

## **III.9 NATIVE AMERICAN INTERESTS**

This chapter addresses both contemporary and traditional concerns of Native Americans and organized tribal governments. It focuses on concerns specific to Native Americans within the LUPA Decision Area and DRECP area boundaries, to which Native Americans bring distinct perspectives. This chapter also identifies federal laws and regulations that govern Native American interests on land traditionally occupied or used by Native Americans.

Central to understanding both the contemporary and traditional concerns of Native American tribes within the LUPA Decision Area is an understanding of what each tribe describes as “traditional cultural values.” According to Parker and King, “Traditional cultural values are often central to the way a community or group defines itself, and maintaining such values is often vital to maintaining the group’s sense of identity and self-respect” (1998).

Of particular cultural value to tribes are Traditional Cultural Properties, (TCPs), sacred sites, and cultural landscapes. These terms are defined in more detail in Chapter III.8, Section III.8.2.1, and examples are provided in Section III.9.4.2 of this chapter. Recent ethnographic studies associated with renewable energy and transmission development have identified several TCPs and cultural landscapes of importance to Native Americans in the California Desert (Braun et al. 2013; Gates 2012; Braun et al. 2013). Also of importance to Native Americans are archaeological objects and sites such as habitation sites, camps, lithic reduction features (quarries), trail segments, rock rings, among others. Plants, animals, and minerals are also thought to hold cultural and spiritual significance since they were used for food, medicine, ceremony, and manufacturing items. Additional Native American concerns relate to the levels of planning and participation involved in renewable energy project development. Specifically, tribes have expressed concern over the following issues, which are discussed in more detail in Section III.9.4.1: (1) consultation, (2) ethnography, (3) document review, (4) confidentiality, (5) monitoring, (6) repatriation, (7) access, and (8) environmental justice (EJ).

### **III.9.1 Regulatory Environment**

Federal regulations relevant to the protection of Native Americans follow. Many of these regulations also apply to the protection of cultural resources and are described in more detail in Section III.8.1. Federal legislation, regulations, and policies specific to projects on Native American tribal lands are not included. Regulations in this section are organized in the following manner: acts, executive orders, secretarial orders, bills, and codes. Within each of these categories, individual laws and regulations are organized by date of enactment.

**Antiquities Act of 1906 (16 United States Code [U.S.C.] 431-433).** See Chapter III, Section III.8.1 for details.

**Bald and Golden Eagle Protection Act of 1940 (Eagle Act) (16 U.S.C. 668-668[d])** allows the Secretary of the Department of the Interior (DOI) to permit the taking, possession, and transportation of bald eagle or golden eagle specimens for the religious purposes of Indian tribes, as well as for other scientific or exhibition purposes (Section 668[a]). In 2009, the U.S. Fish and Wildlife Service promulgated a new permit rule under the Eagle Act that provides a mechanism to authorize unintentional take of eagles (50 Code of Federal Regulations [CFR] 22.26; 74 Federal Register [FR] 46836). The final regulation ensures that requests by Native Americans to take eagles from the wild are given first priority over all other take, except as necessary to alleviate safety emergencies. This criteria applies where the take of live, wild eagles is absolutely necessary to meet the religious purposes of the tribe, as opposed to the use of feathers and parts that may be obtained from the National Eagle Repository. Permit regulations governing take and possession of eagles by Native Americans are set forth in 50 CFR 22.22. Even if not on reservation land, eagles, eagle nests, and other sites have cultural significance to many Native American tribes and tribal members.

**National Historic Preservation Act of 1966 (Public Law [PL] 89-665; 16 U.S.C. 470-1).** See Chapter III, Section III.8.1 for details.

**National Trails System Act of 1968 (16 U.S.C. 1241 et seq.).** See Chapter III, Section III.8.1 for details.

**National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).** See Chapter III, Section III.8.1 for details.

**Federal Land Policy Management Act of 1976 (43 U.S.C. 1701 et seq.).** Section 601 of the Federal Land Policy Act defines the California Desert Conservation Area (CDCA) and provides guidelines for the creation of a comprehensive, long-range plan for the management, use, development, and protection of the public lands within the CDCA.

Appendix VIII of the CDCA Final environmental impact statement (EIS) describes the Native American Element of the CDCA (see Figure III.9-1) and attempts to address both the contemporary and traditional concerns of Native Americans and organized tribal governments. The focus is on traditional heritage and religious concerns and long-range goals and planning efforts. The Native American Element includes the CDCA landscape; wildlife species; prehistoric and historic occupation, worship, domestic activities sites, and plant and animal resources. These resources are important because of their respective roles in ritual or in the origin accounts of a Native American group. Other goals

of this element include (1) the identification of Native American values through consultation, (2) the full consideration of these values in land use planning and management decisions, and (3) the management and protection of these values.

This element also addresses the Bureau of Land Management's (BLM's) approach to legislation that directs the degree and types of Native American consultation and involvement in cultural resource management programs. Some of these include providing access to sacred sites for worship, preserving the confidentiality of Native American information submitted to BLM, restricting public access to field inventory data, developing procedures for identifying concerns, and following procedures for Native American contact and consultation.

Four key issues were identified in this element. First, it acknowledges the difficulties in identifying, protecting, and mitigating impacts to Native American resources. A key observation relevant to the current study is that the "accurate evaluation of potential impacts on cultural values can only be made within the cultural context from which those values are derived" (BLM 1980, Native American Element). In other words, the identification of an impact and the design of appropriate mitigation, if any, must be made in consultation with concerned Native American representatives. Second, the element identifies the need and provides specific guidelines for incorporating formal comments from tribal governments into BLM's environmental review process. Third, this element states that conflicts between Native American values and other activities (such as mining or grazing) can best be identified and resolved through consultation and detailed management plans. Finally, the element acknowledges that many impacts on Native American values are not amenable to mitigation. Nonetheless, "these substantial potential and often irreversible impacts on cultural values will be carefully considered in all actions of the Plan" (BLM 1980, Native American Element).

