

NEVADA INDIAN COMMISSION
POLICY TO PROMOTE COLLABORATION BETWEEN STATE AGENCIES AND INDIAN TRIBES

Section I. Background

- A. Every federally recognized tribe has inherent sovereignty and maintains a government-to-government relationship with the U.S. government, based on the U.S. Constitution, federal treaties, statutes, executive orders, and policies. The U.S. government also has a trust responsibility to each federally recognized tribe. Federal agencies help to fulfill the government-to-government relationship and trust responsibility to tribes through meaningful consultation with federally recognized tribes.
- B. Generally, numerous barriers have existed to effective tribal-state relations, which may be based on outdated and inaccurate perceptions of tribes by non-Indian communities, the lack of understanding of tribal governments and their sovereignty, faulty assumptions regarding tribal governmental capacity, or even tribal government hesitation to form working relationships with state governments because of the tribes' constitutional and direct relationship with the U.S. government. *See* Susan Johnson, et al., *GOVERNMENT TO GOVERNMENT: MODELS OF COOPERATION BETWEEN STATES AND TRIBES* (2nd ed. 2009). Nonetheless, there are many good reasons to strive for cooperation between tribal and state governments, including mutual interests and similar governmental goals to use resources effectively and efficiently, to provide comprehensive services and a safe environment for citizens, to protect natural environments, and to sustain healthy economics. *See id.*
- C. On June 8, 2019, the Governor of the State of Nevada ("State"), Steve Sisolak, approved Assembly Bill 264, "An ACT relating to governmental administration; requiring the Nevada Indian Commission to implement a policy that promotes collaboration between a state agency and Indian tribes; requiring the Governor to meet with the leaders of Indian tribes; requiring certain employees of state agencies to receive certain training; and providing other matters properly relating thereto" (hereinafter "AB 264") into law.
- D. AB 264 was codified into state law under Nevada Revised Statute ("NRS") § 233A.
- E. The purpose of AB 264 is to increase collaboration between the federally recognized tribal entities located within Nevada (hereinafter, collectively, "Tribes") and state agencies (hereinafter, collectively, "State Agencies") that are often charged with developing wide-ranging policies, agreements, and procedures.
- F. NRS 233A.260 charges the Nevada Indian Commission (hereinafter "Commission") with drafting a consultation policy (hereinafter "Policy") that promotes effective communication and collaboration between a state agency and Indian tribes, promotes positive government-to-government relations between the State and Indian tribes, and promotes cultural competency in providing effective services to Indian tribes.
- G. Although the Commission already serves as an intermediary for tribal-state relations, it does not speak for the Tribes, which retain their inherent sovereignty.
- H. A formal policy that establishes a consultation framework would improve the relationships between the Tribes and the State Agencies because it could be utilized by both the Tribes and the State Agencies to clarify what consultation entails and to provide guidance on what types

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of activities require formal tribal consultation. The formal policy could also ensure that there is appropriate training and mechanisms for maintaining relationships between the Tribes and the State Agencies.

- I. The Commission has used US Post, electronic mail, and fax machines (March 14, 2020; June 3, 2020; January 26, 2021; and February 1, 2022) to distribute letters to the Tribes, State Agencies, and other stakeholders (e.g., the Inter-Tribal Council of Nevada ("ITCN"), Nevada Urban Indians, and the Las Vegas Indian Center), requesting feedback and input on what the Policy should include. The Commission held several in-person and virtual public meetings regarding the Policy, including on September 25, 2019; November 8, 2019; January 31, 2020; April 6, 2020; September 9, 2021; April 23, 2023; and July 21, 2023. The Commission solicited feedback and input on the Policy at its quarterly meetings, ITCN Executive Leadership meetings (October 18, 2022, and December 16, 2022), and at the Agriculture and Natural Resources Tribal Submit. In addition to providing a matrix on November 7, 2019, which identified the requirements and spirit of AB264, Commission Chair Lathouris prepared a draft version of the Policy on December 6, 2020, which was subsequently reviewed and revised, leading to this final Policy.

