

Appendix J
AB 52 Correspondence



City of Diamond Bar

21810 Copley Drive | Diamond Bar, CA 91765-4178

909-839-7000 | Fax 909-861-3117

www.DiamondBarCA.gov

Chia Yu Teng

Mayor
District 4

Steve Tye

Mayor Pro Tem
District 1

Andrew Chou

Council Member
District 3

Stan Liu

Council Member
District 5

Ruth M. Low

Council Member
District 2

VIA USPS CERTIFIED MAIL AND FIRST CLASS MAIL

November 7, 2025

Gabrieleño Band of Mission Indians – Kizh Nation
Christine Swindall Martinez, Secretary
P.O. Box 393
Covina, CA 91723

Email: admin@gabrielenoindians.org

Re: Notice of Consultation Opportunity for the proposed **1400 Montefino Project:**
Tribal Cultural Resources under Assembly Bill 52 and Senate Bill 18, pursuant
to Section 21080.3.1 (d) of the Public Resources Code.

Dear Secretary Swindall Martinez:

The City of Diamond Bar is reviewing the proposed development of a residential community project located at 1400 Montefino Avenue, in the City of Diamond Bar, California. The proposed project site was fully developed in the 1980s with a multi-level office building, paved parking lot, and decorative landscaping. The project site is currently located within the Commercial Office (CO) zoning district, with an underlying General Plan land use designation of General Commercial and the project proposes a change to Medium High Density Residential (RMH). A map depicting the location of the project site is enclosed.

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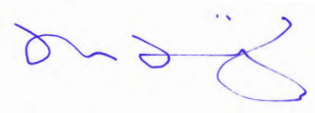
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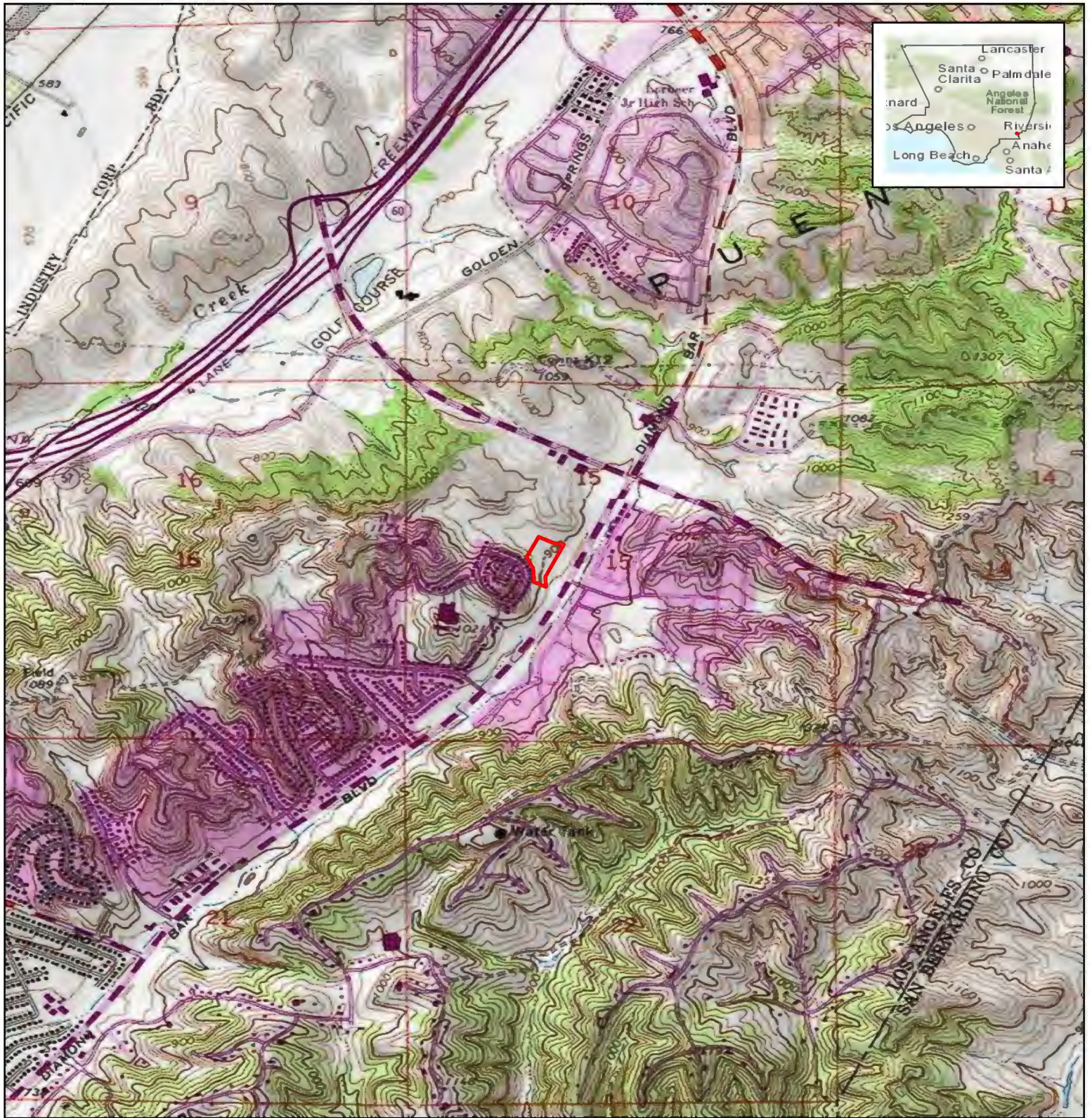
Lead Agency Point of Contact: Mayuko Nakajima, Senior Planner
City of Diamond Bar, Planning Division
21810 Copley Drive, Diamond Bar, CA 91765
Email: MNakajima@DiamondBarCA.Gov
Phone No.: (909) 839-7033

Very Respectfully,



Mayuko Nakajima, Senior Planner

Enclosure: Project Location Map



Source: ESRI USA Topo Maps and World Topo Map 2025

1400 Montefino Avenue Residential Project

Figure 1. Project Location Map

 Project Site

Project Location is within Diamond Bar, California, in Los Angeles County on the USGS Yorba Linda 7.5-minute quadrangle map in Section 15 of Township 02 South and Range 09 West

Center Coordinate (Decimal Degrees):
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0 1,150 2,300 Feet

Scale: 1:24,000





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November 7, 2025

Gabrieleño Tongva San Gabriel Band of Mission Indians

Anthony Morales, Chairperson

P.O. Box 693

San Gabriel, CA 91778

Email GTtribalcouncil@aol.com

Re: Notice of Consultation Opportunity for the proposed **1400 Montefino Project**:
Tribal Cultural Resources under Assembly Bill 52 and Senate Bill 18, pursuant
to Section 21080.3.1 (d) of the Public Resources Code.

Dear Chairperson Morales:

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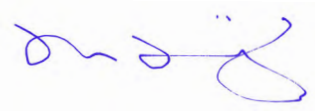
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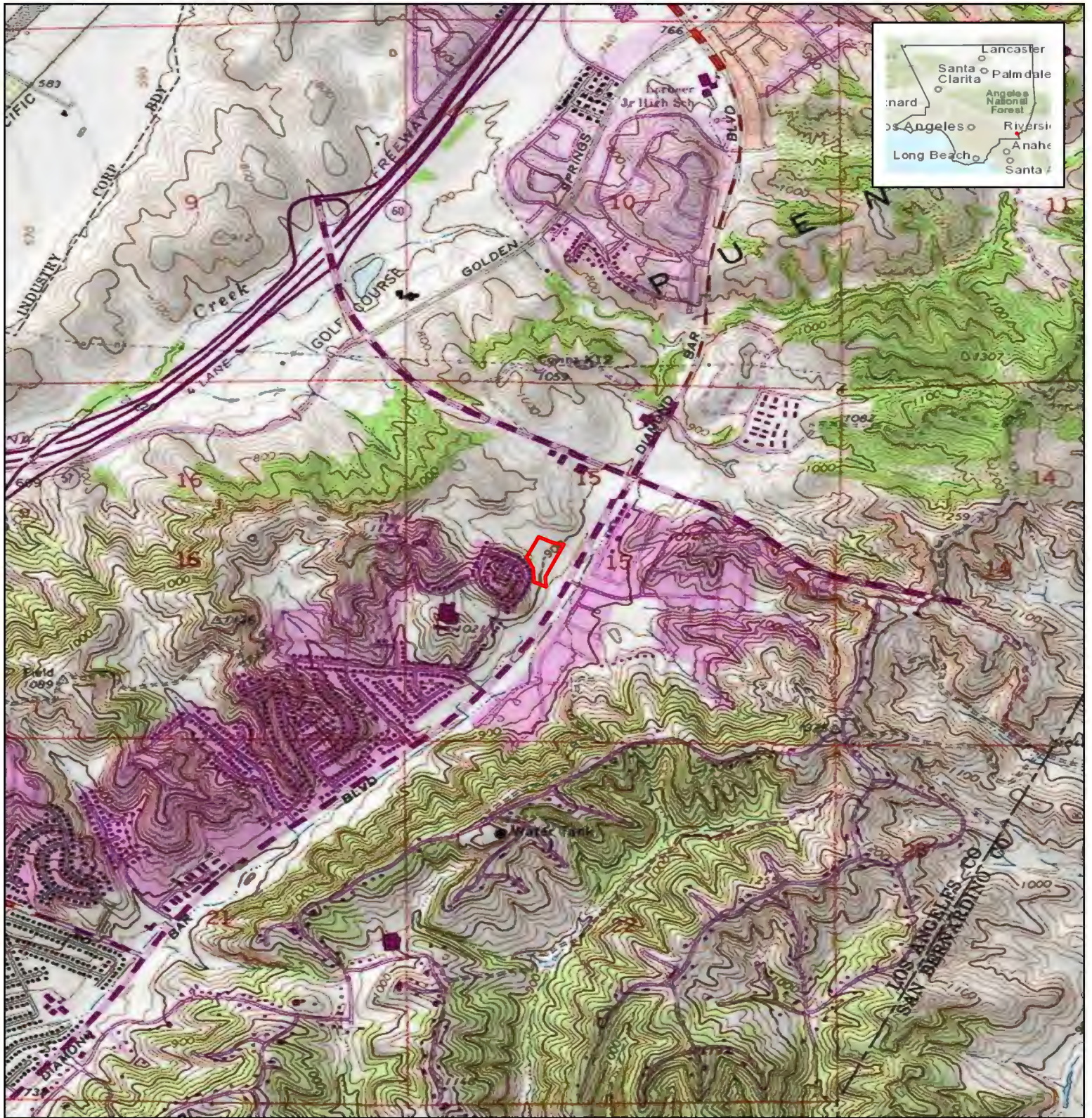
Lead Agency Point of Contact: Mayuko Nakajima, Senior Planner
City of Diamond Bar, Planning Division
21810 Copley Drive, Diamond Bar, CA 91765
Email: MNakajima@DiamondBarCA.Gov
Phone No.: (909) 839-7033

