

# Survey and Interview Analysis: Gaps and Recommendations

## Introduction

This analysis is based primarily on a Tribal consultation survey disseminated to California Native American Tribes in January and February 2024. It also includes information from follow-up interviews with survey participants, and was informed by an original round of interviews with representatives of Tribes, agencies, and legal experts in 2022, and the project steering committee.

The goals of the survey were to assist in identifying gaps in effective implementation of California's laws requiring Tribal consultation, primarily SB 18 and AB 52, and to compile a set of recommendations for addressing the gaps. This analysis presents goals and recommendations from the point of view of Tribal respondents, in accordance with the goals of the laws to protect Tribal cultural places and cultural resources. A companion rubric addresses issues faced by Tribes, agencies, and local governments as a whole in implementing consultation.

## Methods

After conducting an initial round of interviews, the survey was developed by ELI project leaders Cynthia Harris and Greta Swanson, with input from project partners, Tribal representatives, and the project steering committee. ELI obtained Institutional Review Board (IRB) approval for the survey from the California Rural Indian Health Board. The ELI team disseminated the survey directly via email to 141 California Native American Tribes, both federally recognized and non-federally recognized Tribes in California to which the state consultation laws apply. It also disseminated it through Tribal organization channels. 23 California Native American Tribes, two-thirds from federally recognized and one-third from non-federally recognized Tribes, responded to the survey. ELI conducted six follow-up interviews, five of which were with non-federally recognized Tribes.

Although the results are not statistically conclusive, this analysis reviews the quantitative results and accompanying comments as indicators and examples of current on-the-ground implementation of the consultation laws. It discusses the results in terms of key issues in consultation, grouped in three areas. For each issue, it briefly sets out applicable law, policy, and best practices as existing standards. Each section notes any improvements in consultation due to the laws, how the laws are being implemented from the point of view of Tribes, and gaps in implementation. For each issue, the analysis provides recommendations. Many recommendations may be implemented within the existing legal framework. Where legal changes might be required, it is noted. In addition, the recommendations discuss where appropriation of additional funds would be required.

## Trends

Interviews with Tribal representatives and a survey of California Native American Tribes indicate that the state's consultation laws have given many California Tribes greater opportunities to consult and to have an influence on projects. 80% of survey respondents and all of the non-federally recognized (NFR) Tribal respondents agreed that there were increased opportunities for consultation as a result of the laws. Although the opportunities for consultation have increased, the efficacy of such consultation remains limited.. About one-third of Tribal respondents agreed that the laws have given them the ability to change projects early to avoid or mitigate their impacts. One-fourth overall and about one-third of NFR Tribes reported increased effectiveness of consultation. Several noted that consultation effectiveness and relationships vary significantly, depending on the agency and personnel involved.

Of survey respondents, a few indicated that the laws promoted the resolution of issues and promotion of healing for Tribal members, while one commented that there should be more opportunities for healing for Tribal members.

About one-fifth of respondents experienced no improvements as a result of the consultation laws. Comments indicated that some agencies take a checkbox approach to consultation, in which the agency makes no substantive changes as a result of consultation.

Nearly all Tribes sought several objectives through consultation. These included:

- Preservation and avoiding disturbance of the cultural resources
- Documentation of the resources (where there might not be preservation)
- Cultural management of the resources
- Protecting cultural heritage
- Creative mitigation of impacts on the resources

Tribes also sought protection and ecological restoration of ancestral lands, restoration of cultural sites, repatriation of ancestors, and promotion of Tribal sovereignty, among other goals.

Issues on which Tribes had engaged in consultation included Tribal cultural resources (95%), cultural landscapes (70%), sacred sites (85%), Traditional Tribal cultural places (80%), city/county general or specific plans or amendments (90%), and human remains (ancestors) (85%). Tribes had also consulted on environmental and cultural stewardship of traditional lands and other topics.

