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Improving Tribal Collaboration in California's Integrated Regional Water Management Program

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ABSTRACT

Our research examines Integrated Regional Water Management (IRWM) policy-in-practice, which often reflects broader State exclusion of Tribal partners in natural resource policy, yet also provides potential opportunities for government-to-government collaboration and co-management. IRWM is the state of California's chosen mechanism for collaborative water management. Our findings confirm that if Tribes and state or local jurisdictions were already working well together, the IRWM program has been beneficial to Tribal interests. In the Tuolumne-Stanislaus IRWM region, for example, the Regional Water Management Group (RWMG) facilitated a first of its kind voluntary water transfer between a Tribe and a local water agency. Conversely, in situations in which local governments and Tribal governments were adversarial, IRWM presents an additional barrier to Tribal participation in water policy and planning, despite Tribes' Winters*-affirmed federal reserved water rights. In all instances, we found it would significantly improve IRWM statewide to require RWMGs to: (a) engage in statutorily defined*[1] *government-to-government consultation with Tribes and (b) provide seats for Tribal representation on RWMG governance bodies. By revising the IRWM program guidelines, the state of California can continue to address deeply institutionalized inequities within state water policy and management structures. Following the release of our recommendations, California Department of Water Resources (DWR) began holding workshops to examine revising the IRWM program guidelines. If DWR implements the findings from our study and requires Tribal participation in the governance of RWMGs, this could set a productive example for other states, as well as result in significant benefits in California water management.*

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1. S.B. 18, 2003–2004 Leg., Reg. Sess. (Cal. 2003); OFFICE OF THE GOVERNOR, EXEC. ORDER B-10-11 (2011), *available at* gov.ca.gov/news.php?id=17223.

I. INTRODUCTION

Integrated Watershed Management (IWM) is not a new idea. Watershed approaches in the U.S. date back at least to the 1930s,[2] and indigenous societies have long followed the philosophy and practice of an integrated approach to managing ecological systems.[3] The contemporary California incarnation of IWM has been active in Australia since the late 1980s.[4] In Australia's version of IWM, "integrated" refers to a cross-agency, cross-jurisdictional, cross-disciplinary approach to natural resource management decisions and actions. According to California's Department of Water Resources (DWR), Integrated Regional Water Management (IRWM) is:

> a collaborative effort to manage all aspects of water resources in a region. IRWM crosses jurisdictional, watershed, and political boundaries; involves multiple agencies, stakeholders, individuals, and groups; and attempts to address the issues and differing perspectives of all the entities involved through mutually beneficial solutions.[5]

California's regulatory agencies have also embraced integrated water management and backed it with tremendous financial and political support (see Table 1 below). In 2002, the State Legislature enacted the Integrated Regional Water Management Planning Act to:

> facilitate the development of integrated regional water management plans, thereby maximizing the quality and quantity of water available to meet the state's water needs by providing

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2. *See, e.g.*, ALDO LEOPOLD, A SAND COUNTY ALMANAC 237–63 (1st ed. 1949); STEWART UDALL, THE QUIET CRISIS 3–12, 173–92 (1ST ED., 1963).

3. *See, e.g.*, ANTHONY MADRIGAL, SOVEREIGNTY, LAND & WATER: BUILDING TRIBAL ENVIRONMENTAL AND CULTURAL PROGRAMS ON THE CAHUILLA & TWENTY-NINE PALMS RESERVATIONS (Cal. Center for Native Nations, 2008); VINE DELORIA JR., SPIRIT AND REASON: THE VINE DELORIA, JR. READER 223–29 (1999); M. KAT ANDERSON, TENDING THE WILD: NATIVE AMERICAN KNOWLEDGE AND THE MANAGEMENT OF CALIFORNIA'S NATURAL RESOURCES (Univ. Cal. Press, 2005); LES W. FIELD, ABALONE TALES: COLLABORATIVE EXPLORATIONS OF SOVEREIGNTY AND IDENTITY IN NATIVE CALIFORNIA 90–93, 140–43 (2008); GREGORY CAJETE, LOOK TO THE MOUNTAIN: AN ECOLOGY OF INDIGENOUS EDUCATION (1st ed. 1994); Fikret Berkes, Johan Colding & Carl Folke, *Rediscovery of Traditional Ecological Knowledge as Adaptive Management*, 10(5) ECOLOGICAL APPLICATIONS, 1251–62 (2000).

4. *See* Richard D. Margerum, *Integrated Environmental Management: The Foundations for Successful Practice*, 24(2) ENVTL. MANAGEMENT 151–66 (1999).

5. *Integrated Regional Water Management Grants*, CAL. DEPT. OF WATER RES. (2012), http://www.water.ca.gov/irwm/grants/ (last visited Feb. 15, 2015).

> a framework for local agencies to integrate programs and projects that protect and enhance regional water supplies.[6]

In the 12 years since the initial legislation, the state has invested approximately $1.8 billion in the IRWM grant program administered by DWR.

TABLE 1. Timeline of Relevant IRWM & Tribal Legislation

2002		*2006*		*2009*				*2011*	*2014*
S. 1672	Prop 50	Prop 84	Prop 1E	S. 7X 1	S. 7X 6	S. 7X 7	S. 7X 8	EO B-10-11	Prop 1
Integrated Regional Water Management Act	Water Security, Clean Drinking Water, Coastal and Beach Protection Act	Safe Drinking Water, Water Quality and Supply, Flood Control, River & Coastal Protection Bond Act	Disaster Preparedness & Flood Prevention Bond Act	Delta Plan, ACWA	Groundwater Monitoring	Water Conservation	Water Diversion & Rights	Governor's Tribal Advisor & Tribal Consultation Policy	Water Quality, Supply, and Infrastructure Improvement Act
Encourage agency cooperation in water management	$500 Million to fund IRWM planning	$1 Billion for IRWM Planning & Implementation	$300 Million for IRWM Stormwater Flood Management	"California Water Package"				Requires consultation policies for all state agencies	$810 Million for IRWM

Despite the substantial state investment and endorsement of IRWM, Tribes cite barriers to their effective participation in the program. The original legislative bond language and subsequent program Guidelines omitted Tribes from the planning and decision-making processes. The Department of Water Resources attempted to address Tribes' concerns by inserting a provision in the 2009 revised IRWM Guidelines, incentivising Regional Water Management Groups (RWMG) to include Tribal participation in their proposals. However, the Guidelines still imply that, in order to fully participate in their RWMG, Tribes must partially submit to state authority by "signing on" to the IRWM plan via a Memorandum of Understanding/Memorandum of Agreement (MoU/MoA) containing a limited waiver of sovereign immunity. While Tribes in some regions have "signed on" to their IRWM plan, most Tribes view this requirement as a major infringement on their sovereignty. Some regions have also been outright hostile to Tribal participation, deliberately excluding them from attending meetings and serving on project committees. For example, although Tribal representatives from the Upper Sacramento River IRWM planning region had been "trying to be included for

6. CAL. WATER CODE §10531(d) (amended by S. 1672, 2001–2002 Leg., Reg. Sess.) (Cal. 2001).

two years,"[7] by attending IRWM meetings, expressing their concerns, and commenting on IRWM planning documents, the RWMG refused to add Tribal seats to their governance body.

As written, the IRWM program's enabling legislation omits Tribal concerns; therefore, the IRWM program must undergo significant changes to fully realize Tribal collaboration. This article traces Tribal-state relationships in California relevant to the IRWM program, identifies specific barriers to participation as well as solutions that have helped some Tribes overcome such barriers, and explains proposed recommendations for improving Tribal participation in the IRWM program.

The body of the article is divided into four major sections. First, we provide necessary background information on Tribal/State relations in the context of California water, drawing on national examples and case law for further illustration. Next, we describe our research methods from the UC Davis IRWM Tribal Collaboration Effectiveness Study. Third, we address the importance of Tribal participation in IRWM, with a specific focus on two key components: government-to-government consultation; and decision-making authority. We outline the specific policy parameters that restrict Tribal participation. We also analyse examples of Tribes and RWMGs overcoming these barriers, as well as examples where barriers are not overcome. Finally, we discuss broader implications of the IRWM program and apply our findings to other contexts. This section is also divided into two components: general Tribal policy recommendations; and moving from historically adversarial relationships into a more collaborative, co-management model. We conclude with recommendations for achieving effective, equitable collaboration and maintaining historical and cultural cognizance when working with Tribal nations.

II. BACKGROUND: TRIBAL/STATE RELATIONS

A. California Water Management

California water wars[8] are internationally infamous, and ever more intense in the current drought cycle.[9] As traditional land- and water-stewards, California Tribes are dependent upon California waters

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7. Interview with Belinda Brown, Pit River Tribe, in North Lake Tahoe, Cal. (June 11, 2013).

8. *See, e.g.*, MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER (1986).

9. *Governor Brown Declares Drought State of Emergency*, OFFICE OF THE GOVERNOR (Jan. 17, 2014), http://gov.ca.gov/news.php?id=18379; *see, e.g.*, ELLEN HANAK, JEFFREY MOUNT & CAITRIN CHAPPELLE, CALIFORNIA'S LATEST DROUGHT, Pub. Policy Inst. of Cal. (2015), *available at* http://www.ppic.org/content/pubs/jtf/JTF_DroughtJTF.pdf.

for cultural, spiritual, economic, and physical survival. They should be at the table when critical water management decisions are made. Tribal stewardship perspectives benefit entire ecosystems,[10] rather than discrete "beneficial uses." The state's legislature recognizes that water is a valuable resource in California, but defines proper management narrowly to focus only on the state's agricultural, domestic, industrial, and environmental needs (and the latter were only recognized in 1975).[11] The State Water Resources Control Board (State Water Board) recognizes twenty designated "beneficial uses" to which appropriated water can be applied.[12] These designated uses also determine water quality standards required for each beneficial use. This list, however, does not recognize important water uses unique to Tribes. As persistent drought further exacerbates California's water scarcity, it is even more important to include tribal perspectives—and their broader ecosystem approach to water—in comprehensive regional water planning.

In 1999, California passed the Marine Life Protection Act (MLPA), initiating the Marine Protected Area (MPA) planning process.[13] Tribes in the North Coast MPA effectively lobbied the State Water Board to approve two new designations: "Native American Culture Uses of water (CUL)" and "Subsistence Fishing (FISH)," defined as follows:

> CUL: Uses of water that support the cultural and/or traditional rights of indigenous people such as subsistence fishing and shellfish gathering, basket weaving and jewelry material collection, navigation to traditional ceremonial locations, and ceremonial uses.

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10. *See, e.g.*, Cutcha Risling-Baldy, *Why We Gather: Traditional Gathering in Native Northwest California and the Future of Bio-Cultural Sovereignty*, 2:17 ECOLOGICAL PROCESS 1, 1–10 (2013), *available at* http://www.ecologicalprocesses.com/content/2/1/17; ANDERSON, *supra* note 3.

11. CAL. WATER CODE § 1243 (1972) (effective Dec. 1, 1967).

12. Cal. Code Regs. tit. 23, §§ 659–672 (2015); *Water Rights: Public Trust Resources*, CAL. E.P.A. (June 5, 2014), http://www.waterboards.ca.gov/waterrights/water_issues/programs/public_trust_resources/. These uses are: (1) Agricultural supply; (2) Areas of special biological significance; (3) Cold freshwater habitat; (4) Commercial and sport fishing; (5) Estuarine habitat; (6) Freshwater replenishment; (7) Groundwater recharge; (8) Industrial service supply; (9) Marine habitat; (10) Fish migration; (11) Municipal and domestic supply; (12) Navigation; (13) Industrial process supply; (14) Preservation of rare and endangered species; (15) Water contact recreation; (16) Noncontact recreation; (17) Shellfish harvesting; (18) Fish spawning; (19) Warm freshwater habitat; and (20) Wildlife habitat.

13. CAL. FISH & GAME CODE § 2850–2863 (1999); *California Marine Protected Areas Overview*, CAL. DEP'T. OF FISH AND WILDLIFE, http://www.dfg.ca.gov/marine/mpa/overview.asp (last visited Aug. 19, 2014).

FISH: Uses of water that support subsistence fishing.[14]

With these two designations, the state must ensure that water quality standards in the North Coast's waters are commensurate with supporting the defined cultural and subsistence fishing uses. Although a major win for Tribes, these two designations currently apply only to the North Coast region, and not the state's nine other hydrologic regions.

Agency alignment and cooperative management have been proverbial buzzwords in recent years, especially in California water policy. The water code states: "It is the intent of the Legislature to encourage local agencies to work cooperatively to manage their available local and imported water supplies to improve the quality, quantity, and reliability of those supplies."[15] However, "local agency cooperation" often fails to recognize the government-to-government relationship with Tribes, and thus state agencies do not adequately "align" with Tribal policy or interests.[16] The IRWM program is a revealing example. As California's mechanism for collaborative management, IRWM is a wholly voluntary program in which regions are self-identified and self-governed by a collection of state or local agency representatives. After the IRWM Act was passed in 2002, IRWM planning activities were funded through Proposition 50, a ballot-initiative bond measure.[17] The initial grant cycle[18] included a "Regional Acceptance Process" (RAP) by which local agencies and stakeholders formed ad-hoc RWMGs and then applied for IRWM "Planning Grant" funds to develop their region's IRWM Plan. California is now divided into forty-eight IRWM regions, covering 87 percent of the state's land area and 99 percent of its population. Forty-two of these regions have adopted an IRWM plan.[19]

Most RWMGs are governed by an MoU, Memorandum of Mutual Understanding (MoMU), or MoA, which parties are required to "sign on to" if they wish to participate in the group's decision-making structure.

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14. North Coast Regional Water Quality Control Board, *Basin Plan Documents: Beneficial Uses*, CAL. E.P.A. (May 2011).

15. CAL. WATER CODE § 10531(a) (2009).

16. DANIELLE V. DOLAN, TRIBAL COLLABORATION IN IRWM: CHALLENGES, SOLUTIONS, AND RECOMMENDATIONS, Final Report of the IRWM Tribal Collaboration Effectiveness Study to the Department of Water Resources, IRWM Division, 47 (2013).

17. According to the California Constitution, legislation may be passed through propositions placed on the ballot of a general election for voters to either approve or reject directly. CAL. CONST. art. IV, § 8.

18. Proposition 50 IRWM funds were dispersed through a competitive grant program. Funds were released in a phased approach, through a series of grant cycles; each with its own specified guidelines, proposal solicitation package, and application deadlines.

19. *Integrated Regional Water Management Grants*, CAL. DEPT. OF WATER RES. (2014), http://www.water.ca.gov/irwm/grants/prp.cfm (last visited Feb. 15, 2015).

