Appellate Case No.: D085747

IN THE COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH DISTRICT, DIVISION ONE

COMITE CIVICO DEL VALLE, a Non-Profit Corporation; and EARTHWORKS, a Non-Profit Organization,
Petitioners/Appellants,
v.
COUNTY OF IMPERIAL; and DOES 1 through 4,
Respondent;

CONTROLLED THERMAL RESOURCES (US), INC.; HELL'S KITCHEN POWERCO 1, LLC; HELL'S KITCHEN LITHIUMCO 1, LLC,
Real Parties in Interest

On Appeal from Ruling of Imperial County Superior Court
Department 5
Hon. Judge Jeffrey B. Jones
Imperial County Super. Ct. No. ECU003425

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION.

Appellants challenge the County of Imperial's ("County's") approval of Controlled Thermal Resources ("CTR's") proposed geothermal power plant and related direct lithium extraction ("DLE") from geothermal brine facility ("Project") located near the southeastern shore of the Salton Sea and near Niland, California ("Site"). (Administrative Record ["AR"] 187, 189).) The Project includes various land use entitlements (e.g., conditional use permits and variances). The Project's approvals violate provisions of the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.) ("CEQA") and its implementing regulations (14 Cal. Code Regs. § 15000 et seq. ["Guidelines"]).

Generally, DLE refers to a set of physical and chemical processes that directly remove lithium from brine, similar to how a water softener removes minerals from water. (AR 12984.) While DLE technology can be less impactful to the environment than traditional lithium production methods, it nevertheless uses significant amounts of water and generates potentially hazardous materials. (AR 12878-12879, 12891, 12914, 12915, and 12982.) The Project would create a high-water demand in an arid desert environment where the drying out of the Salton Sea worsens severe air pollution impacts. The

Project approval relied upon a Water Supply Assessment ("WSA") assessing only 20 years of the 50-year Project's water demand from the Imperial Irrigation District ("IID").

Respondents failed to properly analyze the Project or consider feasible mitigation measures and conditions due to a deeply flawed environmental impact report ("EIR")—as pointed out by numerous technical experts, academic experts, engineers, tribes, and public agencies—including substantial comments submitted by the IID critical of the EIR's water supply impact analysis (AR 2438-2453), especially in light of the rapidly shrinking Salton Sea (AR 2446-2450) creating air pollution impacts from airborne dust and toxins. Such air pollution is a leading contributor to why the area is identified as a disadvantaged community under laws intended to protect such overburdened communities from further pollution. (AR 12958, 12986.)

Also legally invalid was the lack of meaningful tribal consultation as required pursuant to Assembly Bill No. 52 (2013-2014 Reg. Session) ("Assem. Bill No. 52"). The EIR failed to evaluate impacted tribally-identified cultural resources or to mitigate those impacts by providing even a single tribal monitor or alternative to avoid impacts, despite requests made by Native American tribal leaders and urged by several academic experts.

In sum, the County's Project approval was deeply flawed, relying on missing analysis, inadequate consultation procedures, and unsubstantiated assumptions, which prejudicially skewed the Project's environmental analysis—resulting in significant impacts going unanalyzed and feasible mitigation measures being omitted— particularly as it relates to water usage, air impacts, and tribal cultural resources.

II. STATEMENT OF ISSUES ON APPEAL.

This appeal presents the following issues:

1. Did The EIR Overstate Water Availability From IID Over the Project's 50 Year Life in Violation of CEQA?
2. Did the EIR Omit Air Impact Analysis and Mitigation for Disadvantaged Communities in Violation of CEQA?
3. Did the County's Failure to Consult With Tribal Representatives, Identify Significant Tribal Cultural Resources, and Mitigate Impacts Violate CEQA?
4. Did the EIR Understate and Fail to Mitigate Cumulative Impacts in Violation of CEQA?

The answer to each of these questions is yes.

III. STATEMENT OF RELEVANT FACTS.

A. The Project's Novel Direct Lithium Extraction Operation.

At its most basic, the Project includes (1) a 49.9-megawatt geothermal power plant called Hell's Kitchen Powerplant 1 ("HKP1"), (2) mineral extraction and processing facilities utilizing Direct Lithium Extraction technology ("HKL1"), and (3) other facilities for the handling, packaging, and shipment of mineral byproducts. (AR 42-43.) After geothermal brine is pulled from deep underground to generate geothermal energy at the HKP1 power plant, it would be processed for mineral extraction at the HKL1 DLE plant and subsequently returned to HKP1 for reinjection into the ground. (AR 199-200, 203-204, 12990-12995.) As relevant here, the Project's DLE plant relies on an extraction process requiring a significant amount of freshwater, approximately 6,500 acre-feet[1] per year ("AFY"). (AR 10163.)

B. IID Water and The Shrinking Salton Sea.

IID manages an entitlement of 3.1 million acre-feet ("MAF") of Colorado River water for Imperial Valley, 97 percent of which is used for agriculture and IID reserves up to

[1] "An acre-foot is 43,560 cubic feet. Colloquially, it is an irrigation-based measurement equalling the quantity of water required to cover an acre of land to a depth of one foot." (*Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 182, fn. 1.)

25,000 AFY for non-agricultural industrial use. (AR 363, 13000.) In 2022, after decades of drought, the federal government called for cutting between two to four MAF of Colorado River water use, with California agreeing to conserve approximately 1.6 MAF by 2026—the majority of which would come from IID water cutbacks. (AR 13000.) These types of water cuts acutely affect the Salton Sea, which is a large terminal lake presently receiving Colorado River water primarily through drainage from agricultural fields. (AR 12981, 13001-13002.) As the Salton Sea recedes due to evaporation and other causes, it exposes "previously inundated seabed" (called "playa"). (AR 5916.) Due to years of agricultural runoff, the lakebed playa contains harmful chemical deposits from pesticides and fertilizers. (*Id.*, AR 12913-12914.)

When the Salton Sea experiences decreased water inflows, the shoreline recedes further and exposes more playa, resulting in greater air quality impacts like asthma and other respiratory illnesses in nearby frontline communities. (AR 12877-12878.) These air pollution effects were the subject of public objections, pointing out the community "to the west and east of the plant" are designated pursuant to Assem. Bill No. 617 as communities most impacted by poor air quality for which "Community Air Protection Programs" are created. (AR

12944 [LCJA].)[2] The Project is also located "within a disadvantaged community as identified under Senate Bill (SB) 535 (De Leon, 2012.)" (AR 2420, 12958.)[3]

C. CEQA Review and Swift Project Approval Hearings.

In March 2022, the County released a Notice of Preparation ("NOP") of the Draft EIR, which received multiple comments urging a thorough review. (AR 12751-59, 12775-77.)

In August 2023, the Draft EIR was initially released with missing sections that were subsequently released in October 2023. (AR 12799.) Appellants and others submitted extensive comments, including multiple letters from experts and academics (eight letters in total). (AR 2482-2531.) Other Commenters included several responsible or trustee agencies, i.e., California State Lands Commission (SLC) (AR 2417-28; 12955-12958 [same]), California Department of Fish and

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[2] See Health & Safety Code section 44391.2 subdivision (b)(2), requiring implementation of "a statewide strategy to reduce emissions of toxic air contaminants and criteria air pollutants in communities affected by a high cumulative exposure burden."

[3] SB 535 added sections 39711, 39713, 39715, 39721, and 39723 to the Health and Safety Code. In part, it requires that 25% of the Greenhouse Gas Reduction Fund is spent on projects that benefit designated disadvantaged communities.

Wildlife (AR 2424-2428), and IID submitting extensive comments particularly regarding the EIR's water analysis (AR 2438-2453).

As noted, IID reserves up to 25,000 acre-feet per year ("AFY") for non-agricultural industrial use per IID's adopted Interim Water Supply Policy ("IWSP"). (AR 3928, 13000.) The Project as initially proposed would require approximately 6,500 AFY from the 25,000 AFY allocation. (AR 2301-2303, 10149, 10163.) IID called certain critical EIR disclosures assuming the availability of such water to be "all inaccuracies." (AR 2450.)

In December 2023, the County released the Project's Final EIR, which included minimal revisions to the EIR, with a cursory four-page response to Appellants' robust Draft EIR comments. (AR 2532-2535.) Further, the Draft EIR comments submitted by Leadership Counsel for Justice and Accountability (LCJA) dated October 10, 2023 raised numerous health-related and other issues but were omitted from the Final EIR, as were any responses to them. (AR 12924, 12943 -12950.) The Final EIR's response to IID's detailed, 15-page letter (AR 2438-2453) was a mere two pages (AR 2454-2455.)

Over the objections of Appellants and others, such as Tribal Elder Carmen Lucas of the Kwaaymii Laguna Band of

Indians ("Kwaaymii Laguna Band") (AR 11370-72, 11380-83, 11387-91), the County Planning Commission approved the Project. Appellant Comite Civico Del Valle timely appealed to the County Board of Supervisors (AR 12862-13012.)

Shortly following the Planning Commission's approval but prior to County Board of Supervisors' approval, Real Party in Interest CTR announced its intentions to add six more phases to its geothermal/DLE facilities—thus converting the Project site from a single stage lithium extraction facility into a seven-stage, 190-acre lithium development campus (Respondents' Appendix (RA) [4] pp. 221-222). CTR confirmed the seven-stage plan was reflected on its website, albeit in "concept." (AR 11444, ln. 11.)

Also, around this time (December 5, 2023), the County released the NOP of an EIR for its own proposed Lithium Valley Specific Plan ("LV Specific Plan"), which aimed to further the development of the lithium extraction, battery manufacturing, and adjacent industry over a 51,786-acre planning area, which anticipated over 121 million square feet of buildings requiring over 100,000 AFY of water. (RA 174.) This high-water demand project was also omitted from the

[4] Respondents prepared a Respondents' Appendix under Rule 8.124, to be lodged with the Court with the filing of Appellants' Opening Brief. Appellants cite this Respondents' Appendix in lieu of preparing a separate Appellants' Appendix.

Project EIR's analysis (see AR 215), despite the County's planning staff and Board of Supervisors being informed of the LV Specific Plan's significant water demands. (RA 170-171.) CTR's newly-announced seven stage lithium facility is also within the boundaries of this County-proposed LV Specific Plan. (See RA 211 [LV Specific Plan] and 222 [seven-stage].)

