APPENDIX O

Internal Guidance for Management of Tribal Cultural Resources and Consultation

City of Clearlake
Internal Guidance

Exhibit A

Internal Guidance for Management of Tribal Cultural Resources and Consultation
Volume I: Policy

City of Clearlake

October 2022

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MANAGEMENT SUMMARY

In 2022, the City of Clearlake determined a need for internal guidance intended to provide consistency and fairness in the manner in which tribes are consulted with prior to and during project construction, to ensure a consistent application of policies for all discretionary projects by the City, and to exercise responsible management and use of public funds.

This guidance document is organized into two parts. First is the City's position on tribal participation during the project planning and approval process for discretionary projects. This includes both private sector and public (City) projects, which are subject to state and local laws and regulations that are under the jurisdiction of the City. It also includes guidance for City planners on determining when mitigation measures related to Native American participation are warranted under CEQA, standard treatment and mitigation measures that can be used consistently in project planning, and guidance on the City's use of public funding when conducting consultation.

Second, this guidance document also provides information and guidance for City staff and contractors during the project construction and implementation phases. This includes thresholds for payment for tribal participation, instructions for contractors in the event of an unanticipated discovery, and guidance for City staff in assessing and acting upon unanticipated discoveries.

This guidance document is organized into two sections. Volume 1 is the City policy and procedures, which was adopted by the City Council on October 20, 2022. Volume II is the implementation manual, which includes templates, forms, and example mitigation measure language. The City will periodically review Volume I to determine if revisions to the City's policies warrant consideration by the City Council.

Volume II is intended to be a living document, and modifications to that volume will not require City Council adoption, as long as those amendments are consistent with the policy in Volume 1.

VOLUME I CONTENTS: POLICY

LIST OF FIGURES

LIST OF ACRONYMS AND ABBREVIATIONS

AB	Assembly Bill
CC&Rs	Covenants, Conditions, and Restrictions
CEQA	California Environmental Quality Act
MLD	Most Likely Descendant
NAHC	Native American Heritage Commission
NHPA	National Historic Preservation Act
PRC	Public Resources Code
SB	Senate Bill
TCR	Tribal Cultural Resources
USACE	U.S. Army Corps of Engineers

1.0 INTRODUCTION

1.1 Regulatory Setting

In recent years, a number of changes have occurred in the regulatory context within which the City operates. These changes occurred at various levels of jurisdiction, including at the city, state, and national levels and in the thresholds and expectations for best professional practices in cultural resources management. Changes have also occurred in terms of the level of involvement by stakeholders in cultural resources, particularly Native American tribes, as well as historical societies and the general public. The relevant laws and regulations include the following.

- Assembly Bill (AB) 52, passed by the California legislature in 2014, amended the California Environmental Quality Act (CEQA) to require early consultation with California Native American tribes when preparing a CEQA document for a specific project. The City, as CEQA lead agency, must offer consultation with tribes that request notification of projects at the initiation of CEQA. The consultation, if initiated, is to determine whether or not Tribal Cultural Resources (TCR), as defined by AB 52, would be affected by the project. Subsequently, an update to the CEQA Guidelines took effect September 27, 2016 that revised Appendix G to the CEQA Guidelines to separate the consideration of tribal cultural resources from cultural and paleontological resources, and to add sample checklist questions.

- Senate Bill (SB) 18 was signed into law in September 2004 and became effective in March 2005. SB 18 (Burton, Chapter 905, Statutes of 2004) requires city and county governments to consult with California Native American tribes early in the planning process with the intent of protecting traditional tribal cultural places. The purpose of involving tribes at the early stage of planning efforts is to allow consideration of tribal cultural places in the context of broad local land use policy before project-level land use decisions are made by a local government. As such, SB 18 applies to the adoption or substantial amendment of general or specific plans. The process by which consultation must occur in these cases was published by the Governor's Office of Planning and Research through its *Tribal Consultation Guidelines: Supplement to General Plan Guidelines* (November 14, 2005).

- The regulations implementing Section 106 of the National Historic Preservation Act (NHPA) of 1966 were amended in 2000 and 2004. The amended regulations, found in the Federal Register at 36 CFR Part 800, specify how federal agencies are required to take into account the effects of their undertakings on historic properties. The Section 106 regulations apply to projects in the City when the project would receive federal funding, assistance, licenses, approvals, or permits (such as a Section 404 Clean Water Act permit from the U.S. Army Corps of Engineers [USACE] or funding by the Federal Highway Administration through the California Department of Transportation (Caltrans)). While the City is not a lead agency under Section 106, its projects may be subject to compliance with it.

- Section 5097.5 (a, b & c) of the California Public Resources Code Section states:

  > "A person shall not knowingly and willfully excavate upon, or remove, destroy, injure, or deface, any historic or prehistoric ruins, burial grounds, archaeological, rock art, or vertebrate paleontological site, including fossilized footprints, inscriptions made by

human agency, or any other archaeological, paleontological or historical feature, situated on public lands, except with the express permission of the public agency having jurisdiction over such lands. Violation of this section is a misdemeanor. As used in this section, "public lands" means lands owned by, or under the jurisdiction of, the state, or any city, county, district, authority, or public corporation, or any agency thereof."

- Public Resources Code 5097.9 establishes that no public agency or private party using or occupying public property or operating on public property, under a public license, permit, grant, lease, or contract made on or after July 1, 1977 shall interfere with the free expression or exercise of Native American religion. This code also prohibits damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require.

- Public Resources Code 5097.98 specifies procedures to be followed in the event of the discovery of Native American human remains. This code specifies that the county coroner shall immediately notify the persons believed to be most likely descended from the deceased Native American. It provides that the most likely descendant (MLD) has the right to inspect the site, with permission of the land owner, and provide recommendations for treatment of the remains and grave goods within 48 hours of being granted access to the site. The code also provides procedures in the event that the MLD is unable to be identified or the identified descendants fail to make a recommendation.

- Public Resources Code 5097.99 states that no person shall obtain or possess any Native American artifacts or human remains except as otherwise provided by law. The code further states that unlawful possession of these items is a felony, punishable by imprisonment.

- Health and Safety Code 7050.5 establishes the intentional disturbance, mutilation, or removal of interred human remains a misdemeanor. This code also requires that upon the discovery of human remains outside of a dedicated cemetery excavation or disturbance of land cease until a county coroner makes a report. The code also requires that the county coroner contact the NAHC within 24-hours if he or she determines the remains to be of Native American origin.

In addition, the City is constrained by budgetary factors, coupled with a recent post-recession increase in private-sector development, that have led to the need for mindful expenditures of public funds. Thus, efficiency and consistency in compliance with the above laws and regulations are driving the need to develop standardized guidance for City staff.

1.2 History of Tribal Participation in City Projects

Overall, there has been an increased awareness of the importance of early consultation with resource stakeholders as part of project planning, particularly with tribes. There is an increasingly complex tribal consultation process that the City is either directly or indirectly affected by, and which varies from project to project. Typically, tribal consultation involves two classifications of consulting parties: the California Native American Heritage Commission (NAHC) and California Native American Tribes.

The California NAHC is composed of a nine-member governor-appointed advisory body responsible for the identification and cataloging of places of special religious or social significance to Native Americans,

including sacred sites and known Native American graves and cemeteries. The NAHC may serve as a trustee agency under CEQA and is responsible for identifying an MLD for Native American human remains that are unearthed in California. The NAHC may also serve as a mediator between landowners, agencies, and California Native American tribes.

California Native American Tribes (tribes) are defined in Section 21073 of the California Public Resources Code and Chapter 905 of the Statutes of 2004 and apply to both AB 52 and SB 18 tribal consultation. Under the former, the tribes that notified the City in writing of their request to receive notice of all projects subject to CEQA are subject to specific procedures enacted by AB 52. These tribes need not be physically located in or near Clearlake but must be traditionally and culturally affiliated with the land currently under the jurisdiction of the City. In addition, California Native American Tribes, including but not limited to those that do not request that the City notice them under AB 52, may be consulted under SB 18. The SB 18 lists of tribal contacts typically provided by the NAHC in response to City requests include a number of tribes in the Clearlake region. The City is required to offer consultation to all of the tribes named by the NAHC on its SB 18 list, when SB 18 applies.

