

Master Response 7 Tribal Coordination, Consultation, and Engagement

Overview

Some commenters raised concerns about the Authority and Reclamation’s consultation and engagement with Tribes, as well as Reclamation’s fulfilment of federal trust obligations. This master response addresses those concerns and comments and includes, for ease of reference, a table of contents on the following page to guide readers to topics of their concern.

For detailed information regarding Tribes and the Trinity River, Klamath River, or upper Sacramento River watershed, please refer to Master Response 8, Trinity River. For information regarding agency coordination (e.g., California Water Commission) please refer to Master Response 1, CEQA and NEPA Process, Regulatory Requirements, and General Comments.

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Tribal Coordination and AB 52

Multiple commenters stated that the Authority failed to meet the Tribal consultation legal requirements under CEQA or that outreach and consultation efforts were inadequate. Chapter 23, *Tribal Cultural Resources*, provides a detailed description of California Assembly Bill 52 (AB 52), which prescribes a process for CEQA lead agency consultation with California Native American Tribes that are traditionally and culturally affiliated with the geographic area of a proposed project. AB 52 is a California state authority and is only applicable to decisions made by the Authority and the Authority's decision-making process to approve the Project and certify the EIR.

AB 52 specifically instructs a Tribe to notify California public agencies of their interest in being informed of projects proposed for the geographic area traditionally and culturally affiliated with the Tribe. Without such a request, there is no requirement that a lead agency engage a Tribe in AB 52 consultation. A Tribe's failure to request notification, however, does not preclude an agency from consulting with a Tribe, nor does it limit the ability of a Tribe to submit information to the agency regarding a proposed project's potential impacts on Tribal cultural resources or the environment more broadly.

Following the passage of AB 52, on January 3, 2017, the Cachil Dehe Band of Wintun Indians submitted to the Authority a written request for formal notice of and information on proposed projects for which the Authority will serve as lead CEQA agency. No other Tribes contacted the Authority to request notification of proposed projects. The Authority nevertheless requested a search of the Native American Heritage Commission (NAHC) list for additional Tribes traditionally and culturally affiliated with the study area and contacted those Tribes that had not requested notification and consultation under AB 52.

In 2017, the NAHC provided the Authority with a list of seven Tribes with traditional lands or cultural places located within the Authority's study area for cultural resources. The study area was defined as the Project facilities' footprints, which included portions of Colusa, Glenn, Tehama, and Yolo Counties; the area generally encapsulated any location where the construction of new Project facilities could have a physical, visual, or auditory impact to potential Tribal cultural resources. Project notification letters were sent to the Cachil Dehe Band of Wintun Indians, Yocha Dehe Wintun Nation, Cortina Indian Rancheria of Wintun Indians, Grindstone Indian Rancheria of Wintun-Wailaki, Estom Yumeka Maidu Tribe of the Enterprise Rancheria, Mechoopda Indian Tribe, and Paskenta Band of Nomlaki Indians. Two Tribes—Cachil Dehe Band of Wintun Indians and Yocha Dehe Wintun Nation—that responded to notification of the project described in the 2017 Draft EIR/EIS, as well as the Cortina Indian Rancheria of Wintun Indians, were notified of updated Project geotechnical study activities in 2019. All seven Tribes on the NAHC list were again notified in November 2020, with follow-up in 2021. In 2019, Yocha Dehe Wintun Nation and Cachil Dehe Band of Wintun Indians requested and engaged in consultation, and Yocha Dehe and Cachil Dehe have continued consultation on the revised Project description provided in 2021.

In June 2021, the Authority extended its outreach to seven additional Tribes traditionally or culturally affiliated with locations where Project operations have the potential to change river

flows as compared to baseline conditions. These areas include stretches of the Sacramento River from Keswick in Shasta County downstream through the Yolo Bypass in Yolo County; the Feather River from Oroville Dam to the confluence with the Sacramento River; and the American River from Folsom Dam to the confluence with the Sacramento River. Tribes associated with these areas are the Wintu Tribe of Northern California, Redding Rancheria, Konkow Valley Band of Maidu, United Auburn Indian Community of the Auburn Rancheria, Shingle Springs Band of Miwok Indians, Ione Band of Miwok Indians, and Wilton Rancheria. Letters were sent via U.S. certified mail with a return receipt. Contact information for these Tribes was derived from Tribal websites and the website of the federal Bureau of Indian Affairs.

