From:	Jason Weiner on behalf of Jason
To:	MSFC-SSFL-EIS
Cc:	Mati Waiya; luhui
Subject:	Fw: Wishtoyo DEIS Comments: Demolition and Environmental Cleanup Activities for the NASA-administered portion of the Santa Susana Field Laboratory (SSFL), Ventura County, California
Date:	Tuesday, October 01, 2013 2:42:30 PM
Attachments:	9.30.13_Wishtoyo_SSL DEIS Comments.pdf Canine Forensics Attachment.pdf

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Sent from my Verizon Wireless BlackBerry

From: Jason Weiner <jweiner.venturacoastkeeper@wishtoyo.org>
Sender: jweiner.venturacoastkeeper@gmail.com
Date: Mon, 30 Sep 2013 09:55:53 -0700
To: <msfc-ssfl-eis@mail.nasa.gov>
Cc: Mati Waiya<matiwaiya@wishtoyo.org>; Luhuiisha<luhuiisha@wishtoyo.org>
Subject: Wishtoyo DEIS Comments: Demolition and Environmental Cleanup Activities for the NASA-administered portion of the Santa Susana Field Laboratory (SSFL), Ventura County, California

To whom it may concern,

Please accept Wishtoyo's attached Draft Environmental Impact Statement ("DEIS") for the Demolition and Environmental Cleanup Activities for the NASA-administered portion of the Santa Susana Field Laboratory (SSFL), Ventura County, California ("Project").

Please also confirm receipt of the attached Wishtoyo letter and canine forensic attachment to the letter.

Sincerely,

Jason

--
Jason A. Weiner, M.E.M.
Associate Director & Staff Attorney
Wishtoyo Foundation's Ventura Coastkeeper Program

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Wishtoyo

September 30, 2013

Allen Elliott
SSFL Project Director
NASA MSFC AS01, Building 4494
Huntsville, AL 35812

VIA EMAIL: msfc-ssfl-eis@mail.nasa.gov

RE: Draft Environmental Impact Statement ("DEIS") for Demolition and Environmental Cleanup Activities for the NASA-administered portion of the Santa Susana Field Laboratory (SSFL), Ventura County, California ("Project")

Dear Mr. Elliott:

Wishtoyo thanks you and NASA for the opportunity to comment on the DEIS and the Project.

WISHTOYO FOUNDATION is a California nonprofit public interest organization, founded in 1997, in Ventura County, with over 700 members composed of Chumash Native Americans and Santa Barbara, Ventura, and Los Angeles County residents. Wishtoyo Foundation's mission is to preserve, protect, and restore Chumash culture, the culture of all of three counties' diverse communities, and the environment. The Wishtoyo Foundation shares traditional Chumash beliefs, cultural practices, songs, dances, stories, and values with the public to instill environmental awareness and responsibility for sustaining the health of our land, air, and water for the benefit of future generations.

The Chumash People, including members of Wishtoyo, have a long history of interaction with the SSFL area. The SSFL site is interacted with by the Chumash for a variety of purposes, including religious and ceremonial rites. The Chumash Peoples continue share a sacred and cultural relationship with the many places and the landscape within the SSL site, as the Project site contains the ancestral remains of the Chumash Native Americans with innumerable cultural and natural resources, including burial and sacred sites. This Project has the potential to change the entire cultural landscape this historical, cultural, and religious treasure to the Chumash Peoples.

We are especially concerned about the Project's and the DEIR's identification, mitigation for, and treatment of Chumash cultural resources.

When Chumash cultural resources, including burials are identified, Phase III data recovery, or salvage operation, even if the salvage operation includes re-burial, does not

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achieve preservation in place of the Chumash Peoples' cultural resources, including burial sites, sacred sites, village sites, and cultural artifacts and remains. Even capping and filling of the Chumash Peoples' significant cultural, historic site, and burials, often does not adequately achieve preservation in place of our historic and cultural resources, as it can destroy the necessary relationship between the cultural, historic, and often religious resource with its surroundings and cultural landscape that are a component of the site's significance. Therefore, for identified impacts to Chumash cultural, historic, and religious sites, mitigation measures to achieve preservation in place must be thoroughly analyzed in consultation with the Chumash. The Environmental Impact Statement ("EIS") must not only identify adequate mitigation measures that preserve Chumash cultural resources in place, but it must commit to preservation in place mitigation measures (and not defer the mitigation measures to others' discretion at a later time so that Phase III data recovery can be implemented), unless these measure are proven to be infeasible by defined criteria.

The Project site is rich with the Chumash tribes' historic and cultural resources. To the Chumash, any area with historic value, such as their burial sites, village sites, or sacred sites have deep religious, spiritual, and cultural significance today. The Chumash thus retain strong spiritual, cultural and religious attachment to the lands, their buried ancestors, and resources within the Project site. The Chumash, including members of Wishtoyo, still conduct sacred ceremonies on the Project site today. Chumash remains, burials, sacred sites, and ancestral villages lie in the Project site, and these cultural resources will be directly affected by excavation, earthmoving, and disturbance authorized by this Project.

Based on our knowledge passed down only orally and not recorded in westernized records about the locations and extent of the Chumash remains in the Project site, the initial study and DEIS fail to adequately identify significant impacts to significant Chumash cultural historic resources, villages, burial site, sacred cites, and remains. Further, the on the ground surveys were not sufficiently extensive, as a sufficient frequency of test pits were not dug; when they were dug, they were not dug deep enough; and the entirety of the Project area was not covered by on the ground surveying and sufficiently spaced test pits. Furthermore, best available science was not used, such as forensic canines, to best ensure all Chumash burials and remains were identified in the Project Area. Because Phase III Data recovery is in most cases not sufficient mitigation, a dig first and excavate later approach is not sufficient for mitigation impacts to our cultural resources. It is thus critical to setting forth adequate mitigation measures that the presence of our cultural, historic, and religious resources are adequately analyzed and identified using best available practices.