With both AB 52 and SB 18 consultation, the culturally affiliated tribes that most often engages the City in consultation during project planning and construction are the Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria, the Koi Nation of Northern California, and the Middletown Rancheria of Pomo Indians of California; however, other culturally affiliated tribes are given equal opportunities to consult with the City. The tribal participation in projects typically occurs in one of two points in the process: 1) during pre-project planning and environmental review under CEQA (AB 52) and/or SB 18; and 2) during unanticipated discoveries that may occur during construction. Often, the former leads to requests for more involvement during project construction and implementation, which must be balanced by the requirements and thresholds of CEQA and other applicable laws and regulations.

1.3 Purpose and Need for Internal Guidance

The need for internal guidance for City staff is based on several factors, including the project-specific regulatory complexity for any given project, the diversity and inevitable turnover of City planning staff and elected officials, and limitations on public funding. Internal City guidance is intended to provide consistency and fairness in the manner in which tribes are consulted with prior to and during project construction, to ensure a consistent application of policies for all discretionary projects by the City, and to exercise responsible management and use of public funds.

Therefore, the City developed the following internal guidance, which is organized into the two phases noted above. Section 2.0 describes the City's position on tribal participation during the project planning and approval process for discretionary projects. This includes both private sector and public (City) projects, which are subject to state and local laws and regulations that are under the jurisdiction of the City. Section 2.0 also includes guidance for City planners on determining when mitigation measures related to Native American tribal participation are warranted under CEQA, standard treatment and mitigation measures that can be used consistently in project planning, and guidance on the City's use of public funding when conducting consultation.

Section 3.0 provides information and guidance for City staff and contractors during the project construction and implementation phases. This includes thresholds for payment for tribal participation, instructions for contractors in the event of an unanticipated discovery, and guidance for City staff in assessing and acting upon unanticipated discoveries.

This internal guidance document was developed by the City staff and assembled by a qualified professional who meets Secretary of the Interior's Professional Qualification Standards for Archaeology codified in 36 CFR Part 61.

This guidance document is organized into two sections. Volume 1 is the City policy and procedures, which was adopted by the City Council on October 20, 2022. Volume II is the implementation manual, which includes templates, forms, and example mitigation measure language. Volume II is intended to be a living document, and modifications to that volume will not require City Council adoption, as long as those amendments are consistent with the policy in Volume 1.

2.0 TRIBAL CONSULTATION DURING PROJECT PLANNING AND APPROVAL

2.1 Coordination with Existing Laws and Confidentiality Requirements

In developing this internal guidance, it is the City's intent to follow closely the requirements in applicable law. Nothing in this guidance document is intended to conflict with existing law, and where such conflicts may arise, existing law governs. This applies to the statute and guidelines implementing CEQA, the California Public Resources Code, the California Government Code, and the California Health and Safety Code. The City previously developed standard operating procedures for compliance with AB 52 and SB 18, which are provided in Volume II of this guidance document.

With regard to compliance with AB 52, the City's legal interpretation of the requirements thereof will require tribal consultation when the City is preparing any of the following:

- Initial Study/Negative Declaration
- Initial Study/Mitigated Negative Declaration
- Project or Program Environmental Impact Report
- Supplemental Environmental Impact Report
- Subsequent Environmental Impact Report

It is the City's interpretation of current state law that tribal consultation is not required under AB 52 for Statutory Exemptions, Categorical Exemptions, consistency determinations, or preparation of Addendum CEQA documents; however, tribes may request receipt of all routing notices as notification of all City projects, regardless of the type of discretionary review, thereby allowing for tribal input on the use of Categorical Exemptions.

With regard to compliance with SB 18, the City's legal interpretation of the requirements thereof will require tribal consultation when the City is preparing any of the following:

- Adoption or Amendment of a General Plan
- Adoption or Amendment of a Specific Plan
- Dedication of Open Space that Contains Tribal Resources

In the event that an SB 18 action also triggers CEQA review, then both SB 18 and AB 52 consultation are required; however, it is not necessarily the case that an SB 18 action will trigger a CEQA document that is subject to AB 52.

TCRs may or may not manifest as archaeological sites. In some cases, TCRs are viewsheds, plant gathering areas, or other sacred spaces that are not readily identifiable to non-tribal members. In many cases, TCRs also include an archaeological component, such as artifacts, features, and sites (with or without human remains), and these "archaeological TCRs" are more visible to the public, and thus, more likely to be subject to looting or pothunting. Therefore, maintaining confidentiality of the location and nature of archaeological sites and TCRs is of the utmost importance to the City. Similarly, federal and state law recognize this need. As it pertains specifically to CEQA and this internal guidance document, the City shall make best efforts to ensure that information about the location, description, and use of the tribal cultural resources is not included in the environmental document or otherwise disclosed by the City to the public. Such information is protected from public dissemination through an exemption to the California Public Records Act. In addition, although no federal lands currently exist within the City boundaries, dissemination of archaeological site information is also prohibited by Exemption 3 of the federal Freedom of Information Act (5 USC 552), because the disclosure of cultural resources location information is prohibited by the Archaeological Resources Protection Act of 1979 (16 USC 470hh) and Section 304 of the NHPA. Therefore, it is also exempted from disclosure under the Freedom of Information Act.

In light of these requirements for confidentiality, it is the City's policy to not make publicly available the locations of cultural resources and TCRs, and dissemination of such information will be tightly guarded on a "need to know" basis only. Such circumstances are generally limited to City staff, landowners of property that contain resources, and consultants and engineers who are responsible for designing proposed projects in accordance with these Guidelines.

2.2 Policy of Payment for Consultation

In many areas of California, including the City of Clearlake, some tribes have requested payment of public funds for their participation in the early planning stages of City projects. The purpose of this guidance is to clarify what costs the City will pay in the event the City receives a request for payment for participation in a project planning process.

Currently, there are no laws or regulations that require payment to either consulting parties or tribes during project planning activities, consultation, or construction. In fact, "consultation" is defined by Government Code Section 65352.4 as "the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance."

The City recognizes the importance of providing information, staff time, or contract labor time at no cost to the tribes and expects tribes to provide information to the City at no cost to the City. Additionally, there are numerous California Native American tribes in the region that may ascribe cultural affiliation to the Clearlake area and may request consultation or participation in the future. Because different tribes have

different opinions, interpretations, cultural values, and information, it is the City's intent to consult meaningfully with all California Native American tribes who wish to do so.

Furthermore, because CEQA is founded on consultation with interested parties, commenting agencies, stakeholders, and the public, the City is tasked with consulting with many organizations and individuals regarding all aspects of CEQA review, including biological and wildlife non-profit organizations, professional societies and associations, and members of the public. All voluntarily provide input and information to the City on a wide range of environmental topics covered by CEQA, which is taken into account during the decision-making process for discretionary projects. It has always been the City's view that meaningful consultation cannot take place if such discussions are couched in financial or contractual relationships between the consulting parties and the public.

In addition, the City recognizes the difference between a "consulting party" (as described above) and a "consultant," where the City delegates the preparation of environmental documents and supporting technical information to third party consultants, selected according to qualifications, cost, and technical expertise. Use of registered professionals is defined further in Section 15149 of the CEQA Guidelines and does not include consulting parties. Such consultants represent the subject matter being analyzed and do not require concurrence or agreement from other experts in the field to be considered valid for the purposes of CEQA.

The City does not generally compensate any "consulting parties," including tribes, members of the public, or stakeholders, during project planning and environmental review for: 1) consultation during the City's project planning process; 2) for information that any consulting tribe or party wishes the City to take into consideration during project planning; and 3) for tribes, members of the public, stakeholders, or other parties to visit or survey project areas to make recommendations to the City.

