

**From:** Stephen Rapaport <Stephen@grant-law.net>  
**Sent time:** 06/01/2020 03:32:24 PM  
**To:** vince.bertoni@lacity.org; mindy.nguyen@lacity.org  
**Cc:** Kara Grant <kara@grant-law.net>  
**Subject:** Letter regarding Draft EIR for Hollywood Center Project  
**Attachments:** Hollywood Center Project - Tribe Comments on DEIR - FINAL.pdf

---

Dear Mr. Bertoni and Ms. Nguyen,

Attached, please find a letter from Kara Grant regarding the above-referenced matter.

Thank you for your time and attention to this matter.

Stephen Rapaport  
Paralegal to Kara Grant

> KARA GRANT LAW  
> Attorney at Law  
>

> T | 714.321.7472  
> F | 949.769.6689  
> E | stephen@grant-law.net  
> 17595 Harvard, Suite C-202  
> Irvine, California 92614  
>

> This communication, including any attachments, may contain confidential and/or proprietary information (and, in some cases information protected by either or both doctrines of attorney-client privilege and attorney work-product), and is intended only for the individual(s) or entity or entities to whom the communication is addressed. Any review, dissemination, or copying of this email by anyone other than the intended recipient(s) is strictly prohibited. If you are not an intended recipient, please contact the sender by reply email, and delete and destroy all copies of the original message

# KARA GRANT LAW

17595 Harvard, Suite C-202 · Irvine, California 92614

E | [kara@grant-law.net](mailto:kara@grant-law.net) · T | 949.589.9330

---

VIA E-MAIL

June 1, 2020

Vincent Bertoni, Planning Director  
Mindy Nguyen, City Planner  
City of Los Angeles, Department of City Planning  
221 North Figueroa Street, Suite 1350  
Los Angeles, CA 90012  
[vince.bertoni@lacity.org](mailto:vince.bertoni@lacity.org); [mindy.nguyen@lacity.org](mailto:mindy.nguyen@lacity.org)

**Re: Initial Comments on and Objections to Draft EIR for Hollywood Center Project:  
Case No. ENV-2018-2116-EIR; SCH 2018051002**

Dear Mr. Bertoni and Ms. Nguyen,

My name is Kara Grant and I represent the Gabrieleño Band of Mission Indians – Kizh Nation (the “Tribe” or “Client”). The Tribe requested consultation with the City of Los Angeles’s (the “City”) on the Hollywood Center Project referenced above (the “Project”) pursuant to Assembly Bill 52 (“AB 52”). That consultation commenced on or about December 5, 2018 to determine whether the Project may have a significant impact on tribal cultural resources (“TCR”), and if so, the mitigations necessary to eliminate or minimize those impacts.

Despite ample evidence provided to the City by the Tribe (discussed in detail below), the City ultimately dismissed the Tribe’s evidence in its entirety finding it did not constitute “substantial evidence” to support the City’s finding that the historic and widely recognized trade routes within which the Project is located, or the villages located immediately adjacent to the Project, constituted tribal cultural resources. The City completely ignored the likelihood that the Project site would contain human remains/burial goods, and sensitive, historic, and irreplaceable artifacts given the Project locale. The “standard mitigations” included in the City’s Draft EIR (“DEIR”) for this Project do not remedy these CEQA violations for several reasons, but most significantly because they are unenforceable and incapable of effectively mitigating the significant impacts this Project may have to TCRs. Moreover, the manner in which the City consulted with the Tribe, and the subsequent communications evidence an ongoing, pervasive pattern and practice of CEQA evasion with respect to TCRs. Finally, in 2018, the City permitted the Project applicant to conduct massive ground disturbance at the Project site in connection with Project development, with absolutely no prior consideration for TCRs and no mitigations in place, in violation of CEQA.

For each of these reasons, the City's DEIR is defective and must be revised to include enforceable, effective mitigations for TCRs pursuant to a "good faith" consultation with the Tribe, and all ground disturbing work performed in violation of CEQA, including but not limited to the trenching, shall be redone with a native American monitor from the affiliated Tribe present.

#### **A. AB 52 CONSULTATION BETWEEN THE TRIBAL GOVERNMENT AND THE CITY**

In a letter dated September 10, 2018, the Tribe timely responded to the City's invitation to consult on this Project pursuant to AB 52 (see Pub. Res. Code § 21080.3.1(d)).<sup>1</sup> That letter stated:

"Your project lies within our ancestral tribal territory, meaning belonging to or inherited from, which is a higher degree of kinship than traditional or cultural affiliation. Your project is located within a sensitive area and may cause a substantial adverse change in the significance of our tribal cultural resources. Most often, a records search for our tribal cultural resources will result in a 'no records found' for the project area. The Native American Heritage Commission (NAHC), ethnographers, historians, and professional archaeologists can only provide limited information that has been previously documented about California Native Tribes. For this reason, the NAHC will always refer the lead agency to the respective Native American Tribe of the area. The NAHC is only aware of general information and are not the experts on each California Tribe. Our Elder Committee & tribal historians are the experts for our Tribe and can provide a more complete history (both written and oral) regarding the location of historic villages, trade routes, cemeteries and sacred/religious sites in the project area."

