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.	Court of Appeal Case No. A169438 Consolidated with Case No: A169805 (Superior Court Case No. CV423786)

On Appeal From the Superior Court for the State of California, County of Lake, Case No. CV423786, Hon. Michael Lunas, Department 1, (707) 263-2374

APPELLANT'S OPENING BRIEF

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TO BE FILED IN THE COURT O[illegible]

COURT OF APPEAL FIRST **APPELLATE DISTRICT, DIVISION** TWO	COURT OF APPEAL CASE NUMBER: A169438
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 142580/284074/338366 NAME: William T. Chisum / Holly Roberson / Curtis Vandermolen FIRM NAME: Kronick, Moskovitz, Tiedemann & Girard STREET ADDRESS: 1331 Garden Highway, 2nd Floor CITY: Sacramento STATE: CA ZIP CODE: 95833 TELEPHONE NO.: (916) 321-4500 FAX NO.: (916) 321-4555 E-MAIL ADDRESS: wchisum@kmtg.com ATTORNEY FOR (*name*): Appellant KOI NATION OF NORTHERN CALIFORNIA	SUPERIOR COURT CASE NUMBER: CV423786
APPELLANT/ PETITIONER:KOI NATION OF NORTHERN CALIFORNIA RESPONDENT/ REAL PARTY IN INTEREST: CITY OF CLEARLAKE, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Appellant KOI NATION OF NORTHERN CALIFORNIA

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: January 11, 2024

William T. Chisum
(TYPE OR PRINT NAME)

/s/ William T. Chisum
(SIGNATURE OF APPELLANT OR ATTORNEY)

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I. INTRODUCTION

Due to a legacy of local governments not considering the impacts of their projects on resources that are significant to Indigenous communities, the Legislature amended the California Environmental Quality Act ("CEQA") to protect a new category of resources—tribal cultural resources ("TCR"). (Mtn. for Judicial Notice ("MJN"), Exh. A ("AB 52"); 2014 Stats., ch. 532). Under AB 52, California Native American tribes are entitled to respectful government-to-government consultation where the agency recognizes their viewpoint, incorporates their expert cultural knowledge, and avoids damaging resources with cultural significance.

CEQA encourages tribes to participate in the AB 52 process by confidentially sharing cultural information. Agencies must consider the importance of TCR to tribes and avoid or mitigate impacts to those resources. Given the historical oppression and severe disadvantages facing Indigenous communities, respecting their TCR is a minimum requirement under CEQA, not an aspirational goal.

In this case, the City of Clearlake ("City") did not respectfully consult with the Koi Nation of Northern California ("Koi Nation"), did not consider the importance of TCR to the Koi Nation's culture, and convinced the trial court to conjure procedural barriers to insulate the City from accountability. Procedural chicanery is a tool of oppression that the Legislature neither created nor intended to apply to tribal consultation under AB 52.

Settlers occupied land and established the City where the Koi Nation's ancestors had villages and sacred sites along the shores of Clearlake since time immemorial. The Koi Nation's ancestors and TCR are buried there. Like other environmental resources, TCR includes more than just the archaeological record. The Koi Nation can identify the geographic boundaries of its organized society and the resources used in its culture. The City's projects have damaged the Koi Nation, recently displacing more than

1,500 cultural items and damaging an ancient intact village site. Yet, the Koi Nation's resilient culture is thriving, and the people of the Koi Nation are still here, fighting for their Ancestors and protection of their TCR.

With this Project, the City proposes to construct a hotel and extend a road in the middle of almost a dozen culturally significant archaeological sites. The Project is only a portion of the City's planned development in the area; the City deliberately piecemealed its footprint to narrowly avoid recorded archaeological sites—covering an area where the Koi Nation's Ancestors traveled and gathered. The Project is within a few hundred feet of numerous recorded archaeological sites. A geographically defined tribal cultural landscape covers the Project area, and dense historic Indigenous habitation surrounds it. The Koi Nation's ongoing cultural practices which use the TCR on this site constitute substantial evidence that the Project will have an impact on TCR.

Disregarding this evidence, the City refused to consider the Koi Nation's two simple mitigation requests: (1) that tribal cultural monitors observe all ground-disturbing activities to identify Ancestors and TCR that are disturbed; and (2) that the City and the Koi Nation establish a plan for the safe and respectful removal of those Ancestors and TCR items for their culturally appropriate reburial and protection on site. That is all the Koi Nation asked for, despite knowing that the City will again desecrate its TCR.

After the Koi Nation sued, the City found procedural means to avoid accountability. It cynically convinced the trial court that the Koi Nation needed to use special language on a specific form of communication before the City was legally obligated to consult, an issue the City never raised in the consultation or Project approval process. CEQA simply requires the Koi Nation to respond to the City in writing, and request consultation. The Koi Nation did so; the trial court erred.

In court, the City began claiming for the first time that it decided there

are no TCR on the Project site, in a contradiction of its own adopted mitigated negative declaration ("MND"). Moreover, the City never complied with CEQA's requirement that it consider the significance of resources to the Koi Nation and apply the required statutory criteria before making a discretionary determination. The trial court erred in not applying the whole statute to the City's purported determination.

The Koi Nation respectfully requests this Court find that: (1) the Koi Nation's written consultation requests satisfied CEQA's minimal notice requirement, (2) the City did not lawfully consult with the Koi Nation, (3) the City did not lawfully consider the significance of resources to the Koi Nation, (4) the City did not consider the cumulative impacts of the Project to the Koi Nation's TCR, and (5) the substantial evidence in the record shows there is a fair argument the Project may impact TCR, either directly, indirectly, or cumulatively. The City must lawfully correct these procedural errors and prepare an environmental impact report ("EIR") to fully investigate, analyze, and mitigate the Project's impacts to TCR.

II. JURISDICTION

This Court has jurisdiction over the Koi Nation's timely appeal of the trial court's final judgment denying and dismissing the Koi Nation's petition for writ of mandate. (Code Civ. Proc. § 904.1(a)(1).)

III. STATEMENT OF THE CASE

A. Summary of Facts.

The City rushed the CEQA process, disregarding substantial evidence of the Project's impacts to TCR. This dispute concerns the City's Airport Hotel and 18th Avenue Extension project ("Project"), which includes development of a 75-room hotel, meeting hall, and parking lot; and extension of 18th Avenue to connect two traffic corridors, State Route 53 and Old Highway 53. [AR000809.] According to the City:

The project site is primarily undeveloped... The southern

> portion of APN 042-121-25 has been previously disturbed, as the site is currently being used as a construction staging area for the storage of equipment and vehicles, *stockpiles*, and other construction-related materials... The northern portion of the site is relatively undisturbed and consists primarily of wooded areas… portions of the proposed 18th Avenue extension currently consist of [disturbed] areas, as well as undisturbed land which consists primarily of ruderal grassland with trees and shrubs scattered throughout.

(AR000809-811.)

1. The City improperly segmented the Project and rushed to a predetermined outcome with piecemealed, incomplete environmental review.

The City's Initial Study must inform whether it should prepare an EIR or may adopt an MND (*See Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1346 ["An initial study follows a public agency's preliminary review of a project to determine whether an [EIR] is needed."]; CEQA Guidelines § 15063(c).) The City reversed this process and improperly decided what environmental document to prepare before making its Initial Study fit that decision.

Clearlake City Manager Alan Flora predetermined "to do the infrastructure as one 'project' as an MND" "beginning in the spring." (*See* AR002730-2732 [discussing segmenting the hotel from planned development for the "whole 40-acre site" or segmenting "roadway, water, sewer, dry utility infrastructure for the 40 acres" to meet the developer's Spring timeline]; AR004382 [discussing the "remaining project"]; AR004397 [discussing an arborist report for the "entire airport property, not just the hotel/18th Avenue site"].)

The City intends to develop the whole 40-acre Pearce Airport property, so its cultural resources consultant recommended investigating the whole property. But, the City limited its cultural resources investigation ("CRI") to the Project site boundary consisting of only 6.5 acres (AR002942;

AR003602 ["Cultural Resource Investigation of a Portion of the Proposed Airport Property Commercial Center" (emphasis added)]; AR004814 [cultural resource consultant received complete documents for "the entirety of the Airport Commercial Property"]; AR004836-001 [describing the "Airport Commercial Property," numerous "confirmed prehistoric Native American sites" and that "sites of this age are very significant"], AR004837-001 [map of entire Airport Commercial Property project area].) and ensured that City employees controlled the conclusions of the CRI (AR003590 ["All work prepared by CONSULTANT shall be subject to inspection and approval by CITY..."]). The City knew the Project area is surrounded by recorded archaeological sites and is therefore culturally sensitive, so it piecemealed the Project to unlawfully avoid analysis of the whole project's significant impacts on TCR.

The City described its rushed Project approval process when presenting the MND to the Planning Commission on December 13, 2022. (AR007293-7294 ["Please note that this is the way the City wants to go because it needs to get the project approved before the end of the year" and discussing deferral of additional "cultural evaluation" to another environmental review].) The Planning Commission approved the MND although the City never responded to the Koi Nation's concerns about TCR impacts and requests for culturally appropriate mitigation, which were verbally expressed during the consultation and in written follow-up.

2. The City refused to meaningfully consult with the Koi Nation.

Before the City formally invited the Koi Nation to consult pursuant to CEQA, its archaeologist engaged in pre-consultation with the Koi Nation Tribal Council beginning on February 3, 2022, as part of his cultural resources investigation ("CRI"). (AR008222-007; *see also* AR000811 [the MND erroneously refers to "additional consultation" by the archaeologist].)

Notably, the City's pre-consultation only involved the Koi Nation; the archaeologist did not consult with Habematolel Pomo of Upper Lake ("HPUL").

