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**Comments on Notice of Availability of Preliminary Staff Assessment for
Proposed "Black Rock Geothermal Project", 23-AFC-03 and "Morton Bay Geothermal
Project", 23-AFC-01**

Dear CEC Commissioners and Staff,

September 4, 2024

This comment letter is sent on behalf of Carmen Lucas, Kwaaymii Laguna Band of Indians, on the PSAs for the proposed BHER Black Rock and Morton Bay Geothermal Projects. It is additional to the letter previously docketed regarding the Elmore North Geothermal Project, 23-AFC-02, submitted on her behalf by my office prior to the consolidation of the comment periods. The comments herein also apply to that AFC.

We have appreciated the CEC staff effort to consult both in the field and via Zoom to identify tribal cultural resources and analyze the effects of the proposed project on them. The following comments are geared towards improving analysis, resulting in a more complete review of proposed effects and better fulfillment of mitigation requirements.

General Comments:

1. Concurrent Proceedings.

We would note that running three proceedings concurrently has been a hardship for us, even with the two-week gap between PSA publications and the extended comment period. This burden has been further magnified by the continued delay in access to CEC and County engagement grants. This has exacerbated the unlevel playing field for the public and consulting tribes.

2. Workshops.

We would have appreciated advance notice for the Technical and Mitigation Workshops so that tribal legal counsel could have attended. Also, we note that the Tribal Mitigation Workshop scheduled for September 6, 2024, falls *after* the now consolidated comment deadline on the three PSAs. The three BHER projects and their three PSAs relate to one

another and may be informed by the upcoming Workshops. We therefore reserve the right for continued consultation with CEC staff on these three proposed projects and proposed conditions of certification.

3. CEC Authority and Discretion.

We urge the CEC and its staff to exercise their regulatory discretion to the maximum extent. My client watched the consultants for the applicant at the recent Technical and Mitigation Workshops try to reduce, limit, streamline, erode, or strike most of the mitigation measures discussed at the Technical and Mitigation Workshops. We urge the CEC and its staff to be protective of the environment and take a precautionary approach regarding project conditions and mitigation. This is particularly important given the sensitivity of the environment, landscape, and tribal cultural resources within which the applicant is seeking to site its three new industrial plants. Instead of putting extensive resources into a relentless pressuring of CEC staff and consultants to limit mitigation obligations and challenge the tribal cultural resource, the applicant's consultants should be helping the applicant focus more on how to be a good neighbor. This includes developing meaningful community benefits; long term, funded participatory pathways for residents and consulting tribes; and corporate accountability measures as part of their project applications.

4. Deferred Assessments, Plans, and Mitigation.

Many of the measures as proposed in the PSAs rely upon assessments, plans, and reports to be prepared at some future time including post project approval. Pursuant to CEQA, deferred mitigation is disfavored; if such measures are adopted by the CEC they must address required elements including performance standards. For any plans that are deferred, we also request that an opportunity for review of the draft plan be provided to the public and additionally if such plans involve tribal cultural resources, that consulting tribes be provided an opportunity to consult on the scope of the evaluation, plan, or report and to review and comment on a draft of the evaluation, plan or report.

Specific comments:

1. Tribal Cultural Resource Determination.

We express our appreciation of and support for the staff's finding of a tribal cultural resource, the Southeast Lake Cahuilla Active Volcanic Cultural District (SELCAVCD). This Cultural District includes the Obsidian Butte, Rock Hill, Red Hills, Old Mud Pots, New Mud Pots, and Mullet Island cultural features as well as the setting and landscape within which they are located and interconnect.

We note that regardless of whether a particular regulatory standard exists for a resource or aspect of environmental quality, effects on the condition and integrity of the SELCAVCD, a historic property, must be considered and avoided. We look forward to further consultations with staff to refine the tribal cultural resource analysis, including the evaluation of the historic property under the historic preservation criteria and the objectives and wording of relevant mitigation measures in the FSA.

2. Need for Interdisciplinary Coordination.

The quality of analysis of certain topic areas in the PSAs would have benefited from tribal scoping and interdisciplinary coordination and review by CEC staff. In fact, a meaningful analysis of tribal cultural resource landscapes necessitates an interdisciplinary approach.