Leading up to the Board of Supervisors hearing on January 23, 2024, Appellants and others submitted multiple comment letters. On the eve of the Board hearing, the County released revised CEQA findings and mitigation program with a modified mitigation regarding the Project's water usage. (AR 11320-11321.)

Despite Appellants' request for a brief continuance (AR 11435-11442), and other objections made by Kwaaymii Laguna Band and representatives of other tribes (AR 11469-11471, 11474-11475, 11478-11480), the Board of Supervisors denied the appeal and approved the Project. (AR 6-8.)

Following a Notice of Determination for the Project (AR 1), Appellants filed this lawsuit.

D. Procedural History and Appealability.

Following a hearing on the merits on October 31, 2024, the trial court denied the writ of mandate in a ruling dated February 25, 2025. (RA 549.)

The trial court held that Appellants failed to show an absence of substantial evidence supporting Respondent's finding of no significant impact by the Project to water supply, that all "reasonably probable" projects were included (RA 553), that Appellants failed to show absence of substantial evidence regarding the County of Imperial's compliance with Public Resources Code section 21080.3.1's requirements regarding notification of and consultation with Native American Tribes (RA 554), and that the EIR adequately addressed "non-speculative air quality impacts." (RA 555.)

The judgment (RA 547) is final, so is appealable.

IV. STANDARDS OF REVIEW.

The issues before this Court must be reviewed as a matter of law or for substantial evidentiary support, depending on the issue. (*Sierra Club v. County of Fresno (Friant Ranch LP)* (2018) 6 Cal.5th 502, 514-515 ("*Sierra Club-Friant Ranch.*"))

Non-disclosure of information about the Project's water supply, tribal cultural resources, air quality, and cumulative impacts are omissions of information that are reviewed under the non-deferential question of law standard. (*Sierra Club-Friant Ranch, supra,* 6 Cal.5th 502, 515.) The omission of "material necessary to informed decisionmaking and informed public participation" is prejudicial. (*Id.* at 515.)

Respondents' failure to adequately consult regarding tribal cultural resources is a failure to proceed in a manner required by law, and thus is reviewed as a question of law. (*Vineyard Area*

Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 435 ("*Vineyard Area Citizens*").) The failure to follow procedural mandates of CEQA, especially those related to mandatory consultation requirements, is presumptively prejudicial. (*Fall River Wild Trout Foundation v. County of Shasta* (1999) 70 Cal.App.4th 482, 492.)

Courts enforce CEQA's procedural requirements "scrupulously." (*Vineyard Area Citizens, supra,* 40 Cal.4th 412, 435.) Multiple cases acknowledge the "policy of interpreting CEQA's scope as broadly as possible to accomplish the ends of the act." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259; *Natural Resources Defense Council, Inc. v. City of Los Angeles* (2023) 98 Cal.App.5th 1176, 1200 ("*NRDC*").)

V. ARGUMENT.

A. The EIR Inaccurately Overstates the Availability of Water to Supply the Project Over Its Entire 50-Year Life.

1. Regulatory Background of Water Supply Issues.

CEQA requires that an EIR "identify the significant effects on the environment of a project." (Pub. Resources Code § 21002.1 subd. (a).) The lack of a time qualifier on this requirement implies that *all* significant effects of a project during its lifetime must be identified and disclosed. Guidelines section 15358, defining the term "effects," includes in that definition both direct or primary effects, which occur "at the same time and place" as

the project being analyzed (Guidelines § 15358 subd. (a)), and *in*direct effects, which "are caused by the project and are later in time or farther removed in distance, but are still reasonably foreseeable." (Guidelines § 15358 subd. (b).) Guidelines section 15126 mandates that "All phases of a project must be considered when evaluating its impact on the environment," again implying that impacts during the whole expected life of a project must be considered and disclosed in an EIR. In the case of the Hell's Kitchen Project, that whole life is, as is documented in many places in the record, planned to be *50* years. (AR 415, 418, 208, 424, 2450, 2451.)

Senate Bill 610 (Sen. Bill No. 610 (2001–2002 Reg. Sess. ("SB 610")) amended Water Code section 10910 et seq. and Government Code section 66473.7 to require that when a project is subject to CEQA and exceeds specified size thresholds, the relevant water supply agency must prepare a WSA showing whether the water agency's total projected water supplies can meet the project's water demands over a period of *20* years. (AR 408, AR 1932 et seq.; see also *California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1480 [purpose and limits of SB 610].) SB 610, which applies to the Project, requires an analysis of a normal water year, a single dry water year, and multiple dry water years, in order to show that adequate water is available for the proposed Project in various scenarios. (AR 9309, 10136, 10187.) Thus, Sen. Bill No. 610 has requirements that in some ways parallel, but do not displace, CEQA's water supply analysis requirements.

2. Project Water Supply Assessments Analyzed Only 20-Year Water Availability for a 50-Year Project.

The standard of significance used by the County to assess water supply issues was whether supply would be "sufficient" to serve the project in normal, dry, and multiple dry years. (AR 415.) As important as long-term water supply information is, a WSA only examines the first 20 years of a covered project, as opposed to CEQA's demand that *all* significant environmental impacts over the *full life* of a project be examined. (*Vineyard Area Citizens, supra,* 40 Cal.4th 412, 439 [EIR failed to provide "coherent description of the future demand for new water due to growth"].)

The record contains *three* WSAs prepared during the course of a few months, each coming to differently stated conclusions. (AR 1993, 9029, 10135.) The first WSA, dated June, 2023 finds, presumably based on the Draft EIR, but without citing to any particular evidence in the Draft EIR:

> … the IID projected water supply is sufficient to satisfy the demands of this proposed Project in addition to existing and planned future uses, including agricultural and non-agricultural uses for a 20-year Water Supply Assessment period *and for the 50-year proposed Project life*.

(AR 1993, italics added.)

The second WSA, dated December 2023 finds water sufficient only "for the *30-year proposed Project life*." (AR 9098-9099; 9679, italics added. *See*, also, AR 9100, Finding 4.) This conclusion plainly backs off the findings of the first WSA that the

Project has a 50-year life, and that water would be available for those 50 full years. The third WSA, also dated December 2023 (AR 10208) concurs with the second, finding water sufficient for a "*30-year proposed Project life*." (AR 9958, italics added.)

The Water Supply Assessment fails to show full compliance with CEQA's requirement to analyze all phases of a project. The fact that two WSAs refer to the Project's life as being 30 years and not 50 years is significant in that it created a misleading impression of water availability for a large portion of Project life. (See *Center for Biological Diversity v. County of Los Angeles* (2025) 112 Cal.App.5th 317, 34 [admittedly "misleading" EIR prejudicially failed to inform the public regarding greenhouse gas impacts].)

3. The EIR is Uninformative Regarding the Project's 50-Year Life.

Where an EIR gives "conflicting signals to decision makers and the public about the nature and scope of the activity being proposed, the Project description was fundamentally inadequate and misleading." (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 655–656, fn. omitted; accord *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 84; *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.)

While the EIR repeatedly refers to the Project as having a 50-year lifespan (AR 208, 419, 2096, 2253), it also repeatedly refers to the Project as having a 30-year life. (AR 2066, 2067, 2309, 2313, 2398, 9873; AR 420 refers to both a 50-year and 30-

year Project life on the same page.) A 30-year Project life is assumed in the Mitigation Monitoring and Reporting Program (AR 131) but the Conditional Use Permit was issued by the County for 30 years, subject to ministerial renewal for a successive 30-year period, thus possibly extending the Project to 60 years with no further environmental review. (AR 10344 [Condition G-10].) The EIR's Project lifespan variations of *20 years* or more render the EIR inadequate because it does not analyze sufficient water to support the currently proposed Project- let alone future phases. (Pub. Resources Code, § 21002.1 subd. (a).)

4. The EIR's Assurance That Water Would be Available for the Project Lacked Foundation Given Regulatory and Physical Constraints.

Where water supplies are constrained by physical conditions and regulatory requirements, they cannot be considered as available for a project. (*Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 908 [where state cannot deliver water, "The entitlements represent nothing more than hopes, expectations, water futures or, as the parties refer to them, 'paper water.'"])

In the present case, the County assumed the availability of water supplies despite evidence to the contrary in various forms including comments from water supplier IID that water would not be available to the Project. (AR 2446.) The County's standard of significance- that sufficient water would be available in various years (AR 415)- was not met in the record.

a. The Imperial Valley is a Water Scarce Desert.

An elaborate network of state and federal statutes, regulations, governmental policies, and contractual agreements establishes various States', localities', and Tribal rights to receive and use Colorado River water. The Imperial Valley, the area where the Project would be located, receives only about two and a half to three inches of rain in an average year (AR 9063), has extremely hot temperatures (AR 9061), and receives more sunshine than any other area in the U.S. (AR 229). In short, it is a desert. Virtually all the water used in the Imperial Valley comes from the Colorado River, via the IID. (AR 9064; *Quantification Settlement Agreements* (2011) 201 Cal.App.4th 758, at 784 ["The district [IID] is the sole source of fresh water for the Imperial Valley, and all of that water comes from the Colorado River."]) IID objected to the EIR's discussion of usage of its limited and dwindling supply of water. (AR 2450 [calling EIR discussion "inaccurate".])

b. The Imperial Irrigation District Plays a Central Role in Allocating Scarce Water Resources and Objected to the EIR's Analysis of Water Supply.

Although it is not a party to this case, the IID and its policies play a central role here because of its nearly total control over water supplies for the Imperial Valley. (AR 363.) As an independent irrigation district, IID transports Colorado River water to the Imperial Valley, providing nearly *all* water used in

the Imperial Valley for agricultural, industrial, environmental, and municipal uses. (AR 9064.)

IID is, first and foremost, an irrigation district, with the overwhelming bulk of the Colorado River water it receives and distributes going to agricultural uses (94%) and the remainder (6%) going to non-agricultural uses. (AR 1958.) To provide a potential source of water for new *non*-agricultural projects, IID adopted the Interim Water Supply Policy ("IWSP"), which allows a non-agricultural project to contract for (i.e., to purchase) water from IID's agricultural water supply *if* the non-agricultural project "conserves" the water from agricultural uses. The first WSA claimed:

> The IWSP designates up to 25,000 AFY of water to be conserved from IID's annual Colorado River water supply, consumptive use cap, for new non-agricultural projects.

