

Tolowa Dee-ni' Nation Consultation Policy

Objective: To define the standards for meaningful Communication, Collaboration and Consultation in relation to Government-to-Government Consultation and Partnerships and define the scope and process for these three “C’s” to occur.

Scope: Tribal Communication and Consultation Standard and Protocol of the Tolowa Dee-ni' Nation.

Section 1: Policy Background

As a commitment to Tribal sovereignty and a strong government-to-government relationship, many federal, state, and local agencies are being directed or required to consult with the Tribe when developing regulations, policy or other activities that will or may have Tribal implications. There is often some confusion on the part of the agency or government as to what actually constitutes meaningful consultation. Many agencies and departments have their own unique consultation policies creating a confusing policy landscape for the Tribe as well as other agencies and governments.

In general terms, Consultation is a process that supports Tribal sovereignty and self-determination and recognizes the rights of Indian Tribes to self-governance. Consultation helps ensure that the United States, and the States of California and Oregon are meeting their legal responsibilities with the Tribe.

In an effort to provide clear direction to governments, agencies, and departments seeking to consult with the Tribe, we provide here clear definitions, processes and requirements that must be met in order for a meeting or meeting process to be considered Consultation.

In order to avoid engaging with multiple departments and multiple managing agencies as California enacts Executive Order B-10-11¹, we have developed our own consultation policy for state and federal departments and agencies to comply with. This policy is intended to be consistent with the body of federal law pertaining to Tribal consultation and to provide clear direction to local, state, and federal agencies on what actions are necessary on their part to meet the definition of ‘Consultation.’

On issues relating to tribal self-government, tribal trust resources, and other rights, Federal and State agencies should explore and use consensual mechanisms for developing regulations and other rule making actions. Communication and collaboration are preemptive measures to ensure that actions of State and Federal Governments have minimal impact if not a benefit upon tribal sovereignty.

Section 2: Definitions

2.0 Tribe: *The Tolowa Dee-ni' Nation*

2.1 Tribal Communication: *Regular correspondence at a staff level that results in coordinating efforts of the Tribe. It is the first step in developing a trusting relationship and does not serve as collaboration, nor should it be construed as consultation.*

¹ <http://gov.ca.gov/news.php?id=17223>

2.2 Tribal Collaboration: *In areas or subjects of mutual interest, it is the desire of the Tribe to pursue partnerships to collaborate on solutions for agreed upon outcomes. The structure of these collaborative efforts can range from informal information sharing, to Memorandums of Understanding with more specific agreements regarding working relationships and desired outcomes, to co-management agreements with specific responsibilities and authorities.*

2.3 Tribal Consultation: *The process of seeking, discussing, and seriously considering the views of the Tribe, and seeking agreement with the Tribe on the development of regulations, rules, policies, programs, projects, plans, property decisions and activities that may affect Tribal resources, historic properties, contemporary cultural practices, and those persons under Tribal jurisdiction. This requires true government-to-government contact between the agency, government, or department and the Tribe, where high level Agency representatives meet with Tribal leaders as well as staff.*

2.4 Proposed Activity: *Regulations, rules, policies, programs, projects, plans, property decisions or activities that may affect Tribal resources, historic properties, intellectual properties, contemporary cultural practices, and/or those persons under Tribal jurisdiction, or seeking Official Tribal Positions*

2.5 Project consultation coordinator (PCC): *Is appointed by the Council when official Consultation is initiated, and is tasked with fulfilling Section 5 of this Policy.*

2.6 Tribal staff liaison: *The staff person who facilitates the Communication and Collaboration protocols identified under Sections 3 & 4 of this Policy. Communication and Consultation with the liaison does **not** constitute Consultation unless Council delegates their authority through Resolution/Order.*

2.6 Delegation of Authority: *Council through Order may delegate or appoint authority to Tribal Staff Liaison. The Delegation Order will clearly identify level of authority, roles and responsibilities.*

2.7 Coordination Meetings: *Serve to clarify how the Tribal and Consulting Entity's jurisdictions or responsibilities apply to a given issue. May serve as a place for sharing data or making agreements to share responsibilities about data collection.*

2.8 Consulting Entity: *Any Federal, State or Tribal body that is proposing an Activity.*

2.9 "Little c" consultation: *Refers to Section 3 & 4 of this Policy.*

2.10 "Big C" Consultation: *Refers to Section 5 of this Policy.*

Section 3: Tribal Communication

- Prior to the planning process, any Consulting Entity that seeks to develop a Proposed Activity should contact the Tribe to scope any potential impacts such action may have on Tribe.
- When the Consulting Entity has an idea for a project, it should produce the concept to staff.
- The Consulting Entity should present the proposed idea to the tribal liaison staff and work to formulate a concept to move forward according to this policy.
- Communication should continue at regular intervals through informal meetings.

