LAW OFFICES
MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE
A PROFESSIONAL SERVICE CORPORATION

REBECCA JCH JACKSON (WA)
FRANK R. JOZWIAK (WA)
MASON D. MORISSET (WA)
THOMAS P. SCHLOSSER (WA)
THANE D. SOMERVILLE (WA, OR, AZ)

COMPTROLLER
M. ANN BERNHEISEL

1115 NORTON BUILDING
801 SECOND AVENUE
SEATTLE, WA 98104-1509

TELEPHONE: (206) 386-5200
FACSIMILE: (206) 386-7322

WWW.MSAJ.COM

February 23, 2015

Via e-mail: (docket@energy.ca.gov) and
First Class Mail

California Energy Commission
Dockets Office, MS-4
Docket No. 09-RENEW EO-01
1516 Ninth Street
Sacramento, CA 95814-5512

California Energy Commission
DOCKETED
09-RENEW EO-1
TN 74887
FEB 23 2015

Re: Comments of Quechan Tribe of the Fort Yuma Indian Reservation on the Draft EIR/EIS for the DRECP

Dear California Energy Commission:

The Quechan Tribe of the Fort Yuma Indian Reservation submits the following comments on the Draft EIR/EIS for the proposed Desert Renewable Energy Conservation Plan (DRECP).

I. Interest of the Quechan Tribe

The Quechan Tribe's Fort Yuma Indian Reservation was established at its current site 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. Historically, 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). *See also* Braun & Gates, *PSEGS Ethnographic Report Informing Final Staff Assessment* (August 2013), p. 36 (referring to traditional Quechan use of Chuckwalla, Cibola, and Palo Verde valleys).

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, trails, settlement and battle site locations, 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 California State Office of BLM, Sacramento, California, by EDAW, Inc., San Diego, California (2002).

Large-scale energy development in the California desert, especially on public lands within the California Desert Conservation Area (CDCA), directly and adversely affects the Tribe. As a result, the Tribe has been repeatedly forced to take legal action to protect its cultural heritage. In 2010, the Tribe sued the Department of the Interior based on Interior's unlawful approval of the Imperial Valley Solar (IVS) Project on lands within the traditional territory of the Tribe that contain sensitive cultural and natural resources of signficance to the Tribe. *See Quechan Tribe of the Fort Yuma Indian Reservation v. United States Department of the Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010). On December 15, 2010, the Court enjoined construction of the IVS Project due to Interior's failure to comply with applicable law, including the National Historic Preservation Act (NHPA). *Id.* In 2012, the Tribe again sued Interior based on its approval of the Ocotillo Wind Energy Facility on lands that constitute a Traditional Cultural Property in western Imperial County. That case is currently pending on appeal in the Ninth Circuit. *Quechan Tribe of the Fort Yuma Indian Reservation v. United States Department of the Interior*, Ninth Circuit Case No. 13-55704. The Tribe also filed a formal protest against Interior's approval of the Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States (2012) (Solar PEIS) due to the impacts to cultural resources that would result from the proposed solar energy developments in Quechan's traditional territory. Most recently, the Tribe submitted testimony and comments in opposition to the Palen Solar Electric Generating System (PSEGS), which was only the latest in a long line of large-scale energy proposals that, if approved, would result in destruction of a sensitive cultural landscape of significance to the Tribe. The Tribe will continue to oppose development actions that threaten to destroy its cultural and spiritual heritage.

II. Specific Comments on the Draft EIS/EIR for the DRECP.

A. The Tribe Does Not Support Any Alternative of the DRECP, As Proposed In the Draft EIR/EIS, Due To The Significant Impacts That Will Occur To Cultural Resources and Native American Values.

The DRECP is not a plan to protect cultural resources or Native American values. It is a plan to facilitate large-scale energy development within the California Desert Conservation Area (CDCA) – an area specifically set aside by Congress for protection of the desert's resources. The

Draft EIR/EIS confirms that this intensive development will come at the direct expense of cultural resources and Native American values. The Draft EIR/EIS makes clear that the Preferred Alternative, and all other Alternatives discussed in that document, would cause significant and unmitigable impacts to cultural resources and Native American interests. Draft EIR/EIS, Executive Summary, p. 50. Thus, the Tribe cannot support any alternative of the DRECP, as currently proposed in the Draft EIR/EIS.

