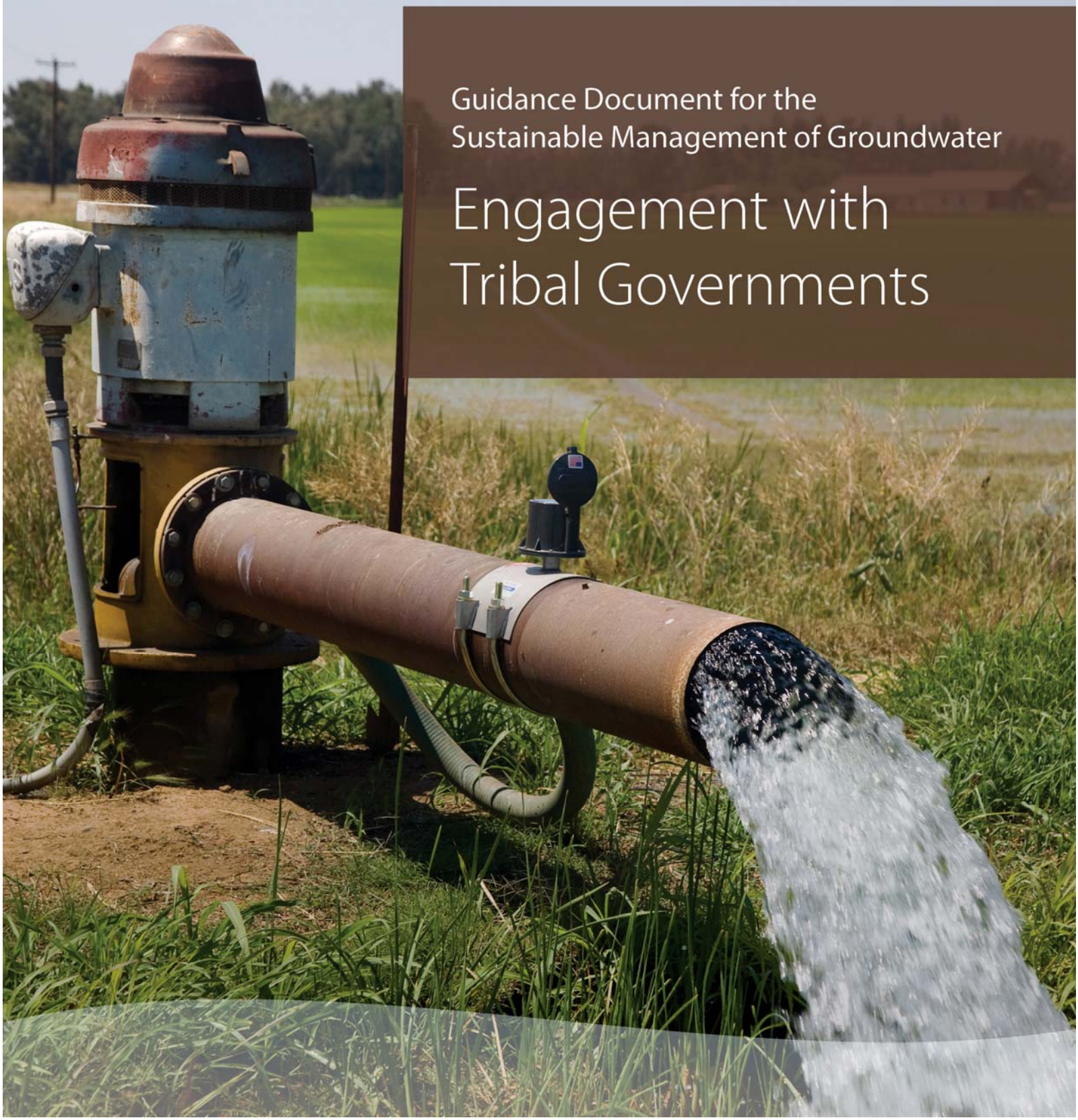
California Department of Water Resources
Sustainable Groundwater Management Program

DRAFT

June 2017

Guidance Document for the
Sustainable Management of Groundwater

Engagement with Tribal Governments



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Guidance Document for the Sustainable Management of Groundwater

Engagement with Tribal Governments

June 2017

The objective of this guidance document is to convey information, as provided by California's Tribal governments, by which local agencies can engage Tribal governments as part of an effort to identify interested persons, and consider the interests of beneficial users of groundwater; including those users on Tribal lands not subject to the Sustainable Groundwater Management Act (SGMA). This guidance document can also be used to help local agencies engage with a Tribal government in the planning, financing, and management of a Groundwater Sustainability Agency (GSA), or help with the development and implementation of a Groundwater Sustainability Plan (GSP) pursuant to SGMA.

