

Tribal Consultation in Colorado

Part I: Tribal Relations

A. History of Tribal Relations

What is now the state of Colorado was originally home to the Indigenous Peoples of the Apache Nation, the Arapaho Nation, the Cheyenne Nation, the Ute Nation, the Pueblo Tribes, and the Shoshone Tribe.¹ The search for gold brought white settlers to the area in the 1800s, invading land that had already been federally recognized to the Cheyenne and Arapaho through the Fort Laramie Treaty, creating conflict.² Forced removal of the Arapaho and Cheyenne Tribes soon followed.³

In 1864, the second territorial governor of the Colorado territory, John Evans, issued two proclamations that targeted Indigenous peoples.⁴ The first proclamation directed “friendly Indians” to specific camps and threatened violence on those who did not comply.⁵ The second proclamation ordered Colorado citizens to “kill and destroy ... hostile Indians.”⁶ In November of 1864, Colorado volunteers massacred around 230 Cheyenne and Arapaho people in southeastern Colorado, known as the Sand Creek Massacre.⁷ While the 1864 proclamations were never lawful, they remained active for over a century until Governor Jared Polis officially rescinded them in 2021.⁸

¹ *Indigenous Tribes of Colorado*, AMERICAN LIBR. ASS'N, <https://www.ala.org/aboutala/offices/denver-colorado-tribes> (last visited June 26, 2024).

² *Treaty & Occupation*, SAND CREEK MASSACRE FOUND., <https://www.sandcreekmassacrefoundation.org/occupation> (last visited June 26, 2024).

³ *1864 Leadup & Massacre*, SAND CREEK MASSACRE FOUND., <https://www.sandcreekmassacrefoundation.org/massacre> (last visited June 26, 2024).

⁴ Colorado Exec. Order No. B-2021-002, Rescinding the 1864 Proclamations Issued by Territorial Governor John Evans (2021), <https://drive.google.com/file/d/1wfwd2woflVMtyPZOVsyArHMNzCnp0HTx/view>.

⁵ *Id.*

⁶ *Id.* (Further, Colorado citizens were urged to “take captive, and hold to their own private use and benefit, all property of said hostile Indians that they may capture, and receive all stolen property recovered from said Indians such reward as may be deemed proper and just therefor.”).

⁷ *Changing the Course of History*, SAND CREEK MASSACRE FOUND., <https://www.sandcreekmassacrefoundation.org/history> (last visited June 26, 2024).

⁸ Colorado Exec. Order No. B-2021-002, Rescinding the 1864 Proclamations Issued by Territorial Governor John Evans (2021), <https://drive.google.com/file/d/1wfwd2woflVMtyPZOVsyArHMNzCnp0HTx/view>.

The Southern Ute Indian Tribe and the Ute Mountain Ute Tribe are now the only two federally recognized Tribes in Colorado.⁹ The Treaty of 1868 established the first Ute reservation in Colorado, reducing Ute lands from approximately 56 million acres to about 18 million.¹⁰ In response to the discovery of valuable mineral deposits in the San Juan Mountains, the federal government negotiated the Brunot Agreement in 1873, further reducing Ute land by another 3.45 million acres and establishing much of the Reservation's modern boundaries.¹¹ The Weeminuche Band of the Ute Nation (known today as the Ute Mountain Ute Tribe) refused to accept allotments from the federal government and moved to the western portion of the reservation.¹²

B. Current Status

A more direct relationship between the Tribes and the state was formed in 1976, when the Colorado General Assembly created the Colorado Commission of Indian Affairs (CCIA) to serve as the official liaison between the two federally recognized Tribes and the state.¹³ CCIA's duties are mandated by Colorado statutes and include coordinating intergovernmental dealings between the Tribal governments and the state, including pending legislation that may affect Tribes in the state, and investigating and alleviating the needs of Tribes in Colorado.¹⁴

⁹ Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 88 Fed. Reg. 2112, 2114-15 (2023); *Southern Ute Indian Tribe*, COLO. COMM'N OF INDIAN AFFAIRS, <https://ccia.colorado.gov/tribes/southern-ute-indian-tribe> (last visited June 26, 2024); *Ute Mountain Ute Tribe*, COLO. COMM'N OF INDIAN AFFAIRS, <https://ccia.colorado.gov/tribes/ute-mountain-ute-tribe> (last visited June 26, 2024).

¹⁰ *Ute History and the Ute Mountain Ute Tribe*, COLO. ENCYCLOPEDIA, <https://coloradoencyclopedia.org/article/ute-history-and-ute-mountain-ute-tribe> (last visited June 26, 2026).

¹¹ *Id.*; BRUNOT AGREEMENT WITH UTE NATION (Apr. 29, 1874), <https://ocs.fortlewis.edu/forestPlan/roundtable/brunotAgreement.pdf>.

¹² *Ute History and the Ute Mountain Ute Tribe*, COLO. ENCYCLOPEDIA, <https://coloradoencyclopedia.org/article/ute-history-and-ute-mountain-ute-tribe> (last visited June 26, 2026).

¹³ COLO. REV. STAT. § 24-44-102.

