

Assembly Bill 52 (AB 52)

Introduction

Assembly Bill 52 (AB 52)¹ establishes a process for government-to-government consultation; imposes substantive and procedural obligations on Tribes, lead agencies, the California Governor’s Office of Planning and Research (OPR), and the Native American Heritage Commission (NAHC); and requires lead agencies to evaluate, as part of CEQA review, impacts to a new category of category of environmental resources, *tribal cultural resources* (TCR), along with enumerating potential mitigation measures.

TCR falls within the scope of CEQA analysis for significant impact—impacts to TCR are automatically considered a significant negative impact on the environment. This presumption immediately triggers all the associated environmental review requirements under CEQA discussed in the CEQA overview section.

AB 52 imposes on both state and local government lead agencies an obligation to notify Tribes “traditionally and culturally affiliated with the geographic area of a proposed project”—with the help of a list maintained by NAHC—about a project triggering CEQA review, but only if a Tribe has previously informed that specific lead agency of its desire to be so notified. Lead agencies must then engage in government-to-government consultation about the project to determine and mitigate impacts of proposed projects on TCR, but again only if a notified Tribe requests consultation. The lead agency is obligated to recommend for inclusion in the final environmental report any mitigation measures agreed upon as an outcome of consultation; or otherwise to select mitigation measures, some of which are enumerated in the statute.

AB 52 further incorporates confidentiality protections for data and information on TCR that Tribes share with lead agencies and other parties during the consultation process. The statute directs OPR to update Appendix G of the CEQA Guidelines. Appendix G is the Environmental Checklist Form, a sample form lead agencies can utilize to ensure they are following CEQA’s procedural and substantive requirements. OPR added consideration of TCR through relevant sample questions.

Legislative Findings and Stated Intent

The legislature, in enacting AB 52, made a series of lofty declarations of intent which are partially met by the effective statutory provisions themselves. Key among legislative findings is recognition of the nexus between natural settings and tribal cultural heritage

¹ Act of Sept. 25, 2014 (Assembly Bill 52), 2014 Cal. Legis. Serv. ch. 532 (codified at Cal. Pub. Res. Code §§ 5097.94, 21073, 21074, 21080.3.1, 21080.3.2, 21082.3, 21083.09, 21084.2, 21084.3) [hereinafter AB 52].

and practices, as well as acknowledgement that these sites often fall outside of Tribes' territorial jurisdiction.²

Key stated intentions include the following.³ Checkmarks indicate where the text of AB 52's statutory provisions plainly realize these intentions.

- ✓ Establishing a new category of resources, "tribal cultural resources," to be evaluated as part of the CEQA assessment for impacts to the environment.
- ✓ Equating substantial adverse changes to TCR as a significant effect on the environment.
- ✓ Establishing examples of mitigation measures for TCR.

- Incorporating tribal knowledge about potentially impacted land and TCR into environmental assessments.
- Establishing a "meaningful consultation process" between tribal governments and state and local lead agencies, at "the earliest possible point" in the CEQA environmental review process.
- Enabling Tribes to manage and serve as caretakers of TCR.

Notably, the California State Assembly—in the same session it enacted AB 52—also endorsed the principles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The Assembly noted that state governments "exercise authority in areas that affect the indigenous peoples within the state."⁴ However, the resolution clearly states it does not create any enforceable rights.⁵

² AB 52 § 1(a).

³ AB 52 § 1(b).

⁴ Assem. J. Res., 42, Chapter 105, 2013-2014 Reg. Sess. (Cal. 2014).

⁵ *Id.*

Tribal cultural resources

Sec. 4. Section 21074.

“Tribal cultural resources” are either of the following:

Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American Tribe that are either of the following:

Included or determined to be eligible for inclusion in the California Register of Historical Resources.

Included in a local register of historical resources as defined in subdivision (k) of Section 5020.1.

A resource determined by the lead agency, *in its discretion* and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1. In applying the criteria set forth in subdivision (c) of Section 5024.1 for the purposes of this paragraph, the lead agency shall *consider* the significance of the resource to a California Native American Tribe.

A cultural landscape that meets the criteria of subdivision (a) is a tribal cultural resource to the extent that the landscape is geographically defined in terms of the size and scope of the landscape.

A historical resource described in Section 21084.1, a unique archaeological resource as defined in subdivision (g) of Section 21083.2, or a “nonunique archaeological resource” as defined in subdivision (h) of Section 21083.2 may also be a tribal cultural resource if it conforms with the criteria of subdivision (a).

Tribal cultural resources, broadly speaking, fall into one of two categories.⁶

The first comprises geographically situated or defined sites (sites, features, places, cultural landscapes, sacred places) and objects with “cultural value” to California Native American Tribes. This category has, or qualifies for, official state or local government recognition: they are included, or eligible to be included, in the California Register of Historical Resources or in a local register of historical resources.⁷

⁶ Cal. Pub. Res. Code § 21074(a).

