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**STATE OF CALIFORNIA**  
**Energy Resources**  
**Conservation and Development Commission**

In the matter of:

Amendment for the **BLYTHE SOLAR  
POWER PROJECT**

DOCKET NO. 09-AFC-06C

**COLORADO RIVER INDIAN TRIBES**

**Opening Testimony of Winter King regarding Lessons Learned from the Unanticipated  
Discovery of Buried Cultural Material at the Genesis Solar Energy Project**

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## INTRODUCTION

The Colorado River Indian Tribes' (CRIT or the Tribes) concerns about the proposed Blythe Solar Power Project (Project or BSPP) stem in part from the Tribe's negative experience with the Genesis Solar Energy Project (Genesis Project or Genesis). Genesis was another utility-scale solar energy facility approved by the California Energy Commission (CEC) and the Bureau of Land Management (BLM) in late 2010. The process followed by the CEC in approving that project was similar to what has been proposed here. After a preliminary review of the project's potential impacts to cultural resources, the CEC and BLM determined that there likely would be adverse impacts to cultural resources, but that they did not know how extensive those impacts would be. Instead, the agencies adopted programs and policies to follow if cultural resources (including buried cultural resources), were discovered during construction. In other words, CEC and BLM approved the Genesis project first, deferring analysis and mitigation of cultural resource impacts until a later date.

As described below, this cart-before-the-horse approval process had disastrous consequences. At the Genesis site, construction began. Large-scale grading ensued. And, before long, the belly-scrappers, graders, and bulldozers began churning up hundreds of buried cultural artifacts, from manos and metates (mortars and pestles) to jewelry. These buried items had been left at the site, located along the shore of a now-dry lake, thousands of years earlier by ancestors of CRIT's members. As CRIT's Chairman stated, the unearthing, damaging, and destruction of these objects was physically painful for many of CRIT's members, for whom disturbing such ancestral objects is taboo.

When CRIT sought to enforce the policies and procedures that CEC and BLM had put into place to deal with such "unanticipated" discoveries of cultural resources, however, the Tribe ran into a brick wall. These procedures clearly stated a preference for avoiding unanticipated cultural resources, yet CRIT was told that BLM was not going to require avoidance. While BLM provided no support for this finding, NextEra, the project owner, indicated that avoidance would simply be too expensive: once work had already begun to build the project, modifying the design would allegedly cost millions. At the end of the day, BLM allowed NextEra to continue building the project on top of the discovered cultural site. Artifacts that were unearthed in the process were collected and transported to San Diego for "data collection" and curation, over CRIT's objections.

CEC did not step in to enforce its own conditions of approval, which were virtually identical to BLM's conditions and required avoidance of newly discovered cultural resources if feasible. Moreover, there was essentially no way for CRIT to challenge CEC's inaction, as any legal challenge to a CEC approval or enforcement of conditions is required to be brought by petition to the California Supreme Court. That Court has discretion to grant or deny petitions and, to our knowledge, has never agreed to hear such a case.

To avoid repeating the post-approval conflicts caused by the Genesis Project's deferral of mitigation, CRIT urges the CEC to: (1) complete all necessary cultural resource analysis before deciding whether to approve the proposed project revisions; (2) adopt mitigation measures that

reduce or eliminate those impacts through avoidance; and (3) ensure that these mitigation measures are enforceable and enforced by the CEC.

## QUALIFICATIONS

Winter King is a partner at Shute, Mihaly & Weinberger, LLP. She has represented the Colorado River Indian Tribes on a variety of land use, environmental, and cultural resource matters for the last seven years, including representing the Tribes in litigation against the Bureau of Land Management following the discovery of substantial buried cultural resources at the site of the Genesis Solar Energy Project. Ms. King has also worked with CRIT to assess the cultural resource impacts resulting from the development of utility-scale renewable projects in the ancestral homeland of CRIT members. Ms. King's experience includes representing tribes, non-profit organizations, community groups and local governments on matters relating to the California Environmental Quality Act, the National Environmental Policy Act, Federal Indian law, and State Planning and Zoning law. Ms. King received her JD from the Yale Law School and her BA from St. John's College.

## STATEMENT

### Summary of Genesis Mitigation and Litigation<sup>1</sup>

*CEC and BLM Approve Genesis Project Without Adequate Cultural Resources Analysis; Agencies Rely on Post-Approval Mitigation Measures to Deal with Cultural Resource Impacts.*

In the fall of 2009, a subsidiary of NextEra Energy Resources LLC (NextEra) applied to the CEC and BLM to construct and operate a 250-megawatt solar electric generating facility on 1,800 acres of undisturbed federal land approximately 25 miles east of Blythe, California. The Project site lies within the ancestral territory of both the Mohave and Chemehuevi people, who, along with the Hopi and Navajo, comprise the Tribes.

