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

By:
Curtis Berkey
Erica Costa
Aviva Simon

Berkey Williams LLP
430 D Street
Davis, CA 95616
Tel: 510-548-7070
E-mail: cberkey@berkeywilliams.com
E-mail: ecosta@berkeywilliams.com
E-mail: asimon@berkeywilliams.com

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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

[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

[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]

[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.

A. *Treaties*

Treaties may be the basis for off-reservation resource-harvesting rights that the State must respect. A treaty is a written agreement that establishes obligations between two or more sovereign governments. Tribal treaties are to be interpreted according to the federal Indian law canons of construction: liberally in favor of Indians, as Indians would have understood them, with ambiguities resolved in favor of Tribes.[105] Courts developed these canons in acknowledgment of several factors. First, tribal treaties were plagued with communication difficulties between the Tribes and the treaty negotiators. Second, tribal treaties were not negotiated between two parties with equal bargaining power. Finally, during the negotiations, Tribes were unlikely to have understood the legal ramifications of the exact wording of their treaties.[106] For these reasons, courts typically apply the canons of construction when interpreting treaties, and the rule has been extended in part to the interpretation of federal statutes, and executive orders as well.

When a treaty reserves land to a Tribe, tribal ownership necessarily includes full hunting, fishing, and gathering rights.[107] Some Tribes as well negotiated for legal guarantees that they would be allowed to continue hunting, fishing and gathering in the areas that were ceded by the treaty.[108] Treaty-reserved hunting, fishing, and gathering rights on off-reservation lands are akin to easements running with the burdened lands, and include easements to access hunting, fishing,

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[105] *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 n.5, 196, 200 (1999).
[106] *See, e.g., Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 667 n. 10 (1979).
[107] *See, e.g., Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968) (reservation of lands "to be held as Indian lands are held" necessarily included rights to hunt and fish on those lands).
[108] For example, 24 Tribes in Washington State have off-reservation hunting rights in areas ceded by treaties. *See, e.g.,* Treaty of Medicine Creek of 1854 with the Puyallup, Nisqually, Muckleshoot and Squaxin Island Tribes.

and gathering sites.[109] These treaty-reserved easements, like the treaty rights themselves, are fifth amendment property rights which cannot be taken without just compensation.[110]

There are only three treaties with California Tribes that have recognized legal effect. The first of the three legally valid treaties is the Kashia[111] Treaty with the Russian American Company, dated September 22, 1817.[112] The Treaty was entered into by the Kashia Band of Pomo Indians and the Russian American Company, a fur trading company charged by the Russian Tsar with establishing trading posts and colonizing the Pacific Coast in Russia's name. This Treaty is legally equivalent to a treaty with one of the original thirteen colonies in the eastern U.S., which have been held to be valid and enforceable under state law.[113] The Kashia Treaty is essentially a peace treaty: the Russians expressed their thanks for allowing the Company to build Fort Ross on Kashia land and hoped the Tribe would "never have reason to regret having Russians as their neighbors," and the Kashia stated they were pleased for the protection from other Tribes that came with the Russians' presence.[114] If the Tribe's concept of protection included the ability to hunt, fish, and gather in their aboriginal territory without

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[109] *United States v. Winans,* 198 U.S. 371, 381 (1905) ("[the treaties] imposed a servitude upon every piece of land as though described therein").

[110] *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1510 (W.D. Wash. 1988); *see also United States v. Welch*, 217 U.S. 333, 338-339 (1910) (easements are property rights requiring just compensation when taken by the federal government).

[111] Most translations of the Treaty spell the Tribe's name "Kashaya." We use "Kashia," the contemporary spelling used by the Kashia Band of Pomo Indians.

[112] *Treaty Between the Kashaya Pomo and the Russian American Company,* published in Vine Deloria, Jr. and Raymond J. DeMallie, *supra,* Vol. 1 at 175.

[113] For example, the Supreme Court of Virginia has held to be valid and enforceable under Virginia law a 1677 treaty between the Powhattan Indians and colonial representatives of King Charles of England, known as The Treaty at Middle Plantation with Tributary Indians After Bacon's Rebellion, May 29, 1677. The Virginia Supreme Court ruled that the Treaty is valid today, inasmuch as the Treaty's language "guaranteed to the Indians the right to obtain full relief as permitted under the law." *Alliance to Save the Mattaponi v. Commonwealth,* 270 Va. 423, 621 (2005).

[114] Spencer-Hancock, Diane, et al. "Notes to the 1817 Treaty between the Russian American Company and Kashaya Pomo Indians." 59 California History 4, 306–313 (1980), www.jstor.org/stable/25158003.

interference from the Russians, this Treaty might serve as the basis for such a right enforceable against California.

A second treaty was signed in 1855 between the Tolowa Dee-ni' Nation and the Klamath and Coast Rangers, two California State militia companies. The Tolowa Treaty prohibits interference with "fishing and hunting [by Tolowa members] at their pleasure."[115] The remaining provisions relate to keeping the peace between the Nation and the white settlers in the Smith River Valley (which were ineffective to achieve that goal).[116] With no geographic limitation on the scope of the fishing and hunting right explicitly agreed to, this Treaty provides a credible basis for an off-reservation fishing and hunting right on State land within the Nation's traditional territory. There are credible legal arguments that the 1855 treaty is a compact between the Tolowa Dee-ni' Nation and California.[117]

The third treaty was entered into by the Hoopa Valley Tribe and the United States on August 6, 1864.[118] This Treaty appears to have been used to select and establish the reservation authorized by an 1864 federal statute.[119] The Treaty established the right to hunt and gather in a "sufficient area of the mountains on either side of the Trinity River" outside the reservation created by the same treaty and by statute.[120] It is not known whether the area designated for hunting and fishing was ever mapped or otherwise demarcated. In its failure to specify the geographic area in which off-reservation rights may be exercised, the 1864 Treaty is similar to many other treaties with Tribes outside California.

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[115] https://www.tolowa-nsn.gov/tolowaculture/our-lands/the-acquisition-of-xaa-wan-kwvt/; *Crescent City Herald*, January 17, 1855 (H.H. Bancroft Collection – Bancroft Library) publication of Treaty language is on file with the authors.
[116] *Id*.
[117] The 1855 Treaty was negotiated between the Nation and California militia troops, organized by the State of California as an extension of California's constitutional power to "call for the militia."
[118] Act of April 8, 1864, 13 Stat. 39, http://www.dcn.davis.ca.us/~ammon/tsnungwe/1864treaty.html
[119] *Id.*
[120] *Id.*

The U.S. Supreme Court has repeatedly affirmed the validity of off-reservation treaty rights to hunt and fish.[121] Most recently, in *Herrera v. Wyoming*, 187 U.S. __ (2019), the Court found that a Crow tribal member's treaty-guaranteed right to hunt on "unoccupied lands of the United States" allowed him to hunt elk within the Bighorn National Forest, several miles from the Crow Reservation boundary. The Court has similarly upheld off-reservation fishing rights in *Washington v. United States* under treaty language protecting numerous Northwest Tribes' "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of [Washington] Territory."[122] Applying the Indian canons of construction, the *Washington* Court found it was "perfectly clear…that the Indians were vitally interested in protecting their right to take fish at usual and accustomed places, whether on or off the reservations," and therefore the treaty must be interpreted as confirming the Tribes' rights to fish off-reservation as well as on.[123]

Of the three, the Hoopa Valley Treaty most assuredly reserves the Tribe a right to harvest resources off-reservation. Whether the Kashia and Tolowa Treaties confirm this same right depends in large part on whether the federal Indian canons of construction apply to state treaties, a novel legal question which we leave for another day.

B. *Aboriginal Title*

A second legal basis Tribes have for taking and managing resources off-reservation on State lands is aboriginal title. Before California became a State and lands were transferred to it through the public domain process, Tribes owned and occupied millions of acres of land. Under

[121] *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172 (1999).
[122] *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979).
[123] *Id.* at 667.

the doctrine of aboriginal title, there is an argument that the Tribes still hold a form of title to those lands today.

Aboriginal title to land[124] is a type of property ownership recognized in the original occupants of the land. A Tribe with aboriginal title to an area of land has a "collective right to occupy and use the land as it sees fit."[125] This right necessarily includes hunting, fishing, and gathering on the land.[126] One could also argue that, as in the case of treaty hunting, fishing, and gathering rights, aboriginal title encompasses a right to engage in co-management activities such as habitat protection.

Spain, Mexico, and the United States have all recognized the doctrine,[127] and the U.S. Supreme Court has confirmed that aboriginal title is as "sacred as the fee simple of the whites."[128] A claim based on aboriginal title is good against all but the United States.[129] Aboriginal use rights continue to be enforceable until they are voluntarily conveyed to the United States, abandoned, or expressly extinguished by federal statute.[130]

To demonstrate aboriginal title, a Tribe must show (1) actual and continuous use, (2) exclusive use and occupancy, (3) for a long time.[131] Most, if not all, California Tribes could likely establish a *prima facie* case for aboriginal title under this standard. Whether Tribes have a right to pursue these activities today on State lands, then, turns on the question of whether their

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[124] There could also be an aboriginal water right component to this tribal title. Aboriginal water rights are beyond the scope of this Report.

[125] Cohen, Federal Indian Law (2012 ed.) at §15.04[2], citing *Johnson v. M'Intosh,* 21 U.S. 543 (1823); *US. v. Winans,* 198 U.S. 371 (1905).

[126] Cohen, Federal Indian Law (2012 ed.) at §18.01.

[127] *Johnson* at 574-76; *United States v. Candelaria,* 271 US 432, 442 (1926); *Chouteau v. Molony,* 57 U.S. 203, 229 (1953).

[128] *Johnson v. M'Intosh,* 21 U.S. (8 wheat.) 543, 574 (1823); *see also US v. Santa Fe Pac. R. Co.,* 314 U.S. 339, 345 (1941).

[129] Cohen, Federal Indian Law (2012 ed.) at §18.01.

[130] *Santa Fe,* 314 U.S. at 347, 353.

[131] *See Pueblo of Jemez v. United States,* 790 F. 3d 1143 (10th Cir. 2015).

aboriginal title survives to this day. Judging by the weight of judicial authority, the answer might appear to be yes, although the payment of the money judgment in several claims court cases has been held to prelude assertions of aboriginal title today,[132] and the failure of Tribes to submit their land claims based on Mexican land grants to a claims commission by 1855 has been held to have extinguished aboriginal title to those lands.[133] However, the grounds on which those preclusive bars may be distinguished regarding California Indian Tribes, which are credible, have not been fully examined by any court. The key point for State agencies is that the Tribes, regardless of the evolution of legal doctrine, tie their use and access to traditional areas on State land and waters to aboriginal cultural practices that have some recognition in the law.[134]

C. *Implied from Statutes or Executive Orders*

Off-reservation use and access rights may also be implied from the creation of Indian reservations by statutes or executive orders.[135] Whether these rights may be implied turns on the intent of Congress or the President in creating the reservation: did they intend the Tribe would have the ability to take fish, game, and plants beyond the reservation in order to sustain itself?

This would largely be a case-by-case inquiry for each California Tribe, looking to the statute or executive order that created the Tribe's reservation. However, there is one statute worth examining for the inferences that could be drawn from it for California Tribes generally.

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[132] *See, e.g., United States v. Dann,* 470 U.S. 39 (1985).
[133] *Barker v. Harvey,* 181 U.S. 492 (1901).
[134] Although the aboriginal title has rarely arisen in legal disputes between the State and Indian Tribes, the State's lawyers have argued that the United States has extinguished aboriginal title throughout the entire State, and that this "undeniably harsh result" is excused by the plenary power of the Congress, even though aboriginal title claims "serve as a reminder of events that should not go unnoticed or forgotten by future generations." The authors, both of whom were deputy attorney generals of California at the time, do not explain how noticing or remembering that aboriginal title once existed promotes justice or collaborative partnerships between the State and Tribes on natural resource issues of mutual concern. Bruce S. Flushman and Joe Barbieri, "Aboriginal Title—The Special Case of California," 17 *Pac. L. J.* 391, 459-460 (1986).
[135] *Confederated Tribes of Chehalis Reservation v. Washington,* 96 F. 3d 334 (9th Cir. 1996); *Walton,* 647 F.2d 412 (9th Cir. 1981); *Metlakatla Indian Community v. Dunleavy,* No. 21-35185, Opinion, (9th Cir. 2022).

