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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

PIT RIVER TRIBE, Plaintiff and Appellant, v. MILFORD DONALDSON et al., Defendants and Respondents.	C051902 (Super. Ct. No. 40149)

The Pit River Tribe, California (the Tribe), a federally recognized Indian tribe whose territorial boundaries include areas of Lassen and Shasta Counties, appeals from a judgment of dismissal after the trial court sustained, without leave to amend, the demurrer of defendants Milford Donaldson, Larry Myers, and state agencies Native American Heritage Commission and Office of Historic Preservation, to the Tribe's amended complaint for injunctive relief and damages. We shall affirm.

BACKGROUND

A. Historical Facts and Allegations

This case arises from the construction of the McArthur Rehabilitation project, a construction project undertaken by the California Department of Transportation (CalTrans) to rehabilitate the roadway along a 10.5-mile segment of State Route 299 in Shasta and Lassen Counties.

As the lead agency responsible for the project, CalTrans prepared an extensive initial study pursuant to the California Environmental Quality Act (CEQA) (Pub. Res. Code, § 21000 et seq.).[1]

Included in this study was an "Historic Property Survey Report" (survey report) examining the effect of the project, including a review of archaeological sites within the project area. The report identified two sites, designated CA-LAS-2242 and CA-LAS-2243 (hereafter "Site 2242" and "Site 2243"), as having prehistoric archeological significance and lying within the project's area of potential effects (APE). These sites contained "surface and subsurface assemblage of flaked and ground stone tools and debris, with a small amount of faunal bone and shell." In addition, a small fragment of human bone was found along with other disbursed materials at Site 2243. However, the survey report noted that neither site was within

[1] Recitations of fact not appearing in the complaint are derived from CEQA documents, of which the trial court took judicial notice in ruling on the demurrer.

the area of direct impact (ADI) “and may, therefore, be avoided by the proposed construction.”

Consistent with the survey report, the initial study confirmed there were two historic archeological sites in the APE that potentially qualified for inclusion in the National Register of Historic Places, but that neither site was in the ADI and therefore would not be adversely affected by the project. The study recommended that environmentally sensitive fencing be placed in those areas and that during construction they be monitored by an archaeologist and a representative from the Native American community.

On May 24, 2001, CalTrans issued a categorical exclusion for the project under CEQA and the federal National Environmental Policy Act of 1969 (43 U.S.C. § 4321). The lead federal agency, the Federal Highway Administration (FHWA) issued a categorical exclusion for the project, exempting it from the preparation of a federal Environmental Impact Statement (EIS). The categorical exclusion stated, in part, that “[t]his project does not involve significant impacts on properties protected by . . . the National Historic Preservation Act.”

On July 6, 2001, CalTrans issued a negative declaration, concluding that the project would not have a significant effect on the environment.

On July 10, 2001, CalTrans sent to the Shasta County clerk a Notice of Determination stating that the project would not have a significant effect on the environment.

According to the allegations of the amended complaint,[2] in July 2004 (all further unspecified calendar references are to that year), three years into the project, CalTrans began excavating in the sensitive area without notifying the Tribe or having an archeologist or monitor present. On July 30, tribal representatives appeared on the site and received permission to look through the soil. They found "obsidian flakes and bone fragments, mortars, hand stones, [and] project points." The next day, a skull fragment was found. Thereafter, CalTrans allowed tribal monitors to go through the excavated soil and retrieve the remains.

On August 11, CalTrans notified the Native American Heritage Commission (NAHC) of the findings of human remains. Thereafter CalTrans and Tribe representatives had a series of discussions about the subject, without reaching any consensus.

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[2] There is considerable confusion as to the proper designation of the complaint that was dismissed by the judgment. The parties refer to it as the "second amended complaint" or "SAC," but there is no pleading with such a title in the record. The last formulation of the complaint in this case is captioned "First Amended Complaint" (FAC). Defendants assert that after they filed their initial demurrers, the Tribe filed an amendment to the FAC correcting the name of the CalTrans director, and that the trial court, after accepting the amendment, renamed both documents the Second Amended Complaint. However, the trial court's order of dismissal refers to this set of pleadings as "the *third* amended complaint." (Italics added.) The parties consistently cite to the FAC in their briefs and implicitly concede that its substantive allegations control the outcome of the case. For simplicity, we shall refer to the last rendition of the complaint against defendants, including all amendments with name substitutions, as "the amended complaint."

