Title: Tribal sovereignty in land use decision making: Evaluating California AB 52 through the lens of cannabis cultivation

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Highlights:

- Cultural resource protection laws tend to "lack teeth," i.e. enforcement mechanisms that ensure that Tribal consultation occurs in a meaningful way and decisions avoid impacts to cultural resources.
- Many agencies are fulfilling the minimum requirements under the law, but not consulting with Tribes in good faith or incorporating Tribes' concerns into environmental decision making.
- A lack of Tribal discretionary authority and a lack of resources and institutional capacity in Tribal and agency offices erodes meaningful consultation and resource protection.
- Meaningful consultation rests upon a range of tangible and intangible prior conditions, without which consultation law by itself is insufficient.
- Bringing Tribal consultation into environmental review at the local level is helping to build long-term partnerships between Tribal and local governments, introducing local knowledge and accountability into land use decisions.

Abstract:

Tribal sovereignty in land use decision making is an ongoing challenge, in part because Tribal sacred sites, cultural heritage sites, and other cultural resources exist in areas outside of Tribal jurisdiction. In 2014, California Assembly Bill 52 (AB 52) amended the California Environmental Quality Act (CEQA) to mandate Tribal consultation as part of environmental reviews. AB 52 affirms Tribal sovereignty in land use planning by creating a mechanism for Tribal consultation on a per-project basis and giving Tribes decision making authority where Tribal Cultural Resources (TCRs) are concerned, even when TCRs are located off-reservation. This study offers the first statewide evaluation of this provision in AB 52 from Tribal and agency perspectives. Using two surveys, one with Tribal respondents (n=46) and one with agency respondents (n=56), we assessed ongoing processes of Tribal consultation in cannabis permitting between Tribal and local governments. Focusing on AB 52 in cannabis permitting provides a lens for evaluating Tribal consultation and TCR protection under CEQA more generally. Our study shows that AB 52 is not consistently applied in land use decision making and that it faces several barriers to implementation. We discuss these findings and suggest how environmental policies and agency processes can be strengthened in support of Tribal sovereignty.

1. Introduction

Aboriginal claims to the land are fundamentally moral claims, often predicated on stewardship and right relations rather than legal status and contemporary property regimes. These land claims arise with political force through the direct actions of land defenders across the globe as well as in U.S.-based social movements such as #NoDAPL and #Landback (Gilio-Whitaker 2019; Estes 2024). But they also show up more quietly in ongoing practices of gathering and land-tending that for many Native peoples in California and beyond are a source of cultural continuity and are intrinsically related to Tribal sovereignty (Baldy 2013). Practicing these traditional forms of land use serves to preserve and restore relationships with one's people and the land (Long et al. 2021; Norgaard 2019; see also volume edited by Yazzie and Baldy 2018).

However, due to colonial legacies of land dispossession and forced displacement (Farrell et al. 2021; Madley 2017), Native ancestral homelands often do not coincide and may even be far away from Indian reservations, allotments, and landless Native communities, including those that have been displaced to urban centers. The lack of jurisdiction over sacred sites, cultural heritage sites, and other traditional use areas poses significant cultural resource access and management challenges, while making culturally sensitive areas vulnerable to public and private development.

In the United States, the lack of jurisdiction over Native ancestral homelands is partially remedied by natural and cultural resource laws that afford Tribal governments and communities limited opportunities to influence land use decision making, even when those projects lie beyond the exterior boundaries of Tribal lands.[1] Typically, these laws entitle Tribes to express their views and concerns through government to government consultation. Since each Tribal government is a unique sovereign nation with distinct protocols and priorities when it comes to land use and other related issues, intergovernmental consultation is usually the most appropriate way to mete out the specific preferences and objectives for each party.

Tribal consultation is not a perfect instrument, however, and the literature on this subject is rife with the failures of associated laws in regard to both substance and procedure.

At the national level, however, only Tribes that are recognized by the Bureau of Indian Affairs (BIA) are eligible to consult and only on the subset of development projects that are led by federal agencies and that meet other qualifying criteria.

The l The requirement for Tribes to have federal recognition in order to consult leaves out hundreds of federally non-recognized Tribes nationwide, some of which have been petitioning the BIA for federal status for decades. Another common complaint is that these laws "lack teeth," which is to say they lack language and enforcement mechanisms that are strong

[1] "Tribal lands," as set forth in the National Historic Preservation Act and Section 106 regulations (36 CFR Part 800), are defined as "all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities."

enough to ensure that consultation is meaningful, decision making is shared, and undesired outcomes are avoided (Hinds 2017; Middleton 2013). Additional factors that undermine the consultation process include power asymmetries between Tribal and U.S. governments, weak or non-existent relationships among consulting parties, poor resources and capacity within Tribal and agency offices, and the exclusion of Tribal knowledge and expertise (Blumm and Pennock 2022; Dongoske et al. 2020; Arsenault et al. 2019; Youdelis 2016; Dongoske et al. 2015; Bathke 2014; Ferguson 2000). In short, federal laws used to protect Tribal cultural properties, landscapes, and resources have rarely delivered satisfying outcomes, leading some critics to reject consultation in favor of other measures of accountability (Stolte 2023; Bevan 2020; Searle 2016).

Short of land return or major congressional reform, however, it is imperative to look for solutions that are more readily available. State- and local-level cultural resource laws are starting to emerge and hold out initial promise for building long-term relationships based on trust and understanding and local knowledge of land, cultures, and resource threats. In California, Senate Bill 18 (SB 18, 2004) is the first law in the nation to mandate Tribal consultation at the local level (Middleton 2013), affording Tribes the opportunity to provide formal input when counties update their general and specific plans. In 2014, the California legislature further strengthened cultural resource protections by passing Assembly Bill 52 (AB 52), which amends the California Environmental Quality Act (CEQA) to include a provision for Tribal consultation. AB 52 is the first law in the nation to mandate Tribal consultation at the state or local level on a per project basis.

Commented [1]: What is the "initial promise" that this paper is testing?

This article examines Tribal sovereignty in land use decision making through a case study of AB 52 consultation surrounding cannabis permitting. In 2016, one year after AB 52 went into effect, California voters endorsed Proposition 64, which legalized the commercial cultivation and sale of recreational cannabis for adult use.[2] The first step for cannabis operators who wished to obtain state licensure was to apply for a land use permit to farm cannabis from the local city or county jurisdiction. Local governments (primarily county planning offices) were tasked with processing thousands of permit applications, each one potentially impacting Tribal cultural resources. In this way, cannabis legalization uniquely tested AB 52, and the resulting strain on Tribal and agency offices exposed important lessons about the challenges and opportunities of Tribal consultation at the local level. To capture some of these lessons, this article draws on two surveys, one with Tribal representatives (n=46) and one with agency representatives (n=56), all of whom are involved in AB 52 consultation.

The next section develops the background context of Tribal consultation in California and analyzes the only extant scholarly article on AB 52. The following section discusses the survey methods, results, and draws out lessons for Tribal consultation and cultural resource protection at the local level. Because this is the first known survey study of AB 52 consultation, and thus the

[2] Prior to Prop 64, California had operated the largest medical cannabis market in the United States. Under the medical system, virtually no cannabis farms had land use permits although there were tens of thousands of farms already producing cannabis legally in the state.

first study to investigate local consultation on a per project basis, we focused on the frequency, strength, and outcomes of

This article evaluates the implementation of AB 52 in view of the tools it affords Tribes to assert their sovereignty in land use decision making. Studies have analyzed previous statutes in California such as SB 18 (Fuller 2011; Middleton 2013) and in national contexts (Blumm and Pennock 2022; Dongoske et al. 2015; Dongoske et al. 2020; Ferguson 2000). With respect to AB 52, Dadashi (2021) provides a legal analysis of the text. This article is the first to evaluate the implementation of AB 52 on-the-ground with respect to how well it upholds Tribal sovereignty and protects Tribal cultural resources. Drawing on two surveys, one with Tribal respondents (n=46) and one with agency respondents (n=56), we examine the frequency, strength, and outcomes of AB 52 consultation in the realm of cannabis permitting. Cannabis is a useful lens because counties are the lead agency in cannabis permitting, which means that they are responsible for applying CEQA, including AB 52 consultation. Moreover, spatial analysis of cannabis permits and discussion with agency planners in high-yield regions such as Humboldt County reveal that there is a high coincidence of cannabis cultivation and TCRs [redacted for peer-review].