Most respondents have engaged in consultation under the California laws. About 75% have engaged in SB 18 consultation and over 85% in AB 52 consultation. About 50% have engaged in consultation on AB 275 and about 30% in AB 178. 83% of the NFR Tribes have engaged in SB 18 and AB 52 consultation.

Trends indicated that although NFR Tribes have had more opportunities for consultation as a result of the laws, their ability to participate in consultation has been more limited than for federally recognized Tribes. This limitation stems from several factors, including a lack of funding. Many participants indicated that, while consultation laws have created opportunities for Tribal participation, they have also imposed significant resource demands on all Tribes.

Another trend noted in the comments and follow-up interviews was that Tribes have experienced more effective consultation with a greater number of state agencies than local governments. Among the reasons respondents gave were the local government's lack of capacity and resources, as well as negative attitudes and carrying out the letter but not spirit of the law.

### **Prior to and in conjunction with consultation**

#### **1. Confidentiality considerations**

##### *Guidelines and legal requirements*

Requirements under AB 52 direct that Tribal information is not to be included in the environmental document.<sup>1</sup> The SB 18 Guidelines provide direction on how to avoid disclosing Tribal confidential information under the mandatory disclosures required under the Brown Act.<sup>2</sup>

##### *Current status, gaps and issues*

- Laws do not provide sanctions for failure to respect Tribal confidentiality; some jurisdictions respect confidentiality while others do not.
- Confidentiality considerations can be a double bind for Tribes. A Tribe might not disclose information because it has no assurance that it won't be shared publicly; as a result, the agency might conclude that the Tribe doesn't have information and doesn't consult.

##### *Recommendations/opportunities*

- Develop a nondisclosure agreement, especially after the Tribe's information is involved, to protect confidentiality of Tribal information.
- Consider limiting to one or two people who will get information.
- Agencies should consider how a Tribe may want to limit disclosure of confidential information, while ensuring Tribal input in determining the existence of Tribal cultural resources.

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<sup>1</sup> GC §§ 65040.2(g)(3), 65352.5, 6254(r), & 6254.10.

<sup>2</sup> SB 18 Tribal Consultation Guidelines, at 25 [Guidelines].

## 2. Relationships between Tribes and agencies/decision-makers

### *Guidelines and legal requirements*

The SB 18 Guidelines discuss the importance of establishing positive working relationships between agencies and Tribes. Part C, which discusses pre-consultation, advises establishing a collaborative relationship as early as possible.<sup>3</sup> It also advises that before consultation, local governments develop a consultation protocol with each Tribe to include the development and maintenance of a collaborative relationship.<sup>4</sup>

The definition of consultation in both SB 18 and AB 52 necessarily involves mutual respect, defining consultation in part as “respectful of each party’s sovereignty.”<sup>5</sup>

### *Current status, gaps and issues*

For about one-third of Tribal respondents and half of NFR Tribal respondents, the laws have improved relationships between their Tribe and lead agencies, while about half neither agreed nor disagreed with the statement. Some Tribes report that agencies fail to fully understand the Tribal perspective and/or that they conduct procedural and substantive planning without Tribal input.

Survey comments indicate that whether Tribes encounter respectful attitudes from and have good relationships with agencies and local governments varies with the Tribe and particular agency and staff involved. Some Tribes have developed ongoing positive relationships with agencies that are open to them. Relationships can include regular meetings and ongoing open communication between the parties apart from formal consultations.

### *Recommendations/opportunities*

- Numerous Tribes stressed the importance of having positive, ongoing relationships with decision-makers, relationships that require both sides to invest time and effort into building. Such relationships can serve a variety of purposes, including providing opportunities for agencies/local governments to better understand Tribal culture and concerns, and for Tribes to learn about upcoming projects and provide input into planning apart from formal consultation. The relationships also allow for less formal but still collaborative decision-making to take place in an environment where both parties have a better understanding of the other.

