

## DOCKETED

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<b>Document Title:</b>	Colorado River Indian Tribes (CRIT) Comment on Blythe Solar CRMMP
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<b>Filer:</b>	Michael D McGuirt
<b>Organization:</b>	Colorado River Indian Tribes
<b>Submitter Role:</b>	Intervenor
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# COLORADO RIVER INDIAN TRIBES

## *Colorado River Indian Reservation*

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November 24, 2014

### *Via Electronic Mail Only*

Michael McGuirt  
California Energy Commission  
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Re: **Comments of the Colorado River Indian Tribes on the Revised Cultural Resources Monitoring and Mitigation Plan for the Modified Blythe Solar Power Project**

Dear Mr. McGuirt:

The Colorado River Indian Tribes (“CRIT” or “Tribes”) submit the following comments on the Revised Cultural Resources Monitoring and Mitigation Plan (CRMMP) for the Modified Blythe Solar Power Project (Blythe Project). As CRIT has noted repeatedly, the Tribes have serious concerns about the Blythe Project’s impacts on sensitive cultural resources within the ancestral homeland of CRIT members. In its current form, the CRMMP does not contain provisions that will adequately protect these cultural resources and fails to fully implement the California Energy Commission’s (CEC) Conditions of Certification (COC). In our opinion, the CRMMP requires substantial revisions before it can be finalized in compliance with state law. CRIT’s specific comments are detailed below:

### **Treatment for Known Cultural Resources**

- **Global Comment:** As you know, CRIT strongly objects to the use of data recovery as “mitigation” for impacts to prehistoric archaeological resources. CRIT acknowledges that the COCs anticipate the use of data recovery for the Prehistoric Quarries Archaeological District (PQAD) and small prehistoric sites. CRIT, however, urges the CEC to reconsider this approach and to permit the use of reburial techniques rather than collection and curation. Under the California Environmental Quality Act, lead agencies are *required* to use preservation in place for archaeological resources if feasible, unless other mitigation would be more protective. CEQA Guidelines

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15126.4(b); *Madera Oversight Coal. v. County of Madera* (2011), 199 Cal.App.4th 48, 82-87. The CEC's proposal does not meet this requirement.

- Page 84, 92: The CRMMP should specify that the Cultural Resources Specialist (CRS), Project Prehistoric Archaeologist (PPA), and archaeological team members must consult with affiliated Native American tribal entities to develop the Archaeological Data Recovery process, especially as “[u]nsurveyed portions of the [PQAD], including unsurveyed areas in quarry site CA-RIV-3419, have the potential to contain trails and other evidence of ritual activity.” Consultation with affiliated Native American tribal entities regarding these efforts is necessary to ensure that the resources are adequately studied and appropriately handled. CRIT's request for consultation on this topic, however, does not condone the use of data recovery.

- Page 100: The CRMMP should specify when and how the CEC will engage in the “Native American consultation” necessary to determine whether the PQAD is eligible under Criteria 1 through 3.

- Page 108-09: The CRMMP should specify that the affiliated Native American tribal entities will receive a copy of the CRS's PQAD evaluation and data recovery report, which will contain the study's goals, project setting, methods, results, and CRHR eligibility recommendations for PQAD. The CRMMP should also specify that the affiliated Native American tribal entities will have an opportunity to consult and comment on this report before it is finalized.

- Page 111: The CRMMP should specify that the affiliated Native American tribal entities will receive a copy of the CUL-7 data recovery letter report, which provides a description of the schedule and methods used in the field effort, a preliminary tally of the numbers and types of features and deposits that were found, a discussion of the potential range of error for that tally, a map showing the location of excavation units including topographic contours and the site landforms, and a discussion of the California Register of Historical Resources (CRHR) eligibility of each site and the justification for that determination. The CRMMP should also specify that the affiliated Native American tribal entities will have an opportunity to consult and comment on this report before it is finalized.

- Page 102-104: CRIT acknowledges that the CEC's decision allows for a compressed Phase II-Phase III approach, but continues to object to the use of the combined evaluation and data recovery for thermal cobble features. As CRIT has previously explained, the compressed Phase II-Phase III methodology allows monitors to assume that an archaeological site is eligible, and therefore significant—without conducting any analysis—and then adopt data recovery as a mitigation measure. Under this truncated approach, affiliated Native American tribal entities are not consulted about

the significance or eligibility of resources, or about appropriate mitigation measures beyond data recovery.

