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1516 Ninth Street, MS-15
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Re: Quechan Indian Tribe Comments on Staff Assessment/Draft Environmental Impact Statement and Draft California Desert Conservation Area Plan Amendment for Imperial Valley Solar Project (SES Solar Two)

Dear Mr. Stobaugh and Mr. Meyer:

On behalf of the Quechan Indian Tribe, we submit these comments on the Staff Assessment/Draft Environmental Impact Statement (herein, "DEIS") and the Draft California Desert Conservation Area Plan Amendment for the Imperial Valley Solar Project (formerly known as Solar Two). At this time, given the significant presence of hundreds of cultural resources on the lands at issue, the inadequate efforts to identify cultural resources, and the improper deferral of evaluation of cultural resources until after the record of decision, the Tribe supports No Action Alternative #1 (deny ROW application and not amend the CDCA Land Use Plan of 1980). The preferred alternative for development, and proposed plan amendment, would severely and permanently impact an undisturbed sensitive area for cultural resources, in exchange for an energy development with an anticipated 40-year life span. BLM and the CEC should not approve the permanent destruction of pre-historic and historic resources in exchange for development of a short-term energy source. Alternative locations that have been subject to prior disturbance and that lack the cultural significance of this area should be evaluated further.

I. Interest of the Quechan Indian Tribe

The Quechan Tribe's Fort Yuma Reservation at its current site was established in 1884 as a permanent homeland for the Quechan people. The Quechan people and their ancestors have inhabited the area surrounding the confluence of the Colorado and Gila Rivers for centuries. The Quechan Tribe's traditional lands extend well beyond the boundaries of the present day Fort

Yuma Indian Reservation. Traditionally, Quechan settlements, or rancherias, were scattered north and south along the Colorado River from the confluence area, and eastward along the Gila. Traditional lands to the west of the present day reservation were also utilized by the Quechan people. According to Quechan tradition, the northern territory extended to the vicinity of Blythe, California, the southern territory reached to Sonora, Mexico, the western territory extended to California's Cahuilla Mountains, and the eastern territory approached Gila Bend, Arizona. The lower Colorado River tribes, which include the Quechan, shifted up and down the Colorado and Gila rivers, utilizing the banks and floodplain on both sides of the rivers for subsistence and settlements at different historical periods. (Alfonzo Ortiz, *Handbook of North American Indians*, Volume 10, Southwest (Quechan)) (Smithsonian Institution, Washington D.C. 1982). The traditional use of the area near the proposed project by Native Americans, including the ancestors of the Quechan, is discussed and confirmed in the DEIS' discussion of the cultural and ethnographic history of the project area. DEIS, Cultural Resources, C.2-40 – C.2-45.

The Quechan cultural landscape consists of a myriad of natural and cultural features. Natural features include the Colorado desert and river, mountains, hills, rock outcrops, flora, and fauna. Cultural features include mythology locales, sacred places, settlement and battle site locations, trails, and other resource use areas, along with prehistoric and historic archaeological sites. The latter include rock art (geoglyphs, petroglyphs, and intaglios), trails (stamped paths), trail markers, rock alignments, rock cairns, cleared (tamped) circles (sleeping, teaching, prayer, and dance circles), milling areas, pot drops, and other site features. *See, e.g.,* Birnbam, Charles A., *Preservation Brief 36: Protecting Cultural Landscapes: Planning, Treatment, and Management*; Technical Preservation Services, National Park Service, Washington D.C. (1994); Russell, John C.; Woods, Clyde M.; and Jackson, Underwood, *An Assessment of the Imperial Sand Dunes as a Native American Cultural Landscape,* prepared for the California State Office of Bureau of Land Management, Sacramento, California, by EDAW, Inc., San Diego, California (2002). The project will also have impacts on the flat-tailed horned lizard. The lizard is part of the Quechan Tribe's creation story and is of cultural significance to the Tribe.

II. Comments on Staff Assessment/Draft Environmental Impact Statement

A. BLM/CEC Should Select the No-Action Alternative Given the Acknowledged Impacts to Cultural Resources and Biological Resources.

This project is located in an area confirmed to have high cultural sensitivity. The DEIS notes that 432 cultural resource sites have been previously recorded in the project area. DEIS, page C.2-65.[1] Development of the preferred alternative would result in significant adverse effects on "a presently unknown subset of 328 known pre-historic and historical surface archaeological resources and may have significant adverse effects under CEQA on an unknown number of buried archaeological deposits." DEIS, at ES-24; *see also* page C.2-1. On page C.2-106, there is an acknowledgement that the project "may wholly or partially destroy all

[1] Due to a numbering error in the DEIS, page numbers in both the biological and cultural resources sections begin with "C.2." The page numbers in the cultural resources section should have begun with the designation "C.3."

archaeological sites on the surface of the project area." See also page B.2-12 (acknowledging that construction of the project would lead to the whole and partial destruction of cultural resources). Yet, BLM and CEC are proceeding to make a decision on this project before completing required tribal consultation and evaluation of the significance of the resources.

The cultural significance of the project area was previously described in the discussion of the proposed Plaster City ACEC in the 1980 Draft California Desert Conservation Area Plan Alternatives and EIS. The proposed ACEC, which included the current project area, was described as having "8,320 acres of high sensitivity/significance and 26,680 acres of high to very high buried site potential that could be severely impacted. In addition, possibly 1,125 prehistoric sites and 2 National Register properties (including 8 linear miles of historically significant trails) also stand to be disturbed and/or destroyed." The cultural value of this landscape has been well known for years. The proposed solar project would significantly impact this cultural landscape.