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<sup>3</sup> *Id.* at 17.

<sup>4</sup> *Id.* at 22.

<sup>5</sup> GC §65352.4.

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- There are multiple approaches to creating ongoing communication between Tribes and agencies outside of formal consultations. These include establishing ongoing communications and meetings with Tribes as to upcoming and long-term plans and projects, and establishing Tribal advisory committees to address and trouble-shoot issues in the consultation process or for planning or project development.
- Throughout, it is important to maintain an attitude of respect on both sides.

Yosemite National Park engages in standing, bi-weekly meetings on upcoming projects with Tribes and sends out a monthly spreadsheet of upcoming projects to Tribes. These actions have fostered a relationship of trust during the pre-planning phase, led to creative mitigation, and provided opportunities for ongoing communication with both federally and non-federally recognized Tribes in and around the Park.

### 3. Provision of resources/alternative methods for Tribes to have a role in decision-making

#### *Guidelines and legal requirements related to resources*

The SB 18 Guidelines ask agencies to be aware of Tribes' staffing levels and ability to respond, and to keep this information in mind when developing protocols.<sup>6</sup>

Federal guidance and policy set a standard for compensating Tribal experts commensurate with other experts engaged in environmental analyses.<sup>7</sup> Because California models its policy on federal policy, these policies are applicable to consultation under California laws.

#### *Current status, gaps and issues*

Consultation is an unfunded mandate imposed on Tribes, who have limited resources. Tribes receive a large volume of consultation requests, which require significant staff or volunteer time to review to make an initial decision as to whether to proceed with consultation, as well as time for consultation itself. Comments included that there are too many consultation requests overall for many Tribes to review. NFR Tribes do not receive funding for a Tribal Historic Preservation Officer and rely on other sources of funding or

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<sup>6</sup> Guidelines, at 17.

<sup>7</sup> Guidance for Federal Departments and Agencies on Indigenous Knowledge, at 18; ACHP Policy Statement on Indigenous Knowledge and Historic Preservation, at 5.

their own personal time to address consultation requests. Additionally, Tribal experts, who provide essential information for planning and projects, are not always paid.

Most Tribal respondents disagreed with the statement that they have adequate personnel and financial resources to participate in consultation to the extent they would like to, while only about one-fourth of respondents agree that they have sufficient resources to effectively engage in consultation. Two-thirds of non-federally recognized California Native American Tribes strongly disagreed that they have sufficient resources, while one-third indicated that resources were sufficient.

### *Recommendations/opportunities*

Providing more resources to Tribes could include the following:

- Increase funding to provide for more than one THPO position per Tribe
- Provide funding to Tribes for additional resources or personnel to research and manage data, provide education to Tribal members, attend consultations, and provide additional expertise.
- Generally, compensate Tribal time and knowledge. Pay Tribal experts for their time at competitive rates. Compensate for initial and subsequent cultural surveys, participation in meetings, and any other time required.
- Provide funding to NRF Tribes.
- Provide a line item in agency budget to pay Tribal staff for consultation and/or members of a Tribal advisory committee, as San Diego County has done.
- Create a permit system, where CRM firms and archaeologists are required to obtain Tribal permits before beginning cultural surveys to both generate revenue for the Tribe and involve Tribal monitors and THPOs from the outset.
- Provide resources to Tribes to support on-going relationship-building.
- Agencies build up resources to assist Tribes with consultation, including staff or Tribal liaison dedicated to facilitating communication and consultation with Tribes.
- Provide dedicated staff to represent Tribes and their concerns in ongoing communications and to maintain relationships with agencies at multiple levels.

Additional approaches to limiting the burden of multiple consultations on Tribes could include:

- creative and more efficient decision-making in accordance with the Tribe's agreement, looking at to what extent Tribes and agencies can collaborate on decisions, and bring related projects into a single decision-making process.
- Tribes collaborate on joint consultation, with explicit Tribal agreement.
- Opportunities for Tribes to know of projects ahead of time, so as to have input ahead of time, sometimes alleviating the need for formal consultation
- Agencies should also ensure that they do not send unrelated notices to Tribes.

