

# Tribal Consultation Rubric

Initial Framework | Expert Interview Data Synthesis

## Table of Contents

Introduction .....	4
Key to Recommendations .....	5
Bucket #1 – Confidentiality .....	6
Synopsis .....	6
Core elements/needs.....	6
Commentary .....	6
Recommendations .....	7
Survey Questions .....	7
.....	8
Bucket #2 - Sufficient and Accessible Resources for Effective Engagement in Consultation .....	8
Synopsis .....	8
Core elements/needs.....	8
Commentary .....	8
Recommendations .....	9
Survey Questions .....	9
Bucket #3 - Relationship-Building .....	10
Synopsis .....	10
Core elements/needs.....	10
Commentary .....	10
Recommendations .....	11
Survey Questions .....	11
Bucket #4 - Education and Capacity-Building .....	12
Synopsis .....	12
Core elements/needs.....	12
Commentary .....	12
Recommendations .....	13
Survey Questions .....	13
Bucket #5 – Notification.....	14
Synopsis .....	14
Core elements/needs.....	14
Commentary .....	14
Recommendations .....	15

Bucket #6 - Effective Consultation Timeline, Procedures, Protocols, and Format .....	16
Synopsis .....	16
Core elements/needs.....	16
Commentary .....	17
Recommendations.....	17
Survey Questions .....	19
Bucket #7 – Consideration of Tribal Expertise and Indigenous Knowledge .....	20
Synopsis .....	20
Core elements/needs.....	20
Commentary .....	20
Recommendations.....	21
Survey Questions .....	22
Bucket #8 – Outcomes: Culturally Appropriate, Practicable, and Creative Mitigation Measures.....	23
Synopsis .....	23
Core elements/needs.....	23
Commentary .....	23
Recommendations.....	24
Survey Questions .....	24
Bucket #9 - Accountability and Oversight.....	25
Synopsis .....	25
Core elements/needs.....	25
Commentary .....	25
Recommendations.....	25
Survey Questions .....	26
Bucket #10 - Institutionalize Strong Tribal Relations and Knowledge Base Through Robust Recordkeeping, Effective Policies, and Dedicated Roles .....	27
Synopsis .....	27
Core elements/needs.....	27
Commentary .....	27
Recommendations.....	27
Survey Questions .....	28
Synopsis .....	29
Core elements/needs.....	29

Commentary .....	29
Recommendations .....	30
Survey Questions .....	30
Overarching Survey Questions.....	31

## Introduction

This framework synthesizes data from a series of interviews ELI’s research team conducted mid- to late 2022. The interviews focused on government-to-government consultation (under AB 52 and SB 18). Interviewees included Tribal, state, and local government officials and staff in California, as well as legal, consulting firm, nonprofit, academic, and other experts with diverse experiences, and key individuals who contributed to the development of these laws and associated regulations, policies, and guidelines. Based on a survey of Tribes that ELI conducted in early 2024, ELI revised the rubric to reflect the results of the survey

ELI’s research team identified and categorized insights derived from each interview into 11 separate “buckets,” or critical components of meaningful consultation within the context of California’s consultation laws, regulations, and policies. Significantly, the concept of advancing Tribal sovereignty is baked into most if not all buckets. Consistency with the recommendations in each bucket means that a consultation policy contributes to advancing Tribal sovereignty.

Each bucket includes:

- A synopsis of the consultation component
- Table listing core elements/needs of key parties involved in the consultation process, reflecting what each requires and/or could provide that would promote meaningful and/or effective consultation
- Commentary providing relevant background
- Recommendations for improving consultation in California
- Potential survey questions to disseminate to California Tribal staff and leadership, lead agency staff, policymakers, consultants, and others involved in consultation, to further examine the effectiveness of California’s consultation laws

Next steps include producing a survey, pursuing a robust outreach strategy for disseminating that survey and encouraging participation, and using the responses to build out this framework into a true “rubric” for analyzing Tribal consultation policies.

**Content Warning:** Bucket #7 contains a discussion of harmful stereotypes held about Tribes.

# Key to Recommendations

Symbol	Meaning
\$	Funding and/or financing
B	Changes to bureaucratic structure
C	Coordination between or within parties
E	Education or training
I	Changes to the implementation of consultation (not necessarily requiring formal statutory or regulatory changes)
R	Changes to regulations
S	Changes to statutes

## Bucket #1 – Confidentiality



### Synopsis

Ensuring the confidentiality of Tribal information under AB 52 and SB 18 reportedly has had mixed results. While some interviewees lauded the statutes’ protections for Tribal information, others raised concerns that lead agency staff do not understand, and have even violated, the confidentiality of disclosed information about Tribal cultural resources and places. Successfully protecting TCRs and TTCPs through consultation depends on agencies knowing their existence and location; this presents Tribes with a choice between disclosing information to protect TCRs and TTCPs from development and concealing the locations of TCRs and TTCPs to protect them against looting and vandalism. Confidentiality can also work against Tribal interests by erasing any written record of consultation upon which a court could base a ruling to overturn a lead agency’s decision that a Tribe provided insufficient information for establishing presence of a TCR or TTCP.