Some of the management tools identified include (1) multiple-use classes drafted to incorporate Native American concerns, (2) incorporation of concerns into general Plan guidelines and other Plan elements, (3) the designation of Areas of Critical Environmental Concern, and (4) the development of guidelines for management of heritage values and formal tribal consultation.

The priorities for implementation of this element emphasize the protection of resources in Areas of Critical Environmental Concern and areas of extensive, diverse, and sensitive cultural values, as illustrated by a map of these key locations (BLM 1980, Cultural Resources Element Map). The element map is now three decades old and is a substantial baseline reflection of Native American heritage values in the DRECP area.

**American Indian Religious Freedom Act of 1978 (42 U.S.C. 1996).** The American Indian Religious Freedom Act of 1978 (AIRFA) was passed to prevent federal agency

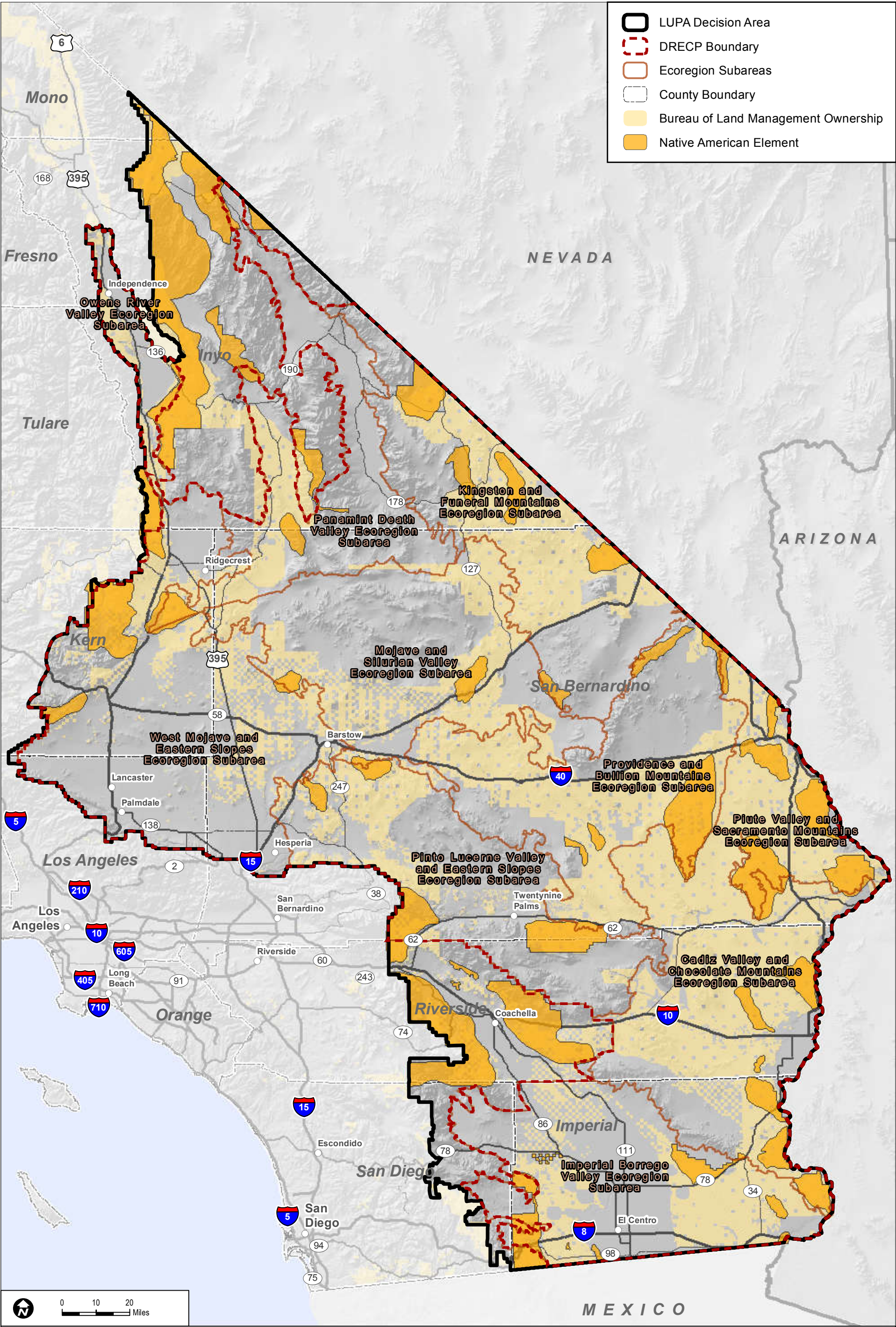
encroachment on or access to Native American religious places and related practices that are located or conducted on federal land or where federal actions would otherwise infringe on Native Americans' constitutional rights to freedom of religion. AIRFA also recognized the rights of Native Americans to possess religious objects. Native Americans were provided special recognition due to the federal government's attempt to reverse some of its previous Indian policies that forbade the expression of Native American religion. A U.S. Forest Service decision to build a road (the "Gasquet to Orleans" or "G-O" Road) through a sacred landscape in Northwestern California in order to provide access between coastal mills and inland forests was litigated by environmental groups and an Intertribal nonprofit in the 1980s. The case eventually was accepted by the U.S. Supreme Court, which ruled that the constitutional right to the freedom of religion is only hampered by the federal government when the government takes actions intended to directly suppress religion. It was reasoned by the U.S. Supreme Court majority opinion that the sole mission and intent of the U.S. Forest Service's desire to build the GO Road was to connect forests with mills to increase timber production and employment and it was not the intent of the agency to infringe on Native American religious expression. Since that decision, AIRFA has been considered to have little relevance for environmental regulatory practice and further meaningful utilization of the law has been sparse. Concern over the implications of this decision resulted in the passage of the Religious Freedom Restoration Act (RFRA) of 1993, described below.

**Archaeological Resources Protection Act of 1979 (16 U.S.C. 470[aa-mm]).** See Chapter III, Section III.8.1 for details.

**Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. 3001-13).** See Chapter III, Section III.8.1 for details.

**Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000[bb]-2000[bb-4]).** Efforts to regain what the U.S. Supreme Court AIRFA decision had limited led Congress to enact RFRA. The Act essentially amended AIRFA by establishing that Native American religious access, worship, and object possession were similarly harmed by the government whether or not the action was done with intent to harm Native American religion or to carry forth an agency's mission. RFRA further provides that should the government wish to go forward with an action that would impact Native American religious freedom then the action must be of a compelling governmental interest. However, subsequent case law clearly established that RFRA did not apply to the state or local government jurisdictions and authorities. That is to say, AIRFA and RFRA are applicable only on federal lands and for federal agencies.

**Omnibus Public Lands Management Act of 2009 (P.L. 111-11).** See Chapter III, Section III.8.1 for details.



Sources: ESRI (2014); BLM (2015); RECON (2015)

FIGURE III.9-1

Native American Elements within the LUPA Decision Area and DRECP Plan Area

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**Executive Order 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (1994).** This Executive Order requires that federal agencies adopt strategies that address EJ concerns within agency operations. Existing laws should provide opportunities for federal agencies to address environmental hazards in minority and low-income communities. It also establishes agencywide goals for American Indian, Alaska Native, and other indigenous peoples (e.g., Native Hawaiians) (59 FR 7929). Additional detail is provided in Chapter III.23, Socioeconomics and Environmental Justice.

**Council on Environmental Quality's Environmental Justice Guidance under the National Environmental Policy Act.** To ensure that EJ concerns are effectively identified and addressed according to Executive Order 12898, the Council on Environmental Quality (CEQ), in consultation with the United States Environmental Protection Agency (EPA), developed guidelines to assist federal agencies with implementation of procedures. According to CEQ's "Environmental Justice Guidance Under NEPA," (National Environmental Policy Act) agencies should consider the composition of affected areas to determine whether minority or low-income populations are affected by a proposed action, and, if so, whether those environmental effects may be disproportionately high or adverse (CEQ 1997).

According to CEQ EJ guidelines, minority populations should be identified if:

- A minority population percentage either exceeds 50% of the population of the affected area.
- If the minority population percentage of the affected area is meaningfully greater than the minority population percentage in the general population or other appropriate unit of geographic analysis (e.g., a governing body's jurisdiction, neighborhood census tract, or other similar unit).

**Environmental Protection Agency Final Guidance for Incorporating Environmental Justice Concerns in EPA's Compliance Analyses.** This document defines how EPA will ensure that disproportionately high and adverse human health or environmental effects on minority communities and low-income communities are identified and addressed. It establishes agency-wide goals for engaging American Indian, Alaska Native, and other indigenous peoples (e.g., Native Hawaiian). It also establishes agency-wide goals for environmental protection and lists actions the EPA would take to incorporate EJ into its mission (EPA 1998).

**Environmental Protection Agency Plan Environmental Justice 2014.** The EPA's Plan Environmental Justice (EJ) 2014 is a strategy to help the agency integrate EJ into its programs, policies, and activities. Plan EJ 2014 identifies Cross-Agency Focus Areas, Tools Development, and Program Initiatives as the three essential Elements that will advance EJ

across EPA and other federal agencies. Plan EJ 2014 is not yet a rule or regulation and is currently under development (EPA 2011).

**EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples 2014.** This policy establishes 17 principles to ensure that achieving EJ is part of the EPA's work with federally recognized tribes, state-recognized tribes, individual tribal members, indigenous community-based and grass-roots organizations, and others living in Indian country. These principles include six related to consultation and coordination, three regarding tribal environmental protection programs, four encouraging fair treatment and meaningful involvement, and three related to intergovernmental coordination and collaboration (EPA 2014).

**Executive Order 13007 Indian Sacred Sites (1996).** See Chapter III, Section III.8.1 for details.

**Executive Order 13175 Consultation and Coordination with Indian Tribal Governments (2000).** In formulating or implementing policies that have tribal implications, agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the federal government and Indian tribal governments. The Executive Memorandum of April 29, 1994, outlines the principles that agencies are to follow in their interactions with Native American tribal governments.

**Executive Order 13287 Preserve America (2003).** See Chapter III, Section III.8.1 for details.

**Secretarial Order 3206 American Indian Tribal Rights and the Endangered Species Act (1997).** This order was issued by the Secretary of DOI and the Secretary of Commerce, pursuant to the Federal Endangered Species Act, the federal-tribal trust relationship, and other applicable laws. It requires that federal agencies be sensitive to Native American cultures, religions, and spirituality, and recognizes that these traditional activities often involve the ceremonial and medicinal uses of plants, animals, and specific geographic locations. In partnership with the tribes, the agencies must promote the conservation of sensitive species and the health of the ecosystems in which they live. Federal agencies shall make available to Indian Tribes information related to tribal resources and Indian lands and to facilitate the mutual exchange of information. Sensitive tribal information shall be protected by federal agencies (Secretarial Order 3206).

**Secretarial Order No. 3317 Policy on Consultation with Indian Tribes (2011).** This order updates, expands, and clarifies DOI's policy on consultation with American Indian and Alaska Native tribes, and acknowledges that the provisions for conducting consultation in compliance with EO 13175 and applicable statutes or administrative

actions are expressed in the Department of the Interior Policy on Consultation with Indian Tribes.

**Secretarial Order No. 3330 Improving Mitigation Policies and Practices of the Department of the Interior (2013).** See Chapter III, Section III.8.1 for details.

**BLM State Protocol Agreement with the California State Historic Preservation Officer and the Nevada State Historic Preservation Officer (2014).** See Chapter III, Section III.8.1.1 for details.

**BLM National Programmatic Agreement with the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers (2012).** See Chapter III, Section III.8.1 for details.

**Programmatic Agreement** among DOI, BLM, the Arizona State Historic Preservation Officer (SHPO), the California SHPO, the Colorado SHPO, the New Mexico SHPO, the Nevada SHPO, the Utah SHPO, and the Advisory Council on Historic Preservation Regarding Solar Energy Development on Lands Administered by the BLM (2012a) (See Chapter III, Section III.8.1 for details.)