Section II. Purpose

Through this Policy, the Commission provides the minimum requirements for consultation between State Agencies and Tribes. It expands and clarifies how to promote effective communication and collaboration between State Agencies and Tribes; positive government-to-government relations between the State and Tribes; cultural competency in providing effective services to Tribes; and a method for notifying employees of State Agencies of the provisions of NRS 233A.200 to 233A.280, inclusive and this Policy.

Section III. Scope

This Policy applies to all State Agencies that develop or implement a State Agency Action with Tribal Implications.

Section IV. Definitions

The following definitions shall apply to this Policy:

- A. "American Indian/Alaska Native" or "Indian" or "Native" means individuals who are members of any Indian Tribe; individuals who would meet the definition of "Indian" pursuant to 18 U.S.C. § 1153; or individuals who have been deemed eligible for services and programs provided to American Indians/Alaska Natives by the U.S. public health service, the Bureau of Indian Affairs, or other federal programs.
- B. "Collaboration" means an informal process in which State Agencies and Tribes work together to achieve a common set of goals. Collaboration may occur between the State Agencies and the Tribes, their respective agents or subdivisions, and may involve Indian Organizations, if needed or requested by the State Agencies and/or Tribes. Collaboration is the timely communication and joint effort that lays the groundwork for mutually beneficial relations,

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including identifying issues and problems, generating improvements and solutions, and providing follow-up as needed. Collaboration does not include meeting with individuals or groups of individuals that are not authorized to represent the State Agencies or Tribes.

- C. “Communication” means the verbal, electronic, or written exchange of information between the State Agencies and the Tribes.
- D. “Consensus” means what is reached when a decision or outcome is mutually satisfactory to the State Agencies and the Tribes affected and adequately addresses the concerns of those affected. The State Agencies shall endeavor to conduct deliberations with the Tribes in good faith and in accordance with the processes outlined in this Policy.
- E. “Federally Recognized Indian Tribe” or “Tribe” means any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the U.S. Department of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 5131.
- F. “Indian country” means Indian country as defined by 18 U.S.C. § 1151.
- G. “Indian Organizations” means those organizations that are predominately operated by American Indians/Alaska Natives, that represent or provide services to American Indians and/or Alaska Natives living on and/or off tribal lands and/or in urban areas.
- H. “State Agency” means an agency, bureau board, commission, department, or division of the Executive Department of State Government.
- I. “State Agency Action with Tribal Implications” means any State Agency regulation, rulemaking, policy, guidance, legislative proposal, plan, programmatic or operational activity, or grant or funding formula changes that may have a substantial direct effect on a Tribe in matters including, but not limited to:
 - 1. Tribal cultural practices; lands; treaty rights; resources; ancestral lands; sacred sites, including sites that are submerged; burial and massacre sites; and lands Tribes were removed from, or access to traditional areas of cultural or religious importance on State managed lands and waters;
 - 2. The ability of a Tribe to govern or provide services to its members;
 - 3. A Tribe’s relationship with the State Agency; or
 - 4. Any action planned by a non-State entity that involves funding, approval, or other final State Agency action, unless the Tribe is a party to the action.
- J. “State Agency Tribal Liaison” refers to an individual designated by a State Agency that communicates with the Tribes on a regular basis, who reports all matters related to this Policy directly to the office of the head of the agency. The State Agency Tribal Liaison shall assist the head of the State Agency with ensuring the implementation of this Policy; serve as a

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contact person who shall maintain ongoing communication between the State Agency and the affected Tribes; and ensure that training is provided to the staff of the State Agency pursuant to NRS 233A.

- K. “Substantial Direct Effects on a Tribe” may include, but is not limited to:
1. Impacts to the Tribe and its members, including health and welfare; the Tribe’s programs and jurisdiction; on-reservation land, activities, treaty, or other rights; and natural and cultural impacts; and
 2. Impacts to off-reservation treaty rights; subsistence rights; religious, traditional, or cultural rights; and sacred, traditional, or cultural resources, including submerged sites.
- L. “Tribal Government” means the elected governing body of a Tribe that has the authority to enact laws and delegate authority within the Tribe.¹
- M. “Tribal Officials” means the elected or appointed Tribal leader or official designated in writing by a Tribe to represent the Tribe in consultation with State Agencies.²

