

Guidance and Responsibilities for Effective Tribal Consultation, Communication, and Engagement

*A Guide for Agencies Working with West Coast Tribes
on Ocean & Coastal Issues*



West Coast
Ocean Tribal Caucus

Developed by Members of the West Coast Tribal Caucus
of the West Coast Ocean Alliance

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I. Executive Summary

In 2019, the Tribal Caucus of the West Coast Ocean Alliance (WCOA) developed this document to serve as a guide to federal and state agencies seeking to engage with Tribal Governments on ocean and coastal issues on the West Coast. It is a Tribally developed document intended to complement individual Tribes' consultation policies by providing background, context, best practices, and resources for working with Tribal Governments. When working with Tribes in any context, it is essential that agencies build relationships with their Tribal counterparts and learn about the policies and protocols of specific Tribal Governments; this guide cannot substitute for the knowledge and connections gained from such efforts.

To appropriately engage with Tribal Governments, it is of paramount importance to understand that the relationship between Tribal Governments and the U.S. federal government (and sometimes Tribal Governments and states) is a **government-to-government relationship (G2G)** between sovereigns, based on Tribes' inherent sovereignty and federal and international law. The G2G relationship is the foundation for the process of Tribal consultation. Recognizing that each individual Tribe may have differing interpretations of consultation, for the purposes of this guide, **Tribal consultation** is defined as the overall process of sharing information, coordination, engagement, and dialogue that occurs between Tribal Governments and governmental or administrative entities within the United States. Tribal consultation occurs before an agency commits itself to a path of action that will affect Tribal rights, lands, resources, governance, or interests. Consultation is a process that ultimately leads to the development of a decision. **Government-to-government consultation** is a formal component of the overall Tribal consultation process in which Tribal leaders engage with their governmental counterparts and Tribal Governments' input is incorporated into decisions. G2G consultation is herein defined as a stage in the larger process of Tribal consultation in order to emphasize that the full process, which may involve a series of interim meetings and steps with various Tribal counterparts, is necessary for the consultation to be meaningful and productive.

In light of Tribes' inherent sovereignty, federal and some state government agencies have a legal and moral obligation to consult with Tribal Governments when their rights, lands, resources, governance, or interests may be affected. This obligation is founded in the G2G relationship and articulated over a long history that includes the establishment of the federal trust responsibility to Tribes, treaty rights, executive orders, and case law. For state and federal agencies, engaging with Tribal Governments through Tribal consultation is an opportunity to honor that responsibility and build relationships based on mutual respect and understanding. Furthermore, from the agency perspective, involving Tribal Governments in project decision making early and in a respectful, meaningful, and appropriate manner can lead to benefits such as improved relationships, partnership opportunities, better public perception, reduced overall project costs, and time saved.

This guide lays out the following principles of a meaningful Tribal consultation process:

- 1) Engaging in **early and frequent communication** with Tribal Governments
- 2) Ensuring the **presence of appropriate representatives** for a given stage of the process
- 3) Having an **understanding of and respect** for Tribal decision-making processes
- 4) Adopting a **consensus-seeking approach** to Tribal consultation

- 5) Ensuring a **transparent and accountable process** that provides clarity on agency decision making and the potential for Tribal Governments to affect the final decision

The guide further articulates a set of best practices for Tribal consultation. It recommends that agencies:

- engage in early and frequent communication with Tribal Governments when a potential action arises that may affect Tribal rights, lands, resources, governance, or interests;
- understand Tribal roles and appropriate Tribal and agency representation for each stage of the process;
- determine the “potentially affected” Tribal Governments with whom to consult;
- determine appropriate roles for non-federal entities, such as applicants and local governments, in the consultation process by discussing their potential involvement with Tribal Governments;
- understand and respect Tribal decision-making processes;
- ascertain that the agency and the Tribal Government have a shared recognition of the stage of consultation;
- share sufficient information in a timely manner;
- incorporate indigenous/traditional ecological knowledge (TEK) into decision-making processes;
- ensure appropriate data management and maintain confidentiality, as agreed with the Tribal Government;
- engage in a consensus-seeking approach to decision making with Tribal Governments;
- demonstrate accountability and a commitment to the G2G relationship; and
- take ownership of the agency responsibility to keep staff trained and informed on Tribal consultation processes, as well as on the history and status of relationships and any ongoing processes with individual Tribal Governments.

While the authors sought to include case studies illustrating an appropriate Tribal consultation process from start to finish, there were no holistic cases available at the time of publication. The Tribal Caucus hopes that as a result of the dissemination of this guide, successful examples of full Tribal consultation processes will develop and can be included in subsequent addenda.

II. Introduction

A. The West Coast Ocean Alliance Tribal Guidance Working Group

In June 2018, President Trump signed Executive Order 13840, directing regional coordination in ocean planning to take place through regional ocean partnerships. In December 2018, state and Tribal Governments¹ that had previously participated in the West Coast Regional Planning Body and the West Coast Ocean Partnership (now defunct) announced that they would form a new West Coast Ocean

¹ Please note that the term “Tribal Government(s)” is used generally throughout this document for consistency to refer to Tribes, Native Nations, Native American Tribes, and/or indigenous governments, etc. Other terms may be used as appropriate based on individual Tribal Government names and/or quoted documents. For additional details, please reference Box 1.

Alliance (WCOA) to serve as the regional ocean partnership for the West Coast, building on previous regional coordination activities.

The WCOA seeks to advance regional activities focused on a range of issues by bringing together Tribal, state, and federal partners on topics such as working towards compatible and sustainable ocean uses, effective and transparent decision making, comprehensive ocean data, and increased understanding of and respect for Tribal rights and indigenous knowledge.

Tribal Government members of the WCOA set up the West Coast Tribal Caucus (Caucus), with the goals of improving government-to-government (G2G) coordination and engagement with federal and state partners, increasing the capacity for Tribes to manage and plan for their ocean areas, and developing this guide on Tribal consultation on the West Coast in an ocean planning context. This guide is a product of the West Coast Tribal Caucus (not the full WCOA) and has been approved by the Tribal Governments listed in [Appendix J](#).

The Tribal Guidance Working Group is comprised of volunteers who are members of the Caucus. See [Appendix A](#) for a list of Working Group participants.

B. Goals of This Guide

The intent of this document is to provide tribally generated guidance and best practices to supplement state and federal agency guidance for working with West Coast Tribes. This document is not meant to be a step-by-step guide or an enforceable policy document. Instead, it provides context, detailed Tribal perspectives, and additional input and guidance on Tribal expectations in the implementation of Tribal consultation policies. Many Tribal Governments in the region have existing consultation policies that must be honored; this guide aims to complement those policies. Federal and state agencies should (1) reach out to individual Tribal Governments for information on their respective consultation policies and (2) review those policies. Agencies should defer to Tribal consultation policies when these exist. Agencies are encouraged to read this guide alongside any existing individual Tribal consultation policies, as well as their own state and federal policies, using it to inform how they approach communication and conversations with Tribal Governments. Given the unique nature of every Tribal Government and the variety of circumstances warranting consultation, agencies should work with Tribal Governments to incorporate customs or procedures specific to each Tribal Government when seeking to apply an existing consultation policy. Should any inconsistencies arise between the consultation policies of the Tribal Governments and those of the agencies, agencies are encouraged to engage in dialogue with the Tribal Government to facilitate the resolution of such inconsistencies.

In developing this guide, the authors sought to incorporate the experience, knowledge, and policies of West Coast Tribes, in the hopes that the final product would serve as a useful tool for any local, state, or federal representative involved in Tribal consultation with West Coast Tribes. Tribal staff and representatives are often called upon to clarify the definition of “consultation” and the activities required to conduct meaningful consultation for their state and federal partners. This guide seeks to avoid reinventing the wheel in discussions relating to G2G consultation to ensure that conversations occur in the most meaningful and respectful manner, without undue strain on Tribal, state, and federal resources and staff time. The authors further hope that this document will serve to reinforce and support the important obligation and proven value of G2G consultation for Tribal governments and non-Tribal governments alike.

III. The Obligation and Value of Tribal Consultation

A. What Is Consultation?

Within this document, a number of terms are used to define processes and interactions between federal/state entities and Tribal Governments. Individual Tribal consultation policies and the terms as defined therein should always take precedence. For the purposes of this guidance document, however, these terms are used as follows:

- The **G2G relationship** refers to the overarching sovereign-to-sovereign relationship that exists between Tribal Governments and the U.S. federal government (and sometimes Tribal Governments and states), including the legal obligations of state and federal governments to Tribal Governments in light of their inherent sovereignty and federal and international laws. The processes of Tribal consultation and G2G consultation are founded on this relationship.
- **Tribal consultation** is the overall process of sharing information, coordination, engagement, and dialogue that occurs between Tribal Governments and governmental or administrative entities within the United States. Tribal consultation occurs before an agency commits itself to a path of action that will affect Tribal rights, lands, resources, governance, or interests. Consultation is a process that ultimately leads to the development of a decision.²
- **G2G consultation** is a formal component of the Tribal consultation process that engages Tribal leaders and incorporates their input into decisions. A formal G2G meeting, between Tribal leaders and similarly high-level federal or state decision-makers, is customarily part of this process, and may include multiple meetings, discussions, and the reciprocal sharing of information. More than one formal G2G meeting among decision-makers may be required in a G2G consultation.

It is worth noting that some Tribal consultation policies do not distinguish between Tribal consultation and G2G consultation. For the purposes of this document, the authors are referring to the entire Tribal consultation process as based on the G2G relationship and its accompanying obligations in order to clarify that all the components of the process are necessary. This helps to avoid an inappropriate focus on solely the formal G2G meetings with Tribal Government leaders and decision-makers. In order to ensure G2G meetings between decision-makers are meaningful and productive, it is essential for agencies to understand the need for the full Tribal consultation process, which may involve a series of interim discussions/meetings. Please see [Appendix B](#) for an illustration of the Tribal consultation process.³

Tribal Governments, agencies, and organizations have developed consultation policies through several different mechanisms. Policies can range from formal policies with foundations in law to best practices guidance; consequently, they can carry differing levels of legal ramifications. They also may range from technical-level guidance to more policy-level discussions. These types are described below:

² Nez Perce Tribe, “Nez Perce Tribe Guidance on Government-to-Government Consultation,” 1.

³ While the Caucus is setting forth an example of Tribal consultation process for illustrative purposes, it is important to remember that the steps and components of this formal decision-making process should be defined by the individual sovereigns that an agency is consulting.

- **Guidance-based:** Non-legal documents that typically include best practices, minimum requirements, and the history of consultation with U.S. Tribal Governments. If they are Tribally developed or are specific to one Tribal Government, they may contain additional examples or preferred processes. Guidance-based examples include the National Association of Tribal Historic Preservation Officers’ (NATHPO) “Tribal Consultation: Best Practices in Historic Preservation” and the Bureau of Ocean Energy Management’s (BOEM) “Guidance Document for Characterizing Tribal Cultural Landscapes.”
- **Ordinance-based:** Tribal laws that formally define consultation requirements between the Tribal Government and outside agencies. Not all Tribal Governments have consultation ordinances, and those who do may also have additional policy or guidance documents to provide details and step-by-step processes. The Rincon Band of Luiseño Indians, for example, has a Tribal consultation ordinance.
- **Formal policies:** Formal documents that define consultation procedures and policies for a Tribal Government, government agency, or organization. These policies may be tied to a Tribal ordinance, state law, or federal executive order, and in such cases, they may include sections that define strict legal requirements for consultation. In the case of Tribal policies, they will usually include triggers for consultation and preferred processes for consultation. Agency-developed policies typically follow the most recent requirements as defined by state laws or executive orders and will include step-by-step procedures and triggers for consultation.

Agency policies do not always match up with Tribal policies, sometimes leading to conflicts during the consultation process. In these instances, it is recommended that federal and state agencies defer to Tribal Consultation policies to the extent possible. If such deference is deemed infeasible, agencies and Tribal Governments should have early discussions regarding any inconsistencies. It is worth noting that agency-developed policies do not always have mechanisms for ensuring flexibility in the process or easily enabling Tribal Government participation.

