

---

## SENATE COMMITTEE ON GOVERNANCE AND FINANCE

Senator Mike McGuire, Chair  
2019 - 2020 Regular

---

**Bill No:** AB 168  
**Author:** Aguiar-Curry  
**Version:** 7/1/19  
**Consultant:** Favorini-Csorba

**Hearing Date:** 7/10/19  
**Tax Levy:** No  
**Fiscal:** Yes

### ***HOUSING: STREAMLINED APPROVALS***

*Establishes a process to identify and mitigate potential impacts on tribal cultural resources from SB 35 projects.*

#### **Background**

**SB 35 (Wiener, 2017).** In 2017, the Legislature enacted a substantial package of legislation aimed at addressing the state's housing crisis. Among other legislation, the Legislature enacted SB 35 (Wiener, 2017) to provide a streamlined, ministerial process for approving housing developments that are in compliance with the applicable objective local planning standards—including the general plan, zoning ordinances, and objective design review standards. In addition, to be eligible for streamlining under SB 35, a specified percentage of the total housing units in the development must be affordable to lower-income households (those under 80 percent of area median income), as follows:

- 10 percent, if the locality has not issued building permits for enough above moderate-income—greater than 120 percent of area median income (AMI)—units to meet their regional housing needs allocation (RHNA);
- 50 percent, if the locality has not issued building permits for enough lower-income units to meet their regional housing needs allocation; or
- The percentage in a local inclusionary zoning ordinance if it is higher than the requirements above.

SB 35 also included certain requirements for labor standards, such as the use of a skilled and trained workforce on an eligible project, and sunsets on January 1, 2026. SB 35 was intended to ensure that developments that are consistent with local objective development standards, but face local opposition, are approved and constructed. All but 13 cities and counties in California are subject to some streamlining under SB 35 because they have not issued building permits to housing units sufficient to meet their RHNA at one or more income levels.

SB 35 included a long list of site criteria that disqualifies a project from being eligible for ministerial approval, including various environmentally sensitive areas and areas that are at elevated risk of natural disasters. The Legislature included these restrictions to ensure that SB 35 projects do not have unintended impacts on the physical environment. These restrictions are needed because the California Environmental Quality Act (CEQA), which requires the state and local governments to study and mitigate, to the extent feasible, the environmental impacts of proposed projects, does not apply to projects approved ministerially, as provided under SB 35.

**Tribal cultural sites.** According to the 2010 Census, California has the highest Native American population in the country, with approximately 720,000 people in the state who identify as Native American. There are currently 109 federally recognized Indian tribes in California and 78 entities petitioning for recognition. California tribes currently have nearly 100 separate reservations or Rancherias.

Tribal cultural resources are sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe. Tribal cultural resources are sometimes referred to as “sacred sites” more generally. Sacred sites may be burial grounds, important archaeological areas, or religious objects. They are culturally akin to churches, and are often sites of special ceremonies and healing. Tribal cultural resources are of central importance to Native American nations because Native religion and culture is essential to the survival of Native American/American Indian nations as a distinctive cultural and political group. Many Native Americans have land-based religions, meaning they practice their religion within specific geographic locations; their faith renders that land itself a sacred, living being.

In some instances, tribal cultural resources have been publicly identified, such as those included or determined to be eligible for inclusion in the California Register of Historical Resources or a local registry of historical resources. However, this is not always the case. Identification may require additional analysis and process, or a tribe may choose to not publicly disclose locations due to concerns that sites may be at risk for desecration, whether purposeful or not.

The Legislature first legally recognized and defined the phrase “Tribal Cultural Resources” in California under CEQA in AB 52 (Gatto, 2014). The primary intent of AB 52 was to include California Native American Tribes early in the environmental review process and to establish a new category of resources related to Native Americans that require consideration under CEQA.

AB 52 specified that any project that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment for the purposes of CEQA, and therefore must be analyzed. Once such a project has been identified, lead agencies must initiate a consultation with relevant tribes in the area to negotiate in good faith any necessary mitigation measures needed to avoid significant, adverse impacts to tribal cultural resources. If agreement is reached on mitigation measures, those measures must be included in the environmental document and enforced. If agreement isn’t reached and the parties negotiated in good faith, AB 52 established a list of alternative mitigation measures that, if feasible, can be considered to avoid or minimize significant, adverse impacts, including:

- Avoidance and preservation of the resources in place.
- Treating the resource with culturally appropriate dignity taking into account the tribal cultural values and meaning of the resource, including, but not limited to protecting: (1) the cultural character and integrity of the resource; (2) the traditional use of the resource; and (3) the confidentiality of the resource.
- Permanent conservation easements or other interests in real property, with culturally appropriate management criteria for the purposes of preserving or utilizing the resources or places.
- Protecting the resource.