On February 10, 2022, Vice Chairperson Dino Beltran emailed the City Manager to inform him that the Koi Nation designated cultural practitioner and TCR expert Robert Geary as its AB 52 consultation representative through an intergovernmental agreement with HPUL. (AR003024-002.) The intergovernmental agreement acknowledged the shared heritage, culture, and historical experience of the Pomo people, from which the Koi Nation and HPUL descend. (AR004381-002.) Recognizing increasing threats to their TCR in the Clearlake area, the Koi Nation and HPUL agreed to "work cooperatively to ensure that appropriate responses are made to notices and requests for consultation issued to them." (*Ibid*.) "The THPO of the Habematolel will… serve as the lead for the Tribes in responding to Notices." (*Ibid*. [emphasis added].)[1] Mr. Geary is a recognized expert in Pomo culture. (AA0139; AA0147.) On February 15, 2022, Vice-Chairman Beltran met with Mr. Flora to introduce Mr. Geary as the Koi Nation's representative. (AR003024-002.)

The next day, February 16, 2022, the City emailed Mr. Geary with an AB 52 invitation to consult regarding the Project's potential impacts on TCR. (AR003038.) The City's invitation requested a formal response from Mr. Geary within 30 days (by March 18, 2022). (AR003038.)

Mr. Geary responded to the City's invitation to consult the same day.

[1] If Koi Nation intended to respond differently than HPUL, it reserved the right to do so upon notice to the HPUL THPO. The City received a copy of the Koi Nation—HPUL agreement on March 23, 2022. (AR004381-002.) The City understood Mr. Geary represented both tribes at least as early as March 15, 2022. (AR004140.)

(AR003159.[2]) In a February 16, 2022, letter, Mr. Geary requested a copy of the City's CRI and requested tribal consultation. (*Ibid*.) Pursuant to the Koi Nation—HPUL intergovernmental agreement, Mr. Geary entered consultation with the City on March 9, 2022, for "Habematolel/Koi." (AR002492.) Mr. Geary explained during consultation that the Project area is culturally sensitive and within a TCR landscape, so he proposed culturally appropriate mitigation measures for the TCR on the Project site, including tribal monitoring and an inadvertent discovery protocol. (*Ibid*.)[3]

Following the only consultation session between the City and the Koi Nation, Mr. Geary clarified his consultation request that the Project "is within the aboriginal territories of the Koi Nation and Habematolel Pomo of Upper Lake." (AR003878.) The City received Mr. Geary's letter on March 11, 2022; within the 30-day window for a written response to the City's invitation to consult.[4]

The City Manager assured the Koi Nation Tribal Council it would "proceed with all due caution" and "coordinate with the Koi Nation on all work scheduled for the Project" (AR 004957-009). At consultation, City staff told Mr. Geary the City Manager would contact him for further discussion about TCR and mitigation (AR002373). The Koi Nation relied on these representations by the City. The City broke its word, and approved the MND

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[2] Mr. Geary responded on HPUL letterhead, which is not significant because he had just been personally introduced to the City by the Koi Nation's Vice-Chairman as their designated representative. Koi Nation THPO letterhead was not yet available.

[3] Mr. Geary's proposed mitigation measures were prepared by him as HPUL's THPO but are equally relevant to the Koi Nation because they are culturally connected to a shared Pomo ancestry.

[4] Mr. Geary's February 23, 2022, consultation request presents substantially the same form and format as his letter dated March 9, 2022, clarifying and confirming the consultation request on the Koi Nation's behalf.

without any further consultation or coordination with the Koi Nation.

The City never responded to the evidence regarding TCR that Mr. Geary provided in consultation, his follow-up letter on the Koi Nation's behalf (AR003878, AR004381-001), or the proposed mitigation measures to reduce the Project's impact on TCR. No further consultation occurred.

Within a week after the City received Mr. Geary's clarified consultation request, and despite Mr. Geary's identification of TCR on the Project site and request for mitigation measures, the City's cultural resources consultant was "completing the finishing touches" on his CRI. (AR004198.) The City received the final CRI report on August 21, 2022, which (*recommended* that the City "comply with [Robert Geary]'s letter" to monitor all ground-disturbing activity. (AR004814; AR004942; AR004999.)

Although Mr. Geary requested a copy of the CRI on February 16, 2022, the City did not provide it to the Koi Nation until January 31, 2023—months after the City received it, 49 days after the Planning Commission approved the MND, and only three days before the City Council hearing. (AR003159; AR002306.) The Koi Nation had no meaningful opportunity to review the CRI for consistency with the evidence Mr. Geary provided, accuracy of TCR identification, adequacy of mitigation, or inclusion of the Koi Nation's concerns regarding the Project's impact on TCR.

3. The record contains evidence of the Project's impacts to TCR.

Piles stored on the Project site are known to contain Native American human remains and midden soil from excavated Koi Nation cultural sites elsewhere in the City. (AR8341-005.) The City's archaeologist explained:

> In the 1990's to the present, the project area has served as the City's materials storage yard…from various sources…
>
> *Some of these piles contain obsidian chunks and flakes, all associated with the dumped foreign fills.*

(AR004957-009 [emphasis added].) As a result of the City's Mullen Storm Drain Project:

> The spoils contained a mix of fill and intact midden soils, numerous obsidian flakes, bifaces, and projectile point fragments, and at least two small fragments of human bone, the latter consisting of additional rib fragments.

(AR008341-005 [emphasis added].)

In shameful disrespect to the Koi Nation, the City allowed those cultural soils to be used as construction fill. The Koi Nation has a valid concern that TCR were left behind, and there are Ancestors and cultural items in the other spoils piles stored on site.

The California Department of Transportation ("Caltrans") notified the City in its comments on the Project that:

> This area is sensitive for archaeological resources. Current records indicate that resources are present.

(AR007194-7195.) Caltrans suggested that "risk will be significantly reduced" if the City limited construction to previously disturbed areas. (*Ibid*.) Caltrans cautioned the City that "the area is of elevated concern to local Tribes," and "consultation will be key to successful project implementation." (*Ibid*.; *see also* AR000852 [the City concluded a "possibility exists that unknown archaeological resources, including human remains, could be uncovered during ground disturbing activities at the project site."].)

Because the City failed to meaningfully consult about confidential TCR information or follow up with the Koi Nation as promised, the Koi Nation's only choice was to present additional evidence about TCR, and Project impacts on TCR, to the City Council in a public appeal hearing. (AR008318-001-002 [confidential maps], AR008341-001–031 [archaeological evidence from the Mullen Storm Drain project] and AR008342-001-017 [addendum], AR002298-2306 [showing the proximity of ten recorded archaeological sites within 0.25 mile radius and their

relevance to the Project site, the relocation of spoils piles containing Native American human remains, non-renewable TCR as a part of history, current cultural practices, the lineal land tracts, and the surrounding TCR landscape], AR002312 [describing confidential maps, and the existence of up to 60 cultural sites in spoils piles], AR002326-2328 [describing family history at the Project site, cultural burials, the significance of 20,000 years of Indigenous history and experience, and historical trauma from destroyed and relocated relatives].) Despite this substantial evidence of the presence of TCR and the Project's impact on them, the City Council rejected the Koi Nation's appeal, adopted the MND and approved the Project on February 2, 2023. (AR000001.)

The Koi Nation submitted confidential maps to the City showing the Project site adjoins the Koi Nation Rancheria. The Rancheria is a TCR, a historic resource, and a significant part of the history of California. The TCR landscape and TCR on the Project site are associated with significant historical events [the original indigenous community structure and the Rancheria era of California history], associated with the lives of important historical persons [the Johnson family of traditional healers], embody distinctive characteristics of the Koi Nation's ancestral society [the unique lineal land tracts], and are thus likely to yield important information about the Koi Nation's and California's history (Public Resources Code "PRC" § 5024.1(c).)

This Project site is culturally significant to the Koi Nation for three main reasons: (1) this site is where the City stockpiles cultural soils that contain displaced TCR and Native American human remains. Given the density of Native American habitation and cultural sites in the Clearlake area, the density of TCR at the locations where the soils were excavated, and because spoils piles stored on the Project site were known to contain Native American human remains and TCR, the Koi Nation knows more are there;

(2) this site is contiguous with the Koi Nation's former Rancheria, a historically and culturally significant place; and (3) this site is part of a TCR landscape that includes lineal land tracts and traditional gathering areas on the Project site, as well as the Rancheria, and the home of the culturally and historically significant Johnson family is adjacent to it. All three factors strongly support the Koi Nation's position that the site is a TCR landscape, and the City will encounter additional TCR during construction.

B. Procedural Posture

The Planning Commission approved the MND on December 13, 2022. (AR001182.) The Koi Nation appealed the Planning Commission's decision to approve the MND on December 22, 2022. (AR002712-2722.) The City Council reviewed the Commission's decision in a public hearing on February 2, 2023, and approved the MND with minor amendments. (AR000001.) The City issued a Notice of Determination on February 3, 2023, and the Koi Nation appealed the City Council's decision on March 3, 2023, by filing its Petition for Writ of Mandate in Lake County Superior Court. (AA0029-0067.)

The trial court entered a temporary stay on July 24, 2023, and a permanent stay on September 20, 2023, preventing any ground-disturbing activity on the Project site pending its resolution of the underlying petition. (AA0525-0527; AA0992-0993.) After the Developers defaulted, the trial court heard arguments on October 20, 2023. On November 20, 2023, it issued an oral statement of decision. (AA1349-1398.) The trial court entered its written judgment on December 22, 2023, denying the Koi Nation's Petition. (AA1348-1398.) The Koi Nation timely appealed the trial court's oral statement of decision on December 18, 2023, and timely appealed the written judgment on February 16, 2024. (AA1336; AA1457.)

On February 27, 2024, this Court temporarily stayed the City's ground-disturbing activities at the Project site pending its decision on the Koi

Nation's Petition for Writ of Supersedeas. Thank you.

IV. STANDARD OF REVIEW

> Abuse of discretion is shown if (1) the agency has not proceeded in a manner required by law, or (2) the determination is not supported by substantial evidence.

