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SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

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SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

TITLE: Pechanga Band of Indians v. City of Corona Intervenor Rincon Band of Luiseño Indians	DATE & DEPT. June 9, 2026 Dept 1	NUMBER CVRI2306028
COUNSEL None	None	REPORTER None

PROCEEDING

Ruling on Submitted Matter—Petition for Writ of Mandate

Petitioners, Pechanga Band of Indians and Soboba Band of Luiseño Indians (“Petitioners”) seek to compel Respondent City of Corona (the “City”) to set aside its approval of the construction of a new sewage lift station and require compliance with the California Environmental Quality Act. Specifically, Petitioners seek to enforce (1) Mitigation Measure CR-1 and the requirements set forth in Public Resources Code (“PRC”) § 21074, and (2) the City’s additional mitigation measure requiring compliance with PRC § 5097.98, as outlined in its Initial Study – Mitigated Negative Declaration (“IS/MND”). Intervenor Rincon Band of Luiseño Indians (“Rincon”) also seeks to compel the City to comply with its Mitigation Measure CR-1 and the requirements of PRC § 21074.

The City is both the project proponent and the lead agency. The project is an expansion of the City’s wastewater infrastructure, including a 2.25 million gallons per day sewer lift station to replace an existing, near-capacity water reclamation facility treatment plant. The project involves excavation of up to 30 feet deep and is part of a broader effort to redirect sewage loads away from the existing facility, which will be decommissioned.

The chief goal of CEQA is the mitigation or avoidance of environmental harm. *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 403. CEQA mandates that public agencies adopt enforceable mitigation measures to avoid or reduce significant environmental impacts. *Cal. Pub. Res. Code* § 21081.6(b) requires that such mitigation measures be fully enforceable through permit conditions, agreements, or other legally binding instruments. Similarly, CEQA Guidelines § 15126.4(a)(2) ensures that mitigation measures are enforceable.

The public agency’s responsibility extends beyond approval to include the adoption of a monitoring

HAROLD W. HOPP, Judge

D. Board, Clerk

Pages 1 of 15

program to ensure compliance with mitigation measures. *Cal. Pub. Res. Code* § 21081.6(a). The purpose of this program is to ensure that mitigation measures are not merely adopted but are actually implemented throughout the life of the project. *King & Gardiner Farms, LLC v. Cnty. of Kern* (2020) 45 Cal.App.5th 814, 852–53; *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261. Failure to enforce mitigation measures is a violation of CEQA. *Sierra Club v. Cnty. of San Diego* (2014) 231 Cal.App.4th 1151, 1167.

In 2014, AB 52 amended CEQA to recognize and address impacts to “tribal cultural resources.” Before the amendment, CEQA did not specifically address these resources; instead, they were considered under general archaeological standards. However, AB 52 created a distinct category for tribal cultural resources, emphasizing their tribal cultural value and establishing a formal consultation process between Native American tribes and lead agencies. *Cal. Pub. Res. Code* § 21080.3.1; *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 213–15.

AB 52 specifically requires consultation with tribes that are traditionally and culturally affiliated with the project area to identify tribal cultural resources. These resources include sacred places, cultural landscapes, and objects of cultural value to a California Native American tribe, provided they either qualify for inclusion in the California Register of Historical Resources or are deemed significant by the lead agency. *Cal. Pub. Res. Code* § 21074(a)(1). If a project may cause a substantial adverse change to such resources, the lead agency must engage in consultation and consider appropriate mitigation measures. The agency is required to explore measures to avoid, minimize, or mitigate impacts to tribal cultural resources, with a preference for preservation in place. *Cal. Pub. Res. Code* § 21084.2.

The legislative intent behind AB 52 includes recognizing tribal cultural resources as integral to the heritage and identity of Native American tribes, establishing a consultation process that incorporates tribal expertise, and ensuring that project impacts are addressed through culturally appropriate mitigation measures. *Cal. Pub. Res. Code* § 21080.3.1(a); AB 52, § 1(b)(4), (b)(6).

Factual Background. As part of its environmental review for the Project, the City’s consultant contacted the Native American Heritage Commission to obtain a list of California Native American tribes traditionally and culturally affiliated with the geographical area of the proposed Project. AR 96. This list includes tribes that have requested formal notification of proposed CEQA projects within their area of traditional and cultural affiliation, as required by CEQA/AB 52 tribal consultation requirements. AR 41, 96; Sealed AR 23–28. The City’s consultant also asked NAHC to conduct a Sacred Lands File search to identify any listed Native American cultural resources in the Project area. AR 41.

On January 13, 2020, NAHC responded to the City’s request for identification of tribes who might be traditionally and culturally affiliated with the Property and also conducted a SLF search, stating that the search was “positive,” which means NAHC identified potentially sensitive tribal cultural resources within the Project area, and recommended that the City contact Pechanga directly concerning sensitive resources in and around the Project site. Sealed AR 7, 23–24.

On January 24, 2020, the City contacted Pechanga via phone and left a voicemail requesting Pechanga to provide any information they might have regarding resources in the vicinity of the Project site. Sealed AR 7. The City also contacted a number of tribes, including Soboba and Rincon by letter. AR 41, 1991. Rincon responded to the City and subsequently engaged in AB 52 consultation with the City. AR 13, 41,

HAROLD W. HOPP, Judge
D. Board, Clerk
Pages 2 of 15

97, 495. As part of that consultation, Rincon recommended that archaeological and tribal monitoring be included for ground disturbances that extend beyond previously disturbed depths in case previously unidentified, buried resources are located on the Project site. AR 41.

