



COLORADO RIVER INDIAN TRIBES

Colorado River Indian Reservation

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RE: Comments of the Colorado River Indian Tribes on the Draft Initial Study/Mitigated Negative Declaration for Southern California Edison's Eldorado-Lugo-Mohave Series Capacitor Project

To Whom It May Concern:

On behalf of the Colorado River Indian Tribes (CRIT or the Tribes), I write to respond to the California Public Utilities Commission's Draft Initial Study/Mitigated Negative Declaration (DIS/MND) for Southern California Edison's Eldorado-Lugo-Mohave Series Capacitor Project (Project). The Tribes oppose the issuance of a mitigated negative declaration given the various potentially significant impacts the Project will have within a landscape that the CPUC itself has acknowledged as a tribal cultural resource. Vague promises of future mitigation to be developed at a later date do not absolve the CPUC of its responsibility to fully examine potential impacts. CRIT therefore urges the CPUC to prepare a full EIR for the Project, before taking any steps to move the Project toward a final decision.

Numerous inadequacies and omissions in the DIS/MND render it insufficient as an environmental review document. In the absence of an enforceable and proven mitigation plan, particularly for impacts on tribal cultural resources, there is ample evidence in the record to support a fair argument that the Project will have significant environmental effects.

As a preliminary matter, the Colorado River Indian Tribes are a federally recognized Indian tribe comprised of over 4,440 members belonging to the Mohave, Chemehuevi, Hopi, and Navajo Tribes. The almost 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 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, we have a strong interest in ensuring that potential cultural resource and other environmental impacts associated with the proposed Eldorado-Lugo-Mohave Project are adequately considered and mitigated.

Despite the proposed mitigation measures, the Tribes remain troubled by the Project's potential to remove, damage, or destroy cultural resources and artifacts. These resources are sacred and finite, and together make up the cultural footprint of the Tribes' ancestors. According to the belief system of CRIT's Mohave members, the disturbance of any cultural resources affiliated with their ancestors is taboo, and thus considered a severe cultural harm. CRIT therefore cannot support any project that will likely result in the disturbance or destruction of cultural resources and artifacts. However, if the Project does move forward, it must be with appropriate analysis of potential effects under the California Environmental Quality Act (CEQA), as described below.

A Mitigated Negative Declaration is Inappropriate Given Potentially Significant Environmental Impacts.

CEQA establishes a “low threshold” for initial preparation of an EIR, especially in the face of conflicting assertions concerning the possible effects of a proposed project. *No Oil, Inc. v. City of Los Angeles*, 12 Cal. 3d 68, 84 (1974). This is because the EIR is the “heart” of CEQA review and the principal means of informing the public about potential environmental impacts. *Id.* A lead agency may adopt a mitigated declaration only when “revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where *clearly* no significant effect on the environment would occur, and . . . there is *no substantial evidence*, in light of the whole record before the lead agency, that the project, as revised, may have a significant effect on the environment.” Pub. Res. Code § 21080(c)(2) (emphasis added).

The CPUC cannot assert here that the proposed mitigation measures—such as preparing a Cultural Resources Management Plan (CRMP) and conducting later surveys to identify and avoid sensitive species in the area—meet the high bar of mitigating effects “to a point where clearly no significant effect on the environment would occur.” This is, in part, because the agency has deferred several relevant surveys of the environmental setting itself—as detailed below—to future stages of the project, indicating that the CPUC has no idea what the scope of the effects will be, let alone the degree to which mitigation could reduce these effects. Therefore, the Tribes urge the CPUC to prepare a full EIR.

In particular, meaningful tribal consultation and further analysis of potentially significant impacts on tribal cultural resources and visual resources, as well as cumulative impacts more generally must be completed in an EIR.

A. Government-to-Government Consultation

California law provides for robust consultation with tribes “traditionally and culturally affiliated with the geographic area of [a] proposed project.” Pub. Res. Code § 21080.3.1. In enacting these consultation requirements, the Legislature sought to “[r]ecognize that California Native American prehistoric, historic, archaeological, cultural, and sacred places are essential elements in tribal cultural traditions, heritages, and identities” and that “tribal knowledge about the land and tribal cultural resources at issue should be included in environmental assessments for projects that may have a significant impact on those resources.” Assembly Bill No. 52 §§ 1(b)(1)-(4) (2014). CRIT has adopted a government-to-government consultation policy to clarify the requirements of adequate consultation. *See* Exhibit 1. In particular, adequate consultation requires an in-person meeting between a decisionmaker “prepared with sufficient details about the proposed project or action, the Tribes’ history, culture, and government, and the Tribes’ anticipated or specific concerns with respect to the proposed action.” *Id.* at 3-4. While CPUC states that it contacted 23 tribes, including CRIT, by formal letter, *see* DIS/MND at 4-6, CRIT maintains that this does not constitute sufficient consultation.