Wishtoyo requests that specially trained forensic canines alone or in combination with ground penetrating radar are utilized (just like they were in Santa Cruz to identify Ohlone Native American burials for the KB Home development [1]), to

[1] Please see Canine Forensics Attachment to this letter for more details about the use of forensic canines and ground penetrating radar to reliably identify the location of Native American Burials for the KB Homes Development in Santa Cruz and for other development projects.

identify the location of all Native American burials within the project envelope. The use of specially trained canine forensics alone, or in combination with ground penetrating radar, represents the best available technology and most reliable means for the identification of Chumash burials, and thus should be used to identify potential impacts to Chumash cultural / historic resources and to mitigate those impacts to a less than significant effect. By utilizing highly trained forensic canines alone or in combination with ground penetrating radar to identify with more reasonable certainty all or almost all of the Native American burials within the Project envelope, mitigation measures can be developed in coordination with the local Native Americans to achieve preservation in place for those impacted burials and cultural historic resources.

Wishtoyo also requests that the DEIS adequately indentify the impacts to Chumash cultural, historic, and religious resources through additional study in consultation with the Chumash and using best available science.

The Project's development envelope also contains Chumash natural cultural and historical resources. These include, but are not limited to hawk and eagle feathers, deer bones used for hair pins, bird bones for flutes, animal skeletal remains used for beads, medicinal plants, oak trees, black walnut trees, soap stone, cheart stone, medicinal plants, rabbit pelts and oarcker; gathering sites for natural cultural resources; and cultural landscapes which include undeveloped mountain tops, hillsides, tributaries and canyons that bring sacredness to sacred sites. These natural cultural resources within the Project site may be contaminated, as may be the areas around the cultural sites within the Project envelope. Thus, not only must these cultural resources be protected and preserved, but the contamination of these cultural resources and sites must be assessed and remediated so that residual toxins do not pose health threats to Chumash Peoples utilizing the area for cultural purposes.

For all the reasons above, meaningful consultation during the NEPA process with Chumash tribal representatives from the Federally recognized Santa Ynez Band of Chumash Indians, and from unrecognized bands of Chumash including Mati Waiya from the Turtle Clan in Saticoy and Luhui Isha Waiya from Barbareño Chumash, is crucial to understanding, identifying, and mitigating irreversible impacts to this national Native American treasure, Chumash cultural landscape, Chumash heritage and culture, and to the scared and religious, cultural resources of the Chumash People within the Project site.

Despite the need, there has been no meaningful consultation with the Chumash. Even the consultation with the Federally recognized band of Santa Ynez Chumash Indians is not in compliance with Section 106 of the National Historic Preservation Act ("NHPA"), which according to the Advisory Council on Historic Preservation states,

> "in carrying out its responsibilities under Section 106, *a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A). [16 U.S.C. 470a (a)(6)(A) and (B)]."*

We believe this Project would significantly alter future use, and impact the Cultural sites, resources and heritage these lands represent. The outreach that has been done is insufficient. Extensive outreach to Chumash, Tatavium, Tongva and other Native American tribal families/groups that have a longtime and historical connection to the sacred and cultural sites at SSFL/Burro Flats should occur with notice of the issues in this letter, and these Native American stakeholders should be given an opportunity to submit comment and participate in meaningful consultation. Even the February 2013 SSFL Community Advisory Group ("CAG") formed to make recommendations to Department of Toxic Substances Control ("DTSC") found shortfalls in outreach to certain stakeholder groups, including and especially to the Native American Tribal Community, which was identified in the highest category (Category 1) of stakeholders that have not received outreach and that are in need of outreach.

In addition to the comments above, we incorporate the comments from the Santa Ynez Band of Chumash Indians (below) and have the following comments on the DEIR and the Project:

1. The project will impart significant negative unmitigated impacts to sacred sites and cultural resources. Areas that contain artifacts contaminated with toxins may need to be cleaned up as part of the project. How are these artifacts, that are contaminated with toxins to be preserved in place, and if storage or removal occurs - which we are opposed to, how are they to be stored. How are uncovered villages or sacred sites to be preserved in place. How would the legal transfer of land on the Project site affect the protection of historic properties? We request that parcels with Chumash sacred and cultural resources are not transferred without adequate guarantees of protection.

2. The Chumash have held ceremonies on the Project site for the past 30 yrs. or more, and want to continue to do so.

3. Please conduct independent studies to review cultural sites and cultural resources that are present. Ensure that Chumash are considered for retention under contract to conduct cultural resources surveys with archeologists, trusted by the Chumash community, who have worked with Chumash resources.

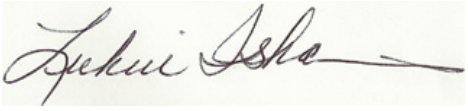
4. Agencies and entities that own the different properties within the Project site, like DOA, Boeing and NASA need to look at, analyze, and mitigate cultural sites as a whole district or historic district, which are not separated by legal property boundaries with the site. The project must avoid all impacts to Chumash cultural resources within the Project site.

5. Traditional cultural landscapes to include natural resources, plants, stones, creeks and habitat that helped us, and continue to help us, sustain our lifeway and traditions. These resources need to be protected.

6. Cultural sites not identified are likely scattered throughout the entire Project site/property. This area hosted different tribal groups that where passing through or were neighboring tribes.

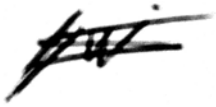
7. Please add a mitigation measure that provides that the Interpretation of Chumash History in relation to the Project site, uncovered cultural resources, preserved in place cultural resources, protected Chumash cultural resources, and recovered cultural resources is to be done by Chumash representatives.