Given the substantial amount of ongoing and proposed solar development on disturbed lands near the project area, the Tribe does not believe that this location is appropriate for the short term (40-year) solar project proposed by the applicant. At minimum, BLM and CEC should complete the cultural identification, evaluation, and mitigation processes as required by NEPA and NHPA Section 106 before making their final decisions on this project.

B. The Analysis of Cultural Resource Impacts Is Incomplete and Based on Inadequate Data.

Under NEPA, BLM is obligated to take a "hard look" at the potential environmental consequences of the proposed project. *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989 (9th Cir. 2004). BLM must ensure the scientific integrity of the discussions and analysis in its EIS. *Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953 (9th Cir. 2005). A Draft EIS must be as complete as possible and must not ignore or exclude important analysis or factual information. *See* 40 C.F.R. § 1502.9(a) ("the draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of NEPA").

In this case, the analysis of cultural resource impacts is based on incomplete and unreliable identification efforts. The DEIS describes the inadequate effort made by the applicant to document the cultural resources affected by the project. Throughout the cultural evaluations, BLM and the CEC have expressed numerous concerns with the completeness and accuracy of information provided by the applicant about cultural resources in the project area. *See* DEIS, pages C.2-57 and 58 (noting that documentation by the applicant of approximately 43% of the archaeological sites in the project area was probably inadequate, and noting conclusion of third-party consultant that extant documentation for the archaeological sites in the project area was inadequate for assessing either the historical significance of the resources or the effects that the proposed action would have on them). Although 432 cultural resource sites have been previously located in the project area, the inventory conducted for the DEIS definitively re-

located only two. DEIS, C.2-65. Overall, the survey effort identified 337 total cultural resources, which is far less than the 432 sites previously recorded. DEIS, C.2-85.

The inadequate identification of resources means that BLM and CEC cannot accurately evaluate the impact that this project will have on cultural resources. On page ES-15 of the DEIS, there is no summary of the short and long term adverse impacts to cultural resources. Instead, that discussion is "to be provided." The very same table on page ES-15 asserts there will be "no cumulative adverse impacts" to cultural resources and that the "level of significance after mitigation" will be "less than significant." It is not clear how BLM and CEC can determine the correct "level of significance" when the impact analysis has not yet been completed.

The DEIS states that the project would have "significant adverse effects" on a "presently unknown subset of approximately 328 known prehistoric and historical surface archaeological resources and . . . on an unknown number of buried archaeological deposits." ES-24. It is not apparent from the DEIS how many of the surface resources will actually be affected. The inadequate identification efforts make it impossible for the decisionmakers and interested public to reasonably evaluate the cultural significance of the area and the full extent of impacts that this project will cause to the cultural landscape. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989) (noting a primary purpose of NEPA is to foster both informed decision making and informed public participation). This also violates the obligation to make a good faith effort to identify cultural resources of concern to interested Indian tribes. *See* 36 C.F.R. § 800.4(b) (requiring agency to make reasonable and good faith effort to identify historic properties affected by undertaking).

There has been no evaluation of the eligibility of the cultural resources for listing on the National Register of Historic Places. This also makes it impossible to know the extent of impact that this project will have on the cultural landscape. As noted in the Tribe's May 4, 2010 letter commenting on the draft Programmatic Agreement (which is attached hereto as Exhibit A and incorporated in these comments by reference), the Tribe objects to BLM's proposal to defer all evaluation and mitigation development efforts until after the decision has been made on the right-of-way. Approving the right-of-way prior to evaluating the eligibility of the resources violates both NEPA and the NHPA. Both NEPA and the NHPA are intended to inform the decision-making process. Deferring evaluation of NHPA-eligibility until after the decision to permit the project has been made is inconsistent with these laws.

In addition to direct impacts to cultural sites in the project area, there will also be impacts to sites outside the project area due to visual and glare impacts. There are many culturally significant areas outside the project boundaries, as evidenced by the proposed Plaster City ACEC discussed above. The DEIS, page C.13-10, also notes the close proximity of culturally and historically significant areas. Several of the cultural sites and geoglyphs located in the Yuha area are ceremonial in nature and the presence of the Suncatchers will interfere with the use of these sites and ability to see from these sites to other landscapes nearby.

In sum, BLM and CEC must complete the cultural resource identification, consultation, and evaluation process before making a final decision on this Project.

C. The Cultural Resource Evaluation Has Occurred Without Required Government-to-Government Consultation with the Quechan Tribe.

BLM has not engaged in government-to-government consultation with the Tribe regarding the impacts of this project on cultural resources. Nor has the Tribe received any of the reports that identify cultural resources within the Project Area. Thus, at this time, the Tribe's (and other stakeholders) ability to comment on the impacts to cultural resources is impaired by lack of information.

The NHPA requires ongoing consultation with interested Indian tribes throughout the identification and evaluation of cultural resources and the resolution of adverse effects. 36 C.F.R. § 800.3(f)(2); 800.4(a)(4); 800.5(c)(2)(iii); 800.6(a); 800.6(b)(2), etc. Here, pursuant to the Draft Programmatic Agreement, all evaluation and resolution of effects will occur after the decision has been made. The Draft Programmatic Agreement fails to provide for the full level of tribal consultation required by 36 C.F.R. Part 800.

