Lauren Coartney

From: Kelly McDonald <kmcdonald@spmcdonaldlaw.com>
Sent: Friday, March 04, 2011 3:54 PM
To: catulewind@blm.gov; ECOSUB
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Subject: Comment Letter re Tule Wind Project DEIS/DEIR
Attachments: Lucas Tule Wind Comment Ltr w Attachs 030311.pdf

Mr. Thomsen,

Attached please find a Comment Letter of March 3, 2011 by Courtney Ann Coyle on behalf of Carmen Lucas regarding the Tule Wind Project DEIS/DEIR.

Thank you,
Kelly McDonald
for
Courtney Ann Coyle
Attorney at Law

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ATTN: Greg Thomsen
BLM California Desert District Office
22835 Calle San Juan de Los Lagos
Moreno Valley, CA 92553-9046

By Email: catulewind@blm.gov
March 3, 2011

Re: DEIS/DEIR for Iberdrola Renewable/Pacific Wind Development Tule Wind Project and SDG&E's East County Substation Project, San Diego County, CA

This comment letter is sent on behalf of our client Carmen Lucas, Kwaaymii Laguna Indian. Ms. Lucas continues to have serious concerns about this Project. As you know, Ms. Lucas has been working as a Native American Monitor in the San Diego and Imperial areas for twenty years. She also has provided information that has been used to support National Register nominations under Criterion A (tribal values), among her many involvements. My office has been assessing environmental documents for their legal adequacy under CEQA and NEPA in this geographical area for nearly twenty years.

These written comments supplement those already provided to BLM in person and in writing, and are timely submitted within the extended public comment period. We have reviewed the Draft EIS/EIR and are deeply disappointed to find that the concerns Ms. Lucas has voiced to the agencies and involved cultural resource management professionals have not been addressed in this joint document, or adequately mitigated, if mitigated at all.

Ms. Lucas' concerns include the following:

Tribal Cultural Landscape Unanalyzed and Unmitigated

As a whole, Ms. Lucas is very concerned that McCain Valley is in itself a largely intact tribal cultural landscape, and is part of an intact larger viewshed experience which includes the Lagunas and the desert below it. The issue of impacts to tribal cultural landscapes is not analyzed in the DEIS/DEIR (with the possible exception of rock features as scenic elements) and no mitigation is proposed. (See, DEIS/DEIR Section 3.5 Cultural and Paleontological Resources).

The applicant or agencies might try to argue this issue is somehow covered in the Aesthetics/Visual Resources section. (See, DEIS/DEIR Section 3.2 Aesthetics and Visual Resources). They would be wrong. First, there is no discussion of tribal cultural values in this section. Neither is there a rationale for how the key observation points were selected or that they reflect tribal concerns. There is no discussion of whether the BLM Scenic Quality Class Ratings, Visual Contrast Ranges or Definitions of Visual Impacts, or that Viewer Sensitivity Levels or CEQA Criteria, as applied, reflect tribal concerns, heritage values and religious and cultural practices. Thus, tribal cultural landscapes have not been adequately analyzed or findings of insignificance substantiated.

Second, the DEIS/DEIR concludes that "No appropriate mitigation measure" has been identified for its substantial adverse impacts on scenic vistas or degradation of existing visual character and quality. (DEIS/DEIR ES-16). No definition of what constitutes an "appropriate" measure is provided in the

DEIS/DEIR. Moreover, under CEQA, even if a mitigation measure may not *fully* or *completely* mitigate an adverse impact, if there are feasible mitigation measures, those feasible measures must still be considered and adopted. (California Public Resources Code section 21002). The DEIS/DEIR does not even discuss which measures might have been considered, but rejected. The DEIS/DEIR wholly lacks this analysis and required mitigation.

Cumulative Impacts to Tribal Cultural Resources Unanalyzed and Unmitigated

Ms. Lucas is very concerned about the individual and cumulative impacts of the Project with all the other proposed wind and solar projects in eastern San Diego County/Western Imperial County (Ocotillo Express, Imperial Valley Solar Project, etc.) in combination with the Sunrise Powerlink and other transmission facilities as well as other activities (i.e., the ongoing OHV destruction of tribal cultural resources and cremations at nearby Lark Valley). There was no adequate cumulative and indirect impacts analysis and mitigation for these impacts individually or taken together. Nor is there any cumulative impacts *analysis* or *mitigation* proposed in the Project DEIS/DEIR, instead there is merely a *listing*. (See, DEIS/DEIR page 3.5-43).

Moreover, there have been no mitigations proposed to benefit area tribes who have had and will have their cultural resources and cultural landscapes cumulatively and adversely affected. For example, no mitigation for cumulative impacts to cultural resources is in this DEIS/DEIR; similarly no such analysis or mitigation has been offered in the Sunrise Powerlink Project environmental documents. Attempts at post-approval mitigation, such as providing for curation funds at the Imperial Valley Desert Museum and putting solar facilities on the Museum's rooftop, while both of arguable benefit to BLM staff, and the latter being ironic, do nothing to mitigate the cultural impacts of these renewable energy projects on tribal communities and practices. In the words of Ms. Lucas, "All of these projects collectively in the desert and back country, amount to nothing less than the blatant desecration of Southern California's Back Country and Deserts, and essence of place." A range of potential mitigation measures for such impacts can be found in the attached report from the recent Tribal Summit on Renewable Energy. The DEIS/DEIR must be revised.

Lack of Coordination between Agencies Regarding Environmental Review

Ms. Lucas is very concerned about a lack of coordination during environmental review between the Project and Sunrise Powerlink. When she was onsite during SDG&E testing, the monitors realized that SDG&E wanted to create many access roads. This would have harmed resources and attracted the public which in turn would cause additional impacts. The monitors requested no access roads and that materials be brought in with helicopters on the SDG&E project. Ms. Lucas makes the same recommendations for this Project, especially as the projects are geographically close together. (See statement at DEIS/DEIR, page 3.5-18, project footprints "overlap" in some places). Unless this recommendation is implemented, potentially unnecessary and unmitigated impacts will occur to cultural and visual resources.

Need to Avoid and Minimize Impacts to Tribal Cultural Resources and Ancestral Human Remains

Ms. Lucas underscores her previous Project input that: 1) all tribal cultural resources and their areas be avoided, with avoidance including adequate buffers and long-term management measures, acceptable to local tribes, 2) qualified Native American Monitors that are capable of expressing themselves be *required* during all additional surveys and field verifications, ground disturbing activities, and future monitoring and maintenance efforts, 3) National Register evaluations and nominations be successfully completed with tribal input and consideration given to listing under Criterion A/1 (tribal values), 4) that research designs and data recovery be informed by Native American input and cultural values, 5) that all suspect bone be identified promptly by the Coroner and 6) that human remains, grave goods, ceremonial items and objects of patrimony, as defined by the affected tribe(s) be repatriated. None of these mitigation measures are presently included as Project mitigation. (See DEIS/DEIR ES-26 through ES-29).

Without these, and possibly other, measures, the conclusions regarding reduction of impacts to cultural resources and human remains are unsubstantiated.

Lack of Analysis of Environmental Justice Impacts to Tribes and their Cultures

Proposed renewable energy projects in Eastern San Diego County and Western Imperial County, including the traditional territory of my client and other affected tribal peoples, will have a disproportional effect on the cultural resources and practices of such people. Yet, this critical aspect of environmental justice is not discussed in the DEIS/DEIR. (See, DEIS/DEIR Section 3.17 Socioeconomics and Environmental Justice). The DEIS/DEIR simply makes a general conclusion that no impacts were identified to environmental justice and therefore no mitigation measures are required. (DEIS/DEIR ES-36).

Also absent from the environmental document is any discussion of the consistency of this Project with the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the United States in December 2010. (See attached Declaration). Sections particularly relevant to this Project include those at Articles 5, 7, 8, 10, 12, 13, 14, 15, 18, 19, 25, 26, 27, 28, and 31. As this is a joint environmental document, without such discussion, impacts and mitigation have not been adequately addressed.