Sincerely Yours,



Luhui Isha
Barbareño Chumash
Cultural Resources & Education Director
Wishtoyo Foundation

Mati Waiya, Chumash Ceremonial Elder
Santa Clara River Turtle Clan
Executive Director
Wishtoyo Foundation



Jason Weiner
Staff Attorney
Wishtoyo Foundation

Attachment to Wishtoyo 9/30/2012 DEIS Letter - Letter from the Santa Ynez Band of Chumash Indians

September 30, 2013

Allen Elliott
SSFL Project Director
NASA MSFC AS01, Building 4494
Huntsville, AL 35812

RE: Draft Environmental Impact Statement (DEIS) for Demolition and Environmental Cleanup Activities for the NASA-administered portion of the Santa Susana Field Laboratory (SSFL), Ventura County, California

Dear Mr. Elliott:

The Santa Ynez Band of Chumash Indians ("Chumash" or "Tribe") thanks you and NASA for the opportunity to comment on the DEIS. NASA procedure requirements state that NASA is "committed to environmental stewardship, sustainable design, and green engineering." In addition, NASA is covered by Executive Order 13175 as reaffirmed by that Presidential Memorandum on Tribal Coordination dated November 5, 2009 that reaffirmed Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," and emphasized the importance of strengthening government-to-government relationships with Native American tribes. See also, http://nodis3.gsfc.nasa.gov/npg_img/N_PR_8580_001A_/N_PR_8580_001A_.pdf**.**

The Tribe, therefore, makes the following comments as to the DEIS:

(1) <u>The EIS Must Address Cultural Resources</u> (copied from http://www.npi.org/NEPA/impact)

Cultural resources are referred to in different ways at different points in the CEQ regulations. The regulatory definition of the term "human environment" at 40 CFR 1508.14 –impacts on the quality of the human environment being the subjects of any EIS – includes "the natural and physical environment and the relationship of people with that environment." The definition of "effects" at 40 CFR 1508.8 – as in "effects on the quality of the human environment" – includes changes in the human environment that are "aesthetic, historic, cultural, economic, (or) social."

The regulatory definition of the word "significantly" at 40 CFR 1508.27 – as in "major federal action significantly affecting the quality of the human environment" – includes as measures of impact intensity:

- Impacts on an area's unique characteristics, such as "historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, and ecologically critical areas" (40 CFR 1508.27(b)(3)).

- Impacts on "districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places" and on "significant scientific, cultural, or historical resources" (40 CFR 1508.27(b)(8)).

Clearly, impacts on cultural resources are to be addressed in an EIS. Note that it is not just impacts on historic properties that should be addressed. The regulations use "historic" and "cultural" in parallel, not as synonyms.

(2) Record of Decision Must Mitigate any Impacts to Cultural Resources (copied from **http://www.npi.org/NEPA/impact**)

Once the EIS analysis has resulted in a draft environmental impact statement (DEIS), it is subjected to public and agency review, and comments are addressed – this may require further analysis. Then, assuming the project has not been abandoned, or so changed that a supplemental DEIS is needed, a final EIS (FEIS) is prepared and published. The FEIS is considered in making the agency's decision about whether and how to proceed with the action that was the subject of the EIS. This decision is recorded in a Record of Decision (ROD). According to 40 CFR 1505.2, the ROD must:

- State what the decision was.

- Identify all alternatives considered.

- Specify the alternative or alternatives considered to be "environmentally preferable." (Note that the agency does not have to select the environmentally preferable alternative, but it does have to discuss what it is.)

- Identify and discuss the factors balanced in making the decision (whether for or against the environmentally preferable alternative).

- State whether "all practicable means to avoid or minimize environmental harm . . . have been adopted, and if not, why they were not."

Having notified the world of its decision, the agency implements it. In doing so, it must carry out any mitigation, i.e., "means to avoid or minimize environmental harm," it has said in the ROD or EIS that it will carry out (40 CFR 1505.3).

(3) Deferral of Mitigation does not Comply with NEPA (copied from **http://www.npi.org/NEPA/impact**)

Deferral. With respect to historic properties, a very common problem is "deferral," in which the agency:

- Acknowledges that it does not know much about what effects there may be on historic properties (often because such properties have not yet been identified); but
- Says that whatever effects there may be, NHPA Section 106 review (of the National Historic Preservation Act), to be performed later, will take care of them; and
- Concludes that therefore, whatever alternative is decided on, impacts on historic properties will not be a problem.

Considering environmental impacts *after* a decision has been made defeats NEPA's purpose of considering impacts in *preparing* to make decisions. It also almost guarantees last-minute conflicts between project implementation and historic preservation.

Failure to consider things that are not historic properties. With respect to other kinds of cultural resources, a common problem is that they are not considered at all. Historic properties, or even more narrowly, archeological sites, are sometimes the only things discussed in the "cultural resource" part of an EIS. If social impacts are considered, they are often considered only terms of easily quantifiable socioeconomic variables like population, employment, and use of public services. The result is that impacts on many classes of cultural resource simply are not identified or considered in deciding whether significant impacts may occur.

(4) Significant Negative Unmitigated Impacts to Sacred Sites and Cultural Resources

4.3.1.2 Soil Cleanup to Background--the total area of the remediation footprint is approximately 105 acres and includes approximately 500,000 yd3 of contaminated soil

Indian Sacred Site and Traditional Cultural Property: The tribe has already designated all of the NASA administered property as a sacred site under E.O. 13007. The impact would be **significant**, **negative**, regional, and **long term** and would constitute an **adverse effect** under Section 106. (DEIS, 4-18)

Archeological Resources: The proposed cleanup of the Burro Flats site (CA-VEN-1072); could result in ***significant, negative, local,*** and ***long-term*** impacts to the site and would constitute an ***adverse effect*** under Section 106. The proposed cleanup of CA-VEN-1803 could result in ***moderate, negative, local,*** and ***long-term impacts*** under NEPA. Excavation on previously undiscovered archeological sites found to be NRHP-eligible could be a ***significant, negative, local,*** and ***long-term*** impact on archeological resources, thus resulting in a finding of ***adverse effect*** under Section 106. (DEIS, 4-19)

Deferral of eligibility determination: A determination of eligibility of CA-VEN-1803, in consultation with the SHPO and the federally recognized tribes, needs to be completed before cleanup began if this site were to be affected by soil cleanup activities. CA-VEN-

1800 would not be affected by excavation and removal of soil because it is not located within the identified cleanup areas.