In June 2020, following consultation with Rincon, the City prepared a draft IS/MND for the Project. AR 1–374. The City included two mitigation measures specific to tribal cultural resources, CR-1 and *California Public Resources Code* § 5097.98. CR-1 required tribal monitoring for ground disturbances that extend beyond previously disturbed depths in the event “unidentified, buried resources are located on the project site.” AR 41. If “any previously unidentified tribal cultural resources” were found, CR-1 required the City to consult with Native American representatives to determine the mitigation measures necessary to avoid or reduce impacts on the resources. AR 42.

CR-1 provides:

A Native American monitor who is ancestrally related to the project area shall be retained to be on site to monitor project-related ground-disturbing construction activities that extend beyond previously disturbed depths (i.e., grading, excavation, trenching, etc.). Native American monitoring of project-related ground-disturbing activities shall be performed under the direction of the qualified archaeologist meeting the Secretary of the Interior’s Professional Qualifications Standards for archaeology (National Park Service 1983). If any **previously unidentified tribal cultural resources are unearthed** during project construction, the City shall continue Native American consultation procedures, which may determine additional measures to avoid or reduce impacts to the resource are required. These additional measures to avoid or reduce impacts shall be determined on a case-by-case basis and approved by the City.

AR 41–42, 632 (emphasis added). The City concluded that with the implementation of CR-1, Project impacts to archaeological resources would be “less than significant.” AR 42.

In addition to CR-1, the City’s IS/MND required additional mitigation, mandating the City to comply with *California Health & Safety Code* § 7050.5, which states that “no further disturbance shall occur until the County Coroner has made a determination of origin,” and to ensure disposition in accordance with *California Public Resources Code* § 5097.98, in the event of an unanticipated discovery of human remains. AR 42. Section 5097.98 imposes statutory obligations on the landowner upon discovery of Native American human remains, including the obligation to notify the most likely descendant (“MLD”) and to discuss and confer with the MLD regarding its recommendations for treatment, “taking into account the possibility of multiple human remains” which may require additional treatment measures. *See Cal. Pub. Res. Code* §§ 5097.98(a)–(b).

The IS/MND explains:

In the event of an unanticipated discovery of human remains, the County Coroner must be notified immediately. If the human remains are determined to be prehistoric or Native American in origin, the Coroner will notify NAHC, which will determine a most likely descendant (MLD). The MLD shall complete the inspection of the site within 48 hours of being granted access and provide recommendations as to the treatment of the remains to the landowner. Therefore, impacts to human remains would be less than significant.

HAROLD W. HOPP, Judge
D. Board, Clerk
Pages 3 of 15

AR 42.

On August 19, 2020, the City adopted the final IS/MND, including CR-1, and approved the Project. AR 631–632. The City then contacted Rincon concerning the tribal construction monitoring required by CR-1. AR 1022–1025. For purposes of CR-1, Rincon deferred the Project’s tribal construction monitoring to Soboba because they are located closer to the Project site. AR 1022–1025, 1033, 1038. The City and Soboba thereafter entered into a tribal construction monitoring agreement in January 2021. AR 38–47, 1033, 1044–1053. In February 2021, the City proceeded with the Project construction. AR 1054–1056.

On March 30, 2022, human remains were unearthed during Project construction. AR 707; Sealed AR 175, 177, 324–325, 1878. Soboba was notified, and upon arrival onsite, Soboba’s Tribal Historic Preservation Officer identified a human cranium in an excavator bucket and fragmented bone pieces in the adjacent spoils pile. Sealed AR 175, 177, 324–325, 1878. The County Coroner was contacted and confirmed that the human remains were prehistoric and Native American in origin, and called NAHC to initiate the process of designating the MLDs. Sealed AR 324, 1878.

Tribal Cultural Resource Determination under *California Public Resources Code* § 21074. CEQA requires the lead agency to determine whether resources meet the statutory criteria for tribal cultural significance. *Cal. Pub. Res. Code* § 21074. These criteria include association with significant events, persons, cultural heritage, and the potential to yield important information in prehistory or history. *Cal. Pub. Res. Code* § 5024.1(c). The lead agency must consider the significance of the resource to a California Native American tribe and base its determination on substantial evidence. *Cal. Pub. Res. Code* § 21074.

In the case of previously unidentified tribal cultural resources unearthed during construction, the lead agency is required to continue consultation with the relevant tribe, ensuring that culturally appropriate mitigation measures are considered. *Cal. Pub. Res. Code* § 21080.3.2. Mitigation measures agreed upon through consultation must be included in the environmental document and adopted into the project’s monitoring and reporting program to ensure compliance. *Cal. Pub. Res. Code* § 21082.3.

The consultation process is intended to be inclusive and mutually respectful, with the aim of reaching an agreement on mitigation measures. *Cal. Pub. Res. Code* § 21080.3.1(b). The consultation concludes either when an agreement is reached or when it is determined, after reasonable efforts, that mutual agreement cannot be achieved. *Cal. Pub. Res. Code* § 21080.3.2(b).

