

DOCKETED

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Document Title:	Comment on Second Review Draft of CRMMP
Description:	Colorado River Indian Tribes comment on the second review draft of the Cultural Resources Monitoring and Mitigation Plan for the construction of the Blythe Solar Power Project
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Organization:	Colorado River Indian Tribes
Submitter Role:	Public Agency
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COLORADO RIVER INDIAN TRIBES

Colorado River Indian Reservation

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April 2, 2015

Sent Via Electronic Mail and United States Mail

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California Energy Commission
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Sacramento, CA 95814-5512
Email: Michael.McGuirt@energy.ca.gov

Re: **Comments of the Colorado River Indian Tribes on the February 2015 Cultural Resources Monitoring and Mitigation Plan for the Modified Blythe Solar Power Project**

Dear Mr. McGuirt:

The Colorado River Indian Tribes (CRIT or Tribes) have reviewed the Revised February 2015 Cultural Resources Monitoring and Mitigation Plan (CRMMP) for the Modified Blythe Solar Power Project (Project), which CRIT received on March 23, 2015. While CRIT appreciates the California Energy Commission's (CEC) efforts to incorporate many of the Tribes' previous comments, numerous issues remain. Consequently, CRIT requests that CEC delay issuing the final CRMMP until after additional substantive edits have been incorporated into a revised version of the CRMMP.

As a preliminary matter, in its November 2014 comments on the draft CRMMP, CRIT requested that the CEC provide written responses to the Tribes' concerns, so that the parties can better understand why the CEC elects to incorporate certain requested modifications but not others. The CEC's implied refusal to provide written responses makes adequate government-to-government consultation difficult, if not impossible. CRIT cannot tell whether the CEC has legitimate reasons for refusing to make the requested modifications, whether CRIT has failed to clearly communicate its requests, or whether the CEC is simply ignoring CRIT's concerns in favor of NextEra's preferences or construction timeline. CRIT reiterates its request for a written response in advance of the CEC finalizing the proposed CRMMP.

CRIT's review of the revised CRMMP reveals that the following issues remain unaddressed:

- Page 51: With regard to prehistoric thermal cobble feature site CA-RIV-9812, the CRMMP's Table 2 identifies the site's status as "treatment pending." This language fails to give the Tribes a clear indication of how much, if any, data recovery has already taken place at this site, whether future treatment will include data recovery, what harm the Project may cause to the site, what mitigation measures have been considered, and what the timeline is for the creation of such a treatment plan. Moreover, it is not clear whether CA-RIV-9812 will be subject to the thermal cobble feature treatment described under Section 7.1.3.5 of the CRMMP. The CRMMP should be revised to clarify what is meant by "treatment pending" and to address the concerns raised in this comment.
- Page 93-94: The revised CRMMP describes the Prehistoric Quarries Archaeological District (PQAD) and Data Recovery Plan, but it is not clear from the CEC's language whether the PQAD evaluation has already taken place, is ongoing, or has yet to begin. The CRMMP should be revised to clarify the timeline of that undertaking. In making this comment, CRIT reiterates its strenuous object to the use of data recovery for the PQAD and urges the CEC to reconsider this approach and to more fully investigate the feasibility of avoidance.
- Page 109: On a related note, the revised CRMMP states that "[t]he assessment of the historical significance of the district as a whole and the assessments of the individual district potential contributors under Criteria 1 through 3 will be addressed through Native American consultation." If the PQAD evaluation has already taken place, CRIT objects to the quoted language from the CRMMP on the grounds that it was never consulted regarding the PQAD or California Register of Historical Resources (CRHR) eligibility for PQAD contributors.
- Page 112: Again, 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.
- Page 129-30: 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. *See* Commission Decision at 292-93. Yet, the CRMMP confines full-time archaeological monitoring to "select

project areas and...activities” articulated in Sections 8.1.1-8.1.2. This is inconsistent with CUL-16, which anticipates monitoring of all ground disturbing activities. *See* Commission Decision at 258-59. The CRMMP must be amended to come into compliance with this COC.

- Page 131: The CRMMP should be revised to clarify that the definition of archaeological construction monitoring also includes the presence of Native American Monitors, in accordance with CUL-16, which specifically requires a Native American monitor to monitor all ground disturbance. *See* Commission Decision at 258-59.
- Page 132: CRIT appreciates the CEC’s addition of language indicating that CRS and other monitoring personnel will be responsive to Native American Monitors’ requests to halt construction upon discovery of a cultural resource, but is disappointed to see that the CEC changed the size of its buffer zone around newly discovered resources from 100 feet to a far less protective 50 feet. The CRMMP should be revised to reinstate the original 100 foot buffer zones.
- Page 134: The CRMMP’s Reporting Procedures should be revised to state that affiliated tribes will also receive electronic copies of the daily monitoring logs provided to the CPM.
- Page 138, 140: Under a number of the CRMMP’s Discovery Protocols, the CEC indicates that it will provide notice within 48 hours to affiliated Native American tribal entities that have “expressed a desire to be notified in the event of any discovery which may be of interest to them.” Given the location of the Project within CRIT’s ancestral land, **all** cultural resource discoveries are of interest to the Tribes, and therefore CRIT requests that it be notified of resource discoveries under any and all applicable Discovery Protocols.
- General Comment: 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 except for the discovery of “[n]on-diagnostic or unexceptional” isolates, which are governed by BLM’s January 2015 isolate treatment protocol. This emphasis on data recovery is particularly problematic with respect to those items described as diagnostic and exceptional finds, expansive finds, or other significant artifacts, which have significant spiritual value to CRIT members. 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-5.¹

