[EXT]Comments of the yak tityu tityu yak tiłhini Northern Chumash Tribe on the DEIR for the Diablo Canyon Power Plant Decommissioning Project

Jennifer Miao <jmiao@smwlaw.com>

Mon 9/25/2023 2:32 PM

To:PL_Diablo <PL_Diablo@co.slo.ca.us>

Cc:Tori Ballif Gibbons <Gibbons@smwlaw.com>

1 attachments (3 MB)

ytt DEIR Comment Letter 9-25-23.pdf;

Dear Ms. Strachan,

Attached please find a letter from Tori Gibbons, on behalf of the *yak tit^{y}u tit^{y}u yak tiłhini* Northern Chumash Tribe and the *ytt* Northern Chumash Nonprofit, regarding the San Luis Obispo County's consideration of a Draft Environmental Impact Report and Development Plan/Coastal Development Permit/Conditional Use Permit for the Diablo Canyon Power Plan Decommissioning Project.

Please confirm receipt of this email and all the attachments, and that you will include everything in its EIR record.

Best,
Jen

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September 25, 2023

Via Electronic Mail

Susan Strachan
Department of Planning & Building
San Luis Obispo County
976 Osos Street, Room 300
San Luis Obispo, CA 93408
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Re: **Comments of the *yak tit^{y}u tit^{y}u yak tilhini* Northern Chumash Tribe on the Draft Environmental Impact Report for the Diablo Canyon Power Plant Decommissioning Project**

Dear Ms. Strachan:

Shute, Mihaly & Weinberger LLP submits this comment letter on behalf of the *yak tit^{y}u tit^{y}u yak tilhini* Northern Chumash Tribe (*ytt* Tribe) and the *ytt* Northern Chumash Nonprofit (together, *ytt*) regarding San Luis Obispo County's (County) consideration of a Draft Environmental Impact Report (DEIR) and Development Plan/Coastal Development Permit/Conditional Use Permit for the Diablo Canyon Power Plan Decommissioning Project (Project).

The proposed Project will have significant impacts on the ancestral homelands of *ytt*'s members. We ask that the County revise its environmental analysis to incorporate the Johnson Report, which clearly sets out the genealogical connection between *ytt*'s members and the ancestral Chumash village sites on the Diablo Lands currently owned by PG&E and subsidiary Eureka Energy. The vast majority of *ytt*'s sacred sites and cultural resources have been lost to centuries of forced removal, genocide, land theft, and development. Now is the time to say ***no more*** and to once again give the descendants of the Diablo Canyon Lands villages an opportunity to protect, honor, steward, and restore their tribal cultural resources.

We have reviewed the DEIR and submit these comments to inform the County that its draft analysis is inadequate under the California Environmental Quality Act

(CEQA), Public Resources Code §§ 21000 *et seq.* and the CEQA Guidelines, California Code of Regulations, title 14, §§ 15000 *et seq.* (CEQA Guidelines). In addition, the Project as currently described conflicts with several provisions of the San Luis Obispo County General Plan, in violation of state Planning and Zoning Law, Gov. Code §§ 65000 *et seq.* For all of these reasons, the County cannot certify this fundamentally flawed EIR or approve the Project as it stands.

I. The County Has Failed to Respect the *ytt* Tribe's Inherent and Recognized Rights to Religious Freedom and Spiritual Well-being.

Under the international human rights standards enshrined in the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"), indigenous peoples, including the *ytt* Tribe, have the right to access, protect, and maintain their religious and cultural sites.[1] In 2014, the United States joined the other United Nations member states in expressing support for the Declaration and committing to its implementation, thereby creating legal obligations for the United States to respect the human rights of indigenous peoples.[2] As a local unit of the United States, the County has a responsibility to work with *ytt* to take appropriate measures to achieve the ends of the UNDRIP. This includes ensuring that "Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; and the right to the use and control of their ceremonial objects."[3]

Here, the PG&E-controlled Diablo Canyon Lands are part of a sacred tribal landscape, and the site of *ytt*'s ancestral villages. Under the provisions of the UNDRIP, the County has an obligation to provide reasonable, feasible and protected access to the Diablo Lands and the other individual tribal cultural resources to the *ytt* Tribe and its nonprofit. Yet, rather than protect these rights, the County has refused to acknowledge *ytt*'s genealogical connection to its ancestral village sites and its descendant tribe status, thereby jeopardizing *ytt*'s ability to maintain religious and cultural identity in its entirety. No mitigation can prevent the severe impact that this omission will have on the Tribe's religion, spirituality, or culture.

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[1] UNDRIP, Article 11, available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf, attached as Exhibit 1
[2] *See id.* at Articles 11, 12, 25, 26, 31, and 38.
[3] *Id.* at Article 12.

The County has failed to meet its obligations to respect *ytt's* inherent and recognized religious freedoms, thereby violating international law. The County must revise its analysis to acknowledge and give deference to the *ytt* Tribe's unique spiritual and cultural connection to the Diablo Canyon Lands.

II. The *ytt* Northern Chumash Object to the County's Handling of the Environmental Review and Tribal Consultation Process.

Members of the *yak titʸu titʸu yak tiłhini* Northern Chumash Tribe represent an unbroken chain of lineage, kinship, and culture from villages on the Pecho Coast. The *ytt* Tribe's ancestors were forcibly removed from their homelands beginning in the 1700s without agreement, consideration, or compensation. Yet, through familial ties and oral history, *ytt* has consistently maintained and documented its ancestral connection to the Pecho Coast where the Diablo Canyon Nuclear Power Plant currently lies. In 2018, *ytt* received a Governor's Historic Preservation Award for their research and collaboration with California Polytechnic State University (Cal Poly) and PG&E to restore one of *ytt*'s ancestral village sites within the Diablo Canyon Lands. As the Office of Historic Preservation explained in bestowing the award, the "project's far-reaching benefits include[d] protection of Northern Chumash cultural materials, reuniting the [*ytt*] Tribe with a culturally significant location, affirming tribal oral history, improved environmental conditions, and provision of living classroom for community engagement and education."[4]

Other genealogical and anthropological research efforts have confirmed members of the *ytt* Tribe as the documented descendants of the Pecho Coast. Most recently, in 2020, the County's Planning Commission authorized Pacific Gas & Electric (PG&E) to consult with *ytt* and other tribal groups regarding a road widening project on the Diablo Canyon Land. In response to concerns from *ytt* about the County's obligations under Senate Bill 18 (SB 18) and Assembly Bill 52 (AB 52), the County's Board of Supervisors required PG&E to submit a genealogy report to assist in determining the appropriate tribal connection to the Diablo Canyon Lands.

This report, entitled "Descendants of Native Rancherias In the Diablo Lands Vicinity: A Northern Chumash Ethnohistorical Study," was prepared by Dr. John Johnson at the Santa Barbara Museum of Natural History (Johnson Report). The Johnson

[4] 2018 Governor's Historic Preservation Awards: Research and Collaboration for Restoration of *Tstyiwi* on the Pecho Coast, attached as Exhibit 2. For more information about the Governor's Historic Preservation Award, please visit https://ohp.parks.ca.gov/pages/1054/files/GovHPAwds_BackgroundandCriteria.pdf.

Report's stated purpose was to "identify descendants of North Chumash people who belonged to[] rancherias that once existed in the Diablo Canyon Lands area" in recognition that state and federal laws require land managers to identify and consult with such descendants where prehistoric burials are encountered or where cultural sites are known to exist. Johnson Report at 1. The Report found "strong supporting evidence" that at least one Northern Chumash village existed within the boundaries of PG&E's Diablo Canyon Lands. *Id.* at 12. Following extensive research, documentation, and synthesis of past studies, the Johnson Report reached the following conclusion:

> Leaders of [the *ytt* Tribe] not only can trace their ancestry back to these original rancherias, but this group of families can demonstrate continuity and identity as a Northern Chumash community that persisted in the San Luis Obispo area from colonial times down to the present day. *Clearly this tribal group is that which demonstrates the strongest case for cultural affiliation with the Diablo Lands area.*

Johnson Report at 51 (emphasis added). Yet, despite the existence of this well-supported and definitive ethnohistorical study and its clear conclusions, nothing in the County's AB 52 consultation or CEQA processes demonstrates that the County incorporated or even considered the Johnson Report when analyzing this current Project or engaging in required consultation. This omission violates the law in several ways.

A. The County's AB 52 Consultation Process Failed to Recognize *ytt* as the Descendant Tribe.

The State Legislature passed AB 52 for the express purpose of including "tribal knowledge about the land and tribal cultural resources at issue…for projects that may have a significant impact on these resources." AB 52, Section I(6)(b)(4). The bill sets up a formal tribal consultation process between a government agency and a Native American tribe in which the tribe can share their traditional and cultural expertise to help an agency better understand a project's tribal cultural resource impacts and provide appropriate mitigation. Pub. Resources Code § 21080.3.1; Governor's Office of Planning and Research (OPR) Technical Advisory at 5. As OPR's Technical Advisory explains, "[c]onsultation with California Native American Tribes is a key way to obtain the information necessary to understand the significance of the resource." OPR Technical Advisory at 10.

