

Environmental Law NEWS

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Editor's Note...

by *Alexander "Sandy" Crockett*

This jumbo issue of *Environmental Law News* is packed full of interesting articles from across a wide spectrum of environmental law. The issue opens with an article presenting a series of four commentaries on how California will need to adjust its approach to water management in order to adapt to the realities of climate change, which include major changes in the supply and timing of water flowing through the state's rivers and reservoirs. The second article provides an introduction to renewable energy development projects in Indian country, along with some observations on what needs to be done to promote worthy projects while protecting important Indian cultural resources. We then move on to a discussion of California's Low Carbon Fuel Standard and the legal challenges that have been brought against it, which are now pending before the Ninth Circuit and raise important constitutional issues that could have major ramifications for how California and other states approach greenhouse gas regulation. Next up is a retrospective on the highly successful Marine Life Protection Act Initiative, which was a groundbreaking collaborative planning process that brought together diverse stakeholders from throughout California's coastal regions to develop a new set of rules for the state's Marine Protected Areas. This is followed by a discussion of the recent emergence of complex multi-party toxic tort and property damage cases as a major area of litigation in California, with some practical insights into the issues that arise when litigating these cases. The final article discusses how to successfully use negotiation as a means of resolving environmental litigation, presenting the perspectives of four environmental practitioners with a great deal of negotiating experience representing diverse interests in environmental disputes, as well as those of an experienced mediation neutral.

The articles featured in this issue were developed primarily out of presentations from last fall's Environmental Law Conference at Yosemite®, and they showcase the wide range of the interesting and insightful topics that the Environmental Law Section presents at the conference each year.

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Indian Energy Development and the Law

by Darcie L. Houck *

This article addresses energy development as it relates to Indian tribes in California. It provides an introduction to the regulatory landscape facing energy projects in Indian country¹ and discusses important issues involved in developing such projects, including tribal land leasing, obstacles to energy development in Indian country, and potential impacts to tribal sacred sites and traditional cultural properties located outside of Indian country from off-reservation projects. The article is intended to give the reader an overview of basic concepts, principles, and concerns regarding energy development and California's Indian tribes. The article focuses on the tribal energy development process generally and renewable energy development specifically.

OVERVIEW OF ENERGY DEVELOPMENT IN INDIAN COUNTRY

Energy development in Indian country is not a new concept to California. Many tribal entities have developed energy projects such as small power plants, co-generation facilities, wind, solar, and geothermal projects, and fuel cell facilities.² Indian tribes have also participated in major California energy projects involving hydropower approvals, power plant licensing, and transmission line siting.³ Many large-scale power facilities within the state are built on lands that were taken from Indian people without consent.⁴ And oil and gas drilling in Indian country over the last twenty-plus years has contributed significant revenues to Indian tribes, despite numerous regulatory hurdles.⁵

Energy projects in Indian country involve a number of unique legal concepts that developers of such projects (or any project in Indian country for that matter) need to keep in mind. Projects proposed in Indian country may encounter multiple different land ownership types, including tribal trust lands, restricted fee lands, tribal lands owned in fee within the reservation boundaries, and land allotments held in trust for the benefit of individual Indians. Such projects also implicate concepts such as tribal sovereignty, the federal trust responsibility, land base and geographic limitations, and land ethic. The overlay of these issues can make developing energy projects in Indian country more complex than in non-Indian areas.

Moreover, energy development in Indian country within California is often located in close proximity to non-tribal operations. Many California tribes have limited land areas or are located close to non-Indian

communities, especially in Southern California where the tribal land base is often interspersed with non-Indian lands in a checkerboard fashion. As a result, energy projects will often have some aspects that involve Indian lands and others that involve non-Indian lands and may be subject to multiple overlapping governmental jurisdictions, particularly where transmission lines and other ancillary facilities are needed for operation.



Darcie L. Houck

What does overlapping jurisdiction mean in the context of energy development in Indian country? It means that depending on the size of the project, the location of project components, the potential impacts of the project, and the types of permits required for the project, various tribal, federal, and/or state entities may have approval authority or jurisdiction over the project or aspects of the project.

The tribe will have primary authority over energy projects on the reservation, absent a specific act of Congress requiring or preventing such development. Primary authority here means that the project will not be built without tribal consent. Many tribal governments have environment and natural resources and/or land use planning departments that will need to review and approve potential on-reservation energy projects and issue appropriate permits. In some cases, a private entity will lease tribal lands to develop an energy project (see discussion of Tribal Land Leasing and Obstacles to Indian Energy Development below), and these leases require tribal approvals (as well as federal approvals in many cases). Moreover, tribal governments often participate in such projects both as the government regulator that must approve a project and as the project proponent or developer (sometimes with a development partner). This is similar to when a federal, state, or local agency proposes an energy project that it will own and operate itself, but which will need approvals by another governmental entity or entities.⁶

Tribes therefore may play either a passive or an active role in the development of energy projects in Indian country. In many cases where the tribe takes an active

role, the tribe will create a separate tribal business entity to participate in the development of the project. Tribes, as governments, enjoy full privileges and immunities, including sovereign immunity, exemption from income taxes, and the ability to issue tax-exempt bonds. In order to take on a business venture while maintaining the full protection of these privileges and immunities so that non-venture tribal assets are not placed at risk, a tribe may form a tribal corporation or a federally chartered corporation under section 17 of the Indian Reorganization Act⁷ to serve as the business arm of the tribe for purposes of developing energy projects on the reservation.⁸ A tribal corporation allows for a tribe to limit its liabilities through contractual arrangements in which it sets aside limited resources (venture resources) in a separate tribal entity and places them at limited risk by agreeing to limited waivers of sovereign immunity where appropriate.⁹

