



Analysis of Tribal Consultation Under California SB 18 and AB 52

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This paper was drafted by Greta Swanson, ELI Visiting Attorney and co-PI on the Advancing Tribal Sovereignty in California project. Contributors included ELI staff Cynthia Harris, co-PI on the project; Zoe Vogel, Public Interest Law Fellow; Ashley Dawn Anderson, Law Clerk; Cecilia Diedrich, Staff Attorney and Managing Attorney for the project; Jesse Ferraioli, Research Associate; Victoria Molyneaux, Public Interest Law Fellow; and Matthew Steelberg, Pro Bono Law Clerk.

Additional contributing ELI staff includes: Alejandro Alvarez; Margaret Badding; Nancy Barrett; Kathryn Blanco; Lily Byrne; MacKayla Class; Michael DiFabrizio; Annalisse Eclipse; Anna Edmunds; Grace Gibson; Maria Irene Jandoc; Nina Jeffries; Priyanka Mahat; Albert Mancilla; Kenadi Mitchell; Kristine Perry; Rebecca Ramirez; Georgia Ray; Stanley Shaw; Bill Schultz; Danielle Straus; Miranda E. Tafoya; Natalie Triana; Jenny Tseng; Abhi Vishwanath; and David White.

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Cover photo of lands returned to the Lone Pine Paiute-Shoshone Reservation, courtesy of Janice Gonzales, provided by the California State Lands Commission (cropped from the original).

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Introduction

The Environmental Law Institute (ELI) partnered with the National Association of Tribal Historic Preservation Officers, Dr. Jamie Donatuto, and Swinomish Elder Larry Campbell† to evaluate implementation of two Tribal consultation laws in California, Senate Bill 18 (SB 18) and Assembly Bill 52 (AB 52), with an emphasis on the impacts on Native American Tribes. Together, the laws require consultation with California Native American Tribes when local governments create or amend general or specific plans and undertake development projects that trigger the California Environmental Quality Act (CEQA). ELI conducted background research, interviewed Tribal, agency, and local government representatives along with consultants and experts on the laws; conducted a survey of California Tribes; and partnered with two Tribes on case studies of their experiences with consultation. In addition, Dr. Donatuto completed a set of Indigenous Health Indicators (IHIs) with one of the partner Tribes, which the Tribe may use to advance its goals for holistic Tribal health in Tribal planning and the Tribe's interactions with local and state agencies.

The project also received direction from a California-based steering committee, two-thirds of which was comprised of members of California Tribes.

Background

After non-Native people arrived in California, Native Americans experienced displacement, disease, forced labor, and genocide. Although the U.S. federal government negotiated treaties with California Tribes in the 1850s that would have ensured a land base of 7,488,000 acres, about one-seventh of the state, California's U.S. senators opposed them and the Senate never ratified them.¹ The loss of land and decimation of their populations disrupted the link between land, culture, and wellness for Native Americans.² In the twenty-first century, however, the state of California has begun to reform its relationship with Tribes and learn from their traditional stewardship of the land to improve the environment and address emerging challenges such as climate change. As Tribes assert their sovereignty, they have sought recognition as sovereign nations, protection of and access to their cultural resources and places, control over their cultural patrimony, and ecological restoration of lands and forests, among other goals. They have been included as

¹ State of California Native American Heritage Commission, *Short Overview of California Indian History*, <https://nahc.ca.gov/native-americans/california-indian-history/>

² See, e.g., Native American Health Center, *California Reducing Disparities Project Native American Strategic Planning Workgroup Report* (2012), https://cpehn.org/assets/uploads/2021/05/Native_CRDP_Vision_Report_Compressed.pdf.

representatives in decision-making and advisory groups, and engaged in co-management. In 2004, the California legislature enacted requirements for government-to-government consultation with California Tribes during the local government planning process.³ In 2015, it passed legislation to require consultation by lead agencies as to impacts on Tribal cultural resources during environmental review under the California Environmental Quality Act (CEQA).⁴

Purpose of project and questions investigated

The purpose of the project was to improve environmental decision-making and support Tribal sovereignty in engagement and government-to-government consultation with Tribal nations for agency decisions that impact Tribal cultural sites and resources.

Specific goals and activities

First, ELI sought to evaluate the effectiveness of state and local Tribal consultation in California in achieving stated statutory goals and advancing Tribal sovereignty. Two key statutory purposes of consultation are to protect Tribal cultural resources and/or places that are significant to Tribes, and to maintain the confidentiality of Tribal information. Protection of culturally significant resources and places plays an integral role in maintaining a Tribe's sovereignty and culture, and is linked to Tribal holistic community health.

Second, the project developed a rubric of best practices and recommendations for improvement, based on the research and recommendations from Tribes and other interviewees.

Among project activities, the team:

- conducted research on and analyses of the laws, their histories and their interactions; best practices in consultation; history of Native Americans in California; and federal and international consultation;
- conducted wide-ranging interviews with Tribal representatives, legal experts, and agency representatives, resulting in a preliminary rubric;
- conducted case studies of Tribal consultation with two partner Tribes;

³ Senate Bill 18, Traditional Tribal Cultural Places (Chapter 905, Statutes of 2004) [hereinafter Senate Bill 18].

⁴ Assembly Bill 52, Native Americans: California Environmental Quality Act (Chapter 532, Statutes of 2014) [hereinafter Assembly Bill 52].

- disseminated a Tribal survey, both quantitative and qualitative; following up with interviews; disseminated survey to 141 federally recognized and non-federally recognized California Native American Tribes and received responses from 23 Tribes;
- developed a set of Indigenous Health Indicators, as a pilot tool for a partner Tribe to use prospectively to evaluate community health goals and impacts of projects and related planning; and to communicate those impacts to others.

The research; interviews with Tribes, agencies, and experts; case studies; and the Tribal survey identified issues with implementation in a number of areas. These were:

- confidentiality of Tribal information;
- consideration of Tribal expertise/Indigenous Knowledge with respect to Tribal cultural resources, sacred sites, and/or traditional cultural places;
- inadequate resources to effectively participate in consultation (unfunded mandate), overwhelming number of requests, need to improve Tribal involvement in a more systematic way to decrease the burden of multiple requests;
- quality of relationships between Tribes and agencies/local governments;
- notice of opportunity for consultation;
- procedures:
 - how consultation interacts with local planning and CEQA processes;
 - timeline, i.e., when consultation should take place in relation to the planning/project processes, and Tribes' needs for scheduling meetings and the consultation process;
 - protocols to follow; qualities of consultation;
- mitigation/preservation;
- accountability;
- institutionalizing agency procedures and knowledge;
- ex-ante protection of cultural resources; and
- education.