According to Petitioners, the discovery of human remains at the Project site triggered CR-1 and § 21074; the City was required to determine whether tribal cultural resources were discovered, and if so, conduct Native American consultation to determine mitigation necessary to reduce or avoid impacts to the resources, and implement the required mitigation. AR 41–42. Petitioners allege that, to date, the City has not made, and, by all indications, will not make, a TCR determination under § 21074.

MLD Recommendations Per *California Public Resources Code* § 5097.98. Section 6097.98 provides additional protection for Native American cultural resources during the CEQA process, particularly when human remains or cultural artifacts are discovered during construction or excavation activities. Section 5097.98 requires NAHC to notify the MLD following the discovery of Native American human remains, as reported by the county coroner under *California Health & Safety Code* § 7050.5(c).

HAROLD W. HOPP, Judge
D. Board, Clerk
Pages 4 of 15

Cal. Pub. Res. Code § 5097.98(a). The MLD has the right to inspect the site, with permission from the landowner, and to recommend treatment or disposition of the remains and associated burial goods. *Id.*

The landowner must protect the immediate vicinity of the discovery from further disturbance until they consult with the MLD regarding recommendations for treatment, considering the possibility of additional human remains. *Cal. Pub. Res. Code* § 5097.98(b). Treatment preferences by the MLD may include preserving the remains and associated items in place. *Cal. Pub. Res. Code* § 5097.98(b)(1). The landowner and MLD may extend discussions if additional remains are found, allowing for additional treatment measures. *Cal. Pub. Res. Code* § 5097.98(b)(2). “Conferral” or “discuss and confer,” as defined by PRC § 5097.98, refers to a meaningful and timely discussion that carefully considers the views of all parties involved, respecting each party’s cultural values. *Cal. Pub. Res. Code* § 5097.98(b).

On April 5, 2022, after the discovery of human remains, NAHC designated Soboba as the MLD for purposes of PRC § 5097.98, along with the Gabrieleno Band of Mission Indians (the “Kizh Nation”). AR 1336. On May 10, 2022, NAHC designated Pechanga as the third MLD. (AR 1358, 1369.) NAHC notified the City that, while three MLDs have been designated for the Project site, “each MLD/tribe should be consulted individually by the City . . . [and] each tribe’s information and recommendations regarding the treatment of and disposition of their ancestor(s) is [to be] carefully considered,” kept “confidential,” and “not disclosed in public documents or to the other MLD/tribes unless expressly permitted by the MLD/tribe.” AR 1374.

On April 5, 2022, Soboba provided its recommendations for the treatment of the discovery. Soboba explained that “[b]ecause property boundary is now confirmed to be a ceremonial site with Native American human remains, which may include ancestral personal items (cultural resources) related to ceremony, there is a high probability of discovering additional Native American human remains and associated grave goods during any planned development.” Sealed AR 325–327. Soboba recommended avoidance and preservation in place. AR 325–327.

In April 2022, the Kizh Nation provided its treatment recommendations, pointing out that “[m]ultiple complete and fragmentary bones, representing one or two individuals were unearthed” and providing a “preliminary list” of identified elements recovered, which indicated likely more than one ancestor. Sealed AR 357, 360. In addition to human remains, numerous milling tool fragments and fire altered rocks were observed. Sealed AR 360. On that basis, it was recommended that the soils containing the decomposed ancestral remains, clothing, and other personal items be treated as “funerary items” and that they be reinterred with the remains. Sealed AR 360–361.

On May 17, 2022, Pechanga provided its treatment recommendations, including stopping ground disturbing activities at the Project site, avoiding and preserving in place the site, engaging in government-to government meetings, reburying onsite at the original excavation area, avoiding all further testing, photographing, or excessive handling, and returning the spoil piles to the area of removal because ancestral remains and grave goods are located in the sacred soils. Sealed AR 367–370.

City’s Draft Action Plan. On June 10, 2022, the City’s consultant circulated a Draft Native American Cultural Resources and Human Remains Recovery and Treatment Plan and circulated it to the MLDs. Sealed AR 375–419. The City’s Draft Action Plan did not adopt Petitioners’ recommendations and contended that the protections for Native American human remains in CEQA “are not applicable.” AR

HAROLD W. HÖPP, Judge

D. Board, Clerk
Pages 5 of 15

On June 29 and 30, 2022, Pechanga and Soboba, respectively, rejected the City's Draft Action Plan and asked the City to engage in a meet and confer with the tribes. Sealed AR 424, 434–435. Thereafter, in furtherance of the recommendations already made, Petitioners asked the City to evaluate offsite and onsite Project alternatives that would avoid impacts to the tribal cultural resources, including moving the Project location (Option 1) and placing above-ground pipelines (Options 2A and 2B with variation). Sealed AR 718–721, 1744–1746, 1764. NAHC echoed Petitioners' requests, and wrote to the City on 10/28/2022, explaining the City's "obligations under the MLD law," referring to *California Public Resources Code* § 5097.98. Sealed AR 748–749.

