REVITALIZING STEWARDSHIP AND USE OF TRIBAL TRADITIONAL TERRITORIES: OPTIONS FOR IMPROVING CALIFORNIA POLICY AND LAW IN STATE-MANAGED LANDS AND WATERS

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Authors' Note: The purpose of this study is to stimulate discussion among Indian Tribes and California State agencies about options for reconnecting the Tribes to their traditional areas on State lands and waters. The options analyzed here have not been recommended or endorsed by any Tribe, Tribal advocate or other entity.

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INTRODUCTION

There are 109 California Tribes recognized by the United States as sovereign governments entitled to the protections and benefits of federal law. Only a small fraction of the land areas Indians occupied and used as their traditional territory is owned and occupied by them today. Much of this traditional land and waters is now owned or controlled by California State agencies as a result of the extermination and dispossession wrought under official State policy in the early days of statehood.

This study has two purposes. First, it analyzes the extent to which State law and policy authorizes or encourages State agencies to promote and protect tribal access, use and management of State lands. Second, it explores potential options available to the State and the Tribes to improve such access, use and management of State lands. Improving tribal relationships to natural and cultural resources on State lands and waters is broadly consistent with the mission of the California Natural Resources Agency to "restore, protect and manage the state's natural, historical and cultural resources for current and future generations using creative approaches and solutions based on science, collaboration, and respect for all the communities and interests involved."[1]

At the outset, however, it must be acknowledged that the categories of "use, access and management" inadequately capture the scope and nature of tribal relationships to the natural areas on State lands and waters. At one level, the problem is one of language, as the English language does not have words sufficient to describe the relationships of respect and reciprocity with the natural world embedded in the traditional knowledge of many Tribes. Recognizing that tribal access to and use of these traditional lands and waters are essential to the health and

[1] California Natural Resources Agency, https://resources.ca.gov/

welfare of Indian people today could form the basis for changes in State law and policy, but such recognition is an incomplete understanding of tribal relationships to the natural world and the culture that sustains tribal communities. Likewise, it is not sufficient for the State to recognize the truth that the State's remaining biological diversity today is largely the result of the Tribes' intergenerational stewardship and management practices of Tribes who depended on such places for food and sustenance.[2] The challenge for the State and the Tribes will be to translate the indigenous relationships of respect of and reciprocity with the natural world into concrete legal and policy initiatives that are consistent with and promote the mission of State agencies to restore, protect and manage the resources found in that world.

Unlike many other Indian people in other states, California Tribes, with only three exceptions, do not have valid and enforceable treaties that can be invoked to protect off-reservation cultural and subsistence activities. In the past few years, in response to the Tribes' efforts to obtain recognition of the importance of maintaining and revitalizing connections to off-reservation sites, California has made tentative yet commendable steps to accommodate this tribal goal. For example, on September 25, 2020, Governor Gavin Newsom issued a policy on behalf of his administration encouraging State entities to "seek opportunities to support California Tribes' co-management of and access to" lands within a California Indian Tribe's traditional territory now under the ownership or control of the State.[3] The Native American Ancestral Lands Policy also encourages State entities to seek opportunities to work with

[2] In this Report, it is assumed that tribal use and management of natural resources and traditional lands and waters would be conducted pursuant to traditional knowledge and practices, based on the Tribes' belief systems, cultural values and lifeways.

[3] Native American Ancestral Lands Policy, Office of Governor Gavin Newsom (Sept. 25, 2020), https://www.gov.ca.gov/2020/09/25/on-native-american-day-governor-newsom-takes-action-to-restore-land-promote-equity-for-california-native-communities/.

California Indian Tribes "that are interested in acquiring natural lands in excess of State needs."[4] The purpose of the Policy, among other things, is to "[i]mprove the ability of California Native Americans to engage in traditional and sustenance gathering, hunting and fishing" and "[p]artner with California Tribes on land management and stewardship utilizing Traditional Ecological Knowledges."[5]

This Policy builds on the steps taken by former Governor Jerry Brown in Executive Order B-10-11 (government-to-government consultation and engagement)[6] and Governor Newsom's Executive Order N-15-19 (acknowledging and apologizing on behalf of the State for the historical "violence, exploitation, dispossession and the attempted destruction of tribal communities").[7] Shortly following the issuance of the Native American Ancestral Lands Policy, Governor Newsom issued Executive Order N-82-20 in an effort to combat the biodiversity and climate crisis. The Executive Order establishes the California Biodiversity Collaborative to bring together State agencies, Indian Tribes and other stakeholders to protect and restore the State's biodiversity and sets a goal of protecting 30 percent of state lands and waters by 2030.[8] Among other things, Executive Order N-82-20 acknowledges that "since time immemorial, California Native Americans have stewarded, managed and lived interdependently with the lands that now make up the State of California."[9]

The Native American Ancestral Lands Policy, and the Executive Orders preceding and following it, represent a new level of respect for and recognition of the importance of tribal traditional territories. However, there has been no systematic examination of State law and

[4] *Id.*
[5] *Id.*
[6] Executive Order B-10-11
[7] Executive Order N-15-19
[8] Executive Order N-82-20
[9] *Id.*

policy to determine how well the State accommodates this crucial aspect of the Tribes' cultures and ways of life. The Native American Ancestral Lands Policy, for example, provides recommendations, rather than mandates.[10] This Report is intended to provide that analysis.