#### 4. Education/training

##### *Guidelines and legal requirements*

The SB 18 Guidelines discuss pre-consultation options that include education of agencies on Tribal culture, history, and interests.<sup>8</sup>

##### *Current status, gaps and issues*

Tribes had varying responses as to whether agencies/local governments sufficiently understand the laws to engage in effective consultation. Approximately one-quarter indicated that agencies sufficiently understand the laws; about a quarter neither agreed nor disagreed, and almost half disagreed.

About three-fourths of Tribal respondents agreed that they have sufficient knowledge of the consultation laws, while a few did not agree. However, only about one-third of NFR Tribes indicated that they have sufficient knowledge.

##### *Recommendations/opportunities*

- Where needed, ensure training and learning opportunities for agencies/local governments on implementation of the consultation laws and on the culture and history of Tribes with which they may consult.
- Connect those Tribes that are interested with free educational resources on the consultation laws.
- Clarify consultation requirements/procedures when joint federal-state/local actions.

#### During the consultation process

#### 5. Notification

Notification of consultation opportunities includes consideration of when to notify, what information to provide, and who to notify.

##### *Guidelines and legal requirements*

Under AB 52, agencies are required to notify Tribes within 14 days of an application being complete or the lead agency's decision to undertake a project.<sup>9</sup> The SB 18 Guidelines advise that once a local government initiates a proposal to adopt/amend a general or specific plan, it must request the Tribal contact list from NAHC. The local government should contact Tribes as soon as possible upon receiving the list.<sup>10</sup>

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<sup>8</sup> Guidelines, at 21.

<sup>9</sup> PRC § 21080.3.1.

<sup>10</sup> Guidelines, at 13.

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Under AB 52, the notice must provide information that includes description and location, and local agency contact.<sup>11</sup> The SB 18 Guidelines suggest that notices include a “description of the proposed general plan or specific plan being considered, the reason for the proposal, and the specific geographic area(s) [with clear maps] that will be affected by the proposal. Relevant technical documents should be provided with a concise explanation that clearly describes the proposed general plan or specific plan amendment and its potential impacts on cultural resources, if known.”<sup>12</sup>

Who to notify varies by statute. Under SB 18, the local government must notify listed Tribal contacts for Tribes on the NAHC contact list.<sup>13</sup> For open space, it must notify those Tribes that have requested notification in advance and are on the NAHC list.<sup>14</sup> Local governments are to contact the NAHC office for Tribes and their contacts to notify. The SB 18 Guidelines point out the need to maintain updated lists. Through pre-consultation, agencies and Tribes can determine procedures to maintain updated contact lists. AB 52 requires notifying Tribes who have requested notification for purposes of CEQA.<sup>15</sup>

A separate issue is that there is a lack of clarity regarding application of California consultation laws that must be followed when there is federal involvement. This situation can be especially difficult when a non-federally recognized Tribe may consult with a state agency but not a federal one on the same project.

### *Current status, gaps and issues*

Survey results indicated that most respondents had received notices inviting them to consult with agencies. Local jurisdictions had sent SB 18 notices to 70% of Tribal respondents overall and to two-thirds of NFR Tribal respondents, and AB 52 notices to 80% overall and all NFR respondents. State agencies had sent AB 52 notices to 80% overall and 83% of NFR respondents.

However, timing of notification may occur after key decisions, including cultural resource surveys, have already been made at the outset of a project, in advance of Tribal involvement. One-third of Tribal respondents agreed that they learn about projects early enough to make changes; over one-third disagreed with the statement, and over one-fifth neither agreed nor disagreed.

An agency may not recognize that CEQA notification to Tribes is triggered when the footprint of an existing building/project is being expanded.

