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The Efficacy of State Law in Protecting Native American Sacred Places: A Case Study of the Paseo Del Norte Extension

ABSTRACT

This article explores the legal and political history of the Paseo Del Norte extension through Petroglyph National Monument in Albuquerque, New Mexico. The underlying theme is protection of Native American sacred sites on public land and how the law can help or hinder protection.

INTRODUCTION

Native Americans have a long history of occupation in what is now the United States. Prior to the arrival of Europeans, the United States was home to many different tribes, each with their own unique cultural practices. Then, Europeans forcefully introduced the concept of land ownership through property law, and in the process determined which areas of the landscape would be occupied and “owned” by which tribe. This long and contentious history of land allocation between tribes and European colonists ultimately resulted in a contraction of the land area “owned” by tribes. As a result, non-tribal agencies and individuals managed large land areas containing tribal ancestral and sacred places.

Native American Tribes have made various attempts to use the legal system to either regain control of lands that were once theirs or, at the very least, encourage government agencies to consider the impacts of their actions on areas that tribes still hold sacred and still use. Tribes have had mixed success with gaining meaningful opportunities to participate in agency land use decisions impacting tribal sacred places. This article explores whether and how Native American Tribes can use the legal system to affect local government land use decisions impacting sacred sites. The

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Paseo Del Norte road extension through Petroglyph National Monument (Monument) on the west side of Albuquerque, New Mexico serves as a case study and also illustrates what went wrong with the laws designed to protect tribal sacred places.

Petroglyph National Monument was designated in 1990,¹ with a portion of the Monument removed from federal jurisdiction and transferred to the City of Albuquerque (City) in 1998² in anticipation of the Paseo Del Norte extension. After spending several years in the planning process, the City tried to move forward with road construction in 2004. This precipitated a lawsuit against the City by SAGE Council,³ an advocacy organization for minority communities on socioeconomic and political issues, and other plaintiffs. These parties claimed that the City had violated the New Mexico Cultural Properties Act when it failed to consider less destructive alternative alignments that would bypass the Monument. In *SAGE Council v. Chavez*,⁴ the court granted summary judgment in favor of the City and road construction was allowed to proceed. While the lawsuit was based solely on the alleged violation of the New Mexico Cultural Properties Act, the project's long history implicated other federal environmental laws as well as issues related to tribal consultation.

This article tracks the various legal and legislative issues leading to the ultimate decision to extend Paseo Del Norte through the Monument and evaluates what the results of this situation portend for protection of sacred sites on public land in general and state land in particular. Beginning with a discussion of the unique nature of Native American sacred sites and a description of the Paseo Del Norte extension (Paseo extension) project through the Monument, the following section describes the Monument itself, including the purposes for its creation and the legal implications of the Monument's designation with respect to federal and state laws that were supposed to protect it from encroachment by surrounding development. Next, the legislative and administrative processes involved in the planning process for the road extension are described since they are a necessary backdrop for understanding the legal foundations for the

1. Petroglyph National Monument Establishment Act of 1990, Pub. L. No. 101-313, 104 Stat. 272, 272-78.

2. Petroglyph National Monument Boundary Adjustment Act, Pub. L. No. 105-174, § 3005, 112 Stat. 58, 82-85 (1998).

3. SAGE Council (Sacred Alliance for Grassroots Equality) is a community organization led by Native Americans and people of color committed to gaining opportunities for these communities to participate in the social, economic, and political decisions affecting them. Sacred Alliance for Grassroots Equality, <http://www.sagecouncil.org/about.html> (last visited Nov. 20, 2007).

4. See Memorandum Opinion and Order, *SAGE Council v. Chavez*, No. CV-2005-01379 (N.M. 2d Dist. Ct. filed Oct. 11, 2005) (on file with Natural Resources Journal).

ensuing litigation. Then the effects of the litigation on the project planning process, the City's tribal consultation efforts, and the ultimate failure of state law to prevent development from encroaching on the Monument are discussed. Finally, the article concludes with an assessment of the efficacy of New Mexico state laws for protecting Native American sacred sites.