Overview of SB 18 and AB 52

This section highlights key elements of the laws, placing them in the context of their legislative history where applicable.

Tribes to which the consultation mandate applies

After non-federally recognized Tribes advocated during the legislative process to be included in the consultation mandates, the final versions of SB 18 and AB 52 both included the requirement to consult with non-federally recognized California Native American Tribes

as well as federally recognized Tribes.⁵ The Native American Heritage Commission (NAHC) is currently developing regulations for the contact list of California Native American Tribes, which will define a process identifying California Native American Tribes, affecting which non-federally recognized Tribes in California are eligible for consultation.⁶

Decision-making processes in which consultation is required

A series of legislative proposals dealt with the question of during which decision-making processes to require consultation. Ultimately, SB 18 and AB 52 as enacted require consultation for two processes: local government planning and lead agencies' consideration of environmental impacts for projects that trigger CEQA.

Governor Gray Davis vetoed a precursor bill to SB 18, SB 1828 (2002), that would have required agencies to consider Tribal cultural places/sacred sites within the CEQA process.⁷ AB 52 eventually did this and required consideration of Tribal cultural resources, (which can include sacred sites), under CEQA, creating "Tribal cultural resources" as a new category of environmental resources for which to consider significant environmental impacts.⁸

Weight and deference given to Tribal expertise and Indigenous Knowledge

A central legislative issue was the weight and degree of deference to be given to Tribal expertise and Indigenous Knowledge, and to the Tribe's proposed mitigation or preservation measures. SB 1828 would have placed a significant burden of proof on an agency if it chose to reject the Tribe's declaration that a project would have an adverse impact on a sacred site. A Tribe could submit substantial evidence to have a site determined to be sacred.⁹ The final version of SB 18, however, contained no mandates related to either of these issues.¹⁰ Only the Tribal Consultation Guidelines acknowledge that Tribes may be the only source of information as to their cultural places.¹¹ The Guidelines also emphasize that agencies should recognize that preservation may be the only acceptable answer for Tribes.¹²

Similarly, during the negotiation of AB 52, the legislature eliminated a provision that would have stated that the lack of a listing on or eligibility for the historic properties list did not

⁵ CAL. GOV'T CODE § 65352.3(a)(1); CAL. PUB. RES. CODE § 21080.3.1(b).

⁶ *Proposed Draft Contact List Regulations*, CAL. NATIVE AMERICAN HERITAGE COMM'N, <https://nahc.ca.gov/proposed-draft-contact-list-regulations/> (last visited Sept. 25, 2024).

⁷ S. B. 1828, Reg. Leg. Sess. 2001-2002 (vetoed by governor and died on file).

⁸ CAL. PUB. RES. CODE § 21074.

⁹ S. B. 1828, Reg. Leg. Sess. 2001-2002 (vetoed by governor and died on file).

¹⁰ Senate Bill 18, *supra* note 3.

¹¹ STATE OF CALIFORNIA GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, TRIBAL CONSULTATION GUIDELINES 17 (2005).

¹² *Id.* at 23.

mean that the cultural place or object would not qualify as a Tribal cultural resource.¹³ The final legislation was more ambiguous. If the resource was not listed on or eligible for a register of historic places, Tribal cultural resources can include “resources that the lead agency determines, in its discretion, are tribal cultural resources,” which determination “must be made using the criteria set forth in subdivision (c) of § 5024.1 of the historical register.”¹⁴ At the same time, the agency must consider the significance of the resource to the Tribe, ultimately making a decision that is supported by substantial evidence.¹⁵ Section 1(b) of the bill discusses the statutory purpose to involve Tribes in evaluation of Tribal cultural resources. Key statements are that the category of Tribal cultural resources is to include “the tribal cultural values in addition to the scientific and archaeological values when determining impacts and mitigation;” agencies are to “recognize that California Native American tribes may have expertise with regard to their tribal history and practices, which concern the tribal cultural resources with which they are traditionally and culturally affiliated” and “tribal knowledge about the land and tribal cultural resources at issue should be included in environmental assessments.”¹⁶

Under the Governor’s Office of Policy and Research (OPR) non-binding AB 52 Technical Advisory, the Tribe’s evidence can be substantial evidence, including “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.”¹⁷ Meeting minutes, anthropological reports, and tribal elder affidavits are evidence of a resource’s cultural significance as well. The Advisory also notes that under the Native American Graves Protection and Repatriation Act (NAGPRA,) cultural affiliation evidence includes geographical, kinship, biological, archeological, anthropological, linguistic, folklore, and oral tradition.¹⁸

Subject of consultation

Comparison of the meanings of traditional Tribal cultural places in SB 18, Tribal cultural resources in AB 52, and traditional cultural properties (or “places”) in Sec. 106 of the federal National Historic Preservation Act (NHPA), as interpreted by Bulletin 38, reveals key similarities and differences.¹⁹

¹³ Cal. Senate Committee on Environmental Quality, Bill Analysis, California Environmental Quality Act (CEQA): Native American Tribes (June 25, 2014), *available at* http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0051-0100/ab_52_cfa_20140623_115333_sen_comm.html.

¹⁴ CAL. PUB. RES. CODE § 21074.

¹⁵ CAL. PUB. RES. CODE § 21074(2).

