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California Department of Toxic Substance Control
Attention: Aaron Yue, Topock Project Manager
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By Email
July 19, 2010

Re: Topock Compressor Station Groundwater Remediation Project
Fort Mojave Indian Tribe Comments on DEIR dated April 2010
SCH No. 2008051003

Dear Mr. Yue:

This comment letter on the Draft Environmental Impact Report ("DEIR") for the proposed Topock Compressor Station Groundwater Remediation Project (the "Project") is timely submitted on behalf of our client, the Fort Mojave Indian Tribe ("FMIT" or "Tribe"), a federally recognized tribal sovereign government.

Introduction

Attached to this comment letter are three expert reports, one photo, relevant letters and mitigation precedents, to wit: 1) Report from Thomas F. King, Ph.D, dated July 17, 2010, 2) Report from Dr. Leo Leonhart, dated July 18, 2010, 3) Report from Nora McDowell-Antone, Topock Remediation Project Manager, dated July 19, 2010, 4) Photo showing the compressor station facilities in their physical context, 5) Letter from DTSC Counsel to the Tribe, 6) Letter from the National Park Service to the author of this letter, 7) list of mitigation precedents, 8) list of PG&E's historic activities in the Topock area and 9) Letter from Pamela Innis to Dr. Leo Leonhart. The Tribe expects and respectfully requests that DTSC respond specifically to the comments made in these attachments as well as to those in this letter.

Based on the information presented in this letter and its attachments, the Tribe strongly believes that its interests have not been adequately or fully addressed in the DEIR, and that impacts on aspects of the environment that are of great concern to the Tribe have been ignored. Moreover, many of the issues outlined in the Tribe's Notice of

Preparation (“NOP”) comment letter, dated July 1, 2008, have not been addressed in the DEIR. Accordingly, the Tribe reaffirms its comments in its NOP scoping letter.

For this, and other reasons as discussed below, the DEIR in its present form, does not comply with the California Environmental Quality Act (“CEQA”) and other pertinent laws and guidance. It is our sincere hope that the Department of Toxic Substances Control (“DTSC”) will work with the Tribe to address the Tribe's concerns so that the environmental document that is ultimately approved by DTSC will be one that the Tribe can support.

Process Issues

The Tribe has tried for many years to work cooperatively on all aspects of this proposed Project with State and Federal Agencies, Pacific Gas & Electric (“PG&E”) and other stakeholders. This included commenting on draft work plans, attending public hearings including those for the NOP, regularly attending the Consultative Working Group (“CWG”), Technical Working Group (“TWG”), Clearinghouse Task Force (“CTF”) and Topock Leadership Partnership (“TLP”) meetings where aspects of the Project and its DEIR were discussed, organizing and attending site visits and providing qualified tribal monitors for projects and providing cultural sensitivity training for PG&E and their contract representatives. We believe that this effort has been successful in influencing the investigations to date, the remedy selected and reduced impacts in the field.

However, up to this point, the RFI/RI, CMS/FS and various work plans did NOT include a detailed evaluation of impacts to cultural resources of concern to the Tribe, despite repeated requests by the Tribe that these documents include such analysis. It is the Tribe's view that avoiding or otherwise managing impacts on these important resources, therefore, was NOT fully considered in the conceptual design of the alternative remedies presented in the DEIR and elsewhere. (For example, see Alternative D (Sequential In Situ Treatment), that proposes a remedy that would put wells in the Maze complex, an area that all parties agree should be avoided). During the RFI/RI and CMS/FS processes, the Tribe was repeatedly assured that those were not the proper times to address "non-technical" constraint, but that all of its cultural concerns would be adequately considered in the DEIR and that the DEIR was the appropriate place for this analysis; this has not happened. The Tribe remains deeply concerned that consideration of tribal cultural resources again is largely deferred to some other time, perhaps during final remedy design and implementation or future work plans, which may further frustrate CEQA and result in a failure to truly analyze and provide effective mitigation for certain types of impacts (regional, cumulative and indirect) at the most opportune time.

During the drafting of the DEIR, there were meetings between DTSC contracted staff and the Tribe. (See, attached comment letter from Nora McDowell-Antone). The Tribe tried on many occasions to review draft portions of the DEIR relative to the Tribe's cultural concerns, to assure itself that DTSC and its contractors understood the concerns

being expressed to them by the Tribe. DTSC refused to provide the Tribe with relevant sections of the DEIR, except for a small portion of the cultural resources section relating to the Tribe. The Tribe provided comments on that section around April 16, 2010, but was told that the comments were too late to be incorporated into the DEIR, but would be considered as comments on the DEIR.

The Tribe's revisions, as previously submitted to DTSC, are attached to Ms. McDowell-Antone's comment letter and relate to concerns that: 1) the Project area was never completely surveyed and was not surveyed with the input of representatives, 2) the Tribe was not fully consulted, 3) that landscape level context needed to be considered, not just discrete sites recorded by archaeologists, 4) that indirect and cumulative effects needed special consideration and 5) that the religious and traditional beliefs of the Mojave People would be uniquely affected. Indeed, these areas are ones that are weakly, analyzed, if they are analyzed at all, in the DEIR.

