



COLORADO RIVER INDIAN TRIBES

Colorado River Indian Reservation

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Via E-Mail and U.S. Mail

John Kalish, Field Office Manager
Bureau of Land Management - South Coast Field Office
1202 Bird Center Drive,
Palm Springs, CA, 92262-8001

Re: Comments on the proposed (Draft) GEOARCHAEOLOGICAL TRENCHING AND CONTROLLED GRADING EVALUATION PLAN, GENESIS SOLAR ENERGY PROJECT, RIVERSIDE COUNTY, CALIFORNIA

Dear Mr. Kalish:

The Colorado River Indian Tribes ("CRIT" or "Tribes") welcomes the opportunity to comment on the Geoarchaeological Trenching and Controlled Grading Evaluation Plan ("Trenching Plan") for the Genesis Solar Energy Project "GSEP" or "Project"), as proposed in the December 2011 draft, and now under consideration by your office.

The Colorado River Indian Tribes wish to express significant concerns it has with respect to treatment of cultural materials discovered at the site of the Genesis Solar Energy Project. As a concurring signatory to the GSEP Project Programmatic Agreement ("PA"), on December 6, 2011, CRIT representatives participated telephonically in a meeting with representatives of the Bureau of Land Management ("BLM" or "Bureau"), the Project applicant ("NextEra"), the California Energy Commission ("CEC"), and other Indian tribes in the region. At this meeting, the participants discussed what was described as the "unprecedented" discovery of significant cultural resources at the Project site during grading operations. (Statement of Holly L. Roberts, Associate Field Manager, BLM, South Coast Field Office, regarding nature of discoveries at GSEP, during telephonic conference, December 6, 2011). At that time, a preliminary Trenching Plan had been proffered as a treatment response to the many discoveries then taking place at the GSEP site.

After reflecting on this new information, and engaging in discussions with other area Tribes and BLM – a discussion wherein Bureau personnel also described the discoveries as unprecedented - CRIT agrees with Ms. Roberts – the discoveries at GSEP are indeed unprecedented.

The CRIT Reservation is very close to the site at Dry Ford Lake. CRIT members feel a strong kinship with the people who are represented by the "artifacts" now being churned up at the Project site. CRIT also feels a strong sense of responsibility to honor and protect those people who left the cultural items there long ago. CRIT is pleased that BLM has taken steps to protect cultural values at GSEP, but we remain

concerned that the cultural values assessment itself may be undertaken primarily by archaeologists working for the Project developers (through AECOM), the California Energy Commission (CEC), and the BLM. While we do not doubt the integrity of these entities, we believe that their interests naturally, and necessarily align with the Project’s continued development and completion. Tribal interests may lie elsewhere. Certainly, CRIT’s interest is in preserving its cultural history. However, without a clear-eyed assessment of the Genesis site, one undertaken by all concerned parties together, Tribal interests may go underrepresented. Thus, CRIT has a number of serious concerns about the Project’s impacts on cultural resources, NextEra’s compliance with their obligations under the PA, Historic Properties Treatment Plan (“HPTP”), and California Energy Commission Conditions, and BLM’s consultation with CRIT. BLM must address these issues before determining whether, and under what conditions, NextEra may be allowed to proceed with construction in the area of these, and future discoveries.

1. Initial Notifications/Consultation Failed to Adhere to Project Requirements:

The GSEP Programmatic Agreement contains a notification and consultation process intended to address treatment of discoveries of cultural materials during construction of the facility. According to representations made at the December 6 meeting, BLM was aware as early as November 14, 2011, that grading activities associated with Project development had revealed and possibly destroyed numerous cultural items associated with a prehistoric human settlement. Yet, CRIT was not notified of this unanticipated find by either NextEra, or BLM until November 29, 2011, more than two weeks later. This delay clearly violated the National Historic Preservation Act and its implementing regulations, which require BLM to notify affected Indian tribes of such discoveries within 48 hours. *See* 36 C.F.R. § 800.13(b)(3); *see also* GSEP Programmatic Agreement (PA), § VI(b) (incorporating requirements of 36 C.F.R. § 800.13(b)(3)).