### Core elements/needs

Tribes	Lead Agencies	Both	Project Proponents
Credible assurance that any confidential information shared with agencies will not be disclosed; acceptable methods for Tribes to indicate the importance of a TCR/TCP/TTCP without sharing specific details	Clear protocols to protect confidentiality of Tribal information		
Recourse for when agencies or project proponents disclose confidential information	Training on public disclosure law exemptions and the sensitivities of disclosing confidential information (see Education)		
Records, appropriately safeguarded, that demonstrate the Tribe raised cultural concerns			

### Commentary

Some interviewees reported that lead agencies have posted planning reports, archaeological reports, contact information, and cultural information on their public websites, and then declined the Tribe’s requests to take down the confidential information. High rates of agency staff turnover (see

Institutionalize agency procedures and knowledge) exacerbate confidentiality concerns and breaches, as newer staff may be less likely to understand the sensitivities of disclosing sensitive Tribal information or that documents shared by Tribes during consultation are exempt from public disclosure requirements. A lack of cultural specialists and culturally competent staff within an agency exacerbates this problem. Tribal representatives reported the best way to protect a TCR or TTCP is by not mentioning it during formal consultations, as putting the location of a TCR or TTCP into writing opens it up to risks of looting, vandalism, and bulldozing. Oftentimes, only certain individuals within a Tribe are entrusted with the location of TCRs and TTCPs; this increases Tribes' reluctance to share this private information with outsiders in lead agencies. Tribes have reported instances—where confidentiality is presumably respected, and Tribal information is not memorialized in writing—where a lead agency will claim that the oral history of a TCR or TTCP is insufficient and the City Council itself can neither review nor hear that information due to its confidentiality. Consequently, a reviewing court has little upon which it can base its decision.

### Recommendations

- **[C, I, R, S]** Confidentiality protocols/nondisclosure agreements developed in collaboration with Tribes to protect Tribal information. Provide recourse for confidentiality violations.
- **[I]** Identify methods on how to best protect Indigenous knowledge, which first requires earning Tribe's trust. These could be part of the mandate of the state clearinghouse (*see Outcomes*).
- **[I]** Leverage California Historical Resources Information System (CHRIS) as a confidential resource for information about every TCR site developers have encountered.
- **[I]** Abstain from recording any notes if requested, nor uploading them to the Internet or to computer systems if notes are taken during consultation. Limit sharing of information to one or two people in agency.
- **[I]** Applicants generally should not be present at consultations, per Tribes' preference, so that Tribes can freely share confidential information.
- **[C, I]** Agencies consider how a Tribe may limit disclosure of confidential information, while ensuring Tribal input in determining the existence of Tribal cultural resources.

### Survey Questions

- What issues has your Tribe/agency encountered regarding confidentiality of Tribal information in the consultation process?
- What measures/approaches within the consultation process would be most effective to protect the confidentiality of Tribal information?



## Bucket #2 - Sufficient and Accessible Resources for Effective Engagement in Consultation



### Synopsis

Consultation laws like AB 52 and SB 18 equate to a state-imposed unfunded mandate on Tribes and lead agencies alike. Effective consultation is resource intensive and requires investment in staff, technical consultants, training, technology, and more. The majority of Tribal survey respondents identified limited resources as constraining effective participation in consultation.

### Core elements/needs

Tribes	Lead Agencies	Both	Project Proponents
Human resources: THPOs, technical experts (legal, cultural, GIS), Tribal monitors	Human resources: Tribal Liaisons, experienced and trained staff, and administrative support staff	Funding	
Access to information/funding to produce data, including technical analysis, GIS mapping, and surveys	Capacity to locate and provide data and information responsive to Tribes' requests	Human resources	
Reduced barriers to, and more assistance with, accessing and applying for funding			
Ability to nominate sacred sites to national and state historic registers			

### Commentary

Tribes reported finding themselves triaging the hundreds of consultation requests they receive annually. Tribes face substantial barriers to accessing state and federal funding, and non-federally recognized and non-gaming Tribes highlighted that they are particularly limited in which resources they can access.

## Recommendations

- **[\$]** New and expanded sources of funding/financing—Federal (NPS-funded THPO for each federally recognized Tribe), state (fund THPO-equivalent for non-federally recognized Tribes)—to which developers/proponents contribute as part of application fee.
- **[S, R]** Reduce barriers to accessing/applying for funding—simplify the Federal tax model (remove the need for non-federally recognized Tribes to form 501(c)(3) organizations) and eliminate waivers of Tribal sovereign immunity as a condition for receiving funding. Assist with completing applications, including direct and technical assistance and capacity building.
- **[\$, I, R]** Fair compensation for Tribal monitors and cultural resources staff (e.g., for research and review), with rates determined in advance against a state or regional benchmark (as a floor).
- **[\$, R, I]** Compensation for Tribal traditional knowledge holders equivalent to that provided to other subject matter experts such as archaeologists for their knowledge and skills, following ACHP section 106 standards.
- **[\$, I, R]** Developer application fee to fund Tribally conducted cultural resource surveys.
- **[C, I]** Joint consultation where multiple Tribes collaborate to share resources and collaborate on strategy.
- **[B, C, I]** State-level ombudsman office to intake, process, and disseminate information about projects triggering consultation. All lead agencies and Tribes would have access to a digital system—linked to CEQAnet or a similar database for other states and jurisdictions—for submitting notifications; making and accepting or declining consultation requests; providing, requesting, and accessing information; scheduling and logging notes of and outcomes from formal consultation; tracking implementation and monitoring; and more. A centralized advocate could both vet and provide recommendations and draft letters and other documents for Tribes.
- **[B, C, I]** Consolidation, planning, and coordination between agencies to reduce duplicative consultation requests. Multiple agencies with jurisdiction over a single project could engage in joint consultation.
- **[C, I]** Tribes and agencies could collaborate on decisions and bring related projects into a single decision-making process. Consolidation, planning and coordination among agencies to reduce duplicative consultation requests. Inform Tribes about projects ahead of time, so as to have input before key decision are made, sometime alleviating the need for formal consultation. [see Relationships]
- **[\$, C, I]** Agencies build up resources to assist Tribes with consultation, including staff or Tribal liaison dedicated to facilitating communication and consultation with Tribes. Agency line-item budgetary allocation for consultation, on-going Tribal input/advisory committee participation.
- **[\$, C, I]** Agencies/state government provide dedicated staff paid to represent Tribes (per Tribes' permission) and their concerns in ongoing communications and for consultation and maintaining relationships with agencies at multiple levels.

## Survey Questions

- What resources (human resources, financial resources, data and information, etc.) does your Tribe/agency need to effectively engage in government-to-government consultation, especially under AB 52/SB 18? To what extent does your Tribe/agency have these resources?
- What suggestions do you have for restructuring consultation to reduce the burden on Tribes?