Section V. Consultation Principles

- A. State Agencies are required to invite Tribes to consult on a government-to-government basis whenever there is a State Agency Action with Tribal Implications.
- B. Consultation is a formal government-to-government process based on a recognition of sovereignty and is generally focused on a given issue or set of issues, including compliance with applicable laws.
- C. Throughout the consultation process, State Agencies must recognize and respect Tribal self-government and sovereignty; identify and consider Tribal treaty rights, reserved rights, and other rights; and respect and elevate Indigenous knowledge, including cultural norms and practices relevant to such consultations.
- D. State Agencies must make good-faith efforts to invite Tribes to consult early in the planning process and throughout the decision-making process and engage in robust, interactive, pre-decisional, informative, and transparent consultation when planning State Agency Actions with Tribal Implications.

¹ A Tribe’s governing body is commonly called a “Tribal Council”; however, Tribes maintain the power to determine their own governance structures. For example, the Tribe’s governing body may be called a “Tribal Legislature” or “Business Council”. Accordingly, State Agencies should take care to correctly identify the Tribe’s governing body. Knowing the correct terminology and structure is important to respecting Tribal sovereignty.

² The written designation is commonly done via a resolution of the Tribe’s governing body; however, this may not always be the case because Tribes maintain the power to determine how the Tribes makes laws.

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- E. Consultation means having both State Agency and Tribal Officials with decision-making authorities present at the government-to-government consultation session(s)/meeting(s) and exchanging information and respectful dialogue regarding a proposed State Agency Action with Tribal Implications and mutual understanding of the issues.
- F. Tribes must be granted the maximum administrative discretion possible.
- G. State Agencies must encourage Tribes to develop their own policies to achieve program objectives and, where possible, defer to Tribes to establish standards. State Agencies must determine whether to establish State standards, including consulting with Tribes as to the need for State standards and any alternatives to preserve the prerogatives and authority of Tribes.
- H. Consultation requires that information obtained from Tribes must be given meaningful consideration and that State Agencies must strive for consensus with Tribes for a mutually desired outcome.
- I. Information received from a Tribe must be deemed confidential, unless otherwise provided by applicable law, regulation, or policy, if disclosure would negatively impact a resource of the Tribe.
- J. Consultation must ensure that applicable information is readily available to all parties; that officials have adequate time to communicate; and that, after a State Agency makes a decision, the consulting Tribe is advised as to how the Tribe's input influenced that decision-making.
- K. Consultation is a shared responsibility that allows an open, timely, and free exchange of information and opinion among parties that, in turn, may lead to mutual understanding and comprehension.
- L. Consultation does not include meeting with individuals or groups of individuals that are not authorized to represent the State Agencies or Tribes.
- M. Upon request, the Commission may assist in planning and facilitating an effective consultation process or collaborative approach to decision-making.
- N. For all statutory or regulatory requirements applicable to Tribes that are subject to State Agency discretion and waiver, each State Agency must streamline the process by which Tribes apply for waivers of those requirements, use flexible policy approaches when reviewing Tribal requests for waivers of those requirements, and render a decision upon a complete application for a waiver within one hundred and twenty (120) days of receipt of such application. If the application for waiver is not granted, the State Agency must provide the Tribal applicant with timely written notice of the decision and the reasons.

Section VI. The Consultation Requirements

- A. Designating Points of Contact for Tribal Consultation:

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1. The head of each State Agency shall designate a primary point of contact for Tribal consultation matters (i.e., the State Agency Tribal Liaison) who is responsible for advising the State Agency's staff on all matters pertaining to Tribal consultation and serving as the primary point of contact for Tribal Officials seeking to consult with the State Agency.
2. The head of each State Agency shall consider designating additional points of contact as necessary to facilitate consultation on varied subject matter areas within the State Agency.
3. Each State Agency shall provide the names and contact information of its State Agency Tribal Liaison(s) on its website, as well as with the Commission.
4. The State Agency Tribal Liaison(s) may delegate consultation responsibilities to other decision-making State Agency officials within their State Agency as necessary and appropriate.

