

# DRAFT TRIBAL CONSULTATION PROTOCOL TEMPLATE

Version: 4/3/2018 9:12 AM

## Table of Contents

<u>1. AUTHORITY AND PURPOSE .....</u>	<u>2</u>
<u>2. DEFINITIONS .....</u>	<u>2</u>
<u>3. GUIDING PRINCIPLES .....</u>	<u>4</u>
<u>4. OBJECTIVES OF CONSULTATION .....</u>	<u>5</u>
<u>5 . ESTABLISHMENT OF POINT OF CONTACT .....</u>	<u>7</u>
<u>6. CONSULTATION PROCEDURE .....</u>	<u>7</u>
<u>7. CONSULTATION RECORD .....</u>	<u>12</u>
<u>8. NO WAIVER OF SOVEREIGN IMMUNITY .....</u>	<u>12</u>
<u>9. SEVERABILITY .....</u>	<u>12</u>

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Version: 4/3/2018 9:12 AM

**This Tribal Consultation Protocol Template, developed pursuant to a grant from the California Consumer Protection Foundation, is designed for California Tribes to tailor to fit their own consultation efforts, resources and timelines. We suggest that Tribes use the sections below as a minimum. SECTION HEADERS are in place along with “Instructions” and *suggested language*, as needed. Instructions should be deleted during the tailoring of the Template.**

**This template was developed using the Karuk Tribe Consultation Policy and Rincon Tribal Code §2.800 Tribal Consultation Ordinance.**

## **1. AUTHORITY AND PURPOSE**

**Instructions:** State the Constitutional Article that provides the **authority** to the Tribal Council or Governing Body to develop and adopt this protocol, ordinance, or policy.

State the **purpose** of this protocol, ordinance, or policy. The purpose of the Ordinance is to establish guidance for federal and state agencies that request consultation with the Tribe. In this provision, the Tribe may establish whether the protocol, ordinance or policy is guidance subject to negotiation or is a mandate for federal and state agencies.

## **2. DEFINITIONS**

*[The following definitions are recommended.]*

- (a) **“Bi-lateral Government-to-Government Consultation”** means authorized individuals of the Tribe meet directly with the Agency in an effort to reach an agreement on a proposed regulation, rule, policy, program, project, plan, property decision, or other activity that would affect the resources, properties, cultural practices, and those persons under the jurisdiction of the Tribe.
- (b) **“Agency”** means any state or federal agency, government, department, or corporation operating subject to federal or state statutes or regulations that obligate them to consult with federally recognized Tribes.
- (c) **“Coordination Meetings”** means on-going discussions between the Tribe and a Agency related to any proposed regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity of the Agency.
- (d) **“Multi-lateral Government-To-Government Consultation”** means meetings between multiple Tribal governments with the Agency when policies or programs with broad application throughout Indian Country are being developed and/or

# DRAFT TRIBAL CONSULTATION PROTOCOL TEMPLATE

Version: 4/3/2018 9:12 AM

modified by the Agency.

- (e) **“Off Reservation Consultation”** means any consultation that the Agency deems necessary held outside the boundaries of the Tribe’s Reservation.
- (f) **“Sensitive Information”** means any information an authorized individual of the Tribe deems to be confidential.
- (g) **“Consultation”**
  - a. Consultation is *“the process of seeking, discussing, and seriously considering the views of the Tribe, and reaching an agreement with the Tribe on the development, implementation or mitigation of regulations, rules, policies, programs, projects, plans, property decisions, inspections, and activities that may affect Tribal sovereignty, resources, properties, cultural practices, and those persons under Tribal jurisdiction.”*
  - b. For broad decisions, such as development or modification of federal policies that affect all Indian Nations similarly, the Tribe may accept invitations to participate in “Multi-lateral Tribal Consultations.”
  - c. For ongoing processes, for example water quality monitoring programs, the Tribe may seek regular meetings at an agreed upon interval. These meetings will be defined as “Coordination Meetings.” Coordination Meetings will serve to clarify how the Tribe and the Agency will continue to consult in order to reach an agreement or end result of the proposed regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity that may have an effect on tribal resources, properties cultural practices, and/or those persons under Tribal jurisdiction. Coordination meetings will serve as a forum for sharing data or making agreements to share responsibilities about data collection. Coordination meetings will be used as an opportunity for the Tribe to provide input on processes; such as development of agency, government, department, or corporation plans. Coordination meetings will usually involve Tribal staff but may involve Tribal Council or other Tribal decision makers.
  - d. For other decisions, particularly but not limited to activities with a direct effect on Tribal sovereignty, resources, properties, cultural practices, and those persons under Tribal jurisdiction, the Tribe may demand “Bi-

