

## Comment Set C1 – Colorado River Indian Tribes

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**Via FedEx**

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Re: Comments of the Colorado River Indian Tribes on the Draft Supplemental Environmental Impact Statement/Environmental Impact Report/Land Use Plan Amendment for the Palen Solar Project (exhibits)

To All Parties:

Please find enclosed the exhibits for Comments of the Colorado River Indian Tribes on the Draft Supplemental EIS for the Palen Solar Project. The comment letter will be arriving via email and mail under separate cover. Please ensure these exhibits are included in the agency's records on this project.

Please contact our office if you have any questions.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



Amy Zehring, Secretary

Enclosure: CD

352273.1

## Comment Set C1 – Colorado River Indian Tribes (cont.)



### COLORADO RIVER INDIAN TRIBES

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**RE: Comments of the Colorado River Indian Tribes on the Draft Supplemental Environmental Impact Statement/Environmental Impact Report/Land Use Plan Amendment for the Palen Solar Project.**

Dear Messrs. DeMaio and Olivas:

On behalf of the Colorado River Indian Tribes (CRIT or the Tribes), I write to respond to your October 27, 2017 notification regarding the Draft Supplemental Environmental Impact Statement/Environmental Impact Report/Land Use Plan Amendment (DSEIS) for the Palen Solar Project (Project).<sup>1</sup> After carefully reviewing the DSEIS, we have concluded that it fails in many respects to meet the requirements of the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), the California Environmental Quality Act (CEQA), and other federal, state, and local laws.

As a preliminary matter, the Colorado River Indian Tribes are a federally recognized Indian tribe comprised of over 4,440 members belonging to the Mohave, Chemehuevi, Hopi and Navajo Tribes. The almost 300,000-acre Colorado River Indian Reservation sits astride the Colorado

<sup>1</sup> As the DSEIS indicates an intent to move forward with the Reduced Acreage Alternative, the term "Project" refers to that Alternative, except as indicated.

C1-1

## Comment Set C1 – Colorado River Indian Tribes (cont.)

River between Blythe, California and Parker, Arizona. The ancestral homelands of the Tribes' members, however, extend far beyond the Reservation boundaries. Significant portions of public and private lands in California, Arizona, and Nevada were occupied by the ancestors of the Tribes' Mohave and Chemehuevi members since time immemorial. These landscapes remain imbued with substantial cultural, spiritual, and religious significance for the Tribes' current members and future generations. For this reason, we urge BLM and the County to deny the proposed Project, which has the potential to transform this cultural landscape to an industrial one. In the event the Project does move forward, however, the agencies must take steps to revise the DSEIS to adequately consider and mitigate for impacts to cultural and other resources.

C1-1  
cont.

### The DSEIS Is Inadequate under NEPA and CEQA.

C1-2

The purpose of NEPA is to inform the public and agency decisionmakers of a project's potential environmental impact before those decisionmakers act. By requiring an EIS to provide a complete picture in advance, the drafters of NEPA expected that decisionmakers would make better decisions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (NEPA "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts"). BLM has an obligation pursuant to NEPA to conduct its analysis "objectively and in good faith, not as an exercise in form over substance, [ ] not as a subterfuge designed to rationalize a decision already made . . . [and] not just to file detailed impact studies which will fill governmental archives." *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000); see also *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1300 (9th Cir. 2003) ("NEPA requires that federal agencies "consider every significant aspect of the environmental impact of a proposed action . . . [and] inform the public that [they have] indeed considered environmental concerns in [their] decision-making process[es].") (citations omitted).

Likewise, the EIR is "the heart of CEQA." *Laurel Heights Improvement Ass'n v. Regents of University of California*, 47 Cal.3d 376, 392 (1988) (citations omitted). It is "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return. The EIR is also intended 'to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.' Because the EIR must be certified or rejected by public officials, it is a document of accountability." *Id.* (citations omitted).

Beyond merely disclosing potential environmental impacts, the environmental review statutes require agencies to develop tactics to address them. Specifically, CEQA requires the EIR not only identify a project's significant effects, but also ways to avoid or minimize them. Pub. Res. Code § 21002.1. An EIR may not defer evaluation of mitigation to a later date. CEQA Guidelines<sup>2</sup> § 15126.4(a)(1)(B). NEPA's requirements are similar: the EIS must "[i]nclude appropriate mitigation measures" and discuss the "[m]eans to mitigate adverse environmental impacts." 40 C.F.R. §§ 1502.14(f), 1502.16(h). The statute "require[s] that an EIS discuss mitigation measures, with 'sufficient detail to ensure that environmental consequences have been fairly evaluated.' An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective." *South Fork Band*

<sup>2</sup> The CEQA Guidelines can be found at Cal. Code Regs., tit. 14, § 15000 et seq.



## Comment Set C1 – Colorado River Indian Tribes (cont.)

*Council of W. Shoshone of Nevada v. U.S. Dep’t of Interior*, 588 F.3d 718, 727 (9th Cir. 2009) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989)).

Where, as here, the environmental review document fails to fully and accurately inform decisionmakers and the public of the environmental consequences of proposed actions, or identify ways to mitigate or avoid those impacts, it does not satisfy the basic goals of either NEPA or CEQA. *See* 40 C.F.R. § 1500.1(b) (“NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.”); Pub. Res. Code § 21061 (“The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect that a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.”). As a result of the DSEIS’s numerous and serious inadequacies, there can be no meaningful review of the Project by either the public or the Agencies’ decisionmakers.

C1-2  
cont.

### **I. The DSEIS Fails to Adequately Analyze or Mitigate for the Project’s Impacts on Cultural Resources.**

C1-3

The proposed Project is one in a string of poorly conceived and ill-sited solar energy proposals located in the Chuckwalla Valley. The first project—a solar thermal project proposed by Solar Millennium—ended in bankruptcy. The next two iterations—two solar power towers proposed first by BrightSource and then by Abengoa—were both shot down or significantly reduced by the California Energy Commission, in part because of significant cultural resource concerns. However, even though the proposed Project would be constructed on the same cultural landscape as the prior iterations, the DSEIS reaches the remarkable conclusions that, under NEPA: (1) “no direct impacts to known historic properties are anticipated” (DSEIS at 4.4-25); (2) “the Proposed Action would not have an indirect impact on places of traditional cultural importance” (*id.*); and (3) “the Project would not result in cumulative indirect adverse effects on historic properties” (DSEIS at 4.4-12); *see also* DSEIS at 4.4-33 (no tribal cultural resources under CEQA). As explained further below, these conclusions are directly refuted by the evidence available to BLM and the County.

#### **A. The DSEIS Incorrectly Determines that All Impacted Cultural Resources Are Valuable for Data Recovery Only.**

C1-4

##### **1. The Project Will Significantly Impact Prehistoric Cultural Landscapes.**

Both state and federal law recognize that cultural resources include cultural landscapes. *See* National Register Bulletin, “Guidelines for Evaluating and Documenting Traditional Cultural Properties” (“A culturally significant natural landscape may be classified as a site” eligible for the National Register); Pub. Res. Code § 21074(a) (tribal cultural resources include “cultural landscapes”). Indeed, evaluation and protection of such landscapes is necessary to ensure adequate protection of both individual resources and their historic context. Recently, the California Office of Historic Preservation recognized the need for cultural resource professionals working on renewable energy projects to shift focus from a site level to the landscape level of assessment. While the DSEIS briefly mentions that cultural landscapes may be protected under new state law (DSEIS at 4.5-2), the DSEIS makes no effort to identify or define any cultural



## Comment Set C1 – Colorado River Indian Tribes (cont.)

landscapes in the vicinity of the Project. This omission is contrary to law, and not supported by the significant evidence available to the agencies.

