COLORADO RIVER INDIAN TRIBES

Colorado River Indian Reservation

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Via E-Mail and U.S. Mail

Mr. David Harlow
California Energy Commission
Dockets Office, MS-4
Docket No. 09-RENEW EO-01
1516 Ninth Street
Sacramento, CA 95814-5512
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Re: Comments of the Colorado River Indian Tribes on the DRECP Interim Document (Docket No. 09-RENEW EO-01).

Dear Mr. Harlow:

The Colorado River Indian Tribes ("CRIT" or "Tribes") submit the following comments on the Desert Renewable Energy Conservation Plan ("DRECP") Description and Comparative Evaluation of Draft DRECP Alternatives ("Interim Document").[1] According to the Interim Document Fact Sheet, the DRECP is intended to identify between 200,000 and 350,000 acres of the California desert where solar, wind, and geothermal projects would have the "least environmental impacts." While CRIT appreciates the effort to minimize the harms caused by renewable energy projects, CRIT continues to have significant concerns about the DRECP, the process used to develop the DRECP, and its impacts on cultural resources in the ancestral homeland of CRIT's members.

I. By Failing to Adequately Analyze Potential Cultural Resource Impacts, the DRECP Fails to Identify Areas with the "Least Environmental Impacts."

The Interim Document states that "the DRECP will identify the places in the desert where solar, wind, and geothermal projects would have the least environmental impacts." Interim Document Fact Sheet at 1. However, much like the Six State Solar Energy Program Programmatic Environmental Impact Statement ("PEIS"), the DRECP predominantly fails to take into account

[1] While comments on the Interim Document were originally due on January 23, 2013, the Tribes requested, and were granted, an extension of the comment period until January 30, 2013, by Mark Purdy, Tribal Liaison for the Bureau of Land Management California Desert District.

potential impacts to cultural resources, and thus cannot meet this goal. Instead, at least some alternatives advanced in the Interim Document would funnel renewable energy projects directly into areas with known cultural resource values. CRIT is disappointed that BLM and the other Renewable Energy Action Team ("REAT") agencies continue to perpetuate the fiction that the PEIS and DRECP planning processes have taken cultural resource concerns into account.

This lack of information and attention is apparent throughout the Interim Document. In identifying the three principles that guide the identification of compatible land, no concern is given to cultural resource values. Instead, renewable energy projects are sited to cause the "least disturbance to *biologically valuable* areas." Interim Document at 1.2-21 (emphasis added). These guiding principles illustrate what CRIT and other tribes have suspected for over a year—the DRECP process was conceived as, and continues to be, exclusively a mechanism for addressing biological resource issues.[2] However, because the DRECP would encourage the development of significantly more federal and private land within the ancestral homeland of CRIT members and other tribes, the Interim Documents only further demonstrate that BLM and the other agencies involved have, again, failed to take seriously concerns raised by the affected tribes.

A. The REAT Agencies Have Failed to Engage CRIT in Consultation, As Required under the National Historic Preservation Act.

The Interim Document acknowledges that meaningful consultation is required for the DRECP to fulfill its stated goal of siting renewable energy facilities where they will have the least environmental impacts. *E.g.*, Interim Document at 2.2-7 ("The need for close and ongoing tribal consultation is a key component of DRECP implementation. The DRECP implementation structure must reflect that."). Efforts thus far have failed to create a plan that adequately protects significant cultural resources, have failed to create a process that is respectful of tribal sovereignty, and have failed to meet the requirements of state and federal law.

CRIT participated in the Tribal-Federal Leadership Conference meetings that were hosted by BLM over the course of 2011 and 2012. Initially, CRIT was optimistic about the process. BLM officials promised financial and technical assistance, protections for culturally sensitive information, enhanced coordination and cooperation, adequate time to develop tribal positions, and most importantly, improved protections of cultural resources. However, in the months that followed, BLM pulled back each of these commitments, instead reverting to a policy of indifference and exclusion. In turn, CRIT and other tribes have been less willing to engage in the DRECP process, resulting in an Interim Document that is fundamentally flawed. BLM and the other REAT agencies have the responsibility to build back that initial trust and create an inclusive and respectful process prior to moving forward with the DRECP.

