

**FIRST IN TIME
FIRST IN RIGHT**
TRIBAL WATER RIGHTS

SAVE CALIFORNIA SALMON



Photo Credit:
Eel River Recovery Project

Save California Salmon

Save California Salmon (SCS) is dedicated to policy change and community advocacy for Northern California's salmon and fish dependent people. We support local communities advocating for effective policy change protecting clean water, restored fisheries and vibrant communities.

We aim to support Tribal and Non-Tribal Communities to engage in public comments related to water pollution, fishers and tribal beneficial uses.

SCS Core Values:

- Support Tribal Rights
- Education
- Youth Leadership
- Water Advocacy
- Social Media Outreach



CNR Tribal Water Summit 2023

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FIRST IN TIME, FIRST IN RIGHT

TRIBAL WATER RIGHTS



Tribal Water Rights

What are Tribal Water Rights and how do they apply to the Potter Valley Project?

The intention of this presentation is to provide knowledge and resources related to Tribal Water Rights.

Tribal Water Rights with respect to Federally Recognized Tribes represent a tri-lateral government system.

Tribal land management may subject to the Administrative Procedures Act meaning judicial decisions are not the single form of adjudication in respect to “dealing with Native Americans” making our dependent nation status unique.

Disclaimer: This presentation is based on my knowledge as Tribal Member, Indigenous Peoples Master Law Student, and Advocate for Tribal Waters and Lands. It does not represent the Round Valley Indian Tribes Tribal Council.



Water Rights System

Tribal Water Rights Cannot Be Destroyed by State Water Law

Water Rights are the entitlement authorizing water usage, these are property rights, holders do not own the water, but the right to use. The California State Water Board may be called upon to adjudicate California water rights, in respect to Tribal Water Rights, both state and federal laws apply.

Tribal Water Rights Equal Senior Water Rights

In Winters, the Supreme Court examined tribal rights to water associated with the Fort Belknap Reservation located in what would later become Montana. The Fort Belknap Reservation was created by an agreement in 1888 between tribal parties and the U.S. government. At the time, the government had a policy seeking to transform Native Americans from “a nomadic and uncivilized people ... to become a pastoral and civilized people” by providing them lands to develop for such purposes.

The Winters Doctrine held Federally reserved lands have a right to use sufficient water to fulfill the “primary purpose” of the reservation, claiming;

Tribal Water Rights Cannot Be Destroyed by State Water Law or By Water Users Acting in Accordance with State Law

EEL RIVER BASIN

The Eel River is the 3rd largest salmon bearing river in California. The river flows through multiple counties, over multiple agency jurisdictions and private lands. It holds tribal significance in place names, representing the ancestral territory of both recognized, and non-recognized tribes from Humboldt, Trinity, Mendocino, and Lake counties. Federally recognized tribes include;

The Rhonerville Rancheria Bear River Band,

The Wiyot Tribe,

Cahto Tribe of Laytonville Rancheria

The Round Valley Indian Tribes,

Sherwood Valley Band of Pomo Indians

The Potter Valley



Public Concerns

Why is Round Valley Indian Tribes the lead tribe or only proponent?

The Potter Valley Project is located in the ancestral territories of the Yuki and Pomo Tribes. The Eel River Basin includes several tribal territories including the Wailaki. The Round Valley Indian Tribes is the only tribe where the (7) Yuki Triblets and Wailaki Tribes are federally recognized.

The 1852 Congressional Act creating the Round Valley Indian Community, known today as Round Valley Indian Tribes, pre-dates any other water right, First In Right, First In Time.

Round Valley Indian Tribes holds a Senior Water Right as the Eel River is adjacent, surrounding the Round Valley Indian Reservation holding a riparian right.





The Round Valley Indian Tribes (RVIT) is 1 of 5 California reservations established by the U. S. by Executive Order in 1852. The Nome Cult Farm, is an administrative extension of the Nome Lackee Reservation, where six tribes were force relocated into aboriginal Yuki territories.

Today the ancestral territories of the seven confederated tribes of RVIT, roughly 5,600 federally recognized members, span from the border of California and Nevada to the Pacific Coast over multiple water basins including the Eel River.

