

**LAHONTAN REGION
MEETING OF MARCH 9-10, 2016
SOUTH LAKE TAHOE**

ITEM 4

RESCISSION OF WASTE DISCHARGE REQUIREMENTS, BOARD ORDER NO. 6-93-90 FOR THE FORT BIDWELL SEWAGE TREATMENT FACILITY, MODOC COUNTY

CHRONOLOGY

April 25, 1974	Lahontan Water Board adopted Waste Discharge Requirements (WDRs) for the Fort Bidwell Sewage Treatment Facility under Board Order No. 6-74-45.
August 9, 1986	Lahontan Water Board adopted updated WDRs under Board Order No. 6-85-102.
September 9, 1993	Lahontan Water Board adopted updated WDRs under Board Order No. 6-93-90.

BACKGROUND

The Water Board is being asked to rescind Board Order No. 6-93-90, which currently regulates the Fort Bidwell Indian Community Council's (Council) Fort Bidwell Sewage Treatment Facility. Rescinding the Board Order is Water Board staff's recommended response to the Council's past correspondence asserting that the Water Board does not have the authority to regulate waste discharges on lands owned by a federally-recognized Indian tribe (Tribal Lands) without the Tribe's expressed consent.

ISSUES

Should the Water Board rescind Board Order No. 6-93-90 based upon the Council's assertion that the Water Board does not have the authority to regulate waste discharges on lands owned by a federally-recognized Indian tribe without the Tribe's expressed consent.

DISCUSSION

Water Board staff recently re-discovered past correspondence from the Council's legal counsel asserting that the Water Board does not have the authority to regulate waste discharges on lands owned by a federally-recognized Indian tribe (Tribal Lands) without the Tribe's expressed consent. The Council is part of the Paiute Tribe, a federally-recognized Indian tribe. The Council also states in its correspondence that it is not aware of ever providing the Water Board with expressed consent to be regulated. Water Board staff also does not have any knowledge or record of the Council or Paiute Tribe providing such consent.

Water Board staff has consulted with State Water Resources Control Board Office of Chief Counsel (OCC) staff regarding the Council's above-referenced assertion. OCC staff has reviewed its guidance documents related to Water Board regulation of waste

discharges on Tribal Lands, and has concluded that its guidance documents generally support the Council's position.

Therefore, it is in the public's interest to rescind Board Order No. 6-93-90. The Council has expressed its willingness to continue to work together with Water Board staff outside the Water Board's regulatory framework as necessary. Additionally, environmental protection on Tribal Lands is subject to United State Environmental Protection Agency oversight, in addition to Tribal legal controls.

PUBLIC OUTREACH/INPUT

Water Board staff contacted Council representatives and other interested persons to inform them of staff's proposal to rescind the waste discharge requirements. No comments opposing rescission of Board Order No. 6-93-90 were received.

RECOMMENDATION

Adoption of Order as proposed.

ENCLOSURE	ITEM	BATES NUMBER
1	Proposed Rescission Order	4-5
2	California Indian Legal Services Letter Discussing Water Board Authority to Regulate Waste Discharges on Tribal Lands – January 3, 2005	4-11

ENCLOSURE 1

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**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LAHONTAN REGION**

BOARD ORDER NO. R6T-2016-(PROPOSED)

**RESCISSION OF WASTE DISCHARGE REQUIREMENTS
BOARD ORDER NO. 6-93-90
WDID 6A250007000**

FOR

FORT BIDWELL SEWAGE TREATMENT FACILITY

Modoc County

The California Regional Water Quality Control Board, Lahontan Region (Water Board) finds:

1. Discharger and Facility Description

The Fort Bidwell Indian Community Council (hereinafter referred to as “Discharger” or “Paiute Tribe”) owns and operates the Fort Bidwell Indian Community sewage collection, treatment, and disposal system (Facility). The Facility is located on the Fort Bidwell Reservation, about one-half mile from the community of Fort Bidwell, in the Surprise Valley Hydrologic Unit.

