



# Statewide Local Development- Intergovernmental Review Program Guide

## **Tribal Development Projects**

**California Department of Transportation**

**July 2008**



# Acknowledgement

The Office of Community Planning extends its appreciation to all who contributed to the completion of this publication. It is a better product due to the help of:

LD-IGR Reviewers and Native American Liaisons from  
Districts 4, 6, 8, and 9  
Headquarters Legal Division  
Headquarters Native American Liaison Branch  
Director's Native American Advisory Committee  
Governor's Office of Planning and Research  
LaPena Law Corporation

## Tribal Development Projects

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## Terms and Definitions

- 1. Bureau of Indian Affairs (BIA).** The agency within the Department of the Interior that is delegated the responsibility to administer and oversee trust responsibilities of the United States in Indian affairs.
- 2. Consultation.** The Code of Federal Regulations (CFR) 23, Subpart A, § 450.104 (Federal Highway Administration), defines consultation as: “*Consultation* means that one or more parties confer with other identified parties in accordance with an established process and, prior to taking action(s), considers the views of the other parties and periodically informs them about action(s) taken.”
- 3. Encroachment Permit.** An encroachment is defined in the Streets and Highways Code as any structure, object, or special event, which is in, under, or over any portion of the highway. An encroachment permit must be obtained for all proposed activities for placement of encroachments in, under, or over State Highway System (SHS) rights of way. An encroachment permit issued by Caltrans is permissive authority for the permittee to enter SHS right of way to construct approved facilities or conduct specified activities. Permitted activities range from single-family residential driveway connections to multi-million dollar construction projects.
- 4. Federally Recognized Tribal Government (Tribe).** Refers to the tribal government and tribal members of any tribe, band, pueblos, nation, or other organized group or community including any Alaska Native village or regional or village corporation (as defined in or established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 et seq.), or that is acknowledged by the Federal Government to constitute a tribe with a government-to-government relationship with the U.S. and eligible for the programs, services, and other relationships established by the U.S. for Indians because of their status as Indians. (U.S. Department of Transportation Order DOT 5301.1 dated November 16, 1999.)
- 5. Indian Reservation Road (IRR).** A public road that is located within or provides access to an Indian reservation or Indian trust land or restricted Indian land that is not subject to fee title alienation without the approval of the federal government, or Indian or Alaska Native villages, groups, or communities in which Indians and Alaskan Natives reside, whom the Secretary of the Interior has determined are eligible for services generally available to Indians under federal laws specifically applicable to Indians. (23 USC Sec. 101(a).)
- 6. Indian Reservation Road (IRR) Program Inventory.** A comprehensive database of all transportation facilities eligible for IRR Program funding by tribe, reservation, BIA agency and region, Congressional district, state, and county. Other specific information collected and maintained under the IRR

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Program includes classification, route number, bridge number, current and future traffic volumes, maintenance responsibility, and ownership.

- 7. Local Development-Intergovernmental Review Program.** Caltrans' internal program that reviews local public and private planning and development activity approved by public agencies and Tribal Governments. If such activity has the potential to significantly impact the SHS, Caltrans recommends improvements that either eliminate an impact or reduce it to a level of insignificance.
- 8. Reservation.** Lands that are generally tribal trust land that is federally protected under the jurisdiction of that Tribal Government.
- 9. Tribal Lands Held in Fee.** Lands owned by a Tribe but not taken into trust by the BIA. Fee simple absolute land means that there are no restrictions on the ownership. Fee simple land can be on or off a reservation. Individual tribal members as well as the Tribe can hold it. The difference between fee simple land and trust property is that fee simple land can be bought and sold to any individual without the consent of the BIA.
- 10. Tribal Sovereignty.** Refers to the unique legal status of federally recognized Indian tribes as set forth in the United States Constitution, treaties, federal statutes, executive orders, and court decisions, which establish these tribes, as domestic dependent nations subject to the protection of the United States Government. As domestic dependent nations, these tribes exercise inherent sovereign powers over their members and territory unless explicitly removed by Congress. (U.S. Department of Transportation Order DOT 5301.1 dated November 16, 1999)
- 11. Tribal Trust land.** Tribal trust land is owned by the United States in trust for a tribe, band, community, group, or pueblo of Indians subject to federal restrictions against alienation or encumbrance. This means that the United States owns the property and has set aside tribal trust property for the exclusive use of a tribe. The BIA has a federal trust responsibility to ensure that the land use is for the benefit of the tribe.
- 12. Unacknowledged Tribal Governments and Communities in California.** When addressing a broad range of legal issues, funding, services, and consultation requirements, the United States Government distinguishes between federally recognized Tribal Governments and other Native American tribal governments and communities. The State of California and its local jurisdictions, under numerous circumstances, recognize federally "unacknowledged" tribal governments and communities; in particular, for consultation purposes regarding Native American historical and cultural significance. The California Native American Heritage Commission provides a listing of these tribal governments and communities.



