

**RINCON BAND OF LUISEÑO MISSION INDIANS
RINCON INDIAN RESERVATION, CALIFORNIA**



**TRIBAL CONSULTATION ORDINANCE
RINCON TRIBAL CODE § 2.800**

Adopted on October 19, 2015

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§ 2.800 INTRODUCTION

(a) As a commitment to Tribal sovereignty and a strong government-to-government relationship, many federal, state, and local agencies are being directed or required to consult with the Rincon Band of Luiseño Indians when developing any regulation, policy, or other activity that may have Tribal implications. There is often some confusion as to what actually constitutes meaningful consultation with a Tribe. Many agencies, governments, departments, and corporations have their own unique consultation policies creating a confusing policy landscape for what constitutes consultation.

(b) Consultation is a process that respects Tribal sovereignty; and recognizes the Tribal right to self-governance and self-determination. Consultation ensures that the United States and the State of California are meeting their legal responsibilities with respect to the Rincon Band of Luiseño Indians.

(c) This Ordinance is intended to provide guidance to agencies, governments, departments, or corporations seeking to consult with the Rincon Band of Luiseño Indians or seeking to develop or implement any regulation, policy or other activities on the Rincon Reservation that may impact the inherent sovereignty or right to self-government of the Rincon Band.

§ 2.801 AUTHORITY AND PURPOSE

(a) This Ordinance is established pursuant to the authority vested in the Tribal Council by Section 6 of the Articles of Association to represent and negotiate with Federal, state and local governments and to enact ordinances.

(b) The purpose of the Ordinance is to establish guidance for agencies, governments, departments, or corporations that request consultation with the Rincon Band to ensure that the Tribe is adequately notified of, and represented by individuals authorized to speak for the Tribe during, any consultation or implementation of any regulation, policy or other activities that may impact the inherent sovereignty or right to self-government held by the Tribe.

§ 2.802 SCOPE

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(a) All agencies, governments, departments, or corporations that request Government-to-Government Consultation with the Tribe must adhere to the consultation procedure set forth in this Ordinance.

§ 2.803 **DEFINITIONS**

(a) **“Bi-lateral Government-to-Government Consultation”** means authorized individuals of the Tribe meet directly with the Consulting Entity in an effort to reach an agreement on a proposed regulation, rule, policy, program, project, plan, property decision, or other activity that would affect the resources, properties, cultural practices, and those persons under the jurisdiction of the Tribe.

(b) **“Consulting Entity”** means any state or federal agency, government, department, or corporation operating subject to federal or state statutes or regulations that obligate them to consult with federally recognized Tribes.

(c) **“Coordination Meetings”** means on-going discussions between the Tribe and a Consulting Entity related to any proposed regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity of the Consulting Entity.

(d) **“Multi-lateral Government-To-Government Consultation”** means meetings between multiple Tribal governments with the Consulting Entity when policies or programs with broad application throughout Indian Country are being developed and/or modified by the Consulting Entity.

(e) **“Off Reservation Consultation”** means any consultation that the Consulting Entity deems necessary held outside the boundaries of the Rincon Reservation.

(f) **“Sensitive Information”** means any information an authorized individual of the Tribe deems to be confidential.

§ 2.804 **LEGAL BACKGROUND**

(g) The United States’ obligation and unique legal relationship with Tribal governments is laid out in the Constitution of the United States, treaties, statutes, executive orders, and court decisions.

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(h) In general, the body of laws, court decisions, and policy decisions pertaining to consultation with Tribes is summed up by the Secretary of Interior’s Standards and Guidelines definition of consultation: “*Consultation means the process of seeking, discussing, and considering the views of others, and where feasible, seeking agreement with them... .*” This definition is consistent with federal court decisions which describe consultation as: direct interaction with the affected Tribe, an exchange of views on the project or decision, and the aspiration to reach a mutual agreement on a course of action. A unilateral communication from the Consulting Entity to the Tribe, e.g., a letter inviting consultation followed by a briefing given to Tribes does not constitute consultation.