On August 22, the Tribe "submitted an administrative review and request for intervention and repatriation" of tribal items found within the project, to the NAHC. The appeal was denied on August 30.

On August 31, the NAHC notified the Tribe that it would not involve itself in the dispute any further, on the advice of the Attorney General. In the meantime, CalTrans resumed construction in the area of Sites 2242 and 2243 without notifying the Tribe. Although the complaint is less than clear on this point, CalTrans apparently moved soil containing the archeological discoveries into one or more "stockpiles" and transferred custody of at least one stockpile to adjoining private property owners J.F. Shea and Patrick Oilar. On September 3, 137 bone fragments and two animal teeth were delivered to the Lassen County coroner.

On September 17, Shea directed Oilar to deny the Tribe access to the stockpile. On October 27, CalTrans dug along and within the environmentally sensitive fence line with hand shovels and seeded a stockpile located on state property. On January 19, 2005, Oilar began bulldozing a stockpile, which was on his property.

B. Procedural History

The Tribe's original complaint named CalTrans as the lone defendant. The crux of its allegations was that, in approving the project and disposing of the stockpiles, CalTrans had violated the federal Native American Graves Protection and

Repatriation Act (NAGPRA) (25 U.S.C. § 3001 et seq.) and the Native American Historical, Cultural and Sacred Sites provisions of the Public Resource Code (Pub. Res. Code, § 5097.9 et seq.).[3]

After pretrial motions were filed, the trial court entered an order dismissing the case on grounds, inter alia, that it lacked jurisdiction.

The court later granted the Tribe's motion for reconsideration, vacated the dismissal and permitted the Tribe leave to amend the complaint.

The Tribe then filed its First Amended Complaint for injunctive relief and damages. In addition to naming CalTrans and its director as defendants, the amended complaint named the State Historic Preservation Office (SHPO), its executive secretary Milford Donaldson, the NAHC and its executive secretary Larry Myers, as well as private property owners J.F. Shea and Patrick Oilar, as new defendants.[4]

The amended complaint features 11 causes of action. The first six generally allege that defendant "state agencies" have failed to comply with CEQA and the California Native American Graves Protection and Repatriation Act of 2001 (CANAGPRA) (Health & Saf. Code, § 8010 et seq.). The seventh cause of

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[3] Undesignated statutory references are to the Public Resources Code.

[4] Although Shea and Oilar were named as defendants, there is no indication in the record that they ever appeared in this action. They are not mentioned in the Tribe's brief.

action alleges a violation of the public trust doctrine. Causes of action eight through ten seek to abate a public nuisance and damages caused by the project's negligent release of contaminants into the groundwater and subsoil.[5]

The prayer for relief is breathtaking in scope, and we will not describe it in detail; however, the main remedies include judicial declarations that defendants violated CEQA and CANAGPRA, as well as injunctive relief preventing further violations.

Defendants CalTrans and its director (CalTrans defendants) and defendants herein filed independent demurrers to the amended complaint.

As a consequence, the trial court issued two separate demurrer rulings. The court sustained the demurrer of the CalTrans defendants *with* leave to amend. On the other hand, the demurrer of the present state defendants was sustained without leave to amend.

Due to the disparate rulings, the Tribe's appeals against the two sets of defendants traveled along two separate procedural tracks. The demurrer interposed by the present defendants produced a judgment of dismissal, from which the Tribe filed a timely notice of appeal on February 6, 2006.

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[5] An eleventh cause of action for violation of the Tribe's federal civil rights (42 U.S.C. § 1983) was dismissed voluntarily before judgment, and shall be omitted from any further discussion.

On the other hand, the trial court's ruling sustaining the demurrer of the CalTrans defendants *with* leave resulted in another round of pleadings, another ruling in their favor and a *second* judgment, which was entered on December 21, 2005.

Because the Tribe failed to take an appeal from the December 21, 2005 judgment and the February 6, 2006 notice of appeal was taken *only from the first judgment* (in favor of the non-CalTrans defendants), the CalTrans defendants moved to dismiss the purported appeal from the separate judgment in their favor. We granted CalTrans's motion and dismissed the appeal on April 27, 2006. The Tribe's motion to recall the remittitur was denied. Accordingly, the trial court's judgment in favor of the CalTrans defendants is now final.

