



COLORADO RIVER INDIAN TRIBES

Colorado River Indian Reservation

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Via E-Mail and U.S. Mail

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

Re: Comments on the *CONTROLLED GRADING PLAN FOR BLOCKS 2 THROUGH 4 OF UNIT 1, GENESIS SOLAR ENERGY PROJECT, RIVERSIDE COUNTY, CALIFORNIA*

Dear Mr. Kalish:

The Colorado River Indian Tribes ("CRIT" or "Tribes") submits these preliminary comments on the February 2012 "Controlled Grading Plan for Blocks 2 through 4 of Unit 1, Genesis Solar Energy Project ("GSEP"), Riverside County, California" ("Plan"). While we also intend to submit more detailed comments, we wanted to present you with our initial concerns as quickly as possible.

Despite the changes made from earlier versions, it appears that the Plan remains inconsistent with numerous provisions of the HPTP and CRMMP, including the specific protocols for site evaluations set forth in those documents. Moreover, as CRIT has stated repeatedly in the past, and as the Plan itself acknowledges, the HPTP and CRMMP establish avoidance as the preferred method of handling unanticipated cultural resource discoveries. It is unclear how a site evaluation plan that relies heavily on the use of a road grader is consistent with this preference. Given these inconsistencies, BLM must revise the Plan.

CRIT also hereby requests in-person consultation with your agency on this Plan. This consultation must occur *before* BLM finalizes the Plan and/or authorizes its implementation. Because (1) the Plan was only provided to the Tribes on Tuesday afternoon (February 21), (2) we are still awaiting additional information related to the Plan that your office has indicated it will provide us (i.e., correspondence between the project developer, NextEra, and the BLM related to the Plan), and (3) many members of the Tribal Council will be in Washington, D.C. next week, we will not be able to hold any consultation meetings before the week of March 5, 2011.

Avoidance Is the Preferred Method for Addressing Unanticipated Cultural Resource Discoveries

As CRIT has previously expressed, the Programmatic Agreement for the GSEP states that "for cultural resources, the preferred method of mitigation is avoidance of all cultural resources to the maximum extent practicable." Programmatic Agreement, Appendix B, § III(a)(ii). This statement is reiterated

through other GSEP documents, including the Historic Properties Treatment Plan (“HPTP”) and the Cultural Resources Monitoring and Mitigation Plan (“CRMMP”). HPTP § 9.4.2 (“Site Avoidance will be the preferred method of dealing with cultural resources during construction of the GSEP.”); CRMMP § 9.4.2 (same). Under both the HPTP and the CRMMP, site evaluation—as proposed here—should proceed only “if a newly discovered resource is potentially significant *and if avoiding the resource proves infeasible.*” HPTP § 9.4.2; CRMMP § 9.4.2 (emphasis added). Thus, pursuant to these adopted plans, BLM must make a preliminary determination of the feasibility of avoidance before any further site evaluation is conducted. We have repeatedly asked you whether NextEra has provided any concrete information or analysis about the feasibility of avoidance. Given that you have never told us otherwise, we assume NextEra has not provided any such information.

While the Plan does mention avoidance as a possible outcome (Plan at 6), it is far from clear that implementation of the controlled grading plan is consistent with the avoidance requirements of the Programmatic Agreement, the HPTP, and the CRMMP. The Plan indicates that “[c]ontrolled grading has been successfully implemented on archaeological sites in California to *identify, recover, and record* numerous types of cultural resources from individual flakes to large features.” Plan at 8 (emphasis added). If the goal of the controlled grading plan is to determine the limits of a potentially eligible site in order to *avoid* disturbance of cultural resources, please explain why the methodology’s success at data recovery is at all relevant.

The Controlled Grading Method Fails to Comply with the HPTP and the CRMMP

CRIT very much appreciates the changes made by BLM to the Plan in response to CRIT’s earlier comments. In particular, we appreciate the specific authorization for CRIT to provide a cultural resources expert to conduct on-site monitoring and program review. Plan at 8. Nonetheless, CRIT has several additional questions and concerns about the proposed Plan.