Very Respectfully,



Mayuko Nakajima, Senior Planner

Enclosure: Project Location Map



Source: ESRI USA Topo Maps and World Topo Map 2025

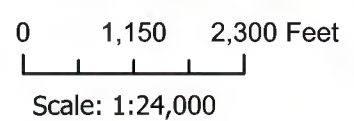
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November 7, 2025

Soboba Band of Luiseño Indians
Joseph Ontiveros, Tribal Historic Preservation Officer
P.O. Box 487
San Jacinto, CA 92581

Email jontiveros@soboba-nsn.gov

Re: Notice of Consultation Opportunity for the proposed **1400 Montefino Project**:
Tribal Cultural Resources under Assembly Bill 52 and Senate Bill 18, pursuant
to Section 21080.3.1 (d) of the Public Resources Code.

Dear Officer Ontiveros:

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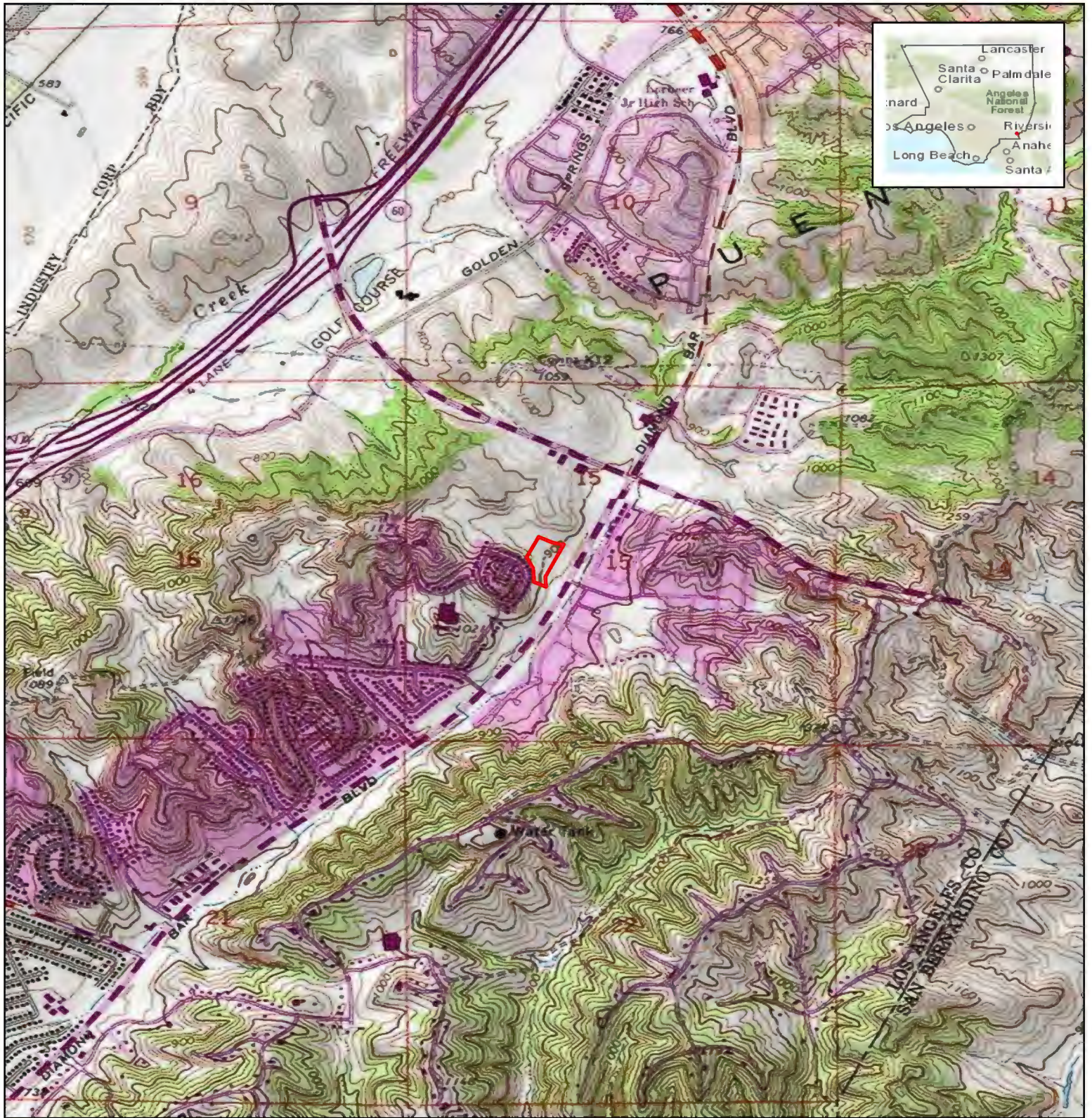
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Source: ESRI USA Topo Maps and World Topo Map 2025

1400 Montefino Avenue Residential Project

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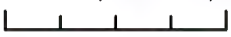
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November 7, 2025

Gabrieleño Band of Mission Indians – Kizh Nation

Andrew Salas, Chairperson

P.O. Box 393

Covina, CA 91723

Email: admin@gabrielenoindians.org

Re: Notice of Consultation Opportunity for the proposed **1400 Montefino Project:** Tribal Cultural Resources under Assembly Bill 52 and Senate Bill 18, pursuant to Section 21080.3.1 (d) of the Public Resources Code.

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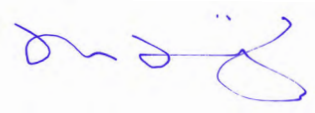
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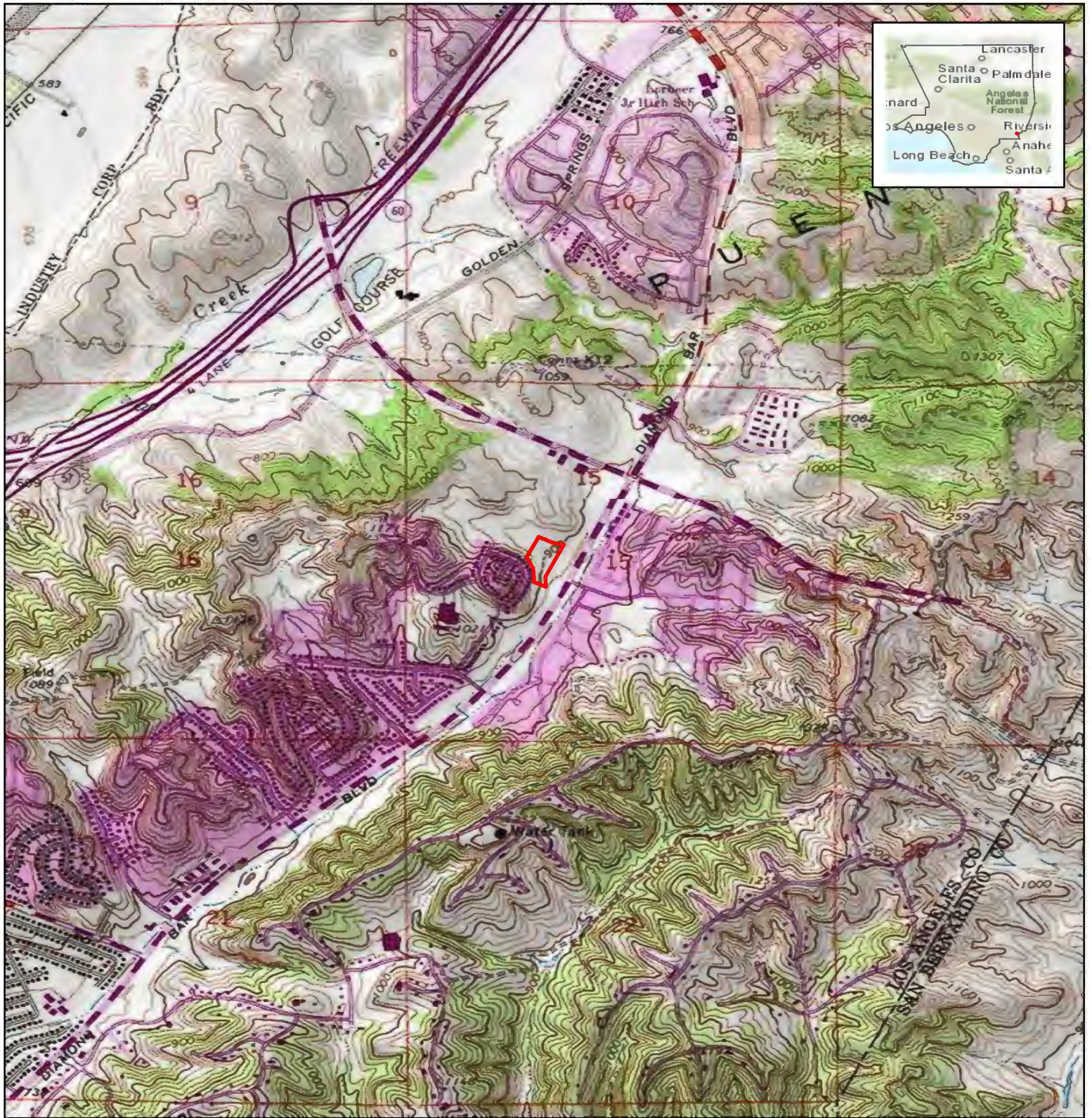
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November 7, 2025

