

# TRIBAL CONSULTATION UNDER AB 52: LEGAL REQUIREMENTS AND BEST PRACTICES FOR TRIBES

---

Terrie L. Robinson, General Counsel, NAHC  
April 20, 2017 Public Hearing



# Presentation Outline

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

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

- Provide needed information to lead agencies in order to preserve the options of avoidance of tribal cultural resources or preservation in place early in the planning process.
- Build working relationships with lead agencies that approve projects in the tribe's area of traditional and cultural affiliation.
- Avoid inadvertent discoveries of Native American burials and work with lead agencies in advance to determine treatment and disposition if burials are inadvertently discovered and if your tribe is designated as MLD.
  - 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 landowner 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)). The NAHC has a notification request form letter for tribes on its website.
  - 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 mitigate or avoid 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 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)).

# 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)).
- But AB 52 DOES!

# AB 52 Tribal Consultation Procedural Requirements -- Confidentiality

- Information submitted by a tribe during consultation or the environmental review process SHALL be published in a confidential appendix to the environmental document UNLESS the tribe that provided the information consents, IN WRITING, to disclosure of some or all of that information to the public. (Pub. Resources Code § 21082.3 (c)(1)).
- IF the project proponent and its consultants participate in the consultation, the parties shall respect the principles set forth in Public Resources Code section 21080.3.2 (AB 52 confidentiality provisions).(Pub. Resources Code § 21080.3.2(d)).

## AB 52 Tribal Consultation Procedural Requirements – Confidentiality: Permitted Disclosures

- Disclosures of tribe's confidential information provided during consultation or the environmental process that ARE NOT prohibited include:
  - The confidential exchange of the submitted information between public agencies that have lawful jurisdiction over the preparation of the environmental document.
  - The confidential exchange of information about the tribe's tribal cultural resources among the lead agency, the tribe, the project applicant, and the project applicant's agent. (Pub. Resources Code § 21082.3 (c) (1)).

## AB 52 Tribal Consultation Procedural Requirements – Confidentiality: Permitted Disclosures

- Confidential appendix to the environmental document:
  - Consistent with Public Resources Code section 21082.3 (c), the lead agency shall publish confidential information obtained from a tribe during the consultation process in a confidential appendix to the environmental document and shall include a general description of the information, as provided under Public Resources Code section 21082.3 (c)(4), in the environmental document for public review during the public comment period.

# 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 – Who Should Be Present

- Who Should Be Present At AB 52 Tribal Consultation?
  - Only the people who are required to be there or are necessary for the consultation.
  - Required: The parties (the lead agency and the tribe).
  - Not required: The project proponent. (Public Resources Code section 21080.3.2 (d) states “IF” the project proponent or its consultants participate . . . ).

# 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 that includes certain cultural resources. 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 from a 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)).
- The NAHC has form letters on its website for tribes to use to request consultation under AB 52.

# AB 52 Tribal Consultation Substantive Requirements – Mitigation Measures

- If a project may have an impact on a tribal cultural resource, the lead agency's environmental document shall discuss BOTH of the following:
  - (1) Whether the proposed project has a significant impact on an identified tribal cultural resource.
  - (2) Whether feasible alternatives or mitigation measures, including those agreed upon pursuant to Public Resources Code section 21082.3 (a), avoid or substantially lessen the impact on the identified tribal cultural resource. (Pub. Resources Code § 21082.3 (b)).

# AB 52 Tribal Consultation Substantive Requirements –Mitigation Measures

- Any mitigation measures agreed upon in consultation under pursuant to Public Resources Code § 21080.3.2.(a) that are capable of avoiding or substantially lessening potential significant impacts to tribal cultural resources SHALL be recommended for inclusion in the environmental document and in an adopted mitigation monitoring and reporting program, if determined to avoid or lessen the impact pursuant to Public Resources Code section 21082.3 (b), and SHALL be fully enforceable. (Pub. Resources Code § 21082.3 (a)).

# AB 52 Tribal Consultation Substantive Requirements – Mitigation Measures

- A project with an effect that may cause a substantial change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment. (Pub. Resources Code § 21084.2).
- This means:
  - Unless the project is statutorily exempt from CEQA, if there is substantial evidence that such a project may cause a substantial change in the significance of a tribal cultural resource, either a mitigated negative declaration or an EIR must be prepared. (Pub. Resources Code § 21080 (c)(2), (d)).
  - A categorical exemption may not be used if the tribal cultural resource in question is also an historical resource. (Pub. Res. Code § 21074 (d); Cal. Code Regs., tit. 14, § 15300.2 (f)).