Deferral of boundary research as to VEN-1072 and VEN-1803: Additional boundary research is required to conclude that any avoidance of excavation within the boundaries of Burro Flats (CA-VEN-1072) and CA-VEN-1803 would diminish or eliminate adverse impacts to known archeological sites and reduce the impacts to ***negligible, negative, local,*** and ***long term*** and could result in a finding of ***no adverse effect*** under Section 106.

Deferral of additional testing as to unknown archaeological deposits: Additional subsurface testing is required to conclude that reducing the amount of excavation on newly discovered archeological deposits (commonly referred to as "inadvertent or accidental discoveries") could minimize the impact if the newly identified sites were avoided, thus reducing the impacts to ***minor, negative, local,*** and ***long-term*** impacts from excavation.

(5) **Failure to Address Executive Order 13007**

On December 10, 2012, the Santa Ynez Band of Chumash Indians, a federally recognized tribe ("Tribe"), designated the NASA portion of the SSFL as an Indian sacred site pursuant to Executive Order 13007. This Indian sacred site also includes the former Rocketdyne and now Boeing portion of SSFL and the Tribe is open to discussing the exact boundaries at a later date.

E.O. 13007 requires Federal land managing agencies to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and to avoid adversely affecting the physical integrity of such sacred sites. It also requires agencies to develop procedures for reasonable notification of proposed actions or land management policies that may restrict access to or ceremonial use of, or adversely affect, sacred sites.

Sacred sites are defined in the executive order as "any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site." There is no review of such determinations by a Federal agency.

It is important to note that a sacred site may not meet the National Register criteria for a historic property and that, conversely, a historic property may not meet the criteria for a sacred site. However, in those instances where an undertaking may affect a historic property that is also considered by an Indian tribe to be a sacred site, the Federal agency should, in the course of the Section 106 review process, consider accommodation of access to and ceremonial use of the property and avoidance of adverse physical effects in accordance with E.O. 13007.

The Advisory Council on Historic Preservation (ACHP) has explained
"The Relationship Between Executive Order 13007 Regarding Indian Sacred Sites and Section 106," **http://www.achp.gov/eo13007-106.html**

> To the extent that the requirements of the executive order and ACHP's regulations are similar, Federal agencies can use the Section 106 review process to ensure that the requirements of E.O. 13007 are fulfilled. For example, E.O. 13007 requires that agencies contact Indian tribes regarding effects and the Section 106 regulations require consultation with Indian tribes to identify and resolve adverse effects to historic properties.
>
> Consultation regarding the identification and evaluation of historic properties of religious and cultural significance to an Indian tribe could include identification of those properties that are also sacred sites. Similarly, consultation to address adverse effects to such historic properties/sacred sites could include discussions regarding access and ceremonial use.

(6) **Failure to address the NASA Site is a Traditional Cultural Property (TCP) eligible for protection on the National Register:**

National Register Bulletin No. 38 (hereinafter referred to as "NPS Bull. No. 38"), Guidelines for evaluating and Documenting Traditional Cultural Properties (1990; revised 1992; 1998) under NHPA
http://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf

A. Locations for traditional ceremonies are defined as a TCP: NPS Bull No. 38, p. 1, provides:

The traditional cultural significance of a historic property, then, is significance derived from the role the property plays in a community's historically rooted beliefs, customs, and practices. Examples of properties possessing such significance include: ***

• a location where Native American religious practitioners have historically gone, and are known or thought to go today, to perform ceremonial activities in accordance with traditional cultural rules of practice;

B. Mountain tops and rock outcroppings like at SSFL are TCP's: NPS Bull. No. 38, p. 2, provides:

Traditional cultural properties are often hard to recognize. A traditional ceremonial location may look like merely a mountaintop, a lake, or a stretch of river; a culturally important neighborhood may look like any other aggregation of houses, and an area where culturally important economic or artistic activities have been carried out may look like any other building, field of grass, or piece of forest in the area. As a result, such places may not necessarily come to light through the conduct of archeological, historical, or architectural surveys. The existence and significance of such locations often can be ascertained only through interviews with knowledgeable users of the area, or through other forms of ethnographic research.

C. NASA must engage specialists as part of its TCP study: NPS Bull. No. 38, p. 10, provides:

In general, the only reasonably reliable way to resolve conflict among sources is to review a wide enough range of documentary data, and to interview a wide enough range of authorities to minimize the likelihood either of inadvertent bias or of being deliberately misled.
Authorities consulted in most cases should include both knowledgeable parties within the group that may attribute cultural value to a property and appropriate specialists in ethnography, sociology, history, and other relevant disciplines.7

D. Specific events like the Solstice ceremony at SSFL qualify as TCP: NPS Bull. No. 38, p. 11, provides:

For example, the National Register
defines a "site" as "the location
of a significant event, a prehistoric or
historic occupation or activity, or a
building or structure, whether standing,
ruined, or vanished, where the location
itself possesses historic, cultural,
or archeological value regardless
of the value of any existing structure."
9 Thus a property may be defined
as a "site" as long as it was the
location of a significant event or activity,
regardless of whether the event or
activity left any evidence of its occurrence.
A culturally significant natural
landscape may be classified as a site,
as may the specific location where significant
traditional events, activities,
or cultural observances have taken
place. A natural object such as a tree
or a rock outcrop may be an eligible
object if it is associated with a significant
tradition or use. A concentration,
linkage, or continuity of such sites or
objects, or of structures comprising a
culturally significant entity, may be
classified as a district.

