

Native American Heritage Commission

## Staff Report

Concerning the

### *Ocotillo Wind Energy Facility Project*

A Joint NEPA/CEQA  
Environmental Impact Statement/  
Environmental Impact Report (EIS/EIR)  
California State Clearinghouse No. 2010121055  
U.S. Bureau of Land Management (CACA 051552)

*And concerning the*

Petitions to the NAHC to Investigate and Conduct a  
Public Hearing

*To Consider Requests*

from both Viejas Band of Kumeyaay Indians and the  
Quechan Indian Nation that the  
Project Site of 12,500-acres/ APE be declared a  
'sanctified cemetery' and that the project be halted to  
assess the damage done to date by  
the project to sacred sites, and to consult with the affected  
tribes accordingly, and to consider additional mutually  
agreed upon mitigation measures to avoid further damage

December 31, 2012

*Ocotillo Wind Energy Facility Project*  
*SCH#2010121055; Joint NEPA/CEQA EIS/EIR*

**TABLE OF CONTENTS**

<u>SECTION</u>	<u>DESCRIPTION</u>	<u>PAGE NO.</u>
I.	INTRODUCTION	1
II.	SUMMARY OF PROJECT: HISTORIC CONTEXT	2
III.	SUMMARY OF PROJECT; LEAD AGENCIES & DEVELOPER	5
IV.	PROFILE OF APPLICANT/DEVELOPER: PATTERN ENERGY	6
V.	NAHC ADVISORY LETTER TO LEAD AGENCIES	7
VI.	GOVERNOR'S FEDERAL-STATE CONSISTENCY LETTER	8
VII.	EARLY TRIBAL PROTESTS; VIEJAS TRIBAL GOVERNMENT RESOLUTION OF 11-23-2011	8
VIII.	CPUC APPROVAL OF SDG&E POWER PURCHASE AGREEMENT	13
IX.	BLM COMMUNICATION & CONSULTATION ACTIVITY	14
X.	SEPTEMBER – OCTOBER 2012 REPORT OF NATIVE AMERICAN REMAINS BY CORONER	15
XI.	AUGUST 2011 REPORT OF NATIVE AMERICAN REMAINS	16
XII.	HISTORIC REPORTS OF NATIVE AMERICAN REMAINS IN OCOTILLO AREA	16
XIII.	HUMAN REMAINS DETECTION CANINE REPORTS	17
XIV.	IMPERIAL COUNTY STATEMENT OF OVERRIDING CONSIDERATION UNDER CEQA CITING A PAUCITY OF ETHNO HISTORY PROVIDED BY TRIBES	19
XV.	SHPO AND NAHC CONCERNS ABOUT INADEQUATE CULTURAL RESOURCES CONSIDERATION	20
XVI.	TRIBES CHARGE INADEQUATE TRIBAL CONSULTATION, VIOLATING SECTION 106 OF THE NHPA	21
XVII.	SUMMARY OF LAW SUITS AGAINST PROJECT	21
XVIII.	TRIBAL REACTION PROJECT APPROVALS	21
XIX.	IMPACT OF PRODUCTION TAX CREDIT OTHER GOVERNMENT INCENTIVES ON 'FAST-TRACT' PROCESSES	22
XX.	TRIBES IMPILORE PRESIDENT OBAMA TO INTERVENE	22
XXI.	FINDINGS AND RECOMMENDATIONS	23

<b>APPENDICES:</b>	<b><u>PAGE NO.</u></b>
<b>A. Viejas Band of Kumeyaay Indians Request to the NAHC</b>	<b>26</b>
<b>B. Quechan Indian Nation Request to the NAHC</b>	<b>33</b>
<b>C. Summary of Project: Historic Context, Lead Agencies and Applicant/Developer</b>	<b>41</b>
<b>D. Profile of Applicant/Developer: Pattern Energy Group, LP</b>	<b>48</b>
<b>E. NAHC Advisory Letters to County of Imperial and BLM Concerning EIS/EIR SCH#2010121055</b>	<b>60</b>
<b>F. California Governor’s Federal-State Consistency Letter and Recommendations</b>	<b>69</b>
<b>G. 2011 Early Tribal Protests to Project; Declaration of Sacred Sites</b>	<b>72</b>
<b>H. Viejas Band of Kumeyaay Indians’ Opposition to CPUC Permit Approval for San Diego GAS 7 Electric (SDG&amp;E) Power Purchase Agreement (PPA); Governor’s Executive Order B-10-11, Issued 9-19-2011</b>	<b>82</b>
<b>I. BLM Consultations with Tribes on Construction Operations/MOA (Memorandum of Agreement); Sample Invitation to Tribes, Hosted by BLM</b>	<b>89</b>
<b>J. Report of Native American Remains Discovered 9-4-2012; Acceptance of Coroner’s Determination per CA Health &amp; Safety Code Section 7050.5 as Of 10-16-2012 – Apparent Misunderstanding of a Message from the Project Archaeologist that Tribes Considered an Invitation to a Reburial on BLM Land without Tribal Consultation as Required by Federal NAGPRA</b>	<b>95</b>
<b>K. Report of Native American Remains Discovered 4-18-2011; Coroner’s Determination Accepted per CA Health &amp; Safety Code Section 7050.5 as of 8-18-2011</b>	<b>105</b>
<b>L. A History of Discoveries of Native American Remains in the Ocotillo Area near the Project Site (APE) Dating Back to 1950</b>	<b>109</b>
<b>M. Forensic Canine Reports of May 2012 and July 2012 of 62 Apparent Alerts of Probable or Possible Native American Remains by Dogs, acknowledged and considered by the Developer as Environmental Sensitive Areas (ESAs) with Cooperation of the federal Lead Agency, Bureau of Land Management</b>	<b>113</b>
<b>N. County of Imperial Approval of Statement of Overriding Consideration Per CEQA Guidelines Sections 15090, 15091 and 15093, citing a Paucity and Inadequate Ethno History Provided by the Affected Native Americans</b>	<b>141</b>

PAGE NO.

<b>O. SHPO and NAHC Letters to Concern to County of Imperial Regarding the Need to Consider Presented Archaeological Data and its Validation as equal to Eligibility for Inclusion on National Register of Historic Places, per the federal National Historic Preservation Act of 1966, as mended</b>	<b>146</b>
<b>P. Tribal Governments of Viejas Band of Kumeyaay Indians and the Quechan Indian Nation, and CRM Consultant Dr. Thomas F. King's Critique of the Inadequate and Incomplete Tribal Consultation Requirements per Section 106, NHPA</b>	<b>154</b>
<b>Q. Summary of the Three Law Suits and Request of the Quechan Indian Nation of March to May, 2012</b>	<b>181</b>
<b>R. News Reports of Tribal Reaction to Project Approval; April 2012</b>	<b>188</b>
<b>S. Government Tax and Other Incentives, including the Production Tax Credit (PTC) for Renewable Energy Projects Operational by January 1, 2013, Explained and Analyzed in Attached News Articles</b>	<b>194</b>
<b>T. Native American Tribes Implore President Obama to Intervene to Stop Ocotillo Wind Energy Facility Project, March 23, 2012 Citing Violations of BLM Policies, U.S. Constitution Guarantees of Religious Freedom and Federal Protection of Native American Religious and Cultural Sites (Letters by Viejas Band of Kumeyaay Indians; Quechan Indian Nation THPO, Other Tribal Support)</b>	<b>203</b>

*Ocotillo Wind Energy Facility Project*  
*SCH#2010121055; Joint NEPA/CEQA EIS/EIR*

**I. Introduction**

The Viejas Band of Kumeyaay Indians petitioned the California Native American Heritage Commission (NAHC), October 17, 2012, under California Public Resources Code Section 5097.9, 5097.94(g) and 5097.97 asking that the NAHC use its authority to preserve the “Area of Potential Effect (or APE),” site of the Ocotillo Wind Energy Facility Project. This project, the Viejas Band argues has caused and will continue to cause, if implemented, *irreparable harm* to invaluable cultural, sacred and (sites of) religious significance to Viejas and other Southern California Tribes.” The APE includes the area surrounding the Community of Ocotillo in southwestern Imperial County and the surrounding foothills including Coyote Mountain, Signal Mountain, Carrizo Mountain, the Spoke-Wheel Geoglyph, In-Ko--Pah Gorge and Indian Hills. This is a cultural landscape of religious significance to local Yuman tribes. (Please see material behind Appendix A, page 26.)

