Tribal Consultation under AB 52: An Overview and Tips for Compliance

With the implementation of Assembly Bill 52 (AB 52) last July, California welcomed a new chapter in the ongoing relationship between public agencies and Native American tribes. This new law recognizes California tribes’ expertise regarding cultural resources and provides a method for agencies to incorporate tribal knowledge into their CEQA environmental review and decision-making processes. Under AB 52, California tribes now have the ability to establish, through a formal notice letter, a standing request to consult with a lead agency regarding any proposed project subject to CEQA in the geographic area with which the tribe is traditionally and culturally affiliated. To help public agencies familiarize themselves with the AB 52 process, this article outlines the basic framework of the new law and offers suggestions for agencies engaging in AB 52 consultation efforts.

What should an agency do when it receives an AB 52 consultation request letter?

Upon receiving a request letter from a tribe, an agency may first wish to contact the Native American Heritage Commission (NAHC) to verify that the requesting group is a California Native American tribe and that the agency potentially has lead decision-making authority over a project(s) in that tribe’s area of traditional and cultural affiliation. See, e.g., Pub. Res. Code § 21080.3.1(c). Once this has been verified, the agency should send a response back to the tribe’s lead contact person, confirming receipt of the request. The agency should then add the tribe to the agency’s notice list and make sure that all staff are aware of the agency’s AB 52 notice and consultation obligations to that tribe regarding CEQA projects for which the agency serves as lead that have potential cultural resource impacts.

When does a lead agency need to provide notice to the requesting tribe?

A lead agency must provide written notification to requesting tribes on its notice list within 14 days of a decision to undertake a project or a determination that a project application is complete. Notice to the tribes must include a brief project description, the project location, and the lead agency’s contact information. A tribe then has 30 days to request consultation. If the tribe does not respond in that period or writes to decline consultation, the lead agency has no further obligation. If the tribe requests consultation, the lead agency must begin the consultation within 30 days and prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report for that proposed project. See Pub. Res. Code § 21080.3.1. This timeline allows the agency to consider the information it receives during consultation in determining the proposed project’s impacts and the appropriate level of CEQA review.
What does consultation entail under AB 52?

California law defines consultation as the “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.” Gov. Code § 65352.4 (emphasis added). AB 52 also allows for the possibility of project applicant participation in the consultation process, but agencies should not view this as an opportunity to delegate their consultation duties to the applicant. See Pub. Res. Code § 21080.3.2(d). AB 52 requires agencies to remain fully responsible for the consultation process.

Confidentiality is crucial to the AB 52 consultation process. See Pub. Res. Code § 21082.3(c)(2)(A). Many tribes consider the nature and location of cultural resources sacred information and have concerns about potential vandalism or desecration if that information is leaked. The consulting agency must respect tribal sovereignty and recognize the need for confidentiality regarding sensitive tribal cultural resource information, consistent with Government Code sections 6254, subdivision (r), and 6240.10, and Code of Regulations section 15120, subdivision (d). Id.; Pub. Res. Code § 21082.3. For this reason, the agency and tribe should agree beforehand as to appropriate recordkeeping practices for the consultation proceedings to ensure that confidentiality is preserved. If the applicant does join the consultation meetings, the agency should stress that all confidentiality obligations extend to the applicant as well. See Pub. Res. Code § 21082.3(c)(2).

Respectful, effective consultation consists of in-person meetings between appropriate representatives of the parties, which the tribe may wish to host at its reservation or rancheria. During consultation meetings, the parties should make a point to identify any significant impacts the proposed project would have on tribal cultural resources and discuss potential avoidance or mitigation measures; the tribe may identify additional consultation topics in its response to the lead agency’s notice letter. Agencies should also be aware that tribes may take a broad view of cultural resources and extend this characterization to entire landscapes, as contemplated under AB 52’s tribal cultural resources definition. See Pub. Res. Code § 21074(a)(1)(A). AB 52 also requires agencies to recognize that tribes may attach cultural or spiritual value to these resources, apart from their scientific or archaeological merit. Id.

