Consulting with Tribes for Off-Reservation Projects

Dean B. Suagee

Renewable energy projects are springing up all over. If we are going to have any hope of reducing greenhouse gas emissions on the scale needed to avoid the more catastrophic effects of global climate change, we need a real commitment to energy efficiency, and we also need to ramp up our use of renewable energy. We have reason to believe that renewable energy and energy efficiency can provide more employment opportunities than continued reliance on fossil fuels and other conventional energy resources. What's not to like?

Well, for one thing, some of the places where people propose to build utility-scale renewable energy projects and associated transmission lines just happen to be in places, or landscapes, that hold religious and cultural significance for Indian tribes. A landscape that looks empty to someone from a perspective grounded in the dominant American culture might be holy ground for someone rooted in a tribal religious tradition. The sacredness of such a place might have something to do with its apparent emptiness. Maybe the emptiness is important for tribal members to perform certain ceremonies or other religious practices. Maybe medicine plants grow there, or it might be a habitat for culturally important wildlife. The landscape may include unmarked burials, and tribes generally regard the graves of ancestors as sacred. A tribe's oral tradition may include stories about important events that occurred in the landscape, some of which may reach back to the tribe's origin as a people.

It is generally true that the environmental impacts associated with renewable energy projects are an order of magnitude or two less intense than the impacts of activities associated with fossil fuels, such as mountaintop removal mining, ordinary run-of-the-mill strip mining, or the extraction of oil from tar sands. But wind farms do cover a lot of space, and the footprint of a concentrating solar thermal power plant can also cover a lot of space. Geothermal projects have the potential to disrupt hydrological features such as hot springs, and hot springs may be regarded as sacred places.

Not that all, most, or even very many renewable energy projects will raise objections or concerns from tribes. Indeed, many tribes have built or are planning their own utility-scale renewable energy projects. *See, e.g.*, Michael L. Connolly, *Commercial Scale Wind Industry on the Campo Indian Reservation*, Nat. Res. & Env't. 25 (Summer 2008). Such projects barely scratch the surface of the ways that tribal renewable energy could contribute to our national energy future. The Department of Energy's (DOE's) Tribal Energy Program has information on a number of renewable energy projects sponsored by tribes with DOE assistance. http://apps1.eere.energy.gov/tribalenergy. Moreover, given the kinds of impacts that tribal cultures will suffer from climate change, tribes have much to gain from helping to realize the transition to a renewable energy future. *See* Dean B. Suagee, *Tribal-Self-Determination in a Low-Carbon Economy*, Nat. Res. & Envt. 58 (Winter 2010). Maybe as alternatives to or in conjunction with centralized solar power projects, tribes could help develop the potential for distributed photovoltaics on reservation rooftops and parking lots.

Tribal concerns about or opposition to a project can cost time and money even if a project ultimately gets built. To reduce such risks, it is critically important to engage in meaningful consultation with concerned tribes and to do so early. If a federal agency has jurisdiction over a renewable energy project, a proposed "federal or federally-assisted undertaking" in the parlance of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470 *et seq.*, then federal law *requires* the agency to consult with any concerned tribe or Native Hawaiian organization, and to do so early. More specifically, NHPA section 101(d)(6), 16 U.S.C. § 470a(d)(6), requires the agency "to consult with any tribe or Native Hawaiian organization that attaches religious and cultural significance" to any historic property that would be affected by the proposed undertaking. A "historic property" is one that is "included in, or eligible for the inclusion on" the National Register of Historic Places. 16 U.S.C. § 470w(5). This consultation is supposed to take place within the framework of the NHPA Section 106 process, 16 U.S.C. § 470f, as implemented through the regulations of the Advisory Council on Historic Preservation (ACHP). 36 C.F.R. pt 800.

The ACHP regulations require agencies to seek the involvement of concerned tribes and Native Hawaiian organizations at each step in the process. For example, at the first step of the Section 106 process the responsible federal agency "shall 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. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one." § 800.3(f)(2).

Like the National Environmental Policy Act (NEPA), NHPA is a procedural law–once a federal agency has fulfilled the procedural requirements, the statute does not prohibit adverse effects on a historic property. There are two provisions in Section 110, however, that do give the statute something almost like having teeth. One of those provisions states that if the federal agency has not entered into an agreement pursuant to the ACHP regulations, the decision to proceed with the undertaking can only be made by the head of the agency, i.e., it cannot be delegated. 16 U.S.C. § 470h-2(l). Another provision that is almost like teeth applies to National Historic Landmarks. If the undertaking would affect such a historic property, "the head of the responsible agency shall, *to the extent possible*, undertake such planning and actions as may be necessary to *minimize harm* to such landmark." 16 U.S.C. § 470h-2(f) (emphasis added). Like NEPA, however, the real teeth of NHPA can be thought of as the availability of injunctive relief when an agency fails to fulfill the procedural requirements.

