

**OLD SPANISH TRAIL ASSOCIATION
REPLY TO APPLICANT'S OBJECTION TO OSTA'S
MOTION FOR SUBPOENA DUCES TECUM
and
MOTION FOR EXTENSION OF TIME FOR REBUTTAL TESTIMONY
or, IN THE ALTERNATIVE,
MOTION TO STRIKE TESTIMONY**

I. INTRODUCTION

The Old Spanish Trail Association (OSTA) hereby replies to Applicant's Objection to OSTA's Motion for subpoena duces tecum pursuant to California Government Code Sections 11450.05-11450.50 and Motion for Extension of Time for Rebuttal Testimony or, In the Alternative, Motion to Strike Testimony ("Motion").

The Motion requests 2 categories of documents that OSTA believes are relevant and material to the issues in this matter. Applicant's Objection ("Objection") does not dispute this; instead, Applicant argues variously that responses to OSTA's requests:

- have been produced
- are protected by an unspecified BLM authority;
- are accessible otherwise (though in Applicant's possession and/or control), and;

further, that all of OSTA's concerns regarding the pedestrian survey are answered in the Applicant's AFC Data Adequacy Supplement B, posted on the CEC site on September 23, 2011.

OSTA agrees with Applicant's contention that some documents have been previously produced; it does NOT request duplicate production of such documents.

Jack Prichett, President of OSTA's Tecopa Chapter, called Applicant's attorney before the Objection was filed in an attempt to resolve the Motion. He, Barbara Milliken (Tecopa Chapter Board Member) and attorney Samantha Pottenger spoke by phone early on the evening of February 20, 2013. Essentially, Mr. Prichett asked if Applicant would simply submit a formal verified response to the two requests in the OSTA motion, so there would be a clear record of specifically:

- which documents and records existed;
- which were in Applicant's possession and/or control;
- whether anything further would be produced;
- what was being withheld and/or objected to;

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- and the basis of any objections.

Prichett stated that he did not want Applicant to again produce what had previously been produced.

Ms. Pottenger replied that the Applicant's Objection to the Motion had already been filed (though neither Mr. Prichett nor Ms. Milliken had seen it yet), asserted the various arguments above, stated that the requested documents were in Applicant's possession and/or control but that OSTA could procure them elsewhere. Mr. Prichett and Ms. Milliken stated that since Applicant had these, it should produce them rather than place further burden on OSTA and also to make sure the record was complete and correct, avoiding confusion and ambiguity.

Ms. Pottenger was asked whether Applicant would produce OSTA-requested, non-publicly available documents. She replied that none would be produced. She was further asked if any of the requested documents were being withheld; she replied that she "didn't know" and specifically that she didn't know if any experts had documents responsive to the requests, particularly relating to instructions given to surveyors regarding mule traces. Mr. Prichett and Ms. Milliken reiterated several times their belief that Applicant was required to state and describe any responsive documents and writings that were withheld. They were very surprised that Applicant's attorney didn't know if any documents were withheld, for any reason. Mr. Prichett sent an email confirming this conversation to Ms. Pottenger on February 22, 2013; a true and correct copy is attached to Mr. Prichett's Declaration.

On February 20, 2013, the Energy Commission Staff filed its Comments on OSTA's Motion. In the second paragraph, the Comments refer to OSTA's specification of the "kind of information that it seeks" relating to the "cultural resources survey that surveyed for evidence of the Old Spanish Trail on the project site." The Comments state an understanding that the survey concluded that there were "no trail traces; if there were not, there are no "sites" that could be imperiled by release of those portions of the cultural resources survey that pertain to the trail, including survey techniques and conditions, and instructions for the consultants, for the Old Spanish Trail. If this is correct, there is no apparent reason why OSTA should not have access to that information in the cultural resources report." OSTA has the same understanding as the CEC staff does and believes therefore that it is entitled to all information relating to the pedestrian survey, as requested.

II. THE REQUESTED INFORMATION IN ITEMS 1 AND 2 OF THE MOTION [SET FORTH BELOW] IS CRUCIAL TO A DETERMINATION OF WHETHER APPLICANT'S CONTENTION THAT THE PROJECT CAUSES NO IMPACT TO THE OSHNT

1. OSTA is particularly interested in HHSEGS Appendix 5-3B Cultural Resources Report.pdf and HHSEGS Appendix 5-3E Known Cultural Resources.pdf. OSTA received from CEC staff several pages of Appendix 5-3B—but not the complete document. OSTA has not yet seen Appendix 5-3E. OSTA is willing to sign a non-disclosure agreement to receive Appendix 5-3E. Examination of these documents will help OSTA to confirm or refute, depending on the content of the documents, Applicant's contention that there are no mule traces, wagon trails, or associated findings relating to the OSHNT/MR NC. See Declaration of Jack Prichett.