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[2] This exclusive focus is also seen in the section on conservation elements. *See* Interim Document at 1.2-3 to -19. Given the DRECP's very real potential to impact cultural resources, the REAT agencies should work with affected tribes to broaden this section to include the conservation and protection of cultural resources and culturally important landscapes.

It is clear from the Interim Document that BLM has failed to uphold its legal obligations under the National Historic Preservation Act ("NHPA"). As outlined in the Interim Document, the Tribal-Federal Leadership Conference meetings referenced above "were held under the authority of the Federal Land Policy and Management Act." Interim Document at 3.8-1. Because these meetings were intended only to convey information from BLM to multiple tribes, they were not government-to-government consultation under the NHPA. *Id.* ("The meetings . . . have not been conducted as consultation under Section 106 . . . . [Such] consultations . . . will occur at a later date.").

This deferral of consultation to some point in the future violates the NHPA and mars the DRECP process. The NHPA mandates that the responsible agency "shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process . . . ." 36 C.F.R. § 800.1(c); *see also id.* § 800.2(c)(2)(ii)(A) ("Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties."). The REAT agencies have already identified the range of alternatives to be considered in the DRECP review, yet the Interim Document admits that NHPA consultation has not yet begun. The NHPA requirements are not diminished because the DRECP is a programmatic level document; if anything, the scope of the document should necessitate more, not less, time for consultation. BLM, as the responsible federal agency, must move quickly to remedy this error and reengage all affected tribes on a government-to-government basis.

B. While Little Is Disclosed About Cultural Resources in the DRECP Area, the Plan Purports to Identify Those Areas Best Suited For Development and Then Defers All Analysis Into the Future.

As revealed in the PEIS, cultural resource surveys are largely incomplete in the California desert and no specific interviews or ethnographic studies have been undertaken. *E.g.*, Solar FPEIS, Vol. 7 at 159 (noting an average cultural resource survey coverage level for all solar energy zones of less than 10 percent). The Interim Document paints a rosier picture, however, claiming that "[w]ithin the Plan Area, there have been numerous surveys and/or investigations." Interim Document at 4.3-1. This statement ignores the truth on the ground: the DRECP Plan Area is very large, and while a number of surveys have been completed, the presence of cultural resources is largely unknown to the decisionmaking agencies. Without additional information to fill the gaps in information left by existing surveys, it is impossible to tell whether the comparative cultural resource analysis completed in Section 4.3 is accurate. As the analysis relies entirely on the presence of known artifacts, the asserted "low" impacts from certain DRECP alternatives may simply be the result of incomplete surveys in the area.

Moreover, while the Interim Document initially contains a broad definition of cultural resources (*see* Interim Document at 3.3-1 ("Cultural resources include the entire spectrum of objects and places, from artifacts to cultural landscapes, without regard to [register] eligibility . . . .")), it appears the comparative analysis includes only artifacts and tangible resources. There is no discussion of cultural landscapes, viewsheds or traditional cultural properties. Without additional information in the dataset, both with respect to additional geographic areas and additional

resources, the Interim Document's conclusions with respect to the impacts of each alternative on cultural resources remain fatally flawed.

