

Submission 719 (Sam Cohen, Santa Ynez Band of Chumash Indians, April 13, 2020)

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Submission Method :	Project Email
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Stakeholder Comments/Issues :	

Many thanks for the additional opportunity to comment.

Sincerely,

Sam Cohen, Government Affairs and Legal Officer
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EIR/EIS Comment : Yes
 Attachments : Bakersfield.Palmdale.EIR.EIS.draft.Comments.Chumash.04-13-20.pdf (802 kb)

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April 13, 2020

California High Speed Rail Authority (CHSRA)
 Bakersfield to Palmdale Section

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Attention: Mark McLoughlin
Mark.mcloughlin@hsr.ca.gov

Attention: Diana Gomez
Diana.Gomez@hsr.ca.gov

RE: CEQA and NEPA Comments and Request for Tribal Consultation
 Santa Ynez Band of Chumash Indians ("Tribe" or "Chumash")
 Draft EIR/EIS for Cal. High Speed Rail Bakersfield to Palmdale Project Section
 ("PROJECT")

Dear Mr. McLoughlin and Ms. Gomez:

The Santa Ynez Band of Chumash Indians provides the following comments and request for Tribal Consultation for the Draft EIR/EIS (DEIS) for the above-mentioned PROJECT.

COMMENTS DEADLINES SHOULD BE EXTENDED FOR COVID-19 FOR 90 DAYS

In response to the COVID-19 pandemic, the state and several local jurisdictions have issued orders/rules in the last few weeks that affect not only the timing of processing land use and planning entitlements, but also the filing of California Environmental Quality Act (CEQA) and other claims challenging land use projects and approvals in California courts. The situation is fluid, but this entry summarizes some of the major orders affecting planning and CEQA deadlines.

In one of the most significant developments, on April 6, 2020, the Judicial Council of California issued Emergency Rules to address impacts of the COVID-19 pandemic on the judicial branch. Among other things, the Judicial Council added emergency rule 9 to the Rules of Court, which tolls the time to file any type of civil litigation from April 6, 2020 until 90 days after California Governor Gavin Newsom lifts the state of emergency for the COVID-19 pandemic. This is a significant time extension for many civil case types, and CEQA claims in particular, as they otherwise must be filed within 30 or 35 days of agency action. In practice, this means that project proponents and lead agencies will likely have a longer period of uncertainty related to whether a project will be challenged in court, both during the state of emergency and for some time afterward.

<https://www.ceqachronicles.com/2020/04/covid-19-alert-judicial-council-issues-sweeping-emergency-rules-local-agencies-issue-regional-changes/>

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CALIFORNIA STATE AND CAL/EPA CONSULTATION OBLIGATIONS

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Independently, we note the obligation of all state agencies, including Cal/EPA and CHSRA to consult with the Tribe generally and specifically as to PROJECT:

Executive Order B-10-11:

IT IS FURTHER ORDERED that it is the policy of this Administration that every state agency and department subject to my executive control shall encourage communication and consultation with California Indian Tribes. Agencies and departments shall permit elected officials and other representatives of tribal governments to provide meaningful input into the development of legislation, regulations, rules, and policies on matters that may affect tribal communities.

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We also note CAL/EPA Policy/Memorandum CIT 09-01, CAL/EPA Policy for Working With California Indian Tribes dated 10-19-09, Guiding Principles that Cal/EPA and its BDOs shall:

1. Acknowledge and respect tribal sovereignty, as defined in this policy.
2. Understand that federally-recognized tribes have a unique relationship with the federal government.
3. Understand the importance of communication and collaboration with California Indian Tribes.
4. Communicate with California Indian Tribes in a manner that is respectful and considerate.
5. Seek to identify and include federally-recognized California Indian Tribes in decision-making processes that affect tribal lands.
6. Seek to identify and include federally-recognized and non-federally recognized California Indian Tribes in decision-making processes that affect cultural resources.
7. Recognize and respect the cultural resources of California Indian Tribes, whether or not on tribal lands.
8. Where appropriate, consider the potential impact of our activities or programs on tribal lands and cultural resources.
9. Encourage collaborative efforts between the California Indian Tribes and federal, state, and local government entities to resolve issues of mutual concern.

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10. Promote efforts of California Indian Tribes to develop and expand environmental programs, and to achieve compliance with environmental laws.

Furthermore, on August 20, 2015, we also note CALEPA Policy/Memorandum CIT 15-01, CAL/EPA Policy on Consultation With California Native American Tribes which provides the following **GUIDING PRINCIPLES:**

CalEPA and its BDOs will be guided by the following principles and best practices to improve and maintain effective government-to-government relationships and consultation with California Native American Tribes. CalEPA and its BDOs shall:

1. Acknowledge and respect Tribal sovereignty.
2. Understand that federally-recognized Tribes have a unique trust relationship with the federal government.
3. Recognize that all California Native American Tribes represent distinct and independent governmental entities with specific beliefs, traditions and unique connections to areas of California that are their ancestral homelands.
4. Communicate and consult with California Native American Tribes during the initial phase of decision-making processes that may affect Tribal lands, people, or cultural resources.
5. Recognize and respect the cultural resources of California Native American Tribes, whether or not the cultural resources are located on Tribal lands.
6. Acknowledge the need for confidentiality regarding places, land, people and cultural resources with traditional Tribal cultural significance.
7. Consider the potential impact of the Agency's activities or programs on Tribal lands and cultural resources.
8. Encourage collaborative efforts between California Native American Tribes and federal, state, and local government entities to resolve issues of mutual concern.