Prior to this invitation to consult, however, the Project applicant carried out massive trenching and other ground disturbing activities on the Project site without any notice to affiliated tribes, and without any mitigations for TCRs in place in violation of CEQA.

On December 5, 2018, the Tribe's Chairman, Andrew Salas, and biologist, Matthew Teutimez, consulted with representatives of the City pursuant to AB 52. Messrs. Salas and Teutimez again informed the City that the Project is located in a place of particular significance to the Tribe – within a significant, historic trade route where it intersects with a second historic trade route, and adjacent to historic villages. Specifically, Messrs. Salas and Teutimez explained to the City that the Project is located within the Camino Real Trade Route and at the point where it converges with the Cahuanga Pass – another trade route of tribal and historical significance. As such, the Project site is itself a TCR per the definition set forth in Section 21074(a) of the Public Resources Code. In addition, because the Project site was historically a highly utilized land area, it is very likely to be ripe with TCRs. Moreover, the Project is located adjacent to the sites of one or more of the Tribe's historic villages known as the Yangna, Sa'angna (sometimes erroneously spelled as "Suangna"), Mauanga, and Cahuanga. These villages overlapped each other within the project area, as reflected in the historic maps shared with the City during consultation (identified below). Per literary sources shared at the consultation, the Tribe's villages usually had between 500 and

---

<sup>1</sup> The Tribe received an invitation to consult on this Project because it is identified by the Native American Heritage Commission as a Tribe affiliated historically and ancestrally with the Project area.

1,500 huts – thus again, indicating the significant potential for TCRs at the Project site.<sup>2</sup> In fact, the City has recognized the presence and locations of these villages and the historic Camino Real and Chauanga Pass trade routes within which this Project is located in other project EIRs, even noting them as “well documented” in the work and maps prepared by anthropologist William McCawley (1996), and by archaeologist Gary Stickel (prepared specifically for the Gabrieleno Band of Mission Indians-Kizh Nation) (James Flaherty 2016), among others.<sup>3</sup>

During the consultation, Messrs. Salas and Teutimez shared their oral history, which explained how these trade routes were heavily used by the Tribe for movement of trade items, visiting of family, going to ceremony, accessing recreation areas, and accessing foraging areas. Within and around them contained seasonal or permanent ramadas or trade depots, seasonal and permanent habitation areas, and often isolated burials and cremations from folks who died along the trail, and are not associated with a village community burial site or ceremonial burial site. In addition to the Tribe’s oral history, Messrs. Salas and Teutimez shared with the City the following maps and excerpts of other historic and expert documents including but not limited to: (1) 1938 Kirkman-Harriman Historical Map; (2) 2018 Kizh Tribal Map [indicating villages and trade routes overlapping the Project site]; (3) Lowell John Bean and Charles R. Smith, “Gabrielino,” in Handbook of North American Indians: California, vol. 8, ed. by R. F. Heizer (Washington D.C.: Smithsonian Institution, 1978); (4) A View of the History of Charter Oak, California, by Jeanine Robertson (University of Claremont Press); and (5) other literary resources describing the village locations within the area where the Project site is located. These documents contain sensitive information and were shared confidentially with the City for consultation purposes pursuant to section 21082.3(c) of the Public Resources Code.

As the Project site is located within and around sensitive, historical landscapes including two prominent trade routes and village, there is a high potential to impact the Tribe’s TCRs since the trade routes and villages themselves constitute TCRs pursuant to Section 21074(a) of the Public Resources code, and because significant artifacts and even human remains and/or burial goods are likely present within the soil from the thousands of years of prehistoric activities that occurred at and adjacent to the Project site. To avoid impacting or destroying TCRs that may be inadvertently unearthed during Project related ground disturbing activities, the Tribe proposed specific mitigation language approved by the Kizh Nation Tribal Government for inclusion in the Project EIR, Mitigation Monitoring and Reporting Plan (“MMRP”), and as a condition to Project approval. The Tribe’s proposed mitigations for this Project generally included native American monitoring of all ground disturbing activities at the Project site, and protocol in the event TCRs are discovered, or human remains/burial goods are unearthed. The Tribe’s proposed Project mitigations are attached hereto as Exhibit A

During the December 5, 2018 consultation, the City neither agreed nor disagreed with the Tribe’s proposed mitigations despite being asked for their thoughts and impressions. However, the very next day, December 6, 2018, the Tribe received a seemingly form email from the City requesting that the Tribe provide to the City “substantial evidence” of TCRs at the Project site in the forms listed below “within 14 days of [that] communication, or Thursday, December 20, 2018, in follow up to the information that was provided during the telephone consultation.”