### **Protective Measures Prior to Ground Disturbance**

- Page 121-22: CUL-5, #10 requires the CRMMP to address how impact-avoidance measures to “prohibit or otherwise restrict access to sensitive resource areas,” such as flagging or fencing, would be implemented *prior* to the start of ground disturbance and how long these measures would be needed to protect the resources from project related impacts. Commission Decision at 269 (emphasis added). The CRMMP provides that the CRS, alternate CRS, or CRM shall set out flagging or fencing to create a buffer zone around known or discovered cultural resources, but does not address the process for putting avoidance measures in place prior to ground disturbance or the locations at which these measures would be needed. The CRMMP should specify that avoidance measures, such as flagging or fencing, will be implemented prior to the start of ground disturbance to protect known sensitive resource areas, and must describe the process for their implementation.

### **Unanticipated Discoveries**

- **Global Comment:** CUL-5 states that the CRMMP must include sections that “clearly and concisely” set out both “flows of authority and work product” and “explicit communication protocols” for monitoring and unanticipated discoveries. CRIT does not believe the CRMMP meets these standards. The sections on monitoring and unanticipated discoveries are poorly organized and difficult to follow; moreover, as detailed further below, they conflict with the COCs. CRIT suggests the use of a flow-chart or other visual aid to help illustrate the process that will occur following an unanticipated discovery.

- **Global Comment:** The CRMMP does not incorporate CUL-17’s requirement that affiliated Native American tribal entities be notified within 48 hours of a discovery. These errors must be remedied before the CRMMP can be finalized. The Bureau of Land Management’s (BLM) Plan for Archaeological Monitoring, Post-Review Discovery, and Unanticipated Effects for the Revised Blythe Solar Project (BLM Plan) requires tribal notification in a number of additional situations beyond those articulated in the CRMMP. The CRMMP, at a minimum, must be made consistent with the BLM Plan. CRIT believes, however, that BLM and the CEC should provide additional tribal notification and consultation beyond what it is articulated in either plan – at discovery, to assess eligibility and feasibility, and to develop mitigation plans.

- Page 124-32: In determining the appropriate treatment and potential mitigation for any newly discovered cultural resource, the CRMMP must specify that the Compliance Project Manager (CPM) will consult with affiliated Native American tribal entities to discuss resource eligibility and potential mitigation measures, including

avoidance.<sup>1</sup> The current CRMMP does not appear to involve affiliated Native American tribal entities in this process at all, other than to ensure, consistent with CUL-16, that the project owner send a letter notifying tribal entities of the discovery within 30 days. Notification and consultation, however, are not the same. Moreover, the CRMMP should be made consistent with the BLM Plan, which specifies that when a new cultural resource is discovered, NextEra Blythe Solar will first consider the possibility of avoidance. The CRMMP should specify, in parallel with the BLM Plan, that NextEra Blythe Solar will submit to the CEC and affiliated Native American tribal entities a written assessment as to whether (a) the find can be avoided, or (b) partial avoidance is feasible, or (c) the find cannot be avoided by Project construction. *See* Plan at 21.

- Page 124, 131 #5: Additional flexibility must be allowed in the event the Most Likely Descendent (MLD) cannot inspect the site and make recommendations within 48 hours. The site is remote, MLD determinations can be contentious, and the development of recommendations regarding treatment and disposition of the identified remains can take significant time.

Page 127: The Plan should specify that the CRS or the Project owner's notification to the CPM regarding prehistoric archaeological resources eligible for prescribed treatment will include a description of the steps taken to determine whether the resource was spatially isolated. CRIT's insistence on this additional evidence in no way condones the practice of prescribed treatment of resources.

### **Protective Measures For Newly Discovered Resources**

- Glossary of Terms: The CRMMP should provide definitional language explaining that an "artifact" refers to "each individual fragment of a portable object manufactured, modified, or used by humans." The CRMMP should specify that an "isolate" consists of three or fewer artifacts found within 5 meters, consistent with the BLM Plan's Glossary of Terms. *See* BLM Plan, Appx. E. Clear definitions of these terms will help avoid monitoring inconsistencies and disagreements like the one recently experienced on the McCoy Project when a Tribal Cultural Consultant (TCC) tried to set up an Environmentally Sensitive Areas (ESA) around four pottery shard fragments. The archaeological monitor removed the ESA stakes based on his belief that the four individual shards should be considered one artifact, making the find an isolate not subject to ESA protections. The lack of definitional clarity in construction monitoring terminology places significant cultural resources at risk and denies them the protection intended under state law. The CRMMP should be revised to eliminate this confusion.

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<sup>1</sup> The Commission's decision is based on an understanding that "avoidance measures" would be described in the CRMMP. *See* Commission Decision at 257.

