

## 5. Environmental Analysis

### 5.14 TRIBAL CULTURAL RESOURCES

Tribal cultural resources (TCR) include landscapes, sacred places, or objects with cultural value to a California Native American tribe. This section of the Draft Environmental Impact Report (DEIR) evaluates the potential for implementation of the Proposed Project to impact TCRs in the City of San Juan Capistrano. Potential impacts to other cultural resources (i.e., historic, archaeological, and paleontological) are evaluated in Section 5.3, *Cultural Resources*. The analysis in this section is based in part on the following information:

- *Cultural and Paleontological Resources Assessment for the Creekside Specific Plan, San Juan Capistrano, Orange County, California*, Cogstone, January 2020.

A complete copy of this study is in the technical appendices of this Draft EIR (Appendix D).

#### 5.14.1 Environmental Setting

##### 5.14.1.1 REGULATORY BACKGROUND

###### Federal

###### *Archaeological Resources Protection Act*

The Archaeological Resources Protection Act of 1979 regulates the protection of archaeological resources and sites on federal and Indian lands.

###### *Native American Graves Protection and Repatriation Act*

The Native American Graves Protection and Repatriation Act is a federal law passed in 1990 that mandates museums and federal agencies to return certain Native American cultural items—such as human remains, funerary objects, sacred objects, or objects of cultural patrimony—to lineal descendants or culturally affiliated Indian tribes.

###### State

###### *Public Resources Code*

Archaeological resources are protected pursuant to a wide variety of state policies and regulations enumerated under the California Public Resources Code (PRC). In addition, cultural resources are recognized as nonrenewable resources and therefore receive protection under the PRC and the California Environmental Quality Act (CEQA).

- **PRC Sections 5097.9 to 5097.991** provide protection to Native American historical and cultural resources and sacred sites and identify the powers and duties of the Native American Heritage Commission (NAHC). They also require notification to descendants of discoveries of Native American human remains and provide for treatment and disposition of human remains and associated grave goods.

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- **PRC Section 5097.9** states that no public agency or private party on public property shall “interfere with the free expression or exercise of Native American Religion.” The code further states that:

No such agency or party [shall] cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine... except on a clear and convincing showing that the public interest and necessity so require. County and city lands are exempt from this provision, except for parklands larger than 100 acres.

#### *Health and Safety Code*

The discovery of human remains is regulated by California Health and Safety Code Section 7050.5, which states that:

In the event of discovery or recognition of any human remains in any location other than a dedicated cemetery, there shall be no further excavation...until the coroner...has determined...that the remains are not subject to...provisions of law concerning investigation of the circumstances, manner and cause of any death, and the recommendations concerning the treatment and disposition of the human remains have been made to the person responsible.... The coroner shall make his or her determination within two working days from the time the person responsible for the excavation, or his or her authorized representative, notifies the coroner of the discovery or recognition of the human remains. If the coroner determines that the remains are not subject to his or her authority and...has reason to believe that they are those of a Native American, he or she shall contact, by telephone within 24 hours, the Native American Heritage Commission.

#### *Senate Bill 18*

Prior to the enactment of Senate Bill 18 (SB 18) (California Government Code Sections 65352.3 et seq.) related to traditional tribal cultural places (TTCP) in 2004, state law provided limited protection for Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places. These places may include sanctified cemeteries, religious and ceremonial sites, shrines, burial grounds, prehistoric ruins, archaeological or historic sites, Native American rock art inscriptions, or features of Native American historic, cultural, and sacred sites.

SB 18 placed new requirements on local governments for developments within or near TTCPs. SB 18 requires local jurisdictions to provide opportunities for involvement of California Native Americans tribes in the land-planning process for the purpose of preserving traditional tribal cultural places. The Final Tribal Guidelines recommends that the NAHC provide written information as soon as possible but no later than 30 days after the receipt of the notification to inform the lead agency if the Proposed Project is determined to be in proximity to a TTCP, and another 90 days for tribes to respond to if they want to consult with the local government to determine whether the project would have an adverse impact on the TTCP. There is no statutory limit on the consultation duration. Forty-five days before the action is publicly considered by the local government council, the local government refers action to agencies, following the CEQA public review time frame. The CEQA public distribution list may include tribes listed by the NAHC who have requested consultation or it may not. If the NAHC, the tribe, and interested parties agree upon the mitigation measures necessary for the project,

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they would be included in the project's EIR. If both the lead agency and the tribe agree that adequate mitigation or preservation measures cannot be taken, then neither party is obligated to take action.