Prior to the finalization of the DEIR, the Tribe also offered to sit down and discuss mitigation strategies with DTSC and its contractors. We felt that these conversations were appropriate under CEQA as well as allowable given the terms of the settlement agreement between the Tribe and DTSC in *Fort Mojave Indian Tribe v. Department of Toxic Substance Control, et al*, Sacramento Superior Court Case No. 05CS00437. We also felt that addressing these issues upfront - before release of the DEIR - would be most efficient and result in less risk of contributing to Project delay, something the Tribe does not want. We have found that writing a DEIR through public comment is often an inefficient process as it may result in the need for recirculation of the environmental documents. It also puts unacceptable burden on the Tribe which has far fewer resources than the applicant. In any case, those offers were not accepted by DTSC, leaving the Tribe with no choice but to voice these serious concerns during the public review process for the DEIR.

The Tribe and DTSC have had two sit-down meetings since the DEIR was released for public review, in which the Tribe has conveyed many of its concerns about the adequacy and completeness of the DEIR.¹ Because the Tribe continues to have deep concerns about: 1) the impacts of this project to its traditional cultural properties and lifeways and 2) the adequacy of this Draft EIR to disclose, analyze and mitigate impacts to resources of concern to the Tribe and its people, we respectfully submit this comment letter and its attachments to supplement and more fully describe those concerns.²

¹ Some concerns expressed in the May 27, 2010, meeting were summarized in DTSC Outside Counsel Andrea Leisy's June 24, 2010, letter to Chairman Williams. (See attached letter). While this letter is generally accurate in capturing some of the items discussed, it is incomplete. Nonetheless, to reduce duplication, the issues summarized in that letter also should be considered part of the Tribe's written comments on the DEIR for which it expects written responses to comment.

² If other than revised Alternative E is going to be approved by either DTSC or BLM/DOI based on information received during the public comment period or for any other reason, the Tribe requests to be immediately consulted and afforded an opportunity to put additional information regarding impacts and mitigation into the Project record.

Cultural Resource Analysis is Flawed, Therefore the DEIR is Inadequate and Must Be Revised

Identification: The DEIR fails to adequately identify the full extent of tribal cultural resources that would be affected by the Project

The DEIR does not reflect the Tribe's cultural views. (See, attached expert reports from Nora McDowell-Antone, Thomas F. King, Ph.D, and Dr. Leo Leonhart). The DEIR fails to explain why prior submissions from the Tribe, including its NOP comment letter, were not adequately reflected in the DEIR text. The DEIR does not achieve the level of analysis required to fully assess the significance of Project impacts nor the adequacy of mitigation for impacts to tribal cultural resources. The Tribe believes these resources are not just important to the Tribe's history, but to the history of the people of the State of California.

- The DEIR acknowledges a "Topock Cultural Area" which is considered a historical resource because of its historic (and continuing) importance to representatives of the FMIT and certain other Yuman-speaking tribes. First, as explained to DTSC by Linda Otero at the May 27, 2010 meeting, tribal members who have been working with DTSC do not sit alone at these meetings, but rather, sit on behalf of their nation; this area is of importance to the Mojave People not just to representatives of FMIT. Second, why is there no analysis in the DEIR of the larger Colorado River Cultural Landscape, stretching from Hoover Dam to below Blythe, down to Pilot Knob, which is the larger traditional cultural property ("TCP") within which the smaller TCP (the DEIR's "Topock Cultural Area") is a part?
- The entire project area has NOT been surveyed by archaeologists. In correspondence from Pamela Innis, Project Manager DOI, dated May 3, 2010, and attached to this comment letter, the Tribe was informed that: 1) areas within the Compressor Station fence line have NOT been surveyed, and 2) areas outside the expanded APE that may be part of the final remedy have NOT been the subject of a true 2010 cultural survey as alluded to in the DEIR, but rather, were the subject of a preliminary or "windshield" examination only. The DEIR must be revised to correctly reflect this information.
- Will the Project area ever be subject to a Tribal survey? The Tribe believes that its team could locate additional sites, given its knowledge and training and especially since the area is a religious property. The Tribe also requests to: 1) be part of the crew on all cultural surveys that are related to the Project and 2) that all such reports be provided to the Tribe in draft form for its review and comment prior to finalization.

- Based on the two bullets above, and that the entire area is a religious and sacred property to the Tribe, one cannot automatically assume that placing uses in so-called "disturbed" areas is acceptable to the Tribe or would cause no adverse effects.
- The DEIR repeatedly refers to October 2005 David Earle report, *National Register of Historic Places Supplement for the Topock Maze*. While the report may have some value relative to the history of the area, it is of questionable or no value when it comes to tribal cultural values because: 1) no Tribal informants were consulted, 2) it is merely a draft, and not a final report, 3) IT does not discuss TCPs, spiritual values or National Register Criterion A (26 CFR 60.4), 4) it focuses only on the three Maze loci as defined archaeologically, and 5) it is unclear about the boundary for the revised nomination and whether related places (intaglios, trails) are included. These limitations of the report must be acknowledged in the DEIR.³
- How are additional cultural finds being handled presently? We understand that archaeologists have made finds of previously unrecorded archaeological sites including at the East Ravine Groundwater Investigation Area (Site K Alternate - lithic scatter) and tribal monitors have also made similar finds at the monitoring area site adjacent to the Maze area, Loci A, southeast area (over 150 pieces). How will such finds during remedy implementation influence Project siting?⁴
- The DEIR does not reflect the Tribe's view of water: that it includes rain, groundwater, the river, and the Mojave People as they are all part of the same natural cycle. That the groundwater was there for thousands of years, in a pure form, and now it polluted, and being handled, being moved, forced - a violation of that sacredness.
- The pollution itself, the introduction of reductant, as well as the Compressor Station, the old and new evaporation ponds, pipelines and the monitoring well in the Maze complex, and the associated activities and disturbances (monitoring, testing and operation and maintenance) are all cumulative impacts - impacts that have largely avoided mitigation measures for their cultural impacts in the past and continue to have adverse effects now. The DEIR must consider and mitigate these cumulative impacts.