Although Governor Newsom has taken steps to recognize and encourage respect for Tribes' connections to traditional lands, his actions beg the question of what else could be done to assist the Tribes in meeting their access, use, and management goals, and what changes in State law or policy may be necessary to meet those goals. Any suitable actions taken by the State should be the result of meaningful consultation between the State and the Tribes. This Report includes several options to stimulate and frame that discussion. The options are designed to promote the Tribes' and the State's shared goal of using and managing the natural and cultural environment on tribal traditional lands that are now under State ownership, to protect and preserve those resources. Although the State and the Tribes may have different epistemological approaches to the management of natural resources, they find common ground on avoiding harm to the natural world that would result from unmanaged resources or from landscapes that are not tied to indigenous stewardship and knowledge.

This Report provides an overview of existing State law and policy regarding the ability of Tribes to access State lands and waters for management purposes, for ceremonies and religious use, and to practice cultural uses such as traditional gathering, hunting and fishing. It also provides a suite of legal and policy options that could initiate, expand or ensure continuation of tribal access to, co-management of and governance over State lands. No single option is recommended, because the propriety of implementing a particular option should be determined in consultations between the Tribes and the State.

[10] *See* Native American Ancestral Lands Policy, *supra* note 3.

This Report has six parts: (1) a brief historical overview of California Indian Tribes' aboriginal property rights and California's treatment of Indian Tribes; (2) an overview of existing State law governing tribal access, management, and use of State lands and waters; (3) potential legal bases for assertion of tribal off-reservation rights; (4) a summary of the moral rationales that might serve as the bases for recognition of California Indian Tribes' right to access and use State lands and waters; (5) a list of discussion options for securing or expanding tribal rights on State lands and waters; and (6) the potential legal and political challenges to implementing those options should the Tribes and the State decide to pursue any one of them.

I. Tribal Stewardship Practices in Traditional Territories

State lands have benefitted from generations of sound management and stewardship of diverse ecosystems by California Tribes. For example, Indian Tribes have long conducted annual cultural burns for ceremonial purposes, to clear out underbrush, to encourage new plant growth for basket weaving and other materials, to eradicate unwanted plants, to promote growth of food-source plants or grazing habitat, and to prevent larger fires.[11] This management and shaping of the environment provided countless benefits to Tribes and enhanced the productivity of California's grasslands, forests, meadows, rivers and streams.[12] However, State law and policy have prevented Tribes from implementing these traditional land management practices.[13]

In recent years, some government agencies have acknowledged the key role that Tribes played in shaping and managing the environment. With longer and more intense wildfire seasons, State agencies and officials have begun working with Tribes to implement wildfire

[11] *See generally,* Kent G. Lightfoot & Otis Parrish, California Indians and Their Environment: An Introduction (2009).
[12] *Id*.
[13] See Part II.A *infra*.

management programs based on Indigenous knowledge and practices.[14] In October 2021, Governor Gavin Newsom signed into law a bill shielding tribes, tribal entities, and cultural fire practitioners from civil liability for fire suppression and other related costs where the fire results in a prescribed cultural burn approved by a tribal government "to achieve cultural goals or objectives, including subsistence, ceremonial activities, [and] biodiversity."[15] "A return to these Indigenous practices could help better steward the land and foster greater climate resiliency," says Don Hankins, a pyrogeographer and Plains Miwok fire expert.[16]

Early State policy played a key role in dramatically altering the Tribes' management of and access to their traditional territories. The State intentionally sought to ensure the dispossession of Indian lands, and policies were often designed to exterminate Tribes from the State entirely. The State's practices have been accurately characterized as "genocidal."[17] California's legislative pressure ensured Congress never ratified 18 treaties negotiated in 1851 and 1852 between more than one hundred Tribes and the federal government.[18] Had the 18 treaties been successfully ratified, the Tribes would have retained 8.5 million acres and ceded the remaining 66.5 million acres of their aboriginal territory to the United States.[19] However, California Senators, along with other State officials, prevented a vote on ratification in the U.S.

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[14] *See* Cutcha Risling Baldy, *"Why we gather: traditional gathering in native Northwest California and the future of bio-cultural sovereignty,"* Ecological Processes 2013, at 3, https://link.springer.com/article/10.1186/2192-1709-2-17; *see also* Lauren Sommer, To Manage Wildfire, California Looks To What Tribes Have Known All Along, NPR (August 24, 2020) https://www.npr.org/2020/08/24/899422710/to-manage-wildfire-california-looks-to-what-Tribes-have-known-all-along.

[15] S.B. 332 (filed with Sec. of State October 6, 2021) (adding Section 3333.8 to the Civil Code), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB332.

[16] Colonization Made California a Tinderbox: Why Indigenous Land Stewardship Would Help Combat Fires, Democracy Now (Sept. 15, 2020), https://www.democracynow.org/2020/9/15/california_wildfires_indigenous_land_stewardship.

[17] *See* Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe* (Yale University Press, 2016).

[18] William Wood, "The Trajectory of Indian Country in California: Rancherias, Villages, Pueblos, Missions, Ranchos, Reservations, Colonies, and Rancherias," 44 Tulsa L. Rev. 317, 339-340 (2013).

