

DOCKETED

Docket Number:	09-AFC-06C
Project Title:	Blythe Solar Power Project - Compliance
TN #:	201342
Document Title:	Opening Brief of Colorado River Indian Tribes
Description:	N/A
Filer:	Winter King
Organization:	Shute, Mihaly & Weinberger LLP
Submitter Role:	Intervenor Representative
Submission Date:	11/27/2013 1:19:15 PM
Docketed Date:	11/27/2013

STATE OF CALIFORNIA
Energy Resources
Conservation and Development Commission

In the matter of:

Amendment for the **BLYTHER SOLAR
POWER PROJECT**

DOCKET NO. 09-AFC-06C

OPENING BRIEF OF THE COLORADO RIVER INDIAN TRIBES

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INTRODUCTION

In September 2010, the California Energy Commission approved the Blythe Solar Power Project, a 1,000 MW, 7,030 acre solar parabolic trough system. Despite concluding that the project would have significant, unavoidable impacts on cultural and other resources, the Commission nevertheless concluded that project benefits, including the “contribution of 1000 MW of renewable energy power,” the reduction in greenhouse gas emissions when compared to existing facilities, and the purported improvements in “local air quality and public health” and diversification of “our energy supply,” outweighed these significant impacts. Exhibit 2004 (TN# 201249), at 543-45. Very few area tribes provided any substantive input into the Commission’s analysis or conclusions.

In April 2012, Solar Trust of America LLC, the original owner of the Blythe Solar Power Project, went bankrupt, and its assets were auctioned. Exhibit 1001 (TN# 65933). NextEra Energy Resources, LLC was selected as the highest bidder. *Id.* Desiring to use its own proprietary technology, NextEra filed a petition to amend the original license to permit the construction of a solar photovoltaic system on a reduced-acreage site (Project). The Commission is currently considering this application.

The Colorado River Indian Tribes (CRIT or the Tribes) were only marginally involved in the original licensing proceeding. As noted in the Staff Assessment, the Commission delegated tribal outreach to the Bureau of Land Management, which mailed one form letter to CRIT’s Museum Director and received no response. Staff Assessment (SA) at 4.3-35 to 36 (Exhibit 2001 (TN# 200840)). Neither agency actually met with CRIT’s Tribal Council or CRIT representatives to discuss the original project. *Id.* Once the project was approved, CRIT signed the Programmatic Agreement proposed by the Bureau of Land Management in an effort obtain some belated involvement in project construction and implementation. These “take-it-or-leave-it” contracts offer increased procedural benefits to concurring parties (i.e., those tribes that sign the agreement). Nothing in the BLM records or the programmatic agreement itself, however, indicates that CRIT was actually consulted on the original project or that any of the Tribes’ concerns had been heard or addressed.¹ Exhibit 2003 (TN# 201189).

Since the agencies’ approval of the original project in 2010, CRIT has become increasingly concerned about the impacts of utility-scale renewable energy projects within the ancestral homeland of CRIT members. These massive projects have begun to transform a sacred cultural landscape into an industrial one. Access to sacred sites has been or is threatened to be impeded; culturally important plant and animal species are being impacted by construction and solar flux; and prehistoric archaeological artifacts have been destroyed or boxed up for curation at distant facilities. Exhibit 4008 (TN# 201191).

¹ CEC Staff’s consultation efforts in 2013 have been similarly lacking. CRIT attended one informational meeting in August, at which CEC Staff “provide[d] updates on several projects,” including Blythe. SA at 4.3-38. Given CRIT’s concerns and CEC Staff’s failure to adequately assess or respond to them, CRIT chose to intervene.

Construction of the Genesis Solar Energy Project in late 2011 and early 2012 served as a wake-up call for CRIT and other area tribes. During project construction, NextEra ultimately unearthed over 2,400 cultural artifacts from the shores of Ford Dry Lake, a result that was sanctioned by the Commission, the Bureau of Land Management, and ultimately the U.S. District Court for the Central District of California, but that devastated CRIT and its members. Exhibit 4008 (TN# 201191) (“The individual and cumulative impacts of this development have been extremely painful for the Tribes’ members. For CRIT’s Aha Macav (Mohave) members, disturbing an ancestor’s belongings and remains is taboo. Imagine the effect on those individuals of witnessing thousands of their ancestors’ manos and metates unearthed with graders, then hauled off in buckets for ‘data recovery,’ ending up in storage in a remote facility.”).

