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CALIFORNIA INDIAN TRIBES AND THE MARINE LIFE PROTECTION ACT: THE SEEDS OF A PARTNERSHIP TO PRESERVE NATURAL RESOURCES

Curtis G. Berkey & Scott W. Williams***

The United States Supreme Court long ago described states as the “deadliest enemies” of Indian tribes.¹ California’s relationship with the Indian tribes within its borders has too often reflected the truth of that characterization. In recent years, however, there are promising signs that California and Indian tribes have taken a new direction. If they continue on that course, the State and tribes may enjoy to their mutual benefit a new era of cooperation and collaboration, specifically with regard to the management and use of natural resources.

In 1999, the California Legislature enacted the Marine Life Protection Act (MLPA), which requires the State to establish an improved network of marine protected areas (MPAs) in the three-mile zone of coastal waters under state jurisdiction. MPAs are designated areas where the harvesting and gathering of marine species are regulated, and sometimes prohibited, to foster the long-term sustainability of ocean ecosystems. Like the vast majority of California laws, the MLPA did not specifically address the rights and concerns of Indian tribes even though the California coast is Indian Country for many tribes. The failure of the legislature to acknowledge the centuries-long stewardship of coastal resources by Indian people, and the commencement of a resources-protection process that did not include tribes, resulted in initial opposition from Indian tribes. Many tribes feared the process would simply be the latest in a long history of state actions that risked the extinguishment of cultural practices. Instead, despite initial misunderstandings, the MPA designation process elevated tribal engagement in state natural resource management and may be the catalyst for a fundamental shift in California’s approach to tribal nations.

This Article describes tribal engagement in California’s MPA planning process, its outcome, and the extent to which the result sparked changes in

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1. *United States v. Kagama*, 118 U.S. 375, 384 (1886).

state-tribal cooperation in other areas of natural resource policy. The Article has seven parts: 1) a brief historical overview of California's treatment of Indian tribes; 2) the development of the Marine Life Protection Act; 3) the experience of the Kashia Band of Pomo, which encountered the State's unilateral imposition of a resource protection zone on a tribal traditional spiritual area; 4) the legal backdrop of California Indian tribes' rights to off-reservation subsistence marine resources; 5) the process on the North Coast of developing a tribal marine resource use regulation; 6) the role of Indian tribes in the implementation of the MPA network and species protections; and 7) the implications of the MLPA outcome for California and tribal relations beyond the MLPA.

I. California's Historical Treatment of Indian Tribes

On April 6, 2016, Governor Jerry Brown of California, Chairman Thomas O'Rourke of the Yurok Tribe, Governor Kate Brown of Oregon, then-Secretary of the U.S. Department of Interior Sally Jewell, and other notable tribal, federal, and state leaders, gathered on the Yurok Reservation to sign a historic agreement.² The agreement called for the removal of four dams on the Klamath River as a first step toward restoring the health of the river, its fishery, and the marine and human communities that depend on the river.³ Governor Jerry Brown described the moment as "starting to get it right after so many years of getting it wrong."⁴ The Yurok Tribal Chairman confirmed the Governor's observation and stated, "The path that we're taking is a sacred path."⁵

A few years and one election later, the current California Governor, Gavin Newsom, issued an apology to tribal leaders "on behalf of the state for a history of repression and violence."⁶ Governor Newsom's apology

2. *Klamath River Dam Removal Deal Signed by Top Federal, State Officials*, MERCURY NEWS (Apr. 7, 2016), <https://www.mercurynews.com/2016/04/07/klamath-river-dam-removal-deal-signed-by-top-federal-state-officials/>; see also Hank Sims, *The Deal Is Done and the Dams Are Coming Down*, LOST COAST OUTPOST (Apr. 6, 2016), <https://lostcoastoutpost.com/2016/apr/6/deal-done-and-dams-are-coming-down-congressman-say/> (providing audio of the speeches at the signing ceremony).

3. See generally *Background*, KLAMATH RIVER RENEWAL CORP., <http://www.klamathrenewal.org/background/> (last visited Apr. 20, 2019).

4. *Klamath River Dam Removal Deal Signed by Top Federal, State Officials*, *supra* note 2.

5. *Id.*

6. Jill Cowan, *'It's Called Genocide': Newsom Apologizes to the State's Native Americans*, N.Y. TIMES (June 19, 2019), <http://www.nytimes.com/2019/06/19/us/newsom-native-american-apology.html>; see also CAL. EDUC. CODE § 51226.9 (Deering Supp. 2019)

was described by the New York Times as “the first broad-based state apology for past atrocities against Native Americans, . . .” The Yurok Tribal Court Judge, Abby Abinanti, described the apology as a “first step in a process that has been a long time coming.”⁷

The achievement of new levels of recognition, understanding, and collaboration between tribes and the State of California has been hard-fought, having grown out of a sordid history, one that Governor Newsom described as including “genocide”. A full understanding of the recent developments in the state-tribal relationship cannot be achieved without considering that history.

Slightly more than 150 years ago, among the earliest legislative acts of the recently established State of California were statutes aimed at enslavement and eradication of Indian people and tribes. It is estimated that in 1769, the indigenous population in what is now California numbered approximately 310,000 persons.⁸ During this time, the landscape was “packed with many modest-sized, semi-autonomous polities, each of which supported its own organization of elites, retainers, religious specialists, craft experts and commoners.”⁹ Along the California coast, Indian oral histories are confirmed by archeological analyses that provide evidence of “maritime economies dating between 13,000 to 10,000 years ago.”¹⁰ Those people built ocean-going vessels and constructed weirs, tools, lines, nets, baskets, and other indicia of an economy focused on resources of the rivers, shoreline, and ocean, all of which were then “one of the most productive and diverse fisheries in North America.”¹¹ Complex societies developed on the coast based on the strength of the healthy maritime resources. On the North Coast, World Renewal Ceremonies were sponsored by families to “maintain the established world” and ensure a continuance of the abundant natural resources.¹² Central to the economy were those activities intended to

(signed into law by Governor Brown in October 2017) (requiring a new curriculum in the State’s public high schools telling the true history of California’s Native Nations based on input from those Nations).

7. Cowan, *supra* note 6.

8. Dwight Dutschke, *A History of American Indians in California: 1769-1848*, in FIVE VIEWS: AN ETHNIC HISTORIC SITE SURVEY FOR CALIFORNIA (Cal. Dep’t of Parks & Recreation 1988), https://www.nps.gov/parkhistory/online_books/5views/5views1b.htm.

9. KENT G. LIGHTFOOT & OTIS PARRISH, CALIFORNIA INDIANS AND THEIR ENVIRONMENT: AN INTRODUCTION 7 (2009).

10. *Id.* at 42.

11. *Id.* at 54.

12. *Id.* at 100.

manage the fishery along with plant and animal resources.¹³ Indian communities along the coast maintained themselves for centuries.

The arrival of Europeans in what is now California was a cataclysmic event from which tribes are still recovering.

Following the invasion by Catholic missionaries and their Spanish army protectors into “Alta California” in the late 1700s, Native people were subject to forced labor, confinement, violence, severe punishment (including execution), and disease.¹⁴ California’s indigenous population declined by two-thirds, to about 100,000, by the time of California’s statehood.¹⁵ It reached its nadir fifty years later, in 1900; fewer than 17,000 Indians had survived the invasion.¹⁶ California tribes lived under Spanish rule from 1769 to 1821 and then under Mexican rule from 1821 to 1848. While under Spanish and Mexican rule, California Indians were treated as a racially inferior laboring class, referred to as “indios,” thought to have been designed for working in mines and on plantations, ranches, and farms to provide sustenance and wealth for the “superior” colonizing nations.¹⁷ The Mexican government dismantled the Catholic mission system in the 1830s and the lands were rapidly taken over by non-Indian Spanish and American colonists.¹⁸ Though the Catholic missions no longer wielded authority over the Native population, in the decades preceding statehood, Indians were still routinely enslaved to provide field labor and servants to wealthy landowners.¹⁹

In 1848, the United States gained control of California under the Treaty of Guadalupe Hidalgo that ended the Mexican-American War and ceded large tracts of Mexican land to the United States government. At the time of California’s statehood in 1850, relations between Indian tribes and the

13. *Id.* at 101. Coastal Indians used prescribed burns to manage land resources and constructed temporary fish dams for prescribed periods to harvest fish while ensuring that sufficient fish “escaped” for successful reproduction.

14. *See* Dutschke, *supra* note 8 (“In 1818, [the Spanish Governor] reported that 64,000 Indians had been baptized, and that 41,000 were dead.”).

15. *Id.*

16. LIGHTFOOT & PARRISH, *supra* note 9, at 3. The authors estimated in 2009 that the California Indian population had “rebounded” to 150,000 persons.

17. Les W. Field, *Complicities and Collaborations: Anthropologists and the “Unacknowledged Tribes” of California*, 40 *CURRENT ANTHROPOLOGY* 193, 196 (1999).

18. ANDRÉS RESENDEZ, *THE OTHER SLAVERY: THE UNCOVERED STORY OF INDIAN ENSLAVEMENT IN AMERICA* 247 (Mariner Books 2017) (2016).

19. *Id.* at 249. In the absence of African slaves and prior to Asian immigration, “Indian labor was the only viable option. . . . Short of working the land themselves, white owners had to rely on [Indian laborers].” *Id.* at 249–50.

United States were characterized generally by great conflict, driven by efforts at forced removal of the tribes in the southeast and violent tribal resistance to western expansion in the plains. In California, the colonizing governments sought to sever the connection of coastal tribes to the ocean and coastal lands.

The newly created State of California continued along that course of history. One of the first pieces of legislation adopted was the Act for the Government and Protection of Indians of 1850.²⁰ The Act's title belied its fundamental cruelty. Any Indian found "loitering and strolling about . . . or leading an immoral or profligate course of life" was subject to arrest; if convicted, the Indian was leased to the highest bidder for up to four months of servitude.²¹ The Act provided that any white person who wanted Indian child labor could appear before a justice of the peace with a parent or "friend" of the Indian child, obtain custody, and thereafter control the child's earnings until he or she reached the age of adulthood.²² All complaints against Indians were heard by a non-Indian justice of the peace, with no right of appeal by the Indian.²³ No white person could be convicted of anything based on testimony by an Indian.²⁴ Though the Act did not specifically authorize enslavement of Indians, as Resendez states, "[T]hese provisions gave considerable latitude to traffickers of Indian children. In northern California, this trade flourished" ²⁵ Indian children were routinely kidnapped and sold.²⁶ These conditions persisted until after the Civil War when, reportedly in response to the adoption of the Fourteenth Amendment to the U.S. Constitution requiring due process and equal protection of the law, the state legislature repealed the Act.²⁷

20. 1850 Cal. Stat. 408 (codified at COMPILED LAWS OF THE STATE OF CALIFORNIA 822 (S. Gardfield & F.A. Snyder comps., Benecia, Cal., S. Garfield 1853)), <https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1850/1850.pdf>; see RESENDEZ, *supra* note 18, at 264 (citing J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION 64-65, 70 (Washington, D.C., John T. Tower, 1850)).

21. Act for the Government and Protection of Indians § 20, 1850 Cal. Stat. at 410, *quoted in* RESENDEZ, *supra* note 18, at 265. The four-month periods were easily extended by release and re-arrest.

22. *Id.*

23. *Id.*

24. *Id.*

25. RESENDEZ, *supra* note 18, at 265.

26. Dwight Dutschke, *A History of American Indians in California: 1849-1879*, in FIVE VIEWS: AN ETHNIC HISTORIC SITE SURVEY FOR CALIFORNIA, *supra* note 8, https://www.nps.gov/parkhistory/online_books/5views/5views1c.htm.

27. *Id.*

During these years of de facto enslavement, the federal government negotiated peace treaties with 139 California tribes.²⁸ The treaties reserved to the Indians more than seven million acres of land, approximately one-third of the State's land base, and provided funds to restore Indian tribal self-sufficiency.²⁹ In 1852, the California Senate objected that the lands reserved to Indians contained valuable minerals (primarily gold) and were rich agricultural areas.³⁰ When the treaties were presented to the United States Senate for ratification, the two Senators from the new State of California urged the Senate to go into a "secret session."³¹ In that session, the Senate declined to ratify the treaties. The treaties were ordered to be stored in inaccessible files. They were not unearthed for more than fifty years.³²

The Senate's refusal to ratify California Indian treaties deprived the tribes of both millions of acres of land and a legally protected land base. The failure of the treaties led to California's development of a tenure system modeled on the Spanish Missions. Thus, state-established Indian reservations were not created with traditional aboriginal territories in mind; instead, they were created to function as temporary "self-supporting work camps where Indians would learn civilized skills and labor under white supervision."³³ Under this model, the reservations were made on "rather small areas of federal, often military, land" over which the federal government maintained full control.³⁴ This reservation system required the forced removal of many tribes from their ancestral lands.³⁵ For coastal tribes, removal often meant losing contact with the ocean, depriving tribes of access to their traditional ceremonial, harvesting, and gathering areas. Additionally, although the federal government set aside a small number of Indian reservations in the early period of California statehood, by the mid-1860s, all but one, Round Valley, were discontinued due to "lack of funding and unrelenting hostility from white settlers" wanting access to the set aside lands.³⁶

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* (discussing the unratified treaties).