[19] *Id*.

Senate, ensuring the treaties would never become effective, resulting in the loss of 66.5 million acres of tribal traditional territory and precluding legal protections for the 8.5 million acres intended as reservations.[20]

The 126 alleged Tribes who negotiated the 18 treaties were never formally informed that the treaties were not ratified.[21] Many non-Indian settlers disregarded tribal boundaries and claimed tribal land as their own, often without facing any repercussions from the federal or state governments. The truth about the Senate's decision to reject the 18 treaties in closed session only came to light about 50 years later when the treaties were re-discovered.[22] By that time, almost all of the land that would have been reserved for the Tribes in the treaties was overrun and "settled" by non-Indians as if they had been part of the public domain.[23] As a result, the Tribes lost tens of million acres of traditional land without any of the bargained-for benefits in exchange.[24] In addition to legal title to reservations, the benefits would have included material items such as clothing, tools, farm implements, livestock, and construction of shops and schools.[25]

Much of the land owned by the State of California today was likely acquired through the deceitful mechanism of unratified federal treaties. In addition to the 18 unratified treaties, similar unratified treaties were made with the Hoopa in 1862;[26] the Hupa, South Fork, Redwood, and Grouse Creek Indians in 1864;[27] Modoc and Shasta Tribes in 1864[28] and Tribes of the Big

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[20] *Id.*
[21] Damon B. Adkins and William J. Bauer, Jr., *We Are the Land: A History of California Indians,* (2021) at 188.
[22] *Id.*
[23] *Id.*
[24] William C Sturtevant, Ed., *Handbook of North American Indians, Volume 8, California* (1978) at 703.
[25] *Id.* at 702.
[26] *Treaty with the Hoopa, August 14, 1862,* published in Vine Deloria, Jr. and Raymond J. Demallie, *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions, 1775-1979,* Vol. 2 at 1348.
[27] *Treaty with the Hupa, South Fork, Redwood, and Grouse Creek Indians, August 6, 1864, Id.*, Vol 1 at 231.
[28] *Agreement with the Modoc, February 14, 1864, Id.* at 1390.

Lakes Region in 1848[29]. The historical record is not clear as to why these later treaties are typically not included in the history of other unratified treaties in California. It may be because the fact of non-ratification was not concealed for these as was the case with the 18 treaties.

Following the non-ratifications of the 18 treaties and others, small reservations were subsequently created piecemeal by the United States, in part as a response to the massive loss of Indian land by the deceitful treaty process. Various Presidential executive orders set aside land for Tribes in the latter part of the 1800s.[30] Then, in the early 1900s, after the 18 treaties were rediscovered, the United States renewed its efforts to secure lands for "homeless" and "landless" Tribes. Congress passed various appropriation acts to purchase lands for these "homeless" Tribes, resulting in numerous rancherias established in central and northern California.[31] These reservations ranged in size from five acres to a few hundred acres each.[32]

Another shift in federal and State policy in the 1950s towards the termination of the United States' trust relationship with Indian Tribes led to the end of federal benefits and protections provided to many California Tribes and their lands. Under this policy, numerous Tribes were "terminated," meaning their special relationship with the federal government ended and they were subject to state jurisdiction just like any other non-Indian state citizen. One of the tragic features of termination is that it converted tribal lands to private ownership, making those lands subject to state and local taxation, which led to many tribal lands being sold for failure to pay taxes many Indian people did not know were due.[33] Although many terminated Tribes were later restored when the federal termination was found to be unlawful,[34] the privatizing of tribal

[29] *Treaty with the Tribes of the Big Lakes Region of California, June 1. 1848, Id.* at 1265.
[30] Wood, *supra* note 18 at 347-354.
[31] Id. at 357-58.
[32] Id. at 358. (By 1930, there were 36 reservations in central and northern California known as rancherias).
[33] William C. Canby, Jr., American Indian Law in a Nutshell 27, 60 (2015 6th ed.)
[34] *Tillie Hardwick v. United States,* No. C-79-1710SW (N. D. Cal. 1983).

land and loss of federal protections meant that tens of thousands of acres, now subject to state and county laws, were transferred out of Indian ownership to non-Indians when real property taxes could not be paid. [35]

The avarice and genocidal policies of the State cut Indian people off from many of their traditional territories. These were the same territories which they had managed and relied on to hunt, fish, and gather in order to provide food for their families and to fulfill their religious and spiritual practices. Currently, California Tribes control approximately 450,000 acres of land in the form of reservations, rancherias, allotments, and trust land outside reservations, which combined represents less than one percent of the land in California.[36]

Today, the Tribes keep their tribal existence alive by continuing to practice the subsistence, cultural, and religious lifeways founded on place-based relationships that, despite all odds against them, have endured since time immemorial. Access to lands and marine waters; harvesting traditional foods and materials; hunting and fishing; and diligently tending cultural ecosystems all nurture the Tribes' relationships with the lands and waters. Gathering and tending traditional foods and materials, hunting, and fishing also nurtures tribal peoples' bodies, minds and spirits. Many reservations are classified as "food deserts" by the U.S. Department of Agriculture (USDA) where tribal communities experience disproportionately high rates of diabetes, obesity, alcoholism and other diseases.[37] Gathering, hunting, and fishing for traditional foods, and tending the ecosystems that support these activities, promote tribal spiritual, mental

