

Karuk Tribe Consultation Policy

As a commitment to Tribal sovereignty and a meaningful government-to-government relationship, many federal, state, and local agencies are being directed or required to consult with the Karuk Tribe when developing regulations and policies or engaging in other activities that may affect Tribal resources. 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 for 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 California are meeting their legal responsibilities with Indian Tribal Governments.

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

Legal Background

United States

The United States’ obligations and unique legal relationship with Indian tribal governments begins with the Constitution in the Commerce Clause and extends through treaties, statutes, executive orders and court decisions. A significant overview of federal laws and policies that describe the United States’ legal obligations to consult with Tribes on a government-to-government basis has been described elsewhere (National Association of Tribal Historic Preservation Officers, 2005) and will not be presented here.

In general, the body of laws, court, and policy decisions pertaining to consultation with Tribes is summed up by the Secretary of Interior’s Standards and Guidelines definition of consultation:

“Consultation means the process of seeking, discussing, and considering the views of others, and where feasible, seeking agreement with them on how historic properties should be identified, considered, and managed.”

This definition is consistent with federal court rulings and describes direct interaction with the affected Tribe, an exchange of views on the project or decision, and the aspiration to reach agreement on a course of action. Thus, a letter inviting consultation followed by a briefing given

to Tribes by the Agency does not constitute consultation. Consultation and coordination may also serve to effect the Tribe's assumption of leadership role in the management of federal programs consistent with the principles of self-governance and self-determination as codified in the Indian Self Determination and Education Assistance Act of 1975, (Public Law 93-638).

In 2000, Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) served as a re-affirmation of the Federal Government's commitment to tribal sovereignty, self-determination, and self-governance. This Order firmly establishes the policy of the administrative branch of government as one that institutionalizes regular and meaningful consultation with Tribes in the development of federal policies affecting Tribes. It directs Agencies to respect treaty rights and grants wide discretion to Tribes to exercise principals of self-governance and develop of Tribal policies. Further, this Order directs each Agency to develop a consultation process (National Association of Tribal Historic Preservation Officers, 2005).

California

The State of California's obligation to consult with Tribes is less clear. It has been generally accepted by policy makers at the state level that the federal obligation to consult with Tribes does not create an obligation for the state.

However, there are several state policies that do require consultation with Tribes. State planning law requires cities and counties to consult with California Native American tribes during the local planning process for the purpose of protecting Traditional Tribal Cultural Places. SB 18, authored by Senator John Burton and signed into law by Governor Arnold Schwarzenegger in September 2004, effectively amended California's General Plan Guidelines to include a Tribal consultation requirement (Governor's Office Office of Planning and Research, 2005). This essentially requires cities and counties to contact, and consult with, California Native American tribes prior to amending or adopting any general plan or specific plan, or designating land as open space. More recently the State Legislature approved AB 52 (effective July 1st, 2015), a bill that amends the California Environmental Quality Act (CEQA) to add protections for the new category of "Tribal Cultural Resources". Furthermore, it requires the lead agency to contact the Tribe about a CEQA project. If the Tribe requests consultation within 30 days, the lead agency must consult with the Tribe.

California Government Code §65352.4 defines consultation for local governments and tribes:

"Consultation means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is

mutually respectful of each party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance."

However, the detailed consultation flow chart included in the California Office of Planning and Research's (OPR) Consultation Guidelines read more like step-by-step directions to notify, take comments, and then make a decision. There is no recourse spelled out if a Tribe and a local government or agency fails to reach agreement.

More recently Governor Jerry Brown addressed California's lack of a more comprehensive tribal consultation policy by signing executive order B-10-11 in 2011. The order is brief and simple, and essentially directs the Governor's Tribal Advisor to:

- Serve as a direct link between the Tribes and the Governor of the State of California.
- Facilitate communication and consultations between the Tribes, the Office of the Governor, state agencies, and agency tribal liaisons.
- Review state legislation and regulations affecting Tribes and make recommendations on these proposals.

It is notable that B-10-11 effectively directs all state agencies and/or departments to develop a consultation policy, and yet does not provide a clear definition of Consultation.

The first California Agency to develop a consultation policy was the Natural Resources Agency. The policy states:

"The purpose of this policy is to ensure effective government-to-government consultation between the Natural Resources Agency, departments of the Natural Resources Agency and Indian tribes and tribal communities to further this mission and to provide meaningful input into the development of regulations, rules, policies, programs, projects, plans, property decisions and activities that may affect tribal communities... The goal of the policy is to engage in timely and active process of actively seeking, discussing, and considering the views of California Indian Tribes..."