E. Native American ceremonies qualify as TCP: NPS Bull. No. 38, p.15, provides:

National Register guidelines
stress the fact that properties can
be listed in or determined eligible for
the Register for their association with
religious history, or with persons significant
in religion, if such significance
has "scholarly, secular recognition."
13 The integral relationship
among traditional Native American
culture, history, and religion is widely
recognized in secular scholarship.14
Studies leading to the nomination of
traditional cultural properties to the
Register should have among their
purposes the application of secular
scholarship to the association of particular

properties with broad patterns
of traditional history and culture. The
fact that traditional history and culture
may be discussed in religious
terms does not make it less historical
or less significant to culture, nor does
it make properties associated with traditional
history and culture ineligible
for inclusion in the National Register.

F. Lack of use does not make a property TCP ineligible: NPS Bull. No. 38, p. 18, provides:

The fact that a property may have
gone unused for a lengthy period of
time, with use beginning again only
recently, does not make the property
ineligible for the Register. For example,
assume that the Indian tribe
referred to above used the mountain
peak in prehistory for communication
with the supernatural, but was forced
to abandon such use when it was confined
to a distant reservation, or when
its members were converted to Christianity.
Assume further that a revitalization
of traditional religion has begun
in the last decade, and as a result
the peak is again being used for vision
quests similar to those carried out
there in prehistory. The fact that the
contemporary use of the peak has
little continuous time depth does not
make the peak ineligible; the peak's
association with the traditional activity
reflected in its contemporary use is
what must be considered in determining
eligibility.

(7) **Traditional Cultural Landscapes must also be included in Section 106 consultations and the EIS**

Traditional cultural landscapes, because they are often a property type such as a district or site, are identified in the same manner in the Section 106 process as other types of historic properties of religious and cultural significance to Indian tribes or Native Hawaiian organizations. The regulations at 36 CFR Section 800.4 outline several steps a federal agency must take to identify historic properties. In summary,

to determine the scope of identification efforts, a federal agency, in consultation with the State Historic Preservation Officers (SHPO)/Tribal Historic Preservation Officer (THPO), must:

1. Determine and document the area of potential effect for its undertaking;
2. Review existing information; and,
3. Seek information from consulting parties including Indian tribes or Native Hawaiian organizations.

Based on the information gathered through these efforts, the federal agency, in consultation with the SHPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by the undertaking, develops and implements a strategy to identify historic properties within the area of potential effects. Identification efforts may include background research, oral history interviews, scientific analysis, and field investigations. **http://www.achp.gov/natl-qa.pdf**

There is no single defining feature or set of features that comprise a traditional cultural landscape. Such places could be comprised of natural features such as mountains, caves, plateaus, and outcroppings; water courses and bodies such as rivers, streams, lakes, bays, and inlets; views and view sheds from them, including the overlook or similar locations ; vegetation that contributes to its significance; and, manmade features including archaeological sites; buildings and structures; circulation features such as trails; land use patterns; evidence of cultural traditions, such as petroglyphs and evidence of burial practices; and markers or monuments, such as cairns, sleeping circles, and geoglyphs. **http://www.achp.gov/natl-qa.pdf**

Based on such research, the ACHP TRADITIONAL CULTURAL LANDSCAPES ACTION PLAN advises as follows:

The ACHP, as the agency with responsibility for overseeing the Section 106 review process, and DOI, through the National Park Service (NPS), as the agency with responsibility for overseeing the National Register of Historic places, should provide leadership in addressing Native American cultural landscapes in the national historic preservation program. Together, the ACHP and NPS should:
--Promote the recognition and protection of Native American traditional cultural landscapes both within the federal government and the historic preservation community as well as at the state and local levels, and,

--Address the challenges of the consideration of these historic properties in the Section 106 review process as well as in NEPA reviews. **http://www.achp.gov/pdfs/native-american-traditional-cultural-landscapes-action-plan-11-23-2011.pdf**

(8) **U.N. Declaration on the Rights of Indigenous Peoples must now be followed after December 2010**

In December 2010, the United States announced support for the **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)**. In announcing this support, President Obama stated: "The aspirations it affirms—including the respect for the institutions and rich cultures of Native peoples—are one we must always seek to fulfill…[W]hat matters far more than any resolution or declaration – are actions to match those words." The UNDRIP addresses indigenous peoples' rights to maintain culture and traditions (Article 11); and religious traditions, customs, and ceremonies (Article 12); to

participate in decision making in matters which would affect their rights (Article 18); and to maintain spiritual connections to traditionally owned lands (Article 25).

The ACHP will now incorporate UNDRIP in the Section 106 review process:

While the Advisory Council on Historic Preservation's (ACHP) work already largely supports the United Nations Declaration on the Rights of Indigenous Peoples, additional and deliberate actions will be taken to more overtly support the Declaration. The Section 106 review process provides Indian tribes and Native Hawaiian organizations (NHOs) with a very important opportunity to influence federal decision making when properties of religious and cultural significance may be threatened by proposed federal actions. While federal agencies are required to consult with Indian tribes and NHOs and to take their comments into account in making decisions in the Section 106 review process, adding the principles of the Declaration to that consideration may assist federal agencies in making decisions that result in the protection of historic properties of religious and cultural significance to Indian tribes and NHOs. **http://www.achp.gov/docs/UN%20Declaration%20Plan%203-21-13.pdf**

9. Official recognition in the DEIS need to be made of the areas surrounding Burro Flats

A. The entire Southern half of Area II District needs to be protected. Sec. 3.3.3.4, p. 3-17

Sec. 3.3.3.3 Archeological Resources, p. 3-16
The earliest documented archeological work at Burro Flats Painted Cave began in 1953 with excavations carried out by the Archaeological Survey Association of Southern California, which made five trips to the site during 1953 and 1954. The site has been recorded several times since then and under numerous separate listings; misidentifications of elements and inconsistencies in function, assemblage, and design interpretations warranted a revisit and a complete recordation of the site's elements**. In June 2007, NASA re-recorded the site and updated the site record; this effort resulted in combining 16 separately recorded sites into one site, CA-VEN-1072, with associated loci and features**.

