

STATE OF CALIFORNIA

Tribal Consultation Guidelines

SUPPLEMENT TO GENERAL PLAN GUIDELINES

November 14, 2005

GOVERNOR'S OFFICE OF PLANNING AND RESEARCH



State of California

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Director's Message

November 14, 2005

The Governor's Office of Planning and Research (OPR) is proud to announce the publication of this November 2005 Supplement to the *General Plan Guidelines*. The 2005 Supplement (also known as Tribal Consultation Guidelines) provides advisory guidance to cities and counties on the process for consulting with Native American Indian tribes during the adoption or amendment of local general plans or specific plans, in accordance with the statutory requirements of Senate Bill 18 (Chapter 905, Statutes of 2004). It reflects recent changes to the California Public Records Act which will facilitate this consultation process.

It is our hope that this 2005 Supplement will be useful not only to city and county planning staffs for implementing the provisions of SB 18, but also to local elected officials, planning consultants, landowners, and tribal members who are involved in the general plan process.

In all of its work, OPR attempts to encourage more collaborative and comprehensive land use planning at the local, regional, and statewide levels. These goals are consistent with the goals of Senate Bill 18, which for the first time in the nation, requires cities and counties to consult with Native American tribes when adopting and amending their general plans or specific plans.

The development of this 2005 Supplement would not have been possible without the advice and assistance of many organizations and individuals, whose support OPR acknowledges and appreciates. These organizations and individuals include the Native American Heritage Commission and its staff, the members and representatives of numerous California Native American tribes, many city and county governments, state agency representatives, professional associations and academic institutions. We appreciate their assistance in preparing this 2005 Supplement, including participation at several meetings and public workshops.

OPR met the statutory deadline of March 1, 2005, to publish these guidelines by issuing interim guidelines on March 1. In developing the interim guidelines, OPR consulted with a wide range of stakeholders and experts. We consulted with city and county representatives (planners, legislative staff and legal counsels); tribal representatives and associations; staff of the Native American Heritage Commission (NAHC), including attendance at two NAHC commission meetings; federal agencies with experience in tribal consultation; academic institutions; and professional associations that deal with archaeological and cultural resource protection. In addition, we consulted with numerous tribal liaisons within state government and sought the input of the League of California Cities and the California State Association of Counties.

Based upon this consultation, OPR issued Draft Tribal Consultation Guidelines on February 22, 2005 for public review and comment. OPR conducted a public workshop on February 25, 2005, which was well attended and resulted in a productive discussion of the process envisioned by SB 18, as well as many specific recommendations for improvements to the 2005 Supplement.

In response to requests from many parties for additional time to consult with OPR regarding the 2005 Supplement, OPR continued to reach out to stakeholders for an additional 45 days to ensure that their interests were heard. Between March 1 and April 15, OPR held four meetings throughout the State to receive additional comments. The meetings were held in Klamath, Corning, Sonora, and Temecula. On April 15, OPR published the guidelines reflecting the comments and concerns expressed at those four meetings, as well as written comments received by OPR.

This November edition of the guidelines reflects recent changes to the Public Records Act that exempt from public disclosure certain documents pertaining to Native American cultural places.

We hope that you will find this 2005 Supplement to be an informative guide and a useful tool in the practice of local planning. I invite your suggestions on ways to improve OPR's *General Plan Guidelines* and this 2005 Supplement, as OPR continues to refine and update all of its guidance to city and county planning agencies.

Sean Walsh
Director, OPR

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Part A

SB 18 Context and Basic Requirements

Sections I through III of the 2005 Supplement provide background information to familiarize local government agencies with the intent of Senate Bill 18 (Burton, Chapter 905, Statutes of 2004) and the importance of protecting California Native American traditional tribal cultural places. Local governments will be better prepared to enter into consultations with tribes if they have a basic knowledge of tribal concerns and the value of cultural places to tribes. The key provisions of SB 18 are also outlined in table and text form.

I. Introduction

This 2005 Supplement to the *2003 General Plan Guidelines* addresses the requirements of SB 18, authored by Senator John Burton and signed into law by Governor Arnold Schwarzenegger in September 2004. SB 18 requires local (city and county) governments to consult with California Native American tribes to aid in the protection of traditional tribal cultural places (“cultural places”) through local land use planning. SB 18 also requires the Governor’s Office of Planning and Research (OPR) to include in the *General Plan Guidelines* advice to local governments for how to conduct these consultations.

The intent of SB 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. The purpose of involving tribes at these early planning stages is to allow consideration of cultural places in the context of broad local land use policy, before individual site-specific, project-level land use decisions are made by a local government.

SB 18 requires local governments to consult with tribes prior to making certain planning decisions and to provide notice to tribes at certain key points in the planning process. These consultation and notice requirements apply to adoption and amendment of both general plans (defined in Government Code §65300 et seq.) and specific plans (defined in Government Code §65450 et seq.). Although SB 18 does not specifically mention consultation or notice requirements for adoption or amendment of specific plans, existing state planning law requires local governments to use the same processes for adoption and amendment of specific plans as for general plans (see Government Code §65453). Therefore, where SB 18 requires consultation and/or notice for a general plan adoption or amendment, the requirement extends also to a specific plan adoption or amendment. Although the new law took effect on January 1, 2005, several of its provisions regarding tribal consultation and notice did not take effect until March 1, 2005.

The *General Plan Guidelines* is an advisory document that explains California legal requirements for general plans.¹ The *General Plan Guidelines* closely adheres to statute and case law. It also relies upon commonly accepted principles of contemporary planning practice.

¹ California Government Code §65040.2

When the words “shall” or “must” are used, they represent a statutory or other legal requirement. “May” and “should” are used when there is no such requirement. The 2005 Supplement:

- Provides background information regarding California Native American cultural places and tribes.
- Outlines the basic requirements of SB 18.
- Provides step-by-step guidance to local governments on how and when to consult with tribes.
- Offers advice to help local governments effectively engage in consultation with tribes.
- Provides information about preserving, or mitigating impacts to, cultural places.
- Discusses methods to protect confidentiality of information regarding cultural places.
- Presents ways of encouraging voluntary landowner involvement in the preservation of cultural places.

II. Background Information

The principal objective of SB 18 is to preserve and protect cultural places of California Native Americans. SB 18 is unique in that it requires local governments to involve California Native Americans in early stages of land use planning, extends to both public and private lands, and includes both federally recognized and non-federally recognized tribes. This section provides an overview of California Native American cultural places and California Native Americans.

California Native American Cultural Places

SB 18 refers to Public Resources Code §5097.9 and 5097.995 to define cultural places:²

- Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine (Public Resources Code §5097.9).
- Native American historic, cultural, or sacred site, that is listed or may be eligible for listing in the California Register of Historic Resources pursuant to Section 5024.1, including any historic or prehistoric ruins, any burial ground, any archaeological or historic site (Public Resources Code §5097.995).³

These definitions can be inclusive of a variety of places. Archaeological or historic sites may include places of tribal habitation and activity, in addition to burial grounds or cemeteries. Some examples are village sites and sites with evidence (artifacts) of economic, artistic, or other cultural activity. Religious or ceremonial sites and sacred shrines may include places associated with creation stories or other significant spiritual history, as well as modern day places of worship. Collection or gathering sites are specific places where California Native Americans access certain plants for food, medicine, clothing, ceremonial objects, basket making, and other

² Due to a drafting error, SB 18 contains multiple references to Public Resources Code (PRC) §5097.995 which is no longer in existence. In 2004, PRC §5097.995 was amended and renumbered to PRC §5097.993 by Senate Bill 1264 (Chapter 286). Local governments should refer to PRC §5097.993 when looking for PRC §5097.995.

³ *Ibid.*

crafts and uses important to on-going cultural traditions and identities; these places may qualify as religious or ceremonial sites as well as sites that are listed or eligible for listing in the California Register of Historic Resources.

Native American cultural places are located throughout California because California Native American people from hundreds of different tribes made these lands their home for thousands of years. Due to the forced relocation of tribes by the Spanish, Mexicans, and Americans, most tribes do not currently control or occupy the lands on which many of their cultural places are located. As a result, California Native Americans have limited ability to maintain, protect, and access many of their cultural places.

A number of federal and state laws have been enacted to preserve cultural resources and have enabled some Native American tribes to promote the preservation and protection of their cultural places. The National Historic Preservation Act (NHPA), which established historic preservation as a national policy in 1966, includes a Section 106 review process that requires consultation to mitigate damage to “historic properties” (defined per 36 CFR 800.16(1) as places that qualify for the National Register of Historic Places), including Native American traditional cultural places (TCPs, as described in National Register Bulletin 38) whenever any agency directs a project, activity or program using any federal funds or requiring a federal permit, license or approval (36CFR800.16). The National Environmental Policy Act (NEPA) requires every federal project to include in an Environmental Impact Statement documentation of environmental concerns, including effects on important historic, cultural, and natural aspects of our national heritage. Presidential Executive Order 13007, “Indian Sacred Sites,” ensures that federal agencies are as responsive as possible to the concerns of Native American tribes regarding their cultural places. The Archaeological Resources Protection Act (ARPA) makes desecration of Native American cultural places on federal lands a felony.

