

Recommendations for more effective Tribal consultation

For the recommendations below, please note that “agencies” includes local governments unless otherwise noted.

Confidentiality

Confidentiality of Tribal information is an essential element and must be ensured before there is consultation on protecting Tribal cultural resources and places.

- Agencies should consider how a Tribe may want to limit disclosure of confidential information, while ensuring Tribal input in determining the existence of Tribal cultural resource.
- Tribe and agency develop a nondisclosure agreement/protocol to protect confidentiality of Tribal information.
- Limit sharing of information to one or two people in agency. Limit recording of notes that disclose confidential information. Applicants should not be present during consultation, unless Tribes agree.
- Provide legal recourse for confidentiality violations.

Relationships

Numerous Tribes stressed the importance of having positive, ongoing relationships with decision-makers, relationships that require both sides to invest time and effort into building:

- Good relationships can serve a variety of purposes. They can provide opportunities for agencies/local governments to better understand Tribal culture and concerns. In addition, they can be the basis for two-way communication between Tribes and agencies about upcoming projects and planning apart from formal consultation. Relationships also allow for less formal but still collaborative decision-making to take place in an environment where both parties have a better understanding of the other.
 - [Beyond relationships, Tribes’ roles in decision-making can be enhanced through joint management arrangements and becoming members of decision-making body.]
- There are multiple approaches to creating ongoing communication between Tribes and agencies outside of formal consultations. These include establishing ongoing communications and regular meetings with Tribes to provide information and consider Tribal concerns as to upcoming and long-term plans and projects; establishing Tribal advisory committees to address and trouble-shoot issues in the

consultation process or for planning or project development; and creating joint protocols between the Tribe and agency as to standards and expectations for consultation and communication.

- To develop personal relationships, agency personnel can show respect for Tribal cultural and spiritual values, make additional efforts to get to know Tribes, and attend Tribal events.
- Throughout, it is important to maintain an attitude of respect on both sides.

Resources/limiting burden of consultation on Tribes

The majority of Tribes and overwhelming majority of non-federally recognized Tribes identified limited resources as constraining effective participation in consultation.

Providing more resources to Tribes could include:

- Provide funding to Tribes for additional resources or personnel to research and manage data, map Tribal resources, provide education to Tribal members, attend consultations, develop relationships with agencies, and provide additional expertise.
- Increase funding to provide for more than one THPO position per Tribe.
- Provide funding to NRF Tribes.
- Generally, compensate Tribal time and knowledge. Compensate Tribal traditional knowledge holders at rates equivalent to that provided to other subject matter experts such as archaeologists for their knowledge and skills, following ACHP section 106 standards. Compensate Tribal members for initial and subsequent cultural surveys, participation in meetings, and any other time required.
- Agencies build up resources to assist Tribes with consultation, including staff or Tribal liaison dedicated to facilitating communication and consultation with Tribes.
- Agencies/state government provide dedicated staff paid to represent groups of Tribes and their concerns in ongoing communications and for consultation and maintaining relationships with agencies at multiple levels.

Sources of additional funding could include:

- New and expanded sources of funding/financing—Federal (NPS-funded THPO for each federally recognized Tribe), state (fund THPO-equivalent for non-federally recognized Tribes)—to which developers/proponents contribute as part of application fee.
- Reduce barriers to accessing/applying for funding—simplify the Federal tax model (remove the need for non-federally recognized Tribes to form 501(c)(3) organizations) and eliminate waivers of Tribal sovereign immunity as a condition for receiving funding. Assist with completing applications, including direct and technical assistance and capacity building

- Developer application fee to fund Tribally conducted cultural resource surveys.
- Agency/local government line-item budgetary allocation for consultation, on-going Tribal input/ advisory committee participation.