These agreements provide certain expectations and varying levels of flexibility, as determined by the language of the agreement. However, these agreements often lack enforcement or accountability; ultimately, there are no sanctions from DWR or recourse to member agencies if commitments are not fulfilled, thus causing frustration between members.

The IRWM program has been equally praised and criticized. Water managers and agency personnel[20] feel IRWM has been successful in bringing multiple parties to the table (although not necessarily Tribes), building collaborative relationships, and implementing small, local water-related projects. Both IRWM supporters and opponents often cite two criticisms that impede improvements in water management and governance: (1) lack of regulatory authority; and (2) lack of sustainable financing.[21] Because RWMGs are voluntary, ad-hoc arrangements of interested parties based on loose cooperative agreements, there is no requirement that any party participate, and the authority of RWMGs is restricted to that of each participating agency's authority over its respective constituency. This structure provides little continuity or accountability to members. Although IRWM has successfully engaged some parties, IRWM's impact remains limited because it does not include all parties or authorities relevant to regional water management.

Thus far, the IRWM program has incentivized participation through competitive grants administered by DWR, financed by general obligation bond appropriations. Indeed, the initial impetus for many participants was the lure of state funding. However, the current funding mechanism is not sustainable. For example, the legislature failed to pass a 2012 water bond, and significant controversy surrounded the 2014 water bond, despite drastic cuts from the 2012 proposal.[22]

Since the IRWM program's inception and first bond appropriations nearly ten years ago, the state has awarded $372 million in plan-

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20. *Integrated Regional Water Management Grants*, *supra* note 5. *See also* 2014 California Water Policy Conference, Integrated Water Management Summit (Apr. 3, 2013).

21. *See generally*, Mark Lubell & Lucas Lippert, *Integrated Regional Water Management: A Study of Collaboration or Water Politics-As-Usual in California, USA*, 77 INT'L REV. OF ADMIN. SCI. 1, 96 (2011).

22. *See generally*, Joe Mathews, *The Water Bond is Another Missed Opportunity*, FOX AND HOUNDS (Aug. 26, 2014), http://www.foxandhoundsdaily.com/2014/08/water-bond-another-missed-opportunity/; James Poulos, *Landmark Water Bond Now Faces Voters*, CALWATCHDOG (Aug. 22, 2014), http://calwatchdog.com/2014/08/22/landmark-water-bond-now-faces-voters/; John Coleman, Kathy Tiegs & Randy Record, *California's 2014 Water Bond – A Watershed Moment That Deserves Reflection*, VOICES ON WATER (Aug. 20, 2014), http://www.acwa.com/blog/california's-2014-water-bond-—-watershed-moment-deserves-reflection. Proposition 1 was approved by voters on the November 4, 2014 general election ballot, and is now the Water Quality, Supply and Infrastructure Improvement Act of 2014, which includes $510 million for IRWM projects.

ning grants, and $205 million to fund 200 implementation projects.[23] Funded projects must address at least one of the state's six water management objectives: (1) Climate Change Response Actions; (2) Expand Environmental Stewardship; (3) Practice Integrated Flood Management; (4) Protect Surface Water & Groundwater Quality; (5) Improve Tribal Water & Natural Resources; (6) Ensure Equitable Distribution of Benefits.[24]

The Proposition 84 Round 2 implementation grant cycle was completed in February 2014, but Round 3 was postponed pending state budget approval.[25] During the period between Round 2 cycle completion and Round 3 budget appropriations, the future of IRWM in California was uncertain. Meanwhile, DWR began conducting a comprehensive program evaluation, and developing the *Strategic Plan for the Future of Integrated Regional Water Management (IRWM) in California*.[26] The first goal of the Strategic Plan, beyond general program improvement, was to determine what would be necessary for the IRWM program to succeed into the future. So far, the $770 million state bond investment in IRWM has leveraged roughly $3.5 billion in local and regional investments.[27] Over 600 local, multi-benefit water projects have been implemented.[28] This high return on investment assured most water managers and IRWM participants that the program would continue, even if it changed shape to become more self-sustained.[29]

In January 2014, California Governor Jerry Brown proclaimed a Drought State of Emergency.[30] In March 2014 he signed legislation to allocate $200 million of the remaining $472.5 million Prop 84 IRWM funding to:

> provide immediate regional drought preparedness, increase local water supply reliability and the delivery of safe drinking

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23. INTEGRATED REGIONAL WATER MANAGEMENT, CAL. DEP'T. OF WATER RES. EMERGING INVESTMENT STRATEGIES FOR THE FUTURE OF IRWM (Apr. 2014).

24. INTEGRATED REGIONAL WATER MANAGEMENT IMPLEMENTATION GRANT PROGRAM, CAL. DEP'T. OF WATER RES GUIDELINES, (2012) [hereinafter 2012 GUIDELINES] (These guidelines were funded by Proposition 84 and 1E).

25. The original projected timeline for Round 3 was for the PSP to be released in Summer 2014, with applications due that Winter (December 2014–February 2015).

26. EMERGING INVESTMENT STRATEGIES FOR THE FUTURE OF IRWM, *supra* note 23.

27. EMERGING INVESTMENT STRATEGIES FOR THE FUTURE OF IRWM, *supra* note 23.

28. EMERGING INVESTMENT STRATEGIES FOR THE FUTURE OF IRWM, *supra* note 23.

29. 2014 California Water Policy Conference, *supra* note 20.

30. *See, e.g.*, OFFICE OF GOVERNOR EDMUND G. BROWN JR., *Governor Brown Declares Drought State of Emergency*, (Jan. 17, 2014), *available at* http://gov.ca.gov/news.php?id=18368; ELLEN HANAK, JEFFREY MOUNT & CAITRIN CHAPPELLE, *California's Latest Drought*, PUB. POLICY INST. OF CAL. (Jan. 2015).

> water, assist water suppliers and regions to implement conservation programs and measures that are not locally cost-effective, and/or reduce water quality conflicts or, ecosystem conflicts created by the drought.[31]

This funding would otherwise have been used for IRWM Round 3 grants. Instead, DWR has dissolved Round 3, and divided the funds into two separate allocations: "Drought Solicitation" and the to-be-determined "Round 2015 Solicitation." At the Governor's request, the grant process for the drought solicitation was greatly expedited: the public comment period for the draft Proposal Solicitation Packet (PSP) was reduced from the standard ninety days to only thirty days.[32] Once the final PSP was released, applicants had only fifty-three days to complete and submit their proposals, in contrast to the typical 120 days. DWR finalized awards to twenty-seven proposals, for $221 million in funding, on November 4, 2014.[33] This funding round placed greater emphasis on "implementation" projects[34] to address water supply and drought mitigation. Details of the drought PSP as relevant to Tribal collaboration will be further addressed in Section IV, part B, Lack of Decision Making Authority in IRWM.

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31. Integrated Regional Water Management Grants, *2014 Drought Grant Proposal Solicitation*, CAL. DEP'T. OF WATER RES., http://www.water.ca.gov/irwm/grants/implementation.cfm (last visited Aug. 28, 2014).

32. The draft PSP was released in April 2014, with only a 30-day public comment period. THE NATURAL RES. AGENCY, DEP'T OF WATER RES., PROPOSAL SOLICITATION PACKAGE DRAFT (April 2014), *available at* http://www.water.ca.gov/irwm/grants/docs/Archives/Prop84/Guidelines_PSPs/P84_IRWM_PSP_Drought2014_PublicReviewDraftV2.pdf. The final PSP was released on May 29, 2014, and applications were due by July 21, 2014. THE NATURAL RES. AGENCY, DEP'T OF WATER RES., *Proposal Solicitation Package* (June 2014), *available at*: http://www.water.ca.gov/irwm/grants/docs/ImplementationGrants/P84_IRWM_PSP_Drought2014_Final.pdf.

33. Integrated Regional Water Management Grants, *Implementation Grants*, DEP'T OF WATER RES, http://www.water.ca.gov/irwm/grants/implementation.cfm.

34. IRWM describes these Implementation Grants as "ready for or nearly ready to proceed to implementation." *Id.*

B. Native Nations in California

California is home to the largest Native population of any state,[35] the largest number of federally recognized Tribes,[36] and a significant number of Tribes seeking federal recognition.[37] California's Native population and number of Native nations stand in stark contrast to the relatively small land and water holdings[38] that are formally under Tribal jurisdiction. Indigenous peoples in California were largely divested of their homelands and waters through the non-ratification of treaties negotiated with California Tribes in the 1850s, state-sanctioned genocide of California Indians from the 1830s through the late nineteenth century,[39] and a host of assimilationist policies (including allotment, relocation, and termination).[40] Today, Tribes hold less than one half of one percent of the total land area of California. Although the federal government recog-

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35. 12 percent of the total U.S. tribal populations live in California, a total of 723,225 individuals. ADMINISTRATIVE OFFICE OF THE COURTS, CENTER FOR FAMILIES, CHILDREN AND THE COURTS, NATIVE AMERICAN STATISTICAL ABSTRACT: POPULATION CHARACTERISTICS (2012), *available at* http://www.courts.ca.gov/documents/Tribal-ResearchUpdate-NAStats.pdf.

36. *Id.* Of the 566 federally recognized Tribes nation-wide, 109 are California Tribes. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 79 Fed. Reg. No. 19 (Jan. 14, 2015).

37. NATIVE AMERICAN STATISTICAL ABSTRACT: POPULATION CHARACTERISTICS, *supra* note 35. The US Bureau of Indian Affairs, Office of Federal Acknowledgement states that, as of November 12, 2013, there were 81 California Indian nations petitioning for federal recognition. BUREAU OF INDIAN AFFAIRS NUMBER OF PETITIONS BY STATE AS OF NOVEMBER 12, 2014, (Nov. 12, 2013), *available at* http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024416.pdf.

38. The state of California's geographical area is 99,813,950 acres. DEP'T OF WATER RES., DIV. OF PLANNING & LOCAL ASSISTANCE, LAND AND WATER AREAS OF CALIFORNIA COUNTIES, 2000 at 1 (2000). Of that, federally recognized Tribes held 480,821.97 acres in trust. Email from Regional Tribal GIS Coordinator, Bureau of Indian Affairs, Pacific Region to Dr. Beth Rose Middleton, Associate Professor of Native American Studies, Univ. of Cal., Davis on (Apr. 20, 2015) (on file with author). However, this does not include individual allotment lands, or lands privately owned by Tribes (whether federally recognized or non-federally recognized). *Id.*

39. *See* CHAD L. HOOPES, DOMESTICATE OR EXTERMINATE: CALIFORNIA INDIAN TREATIES UNRATIFIED AND MADE SECRET IN 1852 (Redwood Coast Publ'ns eds.,1975); ROBERT F. HEIZER, THE DESTRUCTION OF CALIFORNIA INDIANS (Bison Books eds., reprt. ed.1993); JACK NORTON, GENOCIDE IN NORTHWESTERN CALIFORNIA: WHEN OUR WORLDS CRIED (Indian Historian Press eds., 1st ed.1979); RUPERT COSTO & JEANNETTE HENRY COSTO, THE MISSIONS OF CALIFORNIA: A LEGACY OF GENOCIDE (Indian Historian Press eds., 1987); KIMBERLY JOHNSTON-DODDS, EARLY CALIFORNIA LAWS AND POLICIES RELATED TO CALIFORNIA INDIANS (Roz Dick et al. eds., 2002); JACK D. FORBES, NATIVE AMERICANS OF CALIFORNIA AND NEVADA (Naturegraph Publ'n eds., rev. ed. 1982).

40. For an example from the Yurok Tribe, *see* Lynn Huntsinger & Lucy Diekmann, *The Virtual Reservation: Land Distribution, Natural Resource Access, and Equity on the Yurok Forest*, 50 NAT. RESOURCES J. 341 (2010).

nized the primacy of Indian water rights in 1908 (*Winters v. United States*), in practice, few California Tribes have succeeded in the lengthy and expensive quantification and adjudication process necessary to define, exercise, and defend their water rights.[41] This exclusion occurs despite the fact that these lands and waters are clearly within Tribal homelands and continue to be stewarded by Tribal members.[42] The current climate of Tribal exclusion from state natural resources planning and management compounds ongoing struggles arising from the nonratification of treaties, attempted genocide and assimilation, unquantified water rights, and state hostility to Tribal sovereignty.

Founding principles of federal Indian law, beginning with the Commerce Clause of the U.S. Constitution[43] and the trilogy of cases decided by Justice Marshall from 1820–32,[44] established the primacy of a direct relationship between Tribes and the federal government. However, states have continually fought to have some measure of influence over Tribal governance as well as over Tribal lands and waters.[45] The value of natural resources within the state of California and the threat to state authority of so many powerful Native nations within the state's boundaries has long contributed to California's agitation for power over Tribes. California was a key site for the enactment of Termination-era

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41. *See* A. Dan Tarlock, *Tribal Justice and Property Rights: The Evolution of Winters v. United States*, 50 NAT. RESOURCES J. 471 (2010). At the time of this writing, the authors were unable to identify precisely how many Tribes in California have quantified their *Winters* rights and/or live in adjudicated water basins.

42. *See, e.g.*, Don L. Hankins & Jacquelyn Ross, *Research on Native Terms: Navigation and Participation Issues for Native Scholars in Community Research*, *in* PARTNERSHIPS FOR EMPOWERMENT: PARTICIPATORY RESEARCH FOR COMMUNITY-BASED NATURAL RESOURCE MANAGEMENT 239 (Carl Wilmsen et al. eds., 2008); ANDERSON, *supra* note 3 at 195–291; Cutcha Risling Baldy, *Why we gather: traditional gathering in native Northwest California and the future of biocultural sovereignty*, 2:17 ECOLOGICAL PROCESSES (2013) 1–10, *available at* http://www.ecologicalprocesses.com/content/2/1/17; Beth Rose Middleton, *Advocating for Traditional Native American Gathering Rights on US Forest Service Lands*, *in* FORESTS AND PEOPLE: PROPERTY, GOVERNANCE AND HUMAN RIGHTS (Thomas Sikor and Johannes Stahl eds., 2011).