(i) In 2000, President Clinton issued Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” which re-affirmed the Federal Government’s commitment to Tribal sovereignty, self-determination, and self-governance. This Order firmly establishes the policy of the executive branch as one that institutionalizes regular and meaningful consultation with Tribes in the development of federal policies affecting Tribes and directs agencies to respect Tribal rights and requires each agency to develop a consultation policy that has an accountable process to ensure meaningful and timely input by Tribal governments.

(j) In 2009, Secretary’s Order No. 3292 established a Secretarial Commission on Indian Trust Administration and Reform. This Commission issued its Final Report and Recommendations in December of 2013. This Final Report set forth the Commissions views and recommendations regarding the United States’ trust responsibility to American Indians.

(k) In 2011, the Former Secretary Salazar issued Secretarial Order No. 3317 which established the Department of the Interior’s policy on consultation with Indian Tribes. Order No. 3317’s purpose was to update, expand, and clarify the Department’s policy on consultation with American Indians; and to acknowledge that Executive Order 13175, any applicable statutes, and any administrative actions are expressed in the Department of the Interior’s Policy on Consultation with Indian Tribes. Order No. 3317 directs all Departments of the Interior to review and revise their existing practices for consultation with American Indians; and to begin a process of referencing practices on Tribal consultation. Order No. 3317 also established a Joint Tribal-Federal team that will serve to identify priorities that will improve the quality of the Department’s consultation policy.

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(l) In 2013, President Obama issued Executive Order No. 13647 which established the White House Council on Native American Affairs. Executive Order No. 13647 requires cabinet-level participation and interagency coordination for the purpose of “establishing a national policy to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federal recognized tribes in a more coordinated and effective manner [...] by better carrying out its trust responsibilities.” (The Secretary of the Interior, Order No. 3335, pg. 2, 2014)

(m) In August 2014, Secretary Jewell, in response to the Final Report by the Indian Trust Administration and Reform Commission, issued Secretarial Order No. 3335 affirming the Department of the Interior’s trust responsibilities to American Indians. Order No. 3335 provides guidance to Interior agencies in carrying out their obligations to American Indians. Order No. 3335 directs all bureaus and offices of the Department to abide by seven guiding principles.

(n) The State of California’s obligation to consult with Tribes is less clear. Generally, at the state, policy-making, level it has been believed that the federal obligation to consult with Tribes does not create an obligation for the state. However, there are several state policies that require consultation with Tribes.

(o) State planning law requires cities and counties to consult with California Tribes during the local planning process for the purpose of protecting “Traditional Tribal Cultural Places.” SB 18, authored by Senator John Burton and signed into law by Governor Arnold Schwarzenegger in September 2004, amended California’s General Plan Guidelines to include a Tribal consultation requirement (Governor’s Office: Office of Planning and Research, 2005). SB 18 essentially requires cities and counties to contact, and consult with, California Tribes prior to amending any plan, adopting any plan or designating land as open space. The State Legislature approved AB 52 (effective July 1, 2015), which amends the California Environmental Quality Act (CEQA) and adds protections for the new category of “Tribal Cultural Resources.” Furthermore, AB 52 requires lead agencies to contact the Tribe about a CEQA project. If the Tribe requests consultation within 30 days, the lead agency must consult with the Tribe.

(p) California Government Code § 65352.4 provides a definition of consultation for local governments and Tribes: “*Consultation means the meaningful and timely process of seeking, discussing, and considering carefully the view of others, in a manner that is cognizant of all parties cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be*

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

(q) In 2011, Governor Jerry Brown addressed California's lack of a comprehensive Tribal consultation policy by signing Executive Order B-10-11. The Order is brief, simple and essentially directs the Governor's Tribal Advisor to: (1) serve as a direct link between the Tribes and the Governor of the State of California; (2) facilitate communication and consultation between the Tribes, the Office of the Governor, state agencies, and agency tribal liaisons; and (3) review state legislation and regulation affecting Tribes and make recommendations on these proposals. It is notable that the Order effectively directs all state agencies and/or departments to develop a consultation policy; yet, does not provide a clear definition of consultation.