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www.water.ca.gov/groundwater

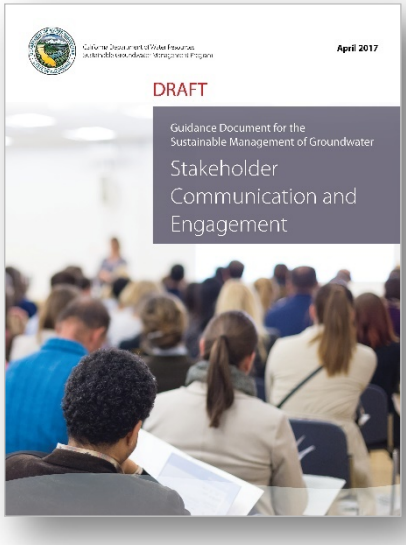
Introduction

This document[1] is intended to provide general guidance to GSAs regarding how and when to engage with Tribal governments. GSAs have the option of using this information as they develop a GSP, as the content provided here does not create any new requirements or obligations for the GSA.

Many groundwater basins include overlying Tribal lands; for this reason, the California Department of Water Resources (DWR) strongly encourages local agency Tribal engagement early and throughout the GSA and GSP development and implementation processes. Local agencies and Tribes are encouraged 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.

Engagement Considerations

As discussed in the Stakeholder Communication and Engagement Guidance Document, SGMA instructs local agencies to consider the interests of all beneficial uses and users of groundwater, to identify persons interested in the preparation of plans, and provides for the formation of GSAs involving multiple agencies, and participation by non-governmental entities. In addition, SGMA specifically authorizes the voluntary participation by federally recognized Tribes in the planning, financing, and management of groundwater basins with local agencies. Local agencies and Tribes may also enter into agreements that allow for coordinated management of groundwater and the achievement of SGMA's sustainability goals. In addition, Tribal governments have unique status due to their sovereignty and regulatory powers over groundwater under trust lands. This status may affect local agency engagement



For information about general communication and engagement best practices, see DWR's Stakeholder Communication and Engagement Guidance Document.

[1] Guidance Documents do not serve as a substitute for the GSP Emergency Regulations or SGMA. GSAs developing a GSP are strongly encouraged to fully read the GSP Regulations and SGMA. In addition, using this Guidance Document to develop a GSP does not equate to an approval determination by DWR. Nor does this Guidance Document replace Tribal consultation at the local or State agency level of Tribal consultation as defined in SB18 or Executive Order B-10-11 of the Tribal Consultation policy of the Natural Resources Agency and DWR's Tribal Engagement Policy.

procedures relevant to the status of Tribes as domestic dependent nations with sovereign authority.

This document was developed to provide guidance to GSAs in association with their stakeholder outreach/engagement and public noticing practices involving Tribal governments. The following information and recommendations are based on input from DWR's Tribal outreach meetings and Sustainable Groundwater Management Program Tribal Advisory Group meetings.

Tribal Recommended Communication Procedures

A GSA is required per Water Code section 10723.4 to establish and maintain a list of persons interested in receiving notices. This includes local Tribal governments whose reservations lay over the basin, as well as local Tribes whose reservations are within the watershed.

When contacting or noticing Tribes, contact should be made first to the Tribal Chair through both land mail and electronic mail. This first communication should also have a copied letter addressed to the Tribal Administrator. A follow-up by mail and telephone to the Tribal Chair should be done within two weeks of initial contact. Local agencies and GSAs should determine whether there are Tribal communication procedures, consultation policies, or agreements in place with local Tribes that govern any communications or meetings. If such procedures exist, the local agency, and then the GSA, should follow these.

