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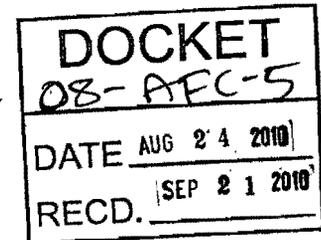
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August 24, 2010

**Via Overnight Delivery and  
E-mail to Brenda\_Hudgens-Williams@blm.gov**

United States Bureau of Land Management  
BLM Director (210)  
Attention: Brenda Williams  
1620 L Street, NW., Suite 1075  
Washington, DC 20036



Re: Quechan Indian Tribe's Protest of BLM's Proposed Resource Management Plan Amendment for the California Desert Conservation Area Plan – Imperial Valley Solar Project

Dear Ms. Williams:

On behalf of the Quechan Indian Tribe, we submit this protest of the Bureau of Land Management's (BLM) Proposed Resource Management Plan Amendment (PRMP-A) for the California Desert Conservation Area Plan – Imperial Valley Solar Project. The Notice of Availability for the PRMP-A was published in the Federal Register on July 28, 2010. This protest is filed pursuant to 43 C.F.R. § 1610.5-2. The Tribe has submitted written comments related to the PRMP-A and BLM's evaluation of the Imperial Valley Solar Project on February 4, 2010; May 17, 2010; June 4, 2010; June 14, 2010; and August 4, 2010. Those comment letters are attached hereto, as required by 43 C.F.R. § 1610.5-2(a)(2)(iv).

The Tribe is filing this protest because the PRMP-A, which would amend the California Desert Conservation Area Plan to allow development of the Imperial Valley Solar Project, would result in permanent destruction and damage to cultural resources, and impair a cultural landscape, of great importance to the Tribe. The PRMP-A would facilitate development of an intensive commercial energy development on previously undisturbed desert land that is known to contain hundreds of cultural resource sites, many of which are eligible for listing under the National Historic Preservation Act (NHPA). The area affected by the PRMP-A is within the traditional territory of the Quechan Tribe and warrants continued protection as an area of cultural sensitivity under the terms of the California Desert Conservation Area Plan.

Of significant concern to the Tribe is the manner in which BLM has conducted its evaluation and review of the PRMP-A and the proposed Imperial Valley Solar Project. BLM has focused on rushing the applicable legal processes relating to cultural resource identification,

evaluation, consultation, and assessment in order to reach an approval decision on an unreasonable "fast track" timeline. The required process to review impacts associated with this project has apparently been rushed to satisfy the applicant's financing objectives. See Applicant's Post-Hearing Brief, California Energy Commission (CEC), August 11, 2010, p. 26 (discussing applicant's desire to commence construction prior to end of 2010 in order to obtain government grant financing).<sup>1</sup> Potential impact to the financing plans of a private applicant seeking permission to use public lands, which Congress has specifically designated for enhanced protection, is no excuse to ignore or defer strict compliance with applicable laws protecting cultural and environmental resources.

The Tribe requests that BLM deny the PRMP-A, preserve this undisturbed desert land in its natural state as intended by the California Desert Conservation Area Plan, and select alternative, previously disturbed, and less culturally sensitive lands for this large-scale commercial energy development. At minimum, BLM should supplement the FEIS with a complete cumulative impact analysis and also require completion of the Section 106 process, including full identification, evaluation, and assessment with meaningful consultation with the Quechan Tribe prior to reaching any final decision on the PRMP-A or issuance of a right-of-way for the Imperial Valley Solar Project.

#### **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, occupied the lands 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 Imperial Valley Solar Project DEIS' discussion of the cultural and ethnographic history of the project area, and also in the FEIS. See DEIS, Cultural Resources, C.2-40 – C.2-45.

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<sup>1</sup> Briefs and transcripts of California Energy Commission proceedings related to this project are available on-line at <http://www.energy.ca.gov/sitingcases/solartwo/documents/>

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, *Assessment of the Imperial Sand Dunes as a Native American Cultural Landscape*, prepared for the California State Office, Bureau of Land Management, Sacramento, California, by EDAW, Inc., San Diego, CA (2002).

Approval of the PRMP-A will result in impacts (in most cases – destruction or removal from natural setting) to at least 378 (perhaps more) cultural resource sites. See FEIS, Table 4-38. Information available at this time suggests that at least 108 sites recommended as eligible for listing under the NHPA will be impacted. See CEC Hearing Transcript, August 16, 2010, p. 21. The project will also have significant 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. Statement of Part or Parts of Plan or Amendment Being Protested**

The Tribe is protesting the BLM's decision to amend the California Desert Conservation Area Plan to allow development of the Imperial Valley Solar project on the specific lands at issue (the IVS Project Site). The Tribe protests the proposed CDCA Plan Amendment in its entirety. The CDCA Plan Amendment is described at page 2-10 and Section 4.9 of the Final Environmental Impact Statement (FEIS) for the Imperial Valley Solar Project (July 28, 2010). As described in more detail below in Section III, the CDCA Plan Amendment (the PRMP-A) is inconsistent and fails to comply with the CDCA Plan, the Federal Land Policy and Management Act (FLPMA), the National Historic Preservation Act (NHPA), and NEPA. The Tribe requests that BLM revise its determination, reject the proposed CDCA Plan Amendment, and select the "No Action Alternative: No ROW Grant and No CDCA Plan Amendment."

## **III. Issues Protested**

Pursuant to 43 C.F.R. § 1610.5-2(a)(2)(ii), this Section III identifies the issues protested by the Quechan Tribe. A concise statement explaining why the State Director's decision is believed to be wrong is provided for each issue protested. 43 C.F.R. § 1610.5-2(a)(2)(v).

**ISSUE #1:** The Tribe Protests BLM's PRMP-A Because the PRMP-A Will Result in Permanent Damage and Destruction to Cultural Resources In Conflict With The Applicable Class L Land-Use Designation.

The CDCA Plan divides the lands in the California Desert Conservation Area into four categories. The lands at issue here, proposed for commercial, large-scale energy development by

the applicant Tessera Solar, are designated as "Class L." According to the CDCA Plan, the Class L designation "protects sensitive, natural, scenic, ecological, and cultural resource values. Public lands designated as Class L are managed to provide for generally lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive values are not diminished." CDCA Plan, Chapter 2, page 13. The solar project proposed here is not a "low-intensity" use.

