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*Via Electronic Mail and Overnight Mail*

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Mayor Iris Smotrich ([iriss@RanchoMirageCA.gov](mailto:iriss@RanchoMirageCA.gov))  
And Honorable Member of the Rancho Mirage City Council  
Cindy Scott, City Clerk ([cscott@ranchomirageca.gov](mailto:cscott@ranchomirageca.gov))  
Steven B. Quintanilla, City Attorney ([sbqlaw@gmail.com](mailto:sbqlaw@gmail.com))  
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Riverside, CA. 92507-4277  
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**Re: Comment re: Draft Environmental Impact Statement for the Proposed  
Section 24 Specific Plan Agua Caliente Band of Cahuilla Indians  
(SCH No. 2014011035)**

Dear Ms. Park, Mayor Smotrich and Riverside Local Agency Formation  
Commission:

This letter is submitted on behalf of Laborers International Union of North  
America, Local Union 1184 and its thousands of members in Riverside  
County(collectively "LIUNA" or "Commenters") regarding the proposed Section  
24 Specific Plan project proposed by the Agua Caliente Band of Cahuilla Indians  
(SCH No. 2014011035). ("Project"). This letter supplements our letter submitted

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on January 16, 2015, and focuses on the biological impacts of the Project. This letter is supported by the comments of expert wildlife biologist, Dr. Shawn Smallwood, Ph.D. Dr. Smallwood's comments are attached hereto and should be responded to separately. We incorporate by reference herein our letter dated January 16, 2015.

1

As discussed herein, after reviewing the Draft Environmental Impact Statement ("DEIS") for the Project together with our expert consultants, it is evident that the document fails to comply with the California Environmental Quality Act, Public Resources Code § 21000 et seq. ("CEQA"), and contains numerous errors and omissions that continue to preclude accurate analysis of the Project.

As a result of these inadequacies, the DEIS fails as an informational document, fails to analyze all significant impacts of the Project, fails to identify and impose feasible mitigation measures to reduce the Project's impacts, and fails to properly analyze Project alternatives and cumulative impacts.<sup>1</sup> As a result, the Project will result in significant environmental impacts that have not been adequately addressed or mitigated as required by CEQA. LIUNA Local 1184 therefore requests that the Tribe and the City of Rancho Mirage ("City") or the Riverside Local Agency Formation Commission ("LAFCO") prepare and circulate a Supplemental Draft Environmental Impact Report ("SEIR") to address the issues raised in this and other comments, and to require implementation of feasible mitigations and alternatives required by law.

2

### **1. The FEIR Fails to Adequately Analyze Impacts to Biological Resources.**

It is the policy of the State of California to

Prevent the elimination of fish or wildlife species due to man's activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities.

3

(Pub. Res. Code § 21001(c).) An EIR may not avoid studying impacts to biological resources by proposing future study or mitigation based on future studies unless the mitigation measures and performance standards are explicit in the DEIR. (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 671)

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<sup>1</sup> We reserve the right to supplement these comments at any later hearings and proceedings related to this Project. See *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109.

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As discussed by Dr. Smallwood, the DEIS fails to assess impacts to wildlife, especially sensitive species and plants. Where impacts are identified, the DEIS impermissibly relies on vague, unenforceable and deferred mitigation measures, most of which lack a foundation in science and performance standards. Consequently, the DEIS must be revised to reassess impacts to biological resources and, where appropriate, propose adequate mitigation measures with definite terms and verifiable performance standards.

3

**a. The DEIS Fails to Describe Existing Conditions That are Necessary for a Reasonable Analysis of the Project's Potentially Significant Biological Impacts.**

Dr. Smallwood concludes that the truncated wildlife surveys for the site ignore applicable protocols and fail to provide a proper baseline or describe the true environmental setting at the proposed Project site.