Examples of agency-developed policies include the U.S. Department of the Interior’s “Policy on Consultation with Indian Tribes” and the National Oceanic and Atmospheric Administration’s (NOAA) “Procedures for Government-to-Government Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations.”

B. The Obligation to Consult for Federal and State Agencies

Tribal Governments are first nations of the United States and have inherent sovereignty. Within the overall Tribal consultation process, G2G consultation is a functional exercise of inherent Tribal sovereignty. The meaningful exercise of Tribal consultation is an essential obligation for federal and some state governments to honor Tribal sovereignty and the unique role Tribal Governments hold in U.S. policy and decision making. Furthermore, G2G consultation, when conducted correctly and appropriately, provides a respectful and efficient mechanism for federal and state agencies to meet their legal and moral obligations to Tribal Governments. These legal obligations include honoring the trust responsibility, treaty rights, executive orders, case law, and a myriad of additional requirements all supporting the G2G relationship between federal agencies and Tribal Governments, or between Tribal Governments and states (see [Appendix H](#) for a list of laws and resources).

Tribal Governments hold, and seek to formally affirm, rights to protect their traditional homelands, waters, and natural and cultural resources. The impacts associated with these rights can best – and, in some cases, only – be defined by Tribal Governments. Speaking, discussing, and engaging with Tribal

Governments through G2G consultation is a meaningful way to develop state and federal actions that ensure Tribal rights are protected and that the federal trust responsibility is upheld.

C. The Value of Consultation for Federal and State Agencies

Tribal values, cultures, and processes are unique for each Tribal Government and often differ from those of federal and state agencies. Tribal consultation offers an opportunity for federal and state agencies to learn about these unique differences and approach discussions in culturally appropriate and respectful ways that can build lasting relationships with Tribal Governments.

From the state and federal agency perspective, early, meaningful, and ongoing communication and consultation ensures that Tribal Governments are able to identify the impacts of federal and state actions and inform decisions, projects, and processes early - before time, money, and effort are invested. The news often provides examples of the negative impacts of (intentionally or unintentionally) excluding important parties from the decision making that impacts their lives and resources. Failing to engage the necessary parties breeds distrust, damages public perception, and can result in project delays, additional costs, and general uncertainty regarding project integrity. These dynamics are most prevalent when the processes or projects involved may impact Tribal resources; such dynamics can be alleviated, however, through meaningful Tribal consultation. Agencies maintaining ongoing communication and partnerships with Tribal Governments have experienced the positive outcomes of improved relationships, better public perception, reduced overall projects costs, and time saved.

IV. Overview and History of Tribal Consultation Policies

A. Tribal Consultation Policies

For agencies seeking to engage with Tribal Governments, the Tribe's own policies should be a primary resource that should not be disregarded in favor of guidance developed by agencies or other entities. Consultation policies can vary between Tribal Governments and are often influenced by the type of federal and state government recognition (see Box 1 below). Tribal consultation policies are often designed to address the capacity of the Tribal Government to respond to or request consultation. It is important to note that a Tribal Government's inability or failure to respond to a consultation request does not indicate that the consultation is not important to the Tribal Government, or that consultation is not required.

Tribal consultation guidance typically includes language defining which lands require consultation procedures, when consultation should begin, and which positions within the Tribal government should be involved in consultation procedures. Agencies should approach Tribal Governments at the beginning of the planning process to enquire about existing consultation policies and to share their own internal consultation procedures.

Box 1. Types of Recognition

All Tribal Governments, as indigenous peoples, retain inherent sovereignty, rights to self-determination, and autonomy in matters relating to their internal affairs (see [United Nations Declaration on the Rights of Indigenous Peoples](#)). As discussed in Section IV, the U.S. Constitution, Congress, and courts have created a legal framework for the legal standing of Tribal Governments. Federal and state governments have established specific definitions and legal standings for Tribal Governments. Notwithstanding Tribal Governments' inherent sovereignty, the legal frameworks created by Federal and state governments impact Tribal Governments' G2G relationships and the processes used for Tribal consultation with federal and state agencies. The following summarizes these distinctions but does not address all the potential legal and political realities of individual Tribal Governments in their working relationships with federal and state agencies.

A **federally recognized Tribe** is an American Indian or Alaska Native Tribal Government that is recognized by the federal government as a sovereign nation having a G2G relationship with the United States and is eligible for funding and services from the federal government. The United States recognizes these Tribes' inherent rights of self-government (i.e., Tribal sovereignty). These Tribes are entitled to receive certain federal benefits, services, and protections because of their special relationship with the United States. (The current list is maintained by the Bureau of Indian Affairs in the *Federal Register*.)

Non-federally recognized Tribes are Tribal Governments exercising and claiming inherent sovereignty but are not currently recognized as Tribal sovereign nations by the United States government. Thus, the federal government does not recognize a trust responsibility or G2G relationship with non-federally recognized Tribes. Some non-federally recognized Tribes may have previously been recognized by the United States, but that status was revoked or terminated. Many non-federally recognized Tribes are currently seeking federal recognition status or reinstatement of their federal recognition status.

State-recognized Tribes are Tribal Governments that are recognized by individual states. State recognition does not impose any obligations on the federal government, unless federal law authorizes such obligations. Typically, state-recognized Tribes exist in those states that have legislation for a formal Tribal recognition process documented in state statute, although other processes may apply.

Treaties and other ocean planning interests: In addition to the G2G relationship, a number of individual and groups of Tribal Governments within the lower 48 states have rights through treaties, laws, and executive orders on the federal government level, as well as through agreements with state governments. These treaties, executive orders, laws, and agreements specify or clarify a range of reserved rights, which were reserved by Tribal Governments either at the time the treaties were created or through the laws, executive orders, and agreements. These affirm additional rights to those Tribal Governments, beyond rights generally acknowledged by the federal and state governments as part of the G2G relationship.

Tribal Governments on one hand, and federal and state agencies on the other, may have differing interpretations regarding the scope of rights reserved and retained pursuant to treaties, executive orders, laws, and agreements. For example, rights reserved retained through treaties between Tribal Governments and the federal government are defined as the supreme law of the land, which may only be compromised by an act of Congress. Individual Tribal Government treaties, executive orders, rights, and agreements should be reviewed and discussed on a case-by-case basis. Given that each Tribal Government has a distinct history and legal background, each Tribal Government's rights should be understood and acknowledged. The following examples illustrate some of the reserved rights that may be of interest in ocean planning discussions. This document does not provide, however, a legal opinion or analysis of those rights.

Within the West Coast Tribal Caucus, the Hoh, Makah, Quileute Tribes, and the Quinalt Nation (Coastal Treaty Tribes) were party to treaties that reserved hunting, fishing and gathering rights within usual and accustomed areas that extend off-reservation sovereign jurisdictions within both federal and state jurisdictions. In Oregon, Tribal Governments retain fishing and other rights to coastal resources. In California, Tribal Governments retain all hunting, fishing, and gathering rights within marine waters; these rights were never ceded and have never been explicitly revoked by Congress. In recognition of those retained rights, California law affirms the right of federally recognized Tribes to utilize marine resources within specific marine protected areas for subsistence, cultural, and other related purposes. Likewise, federal law has acknowledged some California Tribal Governments' rights to fish in-river. (See additional details in [Appendix C](#).)

Additional examples include retained inherent sovereign rights, as well as rights reserved through the formation of executive order reservations or through legislative action, which are interpreted through case law. This document cannot summarize all the rights and interests retained by Tribal Governments, but the authors encourage agency representatives and partners to research these various possibilities and speak with their Tribal counterparts to understand each Tribal Government's unique rights.

B. Federal Consultation Policies

As the legal relationship of the United States with Tribal Governments has developed over its history through treaties, the Constitution, case law, and congressional acts, the federal government “has charged itself with moral obligations of the highest responsibility and trust toward Indian Tribes.”⁴ This obligation continues and extends to all federal executive branch agencies. Justice John Marshall, the first Chief Justice of the Supreme Court of the United States, laid the legal foundation for the modern federal trust relationship with Tribal Governments in three cases often referred to as the “Marshall trilogy”:

- *Johnson v. McIntosh*, 21 U.S. 543 (1823) concluded that the United States had the exclusive right to divest Tribal Governments of original possession of their land and that this right was derived from international law concepts of discovery and conquest.
- *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) characterized Tribal Governments as “domestic dependent nations” and their relation to the United States as that of “ward and guardian,” articulating the trust relationship between the United States and Tribal Governments.
- *Worcester v. Georgia*, 31 U.S. 515 (1832) further articulated the sovereign governmental status of Tribal Governments as “distinct political communities.”

In *Cherokee Nation*, Justice Marshall rejected the notion that Tribal Governments are conquered peoples without rights of self-determination, drawing on the principles of international law to describe Tribal Governments as “domestic dependent nations.” This characterization of Tribal Governments in the international context ensured Tribal Governments could retain their status as sovereign governments and their rights to goods and services from the United States government pursuant to treaties, even though they were dependent on the larger national government for certain protections from other international forces. This unique blend of legal principles and political theory forms the basis of a federal trust relationship between the United States and Tribal Governments today, which is reflected in legislation, treaties, court decisions, and executive orders recognizing the unique rights of Tribal Governments in the United States.

The legal ramifications of the trust relationship are that the U.S. government has the substantive duty to protect “to the fullest extent possible” the Tribal Government’s trust resources and other rights, as affirmed by law.⁵ The United States’ trust responsibility toward Tribal Government trust assets operates in a manner similar to the principles of the common law of trusts, in which the United States as the trustee has the obligation to conserve the “assets held in trust, for the benefit of the beneficiary Tribes.”⁶ The trustee is required to consult with its Tribal beneficiaries to obtain their views of actions that may affect their own interests.⁷ While the Supreme Court has not developed a detailed articulation of the trust

⁴ *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

⁵ Please note that each Tribal Government will have different rights and resources affirmed by law. It is recommended that agencies speak with individual Tribal Governments to ascertain which rights and resources apply.

⁶ *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001); *United States v. Mitchell*, 463 U.S. 206, 224–25 (1983); *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614 (1987).

⁷ *Winnebago Tribe of Nebraska v. Babbitt*, 915 F.Supp157 (D. S.D. 1996).

relationship between the U.S. government and Tribal Governments, it is clear that the trust obligation extends to the affirmative protection of treaty rights as well as Indian lands and resources.⁸

The political aspect of the trust relationship between the United States and Tribal Governments is expressed through the federal government's commitment to G2G consultation, which acknowledges and respects the sovereignty and self-determination of federally recognized Tribal Governments. Executive Order 13175 (issued November 6, 2000) is the most detailed instruction to federal agencies on how and when to conduct G2G consultation. Consultation at the federal level is required to be meaningful, in good faith, and entered into on a G2G basis. These principles have been codified in multiple executive orders and memoranda and have been upheld by the Supreme Court. There are also laws that designate a specific type of consultation with Tribal Governments based on the resources under consideration.⁹

Per Executive Order 13175, each federal agency is required to develop its own consultation process, resulting in some inconsistency between federal agencies. This inconsistency manifests in many ways, from lack of a common definition of consultation to differing levels of Tribal input in consultation and outreach policies. For all agencies, however, consultation follows some basic guidelines:

1. Consultation is required before federal action is taken on reservations or affecting off-reservation reserved rights. Consultation may be required on ceded lands and traditional-use areas if legal precedent exists.
2. According to EO 13175, "When undertaking to formulate and implement policies that have tribal implications¹⁰, agencies shall: (1) encourage Indian tribes to develop their own policies to achieve program objectives; (2) where possible, defer to Indian tribes to establish standards; and (3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes."

Other relevant federal directives include the Unfunded Mandates Reform Act (UMRA) of 1995, which supports the G2G relationship and federal agencies engaging in intergovernmental discussions with Tribal Governments.

The federal government is therefore required by law to consult with federally recognized Tribal Governments, including Alaska Natives, and, in some cases, with Native Hawaiian organizations. The federal government is not required to enter into formal G2G consultations with non-federally recognized Tribal Governments or other indigenous organizations, as they lack the same legal status. Under the National Historic Preservation Act¹¹, however, a federal agency may invite a non-federally recognized

⁸ *Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995), cert. denied, 518 U.S. 1016 (1996).

⁹ The G2G relationship is referenced and discussed in multiple legal cases, laws, executive orders and memoranda. [Appendix H](#) offers a list of some of these resources.