Through the lens of cannabis, this study investigates whether and to what extent AB 52 has helped to incorporate Tribal knowledge and concerns into land use planning and development and to strengthen Tribal-agency relationships at the local level. The results of our study indicate that the nature and extent of Tribal consultation is highly variable under AB 52 and that the lack of Tribal discretionary authority and the lack of resources and institutional capacity in Tribal and agency offices hampers meaningful consultation. Our findings provide insight into whether and to what extent AB 52 is effective in protecting TCRs in other agriculture and natural resources sectors, such as forestry, agriculture and water. We also discuss opportunities for strengthening intergovernmental relations at the local and state levels.

Hence, Native sacred sites, cultural heritage sites, and other cultural use areas and resources exist outside of Tribal jurisdictions, making them vulnerable to public and private development. To protect Tribal cultural resources from development, however, Tribes cannot simply register these sites in public records. Due to histories of dispossession and site desecration via looting and other forms of vandalism, Tribes have been forced to keep the location of many sensitive areas confidential. Additionally, different Tribal governments have distinct priorities and protocols when it comes to site protection, obviating one-size-fits-all solutions for public agencies to follow. The best way to avoid harmful impacts to Tribal cultural resources is therefore meted out on a case-by-case basis through Tribal consultation.

In California, the creation of the Native American Heritage Commission in 1976 and the Indian Gaming Regulatory Act in 1988 increased Tribal political and economic power. This set

the stage for Tribal Nations to challenge a series of development projects during the late 1990s and early 2000s, leading to the passage of cultural resource protection laws – beginning with SB 18 in 2004 – designed to protect Tribal resources. California law, however, did not afford Tribes a consistent and formal role in land use decision making until the passage of California Assembly Bill (AB) 52 in 2014.[3]

AB 52 amends the California Environmental Quality Act (CEQA) – the 1970 statute that requires the study and public disclosure of potential adverse environmental impacts of agency discretionary actions – to mandate Tribal consultation regarding the protection of Tribal Cultural Resources (TCRs), which the statute defines as "sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a Tribe" that are either listed or eligible for listing in local, state, and national registers of historical resources (PRC §21074). On paper, AB 52 affirms Tribal sovereignty in the following ways: it supports Tribal governments' decision making alongside local governments, it expands what is legally protected, and it strengthens consultation requirements (Dadashi 2021). It is the first state law to require Tribal consultation on a per project basis.

2. Background Context

2.1 Tribal consultation in California

In 2014, California public agency requirements to conduct Tribal consultation regarding potential impacts to Tribal Cultural Resources received a boost through the passage of AB 52. AB 52 requires the lead agency permitting projects subject to CEQA to provide Tribes with early notification about the project and to grant them the opportunity to weigh in on potential adverse effects to these resources. Once notified, a Tribe may request consultation and the lead agency must engage in "good faith" consultation to identify and implement feasible mitigate measures (PRC §21080.3.2(b)(1)-(2)).

According to AB 52, Tribes now have a statutory right to consult on projects where TCRs are threatened. "Tribal Cultural Resources" is a capacious category that includes ceremonial and hunting grounds, burial sites, landscape features, and other places of contemporary and active use and traditional cultural significance to Tribes, in addition to objects of archaeological and scientific value. This language positions Tribes as authoritative experts with regard to land use decision making. AB 52 thereby offers TCRs a level of protection substantially stronger than SB 18, which only requires local government to engage in Tribal consultation for updates to general and specific plans. Whereas Tribal consultation under SB 18 occurs infrequently, only applies to "Tribal cultural places," and only "encourages" agencies to mitigate impacts, AB 52 increases

[3] This brief history of the events leading up to the passage of AB 52 came from Laura Miranda, former Chair of the Native American Heritage Commission, at a panel addressing "AB 52 consultation" at the CalTHPO Conference at Pala Indian Resort and Casino, May 2023.

the scope of Tribal jurisdiction, expands the definition of relevant Tribal assets, and mandates feasible mitigation measures for significant impacts.[4] In principle, AB 52 offers Tribes a legal mechanism for influencing land use decisions in order to protect their cultural resources.

However, the language of AB 52 does not go far enough. The statute ultimately upholds agency discretionary authority to determine the status of TCRs. Agency discretion preserves the colonial paternalism of the U.S., treating Tribes as "domestic, dependent nations" (Smith 2004).[5] Especially for Tribes without the legal resources to challenge agency rulings on TCRs, agency discretion leads to cascading effects within agency practices, such as applying archaeological values instead of Indigenous values when evaluating cultural sites, dismissing Tribal knowledge and expertise, treating consultation as a box-checking exercise, and demonstrating a lack of cultural awareness (Dadashi 2021). Agency discretion relegates Tribes to "stakeholder status" and disempowers them as decision makers (Middleton 2013). Along with poor enforcement mechanisms and insufficient funding to support meaningful Tribal engagement in the permitting process, agency discretion erodes cultural resource protection laws like AB 52.[6]

Although AB 52 suffers from these historically rooted substantive and procedural deficits, it is important to note that more frequent Tribal consultation is likely, over time, to strengthen Tribal-agency relationships and affirm Tribal expertise in matters relating to TCRs. It is therefore important to learn from both what is working and not working in the implementation of AB 52.

Methods

3.1 Tribal and Agency survey design

The UC team (UC) developed the Tribal and Agency Surveys in collaboration with a statewide Tribal Advisory Committee (AC) convened for the project. The seven AC members included five Tribal Historic Preservation Officers, a cultural resource specialist, and a Tribal Chair, all of whom had experience coordinating or conducting Tribal consultation and were knowledgeable about the impacts of cannabis cultivation on TCRs. UC asked the AC to explain the permitting process and to describe their experiences and challenges. UC then used these conversations to develop relevant questions and categories to evaluate the effectiveness of government-to-government consultation surrounding cannabis cultivation for the protection of TCRs. UC further refined and expanded the surveys through discussion with the AC.

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[4] See a helpful chart comparing AB 52 and SB 18 in "AB 52: Beyond the Letter of the Law," PLACEVIEWS (Nov. 2015), https://perma.cc/U5AH-AX4B.

[5] The language of "domestic, dependent nations" comes from Chief Justice Marshall's ruling in 1831 on *Cherokee Nation vs. Georgia*.

[6] Beth Rose Middleton (2013) for one urges policy changes that would give Tribes the authority to stop projects, which was in the original language of SB 1828, a bill that failed to pass prior to the successful passage of SB 18.

Both surveys used Likert-scale questions to assess the frequency and effectiveness of Tribal consultation and cultural resource protection. The Tribal Survey asked respondents to evaluate agency consultation processes around cannabis permitting and efforts to mitigate impacts. We also asked two short-answer questions about policy changes that would improve cannabis permitting and additional tools, information, and resources that would help to support related intergovernmental consultation.

The Agency Survey asked respondents to evaluate Tribal engagement in cannabis permitting and agency staff knowledge pertaining to TCRs. UC asked agency respondents whether and how often they work with Tribes on cannabis permitting, how they assess impacts to TCRs, and how they evaluate agency knowledge, relationships, and processes related to TCRs and resource protection. UC also asked short-answer questions about the strengths and challenges of Tribal consultation.

3.2 Survey dissemination

UC obtained approval from [redacted for peer-review] Institutional Review Board and the California Regional Indian Health Board (CRIHB), which helped to ensure that the research would promote the health and social goals of Native communities in California. After developing the survey with the AC, UC piloted the Tribes Survey with members of the AC and the Agency Survey with two agency staff. The surveys were available online through the Qualtrics survey platform in July and August 2022.