Regardless of whether a tribe plays an active or a passive role in the development of energy projects on tribal lands, such projects will require tribal approval. Tribal governmental requirements are typically set forth in tribal codes or ordinances, tribal planning documents, and/or project-by-project resolutions, depending on the individual tribe. Such approvals often involve coordination between the tribe, the potential developer (tribal business entity and/or private entity), and in many cases the Bureau of Indian Affairs (BIA).

Federal approvals for tribal energy projects may also be needed, depending on the size, location, and proponent of the project. If a project will require a lease of tribal land, the lease will likely have to be approved by the BIA, which is a discretionary approval that will trigger review under the National Environmental Policy Act (NEPA).¹⁰ As discussed further in the next section, however, not all leases will require BIA approval. In addition, the federal Clean Air Act (CAA)¹¹ and Clean Water Act (CWA)¹² apply in Indian country, and permits under these statutes may be needed. The United States Environmental Protection Agency (EPA) has responsibility in Indian country for issuing permits under both acts, unless the tribe has been delegated "treatment as a state" (TAS) authority through an approved program similar to state-delegated permitting programs.¹³ Many tribes in California have approved water quality programs and issue permits through an approved delegated program.

In some cases, there will also be state or local permitting for energy projects in Indian country. These permits would involve off-reservation aspects of a project. For example, if an off-reservation transmission line is needed to complete the project, this portion of the project will require approval by the appropriate state¹⁴ or local municipal utility where the project will interconnect.

Similarly, there may be a need to expand a road or seek an encroachment permit off-reservation, which will require approvals from state or local governments depending on who owns the road and where the property at issue is located. If off-reservation water sources are needed for the project, agreements may need to be reached with state or local governments. In many cases, tribal governments have good working relationships with the local governments and can reach agreements where approvals are needed by multiple jurisdictions.

The Agua Caliente Band of Cahuilla Indians and the Yocha Dehe Wintun Nation provide two examples of California tribes that are moving forward with tribal energy development within their territories under this regulatory framework. The Agua Caliente Band of Cahuilla Indians developed a Strategic Energy Plan in 2006 that sets forth near- and long-term objectives, including large-scale renewable energy projects on the reservation.¹⁵ The Yocha Dehe Wintun Nation meets almost 20 percent of its peak energy demand from onsite renewable power supplied by solar and fuel cell energy resources, with a solar array providing 250 kilowatts of power and three hydrogen fuel cells providing another 900 kilowatts.¹⁶

TRIBAL LAND LEASING

Energy projects may occur on land leased from a tribe. In the past, absent a statutory exception, BIA had to approve all leases of tribal lands. Such lease approvals are discretionary federal approvals that trigger NEPA, meaning that unless the project met the criteria for a categorical exemption,¹⁷ BIA was required to conduct an environmental review prior to approving the lease.¹⁸ Such approvals are also subject to specific BIA regulations regarding the leasing of Indian lands.¹⁹

However, legislation passed in August 2012 allows for tribal approval of leases without additional BIA approval, where certain requirements are met.²⁰ The Helping Expedite and Advance Responsible Tribal Home Ownership Act (the HEARTH Act) allows tribes to develop their own land leasing regulations, subject to approval by the Secretary of the Interior.²¹ Tribal leasing regulations that satisfy the Act's requirements will be approved by the Secretary of the Interior, at which point the tribe can approve almost all tribal land leases itself going forward without any additional BIA oversight. In other words, a tribal regulatory scheme has to be approved by BIA, but once it is approved it would be the tribe, not BIA, that is approving the actual leasing of the tribal land.

Thus, under the HEARTH Act, tribes can now develop their own approval regulations, as long as they provide for an environmental review process that (i) identifies any significant effects of the project on the environment;

(ii) informs the public and provides an opportunity for comment; and (iii) requires the tribe to respond to any public comment submitted.²² The Act is restricted to leases for periods of less than certain established time limits, it does not apply to the leasing of allotments or land held in trust for individual Indians, and it excludes leasing for the exploration, development, or extraction of mineral resources.²³

OBSTACLES TO INDIAN ENERGY DEVELOPMENT, AND THE NEED FOR LEGISLATION TO ADDRESS THEM²⁴

Indian country holds significant potential for energy development. Vast amounts of energy resources are located within Indian country, and development of these resources can provide much-needed economic resources to rural Indian populations with high unemployment rates. However, many obstacles exist to efficient development of these vast resources. Overcoming these obstacles will require regulatory improvements to streamline the Indian energy development process, better mechanisms for financing Indian energy development, and the inclusion of tribes in federal, state and local energy programs and planning processes.

Streamlining Energy Development in Indian Country

The approval process for energy development projects in Indian country needs to be streamlined. There are numerous bureaucratic hurdles involved with approvals at the Department of the Interior, which often delay the process and create disincentives for tribal energy development. Specific areas that need improvement include standardizing agency approval procedures; including tribes in decision-making processes; simplifying environmental review of projects in Indian country; establishing Indian energy development offices; improving access to transmission systems; and encouraging tribal energy resource agreements.