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The Native American Heritage Commission (NAHC)

The California Native American Heritage Commission (NAHC), placed in the California Natural Resources Agency, is the State Trustee Agency for the protection and preservation of Native American cultural resources pursuant to CA Public Resources Code §21 070 and Environmental Protection Information Center v. Johnson, 170 Cal App. 3rd 604 (1985). It is a nine-member Commission, all Native American with a requirement that five members be tribal elders, governs the NAHC. The Commission is appointed by the Governor and ratified by the California Senate. California has the greatest population of American Indian persons, about 330,000, than any other state; about 100,000 are descendants of California's indigenous tribes. There are 109 federally recognized (by the U.S. Department of the Interior) tribes in California and another 45 Non

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Federally recognized, but acknowledged as viable tribal governments for the purposes of State of California laws, by the NAHC. While the U.S. Senate never ratified the 18 treaties of 1851-52, with California tribes, there is recognition in state and federal law that California indigenous tribes did own California lands and resources.

Tribal Consultation with the NAHC

Although tribal consultation under the California Environmental Quality Act (CEQA; CA Public Resources Code Section 21000 - 21177) is 'advisory' rather than mandated, the NAHC does request 'lead agencies' to work with tribes and interested Native American individuals as 'consulting parties,' on the lists provided by the NAHC in order that cultural resources will be protected. Consultation is required with California Native American tribes, which includes both federally recognized and non-federally recognized on a list maintained by the NAHC. The Native American Contacts list for the project includes both Ventura County and Los Angeles County.

The NAHC also is a 'reviewing agency' for environmental documents prepared under the National Environmental Policy Act (NEPA; 42 U.S.C 4321 et seq). Also, proposed projects that are subject to the Tribal and interested Native American consultation requirements of the National Historic Preservation Act, as amended (Section 106) (16 U.S.C. 470) consultation with Native American tribes and interested Native American individuals, as consulting parties, is mandatory as part of the Section 4(f) project evaluation. In addition, the provision of the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001-3013) will also apply to this project if Native American human remains are inadvertently discovered during 'ground-breaking' activity of the project, once the project is permitted to construct.

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Cultural Surveys

The California Environmental Quality Act (CEQA) does require that any project that causes a substantial adverse change in the significance of an historical resource, that includes archaeological resources, is a 'significant effect' requiring the preparation of an Environmental Impact Report (EIR) per the California Code of Regulations §15064.5(b)(c)(f) CEQA guidelines). Section 15382 of the 2007 CEQA Guidelines defines a significant impact on the environment as "a substantial, or potentially substantial, adverse change in any of physical conditions within an area affected by the proposed project, including ... objects of historic or aesthetic significance." In order to comply with this provision, the lead agency is required to assess whether the project will have an adverse impact on these resources within the 'area of potential effect (APE)', and if so, to mitigate that effect. The NAHC is of the opinion that the federal standards, pursuant to the above-referenced Acts of the U.S. Congress and the President's Council on Environmental Quality (CSQ; 42 U.S.C. 4371 et seq) are similar to and in many cases more stringent with regard to the 'significance' of historic, including Native American items, and archaeological features, including those of Native American origin, than are the provisions of the California Environmental Quality Act (CEQA.) of 1970, as amended. In most cases, federal environmental policy require that any project that causes a substantial adverse change in the significance of an historical resource, that includes archaeological resources, is a 'significant effect' requiring the preparation of an Environmental Impact Statement (EIS) under NEPA and an Environmental Impact Report (EIR) under CEQA. An Environmental Assessment, (EA) prepared under NEPA or an Initial Study under

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CEQA, defines a significant impact on the environment as "a substantial, or potentially substantial, adverse change in any of physical conditions within an area affected by the proposed project, including ... objects of historic or aesthetic significance." In order for either federal or state 'lead agencies' to comply with this provision, the lead agency is required to assess whether the project will have an adverse impact on these resources within the 'area of potential effect (APE)', and if the project is determined to have an adverse impact on a cultural resources; then, to mitigate that effect of the project.

The following are suggestions for ensuring that an adequate 'cultural survey' is done for the PROJECT site:

1. Review the Cultural Resource Studies of PROJECT and DOE and BOEING;
2. Review the available archaeological files of PROJECT and the Department of Energy (DOE), if available to you;
3. Contact the California Historic Resources Information System (CHRIS), Information Center;
4. Contact the Native American Heritage Commission requesting Sacred Lands File (SLF) searches, from their inventory, separate from that of the CHRIS inventory, established by the California Legislature pursuant to CA Public Resources Code §5097.94(a).

The records searches will determine:

- If a part or the entire APE has been previously surveyed for cultural resources.
- If any known cultural resources have already been recorded in or adjacent to the APE.
- If the probability is low, moderate, or high that cultural resources are located in the APE.
- If a survey is required to determine whether previously unrecorded cultural resources are present.
- If an archaeological inventory survey is required, the final stage is the preparation of a professional report detailing the findings and recommendations of the records search and field survey.
- The final report containing site forms, site significance, and mitigation measures should be submitted immediately to the appropriate planning department. All information regarding site locations, Native American human remains, and associated funerary objects should be in a separate confidential addendum, and not be made available for public disclosure.

Mitigation

The California Native American Heritage Commission does prefer "avoidance, as defined in the California Code of Regulations §15370; if not possible, the following is recommended:

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- The NAHC advises the use of Native American Monitors, also, when professional project proponents employ archaeologists or the equivalent, in order to ensure proper identification and care given cultural resources that may be discovered. This recommendation also applies to Phase I of NEPA and the Initial Study for CEQA. In many cases, only a local tribe(s) or Native American individuals or elders may know the existence of a Native American cultural resources.
- Lack of surface evidence of archeological resources does not preclude their subsurface existence.
- Lead agencies should include in their mitigation plan provisions for the identification and evaluation of accidentally discovered archeological resources, per California Environmental Quality Act (CEQA) §15064.5 (t). In areas of identified archaeological sensitivity, a certified archaeologist and a culturally affiliated Native American, with knowledge in cultural resources, should monitor all ground-disturbing activities.
- Again, a culturally affiliated Native American tribe may be the only source of information about a Sacred Site/Native American cultural resource.
- Lead agencies should include in their mitigation plan provisions for the disposition of recovered artifacts, in consultation with culturally affiliated Native Americans.