For the Tribes Survey, UC aimed to reach Tribal officials, cultural resource officers, and Tribal members whom Tribal governments have authorized to speak on their behalf and who are likely to have direct experience with intergovernmental consultation on land use permitting issues.[7] This person might be a THPO, a cultural resource specialist, a Tribal Chair, or a council member. UC disseminated the survey in two ways. First, UC used the Native American Heritage Commission Tribal leaders contact list (which includes federally-recognized and non-recognized Tribes in California) to reach out to THPOs and Tribal leaders. Some Tribal research protocols require permission from the Tribal Chair or council to involve Tribal members in a research study, so UC copied Tribal Chairs when possible to make them aware of requests. However, since the NAHC list is incomplete and out-of-date UC also distributed an anonymous survey link through existing networks, which included collaborators from previous projects and AC member networks.

Using the first, individualized dissemination strategy, UC sent the survey (and several reminders) to 244 distinct email addresses and received a total of 37 usable responses (7% response rate). Using the second, snowball method, UC does not know how many emails were sent out and received 9 responses.

UC disseminated the Agency Survey to planners, cannabis program officers, and regulatory agents in city and county jurisdictions that permit cannabis cultivation and to state

[7] "Most likely" because we did not assume that Tribal representatives are being consulted.

program units that are involved in cannabis permitting or regulation (including the Department of Cannabis Control, State Water Board, Regional Water Boards, California Department of Fish and Wildlife, and Department of Water Resources). Using the cannabis business license search function on the Department of Cannabis Control website, UC identified cities and counties that allow cannabis cultivation. At the time of the survey (July 1, 2022), 28 of 58 counties and 136 cities allowed cannabis cultivation, including cities within counties that prohibit cultivation. UC contacted all county planning departments that allow cannabis cultivation (n=28) and surveyed all cities that allow cannabis cultivation in the counties that prohibit cultivation (n=39). UC also surveyed a subset of cities (approximately half) that allow cannabis cultivation in counties where cultivation is permitted (n=48). UC contacted a total of 87 cities. Some of the email addresses were generic for the planning department or the cannabis program unit, so UC requested that the recipient pass the survey to the appropriate person or supply contact information. Through the survey design, UC also screened out respondents who do not have a role in cannabis permitting or who do not have direct experience working with Tribal offices. UC supplemented this outreach effort with personalized emails to planners and program officers that project team members had already made contact with through the project.

In total, UC sent the survey to 158 planners and program officers at the city, county, and state levels, occasionally to multiple people in the same office or department. UC received 56 responses (33% response rate), with 22 responses at the city level, 25 at the county level, and 5 at the state level.

3.3 Survey analysis

UC used Qualtrics software and Google Spreadsheets to clean and run preliminary reports on the survey data. UC accepted partially completed surveys, but excluded 11 Tribal responses and 15 Agency responses for insufficient data. Between October and November 2022, UC presented the survey data to the AC, to Tribal Historical Preservation Officers at the CalTHPO monthly meeting, to county planners at the Cannabis Program Forum, and to county commissioners at the Annual California County Commissioners Conference. In each case, UC asked for input on how to interpret the data and solicited additional feedback during Q&A. UC presented the results to the AC once again (in February 2023) to check the plausibility of the interpretations. The AC was also involved in developing and revising this article.[8]

3.4 Limitations of study

[8] Since the advisory committee offered their expertise by orienting the project in its initial phases, positing key questions and hypotheses, and providing feedback on project developments, including deliverables, the research team offered them co-authorship on all publications, including this one. Several accepted the invitation. An earlier draft of the paper also benefited from substantive feedback from several members of the advisory committee.

Commented [2]: From reviewer: a map that summarizes some of this landscape would be helpful---for example, a map of counties that (at the time of the research) permitted cannabis cultivation, overlaid on tribal territories

Commented [3]: @sethlarosa@berkeley.edu would you be able to create a map along the lines of what the reviewer suggests?

A major limitation of both surveys is the small sample size. In California, there are currently 28 counties that permit cannabis cultivation, approximately 110 federally recognized Tribes, and many more non-recognized Tribes (CFCC 2022). Not all Tribes share ancestral boundaries with the 28 cannabis-permitting county jurisdictions, further limiting the number of Tribes from whom we would expect to receive cannabis permitting notifications under AB 52. Although responses came from 22 distinct counties (79%) and 39 distinct Tribes (21%), there are too few responses overall to draw accurate statistical inferences.

A limitation of Tribal survey work in general is the difficulty reaching the target audience. Varying Tribal governance structures and protocols of engagement, inadequate resources, staff turnover, reasonable mistrust of university researchers, inconsistencies in the Native American Heritage Commission Tribal contact list, and the complexities of Tribal affiliation – these factors all impair the degree to which data is representative. Additionally, UC was unable to solicit responses from a representative sample of Tribes without federal recognition. Although there are dozens[9] of Tribes in California currently seeking federal recognition, only 9 of the 44 Tribal respondents who took the survey (20%) were from a non-recognized Tribe.

While these issues limit representation in terms of data collection methods, differences among Tribes limit representation in terms of survey design. For example, one Tribal respondent pointed out that some Tribes consider ecosystems and wildlife to be a TCR, which the survey separated into different categories. Similarly, different Tribes might hold different views of what constitutes meaningful consultation. Finally, the federal prohibition on cannabis and poor information on the extent and legal status of cannabis sites throughout the state make accurate reporting on cannabis difficult. Respondents may be reluctant to indicate knowledge about federally illicit substances and activities that would implicate them and many respondents reported a lack of adequate information on cannabis grows in their areas of concern.

Commented [4]: Reviewer: Rather than a limitation, this may be an important finding that supports state agencies and policies to better engage with diverse tribal nations.

Limitations of the Agency Survey included a high frequency of staff turnover, which often impeded our outreach efforts. Agency staff may also have been reluctant to be candid about their office's TCR protection and consultation efforts due to fears of recrimination and legal liability. Given that AB 52 provides a new regulatory environment and some of the questions had legal bearing, we suspect that counties may be over-reporting on matters of compliance.

The small, self-selected sample size, impediments to reaching our target audience, and disincentives to accurately self-report all suggest that results are non-probabilistic. Nonetheless,

[9] The ACHP lists about 45, but it is difficult to determine the precise number because the typical ways of counting – using the petition list or relying on the NAHC – are flawed. The petition list is inaccurate because some petitions may be inactive, some may refer to Tribes that have already been federally listed, and the BIA recently wiped the list of all Tribes that only submitted a letter of intent rather than an actual petition, which is almost all of them. The NAHC list is also inaccurate, because some of these reps may be from cohesive non-recognized Tribes and some may not be, while other non-recognized Tribes are not involved with NAHC.

we believe the data give a clear indication of salient concerns and implications around cannabis permitting on Native lands.

3. Results

4.1 Characteristics of Tribal respondents

We asked respondents to identify whether they are Native American and, if so, of which Tribe they are a member or enrolled citizen. We also asked respondents to identify whether they work for a Tribe and, if so, which Tribe and in what capacity. Since respondents may both be an enrolled citizen and work for a Tribe or multiple Tribes (which may not be the same Tribe(s) with which they are enrolled), we asked respondents who answered "yes" to both questions to take the survey with reference to the Tribe with which they work primarily. Respondents who do not identify as Native American and who do not actively work for a Tribe (of which there were two) were routed to the end of the survey.

Out of 44 total respondents, 80% (n=35) identified as Native American and 89% (n=39) worked for a Native American Tribe in California. Not all respondents who worked for a Tribe are Native American, and not all Native American respondents work for a Tribe, or they may work for a Tribe other than their own. Of those who work for a Tribe, 79% (n=31) work for a Tribe that is federally-recognized and 21% (n=8) work for a Tribe that is not federally-recognized. A total of 9 responses (20%) were coded as non-federally recognized. Of the 44 respondents, 25 marked that they worked in Tribal government, 25 as Tribal staff, 6 as volunteers, 3 as consultants, and several more declined to answer, with many respondents marking multiple roles.