If no such procedures exist, then local agencies and GSAs should inquire as to the proper contact protocol for the Tribe. For instance, for some Tribes, copies of all communications from the local agency/GSA to the Tribal government should be provided to the Tribal Administrator, the Tribal Environmental Director, and/or appropriate Tribal staff, including subject matter experts such as a Tribal Historic Preservation officer, or other parties as indicated by the Tribal government. The local agency is advised to follow up with phone calls 1-2 weeks after the initial notification. In addition, the local agency may plan to provide several reminder notifications (1 week, 2 week, and/or 1 month) prior to the meeting via phone call and/or e-mail.

Many Tribes require ample notice of meetings or events. For instance, the Tribe may request to be informed of public meetings to discuss GSA formation and GSP development at least 45-60 days in advance.

Tribal Recommended GSA Formation Engagement

Local agencies that wish to form GSAs should notify local Tribes. A local agency issuing a notice of intent to Tribal governments should follow Tribal communication procedures, as discussed previously. The Tribal Chair may request to be informed of public meetings to discuss GSA formation through paper notice and e-mail 45-60 days in advance. Copies of all communications from the local agency to the Tribal government should be provided to the Tribal Administrator, the Tribal Environmental Director, and/or appropriate Tribal staff, including subject matter experts such as a Tribal Historic Preservation officer, or other parties as indicated by the Tribal Chair. The local agency is advised to follow up with phone calls to the Tribal Chair and/or appropriate Tribal staff 1-2 weeks after the initial notification. In addition, the local agency may

plan to provide several reminder notifications (1 week, 2 week, and/or 1 month) prior to the meeting via phone call and/or e-mail.

A local agency deciding to form a GSA can coordinate with Tribal staff to schedule a meeting with the Tribal Council or other Tribal governing body to inform them of the GSA formation process and receive input, in addition to holding the statutorily required public hearing (Water Code section 10723(b)). The local agency may choose to hold such a meeting on Tribal lands when requested by Tribal governments.

The local agencies deciding to become a GSA may choose to obtain a Tribal directory, which is available from the Governor's Tribal Advisor's office (nahc@nahc.ca.gov), in order to identify the list of interested parties for Tribes. Correspondence with the Tribe should include an invitation to be added to the interested parties list unless the Tribe is requesting full participation such as participation in a GSA through a joint powers agreement (JPA) or memorandum of understanding (MOU).

In addition to the interested parties list, once a GSA is established, the GSA should identify opportunities for public engagement including opportunities to engage Tribes.

Tribal Recommended Notice to Prepare GSP Engagement

SGMA requires a GSA to provide a notice of intent to prepare a GSP, prior to beginning GSP development. A GSA should send the notice of intent by mail and e-mail to the Tribal Chair and Tribal staff, as identified through the GSA formation outreach process, and suggest an in-person meeting with the GSA to discuss options for the Tribe's participation in the GSP process. The local agency is advised to follow up with phone calls to the Tribal Chair and Tribal staff 1-2 weeks after the initial notification.

GSP Preparation

As part of public engagement during the development of the GSP, a GSA is encouraged to conduct additional meetings with Tribes within the basin. If meetings are conducted with Tribes, the GSA should follow the same procedures as for the GSA notification meeting, providing paper notice and e-mail 45-60 days in advance and reminder notifications (1 week, 2 week, and/or 1 month) in advance of the meeting or defer to any available local policies or agreements on Tribal communication procedures if applicable in their respective basin. Where there is initial or draft documentation to be discussed, such documentation should be forwarded at least 30 days in advance.

GSP Implementation

During the implementation phase of GSPs, GSAs should continue to coordinate directly with Tribes to allow opportunities for engagement. If a Tribe and local agency have entered into an agreement, the agreement most likely would specify how the Tribe and agency would engage during implementation. The GSA should use the same notification process as identified above to contact Tribes or defer to local policies or agreements on Tribal communication procedures.