¹⁰ "Policies that have tribal implications" are defined in the EO as referring to "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." Tribal Governments are defined herein as best suited to evaluate the likelihood of substantial direct effects.

¹¹ Section 106 regulations at 36 CFR Section 800.2(c)(5).

Tribal Government to participate as a consulting party on a project or process based on that Tribal Government's "demonstrated interest" in the undertaking's effects on historic properties.¹²

While all agencies are not required to engage in G2G consultation with non-federally recognized Tribes, the authors strongly encourage agencies, at a minimum, to include non-federally recognized Tribes in broad engagement when their interests may be affected. Agencies are also encouraged to establish policies to coordinate and communicate early with non-federally recognized Tribes. In some instances, such as in California, determining with whom an agency should consult can be complex because there are more than 100 federally recognized Tribal Governments and more than 100 non-federally recognized Tribal Governments in the state due to historical circumstances (see [Appendix C](#) for additional details). To identify potentially affected, non-federally recognized Tribes in each state, agencies may consult the following resources:

- **California:** There is a list maintained by the California Native American Heritage Commission (<http://nahc.ca.gov/>).
- **Oregon:** A regularly updated list was not available at the time of printing. The Commission on Indian Services site provides a starting point (<https://www.oregonlegislature.gov/cis/Pages/TribalWebsites.aspx>).
- **Washington:** Information is available on the Washington Department of Archeology and Historic Preservation website (<https://dahp.wa.gov/archaeology/tribal-consultation-information>).

C. West Coast State Consultation Policies

Some states have passed legislation providing for the recognition of Tribal Governments. Washington, Oregon, and California have legal consultation policies and requirements that apply to Tribes, but these vary between each state. California's Tribal Consultation Policy includes both federally recognized and non-federally recognized Tribal Governments that are listed on the California Native American Heritage Commission's Contact List.¹³ California only mandates G2G consultation with non-federally recognized Tribal Governments, however, with respect to Native American sacred places and Tribal cultural resources.¹⁴ Oregon's Senate Bill 770 institutionalizes Tribal consultation policies, but only includes federally recognized Tribal Governments. The Centennial Accord and Millennium Agreement in Washington includes language that mirrors the federal trust responsibility doctrine and establishes G2G relationships between the state of Washington and Tribal Governments in Washington. Furthermore, a policy developed between Washington Tribal Governments and the state's attorney general's office in 2019 calls on the state to obtain "free, prior, and informed consent" before taking actions affecting Tribal lands and resources (see [Box 2](#)).

Common elements in the West Coast states' Tribal consultation policies and legislation include the establishment of Tribal liaison offices, directives to state agencies to develop internal consultation policies, and initiatives to improve the cultural and legal competency of employees who interact with Tribal Governments. These state-level policies all include the principles of early and open

¹² Advisory Council on Historic Preservation, *Advisory Council on Historic Preservation Consultation with Indian Tribes in the Section 106 Review Process: A Handbook*, November 2008.

¹³ California Government Code Section 65352.4, also known as SB 18, Governor Brown's Executive Order B-10-11 (2011).

¹⁴ California Public Resources Code Section 21074(a).

communication, as well as the same triggers for on- and off-reservation consultation. As these laws and some executive orders do not carry the authority of federal treaties, they do not always have the same legal ramifications for neglecting to consult with Tribal Governments. For more information on each state's consultation policies, see [Appendix C](#) for details on [California](#), [Oregon](#), and [Washington](#).

Box 2. Free, Prior, and Informed Consent

In 2007, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) set forth the key principle that governments should obtain free, prior, and informed consent (FPIC) from indigenous peoples before enacting policies or actions that may affect their rights, lands, and resources. While the United States has declared support for UNDRIP, it has not been ratified by the Senate and therefore does not carry the force of U.S. law.

The elements of FPIC establish the conditions of consent as a decision-making process that respects the rights, sovereignty, time, and resources of the potentially affected Tribal Government(s) and are important to understanding Tribal Government expectations during G2G consultation. The intent of each element is described below:

- **Consent:** the decision will be taken by the proper body of the rights-holders. It may be “yes,” “no,” or “yes with conditions.” Consent can be given or withheld and may change over the course of a project or with changes in a proposed action.
- **Free:** the process and consent are voluntary, without coercion or other pressures imposed on Tribal Governments. The process is conducted under a structure and timeline acceptable to the Tribal Government(s). Meetings are held according to Tribal customs or procedures and information is freely given as requested through a transparent process.
- **Prior:** consent may only be sought, and information presented, well before any proposed activities are initiated and there must be sufficient time for the rights-holders to understand and analyze proposed actions. It is the responsibility of those seeking consent to understand the time and resources needed by the Tribal Governments for their decision-making process.
- **Informed:** information for decision making must be presented clearly, completely, and accurately with no omissions. It must be accessible and in the format requested by Tribal Governments. Meaningful, accurate, preliminary assessments of all possible impacts - economic, cultural, social and environmental - both positive and negative, are required as a part of any information supplied. Information must be updated regularly as changes occur to it or the proposed action.

V. Guidance for Tribal Consultation Policies and Procedures

A. Principles for Consultation

A definition for Tribal consultation is set out in the [What Is Consultation?](#) section above. It is equally important to understand what consultation is *not*. Consultation is not simply notice of an action occurring or the equivalent of a written comment process. Tribal consultation does not occur when an agency with a preconceived or predetermined plan holds a meeting with Tribal Governments to see how they fit into the agency's plan. Consultation does not presuppose that an agency can or will proceed with a prospective action without taking into consideration and changing that prospective action based on Tribal input.¹⁵ Finally, it is important to recognize that although Tribal Governments have a right to consultation as sovereign governments, a Tribal Government may elect *not* to conduct G2G consultation or may decide to limit the scope of their consultation as needed to meet their internal resource capacity and needs.

Therefore, Tribal consultation means the process of seeking, discussing, and considering the views of the Tribal government(s), at the earliest possible time in the state or federal government's decision-making process. The following are principles outlining the necessary components of consultation:

- 1) **Early and frequent communication:** Consultation means respectful, meaningful, and effective two-way communication *before* the agency makes its decision or moves forward with its action.
- 2) **Appropriate representation:** Tribal consultations take place as planned, structured meetings, either in person or via phone/video teleconference (as mutually agreed upon), between state or federal officials and representatives of the affected Tribal Government(s) or their designees. For formal G2G consultation, the appropriate leadership and decision-makers need to be present.
- 3) **Understanding of and respect for Tribal processes:** It is important for agency counterparts to be aware of Tribal decision-making processes in order to understand how their own processes and information needs could integrate with Tribal ones. This includes having a shared recognition of the current stage of the consultation process.
- 4) **Consensus-seeking approach:** Consultation works towards the goal of consensus that reflects the concerns of the affected Tribal Government(s). The objective is to promote cooperative decision making on activities that may impact treaty trust resources, Tribal lands, executive order reserved rights¹⁶, or the exercise of Tribal rights.
- 5) **Agency transparency and accountability:** It is important for agencies to provide clarity around their own decision-making processes and the potential for Tribal Government input to affect the final decision. Furthermore, both parties should ensure accountability to the agreements made during Tribal consultation by documenting and sharing the results of those discussions.

¹⁵ The Confederated Tribes of the Umatilla Indian Reservation, *Consultation: Government to Government (or otherwise)*, 1.

¹⁶ Refers to those executive orders that explicitly established reservations and reserved rights to Tribal Governments, which are distinct from any rights that may be provided through EO 13175. As noted in *Native American Natural Resources Law*, "Tribes generally have the same rights in executive order reservations as they do in reservations set aside by treaty or statute." (Judith V. Royster and Michael C. Blumm, *Native American Natural Resources Law: Cases and Materials* [Carolina Academic Press, 2002], 151.)

B. Implementing the Principles: Best Practices for Tribal Consultation

This section sets forth best practices for engaging in meaningful Tribal consultation according to the principles outlined above. In any consultation process, it is important for the agency to reach out to the potentially affected Tribal Government(s) to determine whether consultation is desired and what specific consultation procedures and/or requirements they may have. The recommendations in this document reflect the above principles and outline a basic process to consider, while allowing for individual Tribal and G2G consultation procedures to be defined by an affected Tribal Government.

Principle #1: Early and Frequent Communication

Tribal Governments should be engaged early and often in any permitting, funding, rule change, or other action an agency undertakes that may affect Tribal treaty rights, executive order reserved rights, reserved rights, resources, lands, or the habitats and ecosystems upon which Tribal Governments depend. Federal or state agency communication with Tribal Governments must be frequent and initiated before a process of decision making starts. If Tribal Governments are not notified of a proposed action early, they cannot adequately consult, nor can the agency satisfactorily or sufficiently weigh the potential negative impacts that their proposal may have on Tribal Governments. Ongoing communication, transparency, pre-notification, or early consultation are ways to ensure Tribal input is considered in decision making and such approaches are more likely to result in a mutually agreed-upon solution. Tribal Governments prefer that the agency reach out as early in the process as possible (i.e., a project proponent has submitted a proposal/request, the agency is considering a rule change, or the agency is interested in answering a research question). This type of outreach goes beyond a “Dear Tribal Leader” letter and may require follow-up with Tribal Government staff via telephone and/or in-person.

From the Tribal perspective, the frequent agency practice of giving Tribal Governments notice *after* activities have begun feels as if the agency is “checking the box,” the planning and permitting are already complete, and Tribal input or concerns do not matter or cannot affect a change in the action or decision. Tribal Governments are often forced to request consultation when news of the project reaches them. Such delayed involvement limits Tribal input into a project’s development and can result in opposition to the proposal and/or delays. Early involvement of Tribal Governments typically benefits all parties involved, as it can lead to more efficient and informed decision making.

Furthermore, Tribal Governments should not be required to speed their government decision-making processes to adjust to an agency’s failure to provide early notification. Meaningful consultation includes adequate time for Tribal staff to prepare technical information and content and to brief their decision makers. This does not work within 30- or 60-day comment periods, such as those associated with National Environmental Policy Act (NEPA) processes, which are generally intended for the public and are inconsistent with the sovereign status of Tribal Governments. Agencies working with such comment period timelines should consider looking for earlier opportunities to engage with Tribal Governments.



“I’m sorry, but a lack of planning on your part does not constitute an emergency on my part...”

To illustrate the incompatibility of typical comment period windows with Tribal Government processes, a Tribal Government may have a fixed schedule in which any items to come before the Tribal Council on a given month must be in council packets by the first Monday of the month. The relevant staff would need to review the information before then. Council then meets for approvals on the third Friday of the month. Therefore, if a request for consultation comes up with a 60-day window, the agency would need to get it into the system during the first month. If there are any delays or questions raised by staff, however, it may not be possible to introduce the request to the council within the agency's 60-day window.

In addition, it is important to recognize that Tribal staff are often charged with tracking several different issue areas. They attempt to stay abreast of all federal, state, and sometimes county activities that could affect their Tribal Government, and, as a result, staff are frequently responding to not just a single agency proposal, but to multiple ones. Agency staff should be aware that their request may be one among many and allow for sufficient response time from the Tribal Government accordingly.

Early communication is built into some federal agency processes. For example, the Bureau of Ocean Energy Management's (BOEM) offshore oil and gas leasing plan has several stages of development with opportunities for Tribal and public comment throughout the process. Consultation with BOEM at each stage of the plan development is available. Other agencies may also exercise ongoing communication and scoping discussions to keep Tribal Governments informed of potential projects before they are initiated.

Principle #2: Appropriate Representation

Determining with Whom to Consult

As agencies are charged with consulting with "potentially affected" Tribal Governments, the agency's first step is identifying the Tribal Governments with whom it should engage. It is important to consider possible impacts to Tribal Governments broadly, recognizing that "potentially affected" does not mean only those Tribal Governments currently in close proximity to the proposed impacted area, but also all Tribal Governments who consider the impacted area as part of their traditionally and culturally affiliated territory.