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THE ENTIRE PROJECT SITE MUST BE ANALYZED AS A TRADITIONAL CULTURAL LANDSCAPE

This constitutes a project for the purposes of CEQA and the lead agency has a duty to prepare an Environmental Impact Report (“EIR”) to assess the potential environmental effects of the proposed project and identify mitigation measures that could reduce or avoid potential environmental impacts. CEQA Guidelines at 14 CCR 15121(a). The lead agency must consider direct physical changes in the environment and reasonably foreseeable indirect changes in the environment which may be caused by the project and to mitigate or avoid the significant effects on the environment of projects whenever feasible. Public Resources Code (PRC) Secs. 21083.2 – 21084.1 and 21002.1; CEQA Guidelines at 14. CCR Sec. 15064(d). CEQA provides for the protection of unique archaeological resources and historic resources. PRC secs. 21083.2 and 21084.1. A project with an effect that may cause a substantial adverse change in the significance of a historic resource is a project that may have a significant effect on the environment. 14 CCR sec. 15064.5(b). Thus the lead agency has a duty to avoid substantial adverse changes to historical and cultural resources.

Furthermore, the Governor’s Office of Planning and Research (OPR) has observed that California Executive Order W-26-92 affirms that all state agencies shall recognize and, to the extent possible, preserve and maintain the significant heritage resources of the State. See Tribal Consultation Guidelines (Interim), March 1, 2005 at p. 7. California state law includes a variety of provisions that promote the protection and preservation of Native American cultural places. Id.

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AUTHORITY TO IDENTIFY CULTURAL RESOURCES

CEQA provides that certain historical resources are presumed to be historically or culturally significant for the purposes of CEQA. See PRC Sec. 21084.1. Additionally, CEQA provides that, even if a resource has been identified as significant pursuant to one of these mechanisms, a lead agency has the discretion to determine whether the resource may be a historical resource for the purpose of CEQA. Id. The CEQA Guidelines further clarify the authority of a lead agency to determine the presence of historically significant resources:

Any object, building, structure, site, area, place, record, or manuscript which a lead agency determines to be historically significant or significant to in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military, or cultural annals of California may be considered to be an historical resources, provided the lead agency’s determination is supported by substantial evidence in light of the record.

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CEQA Guidelines at 14 CCR sec. 15064.

Generally, a resource shall be considered by the lead agency to be “historically significant” if the resource meets the criteria for listing in CRHP, which include the following:

- (A) Is associated with events that have made a significant contribution to the broad patterns of California’s history and cultural heritage;
- (B) Is associated with the lives of persons important in our past.
- (C) Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual, or possesses high artistic values; or
- (D) Has yielded, or may be likely to yield, information important in prehistory or history.

CEQA Guidelines at 14 CCR at Sec. 15064.5

Thus, provided there sufficient evidence, there is authority to identify resources of historic significance even if such historic resources have not been previously identified. In fact, in light of the recommendations regarding the protection of traditional tribal uses, the lead agency appears to have an obligation to evaluate ongoing traditional tribal uses as significant historic resources in the CEQA process.

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CULTURAL LANDSCAPES

A historic property may be a cultural landscape and it may be based on traditional uses of natural resources. The Department of State Parks has interpreted historic resources to include “cultural landscapes” and has looked to federal guidance interpreting the National Historic Preservation Act (16 U.S.C. sec. 470, et seq.) to define what resources may be designated a cultural landscape. See www.parks.ca.gov/default.asp?page_id=22854 (examples such as Golden Gate Park and

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Lake Shasta). Consistent with federal guidance, the State Parks website explains that the term “cultural landscape is an umbrella term that includes four general landscape types: historic designated landscapes, historic sites, and ethnographic landscapes which are defined in the National Park Service, Preservation Brief 36, Protecting Cultural Landscapes (Brief 36). Id. Brief 36 defines a cultural landscape to be a “geographic area, including both cultural and natural resources and the wildlife and domestic animals therein, associated with a historic event, activity, or person or exhibiting other cultural or aesthetic values.” In the definition of ethnographic landscape, Brief 36 also notes that subsistence of often a component of the landscape.

After reviewing the various types of cultural landscapes, State Parks identifies a list of themes in California history that are recognized as cultural resource deficiencies in the State Parks System. With regard to significant properties, State Parks offers the following themes:

- Settlement and Subsistence Patters;
- Special Adaptations and Environmental Management;
- Trade and Movement; and
- Ideology (e.g. sacred sites, petroglyph and pictograph sites, intaglios).

California State Parks website at www.parks.ca.gov/default.asp?page_id=22854.

The California Environmental Resources Evaluation System (CERES) has also issued guidelines for monitors and consultants working with Native American cultural, religious, and burial sites, which describe the scope of historical resources. Guidelines for Monitors/Consultants Native American Cultural, Religious, and Burial Sites, <http://ceres.ca.gov/nahc/guidelines4mon.html>. Consistent with State Parks interpretation of cultural landscapes, these guidelines advise that historic resources can include Native American graves and artifacts; traditional cultural landscapes; natural resources used for food, ceremonies or traditional crafts; and places that have special significance because of the spiritual power associated with them. Id.

The protections of historic and cultural resources under CEQA and the National Historic Preservation Act are interrelated, and as noted above, the State Parks looks to federal policy documents with respect to evaluating historic and cultural resources. Similarly, the National Parks Service guidelines for cultural resources management help illustrate the connection between cultural landscapes and traditional uses. The National Parks Service recognizes that “[e]thnographic resources are basic expressions of human culture and the basis for continuity of cultural systems” and they are not limited to things commonly thought of a cultural resources.

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See NPS-28, Cultural Resource Management Guideline, issued pursuant to Director’s Order #28. “A cultural system ... includes traditional arts and native languages, religious beliefs and subsistence activities.” Id. “Ethnographic resources are variations of natural resources and standard cultural resource types. They are subsistence and ceremonial locales and sites, structures, objects, and rural and urban landscapes assigned cultural significance by traditional users.” Id. When natural resources acquire meaning according to different cultural constructs of a particular group, they become ethnographic and thus cultural resources as well, and the heritage significance of the natural resources may be related to religious, healing, and subsistence. Id.

