

EXHIBIT 3.1: KEY POLICIES, DIRECTIVES, GUIDANCE, & LAWS FOR TRIBAL DIPLOMACY AND CONSULTATION

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EXHIBIT 3.1: KEY POLICIES, DIRECTIVES, GUIDANCE, & LAWS FOR TRIBAL DIPLOMACY AND CONSULTATION

This Exhibit presents a brief annotated listing of the key policies, directives, guidance, and regulatory requirements that are relevant to tribal government diplomacy and consultation. This Exhibit may serve as a useful companion to the procedures described in Chapter 3.

State and Federal Tribal Government Diplomacy Policies & Directives

Caltrans' Director's Policy 19 – Working with Native American Communities

Caltrans' Director's Policy 19 (DP-19) ([SER Vol 2, Exhibit 3.6](#)) underscores the need to respect tribal sovereignty and to consult with tribes on a government-to-government basis. DP-19 has established the roles and responsibilities of Caltrans' leaders, managers, and staff for developing and maintaining government-to-government relationships with Native American Communities. The provisions of DP-19 are applicable to everyone who works for the Department in any capacity, including contractors, consultants and subcontractors, all of whom are encouraged to familiarize themselves with the content of the policy to ensure compliance and consistency.

California Governor's Executive Order B-10-11 – Government to Government Consultation with California Indian Tribes

Signed by Governor Brown on September 19, 2011, Executive Order ([EO B-10-11](#)) established the position of the Governor's Tribal Advisor in the Office of the Governor to implement effective government-to-government consultation between the governor and tribes. In addition, the EO directs state agencies and department to engage in communication and consultation with California Indian tribes, which for the purposes of the EO includes federally recognized tribes and other California Native Americans. The EO requires state agencies and departments to permit tribal governments to provide meaningful input into the development of legislation, regulations, rules and policies on matters that may affect tribal communities.

California Governor's Executive Order N-15-19 – Formal Apology to California Native American Tribes

Issued by Governor Newsom on June 18, 2019, [EO N-15-19](#) not only reaffirms EO B-10-11, but also extends a formal apology on behalf of the State of California to all California Native Americans and established the Governor's [Truth and Healing Council](#) to clarify the historical

record and reckon with past traumas inflicted on native peoples over the state's history. Many of the complex issues that arise during Caltrans' cultural resources investigations in the context of transportation project delivery are pertinent to the themes of the Governor's Truth and Healing Council. The ability of tribes to have a voice in the interpretation and treatment of tribal cultural sites that may be affected by transportation projects, including the integration of [tribal traditional knowledge and expertise](#) on balance with scientific archaeological knowledge, is an important consideration when engaging with tribal cultural leaders in the context of cultural resources studies.

California State Transportation Agency's Tribal Consultation Policy

In response to EO B-10-11, the California State Transportation Agency (CalSTA)¹ adopted a [Tribal Consultation Policy](#) in 2014 that broadly defines the tribal consultation expectations for CalSTA and its constituent agencies. Five guiding principles were identified, with input from Tribes, to facilitate effective consultation practices and promote cooperation and efficiencies relative to tribal consultation: collaboration, communication, education, process, and timely notice. These principles embrace meaningful dialogues, open and respectful communication, education in the way of training for agency and department staff, transparent processes, and adequate advance notice of requests for consultations or meetings. For purposes of this policy, the terms "Tribe", "California Indian Tribe," and "tribal" include all federally recognized tribes and other California Native Americans.

California Native American Heritage Commission's Tribal Consultation Policy

One of the key concerns of the NAHC is the protection of Native American human burials and skeletal remains from vandalism and inadvertent destruction. The agency also provides a legal means by which Native American descendants can make known their concerns regarding the need for sensitive treatment and disposition of Native American burials, skeletal remains, and items associated with Native American burials. The [NAHC's Tribal Consultation Policy](#) states that communication and consultation with California's Native American tribes is crucial to the NAHC in serving its mission and in advocating other state agencies to do the same. Their policy sets forth a guide for effective consultation with tribes to ensure meaningful input into the development of regulations, rules, and policies on NAHC matters that may affect tribal communities.

¹ CalSTA was created during the reorganization of the Executive Branch of State government and seven transportation related agencies were placed under it, effective July 1, 2013.

U.S. Presidential Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments (2000)

On November 6, 2000, President Clinton signed [EO 13175](#) regarding consultation and coordination with Indian tribal governments that directs federal agencies to establish meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications; strengthen the United States government-to-government relationships with Indian tribes; and reduce the imposition of unfunded mandates upon Indian tribes. EO 13175 supersedes EO 13084 (1998) previously signed by President Clinton.

U.S. Presidential Memorandum on Tribal Consultation (2009)

On November 5, 2009, President Obama issued a [Memorandum on Tribal Consultation](#) that tasked executive departments and agencies with creating detailed plans of actions that they will take to implement the policies and directives of EO 13175.

