

# The Sovereign Next Door

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Helping your client build successful partnerships with  
California Native American Tribal Governments  
*(In 15 minutes or less!)*

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Presented by

Holly Roberson, Attorney, Kronick Moskovitz Tiedemann & Girard

Merri Lopez-Keifer, Chief Legal Counsel, San Luis Rey Band of Mission Indians



# Speaker Introductions – Unique Perspectives That Will Benefit Hopefully Every City Attorney

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## ■ **Merri Lopez-Keifer**

- Chief Counsel, San Luis Rey Band of Mission Indians
- Commissioner and Secretary, Native American Heritage Commission
- Speaker on AB 52 implementation Statewide

## ■ **Holly Roberson**

- Associate, Kronick
- Former Appointed Land Use Counsel, Governor's Office of Planning and Research
- Implemented AB 52 for CEQA Guidelines Initial Study Checklist
- Work with State, County, City, and Tribal Governments Statewide on AB 52 implementation



# The Benefits of a Mutually Respectful Relationship with California Native American Tribal Governments

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- Lower Risk to Being Sued
- Higher Satisfaction for and Less Stress on City Staff
- Public and Private Development Projects Move Forward More Efficiently and Effectively
- All and All a Better Understanding and Respect of Local History



# Importance of Building Successful Relationships with California Native American Tribal Governments

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- Assumed basic knowledge of these statutes and concepts:
  - SB 18 (2004)- Planning
  - AB 52 (2014)- CEQA
  - CEQA Review Process
  - CWA 404 Permit Process
  - Water Agreements
  - Economic Development



# How City Attorneys Can Help Cities Create Successful Partnerships with Tribal Governments

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- Models of Respect and Etiquette
  - Protocol in Conducting Government to Government Consultations
  - Providing Resources in California & Its Native Peoples' History
  - Understanding the “Terms of Art” for California Native American State Laws



# How City Attorneys Can Help Cities Create Successful Partnerships with Tribal Governments

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- Compliance Protocols and Policies
  - Updating guidelines on the Protection and Preservation of Cultural Resources
  - Identifying statutory timeline components for your client
  - Understand the consequences of not complying with statutory requirements



# How City Attorneys Can Help Cities Create Successful Partnerships with Tribal Governments

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- Confidentiality Protocols and Policies
  - AB 52 Catch 22
    - To receive “sacred” or “confidential” information from a tribal government, there must be a trust relationship established first.
    - For local governments to better avoid or protect TCRs, they must have information about TCRs.
  - The Way Out: Develop Practical Confidentiality Policies and Procedures
    - Create confidentiality policies with your client and in consultation with the consulting tribal government.
    - Restricted Need to Know Access to Information



# Other Ways to Use Skills and Experience to Create Successful Relationships with Tribal Governments

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- Support City Staff in Being Free to Think Outside the Box With Regard to CEQA
  - Support California Native American Tribal Perspective vs. Archeological Perspective
  - Creative Assessment Techniques (Methods and Means) to determine impacts on TCRs
    - Incorporate the Presence of a California Native American person that is traditionally and culturally affiliated with the area from the beginning of the project
    - Ground penetrating Radar to detect subsurface features or anomalies
    - Forensic Canines to assist in determining if California Native American ancestors have been buried on the land



# Other Ways to Use Skills and Experience to Create Successful Relationships with Tribal Governments

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- Creative Mitigation Measures
  - Understand Loss of Place, Knowledge and Identify from California Native Perspective
  - Benefits of a Controlled Grade Procedure
  - Benefits of Controlled Vegetation Removal
  - Repatriation and Reburial vs. Curation in a Museum or Curation Facility
  - Data Recovery & Research Questions – Welcome a Change in Perspective
  - Preservation of Knowledge through ethnographies, ethno-histories, language preservation, college scholarships, research projects, cultural heritage programs and buildings, open space dedications, conservation easements, harvesting and gathering areas for traditional practices.



# Other Ways to Use Skills and Experience to Create Successful Relationships with Tribal Governments

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- Putting it all together/ Next steps/ Written materials
  - Checklist: Practical steps to take with your City
  - Primer: Education tools, reference materials, training materials



# Tribal Government Relations for City Attorneys: Overview of Materials



## Tribal Government Relations for City Attorneys: Overview of Materials

1. Introduction: A Note About the Role of a City Attorney in Constructive Tribal Government Relations
2. Checklist: Tribal Government Relations for City Attorneys
3. Appendix: Resources

### Part I: Knowledge Baseline

- A. [California Tribal Court-State Court Forum FAQ](#)
- B. [Prof. Edward D. Castillo, Cahuilla-Luiseno, California Indian History](#)
- C. Selected Sources on California's History with Native People
  1. Madley, Ben. *An American Genocide: The United States and the California Indian Catastrophe, 1846-1873*. Yale University Press. 2017.
  2. Phillips, George Harwood. *Chiefs and Challengers: Indian Resistance and Cooperation in Southern California, 1769-1906*. University of Oklahoma, Norman Press. 2014.
  3. Carrico, Richard. *Strangers in a Stolen Land*. Sunbelt Publications, Inc. 2008
  4. Miranda, Deborah. *Bad Indians: A Tribal Memoir*. Heyday. 2013.