C1-4  
cont.

Specifically, in response to documentary evidence gathered by California Energy Commission Staff and submitted to the Commission by affected Tribes (including CRIT), the Commission recognized two cultural landscapes that encompass the Project site. First, the Energy Commission recognized the Prehistoric Trails Network Cultural Landscape (PTNCL), a discontinuous cultural landscape that incorporates prehistoric archaeological resources associated with the Halchidhoma Trail. The Energy Commission determined that this landscape was eligible for listing on the National Register (Criteria A and D) the California Register of Historical Resources (Criteria 1 and 4). Palen Solar Electric Generating System Revised Presiding Member's Proposed Decision ("PMPD") at 6.3-34, -36 (attached as Exhibit 2). The DSEIS makes no mention of this cultural landscape.<sup>3</sup>

Second, the PMPD recognized the broader, regional Pacific to Rio Grande Trails Landscape (PRGTL), a cultural landscape that encompasses three primary trail corridors from the southern Pacific coast of California across the deserts and the Colorado Plateau of the Southwest to the northern Rio Grande Valley in what is now New Mexico. Energy Commission staff delineated a "Chuckwalla Valley portion" of this broader landscape. PMPD at 6.3-34. Specifically, the PMPD notes that the ethnographic and ethnohistoric maps, literature, historic plat maps, and archaeological site records show a vast network of trails in the Chuckwalla Valley, *several of which pass directly through the project footprint*. PMPD at 6.3-38 to -40 (including Figure 2). Some of these trails are affiliated with various songs and/or stories sung or told by CRIT members. The PMPD consequently determined that this landscape is eligible for listing under Criterion 1, 3, and 4 of the California Register, based in part on testimony provided by Chemehuevi and Mojave Tribal Members called by CRIT in the siting proceeding. PMPD at 6.3-48. Again, the DSEIS makes no mention of the identified trails or cultural landscape.

The cultural landscape is the Tribes' way of life. The trails, which pass through the site, link the petroglyphs and rock shelters found on each surrounding mountain. The entire landscape is culturally sensitive to each associating tribe, including the viewshed and use of trails and rock shelters. The ancestors who created the petroglyphs in the boulders each had ties to the area and reasons for doing so and the entire landscape remains important to each tribal member individually and the Tribes collectively. Project by project, the Tribes' cultural footprint is getting erased and this Project is no exception.

The DSEIS's omission of any discussion of cultural landscapes violates both NEPA and CEQA. As mentioned above, cultural resources are recognized as potential historic sites eligible for inclusion on the National and California Registers. As such, impacts to cultural landscapes must be assessed against the thresholds of significance identified in the DSEIS. The DSEIS's failure to do so is contrary to law.

<sup>3</sup> Even if BLM and the County disagree with the Energy Commission's assessment, the DSEIS must discuss and resolve reasonable opposing views. NEPA is designed to "insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug." *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973); *see also Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*, 57 Cal.4th 439, 445, 457 (2013) (an agency "abuses its discretion if it exercises it in a manner that causes an EIR's analysis to be misleading or without informational value."); 40 C.F.R. § 1502.9(a)-(b).

## Comment Set C1 – Colorado River Indian Tribes (cont.)

These omissions also have significant and prejudicial consequences. Evidence cited in the PMPD indicates that the presence of utility-scale renewable energy projects could “profoundly and irreparably degrade the ability of the[se cultural] landscape[s] to convey [their] historical significance.” PMPD at 6.3-51. Even though the proposed Project does not include the solar power towers, it still would introduce stark visual intrusions and sever tribal connections to the landscape. This possibility is not discussed or mitigated for in the DSEIS.

C1-4  
cont.

### 2. As the Seven Prehistoric Sites Destroyed By the Project Contribute to Cultural Landscapes, Their Removal Constitutes a Significant Impact.

C1-5

The DSEIS notes that seven prehistoric archaeological sites (lithics, groundstone, and fire affected rock) are located within the Project site. DSEIS at 3.4-47. The DSEIS, however, concludes that these resources are not eligible for the National Register; consequently, the document concludes that removal of these resources from the Project site will result in a less than significant impact. DSEIS at 4.4-5 (noting that resources will be destroyed). This conclusion is arbitrary and capricious, and not supported by substantial evidence.

Specifically, the DSEIS fails to evaluate whether any of these seven prehistoric archaeological sites contribute to the cultural landscapes discussed in the prior section. Even if these resources are not significant on their own—a characterization that the Tribes do not support—the DSEIS must evaluate whether these resources are significant because of their contribution to a broader cultural landscape.

The California Energy Commission recognized this possibility. The Commission’s Final Decision in 2010 concluded that “direct impacts to nine prehistoric archaeological sites,”—some of which will be impacted by the proposed Project—were significant, given that they were “all potential contributors to a prehistoric cultural landscape (historic district) identified by Staff.” PMPD at 6.3-33.

The DSEIS’s analysis inappropriately silos these archaeological resources. Under its logic, if an individual resource is not *independently* significant, it does not merit protection. However, NEPA, the NHPA, and CEQA do not take such a cabined view. As the California Office of Historic Preservation has recognized archaeological information—which largely focuses on individual sites—and ethnographic information—which largely focuses on a broader landscape—must be considered together in the identification and evaluation phases of cultural landscape documentation. The DSEIS must be revised accordingly.

### 3. The Project Will Significantly Impact Areas of Critical Environmental Concern.

C1-6

The DSEIS notes that four potential “culturally sensitive” areas will be indirectly impacted by the Project: the Palen Dry Lake ACEC, the Alligator Rock ACEC, the Corn Springs ACEC, and the Palen-Ford Playa Dunes ACEC. DSEIS at 3.4-50. The DSEIS, however, then notes that BLM “disagrees” with the recommendation that these areas are eligible for listing on the National Register (DSEIS at 4.4-6), and specifically claims that these resources are not eligible for listing under Criterion A (sites “associated with events that have made a significant contribution to the



## Comment Set C1 – Colorado River Indian Tribes (cont.)

broad patterns of our history”). DSEIS at 3.4-50. Consequently, the DSEIS concludes that these resources would not be indirectly affected by the Project. *Id.*

C1-6  
cont.

This conclusion is not supported by BLM’s own documents. Chapter 3.15 (“Special Designations”) recognizes that all four ACECs were designated to protect the cultural values of the sites. DSEIS at 3.15-9. These cultural values are not limited to the potential to yield scientific information (i.e., Criterion D). Instead, these ACECs protect sites because of their association with broad patterns of tribal history, as discussed in their Special Unit Management Plans (SUMP), included as part of the DRECP Land Use Plan Amendment (Exhibit 3):

- **Palen Dry Lake ACEC:** The ACEC is designated to protect “evidence of past trade and travel in the form of lithic and ceramic scatters, cleared circles/rock rings, rock alignments and petroglyphs.” Specifically, “Native Americans hold these places sacred.” SUMP at 331.
- **Alligator Rock ACEC:** The ACEC is designated to protect “the largest and most well preserved assemblage of late prehistoric and archaic era petroglyphs,” representing human habitation over several thousand years. Notably, it is a “critically important cultural use site for a variety of tribes that claim ancestral ties with the Chuckwalla Valley.” “It is also a site of high religious importance to many tribes” and “associated with several spiritual trails and songs . . . , rooted deep[ly] in their oral histories.” Crucially, areas of petroglyphs and cleared circles are located in “strategic” areas because of their “clear view of the [Chuckwalla Valley] landscape from an elevated position,” including the proposed Project site. SUMP at 216.
- **Corn Springs ACEC:** The ACEC is designated to protect a “major occupation site of prehistoric Native American Indian groups,” “major east to west trail” and significant prehistoric petroglyph sites. SUMP at 273
- **Palen-Ford Playa Dunes ACEC:** The ACEC is designated to protect “major trail networks [that] transit through the area” and “evidence from [] trade and travel.” It also protects evidence of early human occupation, with a significant presence dating back 10,000 years. SUMP at 342.