Figure 1. Official Role within Tribe

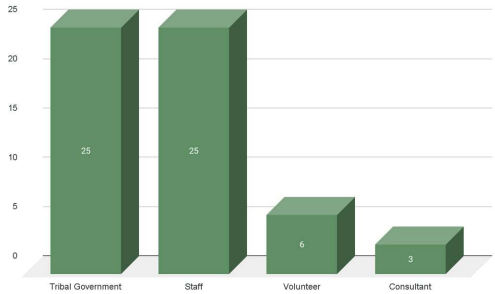
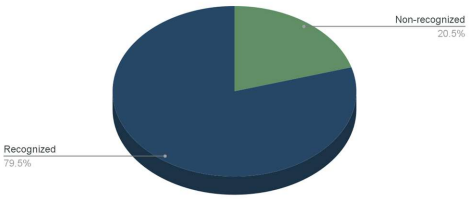


Figure 2. Federal Recognition Status



4.2 Characteristics of Agency respondents

Of the 52 survey responses, 42% (n=22) came from city agencies and 48% (n=25) from county agencies, including agencies from 22 distinct counties. Only 10% (n=5) came from state agencies because the survey instrument selected for agency respondents directly involved in cannabis permitting (routing respondents who were not to the end of the survey). Hence, the five state respondents came from the State and Regional Water Boards, since those offices are involved in cannabis permitting, whereas environmental review (through which Tribes enter the permitting process) occurs predominantly on the local level in California.

Most respondents noted multiple roles in cannabis permitting, including planning (38), policy formation (28), policy implementation (39), site evaluation (28), GIS/mapping (11), permit and document review (43), outreach to applicants (36), outreach to Tribes (23), and permit approval (34).

Figure 3. Jurisdiction

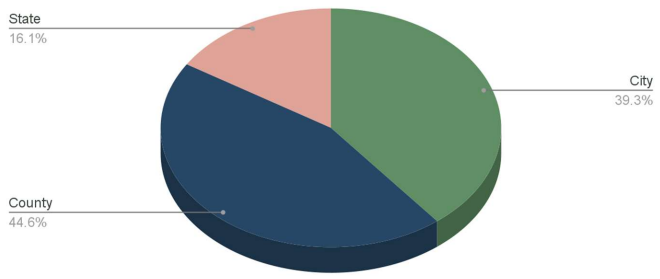
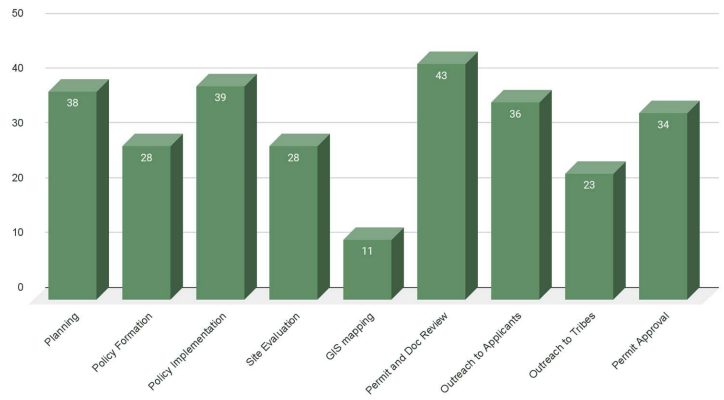


Figure 4. Role in Cannabis Permitting



Since local jurisdictions are the lead agency for the majority of environmental reviews related to cannabis permitting, most of the questions are directed to city and county planning agencies. In what follows, we separate responses by Tribal, city, county, and state jurisdictions.

4.3 Tribal concerns about cannabis impacts

Agency respondents did not demonstrate meaningful awareness of Tribal concerns regarding cannabis impacts, however state agency respondents demonstrated better awareness than county respondents and county respondents demonstrated better awareness than city respondents. This result likely reflects the fact that state agencies have consulted with Tribes under California law for longer and with more frequency than county and city agencies, while the mandate for local agencies to regularly consult only began in 2015 with AB 52. The survey results give a clear indication of knowledge gaps across state, county, and city agents regarding Tribal priorities and concerns.

In results published elsewhere [redacted for peer-review], We asked Tribal respondents to determine the extent to which they think cannabis is impacting: water quality; water access and availability; ecosystems and wildlife; Tribal Cultural Resources; economic opportunities; community health; and housing and cost of living. The strongest impacts were reported with respect to natural and cultural resources. Tribal respondents reported "strong impacts" to water quality (46%), ecosystems and wildlife (44%), water access and availability (41%), and Tribal Cultural Resources (37%). While "strong impacts" were reported at a lower rate with respect to economic opportunities (28%), community health (27%), and housing and cost of living (18%), we still found those numbers to be statistically significant. More than half of respondents reported some level of impact with regard to each category, with the exception of housing and cost of living for which 38% reported some level of impact and 33% were unsure.
(A greater number of respondents reported being "unsure" with regard to social and economic indicators, possibly because impacts are more diffuse and harder to measure).

By comparison, government agency staff at all levels of jurisdiction exhibited low levels of awareness about Tribal concerns regarding cannabis impacts. Counties demonstrated more awareness of impacts than cities with 33% of county respondents reporting awareness of Tribal concerns compared to 0% of city respondents. All county respondents who reported awareness noted Tribal concerns about Tribal Cultural Resources, one reported additional concerns about impacts to ecosystems and wildlife, and another reported additional concerns about economic opportunities and community health. One city respondent explained that they only consult when there is an initial study or Environmental Impact Report. This suggests that cities are less aware of Tribal concerns because they do not frequently consult with Tribes over cannabis permitting. State-level respondents (all from either the Regional or State Water Boards) demonstrated the greatest awareness of Tribal concerns, although our sample size was low (n=5). Out of the five, three reported that Tribes expressed concerns about Tribal Cultural Resources, two reported

concerns about water access and availability, two about ecosystems and wildlife, and one about water quality.

Table 1 Tribal concerns about cannabis impacts

What are Tribal concerns in your area?

	n	None that I'm aware of	Tribal Cultural Resources	Ecosystems and Wildlife	Water Access and Availability	Water Quality	Housing and Cost of Living	Community Health	Economic Opportunity
City	14	14 (100%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
County	18	12 (66.7%)	6 (33.3%)	1 (5.6%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1 (5.6%)	1 (5.6%)
State	5	2 (40.0%)	3 (60.0%)	2 (40%)	2 (40%)	1 (20.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)

4.4 Assessing cannabis impacts

According to agency respondents, the two most common methods of assessing impacts to TCRs are Tribal consultation and hiring a private archeological consulting firm. Out of 21 county respondents, 67% (n=14) reported that they consult with Tribes and 52% (n=11) reported that they either contract with a private consulting firm or require the applicant to do so. 24% (n=5) also use a database or other GIS software. The survey did not capture how agencies are using databases and GIS software and how this impacts the confidentiality of TCR locations. The majority of respondents use two or more of these methods in combination. Three county respondents reported that they do not assess impacts, two reported that impacts are assessed by another department, and one reported being unsure whether and how impacts are assessed. One county respondent wrote in that their county did an initial programmatic EIR for all county permitting and believes that Tribes were consulted at that point.

Commented [5]: Added this sentence in response to reviewer's question about how database/GIS is being used.

Out of 17 city respondents, 47% (n=8) reported that impacts to TCRs are assessed by consulting with Tribes. Of note, the percentage of city respondents who report that their office engages in Tribal consultation is far higher at this point in the survey than at any other: when asked if their office works with Tribes, only 1 out of 21 answered that they do, and when asked if Tribes are consulted during the cannabis permitting process, only 1 out of 14 agreed. In addition to consultation, 12% (n=2) city respondents reported using a private consulting firm, and one uses a database or other GIS software. 24% (n=4) reported that their office does not assess impacts to TCRs and two reported being unsure whether and how their office assesses impacts.