(AR 1960.)

However, this 25,000-acre feet a year of water is not a discrete pool or tank of water freely available to qualifying projects. Rather, as IID itself pointed out this water is "not readily available":

> The [EIR] analysis needs to be modified. The percentage of project demand to "IWSP water demand" is not related to an available "unallocated supply" but rather to an "unallocated water supply that *may be created and set aside for new non-agricultural projects*." *The Project's water supply needs to be conserved and is not readily available*.

(AR 2449, italics added; see, also, AR 1935.) IID further elucidated:

> [T]he IWSP does not dedicate or set aside 25,000 AFY of IID's annual water supply to serve new projects.… The remaining IWSP balance is not 23,020, … as this amount is under 19,620 AFY.

(AR 2450.) The IWSP does not create a new supply of water, it merely allows a project to conserve existing water (through, e.g., instituting new efficiency measures or fallowing cropland) and then to contract with IID to repurpose the conserved water for non-agricultural use. *As confirmed by IID (AR 2449), there is no provision in the IWSP for water to support the Project.*

c. Colorado River Allocation Laws and Agreements and Physical Conditions Severely Constrain Water Availability.

Water rights of Colorado River water are categorized within the Upper Basin and the Lower Basin (including California). (AR 1968). The division of this water has been the source of conflicts, negotiations, lawsuits, and federal intervention for over a century. (AR 1962; *Quantification Settlement Agreement [QSA] Cases* (2011) 201 Cal.App.4th 758, 772-773.)

In these divisions, the Lower Basin has been granted more water than the Upper Basin, and California has been granted the most water in the Lower Basin but the Interim Shortage Guidelines under which this allocation occurs expire at the end of 2025. (AR 1971.) Therefore, the WSA's statements of sufficient water availability (AR 1990-91) are more accurately described as assertions that IID could *possibly* provide that water to the

Project *if* IID continues to receive Colorado River water at the level of its full 3.1 MAF per year entitlement and *if* IID agreed to provide that water out of its allocation.

IID, the water supply agency with the fullest knowledge about its own water resources, did not agree water would be available for the Project. IID's EIR comments stated:

> [Discussing EIR Page 4.13-16 Paragraph two:] The entire paragraph needs to be deleted as the statements are all inaccurate. The existing and near-term On-Farm Efficiency conservation and System Efficiency conservation undertaken by IID and its customers under the QSA and other near-term agreements **do not ensure** that the project's water needs will be met over the next 50 years. Hell's Kitchen, in coordination with IID, will need to implement a conservation program or project to generate the 6,500 AFY of water supply that it will need for its operations.

(AR 2450, bolding and underlining in original, see, also, AR 2451.)

Further, IID commented that neither Hydrology/Water Quality nor Utilities should be included in subject areas found to be "Not Significant" (see AR 415 setting standard) based on the evidence in the first Water Supply Assessment and the DEIR. (AR 2451.) In other words, IID suggested that these impact areas would be significant. As a sister agency, its comments carry weight. (*Berkeley Keep Jets Over the Bay Committee v. Board of Port Com'rs* (2001) 91 Cal.App.4th 1344, 1367 ("*Berkeley Jets*").)

Several very well-credentialed academic experts also submitted comment letters concurring with IID's assessment of a

lack of water availability for the Project. Professor James Blair opined that the EIR's assumption that IID's share of Colorado River water is stable "is misleading because" of agreements to curtail water supplies. (AR 2492.) Dr. Blair also stated that "the IID might not receive its annual 3.1 million-acre feet per year (AFY) according to the Quantification Settlement Agreement (QSA)." (AR 12880; accord AR 12895 [Prof. Alida Cantor confirming 3 MAF reduction]; accord AR 12902 [Prof. Ali Sharbat asserting reduction]; accord AR 12919 [Prof. Kate Berry confirming 3 MAF reduction].)

Further, the federal government's role in managing Colorado River water means it "would take regulatory action to force these reductions in order to protect the Colorado River system in light of the prolonged drought conditions and climate change impacts." (AR 1936.)

Water reductions are likely to occur because of a severe and extended drought in the Colorado River Upper Basin. That drought triggered the need for the 2007 Interim Shortage Guidelines currently in effect. The drought has meant during the 2000-2022 period, only about 70% of the historic flow of water into Lake Powell occurred. (AR 9077.) A graphic in a WSA shows that Lake Mead[5] was only at about 29% of capacity in 2022. (AR 9085).

[5] Lake Powell and Lake Mead are two reservoirs storing water behind dams along the Colorado River. (AR 9076 [map], 9087).

The WSAs both state:

> Given the Colorado River conditions, the *likelihood that IID will not receive* its annual 3.1 MAF apportionment less QSA/Transfer Agreement obligations of Colorado River water *is no longer low* …. Given the prolonged drought conditions … *reductions to all basin contractors, including IID, are increasingly likely*.

(AR 1981, italics added. See, also, AR 9089.)

The County lacks substantial evidence to support its conclusion that, contrary to IID's view, the IID can provide adequate water to the Project for its 50-year life- or even only a 30-year life. The EIR's assertions that adequate water supplies are available to the Project are unsubstantiated and misleading.

B. The EIR Understates and Skews Cumulative Water Supply Impacts.

CEQA requires consideration of the full environmental picture of a project, including incremental effects that are "cumulatively considerable" when a project is viewed in the context of past, current, and future projects. (Pub. Resources Code § 21083 subd. (b)(2); Guidelines §§ l5065 subd. (a)(3), and 15130 subd. (a).) An EIR that "understates information" that minimizes the severity and significance of cumulative impacts effectively "impedes meaningful public discussion" and skews the decision-making process regarding the project, mitigation, and project approval." (*Citizens To Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 431.)

The final WSA suggests the Project would use merely 34.9% of the IID's unallocated water supply (i.e., 6,500 AFY out of 18,620 AFY), leaving 12,120 AFY still available. (AR 10149, 10199, 2535, 10208-09.) This understates and skews the water impacts that would occur. With mitigation measure UTIL-1, the EIR found no significant impacts with the Project's water usage. (AR 73-74, 2397.) The analysis overstates water availability for several reasons discussed below and the eleventh-hour mitigation measure does not address it.

1. Applicable Law Requiring Inclusion of Foreseeable Projects.

CEQA requires an EIR to consider a project's potential environmental impacts, which may be cumulatively considerable. (Pub. Resources Code § 21083 subd. (b)(2); see also Guidelines §§ 15064 subd. (h)(1), l5065 subd. (a)(3), 15130 subd. (b)(1)(A) and 15355 subd. (b).) The discussion should reflect the severity of the impact and likelihood of occurrence and be guided by the standard of practicality and reasonableness. (Guidelines § 15130 subd. (b).)

While unspecified and uncertain projects may be considered speculative (*City of Maywood v. Los Angeles Unified Sch. Dist.* (2012) 208 Cal.App.4th 362, 397-98), projects that are "under review [and] are sufficiently quantified" should be included. (*San Franciscans for*

Reasonable Growth v. City and County of San Francisco ("*San Franciscans*") (1984) 151 Cal.App.3d 61, 76; see also 77; see also *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715, 722-723 [Draft EIR did not attempt to calculate or even discuss the "vast difference between entitlements and the amount of water" that could be actually delivered.].) This includes any future project where the applicant has "devoted significant time and financial resources to prepare for any regulatory review." (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1127.)

The linchpin is whether the information about the cumulative project is "reasonable, feasible and practical" to include as part of the discussion. (*San Franciscans, supra*, 151 Cal.App.3d at 81; see also *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 868-872 [held reasonable to include water curtailment project when agency knew of pending Project at the time EIR was drafted, and knew if approved would limit ability to supply water].)

2. Water Is Not Available Because of the BHER Projects Competing for the Same IID Water Supply.

The EIR's cumulative water impact analysis should have considered foreseeable probable projects, including the proposed three geothermal developments proposed by BHE

Renewable ("BHER"), the County's own LV Specific Plan, and CTR's larger, late-disclosed plans for six more lithium extraction facilities (i.e., seven-stage campus). (Pub. Resources Code § 21083 subd. (b)(2); Guidelines §§ l5065 subd. (a)(3), 15130 subds. (a) and (b)(1)(A).)

IID's comment letter urged consideration of "the three BHE Renewable projects currently under the permitting process: Morton Bay Geothermal, Black Rock Geothermal, and Elmore North Geothermal. These projects are closer and more related and similar in nature than some of the solar projects noted that are also pending approval." (AR 2446.)

The EIR does not consider these three geothermal projects proposed by BHER needing a total of 13,165 AFY of water (AR 2493). The EIR discloses it did not consider these three BHER projects (see AR 215), but it claims it did not have to because they are located more than a mile away from the Project Site. (AR 9881.) This excuse is clearly invalid, not substantial evidence, and insufficiently informative to the public. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 404 ("*Laurel Heights I*").)

All of the three BHER geothermal projects use the same source of IID water (i.e., non-agricultural, industrial use), and IID's comments on the Draft EIR explicitly identified these

three projects as "related and similar" projects that should have been considered. (AR 2446.) Hence, these four geothermal projects (the Project and the BHER projects) alone total 19,665 AFY of water, which exceeds IIDs 18,620 AFY total unallocated water supply (i.e., 1,035 AFY more than is available). The EIR seeks to avoid acknowledging the shortfall by arbitrarily limiting its related project radius to one mile, which narrows the environmental picture of the projects and "impedes meaningful public discussion" regarding the Project. (*Citizens To Preserve the Ojai, supra*, 176 Cal.App.3d at 431.)

Again, IID, an expert in the field and the agency that would provide the water, wholly rejected the EIR's approach in its comments on the Draft EIR: "Related and similar project [sic] within close proximity to Hell's Kitchen should consider the three BHE Renewable Projects currently under the permitting process." (AR 2446.)

