COLORADO RIVER INDIAN TRIBES

Colorado River Indian Reservation

26600 MOHAVE ROAD
PARKER, ARIZONA 85344
TELEPHONE (928) 669-1220
FAX (928) 669-1216

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California Energy Commission
Dockets Office, MS-4
Docket No. 09-RENEW EO-01
1516 Ninth Street
Sacramento, CA 95814-5512
Email: dockets@energy.ca.gov

Re: Comments of the Colorado River Indian Tribes on Draft DRECP NEPA/CEQA Documents

Dear Sir or Madam:

The Colorado River Indian Tribes (CRIT or Tribes) welcomes this opportunity to provide comments on the draft Desert Renewable Energy Conservation Plan and accompanying draft Environmental Impact Report/Environmental Impact Statement (collectively, the DRECP).

CRIT is a federally recognized Indian tribe comprised of over 3,500 members belonging to the Mohave, Chemehuevi, Hopi, and Navajo tribes. The 275,000-acre Colorado River Indian Reservation sits astride the Colorado River between Blythe, California and Parker, Arizona; the California portion of the Reservation is located within the DRECP boundaries. The ancestral homelands of CRIT's members, however, extend far beyond the Reservation boundaries. Significant portions of the public and private lands encompassed by the DRECP were once occupied by the ancestors of CRIT's Mohave and Chemehuevi members. Consequently, these landscapes remain imbued with substantial cultural, spiritual, and religious significance for CRIT's current members.

CRIT has worked tirelessly to protect these landscapes from the threats posed by utility-scale renewable energy development. Since 2009, the corridor surrounding Interstate 10 between Blythe and Desert Center has been under constant pressure from renewable energy developers, despite the significant cultural resources located within this area. CRIT protested the designation of the Riverside East Solar Energy Zone as an area "particularly well-suited" for such industrialization. The Tribes engaged in litigation to try to protect an "unprecedented" discovery of buried cultural resources along the shores of Ford Dry Lake, after the Bureau of Land Management (BLM) authorized the developer to remove this footprint from the land in order to construct a 1,800-acre solar thermal project. And CRIT has participated in the administrative proceedings before both BLM and the California Energy Commission (CEC) for such ill-sited projects as the Palen Solar Electric Generating System, the Blythe Solar Power Project, the McCoy Solar Energy Project, and the Rio Mesa Solar Electric Generating Facility. Despite these

efforts, the state and federal agencies charged with protecting public landscapes for future generations appear set to permit private companies to profit handsomely from the industrialization of this sacred space.

CRIT's review of the DRECP begins, as it must, from this perspective. While the overarching premise of the DRECP—to appropriately balance the nation's acknowledged need to combat climate change and develop domestic sources of energy with the irreplaceable and fragile resources of the California desert—is laudable, CRIT was disappointed to realize that the DRECP relies on the same tactics that have resulted in the destruction of cultural resources and spiritual landscapes over the past five years. For example, while the DRECP purports to identify "Development Focus Areas" that are "most compatible" with renewable energy development, the agencies have largely deferred identification of cultural landscapes, traditional cultural properties, and significant archaeological resources, making it nearly impossible for the DRECP agencies to accurately identify these "most compatible" lands. In addition, the identification of conservation lands is rooted firmly in protection of biological resources; places of cultural importance are protected only to the extent they fortuitously overlap with biological resources. And the agencies' consultation process has been fraught with broken promises, a general lack of responsiveness, and a failure to actually take into consideration the concerns of affected tribes. These issues render the DRECP unsupportable; they also result in myriad violations of the resource protection laws intended to safeguard cultural and other natural resources, including the National Environmental Policy Act (NEPA), the California Environmental Quality Act (CEQA), the National Historic Preservation Act (NHPA), the Federal Lands Policy and Management Act (FLPMA), the Religious Freedom Restoration Act (RFRA), and a host of associated statutes, regulations, and Executive Orders. These violations are detailed below.

I. The DRECP Makes Clear that Protection of Cultural Resources Continues To Be An Afterthought.

The DRECP admits that the primary focus of the agencies has been the appropriate accommodation of both "renewable energy development and *biological resource conservation*" in the Plan area. DRECP at I.3-1 (emphasis added); *see also* DRECP at 14 (setting the three overarching DRECP Planning Goals as renewable energy, biological, and legal/regulatory). While CRIT appreciates the importance of protecting the desert ecosystem (particularly when plants and animals have cultural or spiritual importance), this particular focus has rendered the protection of other resources—particularly cultural resources and Native American interests—little more than an afterthought. This lack of balance can be seen throughout the DRECP document:

- While the DRECP covers 22.6 million acres, the protection of cultural resources is an explicit goal only for the nearly 10 million acres of land managed by the Bureau of Land Management (DRECP at 11, 14). Given the public importance of cultural resources, the tribal consultation goals imposed by Executive Order B-10-11 and the National Historic Preservation Act, and the protections afforded to cultural resources under both CEQA and NEPA, the CEC, the California Department of Fish and Wildlife (CDFW) and the U.S. Fish and Wildlife Service (USFWS) must set cultural resource protection goals as part of their proposed management strategies for the remaining 12.6 million acres.

- In proposing conservation areas, the DRECP specifically identifies those places "compatible with the conservation of species and habitat" to ensure "biological conservation, management, and enhancement." DRECP at 7.[1] Similarly, acquisition of private land is focused exclusively on meeting biological goals. *Id.* at II.3-235. Conservation of cultural resources, therefore, generally occurs only when cultural resources happen to be co-located with biological resources.[2]

  The DRECP reveals that the Plan will result in significant, unavoidable impacts to Cultural Resources and Native American Interests. CEQA and NEPA therefore require the DRECP agencies to evaluate all mitigation measures that could potentially reduce such impacts, including the designation of conservation areas *because of their unique cultural resource values*. *Laurel Heights Improvement Assn. v. Regents of University of California*, 47 Cal.3d 376, 400 (1988); *Environmental Council of Sacramento v. City of Sacramento*, 142 Cal.App.4th 1018, 1039 ("A gloomy forecast of environmental degradation is of little or no value without pragmatic, concrete means to minimize the impacts . . . ."); *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1154 (9th Cir. 1997) (An EIS cannot "omit a reasonably thorough discussion of mitigation measures because to do so would undermine the action-forcing goals of [NEPA]."). The DRECP must be revised to adequately identify significant cultural resource areas and develop conservation area strategies to protect them.

