

# TRIBAL CONSULTATION UNDER AB 52: REQUIREMENTS AND BEST PRACTICES

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# Presentation Outline

- Defining Tribal Consultation
- Goals of Tribal Consultation (AB 52 or Otherwise) for Planning
- AB 52 Tribal Consultation Procedural Requirements
- AB 52 Tribal Consultation Substantive Requirements
- NAHC's Proposed AB 52 Tribal Consultation Best Practices
- Five Most Important Things Agencies Should Know About AB 52

# Defining Tribal Consultation

- Public Resources Code §21080.3.1 (a) and Government Code §65352.4 defines consultation as, “[T]he meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance.”

# Defining Tribal Consultation

- OPR's SB 18 *Tribal Consultation Guidelines* provide further explanation of what “consultation” means. For example, the *Guidelines* explain that consultation “is a process in which both the tribe and local government invest time and effort into seeking a mutually agreeable resolution for the purpose of preserving or mitigating impacts to a cultural place, where feasible.” (At p. 15.) (Emphasis added.)
- It further states, “Effective consultation is an ongoing process, not a single event. The process should focus on identifying issues of concern to tribes pertinent to the cultural place(s) at issue – including cultural values, religious beliefs, traditional practices, and laws protecting California Native American cultural sites – and on defining the full range of acceptable ways in which a local government can accommodate tribal concerns.” (At p. 16.) (Emphasis added.)

# Goals of Tribal Consultation (AB 52 or Otherwise) for Planning

- Get needed information in order to preserve the options of avoidance of cultural resources or preservation in place early in the planning process.
- Build working relationships with tribes that are traditionally and culturally affiliated to the project area or to your agency's geographic area of jurisdiction.
- Avoid inadvertent discoveries of Native American burials and work with tribes in advance to determine treatment and disposition if burials are inadvertently discovered.
  - Statutory and CEQA Guidelines procedures for inadvertent discoveries of Native American burials differ from CEQA tribal consultation regarding impacts to cultural resources – only option upon impasse with a tribe is to reinter the remains on the property in an area without further subsurface disturbance. (Pub. Resources Code § 5097.98, subd. (e); Cal. Code Regs., tit. 14, § 15064.5, subd. (e)(2)).

# AB 52 Tribal Consultation Procedural Requirements

- Prerequisites for AB 52 Tribal Consultation

- Applies to any project for which a Notice of Preparation, Notice of Mitigated Negative Declaration or Notice of Negative Declaration is filed on or after July 1, 2015. (Stats. 2114, ch. 532, § 11 (c)).
- A tribe that is traditionally and culturally affiliated to the geographic area where a project is located must have requested that the lead agency in question provide, in writing, notification to the tribe of projects in the tribe's area of traditional and cultural affiliation. (Pub. Resources Code § 21080.3.1 (b)).

# AB 52 Tribal Consultation Procedural Requirements

- Timeline and Notice Requirements: Five Steps
- Step One: Tribe Requests Notification
  - In order to participate in AB 52 tribal consultation, a tribe must request, in writing, to be notified by lead agencies through formal notification of proposed projects in the geographic area with which the tribe is traditionally and culturally affiliated. (Pub. Resources Code § 21080.3.1, subd. (b)).
  - Without this request, there is no requirement that a lead agency engage in AB 52 tribal consultation.
  - Failure to request notification does not preclude non-AB 52 tribal consultation (more on this later).

# AB 52 Tribal Consultation Procedural Requirements -- Timeline and Notice

- Step Two: Notification by Lead Agency
  - Within 14 days of determining that an application for a project is complete or of a decision by a public agency to undertake a project, a lead agency must provide formal notification to the designated contact or tribal representative of traditionally and culturally affiliated California Native American tribes that have requested notice (Step One). (Pub. Resources Code § 21080.3.1, subd. (d)).

# AB 52 Tribal Consultation Procedural Requirements -- Timeline and Notice

- Step Two (cont'd): This notice shall be accomplished by at least one written notification that includes:
  - A brief description of the proposed project;
  - The project's location;
  - The lead agency contact information; and
  - Notification that the tribe HAS 30 DAYS TO REQUEST CONSULTATION. (Pub. Resources Code § 21080.3.1, subd. (d)).

