CEQA TRIBAL CULTURAL RESOURCE PROTECTION:
Gaps in the Law and Implementation

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Abstract

Assembly Bill No. 52 (AB 52) amended the California Environmental Quality Act (CEQA) in 2014 to mandate early tribal consultation prior to and during CEQA review, and it positions California Native American tribes as the experts on cultural resources within their own geographical areas. AB 52 affords tribal governments a seat at the decisionmaking table alongside public agencies and California local governments. The law also provides greater legal protection and demands more stringent consultation requirements than other historic and cultural resource protection statutes. However, despite formal advancement in tribal resource protection and recognition of tribal expertise, implementation of AB 52 is flawed. The purpose of this paper is to identify problems with the legislative language of AB 52 and gaps in its implementation to provide a point of reflection on how to improve government to government consultation.

About the Author

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Table of Contents

Introduction

Before 2014, the California Environmental Quality Act (CEQA) failed to directly address tribal concerns, and California Native American governments lacked a consistent, formal role in the environmental review process. Consequently, tribal cultural resources, sacred places, and traditions were often overlooked, resulting in detrimental environmental impacts for tribes and California's environment.[1] In recognition of California Native American tribal sovereignty and the unique relationship between California Native American tribal governments and California local governments and public agencies, the California Legislature enacted Assembly Bill No. 52 (AB 52) on September 25, 2014.[2]

This bill intended to establish a new category of resources regulated under CEQA called "tribal cultural resources" that "considers . . . tribal cultural values in addition to . . . scientific and archaeological values when determining impacts and mitigation."[3] AB 52 also created new requirements for consultation with tribal governments regarding projects that may affect a tribal cultural resource.[4]

AB 52 specifies that a project that may "cause a substantial adverse change in the significance of a tribal cultural resource" is a "project that may have a significant effect on the environment."[5] To determine whether a project may have such an effect, AB 52 requires a lead agency,[6] the public agency

1. Assemb. B. 52, c. 532, § 1, 2013–2014 Leg., Reg. Sess. (Cal. 2014).
2. *Id.* (effective July 1, 2015).
3. *Id.* § 1(b)(2).
4. *Id.* § 1(b)(5).
5. Cal. Pub. Res. Code § 21084.2 (2021).
6. The lead agency decides whether a project is subject to CEQA or is categorically exempt. If a project is subject to CEQA, the lead agency is responsible for preparing the appropriate CEQA document. Cal. Code Regs. tit. 14, §§ 15050, 15350 (2021).

that has the principal responsibility for carrying out or approving a project, to consult with any California Native American tribe[7] that requests consultation and is traditionally and culturally affiliated with the geographic area of a proposed project.[8] This consultation must begin prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report (EIR) for a project.[9] If a lead agency determines that a project may cause a substantial adverse change to a tribal cultural resource, the agency must consider measures to mitigate that impact.[10]

AB 52 is a landmark piece of legislation, which establishes a powerful role for Native American tribes in the CEQA process. Tribes possess a unique legal status as indigenous sovereign governments under AB 52. As opposed to simply treating tribal members as members of the public and limiting their input to submission of comment letters, AB 52 offers tribal governments a seat at the decisionmaking table alongside lead agencies and California local governments. The law is more "tribe-centric" than other historic and cultural resource protection statutes because it formally expands what is legally protected and demands more stringent consultation requirements.[11]

Despite formal advancement in tribal resource protection and recognition of tribal expertise, implementation of AB 52 is nevertheless flawed. This flawed implementation fits into a broader legal and political context of Native Americans having merely a *theoretical* input in the federal, state, and local government decisions that affect them. In reality, Native American input has long been ignored and discounted.

The purpose of this paper is to identify problems with the legislative language of AB 52 and gaps in its implementation in order to provide a point of reflection on how to improve government to government consultation. This paper first examines the environmental review and legal framework of tribal resource protection within AB 52. Second, it discusses and defines the concept of traditional ecological knowledge, which lays the groundwork for understanding the importance of AB 52 consultation. Third, it examines AB 52's requirements and protections, including the consultation process, mitigation, the "tribal cultural resources" category, and what constitutes substantial evidence. Fourth, it discusses substantive and procedural problems with AB 52's implementation as well as impediments to tribal consultation more broadly.

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7. A California Native American tribe is "a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission" (NAHC). This definition does not distinguish between federally recognized and non-federally recognized tribal groups and is therefore more inclusive than the federal definition of "Indian tribe." Cal. Pub. Res. Code § 21073 (2021); 25 U.S.C. § 3001(7).

8. Cal. Pub. Res. Code § 21080.3.1(b) (2021).

9. *Id.*

10. *Id.* § 21080.3.2.

11. Assemb. B. 52, c. 532, § 2, 2013–2014 Leg., Reg. Sess. (Cal. 2014). Part II discusses AB 52's broad protections as compared to other statutes.

Finally, the paper concludes with recommendations for amending the law and addressing gaps in implementation.

