O-13 Pechanga Indian Reservation

Comment Letter O-13

PECHANGA INDIAN RESERVATION
Temecula Band of Luiseño Mission Indians

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August 14, 2017

Mr. Mark Slovick
Project Planner
County of San Diego
5510 Overland Avenue, Suite 310
San Diego, CA 92123

Re: Pechanga Tribe Comments on DEIR for the Newland Sierra Project

Dear Mr. Slovick:

This letter is written on behalf of the Pechanga Band of Luiseño Indians ("Tribe"), a federally recognized Indian tribe and sovereign government with culturally affiliated traditional territory within the County of San Diego and the Newland Sierra Project area ("Project"). We write to express continued environmental and cultural resources impact concerns about the Project, which includes 2,135 residential units, 81,000 square feet of commercial development, a school, and various parks and equestrian facilities. The Project also includes off-site improvements to Deer Springs Road, including proposed road widening and a new interchange at Deer Springs Road and the I-15 Freeway, which will have substantial impacts on Luiseño cultural resources, including a Luiseño Traditional Cultural Property ("TCP") known as *Pávxin*, Native American human remains, and sacred areas. O-13-1

We request this letter be incorporated in the CEQA record for this Project and that the Tribe be notified of all documents issued for and actions concerning this Project. The Tribe previously commented on this Project via a letter dated May 26, 2016. We do not see this letter in the record of comment letters in the DEIR documents so we are attaching it as Attachment A herein so that it may be incorporated into the record and responded to by the County. O-13-2

I. THERE IS A HISTORIC RESOURCE WITHIN AND ADJACENT TO THE PROJECT APE

Pávxin (PAHV-hin) is the name of the Luiseño Traditional Cultural Property located within and adjacent to the APE for the Newland Sierra Project, and within the APE for the associated Deer Springs Road improvements. O-13-3

As evidenced in the "Cultural Resources Report for the Newland Sierra Project" and the Pechanga Tribe's confidentially submitted 27-page report entitled "Ethnographic Information on *Pávxin*," the *Pávxin* TCP meets the definition of a Historic Resource (Cal. O-13-4

Pub. Res. Code §21084.1 and §5024.1) and a Tribal Cultural Resource as defined in CEQA (Cal. Pub. Res. Code §21074). This TCP is significant not only because it contains significant archaeological and historic resources, but also because it is an ethnographic landscape that is thousands of years old where ceremonial traditions, healing, and religious gatherings were conducted. Further, the TCP contains cultural value elements and resources that are part of present day traditions, ceremony, and value systems that are essential to the identity and sovereignty of the Pechanga Tribe. More detailed information regarding the location and nature of these elements is confidential for purposes of protecting the resources and the site.[1]

O-13-4 Cont.

The linguistic, ethnographic, historical, and cultural evidence of this landscape is found in the form of songs, the Luiseño place names for the area, and in oral accounts and information, obtained from both present-day sources and documented directly from Luiseño people in the 1930s.

Pávxin was a major regional hub for Luiseño ceremonies and a central meeting point on traveling routes between various villages, including those at Carlsbad and the islands. It is the largest, most extensive, and unique inland ceremonial area connected to the coast. When in full use, the ethnographic landscape also contained major water sources and representations of all major plant resources, which were used for subsistence and medicinal purposes.

O-13-5

Pávxin has been recorded with the State Sacred Lands File at the Native American Heritage Commission.

O-13-6

It is important to note that thousands of cultural and sacred items have been previously unearthed through non-tribally sanctioned archaeological excavations in this area, while thousands of items still remain on the Project property. Since there have not been thorough archaeological investigations of the entire Project area (in part due to the topography of the Project area) and the very nature of recorded site investigations do not account for all resources, it is unknown how many additional resources and other ceremonial items are still buried on the Project property.

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More extensive, detailed information containing the Tribe's expertise on these culturally affiliated resources is included in the Pechanga Tribe's confidential submittals to the County, a general summary of which has been included in the DEIR.

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II. REQUIRED TREATMENT OF THE HISTORIC AND ARCHAEOLOGICAL RESOURCES AFFECTED BY THE PROJECT

The proposed Project will cause damage to unique archaeological resources pursuant to

O-13-10

[1] CEQA Guidelines §15120(d), "No document prepared pursuant to [CEQA] that is available for public examination shall include.....information about the location of archaeological sites and sacred lands, or any other information that is subject to the disclosure restrictions of Section 6254 of the Government Code."

Cal. Pub. Res. Code §21082.2, and will further cause a substantial adverse change in the significance of a Historical Resource under Cal. Pub. Res. Code §21084.1. These affects have been demonstrated through analyzing the description, goals, development footprint, and impacts of the proposed Project, in addition to the associated Deer Springs Road improvements using the expert substantial evidence on record (CEQA Guidelines §15384) in the form of the Cultural Resources Report prepared by Dudek, the Pechanga Tribe's previously submitted comments, ethnographic information, maps, in-person tribal consultations, and through comments and consultations between other culturally affiliated tribes and the County.

In particular, the Project archaeologist, Dudek and the Tribe have demonstrated the identity, location, nature, traditional use, and continued cultural use and value of the archaeological resources and the historic resources affected by the proposed Project through their respective reports. The conclusions and findings in the DEIR on Page 2.5-2 are in accord with these reports by stating that CA-SDI-4558, CA-SDI-5951, and CA-SDI-9822 are determined to be "unique archaeological resources" pursuant to CEQA. As such, they are therefore subject to environmental review under CEQA and entitled to treatment and mitigation under the law.

O-13-10 Cont.

CEQA provides that mitigation for "unique archaeological resources" may consist of the lead agency requiring that reasonable efforts be made to permit any or all of the resources to be preserved in place or left in an undisturbed state. Avoidance and preservation in place, if feasible, is the preference of treatment for archaeological sites (CEQA Guidelines 15126.4). Other examples of treatment include the following: (1) Planning construction to avoid archaeological sites; (2) Deeding archaeological sites into permanent conservation easements; (3) Capping or covering archaeological sites with a layer of soil before building on the sites; or, (4) Planning parks, green space, or other open space to incorporate archaeological sites.

The above preference, along with the examples of treatment, favor avoidance and preservation in place. This is primarily because of the one-of-a-kind nature of such resources. Once resources such as *Pávxin* are disturbed or destroyed they are lost, never to be regained or re-created, and cannot be addressed through processes like mitigation banking in other geographic locations. These statutory intentions are especially important for the resources at issue on this Project property because *Pávxin* is not simply archaeologically sensitive, but also sensitive in terms of the tribal cultural significance. Notably, these sites include items of significant tribal cultural value as explained in the confidentially submitted documents by both the Tribe and Dudek.

O-13-11

The Tribe is in agreement with the DEIR conclusion on Page 2.5-2 that the Historic Resource known as *Pávxin* is eligible for listing as a Traditional Cultural Property pursuant to Cal. Pub. Res. Code §21084.1. Because *Pávxin* is eligible for the State Historic Register it is presumed to be historically or culturally significant, and therefore, must be treated as significant. CEQA requires that if a Project will cause a substantial adverse change in

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O-13-13

significant Historic Resources, like the Traditional Cultural Property known as *Pávxin*, public agencies shall, whenever feasible, seek to avoid damaging effects on any historical resource of an archaeological nature (Cal. Pub. Res. Code §15126.4(b)). Further, preservation in place is the preferred manner of mitigating impacts to such sites. Preservation in place maintains the relationship between artifacts and the archaeological context and may also avoid conflict with religious or cultural values of groups associated with the site (Cal. Pub. Res. Code §15126.4(b)(3)). Here, *Pávxin* contains essential cultural elements and characteristics including the specific physical location and context of this geographical place, as it was utilized for ceremonial and sacred activities. The site also contains the actual physical resources that are ceremonial, religious, and sacred in nature, as well as the connectivity with the regionally related cultural resources and culturalscapes, such as travel and trail routes.

O-13-13 Cont.

O-13-14

Pávxin is also partially located within the roadway of Deer Springs Road. Any improvements to Deer Springs Road will materially impair the TCP because they will demolish and materially alter the essential characteristics of the site, namely the ceremonial items and culturally sensitive Native American resources that are present.

O-13-15

III. UNIQUE ARCHAEOLOGICAL AND HISTORIC RESOURCES WILL BE SUBSTANTIALLY ADVERSELY AFFECTED BY THE PROJECT AND DEER SPRINGS ROAD IMPROVEMENTS

The proposed Project will have direct and significant impacts to the physical resources that comprise the TCP by unearthing them, taking them out of provenience and context, and destroying them through ground-disturbing activities.