# AB 52 Tribal Consultation Substantive Requirements – Mitigation Measures

- Before considering any significant effects to a resource, a lead agency will want to know if the resource in question is a “tribal cultural resource” as defined by CEQA.
- Not all cultural resources meet the CEQA legal definition of “tribal cultural resource.” It must be established that there is substantial evidence that a resource is a tribal cultural resource before the lead agency has to consider any significant effects to it.

## AB 52 Tribal Consultation Substantive Requirements – Tribal Cultural Resource Definition Under CEQA

- (a) A tribal cultural resource is defined as either of the following:
  - (1) Sites, features, places, cultural landscape, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:
    - (A) Included or determined to be eligible for inclusion in the California Register of Historical Resources.
    - (B) Included in a local register of historical resources as defined in subdivision (k) of (Public Resources Code Section 5020.1

## AB 52 Tribal Consultation Substantive Requirements – Tribal Cultural Resource Definition Under CEQA

- Tribal Cultural Resource definition (cont'd)
- (2) A resources determined by a lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to the criteria set forth in subdivision (c) of (Public Resources Code) Section 5024.1. In applying the criteria set forth in subdivision (c) of Section 5024.1, the lead agency SHALL consider the significance of the resource to a California Native American tribe.
- (b) A cultural landscape that meets the criteria of subdivision (a) to the extent that it is geographically defined in terms of size and scope of landscape.

## AB 52 Tribal Consultation Substantive Requirements – Tribal Cultural Resource Definition Under CEQA

- Tribal Cultural Resource definition (cont'd)
- (c) A historical resource described in (Public Resources Code) Section 21084.1, a unique archaeological resource as defined in subdivision (g) of (Public Resources Code) Section 21083.2, or a non-unique archaeological resource as defined in subdivision (h) of Public Resources Code section 21083.2 may also be a tribal cultural resource if it confirms with the criteria of subdivision (a) (of this section).

## AB 52 Tribal Consultation Substantive Requirements – Tribal Cultural Resource Definition Under CEQA

- What this means for tribes:
- If a site, feature, cultural landscape, sacred places or object with cultural value to a California Native American tribe is included or already determined to be eligible for inclusion on the California Register of Historical Resources or on a local register of historical register as defined by Public Resources Code section 5020.1, subdivision (k), it IS a tribal cultural resource. There is nothing for the tribe or the lead agency to prove.
- If not, the lead agency gets to make a discretionary determination whether the resource meets those criteria. It will need substantial evidence to do so.

## AB 52 Tribal Consultation Substantive Requirements – Tribal Cultural Resource Definition Under CEQA

- What this means for tribes:
  - If a lead agency has to make a discretionary determination that a cultural resource meets the legal definition of “tribal cultural resource,” it will need substantial evidence to support that determination. (See generally *Friends of the Willow Glen Trestle v. City of San Jose* (2016) 2 Cal.App. 5<sup>th</sup> 457, 473).
  - That evidence, more likely than not, will need to come from the tribe.

## AB 52 Tribal Consultation Substantive Requirements – Mitigation Measures

- 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, if substantial evidence demonstrates that a project will cause a significant effect to a tribal cultural resource.
- (Pub. Resources Code § 21082.3, subd. (e))

# AB 52 Tribal Consultation Substantive Requirements – Mitigation Measures

- Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource. (Pub. Resources Code § 21084.3)

# AB 52 Tribal Consultation Substantive Requirements – Mitigation Measures

- In summary:
- If mitigation measures are agreed upon in consultation pursuant to Public Resources Code section 21080.3.2, they SHALL be recommended for inclusion in the environmental document. (Pub. Resource Code § 21082.3(a);
- If the recommended mitigation measures are NOT included in the environmental document, or if there are no agreed upon mitigation measures at the end of consultation, and substantial evidence demonstrates that a project will cause a significant effect to a tribal cultural resource, the lead agency shall consider feasible mitigation measures pursuant to subdivision (b) of Public Resources Code section 21084.3.

# AB 52 Tribal Consultation Substantive Requirements – Mitigation Measures

- Public Resources Code section 21084.3 Mitigation Measures (summarized):
  - (1) Avoidance and preservation in place;
  - (2) Treating the resource with culturally appropriate dignity, including but not limited to protecting the cultural character and integrity, traditional use, or confidentiality of the resource;
  - (3) Permanent conservation easements and other interest in real property, with culturally appropriate management criteria for the purposes of preserving or utilizing the resources or places. (Pub. Resources Code § 21084.3(b).

