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August 26, 2015

Honorable Dennis Patch, Chairman
Colorado River Indian Tribes
Colorado River Indian Reservation
26600 Mohave Road
Parker, Arizona 85344

Re: Comments of the Colorado River Indian Tribes on Draft Revisions of the Cultural Resources Monitoring and Mitigation Plan (CRMMP) for the Amended Blythe Solar Power Project (09-AFC-6C)

Dear Chairman Patch,

Energy Commission staff wishes to thank the Colorado River Indian Tribe (CRIT) for the extensive and thoughtful review of the June 2014 and February 2015 drafts of the revised cultural resources monitoring and mitigation plan (CRMMP) for the amended Blythe Solar Power Project (revised CRMMP¹). The combination of the revisions that were made to license condition CUL-5 during the consideration of the April 2013 petition to amend the original license for the project, revisions which have facilitated the Native American review of revisions to this CRMMP, and staff revisions to the June 2014 draft of the revised CRMMP have ensured a broader engagement of the affiliated Native American tribal entities in the compliance process for this license. Staff believes it has been able to substantively address a large majority of the concerns which CRIT shared with the Energy Commission in its letters of November 24, 2014 and April 2, 2015.

This letter responds in detail to the CRIT letter of November 24, 2014 and provides, as well, a response to their letter of April 2, 2015, both of which comment on sequential drafts of the revised CRMMP. The preparation and implementation of the CRMMP is a requirement of Condition of Certification CUL-5 in the Energy Commission's license for the Blythe Solar Power Project (09-AFC-6C), amended in January 2014 to incorporate the Commission's decision to recast the original solar thermal project as a photovoltaic facility. The final Revised CRMMP² reflects thorough consultation among Energy Commission staff, NextEra Blythe Solar (project owner), and CRIT.

CRIT requested in both of their comment letters that Energy Commission staff provide written responses to their concerns, either in a separate letter or in the actual revisions to the CRMMP. In response to CRIT's concerns with the original June 2014 draft

¹ The CRMMP for the original Blythe Solar Power Project is dated December 2010. The June 2014 revised CRMMP was submitted by NextEra Blythe Solar for the amended Blythe Solar Power Project.

² An electronic copy of the final Revised CRMMP may be found on the Energy Commission's webpage for the project at http://doCKETpublic.energy.ca.gov/PublicDocuments/09-AFC-06C/TN205844_20150826T131816_REVISED_CULTURAL_RESOURCES_MONITORING_AND_MITIGATION_PLAN_FOR_T.pdf.

CRMMP, the project owner included extensive revisions in the February 2015 draft of the revised CRMMP, revisions requested by staff, that addressed CRIT's and staff's concerns. CRIT was then afforded the opportunity to review all of the revisions to the February 2015 draft. In this letter, staff highlights the purpose of many of the revisions in the February 2015 draft and also responds to CRIT's April 2 comment on it. Staff is hopeful that CRIT will recognize and concur that staff has made Native American consultation and "in-situ or onsite reburial" more integral elements of those protocols in the revised CRMMP which were open to modification. In particular, staff was able to favorably modify the protocol which deals with the treatment of Native American archaeological sites found during facility construction and the protocol which deals with the discovery and disposition of isolate artifacts. The modifications to these protocols are in close alignment with the Bureau of Land Management's (BLM) analogous protocols. Where the language of the license conditions precludes such modifications, staff explains why and points out the regulatory process necessary to amend the license conditions in a manner which would accommodate further such modifications.

Response to CRIT's November 24, 2014 Comment on the June 2014 Draft of the Revised CRMMP

CRIT's November 24 letter provides 29 comments on what staff distills down to three essential issue areas. Staff summarizes these issue areas as

1. CRIT objects to the perceived Energy Commission reliance on data recovery as the primary mitigation strategy for archaeological resources,
2. CRIT wants affiliated Native American tribal entities to have a more active role in the implementation of the construction monitoring, resource discovery, and discovery treatment processes for the subject project, and
3. CRIT seeks revisions to construction monitoring, resource discovery, and discovery treatment methods and protocols which would better align those methods and protocols with Native American interests.

