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Honorable Chief Justice Tani G. Cantil-Sakauye
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

October 7, 2016

Amici Curiae Letter in Support of Wishtoyo Foundation Petition for Review

Center for Biological Diversity v. California Department of Fish and Wildlife (The Newhall Land and Farming Company)
CA Supreme Court Case No. S236776

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices:

On behalf of the California Native American Tribes (California Tribes) listed below, we write to respectfully request that the Court grant the Petition for Review in the above-referenced appeal relating to the Newhall Ranch Project: If the Court of Appeal's Newhall Opinion, filed July 11, 2016 (Newhall Opinion) regarding preservation-in-place and feasibility stands (Issues 1 and 2), it may have exceptionally harmful consequences for the consideration and protection of cultural resources of value to California Tribes in California Environmental Quality Act (CEQA) review.

I. Intro

We last wrote you in June 2014 requesting review of the CEQA issue exhaustion aspect from the prior Newhall Opinion by the same Court of Appeal. We deeply appreciated this Court accepting review at that time and remanding the cultural resources issues to the Court of Appeal to determine whether its

determinations on the merits required reexamination. Given the outcome of that examination, we believe it is vitally important for the Court now to provide clarity on the preservation-in-place and mitigation feasibility issues, which are critical to tribal efforts - statewide - to protect and preserve irreplaceable cultural resources of importance to California Tribes.

II. Interest of California Tribes

The interest of California Tribes in full preservation-in-place analysis and a transparent consideration of the feasibility of each method of preservation, flows from their deep passion for their ancestors and their traditional lands. Many tribes were separated, some forcibly, from all or part of their homelands and traditional areas over the last century and a half during the settling of the West.[1] Off-reservation sacred places, burial grounds, gathering areas, ceremonial places and villages are now under the jurisdiction of local and state agencies for which CEQA is the primary legal mechanism for identifying, evaluating and mitigating potentially adverse impacts. Thus, tribes, including those listed below, often find themselves trying to have their cultural and religious items, places and values adequately integrated into the CEQA process, as was the case in the Newhall Ranch Project.

III. The Court Should Review the Recent Newhall Appellate Court Opinion to Ensure Cultural Resources of Importance to Tribes are Adequately Considered and Protected in the CEQA Process

The Newhall Opinion, affirming that court's prior holdings regarding cultural resources, appears to interpret CEQA Guidelines section 15126.4 (Consideration and Discussion of Mitigation Measures Proposed to Minimize Significant Effects) to allow: 1) that a preservation-in-place method need not be acceptable to culturally-affiliated tribes and 2) that feasibility determinations for that method or a contingent measure that is not preservation-in-place can be done at some future time after project approval, without the use of standards to ensure that determination is supported by substantial evidence or tribal participation. Thus, the Newhall Opinion may disproportionately impact California Tribes and tribal entities by appearing to "bless" a shortcutting of a full analysis of each of the

[1] See, for example, *Early California Laws and Policies Related to California Indians*, California Research Bureau, Kimberly Johnston-Dodds, September 2002 https://www.library.ca.gov/crb/02/14/02-014.pdf

potential methods to achieve preservation in place,[2] the determination of feasibility of preservation measures and the appropriateness of a project's contingent measures (if any). Instead, the Newhall Opinion appears to condone such post-approval actions *to be made outside an open, transparent and accountable process and potentially by a party with inherent bias*. These issues are of vital importance to California Tribes for the following reasons:

First, as you may know, while CEQA addresses trustee, responsible and lead agencies, until the promulgation of AB 52 in late 2014, it did not directly address tribal governments. This often created a situation where the cultural resource section of environmental documents defaulted to consider only the views of "credentialed" archaeologists or academics interested in "scientific" values rather than to also reflect the views of the people who are in fact culturally-affiliated with those same resources and usually for the cultural or religious (not scientific) value of the resources - which can result in different mitigation measures. Mitigation that might be appropriate to mitigate impacts to *archaeological* values (i.e., excavation or capping), may not be appropriate to mitigate impacts to the *cultural* values of the resource. Further, because there are no "accepted" standards of cultural resource management practice (contrary to the statement in the Newhall Opinion (page 12)), the cultural resource mitigation required on projects varies widely. This overreliance on unaffiliated, "scholarly" consultants working off of unpromulgated, inconsistent standards resulted, in part, in a systemic lack of integration of tribal values and perspectives into projects, their environmental documents and