One area of implementation that might be of particular concern to Tribes is when a GSA is contemplating fees. A GSA is required to hold at least one public meeting prior to imposing any fee or increasing fees per Water Code section 10730(b). While the fees cannot be applied on Tribal trust lands, Tribes may request a tribal consultation through a separate meeting from the public meeting to discuss the applicability of fees on other types of Tribal lands.[2] Similarly, consideration of specific meetings with Tribes may be necessary regarding any curtailment of pumping that may be applicable to types of Tribal lands other than trust lands.

Related Materials

Reference materials have been developed in conjunction with DWR's SGMP Tribal Advisory Group meetings. These materials may be useful to GSAs or Tribes through the implementation of SGMA. A list of these references and links are provided below.

References

Draft Discussion Paper Tribal Participation with Groundwater Sustainability Agencies

This paper was developed to address the issue of Tribal participation with SGMA and in particular the relationship between Tribes and GSAs.

http://www.water.ca.gov/groundwater/sgm/pdfs/SGMA_Tribal_GSAs.pdf

Discussion Questions Relating to Tribal Governments Engagement with Groundwater Suitability Agencies

Developed by the DWR's Sustainable Groundwater Management Program Tribal Advisory Group. This document is intended to provide information about SGMA to Tribal Governments and local agencies, especially those with Tribal lands within or near their jurisdiction.

http://water.ca.gov/tribal/docs/2017/Discussion_Questions_SGMA_Tribal_Local.pdf

A Primer on the Types of Land in Federal Indian Reservations for Groundwater Sustainability Agencies (Attachment 1)

A tool to assist GSAs on the types of land in Federal Indian reservations. The primer was authored by the Barona Band of Mission Indians and Rincon Band of Luiseño Indians. It has also been vetted by DWR's Sustainable Groundwater Management Program Tribal Advisory Group.

http://water.ca.gov/tribal/docs/2016/Land%20primer%20for%20GSA's.pdf

Discussion Paper Definition of Tribal Law (Attachment 2)

A tool for GSA's on the fundamental definition of Tribal Law as cited in SGMA. The paper was authored by the Barona Band of Mission Indians. It has been vetted by the Northern, Central,

[2] GSAs should be prepared to receive questions related to the distinction between trust lands and tribal members not on trust lands when considering fee applicability.

and Southern California Tribal Chairmen's Association and DWR's Sustainable Groundwater Management Program Tribal Advisory Group.

http://water.ca.gov/tribal/docs/2016/Tribal_Law_v1.13.16.pdf

Interested Party Letter to Local Agency

The sample letter was developed as a suggestion from DWR's Tribal outreach for Tribes to reach out to their local agency. A Word version is available online to edit as appropriate for the region and audience.

http://water.ca.gov/tribal/groundwater_sustainability_program.cfm (Scroll down to Tool Kit)

Outreach and Notification Requirements of SGMA

The following Water Code sections and GSP Regulations identify the role of Tribal communities in SGMA and outline the requirements for local agencies and GSAs to address when forming GSAs and developing and implementing GSPs. This list focuses on the outreach and notification requirements of SGMA, as well as the requirements of GSAs to consider the interests of all beneficial uses and users of groundwater in a basin.

WC §10720.3.

(a) This part applies to all groundwater basins in the state.

(b) To the extent authorized under federal or tribal law, this part applies to an Indian tribe and to the federal government, including, but not limited to, the United States Department of Defense.

(c) The federal government or any federally recognized Indian tribe, appreciating the shared interest in assuring the sustainability of groundwater resources, may voluntarily agree to participate in the preparation or administration of a groundwater sustainability plan or groundwater management plan under this part through a joint powers authority or other agreement with local agencies in the basin. A participating tribe shall be eligible to participate fully in planning, financing, and management under this part, including eligibility for grants and technical assistance, if any exercise of regulatory authority, enforcement, or imposition and collection of fees is pursuant to the tribe's independent authority and not pursuant to authority granted to a groundwater sustainability agency under this part.

(d) In an adjudication of rights to the use of groundwater, and in the management of a groundwater basin or subbasin by a groundwater sustainability agency or by the board, federally reserved water rights to groundwater shall be respected in full. In case of conflict between federal and state law in that adjudication or management, federal law shall prevail. The voluntary or involuntary participation of a holder of rights in that adjudication or management shall not subject that holder to state law regarding other proceedings or matters not authorized by federal law. This subdivision is declaratory of existing law.

