

Response to Comment Letter T1

Native American Heritage Commission

July 17, 2017

T1-1

The City of Escondido (City) acknowledges the comment as an introduction to comments that follow. This comment is included in the Final Environmental Impact Report (Final EIR) for review and consideration by the decision makers prior to a final decision on the Project. No further response is required because the comment does not raise an environmental issue.

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The City conducted formal consultation only with those Native American entities that replied to the letters Brian F. Smith and Associates submitted to local listed Native American representatives. The City used the replies, or lack thereof, to respond to the following interested and responsive Native American groups: the San Luis Rey Band of Mission Indians and the San Pasqual Band of Mission Indians. Consultation with the San Luis Rey Band of Mission Indians took place at the City on June 15 and August 9, 2017. Subsequently, consultation with the San Pasqual Band of Mission Indians took place at the City on August 16, 2017.

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Mitigation Measure M-CR-1 will be revised to state that either the archaeologist or Native American

Comment Letter T1

STATE OF CALIFORNIA
 NATIVE AMERICAN HERITAGE COMMISSION
 Environmental and Cultural Department
 1500 Harbor Blvd., Suite 100
 West Sacramento, CA 95991
 Phone (916) 373-3710

Edmund G. Brown Jr., Governor

July 17, 2017



Bill Martin/ Kristin Blackson
 City of Escondido
 201 North Broadway
 Escondido, CA 92025

sent via e-mail: kblackson@escondido.org

Re: SCH# 2017011060, The Villages – Escondido Country Club; ENV 16-0010; SUB 16-0009 Project, City of Escondido; San Diego County, California

Dear Mr. Martin/ Ms. Blackson:

The Native American Heritage Commission (NAHC) has reviewed the Draft Environmental Impact Report prepared for the project referenced above. The review included the Summary and Project Description, the Summary of Significant Effects, the Significant Environmental Effects of the Proposed Project, section 2.3 Cultural Resources and Appendix 2.3-1, Cultural Resources Report prepared by Dudek and Brian F. Smith & Associates, Inc. for the City of Escondido. We have the following concerns:

1. While there is reference to government-to-government consultation by the lead agency with one Native American tribe traditionally and culturally affiliated to the project area after being contacted by the consultant, there is no documentation of consultation outreach by the lead agency as specified in AB-52. Contact by consultants during the Cultural Resources Assessments is not formal consultation.
2. Mitigation Measure CR-1 (5) does not allow for the Tribal Monitor to stop work if resources are found.
3. Mitigation Measure CR-1 (7) does not take Tribal concerns with disposition of "cultural material" into consideration, and allows only for curation. *Mitigation language for archaeological resources is not always appropriate for or similar to measures specifically for handling Tribal Cultural Resources.*
4. Although there is discussion of Tribal Cultural Resources, there are no mitigation measures specifically addressing them separately from Archaeology. *Mitigation language for archaeological resources is not always appropriate for or similar to measures specifically for handling Tribal Cultural Resources.* For simple mitigation measures, please refer to the California Natural Resources Agency (2016) "Final Text for tribal cultural resources update to Appendix G: Environmental Checklist Form," <http://resources.ca.gov/ceqa/docs/ab52/Clean-final/AB-52-App-G-text-Submitted.pdf>

The California Environmental Quality Act (CEQA)¹, specifically Public Resources Code section 21084.1, states that a project that may cause a substantial adverse change in the significance of a historical resource is a project that may have a significant effect on the environment.² If there is substantial evidence, in light of the whole record before a lead agency, that a project may have a significant effect on the environment, an environmental impact report (EIR) shall be prepared.³ In order to determine whether a project will cause a substantial adverse change in the significance of a historical resource, a lead agency will need to determine whether there are historical resources with the area of project effect (APE).

