

SAMPLE ARIZONA INTER TRIBAL COUNCIL CONSULTATION LAW

WHEREAS, the [Tribe/Native Nation] has occupied the [] in what is now known as the State of Arizona since time immemorial; and

WHEREAS, the [] presently resides on the [#] acre [Name of Reservation], a remnant of its once vast Aboriginal lands; and

WHEREAS, the United States of America and the [] have a government to government relationship; and

WHEREAS, the United States and its principal agencies are the Trustees for the [Tribe] and said trust responsibilities must be carried out in accordance with the highest fiduciary standards by the United States to ensure the perpetuation of the _____ Reservation as a self-sustaining culture and homeland for the [Tribe/Nation]; and

WHEREAS, the United States [Departments] continue to ignore the unique status of Indian lands, the political relationship of Tribes to the United States government and has sought to [condemn without tribal consultation and despite tribal opposition] through the administrative rule-making process; and

WHEREAS, the United States has historically breached its trust responsibilities to the [Tribe] by failing to protect the Tribe's holy places and sacred sites. Conflicts of interests in the past performance of these trust obligations have compromised the Secretary of the Interior, the principal agent of the trustee United States, to the extent that the United States acting in concert with State of Arizona's interests destructively manipulated the Aboriginal lands of the Tribe for the benefit of []; and

WHEREAS, the United States has pledged to work together with Tribes and Native Nations to forge a brighter future and restore healing relations with Native Americans and strengthen its partnership with tribal governments, and to honor treaties and recognize Tribes'/Nation Nations/ inherent sovereignty and rights to self-governance; and

WHEREAS, the [Tribe/Native Nation] has enacted the following Consultation Law to assure that these pledged obligations will be met.

BE IT RESOLVED

[]

I. Meaningful consultation between [Tribes and Native Nations (hereinafter "Tribe" or "Nation")] and the federal government is imperative to protecting tribal

rights, resources, and sovereignty. Consultation is meaningful when the federal government engages potentially impacted tribes before making decisions on actions that might affect tribal rights or resources. The process of consultation should begin in the planning and decision-making stages of a proposed federal action, and not after the action has been undertaken. The federal government's duty to engage with tribes in this manner stems from tribal treaties and the U.S. Constitution, and it has been expanded upon through court decisions and Executive Orders.

II. Guiding Principles

- A. Consultations should be conducted in good faith;
- B. Before decisions are made or studies are undertaken;
- C. With adequate time for consideration by the Tribe;
- D. Where the objectives and scope of the Activity is clearly communicated before the Consultation begins;
- E. Where Tribal Representatives have the opportunity to express their concerns at the appropriate level of government;
- F. With an upfront commitment from the government stating how Tribal feedback and input will be considered and implemented by the deciding authority;
- G. In a climate of mutual respect; and
- H. With any barriers to meaningful Consultation being removed through development and distribution of clear information, the use of accessible locations for meeting purposes, the use of translated documents and communications, and through providing financial support for the Consultation process.

III. The Consultation Process

- A. Definitions
 - 1. "Accommodation" means reconciliation or settlement of opposing views;
 - 2. "Activity" or "Activities" are actions or inactions that have the potential to impact Tribal interests and Tribal Lands, including, but not limited to:
 - a) The modification or adoption of statutes and regulations or any Government policy-making, permitting, or planning processes impacting any aspect of the Tribe or Tribal

Lands, including, but not limited to Tribal health, safety, and welfare, Tribal funding, Tribal religious, traditional or cultural practices or Tribal resources;

b) Resource extraction and/or exploration activities on Tribal Lands

c) Alteration to Tribal Lands or places of historical, traditional, religious or cultural significance;

d) Modification or adoption of regimens of resource allocation and management involving any aspect of Tribal Lands; and

e) [Reserved]

3. “Consultation” is a process of notice, shared dialogue, accommodation and meaningful negotiation, facilitated in good faith between the Tribe and relevant Governments. The process of Consultation encompasses longstanding legal duties and the trust responsibility of the United States especially, to cooperate with the tribes and their respective institutions so as to produce free, prior and informed consent with regard to any action taken by Governmental entities, which may impact tribal rights, lands or places of importance to the tribe(s). The process of consultation functions to protect tribal territories’ economic, ecological and cultural integrity;

4. “Consultation Action Area” means all areas affected directly or indirectly by the [federal] action and not merely the immediate area involved in the action;¹

5. “Consultation Scope.” In determining whether the federal government’s action may impact tribal interests, resources, or tribal lands, the acting agency should consider the “Consultation Action Area” together with the cumulative effects of other activities that are interrelated or interdependent with that action. Cumulative effects are those future state or private activities, not involving federal activities, that are reasonably certain to occur within the action area of the federal action subject to consultation.

