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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SISKIYOU

WE ADVOCATE THOROUGH ENVIRONMENTAL REVIEW, A California non-profit Corporation; and WINNEMEM WINTU TRIBE

Petitioners

v.

CITY OF MOUNT SHASTA; CITY OF MOUNT SHASTA CITY COUNCIL; and DOES 1 to 20,

Respondents

CRYSTAL GEYSER WATER COMPANY, a California Corporation; and Does 21-40

Real Parties in Interest.

No. SC CV PT 18-0531

PETITIONERS' OPENING BRIEF

Hearing Date: June 7, 2019
Time: 8:30 a.m.
Dept.: 9
Judge: Hon. Karen Dixon
Petition Filed May 1, 2018

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I. INTRODUCTION

The non-profit We Advocate Thorough Environmental Review ("WATER") and the Winnemem Wintu Tribe ("Tribe") (collectively "Petitioners") bring this mandamus action in the public interest. Petitioners challenge Respondents' March 26, 2018, approval of the Industrial Waste Discharge Permit for Crystal Geyser IWD-2018-01 ("IWDP" or "Permit"); and the conclusion that the Permit was adequately considered in the Environmental Impact Report ("EIR") prepared by the lead agency, Siskiyou County (SCH# 2016062056).[1] The IWDP allows the Real Party in Interest, Crystal Geyser Water Company ("Crystal Geyser") to discharge wastewater to the City's wastewater collection and treatment system under one of the wastewater disposal "options" set forth by the County. Crystal Geyser's domestic wastewater and industrial process wastewater will go to the City treatment facility, while industrial "rinse" wastewater will go to an on-site leachfield. The City's approval of the IWDP also triggers the need for Crystal Geyser to complete the off-site sewer system upgrade to accommodate flows. (See AR 7975.)

During the County's administrative review process of the Crystal Geyser bottling facility operations and the EIR, the City submitted comments objecting to various aspects of the project and the wastewater sections of the EIR. The City, however, determined that it would not challenge the EIR in court, but maintained its objections raised in its comments on the Draft EIR. The issues raised by the City and others were never resolved by the County.

In its comments on the EIR, the City itself recognized the importance of the water supply the Bottling Facility will be depleting, as well as the sensitivity of the environment. Additionally, the area surrounding the bottling facility is within aboriginal territory of the Winnemem Wintu Tribe, near natural springs that are sacred and have significance in Tribal culture.

The proposed bottling facility's significant impacts to water supply, water quality, traffic, noise, hazards and hazardous materials, air quality, climate change, aesthetics, light and glare, and land use, were not adequately addressed in the EIR process and those shortcomings are addressed in the briefing in the County Case. The significant impacts associated with the IWDP are those to water quality and the

[1] Petitioners have also challenged the County's December 12, 2017 certification of the EIR and approval of the Crystal Geyser bottling facility project ("Bottling Facility"), Case No. SCCV-CVPT-2018-41 ("County Case").

off-site impacts that will occur as a result of the upgrade to the City sewer system necessary to accommodate flows from the Bottling Facility project. The water quality impacts and other off-site impacts were not adequately addressed in the EIR, not adequately addressed in the County's flawed AB 52[2] consultation with the Tribe, and also not adequately mitigated.

After the County approved the proposed bottling operation and certified the EIR, the City, despite being a responsible agency for the Project, failed to make any formal findings in compliance with CEQA Guidelines section 15091. It is difficult to assess the City's analysis and reasoning in issuing the IWDP, as it did not make the required findings. It is also odd that the City submitted more than 20 pages of comments on the failings of the County's environmental review, and yet chose not to even articulate findings when it approved the IWDP based upon that same environmental document.

The City also failed to address the comments submitted asserting that the County had failed to complete consultation with the Tribe under AB 52, and that the City must take into consideration the IWDP's impacts on Tribal Cultural Resources. This error is compounded by the fact that the City did not make any findings with respect to the AB 52 process. The City's IWDP has the potential to cause impacts to the local groundwater aquifer and to the Sacramento River, both Tribal Cultural Resources. Rather than analyzing this issue, the City chose to ignore it.

This Court's peremptory writ must issue in the public interest to require the environmental process for the Permit to comply with all procedural and substantive protections, applicable environmental and other statutes, ordinances, and plans.

II. STATEMENT OF FACTS

The City acted as a Responsible Agency under CEQA in issuing the IWDP, and relied upon the EIR for the Bottling Facility project approved by the County on December 12, 2017. (See AR 19620.)[3] Notably, the City Manager's staff report to the City Council regarding the IWDP stated that the County had approved the Bottling Facility project on September 27, 2017, completely omitting discussion of the

[2] Assembly Bill 52 (Chapter 532, Statutes 2014) added several sections to CEQA and required an update to Appendix G (Initial Study Checklist) of the CEQA Guidelines to include questions related to impacts to tribal cultural resources. Changes to Appendix G were approved by the Office of Administrative Law on September 27, 2016.

[3] References to the administrative record of proceedings are to "AR" and the page number.

appeal process at the County and the myriad of issues raised regarding the adequacy of the EIR. (*Id.*) The Bottling Facility project and EIR were approved after appeal on December 12, 2017.

That EIR was based upon a project description that was entirely unclear, as there is no upper limit on the amount of groundwater that may be extracted (and as a result, no upper limit on bottling production and wastewater), and the County approvals did not include any development agreement or mitigation agreement, as has previously been the practice of the County in authorizing use of the bottling facility. (See AR 1587 [bottling facility "by-right" and County claims no approval authoirty].)

The flaws in the EIR and also in the AB 52 Consultation process were pointed out to the City in comments submitted regarding the IWDP, but the City did not remedy the shortcomings in response to the comments. (See AR 21043 and 22183.) The City also did not make any CEQA findings, and so there is no way to determine the factual basis and rationale for any of the City's conclusions.

A. History of environmental review of the proposed bottling facility

In 2013, CG contacted the City of Mt. Shasta regarding their connection to the City's sewer system as part of the proposed reopening of the bottling facility previously operated on the site. (CAR 55416.)[4] The City was able to obtain the grant funds for purposes of funding improvements to the sewer collection system. (CAR 48296.) The City's 2014 EIR effort was abandoned because of a failure in grant funding to the City. (CAR 55409 and 55413.)

While the County and CG had apparently agreed that the County "has no authority" to limit CG's activities at the bottling facility (CAR 1624, and see 55546 [no County authority over amount of groundwater extracted], 55555 [no requirement for CEQA review of bottling operation]), the County figured out a way to prepare an EIR covering the Project operations to provide a platform for issuance of wastewater and air quality permits. The County accepted an application from CG for a "caretaker's residence" on the bottling facility property and got busy preparing an EIR. Instead of simply reviewing the potential impacts of the caretaker's residence, however, the County undertook a huge effort to evaluate a much broader "project." The EIR describes the Project as follows: "The Proposed Project consists of the operation of a spring water bottling facility and ancillary uses within an approximately

[4] References to the County record of proceedings appears as "CAR" [page number]. See also, Petitioners' Request for Judicial Notice ["RJN"], served and filed herewith.