2. All documents relating to the pedestrian survey are necessary, relevant and material to a determination of the accuracy, reliability, validity and professional adequacy of the survey undertaken by Applicant. Interestingly, the survey was undertaken from March 21, 2011, through June 29, 2011, according to the Objection, which states that its Fieldwork Authorization from the BLM for such work was "executed on June 23, 2011 [Objection, p. 3, B., last paragraph]." Apparently, four portions of the survey were completed **before** BLM issued the June 29 authorization. Yet it appears that Applicant is somehow relying, without stating the authority therefore, on this agreement to preclude production.

Moreover, Jack Prichett attempted to contact the BLM person referred by Ms. Pottenger, but was not able to reach her by phone, leaving a message that has not yet been returned. With the impending hearing dates, it is imperative that Applicant, which is in possession of the documents according to its attorney, produce them immediately.

Applicant claims in its February 20 Response to the OSTA motion to have satisfied, in Section 5.3.3.6 of the AFC Data Adequacy Supplement B, OSTA's request for "instructions or advisements given to the surveyors...[and] time sheets, maps, field notes and/or transcriptions thereof, and other documents, writings, notes and records documentation or relating to the scale, scope, time expended and methodology of the pedestrian survey." None of these items are included in AFC Data Adequacy Supplement B.

These actual pedestrian survey documents, as described in OSTA's Motion, will allow OSTA to determine what surveyors had been instructed to seek on the ground. In fact, the survey crew members may never have seen the elegant Research Questions or the

carefully crafted Research Design laid out so articulately in AFC Data Adequacy Supplement B. There can be a world of difference between a research design and what actually gets transmitted to the “troops on the ground.”

III. CONCLUSION

The Hidden Hills Presiding Member should issue an order issuing an administrative subpoena duces tecum directing BrightSource to produce the requested information, with the exception of documents previously produced and served on all parties. The order should also grant OSTA and all other parties four additional days to file any rebuttal testimony, restricted only to the information regarding the pedestrian survey referenced herein. The order should also state that if BrightSource does not produce the information requested herein, all BrightSource testimony and evidence, including any conclusions drawn therefrom, related to the pedestrian survey is stricken and may not be submitted to the evidentiary record herein.

IV. DECLARATION

I declare, under penalty of perjury of the laws of the State of California, that the foregoing is true and correct. Appended hereto is a true and correct copy of my email to Ms. Pottenger, dated February 22, 2013, and referred to herein.

Executed on February 23, 2013 in Venice, California



Jack Prichett
President, Tecopa Chapter of OSHNT
On Behalf of Intervenor, OSHNT

APPENDIX: COPY OF E-MAIL SENT BY OSTA'S JACK PRICHETT TO ATTORNEY SAMANTHA POTTENGER, FEBRUARY 20, 2013

IRe: HHSEGS Application for Certification. CEC Docket No. 11-AFC-02

Dear Ms. Pottenger

This email confirms our conversation from about 7:30 PM to 8:00PM on Feb. 20, when I called you back, as promised, to discuss possible resolution OSTA's Motion for Subpoena Duces Tecum or Motion to Strike Testimony ("Motion"). Barbara Milliken, OSTA Tecopa Chapter Board Member, was also on the 3-way phone call.

We asked that your client submit a full written and verified response to OSTA's request for the 2 items on page 1 of the Motion, specifying the following:

- 1) whether any of the requested documents and materials had previously been produced, and if so, where these could be found in the record;
- 2) whether any of the requested documents and materials were being produced, and if so, when and how; and
- 3) whether any of the requested documents and materials were being withheld.

You replied that your client's Response to the Motion had already been filed that evening and that you believed that all of OSTA's concerns were addressed in the response. We told you that we had not yet seen the Response.

As to 1) above, you stated and we agreed, that some of these documents have been produced; we told you that of course these need not be produced again, but merely itemized and designated in the record. You told us that some documents had not been produced, but that we could obtain those from other sources; we asked if all such documents were in your or your client's possession and/or control. You said "yes"; we said that since you had them and we had asked for them previously as well as in the Motion, you should produce them rather than place the burden of finding/procuring them on us. This would also assure that we obtain correct and complete documents, avoiding any confusion or inaccuracies.

As to 2) above, you advised that you didn't believe that any documents or materials were being produced at this time. any

As to 3) above, you advised that you "didn't know" if any requested documents were being withheld and that you didn't know if experts had any documents which may be responsive to the request in the Motion, particularly specific instructions given to

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surveyors regarding mule traces. We stated that your "I don't know" was certainly a strange comment to make, especially at this stage of the proceedings, and asked you to find out if anything was in fact withheld and why. We told you we were entitled to know if in fact anything was withheld, a description of it and the basis for withholding in a written and verified response.

We sincerely hope that this matter can be resolved, especially in light of the Energy Commission Staff's Comments on the Motion, served Feb. 20.

Jack Prichett
for Intervenor Old Spanish Trail Association