Tribal consultation should not only inform the agency's understanding of a resource's significance, but the identity of the resource itself. Tribal cultural resources are "sites, features, places, cultural landscapes, sacred places, and objects with cultural value

to a California Native American tribe." Pub. Resources Code § 21074(a)(1). They must either be included on or determined eligible for the California Register of Historic Places (CRHR) or determined by the local agency—at its discretion—to be a tribal cultural resource. *Id.* at (a)(1)(A)-(B). The local agency should exercise that discretion to identify tribal cultural resources where the consulting tribe has shared information—either publicly or in confidence—in support of such a designation. For instance, substantial evidence supporting an agency's determination that a resource is a tribal cultural resource could include "elder testimony, oral history, tribal government archival information, testimony of a qualified archaeologist certified by the relevant tribe, testimony of an expert certified by the tribal government, official tribal government declarations or resolutions, formal statements from a certified Tribal Historic Preservation Officer, or historical/anthropological records." OPR Technical Advisory at 5.

Here, the County failed to take tribal knowledge—supported by extensive ethnohistorical documentation—into consideration in analyzing and providing mitigation for impacts to tribal cultural resources in and around the Project site. The County correctly acknowledges that numerous prehistoric cultural and tribal cultural resources exist within the Project site, including at least one "very large, long-term village site that was intermittently occupied" throughout history. DEIR at 4.5-21. Yet, despite *ytt*'s consistent efforts to provide input and share information throughout tribal consultation, the DEIR makes absolutely no mention of *ytt*'s ancestral and genealogical connection to these Diablo Lands village sites. Indeed, the DEIR goes so far as to state in its Cultural Resources Ethnographic Setting that the SMVR-Betteravia Industrial Park (SMVR-SB) area of the Proposed Project is located within "lands traditionally occupied by the Santa Ynez Band of Chumash Indians," (4.6-2), yet provides no recognition that the Northern Chumash village sites within PG&E's Diablo Lands were traditionally occupied by the ancestors of *ytt*'s Tribal members. This omission violates AB 52's clear mandate to incorporate Tribal information into the agency's understanding of a resource.

In consultation, when *ytt* pointed out this fatal flaw in the County's analysis and asked that the DEIR correctly identify *ytt* as the descendant tribe for PG&E's Diablo Lands, the County refused. The County offered two arguments for this unjustifiable position: 1) that the Johnson Report is relevant only to the road improvement project for which it was commissioned, and 2) that AB 52 somehow prevents them from acknowledging and prioritizing *ytt*'s ancestral connection to these village sites. Neither of these excuses holds up under scrutiny.

B. As Substantial Evidence Supporting *ytt*'s Ancestral Connection to the Diablo Lands Villages, the Johnson Report is Relevant to this Project.

The Johnson Report is entirely relevant to the County's analysis of this proposed Project's tribal cultural resource impacts. As discussed in greater detail below in Section III.A of this letter, the Johnson Report—which the County itself required PG&E to commission—is now part of the baseline ethnohistorical understanding of the Diablo Lands. While the Report was drafted as part of a separate road improvement project, its stated purpose as to "identify descendants of Northern Chumash people who belonged to[] rancherias that once existed *in the Diablo Canyon Lands area*." Johnson Report at 1 (emphasis added). Because the current Project will take place largely *on Diablo Canyon Lands*, the Report remains relevant to the County's understanding of tribal cultural resource impacts for this Project as well. To claim otherwise defies both logic and law.

Furthermore, in citing to the Johnson Report to support its claims of ancestral homeland and lineage, *ytt* has made this information relevant under AB 52. *See* Pub. Resources Code § 21080.3; OPR Technical Advisory at 5, 10. As the descendants of the Pecho Coast, members of the *ytt* Tribe have firsthand knowledge of their lineage, which has been passed down in their oral histories and documented in collaborated work between J.P. Harrington and Rosario Cooper, the last traditional speaker of the tiłhini language. Through Ms. Cooper's work with J.P. Harrington, *ytt* has been able to preserve and revitalize much of its language, songs, and culture for the people of the *ytt* Tribe. As the California Legislature recognized, this identity and these efforts give *ytt* "expertise concerning their tribal cultural resources." Pub. Resources Code § 21080.3.1(a). As part of AB 52 consultation, *ytt* is fully entitled to provide substantial evidence supporting its information about a tribal cultural resource. *See* OPR Technical Advisory at 5. Here, the Johnson Report provides just such evidence and the County has an obligation under AB 52 to consider the Report's contents and conclusions.

C. California Law Allows Agencies to Recognize and Prioritize a Tribal Group's Direct Ancestral Connection to a Given Place.

The County's refusal to consider and incorporate the Johnson Report also appears to stem from a mistaken belief that AB 52 somehow prevents it from doing so. This is untrue. AB 52, as well as other California laws and policies, allows agencies to recognize and prioritize a tribal group's direct ancestral connection to a given place.

Consultation under AB 52 centers on "a California Native American tribe that is *traditionally and culturally affiliated with the geographic area* of the proposed project." Pub. Resources Code § 21080.3.1(b) (emphasis added). Though the Native American Heritage Commission may provide the lead agency with multiple tribal groups that have self-identified traditional and cultural affiliation with any given project area, nothing in AB 52 forbids the agency from giving deference and priority to the California Native

American tribe with the most direct ancestral connection to the project site. This is especially true if, as here, when during consultation a tribal group can show a genealogical and ancestral connection to a specific place.

Indeed, other California tribal consultation and tribal cultural resource laws contemplate the ability of an agency to identify the appropriate California Native American tribes for consultation and resource mitigation. For instance, Senate Bill 18—the law that governs tribal consultation for general plan amendments—requires development of "[p]rocedures for identifying through the Native American Heritage Commission the *appropriate* California Native American tribes." Gov. Code § 65040.2(g)(2) (emphasis added). As with AB 52, the SB 18 consultation and procedures must be respectful of tribal sovereignty and the need for confidentiality. *See* Gov. Code § 65352.4.

Similarly, under the California Native American Graves Protection and Repatriation Act, if Native American human remains are discovered, the Native American Heritage Commission has authority to determine "those persons it believes to be most likely descended from the deceased Native American." Pub. Resources Code § 5097.98(a). Being able to identify the Most Likely Descendant group is crucial to determining the appropriate treatment measures for the human remains. *Id.*

Here, the Johnson Report was commissioned for the express purpose of determining the current tribal group with the closest genealogical ties to the ancestral villages in Diablo Canyon Lands area. Johnson Report at 1. Conducted by an impartial third party, the Report expressly considered whether other families and tribes might trace their genealogy back to the Diablo Lands Rancherias, but "none of these additional avenues of research turned up evidence to indicate that other descendants existed who had not already been discovered by the reverse genealogy approach of tracing families descended from original forebears who belonged to Diablo Lands rancherias." Johnson Report at 50. The Report's conclusions are clear, and affirm *ytt*'s ancestral claims to the Diablo Lands villages. Nothing in AB 52 or any other California law prevents the County from acknowledging as much and considering this in its EIR analysis. In fact, as explained below, CEQA *requires* the County to do so.

D. **The County Failed to Meet AB 52's Standards for Mitigation.**

This consistent refusal to incorporate *ytt*'s input regarding its ancestral connection to the Diablo Lands and to consider the Johnson Report in its analysis further renders the County's tribal cultural resource mitigation inadequate. AB 52 provides specific mitigatory recommendations to best protect tribal cultural resources and minimize project

impacts. This includes avoidance and preservation in place, protecting the tribal cultural values and uses of the resource, permanent consideration easements, and other protections. Pub. Resources Code § 21084.3(b). Indeed, the law specifically requires that "[p]ublic agencies *shall*, when feasible, avoid damaging effects to any tribal cultural resource." Id. at (a) (emphasis added). Moreover, if the consulting tribe requests "consultation regarding alternatives to the project, *recommended mitigation measures*, or significant effects, the consultation *shall* include those topics." Pub. Resources Code § 21080.3.2(a) (emphasis added).

Here, *ytt* repeatedly requested that the County incorporate the Johnson Report into its analysis so that it could provide mitigation measures that reflected *ytt*'s status as the descendant tribe of the Diablo Canyon Lands. When given a copy of the proposed mitigation measures to review, *ytt* suggested extensive edits to better reflect the Tribe's ancestral connection to the village sites and tribal cultural resources at issue—edits that the County largely declined to incorporate. *See* Pub. Resources Code § 21080.3.2(c)(1) ("This section does not limit the ability of a California Native American tribe…to submit information to the lead agency regarding the significance of the tribal cultural resources, the significance of the project's impact on tribal cultural resources, *or any appropriate measures to mitigate the impact*.") (emphasis added). In failing to engage with *ytt* regarding the importance of the Johnson Report's conclusions, the County has also failed to provide an accurate representation of tribal cultural resource impacts or adequate mitigation for those impacts. AB 52 consultation requires that an agency create a space to discuss meaningful mitigation, but any efforts to do so have been stymied by the County's refusal to acknowledge *ytt*'s direct genealogical tie to the resources at issue.

III. **The DEIR Is Inadequate Under CEQA.**

The EIR is "the heart of CEQA." *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392 (citation omitted). It is "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return. The EIR is also intended 'to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological impacts of its action. Because the EIR must be certified or rejected by public officials, it is a document of accountability." *Id.* (citations omitted). The EIR must disclose and analyze all reasonably foreseeable direct and indirect environmental effects of a project. *See* CEQA Guidelines § 15064(d); *see also id.* §§ 15065(a)(4), 15358(a); Pub. Resources Code § 21065.3.

