

# The Nexus Between California's AB 52 and SB 18

## Introduction

California has two key statutory frameworks that require government-to-government consultation with Tribal governments. Passed in 2004, Senate Bill 18 (SB 18) requires local governments to consult with California Native American Tribes during the planning stages of local land use decision-making.<sup>1</sup> It is designed to allow for the consideration and protection of traditional Tribal cultural places in the context of local land use policy, and must be adhered to during the adoption or amendment of both specific and general plans. Assembly Bill 52 (AB 52), passed in 2014, requires public agencies at the state and local levels to consult with Tribes during the CEQA process, directing the lead agency to identify significant environmental impacts and avoid or mitigate them when feasible.<sup>2</sup>

Local government planning activities—including adopting, updating, and amending general, specific, and open space plans—bring the consultation requirements of both SB 18 and AB 52 into play.<sup>3</sup> Planning activities directly trigger SB 18 and can also require environmental review under the California Environmental Quality Act (CEQA) and, by extension, AB 52 consultation. Tribes and local agency practitioners accordingly must harmonize both statutory frameworks, which requires understanding the several substantive and procedural differences between them. Confusion about these differences, in combination with the statutes' ambiguities, has led to inconsistent implementation of both laws' requirements. The discussion below relies on practitioner interviews and CEQA documentation to present examples of how Tribes and agencies are navigating the nexus between SB 18 and AB 52 in practice.

As a preliminary matter, local planning activities whose CEQA process began prior to AB 52's effective date in September 2015 are not required to engage in consultation under AB 52. This includes instances where plan amendments or updates 'tier off'<sup>4</sup> of CEQA documents certified prior to 2015. For example, the Murrieta Hills Specific Plan Amendment did not trigger AB 52 because the City of Murrieta published the plan's NOP in

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<sup>1</sup> Senate Bill 18, Traditional Tribal Cultural Places (Chapter 905, Statutes of 2004).

<sup>2</sup> Assembly Bill 52, Native Americans: California Environmental Quality Act (Chapter 532, Statutes of 2014) [hereinafter AB 52].

<sup>3</sup> Zoning activities, however, are important planning efforts that may not necessarily be subject to CEQA. See *Union of Medical Marijuana Patients, Inc. v. City of San Diego (UMMP)*, 7 Cal. 5th 1171 (2019).

<sup>4</sup> 14 CAL. CODE REGS., tit. 14, § 15152; *California Environmental Quality Act (CEQA) Process*, OFF. OF ENV'T PLANNING, UNIV. OF CAL. DAVIS, [environmentalplanning.ucdavis.edu/ceqa-process](http://environmentalplanning.ucdavis.edu/ceqa-process) (last visited Dec. 4, 2023) ("“tiering” refers to the coverage of general environmental matters in broad program-level environmental impact reports (EIRs), with focused environmental documents for individual projects that carry out the broader program”).

2014;<sup>5</sup> nor was the City of Agoura Hills obligated to carry out AB 52 consultation as part of its April 2022 General Plan Update because the underlying General Plan EIR began the CEQA process in 2009.<sup>6</sup> However, other jurisdictions have considered AB 52 triggered by General Plan updates even where the original documentation was published prior to 2015,<sup>7</sup> revealing yet another inconsistency in the statutes' application.

## Key Statutory Differences Between AB 52 and SB 18

AB 52 and SB 18 present both procedural and substantive differences. Misalignment between their features, combined with a lack of central guidance on how to interpret vague provisions of each statute, has led to inconsistent implementation by city and county planning agencies. The following analysis discusses key aspects of consultation under each statute and highlights important ambiguities which may affect Tribes' ability to consult with local governments.

### ***Which Tribes Have an Opportunity to Consult***

**Local governments must offer SB 18 consultation to a list of potentially affected California Native American Tribes received from the Native American Heritage Commission (NAHC), but local government officials must compile their own contact list for AB 52 consultation consisting of Tribes who preemptively requested to be notified of future projects.<sup>8</sup>**

SB 18 requires city and county local planning agencies seeking to adopt or amend a general or specific plan to notify all Tribes with traditional places, features, or cultural objects within the city or county's jurisdiction, as listed in the NAHC registry.<sup>9</sup> The agencies must contact NAHC to obtain this list of potentially affected Tribes, then send each listed Tribe a letter explaining the planning activity underway and inviting consultation.<sup>10</sup> For any open space

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<sup>5</sup> See CITY OF MURRIETA, SCH No. 2014031045, MURRIETA HILLS SPECIFIC PLAN AMENDMENT DRAFT ENVIRONMENTAL IMPACT REPORT 2-4, 4.14-19 (May 2020).

<sup>6</sup> See CITY OF AGOURA HILLS, SCH No. 2021090588, GENERAL PLAN UPDATE DRAFT SUBSEQUENT PROGRAM ENVIRONMENTAL IMPACT REPORT IV.D-4 (April 2022). Though the General Plan Update did qualify as a general plan amendment requiring consultation under SB 18, it did not trigger consultation requirements under AB 52 because the EIR for the update tiered off of the original general plan EIR.

<sup>7</sup> See CITY OF LATHROP, SCH. NO. 2021100139, DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE LATHROP GENERAL PLAN UPDATE 3.5-14 (May 2022); CITY OF MOUNTAIN VIEW, SCH No. 2022020129, CITY OF MOUNTAIN VIEW HOUSING ELEMENT UPDATE DRAFT ENVIRONMENTAL IMPACT REPORT 4.4-9 (July 2022).

<sup>8</sup> CAL. PUB. RES. CODE § 21080.3.1(b).

<sup>9</sup> CAL. GOV'T CODE § 65352.3(a)(1).

<sup>10</sup> *Id.* The SB 18 list is distinct from NAHC's Most Likely Descendent (MLD) list, which is typically sent when the project archaeologist requests NAHC to search their sacred lands file. Carrie Wills, *SB 18- Native American Tribes and Cultural Resources Management*, ADEC INNOVATIONS (Mar. 21, 2013), [adecsg.com/resources/blog/sb-18-native-american-tribes-and-cultural-resources-management/](https://adecsg.com/resources/blog/sb-18-native-american-tribes-and-cultural-resources-management/).

land containing Tribal places, features, or cultural objects, local governments must invite consultation with every Tribe which has been identified by the NAHC as described above for specific and general planning activities and has filed a written request to be notified with the governmental body.<sup>11</sup>

AB 52 requires local governments to provide notice of the opportunity to consult only to the Tribes which (1) are traditionally and culturally affiliated with the geographic area of the proposed project and (2) have, in writing, affirmatively requested to be placed on the lead local planning agency's AB52 notification list.<sup>12</sup> NAHC was directed to provide each Tribe with a list of all geographically relevant potential lead agencies, their contact information, and direction on how the Tribe may request notification of projects by July 1, 2016.<sup>13</sup> NAHC shall assist the lead agency in identifying which Tribes are affiliated with a specific project area,<sup>14</sup> but to meet the second threshold for notification, Tribes must have proactively contacted those lead agencies and requested to be notified of any future projects.

### ***Timeline for Notification and Beginning Consultation***

#### **AB 52 has a shorter procedural timeline and provides more specific guidance about consultation timeframes than SB 18.**

Although SB 18 does not provide a specific triggering event requiring notification, the law requires local governments to conduct consultation with Tribes prior to the amendment or adoption of a general or specific plan.<sup>15</sup> The Guidelines suggest that the triggering event is the proposal of an amendment or adoption of a general or specific plan.<sup>16</sup> Examples of such events include the acceptance of a complete plan proposal from a private applicant or, if initiated by the local government, the introduction of a proposal for study in a public forum.<sup>17</sup> Best practice is to begin the consultation process "as early as possible," even before any formal proposals are submitted or initiated,<sup>18</sup> to ensure that local and Tribal governments have information available early enough in the land use planning process to

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<sup>11</sup> CAL. GOV'T CODE §§ 65092(a), 65562.5; CAL. OFF. OF PLANNING & RSCH., TRIBAL CONSULTATION GUIDELINES: SUPPLEMENT TO GENERAL PLAN GUIDELINES 18 (2005) [hereinafter SB 18 GUIDELINES].

<sup>12</sup> CAL. PUB. RES. CODE § 21080.3.1(b); *see also* CAL. OFF. OF PLANNING & RSCH., TECHNICAL ADVISORY: AB 52 AND TRIBAL CULTURAL RESOURCES IN CEQA 4 (2017) [hereinafter AB 52 TECHNICAL ADVISORY].

<sup>13</sup> CAL. PUB. RES. CODE § 5097.94(m).

<sup>14</sup> *Id.* § 21080.3.1(c).

<sup>15</sup> CAL. GOV'T CODE § 65352.3; SB 18 GUIDELINES, *supra* note 10, at 3.

<sup>16</sup> SB 18 GUIDELINES, *supra* note 10, at 10.

<sup>17</sup> SB 18 GUIDELINES, *supra* note 10, at 12. If either of these events occur post March 1, 2005, then SB 18 applies.