To expedite Project approval, BLM and the CEC undertook joint environmental review, resulting in substantially similar environmental documents. These documents acknowledged that there could be buried cultural resources on the Project site, but the agencies did not analyze the Project's impacts to those resources at that time. Instead, the agencies and NextEra prepared or promised to prepare a series of documents detailing the procedures they would follow if cultural resources were discovered during construction, including a Cultural Resources Mitigation and Monitoring Plan (CRMMP) with the CEC and Programmatic Agreement (PA) and a Historic Properties Treatment Plan (HPTP) with BLM. The CEC is not a party to the PA or the HPTP. The CRMMP and the HPTP are largely identical. The BLM also prepared a plan for handling the

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<sup>1</sup> Evidence supporting this summary was provided to the United States District Court for the Central District of California in support of CRIT's motion for a temporary restraining order and preliminary injunction to stop construction of the Genesis project pending compliance with federal law. *Colorado River Indian Tribes v. U.S. Department of the Interior* (Case No. CV 12-04291 GW (SSx)). Some of these filings are included as Exhibits to this Opening Testimony. See Exhibits 4002-4005.

discovery of human remains pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA Plan).

According to these documents, if NextEra discovered significant cultural resources during Project construction, it was required to avoid them if feasible. The HPTP and CRMMP provided specific, minimally invasive techniques that BLM and the CEC were required to employ to evaluate the scope, extent, and significance of any cultural resources discovered during construction.

The Programmatic Agreement and the HPTP also stated that they were designed to carry out BLM's obligations under Section 106 of the NHPA. To that end, they required BLM to consult with affected Indian tribes in numerous circumstances.

BLM issued a right of way grant for the Project on November 30, 2010 and permitted NextEra to start initial construction on December 10, 2010.

*Project Construction Uncovers Significant Cultural Site; Agencies Fail to Timely Notify CRIT or Otherwise Enforce Promised Mitigation Measures.*

On November 14, 2011, while conducting Project grading, NextEra began uncovering buried artifacts on the eastern portion of the Project site. These artifacts included manos and metates (i.e., grinding tools), a stone pendant, and a possible cremation site ("two overturned metates with an associated charcoal lens"). Shortly thereafter, BLM halted construction on a portion of the Project site (the "Exclusion Zone"). This portion of the site had not been identified during the environmental review process as a cultural resources site, and thus all of these discoveries were considered "unanticipated" for purposes of applying the Programmatic Agreement, HPTP and CRMMP.

The BLM officials who initially reviewed the artifacts referred to the situation as "unprecedented." BLM and CEC archaeologists hypothesized that they were evidence of early human occupation and use of the lands adjacent to a "playa lake" in the desert. These early occupants of the area included the ancestors of present-day CRIT members.

Although federal regulations and the Programmatic Agreement required BLM to notify CRIT and other affected tribes of this discovery within 24 hours, BLM waited *two weeks* before relaying this information CRIT. During that time, NextEra prepared a "data recovery" plan for the site—i.e., a plan that would allow NextEra to continue grading the site after excavating some subset of the buried resources for further scientific analysis—and submitted it to BLM.

On November 29, 2011, the CEC, BLM, and NextEra held a conference call to discuss the proposed plan and next steps. No tribal representatives were present on the call. According to minutes from that call, BLM's archaeologist represented that he had spoken to "the tribes" and that "they are ok with [BLM] keeping them informed regarding the plan and no separate review should be required." The parties on this conference call did not discuss the possibility of "avoiding" the site. All seemed to agree that excavation of the site was a proper and foregone conclusion.

Shortly *after* this conference call was held, CRIT received a call from BLM's Field Manager and archaeologist, notifying CRIT for the first time about the discovery. CRIT expressed its concern about BLM's failure to timely notify them of the discovery and about the proposed plan to continue work on the site. As a result, BLM held another meeting on December 6, 2011, with representatives from CRIT and other tribes in attendance. These representatives plainly and consistently stated that they did not want the buried resources to be disturbed or collected and that the site should be avoided. Tribal representatives further objected to the agencies' failure to consult them early in the process or to notify them promptly of the discoveries.

