

COMMITTEE ON WATER, PARKS, AND WILDLIFE and SELECT COMMITTEE ON NATIVE AMERICAN AFFAIRS

BAUER-KAHAN, RAMOS, Chairs

JOINT INFORMATIONAL HEARING

Tuesday, August 9, 2022

9:30 am – 1021 O Street, Sacramento, CA – Room 1100

Water is Life: Addressing California Tribal Water Issues

Background Paper

*Note on terms: “Native Americans,” “Native Californians,” “California Native Americans,” “Indigenous People,” “Indians,” “Indian Tribes,” and “California Indians” are terms used interchangeably throughout this background paper to refer to the original inhabitants of the lands currently known as California.

Introduction

It is estimated that there were approximately 310,000 Native Americans living in California at the time that the first Spanish mission was founded in 1769; however, some scholars believe this is a conservative estimate and that the number may have been as high as two million given the ability of California’s natural abundance to support a larger population.¹

Today, California is home to the largest Native American population in the country and has 110 federally recognized tribes² with another 81 groups seeking federal recognition³. According to 2020 U.S. Census data, 631,016 Californians identify as “American Indian” or “Alaska Native”; when including the Californians that identify as “American Indian” or “Alaska Native” in combination with another race or ethnicity, the number of Native Americans in California increases to 1.4 million residents.⁴

Very few Native Americans live on their ancestral lands in California today. This is due to the repeated efforts of Spanish, Mexican, Russian, and United States governments to subdue and displace indigenous peoples: “All four colonial nations sponsored policies that uprooted Indigenous People and communities from the lands in which they were created, and all four

¹ Akins, D. and Bauer, Jr., W. (2021). *We Are the Land: A History of Native California*. Oakland: University of California Press, p. 15.

² U.S. Department of Health and Human Services, Indian Health Service. (2022, Jan 28). List of Federally-Recognized Tribes in CA. <https://www.ihs.gov/california/index.cfm/tribal-consultation/resources-for-tribal-leaders/list-of-federally-recognized-tribes-in-ca/>.

³ Center for Families, Children & the Courts. (2012, Jan). Frequently Asked Questions: Indian Tribes and Tribal Communities in California. <https://www.courts.ca.gov/documents/TribalFAQs.pdf>.

⁴ U.S. Census Bureau. (2020, Aug 12). Race and Ethnicity in the United States: 2010 Census and 2020 Census. <https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html>.

deployed violence, in the form of slavery, genocide, and an administrative state bent on eliminating California Indian people.”⁵

The federal government sent three commissioners to California to negotiate treaties with California tribes in 1851. These commissioners negotiated 18 treaties with 139 tribes that would have set aside 7.5 million acres for Indian use and granted other rights to Native Californians; however, when President Fillmore submitted the treaties to the U.S. Senate for ratification in February 1852, senators from California objected and the U.S. Senate rejected the treaties during a secret session. The U.S. Senate then placed the treaties in its archive, concealing the existence of these treaties from the public for more than 50 years.⁶ In 1903, the federal government sent another Indian agent to California to settle Indians on reserved lands. By that time, however, many tribes no longer lived on their ancestral lands, so small plots of land were established for Indian families (see Figure 1).

Lands legally controlled by tribes in California today result from presidential executive order, federal statute, or action by tribes and tribal members themselves to purchase land. Water rights were not often appropriately accounted for in the protection of tribal lands.

Water is essential for all life and, like other groups across the globe, “quite often, Indigenous People chose to live on or near bodies of water.”⁷ In addition, many tribes strongly believe that water is an interconnected element that flows through all spaces in tribal communities. This stems from their own Indigenous Knowledge Systems (IKS); these systems are tribes own skills, perceptions, ideologies, and experiences. One component of IKS is Traditional Ecological Knowledge (TEK), the relationship between the people and the direct contact with the environment.⁸ For example, water holds importance with regard to farming which provides sustenance for community members, fishing which again provides sustenance, and ceremonial use for healing. Additionally, tribal communities believe that water has healing powers and can cure ailments. Some tribal communities’ creation stories include water, some which share that water sources like springs and underground waterways are pathways which connect the ancestors from the past to the present.⁹

The goals of this hearing are to identify and learn about past and current water issues related to California Native American tribes and to explore ways that the State of California may assist in addressing past injustices and help tribes in California to secure access to water necessary to

⁵ Ibid, p. 3.

