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# Taking Care of Native American Cultural Landscapes

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In the expanses of undeveloped public lands in the American Southwest, it may be tempting to perceive them as empty and unoccupied landscapes. Such a perception may be particularly common with respect to many of the national parks, national forests, and holdings under the jurisdiction of the Bureau of Land Management (BLM), which are often prized for their natural, undeveloped, and even wilderness characteristics. From the perspective of Indian tribes with ancestral ties to federally managed lands, these lands are not empty. Rather, they are filled with places that are memorialized in tribal oral traditions, stories, and songs and that are often still visited for various purposes. For the most part, tribes have never really relinquished or disregarded their connections to these places. As tribes increasingly establish their own cultural resources departments, including assuming the responsibilities of Tribal Historic Preservation Officers (THPOs), they have become more knowledgeable about federal and state cultural resource laws and regulations and more engaged in the decision-making processes of federal and state agencies.

The Hualapai Indian Reservation in northwestern Arizona occupies approximately one million acres of typically high desert country bordering 108 miles of the Colorado River in the western Grand Canyon area. Aboriginally, as a primarily hunting and gathering society that also engaged in small-scale farming, the Hualapai people formerly utilized about seven times more land area. Most of this land was ultimately usurped, mainly by ranching and mining interests, but not until the last half of the nineteenth century when growing conflict led to intervention by the U.S. Army and the establishment of the Reservation by Executive Order in 1883.

The Hualapai people regard their place of origin at a free-flowing spring that erupts from the rocks in a small canyon near the base of a mountain in southeastern Nevada known as *Wikaomé* or Spirit Mountain. This is acknowledged as the place of origin for all of the peoples who speak Yuman languages, of which the Hualapai are one such group. (The Hualapai often refer to the “Pai” language group rather than use the term “Yuman.”) The people were led to the Colorado River, where they lived for a time and learned how to survive off the land. As their numbers grew, some people were

left to live by the river while others were led to the deserts, canyons, and plateaus to the east. Eventually, further migrations occurred, resulting in the formation of many interrelated bands, as well as other discrete tribes (such as the Yavapai, another Yuman language people who, at times, were adversaries of the Hualapai). Bands often were tethered to springs, rivers, and cooler mountains in the often harsh desert environment, deriving their group names from the places that were their main home base (e.g., *Haka’sa Pa’a*, for the Pine Springs People). The ancestral Hualapai bands were mobile, however, and moved their camps seasonally throughout a more or less prescribed territory to harvest available plant foods and hunt game, at times cooperating among bands and at other times splitting off into smaller groups as the resource base allowed.

This brief and overgeneralized history serves to demonstrate that over countless generations the Hualapai became knowledgeable about a vast landscape, populated by familiar landmarks, varied ecological zones and niches, places to obtain natural resources for food and tools, ancient settlement areas, and burial grounds, many of which are embodied in stories and songs. Mountain peaks in particular were regarded as places of power that were utilized by shamans for the purpose of communicating with spirits and sending out prayers. It should be no wonder, then, that many places that are now outside of their presently recognized territorial jurisdiction, and which fall within a multitude of administrative and jurisdictional boundaries, remain of great concern to many Hualapai tribal members. One of the authors is often reminded of a Hualapai elder who drove him around to visit ancestral places off the reservation, just to “take care of them.” Clearly, he still considered these places part of Hualapai territory. In deep and personal ways, such places were never really relinquished as a result of “conquest.”

In 2005, the Hualapai Department of Cultural Resources (HDCR) launched an initiative to establish the Hualapai Cultural Atlas, a geographic information systems (GIS) based compendium of tribal knowledge about the ancestral landscape. Initially a place names geodatabase developed using ESRI “ArcGIS” software, the Cultural Atlas has evolved to include links to scanned archival documents, photos, video and audio clips (usually conveying contemporary oral histories or songs), and, most recently, genealogical information related to bands and lineages from various ancestral areas. The word “evolved” is important here because as the application was developed, an open framework (html) was chosen to serve both as a convenient package to hold linked information and as a doorway to access that information. Then, as new kinds of information become available, or as new needs arise, it is relatively easy to accommodate such developments in the Atlas. If there is a geographic aspect to something, there is likely a way to depict it visually through GIS mapping and through

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links to various media. Presently, the Atlas includes more than 900 place names recorded in the geodatabase, including settlement areas, landmarks, springs and other water sources, “rock writing” sites (petroglyphs and pictographs), aboriginal trails, general band territories, plant-gathering areas, and other types of information.