I. The Historic and Cultural Resource Protection Legal Landscape Surrounding AB 52 and CEQA

To highlight the uniquely protective nature of AB 52, this Part juxtaposes AB 52 with other statutes mandating tribal consultation[12] and examines the larger environmental review process under CEQA. AB 52 entered the tribal resource protection legal scene amidst an array of less effective consultation policies. For example, AB 52 provides greater protection and has broader consultation requirements than Senate Bill No. 18 (SB 18), which requires tribal consultation in the CEQA General Plan Update process. AB 52 applies to any CEQA lead agency, including agencies, districts, or jurisdictions, whereas SB 18 only applies to cities and counties. SB 18 only protects "tribal cultural places," which is one of many resource categories protected under AB 52's "tribal cultural resources" umbrella. While SB 18 procedure requires the local jurisdiction to initiate contact with tribes, tribes have the power to initiate contact under AB 52. Moreover, cities and counties are only encouraged to mitigate impacts under SB 18, while lead agencies are mandated to apply feasible mitigation for significant impacts under AB 52.[13]

Section 106 of the National Historic Preservation Act (NHPA), the National Environmental Policy Act's companion law, only offers protection to federally recognized tribes, and tribes are only consulted upon agency initiation. Moreover, AB 52 consultation occurs at the earliest point in the CEQA process, whereas Section 106 consultation occurs later in the environmental review process. Unlike Section 106, AB 52 sets forth action and response timeframes.[14] Similar to Section 106 of the NHPA, the Native American Grave Repatriation Act (NAGPRA) does not require museums and federal agencies to consult with non-federally recognized tribes, although it gives them the discretion to do so.[15] Additionally, while NAGPRA requires museums and federal agencies to initiate consultation within ninety days of receipt of a request from

12. Consultation is "the meaningful and timely process of seeking, discussing, and carefully considering the views of others." Cal. Gov't Code § 65352.4 (2021). Consultation with tribes is considered the most effective way for lead agencies to determine whether a project could result in significant environmental impacts to tribal cultural resources. The AB 52 consultation process will be examined in greater detail in Part IV.

13. *AB 52: Beyond the Letter of the Law*, PLACEVIEWS (Nov. 2015), http://placeworks.com/wp-content/uploads/2015/11/PlaceViews_AB52_20151104.pdf [https://perma.cc/U5AH-AX4B].

14. Andrea P. Clark & Lisa Westwood, *Legal and Practical Considerations Regarding Cultural Resources and AB 52*, League of Cal. Cities (Oct. 7, 2016), https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2016/Annual-2016/10–2016-Annual_Clark_Westwood_Legal-and-Practical.aspx [https://perma.cc/B8DS-242K].

15. *See* 25 U.S.C. § 3001(7); 43 C.F.R. § 10.1 (2021).

a tribe, AB 52 requires the lead agency to begin the consultation process within thirty days of receipt of a California Native American tribe's request.[16]

Notably, AB 52 consultation standards are exceeded by Assembly Bill 168 (AB 168). AB 168 adds new requirements to the streamlined approval process for multi-family housing mandated in Senate Bill 35 (SB 35), which passed in 2017. AB 168 closes the loophole created by SB 35 that allows developers to gain fast-tracked approval of housing projects in locations with known tribal cultural resources, without being subject to CEQA environmental review or tribal consultation.[17] SB 168 goes further than AB 52 by requiring the consent and approval of tribes in regard to the treatment of cultural resources and sacred sites, before a project is eligible for a permit under SB 35.[18] Notwithstanding the more stringent consultation requirements of AB 168, AB 52 stands out among tribal resource protection laws, and its implementation is advantageous to Native American tribes.

AB 52 also serves as a subset of a larger suite of questions built within CEQA. CEQA is California's most comprehensive environmental law, interpreted by courts to afford the fullest environmental protection within the reasonable scope of the statutory language.[19] CEQA applies to all discretionary projects proposed to be conducted or approved by a California public agency, including private projects requiring discretionary government approval.[20]

The purpose of CEQA is to: (1) publicly disclose the significant environmental effects of a proposed discretionary project through the preparation of an Initial Study (IS), Negative Declaration (ND), or Environmental Impact Report (EIR); (2) prevent or minimize damage to the environment through the development of project alternatives, mitigation measures, and mitigation monitoring; (3) publicly disclose the agency decisionmaking process utilized to approve discretionary projects through findings and statements of overriding consideration; (4) enhance public participation in the environmental review process through scoping meetings, public notice, public review, hearings, and the judicial process; and (5) improve interagency coordination through early consultations, scoping meetings, notices of preparation, and State Clearinghouse review.[21]

16. 43 C.F.R. § 10.11(b)(1)(i) (2021); Cal. Pub. Res. Code § 21080.3.1(e) (2021). The California Native American Repatriation Act (Cal NAGPRA), which was enacted in 2001 to mirror the federal NAGPRA, covers state and local lands and expands coverage to non-federally recognized California tribes as well. Assemb. B. 978, c. 818, § 1, 2001–2002 Leg., Red. Sess. (Cal. 2001).

17. *AB 168 Passes Unanimously and is Signed by Governor Newsom*, Shellmound Ohlone Heritage Site and Sacred Grounds (Sept. 22, 2020), https://shellmound.org/2020/09/ab-168-tribal-cultural-resources [https://perma.cc/P4FV-STG7].

18. *Id.*

19. Cal. Code of Regs. tit. 14, § 15003(f) (2021).

20. *Id.* § 15002.

21. *Id.* § 15002(a).

CEQA requires state agencies to evaluate the environmental impacts of proposed projects of private individuals, corporations, and other public agencies. No projects which would result in significant environmental consequences should be approved as proposed if there are feasible alternatives or mitigation measures that would lessen those effects. Full public disclosure of the environmental impacts of a proposed project must be provided through EIRs, which include identification of all significant effects, alternatives, and potential mitigation measures.[22]

Without AB 52, CEQA does not impose upon lead agencies an affirmative duty to contact a tribe. However, CEQA guidelines encourage consultation with the general public or organizations who have concerns with the project as early as possible in the process.[23] AB 52 amended CEQA to mandate early tribal consultation prior to and during CEQA review, and it positions tribes, rather than archeologists, as the experts on the resources within their own geographical areas.