## Bucket #3 - Relationship-Building



### Synopsis

Meaningful consultation rests on a foundation of trust between parties, and trust is established through building a positive, productive, and collaborative relationship over the long term.

### Core elements/needs

<b>Tribes</b>	<b>Lead Agencies</b>	<b>Both</b>	<b>Project Proponents</b>
Honest communication from agencies	Internal bodies dedicated to improving Tribal relationships (e.g., Tribal liaisons and Tribal Advisory Committees)	In-person meetings, if preferred by Tribes	Engagement outside of formal consultation
Agency engagement outside of consultation (e.g., attendance at Tribal events; collaboration (or even formal consultation) on climate resilience planning, land conservation, climate mitigation, state planning goals, and regional development and planning)  Regular meetings with agencies to keep updated on and to provide input into upcoming projects and plans	Consistent engagement with Tribes outside of formal consultation processes	Engagement outside of formal consultation	

### Commentary

The iterative nature of the Tribal consultation process can motivate lead agencies and developers to incorporate Tribal input to maintain a positive relationship that will benefit and expedite future development and public infrastructure projects. Numerous Tribes stressed the importance of having positive ongoing relationships that require both sides to invest time and effort into building. Relationships can serve a variety of purposes, including providing an opportunity for agencies/local governments to better understand Tribal culture and concerns; a basis for two-way communication

between Tribes and agencies about upcoming projects and planning apart from formal consultation; and for less formal but still collaborative decision-making to take place in the context of better mutual understanding.

## Recommendations

- **[I]** Lead agencies can foster positive relationships with Tribes by prioritizing and enabling in-person meetings, engaging with Tribes outside of the consultation process (e.g., attending cultural events—when invited—building one-on-one relationships), acknowledging and respecting Tribal cultural and spiritual values, clearly communicating what can and cannot be accomplished, creating and receiving input from inter- and intra-agency Tribal Advisory Councils, and focusing on Tribal interests and points-of-view during consultation.
- **[I]** Tribes can foster positive relationships with lead agencies by identifying any concerns and proposing mitigation strategies as soon as possible, approaching consultation as a partnership, and engaging with agencies outside of the consultation process.
- **[C, I]** Tribal staff and officials, subject to available resources, and key agencies and decision-makers can meet on a regular basis to provide updates to Tribes and receive Tribal input on upcoming projects and plans.
- **[C, I]** Agencies can establish open and ongoing communications to keep Tribes apprised of upcoming projects through other forms of regular communication.
- **[C, I]** Agencies can establish Tribal advisory committees to address and trouble-shoot issues in the consultation process and/or for planning or project development.
- **[C, I]** Creating joint protocols between the Tribe and agency as to standards and expectations for consultation and communication.

## Survey Questions

- Tribal officials/staff:
  - What are you seeking in a relationship with agencies?
  - What practices/approaches does your Tribe employ that are most conducive to fostering positive relationships with agencies?
  - What practices/approaches by agencies are the most conducive to fostering positive relationships with Tribes?
- Agency staff:
  - What practices/approaches does your agency employ that are most conducive to fostering positive relationships with Tribes?
  - What practices/approaches by Tribes are the most conducive to fostering positive relationships with agencies?

## Bucket #4 - Education and Capacity-Building



### Synopsis

Lead agency staff, especially those at smaller agencies, can lack comprehensive understanding of the consultation laws’ substantive and/or procedural requirements. They may hold generalized and gross misconceptions about Tribal nations, not realize the nuances involved in collaborating with Tribes, and fail to grasp the concept of viewing resources holistically (e.g., cultural landscapes); instead, they may focus on concrete and individual objects and artifacts. Tribes may be unaware of the scope and extent of their rights under consultation laws.

### Core elements/needs

Tribes	Lead Agencies	Both	Project Proponents
Better understanding of legal rights under consultation laws; better understanding of the legal processes available to Tribes and how to participate in them.	Better understanding of agencies’ substantive and procedural duties under consultation laws	Better understanding of consultation laws	Greater cultural competency and sensitivity – Indigenous culture; Tribal government processes; history, religion, and ethics of local Tribes
Better understanding of how to leverage consultation to meaningfully engage in and influence the general and specific local government planning processes	Greater cultural competency and sensitivity – Indigenous culture; Tribal government processes; history, religion, and ethics of local Tribes		
	Means of establishing institutional knowledge of consultation laws and Tribal culture ( <i>See Institutionalize agency procedures and knowledge</i> )		

### Commentary

Interviewees identified a dearth of understanding of Tribal culture, history, and values among agency personnel even more foundational than those directly relevant to consultation and project planning. Judges also would greatly benefit from additional training and education on Tribal issues, given that their misconceptions may limit Tribes’ ability to obtain judicial standing—which in turn presents yet another barrier to Tribes’ ability to hold agencies and project proponents accountable through litigation. *See*

Institutionalize agency procedures and knowledge). Many Tribal respondents to the survey expressed that agencies need additional information on the consultation laws. Some non-federally recognized Tribes also sought more information on the laws.

## Recommendations

- **[E]** Initial and ongoing (*see* Institutionalize agency procedures and knowledge) training for lead agency staff—including in conjunction with Tribes, fairly compensated and where they have both applicable expertise and interest, to design and provide the education. Agencies or state government provides and funds training.
- **[E]** Initial and ongoing (*see* Institutionalize agency procedures and knowledge) training for judges—including in conjunction with Tribes (as subject-matter experts).
- **[B, C, S]** Establish centralized state agency to serve as clearinghouse for training, standards, and resources for lead agencies.
- **[E]** Offer free training to interested Tribes that covers substance of consultation laws and Tribes' rights (e.g., what mitigation measures they are entitled to request, their rights to exclude consultants and developers from meetings and communications), as well as agencies' bureaucratic operations.
- **[C, I]** Allow for the consultation process to provide an opportunity for education, to fill gaps in the agency's understanding of the Tribe's culture, history, and concerns.