43. U.S. CONST. art. I, § 8, cl. 3.

44. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

45. *See, e.g.*, Vincent Mulier, *Recognizing the Full Scope of the Right to Take Fish under the Stevens Treaties: The History of Fishing Rights Litigation in the Pacific Northwest*, 31 AM. INDIAN L. REV. 41 (2006); Shannon Bentley, *Indians' Right to Fish: the Background, Impact, and Legacy of United States v. Washington*, 17 AM. INDIAN L. REV. 1 (1992); WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED, 87–122 (2010); CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280 (1997); *All Things Considered: South Dakota Tribes Accuse State of Violating Indian Welfare Act*, NATIONAL PUBLIC RADIO (Feb. 6, 2013), http://www.npr.org/2013/02/06/171310945/south-dakota-tribes-accuse-state-of-violating-indian-welfare-act.

legislation. These laws included House Concurrent Resolution 108,[46] which promulgated the policy to abolish Tribes' government-to-government status and led to the termination of 109 Tribes[47] and Public Law 280,[48] which asserted state jurisdiction—without Tribal consent—over Tribes (with limited exceptions) in six states, including California. Contemporary resource management policies extend this fraught history if they effectively exclude Native nations from participating in the stewardship of their homelands.

The way IRWM is perceived and implemented in California may have significant influence on other jurisdictions, given the number of Tribes and Native people in California, and the state's national and international economic and political importance. Therefore, it is critical that California ensure its IRWM program not only meets the statutory and judicial precedent requiring government-to-government consultation with Native American Tribes, but also far exceeds this minimum requirement by fully engaging Tribes in collaborative co-management.

III. METHODS

Our research methods followed an indigenous participatory action model,[49] in which the research questions, process, and goals were developed with Native California Tribal members and organizations. Participation was open to all California Native American Tribes, regardless of federal recognition status or level of involvement in IRWM. We

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46. For Indian and non-Indian testimony in Congressional hearings on House Concurrent Resolution 108, see GARY ORFIELD, A STUDY OF THE TERMINATION POLICY (National Congress of American Indians) (1964).

47. Implemented by numerous individual acts, including Pub. L. No. 85-671, 72 Stat. 619 (Aug. 18, 1958), which authorized the termination of 41 California Indian rancherias.

48. Pub. L. No. 83-280, 67 Stat. 588–590 (Aug. 15, 1953); 18 U.S.C. § 1162 (1953); 28 U.S.C. § 1360 (1953); 25 U.S.C. §§ 1321–1326 (1968); *see also* CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280 (1997).

49. *See generally* LINDA TUHIWAI SMITH, DECOLONIZING METHODOLOGIES 123–41 (2012) Tuhiwai Smith outlines specific methodologies for conducting decolonial research with indigenous communities. In Decolonizing Methodologies, she explains in detail how indigenous research should be conducted, both by indigenous researchers, and by non-indigenous researchers conducting research with indigenous participants; Heidi L. Ballard, Joyce A. Trettevick & Don Collins, *Comparing Participatory Ecological Research in Two Contexts: An Immigrant Community and a Native American Community on Olympic Peninsula, Washington*, *in* PARTNERSHIPS FOR EMPOWERMENT: PARTICIPATORY RESEARCH FOR COMMUNITY-BASED NATURAL RESOURCE MANAGEMENT (Carl Wilmsen et al. eds., 2008). Heidi Ballard is a professor at UC Davis, and a practitioner of collaborative research / participatory action research. In this chapter, Ballard et al. compare and contrasts two participatory action research projects. Identifying strengths and challenges, Ballard et al. outlines key principles for successful participatory research.

intentionally invited all perspectives in our research, to include both federally and non-federally recognized Tribes, those that have and have not participated in IRWM, and those with a positive and/or negative experience with IRWM. In this way, we were able to maximize the examples and suggestions collected, and have a wider context from which to identify key challenges and effective recommendations.

Data were collected in three formats: formal surveys, semi-structured interviews, and strategic focus groups. We collected responses from Tribes throughout the state, representing approximately 1/4 of Tribes statewide: 1/3 of all federally recognized Tribes in the state, and just over 1/10 of California non-federally recognized Tribes.[50] We conducted targeted data-collection in five IRWM regions that represented different stages in the IRWM process and were strategically selected in collaboration with our partners.[51] Within each of the five target regions, we ensured the input of at least one third of the federally recognized Tribes, as well as one third of the non-federally recognized Tribes. We identified which Tribes to consider as part of a region using a "wide-net" approach, based on the following criteria:

- Tribes with land-holdings within the IRWM region boundaries, such as reservations, Rancherias, designated Indian communities, Tribal land trusts, private land-holdings, etc.
- Tribes with traditional territory within the IRWM region boundaries,[52] and
- Tribes with territory, such as current land holdings as well as ancestral lands, within the watershed of, or adjacent to the boundaries of the IRWM region.

Our survey tool was developed, field-tested and validated following the Rea and Parker model.[53] Prior to releasing our official survey tool, we sent introductory email letters to the Tribal Chair and other relevant Tribal staff (e.g., the environmental department/program director and/

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50. For more specific information on Tribal participation by IRWM region, refer to DOLAN, *supra* note 16, at app. A-8.

51. Including California Indian Environmental Alliance, which has been organizing Tribal participation in IRWM, and Stephanie Lucero, the Tribal Facilitator for the California Water Plan.

52. Tribal traditional territories were determined using the CALIFORNIA NATIVE AMERICAN HERITAGE COMMISSION, *Native California Languages and Tribes*, http://www.nahc.ca.gov/lanuage.html.

53. RICHARD PARKER & LOUIS REA, DESIGNING AND CONDUCTING EFFECTIVE SURVEY RESEARCH 31–103 (1992). *See* app. A-4 for a copy of the survey instrument and A-5 for the validation process.

or cultural resources representative), for each of the 158[54] Tribes in California (109 federally-recognized and 49 non-federally recognized). To increase the likelihood of reaching our target populations we performed the exhaustive task of collating and cross-referencing Tribal contact lists from multiple state and federal sources, including the Office of the Governor's Tribal Advisor, the California Native American Heritage Commission, and EPA Region 9 Regional Tribal Operations Committee (RTOC). For Tribal contact information that could not be verified, we used multiple sources for individual Tribes. Overall, more than 500 individuals were contacted, informed of our research goals, and notified of the survey.

The survey was converted into an online format using Survey Monkey, and the web link was emailed to 259 listed Tribal Chairs and 258 listed Tribal environmental contacts.[55] Included in the e-mail with the web link was an option to download the survey instrument to be completed and then mailed or scanned and e-mailed for return. We also provided the option to conduct the survey in-person or over the phone during an interview. Additionally, paper copies of the survey instrument were mailed to 33 Tribal contacts for which we only had mailing addresses. Along with the mailed survey, we provided a pre-addressed, stamped envelope in which to return the survey, as well as information on how to complete the survey online, over the phone, in-person, or via e-mail. Two weeks after the surveys were initially sent, we began follow-up with survey invitees, including e-mail, postcards, and phone calls, with the most intensive outreach to Tribal contacts in our five target IRWM regions, totalling 102 Tribes. We received 62 survey responses. Additionally, we conducted 20 interviews and five focus groups, representing a total of more than 60 Tribes and Tribal organizations, from 19 of California's 48 IRWM regions.[56]

Through our focused investigation of Tribal participation in DWR's IRWM Grant Program, we have identified current challenges and potential solutions, as expressed by California Tribes and Tribal organi-

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54. *See* Judicial Council of California, *California Tribal Communities*, CALIFORNIA COURTS, http://www.courts.ca.gov/3066.htm (last visited Mar. 29, 2015); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 78 Fed. Reg. 26384 (May 6, 2013). However, reliable Tribal leaders contest this number, stating that the lists are out-dated, and that there are now 111 federally recognized Tribes in California.

55. The disparity in numbers is due to unverified contact information. Thus, there were multiple contacts for individual Tribes.

56. *See* DOLAN, *supra* note 16, at xii (outlining participation by recognition status and the participation method). For a more thorough analysis of our survey data, please see *id.*, at A-8.

zations. We hope our research process, findings, and policy recommendations will inform future Integrated Water Management policy and practices, leading to improved collaboration with California Native American Tribes.

IV. IMPROVING TRIBAL PARTICIPATION IN IRWM

Research from the UC Davis IRWM Tribal Collaboration Effectiveness Study (hereafter "UC Davis Tribal IRWM Study),"[57] and the report released by the research team ("Tribal Collaboration in IRWM"),[58] identify two critical policy recommendations for improving cooperative management between Tribes and state/local municipalities in the IRWM program. The first is to ensure that RWMGs engage in government-to-government consultation with Tribes, as defined in state statutes.[59] The second would be to require that RWMGs provide seats for Tribal representation on their respective IRWM governance bodies. This section offers examples of both challenges and successes in current IRWM implementation, examines each recommendation in detail, and crystallizes best practices with the goal of policy implementation.

Until the two recommendations are implemented, Tribal participation in IRWM will remain constrained. Progress is occurring, due in part to the recent Tribal IRWM Study, which is the first outside recommendations document to be included in the California Water Plan.[60] The

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57. *See* DOLAN, *supra* note 16. The Center for Collaborative Research for an Equitable California partially funds this study.

58. DOLAN, *supra* note 16.

59. *See, e.g.*, S. 18, ch. 905, § 1(b)(2)–(4) (Cal. 2004); Exec. Order No. B-10-11 (2011):

> In recognition of California Native American tribal sovereignty and the unique relationship between California local governments and California tribal governments, it is the intent of the Legislature, in enacting this act, to accomplish all of the following: . . .
>
> (2) Establish meaningful consultations between California Native American tribal governments and California local governments at the earliest possible point in the local government land use planning process so that these places can be identified and considered.
>
> (3) Establish government-to-government consultations regarding potential means to preserve those places, determine the level of necessary confidentiality of their specific location, and develop proper treatment and management plans.
>
> (4) Ensure that local and tribal governments have information available early in the land use planning process to avoid potential conflicts over the preservation of California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places.

60. The California Water Plan, or Bulletin 118, is the State of California's Strategic Plan for managing its water resources. The Department of Water Resources updates this document every four years through a comprehensive public review process, and then submits it

DWR held three public workshops in February 2014 "to gather input on potential changes to improve the grant solicitation process for the [IRWM] program including Round 3 of IRWM Implementation Grant (IG) solicitation."[61] The department's Tribal Policy Advisor made special efforts to ensure Tribes were adequately informed and invited to these meetings, with the purpose of receiving input on recommendations for revising the IRWM program Guidelines.[62] Also, in February 2014 the State Water Board held two listening sessions "on beneficial uses of water as they apply to Native American tribes" to review the proposed "Native American cultural uses" and "subsistence fishing" designations.[63] The California Water Plan Tribal Caucus held IRWM Briefing Meetings and conference calls in March and April 2014.[64] At the 23rd Annual California Water Policy Conference in April 2014, scholarships and travel funds were made available specifically for Tribal representatives and one breakout session was dedicated to Tribal water resources issues. Additionally, DWR held both informational meetings and official government-to-government Tribal consultation meetings in June, to address the Bay Delta Conservation Plan (BDCP)[65] as well as other department programs.[66]

The Ad-hoc Tribal Water Policy Strategy Group, which arose in conjunction with the UC Davis Study,[67] is pushing forward on a number

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to the Governor for approval. *See Bulletin 118*, CA.GOV, http://water.ca.gov/groundwater/bulletin118.cfm (last visited Jan. 29, 2015).

61. *Process Improvement*, DEPT. OF WATER RESOURCES (Mar. 4, 2014), http://www.water.ca.gov/irwm/grants/processimprovement.cfm.

62. Interview with Anecita Agustinez, Department of Water Resources Tribal Policy Advisor, Sacramento, CA (Feb. 26, 2014). Interview with Emily Alejandrino, Department of Water Resources Staff Environmental Scientist, Sacramento, CA (Feb. 5, 2014).

63. *California Water Plan e-News*, WEDNESDAY UPDATE, (Cal. Dep't of Water Res., Sacramento, CA), Feb. 12, 2014.

64. Interview with Anecita Agustinez Department of Water Resources Tribal Policy Advisor, Sacramento, CA (Mar. 24, 2014). Interview with Emily Alejandrino Department of Water Resources Staff Environmental Scientist, Sacramento, CA (Apr. 7, Apr. 10, 2014).

65. The Bay Delta Conservation Plan is a highly controversial initiative, proposed by an equally controversial state agency—the Delta Stewardship Council—to resolve environmental and economic issues in the Sacramento River-San Francisco Bay Delta. *See* BAY DELTA CONSERVATION PLAN (Jan. 23, 2015), http://baydeltaconservationplan.com/Home.aspx.

66. *See, e.g.*, Bay Delta Conservation Plan: Informational Meeting for Bay-Delta Tribal Community (2014), *available at* http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Bay-Delta_Tribal_Consultation_Meeting_Agenda_6-13-14.sflb.ashx.

67. Beth Middleton & Danielle V. Dolan, *Integrated Regional Water Tribal Collaboration Effectiveness Study*, UNIV. OF CAL. DAVIS (2010), https://ccrec.ucsc.edu/integrated-regional-water-management-irwm-tribal-collaboration-effectiveness-study (funded partially through the Center for Collaborative Research for an Equitable California (CCREC)).

of water policy issues in California, including local drinking water supplies, groundwater management, California Environmental Quality Act (CEQA) permitting revisions, and fracking laws. In addition to its active role in proposing recommended Guidelines revisions for IRWM, the strategy group is advancing the State Water Board's consideration of the two proposed state-wide Beneficial Use designations—CUL and FISH—to inform water quality standards. These efforts illustrate the current opportunities for improving Tribal and state relationships and addressing institutionalized inequities within state water policy and management structures. In the following section, we outline the specific policy parameters that restrict Tribal participation. We also analyse examples of Tribes and RWMGs overcoming these barriers, as well as examples of barriers not yet overcome.

A. Lack of Government-to-Government Consultation in IRWM

The vast majority of issues Tribes face within the IRWM program can be traced directly back to the initial omission of Tribes from the IRWM-enabling legislation. The Integrated Regional Water Management Planning Act states:

> "Regional water management group" means a group in which three or more local agencies, at least two of which have statutory authority over water supply or water management, as well as those other persons who may be necessary for the development and implementation of a plan that meets the requirements in Sections 10540 and 10541, participate by means of a joint powers agreement, memorandum of understanding, or other written agreement, as appropriate, that is approved by the governing bodies of those local agencies.[68]

One may interpret section 10539 of the California Water Code to be inclusive of Tribes, as "those other persons who may be necessary."[69] However, when the Department of Water Resources and the State Water Board jointly drafted the IRWM grant program Guidelines and PSP, they neglected to engage in Tribal consultation. Language used in the grant program Guidelines and PSP was taken directly from the legislation, which outlines a series of 13 minimum requirements for IRWM plans.[70] The legislation includes "[a]ny other matters identified by the depart-

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68. CAL. WATER CODE § 10539 (2009).