In the Act of March 3, 1853, Congress provided for the survey of California land, and for much of the surveyed land to then be conveyed either by gift or by sale from the United States public domain to the State of California, the railroads, and white settlers – with one notable exception. Congress explicitly exempted from conveyance lands occupied by Indians.[136] Section 6 of the Act states that "this act shall not be construed to authorize any settlement to be made on any tract of land in the occupation or possession of any Indian Tribe, or to grant any preemption right to the same."[137]

The statute remains good law today, and this little-known clause within it shows that Congress intended to protect Indians' right to occupy and use land in California. Moreover, applying the Indian law canons of construction, the Act amounts to federal acknowledgement of the Tribes' aboriginal title, at least as to lands "occupied" or "possessed"[138] at the time of the statute's passage. As discussed above, aboriginal title includes the right to hunt, fish, and gather. Thus, it can be inferred from the 1853 Act that the Tribes have use rights on these lands. Faithful adherence to the protections of the 1853 Act would require California to respect the exercise of those rights on public lands today. Considering that in 1853, substantial areas of the State were still under the use and occupation of Indian Tribes, the geographic scope of the legal effect of the 1853 Act could be extensive.

A likely objection to this "implied rights" theory is that the California Rancheria Termination Act[139] terminated the legal existence of certain Tribes and also extinguished all off-

[136] 10 Stat. 244
[137] *Id*.
[138] These words themselves are subject to considerable interpretation. A narrow view applying Eurocentric concepts of property ownership and use might limit occupation and possession to the land where tribal members had their homes. A broader view would take into account tribal property and land use practices which involved a large sustaining area beyond village site(s).
[139] Public Law 85-671 (72 Stat. 619)

reservation rights they might have held. However, there is case law rebutting that conclusion as to several Tribes in California.[140] Termination alone does not automatically extinguish use rights.[141]

D. *Tribal Sovereignty*

A fourth legal basis under which Tribes may assert authority to hunt, fish, gather, and manage cultural landscapes and seascapes outside reservation lands is each Tribe's inherent sovereign authority over the conduct of its members on its aboriginal or traditional territory, including land that lies beyond that reserved to the Tribe. Under this theory, tribal regulation preempts State regulation as a matter of federal law.[142]

Tribes are sovereign governments with inherent powers. As sovereigns, Tribes have authority to regulate the conduct of their members. Tribal powers of self-government are recognized by the U.S. Constitution, federal and California legislation, treaties, judicial decisions, and administrative practice. Neither the passage of time nor the apparent assimilation of native peoples diminishes a Tribe's status as a self-governing entity. Tribal regulatory jurisdiction is territorial, meaning it extends over the Tribe's reservation.[143] A Tribe also has regulatory jurisdiction over its own citizens, or members.[144] This membership-based jurisdiction

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[140] *See, e.g., Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 766 (1985) (Klamath treaty hunting, fishing, and gathering rights survived termination).

[141] *See Menominee Tribe v. United States*, 391 U.S. 404 (1968) (tribal treaty rights not extinguished by termination where the Termination Act was silent as to its effect on treaty rights, and Public Law 280, to which the Tribe was then subject, expressly disclaimed any effect on reserved hunting, fishing, and gathering rights).

[142] *See, e.g., Settler v. Lameer*, 507 F.2d 231, 239 (9th Cir. 1974) (addressing whether the Yakima Indian Nation could enforce its fishing regulations with respect to violations committed by Tribal members outside the reservation by arresting and trying violators upon their return to the reservation); *see also* Guy Charlton, *The Law of Native American Hunting, Fishing and Gathering Outside of Reservation Boundaries in the United States and Canada*, 39 Can.-U.S. L.J. 69, 109-113 (2015), https://scholarlycommons.law.case.edu/cuslj/vol39/iss/5.

[143] Cohen, Federal Indian Law (2012 ed.) at §4.01[1][a].

[144] *See, e.g., New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 330 (1983) (recognizing inherent tribal authority to regulate hunting and fishing on reservation without state interference).

does not stop at the reservation boundary; it continues off-reservation.[145] Therefore, Tribes may authorize and regulate hunting, fishing, and gathering practices of their own members beyond the reservation on State lands.

Tribes have a very strong interest in regulating their members' off-reservation hunting, fishing, and gathering rights.[146] Being able to exercise these rights helps members reconnect with their traditional lands and helps ensure that tribal citizens adhere to tribal law and values. These lands may hold spiritual meaning for those whose ancestors lived on them for generations, since time immemorial. Practices such as hunting deer and elk, fishing for salmon, and gathering seaweed, kelp, acorns, or basketry materials physically nourish and sustain tribal members. They also promote social cohesion, and enable tribal knowledge-bearers to pass down cultural knowledge to the next generation of tribal members.

Courts considering who has authority to regulate tribal members' off-reservation exercise of their reserved rights have found that Tribes and states generally possess concurrent authority to regulate, in the interests of conservation.[147] However, where a Tribe is able to effectively regulate its members' off-reservation hunting, fishing, and gathering activities, tribal jurisdiction may preempt state authority.[148] Here, safeguarding identity, culture, and physical sustenance are strong sovereign interests. California Tribes may enjoy at minimum concurrent, and in some cases exclusive, authority to allow their members to hunt, fish, and gather off-reservation on State lands.

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[145] *See Settler v. Lameer*, 507 F. 2d 231, 236 (9th Cir. 1974).
[146] *See* Cohen, Federal Indian Law (2012 ed.) at §18.01 ("hunting, fishing, trapping, and gathering…'were not much less necessary to the existence of the Indians than the atmosphere they breathed.'") (citing *United States v. Winans*, 198 U.S. 371 (1905)).
[147] *U.S. v. Washington*, 520 F.2d 676, 686 n.4 (9th Cir. 1975).
[148] Cohen, Federal Indian Law (2012 ed.) at §18.04[3][a]; *United States v. Washington*, 520 F. 2d 676, 686 n.4 (9th Cir. 1975).

IV. Policy Rationales for Recognizing Tribal Rights and Management Authority Over State Lands and Waters

Among the rationales for changing California's policy and law to provide a meaningful role for Tribes in the cultural use, tending and management of the State's lands, the moral bases for such action may be the most compelling. Framing the issue in moral terms allows consideration of the history of genocide, forced removal, slavery, violence, and land theft at the hands of the State. Most likely there would be no public lands in California without the massive fraudulent dispossession of Indian Tribes from their traditional lands, whether by the shameful concealment of unratified treaties or by outright seizure and encroachment on tribal lands.

Beginning in 1851, it was the official policy of the State of California to exterminate Indian Tribes. Governor Burnett included the following statement in his annual message: "[That] a war of extermination will continue to be waged between the two races until the Indian race becomes extinct, must be expected. . . …. [T]he inevitable destiny of the [Indian] race is beyond the power and wisdom of man to avert."[149] By the beginning of the twentieth century, the Indian population had declined by more than 90 percent.[150]

Governor's Newsom's Executive Order N-15-19 officially recognizing the State's leading role in the decimation of tribal peoples and their cultures and lands begs the question of what should be done about this history.[151] The tentative steps the Governor has taken to address these injustices are a laudable good start to an historical reckoning,[152] but those actions should be the beginning not the end of restorative measures.

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[149] Quoted in Robert F. Heizer and Alan F. Almquist, *The Other Californians: Prejudice and Discrimination Under Spain, Mexico, and the United States to 1920-22*, U. Cal. Press 1971.
[150] Field, Margaret A., "Genocide and the Indians of California, 1769-1873" (1993). Graduate Masters Theses. Paper 141 at 11.
[151] Executive Order N-15-19.
[152] *See* Native American Ancestral Lands Policy, *supra* note 3; *see also* Executive Order B-10-11; *see also* Executive Order N-15-19; *see also* Executive Order N-82-20; *see also* California Truth and Healing Council, https://tribalaffairs.ca.gov/cthc/

Policy changes as a form of historical redress may be justified by several permutations of the concept: restorative justice; fulfilling unkept promises; environmental justice and environmental benefits. Restorative justice is a notion that has gained currency in the criminal sentencing context, but its application to the tribal policy area is less well developed. Policy changes may also be sustained on the rationale that authorizing use and management of State lands and waters by Tribes in part fulfills promises the United States made in 1851 and 1852 in treaties that the State blocked from ratification in the U.S. Senate. Policy changes to redress the impacts of the unratified treaties may be viewed as a form of environmental justice. Finally, policy changes may be warranted because they contribute environmental benefits accruing from tribal stewardship and co-management of State lands and waters.

A. *Restorative Justice*

Broadly conceived, restorative justice is the notion that systems of law should focus on repairing the damage done by violation of legal norms and prescriptions.[153] At its heart, the goal is to restore the relationships that were harmed by such actions.[154] In the tribal context, the premise of restorative justice is that the admission of historical injustice by the State is the first step to restoring relationships of integrity and mutual respect. This rationale for policy change could be advantageous in deliberating the nature and scope of tribal use and management because it would allow the State and Tribes to acknowledge that the trauma tribal communities feel today from these historical events is a significant impediment to restoring harmonious relationships. The fundamental components of the legal relationship between California and Indian Tribes, modeled on the federal government-to-government association with Tribes, have

[153] *See generally,* Gordon Bazemore and Maria Schiff, *Restorative Community Justice: Repairing Harm and Transforming Communities* (2001).
[154] *See* Robert Yazzie, "Life Comes From It: Navajo Justice Concepts," 24 New Mex. L. Rev. 175 (1994).

been dramatically altered by federal legislation and State intrusions into tribal sovereignty and impediments to self-determination. Although the federal termination of the sovereign status of Indian Tribes in the 1950s did not, as an abstract legal matter, deprive Tribes of their sovereign relationship with the State, both the State's neglect and mistreatment and the federal extinguishment of tribal sovereignty, have as a practical matter gravely injured the Tribes' relations with California.

There is much to restore from the dark history of California's treatment of Tribes. Empowering Tribes to revitalize their cultural connections to what are now public State lands and waters could serve as the centerpiece of a broad effort to re-establish consonant relations. Restorative justice may also be an appropriate rationale because legal recognition of the Tribes' ability to use or manage State lands and waters would reconnect them to specific places and sites that contain plants and animals that are central to their cultural identities and practices. Restorative justice also puts the burden for redressing historical wrongs where it belongs, on the perpetrators of the injustice. Applying that concept to a state government as a whole is appropriate because the people who committed the atrocities against Indian Tribes in most cases were acting as State agents. The California State government today can implement this State responsibility without having to resolve complex questions of successor responsibility among individuals.

The remedies available under a restorative justice approach also make it suitable in the State lands context. Recognizing tribal rights to use, steward, and manage State lands and waters is a form of restitution for historical injustice, rather than a form of retribution. The goal of restoring good relations would be more likely met if restitution is provided to the victims, rather than punishing the perpetrators with a retributive remedy. As one scholar has noted:

> [o]nly a committed and holistic program of legal reformation as the capstone in a broader structure of remedies, including the restoration of Indian lands and the reconciliation between Indian and non-Indian peoples, can satisfy the preconditions for justice for the original peoples of the U.S.[155]

B. *Fulfilling Promises*

As noted, the United States and California negotiated 18 treaties with Indian Tribes between 1851 and 1852 that were never ratified. The consequence was that the Tribes lost millions of acres in their aboriginal territories without securing reservations or other benefits in exchange. Some scholars single out the chicanery over the unratified treaties as having "a more rapid destructive effect on [tribal] population and culture" than any other event in the sordid history of California-Indian relations.[156]

California Indians sued the United States to recover compensation for the loss of their lands, and recovered about forty-seven cents per acre, a value far below the market value.[157] An earlier lawsuit was filed to recover the value of the reservations that were promised but not provided, and that case resulted in a judgment of $5 million for all of the Tribes that had been promised reservations.[158] Although these cases were designed in part to rectify the historical injustice of the Senate's rejection of the treaties, they fell far short of that goal, because the calculation of damages was far below the market value of the land, and a purely economic theory of redress cannot adequately compensate for the loss of land that is the focus of tribal culture, economy and identity. Moreover, the State of California paid nothing in either of these cases so the Tribes received nothing from the State for its role in persuading the Senate to reject the

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[155] William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 Ohio St. L.J. 1, 103 (2005).
[156] Robert Heizer, *Treaties,* in *Handbook of North American Indians,* vol. 8, at 704 (1978).
[157] *Thompson v. United States,* 13 Ind. Cl. Comm. 369 (1964).
[158] *Indians of California v. United States,* 98 Ct. Cls. 562 (1942).

treaties. Legally, California may be seen as a third-party beneficiary of the failed treaty process; it was not a signatory but it benefited enormously by having nearly 67 million acres of land purportedly cleared of the aboriginal title claims of the Tribes. Much of that land ended up titled in the State or conveyed to California citizens through the homestead process under federal law.