Here, the BHER projects were sufficiently definite in location and water usage and were known to the County prior to the EIR's certification. (AR 2446.) Also, they were pending review before the California Energy Commission ("CEC") in its CEQA-equivalent review process. (RA 283, 295-300.) Additionally, multiple commenters and agencies urged the County to consider this readily available information about these Project water needs (AR 2446). (*Kings County Farm Bureau v. City of Hanford* (1990) 221

Cal.App.3d 692, 723 [held reasonable and practical to include information about other projects in a basin where the record reflects information available from other agencies].)

The Project's NOP was issued in March 2022. (AR 2070, 12343-12347). In April 2023, prior to the release of the Project's Draft EIR, the three BHER projects were submitted to the CEC. (RA 283, 295-300.) At this point, these were developments pending and under review within the meaning of relevant cases. (See *San Franciscans*, *supra*, 151 Cal.App.3d at 76; *Friends of the Eel River*, *supra*, 108 Cal.App.4th at 869.)

The County circulated the Project's Draft EIR for public review and accepted comments until November 30, 2023. (AR 2401, 12484.) The Draft EIR's cumulative water assessment did not mention the BHER projects. (AR 215 and 423-424.) The County received comment letters from Appellants, tribes, experts, academics, and agencies highlighting the need to consider the BHER projects, which also included letters in October 2023 detailing the water usage of the BHER projects and how the CTR Project would seem to "exceed" the available 25,000 AFY allocation for non- agricultural uses. (AR 2493, see also AR 2446, 2448, 2478, 2492-2493, 2538, 2525 2482-2531, 12947.)

In December 2023, the County released the Project's Final EIR, with minimal revisions to the EIR (AR 2354-2353), and a brief four-page Response to Appellants' Draft EIR comments (AR 2532-2535) and minimal changes that made references to IID's discretion. (AR 2551, 2553.) In January 2024, CTR's response to Petitioner's appeal, specific to cumulative impact, was simply that the three BHER projects were located "more than 1 mile away" (AR 9880-81) and that 18,620 AFY was remaining (AR 9876, 9879, 9899, 9925, 9959, 9946), with the WSA suggesting the Project would amount to only 34.9% of the unallocated water supply leaving over 12,000 AFY available. (AR 10148.)

At this point, with a vast difference in calculations between 12,000 or more AFY available versus less than zero, the EIR's cumulative impact analysis did not reflect the severity of the issue. (See *Santa Clarita Organization for Planning the Environment, supra,* 106 Cal.App.4th at 722-723.) The disparity between what the County knew (i.e., water demand for the BHER three projects) and what was considered in the EIR was an abuse of discretion. (*San Franciscans*, *supra*, 151 Cal.App.3d at 77.)

Under these circumstances, there was no practical or reasonable barrier to the disclosure and inclusion of the

BHER projects in the EIR's analysis. Failure to include this relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process. (*NRDC, supra,* 98 Cal.App.5th 1176, 1201.)

3. The County's Failure to Consider the LV Specific Plan Also Contributed to Overstating Available Water.

The County also failed to consider the LV Specific Plan in the EIR, claiming development it promoted was unspecified and uncertain. However, the Legislature passed SB 125 (2022) Lithium Extraction Tax Law (Rev. & Tax. Code, § 47000, et seq.), with the expressed intent to promote the "development of a robust lithium production industry" in Imperial County. (Rev. & Tax. Code § 47000 subd. (d); see *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325, 1337-1338 [intent to spur development is relevant to foreseeability.) Moreover, after receiving millions of dollars to prepare the LV Specific Plan Program EIR, and actively participating in the technical studies, the County had sufficient information relevant for the Project EIR's cumulative impacts analysis (i.e., more than 100,000 AFY of demand). Where sufficient information is available, it is reasonable to include projects in cumulative analysis. (See e.g., *Friends of the Eel River, supra,* 108 Cal.App.4th 859, 868-872, *Gray, supra,* 167 Cal.App.4th 1099,

1127–1128.)

The LV Specific Plan covers a 51,786-acre plan area (including the Project site) that calls for over 100,000 AFY of water to build 121 million square feet of near-term, lithium-related development. (RA 174 [Appellants' Request for Judicial Notice].) SB 125 appropriated funding to develop the LV Specific Plan and Program EIR, as well as provide grant funding to the County to conduct community engagement. (RA 333-334.) This included hundreds of thousands of dollars that helped establish technical advisory expert groups (see, e.g., AR 12885, 2489) and support tribal engagement.

By November 2, 2023, draft plans and public input were underway for the LV Specific Plan, with proposed land use alternatives being presented to the County Board of Supervisors on November 7, 2023. (RA 170-171; 173-174; 333-334.) The NOP for the County's LV Specific Plan was sent to the State Clearinghouse on December 5, 2023.

Moreover, the LV Specific Plan was the County's *own Project*, where they were "an active sophisticated participant" in developing the NOP and plans, which called for significant non-agricultural water uses at least a month before the Project's final approval in January. (*Friends of the*

Eel River, supra, 108 Cal.App.4th at, 871.) Given the significant time, financial resources, and level of regulatory review for its own LV Specific Plan project, there was no practical or reasonable barrier for the County to disclose the most probable level of development as part of the Project's cumulative impact analysis. (See *Gray, supra,* 167 Cal.App.4th 1099, 1127– 1128.)

On January 23, 2024, the Board of Supervisors denied Appellant's appeal and approved the proposed CTR Project. (AR 6, 9847, 9850-9851, 11499-11506.) At this point, the LV Specific Plan had been years in the making, with the County already devoting significant time and financial resources to the regulatory process, including holding public meetings, which is relevant under CEQA. (*Gray, supra,* 167 Cal.App.4th at 1127-28.) The County had sufficient detail (RA 174) about the most probable development patterns to assume a level of use for the LV Specific Plan (i.e., square footage of building space and AFY of water). (*City of Antioch,* supra, 187 Cal.App.3d at 1338.)

4. The County's Failure to Consider the Expanded Project Proposal Led to it Understating Water Demand.

A public agency's failure to disclose and analyze all phases of a project proposed violates CEQA. (*Natural*

Resources Defense Council, Inc. v. City of Los Angeles (2002) 103 Cal.App.4th 268, 285 [EIR for multiphase project cannot discuss only first phase and requiring an "EIR addressing all three phases of the Project"].) While it initially sought approval of only one stage, CTR's full plans for a 190-acre, seven-stage campus including the Project site were revealed before the final Project approval (RA 221-222, 227). Shortly after December 13, 2023, when the Planning Commission approved the CTR Project (AR 9016-9018), CTR announced its plans to create a 190-acre, seven-stage campus (RA 221-222, 227 [Appellants' RJN]), which CTR confirmed were concept plans from its website. (AR 11444.) These plans were not disclosed to the public until late in the review process and after the Final EIR was circulated to the public.

5. Late Proposal and Adoption of the Revised Water Supply Mitigation Measure UTIL-1 Did Not Comply With CEQA.

The late addition of necessary mitigation measures fails to inform the public as such information must be in an EIR:

> an agency cannot "make up for the lack of analysis in the EIR" through post-EIR analysis. (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 131, 104 Cal.Rptr.2d 326 (*Save Our Peninsula Committee*) [errata not "subjected to the same ' "critical evaluation that occurs in the draft stage" ' "].) Otherwise, the public would be denied the " 'opportunity to

> test, assess, and evaluate the [newly revealed information] and make an informed judgment as to the validity of the conclusions to be drawn therefrom.' " (*Id.*, at p. 131, 104 Cal.Rptr.2d 326.)

(*People ex rel. Bonta v. County of Lake* (2024) 105 Cal.App.5th 1222, 1232.)

CEQA requires enforceable, non-illusory, performance-based mitigation measures. (Guidelines § 15126.4.)

Here, the initial draft of the EIR included vague mitigation measure UTIL-1, calling for CTR to "work with IID" if it did not receive its 3.1 MAF of Colorado River water allocations. (AR 178.) In addition to other glaring errors found, IID squarely rejected this "blanket" statement as "not acceptable mitigation" (AR 2450-51).

After the Project's Final EIR was released to the public and on the day before the Board of Supervisors approved the Project (AR 11439), a new mitigation measure regarding water supply for the Project was disclosed (AR 103-104). Added to the Mitigation Monitoring and Reporting Program, the measure purported to add Project mitigation if appropriate governmental entities imposed cut-backs in Colorado River supplies to IID, which then could be passed on to the Project. This measure, grafted onto existing Measure UTIL-1, requires the Project to "accept as a condition of water service" that IID could impose a corresponding cut in the Project's water supply. (*Id.*) UTIL-1 provides:

> [O]perational changes *may* be implemented by the Project under these unpredictable conditions *may* include:

- Produce groundwater at property;
- Explore temporary use of recycled drain water; and/or
- Reduce production rates in line with water supply reductions.

(AR 104, italics added.)

The revised UTIL-1 measure, crafted on the eve of the January 23, 2024 Board hearing approving the Project (AR 11321 [Attachment C Revised]) and not circulated to the public, fails to comply with CEQA's public disclosure and evaluation requirements. For example, while the measure calls to "Produce groundwater" and to "Explore temporary use of recycled drain water" (AR 104), the EIR does not consider potential air impacts caused if these measures further reduce water inflows into the Salton Sea (discussed below). (Guidelines § 15126.4 subd. (1)(D).) Also, even if measures could save 945 AFY of water, that does not even come close to covering the shortfall caused by the Project and BHER projects.

Respondents rely on the EIR's assumption that 23,020 AFY is available for nonagricultural projects (AR 2308-09) despite being clearly erroneous, as pointed out by IID and others. (AR 2446.) In sum, the above is nothing more than a "post hoc rationalization" to justify the County's last-minute revised mitigation measures. (*Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco* (1980) 106 Cal.App.3d 893, 907.) "The EIR 'must contain facts

and analysis, not just the agency's bare conclusions or opinions.'" (*California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1239 [citation omitted].)

It is important to note that UTIL-1 also does not commit the Project to any particular operational change, or, indeed, to any particular mitigation at all in the event of an enforced reduction in water supply, despite the Project's estimated need of about 6,500 AFY for Project operation and viability. (AR 9031; AR 419.) It speaks only of what operational changes the Project "may" make, not that it must or will make. This violates Guidelines section 15126.4 subdivision (a)(1)(B), which requires a commitment to mitigate significant impacts and specific performance standards that those mitigation measures must meet. It also violates Guidelines section 15126.4 subdivision (a)(1)(D), which requires mitigation measures to be enforceable. Listing what the Project "may" do if water cutbacks occur is not enforceable. UTIL-1 does not make enforceable commitments or set enforceable performance standards.