³ Furthermore, the Tribe must be consulted on any proposed amendment to the National Register listing consistent with the letter from the National Park Service, dated November 23, 2009, and attached to this comment letter.

⁴ The Tribe believes that it, and not an archaeologist, should determine the proper treatment for any archaeological discoveries in the TCP. As stated previously, in general, the Tribe believes such finds should be avoided.

Impact Assessment: The DEIR Fails to Adequately Assess the Full Extent of Tribal Cultural Resources that Would be Affected by the Project

The Tribe is concerned about the full range of potential impacts to the Tribe and resources of concern to it.

The DEIR lacks an adequate direct or indirect impact analysis for tribal cultural resources. Visual changes, noise, lighting, and vibration are simply listed as potential sources of disturbance, but there is little analysis of how and to what extent each type of disturbance may impact the Project area, its surroundings and tribal practitioners. (DEIR, pages 4.9-4 and 4.9-5). The Tribe is seriously concerned about the Project's impacts adversely affecting the Tribe's relationship to and perception of its cultural areas. For example, the DEIR provides no analysis or consideration of the following concerns:

- The DEIR admits that the introduction of nighttime lighting for site security would introduce a "noticeable change" to the existing visual setting. (DEIR, page 4.1-50). Yet no mitigation is proposed. What level and type of lighting will occur? Will the project cause a "glow" around the area at night? (Please provide a visual simulation of maximum nighttime light and skyglow impacts.) Is there a lighting plan for the Project? If not, why not? The Tribe would like to be consulted on that Plan to assure the minimization of lighting and protection of dark night skies.
- Will the remediation system construction and operational activities cause rock or slope deterioration, movement, dislodgment or change drainages?
- How were the Tribal access considerations determined? The Tribe does not understand why PG&E may exclude the Compressor Station and "related facilities" from the areas for which tribal use may be provided, especially where the property has not been subject to a cultural survey. (DEIR, page 4.4-57). Moreover, it is unclear what is meant by the "Compressor Station" and "related facilities." The Tribe's view is that the DEIR should not place any unnecessary and unjustified restrictions on tribal access to its religious properties.
- According to the settlement agreement between the Tribe and PG&E in the case styled *Fort Mojave Indian Tribe v. Department of Toxic Substance Control, et al*, Sacramento Superior Court Case No. 05CS00437, the IM3 Wastewater Treatment Facility is to be removed as soon as practicable because of its unacceptable impacts to the Tribe. The Tribe, therefore, was surprised to see in DEIR, Key View Number 6, that new structures were shown at the IM3 facility. If the Plant was deemed an unacceptable intrusion, so would any expanded or new structures at this location. The impact to visual resources must also be shown as significant, not less than significant as currently stated in the DEIR. Alternative locations, off IM3, must be found for such structures.

- What does in situ reactive zone of extraction/injection wells "along" portion of National Trails Highway mean? Does this mean within the right of way (assuming one exists)? Within a certain number of feet? Directly within the road? (See, for example, key view 4, DEIR, page 4.1-35). The Tribe, in general, feels that it is preferable to put new wells *in* existing roads instead of into unpaved areas. If there are competing types of historical resources, the Tribe believes that religious tribal cultural properties must take precedence over other kinds of historic properties (such as recreational) which are not entitled to strict scrutiny under the United States and California Constitutions.

The DEIR also makes no effort to show compliance with regulations and policies of the California Native American Heritage Commission (Public Resources Code 5097.9 et. seq.). Portions of this Project would occur on public lands in California, as noted in the Tribe's NOP comment letter. Human remains, sacred shrines and ceremonial places encountered on public land in California are entitled to an enhanced degree of consideration.

Regarding human remains discovered during project construction, the DEIR asserts that if human remains are discovered all work would stop near the find. The DEIR text is unclear whether a qualified archaeologist and Native monitors would be present during all earth moving and construction activities and whether the monitoring team would include someone qualified as a bone expert to assist in making field identifications. Further, the number of observers must be sufficient in number given the large geographical scale of the Project.

Without such provisions being clearly stated, it is unlikely that any inadvertently discovered human remains will be adequately protected during such activities as the other workers (usually untrained or unable from their physical location to see such remains) would likely be unable to recognize these remains and stop work before unnecessary desecration occurs, even with cultural sensitivity training.

