



AB 52: BEYOND THE LETTER OF THE LAW

The California Environmental Quality Act (CEQA) is a fact of life for the development process in California. A recent addition to the CEQA process is the Native American Historic Resource Protection Act (Assembly Bill 52 or AB 52), which is intended to minimize conflict between Native American and development interests. AB 52 adds “tribal cultural resources” (TCR) to the specific cultural resources protected under CEQA, and it requires lead agencies to notify relevant tribes about development projects. It also mandates lead agencies to consult with tribes if requested, and sets the principles for conducting and concluding consultation.

THE CONTEXT

The 1970s witnessed a renewal of Native Americans’ efforts to reverse or prevent the loss of their traditional sites, cemeteries, and artifacts. The federal government implemented legislation from the American Indian Religious Freedom Act to the Native American Graves Protection and Repatriation Act, none of which was entirely successful as protection for TCRs. In 2004, California’s Senate Bill 18 (SB 18) required cities and

counties to consult with tribes about major planning efforts and their potential impact on traditional sites. Assembly Bill 52 takes another step down that road by modifying the CEQA process to require analysis of impacts to TCRs specifically and by establishing a consultation process for lead agencies and California tribes. Projects subject to AB 52 are those that file a notice of preparation for an EIR or notice of intent to adopt a negative or mitigated negative declaration on or after July 1, 2015. However, the Governor’s Office of Planning and Research (OPR) still has until July 1, 2016, to develop guidelines, and the Native American Heritage Commission (NAHC) has until then to inform tribes which agencies are in their traditional area.

BUILD A RELATIONSHIP, NOT A CHECKLIST

Project consultation is not a new process. Federal agencies have been consulting with tribes for at least 20 years, as have state departments of transportation (because of federal funding for roads). Case studies of Native American consultation processes show that, across the board, building trust

and working relationships is essential for successful consultation. Early and ongoing dialogue between tribes and lead agencies seems to be *the* key condition of success, and both federal and tribal agencies recommend it in their guidelines.¹

One reason is that, without the trust that comes from a relationship, tribes may be reluctant to divulge resource locations, and lead agencies may doubt tribes’ information. It takes time to uncover and overcome the impediments on both sides.

The cultural divide between Native and non-Native Americans is very real. Many people don’t know *what* Native Americans consider important, much less understand *why* they are important.² For instance, rock art, i.e., petroglyphs and pictographs, is not what we normally think of as art, but a “spiritual union with the rock,”³ which is itself a living thing with a soul. Rock art and its location may both be sacred, and to remove, destroy, or even add to it is considered desecration.⁴

Another example involves scientific data recovery. Many agencies consider this sufficient mitigation for cultural resources impacts, but tribe members may consider it theft or even desecration, depending on

Endnotes

1. Studies include “Best Practices in State-Tribal Consultations: Findings from Oregon”; “In Their Own Light: A Case Study in Effective Tribal Consultation”; “Successful Practices for Effective Tribal Consultation”; Federal Highway Administration, “Case Studies,” http://www.fhwa.dot.gov/planning/processes/tribal/case_studies/.
2. Gregory Greenberg, “Beneficial Bill or Bust? A Critical Analysis of Senate Bill 18 (SB 18),” master’s thesis submitted to CSU Sonoma, 2010, p. 60, https://sonoma-dspace.calstate.edu/bitstream/handle/10211.1/1381/greenbergG_Thesis.pdf?sequence=1.
3. Ojibwa, “American Indian Sacred Places,” Native American Netroots, December 17, 2009, <http://nativeamericannetroots.net/diary/315>.
4. “California Petroglyphs Damaged and Stolen, Tribes and Authorities Stunned,” Indian Country Today Media Network.com, November 23, 2012, <http://indiancountrytodaymedianetwork.com/2012/11/23/california-petroglyphs-damaged-and-stolen-tribes-and-authorities-stunned-145801>.
5. Governor’s Office of Planning and Research, “Tribal Consultation Guidelines: Supplement to General Plan Guidelines,” 2005, pp. 4–5, http://www.opr.ca.gov/docs/011414_Updated_Guidelines_922.pdf.
6. Public Resources Code (PRC) §§ 21074(a)(1) and (2).
7. PRC §§ 21080.3.1–3.3.
8. OPR, “Tribal Consultation Guidelines”; National Association of Tribal Historic Preservation Officers, “Tribal Consultation: Best Practices In Historic Preservation,” 2005, http://www.nathpo.org/PDF/Tribal_Consultation.pdf.
9. California Code of Regulations § 15300.2(f).
10. PRC § 21080.3.1(d).
11. PRC § 21080.3.1(b).
12. OPR, “Discussion Draft Technical Advisory: AB 52 and Tribal Cultural Resources in CEQA,” 2015, p. 2, http://www.opr.ca.gov/docs/DRAFT_AB_52_Technical_Advisory.pdf.
13. OPR, “Tribal Consultation Guidelines,” p. 3.