CRIT further finds many of the CRMMP's proposed cultural resource protections to be disingenuous in light of the facts on the ground. Ground disturbing activities, as defined in the revised CRMMP Glossary,² are currently occurring and have been since July 28, 2014. *See* CEC Limited Notice to Proceed, 7/28/14. The CEC explicitly approved ground disturbing activities in its Limited Notice to Proceed (July 28, 2014) and Notice to Proceed (March 23, 2015), both of which were issued prior to the finalization of the CRMMP. Moreover, the CEC's Limited Notice to Proceed authorized ground disturbing activities in violation of many of the timelines required under the Project's Conditions of Certification (COC), including CUL-5's requirement that "[n]o ground disturbance shall occur prior to CPM approval of the CRMMP." *See* Commission Decision at 266. The CEC's blatant failure to comply with its own COC renders many of the revised CRMMP's proposed protections meaningless. For example:

- Page 5: The CRMMP lays out a General Sequence for Cultural Resources Compliance, including a list of "pre-ground-disturbance" activities "to be implemented in sequence." Similarly, the Project's COC require many of these activities to take place a specific number of days prior to commencement of ground disturbing at the Project site. For instance, CUL-4 requires that CEC receive all maps and drawings from NextEra Blythe Solar "no less than 60 days prior to ground disturbance." The CRMMP fails to note that ground-disturbing activities have actually been taking place for over six months. The CRMMP should be revised to clarify whether the listed pre-ground-disturbance activities have already taken place and whether they were carried out in accordance with the timelines expressed in the COC.
- Page 87: Under CUL-3, the Cultural Resources Specialist (CRS) must be approved by the Compliance Project Manager (CPM) no less than 75 days prior to the start of ground disturbance. The CRMMP states that Dr. Stacey Jordan-Connor was approved as the Project CRS on July 21, 2014. Under the 75-day requirement, this meant that ground disturbance could not start until October 2, 2014. Yet, the CEC allowed ground disturbing activities on the Project site as

¹ CUL-5, Measure 3: "Explicitly takes 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 operation." Commission Decision at 267.

² "Any construction task that could potentially set in motion any type of sediment, whether the sediment originates from a native or previously undisturbed natural or man-made matrix." Revised CRMMP Glossary, 11.0. p. 167.

early as July 28, 2014. The CRMMP provides no evidence that the CPM gave special permission for this timeline violation.

- Page 134: In another example of the CEC's inconsistency regarding its own procedures, the CRMMP states that "[s]ubsequent to finalization of this CRMMP . . . the Project owner shall have notified every affiliated Native American tribal entity of the CPM's issuance of any NTP prior to the commencement or continuation of project construction." Yet, the CEC issued both its Limited Notice to Proceed and its Notice to Proceed well before the CRMMP had been finalized and, indeed, even before CRIT had a chance to comment on the revised draft, as required under CUL-5. These notice procedures have no value to CRIT where the actions they intend to notice have already occurred.
- General comment: CUL-5 states that "[n]o ground disturbance shall occur prior to CPM approval of the CRMMP, unless such activities are specifically approved the CPM." Despite approving a number of ground disturbing activities without first finalizing the CRMMP, the CEC provides no evidence that the CPM specifically approved these activities.

Lastly, CRIT makes the following requests, based on the language of the revised CRMMP:

- CRIT requests that it be notified of any changes in the Project design and schedule, as well as any cultural resources information provided to the CRS as construction proceeds. (Section 6.2, p. 88-89.)
- CRIT requests a copy of the final Cultural Resources Report. (Section 6.5, p. 91.)
- CRIT requests a copy of the PQAD Evaluation and Data Recovery Report. (Section 7.1.3.8, p. 117-19.)
- CRIT requests copies of future initial drafts of letter reports under CUL-7 for data recovery on small prehistoric sites. (Section 7.2.1, p. 121.)
- CRIT requests electronic copies of the daily monitoring logs. (Section 8.2, p. 134-35.)
- CRIT formally requests government-to-government consultation regarding the treatment of CA-RIV-9812.

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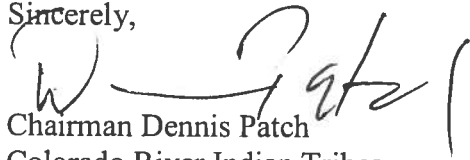
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Michael McGuirt
California Energy Commission
April 2, 2015

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, and Nancy H. Jасulca, CRIT Deputy Attorney General, at njasculca@critdoj.com, on any written correspondence to the Tribe. Finally, prior to CEC's final revisions to the CRMMP, CRIT requests a meeting to discuss those proposed revisions and to address the issues outlined in this letter. We request that the CEC provide the proposed revisions in advance of any meeting. Please contact the CRIT Attorney General's Office to coordinate a meeting date.

Sincerely,



Chairman Dennis Patch
Colorado River Indian Tribes

Cc: CRIT Tribal Council
Rebecca A. Loudbear, CRIT Attorney General
Nancy H. Jасulca, CRIT Deputy Attorney General
Wilene Fisher-Holt, CRIT Museum/Cultural Resources
David Harper, Chairman, Mohave Elders Committee

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