⁷ Cal. Pub. Res. Code § 5020.1(k) “Local register of historical resources” means a list of properties officially designated or recognized as historically significant by a local government pursuant to a

The second category consists of resources a lead agency, in its discretion, determines is significant, applying statutory criteria that is primarily focused on historical value rather than a resource's current or evolving relevance to a Tribe,⁸ although the lead agency is directed to consider significance to a California Native American Tribe. According to the OPR Technical Advisory on AB 52 and Tribal Cultural Resources in CEQA, courts will defer to a lead agency's factual determination that a resource is a TCR if that decision is supported by substantial evidence in the record.⁹

OPR cites NAHC, the California Office of Historical Preservation, and the California Historical Resources Information System (CHRIS) as helpful sources for lead agencies to determine whether the site of a proposed project triggering CEQA review may contain TCR.¹⁰ OPR notes in its Tribal Consultation Guidelines that a Tribe may be the only source of information regarding the existence of a cultural place,¹¹ and provides examples of tribal sources of information that "may support" an agency's finding that a resource meets the statutory definition.¹²

local ordinance or resolution." Cal. Pub. Res. Code § 5020.1(j) defines the term "historical resource" as including, but not limited to "any object, building, structure, site, area, place, record, or manuscript which is historically or archaeologically significant, or is significant in the architectural, engineering, scientific, economic, agricultural, education, social, political, military, or cultural annals of California."

⁸ The lead agency is to apply the criteria established under Cal. Pub. Res. Code § 5024.1(c) ("A resource may be listed as historical resources in the CA Register if it meets any of the following National Register of Historic Places criteria: (1) is associated with events that have made a significant contribution to the broad patterns of CA's history and cultural heritage; (2) is associated with the lives of persons important in our past; (3) embodies the distinctive characteristic of a type, period, region, or method of construction, or represents the work of an important creative individual or possesses high artistic values; (4) has yielded, or may be likely to yield, information important in prehistory or history.").

⁹ GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, *Technical Advisory: AB 52 and Tribal Cultural Resources in CEQA*, 4 (June 2017), https://opr.ca.gov/ceqa/docs/20200224-AB_52_Technical_Advisory_Feb_2020.pdf [hereinafter Technical Advisory].

¹⁰ *Id.* at 13.

¹¹ GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, *Tribal Consultation Guidelines: Supplement to General Plan Guidelines*, 16-17 (Nov. 14, 2005), http://www.opr.ca.gov/docs/011414_Updated_Guidelines_922.pdf [hereinafter Tribal Consultation Guidelines].

¹² Technical Advisory, at 4. This includes "elder testimony, oral history, tribal government archival information, testimony of a qualified archeologist certified by the relevant Tribe, testimony of an expert certified by the tribal government, official tribal government declarations or resolutions, formal statements from a certified THPO, or historical/anthropological records."

Impacts to tribal culture resources triggering CEQA review

AB 52 establishes a presumption that a project with an effect that may cause a substantial adverse change in the significance of a TCR is automatically categorized as a project that may have a significant effect on the environment. This triggers CEQA review. The statute also mandates public agencies to avoid damaging effects to TCR “when feasible.”¹³

Procedural requirements

AB 52 Consultation Process¹⁴

1. Lead agency determines that a private project application is complete.
2. Lead agency then has 14 days to provide written notice to tribal contact on their list. (PRC, § 21080.3.1(d))
3. 14-day notification must include project description, project location, and must state that the tribe has 30 days to request consultation.
4. If the tribe does wish to engage in consultation, the tribe must respond to 14-day notice within 30 days of receipt, otherwise consultation requirement ends here. (PRC, § 21080.3.1(b)(1))
5. Lead agency must begin consultation process within 30 days of consultation request. (PRC, § 21080.3.1(b))
6. Consultation concludes when either:
 - 1) the parties agree to mitigation measures or to avoid significant effects on the tribal cultural resources (PRC, § 21082.3(a)); or
 - 2) a party, acting in good faith and after reasonable effort, concludes that a mutual agreement cannot be reached. (PRC, § 21080.3.2(b)(1)-(2); PRC, § 21080.3.1(b)(1))
7. Release of environmental document with tribal information kept confidential.

AB 52 sets out a timeframe for Tribes and lead agencies to meet (or fail to meet) various obligations.¹⁵

Prior to any project proposal, NAHC provides each California Native American Tribe with a list of all potential lead agencies, and associated contact information, within the geographic

¹³ Under CEQA, *feasible* is defined as: “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.” Cal. Pub. Res. Code § 21061.1.

¹⁴ *Tribal Consultation Process and Timelines*, GOVERNOR’S OFFICE OF PLANNING AND RESEARCH, STATE OF CALIFORNIA, https://www.opr.ca.gov/ceqa/docs/20220223-Tribal_Consultation_Checklist.pdf (last visited May 28, 2024).