The 7 Confederated Tribes have not relinquished the right to our ancestral lands, our water rights, nor have we relinquished our hunting, fishing and gathering rights in our ancestral and or aboriginal territories.



Donnelly v.

U.S., 228 US 243 SC 1913

Donnelly v. US, 228 US 243 SC 1913 provides, Congress itself recognized the Hoopa Valley Reservation as lawfully existing, at least as early as July 27, 1868 (15 Stat. 198, 221, c. 248), when it appropriated money "to pay the settlers of Hoopa Valley for their personal property left upon the Hoopa Valley Reservation at the time the Government took possession;" and also "for removing the Indians from Smith's River Reservation to Hoopa Valley and Round Valley Reservations ... and the Smith River Reservation is hereby discontinued;" and again, in the following year, (act of April 10, 1869, 16 Stat. 13, 37, c. 16), when it appropriated money for the pay of a miller upon the Hoopa Valley Reservation, and "to supply a deficiency for removing the Indians from Smith's River Reservation to Hoopa Valley and Round Valley Reservations."

Fish & Game Code

Covelo Indian Community

§ 16002. “Covelo Indian Community” “Covelo Indian Community” means the confederated tribes of the Round Valley Indian Reservation located in Mendocino County, California, recognized as an Indian tribe by the Secretary of the Interior

§ 16004. “Traditional Indian fishing practice” “Traditional Indian fishing practice” means a mode, method, or way of taking fish that is recognized in the customs and traditions of the Covelo Indian Community.

§ 16005. “Historic 1873 Round Valley Indian Reservation” “Historic 1873 Round Valley Indian Reservation” means the reservation described and set aside by Congress for the Covelo Indian Community in the Act of March 3, 1873 (17 Stat. 633).

Fish & Game Code

Chapter 1. Legislative Findings

§ 16000. Legislative findings and declarations

The Legislature finds:

- (a) Jurisdiction over the protection and development of natural resources, especially the fish resource, is of great importance to both the State of California and California Indian tribes.

- (b) To California Indian tribes, control over their minerals, lands, water, wildlife, and other resources is crucial to their economic self-sufficiency and the preservation of their heritage. On the other hand, the State of California is concerned about protecting and developing its resources; protecting, restoring, and developing its commercial and recreational salmon fisheries; ensuring public access to its waterways; and protecting the environment within its borders.

ABN. 1936, Chapter 478

S.C. Hastings and the state bear significant responsibility for the irreparable harm caused to the Yuki people and the Native American people of the State.

On September 23, 2022, The People of the State of California enacted, AB 1936, Section 1. states; The Legislature finds and declares founder, S.C. Hastings, perpetrated genocidal acts against Native California Indigenous Peoples, specifically the Yuki Tribe, in the 1850s in the Eden Valley and Round Valley Areas in the County of Mendocino.

- (q) S.C. Hasting, promoted and financed Native American hunt expedition in the Eden and Round Valleys’, funding bounties resulting in the massacre of hundreds of Yuki women and Children***
- (r) S.C. Hastings enriched himself through the illegal seizure of large parts of these lands and financed the College***
- (s) S.C. Hastings and the state bear significant responsibility for the irreparable harm caused to the Yuki People and the Native American people of the State***
- (t) The state has formally apologized to the Native American people of the state for the genocide financed and perpetrated by the state.***

The State of California

Executive Order N-15-19

Acknowledges and apologizing on behalf of the State for the historical violence, exploitation, dispossession and attempted destruction of tribal communities.

Executive Order B-10-11

It is the policy of the state administration that every state agency and department subject to executive control is to encourage communication and consultation with California Native American tribes.

Executive Order N-82-20

Addressing biodiversity crisis accelerating nature-based solutions requires inclusive partnerships and collaboration among federal, state and local governments and California Native American tribes.

