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Defending The National Historic Preservation Act: Part 1

By **Ann Berkley Rodgers, Aaron Sims and Gregory Smith**

Ann Berkley Rodgers

Aaron Sims

The federal rush for infrastructure and energy development, combined with the ongoing saga of the Dakota Access pipeline, is placing in jeopardy one of the most important laws used by federally recognized Indian tribes to prevent unintentional and intentional destruction of places of extreme significance to the ongoing survival of a tribe's culture — those central core beliefs and world views that establish and sustain tribal identity.[1] That law is the National Historic Preservation Act ("NHPA") which applies to all federal actions.[2]

When a federal agency is presented with a proposed project, section 106 of the act requires the agency to "take into account the effect of the undertaking" on any property that is listed on, or eligible for the National Register of Historic Places and afford the Advisory Council on Historic Preservation ("ACHP") the opportunity to comment.[3] This requirement is implemented through regulations promulgated by the ACHP.[4] If a site is found to be eligible, the agency with jurisdiction over the proposed action must engage in a consultation process in accordance with the ACHP regulations to determine whether the effects on the site would be adverse and, if so, to attempt to fashion acceptable measures to avoid or mitigate any such adverse effects. Of equal importance is what the act does not do — it does not stop projects from going forward.[5] Mitigation can be as little as a placard designating the importance of the site, a proverbial "Washington slept here" sign, or as substantial as the complete relocation of a project. Now, however, that modicum of protection is being challenged by federal agencies, states and local agencies and private parties who suggest that the process must be changed to minimize tribal participation in order to "streamline" agency approvals.[6] This article suggests that this rush to action is akin to tossing out the baby with the bath water by eliminating an essential element of the law in order to address a different concern.

A Brief History of the Role of Tribes in the NHPA Process

As originally enacted, the NHPA's construct of historic significance was limited by the ethnocentric views of its drafters. Tribal cultural and historic sites did not fit easily into that construct. In 1990, the National Park Service, the agency that supervises implementation of many aspects of the act,[7] recognized that the culture and history of tribes was part of our shared national history, and provided guidance on how to evaluate these sites, referring to them as "traditional cultural properties" ("TCP"s), including issuing National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties. In this guidance document, the National Park Service ("NPS") explained how culturally significant sites, including tribal sacred sites, can be determined eligible for the National Register.[8]

In 1992 the NHPA was amended to confirm the NPS policy that places of "traditional religious and cultural


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importance to an Indian tribe ... may be determined eligible for inclusion on the National Register."[9] This statutory language implicitly includes, but is not limited to, places that are TCPs.[10] Where a tribal sacred place is eligible for the National Register, Section 101(d)(6) of the act explicitly requires the federal agency to consult with Indian tribes in the Section 106 process as to how to avoid or mitigate adverse effects.[11] Furthermore, the criteria for evaluating whether a site is eligible for the register as a TCP effectively require the participation of a tribe because tribes, in almost every case, are the only entities that have sufficient information to evaluate eligibility. A TCP must be associated with the "cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community." [12] For tribes that had long sought recognition that the tribal view of history was part of our national history and a means to afford some measure of protection to places of traditional religious and cultural importance, this statutory amendment was a significant victory.[13] Tribes secured a place at the table, the opportunity to inform a federal agency of the existence of a place of traditional religious and cultural importance to a tribe, to assess any adverse effect to such a place, and to suggest acceptable avoidance or mitigation of adverse effects. [14]

Criticisms of Tribal Consultation

Those seeking to minimize the role of tribes under the NHPA complain that the process is too expensive and results in egregious delays in federal approval of a proposed project. Many do not see why a tribe should have any say in projects that are not undertaken on the tribe's current lands.[15] They object to the notion that a proponent should have to compensate a tribe for identifying its cultural properties in order to develop information necessary for compliance with federal regulations promulgated by the ACHP.[16] For the most part these criticisms are rooted in a mistaken belief that this will reduce the costs of doing business, or just plain ignorance.