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[35] Damon B. Akins and William J. Bauer, Jr, We Are the Land: A History of Native California 273 (2021).
[36] William Wood, "The Trajectory of Indian Country in California: Rancherias, Villages, Pueblos, Missions, Ranchos, Reservations, Colonies and Rancherias," *supra* at 363.
[37] First Nations Development Institute, "Food Deserts, Food Insecurity and Poverty in Native Communities," https://www.firstnations.org/wp-content/uploads/publication-attachments/8%20Fact%20Sheet%20Food%20Deserts%2C%20Food%20Insecurity%20and%20Poverty%20in%20Native%20Communities%20FNDI.pdf; *see also* "Measuring Access to Healthful, Affordable Food in American Indian and Alaska Native Tribal Areas," United States Department of Agriculture, https://www.ers.usda.gov/webdocs/publications/43905/49690_eib131_errata.pdf.

and physical health.[38] More than that, natural resource management and gathering by Indian Tribes promotes ecosystem health and resource abundance.[39] Ensuring and protecting tribal rights to access State lands in order to manage and steward those lands and also to ensure the right to hunt, fish and gather on State lands could provide benefits to all of California's citizenry, not just Indian Tribes.

II. Overview of Existing State Laws Regarding Tribal Access, Management, Gathering, Hunting and Fishing on State Lands and Waters

Various State agencies manage public lands and regulate State citizens', tribal and non-tribal, ability to access, hunt, fish, and gather on State lands. For example, the California Department of Fish and Wildlife (CDFW) is responsible for implementing and enforcing the regulations set by the Fish and Game Commission. The Fish and Game Code, along with the Fish and Game Commission's regulations, regulate hunting and fishing on all public lands and waters by establishing seasons, bag limits and methods of take for game animals, sport or recreational fishing and some commercial fishing, and include terms and conditions for hunting and fishing licenses issued by CDFW.[40] The State's hunting regulations include a general prohibition against taking game birds and mammals at any time on public lands.[41] In California State Parks, all hunting is prohibited, unless the unit has been reclassified as a State Recreation Area.[42] In addition, a valid State hunting license is required.[43] In the context of fishing, the

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[38] *See generally* Traditional Food Stories, Native Diabetes Wellness Program (NDWP), Center for Disease Control and Prevention https://www.cdc.gov/diabetes/ndwp/traditional-foods/index.html; *see also* Michelle L. LeBeau, "Federal land management agencies and California Indians: a proposal to protect native plant species," *Environs Envt'l. Law Pol. J.* 27, 29-30 (1998). One rationale for accommodating tribal harvesting and gathering in Marine Managed Areas, discussed *infra,* is to facilitate access to foods that improve the health of Tribes with high rates of diabetes and other diseases.

[39] *Id.* at 30.

[40] Cal. Fish & Game Code § 200.

[41] Cal. Code Regs. Title 14, § 250.

[42] Cal. Code Regs. Title 14, § 4305.

[43] Cal. Code Regs. Title 14, § 700.

California Constitution confirms the right of all state citizens to "fish upon and from the public lands of the State and in the waters thereof."[44] However, California law authorizes the Fish and Game Commission to regulate the season and conditions under which different species may be taken.[45] Similarly, anyone over the age of 16 must have a State-issued fishing license.[46]

Tribal gathering practices and the ability to access State lands for management and stewardship purposes are inhibited and restricted by State law and regulations. The California Department of Parks and Recreation manages 280 State park units, over 340 miles of coastline, 970 miles of lake and river frontage, 15,000 campsites, and 4,500 miles of trails for a total of 1.5 million acres of land; a vast amount of lands and waters in the State.[47] There is a general prohibition on the removal of trees or plants from parks with a few exceptions granted by permit from the district superintendent.[48] Similarly, the California State Lands Commission manages the public's access rights to four million acres of tideland and submerged lands and the beds of natural navigable waterways including rivers, streams, lakes, bays, and estuaries.[49]

Federal law does not expressly prohibit the application of State laws restricting tribal rights to access, manage, and practice traditional hunting, fishing or gathering on State lands. Outside Indian Country[50], nondiscriminatory State laws are generally presumed to apply to Indians absent express federal law to the contrary, such as treaties securing off-reservation

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[44] Article I Declaration of Rights – Section 25.
[45] Cal. Fish & Game Code §203.
[46] Cal. Fish & Game Code § 7145.
[47] California Department of Parks and Recreation, https://www.parks.ca.gov/?page_id=91; *see also* Parks by the Numbers, California State Parks Quick Facts (last updated 1/11/2005) https://www.parks.ca.gov/pages/23509/files/parks_by_numbers.pdf
[48] Cal. Code Regs. tit. 14, §§ 4306, 4309.
[49] California State Lands Commission, https://www.slc.ca.gov/about/.
[50] "Indian Country" is a term from federal law that is used to demarcate the jurisdictional boundaries between tribal and federal jurisdiction on the one hand and state jurisdiction on the other hand.

hunting and fishing rights.[51] Therefore, with very few exceptions, State laws governing the right to access, manage or use State lands for hunting, fishing or gathering generally apply to all State citizens, including Indian Tribes and tribal peoples. As a result, tribal legal authorization to access, manage, and hunt, fish or gather on State lands must be found in specific State laws, regulations or policies.