2.3 Accommodations for the Expression of Religion

The City recognizes the right of all citizens to freely express religion, and the City does not intend to willfully interfere with religious expression by Native American tribes or by any member of the public in implementing this internal guidance or during the environmental review or consultation processes. Therefore, it is the City's policy to make "reasonable accommodations" for the expression of religion. "Reasonable accommodations" would be evaluated on a case by case basis and may include, but are not limited to:

- Facilitating project area tours during the project planning process;
- Providing privacy for tribal members when visiting TCRs;
- Honoring requests for meetings with tribal members to receive comments verbally, when members do not wish to document comments in writing;
- Temporarily pausing construction activities to accommodate a visit by tribal representatives, when determined by the City to be reasonable and feasible;
- Developing access agreements with tribes to allow for legal visitation of TCRs on City-owned property;

- Accommodating voluntary tribal observation during construction when tribal monitoring is not warranted under CEQA;
- Offering tribal representatives an opportunity to participate in pre-construction meetings with contractors to express tribal views regarding unanticipated discoveries;
- Requiring, as a mitigation measure, tribal monitoring during construction activities where such monitoring is deemed necessary under CEQA;
- Developing TCR treatment and reburial methods that are mindful of tribal values and culture;
- Providing reasonable opportunity for comment in order for the tribe to provide comments on projects during project planning that is subject to AB 52 and SB 18 consultation; and
- Any other accommodation deemed reasonable by the City.

Reasonable accommodations may be rescinded, revoked, or denied in the event of any of the following:

- Cause an unreasonable cost increase or delay that jeopardizes the viability of the project as determined by the City;
- Willful trespass of tribal members or representatives;
- After the City has initiated consultation, failure of a tribe or its representatives to respond to the City in a timely manner or in good faith;
- Any other behavior that is deemed to not be in good faith, as determined by the City.

2.4 Standard Mitigation Measures and Conditions of Approval

The City has developed standard mitigation measures and conditions of approval for discretionary projects under the City's jurisdiction. Below are descriptions of these measures, including guidance on their applicability and use. Actual example mitigation measure language is provided in Volume II (Implementation Manual).

2.4.1 Avoidance and Preservation in Place

Consistent with Section 21084.3(a) of the Public Resources Code, the City shall, when feasible, avoid damaging effects to any TCR. This can be achieved through several possible scenarios, depending on the project circumstances. Each of the following scenarios represents a different level or strength of protection.

Use of Exclusionary Fencing

Where the City has determined that a TCR is located immediately adjacent to ground-disturbing activity, but where the location of the TCR is not proposed for impact, the City may require the placement of temporary construction fencing to prevent accidental or incidental impacts to the location during construction. This may also be appropriate when the TCR is located within a riparian area that cannot be impacted by the project. The exclusionary fencing must be included on all construction plans, specifications, and bid packages, which must stipulate the timing of the installation and conditions under which fencing is monitored and inspected until removal. This mechanism is appropriate when

construction-related activities could inadvertently impact a site but does not provide long-term management or preservation measures.

Modification of Project Boundaries

Where the City has determined that a TCR is located in an area that can be feasibly excluded from the project entirely, it may require that the project be redesigned to avoid the site. This may require either a lot line adjustment, construction perimeter fencing, or other feasible avoidance options. Such a decision would need to occur during the preparation of the CEQA document and could be memorialized as a mitigation measure if agreeable to all parties. This mechanism would allow for avoidance during construction, as well as post-construction, however it would not guarantee preservation of the resource that is no longer within the project boundary.

Incorporation into Open Space with Deed Restrictions

For projects that include the planned dedication of open space (which would also require compliance with SB 18), there may exist an opportunity to capture the TCR into the open space, either as currently designed or through a modification to open space boundaries to incorporate the TCR into it. This is common in oak woodland areas, where there tends to be a correlation between oak trees and bedrock mortars, as one example. Open space typically requires that the landowner restrict future development through recording of a deed restriction on the property; any such restrictions are public documents and must not specifically identify the location of TCRs. Moreover, care should be exercised when using deed restrictions, which can be reversed by landowners in the future. Therefore, this option may be better suited for City projects, as opposed to third party developers, unless additional measures can be put into place that ensure the deed restriction is not reversed without the City's knowledge.

Management of open space may be the responsibility of a homeowner's association, parks and recreation department, or non-profit preserve manager, all of whom would require knowledge of the resource and its location. Furthermore, because open space areas may allow for public visitation, the use of open space as an avoidance and preservation mechanism must be accompanied by a plan that dictates the activities that are allowed and prohibited within the location of the TCR. These activities may differ between the TCR and that which are allowed in the balance of the open space. In general, management of the protected resource should include, but not be limited to, the same types of activities that apply to deed restrictions, as described below.

Use of Development Restrictions in Perpetuity

The strongest method of avoidance and preservation in perpetuity of TCRs is the dedication of a deed restriction or declaration of covenants and restrictions over the site, recorded with the County, to restrict development in perpetuity. The easement may be held either by the City, the County, a non-profit corporation, or a California Native American tribe, as long as the landowner and the easement holder are not the same.

Development restrictions in perpetuity take much longer to negotiate and record, are more expensive due to the funding assurances required (Property Analysis Records and endowments) and are typically more expensive to manage (third party preserve managers and more stringent monitoring and management requirements); however, they are also very difficult to reverse in the future. As such, deed restrictions provide the highest level of assurances that a site will be preserved in perpetuity.

The entity selected for management must be able to demonstrate capability to perform the following actions, as deemed appropriate: fence and gate repair; sign replacement; regular monitoring and associated reporting by a professional archaeologist for damage; erosion control; trash removal; vegetation and weed control; security patrols; vandalism abatement; and removal of trespassers. No signs indicating the presence of tribal cultural resources shall be permitted.

Finally, deed restrictions are public documents and must not specifically identify the location of TCRs; however, the document must specifically include the conservation of cultural and tribal values.

2.4.2 Pre-Project Repatriation Designation

The City may recommend that the landowner or project proponent (if not the City) designate a reburial location on the property for any tribal cultural materials or human remains that may be unearthed during ground-disturbing activities during the project. The location shall be one that will not be subjected to ground-disturbing activities in the future. This location will be documented as a reinternment location by the Native American tribe, and the tribe may file it as such with the NAHC, County, City, and the California Historical Resources Information System. The site of any reburial of Native American human remains shall be kept confidential and not be disclosed pursuant to the California Public Records Act, California Government Code §§ 6254.10, 6254(r). The LakeLake County Coroner is also responsible for withholding from public disclosure any information related to such reburials, pursuant to the specific exemption set forth in California Government Code § 6254.5(e).

2.4.3 Pre-Construction Inspections

In some cases, vegetation, structures, or pavement obscure the ground surface, making identification of archaeological TCRs difficult. When the project description calls for the removal of the material, exposure of the natural soil may reveal evidence of archaeological sites, features, or constituents that were not visible during project planning, which would justify the need for construction monitoring. Conversely, it may indicate that no sites exist below the material, such that monitoring during construction was, in hindsight, not necessary. Therefore, the City may elect to allow tribal representatives an opportunity to perform an inspection during the first week of ground-disturbing activity, in lieu of full-time construction monitoring. The City's policies regarding payment (Section 2.2) shall apply.

In this event, a minimum of seven calendar days prior to beginning earthwork or other soil disturbance activities, the construction manager should notify the City's representative of the proposed earthwork start-date, in order to provide the City with time to contact a culturally affiliated tribe. A tribal representative would be invited to inspect the project location, including any soil piles, trenches, or other disturbed areas, within the first five days of ground-breaking activity, at the discretion of the tribe. During this inspection, a meeting of construction personnel is recommended in order to afford the tribal representative the opportunity to provide tribal cultural resources awareness information. In the event that the tribe does not send a representative within the prescribed time frame, then the City is not obligated to re-invite the tribe and activity will proceed.

2.4.4 Tribal Monitoring

As part of environmental and CEQA review, tribal consultation may or may not cause the City to determine that TCRs (as defined by Section 21074(a) of the Public Resources Code) may be significantly impacted by a proposed project. In many cases, the City receives requests from tribes for tribal

monitoring, regardless of the CEQA findings. The purpose of this section is to define the thresholds for when tribal monitoring shall be a mitigation measure or condition of approval, and when it should not.