For many, the results at Genesis solidified the importance of raising cultural concerns in all available forums. As a result, when the Blythe Solar Power Project proceedings were re-opened to consider the Project, CRIT intervened. Through this proceeding, CRIT has attempted to bring the failures of CEC Staff’s analysis, the Project’s lack of conformance with protective laws, and the inadequacies of proposed mitigation measures directly to the attention of the Commissioners, who must make the ultimate decision to approve the Project.

CRIT’s efforts in this regard have been stymied in part because of the Commission’s exclusive focus on the differences between the project as originally licensed and the proposed amendment. CRIT acknowledges that these changes are likely to result in benefits when compared to the licensed project. However, CRIT views this approach, which shields the Project’s impacts behind a constructed and artificial veil of “beneficial changes,” when NextEra is fundamentally proposing a new project, as inadequate, unjust, and ultimately without legal support. However, in light of the Commission’s clear position that it will not consider such impacts, and the Tribes’ limited resources, CRIT primarily focuses this brief on one specific issue: the proposed Conditions of Certification for cultural resource impacts. As detailed below, these conditions must be changed to comply with the California Environmental Quality Act and the Commission’s certified regulatory program.

STATEMENT OF FACTS

The Palo Verde Mesa is part of the ancestral homeland of both the Chemehuevi and the Mohave, two of the four Tribes that comprise CRIT. Exhibit 4009 (TN# 201183), Exhibits 4012-13.² Since time immemorial, Mohave and Chemehuevi people have lived and survived in this area, leaving indelible marks including trails, archaeological sites, and petroglyphs. These sites and features are now considered sacred sites or traditional cultural properties by CRIT members and within the meaning of state and federal law, for their ability to tangibly confirm to CRIT members their oral histories and lifeways. Exhibit 4012.

Crucially, the Palo Verde Mesa is part of the ongoing “trailscape” of both the Chemehuevi Salt Songs and Mohave Bird Songs. Exhibit 4009 (TN# 201183), Exhibit 4013. These oral traditions, which convey stories of creation, relate specifically and uniquely to this

² As Exhibits 4012 to 4013 are considered confidential for the purposes of this proceeding, no TN# have been assigned.

particular landscape. The songs cannot be shifted to other places if these areas are destroyed. Indeed, interruption of the physical landscape interrupts the spiritual travels of CRIT members and their ancestors. *Id.*

Within this landscape and on approximately 4,070 acres of public land, NextEra proposes to construct four photovoltaic units, though the company has not yet decided on the specific technology. SA at 3-2 to 3. The site will be fenced off and inaccessible throughout the 30 year life of the Project, and the effectiveness of site remediation to restore cultural values in the future is at best an unknown. *See* SA at 4.1-22. The Project is just one of many utility-scale renewable projects proposed for or under construction on the Palo Verde Mesa and within the larger region; at last count, nearly 40 projects are proposed within 50 miles of the Colorado River Indian Reservation and projects on nearly 19,000 acres have already been approved. Exhibit 8022 (TN# 200908); *see* Bureau of Land Management, Solar Energy Program Western Solar Plan (available at <http://blmsolar.anl.gov/sez/ca/riverside-east/>). This industrialization of a vast area is having severe impacts on CRIT and other tribes.

ARGUMENT

I. Standard of Review

The Commission has a certified regulatory program for conducting environmental review in siting cases like this one. Pub. Res. Code §§ 25500, 25519(c).³ Under this program, the Commission must comply with CEQA's substantive mandates. *See* 20 Cal. Code Regs. §§ 1741, 1742, 1752.5. Thus, when referring in this brief to the Commission's legal obligations for environmental review, CRIT cites to CEQA's statutory provisions and implementing regulations.