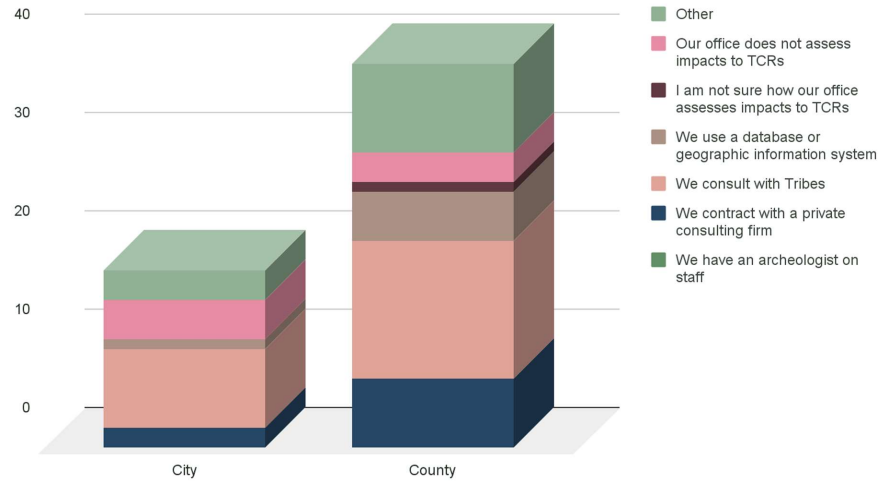
We also asked agency respondents whether Tribes were consulted when drafting the cannabis ordinance. Since a cannabis ordinance is a specific plan, cities and counties would be mandated under Senate Bill 18 to consult with Tribes. Out of 22 county respondents, 41% (n=9) reported that their agency consulted with Tribes, 14% (n=3) reported that they did not, and an additional 45% (n=10) were unsure. Of 16 city respondents, only one reported that their office

consulted with Tribes when drafting the cannabis ordinance, while 56% (n=9) reported that their office did not and 38% (n=6) were unsure.

Commented [6]: Add this lack of compliance and non-enforcement of SB 18 to discussion.

In addition to consultation and the cultural and environmental impact reports and GIS software that facilitate consultation, we asked agencies and Tribes what personnel they have on staff to ensure meaningful consultation. Although 52% of counties and 12% of cities report using an archeological survey to assess impacts to TCRs, none of the 37 county and city respondents reported having an archeologist on staff. Thus, it is unclear who in these city offices has the professional qualifications (required by the secretary of the interior) to properly evaluate cultural impact reports and maintain confidential and sensitive cultural resource information. Additionally, very few local planning offices reported having a designated Tribal liaison for permitting purposes. Out of 22 county respondents, 27% (n=6) reported that their office has a Tribal liaison, while 59% (n=13) reported that their office does not and 14% (n=3) were unsure. Out of 17 city respondents, 24% (4) have a liaison, 71% (n=12) do not, and one was unsure. Finally, we asked Tribal respondents whether they had legal representation for protecting TCRs. Out of 36 respondents, 56% (n=20) said that they do, 19% (n=7) said they do not, and 25% (n=9) were unsure. Out of 6 non-federally recognized respondents, half (n=3) said they have legal representation and half (n=3) said they do not.

Figure 5. How does your agency assess impacts to TCRs?



4.5 Tribal-Agency coordination, collaboration, and consultation

The surveys asked a series of binary (yes/no) and Likert-scale questions to ascertain whether and how Tribes and Agencies are interacting around resource protection, especially through formal consultation. Since formal consultation in cannabis permitting occurs primarily at

the local level, many of the questions in this part of the Agency Survey focused on cities and counties. Likewise, since we knew from our Advisory Committee that Tribal resource protection offices are primarily interacting with counties around cannabis permitting, many of the questions in this part of the Tribal Survey focused on county efforts.

We asked Tribal respondents whether their respective counties notify them about cannabis permitting, engage in consultation, respond to their concerns, resolve those concerns, and mitigate impacts to TCRs. One limitation in the data on notification and consultation is that we were unable to exclude Tribal respondents who are not notified or consulted about cannabis permit applications because their respective counties do not permit cannabis. We tried to control for this possible outcome during the data cleaning phase by excluding respondents (n=3) whose Tribe has no Trust lands or affiliated areas in counties that allow cannabis cultivation and who report being unaware of permitted grows on Trust lands and within affiliated areas.

Table 2 Comparison of Tribal and Agency responses

	n	strongly agree	somewhat agree	neither agree nor disagree	somewhat disagree	strongly disagree
The County notifies the Tribe about new cannabis permit applications. *						
Recognized	32	11 (34.4%)	7 (21.9%)	6 (18.8%)	1 (3.1%)	7 (21.9%)
Non-recognized	5	2 (40.0%)	0 (0.0%)	1 (20.0%)	1 (20.0%)	1 (20.0%)
County	18	11 (61.1%)	4 (22.2%)	2 (11.1%)	1 (5.6%)	0 (0.0%)
City	14	2 (14.3%)	1 (7.1%)	6 (42.9%)	1 (7.1%)	4 (28.6%)
The County consults with the Tribe regarding cannabis permits.						
Recognized	33	11 (33.3%)	5 (15.2%)	4 (12.1%)	3 (9.1%)	10 (30.3%)
Non-recognized	6	3 (50.0%)	0 (0.0%)	1 (16.7%)	1 (16.7%)	1 (16.7%)
County	18	11 (61.1%)	2 (11.1%)	4 (22.2%)	0 (0.0%)	1 (5.6%)
City	14	1 (7.1%)	0 (0.0%)	6 (42.9%)	2 (14.3%)	5 (35.7%)
The County is responsive to the concerns of the Tribe.						
Recognized	35	8 (22.9%)	6 (17.1%)	11 (31.4%)	4 (11.4%)	6 (17.1%)
Non-recognized	5	1 (20.0%)	1 (20.0%)	2 (40.0%)	0 (0.0%)	1 (20.0%)
County	18	14 (77.8%)	2 (11.1%)	2 (11.1%)	0 (0.0%)	0 (0.0%)
City	14	6 (42.9%)	1 (7.1%)	5 (35.7%)	1 (7.1%)	1 (7.1%)
The County is doing a good job minimizing the impacts of cannabis on cultural sites and resources. †						
Recognized	36	5 (13.9%)	3 (8.3%)	13 (36.1%)	6 (16.7%)	9 (25.0%)
Non-recognized	5	1 (20.0%)	1 (20.0%)	1 (20.0%)	2 (40.0%)	1 (20.0%)
County	18	12 (66.7%)	4 (22.2%)	2 (11.1%)	0 (0.0%)	0 (0.0%)
City	14	5 (35.7%)	2 (14.3%)	2 (14.3%)	0 (0.0%)	4 (28.6%)

* We excluded from the total responses two Tribal respondents that may not be receiving notifications because they do not share jurisdiction with counties that permit cannabis cultivation.
† The comparative statement on the Agency Survey was "The current permitting process protects tribal lands and cultural resources."

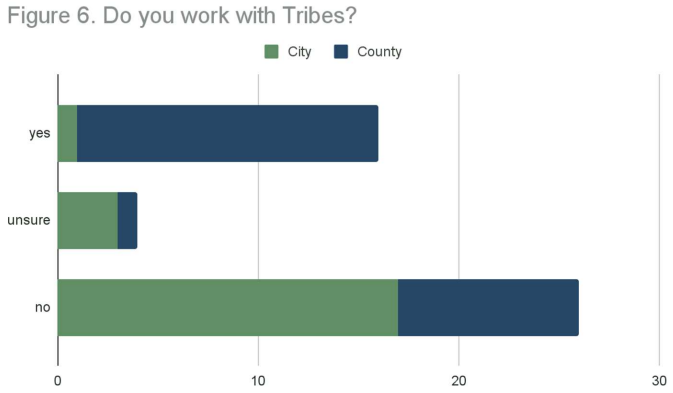
Respondents were noticeably split on each issue, with some respondents clearly having a better experience than others. Positive ratings also steadily declined as our questions progressed from notification and consultation toward mitigating impacts. Out of 32 respondents, 34% (n=11) “strongly agree” and 22% (n=7) “strongly disagree” that they are being notified, and out

of 33 respondents, 32% (n=11) "strongly agree" and 30% (n=10) "strongly disagree" that they are being consulted.[10] With regard to county responsiveness to Tribal concerns and whether the county resolves Tribal concerns in an appropriate and timely way, the highest ranking category was "neither agree nor disagree." When it comes to whether county and state agencies are mitigating impacts to TCRs, those agencies received the lowest ratings. Out of 36 respondents, 42% (n=37) disagreed (Likert-scale ranking 1-2) that the county is doing a good job minimizing the impacts of cannabis on cultural sites and resources and 50% (n=18) disagreed that the state is doing a good job. Survey respondents were more neutral with regard to archeologists working in cannabis permitting. Out of 37 respondents, 57% (n=21) "neither agreed nor disagreed" that archeologists involved in cannabis permitting are responsive to Tribal concerns.