(*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 945 [citations omitted]; *Berkeley Hillside Preservation v. City of Berkeley* ("*Berkeley Hillside*") (2015) 60 Cal.4th 1086, 1110.) "The failure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decision making and informed public participation. Case law is clear that, in such cases, the error is prejudicial." (*Id*. at 946.) The California Supreme Court instructs:

> An appellate court's review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus cases, is the same as the trial court's: the appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo.

(*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427 [emphasis added]; *Save the Hill Group v. City of Livermore* (2022) 76 Cal.App.5th 1092, 1103.)

"The standard of judicial review of an agency decision to adopt a negative declaration is whether there is substantial evidence in support of a 'fair argument' of potential environmental impact." (*Sierra Club v. Cal. Dept. of Forestry & Fire Protection* ("*Sierra Club*") (2007) 150 Cal.App.4th 370, 381.) The fair argument standard establishes "a low threshold requirement for preparation of an EIR." (*Id*. at 380.) The agency and the Court do not weigh evidence in the record. (*Berkeley Hillside*, 60 Cal.4th at 1104.) Whether a fair argument was raised is a question of law. The Court does not defer to the agency's factual findings. (*Banker's Hill v. City of San Diego* (2006) 139 Cal.App.4th 246, 264.)

Substantial evidence of a fair argument does not include speculation or unsubstantiated opinion; however, "expert opinion supported by facts" is *de facto* substantial evidence. (CEQA Guidelines[5] § 15384; *Sierra Club*, 150 Cal.App.4th at 380.) A petitioner who provides expert opinion has met the fair argument standard.

Thus, this Court should review the City's MND *de novo* for both procedural and substantive errors; "the trial court's conclusions are not binding on it." (*San Bernardino Valley Audubon Soc. v. Metropolitan Water Dist.* (1999) 71 Cal.App.4th 382, 389.)

V. ARGUMENT

There are three main issues for this Court to decide on appeal. The first issue is procedural: whether the City was required to consult with the Koi Nation under AB 52 but failed to comply with CEQA's consultation procedures. This Court should decide that the City did not conduct its required consultation with the Koi Nation according to law.

The second independent issue is substantive: whether substantial evidence supports a fair argument that the Project may have a significant effect on TCR. This Court should hold the fair argument standard applies to evidence of the Project's impacts to TCR in this case, and since the Koi Nation met that standard, the City must prepare an EIR.

Third, the City failed to disclose information that was material to its decision and failed to consider the cumulative impacts of successive projects on TCR, in violation of CEQA. This Court should direct the City to redo its environmental review and analyze cumulative impacts.

A. The Koi Nation Properly Requested Consultation, Which the City Did Not Lawfully Perform.

The trial court denied the Koi Nation standing through a tortured

[5] Chapter 3, Division 6, Title 14 of the California Code of Regulations, §§ 15000, *et seq*.

reading of CEQA's notice provisions to avoid deciding whether the City lawfully consulted with the Koi Nation. Thus, a threshold question is whether the Koi Nation notified the City in writing that it wanted to consult.

There is no doubt that the City failed to lawfully conduct or conclude consultation with the Koi Nation. (AA1021 [California's Attorney General concluded 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."].)

Similarly, at least two written documents after the initial response from the Koi Nation's representative properly notified the City that the Koi Nation wanted to consult; clearly the trial court erred.

This issue is a matter of first impression of statutory interpretation which is purely a legal question for this Court to review *de novo*. (*Conway v. Superior Court of Los Angeles* (2023) 97 Cal.App.5th 750, 758.)

1. The Koi Nation met CEQA's simple notice requirement.

Before releasing an MND the City "shall begin consultation with a California Native American tribe" if, *inter alia*, "the California Native American tribe responds, in writing, within 30 days of receipt of the formal notification, and requests the consultation." (PRC § 21080.3.1(b)(2).) The City must formally invite "the designated contact of, or tribal representative of" the Koi Nation to consult. (PRC § 21080.3.1(d).) The Koi Nation's designated representative "has 30 days to request consultation." (*Ibid*.) There are no other procedural or substantive requirements applicable to the tribe.

The Koi Nation complied with all statutory requirements. Even if the Court finds the Koi Nation's notices to the City were not fully compliant, the Koi Nation substantially complied without prejudice to the City under the established standard for CEQA notices. The trial court erred in deciding the Koi Nation lacked standing.

(a) Consultation occurs between sovereign governments.

The Koi Nation is a sovereign nation under federal law. (*Cherokee Nation v. Georgia* (1831) 30 U.S. 1.) Koi Nation retains all aspects of its sovereignty, except for those expressly abrogated by Congress. (*See, e.g., Kiowa Tribe of Okla. v. Manufacturing Tech., Inc.* (1998) 523 U.S. 751; *Haaland v. Brackeen* (2023) 599 U.S. 255.) California acknowledges the Koi Nation's sovereignty by requiring that:

> Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty.

(Gov. Code § 65352.4.) The Koi Nation stands on equal footing with the State. (*Cherokee Nation*, 30 U.S. at 14.)

The City cannot dictate the Koi Nation's sovereign governmental procedures for designating a representative to receive and respond to the City's invitation to consult. Thus, when the Koi Nation designates a representative and notifies the City of that designation, the City cannot impose extra-statutory requirements that the Koi Nation designate another individual or use unstated procedures to request consultation. (*See Linovitz Capo Shores LLC v. California Coastal Commission* (2021) 65 Cal.App.5th 1106, 1122 [courts may not add words to the statute under the guise of legislative interpretation].)

(b) The Koi Nation designated Mr. Geary as its representative for consultation; the City understood his role.

The City must send an invitation to consult to the Koi Nation's representative, and the Koi Nation's representative must respond in writing to request consultation. (PRC § 21080.3.1.) Before the City's invitation to consult, the Koi Nation executed an intergovernmental agreement with the HPUL which designated Mr. Geary as the Koi Nation's representative for

consultation, and notified the City of its designation. (AR004381-002.) The Koi Nation then introduced the City Manager to Mr. Geary as its consultation representative, both in writing and in a meeting. (AR003024-001.) The following day, the City emailed Mr. Geary and invited him to consult on the Project. (AR003038.)

Mr. Geary responded to the City's invitation and requested consultation the same day. (AR003159.) Less than 30 days later, the City met with Mr. Geary for consultation. (AR002492.) Mr. Geary signed into that consultation "on behalf of" the Koi Nation.[6] (*Ibid*.) Mr. Geary followed up in writing with the City after the consultation to clarify—resolving any doubt—that the Koi Nation requested consultation. (AR003878.)

Before the deadline for the Koi Nation to request consultation, the City acknowledged that Mr. Geary "was acting as a representative for both Koi Nation and the Pomo." (AR004118.) An email exchange between the City and its environmental consultant confirms the City understood this relationship:

> Mr. Sookne – "I heard there's a MOA between the City and the Koi Nation. Can I get a copy of that? Also, do you have a point of contact for the tribe?";
>
> Ms. Brown – "Robert Geary is the contact for tribal consultations for the Koi Nation. rgeary@hpultribe-nsn.gov;"
>
> Mr. Sookne – "I thought Robert was the contact for the Habematolel Pomo. Is he also the contact for the Koi Nation?;"
>
> Ms. Brown – "Koi has contracted with Habematolel to handle their tribal consultation for the time being; "

(AR004118-4119 [Mar. 15, 2022; Adeline Brown, City staff, and James Sookne, environmental consultant] [emphasis added].) The record shows the City understood that Mr. Geary represented the Koi Nation in consultation.

[6] The sign-in sheet stated "Habematolel/Koi." (AR002492.)

(c) CEQA does not prescribe a specific form or process for Koi Nation to request consultation.

The Koi Nation's notice to the City merely triggers the 30-day timeline for the City to begin consultation.[7] (PRC § 21080.3.1(e).) CEQA does not prescribe any specific form for the Koi Nation to request consultation with the City, it merely requires that the notice be "in writing," within 30 days after receiving a formal invitation, and "request[] consultation." (PRC § 21080.3.1(b).) The simple rule that fulfills the statute's language and purpose is:

> When the Koi Nation's designated representative provides written notice to the City of its desire to consult on a Project, the City is required to begin consultation with the Koi Nation within 30 days.

The trial court violated the fundamental principles of CEQA when it purported to apply "the express language of the statute and a strict instruction [*sic*] of the statutory requirement" to conclude that the Koi Nation did not make a written request to consult. (RT p. 236:2-5 [emphasis added].) Strict construction is the wrong approach to statutory interpretation in a CEQA case. CEQA must be liberally interpreted to promote its goal of protecting the environment rather than strictly interpreted to bar impacted parties from producing relevant project impact information. (*See Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal.4th 105, 112.)

The goal of statutory interpretation is to effectuate the purpose of the law and the legislative intent of the entire statutory scheme. (*People v. Shirokow* (1980) 26 Cal.3d 301, 307.) Environmental statutes must be liberally construed "to afford the fullest possible protection to the

[7] The notice's secondary purpose is to inform the City of who the Koi Nation's representative is; however, absent a designation the City must still consult with the tribe. (PRC § 21080.3.1(b).)

environment within the reasonable scope of the statutory language." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390.)

Courts must not adopt an exclusionary rule, contrary to the language and intent of AB 52 to include tribal governments in the CEQA process and protect TCR. The legislative intent of AB 52 supports broad tribal involvement, rather than restricting involvement by requiring Native American tribes to jump through hoops to request consultation. (*See also* AA1020 ["Legislative history also shows that the Legislature added tribal consultation to CEQA to rectify the exclusion of tribes from project planning processes."].) The Legislature acknowledged that before AB 52, CEQA:

> does not readily or directly include California Native American tribes' knowledge and concerns. This has resulted in significant environmental impacts to tribal cultural resources and sacred places, including cumulative impacts, to the detriment of California Native American tribes and California's environment.

(AB 52 § 1(a)(3).) AB 52's author, Assembly Member Mike Gatto explained:

> [t]he premise that one culture's sacred sites and historical landmarks aren't given the same value as another culture basically amounts to cultural imperialism. California has the most tribes in the nation, and we need to treat those areas with the dignity and respect they deserve.

