DIALOGUE

IMPLEMENTATION OF TRIBAL CONSULTATION LAWS IN CALIFORNIA

SUMMARY

State and local environmental agencies regularly make decisions that have repercussions for tribes, including for their health and ability to maintain and continue to evolve traditional practices, language, and cultural identity. Meaningful consultation has become central to tribal sovereignty as tribes advocate for legislation that requires consultation on decisions impacting their lands, economy, and culture. A two-year project from the Environmental Law Institute (ELI) and its partners examined the status of consultation in California and how it may promote tribal sovereignty and ensure relevant outcomes. On September 19, 2024, ELI hosted a panel of experts to discuss the challenges and best practices in implementing tribal consultation at the state and local level.

Madison Calhoun is Senior Manager of Educational Programs at the Environmental Law Institute (ELI).
Greta Swanson (moderator) is a Visiting Attorney at ELI.
Sean Scruggs is the Tribal Historic Preservation Officer for the Fort Independence Indian Reservation.
Steven Lazar is Senior Planner, Humboldt County Planning and Building Department.
Merri Lopez-Keifer is Director of the Office of Native American Affairs, Office of the Attorney General, California Department of Justice.

Madison Calhoun: I'll introduce our speakers for today and then hand things over to our moderator, Greta Swanson, who is a visiting attorney at the Environmental Law Institute (ELI). Greta has been closely involved with initiatives in tribal consultation and co-management, marine conservation, and human rights and the environment. Her research and publications have addressed international protections of sharks, community fisheries management in the Mesoamerican reef, human rights and the environmental rule of law, and government-to-government consultation and co-management with Alaska Natives.

Sean Scruggs is the tribal historic preservation officer (THPO) for the Fort Independence Indian Reservation in California, and serves on the Tribal Advisory Committee at San Francisco State University. With six years of experience in consultation and relationship building, Sean works tirelessly to repatriate ancestors, protect his ancestral homelands, address gaps in the National Historic Preservation Act §106 consultation process, and advocate for cultural education among leaders at all levels.

Steven Lazar is a senior planner in the Humboldt County Planning and Building Department. Steven has more than 20 years of experience as a public land use planner. Steven played a key role in developing California's first commercial medical marijuana land use ordinance in 2015 and served as the primary author of the 2018 amendments to the regulations. In 2011, Steven began coordinating meetings with local tribes and THPOs in Humboldt County to collaborate on the development of resources and referral protocols. Steven also serves as planning commissioner for the city of Eureka.

Merri Lopez-Kiefer is director of the Office of Native American Affairs in the Office of the Attorney General, California Department of Justice. Merri works closely with California's Native American tribes to facilitate engagement and coordination with the state on mutual concerns. She also serves as a liaison between the Legal and Law Enforcement Divisions and tribal governments. Before joining the Attorney General's Office, Merri spent 15 years as chief legal counsel for the San Luis Rey Band of Mission Indians, where she worked to protect Luiseño culture, sacred sites, and tribal rights.

Greta Swanson: Since Executive Order No. 13175 was issued in 2000,[1] the federal government along with tribes has undertaken many policy initiatives to develop and improve government-to-government consultation. At the same time, states and localities are making many, many development decisions that impact traditional lands and interests of tribes. One challenge at the state and local levels is that there is not necessarily the inherent trust relationship that exists at the federal level.

1. Exec. Order No. 13175, Consultation and Coordination With Indian Tribal Governments, 65 Fed. Reg. 67249 (Nov. 9, 2000).

However, some states are promoting a government-to-government relationship with tribes and developing tribal consultation laws and practices, which is what ELI's project "Advancing Tribal Sovereignty and Community Health in California" is about.[2] I want to thank our partners, the National Association of Tribal Historic Preservation Officers, the Native American Rights Fund, the National Indian Law Library, Dr. Jamie Donatuto, who worked with the late Swinomish elder Larry Campbell, and the Dry Creek Rancheria Band of Pomo Indians. Also thanks to our California-based steering committee, the ELI team, and many others. We've received support for this project from the Robert Wood Johnson Foundation and the Henry Luce Foundation.

I'm first going to briefly discuss the laws, for those who aren't familiar with them, and then I'll discuss some of our project results. California is unique in the diversity of tribes and cultures in the state. There's a long history of displacement, forced labor, and genocide, which was actually state-sanctioned. In the 1850s, Native Americans signed treaties with the federal government, which would have set aside a significant amount of the land in California for the tribes. However, the U.S. Senate failed to ratify them, leaving tribes with, at this point, probably less than 3% of California land.

After years of tribal advocacy, California started to make changes. I'm going to talk about two laws that were passed, Senate Bill (SB) 18[3] and Assembly Bill (AB) 52.[4] At the same time, the governor issued executive orders, one mandating that state agencies develop tribal consultation policies, and a later one creating the Truth and Healing Council.[5] There are other laws that have also supported tribal consultation in California.

Both SB 18 and AB 52 use the same definition of "consultation," emphasizing a meaningful process that is timely, carefully considers views, recognizes cultural values, reaches agreement if feasible, is respectful of sovereignty, and protects confidentiality. The two laws also require consultation with both the nonfederally recognized and federally recognized California Native American tribes. These tribes are identified and listed by the Native American Heritage Commission, an agency in California. Both laws also seek to protect confidentiality, and AB 52 specifically prohibits public disclosure of tribal information without the tribe's consent.

The laws are different in terms of which agencies consult and on what topics. SB 18 applies to local governments' planning departments that are developing general plans, plan amendments, and specific plans for their jurisdictions. AB 52 applies to agencies that are leading environmental reviews under the California Environmental Quality Act (CEQA).[6]

As for topics of consultation, both laws deal with tribal cultural matters in slightly different ways. Under SB 18, the subject of consultation has been referred to as "traditional tribal cultural places," which include religious sites and eligible listed sites on the California Register of Historic Places. In the case of AB 52, there's a new term, "tribal cultural resources," which must also be eligible for listing or be listed on the California Register. Then, agencies determine their significance, and for that determination, agencies must consider the tribes' information about the cultural resource.

Moving on to the procedures, they are slightly different. Under SB 18, before a local government adopts a plan, it must offer consultation to affiliated tribes and conduct consultation if they accept the offer. First, it contacts the Native American Heritage Commission for a list of affiliated tribes. Then, it sends notices to those tribes. Tribes have 90 days to respond, to decide if they want to consult. Consultation needs to be concluded before the plan or amendment is adopted.