WC §10723.2

The GSA shall consider the interests of all beneficial uses and users of groundwater, as well as those responsible for implementing GSPs. These interests include, but are not limited to, all of the following:

(a) Holders of overlying groundwater rights, including:

(1) Agricultural users.

(2) Domestic Well owners.

(b) Municipal well operators.

(c) Public water systems.

(d) Local land use planning agencies.

(e) Environmental users of groundwater.

(f) Surface water users, if there is a hydrologic connection between surface and groundwater bodies.

(g) The federal government, including, but not limited to, the military and managers of federal lands.

(h) California Native American Tribes.

(i) Disadvantaged communities, including, but not limited to, those served by private domestic wells or small community water systems.

(j) Entities listed in Section 10927 that are monitoring and reporting groundwater elevations in all or a part of a groundwater basin managed by the GSA.

WC §10723.4

The GSA shall establish and maintain a list of persons interested in receiving notices regarding plan preparation, meeting announcements, and availability of draft plans, maps, and other relevant documents. Any person may request, in writing, to be placed on the list of interested persons.

WC §10723.8(a)

Within 30 days of deciding to become or form a GSA, the local agency or combination of local agencies shall inform the department of its decision and its intent to undertake sustainable groundwater management. The notification shall include the following information, as applicable:

(4) A list of interested parties developed pursuant to Section 10723.2 and an explanation of how their interests will be considered in the development and operation of the GSA and the development and implementation of the agency's sustainability plan.

WC §10727.8

(a) Prior to initiating the development of a GSP, the GSA shall make available to the public and the department a written statement describing the manner in which interested parties may participate in the development and implementation of the GSP. The GSA shall provide the written statement to the

legislative body of any city, county, or city and county located within the geographic area to be covered by the plan. The GSA may appoint and consult with an advisory committee consisting of interested parties for the purposes of developing and implementing a GSP. The GSA shall encourage the active involvement of diverse social, cultural, and economic elements of the population within the groundwater basin prior to and during the development and implementation of the GSP.

(b) For purposes of this section, interested parties include entities listed in Section 10927 that are monitoring and reporting groundwater elevations in all or a part of a groundwater basin managed by the GSA.

23CCR § 353.6. Initial Notification

(a) Each Agency shall notify the Department, in writing, prior to initiating development of a Plan. The notification shall provide general information about the Agency's process for developing the Plan, including the manner in which interested parties may contact the Agency and participate in the development and implementation of the Plan. The Agency shall make the information publicly available by posting relevant information on the Agency's website.

23CCR § 354.10. Notice and Communication

Each Plan (GSP) shall include a summary of information relating to notification and communication by the Agency (GSA) with other agencies and interested parties including the following:

(a) A description of the beneficial uses and users of groundwater in the basin, including the land uses and property interests potentially affected by the use of groundwater in the basin, the types of parties representing those interests, and the nature of consultation with those parties.

(b) A list of public meetings at which the Plan was discussed or considered by the Agency.

(c) Comments regarding the Plan received by the Agency and a summary of any responses by the Agency.

(d) A communication section of the Plan that includes the following:

(1) An explanation of the Agency's decision-making process.

(2) Identification of opportunities for public engagement and a discussion of how public input and response will be used.

(3) A description of how the Agency encourages the active involvement of diverse social, cultural, and economic elements of the population within the basin.

(4) The method the Agency shall follow to inform the public about progress implementing the Plan, including the status of projects and actions.

23CCR § 354.26. Undesirable Results

(b) The description of undesirable results shall include the following:

(3) Potential effects on the beneficial uses and users of groundwater, on land uses and property interests, and other potential effects that may occur or are occurring from undesirable results.

23CCR § 354.28. Minimum Thresholds

(b) The description of minimum thresholds shall include the following:

(4) How minimum thresholds may affect the interests of beneficial uses and users of groundwater or land uses and property interests.

23CCR § 354.44. Projects and Management Actions

(b) Each Plan (GSP) shall include a description of the projects and management actions that include the following:

(1)(B) The process by which the Agency (GSA) shall provide notice to the public and other agencies that the implementation of projects or management actions is being considered or has been implemented, including a description of the actions to be taken.