II. Traditional Ecological Knowledge

Establishing an understanding of the traditional ecological knowledge and practices of indigenous communities is imperative to grasping the importance of AB 52's consultation requirements. Traditional Ecological Knowledge (TEK) is an inclusive, holistic, and cumulative body of practices and beliefs, handed down through generations by cultural transmission and evolved by adaptive processes; it is about the relationships of all living beings, including humans, with one another and the environment.[24]

While Western culture perceives society as separate from and exercising control over ecosystems, indigenous cultures typically see themselves as embedded within ecosystems.[25] The anthropocentric approach of Western regional policy, centering on the inquiry of what the environment can do for humans, stands in contrast to indigenous cultures' ecocentric approach to environmental policy, which recognizes the inherent value of nature.[26] Additionally, Western scientific knowledge is didactic, analytical, and based on subsets, tests models, and hypotheses,[27] while TEK is integrative, intuitive, based on whole systems, and taught through storytelling.[28] There is no one way to practice and

22. Cal. Pub. Res. Code § 21002.1 (2021).

23. *Id.* § 21105.

24. Fikret Berkes, Sacred Ecology: Traditional Ecological Knowledge and Resource Management 8 (1999).

25. Jay F. Martin et al., *Traditional Ecological Knowledge (TEK): Ideas, Inspiration, and Designs for Ecological Engineering*, 36 Ecological Engineering 839, 839 (2010).

26. *See id.*; Paul Cryer et al., *Why Ecocentrism is the Key Pathway to Sustainability*, The Millennial Alliance for Humanity & the Biosphere (Jul. 4, 2017), https://mahb.stanford.edu [https://perma.cc/GS6W-MFP6].

27. Cryer et al., *supra* note 26; Fulvio Mazzocchi, *Western Science and Traditional Knowledge*, 7 Eur. Molecular Biology Org. Reps. 463, 464 (2006).

28. Cryer et al., *supra* note 26.

implement TEK; every indigenous group possesses its own body of knowledge that is specifically attuned to its community and lifeway.[29] For this reason, it must be place-based and informed by the indigenous people of a given area.[30]

The AB 52 consultation process is the mechanism by which tribal governments impart their traditional knowledge to lead agencies, which is essential to the agencies' tribal cultural resource determinations. If a lead agency approves a project without first understanding the TEK associated with a particular geographical area, the project may have significant negative impacts on a tribal cultural resource, which in turn may negatively affect the surrounding ecosystem.

III. A Closer Look at AB 52's Requirements and Protections

This Part examines and discusses the requirements and protections under AB 52 involving consultation, mitigation measures, tribal cultural resources, and the use of TEK to establish substantial evidence. Consultation is "the meaningful and timely process of seeking, discussing, and carefully considering the views of others."[31] Meaningful consultation is usually conducted in a manner that recognizes the cultural values of all parties involved and makes a concerted effort to reach an agreement.[32] Consultation with tribes is considered the most effective way for lead agencies to determine whether a project could result in significant environmental impacts to tribal cultural resources.[33]

Consultation can be an ongoing process. It ends when either: (1) both parties agree to measures to avoid or mitigate a significant effect on a tribal cultural resource, or (2) a party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached.[34] Topics discussed during consultation may include the nature of the proposed project, the significance of tribal cultural resources, the significance of project impacts, the type of necessary environmental review, the type of information that can be released to the

29. The term "lifeway" describes "the social, economic, and spiritual interaction of Indigenous peoples with their traditional environments." Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. Colo. L. Rev. 1626, 1628 (2007).

30. *See, e.g.*, Geneva Thompson, Panel: Using Traditional Ecological Knowledge in Environmental Law, UCLA Law Environmental Law Society (Nov. 17, 2020).

31. Cal. Gov't Code § 65352.4 (2021).

32. *Id.*

33. Elizabeth A. Bagwell, *Recently Enacted Assembly Bill 52 and Its Effect On The CEQA Process*, Aspen Envtl. Grp., http://www.aspeneg.com/articles/recently-enacted-assembly-bill-52-and-its-effect-on-the-ceqa-process [https://perma.cc/4774-FTT4] (last visited Dec. 17, 2020).

34. Cal. Pub. Res. Code § 21080.3.2 (2021).

public,[35] and possible mitigation measures and project alternatives, including those recommended by the tribe.[36]

If a lead agency determines through consultation that a project may cause a substantial adverse change to tribal cultural resources, the lead agency must consider measures to mitigate that impact. The Public Resources Code provides examples of mitigation measures that lead agencies may consider to avoid or minimize adverse changes to tribal cultural resources.[37] Recommended measures include: avoidance and preservation of the resource in place; treatment of the resource with culturally appropriate dignity, which entails protecting the cultural character and integrity, traditional use, and confidentiality of the resource; and permanent conservation easements with culturally appropriate management criteria.[38] Agreed upon mitigation measures must be recommended for inclusion in the environmental document and in an adopted mitigation monitoring and reporting program.[39]

"Tribal cultural resources" are sites, features, objects, cultural landscapes, and sacred places with cultural value or significance to a tribe. To qualify as a tribal cultural resource, a resource must either be: (1) listed or determined eligible for listing in the national or state register[40] of historical resources, or listed in a local register of historic resources, or (2) one that the lead agency determines, at its discretion and supported by substantial evidence, is a tribal cultural resource.[41] Tribal representatives are considered experts and are invited to provide substantial evidence regarding the locations, types, and significance of tribal cultural resources within their traditionally and cultural affiliated

35. Under existing law, environmental documents must not include information about the location of an archeological site or sacred lands or any other information that is exempt from public disclosure pursuant to the Public Records Act. Cal. Code Regs. tit. 14, § 15120(d) (2021); Clover Valley Found. v. City of Rocklin, 128 Cal. Rptr. 3d 733, 748–49 (Cal. Ct. App. 2011). Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects are also exempt from disclosure. Cal. Gov't Code § 6254(r) (2021). The project applicant must use a reasonable degree of care to protect the information.