## Introduction

As owner and operator of the State Highway System<sup>1</sup> (SHS), the California Department of Transportation (Caltrans) has the responsibility and authority to engage in environmental review of proposed local development; identify potential adverse impacts to the SHS resulting from such development; and, participate, when appropriate, in determining mitigation for the impacts identified.

Local jurisdictions (generally cities and counties) with the authority to approve proposed local development projects are subordinate political units to state government. As such, these jurisdictions are largely subject to the same state statutory and regulatory framework as Caltrans.

Federally recognized Tribal Governments (Tribes), due to their unique sovereignty, generally are not subject to such legal framework. Nonetheless, it is in the best interests of Caltrans and Tribes to avoid or overcome jurisdictional difficulties that might interfere with tribal project development or appropriate mitigation for the SHS.

To that end, this document incorporates information that is not only geared to specific Local Development-Intergovernmental Review (LD-IGR) activities; it also includes information intended to aid in establishing and maintaining good working relationships with Tribes.

## Tribal Governments in California

California is home to 108 federally recognized Tribes and approximately 84 non-recognized tribes. Both federally recognized and non-federally recognized tribes have unique political units of government. Whereas non-federally recognized tribes continue to practice their traditional forms of government, they have not attained recognition from the federal government. Federally recognized Tribes have governmental authority over their respective lands. For purposes of this guide, LD-IGR addresses those developments under the jurisdictions of federally recognized Tribes.

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

Approximately two-thirds of the federally recognized Tribes operate gaming facilities, as provided for by the Indian Gaming Regulatory Act (IGRA) (1988). Gaming operations have led to increased development of additional economic

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<sup>1</sup> Approximately 15,000 highway miles, which are comprised of Interstates, State Routes, and U.S. Highways.

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enterprises, as well as projects for housing and enhanced health and social services for tribal members.

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

Increasingly, with Tribes exercising their inherent sovereign power to undertake economic development projects and their requisite transportation requirements, both on and off tribal land, it is important that Caltrans and local jurisdictions work closely with the Tribes early in the planning process. Please see Appendix A, Director's Policy DP-19, *Working with Native American Communities*, which directs Caltrans' policy to establish and adhere to government-to-government relationships when interacting with Tribes.

### The Sovereignty of Tribes

Tribes possess inherent sovereignty, meaning that the sovereignty originates from within the Tribe and is not granted to Tribes by any outside government or entity. A Tribe's sovereignty can be affected only by an express act of the U.S. Congress (or in the case of an ambiguous statute, an interpretation by the U.S. Supreme Court). Even then, when Congress or the Court is addressing Indian sovereignty, the action primarily revolves around the *extent* or *nature* of a particular aspect of sovereignty---not the inherent sovereignty itself. Further, Congressional power is not absolute; it is subject to procedural and constitutional limitations.

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

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

The variances in federal Indian law and the exercise of tribal jurisdiction emphasize the importance of partnering with each Tribe individually. While some Tribes in California may share cultural backgrounds, they are not subsets or smaller pieces of one "California tribal nation." Each Tribe in California is a separate, sovereign, political entity.