Further, the California Energy Commission’s Licensing Condition CUL-9 also requires notice to affected Tribes within 48 Hours. (*See below: Historic Properties Treatment Plan, Table 8, pg 6-4.*)

Table 8. Schedule of Pre-construction, Construction, and Post-construction Tasks

Ongoing during construction	Within 48 hours of the discovery of a resource of interest to Native Americans, the project owner shall ensure that the CRS notifies all Native American groups that have expressed a desire to be notified of such finds (CUL-9)
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CRIT reasonably assumed that its signatory status on the PA adequately communicated, and established its “desire to be notified” of these discoveries.

Subsequent communication between BLM and CRIT Tribal Council and staff has improved. However, the early failure to notify CRIT in a timely manner put the Tribes in a disadvantageous position. Research and response to these issues is time-consuming for all involved. In the interim, more discoveries occurred; more cultural items were destroyed, and more spiritual harm was done. There are only two signatory Tribes on the GSEP Programmatic Agreement. This is a very short list. If, as here, only 50% of the affected signatory Tribes are notified and consulted in a timely manner upon discovery of “unprecedented” cultural resources, it raises profound concerns whether Tribes can ever reasonably be confident that their cultural resources are safe in the hands of BLM or project Developers.

2. BLM must Consider Avoidance as the Preferred Treatment Option for Recent Discoveries at GSEP.

i. BLM Response to Discovery of Artifacts.

According to meeting minutes from a November 29, 2011 conference call between BLM, CEC, AECOM and NextEra, it appears that BLM had already committed to allow Project construction to continue on the newly discovered historical site before notifying CRIT of the discovery. For example, these minutes reflect that the conference call participants—which did not include any tribal representatives—were already in the process of preparing a plan to continue grading, so that artifacts would be unearthed and collected as construction continues, rather than avoided. This pre-existing commitment failed to meet the BLM’s obligation to consult with Indian tribes before committing to such a course of action. CRIT is very concerned that such a commitment renders any future “consultation” with CRIT or any other tribe, perfunctory.

Moreover, it appeared from these minutes—as well as from the tenor of the December 6 meeting—that neither NextEra nor BLM had considered avoidance of the discovered site as a method of mitigating significant, adverse impacts to cultural resources, even though the Programmatic Agreement expressly identifies avoidance as the preferred method of mitigation. *See, e.g.*, Programmatic Agreement, App. B, § III(a)(ii) (“For cultural resources, the preferred method of mitigation is avoidance of all cultural resources to the maximum extent practicable.”); *id.*, App. J, § 2.0 (“Avoidance of all cultural resources is preferred and is the goal of BLM.”). Only if avoidance is infeasible should BLM consider allowing adverse impacts to be mitigated by “data recovery” and excavation. *See id.* Programmatic Agreement, App. B, § III(a)(iii)(1); *id.* App. J § 2.0. Avoidance is recognized as the preferred mitigation method by the California Energy Commission in its decision approving the Project. *See* CEC Decision, § VI(C), Findings of Fact #9.

The HTPT is replete with promises – some more specific than others - that avoidance will be considered as a treatment option. Examples from the May, 2011 version of the HTPT include the statement “[t]he avoidance of all cultural items and sites should be considered where feasible.” (Chapter 9.0, Mitigation Plan / Plan For Discovery Of Cultural Resources.) This same statement, though somewhat vague as to its intended application, appears several times throughout the Chapter.

The title of Chapter 9.2, “Definition Of Unanticipated Discoveries Where Avoidance Is Not Required— Prescribed Treatment” suggests that there are corresponding discoveries where avoidance *will* be required.

A more specific promise appears in Chapter 9.4.2, entitled Site Evaluation Methods, which contains the following passage;

“Site avoidance will be the preferred method of dealing with cultural resources during construction of the GSEP. However, if a newly discovered resource is potentially significant and if avoiding the resource proves infeasible (as determined through consultation between the CRS, the project owner, the CEC CPM, BLM, PTNCL and DTCCT specialist (if applicable), and SHPO), then site evaluation will proceed.