36. Cal. Gov't Code § 65352.3(b) (2021).

37. Cal. Pub. Res. Code § 20184.3(b)(2) (2021).

38. *Id.*

39. *Id.* § 21082.3.

40. A resource may be listed as an historical resource in the California Register if it meets any of the following National Register of Historic Places criteria: (1) is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage; (2) is associated with the lives of persons important in our past; (3) embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work if an important creative individual or possesses high artistic values; or (4) has yielded, or may be likely to yield, information important in prehistory or history. *Id.* § 5024.1(c).

41. *Id.* § 21074.

geographic area.[42] In determining whether to treat a resource as a tribal cultural resource, the lead agency must consider its significance to the tribe.[43]

An example of a tribal cultural resource is the Klamath River,[44] which flows through Oregon and Northern California and was once home to the third largest salmon run in the continental United States.[45] Dams built on the Klamath River between the early 1900s and 1962 have been identified as a cause of the significant drop in salmon numbers over the years.[46] People have inhabited the Klamath Basin for millennia, and many Native American tribes, including the Shasta, Yurok, Hupa, and Karuk, have historically relied on the river for food, transportation, recreation, and ceremonial practices.[47] As a part of the Klamath River Renewal Project, which is centered on dam removal, the California Water Board led an AB 52 tribal consultation process.[48] The parties to this consultation reached an agreement on tribal cultural resource mitigation, and on November 17, 2020, a Memorandum of Agreement was signed by California and Oregon, the Yurok Tribe, the Karuk Tribe, PacifiCorp, and the Klamath River Renewal Corporation that describes how the parties will implement the amended Klamath Hydroelectric Settlement Agreement.[49]

TEK qualifies as and fits into the framework of substantial evidence. Evidence that may support a finding that a resource is a tribal cultural resource could include, among other evidence, elder testimony, oral history, tribal government archival information, anthropologist, ethnologist, or archaeologist testimony informed by tribal input, official tribal government declarations or resolutions, formal statements from a certified Tribal Historic Preservation Officer, and historical notes, such as those found in the Harrington Papers and other anthropological records.[50]

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42. *Id.* § 21080.3.1(a).

43. *Id.* § 21074(a)(2).

44. The natural environment of the Klamath riverscape as well as the contributing elements of the salmon, steelhead, eels, and basketry plants may also be considered cultural resources. Thomas F. King, First Salmon: The Klamath Cultural Riverscape and The Klamath River Hydroelectric Project 54 (2004) [https://perma.cc/75ZE-TR9R].

45. Alexander Matthews, *The Largest Dam-Removal in US History*, BBC (Nov. 10, 2020), https://www.bbc.com/future/article/20201110-the-largest-dam-removal-project-in-american-history [https://perma.cc/N5Q6-KL6G].

46. *Id.*

47. "The role of the River to Yurok culture was not limited to transportation, but was an integral part of the social network both within Yurok and between their neighbors." King, *supra* note 44. "It's hard to overstate how important th[e] livelihood [of fishing] has been to the Yurok people who have lived for millennia in rural Northern California." Matthews, *supra* note 44.

48. Mike Belchik & Cynthia Le Doux-Bloom, Let the River Run: Insights into Understanding the Klamath Basin 12 (2019) [https://perma.cc/3GMT-4VEU].

49. *Memorandum of Agreement*, Klamath River Renewal Corp., http://www.klamathrenewal.org/memorandum-of-agreement [https://perma.cc/M6M8-UFA3] (last visited Dec. 17, 2020).

50. Governor's Off. of Plan. and Res., State of Cal.,Technical Advisory AB 52

Federal law also provides examples of potential sources of tribal knowledge. For example, NAGPRA recognizes the following types of evidence of cultural affiliation: geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion.[51] Similarly, the Tenth Circuit discussed tribal knowledge in *Pueblo of Sandia v. United States*. The *Pueblo of Sandia* court observed that materials submitted to the Forest Service by the Governor of the Sandia Pueblo, including the affidavit of a tribal elder and religious leader which listed religious practices and alluded to sacred sites, minutes of a working group meeting that showed a site was used for ceremonial, religious, and medicinal purposes, and an anthropologist's report on a tribe's religious and cultural affiliation with a site, all served as forms of evidence.[52]

After AB 52 was passed, the California Office of Planning and Research (OPR), in cooperation with the California Environmental Protection Agency (CalEPA), the Native American Heritage Commission (NAHC), and the National Indian Justice Center, provided training on the law for lead agencies and tribal governments.[53] The training audience included the CalEPA Boards, Departments, and Office (BDO) executive staff, senior management, counsel, and other state agency tribal liaisons and program staff who regularly engage with tribal governments. The purpose of the training was to provide CalEPA's BDOs with knowledge about AB 52, implement best practices, and offer a better understanding of the cultural and political workings of California tribal governments.[54] Additionally, the OPR and California Natural Resources Agency made an update to Appendix G of the CEQA Guidelines, reflecting the requirements of AB 52.[55] However, despite formal training and instruction, implementation gaps still remain in the government to government consultation process.

IV. How AB 52 Works in Practice: Gaps and Limitations

There are both substantive and procedural problems associated with AB 52 implementation, which will be examined separately in this Part. This Part will not examine the totality of issues that arise during the consultation process. There are many issues associated with consultation and some are unique

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and Tribal Cultural Resources in CEQA 4 (2017) [https://perma.cc/653R-6AWY].

51. 43 C.F.R. § 10.14(e) (2021).

52. Pueblo of Sandia v. United States, 50 F.3d 856, 861 (10th Cir. 1995).

53. *California Native American Tribal Relations: Training*, Cal. Envtl. Prot. Agency, https://calepa.ca.gov/tribal/training (last visited Apr. 10, 2021).