(MJN, Exh. B, p. 9.) Thus:

> The Legislature finds and declares that California Native American tribes traditionally and culturally affiliated with a geographic area may have expertise concerning their TCR.

(PRC § 21080.3.1(a).) Tribal knowledge about the land and TCR at issue should be included in environmental assessments for projects that may have a significant impact on those resources. (AB 52 § 1(b)(4); PRC § 21080.3.1(a).)

The trial court's misguided ruling that certain words must be included

on specific letterhead is nonsensical. (RT pp. 64, 185, 186, 232.) The trial court acknowledged that Koi Nation's designation of Mr. Geary as its representative controls *to whom* the City must send any notice of an opportunity for tribal consultation (RT pp. 231-232.), but not *from whom* the City must accept notice of the Koi Nation's desire to consult. Such conjured procedural hurdles do not fulfill the purpose, intent, or language of the statute. (*See* PRC § 21083.1 [prohibiting courts from imposing "procedural or substantive requirements beyond those explicitly stated"].)

2. Mr. Geary requested consultation as a representative of the Koi Nation, in writing, twice.

Applying the simple rule to the facts in this case, the Koi Nation's designated representative, Mr. Geary, notified the City in writing that it wanted to consult. Contrary to the trial court's erroneous decision, there are, at minimum, two writings by Mr. Geary that satisfy CEQA's notice requirement.

First is Mr. Geary's sign-in to the March 9 consultation meeting, where he signed in as the consultation as the Koi Nation's representative. (AR002492.) The trial court erroneously declared that the sign-in sheet "does nothing more than communicate to the city what they already knew and that Mr. Geary was a representative for the Pomo Tribe and the Koi Tribe." (RT p. 232.) Rather, it fulfills the simple statutory requirement that there be a writing in which the Koi Nation requests consultation. (PRC § 21080.3.1(b).) Second, is Mr. Geary's written clarification of the Koi Nation's consultation request which identified the Project as within Koi Nation's Aboriginal territory. (AR003878.) Both writings occurred before the March 18, 2022, response deadline. The Koi Nation's representative identified the Koi Nation as a traditionally and culturally affiliated Native American tribe and requested consultation in writing—that is all CEQA requires.

According to the City "consultation did occur," so Mr. Geary's

written notices were effective. (MJN, Exh. F, p. 13 [citing Appellant's exhibits].) The City's representative attending consultation admitted within 30 days of the February 16th invitation that Mr. Geary was handling tribal consultation on behalf of the Koi Nation. (AR004118-4119.) The City knew that Mr. Geary represented the Koi Nation for consultation purposes and the Koi Nation wanted to consult on the Project. If the City was somehow confused it should have clarified its understanding with Mr. Geary and the Koi Nation. There is no need for the Court to add unstated procedures or magic words to the statute for the Koi Nation's written requests to fulfill their purpose.

3. The Koi Nation substantially complied with CEQA's statutory requirements.

If this Court finds that the Koi Nation did not fully comply with CEQA's notice provisions, the tribe still substantially complied. Courts evaluate the adequacy of notice and consultation requirements for substantial compliance and proof of prejudice. (*See San Francisco Baykeeper, Inc. v. State Lands Com.* (2015) 242 Cal.App.4th 202, 230; *see also Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 52-53; *Dusek v. Redevelopment Agency* (1985) 173 Cal.App.3d 1029, 1044 ["The issue is whether there was good faith, reasonable, and substantial compliance with CEQA"]; *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 13 ["A reviewing court looks not for perfection but for good faith and substantial compliance."].) The Koi Nation submits that substantial compliance is appropriate for notice requirements the State places on sovereign tribal governments.

The sequence of events reveals both parties' understanding of the Koi Nation's consultation effort. On February 15th, the Koi Nation's Vice Chairman introduced Mr. Geary to the City as the Koi Nation's representative for AB 52 consultation. The following day, the City emailed

Mr. Geary with a formal invitation to consult, and he responded that same day. Three weeks later, Mr. Geary walked into the consultation, signed in as a representative of the Koi Nation, and consulted with the City. His follow-up four days later also identified the Koi Nation.

Mr. Geary's notice to the City was in good faith, reasonable, and in substantial compliance with the requirement that he notify the City in writing and request consultation as the Koi Nation's designated representative. (AR003159.) Further, the City will suffer no prejudice if this Court finds that the Koi Nation substantially complied with the statute because the City: (1) invited the Koi Nation's representative to consultation after being introduced to him by Koi Nation's elected leadership; (2) admitted in writing that it was meeting with the person it believed was the Koi Nation's representative; and (3) knew that it was consulting with the Koi Nation. (AR002492; AR004118-4119.) Given these facts, all of which occurred within the 30-day response window, adding procedural requirements serves no purpose.

Moreover, *before* the City sent its invitation to consult, the City's archaeologist coordinated with the Koi Nation Tribal Council, and then discussed those meetings with the City. (AR004957-008-009.) As a result, "[City Manager] Flora confirmed that the City would proceed with all due caution and Mr. Flora committed to continue coordination with the Koi Nation Tribal Council on all work scheduled for the Airport Commercial Property." (AR004957-009.) The resulting CRI report only referenced the Koi Nation—leaving no doubt with whom the City was consulting. (AR004957-001.)

4. The City did not lawfully conduct or conclude consultation with the Koi Nation; consequently, the MND does not mitigate harm to TCR.

The Koi Nation brought a core issue before the trial court: the City never lawfully conducted or concluded consultation; as a result, it failed to

properly identify TCR and mitigate the Project's impacts on the environment. (*See* PRC §§ 21084.2 [adverse changes to TCR are significant impacts on the environment], 21082.3(e) [requiring feasible mitigation].) Had the City properly consulted, the Koi Nation would have been more able to help the City identify TCR, evaluate the Project's potential impacts to TCR, and appropriately mitigate those impacts to less than significant within the confidential consultation process. The City's refusal to follow CEQA and lawfully consult with the Koi Nation so it could identify and mitigate Project impacts to TCR renders its MND invalid.

While the Koi Nation attempted in good faith to meaningfully consult with the City, the City violated CEQA by disregarding its obligation to identify and avoid, preserve, or mitigate impacts to TCR through respectful and meaningful good-faith, government-to-government consultation with the Koi Nation. (PRC § 21080.3.1(b).)

(a) Consultation includes a respectful discussion about identifying and addressing the Project's impacts to TCR.

The Legislature dictated the type and quality of consultation by requiring the City and the Koi Nation to consider and discuss each party's views in a meaningful and respectful manner. (Gov. Code § 65352.4.) Consultation "is a process in which both the tribe and local government invest time and effort into seeking a mutually agreeable resolution for the purpose of preserving or mitigating impacts to a cultural place, where feasible" and tribal consultation "is an ongoing process, not a single event...." (MJN, Exh. C ("Technical Advisory"), p. 6;[8] *see also* AA1019-1020 [Lead agencies must consult with tribes "*throughout* the CEQA process—from the

[8] AB 52 required OPR to prepare guidelines for lead agencies to incorporate tribal consultation, and the separate consideration of TCR, into their CEQA processes. (PRC § 21083.09.)

identification of TCR through the proposal of mitigation measures to avoid or lessen impacts to those identified resources."]; & AA1020 [Statutory text, legislative intent and history and expert agency technical advisory all "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."].)

The Koi Nation is entitled to a respectful discussion about "the type of environmental review necessary, the significance of tribal cultural resources, [and] the significance of the project's impacts on the tribal cultural resources…." (PRC § 21082.3(c).) During consultation, both the City and the Koi Nation are entitled to "propose mitigation measures… capable of avoiding or substantially lessening potential significant impacts to a tribal cultural resource or alternatives that would avoid significant impacts to a tribal cultural resource." (PRC § 21080.3.2(a).) CEQA requires the City to meaningfully and respectfully consider and discuss "alternatives to the project, recommended mitigation measures, or significant effects" proposed or described by the Koi Nation. (*Ibid*.) Mr. Geary provided the City with expert information about the Project's significant effects on TCR and proposed mitigation, to which the City never responded. (AR003878.)

CEQA requires the City to consult with the Koi Nation in a manner that protects the confidentiality of tribal knowledge. (PRC § 21082.3(c).) Although the City Council discussed some of the Koi Nation's evidence in a public hearing, that discussion was not a meaningful consideration of confidential tribal information about the significance impacts TCR, the appropriateness of mitigation measures, or the significant effects of the Project on TCR. (*See also* AB 52 § 1(b)(5) [noting the need for confidentiality as to TCR].) The City Council hearing was not respectful of

the need for confidentiality about the location of TCR[9] and was not a part of the City's attempt at consultation.

Although the City committed to working with the Koi Nation Tribal Council on the Project, and to following up with Mr. Geary, it never did. The City did not have a respectful discussion with the Koi Nation about identifying TCR or their significance. The only discussion with City decision-makers about identifying TCR was in the City Council's public hearing during the Koi Nation's appeal—a setting that is inconsistent with the City's obligation to seek information from the Koi Nation about TCR confidentially. At that hearing, the City Council members summarily disregarded the substantial evidence and expert cultural knowledge and information provided by the Tribal Council, THPO designee, and a tribal member. The City did not consult the Koi Nation about the Project's impacts to TCR after failing to properly identify them. Instead of seeking mutually agreeable mitigation measures as the statute requires, the City applied the statutory requirements for archaeological discovery to the exposure and destruction of TCR—an antiquated approach that AB 52 was intended to rectify. (AR000875-876 [importing the archaeological mitigation in CUL-1 through CUL-4].)

In its brief session between City planning staff without decision-making authority, and Mr. Geary, the City utterly failed to have a meaningful and respectful discussion wherein the City and the Koi Nation could reach an agreement on the topics that the Koi Nation is entitled to consult about. The City's failure to follow up with the Koi Nation as it promised led directly to its inadequate consideration of TCR in the MND.

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[9] Tribal governments carefully guard the location of their TCR because Native American human remains and cultural items remain valuable in the marketplace—graverobbing and looting of cultural objects remains a major problem affecting Indigenous people today, including in Lake County.