Beyond merely disclosing potential environmental impacts, CEQA requires the EIR identify new ways to avoid or minimize them. Pub. Resources Code § 21002.1. An

EIR may not defer evaluation of mitigation to a later date. CEQA Guidelines § 15126.4(a)(1)(B). Where, as here, the environmental review document fails to fully and accurately inform decisionmakers and the public of the environmental consequences of proposed actions, or identify ways to mitigate or avoid these impacts, it does not satisfy the basic goals of CEQA. *See* Pub. Resources Code § 21061 ("The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.") As a result of the DEIR's numerous and serious inadequacies, there can be no meaningful review of the Project by *ytt*, the public, or the County's decisionmakers.

A. The DEIR Fails to Provide an Adequate Baseline for Its Tribal Cultural Resource Discussion.

Accurate and complete information pertaining to the setting of the Project and surrounding areas is critical to an evaluation of a Project's impact on the environment. *San Joaquin Raptor/Wildlife Rescue Center v. Stanislaus County* (1994) 27 Cal.App.4th 713, 728; *see also Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 875 (incomplete description of the Project's environmental setting fails to set the stage for a discussion of significant effects). An EIR also "must include a description of the physical environmental conditions in the vicinity of the project," as it exists before the commencement of the project, "from both a local and a regional perspective." CEQA Guidelines § 15125; *see also Environmental Planning and Info. Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354. When setting a baseline, "[s]pecial emphasis should be placed on environmental resources that are rare or unique to that region and would be affected by the project." CEQA Guidelines, § 15125(c); *Sierra Watch v. County of Placer* (2021) 69 Cal.App.5th 86, 96. Failure to do so renders an EIR inadequate.

Here, the DEIR's deficiencies in describing the Project's cultural resource and tribal cultural resource setting undermine its adequacy as an informational document. The County has known about the Johnson Report as the most up-to-date, comprehensive ethnohistoric study of the Diablo Lands since its completion in September 2020. The County presumably has a copy of the Johnson Report in its files; *ytt* repeatedly offered to provide one during AB 52 consultation. While the County has a responsibility to maintain the confidentiality of sensitive tribal cultural resource information in the Johnson Report, it had a legal obligation under CEQA to let the Report's highly relevant conclusions inform its EIR analysis. Yet, nowhere in the DEIR's discussion of ethnographic setting

for cultural resource or tribal cultural resources does the County reference the Johnson Report or acknowledge the direct genealogical basis for *ytt*'s cultural affiliation with the Diablo Lands.

Courts have found that similar omissions of relevant baseline information rendered an EIR inadequate. *See, e.g., San Joaquin Raptor/Wildlife Rescue Ctr.,* 27 Cal.App.4th at 723-29 (omission of relevant baseline information "precluded serious inquiry" into the project's impacts and rendered EIR insufficient); *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 944-45 (lack of adequate baseline information violated CEQA). This may be especially true where, as here, the missing baseline information is readily available. *See Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1123-24 (EIR analysis "totally inadequate" since baseline failed to address local microclimate information, "even though the data readily exists"). Indeed, this insufficient treatment of the Johnson Report and the information *ytt* provided during AB 52 consultation violates CEQA, which requires an agency to include known scientific data where available. *See, e.g., Laurel Heights Improvement Assn.*, 47 Cal.3d at 410.

ytt has repeatedly urged the County to utilize the Johnson Report in its analysis and to recognize and give deference to the genealogical connection between *ytt*'s members and the village sites on the Diablo Lands. This would allow decisionmakers and the public to gain a more accurate sense of the Project's tribal cultural resource impacts. *See Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 514 ("*Friant Ranch*") (an EIR that lacks the analysis needed for the public to fully understand a project's impacts is inadequate as a matter of law). Yet, rather than incorporating this widely known and well documented information into its analysis of tribal cultural resource impacts, the County has released a DEIR that presents an incomplete and inaccurate tribal cultural resource analysis under CEQA. It is not enough for the County to make vague assertions about the Project's significant impacts on tribal cultural resources without providing adequate baseline information about those resources. *See, e.g., Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831 (a lead agency may not simply jump to the conclusion that impacts would be significant without disclosing to the public and decisionmakers information about how adverse the impacts would be).

The County must revise its ethnographic setting to include the information from the Johnson Report and present the full baseline discussion that CEQA requires.

B. The DEIR Fails to Adequately Analyze or Mitigate for the Project's Impacts on Tribal Cultural Resources.

CEQA requires public agencies to analyze the impact of a project on tribal cultural resources. Pub. Resources Code § 21084.2. Tribal cultural resources are defined as "[s]ites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe" determined eligible for inclusion in the California Register of Historical Resources or a local register of historical resources. Pub. Resources Code §§ 21074(a)(1)(A)-(B). An agency also has discretion to identify tribal cultural resources as significant based on the criteria under Section 5024.1(c). This could include (1) association with events that have made a significant contribution to the broad patterns of California's history and cultural heritage; (2) association with the lives of persons important in the past; and (3) embodiment of the distinctive characteristics of a type, period, region, or method of construction, or (4) ability to yield information important to prehistory. Any discretionary determinations "shall consider the significance of the resource to a California Native American tribe." Pub. Resources Code § 21074(a)(2).

1. The DEIR Fails to Consider Any Impacts on Native American Spiritual and Religious Values.

The proposed Project and the future of the Diablo Canyon Lands will have a profound impact on members of the *ytt* Tribe. The Diablo Lands—and the Pecho Coast more broadly—is the ancestral homeland of *ytt*'s members. The entire area, including the Project site, is replete with storied cultural sites and features of spiritual significance, as documented in the Johnson Report and the County's confidential cultural resources report.

The existence of the Diablo Canyon Power Plant and the need to decommission this site are clearly connected to the legacy of colonial violence endured by *ytt*'s Northern Chumash ancestors. *ytt* owns no land within its traditional territory, leaving the last remaining sacred sites and ancestral villages to the whims of non-Native people. This Project, especially if carried out in a way that does not recognize *ytt*'s descendant status, would result in significant and irreparable spiritual impacts.

However, the DEIR fails to discuss impacts to these values at all. The DEIR merely states that because there remains a high likelihood of unearthing previously unknown cultural resources, the Project would cause a significant impact. *See* DEIR at 4.5-31, 4.6-9. But this is an impermissible short cut. *See, e.g., Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1370-71; *Galante*

Vineyards v. Monterey Peninsula Water Management Dist. (1997) 60 Cal.App.4th 1109, 1123; *Santiago County Water Dist.*, 118 Cal.App.3d at831 (a lead agency may not simply jump to the conclusion that impacts would be significant without disclosing to the public and decision makers information about how adverse the impacts would be).

The fact that these impacts may be labeled as "social" is of no import. As the CEQA Guidelines explain:

> Economic or social changes may be used…to determine that a physical change shall be regarded as a significant effect on the environment. [E]conomic and social effects of a physical change may be used to determine that the physical change is a significant effect on the environment. If the physical change causes adverse economic or social effects on people, those adverse effects may be used as a factor in determining whether the physical change is significant. For example, if a project would cause overcrowding of a public facility and the overcrowding causes an adverse effect on people, the overcrowding would be regarded as a significant effect.

Guidelines § 15064(e). The Project will result in a physical change to the tribal cultural resources on and near the Project site. The physical change will result in an adverse spiritual and religious effect on people—just like the effects from overcrowding cited in the guidelines. These effects must be discussed in a revised DEIR.

2. The DEIR Fails to Support Its Assertion That Impacts of Opening the Diablo Lands to the Public Would Be Mitigated to a Less-Than-Significant Level.

As part of the Project's decommissioning activities, PG&E proposes to remove the Diablo Canyon Road Guard House Facilities at the Diablo Canyon Road entrance off of Avila Beach Drive. See DEIR at 4.5-41. This, in combination with the potential operation of the Marina by a third party, could open the Diablo Canyon Lands to the public to a much greater degree than ever before. As the DEIR recognizes, "permitting and use of the Marina by a third party could cause indirect impacts to known historical resources, since members of the public would be allowed to explore the area and could stumble upon a known significant resource, increasing the risk of looting." DEIR at 4.5-33. Without additional evidence or discussion, the DEIR then immediately concludes that implementation of mitigation measures CUL-1 through CUL-11, which would establish Environmentally Sensitive Areas and restrict public access through physical barriers and signage, would "reduce the direct and indirect impacts to less than significant." *Id*.

As part of its environmental analysis, an agency must "quantitatively or qualitatively ascertain or estimate the effect of the Project's mitigation measures." *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 842; *see also Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1116 (agency must assure that its mitigation is "effective" and will "present a viable solution" to reducing impacts); *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 728 (groundwater agreement mitigation invalid where agency failed to evaluate whether mitigation would be available). Yet, here, the DEIR offers no evidence or support for its assertion that public barriers and signage would be effective in keeping members of the public from looting tribal cultural resources from the Diablo Lands. Given that looting of archaeological and cultural resources is a significant issue even in sensitive tribal cultural landscapes that employ barriers and signage, *ytt* has grave concerns about the efficacy of the County's proposed mitigation.[5] The DEIR must be revised to provide evidence that this mitigation will actually work to reduce looting to a less than significant level.

