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FILED
SUPERIOR COURT
COUNTY OF LAKE
OCT 17 2023
Krista D. Levier
BY L. Hayes
Deputy Clerk

OCT 06 2023

SUPERIOR COURT OF THE STATE OF CALIFORNIA

LAKE COUNTY

KOI NATION OF NORTHERN CALIFORNIA, Petitioner and Plaintiff, v. **CITY OF CLEARLAKE, A CALIFORNIA MUNICIPAL CORPORATION; CITY OF CLEARLAKE CITY COUNCIL; AND DOES 1 THROUGH 100, INCLUSIVE,** Respondents and Defendants. **MATT PATEL; AND MLI ASSOCIATES, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY, ALSO KNOWN AS MLI ASSOCIATES, INC.,** Real Parties in Interest.	Case No. CV 423786 **~~[PROPOSED]~~ ORDER GRANTING THE ATTORNEY GENERAL'S EX PARTE APPLICATION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER KOI NATION OF NORTHERN CALIFORNIA** Dept: 1 Judge: Hon. Michael S. Lunas Action Filed: March 3, 2023 Trial Date: October 20, 2023 Time: 9:00 a.m.

[PROPOSED] ORDER

Having read and considered the foregoing application of the Attorney General, and good cause appearing therefor,

IT IS ORDERED THAT the application is **GRANTED**. Attorney General Rob Bonta may appear in this case as amicus curiae and file a memorandum of points and authorities in support of Petitioner the Koi Nation of Northern California.

DATED: 10-17-23

Hon. Michael S. Lunas
Judge of the Superior Court

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Exempt from Filing Fee Pursuant to Government Code Section 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

LAKE COUNTY

KOI NATION OF NORTHERN CALIFORNIA,

Petitioner and Plaintiff,

v.

CITY OF CLEARLAKE, A CALIFORNIA MUNICIPAL CORPORATION; CITY OF CLEARLAKE CITY COUNCIL; AND DOES 1 THROUGH 100, INCLUSIVE,

Respondents and Defendants.

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AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL IN SUPPORT OF PETITIONER AND PLAINTIFF

Dept: 1
Judge: Hon. Michael S. Lunas
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STATEMENT OF INTEREST OF AMICUS CURIAE

Attorney General Rob Bonta respectfully submits this brief as amicus curiae. The Attorney General has a duty as the State's chief law enforcement officer to ensure that the State's laws are appropriately enforced and has a duty under the Government Code to protect California's environment and natural resources. (Cal. Const., art. V, § 13; Gov. Code, §§ 12600-12612; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14-15.) These duties give rise to the Attorney General's unique role in enforcing the California Environmental Quality Act (CEQA), which requires that all CEQA petitions be furnished to the Attorney General's Office. (Pub. Resources Code, § 21167.7.) The proper interpretation of CEQA, including the tribal consultation provisions that the state Legislature added to CEQA by enacting Assembly Bill (AB) 52 (2014), is thus of great importance to the Attorney General.

INTRODUCTION AND STATUTORY BACKGROUND

The Attorney General submits this amicus brief in support of Petitioner, the Koi Nation of Northern California ("Tribe"), to assist the Court's consideration of two key questions presented by this case: (1) whether Respondent, the City of Clearlake's ("City") interactions with the Tribe regarding the Airport Hotel and 18th Avenue Extension Project ("Project") constituted the "meaningful consultation" required by CEQA, and (2) whether the City's mitigated negative declaration (MND) satisfied CEQA's requirement to incorporate tribal input and expertise into its determination of what resources constitute tribal cultural resources and the significant impacts to those resources.