To the extent that the DRECP addresses resource protection, that focus is nearly exclusively on protection of biological resources, such as endangered and threatened plants and wildlife. Protection and preservation of cultural resources and Native American values, including NHPA-eligible resources, sacred sites, and Traditional Cultural Places and Landscapes is largely an afterthought. While the Draft EIR/EIS cites to informational meetings held with affected Indian tribes, actual government-to-government consultation regarding the DRECP, the design of Development Focus Areas (DFAs), and how to best ensure protection of cultural resources, has been minimal to non-existent.

The Tribe also does not support the No Action Alternative, which would continue the ineffective case-by-case analysis of development proposals with no comprehensive effort to plan appropriate locations for development. While the Tribe agrees with the idea of prospectively identifying suitable locations for renewable energy development, the focus of such process should be on identifying areas that can be developed without significant impact to all of the desert's sensitive resources, including cultural resources, visual resources, and Native American values, as well as biological resources. The current DRECP alternatives focus on protection of biological resources, while failing to adequately protect other sensitive resources in the desert environment.

While the Tribe supports development of a plan to focus energy development on disturbed lands and non-sensitive areas suitable for intensive use, the Preferred Alternative (and other alternatives) of the DRECP fail to accomplish that goal with regard to cultural resources and Native American interests. Because of the significant impacts that would occur through the expansive energy development envisioned in the DRECP, the Tribe opposes approval of any current alternative of the DRECP. The Tribe encourages a wholesale redesign of the DRECP, in meaningful consultation with Native American interests, to ensure adequate protection of all sensitive desert resources, not just biological resources.

B. The Current Approach of Case-By-Case Project Evaluation Fails to Protect Public Lands, Cultural Resources, and Native American Values.

The No-Action Alternative would continue the status quo in which the BLM and CEC separately accept, analyze, and review individual renewable energy applications on a case-by-case basis. To date, that status quo approach has proven unsatisfactory to both renewable energy developers and those interested in protection of public lands and resources, such as the Tribe. It is clear that BLM and CEC need to carefully study, develop, and implement a program that designates certain non-sensitive lands suitable for large-scale renewable energy development, authorizes renewable energy development in those areas, and prohibits utility-scale energy

development on all other lands in the CDCA. However, the current draft DRECP fails to adequately protect the desert's resources from the impacts of extensive energy development.

Utility-scale renewable energy projects are a uniquely harmful form of public land development due to the very large land areas that are necessary for such projects and intensive degradation of the developed lands. These energy developments have significant impacts on species habitat and cultural landscapes, in addition to other resources, due to their scale. The current case-by-case approach fails to adequately consider the cumulative impact associated with multiple utility-scale renewable energy projects. The Tribe agrees that it is imperative that BLM and CEC identify and set aside certain non-sensitive land areas for utliity-scale renewable energy development and prohibit such intensive development on all other lands. However, any such plan must focus equally on protection of cultural and visual, not just biological, resources.

The current approach, which allows applications for renewable energy development on nearly all BLM lands in the CDCA that are not set aside for wilderness or other special management purposes, is inefficient and has proven unsuccessful. Most, if not all, of the "fast-track" projects that have been approved are or have been subject to litigation (often initiated by adversely affected Indian tribes) due to flaws in the existing BLM process and failure to adequately protect affected resources (often cultural resources). By designating a reasonable amount of specific lands for energy development in non-culturally sensitive areas, BLM and CEC could focus their limited resources on implementing development on those lands, while avoiding controversy and conflicts that arise when BLM and/or CEC approve projects on culturally sensitive lands.

Unfortunately, while the DRECP focuses on steering energy projects away from biologically sensitive lands, it fails to adequately protect cultural resources, visual resources, and Native American values. Thus, while the No-Action Alternative is unacceptable, so are the Alternatives presented for evaluation in the Draft EIR/EIS.

C. The Preferred Alternative Should Be Amended To Remove Any Streamlining of Permits for Energy Development; The Proposed Streamlining Fails to Consider the Time Necessary to Conduct Consultation Under Section 106 of the NHPA and Related Cultural and Ethnographic Evaluations.

The Draft EIR/EIS suggests that applicants seeking to develop large-scale energy projects within DFAs would be entitled to "streamlining" of the permitting process, including a promise that NEPA reviews could be completed in less than one year. The Tribe opposes the proposed streamlining and notes that the promise of streamlined review fails to consider the important, and sometimes lengthy, process associated with consultation and cultural resource evaluation under Section 106 of the National Historic Preservation Act (NHPA).