However, these are not the only violations of Guidelines section 15126.4 found in this so-called mitigation measure. Guidelines section 15126.4 subdivision (a)(1)(D) requires that, if a mitigation measure "would cause one or more significant effects" on its own, such impacts must be analyzed and, if necessary, also mitigated. (Guidelines section 15126.4 subd. (a)(1)(D); *Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986.) The administrative record shows no attempt to do so. The State Lands Commission pointed out the use of groundwater needed to be clarified because

it may "require groundwater or otherwise impede groundwater basin management" (AR 2419) but the EIR provides no information about this potential impact. Furthermore, given the amount of hazardous materials in the brine beneath the Project site, which includes arsenic and heavy metals (AR 196-197, 2524, 11379, 12914), it is not clear – because there is no evidence in the record- that it is feasible to turn this potentially toxic stew into usable process water for the lithium extraction facility.[6]

As to the first potential operational change listed in UTIL-1, namely "Produce groundwater at property" at the Project site (AR 104), both the Draft EIR and the Revised Draft EIR make the same unequivocal statement that groundwater will *not* be used at the Project site. (AR 436 [Draft EIR: "The Project will not use groundwater as a source of water supply for construction or operation"]; AR 2325 [Revised Draft EIR: "The Project will not use groundwater as a source of water supply for construction or operation."]) The Final EIR makes no changes to these inconsistent statements, which as in *San Joaquin Raptor, supra,* 149 Cal.App.4th 645*,* "are at best confusing and worst self-contradictory." (*Id.* at 656, fn. 4.)

Since the EIR repeatedly asserted no use of groundwater by the Project, it performed no analysis of the potential environmental impacts of any such use, as would be required by Guidelines section 15126.4 subdivision (a)(1)(D). CEQA requires

[6] The Project would reportedly generate up to 10 tons of hazardous waste per year to be trucked out of state. (AR 422-423.)

analysis of the potential consequences of pumping groundwater. (*Vineyard Area Citizens, supra,* 40 Cal.4th 412, 448 ["the Draft EIR contained no discussion of the impact the planned groundwater extraction at the Well Field would have on water flows and habitats in the Cosumnes River."])

Further, UTIL-1 contradicts the EIR's already highly questionable Alternatives analysis by listing as a potential mitigation measure for IID water cutbacks a proportionate cutback in production of lithium and other minerals. (AR 104.) Yet, the EIR finds the Reduced Project Size Alternative infeasible because "Engineers have not been able to identify a feasible way to scale the Project down." (AR 426.) However, Mitigation Measure UTIL-1, lists reduced Project operation as a potential mitigation measure. Thus, while building a smaller Project might have been infeasible, Respondent obviously considers limiting Project operations to be feasible relative to the revised mitigation measure. This proves Appellants' point that limited operations should have been considered as an alternative. Instead, the EIR ignored the requirement of Guidelines section 15126.6 subdivision (a) that a reasonable *range* of alternatives be considered, and instead presented only the binary choice of the Project as proposed or No Project at all. This violated CEQA.

No analysis was done on the option to use recycled drain water. (AR 104.) As to "temporary" use of IID drain water, there is also a failure to demonstrate that such use is feasible, that it would be allowed by IID (whose drains would be tapped), or how long such "temporary" use would last. Nor have any

environmental impacts from such a diversion of unspecified amounts of drain water from flowing into the Salton Sea been identified, much less mitigated in the EIR, as required by Guidelines section 15126.4 subdivision (a)(1)(D). Furthermore, this ad hoc mitigation measure does not square with the EIR's assertion that "the Project would not result in a reduction in drainage flow to the Salton Sea." (AR 9879.)

The failure to analyze, disclose, and mitigate the potential impacts of revised Mitigation Measure UTIL-1 is a clear violation of both CEQA's full disclosure requirements and its substantive requirements.

C. EIR Omits a Complete Air Impact Analysis for Designated Disadvantaged Communities.

1. Analysis of Air Quality Impact to Vulnerable Communities Is Required.

Under CEQA, it is a prejudicial abuse of discretion to omit relevant information, which precludes informed decision-making. (*NRDC, supra,* 98 Cal.App.5th 1176, 1201.) An EIR must correlate a project's significant impacts to the health effects that would be caused to people. (*Sierra Club-Friant Ranch, supra,* 6 Cal.5th 502, 520-521.)

Because of the recognized burdening of disadvantaged communities with air pollution and other adverse health impacts, the Legislature adopted SB 535 to direct a portion of funding from the Greenhouse Gas Reduction Fund be spent in

disadvantaged communities and SB 617 to create programs to designate vulnerable communities and improve air quality in these polluted communities. The areas around the Salton Sea are among these specially designated vulnerable communities. (AR 12944 [LCJA comment re AB 617], 12958 [SLC comment re SB 535].)

2. The Project's Cumulative Contribution to the Shrinking of the Salton Sea, and it Attendant Air Quality Impacts, Is Not Analyzed.

Here, the main contributor to poor air quality in the nearby SB 535 disadvantaged communities is the shrinking Salton Sea caused by reduced inflows and exposure to greater pollution-causing playa. (AR 12958, 2489-2490, 2524.) Yet, the EIR provides no discussion of how the Project's freshwater use, individually or cumulatively, would impact water flow into the Salton Sea or contribute to worsening air quality—a common theme from multiple commenters and experts. (*E.g.,* AR 12945-12947.)

The IID historically[7] receives an average of 3.1 MAF of raw water each year from the Colorado River, with about 97 percent of that used for agriculture (AR 3928, 13000). This water is delivered to IID customers via gravity-fed canals. (AR

[7] Recent indications are that this amount of 3.1 MAF will be reduced to 2.1 MAF pursuant to federal government cutbacks of allocations of Colorado River water. (AR 1979.)

3928.) Then, the water drains directly into the Salton Sea. (AR 3927, 5940.) The Salton Sea, which was last created by floodwaters in 1904 (AR 3196, 3381), is sustained primarily by this agricultural drainage flow. (AR 5914.) The Salton Sea is subject to high evaporation rates due to the continual inflow of agricultural drainage waters with high salt loads from canals and laterals in the Imperial Valley. (AR 3214.)

The exposure of playa contributes to poor air quality as reported by numerous experts and academics, and even echoed by IID. (AR 2155, 2166, 2446; 2489-2490, 2524, 12958.) This is significant because it functions as a vicious cycle: as IID's overall water allocation shrinks, the water demand for lithium development is increasing, which in turn leads to more cuts to the system (i.e., retired agricultural uses), resulting in even less water draining into the Salton Sea, further exposing more playa, and worsening air quality.

In the present case, the elevated water demands from the Project, the proposed BHER projects, the proposed LV Specific Plan, and the consequences of systematic water allocation cuts and reduced water flow to the Salton Sea were all sufficiently definite as to be reasonably foreseeable. Thus, the EIR could not pretend these events might not occur (*City of Antioch,* supra, 187 Cal.App.3d at 1338) and that they would not contribute to a cumulatively considerable impact to

an already dire situation. Where current poor conditions are exacerbated, the impact must be considered in an EIR, especially when those impacts affect human health. (*Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1028-1029; *City of Long Beach v. City of Los Angeles* (2018) 19 Cal.App.5th 465, 487.)

Respondents claimed at trial that there is substantial evidence supporting the EIR's air impact analysis because the EIR explained that the Project would be served by untreated raw water, not drain water (AR 2455), and would obtain its annual 6,500 acre-feet of freshwater from IID's annual allocation of 25,000 acre-feet for non-agricultural projects, consistent with IID's adopted IWSP. (AR 2301-2303, 10149.) This, however, conflicts with the ad hoc mitigation measures discussed above (AR 104 [that the Project may use recycled drain water]) and hinges on an assumption that cumulative water impacts would not exceed 25,000 AFY, without considering foreseeable BHER projects and the LV Specific Plan water demands. So, too, it relies on assumptions about California being immune to droughts even as climate in the area becomes more extreme (e.g., assuming the IID will receive its full 3.1 MAF of Colorado River water allocation). The air impact analysis likewise fails to inform the public because a cumulative impact analysis that understates the

severity and significance of cumulative impacts skews the decisionmaker's perspective concerning the necessity for mitigation measures. *(San Franciscans, supra,* 151 Cal.App.3d at 80.)

Nonetheless, despite the potential impacts, CTR claims the Project's water usage is irrelevant because it utilizes non-agricultural water allocation. (AR 9877.) This perfunctory response does not square with the facts, and was rejected by IID, which urged a "full assessment of the project and/or cumulative impacts" resulting from reduced drainage flows exposing playa and thereby contributing to worsening air quality. (AR 2446.)

In sum, the EIR entirely omits this relevant information and analysis, which precludes informed decision-making and informed public participation contrary to the statutory goals of the EIR process. (*NRDC, supra,* 98 Cal.App.5th 1176, 1201.)

3. By Diverting Water From the Salton Sea, The Project May Have a Significant Adverse Effect on Air Quality in Addition to its Cumulative Impacts.

Imperial County already has a serious air pollution problem with larger respirable airborne particulate matter, usually referred to as PM_{10}. The EIR reports the County is in serious non-attainment with the National Ambient Air Quality

Standard for PM10. (AR 233.) Despite this proof that Imperial County seriously exceeds the health-based (AR 601) federal standards for inhalable particulate matter (AR 604), no description of the health impacts of airborne particulates created or exacerbated by the Project appears in the main body of the EIR as required by CEQA. (*Sierra Club-Friant Ranch, supra,* 6 Cal.5th 502, 520-521.) A truncated description of such impacts appears in the Air Quality Technical Report, buried in Appendix B, but as the Supreme Court held "a report 'buried in an appendix,' is not a substitute for 'a good faith reasoned analysis.' " (*Vineyard Area Citizens, supra,* 40 Cal.4th 412, 442, internal quotation marks omitted.)

