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A federal court in San Diego recently issued a preliminary injunction halting construction of the $2 billion Imperial Valley Solar Energy Project in Imperial County, California. The court in *Quechan Tribe v. United States Department of the Interior*, 10cv2241 LAB (CAB), 2010 WL 5113197 (S.D. Cal. Dec. 15, 2010), held that the Bureau of Land Management ("BLM") failed to consult adequately with the Quechan Tribe ("Tribe") prior to approving the project, as required by section 106 of the National Historic Preservation Act ("NHPA").[1]

The court's ruling is significant because it held BLM to unusually strict standards of NHPA tribal consultation. Though the opinion closely tracked the requirements of the Advisory Council on Historic Preservation's ("ACHP's") regulations implementing the NHPA, the court narrowly interpreted the regulations and imposed detailed consultation requirements unprecedented in prior cases. While not binding outside the Southern District of California, the implications of the decision are far-reaching. The opinion has caused several agencies, which previously acted in ways the court held violated the NHPA, to reconsider the manner in which they consult with tribes. In addition, the opinion will undoubtedly be cited by project opponents in future section 106 cases, and these cases will become more frequent.[2] The court's opinion could also influence the decisions of other federal courts.

To briefly summarize the facts of the case, Tessera Solar, LLC applied to the State of California and BLM for permission to construct the Imperial Valley Solar Project on approximately 6,500 acres of federally-managed land located in the California Desert Conservation Area ("CDCA"), for which the Department of the Interior had developed a binding management plan as directed by Congress. Tessera hoped to qualify for stimulus funds under the American Recovery and Reinvestment Act of 2009 by beginning construction before 2011. The solar plant was planned in phases and included construction of about 30,000 individual "suncatcher" solar collectors, as well as support facilities and a power line.

Following communications with several agencies and Indian tribes, including the Quechan Tribe, BLM published an environmental impact statement ("EIS") in July 2010. Simultaneously, BLM published a Resources Management Plan to amend the CDCA. Two months later, in

September 2010, over the Tribe's objection, BLM and other state and federal agencies executed a programmatic agreement ("PA") designed to manage the section 106 review of the solar project.[3]

The project area had a history of extensive use by Native Americans, and 459 cultural resources were identified, including over 300 locations of prehistoric use or settlement. The Tribe sought to enjoin the project, arguing in part, that BLM failed to consult meaningfully before approving the project as required by section 106 of the NHPA. The Tribe believed, and BLM admitted, that the project could destroy hundreds of their ancient cultural sites, including burial sites, religious sites, ancient trails, and buried artifacts. *See Quechan Tribe* opinion ("*Op.*") at 1, 2.

The Tribe presented evidence demonstrating that BLM failed to involve the Tribe early in the section 106 process, did not provide the Tribe with adequate time to provide input, and did not engage in government-to-government consultation. The defendants provided copious documents that they argued evidenced extensive consultation with the Tribe. The defendants also argued that the Tribe was invited to participate in several meetings discussing the project and that an executed PA evidenced their compliance with section 106. *See Op.* at 5

The court expressed a low opinion of defendants' case, flatly rejecting the defendants' argument that BLM had consulted adequately with the Tribe. *Op.* at 13-15. Instead, the court criticized the reliability, organization, and presentation of the defendants' evidence and arguments. Central to the opinion was the court's statement that "government agencies are not free to glide over requirements imposed by Congressionally-approved statutes and duly adopted regulations."

See Op. at 15. Simply put, "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." *See Op.* at 3. To that end, the court identified the following points and requirements as critical in judging the adequacy of NHPA tribal consultation:

1. Tribal consultation must be conducted with a tribal government or a tribe's designated representative(s). Contacts and meetings with tribal members—even with officials such as the tribe's president or the Tribal Historic Preservation Officer—do not constitute NHPA consultation unless the tribe has expressly designated such person(s) as representative(s) for purposes of NHPA consultation and such designation is shown in the record. *See Op.* at 7.
2. Tribal consultation should begin early to ensure that all types of historic properties and all public interests are given due consideration. *See Op.* at 3.
3. Any Indian tribe entitled to be a consulting party under section 106 must be provided with sufficient time to consult and to provide input on a project. *See Op.* at 14.
4. Meaningful tribal consultation requires that an agency supply a tribe

with adequate information, including maps of the project area and identification and location information about all sites surveyed by the applicant. *See Op.* at 13-14.

5. Meetings with a tribe that include other tribes, agencies, or the public are not a substitute for mandatory consultation with that individual tribe. "Tribes are not interchangeable, and consultation with one tribe does [not] relieve BLM of its obligation to consult with any other tribe that may be a consulting party under the NHPA." *See Op.* at 6.
6. Contact with a tribe by a private applicant or consultant does not constitute NHPA consultation. Government-to-government consultation must be conducted by a federal agency manager. *See Op.* at 7.
7. Though helpful and necessary for the process, written tribal contacts, invitations, or statements by an agency do not equate to government-to-government consultation. *See Op.* at 14.
8. Agencies must not confuse tribal "contact" efforts with government-to-government consultation required by the NHPA. *See Op.* at 13.
9. A tribe's reluctance to share information about cultural and religious sites with outsiders is to be expected. Therefore, tribal confidentiality concerns should guide the agency's approach to NHPA consultation. *See Op.* at 4.
10. Development of a project-specific PA requires meaningful tribal consultation. *See Op.* at 5.
11. Although a PA can defer the identification of historic properties if "specifically provided for" in a PA, the deferral cannot be indefinite, and merely entering into a PA not satisfy the NHPA's consultation requirements. *See Op.*

Quechan Tribe marks a dramatic departure from the way in which courts had previously interpreted section 106. Courts had generally deferred to the agency's expertise and relied heavily on the agency's practices and guidelines for carrying out section 106. Several agencies, including many BLM districts, have relied on letters to tribes and presentations at public meetings to evidence tribal consultation. Likewise, several agencies have not distinguished between contact with tribal members and consultation with a tribe's designated representative. The *Quechan Tribe* decision questions these historic agency practices and sets forth a rigid set of expectations for tribal consultation. Under the court's interpretation of the regulations, nothing less than government-to-government interaction with an individual Indian tribe's designated representative constitutes consultation under the NHPA.

For questions about the *Quechan Tribe* case, tribal consultation, or historic preservation, please contact **Melissa Meirink** at mcmeirink@hollandhart.com or **John Clark** at jfclark@hollandhart.com.

[1] Section 106 of the NHPA requires federal agencies to consult with certain parties, including Indian tribes attaching religious and cultural significance to historic properties, before spending money on or approving any federally-assisted undertaking.
[2] In the wake of the *Quechan Tribe* decision, a Native American cultural protection group and several individual Native Americans have recently filed suit against BLM in the Southern District of California, alleging, in part, improper tribal consultation under the NHPA. In an action similar to *Quechan Tribe*, the plaintiffs have challenged BLM's decision to permit six large solar energy projects in the Mohave, Sonoran, and Colorado Deserts in California. http://www.hollandhart.com/Email/La_Cuna_Complaint.pdf
[3] 36 C.F.R. § 800.14(b)(1)(ii) permits agencies to negotiate a PA to govern the resolution of adverse effects to historic properties from a complex project when the effects cannot be determined prior to the approval of a project. Because the project's impacts on historic properties could not be fully determined prior to BLM's approval of the undertaking, BLM negotiated and executed a PA.