Native American Sacred Places

Native American religious beliefs and practices cannot be generalized into a few characteristics that hold true for all tribal groups in the United States, or even for all tribes in a particular state. One theme, however, distinguishes most Native American religions from western monotheistic religions. That theme is Native American Tribes' focus on the importance of place in their religious practices.⁵ Specific rituals are performed in specific places because these places have their own "spiritual properties and significance."⁶ Even the Spanish colonizers in the American Southwest recognized the Native American "belief in a sacred and indissoluble bond between themselves and the land in which their settlements were located."⁷ This "bond" is not one of attachment to the land as a commodity⁸ but rather represents a spiritual connection with the land based on the meaning that a particular place has for the associated Native American Tribe.

The Tewa world view illustrates the belief of the inherent sacredness of a particular place on the landscape. The six Tewa Pueblos are located in the Northern Rio Grande valley between Espanola and Santa Fe in northern New Mexico, approximately 75 miles from the Monument. The Tewa, who claim an association with the Monument, conceptualize the world through "multiple symbolic referents" that include landforms, plants, animals, colors, and spirits tied to the four cardinal directions.⁹

There are four levels to this cosmological system (four levels of being) beginning with the level delineating the exterior boundary of the Tewa world and moving progressively inward toward the community center. The four sacred mountains at each of the cardinal directions mark the exterior boundaries of the Tewa world. Each mountain has certain

5. ARLENE HIRSCHFELDER & PAULETTE MOLIN, *THE ENCYCLOPEDIA OF NATIVE AMERICAN RELIGIONS* 251 (1992).

6. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458-77 (1988) (Brennan, J., dissenting).

7. EDWARD H. SPICER, *CYCLES OF CONQUEST* 576 (1962).

8. Jack F. Trope & Dean B. Suagee, *Tribal Sacred Places and American Values*, 17 *NAT. RESOURCES & ENV'T* 102 (2002).

9. ALFONSO ORTIZ, *THE TEWA WORLD: SPACE, TIME, BEING, AND BECOMING IN A PUEBLO SOCIETY* 16-20 (1969).

sacred characteristics including a lake inhabited by the spirits representing the "highest order" deities¹⁰ and an "earth navel" occupied by the spirits that watch over the Tewa world.¹¹ The next level is marked by the low hills in each of the cardinal directions. Each hill has either a cave or tunnel occupied by masked deities that also watch over the Tewa world.¹² The third level is marked by shrines constructed outside each of the Tewa villages at each cardinal direction occupied by souls and other spirits associated with objects used by Tewa people in the past.¹³ The fourth level is represented by the plaza within the village itself where public rituals are performed at least four times, linking the rituals to the four levels of being and the four cardinal directions.

This larger manifestation of the four levels of being in the Tewa world is recreated at the village level itself by the architecture and placement of dwellings, plazas, and ritual structures known as kivas.¹⁴ In the cardinal landscape, the village is located in the center. Within the village, the buildings surrounding the plaza represent the four sacred mountains and the kiva in the plaza is the center. This illustrates that the landscape, especially the sacred mountains, is so important to the Tewa people that they deliberately build their villages so that the surrounding landscape symbolism is brought into the central plaza such that community members are not separated from the natural sacred symbolism around them.¹⁵

This discussion of Tewa symbology illustrates both the close connection of the Tewa people to the landscape and the inherent sacred nature of specific places in Tewa cosmology. The implication of this symbolic organization is that specific locations on the landscape are inherently meaningful such that religious practices associated with these specific locations cannot simply be performed somewhere else. Thus, the effects of a new highway like the Paseo extension through a landscape imbued with this type of religious significance cannot be mitigated simply by moving landscape features such as petroglyphs used in tribal religious practices out of the construction footprint.

10. *Id.* at 19.

11. *Id.*

12. *Id.*

13. *Id.* at 20.

14. Rina Swentzell, *Pueblo Space, Form, and Mythology*, in *PUEBLO STYLE AND REGIONAL ARCHITECTURE* 23, 27-29 (Nicholas C. Markovich et al. eds., 1990).

15. Tony Anella, *Learning from the Pueblos*, in *PUEBLO STYLE AND REGIONAL ARCHITECTURE*, *supra* note 14, at 31, 39.

Petroglyph National Monument, Las Imagines Archaeological District, and the Paseo Extension

The area surrounding the Monument and Las Imagines Archaeological District (District) is dominated by residential development with few opportunities for local employment, resulting in traffic congestion during peak commuting hours that taxes the area's current road system.¹⁶ The Paseo extension allows residents living west of the Monument to cut directly through it as they head east to various employment centers, rather than having to bypass the Monument using routes to the north and/or south. The Paseo extension through the Monument is a four-lane, 1.6 mile long road that includes enough additional right-of-way for a future six-lane expansion dependent on future traffic demands.¹⁷ The entire roadway corridor is located on land owned by the City of Albuquerque that was removed from the original Monument designation by congressional act in 1998. The road also passes through a section of the Las Imagines Archaeological District, which is listed on the National Register of Historic Places and the New Mexico State Register of Cultural Properties and contains numerous archaeological sites along with an extensive collection of petroglyphs.