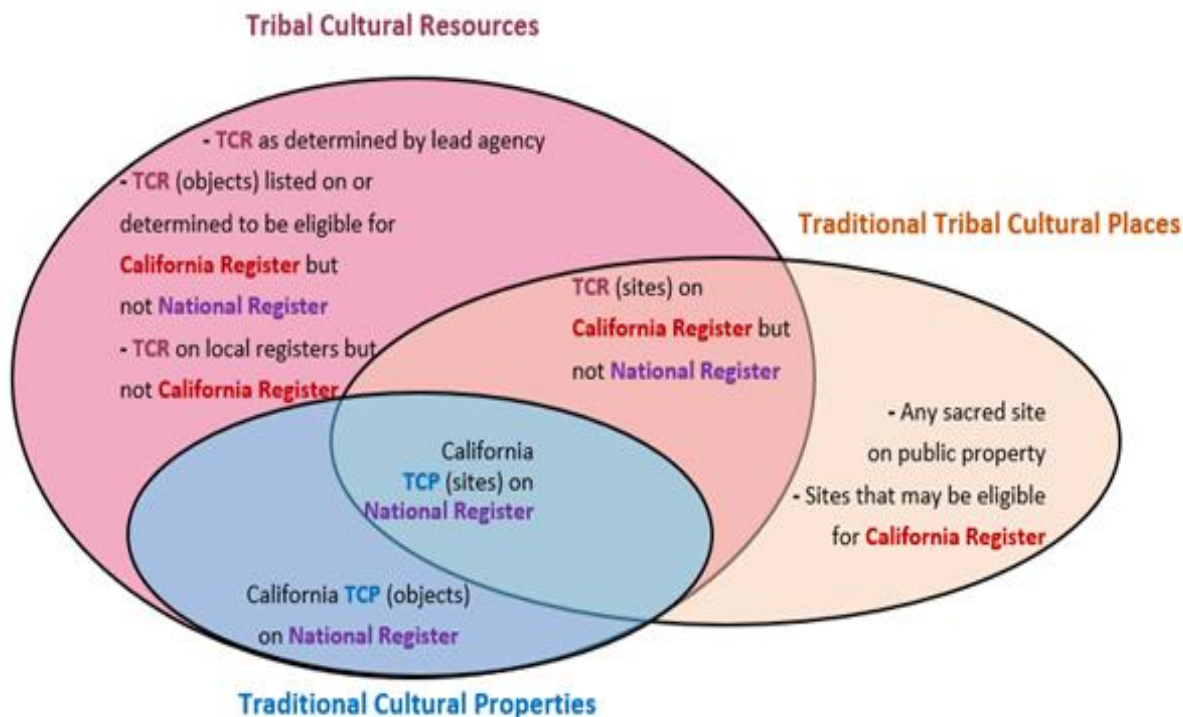
¹⁶ Assembly Bill 52, *supra* note 4, § 1(b)(4).

¹⁷ STATE OF CALIFORNIA GOVERNOR’S OFFICE OF PLANNING AND RESEARCH, TECHNICAL ADVISORY: AB 52 AND TRIBAL CULTURAL RESOURCES IN CEQA 5 (2017).

¹⁸ *Id.* at 5-6.

¹⁹ 54 U.S.C. § 306108; National Park Service, National Register Bulletin 38 [in revision]; CAL. PUB. RES. CODE § 21074; CAL. GOV’T CODE § 65352.3(a)(1), 65040.2(g)(1).

Comparison of definitions in SB 18, AB 52, and Section 106



Common to all three definitions is a reliance in whole or to a large extent on the definition of resources, properties, and/or places that are listed or eligible for listing in an historical register. California law generally follows the federal historic register requirements, with the additions of California register provisions and minor definitional differences. In different ways, SB 18 and AB 52 provide for identifying culturally significant resources/places of Tribes beyond current listings on the California register. SB 18 explicitly includes places described in Public Resources Code section 5097.9, which are any “Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine.”²⁰ The Guidelines note that this category as well as places listed or eligible for listing in the California register “can be inclusive of a variety of places. Archaeological or historic sites may include places of tribal habitation and activity, in addition to burial grounds or cemeteries. Some examples are village sites and sites with evidence (artifacts) of economic, artistic, or other cultural activity. Religious or ceremonial sites and sacred shrines may include places associated with creation stories or other significant spiritual history, as well as modern day places of worship. Collection or gathering sites are specific places where California Native Americans access certain plants for food, medicine, clothing, ceremonial objects, basket making, and other crafts and uses important to on-going cultural traditions and identities; these places may qualify as religious or ceremonial sites as well as sites that

²⁰ CAL. GOV'T CODE § 65352.3(a)(1), 65040.2(g)(1).

are listed or eligible for listing in the California Register of Historic Resources.”²¹ The AB 52 definition of Tribal cultural resources takes a different approach, requiring the agency to consider the importance of the resource to the Tribe together with *eligibility for listing* in an historic register. The agency has discretion to make the final decision, as long as it is supported by substantial evidence.²² Thus, the SB 18 definition allows for consideration of some places not in or eligible for the historic register, while the AB 52 definition allows the agency discretion to include a broad array of resources that include objects and landscapes based on their significance to the Tribe that are not listed but would be eligible for listing. A comparison chart is provided below. The Guidelines’ point that Tribes may be the only source of knowledge about the culturally significant places also applies to AB 52.

Reaching a decision after consultation

In making a final decision, the definition of consultation calls on the parties to make good faith efforts to seek consensus.²³ AB 52 additionally states that consultation concludes with one of two outcomes: either the parties agree to mitigation or avoidance measures addressing any significant impacts on TCR, or one or more parties, “acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached.”²⁴ However, neither the definition of consultation nor its conclusion provide any standards for doing so other than good faith and reasonable effort, which are not defined.

Confidentiality of Tribal information

Legislation also addressed the confidentiality of Tribal information. Both SB 18 and AB 52 direct that Tribes’ confidential information must not be disclosed.²⁵ An earlier 2003 version of SB 18 would have established criminal penalties (\$10,000 fine and/or up to one year imprisonment in county jail) for disclosing the location of traditional Tribal cultural places.²⁶ The final bill contained no penalties for such disclosure.

Confidentiality is to be a topic of consultation. In defining consultation, SB 18 states that “[c]onsultation shall also recognize the tribes’ potential needs for confidentiality with respect to places that have traditional tribal cultural significance,” which applies to open space consultation as well.²⁷ When considering a proposal for open space, the purposes include to determine the confidentiality required to protect the cultural site’s identity, location, and use; and to develop its appropriate treatment in any new or existing

²¹ STATE OF CALIFORNIA GOVERNOR’S OFFICE OF PLANNING AND RESEARCH, TRIBAL CONSULTATION GUIDELINES 4-5 (2005).

²² CAL. PUB. RES. CODE § 21074.

²³ CAL. GOV’T CODE § 65352.4; CAL. PUB. RES. CODE § 21080.3.2(b).

²⁴ PUB. RES. CODE § 21080.3.2(b).

²⁵ CAL. GOV’T CODE § 65352.3(b); CAL. PUB. RES. CODE § 21082.3(c).

²⁶ S. B. 18, Reg. Leg. Sess. 2003-2004 (Cal. 2004) (as amended by Assembly, Jul. 9, 2003).