⁶U.S. National Park Service. (2004, Nov 17). A History of Native American Indians in California 1849-1879. https://www.nps.gov/parkhistory/online_books/5views/5views1c.htm.

⁷ Akins, D. and Bauer, Jr., W. (2021). *We Are the Land: A History of Native California*. Oakland: University of California Press, p. 16.

⁸ U.S. Department of Interior, Bureau of Indian Affairs. (n.d.). Traditional Ecological Knowledge. <https://www.bia.gov/bia/ots/dfwfm/bwfm/fuels-management/traditional-ecological-knowledge>.

⁹ Larned, S. M. (2018) Water is Life: The Native American Tribal Role in Protecting Natural Resources. *Environmental and Earth Law Journal*, Vol. 8, 57-58.

Assembly Water, Parks, and Wildlife Committee and Select Committee on Native American Affairs
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Federally reserved water rights

Since the nation's founding, the federal government has negotiated treaties and reserved federal lands for tribes. The U.S. Constitution grants Congress the authority to regulate commerce with Indian Tribes. The Supreme Court has long recognized that the federal government "has charged itself with moral obligations of the highest responsibility and trust" for Indian tribes.¹⁰ When the federal government reserves land for tribes, it implicitly reserves sufficient water on that land to accomplish the purposes of the reservation. The Supreme Court recognized that reservation of water rights in 1908 in *Winters v. United States* ("the Winters Doctrine"). These "federal reserved water rights," where they exist, enjoy characteristics that differ significantly from state water rights and provide benefits to tribes. Such rights:

- Date to the time of the reservation, or water on ancestral lands may have a priority of "time immemorial;"
- Fulfill the purposes, including current and future needs, of the reservation, not just the historical use of the water;
- Cannot be lost due to non-use; and
- May apply to instream flows, or "nonconsumptive" rights (e.g., water for instream flow to support fish populations), where necessary to support reservation purposes.

Tribal groundwater rights. Because many California tribes do not have immediate access to surface water resources, groundwater may provide critical access to water for tribal needs. A California tribe recently established the principle that tribal reserved water rights include groundwater. In *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District* (2017), the 9th Circuit Court of Appeals affirmed that the Agua Caliente Tribe "has a reserved right to groundwater underlying its reservation," and confirmed the application of the Winters Doctrine to tribal groundwater rights. While the Supreme Court previously had recognized that a national monument could assert rights to protect groundwater from neighbors' pumping, the *Agua Caliente* decision affirmed that principle for tribal reservations.

Quantifying federal reserved water rights for tribes. Quantifying the federal reserved rights of tribes requires adjudication by a court or a settlement authorized by Congressional action. An adjudication of tribal and other federal water rights may occur in a federal court, or in a state court provided that the state court has jurisdiction over all claimants of water rights in the watershed. Congress authorizes waivers of federal sovereign immunity to adjudicate water rights in state courts under certain conditions, pursuant to the 1952 McCarran Amendment. California has not done many water right adjudications, as they can take decades to resolve, requiring water right claimants to spend substantial funding for lawyers and experts to quantify

¹⁰ *Seminole Nation v U.S.* 316 U.S. 286 (1942).

all water rights in the basin. California tribes therefore have not had the opportunity to engage in adjudicating their water rights in court.

Indian water right settlement alternative. Indian water right settlements, leading to Congressional approval, offer a water right quantification alternative to adjudication in court. The U.S. Department of the Interior established a formal Indian Water Right Settlement process in 1990, to resolve disputes between tribes and their neighbors as to water rights. A settlement agreement can provide the tribe with quantified water rights, funding (to meet infrastructure or other needs), and other benefits such as legal rights or ecosystem restoration. In other states, state governments have contributed funding to these water right settlements.

