



PECHANGA INDIAN RESERVATION
Temecula Band of Luiseño Mission Indians

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July 2, 2007

VIA EMAIL ONLY

Robert Worl
Project Manager
California Energy Commission
Energy Facilities Siting Division
1516 9th Street, MS 40
Sacramento, CA 95814

DOCKET	
05-AFC-3	
DATE	JUL 0 2 2007
RECD.	JUL 0 3 2007

Re Comments on Preliminary Staff Assessment for the Sun Valley Energy Project
Application for Certification (05-AFC-3)

Dear Mr. Worl:

Thank you for this opportunity to comment on the above-referenced Project. This comment letter is submitted by the Pechanga Band of Luiseño Indians (hereinafter, "Pechanga Tribe"), a federally recognized Indian tribe and sovereign government. We request that all our comments, including this letter, be part of the record for the approval of this Project.

REQUESTED NOTICE AND INVOLVEMENT PURSUANT TO CEQA

The Pechanga Tribe is formally requesting, pursuant to Public Resources Code §21092.2, to be notified and involved in the entire environmental review and approval process for the duration of the above referenced project (the "Project"), including adding the Tribe to your distribution list(s) for public notices and public circulation of all documents pertaining to this Project. The Tribe further requests to be directly notified of all public hearings and scheduled approvals concerning this Project. Finally, the Tribe requests that it be furnished copies of all cultural resources and archaeological studies, reports and plans.

THE LEAD AGENCY MUST INCLUDE INVOLVEMENT OF AND CONSULTATION WITH THE TRIBE IN ITS REVIEW PROCESS

It has been the intent of the Federal Government¹ and the State of California² that Indian tribes be consulted with regard to issues which impact cultural and spiritual resources, as well as

¹ See Executive Memorandum of April 29, 1994 on Government-to-Government Relations with Native American Tribal Governments and Executive Order of November 6, 2000 on Consultation and Coordination with Indian Tribal Governments.

² See California Public Resource Code §5097.9 et seq. and Cal. Govt. Code §§ 65351, 65352, 65352.3 and 65352.4

other governmental concerns. The responsibility to consult with Indian tribes stems from the unique government-to-government relationship between the United States and Indian tribes. This arises when tribal interests are affected by the actions of governmental agencies and departments such as approval of Specific Plans, EIRs and various permitting and licensing actions. In this case, it is undisputed that the Project lies within the Pechanga Tribe's traditional territory as noted in the Cultural Resources report. Therefore, in order to comply with CEQA and other applicable Federal and California law, it is imperative that the CEC and Applicant consult with the Tribe in order to guarantee an adequate basis of knowledge for an appropriate evaluation of the Project effects, as well as generating adequate mitigation measures that take into account tribal interests.

PECHANGA'S AFFILIATION WITH THE PROJECT AREA

The Pechanga Tribe asserts that the Project area is part of the Pechanga Tribe's aboriginal territory, as evidenced by the existence of Luiseño place names, rock art, pictographs, petroglyphs, and an extensive Luiseño artifact record in the vicinity of the Project. It thus disagrees that this is a "shared" area. The Tribe further asserts that this culturally sensitive area is affiliated specifically with the Pechanga Band of Luiseno Indians because of the Tribe's specific cultural ties to this area. Pechanga considers any resources located on this Project property to be Pechanga cultural resources.

The Pechanga Tribe's knowledge of our ancestral boundaries is based on reliable information passed down to us from our elders; published academic works in the areas of anthropology, history, and ethno-history; and through recorded ethnographic and linguistic accounts. There are many anthropologists and historians who have presented boundaries of Luiseño traditional territory (Sparkman 1908; Kroeber 1925; White 1963; Harvey 1974; Oxendine 1983; Smith and Freers 1994), and such territory descriptions correspond almost identically with what was communicated to the Pechanga people by our elders. While historic accounts, anthropological and linguistic theories are important in determining traditional Luiseño territory; the Pechanga Tribe asserts that the most critical sources of information used to define our traditional territories are our songs, creation accounts, and oral traditions.

For instance, placenames can describe traditional cultural properties, geographic features, "power" locations, or specific gathering areas. The nearest Luiseño placename recorded by J.P. Harrington on a mileage-specific roadtrip, was *Hunáalmo* (*hoon-awl-mow*). The name means to go up to repeatedly and describes a large spring area two miles east of the Sun Valley APE. Incidentally, this spring-location is two miles west of the prolific painted maze rockart site known as CA-RIV 19. The Sun Valley Project APE lies four miles from a traditional cultural area known as *Sóovamay* (*sew-vah-my*). This *Sóovamay*-area is just south of the Double Buttes and parallels a seasonal gathering area now known as Salt Creek. Three miles north of this (east-to-west) valley is cluster of seven granitic boulders named *Chéexayam Pum 'wáppivu* (*che-hhah-yem poom-om-pee-vuh*). This Ancestral placename means: where they (the Pleiades/Seven Sisters) flew up to escape death and become stars.

