



ASSOCIATION OF BAY AREA GOVERNMENTS
METROPOLITAN TRANSPORTATION COMMISSION



Tribal Consultation Toolkit

FOR SENATE BILL 35/ASSEMBLY BILL 168

This toolkit provides local governments and project proponents guidance and supporting information for use during tribal consultation under Senate Bill 35/Assembly Bill 168.



CONTENTS AND HOW TO USE THIS TOOLKIT

The tribal consultation process follows several steps. Click below for guidance and resources on each step:

[Step 1: Preliminary Application and Cultural Resources Study \(pg. 2\)](#)

This section includes information on the preliminary application process and the benefit of conducting a cultural resources study.

[Step 2: Consultation Outreach \(pg. 4\)](#)

This section provides information about the ministerial approval process related to cultural resources, initial outreach procedures for the Agency, and a sample letter for initial outreach.

[Step 3: Consultation Meeting \(pg. 5\)](#)

This section includes information on how to conduct the initial consultation meeting, as well as any follow up meetings, identifying tribal cultural resources, documenting the consultation process, and steps to maintain and cultivate tribal relationship.

[Step 4: Outcomes of the Consultation Process \(pg. 8\)](#)

This section provides guidance for the possible outcomes of consultation, including results of No Consultation Conducted and Consultation Conducted. Examples of a close-out email and an agreement document are provided.

Background Information about Tribal Consultation

The following bookmarks are included for more information on the definitions of cultural resources terminology, regulations related to cultural resources and tribal cultural resources, and material about San Francisco Bay Area Native American Tribes, history, and contact information.

- **[Definitions](#)**
- **[Regulations](#)**
- **[Bay Area Native American Tribes and Organizations](#)**
- **[Tribal Consultation Best Practices](#)**

KEY

This Toolkit includes resources embedded throughout to additional information, template documents, and links to outside web resources. Use this Key to access these additional materials:

TEXT Click for a template document

[Link](#) Click to access a website

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PURPOSE AND NEED

What is tribal consultation?

Tribal consultation is a process that local governments conduct to consult and coordinate with California Native American tribes within the jurisdiction of a proposed project. The goal of tribal consultation is to ensure that any new projects – such as constructing affordable housing – properly identifies, respects, and cares for tribal cultural resources that may be present.

Tribal consultation is led by local government staff and mainly occurs between those staff and the culturally affiliated California Native American tribes. Staff are also responsible for communicating with the project proponent; in some cases, the project proponent may be invited to participate directly in the consultation.

With the implementation of regulations over the past decade, coordination and consultation* with California Native American tribes has become an integral component of project development in California. Cultural resources professionals have been coordinating with Native American tribes for decades and projects subject to Section 106 of the National Historic Preservation Act have required consultation between federally recognized tribes and federal agencies. However, it was not until updates to the California Public Resources Code from California Assembly Bill 52 in 2015, that projects subject to CEQA required consultation between local governments and California Native American tribes, including non-federally recognized tribes.

California Senate Bill 35, effective January 2018, amended California Government Code Section 65913.4 to provide local governments a streamlined ministerial approval process of certain housing projects. To increase transparency and certainty in the development application process, Senate Bill 330 was enacted to require a preliminary application, which provides a specific subset of information to the local government for a housing development application, including consideration of historic and cultural resources.

In 2020, [California Assembly Bill 168](#) was enacted, which further requires local governments to invite California Native American tribes to consult regarding a proposed development's potential effects on any tribal cultural resources for every project subject to potential streamlining pursuant to Senate Bill 35.

Why is this toolkit needed?

Local governments are responsible for the conducting the tribal consultation process. Currently, there is a lack of technical assistance available to ensure that the process is completed effectively, efficiently, and respectfully to California Native American tribes.

This toolkit is intended to be used by local government staff but may be useful to wider audiences to better understand the process. The toolkit includes:

- **Guidance for conducting successful tribal consultation.**
- **Sample templates to use during the consultation.**
- **Background information and history on California Native American tribes and the laws mandating tribal consultation.**

What was the process to create the toolkit?

To create this toolkit, local government representatives; project proponents and land use attorneys; and tribal representatives were invited to provide perspectives on the tribal consultation process, best practices, and examples of successful and challenging consultation. Those that agreed to provide input were interviewed to gain an understanding of the range of experience with the tribal consultation process in the Bay Area, specifically as it relates to Senate Bill 35. Participants included:

- **Local Government Representatives:** Marin County, Santa Clara County, Solano County, City of San José, City of Oakland, City of Santa Rosa, City of Berkeley
- **Project Proponents and Land Use Attorneys:** East Bay Asian Local Development Company, MidPen Housing, Fennemore Wendel, Related, Resources for Community Development, Rhoades Planning Group
- **Tribal Representatives:** Tamien Nation, Confederated Villages of Lisjan, Ramaytush Ohlone

STEP 1: PRELIMINARY APPLICATION AND CULTURAL RESOURCES STUDY

Before Initiating Tribal Consultation

To apply for streamlined ministerial approval under Senate Bill 35, the project proponent (for example, a housing developer), must submit a preliminary application. The preliminary application asks if “any historic or cultural resources known to exist on the property.”

To determine whether any historic or cultural resources are known to exist in a project site, a project proponent should engage a [Qualified Archaeologist](#) to complete a cultural resources study of the project site. Many local governments maintain a list of qualified, preferred cultural resources consultants. If the local government does not maintain a list, the [Northwest Information Center](#) of the California Historical Resources Information System, operated by the California Office of Historic Preservation, maintains a list of qualified cultural resources consultants.

A cultural resources study will provide the project proponent with important information about the project site, and whether the project will qualify for a streamlined process. The study will also provide important information to the local government and California Native American tribes during the consultation process. And, if there is a federal nexus, such as funding or a permit, the cultural resources study can be used to support the federal regulatory process.

Cultural Resources Study for a Proposed Project Site

A cultural resources study generally includes three main components:

- (1) Background Research
- (2) Survey
- (3) Recommendations

(1) Background Research

Background research includes a records search from the California Historical Resources Information System (CHRIS), review of historic maps, aerial imagery, geologic context, archival research, and can sometimes include oral interviews. Only a Qualified Archaeologist or other cultural resources consultant can complete a records search at the Northwest Information Center (NWIC) of the CHRIS. The CHRIS is operated by the California Office of Historic Preservation and maintains

the cultural resources database for the State. The NWIC is located at Sonoma State University in Rohnert Park, Sonoma County, and includes information for the nine Bay Area counties. Cultural resources information from the CHRIS and reports generated from that information is considered confidential and should not be shared with the general public.

*Note on **Non-Confidential Records Searches** - Do not request a “Non-Confidential Records Search” from the NWIC. This document does not provide details on a project site and more often than not recommends additional study.*

(2) Survey

A cultural resources study may also include a survey of the project site. Archaeological sites in the Bay Area are often obscured by development or natural alluvial processes. A Qualified Archaeologist will be able to determine if the project site is sensitive for cultural resources, even if there is no surface visibility and will recommend a surface survey and/or a subsurface survey. A subsurface survey can consist of backhoe trenching, geotechnical coring, or hand excavation. Tribes also sometimes request ground-penetrating radar and human remains detection dogs as other methods for subsurface investigations of a project site.

- **Backhoe Trenching:** Backhoe Trenching is generally considered as the most effective testing method for near-surface (less than 10–12 feet below ground surface) contexts.
- **Geotechnical Coring:** Geotechnical Coring consists of a drilling subcontractor advancing 2-inch-diameter core samplers using a direct push hydraulic rig to obtain a continuous core. Core sampling can extend to great depths and is effective in areas with deeply buried archaeological sensitivity where deep construction activities are anticipated.
- **Ground-Penetrating Radar:** Ground-Penetrating Radar (GPR) survey consists of systematically scanning evenly spaced parallel transects within rectangular grids using a sled or cart-mounted GPR transmitting and receiving unit. GPR data are generated by sending pulses of radar energy into the ground from a surface antenna at a specific time interval. The energy reflected off of buried objects, features, or strata is measured as the waves return to a receiving



antenna, often as it is moved along a transect, collecting reflection traces at intervals tallied with a calibrated survey wheel. The data are sampled and processed by a control unit attached by cable to the receiving antenna. Subsurface features such as utility lines, underground tanks, foundations, and other features can be identified using GPR, as well as archaeological remains and/or human remains, if present.