The Quechan Indian Tribe followed with a petition to the NAHC, October 24, 2012, to hold a hearing “regarding the desecration of Quechan traditional land which are sacred..., by the Ocotillo Express Wind Project (OEWP; also known as Ocotillo Wind Express Project [OWEP]) in the Ocotillo and Yuha Deserts of Imperial County, CA. The Yuha Desert is part of the larger Lower Colorado Desert. Currently the OEWP is causing severe and irreparable damage to a Native American sanctified cemetery, religious and/or ceremonial site located on public property in Imperial County... the OEWP is within a larger landscape... and it is this whole cultural landscape that Quechan seeks to protect from current and future destruction. The Ocotillo Valley is extremely sacred to the Quechan....” (Please see material behind Appendix B, page 31; it includes a list of 19 Native American burial sites in the Ocotillo/Yuha Desert cultural landscape and 22 sacred sites including some photographs, most of each of the sites are recorded with the California Historical Resources Information System, San Diego State University Information Center.)

According to the report of the United States Environmental Protection Agency (USEPA), entitled EPA’s Re-Powering America’s Lands, approximately two million acres of California desert lands are under development for renewable energy (solar, wind, geothermal) development through about 200 separate projects. USEPA, over the past four years, has been attempting to influence policy decisions on the best locations for renewable energy projects, targeting ‘polluted areas.’ Unfortunately, according to a

report aired on the Los Angeles-based public television station, KCET, the joint federal state agency team that prepared the California Desert Renewable Energy Conservation Plan (DRECP) has ignored USEPA's recommendations that included 'brownfields,' Instead, other investment factors were considered by BLM, driven by apparent economic interests.

## **II. Summary of Project**

### **A. Historic Context**

Both the Quechan Indian Tribe and the Viejas Band of Kumeyaay Indians are affiliated with the *Yuman Family of Tribes*. Both are *Hokan-speaking tribes*, linguistically and *share* common culture and traditions that are also shared with the other Hokan-speaking tribes in the region, including the Cocopah, the Colorado River tribes of the Chemehuevi, Mojave, Yavapai, Hualapai and Havasupai, and the Baja California N., Mexico tribes: the Cucapá, Pai Pai, Cochimi, Kiliwa and Kumiai. All of the foregoing are Hokan-speaking tribes sharing cultural traditions extending from the Havasupai people at the bottom of the Grand Canyon to the La Bufadora, the marine geyser, and Santo Tomas near Ensenada, Baja California N., Mexico. These tribes are often together at annual gatherings, singing Kumeyaay bird-songs, Quechan lightening songs and Baja California coyote songs that detail the history and the landmarks of the region including the Ocotillo area. The Imperial Valley Desert Museum, located in Ocotillo, has an annual "**Indian Fair**" that draws singers and crafts from nearly all the tribes mentioned here, from Arizona to Baja California Norte. Also, at the annual **Kuri-Kuri Gathering** at San Miguel near the City of Ensenada, Mexico, the Hokan-speaking tribes gather again to celebrate their culture including the 'Ram head Dancers' of the Havasupai and singers and dancers from the other Yuman tribes. In 2003 **Kuri-Kuri**, the Kumeyaay bird-singers were led by an esteemed elder and decorated World War II veteran, the Chairman of the Ewiiapaayp Band of Kumeyaay Indians who was also Chairperson of the Kumeyaay Cultural Preservation Association.

While the Kamia populated the Ocotillo and Imperial Valley area, the Kumeyaay/Kamia sacred sites such as Signal Mountain (*Avii'Shpa to the Quechan and Aguila to the Cucapá*) and Coyote Mountains are also considered sacred by the Quechan, Cocopah and other Yuman tribes. Signal Mountain (*Avii'Shpa*) is particular sacred to the Quechan as a *Place of Reverence*. The Quechan and Kumeyaay often refer to the Ocotillo Valley and areas to the north below the shelf of the In-Ko-Pah, Jacumba and Vallecito mountains as the *Valley of Death*. It is known to the Yuman and to the Cahuilla tribes further north as an area that includes numerous burial sites. For example, further north of Ocotillo, in 2010, the Imperial County Coroner and the

archaeologist of the California Department of Parks & Recreation reported 523 sets of Native American remains to the NAHC.

The works of Anthropologist E.W. Gifford who wrote the 1931 volume, *The Kamia of the Imperial Valley* and archaeologist Malcolm Rogers, both chronicled the habitation of the Kamia (culturally and ancestrally tied to the Kumeyaay-Ipai-Tipai-Diegueno) in the Imperial Valley, in Los Algodones, Baja California Mexico and at the southern end of the Fort Yuma Indian Reservation, during the 1920s.

The NAHC utilizes, as a 'guide,' the Smithsonian Institution's Handbook of North American Indians; particularly volume 8 but also vols. 10 and 11; Robert Heizer, Editor, 1978; Washington, D.C. The chapter on the Ipai-Tipai (also known as Kumeyaay, Diegueno, Kamia) of Volume 8 was copied by the NAHC and distributed to the Manzanita Band of the Kumeyaay Nation, at their request, to the Kumeyaay Cultural Repatriation Committee (or KCRC, a coalition of 12 Kumeyaay Tribal Governments); in turn, the Manzanita consultant delivered it to the BLM archaeologist at the El Centro Field Office of the Bureau of Land Management (BLM). The description of tribal territory includes the Ocotillo Valley where the Kamia (ancestral forbearers of the Kumeyaay) predominated in population but the territory was shared by other Yuman tribes, especially the Quechan and Cocopah.

The ancient Lake Cahuilla which extended from the lower Coachella Valley in Riverside County to well below the municipality of Mexicali in Baja California N., Mexico, an enormous body of water began to recede 2,000 years ago, according to noted anthropologist Florence C. Shipek, at which time the Kamia began their settlements in the Imperial Valley. At the elevated areas of the deserts there are still 'fish traps' to view, and 'dance arenas.' The Lakebed ebbed and flowed and did not recede in an orderly manner making archaeological survey work challenging. Jay von Werlhof, the long-time head of the Imperial Valley Museum at Ocotillo, which also served as the Southeastern California Information for the State Office of Historic Preservation, took groups on field trips to sites around the Ocotillo area and beyond. In the last decade, prior to Mr. von Werlhof's passing, the fish traps and other sites in the nearby Superstition Mountains were the subject of a KCET-Los Angeles public television documentary, *California Gold*, featuring Jay von Werlhof and his passionate account of the pre-historic Ocotillo and the larger Imperial Valley from an archaeological perspective. Also, Mr. von Werlhof established relations with local tribes to learn from them; a case in point is when he asked members of the Campo Band to show him the dance arenas, just above Ocotillo Valley and the trails used by the Kamia to go from Ocotillo and Mountain Springs up to what is now La Rumerosa, Baja California N., Mexico, where there exist bald eagle and condor nests, both sacred fowl. When the statue was to be developed about 15 years ago, Mr. von Werlhof consulted Florence C. Shipek to gain her recommendations for the design and the sculptor. Dr. Shipek was

very close to the Kumeyaay tribal culture; she had served as the first holder of the Costo Chair of American Indian History at the University of California, Riverside, and the first such endowed Chair in world history, endowed by Rupert Costo. When the sculpted feature was dedicated about 12 years ago, there was a gathering of Hoka-speaking tribes, including those from Baja California N., Mexico (organized by *Culturas Nativas de Baja California (CUNA)*), to dedicate the piece of sculpture – to the approximately 10,000 years of Yuman culture in the region. Not only is the Ocotillo Valley part of a cultural landscape, it is a *spiritual landscape*.