State policy is moving in a positive direction to not only address and reverse the State's earlier policy towards Indian Tribes, but also acknowledge the unique sovereign position of the Tribes. For example, former Governor Jerry Brown issued Executive Order B-10-11 confirming that the State is "committed to strengthening and sustaining effective government-to-government relationships between the State and the Tribes by identifying areas of mutual concern and working to develop partnerships and consensus" and requiring every State agency to implement tribal government-to-government consultation policies.[52] In fact, CDFW's Tribal Consultation Policy, adopted on October 2, 2014, confirms the agency will seek in good faith to:

> "…(1) Communicate and consult with Tribes about fish, wildlife, and plant issues and seek tribal input regarding the identification of potential issues, possible means of addressing those issues, and appropriate actions, if any, to be taken by the Department; … (7) Acknowledge and respect California Native American cultural resources regardless of ***whether those resources are located on or off Tribal Lands***; … (9) Encourage collaborative and cooperative relationships with Tribes in matters affecting fish, wildlife, and plants" (emphasis added).[53]

Similarly, the Department of Parks and Recreation's Native American Consultation Policy requires consultation for "plant and mineral gathering by Native people."[54] Therefore, recent

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[51] *See Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973); *Herrera v. Wyoming*, 139 S. Ct. 1686, 1695 (2019).
[52] Exec. Order No. B-10-11 ("it is the policy of the administration that every state agency and department subject to executive control is to encourage communication and consultation with California Native American Tribes").
[53] Tribal Communication and Consultation Policy, California Department of Fish and Game (October 2, 2014) https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=122905&inline
[54] Native American Consultation Policy & Implementation Procedures, California Department of Parks and Recreation (November 16, 2007) https://www.parks.ca.gov/pages/22491/files/dn%202007-05%20native%20american%20consult.pdf

developments in State policy encourage improved relationships and communication between the Tribes and State agencies, and encourages co-management of lands and species of concern to Indian Tribes.

A. *State Laws Governing Tribally-Specific Rights to Access State Lands and Waters for Management and Stewardship Purposes*

Research has not disclosed any State laws or regulations that confirm the rights and responsibilities of California Tribes generally to access State lands and waters for management and stewardship purposes. Taking positive steps in that direction, Governor Gavin Newsom on September 25, 2020 issued a policy regarding Native American Ancestral Lands (the "Policy") which encourages every State agency, department, board and commission subject to the State's executive control to "seek opportunities to support California Tribes' co-management of and access to natural lands that are within a California Tribe's traditional land and under the ownership or control of the State of California, and to work cooperatively with California Tribes that are interested in acquiring natural lands in excess of State needs."[55]

One of the purposes of the Policy is to partner with California Tribes on land management and stewardship utilizing Traditional Ecological Knowledge. The Policy also outlines examples of actions State agencies may take in accordance with it, including "[e]ntering into memoranda of understanding to allow for access to or co-management of natural lands under the ownership or control of the State with California Tribes with traditional lands located in such areas" [56] and

> [a]dopting preferential policies and practices for California Tribes to access natural lands under the ownership or control of the State that are located within a California Tribe's traditional lands, including coordinating with local governments to zone natural land in excess of State needs in a way conducive to tribal access and use.[57]

[55] *See* Native American Ancestral Lands Policy, *supra* note 3
[56] *Id.*
[57] *Id*.

As discussed previously, this Policy is a commendable step towards confirming the rights of Tribes to access and manage their aboriginal territory outside reservation boundaries. However, it does not mandate compliance by State agencies, but leaves implementation up to the agency's discretion.

Attempts have been made to codify tribally-specific rights to access and manage State lands in State law, and although they were not successful, they illustrate a desire on the part of the State to move in the right direction. For example, Assembly Bill ("AB") 3030, introduced by California State Assembly member Ash Kalra on February 21, 2020, proposed to add Section 9001.6 to the California Public Resources Code, related to resource conservation.[58] Specifically, section 9001.6(e)(13) would have authorized the State to consult with Tribes when State conservation efforts impact tribal traditional homelands, with the specific intent to "help restore tribal access to those lands and maintain or restore tribal land management, stewardship, and ownership."[59] Section 9001.6 would also have authorized the State to partner with Tribes to "learn from and apply traditional ecological knowledge and reintroduce and promote traditional practices to restore ecosystem interconnectivity and balance," through cooperative management agreements and other legal instruments.[60] However, AB 3030 failed to pass before the end of the 2019-2020 legislative session.

B. *State Laws Governing Tribally-Specific Rights to Fish in State Waters*

The California Code of Regulations recognizes the rights of several Tribes to fish outside reservation boundaries or to conduct fishing practices contrary to otherwise applicable State law.

[58] Assembly Bill (AB) 3030, available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB3030.
[59] *Id*. at section 9001.6(e)(13).
[60] *Id*.