On December 9, CRIT put its preliminary concerns in a letter to BLM. CRIT requested more information about whether NextEra had complied with various conditions imposed on it by the CEC and BLM, and any supporting documentation. This request was never answered. CRIT also noted that, based on the minutes it had received from the November 29, 2011 meeting between the CEC, BLM, and NextEra, the agencies had already decided that they would *not* require NextEra to avoid the site, thus rendering meaningless any future "consultation" with the Tribes on this issue. Finally, CRIT asserted that a supplemental environmental impact statement was necessary to properly analyze the significance of the newly discovered resources, and insisted that CRIT be allowed to bring its own cultural resources expert to the site to investigate prior to any consultation.

Later that month, BLM released a "grading and trenching plan," the ostensible purpose of which was to determine whether the discovered site was eligible for listing on the National Register of Historic Places (National Register) or California Register of Historic Resources (California Register), and "whether full-scale data recovery [was] necessary." This plan did not discuss the possibility or feasibility of avoiding the site altogether. It did, however, propose to use backhoes to determine the edge of the cultural site through "trenching."

CRIT quickly objected to this plan, noting that any further disturbance of the site—including the proposed trenching activities—was unacceptable to CRIT. As CRIT's Chairman noted in the January 19th letter, "CRIT Tribal Council members [have] described the disturbance of cultural resources at the Genesis Solar Energy Project site as physically painful to them."

BLM indicated that it would issue a modified plan for analyzing the scope and significance of the site, and assured CRIT that, prior to finalizing this modified plan, the agency would conduct meaningful consultation with CRIT's Tribal Council. BLM issued this modified plan (referred to as a "Controlled Grading Plan") on the afternoon of Tuesday, February 21, 2012. While the plan no longer relied on backhoe trenching, it proposed the use of road graders to identify additional buried resources and the edge of the cultural site.

By Thursday afternoon, February 24, CRIT had provided BLM with preliminary comments on the Controlled Grading Plan, repeating its concerns about the destructive methodology proposed, noting that the use of road graders to identify cultural resources was inconsistent with the requirement that the resources be avoided if feasible, alerting BLM that the plan was inconsistent with the specific provisions of the HPTP, and requesting formal, in-person consultation on the modified plan. This letter also reminded BLM that CRIT had repeatedly

asked for any evidence it had to suggest that avoidance was infeasible, but had received nothing in response.

At 9:00 p.m. on Friday, February 25, BLM informed CRIT via e-mail that it had issued a Notice to Proceed with the Controlled Grading Plan. No consultation was held. BLM did not provide a response to CRIT's comments. According to the email, NextEra was allowed to proceed with the Controlled Grading Plan the following Monday.

BLM provided CRIT and other tribes with the "final results" of the Controlled Grading Plan on March 23, 2012. According to this document, prepared by NextEra's consultant, numerous additional resources were uncovered during implementation of the Controlled Grading Plan, even though NextEra did not complete grading in half of the trenches. Despite these finds, the consultant concluded that "the grading program did not reveal sufficient data to make a recommendation regarding National Register of Historic Places eligibility . . . at this time." BLM then removed additional areas of the Project site from the Exclusion Zone, allowing development to move forward on all but 125 acres of the site. In an e-mail, BLM wrote that the "next step in this process is a decision on National Register eligibility and either avoidance or further testing of this delineated archaeological site."

BLM's decision on avoidance came, by email, one month later. The entire explanation of that decision occupies only several sentences. In sum, BLM thanked CRIT for "sharing [its] views and concerns" regarding the Project's impacts, but stated that BLM "will not require avoidance of the cultural site." BLM's e-mail went on to state that a "site evaluation and data recovery plan" would be released on Monday, April 23, with a final plan to be issued on Friday, April 27. BLM invited Tribes to "consult" on this plan during the intervening four days.

BLM issued its draft site evaluation plan ("Buried Resource Plan") on April 23, 2012. This seventy-page technical document contained many of the same flaws as BLM's earlier grading and trenching plans (e.g., the use of destructive equipment such as backhoes to perform site analysis). It also incorrectly indicated that CRIT's archaeologist had agreed that these site evaluation methods were appropriate.

On April 26, CRIT objected to this latest plan and noted that no meaningful consultation could be held during BLM's four-day consultation window. On Friday, April 27, CRIT contacted BLM and requested that, if it issued a final plan that day, it postpone implementation of the plan until Monday at the earliest to provide the Tribes with an opportunity to seek judicial intervention if necessary. By confirming e-mail, BLM indicated that it would "address[] [CRIT's] request of a 2 working day delay between issuance of the [Notice to Proceed] and any surface disturbing activities related to implementation of the plan."

