



# YUROK TRIBE

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July 12, 2012

Mr. John Laird, Secretary for Natural Resources  
California Natural Resources Agency  
1416 Ninth Street, Suite 1311  
Sacramento, CA 95814

Re: Yurok Tribe comment and recommendations on Natural Resources Agency Tribal Consultation Policy

Dear Secretary Laird,

The Yurok Tribe reserves any and all rights and these comments and recommendations should not be considered a waiver of the same.

The Yurok Tribe would like to thank the Brown Administration for addressing and supporting the development of positive solutions to many complex issues that face California Indian Country. The recent appointments that you have made including, Secretary Laird, Liane Randolph and Catherine Kuhlman are a step in a positive direction.

The Yurok Tribe is the largest tribe in the State of California with 6,000 members. The Tribe is a natural resource Tribe with federally reserved rights to the water and fish of the Klamath River. Due to the migratory patterns of salmon (anadromous fish) the Tribe asserts an interest in the entire Klamath River Basin including but not limited to the main stem Klamath, the Trinity River, Scott, Shasta, and other tributaries. Tribal authority and ordinances extend to all Native Americans within the reservation boundaries. The Tribe has a highly trained police force which enforces tribal law including hunting and fishing within Yurok ancestral territory. Tribal police are cross deputized and can therefore enforce the California Fish and Game Code. The Tribal prosecutor for Fish and Game violations is a former California Superior Court Judge and the Judge of the Tribal Court is a former California Court Commissioner. See our attached profile and legal analysis of Tribal rights. The Tribe diligently protects and maintains subsistence fishing and hunting traditions that have continuously been exercised by the Yurok Tribe and Tribal members since time immemorial. Yurok interests are unique; no one can represent Yurok but the Yurok – we are co-managers.

The California Natural Resources Agency (Resources) Draft Tribal Consultation Policy is a much-needed effort to begin to address effective State-Tribal consultation. The proposed policy is both a welcome symbolism of supporting Tribes and substantive improvement over the historical way in which the State of California and Tribe's engage in policy and technical communications. The process to create an effective respectful working relationship between the Tribes and the State of California will require considerable effort. A consultation policy can be a mere checklist of little substance or represent an effective decision making concept to encourage cooperation and partnerships. Any cooperative and effective partnerships take mutual respect and ongoing, time, effort, and a vision from the top. We look forward to being an active participant in this process and laud your efforts and commit to doing our part to have an effective partnership.

The Yurok Tribe notes that the complex and difficult issue of how to conduct Tribal consultation and input within the context of adjudicatory due process requirements,<sup>1</sup> public notice requirements,<sup>2</sup> and basing decisions solely on the hearing record that have been imposed by various Administrative Code provisions and sometimes the Courts<sup>3</sup> has been deferred. At such time as the Resources Agency or agencies implementing this policy, or the Attorney General's Office takes up this issue the Yurok Tribe requests to be included.

The second difficult and challenging issue not fully addressed by the policy is the nature of the political definition of Tribe and the recognizing entity. In contrast the federal government has precise definitions of what constitutes a Federally recognized Tribe. While this may well be appropriate for a consultative policy, the nature of the relationship can change between government to government, citizens of governments and an ethnic/racial group. In the regulatory process there are very different levels of agency discretion relating to these political versus individual distinction. This means the same consultation may result in different regulatory results.

Implementation will require consideration of individual Tribal ceremonial, religious, cultural and the necessary constitutional balancing tests unique to each tribe.<sup>4</sup>

### **Tribal Capacity and Levels of Engagement**

While Tribes in California have much in common, we are also quite diverse in our goals and capacity. A successful consultation policy will need to recognize this diversity and provide flexibility in the level of engagement tailored to the individual sovereign government's preference and capacity. The Yurok Tribe has included as an exhibit a brief description of our Tribal capacities.

The Yurok Tribe prefers a multi-level approach to consultation. Official meetings with leadership are important to set out the goals and approach to solving problems. In order for consultation to be meaningful, it must then continue with the middle and lower staff levels. Staff actions must be informed and comply with the policy level directive to implement the often detailed efforts necessary. Effective consultation with Tribes requires open communication and information sharing early and often.

