

To: All Department of Fish and Wildlife Staff

Subject: Tribal Communication and Consultation Policy

I. BACKGROUND

The United States, through the Department of the Interior, Bureau of Indian Affairs (BIA), currently recognizes more than one hundred Tribes within the State of California. The State of California, through the Native American Heritage Commission (NAHC), also acknowledges, for purposes of the protection of cultural resources, numerous other Tribes and tribal communities that are not federally recognized. California's Tribes and their members have long served as stewards of the state's fish, wildlife, and plants and possess unique and valuable knowledge and practices for conserving and using these resources in a sustainable manner.

On September 19, 2011, Governor Brown issued Executive Order B-10-11, stating "that it is the policy of this Administration that every state agency and department subject to my executive control shall encourage communication and consultation with California Indian Tribes." To further Executive Order B-10-11, on November 20, 2012 the California Natural Resources Agency (CNRA) adopted its Tribal Consultation Policy to govern and ensure effective communication and government-to-government consultation between Tribes and CNRA and its constituent departments.

The California Department of Fish and Wildlife (Department) maintains native fish, wildlife, and plant species for their intrinsic and ecological value and their benefits to people. This includes habitat protection and maintenance of a sufficient quantity and quality to ensure the survival of all species and natural communities. The Department is also responsible for the diversified use of fish, wildlife, and plants, including recreational, commercial, scientific, and educational uses.

This Tribal Communication and Consultation Policy (Policy) provides the foundation for the Department to work cooperatively, communicate effectively, and consult with Tribes. This Policy also serves as the Department's primary means of implementing Executive Order B-10-11 and the CNRA Tribal Consultation Policy. Both through implementation of this Policy and through additional means, including entering into memoranda of agreement with individual Tribes, the Department seeks to establish a positive, cooperative relationship with Tribes. While the primary purpose of this Policy is to establish effective tools for communicating with Tribes and a formal process for engaging in government-to-government consultations with Tribes, the Department

seeks and encourages collaborative relationships with Tribes, including for the co-management of resources, where appropriate.

II. DEFINITIONS

For purposes of this Policy, the following definitions will apply:

1. Consultation means the process of engaging in government-to-government dialogue with Tribes in a timely manner and in good faith to provide Tribes with necessary information and to seek out, discuss, and give full and meaningful consideration to the views of Tribes in an effort to reach a mutually agreed upon resolution of any concerns expressed by the Tribes or the Department.¹ The Department acknowledges and respects that Tribes are unique and separate governments within the United States with inherent tribal sovereignty, including the rights to independence, self-governance, self-determination, and economic self-sufficiency. These principles form the basis for government-to-government consultations.
2. Cultural Resources means prehistoric and ethnohistoric archaeological sites, historic archaeological sites, historic buildings, and elements or areas of the natural landscape which have traditional cultural significance.
3. Proposed Activity means an activity by the Department that may have a significant impact on Tribal Interests. For purposes of this Policy, the Department will separately consider:
 - a. Statewide Proposed Activities, including: (i) adoption of regulations of statewide application by the California Fish and Game Commission (Commission); (ii) adoption of regulations of statewide application by the Department; and (iii) establishment and implementation of significant statewide policies; and
 - b. Regional Proposed Activities, including: (i) acquisition and disposition of interests in real property; (ii) real property management decisions; (iii) approval of projects sponsored by the Department; (iv) approval of projects permitted by the Department where the Department is the lead agency under the California Environmental Quality Act; (v) submission of comment letters regarding tribal projects; (vi) adoption of regulations of regional application; and (vii) enforcement details.
4. Tribe means any federally recognized Native American tribe and any non-federally recognized Native American Tribe acknowledged by the NAHC for purposes of the protection of cultural resources.

¹ The Department acknowledges that federally recognized tribes have a unique political status and jurisdiction and exercise governmental powers over activities and members within their territory. For that reason, for purposes of this Policy the Department will consult with non-federally recognized tribes and tribal communities acknowledged by the NAHC in generally the same manner as it does federally recognized tribes only with regard to Cultural Resources issues.