Soboba Band of Luiseño Indians
Jessica Valdez, Cultural Resource Specialist
P.O. Box 487
San Jacinto, CA 92581

Email jvaldez@soboba-nsn.gov

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Dear Specialist Valdez:

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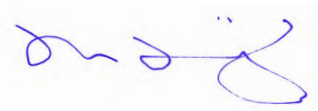
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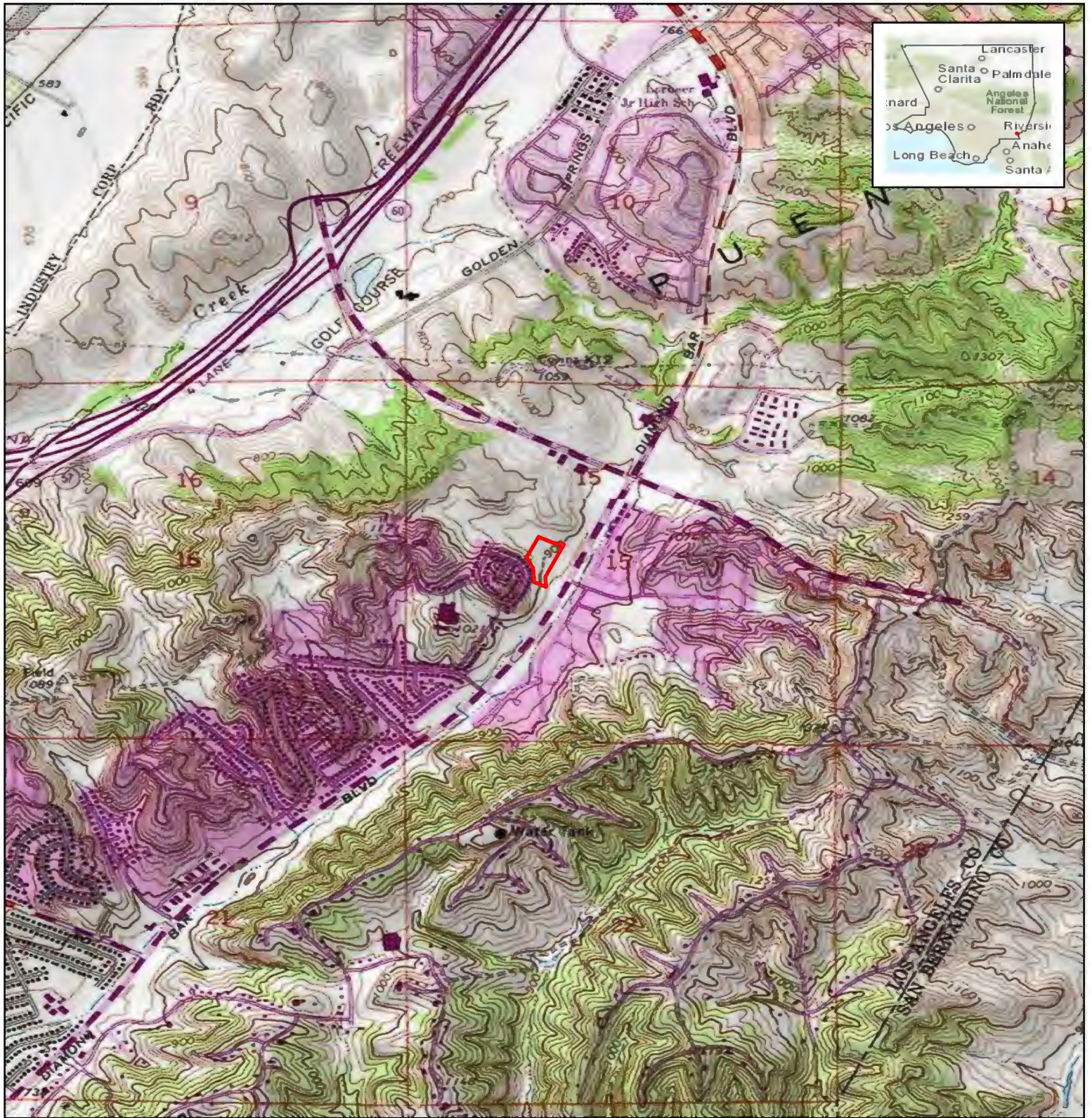
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Mayuko Nakajima, Senior Planner

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GABRIELEÑO BAND OF MISSION INDIANS - KIZH NATION
Historically known as The San Gabriel Band of Mission Indians recognized by the State of California as the
aboriginal tribe of the Los Angeles basin

November 21, 2025

Mayuko Nakajima
Senior Planner
City of Diamond Bar, Planning Division
21810 Copley Drive, Diamond Bar, CA 91765

Subject: Formal Request for Government-to-Government Consultation – 1400 Montefino Project City of Diamond Ave

Dear Mayuko Nakajima,

On behalf of the Gabrieleno Band of Mission Indians Kizh Nation, I am formally requesting government-to-government consultation with the City of Diamond Bar pursuant to Assembly Bill 52 and the California Environmental Quality Act (CEQA) regarding the proposed 1400 Montefino Project. Our tribe has ancestral and cultural ties to this area, and we are concerned that the project may impact Tribal Cultural Resources (TCRs) within our traditional territory.

Under AB52, lead agencies are required to engage in meaningful government-to-government consultation with our tribe who is ancestrally traditionally and culturally affiliated with the project area when the project undergoes CEQA review, in accordance with the law.

We request that formal consultation be initiated within the required timeframe, and we are prepared to meet at your earliest convenience. Please confirm receipt of this request and provide available dates for an initial consultation meeting.

For scheduling or further discussion, please contact me at gabrielenoindians@gmail.com or (844) 390 - 0787. We appreciate your commitment to ensuring compliance with AB 52 and protecting the cultural heritage of our tribal community.

Best regards,

Hereditary Chief Andrew Salas
Gabrieleno Band of Mission Indians–Kizh Nation

Andrew Salas, Chairman
Mike Jesus Lemos, Treasurer I

Nadine Salas, Vice-Chairman
Samantha Lemos, Treasurer II

Dr. Christina Swindall Martinez, Secretary
Richard Gradias, Chairman of the council of Elders

PO Box 393 Covina, CA 91723

www.gabrielenoindians.org

admin@gabrielenoindians.org



GABRIELEÑO BAND OF MISSION INDIANS - KIZH NATION
Historically known as The San Gabriel Band of Mission Indians recognized by the State of California
as the aboriginal tribe of the Los Angeles basin

Legal Thresholds for “Substantial Evidence” in Tribal Consultation

RE: CEQA and AB 52 Tribal Consultation

Attn: Lead Agency Representative

This letter is submitted by the Gabrieleño Band of Mission Indians – Kizh Nation to clarify the legal definition and threshold of “substantial evidence” as required under the California Environmental Quality Act (CEQA) and Assembly Bill 52 (AB 52). These statutes govern how Tribes are determined to be eligible for consultation and involvement in cultural resource protection.

I. Legal Definition of “Substantial Evidence”

Pursuant to CEQA Guidelines § 15384(a):

“Enough relevant information and reasonable inferences from that information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.”

In practical terms, “substantial evidence” is fact-based, documented proof, and not merely opinion or unverified narrative. Lead agencies are required to rely on this standard when determining which tribes have legal standing in consultation, mitigation, monitoring, and repatriation processes under CEQA and AB 52.

Valid examples of substantial evidence include:

- Archaeological records
- Historical documentation
- Spanish/Mexican land grant records and mission-era maps
- Genealogical data showing ancestral ties to the area
- Oral histories (when supported by documentation)
- Expert reports or peer-reviewed scholarly assessments

Andrew Salas, Chairman
Mike Jesus Lemos, Treasurer I

Nadine Salas, Vice-Chairman
Samantha Lemos, Treasurer II

Dr. Christina Swindall Martinez, Secretary
Richard Gradias, Chairman of the council of Elders

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II. What Does Not Qualify as Substantial Evidence?

The intent of CEQA and AB 52 is not to create symbolic inclusivity, but to ensure that only those tribes with documented, lineal, cultural, or ancestral affiliation to a project area are consulted. The law is clear: participation must be based on fact-based documentation, not preference, emotion, or assumption.

According to **CEQA Guidelines § 15384**:

“Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.”

Conversely, **§ 15384(b)** states:

“Argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence that is not credible shall not constitute substantial evidence.”

Invalid examples include:

1. Unsubstantiated Opinions – Generalized claims such as “we feel connected to this area” without accompanying documentation.
2. Speculative Assertions – Guesswork or assumptions without factual or historical support.
3. Form Letters or Equity-Based Requests – Requests made “in the spirit of respect” or for equitable inclusion with no specific tie to the site.
4. NAHC List Status Alone – Being listed on the NAHC Consultation Contact List does not establish cultural affiliation or descent. The NAHC has clarified this list is strictly for contact purposes.
5. Unverified or Fabricated Sources – Misrepresented or plagiarized documents, or third-party claims made without evidence.

Allowing participation based on such unsupported assertions undermines the legal foundation of CEQA, violates the rights of lineal descendant tribes, and puts the lead agency at legal risk.

III. Legal Precedent: [Koi Nation v. City of Clearlake](#) (2020)

This pivotal court case illustrates the legal requirement to honor substantial evidence. The Koi Nation provided maps, Tribal records, and historical evidence of its ancestral ties to a project site in Clearlake. The City dismissed the evidence and issued a Mitigated Negative Declaration (MND) instead of conducting full consultation.

The California Court of Appeal ruled in favor of the Koi Nation, concluding that:

- The Tribe met the substantial evidence standard, triggering the requirement for full CEQA review;
- The city violated CEQA by dismissing the evidence and failing to conduct proper consultation;

- The presence of substantial evidence that cultural resources may be affected required the preparation of an EIR.