California's recognition of the Tribes' right to fulfill their traditional cultural roles on State lands and waters that were traditional lands lost in the treaty process would in part fulfill promises made to the Tribes before the Senate rejected the treaties. Implicit in the treaties were promises that Tribes would have secure territories where their cultures and economies could thrive according to their own laws and customs. In other words, the Tribes would have a sustainable homeland. The United States Supreme Court recently affirmed the fundamental principle of federal Indian law that the United States and individual states should keep the promises they have made to Indian Tribes. [159] The Court's reliance on this simple but profound principle of basic fairness signals a new willingness to hold the United States and states to promises that are in many cases decades old.[160] In a comment that is pertinent here, the Court characterized U.S.-Indian history this way: "Yes, promises were made, but [some would say] the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking."[161] Although the return of all tribal land that was lost is not feasible, holding federal and state governments to their word in this context means working with Tribes for suitable arrangements for their cultural access, tending, use and management of State lands and waters.

[159] *McGirt v. Oklahoma,* 591 U.S.___ (2020).
[160] *Id*.
[161] *Id.*

C. *Environmental Justice*

Reconnecting Indian Tribes to their traditional lands that are now owned by California would also meet environmental justice goals. In California, the legal definition of environmental justice is the fair treatment and meaningful participation of people of all races, cultures and incomes in the development, implementation and enforcement of environmental laws, regulations and policies.[162] As set forth in state policies, the goal of environmental justice, however, is much broader: to require or encourage State agencies to take affirmative steps to remedy environmental degradation or hazards that fall disproportionately on the poor and minorities.

Several California State agencies have adopted environmental justice policies specifically directed at Indian Tribes designed to meet this remedial goal. And other State agencies seek to implement environmental justice goals without adoption of a formal policy statement. As of 2018, California's cities and counties are required to include an environmental justice element in their General Plans.[163] The State Lands Commission has adopted an Environmental Justice Policy that acknowledges that State history and practices resulted in lost opportunities for Indian Tribes to "gather or grow food, hunt or fish, or practice traditional medicine" on State lands.[164] The Policy establishes a goal to "[h]onor the importance of Tribes' ancestral homelands," and to support "opportunities to advance traditional use and enjoyment of ancestral lands by Native Nations by facilitating and prioritizing access and use, restoration, and management of state-owned lands by Tribes with historical connections to the land."[165]

[162] Cal. Gov. Code § 65040.12.
[163] Cal. Gov. Code § 65302(h)(2).
[164] *California State Lands Commission, Environmental Justice Policy*
[165] *California State Lands Commission, Environmental Justice Policy* at 4.

The California Coastal Commission unanimously adopted an Environmental Policy in 2019 based on the fact that "tribal and indigenous communities with cultural ties to the coast depend on access to ancestral lands and sacred sites to maintain traditional practices."[166] The Policy commits the Commission to working "collaboratively with Tribes to better understand the significance of local and regional cultural concerns" including "access to and protection of areas of cultural significance, ethnobotanical resources, traditional fishing and gathering areas, and sacred sites."[167]

The Ocean Protection Council's ("OPC") Strategic Plan for the next five years adopts the goal of promoting equitable treatment of Tribes in ocean and coastal policies, based on the premise that "[t]ribal communities have been exemplary stewards of California's coastal resources for thousands of years and the state has much to learn from their experience and traditional knowledge."[168] The Plan calls on the OPC to develop strategies for more effective partnerships with Indian Tribes, including specifically formulation of a "trusted pathway for the consideration of Traditional Knowledge/Traditional Ecological Knowledge in ocean and coastal management decisions"; stronger support for tribal access to "enhance [tribal] connections to their ancestral lands and waters;"[169] and development of partnerships with coastal tribal communities to formulate strategies to ensure sensitive or sacred coastal areas are protected against degradation from public use.[170]

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[166] *California Coastal Commission, Environmental Justice Policy* at 3.
[167] *Id*. at 6.
[168] Ocean Protection Council, "Strategic Plan to Protect California's Coast and Ocean 2020-2025 at 20.
[169] *Id.* at 21.
[170] *Id.*

D. *Environmental Benefits*

There is growing awareness among State agencies, natural resource scientists, and environmental managers that indigenous methods of land and resource management may be more efficacious in protecting, conserving and sustaining the natural world and the species that depend on it. Empirical studies are documenting this phenomenon. For example, a recent article in *BioScience* analyzed fishing technologies, harvest practices and governance practices of Indian Tribes regarding Pacific salmon, and concluded that revitalizing such traditional systems of salmon management "can improve prospects for sustainable fisheries and healthy fishing communities and identify opportunities for their resurgence."[171] Another such effort is taking place in the California Legislature, where a bill was recently introduced to incorporate traditional ecological knowledge into the conservation and management of State lands.[172] The bill recognizes that California faces a "biodiversity crisis" and that "Tribal methods of protecting and managing land can be an essential and fundamental part of a concerted effort to successfully restore biodiversity."[173] The bill directs the California Natural Resources Agency to conduct a statewide tribal listening tour, with compensation to tribes for their time and expertise, and to develop a policy for incorporating traditional ecological knowledge.[174]

Tribal application of traditional knowledge, and western science's belated acknowledgement of its legitimacy in managing and using natural resources promotes the State's goal to restore, protect and preserve natural and cultural resources. That rationale, too, supports

[171] William I. Atlas, et al, "Indigenous Systems of Management for Culturally and Ecologically Resilient Pacific Salmon (Ochorhynchus spp.) Fisheries," BioScience XX, 1-19 (2020).
[172] A.B. 2225 (Ward), introduced Feb. 15, 2022, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2225.
[173] *Id.*
[174] *Id.*

changes in State policy or regulation to encourage and protect tribal use and management of State lands and waters situated within traditional tribal territories.

V. Options for Policy or Regulatory Changes

The State of California has a wide variety of options available to provide meaningful accommodation to the Tribes' interest in re-establishing their connections to traditional areas located on State lands and waters. In one sense, the choice of regulatory or policy option should depend on the goals of the Tribes themselves. These goals may range from the desire to partner with State agencies in stewardship and management of environmentally and culturally sensitive State lands, to achievement of regulatory arrangements that honor and implement the Tribes' cultural lifeways by, for example, allowing tribal hunting, fishing, and gathering on such lands. The suitability of a particular option to address the interests of Tribes may turn on a complex array of historical, jurisdictional, cultural, political and economic factors unique to each Tribe. One size may not fit all in this context.

Each option should be premised on the State's recognition of the sovereign status of Indian Tribes, which should mirror the government-to-government relationship the Tribes currently have with the United States. California's recognition of the sovereign status of Indian Tribes would be consistent with the nationwide trend,[175] and a bill currently making its way through the State Legislature would take a significant step in this direction, requiring the State and its agencies to "consult on a government-to-government basis with California tribes," and to

[175] Matthew L. Fletcher, "Retiring the 'Deadliest Enemies' Model of Tribal-State Relations," 43 *Tulsa L. Rev.* 73, 74 (2007) ("[A] new political relationship is springing up all over the nation between states . . . and Indian Tribes. . . . Many states now recognize Tribes as de facto political sovereigns, often in the form of a statement of policy whereby the state agrees to engage Indian Tribes in a government-to-government relationship mirroring federal policy.").

"consider the need for tribal consultation before approving an agency policy."[176] Basing policy changes on the sovereign status of the Tribes does not mean the policies must make sharp distinctions between Tribes and the State on questions of jurisdiction and legal rights; rather, because sovereignty among governments "is a constant negotiation," grounding policy changes on the Tribes' sovereign status should foster relationships, collaboration, compromise and on-going engagement.[177] Former Secretary of the Interior Bruce Babbitt was surely correct to note that successful intergovernmental alliances with Indian Tribes depend on "thinking of them as peoples, communities, and governmental units," rather than problems.[178]

The focus on policy changes that foster relationships between the Tribes and State agencies may seem anodyne, but its significance as an agent of change should not be underestimated. The State's long history of violence, hostility and atrocities against the Tribes has created deeply rooted skepticism and distrust of the State and its officials, even if today's representatives are not personally connected to those events and in fact have apologized for them. It will take some time for the State to overcome the cynicism of many Tribes about the State's motives and goals. Policies that recognize the mutually exclusive nature of adversarial and collaborative modes of relationships will help overcome this legacy. Many Tribes and State agencies appear to be genuinely committed to overcoming the fraught relationships of the past. Policy changes should acknowledge the importance of this factor in securing support for meeting the Tribes' goals, both in tribal communities and State agencies.

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[176] A.B. 923 (Ramos) (introduced February 17, 2021; passed Assembly Jan. 31, 2022), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB923.

[177] *See* Stephen H. Greetham, "Water Planning, Tribal Voices and Creative Approaches: Seeking New Paths Through Tribal-State Water Conflict by Collaboration on State Water Planning Efforts," 58 *Nat. Resources J.* 1, 13 (2018).

[178] Quoted in David Getches, Forward to *Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West,* at page 33 (2005).

So, what are the policy and regulatory tools available to the Tribes and State agencies to address the broad array of tribal concerns about management and use of State lands and waters? For Tribes interested in enhancing their roles in the management of State lands and resources, the options could include formal access or cultural conservation easements and co-management agreements. For Tribes interested in establishing the right to hunt, fish or gather on State lands or waters outside their reservations, the options could include regulatory changes that would need to be promulgated by the Fish and Game Commission, State Lands Commission and Department of Parks and Recreation. More permanent changes of this kind could also be effectuated by legislative changes in State law. Rights to access and use certain State lands for cultural purposes may also be authorized pursuant to the creation of cultural reserves under provisions of existing law. Moreover, the Governor recently issued a policy encouraging consideration of returning State lands to Tribes,[179] which existing law authorizes under certain circumstances.[180] The California Public Utility Commission recently adopted a policy granting Indian Tribes a right of first refusal regarding lands offered for sale or disposition by public utilities subject to the Commission's jurisdiction, which could serve as a model for other State agencies to follow.[181] Each option will need to be crafted and implemented to reflect the unique histories, cultures and circumstances of California Tribes.

A. *Conservation Easements*

Conservation easements are legally enforceable agreements to protect natural and cultural values or historic places.[182] In this context, they may be used to memorialize and authorize

[179] *See* Native American Ancestral Lands Policy, *supra* note 3.
[180] *See* Section V(C), *infra.*
[181] California State Lands Commission Tribal Consultation Policy, adopted August 2016.
[182] California law defines conservation easements as voluntary agreements between landowners and nonprofit organizations or Indian tribes that place restrictions or covenants on land use are intended to preserve "land in its natural, scenic, agricultural, historical, forested, or open-space condition. . . ." California Civil Code § 815 et seq.

certain activities that pertain to the Tribes' protection, tending, conservation, and use of cultural resources within lands under State ownership or jurisdiction. In a conservation easement, the landowner agrees to restrict certain activities in order to protect conservation values broadly defined. Conservation easements are a viable mechanism for permanently protecting tribal traditional use, because they are legally binding instruments that provide the State and the Tribes flexibility to define their relationship and address a broad range of issues, including but not limited to co-management, conservation, stewardship, use, and monitoring of culturally important ecosystems and species. The conservation easement option has several advantages. There is an express State statutory basis for California Indian Tribes to hold conservation easements,[183] and, as noted, they provide flexibility for the Tribes and State agencies such as the State Lands Commission, the Department of Fish and Wildlife and the Fish and Game Commission, to negotiate agreements that allow for tribal stewardship, uses while at the same time safeguarding the natural environment and cultural values.