- Page 122, 125, 132: The CRMMP must clearly identify the procedures and methods that will be used to establish the 100-foot buffer zone around newly discovered cultural resource materials until the CRS has evaluated the discovered cultural material. During the construction of the Palo Verde-Devers II Transmission line, CRIT understands that a prehistoric rock circle was damaged by heavy construction equipment, despite flagging. The Blythe Project CRMMP must be revised to ensure that the demarcation of sensitive sites is adequate to prevent similar harm. The CRMMP describes the flagging and fencing procedures for human remains/burial(s), but does not contain that same level of explanation for other cultural resource materials.

- Page 123: The CRMMP must also provide additional information as to the types of mitigation measures the CRS might recommend in the event of newly discovered cultural resource materials, such as avoidance or in-situ/reburial as described under CUL-5.

- Page 127-28: The CRMMP proposes prescribed treatment for certain categories of resources, which conflicts with the BLM Plan's requirement to evaluate the feasibility of avoidance and assess resource National Register of Historic Places (NRHP) eligibility on a discovery-by-discovery basis. CRIT opposes the use of prescribed treatment. The CRMMP should be revised to specify that a parallel evaluation of the feasibility of avoidance and assessment of CRHP eligibility will take place on a discovery-by-discovery basis.

### **Alternatives to Data Recovery**

- **Global comment:** The CRMMP fails to consider the required data recovery alternatives under CUL-5. CUL-5, Subsection 3, requires the CRMMP to “[e]xplicitly tak[e] into account the perspective of affiliated Native American tribal entities with respect to in-situ or onsite reburial, (unless otherwise prohibited) for the disposition of archaeological and ethnographic resources encountered as a result of the application review process and as a result of project construction and application.” The Commission’s Decision echoed this requirement. *See* Commission Decision at 258 (“The CRMMP will now be required to include policies regarding in-situ or onsite reburial.”). This language resulted from consultation between CRIT, CEC Staff, and NextEra at the request of the California Energy Commission. Yet, despite this clear directive, the CRMMP does not make a single mention of in-situ or onsite reburial. Though CRIT would prefer that the Blythe Project be relocated or altered to avoid cultural resources entirely, if cultural resources are discovered within the site during project construction, onsite and in-situ reburial represent vital alternatives to the widespread data recovery and resource removal contemplated in the CRMMP. The CRMMP’s failure to include and consider in-situ or onsite reburial represents an impermissible abandonment of the CEC’s conditions upon which the Blythe Project was approved.

- Page 127-32: As CRIT has repeatedly informed the CEC, data recovery is not an adequate or appropriate mitigation measure to address cultural harm. Yet the CRMMP appears to allow data recovery to proceed without further analysis in all circumstances regardless of the importance of the artifact. This proposal is particularly problematic with respect to those items described as diagnostic and exceptional finds, expansive finds, or other significant artifacts. When such resources are found, the CRMMP must require that the CRS to work with BLM and the affiliated Native American tribal entities to evaluate the feasibility of alternate mitigation measures, including avoidance or in-situ reburial, as contemplated under CUL-5.

- Page 130: The treatment measures for resources not eligible for prescribed treatment indicate that the CRS could submit to the CMP “an avoidance plan” for the newly discovered resource. As indicated above, CRIT strongly supports this approach. The rest of this section, however, assumes that the resource will remain subject to a data recovery plan. This inconsistency must be remedied to ensure that any avoidance plans can be implemented.

#### **Timeline of Research and Construction Activities**

- Page 5: CUL-5 requires that the CRMMP specify the “implementation sequence and the estimated time frames needed to accomplish all project-related tasks during the ground-disturbance and post-ground-disturbance analysis phases of the project.” The CRMMP gives a general sequence for cultural resources compliance under 2.2, but the actual timeline or timeframe for these activities is not clear. Consequently, the CRMMP’s current sequence fails to comply with CUL-5 because it does not include projected estimates as to how much time it will take to complete each step in the sequence.

- Page 83, 87: The CRMMP should specify that affiliated Native American tribal entities will receive a list of any and all ground disturbance activities specifically approved by the CPM (a) prior to CPM approval of Project maps and drawings and/or, (b) prior to CPM approval of the CRS and CRS alternates. *See Commission Decision, CUL-3 at 262, CUL-4 at 265.*

#### **Native American Monitors**

- **Global comment:** The CRMMP uses the term “Native American monitors,” but the draft BLM Plan and the draft Tribal Participation Plan, prepared by NextEra to govern the use of monitors on the Project site, use the term “tribal cultural consultant.” To the extent that these refer to the same person or people, they must be used consistently.

- **Global comment:** The CRMMP should specify that to ensure adequate monitoring conditions, no ground disturbing activities are permitted between 30 minutes after sundown and 30 minutes prior to sunrise.