<sup>18</sup> *Id.*; *see also* Assembly Bill 52, *supra* note 2 (stating that the Legislature's purpose in passing SB 18 was, in part, to establish meaningful Tribal consultations "at the earliest possible point in the local government land use planning process").

avoid potential conflicts over the preservation of Tribal resources.<sup>19</sup> Once the local government planning agency contacts the Tribes on the NAHC-provided list,<sup>20</sup> each Tribe has 90 days to respond either accepting or forgoing the opportunity to consult, unless the Tribe has agreed to a shorter response time.<sup>21</sup> Consultation should begin “within a reasonable time” of a Tribe’s affirmative response<sup>22</sup> and must conclude “prior to the adoption or any amendment of a city or county’s . . . plan.”<sup>23</sup>

AB 52 is more explicit. The statute mandates that agencies notify Tribes within 14 days of “determining that an application for a project is complete” or deciding to undertake a project.<sup>24</sup> The written notification must include a brief description of the proposed project, the project’s location, the lead agency’s contact information, and a notice that the Tribe then has 30 days to respond and, if they choose, request consultation.<sup>25</sup> The lead agency must begin the actual consultation process within 30 days of a Tribe’s request for consultation.<sup>26</sup> Consultation may be ongoing throughout the CEQA process<sup>27</sup> but must conclude prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report for a project.<sup>28</sup>

### ***Topic of Consultation: TTCP vs. TCR***

**The formal subject of consultation under SB 18 is “Traditional Tribal Cultural Places” (TTCPs),<sup>29</sup> whereas under AB 52 “Tribal Cultural Resources” (TCRs) are the subject of consultation.<sup>30</sup> AB 52’s definition of TCR grants greater discretion to lead agencies in determining which Tribal cultural resources and places qualify for mandatory Tribal consultation.**

The primary objective of SB 18 is to “preserve and protect cultural places of California Native Americans.”<sup>31</sup> These protected cultural places, referred to as “traditional tribal cultural places” (TTCPs) in SB 18’s legislative title, are defined by reference to the California

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<sup>19</sup> See *id.* § 1(b)(4).

<sup>20</sup> CAL. GOV’T CODE § 65352.3(a)(1).

<sup>21</sup> *Id.* § 65352.3(a)(2).

<sup>22</sup> SB 18 GUIDELINES, *supra* note 10, at 15.

<sup>23</sup> CAL. GOV’T CODE § 65352.3(a)(1).

<sup>24</sup> CAL. PUB. RES. CODE § 21080.3.1(d).

<sup>25</sup> *Id.* § 21080.3.1(b), (d).

<sup>26</sup> *Id.* § 21080.3.1(e).

<sup>27</sup> AB 52 TECHNICAL ADVISORY, *supra* note 11, at 7.

<sup>28</sup> CAL. PUB. RES. CODE § 21080.3.1(b); AB 52 TECHNICAL ADVISORY, *supra* note 11, at 3.

<sup>29</sup> See CAL. GOV’T CODE § 65352.3(a)(1).

<sup>30</sup> See CAL. PUB. RES. CODE § 21074(a), (b).

<sup>31</sup> SB 18 GUIDELINES, *supra* note 10, at 4; see also CAL. GOV’T CODE § 65352.3(a)(1).

Public Resources Code.<sup>32</sup> The Public Resources Code definitions cover a variety of cultural places, including:

- Archaeological or historical sites, such as village sites, burial grounds, or other sites with economic, artistic, or other cultural artifacts;
- Religious or ceremonial sites and sacred shrines, including both modern-day places of worship and places associated with creation stories or other significant spiritual activity; and
- Collection or gathering sites where Tribes access certain plants important to cultural traditions and identities.<sup>33</sup>

Local governments are directed to conduct records searches with NAHC and the California Historic Resources Information System (CHRIS) to determine whether TTCs exist in the area of a proposed project but also to remain cognizant that a “[T]ribe may be the only source of information regarding the existence of a cultural place.”<sup>34</sup> As such, pre-consultation meetings are a valuable tool in conducting a thorough search for relevant resources.<sup>35</sup>

AB 52 established a new category of resources within the CEQA framework: Tribal Cultural Resources (TCRs).<sup>36</sup> TCRs encompass any Tribal resource, including historical and archaeological resources,<sup>37</sup> that fits into either of the two following categories:

- (1) “[S]ites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American [T]ribe” that are *either*:
  - (a) “included or determined to be eligible for inclusion in the California Register of Historical Resources,” *or*
  - (b) “included in a local register of historical resources.”<sup>38</sup>

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<sup>32</sup> SB 18 GUIDELINES, *supra* note 10, at 4; CAL. GOV'T CODE § 65352.3(a)(1). These places, features, and objects include any “Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine,” CAL. PUB. RES. CODE §5097.9, or “Native American historic, cultural, or sacred site, that is listed or may be eligible for listing in the California Register of Historic Resources . . . including any historic or prehistoric ruins, any burial ground, any archaeological or historic site, any inscriptions made by Native Americans at such a site, any archaeological or historic Native American rock art, or any archaeological or historic feature of a Native American historic, cultural, or sacred site,” CAL. PUB. RES. CODE §5097.993 (renumbered).

<sup>33</sup> SB 18 GUIDELINES, *supra* note 10, at 4-5.

<sup>34</sup> SB 18 GUIDELINES, *supra* note 10, at 17.

<sup>35</sup> SB 18 GUIDELINES, *supra* note 10, at 17-18.

<sup>36</sup> AB 52, *supra* note 2, § 1(b)(2).

<sup>37</sup> CAL. PUB. RES. CODE § 21074(b), (c).

<sup>38</sup> *Id.* § 21074(a).

(2) “[R]esources determined by the lead agency . . . to be significant pursuant to” the criteria for listing a resource in the California Register of Historic Places.<sup>39</sup>

Courts will defer to the agency’s determination that a resource is a TCR if there is substantial evidence in the record supporting the decision.<sup>40</sup> Evidence upon which agencies may rely includes elder testimony, oral history, tribal government archival information, testimony of a qualified archaeologist 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 Tribal Historic Preservation Officer, and historical notes.<sup>41</sup>

Due to AB 52’s grant of discretion to determine what qualifies as a TCR and of authority to look beyond the archaeological record and presence of tangible artifacts in making that determination, the breadth of the TCR definition in effect depends heavily upon the individual lead agency’s implementation of the statute. Lead agencies can define TCR to be broader than, and even encompass, SB 18’s TTCP, but they can also exclude almost any cultural resource that is not already listed in a register of historic resources. The TTCP definition, in contrast, has more guidelines in place to limit local discretion.

### ***Substance of Consultation***

**Both SB 18 and AB 52 rely upon the same statutory definition of consultation;<sup>42</sup> however, AB 52 goes beyond SB 18 in requiring consultations to include discussion of mitigation measures for Tribal cultural resources if Tribes specifically request such discussion.**

SB 18 defines consultation as “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’

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*; AB 52 TECHNICAL ADVISORY, *supra* note 11, at 4; *Berkeley Hillside Preservation v. City of Berkeley*, 60 Cal. 4th 1086, 1117 (Cal. 2015); *Valley Advocates v. City of Fresno*, 160 Cal. App. 4th 1039, 1072 (Cal. 2008).

<sup>41</sup> AB 52 TECHNICAL ADVISORY, *supra* note 11, at 4–5.

<sup>42</sup> SB 18 provides that “‘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.” CAL. GOVT. CODE § 65352.4. AB 52 defines consultation by reference back to SB 18: “for purposes of this section and Section 21080.3.2, ‘consultation’ shall have the same meaning as provided in Section 65352.4 of the Government Code.” CAL. PUB. RES. CODE §21080.3.1(b).

potential needs for confidentiality with respect to places that have traditional tribal cultural significance.”<sup>43</sup>

SB 18 mandates that local governments engage in “meaningful discussion” when they consult with Tribes.<sup>44</sup> The Legislature’s intent in passing SB 18 was that these meaningful consultations would cover potential means to preserve California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places; determine the level of necessary confidentiality of their specific location; and develop proper treatment and management plans.<sup>45</sup>

The Governor’s Office of Planning and Research (OPR) SB 18 Guidelines direct local governments to center Tribal consultations around determining the potential impacts to Tribal cultural places from adopting or amending general and specific plans. In making these determinations, local governments should identify Tribes’ priorities and concerns — such as their “cultural values, religious beliefs, traditional practices, and laws protecting California Native American cultural sites” — and define the “full range of acceptable ways” in which the local government can accommodate those concerns.<sup>46</sup> Consultations should occur face-to-face and in settings that promote confidential treatment of Tribal concerns.<sup>47</sup>

The SB 18 Guidelines also identify the overarching policy objectives of SB 18 consultation, according to the legislative intent of the statute:

- “Recognizing that cultural places are essential elements in tribal culture, traditions, heritages and identities.”
- “Establishing meaningful dialogue between local and tribal governments in order to identify cultural places and consider cultural places in local land use planning.”
- “Avoiding potential conflicts over the preservation of Native American cultural places by ensuring local and tribal governments have information available early in the land use planning process.”
- “Encouraging the preservation and protection of Native American cultural places in the land use process by placing them in open space.”

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<sup>43</sup> CAL. GOV’T CODE § 65352.4.

<sup>44</sup> *Id.* §§ 65352.3(a)(1), 65352.4. Simply notifying a Tribe of a plan proposal is insufficient. SB 18 GUIDELINES, *supra* note 10, at 17; *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995) (holding that a federal agency failed to fulfill its consultation duties under the National Historic Preservation Act by merely sending letters to Tribes requesting information and suggesting that more direct forms of conduct may be required).

<sup>45</sup> AB 52, *supra* note 2, § 1(b)(3).

<sup>46</sup> SB 18 GUIDELINES, *supra* note 10, at 16.

<sup>47</sup> *Id.* at 17.

- “Developing proper treatment and management plans in order to preserve cultural places.”
- “Enabling [T]ribes to manage and act as caretakers of their cultural places.”<sup>48</sup>

SB 18 consultations regarding open space designations must be conducted “for the purpose[s] of determining the level of confidentiality required to protect [the TTCP] . . . and developing treatment [of the TTCP] with appropriate dignity . . . in any corresponding management plan.”<sup>49</sup> Examples of appropriate discussion points include encouraging Tribal involvement in the treatment and management of the space, Tribal access to the space, and land uses in the space that would avoid direct impacts.<sup>50</sup>

AB 52 adopts the SB 18 definition of consultation.<sup>51</sup> This makes the above mandates and guidelines applicable to AB 52 consultations as well.<sup>52</sup> AB 52 further provides that if a Tribe specifically requests consultation regarding the presence of significant impacts to TCRs, alternatives to the project, or measures to mitigate any significant TCR impacts, then the Tribal consultation must include a discussion of the requested topics.<sup>53</sup> Discretionary topics of consultation under AB 52 include the type of environmental review necessary, the significance of TCRs or the project’s impacts on TCRs, and the Tribe’s recommendations for appropriate alternatives and preservation or mitigation measures.<sup>54</sup> Appropriate mitigation measures include avoiding TCRs during planning and construction, incorporating a TCR into greenspace or park with culturally appropriate protection and management, establishing permanent conservation easements, and ensuring the protection of a TCR’s cultural character and integrity, traditional use, and confidentiality.<sup>55</sup>

### ***Conclusion of Consultation***

**While AB 52 provides some guidance as to the conclusion of consultation, both SB 18 and AB 52 are vague about how and when consultation formally ends.** Under both statutes, the agency must either conclude consultation with the relevant Tribes or otherwise fulfill their statutory consultation obligations.

