



Northern Chumash Tribal Council

A Native American Corporation - NorthernChumash.org
67 South Street, San Luis Obispo, CA 93401 805-801-0347

July 16, 2012

RE: SCH#2012041037 CEQA Notice of Completion; proposed Negative Declaration for the "Dana Adobe Nipomo Amigos LUO Amendment (LRP-2011-00001) CUP (DRC2011-00042); Environmental No. ED11-044) Project;" located near Nipomo; San Luis Obispo County, CA

The Northern Chumash Tribal Council (NCTC) is hereby requesting a continuance of Board of Supervisors Agenda item 16 to be heard on July 17th for the above referenced project (the "Proposed Project").

Please accept this request for continuance of the proposed Negative Declaration, LUO Amendment, and Notice of Determination dated April 19, 2012 (MND), for the "Proposed Project" that is being proposed to be built upon a Sacred Native American Chumash Nation Ceremonial Site. This is the Great Gathering Ceremonial site of the Chumash Nation, across the creek were three ¼ mile wide ceremonial circles shown in the disunion drawings, these gatherings would have over 10,000 Native Americans coming together to live our culture and heritage. This Sacred Site where the Dana Adobe is built is part of a one of a kind great Chumash Living Gathering Complex. The potential for Chumash cemetery and burials is very high.

This request is made upon the grounds, among others, that the MND was inadequate noticed; NCTC was never noticed of the MND proceedings. The MND omits or fails to adequately identify the significant Cultural Resources present at the "Proposed Project" site, and attempts to mitigate a Sacred Site by destroying it, through capping and data recover, basically the worst possible outcome of an incredible Chumash Sacred Site for the purpose of a Dana Adobe State Parks and Recreation National Educational Fund Grant, Historical Preservation Multi-Culture "Proposed Project."

More particularly, a continuance is warranted for each of the following reasons:

1. The MND fails to identify or analyze all potential impacts of the Proposed Project.
2. The MND completely ignores the Native American Heritage Commission (NAHC) letter dated April 30, 2012, concerning project sensitivity and avoidance measures.
3. The MND process has fail to have meaningful consultation with all local Tribes on the NAHC contact list for the Proposed Project. (See excerpt of NAHC letter below)
"attached list of native American contacts, to see if your proposed project might impact Native American cultural resources and to obtain their recommendations concerning the proposed project. Pursuant to CA Public Resources Code 5097.95, the NAHC requests cooperation from other public agencies in order that the Native American communities is also a matter of environmental justice as defined by California Government Code 65040.12(e), Pursuant to CA Public Resources Code 5097.95, the NAHC requests that pertinent project information be provided consulting tribal parties".

ENVIRONMENTAL & LAND-USE CONSULTING
EDUCATIONAL SERVICES TEACHING NATURE, NATIVE CULTURE
FARMING

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This has not occurred; NCTC has had no meaningful consultation concerning the MND and the Proposed Project.

In paragraph three first page of the NAHC letter, "The California Environmental Quality Act (CEQA – CA Public Resources Code 21000-21177, amendments effective 3/18/2010) requires that any project that causes a substantial adverse change in the significance of an historical resource, that includes archaeological resources, is a "significant effect" requiring the preparation of an Environmental Impact Report (EIR)."

In the same paragraph last sentence "The NACH did not conduct a Sacred Lands File (SLF) search within the "area of potential effect (APE) due to the absence of the United States Geological Service (USGS) coordinates, further demonstrates the inaccuracy of the MND.

4. The MND is incomplete and internally contradictory in significant respects.
5. The significant impacts that grading, drainage plans, sewage treatment and underground utilities have not been addressed in the Initial Study.
6. It is NCTC understanding that these proceedings also fall under SB 18 a General Plan Amendment, and under SB 18 Tribal Consultation is paramount, which has not occurred.

Recommendations:

Native American traditional cultural and spiritual places are integral to the preservation and continuity of present day California Native American cultures. These places are under constant threat from the accelerating pace of development. It is essential to ensure that every effort is made in the planning and development process to achieve a balance between project development needs and the protection of California Native American Chumash cultural, burial sites and sacred places.

~~To adequately assess the "Proposed Project" impact on Chumash Cultural Resources, NCTC is requesting:~~

1. A focused Environmental Impact Report and Native American Cultural Resource inventory survey. Extended Phase I for the entire 29 acres to be performed by a qualified archeologist who meets the Secretary of Interior archeological standards, with Chumash consultants present throughout the survey.
2. Complete review by all Native American Chumash on NAHC contact list.
3. Meetings with all stakeholders to review possible mitigation measures.

Findings of the Environmental Coordinator:

The Findings of the Environmental Coordinator on the MND, page 1, states that the Proposed Project will not have a significant effect on the environment. NCTC finds the determination to be flawed. The determination made on the basis of the initial study whether to prepare either a Negative Declaration or an EIR or Specific EIR is subject to the "fair argument" test (Laurel Heights Improvement Assoc. v. U.C. Regents (1993) 47 Cal.4th 376). In other words, if a fair argument can be raised on the basis of "substantial evidence" in the record that the project may have a significant adverse environmental impact - even if evidence also exists to the contrary - then an EIR or Specific EIR is required.

Negative Declaration is authorized when the Lead Agency determines that **no substantial evidence** exists supporting a fair argument of significant effect.

