



COLORADO RIVER INDIAN TRIBES

Colorado River Indian Reservation

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

November 30, 2016

Via United States Mail and Email

Office of the Assistant Secretary – Indian Affairs
Attn: Office of Regulatory Affairs & Collaborative Action
1849 C. Street NW, MS 3071
Washington, DC 20240
email: consultation@bia.gov

Re: Comments of the Colorado River Indian Tribes on Federal Decisionmaking on Infrastructure Projects

Dear Mr. Roberts, Ms. Toulou, and Ms. Darcy:

The Colorado River Indian Tribes (“CRIT” or “the Tribes”) submit these comments in response to your September 23, 2016 invitation regarding consultation on infrastructure projects that involve federal agencies. The Colorado River Indian Tribes, along with many other tribes from all across the nation, stand in solidarity with the Standing Rock Sioux Tribe in opposing the Dakota Access Pipeline, and our tribal members traveled to Cannon Ball, North Dakota, earlier this year to deliver our message of support. Recent events on the Standing Rock Indian Reservation and the comments already provided through in-person consultation sessions have affirmed for CRIT that our experience with federal agency consultation is not unique. The federal government routinely ignores or disregards its consultation obligations to federally recognized tribes, particularly when large industries stand to gain from the use of public lands and resources. We can only hope that these disturbing events precipitate much needed revisions to both agency practice and federal law.

The Colorado River Indian Tribes is a federally recognized Indian tribe comprised of over 4,200 members from four distinct tribes—the Mohave, Chemehuevi, Hopi, and Navajo. The approximately 300,000-acre Colorado River Indian Reservation sits astride the Colorado River between Blythe, California and Parker, Arizona. The ancestral homelands of the Tribes’ members, however, extend far beyond the Reservation boundaries. Significant portions of public and private lands in California, Arizona, and Nevada were occupied by the ancestors of the Colorado River Indian Tribes’ Mohave and Chemehuevi members since time immemorial. These landscapes remain imbued with substantial cultural, spiritual, and religious significance for the Tribes’ current members and future generations. For this reason, CRIT has a strong interest in maintaining a voice in land management decisions in the region.

Comments of the Colorado River Indian Tribes on Federal Decisionmaking on Infrastructure Projects

I. The Current Consultation Structure Is Not Working.

While CRIT acknowledges that federal agencies have specifically requested comments on affirmative steps that the federal government can take to improve consultation, that conversation must be grounded in an adequate understanding of the current frustrations experienced by Indian tribes who must rely on federal agencies to adequately protect cultural resources on non-tribal land. For the Tribes, the last five years have been marked by the Bureau of Land Management's encouragement of the rapid industrialization of the Mohave (Mojave) Desert, a landscape of significant cultural importance to CRIT members. Over 50 utility-scale renewable project applications have been submitted for public lands within a 50-mile radius of the Colorado River Indian Reservation. Over the Tribes' objections, BLM has approved over a dozen of these projects. Construction activities have unearthed thousands of buried cultural resources, marred cultural landscapes, blocked prehistoric and spiritual trails, and disturbed burial grounds. The ongoing removal of the tribal footprint from the land causes severe cultural harm that cannot be remedied through any of BLM's proposed mitigation.

Consultation efforts with BLM have been fraught with difficulty. Some of the most pressing issues are described here:

Tribal concerns are repeatedly ignored with impunity. CRIT has repeatedly raised serious concerns about the impacts of utility-scale renewable energy facilities on cultural resources, ancestral homelands, and the way of life of tribal members. BLM has repeatedly ignored these concerns, instead approving nearly every project proposed by energy developers. From CRIT's perspective, BLM officials treat tribal consultation as a box that must be checked, rather than a commitment to listening to and addressing tribal concerns.

CRIT offers three recent examples of this issue. First, in the 1980s, CRIT members participated in consultation efforts to designate certain resources within the California Desert Conservation Act plan area. BLM acted to protect these areas using restrictive land use classifications. However, BLM recently erased these protections by designating the Riverside East Solar Energy Zone, which funnels development activities to the precise areas once slated for protection. When CRIT brought this issue to BLM's attention, the agency failed to respond.