The Tribes received Project applicant SCE’s June 30 letter explaining the project. On July 20, 2017, well within the time frame in which SCE had requested a reply, CRIT requested formal government-to-government consultation. *See* Exhibit 2. Although SCE failed to follow through with a consultation meeting, CRIT clearly intended then and intends now to participate in government-to-government consultation that complies with the requirements of AB 52.

Because the CPUC limited consultation to just four tribes—the San Manuel Band of Mission Indians, the Morongo Band of Mission Indians, the Twenty-Nine Palms Band of Mission Indians, and the Fort Mojave Tribe—and ignored CRIT’s consultation request, its analysis of potential impacts on tribal cultural resources is incomplete in scope. *See id.* at 5-362. CRIT respectfully requests consultation in the same manner granted to these four tribes, including site visits and provision with copies of all relevant cultural resource reports, which were not made publicly available. In addition, CRIT is concerned that the DIS/MND suggests that only “the four consulting tribes” will receive a copy of the draft Cultural Resources Management Plan once available. *Id.* at 4-7. The DIS/MND indicates in several places that the “tribes that consulted” will review and participate in the creation of the CRMP. *See, e.g., id.* at 1-33, 1-47, 6-28 (MM-CR-4). Given the Tribes’ affiliation with the area and outstanding consultation request, CRIT must be included in this group and provided an opportunity to comment and consult on any and all relevant documents and plans. More broadly, however, CRIT urges the CPUC to request and consider input from all traditionally and culturally affiliated area tribes, especially with respect to the forthcoming CRMP.

B. Tribal Cultural Resources

CRIT appreciates the DIS/MND’s description of consultation efforts with the four tribes above and general explanation of their concerns, but reiterates that because the consultation process did not take into account CRIT’s and other affected tribes’ input, the DIS’s discussion of tribal cultural resources is necessarily incomplete. In addition, the analysis CPUC *does* provide is incomplete because it fails to adequately analyze the potential effects of ground-disturbing

activities—a concern common to many tribes in the area—and fails to demonstrate how its forthcoming Cultural Resources Management Plan will fully mitigate for the potential impacts the initial study has brought to light.

At the outset, the Tribes note that CPUC has identified the “Mojave Trails Landscape” as a tribal cultural resource (TCR) that extends from “the Colorado River in the east, Cajon Pass in the west, Granite Mountains to the north, and I-40 to the south.” DIS/MND at 5-364. The DIS/MND states that this large landscape, which is a collection of trails and associated features that have both secular and spiritual significance for local tribes, encompasses “the CEQA Areas of Direct and Indirect Impacts for the entire project.” *Id.* This language appears to recognize the entire Project site as a TCR. However, in subsequent discussions, the DIS/MND refers to restrictions or mitigation conditions for work near “a tribal cultural resource,” as if those considerations were only relevant to part of the Project site. For example, “[w]hen project work is planned within 100 feet of a known prehistoric-era cultural resource or a tribal cultural resource, or any resources that are eligible for the CRHR and/or NRHP, avoidance areas shall be established and monitors shall be present as outlined in the CRMP.” *Id.* at 6-29 (MM CR-5). The DIS/MND must make clear that the provisions about avoidance and monitoring will apply to *any and all* activity within the Project site, given that the entire site is part of a TCR. CRIT also requests further analysis showing how the CPUC has determined that, despite the fact that *the entire Project site* was recognized as a TCR, there is no fair argument that the Project could have a significant impact on tribal cultural resources.

The Tribes are particularly concerned about the large volume of ground-disturbing activities associated with the Project—over 23,000 feet of underground facilities. *Id.* at 4-20 (noting approximately 55 locations with underground structures, each 3 to 6 feet deep). Further, the DIS/MND equivocates on the method SCE will use to excavate, making it difficult to accurately evaluate the potential project impacts. The DIS/MND states that the Project would use open-cut trenching techniques “unless alternate methods are required” for sensitive resources, in which case it would use “horizontal directional drilling (HDD).” *Id.* at 4-44. It does not explain how these different techniques might affect the disturbance of cultural resources—either those underground resources yet to be discovered or the Mojave Trails Landscape that the DIS previously identified as a TCR. CRIT requests further clarification and analysis of the excavation alternatives to facilitate the development of appropriate mitigation measures. At minimum, the Tribes believe that these mitigation measures must include tribal monitoring for all ground-disturbing activities, avoidance of all newly discovered resources if feasible, including through Project modification, and in-situ or onsite reburial under the supervision of tribal monitors where avoidance of cultural resources is not possible. CRIT requests that the CPUC require SCE to contract with the Tribes to provide tribal monitors for this mitigation effort.