54. *Id.*

55. Environmental consulting firms, law firms, and governmental entities have also held AB 52 workshops and issued training documents. *See, e.g.*, *AB 52 Training Workshops Available*, ECORP Consulting, Inc. News & Announcements (Dec. 10, 2015), https://ecorpconsulting.wordpress.com/2015/12/10/ab-52-training-workshops-available [https://perma.cc/BG92-JU2L].

to specific agencies, Native American tribes, and projects. Rather, this Part is intended to analyze and shed light on some of the challenges that impede consultation and optimal cultural resource protection.

The "Substantive Problems" portion partially draws on consultation challenges across legal contexts and in the U.S. more broadly. This is in part because some of the discussed issues extend beyond AB 52. Additionally, there are not as many recorded examples of failed AB 52 consultation processes as there are anecdotal examples, which is partially due to the relatively novel nature of the law. The "Procedural Problems" portion focuses solely on the AB 52 context, particularly highlighting the discretionary language of the statute and the substantial evidence standard, which applies to issues of fact and policy under CEQA.

A. *Substantive Problems*

Although AB 52 encompasses more than just consultation, consultation is at the heart of the law and allows for the exchange of knowledge and information to achieve its ultimate goal of environmental and cultural resource protection. Consultation is about listening, considering the views and values of other participants, and seeking agreement where feasible.[56] Unfortunately, consultation does not always run smoothly due to distrust among parties and cross-cultural differences.

AB 52 states that tribes have expertise about their history and practices related to the tribal cultural resources with which they are traditionally and culturally affiliated. AB 52 also acknowledges the importance of allowing tribes to contribute their knowledge to the environmental review process.[57] Yet, in practice, agencies second guess tribal knowledge and fail to treat tribal representatives as experts. Under AB 52, the lead agency serves as the decisionmaker. Although lead agencies are supposed to be neutral arbiters, many are not concerned about tribal interests and end up dismissing tribal concerns during the CEQA process.[58]

Some lead agencies do not take tribal consultation seriously and treat it as merely a box-ticking exercise on a rulemaking or permitting form.[59] State government leaders sometimes consider working with tribes to be a burden, specifically instructing staff members to avoid collaboration with tribal representatives.[60] Additionally, there is a great deal of distrust and a lack of respect

56. Thomas F. King, Places That Count: Traditional Cultural Properties in Cultural Resource Management 234 (2003).

57. Cal. Pub. Res. Code § 21080.3.1 (2021).

58. Laura Miranda, Native Am. Heritage Comm'n Chairperson, Tribal Legal Development Clinic Lecture (Oct. 10, 2019).

59. Anothony Moffa, Using Traditional Ecological Knowledge in Environmental Law, Panel Discussion, Held by UCLA Law Environmental Law Society (Nov. 17, 2020).

60. Tiana Williams-Claussen, Using Traditional Ecological Knowledge in Environmental Law, Panel Discussion, Held by UCLA Law Environmental Law Society (Nov. 17, 2020). Individuals working at the California Department of Fish and Wildlife shared

among parties, stemming from a troubled history of colonization, genocide, forced assimilation, and other harmful federal, state, and local policies.[61] Although tribal governments have made great progress in their pursuit of self-determination, they continue to have a strained, paternalistic relationship with federal and state governments and cannot self-govern without considering the larger framework of state and federal governance.[62] As a way of restoring their sovereignty and authority to manage their traditional landscapes, Native Americans have to be well-versed, not only in their own culture, but also in the mainstream or dominant culture in the United States.[63]

Cross-cultural differences among parties can critically impede effective consultation. Having either the mindset that one knows best because one is the government or a scientist or having the mindset that one has the moral high ground on behalf of the environment can make it difficult to acknowledge and consider contrasting points of view.[64] The former mindset is common among individuals who work at agencies.[65] Nontribal people typically seek information they can readily understand and identify with some level of scientific certainty.[66] Where traditional knowledge and Western science diverge, traditional knowledge is often ignored due to the scientific community's lack of understanding and familiarity with it.[67] What a scientist may view as healthy skepticism can be insulting to a practitioner of TEK.[68]

Additionally, while a nontribal individual may perceive a folk tale as long-winded or irrelevant, such stories can contain pertinent and intentional information regarding a community's concerns and sentiments about their environment.[69] There is also a tendency in CEQA analyses to segregate studies

with Tiana Williams-Claussen that they were instructed on methods to circumvent tribal rights at a training.

61. Chris Clarke, *Untold History: The Survival of California's Indians*, KCET (Sept. 26, 2016), https://www.kcet.org/shows/tending-the-wild/untold-history-the-survival-of-californias-indians [https://perma.cc/9GG5–5BQQ].

62. Williams-Claussen, *supra* note 60.

63. *Id.*

64. King, *supra* note 56, at 235.

65. *Id.*

66. Miranda, *supra* note 58.

67. Moffa, *supra* note 59. Professor Moffa shared a historical example of skepticism toward indigenous knowledge. In the 1980s, the International Whaling Commission (IWC) was studying populations of bowhead whales in the Pacific Ocean to determine whether the populations were sufficiently resilient for subsistence hunting. The Commission garnered the testimony of some Inuit hunters who, through traditional knowledge, had concluded that the population could sustain subsistence hunting. Before gathering the testimony, the IWC had estimated far lower figures than the traditional knowledge suggested and instead of relying on that knowledge to change its policy, it spent $10 million on Western scientific research over the course of ten years that essentially confirmed the hunters' conclusion that a population of about 10,000 whales could support subsistence fishing. So far, this is the attitude that has pervaded the approach to using traditional knowledge in policy decisions.