City's Preliminary Analysis. On December 15, 2022, after Petitioners asked the City to consider alternatives to the Project, the City issued a "preliminary analysis" of the project, rejecting the proposal to move the Project location (Option 1), and explaining that the options to place the lines above ground (Options 2A and 2B) were viable but further evaluation was needed. Sealed AR 1739–1751. Petitioners then notified the City that Options 2A and 2B should be further analyzed and rejected the balance of proposed alternatives because of impacts to additional human remains on the Project site. Sealed AR 1875–1876. Petitioners requested additional information regarding Project alternatives (Sealed AR 1876), and the City promised to provide that information by September 2023, but failed to do so. AR 2876.

On July 18, 2023, the City wrote to NAHC stating that the Project site was exempt from PRC § 5097.98. Sealed AR 2666–2667. The City also challenged NAHC's jurisdiction to conduct a site visit at the Project location. Sealed AR 2666–2667.

NAHC Hearings. In July, 2023, the NAHC conducted evidentiary proceedings that confirmed the site's sacred and religious significance to the Luiseño Tribes. AR 705–712. Expert testimony and other evidence demonstrated that the ancestral remains constitute a cemetery associated with the ancestral living complex at the Luiseño village of Túu'uv rather than "simply an isolated find." AR 712. Extensive testimony further indicated that the Luiseño Tribes traditionally buried deceased family members in multiple areas near living spaces, rather than as isolated, single burial. AR 707 at 46–47; AR 711 at 36; AR 710 at 16–17, 21–23, 33, 41. Additional expert testimony established the significance of the Project site as a sacred Indian Cemetery, and emphasized its special cultural significance, as well as the spiritual importance of the entire site, including the burial soils. AR 706 at 29–30; AR 707 at 47; AR 712 at 12, 18–19. Furthermore, testimony based on tribal oral tradition, ethnographic records, historic evidence, and location data established that the Project site is associated with the village of Túu'uv and holds prehistoric, ethnographic, and archaeological significance. AR 706 at 32–33; AR 707 at 40–42, 44–45. Testimony also described the Project site's similarity to other identified burial sites in the area. For example, the Tribal Historic Preservation Officer for Soboba also noted that the Project site "is a cemetery based on . . . unique characteristics relating to Luiseño burial practices supported by previously identified cemeteries and burial . . . grounds fitting the same pattern along the Temescal Canyon corridor," which is the same pattern being dealt with at Túu'uv. AR 711 at 21–22. The officer reiterated that Luiseño Tribes "are experts in their own customs traditions and ceremonial practices," and criticized the City's "unwillingness" to account for the prospect of "additional or multiple Native American human remains located within the project area." AR 711 at 21–22.

____ HAROLD W. HOPP, Judge

____ D. Board, Clerk

Pages 6 of 15

On October 20, 2023, the NAHC designated the Project site where Native American remains are located as a Luiseño cemetery and burial ground per PRC § 5097.96. Sealed AR 2887–2888, 2900, n. 1. On October 26, the City responded, stating that the State agency not only lacked authority to designate the Project site as a sanctified cemetery and burial ground, but that the Project site is expressly exempt from *California Public Resources Code* § 5097.98. AR 2872. The City then stated that it would continue to work with the Kizh Nation to rebury the ancestral remains inadvertently discovered on the Project site in accordance with the Kizh Nation’s recommendations for their treatment. AR 2872.

On October 27, the NAHC responded, pointing out the City’s failure to provide a final detailed analysis of Options 2A and 2B, and the need for meaningful consultations. AR 2876. The NAHC then demanded the City to notify of it when the final analysis of the proposed Project alternatives would be completed and to respond to the NAHC’s letter. AR 2878. To date, the City has not responded.

1988 Cultural Resources Assessment. On May 31, 2024, California State Parks produced documents in response to a Public Records Act request, including a confidential Cultural Resources Assessment (“1988 Assessment”). The 1988 Assessment explains that the Project area lies in the territory of the Luiseño Tribes (including Petitioners and Rincon) and adjacent to or within tribal cultural resources that are contributing elements of a Luiseño traditional cultural property known as Túu’uv. It incorporates the results of a field study conducted in 1988 in which the “surface of the ground was scrutinized for any evidence of prehistoric occupation as would be evidenced by the presence of artifacts, lithic debris from the manufacture of stone tools, changes in soil color or the presence of bone or shell.” Petr’s Ex. 4 at 7. The field survey resulted in the discovery of five prehistoric sites containing cultural resources and concluded that “[a]s all five prehistoric sites could potentially yield important information for the prehistory of the region they should be avoided and preserved during any development. If any of these sites are determined to be of significance a mitigation program should be implemented.” *Id.* at 8. After the discovery of this document, Petitioners provided the City with the 1988 Assessment before the preparation and certification of the IS/MND. Petitioners then demanded the City to comply with CEQA by making a TCR determination prescribed by *California Public Resources Code* § 21074. As yet, the City has not made such a determination.

Procedural History. Petitioners filed the initial petition on November 8, 2023, and moved for a preliminary injunction, which was granted. City argued that no tribal cultural resources exist on the Project site and therefore mitigation under CR-1 was not required. The City subsequently filed an action¹ against the NAHC asking the Court to invalidate the designation of the Project site as a sacred cemetery. The FAP was filed on June 17, 2024, asserting causes of action for violation of CEQA (abandonment of mitigation measures) and for declaratory relief.