Few California Indian water right settlements. Despite having 110 tribes in California, few settlements have developed. Many tribes do not have access to surface water on their lands so disputes as to their water rights have been limited. The federal government, as the trustee for tribes, has not started many settlement discussions pursuant to its 1990 regulations. Existing settlements in California include:

- San Luis Rey Indian Water Rights Settlement (1988). This water rights settlement resolved claims between the United States, local water entities, and the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians in Northern San Diego County. Almost 20 years after litigation began in 1969, this settlement appropriated \$30 million to the San Luis Rey Tribal Development Fund within the U.S. Treasury, to be provided as requested by the San Luis Rey Indian Water Authority. The settlement also obligated the provision of up to 16,000 acre-feet per year of supplemental water for the benefit of the Bands and local entities.¹¹
- Soboba Band of Luiseño Indians Settlement (2008). This settlement process began in 1991 and quantified water rights for the San Jacinto Mountains-based Soboba Band at 9,000 acre-feet per year; appropriated \$11 million in federal funding for reservation water and sewer infrastructure; and provided the Band with significant land and \$10 million in funding for economic and commercial development. This settlement resolved water disputes dating to the late 1800s.¹²
- Pechanga Band of Luiseño Mission Indians Water Rights Settlement (2016). In this settlement, the Riverside County reservation was allocated 4,994 acre-feet of water per year and about \$35.5 million in federal funding for water storage construction. Before resolution, the dispute had been pending in adjudication going back to the 1950s.¹³

¹¹ San Luis Rey Indian Water Rights Settlement Act, 102 U.S.C. § 4000 (1988). <https://www.congress.gov/bill/100th-congress/senate-bill/795>.

¹² Soboba Band of Luiseno Indians Settlement Act, 122 U.S.C. § 2975 (2008). <https://www.congress.gov/bill/110th-congress/house-bill/4841/text>.

¹³ WIIN Act, 130 U.S.C. § 1628 (2016). [Text - S.612 - 114th Congress \(2015-2016\): WIIN Act | Congress.gov | Library of Congress](#).

The Congressional Research Service reports that California has three ongoing tribal water rights settlements:

- The Agua Caliente settlement (involving the Agua Caliente Band of Cahuilla Indians);
- The Fallbrook settlement (involving the Cahuilla Band of Mission Indians, the Pechanga Band of Luiseño Mission Indians, and the Ramona Band); and
- The Tule River Indian Tribe's settlement of the Tule River.

Groundwater

Groundwater is the water stored underground in spaces between sand, soils, and fractured rock known as “aquifers.” Groundwater makes up roughly 38 percent of California’s water supply in an average year and more than 45 percent in a dry year.¹⁴ With California tribes having limited access to surface water resources, tribes have turned their attention to groundwater. In the last decade, California has also increased its focus on groundwater management, passing a groundwater monitoring law in 2009 and the Sustainable Groundwater Management Act (SGMA) in 2014. Tribes participated in SGMA’s development and passage, with statutory language reflecting some divergence in perspectives among tribes. SGMA allows tribes “to voluntarily agree to participate in the preparation or administration of a groundwater sustainability plan” (GSP) and provides that “federally reserved water rights to groundwater shall be respected in full” (Water Code § 107020.3). SGMA also requires a groundwater sustainability agency (GSA) to consider the interests of all beneficial users of groundwater including “California Native American tribes” (Water Code § 10723.2).