The Yurok Tribe highly recommends the following regarding consultation considerations which includes but is not limited to:

- Political distinction of Federally Recognized Indian Tribes
- Inclusion at the governance level
- Incorporation of all concepts at all state staff levels
- Institutionalize the Tribal Consultation Policy within all Resources departments.
- Provide opportunity for Tribes to educate Resources staff on effective Tribal consultation

### **Yurok Tribe Comments to Tribal Consultation Policy**

1. **The State of California recognizes Tribal Self-Government of Tribes and supports self-determination.<sup>5</sup>**

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<sup>1</sup> In order to implement agencies need to determine whether the contemplated action is legislative or adjudicatory. Some agencies have well developed guidelines for making such a determination and different ex-parte rules for each. For example the State Water Resources Control Board has a detailed legal opinion. Some agencies have not made such a careful analysis and in order to implement the consultation policy will have to develop such an analysis. This will be a key first step to implementing consultation. There may also be solutions in having upper echelon staff conducting the Tribal consultation although this would have to be vetted with both the Tribes and agencies. Some agencies have and encourage consultation with groups prior to proposing draft language and some do not.

<sup>2</sup> Bagley-Keene Open Meeting Act 2004 Government Code Sections 11120-11132. See an excellent general discussion in the California Attorney General's Office review of the act.

<sup>3</sup> Care has to be taken to comply with the California and Federal Constitutions Establishment clauses.

<sup>4</sup> Eagle Feather cases: U.S. v. Wilgus 638 F.3d 1274 (10<sup>th</sup> Circuit. See also Cal. Fish & Game Commission, Notice of Emergency Regulatory Action Relating to Stewart's Point State Marine Reserve and conservation area June 30, 2010. Found Kashia People's health, safety, and general welfare were deprived by no access.

<sup>5</sup> This may be better placed in an introduction or whereas section of the proposed consultation policy.

2. **Outreach.** The agency and departments must identify the Native American Tribes to consult at the earliest possible time in the planning process and allow a reasonable opportunity for Tribes to respond and participate. Each Resources department is responsible for developing and implementing a meaningful, accountable<sup>6</sup>, consultation process with Native American tribes and must promote regular and early consultation through communication and collaboration. Each department should identify participants in the process—including the decision-makers and staff with an appropriate level of responsibility—that can ensure tribal concerns will be brought forward and adequately addressed.

Each Resources department should disseminate public documents, notices and information to California Native American Tribes. The documents should be readily accessible to Tribes. Notification should include sufficient detail about a topic to be discussed to allow Tribal leaders an opportunity to fully engage in a substantive dialogue. This should also include the applicable timeline of the consultation process, comment period/s and decision making actions. In the event the Resources department makes an attempt to initiate contact and does not receive a response, the department should make reasonable and periodic efforts throughout the process to repeat the invitation.

For each project agencies need to have both a general outreach to all Tribes and a targeted outreach. While there is an upfront cost in agency time to implement a target outreach approach such a process will save considerable time and grief in the future. Factors for targeting should consider traditional ceremonial, religious and cultural use, of both a past and present nature, Tribes located in close geographical proximity to the project area, Tribes with a history of interest in particular a natural resource issue, economic enterprises likely to be affected by the project<sup>7</sup>, the location to and proximity to reservation boundaries, trust land status, existing M.O.U. and or co-management agreements with the State and Federal Government Agencies<sup>8</sup>, the Tribal Right has an additional basis under State Law as provided for in the California Governmental code, Federal Law such as the Clean Water Act<sup>9</sup>, 33 U.S.C. 33 the Clean Air Act 42 U.S.C. 7401 et seq. Endangered Species Act 16 U.S.C. 1531 et seq. which provide for full Tribal regulatory authority instead of the State, existence of federal reserved right,<sup>10</sup> or Tribes having a history of interest, and differing tribal capacities should be targeted for additional contact and coordination efforts.

3. **Tribal Liaisons.** Each Resources department should designate a Tribal liaison, or liaisons, to serve as the central point of contact for Indian Tribes. The role of the Tribal liaison will be to ensure that issues affecting Indian tribes are identified and that department outreach and communication efforts are undertaken in a manner consistent with this policy and to adequately address the applicable issues
4. **Tribal Liaison Committee.** Resources should designate a Tribal Liaison Committee (TLC) consisting of department liaisons that will meet on a regular basis in the Office of the Secretary to review Tribal consultation efforts and opportunities in the departments and share information. The TLC has authority to invite Tribes and Federal agencies for Tribal projects involving multiple agencies, broad based environmental issues or as circumstances warrant. The TLC should have the authority and be encouraged to invite Tribal representatives to present on Resources issues affecting more than the agency.<sup>11</sup>

<sup>6</sup> The requirement for accountability was taken from Federal Register Government to Government requirements. See Federal Register Vol. 65 67250 Sec. 5 November 9, 2000

<sup>7</sup> The Trinidad Rancheria owns and operates the Trinidad Harbor. Anything affecting harbor use including marine environment regulations would need to consult with the Tribe.