On October 19, 2023, the Rincon Tribal chair wrote to the City, stating that it was to continue Native American consultation pursuant to CR-1 if any unidentified tribal cultural resources were unearthed during construction of the Project. Sealed AR 2876-2877. The letter noted that Rincon understood ancestral remains and funerary goods were disturbed during on-site construction activity, but that the City had not notified Rincon. *Id.* Rincon requested immediate consolation with the City to discuss mitigation and avoidance measures as required by CR-1.

¹ *City of Corona v. Native American Heritage Commission*, Riverside Superior Court, Case No. CVRI2400445.

HAROLD W. HOPP, Judge
D. Board, Clerk
Pages 7 of 15

The City responded on October 23, stating that because Rincon had deferred construction monitoring to Soboba, “any consultation required by Mitigation Measure CR-1 has occurred between [the City] and [] Soboba.” Sealed AR 2878–2879. The City also stated that, because Rincon had not been identified as an MLD, it had no legal obligation to consult with Rincon as an MLD. *Id.*

On May 3, 2024, the Rincon Tribal chair wrote to the City, contending that “state law, CEQA, and the PRC, require the City to abide and observe both obligations simultaneously: (1) engage in meaningful consultation with the Tribe pursuant to CEQA/AB 52, and (2) consult with the designated MLD[s] under the PRC.” Intervenor’s Ex. 3 at 3.

On September 18, 2024, Rincon filed its complaint in intervention, asserting causes of action for violation of CEQA (failing to implement or abandoning CR-1 and failing to make a TCR determination) and for declaratory relief.

Petitioners seek to compel the City to implement CR-1 and § 21072(a)(2) and to comply with § 5097.98. They argue that the City must make a TCR determination because it deferred mitigation of harm to tribal cultural resources by including CR-1 in the IS/MND to address “previously unidentified tribal cultural resources.” Second, they argue that apart from CR-1, § 21074(a)(2) requires the City to determine whether later-discovered resources qualify as tribal cultural resources. Third, they argue that the City must comply with § 5097.98, which requires the City to meaningfully confer with MLDs regarding recommendations for treatment and disposition of human remains as well as additional measures for the Project site. They argue that the City has improperly chosen one MLD over the majority (i.e. Petitioners), implementing the practices, customs, and traditions of a non-Luiseño tribe to the exclusion of the remaining MLDs. They further argue that the City has refused to provide information regarding Project alternatives requested by the tribes and NAHC, making clear that it intends to proceed with the Project.

Similarly, Rincon seeks to compel the City to make a TCR determination and to continue consultation required by CR-1 and CEQA/AB 52. They argue that the City is required to make a TCR determination using the criteria in § 21074(a)(2) and 5024.1(c). As do Petitioners, Rincon argues that the City cannot avoid making a TCR determination by claiming that it has discretion not to do so. Rincon further argues that the Project site is a tribal cultural resource and that there is substantial evidence that the Project site, cemetery, and associated artifacts are cultural resources under § 5204.1(c). Rincon argues that it did not defer or opt out of continued consultation with the City nor delegate consultation to Soboba.

The City argues that Petitioners’ and Rincon’s demand for it to make a TCR determination pursuant to PRC § 21074 is time-barred, asserting that this provision applies to pre-project environment review, not post-project approval mitigation. The City further contends that Petitioners failed to seek AB 52 consultation and that Petitioners’ and Rincon’s tribal cultural resource claims represent a belated attempt to revisit the adopted IS/MND. Additionally, the City argues that both Petitioners and Rincon failed to exhaust their administrative remedies. The City argues that Petitioners are equitably estopped from asserting that the City must now determine whether the Project site is a tribal cultural resource and that the claims are barred by laches.

The City also argues that CR-1 does not require it to confer with either Petitioners or Rincon because it does not apply to the discovery of Native American human remains and related items during

HAROLD W. HOPP, Judge
D. Board, Clerk
Pages 8 of 15

construction. It contends that it complied with § 5097.98 by consulting with Petitioners and the Kizh Nation and that no further consultation is required.

Petitioners argue in response that the City decided to defer mitigation, that CR-1 and § 5097.98 are triggered by finding tribal cultural resources, including Native American human remains, during construction and that they do not challenge the IS/MND or its mitigation measures. Instead, they challenge the City's failure to make a TCR determination based on substantial evidence as required by CR-1 and § 21074(a)(2).

Moreover, they argue that there is not substantial evidence to support the City's position that the unearthed remains and other items are not a TCR. Rincon argues that the 30-day CEQA limitations period under § 21167(b) does not bar its TCR claim because it does not apply to enforcement of mitigation measures attached to Project approval, that no statutory period could begin to run until after the discovery of Native American ancestors, sacred soils, and associated artifacts, and that case law establishes that the CEQA limitations statute does not bar actions to enforce mitigation measures.

Evidentiary Objections. City objects to Exhibits 1 (Tribal Evidence) and 2 (TCR Demand Letter) submitted by Petitioners because they were not part of the record and do not qualify as extra-record evidence. The City objects to Exhibit 3 (Attorney General Amicus Brief) on the ground that it is not evidence or part of the record and was not filed by the Attorney General in this case.