Why A Tribe Cares Deeply About Sites Not on Current Tribal Lands.

The critics who seek to limit tribal participation where projects are not located on current Indian lands are ignoring the history of how the United States acquired these lands. Today, the lands of federally recognized tribes are but a fraction of the lands held by tribes in the past. In the western United States, those former tribal lands, in many cases, are on federal lands.[17] Tribes, as with other peoples in the United States, migrated over the earth's surface to where they are located today. These migration stories and the sites mentioned in those stories have, at the very least, the same importance that is attributed to Plymouth Rock, Jamestown, the Santa Fe Trail and the Oregon Trail in U.S. history. For the Pueblos of New Mexico and the Hopi Tribe, whose federally recognized lands are concentrated in pockets of Northern New Mexico and Eastern Arizona, oral histories presently recognize as part of their world-view and culture, sites extending from Utah and Colorado into Mexico. Due to the spiritual beliefs of these tribes, the ancestral villages that dot the larger area are not considered to be abandoned. Tribal members routinely engage in pilgrimages to these sites, with offerings and prayers to renew the ties between the ancestral villages and their present lands. In some instances, these pilgrimage trails are real property interests recognized under law. [18] In other instances, tribes retain a site and its associated importance in modern cultural and spiritual practices, but have not been able to visit a site for decades or even centuries. This does not change the fact that the site is part of a tribe's present cultural identity.

Why Tribal Consultation Takes Time.

It is absolutely correct that consultation with tribes does take time, but in practice, as will be shown later in this article, delays in the process are often a result of the process as presently implemented. The general approach today is for a company to send a professional cultural resources management consultant group (archaeologists) into the field to do an initial assessment of possible cultural resources (archaeological artifacts) before the Section 106 process is initiated by the agency. Inevitably, because there has been no tribal participation at this point, the study has to be redone as part of the Section 106 process once a tribe is given the opportunity to review

the study.

Where a site is located on lands that are not in tribal ownership, identification of sites is not an easy process.[19] There are no books that set out that information, and often, even after a site has been studied by nontribal archaeologists, the sites are not associated with a particular tribal group.[20] Tribes usually have several internal discussions among learned tribal elders as to how to characterize a site, and in most instances, must visit a site to determine if it fits with their oral histories or not. For some tribes, the centuries of blatant prohibition of spiritual practices has resulted in significant limits on what information can and cannot be disseminated.[21] This practice of "secrecy" and guarding of information often times is frustrating to nontribal archaeologists or project proponents.[22] However, this protocol is the result of history. For the Pueblos, encounters with the Spanish who attempted to eradicate Pueblos' indigenous religion and way of life in order to convert Pueblo people to Christianity through the Roman Catholic Church were brutal. Secrecy and the safe guarding of knowledge was a life or death matter which in practice, resulted in the maintenance by the Pueblos of many of their traditions, customs and ways of life to this day. Today, many Pueblos still adhere to strict protocols regarding the dissemination of cultural information to safeguard the Pueblo in the face of cultural exploitation, or to protect against the defacement or looting of sacred sites. Once the significant decision is made to disseminate information so as to protect a site, a tribe must still confirm the identification in the field.

After a site is identified, and the information given to establish it as a TCP, the issue of avoidance and mitigation must be addressed. This, too, requires internal discussions within a tribe. If a site can be avoided, but there are external effects, acceptable mitigation of those effects is not a foregone conclusion. If a site cannot be avoided, deciding what mitigation is acceptable is a very hard decision. A tribe is being asked to allow destruction of a site central to its ongoing culture and identity, to allow for development that often is for private monetary gain. There is no easy answer, and getting to the hard answer takes time. For tribes there is the reality that there may be no truly acceptable answer, and they may often have to settle for or have imposed upon them something less. [23]

