Legal Questions Regarding Tribal Uses
In the State of California Generally & In Marine Protected Areas Specifically

Submitted by Meg Caldwell and Roberta Cordero
Members, MLPA Blue Ribbon Task Force
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Background

The United States federal government has a sovereign-to-sovereign relationship with each federally-recognized tribe or federally-recognized tribal entity in the continental United States. From time to time, this relationship requires Federal government to tribal government consultation of a formal nature when a Federal agency is contemplating an action that has the potential to significantly affect the protected rights of such a tribe. The legal triggers for such formal consultations are set out in a number of laws and court decisions and may include potential effects to archaeological cultural resources, biological cultural resources as well as to cultural, spiritual, and ceremonial practices. In some instances, the Federal government may also have a duty to consult with certain Indian tribes and/or individuals who can show descendancy vis-à-vis a potential effect, whether or not such tribe or individual can claim Federal recognition.

In general, the government-to-government relationships of the tribes and tribal entities in the continental United States with the Federal government are based on treaties or other types of binding agreements in which such entities ceded certain aboriginal rights in consideration for certain actions on the part of the Federal government. In California, the basis for the government-to-government relationship does not include treaties, and California tribes and tribal communities have not formally nor intentionally ceded aboriginal rights.

The MLPA Initiative BRTF for the north coast region wishes to respect any existing tribal rights as well as federal and/or state commitments and responsibilities to tribes and tribal communities in the north coast region as the BRTF considers and develops recommendations for marine protected areas in the north coast region.

Several north coast region tribal representatives have expressed a strong desire and need to continue historic noncommercial gathering practices and ceremonial practices within and outside areas that may be designated as marine protected areas under the MLPA.

In order to develop a robust set of recommendations for the north coast region, the BRTF requests that the following factual and legal questions be addressed to inform its work and the RSG process for the north coast.

Preliminary Factual Questions:

1. Which tribes/tribal communities are federally recognized, non-federally recognized, hold treaty rights, hold coastal property? Where are coastal tribal properties located?

Legal Questions

1. Tribal Designations and Formal Consultation/Informal Consultation

What is the significance of tribal "recognition" designations, if any, for purposes of state marine ecosystem management under MLPA?

- **a.** What, if any, federal laws trigger formal consultation for California (federally-recognized tribes, non-federally recognized tribes, and tribal communities?
- **b.** What, if any, California laws trigger formal consultation (federally-recognized tribes, non-federally recognized tribes, and tribal communities)?
- **c.** What is formal consultation? (federally-recognized tribes, non-federally recognized tribes, and tribal communities)
  - i. Mandatory elements
  - ii. Discretionary elements
  - iii. Necessary elements
- **d.** Does anything prevent the MLPAI BRTF from engaging in informal consultation with tribes/tribal communities? If not, what guidelines, if any, should the BRTF be aware of?

2. Accommodating Noncommercial Traditional Tribal Uses Within MPAs

- **a.** How can marine protected areas allow exclusive extractive uses to tribes and tribal communities? For example, is there a basis and mechanism for allowing continued ceremonial use in an otherwise no-take area? If not, what kind of change in the law would allow for such use?
- **b.** What, if any, legal considerations apply to enforcing tribal exclusive use (e.g. permits vs. MPA regulations allowing tribal take)?
- **c.** If exclusive uses are not currently possible, what are the potential mechanisms and steps required to allow for exclusive use by tribes and tribal communities?
- **d.** Does the state's discretion to provide exclusive rights to tribes or otherwise accommodate tribal uses differ depending on whether a tribe is federally recognized, has any other legal status, owns property, etc.?
- **e.** Does DFG or State Parks currently have the authority to engage in co-management with tribes? If so, within what context and by what entities? If not, what steps are needed to provide that authority?