California state law includes a variety of provisions that promote the protection and preservation of Native American cultural places. A number of these provisions address intentional desecration or destruction of cultural places and define certain of such acts as misdemeanors or felonies punishable by both fines and imprisonment. These include the Native American Historic Resource Protection Act (PRC §5097.995-5097.996⁴), Public Resources Code §5097.99, Penal Code §622.5 and Health and Safety Code §7050.5, §7052. Other provisions require consideration of potential impacts of planned projects on cultural resources, which may include Native American cultural places. Public Resources Code 5097.2 requires archaeological surveys to determine the potential impact that any major public works project on state land may have on archaeological resources. The California Environmental Quality Act (CEQA) requires project lead agencies to consider impacts, and potential mitigation of impacts, to unique archaeological and historical resources.⁵ California Executive Order W-26-92 affirms that all state agencies shall recognize and, to the extent possible, preserve and maintain the significant heritage resources of the State. Public Resources Code §5097.9, which mandates noninterference of free expression or exercise of Native American religion on public lands, promotes preservation of certain Native American cultural places by ensuring tribal access to these places.

⁴ *Ibid.*

⁵ CEQA Statutes at Public Resources Code §21083.2-21084.1; CEQA Guidelines at 14 CCR 15064.5-15360.

While these and other laws permit Native Americans to have some say in how impacts to cultural places could be avoided or mitigated, the laws rarely result in Native American input at early stages of land use planning. Generally, these laws provide protection only to those sites located on public or Native American trust lands and address only the concerns of Native Americans who belong to federally recognized tribes, with no official responsibility to non-federally recognized tribes. The intent of SB 18 is to provide all California Native American tribes, as identified by the NAHC, an opportunity to consult with local governments for the purpose of preserving and protecting their cultural places.

California Native American Tribes

SB 18 uses the term, California Native American tribe, and defines this term as “a federally recognized California Native American tribe or a non-federally recognized California Native American tribe that is on the contact list maintained by the Native American Heritage Commission” (NAHC). “Federal recognition” is a legal distinction that applies to a tribe’s rights to a government-to-government relationship with the federal government and eligibility for federal programs. All California Native American tribes, whether officially recognized by the federal government or not, represent distinct and independent governmental entities with specific cultural beliefs and traditions and unique connections to areas of California that are their ancestral homelands. SB 18 recognizes that protection of traditional tribal cultural places is important to all tribes, whether federally recognized or not, and it provides all California Native American tribes with the opportunity to participate in consultation with city and county governments for this purpose. As used in this document, the term “tribe(s)” refers to a California Native American tribe(s).

California has the largest number of tribes and the largest Native American population of any state in the contiguous United States. California is home to 109 federally recognized tribes and several dozen non-federally recognized tribes. According to a 2004 California Department of Finance estimate, the Native American population in California is 383,197.

Tribal governments throughout California vary in organizational forms and size. Some tribes use the government form established under the Indian Reorganization Act of 1934 (25CFR81) with an adopted constitution and bylaws. Other tribes have adopted constitutions and bylaws that incorporate traditional values in governing tribal affairs. Many tribal governments are comprised of a decision making body of elected officials (tribal governing body) with an elected or designated tribal leader. Some tribes use lineal descent as the means of identifying the tribe’s leader. In general, tribal governing bodies and leaders serve for limited terms and are elected or designated by members of the tribe. Tribal governments control tribal assets, laws/regulations, membership, and land management decisions that affect the tribe.

III. Basic Requirements of SB 18

This section provides a brief summary of the statutory requirements of SB 18. Later sections of the Supplement provide additional detail regarding these requirements and offer advice to local governments on how to fulfill the notification and consultation requirements of SB 18. (Please refer to Section IV and Section V of these guidelines for additional information regarding the responsibilities outlined below.)

Responsibilities of OPR

Government Code §65040.2(g) requires the Governor's Office of Planning and Research (OPR) to amend the *General Plan Guidelines* to contain advice to local governments on the following:

- Consulting with tribes on the preservation of, or the mitigation of impacts to, cultural places.
- Procedures for identifying through the Native American Heritage Commission (NAHC) the appropriate California Native American tribes with whom to consult.
- Procedures for continuing to protect the confidentiality of information concerning the specific identity, location, character, and use of cultural places.
- Procedures to facilitate voluntary landowner participation to preserve and protect the specific identity, location, character, and use of cultural places.

Responsibilities of Local Governments

SB 18 established responsibilities for local governments to contact, provide notice to, refer plans to, and consult with tribes. The provisions of SB 18 apply only to city and county governments and not to other public agencies. The following list briefly identifies the contact and notification responsibilities of local governments, in sequential order of their occurrence.

- Prior to the adoption or any amendment of a general plan or specific plan, a local government must notify the appropriate tribes (on the contact list maintained by the NAHC) of the opportunity to conduct consultations for the purpose of preserving, or mitigating impacts to, cultural places located on land within the local government's jurisdiction that is affected by the proposed plan adoption or amendment. 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 §65352.3).⁶
- Prior to the adoption or substantial amendment of a general plan or specific plan, a local government must refer the proposed action to those tribes that are on the NAHC contact list and have traditional lands located within the city or county's jurisdiction. The referral must allow a 45 day comment period (Government Code §65352). Notice must be sent

⁶ SB 18 added this new provision to state planning law. It applies to any amendment or adoption of a general plan or specific plan, regardless of the type or nature of the amendment. Adoption or amendment of a local coastal program by a city or county constitutes a general plan amendment.

regardless of whether prior consultation has taken place. Such notice does not initiate a new consultation process.⁷

- Local governments must send notice of a public hearing, at least 10 days prior to the hearing, to tribes who have filed a written request for such notice (Government Code §65092).⁸

Under SB 18, local governments must consult with tribes under two circumstances:

- On or after March 1, 2005, local governments must consult with tribes that have requested consultation in accordance with Government Code §65352.3. The purpose of this consultation is to preserve, or mitigate impacts to, cultural places that may be affected by a general plan or specific plan amendment or adoption.
- On or after March 1, 2005, local governments must consult with tribes before designating open space, if the affected land contains a cultural place and if the affected tribe has requested public notice under Government Code §65092. The purpose of this consultation is to protect the identity of the cultural place and to develop treatment with appropriate dignity of the cultural place in any corresponding management plan (Government Code §65562.5).

Responsibilities of NAHC

The NAHC is charged with the responsibility to maintain a list of California Native American tribes with whom local governments must consult or provide notices (as required in Government Code §65352.3, §65352, and §65092). The criteria for defining “tribe” for the purpose of inclusion on this list are the responsibility of the NAHC. The list of tribes, for the purposes of notice and consultation, is distinct from the Most Likely Descendent (MLD) list that the NAHC maintains.

Upon request, the NAHC will provide local governments with a written contact list of tribes with traditional lands or cultural places located within a city’s or county’s jurisdiction. These are the tribes that a local government must contact, for purposes of consultation, prior to adoption or amendment of a general plan or specific plan. The NAHC will identify the tribes that must be contacted, based on NAHC’s understanding of where traditional lands are located within the State.

For more information on the NAHC’s roles and responsibilities, contact the NAHC. (See also Part F: Additional Resources)

⁷ Government Code §65352 was amended by SB 18 to include tribes among the entities to whom the proposed action must be referred. The term “substantial amendment” has been in the statute for many years and was not modified by SB 18.

⁸ Government Code §65092 was modified by SB 18 to include certain tribes as “persons” that are eligible to request and receive notices of public hearing. “Person” now includes a California Native American tribe that is on the contact list maintained by the NAHC.

Other Elements of SB 18

In addition to the notice and consultation requirements outlined above, SB 18 amended Government Code §65560 to allow the protection of cultural places in the open space element of the general plan. (*See Section X.*) Open space is land designated in the city or county open space element of the general plan for one or more of a variety of potential purposes, including protection of cultural places.

SB 18 also amended Civil Code §815.3 and adds California Native American tribes to the list of entities that can acquire and hold conservation easements. Tribes on the contact list maintained by the NAHC now have the ability to acquire, on terms mutually satisfactory to the tribe and the landowner, conservation easements for the purpose of protecting their cultural places. (*See Section IX.*)

Process Overview: General Plan or Specific Plan Adoption or Amendment

As discussed above, SB 18 establishes responsibilities for local government to contact, refer plans to, and consult with tribes. The following table provides an overview of SB 18 requirements related to the adoption or amendment of a general plan or specific plan. All statutory references are to the Government Code (GC).