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

§ 2.805 INTENT AND EXPECTATION

(a) The Tribal Council has determined that the interests of the Tribe are best served by providing guidance on what the Tribe considers to be government-to-government consultation. As a sovereign government, Rincon Band of Luiseño Indians shall develop working relationships with other governments and their entities because of the impact on Tribal rights and resources.

(b) It is the intent of the Tribal Council that this consultation policy lead to effective and consistent direction to all Consulting Entities in the conduct of business with the Tribe.

(c) It is the expectation of the Tribal Council that a consistent and effective approach to government-to-government relations will build and maintain the professional,

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cooperative, and effective reputation of the Tribe as a sovereign government and lead to increased opportunities in the best interests of the Tribe that are aligned with its goals of achieving positive Tribal identity and community pride.

§ 2.806 THE NEED FOR A RINCON BAND OF LUISEÑO INDIANS CONSULTATION ORDINANCE

To ensure adequate consultation, the Tribe we have developed our own consultation procedure for consulting entities to comply with.

§ 2.807 GUIDING PRINCIPLES

This Ordinance is intended to be consistent with the body of federal law pertaining to Tribal consultation and to provide clear direction on what actions are necessary to satisfy consultation with the Tribe.

(a) Consultation is the formal process of cooperation, negotiation, and mutual decision-making between two sovereigns.

(1) Federal Responsibilities

(A) Federal agencies have the obligation of seeking out Tribal input and providing opportunities for meaningful consultation. This requires more than public participation efforts such as sending letters, notices, and copies of documents to Tribe and requesting comments. Where many public participation opportunities exist for a set period time, consultation with the Tribe is ongoing and continuous. Federal agencies must make concerted efforts to provide Tribal involvement in decision-making and follow the consultation procedure set forth in this Ordinance in order to fulfill any consultation requirements. It is important to understand that the Tribe may elect not to participate in consultation or may decide to limit their consultation as necessary.

(2) Participant Roles

(A) Meaningful consultation requires that the Tribe and the Consulting Entity understand their respective roles in the decision-making process. The Tribe and a Consulting Entity must understand the legal underpinnings of the government-to-government relationship and the obligations of the federal trust

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relationship. Tribal governments must understand the policy decision-making authority of the Consulting Entity and national politics of the federal decision that drive the consultation. A Consulting Entity will benefit from an understanding of the Tribes' unique culture, perspective, governmental infrastructure, and resources.

(3) Communication

(A) Communication between the Consulting Entity and Tribe will facilitate the decision-making process. The Tribe cannot understand the political implications of a federal decision without adequate communication. Similarly, the federal government cannot understand Tribal issues and concerns without meeting with Tribal officials to discuss those issues and concerns. Without communication, consultation is meaningless and a mutual agreement is impossible.

§ 2.808 OBJECTIVES OF CONSULTATION

(a) The objectives to be met by persons participating in a government-to-government consultation process, include, but are not limited to, the following:

- (1) Ensure that the authorized individuals of the Tribe have notice of, and understand, the technical and legal issues necessary to make informed policy decisions;
- (2) Ensure federal compliance with trust obligations as well as other applicable federal laws and policies affecting Tribal rights, resources, culture, religion, subsistence, and commerce;
- (3) Improve policy level decision-making of the Tribal Council and the federal government;
- (4) Achieve bi-lateral decision-making of the Tribal Council and the federal government;
- (5) Ensure the protection of Tribal rights, resources, culture, religion, and economy;
- (6) Ensure compliance with Tribal laws and policies;