Need for Timely Consultation and NHPA Section 106 Review

On many renewable and other projects in the California Desert, BLM has taken an unfortunate approach to addressing consultation with tribes and conducting NHPA Section 106 review. In each case, BLM has a disturbing pattern and practice of commencing both late and failing to conclude either prior to making decisions on the projects. (See, for example, attached Order Granting Preliminary Injunction relative to the Imperial Valley Solar Project, December 15, 2010, particularly pages 4 -22). This Project makes the same legal error (DEIS/DEIR, see for example, pages F-85 (prehistoric/historic archaeological sites), F-86 (Native American human remains), and F-87 (Traditional Cultural Properties)).

The effect of this abuse is that tribal concerns are not given the level of consideration that is required under applicable statutes, policies, guidance and Executive Orders. Ms. Lucas therefore requests that formal eligibility recommendations/eligibility determinations be made *prior to* the agencies approving the Project, whenever possible, so that appropriate consideration of tribal cultural resources can occur at a meaningful time in the process, Project changes can be more readily made and enforceable mitigation measures adopted. Evaluations must be made with Criterion A/1 (tribal values) in mind, which do *not necessarily require* collection or excavation. Also, just because an archaeological site may be physically avoided, does not mean there are no indirect effects or impacts to that resource that themselves require mitigation. The environmental document must be revised accordingly. (See, particularly, DEIS/DEIR pages 3.5-34 through 3.5-35).

This concern is underscored by the fact that BLM has a pattern and practice of approving substandard cultural resources Programmatic Agreements related to renewables and other utility projects in the California Desert (these include Topock Investigation and Final Remedy, Imperial Valley Solar, etc.). The DEIS/DEIR's Cultural Resource section admits that NHPA Section 106 consultation is incomplete and that a Programmatic Agreement is being "developed." (DEIS/DEIR, page 3.5-41). Again, impacts and effects to tribal cultural resources must be dealt with upfront in the environmental review process under both NHPA and CEQA - not deferred to after project approval - to be meaningful.

Summary

In the end, my client is deeply saddened that it has come to this and that BLM and other agencies have not yet taken effective actions to protect these sensitive and irreplaceable areas of our backcountry from adverse and permanent impacts and effects. Based on the issues above, and more, Ms. Lucas strongly feels that this area is not an appropriate location for large scale utility projects. Ms. Lucas hopes that there is still time to reassess the appropriateness of this action and related Projects to better respect the irreplaceable cultural and landscape values at stake.

Please provide my office with two hard copies of the written responses to comments, any subsequent environmental documents, the Final EIS/EIR, staff reports, Statement of Overriding Considerations and Findings and notices, including the Notice of Determination.

Thank you for considering our comments.

Very truly yours,

Courtney Ann Coyle
Attorney at Law

Attachments:
Tribal Summit on Renewable Energy Report
UN Declaration on the Rights of Indigenous Peoples
Order Granting Preliminary Injunction, IVSP

Copies to:
Native American Heritage Commission
California SHPO
Advisory Council on Historic Preservation
State Lands Commission
County of San Diego
Kumeyaay Tribal Chairs
Cocopah Chair
Quechan Chair
Interested Parties
Client

Tribal Summit on Renewable Energy
January 12-13, 2011
Palm Springs, California

The Advisory Council on Historic Preservation (ACHP) and National Association of Tribal Historic Preservation Officers (NATHPO) wish to extend their appreciation to those who participated in the Tribal Summit on Renewable Energy on January 11-13, 2011, in Palm Springs, California. Recognizing that renewable energy and its potential effects on historic properties remain areas of concern for Indian tribes, the summit brought together more than 150 tribal representatives and officials from federal, state, and local government and the private sector to share information and discuss local and national implications. The summit included an overview of upcoming federal renewable energy projects and highlighted issues of tribal concern related to past and proposed renewable energy development, such as consultation, timeframes, and indirect and cumulative effects to sites of religious and cultural significance.

The ACHP and NATHPO are committed to advancing the dialogue begun at Palm Springs and look forward to continued involvement with your organization moving forward. Plans are underway to host similar events in other regions so that Indian tribes and federal agencies can identify the full range of issues presented by the development and transmission of renewable energy and improve the consideration of historic preservation issues in these areas. The results of these discussions will be carried forward by the ACHP in its interaction with federal and non-federal stakeholders in a variety of energy-related working groups and inform our priorities for addressing the challenges these issues present to renewable energy development.

As promised at the Summit, a summary of the issues raised during our discussions in Palm Springs is provided below. We encourage you to share this summary with those who have a stake in this issue so that they might benefit from these findings, observations, and recommendations.

Summary of Key Issues

1. Trust responsibility – federal agencies must recognize their trust responsibilities to Indian tribes

2. Overwhelming nature of projects can complicate participation in Section 106 reviews
   - Volume, rate, and timeframes for commenting, as well as number of agencies involved present workload and logistical challenges
   - Large scale of projects presents strain on resources
   - Lack of funding for tribes/THPO programs

3. Ensuring appropriate and effective consultation
   - Federal agencies should consult Indian tribes early and often
   - Government to government consultation important; consultation through consultants inappropriate unless expressly authorized by Indian tribe
   - Formal communication is critical, in addition to emails and phone calls
   - More information about project parameters and time available is often needed to consult effectively
   - Federal agencies should consider ways to involve non-federally recognized Indian tribes
   - Agencies, consultants, and applicants should not assume they understand the concerns of native peoples without asking
   - Agencies should be proactive and reach out to Indian tribes instead of expecting Indian tribes to reach out to them
   - Consultation has to be meaningful, not just consultation for the sake of consultation
   - Consultation should begin before site selection and include site selection

- There remains a general need for more training in Section 106 process; many of these issues would be solved if agencies were better educated on the parameters of Section 106 reviews
- ACHP offers a handbook on consultation at http://www.achp.gov/regs-tribes2008.pdf; free online training developed by the Interagency Working Group on Indian Affairs entitled "Working Effectively With Tribal Governments" is also available at http://tribal.golearnportal.org; and NATHPO provides a consultation best practices document at http://www.nathpo.org/PDF/Tribal_Consultation.pdf
- Agencies are not consistently identifying clear points of contact on historic preservation issues
- Agencies should consider when it is appropriate to include Indian tribes as signatories to agreement documents
- Tribes would benefit from more training in Section 106, especially in developing agreement documents
- Agencies need to remember that providing information and project updates alone is not sufficient consultation
- Problems are created when not all parties agree on what consultation actually is and what it should "look like"
- Consultation is the building of a relationship
- Key individuals should be responsible for carrying out President Obama's executive order regarding consultation

4. Communication issues
   - Consider more regional working groups to keep everyone up to date (involve ACHP, SHPO, interested tribes, agencies, etc.), but recognize limited availability of tribal leaders who are already very busy
   - Use ACHP's list of federal contacts (http://achp.gov/docs/FederalAgencyContacts.pdf) to identify appropriate agencies and individuals to work with on energy issues
   - Indian tribes and agencies should update their contact lists regularly
   - If additional time is needed to review a document or finding, formal requests for an extension should be made
   - If a tribe is not getting a response from FPO, consider contacting a Deputy FPO
   - Agencies should consider using more Native American liaisons
   - Chronic problems with conducting Section 106 at a regional/district office of an agency may indicate that headquarters is not providing adequate oversight
   - Need more visual simulations and ground-proofing to help with effectively communicating and understanding a project's impacts

5. Being proactive
   - Federal agencies should directly address those comments from Indian tribes that are often repeated over time and from project to project to resolve them once and for all
   - BLM should consider permanent set-asides of land and use other lands to meet multiple use mandates
   - Federal agencies should identify areas important to tribes in advance and determine appropriate ways to advise applicants about these areas to inform alternative site selection
   - Recommend California Gov. Jerry Brown name tribal representatives to the CEC and Water Board and other commissions and boards