CRIT also contributes a number of helpful clarifications on terminology and a number of remarks which facilitate the consistent application, in the revised CRMMP, of the language of the conditions of certification. Each of the above issue areas and the recommended clarifications will be discussed in turn below.

Energy Commission Reliance on Data Recovery as Mitigation

On the opening page of its November 24 letter, CRIT clearly states its objection to the use of data recovery as mitigation for significant effects to prehistoric archaeological resources (Comments 1, and 15–19). CRIT suggests that the use of "reburial techniques" rather than "collection and curation" is perhaps closer than data recovery to CEQA's purported mandate to require preservation in place for "archaeological sites." The Commission's January 2014 Final Decision on the project owner's petition to amend the Blythe Solar Power Project includes language the intent of which was to accommodate CRIT's concern with regard to this issue. The Final Decision incorporates a broad concept of artifact reburial and provides direction whereby "the CRMMP will

now be required to include policies regarding in-situ or onsite reburial” (p. 258, Final Decision). The language in one of the Final Decision’s implementing conditions places a key restriction on the scope of such policies. Section 3 of CUL-5 states that the CRMMP shall “explicitly takes [take] 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.” As discussed in more detail below (par. 4, sec. *More Active Native American Role in License Compliance Processes*), the prescriptive character of many of the license conditions which deal with the mitigation of historical resources which were identified over the course of the Energy Commission’s original environmental review of the project (CUL-6–CUL-14) reduce the number of CRMMP protocols where staff would be able to incorporate the concept of “in-situ or onsite reburial.” Since any modification to an approved license condition requires a formal amendment to a license, staff interprets the prescriptive treatment measures in the extant conditions for the present project, where they inherently conflict with “in-situ or onsite reburial,” to be among the types of prohibitions to the incorporation of the concept into the CRMMP which the Commission envisioned. Outside of these staff-understood prohibitions, staff has sought in the revisions of the CRMMP to modify a number of monitoring and discovery protocols to 1) ensure greater transparency in staff’s oversight of the project owner’s compliance with the license conditions, 2) increase the number of consultation points for affiliated Native American tribal entities to meet with the project owner and staff about the disposition of previously known and newly found archaeological resources, and 3) facilitate the reburial of the large majority of newly found archaeological isolates (see pars. 1 and 4, sec. *More Active Native American Role in License Compliance Processes*; par. 2, sec. *Revisions to Construction Monitoring, Resource Discovery, and Discovery Treatment Methods and Protocols*, below). Staff believes these efforts faithfully comport with the Commission’s direction in the Final Decision.

The Commission’s decision with regard to CRIT’s above objections to data recovery is founded on several basic historic preservation precepts in CEQA which are worthy of note, due not only to their applicability to the present project, but their broader applicability to past and future Energy Commission decisions in CRIT’s ancestral homeland. Contrary to the statement on page 1 of CRIT’s November 24 letter, CEQA lead agencies are not “*required* to use preservation in place for archaeological resources, if feasible, unless other mitigation would be more protective [emphasis mine].” The CEQA Guidelines state, rather, that “preservation in place is the *preferred manner* of mitigating impacts to archaeological sites [emphasis mine]” (Cal. Code Regs., tit. 14, § 15126.4, subd. (b)(3)(A)). “Preferred manner,” in this context, can be taken to refer to a broad rule that applies unless another type of mitigation measure may better serve the interests that CEQA protects in general and those *historical* interests that CEQA protects for archaeological and historical resources in particular. These historical interests that CEQA protects are multiple. As one example, a particular archaeological deposit that is historically significant may be of interest to the public at large and to particular groups for very different reasons. Different mitigation measures may protect particular historical interests of that resource better than others. All such