There are three threshold legal questions: 1) are Tribes authorized under State law to hold conservation easements in lands and waters subject to State jurisdiction; 2) does the State Lands Commission, and other State agencies, have legal authority to grant conservation easements to Tribes over lands held by the State; and 3) although conservation easements are sufficient to create partnerships between Tribes and States in management and stewardship of State lands, may they also authorize, restrict, or regulate hunting, fishing and gathering on State lands by the Tribes?

Section 815.3 of the California Civil Code includes California Tribes among the entities that "may acquire and hold conservation easements."[184] Both federally recognized Tribes and

[183] California Civil Code § 815.3(c).
[184] California Civil Code Section 815.3

non-federally recognized Tribes that are on the contact list maintained by the California Native American Heritage Commission are qualified under the statute to hold conservation easements.[185] The statute also provides that conservation easements acquired and held by Tribes shall be for the purpose of protecting "California Native American prehistoric, archaeological, cultural, spiritual, or ceremonial place[s]."[186]

The statute does not restrict tribal conservation easements to private lands, and presumably the Legislature was aware that State lands contained places of tribal cultural and spiritual significance that conservation easements are designed to protect. This suggests the Legislature intended to authorize Tribes to hold conservation easements over any lands to which an owner, including State agencies, is willing to grant access and use in an easement. The Legislature defined conservation easements as an interest in real property created by "any lawful method for the transfer of interests in real property in this State."[187] This too suggests the Legislature intended State agencies to have authority to enter into conservation easements with Tribes, because such agencies have lawful authority otherwise to transfer interests in real property. Finally, section 815 declares the State's policy to encourage the voluntary granting of conservation easements, and such transactions by State agencies would promote that policy.[188]

State lands are held by a variety of State agencies, although the principal agency with authority over State lands generally is the State Lands Commission. The authority of the Commission to grant conservation easements applies to both so-called submerged lands and terrestrial lands.[189] The Commission has "exclusive jurisdiction" over "tidelands and submerged

[185] *Id*.
[186] *Id*.
[187] Cal Civil Code § 815.2
[188] Cal Civil Code § 815
[189] *See generally,* Public Resources Code §§ 6001 et seq.

lands owned by the State."[190] The Commission has broad authority to "exclusively administer and control such lands, and may lease or otherwise dispose of such lands, as provided by law, upon such terms and for such consideration, if any, as are determined by it."[191] The granting of a conservation easement to California Indian Tribes is a disposition of an interest in submerged lands. Such agreements, therefore, would fall within the scope of the Commission's authority under this provision.

Authority to issue conservation easements over State terrestrial lands may be found in section 6501.1 of the Public Resources Code. That provision authorizes the State Lands Commission to "lease" land owned by the State "for such purposes as the Commission deems advisable, including but not limited to grazing leases and leases for commercial and recreational purposes."[192] The term "lease" is defined to include a "permit, easement or license."[193] Although this section does not reference tribal easements or uses, taken together, these provisions are sufficiently broad in scope to authorize conservation easements to Tribes for access and use of State lands.

Restrictions on the Commission's authority must also be considered. The constitutional restriction on the "grant or sale" of tidelands within two miles of an incorporated city, county or town does not apply here because the grant of a conservation easement is not a grant of tidelands per se, but rather is a conveyance of an interest in such lands.[194] The Commission must also ensure that any easement or conveyance of an interest in State lands is consistent with the public interest. One criterion the Commission applies is consistency with "environmental

[190] Cal. Pub. Res. Code § 6301.
[191] *Id.* (emphasis added).
[192] Cal. Pub. Res. Code § 6501
[193] *Id*. (emphasis added).
[194] Cal. Const. Art. 10, § 3.

protection."[195] Depending on the environmental condition of the land, granting a conservation easement to Tribes to enable them to re-establish cultural connections to traditional lands and waters now held by the State should satisfy this criterion.[196]

The exclusive nature of tribal access and use under a conservation easement should not disqualify this option for consideration by the State. The Fish and Game Commission leases submerged lands and water for aquaculture that is not open to members of the public for their use.[197] State law authorizes the leasing of "water bottoms" or the "water column" to "any person" for the purpose of aquaculture, but under the terms of the lease, the lessee has the exclusive right to use the area covered by the lease for that purpose.[198] In addition, the lessee has the right to restrict public access "to the extent necessary to avoid damage to the leasehold and the aquatic life culture therein."[199] Similarly, the right to enter into conservation easements in State lands and waters is open to all, but the Commission can select the entities to which such grants will be made. Once that selection is made, there is no legal or policy reason why the uses provided under easements cannot be exclusively limited to easement holders, which in this case would be the Tribes.

There can be no doubt that conservation easements are appropriate legal instruments by which Indian Tribes and State agencies can develop and adopt measures to share management of culturally important lands, to authorize access to State lands by Tribes on terms not available to

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[195] California State Lands Commission Regulations, Article 9, section 2802(e).

[196] It cannot be assumed that granting a conservation easement to an Indian Tribe would satisfy the public interest consistency test in every case. If the easement authorizes uses or resource extraction in an area already subject to environmental use restrictions, the easement may in fact be inconsistent with the public interest broadly defined.

[197] The standard lease agreement, entitled "LEASE GRANTING THE EXCLUSIVE PRIVILEGE OF CONDUCTING AQUACULTURE AT STATE WATER BOTTOM NO. M-000-00," in section 11 authorizes the tenant to exclude the public as necessary to protect aquatic resources. https://nrm.dfg.gov/FileHandler.ashx?DocumentID=29167&inline.

[198] Cal. Fish and Game Code § 15400(a).

[199] *Id.* at § 15411.

the general public and to collaborate on measures to ensure the permanent protection of these important tribal places. Less certain is the role conservation easements might play to authorize hunting, fishing and gathering by Tribes on State lands and waters. The utility of conservation easements for this purpose may fall on a spectrum from authorizing and refining hunting, fishing and gathering practices for Tribes that are fully consistent with existing State law, which seems fairly well established, to authorizing such practices on terms that are not currently available to the general public, which seems less certain.

There are provisions of the Fish and Game Code that strongly suggest conservation easements between agencies and Tribes could lawfully alter hunting, fishing, and gathering regulations. Fish and Game Code section 1801 establishes a State policy of "encourag[ing] the preservation, conservation, and maintenance of wildlife resources under the jurisdiction and influence of the state."[200] Because tribal traditional hunting, fishing, and gathering are carried out according to their cultural knowledge, in most cases such practices protect the health, abundance, and biological diversity of wildlife and habitats on which they depend. Thus, such practices are consistent with the State's policy as established in section 1801. Conservation easements that promote State policy should be presumptively lawful.

The Fish and Game Commission has broad authority to modify the regulations governing the take of fish and game throughout the State, including the power to create areas where no hunting or fishing is allowed.[201] The power to allow hunting or fishing on terms that vary from generally applicable regulations is necessarily included in the power to prohibit such practices altogether. If the Commission were a party to a tribal conservation easement with a State

[200] Fish and Game Code section 1801.

[201] Fish and Game Code section 314 (the Commission "at any time may close to taking of any species or subspecies of bird or mammal . . . any area where, in the judgment of the commission, added protection for birds or mammals is needed to properly conserve the birds or mammals, for such time as the commission may designate."

agency, or had authority to approve such an easement, that regulatory action would simply be an indirect exercise of authority the Commission would ordinarily exercise directly.[202] Viewed in those terms, tribal conservation easements might be appropriate vehicles to allow Tribes and State agencies to achieve tribal goals in practicing traditional hunting, fishing or gathering on State lands and waters. That in turn could help ensure long-term, culturally informed conservation of certain species and habitats.

California public agencies are already using conservation easements to form partnerships with Tribes to allow access and use of culturally-significant places on their lands. For example, the Midpeninsula Regional Open Space District entered into a Cultural Conservation Easement with the Amah Mutsun Tribal Band that authorizes access and use by the Band of 36 acres on Mt. Umunhum, a place of immense cultural, spiritual and ceremonial importance to the Band.[203] The easement authorizes the Band to apply its traditional knowledge to manage the land consistently with its cultural values, and it specifically authorizes plant gathering, collection of seeds, digging for bulbs and roots, cutting and pruning vegetation, and planting and dispersing seeds and bulbs.[204] Further, the City of Vallejo entered into a Conservation and Cultural Easement with the Yocha Dehe Wintun Nation and the Kletsel Dehe Wintun Nation (formerly the Cortina Band of Wintun Indians) that authorizes these Tribes to restore Glen Cove Waterfront Park, a 15-acre culturally important landscape for these Tribes.[205]

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[202] *See, e.g., Wooster v. Department of Fish and Game,* 211 Cal. App. 4th 1020 (Ct. App. 3d Dist. 2012) (conservation easement between private land owner and the Department of Fish and Game that banned hunting did not violate State policy or violate statute governing ownership of wild animals).
[203] *See* Midpeninsula Regional Open Space, https://www.openspace.org/cultural-conservation-easement#:~:text=On%20December%2013%2C%202017%2C%20the,Sierra%20Azul%20Open%20Space%20Preserve (copy on file with authors).
[204] *Id.*
[205] *See* Yocha Dehe Wintun Nation, https://www.yochadehe.org/news/yocha-dehe-and-cortina-take-lead-protect-sensitive-sites-glen-cove

B. *Co-Management Agreements*

The term "co-management" as a descriptor for the role of Tribes in the administration of land and waters held by public agencies is so widely used on the state and federal level as to make a concise definition difficult. It can mean everything from simple agreements by which public agencies share information about their management of land and wildlife to cross-deputization agreements in which Tribes are authorized to enforce State laws within their traditional territories. The elasticity of the concept is both an advantage and disadvantage. The advantage is it allows flexibility in crafting cooperative agreements that can meet the goals of both Tribes and State agencies. The disadvantage is the term can carry assumptions and expectations about what such agreements can achieve that are inconsistent with the limited nature of the relationships created.

Tribal co-management agreements are relatively new in California, but the concept provides opportunities to bring about genuine and meaningful changes in the Tribes' role in State land management decisions. On the federal level and in other states, the range of topics that could be addressed in co-management agreements includes: shared management responsibilities; information sharing protocols; cooperative land use and access planning procedures; shared monitoring of fish and wildlife populations; education and training both for State agency personnel in traditional ecological knowledge and for tribal personnel in State laws, policies and management approaches; shared authority for decision-making and formal consultation procedures (although consultation often is addressed in a stand-alone agreement or memorandum of understanding).[206]

[206] *See generally,* Kevin K. Washburn, "Facilitating Co-Management of Federal Public Lands," 2022 *Wisc. L. Rev.* 263 (2022).

Co-management in this context raises two legal questions. First is the question of whether existing policy and laws governing the responsibilities of State agencies in managing State lands allows for and encourages meaningful roles for Tribes. Second is the question of whether co-management could serve as a useful concept in focusing efforts to change State law and policy to enhance tribal connections to their traditional places on State lands and waters and to provide a meaningful role for Tribes in protecting and tending those places. What legislative or policy changes are necessary to ensure genuine tribal co-management of resources and places on State lands and waters?

As to the first question, there are no State laws or regulations that specifically authorize co-management agreements with Indian Tribes. On the other hand, State law does not appear to prohibit such agreements either. Such agreements, therefore, must be based on the general legal authority of State agencies to manage land, wildlife and natural resources.[207] That authority is most likely sufficient to authorize co-management agreements. However, the most effective such agreements share authority over the management of land and resources. The question of whether existing California law sanctions such authority-sharing agreements would have to address the concern that such delegations of authority to Tribes might run afoul of the separation of powers doctrine that prohibits State agencies from delegating legislative power.[208] The litigation exposure on this question may deter State agencies from delegating management authority over State lands, wildlife or natural resources to Tribes.

It is the official policy of the State, as articulated by the Governor, to encourage co-management agreements with Indian Tribes. On September 25, 2020, the Governor issued a

[207] See e.g., California Natural Resources Agency, whose mission is to ""to restore, protect and manage the state's natural, historical and cultural resources…" https://resources.ca.gov/About-Us/Who-We-Are

[208] *See, Coastside Fishing Club v. California Resources Agency,* 158 Cal. App. 4th 1183 (Ct. Apps. 1st Dist. 2008).