# AB 52 Tribal Consultation Substantive Measures – Mitigation Measures

- If a project may have a significant impact on a tribal cultural resource, the lead agency's environmental document shall discuss both:
  - (1) Whether the proposed project has a significant impact on an identified tribal cultural resource; and
  - (2) Whether feasible alternatives or mitigation measures, including those that may be agreed to in consultation, avoid or substantially lessen the impact on the identified tribal cultural resource. (Pub. Resources Code § 210182.3 (b)).
- This obligation exists regardless of whether consultation has occurred.

## AB 52 Tribal Consultation Procedural Requirements – Conclusion of Consultation

- 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 Best Practices For Tribes

- Goals of AB 52 Tribal Consultation Should Be:
  - To protect your cultural resources as much as possible;
  - 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;
  - If resolution is not possible, to document why and what efforts were made; and
  - To form working relationships with agencies that are respectful of each party's purposes and obligations.
- 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 – An EIR, MND or ND for a project with a significant impact on an identified tribal cultural resource cannot be adopted or certified until tribal consultation, if requested and engaged in, is completed.

# AB 52 Tribal Consultation Best Practices For Tribes

- Before you begin: Organize and Prepare
  - Organize
    - Form a cultural committee: If you do not already have one, form a cultural committee whose purpose is to consult with agencies for the protection of cultural resources during the CEQA environmental review process. Your committee should include one person who is a good public speaker, one person who keeps organized records, and one person who oversees the calendaring of consultation sessions.
    - AB 52 Requests for Notification: Send the tribe's requests for notifications (preferably certified mail, return receipt) to agencies that approve projects in your tribe's area of traditional and cultural affiliation. Each tribe was sent a list of these agencies by the NAHC on June 28, 2016. If you need another one, check with the NAHC. A tribe cannot request AB 52 tribal consultation with an agency without first requesting notification of projects from that agency. The NAHC has a form letter for this.

# AB 52 Tribal Consultation Best Practices for Tribes

- Before you begin:
- Organize
  - As much as possible in accordance with your tribe's traditions, inventory the tribe's sites that are or may qualify as tribal cultural resources under CEQA. If they are not already listed on the California Register of Historical Resources, gather evidence that would demonstrate that they qualify for listing on the California Register of Historical Resource.
  - Do not wait to be notified of a project to begin before gathering this evidence.
  - This evidence needs to meet the "substantial evidence" standard:

# AB 52 Tribal Consultation Best Practices for Tribes

- **Substantial evidence** includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact. (Pub. Resources Code § 21080 (e) (1)).
- **Substantial evidence** is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment. (Pub. Resources Code § 21080 (e)(2)).

# AB 52 Tribal Consultation Best Practice for Tribes

- Before you begin:
- Organize
  - If possible, set up regularly held consultation sessions with the agencies that approve projects in your area of traditional and cultural affiliation to get advance notice of upcoming projects.
  - Check the websites of agencies that approve projects in the tribe's area of traditional and cultural affiliation to see if there are projects on these agencies' agenda that have been exempted from CEQA or are in the process of being evaluated under CEQA.
  - Create a record keeping system to keep track of the tribe's AB 52 letters requesting notification from agencies, agency letters to the tribe providing notification of projects, and the tribe's letters requesting AB 52 consultation.
  - Create a calendaring system to keep track of deadlines under AB 52. (The Asana app would be good for both correspondence record keeping and calendaring, and it is free).

# AB 52 Tribal Consultation Best Practices for Tribes

- Before you begin: Prepare
- As soon as the tribe receives notification from an agency of a project in the tribe's area of traditional and cultural affiliation, the tribe should respond as quickly as possible to request or decline consultation. If the project is of no interest to the tribe, declining consultation helps the agency keep on track with the CEQA process.
- Remind the agency that it CANNOT release its environmental document until consultation, once requested, has been begun. (Pub. Resources Code § 21080.3.1(b)).
- The NAHC has a form letter for requesting tribal consultation on its website.

# AB 52 Tribal Consultation Best Practices for Tribes

- Before you begin: Prepare
- If the tribe requests consultation, prepare a list of all the tribe's cultural resources in the project area, evidence showing that they meet the legal definition of "tribal cultural resource," and suggestions for avoidance, preservation in place, or mitigation.
- If the tribe requests consultation, ask for a copy of the lead agency's regulations, policies, and procedures for tribal consultation, implementing CEQA, and for maintaining the confidentiality of information provided by the tribe during consultation.
- If the tribe does not want the project proponent present during consultation, it should say so.