Due to the complexity of Tribal rights and history surrounding marine and shoreline areas on the West Coast, this undertaking will vary significantly depending on the location of the proposed project. Agencies could begin by consulting resources detailing current and past habitation of the area, as well as the use of and rights to territory within the proposal area.¹⁷ The agency's survey of potential impacts should extend to resources as well, including mobile resources such as salmon or whales that pass through the proposal area and could have Tribal rights associated with them (e.g., treaty rights or executive order

¹⁷ For example, land-based resources include maps from the U.S. Department of Housing and Urban Development (https://www.hud.gov/program_offices/public_indian_housing/ih/codetalk/onap/map/nationalmap) and the U.S. Department of Agriculture (<https://usfs.maps.arcgis.com/apps/webappviewer/index.html?id=fe311f69cb1d43558227d73bc34f3a32>).

reserved rights). Consideration of such mobile resources broadens the scope beyond simply the geographic area and its cultural and use history.

The authors acknowledge the challenges of identifying all those Tribal Governments that have potentially affected lands or resources, including mobile resources, in a particular area. It is nonetheless the duty and role of government agencies to make their best effort to identify affected Tribal Governments by employing the tools, resources, and recommended relationship-building practices identified in this document. As a potential future resource, the WCOA is developing an online tool that could help identify relevant Tribal contacts for outreach in the area of ocean and coastal resources.

Determining Appropriate Roles

Next, it is important to define some common roles in a consultation process. When an agency is planning and undertaking a consultation process, the appropriate representatives from all parties should be engaged. Doing so allows for efficient communication between agency and Tribal personnel with commensurate responsibilities. It also demonstrates mutual respect for each party's leadership and ensures that the discussion includes the most valuable players or the players who are essential to the most well-founded decision achievable. It is important to note, however, that the presence of a Tribal Council member at a meeting does not necessarily mean the meeting is a policy-level or G2G one. It is equally important to understand that coincidentally meeting Tribal leadership, staff, or Tribal Council members at a meeting where pertinent issues are discussed does *not* constitute G2G consultation.

Typical Tribal roles are the following:

- **The Tribal Council** - Tribal Council is the official point of contact for G2G consultation.
- **Tribal delegates, points of contact** - Tribal Council may choose to designate a point of contact for communication regarding specific issues, concerns, opportunities, impending projects, and other technical expertise.
- **Alternate point of contact** - Tribal Council may designate an alternate point of contact by issuing a written statement signed by Tribal Council Chairperson or Vice Chair. This does not preclude including the Tribal Council in communication for specific cultural or archaeological concerns. Being familiar with appropriate points of contact for specific issues is essential to the efficacy of communication. For example, a Tribal department director could serve as an appropriate Council-designated point of contact for a large range of specific issues.
- **Tribal technical expertise** - Tribal staff and representatives offer technical expertise on specific issues, concerns, opportunities, impending projects, etc. If the Tribal Government employs a Tribal Historic Preservation Officer, for example, this person would serve as the technical expertise for cultural and/or archaeological concerns. These technical staff offer opinions, recommendations, and other guidance to points of contact, delegates, and Tribal Council for the decision-making process.

It is the agency's responsibility to make sure it is contacting the proper Tribal representatives for G2G consultation. It is therefore key to maintain proactive intergovernmental relationships with Tribal

Governments through ongoing communication, partnerships, coordination with tribal liaisons, etc.¹⁸ Tribal representation will be different depending on the level of conversation (national vs. more technical or emergency response). A designated gatekeeper who can help determine what constitutes an emergency can often be a local or technical staff person (e.g., Tribal administrator). Being familiar with the appropriate Tribal staff or representative, especially concerning specific technical expertise, assists the agency in more efficient communication.

Depending on the Tribe, a leader-to-staff or staff-to-leader approach may be appropriate. Often a conversation needs to begin at technical level and requires time and information-sharing before moving to the policy level. Beginning at the technical level can also facilitate responses within the timeframe that the issue needs to be addressed by all parties. Proper timing and sequencing are needed.

In order to identify the most appropriate Tribal representatives or Tribal technical expertise, a number of options are available. An agency representative could:

- Reach out to the Tribal liaison within their own agency
- Attend or host topic-relevant information meetings to meet Tribal technical staff
- Contact the Tribal government administrative offices to find the most appropriate department contact information for the topic
- Visit the website listing technical staff, if applicable and accessible¹⁹

If the agency does not receive a response to its requests for consultation, that does not necessarily indicate the Tribal Government is not interested in consultation on that topic. It is incumbent on the agency representative to ensure that they have reached the appropriate contact person for that request by following up on initial outreach with phone calls or in-person visits until the representative is able to speak to someone and ascertain they have reached the appropriate Tribal representative. As mentioned above, the WCOA online resource may provide a first point of contact for such outreach.

In the event that a Tribal Government has expressed interest in a process but lacks sufficient capacity to engage, agencies should, to the extent feasible, endeavor to support Tribal capacity by providing summaries of materials, travel funds, flexibility of timing, etc. Agencies should also document their efforts to meet G2G responsibilities, which include identifying capacity constraints and maintaining ongoing communication with Tribal Governments on projects, policies, and outcomes.

Identifying Appropriate Roles for Non-federal Entities

It is important to recognize the appropriate roles for other entities - such as state and local agencies or applicants - in a Tribal consultation process. While states and local governments do not have the same

¹⁸ This guidance document provides some resources for identifying updated contact information for individual Tribal Governments. In addition, the WCOA is developing an online tool that may provide some relevant Tribal contact information.

¹⁹ In California, for example, the Office of the Tribal Advisor to the Governor of California publishes a Tribal Government Directory. This directory contains information on California Native American Tribes, including contact information and general information about the Tribe.

legal relationship with Tribal Governments as the federal government, they are often the closest neighbors and governing bodies in proximity to Tribal Governments.

In the marine planning context, states may often be involved in decision making due to the Coastal Zone Management Act, which requires the federal government to comply with the state's Coastal Management Program when taking actions that are likely to affect coastal resources (known as the "federal consistency" provision). It can be valuable for states and Tribal Governments to engage in consultation around such issues. Furthermore, given that some Tribes are recognized by the state but not the federal government, working with the state can offer non-federally recognized Tribes an enhanced opportunity for engagement on issues relevant to them. While Tribal Governments may welcome additional communication opportunities, it is important to note that federal agencies may not delegate their consultation responsibility to states or other entities.

Prior to inviting non-federal entities to a Tribal consultation meeting, it is a best practice for a federal government agency to first ask permission to invite non-federal actors. Maintaining confidentiality during Tribal consultations is of paramount importance and inviting others to a consultation without first notifying and/or requesting permission from the Tribal Government could result in an immediate loss of trust between the two sovereigns. It is also important to note that there are federal and state freedom of information and sunshine laws requiring that government processes be open and transparent to the public, which could affect the confidential nature of the proceedings when non-federal entities are engaged.

Principle #3: Understanding and Respecting Tribal Decision-Making Processes

Federal agencies must respect the processes by which Tribal Governments operate. Tribal Governments have their own established systems of government, equipped with constitutions, codes, policies, laws, and ordinances, and are not under the jurisdiction of federal, state, or local regulations. Tribal Government departments are structured to ensure the government's function and efficacy, as well as to meet Tribal concerns regarding health, longevity, and prosperity. As such, Tribal Government structures are unique and culturally appropriate, with decision-making processes that may not be similar to those of other Tribal Governments or agencies. To effectively communicate with each Tribal Government, it is of paramount importance to acknowledge each Tribal Government's unique structure and recognize there can be a variety of decision-making processes.

As described in the [What Is Consultation?](#) section, formal G2G consultation is the last step in a series of conversations. There could be staff meetings leading up to formal G2G consultation to facilitate frequent communications and support meaningful consultation agreements between sovereign leaders and decision-makers. As noted, agency and Tribal staff may require early meetings to work out technical details in order to adequately inform Tribal decision-makers in advance of more formal meetings. The agency's approach to the process should incorporate flexibility, with attention to making it easy for Tribal Governments to participate.

To convey a sense of the range of decision-making processes, two examples are offered below. The first example, an excerpt from the consultation policy of the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians, can be described as a "top down" approach:

- a. The federal agency contacts the Tribal Council to notify the Tribal Government of an impending project proposal or to conduct an activity that may or may not affect a Tribal resource.
- b. The Tribal Council responds to the agency that the issue is important and that it would like to initiate consultation.
- c. The Tribal Council requests that federal agency technical experts meet with Tribal technical staff or Tribal Council requests a policy-level meeting, initiating Tribal consultation.
- d. Technical staffs meet to discuss technical and legal issues. Tribal staff understands the proposal. Federal agency staff understands at a technical level why the proposed activity is of concern to the Tribal Government.
- e. Tribal staff briefs Tribal Council and provides opinions and recommendations.
- f. The Tribal Council contacts the federal agency to initiate G2G consultation between policy-level decision-makers from the Tribal Government and the federal agency.
- g. Additional meetings are held if necessary.
- h. The federal agency and the Tribal Government formulate a decision. Assurances are made that the decision is consistent with applicable federal and Tribal laws and policies.

A second example process describes a “trickle up” procedure, in which agency representatives are familiar with the Tribal technical points of contact:

- a. The federal agency contacts relevant Tribal technical staff regarding opportunities or issues, impending project proposals, or to conduct an activity that may or may not affect a Tribal resource.
- b. Tribal technical staff responds to the agency that the issue is important.
- c. Tribal technical staff meet with federal agency technical experts to discuss key points surrounding the issues.
- d. The federal agency contacts the Tribal Council on the issue, including the appropriate Tribal staff or department supervisor in the communication.
- e. Tribal staff briefs the Tribal Council and provides opinions and recommendations.
- f. The Tribal Council contacts the federal agency to initiate G2G consultation between policy-level decision-makers from the Tribal Government and the federal agency.
- g. Additional meetings are held if necessary.
- h. The federal agency and the Tribal Government formulate a decision. Assurances are made that the decision is consistent with applicable federal and Tribal laws and policies.

Shared Recognition of the Stage of Consultation

Given that Tribal consultation is a multi-step process, it is essential that both parties agree when they are in the G2G stage. Communications outside of G2G consultation meetings may be part of the overall Tribal consultation process, but these communications cannot be interpreted as formal G2G consultations in themselves (see diagram in [Appendix B](#)).

To ensure agencies and Tribal Governments are on the same page about the stage of consultations, it is important to begin a G2G meeting by establishing the shared expectation that it is indeed G2G; at the meeting's conclusion, participants should confirm any next steps and whether the Tribal Government's G2G needs were met.

It is important to note that Tribal Governments can reinitiate consultation on an action at any time. Consultation is not complete until the project is complete. Even though the agency and the Tribal Government may have worked out procedures and protocols for the project to begin or move forward, from the Tribal perspective this does not constitute the end of consultation on that project. Tribal Governments need to know if an issue arises or an event takes place that was not foreseen during consultation. The Tribal Government can then reopen consultation to deal with this new and unforeseen event.

Agencies, however, may have a different perspective on the timeline for the completion of consultation. In the event that an agency cannot meet the expectations set out in this document for a particular project, those limitations should be outlined and discussed with the Tribal Government early in consultation planning discussions.

Sufficient and Timely Information-Sharing

In order for Tribal Governments to make informed decisions, agencies need to provide accurate, complete, and accessible information about the proposal and its potential impacts. Receiving this type of information early in the process – and through the appropriate channels – allows decision-making to move forward efficiently. Information necessary for Tribal leadership to understand the scope and potential impact of an action should therefore be shared with appropriate representatives in advance of any formal G2G consultation. It is also important that the agency provide timely updates to Tribal governments as relevant new information emerges throughout the consultation process, which helps to build trust between the parties.

Incorporating Traditional Ecological Knowledge²⁰

In most Tribal consultation discussions, Tribal Governments will incorporate or reference Indigenous Knowledge or Traditional Ecological Knowledge (TEK). TEK is a highly credible and valuable resource for informing more effective and holistic policy and project decisions. TEK can inform the adaptive management approaches of both state and Tribal managers. It should not, however, solely be utilized as supplemental information to corroborate “Western science.” TEK is an important component of consultation discussions. Federal agencies should understand what TEK is and how it relates to the topic at hand. It is important to recognize that the only way to effectively incorporate TEK into decision making is through discussions and consultation with Tribal Governments. (See [Appendix G](#) for more details on TEK and how it can be used in an ocean planning context.)

