

Commissioner Guzman Aceves

DRAFT POLICY

California Public Utilities Commission

Investor-Owned Utility Real Property- Land Disposition – First Right of Refusal for Aboriginal Properties to California Native American Tribes

On April 26, 2018, the California Public Utilities Commission (Commission) adopted a Tribal Consultation Policy. Consistent with the goals of the Tribal Consultation Policy and Executive Order B-10-11,¹ this policy provides a first right of refusal by California Native American tribes for: any future disposition² of surplus real property currently owned by investor owned utilities (IOUs), including any future disposition of PG&E retained lands³ pursuant to the Stipulation,⁴ not contained within the boundaries of a Federal Energy Regulatory Commission (FERC) jurisdictional project.

Executive Order B-10-11 declares that “the State is committed to strengthening and sustaining effective government-to-government relationships between the State and the Tribes by identifying areas of mutual concern and working to develop partnerships and consensus.” The Executive Order directs state executive agencies and departments to “encourage communication and consultation with California Indian Tribes.” It further directs state agencies and departments “to permit elected officials and other representatives of tribal governments to provide meaningful input into the development of legislation, regulations, rules, and policies on matters that may affect tribal communities.”

As recognized in the Commission’s Tribal Consultation Policy, California is home to over 170 California Native American tribes.⁵ Executive Order B-10-11 applies to

¹ Adopted September 19, 2011.

² The use of the terms “dispose of” and “disposition” in this Resolution refer to the transfer, sale, donation or disposition by any other means of a fee simple interest or easement in real property.

³ All land currently retained by PG&E that is included in the LCP is referred to here as “retained land.”

⁴ The Land Conservation Plan (LCP) was developed in accordance with the Settlement Agreement, dated December 19, 2003, among PG&E and the Commission and the related Stipulation Resolving Issues Regarding the Land Conservation Commitment (Stipulation). See D.03-12-035, D.08-11-043, D.10-08-004. Any transfers of utility property, including real property, require Commission approval pursuant to Public Utilities Code section 851. All further statutory code references refer to the Public Utilities Code unless otherwise noted.

⁵ “California Native American tribe” means a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004. See Cal. Pub. Res. Code § 21073. California Native American tribes include both federally recognized tribes and tribes that are not recognized by the federal government. Nothing in the policy prevents tribes from consulting with other Native American groups that demonstrate an ongoing connection to a specific place or cultural resource, or issue falling under the jurisdiction of the Commission.

federally-recognized tribes and other California Native Americans. For purposes of this policy, the terms “tribes” and “tribal governments” refer to elected officials and other representatives of federally-recognized tribes and other California Native Americans.

This policy is to be read consistent with the Commission’s Tribal Consultation Policy, which requires that the Commission: provide notification of Commission proceedings to tribes, encourage tribal participation in Commission proceedings, and meaningfully consider tribal interests and the protection of tribal sacred places and cultural resources.

This policy requires IOUs to notify the appropriate California tribe(s) at the time the IOU determines it will dispose of surplus properties or retained land located in or adjacent to a tribe’s territory.⁶ This policy adopts a preference for the transfer of non-FERC jurisdictional surplus property, including retained land, to California tribes consistent with specific considerations, and to the extent that a conflict does not exist with applicable laws or regulations.

The Commission, in adopting this policy, recognizes that:

- The IOUs collectively own a significant amount of undeveloped property located within the aboriginal territories of California tribes. This includes lands both within and without the FERC jurisdictional boundaries. Approximately 140,000 acres of undeveloped watershed property owned by PG&E was identified in the LCP. Some of this land has been transferred to third parties, is in the process of being transferred to third parties or is/will be retained by PG&E consistent with the Stipulation.
- California law and policy encourages consultation and cooperation with tribal governments, particularly concerning the protection of tribal sacred places and cultural resources.⁷
- These surplus properties hold historical and spiritual significance for California tribes: some of these lands include the remains of California Native Americans; others are places of spiritual and cultural importance where California Native Americans have prayed, held ceremonies, and gathered traditional and medicinal plants.

⁶ Tribal territory is defined as the territory designated by the Native American Heritage Commission for notice of projects under AB 52. All notices and consultations required by this policy are to follow the timeframes set out in AB 52 for CEQA consultations.

⁷ Consistent with California law and policy, three of the five Commissioners individually expressed that they would like to see more of the Stewardship Council lands donated to tribes. February 8, 2018 Commission Voting Meeting.