## **III.9.2 Tribes with Interests in the LUPA Decision Area**

This section defines and describes the LUPA Decision Area and its tribal communities. The methods used in this analysis combine cultural resources analysis (see Chapter III.8) and EJ methods (see Chapter III.23).

### **III.9.2.1 Tribal Communities in the LUPA Decision Area**

This section describes the tribal communities potentially impacted by the Proposed LUPA. Please see Section III.8.2.3 for a detailed discussion of the ethnographic context of the LUPA Decision Area. The communities described here are only those tribal communities with traditional affiliations in the LUPA Decision Area. As discussed in Chapter III.8, Cultural Resources, a number of Native American groups traditionally inhabited the LUPA Decision Area, including the Kumeyaay, Cocopah, Quechan, Halchidoma, Mojave, Cahuilla, Serrano, Kitanemuk, Kawaiisu, Southern Paiute (Pahrump, Moapa and Chemehuevi), Western Shoshone, and Owens Valley Paiute (Kroeber 1925; Figure III.8-2). The territorial boundaries of tribes who inhabited the LUPA Decision Area changed over time and overlapped, so resources could be accessed and procured by different groups.

According to the Native American Heritage Commission (NAHC), there are 44 federally recognized tribes and 9 unrecognized tribal communities with traditional affiliations in the LUPA Decision Area (NAHC 2011). A federally recognized tribe can be defined as “an American Indian or Alaska Native tribal entity that is recognized as having a government-

to-government relationship with the United States, with the responsibilities, powers, limitations, and obligations attached to that designation, and is eligible for funding and services from the Bureau of Indian Affairs” (BIA 2014). Federally recognized tribes possess the right to self-determination and governance and are afforded various federal benefits, services, and protections because of their unique relationship with the United States. Public Law 103-454, the Federally Recognized Indian Tribe List Act, established three ways in which an Indian group can achieve federal recognition: (1) by an act of Congress; (2) by the administrative procedures under 25 CFR Part 83, Procedures for Establishing that an American Indian Group Exists as an Indian Tribe; and (3) by decision of a United States court. Currently, there are 566 federally recognized tribes in the United States (BIA 2014).

As self-governing entities, federally recognized tribes have the right to form their own governments, to make and enforce laws, to tax, to establish and determine membership, to license and regulate activities within their jurisdiction, to zone, and to exclude persons from reservation land (BIA 2014). Several federal laws and regulations (Sections III.8.1 and III.9.1) require agencies to conduct government-to-government consultation with tribes affected by proposed projects. The federal government consults on a government-to-government basis with federally recognized tribes. In addition, under Section 106 of the NHPA, federal agencies can consult with unrecognized tribes as additional consulting parties (36 CFR 800.2 [c][5]).

These communities, listed in Table III.9-1, are the focus of the analysis in this section. Many of these communities are regularly asked by federal agencies to participate in NEPA and Section 106 activities associated with the LUPA Decision Area. Members of these communities may or may not live within the LUPA Decision Area.

Table III.9-1 lists all tribes with traditional affiliations to the LUPA Decision Area and identifies both federally recognized and non-federally recognized tribes. In addition, the table identifies which groups have staff able to participate in NEPA and Section 106 document review, government-to-government consultation, and other related tasks.

**Table III.9-1**  
**Tribes with Traditional Ties to LUPA Decision Area**

<b>Name of Tribe</b>	<b>Tribal Enrollment</b>	<b>Cultural Affiliation</b>	<b>Environmental Staff?</b>
Agua Caliente Band of Cahuilla Indians	418	Cahuilla	Yes
Augustine Band of Cahuilla Indians	8	Cahuilla	Unknown
Barona Band of Mission Indians	455	Kumeyaay	Yes
Big Pine Paiute Tribe of the Owens Valley	398	Owens Valley Paiute	Yes
Bishop Paiute Tribe	1,323	Owens Valley Paiute	Yes

**Table III.9-1  
Tribes with Traditional Ties to LUPA Decision Area**

<b>Name of Tribe</b>	<b>Tribal Enrollment</b>	<b>Cultural Affiliation</b>	<b>Environmental Staff?</b>
Cabazon Band of Mission Indians	30	Cahuilla	Yes
Cahuilla Band of Mission Indians	307	Cahuilla	Yes
Campo Band of Diegueño Mission Indians	302	Kumeyaay	Yes
Chemehuevi Indian Tribe	928	Chemehuevi	Yes
Cocopah Tribe	940	Cocopah	Yes
Colorado River Indian Tribes	3,705	Mojave, Chemehuevi, Hopi, and Navajo	Yes
Ewiiapaayp Band of Kumeyaay Indians	7	Kumeyaay	Unknown
Fort Independence Indian Community of Paiute Indians	101	Owens Valley Paiute	Yes
Fort Mojave Indian Tribe	497 (CA) 699 (AZ)	Mojave	Yes
Iipay Nation of San Ysabel	922	Kumeyaay	Yes
Inaja Band of Diegueño Mission Indians of the Inaja and Cosmit Reservation	19	Kumeyaay	Unknown
Jamul Indian Village	63	Kumeyaay	Unknown
Kaiwaiisu	200-300	Kaiwaiisu	Unknown
Kern River Indian Community	NA	Kaiwaiisu, Tubatulabal	Unknown
Kern Valley Indian Council	NA	Tubatulabal	Unknown
Kern Valley Paiute Council	NA	Owens Valley Paiute	Unknown
La Jolla Band of Luiseño Indians	604	Luiseño	Unknown
La Posta Band of Diegueño Mission Indians	16	Kumeyaay	Unknown
Las Vegas Tribe of Paiute Indians	54	Southern Paiute	Yes
Lone Pine Paiute-Shoshone Tribe	295	Owens Valley Paiute, Shoshone	Yes
Los Coyotes Band of Cahuilla and Cupeño Indians	288	Cahuilla, Cupeño	Unknown
Manzanita Band of Diegueño Mission Indians	105	Kumeyaay	Unknown
Mesa Grande Band of Diegueño Mission Indians	690	Kumeyaay	Unknown
Moapa Band of Paiute Indians	304	Southern Paiute	Yes