Moreover, the DEIR's impact thresholds and analysis do not reflect the traditional tribal cultural value ascribed to the area. It is not just appropriate, but required under CEQA, for the EIR to address the physical conditions which exist within an area affected by a proposed project including ambient noise and objects of historical or aesthetic significance. (CEQA Guidelines section 15360).

Environmental settings, such as the sensitive cultural and natural setting at Topock, can trigger significant adverse effects. It is well established in CEQA that significance of an activity can vary with its setting. *Oro Fino Gold Mining Corp. v. County of El Dorado*, 225 Cal.App.3d 872, 882 (1990) (an activity which may not be significant in an urban area may be significant in a rural area).

Public perceptions, economic and social effects may also affect the significance adverse effects. (Guidelines section 15131(b)). The concerns of traditional Mojave People, stated across many meetings and public hearings, are one of the types of public

perceptions and social effects that must be factored into the DEIR's significance standards. Of primary importance to the Tribe, are efforts to avoid and minimize impacts to tribal cultural resources.⁵ It also should be noted that tribes are legally recognized as having special expertise regarding properties that have religious significance to them. (NHPA Section 800.4(c)(1)).

Thus, the trigger for impact thresholds is not necessarily a simple percentage of a given area would be directly affected by a Project, as alluded to in the DEIR. The DEIR adds further confusion to the issue by stating that the total project area in which potential remediation and monitoring facilities could be located is approximately 779.2 acres (DEIR, page 1-2, Exhibit 3-2 "Project Vicinity"). This exhibit has been a source of confusion, as PG&E was trying to use it to argue for a reduced Area of Potential Effect ("APE") under the National Historic Preservation Act ("NHPA") with BLM. We understand from our meeting with DTSC on July 6, 2010, that this graphic was never intended to be used in the NHPA Section 106 process or for an APE. In fact the DEIR itself acknowledges that some impacts, such as air quality or transportation (and we would add cultural, visual and other impacts) could have effects outside of this area. (DEIR, page 1-2). Further, Tribal members told DTSC at the meeting between DTSC and the Tribe on May 27, 2010, that the impact area is far greater than depicted here. DTSC should clarify this issue to avoid further confusion.

Direct impacts are typically the easiest for agencies to understand and address in a DEIR. Pursuant to CEQA, each type of impact can be local or regional in scope. There are also other categories of impacts that must be adequately analyzed and mitigated:

Indirect impacts, which may be later in time or farther removed in distance, are of particular interest to the Tribe given the potential long timeframes for the Project (thirty to 100 plus years) and the potential distance of related resources to those that will be physically affected by the Project (related cultural resources along the Colorado River and visual impacts across the valley).

Cumulative impacts, which are the effects of the Project "taken together" with past, current and future projects that pose "similar impacts." These are also of particular concern to the Tribe given prior effects to the cultural area in and around Topock (including bridges, highways, recreational facilities, utilities, off road vehicle use, etc.) and other closely related cultural resources for the Tribe (including intaglios, trails, sacred places) that have been impacted in the past and may be impacted further in the future (including industrial solar, geothermal, wind facilities and pipelines and transmission lines).⁶ The DEIR should also address the cumulative impacts associated with PG&E's historic operations and previous and ongoing cleanup activities to date. See

⁵ The Tribe incorporates by reference all the letters its technical consultants, legal counsel and Tribal staff and management have submitted to DTSC and received from DTSC since 2004 which support, detail or address the Tribe's views towards protecting resources in the area and minimizing impacts.

⁶ The Tribe does not understand the rationale for using "projects in vicinity" of the Project as the cumulative impact standard. Please explain and provide the legal basis.

attached document entitled "List of Topock Project Documents" for a list of activities that have not fully mitigated impacts to tribal cultural resources.

The Tribe believes the DEIR fails to address impacts to tribal cultural resources and when it does analyze an impact, uses incorrect standards which in turn underestimate the impacts. In all cases, the impacts the Tribe describes relate to physical changes in the environment, as is required by CEQA.

As shown here and in the attached expert reports this includes impacts to:

- **Air quality:** The DEIR fails to analyze whether the Project's dust will impact properties of concern to the Tribe. The DEIR should examine whether portable, non-ground disturbing barriers can be used adjacent to site work locations to redirect dirt and dust away from particular tribal cultural sites or areas.
- **Biological Resources:** The DEIR fails to analyze the possibility that impacts to biological resources may cause cultural impacts to the Tribe. For example, impacts to ceremonial and resource plants such as mesquite and arrowweed put stress on the Tribe as these plants are used for medicine or for cremation ceremonies. There are ceremonies on how to properly treat the plants, and even their ashes; the DEIR does not address these impacts.
- **Landform Alteration:** The Tribe is also concerned about the filling of wetlands and landform alteration which may in turn cause additional visual and erosion impacts. (See, for example, Key View 13, DEIR, page 4-1.45).
- **Visual Resources:** Instead of grouping tribal practitioners with recreational and pedestrian viewers, the DEIR should have acknowledged that Tribal religious and cultural practitioners deserve their own grouping and mitigation for the loss of visual quality both from and towards the Topock area, as requested in the Tribe's NOP scoping letter. The mitigation measures proposed in the DEIR may be appropriate for other users (earth-tone concrete, use of a landscape architect) but the Tribe should have been consulted on what mitigation measures may assist in preserving their experience of the area. For example, views to the Topock area from I-40 and I-95 show the clear impact of the compressor station upon that area with the roof shining in the sun, before the Needles Peaks, and intruding upon the valley's intersection with the mountains, is unmistakable and a constant reminder of the intrusion there of the facilities and the pollution. (See attached photo taken from I-95). The Tribe believes that impacts on the visual quality of area should be categorized as potentially significant and unmitigable and that additional mitigation steps be taken, in consultation with the Tribe.
- **Noise:** Instead of using a worship standard that reflects worship within an enclosed building, the DEIR should have adopted a standard that better accommodates the actual practices of the religious users of this area, the Mojave People, who do NOT traditionally worship within a building but in the open