There are several federal laws that mandate ongoing consultation with Indian tribes where federally approved actions will affect tribal interests. *See* Executive Order 12875, Tribal Governance (Oct. 26, 1993) (the federal government must consult with Indian tribal governments on matters that significantly or uniquely affect tribal governments); Executive Order 12898, Environmental Justice (Feb. 11, 1994) (federal government must consult with tribal leaders on steps to ensure environmental justice requirements); Executive Order No. 13007, Sacred Sites (May 24, 1996) (federal government is obligated to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners, avoid adversely impacting the physical integrity of sites, and facilitate the identification of sacred sites by tribes); Executive Order No. 13084, Consultation and Coordination with Indian Tribal Governments (May 14, 1998) (places burden on federal government to obtain timely and meaningful input from tribes on matters that significantly or uniquely affect tribal communities); Executive Order 13175, Consultation with Indian Tribal Governments (Nov. 6, 2000) (the federal government shall seek to establish regular and meaningful consultation with tribes in the development of federal policies affecting tribes).

The Tribe has identified certain statements in the DEIS that may be inaccurate and that would benefit from consultation with the Tribe. For example, pages C.2-110 and 111 contain a discussion of the Yuha Basin Discontiguous District. According to the Tribe, it is likely that the sites within the project area are directly related to those within the Yuha area. However, due to the lack of consultation or the provision of cultural reports or maps, it is not possible to provide additional meaningful comments on this topic at this time.

To date, BLM has failed to fulfill its obligation to consult on a government-to-government basis with the Quechan Tribe. BLM must fulfill this obligation prior to issuance of

the ROD. Also, the Draft PA should be amended to require ongoing consultation with the Tribe, and tribal monitoring, if the development process goes forward.

Consultation under state law may also be required pursuant to California Government Code § 65562.5, because the project land is currently designated as open space under Imperial County zoning. Section 65562.5 requires local governments to consult with tribes "for the purpose of developing treatment with appropriate dignity of the place, feature, or object in any corresponding management plan." This section suggests that consultation may be required when development is proposed to occur in open space lands containing cultural resources of significance to tribes.

D. The DEIS Fails to Thoroughly Evaluate Cumulative Impacts to Cultural Resources Associated With the Extensive Plans for Renewable Energy Development in Southern California and Arizona.

An EIS must examine the cumulative impacts of proposed actions. *Neighbors of Cuddy Mtn. v. Alexander*, 303 F3d 1059, 1071 (9th Cir. 2002). A cumulative impact is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such actions." 40 CFR § 1508.7. Failure to properly analyze cumulative impacts violates NEPA. *See Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2004) (reversing EIS for failure to properly analyze cumulative impacts); *Ocean Advocates v. United States Army Corps of Engineers*, 402 F.3d 846 (9th Cir. 2005) (overturning FONSI due, in part, to failure to properly analyze cumulative impacts.

The DEIS contains no real analysis of the impact to cultural resources that will result from the extensive proposed development of renewable energy projects throughout the Southwestern United States. The DEIS notes that approximately one million acres of land are proposed for solar and wind energy development just in the southern California desert lands alone. ES-31. The DEIS offers an extremely cursory analysis of cumulative impacts to cultural resources on pages C.2-144 and 145. This analysis is nothing more than a statement of the obvious that more renewable energy developments will likely result in more impacts to cultural resources. This simplistic analysis does not satisfy NEPA requirements. *City of Carmel-By-The-Sea v. United States Department of Transportation*, 123 F.3d 1142 (1997).

The DEIS also fails to comprehensively list the full extent of proposed solar projects within the area. For example, there are four proposed solar projects on abandoned agricultural lands near the project that do not appear to be addressed in the DEIS:

i) Centinela Solar Energy (proposed 125 MW solar facility east of the Imperial Valley substation on approximately 1170 acres)

ii) Sunrise Gateway West Solar farm (proposed 250 MW facility located along I-8 west of El Centro on approximately 1130 acres)

iii) Sunrise Gateway South Solar farm (proposed 200 MW facility located south of I-8 on eastern edge of Yuha desert, along Mexico border, on approx. 903 acres)

iv) USS Imperial PV Solar project (proposed 136 MW facility located south of I-8 on eastern edge of Yuha desert, on approximately 1400 acres).

There are also two proposed solar projects on BLM land near the proposed project that do not appear to be addressed in the DEIS:

i) Sunpeak Solar (proposed 500 MW facility located west-northwest of the City of Westmoreland, on approximately 5,517 acres of BLM land)

ii) SDG&E solar project proposed for 351 acres of BLM land adjacent to Imperial Valley substation in the Yuha desert.

We understand that Solar Millenium is also currently evaluating several potential sites for a solar facility. One of the proposed locations is on approximately 7,000 acres land in the Plaster City area, to the north of the project.

Given the number of projects in the immediate area proposed for already disturbed lands, there is simply no basis to approve the use of this sensitive cultural area, and the permanent destruction of hundreds of cultural resources, for temporary solar development.

In addition to the direct destruction of cultural resources that will result from the development of one million acres of land for solar and wind projects, there will also be indirect visual impacts. For example, the Tribe is concerned that certain ceremonial areas located in the Yuha, just south of the project area, would be affected by the view of this project. The cultural and ceremonial use of the landscape will be impaired when tens of thousands of solar pedestals are visible from these areas.

The cumulative glint/glare impacts associated with the anticipated solar development projects is also inadequately addressed. The glint/glare study performed for the DEIS is not adequate because it fails to account for the cumulative effect of the entirety of solar projects proposed in the broader area. The cumulative glint/glare from the proposed solar developments will not only affect driving conditions along the I-8 corridor, but will also affect the ability of tribal people to use ceremonial sites nearby. In sum, the cumulative visual impacts resulting from the project and other developments have been inadequately addressed.