On paper, SGMA marks an important step forward for the state in engaging tribes in the management of a precious resource. Whether these provisions will ultimately assist tribes in gaining access to groundwater resources remains to be seen since SGMA is currently being implemented and has a 20-year horizon. The committees are aware of at least two groundwater basins where tribes are actively engaging or trying to engage in SGMA implementation:

- Upper San Luis Rey Valley basin. This basin is home to five federally-recognized tribes—the La Jolla Band of Luiseño Indians, Pala Band of Mission Indians, Pauma Band of Luiseño Mission Indians, Rincon Band of Luiseño Indians, and San Pasqual Band of Diegueno Mission Indians. These five tribes formed the San Luis Rey Indian Water Authority (SLRIWA) which recently initiated litigation against the basin’s GSA, the Pauma Valley GSA. The suit alleges the GSA failed to adequately consider and “respect in full” the bands’ federally reserved water rights to groundwater in the GSP, prevented the SLRIWA from fully participating in the development of the GSP, and developed a GSP that does not cover the full basin. The case is pending in the San Diego Superior Court.

¹⁴ Department of Water Resources. (n.d.). Groundwater. <https://water.ca.gov/water-basics/groundwater>.

- Yolo Subbasin of the Sacramento Valley Groundwater basin. In this basin, the Yocha Dehe Wintun Nation entered into a joint exercise of powers agreement (as provided for under Water Code § 10720.3) with several cities, water districts, and reclamation districts in the basin to establish a GSA to manage groundwater in the basin, the Yolo Subbasin GSA. This GSA submitted a GSP to the Department of Water Resources (DWR) in January 2022 and DWR is presently reviewing the GSP for adequacy.

Fisheries and ecosystem restoration

Many tribes in California are traditionally and culturally connected to certain fish species native to their local water bodies. Per UC Davis research on 40 tribes/tribal groups conducted in 2014, all reported historical use of fish by their ancestors, including over 76 different marine and freshwater species.¹⁵ Further, nearly 100 percent of respondents considered fishing to be culturally important to their tribe in the past. Though the species vary, cultural connection to plants and animals is key for tribes across the state. “Affinities for specific animals and plants grow out of a profound linkage to a place. The integral way in which a plant or an animal is interwoven into a culture gives the culture continuity with its past and grounding in a distinct bioregion that has been considered home for untold generations.”¹⁶ Now, however, this tradition has become less accessible to some tribes as a result of declining fish populations. The UC Davis report also suggests reduced riverine flows and poor water quality impact the tribes’ abilities to maintain their fish-related cultural practices.¹⁷

Governing policy. The State Water Board considers Tribal Beneficial Uses under their allocation of water rights. Tribal Beneficial Uses aim to protect Native American cultural activities that depend on certain water uses. The three applicable beneficial uses are Tribal Tradition and Cultural (CUL), Tribal Subsistence Fishing (T-SUB), and Subsistence Fishing (SUB). CUL water use can include necessary flows for fishing, gathering, or consumption of natural aquatic resources. However, Tribal Beneficial Uses, per the State Water Board, “are not to protect or enhance fish populations or aquatic habitats,” and it is unclear if federal reserved water rights include the flows and infrastructure necessary to protect traditional fish stocks.

¹⁵ Shilling, F., Negrette, A., Biondini, L., and Cardenas, S. (2014) California Tribes Fish-Use: Final Report. UC Davis. https://www.waterboards.ca.gov/water_issues/programs/mercury/docs/tribes_%20fish_use.pdf#:~:text=Californi%20Tribes%20have%20been%20fishing%20and%20eating%20fish,cultural%20and%20dietary%20importance%20of%20fish%20has%20not.

¹⁶ Anderson, M. Kat. (2005). *Tending The Wild: Native American Knowledge and the Management of California’s Natural Resources*. Oakland: University of California Press, p. 326.

¹⁷ Shilling, F., Negrette, A., Biondini, L., and Cardenas, S. (2014) California Tribes Fish-Use: Final Report. UC Davis. https://www.waterboards.ca.gov/water_issues/programs/mercury/docs/tribes_%20fish_use.pdf#:~:text=Californi%20Tribes%20have%20been%20fishing%20and%20eating%20fish,cultural%20and%20dietary%20importance%20of%20fish%20has%20not.