Second, CRIT has long urged BLM to permit reburial of cultural resources that are inadvertently disturbed during construction activities, in the event avoidance of the site is infeasible. As data recovery and curation involve the removal of the tribal footprint from the land, CRIT does not consider such actions to be "mitigation" for cultural harm. In response, BLM has offered a series of shifting excuses that federal law allegedly requires off-site curation of artifacts discovered on public land. CRIT has evaluated these claims and provided detailed explanations for why BLM's interpretation does not comport with federal law. Instead of consulting with CRIT on this issue, BLM California recently issued Information Bulletin No. CA-2016-007, which purports to provide guidance that "[a]ny museum collection objects discovered on federal land, including in rights-of-way or during permitted projects, are the property of the federal agency that manages the land" and "[f]ederal law and regulation, (sic) require federal collections be deposited in an established professional curation repository that can provide long term care...." In the aforementioned document, BLM fails to establish that federal law and regulations require excavation and/or removal of artifacts from public lands. Yet BLM claims that the Bulletin is a

Comments of the Colorado River Indian Tribes on Federal Decisionmaking on Infrastructure Projects

summary of federal requirements, conditions, and standards mandated for the curation of museum collections objects from BLM administrated public lands. Not only has BLM refused to consider CRIT's perspective on this issue, but it released the Bulletin without consultation and without notice to the Tribes. In sum, BLM's misguided reliance on off-site curation as the only way to mitigate adverse effects to inadvertently discovered artifacts on public lands is insensitive to the history of Indian peoples in the United States and harmful to the tribal footprint on the land. BLM's rigid reliance on curation as part of adverse effects resolution efforts is a prima facie example of the failure of Federal agencies to ensure meaningful tribal input into infrastructure-related reviews and decisions.

Finally, CRIT actively participated in tribal consultation on the California Desert Renewable Energy Conservation Plan ("DRECP"). The framing paper's celebration of this effort is misleading and inappropriate, and must be revised. Tribes were brought into the DRECP planning process as an afterthought—the final document makes clear that the agency's persistent focus was on balancing renewable energy development with biological resource protection. Moreover, many of the crucial decisions about development areas had already been made through the Six State Solar Programmatic Environmental Impact Statement, rendering later consultation efforts a complete sham. While tribes were initially promised that they could designate areas as "off-limits" to development, the agencies simply reaffirmed the PEIS's designation of the Riverside East Solar Energy Zone, despite CRIT's objection. More recently, CRIT has raised numerous concerns about the implementation of the agencies' obligations under the National Historic Preservation Act ("NHPA") via a programmatic agreement, but these comments have largely been ignored.

Consultation happens far too late or not at all. In CRIT's experience, tribal consultation happens only after projects have gained irreversible momentum. By the time tribes are brought to the table, project developers have already expended significant funds selecting sites, preparing project plans, completing technical analysis, and securing project financing. While the federal agencies technically retain full discretion to grant or deny a right-of-way request, as a practical matter, the momentum and investment seem to be too great to overcome—BLM never says no.

This issue is exacerbated by BLM's approach to cultural resource analysis. In an effort to fast-track the development of renewable energy projects, BLM has deferred on-the-ground analysis, ethnographic studies, and tribal consultation efforts until *after* the project has been approved. This approach has led to conflict. For example, at the Genesis Solar Energy Project, the deferral of cultural resource analysis led the agency to permit construction of a massive solar thermal project along the shore of Ford Dry Lake, a site occupied in prehistoric times and of great importance to area tribes. When construction activities revealed over 3,000 buried cultural artifacts, the project developer claimed it was too late and too expensive to move the project. Over the vehement objection of CRIT and other area tribes, both BLM and a federal district court agreed; consequently, the site was excavated and the artifacts were permanently removed.