²⁰ Note: *Traditional Knowledge* or *Traditional Ecological Knowledge (TEK)* are both non-native derived terms utilized to describe traditional indigenous knowledge systems and bodies of knowledge. Native nations may define these terms as wisdom, knowledge, or life-ways. *Traditional Knowledge*, *Indigenous Traditional Knowledge*, or *ITK* may be preferred terms as this area of knowledge and wisdom extend beyond the ecological sideboards implied by the term *TEK*. *TEK* is utilized herein due to the prevalence of that term in existing agency resources and understanding.

Appropriate Data Management and Maintaining Confidentiality

Data confidentiality is of the utmost concern when working with Tribal Governments and there are many legal and cultural challenges to sharing indigenous knowledge, including TEK. Concerns with sharing indigenous knowledge and identifying use areas must be addressed. Privacy issues arise for individuals sharing culturally sensitive information, for Tribal Governments that may be sharing this information on behalf of their membership, or for Tribal organizations sharing information on behalf of their member Tribal Governments. Non-tribal groups, state and federal agencies, and other entities working with Tribal Governments should consistently demonstrate concern and respect for maintaining confidentiality and appropriate data management approaches in their communications.

Dealing appropriately with data confidentiality, while still developing a valuable dataset based on indigenous knowledge that can inform Tribal projects, baselines, and long-term monitoring, needs to be at the forefront of any project or proposal development. The best way to resolve some of these challenges is to involve each Tribal Government in a manner that allows it to collect the particular information within its respective Tribal community (i.e., membership). This allows the Tribal Government to determine what is appropriate to share with entities outside of the Tribal Government.

Many Tribal Governments and agencies have individual policies and procedures relating to data confidentiality and management. Agencies should refer to these policies, laws, procedures, etc., when working with Tribal Governments to gather, manage, and use data. At the outset of a consultation process, it is advisable to discuss the Tribal Governments' and agencies' respective policies on handling confidential information and to identify any concerns, limitations, and potential areas of sensitive information. In this way, the parties can address any issues before materials are shared. The following suggestions represent a range of options to ensure data confidentiality:

- *Policies, forms, and agreements:* Work with Tribal Governments to determine if they have a policy or, if appropriate, develop a Traditional Knowledge Policy that may be used by each Tribal Government as a means to enforce Tribal law to protect culturally sensitive information. All project leads and associated staff will be required to sign confidentiality agreements. Data-sharing agreements (e.g., MOUs) can be developed between the participating agencies or entities and each Tribal Government, as well as between Tribal Governments, as needed.
- *Data coding/classification:* Information collected through community-based participatory research can be coded/classified and grouped into descriptive categories. These categories are then used to organize and prioritize information and levels of sensitivity. For example, all information related to trees, shrubs, and grass would be grouped into one category: vegetation. Additionally, any personal information about interviewees and other information deemed sensitive (e.g., locations of endangered species) would be coded and/or classified accordingly.
- *Data aggregation:* Specific point data gathered through community-based participatory research can be aggregated by collecting similar, usually adjacent, information or features to form a single, larger entity. For example, gathering locations of a specific species will be aggregated into one polygon for the area rather than numerous specific points.

Principle #4: Consensus-Seeking Approach

From a Tribal perspective, the goal of Tribal consultation is to achieve decision making through consensus. Meaningful consultation using a consensus-seeking decision-making approach acknowledges that Tribal Governments are sovereign governments, not stakeholders. For a Tribal consultation process to honor the principle of a consensus-seeking approach, it must include these aspects:

- The Tribal Government determines the impact the proposed action will have, not the agency.
- Tribal concerns are included in the final decision.
- There is consideration and respect for the principles of FPIC throughout the process (see [Box 2](#)).
- The Tribal Government determines if and when consultation on an action is complete.

The diagram in [Appendix B](#) illustrates a process for a consensus-seeking approach.

While this Tribal perspective may be inconsistent with agency policies, it is the responsibility of agencies to work with their Tribal counterparts to identify, understand, and resolve such inconsistencies through early and ongoing communication. This includes identifying any policy or mission constraints to conducting Tribal consultation and developing mutually agreeable options to navigate those obstacles. If the goal of taking a consensus-seeking approach cannot be achieved, the authors recommend that the agency 1) clearly articulate to the Tribal Government(s) why a consensus-seeking approach is not possible and 2) document the agency's reasons for its inability to fulfill those expectations.

On any particular issue, there may be more than one Tribal Government with an interest in consulting on that issue. Given that each Tribal Government represents an individual sovereign, it is the agency's responsibility to conduct consultation with each interested Tribal Government and to honor their respective input. Sufficient time should be built into the process to conduct multiple consultations as needed.

Recognizing that it can be challenging to reconcile the potentially differing perspectives of individual sovereigns, agencies may consider suggesting joint consultation processes with multiple Tribes. It is important, however, to defer to Tribal Governments on the feasibility and appropriateness of such a process. In the case of minor differences between Tribal Governments, these can often be resolved through good communication. For more significant differences, agencies may assist by providing sufficient time and resources for Tribes to work inter-governmentally (Tribe to Tribe, sovereign to sovereign) in order to come to consensus. In the event that no consensus is reached, the agency will need to seek ways to accommodate the differing needs identified by the individual sovereigns.

Principle #5: Agency Transparency and Accountability

Agency Accountability and Commitment to Governmental Relationship

Tribal Governments often find that while Tribal representatives are required to follow consultation laws and policies, agencies do not necessarily do so. This discrepancy can undermine the governmental relationship and make it difficult to build trust. In order to create a positive working relationship, therefore, agency staff should be attentive to demonstrating their commitment to that relationship. Before entering into a consultation, agency staff should understand their own internal consultation policies and procedures, as well as those of the Tribal Governments. This facilitates early identification and communication regarding inconsistencies between policies and anticipated outcomes, as suggested above.

Similarly, following a consultation, it is important for the agency to maintain open and honest communication with the Tribal Government. Meeting summaries support accountability; by sharing summaries with Tribal Governments, agencies take responsibility for their commitments and facilitate a shared understanding of the agreements and commitments arising from the meeting. In one example, BOEM's consultation policy directs the agency to provide a meeting summary that includes a clear statement of the Tribal Government's position as well as any actionable items identified during consultation. The Tribal Government then has the opportunity to review and provide any edits or corrections to the meeting summary. Providing tangible outcomes and takeaways from a Tribal consultation helps the agency to demonstrate accountability, transparency, and assurance that the Tribal Government's concerns were heard and understood. For the sake of continuity and the ongoing governmental relationship, it is important that both agencies and Tribal Governments keep these records on hand for future reference. In times of transition, they can serve as background materials for new staff and leadership. Furthermore, these records may provide a base of information that allows agencies and Tribal Governments to periodically review their relationship and consultation efforts to identify possible areas for improvement.

Accurate and complete record-keeping of consultation meetings is an essential part of honoring the G2G relationship. To build a genuine governmental relationship founded on trust, however, agencies must demonstrate a commitment to consensus decision making and to incorporating Tribal concerns into agency decisions, as discussed above. Demonstrating commitment to the governmental relationship may include following through on action items discussed in meetings, responding promptly to questions posed during consultation, or indicating how Tribal comments were incorporated into the agency's decision making.

To continue building a respectful G2G relationship post-consultation, the agency should engage in ongoing communication with the Tribal Government, which includes keeping the Tribal Government informed on the implementation of the proposed action and notifying the Tribal Government as early as possible if there are any modifications to the proposal that might warrant reopening consultation on the action.

Agency Ownership of Responsibilities

It often falls to Tribal staff to train their agency counterparts on the G2G relationship. With some agencies, staff can change every two to three years. Educating new staff may include reiterating the Tribe's preferred communication protocols, training agency staff on Tribal history, issues, concerns, and relationship with the agency, and even apprising them of the agency's own consultation policies. Similarly, Tribal members meeting with multiple levels of an agency's personnel throughout the decision-making process may be required to repeat conversations that were previously conducted. This can lead to frustration on the part of Tribal representatives and a waste of Tribal staff resources. Effective Tribal consultation includes the agencies taking ownership and responsibility for informing all of their staff and leadership of ongoing discussions with Tribal Governments and providing adequate training for new staff. Furthermore, to ensure accuracy of the agency's training materials with respect to Tribal Governments, it is a best practice to share those materials with Tribal representatives for review and comment.

In one example from the Canadian province of British Columbia, the provincial government addressed this issue by developing staff performance standards intended to ensure the capacity and adequate training for staff working with First Nations. These performance standards are not limited to Tribal liaisons; all

provincial staff that may interact with First Nations are expected to work effectively and respectfully with First Nations and are required to have the necessary training and education in order to meet those standards.

C. Case Studies

In developing this guide, the authors had originally hoped to include some ocean planning case studies in order to illustrate an appropriate consultation process. Although they were able to identify various examples of some of the foundational communication and engagement elements needed to support meaningful Tribal consultation, to date there are limited cases that embody all of the recommended principles for the duration of the full Tribal consultation process. The authors anticipate, however, that more examples may emerge as this guide is reviewed and put to use by partner agencies. As such case studies arise, they will be included in [Appendix K](#).

VI. Conclusion

The Tribal Caucus's goal in developing this document was to provide a companion guide from a Tribal perspective to individual Tribal Governments' consultation protocols and processes that gives overall guidance, context, and resources to state and federal agencies in their interactions with West Coast Tribes on ocean and coastal issues. This document solely provides an overview of Tribal perspectives and expectations. The Caucus hopes it will serve as a useful tool for building improved governmental relationships; creating more appropriate, timely, and collaborative Tribal and G2G consultation processes; and producing project outcomes that meaningfully incorporate Tribal Government input and decisions. To that end, the Caucus invites state and federal agency partners to work with Caucus members in disseminating this document within their agencies and in developing plans to implement its principles and best practices.

This guide was circulated to the members of the Tribal Caucus for leadership review. Those Tribal Governments that have approved the document as of July 13 2020 are listed in [Appendix J](#).

The Tribal Caucus plans to keep this guide updated through periodic addenda to include new case studies, lessons learned from the implementation of the guidance in this document, and any substantive comments received from West Coast Tribes after the date the guide was finalized. For current contact information for the West Coast Tribal Caucus, please visit the WCOA website (<https://westcoastcooceanalliance.org/>).