Under AB 52, there's a strict timeline. Within 14 days of deciding to undertake an action or determining that a project application is complete, agencies are to contact tribes. Tribes only have 30 days to respond in writing, and then the agency needs to take prompt action to start consultation. Consultation is concluded before the environmental document is finalized.

AB 52 defines the conclusion of consultation. The conclusion is either when there's an agreement on mitigation or avoidance measures, or one party decides after reasonable effort and in good faith that they cannot reach agreement. That part is not defined. SB 18 called for development of tribal consultation guidelines, with input from California tribes, in order to develop best practices for consultation.

Our project undertook to evaluate the effectiveness of state and local tribal consultation under the two consultation laws to achieve statutory goals and related tribal sovereignty and goals. Some of these goals include protecting tribal cultural resources and places and the confidentiality of tribal information.

We took several approaches. We evaluated the laws from a legal and historical perspective; looked at environmental impact reports; conducted interviews with tribal, state, and local officials, legal experts, and consultants; conducted a survey of tribes; researched case studies of consultation; and created a set of Indigenous health indicators for a partner tribe for the project. On the basis of our work, we developed recommendations for implementation of consultation.

We sent a survey to 141 federally recognized and nonfederally recognized California Native American tribes, received 23 responses, and conducted follow-up

2. ELI, *Advancing Tribal Sovereignty and Community Health in California*, https://www.eli.org/advancing-tribal-sovereignty-and-community-health-california (last visited Oct. 16, 2024).
3. S.B. 18, 2003-2004 Leg. (Cal. 2004), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200320040SB18.
4. A.B. 52, 2013-2014 Leg. (Cal. 2014), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB52.
5. Cal. Exec. Order No. B-10-11 (Sept. 19, 2011), https://archive.gov.ca.gov/archive/gov39/2011/09/19/news17223/index.html; Cal. Exec. Order No. N-15-19 (June 18, 2019), https://www.library.ca.gov/wp-content/uploads/GovernmentPublications/executive-order-proclamation/40-N-15-19.pdf.
6. Cal. Pub. Res. Code §§21000 et seq.

interviews with six. Although we cannot draw statistical conclusions from these responses, we did look at the responses as providing trends and examples that were helpful. Most tribes had similar goals for consultation under the laws. They sought to preserve and avoid disturbance of resources, document the resources, engage in cultural management, protect cultural heritage, and use creative mitigation of impacts. They sought numerous other goals as well.

Looking at general trends, on the positive side, the vast majority of people who responded said that there were increased opportunities for consultation. The laws have set a framework for tribes to be at the table. A substantial minority—one-fourth to one-third, depending upon the question—saw substantive improvements in effectiveness, greater protection of cultural resources, and more ability to make changes early in the project to mitigate impacts and improve relationships with lead agencies. A very small minority, in response to a question, reported increased opportunities for healing.

For the majority of tribes who responded, there were still limitations as between federally recognized and nonfederally recognized tribes; nonfederally recognized tribes experienced even more difficulty carrying out effective consultation.

Some of the issues that we addressed in the survey include things that need to be in place before consultation occurs and ongoing throughout consultation. Confidentiality can be a catch-22. On the one hand, tribes need to share information in order to protect their resources. On the other hand, they may be distrustful of agencies as far as keeping that information confidential based on their experiences with the agencies. Although the laws prohibit disclosure, they do not include penalties for disclosure.

Good relationships are fundamental. They facilitate consultation. They can lead to regular communication between tribes and agencies about upcoming projects and plans. They may provide a basis for a greater role for tribes in the form of membership on task forces, decision-making groups, and tribal advisory committees. About one-third of respondents and one-half of the nonfederally recognized tribes reported that the laws had improved relationships with agencies. Others stressed the wide variation in relationships depending upon the particular government agency.

As for resources, consultation is an unfunded mandate imposed on tribes. The majority of tribal respondents and two-thirds of nonfederally recognized tribes identified limited resources as constraining effective participation in consultation. For nonfederally recognized tribes, there are no funds for a THPO.

As for education—addressing whether the staff have a good understanding of the laws and requirements and potential, as well as an understanding of the tribes and the tribal goals of those tribes with whom they are consulting—most tribes did not indicate a need for further education, although some did. About one-half indicated a need for agencies to have additional information and training on the laws, as well as on tribal issues.

On procedures and substantive requirements in the laws, ensuring the engagement of tribes in consultation requires early notification. This gives tribes the opportunity to provide their perspective and information before key decisions are made. About one-third said that they were learning about projects early enough to make impacts.

For the consultation timeline, two-thirds of the respondents indicated that the agencies do not give the tribes sufficient time to consult to the degree that they are seeking. The question of weight to be given to tribal information relates to what kind of impact this information has on outcomes. Providing sufficient deference to tribes' information is necessary to protect the resources and places, and for tribes to achieve their objectives. About two-thirds of federally recognized tribes and more than 80% of nonfederally recognized tribes reported that tribal expertise is not given sufficient weight in the decisions.

A majority of federally recognized tribes and all of the nonfederally recognized tribes noted that the reports of archeologists or cultural resource management (CRM) firms are the primary determinant of the final findings and recommendations on cultural resources. Several noted the importance of engaging tribes in initial cultural surveys.

Creative mitigation is another way in which tribes can have an impact on final decisions. They would like these measures to be considered equally. When critical decisions have already been made about the project, mitigation options often become limited.

As far as accountability measures not being built into the laws, they don't provide for implementation and management for projects, although these can be mitigation measures. Cultural management of resources is a goal for the vast majority of tribes who responded. And about 30% of tribes disagreed that decisions made during consultation were implemented.

I'm going to finish with a plug for another part of the project, which is a database of tribal consultation policies and laws across the nation.[7] This is a free resource that ELI has developed with partners. It includes policies and laws and related documents of tribes, states, state agencies, the federal government, and some localities. We are in the process of adding a second phase that will include consultation resources such as best practices and training webinars. We'll be posting the results of this project on the website as well.

Sean Scruggs: *Manahuu*. Good morning. I am *Chukke-shuv-ve-wē-tah'*, Oak Creek from Fort Independence Indian Reservation, California. Our reservation was established on October 28, 1915, by Executive Order No. 2264, signed by President Woodrow Wilson.[8] I am going to give a disclaimer and a lead-in to my concerns with consultation, and speak to the earlier effort of what I do with education when people approach me and want to know about our

7. ELI, *ELI Tribal Consultation Policy Hub*, https://www.eli.org/eli-tribal-consultation-policy-hub (last visited Oct. 9, 2024).
8. Exec. Order No. 2264 (Oct. 28, 1915).

tribe and our place and our valley. Our valley is *Payahuunadü*, the Land of Flowing Water.