Other studies of this area includes the E.W. Griffith, 1931 book, *The Kamia of the Imperial Valley*, and the 1982 Clyde M. Woods 1982 Study, *APS / San Diego Gas & Electric Interconnection Project et al.* This study was the result of surveys mostly done in the 1970s and with the assistance of the very influential Kumeyaay leader and chairperson of the Kumeyaay Band at Campo. She submitted several sites to the Sacred Lands Inventory of the NAHC, an inventory that is exempt from the California Public Records Act pursuant to California Government Code Section 62254 ( r). The sensitive nature of the sites, as previously noted in the phase, *Valley of Death*, and the confidentiality of Native American sites under California law for which tribes lobbied the California Legislature to enact, may have resulted in minimizing what tribes were willing to share with the lead agencies, County of Imperial and the Bureau of Land Management (BLM), and their contractors, during the environmental processes of the Ocotillo Wind Energy Facility Project. The ethno-history found in the Handbook of the North American Indians, the Clyde M. Woods 1982 work, the sacred sites submitted by Kumeyaay elders to the NAHC Sacred Lands Inventory, were discussed with the project archaeologist, Tierra Environmental of San Diego, in the employ of Pattern Energy. The Handbook of North American Indians chapter was provided to the BLM archaeologist. The NAHC informed the County of Imperial in December of 2010 that there were sacred sites in the ‘area of potential effect’ or APE and invited them to contact the NAHC if they had questions – they never contacted the NAHC to enquire about the sacred sites that were identified in the project area. Furthermore, there were several telephone conversations with the project archaeologist about when and who submitted sites to the NAHC and what they represented. The NAHC responded, without violating the confidentiality provision of the California Government Code, to indicate that the sites were not recently submitted just to stop the project, and that the Clyde M. Woods study of the late 1970s resulted in several sites being submitted to the NAHC by tribal representatives working on the archaeological surveys of that time.

The statements in the Final EIS/EIR of the project indicated the “failure of the tribes to provide an adequate ethno-history of the area” and the “Paucity” of cultural data provided in order for the lead agencies to consider one or more sites in the APE as TCPs, or Traditional Cultural Properties, as defined by Bulletin 38, a technical guide for placing sites on the National Register of Historic Places (NRHP). What the lead



agencies apparently were looking for from the tribes was something of a 'scientific' nature, not expressions of items and areas of religious or cultural significance to the affected tribes. Therefore, no meaningful consultation or communication took place to resolve the tribal concerns, and the lead agencies, facing a fast-track process to meet the deadline to have the OWEPP operational by January 1, 2013, showed no patience for probing or understanding the tribal concerns.

### **III. Summary of Project: Lead Agencies and Applicant/Developer**

**Project Location:** 5 miles west of the Community of Ocotillo in western Imperial County, California.

**Project Lead Agencies for EIS/EIR:**

NEPA

U.S. Department of the Interior  
Bureau of Land Management  
2800 Cottage Way  
Sacramento, CA 95825

CEQA

County of Imperial  
Planning & Development Services Dept  
801 Main Street  
El Centro, CA 92243

Also: BLM District Office  
22835 Calle San Juan De Los Lagos  
Moreno Valley, CA 92553

**Estimated Electricity Production Capacity:** 315 Megawatts transmitted through 112 Transmission Towers, approximately 450 feet high, scaled down from the original proposal of 155 Towers

**Company, Applicant/Developer:** Ocotillo Express LLC a subsidiary of Pattern Energy Group, LP  
1600 Smith Street, Suite 4025  
Houston, Texas 77002-7357

**Acreage:** Approximately 12,436 acres of BLM-administered land with some private land included.

**Chronology of Environmental Actions/Decisions:**

**CEQA Section 15082, Notice of Preparation (NOP): 12/21/2010**

**NEPA/BLM Notice of Intent (NOI), Published, Federal Register, 12/13/2012**

**EIS/EIR Scoping Meetings: Held in El Centro & Ocotillo, January 5-6, 2011**

**County of Imperial approval 'Statement of Overriding Consideration'**

**4/25/2012 per CEQA Guidelines Sections 15090, 15991, 15093**

**Notice of Construct 5/4/2012**

**Federal NEPA Record of Decision Published 5/11/2012**

(Further Comments Prohibited)

**BLM 'Notice to Proceed:' 5/14/2012**

**BLM Signed Notice to Proceed: 6/27/2012**

**Current Status:** Notice of Availability of the Record of Decision published in the Federal Register 5/11/2012

**Electrical Transmission Connection:** Project will facilitate transmission of renewable energy output to load centers in Southern California through an Interconnection with San Diego Gas & Electric Company through the controversial Sunrise Powerlink and the East County Substation at Jacumba in eastern San Diego County, California which is being developed.

**Expected Benefits of Project:** Electric Service to 94,500 homes. Employment of 350 workers during construction and up to 20 employees for the operational life of the project.

Additional Project Summary material is found behind Appendix C , page 41 of this Staff Report.

**IV. Profile of Applicant/Developer: Pattern Energy Group, LP**

San Francisco-based Pattern Energy is one of the largest providers of renewable energy in the United States; the company has operations in Maui, Hawaii, Ontario, Canada and built the Campo (Reservation) Wind Farm. The Campo Reservation Wind Farm became operational in 2008 and part of the California Renewable Energy Grid. The company's holdings also include gas and oil exploration. In 2009, Riverstone LLC, a global private equity firm, acquired Babcock & Brown's North American energy business that included Pattern Energy. Riverstone is also involved in the transmission line building. Riverstone's founder, David Leuschen, is a former managing director of the investment firm, Goldman-Sachs. It entered into a joint venture with another politically connected private equity firm, The Carlyle Group, founded by former U.S. Secretary of Defense, Frank Carlucci. The joint venture is known to draw investment funds from state pension funds nationwide; the partnership has investments in the

Middle East and technology ventures including 'green energy,' through which Pattern Energy allows the Riverstone-Carlyle partnership to diversify

As stated, above, Pattern built the Kumeyaay Wind Farm on the Campo Reservation in eastern San Diego County. The application for the Ocotillo Wind Energy Facility Project fails to mention or explain that in December 2009, the Kumeyaay Wind Farm had 75 blades from the 25 turbines disintegrate and fall to the ground as a blinding blue flash radiated through the Campo wind facility. Pattern, like other renewable energy firms relies heavily on the government incentives including subsidies and tax credits (PTCs) that expire December 31, 2012 and authorized by several federal statutes included the Energy Independence Act of 2007 (authorizing subsidies for wind and alternative energy producers, the American Recovery and Reinvestment Action of 2009 (ARRA Stimulus Package) and the 2008 amendments to the Energy Policy Act of 2005 that authorize loan guarantees for innovative technologies. The Production Tax Credits (PTCs) that include incentives for the wind energy industry were extended at the close of 2012 by the U.S. Congress to December 31, 2013.

Additional background and profile information on Pattern Energy Group LP is found behind Appendix D, page 48 of this Staff Report.

## **V. NAHC Advisory Letters to County of Imperial and BLM Concerning The project: EIS/EIR SCH#2010121055**

The Native American Heritage Commission (NAHC) is the State Trustee Agency for the protection of Native American cultural resources and burial grounds, pursuant to CA Public Resources Code Section 21070. The NAHC is also a 'Reviewing Agency' with particular expertise in the area of Native American cultural resources pursuant to CA Public Resources Code Section 21104 (c). Therefore the NAHC reviews and responds to all environmental documents sent it by the State Clearinghouse of the Governor's Office of Planning & Research (OPR).