5. Tribal Interests includes: (a) Cultural Resources; (b) fish, wildlife, and plant resources; (c) water; and (d) Tribal Lands and other lands, landscapes, and viewsheds within a Tribe's ancestral territory.
6. Tribal Lands means reservations, rancherias, lands held in trust by the United States for the benefit of a Tribe, and any other lands meeting the definition of "Indian Country" in Title 17, Section 1151 of the United States Code.
7. Tribal Sovereignty means the unique political status of federally-recognized Indian tribes. Federally-recognized Indian tribes exercise certain jurisdiction and governmental powers over activities and tribal members within their territories. Some of these powers are inherent, some have been delegated by the United States, and all are subject to limitations by the United States. Existing limitations are defined through acts of Congress, treaties, and federal court decisions.

III. GUIDING PRINCIPLES

The Department seeks to establish and maintain a respectful and effective means of communicating and consulting with Tribes and will seek in good faith to:

1. Communicate and consult with Tribes about fish, wildlife, and plant issues and seek tribal input regarding the identification of potential issues, possible means of addressing those issues, and appropriate actions, if any, to be taken by the Department;
2. Assess the potential impact of Proposed Activities on Tribal Interests and ensure to the maximum extent feasible that tribal concerns are considered before such activities are undertaken and that such impacts are avoided or minimized whenever practicable;
3. Provide timely and useful information relating to Proposed Activities that may affect Tribal Interests;
4. Communicate with and engage with Tribes at the earliest possible stage in the decision-making process;
5. Communicate with Tribes in a manner that is considerate and respectful;
6. Provide Tribes with meaningful opportunities to respond and participate in decision-making processes that affect Tribal Interests;
7. Acknowledge and respect California Native American cultural resources regardless of whether those resources are located on or off Tribal Lands;
8. Acknowledge and respect both the confidential nature of information concerning cultural practices, traditions, beliefs, tribal histories, and Tribal Lands and that state law protects the confidentiality of certain tribal cultural information (Gov. Code, § 6254(r)). The Department will take all lawful and necessary steps to ensure confidential information provided by a Tribe is not disclosed without the prior written permission of the Tribe.
9. Encourage collaborative and cooperative relationships with Tribes in matters affecting fish, wildlife, and plants;

10. Assist the efforts of Tribes to develop sustainable programs, policies, and practices with regard to fish, wildlife, and plants;
11. Acknowledge and seek ways to accommodate the limited financial and staffing resources of Tribes and the Department to ensure effective communication and consultation; and
12. Identify and recommend means to remove procedural impediments to working directly and effectively with Tribes.

IV. TRIBAL LIAISON

1. The Director of the Department will appoint a tribal liaison (Tribal Liaison) for the Department. The Tribal Liaison will report to the Director of the Department and will:
 - a. Advise the Director on policy matters relating to tribal affairs.
 - b. Coordinate the training of Department staff with regard to tribal affairs.
 - c. Coordinate the work of Regional Tribal Liaisons.
 - d. Coordinate the Department's tribal communication and consultation efforts.
 - e. Maintain the Tribal Contact List.
 - f. Respond to inquiries from Tribes.
 - g. Participate in consultations with Tribes.
 - h. Conduct consultations with Tribes when the Tribal Liaison has or has been delegated decision-making authority over the issues to be discussed.
2. The Department's goal is for each of its seven regions to have a regional tribal liaison (Regional Tribal Liaison) to assist the Tribal Liaison and to serve as the primary point of contact for Tribes in that region. The Regional Tribal Liaisons will be appointed by the Regional Managers, subject to available positions and funding. In the absence of currently available positions and funding, for the 2014-2015 fiscal year the Department will operate a pilot program in which the Regional Managers for the Department's Northern Region and Marine Region will appoint acting Regional Tribal Liaisons.

V. TRAINING OF DEPARTMENT STAFF

The Tribal Liaison shall oversee the training of applicable Department staff with respect to:

1. Principles of tribal sovereignty, lands, and jurisdiction.
2. Laws and regulations relating to the protection of Cultural Resources.
3. Implementation of and compliance with this Policy.