The cultural value of this landscape has been well known for years. The Tribe has repeatedly expressed its concern regarding impacts to this area, throughout this planning process and in planning processes for other nearby land use proposals. In addition, 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. At the August 16, 2010 CEC hearing relating to cultural resources, CEC staff testified that the project site has "an extraordinary number of cultural resources" located on it. CEC Hearing Transcript, August 16, 2010, p. 80. The proposed solar project would significantly impact this unique cultural landscape, located on lands designated for preservation in the CDCA Plan.

The proposed amendment to allow large-scale commercial energy development on lands known to be highly sensitive in terms of cultural resources is not consistent with the Class L designation in the CDCA Plan. BLM has no obligation to approve the conditional use and BLM should, in this case, deny the requested amendment. While production of solar energy is not per se prohibited on Class L lands, the CDCA Plan only allows "low-intensity" uses on Class L lands. The CDCA Plan requires a more delicate balancing of resource values on Class L lands than on lands in the Class M (higher intensity use) and Class I (intensive use) designations. The CDCA Plan, page 21, confirms that consumptive uses should be allowed on Class L lands "only up to the point that sensitive natural and cultural values might be degraded." This specific large-scale, high-intensity, project proposal, which will degrade sensitive natural and cultural values is clearly not consistent with Class L land use.

BLM concedes in the FEIS that the development of this Project will not be able to avoid impacts to cultural resources. Moreover, the impacts will be permanent and irreversible. Previously, on page C.2-106 of the DEIS, BLM acknowledged that the project "may wholly or partially destroy all archaeological sites on the surface of the project area." Due to the permanent impairment and destruction of significant cultural resource values, this Project is clearly inconsistent with the Class L land use designation, and the PRMP-A must be denied.

**ISSUE #2:** The Tribe Protests BLM's PRMP-A Because the PRMP-A Proposes Resource Impact and Inadequate Mitigation Measures Instead of Resource Preservation In Conflict With the Applicable Class L Land Use Designation.

The CDCA Plan recognizes that "mitigation" is often not sufficient where cultural resources are at issue. Page 27 of the Plan states "many impacts on resources of Native American value are not amenable to mitigation. Desecration or sacrilegious treatment of religiously significant sites cannot be mitigated as can many adverse effects on material resources. These substantial, potential, and often irreversible impacts on cultural values will be

carefully considered in all actions of the Plan.” In other words, prehistoric cultural resources cannot be simply replaced or put back together once a project is developed and the resource destroyed, relocated, or otherwise altered. *See also* CEC Hearing Transcript, August 16, 2010, p. 122 (Nash Testimony) (“recovering the artifact and storing them doesn’t mitigate the impact because it’s not in the same location, it’s not in the same context”); p. 140-141 (Nissley Testimony (testifying that mitigation measures such as data recovery “doesn’t begin to address the other values that are ascribed to the site by other properties, inherent properties and qualities to that site”). The cultural and spiritual nature of this area will be lost forever once 30,000 “suncatchers” are placed on this previously undisturbed desert land.

The CDCA Plan contains other statements confirming that this Project would not be consistent with the Class L designation. The Plan confirms that on Class L lands, protection and preservation of resources takes precedence over the more typical patterns of impact and mitigation. The Plan states, on page 24, that “mitigation will be used primarily in Classes M [a land-use class that specifically authorizes higher intensity uses like energy and utility development] and I [a land-use class designated for ‘concentrated use of lands and resources to meet human needs’] where resource protection measures cannot override the multiple use class guidelines.” On these Class L lands, BLM should protect and preserve the cultural resources. BLM should reject the PRMP-A, in a manner consistent with the Class L designation. If this Project must be developed in the CDCA, it should be re-directed to appropriate Class M or Class I lands that have already been set apart for this kind of intensive development, or less sensitive Class L lands. Standard “mitigation” is not adequate here. The PRMP-A should be denied.

**ISSUE #3:** The Tribe Protests BLM’s PRMP-A Because BLM Has Failed to Give Full Consideration to Native American Values in the Decision-Making Process And Has Failed to Comply With Section 106 of the NHPA.

Page 26 of the CDCA Plan states that BLM will “give full consideration to Native American values in land use planning and management decisions, consistent with statute, regulation, and policy.” Throughout this process, BLM has treated the Native American consultation process as a burden to endure rather than a meaningful opportunity to engage in government-to-government discussions about the preservation and protection of resources. In the Tribe’s view, BLM’s primary consideration throughout this process has been “fast track” project approval, rather than compliance with fiduciary and legal obligations to affected tribes.

Despite repeated requests over a period of years, the Tribe did not receive a cultural report related to this Project until early July 2010. Lack of access to a final cultural resources report for the project significantly impaired the ability of the Tribe (and other stakeholders) to comment on the impacts to cultural resources. *See, e.g.*, CEC Hearing Transcript, August 16, 2010, p. 111 (Nash testimony) (describing how lack of access to cultural resource report impaired consultation). To date, BLM has not met with the Quechan Tribal Council in government-to-government consultation on this Project, nor discussed the effects of the PRMP-A with the Tribal Council. This is not consistent with the CDCA Plan or applicable federal laws.

The CDCA Plan incorporates the consultation requirements of other federal laws, such as Section 106 of the NHPA and its implementing regulations. 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. The meaningful government-to-government consultation required by law has not occurred here. Instead, BLM is proposing, through its Draft Programmatic Agreement, to postpone consultation until the decision-making process is over. This is not consistent with Section 106 of the NHPA or its implementing regulations. *See also* CEC Hearing Transcript, August 16, 2010, p. 92 (CEC Staff Testimony) (describing BLM's conditions relating to cultural resource protection as a "subversion of the 106 process").

Other federal laws and policies also mandate meaningful government-to-government consultation with interested tribes when 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 required consultation has not occurred in this proceeding, to the detriment of the planning and decision-making process. As made clear by Appendix F to the FEIS, BLM appears to believe that transmission of general project status updates and notices satisfy its obligation to engage in meaningful government-to-government consultation with affected tribes. Notification letters and brief project updates to the general public are not adequate to comply with BLM's Section 106 consultation obligation to the Quechan Tribe. *See, e.g.*, CEC Hearing Transcript, August 16, 2010, p. 118 (Nash testimony). Meaningful consultation includes a timely exchange of information and requires BLM to seek out, discuss, and carefully consider the views of affected tribes regarding identification, evaluation, and mitigation of affected cultural resources prior to reaching any final decision on the project. In this case, BLM's sole focus has been on rushing towards the finish line and getting this project approved on a "fast track," regardless of tribal views or impacts on cultural resources. This is not acceptable and not consistent with BLM's obligations under Section 106 of the NHPA, or the CDCA Plan.

