

## 5. Environmental Analysis

### 5.13 TRIBAL CULTURAL RESOURCES

Tribal cultural resources include landscapes, sacred places, or objects with cultural value to a California Native American tribe. This section of the Draft Environmental Impact Report (DEIR) evaluates the potential for the proposed project to impact tribal cultural resources in the City of San Juan Capistrano. Other potential impacts to cultural resources (i.e., prehistoric, historic, paleontological, and disturbance of human remains) are evaluated in Section 5.4, *Cultural Resources*. The analysis in this section is based in part on the following report:

- Cultural and Paleontological Resources Assessment for the River Street Marketplace, San Juan Capistrano, Orange County, California, Cogstone, June 2018.
- Extended Phase I Testing Report for a Historic Refuse Scatter, River Street Marketplace, San Juan Capistrano, Orange County, California, Cogstone, June 2018.

A complete copy of these studies are included in Appendices D1 and D2 of this DEIR.

#### 5.13.1 Environmental Setting

##### 5.13.1.1 REGULATORY BACKGROUND

###### Federal

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

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

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

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

###### State

###### *Public Resources Code*

Archaeological resources are protected pursuant to a wide variety of state policies and regulations enumerated under the California Public Resources Code. In addition, cultural resources are recognized as a non-renewable resource and therefore receive protection under the California Public Resources Code and CEQA.

- **California Public Resources Code 5097.9–5097.991** provides protection to Native American historical and cultural resources, and sacred sites and identifies the powers and duties of the Native American

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Heritage Commission (NAHC). It also requires notification to descendants of discoveries of Native American human remains and provides for treatment and disposition of human remains and associated grave goods.

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

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

#### *Health and Safety Code*

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

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

#### *Senate Bill 18*

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

SB 18 placed new requirements upon local governments for developments within or near TTCP. SB 18 requires local jurisdictions to provide opportunities for involvement of California Native Americans tribes in the land planning process for the purpose of preserving traditional tribal cultural places. The Final Tribal Guidelines recommends that the NAHC provide written information as soon as possible but no later than 30 days to inform the lead agency if the proposed project is determined to be in proximity to a TTCP and

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another 90 days for tribes to respond to if they want to consult with the local government to determine whether the project would have an adverse impact on the TTCP. There is no statutory limit on the consultation duration. Forty-five days before the action is publicly considered by the local government council, the local government refers action to agencies, following the CEQA public review time frame. The CEQA public distribution list may include tribes listed by the NAHC who have requested consultation or it may not. If the NAHC, the tribe, and interested parties agree upon the mitigation measures necessary for the proposed project, it would be included in the project's EIR. If both the lead agency and the tribe agree that adequate mitigation or preservation measures cannot be taken, then neither party is obligated to take action.

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

### *Assembly Bill 52*

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

TCRs must have certain characteristics:

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

The first category requires that the TCR qualify as a historical resource according to PRC Section 5024.1. The second category gives the lead agency discretion to qualify that resource—under the conditions that it

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support its determination with substantial evidence and consider the resource's significance to a California tribe. The following is a brief outline of the process (PRC §§ 21080.3.1–3.3).

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

### Local

The intent and purpose for the management of historic, archaeological, and paleontological resources is guided by the City of San Juan Capistrano's Council Policy Number 601 and is as follows (City of San Juan Capistrano 1997):

- a. It is the general intent of the City Council to protect and preserve its unique heritage and valuable built historic, archaeological and paleontological resources within the community. In support of this specific goal the City has adopted a Historic Archaeological Element as a part of the City's General Plan.
- b. Since 1985, the City has conducted extensive archaeological studies in the immediate downtown area of the City which have resulted in the discovery of archaeological resources associated with the community's historic past. In response to these discoveries, the City Council has determined that it is necessary to establish specific procedures and policies to ensure that significant historic resources, either known or discovered during construction, will be preserved as a community resource in the most financially equitable method.

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- c. To establish administrative procedures for the preparation of site surveys by professionally qualified persons, i.e., with a specific field of expertise in conducting research and on-site surveys regarding potential historic, archaeological and paleontological resources.
- d. To establish review procedures to evaluate historic resource reports, including possible impacts to sites, structures, and artifacts and identification of potential mitigation measures or project alternatives.
- e. To adopt procedures to insure proper mitigation measures and monitoring are implemented during development to provide historic resource protection and preservation.
- f. To establish administrative procedures where all significant historic, archaeological and paleontological sites would be recorded with the City and with the proper corresponding research institution.
- g. To effect and accomplish the protection, enhancement and perpetuation of historically significant structures, sites, objects and historic districts which represent or reflect elements of the Nation's, State's and/or City's cultural, social, economic, political and architectural history.