69. *Id.*

70. *Id.* at § 10541(e), *amended by* Stats. 2014, c. 717 (A.B. 1249), § 1 (2015). Management plans must include:

ment."[71] However, the original document authors chose to limit the scope of the IRWM program to only those requirements explicitly listed in the legislation, rather than utilizing the authority granted in item 14 for broadening the requirements to include Tribal engagement. Thus, Tribes essentially did not "fit" in the IRWM governance framework, and were blocked from participating at the same level as local agencies. If "California Native American Tribes" had been explicitly included along with local public agencies in section 10539 of the California Water Code, or if "Tribal engagement" had been added to the list of minimum requirements for an eligible IRWM plan, many of the issues Tribes face in fully participating in IRWM would have been avoided.[72]

1. The Importance of Government-to-Government Consultation

The government-to-government relationship between Native American Tribes and the federal government requires consultation to the

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(1) Consideration of all of the resource management strategies identified in the California Water Plan, as updated by department Bulletin No. 160-2005 and future updates.
(2) Consideration of objectives in the appropriate basin plan or plans and strategies to meet applicable water quality standards.
(3) Description of the major water-related objectives and conflicts within a region.
(4) Measurable regional objectives and criteria for developing regional project priorities.
(5) An integrated, collaborative, multi-benefit approach to selection and design of projects and programs.
(6) Identification and consideration of the water-related needs of disadvantaged communities in the area within the boundaries of the plan.
(7) Performance measures and monitoring to demonstrate progress toward meeting regional objectives.
(8) A plan for implementation and financing of identified projects and programs.
(9) Consideration of greenhouse gas emissions of identified programs and projects.
(10) Evaluation of the adaptability to climate change of water management systems in the region.
(11) Documentation of data and technical analyses used in the development of the plan.
(12) A process to disseminate data and information related to the development and implementation of the plan.
(13) A process to coordinate water management projects and activities of participating local agencies and local stakeholders to avoid conflicts and take advantage of efficiencies.
. . . .
(15) Any other matters identified by the department.

71. *Id.* at § 10541(e)(15).
72. DOLAN, *supra*, note 16, at 49–51, 57.

greatest extent practicable, It is especially important for any federal or state agency conducting planning or development (such as IRWM) that may impact Tribal lands and/or cultural resources to conduct formal, government-to-government consultation with each Tribe to the extent permitted by law.[73] Additionally, compliance with the California Environmental Quality Act, required for IRWM grant-funded projects, explicitly requires Tribal notification:

> Before the adoption of a negative declaration or environmental impact report required under Section 75070, the lead agency shall notify the proposed action to a California Native American Tribe, which is on the contact list maintained by the Native American Heritage Commission, if that Tribe has traditional lands located within the area of the proposed project.[74]

Issues arise when this mandate is not adequately fulfilled (i.e., the permittee fails to notify the tribe(s) within a timely manner), and when the requirement to "notify" (under CEQA) or "consult" (under GSA policy[75]) does not meaningfully address Tribal concerns.[76]

In 2011, Governor Brown proclaimed Executive Order B-10-11,[77] requiring all state agencies to engage Tribes in government-to-government consultation, and directing each agency to develop specific Tribal communication plans.[78] This order has yet to be fulfilled or enforced, and the state has not provided guidance to regional or local agencies on how to develop and implement these Tribal consultation policies. While a major step in the right direction, Executive Order B-10-11 was passed nine years after the IRWM Act. As such, Tribes were not consulted in the original development of the IRWM program, from passing the legislative act to developing the Guidelines and PSP.[79]

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73. General Services Administration Directive, ADM 1072.1 GSA Policy Toward Native American and Alaskan Tribes (Nov. 17, 1999), *available at* http://www.gsa.gov/graphics/pbs/ADM1072.1.pdf.

74. Cal. Pub. Res. Code § 75102 (2009).

75. GSA Policy Toward Native American and Alaskan Tribes, *supra* note 73.

76. *See, e.g.*, Beth Rose Middleton, *Just Another Hoop to Jump Through: Using Environmental Laws and Processes to Protect Indigenous Rights, Environmental Management* (2012), *available at* http://link.springer.com/article/10.1007/s00267-012-9984-5 (citing cases and examples).

77. Exec. Order No. B-10-11 (Sept. 19, 2011), http://gov.ca.gov/news.php?id=17223.

78. Dolan, *supra* note 16, at 80.

79. Cal. Dep't of Water Res., Div. of Integrated Regional Water Management, Guidelines (June 2014) [hereinafter Guidelines], *available at* http://www.water.ca.gov/irwm/grants/docs/Archives/Prop84/Guidelines_PSPs/P84_IRWM_GL_Drought2014_Final.pdf.

Because IRWM is a voluntary ad-hoc collaborative process, rather than a state agency or formal coalition, RWMGs have not been required to consult with Tribes. According to one DWR staff member, "If there was a Tribe in the region that was not participating, then it would be a question, but regional water management groups are not bound by law to reach out to anybody."[80] Failure to require RWMGs to follow consultation protocols is directly contrary to judicial precedent,[81] as well as federal and state statues,[82] which acknowledge Tribal sovereignty and establish consultation responsibilities. Tribal sovereignty predates the formation of the American republic.[83] Nonetheless, Native nations have had to struggle for federal and state recognition of this inherent right to self-governance since European contact. Any incursion on tribal sovereignty opens a painful legacy of deeply unjust, and never repealed, court decisions.[84]

Following the contours of the trust relationship, as affirmed in treaties,[85] case law,[86] and general trust law,[87] federal agencies are each

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80. Telephone interview with Anonymous DWR staff, in Davis, Cal. (Apr. 19, 2013).

81. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Talton v. Mayes, 163 US 376 (1896).

82. S. 18, ch. 905 § 1(b) 2003–2004 LEG. REG. SESS. (Cal. 2004):

> In recognition of California Native American tribal sovereignty and the unique relationship between California local governments and California tribal governments, it is the intent of the Legislature, in enacting this act, to accomplish all of the following:
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> . . . .
>
> (2) Establish meaningful consultations between California Native American tribal governments and California local governments at the earliest possible point in the local government land use planning process so that these places can be identified and considered.
>
> (3) Establish government-to-government consultations regarding potential means to preserve those places, determine the level of necessary confidentiality of their specific location, and develop proper treatment and management plans.
>
> (4) Ensure that local and tribal governments have information available early in the land use planning process to avoid potential conflicts over the preservation of California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places.

83. As articulated, for example, in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 519 (1832), "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil."

84. For additional discussion on legacies of injustice in federal Indian law, see ROBERT A. WILLIAMS JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (Univ. of Minn. Press 2005); and ECHO-HAWK, *supra* note 45.

85. *See* the Treaty of Greenville, U.S.-Wyandots Indians, et. al., Aug. 3, 1975, 7 Stat. 49. The Treaty of Greenville included the Wyandots, Delawares, Shawanees, Ottawas, Chippewas, Pattawatimas, Miamis, Eel Rivers, Weas, Kickapoos, Piankeshaws, and Kaskaskias

responsible for implementing the trust relationship and serving as proper trustees for Native lands and waters. The Environmental Protection Agency (EPA) was among the first federal agencies to articulate its formal government-to-government relationship with Tribes.[88] In 1987, the EPA established that federally recognized Tribes may seek "Treatment in the Same Manner as a State" (TAS) status,[89] which conveys to the Tribe the regulatory authority to determine and enforce water quality standards, and other environmental regulations.[90] In California, legislation recognizes not only federally recognized Tribes, but extends the consultation responsibility to "all California Native American Tribes," identified as those included on the list maintained by the California Na-

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tribes. It states that "the Indian tribes again acknowledge themselves to be under the protection of the said United States" *Id.* at art. V. *See also*, the Treaty with the Tribes of Middle Oregon, U.S.-Tygh Indians, et.al., art. II, Jun. 25, 1855, 12 Stat. 1963, (allocating specific federal funds over time "for the use and benefit of the confederated bands, under the direction of the President of the United States"); Rebecca Tsosie, *The Conflict Between the 'Public Trust' and the 'Indian Trust' Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271 (2003) (analysing the Federal Land Policy and Management Act of 1976).

86. *See* Seminole Nation v. United States, 316 U.S. 286, 297 (1942) (holding that the U.S. government breached its fiduciary trust duty when it disbursed monies to the tribal government that was known to be "without integrity" instead of to the individual tribal members).

87. *See* JON SOUDER & SALLY FAIRFAX, *In Lands We Trusted: State Trust Lands as an Alternative Theory of Public Land Ownership*, *in* PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 90 (Charles Geisler & Gail Daneker eds. ISLAND PRESS 2000) ("Typically the trust property or 'corpus' is identified by a 'trustor,' to be managed by a 'trustee' to achieve specific purposes for a 'beneficiary.'").

88. William D. Ruckelshaus, *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, U.S. ENVTL. PROTECTION AGENCY (1984), http://www.epa.gov/superfund/community/relocation/policy.htm.

89. Regina Cutler, *To Clear the Muddy Waters: Tribal Regulatory Authority Under Section 518 of the Clean Water Act*, 29 ENVTL. L. 721, 725–26 (1999) ("In 1987, Congress amended the CWA to allow qualified tribes to receive some of the regulatory authority otherwise delegated to the states. Section 518(e) of the CWA grants EPA the authority to treat qualified tribes as states for a variety of purposes, including establishing water quality standards and issuing NPDES permits."); *id.* at 726 ("Specifically, tribes may be granted TAS status for the following CWA programs: grants for pollution research and pollution control programs, development of water quality standards and implementation plans, various recording and reporting requirements, enforcement, clean lakes, nonpoint source management programs, section 401 certification, NPDES permitting, and the section 404 wetlands program."); 33 U.S.C. § 1377(a) (2012) ("Indian tribes shall be treated as States for the purposes of such section 1251(g) of this title.").

90. *Frequently Asked Questions: TAS Eligibility Process for the Safe Drinking Water Act Public Water System Supervision Program*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/tribal/pdf/tas-strategy-attach-i.pdf (last visited Aug. 4, 2014).

tive American Heritage Commission.[91] Had the original IRWM legislation authors fulfilled these consultation requirements, significant barriers to Tribal participation in the IRWM program could have been avoided.

2. Challenges to Government-to-Government Consultation

It is the responsibility of RWMGs to notify and invite all potentially interested parties to engage in the IRWM planning process. Consultation protocol requires the acting agent (e.g., RWMG) to notify Tribes of intended actions or planning processes. In many regions, Tribes were not consulted in the initial development of RWMGs and the RAP. According to our survey data, roughly two thirds (66 percent) of respondents did not participate in the creation of their regional IRWM. Numerous Tribes are frustrated that they have "not been included in any IRWMP process," and remain concerned that final IRWM plans do not adequately address Tribal needs and interests.[92] Other Tribes reported that they had received no outreach from their RWMG at all,[93] and 42 percent of survey respondents noted that they do not receive regular updates from their RWMG.[94] In the words of one research participant, "government-to-government consultation with Tribes is not happening right now."[95] This lack of consultation is a significant concern, because IRWM is "no longer just a project or program, but our way of doing business" throughout the state.[96]

Tribes in some regions have been very persistent in their efforts to engage with their RWMG, but the legal responsibility remains with RWMG. "We realized that we had very little Tribal representation . . . and so we've basically taken it upon ourselves to impose ourselves into these types of meetings so we can have a voice."[97] However, this takes significant effort that not all Tribes can commit. The onus should be on IRWM groups to conduct mandated consultation with Tribes, rather than on Tribes to ensure consultation occurs. This is consistent with existing legislative policy. According to Federal Executive Order 13084[98]

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91. GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, STATE OF CAL., TRIBAL CONSULTATION GUIDELINES: SUPPLEMENT TO GENERAL PLAN GUIDELINES, at 6 (2005), *available at* http://opr.ca.gov/docs/09_14_05_Updated_Guidelines_922.pdf.

92. Interview with Belinda Brown, *supra* note 7.

93. DOLAN, *supra* note 16, at 19.

94. DOLAN, *supra* note 16, at 15.

95. Interview with Michael DeSpain, Environmental Director, Mechoopda Indian Tribe of Chico Rancheria, in Chico, Cal. (May 10, 2013).

96. Interview with Mark Cowin, Director, California Department of Water Resources Integrated Water Management (IWM) Summit, in Sacramento, Cal. (Apr. 3, 2013).

97. Interview with Belinda Brown, *supra* note 7.

98. Exec. Order No. 13084, 63 C.F.R. 27655 (1998).

and Executive Order 13175[99] on Consultation and Coordination with Indian Tribal Governments, all agencies must conduct meaningful and timely consultation with Indian Tribes on policies that have Tribal implications or projects that affect Tribal communities.[100] While RWMGs are not agencies, they are composed of agencies with these responsibilities, and are therefore charged with implementing a program administered by a state agency. Thus, the responsibility of Tribal consultation still applies.

Many IRWM practitioners feel ill-equipped to conduct Tribal consultation. Specifically, the differentiation between legal consultation requirements and programmatic outreach suggestions is unclear. One IRWM project manager noted participants' "understandable frustration with . . . the lack of guidance on how to engage Tribes; what's required vs. what's suggested?"[101] RWMGs have been told repeatedly to be patient because, "the State is developing Guidelines"[102] to address this question, but those guidelines have yet be provided. This same project manager is concerned that such confusion is "an obstacle to effective participation in an opportunity for benefits to all parties."[103] Diverse IRWM practitioners agree that the state "needs to get it done and provide it to the regional water management groups."[104] Some RWMGs have raised questions regarding which Tribes they need to include and how to identify Tribes within their regions. Tribes are defined in the IRWM Guidelines to include "all Indigenous Communities of California."[105] This includes federally recognized Tribes, non-federally recognized Tribes, and Tribal organizations. Therefore, regarding consistency with State Executive Order B-10-11, it appears that RWMGs should consult with all Tribes and Tribal organizations within their IRWM region. Consultation with any one Tribe does not preclude consultation with others.

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99. Exec. Order No. 13175, 65 C.F.R. 67249 (2000).

100. *See id.*

101. Interview with Daniel Olstein, Director of Land Stewardship, Peninsula Open Space Trust, (Mar. 20, 2013).

102. Telephone interview with Anonymous DWR staff, *supra* note 80; *see also* Interview with Belinda Brown, *supra* note 92; Interview with Meyo Marrufo, *infra* note 110; Interview with Anonymous, *infra* note 158; Interview with Chris Peters, *infra* note 124; Interview with Sherry Norris, *infra* note 183; T. Billington, *infra* note 197.