Senate Bill (SB) 535 (De León, Chapter 830, Statutes of 2012)

CalEPA designated disadvantaged lands, including but not limited to Federal American Indian Reservations and lands held in trust by the United States, for the benefit of American Indian tribes in California (collectively, Tribal Lands)

4. Lands Under Federally Recognized Tribes

CalEPA designated disadvantaged lands under the control of federally recognized Tribes, including but not necessarily limited to Federal American Indian Reservations and lands held in trust by the United States for the benefit of American Indian tribes in California (collectively, Tribal Lands). Data gaps related to Tribal nations make it difficult to accurately assess pollution burden and population characteristics of these areas specifically, because sovereign governments, federally recognized Tribes in California, are not required to report or make publicly available to the state.

Tribal representatives raised concerns that data gaps represent federally recognized Tribes in California have been effectively excluded from California Climate Investments -related funding despite frequently high levels of poverty, health and environmental burden, related to the historical violence and deprivation federally recognized Tribes in California have endured.

Tribal Beneficial Uses

California State Water Board

A group of beneficial uses that can help **protect activities specific to Native American cultures and their uses of California waters**, including the consumption of non-commercial fish or shellfish. Can also be referred to as **cultural uses of water**.

Tribal Tradition and Culture (CUL): Uses of water that support the cultural, spiritual, ceremonial, or traditional rights or lifeways of California Native American Tribes, including, but not limited to: navigation, ceremonies, or fishing, gathering, or consumption of natural aquatic resources, including fish, shellfish, vegetation, and materials.

Tribal Subsistence Fishing (T-SUB): Uses of water involving the non-commercial catching or gathering of natural aquatic resources, including fish and shellfish, for consumption by individuals, households, or communities of California Native American Tribes to meet needs for sustenance.

Subsistence Fishing (SUB): Uses of water involving the non-commercial catching or gathering of natural aquatic resources, including fish and shellfish, for consumption by individuals, households, or communities, to meet needs for sustenance.