**Table III.9-1  
Tribes with Traditional Ties to LUPA Decision Area**

<b>Name of Tribe</b>	<b>Tribal Enrollment</b>	<b>Cultural Affiliation</b>	<b>Environmental Staff?</b>
Monache Intertribal Council	NA	Northfork Mono, Wobonuch, Estimbich, Michahay, Waksachi, Patwisha	Unknown
Morongo Band of Mission Indians	1,015	Cahuilla, Serrano, Chemehuevi	Yes
Pahrump Paiute Tribe	70	Southern Paiute	Yes
Pala Band of Luiseño Mission Indians	906	Cupeño, Luiseño	Yes
Pauma/Yuima Band of Luiseño Mission Indians	189	Luiseño	Unknown
Pechanga Band of Luiseño Mission Indians	1,342	Luiseño	Yes
Quechan Tribe	2,668	Yuma	Unknown
Ramona Band of Cahuilla Mission Indians	7	Cahuilla	Unknown
Rincon Band of Luiseño Mission Indians	575	Luiseño	Yes
San Manuel Band of Mission Indians	178	Serrano	Yes
San Pasqual Band of Diegueño Mission Indians	429	Kumeyaay	Unknown
Santa Rosa Band of Cahuilla Indians	141	Cahuilla	Yes
Santa Ynez Band of Chumash Mission Indians	213	Kumeyaay	Unknown
Soboba Band of Luiseño Indians	963	Luiseño, Cahuilla	Yes
Sycuan Band of the Kumeyaay Nation	73	Kumeyaay	Unknown
Tejon Indian Tribe	850	Kitanemuk, Kawaiisu, Yowlumne	Yes
Timbisha Shoshone Tribe	331	Shoshone	Yes
Torres-Martinez Desert Cahuilla Indians	573	Cahuilla	Yes
Tubatulabal Tribe	280	Tubatulabal	Yes
Twenty-Nine Palms Band of Mission Indians	13	Chemehuevi	Yes
Utu Gwaitu Paiute Tribe	50	Owens Valley Paiute	Unknown
Viejas Band of Kumeyaay Indians	268	Kumeyaay	Unknown

**Notes:**

Non–federally recognized.

BIA 2005.

San Diego State University 2011a.

San Diego State University 2011b. Members of the Kumeyaay Nation have already been counted under tribes listed in this table, including Barona, Campo, Inaja-Cosmit, La Posta, Manzanita, Mesa Grande, San Pasqual, Santa Ysabel, Sycuan, Viejas (Baron Long), and the Jamul Indian Village. About 1,200 living on reservations, with 2,000 more off-reservation.

Pritzner 2000. Enrolled membership in 1992.

Walker 2012. Enrolled membership in Kern Valley.

BusinessWire 2013.

The information provided in this column is derived from reviewing various tribal websites.

### III.9.2.2 Environmental Justice

Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Environmental Justice analyses identify environmental and human health conditions that disproportionately affect minority communities and low-income communities. Definitions of these key concepts, drawn from *Guidance on Considering Environmental Justice During the Development of Regulatory Actions* (EPA 2015), are provided below.

- **Fair Treatment** means that no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental and commercial operations or programs, and policies.
- **Meaningful Involvement** means that: (1) potentially affected community members have an appropriate opportunity to participate in decisions about a proposed activity that will affect their human health or environment, (2) the public's input can influence the regulatory agency's decision, (3) the concerns of all participants involved will be considered in the decision-making process, and (4) the decision makers seek out and facilitate the involvement of those potentially affected.
- **Minority and Indigenous Peoples** are defined by the White House Office of Management and Budget as including five distinct race and ethnic categories: American Indian, Native Hawaiian, or Alaska Native; Asian or other Pacific Islander; Black or African American; and Hispanic or Latino. Statistical data collected by the federal government, such as the U.S. Census, use this classification system.
- **Low-Income.** Environmental Justice analyses characterize low-income communities in a variety of ways. Several different low-income categories, such as families whose income falls above the poverty threshold but below the average household income for the United States, or below two times the poverty threshold may be identified. Additional socioeconomic characteristics such as educational attainment, baseline health status and health insurance coverage may also be useful for identifying, characterizing, and developing strategies for assessing and engaging low-income populations.

- **Disproportionate Impact.** The determination of whether there is a potential disproportionate impact from a particular project is ultimately a policy judgment informed by analysis and is the responsibility of the lead agency. These analyses depend on the availability of scientific and technical data. Examples of the type of information that may be useful to decision makers for considering whether or not effects are disproportionate include: (1) the severity and nature of health consequences, (2) the magnitude of the estimated differences in impacts between population groups, (3) mean or median exposures or risks to relevant population groups, (4) distributions of exposures or risk to relevant population groups, (5) characterization of the uncertainty, and (5) a discussion of factors that may make population groups more vulnerable.

A consistent approach across the nation for identifying Environmental Justice areas and populations has been challenging to develop and implement. The EPA's primary screening tool, the Environmental Justice Strategic Enforcement Assessment Tool, is still in draft form despite years of work. Some have argued that a uniform tool is not appropriate for measuring impacts to diverse populations, and advocate instead for multiple approaches designed for specific places and populations (Holifield 2014).

In the LUPA EIS analysis of Environmental Justice (Chapter III.23 and Chapter IV.23), Native Americans are included in a larger group of minorities that also include individuals who are Alaskan Natives, Asian or Pacific Islanders, Black (not of Hispanic origin), or Hispanic (CEQ 1997). The LUPA analysis used demographic information from 2010 census tracts in the DRECP area and defined an Environmental Justice population as when the minority population of the potentially affected area is greater than 50% of the total population. The analysis also follows CEQ guidance, which defines "low-income populations" as populations with mean annual incomes below the annual statistical poverty level. As shown in Table R1.23-1, 120 Census Tracts contain a low-income population equal to or greater than their respective county and 136 Census Tracts within the DRECP area have a minority population percentage greater than 50%. While the proportion of Native Americans in these Census Tracts and specialized Tribal Census Tracts are not identified, they are included in the overall analysis.