Many of these regulations are not only tribally specific, but also specific to the location and the method of fishing. For example, Karuk tribal members may fish at Ishi Pishi Falls using hand-held dip nets out of season.[61] Members of the Pit River Tribe may take western suckers by hand or hand-thrown spears in the Pit River.[62] Members of the Maidu Tribe may take Fall Run Chinook salmon in the Feather River for religious or cultural purposes using traditional fishing methods under a permit from the CDFW.[63] Yurok tribal members may fish out of season on the Klamath River with special bag limits and fishing methods.[64] And the Hoopa Valley Tribe and Yurok Tribe are exempt under certain circumstances from restrictions on possessing salmon outside reservation boundaries.[65]

The California Code of Regulations also confirms CDFW's authority, subject to the approval of the Fish and Game Commission, to enter into State-Tribal agreements governing fishing outside reservation boundaries with the Round Valley Indian Tribes[66], the Hoopa Valley Tribe[67] and the Yurok Tribe.[68] The CDFW may enter into a mutual agreement or compact with the Round Valley Indian Tribes respecting jurisdiction and authority to regulate traditional Indian subsistence fishing practices in the boundary streams of the historic 1873 Round Valley Indian Reservation.[69] The Regulations also grant the CDFW Director to enter into a mutual agreement or compact with the Hoopa Tribe regarding the taking of fish from the Trinity River within the exterior boundaries of the Hoopa Valley Reservation or with the Yurok Tribe

[61] Cal. Code Regs. Title 14, § 7.50.
[62] Cal. Code Regs. Title 14, § 2.12.
[63] Cal. Code Regs. Title 14, § 8.20.
[64] Cal. Fish & Game Code § 7155.
[65] Cal. Code Regs. Title 14, § 5.86.
[66] Cal. Fish & Game Code § 16006.
[67] Cal. Fish & Game Code § 16530.
[68] *Id.*
[69] Cal. Fish & Game Code § 16000; § 16006.

regarding the taking of fish from the Klamath River within the exterior boundaries of the Yurok Reservation.[70]

Last, the California Code of Regulations regarding Marine Protected Areas ("MPAs"), Marine Managed Areas ("MMAs"), and special marine area closures include certain exemptions applicable to specific Tribes, locations and times.[71] These regulations require compliance with otherwise applicable provisions of the California Fish and Game Code for fishing in State marine and estuarine waters, including the requirement to hold a State-issued fishing license or other required permit when conducting traditional tribal fishing, harvesting or gathering in MPAs and with "current seasonal, bag, possession, gear and size limits in existing Fish and Game Code statutes and regulations of the" Fish and Game Commission.[72]

Despite Tribes' historic and continued use of fishery resources, State laws recognizing tribal rights to continue practicing traditional fishing in their aboriginal territorial waters are all limited to specific Tribes and species of fish taken at designated places and times. California law does not currently provide a general tribal right to fish outside reservation boundaries.

C. *State Laws Governing Tribally-Specific Rights to Hunt on State Lands*

California's hunting regulations include a short provision that allows Tribes to transport off-reservation game birds and mammals taken on the reservation under certain conditions.[73] However, there are no State laws, regulations or policies that directly authorize hunting by tribal members on State lands.[74] Nonetheless, CDFW is pursuing innovative ways to accommodate

[70] Cal. Fish & Game Code § 16530.
[71] Cal. Code Regs. Title 14, § 632(a)(11); § 632(b).
[72] Cal. Code Regs. Title 14, § 632(a)(11).
[73] Cal. Code Regs. Title 14, §251.8.
[74] More than 40 years ago, the California Supreme Court suggested that either the State Legislature or the Fish and Game Commission should grant "limited hunting privileges on [tribal] ancestral lands consistent with the requirement of conservation." *In re Wilson,* 30 Cal. 3d 21, 36 (1981). Noting that neither the Legislature nor the

tribal hunting based on long-standing cultural practices. Two examples are noteworthy. In 2020, CDFW entered into a Memorandum of Agreement ("MOA") with the Bishop Paiute Tribe authorizing the Tribe under a scientific collecting permit to take 12 deer in seven deer hunting zones outside the Tribe's Reservation within the General season and to further take four deer in two such hunting zones during July, August and September before the General seasons.[75] One of the stated purposes of the MOA is to recognize that the Tribe considers access to culturally-important wildlife as essential to its economic self-sufficiency; preservation of Tribal heritage, cultural practices and identity as Paiute people; and crucial to the Tribe's health because it enables reliance on indigenous foods through hunting and fishing.[76] The MOA also recognizes that the Tribe's traditional knowledge and cultural practices can facilitate the management of wildlife resources.[77]

In 2021, CDFW entered into a MOA with the Bear River Band of the Rohnerville Rancheria, which authorizes Tribal Fishers to take under a scientific collecting permit within its ancestral territory up to 15 lamprey per day and to possess up to 30 lamprey at any time.[78] For three species of lamprey with special traditional or cultural significance, up to 10 elders identified by the Band may take these species out of season pursuant to the MOA and the scientific collecting permit.[79] While fishing within the Band's ancestral territory, Tribal Fishers are not required to have a state fishing license, provided they have in their possession a photo

Commission faced legal impediments to such recognition, the Court "commend[ed] such a course to these two governmental bodies." Neither body has acted on the Court's advice.