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<sup>48</sup> *Id.* at 15.

<sup>49</sup> CAL. GOV’T CODE § 65562.5.

<sup>50</sup> SB 18 GUIDELINES, *supra* note 10, at 20.

<sup>51</sup> CAL. PUB. RES. CODE § 21080.3.1(a) (“for purposes of this section and Section 21080.3.2, ‘consultation’ shall have the same meaning as provided in Section 65352.4 of the Government Code”).

<sup>52</sup> AB 52 TECHNICAL ADVISORY, *supra* note 11, at 6.

<sup>53</sup> CAL. PUB. RES. CODE § 21080.3.2(a). There is no equivalent requirement under SB 18.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* § 21084.3(b).



### *Concluding Consultation*

SB 18 consultation must conclude before the adoption or amendment of a general or specific plan,<sup>56</sup> but otherwise, there is no statutory time limit on the duration of SB 18 consultation. Per the SB 18 Guidelines, consultation concludes when either:

- The consulting parties “come to a mutual agreement concerning the appropriate measures for preservation or mitigation” *or*
- Either party, “acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached concerning appropriate measures of preservation or mitigation.”<sup>57</sup>

While exactly what “reasonable effort” entails is unclear, the Guidelines state that reaching a mutual agreement may require a series of meetings,<sup>58</sup> suggesting that the requirement generally is not satisfied after just one unfruitful discussion. In the context of Section 106 of the National Historic Preservation Act of 1966, the Tenth Circuit in *Pueblo of Sandia v. United States* found that “reasonable effort” can require agencies to go beyond simply requesting information from Tribes about the existence of Tribal cultural places (TCPs) where TCPs may be present and Tribal customs might restrict the ready disclosure of specific information.<sup>59</sup> Agencies in these situations must actively pursue the information necessary to evaluate the area’s eligibility for coverage under the act, rather than simply relying upon provided information.<sup>60</sup> Moreover, the court found that the statute mandated an informed consultation with the State Historic Preservation Officer, which required granting them access to available, relevant information.<sup>61</sup>

AB 52 consultation is complete when either of the following occurs:

- Parties “agree to measures to mitigate or avoid a significant effect,” if a significant impact exists, *or*
- Either party “acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached.”<sup>62</sup>

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<sup>56</sup> See CAL. GOV'T CODE §§ 65252.3(a)(1), 65352(a)(8).

<sup>57</sup> SB 18 GUIDELINES, *supra* note 10, at 18.

<sup>58</sup> SB 18 GUIDELINES, *supra* note 10, at 18.

<sup>59</sup> 50 F.3d 856, 860 (10th Cir. 1995); *see also* SB 18 GUIDELINES, *supra* note 10, at 17 n. 9 (citing *Pueblo of Sandia* to stand for the principle that simply notifying a Tribe does not constitute consultation).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 862.

<sup>62</sup> CAL. PUB. RES. CODE § 21080.3.2(b).

### *Fulfilling Consultation Requirements Without Completing Consultation*

A local planning agency fulfills its duty to consult with a Tribe, and thus may move ahead with a project as if consultation is complete, when the Tribe fails to respond within 30 days of receiving an AB 52 notification<sup>63</sup> or within 90 days of receiving an SB 18 notification.<sup>64</sup>

Under AB 52, local planning agencies also fulfill their consultation obligations when a Tribe timely requests consultation but then fails to provide comments to the lead agency or otherwise fails to engage in the consultation process.<sup>65</sup> While SB 18 does not provide a similarly explicit release from duty when a Tribe fails to continue engaging in consultation, local governments are likely still relieved from their obligations under the “good faith and reasonable effort” prong. It is not clear from the statute whether an agency that has made good faith, reasonable efforts to resume contact with a Tribe without a response can excuse itself unilaterally from its SB 18 consultation duties by concluding that mutual agreement cannot be reached due to an inability to begin or continue negotiations with the Tribe. Both statutes are unclear about how long the agency must wait and what efforts to reinitiate contact the agency must undertake before it can come to this conclusion.

### *Upon Completion of Consultation Requirements*

Upon the completion of an agency’s SB 18 consultation duties, cities and counties may complete the process of formally adopting or amending their general plans.<sup>66</sup> Once the AB 52 consultation process concludes, the lead agency may certify the relevant project’s environmental impact report or adopt a mitigated negative declaration if the project will significantly impact an identified TCR.<sup>67</sup>

### ***Binding Nature of Consultation***

**While neither SB 18 nor AB 52 explicitly requires that local governments adopt Tribes’ recommended preservation or mitigation measures, AB 52 provides stronger protections than SB 18 because it mandates that agencies avoid impacts to TCRs when feasible and include Tribal expertise about TCRs as evidence of significant impact in TCR impact assessments.**

Local governments and Tribes engaging in SB 18 consultation are required to carefully consider each party’s views, remain cognizant of all parties’ cultural values, and to seek a

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<sup>63</sup> *Id.* § 21080.3.2(d)(3).

<sup>64</sup> CAL. GOV’T CODE § 65352.3; SB 18 GUIDELINES, *supra* note 10, at 15.

<sup>65</sup> CAL. PUB. RES. CODE § 21080.3.2(d)(2).

<sup>66</sup> CAL. GOV’T CODE §§ 65252.3(a)(1), 65352(a)(8).

<sup>67</sup> *Id.* § 21080.3.2(d)(1).

mutual agreement “where feasible.”<sup>68</sup> Agreement is considered feasible where it can be successfully reached in a reasonable time, considering economic, environmental, social and technological factors.<sup>69</sup> Presumably, local governments should abide by mutually agreed upon preservation and mitigation measures, but SB 18 itself does not explicitly state this or provide a means of enforcing agreements reached during consultation.<sup>70</sup> The only other guidance regarding SB 18’s binding nature offered in its statutory language derives from its overarching articulation of purpose to preserve and mitigate impacts to TCCPs<sup>71</sup> and requirement that cities and counties protect the confidentiality of information concerning TTCPs.<sup>72</sup>

SB 18 consultation offers Tribes an opportunity to protect places before development is initiated at all by incorporating protections into both general and specific plans. However, in practice, plans are frequently amended in the form of specific plans in response to new development initiatives. Thus, protection in a general plan does not necessarily continue into perpetuity. One potential solution to this issue provided by SB 18 is a conservation easement, which may be held by either the local government or the Tribe.<sup>73</sup>

Any mitigation measures agreed upon during AB 52 consultation must be “recommended for inclusion in the environmental document;”<sup>74</sup> however, the statute indicates that an agency is not necessarily required to include nor adopt any specific mitigation measure in its final plans. AB 52 does require that Tribal expertise about TCRs be included as evidence of significant impact in TCR impact assessments.<sup>75</sup> Regardless of whether an agreement as to preservation or mitigation has been reached, if a significant TCR impact exists, then the EIR must discuss mitigation measures and feasible alternatives that would avoid or substantially reduce the TCR impact.<sup>76</sup> Where a project may cause a substantial adverse change to a TCR and mitigation measures are not identified in the consultation process, agencies may consider the following example mitigation measures, if feasible, to avoid or minimize significant adverse impacts to the TCR:

- Avoidance and preservation of the resources in place, including planning and construction to avoid the resources and protect the cultural and natural context, or

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<sup>68</sup> *Id.* § 65252.4; SB 18 GUIDELINES, *supra* note 10, at 24.

<sup>69</sup> SB 18 GUIDELINES, *supra* note 10, at 24.

<sup>70</sup> The adoption of part or all of the general plan or adoption of any amendment to the plan or part “shall be reviewable pursuant to section 1085 of the Code of Civil Procedure” as a legislative act. CAL. GOV’T CODE § 65301.5. However, there are no affirmative cases on this issue.

<sup>71</sup> CAL. GOV’T CODE §§ 65352.3(a)(1), 65352.4.

<sup>72</sup> *Id.* §§ 65040.2(g)(3), 65352.3, 65352.4, 65562.5.

<sup>73</sup> CAL. CIV. CODE § 815.3.

<sup>74</sup> CAL. PUB. RES. CODE § 21082.3(a).

<sup>75</sup> AB 52, *supra* note 2, § 1(b)(4).

<sup>76</sup> CAL. PUB. RES. CODE § 21080.3.2(b).

planning greenspace, parks, or other open space, to incorporate the resources with culturally appropriate protection and management criteria.<sup>77</sup>

- Treating the resource with culturally appropriate dignity considering the tribal cultural values and meaning of the resource, including protecting the TCR’s cultural character and integrity, traditional use, and confidentiality.<sup>78</sup>
- Permanent conservation easements or other interests in real property, with culturally appropriate management criteria for the purposes of preserving or utilizing the resources or places.<sup>79</sup>

AB 52 also directs local government agencies to avoid damaging effects to any TCR “when feasible.”<sup>80</sup>

**Figure**

**Table** illustrating AB 52 and SB 18 Similarities/Differences.

Feature	SB 18	AB 52
Which Tribes may consult	Tribes <b>identified by NAHC</b>	Tribes which <b>proactively requested</b> to be consulted AND are <b>traditionally and culturally affiliated</b> with the geographic area of the proposed project
Timeline for Consultation	<p>Invitations to consult should be sent <b>as early as possible after plan initiated</b>, ideally before any formal proposals are submitted or initiated</p> <p>Tribes must respond within <b>90 Days</b></p> <p>Consultation should begin within a reasonable time of a Tribe’s affirmative response</p>	<p>Invitations to consult should be sent within <b>14 days</b> of deciding a project application is complete or to undertake a project</p> <p>Tribes must respond within <b>30 days</b></p> <p>Consultation must begin within <b>30 days</b> of a Tribe’s affirmative response</p>

<sup>77</sup> *Id.* § 21080.3.2(b)(1).

