

## **Briefing Paper**

### **Tribal Water Summit**

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## **“TRIBAL PARTICIPATION IN CALIFORNIA WATER PLANNING”**

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Tribal participation in statewide water planning is a key topic for a Tribal-State water summit because from the Tribes’ perspective, water resources are essential to their legal, economic and cultural survival. Indian Tribes in California have legally-protected water rights and they have interests in ensuring that their water and the resources dependent upon water are safeguarded against interference. The State has an interest in devising a water policy that respects tribal water rights in order to reduce or eliminate natural resource conflicts with Tribes. Although tribal water rights are uniquely creatures of federal law, Indian Tribes acknowledge that California’s water planning process may present an opportunity for collaboration in devising water management plans that protect tribal resources and foster cooperation between Tribes and their neighbors. This paper provides the legal and historical background on several water planning issues that will frame the discussion. Those issues are: 1) the lack of tribal involvement in state and regional water planning; 2) the need for a statewide consultation policy that recognizes the unique legal status of Indian Tribes; 3) the lack of a state office of Indian affairs; and 4) the need for improved tribal access to water bond funding.

### **I. Tribal involvement in state and regional water planning**

Prior to Update 2009, California’s statewide water planning process did not provide a formal consultative role for Indian Tribes, despite their senior water rights and compelling interest in helping to shape State policy with regard to water resources. The absence of a meaningful role

for sovereign Indian Tribes cannot be justified. The poor record of the State in this regard is likely due to circumstantial factors, rather than any intentional policy to exclude Indian Tribes from the process. Although there has been no formal study of this aspect of State-Tribal relations, a number of factors could have contributed to the exclusion of Tribes from statewide water planning.

Historically, Indian Tribes have kept the State at a distance with regard to legal and political matters, no doubt due to the hostile relationship between the State and the Tribes in the years following statehood and the numerous court battles to protect tribal water and fishing rights. Indian water rights are uniquely federal in nature and the State lacks jurisdiction over such rights. Indian Tribes have been reluctant to share water resource data with state agencies for fear that confidential and proprietary information may be disclosed. Throughout the State nearly all of tribal water rights are unquantified, which may have led to uncertainty about their legal status and place in water rights planning. Moreover, a significant portion of tribal water resources are found underground, and groundwater historically has not been regulated by the State. Finally, it may be that State agencies are not equipped to deal with the political and legal complexities of more than 100 federally-recognized Indian Tribes and countless other non-recognized Tribes with nonetheless credible claims to rights based on a distinct legal existence.

The record of tribal participation in regional water planning is not much better, despite the undeniable fact that tribal water rights are usually entitled to senior priority in water rights allocation schemes. Indian Tribes are far from equal partners with regional bodies in the water management and planning process. To take but one example, the Coachella Valley Water District Final Water Management Plan (2002) (“Plan”) contains no evidence that Indian Tribes were consulted in its formulation, even though there are four Indian reservations comprising nearly 50,000 acres within the District’s boundaries with senior water rights. The Plan concedes that it makes no distinctions among “Indian trust assets and other lands within District boundaries.” Plan

at pages 2-7. Nowhere in the Plan is there any mention of the Tribes' federal reserved water rights, nor the implications of such rights for the successful implementation of the Plan.

The focus on the Coachella Valley Water District is not meant to single out a particular water agency for criticism, but rather to illustrate the challenges Indian Tribes must overcome in order to participate meaningfully in regional agency planning that affects their interests. Indian Tribes are too often seen as merely part of the general public, rather than sovereign entities with enforceable water rights under federal law. It should be noted, however, that the North Coast Regional Water Quality Control Board is making efforts to include Indian Tribes within that region in development of a water quality restoration plan for the Klamath River Basin, and has held at least one hearing on an Indian reservation affected by the plan.

The near invisibility of Indian Tribes in state and regional water planning may be attributed to a more fundamental dynamic. No statute obligates state agencies to give special consideration to the interests of Indian Tribes in the water planning process. The statutory directive encouraging state agencies to "cooperate" with Indian Tribes in economic development does not expressly apply to water planning, and few state agencies would view their responsibilities under that statute as encompassing water matters. Cal. Gov. Code § 11019.9.