Before 2015, CEQA did not require lead agencies to separately analyze the impacts of their actions on tribal cultural resources, which were instead considered archaeological resources or historical resources during the environmental review process. (See *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 215.) As a result, lead agencies considered the impacts of their actions on tribal cultural resources from an archaeological perspective—analyzing the relevance of these resources with respect to western history—rather than factoring in the spiritual, cultural, and intrinsic value of tribal cultural resources to the tribes who maintain

connections with those resources. (See *Soc'y for Archaeology v. County of Butte* (1977) 65 Cal.App.3d 833, 835-37.) Effective since 2015, AB 52 amended CEQA by adding tribal cultural resources as a distinct, separate category of resources on which impacts must be analyzed, subject to the same rigor and burdens of proof as analyses of other resource categories under CEQA. In addition, AB 52 set forth procedural requirements for public agencies to consult with tribes that are traditionally or culturally affiliated with the land on which a project is sited during their environmental review process for a project. (See generally AB 52, § 1.) In passing the bill, the Legislature recognized the expertise and knowledge of California Native American tribes with regard to their tribal history, practices, and cultural resources, and codified the tribes' right to participate in—and contribute their knowledge to—CEQA's environmental review process. (Pub. Resources Code, § 21080.3.1, subd. (a); AB 52, § 1, subds. (b)(4), (b)(6).) Pursuant to AB 52's amendments to CEQA, tribal cultural resources can be sites, features, places, cultural landscapes, sacred places, and objects. (Pub. Resources Code, § 21074.) Notably, the Legislature distinguished this category of resources from archaeological and historical resources and required lead agencies to consider tribal expertise in the identification of tribal cultural resources. (*Ibid*.)

Although AB 52 has been in effect for eight years, there is no appellate case law interpreting its requirements, including what amount of interaction between lead agencies and tribes constitutes "meaningful consultation," and how and to what extent lead agencies should incorporate tribal expertise in their identification of and analyses of impacts to tribal cultural resources. The Attorney General's amicus brief will assist the Court by providing legal analysis of the statutory text, background regarding the legislative purpose and history of AB 52, and information regarding the Governor's Office of Planning and Research's (OPR's)[1] technical advisory regarding tribal consultation. This legislative context, history, and expert agency interpretation of the law shows that meaningful tribal consultation under CEQA's AB 52 requirements is more than the box-checking exercise that the City completed here, and that the

[1] OPR is the agency entrusted by the Legislature to develop and update guidelines for the implementation of CEQA. AB 52 required OPR to prepare guidelines for lead agencies to incorporate tribal consultation, and the separate consideration of tribal cultural resources, into their CEQA processes. (Pub. Resources Code, § 21083.09).

City's failure to include tribal input and expertise in its identification and analysis of impacts on tribal cultural resources was inadequate under CEQA.

FACTUAL BACKGROUND

In this section, the Attorney General highlights only those aspects of the record that are relevant to the Court's determinations of whether the City's consultation with the Tribe was "meaningful," and whether the City sufficiently incorporated tribal expertise into its analysis of impacts to tribal cultural resources.

In February 2022, the City formally notified the Tribe of the Project pursuant to CEQA and subsequently held a consultation meeting on March 9, 2022. (AR003038-003042; AR002490.) During the meeting, the Tribe provided the City with evidence of tribal cultural resources on the Project site, Project impacts to those resources, and proposed mitigation measures to reduce those impacts. (AR002303-2304.) The City staff informed the Tribe that it would need to seek approval of the Tribe's requested mitigation. (AR002367, AR002372.)

Later that day, the Tribe emailed the City, reiterating the Tribe's concern that the Project may have significant impacts on tribal cultural resources. (AR003878.) It also asked about a suggested mitigation measure and informed the City of a culturally appropriate protocol for the treatment of tribal cultural resources. (*Ibid*.) On March 23, 2022, the Tribe again contacted the City, reiterating the Tribe's concerns with the Project and requesting tribal monitoring. (AR004381-001.) The Tribe never heard back from the City after the consultation meeting or in response to its additional communications after the meeting. (AR002307-002308.) The City did not inform the Tribe that it had unilaterally ended consultation. (AR002307; Respondents' Opposition to Petitioner's Ex Parte Application for Stay or, in the Alternative, Application for Temporary Restraining Order and Order to Show Cause Re Issuance of a Preliminary Injunction [Opp. to Stay], p. 13.) The record reflects that the City did not consider the information the Tribe provided in consultation about tribal cultural resources and proposed mitigation measures, despite being informed by its archaeologist that tribal cultural resources may be different from archaeological resources and thus, may require different mitigation measures. (AR004999.) There is also no evidence in the record that the City informed the Tribe it disagreed with the Tribe's