Regulations implementing Section 106 of the NHPA require that, prior to approving a federal undertaking, the federal agency must engage in a multi-part process. First, the agency must identify the historic properties within the affected area. 36 C.F.R. § 800.4. Second, the

agency must evaluate 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 the development of mitigation measures. 36 C.F.R. § 800.6. Throughout all of these processes, the agency must consult with Indian tribes that might attach religious and cultural significance to historic properties within the affected area, even if such area is outside of reservation boundaries. 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 Tribe opposes any effort to rush or defer any component of the Section 106 process including the surveys, identification of resources, evaluation of impacts, development of mitigation measures and alternatives, and government-to-government consultation. The entire Section 106 process relating to the impacts of an energy development undertaking must be completed prior to issuance of any Record of Decision for any specific project.

Failure to complete the Section 106 process before project approval has significant adverse consequences for cultural resources. For example, for the Ocotillo Wind Energy Facility, BLM failed (over tribal objections) to conduct ethnographic or prehistoric trails studies prior to approval of that project, and simply directed such studies to be prepared after the project was already approved and constructed. BLM also failed to identify numerous archaeological sites until after the project was already approved and under construction. A total of 53 archaeological sites and 1104 individual artifacts were identified during just the first 8 weeks of construction of that project. Similarly, the discovery of previously unidentified sites at the Genesis Solar Project led to the filing of a lawsuit by the Colorado River Indian Tribes against BLM/Interior in 2012. These controversies might have been avoided if BLM had made a meaningful effort to fulfill its obligations under Section 106 of the NHPA prior to project approval. Under the NHPA, the decision-maker needs to be fully aware of the cultural significance of the project area before the project is approved. Deferring studies and consultations until after project approval is unlawful under the NHPA and its regulations.

In the Tribe's experience, the length of time needed to adequately complete necessary pedestrian surveys and other cultural and ethnographic studies, and to engage in meaningful consultation as required by Section 106 and the regulations at 36 CFR Part 800, is often more than twelve months. Any effort to rush or expedite the process comes at the expense of protecting cultural resources. Any effort to "streamline" the Section 106 process or the NEPA process as it relates to protection of cultural resources or Native American values is strongly opposed by the Tribe. Federal and state regulators have a legal and public trust obligation to protect and preserve the cultural resources and Native American values in the California desert. The Preferred Alternative should be revised to omit any commitment by regulators to "streamline" the permitting process.

D. The Draft EIR/EIS Should Clarify That No Renewable Energy Development Will Be Permitted Outside of Any Land Formally Designated As A Development Focus Area (DFA).

Under the Preferred Alternative of the DRECP, certain lands would be designated as Development Focus Areas (DFA). Applicants seeking to develop energy on these lands would

be entitled, under the current Preferred Alternative, to certain benefits of "streamlined" review in some aspects of the permitting process. However, it is not clear from the Draft EIR/EIS whether development of renewable energy projects would be limited exclusively to DFA areas or whether a project proponent could still apply for permits/rights-of-way to develop a large-scale energy project outside of a DFA. The Tribe asks that this issue be clarified. The Tribe believes that any benefits of planning appropriate locations for renewable energy development will be lost unless applicants are precluded from developing projects outside of DFAs. The 2012 Solar PEIS suffers from a similar flaw, in that it created Solar Energy Zones, but still allows developers to seek project approvals outside of those zones. If the Preferred Alternative currently allows applicants to develop energy projects outside of DFAs, the Tribe requests that it be amended to preclude any such development outside of DFAs.

E. Under the Preferred Alternative, BLM-Managed Lands Within DFAs Should Be Limited To Lands That Are Currently Classified As Class M or Class I Under the Existing California Desert Conservation Area Plan; No Class L or Class C Lands Should Be Designated As DFAs.

Congress created the California Desert Conservation Area (CDCA) in the Federal Land Policy and Management Act of 1976 (FLPMA). The CDCA was the only conservation area expressly created by Congress in FLPMA. In 1980, at Congress' direction, Interior prepared and approved the California Desert Conservation Area Plan (CDCA Plan). The CDCA Plan establishes a governing management plan for 12.1 million acres of federal lands in Southern California.