My disclaimer: I do not speak on behalf of any other THPO, tribal chair, vice chair, or elder. Each tribe is distinct. Each tribe has their own story. Each tribe has their own experience and place in history. It is extremely important that all agencies—state, local, and federal—as well as project proponents and developers understand that they cannot assume that all tribes have the same collective experience, history, or culture of First Nations, First Peoples. Their differences are one of the primary reasons that individual consultation is critical to each and every tribe.

Today, I am going to share my experience as a THPO since 2018 with my tribe. I am going to ask you to think about an analogy. I am willing to bet that almost everyone on this webinar today either has lived in a house or lives in a home. If you do, do you lock your doors at night? And if you do, why do you do that? I am going to continue with my introduction and then come back to that question.

Our people have been in our homes, in our valleys precontact. I don't acknowledge the terms "prehistoric" or "hunter-gatherer." My tribe has a history. We have been in our valley since the beginning of time. We had no locks on our doors. Personally, I view my valley, my entire valley, which is in eastern California, as a church, as a place of worship in that sense, and also as a supermarket, a place where we had food. We had no way to lock it and protect it. At contact, the cavalry along with settlers came in and began to destroy that place. Since the 1800s and before, our people have been murdered and forced from the land. We have experienced genocide, assimilation, and theft of our cultural resources. Collections are proof of the erasure of our cultural footprint from history.

Since 2018, I have been in some 500 to 600 consultation meetings and have received about 10 to 15, sometimes 20, consultations in a month. Our tribe is extremely small. We have a small tribal government, and our capacity is extremely limited when it comes to answering and being able to spend time on consultation efforts.

I'm going to go back to the question I asked earlier about why you have locks on your doors. Why do you need to protect? That's exactly it. People have a need and a want to protect what they believe, how they live, and their places, either their homes or their yards, their ranches, or even their cities. And it is this need to protect that we as THPOs, elders, tribal leaders, and sovereign nations have to protect our ancestral homelands, our ways of life, and our beliefs. We are not gone. We are still on the lands. And when people want to consult, they are not coming to consult on how to make our lives better. They want to consult on how to mitigate or minimize the damage that's going to be done to continually and "legally" continue to destroy our traditional cultural landscape and our ancestral homelands—our places of worship.

Many times, I receive reports that state that "no cultural resources" were found as a result of site surveys—this occurs at the tail end of consultation when most of the CRM work has already been done. For me, consultation should happen as soon as an idea is born; when an agency thinks of a project or an idea, and it is not sure what to do, then the next step is to consult local tribes and affiliated tribes to get their ideas, their understanding of how the project is going to impact the environment, the insects, the lands.

It's not just the physical land itself. Ground disturbance is likely to happen, but it also affects visual landscapes. It affects the entire environment. Those are important considerations. As far as capacity, I'm not an environmental scientist, but my traditional ecological knowledge, my upbringing, and my beliefs tell me that everything is going to have an impact.

It's a privilege to be working with ELI on this project. It's a privilege to speak today. I say everything respectfully, because it's an opportunity to build relationships, to help the audience to understand the challenges that we have as tribal people, and why consultation is so important. There may even be reasons why we don't consult, such as a need to protect cultural sites, sacred sites. We're looking for ways to share that information with the people that need it, but it's a very delicate process going forward.

Steven Lazar: I work for Humboldt County Planning and Building Department, where I've worked for almost 20 years. And I've worked as a land use planner in California for more than 20 years. I'm going to share some of my experiences in the past 10 to 15 years with our department negotiating the important goal of tribal consultation in all its forms. I'm going to speak about some of the experiences that I was able to have firsthand and how they reflect the evolution that's underway.

Within Humboldt County near the northwest corner of California, there are no fewer than eight different federally recognized tribes at the moment, and arguably additional federally recognized tribes that lie on county boundaries with other neighboring counties. As for tribes that are not recognized, I can name at least three at the moment. In the course of negotiating, this evolution has been about improving relationships with all of these entities, not just the federally recognized tribes, but all the tribes that we have in our county.

There are local milestones that I want to walk through and address what precipitated my role and involvement in them. In 2011, I was working on a discretionary permit in the coastal zone, where the project was approved. After the approval occurred, within a week or two, I was contacted by the now-retired THPO for the Blue Lake Rancheria, Janet Eidsness, asking me why they were not consulted on the project as they own property across the street, and it is within their ancestral territory. In my naïveté, I saw the name Blue Lake and thought it wasn't in the city of Blue Lake, so why would this be something that we needed to speak to them about? There begins showcasing that kind of ignorance and the importance of refining and improving the understanding and the relationships with the tribes.

It was a difficult situation. We had to negotiate an approval. The site was sensitive. The tribe had purchased the property across the street because it was also very sensitive and had cultural resources on it. There was an earlier

project that involved a subdivision. That was why the tribe bought the property across the street. Another planner in our department had been party to the discussions with the tribe, but he and I had not had communication about this. We didn't know that that knowledge wasn't shared across our organization.

In the wake of all of that, we were able to negotiate successfully. The project ultimately was built out. Local students from the university did field work in tandem with the THPO for the tribe, and thankfully we were able to find a spot for the development project to occur.

After that, we started talking about what went wrong and why, and how we could prevent this from continuing to occur. That's what led to establishing protocols that were in the spirit of AB 52, but years before AB 52 came online.

SB 18 had been in place for almost a decade at that point. However, because it really only deals with changes to land use plans, it wasn't something that our organization dealt with very regularly. Ordinarily, land use plans (like general and specific plans) are intended to last for 15-25 years, so comprehensive updates aren't common. It's not the kind of thing that's a "frequent flyer" item. While smaller tweaks to these plans can occur during interim periods, the process is legislative in nature, with lengthy time frames and procedural requirements that serve to discourage interest in pursuing more targeted changes.

The protocols that we established in the wake of that project were things such as figuring out which tribes we need to engage with, even ones that are not federally recognized, and when we should engage with them versus when they don't need to be contacted, which involved developing mapping in consultation with the tribes. It also involved coming up with protocols for how we would contact them, knowing that in the case of a project that I worked on, the THPO had been contacted for one of the Wiyot ancestral tribes, but they were on maternity leave. And because the THPO didn't respond within the time frames of our referral protocol, we assumed their response was no big deal. In the wake of that, we made it clear that it was important for us to circle back and make sure that we actually get a response from the tribe, positive or negative, and not to assume that a nonresponse is an acceptable outcome.