Section 4: Tribal Collaboration Protocol

In areas or subjects of mutual interest, it is the desire of the Tribe to pursue partnerships to collaborate on solutions for agreed upon outcomes. The structure of these collaborative efforts can range from informal information sharing, to MOUs with more specific agreements regarding working relationships and desired outcomes, to co-management agreements with specific responsibilities and authorities.

Collaboration through regular communication and coordination meetings is a preemptive action to avoid proposed actions that could negatively impact tribal sovereignty or having to engage the Tribe in a lengthy consultation process that results in an unfavorable outcome.

For ongoing processes, such as land management programs, the Tribe may seek regular meetings at an agreed upon interval. These meetings would be defined as *Coordination Meetings* which serve to clarify how the Tribal and Consulting Entity's jurisdictions or responsibilities apply to a given issue. Coordination Meetings may serve as for sharing data or making agreements to share responsibilities about data collection. Coordination meetings may also be used as an opportunity for the Tribe to provide input on processes such as development of agency, government, or departmental plans. Often, Coordination meetings involve only staff or committees but may involve Tribal or other decision makers.

Early in the planning process, any Consulting Entity that seeks to develop Proposed Activity should take the following steps.

4.1 Procedures: *Collaboration*

The following steps do not constitute Consultation and are used in the Evaluation Stage that an agency must undergo to seek input from the Tribe to ensure concepts will not negatively impact the Tribe.

4.1.1 Step One: Coordination Meeting

Before the Consulting Entity moves past the scoping stage of a proposed project, it must participate in an initial coordination meeting. This meeting will involve Tribal staff that will be responsible for briefing the committee before an action is proposed through the consultation process.

In this meeting the Consulting Entity should present the proposed **concepts or ideas** of a Proposed Activity.

The Consulting Entity arranges with the liaison, a time, place, and agenda for first coordination meeting.

- a) A discussion to determine if there are barriers to Tribal participation such as timing, financing, and/or location. Agency must provide funds to allow for coordination if necessary;
- b) An agreed upon meeting format for the process;
- c) Once the concept or idea has been vetted through the coordination meeting with staff and it is agreed that a scope may be developed for proposal to the committee.

4.1.2 Step Two: Committee Meeting

The Committee Meeting should address the following:

- a) Presentation of coordination meeting;
- b) Include a draft or overview of the scope of the project, including any maps of the project area and a summary describing how the contemplated regulations, rules, policies, programs, projects, plans, property decisions or activities may affect Tribal resources, historic properties, contemporary cultural practices, and/or those persons under Tribal jurisdiction;
- c) A discussion on any sensitivities regarding sacred sites affected by the project and whether or not a religious leader should be included in the consultation;
- d) Timeline of the project as well as any other relevant information to assist the Tribe in appropriately identifying potential impacts;
- e) Committee will make recommendations to staff if action will impact Tribe.

4.1.3 Step Three: Staff recommendation if action will impact Tribe

- a) If the Committee makes a recommendation to staff that the Proposed Activity will impact the Tribe, the Staff will advise the Agency to submit a request for formal consultation by sending a letter to the Tribal Chair via the Tribe's Office of Self-Governance.

Section 5: Tribal Consultation

The process of seeking, discussing, and seriously considering the views of the Tribe, and seeking agreement with the Tribe on the development of regulations, rules, policies, programs, projects, plans, property decisions and activities that may affect Tribal Resources, historic properties, contemporary cultural practices, and those persons under Tribal jurisdiction. This requires true government-to-government contact between the agency, government, or department and the Tribe, where high level Agency representatives meet with Tribal leaders as well as staff.

For other decisions, particularly but not limited to activities with a direct effect on Tribal resources, the Tribe may demand bi-lateral Government-to-Government consultation. This process is invoked when an Agency has a Proposed Activity.