Extra-record evidence is generally inadmissible, but may be admitted if it does not contradict the lead agency's evidence and provides "background information . . . or for the limited purposes of ascertaining whether the lead agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision." *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 579. The objections are overruled; the exhibits are relevant to determining whether the City fulfilled its obligations under CEQA, including CR-1, and help to explain the City's decision-making process and whether it proceeded in a manner required by law. The attorney general's brief will be considered as persuasive authority as to the interpretation of the relevant statutes.

City objects to Exhibits 1, 2, and 3 offered by Rincon on the ground that they violate the stipulation because they were not part of the proceeding and are inadmissible hearsay. If the Court considers the evidence, the City asks it to consider evidence submitted with the City's notice of lodgment so it may respond to the arguments Rincon made using the exhibits. Rincon responds that it does not object to the evidence lodged by the City. The better course seems to be to overrule the objection and to consider the City's additional evidence.

CEQA Standard of Review. Judicial review of CEQA-related proceedings involves evaluating whether an agency has abused its discretion in implementing and complying with mitigation measures adopted under CEQA. Abuse of discretion can occur when the agency either: (1) fails to proceed in a manner required by law, or (2) reaches a determination that is not supported by substantial evidence. *Cal. Pub. Res. Code* § 21168.5; *Laurel Heights Improvement Assn., supra*, 47 Cal.3d at 392; *North Coast Rivers Alliance v. Marin Municipal Water Dist.* (2013) 216 Cal.App.4th 614, 622. A writ of mandamus may be issued to correct such an abuse by compelling the agency to perform a clear, present, and ministerial duty when the petitioner has a beneficial right to that performance. *See Sierra Club v. Cnty. of Fresno* (2018) 6 Cal.5th 502, 526; *Cal. Oak Foundation v. Regents of Univ. of Cal.* (2010) 188

HAROLD W. HOPP, Judge
D. Board, Clerk
Pages 9 of 15

Claims asserting that an agency has failed to proceed in the manner required by law are reviewed de novo. See *Sierra Club, supra*, 6 Cal.5th at 512, 514; *King & Gardiner Farms, LLC, supra*, 45 Cal.App.5th at 837–38. This means that whether a lead agency has followed the proper procedures is subject to independent judicial review, with courts ensuring that all CEQA requirements mandated by the legislature are strictly followed. *Id.* at 838. Similarly, issue presenting a “mixed question of law and fact” are generally subject to independent review, unless factual questions predominate, in which case courts apply the substantial evidence standard. *Id.* at 838, 843.

The questions presented here are whether the City failed to proceed in the manner required by law by refusing to make a TCR determination and failing to continue tribal consultation under CR-1 and § 21074. Petitioners also content that the City failed to comply with § 5097.98, which governs the discovery and treatment of Native American human remains. These issues present questions of law and thus are subject to de novo review.

Mitigation Measure CR-1 and § 21074.

TCR Determination. In the IS/MND, the City included mitigation measures, one specifically addressing tribal cultural resources that are Native American human remains. CR-1 required the City to retain a Native American monitor to oversee project-related ground-disturbing construction activities that extend beyond previously disturbed depths. AR 41. CR-1 further required that if any previously unidentified tribal cultural resources were unearthed during construction, the City must engage in Native American consultation to determine additional mitigation measures necessary to avoid or reduce impacts to the resources. AR 42. In other words, the City had an ongoing obligation to consult with Native American tribes if previously unidentified tribal cultural resources were discovered during project construction. AR 42.

In addition to the obligations created by CR-1, § 21074(a)(2) requires the City to determine whether any newly discovered resources are “tribal cultural resources” under CEQA. *Cal. Pub. Res. Code* § 21074(a)(2). CEQA defines tribal cultural resources in two categories. First, “[s]ites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe” that are either “[i]ncluded or determined to be eligible for inclusion in the California Register of Historical Resources” or “[i]ncluded in a local register of historical resources.” *Cal. Pub. Res. Code* § 21072(a)(1). Second, include “[a] resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to the criteria set forth in (§ 5024.1(c)).” *Cal. Pub. Res. Code* § 21074(a)(2). When applying these criteria, the City “shall consider the significance of the resource to a California Native American tribe.” *Cal. Pub. Res. Code* § 21074(a)(2). A “California Native American tribe” includes any tribe listed on the contact list maintained by NAHC, which encompasses both Petitioners and Rincon. *Cal. Pub. Res. Code* 21073.

A resource is “significant” if it meets any of the following:

- (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.

HAROLD W. HOPP, Judge

D. Board, Clerk
Pages 10 of 15

- (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.
- (4) Has yielded, or may be likely to yield, information important in prehistory or history.

Cal. Pub. Res. Code § 5024.1(c).

CR-1 requires the City to continue consultation if “any previously unidentified tribal cultural resources are unearthed” during construction. AR 42. Implementing this condition requires an assessment of whether something that unearthed is a tribal cultural resource (that was previously unidentified). If an assessment of whether something is a tribal cultural resource is not made, then CR-1 would never come into play. In making this determination, the criteria in sections 21074(a)(2) and 5024.1 must be used. The determination must be supported by substantial evidence and the City must consider the “significance” of the resources to a California Native American tribe. *Cal. Pub. Res. Code* § 21074(a)(2); AR 41-42.

