No. A169438

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

KOI NATION OF NORTHERN CALIFORNIA,
Petitioner and Appellant,
v.
CITY OF CLEARLAKE, ET AL.,
Respondents.

Lake County Superior Court, Case No. CV423786
The Honorable Michael S. Lunas, Judge

BRIEF OF ATTORNEY GENERAL ROB BONTA AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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Document received by the CA 1st District Court of Appeal.

TABLE OF CONTENTS

Page

Introduction and statement of interest 7

Legal background on AB 52 8

Argument.. 10

I. AB 52's purpose is to facilitate tribal consultation and courts should not add barriers to consultation not found in statute. 10

   A. The Legislature intended to impose minimal burden on tribes' requests for consultation. 10

   B. Courts should apply the substantial compliance doctrine when determining whether a tribe requested consultation. 13

II. The environmental document must reflect that the lead agency considered the significance of the resources to the tribe when identifying tribal cultural resources........... 16

   A. CEQA requires lead agencies to consider tribal input when identifying tribal cultural resources. 17

   B. Tribal input in identifying tribal cultural resources should be reflected in the environmental document... 23

III. Lead agencies must consider tribal knowledge and expertise when analyzing impacts to tribal cultural resources and identifying appropriate mitigation measures for those impacts. 29

Conclusion 32

Document received by the CA 1st District Court of Appeal.

TABLE OF AUTHORITIES

Page

CASES

Citizen for the Restoration of L Street v. City of Fresno (2014) 229 Cal.App.4th 340 .... 16, 23

Citizens for a Sustainable Treasure Island v. City & County of San Francisco (2014) 227 Cal.App.4th 1036 14

City of Long Beach v. City of Los Angeles (2018) 19 Cal.App.5th 465 31

Clover Valley Foundation v. City of Rocklin (2011) 197 Cal.App.4th 200 .... 8, 26

Com. for Green Foothills v. Santa Clara County Bd. of Supervisors (2010) 48 Cal.4th 32 .... 13, 14

Dyna-Med, Inc. v. Fair Employment & Housing Commission (1987) 43 Cal.3d 1379 19

Friends of the Willow Glen Trestle v. City of San Jose (2016) 2 Cal.App.5th 457 .... 25, 29

Gentry v. City of Murrieta (1995) 36 Cal.App.4th 1359 24

League for Protection of Oakland's Architectural & Historic Resources v. City of Oakland (1997) 52 Cal.App.4th 896 19

Leonoff v. Monterey County Board of Supervisors (1990) 222 Cal.App.3d 1337 .... 26, 27, 28

Residents Against Specific Plan 380 v. County of Riverside (2017) 9 Cal.App.5th 941 .... 13, 14

Document received by the CA 1st District Court of Appeal.

TABLE OF AUTHORITIES
(continued)

Page

Sierra Club v. City of Orange
(2008) 163 Cal.App.4th 523 14

Society for California Archaeology v. County of Butte
(1977) 65 Cal.App.3d 832 .... 9, 32

Sundstrom v. County of Mendocino
(1988) 202 Cal.App.3d 296 26

Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova
(2007) 40 Cal.4th 412 30

CONSTITUTIONAL PROVISIONS

Cal. Const., Article V, § 13 8

STATUTES

Cal. Code Regs., Title 14
§ 15063 .... 17, 24, 27
§ 15064.5 .... 19, 25
§ 15071 .... 17, 24, 27

Gov. Code
§ 12511 8
§§ 12600-12612 8

Pub. Resources Code
§ 5024.1 .... 18, 19, 25
§ 21005 .... 17, 24
§ 21074 .... *passim*
§ 21080.3.1 .... 9, 10, 11, 29
§ 21080.3.2 .... 10, 29, 30
§ 21082.3 .... 17, 26
§ 21083 21
§ 21083.09 .... *passim*
§ 21167.7 8
§ 21177 8

Document received by the CA 1st District Court of Appeal.

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

AB 52
§ 1 .... *passim*

Document received by the CA 1st District Court of Appeal.

INTRODUCTION AND STATEMENT OF INTEREST

This case presents important issues of law arising under Assembly Bill (AB) 52—a 2015 amendment to the California Environmental Quality Act (CEQA). The Legislature enacted AB 52 to redress the historical exclusion of California Native American Tribes from providing input regarding their own tribal cultural resources during the CEQA process. AB 52 added tribal cultural resources as a separate category of resources that must be considered under CEQA. And AB 52 introduced a requirement for consultation between lead agencies and tribes during the CEQA process on projects that may impact tribal cultural resources. Although AB 52 has been in effect for more than nine years, this case marks one of the first times that an appellate court will interpret AB 52's requirements. It presents statutory interpretation questions that go to the very heart of AB 52's tribal consultation and tribal cultural resource requirements.