- Similarly, the DRECP focuses exclusively on building a compensation program for biological resource impacts. DRECP at II.3-85. While implementation of future measures *may* result in compensatory mitigation for cultural resource impacts, the DRECP defers development of these programs until a later time. *See, e.g.*, DRECP at 38, II.3-280. CEQA, however, permits lead agencies to defer the development of mitigation measures only when limited circumstances can be met. An agency must: (a) set performance standards to guide the selection of mitigation measures, (b) demonstrate that such future mitigation will be both feasible and efficacious, and (c) explain why such deferral is necessary. *Communities for a Better Environment v. City of Richmond*, 184 Cal.App.4th 70, 95 (2010). The DRECP's proposed compensatory mitigation program for cultural resources meets none of these requirements.

- The DRECP evaluates five different alternatives; however, these alternatives "w[ere] designed to a large extent around areas of low *biological* conflict." DRECP at II.1-2

[1] CRIT has not reviewed the adequacy of the DRECP's efforts to protect biological resources, and these comments should not be interpreted as an endorsement of the DRECP's analysis, strategy, or conformity with state or federal natural resource laws.

[2] While the DRECP baldly states that some NCLS lands are identified based on their cultural resource values, the DRECP contains no specific information to help CRIT or the public evaluate the relevance or importance of these cultural resources or their ability to serve as "mitigation" for the plan's impacts. To the extent the DRECP agencies intend to rely on these lands as mitigation for cultural resource impacts, they must be clearly identified in a revised DRECP.

(emphasis added). In other words, the DRECP sought alternatives that would "reflect[] different approach[es] to balancing the goals of minimizing *biological* resource conflicts and maximizing opportunities to site renewable energy projects in areas of high-value renewable energy resources . . . ." DRECP at II.1-2 (emphasis added); *see also* DRECP at 39 (describing various alternatives based on their balance of biological resource conflict and siting flexibility). While the selected alternatives appear to result in different cultural resource impacts, these differences are incidental, rather than intentional.[3]

Consequently, the DRECP fails to identify *any* alternative that substantially reduces significant impacts to cultural resources and Native American interests. DRECP at 49. Decisionmakers therefore are presented with a false choice: according to the DRECP, all mechanisms for developing renewable energy in the California desert will automatically result in significant and unavoidable impacts. Given the perceived inevitability of these impacts, it is likely that no effort will be expended to develop or implement an alternative that could have lessened impacts.

For these reasons, both CEQA and NEPA prohibit the tactic taken here. A lead agency must focus on those alternatives that reduce the significant, unavoidable impacts of the proposed project. *E.g.*, *Federation of Hillside and Canyon Associations v. City of Los Angeles*, 83 Cal.App.4th 1252, 1264 (2000). Failure to do so constitutes an abuse of discretion. The DRECP must be revised to explore an alternative that substantially reduced impacts to cultural resources and Native American interests.

As noted above, these comments are not intended to downplay the importance of protecting biological resources from the impacts associated with utility-scale renewable energy development. Rather, without a serious attempt to bring the DRECP's cultural resource analysis on par with its biological resource efforts, the document will continue to send a strong signal to affected tribes that the lead agencies do not adequately value the cultural resources and Native American interests that now fall under their purview. Such a scenario is both unfortunate and unjust.

II. The DRECP Cannot Meaningfully Identify Development Focus Areas Given the Agencies' Lack of Information Regarding Cultural Resources.

Much like BLM's Six State Solar Programmatic Environmental Impact Statement, the DRECP purports to identify those "desert locations that are most compatible with renewable energy development." DRECP at I.3-36. The DRECP then designates those locations as Development

[3] The DRECP does claim that the agencies took into account information gathered during the Tribal-Federal Leadership Conferences and government-to-government consultation in developing alternatives (DRECP at II.1-1). However, it provides no specific information that can be used to evaluate the validity of this statement, and the preferred alternative does not appear sensitive to cultural resource concerns. For example, CRIT has repeatedly voiced an objection to the designation of a Development Focus Area along the I-10 corridor, as development in this area has significant cultural resource impacts to the Tribe and its members. Yet none of the alternatives presented significantly reduce impacts in this area.

Focus Areas (DFAs), where "renewable energy development will be directed." *Id.* The agencies purport to have taken into account "culturally important areas" in the proposed designation of DFAs. *Id.* The DRECP itself, however, reveals that this statement is unsupportable.

Crucially, the DRECP repeatedly acknowledges that the agencies know very little about the presence, distribution, or importance of cultural resources throughout the Plan area:

- The online list of California Historical Resources—which forms the backbone of the DRECP's analysis, "includes only a small portion of the resources that may actually be present." DRECP at III.8-68.
- The agencies did not complete a full record search of the entire Plan Area, given the apparent technological difficulties associated with searching five databases. DRECP at III.8-68.
- Existing records are woefully incomplete: "large portions of the California Desert region remain unsurveyed" (DRECP at III.8-69) and "a very large number of cultural resources remain unidentified" (DRECP at III.8-79).
- Survey data is complete only through December 2012 (DRECP at IV.8-2), even though significant cultural resource finds have occurred at during constructions of utility-scale renewable energy projects since that time.
- Information on Traditional Cultural Properties and Cultural Landscapes are specifically excluded from the DRECP's quantitative analysis, because these resources "are not part of the dataset used to quantify cultural resources." DRECP at IV.8-12. Moreover, while the DRECP agencies purport to conduct a "qualitative" analysis of these resources (*id.*), no analysis is provided regarding the Plan's impacts on any specific Traditional Cultural Properties or Cultural Landscapes.
- The DRECP admits that the agencies have identified "no particularly sensitive cultural resources . . . in any particular location" (DRECP at IV.8-52), despite the cultural richness of the California Desert.
- The Native American Element Map from the 1980 California Desert Conservation Act (CDCA) Plan, while forming a crucial starting point for analysis, does not "represent a complete list of places or areas important to tribes." DRECP at IV.9-4.