Nor does it appear that the REAT agencies intend to remedy the current lack of information prior to designating land as development focus areas. The Interim Document notes that "the data set used in the analysis is currently incomplete because the DFAs have not been completely surveyed." Interim Document at 4.3-6. However, additional cultural resources will only be identified "when more of the Plan area is surveyed on a project-by-project basis." *Id.* at 3.3-39. Ethnographic studies are also not planned until individual projects are proposed. Appendix E.[3]

By the time the development focus areas are identified, however, additional information regarding cultural resources will only serve to document their destruction. Project applicants acting in development focus areas receive significant incentives related to project expediting. Interim Document at 2.2-18 to -22. If relevant cultural resource information is not gathered until after the development focus areas are identified and specific projects are proposed, individual projects will have developed significant, irreversible momentum. CRIT has repeatedly witnessed this practical effect with respect to the numerous fast-track projects approved in the vicinity of the Colorado River Indian Reservation. The DRECP process was developed to identify significant resource values *before* renewable energy projects were proposed or developed to prevent controversy and streamline the process. By deferring virtually all analysis until after the individual projects are proposed, the DRECP is all but ensuring that cultural resources will be impacted and controversy will ensue.

C. The Interim Document Improperly Concludes that the NHPA Will Automatically Reduce All Potential Impacts to Cultural Resources.

The Interim Document concludes that "for all potential impacts, the application of mitigation measures developed in consultation under Section 106 of the NHPA would avoid, reduce, or mitigate the potential for adverse impacts on significant cultural resources." 4.3-28. This statement, unfortunately, overstates the ability of the NHPA to adequately protect all cultural resources.

As a preliminary matter, the NHPA offers only procedural guarantees. *Pres. Coal., Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982) ("[T]he NHPA . . . create[s] obligations that are chiefly procedural in nature . . . ."). The statute contains no mandatory substantive protections for cultural resources; should the federal agency conclude that cultural resources cannot be protected, they are authorized under federal law to proceed with the project.

Moreover, the NHPA only protects resources eligible for listing on the National Register of Historic Places. 36 C.F.R. § 800.4(c)(1). However, as the Interim Document acknowledges, cultural resources are much more broadly defined for the purposes of the National Environmental Policy Act ("NEPA") and the California Environmental Quality Act ("CEQA"). The NHPA provides no protections, not even procedural ones, for this broader set of resources.

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[3] No page numbers are provided in the relevant section of Appendix E.

The DRECP could take steps to ensure that projects slated for the development focus areas will have a lessened impact on cultural resources by developing protective conservation and management measures that would apply to all future projects. However, the current measures are too permissive or vague to provide such assurances. For instance, the Interim Document states that mitigation and monitoring plans "could be implemented." Interim Document at 4.3-31. CRIT knows from experience at the Genesis Solar Energy Project that such Mitigation and Monitoring Plans are only as protective as they are enforceable, specific and mandatory. The REAT agencies should work with affected tribes to develop standards that must be included in every mitigation and monitoring plan for projects within the DRECP.

Similarly, the Interim Document states that data recovery plans would be developed for National Register-eligible cultural resources impacted by the project. Interim Document at 4.3-31. CRIT strongly objects to the use of data recovery as "mitigation" for impacts to archaeological resources associated with the ancestors of its members. Disturbing such artifacts, even in the name of "scientific value and analysis" (*id.*), is taboo to CRIT's Mohave members and causes them significant emotional, spiritual, and cultural harms. In recent discussions with the BLM, many other Tribes, such as the Quechan, the Fort Mojave, the Soboba, the Chemehuevi, the Cocopah and the Hualapai Indian Tribes have each expressed the same concern – that avoidance of impacts to cultural resources is far and away the preferred approach. The DRECP should contain mandatory standards regarding the use of data recovery, such that it is limited only to situations in which avoidance is truly infeasible. As noted by the Interim Document, "[c]ultral resources are non-renewable and, once damaged or destroyed, are not recoverable." Interim Document at 4.3-4. The DRECP must be revised to account for this reality.