SB 18 requires a city or county to consult with the NAHC and any appropriate Native American tribe prior to the adoption, revision, amendment, or update of a city's or county's General Plan. Although SB 18 does not specifically mention consultation or notice requirements for adoption or amendment of specific plans, the Final Tribal Guidelines advises that SB 18 requirements extend to specific plans as well, because state planning law requires local governments to use the same process for amendment or adoption of specific plans as for general plans (defined in Government Code § 65453). In addition, SB 18 provides a new definition of TCR that requires a traditional association of the site with Native American traditional beliefs, cultural practices, or ceremonies, or the site must be shown to actually have been used for activities related to traditional beliefs, cultural practices, or ceremonies. Previously, the site was defined to require only an association with traditional beliefs, practices, lifeways, and ceremonial activities. In addition, SB 18 law amended Civil Code Section 815.3 and added California Native American tribes to the list of entities that can acquire and hold conservation easements for the purpose of protecting their cultural places.

### *Assembly Bill 52*

The Native American Historic Resource Protection Act (AB 52) took effect July 1, 2015, and incorporates tribal consultation and analysis of impacts to TCR into the CEQA process. It requires that impacts to TCRs be analyzed like any other CEQA topic and establishes a consultation process for lead agencies and California tribes. Projects that require a Notice of Preparation of an EIR or Notice of Intent to adopt an ND or MND are subject to AB 52. A significant impact on a TCR is considered a significant environmental impact, requiring feasible mitigation measures.

TCRs must have certain characteristics:

- 1) Sites, features, places, cultural landscapes (must be geographically defined), sacred places, and objects with cultural value to a California Native American tribe that are either included or determined to be eligible for inclusion in the California Register of Historic Resources or included in a local register of historical resources. (PRC § 21074[a][1])
- 2) The lead agency, supported by substantial evidence, chooses to treat the resource as a TCR. (PRC § 21074[a][2])

The first category requires that the TCR qualify as a historical resource according to PRC Section 5024.1. The second category gives the lead agency discretion to qualify that resource—under the conditions that it support its determination with substantial evidence and consider the resource's significance to a California tribe. Following is a brief outline of the process (PRC §§ 21080.3.1–3.3).

- 1) A California Native American tribe asks agencies in the geographic area with which it is traditionally and culturally affiliated to be notified about projects. Tribes must ask in writing.

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- 2) Within 14 days of deciding to undertake a project or determining that a project application is complete, the lead agency must provide formal written notification to all tribes who have requested it.
- 3) A tribe must respond within 30 days of receiving the notification if it wishes to engage in consultation.
- 4) The lead agency must initiate consultation within 30 days of receiving the request from the tribe.
- 5) Consultation concludes when both parties have agreed on measures to mitigate or avoid a significant effect to a TCR, OR a party, after a reasonable effort in good faith, decides that mutual agreement cannot be reached.
- 6) Regardless of the outcome of consultation, the CEQA document must disclose significant impacts on TCRs and discuss feasible alternatives or mitigation that avoid or lessen the impact.

#### 5.14.1.2 EXISTING CONDITIONS

The Project Site is fully developed with vacant industrial building. The project area is within the territory of the Acjachemen (Juaneño) (Cogstone 2020). Their traditional tribal territory was situated partly in northern San Diego County and partly in southern Orange County, generally bounded by Las Pulgas Creek to the south, Aliso Creek to the north, the Pacific Ocean to the west, and the Santa Ana Mountains to the east. Villages were mostly along San Juan Creek, Trabuco Creek, and San Mateo Creek. Two prehistoric villages nearest the Project Site are both 0.25 to 0.5 miles from the Project Site. The NAHC performs searches of its Sacred Lands Inventory to alert agencies of the existence, but not the location, of Native American sacred sites in a project's Area of Potential Effects (NAHC 2020). A Sacred Lands File (SLF) search request was sent to the Native American Heritage Commission (NAHC) on November 6, 2019. The NAHC responded on November 22, 2019, with a positive SLF search. There are no known TCRs on the Project Site.