¹⁴ COLO. REV. STAT. § 24-44-103. The statute provides both proactive (e.g., reviewing legislation) and reactive (e.g., alleviating current issues) duties. Additional duties listed in the statute include: cooperating and securing the assistance of local, state, and federal governments, or agencies, with programs on Indian affairs, reviewing legislation that affects American Indians in Colorado, and studying the current status of recognition of American Indian groups in Colorado.

Part II: State Consultation Governance Documents

Colorado does not have any state laws requiring consultation between state agencies and Tribes. As such, most state agencies are not required to consult with Tribes.¹⁵ However, the Colorado Commission of Indian Affairs published a State-Tribal Consultation Guide, which identifies circumstances under which it recommends conducting Tribal consultation and outlines consultation best practices. Additionally, multiple state agencies have developed consultation resources to guide their engagement in Tribal consultation.

A. Colorado Commission of Indian Affairs

The CCIA Enabling Statute established the role and duties of the CCIA as the official liaison between the Southern Ute Tribe and the Ute Mountain Ute Tribe and the Colorado state government.¹⁶ CCIA duties include reviewing all proposed legislation affecting American Indians in Colorado and making legislative recommendations.¹⁷ As for consultation activities, the CCIA has a duty to “coordinate intergovernmental dealings” between the state and Tribes.¹⁸ Of the eleven voting members of the CCIA, there must be two official representatives each from the Southern Ute and Ute Mountain Ute Tribes.¹⁹ The CCIA also includes the executive directors of the department of human services, the department of public health and environment, the department of natural resources, and the department of local affairs.²⁰ And, as the CCIA deems appropriate, it shall consult “with other persons...including representatives of other principal departments of state government, political subdivisions, organizations with experience in American Indian legal matters, or other such entities.”²¹ CCIA is also authorized to create special committees to address Tribal needs.²²

Though not required by the Enabling Statute, the CCIA published the State-Tribal Consultation Guide in 2014 to educate state agencies on the importance of meaningful consultation and recommend procedures for implementing Tribal consultation.²³ The Guide bases its framework for consultation on President Clinton’s Executive Order No. 13175, which defines consultation as “an accountable process ensuring meaningful and

¹⁵ COLO. COMM’N OF INDIAN AFFAIRS, STATE-TRIBAL CONSULTATION GUIDE: AN INTRODUCTION FOR COLORADO STATE AGENCIES TO CONDUCTING FORMAL CONSULTATIONS WITH FEDERALLY RECOGNIZED AMERICAN INDIAN TRIBES 9 (2013), https://ccia.colorado.gov/sites/ccia/files/documents/CO%20State-Tribal%20Consultation%20Guide_0_0.pdf (hereinafter STATE-TRIBAL CONSULTATION GUIDE).

¹⁶ COLO. REV. STAT. § 24-44-101 et seq.

¹⁷ COLO. REV. STAT. § 24-44-103(1)(d), (2)(d).

¹⁸ COLO. REV. STAT. § 24-44-103(1)(a).

¹⁹ COLO. REV. STAT. § 24-44-104(1)(a).

²⁰ *Id.*

²¹ COLO. REV. STAT. § 24-44-104(1)(c).

²² COLO. REV. STAT. § 24-44-103(2)(e).

²³ STATE-TRIBAL CONSULTATION GUIDE, *supra* note 15.

timely input from tribal officials in the development of Department policies that have tribal implications.”²⁴ The Guide is designed to give state agencies direction on when consultation should occur, consultation procedures, and advice for successful communication.²⁵ It is recommended that agencies not required to consult with Tribes utilize the Guide, but it is not mandated.²⁶ The CCIA has not published an updated Guide since its initial release.

Additionally, the CCIA has adopted a variety of initiatives in areas such as public health and environment, natural resources, health care, and economic development.²⁷ For example, a Health and Wellness Committee is responsible for addressing Tribal health issues and coordinating health programs.²⁸ A 2013 Health and Wellness Roundtable, the most recent stakeholder meeting, included attendees from San Juan Basin Health, the Colorado Department of Public Health and Environment, members of the Southern Ute and Ute Mountain Ute Tribal Councils, and a Ute Mountain Ute Health Services representative.²⁹ The Roundtable outlined goals to improve the health and wellness of *Colorado’s Tribes*, including access to health services and effective grant planning and management.³⁰

B. Agency-specific Policy and Guidance

i. *Colorado Department of Transportation*

Colorado’s transportation planning activities are led by the Colorado Department of Transportation (CDOT) in coordination with Transportation Planning Regions (TPRs) and the Statewide Transportation Advisory Committee (STAC). Each transportation region in Colorado is responsible for developing a regional transportation plan.³¹ The STAC is comprised of representatives of each of the TPRs and advises CDOT on transportation system needs in the state, including review of transportation plans prior to their adoption.³² Both the Southern Ute Tribe and the Ute Mountain Ute Tribe have seated membership on CDOT’s Southwest TPR Regional Planning Commission, of which they are

²⁴ STATE-TRIBAL CONSULTATION GUIDE, *supra* note 15, at 8; Consultation and Coordination with Indian Tribal Governments, Exec. Order 13175, 65 Fed. Reg. 67249 (2000).