Failure to comply with these obligations constitutes a prejudicial abuse of discretion, as does a failure to support conclusions with substantial evidence. § 21168.5; *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (“*Laurel Heights I*”) (1988) 47 Cal.3d 376, 392. The Commission fails to “proceed in the manner required by law” if its EIR-equivalent omits relevant information or analysis, or defers analysis or mitigation measures until after project approval. *See Communities for a Better Env't v. City of Richmond* (2010) 184 Cal.App.4th 70, 92-93; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712. Of particular relevance here, if an agency concludes that mitigation measures reduce an otherwise significant impact to less than significant, this reasoning must be supported by substantial evidence. Guidelines § 15091(b).⁴ Findings of infeasibility similarly must be supported by substantial evidence. *Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1260 (“CEQA requires the agency to find, based on substantial evidence . . . that mitigation is infeasible . . .”).

Both the Commission and NextEra have protested that CRIT's concerns regarding cultural resources and other impacts have been brought to their attention too late. *E.g.*, Exhibit

³ Except as otherwise noted, all further statutory references are to the Public Resources Code.

⁴ The CEQA Guidelines, 14 Cal. Code Regs. § 15000 *et seq.*, are referred to herein as “Guidelines.”

2002 (TN# 201190) (“Staff reviewed the nature of the consideration of the proposed amendment which, under CEQA, only warrants staff to conduct analysis on the difference between what was originally licensed and what is now petitioned for amendment.”).⁵ Because CRIT did not participate in the CEC proceeding for the original project, the parties have argued that CRIT is not entitled to present testimony or make legal argument related to cultural resource impacts caused by both the original *and* the new Project.

Under CEQA, this position is untenable. First, the Commission must make override findings with respect to “each significant effect shown in the *previous EIR as revised*.” Guidelines § 15163 (emphasis added); *see also* 20 Cal. Code Regs. § 1769(a)(3)(A). As CRIT’s testimony goes to the balancing test inherent in the override findings (particularly the significant cumulative impact the Project will have on cultural resources), the Commission is required to consider it. Moreover, as NextEra has provided no indication that it would build the already licensed project in the event the petition to amend is not granted, a careful balancing is even more necessary.

With respect to CRIT’s proposed modifications to the conditions of certification, the law is even clearer. Under CEQA, supplemental environmental review must be completed whenever “new information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.” § 21166. This opening brief focuses on the ability of the proposed conditions of certification to address unanticipated discoveries during construction. Since the original decision, the Commission and CRIT have had three years of experience with applying these conditions, as they are similar to those approved for other projects. The unanticipated discovery at Genesis, in particular, has provided a wealth of information about how well these conditions work on the ground. Exhibit 4010 (TN# 201187). As CEC Staff explained at the evidentiary hearing with respect to biological resources, it is entirely proper to consider modifications to conditions based on this kind of experiential new information. Consequently, CRIT urges the Commission to consider its proposed revisions.

II. The Conditions of Certification Proposed for Cultural Resources Do Not Reduce Potentially Significant Impacts to a Less than Significant Level.

A. While CRIT Appreciates NextEra’s Willingness to Stipulate to Limited Modifications, These Changes Are Insufficient to Address CRIT’s Concerns.

After the evidentiary hearing on November 19, 2013, CRIT contacted NextEra to determine whether it would be willing to accommodate the modifications that CRIT had suggested in Exhibit 4007 (TN# 201188). CRIT and NextEra were able to stipulate to changes that address some of CRIT’s and NextEra’s concerns, particularly regarding the involvement of affected tribes in reviewing the Cultural Resources Mitigation and Monitoring Plan (CRMMP), in-situ or onsite reburial, and the use of Native American Monitors, and submitted the stipulation

⁵ As the transcript for the evidentiary hearing is not yet available, CRIT is unable to provide specific citations for oral testimony. CRIT reserves the right to amend this Opening Brief when the transcript is finalized.

to the docket. TN# 201337. While CRIT appreciates NextEra's willingness to accommodate certain changes, these modifications do not address CRIT's fundamental concern that these mitigation measures do not reduce the potentially significant impacts to buried cultural resources to a less than significant level.

