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September 25, 2024

CALIFORNIA ENERGY COMMISSION
715 P Street
Sacramento, CA 95814

Re: Legal Effects of CEC Filing Pre-Project Approval Applications to Registers of Historic Places (23-AFC-01, 23-AFC-02, 23-AFC-03)

Dear CEC Commissioners and Staff:

Our firm represents the County of Imperial (the "County") with respect to the above referenced matters. The County is concerned that California Energy Commission ("CEC") staff have already begun implementing *unadopted* Mitigation Measure Cul/Tri-8[1] proposed for three Geothermal Plants, which may have unintended consequences for future projects in the region under the County's jurisdiction. Specifically, staff has stated it will start using CEC resources to draft applications to the Federal and State historic registers for a "Cultural District" whose existence was first alleged by one tribe. This alleged district falls completely outside of the project areas for the three Geothermal Plants (~7,500 acres inside the Lithium Valley). Such an action is problematic for several reasons:

- The CEC is exceeding its authority by voluntarily expending resources to aid one tribe in applying for listings on Federal and State registers of historic properties outside of the project area boundaries.
- Adding the proposed Cultural District to the Federal register would result in the National Parks Service having jurisdiction over all Lithium Valley projects.
- Listing of the proposed Cultural District jeopardizes the economic, environmental, and environmental justice benefits recognized in SB 125, including funding for the protection and preservation of habitat and tribal

[1] Mitigation Measure Cul/Tri-8 available on page 5.4-101 of the PSA for the Morton Bay Geothermal Project (MBGP): https://efiling.energy.ca.gov/GetDocument.aspx?tn=257470&DocumentContentId=93344. The PSA for the Elmore North Project is available at: https://efiling.energy.ca.gov/GetDocument.aspx?tn=256843&DocumentContentId=92656. The PSA for the Black Rock Project is available at https://efiling.energy.ca.gov/GetDocument.aspx?tn=257697&DocumentContentId=93594.

cultural resources, mitigation of dust from the Salton Sea, and access to clean water.

- There is insufficient evidence in the Preliminary Staff Assessments to support a finding that all 7,500 acres of the alleged Cultural District is a tribal cultural resource or eligible for listing on the Federal or State registries.
- Application for the listing of a Cultural District is not a legally defensible mitigation measure.

The County and the State of California are committed to developing the abundant lithium resources in the County and other renewable industries within an approximately 51,786-acre area adjacent to the Salton Sea, known as the "Lithium Valley Projects." As discussed in Senate Bill 125 "The Legislature finds and declares that promoting the development of a robust lithium production industry in the state to reduce the impact of climate change is a matter of statewide concern." (SB 125 § 6.) Experts believe that Lithium Valley could provide enough lithium to meet all of America's future demand and more than one-third of global demand. The geothermal powerplants will improve grid stability and reliability while providing clean, firm, and renewable power. These projects will drive local employment and provide tax revenue for a host of projects designed to improve public health in disadvantaged communities. In passing SB 125, the State has provided that tax revenue from the Lithium Valley Projects will be used for the protection and preservation of habitat and tribal cultural resources, mitigation of dust from the Salton Sea, and improvements to clean water access.

As summarized above, CEC staff's actions put these goals in jeopardy. The County asks the CEC to reconsider any plans to expend staff time or resources preparing applications for any particular area to be included on the State or Federal historic registries. Additionally, the County asks the CEC to reconsider the effectiveness and legality of requiring such applications as a mitigation measure in any Preliminary Staff Assessment ("PSA"), and to consider the impact such listings would have on the goals of the Lithium Valley Projects, on the environment, and on disadvantaged and environmental justice communities. Instead, the CEC should continue collaborating with the tribes and Project applicants for real solution that protect tribal resources, such as permanent conservation easements over Obsidian Butte and realignment of specific Project features such as cooling towers.

