

ADVANCING TRIBAL SOVEREIGNTY IN STATE AND LOCAL TRIBAL CONSULTATION



NATIONAL ASSOCIATION
OF TRIBAL HISTORIC
PRESERVATION OFFICERS



SWINOMISH ELDER
LARRY CAMPBELL† &
DR. JAMIE DONATUTO



NATIVE AMERICAN
RIGHTS FUND/NATIONAL
INDIAN LAW LIBRARY



DRY CREEK RANCHERIA
BAND OF POMO INDIANS

Greta Swanson

Support for this project was provided by the Robert Wood Johnson Foundation's **Policies for Action** program and the **Henry Luce Foundation**. The views expressed here do not necessarily reflect the views of the Foundations.

ENVIRONMENTAL LAW INSTITUTE
SEPTEMBER 19, 2024

California context

171 California Native American Tribes

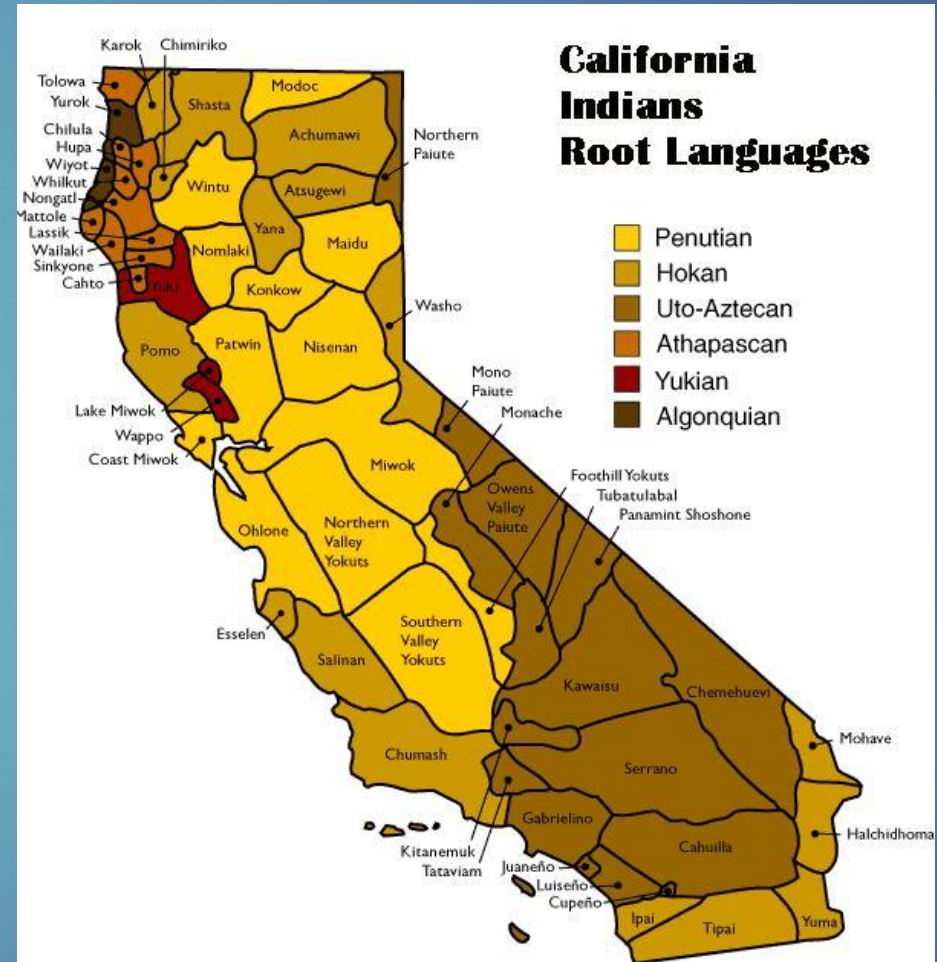
- 109 federally recognized Tribes
- 67 non-federally recognized Tribes

History

- Displacement, forced labor, genocide
- Senate did not ratify treaties

Two of the laws requiring government-to-government consultation

- 2004 – SB 18
- 2014 – AB 52



SB 18 and AB 52 definition of consultation

- ▶ “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.
- ▶ 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.”

SB 18 and AB 52 requirements

SB 18

- ▶ Federally recognized and non-federally recognized California Native American Tribes
- ▶ Local governments must protect confidentiality of Tribal information
- ▶ Local governments consult on general and specific plans
- ▶ Eligible Tribes are those on Native American Heritage Commission list
- ▶ Subject matter: Native American cemeteries, places of worship, religious and sacred sites, and places eligible for or listed on the California Register of Historic Places.

AB 52

- ▶ Federally recognized and non-federally recognized California Native American Tribes
- ▶ Public agency prohibited from public disclosure of Tribal cultural information without Tribe's consent
- ▶ Lead agencies consult during environmental review under California Environmental Quality Act
- ▶ Tribes must send prior notice to agency to request notification
- ▶ Subject matter: Tribal cultural resources eligible for or listed on California Register of Historic Places; agency to consider Tribal information

SB 18 and AB 52 Requirements

SB 18

- ▶ Before finalizing a plan, local governments contact the NAHC for list of affiliated Tribes, then send notice to Tribes on the list
- ▶ Tribes have 90 days to respond after notice
- ▶ Complete consultation before finalizing plan
- ▶ SB 18 Tribal Consultation Guidelines