**ISSUE #4:** The Tribe Protests BLM's PRMP-A Because The PRMP-A Was Issued Without An Adequate Evaluation of the Cumulative Impact On Cultural Resources Associated With The Imperial Valley Solar Project In Conjunction With Other Past, Present, and Reasonably Foreseeable Developments Within the CDCA.

BLM has supported the PRMP-A through analysis contained in the Final Environmental Impact Statement (FEIS) published on July 28, 2010. That FEIS lacks any substantive analysis of the impact to cultural resources that will result from the extensive proposed development of renewable energy projects within the California Desert Conservation Area. Any final decision on the PRMP-A and the ROD for the Imperial Valley Project must await a complete analysis of how this project will interact with other impacts on cultural resources in the CDCA.

An EIS must examine the cumulative impacts of proposed actions. *Neighbors of Cuddy Mtn. v. Alexander*, 303 F.3d 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 Ninth Circuit recently discussed the required elements of a cumulative impacts analysis in *Te-Moak Tribe of Western Shoshone of Nevada v. United States Department of the Interior*, Case No. 07-16336 (9<sup>th</sup> Cir., June 18, 2010) (overturning and remanding for insufficient cumulative impacts analysis). The Court stated:

"In a cumulative impact analysis, an agency must take a 'hard look' at all actions. An EA's analysis of cumulative impacts 'must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment.' *Lands Council*, 395 F.3d at 1028. General statements about 'possible effects' and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided.' *Neighbors of Cuddy Mountain*, 137 F.3d at 1380. '[S]ome quantified or detailed information is required. Without such information, neither the courts nor the public . . . can be assured that the [agency] provided the hard look that it is required to provide.' *Id.* at 1379." *Te-Moak*, at p. 9001.

The FEIS for the PRMP-A lists many past, present, and reasonably foreseeable projects on various lands near the project area. However, there is no substantive quantification or detailed analysis of how these projects, in conjunction with the Imperial Valley Solar Project, are expected to impact the cultural resources of the surrounding area or the broader California Desert Conservation Area. See FEIS, Section 4.5.5. For example, there is no discussion of whether the other projects are located in areas of cultural sensitivity or what percentage of known cultural resources in the California Desert Conservation Area will be affected by the cumulative effect of

all these projects. The FEIS reports that “the construction of the IVS project and other foreseeable cumulative projects will contribute to permanent long-term adverse impacts as a result of the removal and/or destruction of resources on those sites and an overall net reduction in cultural and paleontological resources in the area.” FEIS, Page 4.5-19. This is the type of obvious, cursory analysis rejected by the Ninth Circuit Court of Appeals in *Te-Moak*.

Also, the geographic area selected for the cultural resource cumulative impact analysis (the “Plaster City area”) is unreasonably narrow in scope, in addition to being arbitrary and capricious. BLM offers no rationale in the FEIS for how it defined the geographic scope of the cultural resource cumulative impact analysis or why it chose such a limited area. The relevant area, in the context of a CDCA-Plan amendment, is the entire California Desert Conservation Area. Congress expressly set aside that entire area for careful management of its unique desert resources, and specifically cultural resources. 43 U.S.C. § 1781(a) (finding that archaeological and historic sites in the California desert are “seriously threatened by . . . pressures of increased use . . . which are certain to intensify because of the rapidly growing population of southern California”). BLM needs to consider how the proposed Imperial Valley Solar Project interacts with other projects that impact cultural resources within the entire planning area – not just an arbitrarily defined sub-area.

In addition to the direct destruction of cultural resources that will result from energy projects like Imperial Valley Solar, 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 California Desert, and the broader Southwestern United States, is targeted for substantial solar and wind energy development, in addition to the usual slate of mining, farming, irrigation, and housing projects. It is obvious that the cultural landscape is being diminished at a rapid rate through projects located on public lands managed by BLM. *See, e.g.*, July 27, 2010 CEC Hearing Transcript, p. 142 (discussing “tens of thousands of acres” of renewable energy projects currently under consideration for approval by California BLM). The purpose of a cumulative impact analysis is not just to recite a list of projects, as BLM has done here, but to provide a “hard look” and “quantified and detailed information” about how the addition of this project will add to the other surrounding impacts. The FEIS is inadequate in this respect.

**ISSUE #5:** The Tribe Protests BLM’S PRMP-A Because the PRMP-A Will Result in Permanent Damage and Destruction to Sensitive Biological Resources, Such as the Flat-Tailed Horned Lizard In Conflict With The Applicable Class L Land-Use Designation.

The FEIS confirms that the Flat-Tailed Horned Lizard (FTHL) is known to exist in the project area. *See also* July 27, 2010 CEC Hearing Transcript, p. 189 (noting USFWS estimate that there “are between 1300 and 2000 lizards on site that would be impacted from construction of the Imperial Valley Solar plant”); p. 286 (discussing direct and indirect impacts to lizards likely to result from project). The FEIS also acknowledges that the FTHL is proposed for listing

on the Endangered Species Act and that final action on the proposed listing is likely to occur this year. The lizard is culturally significant to the Quechan Tribe, as it is part of the Tribe's creation story. BLM acknowledges that this Project could result in direct mortality, injury, and harassment of lizards, which are currently being considered for listing on the Endangered Species Act. This is another reason why the PRMP-A is inconsistent with the applicable Class L Land-Use Designation.

Removal of the lizards from the project area is not adequate mitigation. The *Flat-tailed Horned Lizard Rangeland 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.

**ISSUE #6: The Tribe Protests the PRMP-A Because It Is Inconsistent With the Mandates of FLPMA.**

The Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 et seq., requires that the "public lands be managed in a manner that will protect the quality of the scientific, scenic, historical, ecological, environmental, air and atmosphere, water resources and archeological values." 43 U.S.C. § 1701(a)(8). Congress has mandated heightened protection of resources in the California Desert Conservation Area. 43 U.S.C. § 1781(a); 43 U.S.C. § 1781(b) (stating the purpose of this section is "to provide for the immediate and future protection and administration of the public lands in the California desert within the framework of a program of multiple use and sustained yield, and the maintenance of environmental quality"). Separate and apart from the general prohibition on "unnecessary and undue degradation" of the public lands, Congress has additionally prohibited any "undue impairment" of the lands in the California Desert Conservation Area. 43 U.S.C. § 1781(f); 43 U.S.C. § 1732(b).