For an overview of the history of California Indians, as well as federal legislative overviews, please see the *Transportation Guide for Native Americans*, published by the Caltrans Division of Transportation Planning, Office of Regional and Interagency Planning, Native American Liaison Branch at:  
[http://www.dot.ca.gov/hq/tpp/offices/orip/na/index\\_files/Trans-GuideForNativeAmericans.pdf](http://www.dot.ca.gov/hq/tpp/offices/orip/na/index_files/Trans-GuideForNativeAmericans.pdf)

## Environmental Review Rights/Responsibilities

The potential requirements for environmental review of a proposed tribal development project reflect the complexity of federal Indian law and how the application of the law is dependent upon a number of factors.

Depending upon the circumstances, tribal development activities may be subject to provisions contained in the California Environmental Quality Act (CEQA), the National Environmental Policy Act (NEPA) of 1969, the environmental process as defined in a Tribal-State Gaming Compact, or tribal environmental review requirements outside the gaming compact process.

As a general rule, state and local environmental regulations do not apply to reservation lands and tribal trust land. However, development of tribal gaming facilities is subject to environmental impact assessment requirements, as specified in a Compact. The requirements vary depending upon the Compact entered into by the Tribe and the Governor. Compacts must be reviewed individually in order to determine what is required for environmental review of a particular Tribal project.

Further, under any project development circumstance for which a Tribe would need to apply for an encroachment permit to access the SHS right of way, a CEQA review would be required. The CEQA review could result in impact mitigation prior to issuance of a permit by Caltrans. [See “Projects Subject to the California Environmental Quality Act (CEQA)” on Page 6.]

A brief overview of the different environmental review requirements that may apply to tribal development projects is provided below:

### Projects Not Subject to Federal or State Environmental Law

When a Tribe acts as its own lead agency for a development project on tribal trust land only and no federal funding or other federal/state approval is involved (for example, no SHS encroachment), the Tribe dictates the project development and environmental review process. Examples of these kinds of projects include tribally funded commercial development (non-gaming facilities) and housing on trust land.

### Projects Subject to the National Environmental Policy Act (NEPA)

A Tribe must comply with NEPA when federal funding or actions are a part of the proposed project. With regard to gaming projects, if the Tribe decides to hire an outside entity to manage a gaming enterprise, the National Indian Gaming Commission (NIGC) must approve the management contract (federal action). As a rule, when NEPA compliance is required for a proposed project, the Bureau of Indian Affairs (BIA) or the NIGC becomes the lead agency. Other instances in which the BIA will become the lead agency are proposals for land transfers (fee land to be taken into trust for a Tribe by the BIA), federally financed housing or

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commercial projects; and, some gaming development (if fee-to-trust land transfer is involved) or enhancement projects.

### Projects Subject to the California Environmental Quality Act (CEQA)

Development projects on tribal trust land do not fall under the jurisdiction of CEQA. However, if a portion of a tribal development project, which is primarily on tribal trust land, falls outside of the tribal trust land boundaries, compliance with CEQA may be required for that portion.

An example of such a project applicable to Caltrans would be the construction/improvement of a freeway interchange to serve a new gaming facility. A freeway interchange project would encroach upon the SHS right of way, and Caltrans would have to issue an encroachment permit, thus becoming the lead agency for the interchange project and triggering CEQA.<sup>2</sup> Under such circumstances, Caltrans could use the Tribe's environmental analysis if it was determined to be adequate, or Caltrans could complete its own environmental document. Regardless of the source of the environmental analysis, Caltrans could not issue an encroachment permit until the CEQA process had been completed for the interchange project.

Please refer to the Caltrans Division of Traffic Operations, Permits, for more detailed information about encroachment permits at:  
<http://www.dot.ca.gov/hq/traffops/developserv/permits/>

### Projects Subject to the Tribal-State Gaming Compact Requirements

The Indian Gaming Regulatory Act [IGRA] requires that a Tribe enter into a "Tribal-State Gaming Compact (Compact)" with the Governor of a State if the Tribe is planning to develop a new gaming facility that includes Class III<sup>3</sup> games or gaming devices.

