

California MLPA Blue Ribbon Task Force
Guidance Motions Related to Tribes and Tribal Communities Adopted at the
March 18, 2010 MLPA Blue Ribbon Task Force Meeting
Revised March 25, 2010

At its March 18, 2010 meeting, the California Marine Life Protection Act (MLPA) Blue Ribbon Task Force (BRTF) continued its discussion regarding potential tribal legal questions, tribal uses of marine resources, and how the MLPA North Coast Regional Stakeholder Group (NCRSG) should take into account those uses in developing draft marine protected area (MPA) proposals. At this meeting the BRTF received a memo from MLPA staff (Attachment A) with suggestions regarding potential legal questions submitted by task force members and how the NCRSG should consider tribal uses of marine resources in developing draft MPA proposals. The BRTF also received and discussed a statement from the InterTribal Sinkyone Wilderness Council regarding a tribal use policy (Attachment B).

The BRTF took two actions on these subjects:

1. The BRTF received a memo from the InterTribal Sinkyone Wilderness Council and some BRTF members had not had sufficient time to review and consider the points made. After a robust discussion about four bulleted points highlighted in the memo and potential use of the language for providing guidance to the NCRSG, the BRTF requested that staff make available to the public and California tribes and tribal communities the InterTribal Sinkyone Wilderness Council memo, requesting input on the four bulleted points. The BRTF may provide additional guidance to the NCRSG based on any input received on the four bullet points.
2. The BRTF provided guidance to the NCRSG as follows:
 - a. In developing MPA proposals, the NCRSG should strive to accommodate non-commercial, traditional subsistence, religious, cultural and other customary tribal gathering uses, by identifying such gathering uses as permitted in MPAs, understanding that some traditional gathering uses may render an MPA as requiring a specific classification as a state marine conservation area or state marine park and potentially with a level of protection that is different from a state marine reserve. This guidance is consistent with previous BRTF guidance as confirmed on March 1, 2010 (see Attachment C for the January 13, 2010 MLPA staff memo with an updated summary of key guidance provided in previous MLPA study regions) and is supplemental to, but does not in any way replace, prior guidance.
 - b. NCRSG members should work with one another and members of California tribes and tribal communities to understand traditional tribal gathering areas, including high-priority areas, and use this information in developing MPA proposals. It is important that California tribes and tribal communities communicate and share information within the MPA planning process to help ensure that traditional tribal gathering areas are affected to the least extent possible by proposed MPAs.
 - c. NCRSG members should recommend potential co-management opportunities or approaches that can be recommended to the State of California.

- d. NCRSG members should recommend mechanisms for characterizing traditional gathering uses in a respectful manner, so that MLPA Initiative staff and the BRTF can understand how best to classify any MPA that may be coexistent with traditional tribal gathering areas.

ATTACHMENT A

California Marine Life Protection Act Initiative

1416 Ninth Street, Suite 1311 Sacramento, CA 95814 916.654.1885

March 17, 2010

Dear Chair Gustafson,

Per your request, MLPA Initiative senior staff has reviewed the legal questions provided to you by MLPA Blue Ribbon Task Force (BRTF) members Meg Caldwell and Roberta Cordero. We believe some of these questions may be answered when we complete our expanded tribal regional profile appendix next month, but most are best combined and answered in a longer term process that will go well beyond our October completion date for the MLPA North Coast Study Region.

In our continuing discussions with the California Fish and Game Commission and California Department of Fish and Game (DFG) legal staff, all advise that (1) the commission needs to continue its legal obligation of not granting exemption to any party from the MLPA, (2) the commission does not have the legal authority to grant an exclusive use for tribes or tribal communities without legislation, and (3) both the commission and DFG should continue discussions with the tribes and tribal communities. We have requested formal legal written advice from DFG be delivered to the BRTF as soon as possible. Once this guidance and legal framework are formally in place, further discussion on these matters seems outside the charge of the BRTF.

Policy guidance based on legal consultation to date is that state marine reserves should be outside of tribal gathering areas. When this is not possible, these areas should be characterized and protected in a state marine conservation area or a state marine park that does not attempt to provide exclusive use. The language that the BRTF drafted and is being considered at this Thursday's teleconference meeting is consistent with that policy guidance and encourages stakeholders to put forward other options within that guidance that offer potential approaches and mechanisms for respectfully characterizing how traditional gathering uses and locations can co-exist within an MPA. Such options may be able to be put forward as part of the BRTF's final October recommendations or they may need to become part of a longer term process that is scheduled to begin with an April 9 meeting in Sacramento; that meeting will bring together DFG, California State Parks, and California coastal tribes and tribal communities from throughout the state to establish a framework and timeline for addressing these major legal and legislative issues over the longer term.