Overview of SB 18 Consultation and Notice Requirements

<i>Step</i>	<i>OPR Guidelines (GDL) Section and Statutory Reference</i>
Adoption or amendment of any general plan (GP) or specific plan (SP) is proposed on or after March 1, 2005.	GDL Section IV GC §65352.3(a)(1)
Local government sends proposal information to NAHC and requests contact information for tribes with traditional lands or places located within the geographical areas affected by the proposed changes.	GDL Section IV GC §65352.3(a)(2)
NAHC provides tribal contact information. – OPR recommends that NAHC provide written information as soon as possible but no later than 30 days after receiving a local government’s request	GDL Section IV
Local government contacts tribe(s) identified by NAHC and notifies them of the opportunity to consult. – Pursuant to Government Code §65352.3, local government must consult with tribes on the NAHC contact list.	GDL Section IV
Tribe(s) responds to a local government notice within 90 days, indicating whether or not they want to consult with the local government. – Consultation does not begin until/unless a tribe requests it within 90 days of receiving a notice of the opportunity to consult. – Tribes can agree to a shorter timeframe (less than 90 days) to request consultation.	GDL Section IV GC §65352.3(a)(2)

<i>Step</i>	<i>OPR Guidelines (GDL) Section and Statutory Reference</i>
Consultation begins, if requested by tribe. No statutory limit on the duration of the consultation. – Consultation may continue through planning commission or board of supervisors/city council deliberation on plan proposal.	GDL Section IV
Local government continues normal processing of GP/SP adoption or amendment. (CEQA review, preparation of staff reports, consultation, etc., may be ongoing.)	
At least 45 days before local government adopts or substantially amends GP/SP, local government refers proposed action to agencies, including tribe(s). – Referral required regardless of whether or not there has been prior consultation. – This does not initiate a new consultation process. – This opens 45 day comment period before approval by board of supervisors/city council. – Referral required on or after March 1, 2005.	GDL Section III GC §65352(a)(8)
At least 10 days before public hearing, local government provides notice of hearing to tribes and any other persons who have requested such notice.	GDL Section III GC §65092
Public hearing of board of supervisors/city council to take final action on the GP/SP.	

Note: The Permit Streamlining Act (PSA) (GC §65920 et seq.) establishes time limits for public agencies to take action on privately initiated development projects. Some general plan amendments may involve a private applicant for a development project. The PSA does not apply to a project that requires approval by a legislative act, such as a general plan amendment or rezone, even if there is a quasi-judicial approval involved (such as a use permit or subdivision map). Therefore, time limits for project approval under the PSA should not interfere with a local government's process for consultation.

Part B

When and How to Consult with California Native American Tribes

Sections IV and V of the 2005 Supplement provide step-by-step guidance to local government agencies on how and when to consult with tribes, including when to provide certain types of notices during the planning process. It is very important to review the information in Part C (Pre-Consultation) before undertaking consultation on a general plan or specific plan proposal.

IV. Consultation: General Plan and Specific Plan Adoption or Amendment

Each time a local government considers a proposal to adopt or amend the general plan or specific plan, they are required to contact the appropriate tribes identified by the NAHC. If requested by tribes, local governments must consult for the purpose of preserving or mitigating impacts to cultural places. The following section provides basic guidance to local governments on the notification and consultation requirements in Government Code §65352.3.

What Triggers Consultation?

Government Code §65352.3 requires local governments to consult with tribes prior to the adoption or amendment of a general plan or specific plan proposed on or after March 1, 2005. Local governments should consider the following when determining whether a general plan or specific plan adoption or amendment is subject to notice and consultation requirements:

- In the case of an applicant-initiated plan proposal, if the local government accepts a complete application (as defined in Government Code §65943) on or after March 1, 2005, the proposal is subject to Government Code §65352.3.
- In the case of a general plan or specific plan amendment initiated by the local government, any proposal introduced for study in a public forum on or after March 1, 2005 is subject to Government Code §65352.3. A legislative body must take certain actions to initiate, or propose, a general plan or general plan amendment. These actions must be taken in a duly noticed public meeting, and may include, but are not limited to, any of the following: appropriation of funds, adoption of a work program, engaging the services of a consultant, or directing the planning staff to begin research on the activity.

Under Government Code §65352.3, only if a tribe is identified by the NAHC, and that tribe requests consultation after being contacted by a local government, must a local government consult with the tribe on the plan proposal.

Local governments are encouraged to consult with tribes as early as possible and may, if appropriate, begin consultation even before a formal proposal is submitted by an applicant or initiated by the local government.

Identifying Tribes through the NAHC

Once a local government or private applicant initiates a proposal to adopt or amend a general plan or specific plan, the local government must send a written request to the NAHC asking for a list of tribes with whom to consult. OPR recommends that the written request be sent to the NAHC as soon as possible. Local governments should consider the following points when submitting a request to the NAHC:

- All written requests should be sent to the NAHC via certified mail or by fax.
- Requests to the NAHC should include the specific location of the area that is subject to the proposed action, preferably with a map clearly showing the area of land involved.
- Requests should clearly state that the local government is seeking information about tribes that are on the “SB 18 Consultation List.”
- Contact information for the NAHC:

Native American Heritage Commission
915 Capitol Mall, Room 364
Sacramento, CA 95814
Phone: 916-653-4082
Fax: 916-657-5390
<http://www.nahc.ca.gov>

A sample form for submitting a request to the NAHC is provided in Exhibit A. The tribal consultation list request form is also available on the NAHC website.

The NAHC will provide local governments with a written contact list of tribes with traditional lands or cultural places located within the local government’s jurisdiction. For each listed tribe, the NAHC will provide the tribal representative’s name, name of tribe, address, and phone number (if available, fax and email address). Although there is no statutory deadline for NAHC to respond to the local government, OPR recommends that the NAHC provide written contact information as soon as possible but no later than 30 days after receiving a written request from the local government.

Contacting Tribes Pursuant to Government Code §65352.3

Once a tribal contact list is received from the NAHC, local governments must contact the appropriate tribe(s) and invite them to participate in consultation. OPR suggests that local governments contact tribes as soon as possible upon receiving the tribal contact list. While the statute does not specify by what means tribe(s) should be contacted, OPR suggests that local governments send a written notice by certified mail with return receipt requested. Sending a written notice does not preclude a local government from also contacting the tribe by telephone, FAX, or e-mail.

Notices should be concise, clear, and informative so that tribes understand what they are receiving. Try to avoid using a standard public notice format to invite a tribe to consult, as most public notices do not contain sufficient information about the proposed action to enable a tribe to

respond. Keep in mind that the purpose of this notice is to invite a tribe to request consultation. Notices sent from a local government to a tribe, inquiring whether consultation is desired, should contain the following information:

- A clear statement of purpose, inviting the tribe to consult and declaring the importance of the tribe's participation in the local planning process.
- A description of the proposed general plan or specific plan being considered, the reason for the proposal, and the specific geographic area(s) that will be affected by the proposal. Relevant technical documents should be provided with a concise explanation that clearly describes the proposed general plan or specific plan amendment and its potential impacts on cultural resources, if known.
- Maps that clearly detail the geographic areas described in the explanation. Maps should be in a reasonable scale with sufficient references for easy identification of the affected areas.
- The deadline (date) by which the tribe must request a consultation with the local government. By law, tribes have 90 days from the date of receipt of the notice to request consultation (Government Code §65352.3(a)(2)).
- Contact information for representatives of the local government to whom the tribe should respond.
- Contact information for the project proponent/applicant and landowner(s), if applicable.
- Technical reports, including summaries of cultural resource reports and archaeological reports applicable to that tribe's cultural place(s), if available.
- Information on proposed grading or other ground-disturbing activities, if applicable. (This may be included in the project description.)

Subject to confidentiality procedures, both parties should maintain clear records of communications, including letters, telephone calls, and faxes. Both parties may send notices by certified mail and keep logs of telephone calls and faxes. Any returned or unanswered correspondence should be retained in order to verify efforts to communicate. Documentation of notification and consultation requests should be included in the local government's public record.

In addition to the above recommendations, local governments may, in cooperation with tribes, develop notification procedures as a part of consultation protocols established in cooperation with a tribal government. Local governments should be aware that some tribes already have consultation protocols. In addition, local governments may adopt policies regarding consultation with a tribal government. (*See Section VI.*)

After Notification is Sent to the Tribe

Once local governments have sent notification, tribes are responsible for requesting consultation. Pursuant to Government Code §65352.3(a)(2), each tribe has 90 days from the date on which they receive notification to respond and request consultation. Some key points to consider include:

- The time period for consultation (undefined) is independent of the time period for tribes to request consultation (90 days).
- Local governments should be aware that tribes may require the entire 90-day period allowed by law to respond to a consultation request. Tribal governing bodies may need to meet to take a formal position on consultation.
- Local governments and tribal governments may consider addressing the method and timing of a tribe's response to a consultation request in a jointly-developed consultation protocol. (*See Section VI.*)
- At their discretion, tribes can agree to a shorter timeframe (less than 90 days) to respond and request consultation.
- After the information about a proposed plan or plan amendment is received by the tribe, local governments should cooperate to provide any additional pertinent information about the proposed plan or plan amendment that the tribe may request. Local governments may consider extending the 90 day timeframe for the tribe to review the new information and respond accordingly.
- If the tribe does not respond within 90 days or declines consultation, consultation is not required under Government Code §65352.3.

Conducting Consultation on General Plan or Specific Plan Adoption or Amendment

Once a tribe requests consultation, consultation for the purpose of preserving or mitigating impacts to cultural places should begin within a reasonable time. Consultation should focus on how the proposed general plan or specific plan amendment or adoption might impact cultural places located on land affected by the plan proposal. The objectives of consultation, according to the legislative intent of SB 18, include:

- Recognizing that cultural places are essential elements in tribal culture, traditions, heritages and identities.
- Establishing meaningful dialogue between local and tribal governments in order to identify cultural places and consider cultural places in local land use planning.
- Avoiding potential conflicts over the preservation of Native American cultural places by ensuring local and tribal governments have information available early in the land use planning process.
- Encouraging the preservation and protection of Native American cultural places in the land use process by placing them in open space.
- Developing proper treatment and management plans in order to preserve cultural places.
- Enabling tribes to manage and act as caretakers of their cultural places.