The NAHC responded to the draft EIS/EIR on December 27, 2010 attaching a list of culturally affiliated Native American tribes and interested Native American individuals to the project site. Then, the NAHC sent a second advisory letter on August 17, 2011 to the County of Imperial and Bureau of Land Management, with a copy to the California Public Utilities Commission (CPUC) because the latter agency would issue the 'power purchase permit' and licenses transmission lines in the State of California. In both letters, the NAHC indicated that there were and are Native American cultural resources within the project area (e.g. APE). And the NAHC urged consultation with tribes and Native Americans on the list attached to the letters. Despite offering to respond to any questions, none of the three agencies ever contacted the NAHC for more information or

an explanation of the contents of the letters. (Copies of the letters are found behind Appendix E, page 60 of this Staff Report.)

## **VI. Governor's Federal-State Consistency Letter for the Ocotillo Wind Energy Facility Project**

The State of California Governor, represented by the director of the Office of Planning & Research (OPR) submitted a Consistency Review of the Project, to the United States Department of the Interior, Bureau of Land Management pursuant to 43 Code of Federal Regulations, Subpart 1610.3-2 (e). The letter, dated May 1, 2012, makes recommendations to the BLM including “Continue to consult with Tribal Governments and the Native American Heritage Commission for the purpose of protecting cultural, sacred and burial sites that may be impacted by the project,” continue to work with local for emergency responders for fire mitigation in project area, and to continue to work with the California Department of Fish & Game and the County of Imperial regarding plants and animals in the plan area, “continue to work with the State Historic Preservation Officer on outstanding issues related to historic and cultural preservation....”

Based on the several pieces of concerned correspondence from the Viejas and Quechan tribes, and from the State Historic Preservation Officer (SHPO) and the NAHC, the Bureau of Land Management has not taken the recommendations of the California Governor seriously. This is yet another example of the lack responsiveness of the lead agencies in addressing the concerns of agencies with regulatory as well as advisory authority. (Please see behind Appendix F, page 69, for copies of the State of California letters.)

## **VII. 2011 Early Tribal Protests to Project Activity; Declaration of Sacred Sites by Tribal Government Resolution to BLM**

By 2011, the tribes affected by the project, including tribes of affiliation other than Kumeyaay or Quechan or other Hohan-speaking communities, began to mount significant opposition to the project due to its location considered by tribes to be of religious and cultural significance.

October 25, 2011, Chairman Robert H. Smith of the **Southern California Tribal Chairmen's Association (SCTCA)**, a 19 tribal government consortium, representing tribal nations of the Cahuilla, Luiseño and Kumeyaay/Kamia cultural traditions, sent of letter to the Bureau of Land Management's (BLM) California Office Director, James G. Kenna, criticizing the government-to-government consultation BLM was initiating and criticizing the incompleteness and inaccuracies in the environmental documents for the

Ocotillo Wind Energy Facility Project. A copy of Chairman Smith's letter is found behind Appendix G, page 72, of this Staff Report. The SCTCA continues to support the concerns that have persisted through the course of the construction activities to render the project operational by the end of calendar year 2012, in support of the strong opposition by the Viejas and the Quechan tribal governments. The reason for SCTCA's expression of concern is that the nearby tribal governments know that the 'area of potential effect' or APE for the Ocotillo Wind Energy Project is sited on property known to be very sacred.

Then, on November 23, 2011, the **Viejas Tribal Council**, acting under its authority granted it as a federally recognized American Indian Tribe, pursuant to Federal Executive Orders of December 27, 1875, May 3, 1877, June 19, 1883 and May 10, 1894, declaring the project site of the Ocotillo Wind Energy Facility Project as a Traditional Cultural Property (TCP) eligible for the National Register of Historic Places; the site is part of a religious, spiritual and cultural landscape of significance to the Viejas Band and comprises "Indian Sacred Sites" as defined by federal Executive Order 13007. Further, the Viejas tribal government resolution states the "significance of this landscape, and the impacts of the proposed OWEP (e.g. Ocotillo Wind Energy Facility Project) have not been adequately addressed, and indeed have scarcely been addressed at all, by the project proponent, BLM and the County of Imperial." The Viejas Tribal Council resolution continues by stating, "BE IT FURTHER RESOLVED THAT Viejas insists that all agencies of the Federal and California state government accept and respect the above affirmation and declarations and respect Viejas' rights and interests in this landscape and the values ascribed by Viejas to such; BE IT FURTHER RESOLVED THAT Viejas also insists that all agencies of the federal government engage in good faith, meaningful consultation with Viejas under Sections 101(d)(6)(B), and 110 of the National Historic Preservation Act, the American Indian Religious Freedom Act, the Religious Freedom Restoration Act, the Native American Graves Protection and Repatriation Act, and Executive Orders 13007 and 13175, and the Presidential Memorandum of November 5, 2009, and all regulations and statutes regarding confidentiality of information related to sacred places and archaeological sites, as well as pursuant to the federal government's 'trust responsibility' toward Viejas, and that all such agencies seek agreement with Viejas concerning::

1. The direct and indirect effects of the proposed OWEP on the above-referenced landscape and on Viejas' cultural and spiritual values attached to it;
2. The cumulative effects of Ocotillo Express and other existing, proposed and potential renewable energy project on the above-referenced landscape and other areas of cultural and spiritual significance to Viejas; and

3. Alternative to OWEPE that may achieve the OWEPE's public policy goals without adversely affecting the above-referenced landscape and the interest of Viejas therein; and,
4. Other measures to avoid, reduce, compensate for, or otherwise mitigate the adverse effects OWEPE, if constructed, will have on Viejas' cultural and spiritual values and interests.

BE IT FINALLY RESOLVED THAT the Viejas Band further insists that agencies of the federal government as well as state and local agencies consult and work with Viejas at all steps in the their project, planning, and policy development activities, and refrain from imposing regulatory or other standards and burdens on Viejas, or on the consultation with Viejas, to whose imposition Viejas has not explicitly acceded, except where such standards or burdens are explicitly enacted by the United States Congress. This includes that Viejas not be forced to try and explain its cultural values in archaeological terms....”

A copy of this Viejas Band tribal government resolution is found behind Appendix G, pages 75 through 79, of this Staff Report.

The California State Historic Preservation Officer (SHPO), now the Chairperson of the federal Advisory Council on Historic Preservation (ACHP), in his e-mail and letter to the County of Imperial of March 27, 2012 and April 19, 2012 (found behind Appendix O, page146 of this Staff Report) asks of the County, stating that,

“I offered these comments for your consideration based on the best and most recent information that was available for my consideration. Section 15064.5 (a) of the California Environmental Quality Act Guidelines addresses what constitutes a historical resource and in doing so states, *“Public agencies must treat any such resource as significant unless the preponderance of evidence demonstrates that it is not historical or culturally significant.”* This section goes on to state and require that *The fact that a resources is not listed in, or determined to be eligible for listing in the California Register of Historical Resources, not included in a local register of historical resources....does not preclude a lead agency from determining that the resource may be a historical resource as defined in (California) Public Resources Code section 5020.1(j) and 5024 (g).”* I once again ask for your careful consideration of these comments. In making this request for reconsideration of your previous findings. I ask that you careful evaluate the data that is in the record with my recommendation and findings....”