There are additional public notification requirements in the following Water Code sections:

- **WC § 10723(b)**: Publication of notice pursuant to Government Code 6066 prior to deciding to become a GSA.
- **WC § 10725.2(c)**: Notice of proposed GSP adoption on the GSA's website and the requirement to provide electronic notice to any person who requests electronic notification.
- **WC § 10728.4**: Adoption or amendment of a GSP after a public hearing, held at least 90 days after providing notice.
- **WC § 10730**: Notification requirements prior to imposing or increasing a fee.
- **WC § 10730.6(e)**: Noticing requirements related to fee collection and enforcement options.
- **WC § 10732**: Imposing civil penalties after providing notice and an opportunity for a hearing.

Attachment 1:

A Primer on the Types of Land in Federal Indian Reservations for Groundwater Sustainability Agencies

Barona Band of Mission Indians and
Rincon Band of Luiseño Indians

A PRIMER ON THE TYPES OF LAND IN FEDERAL INDIAN RESERVATIONS FOR GROUNDWATER SUSTAINABILITY AGENCIES

Background. In California title to all land was transferred from Mexico to the United States by the Treaty of Guadalupe Hidlago in 1848. The United States immediately enacted a statute setting up a land claims commission to which those who claimed land under Mexican law could present their claims within a 2-year period to the commission and, if found to be proper, the United States would confirm the claim and issue a federal patent. The holders of Spanish and Mexican land grants and pueblos all did so, and their grants were all confirmed. However, no tribe did so because no one ever told them the commission even existed. Therefore, the time period passed and no Indian title was confirmed, even though recognized by Mexican law. In 1903 the U.S. Supreme Court held that this did not matter. Similarly, the United States negotiated 18 treaties with the tribes of California in 1851-1852. In these treaties, the tribes yielded their claims to 7/8 of the land of California to the United States, in return for specified reservations totaling about 1/8 of California. However, the U.S. Senate not only never ratified any of the 18 treaties, it concealed their existence until 1905. Therefore, between the unknown land title commission and the unratified treaties, California tribes were left entirely without any enforceable rights to any land by 1852. Their descendants were later compensated for this loss of most of California's land in 1968 at the munificent rate of 48¢ per acre.

The public domain. Aside from the confirmed Mexican and Spanish grants, all land in California thus belonged to the United States by 1852. Such federal land, not designated for any other use, was and is the public domain. Some of this original vast public domain remains today, and is administered by the Bureau of Land Management. But over the years, much of the public domain in California has been designated, by Congress or the President, for other specified uses such as: Indian reservations, military reservations, national parks, national forests, national monuments, seashores, etc., all of which are public use serving a public purpose. In each of these other kinds of designations, the United States continues to hold fee simple title to the land in its own name, but subject to the designation. However, title is different for federal Indian reservations.

Federal Indian reservations. For only federal Indian reservations, the fee title is not simply in "United States". Instead, title is held as "United States in trust for X Indian tribe". The United States owns the fee, as with other federal reservations and uses, but holds it in trust for a specified tribe. Starting mostly in the 1870's, the President and Congress made attempts to provide some tiny land base for California's otherwise landless tribes by designating specified parcels of public domain land as federal Indian reservations, with title held this way. For many reservations (including rancherias), this is how the title is held today: the United States holds the fee title, but in trust for a specified tribe. This is what is called "trust land", land that the United States holds in trust for a tribe. Such trust land cannot be condemned, sold, leased, conveyed, taxed, regulated, or otherwise dealt with by others unless by specific authorization by Congress. There is a process (often called "fee-to-trust") by which a tribe can now take a

piece of fee land and have the United States accept it into trust as new or additional trust land for that tribe, but the process is onerous and difficult, and does not always succeed.

