

California Public Utilities Commission

Investor-Owned Utility Real Property- Land Disposition – First Right of Refusal for Disposition of Real Property Within the Ancestral Territories of California Native American Tribes

Introduction:

On April 26, 2018, the California Public Utilities Commission (Commission) adopted a Tribal Consultation Policy. Consistent with the goals of the Tribal Consultation Policy Executive Order B-10-11,¹ and Executive Order N-15-19, this Land Disposition Policy provides guidance on how the Commission will apply the Tribal Consultation Policy to future applications and advice letters submitted by investor-owned utilities (IOUs) requesting permission to dispose² of Real Property³ (including any Real Property contained within the hydro watershed lands retained by Pacific Gas and Electric Company (PG&E) through implementation of its Land Conservation Commitment (LCC)⁴) under Section 851 of the Public Utilities Code. Consistent with this Policy, the Commission will encourage and, where possible, facilitate transfers of Real Property to California Native American Tribes.⁵ In particular, this Policy creates an expectation that, for any future disposition of Real Property, the IOU will offer Tribes a right of first refusal⁶ before putting the property on the market. Following adoption of this Policy, the Commission will hold stakeholder workshops discussing how best to implement this Policy and will, through its Resolution process, adopt formal implementation guidelines.

In short, this Policy works as an overlay over the existing Section 851 process. It does not determine the outcome of any Section 851 submission; rather, it expresses a

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 “Real Property” subject to this policy is defined as any IOU property whose disposition is subject to approval in accordance with California Public Utilities Code Section 851.

⁴ The Land Conservation Commitment (LCC) was established and implemented in accordance with Commission Decisions (D.) 03-12-035 and D.08-11-043.

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.

⁶ As we use it here, the term first “right of refusal” means the IOU disposing of the surplus property has to contact the Tribe or Tribes whose ancestral territory surrounds the surplus property and provide such tribe(s) the first right to take/purchase or refuse transfer of the property, before the IOU can seek third party purchasers for such surplus property. The right of first refusal is similar in concept to a call option, in that the Tribe will have the right, but not the obligation, to purchase or accept transfer of the surplus land within a reasonable time period, as determined by the Commission, after notice by the IOU is provided to the Tribe.

preference for the types of dispositions the Commission would like to see, and provides all affected stakeholders, including Tribes, notice and an opportunity to comment.

Background:

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. Executive Order B-10-11 applies to 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 consistent with the definitions set forth in A.B. 52.

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.

When an IOU plans to dispose of Real Property within a Tribe’s ancestral territory,⁷ the Commission will ensure that the Chairperson, or the Chairperson’s designee, of any appropriate Tribe receives notice of the planned disposition. The Commission will set forth specific notice requirements in the guidelines to be adopted later. This policy establishes a Commission preference for the transfer of Real Property to Tribes,

⁷ Tribal ancestral territory is defined as the territory designated by the Tribe and submitted to the Native American Heritage Commission (NAHC) to provide to state agencies and local government for notice of projects under AB 52. Tribes are the primary source for identification of a Tribe’s ancestral territory. A secondary source for tribal ancestral territory not specifically defined by the Tribe pursuant to AB 52 is the Handbook of North American Indians (1978 Sturtevent, Smithsonian Institution) volumes 8, 10, and 11). IOUs shall attempt to resolve any disputes regarding the Tribe with whom it is required to provide notice and/or the location of the tribal territory within which the subject Real Property is located or to which it is immediately adjacent through discussion with the Tribes identified by the NAHC. Should the IOU be unable to resolve identified disputes, it shall exercise reasonable discretion and best judgement to determine how best to proceed with the required notification. The IOU shall document such discussions, notices, and determinations.

consistent with specific considerations identified here.⁸ This preference can be rebutted by a showing that the transfer would conflict with applicable laws or regulations, or by a Commission finding, after a hearing, that the transfer would not be in the public interest.

The Commission, in adopting this policy, recognizes that:

- The IOUs own Real Property located within Tribes' ancestral territories. This includes lands both within and outside the Federal Energy Regulatory Commission (FERC) licenses. Approximately 140,000 acres of watershed property owned by PG&E was identified in the LCC. Some of this land has been donated to third parties, some is in the process of being donated to third parties, and some will be retained by PG&E consistent with the terms of the LCC.
- California law and policy encourages consultation and cooperation with tribal governments, particularly concerning the protection of Tribal sacred places and cultural resources.⁹
- These Real Properties may hold historical, spiritual and other 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.
- Executive Orders, federal and 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 ancestral territory to the appropriate Tribe.

⁸ Specific considerations are identified in this policy and may be added to through development of implementation guidelines to be developed subsequent to the adoption of this policy.

⁹ 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.

- Encourage and facilitate notice and Tribal participation in matters before the Commission that involve Real Property 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. For example, the transfer of property may affect land use activities on or near Tribal communities, may affect ability to protect and access Tribal sacred places and cultural resources, and may 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 disposition of Real Property.