“[M]itigation measures cannot be defeated by ignoring them or by ‘attempting to render them meaningless by moving ahead with the project in spite of them.’” *Sierra Club, supra*, 231 Cal.App.4th at 1167, quoting *Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 450 (*Lincoln Place II*). Once a lead agency adopts an MND, it is an abuse of discretion to abandon or reject the mitigation measures adopted as part of the MND without circulating a supplemental MND supported by findings and substantial evidence showing the measures to be not feasible. *Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 130 Cal.App.4th 1492, 1508-09. City did not circulate a supplemental MND. Therefore, it was required to make a TCR determination when what could be previously unidentified tribal cultural resources were unearthed during construction. CR-1 could not be implemented without doing so. The failure to do so violated CEQA.

City’s argument that it has “discretion” to determine whether to make a TCR determination is contrary to the language of § 21074(a)(2). If the Legislature had intended to grant a lead agency such discretion, the statute would have read “The lead agency has the discretion whether to make a tribal cultural resources determination.” Obviously, the language chosen by the Legislature is different: A tribal cultural resource exists when the lead agency, “in its discretion, supported by substantial evidence,” determines the resource is significant. The discretion is in determining significance of a resource, not in whether to choose not to decide if a tribal cultural resource exists.

The legislative history of AB 52, which codified § 21074, confirms that CEQA previously failed to provide adequate protection for tribal cultural resources. 2014 Cal. Legis. Serv. Ch. 532 (AB 52), § 1(a)(1)–(2). The Legislature found that CEQA did not directly incorporate tribal knowledge and concerns, resulting in significant environmental impacts on tribal cultural resources to the detriment of both California Native American tribes and the state’s cultural heritage. *Id.* at § 1(a)(3). Accordingly, AB 52 was enacted to establish tribal cultural resources as a distinct category of resources under CEQA and to ensure that tribal cultural values—alongside scientific and archaeological considerations—inform impact assessments and mitigation measures. *Id.* at § 1(b)(2)–(3). The Legislature also intended to prioritize preservation in place and to empower tribes to manage and act as caretakers of their cultural resources. *Id.* at § 1(b)(8)–(9).

HAROLD W. HOPP, Judge
D. Board, Clerk
Pages 11 of 15

City's interpretation of § 21074 is contrary to the legislative history. It could ignore tribal knowledge, archaeological and ethnographic evidence, and other information provided by a tribe resulting in harm to tribal cultural resources, the very opposite of what the Legislature intended.

That the attorney general's interpretation of § 21074(a)(2), set forth in the amicus brief filed in *Koi Nation of Northern California v. City of Clearlake* (Ptr's Ex. 3) supports this interpretation of the statute is noteworthy. The Attorney General opines that a lead agency's discretion under PRC § 21074(a)(2) is to apply the criteria set forth in PRC § 5024.1 in determining whether a resource qualifies as a discretionary tribal cultural resource. *Id.* at 17. The Attorney General further explains that "[o]nce a resource is identified as a tribal cultural resource, whether through the mandatory or discretionary process [§ 21074(a)(2)], the lead agency must analyze the proposed project's significant adverse impacts to the resource and impose mitigation measures to address those impacts." *Id.* The Attorney General also emphasizes that AB 52 compliance must be reflected in the lead agency's CEQA documents, which should demonstrate how the agency incorporated tribal input into its analysis of tribal cultural resources. *Id.* at 15–16, *citing* CEQA Guidelines §§ 15063(d) & 15071.

The City correctly points out that the attorney general's opinion is not binding on the courts and was filed in an unrelated case. The opinion is persuasive only. Nevertheless, it is persuasive.

The Court finds that the City's failure to make a determination of whether a potential tribal cultural resource that was previously unidentified and was then unearthed during project construction is a tribal cultural resource violates CEQA and CR-1.

The Claims are not Barred by the Statute of Limitations. City argues that the claims made by Petitioners and Rincon are untimely; that any challenge to the IS/MND had to be made within 30 days of the notice of determination in September 2020. *California Public Resources Code* § 21167(b) states: "An action for proceeding alleging that a public agency has improperly determined whether a project may have a significant effect on the environment shall be commenced within 30 days from the date of the filing of the notice [of determination]." City cites *Committee for Green Foothills v. Santa Clara Cnty. Bd. of Supervisors* (2010) 48 Cal.4th 32, 43, in which the court held that "[i]f a valid NOD has been filed [citations], any challenge to that decision under CEQA must be brought within 30 days, regardless of the nature of the alleged violation."

The City would be correct if Petitioners or Rincon were challenging the IS/NMD. They are not. Instead, they challenge whether the City complied with CEQA and the conditions the City adopted to make the MND possible. Section 21167(b) does not apply to actions to enforce project conditions. *Sierra Club, supra*, 231 Cal.App.4th at 1166-67; *Lincoln Place II, supra*, 155 Cal.App.4th 453, n. 23. Moreover, the statute of limitations could not have started to run until the discovery of Native American remains in March of 2022 and a claim to enforce a condition of approval accrues only when the lead agency's final position is clear. *Honchariw v. County of Stanislaus* (2020) 51 Cal.App.5th 243. Therefore, the claims are not barred by the statute of limitations.