Sincerely,

Ken Wiseman
on behalf of senior staff



ATTACHMENT B
InterTribal Sinkyone Wilderness Council

P.O. Box 1523 Ukiah, CA 95482 Phone (707) 468-9500

InterTribal Cultural Conservation for Sinkyone Indian Lands



California Marine Life Protection Act Initiative

Blue Ribbon Task Force

Meeting of March 18, 2010

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**STATEMENT OF INTERTRIBAL SINKYONE WILDERNESS COUNCIL
ON TRIBAL USE POLICY**

The InterTribal Sinkyone Wilderness Council takes this opportunity to comment on the Initiative's development of a Tribal Use Policy. We understand the Blue Ribbon Task Force (BRTF) intends to adopt such a policy in order to guide the Regional Stakeholder Group's evaluation of external and internal arrays. The need for such guidance arises from the regrettable fact that the Marine Life Protection Act neglected to explicitly address Tribal rights and interests. We are confident, however, that a policy can be devised that avoids interference with long-established Tribal traditional cultural subsistence uses, and at the same time stays within the legal parameters of the Act and other provisions of State and federal law.

We agree with the sum and substance of the prior BRTF discussion that a "policy of affirmation" of the rights of Indian Tribes to continue their traditional uses is most appropriate. We have revised our earlier draft policy recommendation to take into account the emerging consensus on the BRTF that Tribal uses should be protected by avoiding those areas along the North Coast where such uses have traditionally been carried out. In our view, the policy directive to the Regional Stakeholder Group should include the following:

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- Arrays developed by the Regional Stakeholder Group (RSG) should accommodate traditional cultural subsistence, ceremonial and other customary uses of marine resources carried out by the North Coast Tribes and Tribal Communities of Mendocino, Lake, Humboldt, and Del Norte Counties pursuant to aboriginal right or long-established continuous practice by either:
 - a) Delineating Marine Protected Area (MPA) boundaries that do not overlap with such cultural use areas; or
 - b) Identifying such uses as permanently permitted uses within the MPAs.
- The Regional Stakeholder Group should consult with North Coast Tribes to understand the nature and scope of Tribal uses and should further develop proposed MPAs in ways that do not interfere with such uses.
- The Regional Stakeholder Group should identify and recommend to the Blue Ribbon Task Force potential co-management approaches for effective stewardship of critical marine resource areas, consistent with State and federal law.
- The Regional Stakeholder Group's recommendations to the Blue Ribbon Task Force regarding any Tribal issues need to be provided to the Tribes for their review and input prior to the Stakeholder Group submitting such recommendations to the Blue Ribbon Task Force.

We understand the Initiative staff has sought legal advice and guidance from counsel for the Department of Fish and Game and/or the Office of the Attorney General. Our concern is that the array evaluation process now underway may advance too quickly for the legal guidance to have its maximum utility. To address this concern, we would like to suggest that until the guidance is forthcoming, the BRTF direct the RSG to draw the boundaries of MPAs to avoid those areas identified by the Tribes as traditional cultural subsistence use areas. The Tribes have repeatedly made the point that avoiding interference with their traditional cultural uses is consistent with the MLPA's goal of protecting, stewarding and conserving marine resources. This pivotal point is supported by the documented facts that, since the beginning of time, the Tribes have been responsible stewards of their aboriginal lands and waters, and that continued Tribal uses have minimal adverse impacts to marine resources. No further legal authority for a policy of avoidance is needed.

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If this conclusion turns out to be wrong, and insurmountable legal obstacles to accommodating Tribal uses in this way are identified, at that time the Initiative can undertake further consultations with Tribes to develop other measures designed to maintain consistency with State and federal law. Tribal uses cannot be ignored in these early stages of MPA development; otherwise, subsequent revisions to the MPAs will be much more difficult and problematic. **If such revisions cannot be or are not made, the Initiative will have failed in its goal to respond favorably to the concerns of sovereign Indian Tribes.** Having heard from more than 25 North Coast Tribes of the paramount concern of continuing traditional uses, the Initiative should not proceed further with MPA development without first addressing such uses.