The CDCA Plan divides the federal lands into four separate land use classes based on resource sensitivity. "Class C" lands are those suitable for wilderness designations and are the most protected. "Class L" lands are "Limited Use" lands, a designation that "protects sensitive, natural, scenic, ecological, and cultural resource values." The CDCA Plan requires that "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 significantly diminished." The CDCA Plan further elaborates that consumptive uses on Class L lands are allowed "only up to the point that sensitive natural and cultural values might be degraded." Class L provides "protective resource management which complements many identified Native American values." In contrast, Class M ("Moderate Use") and Class I ("Intensive Use") are expressly designed to provide for more-intensive uses such as energy and utility development. Nearly four million acres are identified and designated as Class M or I lands in the CDCA Plan, which is far more than necessary to meet foreseeable renewable energy demand. These land use designations were subject to careful consideration and evaluation when the CDCA Plan was developed in 1980 and were created in large part to protect Native American interests.

Significant resource conflicts arise when Interior approves location of utility-scale development projects on Class L lands – with examples including the Imperial Valley Solar Project and Ocotillo Wind Energy Facility discussed above. These conflicts on Class L lands primarily involve impacts to Native American values and cultural resources. The 1980 EIS for the CDCA Plan confirmed that 78% of very highly sensitive cultural resources and 85% of

identified areas of Native American traditional values within the CDCA occur on Class C and L lands. Thus, restricting development of utility-scale energy projects to the four million acres of Class M and I lands (where there is far less chance of encountering sensitive sites) would significantly reduce these conflicts, while still allowing renewable energy development to occur.

Utility-scale projects often cover many thousands of acres with energy infrastructure. Such development is wholly incompatible with the purposes of the Class L designation and inconsistent with Congress' clear intent to protect the natural and cultural resources of the CDCA. Moreover, prohibiting utility-scale energy development on Class L lands will not interfere with BLM or CEC development goals, because there are millions of acres within the CDCA that are specifically designated for high-intensity, large-scale land uses such as utility-scale energy development. In addition, small energy projects that do not interfere with cultural and natural values could potentially be developed on Class L lands. In order to comply with FLPMA and the CDCA Plan, Class L lands must be excluded from DFAs.

The Draft EIR/EIS does not clearly address how DFAs are going to be allocated amongst Class C, L, M, and I lands. This needs to be clarified for the public. The discussion on Page IV.14-29 of the Draft EIR/EIS appears to suggest that only 1% of lands currently classified as Class I (Intensive) would occur within DFAs. If that is correct, the Preferred Alternative must be amended to include more Class I lands within DFAs. Page IV.14-29 appears to state that approximately 3% of Class L (Limited) lands would be located within DFAs. There are approximately 6,000,000 acres of Class L lands, which would mean that approximately 180,000 acres of Class L lands could be designated as DFAs under the Preferred Alternative. This is inconsistent with the intent of the CDCA Plan and will result in diminishment and desecration of cultural and Native American values present on Class L lands.

The Tribe requests that the Preferred Alternative be revised to omit any Class L lands from Development Focus Areas. Similarly, additional Class I (Intensive Use) lands should be included within Development Focus Areas.

F. The Tribe Agrees That Binding Visual Resource Management (VRM) Classifications Must Be Established on All BLM Lands Throughout the CDCA; However, Those VRM Classifications Should Be Developed In Consultation With Affected Indian Tribes and Should Take Into Account Visual Sensitivity of Traditional Cultural Landscapes.

The CDCA was established by Congress in part to protect its unique and irreplaceable scenic values. 43 U.S.C. § 1781. BLM implements Congress' intent to protect scenic values on public lands through the inventory of scenic values and the subsequent development of Visual Resource Management (VRM) standards. The inventory of values and the development of standards to manage public lands is required by FLPMA in 43 U.S.C. § 1711 and 1712. Although the resource management plan for the CDCA (the CDCA Plan) was developed thirty-four years ago, and has been amended many times over the last three decades, BLM has not yet established VRM standards throughout the entire CDCA. This violates FLPMA. In prior cases, including permitting proceedings for large-scale energy projects such as the Ocotillo Wind

Energy Facility and the Palen Solar Project, BLM has taken the position that it may set VRM standards on a case-by-case basis within the CDCA, and even after the relevant project has been proposed for development. This process, by which BLM lets the development at issue dictate the appropriate level of visual resource management, is arbitrary and capricious, inconsistent with BLM's own policy of setting final VRM standards on all public lands, and inconsistent with Congress' intent to protect scenic values on public lands.