Consultation is a process in which both the tribe and local government invest time and effort into seeking a mutually agreeable resolution for the purpose of preserving or mitigating impacts to a cultural place, where feasible. Government Code §65352.4 provides a definition of consultation for use by local governments and tribes:

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 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.

Effective consultation is an ongoing process, not a single event. The process should focus on identifying issues of concern to tribes pertinent to the cultural place(s) at issue – including cultural values, religious beliefs, traditional practices, and laws protecting California Native American cultural sites – and on defining the full range of acceptable ways in which a local government can accommodate tribal concerns.

Items to Consider When Conducting Consultation

The following list identifies recommendations for how local governments and tribes may approach consultation on general plan and specific plan proposals.

- As defined in Government Code §65352.4, consultation is to be conducted between two parties: the local government and the tribe. Both parties to the consultation are required to carefully consider the views of the other.
- Consultation does not necessarily predetermine the outcome of the plan or amendment. In some instances, local governments may be unable to reach agreement due to other state laws or competing public policy objectives.
- Local governments must consult with each tribe who is identified by the NAHC and requests consultation. The NAHC will identify whether there are, in fact, any tribes with whom the local government must consult. One or more tribes may have traditional cultural ties to land within the local government's jurisdiction and have an interest in preserving cultural places on those lands. Therefore, local governments may have to consult with more than one tribe on any particular plan proposal.
- OPR recommends that local governments consult with tribes one at a time (individually). If multiple tribes are involved and willing to jointly consult, local governments may consult with more than one tribe at a time.
- When a local government first contacts a tribe, its initial inquiry should be made to the tribal representative identified by the NAHC. OPR recommends that a local government department head or other official of similar or higher rank make the initial contact.
- Government leaders of the two consulting parties may consider delegating consultation responsibilities (such as attending meetings, sharing information, and negotiating the needs and concerns of both parties) to staff. Designated representatives should maintain direct relationships with and have ready access to their respective government leaders. These individuals may, but are not required to, be identified in a jointly-developed consultation protocol. (See Section VI.) In addition, the services of other professionals (attorneys,

contractors, or consultants) may be utilized to develop legal, factual, or technical information necessary to facilitate consultation.

- Simply notifying a tribe of a plan proposal is not the same as consultation.⁹
- Local governments should be aware of the potential for vast differences in tribal governments' level of staffing and other resources necessary to participate in the manner required by Government Code §65352.3 and §65352.4. Some may be able to respond more promptly and efficiently than others. Local governments should keep this in mind if and when developing a consultation protocol with a tribe. (*See Section VI.*)
- As a part of consultation, local governments may conduct record searches through the NAHC and California Historic Resources Information System (CHRIS) to determine if any cultural places are located within the area(s) affected by the proposed action. Local governments should be aware, however, that records maintained by the NAHC and CHRIS are not exhaustive, and a negative response to these searches does not preclude the existence of a cultural place. A tribe may be the only source of information regarding the existence of a cultural place.
- Local governments should be aware that the confidentiality of cultural places is critical to tribal culture and that many tribes may seek confidentiality assurances prior to divulging information about those sites. (*See Section VIII.*)
- Tribal consultation should be done face-to-face. If acceptable to both parties, local and tribal governments may wish to define circumstances under which parts of the consultation process can be carried out via conference calls, e-mails, or letters. (*See Section VIII.*)
- Tribal consultations should be conducted in a setting that promotes confidential treatment of any sensitive information that is shared about cultural places. Consultation should not take place in public meetings or public hearings.
- The time and location of consultation meetings should be flexible to accommodate the needs of both the local government and tribe. Local governments should recognize that travel required for in-person consultation may be time-consuming, due to the rural location of a tribe. Local governments should also take into account time zone changes when setting meeting times. Local governments should offer a meeting location at the city hall, county administrative building, or other appropriate location. Local governments should also be open to a tribe's invitation to meet at tribal facilities.
- The local government and tribe can agree to mutually invite private landowners to participate in consultation, if both parties feel that landowner involvement would be appropriate.
- Local governments are encouraged to establish a collaborative relationship with tribes as early as possible, prior to the need to consult on a particular general plan or specific plan

⁹ In *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995), the court held that the U.S. Forest Service had not fulfilled its consultation responsibilities under the National Historic Preservation Act by merely sending letters to request information from tribes. The court ruling held that written correspondence requesting consultation with a tribe was not sufficient for the purpose of conducting consultation as required by law, and that telephone calls or more direct forms of contact may be required.

amendment or adoption. Local governments may consider conducting pre-consultation meetings and developing consultation protocols in cooperation with tribes. (*See Section VI.*)

- Both parties should attempt to document the progress of consultation, including letters, telephone calls, and direct meetings, without disclosing sensitive information about a cultural place. Local governments may also want to document how the local government representative(s) fulfilled their obligations under Government Code §65352.3 and §65352.4.

When is Consultation Over?

Alan Downer, of the Advisory Council on Historic Preservation, described consultation as “conferring between two or more parties to identify issues and make a good faith attempt to find a mutually acceptable resolution of any differences identified.”¹⁰ Differences of opinion and of priorities will arise in consultation between local and tribal governments. Whenever feasible, both local and tribal governments should strive to find mutually acceptable resolutions to differences identified through consultation.

When engaging in consultation, local government and tribal representatives should consider leaving the process open-ended to allow every opportunity for mutual agreement to be reached. Some consultations may involve highly sensitive and complex issues that cannot be resolved in just one discussion. Consultation may require a series of meetings before a mutually acceptable agreement may be achieved. Consultation must be concluded prior to the formal adoption or amendment of a general plan or specific plan.

Consultation, pursuant to Government Code §65352.3 and §65352.4, should be considered concluded at the point in which:

- the parties to the consultation come to a mutual agreement concerning the appropriate measures for preservation or mitigation; or
- either the local government or tribe, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached concerning appropriate measures of preservation or mitigation.

V. Consultation: Cultural Places Located in Open Space

On and after March 1, 2005, if land designated, or proposed to be designated as open space contains a cultural place, and if an affected tribe has requested notice of public hearing under Government Code §65092, then local governments must consult with the tribe. The purpose of this consultation is to determine the level of confidentiality required to protect the specific identity, location, or use of the cultural place, and to develop treatment with appropriate dignity of the cultural place in any corresponding management plan (Government Code §65562.5). This consultation provision does not apply to lands that were designated as open space before March 1, 2005.

¹⁰ From “The Navajo Nation Model: Tribal Consultation Under the National Historic Preservation Act” (2000).

What Triggers Consultation?

Government Code §65562.5 applies to land that is designated, or proposed to be designated, as open space, on or after March 1, 2005. Local governments must consider several criteria when determining whether consultation is required, prior to designating open space on or after March 1, 2005.

Local governments must first learn whether the land designated, or proposed to be designated, as open space contains a cultural place. The following are methods by which local governments may be informed if a cultural place is located on designated or proposed open space:

- Conduct a record search through the NAHC to learn whether any listed cultural places are located on land proposed to be designated as open space. The local government should provide maps of lands proposed as open space to the NAHC with a request to identify whether there are any cultural places on the property. Because the NAHC's sacred lands file is confidential, the commission will only divulge the presence or absence of a listed site and will direct the local government to the appropriate tribe(s) for more information.
- Conduct a record search through CHRIS to learn whether any listed cultural places are located on land proposed to be designated as open space. Local governments should enter into agreements with CHRIS information centers to establish procedures and protocols for requesting searches of historical resource records.
- Request that tribes identify the existence of any cultural places on the proposed open space land. Local governments should send a written request to the NAHC asking for a written list of tribes that have traditional cultural ties to the proposed open space. The NAHC will provide tribal contact information. Local governments should contact each tribe on the list provided by the NAHC to learn whether any cultural places are located on the land proposed as open space. Local government should provide the tribe with a sufficiently detailed map of the open space together with a concise notice as to why the tribe is being contacted. (Note: This contact is strictly for the purpose of identifying whether a cultural place is or may be located on the proposed open space land. It does not start consultation with a tribe.)

Local governments should be aware that records maintained by the NAHC and CHRIS are not exhaustive, and a negative response to searches does not preclude the existence of a cultural place. In most instances, and especially because of associated confidentiality issues, it is likely that tribes will be the only source of information regarding certain cultural places.

After a local government learns that a cultural place is or may be located on land designated or proposed to be designated as open space, the local government must notify the appropriate tribes of the opportunity to participate in consultation. The appropriate tribes are those which have: (1) been identified by the NAHC, and (2) requested notice of public hearing from the local government pursuant to Government Code §65092.

Conducting Consultation Regarding Open Space

The purpose of this consultation is to determine the level of confidentiality required to protect the specific identity, location, character, or use of the cultural place and to develop treatment with appropriate dignity of the cultural place in any corresponding open space management plan. The reference to “any corresponding management plan” is not meant to imply that there is such a plan or that the local government must develop such a management plan. This language is intended to encourage consideration of management policies and practices which may be discussed between the local government and tribe and incorporated into a new or existing management plan for the cultural place.