Trust Allotments. Many reservations now remain as they were established: blocks of land held in trust for the tribe by the United States. However, starting in 1887 many reservations went through a process called "allotment" by which individual parcels of tribal trust land were subdivided into parcels as small as 5 acres, and allocated to individual Indians. These parcels are known as "allotments" by which the title to the individual parcel stayed in trust, but for the individual Indian, not the tribe. Such allotted trust land is different from unallotted tribal trust land. Allotted trust land can be sold so that the buyer receives fee title. It can be condemned. It can be more easily leased. The Indian owner (called the "allottee") can also take it out of trust and receive a fee patent. Then such land passes out of trust and into fee, it is subject to state and local taxation and, in many but not all cases, is subject to state and local regulation (zoning, land use, county ordinances regarding wells, etc.). Reservations that have been allotted typically are a patchwork of (1) unallotted tribal trust land, (2) allotted trust land, and (3) fee land. However, the boundaries of the reservation are not affected by allotment or issuance of a fee patent. Each reservation is different. Outsiders will simply have to inquire to see if a particular reservation was ever allotted and, if so, what the status of individual parcels on it are. In addition, a very few allotments to individual Indians were made from lands of the public domain, known as "public domain allotments". Some have passed into fee, but a few remain in trust.

Tribal governments. Indian tribes are not just voluntary social organizations of people of Indian descent, like the Knights of Columbus. Federally-recognized tribes (there are over 500 in the official list) are governments that exercise normal sovereign powers of self-government on the reservation over their people and over at least all trust land on the reservation and, sometimes, over fee land on the reservation. This includes misdemeanor criminal jurisdiction and the kinds of local powers commonly exercised by counties, such as zoning and land use, environmental controls, and control over wells and groundwater. Many tribes, especially those in remote areas, have been exercising effective sustainable groundwater management on their reservations for decades. Under federal law, state law and county ordinances do not apply to tribes and cannot be enforced against tribes, except where Congress has specifically said so. Although tribes are owners of trust land, they are also the local governments over the reservations. The federal government, and state and local governments, must relate to tribal governments on a government-to-government basis, as well as landowners.

How tribes fit into the Sustainable Groundwater Management Act. Although SGMA does not allow a tribe to be a GSA, it does allow tribes to participate in GSA's by MOU's and similar arrangements. Such participation is optional on the part of a tribe. Some tribes will opt not to participate at all, while others will participate actively. A GSA cannot require a tribe whose reservation is in one of the Bulletin 118 groundwater basins to do anything at all. A GSA will be better served to cultivate a voluntary and mutually beneficial working relationship with such a tribe on a government-to-government basis. Sustainably managed groundwater basins benefit everyone.

Attachment 2:

Definition of Tribal Law

Sustainable Groundwater Management
Tribal Advisory Group

Discussion Paper
Definition of Tribal Law

Sustainable Groundwater Management Tribal Advisory Group
January 13, 2016

1.0 PURPOSE

DEFINITION OF "TRIBAL LAW"

*"To the extent authorized under federal or **tribal law**, this part applies to an Indian tribe…" SGMA, California Water Code §10720.3(b)*

"Tribal Law" should be broadly defined to include all forms of formal expressions of a tribe's sovereign will. It should include, but not be limited to:

1. Written constitutions[1]
2. Articles of Association and equivalent documents
3. Ordinances of the General Council, Tribal Council, or similar governing body
4. Resolutions of the General Council, Tribal Council, or similar governing body
5. Custom and tradition, written and unwritten[2]
6. Delegated federal authority that supplements tribal authority[3]

[1] While many tribes have written constitutions, not all do, and there is no requirement that any tribe have one. The U.S. Supreme Court has noted that "The Navajo Government has been called 'probably the most elaborate' among tribes…. The legitimacy of the Navajo Tribal Council, the freely elected government of the Navajos, is beyond question." And yet the Navajo Nation has no written constitution. *Kerr-Magee Corp. v. Navajo Tribe of Indians,* 471 U.S. 195, 197-199 (1985).

[2] In 1953 Congress enacted Public Law 280, which extended the civil jurisdiction of California's courts over individual reservation Indians (but not tribes) for ordinary civil matters (divorce, contract disputes, car accidents, child custody, etc.). P.L. 280 also preserved the role of written and unwritten tribal custom and tradition in resolving such disputes, in the absence of applicable state law: "Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community, in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in determination of civil causes of action pursuant to this section." 28 U.S.C §1360(c).

[3] e.g. Treatment as a State under the Clean Water Act