# AB 52 Tribal Consultation Procedural Requirements – Timeline and Notice

- Step Three: Tribe Requests Consultation
  - The tribe must respond, in writing, within 30 days of receipt of the formal notification and request consultation.
  - When responding to the lead agency, the tribe shall designate a lead contact person.
  - If the tribe does not designate a lead contact person or designates multiple lead contact persons, the lead agency shall defer to the person listed on the contact list maintained by the NAHC for SB 18 consultation. (Pub. Resources Code § 21080.3.1, subd. (b)).

# AB 52 Tribal Consultation Procedural Requirements – Timeline and Notice

- Step Four: Lead Agency Begins Consultation
  - The lead agency shall begin the consultation process within 30 days of receiving a California Native American tribe's request for consultation and prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report. (Pub. Resources Code § 21080.3.1, subds. (b) & (e)).
  - For purposes of AB 52, “consultation” shall have the same meaning as provided in SB 18 (Govt. Code Section 65352.4). (Pub. Resources Code § 21080.3.1, subd. (b)).

# AB 52 Tribal Consultation Procedural Requirements – Timeline and Notice

- Step Five: Conclusion of Consultation
  - Consultation is concluded when either of the following occurs:
    - The parties agree to measures to avoid or mitigate a significant effect, if a significant effect exists to a tribal cultural resource; or
    - A party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached. (Pub. Resources Code § 21080.3.2, subd. (b)).

# AB 52 Tribal Cultural Substantive Requirements – Tribal Cultural Resource

- Section 21074 of the Public Resources Code defines “tribal cultural resources.” In brief, a resource is a “tribal cultural resource” if it is either:
  - (1) Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a tribe that are listed, or determined to be eligible for listing, in the national or state register of historical resources, or listed in a local register of historic resources; or
  - (2) a resource that the lead agency determines, in its discretion, is a tribal cultural resource.
- OPR *Technical Advisory: AB 52 and Tribal Cultural Resources in CEQA* (At p.3)

# AB 52 Tribal Cultural Substantive Requirements – Tribal Cultural Resource

- According to OPR's *Technical Advisory*, evidence that may support such a finding could include, among other evidence:
  - 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
  - Historical notes, such as those found in the Harrington Papers and other anthropological records.
- OPR *Technical Advisory: AB 52 and Tribal Cultural Resources in CEQA* (At p.3)

# AB 52 Tribal Consultation Substantive Requirements – Avoidance

- Public Resources Code §21084.3 (a) states that, “Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource.”
  - Avoidance and preservation of the resources in place, including, but not limited to, planning and construction to avoid the resources and protect the cultural and natural context, or planning greenspace, parks, or other open space, to incorporate the resources with culturally appropriate protection and management criteria.

# AB 52 Tribal Consultation Substantive Requirements – Mitigation

- Culturally appropriate mitigation for a tribal cultural resource is different than mitigating impacts to archeological resources and appropriate mitigation measures should be identified through consultation with the tribal government.
- If the lead agency determines that a project may cause a substantial adverse change to a tribal cultural resource, and measures are not otherwise identified in the consultation process, new provisions in the Public Resources Code describe mitigation measures that, if determined by the lead agency to be feasible, may avoid or minimize the significant adverse impacts. (Pub. Resources Code, § 21084.3 (b).)
- OPR *Technical Advisory: AB 52 and Tribal Cultural Resources in CEQA* (At p.9)

# AB 52 Tribal Consultation Substantive Requirements – Appropriate Mitigation

- Mitigation Examples:
  - (1) Treating the resource with culturally appropriate dignity taking into account the tribal cultural values and meaning of the resource, including, but not limited to, the following:
    - (a) Protecting the cultural character and integrity of the resource
    - (b) Protecting the traditional use of the resource
    - (c) Protecting the confidentiality of the resource
  - (2) 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
    - CA Civ Code § 815.3 states that only the following entities or organizations may acquire and hold conservation easements:
      - (a) A tax-exempt nonprofit organization qualified under Section 501(c)(3) of the Internal Revenue Code and qualified to do business in the state.
      - (b) The state or any city, county, city and county, district, or other state or local governmental entity, if otherwise authorized to acquire and hold title to real property and if the conservation easement is voluntarily conveyed.
      - (c) A federally recognized California Native American tribe or a nonfederally recognized California Native American tribe that is on the contact list maintained by the Native American Heritage Commission to protect a California Native American prehistoric, archaeological, cultural, spiritual, or ceremonial place, if the conservation easement is voluntarily conveyed.
  - *OPR Technical Advisory: AB 52 and Tribal Cultural Resources in CEQA (At p.9)*

# AB 52 Tribal Consultation Procedural Requirements -- Confidentiality

- AB 52 requires that any information – not just documents – submitted by a California Native American tribe during the environmental review process shall not be included in the environmental document or otherwise disclosed by the lead agency or any other public agency to the public consistent with Gov. Code Sections 6254, subd.(r) and 6254.10. (Pub. Resources Code § 21082.3, subd. (c)(1)).