- **Human Remains Detection:** Human Remains Detection (HRD) dogs have been used worldwide to identify human remains, both modern and non-modern. Archaeological excavations in Croatia, the Czech Republic, and Australia have used HRD dogs, as well as several locations in California along historic emigrant trails and at pre-contact Native American sites. The use of HRD dogs has increased in recent years as a preferable non-invasive detection method among many Native American tribal groups. The efficacy of HRD dogs can be determined by the age of the detected burials, the distance between the dog alert and a grave location, the probability of false positive, and the probability of detection. The probability of detection is limited by sediment, disturbance, or other environmental conditions.

Note on GPR and HRD: While both GPR and HRD dogs have been successful at identifying archaeological sites to varying degrees under controlled circumstances, their use as a testing method in an urban environment has not been as successful as the excavation methods described above due to various potential anomalies that would distract from positive archaeological deposits, cultural materials, and/or features, as well as the limited exposed ground surface. In addition, these methods are useful in areas where the goal is to minimize ground disturbance; however, in a large-scale development project where mass excavation would be conducted, excavation through physical or mechanical means is a more effective presence-absence determination.

Sometimes California Native American tribes request to be present during surface survey and often during subsurface surveys. If surveys are completed, outreach to California Native American tribes by the project proponent may preclude the official consultation request from the local government. **Any pre-consultation outreach should be approved by the local government prior to initiating.**

(3) Recommendations

A cultural resources study provides additional recommendations. Streamlining a project pursuant to Senate Bill 35 may not be feasible if a study identifies cultural resources in the project site. If the study does not identify cultural resources in the project site but does determine the project site to be sensitive for buried or obscured cultural resources, other actions, such as construction monitoring, may be recommended. Recommendations can be captured in an agreement document.

STEP 2: CONSULTATION OUTREACH

Timeline for Consultation Under Assembly Bill 168

Consultation requires a 30-30-30 timeline as outlined by the Office of Planning and Research. Within 30 calendar days of receiving the project proponent's preliminary application, the local government must provide formal notice for each tribe traditionally and culturally affiliated with the geographic area of the project site. The formal notice must include the location and a description of the proposed development, and an invitation to engage in scoping consultation.

Each tribe that receives this notice has 30 calendar days to accept the invitation to engage in consultation. The local government must initiate consultation within 30 calendar days of a tribe's acceptance of the invitation to engage in consultation.

Initial Consultation Letter

The initial outreach letter is an opportunity for the local government to provide information about a project as well as establish consistent communication with tribes and forge relationships. Information to include in an initial outreach letter can include, but not be limited to the following:

- **Project description.** This does not have to be extensively detailed, a one or two-paragraph summary that explains the proposed work for the general public's edification is sufficient. If the tribe wishes more details, they can follow up with a request for more information.
- **Project plans and maps.** These documents should be sufficiently detailed so that the tribe can have a working understanding of the physical footprint of the undertaking.
- **Other information:**
 - Copies of cultural resources study including results of NWIC records search and any completed surveys;
 - Contact information for any cultural resources consultants hired;
 - Copies of environmental studies that provide overviews of the plant and animal communities, and any geotechnical work that may have occurred.

The initial outreach letter should be sent via certified mail and by email. Many tribes have preferences on communication protocol. Ask each tribe for their preferred way of communication.

Additional Outreach May Be Needed

Because of State and federal consultation requirements, tribes receive a high volume of outreach and/or consultation requests. Some tribes may be under-resourced and, therefore, unable to manage the number of outreach and/or consultation requests they receive within specified timeframes. For some projects, tribal officials may need to go before their Tribal Council, which often only meets once a month. If a local government has cultivated tribal relationships, they may make a courtesy call or email, or request an initial virtual meeting, and inform the representative that the request for consultation is pending. During initial outreach, the local government should clarify who within the tribe should receive letters and establish initial consultation meetings.

If a tribe does not respond within the 30-day timeframe, it is good practice to reach out by email (on the same email chain, with the same recipients) a second time with an additional 15-day requested response period.

Native American Heritage Commission List of Tribes

The [Native American Heritage Commission](#) provides a list of California Native American tribes by area. Local governments should review the most recent Native American Heritage Commission list on file that are traditionally and culturally affiliated with their geographic area. The local government should request a new list every six months. It is not necessary to retain a list on a project-by-project basis. A project-by-project approach not only fails to provide a comprehensive understanding of the tribal complexity of the region, it is also less efficient, given that response times from the Native American Heritage Commission can be a number of weeks or months, leading to potential delays.

STEP 3:

CONSULTATION MEETINGS

Once a tribe has requested consultation and accepted an invitation to a meeting, the consultation process starts. As noted, consultation is the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement.

The goals of tribal consultation are:

- To determine whether tribal cultural resources are present within the project site.
- To evaluate tribal cultural resources for their potential significance (i.e., eligibility for listing in the California Register of Historical Resources) using input provided by the tribe.
- To determine whether identified tribal cultural resources would be impacted by the project.
- Develop an agreement to mitigate impacts.

To reach these goals, the consultation meeting process is outlined below, including:

- Who should participate in consultation meetings.
- The meeting format.
- Types of tribal cultural resources.
- Sensitivities around tribal cultural resources.
- Evaluating tribal cultural resources.

Tribal Consultation Participants

Tribal consultation should be conducted by individuals authorized to make decisions on behalf of the local government. Tribes may feel that consultation only with a consultant or only with a local government junior staff person with no authority is disrespectful and dismissive of tribal concerns. For the initial meeting at least, it is recommended that the most senior person available within the local government that is involved in the project should attend. That person should be prepared to welcome the tribe to the project, set a collaborative and productive tone, listen seriously to tribal concerns, and share their contact information. Tribes may similarly bring a high-level tribal official to the initial meeting.

Tribal consultation meetings should include the following people:

- Senior Project Manager
- Subject Matter Expert (archaeologist, sometimes a biologist or hydrologist)
- Legal Counsel, if needed
- Local Government Director, if needed
- Project Proponent (ask tribe for permission prior to inviting)

Format of Initial Tribal Consultation Meeting

The initial meeting should be scheduled with time to cover agenda items and considerable extra time to discuss government-to-government concerns that the tribal representatives may want to bring to the fore.

Schedule the first meeting **(usually a virtual meeting)** for 1-1/2 hours.

The local government official should be prepared to discuss general issues and set up an appropriate time to follow up. The tone and respect set at this initial meeting establishes the dynamic for all future consultations on the project and likely future projects.

Whomever the local government chooses to conduct the consultation going forward should be diplomatic and capable of productive discussions with tribes who may not support the project or have unresolved concerns with the agency on other projects. There may be times when project personnel may not be the appropriate individuals to lead consultation and, in such cases, another individual within the agency should be designated.

Identify Tribal Cultural Resources

A wide range of resources could be identified as potential tribal cultural resources—topographic formations on the landscape, archaeological sites, ancient trees, basketry or medicinal plants, homes and businesses connected with important tribal events, trails, creeks, springs, rivers, beaches, habitat, viewsheds—all of these and more could conceivably be identified by a tribe as holding cultural importance.

Each tribe may have its own perspective on whether sites, features, places, cultural landscapes, sacred places, and objects have a cultural value to the tribe, and the nature of its cultural value. What one tribe considers or does not consider important may be irrelevant to another tribe. Moreover, two tribes whose ancestral boundaries overlap can attribute cultural value to a resource for different reasons and, therefore, a single potential resource may have cultural value to multiple tribes for different reasons. Even within a tribe, different families may ascribe cultural value to a resource that those outside the family may not.

Sensitivity During Tribal Consultation

Asking a tribe for information about places of cultural importance is different than requesting comments from the general public. In many tribal cultures, discussing sacred places, ceremonies, or religious traditions with individuals outside of the tribe, or, in some cases outside of family or clan groups, is against custom. Within some cultural traditions, physical or spiritual harm can result if these locations or practices are shared. These risks increase if mentioned places are visited by individuals who lack the cultural authority to do so. A tribe may withhold information to protect both tribal members and the public.