significant interests must be taken into account. The “reburial techniques” to which CRIT refers in its November 24 letter contradict the concept of “preservation in place” as set out in the CEQA Guidelines and do not protect particular historical interests or key values for which archaeological sites are usually significant. In common practice, archaeological sites are typically, though not exclusively, determined to be historically significant under California Register of Historical Resources (CRHR) Criterion 4 (Pub. Resources Code, § 5024.1(c)(4)) for the information values which they potentially retain. Archaeological sites may, in some cases, also be found to be historically significant under CRHR Criterion 1 for the associative values which some resources may possess, for resource associations “with events that have made a significant contribution to the broad patterns of California’s history and cultural heritage” (Pub. Resources Code, § 5024.1(c)(1)). The construction of a project will variably degrade or destroy the associative and information values for which prehistoric and historical archaeological sites in a project area are historically significant. “Preservation in place,” which, in reference to archaeological deposits, would mean non-disturbance, is precluded. There can be no “preservation in place” when the act of project construction will inherently displace most of the constituent artifacts of the archaeological deposits in a project footprint from their respective physical contexts. The information values of those artifacts are derived as much or more from the spatial associations among the artifacts, associations which careful investigation can document, as they are from the objects themselves. Reburial techniques do not preserve any of these spatial associations. They minimally preserve only that subset of more durable artifacts in a deposit and effectively remove even those artifacts from any further study. This is not “preservation in place.” It is an alternate strategy for “collection and curation,” a strategy which Energy Commission staff has folded into the CRMMP for prehistoric archaeological deposits in a manner which upholds the minimal recovery of pertinent information values, while ultimately facilitating the return of a large percentage of the material culture to the ground in the near vicinity of its recovery. The intent of this reburial is to facilitate a partial restoration of, rather than to preserve, some of the associative values, more particularly the cultural heritage values, which the affected prehistoric archaeological materials may hold for affiliated Native American tribal entities.

More Active Native American Role in License Compliance Processes

Throughout its November 24 letter, CRIT, in various ways, appears to seek a more active role for affiliated Native American tribal entities in the implementation of the construction monitoring, resource discovery, and discovery treatment processes for the subject project. One key aspect of involvement that CRIT seeks is for affiliated Native American tribal entities to be kept better informed. More specifically, CRIT seeks clearer and more frequent information on the facility’s construction schedule (Comment 21), construction monitoring and discovery protocols and schedules (Comment 8), discovery notifications (Comment 9), and the schedule for the implementation of the different components of the CRMMP (Comment 20). Staff extensively reorganized and revised the monitoring and discovery protocols that were in the June 2014 draft of the revised CRMMP in an attempt to address all of these issues. The primary challenge which staff had to surmount was the fact that schedules for facility construction, construction

monitoring, and the implementation of the different components of the CRMMP are too dynamic to pin to particular calendar dates in the CRMMP. Staff opted to frame these schedules more generally in time.

CRIT is also clear in its November 24 letter that it wants to expand the consultation role of affiliated Native American tribal entities with regard to three primary issues related to the evaluation and mitigation of previously known prehistoric archaeological resources and those found during construction. First, CRIT seeks (Comments 2 and 6) to reopen consultation on the structure and scope of the mitigation measures for previously known prehistoric archaeological sites which are in the June 2014 draft of the revised CRMMP. Staff is unable to accommodate further consultation on these issues, because the mitigation measures in the CRMMP for the *previously known* prehistoric archaeological sites are explicitly set out in Conditions of Certification CUL-6 and CUL-7 of the original September 2010 license and remain substantively unchanged in the January 2014 amended license. The measures therefore cannot be substantively changed outside of reopening a formal amendment proceeding, a process which CRIT could request the project owner to initiate.

CRIT seeks, secondly, to clarify the consultation role of affiliated Native American tribal entities with regard to the evaluation of *known* prehistoric archaeological resources and to the review of data recovery reports on them (Comments 3–5). CRIT, more particularly, wants the opportunity to consult on the evaluation of the historical significance of the Prehistoric Quarries Archaeological District (PQAD), a cultural resource identified as one result of the environmental analysis of the project, and to review the reports of data recovery investigations for PQAD and for small prehistoric sites on the facility site which CUL-6 and CUL-7 require. Staff revised language in the June 2014 draft of the revised CRMMP to accommodate these issues in full.