The mapping that we developed will show not the actual maps, but what it looks like as far as the number of tribes that we're able to get mapping from. That process was tedious; it took several years. It involved us developing maps on behalf of the tribes, and signing agreements to keep the mapping that was provided to us confidential, which we've continued to do.

I can tell a story here: one of the tribes that is not federally recognized is the Tsnungwe. They have members of the Hoopa Valley Tribe, as well as other members of nonrecognized tribes that are still seeking federal recognition within a definitive area south of the Hoopa reservation, but they didn't have any maps they could provide to us. I worked with our geographic information system (GIS) technician. We printed out a large-format map with roads and rivers and things, and I had to send it to a post office box in Salyer.

It took two years before I was called to the front counter and an elderly fellow came up to me and said, "Hey, I have something for you." He rolled out the map. They had drawn the boundaries of where they believe their ancestral territory was, which we then used to actually create a GIS layer.

So, we had to be proactive as an agency. When AB 52 came on the scene, incorporating more requirements for a broader assortment of scenarios by local agencies, we already felt like we were doing above and beyond what the law called for. It really didn't change our approach, which was really nice to have in place.

In developing our local cannabis regulations in 2015, that was a very compressed process. The state had passed laws at the end of the legislative session, September 11, 2015, and gave local agencies until March 1, 2016, to develop their own regulations; otherwise, they would forfeit all local control over cannabis to the state, which would have been a terrible outcome for our county and others. It meant that we had to run through a process in less than five months to meet the March 1 deadline.

That meant that when we started the process where we had to prepare an initial study and mitigate a negative declaration pursuant to CEQA, there was no way to meet AB 52-prescribed time frames and still complete the ordinance in time for adoption. Therefore, we banked on the progress we made with those THPOs and their tribes. We reached out and laid our cards on the table, explaining the narrow time frame we were working within, and the THPOs for each tribe agreed to meet with us and have an intimate conversation about how best to address concerns surrounding permitting of cannabis cultivation sites, and we arrived at some policy choices that were presented and embedded into the ordinance and helped address tribal concerns.

Some of those processes were things like making sure that tribes defined what constituted a "tribal cultural resource," not the agency. And it's through an action of a tribal council or an equivalent body. That gave the tribes confidence in our ordinance. It also included that tribal cultural resources were entitled to 600-foot buffers, which was something that we built into the regulations. The buffers can be waived or reduced, but only from the tribe, not from the local agency.

Additional things that were included were a requirement to consult and the tribe having the ability to request a cultural resources survey, and the agency not having any discretion about that. Those were the types of things that we were able to bake into the regulations to give some confidence. Thankfully, we were able to get our regulations online and, as a consequence, we had many, many surveys done in the wake of those regulations, far more than I expected. But in the end, I think it really helped us and the tribes negotiate that.

Another important milestone was after our regulations were adopted—the Yurok Tribe created a ceremonial district through tribal council action. It had a profound impact on cannabis operators in that area, ultimately eliminating the ability for many to seek a permit at the local

level. Thankfully, we had rules in place in our cannabis regulations that allowed sites to be restored and get credit for remediation and restoration, which could be banked and used to allow enlargements in more environmentally superior/ideal locations. Because the ordinance was very restrictive toward allowing new cultivation sites or expansion of existing sites, it created real demand for buying and selling these credits from restored sites.

So, we had something like a pollution credit/transfer of development rights mechanism built into the regulations. Receiving credit for restoration under the regulations required recordation of a covenant prohibiting future cannabis cultivation activity and establishing fines and penalties for violating the covenant. The success of this policy actually led to the Yurok Tribe offering to complete the remediation and restoration of these former cultivation sites and giving the owner/operator the credits, if they were willing to give the tribe title to the property. Because of the remote nature and limited development potential of these parcels, their primary value was tied to their potential use as cannabis cultivation sites, so this ended up being a win-win-win situation.

Things that we innovated in our cannabis regulations ultimately helped us negotiate a difficult situation where the tribes had very much at stake, and thankfully we had many successful outcomes as a result of it—but it wasn't easy. It required people to negotiate and work together.

There are some additional refinements that I think are important to make note of. When we adopted amendments to our regulations in 2018, we included a concept of a tribal ceremonial site, not just tribal cultural resources, and afforded that a larger setback of upwards of 1,000 feet. That created additional comfort for the tribe so that there was more deference to those types of situations.

Moving on, I want to talk about some of the gaps that currently exist in the regulatory framework that we're dealing with under SB 18 and AB 52. First and foremost is when tribes are engaged. There are prescriptions in both laws, and they differ. In the case of SB 18, it's a 45-day window; in the case of AB 52, it's 30 days. The important part that has become quite clear to me is that engagement really needs to happen as early as possible. That principle is not unique to tribal situations, but it's particularly incumbent when you're dealing with the difficulties of modifying a project late in the game. You really lose the ability to come up with effective mitigation at that point.

In the second iteration of our cannabis regulations, we have a notification to the tribe at the application outset. The project comes in over the counter, and whether it's a complete application or not, we give the tribe knowledge of the application being received. But it can be improved upon because oftentimes projects don't just magically land over the counter. There are conversations between counter staff well in advance of that. Having that education within an organization and institution helps so that we can catch it at an early stage before somebody's hired their archeological professional or finalized their project design. That's really how you can improve upon the rules that are already in place.

Next, I think it's important to recognize that the laws are different with respect to federal and nonfederal tribes. AB 52 is more comprehensive; SB 18 less so. In the case of the approach that we took back in 2011, we didn't distinguish between the two. We wanted to give every tribe that was interested an opportunity to be consulted and engaged.

It also needs to be acknowledged that under AB 52, there's an "agree to disagree" provision. You can work through the process but at the end of the day, the lead agency can say, we're sorry, we couldn't work something out and we need to move forward.

That's not the approach that we took with our cannabis regulations. We gave the tribes deference when it came to deciding what was appropriate. That's not going to be popular in every jurisdiction, but that is the type of direction that needs to occur for there to be greater comfort and trust built into the relationships between the agencies and tribes.

