

Analysis of Tribal Consultation in California under SB 18 and AB 52 Executive Summary

Background: The overarching purpose of this project was to improve environmental decision-making and government-to-government consultation between California agencies and local governments and Tribal nations on impacts to Tribal cultural resources and places.

The state of California has had a fraught history with the Native Americans who made the region their home for millennia—over the years, Tribes lost their homelands and experienced forced labor and state-sanctioned genocide. However, in recent decades, California has been reforming its historic relationship with Tribes. Among the reforms are laws requiring government-to-government consultation with California Native American Tribes to better protect Tribal cultural sites and resources. SB 18 requires the planning departments of local governments, during the development or amendment of city or county general or specific plans to offer consultation on traditional Tribal cultural places to Tribes that are culturally-affiliated with the local jurisdiction. AB 52 requires lead agencies, as part of the environmental impact assessment under the California Environmental Quality Act (CEQA), to offer consultation on Tribal cultural resources to culturally-affiliated Tribes who have requested notification.

The project: This project addressed the question of how effective the laws have been in achieving their goals, including protecting Tribal cultural places and resources and ensuring confidentiality of Tribal information. Partnering with the National Association of Tribal Historic Preservation Officers, Dr. Jamie Donatuto, and Swinomish Elder Larry Campbell†, ELI also sought to evaluate implementation from the perspective of Tribes; assessing how well the laws promote Tribal sovereignty and goals, including protecting cultural heritage, which is related to holistic community health.

ELI undertook research on best practices in consultation and the history of the laws; reviewed sample environmental impact reports; analyzed the provisions of the laws; interviewed Tribal members, agency staff, and legal experts; conducted case studies; and disseminated a survey to Tribes. The white paper identifies trends in consultation and implementation gaps, and provides a set of recommendations to address gaps and improve consultation.

Results: Positive results included that the overwhelming majority of Tribal respondents (80%) reported increased opportunities for consultation. However, the influence of Tribes has only moderately improved. A minority, one-fourth to one-third, reported increased effectiveness, improved relationships, greater protection of cultural resources, and a greater ability to make changes early enough in the project to mitigate impacts.

Considerations that should be in place before consultation begins include confidentiality, good relationships, sufficient resources, education of participants, and ex ante protections of resources.

Confidentiality. Protecting the confidentiality of Tribal information is essential to protect the integrity of cultural heritage. The laws prohibit disclosure of Tribal information but provide no sanctions for violation. **Tribes cannot always trust agencies to keep their information confidential.** They may find themselves in a double bind, needing to disclose at least some information in order to protect their resources, which risks putting their cultural heritage in danger.

Relationships. Good relationships facilitate consultation and communication in multiple forms. **A third of all Tribal respondents and half of those not federally recognized reported that the laws resulted in improved relationships.**

Resources. The laws create an unfunded mandate while the majority of Tribal respondents, especially those not federally recognized, have few resources. Neither the state nor federal government fund a Tribal Historic Preservation Officer for non-federally recognized Tribes. **The majority of Tribal respondents overall and overwhelming majority of non-federally recognized respondents identified limited resources as constraining effective participation in consultation.**

Education. Many Tribes reported that agencies lacked education on the laws and best practices for implementation. Relatedly, there is a need to ensure that the knowledge continues over staff changes by **institutionalizing agency procedures and knowledge.** Tribes reported a **wide divergence in the quality of consultation experiences with different agencies and local governments** across the state, likely reflecting a lack of education and institutionalization on the part of some agencies and governments.

Ex ante protections. Establishing ex ante protections of Tribal cultural resources and places before development is envisioned in open space or downzoning are opportunities in county and city planning under SB 18. **The project found a few examples of open space or other protective designations.**

During the consultation process, additional concerns involve notification, the timeline of notice and consultation, consideration of Tribal expertise, and decisions about mitigation.

Notification. SB 18 and AB 52 have different requirements for the notification timeline, which Tribes qualify for notification and the timeline to respond. **Tribal respondents were split on whether they received notices early enough to have an impact on the project: one-third disagreed that they received them early enough while a third agreed that they did.** Some Tribes also report that there is insufficient time to respond.

Consultation timeline. AB 52 requires agencies to start consultation within 30 days of a Tribe's response to the consultation notice. Agencies must complete consultation before adopting a county or city plan or finalizing the environmental document. **Two-thirds of Tribal respondents disagreed that the laws provide sufficient time for consultation.**

Tribal expertise and Indigenous Knowledge. Providing sufficient deference to Tribal expertise and Indigenous Knowledge is essential to identifying and protecting Tribal cultural resources and sites. **Two-thirds of Tribal respondents and more than 80% of non-federally recognized respondents reported that Tribal expertise and Indigenous Knowledge are not given sufficient weight in decisions.** Additionally, more than half overall and all of the non-federally recognized Tribal respondents reported that archaeologist or cultural resource management firm knowledge was prioritized over Tribal expertise in agency decisions.

Decision-making and outcomes. For a substantial minority of Tribal respondents, the laws have improved decisions and outcomes. However, for many, decisions that limit the range of mitigation options available are often made at the outset of a project and avoidance, foreclosing avoidance or more creative mitigation options.

After consultation is concluded, issues include accountability and ongoing management or monitoring.

Accountability. The laws do not provide for easily accessible administrative pathways to hold agencies accountable or resolve disagreements, either as to procedures or implementing decisions. Litigation is not always accessible to Tribes. **About a fourth of Tribal respondents indicated that decisions are not implemented.** Tribes also expressed the concern that Tribal management or monitoring is not built into measures.

Conclusion: SB 18 and AB 52 have required agency consultation with Tribes on planning, land use and environmental decisions, involving many more Tribes in decision-making with local governments and with lead agencies. Gaps in effective implementation, however, remain. The white paper highlights key gaps in implementation and proposes solutions to improve government-to-government consultation.