the regulations, consultation is the process of seeking, discussing, and considering the views of

other participants, and where feasible, seeking agreement with them. When consulting about decisions to monitor, Caltrans' policy is to act in a manner that facilitates effective tribal participation in the historic preservation compliance process and to ensure that tribal expertise is appropriately considered when carrying out transportation project activities. Concepts of tribal stewardship and oversight of ancestral lands may be relevant to the need for retaining tribal monitors for project and/or routine maintenance activities.

3.4.8 Consultation on Avoidance and Minimization

Caltrans' cultural resources policy is to consult and collaborate with Native American tribes to identify culturally important tribal heritage resources and to exercise all practical means to avoid and/or minimize the effects of transportation projects on such resources to the extent feasible.

During the environmental review process, project design efforts are at an early stage of development whereby there is flexibility for the consideration of project modifications, if necessary, to help avoid important tribal resources and/or areas of cultural sensitivity. Consultation with tribes in coordination with design and/or construction engineers regarding strategies for avoidance and protection of resources should begin as early as feasible in the environmental review process to promote the most effective historic preservation and project delivery outcomes.

While design modifications may be successfully implemented during project delivery to avoid or minimize effects to cultural resources, it is worth noting that merely avoiding a resource is not necessarily the same as preservation. The successful avoidance and intentional preservation of important tribal resources are best addressed through early diplomatic engagement and coordination among Caltrans, local/regional agencies, and tribal governments in the context of land use decisions and transportation planning processes. See Section 3.6 for additional discussion on early coordination, planning, and developing strategic partnerships around the protection of tribal cultural heritage.

It is Caltrans' policy to avoid, or minimize, adverse effects to other resources that may have cultural value to the tribal community but may not meet thresholds for significance under historic preservation laws, including native plant gathering locations or other areas of tribal cultural and natural interest. While concerns about these resources may be discussed in the context of transportation project delivery, engagement about areas of tribal cultural interest or sensitivity may also occur outside of project delivery scenarios and can be coordinated in the

context of Caltrans' larger tribal government diplomatic efforts and integrated into Caltrans' planning, operations, and maintenance processes. See Section 3.6 for additional discussion on tribal government diplomacy and early coordination.

3.4.9 Consultation on Effect Determinations and the Resolution of Adverse Effects

Although it is Caltrans' policy to exercise all practical means to avoid and/or minimize the effects of transportation projects on cultural sites and places, there are circumstances in which the avoidance of tribal heritage resources may not be feasible. Multiple environmental considerations must be weighed and balanced with a project's need and purpose and public safety priorities. In such cases, close communication and consultation with the culturally affiliated tribes, including transparency around project decisions that result in effects to tribal heritage sites, is essential for effective project delivery.

In resolving adverse effects to important resources, Caltrans acts in good faith to ensure that mitigation outcomes are meaningful to the affected tribal communities and provide an appropriate degree of public education/enrichment with respect to California's indigenous culture and heritage. Each project scenario is unique, and there are a multitude of possibilities for achieving effective and meaningful mitigation through consultation and collaboration. The ACHP's [Section 106 Archaeology Guidance](#) (2009) provides valuable information and helpful considerations for consulting on the resolution of adverse effects, as well as for determining appropriate scope and level of effort. The CSO and the NACS Branch are available to advise and assist consulting tribes and districts in discussions about resolving adverse effects, if requested by either party. Innovation and collaborative partnerships are encouraged to maximize mitigation benefits for the broader public interest.

3.4.10 Discovery and Treatment of Human Remains and Associated Funerary Objects

During its project, operations, and maintenance activities, Caltrans seeks to avoid disturbing human remains to the maximum extent possible; however, as Native American burials are often unmarked, ancestral human remains may be inadvertently uncovered or disturbed during earth moving activities or may be exposed by natural erosion.

In the event that suspected human remains, including isolated, disarticulated bones or fragments, are discovered during any Caltrans activity, whether it is during maintenance, construction, or an archaeological investigation, Caltrans and/or its agents must act promptly,

sensitively, and respectfully in compliance with the processes and provisions outlined in all applicable state or federal laws. All burials, reburials, and sacred, religious, or ceremonial sites should be recorded on the Sacred Lands Inventory Form, which is submitted to the NAHC. The template is available online on the [NAHC's website](#).