B. The Commission Must Give Avoidance of Prehistoric Archaeological Sites Due Weight as a "Preferred" Mitigation Measure.

The proposed conditions of certification do not require NextEra to avoid, or attempt to avoid, any prehistoric archaeological resources (either known or unanticipated). SA at 4.3-135 to 169. Instead, the required mitigation consists solely of data recovery at impacted sites. *Id.* at 4.3-94. CEQA, however, prescribes specific mitigation activities for archaeological resources, recognizing that avoidance of such sites is the only mechanism for adequately reducing project impacts. Guidelines § 15126.4(b)(3). The Commission therefore must include in the conditions of certification language requiring avoidance of such sites if feasible.

Section 15126.4(b)(3) provides in part:

Public agencies should, whenever feasible, seek to avoid damaging effects on any historical resources of an archaeological nature. . . . *Preservation in place is the preferred manner of mitigating impacts to archaeological sites.* Preservation in place maintains the relationship between artifacts and the archaeological context. Preservation may also avoid conflict with religious or cultural values of groups associated with the site.

(emphasis added). The regulation goes on to explain that "preservation in place" includes avoiding archaeological sites, incorporating such sites into open spaces, or using permanent protection tools such as conservation easements. *Id.* Finally, the regulation states that "when data recovery through excavation *is the only feasible mitigation*, a data recovery plan . . . shall be prepared and adopted." *Id.* (emphasis added).

The California Court of Appeal has interpreted these provisions to impose strict procedural and substantive requirements on lead agencies. In *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, the court held that "feasible preservation in place *must be adopted* to mitigate impacts to historical resources of an archaeological nature unless the lead agency determines that another form of mitigation is available and provides superior mitigation of the impact." *Id.* at 88 (emphasis added). Continuing, the court held that if preservation in place is not adopted, the EIR "shall state why another type of mitigation serves the interests protected by CEQA better than preservation in place." *Id.*

The SA has not complied with either the procedural or substantive requirements for prehistoric archaeological resources. No indication is given that CEC Staff considered the feasibility of requiring preservation in place for either known or unanticipated archaeological resources. Indeed, the SA indicates instead that avoidance of known sites may be feasible: "The owner suggests that the reduced grading requirement may provide the potential to avoid some archeological sites," though requests deferring this determination to the design phase. SA at 4.3-7. The only mention of avoidance relates to the possibility of requiring "further reduction of the

project footprint to avoid resources,” which staff suggests “is not a pragmatic course of action.” *Id.* at 4.3-94. But given that individual prehistoric sites are few in number and relatively small (*id.* at 4.3-104 to 105), this brief discussion is inadequate to support a determination that shifting the location of individual heliostat pedestals is infeasible, particularly given the owner’s statement of possibility. *Id.* at 4.3-7.

Moreover, the SA fails to explain why data recovery would serve the interests protected by CEQA better than preservation in place. While data recovery may present some unique opportunities to assess the *information potential* of the archaeological resources, it is clear from the CEQA Guidelines that preservation in place can better serve that goal as well (i.e. by maintaining the relationship of the artifacts to their archaeological context). Consequently, the SA fails to comply with both the procedural and substantive aspects of CEQA’s requirements to protect archaeological resources.

CRIT also urges the Commission to provide for avoidance of both known and unanticipated prehistoric sites to acknowledge and accommodate the cultural beliefs of CRIT members. As discussed in CRIT’s written testimony, the disturbance of prehistoric artifacts—even in the name of “data recovery”—is considered taboo by CRIT’s Mohave members. Exhibit 4008 (TN# 201191) (describing such activities as physically painful). For these reasons as well, the Commission should modify the Conditions of Certification to require at least an assessment of the feasibility of avoidance.