6. Resource identification and evaluation
   - Encourage applicants to fund survey work on broader level than project-by-project inventories
   - Phased inventory and site analysis can complicate matters by delaying the recognition of critical historic properties earlier on in planning when alternative locations could have been considered
   - Need to analyze resources at a "landscape" level
   - Large historic properties are sometimes inappropriately broken down into smaller units so that some areas can be found ineligible and therefore only small areas are found eligible and subject to mitigation
   - National Register criteria are not always adequate for addressing the significance of some properties

- It is critical that Indian tribes be involved in the identification and evaluation of traditional cultural properties of importance to them
- Consider whether the Secretary of Interior's qualification standards should be updated to reflect tribal expertise
- Agencies should respect tribal determinations that the treatment of some resources under NEPA may have implications for components of these resources that are also significant under Section 106
- Cultural resource assessments must go beyond identifying archaeological sites, and mitigation should be considered broadly for all resource types
- Idea of a comprehensive inventory is generally good, but stakeholders should not view such an inventory as a substitute for meaningful consultation that includes resource identification and evaluation

7. Impacts
   - Need to better assess long term impacts and those that may occur throughout the lifespan of projects, as well as regional, indirect, and cumulative impacts that may go beyond public lands
   - Need to realize impacts are not only on the land, they can also be on people and life ways
   - Disruption of use of lands for ceremonial purposes should be addressed

8. Alternatives
   - Predetermined project locations cut off meaningful consultation and do not allow for real consideration of alternatives
   - Federal agencies should provide clearer indication of their criteria for determining appropriate siting for such projects

9. Draft BLM PEIS and PA for solar installation locations
   - BLM should provide clear indication of the criteria used for identifying appropriate areas, including an assessment of why some areas with known significant resources are still under consideration
   - Many attendees remain unaware of BLM's efforts to consult under Section 106 for the PEIS; BLM reported that PEIS has been out for some time, 350 tribes were contacted and asked to comment, working with six SHPOs and ACHP/NCSHPO/NATHPO on PA, Section 106 process is being conducted parallel with NEPA process

10. Enforcement of agreement documents
    - Effective consultation is only one part of the process—ensuring that agencies implement agreed upon action is critical. Should be clearer repercussions for agencies not meeting their obligations either for consultation or implementing agreement documents
    - Participants want to understand what can be done when an agency believes it has consulted appropriately on the development of an agreement document but an Indian tribe disagrees with that assertion
      - SHPOs, who can play a role in ensuring these provisions are met, rely on agencies to be truthful, but they also talk to the tribes directly (at varying levels)
      - California SHPO requires agencies to include letters to and from tribes (and Native American Heritage Commission) and information on follow up communications (calls and emails) (goes beyond federally recognized tribes to all contacts provided by NAHC)
    - Consider the development of standards against which consultation can be measured

11. Mitigation
    - Many attendees expressed preference that avoidance be considered first, then minimizing impacts, then mitigation as a last resort. Participants also recognized that even if it is not possible to mitigate adverse effects, it is important to think creatively and not walk away from the table
    - Need to find better ways to deal with regional impacts
    - Consider giving equal weight to cultural resources in influencing project development as is given to biological resources. For example, if more than four desert tortoises are found in a certain area, a project may be relocated but similar consideration not given to cultural resources

- Share successful examples where projects were concluded with effective consideration of historic properties; acknowledge the positive benefits of recognizing good work
- Consider a broad array of potential mitigation measures that can be linked to varying levels and types of effects
    - Museum exhibits and other types of interpretation
    - Native language revitalization programs
    - Tribal member scholarship programs in order to create future cultural resource professionals within tribes
    - Restoration projects
    - Funding of ethnographic studies
    - Fund larger, regional studies to address cumulative impacts
    - Create fund endowments (model might be what is being decided for oil spill in the Gulf)
    - Fund expansion of tribal cultural resource departments to enhance capacity to keep up with projects
    - Land exchanges with tribes
    - Technology upgrades for tribes

12. General comments
    - Non-tribal people must respect the way native peoples feel about the land and their unique connection to it
    - Leadership on these issues must be demonstrated at a national level

United Nations Declaration on the Rights of Indigenous Peoples

Adopted by General Assembly Resolution 61/295 on 13 September 2007

The General Assembly,
Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights (2) and the International Covenant on Civil and Political Rights,2 as well as the Vienna Declaration and Programme of Action,(3) affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1
Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights(4) and international human rights law.

Article 2
Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3
Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4
Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5
Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6
Every indigenous individual has the right to a nationality.

Article 7
1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8
1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
(d) Any form of forced assimilation or integration;
(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9
Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10
Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11
1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous

cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17
1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.
3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18
Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19
States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20
1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21
1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22
1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23
Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24
1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25
Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26
1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27
States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28
1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29
1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30
1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31
1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32
1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources,

particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33
1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34
Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35
Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36
1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37
1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38
States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39
Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40
Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41
The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42
The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43
The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44
All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45
Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46
1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

(2) See resolution 2200 A (XXI), annex.

(3) A/CONF.157/24 (Part I), chap. III.

(4) Resolution 217 A (III).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION, a federally recognized Indian Tribe,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants.

CASE NO. 10cv2241-LAB (CAB)

ORDER GRANTING PRELIMINARY INJUNCTION

On October 29, 2010, Plaintiff (the "Tribe") filed its complaint, alleging Defendants' decision to approve a solar energy project violated various provisions of federal law. On November 12, the Tribe filed a motion for preliminary injunction, asking the Court to issue an order to preserve the status quo by enjoining proceeding with the project, pending the outcome of this litigation. After the motion was filed, Imperial Valley Solar LLC intervened as a Defendant.

On Monday, December 13, the Court held a oral argument at which the parties appeared through counsel. After the parties were fully heard, the Court took the matter under submission, with the intent to rule within two days.

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Background

The Quechan Tribe is a federally-recognized Indian tribe whose reservation is located mostly in Imperial County, California and partly in Arizona. A large solar energy project is planned on 6500 acres of federally-owned land known as the California Desert Conservation Area ("CDCA"). The Department of the Interior, as directed by Congress, developed a binding management plan for this area.

The project is being managed by a company called Tessera Solar, LLC.[1] Tessera plans to install about 30,000 individual "suncatcher" solar collectors, expected to generate 709 megawatts when completed. The suncatchers will be about 40 feet high and 38 feet wide, and attached to pedestals about 18 feet high. Support buildings, roads, a pipeline, and a power line to support and service the network of collectors are also planned. Most of the project will be built on public lands. Tessera submitted an application to the state of California to develop the Imperial Valley Solar project. The project is planned in phases.

After communications among BLM, various agencies, the Tribe, and other Indian tribes, a series of agreements, decisions, and other documents was published. The final EIS was issued some time in July, 2010.[2] At the same time, a Proposed Resource Management Plan - Amendment, amending the Department of the interior's CDCA was also published. On September 14 and 15, certain federal and state officials, including BLM's field manager, executed a programmatic agreement (the "Programmatic Agreement") for management of the project.[3] The Tribe objected to this. On October 4, 2010, Director of the Bureau of Land Management Robert Abbey signed the Imperial Valley Record of Decision ("ROD")

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[1] Although the two entities are obviously related, the briefing doesn't explain the relationship between Tessera and Imperial Valley Solar, except to say that Tessera applied to develop the Imperial Valley Solar project.

[2] The final EIS, included as an exhibit to the Tribe's motion, includes the BLM's field manager's signature, the month and year, but no date. It was published in the July 28, 2010 Federal Register.

[3] This is included in the lodged partial administrative record, at PI 007347–007372. While the table of contents refers to "invited signatory parties" and "concurring parties," and lists various appendices, the Programmatic Agreement is cut off immediately after the signatures of federal and state officials.

approving the project, and the next day Secretary of the Interior Ken Salazar signed the ROD. The ROD notice was published on October 13, 2010.

The area where the project would be located has a history of extensive use by Native American groups. The parties agree 459 cultural resources have been identified within the project area. These include over 300 locations of prehistoric use or settlement, and ancient trails that traverse the site. The tribes in this area cremated their dead and buried the remains, so the area also appears to contain archaeological sites and human remains. The draft environmental impact statement ("EIS") prepared by the BLM indicated the project "may wholly or partially destroy all archaeological sites on the surface of the project area."