- The Commission will adopt guidelines requiring notification of the Tribal Chairperson or their designee of the IOU's intent to dispose of any Real Property within a Tribe's ancestral territory. The Commission expects that notice will include: (1) identification of the Real Property at issue; (2) the reason for the disposition; and (3) contact information for a representative of the IOU that is able to provide at the Tribe's request enough additional information for the Tribe to determine whether it is interested in the Real Property. If the Real Property is located within or adjacent to a federally recognized Tribe's Indian Country,¹⁰ the Commission will consider the Tribe whose Indian Country the land is in or adjacent to as the sole Tribe for purposes of the right of first refusal.
- The Commission will give special consideration, to Tribal government requests to participate in Commission proceedings involving requests by IOUs to dispose of Real Property under Section 851. A Tribal government may request to become a party in such proceedings, and the Commission will consider the Tribe's comments or protest of the IOU's request for Commission approval of the transaction.¹¹ If the appropriate Tribe(s) does not receive notice before the IOU begins the Section 851 process, the Commission will provide the Tribe reasonable additional time to participate in the proceeding, and will require

¹⁰ The term "Indian Country" means "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151.

¹¹ This will include requests made either through the Commission's formal application process, which is resolved via Decision, or through the Commission's less-formal advice letter process, which is resolved via Resolution.

meaningful consultation with the tribal government to determine whether the Tribe is interested in acquiring the Real Property.

- Commission staff and Administrative Law Judges will 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 Real Property within a Tribe's ancestral territory, the Commission expects that the IOU will provide the Tribe a right of first refusal. The Commission will further deem that Tribe the preferred transferee absent a finding supported by evidence (1) that the Tribe is not interested in acquiring the Real Property (e.g., the Tribe declined consultation or confirmed that it is not interested); (2) that the IOU acted in good faith and, after reasonable effort, was unable to agree with the Tribe on reasonable terms to transfer the Real Property consistent with Commission policy; (3) that conveyance of the Real Property to another entity is necessary to achieve IOU operational requirements, or to comply with any law, rule, or regulation; or (4) that conveyance of Real Property to another entity would be in the public interest.
- The Commission shall conduct further Tribal consultation, consult with the Governor's Office of the Tribal Advisor, IOUs, and other stakeholders to develop implementation guidelines for the policy.
- Until implementation guidelines are in place, IOUs shall provide notice of the proposed disposition of Real Property to the appropriate Tribe(s). The Tribe will have 90 days to respond to the notification as to its interest in the subject Real Property. The IOU shall maintain a record of all contacts with the Tribe(s), including the notice, return receipt as proof that the Tribal Chairperson received such notice, response to the notice, and any other communications with the Tribe or third parties regarding disposition of the subject Real Property.

If an IOU submits an application or advice letter consistent with Section 851 and relevant Commission decisions for the disposition of Real Property, the Commission will ensure that the record contains a showing of notice and consultation to the appropriate Tribe(s), consistent with the identified Tribal ancestral territory recognized by the Native American Heritage Commission (NAHC). This includes, but is not necessarily limited to:

- A copy of a written request to the NAHC to identify tribal entities interested in the area where the Real Property being disposed of is located.

- A copy of written notice to the Tribal Chairperson or their designee of the IOU's intent to dispose of the subject Real Property, including an offer to consult with the Tribe regarding the Tribe's interest to acquire the subject Real Property.
- Documentation of communication between the IOU and the Tribe regarding whether the Tribe is interested in acquiring the Real Property.

If those requirements are not met, and if those deficiencies cannot be cured, the Commission may deny the application or advice letter without prejudice.

As part of its review of any disposition of Real Property under Section 851, the Commission will consider any request by a Tribal entity, as well as comments regarding potential impacts on Tribal cultural resources, or suggesting measures that would mitigate those impacts. This applies whether the proposed transfer is to the Tribe or a third party. Such review and consideration of impacts to cultural resources will be consistent with all laws, rules, and regulations governing the protection of cultural resources on the Real Property.

If more than one Tribe seeks ownership of available Real Property, and if the Tribes are unable to resolve the dispute themselves, this Policy creates an expectation that the IOU or the Commission will engage in meaningful consultation with the Tribes to attempt to resolve the dispute. As part of the implementation guidelines to be developed under this Policy, the Commission will work with the Tribes, utilities, and other stakeholders to further develop a dispute resolution policy.

The Commission will maintain a list, to be updated every year, of recent and upcoming IOU Real Property dispositions, as well as a summary of Tribal contacts and consultations (including the outcome of those consultations) undertaken over the previous year. As part of the implementation guidelines to be developed under this Policy, the Commission will seek input from stakeholders on the format of this list, and of its updates.

After this Policy is adopted, the Commission's Energy Division will host workshops to develop the implementation guidelines discussed here. After consideration of the workshop comments and the workshop report, if any, Energy Division will draft a Proposed Resolution setting forth the implementation guidelines.

Comments:

The Commission's Emerging Trends Committee adopted a draft version of this policy in April 2019, and made the draft version available for public comment on the Commission's website. The Commission received comments from the Pacific Forest and Watershed Lands Stewardship Council, the Habematolel Pomo of Upper Lake,

Pacific Gas & Electric Co., the Ewiiapaayp Band of Kumeyaay Indians, the Yocha Dehe Wintun Nation, the Native American Land Conservancy, the Agua Caliente Band of Cahuilla Indians, Southern California Edison Co., San Diego Gas & Electric Co., and the Manzanita Band of the Kumeyaay Nation. The Commission also conducted several workshops, both in person and via webinar, and received informal comments there.

In response to comments, the Commission has made some revisions throughout this document. The Commission also notes that this Policy is just that: a policy. It is meant to be an overarching framework, not a detailed guidance document. The Commission, in consultation with the Tribes, IOUs, and other stakeholders, will be developing more detailed guidelines to implement this broad Policy. Some of the concerns raised in the comments, though well taken, will be better addressed in the implementation guidelines, rather than in this policy.

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).