118-acre site formerly developed and operated as a water bottling plant. The Proposed Project consists of operational and physical changes to the former bottling plant facilities for the production of sparkling water, flavored water, juice beverages, and teas. This Environmental Impact Report (EIR) analyzes all modifications undertaken and proposed by CGWC [Crystal Geyser] to operate the proposed bottling plant facilities." (CAR 1624.) The description is misleading in stating that the Bottling Facility project is a "spring water bottling facility." The truth is that the facility will produce and bottle sparkling water, flavored water, juice beverages, and teas." (AR 1607.)

To any reader, the EIR appears to evaluate the entirety of the bottling facility operations. The truth is that the County could not provide a stable project description, because it claimed it had no control over the level or method of production, and no development or mitigation agreement was included with the permit for the "caretaker's residence." The apparent reason for the County's pretense in reviewing the whole of the bottling operation was to provide a basis for the City to issue the IWDP.

After the County went through so much trouble and tested the limits of the public's credulity, the City made only the most passing reference to the EIR in its Resolution approving the IWDP. (AR 691.)

B. History of the Project site

The Project site was used previously as a water bottling facility. Dannon Waters of North American (prior to Dannon becoming Coca-Cola Dannon ["CCDA Waters"]) acquired the property and a draft Initial Study was prepared in March 1998 for the bottling facility ("Plant"). (CAR 1624 and 32537.) In November 1998 the County and the then applicant entered into an agreement regarding mitigation measures identified in the 1998 draft Initial Study ("1998 Agreement"). (CAR 1624 [language disavowing any County land use authority is inserted in the Final EIR] and 55379.) The Plant was subsequently constructed between 1998 through 2000 by CCDA Waters and began operation in January 2001, with a leach field approved by the State for 72,000 gallons per day. (CAR 1624 and 26497.)

CCDA Waters operated the plant from approximately 2000 to 2010 and it has been reported (without specific documentation) that the facility used a monthly average of approximately 160 gallons per minute. (CAR 26751; and see 55996.) It has also been reported by plant neighbors that plant operations negatively impacted domestic wells in the area. (See CAR 1188, 1260, 1356, 27159, 32690,

and 39133.) In 2010, CCDA Waters' plant was closed and the majority of equipment used for the bottling operation was removed. (CAR 1625.) Crystal Geyser purchased the project site in 2013. (*Id.*) Crystal Geyser is owned by Otsuka Pharmaceuticals, a multi-national conglomerate. (See CAR 55671.)

C. The Bottling Facility project

The Project site is bound by residential housing and a few industrial businesses, as well as a KOA campground and a railroad line. (AR 7962.) The County's General Plan designates the Project site as Woodland Productivity and Building Foundation Limitations: Severe Pressure Limitations Soils. The central project site that contains the plant and leach field is zoned M-H (Heavy Industrial), the northern project site that contains the production well is zoned AG-2 (Non-Prime Agricultural), and the eastern project site is zoned R-R-B-1 (Rural Residential Agricultural District). (AR 7966.)

The Project consists of the operation of a bottling facility for the production of sparkling water, flavored sparkling water, juice beverages and tea. (AR 7969.) The bottling plant would use groundwater from the aquifer through an existing production well (DEX-6) in the northern area of the site. "Bottling operations would consist of: (1) water processing (carbonation, tea brewing, juice beverage batching); (2) blow molding of polyethylene terephthalate (PET) plastic bottles from purchased preforms; and (3) filling bottles with product and packaging." (AR 7970.)

The project description includes a "scenario" for predicting water consumption, wastewater production, traffic and air quality impacts. (AR 7969-7970.) The assumption is not based on substantial evidence, as there is nothing requiring CG to remain below a certain level of groundwater extraction, production and/or vehicle trips. The County set up the following conundrum: the EIR could not evaluate expansion of the bottling plant because that would be "speculative"; but the EIR could speculate that CG would not expand, even though there is nothing in the Project approval that would prevent it from doing so. The EIR simply assumes that the Project will engage in the same level of production as the previous site owner, CCDA Waters. (AR 7970.)

The EIR states that the plant would begin with one bottling line, adding a second later, with no plans for a third bottling line. (AR 7969.) Evidence in the record suggests that a third bottling line is anticipated (AR 1329), and there is nothing in the conditional use permit for the caretaker's residence that would preclude increased water extraction and increased production, including addition of bottling

lines. (CAR 13-17 [no conditions regarding production levels] and 1546-1559 [no mitigation measures limiting production levels/extraction of groundwater.) The County claimed that the third bottling line contained in CG's plans was later removed, so should not be considered, but did not address the fact that there is nothing to prevent CG from adding the third line.

The EIR for the Bottling Facility project included four wastewater treatment options. (AR 7974-7983.) The options varied with respect to the destination of "domestic wastewater flows", "industrial process wastewater flows" and "industrial rinse wastewater flows." Option 1 would result in all flows going into the City's sewer system and to the City wastewater treatment plant ("WWTP"). (*Id.*) With Option 2, all flows would go to the WWTP except for industrial rinse wastewater, which would go into the onsite leach field. Option 3 would send domestic flows only to the WWTP and industrial rinse water and industrial process wastewater would go into the leach field, while Option 4 would be similar to Option 3 with some industrial process wastewater being used in an irrigation application. (*Id.*) The IWDP processed by the City approves the discharge of wastewater and triggers the need for the off site pipeline improvements.

In the City's comments to the County, the City insisted that Option 1 was the only option acceptable to the City. (AR 19785-19789.) The IWDP approved by the City, however, provides that all wastewater will go the WWTP, except that industrial rinse water will *not*. (See AR 374-375 and 404.)

The four (reduced by the County to 3) Wastewater Treatment Options and the need for offsite pipeline improvements demand that the City make independent findings regarding the effects of these project elements on the Sacramento River and groundwater Winnemem Wintu Tribal Cultural Resources ("TCRs").

Accordingly, the City's decision with respect to choosing a wastewater treatment option for the Bottling Facility will impact not only the WWTP and the Sacramento River Watershed, but also the aquifer and project neighbors with nearby domestic wells.

D. Administrative Process in Siskiyou County

In July of 2016, the County issued a Notice of Preparation of an Environmental Impact Report for the Bottling Facility project ("NOP"). The California Regional Water Quality Control Board submitted comments on the NOP for the Bottling Facility, outlining the items that should be reviewed in the EIR.

(CAR 19852-19854.) Also in response to the NOP, the City of Mt. Shasta submitted a comment letter. (CAR 19848-19851.) The City stated that a copy of the Draft IWDP should be included in the DEIR for the Bottling Facility. (*Id.*)

On January 12, 2017, Respondent County issued a Draft EIR for the Project. Petitioners and many others submitted extensive comments on the Draft EIR. (CAR 311-1544.) The City of Mt. Shasta submitted comment letters on the DEIR on February 23, 2017, raising various issues. (AR 121-124.) The City commented, as an "interested party" that the DEIR failed to adequately analyze light/glare and noise that would be created by the Bottling Facility, and also impacts to groundwater supply and quality. (AR 121-122.)