Return receipts for the letters were received from six of the seven additional Tribes, which indicated that they had taken possession of the letters. There was no return receipt for the letter sent to the Wintu Tribe of Northern California. Therefore, a follow-up telephone call was made to the Wintu Tribe of Northern California, and the letter was emailed to the Tribe in July 2021. Having received no response from any Tribe to the Authority's June 2021 letters, the Authority re-sent the letter by email. The email address for the Konkow Valley Band of Maidu was invalid, and the email was kicked back; there was no telephone number listed on the Tribal website to enable follow-up by telephone. One Tribe, the United Auburn Indian Community of the Auburn Rancheria, responded to the July follow-up email. The Tribe did not request consultation on the Project and deferred to local Tribes.

When the Authority did not receive any response from the contacted Tribes by the RDEIR/SDEIS publication deadline, the RDEIR/SDEIS recorded this as "no response." Chapter 23, *Tribal Cultural Resources*, has been revised to reflect receipt of the response from the United Auburn Indian Community of the Auburn Rancheria that was omitted from the RDEIR/SDEIS because it was received after the draft document production deadline. None of the commenters who stated that the Authority failed to adequately consult with Tribes under AB 52 indicated that they live within the proposed Project footprint or are associated with the Tribes the Authority had contacted due to their traditional or cultural affiliation with the geographic area of the Project.

To increase meaningful communication and collaboration with local Native American Tribes on Project elements, on June 17, 2022, the Joint Reservoir Committee and Authority Board decided to establish a Tribal Government Working Group with the five Tribes who are traditionally or culturally affiliated with the Project footprint (Yocha Dehe, Cachil Dehe, Cortina Rancheria, Grindstone Rancheria, and Paskenta Band of Nomlaki Indians). Participation in this working group is supplemental to any AB 52 consultation with Yocha Dehe Nation and Cachil Dehe Band of Wintun Indians and is intended to provide an opportunity for input from those Tribes who have not previously participated in a sustained or meaningful manner to communicate and collaborate on the Project. Formal invitation letters to the above-listed Tribes were sent on January 12, 2023. These meetings were anticipated to occur in the first half of 2023; however, the Authority continues to reach out to Tribes for possible meeting dates. Some Tribes have verbally expressed concerns that a Tribal Government Working Group may not be the best forum and/or may need to have a more limited scope. The Authority is working through these concerns and looking for opportunities to establish meaningful and sustained engagement with the five Tribes who are traditionally or culturally affiliated with the Project footprint.

California Public Resources Code Section 21082.3 identifies that a lead agency may certify an EIR for a project with a significant impact on an identified tribal cultural resource only if one of the three actions has occurred: (1) the AB 52 consultation process has concluded; (2) the California Native American Tribe has requested consultation and has not provided comments to the lead agency, or otherwise engaged in the consultation process; or (3) the lead agency has complied with AB 52 noticing requirements and the California Native American Tribe has not requested consultation within 30 days.

Based on consultation with the Tribes formally consulting on the Project (the Yocha Dehe Wintun Nation and Cachil Dehe Band of Wintun Indians), tribal cultural resources are within and surrounding the Project footprint and will be significantly affected by the Project. Mitigation measures for addressing significant impacts on tribal cultural resources have been identified and will be refined and further developed through continued coordination with Yocha Dehe Wintun Nation and Cachil Dehe Band of Wintun Indians (those Tribes formally consulting on the Project pursuant to AB 52) as part of Project implementation.¹ However, to date, no specific written comments on the Project or its mitigation measures have been received from the Cachil Dehe Band of Wintun Indians and Yocha Dehe Wintun Nation.

As described in Chapter 22, *Cultural Resources*, Section 23.4, *Impact Analysis and Mitigation Measures*, the Authority has determined that the Project will have significant impacts on tribal cultural resources. Impacts include the filling of the Sites Reservoir, which would destroy or eliminate access to any resources potentially present in the inundation area (such as, but not limited to, gathering of plant resources) and inundate Native American ancestral sites; construction and operations that could disturb known or currently unknown burial sites; construction that could disturb or destroy both surface and buried tribal cultural resources; and alteration of the landscape, which could disrupt cultural and spiritual practices. Mitigation measures have been identified; however, impacts would remain significant and unavoidable.

As no specific written comments have been received as of late June 2023, the Authority sent letters to the Yocha Dehe Wintun Nation and Cachil Dehe Band of Wintun Indians in July 2023 to inform them of the Authority's intent to consider certification of the EIR for the Project with a significant impact on an identified tribal cultural resource at its September 2023 meeting, concluding the AB 52 process for the Project.