More broadly, while the DIS/MND makes some efforts at tribal cultural resource mitigation, such as CR-1, *id.* at 6-26 (requiring applicant to hire a specialist with experience working with “Southern California Tribal Nations” who will work with “tribal monitors and Field Crew as needed”), many of the cultural resource mitigation measures are underdeveloped. CRIT is concerned both with the deferral of preparation of a Cultural Resources Management Plan and with various aspects of the CRMP, as outlined in Table 6-1, MM-CR-3:

- CR-3 makes clear that CPUC and SCE have not yet properly surveyed historic resources at the Project site: “The CRMP shall define and map all known prehistoric and historic resources eligible to the NRHP and CRHR within 100 feet of proposed work areas. How these resources will be avoided and protected during construction will be described. Avoidance measures to be used will be described, including where and when they will be implemented.” *Id.* at 6-27. While the Tribes appreciate the commitment to map and avoid these cultural resources, surveying and development of clear avoidance measures is a prerequisite to any determination that the Project, as mitigated, will have a less-than-significant impact on tribal cultural resources.
- CR-3 requires the CRMP to address the fact that “[n]o collection of artifacts is authorized or planned for this project.” *Id.* CRIT emphatically supports the principle of avoidance, but is concerned that the DIS/MND goes on to state vaguely that “[i]f an unanticipated discovery requires evaluation via excavation and artifact collection, the retention/disposal, and permanent and temporary curation policies shall be specified. The decision-making process for identifying which artifacts are curated or reburied, where they are reburied and the individuals, including tribal participants, making these decisions shall be described.” *Id.* CRIT strongly opposes data collection and curation as mitigation measures and urges reburial in the event of accidental discovery.
- Similarly, the Tribes are concerned about CR-3’s statement regarding “[t]he commitment to curate all artifacts retained as a result of any archaeological investigations” and encourages the CPUC to adopt an explicit preference for reburial in the presence of tribal monitors. *Id.* at 6-28. The Tribes are opposed to all activities that result in disturbance or removal of cultural resources, even if intended to serve “archaeological investigations.”
- As discussed above, CRIT requests that the CPUC clarify that “consulting tribes” that will have the opportunity to review and comment on the proposed CRMP include any tribes “traditionally and culturally affiliated” with the Project site. *Id.* at 6-27.

Finally, while CRIT appreciates the inclusion of sensitivity training for Project personnel as MM CR-2, the Tribes question whether modules “provided through participating tribes in video format” will be both effective in educating staff about appropriate work practices and respectful of the sacred significance of the tribal cultural resources associated with the Project area. *Id.* at 6-26. In addition, it is not clear whether *only* “cultural resources monitors and tribal monitors” will receive such training; CRIT urges the CPUC to clarify that this educational requirement would apply to anyone who will work at the Project site. *Id.* at 6-27.

C. Visual Resources

The Tribes object to the DIS/MND’s determination that the Project will have no significant impact on visual resources, a determination that relies heavily on the fact that there are already visible “infrastructure” facilities in or around the Project area. *See, e.g.*, DIS/MND at 5-18 (“In the context of surrounding visual elements (e.g., existing conductors, LSTs, distribution poles, and roads), most [project activities] were considered to represent minor changes in the visible landscape having a nominal and highly localized visual impact.”). Further, the agency seems to take the position that as long as mountain views are still *visible* to those in the area, even if energy infrastructure is visible in the foreground, there are no significant visual

impacts. CRIT disputes this characterization and urges the CPUC to engage in a fuller analysis of the aesthetic effects of each of the proposed Project elements, including towers, transmission lines, and other structures, on the surrounding landscape.

Further, the DIS/MND's analysis is inadequate in that it fails to take into account the importance of the surrounding viewshed to the Tribes. The Project will travel through Mojave National Preserve, which is located just across the California/Nevada state line from Spirit Mountain, a place of great spiritual and traditional importance to the Tribes. Spirit Mountain is the center of creation for CRIT members. *See also id.* at 5-360 (recognizing the significance of Spirit Mountain to the Mojave people). According to the Mohave origin story, the Creator Mastamho set the Mohave people at Avi Kwame (Spirit Mountain) and gave them their names. Given Spirit Mountain's unique and highly valued role in CRIT's cultural tradition, the Tribes request that CPUC specifically analyze effects on views of and from Spirit Mountain and the sacred landscapes in the vicinity of the Project before concluding that the impact on visual resources is less than significant.