Even if BLM and NextEra can make a preliminary showing that it is infeasible to avoid the cultural resources already discovered, per HPTP § 9.4.2 and CRMMP § 9.4.2, the Plan’s selection of site evaluation methodology—controlled grading—is inconsistent with both the HPTP and the CRMMP. The HPTP and the CRMMP lay out three specific methodologies that can be employed to determine the extent, depth, and contents of the site to determine its potential eligibility: surface analysis, shovel test units, and test excavation units. HPTP § 9.4.2; CRMMP § 9.4.2. Controlled grading is not among the possibilities.

Under this approach, the project team “must first attempt to gather as much information as possible without formal excavation.” Non-collection of artifacts is “preferred” and soil auguring can be used to determine artifact density. *Id.* Next, the HPTP and CRMMP outline the use of shovel test units at 10 meter intervals, with a focus on the “perceived center of the site.” All excavated materials are then screened for cultural materials. *Id.* Finally, “if the site exhibits subsurface midden or concentrations of materials,” one-meter square test excavation units can be used at a density of 1 unit per 2000 square meters (~2 per acre). These units are to be excavated using sharpened shovels and masonry trowels, and all dirt is screened. The test excavation units must also focus on the areas of greatest concentration. *Id.* Data recovery is permitted, if at all, only after the site is delineated using these methods and evaluated for eligibility. *Id.*

The Plan’s proposed method of site evaluation—controlled grading by a road grader in ten 5-meter-by-100-meter blocks—is far more invasive than any of the methodologies permitted by the HPTP and the

CRMMP. This method is not appropriate to locate, identify, and evaluate archaeological materials, as the large machinery can damage the integrity of both the site and the artifacts, particularly given the site's topography. Thus, at the very least, the plan must be revised to ensure that the selected method of site evaluation is compliant with both the HPTP and the CRMMP.

CRIT also requests additional information regarding the selected location of the controlled grading trenches. As noted in the Plan, the greatest concentration of resources is in the western portion of the blocks, particularly in the western portion of Block 2. Plan at 4-5. The controlled grading trenches, however, are located predominantly on the eastern portion of the blocks. If these locations are being used to determine the outer limits of a potential site concentrated in the western portion of the blocks, please clarify that BLM has already determined that the western portions comprise a potential site and therefore are to be avoided. If the locations were selected for some other purpose, please explain. Finally, if controlled grading on the eastern portion of those blocks does not encounter any significant cultural resources, or otherwise demonstrate an outer limit to a potential site, the BLM must require additional fieldwork closer to the concentrated resources to determine if the outer limit of a potential site lies to the west of the proposed controlled grading areas.

The Plan also indicates that, after a grader makes two passes over the designated controlled grading areas, "[the] deposited soil will be sampled and screened by CRMs in quantities of three 5-gallon buckets per pass, screened through 1/8-inch hardware cloth, or in an amount necessary to insure adequate detection of any cultural materials as determined by the BLM and CEC in coordination with the CRMs and Native American Monitors." Plan at 8. The fifteen gallons of soil to be screened accounts for only approximately 1 percent of the soil removed by each 100-meter pass over the area. If artifacts are found in the removed soil, it will be exceedingly difficult to determine the precise location from which those artifacts were derived, thus preventing the site evaluation purpose of the Plan. If BLM proceeds with controlled grading, BLM should not leave it up to some future determination to increase the number of 5-gallon buckets that must be screened. Instead, a more effective method of screening the materials must be required now. *See, e.g.,* Programmatic Agreement Appendix J at A-112 (Example Monitoring and Discovery Plan requiring screening of trenching materials "at no less than 5-m intervals" and requiring that "all features encountered will be exposed by hand").

In addition, the Plan states that "[a]ny intact features found outside of the limits of a potential site . . . will be hand excavated." Given that the stated purpose of the Plan is to determine the limits of a potential site or sites (Plan at 6), it is unclear how those charged with implementing the Plan will determine whether an intact feature is within or outside "the limits of a potential site."