As shown in the flow charts and procedures in Volume II, the City first must determine, through consultation if requested by a tribe, whether or not a TCR is present within the project area. The City will evaluate the information provided by consulting tribes to determine if the information meets the definitions in Section 21074(a)(1) of the Public Resources Code. If not, then the City will next determine if substantial evidence has been provided, pursuant to Section 21074(a)(2) of the Public Resources Code. The City does not recognize the fair argument standard as meeting the definition of substantial evidence under Section 21074(a)(2).

If the City determines that information submitted by a tribe does not meet the legal definitions of a TCR under state law, then the City shall document this finding in the administrative record, CEQA document, and in its termination of consultation (without agreement) letter to the tribe. The City may elect to use the following language as part of the record:

> "After reviewing the information provided by the tribe, the City has determined that there is not substantial evidence present to support the notion that Tribal Cultural Resources, as defined in Section 21074(a) of the Public Resources Code, will be impacted by the proposed project; however, we would welcome any input on the contractor awareness training session, should you so desire. In addition, the City will notify the tribe in the unlikely event of an unanticipated discovery of potential Tribal Cultural Resources so that we may consult with you on identification and appropriate treatment, pursuant to applicable state law. The City hereby concludes consultation with the tribe pursuant to Section 21080.3.2(b)(2) of the Public Resources Code."

However, if the City determines that a TCR is present, then the City next will determine whether or not the TCR will be significantly impacted by the project (see Volume II). The presence (or likely or possible presence) of a TCR within a project area does not, in and of itself, trigger mitigation. Only after the City determines that the TCR will be significantly impacted does the City consider the appropriate type of mitigation. Tribal consultation will assist the City in making the following decisions.

Appropriate mitigation for TCRs must take into account two primary factors. The first is that the proposed mitigation must be appropriate for the nature of the resource being impacted. For example, tribal monitoring during construction would not necessarily be appropriate if the resource is not archaeological in nature, or if the location will be protected from project activity by exclusionary fencing. Tribal monitoring would also not be appropriate for most activities that occur above the ground surface, or those that are located within and would not excavate below areas of documented fill. Tribal monitoring would, however, be appropriate when there is a known or high likelihood that an archaeological TCR will be encountered during ground-disturbing activities. The City should consider whether or not tribal monitoring, if warranted, should be focused only on vegetation removal, ground disturbance to a specific depth, or in only certain portions of the project.

The second factor is that the proposed mitigation must pass the seven tests for mitigation under CEQA (Figure 1). If the City determines that tribal monitoring (or any mitigation measure) is appropriate given the nature of the TCR and project activity, then the City must subject the proposed measure to the seven tests shown in Figure 1.

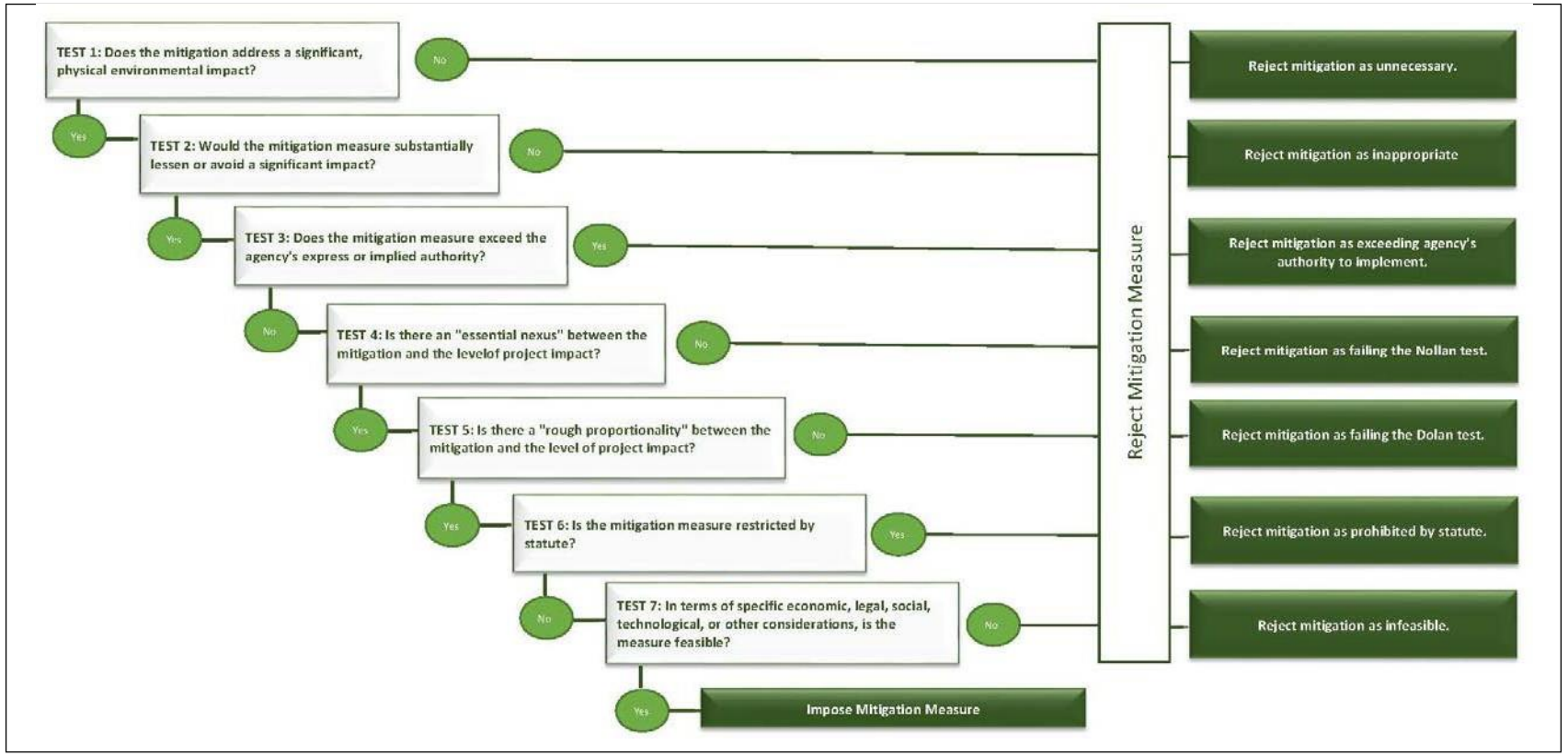

Figure 1. Seven Tests for Mitigation Measures (adapted from Placeworks 2012).

If the City determines that the proposed mitigation of tribal monitoring is both appropriate for the nature of the resource and passes the seven tests for mitigation under CEQA, then the City shall require that as a mitigation measure in the environmental document, pursuant to Section 21082.3(a) of the Public Resources Code. The City should then terminate consultation (with agreement) according to Section 21080.3.2(b)(1) and consider the requirement for payment of tribal monitoring, as described in Section 3.0.

In the event that the City applies the screening methods above to a tribe's proposal for tribal monitoring and determines that the mitigation is neither appropriate nor allowable under CEQA, then the City shall reject the tribe's recommendation. In doing so, the City must document the justification for the decision in the administrative record and in the termination of consultation (without agreement) letter to the tribe. The City may consider using part or all of the following response:

> "In determining appropriate mitigation for significant impacts to Tribal Cultural Resources, the City considered: 1) recommendations submitted by the tribe during AB 52 consultation under Section 21080.3.2(a) of the Public Resources Code; 2) requirements under Section 15041(a) and 15126.4(a)(3) of the CEQA Guidelines for feasible and mandatory mitigation, respectively; and 3) Section 21082.3 of the Public Resources Code regarding mitigation of significant impacts to Tribal Cultural Resources. After evaluating the information provided by the tribe through consultation, and in consideration of the City's legal obligations under CEQA and the requirements cited above, the City determined that tribal monitoring during construction will not reduce the impact to TCRs to a level that is Less Than Significant. However, in accordance with Section 21084.3(b), the City determined that appropriate and feasible mitigation will be composed of the following: [insert].
>
> The City hereby concludes consultation with the tribe pursuant to Section 21080.3.2(b)(2) of the Public Resources Code."