[2] CEQA Guidelines section 15126.4 states that preservation-in-place maintains the relationship between the artifacts and their archaeological context *and may also avoid conflict with the religious or cultural values of groups associated with the site*. It also states that specific methods of achieving preservation-in-place *may* include *but are not limited to*: 1) planning construction to avoid sites, 2) incorporating sites into parks or open space, 3) covering sites with sterile soil and building tennis courts or similar facilities, or 4) dedicating sites into permanent conservation easements. These four methods, and others that might be conceived given a project's and site's facts and environmental context, can be very different from one another and may offer comparative advantages and disadvantages. Such factors should be evaluated in an environmental document and, along with the affiliated tribe's views on the methods, be taken into consideration by the decisionmaker. *Madera Oversight Coalition v. County of Madera*, 199 Cal.App.4th 48 (2011).

mitigation,[3] including as exhibited in the Newhall Ranch Project. Such omissions also resulted in the passage of AB 52, which we will discuss below.

Second, CEQA standards and documents continue to often be poorly harmonized with federal processes such as the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA), as occurred in Newhall, despite the CEQA Guidelines preference for coordination of those statutory processes and environmental documents (CEQA Guidelines section 15226 (Joint Activities)). This disconnect often manifests itself in CEQA documents coming first in time, and only later, the federal documents. This includes cultural resource management documents such as Historic Property Treatment Plans (HPTPs) which then - often years after the project has already been approved under CEQA - form part of the puzzle about what can be preserved and how, and what is feasible. However, CEQA's preference for preservation-in-place can offer a stronger, substantive protection for cultural resources compared to the federal frameworks which may be largely procedural. Allowing the Newhall Opinion to stand, may encourage strategies and tactics by certain parties to continue to engage in uncoordinated and deferred joint activity analysis that creates a perfect storm: reducing the substantive protection for sites, unfairly placing the tribes outside of determinations of feasibility and leaving tribes potentially without a timely CEQA remedy.

Third, we are concerned about not just *when* determinations of feasibility of preservation-in-place methods are made, but *by whom* and *on what basis*. If feasibility determinations are made post-project approval, and outside the "public" CEQA process, there should be objective and clear performance standards set out *prior to project approval* for how feasibility is to be determined and supported by substantial evidence. In Newhall, these standards are not clear from the answers to the petition for review or the mitigation measures themselves. Moreover, such determinations should be made *by the lead agency*, not the project applicant: To allow the applicant to make the determinations, would be for an agency to improperly yield its independent judgment to a private entity and one with an inherent bias in making such findings. Those determinations, if not here certainly

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[3] See, for example, *How the archaeologists stole culture: A gap in American environmental impact assessment practice and how to fill it*, Dr. Tom King, Environmental Impact Assessment Review 18(2)L117-133, March 1998
https://www.researchgate.net/publication/248536857_How_the_archeologists_stole_culture_A_gap_in_American_environmental_impact_assessment_practice_and_how_to_fill_it

on other projects, would be based on maximizing project profits - not maximizing the public good. Tribal interests, which might otherwise be considered by a lead agency including pursuant to government-to-government relations, would also be shortchanged. Such an approach appears to be condoned in the Newhall Opinion. Further, if the Court were to follow the logic of Newhall's answer, there would be scant mechanism for tribes or the public to challenge findings of infeasibility.

Fourth, sometimes an effort is made by agencies or applicants during the CEQA process to pit one tribal entity against another, or have one tribal entity agree to speak on behalf of other tribal entities without authorization from those entities, efforts that are typically not made regarding other types of governmental entities. To help prevent this tribal "forum shopping", it is important that evaluations and mitigations that address the culturally-appropriate treatment of cultural items *be required in the CEQA documents themselves* - and recognize that *the treatments may differ* given the resources encountered and the cultural practices of the tribes affiliated with those resources, which in Newhall, are both the Tataviam and Chumash. Yet, no provisions were made in the Newhall mitigation measures for the appropriate treatment of any Chumash materials that may be encountered on the Newhall Ranch Project despite Chumash monitors having been used during site work on an earlier road project at one of the sites in the Project area.

Finally, when the negotiation of these treatment protocols is deferred to post-project approval or at the time of late discoveries, it frequently disenfranchises all the tribes and creates a void that archaeologists or academics are once again invited *to fill with approaches other than preservation-in-place methods*, such as sampling, partial or full data recovery excavation (all three of which are different) or other methods (euphemistically called "contingencies" in the Newhall Opinion (page 19)) that primarily benefit archaeologists and applicants. Make no mistake: such contingent measures rarely result in preservation-in-place. Moreover, whether preservation-in-place will in fact occur is not an allowable "detail" to be deferred or a substantially confirming measure that may be "substituted" pursuant to CEQA. In Newhall, the contingent mitigation may result in desecrations and spiritual violations for tribes as described by Wishtoyo in its Newhall briefs, the impacts of which however went unanalyzed in the Environmental Impact Report.