It appears that BLM now intends to promulgate binding VRM standards on all BLM-managed lands throughout the entire CDCA. *See* Draft EIR/EIS at IV.20-36 ("the Preferred Alternative would have VRM Classes assigned under it; and VRM objectives would be applied to all BLM lands"). If this is correct, the Tribe agrees that the setting of binding VRM classifications on BLM lands in the CDCA is appropriate and is long overdue. However, it is not apparent from the Draft EIR/EIS how those standards are being determined, whether the standards were developed in consultation with affected Indian tribes, and whether the standards are being developed in a manner that would protect visually sensitive cultural areas and traditional cultural landscapes. The Tribe asks that BLM clarify whether it is setting binding VRM classifications on all BLM lands within the CDCA; how the VRM classifications were developed; and how visual characteristics of traditional cultural landscapes will be protected under the new classification system.

G. The Preferred Alternative Should Be Revised To Omit Any Lands Designated As VRI Class II or VRI Class III From Development Focus Areas (DFAs).

The Tribe objects to any inclusion of lands inventoried as VRI Classes II or III within Development Focus Areas. Lands inventoried as VRI Class II represent lands of high visual (and often cultural) value. Management objectives for Class II lands include retaining the existing character of the landscape. Draft EIR/EIS, at III.20-2, III.20-3. Lands inventoried as VRI Class III have moderate visual value. Management objectives for Class III lands include to partially retain the existing character of the landscape.

Lands that are inventoried as containing Class II or Class III visual values should be managed according to Class II or Class III management objectives. A system that changes the management objective to Class IV solely for the purpose of facilitating large-scale energy development, as opposed to protecting the values actually existing on the land, is not consistent with Congress' intent to protect sensitive visual values within the CDCA, as expressed in FLPMA, and is arbitrary and capricious under the APA. All lands that have been inventoried as VRI Class II or Class III should be removed from Development Focus Areas.

There also appears to be an error or inconsistency in the discussion of the VRI/VRM Classes in the Preferred Alternative. Draft EIR/EIS at IV.20-36. That page states: "Under the Preferred Alternative, there would be approximately 17,000 acres of VRI Class II lands, 61,000 acres of VRI Class III lands, and 27,000 of VRI Class IV lands within DFAs." These figures add up to 105,000 acres. Similarly, the next paragraph, under heading "VRM Classes" states that "Under the Preferred Alternative, all DFAs on BLM land would be designated as VRM Class IV

(106,000 acres) . . ." However, other portions of the Draft EIS/EIR report that there are actually 367,000 acres of DFAs on BLM-administered lands (far more than the ~ 106,000 acres mentioned in the discussion of VRM). Thus, what are the VRI classifications of the other 261,000 acres of DFAs not addressed in section IV.20?

DFAs should be limited to lands within low visual sensitivity; specifically, those lands that have been inventoried as VRI Class IV. Lands that have been inventoried as VRI Classes II and III should not be managed as Class IV lands solely to accommodate development.

H. **Lands That Have Not Yet Been Subject to Cultural Resource Surveys Should Not Be Included Within Development Focus Areas.**

A very small percentage of the lands covered by the DRECP have been subject to cultural resource surveys. Draft EIR/EIS, p. IV.8-2. The Tribe objects to the inclusion of any federally-managed lands within Development Focus Areas until a thorough cultural resource survey has been completed on such lands. Lands that have not yet been surveyed for the presence of cultural resources should be excluded from DFAs until pedestrian surveys are performed. DFAs should be limited to those lands that are confirmed not to contain sensitive cultural resources, sacred sites, or other Native American values.

I. **The EIR/EIS Should Clarify How the DRECP Relates to the Solar PEIS; Specifically Will the Lands Identified As DFAs Replace Lands Previously Identified As Solar Energy Zones In the Solar PEIS?**

On October 15, 2012, Secretary of the Interior Salazar signed a Record of Decision (ROD) approving amendments to BLM resource management plans in California, Arizona, and four other western states based on the 2012 Programmatic EIS for Solar Energy Development in Six Southwestern States (Solar PEIS). Secretary Salazar's decision designated 285,000 acres of federal public lands as Solar Energy Zones where utility-scale solar development will be prioritized, and his decision also allowed energy development on other federal lands known as "variance" lands. The Tribe asks for clarification as to what effect the designation of DFAs in the DRECP will have on the lands designated as Solar Energy Zones. For example, will the Solar Energy Zones remain in effect in addition to the lands designated as DFAs? If so, how much total land will be classified as either Solar Energy Zones or DFAs? Also, what will be the status of the "variance" lands if the DRECP is approved? Will renewable energy development be prohibited on lands outside of DFAs and/or Solar Energy Zones?