¹⁵ Cal. Pub. Res. Code § 21080.3.1.

area traditionally and culturally affiliated with the Tribe.¹⁶ Each California Native American Tribe must submit a request to each lead agency, in writing, , “to be informed . . . through formal notification of proposed projects in the geographic area that is traditionally and culturally affiliated with the tribe, and [the] tribe responds, in writing, within 30 days of receipt of the formal notification, and requests the consultation.”¹⁷

Lead agencies are then responsible for notifying Tribes about projects, triggering CEQA, proposed for geographic areas traditionally associated with that Tribe or Tribes. NAHC, in training materials for state and local agencies on best practices, recommends lead agencies conduct research on potential TCRs in the affected area even prior to deciding whether to undertake a project or determining an application is complete.¹⁸ OPR also encourages local governments to consult with Tribes as early as possible—even prior to initiating the project or to an applicant submitting a formal proposal.¹⁹ OPR lists several state, scientific, and other resources for identifying potential TCR beforehand—although that agency does not explore partnering with Tribes beforehand to co-develop such an inventory.²⁰ OPR’s *Tribal Consultation Guidelines* stresses the benefits of local governments establishing a working relationship with Tribes well before any local proposal triggers consultation.²¹

¹⁶ Cal. Pub. Res. Code § 5097.94(m). “California Native American Tribe” is defined in California statute as “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.” Cal. Pub. Res. Code § 21073.

¹⁷ Cal. Pub. Res. Code § 21080.3.1. NAHC developed a sample template for the AB 52 notice list request letter. See STATE OF CALIFORNIA NATIVE AM. HERITAGE COMM’N, *Implementation of AB52 Sample Letters – Request for Formal Notification and Request for Consultation*, <http://nahc.ca.gov/2015/06/implementation-of-ab52-sample-letters-request-for-formal-notification-and-request-for-consultation/> (last visited Jan. 14, 2021) [hereinafter *Implementation of AB52 Sample Letters*].

¹⁸ STATE OF CALIFORNIA NATIVE AM. HERITAGE COMM’N, *PPT: Tribal Consultation Under AB 52: Requirements and Best Practices*, https://nahc.ca.gov/wp-content/uploads/2015/10/AB52TribalConsultation_CalEPAPDF.pdf (last visited Jan. 14, 2021) [hereinafter *PPT: Tribal Consultation Under AB 52*].

¹⁹ *Tribal Consultation Guidelines*, at 12.

²⁰ See generally *Tribal Consultation Guidelines*, at 19. OPR’s suggestions include requesting Sacred Lands Inventory and CHRIS searches, referencing ethnographic studies, and identifying previous geotechnical and archeological reports for the project site. OPR also advises local governments to ask Tribes to identify whether land that is candidate for open space designation contains any cultural sites. See also State of California Native Am. Heritage Comm’n, Environmental and Cultural Department, <http://nahc.ca.gov/environmental-and-cultural-department/> (last visited Jan. 14, 2021). The California Native American Heritage Commission maintains the state’s Sacred Lands Inventory as a confidential catalog of California Native American sacred and cultural sites, on both private and public lands.

²¹ *Tribal Consultation Guidelines*, at 21-2. The Guidelines refer to General Plans and Plan Amendments, but OPR applies this document to AB 52 consultation as well.

Step 1: Project is Proposed

When a project is proposed in a geographic area traditionally and culturally affiliated with one or more Tribes, the lead agency's responsibilities under AB 52 is triggered by taking one of two actions: (1) deciding to undertake a project (if agency project); or (2) determining the project application is complete. NAHC interprets this as applying to any project for which a Notice of Preparation (NOP) for an EIR, NOMND, or NOND is filed on or after July 1, 2015,²² but not for a Notice of Exemption (NOE). The lead agency must, within 14 days of filing the NOP, issue formal notification to each Tribe that earlier requested such notification.²³ Notification includes a brief description of project and its location, as well as lead agency contact information.²⁴ NAHC suggests, when sending consultation notices, to include the lead agency's policy on discretionary determinations of significance of TCR.²⁵

Step 2: Tribes Are Notified, Respond in Writing, and May Request Consultation

Each Tribe so notified then has 30 days of receipt of notification to respond in writing.²⁶ The Tribe may request consultation; if so, the Tribe either designates a lead contact person or, failing that, the lead agency defers to person listed on the NAHC's contact list. Alternately, the Tribe may decide to forgo consultation, or otherwise fail to provide comments or indicate interest in engaging in the consultation process.²⁷ NAHC notes that failure to request notification does not preclude *non*-AB 52 tribal consultation.²⁸ This arguably encompasses consultation required of local government planning decisions under SB 18.