Congress created the Monument in 1990 "[i]n order to preserve, for the benefit and enjoyment of present and future generations, that area in New Mexico containing the nationally significant West Mesa Escarpment, the Las Imagines National Archaeological District...and other significant natural and cultural resources...."¹⁸ The Act recognized the importance of the petroglyph concentrations located within the Monument boundaries by establishing a "Rock Art Research Center" to support research and interpretation of the petroglyphs, in cooperation with Indian tribes and educational institutions.¹⁹ Primary management and administrative responsibility for the Monument vests in the Secretary of the Interior; however, if the Monument is expanded, the Secretary may share responsibilities for the expanded sections with either the State of New Mexico or the City of Albuquerque.²⁰ An archaeological survey of approximately half of the 7,244-

16. N.M. MID-REGION COUNCIL OF GOVERNMENTS, A TRANSPORTATION ANALYSIS OF THE PASEO DEL NORTE EXTENSION AND OTHER ALTERNATIVES FOR NORTHWEST ALBUQUERQUE 4 (2004) (on file with Natural Resources Journal) [hereinafter N.M. MID-REGION COUNCIL].

17. CITY OF ALBUQUERQUE PUB. WORKS DEP'T, UNSER MIDDLE TRANSPORTATION CORRIDOR RECORD OF DECISION 1 (1993) (on file with Natural Resources Journal) [hereinafter RECORD OF DECISION].

18. Petroglyph National Monument Establishment Act of 1990, Pub. L. No. 101-313, § 102(a), 104 Stat. 272, 273.

19. *Id.* § 109.

20. *Id.* § 102(b).

acre Monument recorded 214 archaeological sites and 270 petroglyphs.²¹ A 2004 archaeological survey of the Paseo extension corridor recorded one archaeological site and four petroglyphs immediately in the path of the road.²²

The District consists of more than 10,000 documented prehistoric and historic petroglyphs and 65 archaeological sites.²³ The prehistoric petroglyphs are attributed to Ancestral Pueblo groups²⁴ that occupied the area between 1100 and 1600 A.D. The historic petroglyphs are most likely associated with early Spanish occupation of the Albuquerque area in the eighteenth century. The District was established in 1986, four years prior to the establishment of the Monument, and encompasses the West Mesa escarpment. Most of the District is now included within the Monument boundary.

A comprehensive 2002 ethnographic study of the Monument/District included interviews with several tribes and residents of traditional Hispanic communities and revealed a long history of traditional use of the area.²⁵ Eastern Pueblos, Western Pueblos, Navajos, and Apaches all have associations with the Monument and continue to visit it in the present day for religious purposes. Traditional Hispanic communities also identify the Monument as a place with particular traditional associations. Thus, land use decisions affecting Monument characteristics could have implications for traditional activities carried out by the diverse cultural groups that attach ritual and cosmological significance to specific locations within Monument boundaries.

21. James M. Brandi, Results of the 1992-1994 Archaeological Resources Inventory: Petroglyph National Monument, New Mexico (1999) (unpublished manuscript, on file with Natl. Park Serv., Petroglyph Natl. Monument, Albuquerque, N.M.) (cited in Raymond, *infra* note 22, at 13).

22. Gerry Raymond, Testing and Data Recovery Plan for LA 145756 and Petroglyph Loci in the Proposed Paseo Del Norte Roadway Extension, City of Albuquerque, Bernalillo County, New Mexico 13 (May 26, 2005) (unpublished manuscript, on file with Natural Resources Journal).

23. See Matthew F. Schmader & John D. Hays, Las Imagines: The Archeology of Albuquerque's West Mesa Escarpment (Sept. 10, 1986) (unpublished National Register Nomination, on file with Natural Resources Journal).