The following are examples of appropriate items to consider and discuss during consultation:

- Encourage tribal involvement in the treatment and management of the cultural place through contracting, monitoring, co-management, and other forms of joint local-tribal participation.
- Tribes may only wish to disclose a sufficient amount of information to protect the site and to allow for the proper treatment and management of the cultural place. (*See Section VIII.*)
- Tribes may wish to have access to cultural places located on open space for gathering, performing ceremonies and/or helping maintain the site.
- Tribes may want to recommend management practices that avoid disturbing or impacting the cultural place.
- Tribes may wish to discourage certain land uses (e.g. recreation) within the open space that could adversely impact the cultural place. Local governments may be asked to consider appropriate land uses in the open space designation that would avoid direct impacts to the cultural place.

The designation of open space, as provided in Government Code §65562.5, may but does not always, involve amending the general plan. In some jurisdictions, designation of open space may occur through rezoning of land from one zone designation to an open space zone designation, without the need for a general plan amendment. However, for proposals to designate open space that require a general plan or specific amendment, the local government should consider the above recommendations as well as the recommendations outlined in Section IV of these guidelines.

When is Consultation Over?

Please refer to Section IV for additional information regarding the meaning of consultation.

Part C

Pre-Consultation

Section VI provides advice to local governments that is intended to help them more effectively engage in consultation with tribes. This part of the 2005 Supplement provides information that may help local governments establish working relationships with tribes prior to entering into the required consultation pursuant to Government Code §65352.3 and §65562.5.

VI. Preparing for Consultation

As discussed above, Government Code §65352.3 requires consultation during the process of amending or adopting general plans or specific plans. In addition, Government Code §65562.5 requires consultation to determine the proper level of confidentiality to protect and treat a cultural place with appropriate dignity, where such places are located on lands to be designated as open space. Before engaging in consultation in either of these cases, local governments may want to consider developing relationships with tribes that have traditional lands within their jurisdiction. Although not required by law, these pre-consultation efforts may develop a foundation for a mutually respectful and cooperative relationship that helps to ensure more smooth and effective communication in future consultations.

Local governments may wish to consider the following when undertaking pre-consultation meetings:

- Contact the NAHC to obtain a list of all appropriate tribes with whom to pre-consult. Because this list may be revised over time by the NAHC, local governments should periodically request updated contact lists.
- Contact the NAHC and CHRIS to learn if any historical or cultural places are located within the city's or county's jurisdiction. (Note that the NAHC and CHRIS have different procedures for searching information about cultural sites. See Part F for more information about each organization and how to contact them. As previously noted, NAHC and CHRIS records pertaining to cultural places are not exhaustive, and a negative response to these searches does not preclude the existence of a cultural place.)
- Invite each tribal government's leaders to meet with local government leaders for the purpose of establishing working relationships and exchanging information about respective governmental structures, practices, and processes. Pre-consultation meetings may include discussion about community goals, planning priorities, and how cultural places play a role in the tribal culture.
- Hold informational workshops or meetings with the tribe(s) to discuss the general plan process, the existing general plan, and any contemplated amendments. Local governments should not expect or ask a tribe to share confidential information in a meeting with other tribes or the general public.
- Ask tribes whether they have existing consultation protocols.

- Develop a consultation protocol that addresses how a cooperative relationship can be maintained and how future consultations should be conducted. Some tribes may already have established protocols through working with other agencies, such as state and federal entities, that can be used as models.

If a tribe and local government decide to develop a consultation protocol, both parties should suggest topics that they believe will facilitate consultation. The following are examples of items that may be appropriate to discuss and include in a jointly-developed consultation protocol:

- Representative(s) from each consulting party who will be designated to participate in consultations and manage the information resulting from the consultations.
- Key points in the consultation process when elected government leaders may need to be directly involved in consultation.
- Method(s) of contact preferred by the tribal government and additional tribal representatives that the local government should contact regarding a proposed action.
- Procedures for giving and receiving notice, including method and timing.
- Preferred method(s) of consultation. While in-person consultation is recommended, it may be acceptable to both parties that certain aspects of consultation occur through conference calls, e-mails, or letters.
- Preferred locations of consultation meetings.
- The tribe's willingness to participate in joint consultation, should a specific site be of interest to more than one tribe.
- Procedures to allow tribal access to the local government's consultation records.
- Procedures for maintaining accurate, up-to-date contact information.

Over time, the initial approach to consultation may need to be updated. Both parties should be open to identifying and agreeing on changes to their consultation protocol.

Part D

Preservation, Mitigation, Confidentiality, and Landowner Participation

Sections VII through IX provide advice to local governments for considering issues such as appropriate means to preserve, or mitigate impacts to, cultural places; methods to protect the confidentiality of cultural places; and ways to encourage the participation of landowners in voluntary preservation efforts.

VII. Preservation of, or Mitigation of Impacts to, Cultural Places

Government Code §65352.3 requires local governments to conduct consultations with tribes (when requested) for the purpose of “preserving or mitigating impacts” to California Native American cultural places. In the course of adopting or amending a general plan or specific plan, local governments may be informed of the existence of a cultural place within the affected area. Should a tribe request consultation to discuss any impacts to the cultural place, local governments should consider a variety of factors when participating in the consultations, including: the history and importance of the cultural place, the adverse impact the local government action may have on the cultural place, options for preserving the cultural place, and options for mitigating impacts of the proposal to the cultural place.

When participating in consultations, it is important that local governments consider that, because of philosophical differences, mitigation will not always be viewed as an appropriate option to protect cultural, and often irreplaceable, places. Many tribes may determine that impacts to a cultural place cannot be mitigated; that the only appropriate treatment may be to preserve the cultural place without impact to its physical or spiritual integrity. Of course, this is not to say that tribes will not engage in discussions regarding mitigation of impacts to their cultural places, but local governments should consider the vastly different perspectives that tribes may have. What a local government may consider to be acceptable treatment under current environmental, land use, and cultural resource protection laws, may not be considered by a tribe to be acceptable treatment for a sacred or religious place.

The following is a discussion of preservation and mitigation, as mentioned in Government Code §65352.3. Local governments should check with their legal counsels to identify any other legal obligations to preserve or mitigate impacts to Native American cultural resources.

What are Preservation and Mitigation?

Preservation is the conscious act of avoiding or protecting a cultural place from adverse impacts including loss or harm. Mitigation, on the other hand, is the act of moderating the adverse impacts that general plan or specific plan adoption or amendment may have on a cultural place.

While local governments should strive to help preserve the integrity of, access to, and use of cultural places¹¹, mitigation may often be achieved through a broad range of measures:

- Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- Rectifying the impact by repairing, rehabilitating, or restoring the impacted cultural place.
- Reducing or eliminating the impact over time through monitoring and management of the cultural place.

Other methods of mitigation may include:

- Designation of open space land in accordance with Government Code §65560(b).
- Enhancement of habitat or open space properties for protection of cultural place.
- Development of an alternate site suitable for tribal purposes and acceptable to the tribe.
- Other alternative means of preserving California Native American cultural features, where feasible.

It is important that local governments consider that mitigation measures may largely differ depending on customs of a particular tribe, the characteristics and uses of a site or object, the cultural place's location, and the importance of the site to the tribe's cultural heritage. Where a cultural place is affected by a proposed general or specific plan adoption or amendment, consultations with tribes should focus on preserving, or mitigating the impacts to, that specific cultural place.

Seeking Agreement Where Feasible

Although Government Code §65352.3(a) requires consultation for the purpose of preserving or mitigating against the adverse impacts that a general plan or specific plan adoption or amendment may have on a cultural place, there is no requirement to preserve a cultural place or adopt mitigation measures, if agreement cannot be reached. Under the definition of "consultation" within Government Code §65352.4, local governments and tribes are required to carefully consider each other's views and are required to seek an agreement, "where feasible." For the purposes of Government Code §65352.4, agreements should be considered "feasible" when capable of being accomplished in a successful manner within a reasonable time taking into account economic, environmental, social and technological factors.¹² If, after conducting consultations in good faith and within the spirit of the definition, the tribe or local government cannot reach agreement on preservation or mitigation of any impact to a California Native American cultural place, neither party is required to take any action under Government Code §65352.3(a).

¹¹ Cultural Places referring to places, features, and objects under Government Code §65352.3(a) and described in Government Code §§5097.9 and 5097.995.

¹² See *State of California General Plan Guidelines*, Governor's Office of Planning & Research, Glossary, page 261.

Monitoring and Management

During consultations, local governments should consider the involvement of tribes in the ongoing treatment and management of cultural places, objects, or cultural features through a specific monitoring program, co-management, or other forms of participation.

Where a cemetery, burial ground, or village site may be present, the planning of treatment and management activities should address the possibility that California Native American human remains may be involved when protecting cultural features. Local governments should consider working with tribes to develop an appropriate plan for the identification and treatment of such discoveries in accordance with Public Resources Code §5097.98.

Private Landowner Involvement

During consideration of a proposed general plan adoption or amendment, a local government may discover or be informed of a cultural place that exists on privately owned land within an affected area. In such an instance, local governments should first contact the appropriate tribe or tribes to offer consultations and determine an acceptable level of landowner involvement. Local governments should be aware that there may be some occasions where a tribe may prefer to maintain strict confidentiality without the inclusion of a private, third party landowner.