Lead agencies are legally obligated to consult and coordinate with tribes that present documented, fact-based evidence of cultural affiliation to a project area. This case confirms that agencies may not substitute convenience, preference, or assumptions in place of the legal requirement to engage Tribes who provide substantial evidence of *ancestral* connection.

IV. Why This Matters

Pursuant to AB 52 and CEQA, consultation must be based on “substantial evidence” demonstrating a tribe’s cultural or ancestral affiliation to the specific project area. Failure to apply the substantial evidence standard results in:

- Invalidation of tribal consultation efforts
- Potential CEQA litigation and project delays
- Legal and ethical harm to culturally affiliated tribes
- Risk of project rejection or reversal


V. The Position of the Kizh Nation

The Gabrieleño Band of Mission Indians – Kizh Nation maintains and submits substantial archaeological, historical, genealogical, and cultural evidence of our ancestral presence in the Greater Los Angeles Basin and associated project areas. This documented affiliation compels our inclusion in all stages of consultation, monitoring, and cultural resource treatment.

We respectfully urge your agency to uphold CEQA and AB 52’s legal standards and to reject unsupported claims that seek involvement based on speculative or generalized assertions. Inclusion in tribal consultation is a legal matter—not a discretionary one.

Should your agency require further documentation, expert testimony, or legal case references to support this position, we are available to provide additional materials upon request.

Respectfully,



Hereditary Chief Andrew Salas
Gabrieleño Band of Mission Indians–Kizh Nation

Andrew Salas, Chairman
Mike Jesus Lemos, Treasurer I

Nadine Salas, Vice-Chairman
Samantha Lemos, Treasurer II

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Hello Mayuko,

Please find below the substantial evidence submitted by the Gabrieleño Band of Mission Indians – Kizh Nation in relation to your project. This documentation fulfills the legal requirement under the California Environmental Quality Act (CEQA) and Assembly Bill 52 (AB 52) to establish our Tribe's ancestral affiliation and the presence of Tribal Cultural Resources within the project area.

Included is clarification on the legal definition and threshold of "substantial evidence" under CEQA and AB 52, which governs Tribal eligibility for consultation and mitigation.

Our mitigation measures—tailored to our Tribe's cultural protocols and based on our direct ancestral connection to the project area—represent the minimum requirements necessary to protect and preserve Tribal Cultural Resources and ensure full compliance with AB 52.

Please confirm receipt of these attachments.

On Wed, Feb 4, 2026 at 12:21 PM Andy Salas <admin@gabrielenoindians.org> wrote:

Hello Mayuko

We are currently working on gathering the information and will have it out to you as soon as possible.

On Wed, Feb 4, 2026 at 10:52 AM Mayuko Nakajima <MNakajima@diamondbarca.gov> wrote:

Hello Andy,

I'd like to follow up as we are preparing our draft Initial study ready for public review.

Thank you,

Mayuko Nakajima | Senior Planner
City of Diamond Bar | Planning Division
909.839.7033

From: Andy Salas <admin@gabrielenoindians.org>
Sent: Friday, January 23, 2026 3:27 PM
To: Mayuko Nakajima <MNakajima@DiamondBarCA.Gov>
Subject: Re: 1400 Montefino Project

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Hello Mayuko

We will have the information out to you by next week.

On Fri, Jan 23, 2026 at 1:41 PM Mayuko Nakajima <MNakajima@diamondbarca.gov> wrote:

Good afternoon Andy,

I was wondering when we can expect the documents for this project.

Thank you,

Mayuko Nakajima | Senior Planner
City of Diamond Bar | Planning Division
909.839.7033

From: Andy Salas <admin@gabrielenoindians.org>
Sent: Monday, January 12, 2026 12:02 PM
To: Mayuko Nakajima <MNakajima@DiamondBarCA.Gov>
Subject: Re: 1400 Montefino Project

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Hello Mayuko

Thank you for understanding. Sounds good we will send over the information to you as soon as possible.

On Mon, Jan 12, 2026 at 11:43 AM Mayuko Nakajima <MNakajima@diamondbarca.gov> wrote:

Hi Andy,

No problem. Let's proceed with consultation via email. I imagine the mitigation measures will be similar to other projects that we've worked on together.

Regards,

Mayuko Nakajima | Senior Planner
City of Diamond Bar | Planning Division
909.839.7033

From: Andy Salas <admin@gabrielenoindians.org>
Sent: Monday, January 12, 2026 11:42 AM
To: Mayuko Nakajima <MNakajima@DiamondBarCA.Gov>
Subject: 1400 Montefino Project

****DO NOT open unknown links or any attachments without confirming with IS or the sender directly.****

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Hello Mayuko Nakajima

We are sorry for the inconvenience. Chief Salas will not be available after all tomorrow. He is asking if we can either reschedule or if we can go through consultation via email to help the project move forward without any delays. We can provide substantial evidence, maps, and mitigation measures. Please let us know what you would like to do.

8 attachments








1400 Montefino Avenue_1881map_.jpg
452K



1400 Montefino Avenue_1938map_.jpg
410K



1400 Montefino Avenue_1898map_.jpg
330K

-  **1400 Montefino Project_.pdf**
202K
-  **Mitigation Measures_1400 Montefino_.pdf**
189K
-  **Attn Lead Agencies.pdf**
320K
-  **Legal Thresholds for “Substantial Evidence” in Tribal Consultation_Final.pdf**
399K
-  **Revised_AB_52_Technical_Advisory_March_2017.pdf**
390K

Abdul Jama <ajama@denovoplanning.com>
To: Christine Abraham <cabraham@denovoplanning.com>

Tue, Feb 10, 2026 at 4:12 PM

Nice, I'll go back to the Tribal Cultural section and complete the consultation question. Also I will update the tribal consultation appendix with these attachments.

Is it alright if I complete this tomorrow morning?

[Quoted text hidden]

--

Abdul Jama | Assistant Planner

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GABRIELEÑO BAND OF MISSION INDIANS - KIZH NATION
Historically known as The San Gabriel Band of Mission Indians recognized by the State of California as the
aboriginal tribe of the Los Angeles basin

Legal Thresholds for “Substantial Evidence” in Tribal Consultation

RE: CEQA, AB52, SB18, AB130, SB35 and Section 106 Tribal Consultation

Attn: Lead Agency Representative

This letter is submitted by the Gabrieleño Band of Mission Indians – Kizh Nation to clarify the legal definition and threshold of “substantial evidence” as required under the California Environmental Quality Act (CEQA) and Assembly Bill 52 (SECTION 106). These statutes govern how Tribes are determined to be eligible for consultation and involvement in cultural resource protection.

I. Legal Definition of “Substantial Evidence”

Pursuant to CEQA Guidelines § 15384(a):

“Enough relevant information and reasonable inferences from that information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.”

In practical terms, “substantial evidence” is fact-based, documented proof, and not merely opinion or unverified narrative. Lead agencies are required to rely on this standard when determining which tribes have legal standing in consultation, mitigation, monitoring, and repatriation processes under CEQA and SECTION 106.

Valid examples of substantial evidence include:

- Archaeological records
- Historical documentation
- Spanish/Mexican land grant records and mission-era maps
- Genealogical data showing ancestral ties to the area
- Oral histories (when supported by documentation)
- Expert reports or peer-reviewed scholarly assessments

Andrew Salas, Chairman
Mike Jesus Lemos, Treasurer I

Nadine Salas, Vice-Chairman
Samantha Lemos, Treasurer II

Dr. Christina Swindall Martinez, Secretary
Richard Gradias, Chairman of the council of Elders

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II. What Does Not Qualify as Substantial Evidence?

The intent of CEQA and SECTION 106 is not to create symbolic inclusivity, but to ensure that only those tribes with documented, lineal, cultural, or ancestral affiliation to a project area are consulted. The law is clear: participation must be based on fact-based documentation, not preference, emotion, or assumption.

According to **CEQA Guidelines § 15384**:

“Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.”

Conversely, § 15384(b) states:

“Argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence that is not credible shall not constitute substantial evidence.”

Invalid examples include:

1. Unsubstantiated Opinions – Generalized claims such as “we feel connected to this area” without accompanying documentation.
2. Speculative Assertions – Guesswork or assumptions without factual or historical support.
3. Form Letters or Equity-Based Requests – Requests made “in the spirit of respect” or for equitable inclusion with no specific tie to the site.
4. NAHC List Status Alone – Being listed on the NAHC Consultation Contact List does not establish cultural affiliation or descent. The NAHC has clarified this list is strictly for contact purposes.
5. Unverified or Fabricated Sources – Misrepresented or plagiarized documents, or third-party claims made without evidence.

Allowing participation based on such unsupported assertions undermines the legal foundation of CEQA, violates the rights of lineal descendant tribes, and puts the lead agency at legal risk.

III. Legal Precedent: Koi Nation v. City of Clearlake (2020)

This pivotal court case illustrates the legal requirement to honor substantial evidence. The Koi Nation provided maps, Tribal records, and historical evidence of its ancestral ties to a project site in Clearlake. The City dismissed the evidence and issued a Mitigated Negative Declaration (MND) instead of conducting full consultation.

The California Court of Appeal ruled in favor of the Koi Nation, concluding that:

- The Tribe met the substantial evidence standard, triggering the requirement for full CEQA review;
- The city violated CEQA by dismissing the evidence and failing to conduct proper consultation;
- The presence of substantial evidence that cultural resources may be affected required the preparation of an EIR.

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Lead agencies are legally obligated to consult and coordinate with tribes that present documented, fact-based evidence of cultural affiliation to a project area. This case confirms that agencies may not substitute convenience, preference, or assumptions in place of the legal requirement to engage Tribes who provide substantial evidence of ancestral connection.