Federal law currently requires tribes to have each individual project approved by several different agencies, each with its own approval process. This often creates delays and confusion for tribes and potential development partners. To ensure efficient project approval, agencies should standardize and coordinate their processes to ensure that tribes do not have to expend limited resources to redo the same work in several different ways for several different agencies. Tribes also need to be part of the decision-making process, and they should be included in discussions with each agency that has approval authority.

In addition, environmental review of energy projects on Indian lands is often more complex and time-consuming than review of comparable projects located on private

lands. This creates a disincentive for development on Indian lands. Moreover, federal agencies often lack the staff and expertise to review such projects efficiently. One potential avenue to overcome this obstacle would be to amend NEPA to include a TAS provision similar to those in CAA and CWA.²⁵ Such an amendment would allow tribal governments to submit programs to the Council on Environmental Quality for approval. Once approved, the tribal government would obtain delegated federal authority for performing environmental reviews under NEPA.

BIA also lacks the staff and expertise to oversee energy development projects in Indian country. This lack of agency expertise—combined with the cumbersome multi-agency review process for many tribal projects—results in disincentives for development in Indian country. Each BIA regional office should have an Indian Energy Development Office that includes staff with expertise in energy projects, including environmental review processes. A national director should be appointed within the Secretary of the Interior's office to oversee the regional offices.

Furthermore, many areas within Indian country lack electric transmission systems, or have transmission systems that are inadequate for large-scale energy development projects. This lack of transmission capacity is a major obstacle to wind resource development in the Dakotas and Wyoming. Studies show that nearly 4,000 MW of wind energy can be developed in these areas, but that development is being delayed because of transmission constraints. Without transmission lines, these projects will not become reality.²⁶

This lack of transmission capacity is also a contributing factor to substandard living conditions on many Indian reservations. For example, the 1990 census reported that 14.2 percent of Indian households lacked access to electric service, compared to 1.4 percent of all U.S. households.²⁷ The Department of Energy is focused on developing the most energy for the most people, and it does not have a program that focuses on efficient distributed generation and community transmission to address these shortcomings. Federal funding and incentives are needed to promote distributed generation resource demonstration projects. These projects would increase energy resources in Indian country and improve quality of living for tribal members.

One attempt to address these problems is the Tribal Energy Resource Agreement (TERA) program, which was created in Title V of the Energy Policy Act of 2005.²⁸ The intent of the program is to provide a more efficient mechanism for approval of tribal energy projects. The program allows for tribal delegated authority to permit energy projects in Indian country upon approval of a

TERA by the Secretary of the Interior. However, the program's approval process is cumbersome and unclear, and to date, no tribe has received an approved TERA. The TERA provisions of federal law need to be amended to allow for a clear, streamlined process that is more certain and provides broader approval authority to tribes once a TERA has been approved. Further consultation with tribes is also needed, as well as revision to the current regulations.

Financing Indian Energy Projects

Tribal governments also need better financing mechanisms for energy projects. These mechanisms include ensuring that tribes can effectively generate tax revenues from projects in Indian country; providing meaningful loan guarantee programs; coordinating federal agency funding and programs; permanently extending investment tax credits that allow developers to take accelerated depreciation for investments in Indian country; and allowing tribes to tap the benefits of renewable energy tax credits.²⁹ An additional financing opportunity for tribes is the use of Tribal Economic Development Bonds.³⁰

Tribal Tax Revenues

Many non-tribal governmental entities currently attempt to tax energy projects in Indian country. Sometimes the non-Indian government will earn more money from taxes levied on the project than will the Indian tribe on whose land the project is located.³¹ But dual or triple taxation creates a major disincentive for energy development in Indian country. Often, tribes have to forgo taxing such projects and thereby miss out on revenues that otherwise could fund tribal programs. Legislation should be enacted to limit the taxing authority of non-Indian governments over projects in Indian country. Non-tribal governmental taxation of energy projects in Indian country should be limited to covering impacts from the project on the non-tribal government's infrastructure.

Loan Guarantee Programs

The Energy Policy Act of 2005 created the Indian Energy Loan Guarantee Program.³² This program is needed to assist tribes in financing energy projects in Indian country. To date, however, the Department of Energy (DOE) has not implemented the program. One way to overcome this obstacle would be to amend the Energy Policy Act to require DOE to operate the Indian Energy Loan Guarantee Program in the same manner as it does the national non-Indian loan guarantee program (also known as the Title XVII Program).³³ Under the Energy Policy Act, DOE was required to develop regulations to implement the Title XVII Program within one year after passage of the Act. Once the Title XVII Program was

established, Congress provided appropriations to fund the program. Imposing similar mandatory deadlines requiring DOE to implement regulations and appropriate funds for the Indian Energy Loan Guarantee Program within set timeframes would allow tribes to utilize this important program, which to date has provided only a theoretical opportunity for assisting tribes with energy development.