Why Tribal Consultation Costs Money

Tribes, as with most other governments fully expect the costs of a proposed project to be borne by the applicant as a cost of doing business. If a company wants to locate a mine in a National Forest, or lease public land for oil or gas, the federal agency requires the company to pay the costs of all necessary evaluations, including those required by the NHPA. Tribal governments are no different, except that budgetary constraints are much greater. ACHP notes in "Consultation with Indian Tribes in the Section 106 Review Process: A Handbook" that there are two possible avenues for funding tribal participation in a Section 106 process. First, federal agencies are encouraged to pay some tribal expense for participation, such as travel expenses for tribal representatives, and if a tribe consents to allow an applicant to carry out tribal consultation, "the applicant is encouraged to use available resources to facilitate and support tribal participation."[24] Second, beyond tribal participation in commenting or concurring in an agency finding or determination, where a tribe is being asked to provide specialized knowledge to fulfill a statutory requirement of the agency, payment for that service is appropriate. [25]

Once a tribe receives notice of a proposal, tribal staff reviews the notice and related documents provided by the agency, and determines what additional information is needed to even begin to decide whether the tribe will want to participate in Section 106 consultation. If a tribe decides to participate, the next step is identification, and this often involves reaching out to other tribal members for information. Many tribes cannot afford to staff all of the many Section 106 consultations for which notices are received, much less put persons with specialized tribal knowledge — essentially tribal scholars — into the field along with trusted archaeologists and ethnologists to assist them. Project proponents have to understand that these tribal scholars and their assistants are no different from the archaeologists, biologists and other professionals that they readily pay to meet federal statutory requirements.

This concludes Part 1 of this article. Part 2 will follow tomorrow.

Ann Berkley Rodgers and Aaron M. Sims are members of Chestnut Law Offices PC in Albuquerque, New Mexico. Gregory A. Smith is a partner in the Washington, D.C., office of Hobbs Straus Dean & Walker LLP. *The authors acknowledge and thank Dean B. Suagee, of counsel to Hobbs Straus, for reviewing the article and providing valuable insights.*

[1] Although the statute provides protections for federally recognized Indian Tribes and Native Hawaiian Organizations, 54 U.S.C. §302706(a), the statute treats Native Hawaiian Organizations differently in certain respects from the way it treats Tribes and involvement of Native Hawaiian Organizations in the implementation of the NHPA is beyond the scope of this article.

[2] 54 U.S.C. §§ 300101 – 307108.

[3] 54 U.S.C. § 306108. Section 106 requires consideration of effects on any "historic property," a term that is statutorily defined to include any property that is eligible for, as well as any property included on, the National Register of Historic Places.

[4] 36 C.F.R. Part 800.

[5] The statute expressly provides that for an undertaking that adversely affects a historic property, if the Federal agency has not entered into an agreement pursuant to the ACHP regulations on acceptable measures to resolve the adverse effects, then the decision on whether to proceed with the undertaking must be made by the head of the agency, a responsibility that cannot be delegated. 54 U.S.C. § 306114.

[6] Remarks by President Trump on Infrastructure, August 15, 2017, available at https://www.whitehouse.gov/the-press-office/2017/08/15/remarks-president-trump-infrastructure; Federal Communications Commission, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, 82 Fed. Reg. 21761-01 (May 10, 2017); H. Comm. on Nat'l Res., Subcomm. on Oversight and Investigations, Oversight Hearing on "Examining Impacts of Federal Natural Resources Laws Gone Astray, Part II," (July 18, 2017); Letter from Amy Lueders, State Director, BLM, to Governor Kurt Riley, Pueblo of Acoma (July 12, 2017) regarding project to streamline land use planning and NEPA processes (on file at the Chestnut Law Offices, P.A).

[7] 54 U.S.C. §§ 100102(1), 300316 (defining the Secretary of the Interior as "the Secretary acting through the Director" of the National Park Service).

[8] A "traditional cultural property" is "eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community." Patricia L. Parker & Thomas F. King, National Park Service, National Register Bulletin 38, at 1, Guidelines for Evaluating and Documenting Traditional Cultural Properties (1998), available at https://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf.