IV. Why This Matters

Pursuant to SECTION 106 and CEQA, consultation must be based on “substantial evidence” demonstrating a tribe’s cultural or ancestral affiliation to the specific project area. Failure to apply the substantial evidence standard results in:

- Invalidation of tribal consultation efforts
- Potential CEQA litigation and project delays
- Legal and ethical harm to culturally affiliated tribes
- Risk of project rejection or reversal

V. Tribal Obligations and Evidentiary Submissions During SECTION 106 Consultation

SECTION 106 consultation is a structured, evidence-driven process. Tribes asserting consultation rights are expected to provide *specific, location-based, and documented information* regarding Tribal Cultural Resources (TCRs) within or near a project area. Consultation is not abstract or generalized; it is grounded in identifiable resources, cultural landscapes, and documented affiliation.

During consultation, a tribe asserting cultural affiliation should be prepared to submit, discuss, and substantiate the following, as applicable:

- Identification of Tribal Cultural Resources (TCRs)
Detailed information identifying sites, features, objects, landscapes, or cultural places that possess cultural, spiritual, ceremonial, or traditional significance. This includes, but is not limited to, village locations, trails, use areas, burial contexts, sacred sites, and cultural landscapes—whether previously recorded or not.
- Maps and Geographic Documentation
Maps delineating the tribe’s area of traditional and cultural affiliation and identifying known or sensitive TCR locations, corridors, or cultural landscapes relevant to the project area.
- Cultural Significance
A clear explanation of why identified resources are culturally significant, including spiritual, ceremonial, historical, or traditional importance. Cultural value is not limited to archaeological visibility and may extend beyond surface expressions.
- Proposed Avoidance, Preservation, or Mitigation Measures
Concrete, project-specific measures proposed by the tribe, including avoidance, preservation in place, cultural monitoring, treatment protocols, access restrictions, or other culturally appropriate protections.

E. Confidentiality Requests

Formal requests to protect sensitive cultural information from public disclosure, as required and authorized under SECTION 106 and CEQA. Lead agencies are obligated to respect and safeguard confidential tribal information provided during consultation.

F. Formal and Timely Response to Consultation Notices

Written responses submitted within statutory timelines, forming part of the administrative record. While sample formats provided by the Native American Heritage Commission (NAHC) may be used, consultation determinations must ultimately rely on the **substantive evidence submitted**, not the format of correspondence.

VI. Consultation Standards: Good-Faith, Substantive, and Documented Engagement

SECTION 106 requires consultation to be conducted in *good faith* and to involve *meaningful, substantive dialogue*, not a procedural or checkbox exercise.

Key consultation principles include:

- **Early Engagement**

Consultation should occur early enough in the planning process to allow for meaningful avoidance and project modification alternatives, not after project parameters are fixed.

- **Substantive Dialogue**

Consultation must involve confidential, substantive discussions—preferably in person—regarding impacts, alternatives, and mitigation measures. Mere information exchange or unilateral agency determinations do not satisfy SECTION 106.

- **Documentation in the Administrative Record**

All tribal input, correspondence, meeting notes, and submitted evidence must be accurately documented by the lead agency in the administrative record supporting environmental review.

- **Proactive Tribal Participation**

Tribes are entitled to propose alternatives, mitigation measures, and treatment protocols that actively shape project outcomes. This proactive engagement strengthens CEQA compliance and reduces legal vulnerability.

By providing detailed, fact-based information and actively participating in consultation, tribes ensure their cultural heritage is properly considered while enabling lead agencies to meet their statutory obligations under CEQA and SECTION 106.

VII. Clarification Regarding County Proclamations and Political Recognition

It is necessary to clarify that **county or municipal proclamations do not constitute substantial evidence** under CEQA or SECTION 106.

A. Legal Standard for Substantial Evidence

- a. CEQA Guidelines § 15384(a) define substantial evidence as:
 - i. “*Facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.*”
- b. CEQA Guidelines § 15384(b) further provide that:
 - i. “Argument, speculation, unsubstantiated opinion, or evidence that is clearly inaccurate or erroneous does not constitute substantial evidence.”

A county proclamation is a *political or ceremonial act*, not a factual, genealogical, ethnographic, or expert determination. It does not meet the substantial evidence standard required by CEQA.

B. SECTION 106 Requires Factual Determination of Cultural Affiliation

Under SECTION 106, tribal participation in consultation and mitigation depends on whether the lead agency determines (**based on substantial evidence**) that:

1. A Tribal Cultural Resource exists (Public Resources Code § 21074(a)(2)); and
2. The tribe is traditionally and culturally affiliated with that resource or geographic area (Public Resources Code § 21080.3.1(b)).

A proclamation does not establish traditional or cultural affiliation and cannot substitute for documented ancestral evidence.

C. Proclamations Are Not Expert or Evidentiary Findings

County proclamations typically:

- Are issued by elected officials;
- Do not include genealogical analysis;
- Do not cite ethnographic, mission-era, or historical documentation;
- Are not the result of CEQA findings, peer review, or expert assessment.

Courts have consistently recognized that *political recognition is not equivalent to evidentiary proof* under CEQA.

D. What Does Qualify as Substantial Evidence of Ancestral Affiliation

Examples of documentation that may satisfy the substantial evidence standard include:

- Mission and baptismal records with genealogical continuity;
- Ethnographic and historical sources (including mission-era and early ethnographic records);
- Documented village locations and evidence of continuous occupation;
- Prior CEQA findings recognizing ancestral affiliation;
- Expert reports grounded in verifiable, peer-reviewed data.

A county proclamation, standing alone, does not constitute substantial evidence under CEQA or SECTION 106 that a tribe is traditionally or culturally affiliated with a project area. While such proclamations may reflect political acknowledgment, they do not satisfy the legal evidentiary requirements of Public Resources Code §§ 21074 and 21080.3.1 or CEQA Guidelines § 15384.

VIII. The Position of the Kizh Nation

The Gabrieleño Band of Mission Indians – Kizh Nation maintains and submits substantial archaeological, historical, genealogical, and cultural evidence of our ancestral presence in the Greater Los Angeles Basin and associated project areas. This documented affiliation compels our inclusion in all stages of consultation, monitoring, and cultural resource treatment.

We respectfully urge your agency to uphold CEQA and SECTION 106’s legal standards and to reject unsupported claims that seek involvement based on speculative or generalized assertions. Inclusion in tribal consultation is a legal matter—not a discretionary one.

Should your agency require further documentation, expert testimony, or legal case references to support this position, we are available to provide additional materials upon request.

Respectfully,



Hereditary Chief Andrew Salas
Gabrieleño Band of Mission Indians–Kizh Nation



GABRIELEÑO BAND OF MISSION INDIANS - KIZH NATION

California State Recognized Aboriginal Tribe of the Los Angeles Basin
(Historically known as the Gabrieleño Tribal Council - San Gabriel Band of Mission Indians)



GABRIELENO BAND OF MISSION INDIANS – KIZH NATION - PROPOSED TCR MITIGATION MEASURES

1400 Montefino Project

TCR-1: Retain a Native American Monitor Prior to Commencement of Ground-Disturbing Activities

- A. The project applicant/lead agency shall retain a Native American Monitor from or approved by the Gabrieleño Band of Mission Indians – Kizh Nation. The monitor shall be retained prior to the commencement of any “ground-disturbing activity” for the subject project at all project locations (i.e., both on-site and any off-site locations that are included in the project description/definition and/or required in connection with the project, such as public improvement work). “Ground-disturbing activity” shall include, but is not limited to, demolition, pavement removal, potholing, auguring, grubbing, tree removal, boring, grading, excavation, drilling, and trenching.
- B. A copy of the executed monitoring agreement shall be submitted to the lead agency prior to the earlier of the commencement of any ground-disturbing activity, or the issuance of any permit necessary to commence a ground-disturbing activity.
- C. The monitor will complete daily monitoring logs that will provide descriptions of the relevant ground-disturbing activities, the type of construction activities performed, locations of ground-disturbing activities, soil types, cultural-related materials, and any other facts, conditions, materials, or discoveries of significance to the Tribe. Monitor logs will identify and describe any discovered TCRs, including but not limited to, Native American cultural and historical artifacts, remains, places of significance, etc., (collectively, tribal cultural resources, or “TCR”), as well as any discovered Native American (ancestral) human remains and burial goods. Copies of monitor logs will be provided to the project applicant/lead agency upon written request to the Tribe.
- D. On-site tribal monitoring shall conclude upon the latter of the following (1) written confirmation to the Kizh from a designated point of contact for the project applicant/lead agency that all ground-disturbing activities and phases that may involve ground-disturbing activities on the project site or in connection with the project are complete; or (2) a determination and written notification by the Kizh to the project applicant/lead agency that no future, planned construction activity and/or development/construction phase at the project site possesses the potential to impact Kizh TCRs.

TCR-2: Unanticipated Discovery of Tribal Cultural Resource Objects (Non-Funerary/Non-Ceremonial)

- A. Upon discovery of any TCRs, all construction activities in the immediate vicinity of the discovery

shall cease (i.e., not less than the surrounding 50 feet) and shall not resume until the discovered TCR has been fully assessed by the Kizh monitor and/or Kizh archaeologist. The Kizh will recover and retain all discovered TCRs in the form and/or manner the Tribe deems appropriate, in the Tribe's sole discretion, and for any purpose the Tribe deems appropriate, including for educational, cultural and/or historic purposes.

TCR-3: Unanticipated Discovery of Human Remains and Associated Funerary or Ceremonial Objects

- A. Native American human remains are defined in PRC 5097.98 (d)(1) as an inhumation or cremation, and in any state of decomposition or skeletal completeness. Funerary objects, called associated grave goods in Public Resources Code Section 5097.98, are also to be treated according to this statute.
- B. If Native American human remains and/or grave goods are discovered or recognized on the project site, then Public Resource Code 5097.9 as well as Health and Safety Code Section 7050.5 shall be followed.
- C. Human remains and grave/burial goods shall be treated alike per California Public Resources Code section 5097.98(d)(1) and (2).
- D. Preservation in place (i.e., avoidance) is the preferred manner of treatment for discovered human remains and/or burial goods.
- E. Any discovery of human remains/burial goods shall be kept confidential to prevent further disturbance.