33. *See* Field, *supra* note 17, at 197.

34. *Id.*

35. *Id.*

36. *Id.*

The effect of the unratified treaties and subsequent federal legislation was that a large majority of California Indians were both landless and homeless by the late nineteenth century.³⁷ Although the reservation system provided refuge for Indian people, it nonetheless deprived most coastal tribes of access to the traditional areas on which they depended for their basic needs.

The California Indian experience was subject as well to developments then affecting Indian nations across the country. For nearly 150 years, Indian tribes were whipsawed by federal and state governments. Reservations throughout the country were broken into individual parcels by the Allotment Act of 1887.³⁸ A fair reading of the Allotment Act in light of its consequences reveals that Congress's intent in dismantling tribal communities was to assimilate Indians into American society.³⁹ The result of the Act was the loss of huge portions of Indian lands.⁴⁰ The Indian Reorganization Act of 1934 (IRA) attempted to impose a democratic form of government on Indian tribes throughout the country; where the Allotment Act failed in achieving full assimilation, the IRA sought assimilation through democratizing tribal governments.⁴¹ Following World War II, where Indians fought in large numbers for the United States, Congress proclaimed the "termination era," a period of both gradual withdrawal of federal support for Indians and sudden unilateral termination

37. Congress passed the California Private Lands Act in 1851. *See* Act of Mar. 3, 1851, ch. 41, 9 Stat. 631. It required all persons claiming title to land that derived from Spanish or Mexican governments to apply for title. *Id.* § 8, 9 Stat. at 632. Failure to apply within two years caused the land to revert to public ownership. *Id.* § 13, 9 Stat. at 633. Failure to document title to the satisfaction of the Public Land Commission also caused the land to revert to public ownership. *Id.* While under Mexican law, lands within ten leagues of the coast were deemed to be "public commons." Congress eliminated that distinction; coastal land occupied for millennia by Indians became subject to private ownership. *See also* *Barker v. Harvey*, 181 U.S. 492 (1901) (deeming Indians who failed to assert land title claims based on Mexican law to have abandoned the lands and their claims). Tribal ancestral lands were transformed into the public domain.

38. Ch. 119, 24 Stat. 388 (repealed 2000).

39. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04, at 72 (Nell Jessup Newton et al. eds., 2012).

40. For a further discussion of the disastrous consequences for Indian tribes brought about by involuntary allotment of tribal lands, see Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 12 (1995) ("By the end of the allotment era, two-thirds of all the land allotted--approximately 27 million acres--had passed into non-Indian ownership.")

41. *See* ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101-5129).

of tribes' status as Indian nations.⁴² In 1953, Congress passed Public Law 280, which gave California and four other states the authority to assume criminal and civil jurisdiction over Indian reservations, depriving Indian nations of significant authority over their people and lands.⁴³ "Throughout much of the twentieth century, California Indians have been administratively, culturally, economically, and politically disadvantaged, even compared with tribes elsewhere in the United States."⁴⁴

The current era of tribal-federal governmental relations is generally thought to have begun during the Nixon years and solidified by the passage of the Indian Self-Determination and Education Assistance Act in 1975.⁴⁵ Broadly speaking, the Act sought to end the paternalistic relationship between tribes and the federal government. It achieved this by requiring federal agencies to enter into agreements with tribes (638 contracts) to transfer federal funds to tribes so Indians could provide for themselves the services that the federal government had previously provided. For example, law enforcement, health care, education, housing, and transportation services were assumed by Indian nations under these 638 contracts. Indian nations began the arduous process of regaining their ability to govern themselves.

With the benefit of nearly four decades of rebuilding tribal governments, Indian nations in California have painstakingly regained some measure of authority over their people and lands and have increased their efforts to protect and restore their cultural traditions and places.⁴⁶ Those efforts

42. See, e.g., the Klamath Termination Act of 1954, Pub. L. No. 83-587, 68 Stat. 718. The Act gave tribal members the choice of retaining their tribal membership or being paid for their share of tribal lands. *Id.* § 5, 68 Stat. at 719. Three-fourths of the Klamath Tribe's members took the money. Wallace Turner, *Last of the Klamath Indians Collect \$49- Million for Tribal Lands*, N.Y. TIMES (Dec. 5, 1974), <https://www.nytimes.com/1974/12/05/archives/last-of-the-klamath-indians-collect-49million-for-tribal-lands.html>; see also Act of July 10, 1957, Pub. L. No. 85-91, 71 Stat. 283 (authorizing the sale of the Coyote Valley Band of Pomo Indians' reservation to the Secretary of the Army for purposes of constructing Coyote Valley Dam in Mendocino County).

43. See Act of Aug. 15, 1953 (Public Law 280), Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, and 28 U.S.C. § 1360).

44. Carole Goldberg & Duane Champagne, *Ramona Redeemed? The Rise of Tribal Political Power in California*, WICAZO SA REV., Spring 2002, at 43, 44.

45. Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended in scattered sections of U.S.C.).

46. The 2010 Census recorded an Indian population in California of 362,801, the largest in the United States and close to the estimated Native population prior to contact with Europeans. CTR. FOR FAMILIES, CHILDREN & THE COURTS, ADMIN. OFFICE OF THE COURTS, CALIFORNIA TRIBAL COURT/STATE COURT FORUM REPORT (2012), <https://www.courts>.

intersected with California's growing interest in protecting and restoring coastal and marine resources—the focus of this Article. The shoreline and coastal area, historically, were Indian country. They still are.

II. Marine Life Protection Act

Beginning in 1998, the California Legislature, reflecting a growing national and international focus on ocean health, sought to transform marine resource management policy in the State with the passage of the Marine Life Management Act,⁴⁷ the Marine Life Protection Act of 1999,⁴⁸ and the Marine Managed Areas Improvement Act of 2000.⁴⁹ These laws were designed to strengthen management of fisheries, enhance protection of marine habitats, and bolster the State's capacity to manage marine resources effectively.⁵⁰

The first of these laws, the Marine Life Management Act (MLMA) of 1998, refocused fisheries management goals toward conservation of entire marine species and habitat ecosystems, as well as long-term sustainability of fish populations.⁵¹ The Marine Life Protection Act (MLPA) of 1999 directed the State to redesign California's existing system of Marine Protected Areas (MPAs) to “increase its coherence and effectiveness for protecting the state's marine life, habitats, and ecosystems.”⁵² The Marine Managed Areas Improvement Act (MMAIA) of 2000 adopted a new classification system for marine management areas (MMAs) to rectify poorly organized management units that had not been managed in a comprehensive and systematic way.⁵³ The MMAIA directed state managing agencies to reclassify existing marine protected areas into three new designations. The first new classification was for “state marine reserves,”

ca.gov/documents/jc-20120831-item2-attach.pdf (page 2 of March 2012 CFCC Research Update). But because California has so little Indian land, in 2005 only three percent of the Indian population lived on a reservation in California. *Id.* It is the authors' observation that a goal of many California tribes is to create the economic and social infrastructure on the reservations sufficient to bring members home.

47. CAL. FISH & GAME CODE §§ 7050–7090 (Deering 2008).

48. CAL. FISH & GAME CODE §§ 2850–2863 (Deering 2008).

49. CAL. PUB. RES. CODE §§ 36600–36900 (Deering 2009).

50. John Kirlin et al., *California's Marine Life Protection Act Initiative: Supporting Implementation of Legislation Establishing a Statewide Network of Marine Protected Areas*, 74 OCEAN & COASTAL MGMT. 3, 4–5 (2013).

51. CAL. FISH & GAME CODE §§ 7050(b)(1)–(2), 7055(a), *cited in* MICHAEL L. WEBER & BURR HENEMAN, GUIDE TO CALIFORNIA'S MARINE LIFE MANAGEMENT ACT 17 (2d ed. 2000).

52. CAL. FISH & GAME CODE § 2853.

53. CAL. PUB. RES. CODE § 36601(a)(6).

which contain rare or imperiled marine species, and within which take would be prohibited except for “research, restoration, or monitoring purposes.”⁵⁴ The second classification was for “state marine parks,” which would be designated to provide “opportunities for spiritual, scientific, educational and recreational opportunities,” and within which no take would be allowed for commercial purposes.⁵⁵ The third classification was for “state marine conservation areas,” which would be designated to provide opportunities for, *inter alia*, “sustainable living marine resource harvest,” and within which commercial and recreational take would be allowed so long as the state managing agency determined such take would not “compromise protection of the species of interest, natural community, habitat or geological features.”⁵⁶

Prior to the MLPA and MMAIA, more than eighty MPAs existed in California, but because they were “small in size, implemented in an *ad hoc* manner, allowed a variety of fishing activities, and not designed as a network[,]” they were largely ineffective.⁵⁷ The primary legal objective of the MLPA was to establish an improved statewide network of MPAs based on the best available science. The MLPA’s goals centered on “protecting the [S]tate’s marine life populations and habitats, marine ecosystems, and marine natural heritage, as well as improving the recreational, educational, and study opportunities provided by marine ecosystems subject to minimal human disturbance.”⁵⁸

The MLPA faced financial and political hurdles in the first few years after its adoption, resulting in two unsuccessful attempts at implementation. In 2004, the State agencies responsible for carrying out the MLPA, the Department of Fish and Game (now the Department of Fish and Wildlife) and the California Natural Resources Agency, partnered with a private foundation, the Resources Legacy Fund, to create a formal MLPA Initiative under a Memorandum of Understanding.⁵⁹ The result provided the

54. *Id.* § 36710(a).

55. *Id.* §§ 36700(b), 36710(b).

56. *Id.* §§ 37600(c)(6), 36710(c).

57. Mary Gleason et al., *Science-Based and Stakeholder Driven Marine Protected Area Network Planning: A Successful Case Study from North Central California*, 53 OCEAN & COASTAL MGMT. 52, 53 (2010).

58. *Id.* at 54.

59. Kirlin et al., *supra* note 50, at 7. For further insight into public-private partnerships, see Michael Mantell & Mary Scoonover, *Early, Patient, Nimble Philanthropy Can Make or Break Public-Private Partnerships*, STAN. SOC. INNOVATION REV. (Apr. 16, 2018), https://ssir.org/articles/entry/early_patient_nimble_philanthropy_can_make_or_break_public

structure, funding, and capacity for regional-scale MPA planning through a stakeholder and science-based process the previous attempts lacked.⁶⁰

The MLPA Initiative (MLPAI) divided the State into four coastal planning regions: South Coast, Central Coast, North Central Coast, and North Coast.⁶¹ Planned sequentially, each region used the same planning components: a regional stakeholder group charged with developing regional objectives, developing specific boundaries and regulations for individual MPAs, and proposing MPA networks; a Science Advisory Team charged with providing scientific advice and input to the other groups throughout the process; and a Blue Ribbon Task Force charged with managing and guiding the development of MPAs in each region.⁶² Unlike prior marine management efforts, the MLPAI was a uniquely stakeholder-driven approach to marine resources management. The MLPAI brought the State's marine resource management planning into the open. One key to its success was the decision to give the regional stakeholder group the responsibility to design and develop the MPAs for their region. After evaluation and public input, the regional stakeholder groups refined the proposals and presented them to the Blue Ribbon Task Force.⁶³ The Task Force then made recommendations to the California Fish and Game Commission.⁶⁴ Under the MLPA, the California Fish and Game Commission has the sole authority to adopt and implement MPAs.⁶⁵ Using this process, the Commission adopted and implemented MPAs for all four coastal regions between 2004 and 2012.⁶⁶ This planning process was largely successful because of "robust stakeholder engagement, strong science guidance, transparent processes, effective leadership by the volunteer BRTF and strong political support" from the state managing agencies and Governor.⁶⁷

_private_partners (discussing the Resources Legacy Fund, a nonprofit organization that was able to secure and direct significant philanthropic resources to help implement the MLPAI).

60. Kirlin et al., *supra* note 50, at 7.

61. *Id.*

62. *Id.* at 7–8.

63. *Id.* at 9 fig.2.

64. *Id.*

65. *Id.* at 6.

66. *Id.* at 10 tbl.5.

67. *Id.* at 11.

III. The Experience of the Kashia Band of Pomo Indians

The California Legislature passed the MLPA without tribal consultation or engagement, despite the Tribes' long history of use and stewardship of marine resources and their common interest in protecting and maintaining coastal ecosystems. The MLPA itself is entirely silent on tribal rights, practices, and interests, as were most state environmental laws at the time. The failure of the MLPA to acknowledge tribal interests was first brought to significant statewide attention by the Kashia Band of Pomo Indians in 2010.