II. The Interim Documents' Alternatives Analysis Fails to Comply with Applicable Law.

A. BLM's Statement of Purpose and Need Is Overly Narrow.

The Interim Document presents a statement of purpose and need for BLM that relies on legal artifices to justify the vast development of the California desert. In particular, BLM relies on the Energy Policy Act of 2005 and Secretarial Order 3285A1 to claim that the DRECP must facilitate the production, development, and delivery of significant quantities of renewable energy. However, the Interim Document neglects to mention that the goal set forth in the Energy Policy Act of 2005—10,000 MW of non-hydropower renewable energy—was met by BLM on October 9, 2012, over three years early. *See* "Salazar Authorizes Landmark Wyoming Wind Project Site, Reaches Presidential Goal of Authorizing 10,000 Megawatts of Renewable Energy" (http://www.blm.gov/wo/st/en/info/newsroom/2012/october/N R 10 09 2012.html). Facilitating additional development under the DRECP is not needed to meet this goal.

In addition, the Interim Document states that the DRECP is intended to respond to "increasing demand for renewable energy development." However, under NEPA, an agency's purpose and need must address *public* considerations, rather than simply responding to private concerns. *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2010). Thus, it is improper for BLM to base its purpose and need on the interests of the private utility industry. Even if the public at large may be said to favor renewable energy as a general matter, that favorable

opinion does not necessarily equate to a "demand" for utility-scale developments of the sort envisioned under the DRECP. There are many other alternatives for energy production today.

B. The Interim Document Artificially Narrows the Range of Alternatives.

All alternatives identified in the Interim Document are intended to produce exactly 20,323 MW of renewable energy. Interim Document at ES-8. The only variation between these alternatives therefore is the geographic distribution of the development focus areas and the relative proportion of wind and solar facilities. This narrow conception of alternatives is not permitted under applicable law.

Under the California Environmental Quality Act, a lead agency is required to provide an alternatives analysis that contains "enough of a variation to allow informed decisionmaking." *Mann v. Community Redevelopment Agency* (1991) 2333 Cal.App.3d 1143, 1151. When the environmental impacts of the project are primarily due to the size of the project itself, as in this case, CEQA requires that the alternatives analysis include "a reduced growth alternative that would meet most of the objectives of the project but would avoid or lessen [] significant environmental impacts." *Watsonville Pilots Ass'n v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1089-90 (General Plan EIR invalid where it failed to include a reduced growth alternative). The Interim Document provides no information indicating why an alternative that would result in somewhat reduced generation capacity would fail to meet at least most of the project objectives.

Courts have reached similar results in applying the National Environmental Policy Act. In *State of California v. Block*, the Ninth Circuit struck down an EIS regarding a forest service decision to allocate roadless national forest system land among three management categories. 690 F.2d 753 (9th Cir. 1982). Though the EIS contained eleven different alternatives, the court found the range impermissibly narrow because each alternative resulted only in minimal shifts in acreage between the non-wilderness, further planning, and wilderness categories. *Id.* at 767. Similarly here, each of the proposed alternatives results in only minimal shifts between geographic areas and renewable technology, while the allocation of land to utility-scale renewable remains largely consistent.

A broader scope of alternatives is especially appropriate given the numerous assumptions built into the REAT agency's projections of demand for renewable energy. That analysis repeatedly acknowledges the "substantial" "uncertainty inherent in long-term projections." Interim Document at L-1 to L-4. By locking into a set projection of future need for utility-scale renewable energy, the Interim Document all but assures the vast destruction of the California desert. By expanding the alternatives analysis to include a reduced-demand alternative, the analysis will shed light on precise sacrifices that will be required to accommodate this amount of demand with utility-scale renewables. Perhaps with such information, both the decisionmakers and the public will be more willing to find alternate mechanisms for meeting future energy needs.

C. The Interim Document Improperly Excludes Alternatives With Significantly Reduced Impacts to Cultural and Other Resources.

