

Discussion Questions Relating to Tribal Governments Engagement with Groundwater Sustainability Agencies

This paper was developed by the California Department of Water Resources Sustainable Groundwater Management Program Tribal Advisory Group. It is intended to provide information about the Sustainable Groundwater Management Act to Tribal Governments and Local Governments. This information may also be helpful to Local Governments with Tribal lands within or near their jurisdiction. It is recommended to seek legal counsel for advice.

Groundwater Sustainability Agencies (GSA's)

1. If a Tribe wishes to be part of a GSA, what agreements may be established between the Tribe and the local agency?

Tribes and local agencies have a shared interest in sustainable groundwater management. The Sustainable Groundwater Management Act (SGMA) recognizes that Tribes and local agencies may enter into a Memorandum of Understanding, Memorandum of Agreement, Joint Powers Authority (See CA Government Code sec. 6500, which includes federally recognized Tribes as "public agencies" for the purpose of acting as a member of a Joint Power Authority) or other voluntary agreement to coordinate groundwater management in the basin. The form of the agreement and level of participation of the Tribes depends on the wishes of the Tribe and local agency. (Water Code sec. 10720.3 & 10723.6)

2. What should local agencies do to initiate consultation with the Tribes to reach agreements?

Local agencies should notify the Tribes within their jurisdictions about their intention to form a GSA as soon as possible during the GSA formation process. After notification, the local agencies and Tribes may engage in consultation to prepare and complete the agreement. See links about consultation process at: <http://www.tribalgovtaffairs.ca.gov/>.

3. If a Tribe wishes to be part of a GSA, but is not permitted by the local agency, what remedies does the Tribe have?

Tribes should notify the local agency in writing of their desire to be part of the GSA as soon as possible and should request that a consultation between the Tribe and the local agency start. California Department of Water Resources (DWR) strongly encourages local agencies and Tribes to come to appropriate agreements that allow for shared management of groundwater and that will likely result in the achievement of SGMA's sustainability goals. This viewpoint is consistent with SGMA, as it requires GSAs to consider the interests of all beneficial uses and users of groundwater, including Tribes (Water Code §10723.2). The failure of a local agency to identify Tribal lands in the Groundwater Sustainability Plan (GSP) may reflect on the ultimate evaluation of the plan by DWR. (23 Cal. Code Regs. sec 354.8 and 355.4), Tribes may use their independent sovereign authority to manage their groundwater resources and achieve sustainability goals regardless of whether they participate in a GSA or GSP.

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Groundwater Sustainability Agency (GSA) Boundaries and Authorities

4. If a Tribe has trust lands in more than one groundwater basin, which may involve multiple GSA's, what options does the Tribe have to manage its groundwater resources?

Tribes have the authority to enter into agreements with more than one GSA in order to participate in the management of multiple basins if the Tribe wishes. If the Tribe coordinates with more than one GSA, the Tribe shall manage its water resources in conjunction with the approved GSP for that basin. If Tribes are not partnered with a local agency, they may use their independent sovereign authority to manage their groundwater resources. In addition, Tribes may consider working with local agencies to modify the groundwater basin boundaries so that all of the trust land is located within the boundaries of a single GSA if appropriate.

5. If a Tribe is not part of a GSA, with boundaries that include the Tribe's trust lands, may the GSA impose groundwater management controls on the Tribe, such as extraction limits?

SGMA states that federally reserved water rights to groundwater shall be respected in full (Water Code §10720.3(d)). SGMA also states that nothing in the Act, or any sustainability plans adopted under the act, will determine or alter surface or groundwater rights (Water Code §10720.5(b)). GSA's do not have the authority to issue binding water rights determinations on Tribes. (Water Code sec. 10726.8) For Tribes that have not legally partnered with the GSA, DWR encourages Tribes and local agencies to coordinate and cooperate to achieve SGMA's sustainability goals through other arrangements.

6. Does a GSA have authority over land initially under its jurisdiction, then later becomes trust land?

Once fee land is approved as trust land, it receives generally the same legal treatment as all trust land. Questions 5 and 8 discuss how trust land is treated under SGMA. The Tribe and GSA may include in any agreement described in Question 1 how the groundwater management of such lands should be addressed.