identification of tribal cultural resources and the proposed mitigation. The Tribe did meet over video conference with the archaeologist hired to conduct a Cultural Resources Investigation prior to government-to-government consultation. (Opp. to Stay, p. 7; Petitioner's Amended Opening Brief in Support of Petition for Writ of Mandate [Pet. Op. Brief], p. 10.) However, the Tribe alleges that the confidential maps it shared with the City and concerns about resources on the Project site, went unaddressed. (Pet. Op. Brief, p. 32-33 [citing Confidential Record].) The Tribe testified at the City Council appeal hearing about the significance of tribal cultural resources onsite and why archaeological studies are inadequate for assessing those resources. (AR002298-002305.) In particular, the Tribe testified about culturally important plants, cultural practices including burials, and expressed concerns that because human remains have been previously identified in one of the spoils piles onsite, there is a high potential for other tribal cultural resources in the remaining spoils piles, which have not been analyzed for tribal cultural resources. (AR002303, AR002326, AR008426.) These tribal input and expertise, which the City was required to consider, are not reflected in the MND.

The Tribe requested updates on the Project, including asking to see a copy of the archaeologist's study, but the City did not provide the study until after the City Planning Commission approved the Project. (AR002306, AR003159, AR004381-001, AR002698.)

Without discussion of the input it received from the Tribe, the City ultimately concluded in an MND that there are no tribal cultural resources on the Project site, and impacts to tribal cultural resources could be mitigated to less than significant. The City Planning Commission adopted the MND for the Project in December 2022. (AR002282-002283.) The Tribe administratively appealed this approval with the City Council, arguing that the approval violated CEQA, and specifically, the tribal consultation requirements added to CEQA by AB 52. (AR002700-002711.) In February 2023, the City denied the Tribe's appeal and approved the Project. (AR002288-002440.)

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ARGUMENT

I. Meaningful Consultation Under CEQA Requires More Than the City's Cursory Approach

CEQA, as amended by AB 52, requires consultation to be a "meaningful and timely process" that involves "considering carefully the views of others" and that is "conducted in a way that is mutually respectful of each party's sovereignty." (Pub. Resources Code, § 21080.3.1, subd. (b) [citing Gov. Code, § 65352.4].) Although the goal of consultation is to reach mutual agreement, the statute allows for one party to unilaterally end consultation, but only after they act in "good faith" and make "reasonable effort" to reach agreement. (Pub. Resources Code, § 21080.3.2, subd. (b)(2).)

Although the statute does not define what constitutes "meaningful" consultation or "reasonable effort," the statutory text, the statute's legislative purpose and history, and OPR's technical advisory for the statute's implementation all indicate that consultation between a lead agency and a tribe during the CEQA process is meant to be consequential to and inform lead agencies' analyses of project impacts to resources important to the tribe.

Whether the City proceeded in a manner required by CEQA is reviewed de novo. (*Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503, 514.) In this case, the City held a single meeting with the Tribe and did not respond to the Tribe's subsequent communications flagging concerns about tribal cultural resources and suggesting mitigation measures. The City then unilaterally ended consultation without informing the Tribe of its conclusion or explaining in the record why mutual agreement was not possible. Those actions show that the City failed to comply with its procedural duties under CEQA to conduct "meaningful" consultation and make "reasonable effort" to reach "mutual agreement" with the Tribe as the statute demands. (Pub. Resources Code, §§ 21080.3.2, subd. (b)(2), 21080.3.1 [citing Gov. Code, § 65352.4].)

A. CEQA's Text Shows Tribal Consultation Is Meant to Have a Consequential Impact on Lead Agency's Environmental Review Process

In interpreting the meaning of a statute, a court first looks to "actual words of the statute" because "it is the language of the statute itself that has successfully braved the legislative

gauntlet.” (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1117.) In addition, the statutory language should be considered in context and “with reference to the whole system of law of which it is a part.” (*Compulink Management Center, Inc. v. St. Paul Fire & Marine Ins. Co.* (2008) 169 Cal.App.4th 289, 296.)

CEQA defines tribal consultation as a “meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties’ cultural values and, where feasible, seeking agreement.” (Pub. Resource Code, § 21080.3.1, subd. (b) [citing Gov. Code, § 65352.4].) A party may unilaterally conclude consultation only if it determines “in good faith and after reasonable effort” that agreement cannot be reached. (Pub. Resources Code, § 21080.3.2, subd. (b)(2).)