²⁵ STATE-TRIBAL CONSULTATION GUIDE, *supra* note 15.

²⁶ STATE-TRIBAL CONSULTATION GUIDE, *supra* note 15, at 9.

²⁷ *Initiatives*, COLO. COMM’N OF INDIAN AFFAIRS, <https://ccia.colorado.gov/initiatives> (last visited June 27, 2024).

²⁸ *Health and Wellness Committee*, COLO. COMM’N OF INDIAN AFFAIRS, <https://ccia.colorado.gov/initiatives/committees/health-and-wellness-committee> (last visited June 27, 2024).

²⁹ COLORADO COMMISSION OF INDIAN AFFAIRS HEALTH AND WELLNESS ROUNDTABLE REPORT (2013), <https://ccia.colorado.gov/initiatives/committees/health-and-wellness-committee>.

³⁰ *Id.*

³¹ 2 COLO. CODE REGS. § 601-22-1.39.

³² COLO. REV. STAT. § 43-1-1104(2).

voting members.³³ Both Tribes also have non-voting membership on the Statewide Transportation Advisory Committee (STAC).³⁴

The Colorado Department of Transportation (CDOT)'s rule governing the statewide transportation planning process and transportation planning regions briefly addresses Tribal consultation. The rule provides that regional transportation planning in the Southwest TPR "shall be coordinated with the transportation planning activities of the Southern Ute and the Ute Mountain Ute Tribal governments."³⁵ Further, the Statewide Transportation Plan and the Southwest TPR Regional Transportation Plan shall incorporate by reference the long-range transportation plans for the Tribal areas.³⁶

In 2013, the Colorado Department of Transportation (CDOT) published its Tribal Coordination Plan, which establishes a consultation protocol with Tribes through the statewide planning and programming processes, including the development of the statewide transportation improvement program and the statewide long-range transportation plan.³⁷

Statewide Transportation Planning Process	Statewide Long Range Plan	Statewide Transportation Improvement Program
<ul style="list-style-type: none"> • Represented by the Southwest TPR • Voting member of the Southwest TPR • Nonvoting membership to STAC • Invited to review and comment on all TPR and Statewide Plans 	<ul style="list-style-type: none"> • State highways located on Tribal lands are included in the 350 corridors with visions, goals and strategies • Invited to participate in the development of the Statewide Long-range Transportation Plan 	<ul style="list-style-type: none"> • Projects located within Tribal lands are included in the STIP • Tribal Transportation Improvement Program(s) included without modification in the STIP • Invited to review and comment on STIP

Opportunities for Tribal Participation in Statewide Transportation Planning and Programming, *CDOT Tribal Consultation Plan*

ii. *Colorado Department of Public Health, Colorado Department of Health Care Policy and Financing, Colorado Department of Human Services*

Pursuant to Section 5006(e) of the American Recovery and Reinvestment Act of 2009, the Colorado Department of Public Health, the Colorado Department of Health Care Policy and

³³ 2 COLO. CODE REGS. § 601-22-2.01.10.

³⁴ *Id.*; COLO. REV. STAT. § 43-1-1104. The Tribes' Commission membership is independent of their status as a member of the STPR.

³⁵ 2 COLO. CODE REGS. § 601-22-2.07.

³⁶ *Id.* Tribal Long Range Transportation Plans are developed in accordance with the May 23, 1983, Memorandum of Agreement between the Bureau of Indian Affairs and the Federal Highway Administration which requires the BIA to carry out a transportation planning process for the Tribal Transportation Program. SOUTHERN UTE INDIAN TRIBE LONG RANGE TRANSPORTATION PLAN 1 (2016).

³⁷ COLO. DEPT OF TRANSPORTATION, TRIBAL COORDINATION PLAN (Apr. 17, 2013).

Financing, and the Colorado Department of Human Services signed a Tribal Consultation Agreement with the Ute Mountain Ute Tribe and the Southern Ute Tribe.³⁸ The Agreement commits the parties to building a government-to-government relationship that results in more efficient, improved, and beneficial services.³⁹ Additionally, the parties agreed that the agencies will provide a Programmatic Action Log Update on a bi-monthly basis and all parties will convene at least once each fiscal year.⁴⁰

In addition to the routine Action Log updates, Tribes may request a consultation meeting or conference regarding any programmatic action with potential Tribal implications that falls within the scope of a state agency's Tribal responsibility.⁴¹ While the Agreement requires consultation to include "continued meetings or teleconferences until concerns over the Actionable Item or other question, concern, policy, practice, or issue within the scope of the State Agencies' responsibilities relating to the health of American Indians/Alaska Natives living in Colorado have been fully discussed," it does not mandate any particular consultation outcome.⁴² Rather, the Agreement provides that "State Agencies shall retain the final decision-making authority with respect to actions undertaken by the State agencies and within the State Agencies' jurisdiction."⁴³

iii. Southern Ute Indian Tribe/State of Colorado Environmental Commission

Former Colorado Governor Bill Owens signed an intergovernmental agreement with the Southern Ute Indian Tribe in 1999 concerning air quality control on the Southern Ute Indian Reservation.⁴⁴ The agreement between the state of Colorado and the Southern Ute Indian Tribe established the Reservation Air Program and created the Southern Ute Indian Tribe