California Government Code (GC) §98000 et seq., "The Tribal Government Gaming and Economic Self-Sufficiency Act of 1998," authorized the Governor to enter into Compacts with Tribes and established the basic terms of the Compacts. Compacts adopted pursuant to GC §98000 et seq. are subject to the unique environmental review provisions contained within each particular Compact. (Tribes with whom Compacts are ratified are identified in GC §12012.5, et seq.)

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<sup>2</sup> A change in the use of an existing encroachment permit also triggers the need for a new encroachment permit, which in turn requires compliance with CEQA.

<sup>3</sup> The IGRA established three different categories of gaming and a regulatory system applicable to each: Class I, which refers to traditional and ceremonial games conducted by Tribes, and for which the IGRA provides exclusive regulatory jurisdiction by the Tribes; Class II, which refers primarily to bingo, games like bingo, pulltabs, and some non-banked card games, and for which the IGRA provides primary regulatory jurisdiction by the Tribes and secondary regulatory jurisdiction by the National Indian Gaming Commission (NIGC); and, Class III, which refers to all other types of gaming, and for which the IGRA provides a unique method of shared jurisdiction between Tribes and states through mutually agreed upon compacts, and over which the NIGC exercises oversight.

However (as discussed in preceding sections), if the SHS right of way would be encroached upon, CEQA requirements would still have to be satisfied before Caltrans could issue an encroachment permit, regardless of the provisions of a Compact.

Furthermore, Tribes depend upon safe accessibility to the SHS for their members and off-reservation visitors. Tribes frequently provide transportation safety measures beyond those required by environmental analysis.

It is also worth repeating that Compact provisions are not uniform among the Tribes, regardless of when they were ratified. Before each tribal development project begins, one must review the Compact of that particular Tribe in order to learn the applicable environmental review requirements.

## **Governor's Office to Review Certain Proposed Tribal Development Projects**

Since 2004, the Governor's Office of Legal Affairs (GOLA) reviews State agency comments that are in response to environmental documents prepared for proposed tribal development projects. The review takes place prior to the comments being sent to a lead agency and only under the following two circumstances: (1) The project involves a gaming facility development; or (2) the project is a large scale non-gaming development.

In response to the policy of GOLA review, the Governor's Office of Planning and Research (OPR), State Clearinghouse, initiated an E-mail Notification System (ENS) to State agencies (in Caltrans' case, to the Districts). The ENS indicates that an "environmental document" (ED) will be sent via U.S. Postal Service, and that a notice printed on yellow paper will be attached to the ED. The yellow "sheet" will serve to alert the reviewer to forward any draft comments about the environmental documents to the GOLA.

There will be a due date written on the yellow sheet indicating when draft comments must be forwarded to the GOLA.

The OPR planning staff will determine, on a case-by-case basis, whether a project is a "large scale development."

In essence, if a District receives a yellow sheet attached to a proposed tribal development project, then the District must send its draft comments to the GOLA for review. Please see Appendix B, "Coordinating Comments on Tribal Gaming and Large Development Projects, including Fee-to-Trust Applications," for more detailed procedures to be followed when sending draft comments to the GOLA.

## Enhancing Working Relationships with Tribal Governments/Consultation

There are a number of steps that Districts could take to develop good government-to-government relationships with Tribes.

Examples of such steps would be regularly scheduled meetings with tribal partners or creation of local working groups (Caltrans/Tribe/City/County) to address non-tribal project effects on cultural sites or other off-reservation impacts of importance to Tribes. Topics of concern to Caltrans could be potential impacts to the SHS caused by proposed tribal projects. Cities and Counties would, of course, have their jurisdictional issues and contributions to discuss.

Consultation with Tribes regarding the tribal governmental planning and programming (budgeting) concerns or needs also enhances our ability to resolve issues when they occur. Please see Appendix C, *Transportation Planning and Programming Requirements Regarding Tribal Governments*, which provides federal statutory and regulatory guidance for including Tribes in state planning. See, also, Appendix E, Executive Order 13175, *Consultation and Coordination With Indian Tribal Governments*, dated November 6, 2000.

23 USC 134 and 23 USC 135 (presented in Appendix C) establish requirements for consultation with Tribes through the Statewide and Metropolitan planning and programming processes. Such requirements do not mean, however, that every meeting we attend or every project we discuss with a Tribe is “consultation.”