Perhaps more important, neither the California legislature nor the state courts appears to have imposed a legally-enforceable duty on the part of State agencies to act in the best interests of Indian Tribes. By contrast, federal law requires federal agencies to carry out special fiduciary duties in dealing with Tribes. *See, e.g. Northwest Sea Farms, Inc. v. U.S. Army Corps of Engineers*, 931 F. Supp. 1515 (W.D. Wash. 1996) (federal trust responsibility required agency to take appropriate action to ensure Indian treaty rights are given full effect in agency decision-making). The case of *Northern Cheyenne Tribe v. Hodel* illustrates why this difference is important. In that case, the federal court ruled that the Department of the Interior had a trust duty to mitigate the

adverse effects of a coal lease on the Tribe's social, economic and cultural resources, and that treating the Tribe as "merely citizens of the affected area and reservation land like any other real estate in the decisional process leading to the [coal lease] sale" violated that duty. 12 Indian Law Reporter 3065 (D. Montana, 1985).

The absence of a corresponding legal duty on the part of the State of California in practice means that State agencies may be able to formulate water policy without taking into account the interests of Indian Tribes in water planning. The unique status of Indian Tribes as separate sovereigns under federal law entitles them to special consideration in the State's water planning process. Yet, State planners and decision-makers have been largely free to devise water policy without regard for tribal interests. Tribal participation has depended on the whims of policy, rather than law.

In 2005, the California Department of Water Resources ("DWR") began to change the way Indian Tribes have been treated in the water planning process. Recommendation 13 of the California Water Plan Update 2005 ("2005 Update") aimed to increase tribal participation in water planning and access to funding for that and related purposes. The 2005 Update recommended that DWR and other State agencies "must invite, encourage, and assist tribal government representatives to participate in statewide, regional, and local water planning processes and to access State funding for water projects." This represented a significant shift in the State's approach to tribal participation in water planning, particularly in light of the facts that the time horizon for the 2005 Update encompasses 25 years and that the recommendation applies to agencies outside the DWR. A Tribal Communication Committee was convened to develop a communications plan designed to encourage tribal participation in the 2009 Update of the State's Water Plan. A series of regional meetings with tribal leaders have been held to gather information and ideas from Tribes with regard to the planning process. A representative of the Native American Heritage Commission sits on the

Water Plan Steering Committee, which should raise the profile of tribal concerns in the water management and planning area. The new policy for the 2009 Update for perhaps the first time provides a meaningful opportunity for Indian Tribes to participate in water planning statewide.

## **II. Statewide consultation policy**

California does not have a comprehensive statewide consultation policy aimed specifically at Indian Tribes or the special circumstances of water planning and management. The need for such a policy is apparent from the fact that there is no established mechanism at the statewide level by which Indian Tribes can make their voices heard during policy formulation. To be sure, Indian people may participate as members of the public during environmental reviews, drafting of regulations and enactment of legislation. However, the unique legal status of Indian Tribes as sovereigns should entitle them to a special consultative role.

Consultation in this context means a great deal more than eliciting the views of Indian Tribes when particular matters of concern come before the State's water agencies. Rather, it must proceed from the legal premise that Indian Tribes are sovereign governments. Because State agencies have a sovereign character as well, consultation with Indian Tribes must be conducted on a government-to-government basis. This approach is familiar to Indian Tribes, as the federal government has had a well-established government-to-government relationship with them since the founding of the United States. The federal consultation policy also has historic roots, and was codified in the Indian Self-Determination and Education Assistance Act of 1974, and reaffirmed by a presidential executive order in 1994. The order directed each federal agency to consult with tribal governments prior to taking actions that affect them. "Government to Government Relations with Native American Tribal Governments: Memorandum for the Heads of Executive Departments and Agencies," April 29, 1994. More than 150 federal statutes and agency regulations impose a duty on federal agencies to consult with Indian Tribes in carrying out their missions. *See, e.g.* 43 C.F.R.

§ 7.7 (“The Federal land manager should also seek to determine, in consultation with official representatives of Indian Tribes . . . what circumstances should be the subject of special notification to the tribe . . . .”)

By contrast, California has a single statute obligating local (city and county) governments to consult with Indian Tribes before adopting or amending a general or specific land use plan. That law, Senate Bill 18 (“SB 18”), took effect in 2005. Although the scope of the law may be sufficiently broad to include tribal concerns about water as a cultural resource, the principal goal of SB 18 is to “preserve and protect cultural places of California Native Americans.” “Tribal Consultation Guidelines: Supplement to General Plan Guidelines,” November 14, 2005, Governor’s Office of Planning and Research. In keeping with the law’s purpose, the consultation guidelines issued by the Governor’s Office focus on consultation with Indian Tribes to identify, protect and mitigate impacts to cultural resources located within the boundaries of the city or county. The guidelines contain useful information about Indian Tribes, their legal status and cultural resources, and specific responsibilities of local governments with regard to the policy.