²⁷ CAL. GOV’T CODE § 65352.4.

management plan.²⁸ The Guidelines elaborate that the setting of consultations should promote confidentiality and discuss ways to ensure confidentiality in the context of open meetings requirements.²⁹ In addition, a provision of the Public Resources Code prohibits the disclosure of certain Tribal information as an exception to the freedom of information requirements.³⁰

AB 52 prohibits public disclosure by any public agency of information about Tribal cultural resources that a Tribe submitted during the consultation process, unless the Tribe gives prior permission to disclose it. Such information may include location, description, and use. If a lead agency publishes Tribal information, the information must be restricted to a confidential index, unless the Tribe provides written consent to public disclosure.³¹ Agencies are allowed to summarize Tribal information in general terms if it is necessary to show support for a decision.³² The project applicant and the applicant's agent(s) must use a "reasonable degree of care" in maintaining confidentiality of the information. Consultation may include discussion of a plan for confidentiality.

Notice requirements and consultation timeline

The timing of consultation, which involves both timing of notice and the consultation process, is related to consideration of the Tribe's expertise and Indigenous Knowledge as well as incorporation of the Tribe's proposals for preservation and mitigation alternatives. Early notice to Tribes, before key plan or project decisions are made, is necessary in order for consultation, including the information and perspectives that Tribes provide, to have an impact on the final decision. A second aspect of timing is whether the agency makes key decisions before it concludes consultation, including fully considering the Tribe's information and views and completing discussions between the agency and Tribe.

Who is notified: SB 18 requires that when initiating a plan or plan amendment, local governments contact the NAHC for a list of Tribes culturally and historically affiliated with the area impacted and contact those Tribes using the contact information supplied by the NAHC.³³ For open space proposals, Tribes must first have notified the local government to be eligible to receive a consultation notice.³⁴ AB 52 requires only that agencies/local

²⁸ CAL. GOV'T CODE § 65562.5.

²⁹ STATE OF CALIFORNIA GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, TRIBAL CONSULTATION GUIDELINES 25-28 (2005); Ralph M. Brown Act, CAL. GOV'T CODE § 54950 *et seq.*

³⁰ California Public Records Act, CAL. GOV'T CODE § 6250 *et seq.*

³¹ CAL. PUB. RES. CODE § 21082.3(c)(1).

³² CAL. PUB. RES. CODE § 21082.3(c)(4).

³³ CAL. GOV'T CODE § 65352.3.(a)(1).

³⁴ CAL. GOV'T CODE § 65352.3(a)(1).

governments notify those Tribes that have previously requested to be notified of projects that trigger CEQA.³⁵

Notification timeline: SB 18 requires local governments, after initiating a general or specific plan or its amendment, to contact the NAHC for a list of culturally and traditionally affiliated Tribes, and then send notices inviting the Tribes to consult.³⁶ Tribes have 90 days to request consultation after receiving the notice.³⁷ Consultation is to be concluded before the final decision is made on the plan.³⁸ However, the requirements leave open how long a local government can take between initiating work on a plan and contacting the Tribes, and whether key decisions impacting the Tribe may be made before consultation is initiated or concluded. The non-mandatory Guidelines recommend that local governments make the contacts as early as possible, even before deciding to initiate work on a plan.³⁹

AB 52 sets out a strict timeline. The agency must contact Tribes within 14 days of “determining that an application for a project is complete” or deciding to undertake a project, Tribes have 30 days to request consultation after the notice, and the agency must begin consultation within 30 days of the Tribe’s request.⁴⁰ The agency must conclude consultation before it finalizes the environmental document, but the statute does not require concluding it before making key decisions affecting the Tribe.⁴¹

Tribal involvement in managing cultural sites and resources

SB 18 set as a goal and provided that consultation address the appropriate treatment of cultural sites specifically in open space.⁴² The Guidelines state that objectives of consultation include: developing proper treatment and management of open space; Tribal access to the cultural place; enabling Tribes to manage and act as caretakers of their cultural places; level of disclosure to protect Tribal information; and the Tribe’s recommendations for land management practices and limiting certain land uses.⁴³ Consultation about open space may discuss, for instance, encouraging “Tribal involvement in the treatment and management of the cultural place through contracting, monitoring, co-management, and other forms of joint local-tribal participation.”⁴⁴ AB 52 is silent on Tribal involvement in management of cultural resources post-consultation other stating as one of the statutory purposes to “[e]nable California Native American tribes to manage and accept

³⁵ CAL. PUB. RES. CODE § 21080.3.1(b).

³⁶ CAL. GOV’T CODE § 65352.3(a)(1).

³⁷ CAL. GOV’T CODE § 65352.3(a)(2).

³⁸ CAL. GOV’T CODE § 65562.5, 65092.

³⁹ STATE OF CALIFORNIA GOVERNOR’S OFFICE OF PLANNING AND RESEARCH, TRIBAL CONSULTATION GUIDELINES 12-13 (2005).

⁴⁰ CAL. PUB. RES. CODE § 21080.3.1.

⁴¹ CAL. PUB. RES. CODE § 21080.3.1(b), 21082.3(d)

⁴² CAL. GOV’T CODE § 65560(b)(5), 65562.5.

⁴³ STATE OF CALIFORNIA GOVERNOR’S OFFICE OF PLANNING AND RESEARCH, TRIBAL CONSULTATION GUIDELINES 15-16 (2005).

⁴⁴ *Id.* at 20.

conveyances of, and act as caretakers of, tribal cultural resources.”⁴⁵ The Tribal Consultation Guidelines apply to consultation under it as well.

Nexus between SB 18 and AB 52

ELI analyzed key issues in integrating SB 18 and AB 52 during the adoption or amendment of a local government general or specific plan. The following are the primary issues in the interactions of the two statutes.

- Whether a single notice or two different notices are sent.
- Which Tribes are notified—the same set of Tribes, or different sets.
- Timing of the notices in relation to initiating the plan, initiating the environmental analysis, Tribes’ responses, and beginning consultation.
- How the resources/places in question are defined, and whether the differences between the definitions of Tribal cultural resources or places under SB 18 and AB 52 make any difference in the resources/places actually considered in consultations on plans.
- Whether the agency complies with both laws separately, or consolidates consultation under a single law or single process.

A review of sample environmental impact reports suggests that local government practice varies widely. At times, the agency sends out separate notices. In such cases, either the AB 52 or SB 18 notice may be sent first, with the time between notices varied as well. In other cases, the notices are combined, usually quoting the language from one but not both of the statutes.

Notices may be sent to the same set of Tribes, or different sets. It was not always clear how agencies determine which Tribes to send notices.

In the small sample, there was no instance in which a difference in definitions between the two statutes resulted in different resources or places considered.

The analysis concluded that in some cases, some culturally affiliated Tribes may not be receiving notices; Tribes may not be given the full 90 days under SB 18 to respond to a notice about a plan; the timeline of sending notices and beginning both CEQA consultation and the planning process may be confusing at best; and the additional leeway in considering what are Tribal places under SB 18 may not be considered.