The ability of tribes to manage fish populations varies based on their recognition status and the terms of their reservation formation. Some tribes with treaty-based reservations maintain the right to protect “Usual and Accustomed” (U&A) fishing areas, where they can claim up to half of harvestable fish stock surplus. The Yurok and Hoopa Valley reservations along the Klamath and Trinity Rivers have federally protected fishing rights in the rivers that run through their territories. In some cases, tribes with these fishing rights can form commissions to co-manage fisheries alongside state and federal governments to maintain populations. However, reservations established by Executive Order hold a “trust” relationship with the federal government, and are therefore not entitled to the same U&A rights as treaty-based reservations. This can create difficulties for tribes interested in protecting culturally important species.



Klamath River salmon. In the Klamath River Basin, concerns are high over the survival of salmon – a fish of high cultural importance to the Klamath Tribes, including the Yurok people. Dams on the Klamath River prevent Chinook and coho salmon from spawning in the river’s upper tributaries, sharply decreasing fish populations.¹⁸ With fewer salmon, the Yurok reservation is left without a key form of sustenance. This causes a reliance on unhealthy preserved food options and a rise in diet-related diseases like diabetes among the tribe.¹⁹ The Yurok people also have a cultural connection to the river and its salmon, honoring the fish with their annual First Salmon Ceremony. Significant declines in salmon stock hurt the tribe’s cultural, spiritual, and physical health, giving the members unique motivation to protect the salmon and its habitat.

Safe drinking water

The U.S. Environmental Protection Agency (U.S. EPA) is responsible for regulating water quality on tribal lands, while the State Water Board regulates water quality for other water systems in California.²⁰ According to U.S. EPA’s ECHO database, there are 110 community water systems in California serving approximately 177,000 people where a tribe has primary enforcement responsibility over the operations of the facility.²¹

¹⁸ Kruse, S. A. and Scholz, J. A. (2006) Preliminary Economic Assessment of Dam Removal: The Klamath River. Ecotrust. https://sites.lafayette.edu/raicha/files/2011/01/Siskiyou_Co_Economic_Assessment1.pdf.

¹⁹ Thompson, B. (September 2021) The familial bond between the Klamath River and the Yurok people. *High County News*, 20-21.

²⁰ Collins, J. and Chappelle, C. (2021, June 21). *Ensuring Safe Drinking Water for California’s Native American Communities*. Public Policy Institute of California. <https://www.pplic.org/blog/ensuring-safe-drinking-water-for-californias-native-american-communities/>.

²¹ U.S. Environmental Protection Agency. (n.d.). *Facility Search – Enforcement and Compliance Data*. <https://echo.epa.gov/facilities/facility-search?mediaSelected=sdw>.

Some Native American communities lack access to safe drinking water. Of the 110 systems mentioned above, 29 systems have current violations and 63 systems have had violations in the past three years.²² Recently, the State Water Board has assessed whether California’s water systems are providing safe and affordable drinking water. However, federally recognized tribal water systems were not able to be incorporated in the 2021 and 2022 Drinking Water Needs Assessments due to missing data. Instead, the State Water Board is working with the U.S. EPA and Indian Health Service to merge and compare existing risk/need assessments for tribal water systems.²³

Federal agencies, not states, have traditionally been funding partners, but as part of its commitment to ensure safe drinking water for all Californians, California has begun to partner with tribes to address this important public health challenge. While the state is not responsible for regulating water quality on tribal lands, Native American communities can access some state funding. For example, the Safe and Affordable Funding for Equity and Resilience (SAFER) program, created in 2019, provides communities with resources to help small systems address violations of drinking water standards — solutions include improved water treatment, new water sources, and consolidation with neighboring water systems.²⁴

The Assembly Environmental Safety and Toxic Materials Committee has legislative jurisdiction for drinking water issues.

²² Ibid.

²³ State Water Resources Control Board. (2022, April). *2022 Drinking Water Needs Assessment*. https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/needs.html.

²⁴ State Water Resources Control Board. (2022, June 21). *Safe and Affordable Funding for Equity and Resilience*. https://www.waterboards.ca.gov/water_issues/programs/grants_loans/sustainable_water_solutions/safer.html.

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