

## Overview of Consultation Recommendations for Tribes

### Introduction

This framework synthesizes data from a series of interviews ELI's research team conducted mid-to late 2022 and a survey of Tribes and follow-up interviews conducted in 2024. The interviews and survey focused on government-to-government consultation under AB 52 and SB 18. Interviewees included Tribal, state, and local government officials and staff in California, as well as legal, consulting firm, nonprofit, academic, and other experts with diverse experiences, and key individuals who contributed to the development of these laws and associated regulations, policies, and guidelines. Tribal survey respondents included Tribal Historic Preservation Officers, cultural staff, and Tribal officials. ELI's research team identified and categorized insights derived from the interviews and survey responses into 11 critical components of meaningful consultation within the context of California's consultation laws, regulations, and policies. Most components relate to the concept of advancing Tribal sovereignty. Below is a brief overview of each critical component identified by the project, followed by key recommendations for addressing each category.

### Critical Components & Recommendations for Tribes

- **Confidentiality:** Ensuring confidentiality of Tribal information when disclosing for the purpose of protecting cultural resources.
  - *Recommendations:* Limit information shared with agencies and/or persons with whom information shared. Request that agency records that Tribe raised cultural concerns. Require legally binding non-disclosure agreements that ensure confidentiality will be maintained without compromising the agencies' reliance on information provided.
- **Relationships:** Building ongoing relationships with agencies that can help build trust and enhance Tribal participation in decision-making.
  - *Recommendations:* Seek and participate in regular meetings and ongoing formal and informal communications with agencies. If desired, request representation in decision-making groups.
- **Resource Limitations & Burden of Consultation:** Ensuring adequate resources and other measures to address burden of consultation.
  - *Recommendations:* Request funds be made available to support participation in consultation. Require compensation for time and knowledge at rates commensurate with that paid to other subject matter experts. Advocate for developers to pay for Tribal cultural resource surveys. Consider working with agencies and/or other Tribes to develop efficiencies, including inter-agency and inter-Tribal coordination.
- **Education:** Need for agency officials to be knowledgeable about Tribal history and culture and consultation requirements and best practices. Some Tribes seek training on the consultation laws.
  - *Recommendations:* If desired, request free educational resources/training on agencies' operations, the consultation laws, and Tribal rights under the laws. Request and offer education, fairly compensated to Tribe, for agency officials on Tribal history and culture. Train on consultation procedures, where Tribe has expertise.

- **Early Notification:** Need for early notification to facilitate meaningful consultation.
  - *Recommendations:* Request use of a clearly defined notification trigger that occurs before project design. Provide up-to-date contact information for the Tribal office or official who will conduct consultation.
- **Timeline & Procedures:** Need for timely, responsive, and flexible processes.
  - *Recommendations:* Require consultation with agency officials who have decision-making authority. Express preferences for venue, agenda, and timeline, and demand consultation be completed before irreversible decisions regarding the proposed project are made. Develop joint protocols; develop Tribal consultation policy and communicate to agencies.
- **Tribal Expertise & Indigenous Knowledge:** Tribal knowledge and expertise is integral to making decisions that protect Tribal cultural resources.
  - *Recommendations:* Request inclusion in initial cultural resource surveys. Advocate for equal weight to be given to Tribal expertise. Inform agencies of CRM firms/archaeologists that collaborate respectfully and effectively with Tribes, reporting those that do not.
- **Outcomes & Creative Mitigation:** Tribal consultation should have real bearing on project decisions.
  - *Recommendations:* Seek free, prior, and informed consent, affirmative assent, or approximate consensus before project approval. Offer mitigation alternatives and require agencies to provide meaningful and feasible mitigation options. Request avoidance where no mitigation is possible due to the significance of the particular resource or place and significant alteration of projects.
- **Accountability:** Meaningful Tribal consultation requires accountability throughout project development.
  - *Recommendations:* Work with agencies to keep written records of consultation proceedings. Request written statement of how Tribal input is used. Reach enforceable agreements with legally cognizable components that detail dispute resolution options. Ensure agreement details are communicated to construction firms and that implementation is monitored.
- **Institutionalize Agency Procedures & Knowledge:** Processes and knowledge should endure changes in staff and governing administrations.
  - *Recommendations:* When possible, develop, refine, and document consultation preferences and communicate them to agency officials, requesting the agencies to train officials on the stated preferences. Participate in developing joint consultation protocols. Request that agencies create and provide adequate resources to designated Tribal relations offices within and/or across agencies, to facilitate ongoing mutual understanding and relationship.
- **Prior Protection of Tribal Resources & Places:** Long-term planning that protects sensitive Tribal resources and places can streamline later project development and consultation.
  - *Recommendations:* Consider collaborating with agencies to develop and maintain a robust database and mapping tool, sensitive to Tribal confidentiality, that can be used to identify places where project development is inapt or prohibited, reducing reliance on a piecemeal approach to consultation when appropriate.