By creating a separate management structure and a heightened standard of protection for California Desert lands, Congress clearly expressed its desire for preservation of resources and strict adherence to the planning requirements and preservation goals of the CDCA Plan. In this case, BLM is proposing to allow permanent impairment of a sensitive cultural resource area on Class L lands that are specifically designated for resource preservation and less intensive uses. Allowing an intensive large-scale energy development on these specific lands will result in undue impairment of the sensitive resources in violation of the CDCA Plan and Congressional intent expressed in FLPMA. The proposed use also constitutes "unnecessary and undue degradation" of the public lands because there are other areas within the CDCA Plan specifically "zoned" for more intensive uses like the project proposed here (Class M and Class I lands). There may also be other Class L lands that are less sensitive and accordingly more appropriate for the proposed project. Amending the CDCA Plan to facilitate large-scale energy development on these specific lands is inconsistent with FLPMA and Congress' intent to protect the CDCA.

**ISSUE #7:** The Tribe Protests the PRMP-A Because It Conflicts With the Decision Criteria In the Energy Production and Utility Corridors Element of the CDCA Plan.

The CDCA Plan provides specific “decision criteria” for evaluation of new energy production applications. One of those criteria requires “avoidance of sensitive resources wherever possible.” CDCA Plan, p. 93. As discussed above, this project will destroy, not avoid, hundreds of sensitive cultural sites. It is “possible” to avoid the resources because BLM has no obligation to amend the CDCA or grant the right-of-way. BLM has adequate authority to protect the resources; however, it is affirmatively choosing not to in conflict with the CDCA Plan. The PRMP-A, and proposed project, are inconsistent with the decision criteria in the CDCA Plan’s Energy Production Element.

**ISSUE #8:** The Tribe Protests the PRMP-A Because the Imperial Valley Project Does Not Conform to the Local Land Use Plan for Imperial County.

The CDCA Plan Decision Criteria for Energy Production requires “conformance to local plans wherever possible.” CDCA Plan, p. 93. Here, the applicable local Imperial County land use designation for the project area is “Open Space Preservation Zone.” DEIS, p. A-5. This designation does not allow use for electric power generation projects. DEIS, p. A-5. The DEIS and FEIS fail 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. DEIS, p. 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”). In addition, the Project is also inconsistent with the Goals and Objectives of Imperial County’s General Plan; specifically, Goal 7 regarding Preservation of Visual Resources and Goal 10 regarding Preservation of Open Space. 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]”).

**ISSUE #9:** The Tribe Protests the PRMP-A Because It Is Inconsistent With the Plan Amendment Criteria Found in the CDCA Plan.

The CDCA Plan provides six factors to analyze when considering an amendment. CDCA Plan, p. 121. The PRMP-A is inconsistent with the relevant factors and the Tribe protests the analysis contained in Section 4.9.4 of the FEIS regarding the CDCA Plan Amendment.

Under the plan amendment factors identified in the CDCA Plan, BLM must first determine whether “any law or regulation prohibits granting the requested amendment.” As discussed above, the PRMP-A would facilitate “undue impairment” of lands within the CDCA and is thus prohibited by FLPMA. The amendment is also prohibited due to the BLM’s failure to comply with Section 106 of the NHPA and failure to prepare an adequate FEIS under NEPA.

Second, BLM must evaluate whether any alternative locations within the CDCA are available which would meet the applicant’s needs without requiring a plan amendment. BLM

failed to adequately analyze this factor. BLM failed to determine whether there are any Class M or I lands within the CDCA that would be adequate for large scale energy development of this kind.

Third, BLM must determine the environmental effects of granting and/or implementing the applicant's request. BLM has failed to satisfy this requirement since it is proposing to render a decision on this project prior to completion of the Section 106 process. In addition, the FEIS prepared by BLM contains an inadequate analysis of the cumulative impacts associated with this project, as discussed in more detail above.

Fourth, BLM must consider the economic and social impacts of granting the applicant's request. BLM has failed to adequately consider the social and environmental justice impacts associated with destroying an area of cultural significance, located within the traditional territory of the Quechan Indian Tribe, for the purpose of potentially short-term energy production. The planned life of the project is only 40 years, although the destruction of resources will be permanent. See FEIS, at p. 2-31 (noting anticipated 40 year life of project).

Fifth, BLM must adequately consider public comment. While BLM has taken public comment, it has failed to engage in meaningful government-to-government consultation with the Quechan Tribe as required by Section 106 of the NHPA and by other federal laws, as discussed in more detail above.

Sixth, BLM must evaluate the effect of the proposed amendment on BLM's obligation to achieve and maintain a balance between resource use and resource protection. The lack of an adequate cumulative impacts analysis, as discussed above, violates this decision criteria. BLM must thoroughly consider the cumulative impact on desert resources associated with past, present, and reasonably foreseeable projects within the entire CDCA – the planning area designated by Congress. BLM should select lands within the Class M or Class I designations for this project, instead of Class L lands known to contain sensitive resources.

In summary, BLM's PRMP-A is inconsistent with the CDCA Plan and should be rejected.

#### **IV. Conclusion**

Thank you for your consideration of this protest letter. The cultural resources affected by BLM's land use planning decisions are of great importance to the Tribe, and BLM has an affirmative obligation to ensure that its proposed actions do not harm cultural properties and sacred sites. The Quechan Tribe looks forward to future government-to-government discussions to resolve the issues addressed in this letter.