103. Interview with Daniel Olstein, *supra* note 101.

104. Interview with Daniel Olstein, *supra* note 101.

105. Exec. Order No. B-10-11, *supra* note 77.

3. Alternative Approaches to Achieving Government-to-Government Participation

Despite the lack of government-to-government consultation in IRWM to date, there are still ways for Tribes to participate in IRWM. All previous IRWM Guidelines,[106] as well as the new 2014 Drought Solicitation Guidelines,[107] require the "applicant" to "be a local agency or nonprofit organization."[108] Joint Powers Authorities (JPAs) are included in the definition of "local agency,"[109] and thus can serve as lead applicant. Some Tribes have had success with IRWM by forming JPAs, rather than participating through an MoA or MoU. The MoA and MoU documents are of particular concern to Tribes because the template provided by DWR requires a waiver of sovereign immunity (WSI).

Signing a WSI is standard practice in many state contracts, as it is the only recourse the state has for recouping losses if a grantee misuses the awarded funding. A WSI would enable the Tribe to be sued in state court, thus forcing the Tribe to come under state jurisdiction.[110] The benefits of the JPA over any memorandum agreement are two-fold: a JPA holds considerable accountability and requires no waiver of sovereign immunity. RWMGs that form JPAs have additional access to resources to support their collective projects and additional authority in water-management decisions. This is especially important for Tribes, as it puts them on equal footing with other entities, and provides an avenue for exercising greater sovereignty and project leadership. Additionally, both federally recognized and non-federally recognized Tribes can use the JPA mechanism.

The MoA and MoU requirement that Tribes sign waivers of sovereign immunity to receive IRWM funding calls to mind a long history of attempted state limitations on tribal sovereignty. These incursions have been a continual challenge, despite the 1790 Trade and Intercourse Act,[111]

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106. *See* Integrated Regional Water Management, *Archives - Proposition 1E*, CAL. DEPT. OF WATER RES., http://www.water.ca.gov/irwm/grants/archive.cfm (last visited Mar. 30, 2015); Integrated Regional Water Management, *Archives - Proposition 50*, CAL. DEPT. OF WATER RES., http://www.water.ca.gov/irwm/grants/archive.cfm (last visited Mar. 30, 2015); Integrated Regional Water Management, *Archives - Proposition 84*, CAL. DEPT. OF WATER RES., http://www.water.ca.gov/irwm/grants/archive.cfm (last visited Mar. 30, 2015).

107. *2014 Drought Grant Proposal Solicitation*, *supra* note 31.

108. *2014 Drought Grant Proposal Solicitation*, *supra* note 31.

109. CAL. WATER CODE, § 10535.

110. Interview with Meyo Marrufo, Environmental Director, Hopland Band of Pomo Indians, in San Francisco, Cal. (July 22, 2013).

111. Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, sec. 4, 1 Stat. 137 (1790) (expired in 1793).

which established the federal government as the entity overseeing land sales and cessions, trade, and agreements with the Tribes. States have resisted this primacy of federal-tribal relations since before the American Revolution, notably in the decisions *Johnson v. McIntosh*,[112] which established that only sales by the federal government of tribal lands were valid, and *Worcester v. Georgia*,[113] which found that the state of Georgia did not have jurisdiction over tribal lands. The often virulent racism of states toward tribal nations within their boundaries, as seen in the context of Georgia's anti-Indian laws of the 1820s[114] and California's 1850 Act for the Government and Protection of Indians,[115] prompted the federal government to establish itself as the primary party to negotiate with Indian nations.[116] There is a history of case law upholding the tribal-federal relationship in the face of attempted state control, including the famous "Boldt Decision" in *United States v. Washington*,[117] which upheld tribal treaty fishing rights over state regulation. Despite a long line of case history upholding the primacy of federal-tribal relations, states continue to attempt to impose state control through mechanisms such as requiring waivers of sovereign immunity.

Tribal sovereign immunity, as a corollary to the freedom from suit that the federal government enjoys in domestic courts, is a key element of tribal sovereignty. It is part of the legal framework that reaffirms Tribes as sovereign governments. Tribal sovereign immunity has been upheld in decisions including *Santa Clara Pueblo v. Martinez*,[118] and *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*.[119] While tribal sovereign immunity raises the spectre of tribal breach of contract,[120] tribal governments are well aware of this concern and have often found it expedient for business relations to issue limited waivers of sovereign immunity.[121] However, it must be the Tribes' decision to issue a limited waiver, not an imposed condition by a state government or another entity, as such an imposition directly hearkens back to a legacy of incursions on aspects of

112. 21 U.S. (8 Wheat.) 543 (1823).
113. 31 U.S. (6 Pet.) 515 (1832).
114. ECHO-HAWK, *supra* note 45, at 95.
115. *See* Johnston-Dodds, *supra* note 39, at 5–12, 15–19.
116. See *Worcestor*, 31 U.S. (6 Pet.) 515, 561 (1832).
117. 384 F. Supp. 312 (W.D. Wash. 1974).
118. 436 U.S. 49 (1978).
119. 523 U.S. 751 (1998).
120. *Id.* at 755–56.
121. *See, e.g.*, Mary Christina Wood & Matthew O'Brien, *Tribes as Trustees Again (Part II): Evaluating Four Models of Tribal Participation in the Conservation Trust Movement*, 27 STAN. ENVTL. L.J. 477, 481 (2008); Forum on Tribal Sovereign Immunity: Native Nations Institute, University of Arizona (May 14, 2007), https://nnidatabase.org/video/nni-forum-tribal-sovereign-immunity.

tribal sovereignty, including but not limited to tribal sovereign immunity.

Tribes who were already participating in the Tuolumne-Stanislaus IRWMP were unwilling to sign the MoU, because "it could have been seen as a waiver of sovereign immunity."[122] The RWMG, desiring the Tribes' continued participation, was amiable to pursuing alternatives. By forming a JPA,[123] the Tribe was able to define specific actions and abilities *without* implying a waiver of sovereign immunity. Once a JPA is formed, Tribes can apply for grants and enter into contracts with the state as part of the JPA. Additionally, any non-profit corporation can also qualify as lead applicant. Many Tribes, especially non-federally recognized Tribes, already have non-profit corporations. A Tribe that does not already have a non-profit could form one, if desired, to enter into a grant contract with the state as a lead applicant. To date, it is unknown whether Tribes have followed this model, or if they have been able to do so without signing a waiver of sovereign immunity.

Other IRWM regions have gained Tribal participation without forming a JPA. Tribes in the North Coast Resource Partnership successfully submitted grant proposals to DWR as the project proponent within an overall grant application. But they too had to overcome the sovereign immunity issue: "We [Tribes] had to convince the entire group to sign a new MoU . . . Tribal lawyers came up with language that Tribes could support and agree to"[124] that *did not* include a waiver of sovereign immunity or imply any other limits to Tribal sovereignty.[125] The North Coast's MoU provides a model other regions can follow to improve Tribal participation.

When negotiating commitments or agreements via an MoU or other such document, it is important that representatives of each party hold equivalent levels of authority within their respective organizations. Within IRWM, gaining participants and signatories to an MoU often falls under outreach and engagement responsibilities, which may be delegated to lower-level staff within public agencies or private entities. However, within Tribal governments, it may only be the Tribal Chair, or an executive staff member granted authority by the Tribal Chair, who can make such a decision, and the Tribe expects the same level of authority from the other party. As one Tribal EPA director noted, "If somebody

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122. Stephanie Suess, Tuolumne Me-Wuk Tribal Council, Address at Sierra Water Work Group Summit (June 13, 2013).

123. *See* CAL. GOV'T CODE, § 6500.

124. Interview with Leaf Hillman, Environmental Director for Karuk Tribe, in Happy Camp, Cal. (June 21, 2013).

125. *Id.*

sits across the table from my Tribal leader or [a staff member] with a delegated authority, they better have the authority to sign that document, as a federal agency or as a senior executive of a state agency with that authority."[126] In this instance, a representative from the IRWM group negotiated participation with the Tribe, but when they reached agreement, the IRWM representative had to report back to the IRWM governing body before a decision could be made. Because the representative's agency had no formal commitment to the IRWM, he did not have the authority to make decisions on behalf of his agency or the IRWM group. Agencies and organizations participating in IRWM can be more effective in working with Tribes by allocating resources to ensure continuity in representation and delegating appropriate decision-making authority to those representatives. This was done successfully in the Upper Sacramento River IRWM, in which "the revised MoU lays out clearer requirements for participation, to make it a more formalized process."[127]

Executive Order B-10-11,[128] mentioned above, requires all state agencies to create Tribal Communication Plans and encourages further collaboration with Tribes in all planning efforts.[129] EO B-10-11 provides additional impetus for RWMGs to engage Tribes, some of which are realizing the benefits. For instance, North Coast IRWMP Chairman Jake Mackenzie has been quite pleased with Tribal participation in their IRWM program. A North Coast IRWM Tribal representative—Leaf Hillman—discussed with Chairman Mackenzie the wide range of technical knowledge and expertise in ecosystem management that Tribal representatives have to offer. According to tribal representative Hillman, Chairman Mackenzie stated: "Tribes are contributing to the process in a very real, beneficial way."[130] Other RWMGs would be wise to recognize the potential benefits of Tribal participation and make greater efforts to engage Tribes.

4. Necessary Policy Change

Given that the federal government, including all its agencies, have both a treaty and a judicially established trust responsibility to manage resources in the best interest of Tribes, CWC section 10539—which defines RWMGs—should be amended as follows:

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126. DeSpain, *supra* note 95.
127. Interview with Daniel Olstein, *supra* note 101.
128. Exec. Order B-10-11, *supra* note 77.
129. Exec. Order B-10-11, *supra* note 77.
130. Interview with Leaf Hillman, *supra* note 124; Interview with Jake Mackenzie, Chairman, North Coast IRWMP in Sacramento, CA (Aug. 21, 2014).

> Regional water management group means a group in which three or more local agencies, at least two of which have statutory authority over water supply or water management, *California Native American Tribes, and* those other persons who may be necessary for the development and implementation of a plan that meets the requirements in Sections 10540 and 10541, participate by means of a joint powers agreement, memorandum of understanding, or other written agreement, as appropriate, that is approved by the governing bodies of those local agencies.[131]

Further, according to the 2012 Guidelines, as well as the new 2014 Drought Solicitation Guidelines, the lead applicant for *funding* must be "a local agency or public utility district" or a 501(c)(3) non-profit corporation.[132] DWR should revise the IRWM Guidelines and PSP for all future funding mechanisms to explicitly include Tribes as potential lead applicants and project sponsors.

In accordance with the UC Davis Tribal IRWM study, the California state legislature should amend CWC section 10541(e) to add Tribal consultation as a specific minimum requirement for an IRWM plan.[133] As currently written, the IRWM legislation includes the following fourteen minimum guideline requirements that must be included in an IRWMP:

> 1. Consideration of all of the resource management strategies identified in the California Water Plan, as updated by department Bulletin No. 160-2005 and future updates.
>
> 2. Consideration of objectives in the appropriate basin plan or plans and strategies to meet applicable water quality standards.
>
> 3. Description of the major water-related objectives and conflicts within a region.
>
> 4. Measureable regional objectives and criteria for developing regional project priorities.
>
> 5. An integrated, collaborative, multibenefit approach to selection and design of projects and programs.
>
> 6. Identification and consideration of the water-related needs of disadvantaged communities in the area within the boundaries of the plan.

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131. CAL. WATER CODE, *supra* note 68 (emphasis added).
132. *Guidelines*, *supra* note 24, at 30.
133. DOLAN, *supra* note 16, at 85.

> 7. Performance measures and monitoring to demonstrate progress toward meeting regional objectives.
>
> 8. A plan for implementation and financing of identified projects and programs.
>
> 9. Consideration of greenhouse gas emissions of identified programs and projects.
>
> 10. Evaluation of the adaptability to climate change of water management systems in the region.
>
> 11. Documentation of data and technical analyses used in the development of the plan.
>
> 12. A process to disseminate data and information related to the development and implementation of the plan.
>
> 13. A process to coordinate water management projects and activities of participating local agencies and local stakeholders to avoid conflicts and take advantage of efficiencies.
>
> 14. Any other matters identified by the department.[134]

Adding a fifteenth minimum requirement of formal consultation with all California Native American Tribes that have land holdings and/or traditional territories within or adjacent to the IRWM region[135] would further clarify the responsibility of RWMGs to conduct government-to-government consultation with Tribes, as outlined in both federal and state policy.[136] As a result, DWR would then have the authority as IRWM program manager to ensure that Tribal consultation occurs.

We recommend that all IRWM practitioners work directly with Tribes in their region(s) to gain understanding of proper protocols for respectful, appropriate communication. At the state level, the Office of the Governor's Tribal Advisor could require every state agency and de-

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134. CAL. WATER CODE § 10541(e) (2015).

135. DOLAN, *supra* note 16, at ix.

136. For example, federal requirements to consult with tribes are included in the National Historic Preservation Act, 16 U.S.C. § 470(a)–(d) (2012). *See also* 40 C.F.R. § 1501.2(d)(2) (2015) (implementing the National Environmental Policy Act); Consultation and Coordination with Indian Tribal Governments Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000). Requirement for federal consultations are also included in the tribal policies of individual federal agencies and in legal interpretation of federal agencies' trust responsibility. *See, e.g.*, *Island Mountain Protectors*, 144 Interior Dec. 168 (IBLA 1998) at 185 ("BLM [is] required to consult with the Tribes and to identify, protect, and conserve trust resources, trust assets, and Tribal health and safety . . . ."). In California, state requirements to consult with tribes are included in S. 18, ch. 905 (Cal. 2004); Assemb. 52, ch. 532 (Cal. 2014); tribal policies of individual state agencies; and Cal. Exec. Order B-10-11 (Sept. 19, 2011).

partment, including RWMGs that implement a state agency program, to undergo regular, or at least annual, "cultural sensitivity" training. These trainings should include information on Tribal history, governance, cultures, and current issues. Agencies and departments could work with Tribes in their region(s) to develop and provide such training. Because RWMGs may not know how to identify which Tribes are in their respective regions, the state must provide support and guidance by providing a database of geographic information system (GIS) data layers and maps for consultation and planning purposes, and by directly facilitating connections between RWMGs and Tribes.

B. Lack of Decision-Making Authority in IRWM

A brochure developed by the California Natural Resources Agency and released by DWR in February 2014 reiterates the Guidelines' definition: a RWMG "consists of three or more local agencies, at least two of which have statutory authority over water supply or water management, as well as those persons who may be necessary for the development and implementation of an IRWM Plan."[137] DWR has interpreted CWC sections 10540 and 10541 to include *only* local public agencies to the *exclusion* of, rather than "*as well as*" those persons who may be necessary for the development and implementation of an IRWM Plan. While it is understandable to require projects funded with state funds to be consistent with state laws and authority, it goes against the primary purpose of IRWM—local, regional water management—to exclude regional authorities such as Tribes.