D. Cumulative Impacts

The DIS/MND similarly fails to take into account cumulative impacts in the Project area. For example, with respect to cultural resources, there is less than half a page of analysis summarily concluding that there are “no projects in the cumulative scenario”—that is, projects within one mile¹—that would have a cumulative effect on cultural resources. DIS/MND at 5-413. However, the DIS/MND suggests that just two capacitor sites and two fiber optic repeater sites—within a project dispersed across more than 235 miles of transmission infrastructure—were the points of reference for determining “cumulatively considerable impact.” *Id.*; *see also id.* at 1-3. In addition, the analysis recognizes the potential for ground-disturbing activities to “affect unknown buried cultural deposits or archaeological sites” at one part of the Project site and two nearby facilities, but concludes simply that the “small size of the Barstow Repeater site (0.13 acres) and the implementation of mitigation measures would result in a less than significant impact and would result in a less than cumulatively considerable impact.” *Id.* at 5-414. This is insufficient discussion to justify bypassing preparation of an EIR.

Further, the only discussion of cumulative “tribal cultural resources” impacts is just two sentences: “The cumulative effect of the ELM Project in combination with effects from projects in the cumulative scenario are similar to those discussed for Cultural Resources (see previous discussion). The cumulative impacts would be less than considerable.” *Id.* at 5-419. Again, this is insufficient. CPUC has made no effort to describe the particular cumulative impacts on tribal cultural resources, despite the fact that its DIS/MND determined that the entire Mojave Trails Landscape—presumably encompassing many of the projects listed in Table 5.21-1—is a TCR.

¹ Although the DIS/MND states that this is the radius of cultural resource impacts considered, it is far from clear which projects fell into this group; CPUC states in its “Approach to Cumulative Impact Analysis” that “Projects used in the cumulative impact analysis are listed in Table 5.21-1, Cumulative Projects within 1 Mile of the Proposed Project, and Table 5.21-2, Cumulative Projects 1 to 5 Miles from the Proposed Project.” *Id.* at 5-400. However, there is no Table 5.21-2 anywhere to be found, and Table 5.21-1 appears to show the five-mile radius instead.

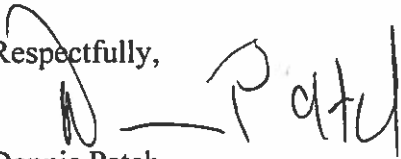
CPUC must adequately analyze cumulative impacts, which requires more than cursory dismissal by reference to mitigation measures. To the extent CPUC wishes to rely on mitigation measures to demonstrate that there are no “cumulatively considerable” impacts, it must first attempt to quantify the cumulative impacts and then specifically explain the effect of each relevant mitigation measure in alleviating such an impact.

E. Growth-Inducting Impacts.

Finally, CRIT disputes CPUC’s conclusion that it need not consider “[e]nvironmental effects that may be associated with future generation facilities . . . that may use Proposed Project facilities to transmit electricity” because they are “speculative” and “not the result of, or made more likely by, the proposed project.” DIS/MND at 3-4. CEQA requires an analysis of growth-inducing impacts. Pub. Res. Code § 21100(b)(5). Clearly, an expansion of energy infrastructure on this scale could foreseeably result in a greater number of future generation facilities. CRIT remains concerned about the gradual advancement of such projects, one by one, across its ancestral territory, and maintains that CPUC may not avoid analyzing growth-inducing impacts by issuing a mitigated negative declaration for the Project.

Conclusion

Thank you for your consideration. To understand how these comments were taken into account in your decisionmaking, we ask for a written response prior to a final decision. As discussed above, the Tribes also request formal consultation with the CPUC on both the Project generally and the CRMP specifically. Please copy the Tribes’ Attorney General Rebecca A. Loudbear, at rloudbear@critdoj.com, Deputy Attorney General Antoinette Flora, at aflora@critdoj.com and THPO Director Bryan Etsitty, at betsitty@crit-nsn.gov, on all correspondence to the Tribes.