(b) Consultation cannot be lawfully concluded until the City and the Koi Nation reached agreement, or agreement could not be reached after a good faith, reasonable effort.

CEQA has provisions to ensure that the City's consultation with the Koi Nation is respectful of tribal sovereignty and is a meaningful government-to-government discussion. Specifically, CEQA provides only two conditions under which the City may stop consulting with the Koi Nation: (1) "[t]he parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource" or (2) "[a] party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached." (PRC § 21080.3.2(b).)

These two conditions are action-forcing. The preferred outcome is that the City and the Koi Nation reach an agreement on the significant impacts of the project on TCR, and alternatives or mitigation measures that address those impacts.

In this case, the Koi Nation did not oppose the City's Project. The Koi Nation requested modest, culturally appropriate, and effective mitigation measures that would help the City avoid impacts to TCR by having tribal monitors present to identify TCR in the spoils piles, and unearthed during construction, and temporarily stop ground-disturbing activities around them until culturally appropriate treatment occurs. (AR003878-3886.) The Koi Nation also requested measures to mitigate the Project's impacts to TCR by having a plan in place for the preservation or reinterment of resources for their protection. (AR003879-3886.) These are common mitigation measures throughout California, and the parties could have reached agreement if the City consulted in good faith. (*See, e.g.*, *Save the Agoura Cornell Knoll v. City of Agoura Hills* ("*Agoura Hills*") (2020) 46 Cal.App.5th 665.) The City has required paid tribal monitoring for projects, including for early stages of this Project.

Where agreement cannot be reached, CEQA requires the City to behave in a respectful manner befitting government-to-government consultation. (Gov. Code § 65352.4.) The City cannot refuse to acknowledge and address the Koi Nation's concerns or refuse to consult on matters that the Koi Nation is entitled to raise and also satisfy CEQA's requirement that the City act "in good faith" and make a "reasonable effort" before concluding that mutual agreement cannot be reached.

The City must make a good faith attempt to reach agreement on issues raised by the Koi Nation, including:

> the type of environmental review necessary, the significance of TCR, the significance of the projects' impacts on the TCR, and… project alternatives or the appropriate measures for preservation or mitigation that the [Koi Nation] may recommend to the [City].
>
> If the California Native American tribe requests consultation regarding alternatives to the project, recommended mitigation measures, or significant effects, the consultation shall include those topics.

(PRC § 21080.3.2(a).) The Koi Nation requested consultation about the Project's significant effects on TCR and recommended mitigation measures. But the City made no effort to reach mutual agreement with the Koi Nation.

The City was not entitled to conclude consultation with the Koi Nation, since it never engaged in good faith and meaningful consultation on identifying TCR or appropriate mitigation measures, among other issues.

It just met with the Koi Nation once, and then didn't respond to follow up.

(c) Established standards govern the City's duty to consult in good faith and with reasonable effort.

Courts are accustomed to determining whether a party acted in good faith, and the contours of consulting with a sovereign Native American tribe

in good faith under CEQA are discernible by analogy to other statutes that concern consultation between the government and Native American tribes. Courts most often consider the State's good faith vis-à-vis a tribe in the context of negotiations for Tribal-State agreements that authorize Indian gaming. (*See* 25 U.S.C. 2710(d)(3)(A) ["the State shall negotiate with the Indian tribe in good faith"].) There, federal courts refer to the good faith negotiation requirements of the Fair Labor Standards Act as interpreted by the National Labor Relations Board ("NLRB"). (*See In re Indian Gaming Related Cases* (2001) 147 F.Supp.2d 1011, 1020-1021; *Fort Independence Indian Community v. Cal.* (2009) 679 F.Supp.2d 1159, 1187; *Pauma Band of Mission Indians v. Cal.* (2020) 973 F.3d 953, 962 & n.1.)

The California Public Employment Relations Board ("PERB") interprets California's good faith labor negotiations standards similarly. PERB's decisions are consistent with the NLRB and should guide the Court in analyzing whether the City's actions amounted to good faith consultation.

An impasse "exists where the parties have considered each other's proposals and counterproposals, attempted to narrow the gap of disagreement and have, nonetheless, reached a point in their negotiations where continued discussion would be futile." (*International Brotherhood of Electrical Workers, Local 465, AFL-CIO v. Imperial Irrigation Dist.* (2023) PERB Decision No. 2861-M, p. 48.)

If a party abandons consultation, however, it constitutes "a per se violation" of its duty to consult in good faith. (*Id*. at p. 48.) "Per se violations [of good faith negotiation] generally involve conduct that violates statutory rights or procedural bargaining norms." (*Ibid*.)

Like the impasse requirement in labor negotiations, CEQA only allows a party to conclude consultation if "mutual agreement cannot be reached." (PRC § 21080.3.2(b)(2) [emphasis added].) The analogy is apt for tribal consultation because CEQA requires the parties to behave in a

respectful and considerate manner and to seek agreement. (Gov. Code § 65352.4.)

(d) The City's refusal to respond to the Koi Nation was not in good faith.

First, the person representing the lead agency in consultation must have the authority to speak for the lead agency and to negotiate and consult with the Tribe in good faith. (*See* MJN, Exh. D, pp. 16-17 ["Government leaders of the two consulting parties may consider delegating consultation responsibilities ([including] negotiating the needs and concerns of both parties) to staff. Designated representatives should maintain direct relationships with and have ready access to their respective government leaders." (emphasis added)]; *but see Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior* (2010) 755 F.Supp.2d 1104, 1119 ["meetings with government staff or contracted investigators… don't amount to the type of 'government-to-government' consultation contemplated by the regulations."].)

The City did not send an individual with decision-making authority to the consultation, in violation of the principle of good faith consultation which is respectful of tribal sovereignty. (Gov. Code § 65352.4.) City staff instead indicated that the unavailable City Manager would need to approve any of the Koi Nation's proposals, although he did not hear the Koi Nation's substantial evidence regarding TCR in consultation firsthand. (AA0140.)

Second, consultation is not a box to be checked after a one-and-done *pro forma* meeting. (*See* AA1020.) Not all consultations require more than one session. Rather, the consultation must be meaningful and include a respectful dialogue that fully addresses the necessary topics. (*But see* AA1021 ["[T]ribal consultation, in general, is an 'ongoing process, not a single event.'"].)

The parties met on March 9, 2022, for consultation. It was the only

consultation session, despite having reached no agreement identifying TCR, Project impacts, the necessary level of environmental review, appropriate measures to avoid, preserve, or mitigate damage to TCR, or any other permitted topic. (AR002490.) Absurdly, the City crammed consultation on four separate projects into this one brief meeting. (AR002492.) Yet, the City did not even consider those projects it consulted on *at the same time* in a cumulative impacts analysis for TCR.

Mr. Geary met with the City in good faith and as a cultural expert provided substantial evidence of the TCR that the Project impacts, discussed the level of impact to those TCR, proposed feasible and culturally appropriate mitigation measures to reduce the level of impact to TCR, described treatment protocols for inadvertent discoveries intended to keep the Project moving forward while respecting TCR, and proposed a basic tribal monitoring agreement. (AR002301-2304.) Shortly after the consultation, Mr. Geary sent a letter to the City reiterating the Koi Nation's requests for specific mitigation measures. (AR003878-3879.) Mr. Geary again followed up in an e-mail to the City on March 23, 2022. (AR004381-001.) He noted that the Koi Nation was waiting for the City to approve or respond to the proposed tribal monitoring agreements. (*Ibid*.)

The City never responded.

No further consultation with the Koi Nation occurred before the City publicly noticed the MND and presented the Project to its Planning Commission in December 2022. (AR002278-2279.) Despite the Koi Nation's March request, the City did not provide the Koi Nation with a copy of its CRI for review until after the Planning Commission adopted the MND and approved the Project. (AR002306.) The City did not consider the Koi Nation's mitigation proposal, offer a counterproposal, or attempt to narrow the gap between them, before walking away from consultation. The City ignored the Koi Nation's evidence and valid impact concerns.

Failing to respond to written and verbal proposals and requests for further information and consultation, while breaking promises to coordinate, is not a meaningful and respectful dialogue that addresses the consultation topics. (*See* AA1018 [concluding that the City's 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."].) Crucially, the City's bad faith conduct denied it information that was necessary to understand the environmental impacts of its decision, and adequately avoid or mitigate those impacts, thereby negating the purpose of tribal consultation.

The City did not lawfully conduct or conclude tribal consultation with the Koi Nation, so the MND based upon such defective consultation violates CEQA's procedural requirements. The Court need not establish minimum requirements for lawful consultation here—the City's efforts did not meet any reasonable threshold for good faith, meaningful consultation.

B. The Record Includes Substantial Evidence of a Fair Argument that the Project May Have a Significant Impact on TCR.

The City's MND declared the Project may impact TCR, but impacts to TCR were reduced to less than significant by the incorporation of cultural and archeological mitigation measures. TCR must be present in order to have something to mitigate. Since the City acknowledged the Project site has TCR, as shown in the MND, when the Koi Nation presented a fair argument that the Project would have unmitigated significant effects on TCR, the City was required to prepare an EIR. (*See Berkeley Hillside*, 60 Cal.4th at 1111 ["If a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect."]; *see also Protect Niles v. City of*

Fremont (2016) 25 Cal.App.5th 1129, 1134 [an EIR is required rather than an MND when substantial evidence supports a fair argument that there will be significant adverse environmental impacts from a project].) The City's adoption of an MND violated CEQA.

1. The City's MND determined the Project impacts TCR.

The City's MND determined TCR "would be potentially affected by this project in an adverse manner." (AR000836.) The MND makes this determination in three places:

> Environmental Factors Effected: **The environmental sections checked below would be potentially affected by this project in an adverse manner**, including at least one environmental issue/significance criteria that is a "less than significant impact with mitigation" as indicated by the analysis in the following evaluation of environmental impacts.