As to direct additions to the County's air pollution problem caused by the Project, the Imperial County Air Pollution Control District's (APCD) comments were emphatic that it did not agree with changes made by the EIR in the standard model used throughout California to predict emissions from proposed projects and to the absence of an adequate explanation for these changes. (AR 2433 [objecting that "reduction of almost half from default values is quite significant and should be adequately explained" and unexplained departures from defaults create "unrealistic depictions of project impacts"], 12672, 12796.) The comments of a sister agency cannot be disregarded. (*Berkeley Jets, supra,* 91 Cal.App.4th 1344 at 1367.)

Perhaps most crucially, the EIR essentially ignores the opinion of both the IID and academic experts as to a likely source of particulate emissions attributable to the Project in the form of

wind-blown dust from the uncovered Salton Sea seabed, exposed to the wind as the Salton Sea recedes. The IID water used by the Project would *not* flow into the Salton Sea. (AR 9056.) The Project's non-agricultural use of IID water would decrease return flows of water to the Salton Sea because *none* of that water would drain there anymore (AR 2448, AR 12780), thereby lowering the Salton Sea's water level and contributing to the further exposure of playa to the winds. The IID stated:

> In general, IID's comments under hydrology and utility systems (as it relates to water supply*) are both directly and indirectly tied to air quality*. A reduction of drainage flow into IID drains and the Salton Sea may affect the level of drainage vegetation and exposed playa which in turn *could result in increased dust emissions without proper mitigation*.

(AR 2446, italics added.)

Dr. James Blair confirmed this prediction of dust emissions and predicted high rates of respiratory illness within frontline communities as a result. (AR 2489; AR 11378-79; accord AR 2498 [Dr. Dustin Mulvaney].)

LCJA submitted comments about these air quality impacts (AR 12943 -12950), but received no acknowledgement or response at all from the County. This non-response is contrary to CEQA. "The requirement that an agency respond to 'comments' to a draft EIR derives not from a particular statutory provision of CEQA, but, rather, from section 15088 of the Guidelines. (*City of Irvine v. County of Orange* (2015) 238 Cal.App.4th 526, 548, 189

Cal.Rptr.3d 279 (*City of Irvine*).)" (*NRDC, supra,* 98 Cal.App.5th 1176, 1215.)

Despite being given this information, the County's EIR performs *no* analysis and adopts *no* mitigation for increases in airborne playa dust caused by the use of water - including by the Project - not returned after use to the Salton Sea. (AR 56-59.) The County instead relied on a negative declaration by IID for non-agricultural projects. (RA 287, 302-303.) This document purportedly analyzed the "environmental impacts" of conserving "up to 25,000 acre-feet" per year of IID's allocation of Colorado River water for non-agricultural projects. (RA 304-305.) However, only a single reference to this inaccessible, unavailable negative declaration appears in the EIR. (AR 10175.) No further information as to the actual contents of this document appears in the EIR. The Negative Declaration also does not appear in the administrative record, nor was otherwise made reviewable by the public. [8]

The Guidelines allow a document to be incorporated in an EIR by reference, but also require that the portion of the document to be incorporated must be set out in full, and that the document itself must be made available in a public building. (Guidelines § 15150 subd. (b).) Even if the County's Request for Judicial Notice of the document had been granted, the public's

[8] While Respondents requested judicial notice for the negative declaration document (RA 301-331), the trial court appears not to have ruled on it (see RA 551-555).

right to see and evaluate the negative declaration prior to Project approval would not have been restored. This nonavailability of a key document is a clear procedural violation of CEQA, in both letter and in spirit. (*Vineyard Area Citizens, supra,* 40 Cal.4th 412, 442.)

D. The County Failed to Engage in Meaningful and Timely Tribal Consultation to Identify and Mitigate Impacts to Tribal Cultural Resources as Required by CEQA.

The County of Imperial accepted comments from affected tribal members, but did not comply with the requirements of Assem. Bill No. 52 by failing to meaningfully consult with tribes and tribal leaders such as Kwaaymii Laguna Band's Elder Carmen Lucas (AR 16382-16383) regarding tribal cultural resources impacts and how to mitigate them. Instead, without explanation in the record, the County chose to regard cultural resources as "less than significant" (AR 67, 2542) despite tribal comments identifying, highlighting, and explaining their significance. (AR 2537-2538 [Oct. 23, 2023]; 16378-16379 [Dec. 8, 2023].) Therefore, the County made an unsupported determination of insignificance of tribal cultural resources impacts and impermissibly failed to consider mitigation measures for, and alternatives to, the Project that would have avoided or reduced impacts to them. This violates CEQA.

1. Applicable Law Requires Tribal Consultation About Tribal Cultural Resources.

Public Resources Code section 21080.3.1 subdivision (a) requires "consultation" with tribal representatives pursuant to Assem. Bill No. 52 that has the same meaning as under Government Code section 65352.4, which provides a "'*meaningful and timely* process of seeking, discussing, and *considering carefully* the views of others, in a manner that is cognizant of all parties' cultural values and, *where feasible, seeking agreement*.'" (*Koi Nation of Northern California v. City of* Clearlake (2025) 109 Cal.App.5th 815, 825, ("*Koi Nation*"), italics added.)

The requirement for meaningful consultation must also be considered in the context of Assem. Bill No. 52's full text and CEQA more broadly. Before 2015, CEQA did not require lead agencies to separately analyze the impacts of their actions on resources of value to California tribes, which were instead considered as archaeological resources or historical resources during the environmental review process. (See, e.g., *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 215.) As a result, lead agencies considered the impacts of their actions on tribal cultural resources, if at all, only from an archaeological perspective—rather than applying tribal methodologies and factoring in the spiritual, cultural, and intrinsic value of the resources to the culturally-affiliated tribes. (See, e.g., *Soc'y*

for Archaeology v. County of Butte (1977) 65 Cal.App.3d 833, 835-37.)

Effective since 2015, Assem. Bill No. 52 amended CEQA by adding "tribal cultural resources" as a distinct, separate category of resources on which impacts must be analyzed, subject to the same rigor and burdens of proof as analyses of other resource categories under CEQA. (*Koi Nation, supra,* 109 Cal.App.5th 815 at 824 citing Pub. Resources Code § 21084.2.) In addition, Assem. Bill No. 52 set forth procedural requirements for public agencies to consult with tribes that are "traditionally and culturally affiliated with the geographic area" on which a project is sited during their environmental review process for a project. (*Koi Nation, supra,* 109 Cal.App.5th 815 at 825.)

In adopting the bill, the Legislature expressly recognized California Native American tribes "have expertise" and knowledge with regard to their tribal history, practices, and cultural resources, and codified the tribes' right to participate in—and contribute their knowledge to—CEQA's environmental review process. (Pub. Resources Code, § 21080.3.1, subd. (a).) Assem. Bill No. 52 adopted a definition of "tribal cultural resources" which includes "Sites, features, places, cultural landscapes, sacred places, objects with cultural value to a California Native American tribe," with cultural landscapes "geographically defined in terms of the size and scope of the landscape." (Pub. Resources Code § 21074 subds. (a) and (b).)

Koi Nation, supra, 109 Cal.App.5th 815 appears to be the first and only case to have interpreted the Assem. Bill No. 52 portion of CEQA since it was enacted in 2015. In *Koi Nation*, the Court of Appeal reversed the approval of the City of Clearlake's adoption of a mitigated negative declaration for development of a 75-room hotel, meeting hall, parking lot, and street extension in a culturally sensitive area. (*Koi Nation, supra*, 109 Cal.App.5th at 822-823.) The Court of Appeal held that Clearlake's approach – accepting information from the Koi Nation but failing to properly analyze it, document the process, or provide notice before closing consultation – did not comply with CEQA. (*Id*. at 841-842.)

Under Public Resources Code section 21080.3.2 subdivision (b), consultation shall be considered concluded only after (1) "parties agree" to measures to mitigate or avoid significant effects on tribal cultural resources, or (2) a party acting in "good faith" and after "reasonable effort" concludes mutual agreement cannot be reached.

Furthermore, Assem. Bill No. 52 does not limit the ability of a tribe member or member of the public to submit comments regarding impacts and appropriate measures to mitigate impacts (Pub. Resources Code § 21080.3.2 subd. (c)(1)). This is consistent with CEQA's basic purposes of informing governments about potential significant impacts, identifying ways to reduce these impacts, and fostering public participation. (Guidelines §§ 15002, 15200, and 15201). The adequacy of the EIR is determined by what is "reasonably

feasible" in light of factors such as the magnitude and geographic scope of the Project and the severity of likely impacts. (Guidelines § 15204 subd. (a).)

Although the statute does not define what constitutes "meaningful" consultation or "reasonable effort," as has been explained in the Attorney General's amicus brief in *Koi Nation,* consultation between a lead agency and a tribe during the CEQA process is meant to be consequential to and inform lead agencies' analyses of project impacts to resources important to the tribe. (See *Koi Nation, supra*, 109 Cal.App.5th at 835 fn. 16 and Appellants' Request for Judicial Notice, Exhibit B [Attorney General Amicus Brief].)[9] The process for tribes to contribute their expertise is through government-to-government consultation. Even if consultation does not occur, the tribes may still participate in the public CEQA process and their comments may not be ignored. (Pub. Resources Code § 21080.3.2 subd. (c)(1).)

2. The County's Failure to Sufficiently Consult with All Relevant Tribes Was Prejudicial.

The EIR asserted that no significant impacts would occur because the County determined there were no known tribal cultural resources within the Project site based on a "Cultural Resources Survey" by the applicant's consultant and alleged

[9] Appellants concurrently seek judicial notice of the Attorney General's Amicus Brief in *Koi Nation, supra,* 109 Cal.App.5th 815. This amicus brief was provided to the County by the Kwaaymii Laguna Band's attorney via a link submitted to the County. (See AR 2541.)

consultation with tribes. (AR 71-73; 2394.) However, the County's failure to comply with CEQA's procedural mandate to consult with affected tribes regarding tribal cultural resources is presumptively prejudicial because it is not possible to reconstruct what tribal members would have said if they had been properly consulted. (*Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 487-488; see also *Fall River Wild Trout Foundation, supra,* 70 Cal.App.4th 482, 491-493.)