Respectfully,


Dennis Patch
Chairman, Colorado River Indian Tribes

Cc: Tribal Council of the Colorado River Indian Tribes
Bryan Etsitty, THPO Director
Rebecca A. Loudbear, Attorney General, Colorado River Indian Tribes

EXHIBIT 1

Government-to-Government Consultation Policy of the Colorado River Indian Tribes

The federally recognized Colorado River Indian Tribes (CRIT or the Tribes) have over 4,000 active members from four distinct tribes – the Mohave, Chemehuevi, Hopi, and Navajo. The Tribes' reservation, which encompasses nearly 300,000 acres, straddles the Colorado River in both Arizona and California. The Tribes' ancestral homelands, however, extend far beyond the current reservation boundaries, into what is now public and private land in Arizona, California, and Nevada. As a result, the Tribes' cultural resources, including sacred sites, trails, and artifacts, are found beyond the reservation boundaries as well. The Tribes are deeply committed to the ongoing protection of such resources located both on- and off-reservation.

Federal law recognizes that CRIT is a sovereign government distinct from the United States. As a result of this status, the United States must engage in government-to-government consultation with the Tribes when actions or decisions of the United States have the potential to impact the Tribes, its government, tribal land, or cultural resources. This consultation must occur before the momentum toward any particular outcome becomes too great. The purpose of this government-to-government consultation must be to obtain CRIT's free, prior, and informed consent for such actions.¹ Desired outcomes include an ongoing, mutually beneficial relationship between federal agencies and the CRIT Tribal Council, deference to tribal sovereignty, and informed decision-making by both the United States and the Tribes. Federal agency staff and decision-makers must view consultation as more than listening and learning sessions with Tribal Council. Instead, there must be an ongoing, dynamic relationship between federal agencies and the Tribes that is built upon the agencies' concerted effort to understand the Tribes' history, culture, and government.

The Tribes have developed this policy paper to guide future government-to-government consultation with the United States and its administrative agencies.² This paper outlines CRIT's consultation rights and the specific characteristics that comprise minimally adequate consultation under federal law. This paper also offers additional suggestions to ensure that consultation is effective and mutually respectful.³ If federal agencies do not follow this policy, CRIT does not consider the communications from the agencies to meet the consultation requirements of tribal or federal law. Acknowledgement of this policy is required before an agency schedules a government-to-government meeting with Tribal Council. CRIT is committed to seeking recourse

¹ United Nations Declaration of the Rights of Indigenous Peoples, Articles 19 and 32; *see also* 36 C.F.R. § 800.1(f) (defining "consultation" as "the process of seeking, discussing, and considering the views of other participants, and where feasible, seeking agreement with them."); BLM Manual Handbook H-8120-1 at I-2 (consultation includes "[t]reating tribal information as a necessary factor in defining the range of acceptable public-land management options.").

² 36 C.F.R. § 800.4(c)(2)(ii)(C); 43 C.F.R. § 10.5(d)(3); Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions (January 2017) ("Improving Tribal Consultation"), Key Principle 8.

³ Required actions are distinguished from recommended actions by use of the words "must" and "shall" versus "should."

through all available political, legal, and media channels if this request is denied or if the agency fails to comply with this policy.

Why A Formal Process is Needed

Federal agencies (including the Department of the Interior, Bureau of Land Management, and Bureau of Indian Affairs) have consistently failed to engage in adequate government-to-government consultation with CRIT and other tribes. The United States recently recognized this troubled history in suggesting needed modifications to the consultation process.⁴ In CRIT's experience, agencies have asked for substantive tribal comments on project and policy documents after those projects and policies have already been approved or implemented. Agency staff and decision-makers have attended meetings with Tribal Council without adequate information or authority to meaningfully respond to the Tribes' concerns. Agencies have repeatedly refused to provide responses to CRIT's comments, including any explanation for why CRIT's requests cannot be accommodated. These failures have resulted in direct harm to CRIT, its members, and cultural resources of great importance to the Tribes.

As one example, BLM authorized construction of the nearly 2,000-acre Genesis Solar Energy Project on land once occupied by the ancestors of CRIT's Mohave members. The project involved significant grading along the shoreline of Ford Dry Lake, resulting in the removal of over 3,000 cultural resources over the vehement objections of the Tribes. These artifacts are now stored at the San Bernardino County Museum with no access for CRIT members. In accordance with cultural, spiritual, and religious practices, CRIT has repeatedly asked BLM to permit reburial of the Genesis artifacts, as well as any other artifacts that are inadvertently disturbed within the ancestral homeland. Yet, BLM has refused to engage in government-to-government consultation on this critical topic. Letters have been left unanswered, harmful agency policies have been issued without advance notice or consultation, and BLM officials have been unprepared to discuss their position when in-person meetings have occurred. These consultation failures have resulted in severe and ongoing harm to CRIT and its members.