Definitions & Descriptions Needed

- Sovereignty (include distinction from autonomy)
- Co-management
- NC-MLPA Initiative – Describe jurisdictions: State, County, tribal
- Aboriginal or unrelinquished tribal rights
- California tribes and tribal communities
- Commercial vs noncommercial use/extraction

Legal Questions Regarding Tribal Uses
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& In Marine Protected Areas Specifically

Submitted by Roberta Cordero, Member, MLPA Blue Ribbon Task Force
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A. The United States federal government has a sovereign-to-sovereign relationship with each federally-recognized tribe or federally-recognized tribal entity in the continental United States. From time to time, this relationship requires Federal government to tribal government consultation of a formal nature when a Federal agency is contemplating an action that have the potential to significantly affect the protected rights of such a tribe. The legal triggers for such formal consultations are set out in a number of laws and court decisions and may include potential effects to archaeological cultural resources, biological cultural resources as well as to cultural, spiritual, and ceremonial practices. In some instances, the Federal government may also have a duty to consult with certain Indian tribes and/or individuals who can show descendancy vis-à-vis a potential effect, whether or not such tribe or individual can claim Federal recognition.

- Based on Federal law and court decisions, what, if any, are the duties and responsibilities of the States, including California, to consult with tribes, both federally-recognized and non-recognized?
- Based on California law and court decisions, what, if any, are the duties and responsibilities of the State of California, including the Department of Fish & Game and the Department of Parks & Recreation, to consult with California tribes and tribal communities?
- Is the Department of Fish and Game authorized by State or federal law to consult with sovereign Indian Tribes on a government-to-government basis with regard to the MLPA Initiative?

B. In general, the government-to-government relationships of the tribes and tribal entities in the continental United States with the Federal government are based on treaties or other types of binding agreements in which such entities ceded certain aboriginal rights in consideration for certain actions on the part of the Federal government. In California, the basis for the government-to-government relationship does not include treaties, and California tribes and tribal communities have not formally nor intentionally ceded aboriginal rights.

- In the cases of those California tribes and tribal communities which have not ceded their aboriginal rights, what, if any, are the duties and responsibilities of the State of California, including the Department of Fish & Game and the Department of Parks & Recreation:
    - to avoid interference with such aboriginal rights?
    - to consult with those tribal entities when a State action has the potential to significantly affect unceded aboriginal rights?

- Does federal law require the Department of Fish and Game to devise MPAs that avoid interference with the exercise of unceded and unextinguished aboriginal rights by Indian Tribes, Indian individuals or Tribal communities?
- Does State law authorize the Department of Fish and Game to devise MPAs that avoid interference with the exercise of unceded and unextinguished aboriginal rights by Indian Tribes, Indian individuals or Tribal communities?
- Is the Department of fish and Game required or authorized to avoid interference with aboriginal Indian use rights in the absence of affirmative legislation specifically directing or authorizing such avoidance?
- Are there other legal bases that would require or authorize the Department of Fish and Game to devise MPAs that avoid interference with Indian traditional cultural subsistence and customary uses of marine resources subject to the MLPA?
- What, if any, legislative measures are necessary to clarify, re-establish, and/or maintain and protect aboriginal rights, especially for purposes of California's Marine Life Protection Act?

C. Under current California law, may the State grant exclusive extractive uses to California tribes and tribal communities in marine protected areas? (Describe possible enforcement issues.)

D. In light of the political relationship between the United States and Indian Tribes, may the Department of Fish and Game grant exclusive extractive uses to California Indian tribes and Tribal communities in MPAs without violating legal requirements of equal treatment under the law?

E. Is the Department of Fish and Game and/or the Department of Parks and Recreation authorized to enter into agreements under which the agency and Indian Tribes will share management and monitoring responsibilities for marine resources along the California coast and ocean waters?

Definitions & Descriptions Needed.

- Government-to-government consultation: When is it mandatory? Discretionary? What are the necessary elements?
- Sovereignty (include distinction from autonomy)
- Co-management.
- NC-MLPA Initiative – Describe jurisdictions: State, County, tribal.
- Aboriginal rights.
- California tribes and tribal communities.