# DRAFT TRIBAL CONSULTATION PROTOCOL TEMPLATE

Version: 4/3/2018 9:12 AM

lateral Government-to-Government consultation” whenever a proposed regulation, rule, policy, program, project, plan, property decision, inspection, or activity will clearly have a significant and direct effect on Tribal sovereignty, resources, properties, cultural practices, and/or those persons under Tribal jurisdiction.

## **3. GUIDING PRINCIPLES**

**Instructions:** This section outlines the roles of the tribe and state/federal agency(ies) and guidelines for communication between the them.

This Ordinance is intended to be consistent with the body of federal law pertaining to Tribal consultation and to provide clear direction on what actions are necessary to satisfy consultation with the Tribe.

Consultation is the formal process of cooperation, negotiation, and mutual decision-making between two or more sovereigns.

### 1) Agency Responsibilities

- a) Federal or State agencies have the obligation of seeking out Tribal input and providing opportunities for meaningful consultation. This requires more than public participation efforts such as sending letters, notices, and copies of documents to Tribe and requesting comments. Where many public participation opportunities exist for a set period time, consultation with the Tribe is ongoing and continuous. Federal agencies must make concerted efforts to provide Tribal involvement in decision-making and follow the consultation procedure in order to fulfill any consultation requirements. It is important to understand that the Tribe may elect not to participate in consultation or may decide to limit their consultation as necessary.

### 2) Participant Roles

- a) Meaningful consultation requires that the Tribe and the Agency understand their respective roles in the decision-making process. The Tribe and an Agency must understand the legal underpinnings of the government-to-government relationship and the obligations of the federal trust relationship. Tribal governments must understand the policy decision-making authority of the Agency and national politics of the federal or state decision that drive the consultation. An Agency will benefit from an understanding of the Tribes’ unique culture, perspective,

# DRAFT TRIBAL CONSULTATION PROTOCOL TEMPLATE

Version: 4/3/2018 9:12 AM

governmental infrastructure, and resources.

### 3) Communication

- a) Communication between the Agency and Tribe will facilitate the decision-making process. Regular consistent communication is essential to meaningful and informed consultation.

## **4. OBJECTIVES OF CONSULTATION**

**Instructions:** This section outlines the legal and decision-making objectives for the tribe and an Agency. It also includes a list of best practices for consulting with the tribe.

- 1) The objectives to be met by persons participating in a government-to-government consultation process, include, but are not limited to, the following:
  - a) Ensure that the authorized individuals of the Tribe have notice of, and understand, the technical and legal issues necessary to make informed policy decisions;
  - b) Ensure Agency compliance with trust obligations as well as other applicable federal or state laws and policies affecting Tribal rights, resources, culture, religion, subsistence, and commerce;
  - c) Improve policy level decision-making of the Tribal Council and the agency;
  - d) Achieve bi-lateral decision-making of the Tribal Council and the agency;
  - e) Ensure the protection of Tribal rights, resources, culture, religion, and economy;
  - f) Ensure compliance with Tribal laws and policies;
  - g) Provide an opportunity for the Tribe to express views and concerns about the issue;
  - h) Develop and achieve mutual decisions through a complete understanding of technical and legal issues; and
  - i) Improve the integrity of federal/state-Tribal decisions.
- 2) Consultation best management practices for an Agency include:

# **DRAFT TRIBAL CONSULTATION PROTOCOL TEMPLATE**

Version: 4/3/2018 9:12 AM

- a) Advance notice from the Agency to the Tribe of any new policy, regulations, rule, program or other activity;
- b) Communication with the Tribe, beginning early in the planning process and continuing throughout the project;
- c) Multiple venues for consultation;
- d) Formal and informal meetings;
- e) The existence of a Tribal liaison;
- f) The Agency's fostering of a relationship with Tribal Council and Tribal staff;
- g) An early effort of identifying potential areas of concern for the Tribe;
- h) Full and candid information provided to the Tribe prior to the first meeting (in the consultation request letter and at the pre-consultation meeting);
- i) An open-ended and flexible agenda (no surprises or hidden agendas);
- j) Facilitators for the sessions, alternating between the Agency and the Tribe, or an agreed upon third party;
- k) A successful result viewed as partners arriving at an agreement, although reaching an agreement is not an end in itself;
- l) Tribal views and concerns are taken into account and implemented;
- m) Agreed upon measures are in place and enforceable;
- n) Implementation of a feedback mechanism;
- o) Tribal participation in the development of agendas for ongoing consultation meetings or coordination meetings; and,
- p) Any other best practices that the Agency and the Tribe agree upon.

## **5. ESTABLISHMENT OF POINT OF CONTACT**

# DRAFT TRIBAL CONSULTATION PROTOCOL TEMPLATE

Version: 4/3/2018 9:12 AM

**Instructions:** This section states the point of contact for consultation and the method for choosing an alternate point of contact.

The Chairperson of the Tribe is the official point of contact for government-to-government consultation unless Tribal Council chooses to designate an alternative point of contact by issuing a written statement signed by Chairperson of the Tribe.

**Insert POC Information:**

*Name*

*Position*

*Employer*

*Address*

*City, State Zip*

*Phone*

*Fax*

*Email*

## **6. CONSULTATION PROCEDURE**

**Instructions: This section defines the detailed steps for conducting government-to-government consultation between the tribe and the agency(ies). Note that the timelines should be adjusted to fit your tribe's staffing and other resources.**

Tribal Council establishes the following procedure for consultation. An agency or other entity wishing to participate in consultation with the Tribe must adhere to the following procedure unless an alternative process is approved, in writing, by the Tribal Council.

1) Request for Consultation and Advance Notice

- a) Early in the planning process, any Agency that seeks to develop or implement any regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity that may affect Tribal sovereignty or the Tribe's right to self-government, Tribal resources, properties, cultural practices, and/or those persons under Tribal jurisdiction must request consultation and provide advance notice to the Tribe. An Agency can do this by sending a letter and attachments requesting consultation or providing notice to the Tribal Chairperson.

# DRAFT TRIBAL CONSULTATION PROTOCOL TEMPLATE

Version: 4/3/2018 9:12 AM

- b) This letter must include: a draft or overview of and need for the policy, rule, regulation, program or project, its scope and impact, any applicable maps of the project area, and a summary describing how the proposed regulation, rule, policy, program, project, plan, property decision, inspection, or activity may affect Tribal sovereignty, resources, properties, cultural practices, and/or those persons under Tribal jurisdiction. This letter must include a contact person, timeline of the project, and any other relevant information to assist the Tribe in determining if consultation is in the best interest of the Tribe.
- c) Within *[7 to 30 (tailor this number based upon tribal staffing resources and the availability of mail services if the tribe is located in a rural area)]* days after receiving the letter requesting consultation, the Tribal Council will designate an authorized individual of the Tribe who will then respond to the Agency that the Tribe would like to schedule a pre-consultation meeting.
- d) If an Agency fails to request consultation on the development of any regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity that the Tribe believes may affect Tribal resources, properties, cultural practices, and/or those persons under Tribal jurisdiction, the Tribe may take the initiative to request consultation. In this event, the Tribe expects a response from the Agency within *[7 to 30 (tailor this number based upon tribal staffing resources)]* days of the receipt of the request.