The environmental analysis presented in this chapter takes a different approach. Clearly, the tribal groups with traditional affiliations within the LUPA Decision Area and DRECP area are minority populations. However, the physical residence location for peoples who have spiritual connections to particular places was not considered relevant. Instead, community membership is used as a proxy for the number of individuals who might be disproportionately impacted by the Proposed LUPA regardless of residence. These analytical groups are considered more appropriate for the current analysis than Census Tracts

because they include people who may not participate in the census, allow for change through time, and allow for groups in multiple states.

As discussed above, the identification of low-income communities can be accomplished in a variety of ways. Incomes among the tribal communities analyzed here appear to be variable. Therefore, in this analysis, rather than focusing on identifying low-income groups, this study emphasizes the financial stress that the participation in NEPA and Section 106 process can put on the local tribal governments that provide these services. While some communities have paid staff, well-equipped offices, and training in these regulatory processes, others do not.

### **III.9.3 Native American Meetings**

#### **III.9.3.1 Previous Dialogues Related to Renewable Energy Development**

Shortly prior to the initiation of consultation efforts for the DRECP, two tribal energy summits were held to discuss the increasing development of energy resources on traditional use areas. These meetings highlighted longstanding concerns of Native Americans regarding impacts to Native American lands and cultural values from energy development.

##### **2011 Tribal Summit on Renewable Energy**

The 2011 Tribal Summit on Renewable Energy, held in Palm Springs on January 11-13, brought together over 150 tribal representatives and officials from federal, state, and local government and the private sector. The summit included an overview of upcoming federal renewable energy projects and highlighted issues of tribal concern related to past and proposed renewable energy development. Issues of key importance related to: (1) the inability of tribes to effectively participate in the Section 106 process, (2) ensuring effective and appropriate consultation, (3) resource identification and evaluation, (4) improving communication between tribes and agencies, (5) stricter enforcement of agreement documents, and (5) consideration of mitigation as a last resort (ACHP 2011).

##### **2011 Department of Energy Tribal Summit**

The 2011 Department of Energy (DOE) Tribal Summit, held in Washington, D.C., on May 4-5, brought together over 350 people, including representatives from 54 tribes across the United States and agency leaders active in Indian energy. Summit attendees discussed a broad range of critical energy and environmental issues on Indian lands. Secretary of Energy Steven Chu announced two new energy initiatives at the summit: (1) the formation of an Indian clean energy and infrastructure working group that will provide a forum to survey, analyze, and provide viewpoints on real-time obstacles that tribes face in using

clean energy; and (2) the development of guidance that will direct DOE to, when possible, purchase renewable energy generated by tribal governments (DOE 2014).

### **III.9.3.2 Consultation for DRECP Proposed LUPA**

In accordance with federal requirements that BLM contact all of the tribal groups identified in Table III.9-1, A meeting was also held on November 15, 2011, where BLM and tribal staff discussed creating maps for incorporation in the DRECP. The federal government-to-government consultation was initiated in 2011 by DOI, including BLM, and several agencies for the DRECP under NEPA, the Endangered Species Act, the NHPA, the American Indian Religious Freedom Act, and Executive Order 13175. Based on the size and complexity of the undertaking, BLM has determined that the development of a Programmatic Agreement (PA) is the most appropriate manner to meet their responsibilities under Section 106 of NHPA. Consultation continues and a record of the consultation, coordination, outreach, and development of the PA, occurring before release of the Draft DRECP from 2011 through finalization of the PA in late 2015, is summarized here and in Volume V, Consultation, Coordination, and Outreach; Appendix V-1, Table 1; and Appendix V-2, Update to Tribal Consultation, Coordination and Outreach.

#### **Tribal Federal Leadership Conference**

DOI and BLM, through the Tribal Federal Leadership Conference, with the participation of the U.S. Fish and Wildlife Service and BIA, solicited tribal input for renewable energy planning in the LUPA Decision Area. Seven of these conferences were held between September 2011 and February 2014, one pre-meeting, numerous technical meetings, and individual meetings with the 40 federally recognized tribes. Tribes were provided with information, maps, technical assistance, presentations, access to executive-level federal management, funding sources, and other specialized services.

The goals of these meetings were to solicit tribal input for the DRECP and incorporate tribal issues into future development planning in the LUPA Decision Area. More information on the Federal Tribal Leadership Conference is included in Section V.4, Government-to-Government Consultation. Appendix V-1, Table 1, lists both the dates and methods of government-to-government communications. These communications with BLM and other agencies created a deeper understanding of and appreciation for tribal concerns that will help BLM and other federal and state land managing agencies manage lands in an informed and fair manner. BLM provided technical support to tribes that requested it for mapping the areas they deemed significant in the LUPA Decision Area.

## **Identification of Sensitive and Nonsensitive Locations in the LUPA Decision Area and DRECP Area**

In 2012, BLM geographic information system specialists worked with Native American tribes to create maps identifying sensitive and nonsensitive locations in the LUPA Decision Area and DRECP area. Information submitted by the tribes was embedded into data layers and included in alternative design but cannot be specifically expressed because of confidentiality concerns raised during consultation. This technical assistance was offered to all participating tribes.

On July 9, 2012, the following cultural data were sent to tribes: (1) cultural resources documents for lands in the Bishop and Bakersfield Field Offices that are included within the DRECP planning boundary; (2) the CDCA Plan, Cultural Resources Element and Native American Element planning maps; and (3) a collection of 24 cultural resources studies. The cultural resources studies represent the analysis and summary of the cultural resources identification efforts carried out to support the CDCA Plan, and further represent the baseline foundational documents for the CDCA Plan, subsequent amendments, program planning, and project review. Many of these studies were commissioned during the CDCA planning effort in the late 1970s and finalized and published in the early 1980s.