DISCUSSION

I. Standard of Review

Since this is an appeal following an order sustaining a demurrer, we accept as true all well-pleaded material allegations of the complaint. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, p. 8, fn. 3; *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 7.) "A demurrer admits the truth of all material factual allegations, and we are required to accept them as such, together with those matters subject to judicial notice." (*Wise v. Pacific Gas & Electric Co*. (1999) 77 Cal.App.4th 287, 291.) Further, "where an allegation is contrary to law or to a fact of which a court may take judicial notice, it is to be treated as a

nullity." (*Dale v. City of Mountain View* (1976) 55 Cal.App.3d 101, 105.)

Although we exercise our independent judgment in reviewing a demurrer to determine whether the allegations of the complaint state a cause of action (*Schmidt v. Foundation Health* (1995) 35 Cal.App.4th 1702, 1706), we must affirm the judgment if the trial court's decision to sustain the demurrer was correct on any theory (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742).

II. CEQA Causes of Action

Many of the Tribe's causes of action (specifically the first, second, third, fourth and fifth) revolve around alleged CEQA violations. These counts allege deficiencies in the process by which the project was approved. The Tribe claims that defendant "state administrative bodies"[6] failed to comply with procedures prescribed by CEQA; and that their actions in "certifying the [Environmental Impact Report (EIR)][7] and

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[6] A central conceptual problem with the amended complaint is that it does not differentiate among the defendants. Although each defendant is a separate state agency or individual administrator, the amended complaint lumps all of them together and targets them as a group, without elaboration or explanation.

[7] Since CalTrans filed a negative declaration for the project, no EIR was ever prepared. The amended complaint asserts that defendants adopted an EIS in place of an EIR, and challenges deficiencies in what it consistently refers to as the "EIR." Under the National Environmental Policy Act, federal agencies must undertake an environmental review process similar to CEQA, which *may* require the preparation of an EIS. (See 2 Robie et al., Cal. Civil Practice--Environmental Litigation (West Group 2002) § 8:3, pp. 8-9 (hereafter Robie).) However, in this case, the responsible federal agency, FHWA, filed a categorical

approving the [p]roject constitute[d] an abuse of discretion . . . , [were unsupported] by substantial evidence . . . and fail[ed] to comply with CEQA and CEQA [g]uidelines."

The Tribe's causes of action based on violations of CEQA are fatally defective for at least three reasons:

First, the amended complaint alleges that CalTrans filed its negative declaration for the project with the county clerk on *July 10, 2001*. Section 21167 provides: "An action or proceeding to attack, review, set aside, void, or annul the following acts or decisions of a public agency on the grounds of noncompliance with this division shall be commenced as follows: [¶] . . . [¶] (b) An action or proceeding alleging that a public agency has improperly determined whether a project may have a significant effect on the environment shall be commenced within 30 days from the date of the filing of the notice . . . ." A notice of determination can be a notice that a project has been approved on the basis of a negative declaration. (See 2 Robie, Cal. Civil Practice--Environmental Litigation, *supra*, § 8:41, p. 69, citing the Guidelines for the Implementation of the California Environmental Quality Act, Cal. Code Regs., tit. 14, §§ 15000 et seq., 15075, 15094 (hereafter

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exclusion, stating that CalTrans's proposed actions do not have a significant effect on the environment and are therefore *excluded* from the requirement of an EIS. Hence, it is not clear what environmental document the Tribe is challenging. We presume it is the negative declaration.

CEQA Guidelines).) Hence, subdivision (b) is applicable to the Tribe's suit.

The first date on which the Tribe filed a complaint alleging CEQA violations was *April 1, 2005*, almost four years after CalTrans filed its notice of determination. Hence, the statute of limitations had long run on any cause of action predicated upon a challenge to a public agency's decision to proceed with the project based on a negative declaration. (*Lee v. Lost Hills Water Dist*. (1978) 78 Cal.App.3d 630, 633-634.) The trial court correctly ruled that the Tribe's CEQA challenges were untimely.