Cumulative impacts on flat-tailed horned lizard habitat also deserve additional attention. DEIS, Biological Resources, page C.2-21 acknowledges that "the FTHL populations have declined throughout their range because of loss and degradation of habitat caused by urbanization, agricultural development, military activities, recreational OHV use, and Border Patrol and illegal drive-through traffic." The *Flat-tailed Horned Lizard Rangewide Management Strategy*, page 45, confirms that it is necessary to "maintain or establish effective habitat corridors between naturally adjacent populations." The DEIS fails to adequately address how the

development of approximately one million acres of renewable energy projects in this area will impact the FTHL and its habitat.

E. The DEIS Relies On A Programmatic Agreement That Fails to Provide Mitigation for Cultural Resources and That Fails to Comply With the Requirements of the National Historic Preservation Act and the Advisory Council Regulations.

The DEIS proposes one condition of certification relating to cultural resource protection, which would require the applicant to abide by the terms of a not-yet-completed programmatic agreement. The Tribe has filed a separate comment letter, dated May 4, 2010, which details how the use of a programmatic agreement in this proceeding is inappropriate. The Tribe's letter (which is attached hereto as Exhibit A and incorporated in these comments by reference) argues that BLM is improperly deferring the required Section 106 process until after its decision on the right-of-way is made, and that the current draft of the programmatic agreement fails to provide sufficient mitigation. The draft programmatic agreement, page 3, states that BLM will incorporate the mitigation measures and performance standards from the Staff Assessment/Draft EIS. The only "mitigation" for cultural resources provided in the Draft EIS is a reference back to the programmatic agreement. In other words, the programmatic agreement and DEIS simply cross-reference each other, but neither document provides for mitigation.

F. The Inadequate Cultural Resource Identification, Evaluation, and Mitigation Efforts Also Violate California Law.

CEQA requires development of appropriate mitigation measures. "Formulation of mitigation measures should not be deferred until some future time. However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way." CEQA Guidelines, § 15126.4(a). The DEIS fails to development appropriate mitigation measures relating to cultural resources. The only mitigation referenced is the Draft PA, which as discussed above, does not contain any actual mitigation measures or performance standards.

California law also favors the preservation of cultural resources in place and the avoidance of impacts to such resources. Appendix K to the CEQA Guidelines states that "public agencies should seek to avoid damaging effects on an archaeological resource whenever feasible." The commentary on Appendix K states that "an important principle in this appendix is the emphasis on avoidance of archaeological sites. . . where the proposed project includes a potential impact on a site, avoidance is suggested as a preferred mitigation measure where all other factors are equal." Here, hundreds of resources will be directly or indirectly impacted. Yet, the rush to issue certification and approve the right-of-way forecloses a meaningful opportunity to design the project in a way that will avoid resources or to consider whether an alternative location should be selected.

G. The Staff Assessment Fails to Comport With CEQA Provisions Addressing Disposition of Discovered Human Remains.

The project area is known to contain sites containing human cremations of potentially historic origin. The full extent of the cremation sites is not currently known to the Quechan Tribe due to the lack of consultation and lack of a cultural resource report. CEQA Guidelines Section 15.064.5(d) states that "when an initial study identifies the existence of, or the probable likelihood, of Native American human remains within the project, a lead agency shall work with the appropriate Native Americans as identified by the Native American Heritage Commission as provided in Public Resource Code 5097.98." Public Resource Code 5097.98 provides a process for identifying the most likely descendants of the remains and provides for inspections, consultations, and development of agreements with the most likely descendants for the appropriate treatment of the remains. It does not appear that the CEC or the applicant have complied with these provisions. Due to the lack of consultation, the Quechan Tribe lacks sufficient information at this time to know whether its people are the most likely descendants of the discovered remains. Further investigation and consultation with affected tribes (including the Quechan) is required before approving any project impacting these sacred cremation sites.

H. The Project Will Have Unacceptable Impacts to the Flat-Tailed Horned Lizard.

The DEIS acknowledges that the Flat-Tailed Horned Lizard (FTHL) is known to exist in the project area. DEIS, Biological Resources, C.2-22. The FTHL is proposed for listing on the Endangered Species Act and final action on the proposed listing is likely to occur this year. The lizard is also culturally significant to the Quechan Tribe, as it is part of the Tribe's creation story. The DEIS acknowledges that this Project could result in direct mortality, injury, and harassment of lizards. DEIS, at C.2-40. This is another reason why the Tribe supports a no-action alternative here.

The mitigation proposed in the DEIS for impacts to the FTHL requires removal surveys to occur prior to construction activities. DEIS, C.2-83. However, the *Flat-tailed Horned Lizard Rangewide Management Strategy* notes that once the FTHLs are relocated to another area, their rate of mortality often increases due to the change in environment. Thus, while removal of the lizards may avoid direct mortality resulting from the construction and operation of this project, it may result in indirect mortality due to the change in habitat.

In light of the need to conduct the removal surveys, no construction should be permitted to occur until Fall of 2011, at the earliest, to allow for completion of surveys. Removal surveys are to be performed betweeen April 1 and September 30 to account for the time period when the lizards are most active and out of hibernation. Since no decision will be made on this project until at least September 2010, the removal surveys would need to occur the following year, between April 1 and September 30, 2011, with no construction beginning until after that date.

III. Comments regarding Amendment to California Desert Conservation Plan.

A. The Amendment Should Be Rejected Because the Project Will Permanently and Adversely Affect Cultural and Biological Resources.