The records in the County's and in BLM's possession include the Viejas Tribal Council government resolution quoted above. The Viejas Band as well as the Quechan Indian Tribe continued to be dissatisfied with the EIS/EIR prepared for the Ocotillo Wind

Energy Project and with the quality of the government-to-government consultation process and the County of Imperial and BLM's assessment of the cultural resources' documentation provided by the tribes, as inadequate. Both the Viejas Band and the Quechan Indian Tribe continued throughout the construction processes of the project, with their complaints and protest, through their requests of the NAHC to conduct a public hearing in October 2012 and their support for the public hearing that the NAHC proposes to be held in February 2013.

### **Differences Between the *California/National Register of Historic Places (NRHP)* and the California Native American Heritage Commission (NAHC) *Sacred Lands Inventory***

The **National Historic Preservation Act of 1966** authorizes the **National Register of Historic Places (NRHP)** (NHPA) (16 U.S.C. 470 *et seq.*). The NHPA consultation requirements with Indian Tribes are triggered by federal actions covered by the National Environmental Policy Act (42 U.S.C. 4321-43351). The **Advisory Council on Historic Preservation (ACHP)** has responsibility under the NHPA to manage the ACHP Native American Program including the unique relationship between the federal government and its trust responsibilities to American Indian governments, government-to-government consultation and the relationship between the National Register and tribal religious and cultural values. The *problem* with the ACHP Native American Program is that it was established without adequate Tribal Consultation (a point made in the November 23, 2011 Tribal Government Resolution from the Viejas Band of Kumeyaay Indians); also, there are no members of the ACHP that are representatives of American Indian tribes or organizations, a situation that may be changed by the new chairman of the ACHP, the former California State Historic Preservation Officer.

To have a site or structure registered with the National Register, the requester must first contact the State Historic Preservation Officer (SHPO). The sites are considered by the California Historic Resources Commission and, if accepted as meeting the NRHP criteria (criterion A, B, C or D or a combination – see pages 80-81 for an overview), a decision is made that the site(s) are eligible or not for the California and therefore eligible of the National Register (all sites, et al. accepted for the California Register are automatically eligible for the National Register). The methodology for qualifying sites for the California and National Register can be termed 'scientific' as there is a strong emphasis in the process of determining the *scientific and educational value* of the items accepted for the National Register.

Regardless, Viejas, Quechan and other tribes have repeatedly concluded and stated that the project area is eligible for listing on both the California and National Registers under several criteria.

Unlike the California or National Registers, California Native American tribes and tribal elders populate the NAHC Sacred Lands Inventory, unlike the California or National Register. The NAHC does not apply an 'evaluation criteria' other than to determine the authenticity of the California Native American tribe or tribal elder submitting the site data. Many of the sites in the NAHC Sacred Lands File are Native American burial sites required by the California Public Resources Code. Public Resources Code Section 5097.94(a) that also provides the authority to the NAHC for the establishment of the Sacred Lands Inventory requires this. The NAHC considers the Native American tribes that submitted the material to the Inventory as the owner of the site record(s); the NAHC is merely the custodian of the Sacred Lands Inventory.

Furthermore, the sites in the NAHC Sacred Lands Inventory are **confidential** and exempt from the California Public Records Act, protected by California Government Code Section 62524( r). The legislative acts authorizing the NAHC Sacred Lands Inventory and those protecting the confidentiality of the Inventory's contents are the result of requests made to the California Legislature by California Native American tribes. Thus, the NAHC Sacred Lands Inventory is a repository of California *Indigenous Knowledge*, not necessarily data of standard scientific and/or educational value but data reflecting the traditional values of California Native American tribes that have religious, cultural and traditional value to them alone. Therefore, the statement by the Viejas Tribal Council in their tribal Government Resolution of 11-23-2011 that the Viejas Band must not be forced to explain their traditional values on the terms of others is consistent with policies codified in state law and in the policies of the NAHC in governing the Sacred Lands Inventory. The contents and description of items in the NAHC Sacred Lands Inventory belong to the Native American tribes that submit to it; the NAHC is the custodian and not the owner or the determining agent of what is contained in the Sacred Lands Inventory. The submitting tribe or tribal elder submits items that meet standards consistent with the submitting tribe's traditions and values and not that of a state agency.

Also, the federal government recognizes the importance of confidentiality with American Indian tribes. Section 304 of the National Historic Preservation Act gives the Secretary of the Interior discretionary authority to declare items presented by tribes as confidential and not subject to public review.

In sum the differences between the National Register criteria and that of the NAHC Sacred Lands Inventory can be described as a difference between what is considered scientific *and/or educational* by the ACHP and what is considered *Indigenous Knowledge* by California Native American tribes. It should not be assumed that because the Ewiiapaayp Band of Kumeyaay is on record supporting the Ocotillo Wind Energy Facility Project and that the Campo, La Posta and Manzanita Band are participating or plan to benefit from the Sunrise Powerlink electrical transmission project



does not mean that those tribes disagree or are in opposition to the concerns raised by the Viejas Band and Quechan Indian Tribes concerning the significance of the Native American sacred sites and burial grounds, and their possible destruction by the OWEP construction activity. It was the tribal consultant to the Manzanita Band of the Kumeyaay Nation that organized, and coordinated the Forensic Canine probes of two samples of the project area (APE) in May and July of 2012. His report of the results of the July 2012 session with the 'forensic dogs' is found behind Appendix M of this Staff Report.

(Descriptive Information concerning the federal Advisory Council on Historic Preservation (ACHP) and the National Register of Historic Places and the Evaluation Criteria is found behind Appendix G, pages 80-81 of this Staff Report.)

### **VIII. California Public Utilities Commission (CPUC) Approval of the Permit for San Diego Gas & Electric Company Power Purchase Agreement (PPA) to Acquire Electric Power Generated from the Ocotillo Wind Energy Project**

The Viejas Band of Kumeyaay Indians, in a letter to the President of the California Public Utilities Commission (CPUC), January 11, 2012, opposed the Power Purchase Agreement (PPA) between the Ocotillo Wind Energy Project and San Diego Gas and Electric Company and asked that the Public Agenda Item 3287, January 12, 2012, be vacated. The reasons given by the Viejas Band included the "premature assessment by the CPUC that the project, as presented in the Draft EIS/EIR, the federal-state environmental document is deficient and that the full impacts and adverse effects of the project have not been fully disclosed by the project proponents.

Moreover, the Viejas Band pointed out that the CPUC resolution, E-4458, does not recognize the serious challenges made about the deficiencies contained in the Draft EIS/EIR of the Ocotillo Wind Energy Facility Project.

Furthermore, legitimate questions can be raised concerning the CPUC's objectivity in adjudicating permit issues involving renewable energy. **Aspen Environmental Group** is a major contractor to the U.S. Department of Energy and has oversight responsibility over the National Environmental Policy Act (NEPA) issues regarding renewable energy in Southern California. The environmental compliance staff of the California Public Utilities Commission (CPUC) has offices in Aspen Environmental's offices at 235 Montgomery Street; San Francisco, CA 94104 instead of at the CPUC headquarters at 505 Van Ness Avenue; San Francisco, 94102. This 'arrangement' certainly gives the appearance of 'conflict of interest,' regardless of the CPUC's justification.

Lastly, the Viejas Band raises questions about the inadequate govern-to-government consultation on concerns Viejas and Colorado River tribes have concerning the project. This failure of meaningful consultation appears in conflict with the California Governor's **Executive Order B-10-11** dated September 19, 2011,

that it is the "policy of the Administration that every state agency and department subject to my executive control shall encourage communication and consultation with California Indian Tribes. Agencies and departments shall permit elected officials and other representatives of tribal governments to provide meaningful input into the development of legislation, regulations, rules, and policies on matters that may affect tribal communities."

No attempt was made by the CPUC to consult with the Viejas Band or any other Native American Tribes, affected by the Ocotillo Wind Energy Facility Project. A copy of the Viejas Band opposition letter and a copy of the Governor's Executive Order B-10-11 are found behind Appendix H, page 82 of this Staff Report.