⁴⁵ Assembly Bill 52, *supra* note 4, § 1(b)(8).

Case studies

Case studies provided a few examples of a Tribe's, Dry Creek Rancheria Band of Pomo Indians', experiences with state and local government-to-government consultation and other forms of collaboration. The studies identified Tribal goals for the consultation or collaboration, the process as it unfolded under the applicable framework, and key aspects that contributed to achieving the Tribe's goals as well as any that interfered with reaching them.

Dry Creek Rancheria's goals for consultation on cultural and environmental or natural resources include maintaining connections to and caring for their homelands; maintaining and/or reestablishing culturally important sites and associated practices; and repatriating and returning ancestors and items of cultural patrimony to the Tribe.⁴⁶ Some of the Tribe's experiences with consultation included work prior to enactment of California consultation laws, under pre-AB 52 CEQA, the California Native American Graves Protection and Repatriation Act of 2001 (CalNAGPRA) prior to 2020 amendments, and a consultation under federal law with the U.S. Department of Transportation.

Aspects of the Tribe's consultation experiences that promoted the Tribe's goals included that:

- Dry Creek Rancheria and agency representatives developed a *positive relationship*;
- the agency *provided full information* in response to the Tribe's requests;
- the agency and project applicant *respected Indigenous Knowledge* and were willing to learn from Tribal experts;
- agency and Tribal representatives had the *authority to make decisions* on behalf of their respective parties; and
- both the Tribe and agency were *committed to resolving issues through consultation*.

Measures that would allow the Tribe to participate more effectively in consultations include:

- *sending the Tribe only those notices that are relevant to the particular Tribe's territory (and fewer notices overall)*, and
- *provision of additional resources* for the Tribe to fund personnel time and map Tribal resources.

⁴⁶ Interview with Sherrie Smith-Ferri, PhD., Tribal Historic Preservation Officer, Dry Creek Rancheria Band of Pomo Indians (June 26, 2023); Interview with Lacie McWhorter, Environmental Resources Technician, Dry Creek Rancheria Band of Pomo Indians (May 2, 2023).

Beyond consultation, Tribal interviewees stressed the importance of Tribes *participating in joint management arrangements and becoming members of decision-making bodies* in promoting Tribal goals during agency decision-making.

A second case study looked at Dry Creek Rancheria's participation as a decision-making member of the North Coast Resource Partnership (NCRP). Tribal involvement in decision-making in the NCRP advances Tribal perspectives and sovereignty in a few ways:

- Tribes are *at the table for decision-making*, with voting representatives in the decision-making bodies. Ad hoc committees include Tribal representatives, whose inclusion helps to incorporate Tribal perspectives as plans are developed.
- *Tribal representatives work to represent the interests of all Tribes in the region* in a unified way.
- *Tribal meetings* allow for Tribes to exchange ideas, learning from each other, and for consensus to be developed. Developing consensus among the Tribes helps to strengthen Tribal voices in the NCRP decision-making process.
- Another key to successfully including the views of Tribes is that a *staff member is paid to represent Tribes*. The Tribal Outreach Coordinator, who coordinates Tribe and Tribal representative meetings, brings Tribes' concerns to staff as well as other committees.
- Operationally, the NCRP seeks to provide assistance to Tribes to improve their involvement. Specifically, it *provides technical and financial support for grants to Tribes, including those with fewer resources*.⁴⁷

In addition, the goals, objectives, and scoring criteria of the NCRP *incorporate important Tribal principles*. These principles in turn help to prioritize Tribal projects that Tribes can shape and direct using traditional ecological knowledge and their own goals. The NCRP recognizes Tribes' concerns with restoring lands and waters in their traditional territories, and the Tribes' "inherent need to manage the land."⁴⁸ In the recently developed NCRP resiliency plan, two of the strategies involve Tribes and Tribal strategies in the management of public lands. One strategy is *Tribal co-management of public lands and increased use of cultural fire* and other Indigenous knowledge and practices. A second is to *engage with Tribes as sovereign nations, support Tribal leadership in public agencies, and support Tribal ecocultural restoration, stewardship, and co-management of public lands*.⁴⁹

⁴⁷ Telephone interview with Sherri Norris, Executive Director, California Indian Environmental Alliance (CIEA) (April 18, 2024).

⁴⁸ Interview with Sherrie Smith-Ferri, PhD., Tribal Historic Preservation Officer, Dry Creek Rancheria Band of Pomo Indians (June 26, 2023); Telephone interview with Sherri Norris, Executive Director, California Indian Environmental Alliance (CIEA) (April 18, 2024).

⁴⁹ NORTH COAST RESOURCE PARTNERSHIP, A VISION FOR NORTH COAST RESILIENCE: PRIORITIES FOR ENHANCING WATERSHED, FIRESHED, FOREST, AND COMMUNITY RESILIENCE IN THE NORTH COAST REGION (2022).

Gaps and opportunities include that because Tribes are a minority of voting members on the two decision-making bodies, the Technical Peer Review Committee (TPRC) and the Leadership Council (LC), they do not hold veto power for their interests. However, because the LC *nearly always makes its decisions by consensus*, Tribal perspectives are likely incorporated. In addition, Tribes are not represented individually but instead regionally through Tribal representatives, so individual Tribes do not engage in formal government-to-government consultation.

The grant to restore Dry Creek Rancheria lands allowed the Tribe to shape the project to its values and goals and use its Traditional Ecological Knowledge of the forest to implement the plan.⁵⁰ The NCRP supported the Tribe's goals for restoration and to steward the land, as well as implementing TEK.

Interview and survey synthesis and recommendations

Based on the interviews, Tribal survey, and case studies, this ELI synthesis identifies key issues and gaps in implementation, and makes recommendations for improvement. The issues arise prior to and in conjunction with consultation, during consultation, or after consultation.

Prior to and in conjunction with consultation

Confidentiality

Central idea: Confidentiality of Tribal information is essential for Tribes to maintain the integrity of cultural resources and places and must be ensured before Tribes share information about their culturally significant resources and places during consultation.

Status/Gaps: Laws do not provide sanctions for violation of confidentiality. The experience of Tribes is inconsistent—some agencies respect confidentiality while others do not. Confidentiality considerations can be a double bind. A Tribe might not share information because it has no assurance that the information won't be shared publicly. As a result, the agency may conclude that the Tribe doesn't have information and doesn't consult. The lack of information in the public record may also work against Tribes when challenging an agency decision.