U.S. Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (2021)

On January 26, 2021 the White House published an [Executive Memorandum](#) on behalf of President Joseph R. Biden Jr. re-emphasizing the sovereignty of tribal governments and prioritizing the need for the federal government to honor its past commitments made to tribes. Specifically, this memorandum underscores the importance of developing stronger relationships with tribal governments by reaffirming the policies detailed in EO 13175 and the Presidential Memorandum on tribal consultation (2009). The memorandum lays out four steps required by each federal agency regarding plans of action to implement EO 13175, appointing an official to coordinate implementation of the EO, and subsequent reporting of the progress of the agency to meet these goals.

U.S. Department of Transportation (USDOT) Order 5301.1 – Programs, Policies, and Procedures Affecting American Indians and Tribes (1999)

U.S. Transportation Secretary Rodney E. Slater signed [USDOT Order 5301](#) (Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes) on November 16, 1999. The Order directs DOT agencies to build more effective working relationships with Native American tribal governments and to provide increased opportunities for Native Americans to participate in transportation programs. The stated purpose of the Order is “[T]o ensure that programs, policies and procedures administered by the DOT are responsive to the needs and concerns of American Indians, Alaska Natives, and tribes.”

U.S. Department of Transportation's (USDOT) Tribal Consultation Plan

In response to the 2009 Memorandum on Tribal Consultation, the USDOT established a [Tribal Consultation Plan](#) that lists actions they will take to foster meaningful government-to-government relations, improve existing tribal programs, ensure meaningful tribal input into future tribal transportation programs, ensure the USDOT's uniform and effective delivery of tribal programs throughout the country, assist in implementing tribal infrastructure projects, assist tribal members in developing transportation capacities, and assist efforts to coordinate national tribal infrastructure policy and programs within the Federal government.

Federal Laws and Regulations

The National Historic Preservation Act

The NHPA, as amended in 1992, enhanced the recognition of tribal governments' roles in the national historic preservation program, including adding a member of an Indian tribe or Native Hawaiian organization to the Advisory Council on Historic Preservation (ACHP).

The NHPA 1992 amendments:

- Clarify that properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined eligible for inclusion in the NRHP.
- Reinforce the provisions of the ACHP's 36 CFR Part 800 regulations (Section 106 regulations) that require the federal agency to consult with tribes on properties of religious and cultural importance.
- Specify that the ACHP can enter into an agreement with tribes that permit undertakings on tribal land and that are reviewed under tribal regulations governing Section 106.

Requirements for consultation with Native American tribes are not streamlined under the 106 PA and remain identical to the provisions in the Section 106 regulations. FHWA retains its government to government consultation responsibilities with Native American tribes. Under the 106 PA, Caltrans conducts consultation for Federal-Aid Highway projects in California but facilitates direct communications between FHWA and tribes, when requested.

The 106 PA does not apply to federal undertakings that occur on or affect historic properties on tribal lands. The Tribal Historic Preservation Officer (THPO) or, if a THPO is not designated, the tribal representative, would be consulted under Section 106 regulations. Exhibit 3.1 includes a definition of what constitutes tribal lands.

Archaeological Resources Protection Act of 1979

The Archaeological Resources Protection Act of 1979 ([ARPA](#)) and implementing [regulations](#) require federal landholding agencies to notify federally recognized Indian tribes before a permit is issued for archaeological excavation on sites of religious or cultural importance to them in national parks, wildlife refuges, or forests, or on Indian lands, and may notify any other Native American group known by the agency to consider the sites to be of cultural or religious importance. Federally recognized tribes must be notified 30 days before issuing a permit for excavations on public lands; upon request, the federal land manager must meet with them in those 30 days to discuss their concerns. On federal tribal trust lands, tribal government consent must be obtained before the permit is granted.

Uniform rules and regulations were published by the Department of the Interior ([43 CFR 7](#)), the Department of Agriculture ([36 CFR 296](#)), the Department of Defense ([32 CFR 229](#)), and the Tennessee Valley Authority ([18 CFR 1313](#)) in the January 6, 1984 *Federal Register*. Regulations for implementing ARPA on Indian lands ([25 CFR 262](#)) were published in the December 13, 1993 *Federal Register*.

The regulations also state that the federal agency also may notify any other Native American group known by the agency to consider the sites to be of cultural or religious importance. The intentional excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony from federal lands and tribal lands must follow both the requirements of ARPA and the Native American Graves Protection and Repatriation Act (NAGPRA). The Bureau of Indian Affairs (BIA) will issue any ARPA permits needed for excavation on private lands within the exterior boundaries of Indian reservations. Caltrans must obtain the appropriate permits whenever excavation is planned on federal or Indian Lands. Section 5.11 of SER Volume II Chapter 5 contains more information on the process of obtaining an ARPA permit.