Step 3: Initiate Consultation

Within 30 days of requesting consulting, the lead agency must initiate consultation. There is no statutory deadline on when consultation itself should begin; OPR's *Tribal Consultation Guidelines* state only that it should begin "within a reasonable time."²⁹ Nor is there a statutory limit on the duration of the consultation.³⁰ However, lead agencies will likely note the deadline for an EIR, MND, or ND; under CEQA and the CEQA Guidelines, Final EIRs and

²² PPT: Tribal Consultation Under AB 52, at 4.

²³ *Id.* at 6. NAHC will assist the lead agency in identifying Tribes traditionally and culturally affiliated with the project area.

²⁴ Cal. Pub. Res. Code § 21080(d). NAHC provides sample templates for an AB 52 notice letter.

²⁵ PPT: Tribal Consultation Under AB 52, at 28. In contrast, SB 18 does not specify by what means Tribe(s) should be contacted, but OPR suggests sending a written notice by certified mail with return receipt requested. This does not preclude also contacting the Tribe by telephone, fax, or e-mail. Tribal Consultation Guidelines , at 13.

²⁶ Cal. Pub. Res. Code § 21080.3.1. OPR points out that a Tribe's governing body may require time to take a formal position on consultation; see also Tribal Consultation Guidelines , at 15.

²⁷ Cal. Pub. Res. Code § 21080.3.2.

²⁸ PPT: Tribal Consultation Under AB 52, at 5.

²⁹ Tribal Consultation Guidelines , at 15.

³⁰ Tribal Consultation Guidelines , at 15.

NDs are to be completed and certified within one year and 180 days respectively, with a possibility of a 90-day extension.³¹

Step 4: Conclude Consultation

Consultation will conclude with one of two outcomes recognized under AB 52: either (1) the parties agree to mitigation or avoidance measures addressing any significant impacts on TCR, (2) or one or more parties, “acting in good faith and after reasonable effort,” concludes that mutual agreement cannot be reached.³² The lead agency then recommends any agreed-upon mitigation measures for inclusion in the environmental document—including a related mitigation monitoring and reporting program.³³ NAHC advises lead agencies inform Tribes that the mitigation measures will be recommended for inclusion in the environmental document, but that does not mean they will be included.³⁴ Interestingly, the statute states both that agreed-upon mitigation measures shall both be “recommended for inclusion in the environmental document” and “shall be fully enforceable.”³⁵ The most direct interpretation is that only any such measures that *are* included will be enforceable.

Next, the environmental document (ND, MND, EIR) is released. If the lead agency determines the project may have significant impact on an identified TCR, the environmental document will discuss:³⁶ (1) whether the proposed project has such an impact; and (2) whether feasible alternatives or mitigation measures –including those agreed to during consultation—avoid or substantially lessen the impact. If the recommended measures are not included, the consultation does not result in any agreed upon measures, or the consultation is not carried out *and* substantial evidence project will cause a significant effect to a TCR,³⁷ the lead agency remains obligated to avoid damaging effects to any TCR, when feasible. AB 52 provides examples of feasible mitigation measures that a lead agency may consider, including:³⁸

- Avoidance and preservation in place
- Treating the resource with “culturally appropriate dignity,” including protecting its traditional use, cultural character and integrity.
- Protecting the confidentiality of the resource

³¹ CEQA §§ 21100.2(a)(1)(A)-(B), 21151.5(a)(1)(A)-(B); Guidelines §§ 15107, 15108.

³² Cal. Pub. Res. Code § 21080.3.2.

³³ OPR in its *Tribal Consultation Guidelines* guidance on consultation regarding open space, encourages local governments to involve Tribes in managing cultural sites through joint arrangements such as co-management, contracting, and monitoring agreements. State of California Governor’s Office of Planning and Research. *Tribal Consultation Guidelines*, at 20.

³⁴ PPT: Tribal Consultation Under AB 52, at 29.

³⁵ Cal. Pub. Res. Code § 21082.3(a).

³⁶ Cal. Pub. Res. Code § 21080.3.

³⁷ Cal. Pub. Res. Code § 21080.3.2.

³⁸ Cal. Pub. Res. Code § 21084.3.

- Permanent conservation easements or other interests in real property for preserving the resource
- Protecting the resource itself

Notably, while the environmental document is released only after consultation is *initiated*, the statute is unclear whether this limitation refers to a *draft* or *final* report. There is no specific prohibition on a lead agency releasing either the draft or final before consultation is *concluded*.

Finally, the lead agency certifies the environmental document, contemplated as an EIR or MND (but NDs are not specifically mentioned).³⁹

Substantive requirements: defining consultation

Consultation is “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.”⁴¹

AB 52 directly references the definition of “consultation” established in SB 18.⁴⁰ Beyond this baseline, the statute enumerates three main topics that *must* be addressed during consultation if the Tribe specifically so requests:

- Alternatives to the project
- Mitigation measures
- Significant effects

There are four additionally, discretionary topics that *may* be addressed:

- The type of environmental review necessary
- The significance of the TCR at issue
- The significance of the project’s impacts on TCR
- Project alternatives, or appropriate measures for preservation or mitigation that the Tribe may recommend

³⁹ Cal. Pub. Res. Code § 21082.3.