Recommendations:

⁵⁰ Interview with Sherrie Smith-Ferri, PhD., Tribal Historic Preservation Officer, Dry Creek Rancheria Band of Pomo Indians (June 26, 2023); Interview with Lacie McWhorter, Environmental Resource Technician, Dry Creek Rancheria Band of Pomo Indians (May 2, 2023).

- Tribe and agency develop a non-disclosure agreement.
- Tribe limits information-sharing to one or two people.
- Tribe limits information that is shared.
- Agency follows SB 18 Guidelines recommendations for procedures to protect confidentiality.
- Update law or regulations to provide penalties for disclosure of confidential information

Relationships

Central idea: Good relationships that include respectful attitudes facilitate effective consultation. Numerous Tribes stressed the importance of having positive, ongoing relationships with decision-makers, relationships that require both sides to invest time and effort into building.

Status/Gaps: About one-third of Tribes overall and half of non-federally recognized Tribes reported that relationships with agencies have improved as a result of the consultation laws. However, there is a great deal of variation in relationships between Tribes and agencies. When good relationships are missing, agencies more frequently fail to understand the Tribal perspective, and are less likely to involve Tribes in planning and decision-making processes.

Recommendations:

- Tribes and agencies build good relationships and mutual respect to serve a variety of purposes, including providing the opportunity for agencies to better understand Tribal culture and concerns and Tribes to understand agency concerns; providing project/planning information to Tribes before consultation is triggered and allowing Tribes the opportunity to provide input; and fostering less formal but still collaborative decision-making.
- Agencies set up regular meetings, communications, or advisory committees with Tribes concerning upcoming and long-term projects and plans.
- Establish Tribal advisory committees to address and trouble-shoot issues in the consultation process.

Resources/limiting burden of consultation on Tribes

Central idea: Consultation is an unfunded mandate imposed on Tribes, many of which have limited time and resources generally and for consultation in particular.

Status/Gaps: The majority of Tribal respondents and overwhelming majority of non-federally recognized Tribes identified limited resources as constraining effective

participation in consultation. Tribes reported receiving too many consultation requests to be able to respond effectively, even when they are significant or relevant. Non-federally recognized Tribes in particular lack funding for a Tribal historic preservation officer and rely on volunteer time or inconsistent sources of funds. Tribal experts, who provide essential Tribal information for planning and projects, are not always paid.

Recommendations: These include additional funding for Tribes, including non-federally recognized Tribes, and other approaches to limiting the burden of multiple consultations on Tribes while still promoting the purpose of opportunities for consultation.

- Provide more resources to Tribes (from federal, state, and/or local government; or developers).
 - Fund more than one Tribal Historic Preservation Officer (THPO) per Tribe.
 - Fund a THPO position for non-federally recognized Tribes.
 - Increase funding to Tribes for multiple purposes: to research and manage data, educate Tribal members, attend consultations, support ongoing relationship-building, and provide additional expertise.
 - Compensate Tribal time and knowledge, including cultural surveys, at competitive rates.
 - Establish line item in agency budget to pay Tribal staff for consultation and/or members of Tribal advisory committees.
 - Create a permit system in which cultural resource management (CRM) firms and archaeologists must obtain Tribal permits from Tribes before beginning cultural surveys.
 - Agencies build up resources to assist Tribes with consultation, including staff or Tribal liaison dedicated to facilitating communication and consultation with Tribes.
 - Provide dedicated staff to represent Tribes and their concerns in ongoing communications and to maintain relationships with agencies at multiple levels.
- Limiting the burden of multiple consultations.
 - Creative and more efficient decision-making in accordance with the Tribe's agreement; collaborate on decisions and bring related projects into a single decision-making process.
 - Tribes collaborate on joint consultation, with explicit Tribal agreement.
 - Opportunities for Tribes to know of projects ahead of time so as to provide early input, sometimes alleviating the need for formal consultation.

Education

Central idea: Knowledge of both the requirements and recommendations for implementing the consultation laws, and of the culture, history and the Tribes with which agencies are consulting is a core element to effectively carrying out the laws.

Status/Gaps: Many Tribal respondents to the survey expressed that agencies need additional information on the consultation laws. Most of the Tribal respondents did not indicate a need for more information on the laws, although some non-federally recognized Tribes sought more education on the laws.

Recommendations:

- Where needed, ensure training for agencies or local governments on the consultation laws and the culture, history, and concerns of Tribes with which they may consult. Compensate Tribes to provide training where have expertise.
- Connect interested Tribes with free educational resources on consultation laws.
- Allow the consultation process to provide the opportunity for Tribes to education agencies about their history, culture and goals.

Institutionalizing agency procedures and knowledge

Central idea: Creating institutional knowledge and practices can help ensure that good practices are internalized by the agency instead of being entirely dependent on individual staff.

Status/Gaps: Tribes' widely varied experiences with agencies imply that some agencies have not institutionalized effective procedures.

Recommendations:

- Lead agencies build up and maintain core institutional knowledge through robust record-keeping practices to assist in staff transitions.
- Designate a Tribal relations office or Tribal liaison (or staff person for small agencies) dedicated to engaging Tribes and representing the agency in the consultation process, facilitating compliance with consultation laws.
- Lead agencies adopt a set of written standard operating procedures, policies, protocols, and handbooks and train staff and elected officials on a regular cycle. Policies can be adopted as statutes, ordinances, or regulations, or entered into as a MOU/MOA with Tribes.
- Establish inter- and intra-agency Tribal advisory committees to help develop Tribal policies and protocols. Compensate Tribal representatives for their time and expenses.

Ex ante protection of Tribal cultural resources and places

Central idea: For more effective protection of Tribal resources and places, protections could be established before development was considered. Options include removing areas of Tribal cultural resources and places from consideration for development, sensitizing agencies to the potential for disturbance, and/or using long-term planning as a means of protection. The declarations of SB 18, its provision for protection of open space, and Tribal Consultation Guidelines provide for these possibilities.⁵¹

Status/Gaps: Although an option in SB 18, very few to no instances of protection of land in open space and/or down-zoning have occurred among those Tribes interviewed. There has been some use of conservation easements, although they typically run to the agency, not the Tribe.