Despite this overwhelming lack of information, the agencies purport to identify alternatives that "avoid areas that were viewed as making significant contributions to . . . non-biological conservation goals" such a cultural resource protection. DRECP at I.3-55. If the DRECP is approved on this scant record, the agencies run a real risk of directing utility-scale renewable energy development to areas replete with significant cultural resources and Native American interests. This type of conflict is exactly what the DRECP was intended to avoid. *E.g.*, DRECP at I.3-37 (stating that "conflict[s] with . . . non-biological resources should be minimized" is a Guiding Principle).

The DRECP's failure to conduct an adequate cultural resource analysis in advance of developing the Plan and proposing alternatives also results in an impermissible deferral of analysis. Over and over again, the DRECP highlights how the agencies will *eventually* consider cultural resources at some later stage. *See, e.g.*, DRECP at 38 (deferring development of compensatory

mitigation program to the project-by-project stage), I.3-2 (deferring development of strategies to ensure continued traditional uses[4]), II.3-155 (describing cultural Conservation and Management Actions (CMAs) that require "identification of cultural resources" "prior to selecting a renewable energy site"), III.8-69 (claiming that deferred "identification, evaluation, and treatment" will comply with cultural resource regulations), IV.9-4 (deferring "additional research, consultation, and meaningful engagement with affected tribal communities" to a later time).

Yet, as CRIT has repeatedly witnessed, **deferral of cultural resource studies until after a project developer has submitted an application to develop a specific project inevitably results in the destruction or removal of such cultural resources and landscapes.** Once a project developer has invested significant resources into the formulation of a project, it appears to be nearly impossible for public agencies to turn down an application. Consequently, the CMAs and mitigation measures requiring future identification of cultural resources (i.e., DRECP at IV.8-41, -42, -47) are unlikely to *reduce* impacts to cultural resources[5]; instead, they simply assure that the agencies and affected tribes know more about existing resources before they are destroyed. This potential is even stronger where, as here, developers are guaranteed financial and process-related incentives to select sites within Development Focus Areas.

The DRECP must be revised to conduct additional research regarding the location and significance of cultural resources before establishing DFAs. If all cultural resources cannot be identified in advance, then the CMAs and mitigation measures must be revised to ensure that the DRECP agencies *cannot* legally approve projects where significant cultural resources are eventually discovered.

The deferral of analysis also renders invalid the DRECP's conclusions regarding alternatives. For instance, the DRECP concludes, without substantial evidence, that the preferred alternative "best minimizes impacts to cultural resources and Native American interest, based on the location and extent of its conservation land." DRECP at 53. It also concludes that the preferred alternative "has the smallest likelihood of affecting cultural resources within the Development Focus Areas" and that it "protect[s] the largest area of lands with Native American Elements." *Id.* Yet these conclusions are based entirely on the DRECP's grossly incomplete attempt to quantify cultural resources. Because this "analysis" relies on incomplete surveys, fails to account for significant variations in the concentration of resources across the landscape, assumes—incorrectly—that all resources have a similar value, fails to separate out prehistoric and historic

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[4] Designation of DFAs and future development of renewable energy projects threaten to curtail access to sacred sites and places of religious importance. To the extent these actions present a substantial burden on the religious free exercise of tribes and traditional practitioners, the federal government violates the Religious Freedom Restoration Act. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. __ (2014).

[5] While the DRECP cites to the NHPA and the Archaeological Resource Protection Act as providing the necessary regulatory protections for cultural resources, both of these acts merely guarantee a certain amount of *process* before an agency can proceed. *E.g.*, *Neighborhood Ass'n of the Back Bay, Inc. v. Federal Transit Admin.*, 463 F.3d 50, 60 (1st Cir. 2006) ("Section 106 is a procedural statute that requires agency decisionmakers to "stop, look, and listen," but not to reach particular outcomes."). Neither guarantees that resources will be protected.

resources, and ignores altogether the most important categories of resources (cultural landscapes and traditional cultural properties), the DRECP's conclusions regarding the relative impacts of various alternatives remain unsupported and unlawful.

Even when the DRECP identifies significant cultural resources, this information appears to play little to no role in the formulation of alternatives or the agencies' decisionmaking process. For instance, the DRECP identifies three cultural landscapes/traditional cultural properties of significant importance to CRIT: the Salt Song Trail, the Xam Kwatcan Trail and the Chuckwalla Valley portion of the Pacific to Rio Grande Trail Landscape. DRECP at III.9-22 to -23. Yet, the DRECP's specific impacts on these landscape is never discussed[6], and no alternative is formulated that would afford protection to these crucial places. Moreover, this section of the DRECP makes no mention of Ford Dry Lake Basin, an area known to have a high cultural resource density. The treatment of these resources calls into question the DRECP's later claim that "[t]ribal input was considered in developing both the DFAs and areas for conservation." DRECP at I.3-61; *see also id.* at 28, II.3-155 (claiming that certain National Conservation Lands were identified based on the presence of "highly significant cultural sites"). Without specific information explaining *how* tribal input was used to formulate alternatives, the DRECP's claims ring hollow.

Relatedly, the DRECP's cursory analysis fails to provide a meaningful discussion of existing energy development projects and their past impacts on cultural resources. For example, CRIT and other tribes had a site visit to the Genesis project where they observed a poorly engineered drainage system causing deep scour marks and water damage to known artifacts in a protected site. The DRECP's failure to provide an adequate discussion of baseline conditions further renders its impacts analysis inadequate. (See Cal. Code Regs., tit. 14, § 15125, subd. (a) [EIR must describe the general environmental setting in which a project will occur, including "the physical environmental conditions in the vicinity of the project . . . from both a local and regional perspective."].)

III. The DRECP Agencies Have Failed to Adequately Consult with CRIT.

Numerous federal and state statutes, regulations and executive orders mandate that the DRECP agencies engage in meaningful government-to-government consultation with affected Indian Tribes. Compliance with these requirements is all the more important given with the DRECP's potential to transform California's irreplaceable cultural landscapes for the decades to come. California's sovereign Indian tribes—whose ancestors occupied these lands long before the recent push to use these lands to offset urban energy needs—must be included in this decisionmaking process. While the DRECP agencies have made some efforts to engage affected tribes, these efforts have been marred by substantive issues since the inception. Consequently, the voices of California desert tribes is noticeably absent from the draft DRECP. As discussed

[6] While the DRECP claims that "impacts to [traditional cultural properties] are [] characterized in a qualitative manner" (DRECP at IV.8-12), the DRECP offers no discussion of how the Plan will impact anything other than a generic traditional cultural property. *E.g.*, DRECP at IV.8-17 to -18. This effort is insufficient.

throughout this comment letter, the lack of information regarding cultural resources and sacred landscapes, which should have been developed through government-to-government consultation, has rendered the document's analysis woefully inadequate.