⁴⁰ Cal. Gov. Code § 65352.4.

Neither the statute nor the Guidelines provide any guidance or minimum standards on how consultation is to be structured or carried out as a practical manner.⁴¹

OPR makes suggestions in its *Tribal Consultation Guidelines* and in training materials intended for state and local agency staff responsible for AB 52 implementation. For example, OPR advises lead agencies to ask Tribes whether they have existing consultation protocols.⁴² OPR also recommends lead agencies develop a consultation protocol cooperatively with the Tribe if one currently does not exist, being sensitive to the fact that a Tribe may have already established a consultation protocol.⁴³ Items for inclusion span: designated representatives, methods of preferred contact, procedures for giving and receiving notice, preferred methods and locations, and the Tribe's willingness to participate in joint consultation with other affected Tribes.⁴⁴

- Designated agency and tribal participation. OPR recommends that tribal representatives should be members of the tribal government or representatives with written designation to speak on behalf of the Tribe.⁴⁵ A state/local department head or other official of similar or higher rank should make the initial contact to the Tribe.⁴⁶ Government leaders affiliated with both parties may consider delegating certain consultation responsibilities where appropriate, such as attending meetings, sharing information, and negotiating the needs and concerns of both parties.⁴⁷ OPR notes, however, there may be pivotal points during consultation when elected government leaders may need to be directly involved.⁴⁸ The services of other professionals—such as attorneys, contractors, and consultants—may be utilized to develop legal, factual, or technical information.⁴⁹ Both parties may agree to invite private landowners to participate.⁵⁰

⁴¹ See PPT: Tribal Consultation Under AB 52; Tribal Consultation Guidelines (advisory guidance to cities and counties on the process for consulting with Native American Indian Tribes in accordance with SB 18 statutory requirements). The Guidelines serve as a supplement to the 2003 *General Plan Guidelines*. SB 18 required OPR to amend the Guidelines to contain advice to local governments on matters related to the statute, including consulting with Tribes on the preservation of, or the mitigation of impacts to, cultural places. *Id.* at 7.

⁴² Tribal Consultation Guidelines, at 21-2.

⁴³ Tribal Consultation Guidelines, at 21-2.

⁴⁴ Tribal Consultation Guidelines, at 21-2.

⁴⁵ PPT: Tribal Consultation Under AB 52, at 29.

⁴⁶ Tribal Consultation Guidelines, at 16-7.

⁴⁷ Tribal Consultation Guidelines, at 16-7.

⁴⁸ Tribal Consultation Guidelines, at 21-2.

⁴⁹ Tribal Consultation Guidelines, at 16-7.

⁵⁰ Tribal Consultation Guidelines, at 16-7.

- Format and structure. OPR advises following existing protocol for meeting with government officials.⁵¹
- Agenda. OPR recommends lead agencies ask each Tribe that responds to the CEQA notice to specify which topics it wishes to cover, and to incorporate those.⁵²
- Timeframe. The Guidelines recognize that consultation may involve highly sensitive and complex issues that cannot be resolved in just one discussion, and instead require engaging in a series of meetings.⁵³ NAHC advises that parties determine whether subsequent consultation sessions will be needed and which topics will be discussed.⁵⁴
- Location. Consultation should be carried out in person, although both parties may determine certain parts may be carried out via conference calls, e-mails, or letters.⁵⁵ OPR stresses the need to hold meetings in a private setting that promotes confidential treatment of any sensitive information that is shared about cultural places.⁵⁶ Lead agencies should be flexible as to time and location, offering a formal agency setting, such as a city hall or county administrative building, and be amenable to meeting at tribal facilities.⁵⁷
- Post-consultation. OPR recommends documenting progress made in consultation, without disclosing sensitive information about a cultural place.⁵⁸ NAHC advises reviewing with lead agency staff, consultants, and consulting Tribes what worked, what failed, and how consultation can be improved.⁵⁹ If no resolution is reached, the parties may find value in documenting why and what efforts were made.⁶⁰ *Local* governments are advised to consider the involvement of Tribes in the ongoing treatment and management of cultural places, objects, or cultural features through a specific monitoring program, co-management, or other forms of participation.⁶¹

OPR and NAHC developed a series of key considerations for lead agency staff to keep in mind when communicating with Tribes about a proposed project. NAHC cautions state and local officials against persuading Tribes to accept the lead agency's preconceived plans, and to acknowledge Tribes wish to be involved at the planning level.⁶² NAHC further stresses the need to respect tribal sovereignty and the need for confidentiality.⁶³ Local governments

⁵¹ PPT: Tribal Consultation Under AB 52, at 29.

