

## 4.12 TRIBAL CULTURAL RESOURCES

This section of the Draft Environmental Impact Report (EIR) evaluates the potential for the proposed Tirador Residential Project (proposed project) to impact tribal cultural resources. Other potential impacts to cultural resources, including historic and archaeological resources, are evaluated in Section 4.4, Cultural Resources, of this Draft EIR. The analysis in this section summarizes pertinent information and findings from both Native American consultation and Section 4.8, Cultural/Scientific Resources, of the City of San Juan Capistrano's (City) *Ventanas Business Center Environmental Impact Report* (2007). The Ventanas Business Center Project was proposed for a 19.43-acre site that included the current project site in its entirety.

### 4.12.1 Scoping Process

The City of San Juan Capistrano (City) received 11 comment letters during the public review period of the Initial Study/Notice of Preparation (IS/NOP). For copies of the IS/NOP comment letters, refer to Appendix A of this EIR. Two of the comment letters included comments related to Tribal Cultural Resources.

The letter from the Native American Heritage Commission (NAHC) received on November 14, 2019, provided information related to Native American consultation as required by Assembly Bill (AB) 52 and Senate Bill (SB) 18. The letter from the Juaneño Band of Mission Indians received on December 5, 2019, requested that a treatment plan be prepared that includes measures regarding monitoring and procedures for how any inadvertent discoveries of tribal resources would be addressed.

### 4.12.2 Methodology

A cultural resources assessment was conducted on the project site in 2007, in conjunction with the preparation of the City's *Ventanas Business Center Environmental Impact Report*. The study included a record search at the South Central Coastal Information Center (SCCIC), a pedestrian survey, and archaeological testing. The purpose of the 2007 records search at the SCCIC was to determine the extent of previous cultural resources investigations within a 0.25-mile radius of the project area, and whether any previously recorded archaeological sites or other historic resources exist within or near the project area.

In order to identify tribal cultural resources on the project site and analyze potentially significant impacts associated with construction and implementation of the proposed project, the City conducted Native American consultation in accordance with AB 52 requirements. AB 52 requires Native American consultation for any California Environmental Quality Act (CEQA) project that has a Notice of Preparation or a Notice of Negative Declaration or Mitigated Negative Declaration filed on or after July 1, 2015.

A Sacred Lands File (SLF) was requested from the NAHC for the proposed project, as was a list of potential Native American contacts for consultation. The search was requested to determine whether there are sensitive or sacred Native American resources on or near the site that could be affected by the proposed project. The NAHC responded on December, 28, 2018, to say that the SLF search was positive for the project area, indicating the presence of known and recorded sites that

may have the potential to contain tribal cultural resources. The NAHC provided a Tribal Consultation List that included the following 30 Native American representatives:

- Jeff Grubbe, Chairperson, Agua Caliente Band of Cahuilla Indians
- Patricia Garcia-Plotkin, Director, Agua Caliente Band of Cahuilla Indians
- Ralph Goff, Chairperson, Campo Band of Mission Indians
- Robert Pinto, Chairperson, Ewiiapaayp Tribal Office
- Michael Garcia, Vice Chairperson, Ewiiapaayp Tribal Office
- Erica Pinto, Chairperson, Jamul Indian Village
- Sonia Johnston, Chairperson, Juaneño Band of Mission Indians
- Matias Belardes, Chairperson, Juaneño Band of Mission Indians Acjachemen Nation – Belardes
- Joyce Perry, Tribal Manager, Juaneño Band of Mission Indians Acjachemen Nation – Belardes
- Teresa Romero, Chairperson, Juaneño Band of Mission Indians Acjachemen Nation – Belardes
- Thomas Rodriguez, Chairperson, La Jolla Band of Luiseno Indians
- Gwendolyn Parada, Chairperson, La Posta Band of Diegueno Mission Indians
- Javaughn Miller, Tribal Administrator, La Posta Band of Diegueno Mission Indians
- Angela Elliott Santos, Chairperson, Manzanita band of Kumeyaay Nation
- Mario Morales, Cultural Resources Representative, Mesa Grande Band of Diegueno Mission Indians
- Virgil Oyos, Chairperson, Mesa Grande Band of Diegueno Mission Indians
- Shasta Gaughen, Tribal Historic Preservation Officer, Pala Band of Mission Indians
- Temet Aguilar, Chairperson, Pauma Band of Luiseno Indians
- Paul Macarro, Cultural Resources Coordinator, Pechanga Band of Mission Indians
- Mark Macarro, Chairperson, Pechanga Band of Mission Indians
- Jim McPherson, Tribal Historic Preservation Officer, Rincon Band of Luiseno Indians
- Bo Mazzetti, Chairperson, Rincon Band of Luiseno Indians
- John Flores, Environmental Coordinator, San Pasqual Band of Diegueno Mission Indians
- Allen Lawson, Chairperson, San Pasqual Band of Diegueno Mission Indians
- Scott Cozart, Chairperson, Soboba Band of Luiseno Indians
- Joseph Ontiveros, Cultural Resource Director, Soboba Band of Luiseno Indians
- Cody Martinez, Chairperson, Sycuan Band of the Kumeyaay Nation
- Lisa Haws, Cultural Resources Manager, Sycuan Band of the Kumeyaay Nation
- Robert Welch, Chairperson, Viejas Band of the Kumeyaay Indians
- Julie Hagen, Viejas Band of the Kumeyaay Indians