Likewise, the PMPD recognized that these areas were likely eligible for the California Register based on their association with events connected to the broad patterns of our history. Specifically, the PMPD found that the Palen Dunes/Palen Lake Traditional Cultural Property (TCP), the Ford Dry Lake TCP, the Corn Spring TCP, and the Long Tank and Alligator Rock TCP were all eligible under Criteria 1 based on their “broad contributions to the unique historic events that shape Native American understanding of their ancestor’s lifeways and burial practices, and the deep oral tradition that is understood to be related to their ancestors.” PMPD at 6.3-19, -21, -25, -29, -30.



## Comment Set C1 – Colorado River Indian Tribes (cont.)

C1-6  
cont.

Other than a conclusory sentence, the DSEIS offers no explanation for why the significant cultural resources protected by these ACECs may not be indirectly and adversely impacted by the proposed Project. As demonstrated above, these cultural resources include areas sacred to area tribes, linked to cultural practices, and grounded in the cultural landscape. The addition of a massive, industrial system to the Chuckwalla Valley has the real potential to adversely impact these values. The agencies must consider these impacts in a revised DSEIS.

Finally, the DSEIS offers no explanation for why two additional ACECs located within 10 miles of the site were not evaluated for their cultural resource values. In particular, the Chuckwalla ACEC is located just a quarter mile from the site, and was designated to protect “cultural, scenic, vegetative, and wildlife values” across 352,633 acres. *Id.* Likewise, the Desert Lily Preserve ACEC was “designated to protect sensitive natural, scenic, ecological, and *cultural resource* values” across 2,055 acres. DSEIS at 3.15-8. The proposed Project’s potential to impact the cultural resources protected within these ACECs must be evaluated.

### 4. The Project Will Significantly Impact Tribal Cultural Resources.

C1-7

Finally, the DSEIS utterly fails to consider the proposed Project’s potential to adversely impact Tribal Cultural Resources. According to the DSEIS, “[i]nformation currently available from recent ethnographic interviews and tribal consultation associated with other projects . . . suggest that the construction and operation of the Proposed Action would not result in unavoidable adverse impacts on culturally sensitive areas through introduction of industrial facilities to a rural setting.” DSEIS at 4.4-26. Likewise, the DSEIS claims that “no tribal cultural resources have been . . . identified through tribal consultation [pursuant to AB 52].” DSEIS at 4.4-33.

These statements ignore the wealth of information available to the agencies regarding tribal cultural resources in the vicinity of the Project. Specifically, the California Energy Commission recognized *eleven* traditional cultural properties that would be impacted by a prior iteration of the Project:

- “The Palen Dunes/Palen Lake is a traditional cultural property (TCP) located on the floor of the Chuckwalla Valley west of the Palen Mountains and southeast of the Coxcomb Mountains. The closest portion is less than one mile northeast of the PSEGS project. This is a place that was, and continues to be, an important destination along the trail network within the Chuckwalla Valley. . . . There are reports of cremations at some of the recorded sites in the TCP.” PMPD at 6.3-18.
- “The Ford Dry Lake is a TCP located on the floor of the Chuckwalla Valley, south-southeast of the Palen Mountains and southwest of the McCoy Mountains, about nine miles east of the PSEGS project area. This is a place that was, and continues to be, an important destination along the trail network within the Chuckwalla Valley.” PMPD at 6.3-20.
- “McCoy Spring is a TCP located in the western portion of the McCoy Mountains about 16 miles northeast of the PSEGS project area and was, and continues to be, an important destination along the trail network within the Chuckwalla Valley.” PMPD at 6.3-21.

## Comment Set C1 – Colorado River Indian Tribes (cont.)

- “Chuckwalla Spring is a TCP located in the northern portion of the Chuckwalla Mountains about 13 miles south of the PSEGS project area and was, and continues to be, an important destination along the trail network within the Chuckwalla Valley.” PMPD at 6.3-23.
- “Corn Spring is a TCP located in the eastern portion of the Chuckwalla Mountains, about 6.75 miles southwest of the PSEGS project area and was, and continues to be, an important destination along the trail network within the Chuckwalla Valley.” PMPD at 6.3-24.
- “The North Chuckwalla Petroglyph District [TCP] is an NRHP-listed property located in the northern portion of the Chuckwalla Mountains about 4 miles west of the PSEGS project area and was, and continues to be, an important destination along the trail network within the Chuckwalla Valley.” PMPD at 6.3-26.
- “The North Chuckwalla Prehistoric Quarry District is a TCP located on the northeast slopes of the Chuckwalla Mountains, about 6.5 miles west of the PSEGS project area. This is a place that was, and continues to be, an important destination along the trail network within the Chuckwalla Valley.” PMPD at 6.3-27.
- “Long Tank is a TCP located in the Alligator Rock ACEC, on the northern slope of the Chuckwalla Mountains, about 10 miles west of the PSEGS project area. This is a place that was, and continues to be, an important destination along the trail network within the Chuckwalla Valley.” PMPD at 6.3-28.
- “Alligator Rock is a TCP located adjacent to the north portion of the Chuckwalla Mountains, about nine miles west of the PSEGS project area. This is a place that was, and continues to be, an important destination along the trail network within the Chuckwalla Valley.” PMPD at 6.3-29.
- “Dragon Wash is a TCP located in the eastern portion of the Eagle Mountains about 14 miles west of the PSEGS project area and was, and continues to be, an important destination along the trail network within the Chuckwalla Valley.” PMPD at 6.3-31.
- “The San Pascual Well TCP is located in a wash on the valley floor of the Chuckwalla Valley and is about five miles northwest from the PSEGS project area.” PMPD at 6.3-32.

C1-7  
cont.

## Comment Set C1 – Colorado River Indian Tribes (cont.)

These TCPs are depicted in Figure 3 of the PMPD. Importantly, the CEC developed these TCPs *in consultation with area tribes* and after receiving testimony and evidence from CRIT and other tribes. Some of this evidence is presented as Exhibit 4.<sup>4</sup>

C1-7  
cont.

The DSEIS does not mention or analyze any of these previously identified traditional cultural properties. Instead, it makes the specious claim that no TCPs have been identified in the area. This omission must be remedied in a revised and recirculated DSEIS.