Failure to address the PROJECT Site is a Traditional Cultural Property (TCP) eligible for protection on the National Register:

National Register Bulletin No. 38 (hereinafter referred to as “NPS Bull. No. 38”), Guidelines for evaluating and Documenting Traditional Cultural Properties (1990; revised 1992; 1998) under NHPA <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf>

- A. Locations for traditional ceremonies are defined as a TCP: NPS Bull No. 38, p. 1, provides:

The traditional cultural significance of a historic property, then, is significance derived from the role the property plays in a community’s historically rooted beliefs, customs, and practices. Examples of properties possessing such significance include: ***

- a location where Native American religious practitioners have historically gone, and are known or thought to go today, to perform ceremonial activities in accordance with traditional cultural rules of practice;

- B. Mountain tops and rock outcroppings like at SSFL are TCP’s: NPS Bull. No. 38, p. 2, provides:

Traditional cultural properties are often hard to recognize. A traditional ceremonial location may look like merely a mountaintop, a lake, or a stretch of river; a culturally important

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neighborhood may look like any other aggregation of houses, and an area where culturally important economic or artistic activities have been carried out may look like any other building, field of grass, or piece of forest in the area. As a result, such places may not necessarily come to light through the conduct of archeological, historical, or architectural surveys. The existence and significance of such locations often can be ascertained only through interviews with knowledgeable users of the area, or through other forms of ethnographic research.

C. PROJECT must engage specialists as part of its TCP study: NPS Bull. No. 38, p. 10, provides:

In general, the only reasonably reliable way to resolve conflict among sources is to review a wide enough range of documentary data, and to interview a wide enough range of authorities to minimize the likelihood either of inadvertent bias or of being deliberately misled. Authorities consulted in most cases should include both knowledgeable parties within the group that may attribute cultural value to a property and appropriate specialists in ethnography, sociology, history, and other relevant disciplines.⁷

D. Specific events like the Solstice ceremony qualify as TCP: NPS Bull. No. 38, p. 11, provides:

For example, the National Register defines a "site" as "the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself possesses historic, cultural, or archeological value regardless of the value of any existing structure."

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9 Thus a property may be defined as a "site" as long as it was the location of a significant event or activity, regardless of whether the event or activity left any evidence of its occurrence. A culturally significant natural landscape may be classified as a site, as may the specific location where significant traditional events, activities, or cultural observances have taken place. A natural object such as a tree or a rock outcrop may be an eligible object if it is associated with a significant tradition or use. A concentration, linkage, or continuity of such sites or objects, or of structures comprising a culturally significant entity, may be classified as a district.

E. Native American ceremonies qualify as TCP: NPS Bull. No. 38, p.15, provides:

National Register guidelines stress the fact that properties can be listed in or determined eligible for the Register for their association with religious history, or with persons significant in religion, if such significance has "scholarly, secular recognition."¹³ The integral relationship among traditional Native American culture, history, and religion is widely recognized in secular scholarship.¹⁴ Studies leading to the nomination of traditional cultural properties to the Register should have among their purposes the application of secular scholarship to the association of particular properties with broad patterns of traditional history and culture. The fact that traditional history and culture may be discussed in religious terms does not make it less historical or less significant to culture, nor does it make properties associated with traditional history and culture ineligible for inclusion in the National Register.

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F. Lack of use does not make a property TCP ineligible: NPS Bull. No. 38, p. 18, provides:

The fact that a property may have gone unused for a lengthy period of time, with use beginning again only recently, does not make the property ineligible for the Register. For example, assume that the Indian tribe referred to above used the mountain peak in prehistory for communication with the supernatural, but was forced to abandon such use when it was confined to a distant reservation, or when its members were converted to Christianity. Assume further that a revitalization of traditional religion has begun in the last decade, and as a result the peak is again being used for vision quests similar to those carried out there in prehistory. The fact that the contemporary use of the peak has little continuous time depth does not make the peak ineligible; the peak's association with the traditional activity reflected in its contemporary use is what must be considered in determining eligibility.

Traditional Cultural Landscapes must also be included in Section 106 consultations and the EIS

Traditional cultural landscapes, because they are often a property type such as a district or site, are identified in the same manner in the Section 106 process as other types of historic properties of religious and cultural significance to Indian tribes or Native Hawaiian organizations. The regulations at 36 CFR Section 800.4 outline several steps a federal agency must take to identify historic properties. In summary, to determine the scope of identification efforts, a federal agency, in consultation with the State Historic Preservation Officers (SHPO)/Tribal Historic Preservation Officer (THPO), must:

1. Determine and document the area of potential effect for its undertaking;
2. Review existing information; and,
3. Seek information from consulting parties including Indian tribes or Native Hawaiian organizations.

Based on the information gathered through these efforts, the federal agency, in consultation with the SHPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by the undertaking, develops and implements a strategy to identify historic properties within the area of potential effects. Identification efforts may include background research, oral history interviews, scientific analysis, and field investigations. <http://www.achp.gov/natl-qa.pdf>

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There is no single defining feature or set of features that comprise a traditional cultural landscape. Such places could be comprised of natural features such as mountains, caves, plateaus, and outcroppings; water courses and bodies such as rivers, streams, lakes, bays, and inlets; views and view sheds from them, including the overlook or similar locations ; vegetation that contributes to its significance; and, manmade features including archaeological sites; buildings and structures; circulation features such as trails; land use patterns; evidence of cultural traditions, such as petroglyphs and evidence of burial practices; and markers or monuments, such as cairns, sleeping circles, and geoglyphs. <http://www.achp.gov/natl-qa.pdf>

Based on such research, the ACHP TRADITIONAL CULTURAL LANDSCAPES ACTION PLAN advises as follows:

The ACHP, as the agency with responsibility for overseeing the Section 106 review process, and DOI, through the National Park Service (NPS), as the agency with responsibility for overseeing the National Register of Historic places, should provide leadership in addressing Native American cultural landscapes in the national historic preservation program. Together, the ACHP and NPS should:

