

DOCKETED

Docket Number:	09-AFC-06C
Project Title:	Blythe Solar Power Project - Compliance
TN #:	203154
Document Title:	Letter from Colorado River Indian Tribes to Express Concerns re Proposed Process and Timeline for Construction
Description:	N/A
Filer:	Mary Dyas
Organization:	Shute Mihaly & Weinberger
Submitter Role:	Intervenor Representative
Submission Date:	10/3/2014 1:47:09 PM
Docketed Date:	10/3/2014

SHUTE MIHALY
& WEINBERGER LLP

396 HAYES STREET, SAN FRANCISCO, CA 94102
T: (415) 552-7272 F: (415) 552-5816
www.smwlaw.com

WINTER KING
Attorney
king@smwlaw.com

October 2, 2014

Via E-Mail and U.S. Mail

John Kalish, Field Manager
Bureau of Land Management
Palm Springs-South Coast Field Office
1201 Bird Center Drive
Palm Springs, CA 92262
jkalish@blm.gov

Mary Dyas, Compliance Project Manager
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5512
mdyas@energy.ca.gov

Re: HPTP/CRMMP for Blythe Solar Power Project

Dear Mr. Kalish and Ms. Dyas:

On behalf of the Colorado River Indian Tribes (“CRIT” or “Tribe”), I am writing to express the Tribe’s concerns about the proposed process and timeline for construction of the Revised Blythe Solar Power Project (“Project” or “BSPP”). We have recently learned that the Project developer, NextEra Blythe Solar (“NextEra”), intends to begin construction of the 4,000-acre power plant in November. To date, however, neither the BLM nor the CEC has provided CRIT with a draft of any of the cultural resource monitoring plans required by the Programmatic Agreement or the California Energy Commission’s (“CEC”) conditions of approval. Thus, we are submitting this letter to you to remind you of your obligations under the law and insist that the Tribe have adequate time to review and consult on these plans before any further “notices to proceed” are issued by your agencies.

As you will no doubt recall, BLM chose to comply with its obligations under the National Historic Preservation Act (“NHPA”) by entering a “Programmatic Agreement” (“PA”) for the Project. *See* 36 C.F.R. 800.4(b)(2). Because the Project’s PA defers final identification and evaluation of historic properties until after Project approval, its terms provide no specific guidance to NextEra on how to treat cultural resources affected by the Project. Instead, the PA expressly requires NextEra and BLM to prepare a Historic Properties Treatment Plan (“HPTP”) prior to beginning construction. *See* PA at 15. The HPTP must include: (a) a list of historic properties determined (or assumed) to be eligible for listing under the NHRP or CRHP; (b) the measures the

Company will take to avoid, minimize, or mitigate adverse effects on these properties; (c) a plan for monitoring during construction that includes a plan for treating inadvertent discoveries “and the participation of tribal cultural specialists”; and (d) the procedures for handling human remains, funerary objects, sacred objects, and objects of cultural patrimony in accordance with the Native American Graves Protection and Repatriation Act (“NAGPRA”). PA at 15 & App. B.

Crucially, the PA also requires BLM to provide CRIT with a draft of any HPTP for a 30-day review period. *See* PA at 15-16. If the HPTP addresses “treatment or adverse effects to historic properties to which Tribes attach religious or cultural significance,” BLM must also consult with the Tribe about these treatment measures. *Id.*

Nearly identical requirements are included in the CEC’s condition of certification CUL-5. This condition provides:

Prior to the start of ground disturbance, the project owner shall submit to the CPM for review and approval draft and final versions of a Cultural Resources Monitoring and Mitigation Plan (CRMMP) *The CPM shall provide each draft of the CRMMP to affiliated Native American tribal entities for review and comment.* Subsequent iterations of the draft CRMMP and the final CRMMP shall evidence consideration of comments received from said tribal entities, where such comments have been received within 30 days for the initial draft and 7 days for each subsequent draft No ground disturbance shall occur prior to CPM approval of the CRMMP, unless such activities are specifically approved by the CPM.

CEC BSPP Decision at 266 (emphasis added). This requirement was also incorporated into BLM’s ROD for the Project. ROD, App. 5, A5-46; *see also id.* at A5-44 (defining ground disturbance to “include[] ‘preconstruction site mobilization,’ ‘ground disturbance,’ and ‘construction grading, boring, and trenching,’ as defined in the [CEC] General Conditions for this Project”).

Despite these clear requirements for plan development and tribal consultation, both BLM and CEC have authorized NextEra to begin “pre-construction” ground-disturbing activities before finalizing the required plans or even sharing drafts

John Kalish
Mary Dyas
October 2, 2014
Page 3

with CRIT for its review and comment.¹ Although CRIT believes these limited notices to proceed plainly violated the law, we understand that the ground-disturbing activities associated with them is largely complete.

More recently, however, CRIT has been informed by NextEra representatives that the Company plans to begin project construction in November. Under the terms of the PA and the conditions of approval imposed by your agencies, no further ground-disturbing activities may be permitted until there are approved plans in place for treating the historic resources (known and as-yet unknown) located within the Project site. These plans cannot be finalized until CRIT has had a full 30 days to review and comment and BLM and CEC have incorporated CRIT's comments and consulted with the Tribe in the manner described above.

To avoid any further confusion over this matter, please confirm, in writing, that your agencies intend to comply with these PA provisions and conditions of certification by: (a) not authorizing any further ground-disturbing activities until both the HPTP and CRMMP are in place; (b) providing CRIT with at least 30 days to review and comment on any draft HPTP/CRMMP; (c) incorporating CRIT's comments into the final HPTP/CRMMP; and (d) consulting with CRIT about any potentially affected resources that have religious or cultural significance to the Tribe.

Thank you for your prompt attention to this matter.

¹ CRIT's Deputy Attorney General, Nancy Jасulca, e-mailed Jared Babula on June 27, 2014, asking for a copy of the "Revised Cultural Resources Monitoring and Mitigation Plan for the Modified Blythe Solar Power Project," which had been docketed confidentially on the CEC's website. Mr. Babula wrote back, indicating that he had received her request and would get back to her the following week after discussing with CEC cultural resource staff. Ms. Jасulca never received any further response.

John Kalish
Mary Dyas
October 2, 2014
Page 4

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

A handwritten signature in blue ink, consisting of two distinct parts. The first part is a stylized, cursive signature that appears to be 'W. King'. The second part is a more fluid, cursive signature that appears to be 'Winter King'.

Winter King

cc: Rebecca Loudbear, CRIT Attorney General

629423.1