[9] 54 U.S.C. § 302706(a).

[10] See ACHP, Consultation with Indian Tribes in the Section 106 Review Process: A Handbook 3 (2008), http://www.achp.gov/regs-tribes2008.pdf.

[11] 54 U.S.C. § 302706(b). This statutory requirement is implemented through numerous provisions in the regulations of the ACHP. 36 C.F.R. Part 800.

[12] See Footnote 9.

[13] For an in-depth discussion of the importance of this "place at the table" for Tribes, see H. Comm. on Nat'l Res., Subcomm. on Oversight and Investigations, Oversight Hearing on "Examining Impacts of Federal Natural Resources Laws Gone Astray, Part II," (July 18, 2017) (Written Statements of the Santa Clara Pueblo, Acoma Pueblo, Hualapai Indian Tribe and the United South and Eastern Tribes Sovereignty Protection Fund) [hereinafter Written Statements].

[14] Determinations under the NHPA feed into the evaluation of alternatives for a proposed federal action under the National Environmental Policy Act. Where avoidance or mitigation is extremely expensive or problematic, it may affect the alternative that the agency approves.

[15] Indeed, in the past, those seeking to traverse Tribal lands have attempted to get congressional authorization removing the ability of Tribes to prevent projects on tribal lands as the railroads did in the 19th Century. The overwhelming majority of these efforts have been thwarted.

[16] See ACHP, Consultation with Indian Tribes in the Section 106 Review Process: A Handbook 11-12 (2008). When an agency or applicant "is essentially asking the tribe to fulfill the duties of the agency in a role similar to that of a consultant or contractor," payment or services is appropriate.

[17] One should not assume that the NHPA only applies to federal lands. A federal undertaking can include a federally funded project, or can also include private lands that are an integral part of a proposed project on both federal and private lands. Furthermore, anyone can nominate a property for the National Register of Historic Places, and eligibility can be determined without the approval of a private landowner.

[18] See, U.S. on Behalf of Zuni Tribe of New Mexico v. Platt, 730 F. Supp. 318 (D. Ariz. 1990). A greater discussion of this topic is found in the written statements.

[19] Some tribes are becoming proactive in identification of these sites, using modern technology to locate sites outside a Section 106 process. While this may be more efficient for initial identification, it does not obviate the need for on-site visits to confirm that a site is a TCP. Another approach discussed in part III is the creation of teams of elders that have training in working with non-Indian cultural resources professionals to do rapid ethnographic assessments in the field. These processes, while effective in "streamlining" the Section 106 process, are major investments that many tribes cannot afford to make.

[20] Examples of this are wellknown. It was not until the last decades of the 20th century that the amazing ruins at Chaco Canyon (designated a National Historical Park in 1907) and Mesa Verde National Park (created in 1906) were acknowledged to be ancestral homes of modern-day Pueblo Indians, rather than some mysterious "Anasazi" peoples who disappeared almost into thin air.

[21] A greater discussion of this topic is found in the Written Statements.

[22] Dr. Joseph Suina, Pueblo Secrecy: Result of Intrusions, New Mexico Magazine (Jan. 1992), available at http://www.mcinnisusa.com/public/Pueblo_Secrecy.pdf.

[23] Even where a project is for public safety, the United States has faced the same problem with the location of a permanent repository

for nuclear waste at Yucca Flats, Nevada. That proposed project has been in the works for over a decade, and it is likely to be several more years before any final decision is made.

[24] See, supra at nt. 17.

[25] Id. At p. 12 ("Since Indian tribes are a recognized source of information regarding historic properties of religious and cultural significance to them, federal agencies should reasonably expect to pay for work carried out by tribes. The agency or applicant is free to refuse just as it may refuse to pay for an archaeological consultant, but the agency still retains the duties of obtaining the necessary information for the identification of historic properties, the evaluation of their National Register eligibility, and the assessment of effects on those historic properties, through reasonable methods.")

