DOCKETED

Docket Number:	09-AFC-06C
Project Title:	Blythe Solar Power Project - Compliance
TN #:	201175
Document Title:	Intervenor CRIT Ex. 4006
Description:	Amicus Brief In Support of Appellant Quechan Tribe of the Fort Yuma Indian Reservation by CRIT
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Submitter Role:	Intervenor Representative
Submission Date:	11/13/2013 10:13:36 AM
Docketed Date:	11/13/2013

Docket No. 13-55704

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION
Plaintiff-Appellant,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Defendants-Appellees.

Appeal From The United States District Court
For The Southern District of California
Case No. 12-1167 GPC/PCL

AMICUS BRIEF IN SUPPORT OF APPELLANT QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION BY THE COLORADO RIVER INDIAN TRIBES

Filed with Consent of All Parties. FRAP 29(a)

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Colorado River Indian Tribes is a federally recognized Indian tribe. Accordingly, a corporate disclosure statement is not required by the Federal Rules of Appellate Procedure Rules 29(c)(1) and 26.1.

INTRODUCTION

The California desert has been home to native people since time immemorial. For thousands of years, these people have developed their cultures, customs, and religious practices within this desert environment. For many groups, the mountains, springs, and landscapes have been an integral part of the religious beliefs and traditions handed down from generation to generation.

Descendants of these early inhabitants continue to live in the region today, though most of their ancestral homeland is now managed by the federal government. Members of the Quechan Tribe ("Quechan"), appellants in this case, and members of the Colorado River Indian Tribes ("CRIT"), amicus curiae, are such descendants. For many of CRIT's members, the trails running through the desert, the tools and pots buried beneath the surface, the cremation sites, and the very landscape itself are not simply artifacts of the past, but connections to their ancestors, affirmation of their beliefs, and essential elements of their continuing culture and religion.

The importance of these desert areas and the cultural resources they hold was recognized by the Department of the Interior, Bureau of Land Management ("Interior" or "BLM") more than thirty years ago when BLM created the California Desert Conservation Area Plan ("CDCA Plan"), a long-range planning document designed to ensure that BLM's management of 12 million acres of federal land in Southern California would "not diminish, on balance, the environmental, cultural, and aesthetic

values of the Desert and its productivity." Excerpts of Record ("ER") 726-27. Tribes were consulted during the creation of the CDCA Plan and the resulting document protected cultural resources and sacred sites by limiting allowable uses of land where such resources and sites are located.

Unfortunately, the very areas designated for protection in the CDCA Plan on account of their cultural value to native people and Indian tribes have now become prime real estate for massive wind and solar projects.[1] The development of these projects has led to the unearthing and destruction of buried cultural resources, the obstruction of ceremonial trails, and the wholesale transformation of this singular cultural landscape.

One of these projects is the Ocotillo Wind Energy Facility ("Ocotillo Wind" or "Project"), the utility-scale wind project that is located on land held sacred to Quechan and other area Indian tribes and is the subject of this appeal. But there are also dozens more either under construction or in the works. Within 50 miles of the Colorado River Indian Reservation, which lies at the intersection of the Mojave and Sonoran Deserts, there are approximately 40 applications for similar large-scale renewable energy projects that are either approved or currently pending with BLM .

[1] Genesis Solar Energy Project PA/FEIS, at 4.4-9 (noting that renewable energy applications have been submitted for nearly 4 percent of the CDCA Plan area) (*available at* http://www.blm.gov/ca/st/en/fo/palmsprings/Solar_Projects/Genesis_Ford_Dry_Lake.html).

Rather than applying the CDCA Plan as it was intended—to protect the cultural, aesthetic, and environmental resources of these desert areas—BLM has repeatedly ignored, modified, or misinterpreted these policies to permit projects like Ocotillo Wind. As described below and in Quechan's brief, each of these projects requires the destruction of thousands of acres of desert landscape resulting in severe impacts to cultural resources.

CRIT respectfully submits this amicus curiae brief in support of Quechan's position that BLM's disregard for its own land use plans and policies, together with its overly narrow consideration of the cumulative impacts these utility-scale energy projects are having on tribal cultural resources, violates federal law.