landscape, without walls, to attenuate the noise experienced. The Tribe should have been consulted on what mitigating measures could preserve or even improve their experience of the area. While the impact conclusion might remain potentially significant and unmitigable, surely additional mitigation steps could be taken to help alleviate current (including boat engines, trains, compressor station phone/PA system, helicopters, Park Moabi music) and project-related noise (including construction, operation, maintenance and decommissioning activities) and understand area conditions, such as prevailing winds as requested in the Tribe's NOP comment letter, to help restore some of the aural quality of this area. Moreover, while some cumulative analysis is in the DEIR for noise, only direct and no cumulative mitigation appears proposed.

- **Aesthetics:** These impacts are more than just a matter of visual concern to the Tribe: Will the Project introduce visual, atmospheric or audible elements that could diminish integrity? Does the Project diminish integrity of location, design, setting, materials, workmanship, feeling or association? What level of air quality and dust impacts will be experienced in these cultural areas? Will they affect traditional Tribal practitioners or how they experience the area? As explained by Linda Otero to DTSC at the May 27, 2010 meeting, "It's like turning a dagger in our heart, disheartening, what to expect as the landscape changes."
- **Utilities:** The location and extent of utility connections, both onsite and offsite, is not adequately addressed in the DEIR, which may also cause unstudied impacts to tribal cultural resources.
- **Hazardous Materials:** From time to time during the interim measures, spills have occurred. Do clean up plans call for the protection of archaeological sites and sacred soils? How is this adequately considered in an "emergency" situation? Are the Project's hazardous materials handling, spills, storage and contingency plans available for review?
- **Water Use Impacts:** The Tribe is concerned that the Project could alter water flows and drainages such that biological resources with cultural value, such as plant and animal species within the natural landscape, may lose their environmental support system and no longer occur or be reduced in number. It could also adversely affect species that play an important role within the tribal cultural TCP. The DEIR fails to discuss these potential impacts to resources that currently support flora and fauna and contribute to the tribal TCP.
- **Water Supply Impacts:** The DEIR does not disclose the extent of potential water use by the preferred project or alternatives. Being a priority holder of water rights in this area, the Tribe needs an assurance that its water rights would not be adversely affected by the Project.

- Working with Tribal Governments: The Project should also conform to recent guidance adopted and issued by CalEPA regarding working with tribal governments.⁷

Mitigation Measures: Inadequate and Culturally Inappropriate

The proposed mitigation measures for cultural and other resources are both inadequate and culturally-inappropriate. In general, the mitigation is inadequate as it is largely nonsubstantive, does not fairly address tribal cultural concerns and tends to parrot boilerplate cultural resource sections of environmental documents typical of much smaller projects, with fewer impacts, over a much shorter time frame, as detailed below. Also, in many instances, the mitigation proposed is culturally-inappropriate as it does not respect or reflect Tribal views and lacks an understanding of the value of Tribal input. Moreover, many of the measures are vague, in that there is no deliverable, no identification of who is responsible for implementation of the mitigation, and/or no timeframe for completion or benchmarks.

The following are some examples of specific mitigation measures listed in Table 1-2 that are of particular concern to the Tribe:

- Some measures state that they "shall be" implemented in a manner consistent with mitigation required through the federal CERCLA process (see, for example, CUL-1a, fourth bullet); yet others, state that "to the extent feasible," the measures shall be implemented in a manner consistent with the mitigation required through CERCLA (see, for example, CUL-1b and 1c, first paragraph). This inconsistent application must be explained or else all references should be made consistent.
- The measures provide for PG&E to retain a "qualified cultural resources consultant" to prepare a "cultural resources study" to assess the potential for significant impacts on "identified cultural resources" and "unique archaeological resources" (DEIR, pages 1-31, 1-33). The purpose and scope of this study is unclear to the Tribe, such as whether this applies to only sites that are already recorded or to newly recorded sites, or both. What are the qualifications that would be appropriate to each study? The Tribe also believes that enough is already known, especially at a programmatic level, to have mitigation measures developed now, and not deferred until some future time when there may be less ability to address certain types of impacts, such as those at the landscape level, as we know the Project will be located in this general area and that will not change with any site design changes or additional surveys. Finally, why is there no parallel requirement for a survey of "tribal cultural resources," once Project design and location determined?

⁷ Cal/EPA Policy Memorandum, *Cal/EPA Policy for Working with California Indian Tribes*, issued 10/19/09, <http://www.calepa.ca.gov/tribal/Documents/CIT01Policy.pdf>.