### **B. The DSEIS Fails to Adequately Mitigate for the Project's Significant Cultural Resource Impacts.**

C1-8

The DSEIS relies on numerous mitigation measures to purportedly reduce the Project's significant cultural resource impacts. *See, e.g.*, DSEIS at 4.4-7 to -8. However, as detailed below, these mitigation measures are wholly inadequate, and represent a significant step backward in BLM's efforts to mitigate cultural resource impacts in the Riverside East SEZ:

- BLM continues to rely on data recovery, removal of resources, and long-term curation as “mitigation” for impacts to prehistoric cultural resources. As CRIT has repeatedly informed BLM, such efforts do not—in any way—mitigate for the significant cultural harms caused by removing the footprint of tribal members' ancestors from the landscape. Indeed, such measures cause more harm than good. BLM has informed CRIT that it is “required” by law to curate such resources, and that it cannot allow such resources to be reburied or otherwise left on-site. As CRIT has previously explained to BLM, this position is not supported by the Archaeological Resources Protection Act, curation regulations, or any ongoing or prior litigation.<sup>5</sup> Consequently, the Tribes respectfully request that BLM reconsider its position on reburial and revise CUL-3, CUL-6, CUL-7, CUL-9, and CUL-10 accordingly. At the very least, the Agencies should permit reburial of any isolates or other non-eligible prehistoric archaeological resources.
- The DSEIS must be revised to clarify that archaeological monitoring and tribal monitoring will be required for all ground disturbing activities, including grading, “disc and roll,” and pile or stake driving, mechanical excavation, drilling, digging, trenching, blasting, or using high pressure water to cut into the ground. While the DSEIS professes to identify areas of the site with higher or lower potential for encountering buried cultural deposits, the possibility always exists. *See* DSEIS at 4.4-17 (the entire landscape represents “areas where Native America artifacts may be discovered”). Given that the project site will be disturbed to a depth of 18 inches (DSEIS at 4.4-4), comprehensive monitoring is necessary. A mitigation measure that fails to use tribal monitors for *all* ground disturbing activities will result in significant impacts, and the DSEIS cannot

C1-9

<sup>4</sup> Other evidence was presented under seal to the California Energy Commission. Please contact the Tribes to discuss mechanisms for confidentially providing these documents to the Agencies.

<sup>5</sup> In responding to a similar issue on the Ten West Link Transmission Line Project, BLM cited to “ongoing litigation” as a reason why reburial could not be accommodated. Further explanation included citations to CRIT's challenges to the Blythe and Genesis projects. Both court cases have been resolved, and neither involved a determination regarding the propriety of reburial on public lands.



## Comment Set C1 – Colorado River Indian Tribes (cont.)

conclude that this partial monitoring will reduce impacts to the extent feasible. To reduce impacts to the extent feasible, tribal monitors must be present for all the activities described above and whenever machines are active.	C1-9 cont.
<ul style="list-style-type: none"> <li>The DSEIS proposes to defer the development of a monitoring and discovery plan, memorandum of agreement, and tribal participation plan to <i>after</i> approval of the record of decision. <i>See</i> CUL-3. This deferral is inappropriate, particularly because CUL-3 provides no performance standards or other mechanisms for determining whether these plans are sufficient to mitigate the proposed Project's impacts. Consequently, the Tribes request that the monitoring and discovery plan and tribal participation plan be developed and circulated for review and comment in advance of the release of any FSEIS.</li> </ul>	C1-10
<ul style="list-style-type: none"> <li>CUL-3 states that implementation of the monitoring and discovery plan is the responsibility of the CRS and project owner. This statement is incorrect, as a matter of law. If the monitoring and discovery plan is intended to implement the Memorandum of Agreement required by the NHPA, BLM is required to implement the plan and be bound by it. <i>Colo. River Indian Tribes v. United States DOI</i> (C.D.Cal. June 25, 2012, No. CV 12-4291-(DTBx)) 2012 U.S.Dist.LEXIS 196792, at *16.</li> </ul>	C1-11
<ul style="list-style-type: none"> <li>The DSEIS claims that CUL-14 ("Update Palen Dry Lake ACEC Management Plan") would "address" any indirect impacts to the Palen Dry Lake ACEC. DSEIS at 4.4-7. This statement is not well supported. To the extent the update is intended to analyze and evaluate the Palen Dry Lake ACEC, such activities are required to support the environmental review process. Deferral of analysis is not permitted under either NEPA or CEQA. Even if the purpose of the update is to increase protections within the ACEC, it is not clear that impacts of the proposed Project on the cultural resources within the ACEC can be ameliorated by actions <i>within</i> the ACEC.</li> </ul>	C1-12
<ul style="list-style-type: none"> <li>BLM has traditionally required tribal representatives participate in the WEAP Training (CUL-5), to ensure that construction personnel can identify tribal cultural resources and other prehistoric properties. This mitigation measure should be modified to include this requirement.</li> </ul>	C1-13
<ul style="list-style-type: none"> <li>CUL-7 must be revised to provide tribal monitors with the authority to halt construction, at least until there can be the opportunity for review by CRS, alternate CRS, or other field staff. Without this power, the tribal monitors will be unable to minimize the potential impacts of the proposed Project. Likewise, CUL-7 must be clarified to provide that tribes must receive notice of newly discovered prehistoric resources within 24 hours of the notification to BLM. Without this time requirement, tribes will be unable to effectively participate in the determination of how to treat any newly discovered prehistoric resource.</li> </ul>	C1-14

## Comment Set C1 – Colorado River Indian Tribes (cont.)

- The Tribes are pleased that the mitigation measures include a requirement that impacts to newly discovered resources must be “reduced or avoided.” However, CUL-8 must be clarified to make the preference for avoidance clear, and to create a mechanism for reviewing when avoidance is feasible. CRIT urges BLM to require avoidance, unless the project developer can demonstrate with written, substantial evidence that avoidance is infeasible. C1-15
  
- The DSEIS explains that measures CUL-16 through CUL-20 “are not required under NEPA.” DSEIS at 4.4-29. However, a close review of these mitigation measures indicates that BLM should also require these measures for NEPA and NHPA compliance. For example, CUL-16 requires ongoing consultation with affected tribes in the event of changes to the project. DSEIS at 4.4-29. The NHPA also requires ongoing consultation in the event of changed circumstances. As was noted during CRIT’s visit to the Palen Site, the sand dunes in the lake bed move due to wind streams coming from the north and flowing south. If the Tribes record finds during sporadic visits, an attempt to locate those same resources over the construction and operation period of the project will be challenging, as they will likely be covered and new resources will be revealed. For this reason, there is no way to guarantee a complete account during past surveys and tribal monitors must be present for *all* ground disturbing activities. C1-16
  
- The DSEIS must also explain how the two sets of mitigation measures will be implemented on the ground. For instance, CUL-17 requires relocation of cultural resources and tribal cultural resources, rather than the data recovery and curation anticipated in CUL-3, CUL-6, CUL-7, CUL-9, and CUL-10. These inconsistencies make it difficult for CRIT to evaluate the DSEIS and will make it difficult for the project developer to implement the mitigation measures. CRIT urges BLM to adopt the more protective mitigation measures currently required by the County. C1-17

### **C. The DSEIS Fails to Support Its Conclusion that the Project Will Not Have Cumulative Adverse Effects on Cultural Resources** C1-18

The DSEIS acknowledges that cumulative activities have resulted in a destruction of *41 percent of the cultural resources* in the study area. DSEIS at 4.4-11. This revelation is devastating. Cultural resources represent a direct linkage between present-day tribal members and their ancestors. Removal of these resources from the landscape is removal of the Tribes’ footprint. Once such resources are gone, it will be difficult, if not impossible, for the Tribes to prove that these lands are part of their ancestral homeland, and that their ancestors lived and worked on these lands since time immemorial.

Remarkably, the DSEIS then concludes that “the Project would not result in cumulative indirect adverse effects on historic properties.” DSEIS at 4.4-12. The DSEIS appears to reach this conclusion because the Project’s direct destruction of cultural resources is only a small fraction of the overall total of cultural resources in the study area. *Id.* But this is the exact circumstance in which a cumulative impact should be recognized—where the individual project’s contribution



## Comment Set C1 – Colorado River Indian Tribes (cont.)

looks tiny on its own, but *together with other projects* represents a significant impact on a resource. The DSEIS must be revised to recognize the Project's cumulatively significant impact.

C1-18  
cont.