STATEMENT OF INTEREST

CRIT is a federally recognized Indian tribe with a reservation located along the Colorado River near Parker, Arizona and Blythe, California. The Colorado River Indian Reservation was originally created for the "Indians of the [Colorado River] and its tributaries," in particular, the Mohave and Chemehuevi people who lived in the desert area along the river. It later became home to Hopi and Navajo members as well. CRIT's Mohave members consider the Quechan people to be relatives; their creation stories tell of how the Mohave and Quechan share the same origin, Avi Quame, or Spirit Mountain.

Much of the ancestral homeland of CRIT's members is currently in federal ownership and managed by BLM under the authority of the Department of the Interior, Defendant-Appellee in this case. In the past five years, BLM has approved numerous utility-scale renewable projects, such as Ocotillo Wind, across landscapes held sacred by members of both CRIT and other federal Indian tribes. Thus, CRIT has a distinct interest in ensuring that cultural and other resources located on these public lands are protected, and consequently in ensuring that BLM upholds federal laws related to resource protection, including the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., the Federal Lands Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701 et seq., and the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470 et seq. CRIT also has "a unique perspective [and] specific information that can assist the court beyond what the parties can provide," *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003), as it has participated in numerous BLM administrative proceedings related to utility-scale energy development on federal lands with sensitive cultural resources. This amicus brief outlines the ways in which BLM has refused to uphold these federal laws in its consideration of utility-scale renewable energy projects throughout the American Southwest and the errors made by the District Court in countenancing this behavior.

All parties have consented to the filing of this brief. Fed. R. App. P. 29(a).

RULE 29(c)(5) STATEMENT

No party's counsel authored this brief in whole or in part. No party, nor any party's counsel, contributed any money that was intended to fund preparing or submitting this brief. No person — other than the amicus curiae, its members, or its counsel — contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

I. The Federal Government's Push to Site Massive Renewable Energy Projects on Public Land in the California Desert Has Significant Adverse Impacts on Tribal Cultural Resources.

Since 2007, renewable energy developers have rushed to submit applications to cover large areas of the public land in the American Southwest with wind turbines and solar panels, capitalizing on California's adoption of Renewables Portfolio Standards (California Senate Bill 107 (2006), California Senate Bill 2 (2011), and California Senate Bill 2 (2011)), the Obama Administration's "All of the Above" energy strategy and fast-track program for renewable energy projects, and funding from the American Recovery and Reinvestment Act (Pub. L. 111-5, 123 Stat. 115), among other incentives. BLM has approved many of these applications, including Ocotillo Wind and seven utility-scale solar projects in close vicinity to the Colorado River Indian Reservation. These eight projects alone will disturb approximately 40,000 acres of land.

These projects have already had dire impacts on tribal cultural resources. For example, in 2011, BLM approved the Genesis Solar Energy Project, a 1,950-acre solar thermal project, on the shores of a now dry lake (Ford Dry Lake) near Interstate 10. During construction, which involved extensive grading, the developer unearthed thousands of buried cultural resources, including mortars and pestles (called "manos and metates") and stone jewelry used by ancestors of CRIT's members. These objects, which had lasted thousands of years in the desert, were no match for the project's graders. Most were chipped, cracked, damaged, or destroyed.[2] Other objects were boxed up and shipped to distant curation facilities, over CRIT's objection that such sacred objects should ideally be left in-situ, or at least remain in the area.

While such impacts to buried resources are certainly devastating to tribes and their members, other impacts that are perhaps less tangible to non-native viewers can be equally harmful to tribes. For example, in processing the Rio Mesa Solar Energy Project, BrightSource Energy, Inc. proposed to simply "relocate" a portion of the Bradshaw Trail, a prehistoric route used by both tribes and the public.[3] While the

[2] In response to its handling of this discovery, CRIT sued BLM, alleging violations of NEPA and the NHPA. *See Colorado River Indian Tribes v. Dep't of Interior*, Case No. CV 12-04291-GW(SSx) (C.D. Cal.).

[3] Rio Mesa Solar Electric Generating System Power Project, Application for Certification, Executive Summary at Fig. No. 1.2-1 (*available at* http://www.energy.ca.gov/sitingcases/riomesa/documents/applicant/afc/). The Rio Mesa Project was eventually abandoned by BrightSource Energy, Inc., the Project applicant, in part because of significant tribal opposition to the Project.

public generally may not be affected by the re-routing of a path simply viewed as a means to an end, for CRIT members, this relocation represented a significant disturbance to a cultural resource used for centuries.