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Defending The National Historic Preservation Act: Part 2

By **Ann Berkley Rodgers, Aaron Sims and Gregory Smith**

This is the second part of the this article. You can read the first part here.

Ann Berkley Rodgers

Aaron Sims

Is There a Better Way?

For tribes, the National Historic Preservation Act is a half-measure, and the expense in dollars, staff-time, as well as the emotional costs that come with it is more than many tribes can bear. Tribes are also very sensitive to the criticisms that are leveled against tribal consultation. As a result, federal agencies and tribes have developed different approaches to the NHPA process to make it more palatable to project proponents and tribes.

Tribal Inventories

The Hualapai Tribe was one of the first tribes to establish a Tribal Historic Preservation Officer ("THPO") program and take over State Historic Preservation Officer functions on its tribal lands, having entered into an agreement with NPS for this purpose in 1996.[1] The Hualapai Indian Reservation, in northwest Arizona, is about one million acres in size and includes about one-seventh of the tribe's ancestral territory.[2] Tribal legislation enacted in 1998, the Hualapai Cultural Heritage Resources Ordinance,[3] formally established the Hualapai Department of Cultural Resources ("HDCR") and designated the HDCR director to serve as THPO, with authority to represent the tribe in the NHPA section 106 process. The tribe now has two decades of experience in advocate for the preservation of places in the tribe's ancestral territory that hold significance for the tribe.

The ordinance also gave the HDCR a mandate to compile and maintain a database of cultural resources located both within the reservation and on ancestral lands outside the reservation boundary. One aspect of this mandate was to develop a Hualapai Register of Heritage Places, analogous to the National Register, to recognize places that are significant in the development and survival of Hualapai culture. Through a rulemaking process that culminated in 2014, the HDCR established criteria of eligibility for the Hualapai Register. The work of compiling the cultural resources database, however, had been ongoing for many years before the formal establishment of the Hualapai Register, including a project known as the Hualapai Cultural Atlas, an initiative that HDCR launched in 2005.

The Hualapai Cultural Atlas is a compendium of tribal knowledge about the ancestral territory based on a geographic information system, which began with place-names and evolved to include links to archival documents, photos, video and audio clips, and genealogical information relating to the bands and lineages that lived in various ancestral areas. The Cultural Atlas includes more than 900 place-names, including settlement areas, landmarks,

springs and other water sources, rock writing and art (petroglyphs and pictographs), aboriginal trails and plant gathering areas. HDCR has created a separate geodatabase for ancestral archaeological sites, which includes more than 1,000 sites. While many of the sites in the Cultural Atlas or the archaeological database have not yet been evaluated for eligibility for the Hualapai Register, for management purposes, HDCR employs a presumption of eligibility.


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While the Cultural Atlas was initially supported with grant funding from NPS, in recent years it has been sustained mainly through contract work, through which HDCR conducts ethnohistorical and archaeological research to develop information for use in the section 106 process. The funding for such work has sometimes been provided through agreements with federal agencies and sometimes through contracts with consulting firms retained by applicants for federal approvals for proposed projects. In addition to supporting the expansion of the HDCR databases, through such agreements, HDCR is often in a position from which to better influence the formulation of mitigation measures. In negotiating such agreements, HDCR routinely seeks contract language recognizing the tribe's rights in its traditional knowledge and limiting the intellectual property rights of the other party to the content of reports delivered by HDCR.