--Promote the recognition and protection of Native American traditional cultural landscapes both within the federal government and the historic preservation community as well as at the state and local levels, and,

--Address the challenges of the consideration of these historic properties in the Section 106 review process as well as in NEPA reviews. <http://www.achp.gov/pdfs/native-american-traditional-cultural-landscapes-action-plan-11-23-2011.pdf>

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U.N. Declaration on the Rights of Indigenous Peoples must now be followed after December 2010

In December 2010, the United States announced support for the **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)**. In announcing this support, President Obama stated: "The aspirations it affirms—including the respect for the institutions and rich cultures of Native peoples—are one we must always seek to fulfill...[W]hat matters far more than any resolution or declaration – are actions to match those words." The UNDRIP addresses indigenous peoples' rights to maintain culture and traditions (Article 11); and religious traditions, customs, and ceremonies (Article 12); to participate in decision making in matters which would affect their rights (Article 18); and to maintain spiritual connections to traditionally owned lands (Article 25).

The ACHP will now incorporate UNDRIP in the Section 106 review process:

While the Advisory Council on Historic Preservation's (ACHP) work already largely supports the United Nations Declaration on the Rights of Indigenous Peoples, additional and deliberate actions will be taken to more overtly support the Declaration. The Section 106 review process provides Indian tribes and Native Hawaiian organizations (NHOs) with a very important opportunity to influence federal decision making when properties of religious and cultural significance may be threatened by proposed federal actions. While federal agencies are required to consult with Indian tribes and NHOs and to take their comments into account in making decisions in the Section 106 review process, adding the principles of the Declaration to that consideration may assist federal agencies in making decisions that result in the protection of historic properties of religious and cultural significance to Indian tribes and NHOs. <http://www.achp.gov/docs/UN%20Declaration%20Plan%203-21-13.pdf>

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Subsurface testing is required.

Pedestrian surveys are of limited utility and never alone are sufficient when there are known areas of habitation or ceremony. We are informed that PROJECT has only completed a Phase I Pedestrian Survey of the site. While such Phase I is an excellent first step, we request additional subsurface archaeological testing for all areas scheduled for any excavation.

If the project is in a region where there are many sites, there may be reason to suspect that buried sites may be present that went undetected during the survey. If the soils profile of the project location shows that heavy erosion has washed away soils then it may explain the absence of cultural resources. However, if the soils profile is depositional then there may be a need to conduct additional subsurface testing, particularly in areas where ground disturbance is planned. In archaeological terminology, this is referred to as “Extended Phase I” testing because it is an intermediate step between Phase 1 (survey), and Phase 2 (controlled excavation to assess the significance of a site). Extended Phase I testing often done by excavating a small pit with a shovel and screening the excavated soil through steel mesh (“shovel test pit” or “STP”). If it is considered to be necessary that a large amount of soil should be examined at deeper levels, then backhoes are sometimes used and informal sampling procedures are often employed while screening the backdirt.

Sometimes the lead agency will argue that archaeological survey is not warranted for a particular project or there may be factors that justify additional investigation even though a Phase I study has been completed with negative results. Following is a list of environmental and cultural factors that should be considered when assessing the overall cultural sensitivity of the SSFL. (Please note that this list is not exhaustive and each factor must be weighted both individually and collectively on a case-by-case basis.)

- a. Areas with high viewshed or visibility such as or ridgelines, peaks, ledges, outcrops, benches, or prominent hills; and
- b. Areas with a relatively high density of sites in the vicinity; and
- c. Areas where past ethnographic studies have revealed associated placenames. Keep in mind that placenames do not always refer to places where evidence of past cultural activity exists; and
- d. Areas near known sites. Mapped boundaries of sites most frequently reflect only cultural residue that was visible on the surface when the site was recorded and do not necessarily reflect the actual extent of the site. In addition, loci such as cemeteries or other areas may be adjacent to or nearby but separate from the main habitation; and
- e. Areas near known rock art sites or rocky outcroppings of the type where rock shelters and art have traditionally been located; and

719-564

f. Areas in or near known gathering areas; and

g. Though all sites are potentially worthy of protection, named, ethnohistorically documented village sites are of the highest priority and therefore warrant the greatest amount of protection possible.

719-565

Exhaustion of Non-Excavation Methods of remediation.

To the extent feasible, PROJECT should exhaust all non-excavation methods of remediation before performing any excavation that could potentially impact cultural and historic sites.

719-566

Soil Prior disturbance is NOT Dispositive:

The mantra that cultural sites have been disturbed and therefore automatically are not significant is oftentimes incorrect:

- a. Disturbed sites still may contain valuable information. The newer approach is to treat disturbed sites as having the potential to provide information even if they have been disturbed;
- b. Disturbed sites still have spiritual significance;
- c. Disturbance may only be on the surface, while much excavation may continue to depths of up to 20 feet.

719-567

Need to Analyze Cumulative Impacts to Cultural Resources:

The DEIS fails to account for other remediation projects in other areas of PROJECT.

719-568

NEW MITIGATION: Native American monitoring during any ground disturbing activities.

719-569

Deferral of Mitigation until Record of Decision (ROD):

- d. It is problematic to defer any mitigation until ROD as it prevents meaningful comment;
- e. Commenter reserve the right to ask for recirculation of the DEIS for any such deferred mitigation.