3. The DEIR Fails to Adequately Mitigate for the Project's Significant Tribal Cultural Resource Impacts.

One key purpose of AB 52 consultation is to allow the lead agency and tribal representatives to discuss and find agreement on mitigation measures that might reduce a project's significant impacts. Pub. Resources Code § 21080.3.2. Given the DEIR's conclusion that tribal cultural resource impacts will be significant, the County has an obligation to consider and adopt all feasible measures that would substantially reduce a project's significant environmental impacts. Pub. Resources Code §§ 21002, 21002.1(b); *Friant Ranch*, 6 Cal.5th at 526. However, as the County failed to provide an adequate tribal cultural resources baseline and analysis, the suggested mitigation measures are inadequate and must be revised.

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[5] *See, e.g.,* Jones, Harry J., "'Devastating' looting hits Native American archaeological sites," *Los Angeles Times*, Aug. 15, 2015 (describing looting at Cuyamaca Rancho State Park, despite park rangers "employing high- and low-tech methods to try to identify the looters"), available at https://www.latimes.com/local/california/la-me-0816-sd-archaelogy-20150816-story.html, attached as Exhibit 3; Rowland-Shea, Jenny, "Bears Ears Cultural Area: The Most Vulnerable U.S. Site for Looting, Vandalism, and Grave Robbing," *American Progress*, June 13, 2016 (describing ATV riders damaging cultural resources in area "closed" to motorized vehicles) available at https://www.americanprogress.org/article/bears-ears-cultural-area-the-most-vulnerable-u-s-site-for-looting-vandalism-and-grave-robbing/, attached as Exhibit 4.

(a) **The DEIR Fails to Prioritize the Most Effective Form of Mitigation: Avoidance, or Preservation in Place.**

ytt strongly advocates for avoidance as a preferred form of mitigation. This involves leaving tribal cultural resources in place, ensuring that they remain undisturbed; this mitigatory practice is sometimes referred to as "preservation in place." CEQA requires agencies to adopt this mitigation for cultural and tribal cultural resources whenever possible. *See* CEQA Guidelines § 15126.4(b); *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 82-87 (CEQA requires preservation in place for archaeological resources, if feasible, unless other mitigation would be more protective).

Yet, despite CEQA's clear direction regarding avoidance and preservation in place, many of the DEIR's proposed alternatives involve significant ground disturbance and soil displacement—both of which create significant risk of disturbing previously unknown cultural and tribal cultural resources. Moreover, though some of the DEIR's proposed mitigation measures mention preservation in place, this avoidance should be elevated as a separate mitigation measure that would apply whenever the constraints of the Project allow. *ytt* implores the County to revise the DEIR to make avoidance a cornerstone of its tribal cultural resource mitigation strategy.

(b) **The DEIR Should Consider a Form of Off-site Mitigation to Offset Tribal Cultural Resource Impacts within the Diablo Lands.**

Over the last decade, *ytt* and its partners, The Land Conservancy and Cal Poly, have put forward numerous proposals to acquire the Diablo Canyon Lands and/or to place them under some type of tribal access and cultural easement. Though portions of the PG&E-owned 12,000 acres are already under conservation easements, those easements allow PG&E to utilize those lands for development, if needed. This makes those lands risky as potential reburial and reinterment locations for tribal cultural resources and ancestors' human remains because *ytt* has no way to ensure that the resources will not be disturbed again at some point in the future. A more permanent land protection is needed to offer true tribal cultural resource mitigation.

AB 52 allows consulting tribes to "propose mitigation measures…capable of avoiding or substantially lessening potentially significant impacts to a tribal cultural resource." Pub. Resources Code § 21080.3.2. If a tribe requests consultation regarding recommended mitigation measures, the "consultation shall include those topics." *Id*. AB 52 contemplates a number of potential mitigation measures "that, if feasible, may be

considered to avoid or minimize the significant adverse impact" of a project. Pub. Resources Code § 21084.3(b). These include "[p]ermanent conservation easements or other interests in real property, with culturally appropriate management criteria for the purposes of preserving or utilizing the resources or places," and other measures that serve to "protect[] the resource." Id. at §§ 21084.3(b)(3)-(4). Allowing for offsite mitigation—or in this instance, mitigation on parts of the Diablo Lands that will not be subject to ground disturbance as part of the Project—would serve to "protect the resource" from further development, and could be accomplished through the use of "permanent conservation easements or other interests in real property."

Such an approach would also align with CEQA's broad mitigatory purposes. As defined under CEQA Guidelines § 15370, subsection (e), mitigation includes "[c]ompensating for the impact by replacing or *providing substitute resources or environments*, including through permanent protection of such resources in the form of conservation easements." (emphasis added). Where feasible, offsite mitigation is a commonly used tool under CEQA and courts have routinely upheld such measures. *See, e.g., Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 278 (loss of habitat mitigated by conservation of other habitat at 1:1 ratio); *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 610-11, 614-26 (upholding habitat loss mitigation at 2:1 ratio); *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 792-94 (upholding mitigation by "offsite preservation of similar habitat"); *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1038 (purchase of a half-acre for habitat reserves for every acre of development); *Masonite Corp. v. County of Mendocino* (2013) 218 Cal.App.4th 230 (using offsite mitigation for conversion of agricultural land).

Though the existing case law addresses offsite mitigation mainly in the agriculture and habitat contexts, the rationale for this type of mitigation would apply equally to tribal cultural landscape impacts. As the court explained in *Masonite Corp.*, "[t]he permanent protection of existing resources off-site is effective mitigation for a project's direct, cumulative, or growth-inducing impacts because it prevents the consumption of a resource to the point that it no longer exists." 218 Cal.App.4th at 238 (internal quotation marks and citations omitted). Similarly, here, if future development or increased public access occurs within the Diablo Canyon Lands following decommissioning, this runs the risk of destroying or irreparably impacting the sensitive tribal cultural resources that have otherwise been undisturbed within the Diablo Lands. Providing permanent protections in the form of land transfers on parts of the Diablo Lands that will not be subject to ground disturbance as part of the Project, or paying a mitigation fee toward *ytt*'s land acquisition

fund to help restore the Tribe as rightful stewards of their ancestral homeland, would offer a way to prevent this from happening.

(c) The DEIR's Proposed Mitigation Measures Contain Legal and Substantive Flaws That Must Be Remedied.

Careful review of the DEIR's proposed cultural and tribal cultural resource mitigation measures reveals a number of substantive and legal flaws that must be corrected. First, CUL-3 must be revised to clarify that a tribal monitor must be present for all ground disturbing activities. In light of *Olen Properties Corp. v. City of Newport Beach* (2023) 93 Cal.App.5th 270, CUL-3, CUL-5, and CUL 7 should be revised to clarify that "tribal monitoring" refers to the constant physical presence of a tribal representative. And, as *ytt* raised repeatedly in tribal consultation, these measures should be revised to clarify that the descendant tribe—in this case, *ytt*—will be given priority in conducting tribal monitoring.

CUL-5 requires the development of a cultural resources monitoring and discovery plan. Defers development of the plan to sometime after the DEIR. Under CEQA, specific details of a mitigation measure "may be developed after project approval when it is impractical or infeasible to include those details during the project's environmental review provided that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will [be] considered, analyzed, and potentially incorporated in the mitigation measure." *Golden Door Properties, LLC v. County of San* Diego (2020) 50 Cal.App.5th 467, 518 (citing CEQA Guidelines § 15126.4(a)(1)(B)). CUL-5 fails to meet this standard. First, the DEIR fails to explain why the monitoring and discovery plan could not feasibly have been drafted *before* the DEIR was published. The measure defers development of the plan to a later point, but fails to include appropriate performance standards. For example, the measure refers to tribal monitoring, but does not say how often monitoring will take place, what kinds of activities will require tribal monitoring, how large the Environmentally Sensitive Area buffer area will be, and numerous other standards that would allow *ytt* and the public determine whether the discovery and monitoring plan will provide effective mitigation. This measure must be revised to provide the standards CEQA requires.

Next, CUL-7 states that "[i]n the event a Chumash Tribal Monitor is dismissed from monitoring and the County of San Luis Obispo Planning and Building Department determines this to be in error, the Chumash Tribal Monitor will be compensated for the time lost by the Applicant." DEIR at 4.5-40. While *ytt* appreciates that compensation will

be provided in such a situation, CUL-7 needs to be revised to clarify what the process will be for appealing a dismissal decision to the County. As currently drafted, the mitigation measure does not make clear the process the County would undertake to determine that the dismissal had been made in error.

Finally, CUL-10 also constitutes improperly deferred mitigation and must be revised. *Golden Door,* 50 Cal.App.5th at 518. The proposed measure requires the Applicant to develop a "plan that details how public access will be restricted to the DCPP site once the guard, guard house, and gate are removed." DEIR at 4.5-41. Yet, the DEIR provides no performance standards to ensure that this plan is actually effective in keeping the public out of restricted areas. CUL-10 makes vague reference to "[o]ther methods (e.g., signage, additional checkpoints or barriers)" that will be identified in the future to notify the public that the site is not open to visitors, but all of those decisions will be made at some future date by the Applicant. There is nothing in the language of CUL-10 that ensures these methods will work or that allows *ytt* or the public to evaluate how effective the mitigation will be in reducing the Project's impacts. *See San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670 (invalidating EIR for relying on deferred habitat mitigation plan without "adequate criteria or standards"); *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 (deferral not proper where proposed "mitigation measure does no more than require a report be prepared and followed"). This is especially problematic where the County relies on this mitigation measure to claim that the Project's public looting impacts will be less than significant. *See* DEIR at 4.5-33. The DEIR must be revised accordingly.