In continuing to be concerned about and connected to places outside their territorial jurisdiction, the Hualapai people are like other indigenous peoples around the world. Such concerns have been recognized in the United Nations Declaration on the Rights of Indigenous Peoples (Declaration). U.N. document A/61/L.67 (7 Sept. 2007), available at [www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf). For example, Article 12 of the Declaration provides: “Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; . . .” Article 25 provides: “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.” See also Articles 11, 13, 15, 25, and 31. That such rights are now enshrined in the Declaration does not, of course, mean that the states of the world will universally honor and defend the exercise of such rights by indigenous peoples.

### ***The Historic Preservation Framework***

From a tribal perspective, places of religious and cultural importance matter because they are just that—sacred and culturally important. In the United States, however, the law does not offer protection for tribal sacred places just because they are sacred. The American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996, does proclaim that it is national policy to protect the freedom of Native American people to exercise their traditional religions, including access to sites, and Executive Order 13007, Indian Sacred Sites, 61 Fed. Reg. 26771 (May 24, 1996), directs each land managing federal agency to “(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.” But neither AIRFA nor Executive Order 13007 gives rise to enforceable rights. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 14.03[2][c][B] (2012 edition).

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Federal law, however, does offer tribes certain procedural rights if such places also hold historic significance and if such places are threatened by federal actions or other actions that involve federal funding. Indian tribes are increasingly using

the procedural framework of historic preservation law to seek protection for places that hold religious and cultural importance. Section 106 of the National Historic Preservation Act (NHPA) requires that any federal agency that is considering a proposed federal or federally assisted undertaking must take into account the effects of the undertaking on any property that is listed on or eligible for the National Register of Historic Places and afford the Advisory Council Historic Preservation an opportunity to comment. 16 U.S.C. § 470f. Places that hold religious and cultural importance for Indian tribes may be eligible for the National Register, and, if such a historic property would be affected by a proposed undertaking, the federal agency has a statutory duty to consult with the concerned tribe in the section 106 process. 16 U.S.C. § 470a(d)(6). These requirements are implemented through regulations issued by the Advisory Council. 36 C.F.R. pt. 800.

In the section 106 process as set out in the regulations, the Advisory Council generally does not participate directly in the review of individual undertakings. Rather, the regulations provide for a prominent role to be performed by State Historic Preservation Officers (SHPOs). NHPA amendments enacted in 1992, authorize tribes to establish THPOs and, when approved by the Secretary of the Interior (acting through the National Park Service (NPS)), assume duties for tribal lands that are performed elsewhere by the SHPO. 16 U.S.C. 470a(d)(2).

The criteria for eligibility for the National Register are set out in regulations issued by NPS. The kinds of properties that may be listed on the National Register include districts, sites, buildings, structures, and objects. Such a property may be eligible for the National Register if it meets one or more of the criteria, that is, if it: (a) is “associated with events that have made a significant contribution to the broad patterns of our history;” (b) is “associated with the lives of persons significant in our past;” (c) “embod [ies] the distinctive characteristics of a type, period, or method of construction, or . . . represent[s] the work of a master, or . . . possess[es] high artistic values, or . . . represent[s] a significant and distinguishable entity whose components may lack individual distinction;” or (d) “has yielded, or may be likely to yield, information important in prehistory or history.” 36 C.F.R. § 60.4. NPS regulations establish a process for determinations of eligibility for the National Register. 36 C.F.R. Part 63. In practice, however, identification and evaluation often takes place within the section 106 process, during the identification step. 36 C.F.R. § 800.4.

In cases of Native American places of significance, these criteria must be contextualized to reflect the perspectives of the people who hold such places significant. This applies to any place that has local significance for people of any background. The National Register has never been understood as reflecting only national values or importance at that scale, but also including places of local and regional importance. For native people, “significant contributions” are often very broad, reflecting and shaping the very identity of a people, to more specific aspects of culture and history, such as culturally significant plant or mineral gathering areas, sacred geography memorialized in creation and migration stories and songs, rocky hill slopes where burials were known to have been placed, sites where significant historic events took place (such as battles with the U.S. Army), or any number of kinds of places deemed important. There are no finite limitations, although a certain level of documentation is typically required to arrive at a determination of eligibility.