Statement of Administration Policy concerning "Native American Ancestral Lands."[209] The Statement directs State agencies "to seek opportunities to support California Tribes' co-management of and access to natural lands that are within a California Tribe's ancestral land and under the ownership or control of the State of California..."[210] Under this policy, co-management is a means to enhance tribal self-determination, facilitate tribal access to sacred sites and cultural resources, and incorporate Traditional Ecological Knowledge of the Tribes into State land management and stewardship.[211] On the question of whether co-management agreements may authorize hunting, fishing, and gathering by Indian Tribes on State lands, the policy is ambiguous. On the one hand, the Statement declares that "[a]ny action taken in accordance with this Policy shall . . . comply with all applicable laws,"[212] which suggests that if existing law does not authorize co-management agreements to address hunting, fishing and gathering, the Policy is not intended to change that. On the other hand, the Policy includes as one of its purposes the goal of "[i]mprov[ing] the ability of California Native Americans to engage in traditional and sustenance gathering, hunting and fishing."[213] That goal suggests such activities should be legitimate subjects of co-management agreements.

The absence of specific statutory or regulatory authorization for such agreements has not deterred several agencies, even before the Governor's Order, to adopt policies that sanction co-management agreements. These agencies have relied on their policy-making authority to encourage co-management agreements with Tribes. For example, the State Lands Commission in its Environmental Justice Policy under the goal of honoring the importance of the Tribes'

[209] *See* Native American Ancestral Lands Policy, *supra* note 3.
[210] *Id*.
[211] *Id*.
[212] *Id*.
[213] *Id*.

"ancestral homelands" calls on the Commission to "[s]upport opportunities to advance traditional use and enjoyment of ancestral lands by Native Nations by facilitating and prioritizing access to and use, restoration, and management of state-owned lands by Tribes with historical connections to the land."[214] Likewise, the Fish and Game Commission, using its general authority to adopt policy regarding fish and wildlife under Fish and Game Code section 703, included in its Tribal Consultation Policy co-management agreements as one form of collaboration between Tribes and the Commission to address subjects of mutual concern or to tailor "solutions" to each Tribe's "unique needs and capacity."[215] The Department of Fish and Wildlife's Tribal Consultation Policy also commits the Department to seek cooperative relationships with Indian Tribes, "including for the co-management of resources, where appropriate."[216] The Policy does not further elucidate the circumstances under which co-management agreements would be "appropriate," although presumably that qualification would have something to do with the subject matter of the agreement and its consistency with existing State law.[217]

In 2018, the Fish and Game Commission adopted a "Co-Management Vision Statement," which is intended to reflect a shared goal of sovereign Tribes, the Commission and Department of Fish and Wildlife to collaborate on developing compatible governance and management objectives aimed at ensuring the health and sustainable use of fish and wildlife.[218] In February 2020, the Commission adopted a formal definition of co-management: "A collaborative effort established through an agreement in which two or more sovereigns mutually negotiate, define,

[214] California State Lands Commission, Environmental Justice Policy https://www.slc.ca.gov/wp-content/uploads/2018/11/EJPolicy.pdf at p.4.
[215] Fish and Game Commission Tribal Consultation Policy, June 10, 2015.
[216] Department of Fish and Wildlife, Tribal Communication and Consultation Policy (Oct. 2, 2014), https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=122905 at p.2.
[217] *Id*.
[218] https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=177360&inline.

and allocate amongst themselves the sharing of management functions and responsibilities for a given territory, area or set of natural resources."[219]

The Coastal Conservancy recently adopted Justice, Equity, Diversity and Inclusion Guidelines that commit the agency to working with Tribes to "enable traditional stewardship and cultural practices on ancestral lands and co-management of their ancestral lands and natural resources."[220] Other State agency policies do not endorse co-management agreements as such, but encourage or sanction cooperative agreements or partnerships with Tribes that may accomplish the same objections.[221]

These policies have been difficult to implement and it remains to be seen whether the Governor's recent statement encouraging co-management agreements will result in concrete progress for Tribes in the use of such agreements to facilitate meaningful access and use of traditional lands and waters under State jurisdiction.[222] Research has disclosed only a single co-management agreement between a State department and an Indian Tribe. That agreement is between the Tolowa Dee-ni' Nation and the Department of Fish and Wildlife to share management of elk herds in the Nation's lands and on State lands within the Nation's aboriginal territory.[223] The purpose of the MOU, which recognizes the "unique authority" of the CDFW and the Tolowa Dee-ni' Nation to protect wildlife resources in California, is to establish "a collaborative effort between the CDFW and the Tribe to achieve mutually agreed upon and

[219] https://www.triplicate.com/news_paid/fish-and-game-commission-tribes-pave-path-toward-cooperative-management-of-natural-resources/article_8d9ea248-5d86-11ea-8e5d-572e3b34ed65.html
[220] Coastal Conservancy, Justice, Equity, Diversity and Inclusion (JEDI) Guidelines, adopted September 3, 2020.
[221] *See., e.g.,* California Environmental Protection Agency, Policy on Consultation with California Native American Tribes, Action Plan, adopted August 20, 2015 ("Develop Memorandums of Understanding, Memorandums of Agreement or other cooperative agreements with California Native American Tribes on specific projects or subject matters, as appropriate.").
[222] *See* Native American Ancestral Lands Policy, *supra* note 3.
[223] *Memorandum of Agreement Between the Department of Fish and Wildlife and the Tolowa Dee-ni' Nation Relative to Establishment and Operation of Elk Monitoring and Tagging Project,* September 28, 2018.

compatible management objectives, to ensure the health and sustainability of elk."[224] The CDFW and the Nation cooperate on collecting and analyzing a wide array of information necessary for sound elk herd management, including abundance, population trends, recruitment, mortality and distribution.[225]

It is too soon to draw any conclusions about the efficacy of co-management agreements in reconnecting Tribes to important cultural and spiritual sites. These policies are to be commended for the explicit recognition they reflect of the essential connection Tribes wish to maintain to their traditional lands. But broadly stated policies at this level of generality can only go so far in facilitating and guaranteeing those connections.

None of the State policies that endorse co-management offers any guidance about what those agreements should contain. The appeal of co-management agreements is their flexibility in allowing the parties to address topics of mutual concern. State tribal consultation policies, which are ubiquitous among State agencies, provide a useful framework for conferring with the Tribes about what principles co-management agreements should honor, but experience on the federal level may offer a useful starting point for those discussions. A recent article on federal-tribal co-management agreements suggested that a genuine co-management approach should honor the following core principles: 1) recognition of Tribes as sovereign governments; 2) incorporation of the federal government's trust responsibilities to Tribes; 3) legitimate structures for tribal involvement; 4) meaningful integration of Tribes early and often in the decision-making process; 5) recognition and incorporation of tribal expertise and traditional knowledge; and 6) dispute

[224] *Id.*
[225] *Id.*

resolution procedures.[226] Except for the federal trust responsibility, all of the elements apply equally to California's approach to co-management with Indian Tribes.

The State's next steps to improve co-management as a tool for enhancing tribal access and stewardship partnerships for State land management should depend on the outcome of the consultation process with the Tribes. For our purposes, it might be useful to offer a few tentative suggestions of how co-management could be improved. The federal experience is a good place to start this exploration. Since 1974, the Bureau of Indian Affairs (BIA) has implemented a self-determination program that turns over the administration and management of federal benefit programs to Indian Tribes, along with the funds the BIA would have otherwise expended on its own for that purpose. Congress enacted the Indian Self-Determination and Education Assistance Act of 1974 for this purpose.[227] The goal of such agreements, known as 638 compacts or contracts, is to enhance tribal autonomy by authorizing Tribes to administer federal benefit programs.[228] The 638 compacts have also been used to share management authority and responsibility between Tribes and certain federal resource agencies.[229] In 1994, the Act was amended to extend compacting authority to non-BIA programs within the Department of the Interior, including granting Tribes authority to manage programs concerning lands of "special geographical, historical and cultural significance."[230] Implementation of the program has been

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[226] Monte Mills and Martin Nie, *Bridges to a New Era: A Report on the Past, Present and Potential Future of Tribal Co-Management on Federal Public Lands,* at page iii, September 2020.

[227] Public Law 93-638, 25 U.S.C. §§ 5304 et. seq.

[228] 25 U.S.C. §§ 5304(b) ("the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities")

[229] *See, e.g.,* USDA Forest Service 638 Authority, https://www.fs.usda.gov/sites/default/files/638-FS-ITC-Joint-Statement-SEP2020.pdf (acknowledging authority granted by 2018 Farm Bill for Forest Service to enter into 638 Compacts with Tribes to pursue work under the Tribal Forest Protection Act).

[230] 25 U.S.C. §§ 458aa-hh. *See generally,* Mary Jane King, "Co-management or Contracting: Agreement Between Native American Tribes and the National Park Service Pursuant to the 1994 Tribal Self-Governance Act," 31 *Harv. Envt'l L. Rev*. 475 (2007).

imperfect, but a recent study concluded that 638 contracts "have spurred a renaissance in tribal governance and technical capacity."[231] Given this long federal experience with the program, there may be concepts and lessons of use to California should it decide to adopt an analogous transfer of authority to Tribes regarding traditional lands and waters within State jurisdiction.

There may be actions the Governor or agency heads could take in the absence of legislative changes that could make co-management agreements more effective tools in assisting Tribes in meeting their cultural access and stewardship goals regarding State lands and waters. Apart from a State 638 compacting analog, the State, led by the Department of Fish and Wildlife, could review the laws and policies that pertain to co-management and propose other legislative or policy changes to effectuate those recommendations. For example, the Public Resources Code authorizes State Parks to enter into agreements for the "development, improvement, restoration, care, maintenance, administration or operation" of a Park unit.[232] However, that authority extends only to "a qualified nonprofit organization," an agency of the United States, city, county, district "or other public agency."[233] Tribes are not included among the entities with which State Parks may contract and it is doubtful they would qualify as a "public agency." Legislation may be needed to extend contracting authority to the Tribes. Alternatively, Tribes could form non-profit organizations purposed to manage culturally important landscapes and seascapes. Two examples are the InterTribal Sinkyone Wilderness Council, a consortium of 10 sovereign Tribes that owns and manages a 4,000-acre bio-culturally significant landscape adjacent to the Sinkyone coast, and the Amah Mutsun Land Trust, which collaborates with Año

[231] Mills and Nie, *Bridges to a New Era, supra* at v.
[232] Cal. Pub. Res. Code § 5080.42.
[233] *Id.* § 5080.30.

Nuevo State Park to protect cultural and natural resources of importance to the Amah Mutsun Tribal Band.[234]

Further, the scope of the topics and authorities for tribal co-management agreements may lawfully address could be clarified in an opinion of the Attorney General or issuance of legal guidance from the general counsels of State agencies. For example, could co-management agreements exempt tribal members from paying entrance fees at State parks if they enter to conduct traditional cultural or spiritual activities such as gathering of medicinal plants, a common practice afforded Tribes at National Parks? The generalized State policy encouraging co-management agreements, as established by the Governor's recent Statement of Administration Policy, could be strengthened by the development, in consultation with Tribes, and issuance of an executive order spelling out in greater detail the standards and protocol for executing such agreements.

C. *Returning Land*

All of California's public lands and marine waters are located within the traditional territories of Tribes, who were dispossessed largely by the official extermination and expropriation policies and practices of the State and its agents. In the United States' pantheon of theft of Indian lands by States, California surely ranks near the top. The Tribes' legal options for recovering their traditional land through litigation are limited.[235] There does not appear to be a

[234] There are other gaps in State law that may inhibit meaningful co-management agreements with Indian Tribes. *See, e.g.,* Pub. Res. Code § 9001(State may cooperate with the United States and with resource conservation districts to implement the resource conservation goals of the State).

[235] *See, e.g., Robinson v. Jewell,* 790 F. 3d 2015 (9th Cir. 2015) (aboriginal title claims of the Kawaiisu, a non-federally recognized Tribe, to the Tejon Ranch rejected because the Tribe's failure to present its claims to the Board of Commissioners created by the 1851 California Land Claims Commission Act extinguished its aboriginal title).

satisfactory legal option by which Tribes could be assured of a reasonable probability of recovering their traditional lands and waters that are now titled in the State.[236]

To state the obvious, returning tribal territories now under State ownership or jurisdiction would be a straightforward and effective means to ensure tribal access to those lands. It would further ensure traditional hunting, fishing, gathering, and cultural practices could continue on the Tribes' own terms. To address concerns about the effect of tribal land transfers on the State's conservation obligations and goals, the State could condition the transfer on the permanent protection of key State public interests related to conservation values and protection of certain species and habitats. Such a requirement would most likely align with tribal traditional values and goals. In many cases, the State and the public might reasonably expect that certain kinds of decades-long public access and use would be retained within State lands and waters. Also, there is the question of whether and how the costs of management and access would be shared, including whether the multi-billion-dollar annual budgets (largely supported by public tax dollars) and public bond funds would be shifted to the Tribes. Return of tribal traditional territories also raises questions of governance and infrastructure that would be necessary for administration and management responsibilities assumed by the Tribes.