CEQA was amended in 2014 by Assembly Bill 52. (AB 52).⁴ AB 52 applies to any project for which a notice of preparation or a notice of negative declaration or mitigated negative declaration is filed on or after July 1, 2015. AB 52 created a separate category for "tribal cultural resources", that now includes "a project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment."⁵ Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource.⁶ Your project may also be subject to Senate Bill 18 (SB 18) (Burton, Chapter 905, Statutes of 2004), Government Code 65352.3, if it also involves the adoption of or amendment to a general plan or a specific plan, or the designation or proposed designation of open space. Both SB 18 and

¹ Pub. Resources Code § 21000 et seq.
² Pub. Resources Code § 21084.1; Cal. Code Regs., tit. 14, § 15064.5 (b); CEQA Guidelines Section 15064.5 (b)
³ Pub. Resources Code § 21080 (g); Cal. Code Regs., tit. 14, § 15064 subd. (a)(1); CEQA Guidelines § 15064 (a)(1)
⁴ Government Code 65352.3
⁵ Pub. Resources Code § 21074
⁶ Pub. Resources Code § 21084.2
⁷ Pub. Resources Code § 21084.3 (a)

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AB 52 have tribal consultation requirements. Additionally, if your project is also subject to the federal National Environmental Policy Act (42 U.S.C. § 4321 et seq.) (NEPA), the tribal consultation requirements of Section 106 of the National Historic Preservation Act of 1966⁴ may also apply.

Consult your legal counsel about compliance with AB 52 and SB 18 as well as compliance with any other applicable laws.

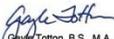
Agencies should be aware that AB 52 does not preclude agencies from initiating tribal consultation with tribes that are traditionally and culturally affiliated with their jurisdictions before the timeframes provided in AB 52. For that reason, we urge you to continue to request Native American Tribal Consultation Lists and Sacred Lands File searches from the NAHC. The request forms can be found online at: <http://nahc.ca.gov/resources/forms/>. Additional information regarding AB 52 can be found online at http://nahc.ca.gov/wp-content/uploads/2015/10/AB52TribalConsultation_CalEPA.pdf, entitled "Tribal Consultation Under AB 52: Requirements and Best Practices".

The NAHC recommends lead agencies consult with all California Native American tribes that are traditionally and culturally affiliated with the geographic area of your proposed project as early as possible in order to avoid inadvertent discoveries of Native American human remains and best protect tribal cultural resources.

A brief summary of portions of AB 52 and SB 18 as well as the NAHC's recommendations for conducting cultural resources assessments is also attached.

Please contact me at gayle.totton@nahc.ca.gov or call (916) 373-3710 if you have any questions.

Sincerely,


Gayle Totton, B.S., M.A., Ph.D.
Associate Governmental Project Analyst

Attachment

cc: State Clearinghouse

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representative may temporarily stop grading in the event of a discovery. These clarifications to the EIR are presented in ~~strikeout~~/underline format; refer to Section 2.6.5 of the EIR. The changes do not raise important new issues about significant effects on the environment. Such changes are insignificant as the term is used in Section 15088.5(b) of the California Environmental Quality Act (CEQA) Guidelines.

The City does not have an explicit policy regarding the curation or repatriation of cultural materials recovered as part of a CEQA-related mitigation process. Therefore, Mitigation Measure M-CR-1(7) will be revised to state the following: "In the event of the discovery of human remains determined to be Native American, any artifacts associated with the burial will be repatriated with the human remains at the request of the most likely descendent. All other artifacts that may be encountered during grading and collected by the archaeologist will be curated at an approved facility unless the Native American representatives request that the artifacts be repatriated to the tribal representative." These clarifications to the EIR are presented in ~~strikeout~~/underline format; refer to Section 2.6.5 of the EIR. The changes do not raise important new issues about significant effects on the environment. Such changes are insignificant as the term is used in Section 15088.5(b) of the CEQA Guidelines.

⁴ 154 U.S.C. 300101, 36 C.F.R. § 800 et seq.