As outlined in Chapter 2 (2.7.12.3 Native American Burials), the provisions of California Health and Safety Code (H&SC) [7050.5](#) and PRC [5097.98](#), govern the actions that Caltrans must take when burials are identified in a project area or when they are discovered inadvertently. Land ownership is an important factor that may affect consultation and procedures regarding the disposition of remains.

3.4.10.1 Discoveries on Public or Private Lands

If suspected human remains are encountered during any level of project activity, under PRC 5097.98 the first course of action is to contact the County Coroner's office pursuant to the H&SC 7050.5. If the remains are confirmed or suspected to be of Native American ancestral origin, the Coroner is responsible for notifying the NAHC of the discovery, and the NAHC is responsible for designating the tribe(s) who are the MLDs for the remains. Caltrans' compliance obligations under the provisions of PRC 5097.98 are to consult with the designated MLD(s) regarding the respectful treatment and disposition of the remains and associated items. To ensure proper and timely notifications to the NAHC, it is recommended that Caltrans PQS staff should also notify the NAHC of any discovery.

3.4.10.2 Discoveries on Federal and Tribal Lands

If suspected human remains are encountered, Caltrans follows the H&S C 7050.5 in contacting the coroner as the remains are found in a location other than a dedicated cemetery. The coroner will contact the NAHC, and the NAHC will designate the MLD in consultation with the appropriate entity for consultation regarding the human remains and associated funerary objects (the federal term for PRC 5097.98's associated items). On federal and tribal lands, the federal or tribal government consults pursuant to the federal Native American Graves Protection and Repatriation Act (NAGPRA) regulations (43CFRPart10) on the treatment and disposition of human remains and associated funerary objects when encountered during the course of archaeological excavations or any ground disturbing activities. The regulations also outline a process for the federal or tribal government to develop, prior to discovery and in consultation with the appropriate tribe(s), an agreement for the treatment and disposition of human remains and associated funerary objects, particularly if human remains could be

anticipated. Without this agreement, the activity which encountered human remains is stopped for 30 days until the appropriate tribe(s) are consulted and an agreement is developed.

Although not addressed under PRC 5097.98, the same process under NAGPRA outlined above is followed for the discovery of sacred objects and objects of cultural patrimony, as defined in NAGPRA regulations.

3.4.11 Collection and Curation of Cultural Materials

Archaeological artifacts and remains refer to the intact or fragmentary artifacts of human manufacture; the by-products, waste products, or debris resulting from manufacture or use of cultural or natural materials; and/or organic materials such as plant and animal remains. Caltrans is responsible for the appropriate treatment and disposition of archaeological remains that may be unearthed or collected as part of Caltrans' cultural resources investigations or other project activities. Both federal and state historic preservation regulations govern Caltrans' responsibilities and actions regarding the collection and treatment of archaeological remains. Caltrans does not collect or curate archaeological human remains or associated funerary items; see Section 3.4.10 regarding the proper treatment and disposition of human remains and associated items.

Under [36 CFR Part 79](#), the National Park Service has established definitions, standards, procedures and guidelines to be followed by Federal agencies to preserve collections of prehistoric and historic material remains, and associated records, recovered under the authority of the Antiquities Act (16 U.S.C. 431-433), the Reservoir Salvage Act (16 U.S.C. 469-469c), section 110 of the NHPA (16 U.S.C. 470h-2) or the Archaeological Resources Protection Act (16 U.S.C. 470aa-mm). They establish: (1) Procedures and guidelines to manage and preserve collections; (2) Terms and conditions for Federal agencies to incorporate into contracts, memoranda, agreements or other written instruments with repositories for curatorial services; (3) Standards to determine when a repository has the capability to provide long-term curatorial services; and (4) Guidelines for providing loans, access to, or other use of collections. The regulations also contain three appendices that provide additional guidance for use by Federal Agency Officials, including examples of agreement documents and memoranda of understanding for curatorial services, donations of materials by non-federal entities, and short-term loans of collections, which may be tailored based on nature/content of the collection or the needs of the federal agency.