A CEQA document “must include a description of the environment in the vicinity of the project, as it exists before the commencement of the project, from both a local and a regional perspective.” (CEQA Guidelines § 15125; see *Environmental Planning and Info. Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354.) This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant.” (CEQA Guidelines § 15125.) Thus, the CEQA “baseline” is the set of environmental conditions against which to compare a project’s anticipated impacts. (*Communities for a Better Environment v. So Coast Air Qual. Mgmt. Dist.* (2010) 48 Cal. 4th 310, 321.) Where a Project’s baseline is skewed by omissions or misrepresentations in the MND, it “mislead(s) the public” and “draws a red herring across the path of public input.” (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 656; *Woodward Park Homeowners v. City of Fresno* (2007) 150 Cal.App.4th 683, 708-711. See *Save Our Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99, 121-23 (“the impacts of the project must be measured against the ‘real conditions on the ground,’” as opposed to hypothetical conditions).)

4

The failure of the DEIS and DEIS consultant to conduct wildlife surveys capable of accurately detecting burrowing owls, clapper rails, other birds of concern, or reptiles and amphibians provides no baseline in the DEIS or its attachments from which the public can evaluate potential impacts to wildlife.

Dr. Smallwood points out that a fundamental shortcoming of the DEIS is that it concludes that Section 24 is an “ecological island.” Dr. Smallwood points out this is a biased perspective to ignores the fact that “many animals can fly, walk, or crawl” on an off of the Project site. Furthermore, plant species exist on the site and successfully spread their seeds. The “ecological island” theory is

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contradicted by the plain fact that several special status species have been found on the site, including the Coachella Valley fringe-toed lizard, flat-tail horned lizard, burrowing owl, and Palm Springs ground squirrel.

5

Dr. Smallwood concludes that the biological surveys performed for the DEIS were inadequate and failed to conform with applicable guidance and protocols. For example, Dr. Smallwood points out that site surveys were conducted in February and March 2014, but this is a time when it is least likely to find special status species. Burrowing owls do not begin nesting until

6

April. (Smallwood, p.3). Dr. Smallwood points out that the consultant smoothed surfaces of Section 24 and then concluded that there are no wildlife movement corridors on the site. Dr. Smallwood concludes that the soil smoothing changes animal behavior by eliminating markings that animals use to mark their paths. "Smoothing obliterates the markings of wildlife, and so disrupt the use of 'corridors.'" (Smallwood, p.4). Thus, "The EIS had no foundation for concludes 'no discernable and routinely used corridors could be found.'" (Id.). Dr. Smallwood points out that the DEIS used no accurate method for detecting bats.

7

Dr. Smallwood points out that desert tortoise surveys were conducted in February and March, but US Fish and Wildlife Service protocols require that surveys be conducted in April and May or September and October. Thus, the DEIS' conclusion that desert tortoise was not found on the site lacks foundation.

8

The DEIS fails entirely to analyze the Project site's importance as stop-over habitat for migratory birds.

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As a result of these and other deficiencies identified by Dr. Smallwood, the DEIS fails to describe the existing environment of Section 24. A supplemental Draft EIS is necessary to accurately describe the Project site and the Project's impacts on the existing environment.