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- (7) Provide an opportunity for the Tribe to express views and concerns about the issue;
 - (8) Develop and achieve mutual decisions through a complete understanding of technical and legal issues; and
 - (9) Improve the integrity of federal-Tribal decisions.
- (b) Consultation best management practices for a Consulting Entity include:
- (1) Advance notice from the Consulting Entity to the Tribe of any new policy, regulations, rule, program or other activity;
 - (2) Communication with the Tribe, beginning early in the planning process and continuing throughout the project;
 - (3) Multiple venues for consultation;
 - (4) Formal and informal meetings;
 - (5) The existence of a Tribal liaison;
 - (6) The Consulting Entity's fostering of a relationship with Tribal Council and Tribal staff;
 - (7) An early effort of identifying potential areas of concern for the Tribe;
 - (8) Full and candid information provided to the Tribe prior to the first meeting (in the consultation request letter and at the pre-consultation meeting);
 - (9) An open-ended and flexible agenda (no surprises or hidden agendas);
 - (10) Facilitators for the sessions, alternating between the Consulting Entity and the Tribe, or an agreed upon third party;
 - (11) A successful result viewed as partners arriving at an agreement, although reaching an agreement is not an end in itself;

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- (12) Tribal views and concerns are taken into account and implemented;
- (13) Agreed upon measures are in place and enforceable;
- (14) Implementation of a feedback mechanism; and
- (15) Tribal participation in the development of agendas for ongoing consultation meetings or coordination meetings; and
- (16) Any other best practices that the Consulting Entity and the Tribe agree upon.

§ 2.809 ESTABLISHMENT OF POINT OF CONTACT

The Chairman of the Tribe is the official point of contact for government-to-government consultation unless Tribal Council chooses to designate an alternative point of contact by issuing a written statement signed by Chairman of the Tribe.

§ 2.810 RINCON BAND OF LUISEÑO INDIAN'S DEFINITION OF CONSULTATION

(a) The Tribe defines consultation as *“the process of seeking, discussing, and seriously considering the views of the Rincon Band of Luiseño Indians, and reaching an agreement with the Tribe on the development or implementation of regulations, rules, policies, programs, projects, plans, property decisions, inspections, and activities that may affect Tribal sovereignty, resources, properties, cultural practices, and those persons under Tribal jurisdiction. This requires true government-to-government consultation between the Consulting Entity and the Tribe, where high level representatives of the Consulting Entity meet with authorized individuals of the Tribe.”*

(b) For broad decisions, such as development or modification of federal policies that affect all Indian Nations similarly, the Tribe may accept invitations to participate in “Multi-lateral Tribal Consultations.”

(c) For ongoing processes, for example water quality monitoring programs, the Tribe may seek regular meetings at an agreed upon interval. These meetings will be defined as “Coordination Meetings.” Coordination Meetings will serve to clarify how the Tribe and the Consulting Entity will continue to consult in order to reach an agreement or end result of the proposed regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity that may have an effect on tribal resources, properties,

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cultural practices, and/or those persons under Tribal jurisdiction. Coordination meetings will serve as a forum for sharing data or making agreements to share responsibilities about data collection. Coordination meetings will be used as an opportunity for the Tribe to provide input on processes; such as development of agency, government, department, or corporation plans. Coordination meetings will usually involve Tribal staff but may involve Tribal Council or other Tribal decision makers.

(d) For other decisions, particularly but not limited to activities with a direct effect on Tribal sovereignty, resources, properties, cultural practices, and those persons under Tribal jurisdiction, the Tribe may demand “Bi-lateral Government-to-Government consultation” whenever a proposed regulation, rule, policy, program, project, plan, property decision, inspection, or activity will clearly have a significant and direct effect on Tribal sovereignty, resources, properties, cultural practices, and/or those persons under Tribal jurisdiction.

§ 2.812 CONSULTATION PROCEDURE

(a) Tribal Council hereby establishes the procedure for government-to-government consultation. An agency, government, department, or corporation wishing to participate in government-to-government consultation with the Tribe must adhere to the following procedure unless an alternative process is approved, in writing, by the Tribal Council.

(1) Step 1: Request for Consultation and Advance Notice

(A) Early in the planning process, any Consulting Entity that seeks to develop or implement any regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity that may affect Tribal sovereignty or the Rincon Band’s right to self-government, Tribal resources, properties, cultural practices, and/or those persons under Tribal jurisdiction must request consultation and provide advance notice to the Tribe. A Consulting Entity can do this by sending a letter requesting consultation or providing notice to the Tribal Chairman.