J. **Meaningful Government-to-Government Consultation Has Not Occurred Regarding the Development of the DRECP.**

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.*

In *Quechan Tribe of the Fort Yuma Indian Reservation v. United States Department of the Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010), the District Court agreed with the Tribe's argument that the Department of the Interior, and specifically California BLM offices, had failed to properly fulfill applicable consultation duties under 36 CFR Part 800. This resulted in entry of a preliminary injunction, which enjoined the development of the Imperial Valley Solar Project.

In *Quechan*, the Court ruled "the consultation requirement [under 36 CFR Part 800] is not an empty formality; rather 'it must recognize the government-to-government relationship between the Federal Government and Indian tribes' and is to be 'conducted in a manner sensitive to the concerns and needs of the Indian tribe.' § 800.2(c)(2)(ii)(C)." 755 F. Supp. 2d at 1108-09. The Court found that the Part 800 regulations "require the agency to consult extensively with Indian tribes." The Court explained: "Section 800.4 alone requires at least seven issues about which the Tribe, as a consulting party, is entitled to be consulted before the project was approved."

- Under § 800.4(a)(3), BLM is required to consult with the Tribe to identify issues relating to the project's potential effects on historic properties.
- Under § 800.4(a)(4), BLM is required to gather information from the Tribe to assist in identifying properties which may be of religious and cultural significance to it.
- Under § 800.4(b), BLM is required to consult with the Tribe to take steps necessary to identify historic properties within the area of potential effects.
- Under § 800.4(b)(1), BLM is required to take into account any confidentiality concerns raised by tribes during the identification process.
- Under § 800.4(c)(1), BLM must consult with the Tribe to apply National Register criteria to properties within the identified area, if they have not yet been evaluated for eligibility for listing in the National Register of Historic Places.
- Under § 800.4(c)(2), if the Tribe doesn't agree with the BLM's determination regarding National Register eligibility, it is entitled to ask for a determination.
- Under § 800.4(d)(1) and (2), if BLM determines no historic properties will be affected, it must give the Tribe a report and invite the Tribe to provide its views.

See 755 F. Supp. 2d at 1109. Sections 800.5 and 800.6 require further consultation and review to resolve adverse effects and to deal with failure to resolve adverse effects. *Id.* "Furthermore, under § 800.2, consulting parties that are Indian tribes are entitled to *special consideration* in the course of an agency's fulfillment of its consultation obligations." *Id.*

Admonishing BLM for its failure to fulfill its consultation duties, the Court ruled: "government agencies are not free to glide over requirements imposed by Congressionally-approved statutes and duly adopted regulations. The required consultation must at least meet the standards set forth in 36 C.F.R. § 800.2(c)(2)(ii), and should begin early. The Tribe was entitled to be provided with adequate information and time, consistent with its status as a government that is entitled to be consulted. The Tribe's consulting rights should have been respected. It is clear that did not happen here." 755 F. Supp. 2d at 1119.

The DRECP is an undertaking subject to NHPA compliance. In developing the DRECP, which will have a significant adverse effect on cultural resources if approved, the BLM has not met the consultation requirements discussed above. General informational meetings in which BLM conveys information to multiple tribes at once is not government-to-government consultation. Many of the required steps in the Section 106 process have been ignored. BLM has not engaged in meaningful government-to-government consultation regarding the DRECP with the Quechan Tribe in accordance with Section 106 of the NHPA or the 36 CFR Part 800 regulations.

K. The Cumulative Effect Analysis In the Draft EIR/EIS Is Unlawfully Vague

An EIS must examine the cumulative impacts of proposed actions. *Neighbors of Cuddy Mtn. v. Alexander*, 303 F3d 1059, 1071 (9th Cir. 2002). A cumulative impact is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such actions." 40 C.F.R § 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 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*, 608 F.3d 592 (9th Cir. 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, 608 F.3d at 603.

The cumulative analysis in the Draft EIR/EIS is exceptionally vague. The document offers no significant information about how implementation of the DRECP will cumulatively affect cultural resources and Native American values, other than generic analysis that development of large-scale energy projects in this region will generally result in cumulative adverse effects. There is no substantive quantification or detailed analysis of how conversion of hundreds of thousands of acres of desert lands will impact the overall cultural and Native American values of the area.

