

Admin.

August 10, 2016

Memorandum 2016-42

Tribal Consultation Policy

At its July 2016 meeting, the Commission¹ directed the staff to prepare a draft tribal consultation policy, for its review and possible adoption. This memorandum presents such a draft.

BACKGROUND

In 2011, Governor Brown issued Executive Order B-10-11. In that document, the Governor orders

that it is the policy of this Administration that every state agency and department subject to my executive control shall encourage communication and consultation with California Indian Tribes. Agencies and departments shall permit elected officials and other representatives of tribal governments to provide meaningful input into the development of legislation, regulations, rules, and policies on matters that may affect tribal communities.

Before 2013, it appears that the Commission had never conducted any studies that related to Native American tribes *as tribes*. That changed when the Commission was assigned the task of assessing whether the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act should be enacted in California. The Uniform Act included provisions that directly related to the civil jurisdiction of tribal courts. To properly assess those provisions, the Commission needed to understand existing law on the relationship between state and tribal court civil jurisdiction.

Because tribal court issues were new to the Commission, the Commission looked for guidance and assistance from the Tribal Court-State Court Forum and Professor Katherine Florey of the UC Davis School of Law. The Commission also

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

received input from the Northern California Tribal Court Coalition and California Indian Legal Services.

In 2014, the Commission was assigned a new study that directly involved the relationship between state courts and tribal courts. The Commission was tasked with reviewing the Tribal Court Civil Money Judgment Act² and the Uniform Foreign-Country Money Judgments Recognition Act³. The bill that assigned that study set a January 1, 2017 deadline for its completion.⁴

In conducting that study, the Commission reached out to all of the persons and groups that had provided input during the Commission's study of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. The Commission also contacted the California Association of Tribal Governments, the Inter-Tribal Council of California, the Inter-Tribal Court of Northern California, the Inter-Tribal Court of Southern California, the Governor's Office of the Tribal Advisor, and a small number of individual tribes.⁵ The Commission will be considering public comments on its tentative recommendation in this study at its September 2016 meeting.

Most recently, the Commission's ongoing work to recodify the Fish and Game Code⁶ has involved an examination of tribal fishing rights. When the Commission first commenced the Fish and Game Code study, the staff reached out to numerous groups and governmental entities that might be affected by the work, including the California Association of Tribal Governments, the Karuk Tribe, the Scotts Valley Band of Pomo Indians, and the Yurok Tribe.

The Yurok Tribe has written the Commission to specifically request changes to the Fish and Game Code, to better reflect their understanding of the relationship between the regulatory authority of the Department of Fish and Wildlife and tribal fishing rights.⁷ Realizing that this issue could affect many California tribes besides the Yurok, the staff decided to broaden its outreach. The staff has been attempting to find contact information for all California tribal governments, using lists maintained by the federal Bureau of Indian Affairs and the Governor's Office of the Tribal Advisor. To date, we have sent initial email

2. Code Civ. Proc. § 1730 *et seq.*

3. Code Civ. Proc. § 1713 *et seq.*

4. 2014 Cal. Stat. ch. 243, § 1; Senate Bill 406 (Evans) (2014).

5. For more detail, see First Supplement to Memorandum 2015-17.

6. As authorized by 2014 Cal. res. ch. 63.

7. See Memorandum 2016-35.

inquiries to dozens of tribes and tribal associations and are continuing our efforts to find contact information for those we have not yet reached.

That recent history of tribe-related work suggests three things:

- (1) Although the Commission's work on laws affecting tribes began only recently, it seems likely to continue.
- (2) While the Commission has made good faith efforts to consult tribes and tribal organizations as our work has turned toward issues affecting tribes, we have done so on an *ad hoc* basis.
- (3) The Commission's *ad hoc* approach to tribal consultation should probably be replaced with a more formal and predictable process for consultation with tribes.

DISCUSSION

Pursuant to Executive Order B-10-11, the Governor's Tribal Advisor is charged with overseeing and implementing effective government-to-government consultation between state agencies and tribes, regarding policies that affect California tribal communities. In carrying out those duties the Office of the Tribal Advisor offers advice to state agencies on how to frame effective tribal consultation policies. It also acts as a clearinghouse, collecting agency tribal consultation policies on its website. Before preparing the draft policy that is presented below, the staff consulted with the Governor's Office of the Tribal Advisor. The staff is grateful for their expertise and assistance.

It is self-evidently important that California tribes be consulted in developing the Commission's tribal consultation policy. To be effective, the policy will need to work for both tribes and the Commission. This presents a bit of a chicken-and-egg problem, as we don't yet have a formal procedure in place for consultation regarding the policy itself. The staff has addressed that as best we could, by mailing a hard copy of this memorandum, with a letter requesting review and comment, to every California tribe on a mailing list provided by the Governor's Office of the Tribal Advisor.

GENERAL PRINCIPLES

The staff believes that the consultation policy should reflect all of the following principles:

- **California tribes are sovereign governments.** They should not be treated as simply another "stakeholder group." In recognition of

the special dignity of tribes as sovereigns, the staff recommends that all initial contacts between tribes and the Commission be handled by the Commission's Chair or the Executive Director. Only if a tribe indicates its willingness to use less formal channels of communication should such channels be used.

- **The Commission cannot predict which studies will be relevant to tribes.** While it will often be clear that a study will affect tribes as tribes, this may not always be true. To be sure that the Commission consults with tribes regarding all Commission work that is of interest to tribes, the staff recommends that the Commission reach out to all tribes before commencing any new study.
- **The Commission should provide every practicable opportunity for consultation with tribes.** Because the Commission is governed by the Bagley-Keene Open Meeting Act, it cannot hold private meetings with tribal government representatives. However, tribes should be expressly invited to appear at the Commission's public meetings. If a tribe wishes to address the Commission at a meeting, time should be set aside for that purpose. Furthermore, the Executive Director should be available to consult with tribes at their request.

PROPOSED POLICY

Consistent with the principles outlined above, the staff recommends that the Commission add the following policy to its Handbook of Practices and Procedures:

Tribal Consultation Policy

Consistent with Executive Order B-10-11, the Commission will take all practicable steps to encourage early and frequent communication and consultation with California Native American Tribes, including all of the following:

- (1) Before the Commission begins a new study, it will send notice to California tribes explaining the scope and nature of the study, inviting consultation regarding the study, and offering to add tribes to the distribution list for materials prepared as part of the study. This notice shall be sent by the Commission's Chair or Executive Director.
- (2) If an official of a California tribe wishes to address the Commission at one of its public meetings, the Commission will set aside time for that purpose.
- (3) The Executive Director will be available for consultation with representatives of California Indian Tribes on their request.

The Commission needs to decide whether to adopt the policy set out above (with or without changes). If the policy is approved, it will be added to the Commission's Handbook of Practices and Procedures. The staff will make minor conforming changes to the headings and numbering of paragraphs in the Handbook to accommodate the best placement of the policy. The policy should also be provided to the Governor's Office of the Tribal Advisor for posting to their website (for the convenience of tribes, they aggregate state agency tribal consultation policies on their website).

Respectfully submitted,

Brian Hebert
Executive Director