On February 24, 2017, the City sent a comprehensive comment letter on the DEIR, including comments on groundwater impacts. (AR 19825-19836.) The City pointed out that the DEIR assumed that little additional development would utilize the groundwater aquifer for water supply, and that assumption was invalid. (AR 19828.) In fact, the City's General Plan calls for a Specific Plan in the Spring Hill area, stating that it is reasonable to assume approximately 2,585 dwelling unit equivalents within the vacant 341 acres. This could result in approximately 4,373 new residents, essentially doubling the population of the City. (*Id.*) Thus, the basic assumption of the EIR with respect to demand for groundwater supplies in the future is simply incorrect. The County did not correct the error in the FEIR (AR 2132) and the City did not mention this error again during the administrative process.

With respect to water quality, the City made an extensive comment, critically noting that the DEIR relies on a report (the "RCS" report) that acknowledges that there was no data available during previous plant operations, concluding, "[t]hus, the impact of future pumping on water quality conditions cannot be readily evaluated at this time." (See AR 19829.) The RCS report recommended phasing the Bottling Facility project and well operations, and collecting data to allow evaluation of impacts to water quality. (*Id.*) The City cited the report and described in detail the data that should be collected in order to fully evaluate the Bottling Facility project's impacts to water quality over time. (*Id.*) The City also requested the following mitigation measure:

> The City requests mitigation be included to require a data collection program to determine [Bottling Facility] Project impacts on the aquifer and offsite wells over time. The data collection program should be consistent with the recommendations included in

> the RCS report. A qualified groundwater professional selected by the County should conduct the monitoring and reporting, and results should be provided to the County, City, and other interested parties. The data collection program should include parameters that must be met before the [Bottling Facility] Project is allowed to expand groundwater production to the next higher pumping capacity. (AR 19830.)

The County dismissed this request (AR 1620-1621), and continued to adhere to the conclusion that impacts to groundwater quality would be insignificant, despite the County's own expert indicating that such a conclusion was not truly supported. The County dismissed the City's other concerns in a similar fashion. (AR 1617-1624.)

This exchange between the City and the County highlights the unpleasant truth that area neighbors have been sounding the alarm about since Crystal Geyser expressed an interest in opening the Bottling Facility. It is not simply that there are experts that disagree about groundwater data and information, the fact is that there simply is *no analysis* of the long-term aquifer depletion and its impacts on neighboring wells. The County as the lead agency, and the City as a responsible agency, simply failed to require the environmental analysis to address this central question. "Virtually no experimental data is presented in this regard and the theoretical analysis that substitutes for actual testing is not appropriate for volcanic regions." (AR 1143.)

Respondent County issued a Final EIR for the Project and scheduled a Planning Commission hearing for September 20, 2017. (CAR 32865-32889.) The Planning Commission hearing occurred on that date and was then continued to September 27, 2017. (CAR 32890.) Petitioners and many others submitted extensive comments on the Final EIR and during the Planning Commission hearing. (CAR 32874-32888.)

On September 15, 2017, The City's consultant, ENPLAN, submitted a letter to the City reviewing the County's response to comments on the DEIR for the Bottling Facility project. (AR 19790-19811.) As an initial matter, ENPLAN noted that the County's proposed resolution approving the Bottling Facility project stated that the project would substantially conform to the application submitted on March 18, 2016. (AR 19791.) ENPLAN pointed out that the resolution did not refer to the FEIR for the Bottling Facility project, and requested that the County use language it ordinarily uses when approving a project, and require that the operation substantially conform to the "project description" approved in the FEIR. (AR 19791.) Of course, the County did not use the language suggested by ENPLAN because the

County asserts that it has no authority to require Crystal Geyser to conform to the project description in the EIR, but only authority over the caretaker's residence. (See CAR 1195, 1624, 55546 and 55555.)

On September 19, 2017, ENPLAN sent another letter to the City, evaluating the County's responses to comments further in response to direction at the September 18, 2017 City Council meeting. (AR 19785.) ENPLAN pointed out that the County had committed to selecting an initial wastewater treatment option for the Bottling Facility project prior to project approval. (*Id.*) The ENPLAN letter reiterated the fact that the only wastewater treatment option acceptable to the City would be all wastewater flows going to the City WWTP, and that since the County had committed to selecting an option prior to approval, this would have to be resolved prior to County approval. (*Id.*) As it turned out, the County reneged on its commitment and simply approved all of the alternative treatment options. (AR 1747.) Despite its repeated statements that the only option acceptable to the City was that all wastewater would go to the WWTP, the City went on to, inexplicably, approve an option that allows Crystal Geyser to discharge to the leach field, and did so without even making findings or providing any rationale.

The supplemental ENPLAN letter went on to discuss impacts to adjacent wells, a comment letter submitted by Timothy K. Parker, certified hydrogeologist, was addressed. (AR 19786.) Mr. Parker is an expert with over 25 years of geologic and hydrologic professional experience. (*Id.*) The FEIR itself (CAR 4856) states that full production at the Bottling Facility would use 28% of the groundwater underflow whereas the 82 neighboring residences combined currently use only 2.5% of that groundwater underflow. Any operation that increases total use of the groundwater flow by more than a factor of 10 can hardly be ignored or passed off as insignificant. While ENPLAN's analysis between September 15 and September 19, 2017 contained some contradictions, ENPLAN reviewed the information and stated that it concurred that a data collection program to determine Project impacts on the aquifer and off-site wells over time is appropriate. (*Id.*) The County refused to even consider such monitoring, despite the fact that the evidence showed it was needed and feasible. The City was correct to insist upon monitoring, but oddly let the entire matter slide after the County approved the Bottling Facility project.

Other important impacts and factual information were discussed by ENPLAN, but similarly ignored by the County and forgotten by the City after County approval. (See AR 19785-19789 and 19790-19811.)

On September 27, 2017, the Planning Commission approved the Project and certified the EIR. (CAR 32856-32859, and see 32268-32275.) Petitioners appealed the decision to the Board of Supervisors. (See AR 32774.)

On November 16, 2017, the Board of Supervisors held a public hearing on the appeal, heard presentations from Petitioners, Crystal Geyser and County staff, and heard public testimony. (CAR 32505-32522.) The Board closed the hearing on November 16, 2017, and continued the item to December 12, 2017, with a request to County staff to provide clarifications and answers to questions raised at the public hearing. (CAR 32520, and see 31955-32255.) On December 12, 2017, the Board of Supervisors received the report from staff, denied the appeal, approved the Project and certified the EIR. (CAR 31733-31954, and 32461-32504.)

