

First Supplement to Memorandum 2016-48

Fish and Game Law (Tribal Fishing)

As noted by the staff at the Commission's¹ September 22, 2016 meeting, the Commission received a comment letter from Cher-Ae Heights Indian Community of the Trinidad Rancheria ("Trinidad Rancheria"), discussing Section 12300 of the Fish and Game Code and the analysis of that section presented in Memorandum 2016-35.

The Trinidad Rancheria's comment letter is attached as an Exhibit.

Respectfully submitted,

Kristin Burford
Staff Counsel

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.



Cher-Ae Heights Indian Community of the Trinidad Rancheria



September 22, 2016

Via U.S. Mail and Email to kburford@clrc.ca.gov

Kristin Burford, Staff Attorney
California Law Revision Commission
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

Dear Ms. Burford:

At the invitation of the Executive Director of the California Law Revision Commission, the Cher-Ae Heights Indian Community of the Trinidad Rancheria (“Trinidad Rancheria” or “Tribe”) submits comments regarding the Law Revision Commission’s review of the California Fish & Game Code and the issues discussed in the Commission’s staff memorandum 2016-35, dated July 13, 2016. The Trinidad Rancheria submits these comments in support of the Tribe’s authority to regulate the hunting, fishing, and gathering activities of its tribal members, and the ability of its tribal members to exercise the Tribe’s reserved rights to hunt, fish, and gather.

The Trinidad Rancheria is a federally recognized Indian tribe located on the coast of what is now northern California near the historic village of Chue-rey (Tsurai). The Trinidad Rancheria lands, on the coastal bluffs of Trinidad Bay, were acquired pursuant to the Indian Appropriation Act of June 21, 1906 (34 Stat. 333) authorizing the Secretary of the Interior to expend certain funds to purchase parcels of land in the State of California for the use and occupancy of Indians in California and to fence, survey and mark such reservations as the Secretary deemed appropriate. In 1917 the Secretary of the Interior formally established and recognized the Trinidad Rancheria. The Tribe is organized under a constitution adopted in accordance with the Indian Reorganization Act.

Although the Trinidad Rancheria has ancestral ties with several native peoples, the Tribe’s members are primarily Yurok people and their ancestral territory is that of the Yurok people. The ancestral territory of the Trinidad Rancheria overlaps with the ancestral territory of other federally recognized tribes of historic Yurok origin, including the Yurok Tribe, the Resighini Rancheria, and the Big Lagoon Rancheria. Since time immemorial, despite terrible adversities, the members of the Trinidad Rancheria have always lived within their aboriginal homelands and sustained a continuous relationship with their homelands and the natural resources located on them, and the Tribal Council is authorized by the Tribe’s Constitution to

manage, develop, protect and regulate the use of water, minerals, and of all other natural resources within tribal jurisdiction. The establishment of the reservation for the Trinidad Rancheria recognizes the Tribe's historic relationship with this part of the ancestral homeland and the uses of the natural resources found in this location, including without limitation fish, animals, and plants. The Rancheria's members maintain active tangible and intangible relationships with sites associated with traditional and customary hunting, fishing, and gathering activities. The tangible relationships maintained by the Tribe and its members include the use of sites for harvesting, hunting, habitat maintenance, social or ritual gatherings, shelter, and trade - including reciprocal site-sharing relationships with other tribes. The Trinidad Rancheria tribal members depend upon the rich diversity of marine and coastal plant resources found within Rancheria lands, as well as fish, animals and plants found throughout ancestral territory, as part of their daily lives.

The Trinidad Rancheria has never waived its aboriginal rights to hunt, fish, and gather within its ancestral territory, and does not do so here. On the contrary, the Tribe has continued to exercise its authority to protect those rights and the ability of its tribal members to carry out those traditional and customary activities within tribal lands and the Tribe's ancestral territory. The Tribe works actively with state and federal partners to protect the rights of its members to continue these activities and to protect the natural resources on which these traditional and customary hunting, fishing, and gathering activities depend. The Tribe has engaged with the California Fish and Game Commission, the California Department of Fish and Wildlife, and the United States Department of the Interior among others. For example, the Trinidad Rancheria participated in a coalition of neighboring tribes that consulted extensively with the California Fish and Game Commission on the development of regulations implementing the Marine Life Protection Act (MLPA) for the purpose of protecting the right and ability of tribal members of the affected tribes to continue to engage in traditional and customary hunting, fishing, and gathering activities while also protecting the related marine resources. The Tribe has also worked with the U.S. Bureau of Land Management (BLM) to support wildlife protection and monitoring as part of the Tribe's harbor plan for Trinidad Harbor, and the Tribe is working with the BLM to negotiate intergovernmental agreements consistent with those efforts. Additionally, the Trinidad Rancheria is also currently participating in a tribal consultation and collaboration process with the California Fish and Game Commission to explore the use of co-management agreements between tribes and the Commission and/or Department of Fish and Wildlife to protect traditional and customary off reservation hunting, fishing and gathering.