Attorney General Rob Bonta submits this amicus brief in support of Petitioner, the Koi Nation of Northern California (the "Tribe"), to assist the Court's consideration of three sets of questions presented by this case: (1) what CEQA requires of a tribe making a request for consultation, and how courts should evaluate whether a tribe has met that requirement; (2) how lead agencies must consider tribal input when identifying tribal cultural resources and how that consideration should be reflected in CEQA environmental documents; and (3) how tribal input and expertise should be reflected in lead agencies' analyses of tribal cultural resource impacts and mitigation measures.

Document received by the CA 1st District Court of Appeal.

The Attorney General has a strong interest in the protection of the State's resources, including tribal cultural resources. (Gov. Code, §§ 12600-12612.) As California's chief law officer, he also has a strong interest in ensuring the appropriate construction of California laws. (Cal. Const., art. V, § 13; Gov. Code, § 12511.) This is especially true with respect to CEQA, given the Attorney General's special role in enforcing CEQA's requirements. (Gov. Code, §§ 12600-12612; Pub. Resources Code, § 21167.7 [requiring all CEQA pleadings to be served on the Attorney General's Office]; Pub. Resources Code, § 21177, subd. (d) [facilitating the Attorney General's participation in CEQA lawsuits].) The Attorney General submits this brief to assist the Court in the correct interpretation of CEQA's AB 52 tribal consultation and tribal cultural resource provisions and to ensure the Legislature's intent in adopting that law is effectuated.

LEGAL BACKGROUND ON AB 52

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 their relevance 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

Document received by the CA 1st District Court of Appeal.

Society for California Archaeology v. County of Butte (1977) 65 Cal.App.3d 832, 835-37.)

AB 52 reflects the Legislature's conclusion that such a regime was inadequate. In the Legislature's view, the failure of CEQA processes to "readily or directly include California Native American tribes' knowledge and concerns … ha[d] resulted in significant environmental impacts to tribal cultural resources and sacred places." (AB 52, § 1, subd. (a)(3).) The Legislature therefore adopted AB 52 to add tribal cultural resources as a distinct, separate category of resources for which impacts must be analyzed, subject to the same rigor and burdens of proof as analyses of other resource categories under CEQA. AB 52 set forth procedural requirements for lead agencies to consult with tribes that are traditionally or culturally affiliated with the land on which a project is proposed during the environmental review process. (See generally AB 52, § 1.) In passing the bill, the Legislature highlighted the expertise and knowledge that California Native American tribes have with regard to their tribal histories, practices, and cultural resources, and the Legislature codified 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).)

With AB 52 enacted, CEQA requires lead agencies to analyze tribal cultural resources as a distinct resource separately from archaeological and historical resources. (Pub. Resources Code, § 21083.09.) And, it requires lead agencies to consider

Document received by the CA 1st District Court of Appeal.

tribal knowledge and expertise in identifying tribal cultural resources, analyzing impacts to those resources, and determining culturally appropriate mitigation for those impacts. (*Id.*, §§ 21074; 21080.3.1, subd. (a); 210803.2, subds. (a) & (c).)

ARGUMENT

I. AB 52'S PURPOSE IS TO FACILITATE TRIBAL CONSULTATION AND COURTS SHOULD NOT ADD BARRIERS TO CONSULTATION NOT FOUND IN STATUTE.

A. The Legislature intended to impose minimal burden on tribes' requests for consultation.

AB 52 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. Resources Code, § 21080.3.1, subd. (b) [citing Gov. Code, § 65352.4].) CEQA, as amended by AB 52, requires that a lead agency undertaking a proposed project formally notify all California Native American tribes that are traditionally and culturally associated with a proposed project's geographic location. Once notified, tribes have 30 days to respond in writing requesting consultation. (*Id.*, § 21080.3.1.) The lead agency must then begin consultation within 30 days of receiving a tribe's request for consultation. *(Ibid.)*

CEQA's statutory language requires a tribe to request consultation by "respond[ing], in writing, within 30 days of receipt of the [lead agency's] formal notification, and request[ing] the consultation." (Pub. Resources Code, § 21080.3.1, subd. (b)(2).) It specifies that, "[w]hen responding to the lead agency, the California Native American tribe shall designate a lead

Document received by the CA 1st District Court of Appeal.

contact person." (*Ibid.*) While the statute does require that the tribe respond "in writing" to a project notice requesting consultation, the plain language of the statute does not require that a tribe's written request for consultation be formal in other ways, such as being contained in one single letter sent to the lead agency on official letterhead, or sent in paper form rather than in electronic form. Indeed, in contrast to the approach the statute takes to a tribe's request for consultation, the statute imposes "formal" notification requirements only on the lead agency. (*Id.*, § 21080.3.1, subd. (d) [requiring the lead agency to provide "formal notification" to the designated contact of a culturally affiliated tribe and providing specific requirements for that formal written notification].)