The practical result of the realities above is that tribes, and issues of tribal concern, may not be adequately, if ever, identified and considered upfront in a particular CEQA process if approaches like those approved of in the Newhall

Opinion are endorsed by the courts. This result would be unfortunate on many levels, including because both state and federal law recognize that tribes have specialized knowledge and expertise regarding cultural resources and impacts to tribal communities. Implementation of the approach described in the Newhall Opinion would result in perpetuation of an unfair and unclear process that raises serious environmental and social justice concerns and result in permanent loss of much of the resource.

IV. Likely Consequences if the Newhall Appellate Court Opinion Stands

While there is no debate the Newhall Ranch Project predated the enactment of AB 52, we are very concerned that agencies and applicants may nevertheless misuse the Newhall Opinion to continue a business-as-usual approach in future environmental documents and processes that *are* required to be AB 52 compliant. Such projects will need to show their compliance with AB 52[4] through demonstrating that a consultative process between the agency and tribes began early in the project process. And, that the analysis presented in the environmental document reflects tribal views on identification, evaluation, treatment and mitigation of tribal cultural resources. It also must include a legally-adequate discussion of preservation-in-place and a feasibility analysis supported by substantial evidence.

Even though the relevant section of the Newhall Opinion is unpublished and therefore cannot be cited as precedent, if the Newhall Opinion stands, the reality is that consultants will advise their clients that "an approach like the one used in Newhall", that minimizes preservation-in-place analysis, allows for a bait and switch to data recovery/excavation after project approval and defers required feasibility analysis to a nonpublic process, can be defended in court - not just for projects predating AB 52 but possibly also for upcoming projects that will require AB 52 compliance. Further, if clarification is not issued by this Court, there is a strong likelihood that the emerging trend of addressing cultural resources of value to tribes in unpublished opinions will continue and additional parties will petition this Court in the near future for direction relative to both pre- and post-AB 52 environmental document adequacy.

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[4] For AB 52 bill text, please see:
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB52

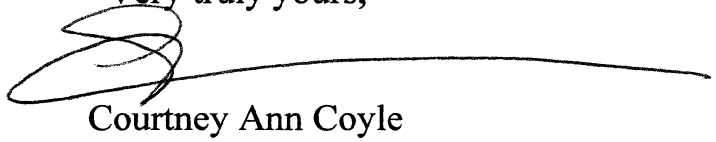
V. Summary and Conclusion: Petition for Review Should be Granted

Our tribal governments are deeply concerned the Newhall Opinion could result in many resources of value to tribes being unnecessarily and permanently adversely impacted. These irreplaceable resources and places are already becoming increasingly rare in our state, weakening the framework for tribal self-determination, identity and sovereignty of California Tribes.

It also would be very concerning to us if this partially-published Newhall Opinion, stemming from a unique and complex procedural posture, were to be interpreted by agencies, applicants and the courts as a general statement that they may disregard, discount, or ignore preferences for culturally-appropriate treatment submitted by tribal entities in other cases - especially for those projects that now must demonstrate AB 52 compliance. This is a significant policy issue of great concern to us.

For these reasons, we respectfully request that the Court accept the issue of preservation-in-place and feasibility for review.

Very truly yours,



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List of Tribal Signatories:

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Chairman

Agua Caliente Band of Cahuilla Indians
Hon. Jeff L. Grubbe
Chairman

Amah Mutsun Tribal Band
Hon. Valentin Lopez
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Tribal Alliance of Sovereign Indian Nations
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United Auburn Indian Community
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PROOF OF SERVICE

Center for Biological Diversity v. California Dept. of Fish & Wildlife (The Newhall Land and Farming Company)
CA Supreme Court Case No. S236776

I, Kelly A. McDonald, declare:

I am over 18 years of age and not a party to this action. I am employed in the County of San Diego, State of California. My business address is 7855 Fay Avenue, Suite 315, La Jolla, California 92037.

On October 7, 2016, I served the foregoing document described as follows:

Courtney Ann Coyle October 7, 2016 Amici Curiae Letter in Support of Wishtoyo Foundation Petition for Review

on the parties in this action as follows:

(X) by placing a true copy thereof enclosed in a sealed envelope and addressed as shown below, and depositing the sealed envelope with the United States Postal Service with the postage fully prepaid.

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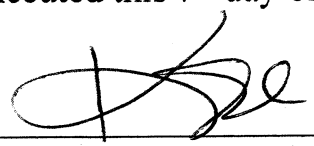
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 7th day of October 2016.



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