Each Tribe has its own way of conducting official business. We should initially contact the duly designated spokesperson, which in most cases is an elected leader. We may conduct further business with other offices or representatives designated by the Tribe, as we would with any other government.

Tribal leaders are not always compensated for the time they spend in their leadership role for the Tribe. Some take on leadership roles on a volunteer basis or as a second career, in addition to a full time job. We need to be cognizant of the particular circumstances and act accordingly. For example, flexibility in scheduling meetings---when and where---is important and beneficial.

Furthermore, it's good to remember that tribal governments are bureaucratic like any other government. Tribal Councils and Committees may meet daily or as infrequently as once a month or once a quarter. We should consider these factors in our collaboration with Tribes, for example, by supplying ample time for them to respond to documents or comments as part of consultation and coordination.



## Contracting with Federally Recognized Tribal Governments for Project Mitigation<sup>4</sup>

Prior to 2005, state law (Government Code) was unclear whether Caltrans could enter into contracts with federally recognized Tribal Governments (Tribes). The lack of clarity in the law was a barrier to Caltrans' ability to engage in comprehensive mitigation negotiations when it was determined that traffic impacts would result from tribal project development. Caltrans, with the support of Tribes that needed to proceed with their projects, urged the Legislature to clarify the matter.

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

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

Mitigation agreements with Tribes contain standard contract language; except, a Tribe will incorporate a provision of limited waiver of sovereign immunity, which will identify specific conditions under which the Tribe will agree that Caltrans can pursue legal remedies should a breach of contract occur on the Tribe's part. Likewise, a Tribe will reserve all of its rights to enforce terms and conditions of an agreement with Caltrans should a breach of contract occur on Caltrans' part.

Districts should contact Headquarters, Legal Division, when considering entering into agreements with a Tribe. The Headquarters Legal Division is experienced in helping negotiate and draft agreements as well as working with attorneys that represent a Tribe.<sup>5</sup> Headquarters Legal Division's phone number is: (916) 654-2630.

Likewise, the Native American Liaison Branch at Headquarters is available to participate in the negotiating process, as are the District Liaisons. (See "Department Native American Liaisons," in the following section.) Also, see Appendix D for a copy of the amended §94.

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<sup>4</sup> **S&H Code, §94 applies only to federally recognized tribes.**

<sup>5</sup> Also see Statewide LD-IGR Program Guide, *Traffic Mitigation Agreements*, dated June 2006.

## Department Native American Liaisons

The Native American Liaison Branch (NALB), Office of Regional and Interagency Planning, Division of Transportation Planning, was created in 1999 to serve as departmental ombudsperson/s for Native American issues and to serve as the initial contact for Native American issues, among which are issues that may need to be directed to the Legal Division.<sup>6</sup>

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

Positions were created within Caltrans' Districts to address Native American issues, as well. Liaisons within the Districts perform various functions, depending upon the Native American population, number of Tribes, nature and extent of tribal activities, and nature and extent of Caltrans' projects. They assist in the Districts' LD-IGR effort, as well as facilitating Caltrans' project delivery goals.

The NALB and District NA Liaisons should be included in the copy distribution list for LD-IGR correspondence between Caltrans and Tribes pertaining to proposed projects. Further, please send a copy of District LD-IGR correspondence addressed to other agencies that pertains to tribal development, to Cynthia Gomez, Chief, Native American Liaison Branch, MS-32, at Headquarters, or via E-mail at [Cynthia\\_Gomez@dot.ca.gov](mailto:Cynthia_Gomez@dot.ca.gov).

District NA Liaisons are identified in the *Statewide Telephone/Fax Contact List* published by the LD-IGR Program.<sup>7</sup>

Tribal issues sometimes overlap between the LD-IGR and NALB functions. If questions arise in connection to the LD-IGR function that cannot be answered at the District, please direct them to the LD-IGR Program at Headquarters, which, in turn, will coordinate responses with the NALB.

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<sup>6</sup> The NALB works in concert with HQ Legal (and LD-IGR); it is understood that an initial contact will be referred to HQ Legal for Caltrans' legal counsel. NALB and LD-IGR are not authorized to provide legal advice.