Finally, the alternatives analysis also errs by eliminating a number of alternatives that have the potential to significantly reduce impacts to cultural and other resources. CRIT and others have strongly advocated that the nation's need to reduce reliance on fossil fuels and the production of greenhouse gas emissions should be met first by energy efficiency programs and renewable energy development in urban areas (e.g., distributed generation) and on previously disturbed lands. Efforts to reduce the nation's greenhouse gas emissions and to develop domestic sources of energy should not come at the expense of cultural resources and sacred sites, especially when other, less destructive options have not been exhausted. The approach outlined in the Interim Document is short-sighted and unjust.

Moreover, the Interim Document fails to support its conclusion that these alternatives (distributed generation, energy efficiency, and disturbed lands), particularly when taken together, would not meet the public purposes identified by the REAT agencies or would be infeasible. For example, the Interim Document claims that "[d]istributed generation alone would not supply enough electricity to meet the state's mandated RPS goals." Interim Document at 2.10-19. The support for this conclusion, however, assumes that current constraints could not be overcome. *E.g.*, 2.10-18 to -19 (noting constraints such as "an interconnection process historically designed for large, central power plants" and "a patchwork of local permitting requirements"). Yet the purpose of the DRECP is to ease existing constraints on renewable energy development. No reason is given for why this effort could not be directed to an alternate, less destructive form of renewable energy.

In addition, the alternatives analysis improperly segments distributed generation, energy efficiency and disturbed lands, so that the REAT agencies can discard each individually as providing insufficient supply/reduction in demand. *See* Interim Document at 2.10-4. In order to consider a full range of alternatives, including one that has the potential to significantly reduce the potential impacts of the DRECP, the DEIS/EIR must include an alternative that combines these three options to meet the demand forecast under the Interim Document.

III. Comments on Specific Alternatives and Analyses

In addition to the overarching concerns outlined above, CRIT also has the following specific comments:

- As outlined in its comment and protest letters on the PEIS, CRIT strongly believes that BLM inappropriately selected the Riverside East Solar Energy Zone given the area's known cultural resources. For that reason, CRIT appreciates that certain alternatives contained in the Interim Document remove portions of the Riverside East SEZ from future development (including Alternatives 1, 3 and 4). However, these areas are protected for their high or moderate biological value, rather than the presence of cultural resources. While the overlap in resources is certainly fortunate, the DRECP should be revised to exclude culturally sensitive areas from future development as well.

- The Executive Summary states that "[a]ll six action alternatives change the Solar PEIS exclusion lands to DFAs in varying degrees depending on the alternatives." Interim Document at ES-7. These re-designations should be better explained and documented. The Solar PEIS identified exclusion lands based on specific resource concerns. *See* Solar FPEIS at ES-7 ("The identification of exclusion areas allows the BLM to support the highest and best use of public lands by avoiding potential resource conflicts and reserving for other uses public lands that are not well suited for utility-scale solar energy development."). Without additional information, it is difficult to understand why land that was considered "not well suited" for development in October 2012 is now considered particularly well suited. CRIT specifically objects to the re-designation of any lands that were excluded for cultural resources concerns.

- The Interim Document's Tribal Interests section consists solely of an evaluation the impacts of the proposed alternatives on areas identified in the Native American Element of the 1980 California Desert Conservation Area Plan. Interim Document at 4.8-1 to -14. While CRIT appreciates the incorporation of this map into the DRECP planning process, this section remains woefully inadequate. As a preliminary measure, the analysis should also include the 1980 Cultural Resource Element map, which includes such crucial areas as the Ford Dry Lake. However, in order to provide even an adequate level of analysis, the REAT agencies must re-engage with affected tribes to first understand the significance of this area and its myriad resources. Only with this background can the agencies complete an adequate analysis of the impacts of the various alternatives on tribal interests.