The Facility’s sewage treatment and disposal components consists of seven earthen evaporation ponds, five of which contain synthetic liners, surrounded by a chain-link fence. The rectangular basins are similar in size, roughly 200 feet by 250 feet, with a total evaporation surface area of about 4.6 acres. A constructed three-sided underground rock drain intercepts and routes groundwater around the ponds.

2. Permit History

The Water Board previously established waste discharge requirements for the Facility under Board Order No. 6-74-45, Board Order No. 6-85-102, and most recently under Board Order No. 6-93-90, which was adopted on September 9, 1993.

3. Basis for Rescission

The Water Board periodically reviews and updates existing waste discharge requirements in order to incorporate new regulations and policies. Water Board staff recently reviewed records for Board Order No. 6-93-90, as part of the above-referenced review and update program.

Water Board staff observed past correspondence from the Discharger's legal counsel asserting that, without expressed consent being provided by the Paiute Tribe, the Water Board did not have the authority to regulate waste discharges on lands owned by a federally-recognized Indian tribe (Tribal Lands). The Paiute Tribe is a federally-recognized Indian tribe. The correspondence also stated that the Paiute Tribe was not aware of providing expressed consent to be regulated by the Water Board. Water Board staff also is not aware of such expressed consent being provided by the Paiute Tribe.

The State Water Resources Control Board Office of Chief Counsel has provided guidance regarding Water Board regulation of discharges on Tribal Lands. The guidance documents generally support the position outlined in the Discharger's correspondence regarding the matter.

Water Board staff contacted Paiute Tribe representatives to inform them of staff's proposal to rescind the waste discharge requirements. The Paiute Tribe representatives reaffirmed their position that discharges on their Tribal Lands are subject to tribal legal controls. The Paiute Tribe representatives expressed appreciation for any technical support the Water Board may provide and did not indicate any opposition to the planned rescission.

4. Conclusions

It is in the public interest to rescind Board Order No. 6-93-90 based upon recognition that the Water Board does not have the authority to regulate discharges on Tribal Lands, the Paiute Tribe does not wish to be subject to waste discharge requirements, and that environmental protection on Tribal Lands is within the United States Environmental Protection Agency's jurisdiction.

5. California Environmental Quality Act

Rescission of the waste discharge requirements is exempt from the provisions of the California Environmental Quality Act (Public Resources Code section 21000, et seq.) in accordance with section 15321, title 14, California Code of Regulations.

6. Notification of Interested Parties

The Water Board notified the Discharger and interested parties of its intent to rescind waste discharge requirements prescribed by Board Order No. 6-93-90 in a tentative Order circulated for public comment from December 17, 2015 through January 18, 2016. No comments in opposition of the tentative Order were received. The Water Board notified interested persons of its intent to adopt the proposed Rescission Order at its March 9-10, 2016 meeting in South Lake Tahoe.

7. Public Meeting

The Water Board, in a public meeting, heard and considered all comments pertaining to this Rescission Order.

IT IS HEREBY ORDERED THAT Board Order No. 6-93-90 is hereby rescinded.

I, Patty Z. Kouyoumdjian, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Lahontan Region, on **March 9, 2016**.

PATTY Z. KOUYOUMDJIAN
EXECUTIVE OFFICER

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ENCLOSURE 2

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January 3, 2005

Robert Tucker
Water Resource Control Engineer
California Regional Water Quality Control Board
2501 Lake Tahoe Blvd
South Lake Tahoe, CA 96150

**Re: Fort Bidwell Indian Community Sewage Treatment Facility
No. 93-090, WDID No. 6A250007000**

Dear Mr. Tucker:

As I informed you over the phone on December 29th, you are advised that California Indian Legal Services ("CILS") represents the Fort Bidwell Indian Community (the "Tribe"), which is a federally recognized Indian Tribe. Please forward all future correspondence regarding this matter to my attention. I am in receipt of a letter from you to the Tribe dated November 30, 2004, threatening enforcement action for failure to comply with the reporting requirements set forth in the California Water Code.