719-570

Need NEPA Mitigation Plan

<http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-mitigation-monitoring-draft-guidance.pdf>

February 18, 2010

MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES
 FROM: NANCY H. SUTLEY, Chair, Council on Environmental Quality
 SUBJECT: DRAFT GUIDANCE FOR NEPA MITIGATION AND MONITORING
 I. INTRODUCTION

Submission 719 (Sam Cohen, Santa Ynez Band of Chumash Indians, April 13, 2020) - Continued

719-570

To provide for the performance of mitigation, agencies should create internal processes to ensure that mitigation actions adopted in any NEPA process are documented and that monitoring and appropriate implementation plans are created to ensure that mitigation is carried out. See *Aligning NEPA Processes with Environmental Management Systems* (CEQ 2007) at 4 (discussing the use of environmental management systems to track implementation and monitoring of mitigation). http://ceq.hss.doe.gov/nepa/nepapubs/Aligning_NEPA_Processes_with_Environmental_Management_Systems_2007.pdf (<http://www.slideshare.net/whitehouse/aligning-nepa-processes>). Agency NEPA implementing procedures should require clearly documenting the commitment to mitigate the measures necessary in the environmental documents prepared during the NEPA process (40 C.F.R. § 1508.10) and in the decision documents such as the Record of Decision. When an agency identifies mitigation in an EIS and commits to implement that mitigation to achieve an environmentally preferable outcome, or commits in an EA to mitigation to support a FONSI and proceeds without preparing an EIS, then the agency should ensure that the mitigation is adopted and implemented.

Methods to ensure implementation should include, as appropriate to the agency's underlying authority for decision-making, appropriate conditions in financial agreements, grants, permits or other approvals, and conditioning funding on implementing the mitigation. To inform performance expectations, mitigation goals should be stated clearly. These should be carefully specified in terms of measurable performance standards to the greatest extent possible. The agency should also identify the duration of the agency action and the mitigation measures in its decision document to ensure that the terms of the mitigation and how it will be implemented are clear.

If funding for implementation of mitigation is not available at the time the decision on the proposed action and mitigation measures is made, then the impact of a lack of funding and resultant environmental effects if the mitigation is not implemented warrant disclosure in the EA or EIS. In cases where, after analyzing the proposed actions with or without the mitigation, the agency determines that mitigation is necessary to support the FONSI or committed to in the ROD, and the necessary funding is not available, the agency may still be able to move forward with the proposed action once the funding does become available. The agencies should ensure that the expertise and professional judgment applied in determining the appropriate mitigation measure is reflected in the administrative record, and when and how those measures will be implemented are analyzed in the EA or EIS.

Under NEPA, a federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions. See 42 U.S.C. § 4332(2)(A). For agency decisions based on an EIS, the regulations require that, "a monitoring and enforcement program shall be adopted...where applicable for mitigation." 40 C.F.R. §1505.2(c). In addition, the regulations state that agencies may "provide for monitoring to assure that their decisions are carried out and should do so in important cases." 40 C.F.R. §1505.3. Monitoring plans and programs should be described or incorporated by reference in the agency decision documents.

719-571

21. Incorporation by reference of Memo dated Nov. 29, 2012, "NEPA alternatives analysis for selection of cleanup standards for the Santa Susana Field Laboratory Site."

Sincerely,

Kenneth Kahn,
Tribal Chairman
Santa Ynez Band of Chumash Indians

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Response to Submission 719 (Sam Cohen, Santa Ynez Band of Chumash Indians, April 13, 2020)

719-554

The comment is introductory and does not contain any substantive comments or questions about the environmental analysis or conclusions contained in the Draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS). The commenter's request for tribal consultation is acknowledged.

719-555

The comment suggests the Authority should extend the comment period for an additional 90 days due to COVID-19 and Judicial Council Emergency Rule 9. The Authority acknowledges that Emergency Rule 9 tolls the statute of limitations for certain civil actions. Amendments effective May 29, 2020, clarified that this tolling of the statute of limitations applies to writs of mandate, including those to enforce California Environmental Quality Act (CEQA), which otherwise has very short statutes of limitations. The May 29, 2020, amendments also identified that the tolling period ends on August 3, 2020, for civil cases with statutes of limitations that are 180 days or less, which is the case with CEQA. The Authority has provided a 60-day comment period for the Draft EIR/EIS, which exceeds the minimum 45 days required by the CEQA Guidelines.

719-556

The U.S. recognizes Indian tribes as sovereign nations. As such, the federal government and Indian tribes have a unique government-to-government relationship, which is grounded in the U.S. Constitution, numerous treaties, statutes, federal case law, regulations, and executive orders that establish and define a trust relationship with Indian tribes. In addition, the State of California has an important relationship with the many Native American tribes indigenous to the state, as set forth and affirmed in both state and federal law.

The State of California is committed to strengthening and sustaining effective government-to-government relationships with both federally recognized tribes and other California Native Americans, as codified in the governor's Executive Order B-10-11. Executive Order B-10-11 established the Governor's Tribal Advisor in the Office of the Governor and further orders that every agency and department subject to the governor's executive control shall encourage communication and consultation with California Indian tribes and permit tribal representatives to provide meaningful input on the development of legislation, regulations, rules, and policies on matters that may affect tribal communities. The Authority acknowledges and reaffirms this commitment. However, it should be noted that under the National Environmental Policy Act (NEPA) assignment, the responsibility for government-to-government tribal consultations with federally recognized tribes remains with the Federal Railroad Administration.

As indicated in Section 9.5.4 of this Final EIR/EIS, the Authority relied on the list of tribal governments provided by the California Native American Heritage Commission (NAHC) to determine which tribes to contact for the project. Based on its initial search of the Sacred Lands File and as part of the March 26, 2015 response to the Authority's request, 12 tribes were invited to participate in the Bakersfield to Palmdale Project Section Tribal Information Meeting, including the Santa Ynez Band of Chumash Indians. The Santa Ynez Band of Chumash Indians was invited by letter to offer information about traditional cultural properties and to attend a meeting but did not respond.