## 2) Pre-Consultation Meeting

- a) Before the Agency moves past the scoping stage of a project, it must participate in a pre-consultation meeting with the Tribe. This meeting will involve authorized Tribal staff who will be responsible for briefing the Tribal Council before the consultation meeting takes place. Tribal Council members may be involved in this pre-consultation meeting.
- b) In this meeting the Agency should prepare a review packet that presents the proposed regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity of the Agency. The Agency must discuss the need for the proposed regulations, rule, policy, program, project or plan and how it may affect Tribal sovereignty, resources, properties, cultural practices, and/or those persons under Tribal jurisdiction.
- c) At a minimum this review packet must also include:

# DRAFT TRIBAL CONSULTATION PROTOCOL TEMPLATE

Version: 4/3/2018 9:12 AM

- i) Who the responsible agency is, the nature of its involvement, and an agency contact person with his/her address, phone, and e-mail
  - ii) Project description, including size and configuration of the proposed action, total acreage, what is known about past and current land use, and the type and extent of the proposed ground disturbance, the location (street address if available);
  - iii) A copy of the current plans;
  - iv) Maps that clearly identify the location., including a copy of the a 7.5” USGS map;
  - v) Clearly defined Area of Potential Effects (APE) for both direct and indirect (visual, audible, atmospheric changes) effects, to be described verbally and drawn on a map;
  - vi) Information on any previous studies and recorded archaeological sites resources within the APE;
  - vii) Sharp, clear photographs of the project area, including views from different perspectives. All photos should be clearly labeled and keyed to the map indicating location and direction of the view;
  - viii) The program, plan or project schedule or timeline.
- d) The Agency must present any technical and legal issues to the Tribal Council or their designee. The Agency will ensure that the Tribal Council or their designee understand the proposed regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity of the Agency.
- e) The Tribal advisors and staff will brief Tribal Council by providing opinions and recommendations. If the Tribal Council determines that it is in the best interest of the Tribe then the authorized Tribal advisor or staff will reach out to the Agency within 30 days to initiate a consultation meeting.

### 3) Consultation Meeting

- a) The Agency must arrange with the Tribal Chairperson a time, place, and agenda for the consultation meeting.

# DRAFT TRIBAL CONSULTATION PROTOCOL TEMPLATE

Version: 4/3/2018 9:12 AM

- b) After the Agency and Tribal Chairperson have made arrangements for a consultation meeting the Agency must confirm the Consultation Meeting with Tribal Chairperson **7 days prior** to the arranged date. Confirmation can be in the form of a phone call, email, or any other approved correspondence by Tribal Chairperson.
- c) The Agency must call the Tribal Chairperson **24 hours** prior to the arranged meeting date to provide adequate notice and confirmation of the meeting to the Tribe. This notice must include the Agency's representative's name, contact information, and expected time of arrival.
- d) The Agency must prepare a review packet for the Tribal Council similar to the review packet required in the pre-consultation meeting and any additional information that will be necessary for the Tribal Council to reach an agreement.
- e) The Consultation Meeting must also address the following:
  - i) A discussion of any barriers to Tribal participation such as timing, financing, and/or location. The Agency must provide funds for off reservation consultation, if necessary;
  - ii) A discussion of any sensitivities regarding sacred sites affected by the project;
  - iii) A discussion of any technical or legal issues;
  - iv) A mutually agreed upon format for process;
  - v) Development of a Consultation calendar or an agreed upon meeting interval to ensure that enough meetings are planned for adequate meaningful consultation. The Consultation calendar or meeting intervals should take into account the Agency's statutory or regulatory obligations pertinent to the decision; availability of Tribal Council members and staff; and time to gather all necessary information required.
- f) The Agency will ensure that the Tribal Council understands the proposed regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity of the Agency.