<sup>7</sup> Contact your District LD-IGR Coordinator, for a copy of the *List*, or contact the Headquarters LD-IGR Program, (916) 653-0808.



# Appendices

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*California Department of Transportation*

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***DIRECTOR'S POLICY***

*Number:* 19  
*Effective Date:* 08-29-01  
*Supersedes:* None

***TITLE*** Working with Native American Communities

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***POLICY***

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

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

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

***INTENDED RESULTS***

When engaging in activities or developing policies that affect Native American tribal rights or trust resources, the Department acts in a knowledgeable, sensitive and respectful manner.

Native American communities include lands held in trust by Tribal Governments, communities of non-federally recognized tribes, tribal members of California tribes living outside the exterior boundaries of a reservation or rancheria, Native Americans that are not part of a California tribe living in California.

***RESPONSIBILITIES***

Director: Works with Tribal Governments to achieve the intended results of this policy either directly or through subordinates.

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### Deputy Director, Planning and Modal Programs:

- Has lead responsibility for the development and implementation of departmental policy regarding issues impacting Native American communities.
- Coordinates the activities of and serves as the Director's representative and ex-officio member to the Director's Native American Advisory Committee.
- Advises Districts, Divisions, agencies and states to resolve issues or concerns of Native American communities.

### Deputy Director, Civil Rights:

- Develops and implements departmental policy on issues regarding Civil Rights, Disadvantaged Business Enterprises (DBE) and Tribal Employment Rights Ordinances (TERO) as they relate to Native Americans and Native American communities.
- Advises Tribal Governments and the Department on Title VI provisions as they relate to Native Americans.

### Deputy Director, Project Delivery:

- Develops and implements departmental policy on issues regarding environmental and cultural resources as they relate to Native American communities.
- Develops procedures to implement this policy as it relates to project delivery issues.

Deputy Director, Maintenance and Operations: Develops procedures to implement this policy as it relates to the maintenance and operation of State transportation facilities.

### District Directors:

- Promote, establish and manage government-to-government relationships between the Department and Tribal Governments.
- Coordinate District activities with the Native American Liaison Branch.

Division Chiefs and Program Manager: Develop procedures to implement this policy as it relates to their respective areas of responsibility.

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Chief, Division of Transportation Planning:

- Oversees the Department's Native American Liaison Branch that:
  - Serves as Department ombudspersons on Native American issues and initial contact for Native American legal issues.
  - Serves as liaisons between the Department, Tribal Governments and other involved third parties to promote government-to-government relationships.
  - Provides information, training and facilitation services related to issues affecting Native American communities.

Chief, Division of Environmental Analysis:

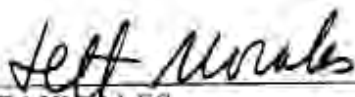
- Oversees the Native American Cultural Studies Branch.
- Develops policies and procedures implementing applicable State and federal environmental and cultural resources laws that affect Native American communities.
- Acknowledges and complies with applicable tribal environmental laws.

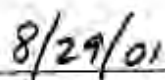
Managers and Supervisors: Ensure that their subordinates are informed of and comply with this policy.

Employees: Ensure that the Department is represented in a knowledgeable, sensitive and respectful manner when engaging in activities that impact Native American communities.

*APPLICABILITY*

Everyone who works for the Department in any capacity including contractors, consultants and subcontractors.

  
\_\_\_\_\_  
JEFF MORALES  
Director

  
\_\_\_\_\_  
Date Signed



**Coordinating Comments on Tribal Gaming and Large Scale Development Projects,  
including Fee-to-Trust<sup>8</sup> Applications**

**1.** If the proposed project is for **gaming**, or is for a **large scale non-gaming** development, the Governor's Office of Legal Affairs (GOLA) will review the District's comment letter in draft (Word) five (5) days<sup>9</sup> prior to the lead agency's due date.