Response to Submission 719 (Sam Cohen, Santa Ynez Band of Chumash Indians, April 13, 2020) - Continued

719-557

The commenter cites the California Environmental Protection Agency's (Cal-EPA) Policy/Memorandum CIT 09-01, CalEPA Policy for Working With California Indian Tribes dated 10-19-09 and CalEPA Policy/Memorandum CIT 15-01, CalEPA Policy on Consultation With California Native American Tribes dated 08-20-15, which states the goal of Cal-EPA is to improve and maintain communication, collaboration, and government-to-government relationships among Cal-EPA; its Boards, Departments, and Offices; and California Indian tribes. The Authority is not one of Cal-EPA's six Boards, Departments, and Offices; however, since March 2015, the Authority engaged with tribal governments in the early stages of the Bakersfield to Palmdale Project Section project development and the preparation of cultural resources studies by affording them the opportunity to participate in the cultural resources investigations throughout the project delivery process. As discussed in Section 3.17.2.2 of this Final EIR/EIS, California Executive Order B-10-11 encourages communication and consultation with California Native American tribes, agencies, and departments, and permits elected officials and other representatives of tribal governments to provide meaningful input into the development of legislation, regulations, rules, and policies on matters that may affect tribal communities. Consistent with the governor's Executive Order B-10-11, the Authority is currently developing its own department-focused tribal consultation policy that would describe the procedures and protocols for tribal participation throughout the high-speed rail (HSR) project planning process to ensure that tribes have the opportunity to express concerns and provide input, as well as have adequate time for consideration of any input, as project decisions are made. More information can be found on the "Tribal Relations" and "Consultation Policy & Guidance" pages of the Authority's website. A summary of the Authority's consultation with tribal governments for the Bakersfield to Palmdale Project Section is included in Section 3.17.4.2 of this Final EIR/EIS.

719-558

The commenter provides regulatory discussion related to coordination with the NAHC. The commenter does not comment on the adequacy of the Authority's consultation with tribal governments, which is included in Section 3.17.4.2 of this Final EIR/EIS. The Authority has consulted the NAHC and has invited tribes identified by the NAHC to be consulting parties to the undertaking. The commenter also states that the NAHC contact list for the project includes Ventura and Los Angeles County; however, the project is actually located in Los Angeles and Kern Counties. It should be noted that under NEPA assignment, the responsibility for government-to-government tribal consultations remains with the Federal Railroad Administration.

719-559

The commenter provides a regulatory discussion related to the state and federal definition of significant archaeological resources, including those of Native American origin, and the state definition of a significant impact on the environment. The comment provides suggestions for ensuring that an adequate cultural survey is done for the project site. The research methods (including field surveys) conducted for the project are discussed in Section 3.17.5.2, Methods for Resource Identification, in this Final EIR/EIS.

719-560

The commenter summarizes the requirements for preparing an EIR in the event a traditional cultural landscape is present in the project vicinity. The heading for this comment is, "THE ENTIRE PROJECT SITE MUST BE ANALYZED AS A TRADITIONAL CULTURAL LANDSCAPE," but the comment does not provide any additional detail other than citing sections from the CEQA Guidelines and the Public Resources Code. Traditional cultural properties are discussed in Section 3.17.5.2, Methods for Resource Identification, in this Final EIR/EIS. By using the National Register of Historic Places eligibility criteria, the Authority has identified a wide range of historic property types, reflecting the diversity of California's history and culture including traditional and historic landscapes.

Response to Submission 719 (Sam Cohen, Santa Ynez Band of Chumash Indians, April 13, 2020) - Continued

719-561

The commenter lists the text of CEQA Guidelines Sections 15064 and 15064.5. Section 3.17.2.2 of the Bakersfield to Palmdale Project Section EIR/EIS discusses CEQA Guidelines Section 15064.5. The National Register of Historic Places eligibility criteria were used to determine the presence of eligible buildings, structures, objects, sites, districts, landscapes, or traditional cultural properties. However, the Authority has continuously consulted with tribes as part of its commitment to connect the tribes more closely with the cultural resources investigations for the HSR program. No revisions to the Final EIR/EIS have been made in response to this comment.

719-562

The commenter provides information related to California State Parks cultural landscapes and guidance to monitors and consultants working with Native American cultural, religious, and burial sites. The commenter summarizes the requirements for evaluation of a traditional cultural landscape. The commenter provides information related to traditional cultural properties. As discussed in Section 3.17.1 of the Bakersfield to Palmdale Project Section EIR/EIS, the Fresno to Bakersfield Section Final Supplemental EIR and EIS (Authority 2018 and 2019), which is referenced above, includes a traditional cultural property (Noriega's, which is discussed in Section 3.17.6.1 of this Final EIR/EIS). Through active Section 106 consultation, the Authority has sought information from Native American tribes related to the potential presence of traditional cultural properties and cultural landscapes within the area of potential effects of the project. However, the Authority has not consulted with the Santa Ynez Band of Chumash Indians, as the Native American Heritage Commission does not identify the tribe as having traditional territory within the Bakersfield to Palmdale Project Section area of potential effect.

719-563

The commenter provides information about the United Nations Declaration on the Rights of Indigenous People, which the Advisory Council on Historic Preservation has stated may assist agencies in making decisions that result in the protection of historic properties of religious and cultural significance. However, the Advisory Council on Historic Preservation did not incorporate the United Nations declaration into the Section 106 process. Several aspects of the declaration intersect with the intent of the National Historic Preservation Act and Section 106, including the protection of past manifestations of archaeological and historical sites and the right for indigenous peoples to participate in decision making. As discussed in Section 3.17 of this EIR/EIS, studies and consultation conducted in the preparation of this section followed those prescribed by Section 106 of the National Historic Preservation Act, as amended, and are consistent with the declaration. The Authority is committed to continued consultation with Native American governments as the design of the project advances and is implemented.

719-564

The commenter acknowledges that the initial pedestrian survey of the project vicinity is an excellent first step but requests additional subsurface archaeological testing for all areas scheduled for any excavation. CUL-IAMF#3, CUL-IAMF#4, and CUL-IAMF#5, described in Section 3.17.5.3 of this Final EIR/EIS, discuss conducting pre-construction surveys once access is acquired prior to any ground-disturbing activities, as required by the MOAs; avoidance of newly discovered archaeological sites; and preparation of an archaeological sensitivity monitoring plan that identifies and maps areas of archaeological sensitivity, respectively. As discussed in CUL-IAMF#4, the HSR is a linear project, and changing the rail alignment to avoid archaeological sites discovered during project construction is likely infeasible. However, access areas and laydown sites may be relocated if their proposed location is found to be on newly discovered archaeological resources. Access areas and laydown sites may also be relocated should a built historic resource have the potential to be affected.