VI. TRIBAL COMMUNICATION

1. Purpose. The Department seeks to establish effective mechanisms for: (a) providing information to Tribes regarding Proposed Activities that may affect Tribal Interests; (b) seeking information and input from Tribes; (c) soliciting the collaboration,

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cooperation, or participation of Tribes; and (d) offering or seeking consultation with affected Tribes.

2. The communication procedures set forth in this section are intended to serve as the Department's default method for communicating information about Proposed Activities to Tribes. Any Tribe may submit to the Department a written request to institute an alternative process, including the designation of either an alternative contact person for the Tribe (i.e., someone other than the Chairperson) or additional contact persons. The Department will make a good faith effort to work with Tribes requesting such alternative processes; provided, however, that Department staffing resources may make it difficult or impractical to fully implement all such requests.
3. Tribal Contact List. In conjunction with the NAHC and the Governor's Office of the Tribal Advisor, the Department's Tribal Liaison will maintain and update a Tribal Contact List to be comprised of BIA's list of federally recognized tribes in California and the NAHC's California Tribal Consultation List.
4. Contacting Tribes with regard to Statewide Proposed Activities. Prior to initiating a Statewide Proposed Activity, Department staff in the region or program implementing the Proposed Activity will contact all federally recognized Tribes identified on the Tribal Contact List. If the Statewide Proposed Activity may affect Cultural Resources, the Department will also contact all non-federally recognized Tribes.
5. Contacting Tribes with regard to Regional Proposed Activities. Prior to initiating a Regional Proposed Activity, Department staff in the region or program implementing the Proposed Activity will:
 - a. With regard to Regional Proposed Activities with potential impacts to Cultural Resources, notify the NAHC of the Proposed Activity and request a list of tribal governments, organizations, and individuals affiliated with the area in which the Proposed Activity is to occur and the results of an NAHC Sacred Lands Files check. Notice to the NAHC will include a brief description of the Proposed Activity and a map or description of the area, if available; or
 - b. With regard to Regional Proposed Activities that will not impact Cultural Resources, the Department will contact all Tribes: (a) located in the county in which the Proposed Activity will occur; and (b) that have notified the Department's Tribal Liaison in writing of their interest in the Proposed Activity regardless of the Tribe's physical location.
6. Written Notice to Tribes. Once a list of affected Tribes has been compiled, Department staff in the region or program implementing the Proposed Activity will send written notice to the Tribes. The written notice will:
 - a. Be sent to the Tribal Chairperson listed on the contact list provided by NAHC or the Department's Tribal Contact List and to any other Tribal officials or employees identified by the Tribe pursuant to Section VI(2) of this Policy.

- b. Be sent in a timely manner to ensure an opportunity to provide input at the earliest possible stage in the decision-making process;
 - c. Be drafted and sent separately from any general public notice;
 - d. Include a brief description of the Proposed Activity; a map or description of the location of the Proposed Activity; a brief description of anticipated impacts of the Proposed Activity; and, if available and applicable, archaeological site records;
 - e. Offer to consult with the Tribe regarding the Proposed Activity and its anticipated impacts on Tribal Interests; and
 - f. Provide Department contact information for obtaining further information and for initiating consultation.
7. Additional Notice for Regional Proposed Activities. After sending written notice of a Regional Proposed Activity, Department staff shall make reasonable efforts to contact the Tribal Chairperson or appropriate Tribal staff by telephone or email to ensure the Tribe has adequate notice.
8. Changes to Proposed Activities. If, after providing notice to Tribes, there are substantial changes to a Proposed Activity or other changed circumstances that could affect Tribal Interests in a manner not contemplated when the original notice was sent, Department staff in the region or program implementing the Proposed Activity shall issue a supplemental notice to affected Tribes.