BACKGROUND

On September 6, 2024, the CEC held a PSA Workshop for Tribally Identified Issues in Imperial County relating to applications for certification of the Morton Bay, Elmore North, and Black Rock Geothermal Projects. During this meeting, CEC staff indicated that it intended to expend staff time and resources on drafting, finalizing, and submitting an application to nominate the alleged and self-titled Southeast Lake Cahuilla Active Volcanic Cultural District ("SELCAVCD") for inclusion in the California

Register of Historic Resources and National Register of Historic Places. Staff stated that it could move forward with these nominations before formal approval of Mitigation Measure Cul/Tri-8, which is proposed as a draft mitigation measure for the Morton Bay Geothermal Project PSA dated June 27, 2024. At the September 19, 2024, PSA Workshop, commenters expressed concern that some of the proposed geothermal production wells *may* be within the proposed SELCAVCD and that directional drilling may go underneath the District. Tribes proposed re-siting the geothermal plants and/or geothermal production wells; despite acknowledging the geothermal production wells are currently located for the best production and efficiency, but did not explain how directional drilling could impact any potential cultural resource.

Mitigation Measure Cul/Tri-8 provides:

> The project owner shall retain a professional cultural anthropologist to document the SELCAVCD on a National Register of Historic Places (NRHP) Nomination Form and submit the form to nominate the cultural district to the NRHP (successful nomination to the NRHP will automatically list the SELCAVCD on the California Register of Historical Resources as well). In the event that NRHP nomination is not attainable, the professional cultural anthropologist shall nominate the SELCAVCD to the California Register of Historical Resources. (PSA at p. 5.4-101.)

The only identified member of the Kwaaymii Laguna Band of Mission Indians alleges the SELCAVCD consists of "two discontiguous units …. The former contains the five volcanic domes of Obsidian Butte, Rock Hill, Red Island, and Mullet Island; two areas of Mud Volcanoes and Mud Pots []; the Pond of Good Water []; and the Saltwater Pond []. Unit B contains the Mud Volcanoes and Old Mud Pots []." (PSA at p. 5.4-54.) The first section is 7,407 acres and the second section is 27 acres. (*Ibid*.) However, *none of the three Geothermal Projects are within the alleged boundaries of the alleged SELCAVCD*. (See PSA, Figure 5.4-2 at p. 5.4-56; compare PSA Figure 1-1 at p. 1-11.)

The PSA concludes "the SELCAVCD is a tribal cultural resource for the purposes of CEQA," but that "[t]he CEC staff has not identified tribal cultural resources that are already listed on the California Register of Historical Resources." (PSA at p. 5.4-63.)

THE CEC'S PROPOSED ACTION EXCEEDS ITS AUTHORITY

Staff have inappropriately offered CEC resources to specifically move forward the nomination process for the tribe's alleged cultural district outside of the PSA and mitigation measure context. Staff lacks the power, and CEC lacks jurisdiction, to take these actions outside of the context of powerplant permitting and formally approved mitigation measures. Indeed, even the proposed mitigation measure places the responsibility on the Project applicants, not the CEC, to retain a cultural anthropologist to draft the applications.

The CEC's own "Resolution Committing to Support California Tribal Energy Sovereignty" does not contain any support for staffs' actions in moving for the listing of new cultural resources districts.[2] To the contrary, that Resolution provides that "that all actions taken pursuant to this commitment to Tribal energy sovereignty, in accordance with the Administration Policy, shall: … (iii) not conflict with the Governor's stated policy priorities, such as housing and homelessness and ***climate action*** …" (Emphasis added.) As discussed below, these actions are inconsistent with the CEC's resolution by creating roadblocks to implementation of the Lithium Valley Projects.

Additionally, CEQA case law[3] holds that merely listing or noting the existence of cultural resources, such as with a plaque or in a formal survey, is not a proper mitigation measure because it does not reduce the actual impacts of a project on those resources. (See *Architectural Heritage Ass'n v. County of Monterey* (2004) 122 Cal.App.4th 1095, 1119 [Exhibition of a plaque does not mitigate impacts to a historic resource.].) Accordingly, nominating and listing any specific proposed cultural resources district to the state or federal registers is not a proper mitigation measure. Furthermore, this does not constitute mitigation for the Geothermal Plants, and lacks the constitutional nexus and rough proportionality to require the applicant to implement such measures.