Similarly, within many tribal traditions, the names of the dead cannot be spoken. A place may be associated with an important individual, but that individual cannot be named or discussed. In consulting with tribes, it is important to comprehend what is not being spoken of as much as what is not. As with disclosing information on sacred places, ceremonies, and religious traditions, tribes may not make such prohibitions explicit during consultation.

Asking a tribe for information about their resources is a serious request that differs from discussions with other interested parties. On one hand, it may be against tribal custom to comply with the request. On the other hand, tribes are actively looking to protect their ancestral places and understand that they need to be engaged in the planning process to do so. Every request for information, therefore, has the potential to be culturally challenging for tribal representatives from the start. Awareness and sensitivity towards this issue is critical for getting consultation off on the right foot.

Types of Tribal Cultural Resources

- A place where an ancestral figure passed through, named a place on the landscape, and/or left a mark on the landscape.
- A place where ceremony is or has been performed.
- A place where an important event in a tribe's history took place.
- A place associated with a dreamer, spiritual leader, or prominent political leader.
- Named places occurring in the early written records.
- A place important to traditional teaching methods or part of instructional stories.
- A home or business of a tribal member crucial to the establishment of the tribe's political autonomy.
- A location where medicinal, basketry, or ceremonial items are harvested, gathered, or stored.
- A place that contains human remains.
- Archaeological sites seen as imbued with ceremonial or spiritual importance.
- Historically important fish migration routes.

This is only a partial list, and each tribe will likely have knowledge of other resources with cultural value to them that fall outside these examples. What is important is that the identification process be conducted openly and collaboratively, with sensitivity to tribal concerns, particularly when a tribe's view of a resource's cultural value is outside the experience or expertise of those acting on behalf of the local government, project proponent, or cultural resources consultant.

Evaluating Tribal Cultural Resources

Tribal cultural resources are considered significant if they meet one of the following two criteria:

- 1) The resource is listed or eligible for listing in the California Register of Historical Resources, or in a local register of historical resources as defined in PRC Section 5020.1(k); or
- 2) The resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in PRC Section 5024.1(c). In applying the criteria set forth in PRC Section 5024.1(c), the lead agency shall consider the significance of the resource to a California Native American tribe.

As noted, if a tribal cultural resource is determined significant, the local government may not be eligible for ministerial approval established under Senate Bill 35.

Document the Consultation Process

The local government should maintain a record of tribal consultation. This record should include the following:

- Copies of all mailed and emailed correspondence between the local government or any consultants assisting with consultation, and consulting tribes.
- A record of the receipt (both mailing and delivery) of all certified mail.
- Agendas and notes from in-person, on-site, telephone, and video consultations.
- A log of all consultation activities.

These records are typically kept on file with the local government and are confidential. Some tribes may request non-disclosure agreements that define how these records are to be kept and who can have access to them. Tribal representatives may change during the consultation process and the local government should be prepared to share the record of consultation to date. Typically, at a minimum, the log of consultation activities is included as an appendix or attachment to environmental documentation, in which case, all potentially confidential information should be omitted.

Remember that the consultation process is confidential. Information provided by the California Native American tribe and cultural resources locational information should not be shared with the public.

Maintain and Cultivate Tribal Relationships

While individual projects have start and stop dates, effective consultation is an ongoing process. Local governments will need to consult with tribes for as long as those agencies have responsibilities in the ancestral territories of those tribes. Agencies should be proactive about building long-term, collaborative relationships with their tribal partners. Such efforts are an investment in the responsible stewardship of these lands and will facilitate future consultations. It is in the long-term best interest to build good tribal relationships that extend beyond the activities of a single undertaking.

A good practice, particularly for local governments with moderate-to-large-size jurisdictions, may be to establish bi-annual or quarterly meetings between tribal and local government representatives. Regular meetings provide an opportunity to build personal relationships and disclose information on upcoming projects in that agency's jurisdiction and develop tribal consultation-related processes and agreement documents.

[Click Here for Additional Best Practices for Tribal Consultation](#)

Local governments should plan for and anticipate providing compensation for services from tribal representatives, which may include field visits to provide information about specific places or sites, review of documentation, monitoring activities, and related travel expenses. Tribal monitors are often a requirement of the permit and compensation must be incorporated into project budgets.

STEP 4:

OUTCOMES OF CONSULTATION PROCESS

No Consultation Conducted

Tribe Did Not Respond to Invitation to Consult

If a tribe did not respond to the formal invitation to consult within 30 days from the date the local government sent the formal invitation (and, did not respond within 15 days of a courtesy follow-up sent after the 30-day initial response period, if conducted), the requirements of Assembly Bill 168 with respect to the project and the tribe are considered complete (California Government Code Section 65913.4(b)(3)(A)).

Tribe Accepted Invitation to Consult (but did not respond to further requests)

If a tribe responded to the formal invitation to consult within 30 days from the date the local government sent the formal invitation but did not respond to the local agency's attempts to initiate consultation with the tribe, the requirements of Assembly Bill 168 with respect to the project and the tribe are considered complete (Government Code Section 65913.4(b)(3)(B)).

As noted in PRC Section 21082.3.(d)(2), if the California Native American tribe has requested consultation pursuant to Section 21080.3.1 and has failed to provide comments to the lead agency, or otherwise "failed to engage," in the consultation process, the consultation process is considered complete.

A good practice is to send a final close out email to the California Native American tribe that had originally accepted consultation. This provides the tribe one final opportunity to consult and ensures the local government has documentation of the consultation process and failure to engage.

Consultation Conducted

Tribe Accepted Invitation to Consult

If a tribe responded to the formal invitation to consult within 30 days from the date the local government sent the formal invitation and responded to the local agency's attempts to initiate consultation with the tribe, the local government should coordinate with the tribe to establish a meeting date/time and carry out consultation.

Consultation should then continue until one of the following occur:

1. Consultation concluded that there is no potential impact to tribal cultural resources resulting from the project (Government Code Section 65913.4(b)(3)(C));
2. Consultation identified potential impacts to tribal cultural resources, and the parties committed to a documented, enforceable agreement regarding the treatment of potential resources (Government Code Section 65913.4(b)(3)(D)); or
3. One or more parties to the consultation, acting in good faith and after a reasonable effort, conclude that a mutual agreement cannot be achieved (Government Code Section 65913.4(b)(2)(D)(iii)).

Note that a project proponent may submit an application for ministerial approval pursuant to Senate Bill 35 for the first two cases above.

No Potential Impacts to Tribal Cultural Resources Identified – Application May Be Submitted

If the parties participating in tribal consultation determine that there is no potential impact to tribal cultural resources resulting from the project, then no further documentation is required, and the development proponent may proceed with submission of its application for ministerial approval under Senate Bill 35 (Government Code Section 65913.4(b)(2)(A)).

Do not forget to document a finding of no potential impacts to tribal cultural resources in an email to the consulting California Native American tribes.

Potential Impacts to Tribal Cultural Resources Identified and Commit to Enforceable Agreement – Application May Be Submitted with Enforceable Agreement for Tribal Cultural Resources Treatment as Condition of Approval

If the tribal consultation identifies a potential impact to tribal cultural resources resulting from the project, then the parties must document an enforceable agreement regarding the methods, measures, and conditions for treatment of tribal cultural resources. This agreement must be a condition of approval for the project application for Senate Bill 35 approval and attached to the local government's approval of the application for Senate Bill 35 ministerial approval (Government Code Section 65913.4(b)(2)(B)).

In many cases, a specific tribal cultural resource may not be identified but the project site is deemed to be culturally sensitive. In such a case, tribes may seek different treatment measures than are typically implemented to mitigate impacts on cultural resources (e.g., archaeological data recovery, interpretive panels, displays, or public visitation). Because the significance of tribal cultural resources is rooted in tribal cultural values, treatment for tribal cultural resources should be heavily based on tribal input. Tribes to whom the tribal cultural resource in question have significance should be given the opportunity to review and comment on proposed treatment of tribal cultural resources to ensure that tribal perspectives are accurately represented, and the treatment measures are as agreed upon. The enforceable agreement outlining treatment of tribal cultural resources should outline the steps agreed upon, responsible parties, timeline, and include or refer to work plans that describe in detail how the results of consultation are to be implemented.