O-13-16

It is also important to analyze not only the impacts to the physical sites and/or resources, but to analyze the impacts to the non-physical elements of cultural landscapes. Memory, history, and shared knowledge are rooted in and derived from the place called *Pávxin*. These elements of cultural identity are embedded in the cultural Traditional Cultural Property, even though these cultural values, ethics, and practices have a non-physical presence (Thomas D. Andrews and Susan Buggey, 2008, Authenticity in Aboriginal Cultural Landscapes, in *Journal of Preservation Technology* 39 (203):63-71.). As demonstrated in the confidential information provided by the Tribe to the County, this area holds great spiritual and cultural significance because the Tribe's traditional practices and ceremonies were carried out here and continue to live here because of their ties to contemporary Luiseño identity. In continuing the Tribe's community practices and values, the existence of this place is valuable because it holds, reminds, and reinforces this value system. This Project will desecrate a ceremonial place that contains thousands of years of knowledge, history, and values for the Luiseño people.

O-13-17

Tribal cultural identity is tied intrinsically to the land, and severing that tie through the destruction of resources and landscapes harms the Tribe's ability to pass on cultural knowledge through the experience of time and place. As such, it is imperative that the

County assesses the impacts to the cultural values of the resources, including the loss of knowledge that our people will experience as a result of this project and associated improvements.

O-13-17 Cont.

CEQA also requires the consideration of the cumulative impacts that a project may have on the environment. "Cumulatively considerable" means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." (CEQA Guidelines §15064(h)(1). Increased population in the area, air pollution, noise, and visual impacts to the TCP by the Project and Deer Springs Road improvements, as well as other presently proposed projects for the area, and associated and required future land use amendments, including road improvements and the proposed highway interchange expansion will all further cause significant impacts to the regional context of these resourcess and limit the Tribe's ability to pass this knowledge and experience on the landscape to future generations. Therefore, it is not only the direct and indirect impacts to the landscape and resources that must be considered, but also the cumulative impacts over time to these connected, finite, and irreplaceable resources. Each project that destroys resources in this area contributes to the total loss of the physical resources, the Tribe's "sense of place," and also hinders the Tribe's ability to teach our future generations about important lands in the Tribe's cultural history and present-day value systems.

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IV. PROPOSED MITIGATION, PROJECT FINDINGS, AND STATEMENT OF OVERRIDING CONSIDERATIONS

It is the Tribe's preference that this Project not be approved; however, because the Tribe understands the nature and uncertainty of the CEQA process, it negotiated through consultation what it was able to agree upon with the Project Applicant and the County given the time and resources constraints in the event the Project is approved.

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The DEIR must include a finding that the Project will cause a substantial adverse change to a Historic Resource, and therefore, that the Project will have a significant effect on the environment.

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Moreover, cultural identity for the Pechanga people is rooted in the land. Severing that connection through the destruction of these places significantly impacts the resources themselves, and also the Tribe's life ways, practices, religion, their very identity, and sovereignty. This type of social effect upon sovereign tribal governments may be considered in an EIR. Such considerations would include an analysis of how the physical effects of a project may directly cause a chain reaction of cause and effect which results in social effects. In this case, the Project impacts directly cause the loss of the ability of the tribal governments to sustain their connectivity with their aboriginal lands and knowledge (Cal. Pub. Res. Code §15131). This effect is a significant impact because it arguably forecloses the Tribe from practicing its value systems, religion, life ways, and those essential components of its self-determination and very identity. We ask that these social

O-13-21

effects be included, assessed, and considered in all Project approval decisions. O-13-21 Cont.

It is our position that, while the mitigation measures reduce the impacts, they do not avoid them. Further, while the impacts may be lessened by the proposed mitigation, and possibly even substantially lessened, they nevertheless remain significant[2]. The Historic Resource *Pávxin*, including the unique archaeological resources and Native American cultural resources located within, will be irreversibly damaged and destroyed forever. No amount of documentation, removal, reburial, or even compensatory mitigation can mitigate for the damages to the essential elements of this place. In its best light, the type of mitigation that has been negotiated by the tribes is a "submission under protest" concerning a proposed development and major road expansion that would surround and cut through this ceremonial site. Not only does this desecrate a religious and ceremonial site, but the proposed mitigation simply will never fulfill culturally appropriate treatment with apt dignity and will, in fact, irreversibly and significantly impact tribal identity sovereignty and self-determination. O-13-22 O-13-23 O-13-24

Moreover, in a situation such as this where an agency decides to approve a project that will cause one or more significant environmental effects, the lead agency shall prepare a statement of overriding considerations which reflects the ultimate balancing of competing public objectives (including environmental, legal, technical, social, and economic factors) (Cal. Pub. Res. Code §21081 and CEQA Guidelines 15093). The County is already requiring an override analysis and documentation for impacts to aesthetics, air quality, mineral resources, noise, population, housing, transportation, and traffic. We assert that cultural and archaeological resources impacts cannot be brought to a level below significance for this Project, even with the proposed mitigation measures. As such, a statement of overriding considerations must be included in the EIR for these resources as well. O-13-25

V. COUNTY OF SAN DIEGO RESOURCE PROTECTION ORDINANCE AND THE GENERAL PLAN

Both the historic resource and unique archaeological sites are resources protected by the San Diego County Resource Protection Ordinance ("RPO"). The RPO defines a "Significant Prehistoric or Historic Site" as a site that provides information regarding important scientific research questions about prehistoric or historic activities that have scientific, religious, or other ethnic value of local, regional, State or Federal importance, including: (1) Any prehistoric or historic site, interrelated collection of features or artifacts O-13-26

[2] *Laurel Hills Homeowners' Ass'n. v. City Council* (1978) 83 Cal.App.3d 515: Court suggested that an impact can be substantially lessened but still remain significant. Source: http://resources.ca.gov/ceqa/flowchart/la_soc.html.

that are formally determined eligible or listed on the National register; (2) One-of-a-kind, locally unique, or regionally unique cultural resources which contain a significant volume and range of data and materials; (3) any location of past or current sacred religious or ceremonial observances which is…protected under Public Law 95-341, the American Indian Religious Freedom Act or Public Resources Code Section 5097.9, such as "burial(s), pictographs…sacred shrines…" (RPO, Section 86.602(o)). As demonstrated through tribal consultations, the Dudek reports and tribal written submittals, *Pávxin* meets all three of the definitions of a Significant Prehistoric or Historic Site under the RPO. The Project archaeologist, in addition to earlier studies (Quintero 1987) have noted that this area is "one-of-a-kind," locally and regionally unique in its composition and use, and even with the limited excavations in the area, has already produced a significant volume and range of materials. Lastly, this place is clearly a [redacted] where religious practices occurred for millennia, further meeting the definition. Per the RPO, if such a site is present, "development, trenching, grading, clearing and grubbing, or any other activity or use damaging to significant prehistoric or historic site lands shall be prohibited…" (Section 86.604(g)). Therefore, the RPO prohibits activity that would damage the resources that meet the definition as identified above.

O-13-26 Cont.

We are aware that under the RPO, "essential projects" may be exempted from the provisions of the Ordinance. (Section 86.605(c)). However, it is our assertion that a housing development of this nature is not an essential project. Lack of housing or a need for more housing in north county San Diego does not directly correlate to this particular project in this particular place. We have yet to be shown the County's analysis and reasoning as to how they arrived at the conclusion that this is an essential project triggering an exemption under the RPO. This must be included in the DEIR.

O-13-27

Moreover, we believe the Deer Springs Road improvements cannot be considered an "essential project" because there was opportunity and obligation for the County to provide an exemption to the General Plan Mobility Element to avoid impacts to these significant resources under the RPO. In fact, the County took such an action on the north side of the I-15 for Deer Springs Road. Under the General Plan, there is an exemption from the Mobility Element that would have required improvements to bring Deer Springs Road in compliance with County standards on mobility and traffic flow. This was done specifically because of significant environmental resources in the area. The County has been well aware of the significant cultural resources that fall under the RPO on this Project property for years, namely because the denial of previous projects in the exact same geographical area revealed them. However, the County failed to take a similar action on the south side of Deer Springs Road where this Project is located. The DEIR must address this failure in light of the General Plan Mobility Element. The fact that an exemption was given on the north side of the I-15 for Deer Springs Road and not on the south side of the I-15 may suggest preference and biased treatment of minority communities and the resources affiliated with them. The reasoning and basis upon which the County granted an exemption on the north side to protect resources while not allowing an exemption on the south side of the I-15 in unclear.

