Exhibit 3.1: Definitions of Consultation

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Exhibit 3.1: **Definitions of Consultation**

Various federal and state laws and regulations define the term "consultation" slightly differently, but common among them is that consultation is a means between interested parties to obtain and consider views and to exchange ideas and information. Often consultation is a defined process to reach an agreement, a consensus, and/or an informed decision.

The term consultation also is used frequently to describe the interaction between the federal government and federally recognized Indian tribes. As sovereign governments, and therefore government entities, federally recognized Indian tribes are involved in transportation issues above and beyond historic preservation concerns. The interaction between the federal government and federally recognized Indian tribes often is referred to as government-to-government consultation, or in the vernacular as “Consultation” with a capital “C.” Consultation, particularly for historic preservation issues under the Section 106 regulations, often is referred to as consultation with a small "c," since it is in reference to consultation with all parties, not just tribes.

Definitions of consultation are found in the federal regulations for complying with Section 106 of the National Historic Preservation Act (NHPA) as amended and transportation planning law, and in state law as it pertains to consultation on General Plans between Native American Indian tribes and cities and counties; they are quoted below. While these definitions lay the foundation for a common understanding of the consultation concept, Caltrans cites the appropriate definition when applicable. For example, when discussing Section 106, refer to the definition contained in 36 CFR 800.16(f).

Federal regulations and guidelines

National Historic Preservation Act Section 106 Definitions

The federal regulations that implement Section 106 of NHPA (16 USC 470) define consultation as it relates to historic preservation. The definition is contained in 36 CFR 800.16(f):

> "Consultation means the process of seeking, discussing, and considering the views of other participants, and where feasible seeking agreement with them regarding matters arising in the section 106 process. The Secretary’s “Standards and Guidelines for Federal Agency Preservation Programs pur-

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suant to the National Historic Preservation Act" provide further guidance on consultation."

Secretary of the Interior's Standards and Guidelines

The definition for consultation in 36 CFR 800 refers to the "Secretary of the Interior's Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act" for further guidance on consultation. That reference is to Standard 5 and its concomitant Guidelines: Consultation General Principles:

Standard 5

"An agency consults with knowledgeable and concerned parties outside the agency about its historic preservation related activities. [Sections 110(a)(2)(D) and (E)(ii)]."

Guidelines: Consultation General Principles

"(a) Consultation means the process of seeking, discussing, and considering the views of others, and, where feasible, seeking agreement with them on how historic properties should be identified, considered, and managed. Consultation is built upon the exchange of ideas, not simply providing information. Whether consulting on a specific project or on broader agency programs, the agency should:

(1) make its interests and constraints clear at the beginning;

(2) make clear any rules, processes, or schedules applicable to the consultation;

(3) acknowledge others' interests and seek to understand them;

(4) develop and consider a full range of options; and,

(5) try to identify solutions that will leave all parties satisfied.

(b) Consultation should include broad efforts to maintain ongoing communication with all those public and private entities that are interested in or affected by the agency's activities and should not be limited to the consideration of specific projects.

(c) Consultation should be undertaken early in the planning stage of any Federal action that might affect historic properties. Although time limits may be necessary on specific transactions carried out in the course of consultation (e.g., the time allowed to respond to an inquiry), there should be no hard-and-fast time limit on consultation overall. Consultation on a specific undertaking

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should proceed until agreement is reached or until it becomes clear to the agency that agreement cannot be reached.

(d) While specific consultation requirements and procedures will vary among agencies depending on their missions and programs, the nature of historic properties that might be affected, and other factors, consultation should always include all affected parties. Section 110(a)(2)(D) specifies that an agency's preservation-related activities be carried out in consultation with other Federal, State, and local agencies, Indian tribes, Native Hawaiian organizations, and the private sector. Section 110(a)(2)(E)(ii) requires an agency's procedures for compliance with section 106 to provide a process for the identification and evaluation of historic properties and the development and implementation of agreements, in consultation with SHPOs[i], local governments, Indian tribes, Native Hawaiian organizations, and the interested public, as appropriate. In addition to having a formal role under the Act, SHPOs and Tribal Preservation Officers can assist in identifying other parties with interests, as well as sources of information.

(e) The agency needs to inform other agencies, organizations, and the public in a timely manner about its projects and programs, and about the possibility of impacts on historic resources of interest to them. However, the agency cannot force a group to express its views, or participate in the consultation. These groups also bear a responsibility, once they have been made aware that a Federal agency is interested in their views, to provide them in a suitable format and in a timely fashion.