Basis of Consultation Right

The fundamental principle underlying CRIT's right to meaningful consultation with the United States is the Indian trust doctrine. Pursuant to this doctrine, the United States has a fiduciary duty over tribal lands and resources as Indian trust assets.⁵ As part of this duty, the United States has an obligation to consult with CRIT about federal actions that have the potential to impact these assets or other attributes of tribal sovereignty. For CRIT, tribal sovereignty includes an obligation to protect tribal and cultural resources that are located in the ancestral homelands of CRIT members.

⁴ Improving Tribal Consultation, at 1-5.

⁵ *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 788 (9th Cir. 2006); *Navajo Tribe of Indians v. United States*, 364 F.2d 320, 322 (Ct. Cl. 1966).

This fundamental consultation right is engendered in federal statutes,⁶ executive orders,⁷ and agency policies.⁸ These laws help implement and explain the consultation right that stems from the Indian trust doctrine, but do not diminish it.⁹ Where appropriate, CRIT relies on these laws to support its definition of adequate consultation.

Characteristics of Adequate Consultation

Tribal Sovereignty. Government-to-government consultation must respect tribal sovereignty.¹⁰ The federal government shall not treat consultation as a “box to be checked,” but as a meaningful dialogue intended to result in consensus between the United States and the Tribes.

Addressing Tribal Concerns. The federal government shall timely seek and review CRIT’s written and oral comments and provide comprehensive responses to Tribal concerns and requests.¹¹ Responses to written comments should generally be provided before any in-person government-to-government consultation. Prior to reaching its final decision, a federal agency must explain how that decision addresses CRIT’s concerns.¹² Where an agency is unable to fully address CRIT’s concerns, the agency shall clearly explain its reasoning based on the legal, practical, or policy constraints on its decision-making.¹³ If CRIT has articulated its concerns in writing, this explanation should be in writing as well.

Involved Parties. Government-to-government consultation requires an in-person meeting between CRIT Tribal Council and the agency decision-maker with ultimate authority for a proposed project or action.¹⁴ This decision-maker must be prepared with sufficient details about the proposed project or action, the Tribes’ history, culture and government, and the Tribes’

⁶ See, e.g., National Historic Preservation Act (NHPA), 54 U.S.C. §§ 302701(e), 302706(b); 36 C.F.R. § 800.5(a); Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3002(b)-(c), 3003(b), 3004(b), 3005(a)(3); 43 C.F.R. § 10.5; Archaeological Resources Protection Act (ARPA), 43 C.F.R. §§ 7.7(b)(4), 7.16(b)(2)-(3).

⁷ Executive Orders 12875, 13007, 13175; September 23, 2004 “Memorandum on Government-to-Government Relationship with Tribal Governments”; November 9, 2009 “Memorandum for the Heads of Executive Departments and Agencies.”

⁸ Secretarial Order 3317 § (b); Department of the Interior Policy on Consultation with Indian Tribes; BLM Manual 8210: Tribal Consultation under Cultural Resource Authorities; Bureau of Indian Affairs Government-to-Government Consultation Policy (BIA Consultation Policy) at V.1-3.

⁹ 36 C.F.R. § 800.4(c)(2)(ii)(B); Executive Order 13175, § 2.

¹⁰ 36 C.F.R. § 800.4(c)(2)(ii)(B); BLM Manual 8120 at .08(A) (“The special legal status of tribal governments requires that official relations with BLM . . . shall be conducted on a government-to-government basis.”).

¹¹ Executive Order 13175, §§ 5(b)(2)(B), 5(c)(2); Improving Tribal Consultation, Key Principle 6.

¹² BLM Manual 8120, Glossary of Terms (“consultation” defined to include “documenting the manner in which the [tribal] input affected the specific management decision(s) at issue.”); BLM Manual Handbook H-8120-1 at I-1; Improving Tribal Consultation, Key Principle 6.

¹³ BLM Manual 8120 at .06(E) (“Field Office Managers and staff . . . shall document all consultation efforts.”); Improving Tribal Consultation, Key Principle 6.