PLEASE NOTE THE FOLLOWING:

Any/all revisions to the Kizh's proposed TCR mitigations set forth above must be requested in writing, and not more than ten (30) calendar days from the date that we consulted on the subject Project so that we can conclude consultation. Requested revisions shall be delivered to the Kizh via email at admin@gabrielenoindians.org, and in a Word document, redline format. Please include as the email subject: "REQUEST FOR MITIGATION REVISIONS," and identify the project name and location/address. If revisions are not requested within 10 calendar days of consultation, the Kizh's proposed mitigations are presumed accepted as proposed (i.e., as set forth above). The laws preserving the confidentiality of Native

The laws preserving the confidentiality of Native

American documents and records prohibits the inclusion of any information about the location of Native American artifacts, sites, sacred lands, or any other information that is exempt from public disclosure pursuant to the Public Records Act. (Cal. Code Regs. § 15120(d) Rocklin (2011) 197 Cal.App.4th 200, at p. 220. Please be advised that these protective mitigation measures are property of the KIZH Nation Tribal government and no other entity or Tribal government nor should they be utilized for any other Tribal government or entity and are protected under the AB52 confidentiality act

Thank you for your anticipated cooperation.

TECHNICAL ADVISORY

AB 52 AND TRIBAL CULTURAL RESOURCES IN CEQA

June, 2017





Technical Advisory:
AB 52 and Tribal Cultural Resources in CEQA
(June, 2017)

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I. Purpose

This technical advisory is one in a series of advisories provided by the Governor’s Office of Planning and Research (OPR) as a service to professional planners, land use officials and California Environmental Quality Act (CEQA) practitioners. OPR creates and updates technical advisories as needed on current issues in environmental law and land use planning that broadly affect the practice of CEQA and land use planning in California.

The purpose of this technical advisory is to provide guidance to lead agencies regarding recent changes to CEQA requiring consultation with California Native American tribes and consideration of tribal cultural resources. It summarizes the reasons for the legislative changes, and explains the substantive and procedural requirements that go into effect on July 1, 2015. Finally, it summarizes relevant case law, and provides a list of additional resources.

II. Legislative Intent

The legislature added the new requirements regarding tribal cultural resources in [Assembly Bill 52 \(Gatto, 2014\)](#). By including tribal cultural resources early in the CEQA process, the legislature intended to ensure that local and Tribal governments, public agencies, and project proponents would have information available, early in the project planning process, to identify and address potential adverse impacts to tribal cultural resources. By taking this proactive approach, the legislature also intended to reduce the potential for delay and conflict in the environmental review process. ((AB 52 § 1 (b)(7).)¹

¹ Assembly Bill 52 (Gatto, 2014). Section 1 of the bill states the legislature’s intent as follows:

In recognition of California Native American tribal sovereignty and the unique relationship of California local governments and public agencies with California Native American tribal governments, and respecting the interests and roles of project proponents, it is the intent of the Legislature, in enacting this act, to accomplish all of the following:(1) Recognize that California Native American prehistoric, historic, archaeological, cultural, and sacred places are essential elements in tribal cultural traditions, heritages, and identities.(2) Establish a new category of resources in the California Environmental Quality Act called “tribal cultural resources” that considers the tribal cultural values in addition to the scientific and archaeological values when determining impacts and mitigation.(3) Establish examples of mitigation measures for tribal cultural resources that uphold the existing mitigation preference for historical and archaeological resources of preservation in place, if feasible.(4) Recognize that California Native American tribes may have expertise with regard to their tribal history and practices, which concern the tribal cultural resources with which they are traditionally and culturally affiliated. Because the California Environmental Quality Act calls for a sufficient degree of analysis, tribal knowledge about the land and tribal cultural resources at issue should be included in environmental assessments for projects that may have a significant impact on those resources.(5) In recognition of their governmental status, 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, and the level of required confidentiality concerning tribal cultural resources, at the earliest possible point in the California Environmental Quality Act environmental review process, so that tribal cultural resources can be identified, and culturally appropriate mitigation and mitigation monitoring programs can be considered by the decision making body of the lead agency.(6) Recognize the unique history of California Native American tribes and uphold existing rights of all California Native American tribes to participate in, and contribute their knowledge to, the environmental review process pursuant to the California Environmental Quality Act (Division 13 (commencing with § 21000) of the Public Resources Code).(7) Ensure that local and tribal governments, public agencies, and project proponents have information available, early in the California Environmental Quality Act environmental review process, for purposes of identifying and addressing potential adverse impacts to tribal cultural resources and to reduce

To accomplish those goals, the legislature added or amended the following sections in the Public Resources Code: [21073](#), [21074](#), [21080.3.1](#), [21080.3.2](#), [21082.3](#), [21083.09](#), [21084.2](#), and [5097.94](#). These changes are summarized in Section III.

III. Summary of New Requirements for Consultation and Tribal Cultural Resources

The Public Resources Code now establishes that “[a] project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment.” ([Pub. Resources Code, § 21084.2](#).)

To help determine whether a project may have such an effect, the Public Resources Code requires a lead agency to consult with any California Native American tribe that requests consultation and is traditionally and culturally affiliated with the geographic area of a proposed project. That consultation must take place prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report for a project. ([Pub. Resources Code, § 21080.3.1](#).)

If a lead agency determines that a project may cause a substantial adverse change to tribal cultural resources, the lead agency must consider measures to mitigate that impact. [Public Resources Code §20184.3 \(b\)\(2\)](#) provides examples of mitigation measures that lead agencies may consider to avoid or minimize impacts to tribal cultural resources.

Specific provisions of the new law are described in more detail below.

A. Definition of Tribal Cultural Resources

New section [21074](#) of the Public Resources Code defines “tribal cultural resources.” In brief, a resource is a “tribal cultural resource” if it is either:

(1) Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a tribe that are listed, or determined to be eligible for listing, in the national or state register of historical resources, or listed in a local register of historic resources; or

(2) a resource that the lead agency determines, in its discretion, is a tribal cultural resource.²

the potential for delay and conflicts in the environmental review process.(8) Enable California Native American tribes to manage and accept conveyances of, and act as caretakers of, tribal cultural resources.(9) Establish that a substantial adverse change to a tribal cultural resource has a significant effect on the environment.

² Pub. Resources Code, § 21074

(a) “Tribal cultural resources” are either of the following:

When a lead agency chooses to treat a resource as a tribal cultural resource, that determination shall be supported with **substantial evidence**,³ applying the criteria in the historical register,⁴ and considering the significance of the resource to a California Native American Tribe. (PRC § 5024.1, PRC § 21074). California Native American tribes traditionally and culturally affiliated with the geographic area of a project may have expertise concerning their tribal cultural resources. (PRC § 21080.3.1). Courts will defer to a lead agency’s factual determination that a resource is a tribal cultural resource if that decision is supported by substantial evidence in the record.⁵

Evidence that may support such a finding could include, among other evidence, elder testimony, oral history, tribal government archival information, testimony of a qualified archaeologist certified by the relevant tribe, testimony of an expert certified by the Tribal Government, official tribal government declarations or resolutions, formal statements from a certified Tribal Historic Preservation Officer, and historical notes, such as those found in the Harrington Papers and other anthropological records⁶.

-
- (1) Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:
- (A) Included or determined to be eligible for inclusion in the California Register of Historical Resources.
 - (B) Included in a local register of historical resources as defined in subdivision (k) of §5020.1.
- (2) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of §5024.1. In applying the criteria set forth in subdivision (c) of §5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.
- (b) A cultural landscape that meets the criteria of subdivision (a) is a tribal cultural resource to the extent that the landscape is geographically defined in terms of the size and scope of the landscape.
- (c) A historical resource described in §21084.1, a unique archaeological resource as defined in subdivision (g) of §21083.2, or a “nonunique archaeological resource” as defined in subdivision (h) of §21083.2 may also be a tribal cultural resource if it conforms with the criteria of subdivision (a).

³ Public Resources Code § 21080 (e)(1) states “...substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.”

⁴ Pub. Resources Code § 5024.1 (c): A resource may be listed as historical resources in the California Register if it meets any of the following National Register of Historic Places criteria:

- (1) Is associated with events that have made a significant contribution to the broad patterns of California’s history and cultural heritage.
- (2) Is associated with the lives of persons important in our past.
- (3) Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual or possesses high artistic values.
- (4) Has yielded, or may be likely to yield, information important in prehistory or history.

⁵ *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal. 4th 1086, 1117; *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 1072.

⁶ For example, the Harrington Papers are a collection of linguistic and cultural materials in the National Anthropological Archives housed in the Smithsonian National Museum of Natural History. The collection represents ethnological and linguistic fieldwork in California and with Native people.

Federal law also provides examples of potential sources of tribal knowledge. For example, the federal Native American Graves Repatriation Act recognizes the following types of evidence of cultural affiliation: geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion. (43 C.F.R. § 10.14 (d).) Similarly, the Tenth Circuit discussed tribal knowledge in the *Pueblo of Sandia* case. Specifically, the court in *Pueblo of Sandia* observed that the affidavit of a tribal elder and religious leader which listed religious practices and alluded to sacred sites, minutes of a working group meeting that showed a site was used for ceremonial, religious, and medicinal purposes, and an anthropologists' report on a tribe's religious and cultural affiliation with a site that noted ceremonial paths and herbs uses, were all forms of evidence. (*Pueblo of Sandia v. United States* (1995) 50 F.3d 856.)

B. Consultation

Public Resources Code [§ 21080.3.1\(a\)](#) defines “consultation” with a cross-reference to [Government Code § 65352.4](#), which applies when local governments consult with tribes on certain planning documents. That section states:

“consultation” means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance. (Gov. Code, [§ 65352.4](#).)

OPR's SB 18 [Tribal Consultation Guidelines](#) provide further explanation of what “consultation” means.⁷ For example, the *Guidelines* explain that consultation “is a process in which both the

tribe and local government invest time and effort into seeking a mutually agreeable resolution for the purpose of preserving or mitigating impacts to a cultural place, where feasible.” (At p. 15.) It further states:

Effective consultation is an ongoing process, not a single event. The process should focus on identifying issues of concern to tribes pertinent to the cultural place(s) at issue – including cultural values, religious beliefs, traditional practices, and laws protecting California Native American cultural sites – and on defining the full range of acceptable ways in which a local government can accommodate tribal concerns. (At p. 16.)