To the extent the Court finds that the statutory text is ambiguous, the legislative intent of AB 52 supports an interpretation that a tribe's request for consultation need not be "formal." The Legislature sought to facilitate "a meaningful consultation process between California Native American tribal governments and lead agencies . . . at the earliest possible point in the [CEQA] review process" (AB 52, § 1, subd. (b)(5)) and to "reduce the potential for delay and conflicts in the environmental review process." (*Id.*, § 1, subd. (b)(7).) Recognizing that tribes have unique histories and resources that existing law did not adequately protect and that CEQA did not "readily or directly include . . . tribes' knowledge and concerns" (*id.*, § 1, subds. (a)(2) & (3)), the Legislature intended for AB 52 to "uphold existing rights of all California Native American tribes to participate

Document received by the CA 1st District Court of Appeal.

in . . . the environmental review process pursuant to [CEQA].” (*Id.* § 1, subd. (b)(6).) As evidenced by the Legislature’s stated objectives, the requirements that AB 52 added to CEQA, including the tribal consultation request provisions, are intended to promote government-to-government consultations between tribes and lead agencies and boost tribes’ ability to contribute to the environmental review process, not to erect barriers that exclude tribes from the process.

Such an understanding is reflected in the Governor’s Office for Planning and Research’s (OPR) AB 52 Technical Advisory, which, in its step-by-step description of the consultation process, indicates that the tribe need only “respond to the lead agency within 30 days of receipt of the formal notification” from the lead agency.[1] This is in contrast to the advisory’s discussion of the lead agency’s formal notifications to the tribe, which “must include” certain substantive details, like the project description and location. Although this document is advisory, it reflects the interpretation of the expert state agency charged by the Legislature with developing implementing regulations for CEQA, including AB 52’s amendments to CEQA. (Pub. Resources Code, § 21083.09 [requiring OPR to update CEQA guidelines to reflect the separate consideration of tribal cultural resources].) OPR’s interpretation reinforces the statute’s relatively low bar for tribes

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[1] OPR, Technical Advisory: AB 52 and Tribal Cultural Resources in CEQA (June 2017) <https://opr.ca.gov/ceqa/docs/20200224-AB_52_Technical_Advisory_Feb_2020.pdf> [as of June 24, 2024] (OPR Technical Advisory).

Document received by the CA 1st District Court of Appeal.

to request consultation while emphasizing that the "formal" requirement is on the lead agency.

Adding formality requirements to the tribes' consultation requests beyond those provided by AB 52's statutory text would have the effect of undermining tribal consultation and excluding tribes from the process, contrary to AB 52's intent. Such barriers to tribal consultation would be particularly detrimental to the participation in the CEQA process of tribes that are already under-resourced. Given the Legislature's stated intention to affirm the rights of tribes to engage in CEQA's environmental review process, it is reasonable to assume that the Legislature would not have intended for additional requirements to be read into the statutory language that impose barriers to tribes seeking to consult. (Cf. *Com. for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 53 [Courts decline to impose additional requirements for a notice beyond those described in CEQA].)

B. Courts should apply the substantial compliance doctrine when determining whether a tribe requested consultation.

In accordance with the Legislature's intent to facilitate rather than obstruct tribal consultation, courts should apply the substantial compliance doctrine when analyzing whether tribes met the statutory requirements to request consultation. Under that doctrine, so long as statutory objectives are met and there is no showing of prejudice, a party is deemed to have complied with legal requirements notwithstanding "technical imperfections of form." (*Residents Against Specific Plan 380 v. County of Riverside*

Document received by the CA 1st District Court of Appeal.

(2017) 9 Cal.App.5th 941, 963 [applying substantial compliance doctrine because there were errors in the notice]; *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1048.)

Courts have a long history of applying the substantial compliance doctrine in the CEQA context.[2] For example, it is not uncommon for an agency's notice of determination or notice of exemption to contain technical defects as to matters such as formatting and labeling. Such documents are nevertheless found to substantially comply with CEQA's procedural requirements where they serve CEQA's objective as a public disclosure document, by allowing the public to weigh in intelligently on the environmental consequences of the agencies' decisions. (See, e.g., *Com. for Green Foothills v. Santa Clara County Bd. of Supervisors*, *supra*, 48 Cal.4th at p. 53*; Residents Against Specific Plan 380 v. County of Riverside, supra*, 9 Cal.App.5th at p. 963.) There is no reason why such a rule should not apply to tribal consultation requests as well. By the doctrine's very terms, substantial compliance will excuse technical defects in a tribe's request as long as statutory objectives are met and it would not prejudice the lead agency—and if those conditions are met, then

[2] Contrary to Respondents' argument that the substantial compliance doctrines applies only where the statutory language explicitly provides for it (Resp. Br. at 22, 26), courts have applied the doctrine in the CEQA context even though CEQA does not contain such a provision. (See e.g., *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 532.)