It is of note that the result of Governor Brown's executive order is that all 11 California agencies, and likely all the departments within those agencies, will develop a separate consultation policy that will have to be consistent with the executive order. This runs the risk of introducing confusing and inconsistent consultation policies and of imposing a lot of work on the part of Tribes to participate in policy development.

The Need for a Karuk Tribal Consultation Policy

In order to avoid engaging with multiple departments and multiple managing agencies as California enacts Executive Order B-10-11, 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.’

Karuk Tribe Definition of Consultation

The Karuk Tribe defines Consultation as *the process of seeking, discussing, and seriously considering the views of the Karuk Tribe, and seeking agreement with the Karuk 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 some broad decisions, such as development and modification of federal policies that affect all Indian Nations similarly, the Tribe may accept invitations to participate in *Multilateral-Tribal consultations*.

For ongoing processes, such as water quality monitoring programs for example, the Tribe may seek regular meetings at an agreed upon interval. These meetings would be defined as *Coordination Meetings* which serve to clarify how Tribal and the Consulting Entity’s jurisdictions or responsibilities apply to a given issue. Coordination Meetings may serve as fora 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 but may involve Tribal or other decision makers.

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 usually invoked when the proposed regulations, rules, policies, programs, projects, plans, property decisions or activities will clearly have a significant and direct effect on Tribal Resources, historic properties, contemporary cultural practices, and/or those persons under Tribal jurisdiction.

Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires Federal agencies to take into account the effects of their undertakings on historic properties. The regulations that

implement section 106 (36 CFR 800) specify a distinct process of evaluation and consultation. The Karuk Tribe has assumed State Historic Preservation Officer (SHPO) responsibilities on their Tribal Lands and also advises and assists on lands within or near Aboriginal Territory that may impact Tribal Cultural Resources. The Karuk Tribe has a Tribal Historic Preservation Officer (THPO). Accordingly, consultations following the Section 106 process should go to the THPO and will be reviewed and coordinated in accordance with the Karuk Tribe THPO Plan.

Karuk Tribe THPO Contact:

Karuk Tribe THPO
Department of Natural Resources
P.O. Box 282
Orleans, CA 95556
Ph: (530) 627-3446

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

Step 1: Request for Consultation

Early in the planning process, any Consulting Entity that seeks to develop regulations, rules, policies, programs, projects, plans, property decisions or activities that may affect Tribal Resources, historic properties, contemporary cultural practices, and/or those persons under Tribal jurisdiction must request consultation by sending a letter to the Tribe's Self-Governance Coordinator. 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 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. The letter should also include a contact person, timeline of the project as well as any other relevant information to assist the Tribe in appropriately identifying potential impacts.

Within 30 days after reception 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 regulations, rules, policies, programs, projects, plans, property decisions or activities that the Tribe believes may affect Tribal Resources, historic properties, contemporary 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 Consulting Entity within 30 days of the receipt of the request.

Step Two: Pre-consultation Meeting

Before the Consulting Entity moves past the scoping stage of the project, it must participate in a pre-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 possibly also involve Tribal Council members.

In this meeting the Consulting Entity should present the proposed regulations, rules, policies, programs, projects, plans, property decisions or activities and discuss how they may affect Tribal Resources, historic properties, contemporary cultural practices, and/or those persons under Tribal jurisdiction.

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:

- 1) 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;
- 2) A discussion of any sensitivity regarding sacred sites affected by the project and whether or not a religious leader should be included in the consultation;
- 3) An agreed upon meeting format for the process;
- 4) Development of a Consultation Calendar or other agreed upon meeting interval to ensure that enough meetings are planned to ensure adequate 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.

Step 4: 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.

Step 5: Certification of Completed Consultation

At the end of the process, the Tribe will offer a Tribal Resolution certifying that 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 director or executive authority of the Consulting Entity.

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 in writing by the Karuk Tribe.

Best Management Practices

In addition to the above requirements for consultation, the Karuk 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.

Definitions

Consulting Entity - any state or federal agency, government, department, or Corporation operating under federal or state statutes or regulations that obligate them to consult with federally recognized Indian Tribes

Multilateral-Tribal Consultation – meetings featuring multiple Tribal Governments along with the Consulting Entity. Usually used when policies or programs with broad application throughout Indian Country are being developed and/or modified.

Coordination Meetings – process of ongoing discussions related to policies, programs, or the development of plans which play out over time. Often involves discussion between Tribe and Consulting Entity on issues of shared jurisdiction or responsibility.

Bi-lateral Government-to-Government Consultation – process whereby Tribe meets directly with Consulting Entity in an effort to reach an agreement on a specific proposed regulation, rule, policy, program, project, plan, property decision or activity that would affect Tribal Resources, historic properties, contemporary cultural practices, and those persons under Tribal jurisdiction.