24. "Ancestral Pueblo" refers to the prehistoric ancestors of modern eastern and western Pueblo groups. Eastern Pueblos include Tewa (San Juan, San Ildefonso, Santa Clara, Nambe, Tesuque, Pojoaque); Northern Tiwa (Taos, Picuris); Southern Tiwa (Sandia, Isleta); Towa (Jemez); and Keres (Cochiti, Santo Domingo, San Felipe, Santa Ana, Zia, Acoma, Laguna). Western Pueblos include Zuni and Hopi. See generally HANDBOOK OF NORTH AMERICAN INDIANS, VOLUME 9: SOUTHWEST (Alfonso Ortiz ed., 1979).

25. See generally Kurt F. Anschuetz et al., "That Place People Talk About": The Petroglyph National Monument Ethnographic Landscape Report (May 10, 2002) (unpublished manuscript, on file with Natl. Park Serv. Petroglyph Natl. Monument, Albuquerque, N.M.).

The travel benefits realized by the Paseo extension seem to pale in comparison with the permanent impacts to two important traditional cultural places like Petroglyph National Monument and Las Imagines Archaeological District. Nevertheless, the Paseo extension is being built, prompting the question: What went wrong with the laws designed to protect tribal sacred places?

LAWS RELATING TO NATIVE AMERICAN SACRED SITES

Federal Laws

National Environmental Policy Act

The purpose of the National Environmental Policy Act (NEPA) is the implementation of a national policy encouraging a productive and harmonious relationship between humans and their environment and the promotion of efforts to minimize or eliminate damage to the environment from governmental actions.²⁶ If any federal agency is proposing an activity that has the potential to impact the quality of the human environment, NEPA requires that the agency prepare a document discussing a detailed analysis of the environmental impact of the proposed action, any adverse effects to the environment that cannot be avoided, and reasonable alternatives to the proposed action.²⁷

NEPA's implementing regulations provide guidance to federal agencies regarding practical application of the law stated above and include the legally sufficient requirements for preparation of NEPA documents and for involving the public in the NEPA process.²⁸ NEPA is a procedural law because it prescribes the necessary process an agency must follow to evaluate a proposed action's potential effects on the environment rather than mandating a particular substantive result.²⁹ Thus, individuals cannot bring a lawsuit against a federal agency alleging NEPA violations simply because they are unhappy with the agency's decision resulting from the NEPA process. To have a cause of action under NEPA, the plaintiff's complaint must allege a legal flaw in the process the agency followed to comply with NEPA such that the agency's final decision was reached without a complete understanding of the true effects of the action on the quality of the environment.

26. See 42 U.S.C. §§ 4321 et seq. (2000).

27. See *id.* § 4332(C).

28. NEPA's implementing regulations are found at 40 C.F.R. §§ 1500 et seq. The specific requirements for an Environmental Impact Statement are found at 40 C.F.R. 1502 (1977).

29. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

National Historic Preservation Act

The National Historic Preservation Act (NHPA) was established to implement a program for preservation of historic properties across the United States for reasons including the ongoing loss and alteration of properties important to the nation's heritage and to orient the American people to their cultural and historical foundations.³⁰ The NHPA directs federal agencies to take into account the effects of their undertakings on historic properties listed on or eligible for listing on the National Register of Historic Places.³¹ A federal undertaking is any action requiring federal funding, licensing, or permitting that has the potential to affect historic properties. Regulations implementing NHPA set forth the practical procedures for agency compliance with "section 106," which include (1) identifying historic properties potentially affected by the undertaking; (2) assessing the undertaking's effects on those properties; and (3) seeking ways to avoid, minimize, or mitigate adverse effects to historic properties.³²

The NHPA is similar to NEPA in two ways. First, the NHPA is a procedural law prescribing the process an agency must follow to identify, evaluate, and assess the effects of a proposed undertaking on historic properties; this process includes a requirement for public participation. Second, individuals cannot bring a lawsuit against an agency for violation of the NHPA based on disagreement with the agency's decisions regarding the undertaking's effects on historic properties. To have a cause of action under NHPA, the plaintiff's complaint must allege a legal flaw in the process the agency followed in identifying or evaluating historic properties and/or considering the effects of the undertaking on eligible historic properties such that, at the completion of the section 106 process, the agency lacks a true understanding of the impacts to historic properties.