**E-mail your draft comment letter to:**

Janielle Jenkins  
Office of Governor Arnold Schwarzenegger  
Legal Affairs  
(916) 445-0873  
E-mail: [Janielle.Jenkins@gov.ca.gov](mailto:Janielle.Jenkins@gov.ca.gov)

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

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

Scott Morgan, Senior Planner, State Clearinghouse  
E-mail: [scott.morgan@opr.ca.gov](mailto:scott.morgan@opr.ca.gov)

Sara Drake, California Department of Justice  
E-mail: [sara.drake@doj.ca.gov](mailto:sara.drake@doj.ca.gov)

David H. McCray, Assistant Chief Counsel, HQ Legal  
E-mail: [david.mccray@dot.ca.gov](mailto:david.mccray@dot.ca.gov)

Cynthia Gomez, Chief, Native American Liaison Branch  
E-mail: [cynthia\\_gomez@dot.ca.gov](mailto:cynthia_gomez@dot.ca.gov)

Betty Miller, Statewide LD-IGR Coordinator  
E-mail: [betty\\_l\\_miller@dot.ca.gov](mailto:betty_l_miller@dot.ca.gov)

Tribal Chairperson (if Tribe is not the lead agency)

**3.** Do not send "no comment" comment letters.

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<sup>8</sup> Fee-to-Trust applications are generated by the U.S. Department of the Interior, Bureau of Indian Affairs for a range of proposed land uses, from a member wanting to transfer a single residential parcel into trust to the Tribal Government purchasing or converting land into trust for gaming, housing, or other governmental/commercial purposes.

<sup>9</sup> If the date indicated on a "yellow sheet" for sending draft comments to the GOLA differs from the 5-day deadline, please use the date on the "yellow sheet."





## **Transportation Planning and Programming Requirements Regarding Federally Recognized Tribal Governments**

Federal statute and regulation require that Tribal Governments be involved in transportation planning and programming in Metropolitan Planning Organizations and States, as appropriate.

Regional transportation agencies are sometimes uncertain of the governance underlying the need to involve Tribal Governments and/or the appropriate methods of involvement required. The following attempts to clarify the "why" and "how" of Tribal Governmental participation in transportation planning and programming.

### **Statute**

**Title 23, U.S.C., Chapter 1, Sections 134 and 135**, as amended by **SAFETEA-LU**, provide statutory guidance relative to the planning requirements.

While **Section 134, Metropolitan Planning**, does not specifically identify Tribal Governments in the required process, **Para. (a), General Requirements**, stipulates that a metropolitan planning organization "in cooperation with the State and public transit operators, shall develop transportation plans and programs for urbanized areas of the State." **Para. (i)(5)(A)(i), Certification**, "The Secretary shall ensure that each metropolitan planning process in each transportation management area is being carried out in accordance with applicable provisions of Federal law." "(B) The Secretary may make the certification under subparagraph (A) if -- (i) the transportation planning process complies with the requirements of this section and other applicable requirements of Federal law, . . ."

**Section 135, Statewide Planning**, on the other hand, includes numerous references to a State's requirement to include Tribal Governments in transportation planning. **Para. (d), Additional Requirements**, "In carrying out planning under this section, each State shall, at a minimum, consider-- (2) The concerns of Indian tribal governments and Federal land management agencies that have jurisdiction over land within the boundaries of the State." **Para. (e), Long-Range Transportation Plan, (2) Consultation with governments.--(C) Indian tribal areas.--**"With respect to each area of the State under the jurisdiction of an Indian tribal government, the long-range transportation plan shall be developed in consultation with the tribal government and the Secretary of the Interior."

### **Regulation**

**Code of Federal Regulations (CFR) 23, pursuant to Title 23, U.S.C.**, provides regulatory guidance relative to the planning requirements.

#### **Part 450, Planning Assistance and Standards:**

**Subpart B, Statewide Transportation Planning, § 450.202 Applicability:** "The requirements of this subpart are applicable to States and any other agencies/organizations which are responsible for satisfying these requirements."

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**Subpart B, § 450.208, Statewide transportation planning process: Factors, (a)** Each State shall, at a minimum, explicitly consider, analyze as appropriate and reflect in planning process products the following factors in conducting its continuing statewide transportation planning process: **(23):** "The concerns of Indian tribal governments having jurisdiction over lands within the boundaries of the State."