Agency respondents, by contrast, ranked themselves higher with regard to consultation and resource protection, with counties indicating more communication and familiarity with Tribal engagement than cities. To capture interaction broadly, we asked county and city respondents whether their office "works" with Tribes on permitting cannabis cultivation. Out of 25 county respondents, 60% (n=15) reported working with Tribes, 36% (n=9) reported to not working with Tribes, and one respondent was unsure. Of those, 9 reported sending notifications and corresponding with Tribes monthly (n=3), weekly (n=2) or rarely (n=4), and engaging in actual consultations for cannabis permitting monthly (n=4), weekly (n=1), or rarely (n=4). 8 reported mediating between Tribes and applicants monthly (2), weekly (1), rarely (3) and never (1). Several respondents noted that the frequency of correspondence with Tribes typically occurs on an as needed or per-application basis, when warranted by a Phase I study. One explained that they send site plans and applications for the Tribe to review. Out of 21 city agency respondents, 81% (n=17) reported that they do not work with Tribes and 16% (n=3) reported being unsure.

[10] Some Tribes who do not have culturally-affiliated areas that overlap with cannabis-permitting counties may not be receiving notifications or engaging in consultation for that reason. During the data cleaning phase of the project, we excluded survey responses (n=3) on notifications and consultations based on these parameters. In general, Tribes only receive notifications if the following conditions are met: 1) a Tribe registers their culturally-affiliated areas with the NAHC (which not all Tribes do for various reasons); 2) there is a (cannabis cultivation) project in a county that requires CEQA review and overlaps with that area; and 3) the county complies with the requirement to notify the corresponding Tribe. When Tribes do not receive notification, it is sometimes unclear which of these conditions was not met. In the survey results, the answer "neither agree nor disagree" to questions about notifications (n=6) and consultations (n=4) may signal a lack of engagement in those activities, rather than neutral feelings toward those activities.

Only one reported working with Tribes but noted that their office provides notifications, corresponds, consults, and mediates "rarely".



A strong majority of county respondents agreed (Likert-scale 4-5) that staff in their office is aware of Tribal lands and cultural resources within their permitting jurisdiction and that TCR protection is a topic of discussion in their office. County respondents reported that they have good relationships with Tribes when it comes to cannabis permitting and that their office is responsive to Tribal concerns. County respondents were also likely to report that Tribes are notified about possible impacts and consulted during the permitting process. Overall, they found that the cannabis permitting process protects Tribal Lands and cultural resources as well as ecosystems and environmental resources.

City respondents ranked themselves lower in each category. Out of 14 city respondents, only slightly over 50% (n=8) reported that staff in their office is aware of Tribal lands and cultural resources and slightly less than 50% (n=6) reported that TCRs are a topic of discussion in their office. Very few (21%) reported that they have good relationships with Tribes, although 50% (n=7) reported that their office is responsive to Tribal concerns. Very few agreed that Tribes are notified about possible impacts and even fewer are consulted. Overall, however, 50% (n=7) of city respondents agreed that the cannabis permitting process protects Tribal lands and cultural resources and 79% (n=11) agreed that it protects ecosystems and environmental resources.

Table 3: Additional Tribal responses

	n	strongly agree	somewhat agree	neither agree nor disagree	somewhat disagree	strongly disagree
When the Tribe has concerns about a proposed project, those concerns are resolved in an appropriate and timely way.						
Recognized	35	6 (17.1%)	8 (22.9%)	10 (28.6%)	3 (8.6%)	8 (22.9%)
Non-recognized	6	1 (16.7%)	1 (16.7%)	2 (33.3%)	1 (16.7%)	1 (16.7%)
The State is doing a good job minimizing the impacts of cannabis on cultural sites and resources.						
Recognized	36	5 (13.9%)	2 (5.6%)	11 (30.6%)	9 (25.0%)	9 (25.0%)
Non-recognized	6	2 (33.3%)	0 (0.0%)	1 (16.7%)	2 (33.3%)	1 (16.7%)
The archeologists involved in cannabis permitting are responsive to tribal concerns.						
Recognized	37	5 (13.5%)	4 (10.8%)	21 (56.8%)	2 (5.4%)	5 (13.5%)
Non-recognized	6	2 (33.3%)	0 (0.0%)	1 (16.7%)	2 (33.3%)	1 (16.7%)

Table 4 Additional Agency responses

	n	strongly agree	somewhat agree	neither agree nor disagree	somewhat disagree	strongly disagree
Staff in my office are aware of Tribal lands and cultural resources in our permitting jurisdiction.						
County	18	13 (72.2%)	4 (22.2%)	0 (0.0%)	1 (5.6%)	0 (0.0%)
City	14	5 (35.7%)	3 (21.4%)	3 (21.4%)	2 (14.3%)	1 (7.1%)
My office has a good relationship with Tribes when it comes to cannabis permitting.						
County	18	7 (38.9%)	4 (22.2%)	7 (38.9%)	0 (0.0%)	0 (0.0%)
City	14	2 (14.3%)	1 (7.1%)	9 (64.3%)	1 (7.1%)	1 (7.1%)
Protection of Tribal lands and cultural resources is a topic of discussion in my office.						
County	18	8 (44.4%)	7 (38.9%)	3 (16.7%)	0 (0.0%)	0 (0.0%)
City	14	3 (21.4%)	3 (21.4%)	4 (28.6%)	0 (0.0%)	4 (28.6%)
The current permitting process protects environmental resources and ecosystems in California.						
County	18	11 (61.1%)	7 (38.9%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
City	14	6 (42.9%)	5 (35.7%)	3 (21.4%)	0 (0.0%)	1 (7.1%)

4.6 Improving cannabis permitting and government to government consultation

The final set of questions asked Tribal and Agency respondents about the strengths and challenges of intergovernmental consultation and about policy changes or resources that would help guide environmental decision making. 21 Tribal respondents wrote short answers about what measures would strengthen consultation. Of those, 38% (n=8) referenced consultation with three emphasizing the importance of early consultation, two advocating for Tribes to have more decision making authority in the permitting process, and one recommending additional funding to support consultation. Underscoring Tribal sovereignty, one respondent wrote: “Tribes should be able to give recommendations that require or cause mitigation to be initiated by the county.” This statement indicates that consultation does not always lead to recommended actions, which is one reason why Tribes ranked agencies higher with regard to consultation than the mitigation of impacts. Two respondents recommended funding for cultural and environmental assessments and staff. Two respondents noted that the permitting process is opaque and should be clarified. Three respondents recommended increasing funding and efforts for enforcement.

Enforcement seems to be especially an issue around illegal grows. As one respondent wrote: “The bulk of ancestral territory lies in areas where cannabis grows are illegal. The main

issue is illegal grow operations, lack of County resources to effectively deal with them, and lack of process to notify/consult with Tribes about the illegal facility and impacts to TCRs as a result of its removal." This statement suggests that the removal of illegal grows is hazardous to TCRs, although there does not currently exist a process for including Tribes in consultation about these removals.

Finally, 24% (n=5) noted the inability of Tribes to participate in the state cannabis market, with several respondents mentioning barriers at the federal level and one emphasizing that the state should allow for permitting on Native lands. Most responses of this kind were framed as an issue of Tribal sovereignty and self-determination.

On the Agency Survey, we asked about the benefits and challenges of government to government consultation. Out of 24 county respondents on the benefits of intergovernmental relations, 22% (n=5) observed that intergovernmental consultation resulted in better protections for TCRs and 17% (n=4) noted improved communication. Three respondents mentioned that it leads to shared learning and knowledge, two noted that it streamlines the permitting process, and two observed that it leads to a better net result.