The Tribe believes the project would destroy hundreds of their ancient cultural sites including burial sites, religious sites, ancient trails, and probably buried artifacts. Secondarily, it argues the project would endanger the habitat of the flat-tailed horned lizard, which is under consideration for listing under the Endangered Species Act and which is culturally important to the Tribe. The Tribe maintains Defendants were required to comply with the National Environmental Policy Act (NEPA), the National Historical Preservation Act (NHPA), and the Federal Land Policy and Management Act of 1976 (FLPMA) by making certain analyses and taking certain factors into account deciding to go ahead with the project. The Tribe now seeks judicial intervention under the Administrative Procedures Act (APA).

Legal Standards

APA

The Court's review of agency action under NEPA, NHPA, or FLPMA is governed by the Administrative Procedures act. Under 5 U.S.C. § 706 the Court is directed to compel agency action that has been unlawfully withheld, (§ 706(1)), and hold unlawful and aside agency actions it finds to be "arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law" (§ 706(2)(A)), or "without observance of procedure required by law" ((§ 706(2)(D)). The burden is on the Tribe to show any decision or action was arbitrary and capricious. *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).

Preliminary Injunctive Relief

The four-factor test for issuance of injunctive relief is set forth in *Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 374 (2008):

> A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

Even after *Winter*, the Court may also use a "sliding scale" approach. As explained in *Alliance for Wild Rockies v. Cottrell*, F.3d 1045, 1049–50 (9th Cir. 2010), "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met."

Here, the merits question is the most complex, and was the primary focus of briefing and argument. The Court considers this question first.

Merits Discussion

The parties agree that, under NHPA Section 106 (16 U.S.C. § 470f) and its implementing regulations, the Bureau of Land Management (BLM) is required to consult with certain parties before spending money on or approving any federally-assisted undertaking such as the project at issue here, and that the Tribe is one of those parties. The Tribe maintains BLM didn't adequately or meaningfully consult with them, but instead approved the project before completing the required consultation. According to the Tribe, BLM simply didn't consider what the tribe had to say before approving the project.

The Court finds this to be the strongest basis for issuance of injunctive relief and therefore focuses on it.

NHPA Consultation Requirements

The NHPA's purpose is to preserve historic resources, and early consultation with tribes is encouraged "to ensure that all types of historic properties and all public interests in such properties are given due consideration . . . ." *Te-Moak Tribe v. U.S. Dept. of Interior*, 608 F.3d 592, 609 (9th Cir. 2010) (quoting 16 U.S.C. § 470a(d)(1)(A)). The consultation

process is governed by 36 C.F.R. § 800.2(c)(2), one of Section 106's implementing regulations. Under this regulation, "[c]onsultation should commence early in the planning process, in order to identify and discuss relevant preservation issues . . . ." § 800.2(c)(2)(ii)(A). The Ninth Circuit has emphasized that the timing of required review processes can affect the outcome and is to be discouraged. *Id*. (citing *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 787, 785–86 (9th Cir. 2006). The consultation requirement is not an empty formality; rather, it "must recognize the government-to-government relationship between the Federal Government and Indian tribes" and is to be "conducted in a manner sensitive to the concerns and needs of the Indian tribe." § 800.2(c)(2)(ii)(C). A tribe may, if it wishes, designate representatives for the consultation. *Id*.

The Section 106 process is described in 36 C.F.R. §§ 800.2–800.6. After preliminary identification of the project and consulting parties, Section 106 requires identifying historic properties within a project's affected area, evaluating the project's potential effects on those properties, and resolving any adverse effects. The Tribe insists this consultation must be completed at least for Phase 1 of the project, before construction begins.

Throughout this process, the regulations require the agency to consult extensively with Indian tribes that fall within the definition of "consulting party," including here the Quechan Tribe.[4] Section 800.4 alone requires at least seven issues about which the Tribe, as a consulting party, is entitled to be consulted before the project was approved. Under § 800.4(a)(3), BLM is required to consult with the Tribe identify issues relating to the project's potential effects on historic properties. Under § 800.4(a)(4), BLM is required to gather information from the Tribe to assist in identifying properties which may be of religious and cultural significance to it. Under § 800.4(b), BLM is required to consult with the Tribe to take steps necessary to identify historic properties within the area of potential effects. Under § 800.4(b)(1), BLM's official is required to take into account any confidentiality concerns raised by tribes during the identification process. Under § 800.4(c)(1), BLM must consult

[4] The Tribe is a consulting party because it attaches religious and cultural significance to the historic properties that may be affected by the project. The fact that the properties are not on the Tribe's own land doesn't affect this status. 36 C.F.R. § 800.2(c)(2)(ii).

with the Tribe to apply National Register criteria to properties within the identified area, if they have not yet been evaluated for eligibility for listing in the National Register of Historic Places. Under § 800.4(c)(2), if the Tribe doesn't agree with the BLM's determination regarding National Register eligibility, it is entitled to ask for a determination. And under § 800.4(d)(1) and (2), if BLM determines no historic properties will be affected, it must give the Tribe a report and invite the Tribe to provide its views. Sections 800.5 and 800.6 require further consultation and review to resolve adverse effects and to deal with failure to resolve adverse effects.

Furthermore, under § 800.2, consulting parties that are Indian tribes are entitled to special consideration in the course of an agency's fulfillment of its consultation obligations. This is spelled out in extensive detail in § 800.2(c). Among other things, that section sets forth the following requirements:

> (A) The agency official shall ensure that consultation in the section 106 process provides the Indian tribe . . . a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. . . . **Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties**.
>
> (B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. **Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. . . .**
>
> (C) **Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government . . . . Consultation with Indian tribes . . . should be conducted in a manner sensitive to the concerns and needs of the Indian tribe . . . .**
>
> (D) When Indian tribes . . . attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian tribes. . . in the section 106 process. **Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes . . . and should consider that when complying with the procedures in this part**.

36 C.F.R. § 800.2(c)(2)(ii)(A)–(D) (emphasis added). The Tribe points out the significance of the "confidentiality" provisions, citing *Pueblo of Sandia v. United States*, 50 F.3d 856, 861–62 (10th Cir. 1995) (noting that pueblo's reticence to share information about cultural and religious sites with outsiders was to be expected, and that federal government knew tribes would typically not answer general requests for information).

The Ninth Circuit has emphasized that federal agencies owe a fiduciary duty to all Indian tribes, and that at a minimum this means agencies must comply with general regulations and statutes. *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 788 (9th Cir. 2006). *See also* 36 C.F.R. § 800.2(c)(2)(ii)(B) (mentioning the "unique legal relationship" between federal government and Indian tribes). Violation of this fiduciary duty to comply with NHPA and NEPA requirements during the process of reviewing and approving projects vitiates the validity of that approval and may require that it be set aside. *Id*.

Defendants, citing 36 C.F.R. § 800.14(b)(1)(ii), argue that "the execution of a Programmatic Agreement completes the Section 106 process" (Opp'n to Mot. for Prelim. Inj., 22:11–17) and is an acceptable way to resolve adverse effects from complex projects "[w]hen effects on historic properties cannot be fully determined prior to approval of an undertaking." (*Id*. at 9:10–11.) But this is true only if "executing" means "carrying out;" merely entering into a programmatic agreement does not satisfy Section 106's consultation requirements. 36 C.F.R. § 800.14(b)(2)(iii) ("Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement . . . .") The Tribe asks that consultation be completed at least for phase 1 before the project begins. That Defendants are resisting this suggests they are probably not prepared to do so.

The programmatic agreement must be negotiated in accordance with § 800.14(b), which itself requires an extensive consultation process. § 800.14(f). The Tribe has also argued a programmatic agreement is not authorized for this type of project.

Defendants are correct that under § 800.4(b)(2), identification of historic properties can be deferred if "specifically provided for" in a programmatic agreement negotiated

pursuant to § 800.14(b). But this deferral is not indefinite, and entering into an appropriately-negotiated programmatic agreement does not relieve the BLM of all responsibility. The second half of § 800.4(b)(2) contemplates consultation on historic properties as it becomes feasible:

> The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of . . . any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.