The Kashia Band is a federally recognized Indian nation with a reservation at Stewarts Point on the coast of Sonoma County within its ancestral lands.⁶⁸ It is today a tribe with creative and stable leadership, a diversifying economy, and resilient cultural traditions. The Tribe speaks its language, preserves its traditions, and meets its spiritual obligations.⁶⁹ The Tribe's healthy economy prior to contact with non-Indians was based largely upon the marine resources of the shoreline and coastal bluffs, as well as the forests, carefully nurtured and protected by Kashia traditional practices.⁷⁰ Pre-contact, the Kashia Pomo people developed "sophisticated

68. The Tribe's ancestral territory extends from an area south of the Russian River northward along the coast to the Gualala River and for many miles inland.

69. About four decades ago, a scholar analyzed the history of the Kashia people and speculated as to reasons for the Tribe's retention of healthy cultural traditions. See June Nize, *The Purchase of Kashaya Reservation* (Cal. State College Dep't of Anthropology, Working Paper No. 7, 1974), <https://www.fortross.org/lib/125/the-purchase-of-kashia-reservation.pdf>. The Kashia's first contact with non-Indians was not with the Spanish and their church, missions, and thirst for converts and free labor. Instead, the Kashia encountered the Russians; entered into a treaty of peace (the Treaty of Hagemeister, 1817); and began an ongoing period of mutually beneficial relations. *Id.* at 2–3; see Treaty Between the Kashaya Pomo and the Russian American Company (Sept. 22, 1817), in 1 VINE DELORIA, JR. & RAYMOND J. DEMALLIE, *DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS AND CONVENTIONS, 1775–1979*, at 175 (1999) (English language version of the treaty); see also DELORIA & DEMALLIE, *supra*, at 108. Today, more than two hundred years later, the Kashia Tribe maintains government-to-government relations with Russia. Rather than suffer violent efforts to eradicate their culture, as occurred in the Catholic missions, Kashia people continued their traditions living alongside the Russian traders. In addition, following the California gold rush and the influx of generally hostile, white homesteaders, the Tribe "entered a more vigorous state of isolation." Nize, *supra*, at 18. For years, interaction with white people was discouraged by tribal leaders. The establishment of the Tribe's reservation, on a ridgetop a few miles inland from Stewarts Point, further contributed to the Tribe's isolation from the non-Indian world.

70. See LIGHTFOOT & PARRISH, *supra* note 9, at 42 (stating that evidence of maritime economies has confirmed Kashia Pomo presence between 9650 and 13,000 years ago).

technologies, cultural practices, and social organizations” to support large numbers of communities.⁷¹ They took full advantage of the wealth of coastal plants and animals, “exploit[ed] seasonal resources,” were mobile (moving inland from the coast during rainy, cool winters), and established camps, homes, and villages according to the season.⁷² The Tribe’s practices reflected those of tribes generally on the northern California central coast:

Through diverse hunting and gathering methods, ownership of productive resource patches [fishing places, clam beds, plant gathering areas, salt production areas], and controlled burning and other landscape management practices, Native Californians throughout the Central Coast Province actively engaged with one another and their natural surroundings to obtain the resources they desired.⁷³

Kashia people today engage in the fishing and gathering practices they have always employed. They teach their children to do the same.

In early 2010, the Kashia Pomo Tribe was shocked to learn that the Fish and Game Commission had adopted a regulation that would shortly go into effect to create the Stewarts Point State Marine Reserve in an area of coast particularly important to the Tribe. While the North Central Coast Regional Stakeholder Group included tribal participants from the Manchester-Point Arena Band of Pomo Indians and the Federated Indians of Graton Rancheria, the Kashia Pomo were not represented on the Group and did not engage in the MPA planning process. The Stewarts Point area was not identified in the MPA planning process as an area of tribal importance.

The Kashia Pomo’s alarm was increased exponentially by the fact that its creation place was within the newly-created State Marine Reserve.⁷⁴ *Danága* (“Stewarts Point” in the English language) is the place where Kashia people came up out of the ocean and adopted the human form. *Danága* is a sacred place; as defined by Kashia people, it is a place where a Kashia person says a prayer going in and a prayer coming out.⁷⁵ Ceremonies at *Danága* are obligatory. Those ceremonies involve the

71. *Id.* at 211.

72. *Id.*

73. *Id.* at 213.

74. Shortly after learning of the new regulation, the Tribe held a ceremony at *Danága*. The public and other tribes were invited. There were prayers and speeches, mostly in the Kashia Pomo language. Those who attended the ceremony left with renewed energy to fix this fundamental error.

75. Author communications from tribal Elders and tribal leaders.

gathering of fish, shellfish, and plants. Because the Stewarts Point SMR prohibited harvest of any kind, the State effectively prohibited the conduct of Kashia ceremonies at the most sacred place on earth.

Kashia tribal leaders developed a careful strategy of public education and advocacy, seeking to restore the Tribe's rightful access to *Danága*. Working closely with two conservation organizations that were instrumental in the passage and implementation of the MLPA (the Natural Resources Defense Council (NRDC) and the Ocean Conservancy (the Conservancy)), the Tribe began to introduce itself to key participants in the MLPA process and to discuss its concern over the Stewarts Point State Marine Reserve designation. It met with the Department of Fish and Wildlife staff and Director. It met with the Fish and Game Commission staff. With technical assistance and support from NRDC and the Conservancy, the Tribe crafted a proposed amendment to the Stewarts Point regulations designed to be faithful to the MLPA science guidelines and in accord with Commission procedural regulations and to restore tribal access to *Danága* with the ability to fish and gather for ceremonial and subsistence purposes.⁷⁶

The Kashia Pomo attended the California Fish and Game Commission hearings in April and May 2010, formally requesting that the Commission consider a proposed amendment to the Stewarts Point State Marine Reserve. Commissioners queried the Tribe on why it had not participated actively in the public MPA planning process for the North Central Coast region. The Tribe's previous encounters with outside governments had taken the form of government-to-government consultations; such formal consultations were not part of the MLPAL. The Commission appeared willing to consider ways to accommodate the Tribe. It urged the Tribe to provide to the Commission evidence of its historic use of the area and to be as specific as possible in documenting its nature and the geographic locale of its request.⁷⁷

76. The Tribe proposed the creation of a marine "conservation area" along a ribbon of shoreline surrounding Stewarts Point. The conservation area designation allows "recreational" fishing and gathering. Though the Tribe was engaged in activities considerably more significant than "recreation," at the time there was no authority for a "tribal take" of marine resources. The Kashia leadership was willing to do what was necessary to regain access to its sacred place.

77. Though the Tribe may have heard of distant discussions about the MLPA process, it had not occurred to anyone in the Tribe that those discussions could conceivably result in the denial of the Tribe's access to its sacred place. The Commission and its staff, on the other hand, had seen the MLPA process as a product of significant public participation. The fact

Although the Tribe believed it was being asked to submit proof of its existence and heritage, it provided the Commission evidence of its history, culture, harvest practices, and current status and made clear that it could not share publicly the details of religious ceremonies. The Tribe relied on both direct testimony of its Elders and leaders and the published research of anthropologists and historians in making its case to the Commission.

With the support of the NRDC, the Conservancy, Department staff, and Commission staff, the Tribe submitted a proposed regulation change to the Commission at a June 2010 meeting. The Fish and Game Commission unanimously adopted the Kashia Pomo's proposed regulatory amendment, treated it as an "emergency" regulation, and hastened the restoration of the Tribe's access to its sacred place.⁷⁸ The Commission followed this emergency action by pursuing a permanent regulatory change for the Stewarts Point MPAs which went into effect in early 2011.⁷⁹

A process that, for the Tribe, began with alarm and outrage, ended with the Commission exercising considerable political will to take immediate corrective action on a fundamental mistake. As discussed below, the involvement of Indian tribes in the implementation of the MLPA in the remaining sections of the California coast was substantial and has since led to increased engagement between the State and tribes in a wide range of resources management fronts.

IV. Legal Background

As the Kashia Tribe's experience demonstrates, neither the language of the MLPA itself, nor the processes established under the MLPAI, included a formal mechanism for tribal participation on either a government-to-government basis or otherwise. Tribes as sovereign governments had no clear path to protecting their traditional fishing and harvesting practices or any formal means of participating in the MPAI process. Opportunities were provided to participate as stakeholders along with other marine resource users, but the regional stakeholder/Blue Ribbon Task Force process lumped tribal interests with non-Indian fishing communities, recreational fishers,

that the Tribe and the Commission overcame the difficulties caused by these different perceptions is testimony to the sincerity of each.

78. Micah Effron et al., *Integrating Tribal Resource Use into the North Coast Marine Life Protection Act Initiative 24* (Bren School of Environmental Science & Management Group Report, Apr. 2011), <https://pdfs.semanticscholar.org/e8fb/42475c4ffa10b7a8653c83b36d58731eccc1.pdf>; see CAL. CODE REGS. tit. 14, §§ 632(b)(33)–(34) (West 2019).

79. CAL. CODE REGS. tit. 14, §§ 632(b)(33)–(34) & n.11.

local governments, environmental groups, and fishing-related businesses.⁸⁰ That categorization of tribal interests was offensive to many tribes.

The tribes' use of marine resources and their stewardship of marine environments for centuries before California was founded present a compelling case for the State to recognize tribal rights to continue practicing traditional harvesting, fishing, and gathering in their ancestral lands and waters. Yet by our count, there are only six examples where California has acknowledged such practices and enshrined them in state law, and all are limited to specific species of fish taken at designated places and times.⁸¹ These provisions were specific discretionary actions by the legislature or the Department of Fish and Game; none were adopted in recognition of a general tribal right to harvest, fish, or gather outside reservation boundaries. The existence of these specific legislated provisions does not provide a legal basis for recognition of such tribal rights more broadly.⁸²

Lacking specific statutory or administrative bases for recognition of tribal rights to harvest, fish, and gather in marine waters, state resource agencies considered tribal subsistence, cultural and ceremonial fishing, and harvesting and gathering as recreational uses.⁸³ Under federal law, in the

80. Effron et al., *supra* note 78, at 43.

81. Karuk tribal members may fish at Ishi Pishi Falls using hand-held dip nets out of season. CAL. CODE REGS. tit. 14, § 7.50 (West 2019). Yurok tribal members may fish out of season on the Klamath River with special bag limits and fishing methods. CAL. FISH & GAME CODE § 7155 (Deering 2008). The Hoopa Valley Tribe and Yurok Tribe are exempt under certain circumstances from restrictions on possessing salmon outside reservation boundaries. CAL. CODE REGS. tit. 14, § 5.86 (West 2019). 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 California Department of Fish and Wildlife. CAL. CODE REGS. tit. 14, § 8.20 (West 2001). And members of the Pit River Tribe may take western suckers by hand or hand-thrown spears in the Pit River from the confluence with the Fall River downstream to Lake Britton and in Hat Creek from Hat No. 2 Powerhouse downstream to Lake Britton, from January 1 to April 15. All fish other than western suckers captured by hand must be returned live to the river. CAL. CODE REGS. tit. 14, § 2.12 (West 2019).

82. Even within reservation boundaries, the State has been reluctant to acknowledge tribal rights to harvest, fish, and gather. Although federal law compels the State to respect the exercise of tribal fishing rights within reservation boundaries, California resisted that fundamental proposition for decades, especially on the Klamath River. *See, e.g.*, United States v. Eberhardt, 789 F.2d 1354 (9th Cir. 1986); *People v. McCovey*, 685 P.2d 687 (Cal. 1984); Scott W. Williams, *The Boundaries of Winters—When the Courts Alone Are Not Enough to Protect Indian Reserved Rights*, in *THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS* 191 (Barbara Cosens & Judith V. Royster eds., 2012).

83. Effron et al., *supra* note 78, at 22.

absence of treaties, Indians outside reservations were subject to the same state statutory and regulatory requirements and limitations on such practices that were applicable to the public.⁸⁴ Many tribes considered the State's approach to be disrespectful even if federal law provided a basis for such treatment.

The MLPAAI was an administrative rule-making proceeding. The tribes, accordingly, used a combination of legal and policy arguments to persuade the decision-makers to recognize and protect their traditional harvesting, fishing, and gathering practices in marine waters. All of their arguments derived from a fundamental, indisputable fact: centuries before Europeans arrived, Indian tribes made their homes in coastal areas, relied on the marine environment for their food and culture, and applied traditional management practices to safeguard marine species and habitats.

The tribes' indigenous use and occupation of what is now California finds legal expression in the doctrine of aboriginal title. That doctrine recognizes tribal title to lands used and occupied before Europeans asserted jurisdiction over them.⁸⁵ Proving aboriginal title requires a showing of continuous, exclusive tribal use and occupancy "for a long time," although it is not necessary to show recognition of such title in a treaty or statute.⁸⁶ Aboriginal title continues to exist until it is lawfully extinguished by Congress.⁸⁷ For purposes of off-reservation usufructuary rights, the doctrine is important because aboriginal title includes the right to use land and water for subsistence activities such as hunting, fishing, and gathering.⁸⁸ These associated rights may be exercised by traditional or so-called "modern" methods of harvesting such resources.⁸⁹ California tribes also had the option

84. *See* *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

85. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) (stating that Indian nations are "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion").