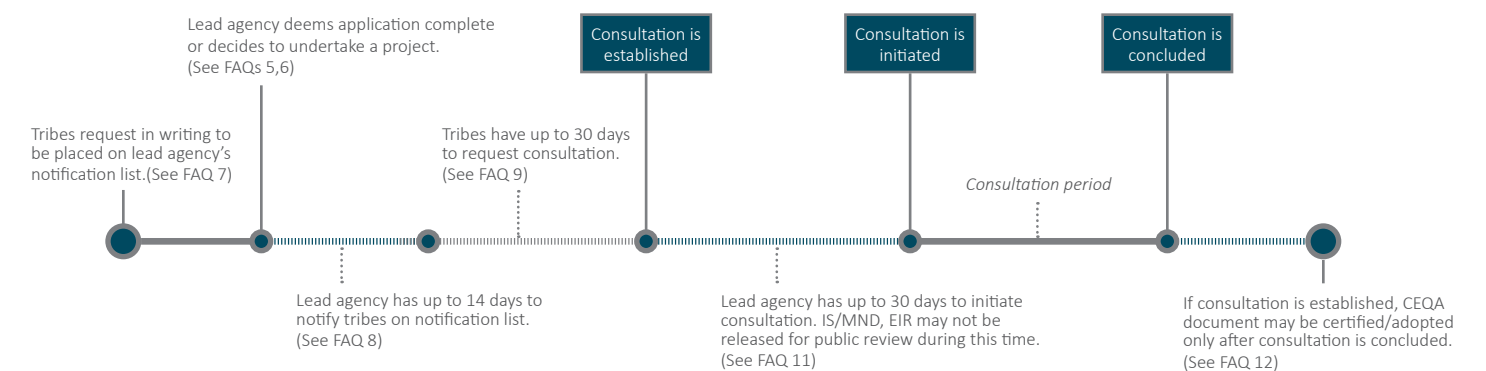
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AB 52 CONSULTATION TIMELINE





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the resource and the tribe. And not all tribes hold the same beliefs; a lead agency won't know what a tribe values until it establishes a relationship with that tribe. Good working relationships between lead agencies and tribes can facilitate the development process and save time and money.

FAQs FOR LEAD AGENCIES

1. *What is a "tribal cultural resource"?* Under AB 52, a TCR is defined in a similar way to tribal cultural places under SB 18⁵—sites, features, places, cultural landscapes (must be geographically defined in terms of size and scope), sacred places, and objects with cultural value to a California Native American tribe that are either included or eligible for inclusion in the California Register of Historic Resources or included in a local register of historical resources. Or the lead agency, supported by substantial evidence, chooses at its discretion to treat the resource as a TCR.⁶
2. *How is traditional and cultural affiliation with a geographic area determined?* Tribes make that determination. Because reservations may not be anywhere near a tribe's traditional geographical "home," lead agencies should not make assumptions about which tribes could be affected by a project. The NAHC can provide information on which tribes may be traditionally and culturally affiliated with a geographic area.
3. *Do I still have to comply with SB 18?* Yes, if you are a city or county adopting or amending a general or specific plan or designating new open space, you must ask NAHC for contacts and ask those tribes if they want to consult, whether or not you have heard from them under AB 52. However, the timeline for SB 18 is different than for AB 52: e.g., SB 18 has no mandated beginning date and gives tribes 90 days to request consultation.

CONSULTATION PROCESS SUMMARY

1. A California Native American tribe asks agencies in the geographic area with which it is traditionally and culturally affiliated to be notified about projects. Tribes must ask in writing.
2. Within 14 days of deciding to undertake a project or determining that a project application is complete, the lead agency must provide formal written notification to all tribes who have requested it (see FAQ 8).
3. A tribe must respond within 30 days of receiving the notification if it wishes to engage in consultation.
4. The lead agency must initiate consultation within 30 days of receiving the request from the tribe.
5. Consultation concludes when both parties have agreed on measures to mitigate or avoid a significant effect to a TCR, or
A party, after a reasonable effort in good faith, decides that mutual agreement cannot be reached.
6. Regardless of the outcome of consultation, the CEQA document must disclose significant impacts on TCRs and discuss feasible alternatives or mitigation that avoid or lessen the impact.⁷

If you already have relationships with the tribes, the two processes should be easier to coordinate.

4. *What do I do until OPR issues guidelines?* OPR suggests including a question about TCRs in the "Cultural Resources" section of the environmental document:

Would the project cause a substantial adverse change in the significance of a tribal cultural resource as defined in Public Resources Code 21074?