---

<sup>2</sup> A View of the History of Charter Oak, California, by Jeanine Robertson (University of Claremont Press).

<sup>3</sup> See examples, Silver Lake and Ivanhoe Reservoirs Aeration and Recirculation System Project EIR, Appendix C; 222 West 2<sup>nd</sup> Project EIR, Appendices K and M; Trident Center Modernization Project EIR, Appendix H.

- Recorded maps demonstrating actual resource found within .5 mile of the project site
- What is the tribal cultural resource identified in the area
- Evidence of human remains and artifacts in the projects surrounding area
- Evidence of sacred land designated for trading routes
- Need factual written language in lieu of verbal knowledge

The Tribe provided key portions of their oral history, historical maps, and literary and expert documentation of the significance of the Project site location being where two major trade routes converge at a village site, and with several other villages adjacent thereto, the existence and legitimacy of which have been recognized by the City in other project EIRs. (See footnote 3, *supra*.) Thus, the Tribe provided no further documentation to the City.

Except for an additional request that the Tribe provide *more* “substantial evidence” that the Project site is a TCR and/or that TCRs may exist at the Project site, no further communication was received by the City until a letter dated April 8, 2020. There, the City unilaterally “concluded” the AB 52 consultation for the subject Project asserting that substantial evidence was not provided to support the existence of a TCR at the Project site or that the site constitutes a TCR, and thus no mitigations were necessary. Thus, according to the City, the consultation was concluded because a mutual agreement on the Project mitigations could not be reached with the Tribe. The pertinent language is quoted below:

“To date, no evidence has been submitted that demonstrates that the specific location of the Project Site should be considered a tribal cultural resource pursuant to Public Resources Code Section 5024.1, such that monitoring for tribal cultural resources would be required to avoid significant and unavoidable impacts. Furthermore, review of the map originally provided with the consultation request did not demonstrate that there is an existing tribal cultural resource within the Project Site.”

The City’s April 8, 2020 letter further states that despite the purported lack of substantial evidence of TCRs, that the City would adopt its “standard Condition of Approval for the treatment of inadvertent tribal cultural resource discoveries.” In short, the City has found that no mitigations for TCRs are required for the Project pursuant to CEQA. The condition of approval merely states that if an object or artifact that may be a tribal cultural resource is encountered during the course of any ground disturbance activities, all such activities shall temporarily cease on the Project site until the potential TCRs are properly assessed and addressed by the City. *If the City determines* pursuant to PRC Section 21074(a)(2) that the object is a TCR, the City will allow any affected tribe a site visit.

**B. THE DEIR VIOLATES CEQA BECAUSE SUBSTANTIAL EVIDENCE OF TRIBAL CULTURAL RESOURCES AT THE PROJECT SITE WAS PROVIDED TO THE CITY, AND THE CITY ABUSED ITS DISCRETION BY REJECTING THAT EVIDENCE**

The City violated CEQA by failing to engage in good faith in the AB 52 consultation process and committed an abuse of discretion by engaging in a pattern and practice whereby the City systematically rejects any and all evidence provided by consulting tribes as not amounting to “substantial evidence” to support TCR mitigations, as the City did on the subject Project. As explained fully below, there is not

substantial evidence in the record to support the City's finding that the Project site itself is not a TCR, that TCRs are likely present at the Project site, or the City's determination that the Project will not have a significant impact on TCRs. Consequently, the DEIR is defective for failing to include proper, effective, and enforceable mitigations for TCRs.

**1) There is No Substantial Evidence to Support the City's Finding that the Trade Routes within which the Project is Located or the Likelihood of TCRs at the Project Site are Not TCRs.**

Per section 21080.3.2(b) of the Public Resources Code, the City and the Tribe (collectively, the "Parties") were required to consult "in good faith," regarding the potential for TCRs at the Project site. Once consultation has begun, as the lead agency, the City may only certify an EIR for the subject project (which that may have a significant impact on a tribal cultural resource) after consultation has concluded. (PRC §21082.3(d).) Consultation is deemed concluded only when the parties agree to measures to mitigate or avoid a significant effect on a tribal cultural resource, or when a party concludes, after a reasonable effort, that mutual agreement cannot be reached. (PRC §21080.3.2(b).)