CRIT previously detailed some of its concerns regarding the consultation process in correspondence to the Department of the Interior[7] and in its comment letter on the Description and Comparative Evaluation of Draft DRECP Alternatives ("Interim Document"),[8] both of which are hereby incorporated by reference. Briefly, the DRECP agencies initially promised adequate time, financial and technical support, confidentiality, and accountability to assure tribes that consultation would be meaningful. Throughout 2011 and 2012, however, the DRECP agencies withdrew from each of these promises, destroying the trust necessary to engage with Indian tribes in a manner respectful of tribal sovereignty. More recently, these problems have been compounded by the DRECP agencies' failure to respond to CRIT's written comments regarding these and other concerns.[9] Without a meaningful effort to respond to the concerns that the Tribes have already identified, CRIT has been hesitant to engage in further discussions with either BLM or the CEC.[10]

However, CRIT also recognizes the potential for the DRECP to significantly, irrevocably, and adversely impact cultural resources and its tribal members' cultural, spiritual, and religious practices. Consequently, CRIT once again requests consultation with the DRECP agencies regarding the DRECP's potential impacts. To ensure productive and meaningful conversation, CRIT requests a written response to this letter in advance of scheduling an in-person, government-to-government meeting. Please contact the Rebecca Loudbear, CRIT Attorney General (rloudbear@critdoj.com) and Nancy Jasculca, CRIT Deputy Attorney General (njasculca@critdoj.com) to make arrangements.

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[7] February 2, 2012 Letter to Ken Salazar, Secretary of the Interior re: Third Tribal-Federal Leadership Conference, Renewable Energy and Desert Planning Meeting, February 16, 2012.

[8] January 30, 2013 Letter to Mr. David Harlow, California Energy Commission re: Comments of the Colorado River Indian Tribes on the DRECP Interim Document (Docket No. 09-RENEW EO-01).

[9] The DRECP agencies solicited comments on the Interim Document. While numerous individuals, organizations, agencies and Indian tribes provided comments on this document, the DRECP does not include a summary of these comments or a public response to these comments. The failure of the DRECP to summarize or respond to these comments thwarts public participation and should be remedied. Even the DRECP's log of consultation efforts fails to summarize CRIT's comments on this document. DRECP at V-8 to -9.

[10] The DRECP agencies' recent NHPA Section 106 consultation efforts also do not inspire confidence in the consultation process, as CRIT and other tribes were given an incorrect teleconference call-in number to join the February 19, 2015 Palm Springs DRECP consulting party meeting.

IV. CRIT Objects to the Designation of DFAs Within and Surrounding the Riverside East SEZ.

In 2012, BLM designated the Riverside East Solar Energy Zone (SEZ) over the strong objections of CRIT and other tribes. This region has been ground zero for utility-scale solar development in the California desert; the construction of five major projects[11] has resulted in the damage, destruction, or removal of thousands of cultural artifacts and burial grounds and the industrialization of irreplaceable cultural landscapes. The discovery of one large archaeological site during the construction of the Genesis Solar Energy Project resulted in a five-month stop work order, litigation over BLM's proposed treatment plan, and the removal of thousands of manos, metates, and other prehistoric artifacts. Yet this region continues to be among the least surveyed and the least understood through the DRECP area. DRECP at III.8-77 (noting that less than 2.9% of the Cadiz Valley and Chocolate Mountain Ecoregion Subarea has been surveyed for cultural resources).

Despite the clear evidence of high cultural resource conflicts, the preferred alternative proposes to *add* approximately 107,543 acres to the Riverside East Solar Energy Zone.[12] Some of these additions, confoundingly, include lands that BLM decided was *too sensitive* to include in the original designation. *See, e.g.*, DRECP II.3-7 (DFA includes lands to the east and west of the Genesis Solar Energy Project, lands within the drainage area between the McCoy and Big Maria Mountains, and lands adjacent to Palen Lake). The preferred alternative also sites DFAs on lands designated in the 1980 CDCA Plan as comprising portions of the Cultural Resource or Native American Element.[13] This siting is completely inappropriate given the high likelihood that the proposed SEZ expansion and DFAs will contain the same level of cultural resource artifacts found during the Genesis project. The Riverside East SEZ, as proposed, would allow the building of energy development projects to extend far beyond the disturbed lands along the Interstate 10 corridor into culturally sensitive lands that have been undisturbed for centuries.

CRIT strongly urges the DRECP agencies to abandon this course and to permanently close sensitive areas within the Riverside East SEZ to utility-scale renewable development. The agencies' repeated designation of this area as "well-suited" or "most compatible" for utility-scale renewable projects represents an ongoing affront to the tribes that count this region as part of their unique and irreplaceable ancestral homeland and who must live with its ongoing destruction.

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[11] These projects include Desert Sunlight, Genesis, McCoy, Blythe, and the Devers-Palo Verde Transmission Line. Other projects have been approved but not built, including Desert Harvest, Palen, Quartzsite and Rice.

[12] The Riverside East SEZ is 159,457 acres, including 11,547 "non-development" acres. The Preferred alternative includes approximately 267,000 DFA acres within subunit 2 of the Cadiz Valley and Chocolate Mountains Ecoregion. DRECP at II.3-162.

[13] The DRECP should be revised to specifically analyze the overlap of the 1980 Cultural Resource Element map and the proposed DFAs. The 1980s map provides crucial information about locations that should be protected, and the DRECP offers no explanation for why it is excluded.