Second, the Tribe failed to exhaust its administrative remedies. "Parties are required to exhaust their administrative remedies before bringing legal challenges under CEQA. [Citations & fn. omitted.] The reason for this rule is that the decisionmaking body '"is entitled to learn the contentions of interested parties before litigation is instituted. If [plaintiffs] have previously sought administrative relief . . . the [administrative body] will have had its opportunity to act and to render litigation unnecessary, if it had chosen to do so."'" (*Corona-Norco Unified School Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 997.) The requirement of exhaustion is incorporated into section 21177.[8]

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[8] Section 21177 provides, in relevant part: "(a) No action or proceeding may be brought pursuant to Section 21167 unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing by any

The Tribe fails to allege that it lodged its objections within the comment period or objected to approval of the project in a proper manner before commencing this action. The Tribe's general allegation that it "ha[s] exhausted [its] administrative remedies by submissions to and appearances before the defendant agencies," is a conclusion of law, which may be disregarded, especially in light of factual allegations elsewhere in the same pleading that the Tribe's first CEQA objections were not made until years after the project was commenced.

The Tribe suggests that changes to the project required the issuance of a supplemental negative declaration or a "new environmental impact report." (Pub. Res. Code, § 21166; CEQA Guidelines, § 15162.) However, the amended complaint targets only the process by which the project was originally approved. No cause of action is based on changed conditions requiring further environmental review.

Moreover, assuming the Tribe is correct that the statute of limitations for attacking the decision not to undertake further environmental review was 180 days from the date they "knew or [should] have known" of the project changes, the statute has

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person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination. [¶] (b) No person shall maintain an action or proceeding unless that person objected to the approval of the project orally or in writing during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination."

run. (See CEQA Guidelines, § 15112(c)(5); 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2006) § 23.25, p. 1154 (hereafter Kostka & Zischke).) By the Tribe's admission, it was on *actual* notice of the changes by August 27, 2004. The first amended complaint adding defendants to the lawsuit was filed on April 1, 2005.

Third, whatever the merit of the Tribe's CEQA objections, none of them may be raised against defendants SHPO, Donaldson, NAHC and Myers, because no present state defendant was the lead agency for the project.

"'Where a project is to be carried out or approved by more than one public agency, one public agency shall be responsible for preparing an EIR or negative declaration for the project. This agency shall be called the lead agency.'" (*City of Redding v. Shasta County Local Agency Formation Com.* (1989) 209 Cal.App.3d 1169, 1174 (*City of Redding*), quoting CEQA Guidelines, § 15050(a); see also Pub. Res. Code, § 21067.) Under CEQA, it is the lead agency that determines whether an EIR will be required for a given project. (CEQA Guidelines, §§ 15002(k)(1), 15060, 15061.) If the lead agency decides that an EIR is not required, it prepares a negative declaration, which is then subject to challenge in the courts. (*City of Sacramento v. State Water Resources Control Bd.* (1992) 2 Cal.App.4th 960, 970; § 21080.1.)

It is not disputed that CalTrans was the lead agency for this project. However, CalTrans is no longer a defendant.

Consequently, all of the Tribe's CEQA challenges are directed to state actors who do not bear responsibility for assessment of the project's environmental effects. (See *Friends of Cuyamaca Valley v. Lake Cuyamaca Recreation & Park Dist.* (1994) 28 Cal.App.4th 419, 429; *City of Redding, supra,* 209 Cal.App.3d at pp. 1180-1181.)[9] For this reason alone, all of the Tribe's CEQA causes of action are doomed to failure.

III. The CANAGPRA

The Tribe's sixth cause of action purported to state a claim under the CANAGPRA. The Tribe alleges that defendant "state agencies" acquired possession of cultural and human remains belonging to the Tribe in 2004; that the Tribe and defendants "failed to agree" on the disposition of these remains; that the Tribe "appealed to the [NAHC] to intervene and order repatriation of the remains," but that NAHC failed to get involved.

The CANAGPRA was passed to create a state repatriation policy consistent with Congress's enactment of the federal NAGPRA.[10] (Health & Saf. Code, § 8011, subds. (b), (e).)

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[9] Nor was any defendant a "responsible agency," since there is no allegation that any of them had discretionary authority over carrying out or approving the project. (See 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, *supra*, § 3.17, p. 115; Pub. Res. Code, § 21069; CEQA Guidelines, § 15381.)