6. “Consent” means the consensus and/or consent of the Tribe in accordance with the Tribe’s traditional customary law. Under the circumstances, consent does not necessarily mean that every single individual Tribal member must agree but rather that consensus will be determined pursuant to customary law and practice of the Tribe.

¹ See 50 CFR § 402.02

7. “Free” means that Consultation should be effectuated in good faith, lacking coercion or pressure, allowing for the Tribe to formulate independent points of view and to raise all possible concerns;
8. “Government” means any federal, state, local governmental entity;
9. “Informed” means that the Tribe and its Tribal Representatives have full access to all information relevant to the Tribal decision-making process, which is to be presented clearly, accurately and in good faith;
10. “Meaningful negotiation,” in order to be meaningful, requires informed participants, and the ability of the tribal representatives to reject any governmental and nongovernmental proposals.
11. “Notice” means clear communication, in official writing, with the Tribe and its designated Tribal Representatives as to any Activity that may impact Tribal rights or interests or Tribal Lands;
12. “Prior” means that consultation must take place in advance of any decision made on the part of the Government to proceed with any Activity that may impact Tribal rights or interests or places of importance on Tribal Lands
13. “Tribal Lands” include all current or future lands taken into trust by the United States of America on behalf of the Tribe and, for purposes of this Consultation Ordinance, the Tribe’s aboriginal territory to which the Tribe claims a cultural affiliation;

[MAP OF ABORIGINAL TERRITORY]

14. “Tribal Representatives” means those persons or Tribal entities specifically authorized to engage in Consultation with the Government and its agents or representatives on a particular Activity.

B. Consultation Process. The duty to consult arises when the Government or an agent of the Government knows or has reason to know of a proposed or ongoing Activity that may impact the Tribe. Consultation must begin at the earliest state of any such consideration of an Activity – before the issuance or approval of any plans, licenses, permits or other authorization – and must include frequent and ongoing communications between Tribal Representatives and the Government and its agents or representatives.

C. Initiating Meaningful Consultation. Consultation should be initiated, at minimum, with written notice to the [Tribal Chairperson], with a

copy to all known Tribal points of contact available to the agency. The notice should provide sufficient information for the Tribe to understand the potential impact of the proposed Activity and to identify within the Tribe the appropriate persons who will be appointed as Tribal Representatives for the Consultation Process. At minimum, the written notice to the [Tribal Chairperson] should include an explanation of:

1. The nature and scope of governmental and nongovernmental proposals;
2. How the proposed Activity might affect Tribal Lands or other Tribal interests;
3. Identification of governmental entities and representatives that are involved;
4. Identification of the Government officials who will make interim and final decisions for the Governmental entities or agencies that are involved;
5. All documents to be referenced during Consultation, including applications, studies, maps, applicant documents and materials, assessments, and policies;
6. All deadlines and filing dates; and
7. The Government's suggested form or protocol for engaging in a meaningful Consultation process.

D. Tribal Representatives. The Tribe will appoint Tribal Representatives to engage in Consultation on behalf of the Tribe. All substantive decisions shall be exclusively reserved to the Tribal Council unless specifically delegated in writing by appropriate Tribal Resolution or formal motion of the Tribal Council to the Tribal Representatives or another Tribal body.

E. Form. Appropriate form and conduct of Consultation shall be established collaboratively at the outset of negotiations, through communications between the Tribe and its Tribal Representatives and appropriate Government representatives. Consultation should be tailored to fit the circumstances surrounding each Activity.