The third primary issue related to CRIT's desire to expand the consultation role of affiliated Native American tribal entities in the implementation of the revised CRMMP relates primarily to the evaluation of the historical significance of cultural resources *found during project construction* and to the treatment of those resources (Comments 10(a) and 17). CRIT seeks the consideration of "in-situ or onsite reburial" of archaeological and ethnographic resources that are encountered both as a result of the original environmental analysis of the project and as a result of project construction. CRIT cites language from the Energy Commission's final decision on the amended project which requires the CRMMP for the amended project to include provisions for "in-situ or onsite reburial, (unless otherwise prohibited)." Many of the Commission-approved mitigation measures in the license's conditions of certification that relate to the treatment of *previously known* historical resources are rather tight prescriptions which frequently include excavation of archaeological resources and retention of recovered artifacts. One consequence of these particular prescriptions is that there are few places in them to develop the Commission's directions on "in-situ or onsite reburial". The extant treatment protocols for *previously known* historical resources were developed and negotiated during the original 2009 and 2010 review of the project's original application for certification. The protocols were originally meant to forge a balance among the

periodically disparate interests of the facility's developer, affiliated Native American tribal entities, the interests of federal, state, and local governments, and statutory and regulatory historic preservation obligations. Collectively, the protocols provide a defined process which enables industry to better calculate construction schedules and costs and also ensures that significant cultural resources get the degree of protection which they are due under the law. Staff did however have greater regulatory latitude in the interpretation of condition language that relates to the treatment of cultural resources *found during project construction*. To facilitate the implementation of the Commission's directions on "in-situ or onsite reburial" in the context of the amended license conditions, staff revised language in the June 2014 draft of the revised CRMMP to provide affiliated Native American tribal entities the opportunity to consult about project owner avoidance assessments for *newly found* cultural resources, a new element in the February 2015 draft of the revised CRMMP, and, at the CPM's discretion, to get a 10-day review of proposed treatment plans for such resources. For those cultural resources where prescribed treatment is not warranted under the extant conditions, the Energy Commission has always been and remains responsible for taking the Native American perspective into account and the CPM can direct the project owner, where warranted, to offer Native Americans the discretionary 10-day treatment plan review.

CRIT seeks a further, more active role for affiliated Native American tribal entities in the implementation of the construction monitoring, resource discovery, and discovery treatment processes for the subject project with the suggestion that affiliated Native American tribal entities be granted, in certain circumstances, a roughly equivalent status to that of the license's Cultural Resources Specialist (CRS) (Comments 25 and 26). More specifically, CRIT seeks to have the project owner provide affiliated Native American tribal entities all of the information that the project owner is required to provide the CRS under CUL-4. CRIT also wishes affiliated Native American tribal entities to have equivalent authority under CUL-17 to halt construction in order to investigate potential cultural resources discoveries. Any modification to an approved license condition would, again, require a formal amendment to the present license. Staff has, however, developed an approach to CRIT's proposals that staff believes addresses the intent of CRIT's goals and yet retains the original structure of the previously negotiated compliance process. Staff revised the language in the June 2014 draft of the revised CRMMP to explicitly direct the CRS to share with affiliated Native American tribal entities all information which the CRS receives under CUL-4. Further language revisions direct the CRS to be responsive to Native American monitors' requests to halt construction to look at potential finds.

Revisions to Construction Monitoring, Resource Discovery, and Discovery Treatment Methods and Protocols

CRIT makes a number of comments on and recommends changes for the extant construction monitoring, resource discovery, and discovery treatment protocols in the revised CRMMP. CRIT finds the monitoring and discovery protocols in the June 2014 draft of the revised CRMMP to be poorly organized and difficult to follow (Comment 8). Staff completely reorganized them and extensively revised the protocols' language, in