As we discussed, while Public Law 83-280 (PL 280) grants the state of California (and its subordinate governmental entities) criminal jurisdiction over lands within an Indian reservation, it does not grant the state civil regulatory jurisdiction over lands within an Indian reservation.

The United States Supreme Court made the reach of PL 280 clear in *California v. Cabazon Band of Mission Indians*, 480 US 202, 208 (1987) (stating that "if the intent of the law is to prohibit certain conduct, it falls within PL 280's grant of criminal jurisdiction, but if state law generally permits the conduct at issue, subject to regulation, it must be classified as civil regulatory and PL 280 does not authorize its enforcement on an Indian reservation").

State laws regarding waste discharge requirements are civil regulatory. Thus, the state lacks the authority to enforce those laws on the reservation.

You indicated that you would forward any information you had that would contradict this assertion. You also stated that your agency may just want the non-compliance order in place to support any future potential federal prosecutions. First, the Tribe has strict

environmental protection regulations for on-reservation activities, and off-reservation contamination is highly unlikely. Second, I offer you a rhetorical question: how might an order of non-compliance for a state law which simply does not apply to federally recognized Indian tribes possibly assist in any future hypothetical "prosecution" against the Tribe?

In any event, as you indicated that you are aware, your enforcement efforts are futile. As a federally recognized Indian Tribe, the Tribe enjoys sovereign immunity from unconsented lawsuits or other enforcement efforts. The status of Indian tribes as sovereign entities was recognized by the United States Supreme Court long ago. As the Supreme Court has noted, Indian tribes are distinct political communities with inherent sovereign powers which are not only acknowledged but guaranteed by the United States. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832).

As an incident of their sovereignty, Indian tribes enjoy sovereign immunity from unconsented suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. Unit* 1940); *People ex rel. Department of Transportation v. Naegle Outdoor Advertising Co.*, 38 Cal.3d 509, 519 (1985); *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council*, 170 Cal. App.3d 489, 216 Cal. Rptr. 59 (1985); *Long v. Chemehuevi Indian Reservation*, 115 Cal. App.3d 853, 171 Cal. Rptr. 733, cert. denied, 454 U.S. 831 (1981).

Sovereign immunity prevents any court from entering orders against the tribe itself in the absence of an effective waiver.

An Indian tribe's immunity from unconsented suit may only be waived by Congress or the tribe itself. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58-59; *Naegle Outdoor Advertising*, 38 Cal.3d at 519; *A.K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (9th Cir. 1986). A waiver of sovereign immunity may not be implied, but must be unequivocally expressed.

Moreover, judicial recognition of a tribe's sovereign immunity from unconsented suit is not discretionary with the court. *Puyallup Tribe v. Department of Game*, 433 U.S. 165, 173 (1977); *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979). The jurisdictional nature of the doctrine of sovereign immunity is well established: "Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized tribe." *Puyallup Tribe v. Dept. of Game*, 433 U.S. at 172. See also *Enterprise Managements Consultants, Inc. v. U.S. ex rel Hodel*, 883 F.2d 890 (1989); *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1051 (9th Cir. 1985); *Long v. Chemehuevi*, 115 Cal. App.3d at 856-858.

Thus, tribal immunity represents a jurisdictional bar to any claims against the tribe, "irrespective of the merits of the claim." *Chemehuevi Indian Tribe*, 757 F.2d at 1051; *Pan American Company v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989).

In the present case, it is my understanding that the Tribe did not execute an express waiver of immunity and would not consent to any legal action against it. Please advise if you know of such a waiver. Therefore, please desist with your enforcement efforts on this matter.

However, should the California Regional Water Quality Control Board wish to work with the Tribe in a government-to-government capacity, the Tribe would, as a courtesy, seriously consider any requests for information and/or assurances regarding its sewage treatment facility.

Please let me know if you have any further questions, and I look forward to hearing from you soon.

Sincerely,

A handwritten signature in blue ink, appearing to read "Stephanie J. Dolan".

Stephanie J. Dolan
Directing Attorney

cc: Ceola Norton, Fort Bidwell Indian Community