Document received by the CA 1st District Court of Appeal.

it is hard to see a valid purpose that would be served by not honoring the tribe's request for consultation.

Where a question regarding the adequacy of a tribe's request for consultation arises, as it did here, a court should determine whether the tribe's request substantially complied with CEQA's objective in making its request. As discussed previously, the broad objective of the consultation request process is to facilitate meaningful consultation between tribal governments and lead agencies. (AB 52, §1, subd. (b)(5).) The statute's specific requirements are that the tribe's consultation request must be made (1) "in writing," and (2) during the 30-day statutory period. The "in writing" requirement presumably is intended to ensure that lead agencies receive adequate notice of the need to consult with tribes and to avoid evidentiary disputes that would arise with oral requests. (*See id.*, § 1, subd. (b)(7) [stating legislative intent to "reduce the potential for delays and conflicts in the environmental review process"].) And, the 30-day statutory period is intended to ensure that the CEQA process moves forward in a timely manner and prevents burdensome delays that prejudice project applicants. (*See ibid* [stating legislative intent to ensure information is available and conflicts are resolved "early in the [CEQA] environmental review process"].)

Given these statutory objectives, the substantial compliance doctrine as applied to a tribe's request for consultation could appropriately involve an inquiry into the following: (a) whether the totality of the writings involved indicate that a tribe is requesting consultation within the 30-day timeframe, (b) whether

Document received by the CA 1st District Court of Appeal.

the administrative record indicates agency knowledge of the request for tribal consultation, and (c) whether imperfections in the tribe's request for consultation impeded the lead agency's timely initiation of consultation. These inquiries would help the court determine whether the statutory objectives of timely notice to the lead agency and prevention of undue delays and prejudice in the CEQA process have been met.

The trial court in this case did not apply the substantial compliance doctrine in its evaluation of whether the Tribe's request met CEQA's requirements. This Court should vacate the trial court's determination regarding the adequacy of the Tribe's consultation request and remand for further consideration consistent with the substantial compliance doctrine.

II. THE ENVIRONMENTAL DOCUMENT MUST REFLECT THAT THE LEAD AGENCY CONSIDERED THE SIGNIFICANCE OF THE RESOURCES TO THE TRIBE WHEN IDENTIFYING TRIBAL CULTURAL RESOURCES.

Before a lead agency undertakes CEQA review to analyze whether a proposed project will impact tribal cultural resources, the lead agency must first identify the tribal cultural resources. (Cf. *Citizen for the Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 340, 368 [identification of historical resources a necessary preliminary step to identifying impacts].) When identifying tribal cultural resources that are not already listed or eligible for listing in the California Register of Historical Resources or a local register, lead agencies "shall consider" the significance of the resource to a tribe. (Pub. Resources Code, § 21074, subd. (a)(2).) The Legislature added this requirement, using the mandatory "shall," because it recognized that tribes

Document received by the CA 1st District Court of Appeal.

must have a voice in identifying tribal cultural resources that may be impacted by a project, and that tribal cultural resources cannot be identified through archaeological studies alone. (AB 52, § 1, subds. (b)(2), (b)(5), (b)(6), & (b)(7).) As further discussed below, a lead agency generally must demonstrate in its CEQA environmental document how it has met this mandate. (Pub. Resources Code, § 21005, subd. (a).) More specifically, the environmental document should include the lead agency's analysis of tribal cultural resources, which in turn should describe the tribal input it received, as well as how that input informed its analysis and identification of tribal cultural resources. (Cal. Code Regs., tit. 14, §§ 15063, subd. (d); 15071.) When information about tribal cultural resources is confidential, the publicly available document should include a general description, with further details in a confidential appendix. (Pub. Resources Code, § 21082.3, subds. (c) & (f).)

A. CEQA requires lead agencies to consider tribal input when identifying tribal cultural resources.

CEQA's plain language shows that the significance of the resource to the tribe must be considered when lead agencies identify tribal cultural resources, and that this requirement is unique to tribal cultural resources. CEQA defines two categories of tribal cultural resources: mandatory and discretionary. Mandatory tribal cultural resources are those that are listed or eligible for listing in the California Register of Historical Resources, or are listed in a local register. (Pub. Resources Code, § 21074, subd. (a)(1).) These resources are considered mandatory tribal cultural resources because a lead agency has no discretion

Document received by the CA 1st District Court of Appeal.

to determine that a resource listed in the California Register of Historical Resources is not a tribal cultural resource. Discretionary tribal cultural resources are defined as follows:

> A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1. In applying the criteria set forth in subdivision (c) of Section 5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.

(*Id.*, § 21074, subd. (a)(2).) Under this definition, the lead agency has discretion to determine that a resource is or is not a tribal cultural resource, using the criteria set forth in the statute. Once a resource is identified as a tribal cultural resource, whether through the mandatory or discretionary process, the lead agency must analyze the proposed project's significant adverse impacts to the resource and impose mitigation measures to address those impacts.