response to this comment, to improve clarity. In addition, staff developed a discovery protocol flowchart, per CRIT's suggestion, to facilitate that protocol's implementation. CRIT also comments that the draft revised CRMMP does not provide a further protocol, per subpart 10 of CUL-5, for the avoidance measures which are to be put into place prior to the onset of construction to protect "sensitive resource areas" (Comment 7). Rather than a staff oversight, the reason that the protocol in question does not appear in the draft revised CRMMP is that there are no "sensitive resource areas" defined in the license conditions, nor is there a definition of the phrase there. CRIT comments further that there is no explicit protocol in the draft revised CRMMP for the establishment and maintenance of the requisite buffer zone for new finds (Comment 14). Staff revised the discovery protocols in response to this comment to include a sub-protocol for buffer zones. One CRIT recommendation is to reconsider the level of screening which monitors are to use when monitoring tunneling and drilling work (Comment 28). Staff revised the screening protocol in response to this recommendation to significantly increase the sample of backfill which will be screened during tunneling and drilling. CRIT makes a broader recommendation to limit project construction from 30 minutes prior to sunrise through 30 minutes after sunset to ensure adequate visibility for cultural resources construction monitoring (Comment 23). Staff is unable to accommodate this recommendation as the implementation of it would require the development of a new condition of certification. The consideration and adoption of such a new condition would require a formal amendment to the present license, a process which CRIT could request the project owner to initiate. CRIT's further recommendations on the development of mitigation treatment options (Comment 11) and the implementation of the prescribed treatment program (Comment 12) include 1) an admonition to staff to provide more schedule flexibility for Most Likely Descendants (MLD) to conduct site visits to assess discovered human remains and to subsequently develop recommendations for the treatment of the remains, and 2) a suggestion that the project owner's notification to the CPM of a newly found prehistoric archaeological resource include a discussion of the steps taken to establish the physical limits of the found resource. Staff revised language in the June 2014 draft CRMMP to respond to these recommendations to 1) extend the MLD's response time to one week, and to 2) require the project owner to provide, on the basis of field observation, a rationale for the qualification of newly found resources for the prescribed treatment program.

One further major focus of CRIT's recommendations in its November 24 letter is that resource avoidance and reburial options should be given more substantive consideration in the mitigation treatment protocols for *previously known* prehistoric archaeological resources and those *found during construction* (Comments 10(b), 17, 18, and 19). In addition to CRIT's comments on the need for greater consultation with affiliated Native American tribal entities on resource avoidance and reburial issues, CRIT recommends the introduction of formal assessments of avoidance feasibility during mitigation development and the consideration of in situ or onsite reburial of material culture items acquired as a result of project planning and construction. In response, staff revised the language of the June 2014 draft of the revised CRMMP to include language which incorporates formal avoidance feasibility assessments into the extant discovery protocols. Staff also revised the treatment protocols for isolated finds,

in consultation with the BLM and in consideration of the BLM's January 16, 2015 isolated protocol for the McCoy Solar Energy Project, to incorporate in situ or onsite reburial of the vast majority of isolated finds.

CRIT seeks the simplification of the separate federal and state monitoring and discovery programs presently being implemented on the facility site. CRIT's recommendation is to have the Energy Commission align, particularly, the portions of the June 2014 draft of the revised CRMMP that deal 1) with discovery notifications for affiliated Native American tribal entities and subsequent discovery consultation, and 2) with the preparation of avoidance feasibility assessments for prehistoric archaeological resources found during construction with the BLM's monitoring and discovery plan analog (Comments 9(b) and 10(b)). Staff was unable to negotiate a single cultural resources compliance process with the BLM in 2009 and 2010. The Energy Commission's present monitoring and discovery plan for the project, the CRMMP, derives from the Energy Commission's conditions of certification, reflects our agency's historic preservation standards, and thus remains separate from the BLM's analogous plan. License condition CUL-19, however, is meant to provide the project owner, affiliated Native American tribal entities, and the public assurance that Energy Commission staff and BLM staff will continue to work closely together to narrow and mediate whatever regulatory gaps may separate our respective compliance protocols.

CRIT also provides a number of helpful recommendations which would provide the June 2014 draft of the revised CRMMP with greater clarity and consistency. CRIT notes that the draft revised CRMMP is inconsistent with the language of CUL-16 (Comment 27). Staff agrees and revised the relevant portions of the draft to better comport with that language. CRIT also points out a number of terms used throughout the CRMMP where the meanings are unclear, or the terms are inconsistently applied (Comments 13, 24, and 29). Staff revised the draft CRMMP to include a glossary to define key terminology in the document. Staff was unable to accommodate CRIT's final terminological issue which was to do a global edit which would change "Native American monitors" to "tribal cultural consultants" (Comment 22). "Native American monitors" is the term used in the approved conditions of certification for the amended project, and staff has retained the use of that term in the final Revised CRMMP to avoid any confusion in the implementation of the license's conditions.