The definition of “meaningful” is “having a meaning or purpose,” or is “significant.” (Meaningful, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/meaningful> [as of Sept. 28, 2023].) “Process” is defined as a “series of actions or operations conducing to an end.” (Process, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/process> [as of Sept. 28, 2023].) Thus, a meaningful consultation is a series of actions leading to an end that has meaning or purpose.

Meaningful consultation must also be considered in the context of AB 52’s full text and CEQA more broadly. Public Resources Code section 21080.3.2, subdivision (b)(2) allows one party to unilaterally end consultation only after making “reasonable effort” to reach “mutual agreement” and after engaging in consultation in “good faith.” The same section also notes the types of topics consultation may include, such as proposed mitigation measures and alternatives to the project. (Pub. Resources Code, § 21080.3.2, subd. (a).) And, if a tribe requests consultation on alternatives to the project, mitigation measures, or significant impacts, the lead agency “must” consult with the tribe on those topics whenever potential impacts to identified tribal cultural resources will occur. (*Ibid.*) Finally, Public Resources Code section 21074, subdivision (a)(2), requires a lead agency to consider tribal input to identify tribal cultural resources. This context shows that the Legislature envisioned engagement between tribes and lead agencies via government-to-government consultation *throughout* the CEQA process—from the identification

of tribal cultural resources through the proposal of mitigation measures to avoid or lessen impacts to those identified resources.

B. Legislative Intent and History Shows Consultation Was Added to Remedy CEQA's Then-Insufficient Protection of Tribal Cultural Resources

If the Court finds that the statutory language is ambiguous, the Court can look to other extrinsic aids such as legislative intent and history and expert agency technical advisory. (*In re Lucas* (2012) 53 Cal.4th 839, 849.) All three support the view that tribal consultation is meant to be more than a box-checking exercise and that, here, the City's consultation was deficient under CEQA.

AB 52's legislative intent language recognizes that CEQA provided only a "limited measure of protection" to resources that are culturally important and sacred to California Native American Tribes. (AB 52, § 1, subd. (a).) CEQA, prior to AB 52's passage, was insufficiently protective of tribal cultural resources in part because it did "not readily or directly include California Native American tribes' knowledge and concerns" in the planning process and environmental review for projects on lands of importance to tribes. (AB 52, § 1, subd. (a).) Furthermore, AB 52 recognizes that because tribes have expertise with regards to their tribal cultural resources, "tribal knowledge about the land and resources at issue should be included in environmental assessments for projects that may have a significant impact on those resources." (*Id.*, § 1, subd. (b)(4).) The process for tribes to contribute their expertise is through government-to-government consultation. (*Id.*, § 1, subds. (b)(5), (b)(6).)

Legislative history also shows that the Legislature added tribal consultation to CEQA to rectify the exclusion of tribes from project planning processes. (Attorney General's Request for Judicial Notice Exhibit A [Assem. Nat. Res. Com., Analysis of Assembly Bill 52 (2013-2014 Reg. Sess.) as amended August 22, 2014, p. 4.) As the Legislature recognized, failure to consider tribal input in the planning process could be disruptive for a project's ultimate execution. For instance, prior to 2015, two large-scale projects near Native American sacred sites went through lengthy, multi-year environmental review processes that did not adequately consider impacts to these sacred sites. (Ex. A, p. 4-5.) Legislators concerned about the lack of tribal involvement and

desecration of tribal sacred sites authored two pieces of legislation designed to stop each project in the eleventh hour. (*Ibid.*) Although the proposed legislation did not ultimately become law, an impetus for the Legislature to enact AB 52 was to prevent similar scenarios by requiring lead agencies to consult with tribes and to allow for the incorporation of input from tribes into project planning processes. (*Ibid.*)

Furthermore, OPR's technical advisory on AB 52 states that tribal consultation, in general, is an "ongoing process, not a single event." (Attorney General's RJN Exhibit C [OPR, AB 52 and Tribal Cultural Resources in CEQA (2017), p. 6].) According to OPR, meaningful consultation requires both parties to "invest time and effort into seeking a mutually agreeable resolution for the purpose of preserving or mitigating impacts to a cultural place, where feasible." (*Ibid.*)