86. *Native Vill. of Eyak v. Blank*, 688 F.3d 619, 622 (9th Cir. 2012) (citation omitted).

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

88. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 713 (1835) ("Indian possession or occupation was considered with reference to their habits and modes of life . . . and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals."); *United States v. Adair*, 723 F.2d 1394, 1413 (9th Cir. 1983) (stating that Klamath Tribes' aboriginal title included hunting and fishing rights, and, "by the same reasoning, an aboriginal right to the water used by the Tribe as it flowed through its homeland").

89. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 352 (7th Cir. 1983).

of establishing off-reservation rights apart from land title by showing continuous and exclusive fishing and other uses before “the arrival of white settlers.”⁹⁰

No court has considered the legal question of aboriginal title to the seabed and ocean waters within California’s three-mile offshore zone of state waters. All aboriginal title cases in California concerned title to land only.⁹¹ None of the tribes affected by the MLPA have voluntarily relinquished or abandoned their aboriginal title to the seabed, and no federal statute or other federal government action extinguished such title. Many of the California coastal tribes have substantial arguments that they continue to possess an aboriginal right to engage in traditional fishing and gathering on the coast.

Had the tribes’ response to the MLPAI been to mount a strictly legal challenge, the most likely response to these arguments would have been that the payment of the Indian Claims Commission award in 1964 to the “Indians of California” for compensation for the taking of the lands covered by the unratified treaties barred assertions of aboriginal title to the same lands.⁹² In reply, the tribes could point out that at the time the United States and California expropriated tribal lands by refusing to ratify the treaties, the three-mile off-shore zone was not within California’s jurisdiction or boundaries.⁹³ The Indian Claims Commission statute limits the *res judicata* bar to “all claims and demands touching any of the matters included in the controversy.”⁹⁴ Thus, as against the State of California at least, the tribes had a credible argument that the MPA zones were not “matters included in the controversy” and, therefore, were not subject to the ICC’s statutory bar. The tribes could reasonably argue their aboriginal title to the submerged

90. *Menominee Indian Tribe of Wis. v. Thompson*, 922 F. Supp. 184, 205 (W.D. Wis. 1996), *aff’d*, 161 F.3d 449 (7th Cir. 1998).

91. *See, e.g., United States ex rel. Chunie v. Ringrose*, 788 F.2d 638 (9th Cir. 1986) (holding that Chumash Indians are barred from asserting aboriginal title to the Channel Islands because they failed to present their claims to the California Claims Commission in 1851).

92. *See, e.g., Western Shoshone Nat’l Council v. Molini*, 951 F.2d 200 (9th Cir. 1991).

93. *United States v. California*, 381 U.S. 139 (1965) (stating that at least until the enactment of the Swamp Lands Act of 1853, the State of California had no title to or property interest in the Pacific Ocean lying seaward of the ordinary low water mark on the coast extending seaward three miles).

94. Indian Claims Commission Act of 1946, § 22(a), Pub. L. No. 726, 60 Stat. 1049, 1055.

areas that became MPAs was not lawfully extinguished by the United States.⁹⁵

Despite the legal merits and moral authority of the tribes' aboriginal title claims, that argument ultimately played a modest role in the MLP AI outcome for tribes. The State was understandably reluctant to formally tie recognition of tribal harvesting and fishing rights to a legal doctrine that would have implications for many other areas of state law and policy. Moreover, the MLP AI process was not structured to respond to purely legal arguments; rather, results were driven largely by public policy rationales. For example, a key public policy goal of the MLPA was to "help sustain, conserve and protect marine life populations. . . ."⁹⁶ Some tribes certainly considered litigation to assert aboriginal title claims but judged the risks and costs of that option to outweigh the potential benefits.

From the tribes' perspective, the MLP AI administrative process provided options better suited to shaping solutions that addressed tribal interests and concerns. Litigation, even if successful, would most likely do no more than simply declare tribal rights and leave implementation and enforcement to future cases. Litigation would have provided few opportunities for collaboration between Indian tribes and state natural resource officials. Besides, the adoption of a regulation that exempted certain tribes from take restrictions otherwise applicable implicitly recognized the tribes' aboriginal ties to and stewardship of the coastal waters.

V. California North Coast Process and Tribal Regulation

The Marine Protected Area network was designed on a regional scale so that "ecologically connected" marine habitats could be managed as a single ecosystem.⁹⁷ The broad geographic scope of the MPA networks along the California coast virtually assured that a large number of proposed MPAs would overlap with significant traditional harvesting, fishing, and gathering areas on which Indian tribes depended for their food, culture, and economy. As noted above, because the MLPA is silent with respect to Indian tribes,

95. See also *People of the Vill. of Gambell v. Hodel*, 869 F.2d 1273 (9th Cir. 1989) (stating that Alaska Native Claims Settlement Act did not extinguish aboriginal title of Alaska Natives to the seabed because the area in question was not within the boundaries of the State of Alaska); *Arizona v. California*, 530 U.S. 392, 418 (2000) (holding that claims for additional water rights for lands within the disputed boundary of the Fort Yuma Reservation were not precluded by the payment of a U.S. Claims Court consent judgment for claims to the Tribe's aboriginal and trust lands).

96. CAL. FISH & GAME CODE § 2853(b)(2) (Deering 2008).

97. Gleason et al., *supra* note 57, at 53.

the MLPAI initially treated Indian tribes like any other stakeholder. Finding the appropriate, respectful role for Indian tribes was complicated by the absence of a formal consultation policy at the Department of Fish and Game. Tribal requests in the North Coast Region asking for tribal concerns to be addressed outside the Initiative process in a government-to-government consultation were either ignored or denied.

Indian tribes faced several challenges with the structure and process of the MLPAI. Lumping tribes with other stakeholders on the Regional Stakeholder Group ignored several critical facts: the sovereign status of tribes as governments under federal law; the aboriginal use and occupancy of the marine environments affected by MPA planning; and the long history of tribal stewardship that pre-dated the arrival of Europeans. When the MLPAI began, neither state law nor policy had mechanisms adequate for recognizing the distinct role of tribes as stewards of the marine environment or their unique role in marine environmental planning. For example, the criteria for selecting members of the regional stakeholder groups, the body that prepared the MPA options, did not provide specifically for tribal representation.⁹⁸ Even when the tribes were granted seven representatives on the North Coast Regional Stakeholder group, the tribal representatives could not have been expected to adequately represent all twenty-six tribes that would be affected.⁹⁹ Each tribe had its own harvesting and gathering area and unique perspective about the best approach for protecting traditional uses along the coastline. Moreover, each tribe had its own sovereign government and administration.

In addition, the MLPAI conducted nearly all its work in meetings open to the public. Because many of the tribal fishing and gathering areas were connected to sensitive cultural sites and cultural practices, tribal law and custom required that their locations remain private. Public disclosure of such areas in the MLPA Initiative process would have violated these cultural norms and perhaps threatened the sites themselves by exposing their location. Prioritizing traditional use areas was difficult for tribes that did not usually rank use areas or that followed cultural values that treated all customary use area as equally important.

98. California Marine Life Protection Act Initiative: Draft Strategy for Public Participation in the MLPA North Coast Study Region 5 (Nov. 17, 2009), <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentVersionID=30508>.

99. California Marine Life Protection Act Initiative: Summary of Input from North Coast Tribes and Tribal Communities Regarding the MLPA North Coast Project 2 (Aug. 25, 2010), <http://nrm.dfg.ca.gov/FileHandler.ashx?DocumentVersionID=42537>.

Further, the MLP AI process was designed to be “science based,” as the statute itself required use of the best readily available science in designing and MPA network.¹⁰⁰ Initially, however, the definition of “best readily available science” did not make room for tribal traditional ecological knowledge or other forms of qualitative tribal knowledge of the marine environment that did not fit easily into the quantitative approach of Western science.¹⁰¹ Finally, compressed timeframes and deadlines for the MLP AI often did not allow sufficient time for tribal participants to fully discuss the proposals with their tribal governments, which often met only monthly. Therefore, in many cases, Indian tribes were unable to make their official views known on a subject before important process deadlines expired.

The unintended consequence of these many challenges was that tribal participation in the MLP AI North Coast Region often took on an adversarial character, which was antithetical to the collaborative and consensus-based decision-making process the Department and Initiative hoped to foster. For the most part, these challenges were overcome largely because, from the beginning, the Regional Stakeholder Group in the North Coast Region was unified in its support of recognizing traditional tribal uses. Over time, the tribes perceived a gradual increase in the willingness of the MLP AI leadership and staff to carry out meaningful outreach to tribal communities. After Jerry Brown became Governor in 2011, it was apparent that the leadership at the Natural Resources Agency and the Department of Fish and Game had a strong desire to recognize and accommodate tribal interests, a goal communicated throughout the agencies.¹⁰²

The Department of Fish and Game deliberately structured the MLP AI to give the stakeholder groups the principal role in devising MPA locations, regulations, and boundaries, with the Science Advisory Team providing the technical evaluation of MPA options.¹⁰³ This bottom-up approach in one

100. CAL. FISH & GAME CODE § 2855(a).

101. Fikret Berkes et al., *Rediscovery of Traditional Ecological Knowledge as Adaptive Management*, 10 *ECOLOGICAL APPLICATIONS* 1251, 1252 (2000) (defining “Traditional Ecological Knowledge” as a “cumulative body of knowledge, practice and belief, evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and their environment”).

102. See Interview with John Laird, Sec’y of the Cal. Nat’l Res. Agency, in Sacramento, Cal. (Mar. 15, 2018); Interview with Charlton Bonham, Dir. of the Cal. Dep’t of Fish & Wildlife, in Sacramento, Cal. (Mar. 16, 2018).

103. CAL. DEP’T OF FISH & GAME, CALIFORNIA MARINE LIFE PROTECTION ACT MASTER PLAN FOR MARINE PROTECTED AREAS 21-25 (rev. draft Jan. 2008), <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=113006&inline>.

sense made the MLPAI fairly well suited to accommodate the views of Indian tribes. But the MLPAI structure proved inadequate to fully address tribal concerns, due to the Tribes' sovereign status and the unique fact that tribal fishing, harvesting, and gathering was imbued with cultural and spiritual meaning often absent from recreational or commercial stakeholders' concerns. At several points in the deliberations, the Blue Ribbon Task Force and Science Advisory Team were met with vocal protests from the tribes, which, but for the diplomatic efforts of certain tribal leaders and MLPAI personnel, could have derailed the entire process.

After recognizing that public fora were inadequate for communicating tribal concerns, the MLPAI reached out to specific Indian tribes through meetings, telephone calls, letters to tribal councils, and visits to several tribal communities. More than thirty meetings were held with twenty tribes.¹⁰⁴ In addition, tribal histories and traditional harvesting practices were incorporated into the North Coast Regional Profile, a compendium of background information on the region. Discussions focused on tribally-specific topics were organized by the Blue Ribbon Task Force. The Department of Fish and Game prepared policy guidance on tribal issues for the discussion of interested parties.¹⁰⁵ The MLPAI appointed a staff member whose responsibilities included outreach to tribal communities. More formally, the Science Advisory Team of the MLPAI established a Tribal Working Group to address the challenge of incorporating tribal traditional ecological knowledge into the scientific analyses.¹⁰⁶ The process of building trust between the MLPAI and Indian tribes was nurtured by the Science Advisory Team's decision to avoid questions about specific species and the level of take on which the tribes relied during the Team's data collection phase of the Initiative. The decision to aggregate tribally-specific knowledge in order to protect the confidentiality of sensitive cultural information also showed a good faith effort to accommodate tribal concerns. Moreover, Indian tribes were not asked to disclose information not directly relevant to the location of a proposed MPA. The tribes' decision to work within the size and spacing guidelines further promoted collaboration toward a viable outcome. Although these steps showed a good

104. Effron et al., *supra* note 78, at 96.

105. Cal. MLPA Blue Ribbon Task Force, Guidance Motions Related to Tribes and Tribal Communities (Mar. 1, 2010), <http://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=18398>.

106. Letter from Satie Airamé, Sci. & Planning Advisor, MLPAI, to Indian Tribes on the North Coast (Apr. 2, 2010), <http://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=19663>.

faith effort to work with the tribes, the difficulty of overcoming initial distrust and discord should not be minimized.

To facilitate serious consideration of tribal concerns, the MLP AI compiled a report on proposed tribal uses as related to sixteen proposed MPAs for consideration in the final round of MPA development by the North Coast Regional Stakeholder Group.¹⁰⁷ The Report noted tribal concerns with regard to specific proposed MPAs.¹⁰⁸

Unlike other regions, the North Coast Region Stakeholder Group developed a single MPA option to present to the Blue Ribbon Task Force and Fish and Game Commission, rather than developing competing proposals. This presented both a challenge and an opportunity. It was a challenge for the tribes because a single option limited the range of possibilities for protecting and respecting tribal uses. It was an opportunity because a single option provided the catalyst for consensus agreement about the proper approach and provided for a more efficient and cost-effective process.