<sup>78</sup> *Id.* § 21080.3.2(b)(2).

<sup>79</sup> *Id.* § 21080.3.2(b)(3).

<sup>80</sup> *Id.* §21084.3(a).

	Consultation must conclude <b>before the adoption or amendment of a general plan</b>	Consultation must conclude <b>prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report</b> for a project, but may be ongoing throughout the CEQA process
Protected Cultural Resources	<b>Traditional Tribal Cultural Places (TTCPs)</b>	<b>Tribal Cultural Resources (TCRs)</b>
Subject of consultation	<p>Consultations should center around <b>determining potential impacts to TTCPs</b> from adopting or amending general and specific plans</p> <p>Local governments should identify Tribes' priorities and concerns and define the full range of acceptable ways in which they can accommodate those concerns</p>	<p>If a Tribe requests consultation regarding the presence of significant impacts to TCRs, alternatives to the project, or measures to mitigate any significant TCR impacts, then <b>consultation must include discussion of the requested topic(s)</b></p>
When consultation duties conclude	<p><b>Consultation Concludes</b> – Consulting parties come to agreement concerning appropriate preservation or mitigation measures <i>or</i> either party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached</p> <p><b>Consultation Duties End</b> – Tribe fails to respond to consultation invitation within <b>90 days</b></p>	<p><b>Consultation Concludes</b> – Parties agree to measures to mitigate or avoid a significant effect, if a significant impact exists, <i>or</i> either party acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached</p> <p><b>Consultation Duties End</b> – Tribe fails to respond to consultation invitation within <b>30 days</b>, <i>or</i> timely requests consultation but fails to provide comments to the lead agency or otherwise engage in the consultation process</p>
Binding nature of consultations	Local governments must strive to reach agreements regarding	Tribal expertise about TCRs must be included as evidence of

	<p>preservation and mitigation with consulting Tribes when feasible</p>	<p>significant impact in TCR impact assessments</p> <p>If a significant impact exists, then the EIR must discuss mitigation measures and feasible alternatives that would avoid or substantially reduce the TCR impacts</p> <p><b>Agreed-upon mitigation measures must be recommended for inclusion in the EIR</b></p>
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SB 18 also provides specific guidelines for consultation regarding cultural places located within open space.<sup>81</sup> The purpose of the consultation is to determine the confidentiality measures necessary to protect the resource, and to develop a management plan that treats it with appropriate dignity.<sup>82</sup>

To determine whether consultation is required, the guidelines provide that local governments should conduct record searches as well as contact Tribes to identify the existence of any protected cultural places, as defined consistently with SB 18’s TTCPs.<sup>83</sup> Local governments should contact NAHC for a list of Tribes with cultural ties to the open space.<sup>84</sup>

After learning that a cultural place is or may be located on current or potential open space, the local government must notify the appropriate Tribes.<sup>85</sup> Similarly to AB 52, not all affiliated Tribes must be invited to consult, as the Tribe must have conducted proactive outreach. To be invited to consult, the Tribe must (a) be identified by NAHC, and (b) have requested notice of public hearing from the local government pursuant to Gov’t Code § 65092.<sup>86</sup>

<sup>81</sup> CAL. GOV’T CODE § 65562.5.

<sup>82</sup> SB 18 GUIDELINES, *supra* note 10, at 18.

<sup>83</sup> SB 18 GUIDELINES, *supra* note 10, at 18; CAL. GOV’T CODE § 65562.5.

<sup>84</sup> SB 18 GUIDELINES, *supra* note 10, at 18.

<sup>85</sup> SB 18 GUIDELINES, *supra* note 10, at 18.

<sup>86</sup> SB 18 GUIDELINES, *supra* note 10, at 18.

## The Nexus in Practice

### ***Which Tribes have an opportunity to consult:***

As discussed in Part I.A.1, agencies use two lists when determining which Tribes to contact for consultation: one provided by NAHC for SB 18 consultation purposes, and one the agency itself develops for AB 52 consultation based upon which Tribes proactively requested to be consulted.<sup>87</sup> The degree to which these lists functionally overlap and duplicate contacts is jurisdiction-dependent. Agencies often send one joint AB 52/SB 18 letter to one set of Tribal contacts, but there are also many instances where agencies reach out to almost completely different sets of Tribes under each consultation framework. When agencies send separate letters pursuant to SB 18 and AB 52, the SB 18 list commonly will completely or substantially contain the entire AB 52 list, meaning that the same Tribal contact receives multiple letters inviting consultation.<sup>88</sup>

### Sometimes, an agency's SB 18 and AB 52 contact lists contain different sets of Tribes:

**Kern County** (Specific Plan Amendment). The County's DEIR for the proposed Rosamond South Solar Project indicates the County sent separate notifications under SB 18 and AB 52, based on different lists.<sup>89</sup> Of 14 Tribes contacted in total, eight were contacted under SB 18 alone, 3 under only AB 52, and three received duplicate letters under both statutes.<sup>90</sup> Notably, the County issued AB 52 notices eight months prior to the SB 18 notices.<sup>91</sup>

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<sup>87</sup> For notices under SB 18, NAHC responds to a request for a list of affiliated Tribes and provides contact information. When contacting Tribes under AB 52, agencies likely rely on the contact information provided in the Tribes' initial request for notification.

<sup>88</sup> See, e.g., CITY OF SHASTA LAKE, 2040 GENERAL PLAN DRAFT ENVIRONMENTAL IMPACT REPORT 4.6-3 (July 2022); CITY OF LATHROP, SCH. NO. 2021100139, DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE LATHROP GENERAL PLAN UPDATE 3.5-14, 24 (May 2022); CITY OF BISHOP, SCH No. 2021050340, DOWNTOWN BISHOP SPECIFIC PLAN AND MIXED-USE OVERLAY DRAFT ENVIRONMENTAL IMPACT REPORT 4.18-4 (May 2022).

<sup>89</sup> KERN COUNTY, SCH No. 2021060079, ROSAMOND SOUTH SOLAR PROJECT DRAFT ENVIRONMENTAL IMPACT REPORT 4.15-2 (July 2022).

<sup>90</sup> *Id.* The Twenty-Nine Palms Band of Mission Indians and the Torres Martinez Desert Cahuilla Indians were only contacted under AB 52. The San Fernando Band of Mission Indians, Big Pine Paiute Tribe of the Owens Valley, Chumash Council of Bakersfield, Quechan Tribe of the Fort Yuma Reservation, and the Kitanemuk and Yowlumne Tejon Indians were only contacted under SB 18. While the Tejon Indian Tribe, Kern Valley Indian Community, and San Manuel Band of Mission Indians were each contacted under both AB 52 and SB 18, Kern County contacted two representatives of the Tejon Indian Tribe, one of whom was contacted only under SB 18 and the other of whom was contacted under both statutes.

<sup>91</sup> *Id.* at 4.15-1.

**City of Anaheim** (General Plan Amendment). In amending the City's General Plan to construct the 1600 West Lincoln Avenue Mixed-Use Development, Anaheim sent out separate consultation notices for SB 18 and AB 52 consultation.<sup>92</sup> Three Tribes received AB 52 notices and eight received SB 18 notices, with two Tribes receiving consultation notices under both statutes.<sup>93</sup>

**City of Los Banos** (General Plan Update). The DEIR developed for the City's General Plan indicates no overlap between the City's SB 18 and AB 52 lists. The City reached out to three Tribes on the NAHC list under SB 18, and the sole Tribe on the city's AB 52 list was not among those three.<sup>94</sup>

**Los Angeles County** (General Plan Update). The County's climate action plan and general plan amendment DEIR indicate that, out of the five Tribes that received AB 52 notices from the County, four also received SB 18 notices and one did not.<sup>95</sup>

In other instances, agencies send separate AB 52 and SB 18 letters, but all contacts receiving an AB 52 notice also receive an SB 18 notice.

**City of Shasta Lake** (General Plan Update). The DEIR indicates that the one Tribe on its AB 52 list was also among the nine Tribes on the NAHC list for SB 18.<sup>96</sup>

**City of Lathrop** (General Plan Update). The DEIR demonstrates that the three Tribes on the City's AB 52 list were all also among the eight Tribes on the NAHC-provided SB 18 list.<sup>97</sup>

**City of Bishop** (Specific Plan and Mixed-Use Overlay). The City's DEIR reports that the three Tribes on the City's AB 52 list were all also notified under SB 18.<sup>98</sup>

Agencies may also disregard the distinction between which Tribes to notify under SB 18 and AB 52, apparently using a single list to send notification letters referencing both statutes. Such practices make it difficult to ascertain whether the local government met its obligations under both laws or muddled the two.

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<sup>92</sup> CITY OF ANAHEIM, 1600 W. LINCOLN AVENUE MIXED-USE DEVELOPMENT DRAFT INITIAL STUDY/MITIGATED NEGATIVE DECLARATION app. L (Feb. 2020) (AB52/SB18 Tribal Consultation).

<sup>93</sup> *Id.*

<sup>94</sup> 4.5-13 (June 2022).

<sup>95</sup> LOS ANGELES COUNTY, SCH No. 2021120568, CLIMATE ACTION PLAN DRAFT PROGRAM ENVIRONMENTAL IMPACT REPORT app. G (May 2022).

<sup>96</sup> CITY OF SHASTA LAKE, 2040 GENERAL PLAN DRAFT ENVIRONMENTAL IMPACT REPORT 4.6-3 (July 2022).

<sup>97</sup> CITY OF LATHROP, SCH. No. 2021100139, DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE LATHROP GENERAL PLAN UPDATE 3.5-14, 24 (May 2022).