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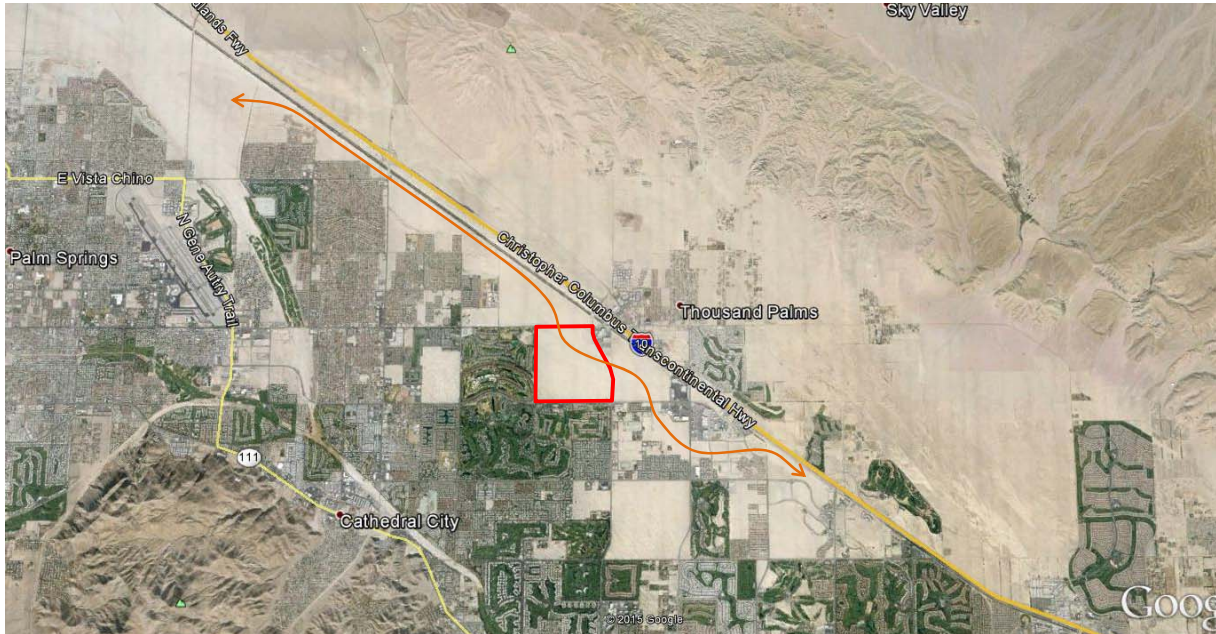
**b. The Project Has Adverse Environmental Impacts Not Addressed in the DEIS.**

Dr. Cashen concludes that the Project will have adverse impacts on wildlife movement corridors. Dr. Cashen states:

Section 24 represents a chokepoint to wildlife movement, so losing it to another residential project will block movement of wildlife along the northwest-southeast band of open spaces south of I-10. Converting Section 24 to urban housing will not only remove 577 acres of habitat of many wildlife species, but will also effectively remove the habitat capacity of at least 2,500 acres of additional habitat southeast of Section 24. The additional impacts are readily apparent in Figure 1, and should not be ignored in the EIS.

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**Figure 1.** Google Earth imagery from 2012 shows the linkages of open space south of I-10, and how converting Section 24 (red boundary) to houses will eliminate the ability of terrestrial wildlife to move (orange arrows) into and out of >2,500 acres of open space.

This impact must be analyzed and mitigated in a supplemental DEIS.

**c. The Project Has Significant Cumulative Impacts.**

Dr. Smallwood points out that the DEIS contains essentially no cumulative impacts analysis – devoting a mere 19 lines of text to the subject. Dr. Smallwood concludes that the Project will have significant cumulative impacts related to habitat fragmentation together with other ongoing, proposed or likely future projects in the area. For example, Dr. Smallwood points out that according to the Desert Renewable Energy Conservation Plan (“DRECP”), 330,000 acres are likely to be converted to solar, wind, geothermal, distributed energy and transmission projects with the Mojave Desert in the near future. Dr. Smallwood concludes that the Project, together with these cumulative projects, “would eliminate most of the remaining population of burrowing owls in California, as well as large proportions of the remaining populations of desert tortoise, Coachella Valley fringe-toed lizard, flat-tail horned lizard, and Palm Springs ground squirrel, among many other special-status species.” (Smallwood, p. 6).

An EIR must discuss significant cumulative impacts. CEQA Guidelines section 15130(a). This requirement flows from CEQA section 21083, which requires a finding that a project may have a significant effect on the environment

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if “the possible effects of a project are individually limited but cumulatively considerable. . . . ‘Cumulatively considerable’ means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.” “Cumulative impacts” are defined as “two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.” CEQA Guidelines section 15355(a). “[I]ndividual effects may be changes resulting from a single project or a number of separate projects.” CEQA Guidelines section 15355(a).