In consideration of the factors above, in general, tribal monitoring would be considered under any of the following circumstances:

- when one or more buried archaeological or known (non-isolate) TCRs is likely in the vicinity, but its specific location is unknown;
- when ground-disturbing activities will come within 100 feet of a recorded Native American archaeological site or TCR; and
- when installing or verifying the placement and integrity of temporary exclusionary (orange barrier or silt) fencing around TCRs that must be avoided.

Mitigation measures that require tribal monitoring must be written with specificity in mind, and must, at minimum:

- specify the exact number of tribal monitors for the project (as these will be paid monitors);
- not name a specific tribe, but reference "a culturally affiliated tribe;"
- clearly define the scope of what should be monitored (e.g., "all ground-disturbing activity for the project," or "initial vegetation removal only," or "ground disturbance down to X feet below the surface," or "all ground-disturbing activity in the [define] area of the project");

- specify the number of hours' notice that a tribe is given in advance of the start of monitoring activity (e.g., 72 hours);
- indicate whether or not activity can proceed without a monitor who did not arrive as scheduled, as long as the notification procedures were followed;
- specify the authority of the tribal monitor to halt project activity and for how long (see Section 3.0 for more information); and
- specify the reporting requirements back to the City for reconciliation with the Mitigation Measure Reporting Program (e.g., monitoring logs).

The City further recognizes that there are numerous culturally affiliated tribes with whom it consults, and that the City is not able to hire more monitors than are necessary simply because there is more than one interested tribe. In cases where more than one tribe wishes to monitor, then the City may require that interested tribes alternate monitoring days or projects, in cases where there are multiple project phases or segments.

Finally, monitoring is considered a last resort to minimizing or mitigating significant impacts and is not the default treatment for all projects. Should the City determine that monitoring is not an appropriate mitigation, then the City (with permission from the landowner, if on private property), may extend an opportunity to tribes to visit the project during construction on a volunteer basis, provided that, if required by the landowner, the visitors receive safety training and sign liability release waivers. The City does not have the authority to grant property access to private property over the objections of the landowner.

2.4.5 Capping

In certain cases, the use of capping with natural materials (e.g. certified sterile soils) may be used to effectively bury a TCR or archaeological site to protect it. This could include sites that are located in highly visible areas where public access could otherwise present a risk to the preservation of the site, where existing topography or future grade differentials could cause erosion and stabilization issues, or where there is not sufficient horizontal separation from project activities, but that vertical separation could be achievable. In these scenarios, the use of capping with soil, vegetation, and/or geotextile fabric may be preferred over complete exposure of the site.

If determined appropriate by the City, in consultation with culturally affiliated tribes, temporary protection, as discussed below, may be provided to cemeteries, burials, burial objects, burial soil, sacred objects, sacred sites, and sacred structures within the direct area of impact or exposed by project-related activities during project construction. These procedures may be undertaken where there is the potential for construction activities to damage site, objects, or human remains. In consultation with a City representative, a tribal monitor and qualified archaeologist will demarcate the limits of the area to be capped.

Where capping is considered an appropriate treatment measure, the following guidelines are recommended:

- The culturally affiliated tribe(s) should be afforded an opportunity to review and comment upon the capping plan and monitor its installation.

- The thickness of the soil cap must take into consideration the size and shape of the site, particularly the elevation of above-surface features like bedrock outcrops.
- The methods used to cap the resource must be designed to avoid damage to the resource during the process of installing the cap (such as prohibition of heavy equipment during installation).
- Caps may be covered with vegetation (without invasive root systems) to discourage erosion and unauthorized digging.
- No buildings or structures shall be placed on top of the cap.
- No signage to indicate the location of a site beneath the cap shall be installed.
- Deed restrictions that limit future use and development in perpetuity should be considered for areas subject to capping.
- As appropriate, the capping should include a combination of layers of culturally sterile and chemically-compatible soil of different colors and/or the layering of cyclone, chain link, or orange barrier fencing to discourage digging.

2.4.6 Project-Specific Public Interpretation and Education

In cases where a significant effect to a TCR will occur and the TCR is deemed significant because of its association with tribal culture, history, religion, or other values, but where the impact by the project is determined to be indirect, or because the qualities that convey the significance of the TCR are not location or materials, interpretation of the TCR for the benefit of the public may be an appropriate mitigation.

This can be achieved through the development of:

- One or more interpretive panels in parks, along trails, or at scenic overlooks (without disclosing the specific locations to the public);
- An educational module for K-12 students;
- Development of an exhibit for the Lake County Museum;
- Creating replicas of artifacts, including the potential for commissioning the creation of cultural items from Native American artisans for museum or educational use; or
- Digital scanning and archiving of sites.

The consultation conducted with the culturally affiliated tribe would determine whether or not one or more of these measures is appropriate for TCRs.

2.4.7 Covenants, Conditions, and Restrictions

For residential development projects that may be located in close proximity to known and/or preserved TCRs, the City may elect to require a notice to future property owners of the prohibition of artifact collecting and excavation, without disclosing specific locations of sites. This can be accomplished through Covenants, Conditions, and Restrictions (CC&Rs) that are recorded on each parcel. In such a case, the City may require the following:

> "The collecting, digging, disturbance, or removal of any artifact or other prehistoric [precontact] or historic object located in an open space area, conservation easement, a lot subject to a deed restriction, or to any archaeological site that may become unearthed in the future, is prohibited."

2.4.8 Tribal Access Agreements

One of the barriers to traditional use of tribal resources has been private land. Many tribes have not been able to demonstrate a continuum of use of a TCR because the land upon which it is located was claimed or deeded to others. This has resulted in either an inability to use TCRs, or the need to risk trespass in order to do so.

In order for a California Native American tribe to gain access to a TCR (located on City property) for visitation, the City may develop a right-of-access authorization for requesting tribes. The authorization shall specify the terms under which tribal access can be legally achieved and shall define the acceptable and prohibited uses thereof, and appropriate liability waivers.

In the event that a tribe requests access to a TCR that is located on private property, the City may require the landowner to develop an access agreement with a culturally affiliated tribe as part of a CEQA mitigation measure.

2.4.9 Contractor Awareness Training

There always remains a possibility that unanticipated discoveries may occur during project construction. For this reason, an archaeological sensitivity training program (Contractor Awareness Training) may be appropriate for both cultural resources and TCRs. In that event the City will develop a program with a focus that is tailored to the type of resources likely to be encountered. For example, a project that involves demolition and replacement of a historic-era building in Clearlake might have a greater potential for the discovery of historic (non-Native American) archaeological materials, and thus, a training program would be developed by a qualified professional archaeologist and not require participation by tribes. However, in cases where the project location is near a natural waterbody or is in an area determined to be sensitive for precontact or Native American resources, then the development of a training program would require input from culturally affiliated tribes.

If deemed necessary by the City, in consultation with a culturally affiliated tribe, sensitivity training should be conducted during a pre-construction meeting for construction supervisors prior to beginning any ground-disturbing project work. The sensitivity training program should provide information about notification procedures when potential archaeological material is discovered, procedures for coordination between construction personnel and monitoring personnel, and information about other treatment or issues that may arise if cultural resources (including human remains) are discovered during project construction. This protocol shall be communicated to all new construction personnel during orientation,

prior to the employee beginning ground-disturbing work on the project, and on a poster that is placed in a visible location inside the construction job trailer.

If the project has the potential to impact TCRs, then tribal input into the program is advised. In this case, the program should include relevant information regarding sensitive tribal cultural resources, including applicable regulations, protocols for avoidance, and consequences of violating state laws and regulations. The program should also describe appropriate avoidance and minimization measures for resources that have the potential to be located on the project site and will outline what to do and whom to contact if any potential TCRs are encountered. The program should also underscore the requirement for confidentiality and culturally appropriate treatment of any find of significance to Native Americans and behaviors, consistent with Native American Tribal values.