Additional approaches to limit the burden of consultations on Tribes could include:

- Tribes and agencies could collaborate on decisions and bring related projects into a single decision-making process. Consolidation, planning and coordination between agencies to reduce duplicative consultation requests. Inform Tribes about projects ahead of time, so as to have input before key decisions are made, sometimes alleviating the need for formal consultation. *[see relationships]*
- Joint consultation where multiple Tribes collaborate to share resources and plan strategy and where Tribes agree to joint consultation.
- Agencies ensure that they do not send unrelated notices to Tribes.
- State-level ombudsman office to intake, process, and disseminate information about projects triggering consultation. All lead agencies and Tribes would have access to a digital system—linked to CEQAnet or a similar database for other states and jurisdictions—for submitting notifications; making and accepting or declining consultation requests; providing, requesting, and accessing information; scheduling and logging notes of and outcomes from formal consultation; tracking implementation and monitoring; and more. A centralized advocate could both vet and provide recommendations and draft letters and other documents for Tribes.

Education

Many Tribal respondents to the survey expressed that agencies need additional information on the consultation laws. Some NFR Tribes also sought more information for themselves.

- Where needed, ensure training and learning opportunities for agencies/local governments on implementation of the consultation laws and on the culture and history of Tribes with which they may consult. Include issues of Tribal sovereignty and the government-to-government relationship. Give Tribes opportunity (paid) to design, provide and/or participate in training.
- Training for judges, including in conjunction with Tribes as subject matter experts.
- Centralized state agency to serve as clearinghouse for training, standards and resources for lead agencies.
- Connect those Tribes that are interested with free educational resources/training on the consultation laws, Tribes' rights under the laws, and agencies' operations.

Notification

Notification is the first step in consultation. Key issues are when to notify Tribes, who (and how) to contact, and information to provide.

When to notify:

- Notification should occur early enough for Tribe's input to be capable of altering the project's outcome, early enough to allow for changes in the plans/project before the CRM report is done, and prior to the lead agency preparing the environmental document and seeking project funding.
- Move the trigger for notification to earlier in the process. Clearly define the trigger. (Could be done by statute or ordinance)
- Provide a more flexible time-frame for responding to a notice. Such accommodation could also be made through a joint protocol.

Who to notify:

- Ensure that notification is sent to the appropriate Tribal contact. Ensure that local governments follow the formal procedure of contacting NAHC for every project. Agency should follow up to multiple contacts if there is no initial response. [counties also avoid sending irrelevant notices to Tribes whose territory is not involved]
- NAHC updates its lists of Tribal contacts regularly, at least on a yearly basis.
- Provide guidance for resolving discrepancies in the lists of Tribes contacted under SB 18/AB 52, with Tribal input.
- A suggestion to reduce conflict among Tribes is to require Tribes to have an ancestral connection to the land to qualify for consultation.

What information to provide:

- Provide sufficient, not overwhelming information; readily provide follow-up information that the Tribe requests promptly *without charge* and in the format requested.

Consultation timeline and process

Agencies bear the burden of compliance with statutes and thus must ensure that the procedures followed are adequate to engage Tribes in effective consultation, which requires being responsive to Tribal needs and concerns.

- Defer to the Tribe's preferred consultation procedures/protocol if available.

- When needed by Tribes, provide a flexible timeline for responding to the invitation for consultation, in accordance with the Tribe's capacity. *[see notice procedures]* Provide timeline conducive to Tribe's schedule in scheduling/ managing consultation process.
- Consultation takes place between decision-makers (high level) or people authorized to speak and make decisions for the agency and Tribe.
- Defer to Tribe's preferences for venue, e.g., phone calls, written communication, video calls, physical venue at convenient location for Tribe.
- Agendas should be mutually agreed upon and flexible.
- Allow for the consultation process to provide an opportunity for education, to fill gaps in the agency's understanding of the Tribe's culture, history, and concerns.
- Agencies should not make significant decisions prior to conclusion of consultation.
- Ensure equitable treatment of and engagement with federally recognized and non-federally recognized Tribes.
- Clarify consultation requirements/procedures when joint federal-state/local actions, especially for non-federally recognized Tribes. Clarify/expand consultation requirements for non-federally recognized Tribes when state agencies consult both on Tribal cultural resources and those issues they do not considered covered under SB 18 or AB 52.
- Ensure clear communication: Agencies should communicate clearly with Tribes using plain language and avoid acronyms and technical terminology. Be forthcoming and honest as to what is and is not feasible, including on project redesign options and mitigation measures.