The State has not undertaken any systematic review or evaluation of what steps could be taken to rectify the loss of tribal land and waters. There has been no State analog to the federal Indian Claims Commission. The State has, however, made a few tentative steps that recognize that returning land to the Tribes might be justified on land management, stewardship and cultural reconnection rationales. For example, the State Lands Commission recently returned

[236] The U.S. Supreme Court's recent decision in *McGirt v. Oklahoma*, which adjudged a large portion of eastern Oklahoma to be part of the Creek Indian Reservation, did not return title to any land to the Creek Nation, but rather resolved only the question of the allocation of jurisdiction over land owned both by the Nation and by non-Indians within the restored reservation boundaries. McGirt v. Oklahoma, 591 U.S.

approximately 40 acres of culturally significant land to the Lone Pine Paiute Tribe in the eastern Sierra Nevada region.[237] The Commission conditioned issuance of a patent for a parcel of land Caltrans needed for State highway purposes on its payment for the purchase of the 40 acres for the Tribe, as a form of mitigation for impacts from the highway construction under the Commission's Environmental Justice Policy.[238]

Another prominent example of State return of traditional tribal lands is the return of Blues Beach in Mendocino County to a non-profit organized by three local Tribes with deep cultural and ancestral ties to the land – Sherwood Valley Band of Pomo Indians, Round Valley Indian Tribes, and Coyote Valley Band of Pomo Indians.[239] SB 231, signed on September 24, 2021 by Governor Newsom, granted the California Department of Transportation (Caltrans) authority to transfer approximately 172 acres of land managed by Caltrans and owned by the State of California to the non-profit run by the three Tribes.[240] SB 231 also granted Caltrans the authority to enter into a Master Planning agreement with the non-profit.[241] California Senator, Mike McGuire, sponsored SB 231 after he began working with the three Tribes in 2019 to reacquire the property.[242] After Governor Newsom signed SB 231, Senator McGuire shared that "[r]eturning this land of cultural significance is not only the right thing to do, but it will also lead

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[237] *State Lands Commission Announces Return of Native American Tribal Land in Central California*, California State Lands Commission (Jun. 23, 2020), https://slc.ca.gov/press-release/return-of-native-american-tribal-land-in-central-california/.
[238] *Id,*
[239] *McGuire's Historic Legislation Transferring Sacred Blues Beach Property Back to Mendocino County Tribes Signed by Governor Newsom,* California Senator Mike McGuire Senate District 2 (Sept. 24, 2021), https://sd02.senate.ca.gov/news/2021-09-24-mcguire%E2%80%99s-historic-legislation-transferring-sacred-blues-beach-property-back.
[240] *Id*.
[241] *Id*.
[242] *Id*.

to enhanced stewardship, historical preservation and protection of sacred sites at the Blues Beach property[.]"[243]

The Governor's recent Statement of Administration Policy encourages State agencies to return to the Tribes "natural lands in excess of state needs."[244] The term "excess" is not defined in the Statement, but its reference to the requirement to comply with "all applicable laws and regulations"[245] suggests the Governor may have intended the policy to apply only to so-called surplus lands, as defined by State law. In general, surplus lands are those that are no longer necessary for the mission of the agency. The goals of the policy are, *inter alia,* to support tribal self-determination, facilitate tribal access to "sacred sites and cultural resources," improve the ability of Tribes to "engage in traditional and sustenance gathering, hunting and fishing," and to reduce "fractionation of tribal lands."[246] The Governor directed State agencies to implement the policy by "working cooperatively within existing statutory and regulatory frameworks with California Tribes that have ancestral territory within those lands and are interested in acquiring them."[247]

Significantly, the policy suggests that State agencies should prioritize tribal purchase or transfers. Implementation of this policy would likely result in fairly widespread changes in how State agencies approach land transfers. Among State agencies that hold title to or control State lands, only the State Lands Commission expressly contemplates Indian Tribes as transferees in land transactions. And that consideration is only by indirection. The Commission requires consultation with Indian Tribes on any activity that "may have a significant impact on Tribal

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[243] *Id.*
[244] Office of the Governor, Statement of Administration Policy, Native American Ancestral Lands, September 25, 2020.
[245] *Id*.
[246] *Id.*
[247] *Id.*

interests," defined as Tribal cultural resources; Tribal practices including Tribal ceremonies, hunting, fishing and resource collection; water; and Tribal lands.[248] When those Tribal interests are potentially affected, the Commission will seek Tribal input on, *inter alia,* the acquisition, sale or exchange of real property interests.[249] Presumably, under these circumstances, returning traditional land to Tribes would be an option for discussion in consultation when tribal interests are affected by a proposed activity of the Commission.

The State's approach to this issue should be developed in consultation with the Tribes whose cultural connections to their traditional lands are at issue. Several ideas may be suggested for consideration in that process. First, the California Public Utilities Commission ("CPUC") on December 5, 2019, adopted a policy that grants Tribes a right of first refusal when investor-owned utilities intend to dispose of surplus land that requires Commission approval.[250] This would typically mean that for lands falling within the Tribe's traditional territory, that Tribe would have the right to match any offers made to purchase the property. As the Policy describes, the right of first refusal means that a utility disposing of real property must contact the Tribe or Tribes whose traditional territory or territories is on or adjacent to the real property, and must provide the Tribe or Tribes the right to acquire or refuse to re-acquire the real property, before the utility can seek third-party purchasers for the real property.[251] The Policy applies to the proposed transfer of any interest in real property that is subject to approval by the Commission under section 851 of the Public Utilities Code, including easements, leases, assignments and encumbrances.[252] The Commission has drafted guidelines for implementing the Policy that were

[248] California State Lands Commission (CPUC) Tribal Consultation Policy, adopted August 2016.
[249] *Id.*
[250] *Id.*
[251] *Id.*
[252] *Id.*

adopted on November 5, 2020.[253] On February 10, 2022, the Commission opened proceeding R.22-02-002, called an Order Instituting Rulemaking (OIR), to consider revisions the Policy's Implementation Guidelines.[254] The CPUC policy raises the question of whether a similar policy could be adopted State-wide for lands owned or controlled by State agencies, which may be more efficient than an agency-by-agency approach.

These preliminary steps to rectifying the displacement of Tribes from their traditional lands may reflect an emerging trend of state governments using land transfers to address historical injustices. For example, last year, the City of Eureka donated Duluwat Island to the Wiyot Tribe, a 280-acre island in Humboldt Bay that was the site of the horrific massacre of hundreds of Wiyot people by local whites in 1863.[255] The City's return of the land was in part reparation for the atrocities of its local citizens.[256] Another prominent example of State support for the return of traditional tribal lands is the California Natural Resources Agency's grant of $4.52 million from Proposition 68 funds to acquire the 1,199-acre Adler Ranch for the Esselen Tribe of Monterey County.[257] The purpose of the acquisition is to protect in perpetuity cultural and natural resources of significance to the Tribe.[258]

The case-by-case approach may work in individual cases, but a State-wide policy may be needed to fulfill the promise of this approach to re-establishing Tribes' cultural and subsistence

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[253] California Public Utilities Commission, Tribal Land Transfer Policy Implementation Guidelines https://www.cpuc.ca.gov/about-cpuc/divisions/office-of-the-tribal-advisor/tribal-land-transfer-policy/tltp-implementation-guidelines

[254] *Id.*

[255] Imbler, Sabrina, "How the Wiyot Tribe Won Back a Sacred California Island," Atlas Obscura (Nov. 15, 2019) https://www.atlasobscura.com/articles/wiyot-won-back-sacred-island#:~:text=On%20October%2021%2C%202019%2C%20it,It's%20unprecedented%2C%E2%80%9D%20Vassel%20says.

[256] *Id.*

[257] *Esselen Tribal Lands Conservation Project, Adler Ranch Big Sur, CA*, California Natural Resources Agency, https://bondaccountability.resources.ca.gov/Project.aspx?ProjectPK=25945&PropositionPK=49.

[258] *Id.*

connections to their traditional lands and waters under State jurisdiction. The first step in assessing this option would be to clarify the authority and limit of State agencies to transfer land to Tribes, either by donation, by purchase or by exchange. State agencies may have varying authority and limitations. So-called public trust lands are controlled by the State Lands Commission.[259] State Park lands are controlled by the State Parks and Recreation Commission.[260] The State Legislature has granted public trust lands to more than 80 cities, counties or governments who are then responsible for implementing the public trust on those lands.[261] The public trust doctrine applies to all lands within the State that are tidelands, submerged lands and inland navigable waters.[262] Tidelands are defined as lands over which the tide ebbs and flows.[263] And submerged lands are State-owned lands between the tidelands and the three-mile limit delineating the boundary between State and federally-owned offshore waters.[264] The State Constitution prohibits the sale or disposition of tidelands except for such lands used for street purposes.[265] Other provisions of California law prohibit the sale or alienation of submerged land and inland navigable lakes and rivers.[266]

Policy statements from the Governor encouraging State agencies to use existing laws and regulations to facilitate the return of traditional lands to Indian Tribes is a long overdue first step in making this option meaningful and effective to Indian Tribes. The State and the Tribes may wish to consider additional steps to improve the chances the policy will result in meaningful land transfers to Tribes. Those steps could include the preparation of an inventory of State lands that

[259] California State Lands Commission, https://www.slc.ca.gov/about/
[260] California Department of Parks and Recreation, https://www.parks.ca.gov/?page_id=91
[261] California State Lands Commission, https://www.slc.ca.gov/granted_lands/
[262] *Id.*
[263] California State Lands Commission, Land Types, https://www.slc.ca.gov/land-types/
[264] *City of Berkeley v. Superior Court*, 606 P.2d 362 (Cal. 1980).
[265] California Constitution, Article 10, Section 3.
[266] *See Nat'l Audubon Soc'y v. Super. Ct.,* 33 Cal. 3d 419, 440-41 (1983).

contain traditional and cultural areas of importance to Tribes, subject to maintaining the precise locations of such areas in confidence for those Tribes that wish to do so.

Another step could be to prepare a State Lands Action Plan for Tribal Relations, perhaps modeled after CAL FIRE's plan[267] for addressing tribal interests in the lands it will receive from Pacific Gas & Electric Company through its Land Commitment administered by the Pacific Forest and Lands Stewardship Council established in 2004 in the PG&E bankruptcy proceeding.[268] The Plan is entitled CAL FIRE Pacific Gas and Electric Lands Action Plan for Native American Tribal Relations, and it applies to approximately 13,000 acres.[269]

A more ambitious step could be the development of protocols and standards by which State agencies would agree to consider transferring traditional lands to the Tribes, beyond the existing State law requirement that such lands be in excess of State needs. The standards should include any documentary proof the Tribes would be required to meet to qualify for State land transfers. All of these steps should also include an assessment of whether the goals of the Tribes and the State can be achieved without legislative or regulatory changes in State law.

D. *Cultural Reserves*

Within the State Park System, the law authorizes the classification of units of the system as "cultural reserves" that are managed by the Department of Parks and Recreation to protect places that contain "evidence of past human lives or events."[270] State law specifically includes "places of spiritual significance to California Native Americans" in the places qualifying for

[267] California's Wildfire and Forest Resilience Action Plan (CAL FIRE plan), Jan. 2021, https://www.fire.ca.gov/media/ps4p2vck/californiawildfireandforestresilienceactionplan.pdf
[268] PG&E Land Conservation Commitment Stewardship Council (April 2004) https://docs.cpuc.ca.gov/publishedDocs/published/REPORT/35463.htm
[269] CAL FIRE plan, *supra* note 267.
[270] Pub. Res. Code § 5019.65.

protection under the Code.[271] Improvements may be undertaken to provide for "public access, enjoyment and education, and for cultural resource protection," taking into account the need for access to the site for "ceremonial or spiritual purposes."[272] These provisions appear sufficient to authorize State Parks, in consultation with Tribes, to put in place specific arrangements to facilitate and protect tribal access and use of cultural reserves within State Parks units.