#### 5.14.2 Thresholds of Significance

According to Appendix G of the CEQA Guidelines, a project would normally have a significant effect on the environment if the project would:

- TCR-1 Cause a substantial adverse change in the significance of a tribal cultural resource, defined in Public Resources Code § 21074 as either a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American tribe, and that is:
- i) Listed or eligible for listing in the California Register of Historical Resources, or in a local register of historical resources as defined in Public Resources Code section 5020.1(k), or
  - ii) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Public Resources Code § 5024.1. In applying the criteria set forth in subdivision (c) of Public

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Resource Code § 5024.1, the lead agency shall consider the significance of the resource to a California Native American tribe.

### 5.14.3 Plans, Programs, and Policies

#### Regulatory Requirements

PPP TCR-1 Pursuant to the California Health and Safety Code Section 7050.5, the Proposed Project would stop further excavation in the event of discovery or recognition of any human remains until a qualified coroner has made appropriate determination regarding the find. The coroner will make his or her determination within two working days from the time the person responsible for the excavation, or his or her authorized representative, notifies the coroner of the discovery or recognition of the human remains. If the coroner determines that the remains are not subject to his or her authority and...has reason to believe that they are those of a Native American, he or she shall contact, by telephone within 24 hours, the Native American Heritage Commission.

### 5.14.4 Environmental Impacts

#### 5.14.4.1 METHODOLOGY

Conducting consultation early in the CEQA process allows tribal governments, public lead agencies, and project proponents to discuss the level of environmental review, identify and address potential adverse impacts to TRC, and reduce the potential for delay and conflict in the environmental review process. The intent of the consultations is to provide an opportunity for interested Native American contacts to work with the City during the project planning process to identify and protect TCRs.

The City sent combined SB18-AB52 invitation letters to Native American tribes on January 7, 2020, which formally invited tribes to consult with the City on the Proposed Project pursuant to SB18 and AB52.

#### SB 18 Consultation

In accordance with SB 18 requirements, the NAHC provided a list of tribal representatives who may have knowledge of TRCs in the project area. The City sent invitation letters to the Native American contacts provided by the NAHC. Letters and emails were sent to:

- Jeff Grubbe, Chairperson, Agua Caliente Band of Cahuilla Indians
- Patricia Garcia-Plotkin, Director, Agua Caliente Band of Cahuilla Indians
- Sonia Johnston, Chairperson, Juaneno Band of Mission Indians
- Joyce Perry, Tribal Manager, Juaneno Band of Mission Indians Acjachemen Nation – Belardes
- Matias Belardes, Chairperson, Juaneno Band of Mission Indians Acjachemen Nation – Belardes

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- Teresa Romero, Chairperson, Juaneno Band of Mission Indians Acjachemen Nation – Romero
- Fred Nelson, Chairperson, La Jolla Band of Luiseno Indians
- Shasta Gaughen, Tribal Historic Preservation Officer, Pala Band of Mission Indians
- Temet Aguilar, Chairperson, Pauma Band of Luiseno Indians
- Mark Macarro, Chairperson, Pechanga Band of Luiseno Indians
- Paul Macarro, Cultural Resources Coordinator, Pechanga Band of Luiseno Indians
- Cheryl Madrigal, Tribal Historic Preservation Officer, Rincon Band of Luiseno Indians
- Bo Mazzetti, Chairperson, Rincon Band of Luiseno Indians
- San Luis Rey, Tribal Council, San Luis Rey Band of Mission Indians
- Joseph Ontiveros, Cultural Resource Department, San Luis Rey Band of Mission Indians Soboba Band of Luiseno Indians
- Scott Cozart, Chairperson, Soboba Band of Luiseno Indians

#### **AB 52 Consultation**

AB 52 requires meaningful consultation with California Native American tribes on potential impacts to TCRs, as defined in PRC Section 21074. TCRs are sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either eligible or listed in the California Register of Historical Resources or local register of historical resources. As part of the AB 52 process, Native American tribes must submit a written request to the lead agency to be notified of projects within their traditionally and culturally affiliated area.