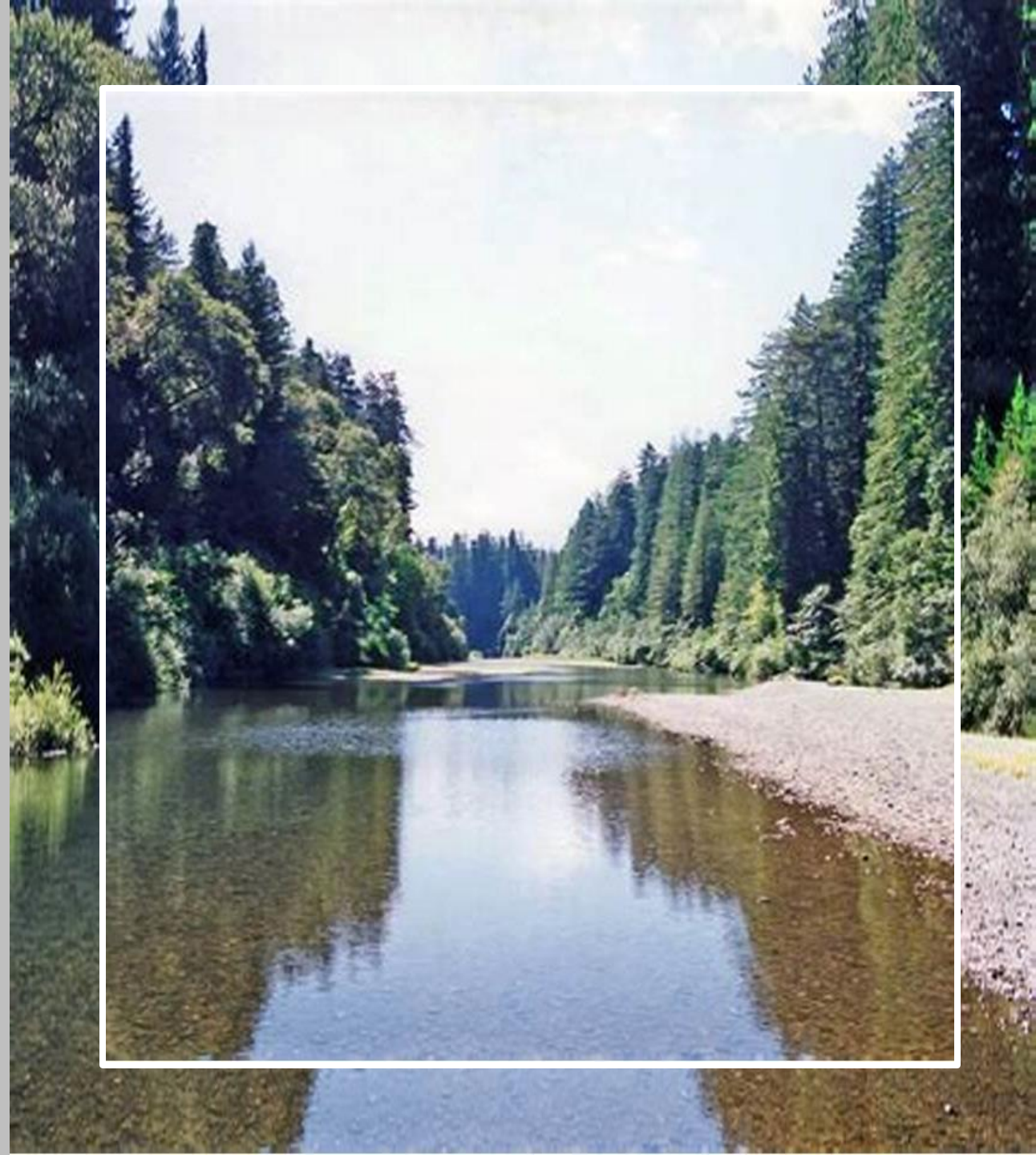


Environmental & Social Justice Action Plan

“Environmental Justice” means the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.

The California Public Utilities Commission (CPUC) regulates essential utility services to consumers, safeguards the environment, assuring safe and reliable access to all Californians. CPUC created the Environmental and Social Justice (ESJ) Action Plan to serve as a commitment to furthering ESJ principles, an operating framework to integrate the agency work.

Serving all Californians effectively, CPU must acknowledge that some populations in California face higher barriers to access to clean, safe, and affordable utility services.



US EPA

Federal Guidance on Environmental Justice Executive Order 12898

[Executive Order 12898 \(February, 1994\)](#), directs each Federal Agency to “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations,” including tribal populations.

The Memorandum calls for agencies to address significant adverse environmental effects on these communities in mitigation measures outlined or analyzed in:

- Environmental assessments (EAs)
- Findings of no significant impact (FONSIs)
- Environmental impact statements (EISs)
- Records of decision (RODs)



Public Comments

Round Valley Indian Tribes says, "but they haven't yet adjudicated their water right!?"

The adjudication process in regards to Water Rights and Indian Tribes does not refer only to Judicial Findings. The Round Valley Indian Tribes has not filled a case in court to claim violations of our water rights, this does not mean that our water rights do not exist.

The Tribe, in the Winters Case, have not "adjudicated" their water right in the court, as of date.

Round Valley Indian Tribes has filled other cases in the court and are referenced in case law holding tribal territories are inclusive of fishing, hunting and water rights.



Secretarial Order Nb. 3403

Joint Secretarial Order No. 3403 Fulfills the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters. Issued by the Secretary of Agriculture and the Secretary of the Interior (Secretaries) to ensure that the Department of Agriculture, the Department of Commerce, the Department of the Interior (Departments) and their component Bureaus and Offices are managing Federal lands and waters in a manner that seeks to protect the treaty, religious, subsistence, and cultural interests of federally recognized Indian Tribes consistent with the nation-to-nation relationship between the United States and federally recognized Indian Tribes; and, that such management fulfills the United States' unique trust obligation to federally recognized Indian Tribes and their citizens.

Covelo Indian Community v. FERC, 895 F.2d 581

Covelo Indian Community v. FERC, 895 F.2d 581, states the underlying premise is that congressional intent will control. [*DeCoteau v. District County Court, supra*](#), [420 U.S.] at 444, 449, [95 S.Ct., at 1092, 1095]; [*United States v. Celestine*](#), 215 U.S. 278, 285, [30 S.Ct. 93, 94, 54 L.Ed. 195] (1909). In determining this intent, we are cautioned to follow "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" [*McClanahan v. Arizona State Tax Comm'n*](#), 411 U.S. 164, 174 [93 S.Ct. 1257, 1263, 36 L.Ed.2d 129] (1973), quoting [*Carpenter v. Shaw*](#), 280 U.S. 363, 367, [50 S.Ct. 121, 122, 74 L.Ed. 478] (1930); see also [*Mattz v. Arnett, supra*](#), [412 U.S.] at 505, [93 S.Ct., at 2258]. The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status.