Courts often rely on agency interpretations of statutes in which they have expertise, even if the interpretation is not regulatory. (See *Holland v. Assessment Appeals Board No. 1* (2014) 58 Cal.4th 482, 494-495 [giving deference to agency's statutory interpretation embodied in an informal advice letter].) Thus, here, OPR's technical advisory should carry weight given OPR's expertise and role in CEQA. OPR is charged by the Legislature with developing and periodically updating CEQA regulations, and AB 52 specifically tasked OPR to revise those regulations to reflect that tribal cultural resources should be considered as a separate resource category from paleontological resources. (Pub. Resources Code, §§ 21083, 21083.09.)

The legislative intent and history and OPR's technical advisory all show that tribal consultation should be a process that is ultimately reflected in the environmental analyses and mitigation measures.

C. The City's Consultation Failed to Meet CEQA's Tribal Consultation Requirements

It is not necessary in this case to define precisely what AB 52 requires. The record reflects that the City did only cursory consultation, did not meaningfully consider the Tribe's input, and did not invest "reasonable effort" to seek mutual resolution. That fell outside of any reasonable view of the statute's requirements.

Here, the Tribe repeatedly reached out to the City to continue discussing the Tribe's concerns and proposed mitigation. (See AR003159, AR004381-001, AR002698.) The City did not respond *at all* to these communications. The lack of response evidences the City's procedural failures under CEQA—it failed to consult with the Tribe on the potential impacts to tribal cultural resources and the Tribe's proposed mitigation measures, and failed to make "reasonable effort" to reach an agreement with the Tribe before unilaterally ending consultation. (Pub. Resources Code, § 21080.3.2, subd. (b)(2).)

There may certainly be instances when a single meeting between a lead agency and a tribe satisfies the requirement for meaningful consultation. Indeed, the Legislature did not require a minimum number of meetings to satisfy AB 52's consultation requirement. Rather, the Legislature focused on the quality of consultation, not the quantity. CEQA requires consultation to be "meaningful and timely," occur with "careful[]" consideration for all parties' views and cultural values, and to "seek[] agreement" where feasible. (Pub. Resource Code, § 21080.3.1, subd. (b) [citing Gov. Code, § 65352.4].) But here, the City's single meeting with the Tribe falls short of the quality of consultation required under CEQA.

II. Agencies Must Consider Tribal Expertise in Determining Tribal Cultural Resources, Significant Impacts to those Resources, and Mitigation Measures Under CEQA

When the Legislature amended CEQA through AB 52, it distinguished tribal cultural resources from archaeological resources or historical resources under CEQA and required lead agencies to evaluate impacts to tribal cultural resources as a separate resource category. (Pub Resources Code, § 21074.) The Legislature also required lead agencies to incorporate tribal expertise and input when determining the existence of those resources, the potential for impacts on them, and the sufficiency of mitigation measures for avoiding those impacts. (Pub. Resources Code, §§ 21074, subd. (a)(2); 21080.3.1, subd. (a); AB 52, § 1, subd. (b).) AB 52 thus established the relevance of evidence grounded in tribal expertise to agencies' tribal cultural resources analyses. This characteristic distinguishes the treatment of tribal cultural resources from archaeological and historical resources, which do not require input from tribes or interested entities, and reflects the Legislature's judgment that archaeological and scientific processes alone

1 are not always sufficient to identify tribal cultural resources. (AB 52, § 1, subd. (b)(2). See also
2 Pub. Resources Code, § 21084.1 [defining archaeological resources].)
3 Here, the City relied solely on a study by the City's archaeologist—and ignored tribal input
4 and expertise—in identifying tribal cultural resources on the Project site, analyzing whether the
5 Project would have significant impacts to those resources, and determining what mitigation
6 measures would reduce those impacts. Just as a lead agency's failure to grapple with relevant,
7 credible evidence renders its analysis inadequate, the City's failure to consider tribal input in its
8 analysis of tribal cultural resources here indicates the City's analysis is insufficient. (See *City of*
9 *Long Beach v. City of Los Angeles* (2018) 19 Cal.App.5th 465, 485 [even when an approved
10 study method is used, analysis is "legally inadequate" when the method omits context-specific
11 "relevant, crucial information"]; *Vineyard Area Citizens for Responsible Growth v. City of*
12 *Rancho Cordova* (2007) 40 Cal.4th 412, 448-449 [expert opinion providing substantial evidence
13 of significant impacts cannot be ignored].)