CRIT has provided draft language to effectuate this requested modification in Exhibit 4007. The crucial changes are summarized here:

- The conditions of certification must require the CRMMP to state that all eligible or presumed eligible prehistoric-period archaeological sites, traditional cultural properties, or ethnographic resources discovered during construction shall be avoided if feasible. CRIT recommends specific procedural requirements to assure that the finding of feasibility is made on the record.
- CUL-17, which specifically governs the treatment of discoveries, must be similarly revised to require consideration of avoidance.
- CUL-6 and CUL-7 require data recovery for certain known prehistoric sites, without any determination of whether avoidance is feasible. This determination must be completed prior to data recovery, particularly in light of NextEra’s statements that project design may accommodate such avoidance.

CRIT acknowledges NextEra’s and the Commission’s concern that a preference for avoidance would require the NextEra to make feasibility evaluations in the field during project construction. While CRIT understands the desire of the Commission and the project owner to move rapidly toward project completion once construction has begun, the price of a short delay is insignificant in comparison to the destruction of sacred and finite cultural resources. Moreover, such a finding is required by both CEQA and federal law—the Commission cannot bypass these requirements due to a preference for expediency.

Finally, to the extent NextEra is concerned about repeated redesigns of the Project, CRIT notes that NextEra has repeatedly asserted that the likelihood of finding buried cultural material is low, making this possibility also unlikely. NextEra is also welcome to pause and assess the site for buried cultural materials following site preparation activities but prior to construction in order to address unanticipated finds at one time.

C. The Commission Must Ensure the Enforceability of Cultural Resource Mitigation Measures.

Second, the SA fails to demonstrate that the specified mitigation measures will be enforced to protect unanticipated discoveries. CEQA requires that a lead agency demonstrate that mitigation measures will be “both feasible and efficacious.” *Communities for a Better Env’t v. City of Richmond* (2010) 184 Cal. App. 4th 70, 95. As part of this standard, the lead agency must assure that all mitigation measures are enforceable, so that promises made to gain project approval do fall through after approval is granted. Guidelines §§ 15064.5(b)(4); 15126.4(a)(2) (“Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments.”).

After the unanticipated discoveries at the Genesis project, CRIT ran into difficulties enforcing both the conditions of certification and the provisions in the CRMMP and BLM’s analogous Historic Properties Treatment Plan. For example, while the applicable mitigation measures required notification to area tribes within 24 hours, CRIT did not receive notice for two weeks. Exhibit 4010 (TN# 201187). By that time, NextEra and the agencies had already formulated a data recovery plan, even though the mitigation measures clearly stated a preference for site avoidance. Specific mechanisms developed to evaluate the project site also conflicted with site evaluation measures provided for in the mitigation plans. Finally, promises of consultation, required in the event of such discoveries, never occurred. *Id.* As a result, CRIT now seeks to ensure that the conditions of certification in place for the Blythe Project are readily enforceable.

At the evidentiary hearing, the Commission questioned whether CRIT’s specific concerns could be best addressed in the formulation of the CRMMP. One of CRIT’s primary concerns with this approach relates to the enforceability of the CRMMP. First, to the extent there is any real or perceived conflict between the conditions of certification and the CRMMP, the conditions of certification must take precedence. SA at 4.3-140. Consequently, efforts to require more protective measures in the CRMMP may result in an impermissible conflict with the conditions. Second, during CRIT’s litigation over the unanticipated discoveries at the Genesis project, BLM argued that the Historic Properties Treatment Plan, an analogous BLM document, was not enforceable. Exhibit 4010 (TN# 201187). CRIT is therefore uncomfortable moving important protections to the CRMMP given BLM’s prior litigation position on the enforceability of such plans, even though the Court ultimately ruled in CRIT’s favor on this issue.

To address enforceability concerns, CRIT proposes the following modifications to the conditions of certification:

- The Commission, specifically through its Compliance Project Manager (CPM), is given authority to interpret and enforce the CRMMP, rather than leaving this task to NextEra and its consultants.
- The CPM is required to ensure a written response is provided to any tribes that submit comments regarding construction monitoring.
- To create an incentive for the project owner to ensure that tribes are timely notified in the event of an unanticipated discovery, CRIT suggests the imposition of a modest monetary fine for any delay.