⁵² PPT: Tribal Consultation Under AB 52, at 28; *see also* Tribal Consultation Guidelines , at 16.

⁵³ Tribal Consultation Guidelines: Supplement, at 18.

⁵⁴ PPT: Tribal Consultation Under AB 52, at 30.

⁵⁵ Tribal Consultation Guidelines , at 16-7.

⁵⁶ Tribal Consultation Guidelines , at 16-7.

⁵⁷ Tribal Consultation Guidelines , at 16-7.

⁵⁸ Tribal Consultation Guidelines , at 16-7.

⁵⁹ PPT: Tribal Consultation Under AB 52, at 31.

⁶⁰ PPT: Tribal Consultation Under AB 52, at 22.

⁶¹ Tribal Consultation Guidelines , at 25.

⁶² PPT: Tribal Consultation Under AB 52, at 23.

⁶³ PPT: Tribal Consultation Under AB 52, at 29.

should also be prepared to consult with more than one Tribe on any particular proposal, as two or more Tribes may have traditional cultural ties to the land. Each Tribe is to be consulted with individually, unless multiple Tribes agree to a joint process.⁶⁴ AB 52 does not obligate lead agencies to attempt to reconcile differences if Tribes disagree on any topic subject to consultation, such as which mitigation measures to take for any shared TCR.

OPR cautions local agencies that tribal governments may have limited staff and other resources necessary to participate.⁶⁵ The Guidelines advise establishing a collaborative relationship with Tribes as early as possible, prior to the need to consult,⁶⁶ and to consider conducting pre-consultation meetings and developing consultation protocols in cooperation with Tribes.⁶⁷ Most state lead agencies and several local lead agencies have developed their own Tribal consultation policies.

Substantive Requirements: Confidentiality

AB 52 contains provisions safeguarding information California Native American Tribes share with lead agencies during the environmental review process—particularly with a mind toward safeguarding sacred and similarly important sites from damage, vandalism, looting, desecration, and other malicious acts. OBJ

The statute prohibits public disclosure, by any public agency, of any information the Tribe submitted during the consultation process related to TCR—including but not limited to location, description, and use—in the environmental document or any other means, without the Tribe’s prior consent.⁶⁸ Any such information that a lead agency does publish is restricted to a confidential index, save when the Tribe provides written consent to partial or full public disclosure.⁶⁹ Lead and other public agencies may, however, summarize this data in general terms as necessary to demonstrate support for a decision.⁷⁰

AB 52 recognizes that this information may be exchanged confidentially between the public agencies involved in preparing the environmental document,⁷¹ as well as with a project applicant and the applicant’s agent(s), who must use a “reasonable degree of care” in maintaining confidentiality of the information.⁷² The statute carves out information that is

⁶⁴ Tribal Consultation Guidelines , at 16-7; PPT: Tribal Consultation Under AB 52.

⁶⁵ Tribal Consultation Guidelines , at 16-7.

⁶⁶ Tribal Consultation Guidelines , at 16-7.

⁶⁷ Tribal Consultation Guidelines , at 16-7.

⁶⁸ Cal. Pub. Res. Code § 21082.3(c)(1). AB 52 references provisions of the California Government Code and California Code of Regulations; see Cal. Gov. Code. §§ 6254(r), 6254.10 and Cal. Code Reg. tit. 14 § 15120(d).

⁶⁹ Cal. Pub. Res. Code § 21082.3(c)(1).

⁷⁰ Cal. Pub. Res. Code § 21082.3(c)(4).

⁷¹ Cal. Pub. Res. Code § 21082.3(c)(1).

⁷² Cal. Pub. Res. Code § 21082.3(c)(2)(A).

or becomes publicly available or that the project applicant already lawfully possessed, lawfully obtained, or independently developed.⁷³

AB 52's protections coexist with other provisions ensuring confidentiality and otherwise safeguarding California Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects under California's Public Records Act and Public Resources Code.⁷⁴ The California Public Records Act declares all written records maintained by state and local governments to be public documents available to the public upon request, but provides certain exemptions for Native American sacred and cultural sites, as well as records obtained by a local or state agency specifically through a consultation process.⁷⁵

OPR's *Tribal Consultation Guidelines* advises additional protocols to maintain a high degree of confidentiality, including developing of agency "in house" procedures; systems for Tribes to share data in a confidential setting; limiting access about specific sites only to the tribal designees, officials, technical consultants, and landowners involved; requiring certain parties sign a non-disclosure agreement; and notifying Tribes when records containing specific site information are requested for public disclosure.⁷⁶

Updating CEQA Guidelines Appendix G

AB 52 obligated OPR to amend Appendix G of the CEQA Guidelines by January 1, 2016. Appendix G serves as a sample form lead agencies can use to meet the requirements for

⁷³ Cal. Pub. Res. Code § 21082.3(c)(2)(B).