If a tribe is interested in involving the landowner in preservation or mitigation activities, the local government should consider facilitating such involvement. It is important that local governments and tribes understand that there is no statutory requirement to include private landowners under the government-to-government consultations requirements of Government Code §65352.3(a). However, because landowner participation is encouraged, local governments may consider suggesting the following methods to facilitate landowner involvement:

- Suggesting that the tribe contact the private landowner directly to facilitate discussions between the tribe and landowner.
- Offering to contact the private landowner directly on behalf of the tribe.
- Suggesting that the private landowner be included as a party to the consultations.

VIII. Confidentiality of Information

Protecting the confidentiality of California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places is one of the most important objectives of SB 18. This is clearly evidenced by SB 18's legislative intent as well as its statutory additions and amendments which address the issue of confidentiality and requires "each city and county to protect the confidentiality of information concerning" cultural places.¹³ By maintaining the confidentiality of a cultural place, including its location, traditional uses, and characteristics, local governments can help assure tribes of continued access and use of these cultural places, in addition to aiding in the preservation of a cultural place's integrity. However, local governments should take into consideration other state and federal laws which may impose conflicting public policy priorities or requirements.

¹³ See SB 18 §1(b)(3), (Burton, Ch. 905, Stat. 2004); Govt. Code §§ 65040.2(g)(3), 65352.3, 65352.4, and 65562.5.

Public Disclosure Laws

The California Public Records Act (Government Code §6250 et. seq.) and California’s open meeting laws applying to local governments (The Brown Act, Government Code §54950 et. seq.) both have implications with regard to maintaining confidentiality of California Native American cultural place information. Local governments are encouraged to carefully consider these laws in greater detail, and adopt or incorporate these recommendations into their own confidentiality procedures in order to avoid the unintended disclosure of confidential cultural place information.

The California Public Records Act (CPRA)

Subject to specified exemptions, the CPRA provides that all written records maintained by local or state government are public documents and are to be made available to the public, upon request. Written records include all forms of recorded information (including electronic) that currently exist or that may exist in the future. The CPRA requires government agencies to make records promptly available to any citizen who asks, unless an exemption applies.

The CPRA contains two exemptions which aid in the protection of records relating to Native American cultural places. Amended in October of 2005 for broad application, these exemptions now permit any state or local agency to deny a CPRA request and withhold from public disclosure:

- 1) “records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in Section 5097.9 and 5097.993 of the Public Resources Code maintained by, or in the possession of, the Native American Heritage Commission, another state agency, or a local agency” (GC § 6254(r)); and
- 2) “records that relate to archaeological site information and reports maintained by, or in the possession of, the Department of Parks and Recreation, the State Historical Resources Commission, the State Lands Commission, another state agency, or a local agency, including the records that the agency obtains through a consultation process between a California Native American tribe and a state or local agency” (GC § 6254.10).

With these two CPRA exemptions in place, information related to Native American cultural places is specifically protected from mandatory public disclosure. Such protections are intended to facilitate the free exchange of information between Native American tribes and California local governments when conducting tribal consultations. Even with this protection, however, it is important for local governments to understand that some tribes may withhold information during consultations due to conflicts with their cultural beliefs and practices. Local governments and Native American tribes should discuss such issues early in consultations, or during pre-consultation, so that each has an understanding of what information can and cannot be divulged. Additionally, it is important for all parties to recognize that a legislative body of a city or county must have access to certain information in order to make an informed decision regarding the given plan adoption or amendment.

The Brown Act

The Brown Act governs the legislative bodies of all local agencies within California. It requires that meetings held by these bodies be “open and public.” Under this Act, no local legislative body may take an action in secret, nor will the body’s action be upheld if it is in violation of California’s open meeting laws. The Brown Act defines a “meeting” as a gathering of a majority of the members of a applicable body to hear, discuss, or deliberate on matters within the agency’s or board’s jurisdiction.

While the Brown Act does contain some exceptions for “closed meetings,” none of these exceptions would allow the quorum of a local legislative body to participate in tribal consultations within a closed meeting. Should a local legislative body participate in confidential tribal consultations, it is important that they do so as an advisory committee with *less than* a quorum, so as to not invoke the Brown Act’s requirements of public participation (see Government Code §54952(b)). Otherwise, the Brown Act will require that the consultations be held in public, thereby defeating the purpose of confidentiality, or, alternatively, any decisions made by the quorum of the body within a closed meeting would be rendered invalid.

In order to efficiently conduct tribal consultation meetings, in addition to maintaining confidentiality at all times, local governments are encouraged to develop procedures in advance that would designate a committee or agency in charge. In doing so, local governments should consider the problems associated with elected official participation within tribal consultations, and should tailor their procedures accordingly.

Public Hearings

General plan amendments, specific plan amendments, and the adoption of a general or specific plan each require both a planning commission and a city council or board of supervisors to conduct public hearings. The decision to approve or deny these proposals must be based in reason and upon evidence in the record of the public hearing. When addressing an adoption or amendment involving a cultural place, elected officials will need to be apprised of the cultural site implications in order to make informed decision. However, to maintain the confidentiality of this cultural place information, local governments and tribes, during consultations, should agree on what non-specific information may be disclosed during the course of a public hearing. Additionally, local governments should avoid including any specific cultural place information within CEQA documents (such as Environmental Impact Reports, Negative Declaration, and Mitigated Negative Declarations) or staff reports which are required to be available at a public hearing. In such cases, confidential cultural resource inventories or reports generated for environmental documents should be maintained under separate cover and shall not be available to the public.

Additional Confidentiality Procedures

Additionally, local governments should consider the following items when considering steps to be taken in order to maintain confidentiality:

- Local governments should develop “in-house” confidentiality procedures.

- Procedures should be established to allow for tribes to share information with local government officials in a confidential setting.
- Only those tribal designees, planning officials, qualified professional archaeologists, and landowners involved in the particular planning activity should obtain information about a specific site.
- Participating landowners should be asked to sign a non-disclosure agreement with the appropriate tribe prior to gaining access to any specific site information.
- Local governments should not include detailed (confidential) information about cultural places in any of its public documents.
- Possible procedures to require local government to notify participating tribes and landowners whenever records containing specific site information have been requested for public disclosure.

Local governments should also keep in mind that the terms for confidentiality may differ depending upon the nature of the site, the tribe, the local government, the landowner, or who proposes to protect the site. Local governments should collaborate with tribes to develop informational materials to educate landowners regarding the cultural sensitivity of divulging site information, explaining the tribe's interest in maintaining the confidentiality and preservation of a site. Landowners should be informed of criminal penalties within the law for the unlawful and intentional destruction, degradation or removal of California Native American cultural or spiritual places located on public or private lands (Public Resources Code §5097.995).¹⁴

Confidentiality Procedures for Private Landowner Involvement

In order to successfully preserve or mitigate impacts to a California Native American cultural place, local governments and tribes may find it necessary or advantageous to involve private landowners early in the consultation process. Often, landowners may not be aware that a cultural place exists on their property, or alternatively, may not realize that the site has become subject to a general plan adoption or amendment. Due to the confidential nature of certain information involved, local governments should consider working with tribes to adopt procedures that would balance the value of landowner involvement with the need for cultural place confidentiality. Local governments and California Native American tribes may wish to consider the following procedures that would inform and potentially involve landowners in the consultation process, without compromising the confidentiality of a cultural place:

- Local governments, at the request of a tribe, may consider contacting a landowner directly and, without disclosing the exact location or characteristics of the site, inform the landowner of the existence of a culturally significant place on their property. A local government may consider inquiring as to whether the landowner would be willing to further discuss the matter directly with the appropriate tribal representative under a non-disclosure agreement.

¹⁴ Due to a drafting error, SB 18 contains multiple references to Public Resources Code (PRC) §5097.995 which is no longer in existence. In 2004, PRC §5097.995 was amended and renumbered to PRC §5097.993 by Senate Bill 1264 (Chapter 286). Local governments should refer to PRC §5097.993 when looking for PRC §5097.995.

- Local governments may consider giving the landowner's contact information to a tribe so that the tribe may contact the landowner directly. Discussion about conservation easements is an example of a case in which a tribe and landowner may wish to meet without the direct participation of the local government.
- Local governments may also consider informing a landowner of the ability of landowners to access CHRIS for cultural resource information specific to their land. Local governments should keep in mind that the CHRIS system does not contain a catalog of every cultural place within California.

IX. Procedures to Facilitate Voluntary Landowner Protection Efforts

In addition to their own consultation with tribes, local governments may help facilitate landowner participation in preserving and protecting cultural places. While each city and county should develop its own policies on landowner participation, general strategies for encouraging landowner awareness of and participation in cultural place protection may include:

- Collaborating with local tribes to offer cultural awareness and other educational events for landowners.
- Encouraging landowner participation in discussions about appropriate preservation and mitigation measures.
- Promoting the use of conservation easements and other private conservation efforts.

It should be noted that SB 18 does not require landowners to dedicate or sell conservation easements for the purpose of cultural place preservation. Neither are local governments required to play a direct role in any private conservation activity. Government Code §65040.2(g), however, does require OPR to recommend procedures to facilitate voluntary landowner participation in the preservation and protection of cultural places.