CEQA defines "tribal cultural resources" as (1) "sites, features, places, cultural landscapes, sacred places and objects with cultural value to a California Native American tribe" that are included in the state or local register of historical resources or that are determined to be eligible for inclusion in the state register; and (2) resources determined by the lead agency, in its discretion, to be significant on the basis of criteria for listing in the state register of historical resources. (Pub. Res. Code § 21074(a).)<sup>4</sup> Moreover, (b) A cultural landscape that meets the criteria of subdivision (a) is a tribal cultural resource to the extent that the landscape is geographically defined in terms of the size and scope of the landscape. (Pub. Res. Code § 21074(b).)

The convergence of historic trade routes used for ages by Native American tribes meets all four of the subcategories described there. Accordingly, in rejecting this location and the likelihood of TCRs present at the Project site as to be TCRs, it relies on finding that the evidence provided by the Tribe to show the significance and likelihood of TCRs does not constitute "substantial evidence." In turn, the City demanded the Tribe to provide more "substantial evidence" following the December 5, 2018 consultation. The City made this demand in order to support its pre-planned finding that mitigation measures for TCRs are not necessary for this Project because there is no hard evidence that TCRs actually are present at the Project site. The City's position completely lacks merit.

The City improperly inverted the burden of proof regarding TCRs. CEQA does not require Tribes to substantiate with evidence the existence of TCRs at every project site on which they consult in order to

---

<sup>4</sup> Public Resources Code section 5024.1(c) states: "A resource may be listed as an historical resource in the California Register if it meets any of the following National Register of Historic Places criteria:

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

justify the need for TCR mitigation measures. To do so would require tribes to possess essentially an inventory of the location of all TCRs throughout the geographic area they are culturally and traditionally affiliated with, which for this Tribe spans several counties across Southern California, and documentation to evidence their TCR inventory. If tribes possessed this kind of information, the Legislature would not have revised CEQA to provide for a consultation process whereby tribes are an integral part of the CEQA review process from the project outset, including proposing mitigation measures that must be included in the CEQA review document for any project that "may" have a significant impact on TCRs. Instead, the Legislature would have drafted measures whereby tribes may obtain access to project sites to retrieve their TCRs per their inventories and records. This is clearly not the case and laws shall not be given interpretations that would moot their very purpose. That intent is apparent from Public Resources Code Section 21084.2, which states that "[a] project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment." A project that may have a significant effect on the environment requires appropriate mitigation. (Pub. Res. Code § 21082.3(b).) CEQA "Defines "significant effect on the environment" as a substantial, or potentially substantial, adverse change in the environment." (Assembly Bill 52, Senate Floor Analysis, 8/27/2014, p. 2.)

Thus the only remaining issue as to whether mitigations should have been adopted for the Project is whether the Tribe provided the "substantial evidence" that the Project may have a significant impact on the identified TCRs thus requiring mitigations to eliminate or minimize those impacts. The CEQA Guidelines (14 Cal Code Regs §15384(a)) define "substantial evidence" as enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Under Public Resources Code Sections 21080(e) and 21082.2(c), and 14 Cal Code Regs Sections 15064(f)(5) and 15384, the following constitute substantial evidence: (1) Facts; (2) Reasonable assumptions predicated on facts; and (3) Expert opinions supported by facts.<sup>5</sup> In contrast, an opinion offered by a person who is not competent to render an opinion on a subject does not amount to substantial evidence. (*Jensen v. City of Santa Rosa* (2018) 23 Cal.App.5th 877, 894; *Cathay Mortuary, Inc. v. San Francisco Planning Comm'n* (1989) 207 Cal.App.3d 275.)

The Technical Advisory on AB 52 and Tribal Cultural Resources in CEQA prepared by the Governor's Office of Planning and Research (the "OPR Advisory") states that "substantial evidence" that a resource is a TCR "could include, among other evidence, elder testimony, oral history, tribal government archival information, testimony of a qualified archaeologist certified by the relevant tribe, testimony of an expert certified by the Tribal Government, official tribal government declarations or resolutions, formal statements from a certified Tribal Historic Preservation Officer, and historical notes, such as those found in the Harrington Papers and other anthropological records." (*Id.* at p. 4.) Interestingly, under these established definitions of "substantial evidence" pertaining specifically to TCRs, the City's Condition to Approval which allows for the opinion of an unidentified "City" personnel as definitive as to whether or not a discovered resource is in fact a TCR does not constitute "substantial evidence."