In addition to this concern with timing, the InterTribal Sinkyone Wilderness Council is also concerned about several proposals for the process by which the Tribal Use Policy may be adopted. We do not support the creation of a tribal advisory group to recommend a policy because this would defeat the goal of conducting direct and genuine consultation with individual North Coast Tribes.

Finally, we understand the BRTF has considered hiring outside counsel to give advice and recommendations for a Tribal Use Policy. Although such advice would be welcome, we do not believe it is necessary at this time. Counsel for the InterTribal Sinkyone Wilderness Council can assist the attorneys for the Department of Fish and Game and in the Office of the Attorney General in working through all the legal questions that have arisen. Together, we believe counsel for the Tribes and the Initiative can develop creative solutions to reaching the goal of the BRTF of avoiding interference with the traditional cultural subsistence uses of North Coast Tribes.

Thank you for your consideration of our views.

ATTACHMENT C

California Marine Life Protection Act Initiative

1416 Ninth Street, Suite 1311 Sacramento, CA 95814 916.654.1885

To: MLPA Blue Ribbon Task Force
From: MLPA Initiative Staff
Subject: Updated Summary of Key Guidance Provided in Previous Marine Life Protection Act Study Regions for the Development of Marine Protected Area Proposals
Date: January 13, 2010

The purpose of this memorandum is to summarize key guidance provided by the Marine Life Protection Act (MLPA) Blue Ribbon Task Force (BRTF) in previous MLPA study regions so that the BRTF may consider how that guidance may or may not apply to the MLPA North Coast Study Region.

The MLPA Initiative began along the central California coast in a pilot project, from Pigeon Point in San Mateo County to Point Conception in Santa Barbara County. Upon successful completion of a recommendation for marine protected areas (MPAs) along the central coast, the next project undertaken was in the north central coast (Alder Creek near Point Arena in Mendocino County to Pigeon Point) and, ultimately, the south coast (Point Conception to the California/Mexico border in San Diego County). In each of these three study regions the BRTF provided specific guidance regarding the development of MPA proposals; attached to this memo are various staff memos with the previous guidance, key points of which are summarized below.

1. Science Guidelines

Place Strong Emphasis on MPAs that Meet the Science Guidelines for "Preferred" Size and Spacing.

Regional stakeholder group members and authors of draft external MPA proposals were advised to place strong emphasis on meeting the science guidelines outlined in the *California Marine Life Protection Act Master Plan for Marine Protected Areas*, including meeting "preferred" MPA size and MPA spacing. The BRTF indicated that marine reserves would, per the MLPA, serve as the "backbone" of any proposed network and requested that proposals include MPAs with "very high" or "high" levels of protection to meet that goal. The BRTF also indicated that proposals could include MPAs with "moderate-high" levels of protection, though they would not contribute toward meeting the master plan science guidelines; the BRTF would seriously consider such proposals and use all SAT-evaluated levels of protection when considering alternative MPA proposals and their potential socio-economic consequences.

2. SAT Evaluations

Place Great Weight on the Results of the MLPA Master Plan Science Advisory Team Evaluations of Marine Protected Area Proposals

Regional stakeholder group members and authors of draft external MPA proposals were advised to incorporate feedback from the MLPA Master Plan Science Advisory Team (SAT), especially results from evaluations of habitat representation, habitat replication, MPA size, and MPA spacing. In the south coast, results of bioeconomic modeling helped address contributions of MPAs proposed at offshore islands,

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where the BRTF agreed, under the advice of the SAT, that the science spacing guidelines did not apply as they did along the mainland coast. The BRTF indicated that the bioeconomic models represented a useful tool that should be utilized in conjunction with, but not in place of, the other SAT analyses.

3. Cross-Interest Support

Cross-interest Support for MPA Proposals is Very Important and Will be Given Great Weight; Strive for Convergence Where Possible

The long-term success of a statewide system of MPAs is dependent upon the active involvement and support of local communities and user groups; cross-interest support is therefore important for helping to ensure community support of an MPA network, both statewide and regionally. Regional stakeholder group members in each study region were charged with creating cross-interest MPA proposals that focused on “middle-ground” options. Cross-interest support was defined as support across a broad range of consumptive and non-consumptive interests, which may include commercial and recreational fishermen, divers, conservation groups, educational and research institutions, military organizations, and federal and state government agencies, tribal governments, and local communities, among others. Stakeholders were advised that MPA proposals that did not reflect cross-interest support would carry less weight in the planning process and might not carry forward to the final round of MPA proposal development.