VII. TRIBAL CONSULTATION

1. Initiation of Consultation. Consultations may be initiated by either a Tribe or the Department.
 - a. All requests by a Tribe for consultation must be submitted in writing to the Tribal Liaison at tribal.liaison@wildlife.ca.gov or at the following address: Tribal Liaison, California Department of Fish and Wildlife, Office of General Counsel, 1416 Ninth Street, Sacramento, CA 95814. Upon receipt of a request for consultation, the Department shall provide the Tribe with a written acceptance of the request.
 - b. All requests by the Department for consultation will be made in writing to the chairperson of the Tribe and will not be deemed accepted until the Department receives written acceptance of the request from the Tribe.
2. Preparing for a Consultation. For a consultation to be effective, prior to holding the consultation Department staff in the region or program implementing the Proposed Activity should take reasonable steps to work with the Tribe's representatives to:
 - (a) understand the Tribe's current and historical relationship to the resources that may be affected by the Proposed action;
 - (b) understand the Tribe's government structure and decision-making process;
 - (c) identify key issues and concerns;
 - (d) identify the participants in the consultation;
 - (e) determine an appropriate location and time for the consultation; and
 - (f) understand the Tribe's concerns with culturally sensitive information.

3. Time, Place, and Manner of Consultations. Whenever feasible, the Department will seek to schedule consultations within thirty days after receipt of a written request for consultation from the Tribe. The Department will pursue in-person consultations whenever possible given the timing, funding, and travel constraints of the Tribes and the Department. Whenever possible, the Department will seek to arrange in-person consultations at the Tribe's offices or at another appropriate location on Tribal Lands. The Department will work with Tribes, on a case-by-case basis, to determine the appropriate form and manner of consultation. Prior to any consultation, the Department shall inform the Tribe in writing of the names and positions of those who will represent the Department during the consultation.
4. Department Representation at Consultations. The Department's consultation process is designed to facilitate direct communication between tribal decision makers and the departmental decision makers for the Proposed Activity. Although the Director of the Department retains ultimate authority with respect to all departmental decisions, significant decision-making authority for Regional Proposed Activities is delegated to the Regional Managers, who are best positioned to lead consultations on these activities.
 - a. Consultations Concerning Statewide Proposed Activities: The Department will be represented at consultations concerning Statewide Proposed Activities by the Director or a Deputy Director. For consultations concerning the adoption of regulations by the Fish and Game Commission, the Department will coordinate with the Executive Director of the Commission to facilitate joint consultation. The Tribal Liaison will seek to participate in all consultations concerning Statewide Proposed Activities.
 - b. Consultations Concerning Regional Proposed Activities: The Department will generally be represented at consultations concerning Regional Proposed Activities by the Regional Manager for the region in which the activity will occur. For consultations concerning the acquisition of interests in real property, the consultation will also include the Executive Director of the Wildlife Conservation Board. For consultations concerning enforcement activities, the Department will be represented by the Assistant Chief for the applicable enforcement district. The Regional Tribal Liaisons will seek to participate in all consultations concerning Regional Proposed Activities in their respective regions.
 - c. Designees: The Director, Deputy Directors, Regional Managers, Executive Director, and Assistant Chiefs may delegate authority to conduct a particular consultation to a designee at an appropriate level of authority. If the Tribe believes a delegation of authority pursuant to this section is inappropriate, the Tribe may submit to the Tribal Liaison a written request to meet with a more senior official with the Department.
 - d. Request by a Tribe for a Meeting with the Director: Nothing in this Policy is intended to preclude a Tribe from requesting a meeting with the Director with regard to any Statewide Proposed Activity or Regional Proposed Activity. If a Tribe seeks to meet with the Director regarding a Regional Proposed Activity or a Statewide Proposed Activity for which someone other than the Director is

initially designated to conduct, the Tribe may submit to the Tribal Liaison a written request to meet with the Director.