These impacts are far from inevitable. As detailed below and in Quechan's opening brief, BLM had policies and plans in place to protect these resources. It chose to disregard these policies. That choice violated federal law.

II. The California Desert Conservation Area Was Intended to Protect Sensitive Resources, Not to Sacrifice Them for Renewable Energy Development.

In designating the CDCA and requiring BLM to develop the CDCA Plan, Congress intended to protect the special ecological and cultural characteristics of the California desert region from harmful uses and development. 43 U.S.C. § 1781. To achieve this end, Congress specifically directed BLM to carefully consider what resources could be developed *without* compromising the area's long-term stability. ER 726.

As part of this process, BLM consulted area tribes about locations of significant cultural importance. CRIT and other tribes participated in these consultation efforts during the 1970s and 1980s, helping BLM map specific locations of cultural and Native American importance in an effort to protect them. *See, e.g.*, ER 828, 853-54, 1431-32 (CDCA Plan Maps from 1980 designating the Native American Element ("concentrated, sensitive areas of traditional native American secular and religious

use") and the Cultural Resource Element ("known and predicted [cultural resource] areas of sensitivity and significance which are most vulnerable to negative impact")).

Unsurprisingly, many of the areas identified in the resulting maps were ultimately designated as Class L lands, which are so designated to "protect[] sensitive, natural, scenic, ecological and cultural resource values," or as more restrictive Class C lands. ER 732.[4] CRIT viewed the designation of these lands as a commitment by the federal government. In exchange for sharing sensitive and confidential information about the importance of these places, tribes would receive protection of these lands through the CDCA Plan, which prohibited development on Class L if sensitive values would be "significantly diminished." *Id.*

Given this history, tribes like CRIT expected BLM to implement the CDCA Plan to protect their cultural resources by denying development applications on these sensitive lands. Instead, BLM has chipped away at the Plan's protections by interpreting the original designation to allow renewable energy projects on Class L lands regardless of their severe cultural and ecological impacts. The lands in question, and the irreplaceable cultural and historic resources contained therein have not diminished in significance in the intervening thirty years. In fact, the contrary is true,

[4] Maps of all Class L Land are available through the Desert Renewable Energy Conservation Plan Description and Comparative Evaluation of Draft DRECP Alternatives, Section 3-7 BLM Land Designations, Figures 3-7.8 to 3.7-17 (*available at* http://drecp.org/documents/docs/alternatives_eval/index.php).

as more and more sites fall victim to human expansion, vandalism, greed, or mere ignorance. Nonetheless, CRIT is unaware of *any* application for utility-scale renewable energy facilities that have been denied by BLM, regardless of the CDCA Plan designation at the selected site.

Again, Ocotillo Wind is a prime example of BLM interpreting the CDCA Plan to allow utility-scale renewable development on Class L lands containing known, sensitive cultural resources. In fact, the lands affected by Ocotillo Wind are designated for protection under both the Native American and Cultural Resource Elements of the CDCA Plan. *See* ER 1431-32. And again, Ocotillo Wind is not the only example.

For instance, the 7,700-acre McCoy Solar Energy Project, located just to the west of the Colorado River Indian Reservation, is located exclusively on land classified as Class L in the CDCA Plan. When CRIT raised its concern that the proposed project would significantly diminish cultural resources and other sensitive values of the area in violation of the CDCA Plan, BLM brushed aside CRIT's concerns. The FEIS rotely concluded that "solar uses are conditionally allowed in the Multiple Use Class L designation contingent on the CDCA Plan amendment process and NEPA requirements being met for the proposed use."[5] In other words, the

[5] McCoy Solar Energy Project PA/FEIS, at 1-6 (*available at* http://www.blm.gov/ca/st/en/fo/palmsprings/Solar_Projects/McCoy.html).

designation that was intended to protect cultural resources from harmful development could, according to BLM, simply be ignored if an EIS was prepared.[6]

BLM also applied this erroneous position even more broadly in the recently enacted Solar Energy Development Program in Six Southwest States, which purports to designate "well-suited" areas for solar development on public land across the American Southwest.[7] CRIT and other members of the public objected that BLM included Class L lands within its designated Solar Energy Zones, and that these "zones" disproportionately overlapped lands identified in the CDCA Plan as culturally and historically sensitive to Native Americans. BLM again ignored these concerns, claiming that such facilities were specifically allowed, no matter what the environmental consequences. This stance, as outlined in Quechan's Opening Brief, simply does not square with the plain language of the CDCA Plan, its overall goal, or the history of its creation.