In short, entering into an appropriately-negotiated programmatic agreement can result in deferral of the consulting process, but it would only allow a temporary delay in consultation, until it is feasible to identify and consult with the Tribe about the historic properties. *Compare Te-Moak*, 608 F.3d at 610 (explaining that assessment of impact on environmental resources could be deferred where drilling locations in mineral exploration project could not reasonably be determined at the time of approval, but where plan required assessment as drilling locations became known).

Communications and Documentary Evidence

The Tribe's Evidence and Arguments

In support of its point that Defendants failed to adequately consult, the Tribe cites its letter to BLM's Field Manager on February 4, 2010, in which it expressed concern that the schedule for issuance of the ROD didn't allow enough time for adequate consultation, and that the required consultation was being inappropriate deferred. (Somerville Decl. in Supp. of Mot. for Prelim. Inj., Ex. 5 at 273–75.) This letter says the Tribe had informally learned that a Programmatic Agreement was being developed, which BLM intended to approve by September, 2010. It also expressed the concern that, if the project were ultimately approved in spite of the presence of cultural resources, the quick schedule wouldn't allow enough time for BLM to consult with the tribe to develop a plan to avoid harming the sites.

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By itself, this letter suggests the Tribe was consulted late in the planning process, wasn't being consulted when it wrote the letter, and was concerned about the lack of consultation. It also suggests the time frame for consultation was compressed. The Tribe also cites other later documents, showing that it expressed its dissatisfaction to the Department.

At oral argument, the Tribe admitted BLM engaged in some communication and did some consulting, but described the purported consulting as cursory and inadequate, consisting mostly of informational meetings where the Tribe's opinions were not sought, rather than government-to-government consultation.

Defendants' Evidence and Arguments

In response, Defendants provide string citations to materials in the record which they say document "extensive consultation with tribes, including Plaintiff." (Opp'n to Mot. for Prelim. Inj. at 4:18–5:2. This description of the documents is general and cursory, and sheds little light on the degree to which BLM consulted with the Tribe, or whether the consultation was intended to comply with NEPA or NHPA. First, the documentation includes consultations with other tribes, agencies, and with the public. While this other consultation appears to be required and serves other important purposes, it doesn't substitute for the mandatory consultation with the Quechan Tribe. In other words, that BLM did a lot of consulting in general doesn't show that its consultation with the Tribe was adequate under the regulations. Indeed, Defendants' grouping tribes together (referring to consultation with "tribes") is unhelpful: Indian tribes aren't interchangeable, and consultation with one tribe doesn't relieve the BLM of its obligation to consult with any other tribe that may be a consulting party under NHPA. At oral argument, the Court inquired of Defendants about consultation, but they were unable to be any more specific than they were in their briefing.

The partial administrative record was provided to the Court on CD-ROM, with the documents numbered consecutively and also assigned page numbers (preceded by "PI"). To determine whether these documents show BLM properly engaged in NHPA-required consultation with the Tribe, the Court reviewed each of the documents Defendants cite. *See*

Opp'n at 4:18–5:2. But the Defendants should take note that as a matter of practice, it is incumbent on them to explain the significance of exhibits they cite, rather than just citing them with the expectation that the Court will sift through them.

Furthermore, a significant number of the cited exhibits are duplicates or inapt. By failing to weed out marginal, needless, or duplicate citations, Defendants create the impression they are padding the record—perhaps because the evidence doesn't favor them.

A final quibble. The briefing also mostly cites documents in the order they appear in the record Defendants prepared. This blurs the chronology, which is obviously a critical factor here. The documents are separately identified in a few instances, but in most cases only a page range is given. For purpose of convenience, this order will treat each undifferentiated citation to a page range as a single document, discuss the documents in the order they are cited, and discuss the chronology later.

Documents Cited to Show Consultation

The first document cited to show consultation (PI 009213–009541) was a log by URS Corporation, a private corporation Imperial Valley Solar, LLC retained to conduct environmental investigation of the proposed project site. *See* Opp'n at 2:16–18 (identifying URS). This doesn't constitute NHPA consultation at all.

The second document is an appendix to the ROD identifying "consultation" with various tribes. The subject matter of the consultation isn't identified, and in some cases the nature of the contact isn't clear. But this summary is helpful in the sense that it shows the chronology of BLM's consultation with the Tribe. Some of the listed contacts were with members of the Tribe, but these don't appear to be designated representatives and therefore consultation with them doesn't constitute consultation with the Tribe for NHPA purposes. Fourteen contacts with the Tribe's president are listed, as follows:

1) A letter from BLM to the Tribe's president on January 8, 2008

2) Another letter from BLM to the Tribe's president on November 11, 2008

3) A follow-up call to the Tribe's president on November 17, 2008

4) A follow-up call to the Tribe's president on December 12, 2008

5) A letter from BLM to the Tribe's president on November 6, 2009

6) A follow-up call or email from BLM to the Tribe's president sometime from November 21, 2009 to December 1, 2009

7) A letter from BLM to the Tribe's president on January 15, 2010

8) A response letter from the Tribe to BLM on February 4

9) A letter from BLM to the Tribe's president on March 11, 2010

10) A letter from BLM to the Tribe's president on March 29, 2010.

11) A letter from BLM to the Tribe's president on June 2, 2010

12) A letter from BLM to the Tribe's president on June 24, 2010

13) A letter in response from the Tribe on August 4, 2010

14) A letter from BLM to the Tribe on August 18, 2010.

(*Id*., PI 000379, 000386.) Many of the documents included in this summary are cited later, and this order discusses them below.

As part of this summary, thirty-one contacts with the Tribe's historic preservation officer are also recorded. (PI 000380, 000386.) The summary says this officer received the same letters and follow-up calls as did the Tribe's president, and had additional contact with BLM. There is no showing the Tribe designated her as a contact for NHPA purposes, though this summary counts her reply letters as replies from the Tribe.

This summary is significant because it shows BLM's early contact with the Tribe consisted of a letter in January, 2008, a second letter in November, 2008 (and follow-up calls), and a third letter (and follow-up calls) in December, 2009. The communication apparently began in earnest with the January, 2010 letter, which prompted the Tribe's response letter discussed above.

The third cited document is a letter to the Tribe's president and dated September 27, 2010. (PI 007345–007346.) This letter urges the Tribe to sign the Programmatic Agreement, but doesn't involve NHPA consultation.

The fourth cited document is actually two documents compressed together. First is a letter to the Tribe's president dated September 7, 2010. (PI 007374–007375.) It

discusses NEPA consultation, and also invites the Tribe to a public informational meeting to be held September 29, 2010. It also extends a general invitation: "The BLM would also be glad to meet with your Tribe about the project or the topics of this letter[.]" The second is a letter to the Tribe's president dated August 18, 2010, responding to a complaint from the Tribe. It outlines the dates it sent letters in the past, characterizes many of those letters as invitations to consult, and contends the Tribe has been fully heard: "As a result of the tribal consultation efforts for this project, BLM is fully aware of the Quechan Indian Tribe[']s issues and concerns and these are being considered in the decision process." (PI 007376.) It also requests an opportunity for an archaeologist on the BLM staff to meet with the tribal council. (PI 007377.)

The fifth cited document is a letter dated August 4, 2010 from the Tribe to Daniel Steward, whom it identifies as the BLM's "project lead." This letter complains that the consultation and review process is being rushed, and asks the BLM to arrange a time to meet with the tribal council after it has had time to review the reports and maps depicting the historical resources on the site.

The sixth cited document is a letter dated June 24, 2010 from the BLM to the Tribe's president. It invites consultation, invites the president to archaeological site visits led by "cultural resource consultants" scheduled for the week of July 26, 2010, and provides an update of a report by URS Corporation.[5] The letter also discusses a past meeting, and without further explanation informs the Tribe that the final Programmatic Agreement must be prepared before the ROD is issued in September, 2010. The letter acknowledges the Programmatic Agreement has been in preparation since December, 2009 and says all comments on the proposed Programmatic Agreement must be received by June 25, the day after the letter is dated.