The California State Historical Resources Commission (SHRC) pursuant to their authority in the Public Resources Code, [Section 5020.5\(b\)](#) has developed [Guidelines for the Curation of Archaeological Collections](#) (1993). These guidelines are written to supplement the "Curation of Federally-Owned and Administered Archeological Collections" (36 CFR Part 79) and are not intended to supersede those regulations as required by federal laws and regulations. The guidelines pertain to collections that are excavated or removed from prehistoric or historic archeological sites on non-federal public and private land in the State of California. The SHRC Guidelines assist private and public curatorial repositories in preserving archeological collections of prehistoric and historic cultural materials and associated records recovered under the authority of existing State environmental laws, codes, and regulations or by the State of California. In addition, they assist agency officials, organizations, and individuals in the selection of an appropriate repository. The stated purpose of SHRC's Guidelines is to ensure that archeological collections and their associated records are preserved and managed adequately so that future generations might use them to: 1. Enhance cultural traditions; 2. Conduct scientific research; and 3. Provide educational and heritage appreciation programs.

Caltrans' policy is to ensure that material culture derived from archaeological excavations are properly treated in accordance with the federal and state curation regulations and guidance, as applicable. As with all projects, agency jurisdiction and land ownership are important factors to account for during consultations about the treatment and disposition of archaeological materials. The federal regulations under 36 CFR Part 79 would be applicable to collections obtained from federal land under the Archaeological Resources Protection Act (ARPA). The SHRC's guidelines would apply to all other collections. Caltrans consults with and considers the views of culturally affiliated Native American tribes regarding curation plans, as outlined in 36 CFR 800.

Tribal sentiments toward the collection, curation, study, and/or display of archaeological materials is variable throughout the state, and it is important for Caltrans PQS to have open discussions with tribal consulting parties regarding their views on the treatment of tribal material culture. The ACHP's Archaeology Guidance provides useful considerations for both tribes and agency cultural resources professionals regarding consultation in the context of data recovery, collection, and curation of archaeological materials. It is always preferable if cultural sites can be avoided altogether; however, according to ACHP's guidance, if a site cannot be avoided and preserved in place, and the federal agency determines it is eligible for the important information it contains and should be retrieved, some agreed-upon level of data recovery, analysis, curation, and reporting is appropriate in order to preserve that important

information for the benefit of future generations. Chapter 5, Section 5.3.5.5 provides an overview on curation agreements.

3.4.12 Documentation of Consultation and Level of Effort

The Caltrans PQS is responsible for making a reasonable and good faith effort to identify and consult with any affected Indian tribes to identify properties to which the tribes may attach religious and cultural significance that may be located within a project's area of potential effects or project area limits. In gauging an appropriate level of effort, a number of factors may need to be considered, including past planning, research and studies; the magnitude and nature of the undertaking; the degree of federal involvement; the nature and extent of potential effects to historic properties; and the likely nature and location of historic properties.

Thorough documentation of project consultation histories is an important and fundamental element of Caltrans' cultural resources investigations in order to demonstrate that consultation efforts have been carried out by Caltrans in good faith, in a manner respectful of tribal sovereignty, and in compliance with applicable state and federal historic preservation laws.

Cultural resources technical reports and environmental compliance documents must include, as a report attachment, a detailed log of key communications with tribal consulting parties concerning the cultural resources investigation, including those involving decisions regarding the identification, evaluation, and treatment of historic properties. Consultation logs should minimally capture the names, dates, roles/titles, communication methods, and subjects discussed and any resolutions or decisions (See Exhibit 3.5 – Sample Consultation Log).

In addition to a consultation log, a narrative summary of the project consultation history and outcomes must also be included in cultural resources technical reports and compliance documents to provide a concise chronological accounting of the consultation process and conclusions. Such summaries should take care to include any comments received from Native American tribes as well as how Caltrans considered such comments in its decision-making.

Efforts to consult with Native American tribes should reflect the scope of the project and the potential to effect resources of concern to the tribal community. Minimal communications may be adequate for smaller projects in areas with low cultural resources sensitivity. Complex projects involving higher levels of cultural sensitivity may involve longer, more intensive and extensive consultation efforts. Regardless of complexity, it must be demonstrated that relevant

historic preservation concerns or questions raised by tribes were meaningfully addressed before consultation may be considered complete or in line with project milestones.