“The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” *Communities for a Better Environment v. Cal. Resources Agency* (“*CBE v. CRA*”), (2002) 103 Cal.App.4<sup>th</sup> 98, 117. A legally adequate cumulative impacts analysis views a particular project over time and in conjunction with other related past, present, and reasonably foreseeable probable future projects whose impacts might compound or interrelate with those of the project at hand. “Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” CEQA Guidelines § 15355(b).

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As the court stated in *CBE v. CRA*, 103 Cal. App. 4th at 114:

Cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.

(Citations omitted).

In *Kings County Farm Bureau v. City of Hanford*, 221 Cal.App.3d at 718, the court concluded that an EIR inadequately considered an air pollution (ozone) cumulative impact. The court said: “The [ ] EIR concludes the project’s contributions to ozone levels in the area would be immeasurable and, therefore, insignificant because the [cogeneration] plant would emit relatively minor amounts of [ozone] precursors compared to the total volume of [ozone] precursors emitted in Kings County. The EIR’s analysis uses the magnitude of the current ozone problem in the air basin in order to trivialize the project’s impact.” The court concluded: “The relevant question to be addressed in the EIR

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is not the relative amount of precursors emitted by the project when compared with preexisting emissions, but whether any additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in this air basin.”<sup>2</sup> The *Kings County* case was recently reaffirmed in *CBE v. CRA*, 103 Cal.App.4th at 116, where the court rejected cases with a narrower construction of “cumulative impacts.”

Similarly, in *Friends of Eel River v. Sonoma County Water Agency*, (2003) 108 Cal. App. 4th 859, the court recently held that the EIR for a project that would divert water from the Eel River had to consider the cumulative impacts of the project together with other past, present and reasonably foreseeable future projects that also divert water from the same river system. The court held that the EIR even had to disclose and analyze projects that were merely proposed, but not yet approved. The court stated, CEQA requires “the Agency to consider ‘past, present, and probable future projects producing related or cumulative impacts . . . .’ (Guidelines, § 15130, subd. (b)(1)(A).) The Agency must interpret this requirement in such a way as to ‘afford the fullest possible protection of the environment.’” *Id.*, at 867, 869. The court held that the failure of the EIR to analyze the impacts of the project together with other proposed projects rendered the document invalid. “The absence of this analysis makes the EIR an inadequate informational document.” *Id.*, at 872.

The court in *Citizens to Preserve the Ojai v. Bd. of Supervisors*, 176 Cal.App.3d 421 (1985), held that an EIR prepared to consider the expansion and modification of an oil refinery was inadequate because it failed to consider the cumulative air quality impacts of other oil refining and extraction activities combined with the project. The court held that the EIR’s use of an Air District Air Emissions Inventory did not constitute an adequate cumulative impacts analysis. The court ordered the agency to prepare a new EIR analyzing the combined impacts of the proposed refinery expansion together with the other oil extraction projects.

The DEIS contains no list of cumulative past, present and reasonably foreseeable future projects, and contains no legally sufficient cumulative impact analysis. A supplemental DEIS is required to analyze the Project’s cumulative impacts and to propose feasible mitigation.

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<sup>2</sup> *Los Angeles Unified v. City of Los Angeles*, 58 Cal.App.4th at 1024-1026 found an EIR inadequate for concluding that a project’s additional increase in noise level of another 2.8 to 3.3 dBA was insignificant given that the existing noise level of 72 dBA already exceeded the regulatory recommended maximum of 70 dBA. The court concluded that this “ratio theory” trivialized the project’s noise impact by focusing on individual inputs rather than their collective significance. The relevant issue was not the relative amount of traffic noise resulting from the project when compared to existing traffic noise, but whether any additional amount of traffic noise should be considered significant given the nature of the existing traffic noise problem.