Compensation is an issue. There are no provisions or requirements within either law. It's something that our tribes have come up with: fees. We've passed those fees on to project applicants. Part of what you do as a lead agency is you set the tone for what is occurring, which begins with staff at the line level (processing permits or handling calls and contacts at the front counter). Building culture within an organization through staff training and developing tribal partnerships is how you begin to normalize these types of things and prevent the friction that can naturally occur when someone goes, "What do you mean I have to pay for the person who's going to decide whether or not my project gets approved?" It's really important and it's part of that relationship.

Last, as it stands right now, if a building permit is the only action in play, there's no protection under SB 18 or AB 52, and building permits can have profound impacts on cultural resources. So, understand that there are these situations. In our general plan, we have policies that apply to ministerial projects. That's where we've gone above and beyond what these laws prescribe.

I want to say with regard to our mapping effort, the mapping is confidential, but to give you an idea of what occurred, a cross-section of the center of our county shows layers that we have on our GIS. Each one came from one-on-one engagement with tribes to develop the spatial information that we use to know when and where to consult. And like I said, it's been done on a case-by-case basis. Then, the Yurok Tribe, for example, provided a polygon layer so we can quickly notify applicants that are within an area of sensitivity. Not every tribe is going to be comfortable with that, so it's important for agencies to recognize there's confidentiality at the heart of this. But I believe the process really does benefit from the planners knowing where these areas are; it gives us the ability to intercept these things early in the process.

I'm going to end with some best practices. It's important to recognize that these laws are a floor, not a ceiling. Early consultation is best, making sure that counter staff understand and are able to coach applicants as early as possible, and to start normalizing and setting up that

anticipation of that part of the process. Making sure that agents and applicants understand what may be required of them and encouraging them to, for instance, pay a site visit with the THPO before projects are even submitted over the counter. And that maybe they're going to have to pay for it, but it might save them a ton of time in the long run. That's the kind of stuff that isn't baked into these laws but will make a huge difference for applicants and tribes in trying to get these things resolved in a manner that's satisfactory to all parties.

And for that reason, agency staff need to have that training and understanding and be sensitive and have those "spidey senses" to know. When we created the cannabis regulations and gave tribes the ability to require cultural resources surveys, I thought maybe 5% of our projects would have to have a cultural resources survey. Boy, was I wrong. I mean, we had 3,500 cannabis applications within a matter of one year and most, 80% probably, had cultural resources surveys. Knowing a little more now, a place where you grow cannabis is somewhere that's going to be the south side of a slope. It's going to be close to a water source. It's probably going to be the flattest place around.

That means it's probably a great place to camp. It was a great place to camp 1,000 years ago and 10,000 years ago. So, there's going to be an understanding when staff have a little more insight into those things and can better tip off an applicant, like, hey, let's not expect that this is going to be a slam dunk.

I think an important component that's not baked into the laws is making sure the THPO or the tribe is given an opportunity to interact with the cultural resources professional if a survey is being required, so that the survey is correctly targeted, and the backstory and background is on point. Otherwise, it just creates more work for everybody and leads to a bad work product.

And then, closing the loops with the tribes, as I mentioned earlier, is important, rather than accepting no answer as an answer, and making sure that there's that understanding. I would say in our case, we were able to build trust with our local tribes because we did it when we weren't required to. We did it in the spirit of "we need your help." We can't be arrogant about what we know and what we don't know. The only way we're going to be able to do that is by developing that capacity and relationship. There's more work to be done for all of us, but I think we're off to a good start. And as long as we continue to evolve, we'll be in a good place.

Merri Lopez-Keifer: I am a member of the San Luis Rey Band of Mission Indians, a California Native American tribe that is traditionally and culturally affiliated in southern California. If anybody knows Camp Pendleton or northern San Diego County, that is where my ancestors are from. We are known as the *Payómkawichum*, meaning "People of the West." We are known today as Luiseños. And as you could hear from the name of my tribe, we are associated with the San Luis Rey Mission in Oceanside, California.

I come to you today as the director of the Office of Native American Affairs at the California Department of Justice. I serve as the legal and policy advisor on tribal affairs to Attorney General Rob Bonta. One of the areas that Attorney General Bonta is focusing his attention on is the enforcement of AB 52—that is, the changes made with CEQA.

Before I begin, I'd like to applaud Steve's and Humboldt County's efforts in developing such a robust and fruitful consultation policy with their eight tribes. Because I know we have people joining us from outside the state, I want to give a snapshot of how many tribes we have here in California. Greta announced in the beginning that for their survey, they have done outreach to about 141 tribes, both federally recognized and nonfederally recognized.

To put it in perspective, there's about 167 California Native American tribes, with 109 federally recognized tribes, meaning that they have a government-to-government relationship with the federal government within a trust relationship. Then, there are about 65 tribes that do not have a government-to-government relationship with the federal government, but that are on the Native American Heritage Commission contact list as a tribe. So, when we use the phrase "California Native American tribe" in California statutes, it is to reference both political status tribes.

Another tidbit is that SB 18 impacted cities and counties. California is a very large state. We have about 483 municipalities, meaning cities, and 58 counties. The map of California includes about 105 reservations and rancherias, and those are located within 34 of our 58 counties. California is home to the most diverse population of American Indian and Alaska Natives. So, our maps are just through the roof, and Humboldt County, almost at the top right next to Del Norte County, has eight tribes that it serves. All the way down to the south, San Diego County serves 17 federally recognized tribes and two nonfederally recognized tribes.

When you're looking at things about SB 18, you look to these counties and say, how do you do this? Because these were brand new laws for the state of California. SB 18 was passed in 2004, but it didn't go into effect until 2005 because they knew they had to give time for the guidelines to be developed and for counties to learn how to interact with tribes and for tribes to learn how to interact with counties.

It was a very tense relationship for most tribes and most counties. If you don't know anything about California Indian history, I recommend that you learn it. The state has done atrocities to its California native population and interfered with treaty making, and also passed many laws that were incredibly detrimental to our California Native Americans, to the tribes and to its citizens.

So, starting at the local level was quite the challenge. I mentioned that that started in 2005. It was followed up with Executive Order No. B-10-11 from Gov. Jerry Brown, which required consultations from executive agencies with all California Native American tribes so that they could

provide input on policies and regulations that might impact them.[9]

Then, we had AB 52, which changed CEQA. It's important to know that before this time, if a project was coming into your ancestral territory, you were a member of the public, meaning the tribe would have to provide their comments as a member of the public. There was no protection for their information, and they had to literally put everything out there to save an area.