Petitioners and Rincon Exhausted Administrative Remedies. Citing *California Public Resources Code* § 21177 and *Hines v. California Coastal Commission* (2010) 186 Cal.App.4th 830, the City argues that Petitioners failed to exhaust administrative remedies because they did not raise their

HAROLD W. HOPP, Judge
D. Board, Clerk
Pages 12 of 15

factual determinations. *Protecting Our Water & Env't Res. v. Cnty. of Stanislaus* (2020) 10 Cal.5th 479, 495.

However, the City has not made such a determination, only asserted it as an argument why the petitions should not be granted. Therefore, the Court declines to decide it.

Compliance with § 5097.98.

In the IS/MND, the City included (apart from CR-1), a mitigation of following *California Public Resources Code* § 5097.98 with respect to the discovery of tribal cultural resources that are Native American human remains. AR 42. The City was required to discuss and confer with the NAHC-designated MLDs regarding their recommendations for the treatment and disposition of the discovered human remains and for additional treatment measures for the Project site, taking into account the possibility that multiple Native American human remains are located thereon. *Cal. Pub. Res. Code* §§ 5097.98(a)–(b).

Petitioners argue that the City violated its obligations under CEQA and § 5097.98, that although the City initially consulted with all three MNDs for 18 months, after deciding not to adopt Petitioners' recommendations for reburial and failing to provide a final report on Project alternatives, the City changed its position and claimed that § 5097.98 no longer applied. Petitioners contend that the City's refusal to follow the statute, including its failure to continue meaningful consultation with the MLDs and disregard for the NAHC's designation of the Project site as a sacred Indian Cemetery, constitutes a violation of both CEQA and PRC § 5097.98. Moreover, Petitioners argue that the City's actions, including choosing one MLD's (the Kizh Nation's) recommendations over others (Petitioners'), proceeding with construction despite the sacred status of the Project site, and refusing to share its plans with the tribes, violate CEQA and the City's own mitigation measures. Petitioners thus request that a writ of mandate be issued to require the City to comply with its obligations under PRC § 5097.98 and CEQA.

The City responds that it complied with § 5097.98. From April 2022 to July 2024, it engaged in consultations with the NAHC-designated MLDs, including Petitioners and the Kizh Nation, to discuss treatment preferences for the remains, as required by § 5097.98. Sealed AR 345, 424, 436–441, 692–713, 763–770, 1660–1662, 2090, 2838–2842. Despite the City's good faith efforts, the negotiations between Petitioners and the Kish Nation broke down by mid-2023 and the City became concerned that Petitioners were not negotiating in good faith. Sealed AR 2055–2057, 2061–2066, 2094–2097; Resp't's Ex. 1. The City invoked the mediation process under *Public Resources Code* § 5097.94(k), which Petitioners refused. Sealed AR 2822-2836. The City asserts that it ultimately decided to reinter the remains in a location not subject to further disturbance, in accordance with PRC § 5097.98(e). Sealed AR 2874–2875, 2881–2882. The City also argues that its actions to comply with PRC § 5097.98 (i.e., to reinter the remains) are exempt from CEQA, which specifically exempts such actions from CEQA's requirements.

However, the City has not met the statutory requirements to move forward with reinterring the remains at its discretion. Section 5097.98(e) provides that, for the City to reinter the remains, three things must have occurred: (1) the City must have “reject(ed)” the recommendation of the “descendants” (i.e., Petitioners and the Kizh Nation, each of whom is a designated MLD); (2) the parties must have engaged

HAROLD W. HOPP, Judge
D. Board, Clerk
Pages 14 of 15

in mediation pursuant to PRC § 5097.94(k); and (3) mediation must have failed. It does not appear that any of these things have happened.

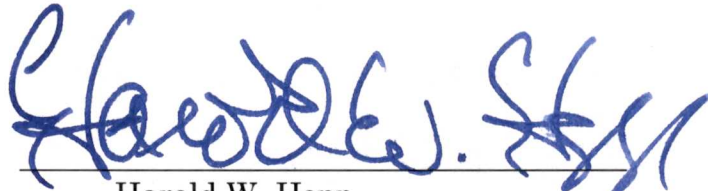
The City has not rejected the recommendations of all of the MNDs, only those from Petitioners (in favor of the Kizh Nation's recommendations). Sealed AR 2887-2890. Mediation never occurred and Petitioners argue that they were still in discussions with the City regarding Project alternatives and were waiting for additional information from the City. AR 2833-2836. The lack of a final detailed analysis of Project alternatives and further consultation indicate that the statutory requirements for mediation and reject of all MLD recommendations have not been met.

Finally, as Petitioners argue, even if the City had met the requirements for reinterring the remains, that would not mean that the City could move forward with construction that would impact the reburial site and destroy the Native American cemetery on the Project site without first evaluating the significance of potential impacts to the unanticipated cultural resources discovered during construction.

Therefore, the petitions are granted, the clerk shall issue a writ of mandate directing the City to comply with the conditions of the IS/MND, including mitigation measures CR-1 and § 21708(a)(2), and § 5097.98.

Petitioners and Rincon to prepare a proposed judgment and writ and to circulate them in the manner required by Rule 3.1312 of the California Rules of Court.

Clerk to give notice.



Harold W. Hopp
Judge of the Superior Court

HAROLD W. HOPP, Judge
D. Board, Clerk
Pages 15 of 15