3.4.13 Confidentiality and Data Sharing Responsibilities

Federal and state laws provide for the confidentiality and protection from public disclosure of any information related to the locations of Native American cultural places, including graves, cemeteries, sacred places, archaeological sites, and other traditional use areas.

[Section 304 of the NHPA](#) requires that federal agencies withhold from public disclosure information on the location, character, or ownership of a historic property if that disclosure would cause a significant invasion of privacy, risk harm to the resource, or would impede the use of a traditional religious site by practitioners. When that information is developed to comply with Sections 106 or 110(f) of the NHPA, the Secretary of the Interior must consult with the ACHP concerning disclosure and who may or may not have access to that information.

[California Government Code 6254\(r\) and 6254.10](#) exempts state and local agencies from publicly disclosing any records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in Sections 5097.9 and 5097.993 of the PRC maintained by, or in the possession of, the NAHC, another state agency, or a local agency. These include any records obtained during consultation with Native American tribes.

The locations of sacred, ceremonial, and/or other tribal traditional use areas are often safeguarded by tribes and may only be known to traditional cultural leaders and select members of a tribe in order to protect such locations from public disclosure and/or potential harm. It is not uncommon for tribes to be reluctant to share sensitive cultural information with government agencies during consultation. Through careful consultation with tribal partners, Districts are advised to develop innovative and flexible approaches to identify sensitive areas to be avoided, without the requirement for full location disclosure by tribes. In coordination with tribal representatives, Caltrans PQS are advised to work with design engineers on approaches to successfully avoid culturally sensitive areas. When avoidance is not feasible, all staff, including consultants, are responsible for protecting the confidentiality of any culturally sensitive information shared by tribes, in accordance with federal and state laws, including the exact locations of burials and other sacred, ceremonial or religious places.

3.4.13.1 Caltrans Data Sources

Caltrans hosts both public-facing and confidential databases and websites that provide both environmental and cultural information. These data may be used by Caltrans PQS for project level cultural resources/environmental studies, as well as for advising our planning staff with early planning and scoping efforts.

There are two sources of data that are publicly available. The [DEA GIS Library](#) contains GIS-based environmental data including, biological, water, air/noise, etc., as well as non-confidential cultural layers. The [Roadmap to Research](#) website is also available publicly and includes both a [Research Tool](#), as well as an [Interactive Map Tool](#) that can be helpful for a variety of research, planning, and project scoping efforts. It is also intended to help connect tribal cultural leaders, traditional practitioners, and native students to original/primary sources of California Native American historical and ethnographic research.

Caltrans also hosts confidential information, available only to Caltrans PQS. The Caltrans Cultural Resources Database (CCRD) is Caltrans' internal inventory of the known cultural resources that have been identified within the rights of way of the state highway system, as well as all associated documentation. Project specific information from this confidential database may be shared with culturally affiliated consulting tribes on a project by project basis. Additionally, the majority of the 12 Caltrans districts have geoarchaeological data, prehistoric site sensitivity modeling, and buried site sensitivity modeling which can be valuable project scoping and planning tools. The sensitivity modeling relies on certain assumptions and requires some degree of professional expertise, analysis, and interpretation. It does not provide for a definitive presence-absence determination but can be a valuable scoping tool when used in conjunction with other corroborating information.

3.4.13.2 Data Sharing Considerations

In general, Caltrans' position on data sharing is to support consultation and promote planning, cooperation, and overall efficiency. Most of the cultural resources data Caltrans maintains involves sensitive and confidential information, for which Caltrans has data stewardship responsibilities.

Caltrans supports sharing of confidential data with culturally affiliated California Native American tribes on a project by project basis as part of the consultation process during cultural resources studies to promote communication and successful project outcomes. Each District

determines the appropriate methods and forms of data sharing, whether in hard copy or electronically. The OHP's [Tribal Access Policy](#) considers tribes as allowed users of confidential cultural data in the California Historical Resources Information System and offers access to tribes at no cost.

Requests for the broad sharing of confidential data for general use unrelated to a specific Caltrans project require consideration on a case-by-case basis and may be subject to certain conditions, depending on the nature and scope of the request and/or staff time and availability to respond to the request. It may be necessary for the requesting party to submit an explanation and justification for the intended use of the data, and it may be appropriate to enter into a more formal data use agreement to ensure the protection of confidential information.