[10] "Congress enacted NAGPRA in 1990 to achieve two principle objectives: to protect Native American human remains, funerary objects, sacred objects and objects of cultural patrimony presently on [f]ederal or tribal lands; and to repatriate Native

However, the CANAGPRA expressly vests in the Repatriation Oversight Commission (ROC) the power to intervene on behalf of tribes for repatriation of human and cultural remains. (Health & Saf. Code, §§ 8012, subd. (c), 8025.)

A Native American tribe claiming cultural affiliation and requesting the return of items in the possession and control of a state agency must (1) file a written request for the remains with the ROC and with the agency believed to have possession or control; and (2) provide evidence that the items are cultural items and culturally affiliated with the tribe making the claim. (Health & Saf. Code, § 8014.)

Upon receiving a request for repatriation, the ROC shall forward a copy of the request to the respective agency and publish it on its Web site for 30 days. If there is no objection to the request within a prescribed period, the agency "shall repatriate the requested item to the requesting party." (Health & Saf. Code, § 8015, subd. (a).)

If the agency objects to the request and the parties are unable to resolve their differences, the CANAGPRA provides for a

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American human remains, associated funerary objects, sacred objects, and objects of cultural patrimony currently held or controlled by [f]ederal agencies and museums. [Citation.] The legislation and subsequent regulations (43 C.F.R. §§ 10.1 to 10.17 [(1995)]), provide a methodology for identifying objects; determining the rights of lineal descendants, Indian tribes and Native Hawaiian organizations; and retrieving and repatriating that property to Native American owners." (*United States v. Corrow* (10th Cir. 1997) 119 F.3d 796, 799-800.)

mediation process under the auspices of the ROC. (Health & Saf. Code, § 8016, subds. (a)-(h).) If the mediation fails to result in an agreement, "the dispute shall be resolved by the [ROC] [and] [t]he determination of the [ROC] shall be deemed to constitute a final administrative remedy." (§ 8016, subd. (j).) An aggrieved party may seek relief from the court by way of petition for administrative mandate. (*Ibid*.)

The amended complaint does not allege compliance with any of these procedures. The Tribe fails to allege that it filed a written request with the state agency in possession of the cultural remains (presumably CalTrans) or with the ROC. All it alleges is that the Tribe "appealed to" the NAHC to intervene and "order repatriation," and that the NAHC failed to do so.

The Tribe continually refers to the Legislature's laudable goals in creating the CANAGPRA, but expressions of legislative intent are of no assistance where the statutory scheme is clear and precise about what procedures are required to obtain repatriation. (*Blue v. Bontá* (2002) 99 Cal.App.4th 980, 988 ["'If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature'"].)

We find no support for the Tribe's claim that pursuing its administrative remedy is voluntary rather than mandatory. Health and Safety Code section 8016, subdivision (j) dictates the opposite conclusion: "Any party to the dispute seeking a review of the determination of the [ROC] is entitled to file an

action in the superior court seeking an independent judgment on the record as to whether the [ROC's] decision is supported by a preponderance of the evidence." This section shows that pursuit of the administrative remedy is not a voluntary option, but an essential prerequisite to relief from the court.

Likewise, the Tribe's discussion of federal NAGPRA statutes has no bearing on whether it has stated a cause of action under the CANAGPRA. The CANAGPRA has its own provisions governing the right to relief. Because the allegations do not show that the Tribe complied with any of the repatriation procedures specified in the CANAGPRA, the trial court properly sustained the demurrer to the sixth cause of action.

In its brief and at oral argument, the Tribe asserted that pursuing relief through ROC was not required because ROC was an "inoperable" agency. Although defendant Myers was appointed by the Governor as Executive Secretary of the ROC, it is true the Legislature had not yet allocated funds to hire staff as of the filing of the amended complaint. However, the Tribe has not provided a satisfactory explanation for its failure to make a written request for repatriation with the state agency in possession of the remains, i.e., CalTrans. (Health & Saf. Code, § 8014.) Moreover, the Tribe never raised its futility argument in opposition to demurrer, contending instead that pursuing administrative relief through the ROC was an "optional" alternative to filing suit in superior court. Arguments not made before the trial court are forfeited and will not be

considered for the first time on appeal. (See 1 Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2004) ¶ 8:229, p. 8-135.)

IV. Public Trust Doctrine

The Tribe's seventh cause of action alleges that the defendant state actors, by transferring control of the tribal remains to private parties, breached their duties under the public trust doctrine.