Less clear is whether tribal use must be limited to cultural and ceremonial activities. For example, could State Parks agree that in cultural reserves, Tribes would be allowed traditional and subsistence hunting, fishing, and gathering rights or privileges? There is language in the statute that suggests the answer could be yes if the law otherwise permits such uses there: "[l]iving . . . resources contained within state cultural reserves may be used for ceremonial or spiritual purposes, consistent with other laws, and if the use if not harmful to threatened or endangered species or to the cultural resources intended for protection by this designation."[273] Thus, for this discrete category of State land—State Parks units designated as cultural reserves—existing law may provide a modicum of access and use to Tribes for important cultural purposes.

For coastal or marine areas, Cultural Preservation Areas designated under the Marine Management Areas Improvement Act ("MMAIA") may be a useful vehicle for protecting tribal access, use and co-management to places of cultural importance.[274] The utility of this option depends on interpretative flexibility on the part of the Department of Fish and Wildlife or the Department of Parks and Recreation, if the areas are within a State Park unit, because the MMAIA does not identify tribal cultural sites or resources specifically as eligible for protection

[271] *Id*.
[272] *Id.* at 5019.65(b).
[273] *Id.*
[274] See generally MPA Founding Legislation, California Department of Fish and Wildlife, https://wildlife.ca.gov/Conservation/Marine/MPAs/Founding-Legislation

within Cultural Preservation Areas. Those areas are designed to protect "cultural objects or sites of historical, archaeological or scientific interest in marine areas."[275] Arguably, sites of historical interest broadly encompass tribal cultural practices and traditional activities because such places in many cases hold historical meaning precisely because they are places where tribal cultural practices have been carried out for millennia. The distinction between cultural sites and cultural practices should not matter in this context. As a result, Cultural Preservation Areas are an option worthy of careful consideration by Tribes and State agencies seeking enhanced protection and revitalization of tribal cultural uses and activities in State marine areas.

E. *Regulatory Reform*

Because California law does not expressly recognize a distinct right of California Tribes to fish, hunt, or gather for traditional, including subsistence, purposes on State lands, the Fish and Game Commission could create a new regulatory category to recognize tribal traditional hunting, fishing, and gathering within State lands and marine waters. This regulatory action might be more suited to secure rights for Tribes to hunt, fish or gather on State lands and waters, rather than to access State lands for management and stewardship purposes, although the latter topic could also be considered under this option. California law authorizes the Fish and Game Commission to regulate the taking or possession of birds, mammals, fish, amphibians, and reptiles; to establish restrictions, seasons, take limits, territorial limits; and to control the manner and means of taking such species.[276] This authority is broad enough to include the power to establish new regulations governing tribal traditional hunting, fishing, and gathering as a third category of use rights, distinct from recreational and commercial uses. As discussed previously, the Fish and Game Code, along with Fish and Game Commission's regulations, regulate hunting

[275] CAL. PUB. RES. CODE § 36700(d) (Deering 2009).
[276] Cal. Fish & Game Code §§ 200, 203.

and fishing on all public lands and waters. The Fish and Game Commission would be the State agency responsible for establishing new regulations governing tribal traditional hunting, fishing, and gathering within State lands and marine waters.

The tribal take regulatory exemption that emerged from the Marine Life Protection Act Initiative is precedent for this approach.[277] Following a fraught yet collaborative process with north coast Tribes lasting more than three years, the Fish and Game Commission in 2012 adopted regulations recognizing and codifying a new category of tribal take under the California Administrative Code.[278] The new category, described as tribal traditional, non-commercial fishing, harvesting and gathering, applies to certain marine species within specific marine protected areas ("MPAs").[279] The State's adoption of a unique regulation applicable only to Tribes was based on substantiated cultural connections to those MPAs.[280] The tribal take regulation exempts these Tribes from the new MPA restrictions that apply to the non-tribal general public.[281] The exemption provides for the continued tribal take of marine species within only certain types of MPAs under State jurisdiction.[282] Although the new regulations exempt designated Tribes from the take restrictions applicable to others, other regulatory provisions still apply.[283] And, the tribal take regulation for MPAs is codified under the State's recreational take provisions.[284] Thus, it did not per se create a separate and distinct category of "tribal take." The MLPA Initiative and the resulting tribal take exemption may be a model for how the Fish and

[277] Cal Code Regs. Title 14, § 632(a), (b).
[278] CAL. CODE REGS. tit. 14, § 632(b) (West 2019).
[279] *Id.*
[280] 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).
[281] Cal Code Regs. Title 14, §§ 632(a)(11), 632(b).
[282] Cal Code Regs. Title 14, § 632(b).
[283] Cal. Code Regs. Title 14, § 632(a)(11) (requiring tribal members to hold a valid California fishing license when conducting traditional tribal fishing in MPAs).
[284] CAL. CODE REGS. tit. 14, § 632(a)(11).

Game Commission could establish additional regulations recognizing a new category of tribal traditional hunting, fishing, and gathering authorized on State lands and waters.

A second useful precedent could be the State Water Resources Control Board's adoption of Tribal Tradition and Culture and Tribal Subsistence Fishing as beneficial uses under state-wide water quality control plans that must be considered by the Board in applications for appropriations of water and Clean Water Act water quality certifications.[285]

Much like the MLPA Initiative, the Fish and Game Commission's development of any new regulatory category applicable to Tribes should be developed in consultation with the Tribes whose traditional hunting, fishing, and gathering practices are at issue. This approach is consistent with the Fish and Game Commission's Tribal Consultation Policy, which confirms the Commission "will pursue partnerships with Tribes to collaborate on solutions tailored to each Tribe's unique needs and capacity."[286] It may be that, much like the MPA regulations, other regulatory provisions will still need to apply to tribal traditional hunting, fishing and gathering (e.g. requiring tribal members to hold a valid California fishing license when conducting traditional tribal fishing on State lands). However, those discussions and the decision-making process should involve consultation and engagement with the Tribes.

Tribes are engaged in activities on State lands that do not easily fit within the category of "recreation" and are distinct from "commercial." The Fish and Game Commission's Tribal Consultation Policy recognizes that Tribes "have distinct cultural, spiritual, environmental, economic and public health interests and unique traditional knowledge about the natural resources of California."[287] This important distinction, along with California tribal history,

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[285] State Water Resources Control Board, Resolution 2017-0027, May 2, 2017.
[286] Tribal Consultation Policy, Fish and Game Commission (June 10, 2015), https://fgc.ca.gov/About/Policies/Miscellaneous#TribalConsultation.
[287] *Id.*

culture, and relationship with the State, is a strong rationale for creating a new category of tribal subsistence hunting, fishing, and gathering authorized on State lands. Regulatory action to recognize tribal traditional hunting, fishing, and gathering on State lands and waters would represent meaningful change in existing law and would further the Governor's goal of improving the ability of Tribes to "engage in traditional and sustenance gathering, hunting and fishing," outlined in his recent Statement of Administration Policy.[288]

F. *Joint Powers Agreements*

Joint powers agreements ("JPAs") between State agencies and Indian Tribes are another mechanism by which tribal cultural use, tending and management of State lands may be authorized and structured. Before 2011, tribal-public agency joint powers agreements needed special legislation for their authority.[289] In that year, the State Legislature amended the Government Code to include federally recognized Indian Tribes among the "public agencies" that may enter into joint powers agreements.[290] Tribal JPAs typically have focused on shared law enforcement authority and responsibilities to address problems created by Public Law 280, a federal statute which authorized partial civil and full criminal state jurisdiction over Indian Country in certain states.[291] Recently, the scope of JPAs with Tribes has expanded. Beginning June 1, 2020, the Yurok Tribe has been operating the Stone Lagoon Visitor Center under a joint

[288] See Native American Ancestral Lands Policy, *supra* note 3.
[289] *See, e.g.* Government Code § 65101.1, which authorized the Hoopa Valley Business Council to enter into a joint powers agreement with Humboldt County, based on "unique circumstances of Humboldt County [that] necessitate this special law."
[290] Gov't Code § 6500
[291] *See,* Duane Champagne and Carole Goldberg, "Promising Strategies: Public Law 280," Tribal Law and Policy Institute, March 2013 (discussing Hoopa Valley Tribe JPA with Humboldt County on PL 280 issues).

powers agreement with the North Coast Redwoods District of the California Department of Parks and Recreation, the first agreement of its kind.[292]

The scope of JPAs may be as broad as the governmental powers the parties may exercise under their laws. State law authorizes joint powers agreements on "any power common to the contracting parties."[293] In other words, State agencies and Indian Tribes may jointly exercise governmental powers that they have in common, as, for example, the power to use or manage natural and cultural resources on State lands. Use of JPAs for this purpose may require the State to acknowledge tribal sovereign powers over their members located outside the reservations or tribal lands, but it may be possible to craft such agreements without fully resolving that issue. State law also provides that it is not necessary for each of the sovereign governments to have authority that is "exercisable by each such contracting party with respect to the geographical area in which such power is to be jointly exercised."[294] As a result, JPAs may be possible on issues of natural resource stewardship, use and management without State agreement that Tribes have sovereign authority over their members on State lands. Moreover, State law does not limit the duration of such agreements.[295]

G. *Expand Tribal Eligibility for State Grant and Bond Funding*

Changes in State policy or law may be ineffective in improving collaborative approaches to tribal use and management if the Tribes are unable to cover their share of the costs of such activities. Many State grant and bond programs define eligible recipients to exclude Indian

[292] Wear, Kimberly, "Yurok Tribe to Run Stone Lagoon Visitor Center in Historic Agreement." North Coast Journal of Politics, People & Art (May 27, 2020) https://www.northcoastjournal.com/NewsBlog/archives/2020/05/27/yurok-tribe-to-run-stone-lagoon-visitor-center-in-historic-agreement

[293] Gov't Code § 6502.

[294] *Id.*

[295] Gov't Code § 6510 (the agreement may be continued for a definite term or until rescinded or terminated).

Tribes, by for example, limiting eligibility to nonprofit organizations.[296] When nonprofit organizations are further defined, State law often limits them to entities organized and chartered under State law, thereby excluding tribal nonprofits organized under the laws of a particular Tribe.[297] Those State programs that are offered to "public agencies" present a conundrum for Indian Tribes, because the Tribes' federal legal status elevates them above local public agencies, even though claiming public agency status may provide access to desperately needed funding. Although courts have found Indian Tribes to be public entities for purpose of the California Evidence Code, to the best of our knowledge, the Tribes have not been treated as public agencies for purposes of bond and other funding.[298] A comprehensive examination of tribal eligibility for State grant and bond programs is beyond the scope of this Report. State agencies should review their programs and work collaboratively with the Tribes to propose and implement changes necessary to ensure eligibility.

VI. Challenges to Policy or Regulatory Changes

There will be challenges to implementing any of these solutions. These will likely include deciding which Tribes will be able to exercise cultural use rights on State lands; deciding who should resolve the conflicting claims of Tribes who claim traditional rights on the same land; responding to concerns about conservation, sustainability, and Tribes' ability to regulate their own members' conduct; and responding to claims that recognizing these rights affords them

[296] See, e.g., CDFW Big Game Enhancement grants, limiting eligible entities to nonprofit organizations. https://wildlife.ca.gov/Grants/Big-Game.

[297] See, e.g., Water Security, Clean Drinking Water, Coastal and Beach Protection Act of 2002, Cal. Water Code § 79505(g) (providing grant funds to nonprofit organizations defined as those organized pursuant to State law and qualified as tax-exempt charitable organizations under the federal Internal Revenue Code).

[298] *Big Valley Band of Pomo Indians v. Superior Court*, 133 Cal. App. 4th 1185, 35 Cal. Rptr. 3d 357 (First Dist. Ct. of Ap. 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).

"special treatment" in violation of State and federal equal protection constitutional guarantees, or will lead to demands to recognize other tribal rights on State lands in the future.