The process established by AB 52 is crucial for a tribal community to participate in a consultation process to identify tribal cultural resources and mitigate any impact to those sites. However, SB 35 did not exclude sites that contain, or may contain, tribal cultural resources, unlike other sensitive sites. Moreover, because CEQA does not apply to SB 35 projects, neither does AB 52's process. The author wants to ensure that potential impacts on these resources from proposed SB 35 projects are identified and mitigated.

### **Proposed Law**

Assembly Bill 168 requires a local government, before it begins to review and approve an application, to engage in a scoping consultation with a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the development. The scoping consultation must be limited to determining whether any potential tribal resource is located on the development site.

The bill defines "scoping consultation" as 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, with the goal of determining whether a tribal cultural resource is located on the development site.

AB 168 requires the scoping consultation process to be conducted in a way that is mutually respectful of each party's sovereignty, and recognizes that California Native American tribes traditionally and culturally affiliated with a geographic area have knowledge and expertise concerning the resources at issue. Any determination will take into account the significance of the resource to the culturally affiliated California Native American tribe.

If, after completing the scoping consultation, it is determined that no potential tribal cultural resource is located on the development site, the local government may review and approve the SB 35 application. However, if it is determined that a potential tribal cultural resource is located on the development site, AB 168 prohibits the local government from approving the SB 35 application until the local government has consulted with a California Native American tribe and followed the requirements under AB 52.

The bill entitles a California Native American tribe that participates in the consultation process to all the rights and remedies that the tribe would be entitled to in connection with the AB 52 process. AB 168 also provides that the requirements under the bill shall not be construed to apply any provisions of CEQA except those provisions specifically indicated in the AB 52 process.

AB 168 states the Legislature's intent that the bill:

- Clarifies that SB 35 did not intend to divest California Native American tribes of input during the streamlined approval process or CEQA process.
- Implements the California Native American tribe consultation process established by AB 52, should there be a potential for tribal resources to be present on a site considered by a development using SB 35.

AB 168 makes additional findings and declarations to support its purposes.

### **State Revenue Impact**

No estimate.

### **Comments**

1. Purpose of the bill. According to the author, “AB 168 is consistent with California laws, which protect tribal lands. Without this bill, tribal cultural resources may be subject to unwanted destruction and desecration in favor of housing developments. We have lost much of our State’s Native history, and once a religious or cultural artifact, site, or burial ground is lost, it cannot be replaced. To honor California’s history and diversity, it is important that we continue to consult with Native American tribes and protect tribal cultural resources. Protecting these sacred places will ensure that generations of Californians to come can value the sovereignty of Native American tribes and communities.”

2. Work in progress. The Legislature enacted SB 35 to unlock development in areas that need housing—as measured by whether the jurisdiction has met their regional housing needs—but have not accomplished that goal because of local opposition. Since these projects are streamlined and ministerially approved, they can skip steps in the development approval process that can be used to stall or stop projects. One of these steps that an SB 35 project avoids is CEQA analysis. The Legislature mitigated the potential for collateral damage on environmentally sensitive sites by simply excluding those sites from eligibility under SB 35. But, one aspect that SB 35 did not account for was the identification of tribal cultural resources that happens through the AB 52 process. AB 168 establishes a process to identify these resources and to mitigate damage to them where they exist, without undermining the spirit of SB 35 approval process to ensure rapid approvals of housing projects. It should be noted that writing a bill that successfully strikes this balance is challenging, and conversations on the bill are ongoing. The Committee may wish to allow these discussions to continue to occur, and to remain engaged to ensure that there is resolution prior to the bill being taken up by the full Senate.

3. Mandate. The California Constitution requires the state to reimburse local governments for the costs of new or expanded state mandated local programs. Because AB 168 imposes new requirements on a local government that receives an application for a housing development that is subject to SB 35’s process, Legislative Counsel says that it imposes a new state mandate. But the bill disclaims the state’s responsibility for reimbursing local agencies by including findings and declarations that local agencies may levy fees to cover the costs of the increased level of service.

4. Incoming! The Senate Rules Committee has ordered a triple-referral of AB 168: first to the Senate Housing Committee, which approved AB 168 at its July 2<sup>nd</sup> meeting on a vote of 11-0, second to the Senate Environmental Quality Committee, which approved AB 168 at its July 3<sup>rd</sup> meeting on a vote of 7-0, and then finally to the Senate Governance and Finance Committee. The Committee is hearing the bill as the committee of third reference.

**Assembly Actions**

Assembly Housing and Community Development Committee:	7-0
Assembly Floor:	76-0

**Support and Opposition** (7/5/19)

Support: Big Valley Band Of Pomo Indians; Dry Creek Rancheria Band Of Pomo Indians; Fernandeno Tataviam Band Of Mission Indians; Fernandeno Tataviam Band Of Mission Indians; Habematolel Pomo Of Upper Lake; Jamul Indian Village Of California; Middletown Rancheria; Mooretown Rancheria; Pala Band Of Mission Indians; Tolowa Dee-Ni' Nation; Tule River Tribe; Wilton Rancheria; Yocha Dehe Wintun Nation

Opposition: Unknown.

-- END --