O-13-28

To residents and stakeholders, it seems as if the County is picking and choosing which of its rules, ordinance, and regulations it will follow at the expense of unfairly impacting tribal cultural resources and tribal governments. Some would argue that these issues were foreclosed with the approval of the General Plan; however, in light of the fact that a General Plan Amendment is at issue here, it seems a discussion concerning how this area shall be treated from a policy planning perspective is actually a ripe issue. This is especially persuasive given that there is the obligation and the opportunity to protect tribal cultural resources under the County RPO and the General Plan. However, for reasons we do not understand, the County is not upholding these local policies. O-13-29

There have been arguments made about similar situations invoking environmental justice issues pursuant to state and federal law. For the County's reference, we have attached as Attachment B former Attorney General Kamala Harris's Environmental Justice Fact Sheet.[3] Under state law, "environmental justice" means the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies (Cal. Gov. Code §65040.12(e)). In this instance, we have a geographical area that is culturally affiliated with California tribal governments. Similarly impactful project proposals for this area have twice been denied, sending an overwhelming message that planning policy for this area should reflect the citizen and stakeholder desires to maintain low density, the rural nature of the area, and no major road expansions. Yet the County insists on spending public money and resources to allow for review of projects that are in direct conflict with the citizen's democratic input and in direct conflict with the County's obligations to the environment and all citizen groups and stakeholders within its jurisdiction. Regardless of whether any tribe or person commented on this aspect of the Mobility Element in the General Plan or the RPO exemption, it is the County's obligation to protect the significant resources in its jurisdiction of which it has been aware for decades. O-13-30 O-13-31

The County should uphold its own regulations which carry out the intent and plain language of the RPO's prohibition on impacts to significant prehistoric and historic sites, rather than creating exemptions that are not based in equitable policy. O-13-32

VI. PECHANGA TRIBE'S REQUESTS

In sum, this Project will cause a substantial adverse change to a Historic Resource and therefore, the Project will have a significant effect on the environment. For the reasons above, the Pechanga Tribe asserts this is not an appropriate Project for this geographic area and that the County is remiss in its obligations to protect significant cultural resources pursuant to State law and their own RPO Ordinance. We further are of the position that a Statement of Overriding Considerations must be done for historic resources, especially O-13-33 O-13-34 O-13-35

[3] In addition, current Attorney General Xavier Becerra adopts the same policy to advance environmental justice, including taking steps to update Harris's Fact Sheet. See Attorney General Becerra's website at https://oag.ca.gov/environment/communities for more information (accessed on August 14, 2017).

given the social effects of this Project on culturally affiliated tribal governments.

O-13-35 Cont.

The Tribe has worked cooperatively with the Project applicant on the proposed mitigation measures contained in the DEIR. We did this for purposes of ensuring limited protections in the event this Project is approved. As the mitigation is still a work in progress[4] we request to continue the consultations we have been engaged in with the County and the applicant in this vein.

O-13-36

We thank you for the opportunity to submit these comments on the DEIR for the Newland Sierra Project. Please contact me at: mhannah@pechanga-nsn.gov and Laura Miranda, Esq. at: lmiranda@pechanga-nsn.gov to continue consultations and for any questions about these comments.

O-13-37

Sincerely,

Michele Hannah

Michele Hannah
Deputy General Counsel

cc: Laura Miranda, Attorney for the Pechanga Tribe
Pechanga Cultural Resources Department.
Cynthia Gomez, Executive Director, Native American Heritage Commission
Donna Beddow, Tribal Liaison, County of San Diego
David Hubbard, Gatzke Dillon & Balance, LLP, Counsel for the Project Applicant
Rita Brandin, Senior VP, Development Director, Newland Real Estate Group
Jacob Armstrong, Chief Development Review Branch, Cal Trans, District 11

Enclosures

[4] The MMRP is missing language that reflects our agreements concerning the preservation and avoidance of CA-SDI-4558.

ATTACHMENT A

PECHANGA INDIAN RESERVATION
Temecula Band of Luiseño Mission Indians

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Re: Pechanga Tribe Additional Comments on NOP for the Newland Sierra Project

Dear Mr. Slovick:

This letter is written on behalf of the Pechanga Band of Luiseño Indians ("Tribe"), a federally recognized Indian tribe and sovereign government with culturally affiliated traditional territory within the County of San Diego and the Newland Sierra Project area ("Project"). We write to express continued environmental and cultural resources impact concerns about the Project, which includes 2,135 residential units, 81,000 square feet of commercial development, a school and various parks and equestrian facilities. The Project also includes off-site improvements to Deer Springs Road, including proposed road widening and a new interchange at Deer Springs Road and the I-15 Freeway, which will have devastating impacts on Luiseño cultural resources, including Luiseño village complexes, a spring known as *Pavxin*, Native American human remains, and sacred areas.

We request this letter be incorporated in the CEQA record for this Project and that the Tribe be notified of all documents and actions concerning this Project. In addition, instead of repeating our previous comments from our March 16, 2015 letter (NOP and SB 18 request), we herein incorporate those comments via this reference as well.

It is our understanding that Newland submitted an application for its project to the County on January 20, 2015, and the County issued a Notice of Preparation ("NOP") for the Project's environmental impact report ("EIR") on February 12, 2015, which was received by the Tribe on February 19, 2015. We submitted NOP comments on March 16, 2015. Further, we received another letter from the County, dated July 15, 2015 titled Sacred Lands/SB-18/AB52 Consultation. The Tribe submitted a request to consult on October 17, 2015. Unfortunately, the Tribe never received a follow-up from the County regarding our request. We also did not receive a scoping notice, either from the County (as is our experience on other County projects) nor the archaeological consultant, as is standard practice. The first contact Pechanga had with the County on this project was during our informal quarterly project meeting in March 2016, a full year after we submitted our NOP comments and nearly five months after our October 2015 request for consultation. At that time, we were informed there were no changes to the road alignment and no changes to the impacts to tribal cultural resources from those of the Merriam Mountains project. We explained to the County that we needed to discuss the situation with our Director given the no change in impacts. Please note for the record that this was not an official consultation under either AB 52 or SB 18 and to date, no such consultation has been initiated or undertaken by the County vis-à-vis the Pechanga Tribe. In

O-13-37

addition, we understand that an additional NOP notice was sent out on December 10, 2015 for the Project – Property Specific Requests, GPA and Rezone. We believe this NOP notice also extended the comment period for the previous NOP issued earlier that year.

In our initial comment letter from March 16, 2015, we specifically included a request to consult pursuant to applicable law, a preliminary identification of environmental and culturally-sensitive resources that would be significantly impacted by the Project, and steps the County should take, both legally and technically, that would constitute a proper assessment pursuant to CEQA. The Tribe never received the items requested in this letter, nor has consultation been initiated. We also wish to note that the Dudek Report (discussed below), dated April 2015 was completed just after we submitted our NOP comments and yet, the Tribe was not asked to consult or otherwise provide information to the consultant. Even more troubling is that the only information available with respect to cultural resources was completed nearly a full year before our initial conversation with the County regarding this project. Now, we understand that the DEIR may be only weeks away from public release and yet, the County has not initiated proper consultation and certainly has not gathered adequate information regarding the nature of and impacts to cultural, historic, archaeological and tribal cultural resources as required by the CEQA.

At this point in the process, there are a number of concerns we have regarding the current direction of the CEQA analysis and environmental document preparation. We formally submit our concerns and comments at this juncture in the hopes that the County will take the time to address the issues identified herein prior to the DEIR being finalized and released for public review.

I. PROJECT ALTERNATIVES

Of primary major concern to the Pechanga Tribe are the proposed improvements to Deer Springs Road, including the off-ramp improvements on the I-15 Freeway. In addition to on-site development, the Project proposes to expand Deer Springs Road from its current two-lane configuration. As indicated in the NOP document, there are only two (2) Alternatives offered concerning this off-site improvement. Further, in a recent meeting with the County (March 2016), we were informed that there were no changes to the road alignment from the old Merriam Mountains project, thus no change in adverse impacts to the cultural resources.

The geographical areas in which both alternatives are proposed contain significant Luiseño tribal cultural resources. The Project area, including the off-site improvements, are located within a *Payomkawichum* village complex. The impacts from the development of the proposed Project and its off-site improvements will directly impact ceremonial and sacred sites, and additionally, will indirectly impact these Luiseño places. It is also important to note that the Cultural Resources Report prepared by Dudek for the Newland Land Company grossly underestimates the Project's impacts to tribal cultural resources, including the Deer Springs Road element. We discuss this concern in more detail below.