- Executive Orders, state laws, policies, and regulations acknowledge legal rights of access to certain lands and require state consultation with affected California Native American tribes prior to taking actions impacting such lands.

Policy Goals: The goals of this policy are as follows:

- Recognize and respect tribal sovereignty.
- Protect tribal sacred places and cultural resources.
- Ensure meaningful consideration of tribal interests and the return of lands within the tribe's aboriginal territory to the appropriate tribe.
- Encourage and facilitate notice and participation in matters before the Commission that involve land transfers subject to Section 851 through either applications or advice letter processes.

The Commission's review of an IOU's request to dispose of surplus property may affect tribes and tribal members in several ways, including, but not limited to: 1) impacts to land use activities on or near tribal communities; 2) the ability to protect and access tribal sacred places and cultural resources; and, 3) provide opportunities to return lands to California tribes that are within their tribal territories.

Facilitating Tribal Government Access to Information:

The Commission will encourage and facilitate tribal government access to information concerning matters before the Commission that involve land transactions that may be of interest to tribes and that include transfer of surplus properties.

- The Commission will require the IOUs to notify tribal governments of any plans to dispose of surplus properties, including retained lands, within a tribe's territory.
- The Commission will give special consideration to tribal government requests to participate in Commission proceedings involving requests by IOUs in accordance with section 851 to dispose of surplus properties, including retained lands. The Commission will grant a tribal government's request to become a party in such proceedings and consider the tribe's comments or protest of IOU's request for Commission approval of the transaction.⁸ If an IOU fails to provide notice to the appropriate tribe(s) before submitting an application or advice letter requesting

⁸ This will include requests made through application or advice letter.

Commission approval of the transaction, the Commission will provide the tribe additional time to participate in the proceeding.

- Commission staff and Administrative Law Judges shall ensure that relevant information the Commission receives from a tribe is submitted into the record of a proceeding (including presenting such information to Commissioners where the land transfer is the subject of an advice letter), consistent with the confidentiality provisions set forth in the Commission's Tribal Consultation Policy.
- Where an IOU seeks approval to transfer non-FERC jurisdictional surplus property, including retained land, within a tribe's territory, the tribe shall be deemed the preferred transferee absent a finding supported by substantial evidence that it would be in the public interest to transfer the land to another entity.
- This policy applies to all proposed transfers of non-FERC jurisdictional surplus properties, including retained lands.

If an IOU submits an application or advice letter consistent with section 851 and relevant Commission decisions for the disposition of surplus property, including retained lands, the application or advice letter must include a showing of notice and consultation to the appropriate tribe(s) consistent with the identified tribal territory recognized by the Native American Heritage Commission.⁹ This includes:

- A request to the Native American Heritage Commission to identify tribal entities interested in the area where the property being disposed of is located.
- Written notice of any proposed disposition of surplus properties, including retained lands in the Tribe's territory prior to any disposition of such land.
- Documentation of communication between the IOU and the Tribe regarding whether or not the Tribe is interested in acquiring the surplus property at issue.

The Commission will grant the tribe a first right of refusal for any IOU requests to transfer non-FERC jurisdictional surplus property, including retained lands. There will be a rebuttable presumption that it is in the public interest to provide tribal entities the first opportunity to acquire such property.

For land transfers pursuant to section 851 for surplus property, including retained lands, located within a FERC jurisdictional project, the Commission will consider any request by a tribal entity, as well as comments regarding potential impacts on tribal cultural

⁹ The timeframes for notice and response set out in AB 52 will apply for purposes of this policy.

resources and suggested mitigation measures that should be included in any authorization of the Commission for the disposition of such assets as part of the proceeding.

Tribal Liaison:

Consistent with the Commission's Tribal Consultation Policy, the Commission's tribal liaison will assist in implementing this policy. The tribal liaison will act as a point of contact for tribes to seek advice on participating in proceedings and inquiries regarding pending section 851 applications/advice letters; filing documents; contacting Commissioners, advisors, or staff; and other related matters. The Tribal Liaison, Stephanie Green, can be contacted at Stephanie.Green@cpuc.ca.gov or (415) 703-5245 Alternatively, tribal governments may contact the Commission's Public Advisor for this assistance (E-mail: Public.Advisor@cpuc.ca.gov or phone: (866) 849-8390).

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