A lead agency may also certify an EIR when the lead agency has complied with AB 52 and the California Native American Tribe has not requested consultation within 30 days. The Paskenta Band of Nomlaki Indians did not request consultation within this timeframe and are not formally consulting on the Project pursuant to AB 52. The Authority sent a letter to the Paskenta Band of

¹ In March 2023, the Paskenta Band of Nomlaki Indians verbally expressed a general interest in consulting on the Project. The Authority has not received a letter requesting formal consultation under AB 52 from the Tribe. However, the Authority appreciates and values the expertise of the Paskenta Band of Nomlaki Indians and their traditional and cultural affiliation with portions of the Project area since time immemorial. The Authority will continue to coordinate with the Paskenta Band of Nomlaki Indians as part of Project planning, implementation, and operations and will continue to seek their input through informal and government-to-government consultation, the Tribal Government Working Group (or what form that may take in the future), and through participation in the Memorandum of Agreement.

Nomlaki Indians in July 2023 to inform them of the Authority's intent to consider certification of the EIR for the Project with a significant impact on an identified tribal cultural resource at its September 2023 meeting, concluding the AB 52 process for the Project.

Regardless of the regulatory process that requires a "conclusion" to AB 52 consultation to proceed with the Project, the Authority is committed to working with Tribes beyond the AB 52 process. To further this commitment, and in addition to establishing the Tribal Government Working Group, the Authority proposes the preparation of a Memorandum of Agreement (MOA) that would formalize a collaborative partnership between the Authority, Yocha Dehe Wintun Nation, Cachil Dehe Band of Wintun Indians, Paskenta Band of Nomlaki Indians, and the additional two Tribes (Cortina Indian Rancheria of Wintun Indians, Grindstone Indian Rancheria of Wintun-Nomlaki) that are traditionally and culturally affiliated with the Project area. The MOA would demonstrate the Authority's commitment to continue to work with the affiliated Tribes to identify tribal cultural resources and methods to avoid, minimize, and mitigate impacts on and manage tribal cultural resources. The partnership defined by the MOA would include a framework for continued collaboration between the Authority and the Tribes during Project planning, implementation, and operations. The Authority would bring to this partnership its commitment to working with the Tribes with traditional or cultural affiliation with the Project area throughout the life of the Project to better understand and respectfully incorporate the Tribes from their perspectives.

Tribal Consultation and Section 106

Cultural resources consultation under Title 54 of United States Code Section 306108, commonly known as Section 106 of the National Historic Preservation Act (Section 106), and its implementing regulations found at Title 36 of Code of Federal Regulations Part 800 is the responsibility of the federal lead agency. The federal lead agency consults with Tribes that have been formally recognized by the U.S. government and that have a traditional religious and cultural affiliation to historic properties that may be affected by the Project. The consultation process enables the federal lead agency to gather information on cultural resources eligible for inclusion on the National Register of Historic Places, including sites of religious and cultural significance pursuant to 36 CFR Section 800.4(a)(4) and sites of a sacred nature pursuant to Executive Order 13007, and to determine the potential effect of a proposed undertaking on such properties. Further, pursuant to 36 CFR Section 800.3(f)(2), it is the federal lead agency's responsibility to invite the Tribes to participate in the Section 106 process as consulting parties. Tribes without formal recognition are similarly contacted as members of the public, or interested parties, under the regulations (36 CFR Section 800.2(d)(2)) and pursuant to 36 CFR Section 800.4(a)(3) for information gathering.

Reclamation began to informally reach out to federally recognized Tribes in the early 2000s, but did not formally contact federally recognized Tribes with a request for consultation on the Project under Section 106 until April 2021. Letters were sent to the Cachil Dehe Band of Wintun Indians, Yocha Dehe Wintun Nation, Cortina Indian Rancheria of Wintun Indians, Grindstone Indian Rancheria of Wintun-Wailaki, Estom Yumeka Maidu Tribe of the Enterprise Rancheria,

Mechoopda Indian Tribe, Paskenta Band of Nomlaki Indians, United Auburn Indian Community of the Auburn Rancheria, and Wilton Rancheria.

As of the release of this Final EIR/EIS, three of the Tribes that were contacted, Cachil Dehe Band of Wintun Indians, the Yocha Dehe Wintun Nation, and Paskenta Band of Nomlaki Indians, have responded to the letter from Reclamation and have requested consultation under Section 106. In addition, in response to the RDEIR/SDEIS, the Shingle Springs Band of Miwok Indians contacted Reclamation in December 2021 and requested to consult on the Project pursuant to Section 106. Reclamation will continue to consult with the Cachil Dehe Band of Wintun Indians, the Yocha Dehe Wintun Nation, Paskenta Band of Nomlaki Indians, and the Shingle Springs Band of Miwok Indians as the Project proceeds. Furthermore, Reclamation is preparing a Programmatic Agreement to address potential effects on historic properties from Project construction and implementation, and, in March 2022, Reclamation invited the Tribes to review the draft agreement document. Accordingly, Reclamation has met and will continue to meet its required obligations for consulting with Tribes under Section 106.