"Under that doctrine, the state holds a trust interest on behalf of the public in tidelands [citation] and in lands between high and low water in nontidal navigable lakes." (*City of Los Angeles v. Venice Peninsula Properties* (1982) 31 Cal.3d 288, 291.) "'By the law of nature these things are common to mankind--the air, running water, the sea and consequently the shores of the sea.' (Institutes of Justinian 2.1.1.) From this origin in Roman law, the English common law evolved the concept of the public trust, under which the sovereign owns 'all of its navigable waterways and the lands lying beneath them "as trustee of a public trust for the benefit of the people."' [Citation.] The State of California acquired title as trustee to such lands and waterways upon its admission to the union . . . ." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 433-434, fn. omitted.) Because there is no allegation that the remains in question were located on navigable waters or in tidelands, the trial court properly held that the amended

complaint failed to state a claim for breach of the public trust.

Even if such a claim could lie, the Tribe has again sued the wrong parties. There are no allegations establishing that the NAHC, SHPO or its executive officers have jurisdiction over public trust lands. On the contrary, the Tribe alleges that *CalTrans* turned over a stockpile located on state property to private individuals. Defendants are not surrogates for CalTrans.

V. Nuisance, Negligence and Injunctive Relief

The Tribe's eighth cause of action is described as one for nuisance. The Tribe alleges that unnamed defendants "occupied, used, and maintained their premises in such a manner that gasoline and other petroleum hydrocarbons have leaked from the heavy machinery and other equipment . . . and have migrated into and contaminated the soil and the groundwater thereunder," causing interference with the Tribe's use of the property. The ninth cause of action contains similar allegations of the release of contaminants under the heading "negligence." The tenth cause of action prays for injunctive relief to abate the previously described "nuisance."

None of these allegations can state a cause of action against the present defendants. The amended complaint's factual recitations make clear that the only state agency involved in moving or relocating soil through "heavy machinery and other equipment" was CalTrans.

The eighth, ninth and tenth causes of action of the amended complaint fail to state a viable claim for nuisance or negligence against the NAHC, SHPO or their executive officers.

VI. NAHCSS

Finally, we address the Tribe's argument that the amended complaint states a claim for relief under chapter 1.75 of the Public Resources Code (§ 5097.9 et seq.) entitled, "Native American Historical, Cultural, and Sacred Sites" (NAHCSS).[11]

Section 5097.9 prohibits any public agency or other party from causing "severe or irreparable damage to any 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." It goes on to state that "[t]he provisions of [chapter 1.75] shall be enforced by the [NAHC], pursuant to Sections 5097.94 and 5097.97."

Section 5097.94 enumerates the "powers and duties" of the NAHC. Most pertinent here is subdivision (g), which authorizes the NAHC to bring an action to prevent severe and irreparable damage to ceremonial sites or sacred shrines located on public property.

[11] For convenience, we adopt the acronym used by the parties, and shall refer to the statutes within chapter 1.75 as the NAHCSS statutes.

As stated in *Native American Heritage Com. v. Board of Trustees* (1996) 51 Cal.App.4th 675 (*Native American Heritage Com.*): "The NAHC is also authorized to investigate complaints regarding a proposed action by a public agency that may cause severe or irreparable damage to a Native American sacred place. Section 5097.97 provides: 'In the event that any Native American organization, tribe, group, or individual advises the [NAHC] that a proposed action by a public agency may cause severe or irreparable damage to a Native American [religious site or shrine] located on public property, or may bar appropriate access thereto by Native Americans, the [NAHC] shall conduct an investigation as to the effect of the proposed action. Where the [NAHC] finds, after a public hearing, that the proposed action would result in such damage or interference, [it] may recommend mitigation measures for consideration by the public agency proposing to take such action. If the public agency fails to accept the mitigation measures, and if the [NAHC] finds that the proposed action would do severe and irreparable damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, the [NAHC] may ask the Attorney General to take appropriate legal action pursuant to subdivision (g) of Section 5097.94.'" (*Native American Heritage Com.*, at pp. 681-682.)

None of the Tribe's causes of action in the amended complaint purport to state a claim under the NAHCSS. In fact,

nowhere in the amended complaint does the Tribe mention *any statute* within NAHCSS. The only statutes the Tribe seeks to enforce are those found in the CANAGPRA and CEQA. Thus, defendants' demurrer to the amended complaint was properly sustained on this basis alone.