Because the NHPA was enacted nearly fifty years ago, the historic preservation efforts of federal agencies in identifying previously unknown historic properties, in planning for the management of public lands, and in making decisions on undertakings, have tended to emphasize archaeological sites. There are likely a number of reasons for this. Archaeological sites are tangible and may be readily managed using time-tested mitigation approaches, such as avoidance or data recovery (i.e., excavation). The vast majority of archaeological sites that are determined to be eligible for the National Register have been so evaluated under Criterion D, which addresses their potential to yield information. If a site cannot be avoided or otherwise preserved in situ in the face of some undertaking, excavation commonly takes place, and the site (as a management concept) ceases to exist. While tribal consultation may take place, this is a process in which nonnative values take precedence in most cases. Even when archaeological sites are acknowledged to be associated with or significant to extant Native American tribes, the possibility that tribes may value these sites for their information potential is usually not seriously considered (not to mention other aspects of National Register criteria).

Furthermore, archaeology has captured the broader public's imagination and is readily accessible to the interested lay person. As such, agency land managers may feel quite comfortable with such preservation decisions knowing that the public is receptive and may appreciate educational benefits. In contrast, from a tribal perspective the historic significance of a place, as embodied in stories and songs, is not readily accessible to the general public. While Tribes may find that sites are relevant in "recovering" knowledge about their historical landscapes or as teaching resources to reinforce cultural knowledge to younger generations, benefits to the broader public may not be apparent. In addition, the information from a tribe's oral tradition that may be divulged in the section 106 process may have confidentiality concerns attached and so may not be readily appropriate for public educational benefits.

Regardless of how the relative public benefit may be perceived by federal land managers, at the beginning of the section 106 process, they are required to make a "reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties." 36 C.F.R. § 800.3(f)(2). At the step of identifying historic properties, the federal agency is required to seek information about potentially eligible properties from any such Indian tribe or Native Hawaiian organization. 36 C.F.R. § 800.4(a)(4). The identification step of the section 106 process is particularly important because many places that hold religious and cultural significance for an Indian tribe have not been identified and evaluated for National Register eligibility. Early identification is also important because fashioning acceptable mitigation for adverse impacts tends to present challenges. Such places tend to have ongoing importance. Unlike archaeological sites, mitigation by destruction is not an acceptable solution.

### **Traditional Cultural Properties**

For identifying places of importance to tribes, a guidance document issued by NPS that has proven to be particularly useful is NATIONAL REGISTER BULLETIN 38, GUIDELINES FOR

EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES (hereinafter "*Bulletin 38*"), available at [www.nps.gov/nr/publications/bulletins/nrb38/](http://www.nps.gov/nr/publications/bulletins/nrb38/). The term "traditional cultural property" (TCP) refers to a particular kind of historic property that 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." *Bulletin 38*, at 1.

*Bulletin 38* explains how a TCP may be eligible for the National Register under one or more of the four criteria. For example, the word "events" in Criterion A may be interpreted to include events that, according to tribal oral traditions, "may have occurred in a time before the creation of the world as we know it." *Bulletin 38*, at 13. Similarly, the word "persons" in Criterion B can refer not just to "persons whose tangible, human existence can be inferred on the basis of historical, ethnographic, or other research [but also] to 'persons' such as gods and demigods who feature in the traditions of a group." *Id.* Just as archaeological sites may be eligible for the National Register under Criterion D for the information such sites may yield about history and prehistory, places that hold religious and cultural significance for tribes may be found eligible under Criterion D when appropriate research methods are used. *Bulletin 38* suggests the methods of "ethnographic, archeological, sociological, folkloric, or other studies." *Id.* at 14.

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In addition to guidance from NPS, the Advisory Council has also issued guidance documents, including CONSULTATION WITH INDIAN TRIBES IN THE SECTION 106 REVIEW PROCESS: A HANDBOOK (hereinafter *ACHP Handbook*), available at [www.achp.gov/nap.html](http://www.achp.gov/nap.html). The *ACHP Handbook* stresses that the term "traditional cultural property" is not used in the statute, but, rather, the factor that gives rise to the statutory right to be consulted is that the proposed undertaking might affect a historic property that holds "religious and cultural significance" for an Indian tribe. 16 U.S.C. § 470a(d)(6). In other words, a TCP is but one kind of historic property that holds religious and cultural significance, and a historic property need not be a TCP for a tribe to have the right to be consulted. Nevertheless, many places that are important to tribes can properly be designated TCPs, and, as such, the term has come into rather widespread use.