The IS/NOP prepared for the project indicated that consultation under Senate Bill (SB) 18 would be required due to a General Plan Amendment proposed as part of the project. Since distribution of the IS/NOP, a General Plan Amendment is no longer required as part of the project, and therefore, consultation under SB 18 is also no longer required. As such, the City did not include the tribal representatives in the above list in the consultation process.

The City maintains a list of the following tribal representatives that have requested consultation under AB 52. The City sent letters for the purposes of AB 52 consultation to the following individuals on the City's AB 52 list on January 21, 2019:

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

No additional responses or requests for consultation have been received.

#### 4.12.2.1 Results

Results of the record search at the SCCIC completed for the City's *Ventanas Business Center Environmental Impact Report* in 2007 indicated that 9 cultural resources occur within 0.25 mile of the project site. Further, the 2007 site survey and assessment resulted in the recordation of one prehistoric site within the project site.

#### 4.12.3 Existing Environmental Setting

Tribal cultural resources are defined as "sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe." Additionally, a lead agency can, at its discretion and supported by substantial evidence, choose to treat a resource as a tribal resource. AB 52 requires lead agencies to conduct formal consultations with California Native American tribes during the CEQA process to identify tribal cultural resources that may be subject to significant impacts by a project.

The project site is located in the City east of Interstate 5 (I-5), south of Calle Arroyo, west of the Ortega Equestrian Center, and north of San Juan Creek. The floodplain of San Juan Creek extends into the southern portion of the project site. The existing project site is primarily characterized by dirt and scattered ruderal vegetation, is irregular in shape, and is relatively flat with a slight slope to the east/southeast. The Cultural Resources Element of the San Juan Capistrano General Plan (1999) delineates areas that possess sensitivity for cultural resources, specifically in Figure CR-2 of the Cultural Resources Element. The project site is located within the limits of the areas identified in Figure CR-2 where prehistoric and historic archaeological resources are known to exist.

Ethnographically, the project site and surrounding area fall within the territory of the Native American Acjachemen Nation, later named the Juaneño by their association with the Mission San Juan Capistrano. The Juaneño Native American tribe consisted of semi-sedentary hunters and gatherers. Much like many of the island tribes, one of the most important sources of food for the Juaneño Native American tribe were acorns gathered from oak groves in canyons, drainages, and foothills. Acorns were ground into flour using mortars and pestles. Seeds from sage, grasses, and other native plant species were collected and ground into meal with manos and metates. The primary sources of protein were meat from deer, rabbits, and other animals hunted with bow and arrow or trapped using snares, nets, and deadfalls. Coastal tribes also collected shellfish and used carved shell hooks for fishing.

The Juaneño Native American tribe lived in villages consisting of up to 250 people located near permanent sources of water and food. Villages were located at the center of an established territory, from which resources were gathered. Small groups left the village for short periods to hunt, fish, and gather plants. When traveling away from the village, small groups established

temporary camps and created locations where food and other materials were processed. Evidence of these areas include manos and metates for seed grinding, bedrock mortars for acorn pulverizing, and lithic scatters indicating manufacturing or maintenance of stone tools used for hunting or butchering.

As stated above, a cultural resources assessment and subsequent testing program were conducted within the project site in 2007 as part of the City's *Ventanas Business Center Environmental Impact Report*. One prehistoric site, CA-ORA-1672, is located within the project site. A subsurface testing project was completed in 2007, and although artifacts were recovered, the context was highly disturbed and the resources were not recommended as significant. The site lacked integrity and did not appear to qualify as a significant cultural resource because the site did not produce adequate data to answer important research questions in prehistory.