### **IX. Bureau of Land Management (BLM) Communication and Consultation with Tribes on Construction Operational Plans and Issues of Unintended Discoveries of Remains and Archaeological Items.**

The BLM El Centro Field Manager, Associate Field Manager, Tribal Liaison, Archaeologist/Resource Supervisor and the Project Developer (Pattern Energy), BLM Deputy Historic Preservation Officer for the applicant, and contract archaeologists made frequent efforts to communicate with the affected local Native American tribes. They did this through frequent e-mails, letters and some meetings were hosted by BLM at local restaurants. The developer also employed on a rotation basis, through contractors, Native American Monitors, at least 25 in number, who were allowed access to project areas where construction was in process.

That stated, the disaffected tribes felt that their primary concerns were not addressed by the Bureau of Land Management nor the project applicant, Pattern Energy LP, nor the County of Imperial. But, there is significant tribal support among some of the Kumeyaay tribes in favor of the project. These tribes of bands included the Campo Kumeyaay Nation that already had a 'wind farm,' built by Pattern Energy, that because operational by 2008. That wind farm and sites for expanding the wind capacity in the mountain areas of eastern San Diego County include the Manzanita, La Posta and the Ewiiapaayp Indian Reservations that may increase the number of turbines to an additional 100. Thus, some of the Kumeyaay tribes seek to participate in the Sunrise

Powerlink development of San Diego Gas & Electric that include an interconnection with the electrical transmission that will be generated by the Ocotillo Wind Energy Facility and other nearby renewable energy projects. More than 12 renewable energy projects are being developed in the Imperial County/East San Diego County region.

A sample of BLM-Tribal communication and consultation opportunities is found behind Appendix "I," page 95 of this Staff Report.

**X. Report of Native American Remains, Discovered September 4, 2012; Coroner's Determination Accepted by the NAHC 10-16-2012 Pursuant to California Health & Safety Code Section 7050.5**

The Imperial County Coroner contacted the Native American Heritage Commission on September 5, 2012 to indicate that bones were found on the Project site of the Ocotillo Wind Energy Facility Project. The coroner indicated that, at that point he was having them removed from the site for further identification and examination by their contract 'forensic anthropologist,' Dr. Madeleine J. Hinkes. Dr. Hinkes reported that two of the bones and possibly two others were human in origin and were 'ancient' in age. The coroner determined that the remains were not of 'modern forensic interest' (therefore, not a crime scene) and that they were ancient in origin; therefore, the NAHC accepted the report as those of Native American remains pursuant to the State Health and Safety Code Section 7050.5.

This discovery was the second report of remains from this project that were considered "Native American" in accordance to reports from the Imperial County Coroner. The first discovery of five sets of remains, considered Native American in origin after an examination by Dr. Madeleine J. Hinkes, was in April 2011 and is discussed in the next section of this report.

The controversy about these remains centered on an e-mail shown on page 96 of this Staff Report, sent to the participating tribes by Dr. Michael Baksh, Principal Archaeologist for **Tierra Environmental Services** of San Diego that serves as the 'project archaeologist' for the developer, Pattern Energy, LP. Dr. Baksh's e-mail. The e-mail was interpreted by the Viejas Band and the Quechan Indian Tribes as an invitation to a re-burial of the remains recently discovered. The e-mail implied, incorrectly, possible assistance by a Pattern Native American Monitor of Kwaaymii descent. The tribes apparently misinterpreted the e-mail. The Viejas Band and the Quechan Indian Tribe protested in correspondence, also found behind Appendix J, pages 97 to 104, of this Staff Report saying that such an act violated the federal Native American Graves Protection and Repatriation Act (NAGPRA; 42 U.S.C. 4321-43351, et seq.) The NAHC was copied on their complaints to the BLM; the Kumeyaay Cultural Repatriation Committee (KCRC), a consortium of 12 Kumeyaay tribal governments)

also complained to the NAHC. Despite the strong complaints contained in correspondence from the Viejas Band and the Quechan Indian Tribes, the BLM Archaeologist/Resources Supervisor informed the NAHC on December 20, 2012 that she did not understand that the tribal complaints stemmed from a misunderstanding of Dr. Baksh's October 11<sup>th</sup>, 2012 e-mail.

The current status of the remains discovered September 4, 2012: The remains were not re-buried; they are still on the surface of the ground. The Native American Monitor mentioned in Dr. Baksh's e-mail was not involved in any activity regarding the remains except to act as an observer; only the Imperial County Coroner and BLM and project developer's staff handled the remains. The remains remain on the ground surface of the Ocotillo Wind Energy Facility Project. The NAHC presumes that BLM is in the process of complying with the Native American Graves Protection and Repatriation Act (NAGPRA) regarding these remains.

### **XI. Report of Native American Remains Discovered April 18, 2011; Coroner's Determination Accepted by the NAHC August 18, 2011**

A Viejas Tribal member and the Secretary of the Kumeyaay Cultural Repatriation Committee (KCRC) informed the NAHC in May, 2011 of remains that had been discovered, on the Ocotillo Wind Energy Facility Project. The discovery had occurred in April. The Viejas tribal member and the KCRC Secretary had accompanied the forensic anthropologist to the site where six sets of remains had been discovered. The forensic anthropologist, Dr. Madeleine J. Hinkes, determined that five of the remains were human. The Imperial County Coroner did not receive the report until August of 2011 and he indicated that the remains from that site were likely Native American in origin. The delay in transmitting the report of the forensic anthropologist was due to the project archaeologist, Tierra Environmental Services holding them for unexplained reasons.

Correspondence between the NAHC and the Imperial County Coroner, the report from the forensic anthropologist and the NAHC correspondence to KCRC referring the consortium to Dr. Sherry Hutt, National NAGPRA Program Manager, is found behind Appendix K, page 108 of this Staff Report.

## **XII. A History of Discoveries of Human/Native American Remains in the Ocotillo Area near the Project Site (e.g. OWEP APE) dating back to 1950**

As indicated above, by the Quechan Indian Tribe calling the Ocotillo Valley 'The Valley of Death,' and similar references from the Kumeyaay bands, it is not surprising that several discoveries of Native American remains have been recorded as a result of historic project activity in the Ocotillo area.

Remains considered Native American were reported to the NAHC by the Imperial County Coroner May 23, 2007 following a report from the project archaeologist, Laguna Mountain Environmental, Inc., for the Ocotillo-based proposed 'Wind Zero' project less than five miles south of the Ocotillo Wind Energy Facility Project area. In the process of this work in the Ocotillo area, Laguna Environmental provided updated site definition for the site, recorded as CA-IMP-24 in the California Historical Resources System (CHRIS Information Center at San Diego State University) The original record was made by University of California, Berkeley researcher, **Dr. Aden Treganza** who was conducting a cultural survey of southern San Diego and Imperial counties and northern Baja California, Mexico. Human cremations were referenced in the record but not explained in Dr. Treganza's reports. A collection of artifacts from the survey site is at the **San Diego Museum of Man**. Laws protecting and requiring reporting of Native American gravesites were not in place in the 1950s. The Native American Graves Protection and Repatriation Act, for instance, was not enacted until 1990. California laws tying associated grave goods to Native American burials was enacted in 1982 as an amendment to the Public Resources Code Section 5097.9. Reportedly, this influenced the federal NAGPRA legislation of 1990. Therefore, data on earlier discoveries of Native American graves is scant.

The 2007 discovery included associate grave goods; they are described as is the site by the Laguna Mountain Environmental archaeologists in their correspondence to the NAHC, found behind Appendix L, page 109 of this Staff Report.

