

A 6-Step Guide To Tribal Consultation Under CEQA

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In June 2017, the California Governor's Office of Planning and Research issued a technical advisory which provides guidelines for consultation with California's Native American tribes under the California Environmental Quality Act following the enactment of Assembly Bill 52.[1] Assembly Bill 52, which became effective on July 1, 2015, revised several portions of California's Public Resources Code to broaden the requirements for tribal consultation and to provide a more formal structure for California's tribes to provide meaningful input to protect their cultural heritage during the CEQA process.



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California Public Resources Code section 21084.2 now establishes that “[a] project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment.” Lead agencies are required to avoid, when feasible, damaging effects to any tribal cultural resource. This requires lead agencies to begin consultation with California Native American tribes that are traditionally and culturally affiliated with the geographic area of the proposed project, “[p]rior to the release of a negative declaration, mitigated negative declaration, or environmental impact report for a project.” Pub. Res. Code § 21080.1.1(b).

Assembly Bill 52 also provided a broad definition for “California Native American Tribe.” Federal statutes aimed at protecting cultural resources often limit the definition of “Indian Tribes” to include only those which are federally recognized. In contrast, Public Resources Code Section 21073 defines “Native American Tribe” as “a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission.” Accordingly, the Native American Heritage Commission (NAHC) has the discretion to include tribes that are not federally recognized on its contact list. Compliance with notice requirements under federal statutes such as the National Historic Preservation Act or Native American Graves Protection and Repatriation Act, might not be sufficient under CEQA.

Consultation with Native American tribes is necessary, not only for the purpose of determining appropriate mitigation measures, but also to help the lead agency identify locations where the proposed project might impact culturally significant areas. Assembly Bill 52's requirement that lead agencies consult with tribes early in a project's development facilitates identification of cultural resources known to tribes and provides a better opportunity to undertake appropriate mitigation measures, if needed.

The technical advisory explains that the meaning of consultation under Assembly Bill 52 is the same as the meaning of consultation under Senate Bill 18, which previously outlined requirements for consultation under CEQA. Senate Bill 18 requires local governments to consult with tribes for the purpose of preserving or mitigating impacts to California Native American cultural places whenever a local government or private applicant initiates a proposal to adopt or amend a general plan or specific plan. Although consultation under each bill is triggered by different requirements, under both consultation structures lead agencies must engage in meaningful discussion taking into consideration the cultural values of the tribe. The technical advisory also stresses the importance of maintaining confidentiality of communications with tribes during the consultation process.

The consultation process includes certain mandatory and discretionary topics. Lead agencies are required to discuss alternatives to the project, recommended mitigation measures, and the project's significant effects, if the tribe requests these topics. Additionally, consultation may include discussion of the significance of the tribal cultural resources and the impact of the project on those resources, the type of environmental review, and appropriate measures for preservation or mitigation that the tribe may recommend to the agency.

The technical advisory provides a succinct six-step outline for the tribal consultation process.

1. If the NAHC includes a California Native American Tribe on its contact list, it is required to provide the tribe with a list of public agencies in the geographic area of the tribe's traditional and cultural affiliation.
2. If a tribe wishes to be notified of projects, it must submit a written request to each relevant agency.
3. The lead agency must provide a formal notification, in writing, to tribes that have requested notification. This notice must be provided within 14 days of determining that a private project application is complete, or a public agency undertakes a project. The 14-day notification must include a description of the project, its location and must state that the tribe has 30 days to request consultation.
4. If a tribe wishes to engage in consultation, it must respond to the lead agency within 30 days of receipt of the formal notification. The tribe's response must designate a lead contact person. If the tribe does not include a contact person, the lead agency is obligated to refer to the list maintained by the NAHC.
5. The lead agency must begin the consultation process with the tribes that have requested consultation within 30 days of receiving the request for consultation.
6. Consultation concludes under either of the following scenarios: (1) the parties agree to measures to mitigate or avoid a significant effect, if it exists, on tribal cultural resources, or (2) a party, acting in good faith and after reasonable effort, concludes that a mutual agreement cannot be reached.

The NAHC has also provided public comment on several draft environmental impact reports since the enactment of Assembly Bill 52. These public comments provide some insight into the commission's expectations during the consultation process. Significantly, the NAHC has made it clear that lead

agencies may be required to comply with Senate Bill 18's consultation requirements in addition to those under Assembly Bill 52. When a project involves a local government amending a general or specific plan, or the designation or proposed designation of open space, both consultation processes will be triggered.

Further, Assembly Bill 52 requires lead agencies to consider the impact of proposed mitigation measures, with or without tribal consultation. Even if a lead agency complies with the 14-day notice requirement and has not received a response from tribes within the 30-day period, the lead agency is still obligated to consider the effect that proposed mitigation measures will have on tribal cultural resources.

Although the technical advisory provided a succinct summary of Assembly Bill 52's consultation timeline, the NAHC's comments on draft environmental impact reports indicate that the commission recommends that lead agencies begin consultation with tribes as early as possible. Early consultation provides greater potential for the project to avoid inadvertent discoveries of Native American human remains and best protect tribal cultural resources.

It has been two years since Assembly Bill 52 became effective and the dearth of mitigation related lawsuits under CEQA is encouraging. The early consultation requirements provided for in Assembly Bill 52 may have had a significant impact on the capacity for tribes to provide meaningful input during the CEQA process to avoid litigation. More importantly, Assembly Bill 52 has facilitated a close relationship between governmental entities and California's Native American tribes, which could help to preserve the tribes' cultural resources and heritage.

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[1] The full text of the Technical Advisory can be found at:
https://www.opr.ca.gov/docs/Revised_AB_52_Technical_Advisory_March_2017.pdf