B. Determining Whether Consultation is Appropriate:

1. The State Agency Tribal Liaison must ensure that the State Agency undertakes an analysis as early as possible to determine whether Tribal consultation is required or appropriate, consistent with this Policy. This analysis must occur regardless of whether a Tribal Government requests consultation. Consultation should start when it becomes apparent that the nature and/or the location of an activity could affect Indian issues or concerns. State Agencies must consider the cultural history of a Tribe up to the present (land, treaties, etc.); governmental organization, primary Tribal Official and staff contacts; previous correspondence with Tribes; records of previous consultations; public participation records; plan protect records; transcripts of public hearings; and minutes of public meetings. State Agencies must pay attention to land claims; boundary disputes; water rights; hunting, fishing, and gathering concerns; past and current Tribal economic development proposals; ethnographic studies; and published and unpublished documentary sources.
2. State Agencies must focus on Tribes known to have concerns about the geographic area/particular resources/land uses involved. Nonresident Tribes with historic ties should be given the same opportunity as resident Tribes to identify their selected contact persons and their issues and concerns.
3. When a Tribe requests consultation, the State Agency—to the extent that it has not yet performed the analysis to determine whether consultation is appropriate—must conduct that analysis as soon as possible and respond to the Tribe within thirty (30) days.
4. If there is a reasonable basis to believe that there is a State Agency Action with Tribal Implications, the State Agency must follow the applicable requirements for consultation. State Agencies may still engage in Tribal consultation even if they

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determine that a State Agency Action will not have Tribal implications and should consider doing so if they determine that the action is of interest to a Tribe or Tribes.

5. State Agencies should operate under the assumption that all actions with land or resource use or resource impacts may have Tribal implications and should extend consultation invitations accordingly.
6. State agencies should also be aware that Tribes continue to have a connection and interest in their traditional homelands but may have been removed from those lands or may have reservations that are significantly reduced from their traditional homelands.
7. If multiple State Agencies are involved in the State Agency Action with Tribal Implications, they must work with each other to identify a lead State Agency for consultation—which may be the action proponent—and coordinate consultation to avoid duplicative consultation efforts.

C. Notice of Consultation:

1. When inviting a Tribe or Tribes to consult, the State Agency must provide adequate notice. A checklist for what constitutes adequate notice is included as **Appendix A**.
2. The notice of consultation should include, to the greatest extent possible, a proposed agenda, framing paper (which, at a minimum, identifies the questions the State Agency has), and other relevant documents to assist in the consultation process.
3. The State Agency must transmit the notice of consultation using its standard method of communication to each affected Tribe and the Commission and consider posting it to the State Agency's website or any centralized State website for providing notice of or coordinating Tribal consultations.
4. The State Agency must provide notice of at least thirty (30) days to the Tribe or Tribes of any planned consultations and then allow for a written comment period following the consultation for at least another thirty (30) days. If there are time constraints such that the thirty (30) days' notice of consultation is not possible, or that the post-consultation written consultation period must be shorter than thirty (30) days, the notice of consultation must include information as to why the standard notice or written comment period cannot be provided. Upon the request of a Tribe, or where it would serve Tribal interests, State Agencies must consider adjusting deadlines for notice of consultations and for accepting written comments.
5. The State Agency must ensure that it uses available tools, databases, and agency documentation, as well as communicate with others who may be knowledgeable about those Tribes and the location(s) affected by the State Agency Action with Tribal Implications, to ensure the State Agency's invitation efforts are appropriately inclusive. Such efforts should account for the fact that Tribes may have connections or legally

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protected rights to locations and resources beyond their current Tribal lands, such as off-reservation fishing, hunting, gathering, or other rights.

6. Providing notification (the distribution of information from one or more State Agency representatives) to one or more Tribes of a State Agency Action with Tribal Implications as a stand-alone effort is not consultation. A State Agency may proceed with the expectation that interested Tribes will respond within a reasonable time only after documenting attempts to follow up on consultation letters through multiple forms (e.g., letters, emails, phone calls, communicating with the Commission, etc.).
7. If a Tribe is unresponsive, the State Agency must carefully document with the Commission the State Agency's consultation notice efforts (i.e., note when, how frequently, and by what means it used). State Agencies should remember that there could be a variety of reasons why a Tribe may be unable to respond, including but not necessarily limited to: sensitivity of the issues involved; reluctance to divulge specific information until later in the process, when it might become more certain that areas of concern will be adversely affected; mislaying or sidelining of State Agency correspondence; delegating response to Tribal staff members who are out-of-the office; lack of institutional capacity; traditional ceremonial or gathering practices; etc. It is also helpful for State Agencies to know the schedules for Tribal Government meetings and to consider requesting to be placed on the agenda for such meetings.