The Project description is at odds with the approval given by the County to Crystal Geyser. The County repeatedly and emphatically throughout the EIR process asserted that it has *no authority* over the operation of the bottling facility, and that the only discretionary approval within the County's authority was the Permit for the caretaker's residence. (See CAR 1195, 1624, 55546 and 55555.) Yet, the EIR for the "Project" includes analysis of the entire bottling facility and operation. The EIR makes unsupported assumptions regarding the level of production anticipated as well as making predictions and conducting analysis regarding every other aspect of the bottling facility operations. (*Id.*)

The City, as a responsible agency, relied upon this entirely inadequate environmental review in its approval of the IWDP.

E. County AB 52 Consultation with the Winnemem Wintu Tribe

The City was made aware of the fact that the County improperly terminated AB 52 Consultation, and requests were made for the City to get input from the Tribe prior to approving the IWDP. (See AR 21043 and 22183 and 248 [comments from Mark Miyoshi, Tribal Historic Preservation Officer].) The City ignored the comments.

The following is a detailed description of the County's AB 52 process:

The consultation process with the Tribe is documented in the County Record of Proceedings at pages 56059-56386. The process began on June 16, 2016, when the County sent a letter to the Tribe indicating the intent to prepare an EIR for the CG Project, and the Tribe had 30 days to respond. (CAR

56076-56079.) The Tribe did so on July 14, 2016. (CAR 56093.) The Tribe submitted comments on the Notice of Preparation raising several concerns, and indicated that the TCRs would be identified during the Consultation. (CAR 56098-56100.)

On August 2, 2016, the Tribe requested that the process be conducted with personnel qualified in the investigation of TCRs (CAR 56101-56102.) The County agreed. (CAR 56103.) On August 23, 2016, the Tribe requested that the County engage a qualified ethnographer to assist with the Consultation, and that it wished to reserve the right to submit information during the Consultation in a form other than in-person, as Tribal representatives may not often be available. (CAR 56108-56109.)

After the County's consultant, Sally Zeff, had a conversation with Tribal representatives, the County sent a letter on September 8, 2016, describing the process to be followed upon identification of TCRs, and indicated that a confidentiality agreement would be acceptable to the County. (CAR 56110-56111.) The County declined to engage an ethnographer, and suggested that the Tribe could do so, and went on to say that information could be presented to the County in written form. (*Id.* at 56111.) The tribe agreed that the TCR information would be provided in writing, and a confidentiality agreement was executed. (CAR 56112, and 56115-56119.)

On November 4, 2016, the Tribe submitted a letter providing initial information identifying the major impacts the Project would have on TCRs. (CAR 56120-56124.) The Tribe identified the following TCRs that will be adversely affected by the Project: (1) the springs and groundwater of Mount Shasta; and (2) the Sacramento River. The letter discussed evidence of the sacred nature of these waters. (*Id.*) The letter emphasized the breadth of these resources as follows: "TCRs are not simply discrete sites containing a few scattered obsidian flakes and other artifacts, but rather places and landscapes, defined by past and present traditional cultural lifeways, illustrated by song, story and myth, intertwined into tribal ceremonies and a spiritual way of life." (*Id.* at 56121.) The letter described in detail the value of the groundwater of Mount Shasta and of the Sacramento River to the life and cultural belief of the Tribal members.

The Tribe stated its concern that the Project will have significant adverse impacts on the TCRs, noting that there is no upper limit on the amount of groundwater CG might pump at full production and through expansion. (CAR 56123.) Consultation materials from the Bureau of Reclamation regarding the

sacred nature of the groundwater of Mount Shasta and the waters of the Sacramento River were attached to the Tribe's correspondence. (CAR 56125-56149.)

The County responded with a letter mistakenly dated September 8, 2016, acknowledging receipt of the November 4 letter from the Tribe. (CAR 56152.) The County attached a draft of the proposed EIR section regarding the TCRs. (CAR 56154-56156.) The proposed section acknowledges that the groundwater and the Sacramento River are TCRs, and then simply reiterates the EIR's standard evaluation of the Project's impacts to hydrology, stating that it would be less than significant. (*Id.*) The attached study did not once discuss the cultural or spiritual value of the water resources evaluated. (CAR 56157-56252.) The threshold of significance was never even discussed with the Tribe.

The Tribe responded on December 16, 2016. (CAR 56254-56256.) The Tribe noted that the short discussion provided for inclusion in the EIR did not meet the standards of AB 52, and failed to include discussion "that considers the tribal cultural values in addition to the scientific and archeological values when determining impacts and mitigation." (CAR 56254, citing AB 52 Section (1)(b)(2), and see Public Resources Code ["PRC"] §21080.3.2.) The letter included many questions regarding the details of the Project, specifically asking why outdated and incomplete data was being used, and what type of monitoring plan would be in place for impacts to groundwater. (CAR 56255.)

On January 3, 2017, the County responded, acknowledging that the TCRs identified would be considered, and stating that the conclusion would be that there would be a less than significant impact, presumably based upon the outdated data sent to the Tribe with the County's last letter. (CAR 56257.) In responding to the Tribe's questions, the letter acknowledged the problem that was on the minds of every Project neighbor: "No permit is required to be issued for water extraction. The County will be issuing a Conditional Use Permit for the proposed Caretaker's residence." (CAR 56258.)

The County dodges the fact that the hydrologic data was in fact inadequate by stating that the disclaimer in the study was "standard." Then the County went on to make a patently false statement that the groundwater information collected in the surrounding neighborhoods had "not been made available to the County." (CAR 56259.) This statement was simply untrue. During the appeal hearing on December 16, 2017, a project neighbor stated that the County continued to rely on old data that did not evaluate the *actual* impacts on the groundwater wells in the area, despite the fact that the studies had been done and

"*even though we've offered them.*" (CAR 32659-32660, emphasis added.) In fact, the Gateway Neighborhood Association submitted to the County a detailed expert analysis of the local groundwater elevation, taking data from wells in the Project vicinity. (CAR 38835-38890.)

The County finished up its letter by stating that no monitoring plan would be proposed or implemented, contradicting the very next paragraph by asserting that the conclusion had already been made that impacts to water resources would be less than significant. (CAR 56259.) Finally, the County noted that if they would like more Consultation (such as it was), the Tribe should request a meeting. (*Id.*)

The Tribe responded to the County on March 1, 2017, correctly noting that the County had already made a significance determination, without even mentioning the cultural significance of the TCRs, and requested further consultation. (CAR 56262, citing PRC § 21080.3.2.) The County had considered only physical quantity and quality data, but failed completely to address the values of the TCRs that are paramount to the Tribe, the values specifically required to be considered under AB 52. (*Id.*) The Tribe's letter described in detail the cultural significance of the resources, and noted that any diminishment of the groundwater would be an adverse impact. (CAR 56262-56267.) The letter offered a list of feasible, effective mitigation measures that could be included in an effort to reduce impacts to the TCRs. (CAR 56265.)

The County responded via email the same day, March 1, 2017, and asked if any of the material submitted was confidential because they wanted to forward to the Project consultant. (CAR 56269.) On May 4, 2017, the Tribe responded via letter, indicating that the information was confidential and asking why the County had not responded to the request for further consultation. (CAR 56272-56273.)