68. King, *supra* note 56, at 239.

69. *Id.*

by discipline, so "cultural resources" are viewed as the business of archeologists, while the natural environment is addressed by biologists. However, neither archeologists nor biologists are necessarily equipped to analyze and understand aspects of cultural significance without garnering TEK through consultation.[70]

In order for their expertise and knowledge to be accepted as legitimate, Native Americans have had to assimilate and conform to the Western framework of knowledge. Before traditional knowledge can be relied upon in the consultation process, it must be translated and organized into a form that can be understood by "the government of the colonizer."[71] For example, in the NAGPRA context, tribes have had to westernize their methods of communication, obtaining redress, and proving ownership over artifacts and remains by turning to the legislative and judicial processes as well as hiring archeologists and planners.[72] Even when tribes do hire their own experts, these experts are accused of being biased as employees of the tribes and the information they provide is still discounted.[73]

Agencies seeking to change policies based on new knowledge acquired from tribal consultation are also sometimes met with scrutiny from the legal community. As a result, some agencies may rightfully be concerned that their decisions will be disposed of by a court, especially due to the increasing scrutiny of policy decisions and rulemaking in administrative law.[74] Because American-trained lawyers are trained to see law as separate from religion and culture, they struggle to grasp tribal legal and governmental systems, where law, religion, and culture are intertwined.[75] Additionally, tribal nations have historically been perceived as lawless or savage in the American imagination. This misperception has served as the justification of nontribal governmental entities for imposing their own legal standards and norms on tribes, while diminishing the norms that comprise tribal identities.[76] Native Americans are sometimes hesitant to seek judicial remedy in the first place because the judicial system has not only been unhelpful in securing tribal interests in the past but has in fact hurt Native American communities on many occasions by setting harmful precedent.[77]

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70. King, *supra* note 44, at 54–55.

71. Moffa, *supra* note 59.

72. According to UCLA Law Professor Lauren van Schilfgaarde and NAHC Commissioner Laura Miranda, this has been anecdotally reported by tribes, such as the Fernandeño Tataviam Band of Mission Indians and the Pechanga Band of Luiseño Indians. Pechanga has hired a planner and three archeologists.

73. *Id.*

74. Moffa, *supra* note 59.

75. Justin B. Richland & Sarah Deer, Introduction to Tribal Legal Studies 7 (3d ed. 2016).

76. *Id.*

77. Miranda, *supra* note 58; *see* Matthew L. M. Fletcher, *A Short History of Indian Law in the Supreme Court*, A.B.A. (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/

Requiring all information about cultural resources to be provided by tribes in writing can diminish the value of the consultation and oral information provided by tribal representatives, tribal cultural experts, and tribal elders.[78] Tribes are sometimes skeptical about providing written information due to a long history of written cultural and burial data being used in ways not intended or approved of by them.[79]

The Sacramento Area Flood Control Agency's (SAFCA) initial consultation with a local tribe illustrates this point.[80] SAFCA sought to provide local cost share of the U.S. Army Corps of Engineers' flood risk reduction project along a stretch of levee in Sacramento to prevent flood risk. The purpose of SAFCA's site visits and consultation with the Tribe was to identify and locate known burial sites close to the river because levees are often constructed over the top of burial sites. Disputes arose between the parties because the agency's cultural resources consultant refused to accept information provided orally during consultation. The Tribe was asked to provide everything in writing with supporting maps, Department of Parks and Recreation forms, or other types of documentation demonstrating the cultural nature of the locations visited.

The Tribe provided some written information but asked that the information provided orally during the site visits be used as well. In the end, the agency's cultural resources consultant concluded that the Tribe did not provide sufficient evidence to treat cultural sites within the project area as significant. None of the information provided by the Tribe was included in the draft EIR. Granted, this initial consultation did not follow the AB 52 framework because the Notice of Preparation for the CEQA document was initiated prior to AB 52 enactment. However, this example still demonstrates challenges in consultation that may arise in the AB 52 context if cross-cultural differences are not addressed.[81]

B. *Procedural Problems*

As mentioned in Part IV of this paper, to qualify as a tribal cultural resource, a resource must either be: (1) listed or determined eligible for listing in the national or state register of historical resources, or listed in a local register of historic resources; or (2) "determined by the lead agency, in its discretion

vol—40—no—1—tribal-sovereignty/short_history_of_indian_law [https://perma.cc/XS2Z-CEQS].

78. Brian Guth et. al., *Compliance with AB 52: A Consultation Success Story*, San Francisco Bar Ass'n (June 27, 2019) [https://perma.cc/N5XV-4XRV].

79. *Id.*

80. *Id.*

81. *Id.* Fortunately, the parties made a second consultation attempt after intervention by NAHC and United Auburn Indian Community, and they were able to develop a Memorandum of Agreement, which included a Monitoring Agreement and a Burial Treatment Agreement. *Id.*

and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1."[82]

Tribal cultural resource designation can depend on the agency that engages with the tribe and whether the agency representatives are agreeable and thoughtful about tribal interests or unfriendly and/or antagonistic towards tribal interests. Based on the statute's permissive wording of the phrase "in its discretion," the lead agency has the latitude to determine whether the resource at issue is significant. Thus, the agency can furnish great protection of tribal interests based on consultation.

An agency may approach the consultation process seeking to learn and work collaboratively with a tribe in order to protect cultural resources. This type of agency would likely make a finding that a resource is significant and adjust its project plans after consultation based on tribal input. However, a scenario may also transpire where an agency sets an unusually high threshold for significance and ultimately ignores evidence presented by a tribe. The agency may also consider the evidence but choose to find that a resource is not significant. In the end, lead agencies are able to discard tribal interests based on AB 52's deferential standard.