- The measures state the Native American Tribal Monitors (“Native Monitors”) shall be "invited" to conduct yearly inspections or to observe ground-disturbing activities. (DEIR, pages 1-32 and 1-34). While additional specificity may be located in the DEIR text, the Tribe is deeply concerned about the term "invite." It is the Tribe's view that PG&E must be required to request qualified Native Monitors for any and all ground-disturbing Project activities and that they must be compensated for their work, as professionals, by PG&E. If a tribe chooses to not have a monitor present, that is their choice but the request for their presence must be made and be made with sufficient advance notice and for an adequate number of monitors to be present for the nature of the activity (i.e., at least one monitor for each piece of earth moving equipment and for each archaeological screening activity).
- The measures state that paleontological monitors "shall be empowered to halt construction activity" in the immediate vicinity of a paleontological find to allow for the recovery of unearthed fossil remains. (DEIR, page 1-35). It is unacceptable to the Tribe that qualified Native Monitors are being given less professional discretion in the field; instead, Native Monitors are being asked to follow a chain of command in the field that may not on its face, enable them to halt construction work in the field to protect tribal cultural resources or human remains. It is the Tribe's opinion that all three field professionals: the paleontological, archaeological and tribal monitors should be given the same professional deference in the field; to do otherwise is discriminatory and an affront to environmental justice. You are asking for the Native Monitor's professional judgment, why would you not follow it? Moreover, the same pragmatic issues of scientific discovery govern: if the Native Monitor is allowed to halt work and inspect, there is actually less opportunity for delay as negative identifications will not need to go through the cumbersome notification process currently proposed.⁸

Mitigation Measures: Additional, Feasible Mitigation Measures Are Available

DTSC has assured the Tribe in the two recent face-to-face meetings that it realizes additional Tribal-specific mitigation is warranted; similarly, in meetings held in June 2010 between the Tribe and BLM/DOI and the Tribe and PG&E, they appeared to agree.

We understand that this is PG&E's largest remediation project. Its cost range within the CMS/FS is listed as \$92 million to \$198 million for Alternative E (CMS/FS, Table D-6, page D-14). We understand that this range includes a -30 percent to + 50 percent contingency because of the uncertainty in materials costs (e.g. fuels) that could affect the estimate between the planning stage through project design and

⁸ DTSC may need to direct PG&E to incorporate provisions for Native Monitors into their contractual agreements to ensure compliance.

implementation.⁹ We also understand, however, that this range does NOT include what might be termed “soft” costs or reimbursement of federal and state entities for their oversight. Thus, mitigation for the significant and unmitigable impacts to cultural resources should be at a scale in proportion to the substantial Project itself and be meaningful to the people who have been and continue to be impacted.¹⁰

The Project may have different impacts on each participating tribe. Therefore, each tribe could identify and support mitigation measures to lessen the impacts on it, as has been done on other projects. Because of its omission in the DEIR, the Tribe has suggested, out of necessity, a mitigation framework both at the BLM Programmatic Agreement (“PA”) meetings and in meetings on the DEIR with DTSC and PG&E. The measures proposed by the Tribe are consistent with CEQA in that they: 1) are reasonably related to and have a nexus to the Project's impacts and 2) the scope of the mitigation measures is roughly proportional to the impacts.

The Tribe's mitigation framework reflects that the project, in its current form, has a disproportionately high impact on FMIT. The Tribe: 1) is the closest to the Project (members of the FMIT have to live in the Project's shadow every day; they see their sacred Avi Kwa Ame and Topock Needles every day, as they live their lives within their sacred places (unlike many religious practitioners who look only to faraway lands, they are reminded daily of their culture and history), 2) is the only tribal landowner within the Project's footprint (this carries a special burden and necessity to monitor the Project for the life of the Project), and 3) is obligated to protect the area that is sacred to it (members of the FMIT have survived forced eviction from their valley, for hundreds of years, and request that the destruction of their culture not be accelerated by the Project).

While some impacts can, be subjective, such as those related to cultural, visual, social, indirect and cumulative impacts, the Tribe has submitted substantial evidence in the record, through letters, testimony and reports, to support the nature and foundation of their views. Based on this evidence, there is no question that environmental harms have been, are presently, and will occur in the future to the FMIT and its people. In fact, both PG&E's and DTSC's upper management admitted this in their respective 2005 formal written apologies to the Tribe. There is no need to wait for the final design phase to begin to mitigate the Project's environmental effects.

The Tribe's suggested categories for additional mitigation measures include: 1) restoring the land and its life-forms, improving tribal access and reducing incompatible uses, 2) strengthening traditional Mojave spiritual, cultural and funerary traditions, and 3) assisting the Tribe in relating to the remediation project. Additional support for these categories is also found in the precedent set on other projects, which have incorporated

⁹ The CMS/FS Appendix D (page D-48) also appears to include a cost for “cultural surveys” of \$ 50,000 over each of 29 years. The Tribe requests clarification of what “cultural surveys” entails to better assess the adequacy of this projection. It is unclear if this includes project monitoring, surveys, oversight, etc.