### II. Neither BLM Nor Riverside County Has Adequately Consulted with the Tribes.

C1-19

In May 2016, the Colorado River Indian Tribes adopted a government-to-government consultation policy to manage its relationship with federal agencies. *See* Exhibit 1. The genesis of this policy was the ongoing failure of the federal government to live up to the requirements for consultation contained in federal statutes, regulations, policies, and executive orders. CRIT requested that each federal agency acknowledge the policy prior to conducting government-to-government consultation with its Tribal Council.

Unfortunately, to our knowledge, the Palm Springs South Coast Field office has not yet acknowledged the Tribes' consultation policy.

The DSEIS notes that Riverside County sent the Tribes an AB52 consultation request on January 3, 2017. DSEIS at 5-9. To the best of our knowledge, the Tribes did not receive this letter. Please provide us with a copy of the correspondence. The Tribes request a government-to-government consultation meeting with the County to discuss the Project. When responding to this comment, please confirm your understanding that the Tribes request this meeting.

C1-20

### III. The DSEIS Fails to Recognize the Environmental Justice Impacts of the Project on Tribes.

#### A. The Environmental Justice Analysis is Overly Narrow.

C1-21

Under NEPA, BLM must consider, to the extent practicable, whether there is or will be an impact on the natural or physical environment that significantly and adversely affects Native American tribes. Specifically, BLM must consider whether significant environmental effects may have an adverse impact on Native American tribes that appreciably exceeds those on the general population. *See, e.g.*, EPA's 1998 Environmental Justice Guidance; Executive Order 12898. These analyses are required for an adequate consideration of environmental justice impacts.

As a preliminary matter, Chapter 3.5—which lays the groundwork for the DSEIS's environmental justice analysis—does not recognize that tribes face unique environmental justice burdens. The Chapter only looks minority and income characteristics of the Desert Center CDP, the City of Blythe, and Riverside County as a whole. It does not evaluate whether the Colorado River Indian Reservation would qualify as a "low-income population of concern." DSEIS at 3.5-3. This Chapter must be revised to evaluate which tribes may be adversely and inequitably affected by the proposed Project.

In addition, the Environmental Justice analysis fails to recognize that the proposed Project will result in adverse impacts on CRIT that appreciably exceed those of the general population. The DSEIS states:



## Comment Set C1 – Colorado River Indian Tribes (cont.)

While the Project would permanently disturb 3,381 acres, the adverse impact to the landscape is not considered to create a disproportionate effect on Native Americans due to the large amount of undisturbed land in the project area and the proximity of the site to I-10 (a major interstate highway that greatly affects the landscape of the site area) and the adjacent transmission corridor. However, the elimination of approximately 4,200 acres for public access (including tribal access) and the alteration of the site from its natural state is considered an unavoidable impact of the Project. *This impact would not be disproportionate to Native Americans as it would affect all members of the public.*

C1-21  
cont.

DSEIS at 4.5-3 (emphasis added). Where the DSEIS errs, however, is in its assumption that changes in public land affect tribes and the public equally. Unlike most members of the public, tribal members maintain long-standing ancestral and traditional practices that connect their identities to *specific environments*. Tribal members cannot easily shift their use and enjoyment of public lands to other, non-industrialized areas, as may be the case for many members of the public. Once these ancestral ties are severed, either by the removal of cultural resources or the fencing and development of the entire site, they cannot be regained. The CEC recognized this issue, noting that “other populations that do not have territories linked to their collective identities.” PMPD at 6.3-63.

Consequently, the DSEIS must be revised to recognize the significant environmental justice impacts of the proposed Project on CRIT and other affected tribes.

### **B. As Mitigation for the Project’s Significant Environmental Justice Impacts, the SEIS Must Consider Preferential Hiring for Both Construction and Permanent Jobs.**

C1-22

One of the most substantial environmental costs of the proposed Project is the destruction of tangible cultural resources and the wholesale transformation of the ancestral homelands of Indian tribes, including CRIT. This cost is borne exclusively by tribal members. The power produced at the proposed Project, however, is unlikely to serve residents of Indian reservations, and the climate change benefits will be spread across the globe. The massive profits, moreover, will benefit a small number of private companies. This imbalanced allocation of costs and benefits, which disproportionately disadvantages a minority population while providing them little or no benefit from the program, satisfies any recognized definition of environmental justice.

To begin to right this imbalance, CRIT urges BLM and Riverside County to adopt a mitigation measure to give employment preferences to Indians, as well as access to any necessary job training programs to ensure performance and experience requirements can be met. CRIT notes that the Project will provide twelve permanent jobs. DSEIS at 4.22-1. Consequently, we seriously question whether the proposed Project will bring much needed construction and permanent jobs to an area close to the Reservation. At a minimum, please provide additional information about the nature of these jobs to ensure that Tribal members may be available for hire.

## Comment Set C1 – Colorado River Indian Tribes (cont.)

Tribal members must have access to these jobs to ensure that at least some of the benefits of the proposed Project flow back to the disadvantaged minority community on the Reservation.

C1-22  
cont.

### IV. The Project Is Not Exempt from the DRECP and the Western Solar Plan.

C1-23

The DSEIS claims that the Project qualifies as a “pending” application that is not subject to either the Western Solar Plan or the Desert Renewable Energy Conservation Plan (DRECP). DSEIS at 1-10. Specifically, the Western Solar Plan Record of Decision states that pending applications are not subject to the Plan’s requirements if amendments either “(1) do not change the boundaries of the pending ROW application; or (2) are related to avoiding resource or land use conflicts, adapting the project to third-party-owned infrastructure constraints, or using or designating translocation or mitigation lands.” Western Solar Plan ROD, at § B.12.

Likewise, the DRECP states that a project is not subject to the Plan’s requirements because it is “proposed in a BLM [Solar Energy Zone]” and “is considered a ‘pending project’ under the Western Solar Plan ROD.” DRECP LUPA at 68.

However, BLM should not apply these exceptions to the proposed Project. This is not a situation in which the original company has requested an amendment to accommodate a minor change to the original ROW application. Instead, EDF Renewable Energy is now the *fourth* proposed applicant with the third new solar technology. The ROW application has been pending for over a decade. This is not a mere amendment. It is an entirely new project and should be treated as such.

BLM’s own right-of-way regulations support this distinction. According to 43 C.F.R. section 2807.21(g), pending applications are generally not assignable between applicants: “Only interests in *issued* right-of-way grants and leases are assignable. Except for applications submitted by a preferred applicant under § 2804.30(g), pending right-of-way applications do not create any property rights or other interest and may not be assigned from one entity to another, except that an entity with a pending application may continue to pursue that application even if that entity becomes a wholly owned subsidiary of a new third party.” As Solar Millennium and the other prior companies were not preferred applicants (i.e., they were not applying for competitive leasing for lands outside of designated leasing areas), it is not clear how EDF lawfully acquired the pending application. This issue must be adequately explained in a revised and recirculated DSEIS. If EDF unlawfully acquired the pending application, then the exceptions from the DRECP and Western Solar Plan certainly should not apply.

### V. The Alternatives Section is Improperly Narrowed by the Project’s Purpose and Need.

#### A. The Project’s Narrow Purpose Impedes an Adequate Alternatives Analysis under NEPA.

C1-24

An agency cannot unreasonably narrow the objective of the proposed action to limit the range of alternatives considered. *See Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998) (“[T]he discretion we have afforded agencies to define the purposes of a project is not unlimited . . . [A]n agency cannot define its objectives in unreasonably narrow terms.” (internal citations omitted)); *Simmons v. United States Army Corps of Eng’rs*, 120 F.3d 664, 666 (7th Cir.

## Comment Set C1 – Colorado River Indian Tribes (cont.)

C1-24  
cont.