# **DRAFT TRIBAL CONSULTATION PROTOCOL TEMPLATE**

Version: 4/3/2018 9:12 AM

- g) Agreements with Agency shall be authorized by Tribal Council [by Tribal Council resolution or letter;.
  - h) Prior to authorizing any agreement, the Tribal Council shall ensure that such agreement: (1) does not contain any provisions that in any way diminish or waive any trust obligation of the Federal Government; (2) does not contain any provisions that waive tribal sovereign immunity, in full or in part; (3) clearly sets forth the expectations of the Tribe for the roles and services to be performed by the Agency with respect to such agreement; and (4) is consistent with established Tribal goals and priorities.
- 4) Ongoing Consultation Meetings (if necessary) or Coordination Meetings
- a) Consultation meetings should continue pursuant to the agreed upon Consultation Calendar or meeting interval until an agreement is reached or until the Tribe and Agency decide that an agreement is possible. Some consultation meetings may be in formal settings, while other may include field trips to project locations as needed. Informal meetings between staff, sub-groups, or sub-committees may be formed on an ad hoc basis as needed and agreed upon by Tribal Council.
  - b) All ongoing Consultation Meetings and Coordination Meetings require the Agency to confirm the meeting with Tribal Council one week prior to the arranged date. Confirmation can be in the form of a phone call, email, or any other approved correspondence by Tribal Council.
  - c) The Agency must call the Tribal Chairperson or their designee 24 hours prior to the arranged meeting date to provide adequate notice and confirmation of the meeting to the Tribe. This notice must include the Agency's representative's name, contact information, and expected time of arrival.
- 5) Provide the Tribe with a Consultation Summary Report
- a) The Agency shall provide the Tribe with a detailed report that provides a review of the government-to-government consultation process and all consultation activities after an agreement has been authorized by the Tribal Council and approved by resolution.
  - b) This Consultation Summary Report may be used by Tribal Council without the consent of the Agency for any Tribal business matter; including but not limited to Tribal meetings.

# DRAFT TRIBAL CONSULTATION PROTOCOL TEMPLATE

Version: 4/3/2018 9:12 AM

## 6) Certification of Completed Consultation

- a) At the end of the government-to-government consultation process, the Tribe will offer a *[Tribal resolution or letter]* certifying that consultation was completed in compliance with this policy or not. In the event that the Tribe deems that the Agency failed to consult properly, a letter from the Tribe will explain this failure and be shared with the director or executive authority of the Agency.

## 7) Emergency Consultation Process

- a) Consultation should be conducted with advance notice to avoid any devastating impacts to tribal resources. Should an Agency require consultation with a tribe in an emergency situation in which notice cannot be provided 7 to 30 days in advance, the Agency needs to contact the Tribal Chairperson immediately and provide a summary of the actions and potential impacts. The Tribal Chairperson will meet with the Tribal Council and stakeholders to determine if the Tribe can participate in an emergency consultation. Action steps will follow the steps set forth above but with immediate and shortened timelines as mutually agreed upon.

## **7. CONSULTATION RECORD**

**Instruction: This section defines which types of notes and other media will serve as the consultation record, who may possess the consultation record, and how the tribe's sensitive information will be handled.**

Meeting notes, minutes, shared documents, and any recorded audio or video files shall be maintained in common between the Tribe and the Agency. Any sensitive information provided by the Tribe shall remain confidential or be returned to the Tribe upon request; unless otherwise agree to, in writing, by the Tribal Council.

## **8. NO WAIVER OF SOVEREIGN IMMUNITY**

**Instruction: This section expressly states that the tribe does not waive sovereign immunity for this ordinance or protocol.**

Nothing in the *[Ordinance/Protocol]* shall be deemed or construed to be a waiver, in full or in part, of the Tribe's sovereign immunity from unconsented suit.

## **9. SEVERABILITY**

# **DRAFT TRIBAL CONSULTATION PROTOCOL TEMPLATE**

Version: 4/3/2018 9:12 AM

**Instruction: This section establishes that if a provision is held to be unconstitutional, then that provision may be severed from the rest of the ordinance/protocol.**

If any provision of this ordinance/protocol shall be held unconstitutional pursuant to the tribal constitution or invalid by a court of competent jurisdiction, only the invalid provision or language shall be severed and the remaining provision and language of this ordinance shall remain in full force and effect.