AB 52

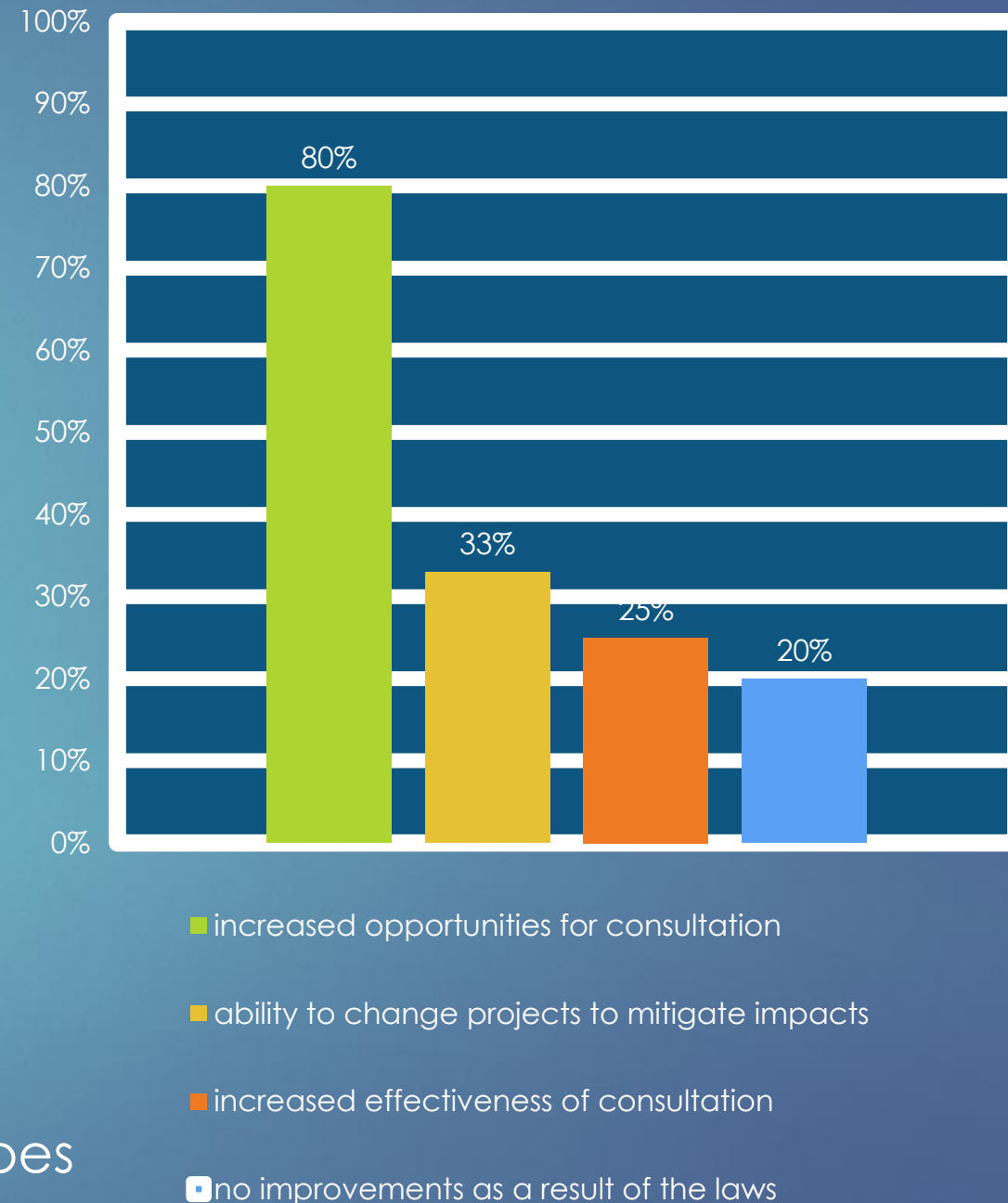
- ▶ Agency to send Tribes that have notified them notice within 14 days of deciding to initiate a project or determining that the project application is complete.
- ▶ Tribes have 30 days to respond in writing. Agencies to initiate consultation 30 days after Tribes respond.
- ▶ Complete consultation before finalizing environmental document
- ▶ Consultation is concluded when parties agree on mitigation measures or a party, after good faith and reasonable effort, determines that agreement cannot be reached

Tribal consultation project

- ▶ Effectiveness of two California laws – SB 18 and AB 52 – in achieving statutory goals and incorporating perspective of Tribes
- ▶ Study: Legal and historical research, review of environmental impact reports, interviews, case studies, Indigenous Health Indicators, Tribal survey, recommendations

Survey results - trends

- ▶ Tribal goals for consultation
- ▶ Increased opportunities for consultation
- ▶ Some Tribes: increased effectiveness and ability to mitigate impacts and protect cultural resources, better relationships
- ▶ Minority: laws promoted resolution of issues and healing for Tribal members
- ▶ Limitations for majority of Tribes
- ▶ Challenges for non-federally recognized Tribes



Survey results – key issues

What needs to be in place?

▶ Confidentiality

▶ Relationships

▶ Resources

▶ Education

Survey results – key issues

Procedures and substantive requirements

- ▶ Ensuring engagement of Tribes
 - ▶ Early notification
 - ▶ Consultation timeline and protocols
- ▶ Tribal knowledge/expertise
- ▶ Creative mitigation
- ▶ Accountability and implementation

Tribal consultation digital hub

- ▶ Free online resource of Tribal consultation policies/laws nationwide
 - ▶ Tribes, States and state agencies, Federal, some local
- ▶ Procedure for including publicly available policies of Tribes – respecting data sovereignty, rescission procedure
- ▶ Phase 2 (coming soon)
 - ▶ consultation resources
 - ▶ results of ELI's research on Tribal consultation in California and other states

THANK YOU!

Links to the Tribal consultation digital hub

<http://Eli.org/tribal-policies>

Questions and feedback

- Additional policies
- Rescission of permission

consultationhub@eli.org

CONTACT:

Greta Swanson
swanson@eli.org