Federal Agency Review of Cultural Landscapes

The Hualapai Cultural Atlas is much more that a listing of sites and associated documentation. It begins with the oral history of the Hualapai, as symbolized in the geography. For tribes that do not have a written language, geography is the physical connection to the past, and a cultural landscape is akin to a history book.[4]

The [traditional cultural property] concept has proven useful in providing recognition for places that tribes consider important, but in some ways this approach falls short. In many cases it is not so much a particular place that matters, but rather how that place fits within the landscape, how it connects to other important places, and what vistas can be taken in from within a place or when viewing it from a distance.[5]

In the last 20 years, the concept of "cultural or historic landscapes" has traveled beyond academic, scholarly works, into decision-making under the NHPA. Initially, cultural landscapes were determined to be eligible for the National Register in the past, as either a site or a historic district.[6] Now, they are a category unto themselves. The Secretary of Interior issued guidelines for evaluating landscapes within the act which defines a cultural landscape as:

> [A] geographic area (including both cultural and nature resources and the wildlife or domestic animals therein), associated with a historic event, activity or person or exhibiting other cultural or aesthetic values. There are four general types of cultural landscapes, not mutually exclusive: historic sites, historic designed landscapes, historic vernacular landscapes, and ethnographic landscapes.[7]

An ethnographic landscape is defined as:

> [A] landscape containing a variety of natural and cultural resources that associated people define as heritage resources. Examples are contemporary settlements, sacred religious sites, and massive geological structures. Small plant communities, subsistence and ceremonial grounds are often components.[8]

Federal agencies have the responsibility under Section 110 of the NHPA to make sure that the lands under an agency's jurisdiction are "managed and maintained in a way that considers the preservation of their historic, archeological, architectural and cultural values."[9] Agency preservation-related activities are to be done in consultation with tribes. If more agencies proactively consulted with tribes, strategies can be developed for identifying and evaluating areas of concern to tribes on lands owned by the federal government. Given the constraints on federal agency budgets, one important consultation topic is the possible role for tribes in assisting with management and maintenance these historic properties in ways that make use of tribal cultural knowledge and expertise.[10]

A good example of a federal agency proactively consulting with tribes on lands under the agency's jurisdiction is what the Cibola National Forest and Grasslands did when several applications were filed to approve plans of operation for uranium mines on Mount Taylor, a mountain known to be of great importance to several tribes in New Mexico. The agency undertook to determine whether the mountain was a traditional cultural property of tribes, and if so, what was the boundary. It invited 16 tribes and 13 Navajo Chapter Houses to consult as to the significance of the mountain.[11] It also noted the significance of the mountain to other nearby non-Indian communities.[12] The CNF concluded that the Mt. Taylor cultural landscape was a site eligible for the National Register of Historic Places under Criteria A, B and D, as a traditional cultural property. [13]

The CNF's determination that Mount Taylor was a traditional cultural property eligible for the National Register of Historic Places under Criteria A, B and D does not obviate the need for additional identification of cultural resources when a specific application is before an agency. What this did, though, was give all potential applicants fair warning of the need for tribal consultation. The most successful consultations for projects on the mountain are the result of applicants reaching out to Tribes and collaborating on cultural resource matters.

Tribal Participation Early and Often — The Acoma Model

The Pueblo of Acoma developed a process for its participation in federal agency review of proposed projects in response to working on two major projects in a relatively short period of time: a proposed uranium mine on Mt. Taylor and a proposed pipeline across Acoma lands.[14] For Acoma, NHPA Tribal Consultation works best when the Pueblo, project proponent and/or federal agency are proactive, and meet together early and often. Once a project is identified, usually through ongoing scheduled meetings with federal agencies, or contact from a project proponent, the Pueblo goes into action. In the case of the uranium mine, Acoma was informed of the proposal by the Cibola National Forest and Grasslands ("CNF") at a quarterly tribal consultation with the CNF over potential projects. At that point the initial cultural resources survey had been completed, but not with tribal participation. Based on the previous ethnographic work done by the CNF on the Mt. Taylor cultural landscape with contributions from several tribes, the agency was fully aware that further work would need to be done — with tribal participation. The CNF required the project proponent to pay the costs for Acoma and other tribes to perform ethnographic assessments. Acoma put together a team of persons with specialized knowledge and retained a trusted archaeologist / anthropologist to assist the Acoma specialists in the field. This effort was so successful that when the project expanded, the project proponent arranged for its' cultural resources management consultant to meet with tribal experts in the field to work collaboratively on the cultural resources inventory. This collaboration is now moving forward through the Section 106 process.