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[5] The summary included in the letter says the cultural resources inventory report for the project has been "completed" and is included on a CD sent along with the letter. The summary says 446 archaeological resources were identified, including 365 archaeological sites and 81 isolated finds. This section also discusses a change to the project plan made in 2008, to alleviate cultural resource concerns.

The letter invites the Tribe's "assistance in identifying any places to which the Tribe may attach religious or cultural significance which could be affected by the proposed project as well as how the project may affect those places." (PI 008156.) It again invites the Tribe to contact the BLM's archaeologist or "point or contact."

The seventh cited document consists of multiple letters spanning 40 pages. The first is a letter to the Tribe's president dated March 29, 2010. It expresses the desire to "continue our efforts to inform and consult with your Tribe" pursuant to NHPA. It explains roughly where the project will be located, mentions that it may include construction of roads, building, a pipeline, and a transmission line, as well as installation of the solar collectors. The letter refers to a group meeting in December, 2009 at which it discussed the need to prepare the Programmatic Agreement. It informs the Tribe that the project might not be able to avoid all historic properties eligible for listing on the National Register, and asks the Tribe to review and offer its suggestions on the proposed Programmatic Agreement listed as an enclosure. It asks the Tribe to return comments by "May, 2009" [*sic*] and says another draft will be provided for the Tribe's review later. (PI 009656.) Finally, the letter invites the Tribe to participate in a meeting to discuss comments on the draft agreement.

The seventh document's second letter is addressed to the Tribe's president and is dated March 11, 2010. It includes much of the same information as was included in the March 29 letter, but primarily addresses the draft environmental impact statement ("DEIS"). It also invites the Tribe to a workshop and public meeting on the DEIS, and to a conference and hearing by the California Energy Commission. As part of the discussion of the DEIS, the letter represents that it includes preliminary results of the cultural resources studies, "with sufficient detail to identify the potential impacts that the proposed project would have on cultural resources." (PI 009687.) Finally, the letter invites consultation on the Programmatic Agreement, issues a general invitation "to initiate or continue government-to-government consultation for this project pursuant to all relevant laws including Section 106," and again invites the Tribe to call the BLM archaeologist or "point of contact" for information. (PI 009688.)

The seventh document's third letter, addressed to the Tribe's president, is dated January 15, 2010. This letter informs the Tribe that Tessera Solar has submitted an application for a right-of-way to develop the project. (This was apparently the Tribe's first notification that an application had been submitted.) The letter gives the same general description of the proposed project and invites the Tribe to a public informational meeting to follow up on the informational meeting it held in December, 2009. This letter also gives tentative dates for issuance of certain documents, including the final environmental impact statement. It tells the Tribe "we must have a finalized [Programmatic Agreement] before the Record of Decision is signed on the Solar Two[6] project. The Record of Decision is planned for September 2010." (PI. 009689.)

The seventh document's fourth letter is addressed to the Tribe's president and is dated November 6, 2009. It too makes general mention of the project and informs the Tribe that Tessera Solar has applied for a right-of-way to develop a solar energy facility. This letter invites the tribe to a "cultural resources information and Programmatic Agreement coordination meeting," and "once again extend[s] an invitation to initiate or continue government-to-government consultation and Section106 consultation pursuant to the *National Historic Preservation Act* and other applicable laws and regulations." (PI 009690.) The letter discusses environmental review, then goes on to discuss the requirements imposed by Section 106. It also gives a general warning:

> As the proposed project may not be able to avoid all historic properties, regulations implementing the *National Historic Preservation Act* require that the lead agency (i.e. BLM) prepare an agreement document in consultation with [certain tribes, agencies, and the public]. The Programmatic Agreement . . . will outline the manner in which the BLM will take into account the effects of the proposed project and conclude its responsibilities under Section 106.

(PI 009691.) The letter then invites the Tribe to participate in a "cultural resources information meeting and project site tour" on December 4, 2009. The letter says this meeting "will also provide an opportunity for the Tribe to participate as a consulting party in

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[6] "Solar Two" is defined in the letter cited next, the November 6, 2009 letter. It was apparently the working name for the project at issue here.

the development of the [Programmatic Agreement]." This letter includes maps showing the outlines of the project area.

The eighth document consists of two letters. The first is dated November 11, 2008 and is addressed to the Tribe's president. This letter informs the Tribe an application for a right-of-way has been submitted for a solar project, gives general information about the project, and invites the Tribe to a public informational meeting. Maps and general descriptions of the proposed project are attached. The second is dated January 8, 2008. It's similar to the November 11 letter, but includes less information. It invites the Tribe to contact the BLM's two "points of contact."

The ninth document consists of six letters from the Tribe's historical preservation officer and president to BLM. The first is a brief letter from the historic preservation officer dated February 19, 2008 informing BLM the project area is within the Tribe's historic use area, and requesting more information, a survey, and a meeting. The remaining letters are much more recent, The earliest is dated February 4, 2010. Like the letters that follow, it raises the Tribe's complaints about the review process. For example, the letters point to the limited schedule, request additional time, and object that a Programmatic Agreement isn't appropriate or provided for under applicable regulations. Later letters raise objections to the draft Programmatic Agreement, and insist that the BLM engage in the process outlined in 36 C.F.R. § 800.4 *et seq.* The letters also identify various legal authority the Tribe believes BLM is disobeying or undermining, and ask BLM to provide them with information about the project so they can review it before the BLM-imposed deadlines pass. The remaining letters are specific in their objections. The final letter in this series, dated August 4, 2010, complained that although the Tribe requested a copy of the cultural report in 2008, BLM only provided a copy in early July, 2010. The letter asks BLM to arrange a time to meet with the tribal council on the reservation, and says the required Section 106 consultation can't begin until the Tribe has time to review the report.

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Supplemental String Citations

After this, Defendants say "BLM's consultation with Plaintiff, in which URS assisted, included many letters, meetings (both with Plaintiff alone and including one or more other tribes), site visits and telephone conversations. Their brief provides a string cite to 32 separate page ranges without individual explanation. Many of the references are either repetitions of the earlier citations, or duplicates of those documents. The Court will discuss those documents below, but only the ones that are not repeat citations or duplicates.

The first non-duplicate supplemental citation (PI 009261) is a letter from URS to the Tribe's president, dated February 28, 2008, providing a map and requesting information about cultural resources that might be affected by the project.

The second (PI 009265) is a similar letter someone named Preston Arrow-weed but otherwise unidentified.

The third (PI 009273) is a letter from the Tribe's historic preservation officer, dated March 17, 2008, re-forwarding her letter of February 19th, 2008.

The fourth (PI 009327) is a letter from Preston Arrow-weed, who apparently is a member of the Tribe, to the Imperial County Board of Supervisors.

The fifth (PI 009476–009482) is a letter from the Tribe's historic preservation officer to the BLM's archaeologist, dated May 4, 2010 and objecting that the draft Programmatic Agreement is inconsistent with Section 106's consulting requirements. This letter also objects that the consultation up to that point has been inadequate and cites portions of Section 106 and its regulations the Tribe believes BLM has been failing to comply with. Finally, the letter includes specific comments on the draft Programmatic Agreement. This letter repeats many of the complaints raised in the other letters.

The sixth (PI 009508–009509) is a letter from BLM to the Tribe's president, dated June 2, 2010, inviting the Tribe to a general informational meeting. The revised Programmatic Agreement is listed as an enclosure, and the letter solicits comments on it. PI 009526–009527 is a letter from the Tribe's historic preservation officer to BLM's "point of contact," dated June 4, 2010. The letter says the officer attended an update meeting the day

before where she was told the cultural report for the project had not yet been completed. The letter complains that it is impossible for the Tribe to consult on cultural resources issues until it has been provided with basic information about what cultural resources the project might affect. The letter also reiterates the officer's request for a map showing where the cultural resources are located, and complains that the points out the number of cultural resources has fluctuated repeatedly. For example, the letter says the Tribe was told on May 25 there were 361 cultural resources in the project area, but the latest count (as of June 4) was 442. The letter asks BLM to revise the timeline to allow for adequate consultation and review.