Federal Trust Responsibility over Indian Trust Assets

Reclamation, as the federal lead agency, has trust responsibilities for natural resources associated with reservations (e.g., Winters doctrine) and former reservation lands and over Indian Trust Assets (ITAs). Trust is a formal, legally defined, property-based relationship that depends on the existence of three elements: (1) a trust asset (e.g., lands, resources, money); (2) a beneficial owner (the Indian Tribe or individual Indian allottee); and (3) a trustee (the Secretary of the Interior) (Bureau of Land Management 2004).

ITAs, as interests held by the federal government in trust for an Indian Tribe or Indian individual, are distinct from “tribal cultural resources” within the meaning of AB 52 and “cultural resources” subject to Section 106’s consultation requirement. Chapter 22, *Cultural Resources*, and Chapter 23, *Tribal Cultural Resources*, in the Final EIR/EIS evaluate impacts on cultural resources and Tribal cultural resources, respectively, pursuant to regulatory requirements under NEPA, Section 106, CEQA, and AB 52, while Chapter 29, *Indian Trust Assets*, evaluates potentially significant impacts on ITAs.

Commenters alleged, without support, that “[t]he Project will definitely ‘affect’ Tribal rights and impact Tribal trust resources.” Those commenters, however, did not elaborate on what they considered to be “Tribal trust resources.” Because the comment referenced a statement made in Chapter 29 of the RDEIR/SDEIS, the Authority and Reclamation interpret the term “tribal trust resources” to refer to ITAs as used therein.

Chapter 29 defines “ITAs” or “trust resources” as “a legal interest in land, minerals, funds, rights, or other property that has been reserved by or granted to Indian tribes or Indian individuals by treaties, statutes, and Executive Orders and held by the United States in trust for an Indian tribe or Indian individual, or held by an Indian tribe or Indian individual subject to a restriction on alienation imposed by the United States.” The Code of Federal Regulations, Title 25, Section 115.002 defines “trust assets” as “trust lands, natural resources, trust funds, or other

assets held by the federal government in trust for Indian tribes and individual Indians.” Department of the Interior Secretarial Order No. 3215 similarly defines “Indian Trust Assets” as “lands, natural resources, money, or other assets held by the federal government in trust or that are restricted against alienation for Indian tribes and individual Indians.”

As described in Chapter 29, Tribal water rights would not be adversely affected and may be benefited because “operation of Alternative 1, 2, or 3 would not change the amount of water obligated to any water rights holder under any contract in effect at the time of operations. Right(s) and agreement(s) as part of Alternative 1, 2, or 3 would protect existing beneficial uses associated with existing water rights, and obtaining new or modified water rights, water supply, and operating agreements would be evaluated pursuant to the State of California’s water rights laws.”

Commenters state that the Project would affect “Tribal trust fisheries such as salmon, trout and lamprey” and that “Tribes have identified... salmon as a Trust species.” To the extent the commenters state that the Project would adversely affect culturally important species such as Chinook salmon (*Oncorhynchus tshawytscha*), Chapter 11, *Aquatic Biological Resources*, describes how the Alternatives would not substantially affect fish habitat or survival. Furthermore, both the Wilkins Slough bypass flow criteria (now up to 10,700 cubic feet per second [cfs] from October to June 15 and 5,000 cfs in September with no diversions from June 15 to August 31) and Bend Bridge Pulse Protection criteria (now triggered by forecasted flows) have been revised for the Final EIR/EIS, offering additional protection to fish species compared to the diversion criteria in the RDEIR/SDEIS.

Tribal Beneficial Uses

In stating that the Project “will definitely ‘affect’ Tribal rights and impact Tribal trust resources,” a commenter notes that “California is currently in the process of identifying Tribal beneficial uses in the Bay Delta and it is highly likely the Sacramento River, Tribal Subsistence Fishing, and Tribal Tradition and Culture will be listed.” The commenter did not explain the relevance of the State Water Board’s designation of beneficial uses to the RDEIR/SDEIS analysis of the Project’s environmental impacts.