Section 12300 of Fish & Game Code

At present, the Trinidad Rancheria confines its comments to Section 12300 of the California Fish and Game Code. The Commission staff report notes that the Yurok Tribe has proposed a change to this section that focuses on the exercise of a tribe's federally reserved fishing, hunting or gathering rights and the deletion of language related to Public Law 83-280 (1953) (codified as 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321-1326). The

Commission staff report indicates that it sees merit in the general approach proposed by the Yurok Tribe but invites comments on several questions and issues related to this section.

The Commission staff memorandum indicates that there is no definition of the term “California Indian” as used in this section 12300. The Commission staff asks whether this term should also cover a member of a non-federally recognized tribe, but indicates that this term likely refers to a member of a federally-recognized tribe, and suggests that it may be appropriate to amend the language of Section 12300 to refer to a “member of a federally-recognized tribe” as opposed to a “California Indian.” The staff memorandum also questions whether a member of a tribe would necessarily be inscribed on a tribal roll, and suggests that referring to a “member” may render that language redundant. The Trinidad Rancheria agrees with the staff memorandum on both of these points. Each tribe has the authority to determine its own membership which need not necessarily include maintaining a roll of members and/or may provide for inclusion as members of certain classes of people who are not on an official roll.

The Commission staff memorandum next notes that Section 12300 currently only applies to the reservation of the tribe at issue, and asks whether tribes may have off-reservation rights. This is an extremely important issue in California. As set out below, the Trinidad Rancheria urges the Law Revision Commission and the California Legislature to recognize and protect the traditional and customary hunting, fishing and gathering activities that take place off reservation. The need for the State Code to recognize and protect these off-reservation activities cannot be separated from the unique and dismal history of the treatment of Native Americans and Indian tribes in California, which resulted in sharply reduced lands protected as Indian country, as defined in 18 U.S.C. 1151, within the State and the lack of treaty rights. We refer you to a law review article for a well-documented discussion of how this history inhibited the establishment of Indian country in California.¹

As noted above, tribal members of the Trinidad Rancheria (as well as members of many other Indian tribes located within California) continue to engage and depend on traditional and customary hunting, fishing, and gathering activities to supplement their diet and to preserve their culture and cultural identity. These activities also represent a significant historic and cultural practice in the State, and, as such, tribes may have important procedural rights under Federal law (e.g. the National Historic Preservation Act) and State law (e.g., the California Environmental Quality Act).

The California Fish and Game Commission has recognized the importance of traditional and customary fishing and gathering activities. For example, the regulations implementing the MLPA recognize the take of tribal members of certain federally recognized Indian tribes in certain marine life protected areas located within their ancestral homeland. *See, e.g.* 14 CCR § 632. The recognition of the rights of the members of certain Indian tribes to engage in such traditional and customary activities is consistent with Federal and State law, and California case

¹ William Wood, *The Trajectory of Indian Country in California: Rancherias, Villages, Pueblos, Missions, Ranchos, Reservations, Colonies, and Rancherias*, 44 *Tulsa Law Review* 2 (2008).

law. For example, in a case addressing asserted aboriginal tribal hunting and fishing rights, which are distinct from the Federal reserved rights protected in Section 12300, the California Supreme Court urged the State Legislature and the California Fish and Game Commission to grant limited hunting privileges on tribal ancestral lands.²

As noted above, the California Fish and Game Commission is exploring one mechanism for recognizing off-reservation hunting, fishing and gathering through the concept of co-management agreements. The Trinidad Rancheria is not prepared, at this juncture, to propose revisions to Section 12300 to address off-reservation hunting, fishing, and gathering by members of Indian tribe in California, but this is a matter that warrants the attention of the Law Revision Commission and the Legislature.

In addition to this larger question about off-reservation rights, however, we recommend the use of the term “Indian country,” as defined in 25 U.S.C. § 1151 rather than the term reservation. The law review article cited above describes in some detail the interchangeable way that various terms have been used to describe Indian country in California.³ The distinctions among these interchangeable terms (Rancheria, Colony, Mission, Reservation, etc.) have no legal consequences as to the status of the land or the rights of the Tribe for whom the land is held. The dispositive question is whether the land is treated as Indian country for the purposes of federal law. As noted in the staff memorandum, there is ample California case law holding that the State cannot impose prohibitions on the off-reservation sale of fish caught on the reservation. The limitation on State authority to impose such prohibitions against a tribal member is incident to the Indian tribe’s reserved hunting, fishing and gathering rights, and this case law should be reflected in Section 12300. To that end, we propose including both the statement making the code inapplicable to the activities of a tribal member while on the Indian country of his or her tribe or a tribal member who is otherwise exercising his or her tribe’s federally reserved fishing, hunting, or gathering rights.