2-73 Cultural resources, CR/mm-1: (Negative Declaration & Notice of Determination)
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"At the time an application for construction permits for development on the 30-acre site, the applicant shall delineate the archaeological site" is in direct conflict with CEQA guidelines. *Sundstrom v. County of Mendocino*, 202 Cal. App. 3d. 296. In *Sundstrom*, the court of appeal found that the "county evaded its duty to engage in a comprehensive environmental review by approving the use permit subject to a condition requiring future regulatory compliance." *Id.* at 296. "Specifically, the use permit required: . . . [that] 'Mitigation measures recommended by the study shall be incorporated as requirements of this use permit.' The requirement that the applicant adopt mitigation measures recommended in a future study is in direct conflict with the guidelines implementing CEQA." *Id.* at 306. Citing to California Code of Regulations Title 14, Section 15070(b)(1), the court went on to state "that if an applicant proposes measures that will mitigate environmental effects, the project plans must be revised to incorporate these mitigation measures 'before the proposed negative declaration is released for public review. . . .' (Italics added.) Here, the use permit contemplates that project plans may be revised to incorporate needed mitigation measures after the final adoption of the negative declaration. This procedure, we repeat, is contrary to law." *Id.* at 306-307.

The court held this to be the case even though the negative declaration required that the county review and approve the additional study, and incorporate the study into the use permit. The court stated that "[e]ven if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA." *Id.* at 307.

The MND mitigation measure requiring implementation of the Phase 2 and Phase 3 to be performed after approval of the MND, not to mention that the Phase 2 may lead to additional future studies, ~~clearly runs afoul of the law as stated in Sundstrom.~~

The reasoning for the holding in *Sundstrom* is clear: Allowing reference to a study or other information to be gathered and incorporated into a negative declaration after its approval allows the lead agency and applicant to avoid the guarantee of an adequate inquiry into the environmental effects of the project in question. Reliance on future studies is not a proper mitigation measure.

Environmental Checklist
Section 5, Cultural Resources.
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In this section the MND offers mitigation measures to build a visitor center on a Chumash Sacred Site by destroying and then collecting the pieces of our Chumash Culture, NCTC finds this proposed action to be in violation of laws of being a good steward of the land.

Under the UN Declaration of the Rights of the Indigenous Peoples (UNDRIP) Native American are a Race of Peoples.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Public Resources Code Section 5020.1(j) provides that "Historical resource" includes, but is not limited to, any object, building, structure, site, area, place, record, or manuscript which is historically or archaeologically significant, or is significant in the architectural, engineering, scientific, economic agricultural, educational, social, political, military, or cultural annals of California.

If the Proposed Project is allowed to go forward, it will desecrate the sacred sites. As noted below, California law prohibits the desecration of historical sites.

Public Resources Code Section 5020.1(k) states that "Local register of historic resources" means a list of properties officially designated or recognized as historically significant by a local government pursuant to a local ordinance or resolution. Public Resources Code Section 5020.1(q) defines "Substantial adverse change" as demolition, destruction, relocation, or alteration such that the significance of an historical resource would be impaired.

Public Resources Code Section 5024.1(b) provides that the California Register shall include historical resources determined by the commission, according to procedures adopted by the commission, to be significant and to meet the criteria in Public Resources Code Section 5024.1(c).

Public Resources Code Section 5024.1(c) states that a resource may be listed as an historical resource in the California Register if it meets any of the following National Register of Historic Places criteria, as follows:

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

CEQA specifically states that significant resources MUST be mitigated either by avoidance (protection as open space, deeded into a conservation easement, etc.), or by recovering the data that the sites contain before they are disturbed (CEQA sec. 21083.2 (b1), (b2), (b3), (b4), 15126.4c).

There is really no acceptable mitigation measure except avoidance that would maintain the sacred nature of the site.

The Initial Study proposes to develop mitigation measures based on future studies, which is in violation of CEQA.

NCTC is perplexed by the County's actions, this is not a new proceeding, and all Tribal organization should have been contacted, especially when the County already knows how important this project is because of the Sacred Chumash Nation Ceremonial Site. NCTC finds it hard to understand how the County forgot to include NCTC.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, include human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

The Dana Adobe is using protected intellectual property owned by NCTC and Chumash Nation to move their project forward without our permission in violation of the UN DRIP, and all intellectual property laws.

Additionally it appears that the County has been in negotiations with other local Native American Tribal groups, NCTC finds this to be violation of our due process and promotes Divide and Conquer illness in the Native American Community. If one person knew that NCTC had not been noticed or decided not to include NCTC than we have a serious case of discrimination.

On March 20th 2012 NCTC had a meeting with Ellen Carroll, Steve McMasters and Brain Pedrotti, to discuss issues, the Dana Adobe was discusses, no one mention that the Board of Supervisors in November of 2011 had authorized LUO update which would require Tribal Consultation.

Based on the numerous issues facing development of the Proposed Project in a way that will not significantly impact the environment, it is respectfully requested that the Board of Supervisors continue the MND, and make sure all parties come to the table to have meaningful consultation with all pertinent information so decisions can be made with current information.

The Elders have taught us that in the face of great adversity, a great opportunity is also present, we all have the opportunity to do thing in a better way for all human beings, the laws were not meant to be stagnate but move in accord with changing society and serving in a more human way, so it is our duty to make things better for everyone.

When NCTC facilitated the process of planning and bidding the Chumash Village and interpretive components of the Dana Adobe Grant Proposal, NCTC included crafts people from our entire Nation, our Village builders the Wishtoyo Foundation, the Chumash Maritime Association, the Coastal Band of Chumash Nation Council, the Barbareño Chumash Council and many others all contributed to the grant process.

NCTC offers a solution:

Gant a continuance so the following can happen.

1. The Dana Adobe shall indorse the UN Declaration of the Rights of Indigenous Peoples.
2. The Dana Adobe shall sign a Memorandum of Agreement with the Chumash Community establishing protocols for solving Native American Indigenous issues.
3. The Dana Adobe shall establish a Chumash Advisory Council.

This will be a start of coming together to find a solution.

Thank you for your anticipated cooperation,

Be Well,



Fred Collins
Tribal Administrator

Northern Chumash Tribal Council