Many tribes already have consultation experience in the federal context under the National Historical Preservation Act, and may have strong views on appropriate mitigation measures for cultural resource impacts. Agencies should anticipate that tribes may have sensitivity to the way cultural resources are monitored, handled, and potentially excavated. Many tribes may have a strong preference for cultural resource avoidance or leaving resources in-situ rather than excavating and storing the artifacts in a museum.

Under AB 52, consultation ends when the parties reach agreement on measures to avoid or mitigate a significant tribal cultural resource impact, which will then be incorporated into the environmental review document, or when a party, “acting in good faith and after reasonable
effort, concludes that mutual agreement cannot be reached.” Pub. Res. Code § 21080.3.2(b). A tribe may continue to submit information to the lead agency even after consultation ends.

Suggestions for agencies

- Agencies should designate a representative or tribal liaison who will take primary responsibility for responding to AB 52 consultation requests, sending notice letters, and setting up consultation meetings. Agencies should also consider providing training to familiarize staff and officials with the requirements and timeline discussed above.
- Agencies should be respectful of each tribe’s unique history, practices, and culture. Prior to initiating consultation with a tribe, the agency should develop an understanding of that tribe’s leadership and governance structures. Some tribes may rely on their Tribal Historic Preservation Officer (THPO) to handle the consultation, while others may prefer to have someone from the highest level of tribal government, like the tribal council, attend the meetings.
- Agencies should also be mindful of potential Brown Act restrictions when engaging in consultation. See Gov. Code §§ 54950 et seq. California law requires that consultation “be conducted in a way that is mutually respectful of each party’s sovereignty,” which Native American tribes frequently interpret to mean a conversation between elected agency officials and tribal government leaders. To the extent that the Brown Act prevents a meeting with elected agency officials or limits the number of officials who can be present, the lead agency should respectfully communicate these restrictions to the tribe early in the consultation process to avoid offense and to allow the tribe to identify appropriate corresponding representatives to send to the meetings.
- Agencies should be thoughtful about involving the project applicant in the consultation process. The applicant’s participation may be helpful in identifying and agreeing upon potential mitigation measures, but it may also add tension to the consultation dynamic. Agencies should propose parameters to guide the applicant’s involvement and to ensure that the agency maintains responsibility for the process.
- To create an efficient and consistent process, it may be helpful to set up an agreement or memorandum of understanding to govern how consultation will proceed. This agreement could define the terms and topics to be discussed during consultation, set out a consultation timeline, identify the parties’ goals, identify a recordkeeping system, and articulate any other rules that will guide the process. See, e.g., Pub. Res. Code § 21080.3.2(a). In drafting this document, the agency should allow enough time to respect the tribe’s decision-making processes.
- If consultation or the agency’s own review efforts suggest that the proposed project will have a significant impact on “tribal cultural resources,” as defined in Public Resources Code section 21074, subdivision (a), these impacts must be addressed in the agency’s CEQA documents. See Pub. Res. Code §§ 21082.3, 21084.2. OPR is developing an update to Appendix G, expected July 2016, to help guide this analysis. Pub. Res. Code § 21083.09.
- Agencies should take care to ensure that agreement to potential mitigation measures during consultation do not amount to an improper pre-commitment under CEQA. See, e.g., Save Tara v. City of West Hollywood, 45 Cal.App.4th 116 (2008). Though the lead agency must be careful to maintain the confidentiality of sensitive tribal cultural resource information, it should still
include a general description in its environmental document so that the public understands why the agreed-upon mitigation measures would be necessary if the project is approved. See Pub. Res. Code § 21082.3(c)(4).

- Just as CEQA contains stronger enforceability language than its federal counterpart NEPA, an agency’s tribal consultation responsibilities under AB 52 are more enforceable than those under Section 106 of the National Historic Preservation Act (NHPA). See Pub. Res. Code § 21082.3(a) (“Any mitigation measures agreed upon in the consultation . . . 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 . . . and shall be fully enforceable.”)