Of striking import in the NOP is that the two alternative road designs are not actually two alternatives. They are really just two methods to execute the same Alternative. This means the NOP for the DEIR offers only one single proposal for the Project's off-site improvement to Deer Springs Road. We believe this is a violation of the CEQA requirements concerning the analysis of Project Alternatives. This, coupled with the non-renewable tribal cultural resources and sacred sites that are at risk, raises the potential impacts of this action to such a level that a careful, thorough and well-informed analysis is required for the environmental document. This includes the analysis of Alternatives and avoidance of impacts to historic, archaeological, cultural and tribal cultural resources as demanded by the CEQA.

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Cont.

This off-site improvement is not a small element of the Project, but rather it is a major piece of the Project as a whole. A project consisting of almost 2,000 acres, 2,135 residential units, 7 Planning areas, 81,000 square feet of commercial development and a new school could not be executed without this road improvement component. It is a core piece of the Project. This element is proposed to address the additional trips and traffic impacts created by the Project, the ingress and outlets for the Project as well as regional circulation elements, including elements set forth in the County's General Plan.

It is our contention that only one single road improvement proposal for this major element of the Project is insufficient to comprise a proper CEQA analysis for this Project. As you know, CEQA Guidelines §15126.6 address alternatives and discuss how an EIR should consider a reasonable range of potentially feasible alternatives. An EIR must set forth alternatives necessary to permit a reasoned choice, with the range of alternatives to be discussed and selected in a manner that fosters meaningful public participation and informed decision-making. The EIR should provide reasonable consideration of Alternatives in light of the nature and the specific facts of the project.

Specifically, given the fact that this road improvement element is a major component without which the Project would not be possible, the existence of potentially feasible Alternative locations and designs for the alignment that would reduce Project impacts is absolutely necessary under CEQA. There are CEQA-significant cultural resources, historic resources, Native American human remains, tribal cultural resources and sacred sites within and surrounding the footprint of the currently offered alignment. Thus, we contend that it is within the scope of reasonable Alternatives pursuant to CEQA for the County to offer at least one other Alternative that avoids the tribal cultural resources and known Native American human remains. We understand there is an actual Alternative that has been circulated to the County that may achieve this, but which is not included in the NOP.

Although the EIR need only discuss those alternatives that could feasibly attain most of the basic objectives of the project, the lead agency must determine the feasibility, not the applicant. If a lead agency decides that certain alternatives/locations are infeasible, then it needs to clearly explain in meaningful detail the reasons and facts supporting that conclusion in the EIR (*City of Rancho Palos Verdes v. City Council* (1976) 59 Cal. App.3d 869, 892).

In addition, it is our understanding that the Project proposes to include hook ramps connecting the I-15 Freeway with Deer Springs Road and that no other potential configurations are being considered. Not only was this a new proposal added after the NOP was publically noticed, but this is another example of the lack of required Alternatives review for this Project pursuant to CEQA. As you may be aware, numerous Native American human remains and ceremonial sites were and are within the footprint of the I-15 Freeway. The area of the off-ramp has an actual potential to impact Native American remains. This fact must be evaluated and culturally-appropriate avoidance (which is CEQA's preference for project impacts) and mitigation measures designed and implemented. This includes the consideration of Alternatives that are the least invasive in terms of excavation and ground-disturbance. One of the "alternatives" is to cap the area where the human remains are located, a measure that is not culturally-appropriate for many Native American tribes. Historically, tribal interests have been ignored and impacts to tribal cultural resources have been an assumed cost of doing business under CEQA. Tribes were forced to choose between the actual removals of their ancestor's remains or to have them "capped" and driven over day after day. Neither of these "mitigation measures" are culturally-sensitive, nor cognizant of tribal values, or religious and sacred views.

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As the recent amendments to CEQA through Assembly Bill 52 recognizes, tribal concerns have been long-ignored. In passing the bill, the legislature acknowledged that CEQA "does not readily or directly include California Native American tribes' knowledge and concerns. This has resulted in significant environmental impacts to tribal cultural resources and sacred places, including cumulative impacts, to the detriment of California Native American tribes and California's environment." Further, the legislature, "recognize[d] that California Native American tribes may have expertise with regard to their tribal history and practices, which concern the tribal cultural resources with which they are traditionally and culturally affiliated. Because the California Environmental Quality Act calls for a sufficient degree of analysis, tribal knowledge about the land and tribal cultural resources at issue should be included in environmental assessments for projects that may gave a significant impact on those resources."

Given the increased role of tribal governments in the CEQA process – both under AB 52 and SB 18 – mitigation measures that conflict with tribal values and beliefs, particularly when no other alternatives are offered, are no longer acceptable as the de facto result of the environmental review process. Here, the County has not offered an option that does not directly impact the cultural resources, tribal cultural resources and human remains present on this Project site. Given the prospect of another alternative design that absolutely avoids impacts to the known resources, the County must, under CEQA consider reasonable and feasible alternatives to avoid those impacts. Regurgitating old mitigation measures from the defunct Merriam Mountains project, which were designed nearly 10 years ago is simply not acceptable in today's environmental and legal framework.

There are significant environmental constraints concerning the single proposed Deer Springs widening element. Without considering alternative routes, including a route through Newland's property to accommodate the Project's increased trips (which is a potentially feasible alternative that has not been assessed), traffic impacts and other cumulative impacts the DEIR for the Project will likely be out of compliance with CEQA.

In addition, when the Tribe asked about the status of the road realignment in March of this year, the County's reply was that Deer Springs Road will have the same alignment and road improvements as previously proposed with respect to the Merriam Mountains project. The Tribe received this message as a statement that the road alignment and associated details were not up for discussion in terms of alternative alignments and designs and that this piece of the Project was pre-determined. As you know, a primary role of the EIR process is to identify environmental impacts and alternatives in order to reduce significant impacts, while meeting the project objectives. From what we have witnessed thus far, it does not seem as though the County is committed to following CEQA in this manner and we question whether it is sincerely exploring Project alternatives and incorporating information on the cultural resources impacts (see sections below) to inform a CEQA-compliant Project. Moreover, it is our understanding that between the point in time that the initial NOP was issued in 2015 to approximately January 2016, the County and the Project applicant re-designed the open space element as well as other Project elements. The Tribe was not involved in these discussions. This nearly year-long time period was an opportunity to discuss cultural resources impacts and how the road alignment, as well as other elements of the Project, could have been altered in order to reduce significant impacts.

At this time, the Tribe requests to engage in consultation pursuant to applicable State law to discuss Project Alternatives for the Deer Springs Road element prior to the finalization and public circulation of the DEIR and with enough time to inform the DEIR analysis and recommendations.

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II. COUNTY GENERAL PLAN

It is our reading that the options proposed for the Deer Springs Road in the NOP[1] is inconsistent with the County's Mobility Element of the General Plan, yet it is our understanding the County is not seeking a General Plan Amendment. Not only is this potentially a violation of the County's own policies and potentially of CEQA, but the current proposal has the potential to result in deferred mitigation and foreclose guaranteed tribal rights under CEQA and federal law. By removing the six-lane grading requirement for Deer Springs Road and only requiring grading for four-lanes (yet leaving the six-lane prime arterial in the GP), the County is creating a potential outcome where a major portion of a significant traditional cultural landscape will be destroyed by this Project without an assessment and full mitigation for the true size and definitions of the sites. The result is that when the rest of the circulation element is build-out at some later date, the County will not have to consider the significant tribal cultural resources because they will have already been mostly destroyed. Segmenting these impacts through the approval of future CEQA projects is not only evasive, but potentially out of compliance with CEQA. An EIR should assess the collective impacts of this Project and the related foreseeable impacts. It should not just account for the impacts of grading out four lanes, but also the impacts of destroying an entire Luiseño cultural complex. In addition, how will the County execute adequate mitigation for the impacts to the entire complex of cultural resources, including ensuring mitigation is carried out at some later date by another developer or Caltrans? This is another reason why Alternative alignments that avoid the cultural resources must be analyzed for this specific Project.

Lastly, these sorts of actions are exactly what tribes continually struggle against. Some tribes can receive these as inimical actions. Just like an archaeologist that utilizes scientific theories and arbitrary constructs to divide up site recordation into specific loci (to avoid a finding of significance under CEQA), the County is blatantly ignoring the totality of the present Luiseño complex and utilizing its authority for destruction of the complex piece by piece so that tribes are foreclosed from cumulative impacts assessments, landscape assessments and related mitigation that they are entitled to under the law.

At a minimum, the EIR must include a discussion concerning the inconsistencies of this Project with the County General Plan, especially the Mobility Element, along with the reasoning for not seeking a GPA and a showing of how all impacts, including related foreseeable impacts will be addressed in compliance with the law.