Coordination Among Funding Programs

Hurdles associated with limited funding for tribal energy projects are compounded by a lack of coordination among responsible federal agencies. Funding for Indian energy activities is spread among many different agencies, including EPA and the departments of Agriculture, Commerce, Energy, Housing and Urban Development, Interior, Labor, and Transportation, and many of the individual agency funding sources are too small to finance energy projects. Additionally, tribes face increased administrative costs because each individual agency has different application and reporting requirements, which decreases the value of any potential funding award. A process that allows tribes to integrate and coordinate energy funding from the various agencies would ensure efficient use of existing federal funds. One potential solution to this problem that has been proposed by several tribes would be to develop a process modeled after the successful Pub. L. 102-477 employment training integration program.³⁴ This would create coordinated integration of the application processes for energy funding, but allow each agency to retain discretion over approval of individual projects.

Permanent Extension of Accelerated Depreciation For Investments in Indian Country

The unemployment rate in Indian country averages 50 percent, and new business and job creation opportunities are scarce. Investment tax credits—i.e., the ability to take accelerated depreciation of property—are a mechanism that can help address these problems by fostering business development in Indian country. However, investment tax credits need long-term authorization to allow businesses to plan accordingly. One way to facilitate the use of this mechanism is for permanent extension of investment tax credits for projects located in Indian country.

Allowing Tribes to Benefit From Renewable Energy Tax Credits

The economic viability of innovative energy projects often depends on the ability to utilize federal tax credits. Currently, however, tribes are not able to take advantage of these tax credits because they are tax-exempt entities. This results in tribal projects effectively being priced out of the market. Indian tribes

should have access to all the tools available to non-Indian entities to lower the cost of developing energy projects. An Indian tribe should be able to assign to a private-sector partner the basis of energy property that would be allocated to the tribe if it were able to take advantage of these tax credits. The tribe could receive an equity interest in the project, or other benefits from its partner, for its share of the basis.

This obstacle is especially problematic for renewable energy projects in Indian country, where the viability of the project often depends on the availability of federal renewable production tax credits. Tribal renewable projects are often economically uncompetitive compared to non-Indian projects that are able to utilize these production tax credits, which can reduce the overall cost of a project by up to 30 percent. As with investment tax credits, a tribe should be allowed to assign its share of the production tax credit for electricity generated from renewable sources to a private-sector partner. The tribe could then receive an equity interest in the renewable project or other benefit from its partner for a share of the renewable energy produced.

Another potential mechanism for leveling the financial playing field for energy projects in Indian country is to allow tribes to receive grants in lieu of tax credits. As stated above, the economic viability of energy projects in Indian country often depends on the ability to utilize federal tax credits. Allowing non-taxpaying entities to receive grants instead of tax credits helps stimulate investment in renewable energy projects.

Tribal Economic Development Bonds

Section 1402 of the American Recovery and Reinvestment Act of 2009 temporarily authorized tribal governments to issue up to \$2 billion of tax-exempt tribal economic development bonds (TED bonds) without satisfying the “essential government function” test.³⁵ That test, which applies only to tribes and not to state or local governments, severely limits how tribes can utilize tax-exempt bonds by restricting such bonds to projects that provide “essential governmental services.” The allocation of these TED bonds has now been completed, however. In order to continue to provide these benefits, the “essential government function” test should be permanently repealed for tribes wishing to issue these tax-exempt bonds, and the same standard that is applied to governmental bonds issued by state and local governments should be used for tribal government bonds, as was recommended by the Treasury Department “[f]or reasons of tax parity, fairness, flexibility, and administrability.”³⁶ In addition, allocations for TED bonds should be available on a recurring annual basis, and unused portions should be reallocated annually.

Including Tribes in Federal Energy Programs and Planning

The federal government also needs to ensure that its energy programs and planning processes give sufficient consideration to tribal needs.

With respect to energy infrastructure planning, tribes must be included up front in the planning process. The federal government has historically ignored or overlooked Indian tribes in critical infrastructure planning for transmission. As a result, tribal lands often lack access to sufficient high-voltage transmission to support large-scale renewable energy projects. Including tribes in federal planning processes will allow for better, more efficient energy planning that will open up new sources of renewable power in Indian country.

The federal government also needs to examine its energy programs to ensure that tribal governments have equal access to program resources. Tribes need ongoing programs to promote energy efficiency and weatherization of Indian homes, as well as preferences in hydroelectric licensing and technical assistance from DOE laboratories. Specific grants, similar to the Energy Efficiency Block Grant Program, should be allocated to tribal governments for energy efficiency activities on tribal lands and in buildings.

Federal funding of weatherization efforts is a paradigm example of where improvement is needed. Under current law, tribes are supposed to receive DOE weatherization funds through state programs.³⁷ However, very little funding actually reaches Indian tribes, despite significant weatherization needs in Indian country. To receive funding independent of the state, a tribe must overcome a significant hurdle by showing that it is not receiving funding equal to what the state is providing its non-Indian population. Currently, of 565 federally recognized tribes, only two tribes and one tribal organization receive direct weatherization. The federal government has a trust relationship with tribes. DOE, as a federal agency that shares this trust relationship, should provide direct funds for tribal weatherization programs.

Another example is federal preferences in hydroelectric project approval. Section 7(a) of the Federal Power Act provides a preference to states and municipalities, but not to tribes, when they apply for hydroelectric preliminary permits and original licenses.³⁸ Tribal governments should be provided the same preferences.