¹⁰ The DEIR also should be clear regarding financial assurances for the Project and its mitigation measures. What kind of financial assurances will be required by DTSC and will these be sufficient to cover the Project through the post-remediation monitoring phase and through all restoration activities?

these forms of mitigation into their Programmatic Agreements or Memoranda of Agreement. (See attached document, entitled "List of PA Mitigation Measures"). The Tribe remains willing and able to further discuss each of these categories, mitigation measures, projects and the anticipated cost ranges for measures within each of these broader categories. Any measure which is not listed as a specific mitigation measure should be incorporated as a condition of project approval.

Even with additional mitigation, however, the Tribe strongly believes the Project's impacts on its tribal cultural resources is still significant and unmitigable. To the extent feasible mitigation measures do not mitigate significant impacts to insignificance, DTSC will have to prepare a Statement of Overriding Considerations to approve the Project, which must be supported by substantial evidence in the record. However, if feasible mitigation is proposed that would reduce the severity of an impact, the Lead Agency must nonetheless adopt it.

Additional, culturally-appropriate mitigations exist for impacts to tribal cultural resources of concern to the Tribe. However, these measures are absent from the DEIR, in part, because the Tribe was not consulted by DTSC on such measures during the development of the DEIR.

Our sacred lands are all that remain keeping us connected to our place on Mother Earth, to our spirituality, our heritage and our lands; what's left of them. If they take it all away, what will remain except a vague memory of a past so forgotten?" excerpt from One Nation, One Land , One People by Tamra Brennan, 2006.

Mitigation Measures: Mitigation Measures of Shared Value

There are also additional mitigation measures that would help mitigate concerns shared by the Tribe and other stakeholders. These include: 1) funding one or more rangers (BLM and/or Tribal) to patrol the Topock area, 2) funding the ACEC management plan and 3) addressing cumulative impacts associated with developments and activities incompatible with the ACEC and National Wildlife Refuge values.

Additional patrol personnel are already warranted under current conditions given the increasing incursions and damages to the area, including to the earth drawings and Maze areas. Based on Tribal experience, these impacts are not limited to any particular time of the year; incursions are a year-round problem (when the weather is warm, the impacts may be associated with the recreational users of the river; when the weather is cooler, the impacts may be associated with the off highway vehicle users). It is expected that these effects will only worsen with the introduction of additional remediation activities in the area, which in turn, the Tribe has observed attracts more of the public to the area. BLM has stated to the Tribe both in the past and recently, that it lacks sufficient personnel to do the patrols.

Similarly, the DEIR analysis is hampered due to the lack of a Management Plan for the ACEC. (See, for example, DEIR, page 4.3-35). The Tribe disagrees that because remediation is "not a prohibited activity" that there are no conflicts between the remediation and cultural elements of the ACEC. This ACEC was established several years ago, but still does not have a governing ACEC management plan. BLM has told the Tribe that this is because of a lack of BLM staff and funding. An additional mitigation measure for the Project would be for it to fund or contribute to the funding of a Management Plan for this ACEC, to be completed within a set timeline. The Tribe, who actively participated in the designation of the ACEC, requests to be consulted and involved in any such effort to develop the much-needed Plan.

Finally, additional projects are being proposed for the Topock area which will likely pose additional effects and uses incompatible with the sacred area and protected environmental values. These include a private hotel development on the Arizona side and further expansion of the Park Moabi facility to include a 250 space RV park. Such projects would further exacerbate cumulative impacts to visual, noise, cultural and biological impacts, among others. The last expansion of Park Moabi, and the proliferation of websites regarding resources at Topock, have already caused harmful exploitation of resources important to the Tribe.

Role of Programmatic DEIR

The instant DEIR is supposed to be Programmatic and related to groundwater. (DEIR, page 4.4-1). We understand from DTSC that the Project elements (up to 170 new wells total, up to 6,000 linear feet new roads, up to 50,000 linear feet of new utility connections, etc.) were requested by DTSC to reflect the maximum amount of facilities. Because the DEIR could authorize that amount of development on a programmatic level, the Tribe requests that mitigation match that amount of worst case development.

Generally, under CEQA, subsequent environmental reviews for future actions will rely on the Programmatic EIR and only look at new, unstudied or worsened potential environmental effects. Yet, the DEIR does not provide a framework for how DTSC intends to examine these future actions and whether or how it intends to involve the tribes in this decision making. This is an important issue, particularly for impacts related to replacement wells, etc., when a like well in the same location is not possible.

A somewhat related concern exists relative to any aspects of the Project that might propose a long term permit, lease or right of way. Lengthy terms, especially those without a review trigger, may pose additional unacceptable risks to the Tribe and visitors. A shorter term, such as no more than 5 years, with renewals contingent on meeting mitigation, monitoring and approval conditions accompanied by public review would be more appropriate.

Finally, how will DTSC provide a framework for checking in periodically and determining: 1) if the impacts are consistent with what was studied in the DEIR (and if they are not, what is the plan for addressing these issues) and 2) that the mitigation

measures are working as predicted in field (and if they are not, what is the plan for addressing these issues).

Restoration Plans Inadequately Addressed in DEIR

The Project's impacts to cultural resources are permanent and irreversible.¹¹ The restoration concepts, such as they are, cannot and do not restore the landscape or the tribal cultural values to even close to what they historically have been and even are today. Nonetheless, restoration plans must be developed and implemented in consultation with the Tribe. The Plans should include performance standards until the restoration is complete, just as DTSC has for health and safety, environmental protection, etc.; this should also include an analysis of not just trying to restore to conditions of the recent past, but looking deeper into history, for example to conditions that may have been present historically, such as forests near the River. It should also include visual simulations of the relevant Project areas during restoration phases and activities.