1997) (“One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing ‘reasonable alternatives’ out of consideration (and even out of existence).”); *see also Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 815 (9th Cir. 1987) (EIR inadequate for failure to analyze alternative sites).

BLM’s purpose and need for the Project “is to respond to a revised ROW application submitted by the Applicant to construct, operate, maintain, and decommission a solar PV energy-generating facility and associated infrastructure on public lands administered by the BLM in compliance with [Federal Lands Policy Management Act (“FLPMA”)], BLM right-of-way regulations, and other applicable Federal laws and policies.” DSEIS at ES-2. The DSEIS also lists various management objectives the Project would allegedly further. DSEIS at 1-4. While it says that BLM will consider “changing the route or the location of the proposed facilities,” the agency unreasonably narrowed the objective of the proposed action by focusing on this particular application, rather than the public goals of providing renewable energy. This narrowing limited the range of reasonable alternatives considered.

BLM states that “many locations and forms of technology were considered but found not appropriate for further analysis within the corollary NEPA documents.” DSEIS at 2-45. The alternative locations considered were all rejected. DSEIS at 2-46. Of the five alternative sites mentioned in the DSEIS, four were located on private land and were considered too speculative based on the number of private landowners whose agreement would be required. DSEIS at 2-46. Only one of the alternative sites was on BLM land and this site was rejected since it was found to conflict with “BLM’s purpose and need, which includes consideration of whether the proposal would comply with BLM mandates under [FLPMA], BLM ROW regulations, and other applicable Federal laws since it was determined to be inconsistent with future expansion of the Joshua Tree National Park and/or the McCoy Wilderness in the area.” DSEIS at 2-46. However, the consideration of only one other BLM-managed site is inadequate.

BLM manages a large amount of land in the area near the Project. *See* DSEIS Figure 1-1: Regional Context. Given the large amount of land under BLM management, the DSEIS does not adequately discuss an alternative location on a BLM site that would comply with the BLM’s purpose and need for the project and result in fewer impacts.

### **B. The Alternatives Analysis Is Similarly Inadequate under CEQA.**

C1-25

CEQA requires an EIR to include analysis of alternative locations. CEQA Guidelines, § 15126.6(f)(2). The EIR must ask if “any of the significant effects of the project would be avoided or substantially lessened by putting the project in another location.” CEQA Guidelines, § 15126.6(f)(2). Only if the lead agency concludes that there are no feasible alternatives, may the agency avoid reviewing at least one alternative site. CEQA Guidelines, § 15126.6(f)(2); *see Laurel Heights Improvement Ass’n v. The Regents of the University of California*, 47 Cal. 3d 376, 399-407 (1988) (finding that the EIR should have explored the potential to locate the project somewhere other than the Laurel Heights property; fact that the University owned the Laurel Heights property did not exempt it from analyzing use of other sites). And, if the agency concludes that no feasible alternative locations exist, it must disclose the reasons for this conclusion in the EIR. CEQA Guidelines, § 15126.6(f)(2).



## Comment Set C1 – Colorado River Indian Tribes (cont.)

The DSEIS does not disclose that no feasible alternative locations exist, nor does it give any reasons for its failure to consider a feasible off-site alternative. Instead, it only lists alternative locations that are infeasible. DSEIS at 2-46. This flatly contradicts the CEQA Guidelines and case law.

C1-25  
cont.

### **C. The County Must Adopt the Environmentally Superior Alternative, Unless Infeasible.**

C1-26

The DSEIS claims that “[a]s the lead agency, CEQA provides the County with an opportunity to select a project alternative rather than the proposed Project, particularly if the alternative will have significantly less physical environmental impacts than the proposed Project. However, the lead agency under CEQA is not required to do so, especially when an alternative does not fulfill all of the stated Project objectives.” DSEIS at 2-44.

These statements inaccurately characterize CEQA’s requirements. Under CEQA, a lead agency is *required* to adopt an environmental superior alternative if it is feasible to do so. Pub. Res. Code § 21002.1 (public agency shall avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so). Here the DSEIS notes that the Avoidance Alternative is the environmentally superior alternative (DSEIS at 2-44). However, it does not provide an adequate discussion, supported by substantial evidence, of the perceived infeasibility of adopting this alternative.

### **D. The County’s Objective to Site the Project on Lands Designated by DRECP Is Misleading and Not Met.**

C1-27

The first, fundamental project objective of Riverside County and the Applicant is “[t]o site the project on lands within a Solar Energy Zone (SEZ) and Development Focus Area (DFA) designated by the Western Solar Plan and [DRECP].” DSEIS at 1-5. This is misleading. Under the DRECP, the site would allow solar development but in a more restricted manner, which would avoid many resource impacts. The Project cannot possibly meet this objective unless the Applicant constructs the Avoidance Alternative, which purports to comply with the DRECP’s Conservation and Management Actions (CMAs). DSEIS at 2-39. Neither the Proposed Action nor the Reduced Footprint Alternative complies with the DRECP CMAs. Therefore, this project objective is not met by the preferred project. Given that this objective shapes the selection of alternatives, the DSEIS must adequately disclose that the preferred alternative does not fully meet this objective and weight other alternatives accordingly.

### **VI. The Project Violates the CDCA Plan and FLPMA and Presents a Misleading Cumulative Impacts Analysis.**

C1-28

Under FLPMA, Congress determined that the California Desert contains “historical, scenic, archeological, environmental, biological, cultural, scientific, educational, recreational, and economic resources that are uniquely located adjacent to an area of large population” and as such, these resources, including “numerous archeological and historic sites, are seriously threatened.” 43 U.S.C. § 1781. In response, Congress directed BLM to prepare a land use management plan for the area that would protect these fragile and threatened resources. *Id.*

## Comment Set C1 – Colorado River Indian Tribes (cont.)

C1-28  
cont.

BLM's subsequent California Desert Conservation Act Plan (CDCA Plan) (Exhibit 5) includes four land use classifications (Classes C, L, M, and I) that direct the multiple uses accommodated on BLM land into appropriate areas. CDCA Plan at 13; DSEIS at 1-12. The Project area falls entirely within Class M, which permits energy and utility development but "is also designed to conserve desert resources and to mitigate damage to those resources which permitted uses may cause." DSEIS at 3.8-2.

As outlined in this comment letter, it is clear that sensitive values within the Project site—particularly cultural and visual resources—are significantly diminished by the proposed Project. As such, any approval of the Project as currently designed would violate both the CDCA Plan and FLPMA. *See also* CDCA Plan, Table 1 (requiring projects within Class M lands to preserve and protect archaeological resources).

Further, the BLM's cumulative effects analysis of land use impacts is misleading and the DSEIS states that because "the DRECP eliminated the [Multiple Use Class] system" and the Project is "located within a [Development Focus Area], it was already taken into consideration as part of the cumulative effects of developing up to 20,000 MW of renewable energy within the DRECP." DSEIS at 4.8-2. The BLM cannot conclude that the Project was already taken into consideration. The DRECP, as noted above, is more protective of desert resources. Therefore, this Project, with less protection for desert resources, cannot be bundled together with the development of renewable energy projects under much stricter CMAs. The DSEIS must be revised to support its cumulative impact analysis to disclose how this more impactful project will combine with other similar projects to produce cumulative impacts, particularly related to cultural resource, environmental justice, and visual resources.