The second project that led to the development of the Acoma process, now referred to as the Acoma Model, was a proposal for a CO2 pipeline where at least two of the alternative routes were to cross Acoma lands. This gave Acoma a greater degree of control over how the project would go forward. Kinder Morgan ("KM") and the Bureau of Land Management ("BLM") came to the Pueblo with a proposal for a pipeline. The Lobos CO2 pipeline, designed for enhanced oil recovery in the larger Permian Basin, would extend 214 miles (344.4 km) from the St. Johns Field in Apache County, Arizona, to connect with Kinder Morgan's Cortez pipeline in Torrance County, New Mexico. Most of the alignment traversed BLM land but approximately fourteen (14) miles crossed lands held by the United States in trust for Acoma Pueblo.

Acoma insisted that Kinder Morgan pay the Pueblo's expenses in relation to the project, including tribal participation in any cultural resources surveys. The Pueblo developed an estimate of its costs for the project, and then entered into an agreement for Kinder Morgan to reimburse the Pueblo for actual costs on a monthly basis. There was no issue as to what the fee was covering or the actual cost. The cost estimate was based on an approach that put Acoma ethnographic assessment teams working with Kinder-Morgan archaeologists and engineers in the field to design and implement a simultaneous Class III cultural resources survey, TCP survey and routing study for the pipeline. A 300-foot corridor was surveyed across BLM land, but on Acoma, it was clear to Acoma's Director of Realty and Natural Resources, a person who had traveled extensively over the land in question, that the study area had to be wider in order to facilitate possible routing alternatives. The survey examined a half mile (2,640 feet) wide study area, within which a 100 foot wide construction corridor was ultimately delineated and approved by the Pueblo of Acoma and Kinder Morgan.

Acoma pottery, both modern and ancient, and other items of cultural patrimony are highly prized by collectors, but when they are looted, the collectors are little more than "thieves of time," often doing great damage to fragile desert environments.[15] Acoma always has grave concerns about confidentiality of information about its cultural resources. To address these concerns, all persons, other than federal employees, who worked on the project, were required to sign confidentiality agreements, specifically designed for a federal project. With Acoma ethnographic assessment teams working with KM's cultural resources management consultant, C.R. Goodwin and Associates, more than 150 cultural and/or archaeological properties were recorded on Acoma land — more than all those recorded along the rest of the alignment. Ninety were TCPs that would not have been recognized by archaeologists untrained in Acoma traditional cultural practices. Furthermore, a number of what the trained archaeologists would call "isolated occurrences" the tribal specialists found to be TCPs. Acoma personnel were also in the field as biological assessments were being done. Paleontological resources were also surveyed at the time. Despite a significant number of TCPs and/or sensitive properties within the Acoma study area, the company engineers, working with the Pueblo specialists and staff, were able to designate an area of potential effect for the entire corridor across Acoma land that avoided all of these properties.

Use of the Acoma Model took approximately six weeks with three of those weeks in the field due to the size of the area to be surveyed, but it saved lengthy consultation time about route selection, identification of TCPs and resolution of adverse effects. It avoided time and costs for preparation and negotiation of Section 106 agreement documents (memorandum of agreement, programmatic agreements, etc.); avoided Phase II evaluations; avoided large expenditures for mitigation (data recoveries); and avoided legal challenges. The cost reimbursement approach removed any issue as to the appropriateness of the tribal fee. With participation of the BLM agency staff in the overall effort, there were no certification issues.

Acoma was compensated for its expertise, was confident that the rich cultural heritage, and other sensitive areas along the route were protected, and the Pueblo avoided all issues over possible public disclosure of confidential information concerning its TCPs. For Acoma there was another benefit of immeasurable value. The land in question had originally been patented by the United States to non-Indians in the early 1900s, and then reacquired in trust for Acoma in the 1980s. Thus, for at least two or three generations, Acoma people had only heard of these TCPs in oral histories and in references to sites to the south in ceremonial activities. The work done by the Acoma, when combined with other work done on other projects, confirmed Acoma's oral history about people coming from the south many centuries ago to become part of what Acoma is today.