<sup>8</sup> Department of Interior Cooperative Agreement with Yurok (See attached enclosures)

<sup>9</sup> The Hoopa Valley Tribe has been certified for Treatment as a State under the Clean Water Act 33 U.S.C. 1251 et seq. and as a consequence completely regulates water quality discharges on the reservation.

<sup>10</sup> Tribal reserved water and fishing rights are often confused by State Agencies with the Public Trust Doctrine. The distinction is that the State has authority to change and interpret a State Public Trust Doctrine but has no such authority for a federal reserved water and fishing right.

<sup>11</sup> Tribal presentations should be encouraged and provided for. (While the policy provision needs to be general the three pattern areas the Yurok Tribe has identified needing such an approach involve Federal and State Endangered Species Act, large land acquisitions, and non-recorded enforceable inter-agency agreements.) Enforceable but unrecorded conservation protection measures are becoming a huge issue in California. An example involving most of these facts was the Yurok Tribe recently had a land project of 22,000 acres requiring

5. **Access to Contact Information.** The agency should work with the Native American Heritage Commission to maintain a contact list of Tribal representatives from federally-recognized and non-federally recognized California tribes. Resources should provide Resources department contact information and organizational charts to each Tribe.
6. **Training.** The agency should provide technical assistance and training to Tribal liaisons and executive staff, managers, supervisors and employees on implementation of this policy. Resources should consider contracting Tribal representatives to help facilitate training to Resources staff. Resources should provide training to Tribes about agency protocols and procedures to help foster a one on one relationship between Resources and Tribal staff.
7. **Grievance Policy.** Resources should develop a Tribal grievance procedure that would include an ombudsman in order to ensure adequate Tribal participation is achieved.
8. **Funding to Facilitate Tribal Participation.** Resources should provide funding to ensure Tribal participation at meetings and inform Tribes of potential collaboration of funding opportunities. Even small travel stipends can go a long way towards a more effective consultation process.
9. **Science Presentations:** Tribes shall have the right to voluntarily submit all forms of science including traditional ecological knowledge to the policy process.

The Yurok Tribe appreciates this opportunity to provide comment on this Natural Resources Agency Tribal Consultation Policy. This is a very important issue that has needed to be addressed and we look forward to building a working relationship with the Resources agency. If you have any questions or concerns please contact the Office of the Tribal Attorney, Ruthie Maloney, Paralegal (707) 482-1350 ext. 1356 or email [rmaloney@yuroktribe.nsn.us](mailto:rmaloney@yuroktribe.nsn.us) or John Corbett, Senior Attorney at (707) 482-1350 ext. 1311 or email at [johnc@yuroktribe.nsn.us](mailto:johnc@yuroktribe.nsn.us).

Respectfully,



Marjorie Bucksin

Yurok Tribal Vice-Chair

cc: John Corbett, Senior Attorney

Enclosures: Description of Yurok Capacity

Legal Analysis

Humboldt County Cross Deputization Agreement

Department of Interior Cooperative Agreement

Draft California Fish and Game Humboldt Martin Agreement

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coordination with the Air Resources Board, (an amendment to proposed carbon regulations and final adoption), Cal Fire, (Coordination of THP with Bureau of Indian affairs timber approvals), Department of Fish and Game (a consistency determination of a Federal Endangered Species Act Habitat Conservation Plan and a performance bond requirement by Fish and Game that had to be modified to respect Tribal sovereignty), North Coast Regional Water Quality Control Board, (non recorded enforceable inter agency agreement) the State Water Resources Control Board, (funding and a non recorded enforceable inter agency agreement), The Tribe is pleased to report that exceptional cooperation was received from each of the State Agencies and within a very short period of time. A further example is the Yurok Tribe as part of our return of the Condor project, developed with Federal Agencies received California Fish and Game concerns and a challenge whether we had authority to return the Condor from Fish and Game. The Tribe noted the 58,000 acre reservation combined with many hundreds of thousands of acres of Redwood National Park land meant re-introduction of the Condor without Fish and Game approval. However, a preferred better approach would be to cooperatively work together with a multi-agency team. While not final the proposed Memorandum of Understanding, MOU agreements has been negotiated and is awaiting final approval by the Department of Fish and Game and the Yurok Tribe Council. **An institutionalized process within the TLC would be helpful to both the Tribes and State Agencies to insure a better working relationship.**