D. Conducting the Consultation:

1. A State Agency should, to the greatest extent practicable, develop a protocol ("Protocol") in collaboration with an affected Tribe, that maximizes the opportunity for timely input by the Tribe, is consistent with both the Tribe and State Agency's schedules, and considers specific Tribal structures and traditional needs. A Protocol is a framework for maintaining the government-to-government relationship and is used to identify, establish, and manage expectations. If there is no Protocol in place, State Agencies should collaborate and develop Protocols with individual Tribes or with groups of Tribes—if collectively desired by the Tribe(s)—to establish procedures so that adequate good faith consultation will occur. These written documents may also be called a "Memorandum of Understanding" ("MOU"), "Memorandum of Agreement" ("MOA"), etc. A list of Protocol considerations is included as **Appendix B**.
2. State Agencies must ensure that State Agency representatives with appropriate expertise and, to the extent practicable, decision-making authority regarding the proposed action are present during the consultation meetings.
3. State Agencies must consider conducting the consultation in a manner that prioritizes participation of Tribal Officials.
4. The State Agency should obtain advance informed and written consent from the Tribe for the use of sensitive information provided by the Tribe and should inform the Tribe about any applicable laws that may require disclosure of such information.

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5. Consultations are not public meetings. Aside from State Agency representatives, all other attendees require the consent of the Tribe.
 6. Consultation session methods may include, but are not limited to, in-person meetings, video conferences, teleconferences, and correspondence to discuss a specific issue, and must identify the session as consultation in advance of the scheduled meeting. Consultation session methods may be expanded upon through subsequent correspondence after consultation is initiated through written notification. The State Agency must strive to include both in-person and virtual consultation session methods to provide Tribes with access to participate in at least one consultation session for a specific issue, regardless of travel capabilities. On a case-by-case basis, consultation may be held through a series of written correspondence with the Tribe's leadership, but only when other consultation session methods are not feasible.
- E. Record of Consultation:
1. The State Agency must maintain a record of the consultation process that includes: a summary of Tribal input received; a general explanation of how Tribal input influenced or was incorporated into the State Agency decision; and, if relevant, the general reasoning for why Tribal suggestions were not incorporated into the State Agency Action or why consensus could not be attained.
 2. For state-wide or regional consultations, or if otherwise appropriate, the State Agency must also consider publicly posting the record of consultation to foster ease of reference and use by other agencies, employees, and processes, and to minimize burdens on Tribes to provide similar input on multiple consultations. Decisions regarding whether to publicly post a record of consultation must be made with Tribal input.
- F. Implementation of Final State Agency Action:
1. The State Agency must timely disclose to the affected Tribe(s) the outcome of the consultation and the decisions made because of the consultation.
 2. To the extent permitted by applicable law, the State Agency must ensure that information designated as sensitive by a Tribe is not publicly disclosed.
 3. The State Agency may consider implementing a post-consultation review process that invites Tribal feedback or considers the need for training or technical assistance concerning the final State Agency Action.
- G. Reporting Consultation: Pursuant to NRS 233A.270(3), on or before July 1st of each year, each State Agency that communicates with Tribes on a regular basis shall submit a report to the Commission on the activities of the State Agency pursuant to NRS 233A.200 to 233A.280, inclusive. The report must include:

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1. The name and contact information of each person in the State Agency who is responsible for developing and implementing programs of the State Agency that directly affect Tribes;
 2. Any actions taken or planned by the state agency to carry out the policy implemented pursuant to NRS 233A.260³;
 3. A certification by the Division of Human Resource Management of the Department of Administration of the number of managers and employees of the State Agency who have completed the training required pursuant to NRS 233A.270(2)⁴;
 4. A description of current and planned programs and services provided to or directly affecting Tribes and the amount of funding for each program; and
 5. A description of the method the State Agency established for notifying employees of the State Agency of the provisions of NRS 233A.200 to 233A.280, inclusive.
- H. Dispute Resolution: Where consensus cannot be reached, the State Agency must review the consultation information and consensus-seeking documentation and determine how to proceed. The Commission may be called upon to provide review and guidance to the State Agency.