F. Funding. Funding for the information to be presented to the tribe(s) during consultation must be borne by the governmental entities involved in the consultation process. Annual programmatic funding must ensure that the Tribe is able to maintain necessary staff to be ready for consultation opportunities over time.

G. Incorporating Traditional Knowledge. Incorporating traditional, religious and cultural information and knowledge, including what some people refer to as “traditional ecological knowledge”, is important to the Consultation and decision-making process. Traditional knowledge and information provided by the Tribe shall be considered the intellectual property of the Tribe, and shall be used only for the purposes agreed to by the Tribe. It shall be respected and protected from disclosure pursuant to the Tribe’s specifications. In some instances, the Tribe may designate certain information as “Confidential” and subject to the requirements of Section IV(H).

H. Confidentiality. Tribes/Nation need be mindful of Freedom of Information Act requests: see *U.S. Department of the Interior v. Klamath Water Users Protective Association* 532 U.S.1 (2001)

I. Duty to Accommodate. The duty to accommodate the Tribe as part of the Consultation process requires flexibility on the part of Government and the willingness to effectuate changes in plans to better ensure adequate Consultation. When consultation reveals a conflict or the possibility of a negative impact to the Tribe, the Government must take all necessary steps to avoid, minimize and mitigate the Activity’s potential harm. This could include, among other things, a decision to:

1. Modify or adopt legislation, policies, planning services, resource allocation regimes or further negotiations;
2. Revise or adapt existing policy and plans;
3. Abandon the proposed Activity;
4. Conduct cumulative impact studies and assessments, make adjustments accordingly, or create strategic legal plans based on the impact study results;
5. Provide for ongoing Consultation and frequent follow up.

IV. Consultation Outcomes. The final outcome of meaningful Consultation may be in the form of a written agreement between the Tribe and the Government in the form of a memorandum of understanding, intergovernmental agreement or any other written form agreed to by the parties. The final agreement may include information on:

- A. Monitoring and management programs;
- B. Follow-up studies;

- C. Measures to protect Tribal Lands and traditional land use practices and rights;
- D. Monitoring performance of operations;
- E. Economic benefits to the tribal communities;
- F. Mechanisms for sharing revenues from resource development;
- G. Ongoing Consultation and follow-up measures; and
- H. Other such measures agreed upon in writing by the parties.

V. Dispute Resolution and Remedies. In the event that Tribe determines that meaningful Consultation has not occurred by the government or non-governmental entities, the tribe(s) shall review the matter, and consultation shall be suspended until the review is completed, unless otherwise directed by the tribe.

[Appropriate causes of action: The Indigenous Peoples Law and Policy Program is generating a separate memorandum on tribal rights of action.]

VI. Tribal Laws Control (supremacy).

VII. Amendments:

- A. This ordinance may be reviewed and amended from time to time by motion of the Intertribal Council of the State of Arizona.
- B. Amendments shall be in force immediately upon ratification by the Intertribal Council of Arizona, unless otherwise stated.

VIII. Non-Governmental, Third Party Implications: Non-governmental entities may be bound by legislation, license conditions, and other legal obligations, to modify projects and use of resources to allow federal and state governments to give effect to the duty to Consult and Accommodate the Tribe.

- A. Non-governmental entities may also be liable to the Tribe Indian for (among other things) negligence, breach of contract and dishonest dealings.
- B. Non-governmental entities must act in accordance with the Guiding Principles, listed in Section II, in order to operate and continue to operate on Tribal Land. Acting without regard to the Guiding Principles while impacting Tribal Lands or resources may result in revocation of a right to operate.
- C. A non-governmental entity that contributes to an act or omission on the part of the Government, shall be deemed to have acted in contravention of the Guiding Principles and without good faith.

IX. Disclaimer.

No other forms of contact will be considered a "Consultation" under the laws of the Tribe, other than what is specified in this ordinance or agreed upon between the Tribe or, if appropriate, its Tribal Representatives and the representatives of the Government. Telephone calls made to tribal officials or employees, as well as faxes, emails and materials sent to the tribe will not be considered to be meaningful Consultation, and such communications shall not discharge the Governments duty to Consult. Consultation can only be effectuated through the relevant decision-making representatives, agreed to in advance between the Tribe and its Tribal Representatives and the Government.