Avoidance is also CRIT’s preferred treatment alternative. The same preference was expressed by several Tribes attending the December 6, 2011 planning meeting referenced above. Though NextEra’s Project representatives asserted that avoidance of the area where recent discoveries occurred would be infeasible, and would result in there being “no project,” neither NextEra, its technical contractor, AECOM, nor BLM has provided CRIT with evidence indicating that avoidance is not feasible. Indeed,

when the Bureau analyzed a "Reduced Size Alternative" in the Draft EIS for the project, it specifically noted that "no evidence has been provided to demonstrate" that "a 250 MW size project is an optimal size," as the developer urged, and that "solar thermal facilities as small as 20 MW are currently proposed in California." DEIS at 2-33.

ii. Halting Construction Activities in Vicinity.

On approximately December 12, 2011, BLM notified CRIT that it had ordered NextEra to stop all construction activities on the Project site in the vicinity of the newly discovered cultural resources. BLM also indicated that it would continue to enforce this stop-work order until formal consultation had occurred. CRIT applauds these actions. However, a short-term work stoppage is only the beginning of the process. Subsequently, BLM engaged in consultation with CRIT Tribal Council, and indicated that consultation will continue, as the treatment alternatives and decisions are considered. CRIT likewise appreciates BLM's stated commitment to these goals.

iii. Review by Independent Expert.

CRIT believes that, for consultation to be meaningful, BLM and NextEra must allow CRIT to bring an expert to the site to investigate and analyze its significance. BLM must not allow NextEra to undertake any construction activities that could further disturb or degrade the site until CRIT's expert has had an opportunity to investigate the site. Please provide CRIT with a schedule of dates available for such a site visit, recognizing that CRIT's expert may need more than one day to conduct his/her research.

iv. The draft Trenching Plan Should be Revised, or Augmented to Include a Detailed Discussion of Avoidance Feasibility.

At the Dec. 6, 2011 meeting, and again during the January 12, 2012 meeting between the Bureau and its Tribal Council, CRIT made it clear to NextEra and to BLM that their first choice for treatment of the newly discovered cultural materials was through avoidance. Even though the proposed Trenching Plan states that it was "prepared . . . in consultation with . . . Native American tribal representatives," Plan at 1, the Plan fails to address what CRIT and other Tribes clearly and unanimously expressed was their preferred treatment option. Given that the PA, the HPTP, and the CEC conditions all state avoidance is the preferred method of handling unanticipated discoveries like those at the site, the Bureau must at the very least analyze the feasibility of avoiding these "unprecedented" finds.

v. Area of Critical Environmental Concern: "Land Swapping" Is Not a Viable Option

During the January 12, 2012 meeting between the Bureau and CRIT Tribal Council, the Bureau suggested that the Trenching Plan might yield information that could support a subsequent designation of lands around the GSEP site as an Area of Critical Environmental Concern ("ACEC"). Thus, while the Trenching and Grading would disturb the GSEP site, it may result in the future protection of neighboring BLM lands.

In response, CRIT Tribal Council members described the disturbance of cultural resources at the Genesis Solar Energy Project site as physically painful to them. One Tribal Council member, immediately grasping the implications of the Bureau's hypothesis, stated flatly, "We don't want to see lands swapped – the items being discovered there are too sacred to disturb."

Thus, the Colorado River Indian Tribes cannot, in good conscience, support trading the destruction of one cultural site for the possible protection of others. In addition, CRIT will be consulting with its own cultural resources expert/archaeologist about how, from a technical perspective, the Bureau can protect the resources at the site from disturbance while providing the information needed to support of a ACEC designation.

3. NAGPRA Does Not Require Excavation or Curation of Human Remains and Funerary Objects.

The discoveries at GSEP include a pair of nested metates lying upon a bed of charcoal. This is universally presumed to be a cremation site by members of the Colorado River Indian Tribes. They need not be shown a charred bone fragment, nor DNA analysis of ash samples to reach that conclusion. Avoidance of the site is CRIT's preferred treatment.

CRIT notes that nothing in the HPTP, or the Native American Graves Protection and Repatriation Act *requires* that the site be further disturbed by excavation, data-recovery or curation. No one at CRIT needs to know anything more than they already do to make this determination. Excavation, and curation are the last alternative that should be considered for protection of the gravesite elements – not the first.