Agreement documents can include several conditions of approval including commitments for cultural resources awareness training, monitoring during construction, and actions to follow in the event of a discovery of cultural resources.

Burial agreements as part of an enforceable agreement document are not recommended. If human remains are identified during project implementation, the provisions of the [California Public Resources Code](#) must be followed.

Monitoring during construction is a common request for an agreement document. While all projects are different, it is recommended that a monitoring plan be developed by a qualified archaeologist as a condition of approval. The monitoring plan will provide parameters for monitoring, such as the types of activities, locations, and depth of proposed monitoring.

Potential Impact to Tribal Cultural Resource

If the consultation results in disqualification of the project from Senate Bill 35's streamlined ministerial approval process, the local government must provide written documentation of the fact, with an explanation for the project's ineligibility, to the development proponent and the California Native American tribe(s) participating in the consultation (Government Code Section 65913.4(b)(5)(A)). The documentation provided to the development proponent must also include information on how to seek a conditional use permit or other discretionary approval of the project from the local government (Government Code Section 65913.4(b)(5)(B)).

If the lead agency and the tribe do not agree and the lead agency chooses to close consultation without agreement, the lead agency needs to document its decision and include it in the public record.

Participants are Unable to Reach Agreement

A project would be ineligible for ministerial approval pursuant to Senate Bill 35 if any of the following conditions apply:

1. The project site contains a tribal cultural resource that is listed on a national, tribal, state, or local historic register (Government Code Section 65913.4(b)(4)(A));
2. The parties to scoping consultation do not agree on whether the project will impact tribal cultural resources (Government Code Section 65913.4(b)(4)(B)); OR
3. A potential tribal cultural resource would be affected by the proposed project, and the parties to scoping consultation were unable to document an enforceable agreement regarding the treatment of potential tribal cultural resources (Government Code Section 65913.4(b)(4)(C)).

Required Documentation upon Conclusion of Tribal Consultation

If the consultation concludes that the project would not affect potential tribal cultural resources, no further documentation is required, and the development proponent may proceed with submission of its application for ministerial approval under Senate Bill 35 (Government Code Section 65913.4(b)(2)(A)). If the consultation results in documentation of an enforceable agreement regarding the treatment of potential tribal resources, that agreement must be attached to the local government's approval of the application for Senate Bill 35 ministerial approval (Government Code Section 65913.4(b)(2)(B)).

DEFINITIONS

Indigenous and Pre-Contact

The term indigenous, rather than prehistoric, is used as a synonym for Native American-related (except when quoting), and pre-contact is used as a chronological adjective to refer to the period prior to Euroamerican arrival in the area. Indigenous and pre-contact are often, but not always, synonymous, since the former refers to a cultural affiliation and the latter chronological.

San Francisco Bay Area

For the purposes of this toolkit, the San Francisco Bay Area, or Bay Area, includes the following counties: Alameda, Contra Costa, Santa Clara, San Mateo, San Francisco, Marin, Sonoma, Napa, and Solano.

California Native American Tribe

A California Native American tribe is any Native American tribe or organization that is on the contact list maintained by the California Native American Heritage Commission. California Native American tribes can be federally recognized or a non-federally recognized tribes.

Project Proponent

The project proponent is the developer or person(s) responsible for carrying out a project. The project proponent has legal and financial responsibility related to a development. For projects related to Senate Bill 35 this is a housing developer or its representatives.

Consultation

Consultation is the meaningful and timely process of seeking, discussing, and carefully considering the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance (California Government Code Section 65352.4).

Cultural Resource

The term cultural resource includes architectural resources, archaeological resources, and human remains. Architectural resources are buildings, structures, or objects. Archeological resources can be historic-era or pre-contact.

Tribal Cultural Resource

A tribal cultural resource is defined in California Public Resources Code Section 21074 as a site, feature, place, or cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American tribe.

A tribal cultural resources must be:

1. Listed or eligible for listing in the California Register of Historical Resources, or in a local register of historical resources as defined in PRC Section 5020.1(k); or
2. A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in PRC Section 5024.1(c). In applying the criteria set forth in PRC Section 5024.1(c), the lead agency shall consider the significance of the resource to a California Native American tribe.

Historical Resource

A historical resource is an object, building, structure, site, area, place, record, or manuscript that is significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military, or cultural annals of California, and is listed or eligible for listing in the California Register of Historical Resources.

To be eligible for the California Register, a historical resource must be significant at the local, state, and/or federal level under one or more of the following four criteria:

1. Is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage; or
2. Is associated with the lives of persons important in our past; or
3. Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of 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.

A resource eligible for the California Register must be at least 50 years old and retain enough of its historic character or appearance (integrity) to convey the reason for its significance.

Unique Archaeological Resource

A unique archaeological resource is an archaeological artifact, object, or site that provides new information or is related to an important event or person.

A unique archaeological resource must clearly demonstrate that, without merely adding to the current body of knowledge, there is a high probability that it meets any of the following criteria:

1. Contains information needed to answer important scientific research questions and that there is a demonstrable public interest in that information.
2. Has a special and particular quality such as being the oldest of its type or the best available example of its type.
3. Is directly associated with a scientifically recognized important prehistoric or historic event or person.

Historic Property

A historic property is a pre-contact or historic-era district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places. Typically, a resource must be more than 50 years old to be considered as a potential historic property. A historic property can be an architectural resource (building, structure, object, district/landscape), an archaeological resource (site, district/landscape), or a traditional cultural property (site, district/landscape).

A historic property must meet the listing criteria at Code of Federal Regulations Title 36 Section 60.4, as stated below:

The quality of significance in American history, architecture, archaeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and:

- A. That are associated with events that have made a significant contribution to the broad patterns of our history; or
- B. That are associated with the lives of persons significant in our past; or
- C. That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- D. That have yielded, or may be likely to yield, information important in prehistory or history.

In addition to meeting one of the above criteria, a resource must also retain integrity to be considered an historic property. Integrity is measured by the degree to which the resource retains its historical attributes and conveys its historical character, the degree to which the original fabric has been retained, and the reversibility of changes to the resources.

Traditional Cultural Property

A traditional cultural property is a resource that is eligible for inclusion in the National Register of Historic Places because of its association with cultural practices or beliefs of a living community that are rooted in the community's history and are important in maintaining the continuing cultural identity of the community.

REGULATIONS

California State Regulations

California Environmental Quality Act

CEQA (codified at PRC Section 21000 et seq.) is the principal statute governing environmental review of projects occurring in California. CEQA requires lead agencies to determine if a project would have a significant effect on historical resources, unique archaeological resources, and tribal cultural resources, in addition to many other resource types.

Assembly Bill 52

Assembly Bill 52 (which amended Section 5097.94, and added Sections 21073, 21074, 21080.3.1, 21080.3.2, 21082.3, 21083.09, 21084.2, and 21084.3 to the Public Resources Code), enacted in September 2014, recognized that California Native American tribes have expertise with regard to their tribal history and practices. Assembly Bill 52 established a new category of resources in CEQA—tribal cultural resources—to consider tribal cultural values when determining the impacts of projects. The law also requires CEQA lead agencies to consult with California Native American tribes to identify, evaluate, and assess potential project impacts on tribal cultural resources.

Pursuant to Assembly Bill 52, for projects subject to CEQA, local governments are required to consult with all California Native American tribes who have formally requested of the agency to receive notifications for projects subject to review under CEQA for which the agency is CEQA lead agency.

Timing - Under Assembly Bill 52, tribes have 30 days from the date on which they receive notification to request consultation.

Senate Bill 35 and Assembly Bill 168

Assembly Bill 168 created a process for tribal consultation for housing development proposals seeking review under the streamlined ministerial approval process created by Senate Bill 35. As required by Assembly Bill 330, project proponents are required to submit a preliminary application with key project details to the local government. Upon receipt of a development proponent's preliminary application, the local government must consult regarding the proposed development with any California Native American tribe that is traditionally and culturally affiliated with the geographic area.