A. Identifying Eligible Tribes

California has 109 federally recognized Tribes, the most of any state in the country. A Tribe that is federally recognized has been acknowledged by the United States to possess certain sovereign powers of self-government and is the beneficiary of a trust relationship with the federal government.[299] Federally recognized Tribes are entitled to receive federal benefits, services, and protections because of this special relationship with the United States.[300]

There are also currently 55 non-federally recognized California Tribes which are considered "tribal governments" under State law for certain purposes.[301] These non-federally recognized Tribes are identified on a list maintained by the California Native American Heritage Commission ("NAHC") and have met certain criteria that entitle them under State law to be consulted when their cultural properties and resources are implicated under State permitting requirements.[302] They are also eligible under State law to hold conservation easements.[303] Non-federally recognized Tribes do not have a trust relationship with the federal government and are not eligible for the federal benefits reserved to recognized Tribes. Nevertheless, non-federally

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[299] Cohen, Federal Indian Law (2012 ed.) at §3.02[3].
[300] Act of November 2, 1994, Public Law 103-454, 108 Stat. 4791, 4792.
[301] *See* California Code, Public Resources Code - PRC § 21073 (defining "California Native American tribe" as a federally recognized or nonfederally recognized "Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission").
[302] *Id.; see also* Assembly Bill 52 (Sept. 25, 2014) https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB52; Native American Heritage Commission Tribal Consultation Policy, https://nahc.ca.gov/wp-content/uploads/2020/09/Signed-NAHC-Tribal-Consultation-Policy.pdf.
[303] *See* Civ. Code §815.3(c) (authorizing among the entities eligible to hold conservation easements "[a] federally recognized California Native American tribe or a nonfederally recognized California Native American tribe that is on the contact list maintained by the Native American Heritage Commission to protect a California Native American prehistoric, archaeological, cultural, spiritual, or ceremonial place, if the conservation easement is voluntarily conveyed").

recognized Tribes maintain their own governmental operations and most remain connected to their traditional lands and cultural lifeways. Although the reasons for lack of federal recognition are different for each Tribe, a connection can be drawn between lack of federal recognition, the failure of the United States to ratify the 18 California treaties, and the State's prior genocidal and assimilationist policies and practices.

If the State is to acknowledge the right of Tribes to gather, hunt, and fish on State lands, should this right be afforded only to federally recognized Tribes, or to non-federally recognized Tribes as well? California agencies that have adopted tribal consultation policies differ in their approaches to this issue. The California Government Operations Agency ("GovOps") Tribal Consultation Policy, which provides broadly for enhanced consultation and meaningful collaboration between GovOps departments (including the Franchise Tax Board and the Office of Administrative Law) and California Tribes, restricts its definition of a "California Indian Tribe" to federally recognized Tribes with one narrow exception.[304] ! Only "in situations involving cultural resources will a non-federally recognized California Native American Tribe that is on the list maintained by the [NAHC] be included in this definition."[305] !The Department of Fish and Wildlife Tribal Communication and Consultation Policy takes a similar position, providing for consultation with non-federally recognized Tribes only for purposes of protecting cultural resources.[306] The Policy explains that this restriction is based on the "unique political status and jurisdiction and exercise [of] governmental powers [held by federally recognized Tribes] over activities and members within their territory."[307]

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[304] *Government Operations Agency Tribal Consultation Policy*, California Government Operations Agency (Sept. 19, 2011), https://www.govops.ca.gov/tribal-consultation-policy-2/
[305] *Id*.
[306] Tribal Communication and Consultation Policy, California Department of Fish and Wildlife (Oct. 2, 2014), https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=122905&inline
[307] *Id*.

The State Water Resources Control Board's ("SWRCB") Tribal Consultation Policy contains somewhat broader language, explaining that "California Native American Tribes, whether officially recognized by the federal government or not, may have distinct environmental, economic, cultural and public health concerns separate from the concerns of other Tribes and the general public."[308] The SWRCB policy requires consultation with both federally recognized Tribes and non-federally recognized Tribes on the NAHC list, without reference to cultural resource protection.[309] With this, SWRCB has arguably gone further than other State agencies, acknowledging that non-federally recognized Tribes' interests go beyond just protecting cultural resources. The California Legislature also recently amended the State Native American Graves Protection Act ("Cal NAGPRA") to extend repatriation rights to non-federally recognized Tribes on the NAHC list.[310]

Having the right to hunt, fish, gather on and co-manage traditional lands that are now titled in the State is likely to garner considerable interest among both federally recognized and non-federally recognized Tribes. Resource conservation and management interests suggest that it is important for eligible Tribes to be willing and able to regulate their members' activities on these lands. To that extent, limiting eligibility to federally recognized Tribes may make sense – they tend to have the governmental authorities, institutional capacity, and resources for self-regulation. On the other hand, denying non-federally recognized Tribes this opportunity to re-connect, restore, and participate in cultural tending and use of their traditional lands penalizes them for the historical happenstance that led to their lack of recognition and further perpetuates

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[308] Tribal Consultation Policy, State Water Resources Control Board (June 2019), https://www.waterboards.ca.gov/about_us//public_participation/tribal_affairs/docs/california_water_board_tribal_consultation_policy.pdf

[309] *Id*.

[310] AB 275, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB275; codified at Cal. Health and Safety Code § 8016.

this injustice. It also deprives the State of the beneficial cultural stewardship practices – such as cultural landscape burning to prevent catastrophic fires – which members of non-recognized Tribes could bring to bear. There may be ways to support non-federally recognized Tribes in exercising traditional hunting, fishing, and gathering rights, both financially and through co-management solutions, that would alleviate the real concern that Tribes engaging in these practices be capable and equipped to execute them responsibly.

B. Overlapping Traditional Territories

If California recognizes the Tribes' inherent rights to carry out cultural tending, use, and management of State lands and waters within their traditional territories, multiple Tribes may claim such rights on the same land and waters. To the extent these claims conflict, how should such disputes should be resolved? Because they are sovereign governments, the best approach would be for the Tribes to seek to settle the dispute themselves. If they are unable to achieve a resolution, then an appropriate State agency could become involved. The California Public Utilities Commission Land Transfer Policy, which grants Tribes a right of first refusal over Investor-Owned Utility properties to be sold within their traditional territory, adopted this approach:

> If more than one Tribe seeks ownership of available Real Property, and if the Tribes are unable to resolve the dispute themselves, this Policy creates an expectation that the IOU [Investor-Owned Utility] or the Commission will engage in meaningful consultation with the Tribes to attempt to resolve the dispute. As part of the implementation guidelines to be developed under this Policy, the Commission will work with the Tribes, utilities, and other stakeholders to further develop a dispute resolution policy.[311]

Cal NAGPRA, a State law that requires museums and universities to repatriate native remains and funerary objects to associated Tribes, grants universities as well as the NAHC the authority

[311] Tribal Land Transfer Policy, California Public Utilities Commission (Dec. 5, 2019), https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/news-and-outreach/documents/bco/tribal/final-land-transfer-policy-116.pdf

to mediate disputes over repatriation claims.[312] Whether the Tribes themselves are to resolve the conflicting claim, or the dispute is brought to the NAHC or another appropriate State agency, one thing is clear: any disputes must be resolved in consultation with the claimant Tribes.

C. Resource Conservation and Tribal Self-Regulation

The historical record shows unequivocally that Tribes had self-regulatory systems in place for thousands of years to ensure intergenerational protection, care and abundance of the resources on which they depended. For many Tribes, those systems are still in place.[313] The State has a legitimate interest in ensuring that, consistent with its conservation and protection goals, tribal cultural tending, use and management arrangements continue to steward such resources in sustainable ways. This concern will be particularly acute regarding species with dwindling populations, and, more generally, regarding all species subject to the vagaries of climate change. Discussions among the Tribes and the State should include this issue and may focus in part on whether and how tribal harvest and management codes address, or should address, this issue. For example, the Tolowa Dee-ni' Nation recently adopted a Harvesting Title in its legal code that spells out cultural prescriptions for harvesting a wide variety of species, designed to ensure they remain healthy and available for future generations.[314]

D. Equal Protection

Finally, a proposal to allow Tribes to gather, harvest, and fish on State lands within their aboriginal territory may be criticized on the basis that it would violate Proposition 209 or the

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[312] Cal. Health and Safety Code § 8016.

[313] *See, e.g.,* "The Importance of Indigenous cultural burning in forested regions of the Pacific West, USA," https://www.fs.fed.us/psw/publications/jwlong/psw_2021_long003.pdf (documenting indigenous cultural burning practices which have been passed down through the generations, and are now being recognized and studied by state and federal forest management agencies).

[314] Tolowa Dee-ni' Nation Tribal Code-Title 16-Harvest Title.

State's constitutional principle of equal protection. Neither concern should deter the State from working with the Tribes to develop options that would be legally and politically defensible. Tribal resource use activities are beyond the scope of Proposition 209, and the implementing regulation or policy arguably would not be a form of race discrimination in violation of equal protection principles. There is considerable evidence that the State's relations with sovereign Tribes and their members are based on a political, rather than racial, classification.

We address Proposition 209 first. Proposition 209, now codified in the California Constitution at Article I, Section 31, provides as follows:

> The State shall not discriminate against, or grant preferential treatment to, an individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.[315]

By its own terms, the prohibition on granting preferential treatment to groups based on race or ethnicity applies only to "public employment, public education, or public contracting."[316] Thus, the provision is not intended to apply to <u>every</u> distinction made on the basis of race or ethnicity.[317]

The tribally-specific changes contemplated here would allow Tribes to hunt, fish, and gather on State lands and waters within their traditional territories, or provide an enhanced role for the Tribes in managing and stewarding State lands and waters for cultural resource protection reasons. None of these arrangements falls within the ordinary meaning of "public employment, public education or public contracting." As a result, Proposition 209's prohibition on preferential treatment would not likely apply to such a legal or policy change.

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[315] California Constitution at Article I, Section 31
[316] *Id*.
[317] 81 Ops. Cal. Atty. Gen. 233, 238 (1998) (concluding Proposition 209 does not apply to provision of State law requiring Secretary of State to maintain a registry of women and minorities to serve on corporate boards of directors); *see also* Opinion No. 07-304, 10 Cal. Daily Op. Serv. 2962, California Department of Transportation (Proposition 209 is State's principal rule against discrimination in public employment and public contracts).

A tribal right to conduct cultural tending, stewardship, hunting, fishing and gathering within State lands and waters is also defensible in the face of an equal protection of the laws challenge. The federal and State constitutions contain provisions entitling all persons to the "equal protection of the laws." The 14th Amendment to the federal constitution provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[318] The California Constitution likewise provides in Article I, Section 7(a) that "[a] person may not be . . . denied the equal protection of the laws."[319] With one exception not relevant here, the State constitutional guarantee is applied in a manner identical to the federal guarantee.[320]

On both the federal and State levels, courts typically uphold preferential treatment to a particular group unless the legislative or administrative scheme implicates a "fundamental right" of the disfavored group or unless the classification of the favored group is based on race. In the absence of a fundamental right or race-based classification, courts apply a rational basis test to legislation or administrative practices favoring one group over another. "The standard formulation for minimum rationality is whether the classification is rationally related to a legitimate governmental purpose."[321] There is a credible argument that this test is met here. A State policy affirming tribal use rights on State lands which once belonged to the Tribes is rationally related to the legitimate governmental interest of respecting and protecting the rights of the Tribes and promoting their health and welfare.

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[318] U.S. Constitution at Art. 14.
[319] California Constitution at Article I, Section 7(a).
[320] *DeRonde v. Regents of University of California,* 28 Cal.3d 875, 889-890, 172 Cal. Rptr. 677, 685 (1981).
[321] *Board of Supervisors v. Local Agency Formation,* 3 Cal. 4th 903, 913, 13 Cal. Rptr. 2d 245 (Court of Appeal, Fourth District 1992).

CONCLUSION

California has made significant strides in providing mechanisms by which Indian Tribes and State agencies may consult about virtually any aspect of State policy and law that affects tribal interests. Those consultation policies provide an ideal framework for a joint effort to formulate changes in State policy and law that will be necessary to honor, respect and strengthen tribal connections to their traditional areas on State lands and waters. The Governor's acknowledgment of the State's role in the decimation of tribal communities and the loss of their lands provides a strong foundation to begin building genuine partnerships with Tribes to revitalize their connections to State lands and waters.