A LISTING ON THE FEDERAL REGISTRY WOULD PUT FUTURE PROJECTS UNDER THE JURISDICTION OF NATIONAL PARKS

Sites that are listed or eligible for listing in the National Register of Historic Places are subject to the procedural protections of the National Historic Preservation Act ("NHPA"). (54 USC § 300101 et seq.) The National Parks Service is responsible for carrying out the Historic Sites, Buildings and Antiquities Act, the National Historic Preservation Act, and other laws relating to protecting and preserving historic sites. (*Ibid*.) The NHPA created the "Advisory Council on Historic Preservation," an independent federal agency which has a crucial role in implementing review of Federal "undertakings[4]" under former[5] Section 106 of NHPA.

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[2] Available at https://www.energy.ca.gov/filebrowser/download/5280.

[3] The CEC does not prepare environmental impact reports (EIRs), but instead prepares environmental assessment documents that are functionally equivalent to EIRs under its certified regulatory program. Regardless, PSA frequently cite to and rely on CEQA statutes and the CEQA Guidelines as a basis for the type of analysis required.

[4] A Federal agency that "undertakes" any activity must take into account its effect on any historic property." (54 U.S.C. § 300608.) An "undertaking" is broadly defined, and includes "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency … " (54 U.S.C. § 300320.)

[5] In 2014, Congress created new U.S. Code Title 54 and combined existing laws related to the organization and management of the National Park Service. This includes most of the provisions of the National Historic Preservation Act, which are now found in 54

Section 106 requires that before issuing any license or approving the expenditure of federal funds on an undertaking, a federal agency must do two things: (1) take into account the impact of the undertaking on any property designated in or eligible for the National Register; and (2) allow the Advisory Council a reasonable opportunity to comment on that undertaking. Federal agencies "must make a reasonable, good faith effort to identify historic properties," "determine whether identified properties are eligible for listing on the National Register," "assess the effects of the undertaking on any eligible historic properties found," "determine whether the effect will be adverse," and "avoid or mitigate any adverse effects." The Advisory Council has the opportunity to submit non-binding comments, but as a practical matter can influence the outcome of a contested Federal agency action.

Here, the Federal Government owns a significant amount of the land both under and surrounding the Salton Sea.[6] Future Lithium Valley Projects will require Federal agency approval.

LISTING THE PROPOSED CULTURAL DISTRICT WILL JEOPARDIZE THE BENEFITS OF THE LITHIUM VALLEY PROJECTS INCONSISTENT WITH STATE POLICY

The inclusion of the SELCAVCD in the National Registry of Historic Places would mean that any Federal agency must comply with Section 106 procedures before approving a project. The introduction of an entirely separate federal process, running in parallel to state and local procedures, will delay the production of vitally needed lithium to ensure this County's transition to renewable energy. Indeed, the PSA itself notes that Ms. Lucas is aware of the inter-related nature of these Geothermal Plants and lithium extraction activities, stating "[a]lso of concern, is the potential to co-locate future lithium extraction activities at these locations." (PSA at p. 5.4-50.)

The PSA, similar to CEQA documents, must disclose any impacts from mitigation measures and inconsistencies with state and local planning efforts. (CEQA Guidelines, §§ 15125, subd. (d), 15126.4, subd. (a)(1)(D).) CEC's own regulations require environmental analysis of powerplants to review compliance with applicable laws. (20 Cal. Code Regs, § 1744; Pub. Resources Code, § 25525.) If the listing of cultural resource districts is still proposed as a mitigation measure, the CEC must analyze whether delays and regulatory burdens from the new listings will result in conflicts with climate change plans or other plans, including SB 125 and the County's Lithium Valley Specific Plan, as well as any impacts to Environmental Justice. The draft PSAs lack this requisite

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U.S.C. § 300101 et seq. The former National Historic Preservation Act is now formally known as "division A of subtitle III of title 54, United States Code." Nonetheless, the Act's title and section numbers from before the 2014 reorganization (e.g., Sections 106 and 110) remain in widespread use. Accordingly, they are referred to below by their original title and section numbers.