More recently, BLM has recently sought to consult with the Tribes on areas of potential effect and cultural resource work plans for two utility-scale solar projects. However, BLM authorized the relevant work to begin *prior* to the close of comment periods offered to tribes. The unavoidable conclusion from the timing of this "consultation" is that BLM never intended to take tribal concerns into account. Even more egregious, BLM issued the information bulletin

Comments of the Colorado River Indian Tribes on Federal Decisionmaking on Infrastructure Projects

discussed above without even offering consultation, even though it addresses a topic of great importance to the Tribes.

BLM places a higher priority on meeting the needs of developers. Tribes are sovereign nations, and as such, have a special relationship with the federal government. In CRIT's experience, however, consultation efforts fail to recognize this special status. For example, BLM staff meets with project developers on a *weekly* basis to ensure that project approvals can be granted in quick fashion. Tribes, however, are relegated to the same status as general members of the public. Meetings with BLM staff are difficult to set up, information is slow to arrive, and little, if any, response is given to the Tribes' concerns.

Federal agency staff are unprepared or lacking in authority. The CRIT Tribal Council is the official decisionmaking body of a sovereign nation; as such, it expects that "government-to-government consultation" occur with individuals of similar authority and knowledge. Unfortunately, BLM staff routinely fail to meet this requirement. As one example, an interim field office manager informed CRIT Tribal Council members that he "could not speak for BLM," even though BLM had sent him as a government-to-government consultation representative. High staff turnover has also created difficulties. Adequate consultation requires in-depth knowledge of tribal interests and concerns. This cannot occur when CRIT is routinely forced to bring new BLM staff members up to speed on the very basic elements of their concerns.

No meaningful engagement. Over the course of the last five years, CRIT has prepared hundreds, if not thousands, of pages of comments on projects proposed for the ancestral homelands of CRIT tribal members. These comments have raised significant legal inadequacies under a host of federal laws, and as such, merit careful consideration. Instead, BLM routinely appears to ignore tribal comments. No written response is given, and often the final documents are approved without changes.

Tribes are overwhelmed by paperwork. CRIT has devoted significant financial and human resources to consultation efforts. For the most part, these efforts have allowed BLM to claim "compliance" with federal consultation obligations while approving projects to which CRIT is opposed. In other words, CRIT is expending scarce resources to help approve damaging projects that provide significant financial benefit to third-party developers. This situation is unjust.

In addition, the day-to-day management of responding to the federal government is often overwhelming. Small or inconsequential projects on already disturbed lands are treated the same as large, damaging projects—in both cases, CRIT receives a "Dear Tribal Leader" letter that it must evaluate, track, and manage. Deadlines are often exceedingly short, especially when the requests warrant careful consideration or implicate confidential or sensitive material. Tribes are expected to divert funds and resources to this effort, even though federal agencies rarely seem interested in or capable of responding to tribal concerns.

The current consultation framework is far too narrow. While various federal statutes and executive orders encourage federal agencies to take an all-encompassing view of cultural resources and tribal concerns, current consultation efforts are largely focused on impacts to discrete archaeological material, rather than on impacts to cultural and spiritual landscapes,

Comments of the Colorado River Indian Tribes on Federal Decisionmaking on Infrastructure Projects

religious practices, or culturally important biological resources. As a result, if a project does not directly impact eligible prehistoric sites, BLM often concludes that the project will have no significant impact on the Tribes. This artificial narrowing overlooks crucial aspects of tribal culture and significantly underestimates the devastating impacts of infrastructure projects.

II. Suggestions for Change within Existing Legal Framework

As requested, CRIT has broken down its recommendations into two categories: (1) those changes that can be accomplished within the existing legal framework and (2) those changes that may require congressional or agency action. With respect to the first category, CRIT offers the suggestions below. From CRIT's perspective, many of these changes must be made for federal agencies to meet the consultation standards already codified in existing law.

Develop protocols to ensure Tribes are treated as sovereign nations, rather than members of the public. The NHPA regulations require that consultation must "be conducted in a sensitive manner respectful of tribal sovereignty" and "must recognize the government-to-government relationship between the Federal Government and Indian tribes." As such, federal agencies must treat CRIT and other tribes as sovereign nations, not as members of the general public, in consulting with tribes on proposed actions.