4. California Department of Fish and Game Feasibility Criteria

Give Strong Consideration to the California Department of Fish and Game Feasibility Criteria and Provide Specific Rationale for Deviations

A statewide system of MPAs must be designed in such a way that it can be feasibly managed by the appropriate organizations. Stakeholders were strongly encouraged to consider the California Department of Fish and Game (DFG) feasibility criteria and address feedback from DFG in developing their MPA proposals. The BRTF indicated that MPA proposals that did not meet DFG feasibility criteria should include a specific rationale as to why they did not. Stakeholders were asked to pay particular attention to enforceability of MPAs, including clear and simple boundaries and regulations. Stakeholders were asked to avoid proposing MPAs that provide minimal amounts of protection and provide clear rationale where MPAs of this nature were included in their MPA proposals. Stakeholders were also asked to recognize that the development of fisheries regulations is outside the purview of the MLPA and to follow the DFG guidance to avoid proposing fisheries regulations within MPAs beyond identifying allowed take (of species and by what gear type).

5. Water Quality

Water Quality Considerations are Secondary to the Science Guidelines of the MLPA and Master Plan

The BRTF indicated that water quality was important to consider in MPA planning, and that the SAT has provided excellent information regarding both opportunities for siting MPAs, such as in areas of special biological significance, and areas to be avoided. Stakeholders were asked to incorporate this information into MPA planning, but also to note that water quality considerations are secondary to the ecological function goals and guidelines of the MLPA and the *California Marine Life Protection Act Master Plan for Marine Protected Areas*.

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6. Use of Best Readily Available Data

Utilize the Best Readily Available Science and Information as Directed by the MLPA

Stakeholders and members of the SAT were asked to utilize the best readily available science and information in developing MPA proposals. The BRTF recognized that fine scale substrate data was not always available in all areas, but noted that the MLPA requires the use of best readily-available science and information, not the gathering of new data and information. The BRTF also recognized that the SAT developed methods for addressing habitat data gaps and clarified those methods for stakeholders and authors of external proposals. The BRTF found the treatment of data gaps adequate and directed stakeholders to move forward with the readily available data.

7. Funding

Long-Term Funding for Implementation and Management is Important, but Does not Affect the MPA Planning Process

The BRTF recognized that the MLPA Initiative is focused on the planning phase of implementing the MLPA. The BRTF provided feedback to the State of California in the first phase of the MLPA Initiative regarding options for long-term funding and recommendations for which options to pursue. The BRTF indicated its support for identifying funding for long-term implementation and management, but also noted that issues of long-term funding would not affect the MPA planning process. Secretary for Resources Mike Chrisman has provided similar guidance to the BRTF, California Fish and Game Commission and members of the public.

8. Special Closures

Special Closures May be Useful in Specific Cases, but Should be Used Sparingly and Selectively

Special closures are designated by the California Fish and Game Commission in the marine environment to provide geographically-specific protection of resources from human activities. The BRTF directed that the main focus of the regional stakeholder group is to develop alternative MPA proposals. In some instances special closures may offer protection, such as to breeding seabird and marine mammal populations, from geographically-specific threats that are not necessarily addressed by MPAs, including disturbance. The BRTF indicated that the regional stakeholder group could elect to include recommendations for special closures so long as it did not detract from completing the primary task of developing alternative MPA proposals. The BRTF stated that special closures should be used sparingly and selectively.

9. Military Use Areas

Military Use Areas May be Proposed as MPAs, Taking into Consideration that Some Military Activities May be Inconsistent with MPA Goals

For the MLPA South Coast Study Region, where military use areas are more prevalent than in other MLPA study regions, the BRTF provided very specific advice about individual military use areas and how they were to be treated in MPA proposals. More generally, the task force also said:

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- Stakeholders and authors of external proposals were given the flexibility to propose MPAs within military use areas
- Stakeholders and authors of external proposals were asked to work with military representatives to address military uses and interests.
- The BRTF directed stakeholders and authors of external proposals to consider available information on where different kinds of military uses occur that may be inconsistent with MPA goals