Unlike Assembly Bill 52, Assembly Bill 168 does not require that California Native American tribes formally request notifications from agencies but rather requires communication with the California Native American Heritage Commission for assistance in identifying relevant California Native American tribes.

Timing - For Assembly Bill 168, the Office of Planning and Research has provided guidance for a 30-day response window.

Senate Bill 18

Senate Bill 18 requires local governments to consult with California Native American tribes prior to making certain planning decisions and to provide notice to California Native American tribes at certain key points in the planning process. These consultation and notice requirements apply to adoption and amendment of general plans, specific plans, and designation of open space. The intent of Senate Bill 18 is to provide California Native American tribes an opportunity to participate in local land use decisions at an early planning stage, for the purpose of protecting, or mitigating impacts to, cultural places.

Timing - Under Senate Bill 18, tribes have 90 days from the date on which they receive notification to request consultation, unless a shorter timeframe has been agreed to by the tribe (Government Code Section 65352.3)

Other California Codes and Regulations

Public Resources Code Section 5097.98 identifies steps to follow in the event of the accidental discovery or recognition of any human remains in any location other than a dedicated cemetery. This includes contacting the California Native American Heritage Commission which designates a Most Likely Descendant.

Section 7050.5 of the California Health and Safety Code protects human remains by prohibiting the disinterring, disturbing, or removing of human remains from any location other than a dedicated cemetery.

The California Native American Historic Resource Protection Act of 2002 imposes civil penalties, including imprisonment and fines up to \$50,000 per violation, for persons who unlawfully and maliciously excavate upon, remove, destroy, injure, or deface a Native American historic, cultural, or sacred site that is listed or may be listed in the California Register.

California Government Code Section 27460 requires that human remains be "interred decently" in the event that no person takes charge of them when an inquest is held by a coroner. Section 27491 requires that, in the case of unattended deaths, the person in charge of the human remains notify the coroner, and that the coroner inquire into the death.

Federal Regulations

Historic properties are considered through the National Historic Preservation Act of 1966, as amended (U.S. Code Title 54 Section 306108) and its implementing regulations (Code of Federal Regulations Title 36 Section 800, Section 60, Section 63). The National Historic Preservation Act establishes the federal government's policy on historic preservation and the programs, including the National Register of Historic Places, through which that policy is implemented.

If a proposed project will include federal funding (e.g., U.S. Housing and Urban Development) or federal permits (e.g., U.S. Army Corps of Engineers), the project would be required to comply with Section 106 of the National Historic Preservation Act, which requires federal agencies to consider the effects of the proposed project on historic properties, in consultation with the State Historic Preservation Officer, Indian tribes, and other interested parties before granting permits, funding, or other authorization of the undertaking.

While the responsibility of the federal lead agency, tribal consultation required under Section 106 is often delegated to the local government and sometimes the project proponent to initiate.

SENATE BILL 35 AND ASSEMBLY BILL 168

Senate Bill 35 Eligibility and Tribal Cultural Resources

A project is eligible for the ministerial approval established under Senate Bill 35 if any of the following conditions apply in regard to tribal consultation and tribal cultural resources:

1. A tribe that received notice of the developer's submission of a preliminary application did not respond to the invitation to engage in consultation within 30 days (Government Code Section 65913.4(b)(3)(A));
2. A tribe accepted an invitation to engage in tribal consultation but failed to engage after repeated attempts by the local government to initiate consultation (Government Code Section 65913.4(b)(3)(B));
3. The consultation concluded that there is no potential harm to tribal cultural resources resulting from the project (Government Code Section 65913.4(b)(3)(C)); or,
4. The consultation identified potential impacts to tribal cultural resources, and the parties committed to a documented, enforceable agreement regarding the treatment of potential resources (Government Code Section 65913.4(b)(3)(D)).

Assembly Bill 168 Text

(b) (1) (A) (i) Before submitting an application for a development subject to the streamlined, ministerial approval process described in subdivision (c), the development proponent shall submit to the local government a notice of its intent to submit an application. The notice of intent shall be in the form of a preliminary application that includes all of the information described in Section 65941.1, as that section read on January 1, 2020.

(ii) Upon receipt of a notice of intent to submit an application described in clause (i), the local government shall engage in a scoping consultation regarding the proposed development with any California Native American tribe that is traditionally and culturally affiliated with the geographic area, as described in Section 21080.3.1 of the Public Resources Code, of the proposed development. In order to expedite compliance with this subdivision, the local government shall contact the Native American Heritage Commission for assistance in identifying any California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed development.

(iii) The timeline for noticing and commencing a scoping consultation in accordance with this subdivision shall be as follows:

(I) The local government shall provide a formal notice of a development proponent's notice of intent to submit an application described in clause (i) to each California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed development within 30 days of receiving that notice of intent. The formal notice provided pursuant to this subclause shall include all of the following:

(ia) A description of the proposed development.

(ib) The location of the proposed development.

(ic) An invitation to engage in a scoping consultation in accordance with this subdivision.

(II) Each California Native American tribe that receives a formal notice pursuant to this clause shall have 30 days from the receipt of that notice to accept the invitation to engage in a scoping consultation.

(III) If the local government receives a response accepting an invitation to engage in a scoping consultation pursuant to this subdivision, the local government shall commence the scoping consultation within 30 days of receiving that response.

(B) The scoping consultation shall recognize that California Native American tribes traditionally and culturally affiliated with a geographic area have knowledge and expertise concerning the resources at issue and shall take into account the cultural significance of the resource to the culturally affiliated California Native American tribe.

(C) The parties to a scoping consultation conducted pursuant to this subdivision shall be the local government and any California Native American tribe traditionally and culturally affiliated with the geographic area of the proposed development. More than one California Native American tribe traditionally and culturally affiliated with the geographic area of the proposed development may participate in the scoping consultation. However, the local government, upon the request of any California Native American tribe traditionally and culturally affiliated with the geographic area of the proposed development, shall engage in a separate scoping consultation with that California Native American tribe. The development proponent and its consultants may participate in a scoping consultation process conducted pursuant to this subdivision if all of the following conditions are met:

(i) The development proponent and its consultants agree to respect the principles set forth in this subdivision.

(ii) The development proponent and its consultants engage in the scoping consultation in good faith.

(iii) The California Native American tribe participating in the scoping consultation approves the participation of the development proponent and its consultants. The California Native American tribe may rescind its approval at any time during the scoping consultation, either for the duration of the scoping consultation or with respect to any particular meeting or discussion held as part of the scoping consultation.

(D) The participants to a scoping consultation pursuant to this subdivision shall comply with all of the following confidentiality requirements:

(i) Subdivision (r) of Section 6254.

(ii) Section 6254.10.

(iii) Subdivision (c) of Section 21082.3 of the Public Resources Code.

(iv) Subdivision (d) of Section 15120 of Title 14 of the California Code of Regulations.

(v) Any additional confidentiality standards adopted by the California Native American tribe participating in the scoping consultation.

(E) The California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) shall not apply to a scoping consultation conducted pursuant to this subdivision.

(2) (A) If, after concluding the scoping consultation, the parties find that no potential tribal cultural resource would be affected by the proposed development, the development proponent may submit an application for the proposed development that is subject to the streamlined, ministerial approval process described in subdivision (c).

(B) If, after concluding the scoping consultation, the parties find that a potential tribal cultural resource could be affected by the proposed development and an enforceable agreement is documented between the California Native American tribe and the local government on methods, measures, and conditions for tribal cultural resource treatment, the development proponent may submit the application for a development subject to the streamlined, ministerial approval process described in subdivision (c). The local government shall ensure that the enforceable agreement is included in the requirements and conditions for the proposed development.

(C) If, after concluding the scoping consultation, the parties find that a potential tribal cultural resource could be affected by the proposed development and an enforceable agreement is not documented between the California Native American tribe and the local government regarding methods, measures, and conditions for tribal cultural resource treatment, the development shall not be eligible for the streamlined, ministerial approval process described in subdivision (c).