The new provisions in the Public Resources Code enumerate topics that may be addressed during consultation. If the California Native American Tribe requests consultation regarding alternatives to the project, recommended mitigation measures, or significant effects, the consultation shall include those topics. (Pub. Resources Code, [§ 21080.3.2\(a\)](#).)

C. Timing in the CEQA Process and Consultation Steps

The new provisions in the Public Resources Code proscribe specific steps and timelines governing the notice and consultation process.

Those steps are summarized below and in the graphic entitled Compliance Timeline and Consultation Process Flowchart in Section V.

⁷ Since 2004, cities and counties have had to consult with California Native American Tribes before adoption or amendment of a general plan, specific plan or designation of open space. (Gov. Code, § 65352.4., “Senate Bill 18” (Burton, Chapter 905, Statutes of 2004).) The Tribal Consultation Guidelines explain those requirements in detail. The new requirements in the Public Resources Code do not change those ongoing responsibilities. In instances in which the requirements of both the Government Code and the Public Resources Code apply to a project, while there may be substantial overlap, the lead agency must ensure that it complies with the requirements of both statutes.

- 1) The Native American Heritage Commission will provide each tribe with a list of all public agencies that may be lead agencies under CEQA within the geographic area with which the tribe is traditionally and culturally affiliated, the contact information of those public agencies, and information on how the Tribe may request consultation. This list must be provided on or before July 1, 2016. (Pub. Resources Code, [§ 5097.94](#) (m).)
- 2) If a tribe wishes to be notified of projects within its traditionally and culturally affiliated area, the tribe must submit a written request to the relevant lead agency. (Pub. Resources Code, [§ 21080.3.1](#) (b).) The Native American Heritage Commission website includes a sample template for an [AB 52 notice list request letter](#) from a California Native American tribe to a lead agency.
- 3) Within 14 days of determining that a private project application is complete, or to undertake a public agency project, the lead agency must provide formal notification, in writing, to the tribes that have requested notification of proposed projects as described in step 2, above. The 14 day notification must include a description of the project, its location, and must state that the tribe has 30 days to request consultation. OPR's AB 52 website includes a [sample template for an AB 52 notice letter](#) from a lead agency to a California Native American tribe.
- 4) If it wishes to engage in consultation on the project, the tribe must respond to the lead agency within 30 days of receipt of the formal notification described in step 3, above. The tribe's response must designate a lead contact person. If the tribe does not designate a lead contact person, or designates multiple people, the lead agency shall defer to the individual listed on the contact list maintained by the Native American Heritage Commission. The [NAHC website](#) includes a sample template for an AB 52 [response letter](#) from a California Native American tribe to a lead agency and other implementation resources for tribal governments and lead agencies.
- 5) The lead agency must *begin* the consultation process with the tribes that have requested consultation within 30 days of receiving the request for consultation.
- 6) Consultation concludes when either: 1) the parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource, or 2) a party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached. (Pub. Resources Code, [§ 21080.3.2](#) (b)(1) & (2).) Note that consultation can also be ongoing throughout the CEQA process.

D. Confidentiality

Under existing law, environmental documents must not include information about the location of an archeological site or sacred lands or any other information that is exempt from public disclosure pursuant to the Public Records Act. ([Cal. Code Regs. § 15120\(d\)](#)); *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 220).⁸ Native American graves,

⁸ In *Clover Valley*, the trial court denied petitions for writ of mandate challenging a city's approval of a subdivision project. Revisions to the project included transferring prehistoric Native American artifacts for preservation. The city prepared a recirculated draft environmental impact report to analyze the revised project. The locations and specific characteristics of the cultural resources were not described. The city provided additional information briefly describing the characteristics of the cultural resources, the project's effects on them, and

cemeteries, and sacred places and records of Native American places, features, and objects are also exempt from disclosure. (Pub. Resources Code, [§§ 5097.9, 5097.993](#).) This exclusion reflects California's strong policy in favor of protecting Native American artifacts. Confidential cultural resource inventories or reports generated for environmental documents should be maintained by the lead agency under separate cover and shall not be available to the public. (*Clower Valley* at 221, citing Governor's Office of Planning and Research, Cal. Tribal Consultation Guidelines, (Nov. 14, 2005 supp. p. 27).)

The new provisions in the Public Resources Code include additional rules governing confidentiality during tribal consultation. (Pub. Resources Code, [§21082.3\(c\)](#).)

First, information submitted by a California Native American tribe during the environmental review process may not be included in the environmental document or disclosed to the public without the prior written consent of the tribe. Consistent with current practice, confidential information may be included in a confidential appendix. A lead agency may exchange information confidentially with other public agencies that have jurisdiction over the environmental document. (Pub. Resources Code, [§ 21082.3\(c\)\(1\)](#).) This confidentiality protection extends to a tribe's comment letter on an environmental document. A lead agency can summarize tribal comment letters in a general way, while still maintaining confidentiality consistent with the holding in *Clower Valley Foundation v. City of Rocklin* (2011) 197Cal.App.4th 200.

Second, an exception to the general rule prohibiting disclosure is that the lead agency and the tribe may agree to share confidential information regarding tribal cultural resources with the project applicant and its agents. In that case, the project applicant is responsible for keeping the information confidential, unless the tribe consents to disclosure in writing, in order to prevent looting, vandalism, or damage to the cultural resource. The project applicant must use a reasonable degree of care to protect the information. Additionally, information that is already publically available, developed by the project applicant, or lawfully obtained from a third party that is not the tribe, lead agency, or another public agency may be disclosed during the environmental review process. (Pub. Resources Code, [§ 21082.3\(c\)\(2\)](#).)

Third, the new law does not affect any existing cultural resource or confidentiality protections. (Pub. Resources Code, [§ 21082.3\(c\)\(3\)](#).)

Fourth and finally, the lead agency or another public agency may describe the information in general terms in the environmental document. This is so that the public is informed about the basis of the decision, while confidentiality is maintained. (Pub. Resources Code, [§ 21082.3\(c\)\(4\)](#).) The decision in *Clower Valley* provides a useful description of how a lead agency may balance the need for confidentiality with disclosure obligations under CEQA.

planned mitigation measures. The Court of Appeal affirmed the trial court's ruling, holding that the changes were not significant in light of disclosure restrictions pertaining to cultural resources. (Gov. Code, § 6254(r); Pub. Resources Code, §§ 5097.9, 5097.993; Cal. Code Regs., (d)).

E. Mitigation

Public agencies shall, when feasible, avoid damaging effects to any Tribal cultural resource. (Pub. Resources Code, [§21084.3](#) (a).)

Culturally appropriate mitigation for a Tribal cultural resource is different than mitigating impacts to archeological resources and appropriate mitigation measures should be identified through consultation with the tribal government. If the lead agency determines that a project may cause a substantial adverse change to a tribal cultural resource, and measures are not otherwise identified in the consultation process, new provisions in the Public Resources Code describe mitigation measures that, if determined by the lead agency to be feasible, may avoid or minimize the significant adverse impacts. (Pub. Resources Code, [§ 21084.3](#) (b).) Examples include:

- (1) Avoidance and preservation of the resources in place, including, but not limited to, planning and construction to avoid the resources and protect the cultural and natural context, or planning greenspace, parks, or other open space, to incorporate the resources with culturally appropriate protection and management criteria.
- (2) Treating the resource with culturally appropriate dignity taking into account the tribal cultural values and meaning of the resource, including, but not limited to, the following:
 - (A) Protecting the cultural character and integrity of the resource
 - (B) Protecting the traditional use of the resource
 - (C) Protecting the confidentiality of the resource
- (3) Permanent conservation easements or other interests in real property, with culturally appropriate management criteria for the purposes of preserving or utilizing the resources or places
- (4) Protecting the resource (*Ibid.*)

IV. Updating Appendix G

The statute directs OPR to develop, and the California Natural Resources Agency to adopt, proposed updates to the sample initial study checklist in Appendix G of the CEQA Guidelines to do both of the following: (a) separate the consideration of paleontological resources from tribal cultural resources and update the relevant sample questions, and (b) add consideration of tribal cultural resources with relevant sample questions.

As noted above, the substantive and procedural requirements added in AB 52 went into effect on July 1, 2015. Because the environmental checklist in Appendix G is a *sample* checklist and not mandatory, lead agencies need not wait for the Appendix G update before updating their own procedures.

In January 2016, OPR transmitted a draft update to Appendix G of the CEQA Guidelines related to tribal cultural resources to the California Natural Resources Agency. On June 3, 2016 the agency

released a revised proposal to include tribal cultural resources in Appendix G. Up to date information can be found here: <http://resources.ca.gov/ceqa/>.

On September 27, 2016 the Office of Administrative Law endorsed/approved the suggested changes. Appendix G now contains a statement in the Environmental Checklist Form at the beginning of Appendix G regarding notice and consultation between lead agencies and California Native American Tribes. Appendix G also has a new section called Tribal Cultural Resources, which asks two questions related to the presence of tribal cultural resources. One question asks whether there is a potential adverse change in the significance of a listed tribal cultural resource, and the other asks whether there is a substantial adverse change in the significance of a resource determined by a lead agency to be a tribal cultural resource. In making the second determination, a lead agency must use its discretion while supporting the decision with substantial evidence, applying the criteria of the historic register, and taking into account the significance of the resource to a California Native American Tribe. Consultation with California Native American Tribes is a key way to obtain the information necessary to understand the significance of the resource.

Appendix G contains the following prompt for lead agencies to consider whether the substantive and procedural requirements for consultation with tribal governments have been followed in accordance with the changes to CEQA made by AB 52.

11. Have California Native American tribes traditionally and culturally affiliated with the project area requested consultation pursuant to Public Resources Code section 21080.3.1? If so, has consultation begun?