Appendix A: Members of the Tribal Guidance Working Group

Tribe

Confederated Tribes of the Coos, Lower Umpqua and Siuslaw

Confederated Tribes of Siletz Indians

Makah Indian Tribe

Quileute Tribe

Quinault Indian Nation

Resighini Rancheria

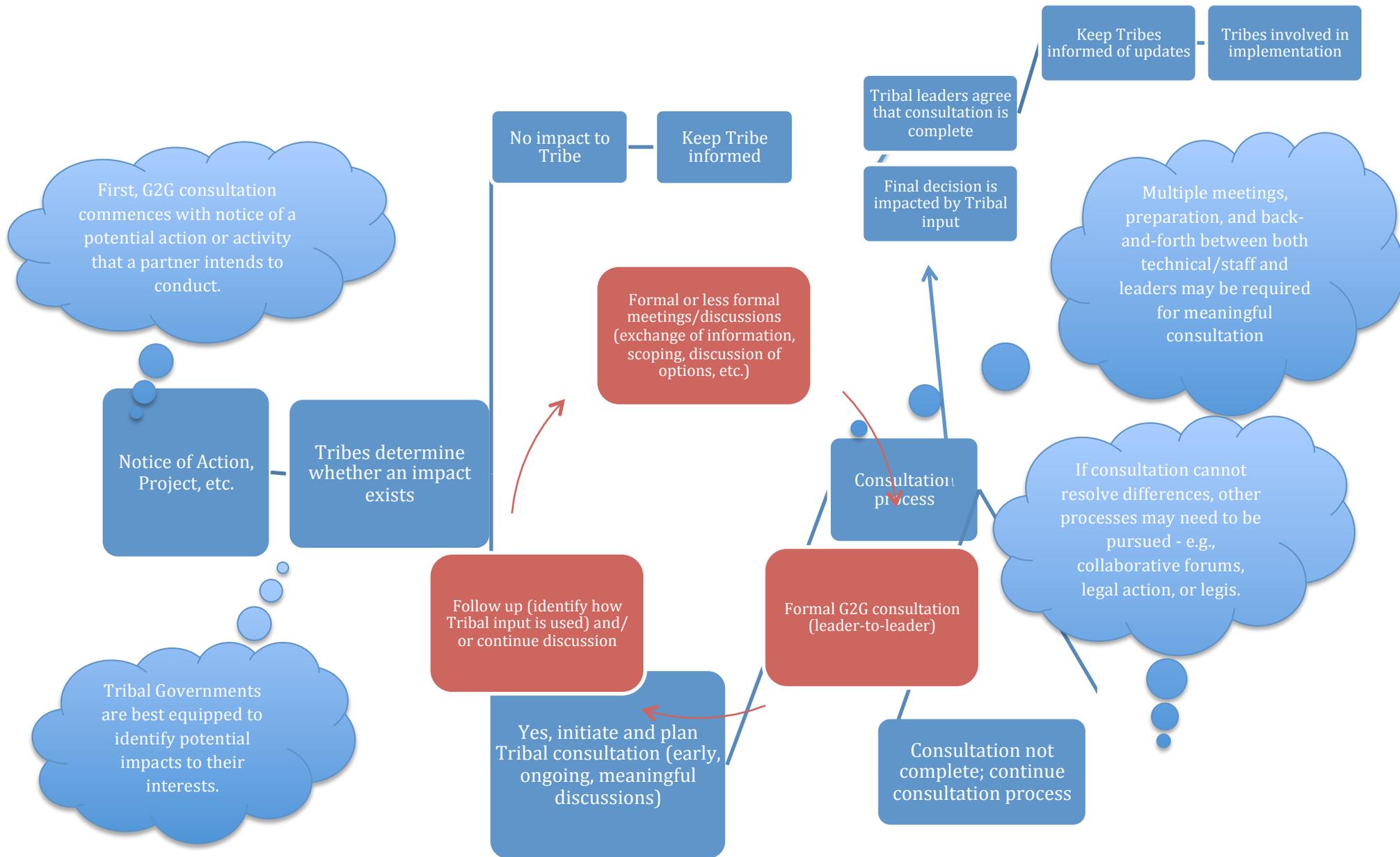
San Luis Rey Band of Mission Indians

Trinidad Rancheria

Appendix B: Diagram of Tribal Consultation Process

The following diagram provides a simplified overview of the Tribal consultation process. This diagram is intended to facilitate an understanding of the overall steps for consultation. Please refer to Tribal contacts for more details. This chart seeks to emphasize the following points in terms of Tribal Government expectations in relation to G2G consultation:

- The arrows help identify the pathways for an individual G2G consultation, including when it begins and when a Tribal Government may determine consultation is finished.
- While this diagram may not provide all elements of the overall process, it may be used as a tool to discuss expectations and the process with individual Tribal contacts.



Appendix C: West Coast State Tribal Consultation Policies

The following summaries provide an overview of state policies for consulting with Tribal Governments on the West Coast. These summaries are snapshots for each state and do not provide the full range of unique rights, history, or issues to consider. As mentioned throughout this document, agencies are strongly encouraged to learn about specific Tribal and local considerations and speak to their Tribal Governments for additional details on the types of reserved rights (inherent, executive, or treaty based), legal standing, history, and intergovernmental relationships pertaining to that Tribe.

California

In California, “California Native American Tribes” are defined as both federally recognized Tribes and non-federally recognized Tribes that are listed on the California Native American Heritage Commission's Contact List. Tribal Governments retain all hunting, fishing, and gathering rights within marine waters; these rights were never ceded and have never been explicitly revoked by Congress. In recognition of those retained rights, California law affirms the right of federally recognized Tribes to utilize marine resources within specific marine protected areas for subsistence, cultural, and other related purposes. Federal law likewise has acknowledged some California Tribal Governments’ rights to fish in-river. G2G consultation with California Native American Tribes includes consultation between Tribal Governments and local agencies (cities and counties regarding planning and zoning issues),²¹ between Tribes and state agencies on policies and projects that may impact Tribal issues and/or resources,²² and lead agencies acting under the authority of the California Environmental Quality Act.^{23,24} California’s Environmental Quality Act was also revised to incorporate California Native American Cultural Resources as part of project impact analysis, which requires consultation with California Native American Tribes.

Consultation has been defined by California through Government Code Section 65352.4 and has been continually incorporated throughout California law. California has defined G2G consultation to mean “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 Tribal Governments 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.”²⁵ The Governor’s Office of Planning and Research provided the following additional guidance regarding G2G consultation: “effective consultation is an ongoing process, not a single event. The process should focus on identifying issues of concern to tribes pertinent to the cultural place(s) at issue – including cultural values, religious beliefs, traditional practices, and laws protecting California Native American cultural sites.”²⁶

As important historical context, between 1850 and 1852, eighteen treaties reserving at least 7.5 million acres of land and reserving hunting, fishing, and gathering rights (among others) were negotiated with California Tribal

²¹ SB 18 - California Government Code Section 65352.3. The intent behind SB 18 Consultation is for local governments to work with Tribal Governments to preserve and/or to mitigate the impacts to cultural places.

²² Executive Order B-10-11.

²³ All of California’s laws mandating G2G consultation emphasize the benefits of early communication between the government agency and the California Native American Tribes.

²⁴ AB52 also requires California agencies to consult Tribal Governments.

²⁵ California Government Code Section 65352.4.

²⁶ State of California, *Tribal Consultation Guidelines*, April 15, 2005, page 16.

Governments. These treaties were never ratified by Congress, however, and were held in secrecy for 50 years. During this time, California state laws sanctioned persecution of California native people, resulting in the displacement of many Tribal Governments from their homelands. Notwithstanding this history, many Tribal Governments have restored their homelands and retained their rights through the creation of presidential executive order reservations. Furthermore, the 1906 Appropriations Act resulted in the purchase of land for California Landless Indians, creating many of the rancherias in existence in California. California Tribal Governments continue to assert their retained rights to hunting, fishing, and gathering within their homelands, including in traditional marine waters.

Oregon

There are nine federally recognized Tribal Governments in Oregon. Some Tribes and reservations in Oregon were established by treaty in the 1850s or 1860s. Others were formed under executive orders and long-standing federal recognition. Others were more recently restored or recognized as Tribal Governments, with G2G relationships with both the state of Oregon and the U.S. federal government.

Governor Vic Atiyeh established strong goals for state-Tribal G2G networking and the Oregon legislature established the Legislative Commission on Indian Services in 1975. In 1996, Governor Kitzhaber signed Executive Order EO-96-30 to establish the consultation process between sovereign Tribal Governments and the state of Oregon. The executive order recognizes the need and purpose for consultation and sets forth general stipulations on what the process for consultation should involve. In 2001, Oregon passed Senate Bill 770 (ORS 182.162-168), making it a legal requirement for the state to exercise G2G consultation with sovereign Tribal Governments when state policies will impact those Tribal Governments. Moreover, this regulation mandates annual training on G2G consultation policies and processes for state agency managers and employees who communicate with Tribal Governments.

Tribal Governments use G2G consultation to work with federal and state agencies to protect ocean and coastal resources. Some western Oregon Tribal Governments have established mutual agreements with state agencies to define the means to continue traditional food gathering activities (e.g., hunting, fishing, collecting) without continuous consultation.

Washington

Tribal Governments in the state of Washington have a rich history, both in terms of the number of Tribal Governments with lands and interests within the state and the legal dynamics of their interactions with federal and state partners. The following summarizes interactions related to ocean planning and G2G consultation with respect to treaty Tribes. There are various other relationship dynamics among Washington Tribes and federal and state partners, however, including those federally recognized Tribes without recognized treaties.

Tribal Governments and the state of Washington have had a contentious history that culminated with the landmark case *United States v. Washington* in 1974.²⁷ That case reaffirmed the reserved treaty rights of Tribal Governments that were forced to stop or limit their fishing practices by the state.

In subsequent years, contentious issues continued to arise and, as a result, steps were taken by the state and Tribal Governments to improve communications and respect for Tribal sovereignty and treaty rights. The state of Washington now requires consultation with federally recognized Tribal Governments through state law, accords, and agreements. In 1989, the governor and leaders of 26 federally recognized Tribal Governments signed the

²⁷ *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

[Centennial Accord](#) as a framework for G2G relationships, improved communications, and dispute resolution. Under state law [RCW 43.376](#), the G2G relationship is recognized and state agencies are directed to “make reasonable efforts to collaborate with Indian Tribes in the development of policies, agreements, and program implementation that directly affect Indian Tribes and develop a consultation process that is used by the agency for issues involving specific Indian Tribes” [RCW 43.376.020(1)]. The [Millennium Agreement](#) enhances the G2G relationship recognized under the Centennial Accord and focuses on areas of mutual concern.

Even with the framework of the Centennial Accord, disputes still occurred and the state and Tribal Governments found themselves in numerous legal actions that may have been settled in other ways. On May 10, 2019, an historic ceremony took place at the Intellectual House, a Tribal longhouse-style facility at the University of Washington. At that meeting, leaders from Washington Tribal Governments joined with Washington State Attorney General Bob Ferguson to announce a new policy for respecting the sovereignty of Tribal Governments in Washington. Specifically, the new policy requires the attorney general’s office to obtain “Free, Prior and Informed Consent” (see Box 2) before initiating a program or project that directly or tangibly affects Tribal Governments, Tribal rights, Tribal lands, and sacred sites. This new policy also requires the state attorney general’s office to refrain from filing any litigation against a Tribal government or Tribally owned business without first engaging in meaningful consultation to resolve the dispute, provided doing so does not violate the rules of professional conduct. The attorney general’s office will propose that this policy be preserved by statute in the 2020 Washington state legislative session.

In the marine planning context, four Coastal Treaty Tribes (Hoh, Makah, Quileute Tribes, and the Quinault Nation), through treaties with the United States, reserved hunting, fishing, and gathering rights to access and use the plants, mammals, fish, and other resources of the Olympic Peninsula in perpetuity.²⁸ Those rights are exercised in each Tribe’s “usual and accustomed areas,” which collectively extend into the open ocean from Point Chehalis on the south to the U.S./Canada border on the north. Rights secured by treaties are protected as the supreme law of the land by the U.S. Constitution (Article 1, Sections 2 and 8 and the Fourteenth Amendment, Section 2). The four Coastal Treaty Tribes have treaties that reserve off-reservation sovereign jurisdiction in areas overlapping both state and federal jurisdictions.

Under the treaties and case law, the coastal Tribes are co-managers of shared ocean resources, along with federal and state governments. The United States has the legal obligation and a profound trust responsibility to protect treaty rights and ensure that Tribal access and use of the resources necessary to sustain their cultures, economies, and lifeways are maintained in perpetuity.

²⁸ The 1855 Treaty of Neah Bay with the Makah Indian Tribe and the 1855 Treaty of Olympia with the Hoh Indian Tribe, Quileute Indian Tribe, and the Quinault Indian Nation.

Appendix D: Glossary of Terms

Executive order reserved rights are rights reserved through executive orders establishing reservations and associated rights. As noted in *Native American Natural Resources Law*, “Tribes generally have the same rights in executive order reservations as they do in reservations set aside by treaty or statute.”

A **federally recognized Tribe** is an American Indian or Alaska Native Tribal Government that is recognized by the federal government as sovereign nation having a G2G relationship with the United States and is eligible for funding and services from the federal government. The United States recognizes these Tribes’ inherent rights of self-government (i.e., Tribal sovereignty). These Tribes are entitled to receive certain federal benefits, services, and protections because of their special relationship with the United States. (The current list is maintained by the Bureau of Indian Affairs in the *Federal Register*.)

Free, Prior, and Informed Consent (FPIC) is the principle of governments obtaining free, prior, and informed consent (FPIC) from indigenous peoples before enacting policies or actions that may affect their rights, lands and resources and is articulated as a key component of the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

Government-to-government (G2G) consultation is a formal component of the Tribal consultation process that engages Tribal leaders and incorporates their input into decisions. A formal G2G meeting, between Tribal leaders and similarly high-level federal or state decision-makers, is customarily part of this process, and may include multiple meetings, discussions, and the reciprocal sharing of information. More than one formal G2G meeting among decision-makers may be required in a G2G consultation.