The California Desert Conservation Plan (herein "CDCA") lists certain criteria to be used when evaluating future applications for energy-related projects. One of the decision criteria is that sensitive resources should be avoided wherever possible. In this case, due to the significant and comprehensive presence of cultural resources throughout the project area, the project cannot be developed in a way that will avoid damage to sensitive cultural resources, or to the sensitive Flat-tailed Horned Lizard population. The analysis of this criteria in the DEIS, at p. A-9, fails to address impacts to the FTHL or cultural resources, which will not be avoided in project development. A major goal of the CDCA is to protect and preserve the sensitive resources in the desert environment. This proposed amendment is inconsistent with that goal and with the requirements of FLPMA.

B. The Amendment Should Be Rejected Because the Project Does Not Conform to the Local Land Use Plan for Imperial County.

Another CDCA decision criteria requires "conformance to local plans wherever possible." Here, the applicable local Imperial County land use designation for the project area is "Open Space Preservation Zone." See DEIS, p. A-5. This designation does not allow use for electric power generation projects. DEIS, p. A-5. Page A-10 of the DEIS asserts that the project is in conformance with the Imperial County General Plan, but fails to acknowledge the lack of compliance with applicable zoning. Amendment of the CDCA to permit a large-scale power development in an area zoned by the local government for open space preservation is not appropriate. *See* DEIS, page C.8-18 ("the proposed project would not be consistent with the intent of the S-2 zone within the county's Land Use Ordinance"); *see also* 43 U.S.C. § 1712(c) ("land use plans of the Secretary . . . shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of [FLPMA]").

C. The Plan Amendment Should Be Rejected Because This Large-Scale Solar Development, In Conjunction with the Cumulative Impacts of Nearby Developments, Will Unreasonably Shift the Multiple-Use Balance in the California Desert Conservation Area In Favor of Power Production and Could Result in Permanent Impairment of Resources In Violation of FLPMA.

The Plan Amendment process requires BLM to determine the environmental effects of granting the applicant's request and also to evaluate the effect of the proposed amendment on BLM's desert-wide obligation to achieve and maintain a balance between resource use and resource protection. Approving the plan amendment here would unreasonably shift the multiple use balance in favor of resource use/development. *See also* 43 U.S.C. § 1712(c)(1) (requiring the Secretary to use and observe the principles of multiple use and sustained yield when developing or revising land use plans).

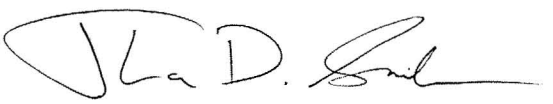
The record is clear that this project is proposed in an extremely sensitive area, that there are numerous solar developments in and around the project area on BLM and private/non-federal lands, and that this area is designated as open space by local land use officials. A balanced, multiple-use, approach to land management mandates that this parcel not be developed for large-scale solar. This project, combined with the cumulative effect of one million or more acres of other renewable projects would dramatically shift the use of BLM's California Desert lands toward energy development at the direct expense of resource protection. Development of the project on this site could also result in the permanent impairment of the land's resources in conflict with 43 U.S.C. § 1702 (defining "multiple use" to require "coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment").

IV. Conclusion.

In conclusion, the Tribe urges the BLM/CEC to revise the DEIS in accordance with these comments, to properly consult with the Tribe as required by law, and to ultimately select the no-action alternative, deny the ROW application, and not amend the CDCA Land Use Plan, based on the project's anticipated impacts to an area of high cultural sensitivity. Thank you for your consideration to these comments.

Sincerely yours,

MORISSET, SCHLOSSER & JOZWIAK



Frank R. Jozwiak
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Attorneys for the Quechan Indian Tribe

cc: President Mike Jackson, Sr.
Vice-President Keeny Escalanti, Sr.
Members of the Quechan Tribal Council
Pauline Jose, Chairperson, Quechan Cultural Committee
Bridget Nash-Chrabascz, Quechan Historic Preservation Officer
Nancy Brown, Advisory Council of Historic Preservation
Wayne Donaldson, California State Historic Preservation Officer
Dave Singleton, Native American Heritage Commission

Attachment A: Quechan Tribe's Comments on Draft Programmatic Agreement

EXHIBIT A

May 4, 2010 Letter to Carrie L. Simmons, Comments on Draft Programmatic Agreement

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May 4, 2010

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1661 S. 4th Street
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Re: Comments on Draft Programmatic Agreement regarding Tessera Solar Imperial Valley Solar Project (formerly Solar Two)

Dear Ms. Simmons:

The Quechan Indian Tribe submits the following comments on the Draft Programmatic Agreement Regarding the Tessera Solar – Imperial Valley Solar Project ("Draft PA"). In summary, the Tribe believes that the Draft PA is inconsistent with the National Historic Preservation Act (NHPA) Section 106 process, and not adequate to evaluate and mitigate effects on cultural resources in and around the project area. The Draft PA defers a substantial majority of the Section 106 process, including all evaluation, treatment, and mitigation until after BLM has granted the right-of-way to the applicant. BLM has failed to adequately explain why a PA is necessary or appropriate here. The only apparent basis for deferring the evaluation of cultural resources, and development of an appropriate treatment plan, until after approval of the right-of-way is the artificial timeline imposed by the applicant.