Even a charitable interpretation of the Tribe's preliminary factual allegations fails to disclose a viable claim. The averments state that the Tribe complained to the NAHC about CalTrans's actions; that its appeal was denied; and that the NAHC refused to involve itself any further. However, the NAHCSS statutes do not confer a private right of action upon Native American tribes. Only the Attorney General may commence an abatement action on behalf of the public.[12]

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[12] Assuming the NAHC's decision to deny the Tribe's "appeal" was made after conducting an administrative hearing, the Tribe's remedy was to file a timely petition for administrative mandate pursuant to Code of Civil Procedure section 1094.5, which is the "customary vehicle for judicial review of a final adjudicatory decision of an administrative agency." (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1150.) Failure to do so rendered the NAHC's decision final and binding. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 69-70.) On the other hand, if a hearing was required but not held, the Tribe's remedy was a petition for ordinary mandate, to compel the agency to hold the required hearing. (*Mobley v. Los Angeles Unified School Dist.* (2001) 90 Cal.App.4th 1221, 1245.) Neither remedy was pursued here.

At oral argument, counsel for the Tribe asserted that the first cause of action constituted a petition for writ of mandate to force NAHC to exercise its duties under NAHCSS, and that she specifically cited section 5097. However, the "petition for writ of mandate" alleged in the first cause of action seeks to remedy violations of CEQA and CANAGPRA, not NAHCSS. And, as

The Tribe relies on *Native American Heritage Com.*, *supra*, 51 Cal.App.4th 765 and *People v. Van Horn* (1990) 218 Cal.App.3d 1378 (*Van Horn*) to support its contention that a private cause of action exists under NAHCSS. Neither case so holds.

In *Native American Heritage Com.*, the NAHC and private individuals brought an action to halt construction of a project allegedly impacting a Native American religious site on property owned by a state university. (*Native American Heritage Com.*, *supra*, 51 Cal.App.4th at p. 677.) The trial court granted the university's request for a preliminary injunction declaring the NAHCSS statutes were *unconstitutional*. (*Id.* at pp. 677-678.) The appellate court held only that the university, a political subdivision of the state, lacked standing to bring a constitutional challenge to a state statute in a dispute with another state agency. (*Id*. at pp. 683-686.)

Van Horn was an action brought *jointly by the NAHC and Attorney General* against an archaeologist to recover possession of Native American artifacts taken from a gravesite in violation of section 5097.99. (*Van Horn*, *supra*, 218 Cal.App.3d at p. 1384.) The case supports our conclusion that only the NAHC, in conjunction with the Attorney General, may commence an action for NACHSS violations.

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previously indicated, the amended complaint contains no citation to section 5097 or any other NAHCSS statute.

Nor can the NAHC incur liability for failing to request intervention by the Attorney General. While section 5097.97 states that the NAHC "shall" conduct an investigation and a public hearing, it also provides that if the NAHC finds that a public agency's action poses a danger of "severe and irreparable damage" to ceremonial sites or sacred shrines, it "*may*" recommend mitigation measures to the public agency. If the agency fails to accept the mitigation measures, the NAHC then "*may* ask the Attorney General to take appropriate legal action pursuant to subdivision (g) of Section 5097.94." (Italics added.)

"It is a well-settled principle of statutory construction that the word 'may' is ordinarily construed as permissive, whereas 'shall' is ordinarily construed as mandatory, particularly when both terms are used in the same statute." (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443.) Here, the NAHC is under no mandatory duty to ask the Attorney General to commence an action. Instead, it retains *discretion* to recommend mitigation measures and to ask the Attorney General to commence an enforcement action. Under California law, public entities and officials are statutorily immune from liability for discretionary acts. (Gov. Code, §§ 815.2, 820.2; *Turner v. Martire* (2000) 82 Cal.App.4th 1042, 1053.)

Since defendants are not amenable to suit under the NAHCSS statutes, the complaint is not curable by amendment and leave to

amend was properly denied. (*Trinkle v. California State Lottery* (1999) 71 Cal.App.4th 1198, 1205.)

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal. (Cal. Rules of Court, rule 8.276(a)(2).)

BUTZ, J.

We concur:

SCOTLAND, P. J.

DAVIS, J.