III. SB 18 AND AB 52

Based on our understanding, the County's position is that SB 18 and federal consultation requirements (for the EIS portion) apply to this Project. The Pechanga Tribe, pursuant to the statutory requirements, requested SB 18 consultation in our letter dated March 16, 2015.

Although technically this Project had an NOP that was noticed in February of 2015, prior to the July 1, 2015 effective date of AB 52, the Project went through many revisions after July 1, 2015, including a new notice concerning an extension of time to comment on the NOP that was issued in December 2015.

Tribal consultation is not new to the County of San Diego as they have been engaging with tribes consistently over the past 20+ years and have the resources and capabilities to comply with the components of AB 52. Through our conversations with County representatives, it is our understanding

[1] See Newland Sierra Specific Plan Chapter 2.3.1.1.

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that the County will honor "tribal consultation pursuant to CEQA," although the representatives have declined to take a formal position as to whether AB 52 is applicable to this Project. However, those representatives also recognized that CEQA has been amended to include a new category of resources, "tribal cultural resources," that must be addressed in the environmental review.

Given the context of the Project's high degree of environmental impacts on tribal concerns, the County's resources and policies, and the nature and purpose of AB 52, the Tribe asserts for the reasons below, that AB 52 can be complied with by the County and that certain elements of AB 52 must legally be followed for this Project to be in CEQA compliance:

1) Tribal consultation[2] with culturally affiliated tribes should occur on Project Alternatives (in particular the Deer Springs Road element);

2) Tribal consultation should be engaged and completed on Project impacts to cultural resources, tribal cultural resources, sacred sites, historic resources, and Native American human remains;

3) The DEIR should contain an analysis on tribal cultural resources (TCRs), including tribal information and tribal values;

4) Avoidance and preservation in place should be the preferred alternative explored concerning the resources listed in 2 and 3;

5) Tribal consultation should be engaged and completed concerning culturally-appropriate mitigation measures for the Project.

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IV. TRIBAL CONSULTATION ON PROJECT ALTERNATIVES IS REQUIRED

Not only is this a key tenant of AB 52 (Cal. Pub. Res. Code §§21080.3.2 and 21080.3.1), but CEQA has always required that the range of feasible alternatives shall be selected and discussed in a manner sufficient to foster meaningful public participation and informed decision-making (Cal. Pub. Res. Code §15126.6(f)). It is not disputed that Tribal government interests are at issue with this Project. Therefore, the obligation to select and discuss alternatives is compounded to account for Tribal government interests, including those that hold the resources at issue as essential elements in their governmental and heritage structures (AB 52, Section 1(b)(1), (5), (6)). In addition, CEQA requires that public agencies shall, when feasible, avoid damaging effects to Historic Resources and Tribal Cultural Resources. In addition, avoidance of the resources must be explored first, separate and apart from the discussions on other mitigation measures (Cal. Pub. Res. Code §21084.3, CEQA Guidelines §15126.4). One key manner in which avoidance is considered is through evaluation and creation of project Alternatives.

V. TRIBAL CONSULTATION ON PROJECT IMPACTS TO RESOURCES IS REQUIRED

In AB 52, the Legislature found and declared that California Native American tribes traditionally and culturally affiliated with a geographic area may have expertise concerning their tribal cultural resources (Cal. Pub. Res. Code §21080.3.1). Although SB 18 did not specifically state such, the basis for the legislature recognizing tribes' SB 18 consultation rights concerning specific plans and general plans is because of the information, knowledge and expertise they possess concerning tribal sacred sites. In addition, CEQA requires inclusion of sufficient details of known information concerning impacts and/or information that

[2] *See* Cal. Gov. Code §65352.4; Cal. Pub. Res. Code §21080.3.1.

the lead agency is to gather, including tribal information and expertise. (Cal. Pub. Res. Code §15151; AB 52 Section 1(b)(4)).

On May 6, 2016, the Tribe for the first time received from the County a copy of the Dudek Cultural Resources Report dated April 2016. We are not aware that any of the information submitted via our March 16, 2015 letter is being considered in the preparation of the DEIR, particularly because none of it was reflected in the Dudek Report. In fact, the Dudek Report suggests that an analysis of tribal cultural resources, specifically traditional cultural properties (TCPs), is *to be completed* and asserts this is being completed by the County itself. Given the information we have to date, and using the time-line outlined at the beginning of this letter, we are not aware of any efforts by the County to complete the TCP analysis.

At this point, the Tribe is concerned that it was not invited to any scoping sessions with the cultural resources consultant that prepared the Cultural Resources Report. We were not invited for a site visit or any of the foot surveys that were conducted. In light of these facts, it already seems like the consultation process is behind schedule, particularly if the DEIR is anticipated to be released in the near future.

We cannot stress enough that a thorough cultural resources and tribal cultural resources analysis must be prepared for the DEIR prior to it being finalized and publically noticed. Tribal consultation is the primary and most crucial step in this fact-gathering and analysis process. The Pechanga Tribe asserts there are actual, not speculative, impacts to cultural resources beyond the extent and magnitude portrayed in the Cultural Resources Report dated April 2015 (and even those assessed for the former Merriam Mountains project). If this piece of the CEQA analysis is not completed prior to the DEIR being circulated, the County will likely need to complete and circulate a subsequent or supplemental EIR containing this information. This will result in delays for the applicant and the unnecessary expenditure of County resources.

As such, the County must engage in tribal consultation pursuant to SB 18 and AB 52 with the Pechanga Tribe prior to the completion of the DEIR. This consultation shall include the Project's impacts to cultural resources, sacred sites, Native American human remains and tribal cultural resources, as well as related Tribal concerns about the Project.

If the County is planning on obtaining and compiling the tribal specific information for the DEIR in some other fashion than through the cultural resources consultant we specifically request to discuss how this will be carried out, including the timing schedule, and to begin such consultation as soon as possible.

The tribal information and expertise may take the form of either a separate technical report focused on tribal values, TCPs and TCRs, documentation or information received via a tribal consultation process, and/or through inclusion in the technical report concerning the broader category of cultural resources. However, we stress that since these resource categories overlap and the categories are simply organizational constructs for ease of legal compliance, it would make more sense for the DEIR to discuss the totality of these impacts together. For example, a site might have archaeological value as well as tribal value. Those discussions should not necessarily be separated or parsed out because of the separate designation categories, but the discussion should focus on the extent and severity of the impacts to that particular site or place at issue. That way a complete and thorough assessment is achieved, as CEQA policy requires.

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VI. DEIR SHOULD CONTAIN ANALYSIS ON TRIBAL CULTURAL RESOURCES (TCRs)

AB 52 creates a new category of resources called "tribal cultural resources" (TCRs) that must now be considered under CEQA. Previously, cultural resources were generally categorized into three subtopics: archaeological, historic, and paleontological. Often, tribal cultural resources were addressed under the rubric of historic resources, in particular traditional cultural properties or significant archaeological resources. At issue with this Project are resources that fall within the categories of traditional cultural properties under CEQA, sacred sites under both AB 52 and CEQA, Native American human remains under CEQA and other sections of the California Public Resources Code and tribal cultural resources under CEQA (and AB 52).

It is also important to note that thus far within the Cultural Resources Report and the NOP, the impacts to these myriad tribal resources are being characterized inadequately and incorrectly. Although there are approximately 15 separate loci/sites within the Project area, the available documents focus on only two of the sites because of a conclusion that only those sites are significant pursuant to CEQA. However, as the Cultural Resources Report indicates, this is based on partial information. In particular, the information concerning the totality of the complex (comprised of these separate sites), the sacred areas, and the Luiseño traditional landscape have not been factored into those conclusions.

Regardless of whether AB 52 technically applies to this Project, the fact is that Luiseño cultural resources, including sacred sites and landscapes exist within this Project footprint. Whether you categorize them under Historic Resources (TCPs) or TCRs under AB 52, they must be addressed in the DEIR. Since a major aspect of AB 52 was to create a new category of resources for those with tribal value (TCRs), in addition to a process for tribal consultation, it would behoove the County to comply with AB 52 here in terms of a TCR assessment and tribal consultation. That way everyone is following established policies and sets of procedures put forth by State policy makers that actually have been State law for over 10 months now (during most of the processing of this Project application).

The Pechanga Tribe contends that it is clearly not the case that only two cultural resources sites warrant consideration under CEQA. To proceed in this manner would be a violation of CEQA requirements to identify project impacts for traditional cultural properties (Cal. Pub. Res. Code §21084.1, CEQA Guidelines §15064.5), sacred sites (SB 18), and tribal cultural resources (AB 52).