Section VII. Additional Consultation Considerations

A list of additional consultation considerations—including the benefits of communicating with Indian Organizations, learning considerations, and best practices—is included as **Appendix C**.

Section VIII. Dissemination of Policy

Upon adopting of this Policy, the Commission shall determine the appropriate method to distribute the Policy to all the State Agencies and the Tribes.

³ For clarification, this includes summarizing and listing all consultation topics; listing all Tribes consulted; listing the location of each consultation or indicating if consultation was held virtually; summarizing outcomes (e.g., decisions made, actions planned or taken, and how Tribal input was incorporated); and summarizing successes and recommendations for improvements to the consultation process. State Agencies must get permission from the Tribe before including any information on successes in the report.

⁴ NRS 233A.280(2) requires that all heads of a State Agency and State Agency managers and employees who have ongoing communication Tribes shall complete a training provided by the Division of Human Resource Management of the Department of Administration, in consultation with the Commission. Such training must be designed to support: (a) the promotion of effective communication and collaboration between State Agencies and Indian tribes; (b) the development of positive government-to-government relations between this State and Tribes; and (c) cultural competency in providing effective services to Tribes.

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Section IX. Amendments and Review of Policy

The Commission will meet periodically with the State Agencies and the Tribes, at least once every two (2) years, to evaluate the effectiveness of this Policy, including the State Agencies' promotion of cultural competence. This Policy is a working document and may be revised as needed by the Commission upon sixty (60) days' notice of the proposed changes and an opportunity for State Agencies, Tribes, and the Deputy Attorney General to comment on the proposed changes.

Section X. Effective Date

This Policy shall become effective upon the date signed by the Commission.

Section XI. Sovereign Immunity

This Policy shall not be construed to waive the sovereign immunity of the State of Nevada or any Tribe, or to create a right of action by or against the State of Nevada or any Tribe, or any State or Tribal official, for failing to comply with this Policy.

Section XII. Closing Statement/Signatures

The Commission hereby adopts this Policy on Friday, July 21, 2023. Commissioner Staci Emm motioned to approve, seconded by Commissioner Brian Wadsworth. The motion carried with a vote of 5 for, 0 against, 0 abstentions (0 Absent).

/S/ Stacey Montooth, Executive Director
State of Nevada Indian Commission

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APPENDIX A:
CONSULTATION NOTICE CHECKLIST

Adequate notice of consultation includes:

- (1) A description of the topics to be discussed;
- (2) Sufficient information on the topic to be discussed, in an accessible language and format, and context for the consultation topic, to facilitate meaningful consultation;
- (3) The purpose and proponent of the State Agency Action with Tribal Implications;
- (4) A detailed map of the proposal at the appropriate scale, if applicable;
- (5) A summary of applicable laws and policies governing the State Agency's consultation process and decision-making, along with a clear explanation of the extent of the State Agency's discretionary decision-making authority under the applicable statutes;
- (6) An explanation of upcoming opportunities for Tribal input into the State Agency's decision-making process and what the State Agency needs to know at different points in that process;
- (7) An invitation for Tribes to specify how they would like to be engaged in the State Agency's decision-making process;
- (8) A timeline of the process and possible outcomes of the State Agency Action with Tribal Implications under consideration;
- (9) The State Agencies that will participate in the consultation and the development and implementation of the State Agency Action with Tribal Implications under consideration;
- (10) The date, time, and location of the consultation, as requested by the State Agency or as developed in consultation with the Tribe or Tribes;
- (11) If consulting virtually or by telephone, links to join or register in advance;
- (12) An explanation of any time constraints known to the State Agency at that time, such as statutory deadlines;
- (13) Deadlines for any written comments on the topic;
- (14) Names and contact information for State Agency staff who can provide more information;
- (15) An explanation that the Tribe can provide feedback prior to the consultation, including time to request technical assistance and/or clarification on how the consultation process conforms to the requirements of this Policy.