The **government-to-government (G2G) relationship** refers to the overarching sovereign-to-sovereign relationship that exists between Tribal Governments and the U.S. federal government (and sometimes Tribal Governments and states), including the legal obligations of state and federal governments to Tribal Governments in light of their inherent sovereignty and federal and international laws. The processes of Tribal consultation and G2G consultation are founded on this relationship.

Non-federally recognized Tribes are Tribal Governments exercising and claiming inherent sovereignty but are not currently recognized as Tribal sovereign nations by the United States government. Thus, the federal government does not recognize a trust responsibility or G2G relationship with non-federally recognized Tribes. Some non-federally recognized Tribes may have previously been recognized by the United States but that status was revoked or terminated. Many non-federally recognized Tribes are currently seeking federal recognition status or reinstatement of their federal recognition status.

State-recognized Tribes are Tribal Governments that are recognized by individual states. State recognition does not impose any obligations on the federal government unless federal law authorizes such obligations. Typically, state-recognized Tribes exist in those states that have legislation for a formal Tribal recognition process documented in state statute, although other processes may apply.

Tribal consultation is the overall process of sharing information, coordination, engagement, and dialogue that occurs between Tribal Governments and governmental or administrative entities within the United States. Tribal consultation occurs before an agency commits itself to a path of action that will affect Tribal rights, lands, resources, governance, or interests. Consultation is a process that ultimately leads to the development of a decision.²⁹

²⁹ Nez Perce Tribe, *Nez Perce Tribe Guidance on Government-to-Government Consultation*, 1.

Appendix E: List of Acronyms

BOEM - Bureau of Ocean Energy Management

CEQA - California Environmental Quality Act

FPIC - Free, Prior, and Informed Consent

G2G – government-to-government

MLPAI - Marine Life Protection Act Initiative

MPA - Marine Protected Area

MOU – Memorandum of Understanding

NATHPO - National Association of Tribal Historic Preservation Officers

NOAA - National Oceanic and Atmospheric Administration

PSC - Pacific Salmon Commission

TEK – Traditional Ecological Knowledge

THPO - Tribal Historic Preservation Officer

WCOA – West Coast Ocean Alliance

Appendix F: References

- “Advisory Council on Historic Preservation Consultation with Indian Tribes in the Section 106 Review Process: A Handbook” (November 2008).
- Alcorn, J. B. Process as resource. *Advances in Economic Botany* 7 (1989): 63-77.
- Berkes, Fikret. *Sacred Ecology: Traditional Ecological Knowledge and Resource Management*. Philadelphia and London, UK: Taylor and Francis, 1999.
- Berkes, Fikret, Johan Colding and Carl Folke, "Rediscovery of Traditional Ecological Knowledge as Adaptive Management," *Ecological Applications* 10 (2000): 1251-1262.
- Berkes, Fikret and Minda Kislalioglu Berkes, "Ecological complexity, fuzzy logic, and holism in indigenous knowledge," *Futures* 41 (2009): 6-12.
- Carter, Brian T.G. and Erik A. Nielsen, "Exploring ecological changes in Cook Inlet beluga whale habitat through traditional and local ecological knowledge of contributing factors for population decline," *Marine Policy* 35 (2011): 299-308.
- Cinner, Joshua E. and Shankar Aswani, "Integrating customary management into marine conservation," *Biological Conservation* (2007): 201-216.
- Cirone, Patricia, "The Integration of Tribal Traditional Lifeway into EPA's Decision Making," *Practicing Anthropology* 27, 1(2005): 20-24.
- Cobell v. Norton, 240 F. 3d 1081, 1099 (D.C. Cir. 2001)
- The Confederated Tribes of the Umatilla Indian Reservation, “Consultation: Government to Government (or otherwise).”
- Drew, Joshua A., "Use of Traditional Ecological Knowledge in Marine Conservation," *Conservation Biology* (2005): 1286-1293.
- Flaster, Trish, "Community Conservation: A Work in Progress," *Practicing Anthropology* 27, 1 (2005): 25-28.
- Foale, Simon, "The intersection of scientific and indigenous ecological knowledge in coastal Melanesia: implications for contemporary marine resource management," *UNESCO* (2006): 129-137.
- Gadgil, M., F. Berkes and C. Folke, "Indigenous knowledge for biodiversity conservation," *Ambio* 22 (1993): 151-156.
- Hunn, Eugene S., Darryll R. Johnson, Priscilla N. Russel, and Thomas F. Thorton. "Huna Tlingit traditional environmental knowledge, conservation, and the management of a "wilderness" park," *Current Anthropology* 445 (2003): 579-5103.
- Hunn, Eugene S., Darryll R. Johnson, Priscilla N. Russel, and Thomas F. Thorton, "Huna Tlingit Gull Egg Harvests in Glacier Bay National Park." *Practicing Anthropology* 27, 1 (2005): 6-10.

- Jollands, Nigel and Garth Harmsworth, "Participation of indigenous groups in sustainable development monitoring: Rationale and examples from New Zealand," *Ecological Economics* 62 (2007): 716-726.
- Jones R.R. and T. L. Williams-Davidson, "Applying Haida ethics in today's fishery." In *Celebration 2000: restoring balance through culture.*, by S.W. and R. World, editors. Fair, (2000) 87-94. Juneau, Alaska: Sealaska Heritage Foundation.
- Jones, Russ, Catherine Rigg and Lynn Lee, "Haida Marine Planning: First Nations as a Partner in Marine Conservation," *Ecology and Society*. 15, 1 (2010): 12.
- Knopp, Jennie A. "Investigating the Effects of Environmental Change on Arctic Char (*Salvelinus alpinus*) Growth Using Scientific and Inuit Traditional Knowledge," *Arctic* 63 (2010): 493-497.
- Lazrus, Heather and Jennifer Sepez, "The NOAA Fisheries Alaska Native Traditional Environmental Knowledge Database," *Practicing Anthropology* 27, 1 (2005): 33-37.
- McIntosh, Stacie, "Incorporating Traditional Knowledge in the Bureau of Land Management's Planning Process in the National Petroleum Reserve-Alaska," *Practicing Anthropology* 27, 1 (2005): 38-41.
- Menzies C., and C. Butler, "Returning to selective fishing through indigenous fisheries knowledge: the example of K'moda, Gitxaala Territory," *American Indian Quarterly* 31 (2007): 441-466.
- Mitchell, Todd, "Native Uses of Wetlands and Natural Resources Planning: The Swinomish Indian Tribal Community's Wetlands Cultural Assessment," *Practicing Anthropology* 27, 1 (2005): 11-14.
- Mymrin, Nikolai I., and The Communities of Novoe Chaplino, Sireniki, Uelen, and Yanrakinnot, and Henry P. Huntington, "Traditional Knowledge of the Ecology of Beluga Whales (*Delphinapterus leucas*) in the Northern Bering Sea, Chukotka, Russia," *Arctic* 52, 1 (1999): 62-70.
- Nez Perce Tribe, "Nez Perce Tribe Guidance on Government-to-Government Consultation."
- Noongwook, George, and The Native Village of Savoonga, The Native Village of Gambell, Henry P. Huntington, and John C. George, "Traditional Knowledge of the Bowhead Whale (*Balaena mysticetus*) around St. Lawrence Island, Alaska," *Arctic* 60, 1(2007): 47-65.
- Parravano v. Babbitt, 70 F.3d 539, 546 (9th Cir. 1995), cert. denied, 518 U.S. 1016 (1996).
- Royster, Judith V. and Michael C. Blumm, *Native American Natural Resources Law: Cases and Materials* (Carolina Academic Press, 2002).
- Schmink, M., K.H. Redford and C. Padoch. "Traditional peoples and the biosphere: framing the issues and defining the terms," In *Conservation of Neotropical Forests: Working from Traditional Resources Use*, by K.H. Redford and C. Padoch editors., 1992, 3-13. New York, N.Y.: Columbia University Press.
- Seminole Nation v. United States, 316 U.S. 286, 297 [1942]
- Thornton, T. F., and Kitka Sr., H., The Tlingit way of conservation: a matter of respect. In Walker Painemilla, K., Rylands, A. B., Woofter, A., and Hughes, C. (eds.), *Indigenous Peoples and Conservation: From Rights to Resource Management*, Conservation International, Arlington, VA (2010) pp. 211–218.

Thornton, Thomas F., and Madonna I. Moss, Virginia L. Butler, Jamie Herbert, and Fritz Funk, "Local and Traditional Knowledge and the Historical Ecology of Pacific Herring in Alaska," *Journal of Ecological Anthropology* 14, 1 (2010): 81-88.

United States v. Mitchell, 463 U.S. 206, 224–25 (1983)

United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

Van Pelt, Megan and Hawk Rosales, Rachel Sundberg, and Dr. Thomas Torma. "Informing the North Coast MPA Baseline: Traditional Ecological Knowledge of Keystone Marine Species and Ecosystems". North Coast MPA Baseline Project. California SeaGrant. 2017.

Wheeler, Polly and Amy Craver, "Office of Subsistence Management and Issues and Challenges of Integrating TEK into Subsistence Fisheries Management," *Practicing Anthropology* 27, 1 (2005): 15-19.

White Mountain Apache Tribe v. United States, 11 Cl. Ct. 614 (1987).

Winnebago Tribe of Nebraska v. Babbitt, 915 F.Supp157 (D. S.D. 1996)

Appendix G: Overview of Traditional Ecological Knowledge

This section is based on the language in the following report: *Informing the North Coast MPA Baseline: Traditional Ecological Knowledge of Keystone Marine Species and Ecosystems*.³⁰

What is TEK?

TEK is defined as a cumulative body of scientific knowledge, passed through cultural transmission, that evolves adaptively through time as a result of Indigenous peoples living in and observing the local environment for many generations; it is a form of adaptive management.³¹ TEK can contribute significantly to understanding the complexity of an entire ecosystem, providing, for example, location-specific knowledge, place names, ecological features, knowledge of environmental linkages and processes, species taxonomies, species geographic patterns, the role of humans, conservation of biodiversity, and sustainable resource use. It also provides the worldview, including ethics, values, and social institutions of a particular indigenous group.³² Areas of new scientific research and management can also be informed by TEK, which can document areas where ecological changes and threats are evident.³³ In the words of one Tribal representative, “TEK helps to keep Indigenous centered in this eco-system of life and guides us in our understanding that we are a part of this circle and not the focus. We are here to do our part in maintaining this perfect balance that the creator has made and stewardship role.”

TEK is what informs customary management by Indigenous peoples, (i.e., spatial, temporal, gear, effort, species, catch, morphological), which has been developed over countless generations and ensures sustainable resource use.³⁴ This includes interrelated values, ethics, and ceremony tied to the integral role of humans in the environment, which provides a conservation/stewardship framework.³⁵

Value and Use of TEK

Uses of traditional ecological knowledge include creating a baseline of ecological features and species observations; identifying areas of concerns/threats for long-term monitoring [i.e., marine protected areas (MPAs), essential fish habitat (EFH), research stations]; and informing West Coast ocean policy and adaptive management.

For MPA placement considerations, TEK can serve as a baseline and may be used to measure and assess the effectiveness of MPAs; it can provide a deeper context to assessing the “health” of the baseline itself. The condition and presence of marine species at given locations can be monitored, thereby providing a better understanding of how Tribal stewardship and use practices have influenced the occurrence and condition of marine and estuarine species. This can avoid and/or inform what is commonly referred to as the “shifting baseline syndrome.”³⁶ As defined by Pauly (1995), the shifting baseline syndrome

has arisen because each generation of fisheries scientists accepts as a baseline the stock size and species composition that occurred at the beginning of their careers, and

³⁰ Van Pelt, Megan and Hawk Rosales, Rachel Sundberg, and Dr. Thomas Torma, "Informing the North Coast MPA Baseline: Traditional Ecological Knowledge of Keystone Marine Species and Ecosystems," North Coast MPA Baseline Project, California SeaGrant (2017).

³¹ Berkes 1999; Berkes et al. 2000.

³² Berkes and Berkes 2009; Drew 2005; Jones and Williams-Davidson 2000; Jones et al. 2010; Mymrin et al. 1999; Noongwook et al. 2007; Alcorn 1989; Gadgil et al. 1993; Berkes 1999; and Schmink et al. 1992.