5. Informal Staff-to-Staff Meetings: At times, both Tribes and the Department may seek to pursue informal discussions and negotiations concerning a Proposed Activity. The Department encourages informal meetings, and nothing in this policy shall be construed to prohibit or otherwise inhibit the Department and a Tribe from pursuing such meetings. For informal meetings the Department will seek to assign staff with appropriate expertise and of a comparable level of authority to that of the Tribe's representative. Informal staff-to-staff meetings do not constitute government-to-government consultation.
6. Joint Consultation. To conserve limited tribal, federal, state, and local government resources, the Department will participate in joint consultations with: (a) other federal, state, or local government agencies when all parties agree and there are sufficient issues in common to warrant a joint consultation; or (b) more than one Tribe when all parties agree and there are sufficient issues in common to warrant a joint consultation.
7. Adoption of Regulations². Fish and Game Code section 200 authorizes the Fish and Game Commission to adopt regulations concerning the taking or possession of birds, mammals, fish, amphibians, and reptiles. Fish and Game Code section 702 authorizes the Department to adopt regulations to administer and enforce the Fish and Game Code except where expressly prohibited or delegated to the Commission. The Department will seek to coordinate with Commission staff regarding communication and consultation concerning regulations to be adopted by the Commission. The adoption of regulations by the Commission and the Department is governed by the California Administrative Procedure Act (APA), which sets forth mandatory requirements and timelines for adopting regulations through the regular rulemaking process. The adoption of regulations is also subject to the California Environmental Quality Act (CEQA), with its own requirements and timelines. The Department will seek to accommodate all requests for consultation concerning proposed regulations; provided, however, that the Department does not have the authority to alter APA or CEQA requirements concerning the timing and structure of the regulatory process.
8. Real Property Transactions. When acquiring interests in real property, the Department acts through the Wildlife Conservation Board.

² The California Fish and Game Commission is an independent state entity. The Department assists the Commission with its adoption of regulations. The Commission is currently developing its tribal consultation policy. The Department will work closely with the Commission throughout this process to ensure, to the maximum extent practicable, that the two policies are compatible and streamline the communication and consultation process for the Commission, the Department, and Tribes. The Department anticipates that it may be necessary to amend Section VII(7) of this Policy once the Commission finalizes its policy. If the Department amends its Policy for purposes of coordinating it with the Commission's policy, the Department will seek to provide notice and opportunities for consultation on the amendments in conjunction with the Commission's consultation on its policy.

The Board also awards grants for the acquisition of property interests and for restoration projects. The Board's consideration of acquisitions of property interests on behalf of the Department, grants for acquisition of property interests by others, and grants for restoration projects all involve processes subject to procedures, timelines, and approvals by the California Department of General Services (DGS). The Board's processes are also subject to CEQA, with its own requirements and timelines. The Board and the Department will seek to accommodate all requests for consultation; provided, however, that neither agency has the authority to alter DGS or CEQA requirements concerning the timing and structure of the process for acquiring interests in real property.

9. Annual Regional Meetings with Tribes. Each Regional Manager shall conduct annually a meeting with all interested Tribes located in that region to discuss any and all matters within the Department's jurisdiction that are of interest to Tribes in that region. The Department will provide written notice of the meeting and solicit agenda items from the Tribes.
10. Reporting.
 - a. Department staff shall provide a brief written report to the Tribal Liaison with regard to any consultation with a Tribe. The report shall include: (i) the names of the Tribes and federal, state, or local agencies that participated in the consultation; (ii) the date and location of the consultation; and (iii) a brief description of the issues discussed and any resolution or agreement reached.
 - b. Department staff shall not include in any report prepared pursuant to this section confidential or culturally sensitive information received from a Tribe.

VIII. GRIEVANCE PROCESS

1. If a Tribe believes Department staff members are not following this Policy or that this Policy is not providing effective access and information, the Tribe may submit a written grievance to the Tribal Liaison at tribal.liaison@wildlife.ca.gov or at the following address: Tribal Liaison, California Department of Fish and Wildlife, 1416 Ninth Street, Sacramento, CA 95814.
2. The Tribal Liaison shall review any grievances submitted pursuant to this section and work with Department staff and the Tribe to ensure the issue is resolved to the parties' mutual satisfaction. If the Tribal Liaison is unable to resolve the issue, the Tribal Liaison shall refer the matter to the Director or a designee at an appropriate level of authority.

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If you have any questions or need assistance concerning this policy, please contact Steven Ingram, Senior Staff Counsel at (916) 651-7401 or at Steven.ingram@wildlife.ca.gov.

Signed original on file
Charlton H. Bonham
Director