Recommendations:

- Develop at the regional/county level a robust database and associated mapping system, regularly updated with traditional Tribal lands and known locations of Tribal cultural resources, Traditional Tribal cultural places, and Traditional cultural places. This includes enforceable safeguards for confidentiality and exemptions from public disclosure requirements. The database could be used to indicate sites where development is inadvisable or prohibited.
- Remove highly sensitive areas from consideration for development through SB 18 provisions, open-space zoning, down-zoning, dedicated parkland, transfer of land to Tribes, conservation easements, prohibitions on development in and/or near Tribal cultural resources, Traditional Tribal cultural places, and Traditional cultural places, and restrictive covenants. Designate sites as historic or protected areas.
- Require developers/project proponents to conduct due diligence of potential project sites as part of the application and planning process. Lead agency staff would conduct investigations, including through the database, and provide pre-application notification to potentially impacted Tribes.
- Broader and higher-level planning to protect Tribal cultural resources, traditional Tribal cultural places, and traditional cultural places through a state-level oversight body, statute or regulations requiring higher-level planning and consultation by lead agencies, involving Tribes in state-level process.

⁵¹ CAL. GOV'T CODE § 65562.5; STATE OF CALIFORNIA GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, TRIBAL CONSULTATION GUIDELINES 9, 15 (2005).

During the consultation process

Notification

Central idea: Notification is the first step in consultation, without which consultation does not take place. Key issues are when to notify Tribes, who and how to contact, and information to provide. Early notification is necessary to give Tribes the opportunity to provide their perspective and information before key decisions are made.

Status/Gaps: The large majority of Tribal respondents have received notices for SB 18 and AB 52 consultation. Although the statutes call for early notification, sometimes key decisions are made before Tribes receive notice. One-third of respondents disagreed that they receive notices early enough to have an impact on a project, while one-third agreed.

Tribes do not always receive the information they need in notices or in response to requests, and they may be asked to pay for the information.

When they do not receive notices, Tribes indicate that it may be due to the AB 52 requirement for Tribes to proactively notify governmental agencies, or the agencies sending notices to the wrong Tribal department, not always contacting the NAHC for the list of Tribes, or the agency's misinformation about the Tribe's traditional territory.

Recommendations:

- Notification should occur early enough for the Tribe's input to be capable of altering the project's outcome and affecting changes in the plans/project, and early enough to impact the cultural resources management report.
- Provide a more flexible timeframe for Tribes to respond to a notice.
- Agencies consistently contact the Native American Heritage Commission for updated list of Tribes and their contacts.
- Agencies follow up with multiple contacts at the Tribe if no initial response to a consultation notice.
- Provide sufficient, not overwhelming information, and additional requested information at no cost to the Tribe.

Consultation timeline and process

Central idea: Agencies bear the burden of compliance with statutes and thus must ensure that the procedures followed, including the timeline and process, are adequate to engage Tribes in effective consultation. This requires being responsive to Tribal needs and concerns. SB 18 Guidelines call for agencies to obtain consultation protocols from Tribes and to develop joint protocols.

Status/Gaps: Two-thirds of Tribal respondents disagreed with the statement that the laws provide sufficient time for consultation. The time limits, particularly the AB 52 30-day limit to respond to a notice, can be too short for Tribes.

Recommendations:

- Provide flexible timeline for Tribes to respond to the invitation to consult, when needed.
- Accommodate Tribe's schedule in managing the consultation process.
- Consultation concludes before related decisions are made on project or plan.
- Defer to the Tribe's preferred consultation procedures or protocol if available; or, negotiate a consultation protocol between Tribe and agency.
- Consultation takes place between decision-makers/people authorized to speak and make decisions for the agency and Tribe.
- Mutually agree upon flexible agendas.
- Defer to the Tribe's preference on venue.
- Allow time and space in the agenda for the consultation process to provide an opportunity for education, to fill in gaps in the agency's understanding of the Tribe's culture, history, and concerns.

Consideration of Tribal expertise/Indigenous Knowledge

Central idea: Providing sufficient deference to a Tribe's expertise and perspective is a core element required to protect Tribal cultural resources and places and for Tribes to achieve their objectives. Deference to Tribal expertise can mean incorporating the Tribe's point of view as to the existence and significance of the cultural resource, and acknowledging the impacts on Tribes of impacts to the resource.

Status/Gaps: Approximately two-thirds of Tribal respondents overall and 83% of non-federally recognized Tribal respondents indicated that Tribal expertise/Indigenous Knowledge is not given sufficient weight in the decisions. More than half overall and all the non-federally recognized Tribes responded that archaeologist/cultural resource management firm knowledge is prioritized over Tribal expertise, even though the statute does not give it preference. Pre-permit reliance on archaeologists to do a cultural resource survey can miss identifying cultural resources not on state databases but known to a Tribe. Such pre-permit reliance can result in consultation that is not meaningful because the environmental impact report (EIR) has already concluded that there are no Tribal cultural resources. One respondent noted that cultural resource management firms have the power to perpetuate inaccurate cultural knowledge, but also to contribute true and accurate Tribal history and culture by working with Tribes to ensure that information is accurate and correct. Some Tribes have found cultural resource management firms with

which they can form good relationships and collaborate on the determination of Tribal cultural resources.

Recommendations:

- Consider Tribal expertise/Indigenous Knowledge early in the cultural resource survey together with any archaeologist evaluation.
- Give at least equal weight to Tribal knowledge versus cultural resource management firm/archaeological knowledge. Defer to Tribal knowledge in case of conflict.
- Pre-permit/initial cultural resource survey should involve Tribes if they wish to be involved. Don't allow a cultural resource management firm's initial finding of no Tribal cultural resources or sites to determine whether to contact the Tribe for consultation.
- Agencies prioritize working with cultural resource management firms/archaeologists that have good working relationships with Tribes.
- Pay Tribal staff for their expertise and time at competitive rates, including for the initial survey and whenever the Tribe's information is involved.
- Impose penalty for failure of CRM firms/archaeologists to consult with Tribes.
- Use state-wide plant database to help identify culturally important plants.

Outcomes/creative mitigation

Central idea: Tribes seek a wide range of creative options for preserving their resources and places and/or mitigating impacts on them. Current practice can limit the range of options. Early involvement should allow for full consideration of alternatives and ways to avoid impacts as much as possible. Tribes seek the ability to ensure that a project avoids cultural resources, to make changes in design ahead of construction, and/or use other creative mitigation measures that are implemented before final decisions are made on the design and location of the project.

Status/Gaps: For a minority of Tribal respondents, the consultation laws have improved decisions. They have given about one-fourth of the Tribes that responded the ability to change projects early to avoid or mitigate impacts, and about one-fourth experienced more effective consultation. About one-third agreed that there was greater protection of the Tribe's cultural resources, although a very small minority of non-federally recognized NFR Tribes indicated this. Only a very small group agreed that healing had taken place as a result of the laws. Interviews suggested that decisions that limit the range of mitigation options available are often made at the outset of a project and mitigation options are frequently limited in practice, with much mitigation consisting solely of using a Tribal monitor during project construction.