Contrary to the City's apparent interpretation, nothing in CEQA suggests, much less states that substantial evidence of TCR provided by a Tribe pursuant to consultation with the City may be negated and

---

<sup>5</sup> Case law makes clear that opinions can constitute "substantial evidence" when they are provided by a witness who is qualified to render an opinion on the subject. (*Sierra Club v Department of Forestry & Fire Protection* (2007) 150 CA4th 370; *Architectural Heritage Ass'n v County of Monterey* (2004) 122 CA4th 1095, 1117.)

then disregarded by database studies on found historical data limited to an arbitrary distance from the project. In fact, this very issue was raised by bill opponents before AB 52 was passed. The question they posed was: "How Does One Prove A TCR is Not a TCR?" The opponents to AB 52 asserted:

" 'While the lead agency retains the authority to make the final determination for this exception [for TCRs], it puts the lead agency in the position of trying to argue against what only tribes can truly know – what is culturally significant to that tribe.' For example, some TCRs may be based on oral history. If a tribe presents oral history as evidence that a resource is a TCR, it seems questionable whether such evidence can ever be disputed."

The Bill opponents went on to state that this caveat "effectively mandates consideration of '[TCRs] (as broadly defined...and the importance/significance of which is determined by the tribe designating it) regardless of prior documentation and/or listing in State surveys and registers of such resources.'" (AB 52, Senate Environmental Quality, pp. 16-17.) Consistent with this analysis, the Legislature expressly stated that California Native American tribes traditionally and culturally affiliated with the geographic area of a project have expertise concerning their tribal cultural resources. (PRC § 21080.3.1.) Accordingly, provided that the tribe provides "substantial evidence" that the project may have a significant impact on TCRs consistent with the foregoing, the project at issue is by definition one that will have a significant effect on the environment, and in turn requires an EIR or an MND.

The Tribe made this showing here. Knowledgeable representatives from the Tribe, whom the legislature deems to be "experts" on their Tribe's cultural resources, history, and places, relayed relevant portions of their oral history to explain why the project site lies within a sensitive area for purposes of their TCRs, and provided the City with documentation illustrating the geography, trade routes, and villages of their people. The Tribe's showing constitutes substantial evidence for purposes of CEQA. Thus, the Tribe has met their statutory burden according to both the express statutory language under CEQA, and to the legislative intent of AB52, as discussed herein. In turn, the Tribe's showing triggered the City's duty to complete the consultation process by one of the prescribed methods, and incorporate appropriate mitigation measures into the project. (PRC § 21082.3(b) [If a project "may have" a significant impact on a tribal cultural resource, the lead agency's CEQA document must discuss whether the project "has" a significant impact on that tribal cultural resource and whether feasible alternatives or mitigation measures, including those agreed to during consultation, will avoid or substantially lessen the impact]; see also Pub Res C §21082.3(e) [Unless the environmental document includes mitigation measures agreed on during the consultation process, "if substantial evidence demonstrates" the project "will cause" a significant effect to a tribal cultural resource, the agency must "consider" feasible mitigation measures "pursuant to" PRC § 21084.3(b)].) The City's assertion that that the Parties could not reach an agreement is devoid of merit as the City refused to discuss mitigations for the project with the Tribe.

In light of the foregoing, the City must consult with the Tribe, consider the mitigations proposed, and come to an agreement regarding those mitigations, which must be included in the EIR and MMRP for this Project for all ground-disturbing activities. Unfortunately, the City's failure to require such mitigations prior to the 2018 extensive trenching at the Project site violated CEQA and caused irreparable harm to TCRs. The Tribe requests that this "ground disturbing" work be redone with a Native American Monitor present, consistent with the mitigations attached hereto as Exhibit A.



## 2) The City's Pattern and Practice of Systematically Rejecting Mitigations for TCRs Violates CEQA and Constitutes an Abuse of Discretion

There is ample evidence that the City routinely and systematically engages in a pattern and practice whereby it initiates consultation with tribes affiliated with a project such as the Project herein at issue pursuant to AB 52. The City receives the evidence provided by the tribe, which in this case was substantial oral history, historical maps, and expert and literary documentation that the Project site is located within a the convergence of two major historical trade routes, and overlapping with well documented villages, within which ceremonial and burial grounds were historically located.

A review of the State Clearinghouse Database for all projects for which the City was the lead agency and adopted an EIR since at least January 1, 2018, shows that the City has never determined that the consulting tribe has provided "substantial evidence" of a TCR for a project, and thus never adopted mitigation measures for TCRs for any such project. This, along with the boilerplate "methodology" identified for each project, as well as the form letters routinely sent to the consulting tribe(s) following the initial consultation asking for more "substantial evidence" regardless of what was provided, evidences a pattern and practice of systematically rejecting Tribal evidence to circumvent CEQA's mitigation requirements for TCRs.

Instead of engaging in good faith discussions re the proposed mitigations, the City routinely adopts the same "Conditions to Project Approval" which do not satisfy CEQA for several reasons: (1) these are not mitigations included in the Project EIR; (2) they were not agreed upon pursuant to the consultation process with the affiliated Tribe; (3) they are unenforceable since no Native American monitor possessing the knowledge and background to identify a Native American TCR is required to monitor the ground disturbing activities, but instead, discretion is given to an unidentified "City" personnel with to determine whether a resource is a TCR; (4) there is no means of enforcing the condition because there is no oversight to recognize noncompliance or report it.