Consideration of Tribal expertise/indigenous knowledge

A majority of Tribal respondents indicated that agencies do not give sufficient weight to Tribal expertise and Indigenous Knowledge in making decisions.

- There should be early consideration of Tribal expertise/Indigenous knowledge together with that of archaeologist in cultural resource survey and report.
- Pre-permit/initial cultural resource surveys should involve Tribes if they wish to be involved, not just CRM firms and archaeologists. Don't allow a CRM's initial finding of no Tribal cultural resources or sites to determine whether to contact Tribes for consultation.
- Agencies prioritize working with CRM firms/archaeologists that have good working relationships with Tribes.
- Tribal staff involved should be paid for the initial survey at competitive rates. *[see resources]*
- Impose penalty for failure of CRM firms/archaeologists to consult with Tribes. (?)

- Tribal knowledge is prioritized over CRM firm/Archaeological knowledge or at least given equal weight. Defer to Tribal knowledge over that of archaeologist in case of conflict.
- Acknowledge and incorporate Tribal expertise/points of view as to identifying cultural resources, their significance, and impacts on Tribal cultural resources [*relate to IHIs*]. Update the definitions of TCR, TTCP, and “substantial evidence” so that Tribes determine the cultural place/resource and its significance. Address the conflict in worldviews between the agency and Tribe with innovative approaches, such as Indigenous Health Indicators.
- Acknowledgement (in practice, policy or statute) that TCRs/TTCPs may be holistic, reliant on connection to other cultural elements and/or exist at the landscape level, depending on Tribe’s understanding of them. Recognize that considering TCRs in isolation can fail to acknowledge the significance of the TCR to Tribes.
- Include current and evolving value of TCRs to Tribes, not only historical value. [SB 52]
- For plants, use the state-wide plant database to help identify culturally important plants.

Outcomes/creative mitigation

Early involvement should allow for full consideration of alternatives and ways to avoid impacts as much as possible. Tribes seek the ability to ensure that a project avoids cultural resources, to make changes in design ahead of construction, and/or use other creative mitigation measures that are implemented before final decisions are made on the design and location of the project.

- Share information proactively with Tribes as to range of potential mitigation measures available.
- Some Tribes suggest changing the laws to require a Tribe’s assent for any project or cultural project related to the Tribe.
- Outcomes should provide opportunities for healing for Tribal members, which would be defined by the Tribe.
- Commitment to resolving issues through consultation and achieving consensus (on both sides) [DCR]
- Ability for Tribes to “veto” (or require significant redesign of) projects whose impacts to TCR/TTCP/TCP cannot be sufficiently mitigated.
- A state clearinghouse can investigate—with Tribal, lead agency, developer, and expert input—a wide range of innovative and practicable mitigation measures. Common examples at the present include hiring Tribal cultural monitors, avoidance, cultural easements, cultural resource surveys by Tribes (including through tools like LIDAR), redesigning a project, preservation in place, curation, and construction worker cultural sensitivity training. Less common and more innovative examples include: Educational signage; murals celebrating the Tribe and its history in that area; granting

cultural easements to Tribes (such that the site will never be developed); donating to local colleges' Native American Studies departments; planting native plant gardens; distributing flyers with information on the site's Tribal cultural heritage to residents of a new development built on the site; and reburying or relocating cultural items.

Accountability

Sometimes carrying out the decisions made during consultation can be a problem. The lack of a "hook" to ensure agency accountability is also a gap in effective implementation. Suggestions cover several categories, from practice to changing the laws.

Written accounts of consultation decisions:

- Create written account of decisions made during consultation. Both parties can take detailed notes at meetings, with a designated person compiling a summary of what was discussed, agreed upon, and decided as next steps, for review and correction. Tribal review and feedback on all notes and agreements.
- Lead agencies demonstrate in writing how a Tribe's recommendations and provided information were seriously considered and incorporated into the decision-making process. If a lead agency decides against including all or part of the Tribe's recommendations in its own recommendation to decision-makers (e.g., planning commission, city council, county board of supervisors), it should thoroughly justify this in writing and provide opportunity for the Tribe to rebut and for both parties to return to the table. If the Tribe and agency do not reach agreement, document reasons why agreement was not reached.