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[6] Similarly, BLM approved the massive Blythe Solar Power Project in 2010, even though the entire project is located within CDCA Class L lands containing prehistoric archaeological sites and trails. Blythe Solar Power Project PA/FEIS, at 4.8-3 (*available at* http://www.blm.gov/ca/st/en/fo/palmsprings/Solar_Projects/Blythe_Solar_Power_Project.html).

[7] Final Solar PEIS, at ES-2 (*available at* http://solareis.anl.gov/documents/fpeis/index.cfm).

III. BLM's Failure to Establish VRM Classifications Across the CDCA Allows the Agency to Make *Post Hoc* Designations that Enable Project Approval.

For CRIT's members, visual resource impacts have cultural harm, as such impacts result in the significant deterioration of the cultural landscape that their ancestors have lived in since time immemorial. The legislation creating the CDCA also required BLM to establish Visual Resource Management ("VRM") classifications to manage the protection of scenic values. *See* 43 U.S.C. § 1711(a). Such VRM classifications, ranging from Class I (highest protection) to Class IV (lowest protection), "set the level of visual change to the landscape that may be permitted for any surface-disturbing activity." ER 299. Much like the rest of resource management planning, advance establishment of VRM classifications would set appropriate levels for disturbance of visual resources across the CDCA. Yet, BLM has failed to undertake this work, leaving individual project managers to set VRM classifications *during* the evaluation of particular projects. ER 300. This process has allowed BLM to render VRM classifications essentially meaningless, in violation of the CDCA and clear law. *Southern Utah Wilderness Alliance*, 144 IBLA 70, 85 (May 20, 1998).

The inadequacies of BLM's current efforts clearly can be seen at Ocotillo Wind. BLM formally designated the exact lands within the Ocotillo Project area as VRM Class III during its approval of the Sunrise Powerlink. ER 964, 977-82, 1064. But when it became clear that the VRM Class III designation would not allow Ocotillo

Wind to be lawfully approved, BLM simply changed its designation, claiming that because the original designation was "interim," it could strip the protections. ER 966-68. But BLM's actions turned the mandatory planning process on its head. FLPMA requires the agency to determine *in advance* the level of regulation necessary to protect resources, not to leave that determination to an after-the-fact justification for project approval.

But Ocotillo Wind is not an isolated occurrence. BLM has repeatedly flouted the VRM protections across the CDCA. For example, at the Desert Harvest Solar Project, the project site was designated under the Visual Resource Inventory as Class II, given its close proximity to Joshua Tree National Park and numerous wilderness areas.[8] Yet, with no explanation for its decision, BLM assigned a Class IV management objective at the time of project processing. According to the agency, this designation specifically would allow "the resulting overall moderate-to-high level of [visual] change."[9] Rather than assigning a VRM classification to protect known resources, BLM set the VRM classification to allow project approval.

Even where more restrictive VRM classifications are made, BLM has largely ignored its duty to enforce the CDCA Plan's requirements. A number of projects,

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[8] Desert Harvest Solar Project Final EIS and Proposed CDCA Plan Amendment, at 3.19-6 (*available at* http://www.blm.gov/ca/st/en/fo/palmsprings/Solar_Projects/Desert_Harvest_Solar_Project.html).

[9] *Id.* at 4.17-22.

including the Desert Sunlight Solar Farm and the Blythe Solar Power Project have been approved even though VRM classifications will not be met.[10] Another project, the Palen Solar Electric Generating System, seems nearing approval despite this same problem.[11] Without clarity that VRM classifications are binding on the agency, this casual discrediting of the CDCA Plan's requirements will continue.