A. While Alternative 1 Appears to Offer Cultural Resource Benefits, Significant Questions Remain.

Given the sensitivity of the landscape surrounding the Riverside East SEZ, CRIT urges the DRECP agencies to turn their attention to developing a modification of Alternative 1 as the preferred alternative. In particular, CRIT supports the significant reduction in size of the DFA surrounding the Interstate 10 corridor (though the remaining lands surrounding the Palo Verde and Chuckwalla Valleys are cause for concern). However, the DRECP's analysis of Alternative 1 presents significant questions:

- Alternative 1 contains the fewest acres allocated to DFAs, and the DRECP acknowledges that the extent of cultural resource impacts is largely correlated to the number of acres developed. DRECP at IV.8-11. Yet the DRECP concludes that Alternative 1 will have "the greatest likelihood of affecting cultural resources with [DFAs]." *Id.* at 53, IV.8-66. This discrepancy must be explained – how does the reduced acreage alternative impact the greatest number of cultural resources? If the discrepancy is accurate, however, the DRECP agencies have selected a reduced acreage alternative that *specifically allows development of lands with a higher-than-average cultural resource value*. The reduced acreage alternative should be reconfigured to avoid such lands and reduce impacts.

- Similarly, the DRECP concludes that Alternative 1 will result in the "smallest area of land with Native American Elements within conservation areas," although the particular focus of this alternative is intended to be *greater conservation*. DRECP at 53. Similarly, Alternative 1 appears to remove important cultural resource sites from NCLS protection. *Id.* at II.4-40 (including Alligator Rock and the Mule Mountains). Once again, it appears the DRECP's myopic focus on biological resource goals has resulted in the development of an alternative that give cultural resources short shrift. The reduced acreage alternative should be reconfigured to include more of the lands identified in both the 1980 Cultural Resources Map and the 1980 Native American Element map and to ensure that all sensitive cultural resource sites are afforded appropriate protection.

- Alternative 1 designates significant acres of the Riverside East Solar SEZ as National Landscape Conservation System (NLCS) and Wildlife Allocation lands. DRECP at II.4-5. Yet the DRECP provides no explanation of whether these new designations will override the SEZ designation of the Six State Solar PEIS. Similarly, the DRECP provides no analysis indicating that significant portions of these new NLCS and Wildlife Allocation lands are already subject to pending applications or approved or constructed projects, which will not be subject to the DRECP's proposed changes. DRECP at II.3-311 to -312. Consequently, the DRECP's analysis of the benefits of Alternative 1 may be artificially inflated.

- The DRECP claims that the Cultural Resource CMAs associated with the preferred alternative are "significantly more protective" than those associated with Alternative 1. DRECP at IV.8-66. However, Alternative 1 presents *no* BLM-Specific CMAs for

Cultural Resources that are different than the preferred alternative. DRECP at II.4-52 to -54. This discrepancy must be explained.

V. The DRECP Improperly Defers the Development of Mitigation Plans to Address Cultural Resource Impacts.

Given the significant likelihood that the DRECP agencies will designate DFAs without adequately understanding the cultural resource impacts likely to occur, the development of a robust cultural resource mitigation program is of utmost importance. Yet just like the deferral of analysis discussed above, the DRECP repeatedly defers the development of monitoring and mitigation programs to a later day. These actions not only place cultural resources and Native American interests at substantial risk, they also violate state and federal law. *E.g.*, *Communities for a Better Environment*, 184 Cal.App.4th at 95 (limiting deferral of mitigation under CEQA). The following are examples of the DRECP's repeated deferral:

- The DRECP claims that it provides "example monitoring strategies for cultural resources and tribal interests." DRECP at II.3-154. Yet no specific monitoring strategies are provided for review, and no process for selecting final monitoring strategies is described.

- The DRECP notes that BLM "would develop interpretive materials and design trainings to provide stewardship programs to protect cultural resources and tribal interests." DRECP at II.3-156. Yet no process or standards are established to ensure that these materials and trainings meet both BLM and tribal needs.

- The CMAs include "a management fee to be paid to the BLM as partial mitigation for cumulative effects that could be used to develop regional research designs and other forms of off-site and compensatory mitigation." DRECP at II.3-156, IV.8-41. The DRECP anticipates that this fee may be developed through the programmatic Section 106 consultation process. *Id.* at IV.8-41. Yet no performance standards are set to guide the development of this fee. Deferral of this important measure is even more problematic given the contentious nature of compensatory mitigation, and the overwhelming failure of existing compensatory mitigation programs to address cultural resource harms.

- The DRECP sets forth a number of Cultural Resource "Goals and Objectives" and Conservation and Management Actions under the preferred alternative. DRECP at II.3-375 to -380. While these generalities offer some basic guidance that could ensure better outcomes, the DRECP offers no information on how these Goals and Objectives or CMAs will actually be implemented or achieved, and provides no enforcement mechanism or strategy to correct future activities if these Goals and Objectives or CMAs are not met.

- One mitigation measure requires project proponents to provide "support [for] tribal participation in the CEQA and NEPA process (consultation, ethnography, document review, monitoring, repatriation, access of sacred sites)." DRECP at IV.9-37. This mitigation measure, however, improperly defers development of its specifics and fails to

> set forth any performance standards to guarantee its success. The measure should be revised to answer key questions now: How much support will be provided? When will such financial support occur? Who will provide the training, and how will potential conflicts of interest be resolved? How can tribes assure that these resources are actually provided?

Finally, the DRECP defers the development of a key mitigation measure of particular concern to CRIT: treatment plans for the unanticipated discovery of cultural resources. DRECP at IV.8-44. In late 2011, construction at the Genesis Solar Energy Project uncovered a significant archaeological site along the shoreline of the now-dry Ford Dry Lake. From the moment CRIT was alerted to the find—which ultimately contained a cremation site, pendant, and thousands of other buried cultural artifacts—the Tribes fought to ensure that it would remain undisturbed. Ultimately, however, BLM authorized its excavation and the ongoing construction of the Project. These actions caused severe and ongoing cultural harm to CRIT members, who view the removal of artifacts from the cultural landscape as taboo. Consequently, CRIT has repeatedly advocated for treatment plans that prioritize avoidance of buried cultural resources and reburial in-situ where avoidance is truly infeasible.