BLM Director  
August 24, 2010  
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Sincerely yours,

MORISSET, SCHLOSSER & JOZWIAK



Frank R. Jozwiak  
Thane D. Somerville  
Attorneys for Quechan Indian Tribe<sup>2</sup>

Enclosures: Quechan Tribe's Letters of February 4, 2010; May 17, 2010; June 4, 2010; June 14, 2010; August 4, 2010.

cc: President Mike Jackson, Sr.  
Vice-President Keeny Escalanti, Sr.  
Members of the Quechan Tribal Council  
Pauline Jose, Chair, Quechan Cultural Committee  
Bridget Nash-Chrabasz, Tribal Historic Preservation Officer  
Jim Stobaugh, BLM Project Manager  
Daniel Steward, BLM Project Lead  
Christopher Meyer, CEC Project Manager

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tds: 8/24/10

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<sup>2</sup> The Director should send its decision on this protest to the attention of Frank R. Jozwiak/Thane D. Somerville, Morisset, Schlosser & Jozwiak, 801 Second Avenue, Suite 1115, Seattle, WA 98104. Telephone Number: 206-386-5200. Facsimile Number: 206-386-7322. E-mail: [f.jozwiak@msaj.com](mailto:f.jozwiak@msaj.com); [t.somerville@msaj.com](mailto:t.somerville@msaj.com)

Frank- file

**QUECHAN INDIAN TRIBE**  
***Ft. Yuma Indian Reservation***



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**MAR 05 2010**

Morisset, Schlosser & Jozwiak  
Seattle, Washington

February 4, 2010

Mr. Daniel Steward, Acting Field Manager  
Bureau of Land Management, El Centro Field Office  
1661 S. 4<sup>th</sup> Street  
El Centro, CA 92243

Re: SES Solar Two Project – Section 106 Consultation Process

Dear Mr. Steward:

This letter addresses concerns that the Quechan Indian Tribe of the Fort Yuma Indian Reservation has with the ongoing evaluation of cultural resource impacts associated with the SES Solar Two Project. Specifically, the Tribe is concerned that the current regulatory approval schedule, which calls for a Record of Decision to be issued by September 2010, does not provide adequate time to conduct a thorough and complete Section 106 consultation under the National Historic Preservation Act (NHPA). BLM must ensure that it completes the Section 106 process, including identification of affected sites, consultation with affected entities and tribes, and development of an appropriate treatment plan, before it makes a final decision whether to approve the right-of-way for the Project. It would be inappropriate to defer consultation or decisions regarding cultural resource protection and mitigation until after the final decision is made.

The SES Solar Two Project is proposed for development on federal (BLM) lands and is subject to the NHPA Section 106 process. Preliminary information suggests that the federal land proposed for development is extremely sensitive in terms of cultural resources. Initial studies indicate that hundreds of cultural resource sites are located in the Project area. These sites include cremation sites, habitation sites, trails, and lithic and pottery scatters to name a few.

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. Prior to creation of the Fort Yuma Indian Reservation, the Tribe and its members traditionally used lands far to the north and west of the Reservation. The cultural landscape of the Quechan consists of a myriad of natural and cultural features. Cultural features include mythology locales, sacred places, petroglyphs, settlement and

battle site locations, trails, and other resource use areas, along with prehistoric and historic archaeological sites. Proposed developments such as the SES Solar Two Project threaten the integrity of the cultural landscape. Careful consideration is required to identify and evaluate measures to avoid impacts to cultural resources.

It is our understanding that the Project is seeking “fast track” approval in order to meet certain Project funding deadlines. However, BLM must not rush the Section 106 process simply to meet the applicant’s timetable. Federal law requires BLM to conduct a thorough and deliberative review of the affected cultural resources, consult with interested parties and tribes, and prepare a meaningful plan to address potential impacts prior to making a final decision. The Tribe expects BLM to comply with that process in this proceeding even it requires pushing the final record-of-decision beyond September 2010.

It is the Tribe’s understanding that BLM is currently developing a Programmatic Agreement (PA) to address effects of the Project on cultural and historic resources. First, the Tribe does not believe that this Project meets any of the regulatory criteria contained in 36 C.F.R. § 800.14(b) for use of a PA. Other than the artificial fast-track timeline proposed by BLM and the Project applicant, there is no apparent reason why effects on cultural resources cannot be fully determined prior to BLM’s decision whether to approve this Project. In addition, the proposed PA is currently being developed without the benefit of a final cultural resources report that comprehensively identifies the potentially affected resources. It is unclear how the PA can adequately address impacts prior to completion of this pending report.

The rush to finalize a PA suggests that BLM is determined to approve the Project regardless of the possible impacts to cultural resources. The Tribe believes that the appropriate course of action is to thoroughly consult and evaluate how the undertaking, if approved, would impact cultural sites and then, based on that thorough review, make an informed decision on whether to approve the Project. The standard Section 106 process of consultation and determination/resolution of effects, prior to project approval, is required here. Even if the PA process is used, government-to-government consultation with the Tribe is still required.

The Quechan Tribe is not necessarily opposed to the SES Solar Two Project, but the Tribe has significant concerns that must be addressed prior to any BLM decision whether to move forward with this Project. BLM must meaningfully comply with the Section 106 and government-to-government consultation processes so that it has sufficient information to determine whether it is appropriate to permit construction of this Project in a very culturally sensitive area. If BLM ultimately determines that the Project can go forward, despite the presence of significant cultural resources, BLM must work with the Tribe to develop a meaningful plan to avoid impacts to the cultural sites. It may not be possible to accomplish these tasks under the “fast track” schedule currently envisioned.

Thank you for your consideration. The Tribe looks forward to working with BLM as this process moves forward.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike Jackson, Sr.", written in a cursive style.

Mike Jackson, Sr., President

cc: Ken Salazar, Secretary of the Interior  
Nancy Brown, Advisory Council on Historic Preservation  
Chris Meyer, California Energy Commission Project Manager  
Wayne Donaldson, California State Historic Preservation Officer  
Dave Singleton, Native American Heritage Commission

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May 17, 2010

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Christopher Meyer, Project Manager  
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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

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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.<sup>1</sup> 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

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<sup>1</sup> 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."

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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 (9<sup>th</sup> 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 (9<sup>th</sup> 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-

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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.

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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

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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 F.3d 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)

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- 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 develop 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 between 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).