The initial omission of Tribes from the IRWM legislation and program documents resulted in most RWMGs convening without Tribal participation, and thus a failure to include Tribes in their IRWM plans. Tribes that lack representation in their RWMGs' governing body essentially have no decision-making power or influence, and thus are not full participants in the IRWM program. Members who have become signatories and have adopted the plan are able to attend a majority of the meetings and have significant influence in determining RWMG leadership. However, some Tribes face specific barriers to becoming signatories and may not be able to attend all of the meetings. This prevents Tribes from joining and becoming fully engaged in the IRWM process. As such, Tribes often feel institutionally excluded from the IRWM program, with no influence over the process or sponsored projects. In this section, we

137. CAL. DEP'T OF WATER RES., HOW CALIFORNIA NATIVE AMERICAN TRIBES CAN ENGAGE IN INTEGRATED REGIONAL WATER MANAGEMENT, (2014), *available at* http://resources.ca.gov/docs/tribal_policy/Final_IRWM_Tribal_Handout.pdf.

will identify specific barriers restricting Tribal decision-making power within IRWM, examples of Tribes that have overcome these barriers, and necessary policy changes for removing such barriers.

1. The Importance of Decision-Making Authority

The goal of IRWM reaches far beyond mere consultation, as it intends to follow a collaborative framework in which all participants have equal authority throughout the process and an equal interest in the outcomes. The means to achieve this goal is supported by a wide body of literature on collaborative processes and decision-making.[138] Indeed, the California IRWM Guidelines recommend consensus-based decision-making.[139]

Thus far, however, California's IRWM program has been more "consultative" than "collaborative." According to Biggs' modes of participation,[140] a "consultative" process occurs "when people are asked for their opinions and consulted . . . before interventions are made."[141] In contrast, a "collaborative" process occurs when "people work together on projects designed, initiated and managed by [a higher authority]."[142] When a representative lacks influence or decision-making authority in a process, there is little value to participating. According to Arnstein's Ladder of Citizen Participation,[143] this is an example of "tokenism," where participants are allowed to "hear and to have a voice. . . . but under these conditions they lack the power to insure that their views will be heeded by the powerful. . . . [T]he ground rules allow have-nots to

138. *See* Nina Wallerstein & Bonnie Duran, *The Theoretical, Historical & Practice Roots of CBPR*, *in* COMMUNITY BASED PARTICIPATORY RESEARCH FOR HEALTH: FROM PROCESS TO OUTCOMES 25–40 (Meredith Minkler & Nina Wallerstein eds., 2nd ed. 2008); Eugenia Eng et al., *Insiders and Outsiders Assess Who is 'The Community': Participant Observation, Key Informant Interview, Focus Group Interview, and Community Forum*, *in* METHODS FOR COMMUNITY-BASED PARTICIPATORY RESEARCH FOR HEALTH 133–60 (Barbara A. Israel et al. eds., 2nd ed. 2012); Eugenia Eng et al., *App. B: Community Member Key Informant Interview Guide*, *in* METHODS FOR COMMUNITY-BASED PARTICIPATORY RESEARCH FOR HEALTH 397–99 (Barbara A. Israel et al. eds., 2nd ed. 2012); JUDITH E. INNES & DAVID E. BOOHER, PLANNING WITH COMPLEXITY: AN INTRODUCTION TO COLLABORATIVE RATIONALITY FOR PUBLIC POLICY ch. 4, ch. 6–8 (2010).

139. CAL. DEP'T OF WATER RES., *supra* note 106, at 35.

140. STEPHEN BIGGS, RESOURCE-POOR FARMER PARTICIPATION IN RESEARCH: A SYNTHESIS OF EXPERIENCES FROM NINE NATIONAL AGRICULTURAL RESEARCH SYSTEMS (1989); Andrea Cornwall & Rachel Jewkes, *What is Participatory Research?*, 41 SOC. SCI. & MED. 12, at 1669 (1995).

141. Cornwall & Jewkes, *supra* note 140.

142. Cornwall & Jewkes, *supra* note 140.

143. Sherry Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. OF PLANNERS 4, 216–24 (July 1969).

advise, but retain for the powerholders the continued right to decide."[144] Some Tribal representatives expressed this sentiment in regard to IRWM:

> You guys [the IRWM groups] have all your projects, and how is it affecting me? And do you care? No. You don't. What you care about is the fact that you don't have Native Americans sitting on your board. That's what you care about. You know, it's not the fact that we should be sitting there to be partners on projects, it's the fact that you want us to be sitting there as your token Indian on your projects. You know, that's not how it works. Well, we don't have that kind of time. You keep your money.[145]

Tokenism fails to recognize self-determination and Tribal sovereignty, and can easily discourage Tribal participation.[146]

For IRWM to be truly effective for Tribal participants, it should follow Biggs' "collegiate" participation model,[147] in which everyone works "together as colleagues with different skills to offer, in a context of mutual learning where local people have control over the process."[148] A collegiate approach would recognize Tribal sovereignty and respect Tribal self-determination. This requires that the IRWM Guidelines be revised to include specific Tribal seats on the governance bodies of each RWMG. Only then will Tribes have the decision-making authority equivalent to other high-level government participants.

2. Challenges to Changing Decision-Making Authority

Most RWMGs are governed by some combination of committees, such as a steering committee, technical advisory committee, or a policy review panel. While many groups strive for consensus, major decisions on projects and funding applications are determined at the committee level. Few RWMGs have established Tribal seats on their governing bodies as a result of the initial lack of consultation between RWMGs and Tribes. The current IRWM Bond Language and Guidelines[149] perpetuate this approach by including Tribes in the list of potential "stakeholders" in the IRWM planning process:

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144. *Id.*

145. Interview with Ron Goode, Tribal Chairman, North Fork Mono Tribe, in Davis, Cal. (Feb. 13, 2013).

146. *See, e.g.*, TAIAIAKE ALFRED, PEACE POWER RIGHTEOUSNESS: AN INDIGENOUS MANIFESTO (2nd ed. 2009) (discussing collective self-determination).

147. BIGGS, *supra* note 140.

148. Cornwall & Jewkes, *supra* note 140.

149. CAL. WATER CODE § 10541(g) (West 2015).

> 1. Wholesale and retail water purveyors, including a local agency, mutual water company, or a water corporation as defined in section 241 of the Public utilities Code.
>
> 2. Wastewater agencies.
>
> 3. Flood control agencies.
>
> 4. Municipal and county governments and special districts.
>
> 5. Electrical corporations, as defined in Section 218 of the Public Utilities Code.
>
> 6. Native American tribes that have lands within the region.
>
> 7. Self-supplied water users, including agricultural, industrial, residential, park districts, school districts, colleges and universities, and others.
>
> 8. Environmental stewardship organizations, including watershed groups, fishing groups, land conservancies, and environmental groups.
>
> 9. Community organizations, including landowner organizations, taxpayer groups, and recreational interests.
>
> 10. Industry organizations representing agriculture, developers, and other industries appropriate to the region.
>
> 11. State, federal, and regional agencies or universities, with specific responsibilities or knowledge within the region.
>
> 12. Disadvantaged community members and representatives, including environmental justice organizations, neighbourhood councils, and social justice organizations.
>
> 13. Any other interested groups appropriate to the region.[150]

A stakeholder is defined as "an individual, group, coalition, agency, or others who are involved in, affected by, or have an interest in the implementation of a specific program or project."[151] In contrast, Tribes are sovereign entities with jurisdictional authority over lands and waters within their recognized territories. When Tribes raised this issue with DWR representatives, they were told that the Department had no authority to expand the definition, and Tribes could not participate unless they signed a waiver of sovereign immunity.[152] As a result, many Tribes could not participate in the governance body.

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150. *Id.*

151. GUIDELINES, *supra* note 79, at 31.

152. Tribal sovereign immunity has been upheld by the courts, *see* Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc. 523 U.S. 751 (1998), yet landowners and

As mentioned above, Tribes view signing a WSI as a significant imposition on their inherent sovereignty. The Hopland Band of Pomo Indians was able to join their RWMG by negotiating a *limited* waiver of sovereign immunity (LWSI), with which the Tribe was satisfied.[153] A LWSI restricts the reach of state jurisdiction to the particular issue at hand. The Tribe revised the state's template, stating that they "will only be accountable for this particular grant and this amount of money"[154] to prevent additional intrusions and potential lawsuits. In this particular instance, the Tribe and the state went through multiple iterations of the agreement's language before each party was satisfied. Their LWSI, like North Coast's MoU, can serve as a model for other regions. However, because the waiver still constitutes a reduction of Tribal sovereignty, requesting even an LWSI can still be a tremendous barrier to Tribal participation and should *not* be required for participation in the RWMG governance structure.

At the 2014 California Water Policy Conference, DWR Tribal Policy Advisor Anecita Agustinez commented that, within IRWM, these ad-hoc regional groups add another layer of bureaucracy, which does not understand "how to negotiate the sovereign immunity question"[155] with Tribes, and admitted that DWR has not provided much direction on how to do so. Many other IRWM practitioners share this sentiment. According to our survey data, the second most important element Tribes want to see added to the IRWM guidelines is "[r]ecognition and provisions to protect Tribal sovereignty."[156] This was second only to "Provisions for Tribal Participation."[157] Indeed, after a particularly contentious RWMG meeting, one Regional Water Board staff person who was actively engaged in IRWM noted that "the state needs to get off its butt and make a statement/finding regarding this issue of sovereignty in IRWM."[158] The Tribal sovereign immunity question lacks a definitive answer, putting the Tribes, as well as DWR staff and IRWM facilitators, in a challenging position when trying to keep the IRWM process moving forward. Tribes are unlikely to cooperate without a satisfactory answer, but DWR has been either unable or unwilling to provide one. This stalemate prevents

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other natural resource managers have often resisted recognition of tribal sovereignty in resource management decision-making; *see* Rebecca Cruz Guiao, *How Tribal Water Rights are Won in the West: Three Case Studies from the Northwest*, 37 AM. INDIAN L. REV. 283 (2012–2013).

153. Interview with Meyo Marrufo, *supra* note 110.
154. Interview with Meyo Marrufo, *supra* note 110.
155. Cal. Water Policy Conference, Riverside, Cal. (Apr. 23, 2014).
156. DOLAN, *supra* note 16, at 17.
157. DOLAN, *supra* note 16, at 18.
158. Interview with Anonymous (June 6, 2013).

facilitators from reaching consensus among partners, and thus stalls the process.

However, there have been some success stories of collaboration between Tribal and local municipalities. At the Southern California Tribal Water Summit, Ms. Anecita Agustinez, DWR's Tribal Policy Advisor, shared a successful example of a Tribe and local municipality working together to arrange an emergency water transfer. In Spring 2014, the Tuolumne County's two main water sources, Pinecrest Lake and Lyons Reservoir, were at critically low levels.[159] Through coordination with the South San Joaquin Irrigation District (SSJID), the Chicken Ranch Rancheria of Me-Wuk Indians sold 2,400 acre-feet of water at a discount to the Tuolumne Utilities District (TUD) for the benefit of the greater community.[160] The Tribe essentially guaranteed 44,000 Tuolumne County residents safe passage through California's driest water year on record. This was the first time in history that a Tribe provided a voluntary water transfer to a water district. To make it happen, the RWMG formed a JPA, of which the Tribe was a member, to enter into contract with the State Water Board. The contract did include a limited waiver of sovereign immunity, which the Tribe was willing to sign, "because during the Rim fire, Tuolumne Tribes were assisted by the SSJID & TUD districts."[161] They had built mutual respect through foundational relationships within the RWMG, and now "treat each other as neighbors."[162] The driving question for the Tuolumne-Stanislaus IRWM was: "how do we manage this crisis together, beyond these boundaries?"[163] It was this collaborative approach that enabled the Tuolumne-Stanislaus IRWM to find a mutually beneficial solution to the water supply crisis. By sharing their case-story with other regions and providing their limited waiver of sovereign immunity as a model template, the Tuolumne-Stanislaus IRWM can help perpetuate similar relationships in other IRWM groups throughout the state. Previous relationships built on mutual respect between the Tribe, the two water agencies, and Tuolumne County, ultimately determined their success. Without that foundation, the water transfer and the limited waiver of sovereign immunity would never have succeeded.

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159. Vallow Troylene and John S. Mills, address at South San Joaquin Irrigation District (Mar. 3, 2014).

160. John Holland, *Toulumne Utilities Districts OKs deal for SSJID Water*, THE MODESTO BEE (Mar. 11, 2014, 5:46 PM), http://www.modbee.com/news/special-reports/groundwater-crisis/article3161807.html.

161. Cal. Water Policy Conference, *supra* note 155.

162. Cal. Water Policy Conference, *supra* note 155.

163. Holland, *supra* note 160.

3. Alternative Approaches to Achieving Shared Decision-Making Authority

California Native American Tribes are not considered subdivisions of the state and thus do not qualify as "local agencies," which may compose two of the three members of the RWMG steering committees. As sovereign nations and government entities with jurisdiction over their own lands and waters, however, Tribes do fall into the category of the third member—that is, "persons who may be necessary for the development and implementation of an IRWM Plan."[164] For example, Tribes with EPA-recognized "Treatment in the Same Manner as a State" (TAS) status and enacted Tribal Water Codes may set water quality standards higher than upstream users, thereby possibly impacting the standards of those users.[165] While the Tribe does not generally have the authority to require the upstream user to comply with its standards,[166] the EPA has the authority to approve the Tribe's standards, and to require upstream users to meet those standards.[167] Thus, because a Tribe with TAS status under the Clean Water Act has delegated authority to manage its water resources which, depending upon EPA interpretation, may impact non-Indian and/or off-reservation users,[168] California Native American Tribes qualify as "persons necessary for the development and implementation of an IRWM Plan."[169]

RWMGs that interpreted the initial guidelines language more broadly and recognized the need to include Tribes, such as in the case of the Tuolumne-Stanislaus IRWM described in the previous section, reached out to Tribes in their region early on by inviting them to participate. In other regions, the Tribes successfully advocated for themselves and gained seats on their RWMG governing bodies. According to our survey data, at least eight IRWM regions have Tribes participating in

164. CAL. WATER CODE § 10539 (2009).

165. *See, e.g.*, Albuquerque v. Browner, 97 F.3d 415 (1996) (affirming the right of Isleta Pueblo to set higher standards than upstream jurisdictions such as the City of Albuquerque, and affirmed EPA's right to require the City of Albuquerque to increase its water quality standards to conform with the Pueblo's standards).

166. Absent the *Montana* exceptions regarding tribal authority over non-Indian conduct that threatens the "political integrity, economic security, or health and welfare of the Tribe." Montana v. U.S., 450 U.S. 544, 566, 101 S. Ct. 1245 (1981).