The substantial evidence standard, which governs lead agency factual determinations made during the CEQA process, may cause problems for tribes that wish to appeal an agency's finding of no significance. Under CEQA, "substantial evidence" means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion," even where other conclusions might also be reached.[83] Courts will defer to a lead agency's factual determination that a resource is a tribal cultural resource if that decision is supported by substantial evidence in the record.[84] Agencies are also accorded deference by courts on determining thresholds of significance.[85]

In applying the substantial evidence standard, a reviewing court must "'resolve reasonable doubts in favor of the administrative finding and decision'" and cannot weigh conflicting evidence or set aside an agency's decision on the ground that an opposite conclusion would have been equally or more reasonable.[86] In this way, substantial evidence is generally a one-way test. The

82. Cal. Pub. Res. Code § 21074 (2021).

83. "Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence." Cal. Code Regs. tit. 14, § 15384(a). "Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." *Id.* § 15384(b).

84. *See* Berkeley Hillside Pres. v. City of Berkeley, 343 P.3d 834, 855 (Cal. 2015); Valley Advocates v. City of Fresno, 74 Cal. Rptr. 3d 151, 176 (Cal. Ct. App. 2008).

85. *See* Cal. Bldg. Indus. Ass'n v. Bay Area Air Quality Mgmt. Dist., 362 P.3d 792 (Cal. 2015).

86. Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 764 P.2d 278, 283–303

California Supreme Court has explained that "even if the statutorily prescribed standard of review permitted [it to weigh conflicting evidence,]" it has "neither the resources nor scientific expertise to engage in such analysis[.]"[87] According to the Court, although CEQA's purpose is to compel the government "to make decisions with environmental consequences in mind," CEQA does not and "cannot guarantee that these decisions will always be those which favor environmental considerations."[88]

Although the substantial evidence standard is uniformly used across CEQA contexts, neither AB 52 nor any subsequently issued guidance documents offer instruction on how it applies where an agency's position differs from that of a tribe and how a tribe may effectively contest an agency's unfavorable or harmful determination, given the high degree of deference accorded to agencies by courts. Additionally, because AB 52 is a relatively new law, there is little to no clarifying guidance by way of case law. "Substantial" also means something different to different adjudicators, which further compounds this uncertainty.

The substantial evidence standard may seem inherently problematic, but it is valuable in this context because it effectively safeguards agency determinations that a resource is significant against challenges brought by third parties that are hostile to tribal interests on the grounds that the resource is not significant. Granted, this positive outcome depends on the jurisdiction in which the challenge is brought. A favorable judicial decision could set a positive precedent and compel compliance and respect towards a cultural resource in the future. A more stringent standard of review might subject agency decision-making to regular scrutiny and make it easy to raise a legal challenge on the basis that an agency abused its discretion. In this way, a lack of deference to agencies could present more severe challenges and may undercut the purpose of AB 52 and tribal protection as a whole.

V. Recommendations

The recommendations in this Part are intended to both amend the statutory language of AB 52 itself and improve its implementation. The recommendations will be examined separately based on these two categories.

(Cal. 1988) (quoting Topanga Ass'n for a Scenic Cmty. v. Cnty. of Los Angeles, 522 P.2d 12, 16 (Cal. 1974)). In *Laurel Heights*, the California Supreme Court declined the Association's request to weigh competing technical data and arguments, focusing on the inquiry before it of whether there is substantial evidence to support the Regent's conclusion. *Id.* at 280. The Association relied on evidence in the record that it claimed supported conclusions contrary to those reached by the Regents. *Id.* at 293.

87. *Id.* at 283.

88. *Id.*

A. *Recommended Amendments to the Law*

First, the California Legislature should remove the phrase "in its discretion" to eradicate the wide latitude agencies have to discard tribal interests. Additionally, although AB 52 already states that lead agencies must support a determination that a resource is significant with substantial evidence, the California Legislature should consider amending the statute to specify that a determination of no significance must also be supported by substantial evidence.

This amendment would oblige agencies to demonstrate and explain why they rejected a tribe's evidence of cultural significance upon consultation. It may be difficult for agencies to prove a negative and provide evidence that a resource is not significant, but this is required of agencies when preparing mitigated negative declarations or negative declarations, especially because these decisions can be challenged in court. Under the fair argument standard, which is a rather weak test, plaintiffs may contend that substantial evidence supports a fair argument that there may be a significant environmental impact.[89] If the record supports this argument, the agency must prepare an EIR.[90]

Removing agency discretion and requiring agencies to support a determination of no significance with substantial evidence would likely result in more findings of significance. An agency may be compelled to make a finding of significance, which may be abused by tribes and paralyze future development. However, given tribes' important and long neglected interest in preserving their sacred landscapes and resources, decisionmakers should exercise this critical determination in favor of tribes.

The California Legislature should also include a list of criteria or conditions for designating a cultural resource as significant to make the process more objective and remove the ability for a callous agency to simply ignore a tribe's compelling evidence that meets the criteria list. Making this list non-exhaustive may offset the difficulty of listing criteria that are sufficiently clear to avoid excessive disputes between parties and also sufficiently helpful given the wide variety of cultural resources.

AB 52 should also delineate a list of methods for establishing evidence in the form of traditional knowledge. NAGPRA and Cal NAGPRA both recognize particular ways of establishing evidence of cultural affiliation, such as oral tradition, folklore, historical evidence, and kinship.[91] Cal NAGPRA also states that "[t]ribal oral histories, documentations, and testimonies shall not be afforded less evidentiary weight than other relevant categories of evidence on

89. *See, e.g.*, Cmtys. for a Better Env't v. S. Coast Air Quality Mgmt. Dist., 226 P.3d 985, 997 (Cal. 2010) (holding that substantial evidence supported a fair argument that project could have significant impacts, thus precluding the negative declaration and requiring preparation of an EIR).

90. *Id.* at 991.