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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  
Thane D. Somerville  
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-Chrabasz, 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



May 4, 2010

## QUECHAN INDIAN TRIBE *Ft. Yuma Indian Reservation*

P.O. Box 1899  
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Carrie L. Simmons, Archaeologist  
El Centro Field Office  
Bureau of Land Management  
1661 S. 4<sup>th</sup> Street  
El Centro, CA 92243

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  
Teri Rami, Bureau of Land Management, California Desert District Manager  
Daniel Steward, Bureau of Land Management, El Centro  
Brian Turner, National Trust for Historic Preservation, Regional Attorney, Western Office  
Jim Bartel, Fish and Wildlife, Field Supervisor  
Michelle Mattson, US Army Corps of Engineers  
Nancy Brown, Advisory Council on Historic Preservation  
Chris Meyer, California Energy Commission Project Manager  
Wayne Donaldson, California State Historic Preservation Officer  
Dave Singleton, Native American Heritage Commission



June 4, 2010

# QUECHAN INDIAN TRIBE

## *Ft. Yuma Indian Reservation*

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JUN 10 2010

Morisset, Schriener & Jozwiak  
Seattle, Washington

Jim Stobaugh, Project Manager  
Bureau of Land Management  
PO Box 12000  
Reno, Nevada 89520

Re: Imperial Valley Solar Project (SES Solar Two) Project Timeline

Dear Mr. Stobaugh:

On June 3, 2010, I met with representatives of the BLM El Centro field office for a monthly update meeting. One of the projects on the agenda for the meeting was the Imperial Valley Solar Project (SES Solar Two) Project. In that meeting, I was informed that the cultural report for the Project has yet to be completed and that the distribution of the report has been pushed back until at least mid-June. It is simply not possible for the Quechan Tribe (or other affected parties) to engage in meaningful consultation on cultural resource issues when it has not yet been provided with basic cultural reports related to this Project. In my experience, requiring affected tribes to consult and comment without being provided access to basic cultural reports is unprecedented. This process is certainly not consistent with the consultation obligations found in Section 106 of the NHPA.

At the June 3 meeting, BLM representatives also informed me of the schedule for completing the NEPA and Section 106 processes. Comments for the revised Programmatic Agreement (PA) are now due June 25<sup>th</sup> with the FEIS for the project projected for early July. If the cultural report is not distributed until mid-June, we will have, at best, ten days to review and digest the information within the cultural report so that we can make informed comments on the PA. That is not adequate time to develop informed and meaningful comments and complete consultation.

As revised, the PA contains a draft of the HPTP that discusses proposed mitigation per site type. The Quechan Tribe, through this office, has repeatedly requested BLM to provide a map with all cultural resources detailed on it so that the consultation process with the Quechan Cultural Committee could begin. The Committee has found it quite difficult, if not impossible, to make specific comments on this project as no detail has been provided. The charts provided in the Staff Assessment/DEIS and in Appendix H of the PA describe the types of sites within the project area but it does not allow for the Committee to view them in terms of the cultural landscape, something that is vital in this area. To date, BLM has not provided the Tribe with the requested map.

The Tribe would like to know how BLM plans to incorporate "general" comments received on the PA by June 25 into the FEIS, which is expected to be released the first week of July. There is

concern that the comments received for the revised PA will not be given due consideration given the quick turnaround.

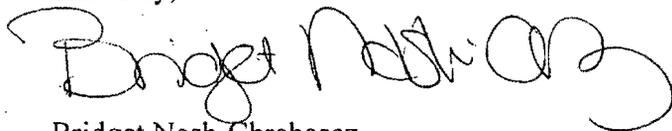
The Tribe has repeatedly expressed concern about the incredibly short, artificial, and inadequate timeline established by BLM. BLM is rushing the process to meet an artificial deadline imposed by the applicant's development schedule, at the expense of the Section 106 process. Drafts of the PA and HPTP are complete and we have not had the benefit of seeing the cultural resources report or consulting with BLM to discuss specific concerns about the project. The proposed timeline has not and will not allow BLM, the Tribes or public, to adequately review the environmental information, consult on the issues and make a decision.

Another point of concern relates to constant change in project information. The number of cultural resources reportedly affected by the Project changes almost on a daily basis. The count located within the PA is currently at 442. Previous counts have ranged from 337 to 432, with Rebecca Apple stating at the evidentiary hearing on May 25, 2010, that 361 cultural resources were identified within the project area. It is impossible to make comments on documents that are constantly changing or information that may change once the comments are made. It is unclear how BLM can make an informed decision when it lacks access to accurate information regarding cultural resources.

In conclusion, the Tribe is very concerned with the impacts that this Project will have on the cultural landscape. The Tribe has repeatedly expressed its concerns with the process BLM is employing in this Project. There is no legitimate basis to rush through or ignore procedures required by federal law in the Section 106 process. The Tribe asks that BLM revise its timeline to allow meaningful review, participation, and consultation as required by law.

We look forward to continue working with BLM as this process continues. Please contact me if you have any questions.

Sincerely,



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  
Teri Rami, Bureau of Land Management, California Desert District Manager  
Daniel Steward, Bureau of Land Management, El Centro  
Carrie L. Simmons, Bureau of Land Management, El Centro  
Brian Turner, National Trust for Historic Preservation, Regional Attorney, Western Office  
Nancy Brown, Advisory Council on Historic Preservation  
Chris Meyer, California Energy Commission Project Manager  
Jennifer Jennings, California Energy Commission Public Adviser  
Wayne Donaldson, California State Historic Preservation Officer  
Dave Singleton, Native American Heritage Commission



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**JUN 21 2010**

Morisset, Schlosser & Jozwiak  
Seattle, Washington

June 14, 2010

Carrie L. Simmons, Archaeologist  
El Centro Field Office  
Bureau of Land Management  
1661 S. 4<sup>th</sup> Street  
El Centro, CA 92243

Re: Comments on Revised 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 "Version Two" of the Draft Programmatic Agreement Regarding the Tessera Solar – Imperial Valley Solar Project ("Draft PA"), which was circulated by e-mail on May 28, 2010. The Tribe submitted previous comments on the Draft PA on May 4, 2010. Unfortunately, very few of the Tribe's comments were addressed in the revised draft. The Tribe continues to generally object to the development of a PA in this context and also continues to object to the failure of BLM to share cultural resource reports and to consult with the Tribe on a government-to-government basis. Thus, in addition to the comments below, the Tribe's prior comments of May 4, 2010 are incorporated herein by reference.

I. Specific Comments on Version Two of Draft PA

- The Draft PA, page 4, states that BLM will incorporate the mitigation measures and performance standards from the Energy Commission's Staff Assessment and Final Environmental Impact Statement for the Project. However, the only Condition of Certification contained in the Draft SA/EIS is that the applicant shall comply with the terms of the programmatic agreement. In other words, at this time, the Draft PA and SA/EIS simply cross-reference each other. The Tribe is not aware of any new Conditions of Certification related to cultural resources that have been proposed for the Final SA/EIS.

- The second "whereas" clause of Page 6 states that BLM "may reach a decision regarding approval of the undertaking before the effects of the undertaking's implementation on historic properties have been fully determined." This conflicts with Section 106 of the NHPA,

which requires that federal decision-makers thoroughly evaluate the impacts of their proposed actions on NHPA-eligible resources prior to taking action. None of the circumstances identified in 36 C.F.R. § 800.14(b)(1) that justify use of a programmatic agreement are present here.