When a resource is not a mandatory tribal cultural resource, the lead agency has discretion to determine whether it is a tribal cultural resource, but the statute provides criteria the lead agency must apply when exercising its discretion. The lead agency must consider whether and how the resource fits within the criteria defined in Public Resources Code section 5024.1, subdivision (c)—including whether the resource was associated with important events or people in California's past, embodies distinctive features of a certain time period or region, or is likely to contribute information important to pre-history or history. And, in applying those criteria, the lead agency must take into

Document received by the CA 1st District Court of Appeal.

account the "significance of the resource to [the] California Native American tribe." (Pub. Resources Code, § 21074, subd. (a)(2).)

The trial court rightly pointed out that there are similarities in the definitions of tribal cultural resources and historical resources. (Oral Ruling Tr. 25:2-5.) Historical resources, like tribal cultural resources, can be either mandatory or discretionary. (*League for Protection of Oakland's Architectural and Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 906-907.) The definition of discretionary tribal cultural resources also mirrors in part that of discretionary historic resources—both require a lead agency's identification to be supported by substantial evidence and evaluated using the criteria in Public Resources Code section 5024.1. (Pub. Resources Code, §§ 21074, subd. (a)(2); 21084.1. Cal. Code Regs., tit. 14, § 15064.5, subd. (a).)

But there is a key difference. When identifying discretionary historical resources, CEQA does not expressly require a lead agency to consider the significance of that resource to a California Native American tribe or any other specified group. Tribal cultural resources are unique in this requirement. Courts should give meaning to the plain language of this distinct statutory language when evaluating a lead agency's identification of tribal cultural resources. (*Dyna-Med, Inc. v. Fair Employment & Housing Commission* (1987) 43 Cal.3d 1379, 1387.)

The statute's other provisions—and the statute's overall structure, purpose, and legislative history—leave no doubt about how an agency should go about considering the significance of the

Document received by the CA 1st District Court of Appeal.

resource to a tribe: the agency should take into account the tribe's own knowledge. As the Legislature stated, one purpose of AB 52 is to uphold tribes' rights to "participate in, and contribute their knowledge to, [CEQA's] environmental review process," including for the "purpose[] of identifying … tribal cultural resources." (AB 52, § 1, subds. (b)(6) & (b)(7).)

AB 52's legislative history shows that the Legislature recognized that the "existence and significance" of some tribal cultural resources can often be understood only with tribal input. (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. (*Id.,* at pp. 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

Document received by the CA 1st District Court of Appeal.

ethnographic[3] research." (*Ibid.*) The legislative history illustrates that the requirement to analyze a resource through the lens of the tribe was added to reduce bias toward western, archaeological values in CEQA analyses and to identify tribal cultural resources that had been previously overlooked. (AB 52, § 1, subds. (a) & (b)(2).)

Expert agency guidance similarly supports the interpretation that lead agencies must consider tribal input and knowledge when identifying tribal cultural resources, and that this information can be substantial evidence of the existence of a tribal cultural resource. OPR's AB 52 Technical Advisory[4] 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 the determination of whether a resource is a tribal cultural resource 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

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[3] Ethnography is defined as the study of people in their own environment through the use of methods such as participant observation and face-to-face interviewing. (National Park Service, Park Ethnography Program <https://www.nps.gov/ethnography/aah/aaheritage/ERCb.htm> [as of June 18, 2024].)

[4] See *supra* p. 11 & note 1 (Pub. Resources Code, §§ 21083, 21083.09.)

Document received by the CA 1st District Court of Appeal.

historical/anthropological records." (OPR Technical Advisory, *supra*, at p. 5.) Tribal elder affidavits and meeting minutes can also constitute evidence of a tribal cultural resource. (*Id.*, at p. 6 [citing *Pueblo of Sandia v. U.S.* (10th Cir. 1995) 50 F.3d 856, 860-861.].)

While a lead agency must consider the significance of the resource to a tribe when identifying tribal cultural resources, this does not mean that a lead agency has no discretion. Indeed, after multiple amendments to the proposed definition of tribal cultural resources, the Legislature adopted the definition that balanced a lead agency's discretionary powers with the requirement to incorporate tribal input in the identification of tribal cultural resources. (Compare Assem. Amend. to AB 52 May 30, 2013, § 21074 with Sen. Amend. to AB 52 Aug. 19, 2014, § 21074, and Sen. Amend. to AB 52 Aug. 22, 2014, § 21074.) The Legislature made similar efforts in other aspects of AB 52 to ensure that lead agencies retained discretion in order to avoid a concern raised by opponents that tribes would have "veto" power over their decisionmaking. (Assem. Com. on Nat. Resources, June 24, 2013, p. 4.)