(B) This letter must include a draft or overview of and need for the policy, rule, regulation, program or project, its scope and impact, any applicable maps of the project area, and a summary describing how the proposed regulation, rule, policy, program, project, plan, property decision, inspection, or activity may

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affect Tribal sovereignty, resources, properties, cultural practices, and/or those persons under Tribal jurisdiction. This letter must include a contact person, timeline of the project, and any other relevant information to assist the Tribe in determining if consultation is in the best interest of the Tribe.

- (C) Within 30 days after receiving the letter requesting consultation, the Tribal Council will designate an authorized individual of the Tribe who will then respond to the Consulting Entity that the Tribe would like to schedule a pre-consultation meeting.
- (D) If a Consulting Entity fails to request consultation on the development of any regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity that the Tribe believes may affect Tribal resources, properties, cultural practices, and/or those persons under Tribal jurisdiction, the Tribe may take the initiative to request consultation. In this event, the Tribe expects a response from the Consulting Entity within 30 days of the receipt of the request.

(2) Step 2: Pre-Consultation Meeting

- (A) Before the Consulting Entity moves past the scoping stage of a project, it must participate in a pre-consultation meeting with the Tribe. This meeting will involve authorized Tribal staff who will be responsible for briefing the Tribal Council before the first true consultation meeting takes place. Tribal Council members may be involved in this pre-consultation meeting.
- (B) In this meeting the Consulting Entity should prepare a review packet that presents the proposed regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity of the Consulting Entity. The Consulting Entity must discuss the need for the proposed regulations, rule, policy, program, project or plan and how it may affect Tribal sovereignty, resources, properties, cultural practices, and/or those persons under Tribal jurisdiction.
 - (i) At a minimum this review packet must also include:
 - (a) Who the responsible federal agency is, the nature of its involvement, and an agency contact person with his/her address, phone, and e-mail;

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- (b) Project description, including size and configuration of the proposed action, total acreage, what is known about past and current land use, and the type and extent of the proposed ground disturbance, the location (street address if available);
 - (c) A copy of the current plans;
 - (d) Maps that clearly identify the location., including a copy of the a 7.5” USGS map;
 - (e) Clearly defined Area of Potential Effects (APE) for both direct and indirect (visual, audible, atmospheric changes) effects, to be described verbally and drawn on a map;
 - (f) Information on any previous studies and recorded archaeological sites resources within the APE;
 - (g) Sharp, clear photographs of the project area, including views from different perspectives. All photos should be clearly labeled and keyed to the map indicating location and direction of the view;
 - (h) The program, plan or project schedule or timeline.
- (ii) The Consulting Entity must present any technical and legal issues to the Tribal Council or their designee. The Consulting Entity will ensure that the Tribal Council or their designee understand the proposed regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity of the Consulting Entity.
 - (iii)The Tribal advisors and staff will brief Tribal Council by providing opinions and recommendations. If the Tribal Council determines that it is in the best interest of the Tribe then the authorized Tribal advisor or staff will reach out to the Consulting Entity within 30 days to initiate a consultation meeting.

(3) Step 3: Consultation Meeting

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- (A) The Consulting Entity must arrange with the Tribal Chairman a time, place, and agenda for the consultation meeting.
- (B) After the Consulting Entity and Tribal Chairman have made arrangements for a consultation meeting the Consulting Entity must confirm the Consultation Meeting with Tribal Chairman one week prior to the arranged date. Confirmation can be in the form of a phone call, email, or any other approved correspondence by Tribal Chairman.
- (C) The Consulting Entity must call the Tribal Chairman 24 hours prior to the arranged meeting date to provide adequate notice and confirmation of the meeting to the Tribe. This notice must include the Consulting Entity's representative's name, contact information, and expected time of arrival.
- (D) The Consulting Entity must prepare a review packet for the Tribal Council similar to the review packet required in the pre-consultation meeting and any additional information that will be necessary for the Tribal Council to reach an agreement.
- (E) The Consultation Meeting must also address the following:
 - (i) A discussion of any barriers to Tribal participation such as timing, financing, and/or location. The Consulting Entity must provide funds for off reservation consultation if necessary;
 - (ii) A discussion of any sensitivities regarding sacred sites affected by the project;
 - (iii) A discussion of any technical or legal issues;
 - (iv) A mutually agreed upon format for process;
 - (v) Development of a Consultation calendar or an agreed upon meeting interval to ensure that enough meetings are planned for adequate consultation. The Consultation calendar or meeting intervals should take into account the Consulting Entity's statutory or regulatory obligations pertinent to the decision; availability of Tribal Council members and staff; and time to gather all necessary information required.