☒	**Aesthetics**	☐	Greenhouse Gas Emissions	☐	Public Services
☐	Agriculture & Forestry Resources	☐	Hazards & Hazardous Materials	☐	Recreation
☒	**Air Quality**	☐	Hydrology / Water Quality	☐	Transportation
☒	**Biological Resources**	☐	Land Use / Planning	☒	**Tribal Cultural Resources**
☒	**Cultural Resources**	☐	Mineral Resources	☐	Utilities / Service Systems
☐	Energy	☒	**Noise & Vibration**	☐	Wildfire
☒	**Geology / Soils**	☐	Population / Housing	☒	**Mandatory Findings of Significance**

(*Ibid*. [emphasis added]); and:

> IMPACT CATEGORIES KEY:
>
> - 1 = Potentially Significant Impact
> - **2 = Less Than Significant with Mitigation Incorporation**
>
> …
>
> - 6 = No Impact

IMPACT CATEGORIES*	1	2	3	4	5	6	All determinations need explanation. Reference to documentation, sources, notes and correspondence.
SECTION XVIII. TRIBAL CULTURAL RESOURCES *Would the project cause a substantial adverse change in the significance of a tribal cultural resource, defined in Public Resources Code section 21074 as either a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American tribe, and that is:*							
a) Listed or eligible for listing in the California Register of Historical Resources, or in a local register of historical resources as defined in Public Resources Code section 5020.1(k), or	☐	☒	☐	☐	☐	☐	**Less than Significant Impact with Mitigation.** As discussed in Section V, Cultural Resources, of this IS/MND the Cultural Resource Investigation prepared for the proposed project included a records search and literature review. In addition, in compliance with the City's Native American Tribal Consultation Program, Sub-Terra initiated tribal coordination with the Koi Nation of California to request any information that tribal representatives might provide regarding the cultural significance of the project area, and any interests or concerns the tribe may express regarding the project activity. Representatives of the Koi Nation expressed concern regarding a home that was historically occupied by a tribal member within the project vicinity. However, the home was located approximately 0.2-mile south of the project area. Nonetheless, the tribe asked that the City proceed with all due caution, and to continue coordination with the Koi Nation Tribal Council on all work scheduled for the proposed project. In compliance with AB 52 (Public Resources Code Section 21080.3.1), notification of the project was sent to local tribes by the City of Clearlake. The Habemetotel tribe requested consultation which occured in March 2022. Although the project area has been subject to a records search and an archeological field survey, and tribal cultural resources were not discovered on the project site, unknown tribal cultural resources have the potential to be uncovered during ground-disturbing activities at the proposed project site. Therefore, the proposed project could result in a substantial adverse change in the significance of a tribal cultural resource. Compliance with Mitigation Measures CUL-1 and CUL-2, as described in Section V,
IMPACT CATEGORIES*	1	2	3	4	5	6	All determinations need explanation. Reference to documentation, sources, notes and correspondence.
							Mitigation Measures: **All potential impacts have been reduced to less than significant levels with the incorporated mitigation Measures GEO-1 through GEO-5 and CUL-1 through CUL-4.**
b) 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 Public Resources Code section 5024.1. In applying the criteria set forth in subdivision (c) of Public Resources Code 5024.1, the lead agency shall consider the significance of the resource to a California Native American tribe.	☐	☒	☐	☐	☐	☐	**Less than Significant Impact with Mitigation.** See Question XVIII-a, above. **Mitigation Measures:** **All potential impacts have been reduced to less than significant levels with the incorporated mitigation Measures GEO-1 through GEO-5 and CUL-1 through CUL-4.**

(AR000838, AR000875-876 [emphasis added].)

The City thrice declared, with checkmarks, that the Project may have a significant effect on TCR. The MND the City Council approved contradicts the City's trial court litigation position that it made a "discretionary determination, backed by substantial evidence, that there was no TCR on the Project site." (MJN, Exh. F, p. 35.) Although members of the City Council were skeptical that there are TCR on the Project site (AR002380-2381), the

City Council discussed enhanced mitigation measures to protect TCR as identified in the MND, which indicates the project may significantly impact TCR. (AR002385-2386 [cultural sensitivity training by a tribal member], AR002389-2391, AR002398-2410, & AR002414-2419 [treatment protocols], AR002395-2396 & AR002410-2413 [tribal monitors].)

The CEQA Guidelines Initial Study checklist on which the City's MND is based establishes a dichotomy between the "No Impact" and "Potentially Significant Impact" categories. (*See Ocean Street Extension Neighborhood Assn. v. City of Santa Cruz* (2021) 73 Cal.App.5th 985, 1003; *compare* AR000838 [no impact to a scenic vista because there is no scenic vista] with AR000839 [potentially significant impact from a new source of light]; AR000864-867 [potentially significant impact from noise levels above specified decibel levels]; AR000859 [potentially significant impact from assumed use of common cleaning products, fertilizers, and herbicides].) Either there are no impacts, or there are potentially significant impacts to a category of environmental resources. Put simply, mitigation reducing an impact on a resource to less than significant means there is a resource present to be impacted, not that there is no resource there. (*See also Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 337 n. 8 & 340 n. 11 [separating mitigation measures from a "No Impact" determination].) The City cannot disavow its determination of potentially significant impacts by the Project on an environmental resource (TCR) without rescinding the MND.

2. The Court should apply the fair argument standard to whether there is substantial evidence in the record that the Project may impact TCR.

If the Court finds the City's MND statements about TCR are ambiguous, the Court should assume that there are TCR on the Project site when there is evidence in the record that TCR are present and the agency has not expressly made a lawful discretionary determination otherwise. Once the

existence of TCR is established, the fair argument standard applies to whether or not an MND mitigates the Project's impacts to less than significant. (*See Agoura Hills*, 46 Cal.App.5th at 686 ["We conclude, however, that substantial evidence supports a fair argument that the MND's measures improperly defer mitigation of the project's impacts on cultural resources, and are insufficient to avoid or reduce those impacts to a less than significant level."]; *see also Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1117 [describing the bifurcated standard of review].)

Consistent with the CEQA process for all resources, the City must first identify TCR, then analyze if they are impacted, then analyze whether mitigation measures mitigate the impacts to less than significance. By statute, the City must identify TCR based on information obtained from the Koi Nation, it may also consider other sources of information but it *shall* consider the significance of the resource to the tribe. CEQA's definition of TCR establishes two categories: resources that are listed or eligible for listing in the California Register (mandatory TCR), and resources that the City determines are "significant" TCR (discretionary TCR). (PRC § 21074(a).) In its haste, the City only completed the easy step of querying the California Register of Historic Resources ("CRHR") to determine whether TCR were already listed. (PRC § 21074(a)(1)(A); AR000875.) The City neither evaluated whether resources are eligible for listing in the CRHR, nor made a lawful discretionary TCR determination.

(a) The City did not evaluate whether resources are eligible for listing in the CRHR.

Mandatory TCR includes resources "determined to be eligible for inclusion in the California Register of Historic Resources." (PRC § 21074(a)(1)(A).) While the City consulted the CRHR for listed resources, the MND does not analyze whether resources, including those identified by

Dr. White in his CRI, are eligible for listing in the CRHR. (PRC § 5024.1(g).) Moreover, the MND never analyzed direct, indirect, or cumulative Project impacts to the mandatory TCR its own archaeologist identified within a half-mile of the Project site; instead arbitrarily limiting its review to the parcel's legal boundaries. (AR008345-002-005.)

(b) The Legislature enacted standards applicable to identifying TCR.

The trial court improperly equated the procedures and standards of review under section 21074 relating to TCR, with the separate category of historical resources under section 21084.1. These procedures and standards are different because the spiritual and cultural significance of a resource to a California Native American tribe is not readily understood by a lead agency. (*See* AB 52 § 1(a)(3) [recognizing the need to include tribal knowledge and concerns as part of the CEQA review process].)

The Legislature set forth a specific procedure for the City to evaluate discretionary TCR under section 21074(a)(2). A discretionary TCR is:

> 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.

(PRC § 21074(a)(2).) The discretionary TCR analysis is more expansive than the historical resources analysis because it includes, by statute: (1) historical resources; (2) unique archaeological resources; (3) non-unique archaeological resources; and (4) any other resource that is significant to a California Native American tribe. (PRC §§ 21074(c), 21074(a)(2).)

(c) The City must first consider, as a matter of law, the significance of a resource to the Koi Nation when applying the CRHR criteria.

The City has an independent duty to consider impacts to TCR.

Through confidential consultation, the City should have solicited and considered information about the TCR that are significant to the Koi Nation, to inform its analysis. (PRC §§ 21074(a)(2), 21080.3.2, 21082.3(c).) The first step in the City's analysis of that information is that the City must "consider the significance of the resource" to the Koi Nation when "applying the criteria set forth in subdivision (c) of Section 5024.1." (PRC § 21074(a)(2).) This first step requires the City, as a matter of law, to consider the significance of the resource to the Koi Nation. Courts review whether a City complied with CEQA *de novo*. (*San Diegans for Open Government v. City of San Diego* (2016) 6 Cal.App.5th 995, 1002 ["We determine de novo whether an agency has complied with CEQA's legal requirements."]; *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 118 ["questions of interpretation or application of the requirements of CEQA are matters of law."].)

The trial court incorrectly analogized identification of historical resources with identification of TCR. Historical resources are those listed on or eligible for listing on the CRHR, included in a local register of historic resources, or deemed significant pursuant to the criteria of Public Resources Code section 5024.1(g). If a resource does not fall within any of these categories it "shall not preclude a local agency from determining whether the resource may be a historical resource for purposes of this section." (PRC § 21084.1 ["discretionary historical resources"].) *Willow Glen and Buena Ventura* held the substantial evidence standard applies to an agency's identification of discretionary historical resources.[10]

Identification of discretionary historical resources under section

[10] *Coalition for Historical Integrity v. City of San Buenaventura* (2023) 92 Cal.App.5th 430 and *Friends of Willow Glen Trestle v. City of San Jose* (2016) 2 CalApp.5th 437.)