### Part II: Legal Background

- D. California Statutes
  1. [AB 52 \(Tribal Cultural Resources and CEQA\)](#)
  2. [SB 18 \(Tribal Consultation and General Plans\)](#)
- E. Selected Case Law
  1. [Desert Water Agency v. Agua Caliente Band of Cahuilla Indians](#), 138 S. Ct. 469
  2. [Berkeley Hillside Preservation v. City of Berkeley](#) (2015) 60 Cal. 4th 1086, 1117
  3. [Citizens for the Restoration of L Street v. City of Fresno](#) (2014) 229 Cal.App.4th 340



4. [Madera Oversight Coalition, Inc. v. County of Madera](#) (2011) 199 Cal.App.4th 48
5. [Clover Valley Foundation v. City of Rocklin](#) (2011) 197 Cal.App.4th 200
6. [Valley Advocates v. City of Fresno](#) (2008) 160 Cal.App.4th 1039
7. [Pueblo of Sandia v. United States](#) (1995) 50 F.3d 856
8. [Muckleshoot Indian Tribe v. United States Forest Service](#) (1999) 177 F.3d 800

### Part III: Tools

#### F. Selected Websites

1. [California Office of Historic Preservation \(OHP\)](#)
2. [California Native American Heritage Commission \(NAHC\)](#)
3. [NAHC's Compilation of State Laws and Codes Relevant to California Native American Tribes](#)
4. [The Governor's Office of Planning and Research \(OPR\) AB 52 Trainings and Materials](#)

#### G. State Agency Guidance Documents

1. [AB 52 Governor's Office of Planning and Research Technical Advisory](#)
2. [SB 18 Tribal Consultation Guidelines, Supplement to the General Plan Guidelines](#)
3. [NAHC Tribal Consultation Under AB 52: Legal Requirements and Best Practices for Tribes](#)
4. [DWR Guidance Document for the Sustainable Management of Groundwater Engagement with Tribal Governments](#)

#### H. Maps

1. [California Indian Pre-Contact Tribal Territories](#)
2. [California Indian Tribal Homelands and Trust Land Map](#)

#### I. Examples from Tribal Governments and Local Governments

1. [Northern California: Karuk Tribe Consultation Policy](#)
2. [Central California: Santa Barbara County](#)
3. [Southern California: City of Carlsbad Guidelines](#)



# City Attorney Checklist for Tribal Government Relations

## CEQA (AB 52 implementation)

- ❑ Identify Tribal Government's areas of traditional and cultural affiliation that overlap with City boundaries, get contact list from Native American Heritage Commission
- ❑ Create process for appropriate staff to track incoming consultation letters, including postmark dates on envelopes and the date of response to comply with CEQA
- ❑ Establish confidentiality protocols for handling sensitive cultural information and train relevant staff in management of confidential information
- ❑ Identify a process for new listings and updates to the City's local register of historic resources
- ❑ Cultural awareness training for employees working with tribal governments on tribal cultural resources issues
- ❑ Identify consultation participants to represent City Government
- ❑ Develop consultation policy and protocols
- ❑ Decide how the costs of AB 52 compliance be will absorbed by the City or Development Applicants
- ❑ Determine process for assessing feasibility of proposed mitigation measures, such as monitoring expenses and land preservation or avoidance measures to ensure consistency across projects.
- ❑ Develop creative off-site mitigation measures for when tribal cultural resources may be impacted, such as contributing to tribal cultural resource databases, cultural centers, language or cultural programs.
- ❑ Coordinate with tribal governments for identification, avoidance, and protection of sensitive areas within the City for tribal cultural resources. Decide whom on City staff will have access to such information and train them in confidentiality protocols.



# City Attorney Checklist for Tribal Government Relations

## General Plan (SB 18 Implementation)

- ☐ Update General Plan to include SB 18 if not previously done (Note: SB 18 requirement originated in 2004)
- ☐ Understand and implement consultation process for SB 18 compliance
- ☐ Determine the City's process for handling of sensitive confidential cultural information
- ☐ Consider whether the City should develop internal and confidential overlays for its General Plan if there are sensitive tribal cultural resource areas within the City in

## Water (SGMA Implementation)

- ☐ Tribal government Memorandum of Understanding (MOU) or Joint Powers Authority (JPA), if needed for participation in Groundwater Sustainability Agency work
- ☐ Data for Groundwater Sustainability Plan (GSP) includes Tribal water amounts and uses, if necessary
- ☐ Applications for grant funding from State- including engagement funds
- ☐ Apply for facilitation funding from Department of Water Resources, if needed
- ☐ Include tribal engagement in GSP engagement plan
- ☐ Plan for AB 52 consultation for GSP implementation, when CEQA applies during GSP implementation

## Other

- ☐ Curriculum Development Partnerships
- ☐ Economic Development Partnerships
- ☐ Emergency Preparedness Partnerships



# Thank You!

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Holly Roberson, Attorney, Kronick, Moskovitz, Tiedemann & Girard  
hroberson@kmtg.com  
916-321-4517

Merri Lopez-Keifer, Chief Legal Counsel for San Luis Rey Band of Mission  
Indians & Commissioner, Native American Heritage Commission  
Lopez-Keifer@gmail.com  
925-457-3395