On May 11, 2017, the new County Director of Community Development sent a letter, assuring the Tribe that the Project consultant was similar to County staff, and so would be covered by the confidentiality agreement, and requested suggestions for a qualified ethnographer. (CAR 56275-56276.) Additionally, around this time, nearly nine months after the Tribe requested that the County engage an ethnographer to assist with the consultation, the County for the first time engaged in discussions of doing so.

Despite indicating that it was considering the qualified ethnographers, the County gave very short shrift to the process. Without communicating with the Tribe, the County summarily terminated the RFP

process, notified the Tribe's recommended ethnographer that her proposal had been rejected and settled on engaging Barbara Wolf – an individual directly involved in preparing the EIR for the Crystal Geyser Project – as the person to review the impacts on the TCR's identified by the Tribe and accepted by the County. (CAR 56277-56321.)

Notably, Ms. Wolf had not even responded to the County's RFP for ethnographic services – nor was she qualified to do so. (CAR 56314-56315.) Ms. Wolf, in fact, is not an ethnographer but instead her title at ICF is "Technical Writer." (CAR 56320). The Tribe objected to County's proposal to hire Ms. Wolf, noting that she was not an ethnographer and did not have the qualifications or experience necessary to fulfill that role. (CAR 56329.)

The only reason the County provided for refusing to consider the Tribe's suggested ethnographer – who had significant knowledge of the project area and the Tribe – was that she was busy and her schedule did not mesh with the County's desire to fast-track the EIR process. (CAR 56325-56326.) Therefore, the County urged the Tribe to agree to engage the services of the inexperienced member of the County consultant's firm in order to get the work done quickly. (*Id.*) Then, just two days after notifying the Tribe that the Tribe's recommended ethnographer would not be hired, the County notified the Tribe that the County planned to hire the inexperienced ethnographer. (CAR 56327-56328.) Again the Tribe objected to Ms. Wolf's lack of experience and noted that "Valid ethnographic interview are built upon trust and understanding and ultimately the work must be done with the permission and cooperation of the target community, who in this case is the Winnemem Wintu Tribe." (CAR 56329) The Tribe reiterated its request to continue the Consultation, and requested work on appropriate mitigation measures. (CAR 56330.)

In response to the Tribe's objection to an inexperienced member of the EIR team being hired as an ethnographer for the consultation process, the County became confrontational and essentially made up a new requirement and stated that in order to justify engaging an ethnographer the Tribe would be required to "provide substantial evidence about the physical locations where significant events, activities, or cultural observances have taken place that are associated with the Tribe's important association with the life force embodied in the water." (CAR 56334.) These, of course, are the things the ethnographer would have assisted in providing. The remainder of the letter stated abruptly that if the Tribe could offer

some "proof" of significant events, activities or cultural observances, the County would "apply its understanding of the Tribe's cultural values, as shared by the Tribe through previous consultation..." (CAR 56355.) The County's letter demonstrated that it had no understanding whatsoever of the Tribe's cultural values. The rest of the letter essentially sets up the further communication in a way that makes it impossible for the Tribe to meet the County's demand for substantial evidence, and regurgitates the County's existing analysis on impacts. (CAR 56355- 56342.)

The Tribe responded on August 25, 2017, providing information regarding an ongoing consultation the Tribe was engaged in with the United States Bureau of Reclamation, shedding light on aspects of the TCRs. (CAR 56343-56374.) The formal federal process documentation sets forth the evidence supporting the sacred nature to the Tribe of Mount Shasta and its groundwater.

On September 6, 2017, the County discussed some of the information submitted by the Tribe, then concluded that the Consultation had been underway for 15 months, and the Tribe had failed to provide any evidence that the Project would have a significant impact to the TCRs. (CAR 56375-56378.) The County went on to say that it had substantial evidence that there would not be impacts, and the Tribe had failed to refute that, and so the County was "electing" to bring the Consultation to completion. (CAR 56377.)

F. Administrative process in City of Mt. Shasta

On August 12, 2016, the City prepared a Draft IWDP for the Bottling Facility. (See AR 19842.) Crystal Geyser responded to the Draft IWDP with extensive comments. (AR 19842-19847.) The City then requested that the County include a copy of the draft permit in the environmental review (AR 19848-19851), and so the draft was attached to the EIR. (AR 6.)

After County approval of the Bottling Facility project and certification of the EIR, at a special meeting on February 5, 2018, the City Council was set to consider a revised version of the IWDP, but continued the item to a future meeting. (AR 2.) The item was on the agenda again for a February 26, 2018, City Council meeting, but was again continued. (AR 125.) On March 26, 2018, the City Council again considered the revised IWDP, and by a vote of 3 to 2 approved the permit. (AR 248-249.)

On February 23, 2018, Petitioners' counsel sent a letter to the City regarding the IWDP. (RJN Exhibit A.) The letter informed the City that it must make an *independent* decision on the adequacy of the EIR and make CEQA findings. On March 16, 2018, Petitioners' counsel sent another letter to the

City, discussing the shortcomings in the City's compliance with CEQA. (RJN, Exhibit B.)

The March 26, 2018 City Council meeting packet included a staff report less than a page long, with an attached resolution containing the following language regarding the EIR for the Bottling Facility project:

> WHEREAS; The City Council has considered the Environmental Impact Report prepared by the County of Siskiyou for the Crystal Geyser Bottling Plant and finds no unmitigated adverse environmental impacts relating to the alternate waste discharge disposal methods. (AR 254.)

This Resolution was ultimately adopted by the City Council. (AR 691.) Notably, the City did not make any independent findings regarding the environmental impacts of granting the IWDP. (See AR 254 and 691.) Crystal Geyser's activities under the IWDP will require the completion of the off-site sewer pipeline upgrades and the EIR for the Bottling Facility project included numerous mitigation measures related to the work on the City's sewer infrastructure. (Mitigation Measures 4.3-1, 4.3-2, S-4.3-1, S-4.3-2, S-4.3-3, S-4.4-2, and S-4.5-1 at AR 1940-1946.) The City failed to adopt those measures as required by CEQA. (*Id.*; PRC § 21002.1(d) and Guidelines § 15096(a).) In fact, the City administrative review process did not include one mention of these Mitigation Measures.

The City had requested that a draft of the IWDP be attached to the FEIR, and did so because this would allow review of the potential impacts, and the EIR for the Bottling Facility project did have a draft IWDP attached that provided information regarding potential impacts that would result from the waste-streams. (See AR 6 and 19848-19851.) Thereafter, the City revised the permit to include three waste-streams that were not considered in the EIR. (See RJN Exhibits A and B.)