3. The County's Consultation Outreach Omitted Key Tribal Representatives Including the Kwaaymii Laguna Band.

Respondents highlight a "Native American Contact Program" which involved sending an email to the NAHC on April 12, 2021 and then contacting the tribes and individuals identified by the NAHC. (AR 1362; 1394-1395 [letter with contact list].) The Kwaaymii Laguna Band was included in this list of contacts (AR 1396), as was the Morongo Band of Mission Indians ("Morongo Band") (AR 1395). Although the record reveals that the NAHC's "Native American Contact List, Imperial County April 2021" includes a list of *26 Native American bands or tribes* (AR 1396), Respondents sent an Assem. Bill No. 52 consultation letter in March 2022 to *only two tribes*- the Quechan Indian Tribe of the Fort Yuma Reservation ("Quechan") and the Torres-Martinez Desert Cahuilla Indians. (AR 15005; AR 1919; 1923.)

In response to these two letters, only one tribe- the Quechan Indian Tribe- responded (AR 14029,15005, 15008)

and the County held consultation with that tribe (AR 15008-15009). However, in an October 23, 2023 letter to the County, attorney Courtney Ann Coyle identified the fact that the Kwaaymii Laguna Band was *not* sent a consultation letter in March 2022 despite being on the NAHC contact list. (AR 2537.) Ms. Lucas of the Kwaaymii Laguna Band in September 2022 had specifically stated "I am *also* specifically requesting consultation" on "the specific plan" and "[Program] EIR for lithium recovery" for other lithium projects. (AR 2539, italics added.) Because the CTR Project site is within the boundaries of the LV Specific Plan area (see RA 211 [LV Specific Plan] and 222), the County should have known this request included a request for consultation about the Project site.

Ms. Lucas is an expert on her tribal culture and traditional cultural landscape which extends from the Laguna Mountains into the desert floor in Imperial County. She also "learned about essence of place and intangible cultural resources from being caretaker of her homeland and burial grounds at the former Laguna Indian Reservation, now Lucas Ranch, *for the last fifty years*." (AR 16389, italics added.) Ms. Lucas has special expertise as it relates to the identification of tribal cultural resources (AR 16389). The County should have heeded her statements and sought agreement with the Kwaaymii Laguna Band *(*Pub. Resources Code § 21080.3.1 subd. (a) [Gov. Code § 65352.4]), such as incorporating reasonable mitigation like tribal monitoring on surveys and all ground disturbing activities prior to the EIR being approved.

(AR 2538.) The need for consultation was emphasized by Ms. Lucas' statements during multiple public hearings (AR 11387, 11471 ["As an American Indian I have a right to consult with you"].) Despite Ms. Lucas' extensive knowledge, the County did not respond to her request with any communication, let alone an invitation to consult.

Undaunted, Ms. Lucas submitted a Draft EIR comment letter (AR 2537-38) and a Final EIR comment letter (AR 16378-16384). She personally appeared during the December 2023 Planning Commission hearing (AR 11387-91) as well as the Board of Supervisors meeting in January 2024 (AR 11469-71). During this time, she clearly and consistently indicated the EIR failed to identify tribal cultural resources (specifically, the "Southeast Lake Cahuilla Active Volcanic Cultural District," "Mullet Island," and "the (new) mud pots"). (AR 2537; see also 10109 and 16378). These fit the textbook definition of tribal cultural resources. (Pub. Resources Code § 21074 subds. (a)-(b).) She urged that the EIR consider the "cumulatively considerable" (AR 2542) impacts caused by the Project in context with the BHER geothermal projects. (AR 2537-2538, 12742), which were not addressed in the EIR or Response to Comments. She also objected to the lack of alternatives that would serve the function of avoiding impacts to tribal cultural resources. (AR 2538.) When the County failed to respond to these specific requests, Ms. Lucas submitted more detailed information, including a confidential map of the location of the

identified tribal cultural resources. (AR 16385-16391.)[10] As a California Indian tribe listed on the NAHC List (AR 13696), the Kwaaymii Laguna Band should have been consulted. (Pub. Resources Code §§ 21080.3.1 subd. (a) and 21080.3.1 subd. (b).) At the very least, the County should have explained in the record why it was rejecting the significance of the Southeast Lake Cahuilla Active Volcanic Cultural District, Mullet Island, and the new mud pots with a reasoned explanation of that rejection.

In *Koi Nation*, when the City of Clearlake rejected consultation, the court found it violated CEQA's requirements by failing to make a reasonable effort to reach agreement as "required for consultation to be deemed concluded under subdivision (b)(2) of section 21080.3.2." (*Koi Nation, supra,* 109 Cal.App.5th at 841.) Assem. Bill No. 52 requires good faith and reasonable efforts to reach mutual agreement on mitigation. (Pub. Resources Code § 21080.3.2 subd. (b).) Meaningful and timely consultation was missing here, as raised by multiple tribal leaders. (AR 11474-11475, 11478-11480.) For example, Ms. Lucas repeatedly participated in commenting about lithium extraction projects impacting tribal cultural resources (AR 2539, 2542, 2537-2538). However, the County failed to show any reasonable efforts were made to reach a mutual agreement with the Kwaaymii Laguna Band.

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[10] Appellants are concurrently requesting leave to file confidential information that includes this map (AR 16388) and meeting notes for a 2017 site visit and meeting that noted the presence of tribal cultural resources (AR 16391).

4. Other Tribes and Tribal Representatives Were Similarly Ignored by the County.

The California State Lands Commission noted concerns raised by Quechan and others. (AR 2419-20, AR 12957). While the Final EIR suggests that appropriate response was made (AR 2421), in subsequent public hearings, a Quechan representative would elaborate on the lack of "meaningful consultation" with significant tribal cultural resource concerns going unaddressed. (AR 11474.)

The State Lands Commission stated that "the draft EIR does not provide the response from the Torres-Martinez Desert Cahuilla Tribe" and therefore requested information about the responses from that tribe. (AR 2420.) The EIR's response instead says "Requests from consulting Tribes were considered and responded to as appropriate" (AR 2421) but does not say what the response was. An EIR may describe the basis of a lead agency's decision without breaching confidentiality. (Pub. Resources Code § 21082.3 subd. (c)(4).) Instead, the FEIR is conclusory and unresponsive.

Furthermore, the Morongo Band requested monitoring by a Cahuilla representative during construction activities (AR 1362), yet no evidence is presented showing what reasonable efforts were made to incorporate such tribal monitoring into the Project. Agua Caliente Band of Cahuilla Indians citizen Dr. Sean Milanovich noted the lack of "reach out to the tribes" and that "We [tribes] are being neglected again." (AR 11478-79.)

In sum, this is not the type of "meaningful and timely"

tribal consultation required by Assem. Bill No. 52 and advocated by the Attorney General in *Koi Nation, supra,* 109 Cal.App.5th 815. (See AR 2541.)

5. The County Failed to Identify Tribal Cultural Resources.

The EIR claims there are no significant impacts because the County determined there were no known tribal cultural resources within the Site based on a "Cultural Resources Survey" and alleged consultation with the tribes. (AR 71-73, 2394.) Such claims are unsupported in the record. Public Resources Code section 21074 subdivision (a)(2) requires a lead agency to consider tribal input to identify tribal cultural resources. The Kwaaymii Laguna Band identified multiple tribal cultural resources that could be affected by the Project that the County did not acknowledge in its EIR. Specifically, the "Southeast Lake Cahuilla Active Volcanic Cultural District," "Mullet Island," and "the (new) mud pots" were noted. (AR 2537; see also 10109 and 16378.)[11]

Where a public agency refuses to acknowledge the significance of tribal cultural resources, it must have substantial evidence to support that refusal. (*Koi Nation, supra,* 109 Cal.App.5th 815, 841.) Just as a lead agency's failure to grapple with relevant, credible evidence renders its analysis inadequate, the County's failure to consider tribal input in its analysis of tribal cultural resources here

[11] CDFW objected to impacts to fully protected bird species, some of which could have cultural significance to Native American tribes. (AR 2426; see AR 16391.)

indicates the County's analysis is insufficient. (See *City of Long Beach v. City of Los Angeles* (2018) 19 Cal.App.5th 465, 485 [even when an approved study method is used, analysis is "legally inadequate" when the method omits context-specific "relevant, crucial information"]; *Vineyard Area Citizens, supra,* 40 Cal.4th 412, 448-449 [expert opinion providing substantial evidence of significant impacts cannot be ignored].)

CEQA requires lead agencies to specifically consider tribal input and expertise in several instances, including, notably, when identifying tribal cultural resources. (Pub. Resources Code, § 21074, subd. (a)(2).) Similarly, tribal expertise and input *must* be considered during the consultation process when identifying significant impacts to tribal cultural resources and considering mitigation measures or project alternatives. (Pub. Resources Code § 21080.3.2, subd. (a).)

There are several ways for resources to qualify as a tribal cultural resource. Similar to historical resources, a resource can qualify as a tribal cultural resource if it is either eligible for listing or is listed in the California Register of Historical Resources or listed in a local register. (Pub. Resources Code §§ 21074, subd. (a)(1) and 21084.1.) A resource can also be a tribal cultural resource even if it is not listed or eligible for listing in a historical register as long as substantial evidence, *including* tribal input, supports the agency's designation. (Pub. Resources Code § 21074, subd.

(a)(2).)

Tribal Elder statements can constitute evidence of the existence of tribal cultural resources. (*Pueblo of Sandia v. U.S.* (10th Cir. 1995) 50 F.3d 856, 860-861 [referring to paths and sites in the canyon significant to cultural and religious practices.])[12] In *Pueblo of Sandia*, the federal Court of Appeal held that the US Forest Service "did not make a reasonable effort to identify historic properties" in light of "specific information" clearly suggesting a sufficient likelihood that the canyon site of a hotel construction project "contains traditional cultural properties" that warranted further investigation. (*Id.* at 861-862.) Similarly, in the present case, the County has failed to make a reasonable effort to evaluate specifically identified tribal cultural resources, or explain its refusal to evaluate those resources.

When the County received evidence—grounded in tribal expertise— countering the EIR's conclusion that the Project would not impact tribal cultural resources (AR 2537-2538, 10002, 10109) it was required to evaluate that evidence in making its determination. (*Koi Nation, supra,* 109 Cal.App.5th at 840 ["in determining whether the project would impact tribal cultural resources, the City failed to consider the value and significance of resources to Koi

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[12] *Pueblo of Sandia* is a federal case interpreting provisions of federal environmental law, but can be useful in interpreting CEQA. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86.)