C. The DEIR's Land Use Analysis Fails to Recognize the Sensitive Tribal Cultural Resources Along the Coast and *ytt*'s Ancestral Connection to the Diablo Lands.

1. The Fragile Tribal Cultural Resources on the Diablo Lands Trigger an Exception to Shoreline Access Requirements.

An agency must analyze whether a Project conflicts with a land use plan or ordinance, which is a significant impact under CEQA Guidelines section 15125, subsection (d). The DEIR's Land Use section contains a discussion of the Project's consistency with a list of local regulations and policies regarding land use and agricultural resources, including the San Luis Obispo County Local Coastal Program Standards (SLO Coastal Plan). Within the SLO Coastal Plan, the Shoreline Access Policy 2 – New Development states that "[m]aximum public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development." DEIR at 4.12-21. The DEIR argues that the Project will be consistent with Shoreline

Access Policy 2 because "[p]ermit conditions for the [Project] would be presented…along with certification of the Final EIR…to require the careful and detailed study, identification, development, construction, implementation, and management of a Diablo Lands Connector Trail." *Id; see also* 4.12-43 to 46. The DEIR then proposes Permit Condition 1, which would require PG&E to record a public access easement through PG&E-owned lands "that would generally connect the area south of the Diablo Canyon Power Plant site to the area north of the site or another alignment determined through the trail alignment Identification process." DEIR at 4.12-44.

Yet, this analysis is flawed for multiple reasons. First and foremost, Permit Condition 1 is entirely unnecessary because the Project is consistent with Shoreline Access Policy 2 *even without* a public access easement across PG&E-controlled Diablo Lands. As the DEIR itself notes, the SLO Coastal Plan allows for exceptions to the requirement that new development allow for maximum public access to the shoreline and along the coast. Importantly, the Coastal Plan does not require public access to the coast where "it is inconsistent with…the *protection of fragile coastal resources*." DEIR at 4.12-21 (quoting SLO Coastal Plan Shoreline Access Policy 2) (emphasis added); *see also* Pub. Resources Code § 30212 (near identical California Coastal Act language). Similarly, the California Coastal Act provides that when seeking to fulfill the maximum public coastal access required under Section 4 of Article X of the California Constitution, an agency must do so in a way protects "natural resource areas from overuse." Pub. Resources Code § 30210; *see also* Pub. Resources Code § 30214(a)(3) ("The appropriateness of limiting public access to the right to pass and repass depend[s] on such factors as *the fragility of the natural resources* in the area…") (emphasis added).

Here, restricted public access is very much needed to protect the fragile tribal coastal resources along the Pecho Coast. The PG&E-owned Diablo Canyon Lands are made up of roughly 12,000 acres of coastline that have largely been spared the development and public recreation pressures seen in other coastal locations. The Diablo Lands and surrounding area are the location of five highly sensitive ancestral village sites, which will suffer incredible harm if opened to public access. *See* Johnson Report at 1. As described above, increased public access and recreation often leads to looting, vandalism, and desecration of tribal cultural resources. Allowing public access to the coast through the Diablo Lands is inconsistent with protecting these fragile resources.

Tribal cultural resources are considered part of the environment under CEQA. *See* Pub. Resources Code § 21084.2 ("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."); *see also* CEQA Guidelines, Appx. G, § XVIII (listing tribal cultural resources as one of the environmental resources an agency must

consider in its CEQA analysis). In this context, they should be considered as part of the "natural resources" the Coastal Act and SLO Coastal Plan describe. Tribal cultural resources incorporate and encompass natural resources, such as vistas, viewsheds, and geographic features. Indeed, CEQA defines tribal cultural resources as "*sites, features, places, cultural landscapes*, sacred places, and objects with cultural value to a California Native American tribe…" Pub. Resources Code § 21074(a) (emphasis added). Including elements of nature in the definition of tribal cultural resources reflects the interconnected relationship that has existed between natural resources and Native people since time immemorial.

The DEIR itself acknowledges that "[t]he Diablo Lands and areas along the shoreline of the DCPP site contain sensitive, fragile coastal resources" and the "Diablo Lands shoreline is unspoiled and has been protected for many years." DEIR at 4.12-42. The analysis then summarily dismisses any harms to these sensitive resources from public access with a blithe assurance that a trail "would be sited in a manner that would protect sensitive resources." *Id.* Yet, other than a passing reference to the Pecho Coast/Rattlesnake Canyon and Point Buchon trails, the DEIR provides no support for this assertion. Even if the County makes a good faith effort to site the trail in the most appropriate location, it has not considered whether that trail and the public access it allows would be compatible with fragile coastal resources. This failure to fully analyze the propriety of shoreline access under Public Resources Code section 30214 violates CEQA and the California Coastal Act.

The analysis also violates CEQA by failing to identify the extent and severity of land use impacts *before* the trail easement requirement is imposed. Under CEQA, when evaluating the significance of a project's impacts, an EIR may not "compress[] the analysis of impacts and mitigation measures into a single issue." *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 656. By assuming the implementation of Project permit conditions as part of the Project, the DEIR here did just that. The DEIR's failure to consider whether the Project conflicted with Coastal Plan Shoreline Access Policy 2 *without* a coastal access easement violates CEQA. Had the County undertaken this analysis in the proper order, it would have better understood that the fragile coastal resources currently on the site trigger an exception to Shoreline Access Policy 2 and the Coastal Act. As in *Lotus*, the EIR's failure to evaluate the significance of the Project's impacts separately from what is effectively its proposed mitigation (implementation of project permit requirements) results in a flawed analysis. By conflating impacts and mitigation, the DEIR fails to first make a significance finding (*i.e.,* determine if a conflict with a land use policy exists) and determine whether mitigation is legally necessary. *See Lotus*, 223 Cal.App.4th at 656-57.

Because the need to protect the invaluable tribal cultural resources on the coast triggers an exception to the SLO Coastal Plan Shoreline Access Policy 2, the Project permitting conditions need not require PG&E to grant a public access easement to the coast. Indeed, where shoreline access is unsuitable because of potential harm to natural resources, the Coastal Plan suggests "payment of a fee in-lieu-of the dedication of access" that "could be charged and deposited in local fund for securing public access in nearby areas more suitable for use." SLO Coastal Plan at 2-10. The DEIR should be revised to include this Permit Condition 1 in lieu of an access easement.

2. The DEIR Fails to Adequately Analyze the Project's Consistency with General Plan Parks and Recreation Policy 3.13.

The DEIR identifies Parks and Recreation Policy 3.13 as another relevant portion of the General Plan with which the Project must comply. In relevant part, Policy 3.13 states:

When a trail dedication is required as a condition of a discretionary permit, the required trail dedication must:

1. Be proportional to the level of development being proposed;

2. Have an appropriate nexus to the effects of the permit;…

3. Result in no long term, unmitigable environmental impacts; and

4. Comply with all applicable local, state and federal laws and regulations.

The DEIR concludes that the Project will be consistent with this policy, but its analysis falls short of CEQA's requirements. *See* DEIR at 4.12-34. First, the DEIR never analyzes whether the trail dedication contemplated in Permit Condition 1 is proportional to the level of development being proposed in the Project. This is especially critical here where PG&E's proposal is overwhelmingly focused on decommissioning, meaning the removal or cessation of development. It is not "proportional" to require miles of new trail dedication for a project that is actually removing development from a sensitive area.

The DEIR also fails to discuss whether there is an appropriate nexus between the trail dedication and the effects of the requested decommissioning permit. Indeed, there is not a single use of the word "nexus" in any of the DEIR's land use analysis beyond the language of Policy 3.13. *See* DEIR at 4.12-34 to -35. This omission is especially glaring in light of CEQA's requirement that all mitigation measures have "an essential

nexus…between the mitigation measure and a legitimate governmental interest." CEQA Guidelines § 15126.4(a)(4)(A).

With respect to Policy 3.13's requirement that the trail dedication "[r]esult in no long term, unmitigable environmental impacts," the DEIR insists that because there would be an environmental assessment to help determine the trail route, "any impacts associated with trail development would be mitigated." DEIR at 4.12-34. But the County cannot make this assurance in advance, especially for tribal cultural resources, which often have significant and unavoidable impacts unless avoided entirely. Elsewhere, the DEIR insists that signage and road blocks will be sufficient to keep public out of sensitive tribal cultural areas, DEIR at 4.5-33, but again, offers no evidence that those methods will actually be effective, especially in light of evidence to the contrary. *See* Section II.B.2, *supra*. Bringing more foot traffic and increased potential for tribal cultural resource looting will almost certainly result in a long term, unmitigable environmental impact in direct conflict with General Plan Policy 3.13.

The DEIR's failure to adequately analyze the Project's conflict with this policy violates CEQA. Guidelines § 15125(d). Moreover, as noted below, the Project's apparent conflict with General Plan Policy 3.13 violates state Planning and Zoning Law. *See* Section IV, *infra*.