L. The Preferred Alternative of the DRECP Should Require Developers of Wind and Solar Energy Projects That Could Take Eagles To Apply For, And Obtain, Federal Take Permits Under the Bald and Golden Eagle Protection Act As A Prerequisite To Project Approval; And Any Applicable Take Limitations Should Be Strictly Enforced.

Commercial-scale wind energy facilities kill eagles in substantial numbers. In September 2013, United States Fish and Wildlife (FWS) biologists published an article in the Journal of Raptor Research entitled *Bald Eagle and Golden Eagle Mortalities at Wind Energy Facilities in the Contiguous United States*. J. Raptor Res. 47(3): 311-315 (2013). This article reports that operation of the Altamont Pass Wind Resource Area in California resulted in annual mortality of up to 75 golden eagles per year in 2005-2007. *Id.* at p. 311. In addition to the mortalities at Altamont, the article reported an additional 67 confirmed mortalities of bald or golden eagles at other commercial-scale wind energy facilities operating in the United States from 2008 through June 2012. *Id.* at p. 312. Comparatively, from 1997 through 2007, there were 18 confirmed mortalities of bald or golden eagles at commercial-scale wind energy facilities. *Id.* at p. 314. The significant increase in eagle mortalities, beginning in 2008, reflects the explosive growth of wind energy development across the United States, especially in the West. The article also advises that "these data underrepresent the total number of mortalities of eagles at wind energy facilities in the United States during this period; e.g., most were discovered incidentally during routine activities at facilities." *Id.* at p. 312. The article noted a "general lack of rigorous monitoring and reporting of eagle mortalities" at commercial wind facilities. *Id.*, at p. 313. "Thus, our findings of the reported mortalities likely underestimate, perhaps substantially, the number of eagles killed at wind facilities in the United States." *Id.*[1]

---

[1] For example, this report documented the deaths of 29 golden eagles at wind-energy facilities in Wyoming since 2009. However, a May 14, 2013 Associated Press article states: "One of the deadliest places in the country for golden eagles is Wyoming, where federal officials said wind farms have killed more than 50 golden eagles since 2009, predominantly in the southeastern part of the state. The officials spoke on condition of anonymity because they were not authorized to disclose the figures." Dina Cappiello, *Wind farms get pass on eagle deaths*, Associated Press, May 14, 2013. This article further

While impacts to birds, including eagles, are more obvious and prevalent at commercial-scale wind energy facilities, recent evidence shows that birds, and potentially eagles, are also subject to unlawful "take" at commercial-scale solar energy facilities. For example, multiple bird injuries and mortalities have been reported at the Ivanpah Solar Electric Generating Station in southeastern California. Compliance reports filed with the California Energy Commission by the project owner reported 26 bird mortalities at the Ivanpah facility between June and mid-September 2013.[2] Some of these deaths reportedly resulted from birds being burned by "heat flux" when flying over the facilities. Others resulted from birds crashing down into the solar heliostats or other structures. Some reports suggest that these large solar projects, which often consist of tens of thousands of concentrated mirrors reflecting into the sky, look like large water bodies from the air, attracting birds searching for water in the desert environment.[3] A protected peregrine falcon was also found injured at the facility in September 2013. Similar avian deaths are reportedly occurring at the Genesis Solar facility, located near Blythe, California.[4] The likely harm to avian species was also a primary factor in the CEC's recommended denial of the Palen Solar Energy Project. The EIR/EIS for the DRECP must consider the possible direct and indirect impacts to eagles and eagle habitat resulting from the rapid expansion of renewable energy projects into the desert environment in the southwestern United States.

Despite the exponential growth in development of commercial-scale renewable energy projects, and the documented injuries and deaths to protected eagles resulting from commercial wind facilities, very few developers have sought approval for programmatic take permits and, to our knowledge, FWS has not issued any programmatic take permits to renewable energy developers under its 2009 regulations. *See* 77 Fed. Reg. 22278, 22279 (April 13, 2012); *see also* M. Weiser, *Eagle conservation effort at Solano wind energy project is first of its kind*, Sacramento Bee, Sep. 27, 2013 (reporting that no programmatic take permits have been issued as of that date).[5] Thus, without take permits in place, every eagle death directly attributable to commercial-scale wind energy facilities (as discussed above) has been an unpermitted and unlawful take of eagles in contravention of the Bald and Golden Eagle Protection Act (BGEPA) and the Migratory Bird Treaty Act (MBTA).

---

reports that the Chokecherry/Sierra Madre Wind Project, an 1,000 turbine project approved by BLM for development in south-central Wyoming, could kill as many as 64 eagles per year.