# AB 52 Tribal Consultation Procedural Requirements -- Confidentiality

- Unless the tribe agrees, in writing, to public disclosure, the project applicant or the project applicant's legal advisors, using a reasonable degree of care, shall maintain the confidentiality of the information exchanged for the purposes of preventing looting, vandalism or damage to a tribal cultural resource and shall not disclose the information to a third party. (Pub. Resources Code § 21082.3, subd. (c)(2)(A)).
- The confidential exchange of information regarding tribal cultural resources submitted by the tribe between the lead agency, the tribe, the project applicant, or the project applicant's agent is not prohibited. (Id.)

# AB 52 Tribal Consultation Procedural Requirements -- Confidentiality

- CEQA Guidelines Section 15120, subd. (d), states that no document prepared for public examination shall include information about the location of sacred sites – doesn't protect the information from other forms of public disclosure. (Cal. Code Regs., tit. 14, §15120, subd. (d)).

# AB 52 Tribal Consultation Procedural Requirements -- Confidentiality

- AB 52's confidentiality provisions DO NOT APPLY TO DATA OR INFORMATION THAT IS:
  - Already publicly available.
  - Already in the lawful possession of the project applicant before it was provided by the tribe.
  - Independently developed by the project applicant or the project applicant's agents.
  - Lawfully obtained by a third party. (Pub. Resources Code § 21082.3, subd. (c)(2)(B))

# AB 52 Tribal Consultation Procedural Requirements – Compared to SB 18's

- Who the law applies to:
  - SB18: All California tribes that are on the Native American Heritage Commission contact list and local governments that adopt or amend general plans or specific plans or create open space designations. (Gov. Code § 65352.3, subd. (a)(1), § 65562.5).
  - AB 52: All California tribes that are on the Native America Heritage Commission contact list and all CEQA lead agencies. (Pub. Resources Code §§ 21074, 21080.3.1, subd. (b)).
- What the law applies to:
  - SB18: Adoption or amendment of general plans or specific plans or open space designations. (Gov. Code § 65352.3, subd. (a)(1); § 65562.5).
  - AB 52: All CEQA projects for which an NOP, Notice of Mitigated Negative Declaration or Notice of Negative Declaration is filed or issued after July 1, 2015. (Stats. 2114, ch. 532, § 11(c))

# AB 52 Tribal Consultation Procedural Requirements – Compared to SB 18's

- What triggers the law:
  - SB 18: Amendment or adoption of a general plan or a specific plan or designation of open space. A local government sends proposal information to the NAHC and requests contact information for tribes with traditional lands or places located in geographic area affected by proposed changes. (Gov. Code § 65352.3, subd. (a)(1); § 65562.5).
  - AB 52: Letters from tribes requesting notification by lead agency of projects in their areas of traditional or cultural affiliation. (Pub. Resources Code § 21080.3.1, subd. (b)).

# AB 52 Tribal Consultation Procedural Requirements – Compared to SB 18's

- How does tribal consultation begin and when?
  - SB 18:
    - Local government contacts tribes about opportunity to consult.
    - Tribes have 90 days to request consultation. (Gov. Code § 65352.3, subd. (a)(2)).
  - AB 52
    - Lead agency contacts tribes that have requested notification of projects within 14 days of an application being complete or the lead agency's decision to undertake a project.
    - Tribes have 30 days to request consultation. (Pub. Resources Code § 21080.3.1, subd. (d)).
- How long does tribal consultation last?
  - SB 18: No statutory limit.
  - AB 52: No statutory limit, but the environmental documents cannot be released until consultation has been initiated. (Pub. Resources Code §21080.3.1, subd. (b)). Environmental documents for a project with a significant impact on an identified tribal cultural resource cannot be certified until consultation, if initiated, has concluded. (Pub. Resources Code § 21082.3, subd. (d)(1)).