Finally, the Plan provides that Controlled Grading must continue until either no more artifacts are found or the grader encounters "noncultural paleosols." Plan at 9. In either event, the grading continues until all cultural materials are scoured from the site within the bounds of the grading location. This is simply unacceptable as a methodology. An earlier stopping point must also be considered: once sufficient artifacts are encountered to support a determination of site eligibility. This earlier stopping point is more consistent with the Plan's purpose, "to identify the horizontal and *uppermost vertical limits* of this unanticipated cultural discovery . . ." (Plan at 6, emphasis added.)

Results of Controlled Grading

The Plan states that "[i]f it is determined that the resources [encountered by controlled grading] do constitute one or more sites eligible for the National Register of Historic Places ("NRHP"), additional

fieldwork may be required to evaluate the site(s) and mitigate or avoid any adverse effects that construction of the GSEP may have to cultural resources.” Plan at 3. Pursuant to section 106 of the National Historic Preservation Act, it is the BLM, not the project proponent, that has authority to determine whether a site is eligible for the NRHP. Thus, the BLM must independently review the evidence submitted to it about the cultural resources discovered as a result of controlled grading and make its own determination about site eligibility. 36 C.F.R. § 800.4(c).

CRIT appreciates the Plan’s acknowledgment that avoidance of newly discovered cultural resources is the preferred method of handling those resources. We further note that, pursuant to the HPTP and CRMMP, any treatment other than avoidance cannot be considered absent evidence that avoidance is truly infeasible. Please provide us with any correspondence from NextEra or other documentation suggesting that avoidance is infeasible.

CRIT Requests Daily Reporting of Discoveries

The Plan indicates that “results of the controlled grading program will be communicated to the BLM, CEC and consulting Tribes within a week of completion of the fieldwork.” Plan at 9. This requirement is based on CEC Condition of Certification CUL-11. However, CUL-11 contains a process for reporting about “data and recovery” of cultural resources and artifacts within a previously identified site (CA-RIV-9072). The controlled grading plan, on the contrary, is intended to determine the boundaries of an unanticipated but potentially eligible site. As a result, the interested parties, including BLM, CEC, and consulting Tribes like CRIT, should not be left in the dark about the results of the grading until a week after all work is completed. Rather, the project developer should be required to provide daily reports to these interested parties on the results of the controlled grading operations – just as it currently does for the Daily Monitoring Reports.

NextEra’s Involvement in Preparation of Plan

On February 10, 2012, you informed us that the Plan was being prepared by the BLM field office and the BLM state office; that representatives of NextEra had been provided with CRIT’s comments on the original grading and trenching plan as well as a preliminary draft of this controlled grading plan, and; that NextEra had provided BLM with comments on these documents. That same day, CRIT requested copies of the Plan and NextEra’s comments.

We have yet to receive NextEra’s comments. As these comments were apparently instrumental in the revision of the Plan (see Plan Cover Page (noting that NextEra’s consultants “contribut[ed]” to the preparation of the Plan)), CRIT again requests copies of the comments as soon as possible. Until we receive these comments, which we were informed would be forthcoming, we cannot engage in meaningful consultation about the Plan.

In addition, we are informed that some tribes that commented on the original grading and trenching plan were not provided with a copy of the draft Plan. Ongoing government-to-government consultation cannot be completed if BLM is unwilling or unable to provide timely information regarding cultural resources to interested tribes.

Avoidance of the Metate Feature

CRIT appreciates that the BLM has required avoidance of the metate feature discovered on November 18, 2011. We look forward to consulting with you on what would constitute an “appropriate distance” for avoidance. This issue must be resolved before any further grading is permitted in the area.

In conclusion, because this Plan remains inconsistent with the HPTP and CRMMP, it must be revised. Any revised plan must not only be consistent with (or less invasive than) the specific protocols set forth in the HPTP and CRMMP, it must also ensure that avoidance remains a viable option upon completion of site evaluation. We look forward to engaging with your agency in meaningful consultation on these issues in the near future.

Very truly yours,
COLORADO RIVER INDIAN TRIBES



Eldred Enas
Tribal Council Chairman

- cc: Tribal Council
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