Thus, the lead agency has discretion to identify tribal cultural resources, but it must consider the significance of the resource to the tribe when it applies the relevant factors provided in the statute, such as whether the resource is associated with important events or people in California's history, embodies distinctive characteristics of a period, or may be likely to yield information important to prehistory or history. (Pub. Resources

Document received by the CA 1st District Court of Appeal.

Code, §§ 21074, subd. (a)(2); 5024.1, subd. (c).) An example of how this should work in practice is that when a tribe identifies a location that has ceremonial significance, even if the location is not significant from a traditional, western archaeological standpoint, the lead agency must consider whether the location is likely to yield information important to prehistory, or meets another of the criteria. While it is the lead agency that ultimately decides whether there is substantial evidence supporting the determination, it should consider testimony from tribal elders, oral history, and testimony from a tribe's historic preservation officer co-equal with other forms of substantial evidence, such as archaeological records.

B. Tribal input in identifying tribal cultural resources should be reflected in the environmental document.

To determine whether a lead agency has in fact considered the significance of the resource to the tribe in its identification of tribal cultural resources, courts should first look to the lead agency's environmental document. CEQA requires lead agencies to document their analyses of tribal cultural resources as distinct resources at the earliest stage of environmental review: the initial study. (Pub. Resources Code, § 21083.09.) The identification of tribal cultural resources, like the identification of historical resources, is a preliminary step that lead agencies must make in order to determine whether a project will have a significant impact on those resources and whether mitigation measures can avoid those impacts. (*Citizens for the Restoration of L Street v. City of Fresno*, *supra*, 229 Cal.App.4th at p. 368.) The

Document received by the CA 1st District Court of Appeal.

initial study or other environmental document should reflect the tribal input that was received in the identification of tribal cultural resources, because decision-makers and the public should be able to understand how the lead agency considered the significance of the resource to the tribe when identifying tribal cultural resources.

At its core, CEQA is an information disclosure statute. When noncompliance with the information disclosure requirements "precludes relevant information from being presented to the public agency," it may constitute a prejudicial abuse of discretion. (Pub. Resources Code, § 21005, subd. (a); *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1375.)

When a lead agency relies on a negative declaration, as the City did here, the negative declaration must include both a finding that the project will not have a significant effect on the environment and an initial study that documents the reasons that support that finding. (Cal. Code Regs., tit. 14, § 15071.) The initial study "should provide documentation of the factual basis for the finding" that the project will not have a significant effect on the environment, including by disclosing the evidence supporting the initial study. (*Id.*, § 15063, subd. (c)(5); *Gentry v. City of Murrieta*, *supra*, 36 Cal.App.4th at p. 1378.)

Tribal cultural resources analyses, like all other resource analyses, must meet CEQA's information disclosure requirement. As the Legislature specified, because CEQA "calls for a sufficient degree of analysis, tribal knowledge about the land and tribal cultural resources at issue should be included in environmental

Document received by the CA 1st District Court of Appeal.

assessments for projects that may have a significant impact on those resources." (AB 52, § 1, subd. (b)(4).) The Legislature intended AB 52 to provide an avenue for tribes and lead agencies to share information and a process by which tribal input would be reflected in environmental documents. (Assem. Com. on Nat. Resources, April 15, 2013, p. 7.)

CEQA requires tribal cultural resources to be differentiated from archaeological and paleontological resources and considered at the earliest point of environmental analyses—at the initial study stage. (Pub. Resources Code, § 21083.09.) Identifying tribal cultural resources is a preliminary step that lead agencies must do before analyzing potential impacts to those resources.

This is similar to the way in which discretionary historical resources are identified. As previously discussed, definitions of both historical resources and tribal cultural resources require lead agencies to analyze whether a resource meets the criteria in Public Resources Code section 5024.1. (Cal. Code Regs., tit. 14, § 15064.5, subd. (a); Pub. Resources Code, § 21074, subd. (a)(2).) In the historical resources context, a lead agency's environmental document should include information, evidence, and analysis about whether a resource fits within that criteria. (See e.g., *Friends of the Willow Glen Trestle v. City of San Jose* (2016) 2 Cal.App.5th 457, 461-462 [analyzing whether a trestle is a historical resource before determining whether project would have impacts on historical resources].) Similarly, a lead agency must include in its environmental document its analysis of whether a resource is a tribal cultural resource, including

Document received by the CA 1st District Court of Appeal.

whether it fits within the statutory criteria and how the agency considered the significance of the resource to the tribe. (Pub. Resources Code, §§ 21074, subd. (a)(2); 21083.09, subd. (b); AB 52, § 1, subd. (b)(4).)