5.1 Procedures: *Bi-lateral Government-to-Government Consultation* must adhere to the following process unless an alternative process is approved by Tribal Council:

5.1.1 Step One: Request for Consultation

Early in the planning process, any Consulting Entity that seeks to develop a Proposed Activity must request consultation by sending a letter to the Tribal Chair via the Tribe's Self-Governance Office, see Section 4.1.3. This letter should include a draft or overview of the scope of the project, including any maps of the project area and a summary describing the contemplated Proposed Activity. The letter should also identify a point of contact at the Agency, timeline of the project, and any other relevant information to assist the Tribe in appropriately identifying potential impacts as well as documenting communication and collaboration has occurred. The letter must demonstrate how communication and collaboration have occurred, as outlined in Sections 3 & 4 of this Policy.

Within 30 days after receipt of the request for Consultation, the Tribal Council will designate a Project Consultation Coordinator (PCC) who will then schedule a Pre-consultation meeting. If the Consulting

Entity fails to request Consultation on the development of the Proposed Activity, the Tribe may take the initiative to request Consultation. In this event, the Tribe expects a response from the Consulting Entity within 30 days of the receipt of the request.

5.1.2 Step Two: Pre-consultation Meeting

Before the Consulting Entity moves past the scoping stage of the project, it must participate in an initial consultation meeting. This meeting will involve the PCC and Tribal staff who will be responsible for briefing the Council before the first true Consultation meeting, and may possibly involve members of Tribal Council.

In this meeting the Consulting Entity should present the Proposed Activity.

5.1.3 Step Three: Initial Consultation Meeting

The Consulting Entity arranges with the PCC, a time, place, and agenda for first Consultation Meeting. The Initial Consultation Meeting should address the following:

- a. A discussion to determine if there are barriers to Tribal participation such as timing, financing, and/or location. Agency must provide funds to allow for consultation if necessary;
- b. A discussion on any sensitivities regarding sacred sites affected by the project and whether or not a religious leader should be included in the Consultation;
- c. An agreed upon meeting format for the process;
- d. Development of a Consultation Calendar or other agreed upon meeting interval to ensure that enough meetings are planned to allow for meaningful Consultation. The Consultation Calendar or planned meetings should take into account the Consulting Entity's statutory or regulatory obligations pertinent to the decision, availability of Tribal Council members (and possibly cultural practitioner(s)) to participate, and time to gather all necessary information and data.

5.1.4 Step Four: Ongoing Consultation Meetings

Consultation meetings should continue at regular intervals pursuant to the agreed upon Consultation Calendar or meeting interval until agreement is reached or until the Tribe and Consulting Entity agrees that agreement is impossible. Some Consultation meetings may be in formal settings, while others may include field trips to project locations as needed. Informal meetings between staff and sub-groups or sub-committees may be formed on an ad hoc basis as needed and agreed upon.

5.1.5 Step Five: Certification of Completed Consultation

At the end of the process, the Tribe will offer a Tribal Resolution certifying whether Consultation was completed in compliance with this policy or not. In the event that the Tribe deems that the Consulting Entity failed to consult properly, a letter from the Tribe will explain this failure and be shared with the director or executive authority of the Consulting Entity.

5.2 Consultation Record

Meeting notes, minutes, shared documents, and any recorded audio or video files shall be maintained in common between the Tribe and the Consulting Entity. Culturally or spiritually sensitive information

provided by the Tribe shall remain confidential or returned to the Tribe upon request unless otherwise agreed to, beforehand and in writing by the Tribe.

Section 6: Best Management Practices

In addition to the above requirements for Consultation, the Tribe suggests the following Best Management Practices for agencies, governments, or departments seeking to engage in consultation to abide by:

- Multiple contacts that begin early in the planning process and continue throughout the project;
- Multiple venues for consultation, such as the Agency office and locations close to Tribe and the area of the undertaking;
- Formal and informal meetings;
- The existence of an Agency Tribal Liaison;
- The Agency's fostering of a relationship with relevant Tribal staff;
- An early effort to identify the areas of concern to the Tribe;
- Provision to Tribe of full and candid information prior to the first meeting (in the consultation initiation letter and at the pre-consultation meeting);
- An open-ended and flexible agenda (no hidden agendas);
- Facilitators for the sessions, alternating between Agency and Tribal leaders or agreed upon third party;
- A successful result viewed as partners arriving at an agreement, although reaching an agreement is not an end in itself;
- Having in place a feedback mechanism to ensure agreed upon measures are in place and enforceable;
- Although the agenda of preliminary consultation meetings will likely be established by the Agency, the Tribe shall participate in the development of agendas for ongoing consultation meetings.