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APPENDIX B:
PROTOCOL CONSIDERATIONS

Protocols can be extremely helpful in successful consultation practices. A Protocol can even be used, if agreed to in writing by both the State Agency the affected Tribe, to waive requirements under this Policy and/or develop innovative consultation practices. When developing a Protocol, the parties should consider what issues might occur and any outstanding questions they may have about the consultation process. A Protocol can address those issues and/or answer those questions.

While not an exhaustive list, some Protocol considerations are:

- (1) Who will represent the Tribe and State Agency? Will decision-makers be involved at all meetings, or will there be meetings for subject matter experts who then report back to decision-makers?
- (2) Will translators be needed?
- (3) How long will a protocol stay in effect? Will it stay in effect until terminated or is it in effect for a limited duration (e.g., a certain project)? How can the protocol be amended?
- (4) What is the succession/transition plan for continuity with both the State Agency and the Tribes? This addresses change of personnel due to elections, appointments, etc.
- (5) What are the roles of attorneys?
- (6) Are there meetings that do not require decision-makers? What are escalation triggers that would require other parties or decision-makers to be present?
- (7) Will there be a land acknowledgment? If so, what does it look like? Who will do it?
- (8) Is there confidential or culturally sensitive information? What are applicable State laws requiring disclosure of such information, if shared by the Tribe? Does the Tribe want to share such information—or is it even necessary?
- (9) Are there any relevant cultural considerations? (E.g., time of season, animals, symbols, places, terminology, etc.)
- (10) What kind of background and preparation will be done or shared?
- (11) Where can the State Agency learn about the Tribe's cultural and historical information?
- (12) What is the State Agency's mission, purpose, involvement?
- (13) What is the Tribe's political system and governing process?
- (14) What is the Tribe's preferred/appropriate channels of communication?

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- (15) How does the Tribe want to be informed about the State Agency system and process?
- (16) Are there any accessibility considerations?
- (17) What are the opening/closing procedures?
- (18) Where will the consultation take place?
- (19) What is the proper dress code?
- (20) What activities does the Tribe want to receive notice about? Are there any types of activities that the Tribe does not want to receive notice about for consultation purposes?
- (21) How will consultation session agendas be created?
- (22) Will the parties identify action items during/at the end of each consultation session?
- (23) Will the parties be allowed to caucus during consultation sessions? Do they have to provide an estimated time frame for the caucus so the other party can plan accordingly?
- (24) What is the time frame for responding to communication?
- (25) What technical assistance/research can be shared?
- (26) Will the Tribe or its representatives be compensated for certain services?
- (27) How often will the parties meet?
- (28) How will the parties resolve disputes?
- (29) What's part of the record? How will the record be kept?
- (30) How does the State Agency know what the Tribe's official response is? In other words, who "sits at the table" versus sitting behind the table in the audience?
- (31) What is the best meeting format? In-person, virtual, site visits, etc.
- (32) What are the food and beverage needs for meetings?
- (33) What are the technological needs for meetings?
- (34) What is the budget for compensation and expenses?
- (35) Will there need to be a facilitator?
- (36) What is the role of parties regarding the media?

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APPENDIX C:
ADDITIONAL CONSULTATION CONSIDERATIONS

- (1) Working With Indian Organizations: Tribal relations can be enhanced through the development of positive working relationships with Indian Organizations. State Agencies should maintain working relationships with relevant Indian Organizations and are encouraged to make presentations to them at their meetings. Individual government-to-government consultation with individual Tribes is still required, unless otherwise specified by a Tribe as part of a Protocol.

- (2) Learning Considerations: When working with Tribes, State Agency representatives should take the time to learn about the Tribes with which they will be working. While there may be similarities, tribes are not all the same. While not an exhaustive list, some questions to consider are:
 - (A) What is the Tribe's history before the Federal Government and the State?
 - (B) What is the Tribe's aboriginal, ancestral, or traditional land base?
 - (C) What has been the Tribe's relationship with the Federal Government and the State?
 - (D) Was a Tribe's reservation rights (if any) established by a treaty or by Executive Order?
 - (E) How is the Tribe organized?
 - (F) Does the Tribe have off-reservation treaty rights or other reserved rights?
 - (G) Is the Tribe related historically or culturally to other Tribes?
 - (H) Are there specific cultural customs that may have a bearing on interactions and meeting protocols?