## **XIII. "Human Remains Detection Canine Report;" the Forensic Investigative Canine Reports of May 2012 and July 2012 Resulting in 62 'Alerts' of Probable or Possible Native American Remains**

In an effort to properly survey the area, tribes requested that BLM and Pattern use the trained 'historic human remains detection dogs. Pattern refused to fund the survey and BLM refused to require it. The Viejas Band of Kumeyaay Indians, the Manzanita Band

of the Kumeyaay Nation and the Sycuan Band of the Kumeyaay Nation, among others, raised the funds to pay the costs of having forensic canines examine at least a sample of the 12,500-acre Ocotillo Wind Energy Facility site focusing on the approximately 16 to 18 of the proposed first pads of the 112 proposed for transmitting electrical power to the San Diego Gas & Electric substation at Jacumba in Eastern San Diego County. The first use of the forensic dogs was in May focusing on the SDG&E Switchyard and Pattern's project substation.

An agreement between the Viejas, Manzanita and Sycuan Kumeyaay bands was reached with the *Institute for Canine Forensic* of Woodside California, Santa Clara County. County coroners and government agencies including the military, for decades, have used canine dogs successfully and effectively. In 2007 they were used to identify remains on the Chancellor's House project at the University of California, San Diego, later declared a 'sanctified cemetery' by the NAHC. Their use at the site of the Ocotillo Wind Energy Facility had the cooperation of the Bureau of Land Management and the project developer, Pattern Energy, LP as long as the activity did not interfere with the planned construction activities.

The May 2012 survey yielded **six hits**. All the positive 'dog alerts,' as they are called involve a second team of dogs in order to determine if they go to and alert at the same sites. All six identified in the May 2012 exercise were confirmed by the second team of dogs. A seventh site was not confirmed and called off due to the extreme heat of the desert. Then, the Manzanita tribal consultant commented:

*"With BLM compliance Pattern elected to treat all 7 of those canine alert sites as ESAs but drew short of calling them cremation sites. To my knowledge the did the same with the 50+ from July (2012).*

So Pattern Energy and BLM are essentially considering these sites as possible burials that they term "Environmentally Sensitive Areas," (ESA) to work around, until or unless the sites are confirmed by modern science to be burial sites. However, they are treating the sites as *areas to avoid*, 'Environmentally Sensitive Areas' or ESAs.

The second session with the forensic canines ,lasted seven days of the July 2012; the forensic canines yielded **55 additional dog alert sites**, confirmed. The transmittal correspondence to the NAHC and the full report is shown behind Appendix M, pages 113 to 140 of this Staff Report.

While the Bureau of Land Management, County of Imperial and the applicant Pattern Energy LP, refused to consider the 62 'dog alerts' as cremations of Native American burial sites, and had issues with the Imperial County Coroner and NAHC determining that the discoveries of April 2011 and September 2012 were Native American burials,

the preponderance of evidence on a survey of a small percentage of the 12,500-acre site, less than five percent, is strongly indicative that the project site is situated on numerous Native American burials.

#### **XIV. County of Imperial Approval of ‘Statement of Overriding Consideration, under CEQA, citing a Paucity and inadequate Ethno History Provided by the Affected Native American Tribes**

The County of Imperial Board of Supervisors, while affirming policies from the Imperial County General Plan to conserve cultural resources including the use of ‘open space;’ nevertheless, stated that the

*“Tribes have not provided sufficient or tribal or ethnographic information about the use of this project site (historic or otherwise) in light of the paucity of information, the BLM has made a conservative assumption of eligibility as a TCP. In the County’s view, the paucity of information supports a finding that the site is not a historic resource. The claim that there is a significant cultural association with the project site has only arisen in the last several years. Some such use may be in response to the proposed project....”*

(Excerpt quoted from Section 3.4, Cultural Resources, Final Environmental Impact Statement/Environmental Impact Report (FEIS/FEIR))

This statement was affirmed in the Imperial County Board of Supervisors’ Resolution of the **Statement of Overriding Consideration** pursuant to CEQA Guidelines Sections 15090, 15091 and 15093, adopted April 25, 2012. The excerpt from Section 3.4, Cultural Resources of the FEIS/FEIR is found behind Appendix N , page 141 following, of this Staff Report. The Tribes strongly challenged these conclusions at public hearings.

This statement and action by the Imperial County Board of Supervisors denies the contents of the Viejas Tribal Government Resolution of November 23, 2011 speaking to the sacred sites issue including the confidentiality provisions, or the ethno-history provided the BLM from the Manzanita Band of the Kumeyaay Nation, of the 12 or more recorded sites available to the County in the California Historical Resources System, Information Center at San Diego State University, formerly with the Imperial Valley College Desert Museum at Ocotillo (known until 2010 as the Southeastern California Information Center, part of the CHRIS System), and the comments of State Historic Preservation Officer, now Chair of the federal Advisory Council on Historic Preservation.

In fact, there is an abundance of scientific archaeological information of the Ocotillo area. The lead agencies did not authorize a full-blown ethno-history of the region until the Spring of 2012; therefore, County of Imperial and federal decision-makers did not have the benefits of a study of the historic context of the project site. Also, lead agencies denied the pleas of local tribes, what the Quechan Indian Tribe, the Kumeyaay band and the neighboring Luiseño, Cahuilla and Chemehuevi consider sacred and significant in the Ocotillo area.

Again, it is significant that no final archaeological report was authorized and prepared by the lead agencies until late in the environmental decision-making process of both the Bureau of Land Management and the County of Imperial. Therefore, such reports were not available to decision-makers in order to advise them.

**XV. Concerns of the State Historic Preservation (SHPO) and of the Executive Secretary of the California Native American Heritage Commission (NAHC) went unheeded by the County of Imperial**

The State Historic Preservation Officer (SHPO), with federal authority, under the National Historic Preservation Act, to determine 'eligibility' for site inclusion in the California and National Register of Historic Places (NRHP) sent an e-mail of March 27, 2012 and a letter of April 19, 2012 to the County of Imperial. The SHPO's correspondence urged that archaeological resources not be looked at "In isolation, but within their cultural context." Also, the SHPO stated that "avoidance of direct impacts to the archaeology may not equate to a *no significant impact to the environment*." The SHPO appears to be urging the CEQA lead agency for the Ocotillo Wind Energy Facility Project to consider other factors than "direct impacts" that may be scientifically proven in rendering a decision about the levels of significance of the cultural resources that may be present by other forms.

THE NAHC Executive Secretary in a letter of March 28, 2012, urges the County to "conduct a careful review of the archaeological and tribal cultural resources that may be harmed...: (by the proposed construction.) It appears that neither the concerns of the California State Historic Preservation Officer nor the Executive Secretary of Native American Heritage Commission who also serves as the Governor's Tribal Advisor, was considered in the County's deliberation when the project was approved April 25, 2012.

Copies of the SHPO's and the NAHC Executive Secretary are shown behind Appendix O, pages 146 to 153 of this Staff Report



**XVI. Tribal Governments Viejas Band of Kumeyaay Indians and Quechan Indian Tribe Express Concerns about the Inadequate and incomplete Tribal Consultation between the federal lead, BLM and the affected Tribal Governments as required by Section 106 of the National Historic Preservation Act of 1966, as amended**

Complaints and concerns of the Viejas Band of Kumeyaay Indians and the Quechan Indian Tribe,, regarding the deficiencies in the tribal consultation, as required by Section 106 of the National Historic Preservation Act is documented in pages 154 to 163 of this Staff Report. Also, the comments of Dr. Thomas F King, a consultant and former staff member of the federal Advisory Council on Historic Preservation, are shown behind Appendix P, pages 164 to 180 of this Staff Report.