## Survey Questions

- Tribal officials/staff:
  - To what extent do you feel your Tribe adequately understands AB 52 and SB 18 and your Tribe's rights under these laws?
  - To what extent do you feel agencies (state/local) adequately understand TCRs/cultural resources/sacred sites/Tribal history and culture?
  - If agency officials were to receive training on Tribal history, culture, and/or values, what topics would be most beneficial to address in that training?
  - What role, if any, would you like to play in educating agencies about the laws, their relationship with you and how to approach consultation with you, and your culture?
- Agency staff:
  - To what extent do you feel your agency adequately understands AB 52 and SB 18's requirements?
  - To what extent do you feel your agency adequately understands TCRs/cultural resources/sacred sites/Tribal history and culture?
  - If your agency were to receive training on Tribal history, culture, and/or values, which topics would be most beneficial to address in that training?
- For which areas of SB 18 and AB 52's consultation requirements would a training program be most helpful to your agency/Tribe? On which aspects of AB 52 and SB 18 would it be most helpful for your Tribe/agency to have additional guidance?

## Bucket #5 – Notification



### Synopsis

For consultation to be effective, notification to Tribes must occur early enough that Tribes can influence key decisions in the planning process. Early notification with the opportunity to influence decisions is important to recognizing Tribal sovereignty and values and ensuring consultation that is truly meaningful with genuine potential to affect project/plan outcomes and details.

In addition to timing, for notification to be effective, it must reach all Tribes with a traditional cultural connection to the area and provide sufficient relevant information for Tribes to make a decision as to whether to pursue consultation.

### Core elements/needs

Tribes	Lead Agencies	Both	Project Proponents
Early notification of opportunity to consult on projects and plans	Clear guidance on when to begin the consultation process		
Effectively reach appropriate contacts of all Tribes with cultural connection			
Provide sufficient relevant information free of charge			

### Commentary

Survey results indicated that most respondents had received notices inviting them to consult with agencies and local governments on both SB 18 and AB 52. 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. In addition, Tribes do not always receive the information that they need in notices or in response to their follow-up requests, or they may be charged for the information.

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

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

### *When to notify:*

- **[I]** Notification should occur early enough for Tribe's input to be capable of altering the project's outcome, early enough to allow for changes in the plans/project before the CRM report is done, and prior to the lead agency preparing the environmental document and seeking project funding.
- **[I, R, S]** Move the trigger for notification to earlier in the process. Clearly define the trigger. (Could be done by statute or ordinance)
- **[I, R, S]** Provide a more flexible timeframe for responding to a notice. Such accommodation could also be made through a joint protocol.

### *Who to notify:*

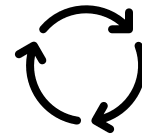
- **[I]** Ensure that notification is sent to the appropriate Tribal contact. Identify, verify, and regularly update key points of contact. Ensure Tribal contact information is complete and up to date. Ensure that local governments follow the formal procedure of contacting NAHC for every project. Agency should follow up to multiple contacts if there is no initial response. [counties also avoid sending irrelevant notices to Tribes whose territory is not involved]
- **[I]** NAHC updates its lists of Tribal contacts regularly, at least on a yearly basis.
- **[I]** Provide guidance for resolving discrepancies in the lists of Tribes contacted under SB 18/AB 52, with Tribal input.
- **[R, S]** A suggestion to reduce conflict among Tribes is to require Tribes to have an ancestral connection to the land to qualify for consultation.

### *What information to provide:*

- **[I]** Provide sufficient, not overwhelming information; readily provide follow-up information that the Tribe requests promptly *without charge* and in the format requested.



## Bucket #6 - Effective Consultation Timeline, Procedures, Protocols, and Format



### Synopsis

Lead agencies may not have in place efficient, effective, and sufficiently flexible protocols to successfully implement consultation, and borrowing existing bureaucratic processes can constrain how consultation is carried out. Tribes may also lack internal protocols and the time and staffing resources to hold in-person consultation meetings at agency offices. Many Tribes report the consultation process still feels like “box checking” on the part of agencies. There is little evidence that many agencies and Tribes have established joint protocols that describe notice, timing, and other expectations for consultation, as the SB 18 Guidelines recommend.

The timing of the consultation process may give Tribe inadequate time to respond to a notice, and may not coincide with agency decisions.

### Core elements/needs

<b>Tribes</b>	<b>Lead Agencies</b>	<b>Both</b>	<b>Project Proponents</b>
Early engagement in planning process	Reasonable timeframe (acknowledging constraints on Tribes)	Regular meetings or communications	Reasonable timeframe (acknowledging constraints on Tribes)
Sufficient time and flexibility to respond to consultation requests	Pre-planning (provide information regarding upcoming projects at regular meetings or other communications)	Robust consultation protocol	Due diligence prior to applying for lead agency approval
	Clear roles and designated points-of-contact for Tribes	Co-produce agenda	Pre-consultation preparation
	Robust record-keeping system		Clear deadlines for consultation to ensure the planning/review process stays on schedule
	Flexibility in scheduling meetings		
	Clear guidance on when to begin the consultation process;		

	Early notice of consultation; ensure the notice reaches the correct person at the Tribe		
	Clear communication during consultation process		
	Clear deadlines for consultation to ensure the planning/review process stays on schedule		

### Commentary

- Tribes face internal constraints due to limited funding and human resources.
- Lead agencies and project proponents must recognize that internal Tribal timelines and priorities may differ from their own when scheduling consultations. Agencies and project proponents should consider, for example, the timing of Tribal Council meetings and the Tribe’s cultural and religious calendar.
- Nearly all Tribes interviewed reported the response periods (30 days for AB 52, 90 days for SB 18) are inadequate, and that project schedules and budget constraints often take precedence over lead agency engagement with Tribes and substantive discussion of impacts. In contrast, local lead agencies felt that consultation acts as a brake, slowing down critical public infrastructure projects, and reported developers advocate for hard deadlines to stay on track with project timelines.
- AB 52 resulted in many Tribes receiving such a high volume of consultation requests that, when combined with limited resources, it is difficult for them to respond to and engage in consultation with lead agencies that do make timely notification.
- AB 52 includes deadlines for formal notice from agencies soliciting interest in consultation requests, for Tribes to respond, and for agencies to initiate the formal consultation process with Tribes. However, there is no deadline for concluding consultation, beyond a requirement that consultation must begin prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report for a project.