- **Global comment:** The CRMMP uses the terms “ground disturbance” and “earth moving” to trigger certain requirements, and refers back to the General Conditions for the definition of “ground disturbance.” *See* CUL-3. CRIT, however, cannot locate a definition for ground disturbance in the General Conditions, and consequently request that the CEC provide a definition in the CRMMP. CRIT understands the term “ground disturbing activities” to describe any time the earth is moved or disturbed. This includes the operation of heavy equipment that disturbs the surface of the soil, such as mowing equipment. It also includes any work in previously disturbed areas, as additional earth moving may uncover or disturb additional resources.

- Page 83-84: The CRMMP should specify that copies of described documents, including the Application for Certification (AFC), data responses, confidential cultural resource documents, the Revised Staff Assessment (RSA), the RSA Supplement/Errata, if any, and maps and drawings showing the footprints of the power plant, all linear facility routes, all access roads, and all laydown areas will be provided to affiliated Native American tribal entities providing monitoring services no less than 60 days prior to the start of ground disturbance. In addition, the CRMMP should specify that the Project construction manager shall also provide weekly schedules to the affiliated Native American tribal entities providing monitoring services.

The CRMMP should also specify that affiliated Native American tribal entities will have an opportunity to consult with the CRS regarding the locations of proposed ground disturbance with respect to cultural resources. CRIT representatives should be kept apprised of all updates to maps and drawings if the Project construction proceeds in phases, and should receive written notice identifying the proposed schedule of each Project phase, along with the CRS and CPM. CRIT should also receive weekly updates of the proposed ground-disturbing Project activities from the Project construction manager. This information is critical for CRIT Monitors and Museum Staff, in order to adequately staff the monitoring activities.

- Page 119-20, 123: The Worker Environmental Awareness Program (WEAP) training should make clear that under the Tribal Participation Plan section 2.3, TCCs also have the authority to stop work in order to make a visual inspection of potential cultural deposits and to consult with the on-site PA or archaeological monitoring supervisor regarding the potential finding. In addition, Section 6.6.4 should be updated to include information about this stop-work authority.



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- Page 120-123: CUL-16 requires the project owner to ensure that the CRS, alternate CRS, or CRMs “prevent construction impacts to undiscovered resources” by monitoring full time all ground disturbances associated with grading and other earthwork, trenches for underground communication lines and natural gas pipeline, holes for the transmission line support structures, and for the jack-and-bore tunneling for underground lines or pipelines and states that “[a] Native American monitor shall be obtained to monitor all of the ground disturbance described above.” *See* Commission Decision at 292-93. Yet, the CRMMP confines full-time archaeological monitoring to certain areas articulated in Sections 6.6.1-6.6.1.1 and Figure 4, and limits Native American monitoring to areas where Native American artifacts may be discovered. This is inconsistent with CUL-16, which anticipates monitoring of all ground disturbing activities and specifically requires a Native American monitor to monitor all ground disturbance, not just in artifact-rich areas. *See* Commission Decision at 258-59. The CRMMP must be amended to come into compliance with this COC.

- Page 121: The CRRMP proposes that the CRM will inspect the dirt piles resulting from tunneling and be required to sieve a one five-gallon bucket per day to detect the presence of cultural material. CRIT is concerned that the screening protocols used for monitoring the spoils from tunneling and drilling work are insufficient to locate all cultural resources. CRIT requests consultation with CEC to discuss the method proposed in the CRRMP for monitoring of tunneling and drilling work.

- Page 122: This section should clarify that monitoring is required for all earth-*moving* (not “removing”) activities, including mowing and other surface activities. Such activities could disturb or destroy cultural resource artifacts; therefore, monitoring is required. *See* CUL-16 (“The project owner shall ensure that the CRS, alternate CRS, or CRMs *prevent construction impacts to undiscovered resources . . .*” (emphasis added)).

Thank you for considering CRIT’s comments. To best understand how these comments are taken into account in any subsequent drafts, we request that the CEC provide written responses to our concerns, either in a letter to the Tribe and/or in the revised CRMMP, as required under CUL-5. Please copy Rebecca A. Loudbear, CRIT Attorney General, at [rloudbear@critdoj.com](mailto:rloudbear@critdoj.com), and Nancy H. Jасulca, CRIT Deputy Attorney General, at [njasculca@critdoj.com](mailto:njasculca@critdoj.com), on any written correspondence to the Tribe. Finally, CRIT requests in-person consultation to discuss CEC’s proposed revisions to address these issues. Please contact the CRIT Attorney General’s Office to coordinate a meeting date.

Sincerely,

  
Chairman Dennis Patch  
Colorado River Indian Tribes

Michael McGuirt  
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November 24, 2014

Cc: CRIT Tribal Council  
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