Response to Submission 719 (Sam Cohen, Santa Ynez Band of Chumash Indians, April 13, 2020) - Continued

719-565

The commenter claims non-excavation methods should be exhausted prior to excavation to potentially avoid impacts on sensitive resources. Specific methods to implement the surveys required under CUL-IAMF#3, described in Section 3.17.5.3 of this Final EIR/EIS, will be determined depending on site conditions within the survey area and will consider non-excavation methods of investigation such as the use of ground-penetrating radar. Proposed survey methods will be described in the Archaeological Treatment Plan (Authority 2021).

719-566

The commenter notes that previously disturbed sites may still contain sensitive resources. CUL-IAMF#2 and CUL-IAMF#5, described in Section 3.17.5.3 of this Final EIR/EIS, discuss conducting a worker awareness training for personnel that provides information on measures to avoid or protect built historic resources, how to recognize archaeological resources that may be encountered, and mandatory procedures to follow should potential cultural resources be exposed during construction; and preparation of an archaeological sensitivity monitoring plan that identifies and maps areas of archaeological sensitivity, respectively. By implementing these IAMFs, the project will reduce potential impacts on potential sensitive resources located in previously disturbed sites.

719-567

The commenter states that the Draft EIR/EIS does not account for other remediation projects in the project vicinity that have the potential to result in cumulative cultural resources impacts. Section 3.19 of the Final EIR/EIS discusses cumulative impacts on cultural resources and Appendix 3.19-A of the Final EIR/EIS provides the complete cumulative project list. Refer to Response to Comment 759-287 for a discussion of the projects included on the cumulative project list and what is considered a reasonably foreseeable project for this analysis. The commenter did not identify or provide any information on other remediation projects referenced in the comment; therefore, it is not possible to ascertain if relevant projects were not included on the project list and to provide a more detailed response.

719-568

The commenter proposes mitigation related to the presence of a Native American monitor during any ground-disturbing activities. The Authority has committed to providing tribal monitors by implementing CUL-IAMF#5, described in Section 3.17.5.3 of this Final EIR/EIS. Additional details regarding tribal monitoring are provided in the *Bakersfield to Palmdale Project Section Archaeological Treatment Plan* (Authority 2021).

Response to Submission 719 (Sam Cohen, Santa Ynez Band of Chumash Indians, April 13, 2020) - Continued

719-569

The commenter states that deferral of mitigation “until Record of Decision” is “problematic.” The comment does not indicate which mitigation is improperly deferred.

The Draft EIR/EIS does not defer development of specific mitigation measures to address impacts. In addition to the IAMFs incorporated into the alternatives “up front” to avoid and minimize adverse impacts, the Draft EIR/EIS provides an extensive set of enforceable mitigation measures to address impacts. In those cases, such as biological, noise, and socioeconomic and communities impacts where the specific site for implementing a mitigation measure is not yet identified, the mitigation measures provide specific performance standards to be achieved. Performance standards establish specific measurable parameters that must be achieved by a mitigation measure.

Under CEQA, where development of specific mitigation may rely upon information not yet available, an EIR may take a phased approach to the development of specific mitigation, provided that it has analyzed the impact and made a significance determination, commits to mitigation in the form of a mitigation measure for the significant effect, and specifies “performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way” (14 C.C.R. 15126.4(a)(1)(b)). The same is true under NEPA. The EIS must discuss mitigation “in sufficient detail to ensure that environmental consequences have been fairly evaluated,” but it is not necessary to formulate and adopt a complete mitigation plan (Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 [1989]). The mitigation measures identified in the Draft EIR/EIS meet these requirements.

Further, the Record of Decision documents approval of the EIS under NEPA. The Record of Decision does not introduce new analysis or new mitigation. Any mitigation that will be approved in the Record of Decision is presented in this Final EIR/EIS.

719-570

The commenter provides information related to preparation of a NEPA Mitigation Plan. As part of the NEPA Record of Decision, the Authority will prepare an MMEP that will adhere to the CEQ’s regulations (40 C.F.R. 1505) and the FRA Procedures for Considering Environmental Impacts (64 Federal Register 28545, May 26, 1999). On January 14, 2011, the CEQ finalized guidance entitled Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact (CEQ Guidance). The CEQ Guidance is intended to assist federal agencies in developing mitigation programs that provide effective documentation, implementation, and monitoring of mitigation commitments. The Authority, as the lead federal agency, will consider the CEQ Guidance in the preparation of the MMEP.

The MMEP is consistent with CEQA requirements for mitigation monitoring as set forth in Section 15097 of the CEQA Guidelines (Title 14 California Code of Regulations, Division 6, Chapter 3). The MMEP will identify responsible parties, timing of implementation, reporting criteria, and when the measure is complete. The MMEP will be considered for adoption at the time the Authority Board considers certification of the EIR and approval of the project.

719-571

The commenter requests that a memorandum associated with a separate non-HSR project that was not attached to the comment letter be incorporated by reference. The Authority reached out to Mr. Freddie Romero, Cultural Resources Coordinator, via email on August 18, 2020 to acknowledge receipt of Santa Ynez Band of Chumash Indians’ comments on the Draft EIR/EIS and to provide additional information regarding the Bakersfield to Palmdale Project Section APE. The Authority had communicated with Mr. Romero in 2014, 2015, 2016 and 2017 to invite the tribe to participate in tribal informational meetings and to consult on the project. Mr. Romero replied on August 18, 2020 that Santa Ynez Band of Chumash Indians’ position remains the same in that they will not be formally commenting at this time but would like to continue to receive project updates. During the Authority’s coordination with Mr. Romero, the tribe did not provide the memo cited in the tribe’s EIR/EIS comment letter. The cited document appears to refer to the Santa Susana Field Laboratory Site, which is not associated with the Bakersfield to Palmdale Project Section. For these reasons, the Authority respectfully declines to incorporate the cited document by reference.