### Recommendations

- **[C, I]** Develop joint, agreed-upon consultation protocol in advance of future proposed projects.
- **[C, I]** Defer to the Tribe’s preferred consultation procedures/protocol if available.
- **[C, I]** When need by a Tribe, provide a flexible timeline for responding to the invitation for consultation, in accordance with the Tribe’s capacity. [see Notification]. Provide timeline conducive Tribe’s schedule in scheduling/managing consultation process.

- **[C, I]** Consultation takes place between decision-makers (high level) or people authorized to speak and make decisions for the agency and Tribe.
- **[C, I]** Agendas should be mutually agreed upon and flexible.
- **[C, I]** Agencies should not make significant decisions prior to conclusion of consultation.
- **[C, I]** Ensure equitable treatment of and engagement with federally recognized and non-federally recognized Tribes.
- **[I, R, S]** Clarify consultation requirements/procedures when joint federal-state/local actions, especially for non-federally recognized Tribes. Clarify/expand consultation requirements with non-federally recognized Tribes when state agencies consult both on Tribal cultural resources and those issues they do not consider covered under SB 18 or AB 52.
- **[C, I]** Both parties can take detailed notes at meetings, with a designated person compiling a summary of what was discussed, agreed upon, and decided as next steps, for review and correction.

### Lead Agencies

- **[I]** Prepare for successful engagement with Tribes by determining who can best answer the Tribe's questions, coordinating with agency staff, holding internal meetings, and compiling the information necessary for Tribes to meaningfully participate as co-equals.
- **[I]** Agencies recognize that they bear the burden of compliance with statutes. Ensure that the procedures followed are adequate to engage Tribes in effective consultation.
- **[I]** Agencies to provide all information requested by Tribes promptly, in the format requested, and without charge.
- **[I]** Communicate clearly with Tribes using plain language and avoid acronyms and technical terminology.
- **[I]** Be forthcoming and honest as to what is and is not feasible, including on project redesign options and mitigation measures.
- **[C, I]** Be flexible and willing to adapt as to the logistics of meetings, including timing and meeting duration, format, and location. Defer to Tribe's preferences for venue, e.g., phone calls, written communication, video calls, physical venue at convenient location for Tribe. Hold face-to-face meetings on Tribal lands, including making site visits, according to the Tribe's preference.
- **[I]** Be flexible as to the substance of meetings, including topics discussed.
- **[\$, B]** Designated Tribal liaison dedicated to engaging Tribes who represents the agency in the consultation process, facilitating compliance with consultation laws. This position may entail educating and training agency staff and acting as an intermediary between the agency and Tribes or other agencies. Tribal relations officers or liaisons should be California Native Americans themselves, who understand California-specific context and history. (See Institutionalize agency procedures and knowledge) and report discussion on the legality of making this a requirement under state and federal law).
- **[I]** Ensure equitable treatment of and engagement with federally recognized and non-federally recognized Tribes.
- **[I]** "Pre-planning" through regular meetings in which agencies keep Tribes apprised of upcoming projects, and at which Tribes and agencies establish consultation protocols.

- **[S, C, I]** Lead agencies inform and engage with Tribes as early in the planning process as possible, prior to preparing the environmental document and seeking project funding. Methods can include updating Tribes in the region about projects in the pipeline (e.g., at quarterly meetings (see Relationships)) and moving the trigger for notification—ideally by statute or ordinance—to earlier in the process.
- **[R, S]** Clearly define the point at which consultation is triggered.
- **[I, R]** Consultation laws create a statutory floor, meaning lead agencies can establish their own, longer, and more flexible timeframe to better accommodate Tribes. In extending timeframes, agencies to consult Tribes regarding Tribes' needs.

### Survey Questions

- How would you structure the process of consultation to make it more meaningful and effective?
- What improvements could agencies make to their consultation procedures/protocols to enable more meaningful and effective consultation?
- How much time would be most ideal for Tribes to respond to agencies' consultation requests?
- At which point in the project review timeline (e.g., before project funding sought, before EIR initiated, before plan details complete, etc.) would it be most productive for agencies to begin consultation with Tribes?
- Which point in the project review timeline would be best for agencies to begin consultation with Tribes?

## Bucket #7 – Consideration of Tribal Expertise and Indigenous Knowledge



### Synopsis

The balance of power between Tribes and lead agencies is inherently uneven, with lead agencies (or the elected body they make staff recommendations to) maintaining significant—if not complete—discretion and holding final decision-making authority. Tribes face significant burden of proof to demonstrate the significance of a TCR, TTCP, and/or TCP. Consultants, such as archaeologists, have outsized influence in determining the significance of both the resource and the risk of harm posed to a proposed project. Conflicting points of view held by the parties are often present, such as differences in how agencies and Tribes understand the meaning and significance of Tribal resources/places.

### Core elements/needs

Tribes	Lead Agencies	Both	Project Proponents
Acknowledgement as subject-matter experts in their own culture	Funding to compensate Indigenous knowledge holders		
Compensation for Indigenous knowledge holders’ time and expertise ( <i>see Resources</i> )	Concrete indicators for TCR/TTCP/TCP, significance, and Tribally relevant impacts		
Greater weight given to Tribe-provided information, data			
Authority to designate Tribal cultural monitors			
Culturally appropriate definition of TCR/TTCP/TCPs			

### Commentary

The Tribal point-of-view is often that a project—threatening particularly significant resources or involving similarly significant factors—simply should not go forward. Granting greater weight to this perspective — compared to the perspective that mitigation is sufficient—may require a statutory/ordinance change. This can take the form of either a Tribal “veto” or outright *ex ante* prohibition on pre-determined project categories (subject to a Tribe authorizing an exemption), such as certain developments within a specific distance of a TCR/TCP/TTCP.