Under CEQA, the lead agency "must 'provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures.'" (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 445.) "As part of the enforcement process, mitigation measures are subject to monitoring and reporting to ensure the measures will be implemented." (*Id.* at 446; Pub. Res. Code § 21081.6(a).) "The reporting or monitoring program shall be designed to ensure compliance during project implementation." (*Id.*) "The purpose of these [monitoring] requirements is to ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded." (*Lincoln Place, supra*, 155 Cal.App.4th at p. 445; *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261.) CEQA requires that mitigation measures adopted in the environmental review are "incorporated into the project or required as a condition of project approval in a manner that will ensure their implementation," and the failure to do so is a basis to set aside the agency's approval. (*Federation, supra*, 83 Cal.App.4th at pp. 1252, 1262 [finding the agency violated CEQA and thus ordering the trial court to issue a writ because the mitigation measures were not "fully enforceable"]; *Lincoln Place Tenants Assn., supra*, 155 Cal.App.4th at p. 453 [holding the city violated CEQA by failing "to enforce the mitigation conditions placed on the project when it failed to monitor whether the measures were being complied with"].) This ample authority makes clear that the "standard Condition to Project Approval" the City adopted is wholly unenforceable and thus a clear violation of CEQA.

Finally, the City's pattern and practice of evading "good faith" consultation with tribes pursuant to AB 52, and systematic rejection of the substantial evidence supporting the existence of TCRs and in turn the project's potential impact on TCRs, amounts to an abuse of discretion and egregious violation of CEQA to the detriment of Tribal governments, like my Client's. In so doing, the City has repeatedly abandoned its fiduciary duties and responsibilities to the public. These violations beg the question whether bias exists against Native American tribes and in favor of project applicants. (See Petrovich Development Company, LLC, et al. v. City of Sacramento, et al. (C087283) [holding that the bias of one council member denied the individual challenging the project a fair hearing].)

### C. CONCLUSION

My Client requests that the City comply with CEQA and all other laws, duties, and requirements. My Client demands that the trenching performed at the Project site without proper TCR mitigations in place be redone with a Native American monitor from the Tribe present. My Client further demands that the City reengage in the AB 52 consultation process in good faith, and adopt the mitigations proposed (or a variation of those mitigations agreed upon by the Parties) as mitigations for this Project, and include those mitigations in the Project EIR and MMRP.

To be clear, my Client's only objective is to preserve and protect its TCRs. There is no public or private entity, and no governing body, that maintains an interest in respecting, preserving, and protecting the Tribe's TCRs equal to that maintained by my Client. Once their TCRs are damaged or destroyed, there is no adequate means of righting those wrongs. The Tribe wishes to effectively and efficiently work together with the City and the Project applicant in carrying out this Project, but such "teamwork" cannot even commence if my Client's cultural resources are treated as dispensable.

Should you have any questions regarding this letter, please feel free to contact me at (949) 579-9330, or by email at [kara@grant-law.net](mailto:kara@grant-law.net).

Sincerely,



Kara E. Grant  
Counsel for the Gabrieleño Band of Mission Indians – Kizh Nation

\_\_\_\_\_  
Enclosure(s) – Proposed Mitigations for TCRs

# EXHIBIT A



## Gabrieleno Band of Mission Indians – Kizh Nation

### *Protection of Tribal Cultural Resources (TCRs)*

#### **Most Important Things for Agencies to Know About AB52:**

- An EIR, MND, or ND can not be certified until AB-52 tribal consultation has concluded.
- Agreed mitigation measures with the tribe, **MUST** be recommended for inclusion in the environmental document.
- Signature confirming acceptance of these mitigation measures recommended by our Tribal Government is required within 14 days of receipt to conclude AB52 consultation.

#### **Tribal Cultural Resources Mitigation Measures within Kizh Nation Tribal Territory:**

Note: To avoid compliance issues with the following laws, all Native American Monitoring shall be conducted by a documented lineal descendant from the ancestral Tribe of the project area (NAGPRA Law 10.14)

- The Native American Graves Protection and Repatriation Act (NAGPRA), Public Law-101-601, 25 U.S.C. 3001 et seq., 104 Stat. 3048.
- CEQA Guidelines Section 15064.5, PRC 5097.98 (d)(1).
- The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