21084.1 is not directly analogous to the identification of TCR under section 21074 because in section 21084.1 there is no corresponding procedural requirement that the agency consider the significance of the resource to a culturally distinct California Native American tribe. The Legislature did not simply apply the existing historic resource definition or criteria to the newly enacted TCR definition. The Legislature added a procedural step where the Agency must consider the significance of the resource to a tribe, in addition to and while applying the CRHR criteria to the resource. This added step is significant and must be taken into account. (*Watt v. Crawford* (1995) 10 Cal.4th 743, 753 ["we commence with the general proposition, derived from established principles of statutory construction, that a material alteration in the phrasing of a statute signals the Legislature's intent to give the enactment a new meaning."]; *People v. Sylvester* (1997) 58 Cal.App.4th 1493, 1496 ["separate items in a statute should be given meaning with reference to the whole, and that each word and phrase in the statute should be interpreted to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose."].) Giving meaning to the second sentence of section 21074(a)(2), requires the City to *first* consider the tribal evidence and perspective when applying the CRHR criteria.

(d) While considering the significance of the resource to the Koi Nation, the City must make a factual determination of whether the resource is significant pursuant to CRHR criteria.

The second step in the City's analysis is determination of whether the resource is "significant pursuant to the criteria set forth in subdivision (c) of Section 5024.1." (PRC § 21074(a)(2).) The statute directs that the City's factual determination at this second step is reviewed under the substantial evidence standard. (PRC § 21074(a)(2) ["in its discretion and supported by substantial evidence"].) Specifically, the record must show substantial

evidence that the resource:

> (1) Is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage.
>
> (2) Is associated with the lives of persons important in our past.
>
> (3) Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual, or possesses high artistic values. [or]
>
> (4) Has yielded, or may be likely to yield, information important in prehistory or history.

(PRC § 5024.1(c).) If, while considering the significance to the Koi Nation, the City determines that the resource is significant "pursuant to" one of these four criteria then the resource is a TCR.

(e) The City did not consider the significance of resources to the Koi Nation or apply the CRHR criteria, as the statute requires.

The City did not complete the process. The City did not properly consult with the Koi Nation in a confidential forum to obtain information about resources significant to the tribe, which should have been evaluated under section 21074(a)(2). The City did not consider the significance of *any* resource to the Koi Nation, or apply the CRHR criteria to the resource. The City did not exercise its discretion to make a final determination about the significance of any resource.

For those resources that the Koi Nation was allowed to identify as significant, the City cannot produce record evidence that it considered the significance of the resource to the Koi Nation *while* applying the CRHR criteria and considering the significance of the resource to the tribe, as CEQA requires. Under *de novo* review, the City's procedural missteps are due no deference. Consistent with CEQA analyses for all other types of

environmental resources, the City must show its work. (*Sierra Club*, 6 Cal.5th at 513 ["there must be a disclosure of the analytic route the agency traveled from evidence to action"].)

Lacking information showing the City complied with its legal obligation to consider the tribal perspective, the MND fails as a matter of law. (*See Save Our Peninsula Committee v. Monterey County Board of Supervisors*, *supra*, 87 Cal.App.4th at 118 ["Although the agency's factual determinations are subject to deferential review, questions of interpretation or application of the requirements of CEQA are matters of law… While we may not substitute our judgment for that of the decisionmakers, we must ensure strict compliance with the procedures and mandates of the statute… When the informational requirements of CEQA are not complied with, an agency has failed to proceed in 'a manner required by law' and has therefore abused its discretion."].)

(f) The trial court erred by failing to determine whether the City evaluated the CRHR criteria while considering the significance of the resources to the Koi Nation.

In rejecting the Koi Nation's petition, the trial court erred. The trial court acknowledged the statutory definition of TCR, but finding no case directly on point, determined the "analogous applicable standard of review of historical resources such as [*sic*] done in *Willow Glen* case and the *City of Buena Ventura* case" supported substantial evidence as the only applicable standard of review. (RT p. 242.)

The trial court incorrectly stated that "Dr. White's Cultural Resource Investigation Report determined no tribal cultural resources to be present on the site." (RT p. 243.) Dr. White consistently disclaimed that his report drew any final conclusions about the existence or identity of TCR that the Project may impact. (AR002942; AR002968; AR002749; AR003237.) The trial court also incorrectly approached the City's purported analysis without

reviewing the statutory procedures. The trial court incorrectly decided that the Koi Nation had the "opportunity to present all evidence desired to be presented" during a public City Council hearing. (RT p. 246.) First, the public City Council hearing did not comply with the statute's requirement that the City conduct consultation and maintain cultural information confidentially—the Koi Nation did not have a full opportunity to present its confidential evidence. Second, the City Council's discussion did not address any of the section 5024.1(c) criteria while considering the significance of resources to the Koi Nation. Merely discussing a non-confidential subset of information in a general manner is not procedurally sufficient.

Lacking record evidence that the City complied with its legal obligation when exercising its discretion, the trial court's decision was erroneous. (*See Save Our Peninsula Committee v. Monterey County Board of Supervisors*, *supra*, 87 Cal.App.4th at 118.)

3. Substantial evidence in the record supports a fair argument that the Project may have a significant impact on TCR.

Numerous experts from the City, the State, and the Koi Nation presented substantial evidence of Project impacts on TCR. Mr. Geary initially presented evidence during the consultation; he could have added more detail during further consultation sessions had the City indicated it disagreed and complied with its statutory obligations. (AR002301-2304.) The Koi Nation presented additional evidence of TCR on the Project site and the impacts of the Project on TCR at the City Council hearing.

Mr. Geary publicly identified numerous TCR sites within a quarter mile of the Project as evidence of the existence of a TCR landscape extending on and over the Project site and establishing the cumulatively significant impact of the Project on TCR. (AR002298.) Given the multiple proximal TCR sites and that the boundary of the Koi Nation's former Rancheria

adjoins the Project site, Mr. Geary confirmed the nature of the TCR Landscape present on the Project site: "This is a sensitive area. Highly sensitive area. Cultural resources and historic resources are there." (AR002300.) He stated that since the Project area is surrounded by archeological sites which are also TCR, there is a very high probability of previously undiscovered TCR being in the middle of this area. (AR002394-2395.) Mr. Geary explained the land is part of two geographically defined lineal land tracts where distinct families of the Koi Nation lived, worked, engaged in cultural practices, and gathered TCR. (AR002303, AR002395.) The lineal land tracts include oak trees for food from acorns, plants for fiber and regalia making, and medicinal plants, all of which are a TCR. Mr. Geary concluded that when contractors start digging deep trenches, storm drains, and utility lines they are going to disturb and destroy TCR. (AR002394-2395.)

However, that presentation occurred in a public meeting where the Koi Nation was unable to confidentially explain all of the facts supporting Mr. Geary's expert opinion. (*See, e.g.*, AR008318-001-002, AR008341-001-031, AR008342-001-017, AR002298-2306, AR002312, AR002326-2328.) The Koi Nation should never have been put in the position of having to reveal confidential cultural information during a public meeting for the City Council to take appropriate action—CEQA requires the City to conduct confidential consultation to, *inter alia*, protect TCR from being plundered by graverobbers and looters for sale on the black market. Tribal consultation is a separate process from public comment on an environmental document. (*Compare* PRC §§ 21080.3.1 with 21080.3.2(c)(1); 21082.3(c)(2)(A) [protecting information submitted "during the consultation or environmental review process" (emphasis added)].) During the City Council's public hearing, the Koi Nation requested an opportunity to confidentially meet with the City to discuss the facts underlying Mr. Geary's expert opinion, but that

request was denied. (AR002363-2364.)

Koi Nation citizen and roundhouse singer Rob Morgan provided testimony on his knowledge of the traditional uses of the Rancheria and the high likelihood that Native American human remains will be found on the Project site where his Ancestors walked between village locations, including the remains of babies and children that died during the reservation era and the cultural practice of burying them where they died. (AR002326-2328.) Additionally, the MND and CRI confirm that spoil piles on the Airport "contain obsidian chunks and flakes, all associated with the dumped foreign fills." (AR004957-009.) Tribal members provided testimony to the City Council that the spoil piles from other projects that impacted TCR remain on the Project site. (AR002366.)

The City Council's own Planning Commissioner, Dave Hughes, told the City Council that all of "Lake County is an archaeological site, period." (AR002325.) He stated that in his 50 years of experience, "You can walk on the beach and find—well, you can find artifacts. I mean, we—we do it all the time." (AR002324-2325.) Considering all of the evidence described herein, the City's archaeologist, the City's Planning Commissioner, Caltrans, and the Koi Nation provided evidence supporting a fair argument that the Project may significantly impact TCR.

(a) Expert opinion is de facto substantial evidence of a fair argument.

Under CEQA, the opinion of Koi Nation's designated TCR expert and THPO designee is *de facto* substantial evidence that supports a fair argument. (CEQA Guidelines § 15384(b) ["Substantial evidence shall include… expert opinion supported by facts."].) CEQA prescribes that "California Native American tribes traditionally and culturally affiliated with a geographic area may have expertise concerning their tribal cultural resources." (PRC § 21080.3.1(a).)

The Legislature directed that "tribal knowledge about the land and tribal cultural resources at issue should be included in environmental assessments for projects that may have a significant impact on those resources." (AB 52, §§ 1(b)(4) & (9).) In determining the existence of TCR, "the lead agency shall consider the significance of the resource to the California Native Tribe." (PRC § 21074.) Elder testimony, oral history, and statements from Koi Nation's representatives may provide facts supporting expert opinion about TCR. (Technical Advisory, p. 5, *see also Pueblo of Sandia v. U.S.* (10th Cir. 1995) 50 F.3d 856, 860-861 [holding that affidavits from tribal elders, among other things, are admissible evidence].)