CRIT believes that these requests are neither onerous nor unwarranted, given the Tribes' past experiences. Instead, they provide for clearer lines of accountability and increased communication in the event of an unanticipated discovery. Given that staff and NextEra have argued such discoveries are unlikely, any burden imposed by the changes should be correspondingly small. Specific modifications are provided in Exhibit 4007 (TN# 201188).

D. Condensed “Phase II-Phase III” Mitigation Violates CEQA’s Mandate to First Analyze Significant Impacts.

In licensing the original project, the Commission developed a truncated method for assessing impacts to archaeological resources, the alleged “primary benefit” of which was “a *substantial reduction*” in the amount of time spent analyzing cultural resources. SA at 4.3-79 (emphasis added); *see also* SA at 4.3-81 (“gearing up would only have to happen once, which saves time and money”). This methodology, known as a “compressed Phase II-Phase III” assessment, would have allowed staff to assume that all archaeological sites were eligible, and therefore significant—without conducting any analysis—and then adopt recovery as a mitigation measure for all sites. SA at 4.3-79 to 80. In this shortened review, affected tribes would not be consulted about the significance or eligibility of resources, or about appropriate mitigation measures. Rather, the Project developer could simply engage in “a brief consultation with Energy Commission staff and BLM by telephone,” followed by excavation of buried cultural material without determining the extent of the site, in order to “further accelerate” data recovery. SA at 4.3-80 to 81. The SA claims that this abridged process was necessary to secure financing under the American Recovery and Reinvestment Act. SA at 4.3-79.

Even though ARRA funding deadlines are no longer at issue with the revised Project, the SA proposes to rely on the exact same truncated process. CEC Staff would assume that “all project-related direct, indirect, and cumulative construction impacts, to known cultural resources . . . would be significant.” SA at 4.3-90. The fast-paced data recovery efforts “remain[s] largely unchanged” for the revised project. SA at 4.3-80.

This approach violates CEQA in at least two ways. First, it is black-letter CEQA law that a lead agency cannot simply assume the significance of an impact without undertaking necessary analysis. As the California Court of Appeal held in *Berkeley Keep Jets over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1371:

This approach has the process exactly backward and allows the lead agency to travel the legally impermissible easy road to CEQA compliance. *Before* one brings about a potentially significant and irreversible change to the environment, an EIR must be prepared that sufficiently explores the significant environmental effects created by the project. The [] approach of simply labeling the effect “significant” without accompanying analysis of the project’s impact . . . is inadequate to meet the environmental assessment requirements of CEQA.

Second, *Madera Oversight* holds that this approach is specifically prohibited with respect to analysis of archaeological resources. 199 Cal.App.4th at 80. In that case, the lead agency approved a mitigation measure that would have allowed an eligibility determination to be made after project approval, including a “not eligible” finding, with specific mitigation then applied depending on the determination. The Court struck down this approach, noting that under Guidelines section 15064.5, “the [eligibility] determination *must be made sometime before the final EIR is certified*, and cannot be undone after the certification of the EIR.” *Id.* at 81. Contrary to this holding, the conditions of certification propose to use this exact approach for archaeological sites impacted by the Blythe Project.

As a result of this clear inconsistency with applicable law, and the change circumstances, the Commission must revise CUL-6 and CUL-7 to remove any “compressed Phase II-Phase III” approach.

III. The Staff Assessment Erroneously Concludes that the Project Conforms with all LORS.

Finally, the Commission must consider whether the Project, as amended, complies with all applicable LORS. As described below, the Project is demonstrably out of compliance with two federal land use standards intended to protect sensitive resources. While CEC Staff and NextEra have not responded to CRIT’s comments on this point (*compare* Exhibit 4011 (TN# 201149) (CRIT’s comment letter on the SA) *with* Exhibit 2002 (TN# 201190) (CEC Staff’s response to comments on the SA), CRIT anticipates that both parties will assert that these issues have already been adjudicated and are not properly before the Commission at this time. However, the Commission’s own regulations are clear on this point: for amendments, the Commission must newly consider whether “the project would remain in compliance with all applicable laws, ordinances, regulations, and standards.” 20 Cal. Code Regs. § 1769(a)(3)(B). As described below, the original project was not in compliance and the proposed amendments do nothing to bring the Project into compliance.