### **BLM Workshops**

On December 17, 2012, the Description and Comparative Evaluation of Draft DRECP Alternatives, was released. This document contained: (1) a preliminary description of the affected environment and existing environmental conditions in the DRECP area, (2) an overview of some of the possible project alternatives that agencies were considering for inclusion in the Draft EIS, and (3) a discussion and tentative analysis of the potential impacts of those alternatives. Workshops were held in the five BLM field offices in the California Desert District so that tribal representatives could meet with BLM managers to learn about the document, review DRECP maps by field office, and provide comments on the planning effort.

### **Tribal Response Summary to Date**

The BLM and DOI have met with most of the federally recognized tribes in face-to-face meetings, and have also contacted other potential consulting parties. This outreach has led to the exchange of information and discussion of concerns that have shaped the development of the DRECP. (Please refer to Vol. 5, Section V.4; Appendix V-1 [Table] and Appendix V-2, Update to Tribal Consultation, Coordination, and Outreach, for a more detailed summary of tribal participation in the planning process and tribal responses and concerns regarding the Proposed LUPA.) Consultation among BLM, tribes, and other consulting parties is ongoing and will continue after release of the Final DRECP EIS. Because of this ongoing consultation process and required consultation for future projects

within the LUPA Decision Area, Native American tribes will be able to add areas of concern to current knowledge.

## III.9.4 Native American Concerns

Review of earlier documents, ethnographic studies conducted for renewable energy projects within the boundaries of the DRECP area, and government-to-government consultation to date, have collectively identified two broad areas of concern to tribes potentially affected by the Proposed LUPA. They are:

- The process of environmental review, permitting, and mitigation under NEPA and NHPA Section 106, and the role of Native Americans in that process. Process concerns appear in Section III.9.4.1.
- Impacts to the physical world: cultural resources (including traditional cultural properties and landscapes), human remains, natural resources, and landscapes. Physical concerns appear in Section III.9.4.2.

### III.9.4.1 Process Concerns

Key tribal planning process concerns include, but are not limited to, the following thematic topics:

- **Consultation.** Consultation should be conducted early, often, and in an ongoing manner that is respectful of tribal sovereignty, heritage values, and that strives for meaningful dialogue. Tribes have been provided early access to meetings outside the public forum. Some tribes feel that the dialogue has been less than meaningful and are concerned that they be afforded additional consultation opportunities as the NHPA Section 106 process continues.
- **Ethnography.** Tribes feel that their heritage values are not fully considered by cultural resources analysis that weighs heavily on archaeological expertise and methods. Some believe that mitigation also tends to ensue from these more narrow non-native perspectives.
- **Document Review.** Tribes want access to cultural resources and other data sets to determine for themselves to what extent tribally valued resources are present, absent, or being considered during the planning process. Tribes also find that they are underfunded, understaffed and overwhelmed with various project document review workloads.
- **Confidentiality.** Tribes want a high level of assurance that protocols for keeping sensitive cultural resources and heritage value information out of the public purview. Tribes are also adamant that confidentiality requirements are not used to keep important information from tribal review.

- **Monitoring.** Tribal Monitoring is viewed by tribes as a last-ditch effort to protect cultural resources that could otherwise be damaged by construction. Tribes want assurances that tribal monitoring is routinely required for approved projects and that monitoring protocols provide Native American monitors sufficient authority to adequately protect cultural resources of tribal value. There is also a secondary issue with the level of tribal monitor training that is not consistent across all tribes, as well as the need to balance tribal monitoring experience with monitors that are most closely affiliated with specific project areas.
- **Repatriation.** Tribes want avoidance of archaeological materials to be the primary method for mitigating these cultural resources. If avoidance cannot be achieved, then some tribes may prefer repatriation instead of long-term curation.
- **Access.** Tribal traditional practitioners want to maintain access, to the extent feasible, to sacred places to conduct cultural and religious practices.
- **Environmental Justice.** Tribes affiliated with project areas through ancestral or traditional use claim they are EJ populations because tribal people maintain long-standing ancestral and traditional-use practices and concepts connected to the environment and to their identities as Indian people, unlike other populations that do not have territories linked to their collective identities. Tribes are requesting that EJ studies be conducted to link tribal resources with tribal cultural practices and their need to perpetuate traditional cultures that rely upon intact landscapes.

#### III.9.4.2 Physical World Concerns

Given the programmatic nature of this document, specific locations of concern to Native Americans in the LUPA Decision Area are not addressed. However, the Native American Element Map of the 1980 CDCA identified Areas of Critical Environmental Concern and areas of high sensitivity. These places continue to be considered sensitive. However, some tribes do not think that the areas of sensitivity reflected in the 1980 Cultural Element Map fully represent what is known today to be culturally sensitive. Indeed, specific renewable energy projects undergoing licensing in 2013 and 2014 have produced cultural landscapes documentation in areas that are not identified as culturally sensitive on the 1980 Cultural Element Map. Concerns related to the physical world include, but are not limited to, impacts to cultural resources and natural resources.

- **Cultural Resources.** Cultural resources are defined in Chapter III.8. In the following discussion, types of cultural resources in the LUPA Decision Area and DRECP area are listed, with examples of Native American interest in some of these resource types.
  - **Archaeological objects and sites.** Some of the archaeological resources identified in the LUPA Decision Area and the DRECP area that are associated with Native Americans include, but are not limited to: habitation sites, camps, human

remains, lithic reduction features (quarries), thermal features, trail segments, pot drops, cairns, cleared circles, rock rings, quartz shatter concentrations, rock art, and earth figures.