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- (F) The Consulting Entity will ensure that the Tribal Council understands the proposed regulation, rule, policy, program, project, plan, property decision, inspection, or any other activity of the Consulting Entity.
- (G) Agreements with Consulting Entities shall be authorized by Tribal Council, by resolution.
- (H) Prior to authorizing any agreement the Tribal Council shall ensure that such agreement: (1) does not contain any provisions that in any way diminish or waive any trust obligation of the Federal Government; (2) clearly sets forth the expectations of the Tribe for the roles and services to be performed by the Consulting Entity with respect to such agreement; and (3) is consistent with established Tribal goals and priorities.
- (4) Step 4: Ongoing Consultation Meetings (if necessary) or Coordination Meetings
- (A) Consultation meetings should continue pursuant to the agreed upon Consultation Calendar or meeting interval until an agreement is reached or until the Tribe and Consulting Entity decide that an agreement is possible. Some consultation meetings may be in formal settings, while other may include field trips to project locations as needed. Informal meetings between staff, sub-groups, or sub-committees may be formed on an ad hoc basis as needed and agreed upon by Tribal Council.
- (B) All ongoing Consultation Meetings and Coordination Meetings require the Consulting Entity to confirm the meeting with Tribal Council one week prior to the arranged date. Confirmation can be in the form of a phone call, email, or any other approved correspondence by Tribal Council.
- (C) The Consulting Entity must call the Tribal Chairman or his designee 24 hours prior to the arranged meeting date to provide adequate notice and confirmation of the meeting to the Tribe. This notice must include the Consulting Entity's representative's name, contact information, and expected time of arrival.

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(5) Step 5: Provide the Tribe with a Consultation Summary Report

(A) The Consulting Entity shall provide the Tribe with a detailed report that provides a review of the government-to-government consultation process and all consultation activities after an agreement has been authorized by the Tribal Council and approved by resolution.

(B) This Consultation Summary Report may be used by Tribal Council without the consent of the Consulting Entity for any Tribal business matter; including but not limited to Tribal meetings.

(6) Step 6: Certification of Completed Consultation

(A) At the end of the government-to-government consultation process, the Tribe will offer a Tribal Resolution certifying that consultation was completed in compliance with this policy or not. In the event that the Tribe deems that the Consulting Entity failed to consult properly, a letter from the Tribe will explain this failure and be shared with the director or executive authority of the Consulting Entity.

§ 2.813 CONSULTATION RECORD

Meeting notes, minutes, shared documents, and any recorded audio or video files shall be maintained in common between the Tribe and the Consulting Entity. Any sensitive information provided by the Tribe shall remain confidential or be returned to the Tribe upon request; unless otherwise agree to, in writing, by the Tribal Council.

§ 2.814 NO WAIVER OF SOVEREIGN IMMUNITY

All inherent sovereign rights of the Rincon Band as a federally recognized Indian tribe with respect to provisions authorized in this Ordinance are hereby expressly reserved, including sovereign immunity from unconsented suit. Nothing in the Ordinance shall be deemed or construed to be a waiver of the Rincon Band's sovereign immunity from unconsented suit.

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§ 2.815 SEVERABILITY

If any provision of this ordinance shall be held unconstitutional or invalid by the Rincon Tribal Court, only the invalid provision or language shall be severed and the remaining provision and language of this ordinance shall remain in full force and effect.

[END OF DOCUMENT]