3. **The DEIR Should Be Revised to Prioritize *ytt*'s Input in the Trail Alignment Identification Planning.**

If public access is granted through the Diablo Lands, Permit Condition 2 requires the development of a Trail Alignment Identification Plan to "establish the team, methodology, and process to locate an optimal route or routes for a public access trail." DEIR at 4.12-44. A trail design team would be tasked with "identifying the appropriate trail route(s)." *Id*. The proposed permit condition further provides that the trail design team would "include County-approved engineers, biologists, and archaeologists, as well as representatives from the Tribes that participated in the [Project's] AB 52 consultation process," as well as representatives from PG&E, relevant state agencies, and the County. *Id*.

This inclusion of all Tribes that consulted on the Project fails to recognize the status of *ytt*'s members as direct descendants from the Diablo Lands ancestral villages. While the County used the Native American Heritage Commission's list of area tribal groups to initiate AB 52 consultation, it may base appropriate future tribal participation in the permitting process on the information it obtained from those consultation conversations. Given the evidence in the Johnson Report regarding *ytt*'s clear status as

the descendant Tribe for the Project site, *ytt*'s input should be recognized and prioritized in any decisions regarding appropriate trail alignment. If the County insists on requiring Permit Condition 1, Permit Condition 2 must be revised to clearly reflect this.

D. The County Should Consider an Alternative That Minimizes Ground Disturbance Now and In the Future.

A proper analysis of alternatives is essential to comply with CEQA's mandate that, where feasible, significant environmental damage be avoided. Pub. Resources Code § 21102 (projects should not be approved if there are feasible alternatives that would substantially lessen environmental impacts); CEQA Guidelines §§ 15002(a)(3), 15021(a)(2), 15126(f). Every EIR must describe a range of alternatives to the proposed project that would feasibly attain the project's basic objectives while avoiding or substantially lessening the project's significant impacts. Pub. Resources Code § 21100(b)(4); CEQA Guidelines § 15126(d). Therefore, the discussion of alternatives must focus on project alternatives that can avoid or substantially lessening the significant effects of the project, "*even if [such] alternatives would impede to some degree the attainment of the project objective,s or would be more costly*. CEQA Guidelines § 15126.6(b) (emphasis added); *see also Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1089 ("[T]he key to the selection of the range of alternatives is to identify alternatives that meet *most* of the project's objectives but have a reduced level of environmental impacts") (emphasis added).

In this case, where the proposed Project presents very real dangers to tribal cultural resources that have already been imperiled throughout post-colonial history, it is especially important that the DEIR analyze alternatives that could avoid or lessen the Project's impacts. *See* CEQA Guidelines § 15126.6(c). For this reason, *ytt* urges the County to adopt the Minimum Demolition Alternative, which would "result in less structures requiring decommissioning and dismantlement in the short term." DEIR at 5-40. The DEIR assumes that "the amount of short-term and future ground disturbance is assumed to be less than the Proposed Project," though it expresses uncertainty regarding the extent of soil remediation efforts. *Id.* The DEIR further qualifies that "there is the possibility of future eventual dismantlement of remaining structures and facilities." *Id.* Not only does *ytt* encourage the County to select the alternative that would allow for the least ground disturbance within the highly sensitive Diablo Canyon Lands, *ytt* urges the County to consider and adopt a mitigation measure that would avoid future dismantlement entirely by finding other appropriate uses for the vacant buildings. This would allow the County and PG&E to make use of existing resources and avoid future ground disturbance.

IV. The Project Conflicts with the County's General Plan Policies Regarding Tribal Cultural Resources, and the EIR Fails to Address These Conflicts.

The State Planning and Zoning Law (Gov. Code §§ 65000 *et seq*.) requires that development decisions be consistent with the jurisdiction's general plan. See, e.g., Gov.Code §§ 65860, 66473.5, 66474, 65359, 65454. Thus, "[u]nder state law, the propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements." *Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800, 806. Accordingly, "[t]he consistency doctrine [is] the linchpin of California's land use and development laws; it is the principle which infuses the concept of planned growth with the force of law." *Families Unafraid to Uphold Rural El Dorado County v. Bd. of Supervisors* (1998) 62 Cal.App.4th 1332, 1336 (internal citations omitted).

It is an abuse of discretion to approve a project "that frustrate[s] the General Plan's goals and policies." *Napa Citizens for Honest Government v. Napa County Bd. Of Supervisors* (2001) 91 Cal.App.4th 342, 379. The project need not present an "outright conflict" with a general plan provision to be considered inconsistent; the determining question is instead whether the project is "compatible with and will not frustrate the General Plan's goals and policies." *Napa Citizens*, 91 Cal.App.4th at 379. Here, the proposed Project does more than just frustrate the General Plan's goals. It is directly inconsistent with numerous provisions in the General Plan, a violation of State Planning and Zoning Law.

Moreover, the DEIR pays short shrift to these inconsistencies. In both the Cultural Resources and Tribal Cultural Resources sections, the DEIR lists the allegedly applicable General Plan policies, but fails to analyze the Project's consistency with said policies. The only consistency analysis is in DEIR section 4.12.2, which does not appear to address the policies listed in the tribal cultural resource section. This omission violates CEQA, which requires an analysis of potential conflicts with *any* land use plan, policy, or regulation adopted for the purpose of avoiding or mitigating an environmental effect. *See* CEQA Guidelines, App. G, § XI(b) (emphasis added); DEIR at 4.12-35 (adopting Appendix G threshold of significance).

Some of the clear inconsistencies are as follows:

General Plan Policy	Project Inconsistency
General Plan Goal CR 4. The County's known and potential Native American,	The Project will have significant and unavoidable impacts on tribal cultural

archaeological, and paleontological resources will be preserved and protected.	resources. If the County selects an alternative with high ground disturbance or if the public is given greater access to sensitive Diablo Canyon Lands, the risk of tribal cultural resource disturbance and destruction will be even higher.
General Plan Policy CR 4.1. Non-development Activities. Discourage or avoid non-development activities that could damage or destroy Native American and archaeological sites, including off-road vehicle use on or adjacent to known sites. Prohibit unauthorized collection of artifacts.	The Project will have significant and unavoidable impacts on tribal cultural resources. If the County selects an alternative with high ground disturbance or if the public is given greater access to sensitive Diablo Canyon Lands, the risk of tribal cultural resource disturbance and destruction will be even higher. The County's determination that risks of looting will be mitigated to a less-than-significant level is unsupported and relies on improperly deferred mitigation.
General Plan Policy CR 4.2. Protection of Native American Cultural Sites. Ensure Protection of Native American Cultural Sites. Ensure protection of archaeological sites that are culturally significant to Native Americans, even if they have lost their scientific or archaeological integrity through previous disturbance. Protect sites that have religious or spiritual value, even if no artifacts are present. Protect sites that have religious or spiritual value, even if no artifacts are present. Protect sites that contain artifacts, which may have intrinsic value, even though their	The Project will have significant and unavoidable impacts on tribal cultural resources. If the County selects an alternative with high ground disturbance or if the public is given greater access to sensitive Diablo Canyon Lands, the risk of tribal cultural resource disturbance and destruction will be even higher. The DEIR does not include any mitigation measures focused entirely on avoidance or preservation in place.

archaeological context has been disturbed.	
General Plan Policy CR 4.3. Cultural Resources and Open Space. The County supports the concept of cultural landscapes and the protection and preservation of archaeological or historical resources as open space or parkland on public or private lands.	None of the DEIR's proposed alternatives contemplates placing all or part of the Diablo Canyon Lands under a protective tribal cultural easement.
General Plan Policy CR 4.4. Development Activities and Archaeological Sites. Protect archaeological and culturally sensitive sites from the effects of development by avoiding disturbance where feasible. Avoid archaeological resources as the primary method of protection.	The Project will have significant and unavoidable impacts on tribal cultural resources. If the County selects an alternative with high ground disturbance or if the public is given greater access to sensitive Diablo Canyon Lands, the risk of tribal cultural resource disturbance and destruction will be even higher. The DEIR does not include any mitigation measures focused entirely on avoidance or preservation in place.
General Plan Recreation Element Policy 3.13. When a trail dedication is required as a condition of a discretionary permit, the required trail dedication must: 1. Be proportional to the level of development being proposed; 2. Have an appropriate nexus to the effects of the permit; … 4. Result in no long term, unmitigable environmental impacts; and	*See* Section III.C.2, *supra.*

5. Comply with all applicable local, state and federal laws and regulations.	

V. Conclusion

This Project cannot be approved in its present form. The DEIR is legally inadequate and cannot serve as the basis for Project approval, especially when it fails to provide an adequate baseline setting for the Project's tribal cultural resource analysis. For these reasons, the County must make the requisite changes to the DEIR so that it is consistent with CEQA and all applicable requirements, and recirculate it for public review.

Thank you for your consideration.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Tori Gibbons

1694948.1

EXHIBIT 1

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

United Nations

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

United Nations

Resolution adopted by the General Assembly on 13 September 2007

[without reference to a Main Committee (A/61/L.67 and Add.1)]

61/295. United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006[1], by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

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1 See Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53), part one, chap. II, sect. A.

