

Washington, DC, January 5, 2017.

Attn: Shannon Allen
City of Berkeley Planning and Development Department
1947 Center Street, 2nd Floor
Berkeley, CA 94704

Dear Ms. Allen,

We appreciate this opportunity to submit comments on the **Draft Environmental Impact Report (EIR) regarding 1900 Fourth Street**. Since 1989, the Center for International Environmental Law (CIEL) has used the power of law to protect the environment, promote human rights, and ensure a just and sustainable society. CIEL seeks a world where the law reflects the interconnection between humans and the environment, respects the limits of the planet, protects the dignity and equality of each person, and encourages all of earth's inhabitants to live in balance with each other.

One of the main goals of CIEL's work is to enable communities to advocate for their rights by engaging directly with decision-makers in projects that may affect them. We have become aware of the community concern and opposition that has arisen regarding the 1900 Fourth Street Project, its draft EIR and the process by which tribal leaders were made eligible to consult under AB 52.

We would remind the City of Berkeley Planning and Development Department that on May 19, 2009 the Berkeley City Council passed a resolution recognizing and endorsing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which encompasses international standards for the recognition, promotion and protection of the rights and freedoms of indigenous peoples. Surely this decision stemmed from the recognition that indigenous and tribal peoples require special protection resulting from their greater vulnerability and their historical conditions of marginalization and discrimination.

Among these indigenous and tribal rights we would highlight the critical importance of proper, meaningful and inclusive consultations as set forth in article 32.2 of the declaration:

"States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization of exploitation of mineral, water or other resources".

1350 Connecticut Avenue NW, Suite #1100, Washington, DC 20036 USA
Tel: 1-202-785-8700 | Fax: 1-202-785-8701 | info@ciel.org

15 rue des Savoises, 1205 Geneva, Switzerland
Tel: 41-22-789-0500 | Fax 41-22-789-0739 | geneva@ciel.org

www.ciel.org

Additionally, the City Council took steps to implement UNDRIP as Municipal Policy and even gave further recognition of the declaration by endorsing the call to upgrade the UNDRIP to a Convention in December of 2015¹. While we applaud the City of Berkeley's steps toward recognition of the rights of indigenous peoples, we are well aware of the complexities regarding full implementation of these rights, mainly as it pertains to the process by which proper and meaningful consultation of indigenous peoples should occur.

With that in mind we would question the process by which the City of Berkeley carried out its due diligence regarding the identification of tribes eligible to consult with the City pursuant to AB 52 and the UNDRIP regarding this project, as well as, the process by which individuals were notified and included in any type of consultation.

As stated in the draft Environmental Impact Report: "(3) California Assembly Bill 52 - Tribal Cultural Resources and Consultation. Assembly Bill 52 (AB 52), which became law on January 1, 2015, provides for consultation with California Native American tribes during the CEQA process, and equates significant impacts to "tribal cultural resources" with significant environmental impacts." Further AB 52 specifically states:

SECTION 1. (b) In recognition of California Native American tribal sovereignty and the unique relationship of California local governments and public agencies with California Native American tribal governments, and respecting the interests and roles of project proponents, it is the intent of the Legislature, in enacting this act, to accomplish all of the following:
(7) Ensure that local and tribal governments, public agencies, and project proponents have information available, early in the California Environmental Quality Act environmental review process, for purposes of identifying and addressing potential adverse impacts to tribal cultural resources and to reduce the potential for delay and conflicts in the environmental review process."

In implementing the right to consultation of indigenous peoples, there is full agreement that consultation is by no means a single act, "*but a process of dialogue and negotiation that implies both parties' good faith and the objective of achieving a mutual agreement. Consultation procedures, as a form of guaranteeing indigenous and tribal peoples' right to participate in matters which can affect them, "must be designed to secure the free and informed consent of these peoples, and must not be limited to notification or quantification of damages."* The consultation procedure may not be limited to compliance with a series of formal requirements. Even in instances in which indigenous peoples' consent is not a necessary requirement, States have the duty to give due regard to the results of the consultation or provide objective and reasonable motives for not having taken them into consideration."²

¹ City of Berkeley resolutions in support the rights of indigenous peoples, including the adoption of the UNDRIP as municipal practice: https://www.cityofberkeley.info/Clerk/City_Council/2016/01_Jan/Documents/2016-01-19_Item_31_Support_of_Indigenous_Peoples.aspx

² IACHR, *Report Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources*, Norms and Jurisprudence of the Inter-American Human Rights System, at p. 106-107. <http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf>

As included in A. Cultural Resources (3) Native American Consultation of the EIR, a list of five individuals were found eligible to consult under AB 52, and only one individual from the Ohlone Indian Tribe met with the City of Berkeley. According to the guidelines for implementation of the rights of indigenous peoples, this does not meet the standards of a free, prior, informed consultation.

The EIR gives little indication as to the process by which these five individuals were identified and apparently relies on the delivery of one letter of correspondence. This limited effort to reach out to tribal peoples in the area has not only excluded them from learning about and participating in the recognition and identification of what has been defined as tribal cultural resources, but also from the decision regarding conservation of these resources for future generations.

We are concerned about the obvious limitations of a consultation process carried out with a single individual and a single tribe. Furthermore, the project applicant's proposed measures to donate money to the Ohlone Indian Tribe and for the creation of a GIS database designating areas of archeological sensitivity for use in future planning purposes within the City of Berkeley, could constitute potential compensation which other tribal peoples would not consent to.

One of the fundamental beliefs and vision which indigenous and tribal peoples have defended and is now recognized by treaties and conventions such as UNDRIP is their collective rights. The collective rights of indigenous peoples cannot be asserted to the exclusion of the participation of individual members in a consultation process.

By limiting the consultation process within this project to a sole individual, the City of Berkeley has failed to provide for the conditions needed for *prior* and timely access to information that would allow for *free* and *informed* participation by indigenous tribal peoples in a meaningful *consultation*.

We would request that the current draft EIR be rejected in favor of carrying out a proper and meaningful consultation process that enforces the City of Berkeley's adopted Municipal Policy to respect and protect the rights of indigenous peoples according to the UNDRIP and AB 52. As in the past, the City of Berkeley has shown its leadership in adopting international legal standards, we would hope that it would also follow the guidance and standards for its implementation to afford special protection to all indigenous and tribal peoples who may be affected by this project.

Respectfully,

Carla García Zendejas
Director, People, Land & Resources
Center for International Environmental Law

1350 Connecticut Avenue NW, Suite #1100, Washington, DC 20036 USA
Tel: 1-202-785-8700 | Fax: 1-202-785-8701 | info@ciel.org

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