Note: Conducting consultation early in the CEQA process allows tribal governments, lead agencies, and project proponents to discuss the level of environmental review, identify and address potential adverse impacts to tribal cultural resources, and reduce the potential for delay and conflict in the environmental review process. (See Public Resources Code section 21083.3.2.) Information may also be available from the California Native American Heritage Commission's Sacred Lands File per Public Resources Code section 5097.96 and the California Historical Resources Information System administered by the California Office of Historic Preservation. Please also note that Public Resources Code section 21082.3(c) contains provisions specific to confidentiality.

Appendix G of the CEQA Guidelines now contains the following questions:

XVII. TRIBAL CULTURAL RESOURCES

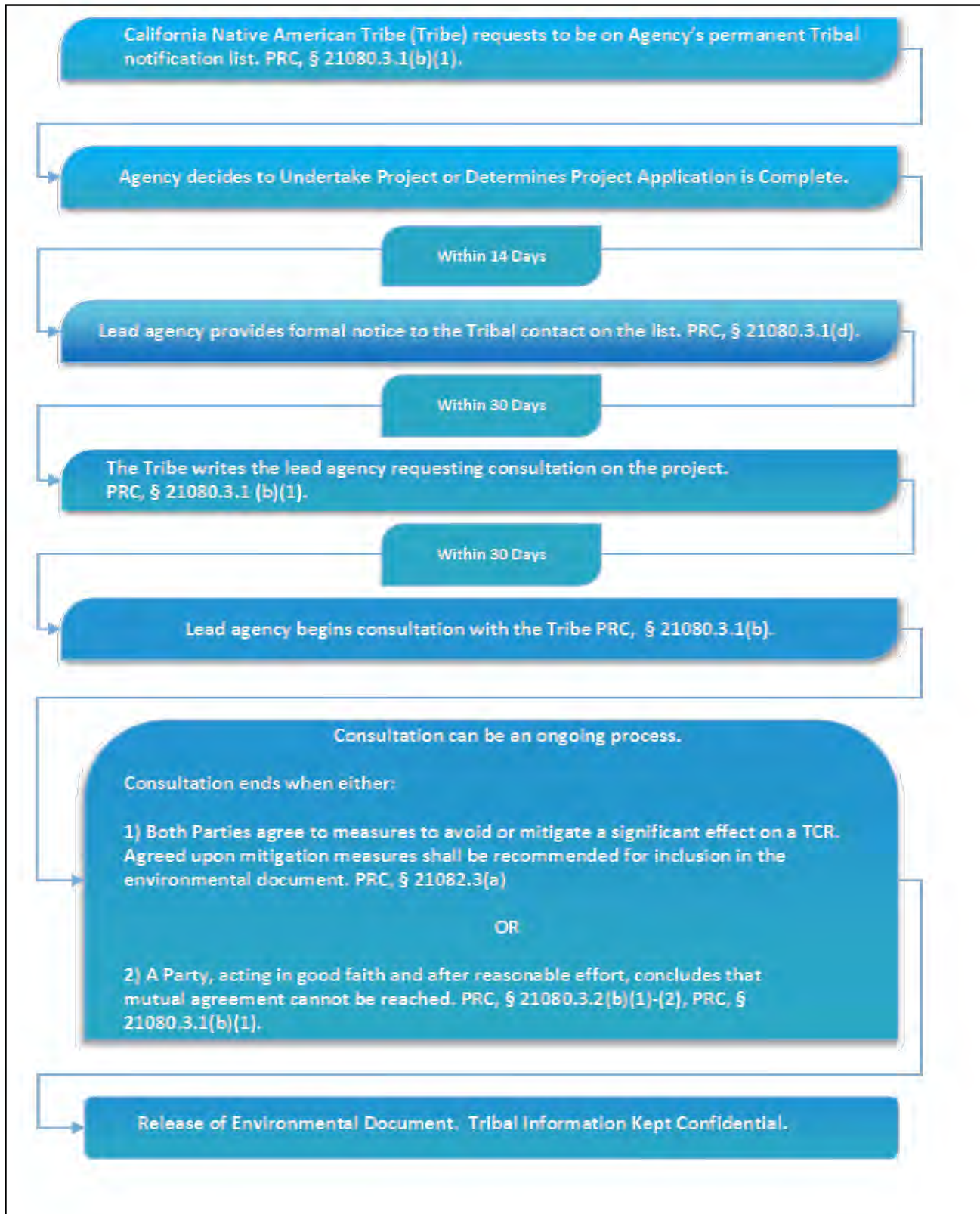
a) Would the project cause a substantial adverse change in the significance of a tribal cultural resource, defined in Public Resources Code section 21074 as either a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American tribe, and that is:

i) Listed or eligible for listing in the California Register of Historical Resources, or in a local register of historical resources as defined in Public Resources Code section 5020.1(k), or

ii) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Public Resources

Code Section 5024.1. In applying the criteria set forth in subdivision (c) of Public Resource Code Section 5024.1, the lead agency shall consider the significance of the resource to a California Native American tribe.

V. Compliance Timeline and Consultation Process Flowchart



VI. Bibliography of Resources

A. California Government Resources

Assembly Bill No. 52 (2013- 2014 Reg. Sess.)

<http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB52> (as of Feb. 17, 2015).

Senate Bill No. 18 (2003-2004 Reg. Sess.) <http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0001-0050/sb_18_bill_20040930_chaptered.html> (as of Feb. 17, 2015).

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Governor's Office of Planning and Research, Tribal Consultation Guidelines: Supplement to General Plan Guidelines (Nov. 14, 2005)

<http://www.opr.ca.gov/docs/011414_Updated_Guidelines_922.pdf> (as of Feb. 17, 2015).

Governor's Office of Planning and Research Tribal Cultural Resources and CEQA website and Implementation Resources (2016) <https://www.opr.ca.gov/s_ab52.php> (as of Jul. 14, 2016).

California Native American Heritage Commission Web Site and Implementation Resources (2015) <<http://www.nahc.ca.gov>> (as of Jul. 14, 2016).

California Energy Commission, Tribal Consultation Policy (Nov. 2014)

<http://www.energy.ca.gov/Tribal/documents/2014-11-12_Draft_Tribal_Consultation_Policy.pdf> (as of Feb. 17, 2015).

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California Department of Transportation, Native American Liaison Web Site (2007)

<<http://dot.ca.gov/hq/tpp/offices/ocp/nalb/>> (as of Feb. 17, 2015).

B. Federal Government Resources

Executive Order 13175, 65 Federal Register 67249 (Nov. 9, 2009) regarding Consultation and Coordination with Indian Tribal Governments <<http://www.whitehouse.gov/the-press-office/memorandum-Tribal-consultation-signed-president>> (as of Feb. 17, 2015).

Executive Order 13007, 61 Federal Register 26771 (May 24, 1996), regarding Tribal Sacred Sites <<http://www.achp.gov/EO13007.html>> (as of Feb. 17, 2015).

U.S. Department of the Interior, National Parks Service, Guidelines for Evaluating and Registering Archeological Properties (2000) (“Bulletin 36”) <<http://www.nps.gov/nr/publications/bulletins/pdfs/nrb36.pdf>> (as of Feb. 17, 2015).

U.S. Department of the Interior, National Parks Service, Guidelines for Evaluating and Documenting Traditional Cultural Properties (1990, revised 1998) (“Bulletin 38”) <<http://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf>> (as of Feb. 17, 2015).

Advisory Council on Historic Preservation, Working With §106 Web Site (Feb. 13, 2015) <<http://www.achp.gov/work106.html>> (as of Feb. 17, 2015).

C. Selected California Cases

Berkeley Hillside Preservation v. City of Berkeley (2015) 60 Cal. 4th 1086, 1117 [holding that an agency’s factual determination of whether unusual circumstances exist is reviewed under the substantial evidence standard, and favorably citing the holding in *Valley Advocates*].

Citizens for the Restoration of L Street v. City of Fresno (2014) 229 Cal.App.4th 340 [holding that the fair argument standard does not apply to a lead agency’s discretionary determination of whether a non-listed building or district is an historical resource for purposes of CEQA]

Madera Oversight Coalition, Inc. v. County of Madera (2011) 199 Cal.App.4th 48 [holding that the phrase “preservation in place is the ‘preferred manner’ of mitigating impacts to archaeological sites” means that feasible preservation in place must be adopted to mitigate impacts to historical resources of an archaeological nature unless the lead agency determines that another form of mitigation is available and provides superior mitigation of impacts. Preservation in place maintains the relationship between artifacts and the archaeological context. Preservation may also avoid conflict with religious or cultural values of groups associated with the site. (Cal. Code Regs. § 15126.4(b)(3)(A)). Overruled in part on other grounds.]

Clover Valley Foundation v. City of Rocklin (2011) 197 Cal.App.4th 200 [holding that CEQA does not require a lead agency to disclose confidential information regarding the location and nature of cultural resources sites and that a lead agency need only provide a general description of those resources and mitigation measures in an EIR.]

Valley Advocates v. City of Fresno (2008) 160 Cal.App.4th 1039 [holding that the substantial evidence standard of review applies to an agency’s determination of whether a building that is not listed, or eligible for listing, in a historic register qualifies as an historical resource, and further holding that once a lead agency determines the resource to be an historical resource, the fair argument standard applies to the question of whether the proposed project may cause a substantial adverse change in the significance of that historical resource].

D. Selected Federal Cases

Pueblo of Sandia v. United States (1995) 50 F.3d 856 [Federal case regarding traditional cultural properties under the National Historic Preservation Act and the National Environmental Policy Act, including an example of a reasonable and good faith effort at consultation between a lead agency and a tribe. This case includes a discussion on cumulative impact analysis and a reasonable range of alternatives analysis under NEPA and Section 106 of the NHPA. This case recognizes as evidence the affidavit of a tribal elder and religious leader.]

Muckleshoot Indian Tribe v. United States Forest Service (1999) 177 F. 3d 800 [Federal case regarding traditional cultural properties under the National Historic Preservation Act and the National Environmental Policy Act, including a discussion of how adequate mitigation for a tribally significant historic property may be different than mitigation for an historic resource. This case includes examples of tribal evidence