The DRECP, however, does not provide any performance standards or other guidelines to help formulate future treatment plans. If anything, the DRECP takes the agencies in the wrong direction, as one mitigation measure proposes using "data recovery plans [to] resolve adverse effects to those NRHP/CRHR-eligible cultural resources that would be impacted by the project." DRECP at IV.8-45. Another measure allows agencies to assume that sites are eligible (usually under Criteria D, which captures the site's *scientific* value), without conducting the necessary work to understand the cultural significance of the site. *Id.* at III.8-80. In CRIT's view, however, data recovery *is not mitigation* for the cultural harms that result from the unanticipated discovery of cultural resources. The DRECP must be revised to set forth standards for the development of treatment plans for the unanticipated discovery of cultural resources, including standards that prioritize avoidance and permit reburial in-situ. Such standards should also mandate the use of Native American Monitors whenever prehistoric cultural resources could be disturbed by construction activities; the current mitigation measure—which specifies the use of monitors "where field conditions merit"—is too vague to ensure adequate protection of resources. DRECP at IV.8-45.

VI. The DRECP's Proposed Streamlining Process Will Cut Short Tribal Consultation and Allow Damaging Projects to Proceed.

The DRECP would offer a number of incentives to energy companies that propose to develop projects within DFAs. DRECP at II.3-307. Among these incentives is a promise that project-specific environmental review will be completed within one year for projects that receive a preliminary positive assessment regarding conformity with the DRECP. *Id.* at II.3-213. CRIT is concerned that this process, as conceived, will inevitably cut short tribal consultation and allow damaging projects to be approved without adequate review.

The DRECP proposes to allow the Coordination Group to make a preliminary assessment of whether a project is in conformity with the DRECP. DRECP at II.3-213. The DRECP does not

provide for public participation in the Coordination Group or public comment or review of this assessment, and the timeline for review is exceedingly short. Moreover, the DRECP does not mandate that an applicant provide any particular information regarding impacts to cultural resources (DRECP at II.3-229); indeed, if the project is located on BLM lands, the project applicant many not have access to survey information necessary to provide information about cultural resource impacts (*id.* at II.3-230). Once the Coordination Group offers a preliminary positive assessment, however, the clock starts running for the DRECP agencies to approve the proposed project.

As a result, the Coordination Group is tasked with initially reviewing a project with little to no information about potential impacts to cultural resources. The DRECP agencies are then asked to do the *only* thorough review of a project's potential impacts within a shortened timeframe and up against a project developer that already has a "preliminary positive assessment" in hand. During this one-year period, the DRECP agencies must consult with affected tribes, but by this stage in the process, meaningful government-to-government consultation will be nearly impossible. As CRIT has seen time and time again, the project will simply have too much momentum to be turned down, regardless of what the eventual cultural resource review and tribal consultation uncovers. This problem is compounded by the DRECP's lack of clear and enforceable guidelines for tribal consultation during project development. *Cf.* DRECP at IV.9-15 (while the DRECP claims that it "identifies methods and best practices for consulting with and engaging tribes in a meaningful dialogue," CRIT has been unable to locate these requirements).

To remedy these issues, the DRECP should be revised to: (a) select DFAs only after specific and meaningful analysis of cultural resources and Native American interests can be completed, (b) require the gathering of project-specific cultural resource data *before* a preliminary assessment is completed, (c) permit tribal and public review and input into the preliminary assessment, and (d) remove the one-year permitting guarantee in cases where significant cultural resources may be affected.

VII. The DRECP's Alternatives Analysis Is Fundamentally Flawed.

A. The State of California's 20,000 MW Goal Impermissibly Narrows the DRECP's Consideration of Alternatives.

The DRECP starts with a foundational premise: the California desert *must* provide at least additional 20,000 MW of renewable energy by 2040 (on top of the 6,250 MW associated with projects already operational or under construction). DRECP at I.3-37, O-1. This critical assumption colors the rest of the DRECP's analysis: all programmatic alternatives are tailored to meet this generation goal. *Id.* at 16. Decision makers are shielded from considering any approach that relies more or less heavily on the California desert to accomplish state and national climate change goals. As a result, every alternative considers sacrificing at least 1.07 million additional acres of California desert to industrial development.

This approach impermissibly narrows the question that the DRECP agencies must confront. The purpose of an alternatives analysis is to better understand the trade-offs between the public goals of the project (in this case, adding renewable energy capacity to the state's energy mix to meet

climate change and domestic energy goals) *and the environmental harms that may result. E.g., Citizens of Goleta Valley v. Board of Supervisors*, 197 Cal.App.3d 1167, 1179 (1988) (alternatives must be developed to best understand how to "serve the public purpose at minimal environmental expense"). By setting a static energy generation goal, however, the DRECP only compares the trade-offs between *alternative technologies* (DRECP at I.3-56), not the trade-offs associated with funneling utility-scale renewable energy into the California desert in the first place.

As detailed in CRIT's comment letter on the DRECP Interim Document, this approach consequently violates both CEQA and NEPA. Lead agencies are not permitted to set their purpose and need or project objectives so narrowly as to exclude viable alternatives. *Watsonville Pilots Ass'n v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1089-90; *State of California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982). Yet here, the State of California has stated that the DRECP must include "planning for approximately 20,000 MW of renewable energy in the Plan Area by 2040." DRECP at II.8-3; *see also id.* at I.1-10. The DRECP must be revised to broaden the State Objectives and permit consideration of an alternative that better demonstrates the environmental trade-offs associated with sacrificing the California desert.

The DRECP preemptively attempts to counter this argument by pointing out that "[i]f energy and economic variables, governmental requirements, and other factors translate into a need for only 10,000 or 15,000 MW of renewable generation in the DRECP, that is all that will be built under the DRECP." DRECP at I.3-51. In other words, designation of an area as a DFA does not guarantee that it will be developed at the intensity assumed in this planning document. *Id.* at I.3-58 ("[w]hich parts of designated DFAs are developed first and which receive the most projects will largely depend on decision made by project developers and retail electricity providers").

This argument, however, is flawed for two reasons. First, lead agencies are not permitted to assume that their proposed projects will not be built in order to back away from environmental criticism. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412, 429 (2007). More importantly, however, this argument ignores how DFAs will be handled if the DRECP is approved. Under all scenarios, the DRECP creates incentives for companies to develop projects throughout the DFAs.[14] No effort will be made to first direct projects to DFA areas best suited for development. And no cut-off will be imposed once the 20,000 MW acre goal is reached, even though all acreage calculations contain generous assumptions and therefore tend to overestimate the amount of acreage needed to reach 20,000 MW.[15] Consequently, it is at least as likely that the DRECP will result in *more* capacity, *more* development, and *greater* impacts than anticipated in the planning documents.