### 5.13.1.2 EXISTING CONDITIONS

The project site is currently developed with commercial nursery operation. The northern portion of the property is lined with potted plants for sale, a small office out building, and numerous work stations; the southern portion of the project site is on an inactive portion of the nursery that is used for storage; and the furthest southern boundary is left open and is covered in invasive weeds and trash. The southeast boundary of the site consists of a personal garden and numerous fruit trees (orange, avocado) and a massive 50 year old Peruvian Torch Cactus (*Echinopsis peruviana*) (Cogstone 2018). A mature Coast Live Oak (*Quercus agrifolia*) is on the northwest corner of the project site.

Sediments from the south-center of project site consist of red-brown to dark grayish brown Holocene soils, which form a sedimentary cap over older Pleistocene sediments in the subsurface. Surface soils rework the older formations they cap through bioturbation as well as organic enrichment from local vegetation.

Refer to Section 5.4, *Cultural Resources*, for a description of the sites historic and prehistoric context.

### 5.13.2 Thresholds of Significance

According to Appendix G of the CEQA Guidelines, a project would normally have a significant effect on the environment if the project would cause a substantial adverse change in the significance of a tribal cultural resource, defined in Public Resources Code section 21074 as either a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American tribe, and that is:

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- TCR-1 Listed or eligible for listing in the California Register of Historical Resources, or in a local register of historical resources as defined in Public Resources Code section 5020.1(k), or
- TCR-2 A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Public Resources Code section 5024.1. In applying the criteria set forth in subdivision (c) of Public Resource Code Section 5024.1, the lead agency shall consider the significance of the resource to a California Native American tribe.

### 5.13.3 Environmental Impacts

#### 5.13.3.1 METHODOLOGY

In order to identify tribal cultural resources and analyze any potentially significant adverse impacts, Cogstone conducted records searches, site inspections, intensive-level surveys, and background research. The City of San Juan Capistrano staff conducted a Native American consultation per SB 18 and AB 52 requirements. The National Register of Historic Places and CRHR criteria were also used and a sacred lands file search from NAHC was conducted.

The purpose of the site survey is to verify the exact location of each identified cultural resource, the condition or integrity of the resource, and the proximity of the resource to areas of cultural resources sensitivity. An intensive archaeological and paleontological pedestrian survey was conducted by Megan Wilson of the entire 5.6 acre project site on February 26, 2018. All undeveloped ground surface areas within the ground disturbance portion of the project site were examined. Existing ground disturbances (e.g., cutbanks, ditches, animal burrows, etc.) were visually inspected. Photographs of the project including ground surface visibility and items of interest, were taken. The surveyor searched for artifacts (e.g., flaked stone tools, tool-making debris, stone milling tools or fire-affected rock), soil discoloration that might indicate the presence of a cultural midden, soil depressions and features indicative of the former presence of structures or buildings (e.g., postholes, foundations), or historic-era debris (e.g., metal, glass, ceramics).

#### 5.13.3.2 IMPACT ANALYSIS

The following impact analysis addresses thresholds of significance for which there are potentially significant or less than significant impacts. Effects of the project determined to have no impact are identified and described in Chapter 8 of this DEIR. The applicable thresholds are identified in brackets after the impact statement.

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**Impact 5.13-1: Grading activities associated with the proposed project have the potential to encounter tribal cultural resources. [Thresholds TCR-1 and TCR-2]**

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*Impact Analysis:* Conducting consultation early in the CEQA process allows tribal governments, public lead agencies, and project proponents to discuss the level of environmental review, identify and address potential adverse impacts to tribal cultural resources, and reduce the potential for delay and conflict in the environmental review process. The intent of the consultations is to provide an opportunity for interested

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Native American contacts to work together with the City during the project planning process to identify and protect tribal cultural resources.

### **Sacred Lands File Search and Consultation**

As stated in Section 5.4, *Cultural Resources*, and Appendix D1 of this DEIR, 69 resources have been recorded within a half-mile radius of the project site—three prehistoric archaeological sites, eight prehistoric isolates, nine multicomponent sites, three multicomponent isolates, 11 historic archaeological sites, two historic isolates, and 33 historic resources (Cogstone 2018). On February 15, 2017, a Sacred Lands File search was conducted by NAHC to determine if any sacred lands or traditional cultural properties had been identified near the project site. The NAHC response identified one site recorded in the project area that could be impacted by the proposed project and suggested that the City contact the Juaneño Band of Mission Indians—Acjachemen Nation for additional information. The NAHC provided a list of 11 Native American groups and individuals who may have knowledge of tribal cultural resources in the project area. The City sent letters to each of the contacts, identifying the project location and requesting input, via U.S. certified mail on January 19, 2017, as part of the AB 52 and SB 18 process. The results of this consultation is described below.