Pertinent Statutory Information:

Under AB 52:
 AB 52 has added to CEQA the additional requirements listed below, along with many other requirements:
 Within fourteen (14) days of determining that an application for a project is complete or of a decision by a public agency to undertake a project, a **lead agency** shall provide formal notification to a designated contact of, or tribal representative of, traditionally and culturally affiliated California Native American tribes that have requested notice.
 A lead agency shall begin the consultation process within 30 days of receiving a request for consultation from a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project,⁸ and prior to the release of a **negative declaration, mitigated negative declaration or environmental impact report**. For purposes of AB 52, "consultation shall have the same meaning as provided in Gov. Code § 65352.4 (SB 18)."⁹
 The following topics of consultation, if a tribe requests to discuss them, are mandatory topics of consultation:
 a. Alternatives to the project.
 b. Recommended mitigation measures.
 c. Significant effects.¹¹

1. The following topics are discretionary topics of consultation:
 a. Type of environmental review necessary.
 b. Significance of the tribal cultural resources.
 c. Significance of the project's impacts on tribal cultural resources.
 If necessary, project alternatives or appropriate measures for preservation or mitigation that the tribe may recommend to the lead agency.¹²

With some exceptions, any information, including but not limited to, the location, description, and use of tribal cultural resources submitted by a California Native American tribe during the environmental review process shall not be included in the environmental document or otherwise disclosed by the lead agency or any other public agency to the public, consistent with Government Code sections 6254 (r) and 6254.10. Any information submitted by a California Native American tribe during the consultation or environmental review process shall be published in a confidential appendix to the environmental document unless the tribe that provided the information consents, in writing, to the disclosure of some or all of the information to the public.¹³

If a project may have a significant impact on a tribal cultural resource, the **lead agency's environmental document shall discuss** both of the following:
 a. Whether the proposed project has a significant impact on an identified tribal cultural resource.
 b. Whether feasible alternatives or mitigation measures, including those measures that may be agreed to pursuant to Public Resources Code section 21082.3, subdivision (a), avoid or substantially lessen the impact on the identified tribal cultural resource.¹⁴

Consultation with a tribe shall be considered concluded when either of the following occurs:
 a. The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource; or
 b. A party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached.¹⁵

Any mitigation measures agreed upon in the consultation conducted pursuant to Public Resources Code section 21080.3.2 shall be recommended for inclusion in the environmental document and in an adopted mitigation monitoring and reporting program, if determined to avoid or lessen the impact pursuant to Public Resources Code section 21082.3, subdivision (b), paragraph 2, and shall be fully enforceable.¹⁶

If mitigation measures recommended by the staff of the lead agency as a result of the consultation process are not included in the environmental document or if there are no agreed upon mitigation measures at the conclusion of consultation, or if consultation does not occur, and if substantial evidence demonstrates that a project will cause a significant effect to a tribal cultural resource, the lead agency shall consider feasible mitigation pursuant to Public Resources Code section 21084.3 (b).¹⁷

An environmental impact report may not be certified, nor may a mitigated negative declaration or a negative declaration be adopted unless one of the following occurs:
 a. The consultation process between the tribes and the lead agency has occurred as provided in Public Resources Code sections 21080.3.1 and 21080.3.2 and concluded pursuant to Public Resources Code section 21080.3.2.
 b. The tribe that requested consultation failed to provide comments to the lead agency or otherwise failed to engage in the consultation process.

⁸ Pub. Resources Code § 21080.3.1, subd. (d) and (e)
⁹ Pub. Resources Code § 21080.3.1 (b)
¹⁰ Pub. Resources Code § 21080.3.2 (a)
¹¹ Pub. Resources Code § 21080.3.2 (d)
¹² Pub. Resources Code § 21082.3 (c)(1)
¹³ Pub. Resources Code § 21080.3 (b)
¹⁴ Pub. Resources Code § 21080.3.2 (b)
¹⁵ Pub. Resources Code § 21080.3 (a)
¹⁶ Pub. Resources Code § 21082.3 (e)

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Local Native American tribes have not identified any tribal cultural resources within the Project site. Should a discovery be made during grading that is interpreted by Native American representatives as a tribal cultural resource, the City will require the applicant to consider any measures beyond those stipulated by the consulting archaeologist to mitigate impacts to any significant resources identified by the tribal representatives as a tribal cultural resource.