One of the things you need to understand is if a tribe does that, then they are putting that area in danger because pot-hunting is real, desecration of sites is real. So, a tribe had to be in that situation—do I say something, do I not say something, to protect the site? Tribes and agencies and county governments were learning how to engage with one another, to develop mutual respect, to figure out how to communicate with one another, and to understand each other's capacity levels.

For a lot of members of nonfederally recognized tribes who were entrusted to protect cultural sites, this was a second job. They would have their day job, then they would try to protect sites. Engaging with those local agencies, you learn about each other. AB 52 created "tribal cultural resources." That terminology had never been used before in state law. It also made a very important statement. It said that any substantive impact to a tribal cultural resource is a significant impact to the environment, and therefore more review would be necessary to determine if that action should be avoided or if it should be mitigated. Thus, AB 52 was very, very important in the area of cultural resources protection.

Now, the role of the attorney general is why I'm here. I mentioned CEQA a couple of times. It's more than 40 years old. It's one of the state's most important environmental laws. The Act established a state policy of sustainability to create and maintain conditions under which man and nature can exist in productive harmony to fulfill the social and economic requirements of present and future generations. It requires state and local agencies to evaluate the significant environmental impacts of proposed projects and to adopt feasible mitigation measures to reduce or eliminate those impacts. As I just shared, AB 52 changed the Act so that if there was a substantial impact to a tribal cultural resource, then that would be considered a significant effect on the environment.

The attorney general, in his independent capacity, has a very special role in overseeing and enforcing CEQA. He focuses on how to address those impacts that affect our most vulnerable residents and our futures. That can look like providing comments to environmental impact reports as well as filing amicus briefs or participating in settlement discussions.

AB 52 was passed in 2014, but like SB 18, time was added before its effective date, so it didn't actually come into effect until July 2015. In that time, there were many things that had to happen, including that the Native American Heritage Commission had to determine which lead agencies would need to contact tribes and which tribes would need to contact lead agencies. There was a whole mapping responsibility they had. And the tribes had to then digest this information, which could have been more than 500 lead agencies, to decide who they were going to provide notice to so that they could then be given AB 52 notice so that consultations could occur.

I mention this because it's now 2024, and there's not a lot of case law yet in helping tribes or lead agencies in figuring things out. There's a lot of guidance material out there on AB 52, as well as SB 18. The Governor's Office of Land Use and Climate Innovation (formerly the Office of Planning and Research) has guidelines. The Native American Heritage Commission has guidelines, as well as excellent templates for tribes who want to provide such notice to lead agencies. This is why the attorney general is now becoming involved.

There are two different types of cases coming up through our court system here in California, and they are considered cases of first impression for AB 52. The attorney general has filed amicus briefs in both matters. These amicus briefs are really focusing on what meaningful consultation looks like and also what agencies need to be considering when working with a tribe, and that tribe is providing expertise in their area and their cultural resources.

A lot of what Steve described about early consultation and working together until you have this understanding that's deferential to the tribes is the gold standard. Unfortunately, that's not happening throughout the state, so that is why the attorney general is starting to become more involved in how agencies are assessing, evaluating, and mitigating for impacts to cultural resources. Again, really looking at that term of "meaningful consultation" and how it requires more than a cursory approach. Also, how agencies are receiving from tribes and how they're considering tribal expertise, because the statute does require that they do consider it and how it impacts the cultural resources.

That is one of the areas that I want to share today about how the Attorney General's Office is becoming more involved and providing those comments and amici to show what is necessary in developing these relationships and how it can be beneficial for future generations by respecting tribal sovereignty but also respecting tribal traditional knowledge that is incredibly important, especially given the role the state played in the genocide against its First People.

Greta Swanson: Thank you all. You have amazing presentations and ideas about consultation. I want to get to a couple of questions. I'm going to start with a question that I have.

Steve, you had some very specific suggestions for the timeline, but do you or the other panelists want to add to your thoughts on notifying tribes earlier in the pipeline? How would you define the point at which tribes should be involved and become informed? Is that something that can

9. Cal. Exec. Order No. B-10-11 (Sept. 19, 2011), https://archive.gov.ca.gov/archive/gov39/2011/09/19/news17223/index.html.

be defined? And related to that, how should developers be contacting tribes, or should they be?

Sean Scruggs: A couple things here. An audience member asked about sources. It's incredibly difficult to provide sources because you have to look at the authenticity, who's writing the information and where that's coming from. Regarding who's going to contact the tribes, it's very difficult because with my information, some of it comes through private developers and some of it is through the Bureau of Land Management or other agencies that already exist in my valley.

One of the things that becomes incredibly difficult is that with notification, again, there's a presumption that our tribes are absent from the land. There's a perception that our tribes only live on the designated boundaries. And when we try to describe culturally how big our area is, our use of land owned since the beginning of time, I think there is also an idea that, oh, this is 140 miles from your reservation, so we're just checking with you to see if it's okay to develop this area.

But for me as a THPO, as a person who does this work, it's very necessary for me to personally visit the site itself, to walk the land. I cannot legitimately respond to a consultation request unless I know an ethnographic history. A lot of times in THPO work, we call for site surveys and site visits to be conducted by tribal cultural monitors, in addition to a CRM firm or someone going to actually see the site itself—this should be conducted at the soonest possible time in the consultation process by local and affiliated tribes. If we visit the site immediately and know the area, it's more possible for us to know the stories on how the land was impacted after contact because our way of life changed. This drives the necessity for people to come to us immediately and understand that they're probably going to get a request for a lot of extra consultation.

How do I prioritize this? It's very difficult. I try to respond to everybody almost immediately when they're coming to consultation because I need to know where they're at in the process. One issue I just looked at is a lithium mine that's being proposed. They've been working on it for five years, and I literally had 48 hours. I was brought in so late. It's not really the fault of the people who were in charge of the project. It was so late that I delivered a five-page response in about 48 hours.

To follow up on an audience member's question, can the tribe say "no"? They can, actually. In environmental assessments, we can say "no" and we can ask for informed prior consent. We're also now exploring ways to see what the mitigation looks like when we say "no" because of the lack of continuing consultation. These are new areas.

Steven Lazar: I'll add to what I was saying earlier that the agencies have a role to play in ensuring that consultation, or something approaching it, occurs as early as possible. It means that there really has to be cross-training within their organizations so that people who are in the positions to be interacting with the public, with applicants, with agents, with the consultants can direct them to the appropriate party.