A. Tribal Options

Because California law did not expressly recognize a distinct right of Indian tribes to fish, harvest, or gather outside reservation boundaries, the tribes considered several options for protecting their traditional uses against impairment by anticipated take restrictions in the MPAs.

The most obvious option was for the tribes to seek amendment to the MLPA by the California Legislature to provide for specific recognition of the right of Indian tribes to take marine resources for traditional and subsistence purposes in state MPAs, or alternatively, to require the MLP AI to consult with tribes to devise acceptable means to protect their uses while meeting the conservation goals of the Act. Several tribes drafted proposed amendments to the MLPA in the earliest stages of the MLP AI. These efforts did not gain widespread support, principally out of concern that so-called “legislative fixes” to the MLPA might invite other interest groups to

107. See, e.g., California Marine Life Protection Act Initiative: Proposed Uses from North Coast Tribes and Tribal Communities for Round 2 Draft MPA Proposals 9 (July 29, 2010), <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentVersionID=73804> (noting that the proposed Russian Gulch SMCA “overlaps with an area of traditional tribal gathering” and that the take regulations should be clarified to reflect that “Tribes do not fall under ‘recreational’ [uses]” and that tribal traditional uses in this MPA should be allowed to continue).

108. *Id.* at 1.

seek legislative changes, thereby risking piece-meal, unfavorable alteration of the basic structure and goals of the Act.

A second option was to pursue agreements between the Department of Fish and Game and Indian tribes to share management responsibilities for the marine environment covered by MPAs. So-called “co-management agreements” have gained currency among Indian tribes and federal agencies, and they range from information sharing arrangements to fuller collaboration in resource management.¹⁰⁹ Co-management agreements can be an appropriate way for Indian tribes to maintain their connections and uses of lands and waters outside their reservation boundaries.¹¹⁰ This option was not pursued in the MLPAI due to the complexities of incorporating such agreements into existing state legal management authorities and the State’s position that co-management agreements could not authorize tribal take of marine resources outside reservation boundaries.

A third option was to designate tribal traditional uses within MPAs as Cultural Preservation Areas under the California Public Resources Code. California law authorizes the State Parks and Recreation Commission to create such areas to “preserve cultural objects or sites of historical, archaeological or scientific interest” in marine areas.¹¹¹ The statute’s focus on “object or sites” made this option ill-suited for allowing tribal traditional uses and harvest practices to continue within MPAs. Also, state law did not provide specifically for the take of natural resources within Cultural Preservation Areas. Thus, the idea of overlaying Cultural Preservation Areas on MPAs created its own legal and administrative complexities.

B. Development of the Tribal Use Regulation

Because each of these options raised significant legal and political challenges, the tribes, the Department, and the MLPAI eventually settled on the approach of addressing tribal uses directly in the administrative regulations that would govern take of marine species within individual MPA boundaries. The California Fish and Game Code grants the Fish and

109. See generally Mary Ann King, *Co-Management or Contracting? Agreement Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENV'T L. REV. 475 (2007).

110. *Introduction to Part III: Self-Determination: Pursuing Indigenous and Multiagency Management*, in TRUSTEESHIP IN CHANGE: TOWARD TRIBAL AUTONOMY IN RESOURCE MANAGEMENT 225, 225 (Richmond L. Clow & Imre Sutton eds., 2001) (“As an extension of the meaning of self-determination, numerous tribes have asserted their historical traditions on lands no longer part of reservations.”)

111. CAL. PUB. RES. CODE § 36700(d) (Deering 2009).

Game Commission broad authority to establish seasons, set take limits, designate territorial limits, and regulate manner of taking marine species.¹¹² This grant of authority was sufficiently broad to include the power to establish regulations governing specified cultural harvest by Indian tribes distinct from recreational and commercial harvesters.

On the North Coast Region, ten new State Marine Conservation Areas were created under the MLPAI and three such areas were modified.¹¹³ In addition, six State Marine Reserves were established where no take was allowed, one State Marine Recreational Management Area was created, and six “Special Closures”, which are very small areas closed to entry in order to protect sea bird rookeries and marine mammal haul-out sites, were established. The area encompassed by these MPAs is 137 square miles, or about 13% of California’s three-mile offshore jurisdictional zone within the North Coast region.¹¹⁴ Although the MLPAI made concerted efforts to avoid placement of MPAs in areas of traditional and cultural tribal use, some overlap was inevitable because the MPA science guidelines required a network of MPAs spread along the coast to meet various levels of protection for marine species and habitats. This was also due to the broad geographic extent of tribal cultural use of marine resources in the region.

The North Coast MPA regulations adopted by the Fish and Game Commission bore the marks of compromise by all parties. The tribes proposed a variety of measures to protect their uses, including complete avoidance of traditional gathering areas in the siting of MPAs, and co-management of MPAs with tribal take authorized as part of the management regime. The North Coast Regional Stakeholder Group recommended the Commission create a new regulatory category of “tribal take” authorized in all MPAs in the North Coast Region, including State Marine Reserves where all other take would be prohibited.¹¹⁵ For its part, the Blue Ribbon Task Force recommended that tribal traditional harvesting and gathering should be allowed to continue in all MPAs, except for one State Marine Conservation Area and the four State Marine Reserves.¹¹⁶ Not

112. CAL. FISH & GAME CODE § 205 (Deering 2018).

113. SMCAs are MPAs that allow for some specified forms of take to occur.

114. *Northern California Marine Protected Areas*, CAL. DEP’T OF FISH & WILDLIFE, <https://www.wildlife.ca.gov/conservation/marine/mpas/network/northern-california> (last updated Jan. 1, 2019).

115. Options Regarding Marine Protected Areas for the MLPA North Coast Study Region: California Fish and Game Commission June 2011 Meeting 1 (June 9, 2011), <http://www.dfg.ca.gov/mlpa/pdfs/northcoastoptions060911.pdf>.

116. *Id.* at 1–2.

persuaded that these options were entirely satisfactory, the Commission directed the formation of a working group to develop feasible options to address tribal harvesting and gathering in MPAs that also complied with the science guidelines and MLPA goals.¹¹⁷

The working group presented three options to the Commission: 1) allow tribal harvesting and gathering as a separate category to continue in State Marine Conservation Areas but disallow such tribal harvest in State Marine Reserves, provided the tribes establish a factual record showing “ancestral take or tribal gathering practices” in that specific MPA; 2) allow tribal harvesting and gathering in all MPAs except State Marine Reserves as part of take allowed for recreational users generally; or 3) allow tribal harvesting and gathering to occur within a newly created nearshore “ribbon” or specified zone in all MPAs except State Marine Reserves.¹¹⁸

Following additional public meetings and consultation with Indian tribes, the Fish and Game Commission chose the first option as the closest approximation of a consensus-based proposal.¹¹⁹ Although no tribal proposal garnered unanimous support, many viewed the option adopted by the Commission as a fair balance between respect for historic and current tribal harvesting and gathering practices and conservation and protection of marine species. To bolster the factual basis on which a tribal take exemption for the MPA restrictions could be recognized, the Commission requested the tribes submit “a factual record of historic and current uses in specific geographies, other than SMRs,” to the Commission within a sixty-day period.¹²⁰ Six such written records were timely submitted, encompassing twenty-four federally-recognized tribes in the North Coast Region.¹²¹

As finally promulgated, the tribal take regulations allowed continued take of marine species by those designated tribes within specified MPAs, not including State Marine Reserves.¹²² Although the regulation exempted such tribes from the take restrictions applicable to others, the tribal take authorization was subject to additional criteria. First, the exemption was limited to those tribes recognized by the federal governments as eligible for

117. *Id.* at 2.

118. *Id.* at 2–3.

119. Cal. Fish & Game Comm’n, Initial Statement of Reasons for Regulatory Action 7 (Dec. 12, 2011), <https://web.archive.org/web/20121102153953/https://www.fgc.ca.gov/regulations/2012/632ncisor.pdf> (discussing CAL. CODE REGS. tit. 14, § 652).

120. *Id.*

121. *Id.*

122. CAL. CODE REGS. tit. 14, § 632(b) (West 2019).

the protections of federal law, so-called federally-recognized tribes.¹²³ Second, the authorization was limited to enrolled members of such federally-recognized tribes, who also must possess an identification card issued by the tribe to which the member belongs.¹²⁴ Third, tribal traditional harvesting and gathering were expressly limited to non-commercial activities, although that term was not defined.¹²⁵ Fourth, tribal members were required to comply with otherwise applicable provisions of the California Fish and Game Code for fishing outside Indian reservation boundaries, including the requirement to hold a valid California fishing license or other required permit when conducting traditional tribal fishing in MPAs.¹²⁶ Fifth, tribal members exercising tribal take authorizations must nonetheless comply with “current seasonal, bag, possession, gear and size limits in existing Fish and Game Code statutes and regulations of the” Fish and Game Commission.¹²⁷ Thus circumscribed, the new regulations nonetheless marked the first time the State recognized the right of sovereign Indian tribes to carry out traditional harvesting and gathering for cultural and subsistence purposes in waters under State jurisdiction outside federal Indian reservation boundaries.

Although couched in terms of an exemption from take restrictions applicable to others, the regulations recognized a new category of tribal take under the California Administrative Code. Considering the steep learning curve for the MLPAI to understand tribal histories and culture, the laudable but complex public process that combined significant public participation and science, and the legislature’s failure in the MLPA to address tribal sovereign interests, the new regulation exemplifies an extraordinary achievement. Tribal reactions, although mixed, have generally been positive and several North Coast tribes have praised the regulations as a sterling example of the results that can be achieved by genuine collaboration between Indian tribes and state resource agencies in California.¹²⁸

123. *Id.* §§ 632(a)(11), 632(b).

124. *Id.* § 632(a)(11) (requiring tribal ID cards to include a “valid photo identification, expiration date, tribal name, tribal member number, name, signature, date of birth” and personal identification features).

125. *Id.* § 632(b).

126. *Id.* § 632(a)(11).

127. *Id.*

128. *See* Hawk Rosales, Executive Director, InterTribal Sinkyone Wilderness Council, Presentation Outline for Session 20: Checking Up On California’s Innovative Marine Protected Areas 4 (Environmental Law Conference, State Bar of California, Oct. 28, 2012) (on file with the *American Indian Law Review*) (“Through this model of collaboration, the

While an important step forward, the North Coast MPA result was an imperfect outcome for some tribes. It does not apply to tribes that are recognized by the State but not recognized by the federal government. Not all tribes in the North Coast Region had the resources to participate in the process or prepare written documentation of their traditional cultural harvesting and gathering practices in the MPAs. Nor do the new MPA regulations address the larger question of protection for such practices outside MPAs.¹²⁹ This made for artificial geographic limitations, contrary to tribal views of the ocean environment as an integrated whole. The no-take prohibitions in State Marine Reserves, however small in number, apply to tribes like everyone else, and will inevitably curtail some tribal subsistence practices in those areas.

C. Legal Concerns About the Tribal Use Regulation

During the MLPAI process, some state agency staff voiced concern that a tribal take exemption might be viewed as a form of preferential treatment based on a racial classification in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. That clause prohibits a state from denying to “any person within its jurisdiction the equal protection of the laws.”¹³⁰ From a legal perspective, the question is whether the state can justify differential treatment with legally-supportable reasons. Classifications based on race traditionally are subjected to stricter scrutiny by courts considering the reasons for differential treatment.¹³¹ The Supreme Court decided long ago that preferential treatment by the federal government for Indian tribes does not violate the Equal Protection Clause because the classification is based on a political, rather than racial, status.¹³² The Court’s decision was based on the fact that Indian tribes are sovereign governments, whose powers of self-government are inherent and existed long before the formation of the United States.¹³³ As a result, tribal membership is fundamentally a political status, even if those individuals

Tribes and the State of California have achieved a remarkable victory for the conservation of our precious ocean environment and resources and those traditional cultural ways of life that have existed in the North Coast region since the beginning of time.”)

129. Interview with Megan Van Pelt, MPA N. Reg'l Tribal Representative, in Smith River, Cal. (Mar. 8, 2018).

130. U.S. CONST. amend. XIV § 1.

131. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

132. *Morton v. Mancari*, 417 U.S. 535, 553–54 (1974).

133. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 12 (1831) (noting that the Cherokees have been uniformly treated as a sovereign state from the settlement of the United States).

happen to also comprise a distinct racial or ethnic group. *Mancari* instructs that courts should reject equal protection challenges to legislation and regulations providing special benefits to Indian tribes “as long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.”¹³⁴ Tribally-specific legislation would not violate the Equal Protection Clause if this federal nexus can be shown.