³⁸ TRIBAL CONSULTATION AGREEMENT FOR THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT AND THE COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING (2011). The Colorado Department of Human Services signed on to the agreement in 2012. ADDENDUM – STATE OF COLORADO TRIBAL CONSULTATION AGREEMENT (2012). Pub. L. 111-5 Sec. 5006(e) requires states to "seek advice" on a regular, ongoing basis from designees of Indian Health Programs and Urban Indian Organizations concerning Medicaid and CHIP matters that have a direct effect on American Indians, Alaska Natives, or Indian Health Programs.

³⁹ *Id.* at 2.

⁴⁰ *Id.* at 4.

⁴¹ These meetings or conferences are referred to as "additional consultation" in the agreement. *Id.* at 4-5.

⁴² *Id.*

⁴³ *Id.* at 6.

⁴⁴ COLO. REV. STAT. § 24-62-101. The Tribe had applied for 'treatment as a state' to EPA under the Clean Air Act, asserting that it "had jurisdiction to regulate all sources of air pollution located within the Reservation's exterior boundaries." The state objected to Tribal authority over non-Indian owned sources located on fee land within the Reservation's boundaries. Rather than litigating the issue, the Tribe and the State came to this agreement. The final agreement and its program are applicable to all lands within the exterior boundaries of the Southern Ute Indian Reservation, including sources located on non-Indian owned fee land.

and State of Colorado Environmental Control Commission (Commission) as its policy making and administrative review authority.⁴⁵

The Commission is not an agency of the state nor the Southern Ute Indian Tribe, but is a separate entity.⁴⁶ It is composed of six members, of which the Southern Ute Indian Tribe Tribal Council and Governor of Colorado each appoint three.⁴⁷ The Commission holds regular meetings on the Southern Ute Indian Reservation's air quality issues for discussion and rule-making.⁴⁸ The Southern Ute Indian Tribe Air Quality Program participates in these meetings through informational presentations to help the Commission make decisions.⁴⁹

The agreement provides that the resulting air quality program should reflect the Tribe's interests, while remaining compatible with state air quality goals.⁵⁰ The day-to-day administration and enforcement of the Reservation Air Program is the responsibility of the Tribe, which administers the standards, rules, and regulations adopted by the Commission.⁵¹ Additionally, the Tribe may promulgate rules and regulations that are consistent with those of the Commission.⁵²

Part III: Local Consultation Policies

A. City of Boulder Tribal Consultation Policy

The City of Boulder conducts government-to-government consultation with federally recognized Tribes regarding city actions that may affect Tribal interests. Such consultation is conducted in accordance with federal guidance, the CCIA's Tribal Consultation Guide, and Memorandums of Understandings (MOUs) with Tribal Nations. Additionally, Boulder states that it "bases its consultation practices on direction and wishes provided by Tribal representatives during ongoing consultations."⁵³

⁴⁵ COLO. REV. STAT. § 24-62-101.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Southern Ute Indian Tribe, *Environmental Commission*, (last visited May 28, 2022), <https://www.southernute-nsn.gov/government/departments/epd/air-quality/env-commission/>

⁴⁹ *Id.*

⁵⁰ COLO. REV. STAT. § 24-62-101.

⁵¹ *Id.*; In addition to this agreement, this authority is pursuant to the Southern Ute and Colorado Intergovernmental Agreement Implementation Act of 2004, which authorizes the EPA to treat the Southern Ute Indian Tribe as a state for purposes of implementing and enforcing air quality control programs. Pub. L. No. 108-336, 118 Stat. 1354 (2004).

⁵² COLO. REV. STAT. § 24-62-101.

⁵³ *Tribal Consultation*, CITY OF BOULDER, <https://bouldercolorado.gov/services/tribal-consultation> (last visited Aug. 6, 2024).

In the late 1990s and early 2000s, Boulder entered into four agreements with thirteen federally recognized Tribes, including the Southern Ute Tribe, the Ute Mountain Ute Tribe, as well as Tribes with established reservations in nearby states.⁵⁴

- 1999 MOU (A): Agreement to joint “spiritual, moral and policy support” of Open Space lands south of the city.⁵⁵
- 1999 MOU (B): Tribes provided a utility easement on Tribal protected area and Boulder provided for a Tribal monitor during their construction activities on the easement. Additionally, Boulder agreed to provide fire protection services for permitted Tribal cultural use of a protected area during fire bans.⁵⁶
- 2002 MOU: Outlines agreements regarding cultural resource consultations, Tribal notification of funerary object and human remains discovery, and ceremonial access requiring temporary structures and/or fires.⁵⁷
- 2002 MOU Amendment: Updated procedures related to ceremonies involving temporary structures and/or fires.⁵⁸