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

107th plenary meeting
13 September 2007

Annex

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples

affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights[2] and the International Covenant on Civil and Political Rights,[2] as well as the Vienna Declaration and Programme of Action,[3] affirm the fundamental importance of the right to self-determination of all peoples, by

2 See resolution 2200 A (XXI), annex.

3 A/CONF.157/24 (Part I), chap. III.

virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all

human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights[4] and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

4 Resolution 217 A (III).

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

   (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

   (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

   (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

   (d) Any form of forced assimilation or integration;

   (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future genera-

tions their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including

those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous

cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect

their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take

the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the

right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and

appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and re-

spect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective

remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

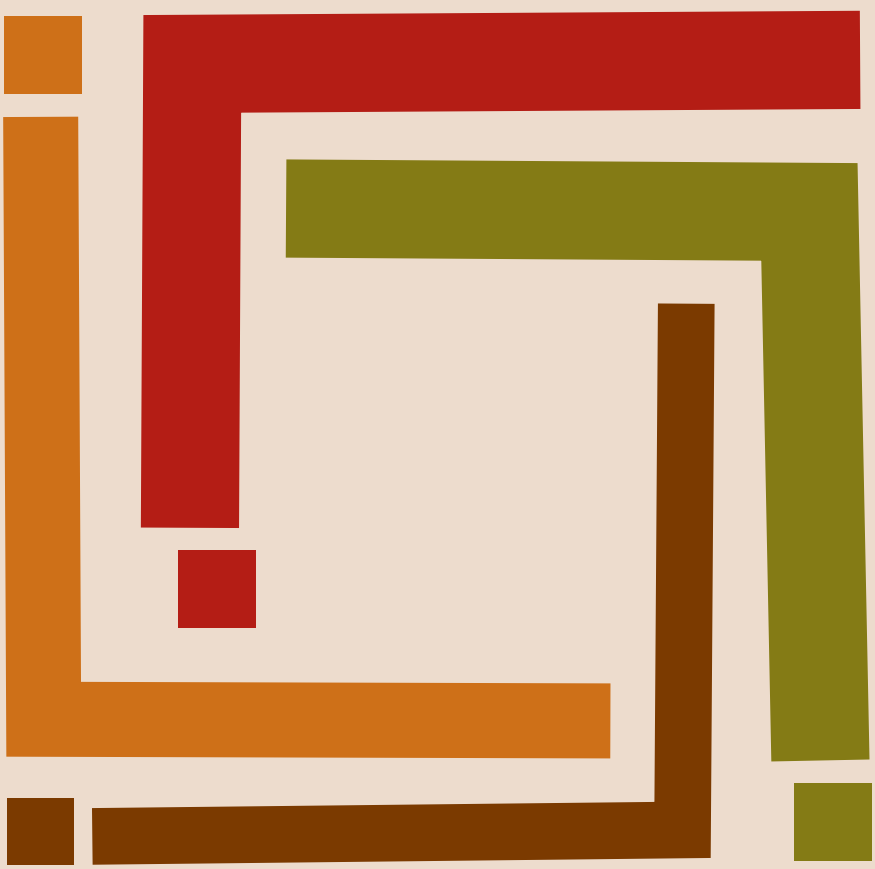
Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismem-

ber or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.



Designed by the Graphic Design Unit, Department of Public Information, United Nations

EXHIBIT 2

Research and Collaboration for Restoration of *Tstyiwi* on the Pecho Coast

Since 2009, PG&E has hosted a Cal Poly archaeological field class on the lands surrounding the Diablo Canyon Power Plant in collaboration with the yak tityu yak tiłhini - Northern Chumash Tribe. The field class focuses on Native-affiliated sites with middens that have been affected by coastal erosion, public trail access and historic land uses.

In 2015, Cal Poly held their archaeological field class along lower Pecho Creek at site CA-SLO-51/H, a multi-component site listed on the National Register of Historic Places as a contributing element to the *Rancho Canada de los Osos y Pecho y Islay* archaeological district since 1974. The restoration area corresponds to the former Northern Chumash village site of *Tstyiwi*, which was later the site of a Rancho Period adobe, representing a microcosm of California history. The site was selected for the 2015 Cal Poly archaeological field class because its integrity was being steadily compromised by cliff-face and creek bank erosion, aeolian erosion and disturbances related to agricultural uses (primarily plowing) dating back to circa 1844.

Approximately 25 Cal Poly students, Northern Chumash monitors, tribal representatives, professional CRM archaeologists, and visiting scholars worked at CA-SLO-51/H under the direction of Dr. Terry Jones as part of the archaeological field class. Mike Taggart, PG&E Cultural Resource Specialist for the Diablo Canyon lands, facilitated the Cal Poly fieldwork and development of the restoration project.

Recognizing the cultural and scientific significance of the Pecho Creek site (CA-SLO-51/H), PG&E's Diablo Canyon Land Stewardship Team (DCLST) permanently discontinued agricultural cultivation at

the site. The DCLST voluntarily changed the long-standing agriculturally focused land use to one that emphasizes protection of the cultural resources, improving water quality, expanding native habitat and providing a living classroom for education. With these shared goals in mind, PG&E re-engaged the Tribe and Cal Poly to develop and implement a restoration plan for the site in early 2016.

The project played an important role in reuniting the Northern Chumash Tribe with a place imbued with cultural significance and affirming oral history. Personal and family connections between the Tribe and *Tstyiwi* are profound with very deep roots. The site retains tremendous significance to the Tribe as an element of their cultural patrimony. Because of this significance, Cal Poly decided to limit archaeological investigation to the testing completed in 2015, and to focus instead on working with PG&E to eliminate subsurface impacts and stabilize the site area.

Results of the archival and archaeological research undertaken at the site have been used for education, training, and creation of an educational exhibit at PG&E's Energy Education Center in San Luis Obispo. The project's far-reaching benefits include protection of Northern Chumash cultural materials, reuniting the Tribe with a culturally significant location, affirming tribal oral history, improved environmental conditions, and provision of a living classroom for community engagement and education.

Learn more about the Pecho Coast, and the Northern Chumash Tribe.

EXHIBIT 3

Los Angeles Times

CALIFORNIA

‘Devastating’ looting hits Native American archaeological sites

State parks archaeologist Robin Connors inspects a grinding hole at a village site in Cuyamaca Rancho State Park, where looting has been discovered. (John Gibbins / San Diego Union-Tribune)

BY J. HARRY JONES

AUG. 15, 2015 7:22 PM PT

Reporting From San Diego — State parks officials and Native American leaders are decrying what they say has been a devastating spate of vandalism and looting at historically and culturally significant sites in San Diego County’s backcountry.

At least five times in the past two years, looters have targeted American Indian archaeological sites within Cuyamaca Rancho State Park, authorities said.

At one site, 21 dig holes were found, each the size of a dinner table.

“I’ve seen some pretty looted sites across California, and that one was one of the worst I’ve ever seen, and it was one of the first ones we found,” said Dan Falat, superintendent of California State Parks’ Colorado Desert District, which includes Cuyamaca Rancho, Palomar Mountain and Anza-Borrego Desert state parks.

At another archaeological site, not too far west of State Route 79, the remains of an ancient village had been plundered. That site features a huge slab of granite in which more than 40 bedrock mortars had been dug by generations of Kumeyaay women. Deep and cylindrical, the mortars — used to grind acorns — had been created over several centuries, with some up to 1,000 years old.

Authorities said that, at some of the locations, they’ve found shovels, screens, rakes and other tools that looters have used to dig up the earth and sift through soil to uncover arrowheads, other stone projectiles, and pieces of pottery.

The actions are criminal and in some cases could lead to felony charges of destruction of cultural resources, officials said.

Archaeologists say the damage is irreversible.

“Once you take it from where it is, it loses its context with the rest of the things that are found,” said park archaeologist Robin Connors. The artifacts “are all pieces of a puzzle, and once you take one piece out, it’s really irritating because you can’t find it again. It’s devastating, just devastating.”

Shasta Gaughen, the historic preservation officer for the Pala Band of Mission Indians, said the destruction is even worse from a cultural standpoint.

“For the Native American communities it’s basically grave robbing because you’re going into a sacred space and taking away the objects that were made by the ancestors,” she said. “Tribes believe those are things that should be left in place and they should be undisturbed. … It’s like you’re taking bodies from a cemetery.”

San Diego and Imperial counties are home to four indigenous Native American tribes, with roots going back 12,000 years: the Kumeyaay, Luiseño, Cupeño and Cahuilla.

Falat said there are hundreds of archaeologically rich sites in Cuyamaca Rancho State Park and thousands more in Anza-Borrego, which has also been targeted by looters.

“To me this area of San Diego, from a cultural resources standpoint, is above anything you’d ever find in the state and probably the country,” Falat said.

The five recently looted sites — authorities asked that their specific locations be withheld — were discovered by “site stewards,” park volunteers who routinely check on culturally significant sites, photographing and making reports about each one.

Parks officials say the vandals are probably hobbyists and collectors rather than fortune hunters looking to sell what they find. Most arrowheads are worth only $3 to $5.

“It’s not a money-making venture,” Connors said. “It’s just that people are die-hard collectors.” She cited a case in the 1980s in which a man who had spent years illegally digging for arrowheads in the park was finally identified as a school counselor. In his house authorities found thousands of items, many that he had made into elaborate mosaics.

“There are people who just can’t stop collecting,” she said.

At the same time, the looting is organized and intentional, Connors added.

“It’s not just chance, people randomly stumbling upon things,” she said. “They’re coming up here with tools.”