Even if this *is* merely a chance grouping of elements, a coincidence of time, weather, and geologic processes, placing the two stone metates in a nested position atop the remnants of a domestic cooking or heating fire, there is still no compelling reason of which CRIT is aware, to unearth the site. Unless additional information establishing some compelling need to further disturb this site is provided, CRIT's treatment preference continues to be avoidance.

4. Supplemental EIS is Required.

At a minimum, given the extraordinary nature of the archaeological find at the Project site, BLM must prepare a Supplemental EIS for the Project, per 40 C.F.R. § 1502.9(c)(1)(ii), to address the "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. As previously noted in communications with BLM, CRIT disagrees with the statement, contained in the minutes from the November 29 conference call, that: "George Kline indicated he talked to the tribes and they are ok with him keeping them informed regarding the plan and *no separate review would be required.*" Given that BLM did not contact CRIT until after this conference call—a fact acknowledged later in the same minutes—this statement is obviously inaccurate, at least as regards CRIT.

The HPTP itself supports such a review. Section 10.2 of the HPTP, entitled *Prehistoric Sites Associated With The PTNCL*, identifies Early Holocene discoveries at known sites in the same area as "exceedingly rare . . . making these discoveries quite significant." Section 10.2 goes on to state that the previous discoveries were made at CA-RIV-9047, CA-RIV-9072, and CA-RIV-9212., and that, like the current location of discoveries at GSEP, "[t]hese sites are all located along the north shoreline of Ford Dry Lake in sites that contain no ceramics or other diagnostic artifacts dating to periods later than the Archaic. This could possibly indicate a site complex . . ." With such clear indication of the potential significance of these discoveries, the Tribes must demand that BLM consider avoidance of the area as its preferred treatment alternative. The Trenching Plan fails to address the avoidance option.

CRIT firmly believes that a Supplemental EIS, and not a Trenching Plan, is warranted here. The Trenching Plan assumes further disturbance is inevitable. CRIT does not support this assumption.

5. NextEra's Compliance with ROW Lease and CEC Conditions of Certification. Pursuant to its Right-of-Way Lease/Grant, NextEra was required to "immediately report[] to the Authorized Officer [at BLM]" "[a]ny cultural and/or paleontological resource (historic or prehistoric site or object) discovered by [NextEra], or any person working on its behalf." Right-of-Way Lease/Grant Serial Number CACA-048880, Exh. B, ¶ 4. NextEra was also required to "suspend all operations in the immediate area of such discovery until written authorization to proceed is issued by the Authorized Officer." *Id.* CRIT is unaware whether NextEra complied with this condition, and whether BLM issued written authorization for NextEra to continue grading the site after such cultural resources were discovered. Please also provide us with any documentation related to NextEra's compliance with this provision (or lack thereof).

The Conditions of Certification imposed by the California Energy Commission also provide that, upon discovery of a cultural resource more than 50 years old, "ground disturbance shall be halted or redirected in the immediate vicinity of the discovery sufficient to ensure that the resource is protected from further impacts." CEC, Genesis Solar Energy Project, Commission Decision (September 2010) ("CEC Decision"), CUL-9. Ground disturbing activities cannot resume in the area unless and until a recommendation has been made on CRHR eligibility, all interested Tribes have been notified, and other steps have been taken—including the development of mitigation. Please advise us whether NextEra is in full compliance with this condition, and whether a CRHR eligibility determination has been made.

6. Security Measures

With the already large number of discovered cultural items increasing daily, CRIT is concerned that security measures to protect and preserve these irreplaceable items may be inadequate. The Tribes therefore request that NextEra be required to provide to each interested Tribe, a brief, but complete, confidential description of the cultural items located to date, whether these items have been removed from the site, where any removed items are presently located, and how those items, and the worksite are being secured.

7. Observations Regarding "Fast-Tracking" of Project Applications

The Tribe recognizes that modern public policy favors the development of renewable energy resources, deeming such development a benefit to society as a whole. Consequently, pursuant to federal policy, numerous project proposals have been, or are currently being "fast-tracked" through the regulatory approval process, toward ultimate development.