Mancari addressed only the question of whether congressional legislation that benefits Indian tribes runs afoul of the Equal Protection Clause.¹³⁵ States, however, have faced the same issue with regard to legislation or administrative regulations that provide benefits exclusively to Indian tribes. The majority of state and federal courts that have considered the question have upheld state statutes and regulations providing benefits to Indian tribes but not others. In *State v. Shook*, the Supreme Court of Montana upheld a state regulation prohibiting non-tribal members from hunting big game on Indian reservations against an equal protection challenge on the ground that the state regulation was, under the *Mancari* rationale, “rationally tied to the fulfillment of the unique obligation towards Indians.”¹³⁶ In *New York Ass’n of Convenience Stores v. Urbach*, the New York Court of Appeals rejected an equal protection challenge to special tax provisions for Indians.¹³⁷ The court rejected on the ground that, while states do not have the same unique relationship with tribes that the federal government does, “they may adopt laws and policies that reflect or effectuate [f]ederal laws” without violating equal protection.¹³⁸ The Fifth Circuit Court of Appeals affirmed a Texas law that allowed only certain Indians to use peyote in their religious ceremonies, applying *Mancari* to conclude that states may “exercise the federal trust power for the benefit of tribal Native Americans” based on implied congressional intent to allow such use.¹³⁹

134. 417 U.S. at 555.

135. *Id.*

136. 67 P.3d 863, 867 (Mont. 2002).

137. 699 N.E.2d 904, 908 (N.Y. 1998).

138. *Id.*

139. *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F. 2d 1210, 1219 (5th Cir. 1991); *see also* *Livingston v. Ewing*, 601 F.2d 1110, 1116 (10th Cir. 1979) (upholding policy of State of New Mexico and City of Santa Fe allowing exclusive rights to Indians to sell handcrafted items on designated public museum grounds); *St. Paul Intertribal Housing Bd. v. Reynolds*, 564 F. Supp. 1408, 1412 (D. Minn. 1983) (rejecting equal protection challenge to providing state benefits to Indian housing program on the ground that such “special treatment is rationally related to the government’s unique obligation to the Indians and thus falls under the trust doctrine”); *State v. Forge*, 262 N.W.2d 341, 343 (Minn. 1977)

The only California cases to consider this issue involved Indian gaming compacts with the state, which were executed pursuant to specific federal statutory authority in the Indian Gaming Regulatory Act.¹⁴⁰ Those cases, therefore, are of limited utility in assessing the likelihood of a successful equal protection challenge to MPA regulations that exempt Indian tribes and their members from take restrictions otherwise applicable to the public. Nonetheless, an equal protection challenge to the tribal MLPA regulation is likely to fail because the State's action is consistent with and promotes the unique legal relationship between the federal government and sovereign Indian tribes. As the leading treatise on federal Indian law explains:

Under the supremacy clause, states must observe federal laws and treaties, and when the federal standards in these laws and treaties are valid under the fifth amendment (Equal Protection Clause), state action in accordance with them does not violate the equal protection clause of the fourteenth amendment.¹⁴¹

California, just like the federal government, recognizes the sovereign status of Indian tribes.¹⁴² Unlike other Californians, tribal members belong to sovereign entities expressly recognized by the State.¹⁴³ By their very nature, tribal relations with state agencies, including those responsible for fish and game management, are governmental because both tribes and states are sovereigns. That the MLPA concerns intergovernmental matters gives California greater authority in addressing the issue than it would

(holding that a state statute requiring non-members of Tribe to pay special licensing fee to fish on Leech Lake Reservation is not unconstitutional denial of equal protection).

140. The cases are *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003), and *Flynt v. California Gambling Control Commission*, 104 Cal. App. 4th 1125 (2002). The Ninth Circuit in *Artichoke Joe's* rejected an equal protection challenge to a California law granting a monopoly to Indian tribes for certain kinds of gambling operations on the ground that it passed the rational basis test because the law was enacted "with reference to the authority that Congress had granted to the State of California." 353 F.3d at 736. In *Flynt*, the California Court of Appeals for the Fourth District applied *Mancari* and concluded that the exclusive right to conduct gambling under the IGRA was rationally related to fulfilling Congress' "unique obligation towards Indians." 104 Cal. App. 4th at 1127.

141. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 39, § 14.03[2][b][iii], at 959.

142. *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 40 Cal. 4th 239, 247 (2006).

143. See, e.g., CAL. GOV'T CODE § 11019.8 (Deering 2010) (encouraging and authorizing all state agencies to cooperate with federally recognized California Indian tribes on matters affecting their economic development and improvement).

otherwise have if only the interests of private parties were involved. As one state Supreme Court has noted, “[T]he state has considerable latitude in dealing with recognized tribes as to matters of intersecting governmental concern when the state’s actions rationally promote legitimate mutual governmental or proprietary interests.”¹⁴⁴ The protection of tribal cultural interests in continuing traditional, non-commercial gathering and harvesting in nearshore marine areas is a mutual governmental concern of California and federally-recognized Indian tribes within the state.

The California Attorney General has relied on this rationale to conclude that a state-implemented hiring preference limited to enrolled members of federally-recognized tribes does not violate the equal protection guarantee because it is a political, rather than a racial, classification.¹⁴⁵ The Attorney General concluded that because Congress anticipates that states, as well as the federal government, may deal with tribes on a government-to-government basis, the hiring preference at issue was a political rather than a racial classification.¹⁴⁶ The Attorney General said, “California law also recognizes the quasi-sovereign status of Indian tribes, and from time to time the Legislature has expressed its intent to deal with tribes on a government-to-government basis in furtherance of federal, state, and tribal interests.”¹⁴⁷

There are numerous federal statutes and policies that promote tribal participation in the use and management of off-shore marine resources. For example, the National Marine Sanctuaries Act calls for coordination with Indian tribes in the development and implementation of plans for the protection and management of marine sanctuaries.¹⁴⁸ The federal Marine Mammal Protection Act also encourages and promotes tribal participation in management plans.¹⁴⁹ To promote tribal participation specifically in the management of marine protected areas, President Clinton issued an executive order that recognized tribal authority to designate marine protected areas: “‘Marine protected area’ means any area of the marine environment that has been reserved by Federal, State, territorial, tribal or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein.”¹⁵⁰

144. *Malabed v. North Slope Borough*, 70 P.3d 416, 426 n.51 (Alaska 2003).

145. 93 Ops. Cal. Atty. Gen. 19, at 10 (Mar. 8, 2010) (No. 07-304, <https://oag.ca.gov/system/files/opinions/pdfs/07-304.pdf>).

146. *Id.* at 12.

147. *Id.* at 12–13.

148. 16 U.S.C. § 1431(b)(7) (2018).

149. 16 U.S.C. §§ 1386(d)(1), 1389(c)(2) (2018).

150. Exec. Order 13,158, 65 Fed. Reg. 34,909 (May 26, 2000).

President Bush reaffirmed this federal policy in 2004 in an executive order that committed the United States to “facilitate, as appropriate, coordination and consultation regarding ocean-related matters among federal, state, tribal, local governments, the private sector, foreign governments, and international organizations.”¹⁵¹

California’s recognition of exclusive tribal uses in MPAs is rationally related to these federal statutes and policies, and would, therefore, likely withstand an equal protection challenge based on a purported racial classification. The federal policy is premised on the legal status of Indian tribes as sovereign governments. California’s actions in the MLPAI are based on the same treatment of Indian tribes as self-governing political entities, and the State’s regulation promotes the same interests as embodied in the federal policy. The MPA tribal regulation thus is tied to the unique obligation of the United States to respect and promote tribal sovereignty.

VI. Implementation of MPA Protections

The Marine Life Protection Act directs the Fish and Game Commission to employ “adaptive management” of MPAs as the preferred means to meet the goals of sustaining, conserving, and protecting marine life populations.¹⁵² Adaptive management is defined as the use of programmatic actions as “tools for learning,” so that monitoring and evaluation of those actions may facilitate understanding about “the interaction of different elements within marine systems” as an iterative process.¹⁵³ To carry out the Act’s mandate, the Fish and Game Commission and the Department of Fish and Wildlife adopted an MPA Master Plan in 2016.¹⁵⁴

The MPA Master Plan acknowledges the separate, sovereign status of Indian tribes as co-equal users, managers, and stewards of marine species. For example, the MPA Master Plan is described as a “programmatic guidance document” for the Marine Life Protection Program and “other natural resource management agencies, California Tribes and Tribal governments, the California Legislature, and the general public.”¹⁵⁵ The Master Plan commits the California Department of Fish and Wildlife to

151. Exec. Order 13,366, 69 Fed. Reg. 76,591 (Dec. 17, 2004).

152. CAL. FISH & GAME CODE § 2853(c)(3) (Deering 2008).

153. *Id.* § 2852(a).

154. CAL. DEP’T OF FISH & WILDLIFE, CALIFORNIA MARINE LIFE PROTECTION ACT MASTER PLAN FOR MARINE PROTECTED AREAS 3 (2016), [https://nrm.dfg.ca.gov/FileHandler.ashx?](https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=133535&inline)

DocumentID=133535&inline [hereinafter CALIFORNIA 2016 MASTER PLAN].

155. *Id.*

“meaningful consultation” with tribes and their governments. The Master Plan also correctly recognizes that tribes’ aboriginal stewardship and use of marine resources have contributed to their preservation today.¹⁵⁶ Perhaps most significantly, the Plan acknowledges that the tribes’ traditional knowledge (TK)¹⁵⁷ is the “foundation of their management” of marine resources and should inform the state’s efforts to manage and protect such resources.¹⁵⁸

The MPA adaptive management program comprises three components: 1) management, with the Department of Fish and Wildlife having the principal responsibility and role; 2) regulatory, with the Fish and Game Commission having the principal responsibility and role; and 3) policy, with the Ocean Protection Council having the principal responsibility and role. Analyzing each of these from the perspective of Indian tribes who have used and managed marine and coastal resources for millennia reveals a deepening commitment by the State to collaborate with tribes as co-equal partners.

A. Management

The MPA management component includes monitoring, evaluation, and research elements. To evaluate the effectiveness of the Marine Life Protection Act and the network of MPAs set up under the Act, it was necessary to establish a baseline of ecological conditions at the time of implementation against which changes in such conditions could be periodically assessed.

From the tribal perspective, the most significant aspect of the baseline monitoring program and data collection standard is the explicit incorporation of TK in both. In other contexts, state resource managers have often been reluctant to incorporate TK as a management tool because of concerns about ambiguities in the definition, its practical scope, and lack of consensus about its utility. The Department of Fish and Wildlife’s willingness to formally include TK in monitoring and implementation plans reflects the extent to which genuine collaboration has occurred between that agency and Indian tribes on this issue. Among eleven monitoring projects

156. *Id.* at 6.

157. The MLPA materials variously refer to the traditional and customary knowledge of Indian tribes about the natural environment as Traditional Ecological Knowledge (TEK), Tribal/Indigenous Traditional Knowledge (T/ITK), and Traditional Knowledge (TK). For consistency and ease of reference, this Article refers to such knowledge as Traditional Knowledge (TK).

158. CALIFORNIA 2016 MASTER PLAN, *supra* note 154, at 6.

funded by the Department for the North Coast, for example, was an innovative baseline monitoring project designed and implemented by a coalition of the Tolowa Dee-ni' Nation, Cher-Ae Heights Indian Community of the Trinidad Rancheria, the Wiyot Tribe, and the InterTribal Sinkyone Wilderness Council, a not-for-profit consortium of ten tribes. This tribal coalition collected and analyzed traditional knowledge of several North Coast tribes in order to “inform the baseline characterization for State Marine Protected Area (MPA) monitoring.”¹⁵⁹

The goal of the Tribal Baseline Report was to develop for the North Coast Region “a baseline of ecological features and species observations, identify areas of concerns/threats for long-term monitoring and to inform ocean policy and adaptive management.”¹⁶⁰ TK was obtained through interviews with tribal citizens knowledgeable about marine species, cultural values and practices, and archival research regarding tribal historical harvesting methods, locations, and practices.¹⁶¹ TK differs from so-called western science in many ways, principal among them in its rejection of thinking about knowledge of marine ecosystems as discrete and separate pieces of data. Rather, TK seeks to integrate quantifiable information with tribal beliefs, values, and historic practices.¹⁶² For example, the Tribal Baseline Report summarizes five principles that generally define the tribal relationship to marine ecosystems: 1) “[I]live in a good way, ask for what you need,” and give prayerful thanks; 2) “[d]on’t take more than you need and can care for” and do not be wasteful; 3) acknowledge your responsibility to your community and recognize that all things are connected and therefore rely on each other; 4) “[a]bide by teachings passed down through generations” and follow cultural protocols and laws governing use of marine species; and 5) seek to maintain a healthy balance between marine species health and abundance and seek to manage marine ecosystems in that way.¹⁶³

159. TOLOWA DEE-NI' NATION, INTERTRIBAL SINKYONE WILDERNESS COUNCIL, CHER-AE HEIGHTS INDIAN COMMUNITY OF THE TRINIDAD RANCHERIA & WIYOT TRIBE, INFORMING THE NORTH COAST MPA BASELINE: TRADITIONAL ECOLOGICAL KNOWLEDGE OF KEYSTONE MARINE SPECIES AND Ecosystems at i (2017), <https://data.cnra.ca.gov/dataset/fdab87ea-2831-4772-84c7-64d813987e72/resource/78633277-141c-4e02-8eec-83a42a381c83/download/39-rocha-final.pdf>.