The contents of a State consultation policy should be devised by Indian Tribes in collaboration with State agencies and officials. SB 18 may be a useful starting point for the development of a consultation policy. SB 18 defines consultation as “the meaningful and timely process of seeking, discussing and considering carefully the views of others in a manner that is cognizant of all parties’ cultural values, and where feasible seeking agreement.” Cal. Gov. Code § 65352.4. It goes on to emphasize that consultation must proceed on the basis of mutual respect: “Consultation between government agencies and Native American Tribes shall be conducted in a way that is mutually respectful of each party’s sovereignty.” *Id.*

The formulation of a consultation policy should also take into account developments at the federal level. Federal Indian law has imbued consultation with special meanings and

understandings. It is premised on the idea that early consultation with Indian Tribes is good public policy because it acknowledges their sovereign legal status and creates administrative efficiencies by avoiding unnecessary and costly analysis of issues of lesser concern to Tribes. A sound consultation policy should recognize that it is a process, not a single event. It is not an end in itself, but rather a means to the end of a mutually satisfactory resolution of matters of concern to the State and the Tribes.

Under either state or federal law, consultation should be more than a synonym for meetings and discussion with Indian Tribes. It should incorporate many of the same protections inherent in fundamental due process, such as early notice of intended governmental action, ample opportunity to be heard on matters of importance to the Tribes, decisions by a neutral governmental official and a statement of reasons for the decision where appropriate. Genuine consultation is a two-way process, with state agencies taking the trouble to inform themselves about tribal concerns and the Tribes likewise becoming educated about state agency concerns before discussions begin. A critical component of every consultation is that it begins before a decision is reached; tribal ratification of decisions already made is not consultation under any definition of the term.

Consultation must be more than state agencies gathering information about and from Indian Tribes. The federal courts have condemned such perfunctory efforts at consultation. *See, e.g., Pueblo of Sandia v. United States*, 50 F.3d 856 (10<sup>th</sup> Cir. 1995) (U.S. Forest Service sending letters to Tribe requesting information is not adequate consultation under the National Historic Preservation Act). From the Tribes' perspective, consultation includes a good faith commitment on the part of the agency to seek tribal views and to consider them before decisions are made. In this way, consultation may help build better relationships between the State and Indian Tribes.

### **III. State Office of Indian Affairs**

The experiences of Indian Tribes have shown that consultation works best when the state has committed to a formal and structured process. Twenty nine states have dedicated offices of Indian affairs, either as part of the Governor's office or as an independent state agency. The first such office was set up in Minnesota in 1963. Surprisingly, California, with the largest census-recorded Native American population, has no such office.

The responsibilities of state Indian affairs offices range from information dissemination and reference assistance to active liaison between Tribes and state agencies on the most important issues in their relationship. In addition to the laudable function of improving communication, three rationales are often cited for such offices. First, a dedicated state office can provide a forum for longer term planning and policy development on the most significant Tribal-State issues. Because the mission and work of state agencies are often focused on specific problems of a short term nature, having a structure in place for long term planning may improve State policy and strengthen relationships between the Tribes and the State. Second, many issues of serious concern to Indian Tribes may not precisely fall within the scope of an agency's responsibility, and an Indian affairs office may ensure that these issues are not ignored. Third, a state office is likely to raise the profile of Indian issues generally throughout state government. Overall, a state office may help avoid conflicts between Tribes and the state, and thereby minimize the risk of costly litigation.

The principal disadvantage of a state office of Indian affairs is that other state agencies may neglect concerns of Indian Tribes on the ground that the state office is exclusively responsible for such matters. The net effect could be a segregation of Indian policy and its implementation in a single office, to the detriment of Indian affairs generally. Especially if the state office is not adequately funded and staffed, a separate office could isolate Indian policy from state policy generally. Within the federal government, it is commonly understood that many agencies do not

believe they have any special responsibility for carrying out the federal government's trust duty because the Bureau of Indian Affairs presumably was created specifically for that purpose.