*If you are receiving these measures, The Gabrieleno Band of Mission Indians Kizh -Nation are the direct lineal descendants of your project area. The Kizh Nation ONLY responds and consults on projects within their ANCESTRAL tribal territory. Therefore, to remain in compliance with above referenced laws and to enable our Tribe with the ability to protect and preserve our last remaining and irreplaceable Tribal Cultural Resources, it is recommended that the project applicant retain a qualified professional tribal monitor/consultant from the Gabrieleno Band of Mission Indians Kizh -Nation. The Kizh Nation possesses Tribal archives including documented historical information as well as multiple members who possess unique knowledge derived from oral tradition passed down through generations of the Tribe in order to provide the expertise needed to identify whether a project is located within a culturally sensitive area given its proximity to village areas, commerce areas, recreation areas, ceremonial areas, and burial locations.*

#### **Native American Heritage Commission (NAHC) Guidelines for Native American Monitors/Consultants**

**(approved 9/13/05):** By acting as a liaison between Native American, archaeologist, developers, contactors and public agency, a Native American monitor/consultant can ensure that cultural features are treated appropriately from the Native American point of view. This can help others involved in a project to coordinate mitigation measures. These guidelines are intended to provide prospective monitors/consultants, and people who hire monitors/consultants, with an understanding of the scope and extent of knowledge that should be expected.

**Mitigation Guidelines for Tribal Cultural Resources (TCRs):** CEQA now defines TCRs as an independent element separate from archaeological resources. Environmental documents shall address a separate Tribal Cultural Resources section that includes a thorough analysis of the impacts to only TCRs and includes separate and independent mitigation measures created with tribal input under AB-52 consultations. Therefore, all agreements, mitigation, and conditions of approval regarding TCRs shall be handled solely with the Tribal Government and conversely all agreements, mitigation, and conditions of approval regarding Archaeological Resources shall be handled by an Archaeological resource company.



## MITIGATION MEASURES

**Retain a Native American Monitor/Consultant:** The Project Applicant shall be required to retain and compensate for the services of a Tribal monitor/consultant who is both ancestrally affiliated with the project area and approved by the Gabrieleño Band of Mission Indians-Kizh Nation Tribal Government and is listed under the Native American Heritage Commission's (NAHC) Tribal Contact list for the area of the project location. This list is provided by the NAHC. A Native American monitor shall be retained by the Lead Agency or owner of the project to be on site to monitor all project-related, ground-disturbing construction activities (i.e., boring, grading, excavation, potholing, trenching, etc.). A monitor associated with one of the NAHC recognized Tribal governments which have commented on the project shall provide the Native American monitor. The monitor/consultant will only be present on-site during the construction phases that involve ground disturbing activities. Ground disturbing activities are defined by the Gabrieleño Band of Mission Indians-Kizh Nation as activities that may include, but are not limited to, pavement removal, pot-holing or auguring, grubbing, tree removals, boring, grading, excavation, drilling, and trenching, within the project area. The Tribal Monitor/consultant will complete daily monitoring logs that will provide descriptions of the day's activities, including construction activities, locations, soil, and any cultural materials identified. The on-site monitoring shall end when the project site grading and excavation activities are completed, or when the Tribal Representatives and monitor/consultant have indicated that the site has a low potential for impacting Tribal Cultural Resources.

**Unanticipated Discovery of Tribal Cultural and Archaeological Resources:** Upon discovery of any tribal cultural or archaeological resources, cease construction activities in the immediate vicinity of the find until the find can be assessed. All tribal cultural and archaeological resources unearthed by project construction activities shall be evaluated by the qualified archaeologist and tribal monitor/consultant. If the resources are Native American in origin, the Gabrieleño Band of Mission Indians-Kizh Nation shall coordinate with the landowner regarding treatment and curation of these resources. Typically, the Tribe will request preservation in place or recovery for educational purposes. Work may continue on other parts of the project while evaluation and, if necessary, additional protective mitigation takes place (CEQA Guidelines Section 15064.5 [f]). If a resource is determined by the qualified archaeologist to constitute a "historical resource" or "unique archaeological resource", time allotment and funding sufficient to allow for implementation of avoidance measures, or appropriate mitigation, must be available. The treatment plan established for the resources shall be in accordance with CEQA Guidelines Section 15064.5(f) for historical resources.

**Public Resources Code Sections 21083.2(b)** for unique archaeological resources. Preservation in place (i.e., avoidance) is the preferred manner of treatment. If preservation in place is not feasible, treatment may include implementation of archaeological data recovery excavations to remove the resource along with subsequent laboratory processing and analysis. All Tribal Cultural Resources shall be returned to the Tribe. Any historic archaeological material that is not Native American in origin shall be curated at a public, non-profit institution with a research interest in the materials, if such an institution agrees to accept the material. If no institution accepts the archaeological material, they shall be offered to the Tribe or a local school or historical society in the area for educational purposes.