(D) For purposes of this paragraph, a scoping consultation shall be deemed to be concluded if either of the following occur:

(i) The parties to the scoping consultation document an enforceable agreement concerning methods, measures, and conditions to avoid or address potential impacts to tribal cultural resources that are or may be present.

(ii) One or more parties to the scoping consultation, acting in good faith and after reasonable effort, conclude that a mutual agreement on methods, measures, and conditions to avoid or address impacts to tribal cultural resources that are or may be present cannot be reached.

(E) If the development or environmental setting substantially changes after the completion of the scoping consultation, the local government shall notify the California Native American tribe of the changes and engage in a subsequent scoping consultation if requested by the California Native American tribe.

(3) A local government may only accept an application for streamlined, ministerial approval pursuant to this section if one of the following applies:

(A) A California Native American tribe that received a formal notice of the development proponent's notice of intent to submit an application pursuant to subclause (I) of clause (iii) of subparagraph (A) of paragraph (1) did not accept the invitation to engage in a scoping consultation.

(B) The California Native American tribe accepted an invitation to engage in a scoping consultation pursuant to subclause (II) of clause (iii) of subparagraph (A) of paragraph (1) but substantially failed to engage in the scoping consultation after repeated documented attempts by the local government to engage the California Native American tribe.

(C) The parties to a scoping consultation pursuant to this subdivision find that no potential tribal cultural resource will be affected by the proposed development pursuant to subparagraph (A) of paragraph (2).

(D) A scoping consultation between a California Native American tribe and the local government has occurred in accordance with this subdivision and resulted in agreement pursuant to subparagraph (B) of paragraph (2).

(4) A project shall not be eligible for the streamlined, ministerial process described in subdivision (c) if any of the following apply:

(A) There is a tribal cultural resource that is on a national, state, tribal, or local historic register list located on the site of the project.

(B) There is a potential tribal cultural resource that could be affected by the proposed development and the parties to a scoping consultation conducted pursuant to this subdivision do not document an enforceable agreement on methods, measures, and conditions for tribal cultural resource treatment, as described in subparagraph (C) of paragraph (2).

(C) The parties to a scoping consultation conducted pursuant to this subdivision do not agree as to whether a potential tribal cultural resource will be affected by the proposed development.

(5) (A) If, after a scoping consultation conducted pursuant to this subdivision, a project is not eligible for the streamlined, ministerial process described in subdivision (c) for any or all of the following reasons, the local government shall provide written documentation of that fact, and an explanation of the reason for which the project is not eligible, to the development proponent and to any California Native American tribe that is a party to that scoping consultation:

(i) There is a tribal cultural resource that is on a national, state, tribal, or local historic register list located on the site of the project, as described in subparagraph (A) of paragraph (4).

(ii) The parties to the scoping consultation have not documented an enforceable agreement on methods, measures, and conditions for tribal cultural resource treatment, as described in subparagraph (C) of paragraph (2) and subparagraph (B) of paragraph (4).

(iii) The parties to the scoping consultation do not agree as to whether a potential tribal cultural resource will be affected by the proposed development, as described in subparagraph (C) of paragraph (4).

(B) The written documentation provided to a development proponent pursuant to this paragraph shall include information on how the development proponent may seek a conditional use permit or other discretionary approval of the development from the local government.

(6) This section is not intended, and shall not be construed, to limit consultation and discussion between a local government and a California Native American tribe pursuant to other applicable law, confidentiality provisions under other applicable law, the protection of religious exercise to the fullest extent permitted under state and federal law, or the ability of a California Native American tribe to submit information to the local government or participate in any process of the local government.

(7) For purposes of this subdivision:

(A) "Consultation" means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between local governments and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural importance. A lead agency shall consult the tribal consultation best practices described in the "State of California Tribal Consultation Guidelines: Supplement to the General Plan Guidelines" prepared by the Office of Planning and Research.

(B) "Scoping" means the act of participating in early discussions or investigations between the local government and California Native American tribe, and the development proponent if authorized by the California Native American tribe, regarding the potential effects a proposed development could have on a potential tribal cultural resource, as defined in Section 21074 of the Public Resources Code, or California Native American tribe, as defined in Section 21073 of the Public Resources Code.

CALIFORNIA PUBLIC RESOURCES CODE 5097.98

(a) Whenever the commission receives notification of a discovery of Native American human remains from a county coroner pursuant to subdivision (c) of Section 7050.5 of the Health and Safety Code, it shall immediately notify those persons it believes to be most likely descended from the deceased Native American. The descendants may, with the permission of the owner of the land, or his or her authorized representative, inspect the site of the discovery of the Native American remains and may recommend to the owner or the person responsible for the excavation work means for treating or disposing, with appropriate dignity, the human remains and any associated grave goods. The descendants shall complete their inspection and make their recommendation within 48 hours of their notification by the Native American Heritage Commission. The recommendation may include the scientific removal and nondestructive analysis of human remains and items associated with Native American burials.

(b) Upon the discovery of the Native American remains, the landowner shall ensure that the immediate vicinity, according to generally accepted cultural or archaeological standards or practices, where the Native American human remains are located, is not damaged or disturbed by further development activity until the landowner has discussed and conferred, as prescribed in this section, with the most likely descendants regarding their recommendations, if applicable, taking into account the possibility of multiple human remains. The landowner shall discuss and confer with the descendants all reasonable options regarding the descendants' preferences for treatment.

(1) The descendants' preferences for treatment may include the following:

- (A) The nondestructive removal and analysis of human remains and items associated with Native American human remains.
- (B) Preservation of Native American human remains and associated items in place.
- (C) Relinquishment of Native American human remains and associated items to the descendants for treatment.
- (D) Other culturally appropriate treatment.

(2) The parties may also mutually agree to extend discussions, taking into account the possibility that additional or multiple Native American human remains, as defined in this section, are located in the project area providing a basis for additional treatment measures.



BAY AREA NATIVE AMERICAN TRIBES AND ORGANIZATIONS

California Native American tribes have a tumultuous and complex history. Spanish missionaries, Mexican landowners, Gold Rush incursions, and historic government policy have deprived California Native American tribes of their land, family, sovereignty, and culture. However, California Native American resistance, resilience, and persistence maintained many traditional cultural organizations and values.

[The following link provides a summary of California Native American history.](#)

The California Native American Heritage Commission (Commission), created in 1976 (Chapter 1332, Statutes of 1976), is a nine-member body whose members are appointed by the Governor. The NAHC identifies, catalogs, and protects Native American cultural resources—ancient places of special religious or social significance to Native Americans and known ancient graves and cemeteries of Native Americans on private and public lands in California. The Commission is also charged with ensuring California Native American tribes' accessibility to ancient Native American cultural resources on public lands, overseeing the treatment and disposition of inadvertently discovered Native American human remains and burial items, and administering the California Native American Graves Protection and Repatriation Act, among many other powers and duties.

The Commission maintains a list of California Native American tribes based on geographic area. Local governments, project proponents, and other members of the public can request a list of California Native American tribes by sending a [request form](#) and a map of the area of interest.

There are currently over 170 California Native American tribes and organizations listed with the Commission. The list is updated on an ongoing basis and only includes tribes that are recognized by the Native American Heritage Commission as California-listed Native American tribes. Not all California-listed tribes are federally recognized; most tribes in the San Francisco Bay Area are not federally recognized tribes.

Local governments recognize that California Native American tribes offer expertise regarding tribal cultural resources and interests in the protection of land, resources, and culture. Paramount to tribal consultation is a good faith, reasonable effort to understand and consider tribal interests for projects within a local government's jurisdiction. Long-term partnerships between local governments and California Native American tribes provide opportunities to educate the public about tribal cultural resources and find alternatives to prevent or mitigate further loss of resources, heritage, and cultural values.

TRIBAL CONSULTATION BEST PRACTICES

Best Management Practices *(Adapted from Marin County)*

Consult Early. Contact California Native American tribes as early in the process as possible. The timeline for consultation includes 30 days for a tribe to respond to a request for consultation. Once consultation begins, there is no timeline associated with the conclusion of consultation so be prepared for several meetings if there are sensitive resources or areas to discuss.