Use of enforceable measures:

- Written agreement such as MOU or programmatic agreement as key step in accountability.
- Ensure agreed-upon mitigation measures are enforceable, including as permit conditions, binding agreements, and foreclosing conflicting land uses via zoning, conservation easements, and restrictive covenants in perpetuity, and/or enforceable contracts between Tribes and agencies/project proponents.

Implementation of agreements during construction:

- Need for coordination with construction firms to ensure implementation of decisions made.

Ongoing monitoring/management:

- Plan for future of project, which will likely involve maintenance and potential expansion, in which the Tribe is regularly apprised of ongoing action involving the project.
- Provide avenues for Tribes to be involved in ongoing management of cultural places after development and/or designation as open space.
- Monitoring role for Tribes for mitigation measures

Accessible dispute resolution options:

- Establish accessible means other than litigation of holding agencies/local governments accountable. Appeal processes.
- Dispute resolution process. Culturally appropriate, low-barrier dispute resolution process to resolve conflicts between Tribes and lead agencies.
- Lower barriers to Tribes pursuing litigation, including through broad standing requirements, establishment of fund to pay for legal costs, and better-informed courts
- State-level oversight body responsible for enforcing consultation laws and permit conditions, informed by joint Tribal/state and local lead agency advisory committee, and dissemination of annual status reports.

Legal consequences for violation of agreement, destruction of cultural resources

- Change laws to improve accountability of agencies in consultation.
- Strong repercussions for developers who damage cultural resources in violation of permit conditions, such as substantial punitive fines and making culturally appropriate compensation. Disallow payment of fines in lieu of mitigation.

Institutionalize agency procedures and knowledge

Creating institutional knowledge and practices can help ensure that good practices are internalized by the agency instead of being entirely dependent on individual staff.

- Lead agencies can build up and maintain core institutional knowledge through robust record-keeping practices to assist in staff transitions.
- Designate a Tribal Relations office, or Tribal Liaison at minimum, dedicated to engaging Tribes and representing the agency in the consultation process, facilitating compliance with consultation laws. Small jurisdictions with limited resources may—unless recipient of state or federal funding—designate as Tribal Liaison a staff member with multiple duties, given that person is qualified and can dedicate sufficient time and other resources to this role.

- Lead agencies benefit by adopting a set of written standard operating procedures, policies, protocols, and handbooks and training staff and elected officials on them on a regular cycle. Core policies can be strengthened by adopting them as municipal/county/state statutes/ordinances or regulations, or entered into as memoranda of understanding/agreement with Tribes.
- Establish inter- and intra-agency Tribal advisory committees (TACs), comprising agency staff and/or Tribal representatives, to help develop Tribal policies and protocols. Compensate any Tribal representatives for their time and expenses.

Ex ante protection of Tribal cultural resources and places

For more effective protection of Tribal resources and places, protections would be established before development was considered. They could include removing areas of Tribal cultural resources and places from consideration for development, sensitizing agencies to the potential for disturbance, and/or using long-term planning as a means of protection.

- Development at the regional (e.g., County) level of a robust database and associated mapping system, regularly updated, of traditional Tribal lands and known locations of TCR/TTCP/TCP. This includes enforceable safeguards for confidentiality and exemptions from public records requirements. Such a database could be used to indicate sites where development is inadvisable or even prohibited.
- Remove highly sensitive areas from consideration for development, such as by leveraging SB 18 more effectively, open-space zoning, down-zoning, dedicated parkland, transfer of land to Tribes with support for applications to take it into trust, conservation easements, prohibitions on development on/near TCR/TTCP/TCP, and restrictive covenants. State-level protections could include designating sites as historic or as protected areas.
- Obligation for developers/project proponents to conduct due diligence of potential project sites as part of the application and planning process. Lead agency staff would conduct investigations, including through the database referenced above, and provide pre-application notification to potentially impacted Tribes.
- Broader and higher-level planning to protect TCR/TCP/TTCP, rather than narrowing in on consultation on a project-by-project basis. This could be achieved by a state-level oversight body, statute, and/or regulations requiring higher-level planning and consultation by lead agencies, involving Tribes in state-level programmatic planning for infrastructure, protected areas, and more.