# AB 52 Tribal Consultation Procedural Requirements – Compared to SB 18's

- How does consultation end?
  - SB 18 and AB 52: Consultation is concluded when:
    - Parties reach mutual agreement concerning appropriate measures for preservation or mitigation; or
    - Either party, acting in good faith or after reasonable effort, concludes that mutual agreement cannot be reached concerning appropriate measures of preservation or mitigation. (Pub. Resources Code § 21082.3, subd. (b); Governor's Office of Planning and Research, Tribal Consultation Guidelines, Supplement to General Plan Guidelines, p. 18 (Nov. 14, 2005)).

# AB 52 Tribal Consultation Substantive Requirements

- Mandatory Topics of Consultation (If requested by tribe):
  - Alternatives to the project.
  - Recommended mitigation measures.
  - Significant effects.
- Discretionary Topics of Consultation:
  - The type of environmental review necessary.
  - The significance of tribal cultural resources.
  - The significance of the project's impacts on the tribal cultural resources; and
  - If necessary, project alternatives or appropriate measures for preservation or mitigation that the tribe may recommend. (Pub. Resources Code § 21080.3.2, subd. (a)).

# AB 52 Tribal Consultation Substantive Requirements

- An EIR, MND or ND for a project with a significant impact on an identified tribal cultural resource cannot be certified or adopted unless one of the following occurs:
  - The consultation process between the tribe and the lead agency has concluded;
  - The tribe requested consultation but failed to provide comments or otherwise failed to engage in consultation;
  - The lead agency provided notice of the project to a tribe and the tribe failed to request consultation within the 30 day deadline. (Pub. Resources Code § 21082.3, subd. (d)).

# AB 52 Tribal Consultation Substantive Requirements

- If mitigation measures agreed upon and recommended by staff are not included in the environmental document or if there are no agreed upon mitigation measures, the lead agency shall consider feasible mitigation measures pursuant to subdivision (b) of Section 20184.3. (Pub. Resources Code § 21082.3, subd. (e)).

# AB 52 Tribal Consultation Best Practices

- Goals of AB 52 Tribal Consultation Should Be:
  - To discuss mandatory and discretionary topics requested by tribe, particularly significance of tribal cultural resources, avoidance, preservation in place, and/or mitigation measures;
  - To achieve resolution on those topics; and
  - If resolution is not possible, to document why and what efforts were made.
- What AB 52 Tribal Consultation Should Not Be:
  - An information exchange in order to discuss mandatory and discretionary topics – information needed to conduct AB 52 tribal consultation should be gathered in advance.
  - Remember – EIR, MND or ND for a project with a significant impact on an identified tribal cultural resource cannot be certified until tribal consultation, if requested and engaged in, is completed.

# AB 52 Tribal Consultation Best Practices

- Before you begin:

- Understand that tribes expect to be respectfully engaged and expect their proposals to be thoughtfully considered, even if not expressed in technical language.
- Understand that the discussion of confidential sacred site locations, burial locations, and tribal practices touches on spiritual matters and would not occur but for the possibility of protecting the tribe's cultural resources; think of how you would want your spiritual beliefs and practices respected and act accordingly.
- Understand that tribes don't want to be persuaded to accept your preconceived plans; they want to be involved in the planning.
- Under no circumstances should you issue an ultimatum to a tribe. Tribal consultation is not an "accommodation" to a tribe; it's the law.

# AB 52 Tribal Consultation Best Practices

- Do your research before the determination to undertake a project or before an application is complete.
  - Request Sacred Lands Inventory and CHRIS searches to find out the cultural resources in your proposed project area.
  - Request an AB 52 list of culturally affiliated tribes -- research:
    - Current tribal leadership (The Governor's Office of the Tribal Advisor has published a California Tribal Directory)
    - Area of traditional and cultural affiliation
    - Newspaper articles and other indicia of tribes' concerns about your project
    - Other projects about which your agency has consulted the tribe and how the consultation process went

# AB 52 Tribal Consultation Best Practices

- Do your research (cont'd):

- Review ethnographic studies to determine possible village sites, sacred sites and/or burials not indicated on the Sacred Lands Inventory or CHRIS.
- Document confidential tribal cultural resource information already possessed by the lead agency, applicant and applicant's counsel.
- Review previous geotechnical and archaeological reports, as well as any relevant prior environmental documents for the project site.
- Consult with culturally affiliated tribes about cultural resources in advance of AB 52 tribal consultation to find out what cultural resources may be affected by your project. Make sure tribes understand that this is NOT AB 52 consultation.