In short answers, agency respondents across all three jurisdictional levels explained the challenges of government-to-government coordination and consultation around cannabis permitting in greater detail. City and county agencies were most likely to highlight the challenge of aligning policies across regulatory agencies or mention inconsistent and duplicative policy processes, especially around CEQA compliance and drafting initial studies. State agents were most likely to cite TCR protection as a challenge.

Out of 24 total respondents, 46% (N=11) mentioned policy challenges, with seven of those respondents referencing policy and regulatory differences that make policy processes duplicative or inconsistent. Two noted that the policy scope is too limited, with one noting the inadequacy of buffer zones and another noting the prevalence of CEQA exemptions. 25% (n=6) noted that communication and/or coordination continues to be a challenge. 17% (n=4) cited a lack of Tribal and Agency staff resources and capacity. 13% (n=3) cited information challenges, with two noting that the lack of data on Tribal lands for front-end processing is a challenge and

Table 5 Barriers to Tribal participation in cannabis permitting

What are the barriers to involving Tribes more fully in the cannabis permitting process?

	n	Agency resources or capacity	Tribal resources or capacity	Lack of maps and survey data	Lack of staff training	Lack of G-2-G coordination	Inadequate internal policies	Complexity of permitting process	Not Applicable
City	8	1 (12.5%)	2 (25.0%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	8 (100.0%)
County	17	5 (29.4%)	6 (35.3%)	5 (29.4%)	4 (23.5%)	3 (17.6%)	3 (17.6%)	9 (52.9%)	3 (17.6%)
State	4	2 (50.0%)	3 (75.0%)	1 (25%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1 (25%)	0 (0.0%)

*"Not applicable" indicates that these agencies do not consult.

one saying that sharing information with external agencies requires labor intensive MOUs. One respondent cited a lack of respect for TCRs and two cited project delays as a challenge.

4.7 Information, tools, and resources to strengthen consultation

The final question on both surveys asked respondents to identify information, tools, and resources to support consultation around permitting and environmental decision making. Out of 19 Tribal respondents, 47% (n=9) mentioned GIS layers for cannabis grows, with specific layers for permit data and environmental conditions. One respondent wrote: "GIS data - e.g., robust geodatabases with various layers (e.g., land ownership, cultural resources, active grows, hydrogeological, wildlife, soil, vegetation, etc.), basemaps, and useful metadata." Several respondents added that they would need staff, funding, training, and equipment to incorporate mapping resources into their workflow. Additionally, one respondent recommended each of the following: education for Tribes; cultural awareness training for agencies; interstate collaboration; a dedicated Tribal liaison and bi-annual meetings between Tribes and agencies; and stronger cultural monitoring at construction sites. One respondent eloquently wrote that consultation law and permitting data do not ultimately matter if Tribes are not empowered to share in decision making authority: "There are already court mandated requirements for Consultation, including in addition to State Consultation guidelines, all of which a Tribe CR rep will already have in hand and request from local government as needed. The permitting agency already provides the needed information for the decision making process. However the permitting agency fails to share decision making authority with Tribes and always differs from a scientific approach to data collection as opposed to allowing Tribes to decide which resources are important first. Without shared decision making authority, it's just manipulation."

When asked a similar question, city respondents, as before, were most likely to say that Tribal consultation does not apply to their agency and county respondents were most likely to recommend improving databases and maps. Out of 16 total agency respondents, 44% (n=7) mentioned databases, maps, or GIS, with 5 of those recommending increased access to data and

one recommending that Tribes have access to cannabis permitting data. Two mentioned consultation training resources, examples, and/or a "best practices" guide. Additionally, one respondent recommended the following: increased staffing for Tribes and agencies; a well monitoring program; a single point-person for CEQA coordination; and outreach material for Tribes to better understand the permitting process and opportunities for Tribal participation.

One state respondent offered three detailed suggestions for consideration, which we quote in full: "(1) Give state and local agencies access to more expansive geo-referenced screening data (for some Tribes, this is a sensitive and potentially controversial suggestion) to better identify proposed cannabis cultivation operations that could affect cultural resources and ancestral lands, thus improving the agencies' abilities to ensure appropriate protections are in place, (2) Develop and distribute to Tribes outreach materials explaining the licensing/permitting process(es) and opportunities for Tribal participation beyond the formal AB 52 consultation process, (3) Provide Tribes access to an integrated, geo-referenced statewide database of license/permit applications and approvals (incorporation of county data would likely be problematic)." While recommendations (2) and (3) would enhance Tribal efforts to meaningfully engage in the permitting process, recommendation (1) seems to miss the point that being able to identify and mitigate potential effects to cultural resources is precisely what consultation is all about. No database can replace consultation since Tribes give information on a need-to-know basis and must be directly involved in decision making to determine the sensitivity of a particular site and appropriate mitigation measures.

4. Discussion

5.1 Evaluating the implementation of California Assembly Bill 52

Does California Assembly Bill 52 support Tribes' abilities to protect Tribal Cultural Resources from the impacts of regulated cannabis cultivation? Experiences vary. On the whole, Tribal respondents were split with regard to experiences with county permitting agencies. Slightly more Tribal respondents were having good experiences with notifications, consultations, and agency responsiveness than those who were not, although this balance tipped in the other direction when it came to mitigating impacts to cultural sites and resources.

From this we can draw several inferences. First, not all agencies that permit cannabis are consistently consulting with Tribes, which means either that they are out of compliance or that they are bypassing CEQA, whether by applying exemptions or by relying exclusively on a Programmatic Environmental Impact Report (PEIR) for permit approvals. If Tribal consultation is necessary for protecting TCRs, then there needs to be both better enforcement mechanisms to ensure AB 52 compliance and measures to close legal loopholes for circumventing consultation. Second, different Tribes are having different experiences with different counties and possibly with the same county. Some counties are likely more fully compliant with their mandate to notify and consult than other counties, and some counties may be notifying and consulting with only some of the Tribes that want to be notified and consulted. Third, we infer that notification and

consultation does not guarantee agency responsiveness to Tribal concerns or the mitigation of impacts to TCRs. The drop in satisfaction among Tribal respondents between notifications and consultations, on one hand, and mitigation of impacts, on the other, indicates that agencies may be fulfilling the minimum requirements under the law, but not consulting in good faith with Tribes, nor incorporating Tribes' concerns in environmental decision making.

County survey respondents, meanwhile, ranked themselves much more favorably with regard to their formal interactions with Tribal governments than Tribal respondents ranked them. Nearly twice as many county respondents "strongly agreed" that they send notifications and engage in consultation than their Tribal counterparts, and this margin widens when it comes to more subjective categories such as agency responsiveness to Tribal concerns and mitigation of impacts to TCRs. We believe that this discrepancy is due in part to 1) counties over-reporting on their formal obligations under AB 52 and 2) differences in understanding between Tribes and counties regarding what counts as notifications, consultations, responsiveness, and TCRs. For example, based on the discrepancy between Tribal concerns and agency awareness discussed above, it is possible that most agency respondents believe they are mitigating impacts to TCRs because they are using a narrower definition of TCRs that does not include water, ecosystems, and wildlife. By the same token, agencies may believe sending an email or making a phone call fulfills their obligation to notify or consult, whereas Tribal respondents may define notification and consultation more substantially. The discrepancy may thus reflect different understandings of what is meant by each term.

Interpretive differences and poor enforcement mechanisms regarding the law point to a central takeaway of this study: Tribal consultation and resource protection law only create formal doctrine that it is up to decision makers to interpret and implement as they see fit. When Tribes are not authorized to interpret, implement, and enforce the law, public agencies and private developers are more likely to be able to turn the law to their favor. As the literature on Tribal consultation makes clear, agency discretion in these matters works against the ability of resource protection laws to fulfill their intention. For example, Humboldt County approved conditional use permits for Rolling Meadow Ranch, an industrial-scale cannabis grow facility, despite protest from a coalition of local landowners and the Sinkyone Tribe, which presented evidence of village and gravesites within the area proposed for development. Agency discretion makes it possible for an agency to consider a Tribe's request to stop or modify a project and decide to disregard the request, leaving the Tribe no other recourse but to file a lawsuit on the basis of having provided "substantial evidence" of there being an adverse impact to a TCR.