The 2002 MOU speaks most clearly to consultation.⁵⁹ It provides for “ongoing consultation about cultural resources on Open Space and Mountain Parks land for the purpose of identifying areas of religious and cultural significance and recognizing cultural resources in the area.”⁶⁰ This consultation is conducted through annual meetings hosted by the city.⁶¹

⁵⁴ *Id.*

⁵⁵ Memorandum of Understanding between The Southern Ute, The Ute Mountain Ute, The Jicarilla Apache, The Apache of Oklahoma, The Kiowa of Oklahoma, The Comanche of Oklahoma, The Cheyenne and Arapaho Tribes of Oklahoma, The Pawnee of Oklahoma, The Eastern Shoshone, The Northern Arapaho, The Northern Cheyenne, The Oglala Sioux, The Rosebud Sioux, the Medicine Wheel Coalition for Sacred Sites, and the City of Boulder (Mar. 1, 1999).

⁵⁶ Memorandum of Understanding between The Southern Ute, The Ute Mountain Ute, The Apache of Oklahoma, The Kiowa of Oklahoma, The Comanche of Oklahoma, The Cheyenne and Arapaho Tribes of Oklahoma, The Pawnee of Oklahoma, The Eastern Shoshone, The Northern Arapaho, The Northern Cheyenne, The Oglala Sioux, The Rosebud Sioux, the Medicine Wheel Coalition for Sacred Sites, and the City of Boulder (Mar. 1, 1999).

⁵⁷ Memorandum of Understanding between The Southern Ute, The Ute Mountain Ute, The Jicarilla Apache, , The Kiowa Nation, The Comanche Nation of Oklahoma, The Southern Cheyenne Tribe of Oklahoma, the Southern Arapaho Tribe of Oklahoma, The Pawnee Nation of Oklahoma, The Eastern Shoshone, The Northern Arapaho, The Northern Cheyenne, The Oglala Sioux, The Rosebud Sioux, the Medicine Wheel Coalition for Sacred Sites, the United Tribes of Colorado, and the City of Boulder (Aug. 17, 2002) (hereinafter 2002 MOU).

⁵⁸ First Amendment to the Memorandum of Understanding between the City of Boulder and the Tribes dated August 17, 2002 (Jan. 3, 2004).

⁵⁹ 2002 MOU, *supra* note 56.

⁶⁰ *Id.* at 2.

⁶¹ *Id.*

In 2019, Boulder’s city government hosted a formal consultation with fourteen Tribes to begin the process of updating the MOUs.⁶² In 2021, Boulder again hosted Tribal representatives, including both the Southern Ute Tribe and the Ute Mountain Ute Tribe. At that meeting, all parties agreed to rename Settler’s Park to “The People’s Crossing” in honor of the Indigenous Peoples who traversed the area, continue working on revising current city-Tribal agreements, and plan a future consultation.⁶³ On March 16, 2022, the City and Tribes reviewed a proposed updated City-Tribal Nation MOU that consolidated and built upon previous consultations.⁶⁴ Tribes unable to attend the March 2022 Consultation were invited to two online consultation sessions in September 2022, and a subsequent Fall 2022 Final Statement was published.⁶⁵ The March 2023 Consultation adopted the Fall 2022 Final Statement’s focus on developing open land management practices and integrating Indigenous history and culture into education materials.⁶⁶

B. Montezuma County Tribal Consultation Policy

The Montezuma County Comprehensive Land Use Plan for the Unincorporated Areas of Montezuma County contains provisions related to intergovernmental relations, including those pertaining to the Ute Mountain Ute Tribe.⁶⁷ It provides that “[i]t is recommended that the County coordinate with the Tribe on issues of mutual importance such as water resources, archaeological resources, gambling, education, social services, employment, economic development, Federal grazing permits, and infrastructure planning and

⁶² *2019 Tribal Consultation Final Statement*, CITY OF BOULDER, <https://bouldercolorado.gov/2019-tribal-consultation-final-statement> (last visited Aug. 6, 2024).

⁶³ *City Renames "Settler's Park" to "The Peoples' Crossing"*, CITY OF BOULDER, <https://bouldercolorado.gov/news/city-renames-settlers-park-peoples-crossing> (last visited Aug. 6, 2024); *2021 Tribal Consultation Final Statement*, CITY OF BOULDER, <https://bouldercolorado.gov/2021-tribal-consultation-final-statement> (last visited Aug. 6, 2024).

⁶⁴ *2022 Tribal Consultation Final Statement*, CITY OF BOULDER, <https://bouldercolorado.gov/2022-tribal-consultation-final-statement> (last visited Aug. 6, 2024).

⁶⁵ *September 2022 Consultation Statement*, CITY OF BOULDER, <https://bouldercolorado.gov/september-2022-consultation-statement> (last visited Aug. 6, 2024).

⁶⁶ In ongoing consultations, the following Tribes are invited to send representatives: Apache Tribe of Oklahoma, Cheyenne and Arapaho Tribes, Cheyenne River Sioux Tribe, Comanche Nation of Oklahoma, Eastern Shoshone Tribe, Jicarilla Apache Nation, Kiowa Tribe, Northern Arapaho Tribe, Northern Cheyenne Tribe, Oglala Sioux Tribe, Pawnee Nation of Oklahoma, Rosebud Sioux Tribe, Southern Ute Indian Tribe, Standing Rock Sioux Tribe, Ute Mountain Ute Tribe, and Ute Indian Tribe of the Uintah & Ouray Reservation. Tribal Consultation, City of Boulder, <https://bouldercolorado.gov/services/tribal-consultation> (last visited Aug. 6, 2024).