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[14] These incentives are significant. For example, the DRECP agencies intend to offer fixed MW capacity fees, limited base acreage rental payments, restructured bonding requirements, fixed long-term leases, reduced administrative oversight and costs, and streamlined environmental review. DRECP at II.3-307.

[15] For example, the DRECP rounds up from the top end of the projected MW range (DRECP at I.3-39), uses acreage yield factors based on current technology rather than more efficient future technology (*id.* at

(footnote continued on next page)

B. The DRECP Fails to Consider Feasible Alternatives that Would Reduce the Plan's Significant and Unavoidable Impacts.

The DRECP also uses the 20,000 MW State Objective to impermissibly reject feasible alternatives. In particular, the DRECP fails to consider an alternative that combines distributed generation, disturbed site redevelopment, and energy efficiency to meet the state and federal climate change and domestic energy goals. As both CEQA and NEPA mandate that lead agencies consider feasible alternatives that would reduce the project's significant environmental impacts (*E.g.*, *Federation of Hillside and Canyon Associations*, 83 Cal.App.4th at 1264), and as the current range of DRECP alternatives present no options that would reduce significant impacts to Cultural Resources, Native American interests, Agricultural Resources, Mineral Resources, Outdoor Recreation, and Visual Resources (DRECP at 48-49), this approach is unlawful.

An alternative that would reduce significant impacts to the aforementioned resources and interests has been robustly developed by Basin and Range Watch in coalition with other environmental organizations, yet instead of seriously considering this alternative, the DRECP blithely brushes aside such ideas. *E.g.*, DRECP at II.8-7 ("distributed generation alone cannot meet the goals for renewable energy development"), II.8-9 (alternative ideas do "not meet the interagency goal because [they do] not provide a streamlined process for the development of utility-scale renewable energy and [do] not provide for the long-term conservation and management of Covered Species and other physical, cultural, scenic and social values within the Plan Area."). By artificially parsing non-utility scale renewable technologies into individual components and by refusing to link conservation and management objectives to alternative technologies, the DRECP agencies claim that these alternate strategies cannot meet their goals. NEPA and CEQA do not countenance such artifices. The DRECP must be revised to include an alternative that incorporates distributed generation, disturbed site redevelopment, and energy efficiency together with the beneficial conservation and management objectives set forth in existing alternatives. Only then will the public and agency decision makers have a full suite of viable alternatives available for consideration.

VIII. To Avoid Sensitive Cultural and Other Resources, the DRECP Should Designate Transmission Line Corridors, Rather Than Offering Streamlining Benefits Throughout the Plan Area.

Rather than identify areas well-suited to development, the DRECP proposes to streamline the construction of transmission line corridors anywhere in the plan area, across all alternatives. DRECP at 16. This approach appears to assume that construction of transmission lines will result in fewer impacts than construction of renewable energy facilities. CRIT's experience with the Devers-Palo Verde Transmission Line—construction of which resulted in the disturbance of a burial site and the destruction of a sacred rock circle—demonstrates the fallacy of this

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I.3-51 to -52), and uses "rule of thumb" discount factors to increase the amount of acreage needed by up to five times (*id.* at I.3-52).

assumption. The DRECP should be revised to better understand where transmission corridors will have the fewest impacts and to direct development to those areas. CRIT is particularly concerned that a number of "conceptual" transmission line corridors near Interstate 10 are designated to cross existing ACECs, Legally and Legislatively Protected Areas and proposed NLCS lands.

The DRECP appears to take a preliminary step in this direction by demarcating "conceptual transmission" lines for public review. DRECP at 30. The purpose of these designations is not entirely clear; however, to the extent the DRECP takes any preliminary steps towards their designation or construction, both CEQA and NEPA mandate that associated impacts be studied in this analysis. *Bozung v. Local Agency Formation Commission*, 13 Cal.3d 263, 279-85 (1975); *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000).

IX. BLM's Proposed DRECP Designations Must Be Clear and Enforceable.

The DRECP proposes to change the classification system for lands throughout the California Desert Conservation Act area. Under the existing system, four land use designations are provided for all BLM lands, ranging from Class L ("Limited") to Class I ("Intensive"). The DRECP would remove these classifications, instead relying on DRECP-specific designations (such as DFAs).

Throughout the past five years, BLM has repeatedly permitted utility-scale renewable energy projects on Class L lands, despite a CDCA Plan requirement that Class L lands be "managed to provide for generally lower-intensity, carefully controlled multiple use of resources, while ensuring that *sensitive values are not significantly diminished.*" CRIT, other tribes, and environmental organizations have questioned the validity of these approvals; litigation challenging this practice is currently pending before the Ninth Circuit Court of Appeals. *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Department of the Interior*, Case No. 13-55704 (9th Cir.).

While CRIT does not generally object to the change in classification proposed in the DRECP, the DRECP agencies must ensure that future designations do not suffer from the same enforceability issues as the current land use classifications. The DRECP designations must be clear, specific, and readily enforceable. In addition, BLM must not be permitted to simply change designations to pacify developers or accommodate new uses.

CRIT does take issue, however, with the scattered nature of the proposed conservation areas and areas of critical environmental concern under the DRECP. Again demonstrating a focus on prioritization of biological resources over cultural resources, these hodgepodge designations fail to preserve the connectivity vital to the cultural resource landscape. Much of the traditional value of these cultural resources comes from maintaining the connectivity between cultural resource sites stretching from Spirit Mountain in Nevada to Blythe. Providing only sporadic protection and conservation designations in this area fails to ensure meaningful protection of these resources. The DRECP should be revised to prohibit energy development in these traditional areas of cultural resource connectivity.

X. Designation of Visual Resource Management Classes Should Be Based on Visual Resource Values, Rather Than Desired Uses.

Since the completion of the CDCA Plan in the 1980s, BLM has classified lands within the DRECP area according to Visual Resource Management (VRM) classes on an ad hoc basis. With each proposed project, BLM has evaluated the underlying visual resource values (using its Visual Resource Inventory (VRI) tool) and determined the standard to which development must conform. This piecemeal approach has not adequately protected visual resources in the CDCA area. CRIT consequently supports the DRECP's intent to comprehensively designate VRM classes.