Including tribes in these programs and planning processes will allow for better, more efficient energy planning, which will help promote renewable power and energy efficiency in some of the areas of the country where it is most needed.

ENERGY DEVELOPMENT ON OFF-RESERVATION LANDS: SACRED SITES AND TRADITIONAL CULTURAL PROPERTIES

Tribes face an array of challenges in developing energy projects in Indian country. Outside of Indian country, however, the challenge is different. For projects off tribal lands, the main concern is ensuring that culturally significant sites are protected in the rush to develop renewable energy resources on federal lands.

Risks To Indian Cultural Resources From Large-Scale Renewable Energy Projects

Renewable energy projects provide significant benefits both in promoting energy self-sufficiency and as a response to global climate change. As the United States shifts its energy policy away from fossil fuels and towards renewable energy sources in order to take advantage of these benefits, the West—and California in particular—are experiencing a dramatic increase in the number of utility-scale solar projects being sited or proposed to be sited on federal public lands managed by the Bureau of Land Management (BLM). As of July 2012, 11 solar projects were approved on 36,000 acres of public land in California, Nevada, and Arizona.³⁹ Six of these projects were approved in California. The BLM lands proposed for siting these projects or where projects already have been sited often include lands that are of religious, cultural, and historic significance to Indian tribes.⁴⁰

The consequences of renewable energy development can be devastating to pristine, irreplaceable landscapes that hold religious, cultural, and historic significance to Native American people and Indian tribes.⁴¹ These projects are large in scale, with an average capacity of 250 megawatts, and an average project area exceeding 3,000 acres. The project areas are fenced off and can involve leveling of land and removal of vegetation. This increases the risk of erosion and alters water flow. Significant impacts to wildlife include destruction of habitat and blocking of connectivity corridors and migration routes. There are significant visual impacts, as the project area is often a pristine landscape with little to no development other than the project itself. There are also noise and air quality impacts. These impacts all significantly change the character of the area and affect lands of religious, cultural, and historic significance to Indian tribes.

In developing renewable energy projects that are intended to mitigate climate change impacts and protect the environment, therefore, it is critical that government agencies with approval authority over these projects ensure that such development does not destroy the very things that renewable energy development is intended to protect.

Consultation with Indian Tribes Under Section 106 of the National Historic Preservation Act

Lands with traditional religious and historic significance include ancient trails, rock art, viewsheds, sacred landscapes, burial grounds, lands where soils, plants, and animal communities of significance are located, and traditional use areas.⁴² These lands have tangible cultural and religious significance for Indian tribes. This affects the federal approval process.

BLM must grant approval for any project on BLM lands before construction can begin. These are discretionary approvals, and BLM must therefore comply with NEPA for any projects that may affect the environment. Additionally, as a federal agency, BLM must also comply with other federal laws adopted to protect cultural and historic resources, including the Federal Land Policy and Management Act of 1976,⁴³ the National Historic Preservation Act (NHPA),⁴⁴ the Native American Graves Protection and Repatriation Act of 1990,⁴⁵ the Archaeological Resources Protection Act,⁴⁶ and the American Indian Religious Freedom Act.⁴⁷ BLM must similarly comply with Executive Orders 13007,⁴⁸ 12898,⁴⁹ and 13175.⁵⁰

The major federal law protecting cultural and historic resources is the NHPA, which encompasses protection of places that hold traditional religious and cultural significance to Indian tribes.⁵¹ The NHPA's implementing regulations are promulgated by the Advisory Council on Historic Preservation (ACHP).⁵² The heart of the NHPA's protection of Native American traditional religious and cultural places is Section 106, which requires consultation with Indian tribes.⁵³ The goal of this consultation is to avoid, minimize, or mitigate adverse impacts of a proposed project.⁵⁴

Section 106 directs federal agencies, including BLM, to "take into account" the effects of their actions before proceeding with a "Federal or federally assisted undertaking."⁵⁵ The federal agency must "consult with any Indian tribe . . . that attaches religious and cultural significance" to any historic property that would be affected by the proposed undertaking.⁵⁶ ACHP's implementing regulations clearly state that these protections apply regardless of whether the properties of concern are on or off tribal land.⁵⁷

Under the ACHP regulations, a federal agency reviewing a potential project must identify tribes that might attach religious or cultural significance to properties in the area of the project, invite them to consult, and identify the properties of concern.⁵⁸ The agency then determines whether the project will adversely affect these properties. The agency must defer to the tribe regarding whether a property has religious or cultural significance.⁵⁹ Consultation "must recognize the

government-to-government relationship between the Federal Government and Indian tribes.⁶⁰ Consultation must also be “conducted in a manner sensitive to the concerns and needs of the Indian tribe,” and be “early in the planning process, in order to identify and discuss relevant preservation issues”⁶¹

Need For Improvement in BLM’s Section 106 Consultation Process

The Section 106 consultation process should help avoid adverse impacts from projects on BLM lands, and should improve projects by alleviating controversy, conflict, and costly delays during the project approval process. The Section 106 consultation process can also prevent post-approval project delays caused by discovery of significant cultural resources during construction and by litigation for non-compliance with procedural requirements. But although federal agencies are required to comply with Section 106, the goals of the Section 106 process have not always been met, as evidenced by current disputes between BLM and several Indian tribes over the development of large-scale solar projects proposed for the Southwest.