American Indian Religious Freedom Act of 1978

In 1978, the U. S. Senate and House of Representatives recognized that the passage of laws meant to conserve and preserve natural species and resources unintentionally impinged on the free exercise of religion for Native Americans. These laws limited Native Americans' access to sacred sites and prohibited the use and possession of sacred objects necessary to practice their religion.

The American Indian Religious Freedom Act of 1978 ([AIRFA](#)) [P.L. 95-341] and [Amendments](#) of 1994 [P.L. 103-334] states, "it shall be the policy of the United States to protect and preserve

for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”

The Native American Graves Protection and Repatriation Act of 1990

The Native American Graves Protection and Repatriation Act (NAGPRA) applies to Caltrans only when a Federal-aid transportation project is located on Federal lands or on tribal trust lands. Enacted November 16, 1990, the [NAGPRA](#) addresses the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to ancestral human remains and certain cultural items with which they are affiliated. NAGPRA directs federal agencies and museums to identify, in consultation with Native American tribes, the cultural affiliation of Native American human remains and associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony, in holdings or collections under their possession (i.e., physical custody) or control (i.e., having sufficient legal interest). Ultimately, the intent is to repatriate human remains and other cultural items to the appropriate lineal descendants or tribe.

The NAGPRA regulations ([43 CFR 10](#)) were initially published in the *Federal Register* on December 4, 1995 and republished on May 9, 2013 to include additional rules and address minor inaccuracies and inconsistencies. The regulations establish definitions and consultation procedures for lineal descendants, Indian tribes, Native Hawaiian organizations, museums and Federal agencies to follow to carry out the Act.

Caltrans is actively working with universities and other repositories on repatriation of human remains and associated items recovered from collections generated by past Caltrans activities. Most of the collections with human remains were obtained from Caltrans projects prior to 1976. Since 1976, the discovery of human remains on non-federal/non-tribal lands requires consultation with a designated Most Likely Descendant(s) in accordance with California Public Resources Code 5097.98 to ensure the respectful treatment and disposition of human remains. For all on-going and future projects, the FHWA reimburses costs associated with inventory, identification, and repatriation of human remains and funerary objects as an environmental mitigation expense.

Executive Order 13007 - Indian Sacred Sites

President Clinton signed [EO 13007](#) on May 24, 1996, ordering federal land management agencies to implement procedures to:

- Accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners
- Avoid adversely affecting the physical integrity of such sacred sites
- Ensure that reasonable notice is provided of any proposed action that may restrict future access or use or could adversely affect the sites

See the [ACHP's publication](#), "The Relationship Between Executive Order 13007 Regarding Indian Sacred Sites and Section 106."

California State Laws and Regulations

Assembly Bill 52 - CEQA Amendment (2014)

Signed into law in 2014, [Assembly Bill No. 52 \(AB-52\)](#) amended Section 5097.94 of the California Public Resources Code and added Sections 21073, 21074, 21080.3.1, 21080.3.2, 21082.3, 21083.09, 21084.2, and 21084.3 relating to Native Americans.

AB-52 established "tribal cultural resources" as a new category of environmental resources that must be considered under CEQA. It specifies that a project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource, as defined, is a project that may have a significant effect on the environment. Tribal cultural resources are identified by the agency in consultation with culturally affiliated California Native American tribes (using list obtained from the NAHC), in recognition and consideration of tribal cultural values. The lead agency has discretion to determine the significance of a tribal cultural resource, as supported by substantial evidence. In applying the criteria of significance under 5024.1, the lead agency must also consider the significance of the resource to a California Native American tribe.

The intent of the legislation, in part, is to recognize tribal governmental status, and establish a meaningful consultation process between California Native American tribal governments and lead agencies, respecting the interests and roles of all California Native American tribes and project proponents, as well as the level of required confidentiality concerning tribal cultural resources, at the earliest possible point in the CEQA environmental review process, so that tribal cultural resources can be identified, and culturally appropriate mitigation and monitoring

programs can be considered by the decisionmaking body of the lead agency. Section 1(b) of the Amendment lists the full legislative intent of the act.

AB-52 tribal consultation requirements are applicable to projects for which the level of environmental document is above a Categorical Exemption (CE). AB-52 specifies that the CEQA lead agency must begin consultation with [California Native American Tribes](#) that are traditionally and culturally affiliated with the geographic area of a proposed project, if the tribe had requested of the lead agency in writing to be informed and consulted about proposed projects in that area.

As Caltrans generally conducts its cultural resources investigations in accordance with both state and federal laws, Caltrans' AB-52 consultation with Native Americans is carried out in tandem with Section 106 consultation efforts. The results of the consultation efforts must be included in the environmental document, in a confidential appendix if necessary.