14 **A. CEQA's Text Shows Agencies Must Consider Tribal Expertise Because of**
15 **Tribes' Unique Knowledge of Their Tribal Cultural Resources**

16 CEQA requires agencies to consider tribal input and expertise in several instances,
17 including, notably, when identifying tribal cultural resources. (Pub. Resources Code, § 21074,
18 subd. (a)(2).) Similarly, tribal expertise and input must be considered during the consultation
19 process when identifying significant impacts to tribal cultural resources and considering
20 mitigation measures or project alternatives. (*Id.*, § 21080.3.2, subd. (a).)
21 There are several ways for resources to qualify as a tribal cultural resource. Similar to
22 historical resources, a resource can qualify as a tribal cultural resource if it is either eligible for
23 listing or is listed in the California Register of Historical Places or listed in a local register. (*Id.*,
24 §§ 21074, subd. (a)(1) [defining eligibility of tribal cultural resource], 21084.1 [defining
25 eligibility of historical resource].) A resource can also be a tribal cultural resource even if it is not
26 listed or eligible for listing in a historical register as long as substantial evidence, *including* tribal
27 input, supports the agency's designation. (*Id.*, § 21074, subd. (a)(2) [citing § 5024.1, subd. (c)].)
28

Even though agencies have discretion to determine whether a resource is a tribal cultural resource, they "shall consider" tribal input and expertise in making that determination. (*Ibid.*)

The requirement for lead agencies to consider tribal input when determining tribal cultural resources is unique under CEQA. While CEQA requires substantial evidence to support lead agencies' discretionary determinations of other types of resources, like historical resources, the law does not recognize special expertise in interested entities' perspectives on whether a resource should qualify as a protected resource. (*Id.*, § 21084.1.) CEQA's statutory text, through its distinctive treatment of tribal cultural resources, recognizes tribes' unique knowledge of their resources and requires that knowledge to be incorporated into and throughout the CEQA process.

B. Legislative Intent and History and Expert Agency Guidelines Illustrate Tribal Expertise is Distinct from Archaeological Expertise

The Legislature carved out tribal cultural resources as a separate resource category because it intended for agencies to consider "the tribal cultural values in addition to the scientific and archaeological values when determining impacts and mitigation." (AB 52, § 1, subd. (b)(2).) The Legislature intended to "recognize that California Native American tribes may have expertise with regard to their tribal history and practices." (*Id.*, § 1, subd. (b)(4).) AB 52 specified that "tribal knowledge about the land and tribal cultural resources at issue should be included in environmental assessments." (*Ibid.*)

The legislative history of AB 52 supports the view that the Legislature intended tribal expertise to be considered when agencies identify tribal cultural resources because archaeological tools alone are insufficient. The "existence and significance" of some tribal cultural resources can often be understood only with tribal input. (Attorney General's RJN Exhibit B [Sen. Rules Com., Office of Sen. Floor Analyses, 3d reading analysis of Assembly Bill 52 (2013-2014 Reg. Sess.) as amended August 22, 2014 , p. 10 (quoting National Park Service, National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties)].)

Tribes ascribe spiritual and intrinsic values to tribal cultural resources that are not captured through western archaeological and historical surveys. (Ex. B, p. 10-11.) As noted by the Legislature, "traditional cultural properties are often hard to recognize." (*Ibid.*) A traditional

ceremonial location may “look like merely a mountaintop” to those not affiliated with the tribe that maintains or has knowledge of tribal traditions (*Ibid.*) As such, archaeological or historical surveys, often performed by those without tribal affiliations, may be insufficient to identify tribal cultural resources. Instead, “the existence and significance of such locations often can be ascertained *only* through interviews with knowledgeable users of the area, or through other forms of ethnographic research.”[2] (*Ibid* [emphasis added].)