Religious Freedom Restoration Act

The Religious Freedom Restoration Act (RFRA) is a law of general applicability prohibiting governmental action that substantially burdens a person's exercise of their religion unless the government's action is the least restrictive means of serving a compelling governmental interest.³³ The

30. See 16 U.S.C. § 470 (2000).

31. See *id.* § 470f. This section is commonly referred to as "section 106" of the NHPA.

32. See 36 C.F.R. § 800.1 (2000). The full scope of the section 106 procedure is found in 36 C.F.R. §§ 800.3-800.6.

33. *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866, 903 (D. Ariz. 2006) (citing 42 U.S.C. § 2000bb-1(b)).

plaintiff has the burden of establishing a prima facie case³⁴ under RFRA by demonstrating that a governmental activity substantially burdens his ability to freely exercise his religion. Once the plaintiff has established his prima facie case, the burden shifts to the defendant to demonstrate a compelling governmental interest in the proposed action and that the least restrictive means are being employed to meet that interest. RFRA does not provide a definition of a "substantial burden" because Congress expected courts to rely on pre-1990³⁵ free exercise cases for guidance in determining whether a government action has substantially burdened the free exercise of religion.³⁶

Unlike both NEPA and NHPA, RFRA is not a procedural law but instead was enacted by Congress to protect the free exercise of minority religions.³⁷ RFRA does not protect religious activities when they conflict with the federal government's use of its own land because the courts have held that land use activities do not constitute burdens on religion.³⁸

American Indian Religious Freedom Act

The American Indian Religious Freedom Act (AIRFA) establishes federal policy protecting and preserving the religious beliefs and practices of Native Americans primarily by encouraging federal agencies not to limit a tribe's access to sacred sites.³⁹ The second section of AIRFA directs federal agencies responsible for administering relevant laws to evaluate their policies in consultation with Native American tribes to ensure the protection of Native American religions. Congress intended AIRFA as a remedial action to correct the federal government's and judiciary's prior lack of concern with and support for Native American religious rights.⁴⁰ While the legislative history for AIRFA is replete with strong support from both House and Senate members for the religious rights of Native Americans,⁴¹ the Act does not create a private right of action and so "has no teeth to it."⁴²

34. A "prima facie case" is when a party produces enough evidence for a trier of fact "to infer the fact at issue and rule in the party's favor." BLACK'S LAW DICTIONARY 1228 (8th ed. 2004).

35. Congress is referring to free exercise cases decided before *Employment Division v. Smith*, 494 U.S. 872 (1990).

36. See S. REP. NO. 103-111, at 8-9 (1993).

37. Shawna Lee, *Government Managed Shrines: Protection of Native American Sacred Site Worship*, 35 VAL. U. L. REV. 265, 289 (2000).

38. *Id.* at 291.

39. See 42 U.S.C. § 1996 (2000).

40. Joshua D. Rievman, *Judicial Scrutiny of Native American Free Exercise Rights: Lyng and the Decline of the Yoder Doctrine*, 17 B.C. ENVTL. AFF. L. REV. 169, 181 (1989) (citation omitted).

41. *Id.* at 182-83.

42. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988).

Because AIRFA's primary intent is to explicitly recognize a federal policy of greater sensitivity to Native American religious concerns as they intersect with federal decision making about public lands, the Act does not specifically prohibit federal land management agencies from adopting land use plans that conflict with Native American beliefs or practices.⁴³ Therefore, an agency action on public land that would lead to the virtual destruction of a tribe's ability to practice its religion would not necessarily be prohibited under AIRFA.⁴⁴

Section 4(f) of the Department of Transportation Act

Section 4(f) of the Department of Transportation Act (section 4(f)) provides that the Secretary of Transportation may not approve a federal transportation project that will "use" publicly owned land from an historic site of national, state, or local significance unless "there is no prudent and feasible alternative to using that land; and the program or project includes all possible planning to minimize harm to the...historic site resulting from the use."⁴⁵ Only those historic properties eligible for listing or listed on the National Register and subject to "use" by a proposed transportation project are protected under section 4(f).⁴⁶ Historic properties can be used by a transportation project in one of two ways: direct use and constructive use. Direct use occurs when "land [from an historic property] is permanently incorporated into a transportation facility"; constructive use occurs when "the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under Section 4(f) are substantially impaired."⁴⁷

In determining whether an agency has violated section 4(f), courts use a three-part inquiry established in *Citizens to Preserve Overton Park v. Volpe*.⁴⁸ First, the court must decide whether the Secretary acted within the scope of his authority.⁴⁹ Second, the court must determine whether the decision made was a clear error in judgment.⁵⁰ Finally, the court must determine whether the Secretary's action followed the necessary procedures.⁵¹ As discussed below, this federal court review procedure has

43. DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 751 (5th ed. 2005).

44. *Lyng*, 485 U.S. at 451-52.