### VII. The DSEIS's Analysis of Impacts to Visual Resources Is Inadequate.

C1-29

The Visual Resources section of the DSEIS does not address the cultural implications of the Project's disruption of the visual landscape. While the DSEIS considers impacts to motorists, OHV users, and campers, it fails to consider the Project's visual impact on Tribal members. DSEIS at 4.18-3. The McCoy Mountains are more than a recreational resource for the Tribes; they have longstanding cultural and spiritual significance as ancestral lands. Any large-scale visual alteration to this space disturbs the sanctity of the outdoor environment and constitutes a significant impact. Despite this special significance, the DSEIS does not mention the visual impact on CRIT members in the Visual Resources section, and the DSEIS does not indicate that CRIT was consulted for this section. The DSEIS does include a vantage point in the McCoy Mountains as a "Key Observation Point." After reviewing the simulations, it appears that from this vantage point, the visual disturbance would be the greatest compared to the other observation points. *Compare* DSEIS Figures 4.18-06A, 4.18-06B to Figures 4.18-02A – 4.18-05B and 4.18-07A – 4.18-07B. BLM must consult with the Tribe to determine the full significance of the visual landscape of the McCoy Mountains as a cultural resource, and to explore possible additional or alternative mitigation that would best minimize visual impacts as a whole.

Additionally, the DSEIS downplays the visual resources impacts by describing the long-term visual alteration area as: "classified as C-Quality scenery [lowest possible] and managed under an Interim VRM Class III designation." DSEIS at 4.18-1. The Class III designation was reached



## Comment Set C1 – Colorado River Indian Tribes (cont.)

through a systematic process that documents the landscape through three factors: scenic quality, public sensitivity, and visibility. DSEIS at 3.18-1. Each of the three factors is evaluated separately and then combined through an overlay analysis to determine the Class. DSEIS at 3.18-1. By narrowly focusing on a single factor and describing the scenery as C-Quality, the description in the DSEIS downplays the other two factors. In fact, the project area is assigned a high visual sensitivity level and the distance zone is assigned “foreground/middleground” due to the short distance to I-10 and other local roads. DSEIS at 3.18-6. The sensitivity level is the highest possible and the foreground/middleground is the closest and most disruptive distance zone. It is misleading to only refer to one factor in the Class rating system when describing the impacts on visual resources in the DSEIS. DSEIS at 3.18-2.

C1-29  
cont.

### VIII. The Biological Resources Analysis Is Inadequate under CEQA.

C1-30

The California Department of Fish and Wildlife (“CDFW”) has the authority to regulate projects that may impact species protected by the California Endangered Species Act. Under CEQA case law, the EIS should have discussed CDFW’s permitting process and any potential mitigation or project modifications that may be required by the agency.

Specifically, the EIR project description must include a list of consultation requirements and “to the fullest extent possible, the lead agency should integrate CEQA review with these related environmental review and consultation requirements.” Guidelines, § 15124(d)(1)(C); *see Banning Ranch Conservancy v. City of Newport Beach*, 2 Cal. 5th 918, 936-942 (2017). In *Banning Ranch*, the city ignored its “obligation to integrate CEQA review with the requirements of the Coastal Act” (specifically the Coastal Act’s habitat designation requirements). *Id.* at 936. The Court invalidated the City’s CEQA analysis because the “omission resulted in inadequate evaluation of project alternatives and mitigation measures. Information highly relevant to the Coastal Commission’s permitting function was suppressed. The public was deprived of a full understanding of the environmental issues raised by the Banning Ranch project proposal.” *Id.* at 942.

The DSEIS notes that the California Department of Fish and Wildlife (CDFW) “has the authority to regulate potential impacts to species that are protected under the California Endangered Species Act.” DSEIS at 5-2. And it further notes that a previous applicant filed an application for a take permit and revised technical report in January 2010. DSEIS at 5-2. However, the DSEIS fails to discuss current compliance or consultation with CDFW for this iteration of the project. As in *Banning Ranch*, where there was “ample evidence” that sensitive coastal habitat was present, here there is ample evidence of occupied habitat of the state and federally threatened desert tortoise in the western extent of the gen-tie line, and “the decision to forego discussion of these topics cannot be considered reasonable.” *See Banning Ranch*, 2 Cal. 5th at 937; DSEIS at 3.21-8. The DSEIS must discuss the consultation with CDFW and compliance with its requirements, as well as those of any other local, state, or federal agency with jurisdiction over the Project.



## Comment Set C1 – Colorado River Indian Tribes (cont.)

### **IX. The DSEIS Improperly Narrows the Analysis of Growth-Inducing Impacts from the Project.**

C1-31

A draft EIR must discuss the ways in which the proposed project could foster growth-inducing impacts. Pub. Resources Code § 21100(b)(5); CEQA Guidelines §§ 15126(d), 15126.2(d). The DSEIS limits its analysis of growth-inducing impacts to “the relationships between employment and potential local population growth and increased power generation and potential regional population growth.” DSEIS at 4.22-1. However, CEQA requires an agency to also “discuss the characteristic of some projects which may encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively.” CEQA Guidelines § 15126.2(d).

The DSEIS should consider the characteristic of this project to induce further solar development. Specifically, the construction of the gen-tie line may “encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively.” *See* CEQA Guidelines § 15126.2(d). The analysis must consider future solar projects, which are constructed due to the growth-inducing effect of this Project, and their impacts to the environment.

### **X. The Project Inadequately Protects Air Resources and Mitigation Measures Should Be Rewritten to Account for Advances in Diesel-Fueled Engine Control Technology.**

C1-32

Joshua Tree National Park (JTNP) is a Class I area (highest level of visibility protection from air pollution) seven miles from the Project site. DSEIS at 3.2-4. The DSEIS discloses that “dust generated at the project site could be visible during construction from within the park” but then concludes somewhat incongruously “the Proposed Action would not create adverse project-related visibility impacts to vistas or in night sky visibility in the JTNP Class I area.” DSEIS at 4.2-5. (The Reduced Footprint Alternative adopts the same visibility analysis. DSEIS at 4.2-5-6.) While the DSEIS reaches this conclusion through reliance on mitigation measures aimed at PM<sub>10</sub> and precursors to formation of secondary particulate matter, the mitigation measures meant to reduce particulate matter are inadequate.

Specifically, the AQ-SC-5 Diesel-Fueled Engine Control mitigation measure purports to require all construction diesel engines to meet Tier 3 California Emission Standards for Off-Road Compression-Ignition Engines. DSEIS at 4.2-10. However, the number loopholes in this measure render it nearly useless. If a Tier 3 engine is not available, a machine with a Tier 2 engine may be used or an engine with retrofit controls to reduce NO<sub>x</sub> and DPM to no more than Tier 2 levels. DSEIS at 4.2-10. Unfortunately, even this less restrictive standard need not be met if “not practical.” DSEIS at 4.2-10. Moreover, Tier 4 engines are now readily available and have superseded Tier 3 engines.<sup>6</sup> The mitigation measure must be rewritten to require Tier 4 engines and to close the loopholes currently present in the mitigation measure. This mitigation measure must be strengthened to protect air quality, visibility, and the health of the construction workers on the site.

<sup>6</sup> Tier 3 engines have been superseded by EPA’s more stringent Tier 4 Standards. *See* EPA, Control of Emissions of Air Pollution from Nonroad Diesel Emissions and Fuel, 69 Fed. Reg. 38958 (June 29, 2004) (establishing Tier 4 to reduce NO<sub>x</sub> and PM emissions by 90% and 95% respectively). Compare 40 C.F.R. Part 89 (Tier 3 and earlier standards) to 40 C.F.R. Part 1039 (Tier 4 standards).