3.4.14 Emergency Procedures

If historic properties have been or are likely to be affected by an emergency incident, then consultation with tribes that attach religious or cultural significance to the affected properties should be initiated as soon as possible. The District PQS is responsible for notifying the SHPO and other consulting parties that Caltrans intends to use the emergency provisions of the 106 PA, Stipulation XVI, or the 5024 MOU, Stipulation XV. This concurrent notification is provided to CSO and any tribes, as applicable. Notification to the SHPO and CSO should include the tribe's views and concerns, as feasible.

Detailed instructions about the notification and required information for emergency procedures is found in Chapter 2, Sections 2.5.3.2 and 2.11.2.2. Caltrans' emergency procedures under the 106 PA and 5024 MOU are detailed in SER Volume 2, Chapter 2, Sections 2.5.3 and 2.11.2.

3.5 Tribal Coordination on Maintenance and Encroachment Activities

3.5.1 Maintenance and Environmental Communications

It is best practice for Districts to establish consistent communications between Cultural/Environmental staff and Maintenance staff, whether through regular meetings, trainings, and/or preparation of written procedures, to support routine Maintenance activities, while also addressing the cultural and environmental concerns expressed by local tribal government partners. PQS are available to assist Maintenance personnel in identifying areas of

tribal cultural sensitivity for which routine activities may need to be modified help protect resources. It is important that Districts take measures to engage with and understand the local or regional concerns that tribes may have about Caltrans' daily/routine maintenance activities/programs and their potential to effect tribal heritage resources, cultural landscapes, or other areas of tribal community concern.

Districts are advised to develop and maintain relevant data and/or mapping of Environmentally Sensitive Areas (ESAs) and other areas of special concern, along with instructions and key environmental contacts, to assist maintenance forces. The inclusion of ESA information into the IMMS (Integrated Maintenance Management System) is one of the most effective means by which to communicate data about environmentally sensitive areas to Maintenance personnel. Information about ESAs can also be placed in the Annual Vegetation Control Plan, as identified in the Maintenance Manual, Chapter C2 – Vegetation Control, which would provide for the avoidance of sensitive resources without revealing confidential details about the nature of the resource (e.g. archaeological sites, gathering areas, etc.). The information in the IMMS and the Vegetation Control Plan could also be shared with culturally affiliated tribes. The CSO is available to assist and advise districts on Maintenance and Cultural/Environmental coordination efforts.

3.5.2 Coordination of Encroachment Permitting for Native Plant Gathering

Each Caltrans District prepares an Annual Vegetation Control Plan, which undergoes an annual review process. There is the capacity within this Plan to coordinate with tribes to identify native plant gathering locations within and adjacent to the Caltrans right-of-way and a to establish a policy to prohibit herbicides in these areas. Caltrans Maintenance, where possible, may develop trimming plans that assist in stimulating favorable plant growth. Each District has Landscape Specialists who can work with DNACs and local Native American tribes to discuss gathering procedures and issue permits to support safety and accessibility.

Native Americans who are gathering plants for religious purposes or for traditional arts, crafts, and medicines may be issued either a Consent Letter or an encroachment permit, as applicable. The appropriate Maintenance Area Superintendent Office issues a Consent Letter if only one day for gathering is requested. When gathering for more than one day is requested, the District permit office may require an encroachment permit. Group participation is limited to a maximum of 20 people at a time. For additional information and requirements, see the [Encroachment Permits Manual](#) section 508.11.

3.5.3 Coordination Regarding Roadkill Salvage

Some tribes are interested in roadkill salvage of certain animal species for the creation of traditional cultural and ceremonial items. Caltrans District staff are advised to work with their district Maintenance Area Supervisor(s), along with interested culturally affiliated tribes, to establish procedures for the salvage of certain species of roadkill from Caltrans right-of-way for traditional and ceremonial use. The Maintenance Manual (Section D1:08 Disposal of Animal Carcasses) does not address distribution of animal carcasses to tribes but does state that “In the case of wild, feral, protected, or endangered animals, disposal shall be accomplished in accordance with applicable provisions of the Fish and Game Code.” It also indicates that disposal technologies may include “donation” (Section D1.08.2).