A. The Amended Project Does Not Conform to the Class L Requirements of the California Desert Conservation Act Plan.

The SA claims that the Project is located entirely on lands classified as “Class M” under the California Desert Conservation Act (CDCA) Plan. SA at 4.5-6. This information is incorrect. According to the Final EIS for the prior project, as well as maps of the CDCA Plan, the proposed Project is located entirely on “Class L” Lands. Blythe Solar Power Project PA/FEIS, at 1-6; Exhibit 4011 (TN# 201149) (attaching Desert Renewable Energy Conservation Plan, Description

and Comparative Evaluation of Draft DRECP Alternatives, Figure 3.7-8, Multiple Use Classes within the Cadiz Valley and Chocolate Mountains Ecoregion).

This distinction is crucial. Class L lands are so designated to “protect[] sensitive, natural, scenic, ecological and cultural resource values.” The CDCA Plan prohibits development on Class L lands if sensitive values will be “significantly diminished.” *Id.* In sharp contrast, Class M lands permit a “controlled balance between higher intensity use and protection of public lands” and specifically permits “energy, and utility development,” so long as the projects are designed and managed “to mitigate damage to [desert] resources.” As described above, the Project does not adequately mitigate damage to cultural resources, arguably rendering the Project out of compliance with Class M requirements. But given that the proposed Project is within Class L lands, the Project is certainly out of conformance with the more stringent requirements regarding protection of sensitive cultural resources. The Commission cannot approve the Project without (a) finding the amended project out of conformance with federal LORS and (b) making necessary override findings.

B. The Amended Project Does Not Conform to the VRM Class III Requirements of the California Desert Conservation Act Plan.

Similarly, the SA fails to consider whether the Project is in conformance with the CDCA Plan’s requirements for visual resources. While the CDCA itself did not specify Visual Resource Management (VRM) classifications for the lands under the CDCA’s purview, it required BLM to later establish such classifications to manage the protection of scenic values. *See* 43 U.S.C. § 1711(a). VRM classifications, ranging from Class I (highest protection) to Class VI (lowest protection), set the level of visual change to the landscape that may be permitted for any surface-disturbing activity.

Within the CDCA, BLM establishes VRM classifications piecemeal. For the Project area, BLM set the VRM classification through its approval of the Devers-Palo Verde II transmission line, such that most of the Project area is designated VRM Class III. The BLM field manager also recommended that the remainder of the area also be designated as Interim VRM Class III, in part because the land use classification is the more restrictive Class L. Blythe Solar Power Project PA/FEIS, at 3.19-8. A VRM Class III requires the “partial[] ret[ention of] the existing character of the landscape,” such that the project does not “dominate the view of the casual observer.” *Id.* at 4.18-1. The PA/FEIS then goes on to note that the Project *is out of conformance with the VRM classifications*, particularly from such important areas as the McCoy Mountains. *Id.* at 4.18-9, -10, -11, -13. Yet the SA utterly fails to mention the VRM requirements, the existing site designation, and the Project’s lack of conformity. Again, the Commission cannot approve the Project without (a) finding the amended project out of conformance with federal LORS and (b) making a necessary override.

CONCLUSION

CRIT urges the Commission to reconsider its narrow position that it must only consider impacts flowing from NextEra’s proposed amendment to the Blythe Project. Given the change in owner and the proprietary nature of solar technology, it is highly unlikely that without an approved amendment, the original Blythe Solar Power Project would ever be built.

DECLARATION OF SERVICE

I, Sean Mulligan, declare that on November 27, 2013, I served and filed copies of Opening Brief of Colorado River Indian Tribes, dated November 27, 2013. The most recent Proof of Service List, which I copied from the web page for this project at: <http://www.energy.ca.gov>, is attached to this Declaration.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I am over the age of 18 years.

Dated: November 27, 2013

/s/ Sean Mulligan

[Name]



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