Confidentiality. Always withhold confidential information from the public and from other tribes. "Confidential information" includes correspondence with a tribe or information revealed during a consultation. Do not include any of this highly sensitive information in public-facing documents or work products. Also, maintain information confidential internally (computer files/network), labeling them as such, as needed.

Prepare for the Meeting. The first contact between a local government and tribe is critical to relationship building. Hold an internal pre-meeting before the consultation to ensure staff, project proponents, and consultants are coordinated about the project, cultural resources sensitivity, and projected impacts.

Individual Meetings. Privately consult with only one tribe at a time, in separate meetings, unless the tribes agree otherwise. During consultation, avoid mentioning previous work with other tribes.

Include Key Staff. Provide a list of attendees and meeting agenda to the tribe prior to the consultation. Clear communication about attendees will strengthen tribal-agency relationships over time. Invite the following people as appropriate:

- **Local Government Project Manager.** Someone who can speak to the project details. Invite the highest-ranking person associated with the project to lead the consultation process.
- **Cultural Resources Professional (Archaeologist).** Someone who can speak to relevant technical aspects of the project site, such as an archaeologist. Ideally, this would be the consultant or subconsultant working on the project. If not possible, invite someone who is a subject matter expert in cultural resources.
- **Legal Counsel (if needed).** Tribes sometimes invite their legal counsel to consultations. Check beforehand if the tribe plans to do this; you can ask them directly if unknown. If they do, invite your own counsel representative.

- **Agency Director (if needed).** Agency leadership should attend larger or more significant consultations but is likely unnecessary for most project-specific meetings.
- **Project Proponent (possibly).** Always obtain prior approval from the tribe before including the proponent.

Introductions. At the beginning of the consultation, introduce all participants, explain who they represent and why they are in attendance, and agree on one person to keep track of the agenda. Reaffirm at the beginning that all parties agree to keep the information exchanged in confidence.

Respect. Know who will be representing the tribe and use their titles. For example, do not address a tribal chairperson by their first name, but instead as Chairperson [Last Name].

Maintain Composure. Be respectful and non-combative. If you do not know the answer to a question, do not become defensive, rather, say you will look into it and get back to them.

Unforeseen Circumstances. Cultural resources studies for tribal cultural resources are not exhaustive and additional resources may emerge through consultation—be ready for and receptive to surprises.

Documentation. Document in writing the progress of the consultation and the outcome (this documentation is sensitive and confidential). This includes emails and letters sent and received, telephone calls, meetings, and site visits. If possible, provide tribes with meeting notes.

Remember the Limited Resources of Many Tribes. A good faith effort in consultation with tribes recognizes the limited resources that tribes have to respond to every request and respects their need for proper background documentation to provide an appropriate response.

Because of state and federal consultation requirements, tribes receive a high volume of consultation and/or outreach requests. Some tribes may be under-resourced and are, therefore, unable to manage the number of outreach and/or consultation requests they receive within specified timeframes. For some undertakings, tribal officials may need to go before their Tribal Council, which often only meets once a month. Direct communication with tribal officials regarding their internal processes for responding to consultation requests, and then accommodating these processes, if possible, is critical towards engaging in effective consultation.

Sample Initial Outreach Letter

The Agency proposes the XXX project (proposed project). The proposed project would brief summary. Please see attached map for the proposed project location (attachment). The proposed project qualifies as a multi-family housing project undergoing the streamlined ministerial process under Senate Bill 35 and is therefore subject to comply with the tribal consultation requirements of Assembly Bill 168.

The proposed project consists of XXX. There would be XXX ground disturbance associated with the project. The results of the background research completed by XXX consultant are detailed summary.

The Agency would like to provide you with an opportunity to communicate concerns you might have regarding historical resources or tribal cultural resources important to your community that could be impacted by the proposed project. The Agency requests your participation in the identification and protection of historical resources and tribal cultural resources that could be impacted by the proposed project, with the understanding that you or other members of your community might possess specialized knowledge of the area.

Please consider this letter and preliminary project information as formal notification of a proposed project. Please respond in writing within 30 days if you wish to request consultation regarding possible significant effects that the proposed project may have on tribal cultural resources. Please provide a designated lead contact person if you have not already provided such information.

If you or any of your tribal members have any questions or concerns regarding the proposed project, please contact me Agency contact at:

[Address and Email of Agency Contact]

Sample Final Close-out Email

As a follow up regarding the XXX Project, the Agency wanted to reach out as the requested DATE deadline has passed for the Tribe to provide tribal cultural resources information for the CEQA document for this project. Due to timing constraints and larger project deadlines, the Agency will be moving forward with the environmental review for the project.

As part of moving forward with the environmental review, we will also be incorporating the following conditions of approval (AS APPLICABLE / attachment). As part of that process, the Agency will coordinate with you regarding any inadvertent discoveries and will similarly coordinate closely for any associated work.

Sample Agreement Document

Re: AB 168 Tribal Consultation Enforceable Agreement: XXX Project

The purpose of this letter is to inform you that the Assembly Bill 168 formal consultation between the Agency and the XXX Tribe has concluded. Attached to this letter is Exhibit A, the enforceable agreement required pursuant to California Government Code Section 65913.4(b)(2)(B). The Agency initiated this consultation via a letter emailed to you on XXX, to which you responded on XXX. The parties, including the development proponent, XXX, met on XXX.

Pursuant to California Government Code Section 65913.4(b)(2), subsection (B), the parties find that a potential tribal cultural resource could be affected by the proposed development and an enforceable agreement is made between both parties on methods, measures, and conditions for tribal cultural resource treatment. Based on this agreement, the project proponent may submit an application for a development subject to the streamlined, ministerial approval process described in the agreement.

Thank you for consulting with the Agency on this project. We value your assistance and look forward to consulting with you on future projects.

If you have any further questions, please contact the XXX for this project: Agency Contact.

Exhibit A: AB 168 Enforceable Agreement between the Agency and XXX Tribe

Pursuant to California Government Code Section 65913.4(b)(2), subsection (B), the parties, the Agency and XXX Tribe ("parties"), find that a potential impact would result from a proposed project at the approximately XXX-acre project site located at XXX and this enforceable agreement ("Agreement") is made between the parties on DATE on methods, measures, and conditions for tribal cultural resource treatment. Based on this Agreement, the development Permittee, XXX, may submit an application for a development subject to the streamlined, ministerial approval process described below.

The parties to this Agreement consent to the following conditions of approval to be included in the project approval(s): [EXAMPLE CONDITIONS OF APPROVAL]

Cultural Resources Awareness Training. The Agency shall require the project applicant to provide a cultural resources and tribal cultural resources sensitivity and awareness training program for all personnel involved in project construction, including field consultants and construction workers. The training program will be developed in coordination with a Secretary of the Interior-qualified archaeologist. The Agency will invite Native American representative(s) from California Native American tribe(s) that consulted on the project, is registered with the Native American Heritage Commission, and that is traditionally and culturally affiliated with the geographic area as described in Public Resources Code Section 21080.3 to participate. The training program will include relevant information regarding sensitive cultural resources and tribal cultural resources, including applicable regulations, protocols for avoidance, and consequences of violating State laws and regulations. The training program will also describe appropriate avoidance and minimization measures for resources that have the potential to be located in the project area and will outline what to do and who to contact if any potential cultural resources or tribal cultural resources are encountered. The training program will emphasize the requirement for confidentiality and culturally appropriate treatment of any discovery of significance to Native Americans.

On-site Monitoring. Prior to the issuance of a Grading Permit or demolition permit, the project applicant shall submit to the Agency, contracts for (1) a Secretary of the Interior-qualified archaeologist and (2) a Native American representative from a California Native American tribe that has consulted on the project, is registered with the Native American Heritage Commission, and that is traditionally and culturally affiliated with the geographic area as described in Public Resources Code Section 21080.3, to be present at the project site during ground disturbance activities according to a pre-established Cultural Resources Monitoring Plan. The archaeologist and tribal monitor may adjust the frequency of the monitoring based on the conditions and professional judgment regarding the potential to impact resources.