2.4.10 Post-Review Discoveries

There always remains the potential for ground-disturbing activities to expose previously unrecorded cultural resources or TCRs, even for projects that do not have known resources present. If subsurface deposits believed to be cultural or human in origin are discovered during construction, then the City must carry out steps to identify, evaluate, and treat the find in accordance with applicable state law. Because this potential exists for all projects that involve ground disturbance, it is recommended that an unanticipated discovery procedure be a required mitigation measure or condition of approval for all projects that will disturb the ground. Specific procedures for addressing discoveries are provided in the following chapter.

2.4.11 Alternative Treatment Measures

Based on the number and type of resources within a project, or based on the construction timing of the project, there may be a need to develop and negotiate certain types of mitigation that are not provided for above. There may also be requests from consulting tribes for methods of identification that may be considered to be non-traditional in mainstream cultural resources management (hereafter, "alternative"). The City, in consultation with appropriate professionals, experts, and tribes, shall be solely responsible for making the decision about whether or not an alternative method is appropriate for City projects. For private projects, where a project applicant objects to an alternative method, the City may opt to require a suitable substitute, as long as it has a similar result or effect. In any case, the City shall not require mitigation when the effects are found under CEQA to be not significant, and any such mitigation must be commensurate with the impact.

However, there are specific types of alternative methods that the City has determined are not appropriate at this time, including:

- Unless mutually agreed to by all culturally affiliated consulting tribe(s) and the City, use of forensic or human remains detection canines for surveys;
- Use of compensatory mitigation (payment of funds in exchange for impacts);
- Any mitigation or treatment that appears to benefit a specific entity, person, or tribe, rather than mitigating for a resource;

- Any method that is not proven or accepted by the professional community that would create an undue financial burden on the City or applicant; and
- Any other method or treatment that the City deems is not appropriate.

Controlled Grading

One example of an alternative method is controlled grading to slowly and carefully remove overburden and allow for less destructive exposure of any cultural constituents. This may be implemented during the excavation of soil that is identified as part of a precontact site. When used specifically for precontact archaeological sites or TCRs, this technique would, by definition, require the use of both an archaeological monitor and a tribal monitor from a culturally affiliated tribe. Because a tribal monitor would be required in this scenario, payment for monitoring is appropriate (see Section 3.0 for policies on payment).

Controlled grading would not be required for soil that is identified as non-cultural formational soil or fill dirt imported to the site that is determined to lack cultural constituents. The determination of the transition from cultural soil to formational soil should be made jointly by the project's archaeological consultant, City staff, culturally affiliated tribe(s), and geotechnical professionals.

Controlled grading will involve use of a small piece of equipment or a road grader to peel away native soil using shallow cuts made in approximately two-to-five-inch-deep layers. The grading equipment will push the shallow cuts of soil to the outside of the cultural deposit area. This deposited soil may be sampled and screened to ensure adequate detection of any cultural materials that may be present. The monitors will observe and may provide input on the controlled grading process; however, the pace of the grading and the depth of layers to be removed will be directed by the City and implemented by the contractor. The potential exists that discoveries may temporarily suspend the controlled grading process if they are significant and require focused archaeological excavations or other appropriate treatment.

The archaeological monitor and tribal monitor will observe the removal of soil by a backhoe equipped with a flat-edge bucket or follow closely behind the grading equipment and mark any cultural material with pin flags. Each artifact will be recorded to provide horizontal and vertical locational data. If no cultural deposits are encountered, the road grader will continue to make passes until one of two conditions are met (whichever occurs first):

- Grading will continue to a depth of 30 centimeters below the depth of any recorded artifacts, suggesting an end to the potential for cultural deposits; or
- Non-cultural formational soils are encountered that predate any human occupation of this location.

Once the cultural deposit has been completely removed, the controlled grading process will be terminated, and mass grading may proceed.

3.0 TRIBAL PARTICIPATION DURING PROJECT CONSTRUCTION

The intent of tribal consultation during project planning and environmental review is to resolve potential conflicts between projects and resources early in the planning stages. In many cases under the City's jurisdiction, this has been successful. However, there are circumstances that arise during project construction, such as unanticipated discoveries, that can lead to additional participation by tribes. This section describes the City's policies and procedures for addressing tribal participation during construction.

3.1 Policy of Payment for Tribal Participation During Construction

If the City determines that tribal monitoring or participation is required as a mitigation measure or condition of approval, then payment is appropriate (payment for non-required tribal observation and for consultation is not; see Section 2.0.). The following policy is intended for both City and private projects under the jurisdiction of the City.

When a mitigation measure of a certified environmental document or a condition of a permit or approval requires tribal monitoring of construction-related activities, the City shall retain the specified number of tribal monitor(s) under contract for the purpose expressed in the mitigation measure using the payment schedule provided further below.

3.1.1 Tribal Monitor

A tribal representative that is paid for his or her participation as a monitor:

- has the Tribe's authority to make daily decisions on Native American beliefs, wishes or policy, but may consult with other tribal members with authority and/or experience when it does not delay project progress;
- has the Tribe's authority to consult on their behalf with the Project Archaeologist on the archaeological investigations;
- is required to report to the appropriate tribal members on project progress, activities, finds, problems by whatever methods are appropriate;
- is required to report to the designated job supervisor on a daily basis; and
- has the Tribe's authority to lodge a formal complaint.

Examples (for the purpose of this section) include Tribal Historic Preservation Officers, Tribal Council Members, and Tribal Monitors. The Maximum Actual Hourly Rate paid for a Tribal Monitor shall be consistent with the most current version of the Caltrans North Region Native American Monitoring Procedures pay rates. The City will revisit the pay schedule with each update of these Guidelines, which may or may not result in a revision.

In addition, the following parameters apply:

- Tribal Monitors shall be compensated only for City-authorized labor spent on the job site and are subject to applicable labor laws with respect to paid rest breaks and unpaid meal periods.

- The City shall not compensate more than one Tribal Monitor per project without prior approval by City staff in advance.
- The City shall not compensate trainees or interns for tribal monitoring.
- The City shall not pay for monitoring of activities that do not involve ground or vegetation disturbance that would have the potential to impact a TCR, as determined through the City's environmental review and associated consultation process.
- All representatives and monitors must adhere to job site safety protocols.
- Private property owners reserve the right to prohibit entry to private lands.
- The City will identify Tribal Monitors and will discuss Tribal Monitor assignments with culturally affiliated tribes prior to monitoring activities.
- Tribal Monitors shall not be considered employees of the City.

Pay rates for tribal monitoring and participation for private developments (where the City is not the project proponent) may be separately negotiated between the tribe and project proponent. Nothing in these guidelines or in applicable law prohibits a private landowner from separately entering into an agreement with a tribe to provide unrequired monitoring or monitoring at higher rates, so long as doing so does not attempt to circumvent existing laws and consultation processes.

In the event that the City receives a request for tribal monitoring after project approval, which may be just before or during construction, when tribal monitoring was not a mitigation measure or condition of approval, the City shall not pay for tribal monitoring. However, the City will consider requests from interested tribes to visit the project site to observe project activities on a voluntary basis, as long as appropriate safety procedures are followed and a waiver of liability (including proof of workers compensation insurance) is on file with the City.

3.2 Contractor Guidance for the Response to Unanticipated Discoveries

In the event that project construction activities result in the discovery of previously unknown cultural resources, which may or may not include TCRs, the following procedures generally apply. These procedures may be superseded by equivalent or more effective mitigation measures in the approved CEQA document, or by federal permits and conditions. Therefore, these procedures are intended to serve as guidance when another permit or environmental document is silent on one or more of these issues. Deviation from these procedures may also be warranted, in the event that the discovery is atypical. The City shall exercise discretion in deviating from this guidance. The City may also choose to extend the timelines as stated in the procedures below. Any extension of timelines shall be documented in writing, which may be satisfied by electronic communication.