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The City notes that the comment provides factual background information and does not raise an environmental issue within the meaning of CEQA. No further response is required because the comment does not raise an environmental issue. The City will include the comment as part of the Final EIR for review and consideration by the decision makers prior to a final decision on the Project.

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The City notes that the comment provides factual background information related to Assembly Bill 52, Senate Bill 18, and general Native American Heritage Commission recommendations and does not raise an environmental issue within the meaning of CEQA. Therefore, no further response is required. However, it should be noted that, through tribal consultation between the City and the San Luis Rey Band of Mission Indians under Assembly Bill 52, the applicant has agreed to excavate the prehistoric milling features

located on the Project site move to a location at the request of the tribe. This will be made a condition of the Project.

c. The lead agency provided notice of the project to the tribe in compliance with Public Resources Code section 21080.3.1 (d) and the tribe failed to request consultation within 30 days.¹⁸
This process should be documented in the Tribal Cultural Resources section of your environmental document.

Under SB 18:

Government Code § 65352.3 (a) (1) requires consultation with Native Americans on general plan proposals for the purposes of "preserving or mitigating impacts to places, features, and objects described § 5097.9 and § 5097.993 of the Public Resources Code that are located within the city or county's jurisdiction. Government Code § 65560 (a), (b), and (c) provides for consultation with Native American tribes on the open-space element of a county or city general plan for the purposes of protecting places, features, and objects described in Sections 5097.9 and 5097.993 of the Public Resources Code.

- SB 18 applies to local governments and requires them to contact, provide notice to, refer plans to, and consult with tribes prior to the adoption or amendment of a general plan or a specific plan, or the designation of open space. Local governments should consult the Governor's Office of Planning and Research's "Tribal Consultation Guidelines," which can be found online at: https://www.opr.ca.gov/docs/09_14_05_Updated_Guidelines_022.pdf
- Tribal Consultation: If a local government considers a proposal to adopt or amend a general plan or a specific plan, or to designate open space it is required to contact the appropriate tribes identified by the NAHC by requesting a "Tribal Consultation List." If a tribe, once contacted, requests consultation the local government must consult with the tribe on the plan proposal. A tribe has 90 days from the date of receipt of notification to request consultation unless a shorter timeframe has been agreed to by the tribe.¹⁹
- There is no Statutory Time Limit on Tribal Consultation under the law.
- Confidentiality: Consistent with the guidelines developed and adopted by the Office of Planning and Research,²⁰ the city or county shall protect the confidentiality of the information concerning the specific identity, location, character, and use of places, features and objects described in Public Resources Code sections 5097.9 and 5097.993 that are within the city's or county's jurisdiction.²¹
- Conclusion Tribal Consultation: Consultation should be concluded at the point in which:
 - o The parties to the consultation come to a mutual agreement concerning the appropriate measures for preservation or mitigation; or
 - o Either the local government or the tribe, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached concerning the appropriate measures of preservation or mitigation.²²

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NAHC Recommendations for Cultural Resources Assessments:

- Contact the NAHC for:
 - o A Sacred Lands File search. Remember that tribes do not always record their sacred sites in the Sacred Lands File, nor are they required to do so. A Sacred Lands File search is not a substitute for consultation with tribes that are traditionally and culturally affiliated with the geographic area of the project's APE.
 - o A Native American Tribal Contact List of appropriate tribes for consultation concerning the project site and to assist in planning for avoidance, preservation in place, or, failing both, mitigation measures.
 - * The request form can be found at <http://nahc.ca.gov/resources/forms/>.
- Contact the appropriate regional California Historical Research Information System (CHRIS) Center (http://ohp.parks.ca.gov/?page_id=1058) for an archaeological records search. The records search will determine:
 - o If part or the entire APE has been previously surveyed for cultural resources.
 - o If any known cultural resources have been already been recorded on or adjacent to the APE.
 - o If the probability is low, moderate, or high that cultural resources are located in the APE.
 - o If a survey is required to determine whether previously unrecorded cultural resources are present.
- If an archaeological inventory survey is required, the final stage is the preparation of a professional report detailing the findings and recommendations of the records search and field survey.
 - o The final report containing site forms, site significance, and mitigation measures should be submitted immediately to the planning department. All information regarding site locations, Native American human remains, and associated funerary objects should be in a separate confidential addendum and not be made available for public disclosure.
 - o The final written report should be submitted within 3 months after work has been completed to the appropriate regional CHRIS center.

¹⁸ Pub. Resources Code § 21082.3 (f)
¹⁹ Gov. Code § 65352.3 (a)(2)
²⁰ Pursuant to Gov. Code section 65040.2,
²¹ Gov. Code § 65352.3 (b)
²² Tribal Consultation Guidelines, Governor's Office of Planning and Research (2005) at p. 18.

Examples of Mitigation Measures That May Be Considered to Avoid or Minimize Significant Adverse Impacts to Tribal Cultural Resources:

- o Avoidance and preservation of the resources in place, including, but not limited to:
 - Planning and construction to avoid the resources and protect the cultural and natural context.
 - Planning greenspace, parks, or other open space, to incorporate the resources with culturally appropriate protection and management criteria.
- o Treating the resource with culturally appropriate dignity, taking into account the tribal cultural values and meaning of the resource, including, but not limited to, the following:
 - Protecting the cultural character and integrity of the resource.
 - Protecting the traditional use of the resource.
 - Protecting the confidentiality of the resource.
- o Permanent conservation easements or other interests in real property, with culturally appropriate management criteria for the purposes of preserving or utilizing the resources or places.
- o Please note that a federally recognized California Native American tribe or a non-federally recognized California Native American tribe that is on the contact list maintained by the NAHC to protect a California prehistoric, archaeological, cultural, spiritual, or ceremonial place may acquire and hold conservation easements if the conservation easement is voluntarily conveyed.⁵³
- o Please note that it is the policy of the state that Native American remains and associated grave artifacts shall be repatriated.⁵⁴

The lack of surface evidence of archaeological resources (including tribal cultural resources) does not preclude their subsurface existence.

- o Lead agencies should include in their mitigation and monitoring reporting program plan provisions for the identification and evaluation of inadvertently discovered archaeological resources.⁵⁵ In areas of identified archaeological sensitivity, a certified archaeologist and a culturally affiliated Native American with knowledge of cultural resources should monitor all ground-disturbing activities.
- o Lead agencies should include in their mitigation and monitoring reporting program plans provisions for the disposition of recovered cultural items that are not burial associated in consultation with culturally affiliated Native Americans.
- o Lead agencies should include in their mitigation and monitoring reporting program plans provisions for the treatment and disposition of inadvertently discovered Native American human remains. Health and Safety Code section 7050.5, Public Resources Code section 5097.98, and Cal. Code Regs., tit. 14, section 15064.5, subdivisions (d) and (e) (CEQA Guidelines section 15064.5, subs. (d) and (e)) address the processes to be followed in the event of an inadvertent discovery of any Native American human remains and associated grave goods in a location other than a dedicated cemetery.

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⁵³ Civ. Code § 815.3 (d).
⁵⁴ Pub. Resources Code § 5097.991.
⁵⁵ per Cal. Code Regs., tit. 14, section 15064.5(f) (CEQA Guidelines section 15064.5(f)).

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