<sup>98</sup> CITY OF BISHOP, SCH No. 2021050340, DOWNTOWN BISHOP SPECIFIC PLAN AND MIXED-USE OVERLAY DRAFT ENVIRONMENTAL IMPACT REPORT 4.18-4 (May 2022).



**Town of Apple Valley** (Specific Plan). The City's DEIR indicates that the City contacted eight Tribes identified by NAHC, pursuant to both AB 52 and SB 18.<sup>99</sup> It is unclear whether any Tribes had requested to be contacted regarding consultation, and thus whether AB 52 applied to this DEIR in practice.

**City of Huntington Beach** (General Plan Amendment). In the DEIR issued for the general plan amendment to allow the construction of the Bolsa Chica Senior Living Community, Huntington Beach sent out consultation invitations referencing both AB 52 and SB 18, but only the Tribes on the NAHC-provided list were notified of their opportunity to consult with the City.<sup>100</sup>

**City of Mountain View** (General Plan Update). The DEIR issued with the City's housing element update to its General Plan indicates that the City sent letters to 10 Tribes based on prior consultation activities, ostensibly not pursuant to either SB 18 or AB 52.<sup>101</sup> The City later sent letters to 11 Tribal representatives based on a "list developed by NAHC."<sup>102</sup> Despite presumably applying SB 18 procedural rules in obligating Tribes to comply with a 90-day response window, the EIR states that the City carried out its consultation efforts pursuant to both SB 18 and AB 52, without referencing a separate AB 52 list.<sup>103</sup>

**Sonoma County** (Specific Plan). The County's DEIR indicates that Sonoma County completely merged its SB 18 and AB 52 contact lists into what was functionally a single SB 18 list, presumably meeting the requirements of both statutes. The County reported reaching out to Tribes on the NAHC-provided list, "pursuant to SB 18 and AB 52," without mentioning a separate AB 52 list.<sup>104</sup>

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<sup>99</sup> TOWN OF APPLE VALLEY, SCH No. 2021110271, RECIRCULATED DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE VILLAGE SPECIFIC PLAN 2.18-4 (July 2022).

<sup>100</sup> CITY OF HUNTINGTON BEACH, INITIAL STUDY OF BOLSA CHICA SENIOR LIVING COMMUNITY PROJECT app. J (Oct. 2022) (Letter from Andrew Green, Senior Analyst, Native Am. Heritage Comm'n to Hayden Beckman, Senior Planner, City of Huntington Beach, Cal. (Sept. 6, 2022)); *Id.* (Letter from Hayden Beckman, Senior Planner, City of Huntington Beach, Cal., to Native Am. Tribal Leaders, AB 52/SB 18 Notice of Opportunity to Consult for the Bolsa Chica Senior Living Community Project (Sept. 22, 2022)).

<sup>101</sup> CITY OF MOUNTAIN VIEW, SCH No. 2022020129, CITY OF MOUNTAIN VIEW HOUSING ELEMENT UPDATE DRAFT ENVIRONMENTAL IMPACT REPORT 4.4-9 (July 2022).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> SONOMA COUNTY, SCH No. 2018062068, DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE SPRINGS SPECIFIC PLAN 3.15-3 (May 2022).

**City of Thousand Oaks** (Specific Plan). Thousand Oaks' DEIR indicates that the City reached out to 12 Tribes "pursuant to AB 52 and SB 18" using an NAHC list.<sup>105</sup>

The different requirements for whom agencies must contact for Tribal consultation under SB 18 and AB 52 can result in more Tribes receiving invitations to consult at the planning stage than would be notified if only one statute's list were used in isolation. This review of agency practice indicates, however, that the Tribes receiving AB 52 and SB 18 notices are often functionally the same set of contacts – either because the AB 52 list contains only contacts already on the NAHC's SB 18 list, or the agency uses the NAHC list to send merged SB 18/AB 52 letters. It remains unclear whether in these instances the local governments are extending consultation opportunities to Tribes under a statute that would otherwise be inapplicable or whether both statutes apply to the same set of Tribes.

### ***Notification and Consultation Timeline***

*Another point of ambiguity at the planning stage is whether consultation requirements under SB 18 and AB 52 are triggered separately or simultaneously. There is considerable variation in how agencies implement the SB 18 and AB 52 timelines relative to one another. Sometimes, agencies send out AB 52 notice letters months prior to sending out SB 18 notices, whereas in other instances the opposite is true. It is also common for agencies to send separate SB 18 and AB 52 notices at the same time, and several examples exist of agencies merging SB 18 and AB 52 letters by mailing notifications that reference both statutes. Even when SB 18 or AB 52 notices are sent months apart from one another, no examples were identified of two separate consultations actually taking place.*

Local governments often merge SB 18 and AB 52 notices, sending each contact a single letter that references both statutes.

**City of Apple Valley** (Village Specific Plan Adoption). The Apple Valley's Specific Plan DEIR indicates that the City reached out to eight Tribal contacts via one wave of letters referencing both AB 52 and SB 18.<sup>106</sup>

**City of Huntington Beach** (General Plan Amendment). When inviting consultation regarding the Bolsa Chica Senior Living Community, the City sent out one letter notifying Tribes of their opportunity to consult under both AB 52 and SB 18;

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<sup>105</sup> CITY OF THOUSAND OAKS, SCH No. 2022010527, THE OAKS SPECIFIC PLAN DRAFT ENVIRONMENTAL IMPACT REPORT 3.15-3 (April 2022).

<sup>106</sup> TOWN OF APPLE VALLEY, SCH No. 2021110271, RECIRCULATED DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE VILLAGE SPECIFIC PLAN 2.18-4 (July 2022).

however, while SB 18 was mentioned in the subject of the letter, its body focused exclusively on AB 52 and its substantive and procedural requirements.<sup>107</sup>

**City of Mountain View** (General Plan Amendment). In adopting its Housing Element Update DEIR, the City sent out one set of letters referencing both AB 52 and SB 18, but the content of the letters was more tailored to SB 18's requirements.<sup>108</sup>

**Sonoma County** (Springs Specific Plan Adoption). The County's Specific Plan DEIR indicates that each agency sent out one set of letters to a list of Tribes provided by NAHC referencing both AB 52 and SB 18 but the content of the letters was more tailored to SB 18's requirements.<sup>109</sup>

**City of South San Francisco** (General Plan Update). The City sent out one set of letters attributed to both SB 18 and AB 52.<sup>110</sup> While the DEIR consistently references SB 18 and AB 52 together, the actual letters included in an appendix reference only SB 18, with no mention of AB 52. The letters also include substantive and procedural content unique to SB 18, including a 90-day response window and references to "ancestral tribal sites" rather than TCRs.<sup>111</sup>

**City of Thousand Oaks** (Specific Plan Adoption). The City used a single set of unified AB 52 and SB 18 letters.<sup>112</sup>

It also common for agencies to send out separate but simultaneous SB 18 and AB 52 notices.

**Los Angeles County** (General Plan update, Climate Action Plan). The County sent AB 52 and SB 18 notices separately, but on the same day, to overlapping but distinct lists of Tribal contacts.<sup>113</sup>

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<sup>107</sup> CITY OF HUNTINGTON BEACH, INITIAL STUDY OF BOLSA CHICA SENIOR LIVING COMMUNITY PROJECT app. J (Oct. 2022) (Letter from Hayden Beckman, Senior Planner, City of Huntington Beach, Cal., to Native Am. Tribal Leaders, AB 52/SB 18 Notice of Opportunity to Consult for the Bolsa Chica Senior Living Community Project (Sept. 22, 2022)).

<sup>108</sup> CITY OF MOUNTAIN VIEW, SCH No. 2022020129, CITY OF MOUNTAIN VIEW HOUSING ELEMENT UPDATE DRAFT ENVIRONMENTAL IMPACT REPORT 4.4-9 (July 2022).

<sup>109</sup> SONOMA COUNTY, SCH No. 2018062068, DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE SPRINGS SPECIFIC PLAN 3.15-3 (May 2022).

<sup>110</sup> CITY OF SOUTH SAN FRANCISCO, SCH No. 2021020064, GENERAL PLAN UPDATE, ZONING CODE AMENDMENTS, AND CLIMATE ACTION PLAN PROGRAM DRAFT ENVIRONMENTAL IMPACT REPORT 3.4-31 (June 2022).

<sup>111</sup> *Id.* app. D.

<sup>112</sup> CITY OF THOUSAND OAKS, SCH No. 2022010527, THE OAKS SPECIFIC PLAN DRAFT ENVIRONMENTAL IMPACT REPORT 3.15-3 (Apr. 2022).

<sup>113</sup> LOS ANGELES COUNTY, SCH No. 2021120568, CLIMATE ACTION PLAN DRAFT PROGRAM ENVIRONMENTAL IMPACT REPORT 1-3-1-4 (May 2022).

**City of Bishop** (Downtown Specific Plan). The City notified eight Tribes under SB 18 and three Tribes under AB 52 on the same day. All contacts notified under AB 52 were also notified under SB 18.<sup>114</sup>

**County of San Diego** (Supplement to the 2011 GPU PEIR). On January 6, 2017, the County sent out AB 52 consultation letters to eleven Tribes and SB 18 consultation letters to 25 Tribes.<sup>115</sup>

In other instances, agencies do not begin the SB 18 and AB 52 processes at the same time, instead first notifying a list of Tribal contacts pursuant to SB 18 prior to beginning notification under AB 52.

**City of Lathrop** (General Plan updated). The City issued SB 18 letters to eight Tribal contacts “at the onset of general plan update.” Three of those contacts received another notification later under AB 52, and all Tribes contacted under AB 52 were already contacted under SB 18.<sup>116</sup>

The reverse also occurs, where agencies issue AB 52 notices prior to SB 18 notices. In some instances, this may be due to the additional time required to request and receive a list of Tribes to contact from NAHC.