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Groundwater Sustainability Agency (GSA) Enforcement

1. What groundwater management enforcement authority, if any, will the GSA have on the following types of lands:

a. Tribal Trust Land (land held in trust for a tribe):

The GSA would not have enforcement authority over Tribal trust lands. A Tribe that voluntarily participates in a GSA may agree to appropriate means of enforcement on Tribal trust land in the agreement described in Question 1, including that all enforcement actions on Tribal trust lands will be carried out by the Tribe.

b. Allotted Trust Land on a reservation:

Same answer as 8a.

c. Allotted Trust Land off a reservation (public domain allotment):

These lands are generally subject to GSA enforcement authority.

d. Fee Land on a reservation (former trust allotment):

These lands are probably subject to GSA enforcement authority unless the action would threaten or affect Tribal health or other important interests.

e. Fee land off a reservation:

As discussed in Question 6, these lands are generally subject to GSA enforcement authority

f. Tribal or Allotted Trust Land within an adjudicated basin:

For adjudicated basins with Tribal or allotted trust land, the authority for enforcement would generally be specified in the adjudication.

Basin Boundary Modifications

1. Can Tribal trust lands be included in a local agency request to modify a groundwater basin?

Yes. Basin boundary modifications may include Tribal trust lands

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2. Can a Tribe request a Jurisdictional Basin Boundary Modification?

Only local agencies are eligible to request a basin boundary modification. Tribes may consult with local agencies if they believe there is a need to make a scientific or jurisdictional boundary modification.

3. Should a Local Agency consult with a Tribe prior to a basin boundary modification?

Yes. SGMA regulations require local agencies to consult with affected parties before initiating basin boundary modifications. (23 Cal. Code Regs sec. 344.4.) Local agencies and GSA's should consult with Tribes prior to initiating a modification. Tribes may also contact local agencies and request such consultation. DWR retains statutory authority to modify the boundaries of groundwater basins (Water Code § 12924).

Groundwater Sustainability Plan (GSP)

1. If a Tribe does not wish to be part of a GSA, may the Tribe nevertheless engage in the preparation of the GSP?

Yes. Local agencies are required under SGMA to encourage the involvement of diverse social, cultural, and economic elements of the population within the basin during the preparation of and development of the GSP. (Water Code sec. 10727.6) Tribes may be part of any advisory committee created by the GSA to assist in the preparation and development of the GSP. If a Tribe wishes, to be part of such committee, it should make a request to the GSA. In addition, many Tribes have prepared a GSP before SGMA was enacted. A Tribe may coordinate with the GSA to ensure its plan, data, and methodologies are compatible with the GSP. (See Water Code sec. 10727.6) A Tribe may voluntarily participate in the preparation or administration of a GSP or groundwater management plan through a Joint Powers Authority or other agreements with a local agency or GSA. Many Tribes have prepared a Groundwater Management Plans (GWMP) before SGMA.

2. If a Tribe elects to help with the preparation of a GSP, must the National Environmental Policy Act (NEPA) be complied with?

No. NEPA applies to federal actions, and the preparation of the GSP is consider a local action. In addition, the preparation of plans is exempt from the California Environmental Quality Act (Water Code sec. 10728.6).

3. If a Tribe already has a GWMP, can that plan be incorporated into a local agency GSP?

Yes. In preparation of the GSP, the GSA should consult with the Tribe to consider the possibility of incorporating the Tribal GWMP into the local agency GSP. The GSA has an obligation to consider how the GSP may affect other groundwater management plans, including GWMP's

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prepared by the Tribe. (Water Code sec. 10727.2(g).) DWR strongly encourages local agencies and Tribes to coordinate and cooperate.

4. If a Tribe has a GWMP, and is not part of a GSA, should the GSA consider the Tribal GWMP during the preparation of the local GSP?

Yes. The Tribe should consult with the GSA to discuss methods to incorporate the Tribal GWMP into the basin's GSP. The GSA has a requirement to identify any existing water resource monitoring and management programs in the basin, including Tribal GWMP, and may coordinate with those programs to incorporate and adopt those programs as part of the GSP. (23 Cal. Code Regs. sec 354.8)

5. Must a GSA notify a Tribe prior the initiating the preparation of a GSP under SGMA?

Before starting the development of the GSP, GSA's are required to develop a written statement describing the manner in which interested parties and the public may participate in the preparation and the implementation of the GSP, including providing notice to Tribes. (Water Code sec. 10727.8(a).) Tribes should contact the GSA requesting to be notified of plan preparation.

Basin Prioritization

1. What is the process for Tribes to change the status of a groundwater basin priority designation (high, medium, etc.)?

DWR has the responsibility to establish the category of each basin's priority when it modifies groundwater basin boundaries and publishes those boundaries in Bulletin 118. The next Bulletin 118 update is anticipated in 2017. A Tribe should contact DWR as soon as possible if it believes it has data to support an adjustment for a basin priority. (Water Code sec. 10933 & 10722.4(d).)