The letter from Petitioners' counsel stated that the revised permit deviated significantly from the permit analyzed in the EIR, and that there was no evidence in the record to support the City's conclusions that these waste-streams would not have significant impacts. (*Id.*)

Prior to the March 26, 2018 approval by the City Council, on March 20, 2018, the attorney for the City presented a memorandum to the City manager regarding the letters from Petitioners' counsel. (AR 19783-19784.) The memorandum dismissed the concerns about the significant changes in the draft IWDP attached to the EIR and the one being considered by the City, first by misstating the requirements of CEQA with respect to changes in a project (see Section IV.A below), and concluding that, in his opinion, the new permit did not "contain any information that would require further or subsequent environmental

review." (AR 19783-19784.) The memorandum from the City attorney did not even address the fact that as a Responsible agency, the City was required to exercise its independent judgment and make CEQA findings.

As set forth in detail in Section IV.A below, the City failed to comply with CEQA by failing to make independent findings and refusing to adopt mitigation measures applicable to the work to be performed on the City's sewer infrastructure and the use of the leach field.

III. STANDARD OF REVIEW

CEQA's dual standard of review is well-settled. A court will "determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements," while according "greater deference to the agency's substantive factual conclusions." (*Banning Ranch v. City of Newport Beach* (2017) 2 Cal.5th 918, 935, citations omitted ["*Banning Ranch*"].) Thus, when reviewing an agency's CEQA compliance, the "court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of the improper procedure or a dispute over the facts." (*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 [*"Vineyard"*].)

Whether an EIR "omit[s] essential information," or fails to address an issue, is a procedural issue subject to de novo review. (*Banning Ranch, supra,* 2 Cal.4th at 935.) By contrast the courts use the "substantial evidence" test to review an agency's "substantive factual conclusions." (*Id.*) "Substantial evidence" is "evidence of ponderable legal significance, reasonable in nature, credible, and of solid value, evidence that a reasonable mind might accept as adequate to support a conclusion." (*American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1070.)

Here, Petitioners have challenged the EIR's failure to disclose information and to complete AB 52 Consultation, in the case against the County. In the present case, the issues are as follows: (1) whether the City erred in failing to make any CEQA findings and failing to adopt the mitigation measures applicable to the portions of the project being approved by the City; (2) whether the City erred in relying on the EIR's analysis of the impacts of wastewater disposal in light of the significant changes made to the

draft IWDP considered in the EIR; and (3) whether the City erred in relying on the County's flawed AB 52 Consultation.

All of these issues fall under the *de novo* standard applicable to a determination of whether the agency complied with the procedural requirements of CEQA.

As the Supreme Court instructed in the landmark *Friends of Mammoth v. Board of Supervisors* case, CEQA must be construed broadly to "afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259 (superseded by statute on other grounds).)

The City approval was not supported by EIR analysis of all of the waste-streams included in the final IWDP, the City did not even consider or discuss the adequacy of the AB 52 Consultation, and the City ignored written requests that the City make the required CEQA findings. The City's errors were prejudicial. (See *Banning Ranch, supra,* 2 Cal.5th at 942.)

IV. DISCUSSION

A. The City erred in failing to make CEQA findings and adopt mitigation measures

To comply with CEQA, the responsible agency must consider the final EIR prepared by the lead agency and reach its own conclusions on whether and how to approve the proposed project. (Guidelines § 15096(a) and (f).) Before reaching a decision, a responsible agency must consider the environmental effects identified in the EIR of those activities that it is required to approve or carry out, and it must independently decide whether to require additional environmental documentation. (PRC § 21002.1(d); Guidelines § 15096(a) and (f).)

The City's refusal to make findings is particularly troublesome in light of the fact that prior to the County's approval of the Bottling Facility project, the City had submitted detailed comments to the County asserting that many aspects of the EIR were insufficient. (See AR 19785-19811 and 19825-19836.) As set forth above, the City believed that the waste-streams from the Bottling Facility project pose a risk to groundwater quality, and yet the City allowed three additional waste-streams to be included, and these three new items were vaguely identified. (See RJN Exhibit B.) With little discussion, and no CEQA findings, the City attorney simply made the conclusion that this "new

information" did not trigger the need for additional environmental review. (AR 1982.) This is insufficient.

A responsible agency, like a lead agency, must make the findings required by Section 21081 and Guidelines section 15091, and must make a statement of overriding considerations as required by Guidelines section 15093. (Guidelines § 15096(h).)

Further, Guidelines section 15096(g)(1) provides that a responsible agency must consider mitigation measures for the parts of the project it decides to carry out, finance, or approve.

As set forth above, the City did not make CEQA findings. The City also failed to include any analysis or discussion of the mitigation measures that the EIR identified as necessary with respect to the aspects of the Bottling Facility project over which the City has jurisdiction.

The EIR required several mitigation measures for the work to be done to improve the City's sewer collection system (Mitigation Measures 4.3-1, 4.3-2, S-4.3-1, S-4.3-2, S-4.3-3, S-4.4-2, and S-4.5-1 at AR 1940-1946) and the City not only failed to consider or discuss these measures, it failed to adopt the measures and include them in a mitigation and monitoring plan. (AR 370-419.)

Failure to make the findings required by CEQA is a prejudicial abuse of discretion. (See *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1034-1035.) In this case, in reviewing the record of the City's proceedings, it is as though an EIR was not prepared at all. The resolution approving the IWDP makes no mention of the improvements to the City sewer that will be required as a result of the permit, nor of any aspect of the EIR's analysis. The only statement included is a cursory mention that the "City Council has considered the Environmental Impact Report prepared by the County of Siskiyou for the Crystal Geyser Bottling Plant and finds no unmitigated adverse environmental impacts relating to the alternate waste discharge disposal methods." (AR 254.) The City disclosed no analysis and no findings.

"The writing of a perfect EIR becomes a futile action if that EIR is not adequately considered by the public agency responsible for approving a project. Indeed, it is almost as if no EIR was prepared at all. ... [¶] Additionally, even though the board may have fully considered the EIR and made a wise and eminently rational decision in approving the proposed project, the board's thinking process, its 'analytic route,' has not been revealed. Only by making this disclosure can others, be they courts or constituents,

intelligently analyze the logic of the board's decision." (*Village Laguna of Laguna Beach, Inc. v. Board of Supervisors, supra,* 134 Cal.App.3d at 1034-1035; accord, *Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 896–898, rev. den. July 29, 1987; see also *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 361–362.)

In addition to making findings, a responsible agency must incorporate mitigation measures into its findings prior to approving a portion of a project with identified potentially significant impacts. (*Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal.App.3d 433, 442.) The fact that the City did not even mention much less adopt the mitigation measures set forth in the EIR for the portions of the Bottling Facility project under the City's jurisdiction compels a finding of prejudice.

B. Additional environmental review was necessary as a result of the addition of three unanalyzed waste-streams in the final IWDP

The IWDP approved by the City was a revised version of the Draft IWDP that was attached to the EIR as Appendix I, and it was revised to include: "condensate, boiler blowdown water, [and] cooling tower blowdown water." (AR 133-246, at 141.) The EIR did not analyze these wastewater streams, and the constituents that will be contained in this wastewater was not disclosed to the public or the decision makers, nor were the potential impacts of treatment of this wastewater analyzed.