3.5.3 Encroachment Permitting and Access to Sacred Sites/Tribal Cultural Events

Pursuant to [PRC 5097.9](#) and where feasible and appropriate, Caltrans ensures Native American tribal communities have access to places of traditional, spiritual or social importance (such as prayer sites, ceremonial sites, and shrines), areas important in folklore and legend, or areas attributed with special or unique powers of sacredness, including Tribal Cultural Resources (PRC [21074](#)) that are located on Caltrans-owned land or are traversed by a State highway.

Districts are encouraged to engage with local culturally affiliated tribal governments regarding tribal sacred sites for which access to or from the state highway rights-of-way may be needed, as safety is a key priority when conducting any activities withing the state highway system. Encroachment permits may be necessary for access if a special event or activity is not consistent with the primary use of the state highway system or requires lane closures or the use of traffic control measures for a portion of the highway. More information is available in the Encroachment Permits Manual Section [508.14](#).

PRC 5097.9 should also be considered in the context of projects when an activity of a project would inhibit access to such areas. Close consultation with Native American tribes is necessary to determine potential effects to these locations and to ensure that a project’s proximity would not have an unintended consequence to the qualities of resource that make it important.

3.6 Tribal Government Diplomacy and Early Coordination

3.6.1 Tribal Government Diplomatic Responsibilities

Caltrans' DP-19 establishes the roles and responsibilities of all the department's leaders, managers, and staff for developing and maintaining the broader government-to-government diplomatic relationship with Native American tribes and their communities. The provisions of DP-19 are applicable to everyone who works for Caltrans in any capacity, including contractors, consultants and subcontractors. According to DP-19, Caltrans acts in a knowledgeable, sensitive, and respectful manner when engaging in activities or developing policies that affect Native American tribal rights or trust resources, including:

- Acknowledging tribes as unique and separate governments within the United States;
- Ensuring that Caltrans programs and activities avoid or minimize adverse impacts to cultural and other resources;
- Recognizing and respecting important California Native American rights, sites, traditions and practices; and
- Consulting with Tribal Governments prior to making decisions, taking actions or implementing programs that may impact tribal communities.

Over and above Caltrans' own policy for working with Native American communities, a number of higher-level state directives also underscore the importance of California state government agencies establishing and maintaining cooperative diplomatic relationships with tribal governments. Governor's EO B-10-11 directs every state agency under executive control to encourage communication and consultation with California Indian Tribes and further directs state agencies and departments to 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.

CalSTA's [Tribal Consultation Policy](#) further emphasizes the importance of respect for tribal government sovereignty and identifies five guiding principles that govern the process with which CalSTA and its constituent agencies must engage in consultation with California Native American Tribes. As a constituent agency of CalSTA, Caltrans carries out its tribal engagement and consultation efforts in a manner that is consistent with CalSTA's policy and guiding principles.

The federal government has an important and unique legal relationship with Indian tribes that is rooted in the United States Constitution, treaties, statutes, and court decisions. As Caltrans

serves in a federal agency leadership role under NEPA Assignment and the 106 PA, Caltrans leaders and staff are expected to conduct consultation with Native American tribes in a manner that recognizes the federal government-to-government relationship and is respectful of tribal sovereignty.

The diplomatic responsibilities of both state and federal agencies for establishing and maintaining government-to-government relationships with Native American tribes are detailed in a number of executive orders, memoranda, and policies, as described in Exhibit 3.1.

3.6.2 Early Tribal Engagement and Coordination

Native American cultural preservation values generally emphasize the importance of ‘sense of place’ and maintain a preference for cultural sites and landscapes to remain intact and undisturbed. As transportation is largely a response to local and regional land use planning decisions that have the potential to effect natural and/or cultural resources and landscapes of value to tribal communities, early coordination among Caltrans’ Planning and Environmental divisions is imperative to the proper consideration and preservation of sensitive tribal resources. Considerations for the protection of cultural and natural resources should ideally be incorporated into early planning processes in coordination with tribes and local/regional planning entities.