**City of Shasta Lake** (2040 General Plan Adoption). The City sent out AB 52 notices prior to SB 18 notices.<sup>117</sup> There, only one day apart, the city sent AB 52 notices to Tribes *and* a letter to NAHC asking for an SB 18 list.<sup>118</sup> NAHC provided the list approximately one month later, and the City sent out SB 18 notices about one week after that.<sup>119</sup> No Tribes responded to the AB 52 letters, and one Tribe responded to an SB 18 letter declining consultation.

**City of Anaheim** (General Plan Amendment). On the same day, the City mailed AB 52 consultation notices and requested from NAHC a list of Tribes to contact

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<sup>114</sup> CITY OF BISHOP, SCH No. 2021050340, DOWNTOWN BISHOP SPECIFIC PLAN AND MIXED-USE OVERLAY DRAFT ENVIRONMENTAL IMPACT REPORT 4.18-4 (May 2022).

<sup>115</sup> COUNTY OF SAN DIEGO, SCH No. 2016101055, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT REPORT FOR THE CLIMATE ACTION PLAN, GENERAL PLAN AMENDMENT, GHG THRESHOLD, AND GUIDELINES FOR DETERMINING SIGNIFICANCE FOR CLIMATE CHANGE 2.13-7 (Jan. 2018).

<sup>116</sup> CITY OF LATHROP, SCH. NO. 2021100139, DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE LATHROP GENERAL PLAN UPDATE 3.5-14, 24 (May 2022).

<sup>117</sup> CITY OF SHASTA LAKE, 2040 GENERAL PLAN DRAFT ENVIRONMENTAL IMPACT REPORT 4.6-3-4.6-4 (July 2022).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

regarding SB 18 consultation.<sup>120</sup> NAHC provided a list of traditionally affiliated Tribes five days later, and Anaheim sent out SB 18 consultation notices approximately two weeks after receiving the NAHC list.<sup>121</sup> Only one Tribe requested consultation, and their consultation was presumably held pursuant to both AB 52 and SB 18, as the dates given in the Initial Study and Mitigated Negative Declaration for consultation under each statute are the same.<sup>122</sup>

**Kern County** (Specific Plan Amendment in conjunction with the Rosamond South Solar Project). The City reached out to NAHC for an SB 18 list in December 2020, sent AB 52 letters to six Tribes from its own AB 52 list in February 2021, and then in October 2021 sent SB 18 letters to the 11 Tribes the NAHC ultimately identified.<sup>123</sup> Only one Tribe, which was contacted successively under both SB 18 and AB 52, responded requesting consultation, after receiving only the AB 52 notice.<sup>124</sup> The DEIR in some places refers to this consultation with the San Manuel Band of Mission Indians that ultimately took place as being “pursuant to AB 52,”<sup>125</sup> and in other places as “part of AB 52 and SB 18.”<sup>126</sup> In either case, no secondary consultation occurred solely pursuant to SB 18, despite the agency sending an SB 18 notice after the Tribe had already received and responded to an AB 52 notice months prior.

This review of agency practice suggests that the SB 18 and AB 52 nexus at the planning stage could theoretically present Tribes a “second bite at the apple” when they receive a second consultation notice for the same planning activity. While this research identified instances where Tribes could have benefitted from two consultation invitations in theory, no such example is identified where a Tribe did not request consultation after the first letter but did so after the second. Tribes who did not respond to a local government’s first consultation notice did not respond to their subsequent invitations to consult, nor did any agency actually engage in a second substantive consultation with a Tribe they had already consulted for the same planning activity pursuant to the other statute. Instead, agencies appear to consistently merge SB 18 and AB 52 consultations into the same dialogue, even if notices pursuant to each statute were sent out separately or at different times.

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<sup>120</sup> CITY OF ANAHEIM, 1600 W. LINCOLN AVENUE MIXED-USE DEVELOPMENT DRAFT INITIAL STUDY/MITIGATED NEGATIVE DECLARATION app. L (Feb. 2020) (AB52/SB18 Tribal Consultation).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 169-70 (Mar. 2020).

<sup>123</sup> KERN COUNTY, SCH No. 2021060079, ROSAMOND SOUTH SOLAR PROJECT DRAFT ENVIRONMENTAL IMPACT REPORT 4.15-1 (July 2022).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 4.15-7.

<sup>126</sup> *Id.* at 4.15-8.

### **Topic of Consultation: TTCP (SB 18) vs. TCR (AB 52)**

In practice, agencies infrequently appear to make a material distinction between TTCPs and TCRs. In the DEIRs reviewed, it is common for agencies to frame TCRs as the subject of both SB 18 and AB 52 consultation. No examples were identified of separate consultations taking place under SB 18 and AB 52 which specifically focus on TTCPs as opposed to TCRs, or vice versa. This practice may contravene the state legislature’s attempts to make the definition of TCR more expansive than previous terms like SB 18’s TTCP,<sup>127</sup> or it may expand the scope of consultation by encompassing resources that fall under TCR or TTCP, rather than just one set of Tribal resources.

Local governments at times do seem to distinguish between TCR under AB 52 and TTCP under SB 18.

**Los Angeles County** (General Plan Amendment). The County issued SB 18 letters explaining that NAHC identified the recipient Tribe as one with “traditional lands or cultural places located within [the] proposed boundary” of project.<sup>128</sup> By contrast, the County’s AB 52 letters—issued for the same general plan amendment—included TCR in the subject line but contained no discussion of what resources were identified so as to require consultation.<sup>129</sup> No consultations ultimately occurred, so it is not clear whether the county would have maintained this distinction during the substantive consultation.

More commonly, an agency will use TCR as the basis for all consultations, attributing TCR information in an EIR to both AB 52 and SB 18.

**Kern County** (Specific Plan Amendment). The County’s DEIR noted that, in carrying out consultation with the San Manuel Band, “as part of the AB 52 and SB 18

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<sup>127</sup> The TCR definition was central to AB 52’s drafting and legislative negotiation. The final definition enshrined in CAL. PUB. RES. CODE § 21074(a) is narrower than many Tribal advocates desired, but it is still meant to be more expansive than previous terms such as SB 18’s TTCP. See Interview with Tribal Environmental Director & Tribal Historic Preservation Officer (May 31, 2022) (anonymized for confidentiality purposes) (on file with author); Interview with consultation firm’s Director of Cultural Resources (May 27, 2022) (anonymized for confidentiality purposes) (on file with author); Interview with owner of a cultural resources firm (May 3, 2022) (anonymized for confidentiality purposes) (on file with author); Interview with Calif. State Assoc. of Counties Legislative Representative (May 17, 2022) (anonymized for confidentiality purposes) (on file with author).

<sup>128</sup> LOS ANGELES COUNTY, SCH No. 2021120568, CLIMATE ACTION PLAN DRAFT PROGRAM ENVIRONMENTAL IMPACT REPORT app. G (May 2022).

<sup>129</sup> *Id.*

consultation process” the county agreed to avoid any newly discovered unknown TCRs during construction, and the parties agreed to mitigation measures.<sup>130</sup>

**City of Anaheim** (1600 W. Lincoln Avenue Apartments Initial Study/Mitigated Negative Declaration). Anaheim issued AB 52 letters extending invitations to consult regarding “tribal cultural resources” and SB 18 letters identifying Tribes as being on NAHC’s list of Tribes with “cultural resources” in Orange County,<sup>131</sup> though the Mitigated Negative Declaration elsewhere distinguishes between TCRs and TTCPs.<sup>132</sup>

On certain occasions, an agency may use a concept or term closer to TTCP as the basis for all consultations.

**City of South San Francisco** (General Plan Update). South San Francisco sent merged SB 18/AB 52 letters to Tribal contacts. The letters themselves, while mentioning both SB 18 and AB 52, included only content specific to SB 18, such as references to a 90-day response window and “ancestral tribal sites” as the topic of consultation.<sup>133</sup>

**County of San Diego** (Supplement to the 2011 GPU PEIR). The County sent separate SB 18 and AB 52 letters, but the PEIR supplement references discussion of only TCRs during consultation with Tribes.<sup>134</sup>

Agencies have also applied the *federal* Traditional Cultural Properties (“TCPs”)<sup>135</sup> definition to SB 18 consultations and to the TCR section in CEQA documentation.

**City of Murrieta** (Specific Plan Amendment). Murrieta conducted only SB 18 consultation and not AB 52 consultation because the underlying plan preceded AB 52. The City included a TCR section in its EIR but utilized the federal “TCP” term

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<sup>130</sup> KERN COUNTY, SCH No. 2021060079, ROSAMOND SOUTH SOLAR PROJECT DRAFT ENVIRONMENTAL IMPACT REPORT 4.15-8 (July 2022).

<sup>131</sup> CITY OF ANAHEIM, 1600 W. LINCOLN AVENUE MIXED-USE DEVELOPMENT DRAFT INITIAL STUDY/MITIGATED NEGATIVE DECLARATION app. L (Feb. 2020) (AB52/SB18 Tribal Consultation).

<sup>132</sup> *Id.* at 167-68.

<sup>133</sup> CITY OF SOUTH SAN FRANCISCO, SCH No. 2021020064, GENERAL PLAN UPDATE, ZONING CODE AMENDMENTS, AND CLIMATE ACTION PLAN PROGRAM DRAFT ENVIRONMENTAL IMPACT REPORT 3.4-31 (June 2022).

<sup>134</sup> COUNTY OF SAN DIEGO, SCH No. 2016101055, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT REPORT FOR THE CLIMATE ACTION PLAN, GENERAL PLAN AMENDMENT, GHG THRESHOLD, AND GUIDELINES FOR DETERMINING SIGNIFICANCE FOR CLIMATE CHANGE 2.13-7 (Jan. 2018).