One example of a solar project where BLM did not adequately consult with impacted Indian tribes is the Imperial Valley Solar Project, one of the first solar projects approved by BLM. This project was challenged by the Quechan tribe for failure to properly consult.⁶² At least 459 sites eligible for the National Register of Historic Places were identified in the 6,000-acre project area from surface-level studies alone. These sites included burial sites, religious sites, and ancient trails. The draft environmental impact statement (EIS) for the project stated that the project “may wholly or partially destroy all . . . [surface] sites”⁶³ BLM represented that it had consulted with the tribe, but the tribe disagreed and challenged BLM’s approval in federal district court. The court issued a preliminary injunction stopping work on the project, finding that the tribe was likely to prevail on its claim that BLM had not adequately consulted under the NHPA prior to approval of the project.⁶⁴

The court’s opinion in the Quechan case discusses what is and is not adequate consultation under the law. Consultation with other tribes or tribes generally does not suffice as adequate consultation; consultation must be on a government-to-government basis with the tribe that places significance on the religious or cultural place. As the court explained, “Indian tribes aren’t interchangeable and consultation with one doesn’t relieve the BLM of its obligation to consult with any other tribe.”⁶⁵ Sending a tribe multiple form letters or consulting with individuals rather than the tribe’s designated representative does not amount to consultation.⁶⁶ Also, requiring tribes to gather their own information and to present this information at public meetings does not meet the Section 106 requirements.⁶⁷

Adequate consultation requires government-to-government contact—that is, meetings between the tribe or its tribal council and the United States or its designated representative (here, BLM).⁶⁸ The federal agency must provide sufficient information, as well as time to review materials and obtain any additional information needed, to allow for meaningful participation by the tribe.⁶⁹ The court held that state and federal policies favoring renewable energy development do not provide a “free pass” from complying with applicable laws adopted to protect cultural and historic resources.⁷⁰

Steps in the Right Direction: BLM’s Programmatic EIS For Solar Projects

BLM is attempting to develop a better consultation process with tribes and has moved forward with adopting a programmatic EIS—known as the “Final Solar PEIS”—to guide new solar development on public lands. The new program limits the locations for development of large-scale solar projects, with seventy-nine million acres of BLM land excluded from solar development.⁷¹ This excluded acreage includes areas that contain national trails, national historic landmarks, traditional cultural properties, and Native American sacred sites as identified through consultation with Indian tribes.⁷² The Final Solar PEIS also designates priority areas for development of solar projects and provides incentives for development in these areas.⁷³ In addition, BLM has committed to government-to-government consultation to determine whether additional data is needed in the designated solar development zones in response to proposed projects.

Challenges still exist with the new program, however. The program does not apply to projects under 20 megawatts, and it does not preclude development outside the zones identified for solar projects. It also does not fully protect resources in the excluded areas from indirect or cumulative impacts, and infrastructure such as transmission lines and roads may be sited through these excluded areas. In addition, the new program provides only limited protection of viewsheds, and it does not protect all areas that are culturally and historically significant to tribes.⁷⁴ Thus, while the new program is likely to reduce the risk of damage to or destruction of culturally and historically significant resources, it will not eliminate it.

Nevertheless, the Final Solar PEIS represents significant steps by BLM and the Department of the Interior to protect cultural and historic lands of significance. In developing the Final Solar PEIS, BLM provided documentation to tribes, including maps and other data, as well as requested government-to-government consultation.⁷⁵ Face-to-face meetings between BLM and designated tribal representatives occurred. BLM contacted at least forty-one tribes, considered input from certain tribes,

and interviewed representatives from at least six tribes with ties to the identified solar development zones in two states.⁷⁶ And a negotiated “Programmatic Agreement” with ACHP and state Historic Preservation Officers of the six states covered by the solar development program on BLM lands was developed and executed pursuant to the Section 106 process.⁷⁷

Thoughts for the Future

Renewable energy development is increasing in California and across the Southwest. In developing renewable energy projects, particularly solar projects, federal and state agencies must not lose sight of the potential significant environmental impacts that could result from these “clean energy” sources. These projects need to be managed in full compliance with federal laws adopted to protect cultural and historic resources.

The recent Final Solar PEIS sets forth a new program for managing solar projects developed on public lands. This program, combined with the Programmatic Agreement, provides an improved framework for protecting unique and sensitive lands. The new program provides a more inclusive process that requires BLM to comply with existing law in a manner that has the potential to provide tribes a meaningful seat at the table in defining projects that may adversely impact tribal resources. Despite this improved framework, however, tribes will need to remain vigilant and continue to proactively protect these critical resources, which could face significant impacts from the development of energy projects on public lands.

CONCLUSIONS

Energy development in Indian country is not a simple topic. When developing projects in Indian country, the tribe is the primary decision-maker. Projects must comply with tribal and federal law, and where components of a project extend outside Indian country, there may need to be state approvals. Many obstacles exist in developing renewable energy projects in Indian country. To overcome these obstacles, changes in federal law are needed. The permitting of tribal energy projects must be streamlined. Financing options for Indian tribes must be accessible. Additionally, federal energy programs and planning processes must include Indian tribes, and do so at the earliest possible stage in the process. It is also important to remember that energy projects have impacts to tribal resources, both on and off the reservation. Many traditional religious and cultural sites of significance to tribes are located outside of what is legally defined as Indian country. These off-reservation lands of religious and historic importance have irreplaceable value and significance for Indian tribes. Many tribes did not choose to have these places taken from them or put under the control of BLM. Where renewable energy projects are proposed on public lands, Indian tribes must have a

meaningful seat at the table early in the process to ensure participation that will minimize or eliminate impacts to these critical tribal resources.