Lead agency staff, elected officials, consultants, developers, and property owners may hold implicit or explicit racial bias about Tribes and Indigenous peoples. The issue of potential systemic racism was identified in E.O. N-1519 that established the Truth and Healing Council. Identified biases and stereotypes about Tribes include:

- Tribes are overly emotional in conversations about their cultural resources.
- All Tribes are wealthy because they have casinos.
- Tribes, especially those with small memberships, should be regarded more like clans or families as opposed to legitimate governments.
- Tribal citizens/Indigenous people who do not live on reservations are not “real” Native Americans.

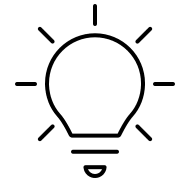
## Recommendations

- **[S, R]** Update the definitions of TCR, TTCP, and “substantial evidence” so that Tribes determine the cultural place/resource and its significance. Address the conflict in worldviews between the agency and Tribe with innovative approaches, such as Indigenous Health Indicators.
- **[S, R, I]** Remove requirements that Tribes prove the validity of their own knowledge systems.
- **[E]** Education/training for lead agency staff on Tribal sovereignty; the government-to-government relationship; Tribes’ history and values (see Education).
- **[I, R, S]** Ensure that Tribal input/knowledge is given at least as much weight as that granted to archeological/cultural resources consultants. Defer to Tribal knowledge over that of archaeologist in case of conflict.
- **[S, R]** Ability for Tribes to “veto” (or require significant redesign of) projects whose impacts to TCR/TTCP/TCP cannot be sufficiently mitigated.
- **[I, R]** Acknowledge and incorporate Tribal expertise relating to identification of cultural resources, their significance, and impacts on Tribal cultural resources. Update the definitions of TCR, TTCP, and “substantial evidence” so that Tribes determine the cultural place/resource and its significance. Address the conflict in worldviews between the agency and Tribe with innovative approaches, such as Indigenous Health Indicators. Recognize that considering TCRs in isolation can fail to acknowledge the significance of the TCR to Tribes. Acknowledgement (in practice, policy or statute) that TCRs/TTCPs may be holistic, reliant on connection to other cultural elements and/or exist at the landscape level, depending on Tribe’s understanding of them. Include current and evolving value of TCRs to Tribes, not only historical value.
- **[I]** For plants, use state-wide database to help identify culturally important plants.
- **[I, R]** There should be early consideration of Tribal expertise/Indigenous knowledge together with that of archaeologist in cultural resource survey and report.
- **[I, R]** 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.
- **[I]** Agencies prioritize working with CRM firms/archaeologists that have good working relationships with Tribes.
- **[\$, I]** Tribal staff involved should be paid for the initial survey at competitive rates. [see Resources]
- **[I, R]** Impose penalty for failure of CRM firms/archaeologists to consult with Tribes.

## Survey Questions

- Tribal officials/staff:
  - To what extent do you feel your Tribe's expertise on TCR/TCP/TTCP is recognized/respected in the consultation process?
  - What would be the most effective way to increase the weight of Tribal input/expertise and agency understanding of the Tribe's point of view and supplied data/information in the consultation process?
  - Is recognition by the agency of the existence of a TTCP/TCR/TCP, or of its significance to the Tribe, more of a barrier to protection during consultation?
- Agency staff:
  - To what extent do you rely on Tribal expertise in making decisions regarding TCR/TCP/TTCP in the consultation process?
  - Do you feel your agency could give greater weight to Tribal expertise and better understand the Tribe's point of view and the information/data it supplies? What are the main barriers to doing so?

## Bucket #8 – Outcomes: Culturally Appropriate, Practicable, and Creative Mitigation Measures



### Synopsis

Evaluation of multiple EIR/MND and MMRP indicates lead agencies typically rely on a standard set of “boilerplate” mitigation measures, with Tribes reacting to provided language instead of parties collaborating as equal partners. Some Tribes develop their own set of standard measures, calibrated to the level of TCR/TTCP/TCP significance and potential for harm. It is rare for lead agencies to defer to Tribes. Tribes may be unaware of the extent and variety of mitigation measures that are available, and for which they can advocate.

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.

### Core elements/needs

Tribes	Lead Agencies	Both	Project Proponents
Education/outreach on what Tribes are entitled to request, range of potential mitigation measures	Education on a wide range of potential mitigation measures which are technically feasible	Education on mitigation options that are and are not feasible	Mitigation options that are culturally appropriate and meet Tribal needs while also minimizing expenses and project delays

### Commentary

The very term “mitigation” demonstrates a fundamental gap in worldview and priorities, in which Tribes prioritize avoidance and preservation-in-place (TCR/TTCP/TCP are invaluable and irreplaceable), whereas agencies prioritize cost-benefit analysis and default to mitigation (reducing harm) with the goal of moving forward the project with minimal changes. Mitigation measures that are considered archaeologically appropriate may not be culturally appropriate for the Tribe. Some Tribes reported lead agencies over-relying on Tribal monitors as sufficient mitigation, whereas lead agencies reported that Tribes may not understand inherent limitations—such as funding, competing priorities, technical expertise—constraining both agencies and developers. Mitigation measures are effective only when implementation is an enforceable obligation on developers (*see* Accountability). Frequently, agencies (and Tribes, at times) rely on the use of Tribal monitors, which may be inappropriate for the project (e.g., a viewshed), result in a constrained understanding of cultural resources, and/or fail to proactively address protection of resources.