Inadvertent Discovery of Cultural Resources. If pre-contact or historic-era archaeological resources are encountered during project implementation, all construction activities within 100 feet shall halt, and a Secretary of the Interior-qualified archaeologist shall inspect the find within 24 hours of discovery and notify the Agency of their initial assessment. If the find is deemed pre-contact, Native American representative(s) from California Native American tribe(s) that consulted on the project, is registered with the Native American Heritage Commission, and that is traditionally and culturally affiliated with the geographic area as described in Public Resources Code Section 21080.3 will be invited to evaluate the find. Pre-contact archaeological materials might include obsidian and chert flaked-stone tools (e.g., projectile points, knives, scrapers) or toolmaking debris; culturally darkened soil ("midden") containing heat-affected rocks, artifacts, or shellfish remains; and stone milling equipment (e.g., mortars, pestles, handstones, or milling slabs); and battered stone tools, such as hammerstones and pitted stones. Historic-era materials might include building or structure footings and walls, and deposits of metal, glass, and/or ceramic refuse.

If the Agency determines, based on recommendations from a Secretary of the Interior-qualified archaeologist and affiliated Native American tribal representatives (if the resource is Native American related), that the resource may qualify as a historical resource or unique archaeological resource (defined in CEQA Guidelines Section 15064.5), a tribal cultural resource (defined in PRC Section 21080.3), or a historic property (defined in the National Historic Preservation Act), the resource shall be avoided, if feasible. This may be accomplished through planning construction to avoid the resource; incorporating the resource within open space; capping and covering the resource; or deeding the site into a permanent conservation easement.

If avoidance is not feasible, the Agency shall work with a Secretary of the Interior-qualified archaeologist and affiliated Native American tribal representatives (if the resource is Native American-related) to determine treatment measures to avoid, minimize, or mitigate any potential impacts or adverse effects to the resource. This shall include documentation of the resource and may include data recovery, if deemed appropriate, or other actions such as treating the resource with culturally appropriate dignity and protecting the cultural character and integrity of the resource.

Inadvertent Discovery of Human Remains. If any human remains are found during any field investigations, grading, or other construction activities, all provisions of California Health and Safety Code Sections 7054 and 7050.5 and Public Resources Code Sections 5097.9 through 5097.99, as amended per Assembly Bill 2641, shall be followed. If human remains are discovered during construction, there shall be no further excavation or disturbance of the area, or any nearby area reasonably suspected to overlie adjacent remains. The project applicant shall immediately notify the Agency and the qualified archaeologist, who shall then notify the County Coroner. The Coroner will make a determination as to whether the remains are Native American. If the remains are believed to be Native American, the Coroner will contact the Native American Heritage Commission within 24 hours. The Native American Heritage Commission will then designate a Most Likely Descendant. The Most Likely Descendant will inspect the remains and make a recommendation on the treatment of the remains and associated artifacts.

Sample Monitoring Plan

Please note that the Monitoring Plan should be completed by a U.S. Secretary of the Interior qualified archaeologist.

INTRODUCTION

This Cultural Resources Monitoring Plan has been prepared for the XXX project. The project proposes XXX. Provide details on project extent and depth of ground disturbance as well as any previous disturbance, limitations, or other relevant project information.

BACKGROUND AND RECOMMENDATIONS

Based on the background research and consultation, there appears to be limited potential for the discovery of unrecorded pre-contact cultural materials during project implementation. However, the unanticipated discovery of cultural materials cannot be entirely discounted, and a cultural resources awareness training to all project personnel involved in ground disturbing activity as well as a cultural resources monitoring program is required as a Condition of Approval for the project (as outlined in the agreement document).

MONITORING DURATION

An archaeological monitor and a tribal monitor (collectively referred to as the monitors) will be present during the following types of ground disturbance activities: Provide area, location, depth, and conditions for monitoring; include specifics so that monitoring is not for "all ground disturbing activities".

Following this initial monitoring, the monitors will determine, based on professional judgment and proposed project activities, if additional monitoring is warranted.

CONTACT INFORMATION

If previously unrecorded cultural materials or features are uncovered during monitoring, the archaeological monitor will contact the archaeological supervisor who will contact XXX (Agency representation) at telephone number / email.

If human remains are identified, the Agency representative will contact the County coroner according to the provisions outlined in the general monitoring provisions, below.

HEALTH AND SAFETY

The monitors will work under the general contractor's health and safety plan, which would describe any hazards that are likely to be encountered and how the monitors will be protected. If additional health and safety measures are warranted, include here.

CULTURAL RESOURCES AWARENESS TRAINING

Prior to the start of construction, the monitors will provide a cultural resources and tribal cultural resources sensitivity and awareness training program for all personnel involved in project construction. The training program will include relevant information about sensitive cultural resources and tribal cultural resources in the vicinity, as well as applicable regulations, protocols for avoidance, and consequences of violating State laws and regulations. The training program will describe appropriate avoidance and minimization measures for resources that have the potential to be located in the vicinity and will outline what to do and who to contact if any potential cultural resources or tribal cultural resources are encountered. The training program will emphasize the requirement for confidentiality and culturally appropriate treatment of any discovery of significance to Native Americans. The training program can be on-site or a video presentation.

GENERAL MONITORING PRINCIPLES

1. Monitoring will be completed in coordination with the Agency, an archaeological consultant, and a Native American representative from a California Native American tribe that has consulted on the project, is registered with the Native American Heritage Commission, and that is traditionally and culturally affiliated with the geographic area as described in Public Resources Code Section 21080.3.
2. The archaeological monitor will be a Secretary of Interior-qualified archaeologist or directly under the supervision of a Secretary of the Interior-qualified archaeologist.
3. The monitors will have the experience and demonstrated ability to recognize all types of cultural materials and features that may be discovered. In addition, the monitors will be able to perform basic archaeological triage; that is, to distinguish between an association of materials that may constitute an archaeological site and, therefore, merit further consideration, versus those that are part of the general 'background' distribution of remains that can be merely noted.
4. If pre-contact or historic-era resources are encountered during excavation and/or grading of the project site, all activity within a 50-foot radius of the find shall be stopped, the Agency shall be notified, and a qualified archaeologist in consultation with the tribal representative shall examine the find. The archaeologist in consultation with the tribal representative registered with the Native American Heritage Commission and that is traditionally and culturally affiliated with the geographic area as described in Public Resources Code Section 21080.3 shall 1) evaluate the find(s) to determine if they meet the definition of a historical or unique archaeological resource; and (2) make appropriate recommendations regarding the disposition of such finds prior to issuance of building permits. Recommendations could include collection, recordation, reburial, and/or analysis of any significant cultural materials. A report of findings documenting any data recovery shall be submitted to the Agency and the Northwest Information Center (if applicable). Project personnel shall not collect or move any cultural materials. Cultural materials will not be removed from the identified location. Fragile or exposed cultural materials may be temporarily stored in a secure location approved by the consulting tribe, until a determination is made about the significance of the resource and a treatment plan is developed. If the cultural materials are determined to not be significant, they will be reburied on site or disposed of in an appropriate facility.
5. The Agency will provide security, as needed, to ensure that no looting or disturbance occurs to significant cultural resources. This may include fencing and/or on-site security depending on the extent of the find and the duration the cultural materials remain exposed.
6. If any human remains are found, all provisions of California Health and Safety Code Sections 7054 and 7050.5 and Public Resources Code Sections 5097.9 through 5097.99, as amended per Assembly Bill 2641, shall be followed. If human remains are discovered during construction, there shall be no further excavation or disturbance of the site, or any nearby area reasonably suspected to overlie adjacent remains. The project applicant shall immediately notify the Agency and the qualified archaeologist, who shall then notify the County Coroner. The Coroner will make a determination as to whether the remains are Native American. If the remains are believed to be Native American, the Coroner will contact the Native American Heritage Commission within 24 hours. The Native American Heritage Commission will then designate a Most Likely Descendant. The Most Likely Descendant will inspect the remains and make a recommendation on the treatment of the remains and associated artifacts.

REPORTING

The archaeological monitor will maintain a daily log of activities, discoveries, and visitors. At the conclusion of the monitoring, the supervising archaeological consultant will submit a monitoring report to the Agency describing the monitoring process, significant discoveries, and other outcomes. The final monitoring report will be submitted to the Northwest Information Center.