⁶⁷ Montezuma County, *Comprehensive Land Use Plan for the Unincorporated Areas of Montezuma County* (Jan. 6, 1997), <https://montezumacounty.org/wp-content/uploads/2020/10/Comprehensive-Land-Use-Plan.pdf>

development.⁶⁸ There are no specific recommendations for when consultation should be initiated, nor details on consultation procedures.⁶⁹

Part IV: Colorado Commission of Indian Affairs State-Tribal Consultation Guide

A. Introduction to the CCIA's Guide

Published in 2014, the CCIA's State-Tribal Consultation Guide outlines a suggested framework for effective state-Tribal consultation. While the Guide does not create legal obligations, it recommends that agencies conduct consultation when they determine a subject matter could affect a Tribe "in any capacity."⁷⁰ Some points for state agencies to consider "before taking or making any action, policy, or decision" include actions or policies targeted at or dealing with laws affecting Tribes or Tribal lands, Tribal community interests (i.e. health, environment, culture), the relationship between the state government and the Tribe, and toward which Tribal members have expressed concern.⁷¹ There are four specific steps to Tribal consultation in the CCIA Guide: (1) Initiate Consultation, (2) Plan the Consultation, (3) Conduct Consultation, and (4) Follow-up with the Tribe(s).⁷²

B. CCIA Guide Tribal Consultation Procedures

i. *Step 1: Initiate Consultation*

Depending on the issue, state agencies may decide to consult with multiple Tribes at once or consult with Tribes individually.⁷³ State agencies are directed to contact the Tribal Council's Executive Assistants to propose consultation dates and to include both options in their initial letters to the Tribe.⁷⁴ Although the Guide does not give any guidance on which Tribes specifically to contact, it does outline who to address and what language to include in the invitation.⁷⁵ At least a thirty-day notice of invitation or notification is preferred.⁷⁶ The letter should detail relevant issues, reasons for consultation, and a proposal of consultation

⁶⁸ *Id.* at 13-5.

⁶⁹ *Id.*

⁷⁰ STATE-TRIBAL CONSULTATION GUIDE, *supra* note 15. This determination is made by the state agency. The Guide does not indicate Tribal involvement in the decision.

⁷¹ *Id.*

⁷² *Id.* at 21-32.

⁷³ STATE-TRIBAL CONSULTATION GUIDE, *supra* note 15 at 21.

⁷⁴ *Id.* Each Tribe must be individually addressed and invited via email and mail, even if the invitation is for joint consultation.

⁷⁵ *Id.* at 22.

⁷⁶ *Id.*

dates.⁷⁷ CCIA recommends a full day of consultation for each Tribe and that formal consultations must include both parties' most senior leaders.⁷⁸

ii. Step 2: Plan the Consultation

When planning consultations, in-person meetings should be prioritized, with the location determined by the Tribe(s) involved. The Guide recommends that the first Tribal consultation occur at Tribal headquarters, "either in Towaoc (Ute Mountain Ute reservation) or Ignacio (Southern Ute Indian reservation)." If the consultation must occur any large distance from Tribal headquarters, state agencies should cover all or part of the travel costs for Tribal representatives.⁷⁹

When developing the agenda, agencies are recommended to communicate with Tribes to ask about preferred agenda items, and to share the document prior to the consultation so that everyone has a chance to review it. Additionally, the Guide advises that it may be appropriate to ask a Tribal leader to give an invocation at the beginning of the consultation, and to be prepared in the event Tribal leaders request a Tribal caucus.⁸⁰

iii. Step 3: Conduct Consultation

State agencies should be clear about consultation logistics (such as food and restroom arrangements), document the consultation, offer refreshments, generally avoid involving the media, and assess whether everyone had an opportunity to contribute to the consultation before wrapping up.⁸¹ Documentation should include all efforts from the planning stages through final consultation meetings.⁸² The Guide provides that the state agency and the Tribe should reach an agreement as to who will be responsible for the preparation and distribution of consultation notes, although it will usually be the state agency.⁸³ Additionally, it provides that notes should be circulated among all participants for review and comments before they are distributed as a final document to ensure that all views and interests are accurately characterized.⁸⁴

⁷⁷ *Id.*

⁷⁸ *Id.* State agencies should provide an Executive Director or equivalent, Department Directors, and necessary topic specialists. Invitations should extend to the Tribal Chairperson, Governor, or President depending on the Tribe's structure, the Tribal Council and their relevant Committees, and Tribal Program/Department Directors. The role of third parties, such as urban American Indian organizations, should also be considered when extending invitations.

⁷⁹ *Id.* at 27. "This also allows for state agents to become familiar with the reservation, culture, and people." *Id.*

⁸⁰ *Id.* at 26 (A Tribal caucus is "time for the Tribal leadership to privately discuss an issue.").