The Koi Nation Tribal Council and Mr. Geary are cultural experts. Mr. Geary is the Koi Nation's THPO designee, a cultural leader, and a native language speaker. Mr. Geary is recognized by the Pomo community as an expert in local Indigenous history and TCR knowledge; he serves as the THPO for HPUL and the Koi Nation. (*See* Technical Advisory, p.5 [recognizing a THPO's testimony as valid evidence]; *Agoura Hills*, 46 Cal.App.5th at 689 [comments from a recognized expert in Native American history are not "speculation and unsubstantiated opinion"]; *U.S. v. Tidwell* (1999) 191 F.3d 976, 980 [tribal knowledge may support a conviction for selling objects of cultural patrimony].)

(b) Mr. Geary's expert opinion was supported by fact.

Mr. Geary presented expert opinion supported by fact that the Project may significantly impact TCR. The trial court found that facts supported Mr. Geary's expert opinion:

> I don't think it could be fairly argued that there was not circumstantial evidence that could be taken by a reasonable person to lead to an inference that TCR might be or could be

present underground based on those circumstances.[11]

(RT pp. 245, 244 ["a fair and open-minded review" shows there was "evidence presented by petitioner on the subject…"].)

As noted above, Dr. White, Commissioner Hughes, Caltrans, and the Koi Nation entered substantial evidence into the record, including maps, cultural practices, historical activities, important sites, and other materials, to support Mr. Geary's expert opinion that this Project will impact TCR and that the mitigation measures are inadequate to reduce the level of impact to less than significant. This evidence supported oral testimony by a cultural expert. (*See* Technical Advisory.) The "classic Catch-22" was described by the D.C. Circuit:

> In order to require the agency to complete an adequate survey of the project site before granting a license, the Tribe must show that construction at the site would cause irreparable harm to cultural or historical resources. But without an adequate survey of the cultural and historical resources at the site, such a showing may well be impossible. Of course, if the project does go forward and such resources are damaged, the Tribe will then be able to show irreparable harm. By then, however, it will be too late.

(*Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n* (2018) 896 F.3d 520, 523.) What the trial court dismissively called "circumstantial evidence" in this case are facts supporting Mr. Geary's expert opinion as a THPO. Therefore, the Koi Nation presented the City with substantial evidence of a fair argument that the Project may have a significant effect on TCR. (CEQA Guidelines § 15384(b) [expert opinion supported by fact is substantial evidence]; MJN, Exh. E, p. 22 [federal agencies are not required to verify tribal knowledge, and "the information obtained from an Indian tribe's

[11] As noted above, Mr. Geary could not make more than a general reference in the City Council's public meeting and also protect the confidentiality of the Koi Nation's TCR information.

recognized expert [is] a valid line of evidence in considering determinations of significance."].)

C. The MND Fails to Set Forth Required Information, it Does Not Comply with CEQA.

Even if this Court could resolve all other issues in the City's favor, the MND still does not comply with CEQA's requirements that environmental documents provide critical information for the public and the City's decision makers. The MND does not provide information about the City's tribal consultation efforts or the City's evaluation of resources that the Koi Nation identified as significant TCR. (*See* AR000811, AR000875-876.) Such information should have been included in general terms in the MND, with the details in a confidential appendix. The MND summarily concludes there is no potential for cumulative impacts to TCR, although many City projects have damaged and destroyed the Koi Nation's TCR, and the CRI report describes numerous archaeologically significant sites near the Project which were not analyzed as part of cumulative impacts to the broader TCR landscape. Thus, the MND does not comply with CEQA.

1. The MND lacks required information about tribal consultation and TCR.

Although details about the Koi Nation's TCR are confidential and protected by CEQA, the City is required, to "describ[e] the information in general terms in the environmental document so as to inform the public of the basis of the lead agency's or other public agency's decision." (PRC §§ 21082.3(c)(4), (f).) The City's meager summary of information about one TCR only acknowledges the existence of a relatively modern homestead from when the Koi Nation was granted a reservation adjacent to the Project site. (AR00875.) The City never discussed whether the Project would impact the TCR. Worse, the City completely avoided discussion about the multitude of Koi Nation TCR sites, the Koi Nation's TCR landscape, and the Koi Nation's historic practices of burying ancestors where they died, which

spanned more than 10 centuries according to the City's archaeologist. (AR004957-003.)

As with all other conclusions regarding resource impacts in an environmental document, the City's MND was required to explain its reasons for concluding that the Project would not have a significant impact on the TCR the Koi Nation identified as impacted by the Project. (*Sierra Club*, 6 Cal.5th at 513 ["there must be a disclosure of the analytic route the agency traveled from evidence to action"].)

2. The MND fails to address cumulative impacts.

A project may have a significant effect on the environment if the effects of a project are individually limited but cumulatively considerable. (PRC § 21083(b)(2).) Cumulatively considerable "means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." (*Ibid*.) The City's MND fails to acknowledge the effects of past, current, and future projects on TCR, and it does not attempt to determine whether this Project may have a cumulatively significant impact on TCR. The City's only statement in the MND is its cursory conclusion with boilerplate language that:

> when viewed in conjunction with other closely related past, present, or reasonably foreseeable future projects, development of the proposed project would not result in a cumulatively considerable contribution to cumulative impacts in the City, and the project's incremental contribution to cumulative impacts would be less than significant with mitigation incorporated.

(AR000879.) Beyond this statement, there is no actual analysis of cumulative impacts to TCR in the MND as required by law. (PRC § 21082.4(b)(2); CEQA Guidelines § 15063(b)(1); *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1411-1412 [where an agency did not analyze cumulative impacts, evidence of incremental impacts from other projects gives rise to a

fair argument]; *McCann v. City of San Diego* (2021) 70 Cal.App.5th 51, 84 ["an agency may not improperly split a project into separate segments to avoid consideration of the cumulative environmental impacts of a project."].) The MND does not acknowledge that closely related past projects have had actual impacts on TCR, so an appropriate analysis of cumulative impacts is wholly absent.

Shockingly, Councilmember Overton expressly stated during the Koi Nation's appeal that she would not consider cumulative impacts from other projects. (AR002374 ["And what happened with other projects, I can't bring into this one here."].)

The City's projects have resulted in, and will continue to result in, the disturbance of Native American human remains and damage to or destruction of a significant number of TCR. Such destruction occurred at the recent Austin Park Splash Pad Project where, in the first few days of construction, over 1,500 TCR were unearthed despite—like the current Project—the City claimed there would be no impact to TCR. (AR002317.) Similarly, the Burns Valley Sports Complex Project contains an intact village site and requires substantial TCR mitigation. (AR002372.) The City's Mullen Storm Drain Project involved the excavation of soil containing TCR and Native American human remains which were transported to the Pearce Airport, where this Project is located, and then taken and used as construction fill material despite the City's promise to protect them; all in a highly disrespectful manner. (AR008341-005 & AR008426.)

The City's singular consultation session with the Koi Nation regarding this Project included three other active City projects with TCR impacts: the Dam Road Extension & South Center Drive, Dam Road Roundabout, and Clearlake Austin Park Splash Pad projects. (AR002492.) Each of those projects have TCR impacts. At a minimum, those contemporaneous projects should have been included in the cumulative

impact analysis for this Project.

The City knew that its past projects in the vicinity of the Project have had significant effects on TCR and knew that Koi Nation provided tribal knowledge in consultation regarding four concurrent projects with impacts on TCR. However, the MND did not identify or analyze the cumulative impacts of any other projects on TCR. Conclusions that are unsupported by analysis do not pass muster under CEQA. (*See Laurel Heights,* 47 Cal.3d at 404 ["Conclusory comments in support of environmental conclusions are generally inappropriate."].)

3. The MND is legally insufficient under CEQA as an informational document.

The City's MND is legally insufficient as an informational and decision-making document. (*Sierra Club*, 6 Cal.5th at 514 ["whether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question."].) The MND fails as an informational document because it does not include "an adequate description of adverse environmental effects [that] is necessary to inform the critical discussion of mitigation measures and project alternatives…." (*Sierra Club*, 6 Cal.5th at 514.) The City ignored the Koi Nation's expert evidence, refused to analyze or discuss the Project's potential impacts to TCR, failed to meaningfully disclose information that CEQA requires in its environmental document, and concocted deferred mitigation measures that are only triggered after harm to the Koi Nation's TCR has already occurred. "The failure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decision-making and informed public participation. Case law is clear: the error is prejudicial." (*Sierra Club*, 6 Cal.5th at 515.)

VI. CONCLUSION

For the foregoing reasons, the Koi Nation prays that this Court reverse

the trial court's judgment, vacate the City's MND, and order the City to (1) consult with the Koi Nation in a meaningful and good faith manner that respects the Koi Nation's sovereignty and knowledge about TCR, and (2) prepare an EIR for the Project that lawfully evaluates the Project's significant direct, indirect, and cumulative impacts to TCR, and includes project alternatives and culturally appropriate, feasible mitigation measures to avoid or mitigate those impacts.

DATED: April 30, 2024

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c), I certify that the total word count of this Appellant's Opening Brief, excluding covers, table of contents, table of authorities, and certificate of compliance, is 13,925.

DATED: April 30, 2024

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PROOF OF SERVICE

Koi Nation of Northern California v. City of Clearlake, et al.
First District Court of Appeal Case No. A169438
Consolidated with Appeal Case No: A169805

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 1331 Garden Hwy, 2nd Floor, Sacramento, CA 95833.

On April 30, 2024, I served true copies of the following document(s) described as **APPELLANT'S OPENING BRIEF** on the interested parties in this action as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 30, 2024, at Sacramento, California.

Sherry Ramirez

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First District Court of Appeal Case No. A169438
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STATE OF CALIFORNIA California Court of Appeal, First Appellate District	***PROOF OF SERVICE*** **STATE OF CALIFORNIA** California Court of Appeal, First Appellate District

Case Name: **Koi Nation of Northern California v. City of Clearlake**
Case Number: **A169438**
Lower Court Case Number: **CV423786**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

4/30/2024

Date

/s/Sherry Ramirez

Signature

Ramirez, Sherry (Other)

Last Name, First Name (PNum)