We are unaware of any directed efforts to significantly involve tribes regarding the Project's impacts on important tribal cultural resources. By not doing so, the County would deny the tribes their rights under applicable laws noted above and would enable the destruction of these non-renewable cultural resources.

In addition, AB 52 is evidence that public policy favors tribal consultation where tribal resources are concerned. Given the significant project impacts to such resources, tribal consultation and a thorough EIR addressing these impacts would ensure not only CEQA compliance, but uphold the public policy for tribes to protect the sensitive tribal cultural resources within the Project's footprint.

VII. PRESERVATION IN PLACE AS THE PREFERRED ALTERNATIVE MUST BE CONSIDERED AND EXECUTED WHEN FEASIBLE

Even prior to the passage of AB 52, CEQA announced a "preference for historical and archeological resources of preservation in place, if feasible" (CEQA Guidelines §15126.4) and, consistent with this public policy, AB 52 likewise requests that when feasible, public agencies *shall* avoid damaging effects to tribal cultural resources (Cal. Pub. Res. Code §21084.3). Thus, whether the County believes AB 52 applies to this

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project, the law both pre-AB 52 and post-AB 52 prefers avoidance of impacts to cultural resources. Despite a seemingly popular assumption, mitigation (i.e., capping) is not avoidance. It is still an impact.

SB 18 states that the purpose of tribal consultation is specifically for "*preserving* or mitigation of impacts," with the General Plan Guidelines further explaining that, "[p]reservation is the conscious act of avoiding or protection of a cultural place from adverse impacts including loss or harm. Mitigation, on the other hand, is the act of moderating the adverse impacts that a general or specific plan adoption or amendment may have on a cultural place" (Cal. Govt. Code §65040.2 (g)(1); 2005 Supplement to General Plan Guidelines, Pg. 29). In order to carry out the avoidance or preserving requirement, consultation must necessarily occur *prior* to discussions about mitigation. At the very least it is improper and contrary to State policy for a lead agency to jump to mitigation solutions without meaningful consideration of preservation and avoidance.

This preference for avoidance must be applied to this Project and specifically applied to the improvements to Deer Springs Road. As previously mentioned, there are at least two archaeological sites with tribal artifacts of significant cultural value in close proximity to the north side of Deer Springs Road. CA-SDI-4558 and CA-SDI-9822 have been "previously tested and identified as significant under the County of San Diego and CEQA criteria . . . on the basis of human remains and a pictograph feature . . . bedrock milling features, and foundations from remains of residential structures." As noted earlier, both the characterization of these two sites and the Project area as a whole fail to include the tribal values component or the relatedness of these sites with the larger Luiseño complex. The result of these shortcomings is that these two sites as well as the additional impacts to the Luiseño complex (whether we categorize it as a TCP or a TCR, or both) is at risk of being destroyed by the widening of Deer Springs Road. As such, alternative designs and footprints of this roadway, as well as culturally-appropriate mitigation that seeks avoidance should be considered and assessed in the DEIR.

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VIII. Tribal Consultation on Mitigation Measures

AB 52 requires project proponents to consider tribal cultural values in determining project impacts and mitigation. SB 18 requires tribal consultation for the purposes of preservation or mitigating impacts (Cal. Govt. Code §65040.2 (g)(1)); 2005 Supplement to General Plan Guidelines, Pg. 29).

A key component of AB 52 was not only to create a new category of resources that accounts for their tribal values, but to ensure those resources were addressed in a manner, either through avoidance or mitigation, that includes preservation of those tribal values. For example, if a site is protected in an archaeologically appropriate manner, but it neglects the tribal value of the site (i.e., excludes site visits for ceremonies), this would be mitigation that does not take into account tribal value of the site. In addition, the SB 18 Guidelines point out that it is "important that local governments consider that mitigation measures may largely differ depending on customs of a particular tribe, the characteristics and uses of a site or object, the cultural place's location, and the importance of the site to the tribe's cultural heritage. Where a cultural place is affected by a proposed general or specific plan adoption or amendment, consultations with tribes should focus on preserving, or mitigation the impacts to, that specific cultural place" (2005 Supplement to General Plan Guidelines, Pg. 30).

Part of the tribal consultation process, the definition of which is the same in both SB 18 and AB 52, is "seeking agreement where feasible." This applies to mitigation measures. Although not codified the same way in SB 18 as it is in AB 52, the point is the same. The Tribe and the public agency shall seek to agree on mitigation measures, which in turn will be recommended for inclusion in the environmental document.

Again, as explained above, because the public policy in SB 18 and AB 52 is the same, the County would be astute to go ahead and follow the processes set forth in AB 52 as well as SB 18 for avoidance and mitigation. This includes consultation with the Tribe about mitigation and where feasible, seeking agreement.

IX. DUDEK CULTURAL RESOURCES REPORT DATED APRIL 2015

The Tribe is in receipt of the Cultural Resources Report, dated April 2015 and prepared by Dudek ("Dudek Report" or "Report"). Prior to receiving the Report, we were informed via a conference call with County representatives that the report is a draft and has not yet been finalized, although the copy we have does not say draft. The Report appears to have been "approved" by Micah Hale, Ph.D., RPA. Thus, we are treating this as though it is a final report for purposes of this letter.

Although the Dudek Report contains information and assessments of resources that are tribal cultural resources (TCRs) and traditional cultural properties (TCPs), the Pechanga Band was not consulted with concerning the surveys, assessment of impacts, or characterization of the resources within the Report. However, there is no tribal information included, despite the Tribe providing information in our March 2015 letter. Dudek has not endeavored to seek additional information from the Pechanga Band, either.

The Report makes a number of determinations and conclusions without proper basis or evidence for such conclusions. In particular the Report sets forth an incomplete analysis to reach the conclusion that there are only two ways to address the sites in the Deer Springs Road proposed improvements: 1) subject them to data recovery or; 2) cap and build over them. Avoidance of the impacts is not even considered. Further, the Report says there are two sites (-4558, -9822) that qualify as significant under CEQA and the County of San Diego Resources Protection Ordinance ("RPO"), but the Report concludes that since the road is an "essential public project" those sites may be excluded from the avoidance consideration under the County's RPO.

First of all, we are puzzled as to why a cultural resources consultant (Dudek) would be taking the liberty of making a conclusion as to what is an "essential public project" in the County's jurisdiction and also why they would conjecture a legal analysis concerning the applicability of the RPO. This is an issue that should be researched and analyzed by the County as the lead agency so that the analysis is disclosed during the public CEQA process in the environmental document itself. Not only is Dudek unqualified to make this assertion, but as the consultant hired by the applicant, it is not their determination to make, even if qualified to do so. The lead agency, the County, is responsible for determining whether something is an "essential public project," and thus, responsible for adopting a statement of overriding considerations when adverse impacts cannot be avoided. For the applicant's consultant to suggest that the road is essential could be seen as an attempt to sway the decision-makers to the benefit of the applicant. CEQA review is meant to be an unbiased process, whereby planning decisions are made on a finding of substantial evidence. Neither the applicant nor their consultant should have a say in what is an "essential public project." That is for the County to determine.

Further, the Report seems to ignore that, pursuant to CEQA, avoidance is the preferred method of treatment for historic resources, archaeological resources and tribal cultural resources. As explained above, an analysis and consideration of avoidance must occur in the DEIR and it cannot be excluded based solely upon a cultural resources consultant's incomplete technical report or the inapplicability of the County RPO. It is clear that avoidance preferences in CEQA must still be complied with, particularly when there has been no offering of alternatives that actually seek to avoid impacts.

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Moreover, such a "write-off" by Dudek completely usurps the County's obligations and duties under CEQA to explore Project alternatives and avoidance of significant sites, including an alternative location for the Deer Springs Road alignment. Sadly, even from the Merriam Mountains days the County has presumed that there were no alternatives available to avoid impacts to the significant resources that will be destroyed by this Project. This despite never having adequately assessed potential alternatives. Dudek's dismissal of alternatives is not based on any true analysis of avoidance options and is certainly not only outside their purview, but also premature given the status of the environmental review process.

The Dudek Report concludes that there are only two out of 15+ known sites impacted by the Project that are significant under CEQA. The Pechanga Tribe does not agree with that conclusion. First of all, the Report neglects to incorporate vital information concerning the Luiseño village complex and the cultural landscape in the area. In addition, Dudek itself admits their inability during the foot survey to re-locate most of the rest of sites because of poor visibility. How can they properly assess the resources having been unable to view them due to the site conditions? They then are permitted to simply write-off the previously recorded sites without further research. If the County does not consult properly with the Tribe, and fails to incorporate the tribal values inherent in these resources, Dudek's report will stand as the ultimate arbiter of what is a cultural resource and what are the impacts thereto. Lastly, we are also unsure as to whether the entire Project area was subjected to a foot survey. We have information from another survey commissioned by the Golden Door Spa and Resort which uncovered two additional sites that the Dudek firm missed. It seems that in order to have even a proper assessment of cultural resources (let alone of tribal cultural resources), far more work needs to be done in order to meet the evidentiary standards imposed by the CEQA.