- CRIT is particularly concerned about the DRECP's proposed designation of development focus areas in the Riverside East Solar Energy Zone and the area surrounding Blythe, California. The Riverside East SEZ contains portions of the sacred Salt Song trails (still in use by CRIT's Chemehuevi members), ancient lakes and streambeds where significant buried cultural artifacts are likely to be found, and viewsheds from numerous sacred places. Some of these concerns are illustrated by the 1980 Cultural Resources Element maps, which significantly overlaps with the Riverside East SEZ. This SEZ is largely undeveloped, and focusing utility-scale renewable energy to this area will result in significant cultural and spiritual harm to both CRIT and its members. Moreover, though the area surrounding Blythe is largely in productive agriculture, transforming this landscape into utility-scale renewable energy projects may also result in similar harms. Certain renewable technology—especially concentrated solar power or "power towers"—has the potential for severe visual resource impacts, particularly from the Colorado River Indian Reservation. In addition, any technology requiring ground-disturbing activities that are more extensive than typical farming practices have the potential to impact buried cultural resources. For these reasons, CRIT urges the REAT agencies to formulate an alternative that significantly reduces the development focus areas in the vicinity of the Colorado River Indian Reservation and that limits the use of certain technologies with greater cultural resources impacts.

- While the section on Alternative 1 contains a description of the reasoning behind its inclusion (Interim Document at 2.3-1 to -3), the Interim Document fails to provide sufficient information regarding the remaining alternatives. *E.g.*, *id.* at 2.4-1 (purporting to describe Alternative 2). The Interim Document should be revised to include this information.

- In Alternative 1, lands within the boundaries of properties listed in the California Register of Historic Properties should also be eliminated as variance lands. Interim Document at 2.3-2.

- According to Appendix I, pending applications on BLM land likely will be permitted to move forward, including the projects at Blythe, Palen, McCoy, Rio Mesa, and Desert Harvest. It appears from the Alternatives maps that these projects may overlap with some areas proposed for conservation. *E.g.*, Figure 2.3-1. These Alternatives should be revised to clarify that pending applications will be permitted to move forward, and therefore these areas will not be available for conservation. The current analysis allows the REAT agencies to take credit for conservation that will not be available.

- The cultural resource analysis assumes that only a proportion of cultural resource sites located in the development focus areas will actually be impacted by the development footprint. Interim Document at 4.3-9. The Interim Document must be revised to clarify whether the locations of these development footprints have been identified or whether the analysis simply assumes a direct proportion based on acreage.

- The cultural resource analysis breaks down site impacts by ecoregions. Interim Document at 4.3-9. However, the locations of these ecoregions are not easily identified in the Executive Summary, Introduction, or Description of Alternatives Sections. Instead, identifying maps appear only in the biological resources section, though the terms are used throughout the document. Please revise to make the document more accessible.

- The Interim Document notes that "[f]or projects on non-federal land, CEQA review would be conducted on individual projects." Interim Document at 4.3-32. The document must be revised to take into account CEQA's specific requirements for impacts to archaeological resources. Under CEQA, a lead agency must give strong preference for preservation in place. Under section 15126.4(b)(3), "[p]reservation in place is the preferred manner of mitigating impacts to archaeological sites." In *Madera Oversight Coalition, Inc. v. County of Madera*, the California Court of Appeal held that this section requires a lead agency to evaluate whether preservation in place is a feasible mitigation option. (2011) 199 Cal.App.4th 48, 86-87. A lead agency must evaluate the four specific preservation in place options listed in the CEQA Guidelines, as well as any other feasible preservation in place measures. *Id. Madera Oversight* also dictates that a lead agency *must* adopt feasible means of preservation in place "unless [a] lead agency determines that another form of mitigation . . . provides superior mitigation of the impacts." *Id.* at 87.

Sincerely,

Chairman Wayne Patch, Sr.
Colorado River Indian Tribes

cc: CRIT Tribal Council
CRIT Museum

In responding, please copy Sara Clark, Shute, Mihaly & Weinberger, LLP 396 Hayes Street, San Francisco, CA 94103; clark@smwlaw.com; 415-552-7272.