

The Big Pine Paiute Tribe's experiences with SB18 and some recommendations

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Inyo County is a good example of a local government that is not following SB 18. In 2009, the Big Pine Paiute Tribe (Tribe) received a letter from Inyo County which initiated government-to-government consultation for a proposed Renewable Energy General Plan Amendment (GPA) for the County. The GPA proposed zoning approximately one million acres for large-scale solar and wind development. Members of the Tribal Council and staff met with the Inyo County Planning Director three times to discuss this issue. We asked for the detailed criteria they were using for choosing one area over another, receiving only vague answers in return. It was obvious that an Environmental Impact Report (EIR) was needed in order to have even a general understanding of why large scale solar projects should be appropriate in one place rather than another. The GPA was later rescinded by the County after the Sierra Club and Center for Biological Diversity threatened to sue Inyo County for not preparing an EIR.

The Planning Director told us that an EIR was not necessary and the County did not have the money to prepare one. When the meetings with the Planning Director were going nowhere, the Big Pine Tribal Council decided to request a government-to-government consultation meeting with the Inyo County Board of Supervisors. The Board refused. The Board's position was that as long as they sent their staff to consult with the Tribe, then meaningful consultation was conducted from their end. The Board felt that it was not their responsibility if the Tribe didn't think that there was meaningful consultation in meeting with their staff. I'm sure their argument would be that there is nothing in the statute or the OPR guidelines which specifically states that the government leaders *must* or are even *encouraged* to consult with Tribal leaders upon request if local government staff is sent to consult. The language of SB 18 is ambiguous on this matter:

From SB 18, p. 2: The bill would require that, prior to the adoption or amendment of a city or county's general plan, the **city or county** conduct consultations with **California Native American tribes** for the purpose of preserving specified places, features, and objects that are located within the city or county's jurisdiction. The bill would define the term "consultation" for purposes of those provisions.

SB 18, p. 3: (2) Establish meaningful consultations between **California Native American tribal governments** and **California local governments** at the earliest possible point in the local government land use planning process so that these places can be identified and considered.

SB 18, p. 3: (3) Establish **government-to-government consultations** regarding potential means to preserve those places, determine the level of necessary

confidentiality of their specific location, and develop proper treatment and management plans.

SB 18, p. 7: 65352.4. For purposes of Section 65351, 65352.3, and 65562.5,"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.

In bold are the terms used above for the local government who must consult with California tribes:

city or county consults with **California Native American tribes**

California local governments consults with **Native American tribal governments**

government-to-government consultations with no definition of what this means.

government agencies consults with **Native American tribes** (now it is the agency who consults, which implies staff rather than elected leader).

"Government agencies" is used in the definition of consultation, but it doesn't seem to imply the denial of the local government leaders from consulting rather than a delegated government agency. The language is very confusing.

The Governor's Office of Planning and Research (OPR) and SB 18 Guidelines

There is also ambiguous language in the SB 18 Guidelines on the OPR website. The following are some examples:

OPR's SB 18 Guidelines (11-16-05), p. 16: "As defined in Government Code §65352.4, consultation is to be conducted between two parties: the **local government** and the **tribe**. Both parties to the consultation are required to carefully consider the views of the other."

Later on the same page, the Guidelines state:

OPR's SB 18 Guidelines (11-16-05), p. 16: "When a **local government** first contacts a tribe, its initial inquiry should be made to the tribal representative

identified by the NAHC. OPR recommends that a **local government department head** or other official of similar or higher rank make the initial contact.”

However, I think it would be more appropriate for the initial contact to come from the local government leader to the tribal leader, with a copy to the appropriate staff with contact number. Recommending local government staff for the initial contact takes the local government leader out of the loop. The federal tribal government to government protocol should be followed: local leader to contact tribal leader.

After the initial leader to leader consultation letter the following guideline makes more sense:

(pp. 16-17): "Government leaders of the two consulting parties may consider delegating consultation responsibilities (such as attending meetings, sharing information, and negotiating the needs and concerns of both parties) to staff. Designated representatives should maintain direct relationships with and have ready access to their respective government leaders. These individuals may, but are not required to, be identified in a jointly-developed consultation protocol. (See Section VI.) In addition, the services of other professionals (attorneys, 16 2005 Supplement to General Plan Guidelines contractors, or consultants) may be utilized to develop legal, factual, or technical information necessary to facilitate consultation."

However, the Guidelines should state that the *primary* government to government consultation should be leader to leader. If one party substitutes staff instead of the government leader against the wishes of the other party, then it is obviously not meaningful consultation, and this needs to be clarified in the OPR Guidelines.

Lastly, local governments should be strongly encouraged to contact tribes regarding proposed General Plan Amendments at least the same time other agencies are contacted. The Big Pine Paiute Tribe was contacted much later than other federal and state agencies about the proposed Inyo County Renewable Energy General Plan Amendment. Inyo County waited until 90 days before the first possible decision on the GPA could be made—a vote by the Planning Commission—and then contacted the Tribe. If the Tribe had waited the full 90 days and then requested consultation from the County, there would have been one day for consultation before a possible County decision. After this experience, it seems like there should also be a minimum time before a decision is made on a GPA after consultation is initiated within the 90 day period. This time frame could also be 90 days, which would encourage local governments to contact tribes well in advance of any proposed initial decision on a GPA

Local governments should also be strongly encouraged to conduct follow-up phone calls to tribal leaders and appropriate staff to make sure the consultation

letters were received, and if there are any questions about a proposed GPA.

The consultation letter the Big Pine Paiute Tribe received from Inyo County was so minimalist and vague that it was hard to figure out its full ramifications upon a first read. No maps or supporting documents were included.

There may be other areas of the statute and the Guidelines which need clarifying, but this is the problem that the Big Pine Paiute Tribe has had with the ambiguous language of the Guidelines and the SB 18 Statute in dealing with a Board of Supervisors which is not sympathetic to tribal interests.

What can be done to improve consultation under SB 18?

1. The language in the SB 18 Statute and OPR Guidelines can be clarified so that the goal of meaningful consultation can be better achieved. For instance, if tribal leaders would like to consult with principals of the same stature (i.e., city or county elected officials), then the city or county officials should be strongly encouraged to do so according to *revised* language in the Statute and the OPR Guidelines. This does not mean that the appropriate staff would not be involved, but that the primary level of consultation is the leadership, and the staff of either party is there to support the consultation process on behalf of the tribal or local government leadership.

2. OPR should conduct another round of SB 18 trainings, with an emphasis on getting tribal leadership and city or county elected officials to attend in addition to staff participation.