Good guidelines for consultation are OPR's "Tribal Consultation Guidelines: Supplement to General Plan Guidelines" and the National Association of Tribal Historic Preservation Officers' "Tribal Consultation: Best Practices in Historic Preservation."⁸

5. *Is consultation required for addendums or notices of exemption (NOEs)?* No, AB 52 is applicable only to CEQA projects where public noticing is required.

However, if the project would impact a historical resource—*aka* TCR—an NOE cannot be used.⁹ If a lead agency already has established relationships with tribes, it may already have the needed information or know the relevant person to ask.

6. *Should notification for consultation be sent to tribes if the type of environmental document is unknown?* The deadline for notifying tribes is not tied to the release of CEQA notices, but to the larger project schedule, i.e., when a lead agency decides to undertake a project or determines a project application is complete. If the lead agency is not sure which type of document will apply, it will have to use its own judgment to decide whether or not to notify tribes. This is a gray area that OPR will hopefully clarify in its guidelines. Until then, act according to which document is the most likely, but err on the side of caution.

7. *What if no tribes have asked to be notified?* It's up to tribes to let agencies know they want to be notified, but NAHC has until July 1, 2016, to give each tribe its list of relevant agencies. Until then, it is at the discretion of lead agencies whether to ask the NAHC for relevant contacts of tribes who have not requested notification and notify them about projects.
8. *What should be included in the notification letter sent to tribal groups?* The lead agency must include a brief project description, project location, and the lead agency's contact information. It must also inform the tribal group that it has 30 days to request consultation.¹⁰ Beyond these requirements, the lead agency should include any information it already has about sacred lands affiliated with that tribe and any other information that could prove pertinent, especially the archaeological records search.
9. *What if more than one tribe requests consultation?* If you have to consult with more than one tribe, conduct separate consultations, at least at first. Different tribes and individual tribal representatives may work in different ways. If some tribes are willing to collaborate or already do, ask each party's permission to combine consultation.
10. *What are the requirements for documenting the process?* There are no special requirements for documenting the consultation process under AB 52. However, we recommend carefully documenting interactions and setting general parameters with each consulting tribe on the documentation process.
11. *How does consultation affect the release of a CEQA document for public review?* Between the time when a tribe "establishes" consultation and a lead agency "initiates" consultation, a CEQA

document cannot be released for public review (see p. 1 timeline).¹¹ Initiating consultation could potentially take up to 74 days if all the maximum time allotments are used. A lead agency can shorten the time frame by sending tribal notifications in less than the allotted 14 days and by initiating consultation in less than the allotted 30 days. The tribes still have 30 days to request consultation.

12. *Can the lead agency certify an environmental impact report—or adopt a mitigated negative declaration—if the lead agency and tribe cannot agree on mitigation for a significant impact to a TCR or even if an impact is significant?*

A lead agency can certify or adopt a CEQA document under one of these scenarios: 1) A tribe does not request consultation within 30 days of being notified; 2) consultation is established, but the tribe does not engage in the process or provide comments; 3) consultation in good faith fails to produce an agreement; or 4) consultation produces an agreement. If a significant impact to a TCR is identified, CEQA requires a lead agency to identify and implement all feasible mitigation measures to reduce it, regardless of the outcome of AB 52 consultation.

AB 52 vs SB 18

	AB 52	SB 18
Purpose	"ensure that local and Tribal governments, public agencies, and project proponents have information available, early in the project planning process, to identify and address potential adverse impacts to tribal cultural resources." ¹²	"provide California Native American tribes an opportunity to participate in local land use decisions at an early planning stage, for the purpose of protecting, or mitigating impacts to, cultural places." ¹³
Process	CEQA.	Planning.
Guidelines	OPR recommends same best practices as SB 18 for consultation; specific guidelines due July 2016.	OPR's Tribal Consultation Guidelines (2005)
Confidentiality	Yes.	Yes.
Who must comply	Any CEQA lead agency—agencies, districts, jurisdictions, etc.	Cities and counties only.
Projects affected	All projects subject to CEQA that prepare an ND, MND, or EIR.	General plans, specific plans, and their amendments; some designations of new open space.
Focus of protection	Tribal cultural resources, including places.	Tribal cultural places.
Initial contact	Tribes request notification of projects.	Jurisdiction initiates contact with NAHC and tribes.
Consultation timeline after initial contact	Lead agency has 14 days to notify about project; tribes have 30 days to respond; lead agency has 30 days to initiate consultation.	NAHC has 30 days to respond to lead agency request; after jurisdiction notifies tribes, tribes have 90 days to request consultation.
Mitigation	Mandated to apply feasible mitigation for significant impacts.	Encouraged to mitigate impacts.