91. 43 C.F.R. § 10.14(d) (2021); Cal. Health & Safety Code § 8012(n) (2021).

account of being in those categories."[92] Although there are still implementation gaps in NAGPRA and Cal NAGPRA consultation processes despite this language in the respective statutes, the Legislature should consider adding this language to AB 52 to facilitate its enforceability.

Additionally, AB 52 should specify a recourse in the event that parties fail to reach an agreement.[93] The law states that "if there are no agreed upon mitigation measures at the conclusion of the consultation or if consultation does not occur, . . . the lead agency shall consider feasible mitigation."[94] This language is unsatisfactory because agencies may select mitigation measures that do not satisfy tribes' interests and fail to meaningfully protect a resource, which in some instances may defeat the purpose of the mitigation and the entire consultation in the first place. Instead of leaving "feasible mitigation" to the lead agency in the event of a failed consultation, AB 52 could require the lead agency to consult with the NAHC about recommended mitigation measures given that the NAHC's mission is to protect Native American cultural resources. This amendment to AB 52 would ensure that the law will actually meet its intended goals.

B. *Recommendations for Improved Implementation*

Tribal governments, nontribal governments, lawyers, scientists, and society as a whole play an important role in smoothly and thoroughly implementing AB 52. Consultation is meant to be a collaborative process, not confrontational or competitive, and it cannot be divorced from overall relationship building. Broader changes to the relationship between tribal governments and state and local governments will aid efforts to improve and fully address the issues impeding consultation. State agencies should work with tribes to identify key priorities and concerns to improve this relationship and advance common interests. This collaboration should be done in conjunction with other agencies to ensure coordination of objectives and approaches.

Training for agency staff prior to consultation is essential. To ensure an efficient and consistent process at the outset, it may be helpful to compose a memorandum of understanding to guide how consultation will proceed. This agreement could define the terms and topics to be discussed during consultation, set out a consultation timeline, determine the parties' goals, and identify a recordkeeping system. In drafting this document, the parties should allow enough time to respect both of their decisionmaking processes.[95]

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92. Cal. Health and Safety Code §§ 8012(f), 8016(i) (2021).

93. *See* Karuk Tribe Consultation Policy 3 (2015) [https://perma.cc/YV38-Y6ZQ].

94. Cal. Pub. Res. Code § 21082.3(e) (2021).

95. *Tribal Consultation Under AB 52: An Overview and Tips for Compliance*, Shute Mihaly & Weinberger LLP (May 15, 2016), https://www.smwlaw.com/2016/05/15/tribal-consultation-under-ab-52-an-overview-and-tips-for-compliance [https://perma.cc/3CNL-C6X3].

During consultation, parties should develop tribally-driven mitigation measures, such as funding cultural lands repatriation, building Tribal Historic Preservation Offices, cultural department, and Geographic Information Systems capacity, and developing cultural centers and programs.[96] Tribes should evaluate consultation processes and share their experiences to provide insight for future consultation. This information can then be circulated by the Office of Planning and Research, the Native American Heritage Commission, and the California Natural Resources Agency. The Office of Planning and Research should also issue additional guidelines about establishing tribal substantial evidence and instructions on how to navigate competing positions between parties for determinations of significance.

Consultation should recognize the tribe's potential need for confidentiality regarding places that hold traditional tribal significance. Lead agencies should include a general description of cultural resource information in its environmental document to maintain confidentiality of sensitive information and also explain to the public why the agreed-upon mitigation measures will be necessary if the project is approved.[97]

Moreover, lawyers advocating for tribal interests should have the strength and perseverance to push back during training sessions and meetings when leaders at state agencies advise them to avoid working and engaging meaningfully with tribes.[98] It is the responsibility of local governments to establish trust with tribes in the first place; tribal governments should not be expected to trust a government that has mistreated them for centuries.[99]

Additionally, traditional knowledge must be respected and normalized because it allows for the advancement of progressive, forward-looking environmental policy. Native Americans in California have utilized holistic ecological strategies for at least 15,000 years[100] and should be able to meaningfully leverage their own resources and knowledge about their geographic areas. A holistic ecosystem-based approach could better protect and sustain the environment for future generations, and fortunately, it is gradually being embraced by Western scientists and policymakers.[101]

Lead agencies that learn about TEK during consultation should document it, with consent from tribes, because documentation will help fill in gaps

96. Courtney Ann Coyle, OHP CEQA Training for Tribal Nations: A Tribally Focused Point of View, (June 18, 2015) [https://perma.cc/58RW-8JYP]

97. *See* Cal. Pub. Res. Code § 21082.3(c)(4) (2021).

98. Williams-Claussen, *supra* note 60.

99. Moffa, *supra* note 59.

100. *See* Michelle LaPena, *Protections for At-Risk Tribal Cultural Sites*, The Bus. J. (Apr. 6, 2021), https://www.bizjournals.com/sacramento/news/2020/05/28/protections-for-at-risk-tribal-cultural-sites.html [https://perma.cc/3MPV-U7UV].

101. George Nicholas, *It's Taken Thousands of Years, but Western Science is Finally Catching Up to Traditional Knowledge*, The Conversation (Feb. 14, 2018), https://theconversation.com/its-taken-thousands-of-years-but-western-science-is-finally-catching-up-to-traditional-knowledge-90291 [https://perma.cc/K3QB-FSJB].

in Western science or inform Western science where it diverges from TEK.[102] Moreover, environmental attorneys and other professionals working to protect the environment must challenge Western scientific paradigms in their day to day lives.[103]

In order to effectively defend the environment and prevent the erasure of Native American identities, we must ensure that the laws designed to effectuate these goals are functioning properly. While some of the gaps in the implementation of these laws are superficial, others are capacious and run deep, and they cannot be repaired without a concerted societal effort.

102. Moffa, *supra* note 59; Martin et al., *supra* note 25.
103. Moffa, *supra* note 59.