**XVII. Summary of Lawsuits to Halt the Ocotillo Wind Energy Facility Project**

The **Quechan Indian Tribe of the Fort Yuma Reservation** filed the first action against the Ocotillo Wind Energy Project in U.S. Federal District Court, Southern District in San Diego March, 2012. The Quechan argued in seeking a Temporary Restraining Order (TRO) that the project area was given protection by the California Desert Conservation Area (CDCA) plan, approved by the U.S. Congress in 1976, and the project threatens the tribes' cultural resources, as planned. Three other lawsuits followed including one by the influential **Desert Protective Council**. All four lawsuits failed as of May 31, 2012 but there may be others pending.

A summary of the lawsuits is found behind Appendix Q, page 181 of this Staff Report.

**XVIII. News Report on of Tribal Reaction to Project Approval**

Shown behind Appendix R , page 188, of this Staff Report is a summary of the reaction and comments of local tribal leaders following the first of a series of approvals of the project by local and federal authorities.

**XIX. Discussion of Government Tax and Other Incentives such as the Production Tax Credit (PTC) to Provide Incentives for Private Investment in Renewable Energy**

The Production Tax Credit (PTC) that provides as much as 30 percent of investment capital, as a tax credit for private investment in renewable energy production. This, and other government incentives, are important in order to make renewable energy projects competitive and profitable for private investors. Such incentives were used as a basis for fast-tracking projects such as Ocotillo. The fast-tracking persisted even after tribes complained about the fast-track processes for cutting short adequate project review and consideration. The PTC is now extended to December 31, 2013, as a result of the action by the U.S. Congress at the end of 2012. These incentives remain important to private companies and their investors. A discussion of these incentives is found in the articles behind Appendix S, pages 194 to 202 of this Staff Report.

**XX. Native American Tribes Implore the President to Intervene to Halt the Ocotillo Wind Energy Project, Citing Violations of BLM Policies, U.S. Constitutional Guarantees of Religious Freedom and Federal Protection of Native American Religious and Cultural Sites.**

Letters to President Barak Obama, initiated by the Quechan Indian Tribe, supported by other Colorado Indian tribes, and from the Viejas Band of Kumeyaay Indians, are reported in news media copies and shown behind Appendix T, pages 203 to 211 of this Staff Report. The essence of the letters expresses tribal concerns about 'fast-track' projects such as Ocotillo Wind Express, their 'rough-shod' trampling of Native American governmental rights and cultural concerns, in order for projects to meet a deadline to achieve the government tax credits and other incentives. Projects, such as Ocotillo Wind Energy Facility had to be operational by December 31, 2012 to get the government incentives. Viejas and Quechan are concerned about the implications of other fast-track projects have on future Federal agency/local agency/tribal government-to-government relations.

Does it mean, tribal concerns indicate, that whenever the federal government has a project on a fast-track, and in the interest of national defense (as all the large-scale renewable energy projects are considered) that tribal governmental rights, rights to religious freedom, and the protection of cultural sites, honored and revered by the country's American Indian tribal governments, can be trampled upon, and ignored. The

answer to this question is of profound importance to California tribes and to other tribes around the nation.

In this case, the federal and state lead agencies responsible for statutory and regulatory compliance for the Ocotillo Wind Energy Facility Project, clearly did not consider tribal concerns and recommendations a priority. Yes, those agencies spent considerable sums and time to meet with tribes on all aspects of the proposed project, but the issues about which the tribes were most concerned, their sacred sites and their burial sites, and their status as tribal governments, were not adequately addressed. So, the tribes have turned to the California Native American Heritage Commission (NAHC) to hear their agony over the Ocotillo Project and the unsustainable pattern of tribal-government (both state and federal) relations it represented. The tribes are asking that the project site of the Ocotillo Wind Energy Facility Project be declared a 'sanctified cemetery,' pursuant to the California Public Resources Code Section 5097.97 because of the irreparable harm that will result as the project is implemented pursuant to California Public Resources Code Section 5097.94(g). Tribes request that the project be halted immediately for an assessment to be made 1) of the damage already caused by project construction; 2) to determine what aspects of the project can be mitigated, if any; 3) to determine on-going tribal government-to-government relations including tribal involvement in the project operations, if the project continues to proceed; and 4) a renewed commitment by the federal government of the their 'trust responsibilities' toward American Indian Tribal governments.

## **XXI. Findings and Recommendations**

- A. The Project Site of the Ocotillo Wind Energy Facility Project (hereinafter referred to as "Project") of approximately 12500-acres is public land, administered by the U.S. Bureau of Land Management (BLM);
- B. The Project is a Joint Federal-State Responsibility of both the Bureau of Land Management and the County of Imperial approving a Joint EIS/EIR under State Clearinghouse No. 2010121055 and BLM No. CACA 051552;
- C. Lead Agencies, BLM and the County of Imperial have allowed a private party, Pattern Energy LP, to cause severe or irreparable damage to a Native American sanctified cemetery, and ceremonial sites;
- D. The Commission finds that the Viejas Band Of Kumeyaay Indians, the Quechan Indian Tribe and the Southern California Tribal Chairmen's Association all support Renewable Energy if planned and implemented with respect for Tribal Government and Native American Cultural Resources;
- E. The Commission finds, that the Spoked-Wheel Geoglyph, situated in the Ocotillo area, is clearly a ceremonial site, identified as such by both the Quechan Indian

- Tribe, in their petition to the NAHC, and the Viejas Band of Kumeyaay Indians; this site was rejected by the lead agencies as a “Traditional Cultural Property;”
- F. Seven sets of remains were reported to the NAHC in 2011 and 2012 by the Imperial County Coroner, meeting the standard of “multiple remains’ pursuant to California Public Resources Code Section 5097.98;
  - G. The County of Imperial and the BLM did not consider the Tribal Government Resolution of the Viejas Band of Kumeyaay Indians, enacted November 23, 2011, or invite consultation on the tribal concerns as recommended by the Native American Heritage Commission;
  - H. The County of Imperial never responded to the concerns expressed to them in writing about the Native American sacred sites in the project area (APE) in possible violation of California Public Resources Code Section 5097.95 that urges state and local agencies to work in cooperation with the Commission in carrying out its duties under this code;”
  - I. The California Public Utilities Commission (CPUC) did not consider tribal concerns brought by the Viejas Band of Kumeyaay Indians, nor did it consult with other affected Native American tribes as requested in the Governor’s Executive Order B-10-11;
  - J. The BLM and the County of Imperial have not shown clear and convincing evidence that the destruction of this site is in the public interest and necessary and alternatives were available but not studied or selected;
  - K. The Commission does find that, from the evidence presented it, that Native American people have historically regarded this site as a sacred and sanctified place; the lead agencies did not authorize a major ethno-history of the site and surrounding area until March of 2012 depriving decision-makers of its findings;
  - L. The Commission also find that this site has a unique historical and cultural significance to Indian tribes in this region of Southern California;
  - M. The Commission, after being notified by the affected Native American tribes of the proposed action, conducted an investigation, held a public hearing to determine that the proposed action of construction and project implementation will cause damage to Native American cultural practices and recommends the following mitigation measures: 1) lead agencies, the BLM and the County of Imperial, and the private companies, Pattern Energy LP and San Diego Gas & Electric Company, effectively consult with local tribes regarding future projects and the implementation and maintenance of current projects. 2) Consider this designation if technologies change or the applicant wants to expand operations, and 3) provide mitigation measures that are meaningful to affected tribal nations here and on other renewable projects;
  - N. If the BLM and the County of Imperial, as lead agencies, rejects these mitigation measures, the Commission request that the California Attorney General file suit on behalf of the Commission to prevent further severe and irreparable harm to Native American cultural sites.



# *Ocotillo Wind Energy Facility Project*

A Joint NEPA/CEQA  
Environmental Impact Statement/  
Environmental Impact Report (EIS/EIR)  
California State Clearinghouse No. 2010121055  
U.S. Bureau of Land Management (CACA 051552)

## **APPENDICES**