Even when the evidence relied upon is confidential, as is often the case with tribal cultural resources, the lead agency must still describe the information in general terms to inform the public and decision-makers of the basis of its decision. (Pub. Resources Code, § 21082.3, subd. (f) [environmental document "shall" include general description of confidential information obtained through consultation]; *Clover Valley Foundation v. City of Rocklin*, *supra*, 197 Cal.App.4th at pp. 221-222 [finding that a lead agency properly balanced CEQA's disclosure requirements with state law requirements to keep confidential Native American sacred sites when it described the resources in general terms and did not disclose their locations].)

A defective initial study can sometimes be cured when the agency's decision is based on additional information in the record, including testimony at a public hearing. (*Leonoff v. Monterey County Board of Supervisors* (1990) 222 Cal.App.3d 1337, 1347-1348.) But that additional information should demonstrate that the lead agency did in fact do the analysis—an "agency should not be allowed to hide behind its failure to gather relevant data." (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.)

Here, the trial court did not consider whether the City's mitigated negative declaration included the necessary analysis

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supporting the City's identification of tribal cultural resources. Instead, when the court concluded that the City had adequately considered the resource's significance to the Tribe, it seemed to do so based on the City's having allowed the Koi Nation to testify at the administrative appeal hearing. (Oral Ruling Tr. 29-32.) But the ruling missed an important step—when evaluating whether a lead agency considered a tribe's view in the identification of tribal cultural resources, courts should look first to the environmental document, which is where the lead agency should make its initial, preliminary determination of whether a resource is a tribal cultural resource and disclose the evidence relied upon and the analysis that led to its conclusion. (Pub. Resources Code, § 21083.09; Cal. Code Regs., tit. 14, § 15063, subd. (d); AB 52, § 1, subd. (b)(4).) If the initial study is lacking, the court can then determine whether other evidence in the record, such as evidence from a public hearing, cured that defect. (*Leonoff v. Monterey County Board of Supervisors*, *supra*, 222 Cal.App.3d, at pp. 1347-1348.)

Here, the City's mitigated negative declaration contains no analysis of discretionary tribal cultural resources. (AR000875-876.) Instead, it simply cross references the section on mandatory tribal cultural resources. (*Ibid*.) But as discussed *supra* at pages 14-16, the identification of mandatory and discretionary tribal cultural resources requires distinct analyses by the lead agency. Identifying mandatory tribal cultural resources involves determining whether the resource is listed in or eligible for listing in the state historical register or listed in a local historical

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register. (Pub. Resources Code, § 21074, subd. (a)(1).) Identifying discretionary tribal cultural resources is done outside of the registry process. Instead, a lead agency must consider the significance of the resource to the tribe while analyzing whether the resource is associated with a person important to California's past, is likely to yield important information about the state's history or prehistory, or meets another of the defined criteria. (*Id.*, §§ 21074, subd. (a)(2); 5024.1, subd. (c).) As discussed above, analyzing the resource through a tribe's perspective helps avoid the problem of viewing resources only through a western, archaeological lens. Contrary to CEQA, the City's environmental document does not discuss, even in general terms, any analysis supporting the City's determination regarding discretionary tribal cultural resources, including the statutory criteria and how the City considered the significance of the resources to the Tribe. In addition, the environmental document fails to discuss at all any non-confidential information the Tribe provided to the City in the consultation meeting or in any other communications between the City and the Tribe related to discretionary tribal cultural resources. (AR000875-876. *Leonoff v. Monterey County Board of Supervisors*, *supra*, 222 Cal.App.3d at p. 1347.)

Here, the trial court acknowledged the City's failure to document the exchange of evidence at its single tribal consultation meeting. (Oral Ruling Tr. 29:11-13.). But the court did not find this to be an error, nor did it discuss at all the lack of analysis and evidence related to discretionary tribal cultural resources in the City's mitigated negative declaration.

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The trial court focused its analysis on testimony at the City Council appeal hearing. (Oral Ruling Tr. 30:7-25.) But in order for the City Council hearing to have cured the defects of the environmental document, the City Council would have had to perform the required analysis. (See, e.g., *Friends of the Willow Glen Trestle v. City of San Jose*, *supra*, 2 Cal.App.5th at p. 462.) Because the mitigated negative declaration lacked the required analysis, the City Council had an obligation to not only listen to the Koi Nation's testimony, but to assess the testimony in light of factors defining eligibility for tribal cultural resources, and to then explain to the public its decision. Here, the City Council concluded there were no tribal cultural resources, but did not explain how it reached this determination, including how it considered the significance of the resources to the Koi Nation and how it conducted the statutory analysis. (AR000875-876, AR002380-2382.) That is not enough to comply with CEQA.

III. LEAD AGENCIES MUST CONSIDER TRIBAL KNOWLEDGE AND EXPERTISE WHEN ANALYZING IMPACTS TO TRIBAL CULTURAL RESOURCES AND IDENTIFYING APPROPRIATE MITIGATION MEASURES FOR THOSE IMPACTS.