Decisionmakers must participate in government-to-government consultation. It is unacceptable for federal agencies to engage in "government-to-government" consultation with individuals who lack decisionmaking authority. Federal agencies must ensure that decisionmakers are available to consult on a regular basis and that they have the requisite background knowledge to consult on issues of importance to the Tribes.

Respond to comments in writing. Under the NHPA, "consultation means the process of seeking, discussing, and considering the views of other participants, and where feasible, seeking agreement with them." 36 C.F.R. § 800.16(f). Consultation, therefore, must be a two-way street, an act of receiving comments *and responding to them*. In order to provide detailed remarks and a record of the Tribes' concerns, CRIT frequently engages in consultation via written comments. However, BLM rarely responds. In order to ensure that consultation meets the NHPA standards, all federal agencies must adopt internal policies requiring that any written comments from federally recognized tribes require a timely and detailed response to all concerns raised.

Ensure early consultation. The NHPA regulations state that agencies are permitted to conduct or authorize project planning activities before completing section 106 consultation, but only if "such actions do not restrict the subsequent consideration of alternatives to avoid, minimize, or mitigate the undertaking's adverse effects on historic properties." 36 C.F.R. § 800.1(c). As described above, these early project planning activities often have the effect of foreclosing future options, including the option of turning down the right-of-way grant request. Consequently, federal agencies must initiate consultation *as soon as* project developers approach BLM about submitting a project application rather than after project planning activities have already begun. Any concerns about the lack of specific information available at that time must be outweighed by the importance of seeking early consultation.

Comments of the Colorado River Indian Tribes on Federal Decisionmaking on Infrastructure Projects

Provide funding to engage in consultation. Renewable energy and other project developers stand to earn significant profit from exploiting public land and resources. Federal agencies recognize this profit potential, and require developers to reimburse agencies for expenses incurred in Section 106 compliance and consultation. *See, e.g.*, DRECP Conservation and Management Actions LUPA-TRANS-CUL-1 and -2. Yet federally recognized tribes are forced to shoulder the significant expense of engaging in consultation on myriad projects with multiple agencies. Project developers must also be required to reimburse tribes for the time and resources expended to ensure compliance with federal law for their projects.

Offer better training for agency staff. Based on CRIT's experience, it is clear that BLM staff is largely unprepared to engage in adequate consultation. Federal agencies must offer better training on federal consultation and cultural resource protection law, creating institutional memory to facilitate consultation relationship, cultural competency, and engaging with sovereign nations. Tribes must be involved in the development of these training programs to ensure that they are appropriately tailored to the issues facing both the agency and affected tribes.

III. Suggestions for Changes to Legal Framework

With respect to the second category, CRIT urges the federal agencies to work quickly to codify the following requirements into law. These changes are necessary to fully implement the federal government's trust obligation to tribal nations.

Tribes must be able to hold agencies accountable. As described above, BLM conduct has repeatedly violated the guiding principles of consultation, which are necessary to create effective collaboration and informed federal decision-making. These actions have resulted in significant harm to cultural resources and the cultural, spiritual, and religious practices of CRIT tribal members. Yet CRIT has been unable to hold BLM accountable for its failings. Two federal district court judges have allowed renewable energy projects to move forward, despite BLM actions that fell far short of its consultation responsibilities as CRIT understands them.

For these reasons, Congress must look at revising federal law to add substantive requirements or more specific procedural requirements to the NHPA. These revisions could take different approaches:

- Add substantive requirements mandating that eligible historic resources affiliated with federally recognized tribes be left in an undisturbed state or otherwise preserved in place.
- Add substantive requirements obligating agencies to disapprove projects that result in unmitigable, adverse impacts to eligible historic resources affiliated with federally recognized tribes, unless those tribes provide *consent* for the adverse impact.
- Add procedural requirements akin to the finding requirements found in the California Environmental Quality Act. Require agencies to explain how avoiding or mitigating an adverse impact to eligible historic resources affiliated with federally recognized tribes is infeasible. If a project would result in any

Comments of the Colorado River Indian Tribes on Federal Decisionmaking on Infrastructure Projects

unmitigable, adverse impacts, require agencies to provide specific reasons why the project should nevertheless be approved. Require these statements to be clearly supported by substantial evidence.