One area in particular relates to noise analysis. In relation to tribal cultural resources, distance of a receptor from the project may not be the only measure. Tribal users, particularly those for cultural, education, and ceremonial purposes are often better categorized as sensitive receptors requiring a certain level of ambient sound quality to conduct those uses. Disruptive chronic noise and impulse noise at the existing facilities can already be heard at Obsidian Butte, Rock Hill, and the Old Mud Pots. These effects would only worsen with the addition of additional plants nearby. What efforts are being made to reduce noise effects to the cultural landscape? For these reasons, we support Intervenor CURE's comments at the July 31, 2024, Workshop related to BIO-14 (noise) and support any measures that reduce thresholds for noise and oppose any requests to raise noise thresholds for any project activities.

Another topic area that could have benefited from interdisciplinary analysis relates to visual impacts. The proposed projects are an industrial use in a largely natural and agricultural setting. Once again, tribal cultural users are highly sensitive to visual effect. This also includes sensitivity to night lighting, an important aspect of tribal cultural use, such that the proposed project and its spill over lighting would further diminish the dark night sky of the area specific to the cultural features and generally within the cultural district. Nighttime visual analysis should consider nighttime parking area lighting, headlights, and nighttime construction and visual simulations could be useful.

Tribes are also concerned about the buildup of haze or particulates that can diminish or shroud long views to cultural landmarks from the cultural district. In contrast, the Visual Ratings forms, as completed, appear to reflect a more general and almost pseudo-scientific assessment approach. It was as if the preparer of this section never visited the site in person. The assessment also does not reflect effects of the proposed project on

tribal cultural uses or the experience of the sacred tribal landscape, its feeling and association, essential aspects of effects to tribal historic properties.

Further, both noise and visual effects can be intensified by cumulative effects, discussed below.

3. Project Description Clarity.

We are concerned that the project descriptions may not include all the facilities or components necessary for or related to the proposed projects. For example, it appears the line between the proposed IID switching station and the transmission line connecting to the Coachella Valley substation was not part of the analysis. Similarly, we would also object to decommissioning being removed from project analysis as was requested by the applicant's consultants at the Technical and Mitigation Workshops. (See also comments below in Construction Timing and Phasing section).

Additionally, the presence and extent of any potential directional or slant drilling or wells into the SELCAVCD should be fully described and shown on a graphic. Tribal sacred areas are often not just what can be observed or experienced on the surface of the ground, but rather often extend in space below and above the ground.

At the Technical and Mitigation Workshops, the applicant stated that lithium extraction is not a part of these PSAs. Left unsaid was what *would be* the process of approval for any future DRE or other extraction methods. Any such process must include a public process for consideration of the project and its environmental effects and require tribal consultation. Environmental exemptions would not on their face not provide this. The potential for piecemealing or avoidance of cumulative effect analysis should be clarified in the FSAs.

4. Cumulative Effects Analysis Incomplete.

A cross-stakeholder concern is the cumulative effects analysis which appears to have omitted several proposed projects. These are not speculative, as they include those that have even issued Notices of Preparation under CEQA, including (but not limited to) the County of Imperial's Lithium Valley Specific Plan; the draft PEIR for that plan is expected to be released for public review the first part of 2025. The location of that Specific Plan encompasses the area of the proposed project as well at the SELCAVCD. Effects and mitigations for these PSAs must consider all cumulative effects.

5. Water Availability Unsupported.

Ms. Lucas is very concerned that insufficient water is available to support the proposed projects as well as environmental quality. This concern is magnified when considering all

three BHER proposed projects and other cumulative projects. There appears to remain a significant math problem regarding water availability versus project consumptions that has yet to be addressed. Moreover, Ms. Lucas is concerned about the proposed project's contribution to the drying of the Salton Sea, California's largest lake and an important stop over on the Pacific Flyway, and how that could in turn affect the SELCAVCD and the resources within it.