[6] http://www.saltonsea.ca.gov/SSea_ownership.pdf

analysis, which will likely show that the added burden of listing the cultural resource will conflict with state and local policies supporting development of the Lithium Valley Projects. As described above, the Lithium Valley Projects will drive local employment and provide tax revenue for a host of projects designed to improve public health in disadvantaged communities, and SB 125 specifically provides that tax revenue from the Lithium Valley Projects will be used for the protection and preservation of habitat and tribal cultural resources, mitigation of dust from the Salton Sea, and improvements to clean water access. The Lithium Valley Projects would provide extensive economic opportunities, including job creation, to a disadvantaged community facing 14 percent unemployment and a 21 percent poverty rate.

DESIGNATION OF THE ALLEGED CULTURAL DISTRICT AS A TRIBAL CULTURAL RESOURCE AND IN THE STATE AND FEDERAL HISTORIC REGISTERS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

We also have concerns about whether there is substantial evidence to support the designation of the alleged "SELCAVCD" in its entirety as a tribal cultural resource. Tribal Cultural Resources were statutorily defined by AB 52 in 2015, which "[e]stablished *a new category of resources* in [CEQA] … that consider the tribal values in addition to the scientific and archaeological values …." The existence of these resources must be supported by "substantial evidence." (See Pub. Resources Code ,§ 21074, subd. (a).) This standard is reiterated in the PSA itself. (PSA at p. 5.4-81.) Substantial evidence is statutorily defined as including "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (Pub. Resources Code, § 21082.2, subd. (c).) "[U]nsubstantiated opinion or narrative…is not substantial evidence." (*Id.*) For listing in the National Register of Historic Places, applicants must provide "substantive information on the property, including a description, specific boundaries, its significance under National Register Criteria, and an explanation of why the property is eligible for listing in the National Register." (36 C.F.R. § 63.2.)

CEC Staff indicated at the September 9 meeting that it believed that it was "good enough" that a single tribe member asserted the existence of the SELCAVCD, a sentiment shared by Carmen Lucas of the Kwaaymii Laguna Band of Indians. Indeed, Ms. Lucas was the *only* tribal member who expressed an opinion that all 7,500 acres of the SELCAVCD is a tribal cultural resource. While there is likely evidence that specific resources such as Obsidian Butte are tribal cultural resources, it does not appear that there is substantial evidence that 7,500 acres is a tribal cultural resource. Indeed, other evidence presented in the PSA suggests that large portions of the SELCAVCD are not tribal cultural resources. (See PSA at p. 5.4-25 [Regarding the mudpots, a member of a tribe states that "[n]o one could go close to them, for the ground was sticky and soft and the air was poisoned with gas," and that "[t]he Indian people do not go very near them. It is very dangerous and there is nothing to go to them for. The Indians called the place Par-powl, which means water bewitched, and they stayed away".].)

Furthermore, definition of a tribal cultural resource considers "the tribal cultural values in addition to the scientific and archaeological values," a broader standard than the criteria for listings on the state and federal historic registers Statements by tribe members, by themselves, are therefore not substantial evidence that all 7,500 acres of the SELCAVCD meet the National Register Criteria. .

The County believes a better way forward for legally-defensible protection of these resources is found in the measure suggested by the Geothermal Project applicants. These measures include, but are not limited to, conservation easements over Obsidian Butte, and realignment of the Morton Bay cooling tower, and adjusting the location of the Black Rock facility.

Very truly yours,

MARGARET M. SOHAGI
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