In addition, the Report concludes, "There are no unavoidable impacts associated with the project design." This language is based upon faulty reasoning and is arguably outside of the scope of a cultural resources consultant. Again, this is a conclusion that should be made by the County based upon a complete set of information, including tribal information, which the Report does not contain. In addition, this sort of language forecloses the necessary consideration of avoidance and that a finding of overriding consideration may need to be made.

We are also struck by the insensitivity of Dudek to intuit that, since capping was preferred by tribes on some other project in San Diego that it is a culturally-appropriate option here. Again the tribal preference as well as the State policy preference is for avoidance, not capping. Further, whether a tribe "agreed" to capping on another project is irrelevant as the facts and circumstances of each project is unique. Additionally, there are 17 federally-recognized Indian tribes in San Diego County. To presume each one has the same tradition or preference vis-à-vis preservation, avoidance and/or mitigation is ethnocentric at best. And as stated in the SB 18 Guidelines, some forms of mitigation that are appropriate for archaeological sites may not be appropriate for tribal places as they do not honor cultural values. Further, as noted above, tribes' ability to pursue avoidance has only recently found a stronger voice. Before SB 18 and AB 52, tribes were often forced to accept either complete destruction of cultural sites and removal of burials or capping of the sites. Just because a tribe was in the position to choose the lesser of two evils on another project does not mean that such an approach is culturally-appropriate or respectful. This narrow ethnocentric assumption by Dudek is a prime example of the evil AB 52 sought to stop – hired consultants telling our histories, our stories, our beliefs and our traditions.

We also have questions about the role of the Palomar collections. It appears those collections are from the two sites in the roadway area (-4558, -9822). Further, the Report recommends that they use the excavated materials as part of one of the mitigation options of data recovery; however, it is unclear to us whether the Report is concluding that such mitigation is already complete because of the previously excavated

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materials or if there would need to be more work involved, including additional excavations of the sites themselves. At this point it is important to note that Pechanga may oppose additional excavation of the sites. If Dudek is proposing such, tribal consultation should occur on this issue.

Again, we are not sure of the County's plan and process of how to assess Project impacts to sacred sites, TCRs and TCPs, but it is extremely troubling that the Cultural Resources Report contains but one paragraph about these issues.

We are also concerned with respect to section 5.1.4 Native American Heritage Values of Tested Sites of the Report. "Native American consultation is currently being performed by the County. As consultation proceeds, any information provided by the NAHC or tribes in the area regarding archaeological sites or potential Traditional Cultural Properties (TCP) will be incorporated into this report. To date, no TCPs are known to exist within the project area that currently serve religious or other community practices. During the current archaeological evaluation, no artifacts or remains were identified or recovered that could be reasonably associated with such practices" (Dudek Report, Pg. 143).

The Pechanga Tribe disagrees with this characterization about tribal cultural resources. And it is concerning that our initial letter highlighting tribally-significant places in the area was not even factored into these statements. In addition, this makes us extremely uneasy concerning the timing of compiling all this information prior to the DEIR. Again, as discussed above, the County is risking having to complete a supplemental and or subsequent EIR without it.

Most significantly, the Dudek Report makes conclusions about which sites are significant under CEQA and what types of mitigation can be approved by the lead agency with incomplete information. The Report ignores tribal information submitted thus far and does not even engage in a discussion about TCPs (a sub-category of Historic Resources) which are well within the scope of a cultural resources consultant to address.

As far as we are concerned, this Report is not conclusive concerning how many cultural sites, landscapes, sacred sites, or village complexes are present and will be impacted. Plus, the Report is missing vital tribal cultural information that would contribute to a complete assessment of the significance of the impacts to the plethora of resources present on this project site. This report as is should not be relied upon concerning the Project's impacts to historic resources, cultural resources, Native American human remains, sacred sites or tribal cultural resources.

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X. CEQA (EIR Process) and Section 106 (EIS Process) Must be Completed Concurrently

Lastly, we cannot stress enough how important it is that both the CEQA and any federal permitting processes take place at the same time. The environmental issues will overlap and it would be inequitable and unproductive to parse out the impacts assessments so that CEQA is completed first. Unfortunately, the Pechanga Tribe has faced this inequitable result previously in the County when the two environmental processes were not addressed concurrently. The result of that disjointed process was an insensitive and morally reprehensible outcome – the capping (against tribal wishes) of fourteen burials and cremations. Certainly the County, as an agency with 17 tribes within its jurisdiction, would not want to risk yet another disastrous outcome. Particularly when the County is on notice that failing to complete both processes simultaneously results in limiting the options and rights guaranteed the tribes under a Section 106 consultation process. In fact, CEQA specifically encourages that documents and assessments should be prepared together. (See 14 C.C.R. §15226, "State and local agencies should cooperate with federal agencies

to the fullest extent possible...includ[ing]: joint planning processes, (b) Joint environmental research and studies,...(d) Joint environmental documents). We believe the County would potentially be violating tribal legal rights under federal law if the consultation processes are not carried out with applicable laws followed simultaneously.

XI. CONCLUSION

In closing, the County must ensure that the Project complies with SB 18 and CEQA requirements regarding tribal consultation, avoidance of cultural resources, project alternatives, cumulative impacts, culturally-appropriate mitigation and public participation. In particular, the proposed Deer Springs Road improvements, the Project's open space designation, and numerous other aspects of the previous Project documents need to be the subject of consultation with the Pechanga Tribe prior to the DEIR publication. Tribal information and expertise concerning tribal cultural resources, sacred sites, and Native American human remains must also be incorporated into the DEIR assessments and analysis.

Again, we send this letter with the intent of working through these issues early in the process, as public policy requires and for the purposes of ensuring a thorough and adequate DEIR as well as upholding tribal legal rights concerning this Project.

We thank you for your time and consideration. If you have any questions please contact me at (951) 770-6179 or mhannah@pechanga-nsn.gov. We look forward to hearing from you to schedule an in-person consultation meeting.

Sincerely,

Michele Hannah

Michele Hannah
Deputy General Counsel

cc: Laura Miranda, Attorney for the Pechanga Tribe
Cynthia Gomez, Native American Heritage Commission
Donna Beddow, Tribal Liaison, County of San Diego

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ATTACHMENT B

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

Environmental Justice at the Local and Regional Level
Legal Background

Cities, counties, and other local governmental entities have an important role to play in ensuring environmental justice for all of California's residents. Under state law:

> "[E]nvironmental justice" means the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.

(Gov. Code, § 65040.12, subd. (e).) Fairness in this context means that the *benefits* of a healthy environment should be available to everyone, and the *burdens* of pollution should not be focused on sensitive populations or on communities that already are experiencing its adverse effects.

Many local governments recognize the advantages of environmental justice; these include healthier children, fewer school days lost to illness and asthma, a more productive workforce, and a cleaner and more sustainable environment. Environmental justice cannot be achieved, however, simply by adopting generalized policies and goals. Instead, environmental justice requires an ongoing commitment to identifying existing and potential problems, and to finding and applying solutions, both in approving specific projects and planning for future development.

There are a number of state laws and programs relating to environmental justice. This document explains two sources of environmental justice-related responsibilities for local governments, which are contained in the Government Code and in the California Environmental Quality Act (CEQA).

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Government Code

Government Code section 11135, subdivision (a) provides in relevant part:

> No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state….

While this provision does not include the words "environmental justice," in certain circumstances, it can require local agencies to undertake the same consideration of fairness in the distribution of environmental benefits and burdens discussed above. Where, for example, a general plan update is funded by or receives financial assistance from the state or a state agency, the local government should take special care to ensure that the plan's goals, objectives, policies

and implementation measures (a) foster equal access to a clean environment and public health benefits (such as parks, sidewalks, and public transportation); and (b) do not result in the unmitigated concentration of polluting activities near communities that fall into the categories defined in Government Code section 11135.[1] In addition, in formulating its public outreach for the general plan update, the local agency should evaluate whether regulations governing equal "opportunity to participate" and requiring "alternative communication services" (*e.g.*, translations) apply. (See Cal. Code Regs., tit. 22, §§ 98101, 98211.)