### **AB 52 and SB 18 Consultation**

In accordance with AB 52 and SB 18 requirements, NAHC provided a list of tribal representatives who may have knowledge of tribal cultural resources in the project area. The City sent invitation letters to representatives of the Native American contacts provided by the NAHC on January 19, 2017, formally inviting tribes to consult with the City on the proposed project. The intent of the consultations was to provide an opportunity for interested Native American contacts to work together with the City during the project planning process to identify and protect tribal cultural resources. Letters were sent to the following Tribes and individuals:

#### **AB 52**

- Joyce Stanfield Perry, Tribal Manager, Juaneño Band of Mission Indians Acjachemen Nation
- Joseph Ontiveros, Cultural Resource Director, Soboba Band of Luiseño Indians
- Michael Mirelez, Cultural Resource Coordinator, Torres Martinez Desert Cahuilla Indians

#### **SB 18**

- Matias Belardes, Chairperson, Juaneño Band of Mission Indians Acjachemen Nation
- Teresa Romero, Chairwoman, Juaneño Band of Mission Indians Acjachemen Nation
- Thomas Rodriguez, Chairperson, La Jolla Band of Luiseño Indians
- Jeff Grubbe, Chairperson, Agua Caliente Band of Cahuilla Indians
- Sonia Johnston, Chairperson, Juaneño Band of Mission Indians
- Robert Smith, Chairperson, Pala Band of Mission Indians
- Temet Aguilar, Chairperson, Pauma Band of Luiseno Indians – Pauma & Yuima Reservation
- Mark Macarro, Chairperson, Pechanga Band of Mission Indians

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- Bo Mazzetti, Chairperson, Rincon Band of Mission Indians
- Jim McPherson, tribal Historic Preservation Officer, Rincon Band of Mission Indians
- Rosemary Morillo, Chairperson, Soboba Band of Luiseño Indians

Two Tribes responded to the City's request for consultation—Agua Caliente Band of Cahuilla Indians and Juaneño Band of Mission Indians—Acjachemen Nation.

- **Agua Caliente Band of Cahuilla Indians:** Deferred input to the local tribe.
- **Juaneño Band of Mission Indians—Acjachemen Nation:** Requested formal consultation with the City. Joyce Perry, Tribal Manager of Juaneño Band of Mission Indians—Acjachemen Nation met with the City on February 13, 2017. Ms. Perry provided an oral history of the site and indicated that the site is historically and culturally sensitive. Ms. Perry inquired as to who lived on the nursery property and whether the artifact collection from the nursery will go to the Historic Society. She stated her desire that the development be environmentally responsible and that conditions need to be placed on the project requiring archaeological and Native American monitoring. Ms. Perry requested a copy of the sacred lands file when it became available. Following consultation with the City, Cogstone provided Ms. Perry with the data previously requested—the sacred lands file and the cultural and paleontological assessment. Ms. Perry also provided a Native American monitor during the XPI investigations (see Appendix D2). She indicated that that Native American monitoring should occur during construction for development of the project.

Joyce Perry, Tribal Manager of the Juaneño Band of Mission Indians—Acjachemen Nation identified that there are tribal cultural resources in the vicinity of the project site, and that there is a potential to encounter buried prehistoric deposits on the project site. Buried or obscured archaeological resources may be encountered during construction, and development of the project site through grading and excavation activities could impact previously undisturbed prehistoric archaeological resources. Impacts to tribal cultural resources are potentially significant.

*Level of Significance before Mitigation:* Impact 5.13-1 is potentially significant.

#### 5.13.4 Cumulative Impacts

Cumulative impacts to cultural resources would occur when the impacts of the proposed project, in conjunction with other projects and development in the region, result in multiple and/or cumulative impacts to tribal cultural resources in the area. No prehistoric sites have been recorded on the project site, however, one sacred site has been documented within or adjacent to the project site, and 69 have been recorded within a half-mile radius of the site. It is possible that buried prehistoric artifacts or tribal cultural resources could be present within the area. Each future project considered for approval by the City would be required to comply with Policy 601 and include measures to protect these resources if they are uncovered during grading activities. The proposed project also includes mitigation measures to ensure proper identification, treatment, and preservation of tribal cultural resources. Implementation of these measures would reduce the potential for adverse impacts on tribal cultural resources both individually and cumulatively. Therefore, cumulative impacts to cultural resources would be less than significant.