# AB 52 Tribal Consultation Best Practices for Tribes

- Before you begin: Prepare
- Research the agency and your tribe's history with it.
  - What projects has the agency approved recently and what kinds of mitigation measures they have made conditions of approval?.
  - What has been your tribe's history with this agency? Is it good or bad?
  - What kind of projects has the agency deemed exempt from CEQA and why?
  - Google the staff members you will be meeting with as well as the project proponent.
- Prepare an inventory of the confidential information the tribe will provide during the consultation so the agency and project proponent know what they need to keep confidential.

# AB 52 Tribal Consultation Best Practices for Tribes

- Before you begin: Prepare
- Ask for and review any previous environmental documents, geotechnical and archaeological reports, and non-confidential ethnographic studies the agency has for the project area.
- If possible, provide the agency in advance of consultation and in confidence the tribe's suggestions for the type of environmental document, project alternatives, and mitigation measures, if any, the tribe would like considered during consultation if there are significant impacts to the tribe's tribal cultural resources.
- Know who will be attending consultation and their titles.
- Agree on an agenda in advance.

# AB 52 Tribal Consultation Best Practices for Tribes

- Consultation

- Come to consultation with solutions, not just problems, and be prepared to work collaboratively with agency staff to find the best solutions to protect tribal cultural resources.
- Make sure that everyone in attendance needs to be there and that they understand the confidentiality provisions of AB 52.
- Provide an inventory of the confidential information that the tribe will be providing and ask for a determination that the information is not exempt from confidentiality.
- When talking about the tribe's cultural resources, show that they are or should be considered "tribal cultural resources" under the CEQA definition.

# AB 52 Tribal Consultation Best Practices for Tribes

- Consultation

- If the tribe is told that avoidance, preservation in place, and/or mitigation measures are not feasible, ask for a written explanation why. Try to negotiate options that may be feasible that the agency may not have thought of.
- Document:
  - What was discussed
  - What was agreed upon
  - Whether additional consultation sessions are necessary
  - How consultation concluded.
- If, after good faith and reasonable effort, the tribe and the agency do not agree on avoidance, preservation in place, or mitigation measures, document why agreement was not possible.

# AB 52 Tribal Consultation Best Practices for Tribes

- Consultation
- If during consultation it was agreed that a project would have a significant impact on a tribal cultural resource but agreement could not be reached on mitigation measures, remind the agency of its legal obligation consider feasible mitigation measures and discuss them in the environmental document.(Pub. Resources Code §21802.3(b) and (e))
- If the tribe receives a letter from the agency ending consultation and the tribe disputes whether the agency made a good faith and reasonable effort to reach agreement, send a letter ASAP to the agency and ask that it be included in the administrative record.

# AB 52 Tribal Consultation Best Practices For Tribes

- After Consultation

- Make sure that any mitigation measures agreed upon in consultation pursuant to Public Resources Code section 21080.3.2(a) that are capable of avoiding or substantially lessening potential significant impacts to a tribal cultural resources are recommended for inclusion in the environmental document. (Pub. Resources Code section 21082.3 (a)).
- Ask to review the confidential appendix that includes your tribe's confidential information.
- Make sure that, even if mitigation measures were not agreed upon, if the project may have a significant impact on a tribal cultural resource, the agency addresses feasible mitigation measures in the environmental document. (Pub. Resources Code § 21082.3 (b)).

# AB 52 Tribal Consultation Best Practices for Tribes

- After Consultation
- Make sure the environmental document describe confidential site information, if at all, in general terms.
- If the tribe disagrees with the agency regarding whether a resource is a tribal cultural resource, whether there are significant impacts, or whether alternatives or mitigation measures are feasible, comment on the environmental document in writing AND testify at any hearing to approve the project. Provide copies of your testimony in writing and ask that it be included in the administrative record.
- Assess how the consultation went and how it can be improved.

# Six Most Important Things for Tribes 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.
- 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 begun.

# Six Most Important Things for Tribes 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 in accordance with Public Resources Code section 21082.3, the measures must be recommended for inclusion in the environmental document.
- Tribes do not lose their right to participate in the CEQA review process even if they do or do not participate in AB 52 consultation.

# Thank You!

- Questions?
  - Contact Terrie Robinson, NAHC General Counsel, [terrie.robinson@nahc.ca.gov](mailto:terrie.robinson@nahc.ca.gov), (916) 373-3716
  - Check our website, [nahc.ca.gov](http://nahc.ca.gov), for future guidance on AB 52 best practices