⁸¹ *Id.* at 31.

⁸² *Id.* at 31.

⁸³ *Id.* at 31.

⁸⁴ *Id.* at 31.

iv. Step 4: Follow-up with the Tribe(s)

To follow-up with the Tribe(s), the state agency should send a letter to Tribal leadership involved in the consultation. The letter should be a response to the consultation, and should explain “how the Tribes’ input was or will be incorporated into the decision making process and/or how their comments and concerns were or will be addressed.”⁸⁵ If relevant, it should also include a follow-up method for the next consultation meeting.⁸⁶ The letter should be signed by the highest-level state official involved in the consultation and addressed to the most senior Tribal official involved, copying any other participants.⁸⁷

C. CCIA Guide Tribal Consultation Substantive Recommendations

The CCIA State-Tribal Consultation Guide does not provide a singular definition of consultation in recognition of the fact that there are many different interpretations.⁸⁸ However, it provides one working definition: “consultation is the open and mutual exchange of information integral to effective collaboration, participation, and informed decision making, with the ultimate goal of reaching consensus on issues. Consultation is the development of a relationship based on trust, an effort to understand and consider any effects an undertaking may have on the consulting parties.”⁸⁹

It stresses the importance for parties to demonstrate openness, respect, and in-depth communication during consultation: “Successful consultation is a two-way exchange of information, a willingness to listen, and an attempt to understand and genuinely consider each other’s opinions, beliefs, and desired outcomes.”⁹⁰

i. Recognition of Tribal Sovereignty

The Guide emphasizes that a government-to-government relationship that is necessary to State-Tribal consultation is “based on the sovereign status of tribal governments.”⁹¹ The Guide includes an educational section on Tribal sovereignty, defining it as “the inherent right of [T]ribal peoples to govern themselves,” giving a history of Tribal sovereignty, and describing government-to-government relationships as “based on the sovereign status of [T]ribal governments.”⁹²

⁸⁵ *Id.* at 32.

⁸⁶ *Id.* at 32.

⁸⁷ *Id.* at 32.

⁸⁸ *Id.* at 8.

⁸⁹ *Id.* at 8.

⁹⁰ *Id.* at 8-9.

⁹¹ *Id.* at 7.

⁹² *Id.* at 5-7.

ii. Confidentiality

The Guide contains no mention of confidentiality, nor any mechanism to protect sensitive Tribal information. This is in sharp contrast with the Ute Mountain Ute Tribe Cultural Resources Management Plan (CRMP).⁹³ The CRMP contains multiple provisions related to confidentiality, particularly with respect to the treatment of human remains. The CRMP requires the location of repatriated human remains to be kept confidential, which includes ensuring that locational information in communications is provided in a confidential appendix.⁹⁴ The CRMP also includes information on Executive Order No. 13007, which provides that “agencies shall maintain the confidentiality of sacred sites.”⁹⁵

iii. Subject of Consultation

The Guide recommends conducting consultation when “an action, policy, or decision may affect Tribal interests.”⁹⁶ While it does not identify specific topics to discuss, it advises agencies to assess the following questions before concluding:

- “Did everyone have the opportunity to contribute?”
- Did everyone understand the issues?
- Did everyone understand the process for action?
- Did everyone understand what will happen next?
- Did the participants make any commitments about what will happen next (i.e., is another meeting warranted)?”⁹⁷

iv. Relationship Building

The Guide emphasizes the importance of developing ongoing relationships and provides various recommendations for doing so.⁹⁸ Such recommendations include meeting with the Tribal Council on a regular basis, touring the community to learn about the land and

⁹³ UTE MOUNTAIN UTE TRIBE, CULTURAL RESOURCES MANAGEMENT PLAN (2015), <https://www.utemountainutetribe.com/images/THPO%20information/UMTU%20CRMP.pdf> (“This Cultural Resource Manage Plan was adopted by the Ute Mountain Ute Tribal Council [...] as the Tribe’s plan for managing and caring for the myriad cultural resources associated with its lands.”). The Plan outlines a number of processes that serve to protect Tribal cultural resources, all of which related to federal consultation mandates. This includes a review process that defines Tribal Council expectations of federal, state and local governments when considering the effects of their programs, actions, and activities on significant cultural resources on Tribal lands under the Tribe’s Section 106 review process.

⁹⁴ *Id.* at 170.

⁹⁵ *Id.* at 74 (citing Exec. Order No. 13007, 61 Fed. Reg. 26771 (1996) (Indian Sacred Sites)).

⁹⁶ STATE-TRIBAL CONSULTATION GUIDE, *supra* note 15 at 9.

⁹⁷ *Id.* at 31.

⁹⁸ *Id.*

history of the Tribe, attending council meetings, and introducing yourself to council members.⁹⁹ Additionally, the Guide provides that agencies and their employees should “plan to spend substantial amounts of time and personal involvement to develop relationships that will lead to productive consultations.”¹⁰⁰

Part V: Other Recent Legislation

A. Representation on Advisory Bodies

Over the past few years, the Colorado legislature has passed several pieces of legislation creating positions on state department councils for Tribal members or Tribal representatives that seek to give Tribes a voice in decision-making.