In addition, Luiseño Pechanga people have long identified with several Traditional Cultural Properties (TCP's) or cultural features in the immediate area, some of these include: a black pigmented boulder located/preserved atop the new Domenigoni Road-segment; a pictograph known as the "painted maze" located at CA-RIV 19; a petroglyph cupule boulder located at that CA-RIV site; Salt Creek, which is a tributary of the San Jacinto River and eventually flows into Lake Elsinore; and springs located at Winchester Ridge, CA-RIV 19. Further, the outline of the Double Buttes is regarded as a geographical/phenomenological image of a "sleeping Indian" ancestor.

The Pechanga Tribe also has a long modern day history of involvement with Projects in this Sun Valley Project area. Not only has the Pechanga Tribe been involved, but has been given the designation of the consulting tribe or affiliated tribe on the following projects located within five miles of the Project area: the entire Winchester C.F.D; Winchester Ridge; the Copper Sky Project (TR 30809); the Domenigoni Road Widening; the Newport Road Widening; the Indigo Hills Project; Winchester Valley 40/TR 30806; Winchester Valley/ Rancon 85 & 200; TR 32400 (at CA-RIV 19); and the Choate Property. Moreover, Pechanga was named the Most Likely Descendant for two cremation burials which were located during the testing and construction phases of Lennar's Winchester Ridge Project (as described by Jim Fagelson in the PSA).

The Tribe is happy to have further discussions with the CEC regarding its affiliation with the Project area.

PROJECT IMPACTS TO CULTURAL RESOURCES

The Pechanga Tribe is not opposed to this development project in the Romoland area of the Perris Valley. The Pechanga Tribe's primary concerns stem from the project's likely impacts on Native American cultural resources. The Pechanga Tribe has a long history of involvement with projects in and around the County of Riverside with regard to the protection and preservation of cultural resources. The Pechanga Tribal Government has a Cultural Resources Department, with a staff of experts in Luiseño history and archeology, which its elders entrust to protect and preserve its cultural resources for future generations. As such, the Pechanga Tribe is concerned about both the protection of unique and irreplaceable cultural resources and archaeological items which would be displaced by ground-disturbing work on the project, and on the proper and lawful treatment of cultural items, Native American human remains and sacred items that may be discovered in the course of the work.

PECHANGA DISAGREES WITH THE CONCLUSIONS OF THE APPLICANTS CULTURAL RESOURCES STUDY

Initially, the Pechanga Tribe disagrees with the conclusions reached in the cultural resources report prepared and submitted by the Applicant and relied on by CEC staff in its assessment. While there were no cultural resources found during the field survey of the site, such a survey is in no way determinative of a lack of cultural resources at the Project site. To start with, according to the report the visibility on site averaged at around forty (40) percent which leaves over half of the site with less than adequate visibility. Further, given the disturbed

nature of the surface from past farming uses, it is not unusual to find a lack of surface artifacts. This does not, however, negate the fact that there can be subsurface sites which will be impacted by the Project.

Further, the Applicant and its cultural resources specialist summarily determine that the three nearby pre-historic archaeological sites were not significant despite the fact that neither the original reporters nor the Applicant's archaeologists actually evaluated the significance of the sites. The Tribe asserts that had a thorough evaluation been done of the sites, especially the habitation site, they would likely be found to be significant. This is especially true given the nature of resources found within the habitation site. As will be discussed below, the Tribe cautions the CEC from basing its recommendations and mitigation on unsupported conclusions. In fact, the Pechanga Tribe would suggest following the County of Riverside's Criteria for the Determination of Resource Importance which takes into account not only the archaeological/scientific aspect of a site or resource, but also the cultural aspect in determining that unless a resource is properly evaluated and determined not to be significant, it should be considered significant.

The previous cultural resource studies reveal the presence of cultural sites and one possible village site within a one-mile radius of the Project. Further, according to the PSA, Riverside County Cultural Resources Specialist Jim Fagelson has indicated that a burial site was found in close proximity to this Project site. As discussed above, the Pechanga Tribe was named MLD for that find. Contrary to the conclusions of the Applicant's archaeologist, the presence of cultural resources around the Project area indicate that there is a high likelihood that surface and subsurface resources will be found during the grading and ground-disturbing work for this Project.