California PRC 5097.9 – 5097.991 – Discovery and Treatment of Native American Historical, Cultural, and Sacred Sites

The primary California state law guiding Caltrans' policies and practices for the discovery and treatment of Native American Historical, Cultural, and Sacred Sites is Chapter 1.75 of PRC [5097.9-5097.991](#). This law established the [Native American Heritage Commission](#) (NAHC) and its power, roles, and responsibilities. It requires state and local agencies to cooperate with the NAHC in carrying out its duties and prohibits a public agency from interfering with the free expression or exercise of Native American religion or causing severe or irreparable damage to any Native American "sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine" unless shown to be necessary for the public interest. The NAHC may bring an action against a public agency if it appears that their actions will result in such damage.

PRC 5097.98 – Discovery of Human Remains

PRC [5097.98](#) governs the process for when Native American human remains are encountered. Under PRC 5097.98, the NAHC formally designates a tribe or tribes it believes to be the Most Likely Descendant (MLD) of the deceased. Within 48 hours of being granted access to the site, the MLD provides recommendations for the appropriate and dignified treatment and disposition of the human remains and associated items. If the NAHC does not identify the MLD, or the MLD does not make a recommendation, or the landowner does not accept the recommendation, and any mediation attempted fails to provide the landowner acceptable measures, the landowner must re-inter the remains on the property in an area not subject to further disturbance, and record the site with the NAHC, the appropriate Information Center,

and the appropriate county. It is a felony to obtain or possess Native American artifacts or human remains from a grave or burial claim except as otherwise provided by law or in accordance with an agreement reached pursuant to PRC 5097.94 or PRC 5097.98.

California Health and Safety Code 7050.5 – Coroner Notifications

If any human remains are discovered or recognized, Health and Safety Code (HSC) [7050.5](#) requires that no further excavation or disturbance occur in the area and that the county coroner be called immediately to confirm the remains are not modern. The code specifies that the coroner will contact the NAHC, within 24 hours of notification, if the remains are known to be or determined to be Native American in origin.

California HSC 7054(c) – Disposition of Remains

HSC [7054\(c\)](#) states that any person who deposits human remains in any place other than a cemetery is guilty of a misdemeanor. The law does not apply to the intentional, planned reburial of Native American human remains under an agreement between the landowner and the MLD developed pursuant to PRC 5097.94(l) or under PRC 5097.98.

PRC 5097.991 – Repatriation of Remains

PRC [5097.991](#) Repatriation of Native American Remains and Associated Grave Artifacts states that *“It is the policy of the state that Native American remains and associated grave artifacts shall be repatriated.”* Caltrans is actively working with universities and other repositories on the repatriation of human remains and associated items recovered from collections generated by Caltrans’ pre-1976 project activities. Since 1976, the recommendations of the designated Most Likely Descendants have guided the treatment and disposition of human remains and associated funerary items, encountered during project activities, in accordance with the process specified in PRC 5097.98.

California Native American Graves Protection and Repatriation Act of 2001 (Cal NAGPRA) and Assembly Bill 275 (2020) – Native American Cultural Preservation

[Cal NAGPRA](#), as codified in HSC Sections 8010-8030, provides for the repatriation of human remains and cultural items in the possession or control of a state or local agency or museum to California Indian tribes. Cal NAGPRA defines “California Indian tribes” to include non-federally recognized groups as entities that have standing under this law. It also outlines inventory, summary and repatriation processes similar to the federal NAGPRA and establishes penalties and enforcement procedures for non-compliance. Cal NAGPRA was amended in 2015 to supplant the Repatriation Oversight Commission with the NAHC, effective January 1, 2016.

[Assembly Bill \(AB\) 275 \(2020\)](#), effective January 1, 2021, modified Cal NAGPRA to address California-specific issues since the passage of federal NAGPRA in 1990. AB 275 facilitates proactive repatriation, active outreach, and confidential consultations between state agencies and tribes and recognizes the authority of tribal traditional knowledge (TTK) in the identification of human remains, funerary objects, sacred objects, objects of cultural patrimony, ceremonial objects, and the cultural affiliation of the tribe to those remains and cultural items. Deference is to be given to TTK, oral histories, documentation, and testimonies, relative to other relevant categories of evidence when assessing the preponderance of evidence. AB 275 elaborates on the inventory and summary requirements and the involvement of the NAHC.

AB 275 revised various definitions, including, the definition of “California Indian Tribe” to include both a tribe that meets the federal definition of Indian tribe, as well as a tribe that is not recognized by the federal government, but that is a native tribe located in California that is on the list maintained by the NAHC. It also required every state agency with significant interaction with tribal issues, peoples, or lands to designate one or more liaisons for the purpose of engaging in consultation with California Native American tribes on the tribal contact list and educating the agency on topics relevant to the state’s relationship with those tribes.