Existing obligations for PG&E to restore aspects of the Topock area should NOT be included as mitigation measures for the Project, as that would allow PG&E to "double dip" and take double credit for mitigation. Restoration that is NOT mitigation for the current Project, but for past activities, includes restoration of any existing evaporation ponds and restoration of IM3 and its component parts, as there are pre-existing commitments to perform this restoration, unrelated to the final remedy. While the Tribe may support those activities, the Tribe wants to ensure that they are not credited against the mitigation required for the Project's additional impacts to tribal cultural resources. Finally, will restoration plans be separately reviewed pursuant to CEQA?

Project's Federal Nexus

The DEIR text is unclear regarding how the state and federal regulatory processes and framework for the Project intersect and what to do when the intersections are NOT seamless, such as designation of the No Action/No Project Alternative.¹² This has been an issue of concern to the Tribe that has been raised for several years with state and

¹¹ From the Tribal viewpoint, data recovery is NOT the only form of irreversible effect to tribal cultural resources.

¹² The so-called "No Project Alternative" (referred to in the Statement of Basis and by DOI as Alternative I) is neither a "no project alternative" nor does it comply with the Settlement Agreement, as discussed in DEIR Section 7. The IM3 facility was cited under an emergency authorization, and there is no authority for an indefinite continuation of that interim remedy: An alternative final remedy must be selected. Also, the DEIR states in Section 8.7.4 that CEQA Guidelines state that "the No Project Alternative should consider the existing conditions at the time of the notice of preparation (NOP) is published." While the CEQA Guidelines provide that guidance, that guidance does allow for some agency discretion and was expressly superseded by the Settlement Agreement which *requires* that a January 2004 environmental baseline be used for "retaining any equipment or installation on the IM-3 Site." Thus, a Final EIR that was used as a basis for selecting the No Project Alternative would be fatally defective. However, should Alternative E, as revised, be selected (and all feasible mitigation measures using the January 2004 environmental baseline be adopted for that alternative), the failure to use the proper environmental baseline for the No Project Alternative could be harmless error.

federal agencies and never received a satisfactory response; the only response has been, in essence, not to worry as DTSC and DOI are working together closely.

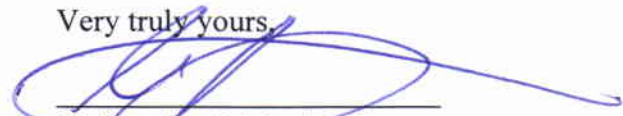
A similar area of concern has been the treatment of tribal concerns as ARARS. As the Tribe has repeatedly pointed out, the impact of a remedy is a required "threshold criterion" for remedy selection, not just a "modifying criterion" of "community acceptance." See, for example, Letter from Hargis + Associates to DTSC and DOI, dated February 26, 2009, regarding FMIT comments on Draft CMS/FS, incorporated herein by this reference. In the DTSC's PowerPoint presentation on the DEIR for the Tribe's May 27, 2010, meeting with it, slide 12 was confused regarding whether tribal concerns were a performance standard or a balancing criterion. The Tribe's concern all along has been that its concerns be treated seriously and as early as possible in Project planning. The impacts on the Tribe's cultural and spiritual interests, arising directly or indirectly from the Project or alternatives, must be considered as a "threshold criterion" by both DTSC and DOI in remedy selection, and such impacts (which have been determined to be unavoidable and not capable of mitigation below a level of significance) must be mitigated to the maximum extent feasible.

Conclusion

In closing, we respectfully request: 1) that my office be provided with any future public notices or environmental review documents related to the proposal, 2) to be provided with copies of all DEIR comment letters within ten days of the close of the public comment period and 3) to have 30 days to review the FEIR prior to approval by the agency in order to consult, if necessary, on its conclusions relative to Tribal concerns.

We appreciate the extended review period given to tribal governments and other stakeholders and remain open to dialogue with DTSC and PG&E with the goal of revising the DEIR and conditions of project approval so that the Tribe may support the document.

Very truly yours,



Christopher J. Martin, Esq.
for
Courtney Ann Coyle
Attorney at Law

Attchs.:

Expert Report 1: Thomas F. King, Ph.D, Technical Consultant, dated July 17, 2010
Expert Report 2: Dr. Leo Leonhart, Technical Consultant, dated July 18, 2010
Expert Report 3: Nora McDowell-Antone, Topock Remediation Project Manager, dated July 19, 2010
Photograph taken from I-95

Letter from DTSC Counsel Leisy to Chairman Williams, dated June 24, 2010
Letter from National Park Service to Courtney Ann Coyle, dated November 23, 2009
List of PA Mitigation Precedents, dated July 5, 2010
List of Topock Project Documents
Letter from Pamela Innis to Dr. Leo Leonhard, dated May 3, 2010

CCs:

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Each Tribal Council Member, Fort Mojave Indian Tribe
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Scott Morgan, State Clearinghouse
Other Interested Parties