3.2.1 Initial Pause and Assessment for All Discoveries, Regardless of Cultural Affiliation

In the event of an unanticipated discovery during construction, all ground disturbing work must pause within a 100-foot radius of the discovery, and the construction manager must take reasonable measures to protect the discovery from damage by equipment or personnel. This may include placement of plywood or steel plates over the excavation area (if feasible), or placement of exclusionary fencing. Work may continue on other parts of the project while the following procedures are carried out, but construction personnel are strictly prohibited from disclosing the discovery to the public, which includes posting on social media.

Immediately upon taking reasonable measures to protect the discovery, the construction manager must notify the City's representative by phone, regardless of the presence of an archaeological or tribal monitor. The City's representative will immediately coordinate with the monitoring archaeologist (if present) or contact the project archaeologist, or, in the absence of either, contact a qualified professional archaeologist, meeting the Secretary of the Interior's Professional Qualification Standards for archaeologist.

The professional archaeologist must make a determination, based on professional judgement and supported by substantial evidence, within one business day of being notified, as to whether or not the find represents a cultural resource or has the potential to be a tribal cultural resource. The subsequent actions will be determined by the type of discovery, as described below. These include: 1) a work pause that, upon further investigation, is not actually a discovery and the work pause was simply needed in order to allow for closer examination of soil (a "false alarm"); 2) a work pause and subsequent action for discoveries that are clearly not related to tribal resources, such as can and bottle dumps, artifacts of European origin, and remnants of built environment features; and 3) a work pause and subsequent action for discoveries that are likely related to tribal resources, such as midden soil, bedrock mortars, groundstone, or other similar expressions.

Whenever there is question as to whether or not the discovery represents a tribal resource, the City shall consult with culturally affiliated tribes in making the determination. Whenever a tribal monitor is present, he or she shall be consulted.

3.2.2 Response to False Alarms

If the professional archaeologist determines that the find is negative for any cultural indicators, then work may resume immediately upon notice to proceed from the City's representative. No further notifications or tribal consultation is necessary, because the discovery is not a cultural resource of any kind. Should tribal representatives or monitors desire to take possession of non-cultural materials, the tribe may execute a voluntary agreement with the property owner to take possession as long as removal has been approved in writing by the property owner (if not the City). In this case, where the find is determined to not be a cultural resource, then the maximum delay to the project activities is expected to be one business day.

If the find represents a paleontological resource, then the City's representative will notify a professionally qualified paleontologist to address the find separately and notice to resume work at that location cannot occur until authorized by the City's representative, and the time required to do so is not addressed in this

guidance. Tribal representatives may not remove paleontological materials without permission from the City and property owner (if not the City).

If the find is determined to be a cultural resource, then the procedures below apply.

3.2.3 Response to Non-Tribal Discoveries

If a tribal monitor is not present at the time of discovery and the professionally qualified archaeologist determines that the discovery is a cultural resource but is not reasonably associated with Native American culture, then the City shall notify by e-mail any tribes that specifically requested notification of such discoveries, with a description and a photograph of the find. These requests for notification must be provided to the City in writing in advance of a discovery. Notified tribes shall be afforded up to 24 hours (none of which time period may fall on weekends or City holidays) to review the information (which may or may not include a site visit) and determine whether or not the tribe possesses information about the discovery that would differ from the determination made by the professionally qualified archaeologist. If a notified tribe responds within 24 hours to indicate that the find represents a tribal cultural resource, then work may not resume at the location until the City, in consultation with the tribe(s), addresses the find in accordance with CEQA and Section 3.2.4.

If the tribe fails to respond within 24 hours or responds to concur with the archaeologist that the discovery does not constitute a tribal resource, then the archaeologist shall submit to the City, within two business days, a brief plan for evaluating the significance and recommended treatment. The City shall have up to two business days to review and approve the implementation of the plan.

Upon receiving a notice to proceed from the City, the professional archaeologist must complete the evaluation within five business days, unless additional time is granted by the City in light of the nature of the find. The results of the evaluation may be communicated to the City in an email; formal reporting may continue during construction, after the data collection is completed and the City authorizes a notice to resume work at the location.

If the evaluation results in a finding that the discovery is not a historical resource under CEQA, then work may resume at the location of the discovery immediately upon notification of such from the City's representative. The delay to project construction at that location would be expected to be no more than 10 business days.

If the evaluation results in a finding that the discovery is a historical resource under CEQA, then the professional archaeologist shall immediately implement the treatment specified in the work plan. Work may not resume at the location of the discovery until the City issues a notice to proceed. The amount of delay to the discovery location depends on the nature and extent of the discovery; however, the City shall issue a notice to resume work at that location as soon as data collection is completed by the archaeologist. Formal reporting and analysis may continue during construction, after the City authorizes a notice to resume work at the location.

3.2.4 Response to Tribal Discoveries

If the professional archaeologist determines within one business day that the find does represent a cultural resource, and that it is reasonably believed to be associated with Native American culture, or when a notified tribe responds pursuant to the notification process in Section 3.2.3 that the find does, in fact,

represent tribal resources, then the City shall notify by email, within one business day of receiving such information, all culturally affiliated tribes that specifically requested such tribal consultation notification during environmental review and planning. Tribes that did not respond to offers to consult or declined consultation without such request for notification will not be contacted. Each notified tribe will have one business day from the time of notification to request a visit of the discovery location (if so desired). Tribal representatives who wish to visit the location must notify the City's representative in its response to obtain access and safety information and all non-agency and non-contracted personnel are subject to approval by private property owners. However, it should be noted that while a property owner has the legal right to approve non-agency and non-contracted personnel, the City will not authorize work to resume until appropriate personnel have been approved for entry so that the project conditions can be satisfied. Notified tribes that do not respond or visit the location within one business day may submit comments to the City in writing; however, field visits may or may not be accommodated.

Each visiting tribe will have two business days from the time of the site visit to submit written recommendations to the City for appropriate treatment. Recommendations must be accompanied by supporting information that constitutes substantial evidence for any determination of a TCR. Any recommendations for treatment or mitigation are subject to the process illustrated in Figure 1. Only those recommendations that are determined by the City, as lead agency and engaging in good faith consultation, to be both appropriate and allowable under CEQA would be subject to payment for tribal representatives or monitors.

The City shall have three business days from the close of the two-day comment period to review the information submitted and determine: 1) whether or not the find is subject to state law; 2) whether or not the find represents either a TCR or a historical resource; 3) whether or not the find has been significantly impacted; and if so, then 4) the appropriate treatment. In the absence of substantial evidence or in the case of conflicting tribal comments, the City may elect to exercise one or more of the options specified in Section 21084.3(b), if feasible. Any recommendations submitted by tribes that are not implemented by the City shall be documented in the administrative record with an explanation as to why the recommendations were rejected. If the City determines that the find is either a TCR or a historical resource, then work cannot resume at that location until the resource is treated to the satisfaction of the City, acting as the Lead Agency.

If the City determines that the find is neither a TCR nor a historical resource, then no additional treatment is necessary under state law, and the City's representative shall issue a notice to proceed with activity at that location. In this case, the maximum delay to project activities is expected to be eight business days.

The amount of delay to the discovery location depends on the nature and extent of the discovery; however, the City shall issue a notice to resume work at that location as soon as possible. If other areas outside of the 100-foot radius of the discovery are available to continue with work, notice to resume work may be given for these locations. Formal reporting or other types of mitigation (such as public interpretation) may continue during construction, after the City authorizes a notice to resume work at the location.

3.2.5 Response to Human Remains Subject to State Law

If it is determined that human remains are found, or remains that are potentially human, then the treatment shall conform to the requirements of state law under California Health and Safety Code Section 7050.5

and Public Resources Code (PRC) Section 5097.98. For the purposes of this project, the definition of remains subject to state law (Section 5097.98) shall apply. This definition states: "(d)(1) Human remains of a Native American may be an inhumation or cremation, and in any state of decomposition or skeletal completeness. (2) Any items associated with the human remains that are placed or buried with the Native American human remains are to be treated in the same manner as the remains, but do not by themselves constitute human remains. "The City understands that Native American tribes ascribe importance to objects and surrounding soil matrix associated with human remains that is broader than what is defined in state law. The City will consider requests from tribes to treat additional objects and matrix in the same manner as human remains and will exercise its discretion in doing so on a case-by-case basis.