⁷⁴ Cal. Pub. Res. Code § 5097.9 ("No public agency...or party cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require."); *see also* Cal. Pub. Res. Code § 5097.993 (making desecration of a Native American historic, cultural, or sacred site a misdemeanor); *See also* Cal. Gov. Code. § 2524 ("Except as provided in Sections 6254.7 and 6254.13, this chapter does not require the disclosure of any of the following records: ... (r) Records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in Sections 5097.9 and 5097.993 of the Public Resources Code maintained by, or in the possession of, the Native American Heritage Commission, another state agency, or a local agency.").

⁷⁵ *See* Tribal Consultation Guidelines , at 26; *See also* Cal. Gov. Code §6254.10 ("Nothing in this chapter requires disclosure of records that relate to archaeological site information and reports maintained by, or in the possession of...the Native American Heritage Commission, another state agency, or a local agency, including the records that the agency obtains through a consultation process between a California Native American Tribe and a state or local agency.") *and see, e.g.*, Pub. Res. Code 15120(d) [CEQA] ("No document prepared pursuant to this article that is available for public examination shall include...information about the location of archaeological sites and sacred lands, or any other information that is subject to the disclosure restrictions of Section 6254 of the Government Code.").

⁷⁶ Tribal Consultation Guidelines , at 27-8.

an initial study. In addition to separating consideration of paleontological resources from TCRs, OPR added consideration of TCR to the sample questions.⁷⁷

The updated Appendix G contains a prompt for lead agencies to consider whether the substantive and procedural requirements for consultation with tribal governments have been followed:

“Have California Native American Tribes traditionally and culturally affiliated with the project area requested consultation pursuant to Public Resources Code section 21080.3.1? If so, is there a plan for consultation that includes, for example, the determination of significance of impacts to tribal cultural resources, procedures regarding confidentiality, etc.?”⁷⁸

Tribal Cultural Resources is added to the checklist of environmental factors potentially affected, along with two Sample Questions under a new Tribal Cultural Resources section, inquiring whether the project would cause a substantial adverse change in the significance of a tribal cultural resource, as defined.⁷⁹

AB 52 also directs OPR to implement a public assistance and information program “to ensure efficient and effective implementation” of CEQA. This includes a public information and training program for planners, developers, and other interested parties.⁸⁰

Gaps in AB 52 statutory and regulatory provisions

Immediate and identified gaps in the statutory framework itself follow. The survey analysis in this report addresses some of the gaps in Implementation.

Timeframes are vague and permit lead agencies to make significant decisions prior to conclusion of consultation. For example, initial determination of the type of environmental review necessary (ND, MND, or EIR) is a threshold question, but AB 52’s timing indicates the lead agency may already have made that determination prior to even initiating consultation. Further, the statute states only that lead agency must *begin* consultation before environmental document is released and must *conclude* before *certifying* the final document—and not the draft. Best practices admonish lead agencies not to release a proposed MND or Draft EIR for public review before each Tribe has had opportunity to *request* consultation—or ideally, before consultation concludes—but the statute leaves agencies with substantial discretion.

⁷⁷ Technical Advisory, at 9. AB 52 went into effect July 1, 2015 and the Office of Administrative law endorsed the suggested changes September 27, 2016.

⁷⁸ Guidelines, app’x G (Question 11).

⁷⁹ *Id.*

⁸⁰ Cal. Pub. Res. Code § 21159.9.

No provisions designate high-level personnel to carry out consultation. AB 52 does not explicitly require the personnel representing the lead agency in consultation be of a certain rank or higher, nor does it mandate establishment of a tribal liaison responsible for facilitating consultation.

Statutory scope of “tribal cultural resources” is overly narrow. TCR as a concept focuses on historical, rather than current or evolving value to Tribes. TCR is also almost exclusively place- or object-based and does not consider the living environment or resources.

Agencies delegated too much discretion. This includes what qualifies as TCR, and therefore whether consultation obligations are triggered in the first place. Additionally, the Guidelines envision the consultation agenda as driven by the lead agency rather than in coordination with Tribes.

Limited incorporation of Indigenous Knowledge/Traditional Ecological Knowledge (IK/TEK).⁸¹ Only the nonenforceable preamble and agency guidelines encourage lead agencies to account for IK/TEK; the statute requires only that lead agencies “shall consider the significance of the resource to a California Native American Tribe” in determining the existence of TCR.⁸²

Lack of accountability and metrics. AB 52 does not provide for a Tribal suit provision to enforce AB provisions, nor for review of implementation at designated intervals. There is no floor for what “reasonable effort” entails in attempting to come to a mutual agreement during consultation, and no minimum criteria for what consultation entails as a process.

No provision for a monitoring role for Tribes in any adopted mitigation monitoring and reporting program. In practice, Tribes have indicated in interviews that monitoring can be an issue.