I. The Draft PA Is Inconsistent With Section 106 of the NHPA.

Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, requires that BLM "shall, *prior to the approval* of the expenditure of any Federal funds on the undertaking or *prior to the issuance of any license*, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." (emphasis added). Only "nondestructive project planning activities may be completed before completing compliance with Section 106." 36 C.F.R. § 800.1(c). Similar to NEPA, the NHPA is designed to ensure that federal decision-makers thoroughly evaluate the impacts of their proposed actions on NHPA-eligible resources *prior to* taking action.

Prior to the approval of a federal undertaking, the federal agency must engage in a four-part process. First, the agency must identify the "historic properties" within the area of potential effects. 36 C.F.R. § 800.4. Second, the agency must evaluate the potential effects that the undertaking may have on historic properties. 36 C.F.R. § 800.5. Third, the agency must resolve the adverse effects through development of mitigation measures. 36 C.F.R. § 800.6. Fourth,

throughout all of these processes, BLM must consult with interested Indian tribes that might attach religious and cultural significance to properties within the area of potential effects. 36 C.F.R. §§ 800.3(f)(2); 800.4(a)(4); 800.5(c)(2)(iii); 800.6(a); 800.6(b)(2), etc.

Instead of completing this required process, BLM is opting to use a programmatic agreement to defer evaluation, mitigation, and treatment until after approval of the right-of-way. 36 C.F.R. § 800.14(b) authorizes the Advisory Council and the agency to negotiate programmatic agreements to govern programs, complex project situations, or multiple undertakings. 36 C.F.R. § 800.14(b)(1) specifies the circumstances under which a programmatic agreement may be used. None of those circumstances exist in this case. Nor does the Draft PA identify any element of 36 C.F.R. § 800.14(b)(1) that justifies the use of a PA here.

There is no reasonable basis to depart from the standard Section 106 process. There is no valid reason why the effects on historic properties cannot be fully determined prior to approval of this undertaking. The only apparent reason why BLM is choosing to use a programmatic agreement is to allow the applicant to obtain its right-of-way approval before the end of the calendar year, in an effort to qualify for federal funding. *See* Draft PA, p. 5. Absent this arbitrary deadline being imposed by the applicant, there is no reason to believe that BLM could not complete the standard Section 106 process before it makes its decision on right-of-way issuance.

To the extent that the Advisory Council regulations authorize the deferral of the Section 106 process until after approval of the undertaking, those regulations are inconsistent with the plain language of 16 U.S.C. § 470f and invalid. The statute is clear that the agency must consider the effect of its undertaking on historic properties prior to approval. *See Corridor H Alternatives, Inc., v. Slater*, 166 F.3d 368 (D.C. Cir. 1999) (rejecting agency's use of PA to defer Section 106 process until after issuance of ROD); *City of Alexandria v. Slater*, 198 F.3d 862 (D.C. Cir. 1999) (approving PA where agency only deferred identification of sites that might be impacted by small number of ancillary activities, and distinguishing from case where the entire Section 106 process is deferred). While the Advisory Council has discretion to determine how the effects on historic properties are evaluated, it does not have authority to permit the approval of undertakings prior to the completion of that evaluation. *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (ruling that the judiciary must reject administrative interpretations that are contrary to clear congressional intent).

In summary, this is not an appropriate case for use of a programmatic agreement. This case involves a straightforward proposal to issue a right-of-way on BLM lands for a single solar development project. There is no "program" at issue, no significant complexity, and no reason why the standard identification, evaluation, and resolution process cannot occur prior to approval of the undertaking. BLM must complete the cultural resource evaluation required by Section 106 prior to approving the right-of-way for this project.

II. BLM Has Not Fulfilled Its Government-to-Government or Section 106 Tribal Consultation Obligations.

The NHPA and the Advisory Council regulations contain detailed requirements for consultation with Indian tribes who attach religious and/or cultural significance to historic properties that may be affected by an undertaking. *See* NHPA, Section 101(d)(6)(B). This

consultation obligation applies "regardless of the location of the historic property." 36 C.F.R. § 800.2(c)(2)(ii). "The agency official shall ensure that consultation in the section 106 process provides the Indian tribe . . . a reasonable opportunity to identify its concerns about historic properties, including those of religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R. § 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." *Id.*

There are also several federal laws that mandate ongoing government-to-government consultation with Indian tribes where federally approved actions will affect tribal interests. *See* Executive Order 12875, Tribal Governance (Oct. 26, 1993) (the federal government must consult with Indian tribal governments on matters that significantly or uniquely affect tribal governments); Executive Order 12898, Environmental Justice (Feb. 11, 1994) (federal government must consult with tribal leaders on steps to ensure environmental justice requirements); Executive Order No. 13007, Sacred Sites (May 24, 1996) (federal government is obligated to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners, avoid adversely impacting the physical integrity of sites, and facilitate the identification of sacred sites by tribes); Executive Order No. 13084, Consultation and Coordination with Indian Tribal Governments (May 14, 1998) (places burden on federal government to obtain timely and meaningful input from tribes on matters that significantly or uniquely affect tribal communities); Executive Order 13175, Consultation with Indian Tribal Governments (Nov. 6, 2000) (the federal government shall seek to establish regular and meaningful consultation with tribes in the development of federal policies affecting tribes).

The Advisory Council regulations make it clear that consultation with interested tribes is to occur throughout the entire Section 106 process. 36 C.F.R. § 800.4(a)(4) requires BLM to consult with interested tribes "to assist in identifying properties, including those off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register." 36 C.F.R. § 800.5(a) requires BLM to consult with interested tribes when assessing adverse effects. 36 C.F.R. § 800.6(a) requires BLM to consult with interested tribes when developing and evaluating alternatives that could avoid, minimize, or mitigate adverse effects on historic properties.