After tribal cultural resources are identified with the help of tribal knowledge, CEQA requires lead agencies to also consider tribal input in the analysis of impacts to tribal cultural resources and the identification of culturally appropriate mitigation measures. (Pub. Resources Code, § 21080.3.2; AB 52, § 1, subds. (b)(2), (b)(4), (b)(6), & (b)(7).) CEQA recognizes that tribes "may have expertise concerning their tribal cultural resources." (Pub. Resources Code, § 21080.3.1, subd. (a).) Like tribal information identifying tribal cultural resources, a tribe's opinion regarding

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significant impacts to tribal cultural resources should also be included in a lead agency's environmental document. (*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 448-449 [finding the environmental document inadequate for failing to consider an expert opinion on project's impacts to salmon migration].)

As discussed in Section II, when the Legislature created tribal cultural resources as a distinct category of resources under CEQA, it recognized that tribes ascribe different value and meaning to their resources than might be reflected by western archaeological studies. This is why the Legislature required lead agencies consider "tribal cultural values in addition to the scientific and archaeological values when determining impacts and mitigation." (AB 52, § 1, subd. (b)(2).) The Legislature recognized that archaeological studies alone would be insufficient for determining impacts to tribal cultural resources and that mitigation measures should be "culturally appropriate." (*Id.*, § 1, subd. (b)(5).) "Appropriate mitigation for a tribal cultural resource is different than mitigation for archaeological resources." (OPR Technical Advisory on AB 52, p. 9].)

The Legislature codified tribes' right to contribute information during project planning processes regarding "the significance of the tribal cultural resources, the significance of the project's impact on tribal cultural resources, or any appropriate measures to mitigate the impact." (Pub. Resources Code, § 21080.3.2, subds. (a) & (c); AB 52, § 1, subd. (b)(6).) Just as tribal input related to the identification of tribal cultural

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resources should be explained in the environmental document and/or technical studies, so too should tribal input on the analysis of impacts to tribal cultural resources and the selection of mitigation measures. Without this context-specific, "relevant, crucial information," the environmental document's analysis is "legally inadequate." (*City of Long Beach v. City of Los Angeles* (2018) 19 Cal.App.5th 465, 485-487 [finding an air quality analysis incomplete, even though the method itself was approved, when it omitted crucial information].)

The trial court determined that the Tribe failed to establish that the archaeological study was an "insufficient investigation of tribal cultural resources." (Oral Ruling Tr. 32: 24-26.) But that ruling misses that it was the City's duty in the first instance to incorporate tribal knowledge and expertise into its impact analyses and proposed mitigation. Instead, the City relied solely on an archaeological study to evaluate and mitigate impacts to tribal cultural resources—the very situation the Legislature sought to remedy. (AB 52, § 1, subd. (a).) The City's archaeological study did not include any analysis by the Koi Nation. Nor did not the Koi Nation have the opportunity to review the study and provide input on the analysis and the study's suggested mitigation before the City approved the project. (AR002311.) This is despite the archaeologist's own acknowledgement that his study reflected "recommendations based on the archaeology side of the balance," not tribal cultural resources. (AR004999.) The mitigated negative declaration thus does not reflect the input the Tribe provided about the Tribe's

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cultural practices and history on the property and about tribal cultural resources. That was legally inadequate. (*Society for California Archaeology v. County of Butte*, *supra*, 65 Cal.App.3d at pp. 839-840 [expert opinion "may not simply be ignored"].) And it undercut AB 52's mandate to consider tribal knowledge, including testimony from a tribal historic preservation officer, as substantial evidence, and not rely solely on archaeological expertise. (AB 52, § 1, subd. (b)(2); OPR Technical Advisory, *supra*, p. 5.)

CONCLUSION

For the aforementioned reasons, the court should vacate the trial court's decision and remand for reconsideration consistent with AB 52's requirements.

Respectfully submitted,

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July 22, 2024

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF OF ATTORNEY GENERAL ROB BONTA AS AMICUS CURIAE IN SUPPORT OF APPELLANT uses a 13 point Century Schoolbook font and contains 6300 words.

ROB BONTA
Attorney General of California

/s/ *Monica Heger*
MONICA HEGER
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Deputy Attorney General
Attorneys for Amicus Curiae the Attorney General of California

July 22, 2024

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **Koi Nation of Northern California v. City of Clearlake, et al.**
No.: **A169438**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On July 22, 2024, I electronically served the attached **BRIEF OF ATTORNEY GENERAL ROB BONTA AS AMICUS CURIAE IN SUPPORT OF APPELLANT** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on July 22, 2024, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1515 Clay Street, 20th Floor, Oakland, CA 94612, addressed as follows:

Superior Court of California
County of Lake
Attn: Judge Michael S. Lunas
255 North Forbes Street
4th Floor, Room 417
Lakeport, CA 95453
Trial Court Case No: CV423786

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on July 22, 2024, at Oakland, California.

Stephanie Williams	
Declarant	Signature

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