Streamlined Ministerial Review for Affordable Multi-family Housing⁸³

Senate Bill (SB) 35 in 2017 created a new streamlined ministerial approval process for multifamily housing developments in localities that fail to make sufficient progress towards

⁸¹ *But see* Guidelines, § 15142 (“An EIR shall be prepared using an interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the consideration of qualitative as well as quantitative factors.”), arguably permitting an interpretation that considers incorporation of Indigenous Knowledge. [IHIs?]

⁸² Cal. Pub. Res. Code § 21074(a) (emphasis added).

⁸³ CALIFORNIA GOVERNOR’S OFFICE OF PLANNING AND RESEARCH. *Technical Advisory AB 168: Tribal Scoping Consultation Requirements for Projects Seeking Review Under the Streamlined Ministerial Approval Process (SB 35)* (2020), https://opr.ca.gov/docs/20201202-AB_168_Advisory_FINAL.pdf.

meeting their share of the regional housing need.⁸⁴ Such projects are exempted from CEQA review, and therefore from CEQA’s Tribal consultation requirement.⁸⁵ The state legislature corrected this oversight with the passage of Assembly Bill (AB) 168 in 2020, which created a process for “Tribal scoping consultation” paralleling CEQA consultation in several ways, but with some differences.⁸⁶

As in AB 52, AB 168 references the definition of “consultation” contained in SB 18, as well as the OPR’s Tribal Consultation Guidelines.⁸⁷ The process begins when a proponent submits to the lead agency—which will be a local government—a notice of intent to submit an application,⁸⁸ along with a preliminary application, containing certain information, including any historic or cultural resources known to exist on the property. The lead agency issues formal notice to each Tribe traditionally and culturally affiliated with the geographic area of the project site, describing the project and location, and inviting the Tribe to engage in formal consultation. The Tribe has 30 days to accept the invitation, followed by 30 days for the lead agency to initiate consultation.

Parties to consultation include the local government and the Tribe or Tribes. The proponent and its consultants may participate if the Tribe approves and if they respect the principles established under AB 168 and engage in good faith.⁸⁹ Confidentiality requirements apply,⁹⁰ and a Tribe may adopt further confidentiality requirements.

There are three possible outcomes to scoping consultation:⁹¹

- The parties determine there will be no potential impact to TCR; consequently, the proponent may submit a full application
- The parties identify a potential impact to TCR and document an enforceable agreement governing how TCR is/are treated, which becomes a condition of application approval⁹²
- One or more parties, “acting in good faith and after a reasonable effort,” conclude mutual agreement cannot be reached or parties otherwise unable to reach an

⁸⁴ Cal. Gov. Code § 65913.4(a). These developments are subject to certain requirements, including dedicating a prescribed minimum of affordable housing units.

⁸⁵ Cal. Gov. Code § 65913.4(b)(1)(E).

⁸⁶ Cal. Gov. Code § 65913.4(b)(1)(A)(ii).

⁸⁷ Cal. Gov. Code § 65913.4(b)(7)(A).

⁸⁸ Cal. Gov. Code § 65913.4(b)(1)(A)(i).

⁸⁹ Cal. Gov. Code § 65913.4(b)(1)(C). A Tribe may rescind its approval at any time.

⁹⁰ Cal. Gov. Code § 65913.4(b)(1)(D). [cross-reference earlier citations]. *See also* Cal. Gov. Code § 6254(r); Cal. Gov. Code. § 6254.10; Cal. Pub. Res. Code § 21082.3(c); and CCR tit. 14 § 15120(d).

⁹¹ Cal. Gov. Code § 65913.4(b)(2).

⁹² The enforceable agreement addresses “methods, measures, and conditions for tribal cultural resource treatment.”

enforceable agreement. The project is, as a result, deemed ineligible for ministerial approval

The statute requires that consultation recognize the expertise on TCRs of Tribes that are traditionally and culturally affiliated with the area, and states that it “shall take into account the cultural significance of the resource” to the Tribe.⁹³

A proponent’s application will also move forward if the Tribe does not respond to the invitation in a timely manner or accepts but fails to “substantially engage” in consultation.⁹⁴

A project is also disqualified from ministerial approval if: (1) the project site contains a TCR listed on a national, tribal, state, or local historic register;⁹⁵ (2) parties to scoping consultation disagree on whether project will impact TCR; or (3) a potential TCR would be affected but the parties are unable to document an enforceable agreement regarding its treatment. A proponent of a project disqualified under AB 168 may still seek a conditional use permit or other discretionary approval.

A local government must notify affected Tribes of any subsequent, substantial changes to the development or environmental setting and engage in additional consultation if the Tribe(s) so requests.⁹⁶

⁹³ GC §65913.4(b)(1)(B)).

⁹⁴ Cal. Gov. Code § 65913.4(b)(3)(A)-(B).

⁹⁵ Cal. Gov. Code § 65913.4(b)(3)(D)(4).

⁹⁶ Cal. Gov. Code § 65913.4(b)(2)(E).