If available, State Agencies can learn from ethnographic histories, information produced by Tribes, Tribal media/websites, and meeting or contacting Tribal representatives.

- (3) Best Practice Considerations:
 - (A) During consultation, State Agencies should consider asking Tribes for information, as relevant, regarding: Tribal concerns about a proposed action and how to resolve any issues that might affect Tribes; how to resolve adverse effects on traditional resources, use areas, trails, and natural or heritage resources identified in reviews of existing data; places of traditional religious or cultural importance that might exist but have not been identified in background data reviews for a project; treatment of human remains and cultural items as defined by the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001, et seq., if discovery, excavation, or removal of those remains and items is anticipated; and the necessity for the State Agency to contact any traditional Tribal leaders or religious practitioners.

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- (B) Most successful working relationships are built and maintained over a long period of time with the same individuals representing each party. Accordingly, State Agencies should assign Tribal coordination duties to a limited number of employees with the goal of encouraging those employees to develop long-term professional relationships with Tribes. State Agencies should also take appropriate actions to help minimize the turnover of personnel responsible for Tribal coordination.
- (C) State Agencies are encouraged to visit Tribal Governments and Tribal Officials on a reoccurring basis, including attending, as invited, economic enterprises, celebrations, dances, cultural festivities, sporting events, or feasts. When possible, State Agencies should take the opportunity to meet with new Tribal Officials at the start of their tenure to discuss ongoing planning, actions, and proactive programs of interest.
- (D) State Agencies should be mindful of Self-Determination Contracts (also known as “638” contracts) and Self-Governing Funding Agreements through the Indian Self-Determination and Education Assistance Act. 25 U.S.C. § 450, et seq.
- (E) State Agencies should be knowledgeable about any authority to provide compensation or require that compensation needed to acquire information necessary for the State Agencies to make decisions be provided by third parties. This includes whether a State Agency may utilize its own appropriated funds or cost reimbursable accounts to reimburse Tribal members for travel expenses to attend meetings or for taking time to discuss or provide certain information.
- (F) During consultation, State Agencies should ask Tribal Officials to not only identify concerns but also to suggest potentially effective mitigation strategies to deal with the concerns, including the most effective measures to reduce effects if complete avoidance is not feasible.
- (G) If a consultation session can be scheduled on or near a reservation, Tribal members are more likely to attend.
- (H) State Agencies should be respectful of the fact that meetings will often open and close with a prayer.
- (I) State Agencies should be patient, especially if the meeting with the Tribal Government includes additional agenda items or follows no fixed schedule. To the greatest extent possible, the State Agency should prioritize building a healthy relationship over time efficiency.
- (J) If the State Agency is hosting a meeting, it should allow time at the beginning of the meeting to introduce participants and their roles and provide a brief overview of the venue to allow for comfort.

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- (K) State Agencies should keep in mind that gifts and/or food may be important parts of cultural exchanges. If there are questions about this, they can be addressed as part of the Protocol.

- (L) State Agencies must always be clear about what they are doing and why, including which laws and regulations govern their actions. State Agencies must set realistic expectations about what they can and cannot do.

- (M) State Agencies must remember that Indigenous traditional ecological knowledge (“ITEK”) is recognized as “one of the many important bodies of knowledge that contributes to the scientific, technical, social, and economic advancements of the United States and to our collective understanding of the natural world.” Executive Office of the President, Office of Science and Technology Policy, Council on Environmental Quality, “Indigenous Traditional Ecological Knowledge and Federal Decision Making” (Nov. 15, 2021). ITEK includes insights based on evidence acquired through direct contact with the environment and long-term experiences, as well as extensive observations, lessons, and skills passed from generation to generation. It is a body of observations, oral and written knowledge, practices, and beliefs that promote environmental sustainability and the responsible stewardship of natural resources through relationships between humans and environmental systems. ITEK continues to evolve. It is owned by Indigenous people and State Agencies should only engage in ITEK through relationships with Tribes and Native communities. State Agencies must respect the rights of knowledge holders to control access to their knowledge, to grant or withhold permission, and dictate the terms of application. If shared, the knowledge should benefit everyone.