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**d. The DEIS Relies on Legally Inadequate Mitigation Measures.**

Dr. Smallwood points out that the DEIS relies on legally and factually inadequate mitigation measures for the Project's biological impacts. The primary mitigation measure is a payment to the Tribal Habitat Conservation Plan (THCP) in the amount of \$2371 per disturbed acre. This mitigation measure is inadequate as a matter of law.

First, the US Fish and Wildlife Service has not yet approved the THCP. (DEIS p.2.0-23). Therefore, there can be no assurance that the THCP is adequate to mitigate Project impacts, and no calculation of the appropriate fee that would be required for mitigation. The DEIS may not rely on an unapproved THCP as mitigation.

Second, mitigation fees are generally not adequate mitigation, unless specific measures are identified that will be paid for and implemented by the fee. The DEIS fails to identify any specific measures. Measures may include such things as conservation easements, creation of off-site habitat, or other measures, but the DEIS fails to identify any specific measures. This renders the mitigation legally inadequate. Mitigation fees are not adequate mitigation unless the lead agency can show that the fees will fund a specific mitigation plan that will actually be implemented in its entirety. *Napa Citizens for Honest Gov. v. Bd. Of Supervisors* (2001) 91 Cal.App.4th 342 (no evidence that impacts will be mitigated simply by paying a fee); *Anderson First Coal. v. City of Anderson* (2005) 130 Cal.App.4th 1173 (traffic mitigation fee is inadequate because it does not ensure that mitigation measure will actually be implemented); *Kings Co. Farm Bureau v. Hanford* (1990) 221 Cal.App.3d 692. But see, *Save Our Peninsula Comm v. Monterey Co.* (2001) 87 Cal.App.4th 99 (mitigation fee allowed when evidence in the record demonstrates that the fee will fund a specific mitigation plan that will actually be implemented in its entirety). In *California Native Plant Society v. County of El Dorado et al.* (2009) 170 Cal. App. 4th 1026, the court held that the fee program had to have gone through CEQA review for an agency to say that the payment of the fee alone is adequate CEQA mitigation.

Third, the mitigation fee constitutes a prohibited deferred mitigation measure. CEQA requires the specific mitigation measures to be set forth in the DEIR, so that the public may review and comment on the measures. The DEIS fails to identify any specific measures to mitigate the Project's biological impacts. While a payment amount is identified, the DEIS fails to identify any specific measures that will be implemented with this fee. Any specific measures will be developed at a later time. This constitutes improper deferred mitigation. Deferral of mitigation measures is prohibited under CEQA:



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By adopting the condition that applicant would comply with environmental standards for sludge disposal, the County effectively removed this aspect of the project from environmental review, trusting that the Regional Water Quality Control Board and the applicant would work out some solution in the future..... Having no "relevant data" pointing to a solution of the sludge disposal problem, the County evaded its duty to engage in a comprehensive environmental review by approving the use permit subject to a condition requiring future regulatory compliance. *Sundstrom*, 202 Cal.App.3d at 309.

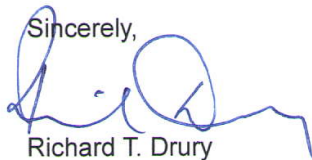
[R]eliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA's goals of full disclosure and informed decisionmaking; and[,] consequently, these mitigation plans have been overturned on judicial review as constituting improper deferral of environmental assessment. *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th at 92.

Fourth, the burrowing owl mitigation measure fails to comply with applicable guidance. MM 5.3-2 requires pre-construction surveys for burrowing owls 30 days prior to construction. However, the California Department of Fish and Game (2012) requires burrowing owl surveys 15 days prior to construction. CDFG also recommends 500 meter buffer zones between owl burrows and construction areas. The DEIS fails to incorporate these measures. The DEIS therefore fails to impose all feasible mitigation measures.

### CONCLUSION

LIUNA Local Union No. 1184 believes the DEIS is legally inadequate and requires significant revision, recirculation and review. Thank you for your attention to these comments. Please include this letter and all attachments hereto in the record of proceedings for this project.

Sincerely,



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