#### 4.12.4 Regulatory Setting

This section includes applicable federal, State, regional, and City regulations.

##### 4.12.4.1 Federal Regulations

**Archaeological Resources Protection Act.** The Archaeological Resources Protection Act was enacted in 1979 with the purpose of securing the protection of archaeological resources and sites on public lands and Native American lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals.

**Native American Graves Protection and Repatriation Act.** The Native American Graves Protection and Repatriation Act (NAGPRA) was passed in 1990 with the purpose of outlining 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. The Act also establishes procedures for the inadvertent discovery or planned excavation of Native American cultural items on federal or tribal lands. While these provisions do not apply to discovery or excavations on private or State lands, the collections portions of the Act may apply to cultural items if they are under control of an institution that receives federal funding. The Act also makes it a criminal offense to traffic in Native American human remains without right of possession or in cultural items obtained in violation of the Act.

##### 4.12.4.2 State Regulations

**Native American Heritage Commission (NAHC).** In 1976, the California State Government passed AB 4239, creating the Native American Heritage Commission (NAHC). The NAHC is responsible for identifying and categorizing Native American cultural resources as well as preventing damages to designated sacred sites and associated artifacts and remains. Legislation passed in 1982 authorized the NAHC to identify a Most Likely Descendant (MLD) when Native American remains are found outside of any place other than a designated cemetery. An MLD has the authority to make recommendations in regards to the treatment and disposition of the discovered remains.

**The Native American Historic Resource Protection Act.** The Native American Historic Resource Protection Act, or AB 52, defines guidelines for reducing conflicts between Native Americans and development projects and activities. Projects are subject to AB 52 if a notice of preparation for an EIR is filed or a notice of intent to adopt a Negative or Mitigated Negative Declaration is filed on or after July 1, 2016. “Tribal cultural resources” are protected under CEQA and are defined as a site, feature, place, cultural landscape (must include the size and scope of landscape), sacred place, and object with a cultural value to a California Native American tribe that is either included or eligible for inclusion in the California Register of Historical Resources (California Register), or included in a local register of historical resources. At the lead agency’s discretion, a resource can be treated as a tribal cultural resource if a Native American Tribe provides substantial evidence. Additionally, AB 52 allows tribes to engage in consultation with lead agencies and sets guidelines for such consultation.

**California Public Resources Code 5097.9–5097.991.** California Public Resources Code (PRC) 5097.9–5097.991 provides protection to Native American historical and cultural resources (including sanctified cemeteries, places of worship, religious sites, or sacred shrines) and sacred sites and gives the NAHC enforcement authority.

Specifically, California PRC 5097.98 outlines procedures in the event human remains are discovered. The Orange County (County) Coroner shall make a determination within two working days from the time the person responsible for the excavation, or designee, notifies the County Coroner of the discovery or recognition of the human remains. If the County Coroner identifies the remains to be of Native American origin, or has reason to believe that the remains are those of Native American origin, the County Coroner must contact the California NAHC within 24 hours. The NAHC representative will then alert a Native American MLD to conduct an inspection of the site and to determine the following course of treatment and action. Additionally, *State CEQA Guidelines* Section 15064.5 sets forth a procedure if human remains are found on land outside of federal jurisdiction.

**Health and Safety Code Section 7050.5.** Section 7050.5 of the California Health and Safety Code protects Native American burials, remains, and associated grave artifacts in the event that they are discovered in any location other than a designated cemetery. The Health and Safety Code mandates the immediate stop of excavation in the site as well as any adjacent or overlying area where the remains or associated item is found, and provides for the sensitive disposition of those remains. Should remains be discovered, the County Coroner must determine that the remains are not subject to the provisions of Section 27491 of the Government Code or any other related 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 for the excavation, or designee, in the manner provided in PRC Section 5097.98.

#### 4.12.4.3 Regional Regulations

There are no regional regulations that are applicable to tribal cultural resources relevant to the proposed project.

#### 4.12.4.4 Local Regulations

**City of San Juan Capistrano Historical, Archaeological, and Paleontological Resource Management Guidelines.** In 1997, the City revised City Council Policy 601 and renamed this policy, “Historical, Archaeological, and Paleontological Resource Management Guidelines.” These guidelines aim to ensure that cultural resource evaluations for projects within the City are conducted by qualified individuals. The policy also establishes procedures for reviewing these reports and mitigation measures to address potential impacts to previously unknown cultural resources during construction activities. In the event cultural resources are discovered, these guidelines require that the locations of all significant historic resources within the City be recorded. These guidelines also outline specific circumstances during which a Native American monitor would be required during construction.