Government Code section 11136 provides for an administrative hearing by a state agency to decide whether a violation of Government Code section 11135 has occurred. If the state agency determines that the local government has violated the statute, it is required to take action to "curtail" state funding in whole or in part to the local agency. (Gov. Code, § 11137.) In addition, a civil action may be brought in state court to enforce section 11135. (Gov. Code, § 11139.)

California Environmental Quality Act (CEQA)

Under CEQA, "public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects ...." (Pub. Res. Code, § 21002.) Human beings are an integral part of the "environment." An agency is required to find that a "project may have a 'significant effect on the environment'" if, among other things, "[t]he environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly[.]" (Pub. Res. Code, § 21083, subd. (b)(3); see also CEQA Guidelines,[2] § 15126.2 [noting that a project may cause a significant effect by bringing people to hazards].)

CEQA does not use the terms "fair treatment" or "environmental justice." Rather, CEQA centers on whether a project may have a significant effect on the physical environment. Still, as set out below, by following well-established CEQA principles, local governments can further environmental justice.

CEQA's Purposes

The importance of a healthy environment for all of California's residents is reflected in CEQA's purposes. In passing CEQA, the Legislature determined:

- "The maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern." (Pub. Res. Code, § 21000, subd. (a).)
- We must "identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds from being reached." (*Id.* at subd. (d).)

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[1] To support a finding that such concentration will not occur, the local government likely will need to identity candidate communities and assess their current burdens.
[2] The CEQA Guidelines (Cal. Code Regs., tit. 14, §§ 15000, et seq.) are available at http://ceres.ca.gov/ceqa/.

- "[M]ajor consideration [must be] given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian." (*Id.* at subd. (g).)

- We must "[t]ake all action necessary to provide the people of this state with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise." (Pub. Res. Code, § 21001, subd. (b).)

Specific provisions of CEQA and its Guidelines require that local lead agencies consider how the environmental and public health burdens of a project might specially affect certain communities. Several examples follow.

Environmental Setting and Cumulative Impacts

There are a number of different types of projects that have the potential to cause physical impacts to low-income communities and communities of color. One example is a project that will emit pollution. Where a project will cause pollution, the relevant question under CEQA is whether the environmental effect of the pollution is significant. In making this determination, two long-standing CEQA considerations that may relate to environmental justice are relevant – setting and cumulative impacts.

It is well established that "[t]he significance of an activity depends upon the setting." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 718 [citing CEQA Guidelines, § 15064, subd. (b)]; see also *id.* at 721; CEQA Guidelines, § 15300.2, subd. (a) [noting that availability of listed CEQA exceptions "are qualified by consideration of where the project is to be located – a project that is ordinarily insignificant in its impact on the environment may in a particularly sensitive environment be significant."]) For example, a proposed project's particulate emissions might not be significant if the project will be located far from populated areas, but may be significant if the project will be located in the air shed of a community whose residents may be particularly sensitive to this type of pollution, or already are experiencing higher-than-average asthma rates. A lead agency therefore should take special care to determine whether the project will expose "sensitive receptors" to pollution (see, e.g., CEQA Guidelines, App. G); if it will, the impacts of that pollution are more likely to be significant.[3]

In addition, CEQA requires a lead agency to consider whether a project's effects, while they might appear limited on their own, are "cumulatively considerable" and therefore significant. (Pub. Res. Code, § 21083, subd. (b)(3).) "'[C]umulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future

[3] "[A] number of studies have reported increased sensitivity to pollution, for communities with low income levels, low education levels, and other biological and social factors. This combination of multiple pollutants and increased sensitivity in these communities can result in a higher cumulative pollution impact." Office of Environmental Health Hazard Assessment, *Cumulative Impacts: Building a Scientific Foundation* (Dec. 2010), Exec. Summary, p. ix, available at http://oehha.ca.gov/ej/cipa123110.html.

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projects." (*Id.*) This requires a local lead agency to determine whether pollution from a proposed project will have significant effects on any nearby communities, when considered together with any pollution burdens those communities already are bearing, or may bear from probable future projects. Accordingly, the fact that an area already is polluted makes it *more likely* that any additional, unmitigated pollution will be significant. Where there already is a high pollution burden on a community, the "relevant question" is "whether any additional amount" of pollution "should be considered significant in light of the serious nature" of the existing problem. (*Hanford, supra*, 221 Cal.App.3d at 661; see also *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1025 [holding that "the relevant issue … is not the relative amount of traffic noise resulting from the project when compared to existing traffic noise, but whether any additional amount of traffic noise should be considered significant in light of the serious nature of the traffic noise problem already existing around the schools."])

The Role of Social and Economic Impacts Under CEQA

Although CEQA focuses on impacts to the physical environment, economic and social effects may be relevant in determining significance under CEQA in two ways. (See CEQA Guidelines, §§ 15064, subd. (e), 15131.) First, as the CEQA Guidelines note, social or economic impacts may lead to physical changes to the environment that are significant. (*Id.* at §§ 15064, subd. (e), 15131, subd. (a).) To illustrate, if a proposed development project may cause economic harm to a community's existing businesses, and if that could in turn "result in business closures and physical deterioration" of that community, then the agency "should consider these problems to the extent that potential is demonstrated to be an indirect environmental effect of the proposed project." (See *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal.App.3d 433, 446.)

Second, the economic and social effects of a physical change to the environment may be considered in determining whether that physical change is significant. (*Id.* at §§ 15064, subd. (e), 15131, subd. (b).) The CEQA Guidelines illustrate: "For example, if the construction of a new freeway or rail line divides an existing community, the construction would be the physical change, but the social effect on the community would be the basis for determining that the effect would be significant." (*Id.* at § 15131, subd. (b); see also *id.* at § 15382 ["A social or economic change related to a physical change may be considered in determining whether the physical change is significant."])

Alternatives and Mitigation

CEQA's "substantive mandate" prohibits agencies from approving projects with significant environmental effects if there are feasible alternatives or mitigation measures that would substantially lessen or avoid those effects. (*Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 134.) Where a local agency has determined that a project may cause significant impacts to a particular community or sensitive subgroup, the alternative and mitigation analyses should address ways to reduce or eliminate the project's impacts to that community or subgroup. (See CEQA Guidelines, § 15041, subd. (a) [noting need for "nexus" between required changes and project's impacts].)

Depending on the circumstances of the project, the local agency may be required to consider alternative project locations (see *Laurel Heights Improvement Assn. v. Regents of University of*

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California (1988) 47 Cal.3d 376, 404) or alternative project designs (see *Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1183) that could reduce or eliminate the effects of the project on the affected community.

The lead agency should discuss and develop mitigation in a process that is accessible to the public and the affected community. "Fundamentally, the development of mitigation measures, as envisioned by CEQA, is not meant to be a bilateral negotiation between a project proponent and the lead agency after project approval; but rather, an open process that also involves other interested agencies and the public." (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 93.) Further, "[m]itigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments." (CEQA Guidelines, § 15126.4, subd. (a)(2).)

As part of the enforcement process, "[i]n order to ensure that the mitigation measures and project revisions identified in the EIR or negative declaration are implemented," the local agency must also adopt a program for mitigation monitoring or reporting. (CEQA Guidelines, § 15097, subd. (a).) "The purpose of these [monitoring and reporting] requirements is to ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded." (*Federation of Hillside and Canyon Assns. v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261.) Where a local agency adopts a monitoring or reporting program related to the mitigation of impacts to a particular community or sensitive subgroup, its monitoring and reporting necessarily should focus on data from that community or subgroup.

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Transparency in Statements of Overriding Consideration

Under CEQA, a local government is charged with the important task of "determining whether and how a project should be approved," and must exercise its own best judgment to "balance a variety of public objectives, including economic, environmental, and social factors and in particular the goal of providing a decent home and satisfying living environment for every Californian." (CEQA Guidelines, § 15021, subd. (d).) A local agency has discretion to approve a project even where, after application of all feasible mitigation, the project will have unavoidable adverse environmental impacts. (*Id.* at § 15093.) When the agency does so, however, it must be clear and transparent about the balance it has struck.

To satisfy CEQA's public information and informed decision making purposes, in making a statement of overriding considerations, the agency should clearly state not only the "specific economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits" that, in its view, warrant approval of the project, but also the project's "unavoidable adverse environmental effects[.]" (*Id.* at subd. (a).) If, for example, the benefits of the project will be enjoyed widely, but the environmental burdens of a project will be felt particularly by the neighboring communities, this should be set out plainly in the statement of overriding considerations.

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The Attorney General's Office appreciates the leadership role that local governments have played, and will continue to play, in ensuring that environmental justice is achieved for all of California's residents. Additional information about environmental justice may be found on the Attorney General's website at http://oag.ca.gov/environment.