<sup>135</sup> A TCP “can be defined generally as one that is eligible for inclusion in the National Register [of Historic Places] because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community’s history, and (b) are important in maintaining the continuing cultural identity of the community.” NAT’L PARKS SERV., NATIONAL REGISTER BULLETIN NO. 38, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES 1 (1990).

throughout, including when discussing the substance of SB 18 consultation.<sup>136</sup> Murrieta explains its choice to rely on the term “TCP” as based on AB 52 not being triggered and because TTCP is not well defined in SB 18.<sup>137</sup>

This review of practice demonstrates that, while some level of inconsistency exists, agencies tend to conduct consultations and analyses around TCRs. What constitutes a TCR may be a divisive topic in formulating certain plans, but the difference between AB 52’s TCR and SB 18’s TTCP does not appear to become a central issue.

### ***Incorporation of Tribal Requests and Recommendations***

There is no notable difference, in the examples reviewed, between the deference local governments give Tribal recommendations and requests under SB 18 versus under AB 52. This is notwithstanding AB 52 imposing specific, although still limited, statutory responsibility upon agencies to incorporate Tribes’ recommendations in their decision-making, as discussed in Part I.A.6. Local governments in many cases have information from archaeologists on hand as a baseline prior to beginning the consultation process. This is indicated by many TCR sections incorporating by reference the separate Cultural Resources section, which is heavily based on archaeological and historical records and experts.<sup>138</sup> If, as appears common at the planning stage, Tribes decline to consult or fail to respond to the invitation, the DEIR relies heavily on this archaeological evidence in crafting the TCR section.

While AB 52 directs agencies to consider Tribal knowledge as evidence of TCR, Tribal practitioners expressed during interviews that some agencies hesitate to defer to broad Tribal perspectives on what constitutes a TCR, especially when it is difficult or impossible to

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<sup>136</sup> See CITY OF MURRIETA, SCH No. 2014031045, MURRIETA HILLS SPECIFIC PLAN AMENDMENT DRAFT ENVIRONMENTAL IMPACT REPORT 4.14-23–4.14-27 (May 2020).

<sup>137</sup> *Id.* at 4.14-4 (“For purposes of this analysis, further references to Tribal Cultural Resources, or TCRs, will be identified as Traditional Cultural Properties, or TCPs. This is because NRB 38 guidance serves as the best and most recognized guidance for identifying TCPs. Additionally, while AB 52 does define Tribal Cultural Resources, the bill does not apply to this Project, and SB 18, which does apply to the Project, does not define Traditional Tribal Cultural Places. Further, the construction of the project will require regulatory permitting through the United States Army Corps of Engineers which, in turn, will require compliance with Section 106 of the National Historic Preservation Act of 1966 and evaluation of TCPs is a necessary component of that compliance process . . . Lastly, Confidential Appendix 9.4.5, Final Traditional Cultural Properties Management Summary, considers potential effects the Project may have on TCPs.”).

<sup>138</sup> Sometimes, the cultural resources section of a DEIR also can include Tribal resource determinations.



produce data easily cognizable in the CEQA framework.<sup>139</sup> Despite the AB 52 Technical Advisory's attempts to elevate Tribal knowledge under CEQA,<sup>140</sup> one Tribal representative reported that sites they have identified as containing TCRs were rejected by agencies because the Tribe's "robust evidence" that a TCR existed – including GIS mapping of the resource – did not qualify as the 'substantial evidence' the agency needed to declare the resource a TCR.<sup>141</sup> This representative felt that the evidence the agencies would consider to determine whether a TCR existed was not appropriate because it has little to do with the TCR itself.<sup>142</sup> Additionally, another issue that frequently arises is that an agency may not consider a resource significant because it considers it in isolation, while a Tribe may see it as interconnected with other resources, and thus a significant part of the whole.<sup>143</sup>

Sometimes a local government will defer to Tribal knowledge, broadening its notion of what constitutes a TCR, vis-à-vis the planning area, after consulting with Tribal representatives.

**City and County of San Francisco** (General Plan Housing Element Update). When San Francisco and Ohlone representatives engaged in consultation,<sup>144</sup> the Ohlone representatives advocated not only for known and yet undiscovered archaeological sites to be considered TCRs but also for the inclusion of broader landscape features as constituting TCRs.<sup>145</sup> In its DEIR, San Francisco included the following broader landscape and ecosystem-level features as TCRs, deferring to Ohlone knowledge received during consultation:

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<sup>139</sup> See Interview with Tribal Heritage Manager (June 24, 2022) (anonymized for confidentiality purposes) (on file with author); Interview with owner of a cultural resources firm (May 3, 2022) (anonymized for confidentiality purposes) (on file with author); See Interview with Tribal law attorney (July 19, 2022) (anonymized for confidentiality) (on file with author).

<sup>140</sup> See Interview with Tribal law attorney (July 19, 2022) (anonymized for confidentiality purposes) (on file with author). Per OPR's technical advisory, evidence that can support finding a resource is a TCR can include "elder testimony, oral history, tribal government archival information, testimony of a qualified archaeologist 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 Tribal Historic Preservation Officer, or historical/anthropological records," as well as "geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion" and "meeting minutes, anthropological reports, and tribal elder affidavits." AB 52 TECHNICAL ADVISORY, *supra* note 11, at 5-6.

<sup>141</sup> See Interview with Tribal Heritage Manager (June 24, 2022) (anonymized for confidentiality purposes) (on file with author).

<sup>142</sup> *Id.*

<sup>143</sup> See City of Murietta (Specific Plan Amendment) discussed *infra* at 19.

<sup>144</sup> The DEIR mentions that San Francisco reached out to an NAHC provided list, suggesting AB 52 was merged into SB 18.

<sup>145</sup> SAN FRANCISCO PLANNING DEPARTMENT, SCH No. 2021060358, SAN FRANCISCO HOUSING ELEMENT UPDATE DRAFT ENVIRONMENTAL IMPACT REPORT 4.3-14 (Apr. 2022).

- Locations modeled as having high sensitivity for Native American archeological resources;
- The shoreline and marsh zone associated with natural environmental change over the period between about 8,000 years ago and 170 years ago, including areas modeled as having high sensitivity for archeological resources that were submerged by the rising bay;
- Known historical locations of creek channels, ponds, marshes, and other wetlands; and
- The modern San Francisco Bay and ocean shoreline, as well as the shores of remnant creek channels, lakes, and ponds that are characterized by above-ground water today.<sup>146</sup>

In other instances, a gap exists between local government and Tribal understandings of what the term “TCR” encompasses.

**City of Murrieta** (Specific Plan Amendment). The Pechanga understand the entire project area to be a single TCP, as one unified historic village; however, the City reported in its DEIR that the archaeological record does not support such an all-encompassing TCR characterization.<sup>147</sup> The DEIR instead analyzed only three individual archaeological TCPs within the planning area.<sup>148</sup>

As discussed in Part I.A, both SB 18 and AB 52 grant some level of discretion to local governments when determining whether a resource qualifies as a TTCP or a TCR. In practice, this has led to varying success among Tribes advocating for the inclusion of additional Tribal resources, particularly in CEQA review.

### ***Endpoint and Binding Nature of Consultation:***

Consultation often ends with some mutual agreement on mitigation measures. The reviewed DEIRs did not indicate any disparity between SB 18 and AB 52 planning-stage consultations with respect to the likelihood of ending in agreement, nor were there any examples of an agency explicitly ending the AB 52 consultation process using the “good faith and reasonable effort” provision. Standard agency practice appeared to favor attributing any mitigation measures in the DEIR resulting from consultation to both SB 18 and AB 52.

It was by far most common in the reviewed DEIRs for no Tribes to have engaged in any substantive consultation, and for the DEIR to accordingly find TCR impacts insignificant,

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<sup>146</sup> *Id.* at 4.3-17.

<sup>147</sup> CITY OF MURRIETA, SCH No. 2014031045, MURRIETA HILLS SPECIFIC PLAN AMENDMENT DRAFT ENVIRONMENTAL IMPACT REPORT 4.14-23 – 4.14-24 (May 2020).

<sup>148</sup> *Id.*

sometimes after including boilerplate mitigation measures (e.g., standard protocols in the event new TCRs are found). This may have been by design, as Tribes might have promoted some of these mitigation measures to be included in statutory protocols to limit the need for more involved consultation where Tribes have not identified any TCRs at the outset.<sup>149</sup> In the DEIRs reviewed, numerous Tribes responded to an agency's initial notice affirmatively but then subsequently dropped out of contact before any consultation could occur.<sup>150</sup> A number of Tribes declined consultation<sup>151</sup> or never responded to the initial notice.<sup>152</sup>

AB 52 releases agencies from their consultation obligations when a Tribe requests consultation but falls out of contact prior to any consultation taking place or otherwise fails to provide any comments to the agency.<sup>153</sup> In the DEIRs reviewed, agencies in this situation sometimes reached out again to Tribes to reinitiate contact.<sup>154</sup> Otherwise, practically uniformly, agencies responded to Tribes' unresponsiveness by determining that their statutory obligations under both SB 18 and AB 52 had been fulfilled. Typically, this resulted in EIRs with more boilerplate TCR sections that closely parallel the Cultural Resources section and thus rely on recorded and archaeological data, rather than Tribal input, for TCRs.

In interviews conducted with Tribal cultural resources directors, archaeologists, and attorneys specializing in CEQA and Tribal cultural resources protection, a recurring insight was that one opportunity for Tribes to leverage the nexus of SB 18 and AB 52 is to advocate for downzoning, open space designation, or a similar planning modification at the general

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<sup>149</sup> See Interview with Tribal member (anonymized for confidentiality purposes) (on file with author).

<sup>150</sup> See, e.g., KERN COUNTY, SCH No. 2021060079, ROSAMOND SOUTH SOLAR PROJECT DRAFT ENVIRONMENTAL IMPACT REPORT 4.15-2–4.15-3, 4.15-7 (July 2022); CITY OF LATHROP, SCH. No. 2021100139, DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE LATHROP GENERAL PLAN UPDATE 3.5-14, 24 (May 2022).

<sup>151</sup> See, e.g., LOS ANGELES COUNTY, SCH No. 2021120568, CLIMATE ACTION PLAN DRAFT PROGRAM ENVIRONMENTAL IMPACT REPORT app. G (May 2022); CITY OF SHASTA LAKE, 2040 GENERAL PLAN DRAFT ENVIRONMENTAL IMPACT REPORT 4.6-3—4.6-4 (July 2022).