Law	Advisory Body	Tribal Representation	Purpose of Advisory Body
HB20-1021 ¹⁰¹	Colorado Youth Advisory Council	One voting member representing the Southern Ute Indian Tribe, one voting member representing the Ute Mountain Ute Tribe	Examine, evaluate, and discuss the issues, interests, and needs affecting Colorado youth now and in the future and to formally advise and make recommendations to elected officials regarding those issues
HB21-1181 ¹⁰²	Soil Health Advisory Committee	Committee to include a representative of a Tribe	Make recommendations to the department concerning and assist in the development of the soil health program
SB21-237 ¹⁰³	Forest Health Council	Council to include one member who is an enrolled member of a Tribe that has a reservation within Colorado	Provide a collaborative forum to advise the governor and general assembly on a broad range of issues, opportunities, and threats with regard to Colorado’s forests
HB21-1266 ¹⁰⁴	Environmental Justice Action Task Force	Task force to include one member appointed by the chair of the Southern Ute Indian Tribal Council and one member appointed by the chair of the Ute Mountain Ute Tribal Council	Recommend and promote strategies for incorporating environmental justice and equity into how state agencies discharge their responsibilities

⁹⁹ *Id.* at 36.

¹⁰⁰ *Id.* at 23.

¹⁰¹ COLO. REV. STAT. § 2-2-1303 (amended to include Tribal representation in 2020).

¹⁰² COLO. REV. STAT. § 35-73-106 (2021).

¹⁰³ COLO. REV. STAT. § 23-31-316 (reenacted in 2021).

¹⁰⁴ COLO. REV. STAT. § 25-1-133 (2021).

SB2-011	America 250 – Colorado 150 Commission	One voting member designated by the Southern Ute Indian Tribal Council, one voting member designated by the Ute Mountain Ute Tribal Council	plan for the official observance across Colorado of the 250th anniversary of the founding of the United States and the 150 th anniversary of Colorado statehood (to be celebrated in 2026)
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B. Other Legislation

SB22-104 requires the office of the Colorado Commission on Indian Affairs, in consultation with the Ute Mountain Ute Tribe and the Southern Ute Indian Tribe, “to submit a report to the legislative council by March 1, 2023, identifying opportunities for [T]ribal governments to be included in the operations or programs of the state as a partner, assessing whether the Colorado commission on Indian affairs can facilitate or provide those opportunities, and recommending other ways for the state to facilitate or provide those opportunities.”¹⁰⁵ Recommendations from the report include strengthening the Tribal consultation process, establishing standards for engagement with Tribes, understanding data sovereignty as it relates to reporting requirements, and involving CCIA throughout the Tribal engagement process to ensure meaningful government-to-government relationships.¹⁰⁶

SB21-258, designed to address wildfire risk mitigation, has less concrete consultation requirements. It dictates that staff working to mitigate wildfires “shall consult with stakeholders including...[T]ribes...to identify and implement priority wildfire mitigation projects on municipal, county, [T]ribal, state, state-operated, federal, and private lands, as appropriate.”¹⁰⁷

Part VI: Conclusion

Colorado and its local governments have made significant strides in strengthening government-to-government relationships with Tribes over the last twenty years. However, significant room remains to make improvements in expanding the circumstances under which the State is required to consult, improving the enforceability of consultation requirements, and further integrating Tribal perspectives into decision-making.

At the state level, the Colorado legislature established the Colorado Commission on Indian Affairs as the official liaison between the State and the Ute Mountain Ute and Southern Ute

¹⁰⁵ COLO. REV. STAT. § 2-3-312.

¹⁰⁶ REPORT TO EXPLORE AND MAKE RECOMMENDATIONS CONCERNING THE INCLUSION OF TRIBAL GOVERNMENTS IN STATE PROGRAMS 9-12 (2023), <https://www.leg.state.co.us/library/reports.nsf/ReportsDoc.xsp?documentId=BBA4D98AAF28D967872589A20072973B>.

¹⁰⁷ COLO. REV. STAT. § 24-33-117.

Tribes. The CCIA's State-Tribal Consultation Guide outlines a suggested framework for effective state-Tribal consultation. However, the Guide does not create a legally enforceable obligation, and is only a recommendation that state agencies consult with Tribes when taking actions or making decisions that may impact Tribes.

A few state agencies have taken similar steps to establish consultation procedure recommendations. Most agency guidance is in the form of agreements that have been reached between the state agency and Tribes. Only the Colorado Department of Transportation has established an independent Tribal Consultation Plan, which outlines the intersection of obligations required under federal law, state law, and an agreement between the agency and the Southern Ute Tribe.

At the local level, the City of Boulder consults with approximately fourteen Tribes, including the Ute Mountain Ute and the Southern Ute, on an annual basis. Outcomes include the renaming of Settler's Park to "The People's Crossing" in honor of Indigenous Peoples who traversed the area. The City and Tribes are also continually working to update the MOUs that were developed during previous consultations.