Landowner Education and Participation

Public workshops, seminars, and other educational sessions may provide forums for tribal representatives to share tribal and cultural information and discuss general protection concerns with landowners. These sessions may build cultural awareness, develop landowner understanding of the importance of cultural places, and also encourage further dialogue between tribes and landowners. These sessions should generally inform landowners of the importance of cultural places and should not compromise the confidentiality of a specific cultural place.

Local governments may also encourage landowner participation in discussions about preserving or mitigating impacts to a cultural place located on a landowner's private property. (*See Section VII and Section VIII for further information.*)

Private Conservation Efforts

Although local governments are not required to play a direct role in any private conservation activity, they can promote the use of conservation easements and other conservation programs to protect cultural places. Local governments may consider adoption of a policy to encourage voluntary landowner participation in protection programs. Local governments may also develop and distribute informational materials about potential incentives for private conservation efforts, such as Mills Act tax credits or the tax benefits of donating or selling conservation easements.

A conservation easement is a voluntary agreement between a landowner and an authorized party (including a tribe pursuant to Civil Code 815.3(c)) that allows the easement holder to limit the type or amount of development on the property while the landowner retains title to the land. The landowner is compensated for voluntarily giving up some development opportunities. The easement is binding upon successive owners of the land. It is common for a conservation

easement to be recorded against the property as a way to inform future purchasers of the existence of an easement. Granting of a conservation easement may qualify as a charitable contribution for tax purposes.

Should a landowner choose to sell a conservation easement, the landowner should first consult with all tribes affiliated with the land on which the easement is proposed. It is also recommended that tribes hold conservation easements only within their areas of cultural affiliation.

As an alternative to conservation easements, local governments may also promote private preservation of cultural places through the use of Memoranda of Understanding (MOU). As a direct agreement between a landowner and tribe, a MOU allows a tribe and landowner to agree on appropriate treatment of cultural places located on the landowner's private property and may give certain privileges to tribes, such as access to perform ceremonial rituals. MOUs may also be used to facilitate co-management by tribes, landowners, and conservation organizations. For example, if a conservation easement established for wildlife protection also contains a cultural place, the landowner, conservation entity, and tribe could agree on co-management (in the MOU) that protects both the habitat and cultural place.

Part E

Open Space

Section X provides information for incorporating the protection of cultural places into the open space element of the general plan.

X. Open Space for the Protection of Cultural Places

SB 18 amended Government Code §66560 to include open space for the protection of cultural places as an allowable purpose of the open space element. Local governments may, but are not required to, consider adopting open space policies regarding the protection of cultural places. Local governments may wish to consider the following when and if they develop such policies:

- Limiting the types of land uses allowed in an open space designation in order to protect the cultural place from potentially harmful uses.
- Facilitating access to tribes for maintenance and traditional use of cultural places.
- Protecting the confidentiality of cultural places by not disclosing specific information about their identity, location, character, or use.
- Giving developers incentives to protect cultural places through voluntary measures.
- Incorporating goals for protection of cultural places in open space that is also part of a regional habitat conservation and protection program, for example, a local or regional Habitat Conservation Plan (HCP) or Natural Community Conservation Program (NCCP).
- Reviewing and conforming other elements of the general plan that deal with conservation of natural and cultural resources to the open space element.

The development of open space policies for the protection of cultural places should be done in consultation with culturally-affiliated tribes. It is important to note that the importance of cultural places is not solely rooted in the land or other physical features or objects related to the land on which the cultural place is located. The sense of “place” is often as important as any physical or tangible characteristic. It may be important to a tribe to preserve a certain non-material aspect of a cultural place, such as views or vantage points from or to the cultural place. Cultural interpretation and importance of the place to the tribe should be taken into consideration, in addition to any potential archaeological importance of the place. With this in mind, local governments should be prepared to consider creative solutions for preservation and protection of cultural places.

Neither Government Code §65560(b)(5) nor Government Code §65562.5 mandate local review or revision of the existing open space element of the general plan to inventory and/or protect cultural places. However, local governments should consider doing so in future updates of or comprehensive revisions to the open space element.

Part F Additional Resources

XI. Additional Resources

In addition to the information provided in the 2005 Supplement to the *General Plan Guidelines*, local governments may wish to investigate additional resources that can provide more detailed information about Native American people, cultural places, tribal governments, consultation, confidentiality, conservation easements, and other issues related to SB 18. Sources of additional information include federal and state government agencies that have previous experience with tribal consultations, colleges and universities, private organizations and foundations, and the literature and web sites associated with these groups. Although it is not intended to be a comprehensive list, some potentially useful resources are included below.

It is important that local governments keep in mind that Native American tribes are often the best source of information concerning a cultural place's location and characteristics. Local governments are encouraged to seek this information, if available, directly from the tribes themselves.

State Agencies

California Native American Heritage Commission (NAHC)

The NAHC is the state commission responsible for advocating preservation and protection of Native American human remains and cultural resources. NAHC maintains confidential records concerning places of special religious or social significance to Native Americans, including graves and cemeteries and other cultural places. The NAHC reviews CEQA documents to provide recommendations to lead agencies about consulting with tribes to mitigate potential project impacts to these sites.

The NAHC maintains a list of California tribes and the corresponding contacts that local governments should use for the purpose of meeting SB 18 consultation requirements.

The NAHC web site also provides a number of links to information about federal and state laws, local ordinances and codes, and cultural resources in relation to Native Americans.

Native American Heritage Commission
1556 Harbor Blvd.
West Sacramento, CA 95691
916-373-3710
916-373-5471 - Fax
<http://www.nahc.ca.gov>

California Office of Historic Preservation (OHP)

California Historical Resources Information System (CHRIS)

Pursuant to state and federal law, the California Office of Historic Preservation (OHP) administers the California Historical Resources Information system (CHRIS). The CHRIS is organized by county and managed by regional information centers (posted on the OHP website). These CHRIS centers house records, reports, and other documents relating to cultural and archaeological resources, and provide information and recommendations regarding such resources on a fee-for-service basis. Local governments may enter into agreements with CHRIS information centers to establish procedures and protocols for requesting searches of historical resource records.

The OHP also provides assistance to local governments to encourage direct participation in historic preservation. OHP provides technical assistance to local governments including training for local commissions and review boards, drafting of preservation plans and ordinances, and developing archaeological and historical surveys.

Office of Historic Preservation
P.O. Box 942896
Sacramento, CA 94296-0001
Phone: (916) 653-6624
Fax: (916) 653-9824
<http://www.ohp.parks.ca.gov>

California Department of Conservation

Division of Land Resource Protection (DLRP)

The DLRP works with landowners, local governments, and researchers to conserve productive farmland and open spaces.

California Department of Conservation
Division of Land Resource Protection
801 K Street, MS 18-01
Sacramento, CA 95814-3528
Phone: (916) 324-0850
<http://www.consrv.ca.gov/DLRP/index.htm>

California Department of Housing and Community Development

California Indian Assistance Program (CIAP)

The California Indian Assistance Program's primary role is to assist tribal governments with obtaining and managing funds for community development and government enhancement. CIAP's *2004 Field Directory of the California Indian Community* is a good reference for California Native American tribes, including location of Indian lands, federal recognition status of tribes, history of laws affecting tribes, and other programs and agencies involved in tribal relationships.

California Indian Assistance Program
1800 Third Street, Room 365
Sacramento, CA 95814
Phone: (916) 445-4727
<http://www.hcd.ca.gov/ca/ciap/>

**California Department of Transportation (DOT)
Native American Liaison Branch**

The California DOT administers most of its projects with some federal funding and is therefore subject to Section 106 consultation requirements under NHPA. The department has a Native American Liaison Branch (NALB), with headquarters in Sacramento and Native American Liaisons in each of its twelve districts. The NALB web site contains policy statements and links to other useful resources.

Office of Regional and Interagency Planning
Native American Liaison Branch
1120 N Street, MS 32
Sacramento, CA 95814
Phone: (916) 651-8195
Phone: (916) 654-2389
Fax: (916) 653-0001
http://www.dot.ca.gov/hq/tpp/offices/orip/na/native_american.htm

Federal Agencies

Federal Highway Administration – AASHTO (American Association of State Highway and Transportation Officials) Center for Environmental Excellence

The AASHTO Center for Environmental Excellence provides a web site designed to provide tools for Section 106 of the National Historical Preservation Act (NHPA) tribal consultation. This site contains documents and links to web sites that address key aspects of tribal consultation relevant to SB 18. Information also includes federal, tribal, and state policies and protocols, case law, and best practices as implemented by federal and state agencies and tribes.
http://environment.transportation.org/environmental_issues/tribal_consultation/overview.htm

U.S. Army Corps of Engineers

The U.S. Army Corps of Engineers has lasting and positive relations with many tribal governments. The “Tribal Affairs and Initiatives” section of their web site provides information regarding the U.S. Army Corps of Engineers’ approach to tribal consultation and preservation of cultural resources.
<http://www.usace.army.mil/inet/functions/cw/cecwp/tribal/index.htm>

USDA Forest Service

The Forest Service has extensive experience in consulting with Native American tribes. The Forest Service's *Forest Service National Resource Book on American Indian and Alaska Native Relations* is an excellent resource book on tribal beliefs and practices, tribal consultation, and laws affecting Native Americans. The Forest Service's *Report of the National Tribal Relations Program Implementation Team* (June 2003) reviews relationships between the Forest Service and tribes, identifying pervasive problems and concerns and making recommendations to improve the effectiveness of the program at maintaining long-term collaborative relationships with tribal governments.