The fast-tracking approach has resulted in short reviews, poor consultation practice, and needless conflict, causing all concerned undue hardship, and failing to adequately protect invaluable, irreplaceable resources of many varieties. With so many project proposals to monitor, and the flood of new project applications overwhelming the staff of BLM Field Offices all over the region, CRIT feels it must be proactive in the protection and oversight of cultural resources in the area.

In principle, CRIT, like many Tribes, favors renewable energy development.¹ However, the problems sought to be remedied by large-scale renewable energy projects largely are an outgrowth of human activities in concentrated urban-industrial population centers coupled with our current dependence on fossil fuels. Historically, isolated and often remote Tribal communities contribute only minimally to these problems. CRIT appreciates the potential value of a streamlined project approval process – increased economic efficiency for both federal agencies and developers, increased energy resources, reduced greenhouse gas emissions, enhanced energy independence – yet, the recent flood of GSEP discoveries makes a strong counterargument for amending the process to better protect cultural resources that are “non-renewable and irreplaceable, a part of our national heritage.”² The Tribe believes that needless disturbance of significant cultural resources has occurred at the Genesis site, and that these unfortunate outcomes are likely to occur again and again if the “fast-track” protocols remain in effect. CRIT’s concerns are aptly characterized in testimony given by Dr. Elizabeth Bagwell, CEC’s staff Project Archaeologist, at the Evidentiary Hearing Before The California Energy Resources Conservation And Development Commission, during the Application for Certification Proceedings. Dr. Bagwell stated as follows:

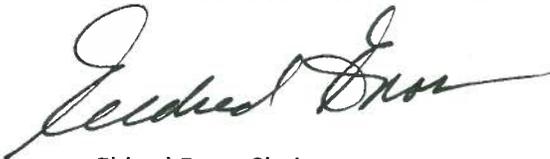
[C]ultural resources are a non-renewable resource. Unlike biology, where you can repair the environment to a certain degree and encourage plants and animals to return. Once you've destroyed cultural resources, they're gone forever.

Bagwell, Elizabeth, Ph.D. Transcript, CEC, Pg. 147

CRIT shares Dr. Bagwell’s concerns. The potential for adverse impacts to this “non-renewable resource” is clear, and “[o]nce you’ve destroyed cultural resources, they’re gone forever.”

Thank you for this opportunity to comment on the proposed Trenching Plan. CRIT remains ready to discuss these issues with the Bureau, NextEra and other affected parties so that we may reach agreement on an acceptable and respectful way to handle this new discovery.

Very truly yours,
COLORADO RIVER INDIAN TRIBES



Eldred Enas, Chairman

cc: Tribal Council
Ken Salazar, Secretary of the Interior
Larry Echo Hawk, Assistant Secretary of Indian Affairs, DOI

¹ Letter from Mike Jackson, Sr., President, Quechan Indian Tribe, to John Kalish, Field Manager, BLM Palm Springs Field Office. (February 16, 2010) (Retrieved from: http://www.energy.ca.gov/sitingcases/genesis_solar/documents/others/2010-02-16_Section_106_Consultation_Process_Letter_TN-55835.pdf. (January 20, 2012)

² Electronic Mail from Greg Glassco, Yavapai-Prescott Indian Tribes, Cultural Resources Manager to Douglas F. Bonamici. Law Clerk, Colorado River Indian Tribes (January 19, 2012, 4:02 pm MST) (on file with author).

cc: Tribal Council
Ken Salazar, Secretary of the Interior
Larry Echo Hawk, Assistant Secretary of Indian Affairs, DOI
Bob Abbey, Director, Bureau of Land Management
James G. Kenna, California State Director, BLM
Teri Raml, District Manager- California Desert District, BLM
Janice Staudte, Superintendent, Colorado River Agency, BIA
George Klein, Archaeologist, South Coast Field Office, BLM
Eric N. Shepard, Attorney General
Lisa Swick, Acting Museum Director
Ron Escobar, Tribal Secretary/ Treasurer, Chemehuevi Tribe
Linda Otero, Tribal Council, Fort Mojave Indian Tribe
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