Here, BLM has not complied with the tribal consultation regulations. Since BLM is proposing to defer the identification, evaluation, and impact mitigation until after it approves the right-of-way, the Quechan Tribe and other tribes are being deprived of their ability to provide meaningful input prior to BLM's decision. In addition, the Tribe has not yet received a final cultural resources report for this project, further impairing its ability to consult.

The tribal consultation provisions in the Draft PA are also inconsistent with the Advisory Council regulations. Appendix A, Section I(d) of the Draft PA requires BLM to consult with tribes to identify traditional cultural places within the APE. However, this is narrower than the regulations' requirement to consult for the purpose of identifying properties, "which may be of religious and cultural significance." 36 C.F.R. § 800.4(a)(4). Likewise, Appendix A, Section II of the Draft PA requires consultation with tribes in the resource evaluation phase, but only for the purpose of determining whether or not a resource is NRHP-eligible. In contrast, the ACHP

regulations also require consultation with tribes in the assessment of effects to the properties. 36 C.F.R. § 800.5(a). The Draft PA does not provide for this phase of tribal consultation.

Appendix B of the Draft PA requires the applicant to develop a Treatment Plan in consultation only with BLM and other *signatories* to the PA. Thus, if the Tribe does not sign the PA, it loses its right to consult on the resolution of adverse effects required by 36 C.F.R. § 800.6(a). BLM can not condition tribal consultation on execution of a PA that the Tribe objects to. If the Tribe declines to sign the PA, BLM and the applicant must still comply with the tribal consultation provisions in 36 C.F.R. § 800.6(a) and consult with the Tribe in development and implementation of the Treatment Plan. This should be made clear in the PA.

In summary, BLM has failed to comply with its tribal consultation obligations. In addition, the Draft PA does not provide for the level of tribal consultation required by the Advisory Council regulations. At minimum, the Draft PA should be revised to provide for tribal consultation in a manner consistent with 36 C.F.R. Part 800. No work should be authorized until tribal consultation on the evaluation and resolution of effects is completed

III. Specific Comments on Draft PA

As noted above, the Tribe believes that use of a programmatic agreement in this case violates both the letter and spirit of the NHPA by deferring evaluation and resolution of effects until after approval of the undertaking. In addition, the programmatic agreement is woefully inadequate in terms of specifying appropriate mitigation measures. The following are specific comments on the Draft PA:

- The Draft PA, page 3, states that BLM will incorporate the mitigation measures and performance standards from the Staff Assessment/Draft EIS ("SA/DEIS") for the SES Solar Two Project. However, the only Condition of Certification contained in the SA/DEIS is that the applicant shall comply with the terms of the programmatic agreement. In other words, the Draft PA and SA/DEIS simply cross-reference each other, but neither document provides any substantive mitigation measures or performance standards.

- The Draft PA, page 6, states that BLM has determined that a "phased (tiered) process for compliance with section 106 of the NHPA is appropriate for the undertaking." BLM fails to explain why a phased approach is appropriate in this case. Even if a phased approach was appropriate, there is no valid reason why BLM should not complete the Section 106 process for at least Phase I of the Project prior to approval of the undertaking. BLM is not just deferring evaluation of effects for Phase II of this Project, but is deferring the entire Section 106 process for all phases until after approval of the undertaking. This is not consistent with NHPA requirements.

- The Draft PA, page 6, asserts that BLM has "comparatively examined the relative effects of the alternatives [in the SA/DEIS] on known historic properties." However, there has not actually been any evaluation of the identified historic properties to date. The DEIS simply assumes that effects on cultural resources can be adequately mitigated through the PA, but the Draft PA lacks any actual mitigation measures or performance standards.

- The Draft PA, page 6, states that identification, determination of effects, and consultation on mitigation will occur prior to issuance of any "Notice to Proceed." This is misleading and inaccurate. Stipulation IX of the Draft PA, on page 11, confirms that BLM does intend to authorize construction activities while the Section 106 evaluations take place. Permitting construction to proceed prior to concluding the Section 106 process (including the identification and evaluation of affected resources) conflicts with clear language in the NHPA.

- The Draft PA, pages 6-7, notes BLM's obligation to consult with interested Indian tribes. To date, BLM has not formally consulted on a government-to-government basis with the Quechan Tribe. It would be inappropriate to sign the Draft PA prior to formal consultation with the Tribe. In addition, the Tribe's ability to meaningfully consult in this matter has been, and continues to be, impaired since it has not yet received any cultural resources report specifically identifying the resources discovered to date. The tribal consultation requirements of Section 106 and the ACHP regulations have not been complied with.

- The Draft PA, page 7, contains a definition of "cultural resource," but then fails to use that definition consistently throughout the document. The term "cultural resource" as defined on page 7 should be incorporated throughout the substantive terms of the agreement.

- The area of potential effects (APE) is coterminous with the project boundary. However, there are many other sensitive areas adjacent to the project area. It may be appropriate to broaden the APE to consider the indirect effects that this project will have on the adjacent areas. Further consultation with the Tribe is necessary on this issue.

- Stipulation VI discusses the need to treat Native American burials and related items discovered during implementation of the Agreement in compliance with NAGPRA. The Tribe is aware that cremation sites have been located in the project area, yet the Tribe has not been consulted or provided with specific information about the nature or extent of these cremation sites. The Tribe is very concerned with a ROD being issued until full identification and evaluation of cremation sites in compliance with NHPA and NAGPRA takes place.