Finally, it is clear that BLM's lax approach to VRM classifications is problematic outside the CDCA as well. For example, at the Quartzsite Solar Energy Project, located just to the east of the Colorado River Indian Reservation in Arizona, the existing resource management plan ("RMP") contained a VRM classification that would have prohibited the project. Instead of denying the application however, BLM amended the applicable RMP, noting that the change would "simply allow[] the Project to be built . . . ."[12] VRM classifications are intended to protect scenic

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[10] Desert Sunlight Solar Farm Project Final EIS and CDCA Plan Amendment, at 4.16-22, -28 (*available at* http://www.blm.gov/ca/st/en/fo/palmsprings/Solar_Projects/Desert_Sunlight.html); Blythe Solar Power Project PA/FEIS, at 4.18-10, -13, -18; *see also* Genesis Solar Energy Project PA/FEIS at 4.18-13 (acknowledging a non-conforming degree of visual contrast from the Palen-McCoy Wilderness, an area of spiritual significance to CRIT, but failing to find a lack of conformity as the number of users was allegedly too low to be significant).

[11] Palen Solar Electric Generating System Draft SEIS, at 4.18-15 to 17, -22 (*available at* http://www.blm.gov/ca/st/en/fo/palmsprings/Solar_Projects/palen_solar_electric.html).

[12] Quartzsite Solar Energy Project Draft EIS and Proposed YFO RMP Amendment, at ES-6 (*available at* http://www.blm.gov/az/st/en/prog/energy/solar/quartzsite_solar_energy.html).

resources, in accordance with FLPMA. This Court must require BLM to start applying these classifications in a way that actually results in this protection.

IV. BLM's Selection of Narrow Geographic Boundaries for Assessing Cumulative Impacts to Cultural Resources Ignores the Resources' Finite and Connected Nature.

Finally, BLM limits its assessment of cumulative cultural resource impacts to a 10-mile radius around the Project site. ER 386. BLM has also used this approach in the past, in violation of NEPA's requirement that the federal government examine projects within a larger context to determine the adverse effects that might result from the interaction between multiple projects. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 395 (9th Cir. 2002).

BLM's approach appears to result predominantly from a flawed understanding of cultural resources. For example, in the EIS for the Quartzsite Solar Energy Project, a 650-foot solar power tower covering 1,675 acres due east of the Colorado River Indian Reservation, BLM stated that "[i]mpacts to cultural resources are generally localized and do not result in regionally cumulative impacts."[13] BLM took the same approach for the Rice Solar Energy Project[14] and at Ocotillo Wind. ER 386.

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[13] *Id.* at 4-83.

[14] Rice Solar Energy Project Draft EIS, at 6.3-59 (*available at* http://www.blm.gov/ca/st/en/fo/palmsprings/Solar_Projects/Ricd_Solar_Power_Project.html).

Yet, as explained above, the disturbance of cultural resources does not occur in isolation for CRIT or other tribes. These resources are finite and located only within this particular part of the world. A cumulative impact analysis that focuses exclusively on the small radius around a project fails to capture the aggregate loss of these crucial resources across the landscape.

In addition, the limited analysis utterly misses the impacts resulting from the wholesale transformation of this cultural landscape. The cultural and religious beliefs of CRIT members are intimately tied to this particular landscape. The clan names of CRIT's Mohave members come from the desert: cactus plants, coyote, fox, stars, water, and mountains. Ceremonial songs tell of desert trails, mountains, petroglyphs, geoglyphs, and animals. The trails are considered sacred to many CRIT members because they tell how their ancestors traveled the desert, survived there, and made a way for future generations. The cumulative industrialization of this desert landscape adversely affects the ability of CRIT's members to connect traditional beliefs to on-the-ground circumstances. The cumulative impact analysis under NEPA is intended to address these precise circumstances. BLM's arbitrary geographical cut-off violates NEPA's requirements.

CONCLUSION

For the foregoing reasons, CRIT respectfully requests that this Court reverse the District Court's opinion.

DATED: September 10, 2013 SHUTE, MIHALY & WEINBERGER LLP

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 3,392 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced roman typeface, 14-point Times New Roman, using Microsoft Word 2010.

DATED: September 10, 2013 SHUTE, MIHALY & WEINBERGER LLP

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