160. *Id.*

161. *Id.* at i–ii.

162. *Id.* at 7.

163. *Id.* at ii.

More broadly, the work of the tribes in the Tribal Baseline Report is reflected in the MPA Monitoring Plan adopted by the Department of Fish and Wildlife for the North Coast Region.¹⁶⁴ That Plan identifies traditional ecological knowledge as an ecosystem feature that comprises part of the “overarching structure” for monitoring in that region.¹⁶⁵ TK in this context is “the product of keen observation, patience, experimentation, and long term relationships with resources.”¹⁶⁶ The Department’s understanding of TK is largely consistent with that of the tribes, as it incorporates practices and beliefs transmitted by generations of tribal people about the relationship of living beings, including humans, with each other and their environment. The explicit endorsement of the adaptive nature of environmental processes under this formulation of TK is also consistent with the adaptive management approach of MPA monitoring generally in California.

The standards for developing data to be used in monitoring and managing the health of species within MPAs also acknowledge the usefulness of TK.¹⁶⁷ The Standards define TK as an “entire worldview that incorporates knowledge, teachings, beliefs and practices that operate in iterative and holistic ways of life that have emerged over time and across generations since time immemorial.”¹⁶⁸ The Standards also recognize the culturally-sensitive nature of much of TK and underscore the need to respect and protect the confidentiality of such knowledge. As the MLPA monitoring program progresses, there is much work to be done to determine how the incorporation of TK will look in practical effect.

B. Regulatory

The Fish and Game Commission has primary responsibility for managing wildlife and habitat issues in the state, including regulating MPAs.¹⁶⁹ Based on the extensive engagement with tribes that occurred during and following the MLP AI, the state legislature in 2017 established a Tribal Committee to advise the Commission on matters related to Indian

164. CAL. DEP’T OF FISH AND WILDLIFE, NORTH COAST MLPA MONITORING PLAN (2017), <https://data.cnra.ca.gov/dataset/fdab87ea-2831-4772-84c7-64d813987e72/resource/78633277-141c-4e02-8eec-83a42a381c83/download/39-rocha-final.pdf>.

165. *Id.* at 8.

166. *Id.*

167. CAL. OCEAN SCI. TR., DATA AND METADATA STANDARDS 10 (2017), http://www.opc.ca.gov/webmaster/_media_library/2017/04/DataMetadataStandards_Jan2017-1.pdf.

168. *Id.*

169. CAL. FISH & GAME CODE § 2855(a) (Deering 2008).

tribes.¹⁷⁰ The legislation was described as having given a “permanent voice” to Indian tribes in the management of California’s fish and wildlife.¹⁷¹ The Committee is chaired by a member of the Fish and Game Commission, meets three times each year and has adopted an ambitious plan for its work, including the development of a vision statement for co-management of marine and wildlife species between tribes and state agencies, as well as ideas for more fully integrating tribes and their concerns into State resources planning and regulations.¹⁷² Notably, while the Tribal Committee was founded in the wake of the state’s interactions with tribes over MPAs, the purview of the Committee is not limited to MPAs but extends to all matters under the Fish and Game Commission.¹⁷³

The MPA Master Plan identifies specific areas where the state anticipates further engagement with Indian tribes on regulatory issues. First, as noted, the tribal exemption from certain MPA species take restrictions applied only to designated tribes in the North Coast Region. The MPA Master Plan notes that it may be desirable from a policy and equity perspective to extend similar exemptions to tribes in other regions in the State.¹⁷⁴

Second, the Master Plan calls for an adaptive management review of the MPA program in 2022 and notes that incorporation of traditional knowledge in that ten-year management review can “improve the understanding of historical and current ocean conditions.”¹⁷⁵ Tribes may also choose to engage in the 2022 MPA review process by recommending any necessary changes they see to meet the goals of the MLPA and satisfy tribal concerns.

170. CAL. FISH & GAME CODE § 106.5 (Deering Supp. 2019).

171. Opinion, *Ensuring Tribes Have a Voice on Fish, Wildlife*, TIMES-STANDARD (Eureka, Cal.) (Oct. 31, 2017), <https://www.times-standard.com/2017/10/31/ensuring-tribes-have-a-voice-on-fish-wildlife/>.

172. See California Fish and Game Commission Tribal Committee (TC) Work Plan (rev. Oct. 2017), <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=150188&inline>. The Commission, in fact, has adopted regulatory changes specific to both the Kashia Tribe and the Santa Ynez Band of Chumash Indians. At its meeting in August 2018, the Commission amended a regulation to authorize the Kashia tribal members to fish and gather from the shoreline of the Tribe’s newly-acquired property, an area previously designated a State Marine Reserve. The Commission on the same day authorized tribal-take provisions for the Chumash at the coast near Santa Barbara. There was no public evidence of controversy about either amendment.

173. Tribal Comm., Cal. Fish & Game Comm’n, Meeting Materials (June 11, 2019) (annotated), <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=169803&inline>.

174. CALIFORNIA 2016 MASTER PLAN, *supra* note 154, at 39.

175. *Id.* at 45.

C. Policy Development

Opportunities for tribes to participate in the development of policies governing MPAs and their management, as directed by the Ocean Protection Council, are provided in the MPA Partnership Plan adopted by the Council in 2014.¹⁷⁶ The Plan spells out a meaningful role for Indian tribes in virtually every aspect of MPA management and enforcement: education and outreach; stewardship; scientific research and monitoring; compliance and enforcement; sustainable financing; and incorporating TK into education and management activities.¹⁷⁷ Some of these activities are already occurring, such as developing MPA signage and educational materials that highlight tribal practices and perspectives.¹⁷⁸ Others are aspirational, such as collaborating “with the District Attorney and tribal authorities on developing complementary administrative and enforcement processes on tribal land.”¹⁷⁹ Because under the Plan this list is not intended to be exhaustive, other forms of collaboration could also be considered, such as joint efforts to allow the exercise of tribal governmental authority over tribal citizens who fish and gather within State waters outside reservation boundaries.

The MPA Partnership Plan is also notable for its explicit recognition that the “coastline and marine waters of California are situated within the ancestral territories of tribes, who lived along the coast, utilized marine resources, and stewarded marine and coastal ecosystems for countless generations.”¹⁸⁰ Tribes are also characterized as “essential partners” because of their “inherent legal authority over marine resources” and their “sophisticated marine management, protection, and conservation efforts for generations.”¹⁸¹ The Plan further declares a state policy that the success of the MPA network and marine programs more broadly will depend on “tribal support and active engagement with marine policy and science.”¹⁸²

176. CAL. OCEAN PROTECTION COUNCIL, THE CALIFORNIA COLLABORATIVE APPROACH: MARINE PROTECTED AREAS PARTNERSHIP PLAN 31 (2014), http://www.opc.ca.gov/webmaster/ftp/pdf/docs/mpa/APPROVED_FINAL_MPA_Partnership_Plan_12022014.pdf [hereinafter MPA PARTNERSHIP PLAN].

177. *Id.*

178. *Tribal Resources*, CAL. MARINE PROTECTED AREAS, <http://californiampas.org/tribalresources> (last visited May 23, 2019).

179. MPA PARTNERSHIP PLAN, *supra* note 176, at 29.

180. *Id.* at 13.

181. *Id.*

182. *Id.*

The Plan also calls for robust consultation with tribes under the California Natural Resources Agency Formal Consultation Policy.¹⁸³

Taken together, these tribally-specific monitoring and implementation measures represent important initial steps toward treating Indian tribes as partners in State marine resource policy and management. Co-management with tribes may be some time in the future, but a strong foundation has been laid and genuine opportunities for future collaboration and engagement have been provided.

VII. The MLPAI as Catalyst for Changes in State Indian Policy

The MLPAI is an example of state-tribal collaboration on natural resources policy development that benefits the state and the tribes while serving the public interest. It also illustrates the fundamental change in the relationship between the state and tribal governments from the early days of California statehood. That relationship will continue to change. As one commentator has put it:

Sovereignty, as among governments, is a constant negotiation. Its exercise and health requires engagement and relationship, not the mere drawing of lines or the defining of legal rights. . . . [T]ribal survival has long “necessitated the practice of aboriginal sovereigns negotiating political compacts, treaties, and alliances with European nations and later the United States.”¹⁸⁴

In the MLPAI, California and the tribes expanded their government-to-government relationship when focused on the mutual goal of conserving marine resources. That development was both the product of formal actions by the state and tribes, and the catalyst for developing natural resource policy beyond marine resources. The official steps taken by California to secure the participation of sovereign Indian tribes in statewide policy development are evidence of that energizing effect.

Jerry Brown was elected Governor of California in November 2010 and took office in January 2011. Governor Brown’s first appointment to the California Natural Resources Agency was John Laird. Secretary Laird immediately directed his staff to engage with the tribes on MLPA issues, making clear that addressing tribal concerns was a top policy priority of the

183. *Id.* at 14–15.

184. 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) (internal citations omitted).

Brown Administration. Secretary Laird went to the Attorney General's office to seek a legally feasible path toward Indian nations' meaningful participation in the MLPA.¹⁸⁵ These early commitments by the Brown administration to seeking resolution of tribal MPA issues started California on a path to salutary changes in broader areas of state-tribal relations.

In September, 2011, less than a year after taking office, Governor Brown issued Executive Order B-10-11, focused on relations between the state and its resident Indian nations.¹⁸⁶ The Executive Order established the position of Tribal Advisor in the Governor's Office; ordered the Tribal Advisor to implement consultation between the Administration and tribes "on policies that affect California tribal communities"; required regular meetings between the Governor and tribal nations; and required every state agency under the control of the Executive to "encourage communication and consultation" with Indian tribes and "permit" tribal government representatives to have input into legislation, regulation, and policies that affect tribal communities.¹⁸⁷

The following year, in November of 2012, after numerous meetings with Indian tribes throughout the state, Secretary Laird adopted the "California Natural Resources Agency Tribal Consultation Policy."¹⁸⁸ The Secretary consulted with Indian tribes in developing the policy, as evidenced by its explicit acknowledgment of the tribes' sovereign authority:

California Native American Tribes and tribal communities have sovereign authority over their members and territory and a unique relationship with California's resources. All California Tribes and tribal communities, whether federally recognized or not, have distinct cultural, spiritual, environmental, economic and public health interests and unique traditional cultural knowledge about California Resources.¹⁸⁹

185. The Secretary consulted Senior Assistant Attorney General Matthew Rodriguez. Rodriguez's question was: what is the best public policy here? The Secretary told him he thought the best policy required Indian participation. Rodriguez figured out how to make that work within the law. Matthew Rodriguez is, at the time of this writing, the Secretary of the California Environmental Protection Agency. Interview with John Laird, *supra* note 102.

186. Cal. Exec. Order No. B-10-11 (Sep. 19, 2011), http://ohp.parks.ca.gov/pages/1054/files/thpshposummit2013_day1_panel1_randolphmorgan1.pdf.

187. *Id.*

188. Cal. Nat. Res. Agency, Adoption of Final Tribal Consultation Policy (Nov. 20, 2012), http://www.rmc.ca.gov/Tribal_Policy_Resources%20Agency.pdf.

189. *Id.* at 1.

The purpose of the policy was to “ensure effective government-to-government” consultation between the Agency and its Departments and Indian tribes.¹⁹⁰ The direction to adopt a formal policy of effective consultation with Indian tribes was implemented throughout the Agency:

- Department of Water Resources (2016) (Tribal Policy Advisor position created 2013)¹⁹¹
- Department of Fish and Wildlife (September 2014)¹⁹²
- State Coastal Conservancy (September 2014)¹⁹³
- Department of Conservation (March 2015)¹⁹⁴
- California Fish and Game Commission (June 2015)¹⁹⁵
- California Environmental Protection Agency (August 2015)¹⁹⁶
- Sierra Nevada Conservancy (September 2015)¹⁹⁷

190. *Id.*

191. ANECITA AGUSTINEZ, TRIBAL POLICY ADVISOR, CAL. DEP’T OF WATER RES., CALIFORNIA DEPARTMENT OF WATER RESOURCES TRIBAL CONSULTATION PROCESS (Dec. 10, 2013) (slideshow), https://water.ca.gov/LegacyFiles/tribal/docs/121013_BDCP_meeting_presentations/Resouces%20Tribal%20Consultation%20Process%20by%20Anecita%20Agustinez%20Tribal%20Policy%20Advisor.pdf (stating that the Tribal Communication Committee was formed in 2009; Tribal Water Summits are held every four years; and the Tribal Advisory Committee was formed in 2013); California Dep’t of Water Res., Tribal Engagement Policy (Mar. 8, 2016), <https://water.ca.gov/LegacyFiles/tribal/docs/2016/policy.pdf>.