- Stipulation VIII, on page 10, states that BLM will ensure preparation and distribution of a report to consulting parties that documents the results of implementing the evaluation and treatment plan efforts referenced in Stipulations III and IV. This report will be circulated within 18 months after all fieldwork required by Stipulations III "or" IV is complete. This stipulation should be modified to require the preparation of two reports; one that addresses evaluation of resources and a second that addresses treatment. The first report, which would document evaluation efforts, should be subject to comments of consulting parties and other interested Indian tribes prior to preparation of a treatment plan. The evaluation report would help inform development of the treatment plan. There should be consultation throughout the evaluation process, and throughout the development and implementation of the treatment plan.

- Stipulation IX authorizes BLM to commence "construction activities such as grading, buildings, and installation of Sun Catchers" prior to completion of the evaluation of resources and the development and implementation of a treatment plan. The Tribe objects to this as inconsistent with the requirements of the NHPA. BLM should not authorize any construction until the evaluation of resources, and development of a treatment plan, occurs.

- Stipulation XI discusses dispute resolution in the event there is disagreement about how the terms of the PA are being implemented. BLM's authority to revoke its right-of-way, or to impose additional conditions on the project for failure to comply with the PA, should be made clear in this section. If BLM proceeds with the PA, and defers the Section 106 process until after it issues the right-of-way, it must also retain the authority to revoke or condition the project in the event that the applicant violates the PA. The Draft PA does not contain clear language that ensures BLM will have authority to meaningfully enforce the terms of the Agreement.

- Stipulation XII discusses termination of the Agreement, but fails to clearly state that if the agreement is terminated, then the applicant must stop work on the project. Again, BLM is deferring the Section 106 process through the proposed agreement. Compliance with mitigation measures developed through the Section 106 process should be an express condition of the right-of-way approval. In other words, it should be clear both in the PA and in the ROD that termination of the PA, or other failure to comply with prescribed mitigation measures, means that work must stop pending full compliance with any unfulfilled obligations under the NHPA.

- Stipulation XIV is unclear. Section (a) states that the PA will expire if the undertaking or the Stipulations have not been performed within five years. "At such time," says the PA, the BLM shall either execute an MOA or request comments from the ACHP. Does this mean that the PA will change into an MOA at the end of the five year period? If the applicant fails to agree to the MOA, does this result in revocation of the right to continue with the undertaking? Section (b) then indicates that the undertaking may proceed even though the PA is terminated. This section should make it clear that, if the PA is terminated, all work must cease until the development of a new PA or MOA.

- Stipulation XV(b) states that execution and implementation of the PA is evidence that BLM has afforded the ACHP a reasonable opportunity to comment on the undertaking. However, even if this is true, implementation of the PA is not evidence that BLM has satisfied its consultation obligations to interested Indian tribes.

- Appendix A, Section I(b) states that an inventory report, containing 100% survey of the APE, has been submitted to BLM. The Tribe has not received a copy of that report from BLM, nor has it been consulted as to the contents of that report. This has limited the ability of the Tribe to effectively consult and comment in this process.

- Appendix A, Section I(d) states BLM shall consult with Tribes to identify traditional cultural places, but does not require this consultation to occur prior to issuance of the ROD. BLM is violating Section 106 and the Advisory Council regulations by failing to provide meaningful consultation with the Tribes prior to issuance of the ROD in this proceeding.

- Appendix A, Section II discusses evaluation of historic properties. The Tribe disagrees with the presumption in Section (e) that isolated artifacts may not be considered eligible under the NRHP. The Tribe also disagrees with Section (f), which states that cultural resources that can be "avoided" will not be evaluated. This is inconsistent with the NHPA and the Advisory Council Regulations. BLM must evaluate all of the identified cultural resources for NRHP eligibility. The mere fact that the project footprint will not directly damage a resource does not mean that a resource will not be affected by the development of the project. This is

especially true for resources that have cultural or religious significance to tribes, which can suffer impacts from the presence of adjacent commercial developments. Development activities may affect the cultural setting in which resources lie, even if the project does not directly impact them. Thus, all identified resources should be evaluated for NRHP eligibility. The Section 106 process is intended to inform BLM and the public of how sensitive a project area is. An analysis of how many eligible resources are located on the site should occur before any decision is made to permit the project.

- Appendix B states that the treatment plan will be developed among Signatory Parties. BLM cannot deprive the Tribe of its rights as a consulting party if the Tribe chooses not to be a signatory party. As discussed above, the regulations require consultation with the Tribe in the resolution of adverse effects, and the Draft PA should clarify that such consultation is required. No work should be authorized until resources are evaluated and the HPTP is completed.

In conclusion, the Tribe objects to the use of a programmatic agreement in this proceeding. The Section 106 process, and the evaluation of impacts to cultural resources is being arbitrarily rushed to the detriment of tribal input and protection of the resources. To the extent that a programmatic agreement is adopted, the current draft is inadequate and should be revised in accordance with the comments above. We look forward to continue working with BLM as this process continues. Please contact me if you have any questions.

Sincerely,

QUECHAN INDIAN TRIBE

Bridget Nash-Chrabascz
Quechan Tribe Historic Preservation Officer

cc: President Mike Jackson, Sr.
Vice-President Keeny Escalanti, Sr.
Members of the Quechan Tribal Council
Pauline Jose, Chairperson, Quechan Cultural Committee
Kenneth Salazar, Department of the Interior, Secretary of the Interior
Jim Abbott, Bureau of Land Management, Acting State Director
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