¹⁴ See, e.g., 36 C.F.R. § 800.2(a); BIA Consultation Policy at VI.A(4); BLM Manual 8210 at .06(A).

anticipated or specific concerns with respect to the proposed project or action.¹⁵ This decision-maker should also have formal training regarding tribal sovereignty, the Indian trust doctrine, and other aspects of federal Indian law. The agency should use its staff to communicate project information to CRIT and its staff and to prepare the agency decision-maker for the government-to-government consultation. For example, prior to meeting with CRIT Tribal Council, it is the Tribes' expectation that agency staff will have provided baseline information about the project and its potential impacts to Tribal staff, such as survey results and ethnographic reports. However, CRIT does not recognize staff-to-staff discussions or communications as fulfilling the federal government's consultation responsibility.¹⁶

In addition, communications between CRIT and project applicants or proponents (where such applicants or proponents are not federal entities) are not government-to-government consultation. Such communications, however, can help to convey information and reduce conflict. Unless requested by CRIT, federal agencies shall not interfere with such communications. Finally, meetings held with representatives from multiple tribes do not constitute consultation with CRIT unless CRIT expressly agrees that consultation format.¹⁷

Timing. Government-to-government consultation must occur as early as practicable, so that tribal concerns can be taken into account before the momentum toward a particular project or action is too great.¹⁸ Federal agencies should provide basic information about a project or action and its potential impacts to CRIT as soon as the agency begins initial planning for a project or action or a private entity approaches the agency to submit an application.¹⁹ Federal agencies should keep CRIT apprised of the decision-making timeline so that the Tribes can participate at appropriate junctures. Federal agencies shall continue to consult with Tribes until they make a decision on the proposed project or action, and if requested by the Tribes or required by law, until construction or implementation of the project or action is complete.

¹⁵ See also *Pueblo of Sandia v. United States*, 50 F.3d 856, 860, 862 (10th Cir. 1995) (Section 106 "mandates an informed consultation."); BLM Manual 8120 at .06(C) ("Field Office Managers shall recognize that traditional tribal practices and beliefs are an important, living part of our Nation's heritage, and shall develop the capability to address their potential disruption . . ."); BLM Manual Handbook H-8120-1 at I-2 ("BLM's representative must be authorized to speak for the BLM and must be adequately knowledgeable about the matter at hand."); Improving Tribal Consultation, Key Principle 5.

¹⁶ *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1118-19 (S.D. Cal. 2010).

¹⁷ *Id.*

¹⁸ 16 U.S.C. §§ 470a(d)(6), 470f (requiring consideration of historic resource impacts "prior to the approval of . . . the undertaking") (emphasis added); 36 C.F.R. §§ 800.1(c), 800.4(c)(2)(ii)(A); Executive Order 13175, §§ 5(b)(2)(A), 5(c)(1); Secretarial Order 3317, U.S. Dept. of the Interior, § 4(a); Dep't of the Interior Tribal Consultation Policy at 7-8; BIA Consultation Policy at VI.A; BLM Manual 8120 at .02(B) (consultation must "[e]nsure that tribal issues and concerns are given legally adequate consideration during decision-making") (emphasis added); BLM Handbook Manual H-8120-1 at V-5 (" . . . the BLM manager should initiate appropriate consultation with potentially affected Native Americans, as soon as possible after the general outlines of the land use plan or the proposed land use decision can be described.").

¹⁹ Improving Tribal Consultation, Key Principle 3.

Scope of Consultation. Federal agencies must be willing to engage in consultation on any potential impacts of a proposed project or action to CRIT, its members, its land, or its cultural resources.²⁰ Consultation shall not be limited to potential impacts to properties eligible for listing on the National Register of Historic Places²¹ or equivalent state registers, or protected by the Native American Graves Protection and Repatriation Act. If federal approval is needed for only a portion of a proposed project or action, the agency shall nevertheless consult on potential impacts from the whole of the project or action. Federal agencies should not expect CRIT to provide information about impacts to cultural resources in scientific terms and should weigh the Tribe's cultural, spiritual, historical, and anthropological input with the respect and deference that it is due.²²

Confidentiality. Information obtained via government-to-government consultation shall be kept confidential, except to the extent that CRIT provides information in a public forum (such as via a letter submitted during a comment period or comments made at a hearing) and to the extent such information must be revealed pursuant to federal or other applicable law.²³ If a federal agency determines that confidential information obtained from CRIT must be revealed, the agency shall inform CRIT prior to the release and make all reasonable attempts to limit its scope. Federal agencies shall acknowledge that confidential information is not limited to the location of sites eligible for listing on the National Register of Historic Places²⁴ or protected by the Native American Graves Protection and Repatriation Act, but includes any information about sensitive resources, culture, or religious beliefs, obtained through consultation.