As someone working in an agency, I always feel more comfortable being the liaison between the applicant, agent, and tribe. Not pushing a developer to the tribe. We can be more frank with the THPO. We have a relationship preferably, and then we can begin to provide that crosswalk to the applicant or agent. I like to approach it that way.

Merri Lopez-Keifer: Early and often is the key. When you have information, you should share it with the tribe. As Steve and Sean mentioned, earlier in the process you're going to be able to make it so resolutions can be made sooner. That is before you start developing a map; I know developers like to do that, to get the whole thing planned out before they even start engaging sometimes with the city planner or the tribe. Bring them to the discussions early and often because you may need to avoid a certain area, and then you don't have to go through all of the expense with your architects, your soils people, and all of that. That's why it's always good to hear from the tribe early on, before you start putting pen to paper.

Like Steve shared, a lot is happening at the desk. People are coming in asking questions. It's always a good idea for staff to be trained. Then, they can tell people coming in what tribe they need to work with, whether there's going to be a pre-excavation agreement, or whether to have the tribe walk with them on the site before they go out there. Planning is learning what the tribe is looking for. Just as Steve described with the cannabis locations, I'll say, "Wait, this is probably going to be an important area."

Last, there's always caution about having a developer be in direct communications with the tribe as far as what information the tribe will want to share with the developer or even a private landowner if the developer isn't the landowner yet.

There are concerns regarding confidentiality of information or a possible destruction of sites. So, sometimes the tribes would prefer to work directly with the city planner or the agency planner so they know that those sites will be protected. Whether that's through a confidentiality agreement or under the code within the state for protection of specific sites, there's sometimes a bit more comfort in that. If I'm telling you exactly where the important site is that's going to impact your project, you may want to destroy that. That is why I suggest always having an intermediary, especially if there is a confidentiality understanding as far as where those potential sites might be.

Greta Swanson: Building on the early notification, there was a question about good-faith requirements to continue to reach out to tribes if there is no response. Steve gave us an example of best practices in Humboldt County. I was wondering, Merri, does that feed into any of the litigation that the attorney general is involved in? If you do not receive a response from the tribe, are you continuing to reach out and reach out to the right person?

Merri Lopez-Keifer: Those are always best practices. To be able to show that in good faith, that in all we did, we did attempt to contact you. You have to rely on that common

sense. Steve's taken that responsibility of making sure he knows who all the tribes are and who their designees are.

We are looking at notices, what are the strict requirements, and can it be put into multiples. That is something that the courts are looking at as well. In our last amicus brief in the Koi Nation matter, we actually asked the court to not put on extra barriers in developing these responses to notices. You need to always be conscious as a lead agency or a city or county.

This is a typical response. Like Sean, I can't speak for all tribes, but they are receiving hundreds of notices a day from their federal partners, local partners, state partners, private entities, and CRM firms. Everybody's wanting the tribe to share their information, and the tribe really has to prioritize which ones they are going to be able to respond to.

When you're dealing with these complex laws with very specific timelines, it can become very overwhelming. My advice is, if you know the tribe is normally engaging with you, please keep following up. It could be a situation where the THPO is on maternity leave, or it could be a situation where they had leadership changes. How many times has there been turnover at your own agency?

It's always good to pick up a phone and call. Don't just rely on e-mail or snail mail. Some people might not go into the office anymore. And that's just developing the relationship. That's just good solid business practice. Understand who you're working with and pick up the phone, because you don't know. You don't know that Sean just got a major last-minute request regarding a lithium mine, which will potentially destroy the entire landscape. Sean's focusing on that. If you really need something or if you want to find out if the tribe would like to be consulted, pick up the phone in addition to e-mailing and snail mailing.

Greta Swanson: In other words, I understand that since the law does not require multiple efforts at reaching out and finding the right person in the tribe, that may or may not relate to whether the agency has made a good-faith effort to engage in consultation.

Merri Lopez-Keifer: Typically, the tribe's notice under AB 52 has the contact information. If the tribe is changing that contact information, it's a good idea to update your agency's too as to who they should be contacting. It's a two-way street for sure.

But like Steve said in the beginning, AB 52 and the laws that are put forth under it are the floor, not the ceiling. There's a lot of room in there to insert your own common sense and insert something that will be more beneficial. Like the whole list that Steve shared that Humboldt is doing regarding compensation to tribes and then passing that along in the application process, that's also not included in the statute, but it makes sense because everyone in the room is being compensated for their information and compensated for their time except for the tribe. But the tribe is providing this information.

There may be some intellectual property there too. It's not always in the best interest of the tribe to share all of their information because that is theirs to protect and preserve. It really depends on that trust relationship with the government agency.

Greta Swanson: Related to that, we have a couple of questions on confidentiality. Are there provisions of the California law to protect confidentiality even in the face of public records requests? There are limited exemptions from those requests, but there are issues with public meetings.

The SB 18 guidelines provide best practices as far as how to create a meeting that is not going to trigger public records requests. Merri, you might be able to add to that. Others may have other ideas. Related to this, more generally, does anyone have anything to add on how to ensure confidentiality for the information that is being provided?

Sean Scruggs: There's a disconnect here, and I want to address that. Anybody who's worked with me in consultation or met with me in person understands that one of the things that I state is that there are several laws that are written according to who's writing the law to presumably protect First Nations Native American people and their interests.

Few if any of those laws are actually written by natives with our perspective and our concern. So, when it comes to the law showing up, a person should look at our history and interaction with government agencies and state agencies. The truth is that the law, when you actually try to apply it at one level, may or may not work. In my experience, many times it does not work—it somehow doesn't apply, or it wasn't clear enough, or the "intent" wasn't clarified according to our perspective.

When the California Department of Transportation developed the 12-mile bypass in eastern California, once the site started to begin to develop, I was involved in protecting many grave sites. We ended up having tribal security called to that site to protect areas after we discovered ancestral remains and funerary objects. The site had been looted.

To what Merri was saying before, "pot-hunting" is people who come out and look for graves and our ancestral markers or any of our ancestral cultural resources out there. There's really no way to protect what we experience on a daily basis.

Regarding that highway, we ended up protecting more than 100 graves. But the ultimate solution became working with engineers to develop how to build a highway 10 feet at a time. There are many stories around that development, and I'm not going to get embroiled in it. But the reality of it is that nondisclosure agreements with, for instance, a governor or a state director, or the person who's actually in charge, a commissioner, may be the only way to share confidential information and hold those leaders accountable.