If the find includes human remains, or remains that are potentially human (as defined in state law), then the individual making the discovery shall ensure reasonable protection measures are taken to protect the discovery from disturbance (AB 2641, Native American human remains and multiple human remains). The archaeologist shall notify the Lake County Coroner (per Section 7050.5 of the Health and Safety Code). The provisions of Section 7050.5 of the California Health and Safety Code, Section 5097.98 of the California Public Resources Code, and AB 2641 will be implemented. If the Coroner determines the remains are Native American and not the result of a crime scene, then the Coroner will notify the NAHC, which then will designate a Native American MLD for the project (Section 5097.98 of the Public Resources Code). The designated MLD will have 48 hours from the time access to the property is granted to make recommendations concerning treatment of the remains. Further, pursuant to California Public Resources Code Section 5097.98(b), remains shall be left in place and free from disturbance until a final decision as to the treatment and disposition has been made. If the landowner does not agree with the recommendations of the MLD, then the NAHC can mediate (Section 5097.94 of the Public Resources Code). If no agreement is reached, the landowner must rebury the remains where they will not be further disturbed (Section 5097.98 of the Public Resources Code). This will also include either recording the site with the NAHC or the appropriate Information Center, using an open space zoning designation or deed restriction as appropriate, and/or recording a reinterment document with Lake County (AB 2641).

3.3 Policy of Payment for Unanticipated Discovery Response

Under state law (Public Resources Code section 5097.98(a)), where human remains are encountered and the NAHC identifies a MLD, the MLD "may, with the permission of the owner of the land, or his or her authorized representative, inspect the site of the discovery of the Native American human remains and may recommend to the owner or the person responsible for the excavation work means for treatment or disposition, with appropriate dignity, of the human remains and any associated grave goods. The descendants shall complete their inspection and make recommendations or preferences for treatment within 48 hours of being granted access to the site." The landowner must next discuss and confer with the MLD "all reasonable options regarding the descendants' preferences for treatment."

The Public Resources Code (PRC section 5097.98(e)) further provides: "Whenever the commission is unable to identify a descendant, or the descendants identified fail to make a recommendation, or the landowner or his or her authorized representative rejects the recommendation of the descendants and the mediation provided for in subdivision (k) of Section 5097.94, if invoked, fails to provide measures acceptable to the landowner, the landowner or his or her authorized representative shall reinter the human remains and items associated with Native American human remains with appropriate dignity on the property in a location not subject to further and future subsurface disturbance."

The Public Resources Code requires that under limited circumstances (e.g., when the MLD fails to make a recommendation, or the landowner rejects the recommendation) the landowner must reinter remains and associated items. It is therefore the City's policy to cover the reasonable cost of that reinterment when the find occurs on City property. In the event that reinterment applies to projects on non-City (private) property, then the landowner may negotiate the cost separately with the MLD.

In the event of the disturbance of human remains on City-owned property, the City shall be responsible for the reasonable reinterment of remains in a manner that is considered equivalent to the physical condition that the remains were in at the time of discovery, with the intent of restoring the remains to that form. That is, the City is responsible for mitigating direct, physical construction impacts caused by a City project to human remains, consistent with the nexus provisions of CEQA. Any proposal for reburial on City property must first be reviewed and approved by the City to confirm the location does not conflict with current or reasonably foreseeable City improvements, utilities, maintenance, or other City operations.

For the purposes of this section, "remains" is inclusive of associated grave goods, plus any additional objects and matrix the City has agreed to treat in the same manner are human remains. The City will not compensate or reimburse for the processing of remains or reburial using methods that cannot be reasonably ascertained from the discovery. The City is responsible for the reasonable and necessary costs of the disinterment and reinterment process, but not for any cleaning, blessing, data recovery, or other "processing" of the remains, or for any interim storage where the purpose is to provide space for such "processing." As an example, if the remains were encountered as a cremation, the City will not pay for the cost of reinterring the cremains in wooden boxes or with other materials, as doing so would not be returning them to their original form at the time of discovery. However, the City will make reasonable accommodations of time for the MLD to prepare the cremains in any other manner that is beyond that which the City can compensate. Examples are given below; they are intended for illustrative purposes only and may not represent all potential scenarios encountered. These examples would also provide guidance to the discovery of non-Native American human remains that are not the result of a crime scene. These examples are written based on the assumption that the remains are left in place until the new burial site is prepared, and therefore interim storage is not needed. However, there may be circumstances in which the City determines that interim storage would be needed, such as if the remains need to be removed from the construction site before the new burial site is ready.

3.3.1 Scenario 1

In the event of the discovery of cremated or fragmented remains in a discrete concentration, the City will be financially responsible for securing a location free from future disturbance; retaining a tribal representative to oversee or carry out the placement of remains into the reinterment location; transport of the remains to the reinterment site; providing a backhoe and operator to excavate a reinterment location roughly proportional to the dimensions of the concentrations and backfilling after reinterment; and filing of a deed restriction on the location to ensure no future disturbance, as necessary. The City will not be financially responsible for religious ceremony, ritual, or blessing; wrapping, padding, or similar preparation; wooden boxes or vessels; or space for interim storage or processing; however, the City will not willfully interfere with religious expression by Native American tribes, should they wish to provide additional treatment of materials prior to reburial.

3.3.2 Scenario 2

In the event of the discovery of cremated or fragmented remains in a dispersed context that are not in a discrete concentration or intact burial, the City will be financially responsible for securing a location free from future disturbance; retaining a tribal representative to oversee or carry out the placement of remains into the reinterment location; transport of the remains to the reinterment site; providing a backhoe and operator to excavate a reinterment location roughly proportional to the volume of material recovered, and backfilling after reinterment; and filing of a deed restriction on the location to ensure no future disturbance, as necessary. The City will not be financially responsible for religious ceremony, ritual, or blessing; wrapping, padding, or similar preparation; wooden boxes or vessels; or space for interim storage or processing; however, the City will not willfully interfere with religious expression by Native American tribes, should they wish to provide additional treatment of materials prior to reburial.

3.3.3 Scenario 3

In the event of the discovery of an intact burial (articulated skeleton), the City will be financially responsible for securing a location free from future disturbance; retaining a tribal representative from the MLD to oversee or carry out the placement of remains into the reinterment location in a similar configuration as original burial; transport of the remains to the reinterment site; providing a backhoe and operator to excavate a reinterment location roughly proportional to the dimensions of the burial(s), and backfilling after reinterment; and filing of a deed restriction on the location to ensure no future disturbance, as necessary. The City will not be financially responsible for religious ceremony, ritual, or blessing; wrapping, padding, or similar preparation; wooden boxes or vessels; or space for interim storage or processing; however, the City will not willfully interfere with religious expression by Native American tribes, should they wish to provide additional treatment of materials prior to reburial.

3.3.4 Scenario 4

In the event of the discovery of an intact grave with remnants of, or an intact, coffin or container, the City will be financially responsive for securing a location free from future disturbance; if the coffin or container was damaged during the unanticipated discovery, materials and labor to create or provide a replacement coffin or container that is roughly in-kind if requested by the MLD[1]; retaining a tribal representative to oversee or carry out the placement of remains into the coffin or container and into the reinterment location; transport of the remains to the reinterment site; providing a backhoe and operator to excavate a reinterment location roughly proportional to the dimensions of the grave, and backfilling after reinterment; and filing of a deed restriction on the location to ensure no future disturbance, as necessary. The City will not be financially responsible for religious ceremony, ritual, or blessing; wrapping, padding, or similar preparation; or space for interim storage or processing; however, the City will not willfully interfere with religious expression by Native American tribes, should they wish to provide additional treatment of materials prior to reburial.

[1] The original coffin or container may be of religious or other significance to the MLD, and therefore replacement should be offered, but should be a decision of the MLD.

4.0 REFERENCES

Placeworks. 2012. A Practical Guide to the California Environmental Quality Act.