The park service is employing high- and low-tech methods to try to identify the looters, including surveillance cameras, patrols and other investigative tools, said Falat, the parks superintendent. Park visitors are being encouraged to report any suspicious behavior they may see.

Depending on the site and what is taken, such thefts could lead to felony charges of destruction of cultural resources, theft of cultural resources, damage to state park land and disturbance of Native American remains.

“I really want people to know that it’s illegal and there are consequences,” Connors said. “It’s not like in the past when boys and girls would go out arrowhead hunting.”

Falat reiterated that, to the American Indian community, the sites are irreplaceable.

“In many cases, this is all the history that is left,” he said.

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J. Harry Jones writes for the San Diego Union-Tribune.

EXHIBIT 4

ARTICLE JUN 13, 2016

Bears Ears Cultural Area: The Most Vulnerable U.S. Site for Looting, Vandalism, and Grave Robbing

A Native American intertribal coalition has asked President Obama to create a national monument in Utah's Bears Ears region.

AUTHORS

Jenny Rowland-Shea

Tackling Climate Change and Environmental Injustice, Clean Energy, Conservation, +1 More

A petroglyph graces the Comb Ridge in the Bears Ears region. (Josh Ewing)

One of America's most archaeologically and culturally rich yet unprotected areas is experiencing an onslaught of looting, vandalism, and grave robbing. A Native American intertribal coalition—led by the Navajo Nation, the Hopi Tribe, the Ute Mountain Ute Tribe, the Pueblo of Zuni, and the Ute Indian Tribe—has called on President Barack Obama to protect the area as a national monument.

The Bears Ears region is a diverse landscape of public lands and Native American cultural and ancestral land located in San Juan County in southeastern Utah. The area is estimated to contain more than 100,000 cultural and archaeological sites in its proposed 1.9 million acre range. Officials estimate that Utah's San Juan County has more archaeological sites per square mile—roughly 250,000—than any other county in the nation. The Bears Ears Inter-Tribal Coalition has called it the most significant unprotected archaeological area and cultural landscape in the United States.

In recent years, the area has become a hotbed for grave robbing, looting, and other destructive activities. While there are underenforced federal and state laws—including the Archaeological Resources Protection Act, or ARPA, and the Native American Graves Protection and Repatriation Act, or NAGPRA—that ban the removal or sale of artifacts from federal lands, Indian reservations, or burial grounds, the area is not specifically protected under national conservation or preservation laws.

The Monticello, Utah, field office of the Bureau of Land Management, or BLM, has reported at least 25 incidents of looting, vandalism, and disturbance of human remains in San Juan County since 2011. However, crimes of this nature are historically underreported, and it is likely that other instances remain unknown. The number also does not include incidents on lands managed by the U.S. Forest Service, U.S. Park Service, or Utah School and Institutional Trust Lands Administration. The nonprofit Friends of Cedar Mesa, which has been tracking recent disturbances, conservatively estimates there have been more than 50 incidents during this time frame.

The combination of Bears Ears' vast size, number of archaeological sites, surge in looting incidences, and unprotected status make it the most vulnerable place in the United States for these kinds of activities.

The problem

Looting, desecration, and vandalism are unfortunately common problems in many areas rich in cultural sites. These practices have long been a regular occurrence in Bears Ears, but according to archaeologists and law enforcement officers who patrol the area, these types of destructive incidents have been on the rise.

Navajo archaeologists note that the consideration of looting and grave robbing as a "hobby" or "pastime" is simply a euphemism for destructive, disrespectful, and illegal practices. These activities dishonor Native American history and infringe on the cultural and spiritual identity of Native peoples. They also undermine the integrity of the archaeological record and hamper the ability of archaeologists to understand the past.

Archaeologists have found that many looters target burial grounds and graves in order to recover valuable and intact items buried with the dead. Human bones are often cast aside. "This destruction of our sacred sites—including the gravesites of our ancestors—deeply wounds us," said Regina Lopez-Whiteskunk, councilwoman to the Ute Mountain Ute. "Bears Ears should have been protected long ago. It has been central to our creation and migration stories since time immemorial," she continued.

Vandalism is also a problem. Centuries-old and ancient art is frequently damaged by graffiti or off-road vehicles. Other sites are threatened because they do not appear to be of historic value to the untrained eye since they are hidden under soil or have been damaged from previous disturbances. Many of the sites and artifacts in the Bears Ears region have never been inventoried or studied.

Examples of destruction and desecration in the Bears Ears area

The most prominent example of looting in the area comes from a 2009 sting operation directed by the BLM and FBI, which led to the largest investigation of artifacts taken from Native American land in U.S. history.

The two-year undercover operation focused on a ring of people in and around San Juan County who had been known to sell artifacts taken from tribal and federal lands. Records from the arrests show that 24 people were indicted under multiple counts each of violations under the ARPA and NAGPRA laws for trafficking in stolen artifacts, theft of government property, and trafficking in Native American cultural items.

The case used 256 artifacts valued at $335,685 as direct evidence. However, experts estimate that more than 40,000 artifacts were seized in the operation.

None of the accused served jail time, though defendants were required to turn over their collections. Two of the suspects ultimately committed suicide.

More recently, the BLM reported a surge of disturbing archaeological crimes. Estimates of more than 50 incidents in the area since 2011 include:

- 2012: Campers tore down a 19th-century Navajo hogan for use as firewood.

- 2013: Looters desecrated a burial site in Butler Wash.
- 2014: A 2,000-year-old pictograph site in Grand Gulch was vandalized.
- 2015: Three remote burial sites in Cedar Mesa were dug up and looted, and a separate burial site was dug up in Reef Basin.
- 2015: Prehistoric walls were torn down at the Monarch Cave and Double Stack Ruins on Comb Ridge.

In 2014, San Juan County Commissioner Phil Lyman, along with anti-government militia members from the Bundy standoff in Nevada, made headlines with an all-terrain vehicle, or ATV, ride in Recapture Canyon, an area closed off to motorized vehicles to protect known Native American archaeological resources. The anti-federal government protest ride got Lyman a 10-day jail sentence and $1,000 fine.

Just this year, there have been at least five destructive incidents within the Bears Ears area:

- In January, a petroglyph was partially removed from a wall with a rock saw and chisel, badly damaging the ancient rock art.
- In March, rock art in a cave was vandalized with names scratched into the art.
- Also in March, a fire ring on Muley Point was constructed out of materials from a 2,000-year-old to 3,000-year-old site.
- In April, ATV riders intentionally left the trail to drive through two archaeological sites in the lower Fish Creek Canyon Wilderness Study Area.

The need to protect Bears Ears under the Antiquities Act

The Antiquities Act was signed into law with the intent of protecting sites and artifacts such as those in Bears Ears. Not only does it make theft or desecration of historic ruins illegal, the 1906 law gives the president power to set aside places and lands for specific protection. Both Republican and Democratic presidents have used the Antiquities Act to protect some of the nation's most valued sites, including the Grand Canyon, the Statue of Liberty, and numerous Native American cultural sites. In fact, the law originally grew out of a movement to preserve archaeological resources from looting and vandalism in the Four Corners region, an area with large swaths of Native American-owned land where southeastern Utah, southwestern Colorado, northwestern New Mexico, and northeastern Arizona meet. This region includes Bears Ears.

Monument protection status for Bears Ears is warranted and could ease the wave of looting and vandalism. When compared to many of the already-protected cultural areas in the Four Corners region, Bears Ears and its estimated 100,000 cultural and archaeological sites clearly need similar protections. In comparison, Canyon De Chelly National Monument in Arizona contains an estimated 3,500 or more Navajo archaeological resources and landscape sites. Chaco Canyon National Historical Park in New Mexico includes 4,000 prehistoric and historic agrological sites, while Mesa Verde National Park in Colorado protects nearly 5,000 known archaeological sites, including 600 cliff dwellings.

 number of cultural and archaeological

With only four federal law enforcement rangers in the region, each patrolling an average of 1 million acres, the BLM does not currently have the resources to monitor the wealth of sites and artifacts in Bears Ears. Granting Bears Ears national monument status would allow increased funding for staff, management, and law enforcement to better patrol the area and increase education and management of the area's visitors.

A presidential monument designation is also the most viable option for protecting the area, given that Congress has been unwilling to sufficiently protect the resources in Bears Ears. Draft legislation by Reps. Rob Bishop (R-UT) and Jason Chaffetz (R-UT) intended to protect lands in southern Utah—the Public Lands Initiative, or PLI—falls severely short of the needed protections for Native American cultural heritage and agrological sites. Initially supportive of the PLI proposal, the Bears Ears Inter-Tribal Coalition revoked its endorsement after being repeatedly ignored by Bishop, Chaffetz, and the San Juan County Commission, which was also leading discussion on the bill. The tribes complained that they were left out of substantive conversations on the bill and that their proposals were disregarded, resulting in a draft bill that the tribes say "adds insult to injury" and is "woefully inadequate."

Rep. Bishop and other members of the congressional anti-parks caucus consistently criticize use of the Antiquities Act, claiming a lack of public buy-in or that use of the act has strayed from its original intent to protect archaeological sites from looting. In the case of Bears Ears, several tribes and 71 percent of Utah voters have declared their support for a national monument that would formally protect one of America's largest swaths of antiquities from persistent looting and destruction.

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