(f) Agency efforts to inform the public about its projects and programs and about the possibility of impacts on historic resources must be carried out in a manner consistent with the provisions of section 304 of the Act, which calls for withholding from disclosure to the public information on the location, character, or ownership of a historic resource where such disclosure may:

(1) cause a significant invasion of privacy;

(2) risk harm to the historic resource; or,

(3) impede the use of a traditional religious site by practitioners.

[i] State Historic Preservation Officers

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Guidelines: Consultation with Native Americans

(g) Inclusion of Indian tribes and Native Hawaiian organizations in the consultation process is imperative and is specifically mandated by the Act [Sec. 110(a)(2)(D)]:

(1) properties with traditional religious and cultural importance to Native American and Native Hawaiian groups may be eligible for the National Register; such properties must be considered, and the appropriate Native American and/or Native Hawaiian groups must be consulted in project and program planning through the section 106 review process (see NHPA Sec. 101(d)(6)(A&B);

(2) Section 101(d)(2) of the Act provides that Indian tribes may assume State Historic Preservation Officer responsibilities on tribal lands, when approved to do so by the Secretary of the Interior. In those cases where a tribe has assumed such responsibilities on tribal lands, a Federal agency must consult with the tribe instead of the SHPO, in order to meet agency responsibilities for consultation pursuant to the Act;

(3) the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) establishes consultation requirements (43 CFR 10) that may affect or be affected by consultation pursuant to section 106 of the NHPA concerning activities on Federal and Tribal lands that could affect human remains and cultural items. The Archeological Resources Protection Act of 1979 and its uniform regulations also require consultation with tribes and provide a formal process of notification (16 USC 470cc-dd);

(4) Section 110 requires that an agency's efforts to comply with section 106 must also be consistent with the requirements of section 3(c) of NAGPRA concerning the disposition of human remains and Native American cultural items from Federal and tribal lands.

(h) Where those consulted do not routinely or customarily participate in traditional governmental means of consultation (e.g., through public meetings, exchanges of correspondence), reasonable efforts should be made to accommodate their cultural values and modes of communication."

U.S. Department of Transportation Regulations

The Caltrans Division of Transportation Planning would refer to the following definition from the regulations that implement transportation planning efforts under Title 23 of the

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United States Code that governs highways. The definition below, contained in 23 CFR 450.104, may help draw the distinction between consultation with a small "c" and Consultation with a capital "C."

> *Consultation* means that one or more parties confer with other identified parties in accordance with an established process and, prior to taking action(s), considers the views of the other parties and periodically informs them about action(s) taken. This definition does not apply to the "consultation" performed by the States and the MPOs[ii] in comparing the long-range statewide transportation plan and the metropolitan transportation plan, respectively, to State and Tribal conservation plans or maps or inventories of natural or historic resources (see 450.214(i) and 450.322(g)(1) and (g)(2)).

The additional referenced sections of 23 CFR 450 are:

> 450.214(i) The long-range statewide transportation plan shall be developed, as appropriate, in consultation with State, Tribal, and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation. This consultation shall involve comparison of transportation plans to State and Tribal conservation plans or maps, if available, and comparison of transportation plans to inventories of natural or historic resources, if available.
>
> 450.322(g) The MPO shall consult, as appropriate, with State and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation concerning the development of the transportation plan. The consultation shall involve, as appropriate:
>
> > (1) Comparison of transportation plans with State conservation plans or maps, if available; or
> >
> > (2) Comparison of transportation plans to inventories of natural or historic resources, if available.

U.S. Department of Transportation Tribal Consultation Plan

The U.S. Department of Transportation Tribal Consultation Plan's definition of consultation is: "*Consultation*" refers to meaningful and timely discussion in an understandable language with tribal governments.

[ii] Metropolitan Planning Organizations

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State definitions

California Government Code Section 65352.4

In 2004, California Senate Bill 18 amended the California Government Code to require city and county governments to consult with California Native American tribes[iii] when developing or amending General Plans. Several sections in California's Government Code refer to this consultation. California Government Code Section 65352.4 provides the definition of consultation, by stating the following:

> "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."

California State Transportation Agency Draft Tribal Consultation Policy

In the California State Transportation Agency's draft November 2013 Tribal Consultation Policy, the Agency defines consultation as "a process whereby parties meet and confer to exchange information, compromise, and reach understandings that, when possible, may result in the adoption of mutually-beneficial policies and sustainable outcomes.

[iii] Federally recognized California Native American tribe and non-federally recognized California Native American tribe on a contact list managed by the Native American Heritage Commission.

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