OPR’s AB 52 technical advisory recognizes that evidence in support of the determination of a tribal cultural resource includes more than archaeological evidence. The advisory states that substantial evidence supporting a resource determination can include “elder testimony, oral history, tribal government archival information, testimony of a qualified archaeologist certified by the relevant tribe, testimony of an expert certified by the tribal government, official tribal government declarations or resolutions, formal statements from a certified Tribal Historic Preservation Officer, or historical/anthropological records.” (Attorney General’s RJN Exhibit C, p. 5.) Tribal elder affidavits and meeting minutes can also constitute evidence of a tribal cultural resource. (*Ibid.* [citing *Pueblo of Sandia v. U.S.* (10th Cir. 1995) 50 F.3d 856, 860-861.].)

CEQA requires tribal expertise be considered because, as the Legislature pointed out, tribal cultural resources can be difficult to recognize using archaeological or scientific methods alone. “Early definitions of cultural property focused almost entirely on tangible resources, specifically those that were thought to have ethnographic, artistic, or historical value. Today, the field has shifted from strict property conception toward the more expansive conception of ‘cultural heritage’ and, concomitantly, moved from the strictly tangible to the intangible.” (Riley, *The Ascension of Indigenous Cultural Property Law* (2022) 121 Mich. L. Rev. 75, 84.) An archaeological perspective can fail to consider intrinsic values, religious significance, and natural resource needs. (King, How the Archaeologists Stole Culture: A Gap in American Environmental Impact Assessment and What to do About It (1998), p. 125.)

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[2] Ethnography is the study of people and their culture through methods such as participant observation, in-person interviews, literature review, focus groups, and mapping. (National Park Service, Park Ethnography Program <https://www.nps.gov/ethnography/aah/aaheritage/ERCb.htm> [as of Sept. 30, 2023].)

C. The City was Required to Consider Tribal Input but Failed to Do So

The City, which determined that there were no tribal cultural resources on the Project site based on its review of the archaeological study, claims the determination is supported by substantial evidence and therefore is entitled to deference. (Opp. to Stay, p. 14-15.) But the City's argument here misses the point. When the City received evidence—grounded in tribal expertise—countering the archaeological study's conclusion that the Project would not impact tribal cultural resources, it was required to evaluate that evidence in making its determination. As AB 52, the Legislative intent, and OPR technical advisory instruct, archaeological evidence neither is equivalent to, nor substitutes for, tribal expertise. (Pub. Resources Code, § 21074, subd. (a)(2).) The City accordingly could not ignore tribal input by relying solely on the archeological study.

The record shows that the Tribe provided confidential maps and information related to tribal cultural resources to the City during its one consultation meeting, and testified at the City Council hearing on the significance of tribal cultural resources on the Project site and why the archaeological study did not adequately capture the significance of those resources from a tribal perspective. (AR002298-002305.) The City was required to consider this evidence.

The "extensive archival document review" and the "intensive, in-person archaeological survey" conducted by the City archaeologist to support the City's determination are insufficient because neither considers tribal input or expertise, which, as discussed above, is different from archaeological evidence. (See Opp. to Stay, p. 8.) Indeed, the City's archaeologist recognizes that archaeological resources are distinct from tribal cultural resources and that such distinction is "rooted in and consistent with current CEQA regulation and practice." (AR004999.) He also explained to the City that while his study evaluates and makes "recommendations based on the archaeology side of the balance," the Tribe "has the authority to make different recommendations regarding tribal cultural resources." (*Ibid.*)

And while the Tribe did meet over video conference with the archaeologist in advance of the study being conducted (Opp. to Stay, p. 7; Pet. Op. Brief, p. 10), the Tribe did not receive the City's archaeological study until after the City Planning Commission approved the Project—suggesting that tribal expertise was not considered throughout the analysis and depriving the City

of any supplementation to the study's conclusions that are based on the Tribe's knowledge and perspective on its own tribal cultural resources. (AR002306.) Thus, the record suggests that tribal concerns and expertise were not considered in the City's environmental analysis and conclusions. CEQA requires more.

CONCLUSION

For the above reasons, this Court should conclude that the City's consultation process, including its failure to consider tribal expertise, was insufficient under CEQA.

Dated: October 6, 2023

Respectfully submitted,

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