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<sup>11</sup> PRC § 21080.3.1.

<sup>12</sup> Guidelines, at 14.

<sup>13</sup> G.C. § 65352.2.

<sup>14</sup> G.C. § 65562.5.

<sup>15</sup> PRC § 21080.3.1.



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Tribes do not always receive the information that they need in notices or in response to their follow-up requests.

As for who to notify, the fact that AB 52 requires Tribes to proactively notify the agencies with which they would like to consult has resulted in some Tribes not receiving notifications. In addition, notices may be sent to the wrong Tribal department, or the governmental entity may be mistaken as to the Tribe's traditional territory or fail to follow the rule to reach out to the NAHC, leaving out some Tribes. When there is no initial response, there may be a failure to follow up to obtain an answer from the Tribe.

### *Recommendations/opportunities*

- Notification should occur early enough for Tribe's input to be capable of altering the project's outcome, and early enough to allow for changes in the plans/project before the CRM report is done.
- Provide a more flexible timeframe for responding to a notice. In one example, an agency accepted a Tribe's response to the invitation even though it was submitted after the deadline, based on an ongoing good relationship. Such accommodation could also be made through a joint protocol.
- Ensure education of agencies such that they at a minimum follow the law for notification.
- Provide sufficient, not overwhelming information; readily provide follow-up information that the Tribe requests.
- Ensure that notification is sent to the appropriate Tribal contact. Ensure that local governments follow the formal procedure of contacting NAHC for every project. Agency should follow up to multiple contacts if there is no initial response.

### 6. Consultation process: timeline for consultation and consultation procedures

#### *Guidelines and legal requirements*

The SB 18 Guidelines encourage local governments to consult as early as possible, beginning consultation before a formal proposal is submitted.<sup>16</sup> After notifying Tribes of the opportunity to consult within 14 days of a completed application or the agency decision to undertake a project and a Tribe's request within 30 day of notification, AB 52 requires that the agency initiate consultation within 30 days of the Tribe's request.<sup>17</sup>

The Guidelines encourage local governments to develop joint consultation protocols with each Tribe through pre-consultation. Governments should ask Tribes for their protocol if

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<sup>16</sup> Guidelines, at 12.

<sup>17</sup> PRC § 21080.3.1.

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available. They are to contact the Tribal representative identified by NAHC.<sup>18</sup> Under AB 52, the Tribe is to designate a lead contact person.<sup>19</sup>

### *Current status, gaps and issues*

About two-thirds of survey respondents disagreed with the statement that the laws provide sufficient time for consultation.

The consultation timeline can be challenging for many Tribes, especially those with limited resources. Timing may constrain Tribes' ability to participate. The 30-day time limit for responding to an AB 52 notice can be too short for some Tribes.

### *Recommendations/opportunities*

- When needed by Tribes, provide a flexible timeline for responding to the invitation for consultation, in accordance with the Tribe's capacity. (see Notification) Provide timeline conducive to Tribe's schedule in scheduling/ managing consultation process.
- Defer to the Tribe's preferred consultation procedures/protocol if available
- Consultation takes place between decision-makers (high level) or people authorized to speak and make decisions for the agency and Tribe
- Defer to Tribe's preferences for venue, e.g., phone calls, written communication, video calls, physical venue at convenient location for Tribe.
- Agendas should be mutually agreed upon and flexible.
- Allow for the consultation process to provide an opportunity for education, to fill in gaps in the agency's understanding of the Tribe's culture, history, and concerns.

## 7. Consideration of Tribal expertise and Indigenous knowledge

Related issues here include how traditional Tribal cultural places and Tribal cultural resources are identified and who identifies them, and determining the significance of both the Tribal cultural resources and the impacts of the project on the Tribal cultural resources.