## Recommendations

- **[B, \$]** A state clearinghouse (see Institutionalize agency procedures and knowledge) can investigate—with Tribal, lead agency, developer, and expert input)—a wide range of innovative and practicable mitigation measures. Common examples at the present include hiring Tribal cultural monitors, avoidance, cultural easements, cultural resource surveys by Tribes (including through tools like LIDAR), redesigning a project, preservation in place, curation, and construction worker cultural sensitivity training. Less common and more innovative examples include: Educational signage; murals celebrating the Tribe and its history in that area; granting cultural easements to Tribes (such that the site will never be developed); donating to local colleges' Native American Studies departments; planting native plant gardens; distributing flyers with information on the site's Tribal cultural heritage to residents of a new development built on the site; and reburying or relocating cultural items.
- **[C, I]** Information proactively shared with Tribes, either as general education/training or provided by individual lead agencies and project proponents, as to what mitigation measures are not feasible.
- **[I]** Enforceable contracts signed by Tribes and agencies and/or project proponents which specify agreed-upon mitigation measures. (See also Accountability)
- **[R, S]** Some Tribes suggest changing the laws to require a Tribe's assent for any project or cultural project related to the Tribe.
- **[R, S]** Ability for Tribes to “veto” (or require significant redesign of) projects which impacts to TCR/TTCP/TCP cannot be sufficiently mitigated.
- **[C, I]** Outcomes should provide opportunities for healing for Tribal members, which would be defined by the Tribe.
- **[C, I]** Commitment to resolving issues through consultation and achieving consensus (on both sides)

## Survey Questions

- What are examples of effective avoidance/mitigation measures that could be taken to protect TCR/TTCP/TCP from harm?
- What constraints does your agency/Tribe face, if any, in employing avoidance/mitigation measures to prevent harm to TCRs/TTCPs/TCPs?

## Bucket #9 - Accountability and Oversight



### Synopsis

Consultation frameworks rarely establish mechanisms to hold lead agencies accountable for complying with their obligations, including notifying Tribes, carrying out consultation in a substantively meaningful manner, and monitoring implementation of mitigation measures. Accountability of project proponents is a significant gap, and developers may calculate paying fines as an acceptable cost for destroying cultural resources or sites. Another gap is evident in situations where a non-landowner lessee impacts cultural resources: the landowner holds title to the cultural resources, but the permit imposes conditions only on the lessee.

### Core elements/needs

Tribes	Lead Agencies	Both	Project Proponents
Streamlined, inexpensive, nonbureaucratic complaint and grievance resolution mechanism, including when Tribe disagrees with lead agency over consultation process or outcome	Stronger means of enforcement when project proponents violate statutes or building permits		Clear-cut repercussions for violating statutes, permits, and contractual agreements
Recourse when TCR/TTCP/TCP is destroyed			
Enforceable mitigation measures			

### Commentary

Tribes have limited recourse once a culturally significant resource is destroyed. There is no clear provision or guidance for any dispute resolution process. Litigation (*ex ante* injunction or *ex post* compensation) is not necessarily a financially viable option; litigation may also breach confidentiality and expose cultural resources to vandalism and worse. Many Tribes report that the offering of money as a mitigation measure or as compensation for destroyed cultural resources is offensive because these resources are invaluable.

### Recommendations

- **[R, I]** Lead agencies demonstrate in writing how a Tribe's recommendations and provided information were seriously considered and incorporated into the decision-making process. If a lead agency decides against including all or part of the Tribe's recommendations in its own recommendation to decision-makers (e.g., planning commission, city council, county board of

supervisors), it should thoroughly justify this in writing and provide opportunity for the Tribe to rebut and for both parties to return to the table. If the Tribe and agency do not reach agreement, document reasons why agreement was not reached.

- **[I, R]** Create written account of decisions made during consultation. Both parties can take detailed notes at meetings, with a designated person compiling a summary of what was discussed, agreed upon, and decided as next steps, for review and correction. Tribal review and feedback on all notes and agreements.
- **[S, R]** Strong repercussions for developers who damage cultural resources in violation of permit conditions, such as substantial punitive fines and making culturally appropriate compensation.
- **[B, S, R]** State-level oversight body responsible for enforcing consultation laws and permit conditions, informed by joint Tribal/state and local lead agency advisory committee, and dissemination of annual status reports.
- **[B, S, R]** Culturally appropriate, low-barrier dispute resolution process to resolve conflicts between Tribes and lead agencies.
- **[S, R]** Lower barriers to Tribes pursuing litigation, including through broad standing requirements, establishment of fund to pay for legal costs, and better-informed courts.
- **[I]** Ensure agreed-upon mitigation measures are enforceable, including permit conditions, binding agreements, and foreclosing conflicting land uses via zoning, conservation easements, and restrictive covenants in perpetuity and/or enforceable contracts between Tribes and agencies/project proponents.
- **[S, R]** Strong repercussions for developers who damage cultural resources in violation of permit conditions, such as substantial punitive fines and making culturally appropriate compensation. Disallow payment of fines in lieu of mitigation.
- **[C, I]** Coordination with construction firms to ensure implementation of decisions made.
- **[I]** 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.
- **[C, I]** Provide avenues for Tribes to be involved in ongoing management of cultural places after development and/or designation as open space.
- **[C, I]** Monitoring role for Tribes for mitigation measures.
- **[S, R]** Change laws to improve accountability of agencies in consultation.
- **[I]** Written agreement such as MOU or programmatic agreement as key step in accountability. Memorialize consultation discussions, including any agreements. Tribal review and feedback on all notes and agreements.

## Survey Questions

- What are the most significant gaps in or barriers to agency/project proponent accountability within the consultation process?
- How can agency/project proponent accountability be more effectively built into the consultation process?
- Tribal officials/staff:
  - What are the greatest barriers your Tribe faces in holding agencies accountable, such as through the courts or administrative processes?
  - What does accountability look like to your Tribe?

## Bucket #10 - Institutionalize Strong Tribal Relations and Knowledge Base Through Robust Recordkeeping, Effective Policies, and Dedicated Roles



### Synopsis

Turnover of lead agency staff, consultants, and elected officials creates situations where Tribes find themselves constantly educating and training planners, developers, consultants, and officials about their consultation obligations and Tribal culture, history, and values. Turnover impedes relationship-building and erodes institutional knowledge.