The Promise of the NHPA is Only Realized With Early and Often Collaboration Among the Federal Agency, the Project Proponent and Indian Tribes

This article does not presume to describe each and every way that tribal consultation pursuant to the NHPA can work. It can, and should be a collaborative process. Project proponents should not sit back and wait for a federal agency to initiate a Section 106 process. Tribes should not be fearful of meeting with project proponents to collaborate on projects. Federal agencies must be willing to allow for new strategies to emerge that may be unique, but are best suited to the proposed project and the federal purposes set out in the NHPA.

What is clear, however, is that there is no need to amend the act, or make radical challenges to existing regulations.

Ann Berkley Rodgers and Aaron M. Sims are members of Chestnut Law Offices PC in Albuquerque, New Mexico. Gregory A. Smith is a partner in the Washington, D.C., office of Hobbs Straus Dean & Walker LLP. *The authors acknowledge and thank Dean B. Suagee, of counsel to Hobbs Straus, for reviewing the article and providing valuable insights.*

[1] Dean B. Suagee and Peter Bungart, Traditional Cultural Landscapes, Consultation, and the Hualapai Cultural Atlas, 8 Preservation Education & Research 41, 44 (2016).

[2] Id. at 43. See also Dean B. Suagee and Peter Bungart, Taking Care of Native American Cultural Landscapes, 27, no. 4 Nat. Res. & Envt. 23 (Spring 2013).

[3] Enacted by Tribal Council Resolution No. 13-98 (Feb. 18, 1998).

[4] The effort to provide meaningful protection to cultural landscapes is a 21st Century product. The National Landscape Conservation System ("NLCS") was established within the BLM by Secretarial Order in 2000, and was authorized in the Omnibus Public Lands Management Act of 2009. Pub. L. No. 111-11 § 2002, 123 Stat 1095. The NLCS was established to "conserve, protect, and restore nationally significant landscapes that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations." The ACHP began formal, serious consideration of traditional cultural landscapes in 2011. ACHP Native American Traditional Cultural Landscapes Action Plan (Nov. 23, 2011). The National Park Service followed in 2012. NPS Request for Comments, 77 Fed. Reg. 47,875 (Aug. 10, 2012), and its actions culminated in these Guidelines.

[5] Taking Care of Native American Cultural Landscapes, 27, no. 4 Nat. Res. & Envt. 23 at 4.

[6] The Mount Taylor Cultural Landscape was categorized as a "site" by the Cibola National Forest and Grasslands when it was determined to be eligible for the National Register of Historic Places. See, Cynthia B. Benedict and Eric Hudson, Mt. Taylor Traditional Cultural Property Determination Of Eligibility For The National Register Of Historic Places, Feb. 4, 2008, p. 29, Cibola National Forest and Grasslands, available at http://www.nmhistoricpreservation.org/documents/cprc/MtTaylorAttachment5.pdf.

[7] The Secretary of the Interior's Standards for the Treatment of Historic Properties and Guidelines for Treatment of Cultural Landscapes, available at https://www.nps.gov/tps/standards/four-treatments/landscape-guidelines/terminology.htm.

[8] Id.

[9] 54 U.S.C. § 306102.

[10] Written Statements, p. 6

[11] See, Benedict and Hudson, Mt. Taylor Traditional Cultural Property Determination Of Eligibility For The National Register Of Historic Places, p.13, Cibola National Forest and Grasslands.

[12] Id. at pp 9-12.

[13] Id. p. 36-38.

[14] Acoma has also used this model when approached by companies with projects on neighboring private lands as well.

[15] The phrase "thieves of time" is used with apologies Tony Hillerman, author of A Thief of Time, published by Harper, 1988.