[75] Memorandum of Agreement Between the California Department of Fish and Wildlife and the Bishop Paiute Tribe, January 21, 2020.

[76] *Id*.

[77] *Id*.

[78] Memorandum of Agreement Between the California Department of Fish and Wildlife and the Bear River Band of Rohnerville Rancheria (June 21, 2021), Section VI(C)("Exceptions to State Take Regulations).

[79] *Id*. at Sec. VI(C)(3).

identification Tribal Fisher License issued by the Band.[80] The MOA also includes provisions for the Band and CFFW to share fish harvest data, to jointly conduct research related to the management of fish and wildlife and their habitats and to cooperate on measures to protect fish and wildlife resources from degradation.[81]

D. *State Laws Governing Tribally-Specific Rights to Gather on State Lands and Waters*

Tribal gathering practices on State lands and waters are severely inhibited by a combination of restrictive State laws, overuse and population collapse caused by climate change. This is particularly true for state-managed coastal lands and marine waters. Overharvesting by non-Indian harvesters, accelerating climate change and other environmental factors contribute to a decline in culturally important species that has made tribal members' gathering of traditional marine foods and medicines increasingly difficult. That State rules do not take into account the unique nature of the Tribes' cultural gathering practices, or tribal communities' unique cultural and dietary needs exacerbates the difficulty.

Three species of high cultural importance to Tribes are abalone, seaweed and smelt (surf fish).[82] For decades, Tribes have contended that take limits for these species imposed by the State upon tribal members are unjust and unreasonable, whether categorized as recreational or, in the case of some species, commercial take.[83] They have pointed out that these species are necessary for tribal health and wellbeing, and that overharvest by commercial and recreational

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[80] *Id*. at Section VI(C).
[81] *Id*. at Section VII.
[82] "Informing the North Coast MPA Baseline: Traditional Ecological Knowledge of Keystone Marine Species and Ecosystems," A Collaborative Project Among: Tolowa Dee-ni' Nation, InterTribal Sinkyone Wilderness Council, Cher-Ae Heights Indian Community of the Trinidad Rancheria, and the Wiyot Tribe (May 2017), Executive Summary, Sec. I, https://caseagrant.ucsd.edu/sites/default/files/39-Rocha-Final.pdf
[83] *See generally*, Curtis G. Berkey and Scott W. Williams, "California Indian Tribes and the Marine Life Protection Act: The Seeds of a Partnership to Preserve Natural Resources," 43 *Am. Ind. L. Rev.* 307, 325-329 (2018-2019).

harvesters has been a key factor in the decline of these and other marine species.[84] Tribes have also objected to CDFW and the Fish and Game Commission that their traditional harvest of these and other species is neither recreational nor commercial in nature.[85] Members of the public and tribal members who harvest some kinds of seaweed are required to abide by regulations governing recreational harvest, including rules applicable to marine protected areas,[86] and the State's Ocean Sport Fishing Regulations.[87]

In 2018, CDFW closed the abalone harvest season due to drastically declining numbers,[88] and subsequently extended the closure to April 1, 2026, in order to give the species a chance to recover.[89] Kelp provides essential habitat and food for abalone.[90] Since 2016, kelp forests along California's north coast have suffered severe and continuing declines that are likely to persist, thus contributing to the continued decline of abalone.[91] Increasing proliferation of purple urchin continues to prevent kelp from regenerating along vast stretches of the north coast.[92]

California law also prohibits anyone from cutting, destroying, mutilating, or removing plant materials that are growing upon State or county highway rights-of-way, public land or private land without permissions from the owner.[93] A violation of § 384a is a misdemeanor, punishable by a fine of up to $1,000, imprisonment in county jail for not more than six months,

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[84] *Id.*
[85] *Id.*
[86] Cal. Code Regs. Title 14, § 632.
[87] Title 14, California Code of Regulations.
[88] North Coast Red Abalone Fishery Closed for 2018, California Department of Fish and Wildlife (April 2, 2018), https://cdfgnews.wordpress.com/2018/04/02/north-coast-red-abalone-fishery-closed-for-2018/
[89] The Recreational Red Abalone Fishery To Remain Closed Until 2026, California Department of Fish and Wildlife (March 19, 2021), https://wildlife.ca.gov/News/the-recreational-red-abalone-fishery-to-remain-closed-until-20261
[90] "Perfect Storm" Decimates Northern California Kelp Forests ("Perfect Storm"), California Department of Fish and Wildlife (March 30, 2016), https://cdfwmarine.wordpress.com/2016/03/30/perfect-storm-decimates-kelp/
[91] Richie Hertzberg, "California's disappearing sea snails carry a grim climate warning," National Geographic (Aug. 20, 2019) https://www.nationalgeographic.com/environment/2019/08/red-abalone-closure-kelp-die-off-documentary-environment/#close
[92] See Perfect Storm, *supra* note 90.
[93] Cal. Penal Code § 384a.

or both.[94] In addition, the California Desert Native Plants Act prohibits the unlawful harvesting of California desert native plants on both public and privately owned lands within the boundaries of Imperial, Inyo, Kern, Los Angeles, Mono, Riverside, San Bernardino, and San Diego counties.[95] The California Department of Parks and Recreation also prohibits picking, digging up, cutting, disturbing, moving, or carrying away trees, plants, flowers, fruits, berries on State park lands unless otherwise authorized by the District Superintendent.[96]

However, tribal gatherers conducting such activities as part of religious practices may be exempt from these prohibitions. State law provides that neither a State agency nor a private party using, occupying, or operating on State lands "may interfere with the free expression or exercise of Indian religion."[97] For many Indian Tribes, gathering sites are places where traditional practitioners go to gather materials used in ceremonies. These gathering sites are often located outside reservation boundaries, on State lands. Therefore, the inability to access and gather on State lands may interfere with some tribal religious practices.