At the Technical and Mitigation Workshops, the applicant stated that its three projects would use no local groundwater. What was meant by *local*? Would groundwater be taken from other sensitive locations in our region? If so, the effects on those extraction locations also must be considered as project effects. Further, any restriction on groundwater use should be clearly stated in the FSAs and any deviations require environmental analysis and mitigation reflected in a public workshop and require tribal consultation.

6. Effect on Plants and Animals.

Ms. Lucas is deeply concerned about the proposed project's effect on plants and animals within and near the proposed projects' locations. Biological resources often are an essential element of cultural landscape. For example, we have observed burrowing owls along the road edge entering Obsidian Butte. Burrowing owls are just one of the animals important in Tribal Legends. There is also concern for the proposed projects' effects on the well-being and operations on the Sonny Bono National Wildlife Refuge.

For these reasons, Ms. Lucas supports and concurs with the comments and suggested improvements from Intervenor CURE at the July 31, 2024, Workshop including those related to BIO-4 (canals and drains), BIO-5 (night lighting, injured wildlife, WEAP training), BIO-6 (field survey frequency and qualifications), BIO-7 (species detection), BIO-8 (baseline invasive conditions established prior to construction and biological and tribal monitors to be in area of vegetation removal), BIO-9 (jurisdictional clarity and surveys reflecting dynamic nature of biology in area), BIO-9 (jurisdiction), BIO-10 (performance standards for invasive species), BIO-11 (long term monitoring and success criteria), BIO-12 (bird density and species specific buffers), BIO-13 (address entire suite of special status birds), BIO-14 (noise levels and sensitive species behavior), BIO-15 (clarify burrowing owl exclusion plan), BIO-16 (more specificity for burrowing owl avoidance and compensatory habitat), BIO-20 (install avian collision markers along whole line), and BIO-22 (need for complete jurisdictional mapping, consideration of all project elements, and flexibility for siting).

Also at the July 31, 2024, Workshop, Ms. Lucas requested that qualified tribal monitors be required to be present whenever biological monitors are required during pedestrian surveys

and construction activities (to include preconstruction activities). Tribal monitors shall be sufficient in number for the scope of activities and be compensated by the applicant at professional rates. This should be included as a condition of approval or mitigation measure.

Ms. Lucas also requests that a joint orientation by the biological and tribal monitors for workers be held prior to entry into the field so that Ms. Lucas and other affiliated tribal entities can explain the connection between tribes and the biological resources present to set the context for the work and to promote respect in the field. Orientations to be held at sufficient intervals so that workers can be timely on-boarded. All tribal monitors and tribal representatives conducting the orientation to be compensated by the applicant at professional rates. This should be included as a condition of approval or mitigation measure.

7. Induced Seismicity.

The PSA does not analyze the potential of the proposed project, alone or in combination with other geothermal facilities and future development, to cause or contribute to induced seismicity. One or more qualified, independent scientists should be retained to study this issue prior to project approval so that adjustments in the project and its conditions of approval can be made. This should include adaptive management features in case “unexpected” environmental conditions or seismic events occur.

8. Site Plan Rearrangement.

Ms. Lucas continues to question the need for the size and proposed locations of the projects so close to the SELCAVCD. If these three projects cannot be moved to locations less impactful to the district, the three site plans should be rearranged to reduce effects on the tribal cultural resource. Whether approached as mitigation or design features, rearrangement of site components to reduce effects should be pursued.

Relative to Black Rock, this could include a general reduction of overall bulk and scale and reorienting the site design so that the massing of the facility is visually more concentrated as seen from cultural features in the south and west of Obsidian Butte area. Moving the proposed plant would also have the benefit of moving the plant further away from the current primary entrance used by tribes to access the area, shifting facility impacts away from the path used by tribes to prepare themselves before they enter the cultural feature. Overall reduction in plant massing would also help reduce visual effects from the high point on Obsidian Butte.

Relative to Morton Bay, this could include shifting tall project elements on site to provide for a protected visual connection between the Old Mud Pots and both peaks of the Red Hill

cultural feature. Effort should also be made to reduce the height and consider the materials for any required site fencing or berms to reduce visual effects to the cultural features at the Old Mud Pots and also in the viewshed towards Red Hill. Such efforts should be done in consultation with consulting tribes. Because of the addition of a new facility, with induced personnel and cars to the area of the Old Mud Pots, consideration must be given to how to best protect the condition and integrity of the Old Mud Pots in consultation with consulting tribes. This could include the applicant funding a tribal site monitoring plan, potentially in conjunction with the owner Hudson Ranch.