On March 19, 2020, response emails were received from two tribal representative—Joyce Perry, Tribal Manager, Cultural Resource Director and Matias Belardes, Chairperson, of Juaneño Band of Mission Indians Acjachemen Nation—Belardes—requesting native and archaeological monitoring of all ground-disturbing activities and to be consulted and kept informed of the Proposed Project. No in-person meeting or telephone meeting was requested. The City is in compliance with AB 52.

#### **5.14.4.2 IMPACT ANALYSIS**

The following impact analysis addresses thresholds of significance for which the Initial Study disclosed potentially significant impacts. The applicable thresholds are identified in brackets after the impact statement.

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**Impact 5.14-1: The Proposed Project would not cause a substantial adverse change in the significance of a tribal cultural resource that is listed or eligible for listing in the California Register of Historical Resources or in a local register of historical resources as defined in Public Resources Code section 5020.1(k). [Threshold TCR-1.i]**

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The Project Site east of Rancho Viejo Road is developed as an industrial building and associated surface parking lot, and the area west of Viejo Road and the extent of impact area are undeveloped, and nonnative vegetation and trees cover the ground surface. The Project Site is not eligible or listed in the California Register of Historical Resources or local register of historical resources (Public Resources Code § 21074) (Cogstone 2020). Implementation of the Proposed Project would not result in any substantial adverse change in a TCR defined pursuant to PRC 5024.1 or PRC 5020.1(k).

*Level of Significance Before Mitigation:* No Impact.

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**Impact 5.14-2: The Proposed Project could cause a substantial adverse change in the significance of a tribal cultural resource that is determined by the lead agency to be significant pursuant to criteria in Public Resources Code section 5024.1(c). [Threshold TCR-1.ii]**

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There are no known TCRs within the boundaries of the Project Site. The Project Site was developed between 1972 through 1977 and is not listed in the California Register of Historical Resources or National Register of Historic Places (Cogstone 2020). The Project Site does not meet any of the historical resources criteria outlined in the PRC 2024.1.

In considering the significance of the resource to a California Native American tribe, the City contacted the Native American Heritage Commission for the listing of tribes with traditional lands or cultural places located within the boundaries of the Project Site and to search the Sacred Lands File. The SLF search result was positive. And as described in Section 5.14.4.1, *Methodology*, the City contacted the listed tribes, and only two tribal representatives from the same tribal group responded—Joyce Perry, Tribal Manager, Cultural Resource Director and Matias Belardes, Chairperson, of Juaneño Band of Mission Indians Acjachemen Nation–Belardes.

The Juaneño Band of Mission Indians Acjachemen Nation–Belardes considers the Project Site within its ancestral tribal territory, descending from a higher degree of kinship than traditional or cultural affiliation. Provided that the Project Site is in the SLF per the NAHC search and that the Juaneño Band of Mission Indians Acjachemen Nation–Belardes requested a native and archaeological monitor to be on-site during all ground-disturbing activities, the Project Site is considered in a sensitive area and may cause a substantial adverse change in the significance of their TCRs. Because there is a possibility that grading and excavation activities during implementation of the Proposed Project could impact previously undisturbed TCRs, impacts to TCRs are considered potentially significant.

*Level of Significance Before Mitigation:* Potentially Significant.

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#### 5.14.5 Cumulative Impacts

Cumulative impacts to TCRs would occur when the impacts of the Proposed Project, in conjunction with other projects and development in the City, result in multiple and/or cumulative impacts to TCRs in the area. The presence of TCRs are site specific. Similar to the Proposed Project, it is anticipated that other development projects would consult with NAHC and comply with AB52 and SB18 as required. If requested, each development project would consult with Native American tribes that request consultation and develop appropriate mitigation measures.

For the Proposed Project, the Juaneño Band of Mission Indians Acjachemen Nation–Belardes, the ancestral tribal group, did not identify any recorded TCR on or near the Project Site, and the archaeological survey did not identify any cultural resources. However, a records search through SCCIC and SLF indicated that the Project Site is in the vicinity of two prehistoric village sites. Therefore, a mitigation measure has been provided to reduce the potential impacts, and it is unlikely that the Proposed Project, in conjunction with other development projects in the City (which would also incorporate mitigation measures as needed), would result in cumulatively significant TCR impacts.

*Level of Significance Before Mitigation:* Less than significant.

