June 6, 2014

The Honorable Mike Gatto
Member, California State Assembly
State Capitol, Room 2114
Sacramento, CA 95814

Re: AB 52 (Gatto): Native Americans: California Environmental Quality Act
As amended June 2, 2014 – OPPOSE
Set for hearing 6/18/14 – Senate Environmental Quality Committee

Dear Assembly Member Gatto:

On behalf of the California State Association of Counties (CSAC), the Rural County Representatives of California (RCRC), and the California Special Districts Association (CSDA), we regret to inform you of our opposition to your AB 52 as amended June 2, 2014. We appreciate and understand the desire of Native American tribes to be consulted on projects that could impact culturally-significant lands and resources. Indeed, in some cases, local governments have instituted processes that extend beyond what is required by law to consult with tribes on proposed projects. Further, as a matter of statewide policy, we promote consultation, collaboration and cooperation between local governments and tribes within federal processes such as acknowledgement and fee-to-trust, state processes such as negotiating local mitigation agreements for off-reservation impacts from gaming operations, and at the local level outside legally required interactions such as collaborating on mutually beneficial development projects or programs. Unfortunately, CSAC, RCRC and CSDA feel strongly that the legitimate need for consultation between local governments and tribal governments on a project-by-project basis belongs in the Government Code, where it could expand upon existing General Plan consultation requirements, rather than within the CEQA process.

AB 52 would create significant uncertainty and increased potential for litigation for lead agencies. While the bill lists specific criteria for what constitutes a tribal cultural resource, it also explicitly notes that cultural resources are not limited to those criteria. Additionally, the new language creates a new legal standard by requiring a preponderance of the evidence to demonstrate that a tribal cultural resource is not culturally significant. A preponderance of evidence standard is not currently codified in CEQA. The bill also prevents the disclosure of the location and nature of a tribal cultural resource to the project proponents. While this requirement is clearly appropriate for specific sites that could be at risk of depredation if their location is revealed, it does not easily lend itself to resources that have broader geographic scope; for instance landscapes considered sacred by a tribe. Lead agencies could be faced with requiring project proponents to make changes to their proposals without being able to clearly delineate the cultural resources that the revisions must protect. In the event of especially costly changes, this would create the potential for litigation between project proponents and lead agencies.

The bill's current consultation requirements are unworkable, as they require lead agencies to start consultation at four distinct points in the CEQA process: before an agency determines whether a Negative Declaration (ND) or Environmental Impact Report (EIR) is required; after an agency decides upon the type of document but before any public review commences; after an

agency decides upon an EIR and starts the scoping period, before the comment period on the Draft EIR; and again during the public comment period on the ND or EIR. Most troubling is the provision that would allow a tribe to request consultation during the public comment period on the EIR after which the lead agency has already considered the project, mitigation measures, etc. This is too late in the process to be productive and runs counter to the goal of the bill which is to promote *early* consultation.

As previously mentioned, our fundamental policy goal with regard to local government-tribal intergovernmental relations is to promote policies that incentivize cooperation and collaboration. Local governments recognize that there is a clear role for government-to-government consultation, collaboration and concessions when land use decisions made by local agencies or tribal governments impact tribal cultural resources or the off-reservation lands outside of tribal jurisdiction. In this instance, rather than complicating the CEQA process by adding a new, broadly defined class of potential significant environmental impacts—a subset of which are already covered by existing CEQA statute—we feel that project-by-project consultation should be governed by the Government Code. This approach would avoid the many potential pitfalls of grafting this new class of impacts onto an already complex body of law. Moreover, local agencies retain their fundamental police powers, which allow them to require conditions of approval on projects as a means of protecting tribal cultural resources outside of the vagaries of the CEQA process.

For these reasons, CSAC, RCRC and CSDA oppose AB 52. While we are open to developing alternative methods of local government-tribal consultation on a project-by-project basis, any additional consultation scheme should build off of the existing framework of SB 18. If you have any questions about our position, please do not hesitate to contact Kiana Buss, CSAC, at (916) 327-7500 ext. 566 or kbuss@counties.org, Kathy Mannion, RCRC, at (916) 447-4806 or kmannion@rcrcnet.org, or Christina Lokke, CSDA, at (916) 442-7887 or ChristinaL@csda.net.

Sincerely,

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cc: Members, Senate Environmental Quality Committee
Joanne Roy, Consultant, Senate Environmental Quality Committee
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