The City made the cursory conclusion that the new constituents were not significant. (AR 19783-19784.)

City staff was aware of the additional waste-streams before the County approved the FEIR for the Bottling Facility project, but the City did not notify the County that the Draft IWDP was incorrect. (See AR 20190.) Crystal Geyser's consultant explained to the City in January of 2018 that CG wished to revise the permit to allow the discharge of the three wastewater streams to the City WWTP. (*Id.*) CG wished to add condensate and non-contact cooling water to the permit. (*Id.*) The justification for adding the condensate is that the air compressors at the Bottling Facility are oil free, so this waste-stream would be free of oil. (AR 20190.)

The non-contact cooling water, according to CG's consultant, would consist of "boiler blow down water" and "cooling tower blow down water." (AR 20190-20191.) These waste streams would contain anti-scaling chemicals, and the consultant made the conclusion that "[w]e anticipate having no problems

in meeting the water quality objectives at the monitoring point...." (AR 20191.)

The City did not explain to the public how or why these additional chemicals would not cause water quality impacts. The data sheets sent to the City by the consultant indicate that Boilermate 1200S should not be discharged into lakes, streams, ponds or public waters. (AR 20193.) The product has also been identified as a "Hazardous Chemical" as defined by OSHA Hazard Communication Standard, 29 CFR 1910.1200. (AR 20198.) Boilermate 3300C is also noted for "acute toxicity" and for being a hazardous chemical. (AR 20200, 20202, and 20206.) These types of hazardous chemicals warranted at least some analysis and discussion.

The City's only response to concerns raised about these new constituents is a statement by Pace Engineering that "an evaluation was conducted and the current permit reflects that evaluation." (AR 20904.) The IWDP mentions Boilermate products in a footnote, but there is no "evaluation" of the chemicals it contains. (See AR 20884.)

Whether an EIR "omit[s] essential information," or fails to address an issue, is a procedural issue subject to de novo review. (*Banning Ranch, supra,* 2 Cal.4th at 935.) In this case, the failure to even discuss the impacts associated with constituents that had not been included in the EIR's analysis equates to a failure to disclose essential information, and it was a prejudicial abuse of discretion.

C. The City erred in failing to independently review the AB 52 Consultation process conducted by the County

The City's staff report and discussion did not include a single mention of the Tribal Cultural Resources. This is so despite the fact that, the City's own comment letters to the County insisted that operation of the Bottling Facility project could have a significant impact on groundwater quality, and also knew from the EIR that the groundwater had been identified as a TCR. (AR 8185.) Yet, the City did nothing in response to these concerns, ignoring the TCRs and approving the IWDP with *no findings* and despite the fact that identified hazardous chemicals were being added to the wastewater stream without analysis. Rather, the City relied on consultations, initiated by County, but not completed, regarding the Bottling Facility project on which the County was the lead agency.

AB 52 is a substantive addition to CEQA. The provisions added to CEQA are not aspirational. They are mandatory. The express goal and purpose of AB 52 is to protect the sacred places of Native

Americans, including but not limited to places of worship, religious or ceremonial sites, and sacred shrines that are central to a Tribe's culture. In order to achieve these goals AB 52 does numerous things.

First, AB 52 establishes "a new category of resources in the California Environmental Quality Act called "tribal cultural resources" ("TCRs") that considers the tribal cultural values *in addition to* the scientific and archaeological values considered when determining and mitigating the impacts of a proposed project. Notably, this newly created category of Tribal cultural resources" expressly includes "non-unique archaeological resource[s]" as a resource that, if identified as a TCR, must be studied to determine if it will be significantly impacted by a proposed project. (PRC § 21074(c).) This is sharp departure from the treatment of "non-unique archaeological resource" that is not considered a TCR, as to which lead agencies need not give any consideration and are not even required to record. (See PRC § 21083.2(h).)

Second, AB 52 recognizes that Tribe's will have considerable expertise concerning their tribal histories, cultural practices, and the cultural resources central to the Tribe. (PRC § 21080.3.1) Third, and critical to this action, AB 52 mandates that *the lead agency for a proposed project must engage in meaningful, and good faith consultation with appropriate tribes to identify TCRs located within a project area, determine their cultural significances, and develop mitigation measures, or project alternatives, to protect any TCRs that may be significantly impacted by a proposed project*. (See PRC §§ 21080.3.1; 21080.3.2; 21082.3; 21084.3 [emphasis added]) The lead agency is responsible for initiating and completing consultation, but the responsible agency has the ongoing obligation to evaluate the EIR's conclusions and exercise its independent judgment, and so the City was not at liberty to simply ignore the comments submitted asserting that the County failed to adequately analyze the TRCs and protect them. (PRC § 21002.1(d) and Guidelines § 15096(a) and (f).)

The consultation requirement is meaningful and significant. Moreover, a lead agency's failure, or refusal, to engage in meaningful tribal consultation has real-world consequences. For example, once a tribe has requested consultation a lead agency cannot release project documents for a proposed project until after the agency has begun the mandatory tribal consultation. (PRC § 21080.3.1(b).) Relatedly, an agency cannot certify an EIR on any project that will have significant impact on an

identified TRC until after the tribal consultation has been appropriately concluded. (PRC § 21082.3(d)(1).) And, importantly, AB 52 provides that the tribal consultation can be considered concluded if: (1) the consulting parties agree to mitigation measures to avoid significant impacts on TCRs; or (2) one party "acting in good faith and after reasonable efforts" determines that achieving an mutual agreement is impossible. (PRC § 21080.3.2(b).)

Even if the City could rely on the consultation conducted by a lead agency, the City could not have reasonably relied on the consultation the County conducted because the City was made fully aware of the flaws in the County's AB 52 consultation process. As noted above, many comments stated that the County failed to complete the AB 52 Consultation process, and some commenters stated that the City should gather input from the Tribe before making any decisions because of the County's failure. (See AR 20143 and 22183.)

As noted, the City was, and continues to be, aware that the Tribe had raised numerous issues concerning the impacts the project approved by the County would have on TCRs. For example, in addition to other facts addressed above, the EIR acknowledges the hydraulic connectivity between the groundwater TCR and DEX-6 (CAR 1193-1194), but concludes that the impact will be less than significant. (CAR 11194-1195.) However, those conclusions are based upon analyses that indirectly assess the potential impact of Project groundwater pumping on the aquifer. The County did not once engage with the Tribe and consult with it regarding the significance the projected pumping from the aquifer may have on the TRC from the Tribal perspective. To be sure, the Tribe raised precisely this issue with the County in a letter dated March 1, 2017. There, the Tribe stated that the DEIR itself showed that the total amount of water that the Project may extract in one year equals 28% of the total aquifer flow, and the Project could extract 62% of the total aquifer flow on any given day. These figures do not include reasonable foreseeable expansion of the Project. (CAR 56262-56267, at 56264.)