Many, perhaps most, of the kinds of geographic areas included in the Hualapai Cultural Atlas may be considered TCPs. The Atlas does not, for the most part, include recorded archaeological sites. These are contained in a separate but associated database, which involves different levels of recording and management practices. The archaeological site database includes more than 1,000 sites, some of which may also be considered TCPs. Although the HDCR has made much progress in developing the Atlas, it seems like only the beginning. It will undoubtedly be the kind of job that can never be finished, always uncovering new sources of information, through archival research and through the continued participation of tribal elders and other knowledgeable individuals.

Prior to about twenty years ago, at least in the American Southwest, it was rare to hear of TCPs being given serious consideration in management decisions on nonreservation lands. Only in the past decade or so has this consideration accelerated to the point that attention to TCPs is now commonplace, albeit with varying sincerity and commitment. This variability can be found across agencies and with regional differences that seem to reflect political leanings, economic forces, and socio-cultural trends. The growth in attention to TCPs on the part of federal agencies has largely resulted from tribes becoming more proactively engaged in the section 106 process. At least two factors have contributed to this phenomenon. First, the number of tribes achieving THPO status continues to increase, and tribes with THPO programs are more likely to be informed about undertakings on federal and state lands and are more likely to have staff to actively participate in review and consultation (although these tasks can become overwhelming financially and burdensome with limited personnel). Second, tribal governments have generally become more supportive of maintaining cultural resource programs, often aided by gaming or tourism-related revenues. In the best circumstances, tribes and local federal land management agency offices have proactively fostered constructive consultation practices and relationships.

### Preservation at the Landscape Scale

The TCP 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. In recognition of such concerns, the concept of Native American Traditional Cultural Landscapes has recently found a place on the agenda of both ACHP and NPS. As discussed by ACHP:

These large-scale properties are often comprised of multiple, linked features that form a cohesive “landscape.” The recognition, understanding, and treatment of such places can be a struggle for the nontribal or non-Native Hawaiian participants in the Section 106 process, partly due to the lack of experience in addressing such places and partly due to the lack of guidance regarding these traditional cultural landscapes.

ACHP, Native American Traditional Cultural Landscapes Action Plan (Nov. 23, 2011), *available at* [www.achp.gov/news10102011.html](http://www.achp.gov/news10102011.html).

One reason that treatment of landscapes “can be a struggle” may be that landscapes *per se* are not a kind of property that is explicitly eligible for the National Register. Landscapes, of course, can qualify as districts.

The NPS initiative on Native American Cultural Landscapes began with government-to-government consultation to consider the development of a new guidance document on the subject and the revision of *Bulletin 38*, or possibly the development of a single guidance document dealing with both subjects. NPS has also published a request for comments on this initiative. NPS, Request for Comments, 77 Fed. Reg. 47,875 (Aug. 10, 2012); extension of comment period [www.nps.gov/nr/publications/guidance/TCP\\_comments.htm#extension](http://www.nps.gov/nr/publications/guidance/TCP_comments.htm#extension).

The BLM has also become engaged in the preservation of landscapes, though for reasons other than their historic significance. The National Landscape Conservation System (NLCS) was established within the BLM by Secretarial Order in 2000 and was given statutory authorization in the Omnibus Public Lands Management Act of 2009. Pub. L. NO. 111-11, § 2002, 123 Stat. 1095. The reasons for establishing the NLCS are to “conserve, protect, and restore nationally significant landscapes that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations.” *Id.* The BLM has released a strategy document for how it plans to manage the NLCS, a document that, at many points, calls for the inclusion of tribes in implementing the strategy. BLM, THE NATIONAL LANDSCAPE CONSERVATION SYSTEM: 15-YEAR STRATEGY, 2010–2025 (2011), *available at* [www.blm.gov/wo/st/en/prog/blm\\_special\\_areas/NLCS.html](http://www.blm.gov/wo/st/en/prog/blm_special_areas/NLCS.html).

While these federal agency landscape initiatives may be perceived by tribes as glimmers of hope, tribal staff, and THPOs know from experience that using the section 106 process to protect TCPs is challenging. Trying to protect whole landscapes is bound to be even harder.

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## The new wave of proposed wind farms and solar facilities present challenges on a different scale.