**Subpart B, § 450.210, Coordination, (a):** "In addition to the coordination required under § 450.208(a)(21) in carrying out the requirements of this subpart, each State, in cooperation with participating organizations (such as MPOs, Indian tribal governments, environmental, resource and permit agencies, public transit operators) shall, to the extent appropriate, provide for a fully coordinated process including coordination of the following:

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

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

**Subpart B, § 450.214, Statewide transportation plan, (a):** "The State shall develop a statewide transportation plan for all areas of the State."

**(c):** "In developing the plan, the State shall:

**(2)** "Cooperate with the Indian tribal government and the Secretary of the Interior on the portions of the plan affecting areas of the State under the jurisdiction of an Indian tribal government:"

**Subpart C, Metropolitan Transportation Planning and Programming, § 450.312**  
**Metropolitan transportation planning: Responsibilities, cooperation, and coordination,**

**(i):** "Where a metropolitan planning area includes Federal public lands and/or Indian tribal lands, the affected Federal agencies and Indian tribal governments shall be involved appropriately in the development of transportation plans and programs."

**Subpart C, § 450.324, Transportation improvement program: General,**

**(f):** The TIP shall include:

**(1):** "All transportation projects, or identified phases of a project, (including pedestrian walkways, bicycle transportation facilities and transportation enhancement projects) within the metropolitan planning area proposed for funding under title 23, U.S.C., (including Federal Lands Highway projects) . . . "

California Streets and Highways Code  
**Division 1** State Highways  
**Chapter 1** Administration

**Section 94. Contracts with Federally-recognized Indian Tribes**

- (a) The department may make and enter into any contracts in the manner provided by law that are required for performance of its duties, provided that contracts with federally recognized Indian tribes shall be limited to activities related to on-reservation or off-reservation cultural resource management and environmental studies and off-reservation traffic impact mitigation projects on or connecting to the state highway system.
- (b) To implement off-reservation traffic impact mitigation contracts with federally recognized Indian tribes, all of the following shall apply:
  - (1) Any contract shall provide for the full reimbursement of expenses and costs incurred by the department in the exercise of its contractual responsibilities. Funds for the project shall be placed in an escrow account prior to project development. The contract shall also provide for a limited waiver of sovereign immunity by that Indian tribe for the state for the purpose of enforcing obligations arising from the contracted activity.
  - (2) The proposed transportation project shall comply with all applicable state and federal environmental impact and review requirements, including, but not limited to, the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).
  - (3) The department's work on the transportation project under the contract shall not jeopardize or adversely affect the completion of other transportation projects included in the adopted State Transportation Improvement Program.
  - (4) The transportation project is included in or consistent with the affected regional transportation plan.

*[Amended, Chapter 274, SB1189, 2005]*



## Presidential Documents

Title 3—

Executive Order 13175 of November 6, 2000

The President

### Consultation and Coordination With Indian Tribal Governments

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes, it is hereby ordered as follows:

**Section 1. Definitions.** For purposes of this order:

(a) "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

(b) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

**Sec. 2. Fundamental Principles.** In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

**Sec. 3. Policymaking Criteria.** In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

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(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

**Sec. 4. *Special Requirements for Legislative Proposals.*** Agencies shall not submit to the Congress legislation that would be inconsistent with the policy-making criteria in Section 3.

**Sec. 5. *Consultation.*** (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the



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need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

### **Sec. 6. Increasing Flexibility for Indian Tribal Waivers.**

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

### **Sec. 7. Accountability.**

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

**Sec. 8. Independent Agencies.** Independent regulatory agencies are encouraged to comply with the provisions of this order.

**Sec. 9. General Provisions.** (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

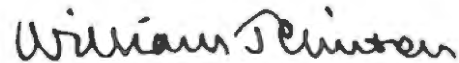
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**Sec. 10. *Judicial Review.*** This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.



THE WHITE HOUSE,  
November 6, 2000.

[FR Doc. 00-29003  
Filed 11-8-00; 8:45 am]  
Billing code 3195-01-P