USDA Forest Service
Regional Office of Tribal Relations
Sonia Tamez
1323 Club Drive
Vallejo, CA 95492
Phone: (707) 562-8919
www.r5.fs.fed.us

USDA National Sustainable Agriculture Information Service (ATTRA)

The ATTRA provides information and other technical assistance to farmers, ranchers, Extension agents, educators, and others involved in sustainable agriculture in the United States. The ATTRA publication, *Conservation Easements, Resource Series (2003)*, provides an overview of what holding and selling conservation easements entail.

ATTRA - National Sustainable Agriculture Information Service
PO Box 3657
Fayetteville, AR 72702
Phone: (800) 346-9140
Fax: (479) 442-9842
<http://attra.ncat.org/>

USDA Natural Resources Conservation Service (NRCS)

The mission of the NRCS is to address natural resource conservation on private lands. The web site contains links to various conservation technical resources and to additional contact information for area offices and service centers.

California NRCS State Office
430 G Street #4164
Davis, CA 95616-4164
Phone: (530) 792-5600
Fax: (530) 792-5610
<http://www.ca.nrcs.usda.gov/>

U.S. Department of Interior – Bureau of Indian Affairs

The Bureau of Indian Affairs (BIA) is responsible for the administration and management of 55.7 million acres of land held in trust by the United States for American Indians, Indian tribes, and Alaska Natives. Developing forestlands, leasing assets on these lands, directing agricultural

programs, protecting water and land rights, developing and maintaining infrastructure, and economic development are all agency responsibilities. The BIA web site includes links to other federal agencies, inter-tribal organizations, environmental organizations, and cultural resources.

Bureau of Indian Affairs

Phone: (202) 208-3710

<http://www.doi.gov/bureau-indian-affairs.html>

U.S. Department of Interior – Bureau of Land Management

The Bureau of Land Management manages 261 million acres of land and has staff whose duties include coordination and consultation with Native Americans. The Bureau publishes *Native American Coordination and Consultation, Manual Section 8160 with Handbook H-8160-1*. The handbook is devoted to providing general guidance for tribal consultation, and can be found online at: <http://www.blm.gov/nhp/efoia/wo/handbook/h8160-1.html>.

Bureau of Land Management

California State Office

2800 Cottage Way, Suite W-1834

Sacramento, CA 95825-1886

Phone: (916) 978-4400

Phone: (916) 978-4416

TDD: (916) 978-4419

<http://www.ca.blm.gov/>

U.S. Department of Interior- National Park Service

The following National Park Service web site specifically focuses on cultural resource preservation. The site includes links to tools for cultural resource preservation, different areas of cultural resource protection and different offices of the National Park Service that handle cultural preservation issues. Included among these offices is the American Indian Liaison Office, the web site of which contains a number of information resources that are potentially useful to local governments learning how to consult with Native American tribes on land use policy.

<http://www.cr.nps.gov>

U.S. Department of Interior – Office of Collaborative Action and Dispute Resolution

This web site provides links to federal agencies' policies on tribal consultation:

<http://mits.doi.gov/cadr/main/G2GAgencyPolicies.cfm>

Colleges and Universities

Humboldt State University

The Center for Indian Community Development (CICD)

The CICD primarily focuses on Indian language education, but also acts in the capacity of a liaison between Native American tribes and the community. The CICD includes a cultural resource facility where information about Native American burial grounds and cultural resource monitoring can be found. The CICD offers useful publications on tribal governments and cultural approaches to environmental protection of Native American lands on its web site.

Humboldt State University
Center for Indian Community Development
#1 Harpst Street
Arcata, CA 95521
Phone: (707) 826-3711
<http://www.humboldt.edu/~cicd/>

**University of California, Los Angeles
American Indian Studies Center (AISC)**

The AISC has spent a number of years conducting research on issues affecting Native American Indian communities. The center has sponsored conferences on issues including California tribes, repatriation, federal recognition, and Indian gaming. The AISC offers a number of publications on issues ranging from Contemporary Native American Issues and Native American Politics to Native American Theater and Native American Literature.

UCLA American Indian Studies Center
3220 Campbell Hall
Los Angeles, CA 90095-1548
Phone: (310) 825-7315
Fax: (310) 206-7060
<http://www.aisc.ucla.edu/>

**University of California, Los Angeles School of Law
Native Nations Law and Policy Center (NNLPC)**

The mission of NNLPC at UCLA Law is to support Native nations throughout the United States, with a special focus on California tribes, in developing their systems of governance and in addressing critical public policy issues and to apply the resources of state-supported education together with tribal expertise to address contemporary educational needs for California Tribes. The Research and Publications division secures grants, carries out research, and sponsors conferences and roundtables drawing together scholars, tribal leaders, and federal/state policy-makers.

UCLA School of Law
P.O. Box 951476
Los Angeles, CA 90095-1476
Phone: (310) 825-4841
<http://www.law.ucla.edu/students/academicprograms/nativenations/nnlapc.htm>

Private Organizations and Foundations

American Farmland Trust (AFT)

Since its founding in 1980, the AFT has helped to achieve permanent protection for over a million acres of American farmland. The AFT focuses its strategies on protecting land through publicly funded agricultural conservation easement programs and encouraging conservation practices in community planning and growth management.

American Farmland Trust
1200 18th Street NW
Washington, D.C. 20036
Phone: (202) 331-7300
Fax: (202) 659-8339
<http://www.farmland.org/>

Inter-Tribal Council of California, Inc. (ITCC)

The key role of the Inter-Tribal Council of California (ITCC) is to assist in bridging relationships between California tribal governments and other organizations, including local government agencies. The ITCC offers workshops on Native American cultural proficiency and tribal governments for the purpose of educating non-Native Americans on how to effectively communicate with tribal governments, in addition to other training and technical assistance. The ITCC is experienced in assisting the development of Memoranda of Understanding and Agreement, protocols, and educational outreach materials.

Inter-Tribal Council of California, Inc.
2755 Cottage Way, Suite 14
Sacramento, CA 95825
Phone: (916) 973-9581
Fax: (916) 973-0117

Land Trust Alliance (LTA)

The Land Trust Alliance promotes voluntary land conservation by offering training, conferences, literature, reports, and other information on land conservation. The LTA has several publications discussing conservation techniques. Their web site addresses different conservation options for landowners and includes questions and answers about conservation easements, land donation, and bargain sale of land.

Land Trust Alliance
1331 H Street NW, Suite 400
Washington D.C. 20005-4734
Phone: (202) 638-4725
Fax: (202) 638-4730
<http://www.lta.org/conserve/options.htm>

Native American Land Conservancy

The Native American Land Conservancy is a nonprofit corporation formed for the conservation and preservation of Native American sacred lands.

Native American Land Conservancy
Kurt Russo, Executive Director
PO Box 1829
Indio, CA 92202
Phone: (800) 6770-6252

The Nature Conservancy (TNC)

The Nature Conservancy is a non-profit organization that works with communities, businesses, and individuals to preserve lands with natural and cultural resources.

The Nature Conservancy
4245 North Fairfax Drive, Suite 100
Arlington, VA 22203-1606
<http://nature.org/>

Southern California Tribal Chairmen's Association (SCTCA)

The Southern California Tribal Chairmen's Association (SCTCA) is a multi-service non-profit corporation established in 1972 for a consortium of 19 Federally recognized Indian tribes in Southern California. The Primary goals and objectives of SCTCA are the health, welfare, safety, education, culture, economic and employment opportunities for its tribal members. A board of directors comprised of tribal chairpersons from each of its member tribes governs SCTCA.

Southern California Tribal Chairmen's Association
Denis Turner
Executive Director
Phone: (760) 742-8600 x100
<http://www.sctca.net/>

Trust for Public Land (TPL)

The Trust for Public Land (TPL) is a national, nonprofit, land conservation organization that conserves land for people to enjoy as parks, community gardens, historic sites, rural lands, and other natural places, ensuring livable communities for generations to come. Since 1972, TPL has worked with willing landowners, community groups, and national, state, and local agencies to complete more than 2,700 land conservation projects in 46 states, protecting nearly 2 million acres.

Trust for Public Land National Office
116 New Montgomery St., 4th Floor
San Francisco, CA 94105
Phone: (415) 495-4014
Fax: (415) 495-4103
<http://www.tpl.org>

Exhibit A: Sample Request to the NAHC for Tribal Contact Information

	<u>LOCAL GOVERNMENT</u> <u>TRIBAL CONSULTATION LIST REQUEST</u> NATIVE AMERICAN HERITAGE COMMISSION 1556 HARBOR BLVD. WEST SACRAMENTO, CA 95691 916-373-3710 916-373-5471 - Fax	
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Project Title: _____

Local Government/Lead Agency: _____ **Contact Person:** _____

_____ **Phone:** _____

Street Address: _____ **Fax:** _____

___ General Plan Amendment ___ Specific Plan Amendment

___ Pre-planning Outreach Activity

Project Description:

NAHC Use Only

Date Received: _____

Date Completed _____

Native American Tribal Consultation lists are only applicable for consulting with California Native American tribes per Government Code Section 65352.3.