We therefore request that the entire Southern half of Area II District needs to be protected. Sec. 3.3.3.4, p. 3-17.

B. All structures should be removed in the Coca Historic District. These structures impinge on the ceremonial areas. If a decision is reached to save a test stand, Alfa or Bravo should be retained instead of Coca.

10. Additional Investigation of the Northern Half of the SSFL site

While the Southern half of Area II contains the pictographs and additional 16 sites, the Northern half of SSFL needs additional investigation, including, without limitation:

a. Geography—this areas contains numerous flat areas that would be suitable camp sites;
b. Areas of food—this areas contains forests and riparian areas that could be utilized in the gathering of food;
c. Support for ceremonial area in the Southern half of Area II—It is not inconceivable that the Northern half of the SSFL site provided support for the ceremonies in the Southern half of SSFL;

d. Separate areas for different tribes—if SSFL was an inter-tribal gathering place, then each tribe would have congregated separately in different parts of the site.

11. <u>Subsurface testing is required.</u>

Pedestrian surveys are of limited utility and never alone are sufficient when there are known areas of habitation or ceremony. We are informed that NASA has recently completed a Phase I Pedestrian Survey of the site. While such Phase I is an excellent first step, we request additional subsurface archaeological testing for all areas scheduled for any excavation.

If the project is in a region where there are many sites, there may be reason to suspect that buried sites may be present that went undetected during the survey. If the soils profile of the project location shows that heavy erosion has washed away soils then it may explain the absence of cultural resources. However, if the soils profile is depositional then there may be a need to conduct additional subsurface testing, particularly in areas where ground disturbance is planned. In archaeological terminology, this is referred to as "Extended Phase I" testing because it is an intermediate step between Phase 1 (survey), and Phase 2 (controlled excavation to assess the significance of a site). Extended Phase I testing often done by excavating a small pit with a shovel and screening the excavated soil through steel mesh ("shovel test pit" or "STP"). If it is considered to be necessary that a large amount of soil should be examined at deeper levels, then backhoes are sometimes used and informal sampling procedures are often employed while screening the backdirt.

Sometimes the lead agency will argue that archaeological survey is not warranted for a particular project or there may be factors that justify additional investigation even though a Phase I study has been completed with negative results. Following is a list of environmental and cultural factors that should be considered when assessing the overall cultural sensitivity of the SSFL. (Please note that this list is not exhaustive and each factor must be weighted both individually and collectively on a case-by-case basis.)

a. Areas with high viewshed or visibility such as or ridgelines, peaks, ledges, outcrops, benches, or prominent hills; and

b. Areas with a relatively high density of sites in the vicinity; and

c. Areas where past ethnographic studies have revealed associated placenames. Keep in mind that placenames do not always refer to places where evidence of past cultural activity exists; and

d. Areas near known sites. Mapped boundaries of sites most frequently reflect only cultural residue that was visible on the surface when the site was recorded and do not necessarily reflect the actual extent of the site. In addition, loci such as cemeteries or other areas may be adjacent to or nearby but separate from the main habitation; and

e. Areas near known rock art sites or rocky outcroppings of the type where rock shelters and art have traditionally been located; and

f. Areas in or near known gathering areas; and

g. Though all sites are potentially worthy of protection, named, ethnohistorically documented village sites are of the highest priority and therefore warrant the greatest amount of protection possible.

12. **Exhaustion of Non-Excavation Methods of remediation**.

Figure 2.2-3, p. 2-21, illustrates the Preliminary Remediation Area Types Under the Proposed Action. To the extent feasible, NASA should exhaust all non-excavation methods of remediation before performing any excavation that could potentially impact cultural and historic sites.

13. **Soil Prior disturbance is NOT Dispositive**:

The mantra that cultural sites have been disturbed and therefore automatically are not significant is oftentimes incorrect:

a. Disturbed sites still may contain valuable information. The newer approach is to treat disturbed sites as having the potential to provide information even if they have been disturbed;
b. Disturbed sites still have spiritual significance;
c. Disturbance may only be on the surface, while much excavation may continue to depths of up to 20 feet.

14. **Need to Analyze Cumulative Impacts to Cultural Resources**:

The DEIS fails to account for other remediation projects in other areas of SSFL:

a. Need to add Department of Energy (DOE) cultural sites;
b. Need to add Boeing cultural sites;
c. Other areas within SSFL.

15. **NEW MITIGATION: Cultural Interpretive Center**:

a. Can use existing building;
b. Preferably near saved historic structure and/or test stand;
c. Preferably away from CA-VEN-1072;
d. Need to Reserve maintenance funds.

16. **NEW MITIGATION: Native American monitoring during any ground disturbing activities**.

17. Need to protect CA-VEN-1072 from trespassers and vandals.

18. <u>Deferral of Mitigation until Record of Decision (ROD):</u>

a. It is problematic to defer any mitigation until ROD as it prevents meaningful comment;
b. Commenter reserve the right to ask for recirculation of the DEIS and EIS for any such deferred mitigation.

19. **<u>Use of NEPA EIS instead of NHPA 106</u>**—Recent ACHP guidance:

http://www.achp.gov/docs/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf

Substitution under 36 C.F.R. § 800.8(c) permits agencies to use the NEPA review to comply with Section 106 as an alternative to the process set out in 36 C.F.R. §§ 800.3-800.6. The use of a substitution approach allows agencies to use the procedures and documentation required for the preparation of an EA/FONSI or EIS/ROD to comply with the Section 106 procedures. To do so, the agency must notify the ACHP and SHPO/THPO in advance that it intends to do so and meet certain specified standards and documentation requirements as set forth in 36 C.F.R. § 800.8(c)(1).

If, as the result of an objection under 36 C.F.R. § 800.8(c) (2)(ii) or during consultation to resolve adverse effects, disagreement reaches a point where the substitution process is no longer prudent, then agencies may return to the appropriate step in the standard Section 106 process with notification to consulting parties.