#### 4.12.5 Thresholds of Significance

The thresholds for tribal cultural resources impacts used in this analysis are consistent with Appendix G of the *State CEQA Guidelines* and the City’s *Local Guidelines for Implementing the California Environmental Quality Act* (2019). The proposed project may be deemed to have a significant impact with respect to tribal cultural resources if it would:

**Threshold 4.12.1:** 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: Listed or eligible for listing in the California Register of Historical Resources, or in a local register of historical resources as defined in Public Resources Code section 5020.1(k).

**Threshold 4.12.2:** 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: 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.

#### 4.12.6 Project Impacts

**Threshold 4.12.1:** Would the project 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 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)?**

**Less Than Significant Impact.** The project site is not listed or eligible for listing in the California Register, or in a local register of historical resources. However, the NAHC SLF search did return positive results as one prehistoric site, CA-ORA-1672, located within the project site. Despite this positive finding, subsequent subsurface testing was completed and the resources were not recommended as significant due to their lack of integrity and the absence of data to answer important research questions in prehistory. Therefore, because there is no resource listed or eligible for listing on the California Register or local register, impacts under this threshold are considered less than significant. No mitigation is required.

**Threshold 4.12.2: Would the project 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 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.**

**Less Than Significant with Mitigation Incorporated.** As noted above, an SLF through the NAHC and AB 52 Native American consultation were conducted for the proposed project. The purpose of these efforts was to identify known tribal cultural resources on or near the project site. The request for a search of the SLF with the NAHC (December 2018) resulted in positive findings. However, no responses were received from Native American representatives with regard to AB 52 consultation and outreach. However, as stated previously, two comment letters were received during the public review period for the IS/NOP, but after the AB 52 consultation period had concluded. Further, one prehistoric site, CA-ORA-1672, is located within the project site. However, a subsequent testing program at the prehistoric site established that it does not appear to qualify as a significant cultural resource because it lacks integrity and does not contain the data to answer important research questions in prehistory. Due to the presence of cultural resources within the project site and the location of the project site in an area near the San Juan Creek, the project area is considered potentially sensitive for tribal cultural resources. In addition, the City requires monitoring for development projects in culturally sensitive areas. As such, monitoring by an archaeological monitor under the supervision of an Orange County Certified Archaeologist and by a Native American representative is required (see Mitigation Measure CUL-1 in Section 4.4., Cultural Resources, of this Draft EIR). Mitigation Measure CUL-1 would reduce any potential impacts to previously undiscovered tribal cultural resources to a less than significant level. In addition, in the unlikely event that human remains are encountered during project grading, the County Coroner would be notified immediately, and no further disturbance would occur until the County Coroner makes a determination of origin and disposition pursuant to PRC Section 5097.98. If the remains are determined to be Native American, the County Coroner would notify the NAHC, which would then

determine and notify the MLD. With permission from the City, the MLD would complete inspection within 48 hours of notification by the NAHC (see Mitigation Measure CUL-2 in Section 4.4., Cultural Resources, of this Draft EIR). Mitigation Measure CUL-2 would reduce potential impacts related to the discovery of unknown Native American human remains on the project site to a less than significant level.

#### 4.12.7 Level of Significance Prior to Mitigation

The proposed project could result in potentially significant impacts with respect to tribal cultural resources without the implementation of applicable mitigation measures.

#### 4.12.8 Regulatory Compliance Measures and Mitigation Measures

##### 4.12.8.1 Regulatory Compliance Measures

No regulatory compliance measures are required for the proposed project.

##### 4.12.8.2 Mitigation Measures

The proposed project would comply with the following mitigation measures, identified in Section 4.4., Cultural Resources, of this Draft EIR.

#### Mitigation Measure CUL-1

**Cultural Resources Monitoring and Accidental Discovery.** Prior to the issuance of grading permits, the Project Applicant shall retain, with approval of the City of San Juan Capistrano (City) Development Services Director, or designee, a qualified archaeological monitor. A monitoring plan should be prepared by the archaeologist and implemented upon approval by the City. Prior to issuance of grading permits, the Project Applicant, with City approval, shall also retain a Native American monitor after consultation with interested tribal and Native American representatives. Both monitors shall be present on the project site during ground-disturbing activities to monitor rough and finish grading, excavation, and other ground-disturbing activities in the native soils. Because cultural resources were previously identified on the project site, both monitors are required to be present on a full-time basis during initial site preparation and initial ground-disturbing activities. Further, each monitor shall spot check any ground-disturbing activities (e.g., finish grading) to ensure that no cultural resources are impacted during construction activities.