The FSA must also correct the buffer discussion to better reflect information provided during tribal consultation and include a meaningful buffer analysis tailored to specific conditions at the SELCAVCD and its cultural features. To be clear, a specific buffer measured strictly in miles was not requested in consultation.

Feasible mitigation measures that reduce significant effects, even if their enactment may not lower those effects to insignificant, must still be adopted. In turn, modified site plans that reduce significant effects, can and should be incorporated into the Environmentally Superior Alternative (i.e., replacing the No Project Alternative with alternative site plans as the Environmentally Superior Alternative) to better align with the goals of CEQA analysis.

9. Construction Timing and Phasing.

The PSA did not appear to address the relative timing or phasing of the construction of the proposed three BHER projects; would they be concurrent? If serial, in what order would the facilities be constructed? When would the laydown, parking, and camps be installed? Are there restrictions in the conditions for how such facilities can be used and by whom? Would the “man camps” associated with the proposed projects contribute to Missing or Murdered Indigenous Persons? Where would the borrow pits be and are Tribal Monitors required during any extractive activities? What controls would be applied to prevent opportunistic dumping and extraction in these areas or in and around the district and its cultural features? Such dumping and extraction is already a problem in the area and should be stopped and controlled. These issues must be addressed in the FSAs.

10. Mitigation and Conditions.

We support that funding for both a SELCAVCD cultural report and nomination paperwork be secured such that a tribally driven and tribally managed CRHP/NRHP nomination for the SELCAVCD historic property can be prepared and timely submitted. We believe there is sufficient documentation to support staff’s CEC tribal cultural resource determination; this documentation would benefit the historic property and its appropriate management as well as future generations of affiliated Indian People.

We also support the following steps, mitigation, and conditions to offset project and cumulative effects. Some may be more project-specific, while others more programmatic related to the three BHER projects and cumulative effects. The development of such mitigation should be the result of tribal consultation and may include the following:

- Completion of a DPR form for the district in consultation with affiliated tribes and filing with the appropriate Information Center;
- Direct land set aside of one or more of the cultural features making up the SELCAVCD;
- Placing a conservation easement over one or more of the cultural features making up the SELCAVCD;
- Effecting a lease assumption of one or more of the cultural features making up the SELCAVCD;
- Creation of and meaningful funding for an entity with a 100% or majority of affiliated tribal membership to support management in perpetuity of any such land set asides, lands with cultural conservation easements, and/or long term leases;
- Funding for the rehabilitation and restoration of the cultural features and lands within the SELCAVCD;
- Funding to support cultural engagement and educational activities of affiliated tribes in the SELCAVCD;
- Consulting tribes being added to the list of governmental entities to be provided notice, e.g., on noise mitigation, construction starts, etc., and be provided conceptual noise and light pollution control plans;
- Other measures developed through consultation.

In closing, Ms. Lucas has a vision for development in Imperial County that balances clean energy with the unique and irreplaceable tribal cultural and environmental resources that exist within the SELCAVCD and maintains the intangible aspects of culture. This vision includes protected tribal cultural features within a vibrant environment including the Salton Sea, healthy avian and wildlife species, and beautiful long range viewscoapes coexisting with carefully sited and effectively monitored clean energy. This vision can only be achieved through up front, meaningful project planning that includes early tribal consultation, robust surveys and studies, accurate environmental baselines, accountability of the applicant, transparency of process, and continued tribal engagement. Such facilities must also be good neighbors to Tribal and other community stakeholders.

It is our hope that these comments are helpful to you. We look forward to further amplifying these comments at upcoming Workshops and in continued consultation with staff.

Very truly yours,

A handwritten signature in black ink, appearing to be 'Courtney Ann Coyle', written in a cursive style.

Courtney Ann Coyle
Attorney at Law

Cc:

Carmen Lucas, Client File
Sierra Graves, CEC Tribal Liaison