20. <u>Need NEPA Mitigation Plan</u>

http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-mitigation-monitoring-draft-guidance.pdf

February 18, 2010

MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES
FROM: NANCY H. SUTLEY, Chair, Council on Environmental Quality
SUBJECT: DRAFT GUIDANCE FOR NEPA MITIGATION AND MONITORING
I. INTRODUCTION

To provide for the performance of mitigation, agencies should create internal processes to ensure that mitigation actions adopted in any NEPA process are documented and that monitoring and appropriate implementation plans are created to ensure that mitigation is carried out. See *Aligning NEPA Processes with Environmental Management Systems* (CEQ 2007) at 4 (discussing the use of environmental management systems to track implementation and monitoring of mitigation). http://ceq hss.doe.gov/nepa/nepapubs/Aligning_NEPA_Processes_with_Environmental_Management_Systems_2007.pdf (**http://www.slideshare.net/whitehouse/aligning-nepa-processes**). Agency NEPA

implementing procedures should require clearly documenting the commitment to mitigate the measures necessary in the environmental documents prepared during the NEPA process (40 C.F.R. § 1508.10) and in the decision documents such as the Record of Decision. When an agency identifies mitigation in an EIS and commits to implement that mitigation to achieve an environmentally preferable outcome, or commits in an EA to mitigation to support a FONSI and proceeds without preparing an EIS, then the agency should ensure that the mitigation is adopted and implemented.

Methods to ensure implementation should include, as appropriate to the agency's underlying authority for decision-making, appropriate conditions in financial agreements, grants, permits or other approvals, and conditioning funding on implementing the mitigation. To inform performance expectations, mitigation goals should be stated clearly. These should be carefully specified in terms of measurable performance standards to the greatest extent possible. The agency should also identify the duration of the agency action and the mitigation measures in its decision document to ensure that the terms of the mitigation and how it will be implemented are clear.

If funding for implementation of mitigation is not available at the time the decision on the proposed action and mitigation measures is made, then the impact of a lack of funding and resultant environmental effects if the mitigation is not implemented warrant disclosure in the EA or EIS. In cases where, after analyzing the proposed actions with or without the mitigation, the agency determines that mitigation is necessary to support the FONSI or committed to in the ROD, and the necessary funding is not available, the agency may still be able to move forward with the proposed action once the funding does become available. The agencies should ensure that the expertise and professional judgment applied in determining the appropriate mitigation measure is reflected in the administrative record, and when and how those measures will be implemented are analyzed in the EA or EIS.

Under NEPA, a federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions. See 42 U.S.C. § 4332(2)(A). For agency decisions based on an EIS, the regulations require that, "a monitoring and enforcement program shall be adopted…where applicable for mitigation." 40 C.F.R. §1505.2(c). In addition, the regulations state that agencies may "provide for monitoring to assure that their decisions are carried out and should do so in important cases." 40 C.F.R. §1505.3. Monitoring plans and programs should be described or incorporated by reference in the agency decision documents.

21. Incorporation by reference of Memo dated Nov. 29, 2012, "NEPA alternatives analysis for selection of cleanup standards for the Santa Susana Field Laboratory Site."

Sincerely,

Sam Cohen
Government and Legal Specialist
Santa Ynez Band of Chumash Indians

Articles Discussing How Forensic Dogs can be and have been successfully used to identify and locate Native American human remains (last visited October 21, 2011)

1.) http://www.ohlonenation.org/?p=264

By charlene on September 20th, 2011

Forensic Dogs Successful in Identifying Ancient Human Remains for Ohlone

Category: Uncategorized, Tags: burial site, forensic dog, kb homes, ohlone, santa cruz

Native Americans are always concerned when their exists the potential of unearthing human remains during construction projects. During a time when regular protocol would dictate the use of drills and tedious ground penetrating strategies that might harm or destroy findings, two alternatives have been incorporated during a recent project.

This fall the remains of an Ohlone boy were discovered during a KB home building project in Santa Cruz, CA. During negotiation meetings between the home builder, the City of Santa Cruz, CA and the Ohlone all parties agreed to respect and accept the results from two alternative proven methods of ground investigation. The two methods include ground penetrating radar or (GPR) and specially trained forensic dogs.

In this case, Ohlone descendant Chuck Strickland recommended the GPR method. A trained GPR technician came to the building site and scanned surface of the earth to see if additional buried remains could be detected. Unfortunately, due to layers of sediment and rock would not allow proper functioning of this method. While this did meet the Ohlone requirement of a non-invasive method for predicting the likelihood of findings, it would not be a good match for this project.

Next, Gregg Castro, also an Ohlone descendant recommended the use of specially trained dogs from the Institute for Canine Forensics.

The institute has it's headquarters in California, but has provided services nationally and internationally. The institute trains for nine distinct types of area scannings. The match for the Ohlone project would be a team of dogs who could detect historical human remains. Dogs are taught not to disturb a scene by digging or retrieving evidence. Further, the dog can discriminate between human remains and all other non-human items. In this case, the dogs were able to detect the spot of the original finding as well as additional findings that would require great care if the construction project were to continue.

In this project, the Ohlone, the city and the home builder came together to agree upon these alternative scientific methods for land surveying. It is the hope of the Ohlone Elders Circle that these non-invasive methods become part of the regular process to be implemented in order to preserve former village sites.

2.) http://www.santacruzsentinel.com/localnews/ci_18929918

Santa Cruz, developer reach agreement not to build on Ohlone site

By J.M. BROWN
Posted: 09/19/2011 03:37:31 PM PDT

Archeologist and helpers sift through burial site on land where KB Homes is... (DAN COYRO/SENTINEL)

SANTA CRUZ - After weeks of negotiations with the city and Native American elders, the developers of a 32-unit housing complex on the Eastside agreed Monday not to build over an Ohlone burial site.