<sup>152</sup> See, e.g., CITY OF MOUNTAIN VIEW, SCH No. 2022020129, CITY OF MOUNTAIN VIEW HOUSING ELEMENT UPDATE DRAFT ENVIRONMENTAL IMPACT REPORT 4.4-9 (July 2022); CITY OF LOS BANOS, SCH No. 2022010254, LAS BANOS GENERAL PLAN 2042 DRAFT EIR 4.5-13 (June 2022); CITY OF SOUTH SAN FRANCISCO, SCH No. 2021020064, GENERAL PLAN UPDATE, ZONING CODE AMENDMENTS, AND CLIMATE ACTION PLAN PROGRAM DRAFT ENVIRONMENTAL IMPACT REPORT 3.4-31 (June 2022); CITY OF BISHOP, SCH No. 2021050340, DOWNTOWN BISHOP SPECIFIC PLAN AND MIXED-USE OVERLAY DRAFT ENVIRONMENTAL IMPACT REPORT 4.18-4–4.18-5 (May 2022); TOWN OF APPLE VALLEY, SCH No. 2021110271, RECIRCULATED DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE VILLAGE SPECIFIC PLAN 2.18-6 (July 2022).

<sup>153</sup> CAL. PUB. RES. CODE § 21080.3.2(d)(2).

<sup>154</sup> See SONOMA COUNTY, SCH No. 2018062068, DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE SPRINGS SPECIFIC PLAN 3.15-3 (May 2022); CITY OF AGOURA HILLS, SCH No. 2021090588, GENERAL PLAN UPDATE DRAFT SUBSEQUENT PROGRAM ENVIRONMENTAL IMPACT REPORT IV.D-4, 14 (Apr. 2022).

or specific planning stage.<sup>155</sup> For example, this could mean designating a park or open space in an area where a TCR exists.<sup>156</sup> Such an arrangement could preemptively avoid the development of areas with TCRs, or at least put Tribal representatives in a better negotiating position at the time of a later specific project in the area that triggers AB 52 again. No examples were identified in which Tribes leveraged this opportunity in this way, neither through a survey of DEIRs nor in any of the interviews conducted.

Despite finding no such examples of Tribes leveraging downzoning or conservation easements under SB 18, there are identified examples of Tribe-initiated mitigation measures being incorporated by agencies at the planning level.

**City of Woodland** (Woodland Research and Technology Park Specific Plan). During AB 52 consultation, the Yocha Dehe Tribe offered mitigation measure recommendations – that developers undergo cultural sensitivity training and that all work should cease within 150 feet of human remains or prehistoric cultural resources that may be discovered during project implementation – which were included within the DEIR and FEIR’s mitigation measures.<sup>157</sup>

**City of Anaheim** (1600 W Lincoln Avenue Development General Plan Amendment). Following a three-day consultation with the Gabrieleño Band of Mission Indians – Kizh Nation under both SB 18 and AB 52, Anaheim adopted two of the Tribe’s suggested mitigation measures:

- Before receiving a grading permit, property owners and developers must retain a Native American monitor/consultation who is both approved by the Gabrieleño Band of Mission Indians-Kizh Nation Tribal Government and listed under the NAHC’s Tribal Contact list for the Project area.

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<sup>155</sup> Interview with Tribal law attorney (July 19, 2022) (“Tribes can but have not often taken advantage of the opportunity under SB 18 to proactively protect sites before development takes place through open space designation or downzoning under the general plan.”) (anonymized for confidentiality purposes) (on file with author); *see also* Interview with archaeologist (July 11, 2022) (opining that the open space requirement is an important facet of SB 18 that not many Tribes latch onto) (anonymized for confidentiality purposes) (on file with author); Interview with Tribal Executive Director of Cultural Resources (June 27, 2022) (stating that SB 18 has opportunities to set aside TCRs in open space but it’s always been in concurrence with other projects that have made it possible, so it does not happen often) (anonymized for confidentiality purposes) (on file with author).

<sup>156</sup> Interview with Tribal law attorney (July 19, 2022) (anonymized for confidentiality purposes) (on file with author).

<sup>157</sup> CITY OF WOODLAND, SCH No. 2017062042, WOODLAND RESEARCH AND TECHNOLOGY PARK SPECIFIC PLAN DRAFT ENVIRONMENTAL IMPACT REPORT 3.6-10 (May 2021); CITY OF WOODLAND, SCH No. 2017062042, WOODLAND RESEARCH AND TECHNOLOGY PARK SPECIFIC PLAN FINAL ENVIRONMENTAL IMPACT REPORT A-17—19 (Aug. 2023).

- If any archaeological resources are discovered, construction activities must temporarily cease in their immediate vicinity, and if those resources are Native American in origin, the property owner or developer must coordinate with the Gabrieleño Band of Mission Indians-Kizh Nation to determine the treatment and curation of the resources. The Tribe typically requests reburial or preservation for educational purposes.<sup>158</sup>

**San Luis Obispo County** (Dana Reserve Specific Plan Amendment). The County's August 2023 FEIR included several mitigation measures not seen in boilerplate TCR mitigation sections at the planning level. These planning-level mitigation measures, suggested by the Northern Chumash Tribal Council after field visits and consultation, include:

- Designating areas for local Chumash Tribes to use for various purposes (ceremonial gatherings, education, events, etc.)
- Planting native vegetation of cultural significance
- Incorporating informative and interpretive signage
- Incorporation of Tribal names/placenames
- Development of trails away from known TCRs to avoid contact/looting
- Protection of known TCRs as Environmentally Sensitive Areas
- Deed-restricted location to repatriate TCRs encountered during development, if avoidance is not feasible for any TCR<sup>159</sup>

These mitigation measures are consistent with all suggestions initially put forward by the Northern Chumash Tribal Council, evidencing success in convincing the county to alter projects as a result of consultation.<sup>160</sup>

Tribal and agency practitioners report hesitation on part of Tribes to disclose locations of TCRs at the planning stage, and a feeling that the planning stage does not offer the same clarity and detail that specific projects do to allow Tribes concrete substance to comment

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<sup>158</sup> CITY OF ANAHEIM, 1600 W. LINCOLN AVENUE MIXED-USE DEVELOPMENT DRAFT INITIAL STUDY/MITIGATED NEGATIVE DECLARATION 169-71 (Feb. 2020).

<sup>159</sup> COUNTY OF SAN LUIS OBISPO, SCH NO. 2021060558, DANA RESERVE SPECIFIC PLAN FINAL ENVIRONMENTAL IMPACT REPORT 4.5-19, 4.18-8–4.18-9 (Aug. 2023).

<sup>160</sup> COUNTY OF SAN LUIS OBISPO, SCH NO. 2021060558, DANA RESERVE SPECIFIC PLAN FINAL ENVIRONMENTAL IMPACT REPORT 4.18-6 (Aug. 2023). Relatedly, in an interview, a Tribal Councilmember said that when the Tribe makes a 'legitimate evidence-based request', the Tribe has observed that the county makes substantive efforts to redesign projects, even at great expense to the applicant. *see* Interview with Tribal Councilmember (July 1, 2022) (anonymized for confidentiality purposes) (on file with author). However, the representative also reported an "avalanche" of consultation requests, and a lack of capacity to request consultation for all projects, or even to respond to all notifications. *Id.* The general lack of engagement in consultation at the planning stage is consistent with reviewed DEIRs and feedback from interviewed practitioners.

upon.<sup>161</sup> Tribes may lack the resources needed to engage in the planning process, and they may be distrustful of revealing that the area contains TCRs or TTCPs if they do not believe that confidentiality will be maintained.<sup>162</sup>

## Conclusion

Local government planning activities typically obligate agencies to engage in Tribal consultation under *both* SB 18 and AB 52. Discrepancies between SB 18 and AB 52 leave both Tribal and agency practitioners lacking clarity about how to implement the two frameworks in conjunction with one another. Key points of difference between SB 18 and AB 52 are the lists of Tribes an agency must contact, the notification and consultation timelines, the substantive topics around which consultation centers, and the legal endpoints and binding nature of consultation. In practice, when the same action triggers both SB 18 and AB 52, agencies navigate the intersection in a wide variety of ways, without central guidance.

These uncertainties manifest in a wide array of issues, interfering with the implementation of these statutes and impeding Tribes' ability to participate in decision-making to the fullest extent possible. Ensuring agencies understand their obligations under these laws, conducting consultation in a manner that maximizes available resources, and building enduring relationships between Tribes, state agencies, and local governments are key to ensuring the mandates of SB 18 and AB 52 are properly fulfilled.

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<sup>161</sup> See Interview with Tribal Environmental Director & Tribal Historic Preservation Officer (May 31, 2022) (explaining the view that, at the planning stage, there is not as much concrete substance for Tribes to consult on, as compared to at the project stage when specific ground disturbance and construction is proposed) (anonymized for confidentiality purposes) (on file with author); Interview with Tribal Heritage Manager (June 24, 2022) (reporting an overwhelming number of AB 52 requests) (anonymized for confidentiality purposes) (on file with author); Interview with Archaeologist (May 18, 2022) (explaining the County's experience that at the planning stage, Tribes are hesitant to disclose where sacred sites are before a specific project is proposed, and saying that the County gets responses to less than half of the consultation notification letters sent out) (anonymized for confidentiality purposes) (on file with author).

<sup>162</sup> See, e.g., Interview with Tribal Heritage Manager (June 24, 2022) (reporting an overwhelming number of AB 52 requests) (anonymized for confidentiality purposes) (on file with author); Interview with Archaeologist (May 18, 2022) (explaining the County's experience that at the planning stage, Tribes are hesitant to disclose where sacred sites are before a specific project is proposed, and saying that the County gets responses to less than half of the consultation notification letters sent out) (anonymized for confidentiality purposes) (on file with author).