As it did with regard to every other issue the Tribe raised, the County simply brushed the impact aside. Thus, in reply to the Tribe's March 1, 2017, letter the County merely stated that the: "EIR covers the proposed Project, which is fully described in the project description of the EIR." The County then asserted that no permit is required to be issued for water extraction, and so there will be *no maximum limit* on the amount of water the Project will extract. In other words, the Project description

does not contain a full description of the Project, as there is no upper limit on groundwater extraction. And, the County asserts that it may not legally impose any restrictions on groundwater extractions by Crystal Geyser, and that any analysis of future expansion would be "speculative." (CAR 56383.)

The County essentially acknowledged that it did not, and could not determine the full scope of the Project's water extraction, but it could nonetheless determine that the limitless extraction of water would not significantly impact the TCRs the Tribe identified. The County's approach defies any logic. There simply is no way to avoid the conclusion that this open-ended extraction will result in a potentially significant impact to the groundwater TCR. This triggers the AB 52 requirement that the County consult regarding the significance in light of the sacred and culturally important nature of groundwater TCR and other TCRs identified, and mitigation measures or alternatives that could be adopted to avoid the impacts. The County failed to do so in any meaningful way.

Moreover, to the extent that the County ever engaged in meaningful consultation – a fact not supported by the record – the County abruptly and improperly terminated the consultation in a manner that directly violated AB 52. The County purported to notify the Tribe that the County was "electing to bring the consultation to completion on September 6, 2017 (CAR 5609-56062.) In the September 6, 2017, letter the County expressly provides its bases the County believed supported concluding the consultation process. Thus, the County notes such things as: the timing and manner of the comments the Tribe submitted; the County's purported efforts to hire an inexperienced and unqualified consultant – who was a member of the team preparing the EIR and thereby had a direct conflict of interest – to act as an ethnographer for the consultation process; the County's efforts to meet face to face with the Tribe – after the Tribe informed the County that such meetings were too difficult to arrange and the County agreed to written exchanges; and incredibly the Tribe's failure to do the County's job and evaluate the project in terms of potential adverse impacts the Project may have on TCRs the Tribe identified to the County. (CAR 56061-56062.)

As a responsible agency, the City was obligated to consider the environmental effects identified in the EIR of those activities that it is required to approve or carry out, and it must independently decide whether to require additional environmental documentation. (PRC § 21002.1(d); Guidelines § 15096(a) and (f).) The City had been informed that the Tribe had challenged the County's approval in court on the

grounds that the AB 52 consultation had not been completed and that the project would have a significant impact on the TCRs identified by the Tribe. (AR 21043, 22182 and 22841.) The City simply ignored these comments.

There is no evidence in the record that the City even consulted with the County regarding its AB 52 Consultation with the Tribe. Indeed, it is clear from the record that the City did not consider any aspect of the project or the EIR in an independent way, nor did it record any of its reasoning or rational in an attempt to support its conclusions.

Had the City bothered to look into the County's AB 52 process, it would have discovered the flaws. The City would have discovered that the County terminated the AB 52 Consultation because it was simply taking too long to suit Crystal Geyser.

While the County's September 6, 2017 letter may hint at the difficulty inherent in the consultation process, it also exposes the County's real reason for concluding the consultation process – that the process was taking too long and to hire an actual and experienced ethnographer to assist with the evaluation of the impacts would take too long. (CAR 56061)

The County's letter then claims that AB 52 did not amend these provisions of state law. (*Id.*). What the County fails to acknowledge, is that as discussed above, AB 52 specifically provides that once consultation begins a lead agency cannot certify an EIR until consultation has been *properly* concluded. (PRC § 21082.3(d)(1).) And, AB 52 specifically does not provide that the fact that consultation is taking time is grounds for concluding the consultation process. (PRC § 21080.3.2.) The County's September 6, 2017, letter also fails to acknowledge that Tribe requested the engagement of an ethnographer as early as August 2016 and that it was the County that dragged that process out creating the delay that the County cites as support for its premature termination of an incomplete consultation process. (CAR 56101-56102.)

Both, the manner in which the County conducted the consultation mandated by AB 52 and manner in which the County terminated that consultation violated CEQA. The County did not consult in good -faith with any eye toward analyzing and addressing the impacts the Project would have on the TCRs the Tribe identified and it terminated the consultation prematurely and based on insufficient

grounds. Consequently, the EIR must be set aside and the County must reengage in consultation with the Tribe in a manner that satisfies the letter and the intent of AB 52.

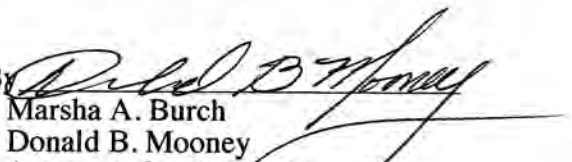
Based on these circumstances, the City, as a responsible agency, had no substantial evidence to support its *independent* conclusion that the EIR's analysis and conclusions regarding the TCRs was sufficient. This was an abuse of discretion, and compounded the County's insufficient and dismissive approach to the AB 52 Consultation with the Tribe for the Bottling Facility project.

V. CONCLUSION

For three reasons, all issues subject to *de novo* review by this Court, the City erred in approving the IWDP. The City overlooked its obligation as a responsible agency to exercise its independent judgment, make CEQA findings, and adopt the mitigation measures applicable to the portions of the project it was approving. The City added hazardous constituents to the IWDP's allowed waste streams that had never been analyzed in the EIR, then failed to identify a single fact to support its conclusion that the additions were insignificant. And finally, the City erred in relying on the County's flawed AB 52 Consultation, and ignoring comments requesting that it make an attempt to come to an independent conclusion regarding the EIR's analysis of TCRs. The City simply failed to live up to any of its obligations as a CEQA responsible agency. For the foregoing reasons, Petitioners respectfully request that the Court issue a writ of mandate directing the City to vacate its approval of the IWDP.

DATED: March 29, 2019

LAW OFFICES OF DONALD B. MOONEY

By 

Marsha A. Burch
Donald B. Mooney
Attorneys for Petitioners
We Advocate Thorough Environmental Review
and Winnemem Wintu Tribe

PROOF OF SERVICE

I am employed in the County of Yolo; my business address is 417 Mace Blvd, Suite J-334, Davis, California; I am over the age of 18 years and not a party to the foregoing action. On March 29, 2019, I served a true and correct copy of

PETITIONERS' OPENING BRIEF

___(by mail) on all parties in said action listed below, in accordance with Code of Civil Procedure §1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a United States mailbox in the City of Davis, California.

__X__(by overnight delivery service) via Federal Express to the person at the address set forth below:

___ (by personal delivery) by personally delivering a true copy thereof to the person and at the address set forth below:

___ (by facsimile transmission) to the person at the address and phone number set forth below:

John S. Kenny
Kenny & Norine
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Redding, CA 96001

Representing Respondents

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Churchell White LLP
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Sacramento, CA 95814

Representing Real Parties in Interest

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 29, 2019, at Davis, California.

Donald B. Mooney