[2] http://www.kcet.org/news/rewire/solar/concentrating-solar/bird-deaths-mount-at-ivanpah-solar.html

[3] http://www.kcet.org/news/rewire/solar/water-birds-turning-up-dead-at-solar-projects-in-desert.html

[4] http://www.kcet.org/news/rewire/wildlife/august-was-a-bad-month-for-birds-at-genesis-solar.html

[5] The few applications for programmatic take permits that have been filed evidence the significant impact to eagles caused by commercial wind-energy production. For example, one proposed 94-turbine wind farm in Oklahoma is seeking a permit to kill up to 120 eagles over the life of the project. Another application in California, for a proposed 50-turbine wind farm, has sought a permit to kill five golden eagles over five years. These are only two of the numerous projects being proposed around the country. The cumulative effect of commercial wind energy development on eagles will likely be devastating.

Despite the evidence gathered by FWS' biologists and scientists of eagle deaths caused by commercial-scale wind energy facilities, enforcement of take prohibitions against renewable energy developers has been minimal. For example, a May 14, 2013 Associated Press article reported:

> Wind farms in this corner of Wyoming have killed more than four dozen golden eagles since 2009, one of the deadliest places in the country of its kind. But so far, the companies operating industrial-sized turbines here and elsewhere that are killing eagles and other protected birds have yet to be fined or prosecuted – even though every death is a criminal violation. The Obama administration has charged oil companies for drowning birds in their waste pits, and power companies for electrocuting birds on power lines. But the administration has never fined or prosecuted a wind-energy company, even those that flout the law repeatedly.

Dina Cappiello, *Wind farms get pass on eagle deaths*, Associated Press, May 14, 2013. This selective enforcement policy, in which wind energy projects are not held accountable for violations of existing federal laws like the BGEPA and MBTA, is also documented by Scott W. Brunner, *The Prosecutor's Vulture: Inconsistent MBTA Prosecution, Its Clash with Wind Farms, and How to Fix It*, Seattle University Journal Of Environmental Law (2013).[6]

The Interior Department's renewable energy development policies, combined with its practice of not enforcing federal laws prohibiting eagle take, have created a regulatory environment that provides little incentive for energy developers to apply for and obtain take permits, which could require costly mitigation measures. Interior, acting through the BLM, currently allows renewable energy projects to proceed on federal lands even if the proponent does not apply for or obtain an eagle take permit. To our knowledge, few (and perhaps none) of the renewable energy projects approved by BLM since 2009 have obtained an eagle take permit under the regulations approved by FWS in 2009. A renewable energy developer can reasonably assume that, even if it violates federal law by taking eagles without a permit, the United States will not impose any penalties against it. *See* Cappiello, *supra* ("By not enforcing the law, the administration provides little incentive for companies to build wind farms where there are fewer birds. And while companies already operating turbines are supposed to avoid killing birds, in reality there's little they can do once the windmills are spinning").

If BLM and CEC are going to proceed on a course of permitting more utility-scale renewable energy projects in the California desert, they must do more to ensure that federal laws regarding protection of bald and golden eagles are implemented and enforced. First, all proponents of renewable energy projects, which are anticipated to take eagles, must be required to apply for and obtain an eagle take permit prior to project approval. Permits must be a mandatory prerequisite, not merely voluntary or at the discretion of the applicant. Second, any permitted take must be assessed comprehensively throughout the planning area; i.e., a limit on permissible take should be set throughout the plan area and no permits should be authorized if

[6] http://www.sjel.org/vol3/the-prosecutors-vulture

the overall cumulative take limit would be exceeded in the planning area. Third, the federal and state regulators and land managers must exercise their respective enforcement authorities against projects that unlawfully take eagles without a permit (or at levels that exceed the permitted take levels in a permit).

III. **Conclusion**.

The Quechan Tribe urges BLM and CEC to not approve any alternative of the DRECP as currently proposed. BLM and CEC must commit to creating a revised version of the plan, in consultation with affected tribal governments, that will protect sensitive cultural, visual, and Native American values in the California desert. Thank you for your consideration to the Tribe's comments. Questions regarding these comments can be directed to the undersigned.

Sincerely yours,

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

Thane D. Somerville
Attorneys for Quechan Tribe of the Fort Yuma Indian Reservation

T:\WPDOCS\0267\10057\Comments on DRECP_01.docx
tds:2/18/15