If I were a tribal chair, and if development is that important, then that's what I would be asking for. If a project is so important that we have to disclose what our cultural sites are or how we're going to protect them, then we need agreement at the highest level. That would, in my mind, go to government-to-government consultation

where you have the leaders trusting leaders. In my experience as a THPO, being under my tribal leadership, I consult on cultural concerns, but it's not my place to make those types of agreements. All I can do is work toward suggestions and solutions.

Steven Lazar: I have a project at the Humboldt County Planning Commission tonight. When we circulated the mitigated negative declaration for it, we did not include the cultural resources survey as part of what gets uploaded to the CEQAnet Web Portal. It's referenced in the package, but it's not included. It wasn't appropriate to include. It also isn't included in the public documents that are provided to the planning commission in advance of tonight's meeting.

There are other ways to approach that. CRM professionals can create a dumbed-down version of the report that doesn't divulge sensitive information. But that should only be done through the THPO and with the understanding that the report is ready for public consumption. In light of that, I am always leery of including that information in any public-facing parts of a project.

Merri Lopez-Keifer: To add to that, because these are public proceedings, there are specific protections put in place for Native American records and sacred places under the Public Records Act here in California. This includes burial areas, ceremonial sites, features, and objects, which are specifically protected in California Government Code §6254(r).

Again, the state of California has recognized that these are places that need to be protected, so they are specifically excluded from the Public Records Act. Then, to both of your points regarding the actual environmental documents, those appendices are usually kept confidential. If a tribe does discover that its maps are being shared or whatnot, the Office of Historic Preservation is an excellent resource. They are able to step in and let the agency know that it is providing confidential information that needs to be excluded from the public record. Then, if the agency continues to violate that, it could actually lose its ability to have access to those types of maps and information, which is something no lead agency wants to happen because then it can't do its job.

It's an understanding between the agencies and the tribes that this type of information really does need to be kept confidential. I know there are others that look into nondisclosure agreements, or at not providing a map but just talking about it instead, or showing a map that the agency cannot recreate. Those decisions are all part of the relationship-building and how you want to exchange information with one another.

I know there are well-founded fears, given the experience of most tribes in California, when dealing with local or state agencies or sometimes federal agencies—that if I share my information with you about where these sites are located, you are now going to disregard involving me in the future because you just took all my information and now I am not relevant to your discussion. It is important that there are those base understandings as to how you're going to share information and what the expectation is for both sides on how the information is to be used and if it can be shared.

I liked hearing what Steve shared about Humboldt County, that they have internal review purposes only for certain information that's shared with them by the tribes. Hopefully, they even have designated people so that not everybody has access to that information. The Native American Heritage Commission has a sacred land file. It's a similar process where they receive information from the tribes regarding specific sacred areas, and that information is not accessible by everyone. It's very important that these processes are developed so that good expectations can be had, and so that trust can keep evolving.

Greta Swanson: I want to pick up a question on a little different tack. What is the lead agency's responsibility when there's more than one tribe in consultation and the tribes are not in agreement? Does anybody have any suggestions there?

Sean Scruggs: That's exactly the idea of consultation. It's that sometimes you can get tribes together regarding even cultural concerns. As THPOs, the tribes in our valley work together to address cultural concerns in which sometimes there's great consensus. Usually, we don't have a difference of opinion. However, each tribe has their own history and interaction with agencies. Some of them have their own needs. That's the right and privilege of each tribe to call for separate consultation and meetings because sometimes the tribal leadership will have disagreements or different concerns.

You also have to remember the tribal leaders. A lot of people don't understand how we govern. The general counsel with elders may have different concerns as well. When it comes down to that, just for the agency, sometimes they'll be working in an area that has eight tribes and they may not like that. Sometimes, they can get them all together. If they can't, then they may be in a position where they're going to have to consult with each of the eight tribes. In some areas, it's 17.

Look for cooperation where you can. When there is no cooperation, please don't be frustrated with the idea that you're going to have to consult with each of the tribal leaderships, sometimes even when they appear before the councils, which leads to capacity problems. We only meet once a month for our tribe, yet some people want to put us on a 30- or 60-day limitation. If I don't get to my general counsel for two months, I may not have an answer for three months.

Steven Lazar: To echo what Sean said, you have to work with each tribe independently. It is convenient when the tribes are of a similar mind, but you can't expect that. You have to allow for each tribe to be given their opportunity to participate and represent their interests and position on a project. It can be challenging. That's just how we've got to negotiate.

Merri Lopez-Keifer: I too would echo that. You can have multiple tribes that are traditionally and culturally affiliated with one particular area. There's a lot of shared territories within the state. It's important that the lead agencies (1) come to the table understanding that, but (2) are able to hear everyone regarding their concerns about the impacts to those potential tribal cultural resources.

Hopefully, there can be consensus-building when you're hearing from multiple tribes about protecting the resource. Hopefully from there, you can develop some appropriate mitigation measures that would be appreciated by both of the different cultural discussions.

Greta Swanson: Another question is on informed consent. One audience member asks, if a tribe says "no," what are the next steps? What happens if the "no" is not respected? My sense is that improving consultation and relationships is one step. Certainly, the consultation laws do not require that there is informed consent. Does anyone else have any other ideas on that?

Sean Scruggs: As a THPO, I'm beginning new types of thoughts on that moving forward. That's part of what mitigation is about. Part of the gray area becomes, when we ask for mitigation as tribes, we don't want to come across as saying that the mitigation is payment for destruction of our lands or that we are giving permission to destroy, but rather that mitigation can be a way to help restore the land that has come at a huge price to our culture. Because these are ancestral lands but they're on federal Bureau of Land Management land, California State Lands Commission land, or other agency land, and private ownership, we can only go so far as saying "no."

This is beyond consultation. It's getting into lawsuits, or settling and disputing who's right. Just as tribes can, say, define what a "tribal cultural resource" is, other people don't have to agree to that. So, they become very complex situations when we get to that point. We try to always get ahead of lawsuits.

With one of the bigger projects that I worked on, I was being told at lower levels that the conversations we were having were government-to-government. We kept pushing back as tribes saying, no, that's not what this is. When you get to the state director and that state director is talking directly to the tribal chairs, that's when actual government-to-government consultation happens.

I'm very careful to describe in meetings that I'm only representing my tribe's cultural concerns and trying to understand what's going on. Sometimes, I can reply back to responses on environmental assessments. But many times, when it comes to that level, that's where that consultation needs to escalate to who's in charge of the project. Actually, it's the agencies, directors, commissioners, and those levels. That's where sometimes the conversations directly need to go.