The seventh (PI 009528–009533) is a letter from the Tribe's historic preservation officer to BLM's archaeologist, dated June 14, 2010, objecting to various points in the draft Programmatic Agreement.

The eighth (PI 010249–1010251) is a meeting summary for a group presentation to attendees from several tribes on September 29, 2010. Lorey Cachora, a member of the Tribe, is shown in attendance but no representatives from the Tribe's government. The minutes of the meeting show that the Programmatic Agreement had been signed by federal agencies and would be forwarded to tribes for their signatures, with the explanation that the tribes' assent would mean nothing more than that they wished to be consulted about the project.

The ninth (PI 010290–10293) is notes from a site visit on July 29 through 31, 2010. A person from the Tribe, Manfred Scott, was in attendance on July 29 but his role is not otherwise explained. The notes also show Preston Arrow-weed attended the visit on both the 29th and 30th, and was shown a map of all cultural sites along an ancient shoreline he inquired about.

The tenth (PI 010294–010312) is notes from a meeting on June 16, 2010. Several members of the Tribe and its historic preservation officer are shown as attending either in person or telephonically. The notes show tribal members complaining about inadequate

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notice of the meeting, the approval process being rushed, and the lack of a report. The notes also show discussion of some sites and archaeological finds.

The eleventh (PI 010313–010320) is notes from a meeting on May 18, 2010, at which the Tribe's historic preservation officer appeared telephonically. The meeting concerned drafting of the Programmatic Agreement.

The twelfth (PI 010321–010328) is notes from a meeting on May 4, 2010 at which the Tribe's historic preservation officer and two members of the Tribe appeared. This meeting appears to be a status update, and focuses on the development of the Programmatic Agreement. The notes show the cultural resources inventory hadn't been completed. Historical resources were discussed to some extent, and the number was set at 350. Some specifics about the projects and impact mitigation were discussed. Attendees also objected that they didn't have a map of the site, and complained that the informational meetings being held weren't consultation as required under Section 106.

The thirteenth (PI 010329–010337) is an agenda, sign-in sheet, and notes from a general meeting on December 4, 2009 at which several members of the Tribe attended. The record doesn't show any official representative of the Tribe attended.

The fourteenth (PI 010338–010340) is photocopied notes on a steno pad. The import of this is unclear but it seems to concern a meeting in August, 2008 with the Tribe's historic preservation officer.

The fifteenth (PI 010341–010342) is more photocopied notes on a steno pad, dated in July, 2009. Apparently it concerns some kind of meeting with members of the Tribe.

Finally, Defendants cite to paragraphs 6 through 10 of the declaration of Rebecca Apple in support of their opposition. This portion of her declaration attests to her preparation of certain reports, and meetings and visits with members of tribes generally Ms. Apple's only recorded meeting with designated representatives of the Tribe occurred on October 16, 2010.

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Analysis of Documentary Evidence

Preliminarily, several points bear noting. First, the sheer volume of documents is not meaningful. The number of letters, reports, meetings, etc. and the size of the various documents doesn't in itself show the NHPA-required consultation occurred.

Second, the BLM's communications are replete with recitals of law (including Section 106), professions of good intent, and solicitations to consult with the Tribe. But mere *pro forma* recitals do not, by themselves, show BLM actually complied with the law. As discussed below, documentation that might support a finding that true government-to-government consultation occurred is painfully thin.

At oral argument, the Tribe described the meetings as cursory information sessions and the reports and other communications as inadequate. Its briefing also argues that Defendants have confused "contact" with required "consultation." Defendants In response, Defendants argue that the Tribe "has been invited to government-to-government consultations since 2008" "BLM began informing the Tribe of proposed renewable energy projects within the California Desert District as early as 2007," and "[s]ince that time BLM has regularly updated the Tribe on the status of the [Imperial Valley Solar] project." (Opp'n, 5:26-6:3.)

The Tribe's first document contact with BLM was the tribal historical preservation officer's letter of February 19, 2008. That letter put BLM on notice that the historical and cultural sites within the project area would be considered important to the Tribe. It also asked BLM to provide a survey of the area and to meet with the Tribe's government, which would have constituted government-to-government consultation. BLM could not have provided the survey at that time, and apparently also didn't comply with the meeting request, because the historic preservation officer re-sent the letter the next month. In fact, the documentary evidence doesn't show BLM ever met with the Tribe's government until October 16, 2010, well after the project was approved. All available evidence tends to show BLM repeatedly said it would be glad to meet with the Tribe, but never did so.

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Although BLM invited the Tribe to attend public informational meetings about the project, the invitations do not appear to meet the requirements set forth in 36 C.F.R. § 800.2(c)(2)(ii). This is particularly true because the Tribe first requested a more private, closed meeting between BLM and its tribal council. In later communications, the Tribe continued to request that BLM meet with its tribal council on the Tribe's reservation. In addition, the Tribe repeatedly complained that the properties hadn't been identified, and asked for a map showing where the identified sites were, requests that apparently went unanswered at least as late as June, 2010. The Tribe's letter of August 4, 2010 apparently acknowledges receipt of maps, but asks for an extension of the deadline so it could review them before responding.

The documentary evidence also confirms the Tribe's contention that the number of identified sites continued to fluctuate. Compare, *e.g.*, PI 008155 (BLM letter dated June 24, 2010 setting number of cultural sites in the project area at 446) and PI 00993 (Final EIS, stating Class III inventory identified 459 cultural sites). And Defendants have admitted the evaluation of sites eligible for inclusion in the National Register hasn't yet been completed.

BLM's invitation to "consult," then, amounted to little more than a general request for the Tribe to gather its own information about all sites within the area and disclose it at public meetings. Because of the lack of information, it was impossible for the Tribe to have been consulted meaningful as required in applicable regulations. The documentary evidence also discloses almost no "government-to-government" consultation. While public informational meetings, consultations with individual tribal members, meetings with government staff or contracted investigators, and written updates are obviously a helpful and necessary part of the process, they don't amount to the type of "government-to-government" consultation contemplated by the regulations. This is particularly true because the Tribe's government's requests for information and meetings were frequently rebuffed or responses were extremely delayed as BLM-imposed deadlines loomed or passed.

No letters from the BLM ever initiate government-to-government contact between the Tribe and the United States or its designated representatives, the BLM field managers

Margaret Goodro, Vicki Wood, or acting field manager Daniel Steward. Rather, the Tribe was invited to attend public informational meetings or to consult with two members of her staff, an archaeologist and a person identified only as a "point of contact." The BLM in fact rebuffed the Tribe's August 4 request that the BLM meet with the tribal council on its reservation, proposing instead that the tribal council call BLM staff.

The Tribe also repeatedly protested it was not being given enough time or information to consider the Programmatic Agreement, a matter it was also entitled to be consulted about. The letters sent to the Tribe's president make clear BLM had determined a programmatic agreement would be used and would be entered into no later than September, 2010. The Tribe's letter of February 4, 2010 suggests the Tribe had discovered on its own that BLM was already drafting the Programmatic Agreement. Furthermore, BLM insisted that consulting parties send their suggestions in writing. The Tribe's requests to consult about the Programmatic Agreement were obviously not granted.

Defendants have emphasized the size, complexity, and expense of this project, as well as the time limits, and the facts are sympathetic. Tessera hoped to qualify for stimulus funds under the American Recovery and Reinvestment Act of 2009 by beginning construction no later than the end of this year, which is about two weeks away. To that end, BLM apparently imposed deadlines of its own choosing. Section 106's consulting requirements can be onerous, and would have been particularly so here. Because of the large number of consulting parties (including several tribes), the logistics and expense of consulting would have been incredibly difficult. None of this analysis is meant to suggest federal agencies must acquiesce to every tribal request.

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

The Court therefore determines the Tribe is likely to prevail at least on its claim that it was not adequately consulted as required under NHPA before the project was approved,. Because the project was approved "without observance of procedure required by law," the Tribe is entitled to have the BLM's actions set aside under 5 U.S.C. § 706(2)(D).