KB Home will set aside a premier, 13,000-square-foot parcel at the top of a knoll, where several remains were discovered this summer, to preserve in perpetuity for Ohlone elders to access for ceremonies. Elders, who believe the spirits of buried people wander if their resting place is disturbed, will be able to use the site for ceremonies in coordination with the site's homeowners association.

"I am ecstatic," said Ann-Marie Sayers, a state-designated Ohlone descendant who negotiated with the city and company to preserve the knoll. "Just the fact that KB Home honored the request of the original people whose land they are building on, it is so long overdue for developers to honor sacred sites. I truly believe they did the right thing."

Sayers, who lives in a Native American community outside Hollister, will join Ohlone elders from other parts of the state in walking the site with company representatives later this week. The elders, who had recommended KB Home fully set aside the parcel containing the knoll, will finalize details of the accord reached after numerous meetings since early August, when the remains of an Ohlone child were discovered.

During an archeological evaluation triggered by the discovery, researchers later recovered remains believed to be teeth and a skull fragment unrelated to the child or each other, officials said. Forensic dogs identified another area on the knoll believed to contain remains, but all sides agreed not to disturb it.

KB Home will establish a permanent cultural easement on land that would have contained a 2,200-square-foot house and driveway, a unit that would have been among the largest and most expensive planned for the community at Market Street and Isbel Drive. The preserved area, where all remains will be buried again, is attached to three acres already set aside to preserve the endangered spineflower.

"We essentially decided to do this out of respect for the elders and folks from the Native American community," said Ray Panek, senior vice president for forward planning at KB Home, who took part in the talks. "It will be just allowed to go to a more natural state. It seems like a good solution."

Panek said he did not have immediate estimates on lost revenue for setting aside the land or the total cost to the company for archeological research. The company agreed to bring in subsurface sonar equipment and forensic dogs at the request of Native American representatives, and two sets of archeologists worked on the site.

The city ordered the company to stop construction work around the knoll after the remains were recovered. Panek said he expected work would resume soon after the elders walk the preservation area.

"KB was generous in what they were willing to do and elders were flexible in understanding what was possible and meaningful," said Vice Mayor Don Lane, who participated in the talks.

Lane said the outcome was "a really nice conclusion," especially amid all of the demonstrations at the site and at City Hall since the first remains were found. "Everyone was a little pessimistic that goodwill wouldn't manifest."

For the past month, demonstrators have been calling for an end to building plans around the knoll. Protesters resumed their demonstrating Monday until they heard from officials outside City Hall that an agreement had been reached.

3.) http://www.k9forensic.org/historical.html (the site has links to many articles about canine forensics detecting Native American Burials)

Historical Grave Detection Group

Group has been formed by several Forensic Evidence
and Historical Human Remains Detection (HHRD) dog teams
under the umbrella of Institute for Canine Forensics

In archaeology, an HHRD trained canine with impeccable manners, slow and methodical search style, properly trained and certified, may be the Remote Sensing Tool of the future. ICF canine trainers are "writing the book" in this field. Certification standards are high insuring that the ICF certified canines are reliable, non-invasive tools to be used in modern archaeology.
tools to be used in modern archaeology.

4.) http://www.pressdemocrat.com/article/20091121/ARTICLES/911219966?p=1&tc=pg

Reclaiming Santa Rosa's century-old graves

By MARY CALLAHAN
THE PRESS DEMOCRAT

Published: Saturday, November 21, 2009 at 5:33 p.m.

Last Modified: Saturday, November 21, 2009 at 5:33 p.m.

The graves are thought to be well over 100 years old, forgotten over time, unclaimed and uncelebrated.

Photo Galleries

- Dogs Search Cemetery

Tiny yellow and red flags newly planted Saturday in several overgrown areas of the Santa Rosa Rural Cemetery began to acknowledge the loved ones who rest there and the history they represent.

But Rhea, Eros, Alice and Osara, four dogs trained to sniff out old bones, were focused firmly on the present as they criss-crossed designated areas of the 17-acre cemetery in search of human remains.

The canine foursome - as well as several others still in training - were brought to Santa Rosa by the Woodside-based Institute for Canine Forensics, which trains and deploys Human Remain Detection Dog teams.

Though some also work in search-and-rescue contexts and seek out human remains from recent tragedies, the Institute is the only such agency in the world focused on detection of historic remains, whether in law enforcement or archaeological contexts, representatives said.

Dogs associated with the Institute have been used, for example, to search for human remains at the home of a Hayward couple charged with kidnapping of Jaycee Dugard, who was snatched off a Lake Tahoe road at age 11 and kept for 18 years.

They've also identified Native American burial sites around the western United States, and served at New York City's Ground Zero and along the trail of the Space Shuttle Columbia, which exploded over Texas.

They came to Santa Rosa at the invitation of the Rural Cemetery's volunteer Preservation Committee. The organization hoped to determine whether human remains were buried in more than 100 plots recently discovered on maps long tucked away from human eyes and

never marked by gravestones at the cemetery, said Sandy Frary, who, with her husband Jim, is a key organizer for the committe.

Committee members thought it possible the plots had been mapped and never used, and wanted to find out, part of their effort to restore the cemetery fully and document its history in as precise a manner as possible.

The scent of cadavers lingers in the soil and can be sifted and distinguished with a dog's sensitive nose, though it's sometimes hard to pinpoint precisely from where the odor comes, handlers said.

Dogs can even detect remains in ancient sites after centuries f burial.

The gravesites sought Saturday were probably closer to 130 or 140 years old, though there was plenty of doubt they were there in the first place - especially on a rough, sloping area along Franklin Road where 12 flags were left Saturday, indicating multiple bural plots.

Nobody had thought there were burials in those sections of the cemetery, Sandy Frary said, adding, "I'm totally amazed."

Another 10 or so flags were scattered about a meadow and adjacent hillside at the north side of the cemetery, while half a dozen others remained planted along a back road near the top of the acreage.

Volunteers still hope to rake the areas, pull up weed cover and probe around to see what more can be determined, Frary said.