ENDNOTES

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1. “Indian country” is defined under federal law to include “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” 18 U.S.C. § 1151.
2. See U.S. Department of Energy, Tribal Energy Program, *Projects on Tribal Lands* webpage, <http://apps1.eere.energy.gov/tribalenergy/projects.cfm>.
3. See Memorandum from Dave Singleton, California Native American Heritage Commission, to Scott Flint, California Department of Fish & Game Renewable Energy Action Team (Oct. 5, 2009), available at www.energy.ca.gov/33by2020/documents/2009-10-13_meeting/comments_bmp_draft/NAHC_Tribal_Guidance_for_Desert%20Plans.pdf.
4. Kimberly Johnston-Dodds, *Early California Laws and Policies Related to California Indians*, Pub. No. CRB-02-014, California Research Bureau, California State Library (Sept. 2002), available at www.library.ca.gov/crb/02/14/02-014.pdf.
5. Tom Fredericks & Andrea Aseff, *When Did Congress Deem Indian Lands Public Lands?: The Problem of BLM Exercising Oil and Gas Regulatory Jurisdiction in Indian Country*, 33 Energy L.J. 119 (2012).
6. Examples of such projects include hydropower facilities owned and operated by the California Department of Water Resources, which are all permitted by the Federal Energy Regulatory Commission.
7. 25 U.S.C. § 477.

8. See Karen J. Atkinson & Kathleen M. Nilles, *Tribal Business Structure Handbook*, U.S. Department of the Interior, Office of the Assistant Secretary–Indian Affairs (2008).
9. Limited waivers of sovereign immunity may limit the parties that can sue a tribe or tribal entity, the forums in which such suits can be brought, and type of remedies that a potential litigant may seek.
10. 42 U.S.C. § 4321 et seq.; see also 40 C.F.R. § 1500.1 et seq. for implementing regulations.
11. 42 U.S.C. § 7401 et seq.
12. 33 U.S.C. § 1251 et seq.
13. See 33 U.S.C. § 1377(e); see also 42 U.S.C. § 7601(d).
14. In California, there would potentially need to be approvals by the California Energy Commission for new transmission lines and the California Public Utilities Commission for interconnection with an investor-owned utility transmission system.
15. Todd Davis, *Energy Development on Tribal Lands*, presentation at the 2012 Environmental Law Conference at Yosemite® (Oct. 26, 2012).
16. Yocha Dehe Wintun Nation, Environmental Department, *Energy* webpage, <http://yochadehe.org/tribal-government/environmental-department/energy>.
17. See 40 C.F.R. §§ 1507.3, 1508.4.
18. See 42 U.S.C. § 4332; see also 40 C.F.R. pts. 1501, 1502.
19. 25 C.F.R. pt. 162.
20. 25 U.S.C. § 415.
21. *Id.* § 415(h)(3)(B).
22. *Id.* § 415.
23. These provisions will not be discussed in detail here, as this article focuses on the development of renewable resources in Indian country.
24. The author wishes to thank Rollie Wilson, partner, Fredericks Peebles & Morgan LLP, Washington, D.C. office, for his assistance on this section. Mr. Wilson formerly served as senior counsel for the chairman of the U.S. Senate Committee on Indian Affairs and has extensive experience in the development of tribal energy legislative proposals.
25. See 33 U.S.C. § 1377(e); see also 42 U.S.C. § 7601(d).
26. See Dennis Daugaard, Lieutenant Governor, South Dakota, opening remarks at *Wind Energy & Transmission: the South Dakota Landscape* conference (Nov. 29, 2007), summary available at www.nationalwind.org/assets/transmission/SDWindTransmissionSummaryFINAL.pdf.
27. See also testimony of the Hon. Tex G. Hall, Chairman, Mandan, Hidatsa and Arikara Nation of the Fort Berthold Reservation, *S. 1684, the Indian Tribal Energy Development and Self-Determination Act Amendments of 2011: Hearing Before the Sen. Comm. on Indian Affairs*, 112th Cong. (2012).
28. 25 U.S.C. § 3504.
29. A recent IRS ruling provides some positive guidance that will assist in renewable energy development in Indian country by allowing tribes to elect to pass investment credits associated with renewable energy assets to an unrelated third party lessee. See Internal Revenue Service ruling no. 201310001 (Mar. 8, 2013), available at www.irs.gov/pub/irs-wd/1310001.pdf.
30. *Energy Development in Indian Country: Hearing Before the Sen. Comm. on Indian Affairs*, 112th Cong. (2012).
31. *Id.*
32. 25 U.S.C. § 3502(c).
33. Title XVII of the Energy Policy Act of 2005.
34. Indian Employment, Training, and Related Services Demonstration Act of 1992, 25 U.S.C. ch. 36. Testimony by several tribes before the Senate Committee on Indian Affairs as to S. 1684, the Indian Tribal Energy Development and Self-Determination Act Amendments, has included a proposal to model a process for coordinated agency energy funding after the process set forth in 25 U.S.C. Chapter 36.
35. American Recovery and Reinvestment Act of 2009, Pub. L. No. 115-5, 123 Stat. 115 (2009).
36. In addition to authorizing \$2 billion in bond authority for Indian tribes, the American Recovery and Reinvestment Act also required the Treasury Department to conduct a study of the effects of the new authority, and to make recommendations as to whether Congress should “eliminate or otherwise modify” the “essential governmental function” standard for Indian tribal bond financing. The Treasury Department’s “core recommendation” was to eliminate this requirement and adopt the same standard for tribal government bonds as it applies to governmental bonds issued by State and local governments. See Report and Recommendations to Congress regarding Tribal Economic Development Bond provision under Section 7871 of the Internal Revenue Code, Department of Treasury (Dec. 2011) at pp. 2, 11, available at www.treasury.gov/resource-center/tax-policy/Documents/Tribal-Economic-Development-Bond-Provision-under-Section-7871-of-IRC-12-19-11.pdf.
37. 42 U.S.C. § 6863.
38. 16 U.S.C. § 800(a).
39. See Fact Sheet, *Renewable Energy and the BLM: SOLAR*, U.S. Department of the Interior, Bureau of Land Management (July 2012), available at www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS__REALTY__AND_RESOURCE_PROTECTION_/energy.Par.71463.File.dat/.
40. See Miriam Raftery, *Federal Judge Hears Quechan Tribe’s Case on Ocotillo Wind Project Harm to Sacred Sites*, East County Magazine (Jan. 21, 2013), available at <http://eastcountymagazine.org/node/12269>; Todd Woody, *Solar Energy Faces Tests on Greenness*, N.Y. Times (Feb. 24, 2011), at B1.
41. See generally U.S. Department of Energy and U.S. Department of the Interior, *Final Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States* (July 2012) (hereinafter “Final Solar PEIS”), available at <http://solareis.anl.gov/documents/fpeis/index.cfm>.