LEGAL REQUIREMENTS FOR PRELIMINARY STAFF ASSESSMENT AND MITIGATION MEASURES

The Tribe appreciates the fact that the CEC staff has made an effort to do an independent evaluation of the effect of the Project on cultural resources in the area. Any kind of environmental review must provide adequate protection for significant archaeological and cultural sites and adequately follow the provisions of CEQA and its Guidelines. The Tribe believes that the current Conditions of Certification in the PSA do not provide adequate protection for significant archaeological and cultural sites and does not adequately follow the provisions of CEQA and its Guidelines, including Calif. Pub. Res. Code § 21083.2(b) (avoidance as preferred method of preservation of archaeological resources), CEQA Guidelines § 15126.4(b)(3) (agencies should avoid effects on historical resources of archaeological nature), and CEQA Guidelines § 15020 (lead agency responsible for adequacy of environmental documents).

CEQA makes clear that the main purposes of an environmental evaluation is to identify and analyze the environmental effects of a project. (California Public Resource Code § 21002.1(a); 14 California Code of Regulations ("Guidelines") §15126). With respect to cultural or archaeological resources, this analysis and evaluation is governed by provisions of the NEPA

and/or CEQA, depending upon the nature of the project. As such, sufficient investigation must be done to make a determination whether an archaeological site is considered "Significant" under NEPA/NHPA or "unique" under CEQA. In order to approve an environmental review the lead agency is required to make findings that it has adopted mitigation measures that have eliminated or substantially lessened all significant effects on the environment where feasible. CEQA Guidelines § 15092. Further, a lead agency cannot and should not delegate its decision making authority to an applicant or third party consultant. As Lead Agency, CEC is required to independently review and analyze any report and issue draft documents that reflects its independent judgment. Ca. Pub. Res. Code 21081.1(c).

THE MITIGATION MEASURES DO NOT ADEQUATELY ADDRESS TRIBAL CONCERNS

The Pechanga Tribe involves themselves in these matters because their contributions and knowledge of these natural/cultural resources is not couched in the archeological or scientific importance of the resources, but in the cultural and sociological significance of these sites and places. As such, we request that CEC take into account the Pechanga Tribe's cultural view of the potential resources when evaluating Project impacts to cultural resources and the uniqueness of those resources. Mitigation measures for the Project should encompass the wishes and reflect the cultural traditions and practices of the Indian descendants of the original occupants of the complex. The current mitigation measures outlined in the PSA do not take Indian cultural concerns into account. That is, the proposed mitigation measures imply that the only worth or value of the complex is for scientific investigation. The proposed mitigation measures only "mitigate" in the archaeological sense, not in the human and cultural sense.

Again, the Tribe appreciates that the staff determined that additional mitigation was necessary to address possible impacts to cultural resources from the Project. Nevertheless, the Tribe again cautions against relying too heavily on the conclusions of the Applicant's archaeologist. For instance, the PSA states: "Notably, the applicant explicitly rejected the need for continuous archaeological monitoring of SVEP construction because the project area is judged to have low sensitivity for archaeological resources." (PSA 2007: 4.3-20) First, it should go without saying that the Applicant has monetary incentive determine that full-time monitoring is not necessary. Secondly, as has been pointed out previously, the determination of low sensitivity is an unsupported conclusion since the Tribe does not believe adequate evaluation of the nearby sites was done.

The Pechanga Tribe's knowledge of the continuous occupation of the Luiseño people in this geographical area for thousands of years, through their stories and songs, is cultural evidence that subsurface sites may exist in this Project area. Therefore, the Pechanga Tribe requests that in the case of discovery of new or additional sites, that the CEC re-evaluate the Project impacts to cultural resources and adopt appropriate mitigation measures to address such. The Pechanga Tribe intends to assert its legal rights with respect to additional finds of significant sites or cultural resources which are of sacred and ceremonial significance to the Pechanga Tribe.

Further, the Pechanga Tribe believes that if human remains are discovered, State law would apply and the mitigation measures for the permit must account for this. According to the California Public Resources Code, § 5097.98, if Native American human remains are discovered, the Native American Heritage commission must name a "most likely descendant," who shall be consulted as to the appropriate disposition of the remains. Given the Project's location in Pechanga territory, and the fact that Pechanga has been named MLD on nearby projects, the Pechanga Tribe intends to assert its right pursuant to California law with regard to any remains or items discovered in the course of this project. Accordingly, the Pechanga Tribe further requests that the CEC work with them to draft an agreement which would address any inadvertent discoveries of cultural resources, including human remains. Surveys and grading may reveal significant archaeological resources and sites which may be eligible for inclusion in the historic site register, and may contain human remains

CONDITIONS OF CERTIFICATION

In general, the Tribe believes that the conditions should reflect the above-discussed principals of cultural significance as well as scientific significance. It would therefore request consultation on all plans and programs designed to address cultural resources for the Project. (See e.g., CUL-3 and CUL-4)

CUL-1

Given the presence of cultural resources in close proximity to the Project site, it is imperative that tribal monitors be present during all ground-breaking activities within the entire Project area. It is important for the CEC to note that tribal monitors bring a different knowledge and expertise to the monitoring of a project than do archaeological monitors. Often, tribal monitors have a cultural/historical knowledge of an artifact or location that the archaeologist would not possess. It is thus important that both types of monitors be included during ground-disturbing activities at the Project site. Therefore, in addition to retaining the CRS, the Tribe requests that the Project applicant enter into a treatment and monitoring agreement with the Tribe to address protection of cultural resources which may be found on site.