Consultation obligation in federal statutes must be broader or executive orders must be enforceable. As discussed above, the NHPA currently contains the most robust and enforceable consultation obligations in federal law. However, the NHPA has significant limitations. It focuses too narrowly on archaeological resources. It relies on National Register eligibility definitions that exclude items, places, and landscapes of great importance to tribes. It focuses consultation on the project's adverse impacts to these eligible items, instead of accounting for the broader concerns that tribal nations may have about federal projects. Finally, it says nothing about how information received during consultation must be accounted for in decisionmaking. While executive orders are framed more broadly (i.e., Executive Order 13175's focus on policy decisions that have tribal implications), these executive orders are not enforceable.

Tribes must be offered signatory status in NHPA documents, without forgoing other rights. As part of the "resolution" of adverse effects under the NHPA, agencies often prepare programmatic agreements or memoranda of agreement with State Historic Preservation Officers, project developers, and other interested parties. The NHPA must be revised to ensure that tribes obtain full enforcement and consultation rights under these agreements without having to agree that consultation obligations were met. Too often, these agreements require tribes to sign on to statements that the federal agency has adequately fulfilled its obligations under Section 106 or that tribes have been adequately consulted. These statements put tribes into a Catch-22: either sign on to obtain the rights afforded to signatories or retain the right to protest the agency's action and compliance with federal law.

The Archaeological Resource Protection Act must clarify that reburial of prehistoric cultural resources is permitted. As discussed above, reburial of cultural resources is the only culturally appropriate mitigation measure available in the event that prehistoric cultural resources cannot be completely avoided. However, BLM has claimed that the regulations issued under the Archaeological Resource Protection Act prohibits it from accommodating this reasonable mitigation measure as to all unearthened prehistoric cultural resources. While CRIT strongly disagrees with BLM's interpretation of the Act, CRIT urges Congress to revise the Act to explicitly allow reburial.

Revise Native American Graves Protection and Repatriation Act regulations to restore broad "cultural items" definition. NAGPRA protections are triggered if the discovered objects fall into at least one of four categories of cultural items. The NAGPRA regulations, however, carve out exceptions in these categories, preventing the Act from being applied to items such as unassociated funerary objects that were returned to living descendants or ancient pottery sherds or arrowheads that are not part of an ongoing religious ceremony. *E.g.*, 43 C.F.R. §§ 10.2(d)(2), (3). There is no tenable explanation for why these types of items are afforded lesser protections, particularly when they continue to hold important cultural, spiritual, and religious value for tribes. These exclusions are particularly problematic for tribal cultures that practice cremation, like the Mohave members of CRIT. Artifacts that would otherwise be protected as associated burial objects are given no NAGPRA protection, simply because cremation sites are unlikely to be preserved.

Comments of the Colorado River Indian Tribes on Federal Decisionmaking on Infrastructure Projects

IV. Conclusion

The Colorado River Indian Tribes stand in solidarity with the Standing Rock Sioux Tribe and their opposition to the Dakota Access Pipeline. The federal government's inability or unwillingness to adequately consult with the Standing Rock Sioux Tribe unfortunately mirrors the Tribes' experience with BLM. We stand with Indian Country united in opposition to government processes that continue to bow to corporate interests at the expense of tribes.

CRIT is encouraged by federal efforts to understand the many ways in which our current consultation framework is failing tribes and our ancestral lands, sacred sites, and waters. But these outreach efforts must be partnered with action. The federal agencies must take what they have heard during these listening sessions and move to implement necessary changes, particularly in the face of changing administrations, or else this effort will be viewed as yet another example of how consultation has failed us.

Respectfully,

COLORADO RIVER INDIAN TRIBES

 ACTING
Dennis Patch
Chairman

Cc: Tribal Council of the Colorado River Indian Tribes
David Harper, Director, THPO
Rebecca A. Loudbear, Attorney General, Colorado River Indian Tribes
Nancy H. Jасulca, Deputy Attorney General, Colorado River Indian Tribes