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*Level of Significance before Mitigation:* Cumulative impacts to tribal cultural resources would be less than significant.

### 5.13.5 Existing Regulations and Standard Conditions

This analysis assumes compliance with all applicable laws. The following codes, rules, and regulations pertain to tribal cultural resources and were described in detail in Sections 5.13.1.1 of this DEIR and are listed below.

#### Federal

- Archaeological Resources Protection Act
- Native American Graves Protection and Repatriation Act

#### State

- California Public Resources Code Sections 5079–5079.65
- California Senate Bill 18
- Assembly Bill 52

#### Local

- City of San Juan Capistrano’s Council Policy Number 601

### 5.13.6 Level of Significance Before Mitigation

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

- Impact 5.13-1 Tribal cultural resources could be adversely impacted by grading activities associated with the proposed project.

### 5.13.7 Mitigation Measures

#### Impact 5.13-1

Mitigation Measure CUL-1 in Section 5.4, *Cultural Resources*, of this DEIR applies and is reproduced below.

CUL-1 Prior to issuance of any permits allowing ground-disturbing activities for the River Street Marketplace project the City of San Juan Capistrano shall ensure that an archeologist who meets the Secretary of the Interior’s Standards for professional archaeology has been retained for the project and will monitor all grading and other significant ground-disturbing activities. The Qualified Archaeologist shall ensure that the following measures are followed for the project:

- Prior to any ground disturbance, the Qualified Archaeologist, or their designee, shall provide worker environmental awareness protection training to construction personnel

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regarding regulatory requirements for the protection of cultural (prehistoric and historic) resources. As part of this training, construction personnel shall be briefed on proper procedures to follow should unanticipated cultural resources be made during construction. Workers will be provided contact information and protocols to follow in the event that inadvertent discoveries are made. The training can be in the form of a video or PowerPoint presentation. Printed literature (handouts) can accompany the training and can also be given to new workers and contractors to avoid the necessity of continuous training over the course of the project.

- Prior to any ground disturbance, the applicant shall submit a written Project Monitoring Plan (PMP) to the City's Development Services Director for review and approval. The monitoring plan shall include monitor contact information, specific procedures for field observation, diverting and grading to protect finds, and procedures to be followed in the event of significant finds.
- During grading or trenching activities, a Native American monitor provided by the Juaneño Band of Mission Indians—Acjachemen Nation shall observe all grading and trenching activities below the original ground surface. The Native American monitor shall consult with the archaeological monitor regarding objects and remains encountered during grading or trenching activities that may be considered sacred or important.
- In the event that unanticipated cultural material is encountered during any phase of project construction, all construction work within 50 feet (15 meters) of the find shall cease and the Qualified Archaeologist shall assess the find for importance. Construction activities may continue in other areas. If the discovery is determined to not be important by the Qualified Archaeologist and the Native American monitor, work will be permitted to continue in the area.
  - If a find is determined to be important, additional investigation may be warranted, or the find can be preserved in place and construction may be allowed to proceed.
  - Additional investigation can include scientific recording and excavation of the important portion of the find.
  - If excavation of a find occurs, the Qualified Archaeologist shall draft a report within 60 days of conclusion of excavation that identifies the find and summarizes the analysis conducted. The completed report shall be approved by the City's Development Services Director and filed with the County and with the South Central Coastal Information Center at California State University, Fullerton.
  - Excavated finds shall be curated at a repository determined by the Qualified Archaeologist in consultation with the Native American monitor and approved by the City.

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### 5.13.8 Level of Significance After Mitigation

#### Impact 5.13-1

Implementation of Mitigation Measure CUL-1 would ensure the project applicant and construction contractors are cognizant of potential tribal cultural resources onsite and have specified procedures to implement to ensure these potentially uncovered resources are not damaged during grading and construction activities. The mitigation measure requires that any archaeological resources encountered during project ground-disturbing activities be recovered, evaluated and curated, if necessary, by a qualified archaeologist, thus reducing potential impacts associated with tribal cultural resources to a level that is less than significant. Therefore, no significant unavoidable adverse impacts relating to tribal cultural resources have been identified.

### 5.13.9 References

- Cogstone. 2018, June. Cultural and Paleontological Resources Assessment for the River Street Marketplace, San Juan Capistrano, Orange County, California.
- . 2018, June. Extended Phase I Testing Report for a Historic Refuse Scatter, River Street Marketplace, San Juan Capistrano, Orange County, California.

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