Covelo Indian Community v. FERC, 895 F.2d 581

Covelo Indian Community v. FERC, 895 F.2d 581 exerts, As an agency of the federal government, FERC is subject to the United States' fiduciary responsibilities towards Indian tribes. See [*Nance v. EPA, 645 F.2d 701, 711 \(9th Cir.\), cert. denied, 454 U.S. 1081, 102 S.Ct. 635, 70 L.Ed.2d 615 \(1981\)*](#). The same trust principles that govern private fiduciaries determine the scope of FERC's obligations to the Community. See [*Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation, 792 F.2d 782, 794 \(9th Cir.1986\)*](#). The Community, known today as the Round Valley Indian Tribes, by virtue of being located on the Round Valley Indian Reservation, has statutory fishing rights in the Eel River. See 17 Stat. 633 (1873). This should sufficiently establish the Community's property right for purposes of due process analysis.

LEGAL OVERVIEW

Adjudication

The legal process of resolving a dispute, deciding a case based on claims to the courts identifying the rights of both parties. Adjudication also refers to the judicial decision, judgment is determined by the doctrine of former adjudication; collateral estoppel and res judicata.

5 U.S. Code § 554 - Adjudications

(a) applies, according to the provisions thereof, in every case of [adjudication](#) required by statute to be determined on the record after opportunity for an [agency](#) hearing, with exceptions

Abrogation

Formally annul or repeal a law through an act of legislation, constitutional authority or custom. In Constitutional Law the abrogation doctrine refers to the power of Congress to revoke a states sovereign immunity and authorize lawsuits against the states sovereign

Regulation

Regulation, is an official rule, administrative agencies have an authority to control conduct, within their area of responsibility. Agencies are delegated legislative power to create and apply rules and regulations

LEGAL OVERVIEW CONTINUED

The Administrative Procedure Act (APA)

The Administrative Procedure Act (APA) is a federal [act](#) that governs the procedures of [administrative law](#). The APA is codified in [5 U.S.C. §§ 551–559](#). The act establishes how federal [administrative agencies](#) create [rules](#) and [adjudicate](#) administrative litigation.

[5 U.S.C. § 551\(5\)–\(7\)](#) clarifies the “agency process for formulating, amending, and repealing a rule,” adjudication is the final disposition of an agency matter other than rulemaking. That is, rulemaking goes beyond resolution of specific controversies between parties and includes management and administrative functions. Rulemaking and adjudication can be formal or informal, which in turn determines which APA procedural requirements apply. The APA applies to the different types of administrative actions as follows:

1. Formal Rulemaking. [5 U.S.C. §§ 553, 556, and 557](#) govern formal rulemaking.
2. Informal Rulemaking. [5 U.S.C. § 553](#) governs informal rulemaking.
3. Formal Adjudication. [5 U.S.C. §§ 554, 556, and 557](#) govern formal adjudication.
4. Informal Adjudication. The APA does not establish procedural requirements for informal administrative adjudication, but the [Due Process Clause](#) of the constitution, the specific agency’s regulations, or other [statutes](#) may create procedural protections.

Public Law 280 (67 Stat. 588)

States may not regulate *environmental control*, land use, gambling and licenses on federal Indian reservations.

In 1953, Congress enacted [Public Law 280](#) (67 Stat. 588) (PL 280) granting jurisdiction from the federal government to the states in civil and criminal cases involving American Indians. The law does not grant regulatory power over tribes or lands held in trust by the United States. **States may not regulate environmental control, land use, gambling and licenses on federal Indian reservations.** The U.S. Supreme Court declared regulatory state criminal laws are outside the jurisdiction of PL 280. Prior to the enactment of PL 280 jurisdiction over Native Americans and their lands were held between federal government and the Department of Interior.