Recommendations:

- Ensure early involvement of Tribes that allows for full consideration of alternatives to avoid impacts as much as possible before making final decisions on the project. Approaches include avoiding cultural resources, changing design ahead of construction, and/or other creative mitigation measures. Consider the Tribe's proposals for alternatives.
- Consider the implications for healing in evaluating preservation and mitigation options.
- Change the laws to require a Tribe's assent to any project or cultural project related to the Tribe.

After consultation is concluded

Accountability

Central idea: The consultation laws do not explicitly include means of holding agencies accountable.⁵² Decisions made during consultation may not always be effectively communicated to project developers. The lack of a "hook" to ensure agency accountability is experienced by many Tribes as a gap in effective implementation.

Status/Gaps: Most Tribes neither agreed nor disagreed as to whether measures agreed to during consultation were implemented. About one-fourth disagreed that they were implemented. Comments indicated that decisions are not always communicated to the construction firm or that on-the-ground coordination is lacking or does not accommodate a Tribal Historic Preservation Officer's schedule. In addition, the concern that Tribal management or monitoring is not built into measures is a significant gap. Many identified issues with accountability, noting that the laws do not have accountability built into them.

Recommendations: Suggestions cover several categories, from practice to changing the laws.

- Create written account of decisions made during consultation, as recommended in the Tribal Consultation Guidelines and AB 52 Best Practices.
- Include enforceable provisions, to include a memorandum of understanding or programmatic agreement. Ensure that agreed-upon mitigation measures are enforceable, including as permit conditions, binding agreements and foreclosing conflicting land uses via zoning, conservation easements and restrictive covenants or enforceable contracts between Tribes and agencies/project proponents.

⁵² Tribes have, however, sued on a failure to comply with AB 52 requirements for consultation with Tribes. The California Attorney General's office has also filed amicus briefs alleging violations of AB 52. *See, e.g.,* Brief of Attorney General Rob Bonta as Amicus Curiae in Support of Appellant, Koi Nation of Northern California v. City of Clearlake, Cal. Ct. of App., 1st Div., Case No. 423786 (filed Oct. 17, 2023), *available at* <https://oag.ca.gov/system/files/attachments/press-docs/Clearlake%20Amicus%20Brief.pdf>.

- Ensure coordination with construction firms to ensure implementation of decisions made during consultation.
- Ongoing monitoring/management: Plan for future of project, including maintenance and expansion, in which the Tribe is regularly apprised of ongoing action involving the project. Provide avenues for Tribes to be involved in ongoing management of cultural places in open space. Monitoring role for Tribes for mitigation measures.
- Accessible dispute resolution options: Establish accessible appeal process/means other than litigation of holding agencies accountable. Lower barriers to Tribes pursuing litigation. State-level oversight body responsible for enforcement consultation laws and permit conditions.
- Change laws to improve accountability of agencies in consultation. Provide strong repercussions for developers who damage cultural resources in violation of permit conditions.

Comparison of SB 18 and AB 52 with recommendations

A comparison of SB 18 and AB 52 provisions with the recommendations reveals that the laws leave numerous gaps that do not adequately address key concerns of Tribes. A summary chart is below.

Comparison of consultation laws with recommendations: (summary chart)

Element of consultation	SB 18	AB 52
Confidentiality	part of definition of consultation; no mandatory elements; no repercussions for violation	part of definition of consultation; no mandatory elements; no repercussions for violation
Relationships	not discussed	not discussed
Resource limitations and burden of consultation	not discussed other than suggested adjustments to timeline	not discussed
Education	Guidelines recognize that consultation can provide an agency an opportunity to learn about Tribe's history and goals; no mandatory elements	Guidelines recognize that consultation can provide an agency an opportunity to learn about Tribe's history and goals; no mandatory elements

Element of consultation	SB 18	AB 52
Early notification	trigger not clearly defined; follow-up by agency not clearly defined	trigger may occur after cultural resource surveys and other key project design decisions already made
Timeline and procedures	no specific timeline requirements other than completing consultation before plan approval; guidelines encourage agencies to create protocols with Tribes	no specific timeline requirements other than completing consultation before environmental document is finalized
Tribal expertise and Indigenous knowledge	recognition in Guidelines that Tribe may be only source of knowledge as to a place; no mandatory elements	statute unclear as to how much weight to give to Tribal expertise; agency is to take into account the importance of a resource to the Tribe; no guidelines for weighting Tribal expertise versus archaeological expertise
Outcomes and creative mitigation	Guidelines recognize that preservation may be only acceptable option to Tribe; no mandatory elements	agency may but is not required to consult on Tribe's preferred mitigation measures
Accountability	no easily accessible recourse for failure to follow consultation requirements	no easily accessible recourse for failure to follow consultation requirements
Institutionalizing agency procedures and knowledge	not mentioned	not mentioned
Prior protection of Tribal resources and places	Open space planning may provide opportunity to protect Tribal cultural places; placing place on an historic preservation list	may place site/resource on an historic preservation list

Although the laws do not specifically address several concerns, the recommendations in this white paper are largely oriented to Tribal, state agency and local government practice of consultation, which changes could result in more effective consultations with Tribe and engagement in joint decision-making with agencies. In cases where differences are not resolved, mandatory elements that penalize the disclosure of confidential information, provide resources to Tribes, give greater weight to Tribal information, ensure Tribal

involvement before key decisions are made, ensure agency education, and provide a dispute resolution process would improve effectiveness of the consultation laws.

Conclusion

This project to evaluate the effectiveness of government-to-government consultation under California's SB 18 and AB 52 took several approaches. The team evaluated the laws from a legal and historical perspective; looked at environmental impact reports; conducted interviews with Tribal, state, and local officials and staff and with legal experts and consultants; conducted a survey of Tribes; researched case studies of consultation; and created a set of Indigenous Health Indicators for a partner Tribe.

Through the research, ELI found that the laws have increased consultation opportunities for the majority of Tribal respondents. For at least a significant minority of Tribal respondents, they have improved the effectiveness of consultation, resulted in better relationships, ensured that Tribes receive notice early enough for Tribal input to have an impact on the project outcome, and resulted in greater protection of Tribal cultural resources. However, many gaps remain in implementing the laws effectively to ensure that for all California Tribes, Tribal goals, interests, and knowledge are fully taken into account during consultation. Among these gaps are the need to ensure confidentiality, give greater weight to Tribal expertise and Indigenous Knowledge, and have real impact on planning and development in order to protect Tribal resources.