- **Traditional Cultural Properties.** Examples of TCPs for Native American communities may include natural landscape features, trail systems, places used for ceremonies and worship, places where plants are gathered for use in traditional medicines and ceremonies, places where artisan materials are found, and places and features of traditional subsistence systems, such as hunting areas. Given the nature of these resources, they may not necessarily be identified during conventional archeological, historical, or architectural surveys. As a result, the existence or significance of such locations often requires ethnographic input from the tribes viewing them as significant.
- **Cultural landscapes.** Tribes are particularly concerned with cultural landscapes because landscape analysis can consider culture in holistic ways that move beyond discrete objects and bounded sites. The California Office of Historic Preservation's (OHP) Statewide Historic Preservation Plan, 2013-2017, recommends that archaeological and ethnographic information be analyzed together in the identification and evaluation phases of cultural landscape documentation. The OHP has further identified the need for cultural resources professionals working on renewable energy projects to shift their focus from a site-level to a landscape-level assessment (OHP 2013). OHP's advice is partially echoed by Secretary of the Interior Order No. 3330. The following three examples illustrate how cultural landscapes of importance to tribes do exist in areas considered to be nonsensitive according to the 1980 Cultural Element Map.
  - The Salt Song Trail is a Southern Paiute sacred trail corridor that crosses several states and makes a circuit between the Mojave Desert and the southern portion of the Wasatch Range. It closely follows the Colorado River. It is a trail system believed to be traveled by the deceased who, with the aid of traditional practitioners who, through song, story, and prayer, usher the deceased along the path on their post-burial journey to the afterlife. The trail consists of physical marks on the land, both trail marks and natural land patterns, wayside locations where specific songs and other ceremonies are sung or conducted, and a corridor along the trail system.
  - The Keruk Xam Kwatcan/Earth Figures Landscape is a Yuman sacred trail corridor that parallels the Colorado River between Spirit Mountain in the north (near Laughlin, Nevada) and Pilot Knob in the south (near Yuma, Arizona). A significant third sacred mountain located in the approximate mid-portion of the trail corridor is Palo Verde Peak. It is a trail system that the deceased are believed to follow after the cremation ceremony as they

make their way to the afterlife, and where living people travel to assist the departure of their deceased ancestors. It is also a trail that traditional Yumans take as a pilgrimage of return to the place of creation. For those who have proper training, the trail can also be travelled in dreams. The trail is a physical mark on the land (in some places consisting of parallel trails and trails on both sides of the river) with numerous wayside locations, which include many earth figures. The earth figures also have many contributing features such as cleared circles, rock cairns, altars, cul-de-sac trails, altars, and lithics, including shattered quartz. The Mule Mountains and immediate surrounding environs are believed to be a place where souls may go to wait out the year of mourning between the cremation ceremony and the final journey to the afterlife.

- The Pacific to Rio Grande Trail Landscape, a cultural landscape that reflects a major trail corridor that connects the Southern California Pacific Coastline to the northern Rio Grande Valley and includes three prominent trail corridors: the Northern (I-40 [Interstate] I-15) corridor, the Central (I-10) corridor and the Southern (I-8) corridor. The landscape is bounded on the North (and listed from west to east) by the Santa Barbara Mountains, the Garlock Fault, the Spring Mountains, the Colorado Plateau and the Northern Rio Grande Valley (Santa Fe, New Mexico). The landscape is bounded on its southern extent by the northern terminus of the Sea of Cortez and by the Gila River watershed in its entirety. This broad landscape is uniquely positioned and bounded because it provides the area that most likely and most readily provides the greatest potential for understanding coastal-interior migrations. The landscape is between the two most viable routes for entry, population, and settlement of North America, within which viable indigenous cultures exist that maintain intimate and intact knowledge of origins, migrations, and homeland ecological knowledge. This broad landscape is treated as a thematic context within which the Chuckwalla Valley portion of the cultural landscape is articulated. The Chuckwalla Valley portion of the Pacific to Rio Grande Trail Landscape has been identified by the California Energy Commission (a California Environmental Quality Act [CEQA] lead agency) as a cultural landscape and historical resource, under CEQA, that has both archaeological and ethnographic contributing elements. The landscape appears to date from a presently undetermined point in prehistory through 1936, and includes archaeological sites and features, Traditional Cultural Properties, a complex trail system, springs, tanks, and wells, and culturally important plant and animal species. The combination of cultural and natural features that make up this composite resource qualify the resource as a type of cultural landscape.

- **Natural Resources.** Some natural resources of interest to Native Americans include but are not limited to: plants, animals, minerals, water, and natural settings. Natural resources can be used for food, medicine, totem, aesthetic or spiritual purposes. Ensuring the spiritual efficacy of plant, animal, or mineral products requires adherence to proper traditional techniques critical to the perpetuation of indigenous cultures.
  - **Plants.** Any native plant population may be of cultural interest to Native Americans. Culturally significant plants are often used for medicine, food, clothing, basketry, structures, totems, and aesthetic or ritual purposes.
  - **Animals.** Any native animal population may be of cultural interest to Native Americans, but they tend to be those that were traditionally used for medicine, food, clothing, totems, or ritual purposes.
  - **Minerals.** The kinds of mineral resources that might be of interest to Native Americans include clay (for pottery), salt, turquoise, obsidian, quartz crystals, and mineral pigments.
  - **Water.** Water is critical to all life forms, and is especially critical in the desert. This is a fact not lost on indigenous peoples of the desert; places with water are often also culturally important places. Water also plays an important role in the creation stories and histories of Indian tribes of the desert. Key issues associated with water include access, available amounts, quality, and plants and animals supported by the water. Some of the sources of water in the LUPA Decision Area include springs, seeps, tanks, lakes (wet and dry), and rivers. The Colorado River is considered to be especially important. In Native American understandings, the Colorado River is an earthly manifestation mirroring the great river in the night sky known as the Milky Way. Both the Colorado River and the Milky Way are also representations of the north–south orientation of the first migrations of the people, first from the world beyond, and second, into the physical world as the Creator led people to various new homelands of each group in Pai (Yuman) country.
  - **Natural Setting.** An important component of Native American natural aesthetics is the relationship between landforms, skies, and traditional practitioners. Local, intermediate, and distant horizons provide a palpable context within which natural and cultural resources are understood in culturally integrated ways.