192. Cal. Dep’t of Fish & Wildlife, Bulletin No. 2014-07, Tribal Communication and Consultation Policy 1 (Oct. 2, 2014), <http://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=122905>.

193. Cal. Coastal Conservancy, State Coastal Conservancy Tribal Consultation Policy (Sept. 14, 2015), <https://scc.ca.gov/webmaster/ftp/pdf/notices/Coastal%20Conservancy%20Tribal%20Consultation%20Policy.pdf>.

194. Cal. Dep’t of Conservation, Native American Tribal Communities Relations and Consultation Policy (Mar. 26, 2015), <https://www.conservation.ca.gov/index/Documents/Tribal-Policy-on-Letterhead-032615-CNRA%20approved-002.pdf>.

195. *Tribal Consultation Policy*, CAL. FISH & GAME COMMISSION (June 10, 2015), <https://fgc.ca.gov/About/Policies/Miscellaneous#TribalConsultation>.

196. Cal. Env’tl. Prot. Agency, Memorandum No. CIT-15-01, CALEPA Policy on Consultation with California Native American Tribes (Aug. 20, 2015), <https://calepa.ca.gov/wp-content/uploads/sites/6/2016/10/Tribal-Policy-2015Policy.pdf>.

197. Sierra Nevada Conservancy, Policy and Procedure No. 043, Tribal Consultation (Sept. 2, 2015), <https://sierranevada.ca.gov/wp-content/uploads/sites/236/about-us/DatedSignedTribalConsultation.pdf>.

- The California Air Resources Board (2018)¹⁹⁸
- California Office of Environmental Health Hazard Assessment. (2019)¹⁹⁹

The State Water Resources Control Board is also developing a tribal consultation policy.²⁰⁰

The scope of tribal-state involvement at the level of the Governor's office and executive agencies is significantly broader in comparison to the level of activity prior to 2011.²⁰¹ Beyond "effective communication" required by the consultation policies, the departments within the Natural Resource Agency began including Indian tribes in the planning stages and management of natural resources. The MLP AI has created opportunities for an enhanced role for Indian tribes in the management of the state's marine resources. As noted, the Fish and Game Commission's 2016 Master Plan for Marine Protected Areas creates a meaningful role for tribes in the implementation of the Marine Protected Areas.²⁰² Under the Master Plan, the management role of tribes as the "traditional users and stewards of California's marine resources" includes "education and outreach, stewardship, research and monitoring, and compliance and enforcement."²⁰³

Explicit steps toward recognition and inclusion of Indian tribes in the formation of state policy, as initiated in the MLP AI, has also spread to other state agencies. In September of 2014, the Legislature passed, and the Governor signed, Assembly Bill 52, an amendment to the California Environmental Quality Act.²⁰⁴ CEQA requires an environmental impact

198. CAL. AIR RESOURCES BD., TRIBAL CONSULTATION POLICY (Oct. 2018), https://ww3.arb.ca.gov/regact/nonreg/2018/california_air_resources_board_tribal_consultation_policy.pdf.

199. Cal. Office of Env'tl. Health Hazard Assessment, Policy Memorandum No. 19-001, Consultation with California Native American Tribes (Jan. 31, 2019), <https://oehha.ca.gov/media/downloads/public-information/document/oehhapolicyonconsultationwithtribesigned.pdf>.

200. Cal. State Water Res. Control Bd., Draft Tribal Consultation Policy (Oct. 15, 2018), [https://www.waterboards.ca.gov/about_us/public_participation/tribal_affairs/docs/draft_calif_water_board_draft_tribal\(10152018\).asd.pdf](https://www.waterboards.ca.gov/about_us/public_participation/tribal_affairs/docs/draft_calif_water_board_draft_tribal(10152018).asd.pdf).

201. See *Welcome to the Governor's Tribal Advisor Office*, CA.GOV: OFFICE OF THE TRIBAL ADVISOR, <http://www.tribalgovtaffairs.ca.gov/> (last visited May 23, 2019) (summarizing tribal liaison contacts at the agencies, consultation plans, grant opportunities and ongoing consultations).

202. See CALIFORNIA 2016 MASTER PLAN, *supra* note 154.

203. *Id.* at 9.

204. Act of Sept. 25, 2014 (Assembly Bill 52), 2014 Cal. Legis. Serv. ch. 532 (codified at CAL. PUB. RES. CODE §§ 5097.94, 21073, 21074, 21080.3.1, 21080.3.2, 21082.3,

report on projects any governmental agency proposes to carry out or approve that “may have a significant effect on the environment.”²⁰⁵ Significant effects on the environment must be avoided or mitigated.²⁰⁶ Assembly Bill 52 included in the definition of “significant effect on the environment” any project “with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource.”²⁰⁷ The statute requires notice to Indian tribes “traditionally and culturally affiliated with the geographic area of the proposed project,” consultation with those tribes, and mitigation measures where appropriate.²⁰⁸

In 2017, the State Water Resources Control Board adopted two new categories of tribal beneficial water uses for designation in a water quality control plan for a particular waterbody segment: Tribal Tradition and Culture (uses of water that support the cultural, spiritual, ceremonial, or traditional rights or lifeways of California Native American Tribes) and Tribal Subsistence Fishing (uses of water involving non-commercial catching or gathering of natural aquatic resources, including fish and shellfish, for consumption by individuals, households, or communities of California Native American Tribes to meet needs for sustenance).²⁰⁹ The new standards mark the first time the SWRCB has taken steps to protect tribal members’ reliance on subsistence fishing and culture. Further, the State Sustainable Groundwater Management Act acknowledges the importance of water to the survival of Indian tribes by requiring that groundwater sustainability plans avoid impairment or interference with the tribes’ federal reserved water rights. Tribal governments are also eligible for grants to protect their communities’ water quality.²¹⁰

California has lagged behind other states in recognizing the existence of Indian tribes as the third sovereign, along with the sovereign United States and the fifty states. California’s collaboration with Indian tribes in seeking a

21083.09, 21084.2, 21084.3), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB52.

205. CAL. CODE REGS. § 15002(k)(2) (West 2019).

206. *Id.* § 15002(a)(3).

207. Assembly Bill 52, § 9.

208. *Id.* § 5; *see also* HOLLY ROBBERSON, CAL. GOVERNOR’S OFFICE OF PLANNING & RES., AB52: A CEQA GUIDELINES UPDATE FOR TRIBAL CULTURAL RESOURCES (n.d.) (draft slideshow) (governor’s state-wide campaign to promote compliance with the new law).

209. CAL. WATER RES. CONTROL BD., PART 2 OF THE WATER QUALITY CONTROL PLAN FOR INLAND SURFACE WATERS, ENCLOSED BAYS, AND ESTUARIES OF CALIFORNIA—TRIBAL AND SUBSISTENCE FISHING BENEFICIAL USES AND MERCURY PROVISIONS A-3 (n.d.), https://www.waterboards.ca.gov/water_issues/programs/mercury/docs/hg_prov_final.pdf.

210. CAL. WATER CODE § 10720.3(c)–(d) (Deering 2018).

way to make the MLPA work for them was a long time in the making. One may question why these developments happened when they did. Chuck Bonham, the Director of the Department of Fish and Wildlife (within the Natural Resources Agency), has said that the timing was a function of the “right people in the right place at the right time” at the various levels of agency management.²¹¹ The Governor issued his Executive Order early in his Administration. Immediately upon taking office, Secretary Laird was faced with the final stages of the MPA development on the North Coast—which is “Indian country” in the minds of many—and recognized that partnerships with tribes were essential to policies providing effective marine resource protection.²¹² Director Bonham, already familiar with the benefits of working with tribes upon his arrival in Sacramento in September of 2011, was eager to implement the policies established by the Governor and Secretary.²¹³ Similarly, at the Fish and Game Commission, the Commissioners, following the adoption of the MLPA tribal regulation and including a person with experience working with Indian tribes, all supported tribal collaboration and developed a tribal working group, a consultation policy, and genuine engagement with Indian tribes.

Bruce Babbitt, the former Governor of Arizona and former U.S. Secretary of the Interior, in talking about partnerships with Indian tribes, has said:

This is not a problem, it's an opportunity What we have is an intergovernmental environment in which, if we could just quit thinking of Indian tribes and nations as problems and start thinking of them as peoples, communities, and governmental units, we can get on with business and make it happen.²¹⁴

The perceptions of tribal representatives who participated in the late stages of the MLPA process bears out the truth of the Governor's observation. One tribal advocate said that, though there is a great deal of work yet to be done to fully recognize tribal rights to marine resources, the “space created by the MLPA is a promising first step.”²¹⁵ The involvement

211. Interview with Charlton Bonham, *supra* note 102.

212. Baum Found., *Stewards of the Wild Sea*, YOUTUBE (Nov. 14, 2013), <https://www.youtube.com/watch?v=vWYxjEaip7g> [hereinafter *Stewards of the Wild Sea*]. Secretary Laird said he was confronted by this issue “on the very first day” of his tenure. *Id.* at 1:12.

213. Interview with Charlton Bonham, *supra* note 102.

214. Greetham, *supra* note 184, at 14 (quoting former Arizona Governor Bruce Babbitt).

215. Interview with Megan Van Pelt, *supra* note 129.

of the tribes, the original stewards of those resources, resulted in the authorization of a “tribal take” of resources—something one former tribal chairwoman describes as “a big step.”²¹⁶ It was a feeling of “great elation and relief for us.”²¹⁷ Both the State and some tribal representatives see a trend toward a marked increase in tribal participation in the development of state policy beyond that of marine resources.²¹⁸ While not every tribe has the resources to respond to state agency invitations, at least they have a greater opportunity.

The tribal-state collaboration produced benefits for both governments in establishing a workable policy to restore and protect marine resources while simultaneously preserving the traditional practices of the Indian tribes. The various ways in which these changes will be realized depend on the political will of these sovereign governments to continue this partnership and incorporate its benefits into other public policy areas. In the natural resources arena, the Governor, the Secretary, and the Fish and Game Commission set the policy; it is implemented at the departmental level. It is at the departmental level that the functional decisions are made: authority is granted for projects, permits are issued for activities, and the relationship is implemented.²¹⁹ The obligations imposed on state agencies to collaborate with tribes are now embedded at the departmental level, at least with respect to natural resources. California now “does business,” as Governor Babbitt may have said, with tribes at the functional level. That may provide reason to believe that, as the political pendulum swings with successor State Administrations, the value of tribal/state collaboration will continue and the benefits to both will be fully realized.

From the tribal perspective, it seems unlikely that Indian nations would easily give up the recognition of rights they have achieved through collaboration. The process from the Kashia’s Stewarts Point Marine Reserve in 2009, when Indian interests were not initially considered, to the North Coast Marine Protection Areas in 2012 when the tribes’ right to take resources sustainably was recognized, was arduous. The disagreements and compromises, however, fostered mutual respect.²²⁰ And the process, to use

216. *Stewards of the Wild Sea*, *supra* note 212, at 7:50 (quoting Chairwoman Priscilla Hunter).

217. *Id.* at 7:23 (quoting Hawk Rosales, Intertribal Sinkyone Wilderness Council).

218. Interview with Charlton Bonham, *supra* note 102; Interview with Megan Rocha (Mar. 9, 2018).

219. Author communication from Director Charlton Bonham.

220. *Stewards of the Wild Sea*, *supra* note 212, at 4:34 (quoting Secretary Laird) (“I heard a narrative [from Indians] that was impossible to resist. . . . ‘We’ve been fishing

Director Bonham's word, is now "embedded" in the State's administrative apparatus. It is entirely possible that a long, frustrating, yet successful process is more likely to last and to become a foundation for future partnerships.

There is much more that could be achieved by a state that has the largest number of Indian tribes and native people in the Nation, including: legislative committees devoted specifically to Indian affairs; a state commission on Indian affairs; increased representation in the Legislature for Indian tribes; formal acknowledgement of, and reparations for, state-sanctioned violence that decimated Indian tribes for generations; and educating all three branches of state government about the historic and current struggles of tribal communities.²²¹ The MLP AI laid a strong foundation for these and other changes that could mark a new day in the relationship between Indian tribes and California. In the end, it turned out that the MLP AI was about more than marine resources.

sustainably for thousands of years, [and] you guys show up and then suddenly you tell us we can't fish in places.' Well, how can you resist that argument? There's such an intellectual honesty to it.").

221. See generally SUSAN JOHNSON, JEANNE KAUFMAN, JOHN DOSSETT, SARAH HICKS & SIA DAVIS, NAT'L CONFERENCE OF STATE LEGISLATURES, GOVERNMENT TO GOVERNMENT: MODELS OF COOPERATION BETWEEN STATES AND TRIBES (2d ed., 2009), <http://www.ncsl.org/documents/statetribe/item019417.pdf>.