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Another glimmer of hope can be seen in a multiagency Memorandum of Understanding “Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites” (Dec. 2012) (Sacred Sites MOU), *available at* [www.achp.gov/docs/SacredSites-MOU\\_121205.pdf](http://www.achp.gov/docs/SacredSites-MOU_121205.pdf). Among the actions that the agencies “agree to work together to accomplish” is to establish management practices that could include “Federal-tribal partnerships in conducting landscape level cultural geography assessments.” *Id.* In another recent development worth noting, the Department of Agriculture has released its Report to the Secretary of Agriculture. USDA POLICY AND PROCEDURES REVIEW AND RECOMMENDATIONS: INDIAN SACRED SITES (Dec. 2012), *available at* [www.fs.fed.us/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf](http://www.fs.fed.us/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf).

The challenges to tribal cultural resources departments are great, however, and whether the signing of the *Sacred Sites* MOU or the release of the *USDA Sacred Sites Report* leads to real changes in the behavior of federal agencies remains to be seen. From a tribal perspective, representatives of federal and state agencies often seem to serve as brokers of sorts for development projects and resource extraction industries, especially on lands managed with an ostensible “multiple-use” mandate such as BLM lands and National Forests. Managers of such multiple use lands have allowed countless mines, oil and gas wells and pipelines, rock and gravel quarries, communications facilities, electricity transmission lines, and commercial forestry activities. Such facilities may scar the landscape for generations, although disruptions of cultural landscapes can sometimes be avoided or limited if tribal consultation occurs early enough.

The new wave of proposed wind farms and solar facilities, however, present challenges on a different scale. Such projects may occupy tens of thousands of acres. Although such projects can produce electric power without carbon dioxide emissions, tribes may still find them objectionable where they would disrupt cultural landscapes. Whether such adverse effects can be mitigated by measures short of choosing a different location remains to be seen. In any case, early tribal consultation is essential.

### ***Contracting with Tribes***

One way to engage a tribe early in the planning process is to pay for the tribe’s help in identifying historic properties. As explained in the *ACHP Handbook*, it is perfectly appropriate for an agency or applicant to pay a tribe for providing “specific information and documentation regarding . . . individual sites, or . . . to request that a survey be conducted by the tribe. In doing so, the 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.” *ACHP Handbook*, at 12. The *Sacred Sites* MOU calls for the signatory agencies to identify “contracting mechanisms for obtaining tribal expertise.” *Sacred Sites* MOU, at 3.

The *Sacred Sites* MOU also calls for the signatory agencies to develop “recommendations for addressing confidentiality concerns.” *Id.* at 2. One way to address confidentiality concerns is for contracts with tribes to treat documentation generated by a tribe as its intellectual property, in recognition, as provided in Article 31 of the Declaration, that tribes “have the right to maintain, control, protect and develop their intellectual property over [their] cultural heritage, traditional knowledge and traditional cultural expressions.”

The Hualapai Cultural Atlas, which was initially supported through grants from NPS, is now sustained mainly through contract work, along with assorted grants. Originally

conceived as a management tool for the Tribe’s THPO, the Atlas allows for efficient retrieval of information when federal agencies request consultation, usually related to some type of undertaking. As a GIS application, a buffer around the area of potential effect can be specified and a list of TCPs within that buffer identified. In practice, though, this becomes just a starting point. We have found that there is almost always a good likelihood that new places will be identified and additional knowledge about previously documented places will come to light. It was in light of this realization that the HDCR decided to pursue its own cultural resource studies in and surrounding project areas, in order to present a more complete and nuanced picture of the cultural landscape. Not only might new places be identified, but a more appropriate evaluation of their significance can be developed. To this end, the HDCR has been fairly successful in obtaining funding (sometimes as a subcontractor) to conduct ethnohistorical and archaeological research. This approach has had positive results in that HDCR receives financial support for fieldwork and report preparation, which contrasts with typical section 106 consultation, where there are considerable financial and staffing burdens on tribal cultural departments. In addition to providing better information for proposed undertakings, the contracting approach also helps in fashioning more appropriate mitigation measures to resolve potential adverse effects to TCPs.

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As these efforts by HDCR continue, a cumulative augmentation of the Cultural Atlas has taken place. Its scope has evolved from a management tool into a genuine tribal community resource. Like other Indian tribes, the Hualapai people face a host of challenges in maintaining and revitalizing their culture, and the Cultural Atlas is a profoundly important resource. While cultural survival is of primary importance to the Hualapai people, the larger American society benefits as well. America is enriched by the survival, and by the flourishing, of each and every Indian tribe. 🌳