At 1:40 a.m. on Saturday, May 12, 2012, BLM notified CRIT that it had issued its final Buried Resource Plan and related Notice to Proceed. This final plan, unlike the draft, assumed that the site of the buried resources is eligible for listing on the National and California Registers. Like the draft, however, the final plan required "trenching" within the cultural site so that archaeologists could study some of the buried resources (i.e., "data recovery") before the site was developed. The plan also required the completion of an ethnographic study to determine the importance of the site *after* it was destroyed entirely.

According to the final Buried Resource Plan and Notice to Proceed, the data recovery process (i.e., trenching) was allowed to begin on Monday, May 14. Thus, CRIT was not provided with even a single working day to review the final plan. After receiving notice of CRIT's intent to file for a temporary restraining order, the parties agreed to stay implementation of the plan until Friday, May 18 at 12:00 p.m.

*CRIT Sues to Enjoin Construction Until Promised Mitigation Measures Are Enforced; BLM Argues Its Mitigation Plan Is Non-Binding; NextEra Argues Avoidance Too Expensive.*

Faced with the imminent destruction of its cultural resources, CRIT filed a lawsuit on May 17, 2012, alleging that BLM's actions following the discovery of cultural resources on the site violated the NHPA, NEPA, and the Administrative Procedures Act (APA). Concurrently, CRIT sought preliminary injunctive relief to preserve the status quo pending a determination of the merits of its claims.

BLM and the project developer raised several arguments in defending against CRIT's lawsuit that raise questions about the effectiveness of mitigation measures designed to be applied after project approval. First, BLM argued that its own Historic Properties Treatment Plan, akin to CEC's Cultural Resources Monitoring and Mitigation Plan ("CRMMP"), was not binding, and thus CRIT could not enforce it. Second, NextEra argued that avoiding the cultural resources discovered during project construction was virtually impossible for engineering as well as financial reasons. Third, both defendants argued that CRIT should have objected to the original project approval if it was concerned about potential impacts to buried resources instead of relying on the promised mitigation.

In the end, the district court declined to enjoin construction at the Genesis site. Thousands of additional artifacts were unearthed, damaged and destroyed in the course of completing construction.

### **Lessons Learned from Genesis**

CRIT's experience with the Genesis project raises several important considerations for the CEC as it considers authorizing yet another utility-scale solar energy facility on the ancestral homelands of California's native people.

*First*, it is inexcusable and unwise to approve such projects before completing an adequate study of potential cultural resource impacts. The Genesis Project's impacts could have been reduced dramatically, if not eliminated, if the CEC and BLM had conducted this necessary research—including adequate consultation and an ethnographic study—before approving the project. Such research would have provided the CEC and NextEra with information that could have led to a better location for the facility.

*Second*, any policies and mitigation measures that will apply to unanticipated cultural resource impacts after project approval must be clear and enforceable. Moreover, the CEC must be willing and able to actually enforce these measures in the event of an unanticipated discovery, rather than leaving the project owner to enforce the conditions on itself. Project applicants should be required to explain how they would be able to respond to an unanticipated discovery,



including how they will obtain the funding to doing so. Without such clarity and enforceability, post-approval mitigation plans are meaningless.

*Third*, the CEC must consider the stated preferences of affected tribes in deciding what kinds of mitigation measures to impose. For CRIT, disturbing buried artifacts is taboo. Thus, “data recovery”—i.e., the removal of discovered artifacts to a research facility for description, logging, and preservation—does nothing to reduce the cultural harm experienced by CRIT’s members. CRIT has repeatedly expressed the need to avoid culturally sensitive sites and, in the event of an unexpected discovery, to allow the Tribe to rebury the artifacts on-site in a location that is unlikely to result in further disturbance.

**Declaration of Winter King  
regarding Lessons Learned from the Unanticipated Discovery of Buried Cultural Material  
at the Genesis Solar Energy Project**

I, Winter King, declare as follows:

1. I am a Partner at Shute, Mihaly and Weinberger LLP, outside counsel to the Colorado River Indian Tribes. I have worked with CRIT on cultural resource protection issues and other matters for 7 years.

2. My relevant professional qualifications and experience are set forth in the attached resume and testimony.

3. I prepared in part the attached testimony relating to the proposed Amendment to the Blythe Solar Power Project.

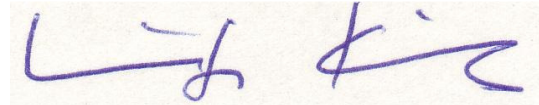
4. It is my professional opinion that the attached testimony is true and accurate with respect to the issues that are addressed.

5. I am personally familiar with the facts and conclusions described within the attached testimony and if called as a witness, I could testify competently thereto.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

DATED: November 13, 2013  
AT: San Francisco, CA

By:



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Winter King