42. See *generally id.*, vol. 1, ch. 4, at 4-31.
43. 43 U.S.C. § 1701 et seq.
44. 16 U.S.C. § 470 et seq.
45. 25 U.S.C. § 3001 et seq.
46. 16 U.S.C. § 470aa et seq.
47. 42 U.S.C. § 1996 et seq.
48. Exec. Order No. 13007, 61 Fed. Reg. 26,771 (May 24, 1996). This Executive Order provides that each federal agency “shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, ... avoid adversely affecting the physical integrity of [Indian] sacred sites.”
49. Exec. Order No. 12898, 59 Fed. Reg. 7,629 (Feb. 11, 1994). Section 6-606 applies the provisions of this executive order on environmental justice to Native American programs.
50. Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000). It requires each federal agency “to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” The executive order was issued to promote “regular and meaningful consultation” with Indian tribes.
51. See 16 U.S.C. § 470a(d)(6).
52. See 36 C.F.R. pt. 800.
53. See 16 U.S.C. § 470f.
54. See *id.*; see also 36 C.F.R. §§ 800.1(a), 800.6(a).
55. 16 U.S.C. § 470f.
56. *Id.* § 470a(d)(6)(B).
57. *Id.* § 800.2(c)(2)(ii).
58. *Id.* § 800.3(f)(2).
59. *Id.* § 800.4(c)(1).
60. *Id.* § 800.2(c)(2)(ii)(C).
61. *Id.* § 800.2(c)(2).
62. See *Quechan Tribe v. U.S. Dept. of Interior*, 755 F.Supp.2d 1104 (S.D. Cal. 2010).
63. *Id.* at 1107.
64. *Id.* at 1120-1122.
65. *Id.* at 1112.
66. *Id.*
67. *Id.* at 1112-1119.
68. *Id.* at 1119.
69. *Id.*
70. *Id.* at 1120-1121.
71. See Final Solar PEIS, *supra* note 41, Executive Summary, Table ES.2-1, at ES-5.
72. Cultural Resources Preservation Coalition, Recommendations to the Bureau of Land Management Regarding the Draft Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States (May 2, 2010), at 10-11. See also Programmatic Agreement Among the United States Department of Interior, Bureau of Land Management, The Arizona State Historic Preservation Officer, the California State Historic Preservation Officer, the Colorado State Historic Preservation Officer, the New Mexico State Historic Preservation Officer, the Nevada State Historic Preservation Officer, the Utah State Historic Preservation Officer, and the Advisory Council on Historic Preservation Regarding Solar Energy Development on Lands Administered by the Bureau of Land Management (Sept. 24, 2012) (hereinafter “Programmatic Agreement”), available at http://solareis.anl.gov/documents/docs/Solar_PA.pdf.
73. *Id.*; see also Final Solar PEIS, *supra* note 41.
74. Final Solar PEIS, *supra* note 41, vol. 1, ch. 2, at 2-50, & vol. 1, ch.4, at 4-31, 4-40.
75. *Id.*, Executive Summary, at ES-45; see also *id.* at vol. 6, pt. 2, app. K.
76. *Id.*
77. See Programmatic Agreement, *supra* note 72. This agreement was negotiated pursuant to the implementing regulations for the Section 106 process. See 36 C.F.R. § 800.6(a)(1)(C).