### Core elements/needs

Tribes	Lead Agencies	Both	Project Proponents
	Effective recordkeeping system	Ongoing and regular communication, meetings with lead agencies irrespective of turnover	
	Dedicated Tribal liaison(s)		
	Written policies and Standard Operating Procedures (SOPs)		

### Commentary

The impacts of turnover extend beyond the statutory parties. Interviewees reported instances of large consulting firms replacing key staff at important points in the consultation process, eroding relationship-building.

### Recommendations

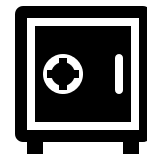
- **[I]** Lead agencies can build up and maintain core institutional knowledge through robust record-keeping practices to assist in staff transitions.
- **[B]** Designate a Tribal Relations office, or Tribal Liaison at minimum, dedicated to engaging Tribes and representing the agency in the consultation process, facilitating compliance with consultation laws (*see* Accountability). Small jurisdictions with limited resources may—unless recipient of state or federal funding—designate as Tribal Liaison a staff member with multiple duties, given that person is qualified and can dedicate sufficient time and other resources to this role.
- **[I, R, S]** Lead agencies benefit by adopting a set of written standard operating procedures, policies, protocols, and handbooks and training staff and elected officials on them on a regular cycle. Core policies can be strengthened by adopting them as municipal/county/state statutes/ordinances or regulations, or entered into as memoranda of understanding/agreement with Tribes.

- **[B]** Establish inter- and intra-agency Tribal advisory committees (TACs), comprising agency staff and/or Tribal representatives, to help develop Tribal policies and protocols. Compensate any Tribal representatives for their time and expenses.

### Survey Questions

- In what ways does agency/consultant staff turnover cause issues with the effectiveness of consultation?
- What is/are the most salient examples?
- What are/would be effective ways to build institutional knowledge within agencies to reduce these impacts?

## Bucket #11 - Ex Ante Protection of Tribal Resources (TCRs, TTCPs, TCPs)



### Synopsis

Proactive measures to—confidentially—identify and protect Tribal resources before projects are even proposed can avoid harm to or destruction of TCR/TTCP/TCP; enable better planning at both the regional and project site level; head off conflict between Tribes, lead agencies, and developers; and assist project proponents in making sound investment decisions.

### Core elements/needs

Tribes	Lead Agencies	Both	Project Proponents
Method for confidentially providing information on locations of TCR/TTCP/TCP	Confidential Database, mapping system for recording known TCR/TTCP/TCP at a regional level	Legal tools for effectively protecting critical TCR/TTCP/TCP in perpetuity	Due diligence
	Responsibility for, and ability to determine whether proposed project site overlaps TCR/TTCP/TCP	Resources (technology, staffing, funding) to identify sites with high potential for TCR	Responsibility for, and ability to determine whether a proposed project site overlaps TCR/TTCP/TCP
	Confidentiality provisions		
	Recognition of Tribal expertise, ethnographic information as valid on par (or more so) with consultants/in-house technical experts		

### Commentary

Many interviewees note that CEQA (which encodes AB 52) is limited to a project-by-project analysis. This creates obstacles to engaging in comprehensive planning. The project-by-project approach can perversely benefit project proponents and developers because it often fails to recognize, and thus hold developers accountable for, the cumulative impacts of development on Tribal resources. Nor does this approach lend itself to overall planning. A developer (or several developers) may pursue many small projects without significant mitigation because no one *individual* project significantly impacts Tribal resources. But multiple developments in aggregate may significantly impair or even destroy a valuable Tribal cultural resource or place. The result is a "death by a thousand cuts", whereby each additional development, without sufficient

mitigation or an overall plan, causes additional harm to Tribes, leading to significant environmental and cultural loss.

## Recommendations

- **[I, \$]** Development at the regional (e.g., County) level of a robust database and associated mapping system, regularly updated, of traditional Tribal lands and known locations of TCR/TTCP/TCP. This includes enforceable safeguards for confidentiality and exemptions from public records requirements. Such a database could be used to indicate sites where development is inadvisable or even prohibited.
- **[I]** Remove highly sensitive areas from consideration for development, such as by leveraging SB 18 more effectively, open-space zoning, down-zoning, dedicated parkland, transfer of land to Tribes with support for applications to take it into trust, conservation easements, prohibitions on development on/near TCR/TTCP/TCP, and restrictive covenants. State-level protections could include designating sites as historic or as protected areas.
- **[R, S]** Obligation for developers/project proponents to conduct due diligence of potential project sites as part of the application and planning process. Lead agency staff would conduct investigations, including through the database referenced above, and provide pre-application notification to potentially impacted Tribes.
- **[B, R, S]** Broader and higher-level planning to protect TCR/TCP/TTCP, rather than narrowing in on consultation on a project-by-project basis. This could be achieved by a state-level oversight body, statute, and/or regulations requiring higher-level planning and consultation by lead agencies, involving Tribes in state-level programmatic planning for infrastructure, protected areas, and more.

## Survey Questions

- What actions could be taken to protect TCR/TTCP/TCP from harm prior to any development?
- What constraints does your agency/Tribe face, if any, in taking proactive measures to prevent harm to TCRs/TTCPs/TCPs?
- Tribal officials/staff:
  - What assistance would your Tribe need to pursue eligibility of TCR/TCP/TTCP for inclusion in national/state/local historic registries and/or for other protections?
  - Would your Tribe participate in a project to confidentially map sensitive cultural areas at the county and/or state level, to assist in protecting the areas ahead of development?

## Overarching Survey Questions

- What is most needed to ensure that consultation, in substance and/or process, advances Tribes' sovereignty in the context of their relationship with state/local governments?
- What advice do you have on restructuring consultation to reduce burdens on Tribes/agencies? If you had a magic wand, what is the top thing you would improve about government-to-government consultation?