#### 5.14.6 Level of Significance Before Mitigation

Upon implementation of regulatory requirements and standard conditions of approval, the following impacts would be less than significant: 5.14-1.

Without mitigation, the following impacts would be **potentially significant**:

- **Impact 5.14-2** Tribal cultural resources could be adversely impacted by grading activities associated with the Proposed Project.

#### 5.14.7 Mitigation Measures

##### Impact 5.14-2

TCR-1 Prior to the issuance of any permits allowing ground-disturbing activities that cause excavation to depths greater than artificial fill, the City of San Juan Capistrano shall ensure that the applicant/developer retains qualified Native American monitor(s) during construction-related ground disturbance activities. The monitor(s) shall be approved by the tribal representatives of the Juaneño Band of Mission Indians Acjachemen Nation–Belardes and be present on-site during construction that involves ground-disturbing activities. The Native American monitor(s) shall be responsible for the following activities during the monitoring, as appropriate:

- Complete monitoring logs on a daily basis, providing descriptions of the daily activities, including construction activities, locations, soil, and any cultural materials identified.

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- The on-site monitoring shall end when the Project Site grading and excavation activities are completed, or when the tribal representatives and monitor have indicated that the Project Site has a low potential for tribal cultural resources.
- Upon discovery of human remains, the tribal and/or archaeological monitor/consultant/consultant shall immediately divert work a minimum of 150 feet and place an exclusion zone around the burial. The monitor/consultant(s) shall then notify the tribe, the qualified lead archaeologist, and the construction manager who shall call the coroner.
- Work will continue to be diverted while the coroner determines whether the remains are Native American. The discovery is to be kept confidential and secure to prevent any further disturbance. If the finds are determined to be Native American, the coroner will notify the Native American Heritage Commission (NAHC), as mandated by state law, who will then appoint a Most Likely Descendent (MLD).

If the Juaneño Band of Mission Indians Acjachemen Nation–Belardes is designated MLD, the following treatment measures shall be implemented.

- Prior to the continuation of ground-disturbing activities, the applicant/developer shall arrange a designated site location within the footprint of the Project Site for the respectful reburial of the human remains and/or ceremonial objects.
- In the case where discovered human remains cannot be fully documented and recovered on the same day, the remains shall be covered with muslin cloth and a steel plate that can be moved by heavy equipment placed over the excavation opening to protect the remains. If this type of steel plate is not available, a 24-hour guard should be posted outside of working hours.
- The tribe shall make every effort to recommend diverting the development and keeping the remains in situ and protected. If the development cannot be diverted, it may be determined that the burials will be removed. The tribe will work closely with the qualified archaeologist to ensure that the excavation is treated carefully, ethically, and respectfully.
- If data recovery is approved by the tribe, documentation shall be taken that includes, at a minimum, detailed descriptive notes and sketches. Additional types of documentation shall be approved by the tribe for data recovery purposes.
- Cremations will either be removed in bulk or by other means as necessary to ensure completely recovery of all material. If the discovery of human remains includes four or more burials, the location is considered a cemetery and a separate treatment plan shall be created. Once complete, a final report of all activities is to be submitted to the tribe and the NAHC.
- Each occurrence of human remains and associated funerary objects shall be stored using opaque cloth bags. All human remains, funerary objects, sacred objects, and objects of

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cultural patrimony will be removed to a secure container on-site if possible. These items should be retained and reburied within six months of recovery. The site of reburial/repatriation shall be on the Project Site but at a location agreed upon between the tribe and the applicant/developer that will be protected in perpetuity. There shall be no publicity regarding any cultural materials recovered.

#### 5.14.8 Level of Significance After Mitigation

The mitigation measure identified above would reduce potential impacts associated with tribal cultural resources to a level that is less than significant. Therefore, no significant unavoidable adverse impacts relating to tribal cultural resources remain.

#### 5.14.9 References

Cogstone. 2020, January. Cultural and Paleontological Resources Assessment for the Creekside Specific Plan, San Juan Capistrano, Orange County, California.

State of California, Native American Heritage Commission (NAHC). 2020, June 29 (assessed).  
Environmental and Cultural Department. <http://nahc.ca.gov/new-pages/environmental-and-cultural-department/>