- Page 7 identifies a cultural resources report prepared by URS. The Quechan Tribe has not yet been provided with a copy of this report, despite numerous requests. The Tribe again objects to this process in which BLM is expecting the Tribe to consult without being provided with access to the cultural reports.

- Page 7 states that BLM has “invited the . . . Quechan Indian Tribe . . . to consult on this undertaking and participate in this Agreement as a Concurring Party.” 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 describing the resources identified to date. The tribal consultation requirements of Section 106 and the ACHP regulations have not been complied with.

- Page 8 states that BLM and other agencies “agree that the undertaking shall be implemented in accordance with the following stipulations . . . .” The sentence suggests that BLM has already pre-determined that it will approve the right-of-way.

- Page 8 defines “Consulting Party” as “Signatory, Invited Signatory, and Concurring Parties.” Thus, if an Indian tribe that attaches religious or cultural significance to properties within the APE fails to concur in the Agreement, they are excluded from the definition of Consulting Party. This is not consistent with Section 106 of the NHPA, which requires consultation with tribes throughout the entire Section 106 process.

- The definitions section in pages 8-9 now contains separate definitions for “cultural resource,” “historic properties,” “historical resources,” and “traditional cultural property.” It may be difficult for persons implementing the agreement to understand how these terms relate to one another. It would be useful to explain how the terms relate to one another; i.e., which definition is the broadest and which is the narrowest. If all four definitions/terms are necessary, BLM must be sure that the terms are used consistently and properly throughout the agreement.

An example of potential confusion resulting from the numerous definitions occurs on page 11. We recommend that the first sentence of page 11 be changed to read: “Historic properties *and cultural resources* not located within the areas . . . .” This change is necessary to ensure that the APE includes cultural resources regardless of their formal NRHP-eligibility determinations.

- Stipulation II(B) of the Draft PA, at Page 14, states that BLM shall make determinations of eligibility prior to the Record of Decision. The procedures set forth in Section II(B) do not comport with Section 106 regulations. 36 CFR § 800.4(c)(1) requires BLM to evaluate the historic significance of properties in consultation with interested Indian tribes. As noted above, the tribes have not even been provided with the cultural reports yet and have had no opportunity to examine information relating to properties identified in the APE. BLM must

which requires that federal decision-makers thoroughly evaluate the impacts of their proposed actions on NHPA-eligible resources prior to taking action. None of the circumstances identified in 36 C.F.R. § 800.14(b)(1) that justify use of a programmatic agreement are present here.

- Page 7 identifies a cultural resources report prepared by URS. The Quechan Tribe has not yet been provided with a copy of this report, despite numerous requests. The Tribe again objects to this process in which BLM is expecting the Tribe to consult without being provided with access to the cultural reports.

- Page 7 states that BLM has “invited the . . . Quechan Indian Tribe . . . to consult on this undertaking and participate in this Agreement as a Concurring Party.” 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 describing the resources identified to date. The tribal consultation requirements of Section 106 and the ACHP regulations have not been complied with.

- Page 8 states that BLM and other agencies “agree that the undertaking shall be implemented in accordance with the following stipulations . . . .” The sentence suggests that BLM has already pre-determined that it will approve the right-of-way.

- Page 8 defines “Consulting Party” as “Signatory, Invited Signatory, and Concurring Parties.” Thus, if an Indian tribe that attaches religious or cultural significance to properties within the APE fails to concur in the Agreement, they are excluded from the definition of Consulting Party. This is not consistent with Section 106 of the NHPA, which requires consultation with tribes throughout the entire Section 106 process.

- The definitions section in pages 8-9 now contains separate definitions for “cultural resource,” “historic properties,” “historical resources,” and “traditional cultural property.” It may be difficult for persons implementing the agreement to understand how these terms relate to one another. It would be useful to explain how the terms relate to one another; i.e., which definition is the broadest and which is the narrowest. If all four definitions/terms are necessary, BLM must be sure that the terms are used consistently and properly throughout the agreement.

An example of potential confusion resulting from the numerous definitions occurs on page 11. We recommend that the first sentence of page 11 be changed to read: “Historic properties and cultural resources not located within the areas . . . .” This change is necessary to ensure that the APE includes cultural resources regardless of their formal NRHP-eligibility determinations.

- Stipulation II(B) of the Draft PA, at Page 14, states that BLM shall make determinations of eligibility prior to the Record of Decision. The procedures set forth in Section II(B) do not comport with Section 106 regulations. 36 CFR § 800.4(c)(1) requires BLM to evaluate the historic significance of properties in consultation with interested Indian tribes. As noted above, the tribes have not even been provided with the cultural reports yet and have had no opportunity to examine information relating to properties identified in the APE. BLM must

consult with and allow the participation of interested tribes in the eligibility determination process.

- Stipulation II(B) also fails to provide procedures that allow Indian tribes to request participation of the Advisory Council in the event that there is a disagreement regarding eligibility. *See* 36 CFR § 800.4(c)(2) (providing that “if an Indian tribe . . . that attaches religious and cultural significance to a property off tribal lands does not agree [with the eligibility determination], it may ask the Council to request the agency official to obtain a determination of eligibility [from the Secretary pursuant to 36 CFR part 63]”). The Tribe agrees that the ROD should not be issued until all processes in Stipulation II(B) and those required by 36 C.F.R. § 800.4(c)(2) are completed. ROD issuance prior to eligibility determinations would not be consistent with Section 106 of the NHPA or its implementing regulations.

- Stipulation III(a)(i)(1), on page 16, requires the Applicant to develop and submit one or more HPTPs to BLM prior to issuance of any Notice to Proceed. This sentence should clarify that no Notice to Proceed may be issued until BLM reviews and approves the HPTPs in consultation with all consulting parties and interested Indian tribes.

- Stipulation III(a)(ii) references the development of treatment or mitigation measures proposed in the Energy Commission’s Conditions of Certification. However, the only Condition of Certification contained in the SA/DEIS is preparation and implementation of this Programmatic Agreement. No other independent mitigation measures or performance standards have been proposed for the Conditions of Certification.

- BLM should clarify in Stipulation III that the rights of Tribes to consult and participate in development of the HPTP(s) are equal to that of other consulting parties. It is unclear in the current draft whether Indian tribes who are not consulting parties, as defined in the PA, will be afforded equal opportunity to participate in development of the HPTPs.