### **Unanticipated Discovery of Human Remains and Associated Funerary Objects:**

Native American human remains are defined in PRC 5097.98 (d)(1) as an inhumation or cremation, and in any state of decomposition or skeletal completeness. Funerary objects, called associated grave goods in PRC 5097.98, are also to be treated according to this statute. Health and Safety Code 7050.5 dictates that any discoveries of human skeletal material shall be immediately reported to the County Coroner and excavation halted until the coroner has determined the nature of the remains. If the coroner recognizes the human remains to be those of a Native American or has reason to believe that they are those of a Native American, he or she shall contact, by telephone within 24 hours, the NAHC and PRC 5097.98 shall be followed.



### **Resource Assessment & Continuation of Work Protocol:**

Upon discovery of human remains, the tribal and/or archaeological monitor/consultant/consultant will immediately divert work at minimum of 150 feet and place an exclusion zone around the discovery location. The monitor/consultant(s) will then notify the Tribe, the qualified lead archaeologist, and the construction manager who will call the coroner. Work will continue to be diverted while the coroner determines whether the remains are human and subsequently Native American. The discovery is to be kept confidential and secure to prevent any further disturbance. If the finds are determined to be Native American, the coroner will notify the NAHC as mandated by state law who will then appoint a Most Likely Descendent (MLD).

### **Kizh-Gabrieleno Procedures for burials and funerary remains:**

If the Gabrieleno Band of Mission Indians - Kizh Nation is designated MLD, the Koo-nas-gna Burial Policy shall be implemented. To the Tribe, the term "human remains" encompasses more than human bones. In ancient as well as historic times, Tribal Traditions included, but were not limited to, the preparation of the soil for burial, the burial of funerary objects with the deceased, and the ceremonial burning of human remains. The prepared soil and cremation soils are to be treated in the same manner as bone fragments that remain intact. Associated funerary objects are objects that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later; other items made exclusively for burial purposes or to contain human remains can also be considered as associated funerary objects.

### **Treatment Measures:**

Prior to the continuation of ground disturbing activities, the landowner shall arrange a designated site location within the footprint of the project for the respectful reburial of the human remains and/or ceremonial objects. In the case where discovered human remains cannot be fully documented and recovered on the same day, the remains will be covered with muslin cloth and a steel plate that can be moved by heavy equipment placed over the excavation opening to protect the remains. If this type of steel plate is not available, a 24-hour guard should be posted outside of working hours. The Tribe will make every effort to recommend diverting the project and keeping the remains in situ and protected. If the project cannot be diverted, it may be determined that burials will be removed. The Tribe will work closely with the qualified archaeologist to ensure that the excavation is treated carefully, ethically and respectfully. If data recovery is approved by the Tribe, documentation shall be taken which includes at a minimum detailed descriptive notes and sketches. Additional types of documentation shall be approved by the Tribe for data recovery purposes. Cremations will either be removed in bulk or by means as necessary to ensure completely recovery of all material. If the discovery of human remains includes four or more burials, the location is considered a cemetery and a separate treatment plan shall be created. Once complete, a final report of all activities is to be submitted to the Tribe and the NAHC. The Tribe does NOT authorize any scientific study or the utilization of any invasive and/or destructive diagnostics on human remains.

Each occurrence of human remains and associated funerary objects will be stored using opaque cloth bags. All human remains, funerary objects, sacred objects and objects of cultural patrimony will be removed to a secure container on site if possible. These items should be retained and reburied within six months of recovery. The site of reburial/repatriation shall be on the project site but at a location agreed upon between the Tribe and the landowner at a site to be protected in perpetuity. There shall be no publicity regarding any cultural materials recovered.



**Professional Standards:** Archaeological and Native American monitoring and excavation during construction projects will be consistent with current professional standards. All feasible care to avoid any unnecessary disturbance, physical modification, or separation of human remains and associated funerary objects shall be taken. Principal personnel must meet the Secretary of Interior standards for archaeology and have a minimum of 10 years of experience as a principal investigator working with Native American archaeological sites in southern California. The Qualified Archaeologist shall ensure that all other personnel are appropriately trained and qualified.

Acceptance of Tribal Government Recommended Mitigation Measures:

By \_\_\_\_\_  
Lead Agency Representative Signature

Date: \_\_\_\_\_





## Attachment A

Kizh Nation Ancestral Tribal Territory extended along the coast from Malibu Creek in Los Angeles County down to Aliso Creek in Orange County and encompassed the Channel Islands of Catalina (Pimugna), San Nicolas (Haraasnga), and San Clemente (Kiinkenga). Our inland border was the San Gabriel Mountains (Hidakupa) and eastwardly our territory extended to parts of San Bernardino (Waatsngna), Orange, and Riverside counties.