Nation ([Pub. Resources Code] § 21074 subd. (a).)"].) The County failed in its duty.

6. The County Failed to Adequately Mitigate Impacts to Tribal Cultural Resources.

a. No Tribal-Specific Monitors Were Provided Despite Multiple Requests.

Having failed to consult with all relevant tribal representatives or identify all relevant tribal cultural resources, the County relied on mitigation measures CUL-1 thru CUL-5 (AR 2394-2397), as mitigation for tribal cultural resources impacts. However, this is insufficient because the Project includes no tribal-specific mitigation (AR 131), such as requiring tribal monitors during all earth-moving activities. Instead, the EIR relies on generic archaeological mitigation (i.e., CUL-1 – CUL-5) (AR 2394-2397), with only minimal opportunity for a "tribal monitor" to attend preconstruction briefing (AR 2394 [CUL-2]) and receive notice if Ancestral human remains are discovered[13] (AR 2395[CUL-4]).

The record does not indicate reasonable efforts were made to reach a mutual agreement on providing "tribal" specific mitigation, which is "distinguishable" from archaeological mitigation measures, as pointed out by the Attorney General (AR 2541), Kwaaymii Laguna Band (AR 2537-4538), and three highly qualified academic professionals. (AR 2492 [Prof. James Blair of

[13] See Health & Safety Code 7050.5 [general prohibition on disinterring, disturbing, or removing human remains from any location other than a dedicated cemetery]; Pub. Resources Code § 5097.98; Guidelines §15064.5 subd. (d) requiring same.

Cal Poly Pomona]; AR 2507-08 Dr. Alicia Cantor of Portland State University], AR 2528 [Dr. Kate Berry].) No tribal-specific mitigation is adopted (AR 2394), such as tribal monitors *during* all construction and earth- moving activities and culturally specific treatment if discoveries are encountered.

Properly conducted Assem. Bill No. 52 consultation would have required the County to either agree on mitigation measures or make a good faith reasonable effort to find mutual agreement before ending consultation pursuant to impasse. (Pub. Resources Code § 21080.3.2 subd. (b).) As occurred in *Koi Nation*, the County "simply determined at some point after [a consultant's] report was completed… that the mitigation measures that [a tribal representative] had proposed were unnecessary, but the City did not inform Koi Nation of its decision or the basis for that decision." (*Koi Nation, supra,* 109 Cal.App.5th at 841.) Similarly, here there is no basis stated in the record for the County's rejection of the significance of identified tribal cultural resources or the refusal to mitigate impacts to them. "In the absence of the City taking the necessary steps to identify tribal cultural resources, its determination that the project will have no significant effect on tribal cultural resources carries no weight." (*Id.* at 841.)

In *Koi Nation*, the affected tribe requested "cultural monitors during development and all ground disturbance activities." (*Koi Nation, supra,* 109 Cal.App.5th 815, 829.) Provision of such tribal monitors during activities is a far cry from the Project's mere allowance of tribal monitors at a

"construction phase kickoff meeting." (AR 2394.) Notably, the tribe in *Koi Nation* did not agree with the efficacy of even the monitoring measure used there. (*Id*. at 840.) In *Koi Nation*, the court agreed the city there failed to sufficiently consult with the Koi Nation. (*Id*. at 840-841.) Similarly, the County failed here to adequately consult with tribal leaders.

b. The EIR Failed to Mitigate Tribal Resource Impacts by Analyzing a Sufficient Range of Alternatives.

Alternatives are a form of mitigation measures because they have the same function of avoiding or reducing impacts. (*Laurel Heights I*, *supra*, 47 Cal.3d 376 at 404 and *Citizens of Goleta Valley v. Bd. of Sup.* (1990) 52 Cal.3d 553, 564.) Here, instead of analyzing any onsite design options or offsite location alternatives, the EIR claimed no alternatives were feasible and that only the No Project Alternative would be analyzed in the EIR. (AR 426-427). The Kwaaymii Laguna Band objected to the narrow range of project alternatives because the EIR failed to analyze *any* alternatives to the proposed project. (AR 2538; see also 11377.) The EIR's failure to analyze a range of alternatives violates CEQA and would not avoid or minimize effects to identified tribal cultural resources.

E. Cumulative Project Impacts to Water Supplies, Air Quality, and Tribal Cultural Resources Are Inadequately Analyzed and Mitigated.

In performing a cumulative impact analysis, an EIR attempts to predict the total significant environmental impacts of both the proposed Project itself added together with "other closely

related past, present, and reasonable, foreseeable probable future projects." (Guidelines § 15355 subd. (b).) As *League to Save Lake Tahoe Mountain, etc. v. County of Placer* (2008) 75 Cal.App.5th 63 describes the process:

> The Guidelines provide two alternative methods for discussing significant cumulative impacts in an EIR, and at least one of them must be used. Under the first method, the EIR may evaluate cumulative impacts using a "list of past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency[.]" (Guidelines, § 15130, subd. (b)(1)(A).). . . Under the second method for analyzing cumulative impacts, an agency may utilize a "summary of projections contained in an adopted [plan]." (Guidelines, § 15130, subd. (b)(1)(B).)

(*Id*. at 148-149.)

Here, the County chose the list method (AR 215) and, in the trial court, insisted that only proposed projects for which approval had been applied, and that were already being actively processed when the NOP of the EIR was issued (March of 2022) should or could be considered in the cumulative impacts analysis for the Project (RA 272). However, the Guidelines do not validate this rigid, time-based approach. Guidelines section 15355 subdivision (b) defines "cumulative impact" to include impacts from "closely related past, present, and reasonably foreseeable probable future projects."

While the lead agency for a project may exercise discretion in choosing the projects on the related projects list, its discretion is not unfettered. As held in *Rodeo Citizens Assn. v. County of Contra Costa* (2018) 22 Cal.App.5th 214:

> [Courts] review an agency's decision regarding the inclusion of information in the cumulative impacts analysis under an abuse of discretion standard. The primary determination is whether it was reasonable and practical to include the projects and whether, without their inclusion, the severity and significance of the cumulative impacts were reflected adequately.

(*Id*. at 231, internal citation omitted.) A lead agency may not limit that list so restrictively as to deprive the public of knowledge of projects that may have significant cumulative effects with the proposed project.

San Franciscans, supra, 151 Cal.App.3d 61, held: "probable future projects" can be interpreted as "reasonably probable future projects." (*Id*. at 74.) Interpreting that case, *Gray, supra,* 167 Cal.App.4th 1099, held:

> [P]rojects that are undergoing environmental review are reasonably probable future projects. We conclude that any future project where the applicant has devoted significant time and financial resources to prepare for any regulatory review should be considered as probable future projects for the purposes of cumulative impact.

(*Id*. at 1127-28; see, also, *Friends of the Eel River, supra,* 108 Cal.App.4th 859, 870 [projects under environmental review are reasonably foreseeable projects.])

Here, the County omitted from the cumulative analysis list projects that it had been advised, and that are, essential for full environmental disclosure. There is no reasonable or practical barrier to the County as lead agency addressing the BHER geothermal projects, since- as discussed above- IID explicitly informed the County that the BHER projects were already in the

permitting process. (AR 2446; see also AR 12780.) IID also advised the County that IID - the source of the water that both the Project and the BHER projects would use- considered them to be related projects to the Hell's Kitchen project. (*Ibid*.)

These BHER projects would have similar impacts to water supplies, air quality, and tribal cultural resources in the Imperial Valley around the Salton Sea. (AR 2446 [water]; AR 2538 [tribal cultural resources]; AR 12947-12948 [LCJA letter].) The BHER projects, LV Specific Plan, and future phases of the Hell's Kitchen Project certainly constitute "reasonably foreseeable projects." (See *San Franciscans, supra,* 151 Cal.App.3d 61, 75.)

VI. CONCLUSION.

The County's approval of the Project violated core requirements of the California Environmental Quality Act. The County's analysis of water supply failed to provide information crucial for informed public participation. It did not address air quality impacts to disadvantaged communities. The County also failed to consult with identified tribal representatives, consider tribally-identified cultural resources, and mitigate Project impacts to those resources. Finally, the County failed to account for cumulative water, air quality, and tribal cultural resource impacts. The County's certification of the EIR and its approval of the Project should be set aside.

DATE: September 11, 2025

Respectfully Submitted,
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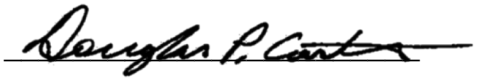
CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rules 8.204 and 8.520 subd. (c)(1), I hereby certify that this APPELLANTS' OPENING BRIEF is proportionally spaced, has a typeface of 13-point, proportionally-spaced font and contains **13,953** words, according to the word counting function of the word processing program used to prepare this brief.

Executed on this 11th day of September, 2025, at Redondo Beach, California.



Douglas P. Carstens

PROOF OF SERVICE

I am employed by Carstens, Black & Minteer LLP in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 700 North Pacific Coast Highway, Ste. 200, Redondo Beach, CA 90277. On September 11, 2025, I served the within documents:

APPELLANT'S OPENING BRIEF

[X] **VIA UNITED STATES MAIL.** I am readily familiar with this business' practice for collection and processing of correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid. I enclosed the above-referenced document(s) in a sealed envelope or package addressed to the person(s) at the address(es) as set forth below, and following ordinary business practices I placed the package for collection and mailing on the date and at the place of business set forth above.

[ ] **VIA OVERNIGHT DELIVERY.** I enclosed the above-referenced document(s) in an envelope or package designated by an overnight delivery carrier with delivery fees paid or provided for and addressed to the person(s) at the address(es) listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

[X] **VIA ELECTRONIC SERVICE THROUGH TRUEFILING.** Based on a court order or an agreement of the parties to accept service by electronic transmission through TrueFiling, I caused the above-referenced document(s) to be sent to the person(s) at the electronic address(es) listed below.

I declare that I am employed in the office of a member of the bar of this court whose direction the service was made. I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 11, 2025, at Redondo Beach, California 90277.

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