Unfortunately, however, the DRECP's approach to completing this task appears to violate both the letter and spirit of FLPMA's mandate to inventory and protect the quality of scenic values within the CDCA. 43 U.S.C. §§ 1701(a)(8), 1702(c), 1711(a), 1765(a), 1781(a)(1). Instead of evaluating the underlying visual resource values of the landscape (using either VRI or another tool) and then assigning VRM classes based on these values, the DRECP proposes to assign VRM classes *based on the particular uses* proposed by the DRECP agencies. For example, the DRECP states that BLM will manage all DFAs as VRM Class IV (the lowest level of protection) and all Variance Lands as Class III. DRECP at II.3-159.[16] This classification structure completely divorces visual resource *values* from visual resource *management*, and the VRM classifications simply become an overlay with which all proposed projects will automatically comply. The DRECP must be revised to assign VRM classifications based on underlying visual resource values, rather than the agencies desired development patterns.

In addition, the DRECP recognizes that the Plan will result in significant and unavoidable visual resource impacts across all alternatives. DRECP at 49. As a result, both CEQA and NEPA mandate that the DRECP agencies evaluate potential mitigation strategies to reduce these significant impacts. *E.g.*, *Laurel Heights Improvement Assn.*, 47 Cal.3d at 400; *City of Carmel-By-The-Sea*, 123 F.3d at 1154. Yet the DRECP rotely dismisses this requirement, stating that "[n]o mitigation is recommended." DRECP at 49. The DRECP must be revised to evaluate whether feasible mitigation measures are available to reduce the Plan's significant environmental impact.

XI. The DRECP Does Not Address Environmental Justice Impacts for Native American Tribes.

The vast transformation of an entire cultural landscape has significant environmental justice implications that are not addressed by the DRECP. The DRECP's Socioeconomic and Environmental Justice section ignores Native American environmental justice impacts, instead

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[16] Confusingly, the DRECP also states that VRM classification may happen in the future. For example, the DRECP lists as a CMA: "Coordinate with visual resources staff to ensure VRM classes consider cultural resources and tribal consultation to include landmarks of cultural significance to Native Americans (TCPs, trails, etc.)." DRECP at IV.8-39. This work must be completed *before* VRM classes are set.

referencing Chapter IV.9, Native American Interests, which also fails to provide any meaningful analysis of environmental justice impacts. This is unacceptable. The benefits of the renewable energy projects encouraged under the DRECP will flow to energy customers in southern California and the shareholders of large energy companies. The impacts of such projects, however, will be uniquely felt by area tribes and their members whose interests in this area extend beyond economics to its cultural and spiritual value. As acknowledged by CEC Commissioner Karen Douglas in another proceeding, "Indian tribes maintain long-standing ancestral and traditional practices that connect their identities as Indian people to the environment, unlike other populations that do not have territories linked to their collective identities." Palen Solar Electric Generating System PMPD at 6.3057. Shifting the burden of renewable energy development to unique communities that have occupied this landscape since time immemorial, while providing such communities with no identified benefits, is the very definition of environmental injustice. The DRECP agencies must both recognize and address such realities.

XII. Portions of the DRECP Remain Confusing and Inaccessible.

The following portions of the DRECP are inconsistent or difficult to follow:

- One of the purported benefits of the DRECP is its proposed designation of *new* conservation areas, particularly on lands managed by the BLM. Yet the information provided regarding BLM conservation areas makes it difficult to determine the DRECP's additional benefits. The DRECP states that existing conservation on BLM lands totals 3,264,000 acres. DRECP at II.3-299. This figure includes 3,260,000 acres of Legally and Legislatively Protected Areas, all of which are wilderness areas or wilderness study areas. *Id.* The existing classification of the remaining 4,000 acres, however, is not provided.

  The preferred alternative would designate **1,362,000 acres** as "existing or proposed ACECs." DRECP at II.3-299. No explanation is provided as to why *existing* ACECs are not included in the "existing conservation" figure provided above, or why existing and proposed ACECs are lumped together in one category. Even more confusingly, the DRECP later states that the preferred alternative includes 127 ACECs, totaling approximately **5,403,000 acres**. DRECP II.3-366. No explanation is given for this discrepancy of more than 4,000,000 acres. The DRECP should be revised to provide (a) a clear statement of how much BLM land is currently conserved as LLPAs, wilderness areas, wilderness study areas, and ACECs, and how much *new* conservation land the various alternatives would add.

- The DRECP's discussion of NCLs includes a breakdown by "subareas." DRECP at II.3-320. The DRECP, however, fails to include a description or map of these particular subareas, making it difficult to determine which regions are being discussed. Moreover, these subareas are different than those used on other maps within the DRECP (i.e., the Cadiz Valley and Chocolate Mountain subregion). The DRECP should be revised to either use the same subareas consistently, or to provide maps at the beginning of the NCLs discussion to identify both the subareas and the particular sites being discussed.

- The DRECP states that the Ford Dry Lake Basin may not be developed. DRECP at IV.8-42. However, this area is still designated as a DFA under the preferred alternative and Alternatives 2 and 4. The development designation of this culturally important feature must be clarified.

- The DRECP claims that the Cultural Resource Conservation and Management Actions are "significantly more protective" than the No Action Alternative. DRECP at IV.8-52. However, the DRECP fails to adequately explain the existing baseline—how are cultural resources currently protected under state and federal law, including the Six-State Solar PEIS and the CDCA Plan? Many of these documents purport to protect cultural resources and Native American interest; where the agencies have failed is largely in implementation. The public must be presented with a clearer picture of how the CMAs provide *additional* benefits, particularly around enforceability.

Conclusion

CRIT appreciates the opportunity to comment on the draft DRECP. While the DRECP agencies have established supportable goals (directing development to low conflict areas and designating public and private land for additional resource conservation), CRIT has significant concerns regarding the DRECP's current ability to meet these goals, particularly with respect to cultural resources and Native American interests. The DRECP must be revised to correct the many identified violations of state and federal law and to better accommodate the concerns of CRIT and other affected Tribes, and a revised draft EIR/EIS must be recirculated.

Sincerely,

ACTING

Chairman Dennis Patch
Colorado River Indian Tribes

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