If cultural materials are discovered during site preparation, grading, or excavation, the construction contractor shall divert all earthmoving activity within and around the immediate discovery area until a qualified archaeologist can assess the nature and significance of the find. Project personnel shall not collect or move any archaeological materials or human remains and associated materials. To the extent feasible, project activities shall avoid these



deposits. Where avoidance is not feasible, the archaeological deposits shall be evaluated for their eligibility for listing on the California Register of Historical Resources. If the deposits are not eligible, avoidance is not necessary. If the deposits are eligible, adverse effects on the deposits must be avoided, or such effects must be mitigated. Mitigation can include, but is not necessarily limited to: excavation of the deposit in accordance with a data recovery plan (see California Code of Regulations [CCR] Title 14(3) Section 15126.4(b)(3)(C)) and standard archaeological field methods and procedures; laboratory and technical analyses of recovered archaeological materials; production of a report detailing the methods, findings, and significance of the archaeological site and associated materials; curation of archaeological materials at an appropriate facility for future research and/or display; an interpretive display of recovered archaeological materials at a local school, museum, or library; and public lectures at local schools and/or historical societies on the findings and significance of the site and recovered archaeological materials. The City Development Services Director, or designee, shall be responsible for reviewing any reports produced by the archaeologist to determine the appropriateness and adequacy of the findings and recommendations.

**Mitigation Measure CUL-2**

**Human Remains.** Consistent with the requirements of CCR Section 15064.5(e), if human remains are encountered during site disturbance, grading, or other construction activities on the project site, the construction contractor shall halt work within 25 feet of the discovery; all work within 25 feet of the discovery shall be redirected and the Orange County (County) Coroner notified immediately. No further disturbance shall occur until the County Coroner has made a determination of origin and disposition pursuant to Public Resources Code Section 5097.98. If the remains are determined to be Native American, the County Coroner shall notify the Native American Heritage Commission (NAHC), which will determine and notify a Most Likely Descendant (MLD). With the permission of the City, the MLD may inspect the site of the discovery. The MLD shall complete the inspection within 48 hours of notification by the NAHC. The MLD may recommend scientific removal and nondestructive analysis of human remains and items associated with Native American burials. Consistent with CCR Section 15064.5(d), if the remains are determined to be Native American and an MLD is notified, the City shall consult with the MLD identified by the NAHC to develop an agreement for the treatment and disposition of the remains.

Upon completion of the assessment, the consulting archaeologist shall prepare a report documenting the methods and results and provide recommendations regarding the treatment of the human remains and any associated cultural materials, as appropriate, and in coordination with the recommendations of the MLD. The report shall be submitted to the City Development Services Director, or designee, and the South Central Coastal Information Center. The City Development Services Director, or designee, shall be responsible for reviewing any reports produced by the archaeologist to determine the appropriateness and adequacy of the findings and recommendations.

#### **4.12.9 Level of Significance after Mitigation**

The proposed project would result in less than significant impacts with respect to tribal cultural resources following implementation of Mitigation Measures CUL-1 and CUL-2, as identified in Section 4.4., Cultural Resources, of this Draft EIR.

#### **4.12.10 Cumulative Impacts**

As defined in the *State CEQA Guidelines*, cumulative impacts are the incremental effects of an individual project when viewed in connection with the effects of past, current, and probable future projects within the cumulative impact area for tribal cultural resources. The cumulative study area for tribal cultural resources is the geographical area of the City of San Juan Capistrano, which is the geographical area covered by the City's General Plan, including all goals and policies therein. Future development in the City could include excavation and grading that could potentially impact tribal cultural resources. The cumulative effect of the proposed project would be the continued loss of these resources. The proposed project, in conjunction with other development in the City, has the potential to cumulatively impact tribal cultural resources; however, it should be noted that each development proposal requiring a discretionary approval received by the City would undergo environmental review pursuant to CEQA. If there is a potential for significant impacts to tribal cultural resources, an investigation would be required to determine the nature and extent of the resources and to identify appropriate mitigation measures. If subsurface cultural resources are assessed and/or protected as they are discovered, impacts to these resources would be less than significant. In addition, applicable City ordinances and General Plan policies would be implemented as appropriate to reduce the effects of additional development to tribal cultural resources within the City. The proposed project would result in less than cumulatively significant impacts with respect to tribal cultural resources following implementation of Mitigation Measures CUL-1 and CUL-2, as identified in Section 4.4., Cultural Resources, of this Draft EIR.