167. *Browner*, 97 F.3d 415.

168. James M. Grijalva, *Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters*, 71 N.D. L. REV. 433, 438–39 (1995), (describing how the EPA can delegate primary responsibility for the protection of the quality of reservation waters to the tribe); *Browner*, 97 F.3d 415.

169. CAL. WATER CODE, §§ 10540, 10541.

decision-making.[170] Some regions also have specific Tribal Working Group sub-committees made up of representatives from multiple Tribes in the region that meet to discuss IRWM issues specifically relevant to Tribal concerns. It is unclear, however, how many Tribal seats on the respective governing bodies are filled, and therefore how many Tribes are actually represented.[171] In the North Coast IRWMP (now the North Coast Resource Partnership), eight to ten Tribes are actively participating.[172] All eight Tribal projects submitted in the Round 2 funding cycle were funded, in excess of $3 million going to Tribes.[173] IRWM project funding offers a specific opportunity to improve critical conditions in Tribal communities, where needs "are typically greater and more dire than in non-Tribal communities . . . [and] resources to do that are [limited]."[174] Additionally, these benefits extend far off of Tribal lands; according to a Tribal member involved in the IRWM process, "[IRWM]-funded projects meet major infrastructure needs that benefit the entire community, not just the Tribes."[175]

4. Necessary Policy Change

Neither the legislative language nor subsequent code explicitly limit IRWM grant funding applicants to local agencies or non-profit organizations. DWR and the State Water Board made this policy decision when developing the IRWM program Guidelines. To illustrate this point, the language used in CWC §§ 10540 and 10541 states:[176]

> § 10541 (a) The department shall develop project solicitation and evaluation guidelines for the application of funds made

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170. The following Tribes, from their respective IRWM regions, reported having some decision-making authority: North Coast: Yurok, Karuk, Hopland Pomo. Inyo-Mono: anonymous. North Sac Valley: anonymous. Tuolumne-Stanislaus: Tuolumne Band of Mewuk Indians, Chicken Ranch Rancheria of Mewuk Indians. Coachella Valley: Cabazon Band, 1 anonymous. WestSide: anonymous, Scotts Valley Pomo (Lakeport). North Lahontan: Susanville. San Diego: Pala Temecula, SoCal Tribal Chair Committee. NC, SoCal, others, have Tribal Working Groups. DANIELLE V. DOLAN, IRWM TRIBAL COLLABORATION EFFECTIVENESS STUDY, App. A (2013) (on file with author).

171. Our data (surveys, interviews, focus groups) includes at least one third of all Tribes in the state, and 19 of the 48 IRWM regions, representative of conditions at time of data collection. Additional IRWM regions may have since added or lost Tribal seats, and additional Tribes may have become active since the conclusion of our study in December 2013.

172. Hillman, *supra* note 124.

173. Interview with Chris Peters, Director, Red Deer Consulting in North Lake Tahoe, Cal. (June 11, 2013).

174. Hillman, *supra* note 124.

175. Hillman, *supra* note 124.

176. CAL. WATER CODE §§ 10540, 10541 (2014).

> available pursuant to Section 75026 of the Public Resources Code, to enable broad and diverse participation in integrated regional water management plan development and refinement.
>
> § 10541 (i) The guidelines shall provide for a process for the development, periodic review, updating, and amending of integrated regional water management plans. The department shall establish eligibility requirements for the project funding, that provide sufficient time for the updating of plans as necessary to reflect changes in the guidelines.

As illustrated by the language in CWC sections 10540 and 10541, the current statutory interpretation that excludes Tribes from eligibility as lead applicants is a policy decision, not a legislative mandate, and thus can be changed by DWR without legislative action.

The most current IRWM Guidelines—released for the 2014 Drought Solicitation—state: "The grant applicant must be a local agency or non-profit organization."[177] The definition for Local Public Agency comes directly from legislative code:

> [A]ny city, county, city and county, special district, joint powers authority, or other political subdivision of the State, a public utility as defined in §216 of the Public Utilities Code, or a mutual water company as defined in §2725 of the Public Utilities Code.[178]

The definition of "Applicant," however, is not legislatively mandated, and could potentially be revised to include Tribes. In the 2014 Drought Solicitation Guidelines, DWR added two sentences to "section III. Eligibility Requirements, A. Eligible Grant Applicants:"

> *Federally recognized Tribes* can be members of a Joint Powers Agreement (JPA), per Government Code §6500 *et. seq*. . . . *Tribes*, partner entities, or IRWM stakeholders, as defined in CWC §10541(g), may be part of the proposal as a project proponent and access grant funding through their relationship with the applicant, at DWR's discretion.[179]

While this revision from the *2012 Guidelines* does clarify earlier concerns regarding Tribes' eligibility as project proponents (and thus grant funding recipients), it still falls short of allowing Tribes full access to IRWM leadership. We recommend revising the Guidelines definitions to read,

177. Integrated Regional Water Management Grants, *supra* note 151, at 28.
178. Integrated Regional Water Management Grants, *supra* note 151, at 29.
179. Integrated Regional Water Management Grants, *supra* note 151, at 12–13.

"The grant applicant must be a local public agency, non-profit organization, or California Native American Tribe." Unless DWR explicitly states that Tribes are eligible to sit on RWMG steering committees, and can serve as *lead* applicants on grant funding proposals, Tribal decision-making authority within their RWMGs will remain diminished, and Tribes will continue to be marginalized in the Integrated Regional Water Management process.

Fully addressing the sovereign immunity issue requires significant institutional change in how the state government enters into contracts with Tribes. A "compact" framework—in which two equally sovereign entities agree to mutually fulfil some joint obligation—could be a more equitable model than the current WSI contracts.[180] In adopting a "compact" framework, any "instrument [used] must be reflective of Tribal sovereignty and mutual respect between sovereigns."[181]

Specifically, in regard to IRWM, the state must add a section to the 2012 Guidelines that provides a solution to the sovereign immunity issue. That addition must either state that: (a) Tribes are required to sign a limited waiver of sovereign immunity, unique to the Tribe, and restricted to *only* the funding provided through the grant project; or (b) California Native American Tribes are not required to sign any WSI when entering into grant contracts with the state, and will thus have a separate MoU/MoA from the rest of the RWMG, unique to the Tribe. Because option (a) is likely far more amenable to state agencies than option (b), the state should compile a number of model MoA/MoUs and associated LWSI that have been acceptable to both the state and respective Tribe. This issue is critical to Tribes across the state. Over 50 percent of our survey respondents identified the need "[t]o revise the local IRWMP by changing participatory documents to improve language for better Tribal participation and greater protection of Tribal sovereignty" as one of the key reasons for which their Tribe would consider participating in IRWM. This was the second most recommended change, the first being to include Tribes "as part of a workgroup to address DWR's mandated 'Tribal Issues' area of concern."[182]

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180. A contract implies a certain level of primacy—the contractor has power or influence over the contractee, and the contractee is expected to meet some expectation of the contractor in exchange for some benefit. A compact, on the other hand, implies mutual agreement between equal parties.

181. Interview with Leaf Hillman, Environmental Director for Karuk Tribe Dept. of Natural Resources, and Earl Crosby, Watershed Restoration Coordinator for Karuk Tribe Dept. of Natural Resources, in Happy Camp, Cal. (June 21, 2013).

182. DOLAN, *supra* note 16, at 42.

V. BROADER IMPLICATIONS/APPLICATIONS

A. IRWM: General Tribal Policy Recommendations

Tribes were initially dissatisfied with the IRWM grant program Guidelines because the bond language essentially excluded Tribes from the planning and decision-making processes.[183] In response, DWR revised the IRWM Guidelines to incentivize IRWM groups to pursue Tribal participation.[184] As of 2009, applicants can receive two additional points on their implementation grant proposals if Tribes are participants in their RWMG. The Work Plan Content section of the 2010 Proposal Solicitation Package (PSP) requires proposals to "explain how the proposed tasks support involvement and participation of Native American Tribal communities in the IRWM planning effort."[185] However, there were no specific planning criteria associated with this requirement. The 2012 IRWM Plan Standards, under section 14, specifically list Native American Tribes as one of the 13 "appropriate local agencies and stakeholders"[186] to whom the IRWM plan must provide outreach. Section 14 also requires "a discussion of how the RWMG will endeavour to involve Disadvantaged Communities (DACs) and Native American Tribal communities in the IRWM planning effort."[187] In its seven Review and Scoring Criteria, the 2012 PSP includes a potential five points for "whether the Proposal will implement one or more of the specified IRWM Grant Program Preferences,"[188] called Statewide Priorities. One of these Statewide Priorities is to "Improve Tribal Water and Natural Resources."[189]

DWR's changes have led to some improvements in in the overall IRWM program. Tribes have participated in their local IRWMP revisions, and some RWMGs include specific positions on their governance bodies for Tribes. However, according to data collected through the UC Davis Tribal IRWM Study, this is only true for a handful of cases.[190] Many

183. Interview with Sherry Norris, Executive Director, California Indian Environmental Alliance, in Davis, Cal. (Mar. 15 2012).

184. GUIDELINES, *supra* note 79.

185. Integrated Regional Water Management Grants, *Proposal Solicitation Package*, CAL. DEP'T. OF WATER RES. at 15 (Aug. 2010), *available at* http://water.ca.gov/irwm/grants/docs/Archives/Prop84/Guidelines_PSPs/Final_PLANNING PSP_072010.pdf

186. 2012 GUIDELINES, *supra* note 24, at 22.

187. Integrated Regional Water Management Grants, *2012 IRWM Plan Standards Review Form Tables*, Cal. Dep't of Water Res. at 4 (June 2014), *available at* http://www.slocountywater.org/site/Frequent%20Downloads/Integrated%20Regional%20Water%20Management%20Plan/IRWM%20Plan%20Update%202014/pdf/02_DWR%20IRWM%20Plan%20Requirement%20Tables%20-%20overview.pdf.

188. 2012 GUIDELINES, *supra* note 24, at 12–14.

189. *2014 Drought Grant Proposal Solicitation*, *supra* note 31, at 14.

190. DOLAN, *supra* note 16, at 67.

Tribes continue to report barriers to full participation in IRWM.[191] While IRWM seems to be improving, additional changes are required before Tribal collaboration sees significant results. Tribes have suggested many specific revisions to the Guidelines and PSP since the program's inception, and are addressed in both the UC Davis Tribal IRWM Study report, and the Tribal Water Summit Proceedings.[192]

Our primary policy recommendation directly addresses the two major barriers to Tribal participation created by the IRWM Guidelines. In order to eliminate these barriers, DWR must revise the IRWM Program Guidelines and PSPs to explicitly include language that: (1) directs RWMGs to conduct government-to-government consultation with all Tribes in their region; and (2) enables Tribes to fully participate in their RWMG. Without specific requirements and guiding language added to the IRWM program documents, little improvement is likely to occur. Seventy-two percent of survey respondents in the Tribal IRWM Study agreed "additional mandates from IRWM funding managers are necessary to ensure Tribal concerns are addressed."[193]

Tribes have been inciting DWR to revise the Guidelines and address Tribal concerns since the documents were initially drafted in 2004. Despite legislative evidence to the contrary, as discussed above,[194] the common refrain from DWR representatives was that the Tribes do not have the authority. The Guidelines come directly from the legislative code and in order to obtain a legislative fix the Tribes would have to talk to their respective legislator.[195] Then, in September of 2013, DWR released the "Draft Addendum to the 2012 Guidelines; Appendix H: IRWM Plan Review Process"[196] in preparation for anticipated Round 3 Grant Funding allocation from the legislature. On more than one occasion, the Financial Assistance Branch Chief expressed that DWR does not intend to revise the Guidelines at all, unless they are required to do so by future legislation.[197] These statements caused uproar in the Tribal com-

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191. *See* DOLAN, *supra* note 16, at 67; Interview with A. Agustinez, *supra* note 64.

192. *See* DOLAN, *supra* note 16, at 9–58, 94; Cal. Tribal Water Summit in Sacramento, Cal. (Apr. 2013).

193. DOLAN, *supra* note 16, at 11.

194. *See supra* Part IV.B.4.

195. *See* Telephone interview with Anonymous DWR staff, *supra* note 80; Interview with Belinda Brown, *supra* note 92; Interview with Meyo Marrufo, *supra* note 110; Interview with Anonymous, *supra* note 158; Interview with Chris Peters, *supra* note 173; Interview with Sherry Norris *supra* note 183; T. Billington, *infra* note 197.

196. DIV. OF INTEGRATED REG'L WATER MGMT., CAL. DEPT. OF WATER RES., IRWM GRANT PROGRAM 2014 DROUGHT GUIDELINES 85 (2014).

197. Tracy Billington, Address at the Integrated Regional Water Management Conference: Tranforming the Water Management Culture (Apr. 5 2013); Dep't Water Res. Proposal Review Process Public Meeting (Oct. 7, 2013).

munity, leading to a coordinated effort between Tribes, Tribal affiliates, and the Ad-hoc Tribal Water Policy Strategy Group. The strategy group developed a referendum in response to the Addendum, calling on DWR yet again to respond to incessant Tribal requests for Guidelines revisions.[198]

Thanks to the concerted efforts of multiple organized groups,[199] as well as the results of the UC Davis Tribal IRWM Study, DWR finally conceded to revise the IRWM program documents and held a series of workshops and listening sessions to gain stakeholder input on potential revisions. DWR released the 2014 IRWM Drought Solicitation Guidelines and PSP on June 2014,[200] following Governor Jerry Brown's Drought Emergency Proclamation[201]and funding appropriation.[202] Review of the program documents illustrates that DWR implemented some of the UC Davis Tribal IRWM Study findings. Tribes and/or tribal considerations are addressed in thirty specific instances[203] (as compared to twelve instances in the last PSP & Guidelines).[204] Although the Final Drought Guidelines and PSP stop short of requiring RWMGs to provide seats for Tribal representation on their governance bodies, "tribal governments" are specifically named as potential members, and guidance on IRWM governance includes directives for engaging Tribes.[205] The program documents explicitly acknowledge Tribes as sovereign nations, direct RWMGs to coordinate with them on a government-to-government basis,[206] and provide additional guidance for proper Tribal consultation.[207] Furthermore, the Guidelines clearly state that Tribes can participate in

198. DOLAN, *supra* note 16, at app. D-12.

199. Tribal Advisory Committee to the California Water Plan, Ad-hoc Tribal Water Policy Strategy Group, University of California Davis Tribal IRWM Study research team, Environmental Justice Coalition for Water, IRWM Round Table of Regions, Tribal Policy Advisor to DWR, and others.