Response to CRIT's April 2, 2015 Comment on the February 2015 Draft of the CRMMP

Staff believes that the explicit responses above to CRIT's November 24, 2014 comments, comments that staff responded to via the February 2015 draft of the revised CRMMP, already address the salient issues that CRIT raises in its April 2 letter. CRIT does however raise a broad new issue in the more recent letter (Comment 40). CRIT believes that a number of elements in the February 2015 draft of the revised CRMMP no longer accurately reflect the project owner's progress through the cultural resources compliance process as set out in that document and that a number of historical resource protections in the document have not been implemented as a result. Construction has been underway since July 2014 under multiple notices to proceed,

and the project owner has been operating under different iterations of the revised CRMMP during the document's ongoing review, revision, and finalization. CUL-5 clearly states that ground disturbance may occur in the absence of an approved CRMMP when "such activities are specifically approved by the CPM." The Energy Commission's limited notices to proceed (July 28 and September 30, 2014; January 16, 2015) and the issuance of the March 19, 2015 full notice to proceed all required the project owner to meet the standard cultural resources conditions of certification which lead up to the onset of construction. The March 2015 full notice to proceed gave the project owner permission to construct under the February 2015 draft of the revised CRMMP, with the understanding that the project owner would implement the final Revised CRMMP upon its approval. Affiliated Native American tribal entities, the Energy Commission, the BLM, and the project owner have subsequently been engaged in the effort to finalize the document. In terms of the Energy Commission's historic preservation obligations, actions on the ground have been required to meet and ultimately will have met the requirements of the amended cultural resources conditions of certification and the substantive requirements of the February 2015 draft revised CRMMP.

Among the comments that CRIT made in its April 2 letter, staff would like to respond more specifically to two of them. One of the comments expresses an objection to a particular edit which staff made to the June 2014 draft of the revised CRMMP and the other is a new comment altogether. CRIT notes an objection to the fact that section 8.1.3 of the February 2015 draft of the revised CRMMP includes a change in the prescribed radius of discovery buffer zones from 100 to 50 feet, and expresses a concern that the new 50-foot radius zone would offer far less protection to discovered cultural resources (Comment 36). This change is a response to a project owner request for relief from the uncritical application of relatively large buffer zones to small, surficial archaeological deposits. Staff believes that this is a reasonable request and has adjusted the buffer zone radius accordingly. Please note that language has been added to section 8.1.3 which states that:

If any of the cultural resources personnel granted the authority to halt construction under **CUL-17** determine that a 50-foot buffer zone is insufficient to ensure that a resource is protected from further destruction, then said personnel have the authority to enlarge the buffer to whatever distance they deem adequate to accomplish this temporary protection goal.

Staff believes the ability of cultural resources personnel to exercise this discretionary authority is an effective safeguard for any situation where the initial application of a 50-foot buffer zone proves to be insufficient.

CRIT makes a new comment on the email distribution of the daily cultural resources monitoring report required under section 8.2 of the draft revised CRMMP (Comment 37). The explanation of the distribution protocol for this daily report in the revised CRMMP does not reflect the actual scope of its potential distribution. Under verification 4, CUL-16, the Cultural Resources Specialist (CRS) is to provide this report to the CPM

and to “any affiliated Native American tribal entities that request” receipt of the reports on a daily basis. The absence of this language in the CRMMP has no effect on the language in the condition’s verification. The CPM will ensure that the CRS honors CRIT’s request to receive electronic copies of the daily cultural resources monitoring report (Comment 45).

On the basis of staff’s review of the February 2015 draft of the revised CRMMP, and in consideration of and response to CRIT’s April 2 letter, I have directed the Energy Commission’s Compliance Project Manager to approve the February 2015 draft as the final Revised CRMMP. The final Revised CRMMP may be accessed online at [http://docketpublic.energy.ca.gov/PublicDocuments/09-AFC-06C/TN205844_20150826T131816_REVISIED_CULTURAL_RESOURCES_MONITORING AND MITIGATION PLAN FOR T.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/09-AFC-06C/TN205844_20150826T131816_REVISIED_CULTURAL_RESOURCES_MONITORING_AND_MITIGATION_PLAN_FOR_T.pdf). Staff is available to meet with your staff should you wish to discuss the issues detailed in this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Roger E. Johnson", written in a cursive style.

Roger E. Johnson, Deputy Director
Siting, Transmission, and
Environmental Protection Division
Tribal Liaison