Transportation Planners are encouraged to seek the expertise of Caltrans PQS for guidance on planning and cultural sensitivity scoping efforts, as well as on engagement with tribal cultural leaders, to ensure that tribal cultural/natural heritage considerations are integrated into planning decisions and vision documents. In addition to promoting community enrichment and fostering a sense of place and pride in local heritage, the integration of historic preservation and tribal conservation values into planning decisions has the potential to provide economic and environmental benefits for communities.³ These considerations may help incentivize planning decisions and present opportunities for innovative, collaborative, partnerships around the protection of the state’s rich tribal cultural heritage. The Governor’s *Statement of Administration Policy on Native American Ancestral Lands* may be particularly informative for partnerships that seek to support California tribes’ co-management and access to natural lands within a tribe’s ancestral territory that are under the ownership or control of the State of California. The [National Park Service](#) also provides information on how investments in historic

³ See [Measuring Economic Impacts of Historic Preservation: A Report to the Advisory Council on Historic Preservation](#) by Donoval R. Rypkena, Caroline Cheong and Randall F. Mason, PdD (November 2011).

preservation have the potential to be economically, aesthetically, socially and environmentally beneficial for communities.

In terms of early coordination, the Secretary of the Interior's [Standards and Guidelines](#) for Federal Agency Preservation Programs recommends that "consultation should include broad efforts to maintain ongoing communications with entities that are interested in or affected by the agency's activities and *should not be limited to the consideration of specific projects.*" The ACHP's 2019 guidance, [Early Coordination with Indian Tribes During Pre-Application Processes: A Handbook](#), focuses on improving the consideration and protection of tribal historic properties during early planning stages, prior to project approvals and funding, to ultimately foster a more efficient and effective Section 106 review process, as well as promote stronger diplomatic relationships with tribes and better historic preservation outcomes.

FHWA's PEL Initiative provides a framework for how Caltrans, tribes, and other agency partners and stakeholders can better engage during planning phases to most effectively incorporate tribal cultural preservation values into regional planning visions and transportation decisions. FHWA's [Tribal Transportation Planning Program](#) states that transportation planning enables communities to identify broad goals and strategies to address a variety of community needs, including current and future land use, economic, travel, safety, health, and social needs, among others. It is in this context that tribal historic preservation considerations could also be incorporated into planning strategies to address a number of local and regional community needs and values. Early planning efforts not only promote better historic preservation outcomes, but also provide for more efficient and effective project delivery processes and better overall diplomatic relationships.

As part of Caltrans' broader outreach and engagement efforts with California tribal governments, Caltrans' Headquarters CSO/NACS Branch administers the [Cultural Studies Subcommittee](#) to the NAAC that serves as forum in which Caltrans' headquarters, districts, and tribal cultural leaders from throughout the state engage directly on tribal historic preservation issues in transportation on an ongoing basis. The Cultural Studies Subcommittee meets quarterly to identify policy issues and establish best practices around the protection of tribal cultural heritage in transportation, as well as to foster partnerships and innovation around these topics. The Subcommittee reports to and provides input and policy recommendations to the NAAC and to Caltrans executive leadership. All California Native American Tribes are welcome to participate in the Headquarters Cultural Studies Subcommittee meetings and may

be added to the meeting invitation roster by contacting the [Native American Cultural Studies Branch](#).

3.6.3 Memoranda of Understanding/Communication Protocol Agreements

Caltrans Districts and California Native American Tribes are encouraged to engage and coordinate outside of project specific scenarios to develop mutually agreed upon protocols for communication and coordination to support planning and project delivery efforts while addressing tribal concerns. Memoranda of Understanding (MOUs) or Communication Protocol Agreements are effective tools for cultivating government to government relationships and facilitating efficient coordination between tribes and Caltrans. For example, Caltrans Districts may enter into agreements with tribes that specify how Caltrans will carry out its responsibilities with regard to tribal participation in the Section 106 process or other Department activities, such as routine maintenance or encroachment activities.

As the locations of tribal heritage sites and places are sensitive and/or confidential, early coordination and consultation among Caltrans and tribal government partners during planning and scoping phases is an important opportunity to promote the preservation and/or avoidance of important cultural heritage areas. District leaders and staff are encouraged to contact the Cultural Studies Office for guidance and assistance on early tribal government coordination and/or the development of MOUs or communication protocol agreements.