The Trinidad Rancheria agrees with the Law Revision Commission staff memorandum’s assessment that P.L. 280 has little or no effect on the ability of the state to regulate tribal fishing. Further, as the memorandum correctly points out, P.L. 280 has been construed not to grant states general regulatory authority over tribes, and, as such, the provision referencing the effective date of P.L. 280 unhelpful and misleading. Based on this analysis, the Trinidad Rancheria agrees with the Yurok Tribe’s suggestion to strike the following from subdivision (a) of Section 12300: “and under those circumstances in this state where the code was not applicable to them immediately

² See *In re Wilson*, 30 Cal. 3d 21 (1981). In this case, the court noted that aboriginal hunting and fishing rights are incidental to the right of occupancy, which is an incident of aboriginal title. *Id.* at 29-30. The court, however, found that the aboriginal title of a specific tribe (not the Trinidad Rancheria) was extinguished, and that when the tribe’s Indian title was extinguished, so to were the tribe’s aboriginal hunting rights. *Id.* at 35. As noted above, the Trinidad Rancheria has not ceded any such rights and the Tribe believes that the holding of the *In re Wilson* decision, which is specific to the unique facts of another tribe, does not extend to the Trinidad Rancheria. We refer the Law Revision Commission to the dissent filed by Justice Mosk in *In re Wilson*, which was concurred in by Justice Newman. *Id.* at 37 – 42.

³ See Wood, *supra* note 1, at 356 – 361.

before the effective date of Public Law 280, Chapter 505, First Session, 1953, 83d Congress of the United States.”

The Commission staff memorandum indicates that there may be some exceptional circumstances where a court might authorize the State to regulate the hunting and fishing of a tribal member while on his or her tribe’s reservation (Indian country). The memorandum suggests inserting the following clause at the end of the subdivision (a) of Section 12300: “where federal law would preclude state regulation of the conduct at issue.”

As support for this suggestion, the memorandum cites to the decision in *Puyallup Tribe, Inc. v. Department of Game of State of Washington*, 433 U.S. 165 (1977). To our knowledge *Puyallup Tribe* is the only decision upholding the right of a state to regulate the fishing of tribal members within the reservation, and the facts in that case are truly exception and not applicable to California. In particular the Court noted that all but 22 acres of the 18,000-acre Puyallup Reservation was owned in fee status rather than held in trust, and the Court applied a provision in the Tribe’s treaty that pertained to off-reservation fishing. *Id.* at 174-175. The memorandum also cites to California case law suggesting, but never holding, that the State may regulate the on-reservation fishing of tribal members within their tribe’s reservation.

Additionally, the revision suggested in the memorandum is so broad that it could be interpreted as swallowing the entire section 12300. Such an interpretation would, in effect, require that in order to conclude that the state’s regulation does not apply one must first undertake a preemption analysis to determine whether the actions of the individual Indian, on the Indian country of his or her tribe, were subject to state code and state prosecution. The clarity of a bright line rule would be preferable. The Trinidad Rancheria, therefore, objects to this suggested provision and the related suggestion that the inapplicability of the state code be limited to circumstances “where preempted by federal law.”

The Commission staff memo suggests striking the first sentence of subdivision (b), which provides that “[n]o Indian described in subdivision (a) shall be prosecuted for the violation of any provision of this code occurring in the places and under the circumstances described in subdivision (a).” Trinidad Rancheria disagrees with this suggestion. Although it is logical that no person should be prosecuted under the code for actions where the code is inapplicable, an express prohibition serves a purpose, especially for a population that has been subject to historic institutional discrimination by the State, by making it absolutely clear that such prosecutions are barred. We are also concerned that the removal of the long-standing provision may be misinterpreted.

The Trinidad Rancheria agrees that the second sentence in subdivision (b) of Section 12300 conflicts with applicable case law, and we agree with the proposed to strike that sentence.

Below are the changes to Section 12300 proposed by the Trinidad Rancheria:

(a) Notwithstanding any other provision of law, the provisions of this code are not applicable to the member of a federally recognized Indian tribe whose Indian country, as defined in 18 U.S.C § 1151, is located wholly or partially within the state ~~California Indians whose names are inscribed upon the tribe tribal rolls, while on lands within reservation of that tribe's Indian country, or who is otherwise exercising that tribe's federally reserved fishing, hunting or gathering rights. and under those circumstances in this state where the code was not applicable to them immediately before the effective date of Public Law 280, Chapter 505, First Session, 1953, 83d Congress of the United States.~~

(b) No Indian described in subdivision (a) shall be prosecuted for the violation of any provision of this code occurring in the places and under the circumstances described in subdivision (a). ~~Nothing in this section, however, prohibits or restricts the prosecution of an Indian for the violation of a provision of this code prohibiting the sale of a bird, mammal, fish, amphibian, or reptile.~~

The reason that we include the words “or partially” in our suggested revision is to recognize that there are some tribes whose reservations are located partially within California and partially within other states.

Conclusion

The Trinidad Rancheria appreciates the Law Revision Commission's review of these important matters and the thoughtful analysis prepared by the Commission's staff, and the opportunity to submit these comments. Please contact Shirley Laos, Governmental Affairs Coordinator at (707) 677-0211 if the Law Review Commission has any questions regarding our comments.

Sincerely,



Garth Sundberg
Tribal Chairperson