³³ Carter and Nielsen 2011

³⁴ Cinner and Aswani 2007; Hunn et al. 2003; Menzies and Butler 2007

³⁵ Thorton and Kitka Sr. 2010

³⁶ Thornton et al. 2010

uses this to evaluate changes. When the next generation starts its career, the stocks have further declined, but it is the stocks at that time that serve as a new baseline. The result obviously is a gradual shift of the baseline, a gradual accommodation of the creeping disappearance of resource species, and inappropriate reference points for evaluating economic losses resulting from overfishing, or for identifying targets for rehabilitation measures.

TEK can also identify possible shifts and changes in habitats over long periods. The location, size, composition, presence/absence, and/or species of a given habitat can shift, particularly over great lengths of time, which may be recorded through oral history. Examples are the changing locations of bay sloughs, seaweed distribution and composition on a stretch of rocky coastline, changes in gravel distribution necessary for smelt spawning along a sandy beach, and the distance of tidal influence upstream in particular rivers. Having this deeper historical perspective could inform future benchmarks and/or goals that should be set as part of an adaptive management approach and should include parameters for determining when an ecosystem is considered healthy and biologically diverse.

TEK is increasingly becoming a recognized form of science by those outside of the indigenous community, and a source of valuable information used by non-Tribal governmental agencies to inform conservation management and decision making.³⁷ Many researchers have concluded that both the more qualitative (TEK) and quantitative (Western science) ways of knowing are together more powerful to understanding ecological features and systems than either are independently.³⁸

TEK and Policy Making

TEK is a highly credible and valuable source for informing more effective and holistic monitoring of ocean health and biodiversity, and to inform adaptive management approaches by state and Tribal managers. TEK cannot serve as a mere footnote; nor can it be relegated to the category of supplemental information used simply to corroborate “Western science.” Rather, TEK must be examined in a meaningful and contextualized way. The gathering of TEK will not be effective if it is not driven by the Tribes on behalf of their respective members/communities. In order to do this, it is essential that each participating Tribe be empowered to gather the information and work within its own community. TEK information and usage must be gathered and organized using a standardized methodology that will be consistent among all participating Tribes and implemented across the West Coast region.

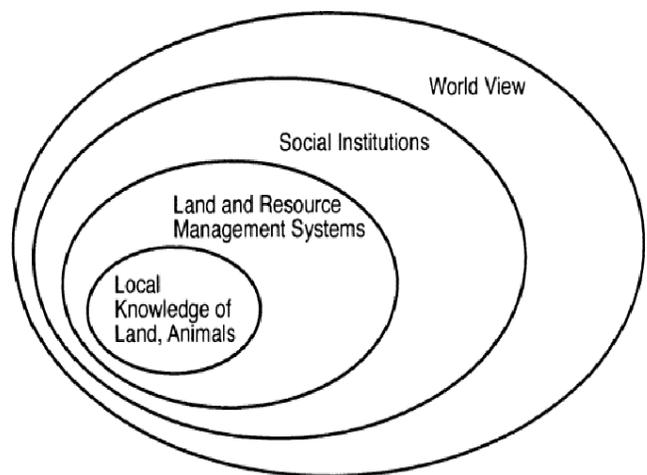


Figure 1. Levels of Analysis in Traditional Knowledge and Management Systems (Berkes et al. 2000, adapted from Berkes 1999).

³⁷ Cirone 2005; Flaster 2005; Hunn et al. 2003; Hunn et al. 2005; Jollands and Harmsworth 2007; Jones et al. 2010; Lazrus and Sepez 2005; McIntosh 2005; Mitchell 2005; and Wheeler 2005

³⁸ Berkes and Berkes 2009; Foale 2006; and Knopp 2010

TEK Case Study: California Marine Life Protection Act

An opportunity for utilizing TEK and Tribal community perspectives occurred in the North Coast region of California with the state's Marine Life Protection Act and the potential effects that the new "Tribal Take" regulation may have on traditional subsistence, ceremonial, and customary Tribal gathering, harvesting and fishing within MPAs in order to directly inform policy, long-term stewardship, and adaptive management.

During the California Marine Life Protection Act Initiative (MLPAI) process, North Coast Tribes strongly advocated for the recognition of TEK as a science that informs sustainable management, their integral relationship within marine ecosystems, and the cultural and political importance of continued customary uses as inherent rights. North Coast Tribes have never lost the capability to manage, govern, and otherwise use the coastal, marine, and estuarine ecosystems. The North Coast Marine Protected Area (MPA) Baseline Program provides an opportunity for a tribally driven project that looks to TEK as a highly credible source for understanding ecological features, documenting observations of keystone species, identifying areas of concern and related threats, and informing policy and adaptive management in the North Coast Study Region of California.

TEK and Data Management

TEK should be collated and maintained in a manner that is culturally appropriate, ensures the protection of sensitive information, and provides analyses that can inform the baseline. Methods of gathering TEK are through published archival and gray literature research, as well as Tribal community participatory research. TEK-informed data can be used to establish a baseline of ecological features, species observations, and areas of concerns/threats.

Furthermore, Tribes should lead projects that involve data collection, as well as any projects that include the collection, analysis, interpretation, and application of traditional knowledge to collected data.

Appendix H: List of Laws & Resources

(Note: This list of selected laws and resources is not comprehensive.)

Echo-Hawk, Walter R., In the Courts of the Conqueror: The Ten Worst Indian Law Cases Ever Decided (2010)

Jorgensen, Miriam, (Ed.), Rebuilding Native Nations: Strategies for Governance and Development, Univ. of Arizona Press, (2007)

National Museum of the American Indian, Do all Indians Live in Tipis?, Smithsonian Institute (2007)

National Congress of American Indians, Tribal Nations and the United States: An Introduction (2015)

Newton, Nell Jessup (Ed.), Felix S. Cohen's Handbook of Federal Indian Law, LexisNexis (2012)

Segwalise, The Hau De No Sau Nee: A Nation since Time Immemorial, in R. O. Porter, Sovereignty, Colonialism and the Indigenous Nations 101 (2005)

Wilkinson, Charles & The American Indian Resources Institute, Indian Tribes as Sovereign Governments (2nd ed.) American Indian Lawyer Training Program, Inc. (2004)

Case Law³⁹

- *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823)
- *Cherokee Nation v. Georgia*, 30 U.S. (5. Pet.) 1 (1831)
- *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)
- *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)
- *US v. Washington*, 384 F. Supp.312 (W.D. Wash. 1973)
- *Morton v. Mancari*, 417 U.S. 525 (1974)
- *Washington v. Washington State Commercial passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979)
- *United States v. Mitchell*, 463 U.S. 206 (1983)

Legislation and Executive Orders

Executive Order (E.O.) 13175, Consultation and Coordination with Indian Tribal Governments (November 6, 2000)

³⁹ Federal Indian Law is a very complex area of law. The cases presented are not exhaustive in relation to the government-to-government relationship and trust obligations.

President Obama's November 5, 2009 Memorandum for the Heads of Executive Departments and Agencies

Consultation with Alaska Native Corporations, Public Law 108-199, Div. H, Sec. 161, Jan. 23, 2004, 118 Stat. 452, as amended by Public Law 108-447, Div. H, Title V, Sec. 518, Dec. 8, 2004, 118 Stat. 3267

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

Appropriations Act of March 3, 1871, 25 U.S.C. § 71

Indian Self Determination and Education Assistance Act, 43 U.S.C. 450b(e).

Apology to Native Americans Public Law No. 111-118, § 8113, 123 Stat. 3409, 3453-54 (2009)

National Historic Preservation Act (NHPA) 16 U.S.C. 470f

Unfunded Mandates Reform Act of 1995 [2 USC 1534(b)]

Agency Policies on Government to Government Consultation

Advisory Council for Historic Preservation. (2000) ACHP Policy Statement Regarding ACHP's Relationship with Indian Tribes.

Bureau of Land Management. (2016). BLM Tribal Consultation Guidance.

Bureau of Ocean Energy Management (2018). BOEM Tribal Consultation Guidance.

Bureau of Reclamation. (2014 with minor revisions in 2016, 2018). Indian Policy of the Bureau of Reclamation.

Department of Defense. American Indian and Alaska Native Policy.

Department of Energy. (2000). A Guide for DOE Employees Working with Indian Tribal Nations.

Department of Energy. (2009). American Indian & Alaska Native Tribal Governance Policy.

Department of Energy. Office of Environmental Management. Office of Intergovernmental and Public Accountability. Tribal Nations Website

Department of the Interior. Department of the Interior Policy on Consultation with Indian Tribes. Available at <https://www.doi.gov/sites/doi.gov/files/migrated/cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf>.

Department of the Interior, Departmental Manual, Part 512: Chapter 4: "Department of the Interior Policy on Consultation with Indian Tribes and Alaska Native Corporations." Chapter 5: "Procedures for Consultation with Indian Tribes." Available at <https://www.doi.gov/elips/browse>.

Department of the Navy. (2005). Department of the Navy Policy for Consultation with Federally Recognized Indian Tribes.

Federal Aviation Administration. (2004). American Indian and Alaska Native Tribal Consultation Policy and Procedures.

Federal Energy Regulatory Commission. (2003). Policy Statement on Consultation with Indian Tribes in Commission Proceedings.

National Park Service. Native American Consultation Database.

National Oceanic and Atmospheric Administration (2013) NOAA procedures for Government-to-Government Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations

Office of Natural Resources Revenue. (2018). ONRR Tribal Consultation Policy.

U.S. Environmental Protection Agency. (2011).EPA Policy on Consultation and Coordination with Indian Tribes.

U.S. Environmental Protection Agency. (1984). EPA Policy for the Administration of Environmental Programs on Indian Reservations.

U.S. Fish and Wildlife Service. (2011, updated 2018). U.S. Fish & Wildlife Service Tribal Consultation Handbook.

U.S. Geological Survey. Office of Tribal Relations.

U.S. Geological Survey. (1997). U.S. Geological Survey Manual, Section 500.6 American Indian and Alaska Native Sacred Sites.

U.S. Government Accountability Office. (March 2019.) Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects.

Other resources not available electronically:

U.S. Environmental Protection Agency. (2000). *Working Effectively with Federally Recognized Indian Tribes: A Practical Guide for EPA Employees.* EPA 305-K-99-006

White House Council on Environmental Quality. (February 4, 2003). *Memorandum for Tribal Leaders: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act.*

- Executive Materials on Government-to-Government Consultation
- Agency Orders on Government-to-Government Consultation

Appendix I: Tribal Consultation Trainings for State and Federal Agencies

- DOI Consulting with Tribal Nations Training:
<https://doiu.doi.gov/niptc/course.cfm?id=249182949>. Offered regularly throughout the year.
- Institute for Tribal Environmental Professionals conferences:
<http://www7.nau.edu/itep/main/Conferences/>
- Washington State Government to Government Training:
<https://des.wa.gov/training/category/46/GovernmenttoGovernmentTraining>
- Udall Foundation's National Center for Environmental Conflict Resolution, Collaboration with Native Nations and Tribal Consultation Training:
<https://www.udall.gov/OurPrograms/Institute/Training.aspx>

Appendix J: List of Tribal Governments Approving the Guidance Document

The tribal governments listed below have submitted letters or similar resolutions from their tribal leadership signifying their support of the Guidance Document and the principles and recommendations it contains. Please see each letter for the specific elements of support from each tribe, available on the WCOA website at www.westcoastcoceanalliance.org/tribal-engagement.

Please note this list is current as of the public release of the document on July 13, 2020. Additional tribes may add their letters of support in the future and they will be added to future drafts of this document, along with the WCOA website, accordingly.

- Coastal Band of the Chumash Nation
- Confederated Tribes of Siletz Indians
- Coquille Indian Tribe
- Fernandeano Tataviam Band of Mission Indians
- Juaneño Band of Mission Indians - Acjachemen Nation
- Kashia Band of Pomo Indians
- Quileute Tribe
- Quinault Indian Nation
- Resighini Rancheria
- San Luis Rey Band of Mission Indians
- Trinidad Rancheria

Current as of July 13 2020

Appendix K: Tribal Consultation Case Studies

In development