Resources. Federal agencies must recognize that government-to-government consultation consumes scarce tribal resources. Agencies should minimize costs to CRIT by conducting government-to-government consultation meetings in Parker, Arizona²⁵; providing clear and succinct information about proposed projects or actions and their potential impacts; and ensuring that agency staff document CRIT's interests and concerns. CRIT should not be required to repeatedly provide the same information to an agency because of agency staff turnover. Agencies should explore funding sources to remunerate the Tribes for participating in consultation.

Key Requirements

To aid in implementation of this policy, agency officials shall ensure their government-to-government consultation efforts comport with this summary of key requirements:

- Initiate consultation as early as practicable.
- Timely seek and review CRIT's written and oral comments.

²⁰ Executive Order 13175, § 1(a).

²¹ 36 C.F.R. § 800.4(c)(2)(ii).

²² See, e.g., BLM Manual Handbook B-8120-1 at II-5.

²³ See 36 C.F.R. §§ 800.4(a)(4), 800.11(c); see also BLM Manual 8120 at .06(G).

²⁴ 36 C.F.R. § 800.4(c)(2)(ii)(A); see also BLM Manual Handbook H-8120-1 at V-1.

²⁵ Improving Tribal Consultation, Key Principle 4.

- Provide comprehensive responses to Tribal concerns and requests in the same format as such concerns and requests were provided to the agency.
- Explain agency decisions based on legal, practical, and policy constraints on decision-making.
- Involve agency decision-makers with ultimate authority in in-person consultation meetings.
- Sufficiently prepare for in-person consultation meetings with Tribal Council to be able to respond to and address the Tribes' concerns.
- Do not claim that communication with CRIT staff, between CRIT and project applicants, or in the presence of multiple tribes is government-to-government consultation.
- Consult on any potential impacts of a proposed project or action on CRIT, its members, its land, or its cultural resources.
- Keep information obtained via government-to-government consultation confidential.



COLORADO RIVER INDIAN TRIBES

Tribal Historic Preservation Office

26600 Mohave Road

Parker, Arizona 85344

Telephone: (928)-669-5822 Fax: (928) 669-5843

July 20, 2017

Southern California Edison
2244 Walnut Grove avenue
Rosemead, CA 91770

RE: Eldorado-Lugo-Mohave Capacitor Project

Dear Ms. Audry Williams:

The Colorado River Indian Tribes' Tribal Historic Preservation Office ("CRIT THPO") has received your letter dated June 30, 2017, regarding the *Cultural Resource Inquiry for Southern California Edison Company's Eldorado-Lugo-Mohave Capacitor Project in San Bernardino County, California and Clark County, Nevada*.

As a preliminary matter, the Colorado River Indian Tribes are a federally recognized Indian tribe comprised of over 4,200 members belonging to the Mohave, Chemehuevi, Hopi and Navajo Tribes. The almost 300,000 acre Colorado River Indian Reservation sits astride the Colorado River between Blythe, California and Parker, Arizona. The ancestral homelands of the Tribe's 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, we have a strong interest in ensuring that potential cultural resource impacts are adequately considered and mitigated.

In particular, the Colorado River Indian Tribes are concerned about the removal of artifacts from this area and corresponding destruction of the Tribes' footprint on this landscape. As such, the Tribes request that all prehistoric cultural resources, including both known and yet-to-be-discovered sites, be avoided if feasible. If avoidance of the site is infeasible, then the Tribes request that the resources be left in-situ or reburied in a nearby area, after consultation. This language should be incorporated into enforceable mitigation measures.

In addition, we respond as follows:

- Given the potential impact of the project on important cultural resources, the Colorado River Indian Tribes request in-person government-to-government consultation. Please contact the CRIT THPO to discuss our concerns and schedule a meeting with Tribal Council.

CRIT THPO

Project Name: Eldorado Lugo Mohave Project

Date: July 20, 2017

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_____ In the event any human remains or objects subject to provision of the Native American Graves Protection and Repatriation Act, or cultural resources such as sites, trails, artifacts are identified during ground disturbance, please contact the CRIT THPO within 48 hours.

_____ The Colorado River Indian Tribes request tribal monitoring of any ground disturbing activity as a condition of project approval. The Tribes request notification of any opportunities to provide tribal monitoring for the project.

_____ The Colorado River Indian Tribes do not have any specific comment on the proposed project and instead defer to the comments of other affiliated tribes.

Thank you for your consideration. Please contact the undersigned if you have any questions or concerns.

Please be advised that David Harper is no longer associated with this Department. Mr. Bryan Etsitty has been appointed as Acting-Director.

Sincerely,

**COLORADO RIVER INDIAN TRIBES
TRIBAL HISTORIC PRESERVATION OFFICE**

/s/ Bryan Etsitty, Acting-Director

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