- Stipulation V 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 VI(b) should delete the phrase “to every reasonable extent” found in the second line. There is no basis to exempt the applicant from the required reporting and documentation standards found in the Guidelines.

- Stipulation VII, on page 19, 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 II and III. This report will be circulated within 18 months after all fieldwork required by Stipulations II “or” III 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. The Tribe also requests that the Stipulation be amended to require distribution to consulting parties and tribes. As currently drafted, tribes will be excluded unless they agree to sign the Agreement. BLM cannot condition tribal participation in the Section 106 process on signing a programmatic agreement.

- Stipulation VIII(b) 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. The revised draft of Stipulation VIII(b) actually became less protective of resources than the prior draft of the PA. The revised draft would permit construction activities even without the prior approval of a monitoring and discovery plan. Stipulation VIII(b) could be improved by replacing the word “or” found at page 20, line 749, with “and”.

- Stipulation X 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 XI 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 XIII regarding “Duration of the Agreement” was revised, but the Stipulation is still not clear. Now it states that the Agreement will expire if the undertaking has not been “initiated and the BLM right-of-way grant expires or is withdrawn.” Then it says “at such time,” the BLM shall either execute a MOA or request comments from the ACHP. If the Agreement expires and the right-of-way grant expires, why would any further action be taken? The applicant would simply lose its rights to proceed. If the PA and right-of-way are both expired, there would be no further action to base an MOA or Council consultation.

- Stipulation XIV 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.

- The previous draft of Appendix A stated that BLM would consult with Tribes to identify traditional cultural places that may exist within the APE. The revised draft appears to have removed that obligation and replaced it with an obligation to consult with regard to “unevaluated archaeological site to which they may attach religious or cultural significance.” The term “archaeological site” is not defined in the agreement. The Tribe believes that the Agreement should simply track the language and requirements found in the Section 106 regulations. BLM’s efforts to paraphrase the obligations contained in the Section 106 regulations will only lead to confusion.

- Appendix B, Section III states that “avoidance” is the preferred method of mitigation, but provides no firm requirements to actually implement “avoidance.” In all instances, it appears that BLM and/or the applicant will be able to choose mitigation measures other than avoidance. Although “preferred,” there is no basis to believe that avoidance will actually be the selected mitigation alternative. If avoidance is “preferred,” BLM should do more to ensure that avoidance is actually selected as a mitigation measure.

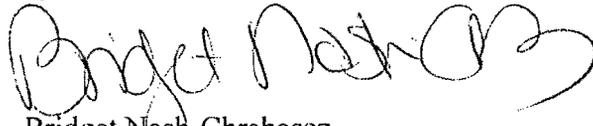
- The Tribe disagrees with BLM’s intention to not evaluate NRHP-eligibility for cultural resources that can be “avoided.” This is inconsistent with the NHPA and the Advisory Council Regulations. BLM must evaluate all of the identified cultural resources for NRHP eligibility prior to issuance of the ROD. 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.

- The lack of access to maps and cultural reports has also impaired the Tribe’s consultation under NAGPRA and 43 C.F.R. Part 10. The Tribe understands that cremation sites and burials are located throughout the Project area. These sites should be avoided with a substantial buffer placed around them. No disturbance of the sites can occur without full compliance with NAGPRA and 43 C.F.R. Part 10. The Introduction to the Plan of Action contained in Appendix L should make clear that it applies both to intentional excavation and future inadvertent discoveries. The Tribe expects full compliance with the provisions of NAGPRA and 43 C.F.R. Part 10.

In conclusion, the Tribe continues to object 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. The Revised Draft PA has failed to address the vast majority of the Tribe's comments in its previous May 4 letter. Thank you for your further consideration of the Tribe's comments in this process. Please contact me if you have any questions.

Sincerely,

QUECHAN INDIAN TRIBE

A handwritten signature in black ink, appearing to read "Bridget Nash-Chrabasz". The signature is fluid and cursive, with a large initial "B" and a long, sweeping tail.

Bridget Nash-Chrabasz

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  
Daniel Steward, Bureau of Land Management, El Centro  
Nancy Brown, Advisory Council on Historic Preservation  
Chris Meyer, California Energy Commission Project Manager  
Wayne Donaldson, California State Historic Preservation Officer  
Dave Singleton, Native American Heritage Commission



**QUECHAN INDIAN TRIBE**  
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August 4, 2010

Mr. Daniel Steward, Project Lead  
Bureau of Land Management, El Centro Field Office  
1661 S. 4<sup>th</sup> Street  
El Centro, CA 92243

Re: Imperial Valley Solar Project (SES Two) – Section 106 Consultation

Dear Mr. Steward:

On February 4, 2010, I wrote to you regarding the Quechan Tribe's concern with BLM's evaluation of cultural resource impacts associated with the Imperial Valley Solar Project (formerly known as SES Two) and BLM's failure to consult with the Quechan Tribe as required by law. Since that date, the Tribe's concerns with this Project and BLM's review process have only increased. The Tribe requests that BLM stop rushing this process and allow adequate time to meaningfully comply with the consultation process required by law and to properly evaluate the impacts this project would have on cultural resources if approved.

The Tribe's Historic Preservation Officer (HPO) first requested a copy of the cultural report for this project over two years ago, on February 19, 2008. In subsequent meetings, BLM informed the Tribe's HPO that the cultural report would be ready for distribution in June 2008. However, the Tribe only recently received a CD containing a copy of the cultural report in early July 2010. Required consultation under Section 106 regarding the evaluation of resources and the mitigation of impacts can not even begin until the Tribe has adequate time to review the lengthy cultural resources report. Yet, BLM contends that it will be ready to consider approval of this Project within weeks. BLM is not complying with the Section 106 process or its fiduciary obligations to the Tribe.

To date, BLM has not met with the Quechan Tribal Council to discuss this project. The Tribe requests that BLM arrange a time to meet with the Tribal Council at the Fort Yuma Indian Reservation to engage in meaningful government-to-government consultation. Such consultation should occur only after the Tribe has been provided adequate time to review the relevant reports and maps describing the cultural resources present on the project site.

To be clear, notification letters and brief project updates to the general public are not adequate to comply with BLM's Section 106 consultation obligation to the Quechan Tribe. Meaningful consultation includes a timely exchange of information and requires BLM to seek