Merits Analysis of Other Claims

The evidence shows, and the parties do not dispute, that the planned project is extensive. The size and number of sun-catchers, not to mention roads, buildings, and other supporting infrastructure, ensures this will be a massive project. The undisputed evidence also shows the 459 historic properties extend from one end of the area to the other, so some type of impact on the properties is likely. In fact, phase 1 of the plan acknowledges that one such property will be adversely impacted; because of the property's size, power lines cannot span it, and one power pole must be installed on the property.

The Court therefore holds the FLPMA claim at least raises "serious questions" for purposes of injunctive relief.

The substance of the NEPA claim is less clear. Extensive environmental review has been conducted, so the chance that this project will harm the flat-tailed horned lizard appears to be reduced. At the same time, the Tribe was entitled to be consulted under NEPA as under NHPA, and its claims in this respect also raise "serious questions."

Remaining Injunctive Relief Analysis

Having determined that the Tribe is likely to succeed on the merits, at least as to its claim that required NHPA consulting must be completed before phase 1 of the project begins, the Court turns to the remaining *Winter* factors.

Irreparable Harm

To obtain preliminary injunctive relief, the Tribe must show it is likely to suffer irreparable harm in the absence of preliminary relief. *Winter*, 129 S.Ct. at 374. *Winter* emphasizes that the mere possibility of irreparable harm isn't enough; such harm must be likely. *Id*. at 375–76. This is the easiest and most straightforward part of the inquiry, because the Court finds it is very likely the Tribe will suffer irreparable harm.

The parties agree there are hundreds of known historical sites on the land, and the Tribe attaches cultural and religious significance to many if not most of these. Hundreds of these sites have been identified as prehistoric, and many contain human remains. Damage to or destruction of any of them would constitute irreparable harm in some degree. Second, if the tribe hasn't been adequately consulted and the project goes ahead anyway, this legally-protected procedural interest would effectively be lost. *See Save Strawberry Canyon v. Dep't of Energy*, 613 F. Supp. 2d 1177, 1187 (N.D.Cal.2009) (finding that, due to the alleged NEPA violations, the plaintiff was "virtually certain to suffer irreparable procedural injury absent an injunction") (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 & n.7 (1992)).

The briefing didn't focus extensively on the risk of specific damage, but the massive size of the project and the large number of historic properties and incomplete state of the evaluation virtually ensures some loss or damage. The Tribe has pointed out that the project would not avoid most of the 459 sites. (Reply to Opp'n, 9:22-24 (citing Defendants' declarations that only 4 of 73 sites in phase 1 and 39 of 203 sites in phase 2 would be avoided)). And, as discussed, phase 1 would involve damage to at least one known site.

The Court therefore finds this key requirement is easily met, and turns to the remaining two *Winter* factors.

Balance of Equities

To obtain injunctive relief under *Winter*, the Tribe must establish the balance of equities tips in its favor. 129 S.Ct. at 374. *Winter* also refers to this as the "balance of hardships" inquiry.

Here, Defendants held most of the power—including the power to control the timing of the project and the review process. Their briefing mentions that as early as 2007 they notified the Tribe of interest in developing the area for solar power generation, and the project was being planned at least as early as January, 2008. In February, 2008, BLM was put on notice it needed to consult with the Tribe. BLM imposed requirements deadlines on consulting parties, including the Tribes. For example, it determined unilaterally that a

programmatic agreement would be used, and would be adopted no later than September, 2010. BLM set deadlines and determined the timing and format of meetings. Defendants were therefore in the best position to work out scheduling problems, and the Tribe had almost no power in this respect.

The Ninth Circuit has emphasized that consultation with tribes must begin early, and that if consultation begins after other parties may have invested a great deal of time and money, the other parties may become entrenched and inflexible, and the government agency may be inclined to tolerate degradation it would otherwise have insisted be avoided. *Te-Moak Tribe*, 608 F.3d at 609. This appears to be happening here. While the Court is sympathetic to the problems Defendants face, the fact that they are now pressed for time and somewhat desperate after having invested a great deal of effort and money is a problem of their own making and does not weigh in their favor.

It bears considering, too, that two of the Defendants are Secretary of the Interior Salazar and BLM, who represent part of the United States government, and that Congress and the Department of the Interior created the requirements that Defendants are finding so onerous. Congress and, to a lesser extent, the Department of the Interior could have made these consulting requirements less stringent, but they didn't. Congress could also have exempted renewable energy projects such as this from the Section 106 review process, but didn't. Congress could also extend ARRA project deadlines for this project but hasn't, though, it was conceded at argument, Congress still might do so.

The Court is mindful that Defendants face hardships as well. For example, Imperial Valley Solar has already spent millions of dollars preparing this project, and faces difficulties obtaining investment and financing if the project is held up. Even so, the Court finds the balance of equities tips heavily in the Tribe's favor.

Public Interest

The final step in the *Winter* analysis requires the Court to consider whether a preliminary injunction is in the public interest. 129 S.Ct. at 374. Obviously there are many competing interests here. The interests the Tribe urges the Court to consider involve historic

and cultural preservation, in this case of hundreds of prehistoric sites and other sites whose significance has yet to be completely evaluated. The Tribe itself is a sovereign, and both it and its members have an interest in protecting their cultural patrimony. The culture and history of the Tribe and its members are also part of the culture and history of the United States more generally.

The value of a renewal energy project of this magnitude to the public is also great. It provides the public with a significant amount of power while reducing pollution and dependence on fossil fuels. As Defendants point out, it is a goal of the federal government and the state of California to promote the development of such projects. Current federal policy as embodied in ARRA also favors the undertaking of projects of this time, as a way of creating jobs and stimulating the economy.

That being said, the Court looks to the statutes enacted by Congress rather than to its own analysis of desirable priorities in the first instance. *See, e.g., Marshall v. Barlow's, Inc.*, 436 U.S. 307, 331 (1978) (refusing to question Congress' weighing of interests when enacting statute); *Salazar v. Buono*, 130 S.Ct. 1803, 1828 (2010) (Scalia, J., concurring in the judgment) ("Federal courts have no warrant to revisit [Congress' decision about what is in the public interest]—and to risk replacing the people's judgment with their own. . . ."). Here, in enacting NHPA Congress has adjudged the preservation of historic properties and the rights of Indian tribes to consultation to be in the public interest. Congress could have, but didn't, include exemptions for renewable energy projects such as this one. And, as pointed out, Congress could determine this particular project is in the public interest and sweep aside ARRA deadlines as well as requirements under NHPA, NEPA, and FLPMA to get it built. But because Congress didn't do that, and instead made the determination that preservation of historical properties takes priority here, the Court must adopt the same view.

Alternate Basis for Injunctive Relief

As an alternative basis for the Court's decision, *Alliance for Wild Rockies*, 622 F.3d at1049–50 authorizes the granting of preliminary injunctive relief on a showing of "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff

. . ., assuming the other two elements of the *Winter* test are also met." The "likelihood of irreparable harm" factor is required, and is particularly emphasized. *Id*. at 1052.

As noted, the procedural NEPA claim and the substantive claim under FLPMA raise "serious questions going to the merits." For the reasons just discussed, the Court also finds the hardship balance tips sharply towards the Tribe, and the other two *Winter* factors are also met. The most important of these factors, the likelihood of irreparable harm, is the clearest and most obvious. For these reasons, the Court holds either of these would also serve as an adequate basis for the grant of preliminary injunctive relief.

Conclusion and Order

For these reasons, the Tribe's motion for preliminary injunctive relief is **GRANTED**. No later than Friday, December 17, 2010, the Tribe shall lodge by email a proposed order temporarily enjoining the project. *See* Electronic Case Filing Administrative Policies and Procedures Manual for this District, § 2(h). The proposed order shall be in editable format and Defendants shall be copied on the email.

IT IS SO ORDERED.

DATED: December 15, 2010

HONORABLE LARRY ALAN BURNS
United States District Judge