CUL-3

While not specifically a condition, the PSA mentions curation of any artifacts found during construction in the discussion of what a CRMMP should include. The Tribe strongly opposes any type of curation of artifacts or resources, and instead requests return of all items for appropriate treatment and disposition by the Tribe.

CUL-5

While the Tribe does not disagree with providing the construction crew with a sensitivity program to help them possibly identify cultural artifacts, the mitigation measures do not adequately address the potential for discovery of unknown cultural resources at the Project site. Pursuant to Public Resources Code 21082; CEQA Guidelines §§ 15064.5, 15126.4 and 15151 a

Lead Agency should make provisions for historical or unique archeological resources accidentally discovered during construction. The CEC and Applicant cannot assume that construction workers or other Project workers, even with a brief training, have the expertise to adequately identify cultural resources which might be uncovered by grading and excavation activities. To allow such mitigation to stand seems to indicate that the background and educational requirements for an archaeologist or cultural resources monitor have no meaning. It should be made clear that such training is in no way a substitution for or exception to a requirement for adequate monitoring of the initial ground-disturbing activities as discussed in *CUL-6*.

CUL-6

Given the amount of excavation necessary for both the plant site and trenching, the Tribe agrees that full-time monitoring of ground-disturbing activities in the native soils is imperative given the high likelihood that resource will be encountered. However, the Tribe disagrees with the CEC only requiring Tribal monitors if deemed appropriate by the archeologist. The Tribe disagrees with fact that the CEC is placing discretionary powers with the Project archeologist or CRS. As the CEC is the Lead Agency, it is the certifying and permitting agency for this Project. This means the CEC is the entity responsible for compliance with CEQA. The CEC is the only entity that can make the findings regarding environmental impacts, and it is the only entity that can set and approve mitigation with regard to such impacts. As the condition currently reads, it leaves decisions that are solely within the discretion of the CEC in the hands of the Project archeologist or CRS. This is possibly a violation of the CEC's duties and responsibilities in complying with CEQA. In addition, it is in direct violation with the spirit of CEQA, contrary to the interests of the public and other interested entities, such as the Tribe, and a direct conflict of interest concerning Project approval. The Condition language squarely vests decision making abilities with a non-CEC representative, and leaves them with an agent of the Project Applicant/Developer, a direct conflict of interest. In addition, this is in direct violation of the Lead Agency's discretionary responsibilities, and may be a case of "deferred mitigation," which is generally prohibited by CEQA. Therefore the Tribe requests that the CEC redraft the mitigation measure to include full-time Tribal monitoring as well.

CUL-7

Like *CUL-6*, this condition delegates mitigation decisions to the Applicant, rather than vesting it in the CEC. Further, as worded, the condition does not adequately acknowledge to unique government-to-government relationship which exists between tribes and all public agencies. It is not just any "Native American" who can monitor a project, but rather should be the appropriately affiliated tribe who will designate appropriate monitors. Further, the Tribe believe that it is problematic to make the Applicant enter into agreements with multiple tribes regarding cultural resources issues because each tribe is likely to have a different viewpoint. The NAHC recently asserted that the MLD would normally be the 'consulting tribe.' It is Pechanga's position that we would be named MLD concerning any find of Native American human remains on this Project as it was on the burial find described by Mr. Fagelson. As such, the Tribe believes that it is the appropriate tribe for monitoring and mitigation purposes. This way all

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decisions concerning the remains and affiliated resources and sites can be treated uniformly and consistently in accordance with the Public Resources Code processes and the Tribe's practices, without imposing conflict of practices issues between the tribes on the Applicant and CEC as the lead agency.

CUL-8

As with prior conditions, the evaluation process needs to include adequate tribal input. Further, the evaluation should not only consider data recovery as possible mitigation for previously undiscovered resources. As discussed above, avoidance is the preferred mitigation for cultural resources and depending upon the nature and sensitivity of the fine, the Tribe does not want to foreclose other possible mitigation measures.

The Tribe appreciates the opportunity to provide these comments and suggestions and looks forward to working with the California Energy Commission, the Project Applicant and other interested agencies in protecting the invaluable Luiseño cultural resources found in the Project area. If you have any questions, please do not hesitate to contact me at (951) 676-2768, Ext. 2137.

Sincerely,



Laura Miranda
Deputy General Counsel

Cc: Pechanga Cultural Resources Department