200. GUIDELINES, *supra* note 79.

201. *Governor Brown Declares Drought State of Emergency*, OFFICE OF GOVERNOR EDMUND G. BROWN JR. (Jan. 17, 2014), http://gov.ca.gov/news.php?id=18379.

202. *Governor Brown Signs Drought Legislation*, OFFICE OF GOVERNOR EDMUND G. BROWN JR. (Mar. 1, 2014), http://gov.ca.gov/news.php?id=18432.

203. *See* GUIDELINES, *supra* note 79, at 4, 5, 7, 12, 13, 17, 18, 19, 20, 21, 22, 28, 32, 34, 44, 60, 71, 77, 92, 96, 99.

204. *See* 2012 GUIDELINES *supra* note 24, at 5, 7, 14, 19, 20, 21, 22, 23, 24, 30, 35, 37, 47, 63, 74, 80.

205. *See* GUIDELINES, *supra* note 79, at 19–20; *id.* at 32–34 ("RWMGs can include, but are not limited to, local public agencies, non-profit organizations, privately owned water utilities regulated by the Public Utilities Commission, tribal governments, and other stakeholders that are necessary to develop and implement the IRWM Plan.").

206. *See id.* at 19–20, ("It should be noted that tribes are sovereign nations, and as such coordination with tribes is on a government-to-government basis.").

207. *See id.* at 71.

the governance structure of an IRWM, be part of a JPA, and receive grant funds as a project proponent.[208] However, Tribes still cannot be lead applicants on a proposal because they do not qualify as local agencies.[209] Despite significant improvements to the Drought Guidelines—which removed or mitigated some of the barriers to Tribal participation—only one of the 137 proposals funded through the 2014 Solicitation (announced in October 2014) includes a project with a Tribe as the direct project proponent.[210] The most recent changes made to the IRWM program are indeed a step in the right direction, but clearly more still needs to be done for Tribes to fully engage in the IRWM process.

B. From Historical Adversaries to Collaborative Co-Managers

Across California, some regions have historically adversarial relationships between Tribes and local stakeholders, making IRWM collaboration difficult. These adversarial relationships could have long roots in historically discriminatory policies promulgated by local jurisdictions including cities, counties, service districts, etc. They may also result from more recent conflicts over land use, economic development, and planning. One Tribal EPA Director for a North Coast region Tribe felt that county governments expressed "prevalent negative attitude(s) about

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208. *See id.* at 12–13 ("Eligible grant applicants are local public agencies and non-profit organizations, as defined in Appendix B. Federally recognized Tribes can be members of a Joint Powers Agreement (JPA), per Government Code §6500 *et seq.* . . . For the IRWM Implementation Grant Program, the grant applicant is the agency submitting an application on behalf of an IRWM region. The grant applicant is also the agency that would enter into an agreement with the State, should the application be successful. Tribes, partner entities, or IRWM stakeholders, as defined in CWC §10541(g), may be part of the proposal as a project proponent and access grant funding through their relationship with the applicant, at DWR's discretion.").

209. *See id.* at 29 ("LOCAL PUBLIC AGENCY – any city, county, city and county, special district, joint powers authority, or other political subdivision of the State, a public utility as defined in Sections 216 of the Public Utilities Code, or a mutual water company as defined in §2725 of the Public Utilities Code (CWC §10535).").

210. The Yurok Tribe is the project proponent for the Weitchpec Water Station, under the North Coast Resource Partnership Proposal. It should be noted that other projects may include benefits to Tribes, although no others have Tribes as the project proponent. Without a complete analysis of all projects submitted and funded, we cannot determine the extent of Tribal participation in the 2014 Drought Solicitation. *See* DIV. OF INTEGRATED REG'L WATER MGMT., CAL. DEPT. OF WATER RES., *List of Awarded Projects, 2014 IRWM Drought Grant Solicitation* 4, http://www.water.ca.gov/irwm/grants/archives_p84.cfm; CNTY. OF HUMBOLT, *Proposal Full View* 11 (Jul. 22, 2014), *available at* http://www.water.ca.gov/irwm/grants/docs/Archives/Prop84/Submitted_Applications/P84_2014Drought/County%20of%20Humboldt%20(201498760037)/North%20Coast%20Resource%20Partnership%202014%20IRWM%20Drought%20Project%20Grant%20Application%20ProposalFullView.pdf.

Tribes"[211] in both offhand comments during meetings as well as in formal, institutionalized processes. A representative of a Tribe in the Upper Feather River and Cosumnes American Bear Yuba (CABY) regions lamented that "[f]or the most part, we want to be good neighbours; we want to work with everybody. But [other stakeholders in the region] come at it very adversarial . . . that doesn't accomplish anything."[212] One long-time Tribal environmental director felt strongly that specific state and federal agencies, including DWR, had not offered resources or support, but had only approached the Tribes for information and endorsements. In regions where these adversarial attitudes are present, they substantially inhibit collaboration.

There is no single method for achieving effective Tribal-RWMG collaboration, however, our research identified several elements that may assist the process. Problematic IRWM groups exhibited ineffective outreach, weak or strained intergovernmental relationships, and exclusion of Tribal participation on governing bodies. In contrast, capable leadership, trust between parties, and feasible project development defined more successful IRWM groups. We examined how RWMGs may move along the scale from ineffective to effective Tribal collaboration; the Upper Sacramento River IRWMP is a fitting example. Initially there was significant lack of trust between the Tribes, agency representatives, and IRWM consultants.[213] After two years of struggle between the RWMG and Tribes, the RWMG's new facilitator overcame the initial mistrust by building a strong relationship directly with some of the Tribal representatives. After one of the Tribes recommended specific contacts to the RWMG, the RWMG reached out to every Tribe in the region.

To assist with building trust between RWMGs and Tribes, study participants suggested that the RWMG, DWR staff, or a professional facilitator with experience working with Tribes, facilitate a dialogue between adversarial parties. Participants also recommended that RWMGs designate a Tribal liaison—someone trained in cultural protocols—to focus on developing strong working relationships between Tribes and other IRWMP participants. They further recommended that all RWMG members receive direct guidance from local Tribes on how to follow protocols for right engagement.[214] According to one Tribal chairperson, "it's

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211. Interview with L. Hillman, *supra* note 124.

212. Interview with Guy Taylor, Envtl. Director, Mooretown Rancheria of Maidu Indians of Cal., in Oroville, Cal. (June 7, 2013).

213. Interview with Belinda Brown, *supra* note 7.

214. *See, e.g.*, CHARLES R. MENZIES ET AL., TRADITIONAL ECOLOGICAL KNOWLEDGE AND NATURAL RESOURCES MANAGEMENT 1–17 (Charles R. Menzies & Caroline Butler, eds., 2006); SHAWN WILSON, RESEARCH IS CEREMONY 126–38 (2008); LINDA TUHIWAI SMITH, DECOLONIZING METHODOLOGIES 123–41 (1999); BETH ROSE MIDDLETON, TRUST IN THE LAND 34–42 (2011).

a gentle process; it's something that you can't just force . . . it's like a relationship . . . take a little bit of time, and let's build this so that it's right, correct, and everybody is okay with it."[215] This "gentle process" is critical for incorporating Tribal perspectives into IRWM plans and projects, whether or not the Tribal projects are ultimately funded. According to a former Tribal chairwoman actively engaged in IRWM:

> [W]e're not going to please everybody, we're not going to make everybody happy, but we certainly can have a facilitated planning process that everybody can walk away knowing that they had a voice. Even though their project might not be funded, at least they had a voice in that planning process, and in that planning document.[216]

Struggling RWMGs have positive examples to follow; some regions have successfully engaged Tribes by increasing Tribal participation, following protocols, and accommodating Tribal interests.

Finally, sustainable, integrated problem solving requires respectful government-to-government coordination among the various sovereign entities involved (whether they are a state agency, a US federal agency, or a Tribal nation). No solution will work unless and until Tribal interests are recognized and invited into this collaborative process for addressing California water management.[217] One central California county earned a reputation of working well with Tribes, simply because "they set down and bargain in good faith."[218] Further, developing strong, personal relationships with collaborative partners is crucial to effective co-management efforts. According to one active IRWM representative, success or failure often "comes down to personalities and one-on-one interactions. . . . I have personal history and background with many people in the area—that has helped."[219] RWMGs should utilize existing relationships among their stakeholders to facilitate this process. One Tribal IRWM facilitator admonished RWMGs to "get to know the Indians that belong in [their] area . . . getting to know the subtleties of our Tribal governments, relationships and structure, and how it could affect the IRWM process, is an extremely important piece."[220] Working to build

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215. Interview with Belinda Brown, *supra* note 7.

216. *Id.*

217. Edmund J. Goodman, *Indian Tribal Sovereignty and Water Resources; Watersheds, Ecosystems and Tribal Co-Management*, 20 J. LAND RES. & ENVTL. L. 185, 215–16 (2000).

218. Interview with anonymous Tribal Representative, in Cal. (June 7, 2013).

219. Telephone interview with Stephanie Suess, then-Environmental Director, Tuolumne Band of Me-wuk Indians, in Davis, Cal. (May 3, 2013).

220. Shanti Warlick, Address at Sierra Water Work Group Summit, North Lake Tahoe, Cal. (June 13 2013).

these relationships and partnerships lays the foundation for long-term sustainability in co-management of water resources. This is even more important as water becomes more scarce and potential for conflict increases.

VI. CONCLUSION

A. Achieving Effective, Equitable Collaboration

For Tribal collaboration in IRWM to be most effective, it should take on a form of cooperative co-management. One possible model for incorporating Tribal perspectives in co-management applies three components to fostering cooperative stewardship:

> 1. Develop a general understanding of Tribal history, cultures, and depth of responsibilities to steward the land/water/resources, to inform culturally competent interactions;
>
> 2. Develop and evaluate sustainable water management policy to reflect Tribal values, rights and needs; and
>
> 3. Develop and offer public education activities designed to facilitate mutual respect, effective communication, and knowledge sharing between Tribes and other watershed stakeholders.[221]

These three principles can serve as a guide to more equitable and efficient Tribal collaboration in IRWM.

Some Tribes have been successful in building unity within adversarial groups. Parties that disagree with one another but support the Tribe, or agree with the Tribes' methods or perspectives, are more willing to come to a resolution with the Tribe's support. In one IRWMP, "The Tribe has been the tiebreaker, the glue, the ray of light in some of these rooms. It's worked really well."[222] As such, where Tribes have been able to productively participate, Tribal participation in IRWM has helped to improve IRWM processes and products for all participants. Challenges can be further minimized by removing barriers to Tribal participation, sharing the inspiring successes involved when there is meaningful Tribal participation, and encouraging both Tribes and other IRWM practitioners to begin communicating. One Tribal EPA Director, during the statewide IRWM conference, explained it as follows:

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221. Charles R. Menzies & Caroline Butler, *Introduction: Understanding Ecological Knowledge*, *in* TRADITIONAL ECOLOGICAL KNOWLEDGE AND NATURAL RESOURCES MANAGEMENT 3 (Charles R. Menzies ed., 2006).

222. Telephone interview with Stephanie Suess, *supra* note 219.

> It's a two-way street. Tribes need to be better and more aggressive at engaging local and regional partners, regional partners need to do a way better job than they are now of not seeing Tribes as a threat, but seeing Tribes as strong partners in water resources planning.[223]

The above two examples, from the Tuolumne-Stanislaus IRWM[224] and the North Coast IRWM,[225] respectively, provide hope for Tribal collaboration in IRWM. Not only *can* it be done, but it can be done *well*. Some RWMGs and Tribes are working together quite effectively, and can provide positive models for similar collaboratives, whether IRWM or otherwise. Any multi-jurisdictional collaborative governance structure is going to have its challenges, but working through these difficulties is well worth the potential benefits. This was expressed by one Tribal EPA director in Southern California: "just having a relationship with DWR, and the State of California, there are still some things to be worked out. But certainly I'm excited about what's going on with our region. . . . actually just talking together and seeing how we can work together." This foundational relationship building is one of the greatest successes of the IRWM program, and a key component of improved collaboration.

B. Maintaining Historical and Cultural Cognizance

Due to the history of Native American genocide and survival in California, Tribes and local agency representatives often lack trust in one another.[226] However, building trust and mutual respect are crucial for collaborative management.[227] When thoughtfully and effectively implemented, California's IRWM process can provide a venue for collaboration and trust building through increased engagement and project implementation. This is exhibited by the success stories shared through

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223. Leaf Hillman, Address at Integrated Regional Water Management Conference: Transforming the Water Management Culture, Sacramento, Cal. (Apr. 2013).

224. *See supra* Part IV.B.4.

225. *See supra* Part IV.B.4.

226. *See, e.g.*, NORTON, *supra* note 39 (describing the history of attempted indigenous genocide in north-western California); COSTO & COSTO, *supra* note 39 (examining the history of forced labour at missions established in California by the Spanish); Heizer, *supra* note 39 (detailing genocidal acts toward indigenous peoples of California by both the State government and private citizens in the American period); and Hoopes, *supra* note 39 (documenting the 1851–52 treaty-making process between the US government and California Indians, and reveals the devastating impact of the non-ratification of treaties, which led directly to the landlessness that many California Indians still experience today).

227. *See generally*, INNES & BOOHER, *supra* note 138 CH; 4 JERRY MANDER, IN THE ABSENCE OF THE SACRED 59–61, 256–62, 367 (1991).

the UC Davis Tribal IRWM Study.[228] If best practices are not followed, however, IRWM is just another venue for perpetuating marginalization of California's Native Peoples in natural resource decision-making.

For sustainable long-term watershed management, legislators and agencies should remain cognizant of and sensitive to the past. Former policies have not only created the exclusionary resource management structure we have today, but also shaped persistent inter-governmental relationships. Despite over a century of attempted exclusion from natural resource decision-making,[229] Native Californians are still here, and still stewarding ecosystems with timehonored methods that enhance those ecosystems for all Californians.[230] Tribal people need to be seated at the table with state and federal entities, as equal partners in achieving shared goals. Otherwise, California is just practicing business-as-usual politics under the guise of comprehensive collaborative stewardship.

228. DOLAN, *supra* note 16, at 14–67.

229. *See, e.g.*, Anderson, *supra* note 3; KIMBERLY JOHNSTON-DODDS, EARLY CALIFORNIA LAWS AND POLICIES RELATED TO CALIFORNIA INDIANS (Sept. 2002); Kimberly Johnston-Dodds, *Northern California Indian Historiography 1847–1866*, CALINDIANHISTORY.ORG, http://www.calindianhistory.org.

230. *See* Risling-Baldy, *supra* note 10; Anderson, *supra* note 3.