Commented [7]: Added at the request of reviewer. Fact check.

In summary, this study of AB 52 implementation suggests that the statute is leading to a fair amount of consultation. This is remarkable in itself since, prior to AB 52, consultation at the local level was less frequent, granting fewer opportunities to build long-term relationships between Tribes and local governments or to incorporate Tribal priorities into land use decision making. That some Tribal respondents responded positively regarding agency interactions is an indication of improvements in intergovernmental relations. At the same time, wide discrepancies between Tribal and agency reports on consultation and low levels of agency awareness around

Tribal concerns suggests that Tribal-agency partnerships can be significantly strengthened to support Tribal sovereignty over ancestral lands and cultural resources.

5.2 Improving consultation and resource protection in California

This section highlights lessons from the two surveys in terms of areas for improvement in Tribal consultation and resource protection. While we focus primarily on the survey data, the authors draw on additional insights gathered from interviews with Tribal Historical Preservation Officers, Tribal Chairs, agency planners and regulatory specialists, archeologists, as well as on informal conversations we have had presenting this work at professional meetings. What follows is only a short list of areas for improvement and is not meant to be exhaustive.

Improvements in the legal context

Although local jurisdictions are the lead CEQA agencies for cannabis permitting, county planning offices are not always consulting with Tribes and city offices are doing almost no Tribal consultation. As mentioned above, some projects are being exempted, sometimes improperly, from CEQA, and other projects are receiving permits exclusively based on Programmatic EIRs. As an appendix to CEQA, AB 52 only applies where CEQA goes into effect. When CEQA is not triggered, there is no obligation to consult under AB 52.

There is no way to fix this loophole from within CEQA since the problem is that CEQA is being circumvented. Moreover, some Tribes are dissatisfied that the requirement to consult falls under CEQA, since they have concerns about the ability of CEQA, which was not designed for cultural resource protection, to adequately work for this purpose and since many believe there should be a separate process for consultation among sovereign nations. Hence, legal reform to create a "stand alone" mechanism for Tribal consultation surrounding resource protection would avoid CEQA's limitations and may better support Tribal sovereignty.

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Improvements in the consultation process

Tribes want to be consulted "early and often," but they frequently find that consultation is treated as a "box-checking" exercise during or even at the end of permitting. Failure to consult early in the process often leads to poor outcomes, since projects get "locked in" once they begin and more so as they progress. Despite the mandate to engage in "good faith" and "meaningful consultation," which is in the language of AB 52, the results show that many Tribes feel that they are not treated with appropriate dignity and respect and that consultation often does not lead to adequate resource protections. Tribes that have experienced violations of AB 52 may have little recourse but to appeal to non-responsive state agencies or to launch protracted and costly legal campaigns (Ivan Senock, *pers comm*, 2023). Tribal consultation should not rely on "good faith" actors. There must be enforcement mechanisms – i.e. "teeth" – to ensure compliance.

One way to prevent agencies from treating consultation as a box-checking exercise and to support Tribal sovereignty is to grant Tribes decision making authority. If Tribes have the power to stop a project that will damage cultural resources, agencies will be forced to engage in "good faith" consultation in an appropriate and timely manner. As AB 52 reaffirms in section 1b4, Tribes should be considered the experts in evaluating the presence and integrity of TCRs and determining their eligibility for official registries. However, the state should go further than recognizing Tribal expertise. As the law is currently written in section 1b5, culturally appropriate mitigation or avoidance of impacts are still only considered rather than mandated within the CEQA process at the discretion of the decision making body of the lead agency. Procedural justice through consultation entails not only opportunities to provide input into and feedback on decision making processes, but also control over outcomes. The degree to which consultation actually leads to acceptable outcomes for Tribes is a good litmus test for how well consultation is working.

Improvements in the "infrastructure" of consultation

Consultation must also be strengthened through long-term Tribal-agency relationships. As this study demonstrates, consultation and resource protection law is often a necessary but insufficient means to achieve the desired outcomes. This is because the law requires *people* to interpret, implement, and enforce it. From the standpoint of cultural resource protection, the best way to ensure the appropriate interpretation, implementation, and enforcement of the law is for consulting parties to have strong relationships. In some cases, these relationships may even exceed weaknesses in the law. For example, Humboldt County has developed a consultation process similar to AB 52 that they apply even when CEQA is not triggered.

Meaningful consultation rests upon a range of tangible and intangible prior conditions, without which consultation law by itself is insufficient. We can call these conditions the essential "infrastructure" of effective consultation. Among the intangible infrastructure of consultation are relationships of trust and mutuality, institutional knowledge, cultural awareness, communication skills, and equality among decision makers. When survey respondents note complexity in the permitting process, the challenge of staff turnover, or the need for more training and respect for TCRs, they are pointing toward the intangible infrastructure of consultation. Making information available is not enough, however. While both Tribes and agencies mention that mapping layers would help their efforts, a Tribal respondent noted that they would need additional funding for equipment, training, and staff to be able to use mapping software. Respondents also mentioned funding needs for cultural and environmental assessments, enforcement, and consultation itself. These requests for funding and personnel are not a separate issue from consultation, but part of the tangible infrastructure that makes consultation effective.

Without the tangible and intangible infrastructure of consultation, AB 52 is rendered less effective for protecting cultural resources. At the same time, AB 52 helps to create some of the intangible infrastructure needed to improve consultation. Some agencies are becoming familiar

with their Tribal counterparts for the first time through AB 52 consultations, and this in itself is an advancement toward creating conditions of mutual understanding, accountability, and respect.

5.3 Future research

Additional research is needed to understand the barriers Tribes face with respect to consultation and resource protection. Qualitative research on how local jurisdictions are interacting with and sometimes circumventing CEQA and AB 52 would help to explain why city jurisdictions are not consulting and where consultation policy can be further strengthened. A comparative study of agency and Tribal perspectives on the elements of effective consultation and the definition of Tribal Cultural Resources would be especially helpful to identify areas of miscommunication and future learning in the field of cultural resource management. Qualitative research on challenges that Tribes and agencies face in the consultation process and effective strategies to strengthen Tribal-agency partnerships would also be instructive beyond the California context for the fields of cultural resource management and government to government policy generally. In cannabis policy research, future studies should look at Tribal participation in the legal cannabis market (and barriers to participation) as well as ongoing issues surrounding illicit cannabis in California, impacts to TCRs, and effective mitigation measures.

Conclusion

Bringing Tribal consultation into environmental review under CEQA has the potential to enhance the role of Tribes in land use decision making beyond trust and reservation lands and to help build long-term partnerships between Tribal and local governments. In the interest of protecting Tribal Cultural Resources, local-level consultation introduces local knowledge and accountability into land use decisions.

As the case of cannabis permitting shows, AB 52 has led to more frequent consultations, which presumably is leading to stronger Tribal-agency relationships, more agency awareness of TCRs, and better protections for TCRs overall. However, effective consultation is not happening across the board. According to our survey, this is likely due in part to CEQA's limited scope as well as a lack of capacity and resources in both Tribal and agency offices, including inadequate funding, staff shortages, and poor information. Tribal-agency communication and coordination is further impeded by the complexity of the permitting process and inconsistent policies across jurisdictions. Some factors preventing meaningful consultation and mutually satisfying outcomes will improve with time, but others are systemic. Key recommendations coming from this survey are to: 1) require agencies to provide higher quality information so that consultation processes can be better informed; 2) fund Tribes to access and make proficient use of GIS and other mapping technologies, including funds for staff time, training, and equipment needs; and 3) reform policies such that Tribes have discretionary authority to stop or modify a project that

threatens TCRs. These and other changes are necessary infrastructure to support meaningful consultation.

AB 52 is landmark legislation for strengthening protections of Tribal Cultural Resources, affirming Tribal expertise, and giving Tribes a stronger position at the decision making table on non-reservation lands. However, the statute may be best understood as one more step toward codifying Tribal sovereignty over their ancestral lands and cultural heritage into law. Future statutes will advance further toward providing an adequate basis for cultural resource protection and Tribal self-determination.

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