### *Guidelines and legal requirements*

SB 18 notes that Tribes may have knowledge not otherwise available to local governments/project stakeholders. The SB 18 Guidelines state, "[a] Tribe may be the only source of information regarding the existence of a cultural place." Under AB 52, discretionary types of consultation include: the significance of Tribal cultural resources, and the significance of impacts on Tribal cultural resources. Appendix G, which provides additional direction for implementing the law, directs the agency to ask whether the project

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<sup>18</sup> Guidelines, at 13.

<sup>19</sup> PRC § 21080.3.1.

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would cause a substantial adverse change in the significance of Tribal cultural resources. A significant resource includes one “determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to [historic preservation] criteria,” considering “the significance of the resource to a California Native American tribe.”

### *Current status, gaps and issues*

Pre-permit reliance on archaeologists to do a cultural resource survey can miss identifying cultural resources not on state databases but known to a Tribe. Such pre-permit reliance can result in consultation that is not meaningful because the environmental impact report has already concluded that there are no Tribal Cultural Resources.

Approximately two-thirds of Tribal respondents overall and 83% of NFR Tribal respondents indicated that Tribal expertise/Indigenous knowledge is not given sufficient weight in the decision. More than half overall and all the NFR Tribes responded that archaeologist/CRM firm knowledge is prioritized over Tribal expertise. In particular, one respondent noted that CRM firms currently wield the power to perpetuate inaccurate cultural knowledge to agencies they report to, but also have the power to contribute true and accurate Tribal history and culture by working with tribes to get information accurate and correct. Interviews indicated that younger/newer archaeologists tend to be more receptive to Tribal recommendations concerning Tribal cultural resources. Some Tribes have found CRM firms with which they can form good relationships and collaborate on the determination of Tribal cultural resources.

### *Recommendations/opportunities*

- There should be early consideration of Tribal expertise/Indigenous knowledge together with that of archaeologist in cultural resource survey and report
- Pre-permit/initial cultural resource surveys should involve Tribes if they wish to be involved, not just CRM firms and archaeologists. Don't allow a CRM's initial finding of no Tribal cultural resources or sites to determine whether to contact Tribes for consultation.
- Agencies prioritize working with CRM firms/archaeologists that have good working relationships with Tribes.
- Tribal staff involved should be paid for the initial survey at competitive rates. At the point that the Tribe's information is involved, ensure payment of the Tribal staff involved for their expertise and time.
- Impose penalty for failure of CRM firms/archaeologists to consult with Tribes.
- Tribal knowledge is prioritized over CRM firm/ archaeological knowledge or at least given equal weight. Defer to Tribal knowledge over that of archaeologist in case of conflict .

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- For plants, use the state-wide plant database to help identify culturally important plants.
- Implications of deference to Tribal expertise can include acknowledging impacts on Tribes, of impacts on Tribal cultural resources , and incorporating Tribal point of view as to the importance/significance of a resource.

### 8. Outcomes: creative mitigation of impacts

#### *Guidelines and legal requirements*

SB 18 requires local governments to conduct consultations with Tribes (when requested) for the purpose of “preserving or mitigating impacts” to the cultural places.<sup>20</sup> The SB 18 Guidelines note that preservation may be the only appropriate treatment when impacts to the physical or spiritual integrity of a cultural place cannot be mitigated. The Guidelines suggest as possible mitigation measures: Minimizing impacts by limiting the degree or magnitude of the action and its implementation; Rectifying the impact by repairing, rehabilitating, or restoring the impacted cultural place; Reducing or eliminating the impact over time through monitoring and management of the cultural place; Designation of open space land in accordance with GC §65560(b); Enhancement of habitat or open space properties for protection of cultural place; Development of an alternate site suitable for Tribal purposes and acceptable to the Tribe.<sup>21</sup>

AB 52 requires agencies to avoid damaging effects to Tribal cultural resources when feasible.<sup>22</sup> Mitigation is a mandatory topic of consultation. Discretionary topics are project alternatives or appropriate measures for preservation or mitigation that the Tribe may recommend. If measures are not identified during the consultation process, agency may consider: (1) Avoidance and preservation of the resources in place, including 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. (2) Treating the resource with culturally appropriate dignity, taking into account the tribal cultural values and meaning of the resource, including the following: (A) Protecting the cultural character and integrity of the resource; (B) Protecting the traditional use of the resource; or (C) Protecting the confidentiality of the resource. (3) 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. (4) Protecting the resource.<sup>23</sup>

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<sup>20</sup> GC § 65352.3.