If an office dedicated to Indian affairs is to be created, a number of organizational questions must be addressed. First, should the office be created by executive action of the Governor, or should it be the creation of the legislature? The answer may depend on budgeting and funding issues that are beyond the scope of this paper. Second, should the office be housed within the Governor's office or set up as a separate and independent state agency? The office may have a higher profile as part of the Governor's office, but what is gained in visibility may be lost in terms of compromised independence. Third, who should have the authority and responsibility to appoint the staff for the office, and how should the budget be prepared? The answer to this question may depend on the purpose, mission and goals for the office.

#### **IV. Tribal Access to Bond Funding**

With rare exception, the story of Indian Tribes and water bond funding mirrors their experience in water planning generally: they have been largely excluded. The reason for this may be related to a simple but disabling problem of definition. A review of the eligibility requirements for access to water bond funding shows that virtually none of them expressly includes Indian Tribes among the eligible entities. For example, Proposition 50, the Water Security, Clean Drinking Water, Coastal and Beach Protection Act of 2002, provides grant funds to "nonprofit organizations," but defines such organizations restrictively to include only those organized pursuant to state law and qualified as a charitable organization under the federal Internal Revenue Code. Cal. Water Code § 79505(g). Tribal organizations created pursuant to tribal law for similar charitable purposes are not included in the definition of entities eligible for funding.

Another example concerns the definition of "disadvantaged communities," which the legislature has determined should be entitled to preference for Prop 50 funding for safe drinking

water and water quality projects. The definition includes communities with median household income less than 80 percent of the statewide annual median, which is no doubt sufficiently broad to include many tribal communities. However, the failure to specifically designate Indian tribal communities may create confusion and uncertainty about their eligibility, especially because the statutory definition does not reference communities with governmental status as being eligible.

Similar definitional problems may have hampered the ability of Indian Tribes to access funding under Proposition 84, the Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal Protection Act of 2006 (“Act”). The statute provides that funds for projects aimed at “the delivery of safe drinking water and the protection of water quality and the environment” shall be available to “local public agencies.” Cal. Pub. Res. Code § 75026(a). The term is not defined in the statute, but it is commonly understood to include governmental agencies created by state law only, thereby excluding Indian Tribes from the coverage of the Act. Although courts have found Indian Tribes to be “public entities” within the meaning of the California Evidence Code, apparently Tribes have not been treated as public agencies for purposes of Prop 84 funding. *Big Valley Band of Pomo Indians v. Superior Court*, 133 Cal. App. 4<sup>th</sup> 1185, 35 Cal. Rptr. 3d 357 (First District Court of Appeal 2005) (an Indian Tribe’s constitution and enactments of its tribal council may be judicially noticed as the legislative enactments of a public entity and the official act of a state within the meaning of the California Evidence Code). From the perspective of Indian Tribes, the issue presents a difficult conundrum, as the legal status of Indian Tribes under federal law is higher than “local public agencies,” yet they might be forced to seek that status in order to gain access to badly-needed funding for water projects.

Although it may be theoretically possible for Indian Tribes to access water project bond funding by collaborating with public agencies and others on joint projects, there may be an additional legal impediment for this alternative approach. If the project involves the exercise of

governmental power, any agreement would require the execution of a Joint Powers Agreement in order to be successfully and lawfully implemented. Cal. Gov. Code § 6502. California law, however, does not specifically authorize joint powers agreements between Indian Tribes and public agencies. As a result, Indian Tribes have been required to obtain special authorization for such arrangements from the state legislature. *See, e.g.*, Cal. Gov. Code § 6529 (authorizing Elk Valley Rancheria Tribal Council to enter into a joint powers agreement with the County of Del Norte and the City of Crescent City and providing that the Tribe shall be “deemed to be a public agency” for this purpose). This cumbersome and expensive process may deter Indian Tribes from seeking collaborative projects with entities that are eligible for water project bond funding.

## **V. Conclusion**

The common thread running through these issues is the importance of treating Indian Tribes as equal sovereigns with senior and enforceable rights to water that must be taken into account in any statewide or regional water planning process. Only on that basis can state water planning involve Indian Tribes as collaborative partners. The benefits of meaningful consultation for both the Tribes and the State should be self-evident. A genuine effort to engage the Tribes in the planning process is likely to prevent costly conflicts and provide a sound legal and factual basis for the development of water policy in the future. The State ignores tribal water rights at its peril.