## Comment Set C1 – Colorado River Indian Tribes (cont.)

### **XI. The Paleontological Resources Section Contains Errors and Is Missing Crucial Information about the Project Site.**

C1-33

The DSEIS describes the area encompassing the project site as “poorly understood” in terms of fossil probability. DSEIS at 3.10-5. However, construction of other solar projects has repeatedly demonstrated that significant fossils may be found where BLM has assumed the presence of few vertebrate fossils. DSEIS at 3.10-6. Especially because the project site is “entirely...undisturbed” land and these resources are “nonrenewable” and “once destroyed...can never be replaced,” more care should be taken and the entire site should be surveyed. *See* DSEIS at 3.10-1.

The DSEIS discloses that 431 acres of the Proposed Project and 373 acres of the Reduced Footprint Alternative remain to be surveyed. DSEIS at 4.10-3, -4. Mitigation measure PAL-5 delays the survey until after the SEIS is complete. DSEIS at 4.10-12. This delay undermines the functions of both CEQA and NEPA—to inform both the decisionmakers and the public as to the true environmental impacts of the Project. 40 C.F.R. § 1502.1; CEQA Guidelines § 15002(a)(1). The BLM should complete this survey before this environmental review document is certified so that decisionmakers and the public are fully informed.

Additionally, there are inconsistencies in the information about the type and depth of the excavation that will occur. In the paleontological resources section, the DSEIS discloses that disturbance would occur to a maximum of 16 feet. DSEIS at 4.10-2. It also discloses that “[f]oundation excavations will be made using mechanized equipment, with the poles requiring one hole, 6 to 12 feet in diameter. Structure foundations will be excavated to a depth of up to 16 feet using a vehicle-mounted power auger or a backhoe. In rocky areas, the foundation holes would be excavated by drilling.” DSEIS 4.10-2. However, in the cultural resources section, the DSEIS discloses that excavation will occur to a depth of 30 feet. DSEIS at 4.4-4. It also states that “[n]o excavation for foundations would be required.” DSEIS at 4.4-4. Both the disclosed depth and the statement about the excavation for foundations are directly at odds with the information contained in the paleontological resources section. This inconsistency must be addressed and remedied.

Lastly, the DSEIS states that up to ten water wells will “require excavation to a depth of approximately 10 feet.” DSEIS at 4.10-3. Does this mean that the area around the wells will be excavated 10 feet? What is the estimated depth of the wells themselves? The DSEIS must be revised to answer these questions.

### **XII. The Recreation and Special Designations Sections Contain Errors.**

C1-34

As written, the Recreation section in combination with the Special Designations section creates confusion about the location of the Palen-Ford Playa Dunes ACEC. It is described variously as 2 miles from the project site (DSEIS at 3.15-9), 1.1 miles away (DSEIS at 3.15-8), and 0.1 miles from the site (DSEIS at 3.12-5). The DSEIS must be corrected to reflect the actual distance this ACEC is from the Project site.

## Comment Set C1 – Colorado River Indian Tribes (cont.)

### Conclusion

Thank you for your consideration. Please copy the Tribes' Attorney General, Rebecca A. Loudbear, at [rloudbear@critdoj.com](mailto:rloudbear@critdoj.com), Deputy Attorney General Nancy H. Jasculca, [njasculca@critdoj.com](mailto:njasculca@critdoj.com), and Acting THPO Director Bryan Etsitty, at [betsitty@crit-nsn.gov](mailto:betsitty@crit-nsn.gov), on all correspondence to the Tribes.

Respectfully,



Dennis Patch  
Chairman, Colorado River Indian Tribes

Cc: Tribal Council of the Colorado River Indian Tribes  
Bryan Etsitty, Acting THPO Director  
Rebecca A. Loudbear, Attorney General, Colorado River Indian Tribes

Exhibits:	(1) Colorado River Indian Tribes Government-to-Government Consultation Policy	C1-35
	(2) Palen Solar Electric Generating System – Revised Presiding Members Proposed Decision (Chapter VI.C – Cultural Resources)	C1-36
	(3) DRECP Special Unit Management Plans – Colorado Desert	C1-37
	(4) Compilation of CEC Testimony and Exhibits	C1-38
	(5) California Desert Conservation Act Plan	C1-39



## Comment Set C2 – Morongo Band of Mission Indians

**From:** Ray Huaute <[RHuaute@morongo-nsn.gov](mailto:RHuaute@morongo-nsn.gov)>

**Date:** December 12, 2017 at 1:14:39 PM PST

**To:** "[dherrema@blm.gov](mailto:dherrema@blm.gov)" <[dherrema@blm.gov](mailto:dherrema@blm.gov)>

**Cc:** "[gkline@blm.gov](mailto:gkline@blm.gov)" <[gkline@blm.gov](mailto:gkline@blm.gov)>

**Subject:** Palen DEIS Comments

Hi Doug,

I have been traveling so I was not able to send this yesterday but I am submitting to you today our written comments for Palen below:

C2-1

The following are Morongo comments regarding the Palen Solar PV Project Administrative Draft Supplement EIS/EIR/LUPA:

The cultural resources consultant for the proposed project has documented that four culturally sensitive areas are within or partially within the project indirect effects APE: The Palen Dry Lake ACEC, Alligator Rock ACEC, Corn Springs ACEC and Palen-Ford Playa Dunes ACEC.

The consultant determined that these areas are eligible for listing on the National Register of Historic Places under Criteria A because they relate to broad patterns of prehistory on regional and local levels for understanding past and continuing Native American traditional culture. The consultant also has determined that these sensitive areas are eligible under Criteria D at the regional and local levels because have yielded and will continue to yield data to contribute to the understanding of the prehistory of southeastern California and the Chuckwalla Valley. These sites also meet the integrity standards required for eligibility.

The project will have visual and other impacts on these four sites that could harm their eligibility under Criteria A.

Alligator Rock ACEC, for example, is a multicomponent district that includes a high number of well-preserved rock art panels from the Late Prehistoric and Archaic Periods. The Quarry District encompasses significant workshop areas for lithic production including materials used as trade goods in the region.

In addition to the cultural values and significance of this area, there exist numerous scientific and cultural questions that the resources here could help address. The draft document, for example, states: "One stylistic motif has yet to be explained by local rock art specialists, some say they are 'ringing rocks' (rocks that produce a percussive sound) yet other researchers claim some as yet unknown function." This area has been the focus of considerable study of the

## Comment Set C2 – Morongo Band of Mission Indians (cont.)

past decades because of its association with the prehistory of region and its connections to trade and social networks, trails, resource procurement, use of water sources, and migration.

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cont.

There is no doubt that under any objective measure used in National Register eligibility analysis that Alligator Rock and the other three sensitive areas qualify under Criteria A as the consultant already determined.

One concern is that construction of past transmissions lines already has harmed these areas, such as the lithic workshop stations in the Alligator Rock area. This project's visual impacts will further do so and potentially could harm future eligibility considerations for adding or retaining such sites to the National Register. As such, the cumulative impacts on eligibility need consideration as well.

We concur that these resources qualify for the National Register under Criteria D for their data potential and the integrity of the setting of its subsurface deposits.

The final document also should clarify the archaeological survey techniques and results. Specifically, what approach did the surveyors use when encountering features and artifacts just outside the formal survey boundaries? Our understanding is that archaeological materials outside the boundaries were not noted, even in general terms, on the records when these materials would be connected to site found within the boundaries. This approach would diminish significance and eligibility as the survey would provide an incomplete picture of the true extent of the resource and impacts on it. This also is particularly important because the draft document notes that many of these areas had not been surveyed during previous archaeological surveys.

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Please let me know that you are in receipt Morongo's comments and whether they will be incorporated in your comment matrix and documented in the DEIS. If you have any questions feel free to contact our office.

Sincerley,

Ray Huaute

Morongo Tribal Historic Preservation Officer