<sup>21</sup> Guidelines, at 24.

<sup>22</sup> PRC § 21084.3 (a).

<sup>23</sup> PRC § 21084.3 (b).

*Current status, gaps and issues*

Interviews suggested that decisions that implicate the range of mitigation options available are often made at the outset of a project, in advance of Tribal involvement. However, about one-fourth of survey respondents report that they had an ability to change projects early to avoid or mitigate impacts and about one-fourth agreed that consultation was more effective because of the consultation laws. About 35% overall agreed that there was greater protection of the Tribe's cultural resources, although only a small minority (1) of NFR Tribes saw this result. A small group indicated that healing had taken place as a result of the consultation laws.

A common comment is that mitigation options are frequently quite limited in practice, with much mitigation consisting solely of using a Tribal monitor during project construction.

United Auburn Indian Community has publicly available guidance on Tribal Goals for AB 52 Consultation, which includes preferred mitigation and site restoration options for projects where avoidance is unfeasible.<sup>24</sup> The guidance mandates the development of a long-term management plan, encompassing measures like fencing and regular operation and maintenance in culturally sensitive zones, alongside an unanticipated discoveries protocol, during the consultation phase.<sup>25</sup> Since each Tribe has distinct consultation preferences, this guidance shows the value of a Tribal consultation policy.

*Recommendations/opportunities*

- Early involvement should allow for full consideration of alternatives, and ways to avoid impacts as much as possible. Tribes seek the ability to ensure that a project avoids cultural resources, to make changes in design ahead of construction, and/or use other creative mitigation measures that are implemented before final decisions are made on the design and location of the project.
- Some Tribes suggest changing the laws to require a Tribe's assent for any project or cultural project related to the Tribe.
- Outcomes should provide opportunities for healing for Tribal members, which would be defined by the Tribe.

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<sup>24</sup> United Auburn Indian Community, Tribal Goals for AB 52 Consultation (2023), <https://auburnrancheria.com/wp-content/uploads/2023/04/UAIC-AB52.pdf>.

<sup>25</sup> *Id.* at 9.

## After consultation

### 9. Implementation/accountability

#### *Guidelines and legal requirements*

The SB 18 Guidelines suggest that both parties document consultation, “including letters, telephone calls, and direct meetings,” without disclosing confidential information.<sup>26</sup>

AB 52 Best Practices advises that if there is no resolution at the conclusion of consultation, the parties should “document why and what efforts were made.”

#### *Current status, gaps and issues*

Most Tribes neither agreed nor disagreed as to whether measures agreed to during consultation were implemented. About one-fourth disagreed that they were implemented. Comments indicated that decisions are not always communicated to the construction firm or that on-the-ground coordination is lacking or does not accommodate a THPO’s schedule. Many identified issues with accountability, noting that the laws do not have any accountability built into them.

#### *Recommendations/opportunities*

Options for improving accountability include:

- Establish accessible means other than litigation of holding agencies/local governments accountable. Establish accessible appeal processes.
- Create written account of decisions made during consultation.
- Ensure coordination with construction firms to ensure implementation of decisions made in consultation.
- Plan for future of project, which will likely involve maintenance and potential expansion, in which the Tribe is regularly apprised of ongoing action involving the project.
- Change laws to improve accountability of agencies in consultation.

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<sup>26</sup> Guidelines, at 18.