In addition to NHPA, projects on federal land may encounter sites that are subject to the inadvertent discovery and

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intentional excavation provisions of the Native American Graves Protection and Repatriation Act (NAGPRA). 25 U.S.C. § 3002. This law provides that if a person inadvertently discovers Native American graves on federal land the activity in the area of the discovery must stop, generally for at least thirty days, while the federal agency consults with the appropriate tribes and decides what to do. This could mean excavation and reburial. (NAGPRA applies somewhat differently within reservation boundaries.) NAGPRA does not include any proactive requirements to identify such burial sites ahead of time. The NHPA consultation process, however, can be used to gather information about where burials may be located so that likelihood of encountering such areas can be reduced.

The NHPA requirement to consult with tribes was enacted in 1992. Pub. L. No. 102-575, tit. XL. Implementing regulations have been in place since 1999. 64 Fed. Reg. 27,043 (May 18, 1999); *republished* 65 Fed. Reg. 77,697 (Dec. 12, 2000). NAGPRA, with its graves protection provisions, was enacted in 1990, Pub. L. No. 101-601, with final rules issued in 1995. 60 Fed. Reg. 62,134 (Dec. 4, 1995) (codified at 43 C.F.R. pt. 10). In addition, it has been two decades since the National Park Service, the agency that administers the National Register, issued a guidance document on how to identify and evaluate the variety of historic property known as "traditional cultural properties" (TCPs). National Park Service, National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties, *available at* www.nps.gov/history/nr/publications/bulletins/nrb38/. Federal agencies, especially land managing agencies, should be expected to be familiar with this body of law. *See generally* Cohen's Handbook of Federal Indian Law § 20.02 (2005 ed.). Many tribes have established Tribal Historic Preservation Officer (THPO) programs, which are tribal sources of expertise in cultural resources management. *See generally* National Association of Tribal Historic Preservation Officers, www.nathpo.org.

Some federal agencies have been quicker and better than others in learning how to consult with tribes in the NHPA Section 106 process. A number of agencies have entered into agreements in which the ACHP is a party and in which, at least on paper, provisions are included to engage tribes in consultation. One such example is a Memorandum of Understanding among nine federal agencies, including the ACHP, regarding "Coordination of Federal Agency Review of Electric Transmission Facilities on Federal Land" (Oct. 2009), *available at* www.achp.gov/news091029.html. Under that MOU, the lead agency for any given project is responsible for facilitating a "pre-application meeting for prospective applicants and relevant federal and state agencies and Tribes to communicate key issues of concern." *Id.* at 5. In addition, the Bureau of Indian Affairs, within the Department of the Interior, "will facilitate contact with tribes likely to be affected by qualifying transmission projects and ensure that tribal interests are represented and considered." *Id* at 10. Time will tell how well this works.

Some examples can be cited in which the agency's performance left something to be desired. One such example is the wind farm project proposed to be located in Nantucket Sound by Cape Wind Associates, LLC. On April 28, 2010, Secretary of the Interior Ken Salazar approved this project, after having "terminated" the Section 106 process, and asked the ACHP for its comments. The ACHP had issued comments recommending that the Secretary not approve the project. *See* www.achp.gov. This recommendation was based in part on concerns of two tribes, the Wampanoag Tribe of Gay Head and the Mashpee Wampanoag Tribe. ACHP found that consultation with the Tribes by the Minerals Management Service (MMS) and Army Corps of Engineers was "tentative, inconsistent, and late." *Id.* at 4. The tribes had "clearly identified their concerns about the effects of the undertaking on TCPs and about the importance of Nantucket Sound as a TCP and the location of former aboriginal lands in 2004," but it was not until 2009 that MMS "took steps to remedy deficiencies in the tribal consultation process." *Id.* at 4–5. Regardless of Secretary Salazar's ultimate decision, the project may live on as an example of how not to do consultation with tribes.

Federal agencies that use NEPA documents for NHPA compliance must pay attention to requirements of the ACHP regulations. 36 C.F.R. § 800.8. For example, an agency can use the NEPA scoping process to identify potential consulting parties, as long as the results are consistent with Section 800.3(f). As quoted earlier, that section requires the agency to "make a reasonable and good faith effort" to identify concerned Indian tribes and invite them to be consulting parties. If an environmental impact statement is prepared for a proposed project, the lead federal agency may invite concerned tribes to be cooperating agencies. *See* 40 C.F.R. §§ 1501.6, 1508.5. In light of their special expertise regarding impacts on places that have religious and cultural significance, tribes will generally qualify to serve as cooperating agencies. In this role, tribes can actively help to develop alternatives to avoid or mitigate adverse effects.

By engaging tribes early in the review process, the risk of delays in federal approvals for renewable energy projects can be reduced, and some projects might even be improved. Our national historic preservation program will also benefit, by documenting and preserving some of the places that are important for tribal cultures. The history of each Indian tribe is, after all, an important part of the history of the American people.

Mr. Suagee is of counsel to Hobbs, Straus, Dean & Walker, LLP, in Washington, D.C., and a member of the editorial board of* Natural Resources & Environment. *He is a citizen of the Cherokee Nation. He may be reached at dsuagee@hobbsstraus.com.