# AB 52 Tribal Consultation Best Practices

- Before sending formal notification of projects:
  - Review the SB 18 Consultation Guidelines and the Technical Advisory on AB52 and Tribal Cultural Resources in CEQA on the OPR website.
  - Double check within your agency and with consultants to be sure you have all of the requests for notification received from tribes.
  - Since avoidance of damaging effects to tribal cultural resources, if feasible, is required, be prepared to consider avoidance or explain why it isn't feasible. Be prepared to consider preservation in place or explain why it isn't feasible.
  - Be prepared to discuss all mandatory and discretionary topics of consultation. Get all the necessary information needed to do so to avoid using AB 52 consultations as information exchanges.

# AB 52 Tribal Consultation Best Practices

## When sending AB 52 tribal consultation notices:

- Make it clear that the notice is for AB 52 consultation, not any other kind of consultation
- Include the statutorily required information in your notice: Brief project description, project's location, lead agency contact information, notice that tribe has 30 days to request consultation.
- Send your notice return receipt requested to document when it was received.

# AB 52 Tribal Consultation Best Practices

- When sending consultation notices:
  - Include confidentiality provisions of Public Resources Code section 21082.3, subd. (c).
  - Include lead agency's policy on discretionary determinations of significance of tribal cultural resources.
  - Send more than one consultation notice.
  - Ask responding tribes to be specific as to which mandatory and discretionary topics they want to discuss and incorporate those topics in your consultation agenda.
  - Seek the tribe's agreement upon the consultation agenda in advance of beginning consultation.

# AB 52 Tribal Consultation Best Practices

- Consultation

- Keep consultation government-to-government. Tribal representatives should be members of the tribal government or representatives with written designation to speak on behalf of the tribe.
- Know who will be representing the tribe and follow protocol for meeting with government officials, i.e., know their titles and use them, introduce all participants, explain who they represent and why they are present. Agree on one person to lead the meeting and keep the agenda on track.
- Respect tribal sovereignty and confidentiality. Consult with one tribe at a time unless tribes agree otherwise, and do so in a private place with only the necessary participants present.
- Do not share one tribe's confidential information with another. Be able to explain why those who are present need to know confidential information.

# AB 52 Tribal Consultation Best Practices

- Consultation (cont'd):
  - Document in real time:
    - Consultation topics discussed and resolution, if any.
    - Confidential information received from tribe and the form in which it was received.
    - Whether subsequent consultation sessions will be needed and what topics will be discussed.
    - Agree on the next consultation agenda and what additional information, if any, is needed before the next consultation session.
- Conclusion of Consultation
  - If agreement was reached on mitigation measures, inform tribe that the mitigation measures will be recommended for inclusion in the environmental document, but that doesn't mean they will be included.
  - Document all areas on which agreement was reached or not reached.
  - If consultation is unilaterally concluded, be able to document that requirements for doing so have been met.

# AB 52 Tribal Consultation Best Practices

- After Consultation
  - Review with lead agency staff, consultants and consulting tribes what worked, what didn't, and how consultation can be improved.

# Five Most Important Things for Agencies to Know About AB 52

- Unless a tribe requests notification of projects in their area of traditional and cultural affiliation, there is no AB 52 consultation obligation with them.
- Lead agencies have an affirmative duty to use reasonable care to protect confidential information received from tribes through consultation, with exceptions.
- An environmental document cannot be released until consultation with tribes that have sent notification and consultation requests has been initiated.

# Five Most Important Things for Agencies to Know About AB 52

- An EIR, MND or ND for a project with a significant impact on an identified tribal cultural resource cannot be certified or adopted until AB 52 tribal consultation, if requested, has concluded.
- If mitigation measures are agreed upon with a tribe, the measures must be recommended for inclusion in the environmental document.

# Thank You!

- Questions?
  - Contact Terrie Robinson, NAHC General Counsel  
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  - Check our website, nahc.ca.gov, for future guidance on AB 52 best practices