

Overview of Consultation Recommendations for Agencies & Local Governments

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 Agencies & Local Governments

- **Confidentiality:** Ensure confidentiality of Tribal information when disclosing for the purpose of protecting cultural resources.
 - *Recommendations:* Use legally binding non-disclosure agreements and limit internal exposure to assure Tribes that confidentiality will be maintained. Allow general information about cultural resources from Tribes as valid evidence without requiring specific information that would compromise confidentiality.
- **Relationships:** Build trust, mutual understanding, and collaboration by establishing ongoing relationships with Tribes.
 - *Recommendations:* Hold regular meetings and establish ongoing formal and informal communications with Tribes about agency plans and projects. Include Tribal advisory groups and Tribal representatives in decision-making groups.
- **Resource Limitations & Burden of Consultation:** Act to help alleviate the burden of consultation on Tribes, which typically have limited resources.
 - *Recommendations:* Make funds available to support Tribal participation in consultation, including for non-federally recognized Tribes. Compensate Tribal experts and staff for their time and knowledge at rates commensurate with that paid to other subject matter experts. With Tribes' permission seek efficiencies, including inter-agency and inter-Tribal coordination.
- **Education:** Agency officials must be knowledgeable about Tribal consultation, as well as Tribal history and culture. Some Tribes seek additional training on the consultation laws.
 - *Recommendations:* Provide internal training to agency officials regarding Tribal consultation procedures and best practices, as well as Tribal history, culture and goals. Pay Tribes to provide training where they have expertise. Connect interested Tribes with free educational resources/training on agencies' operations, the consultation laws, and Tribes' rights under the laws.

- **Early Notification:** Early notification facilitates meaningful Tribal consultation.
 - *Recommendations:* Ensure use of a clearly defined notification trigger that occurs before project design. Ensure that notice reaches Tribes by keeping up-to-date Tribal contact lists and following up with Tribes if no initial response is received.
- **Timeline & Procedures:** Adequate Tribal consultation requires timely, responsive, and flexible processes.
 - *Recommendations:* Consultation should take place between Tribal and agency officials with decision-making authority, be flexible to Tribes' preferences for venue, agenda, and timeline, and be completed before making irreversible decisions regarding the proposed project.
- **Tribal Expertise & Indigenous Knowledge:** Give sufficient weight to Tribal knowledge and expertise.
 - *Recommendations:* Include Tribes in initial cultural resource surveys, giving equal or greater weight to Tribal knowledge regarding the location and significance of resources and places as that given CRM firms/archaeologists. Select CRM firms/archaeologists that work respectfully with Tribes and issue penalties for those that do not.
- **Outcomes & Creative Mitigation:** Meaningful Tribal consultation should have real bearing on project decisions.
 - *Recommendations:* Ensure free, prior, and informed consent, affirmative assent, or approximate consensus before approving project. Provide meaningful and feasible mitigation options and be willing to significantly alter projects when necessary, respecting Tribes' determination that no mitigation is possible due to the significance of a particular resource or place.
- **Accountability:** Meaningful Tribal consultation requires accountability throughout project development.
 - *Recommendations:* Keep written records of consultation proceedings and reach enforceable agreements with legally cognizable components that detail dispute resolution options. Communicate agreement details with construction firms and monitor implementation. Provide accessible procedure for recourse when there is disagreement.
- **Institutionalize Agency Procedures & Knowledge:** Processes and knowledge should endure changes in staff and governing administrations.
 - *Recommendations:* Create and provide adequate resources to designated Tribal relations offices within and/or across agencies responsible for developing, refining, and delivering best practices guidance and training to agency officials, building ongoing relationships with Tribes, and serving as an enduring resource across administrations, including via adequate recordkeeping.
- **Prior Protection of Tribal Resources & Places:** Long-term planning that protects sensitive Tribal resources and places can streamline later project development and consultation.
 - *Recommendations:* In collaboration with interested Tribes, 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.