“*Beneficial uses* are goals the California Water Boards designate to ensure Californians have access to the highest water quality and can use it for maximum benefit” (State Water Resources Control Board 2020). On May 2, 2017, the State Water Resources Control Board (State Water Board) adopted Resolution 2017-0027 establishing “three new beneficial use definitions for use by the State and Regional Water Boards: Tribal Traditional Culture (CUL), Tribal Subsistence Fishing (T-SUB), and Subsistence Fishing (SUB) beneficial uses.” CUL uses are “uses of water that support the cultural, spiritual, ceremonial, or traditional rights or lifeways of California Native American Tribes, including, but not limited to: navigation, ceremonies, or fishing, gathering, or consumption of natural aquatic resources, including fish, shellfish, vegetation, and materials.” T-SUB uses are “uses of water involving the non-commercial catching or gathering of natural aquatic resources, including fish and shellfish, for consumption by individuals, households, or communities of California Native American Tribes to meet needs for sustenance.”

SUB uses are “uses of water involving the non-commercial catching or gathering of natural aquatic resources, including fish and shellfish, for consumption by individuals, households, or communities, to meet needs for sustenance.” The SUB beneficial use does not specifically mention “California Native American Tribe” but “may still be of interest to, and can still be utilized by, California Native American Tribes, Tribal members, as well as other interested persons or members of the public” (Central Valley Regional Water Quality Control Board 2022a).

Tribal Beneficial Uses (TBUs) as defined by a water quality control plan or basin plan adopted by the State Water Board or a Regional Water Quality Control Board (RWQCB) are distinct and separate from Tribal cultural resources as defined by CEQA and from ITAs, which are interests held by the federal government in trust for an Indian Tribe or Indian individual. The State Water Board established TBUs in 2017 (State Water Resources Control Board 2020), and the Central Valley RWQCB proposed adoption of the three new TBU amendments to its basin plan (Central Valley Regional Water Quality Control Board 2021, 2022a). The Central Valley RWQCB adopted the TBU amendments to its basin plan on April 5, 2022 (Resolution R5-2022-0018, Central Valley Regional Water Quality Control Board 2022b). TBUs would apply to water quality criteria only in specific waterbodies or segments designated in a basin plan. A California Native American Tribe must confirm the designation of CUL and T-SUB uses in a basin plan for a particular waterbody segment and time of year are appropriate (Central Valley Regional Water Quality Control Board 2021:12). As of October 4, 2022, the Central Valley RWQCB was accepting TBU designation requests, but had not yet designated TBUs for any waterbodies (Central Valley Regional Water Quality Control Board 2022a). The Authority will consider Project effects, if any, on TBUs in the same manner as other beneficial uses and water quality criteria at such time as TBUs are established for relevant waterbody segments (including the Sites Reservoir that does not yet exist) that would be affected by the Project.

Additional Tribal Outreach

In the spirit of the Governor’s Executive Order (EO) N-15-19,² policies established in EO B-10-11,³ and state policy on Native American Ancestral Lands,⁴ the Authority will continue to facilitate the Tribal Government Working Group as a means of interfacing with Tribal groups who may not already be consulting with the Authority or with Reclamation.

² Executive Order N-15-19 apologizes on behalf of the State for the historical “violence, exploitation, dispossession and the attempted destruction of tribal communities” which dislocated California Native Americans from their ancestral land and sacred practices.

³ Executive Order B-10-11 established “the policy of the administration that every state agency and department subject to executive control is to encourage communication and consultation with California Native American tribes.”

⁴ The “Statement of Administration Policy on Native American Ancestral Lands” encourages State entities to seek opportunities to support California Tribes’ co-management of and access to natural lands that are within a California Tribe’s ancestral land and under the ownership or control of the State of California.

In addition to the Tribal Government Working Group, the Authority established a Local Community Working Group to provide local knowledge and constructive input to several important locally driven elements of the Project. Refer to Master Response 1, *CEQA and NEPA Process, Regulatory Requirements, and General Comments*, regarding this effort and other general outreach activities.

References Cited

- Bureau of Land Management. 2004. *H-8120-1 General Procedure Guidance for Native American Consultation*. December 3, 2004.
- Central Valley Regional Water Quality Control Board. 2021. *Staff Report for Proposed Amendments to the Water Quality Control Plans for the Sacramento River and San Joaquin River Basins and Tulare Lake Basin*. November 17. Available: https://www.waterboards.ca.gov/centralvalley/water_issues/basin_plans/tribal_beneficial_uses/tbu_defs_20211201_staffrpt.pdf. Accessed: March 18, 2022.
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