Arguably, tribal ceremonial gathering practices on State lands should be authorized and protected as an expression of religious rights or as a religious practice under Public Resources Code § 5097.9. There are no cases or State policies providing guidance on the circumstances under which tribal gathering should be treated as the exercise of religious rights. The California Constitution obligates State agencies to respect the free exercise of religion by California citizens and to accommodate religious practices, provided such accommodation does not amount to endorsement of a particular religion.[98] The extent to which tribal gathering as an expression of

[94] Cal. Penal Code § 384a(f).
[95] Cal. Food and Agricultural Code §80001 et seq.
[96] Cal. Code Regs. Title. 14, § 4306.
[97] Cal. Pub. Resources Code, § 5097.9.
[98] California Constitution, Article I, Section 4.

religious practice implicates these constitutional provisions is beyond the scope of this Report. However, the principle that neither courts nor State officials may question the sincerity of professed religious belief, nor the religious basis of individual practices suggests that State agencies should be sensitive to the spiritual element of many tribal gathering, hunting, and fishing practices.

State laws and regulations prohibiting and restricting tribal gathering practices on State lands stand in stark contrast to federal law, which has many provisions allowing tribal gathering on federal land. For example, pursuant to the National Park Services' federal regulations, Tribes may enter into agreements with the Superintendent that authorize the Tribe to practice traditional gathering and removal of plants or plant parts for traditional purposes on National Park lands.[99] In fact, Congress has in certain instances explicitly directed the Secretary of the Interior to allow traditional gathering practices on federal lands by members of California Indian Tribes.[100] The Secretary of the Interior also issued Order No. 3342, which directs bureaus within the Department of the Interior including the National Parks Service, the Bureau of Land Management, and the Fish and Wildlife Service, to identify opportunities for cooperative management arrangements and collaborative partnerships with federally recognized Indian Tribes in the management of federal lands and waters.[101]

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[99] 36 CFR § 2.6.; *see* Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes, 81 FR 45,024 (adopting final rule authorizing agreements between the National Park Service and federally recognized Tribes that "facilitate the continuation of tribal cultural practices on lands within areas of the National Park System where those practices traditionally occurred").

[100] 81 Fed. Reg. 45024, 45028 n.5 (July 12, 2016) (*see* e.g., § 5(e) of the Timbisha Shoshone Homeland Act, Public Law 106-423, 114 Stat. 1875, 1879 (2000) directing Secretary of Interior to permit Timbisha Shoshone Tribe's continued use of park resources in "special use areas" in Death Valley National Park, California, "for traditional tribal purposes, practices, and activities," not including the taking of wildlife).

[101] Secretarial Order No. 3342 (Oct. 21, 2016), https://www.doi.gov/sites/doi.gov/files/uploads/so3342_partnerships.pdf (last visited Nov. 29, 2019).

State officials have attempted to redress the absence of State law authorizing tribal access to State lands for gathering purposes. In 1978, the California State Senate filed Senate Concurrent Resolution No. 87 - Relative to Native American gathering sites on State lands with the Secretary of State.[102] The Resolution acknowledges the importance to the Tribes and tribal peoples of gathering natural materials on lands across the State, and directs the State Lands Commission to lease three parcels of land, at no cost, to the Native American Heritage Commission ("NAHC") for traditional gathering purposes.[103] Senate concurrent resolutions are typically only used to address the business of the Legislature itself and they do not have the force of law. To the best of our knowledge, this Resolution has not been implemented. Neither the NAHC nor the State Lands Commission responded to requests for clarification of the status of the Resolution.[104] Neither agency could confirm that the three parcels have been leased to the NAHC.

III. Possible Legal Bases for Tribal Rights on State Lands and Waters

Federal law permits states to regulate most tribal activities off-reservation. Nevertheless, there are four potential legal bases that support extension of tribal authority beyond reservation boundaries: treaty rights, aboriginal title, by implication from statutes or executive orders and preemption of state law. Some of these bases raise novel questions of law, while others stand on more sure legal footing. All of them bolster the case for changes to California law and policy that accommodate tribal cultural use rights and co-management goals on State lands.

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[102] California Senate Concurrent Resolution Number 87 - Resolution Chapter 104 (Garamendi) (on file with author); *see* Glossary of Terms, California State Senate, https://www.senate.ca.gov/glossary#c ("A measure introduced in one house that, if approved, must be sent to the other house for approval. The Governor's signature is not required. These measures usually involve the internal business of the Legislature").

[103] *Id*.

[104] The authors contacted both NAHC and the State Lands Commission in the Summer of 2020. Due to the COVID-19 pandemic, understaffing and various other issues, the authors did not receive follow up information or clarification.