45. 49 U.S.C. § 303(c).

46. 23 C.F.R. § 771.135(a)(1)(e).

47. *Id.* § 771.135(p)(1)(i)-(p)(2).

48. 401 U.S. 402, 415-17 (1971).

49. *Id.*

50. *Id.*

51. *Id.*

been adopted by the New Mexico state courts for review of state Preservation Act violations.

State Laws and Executive Orders

The New Mexico Prehistoric and Historic Sites Preservation Act

The New Mexico Prehistoric and Historic Sites Preservation Act (Preservation Act) was enacted to promote the "acquisition, stabilization, restoration or protection of significant prehistoric and historic sites by the state of New Mexico and corporations."⁵² New Mexico's Preservation Act is modeled after the federal section 4(f) act discussed above, and the New Mexico Court of Appeals has held that the federal Section 4(f) law can be used as guidance for construing the Preservation Act.⁵³ The Preservation Act provides that

[n]o public funds of the state or any of its agencies or political subdivisions shall be spent on any program or project that requires the use of any portion of or any land from a significant prehistoric or historic site unless there is no feasible and prudent alternative to such use, and unless the program or project includes all possible planning to preserve and protect and to minimize harm to the significant prehistoric or historic site resulting from such use.⁵⁴

Only those prehistoric and historic sites listed on either the State Register of Cultural Properties or the National Register of Historic Places are protected by the Preservation Act.⁵⁵ Enforcement of the Preservation Act is through "an action for injunction or other appropriate relief in a court of competent jurisdiction."⁵⁶ The implementing regulations for the Preservation Act allow the State Historic Preservation Officer or "any other interested person" to bring an action for the Act's enforcement.⁵⁷ In evaluating whether a violation of the Preservation Act has occurred, state courts will follow the same three-tiered inquiry as used for the evaluation of federal Section 4(f) claims.⁵⁸

52. NMSA 1978, § 18-8-2 (1989). The act in its entirety is encompassed by sections 18-8-1 through 18-8-8.

53. *Nat'l Trust for Historic Pres. v. City of Albuquerque*, 117 N.M. 590, 596 (Ct. App. 1994).

54. NMSA 1978, § 18-8-7 (1989).

55. *Id.* at 18-8-3C (2004). Prehistoric and historic sites that are "eligible" for listing but have not been officially listed on either the state or national registers are not protected by the Preservation Act.

56. NMSA 1978, § 18-8-5B (1989).

57. 4 NMAC 10.12.13.

58. Memorandum Opinion and Order, *supra* note 4, at 17.

The implementing regulations of the Preservation Act provide guidance for the governmental project proponent sufficient to demonstrate consideration of any prudent and feasible alternatives to use of the historic property.⁵⁹ If no such alternatives are available, the project proponent must then produce a plan to minimize harm to the affected historic property, which may require additional public hearings to allow the public an opportunity to participate in the planning process.⁶⁰

The New Mexico State Cultural Properties Act

The purpose of the New Mexico State Cultural Properties Act is to "provide for the preservation, protection and enhancement of structures, sites and objects of historical significance within the state, in a manner conforming with, but not limited by, the provisions of the National Historic Preservation Act of 1966."⁶¹ This Act is the state counterpart to the federal NHPA discussed above. Unlike the state Preservation Act, which only protects listed properties, the Cultural Properties Act protects both listed and eligible historic properties. This Act governs the issuance of permits for archaeological excavation on state land⁶² and excavation of ancient human burials on state and private land,⁶³ and provides that any unpermitted excavation of archaeological sites or human burials constitutes larceny punishable by fine and possible imprisonment depending on the monetary value of the disturbed property.⁶⁴

The Cultural Properties Review Committee (CPRC) is responsible for reviewing all applications for archaeological and ancient human burial excavation permits in the state.⁶⁵ When a state or local government project sponsor identifies an eligible archaeological property in its project area that cannot be avoided, that agency must apply to the CPRC for an archaeological excavation permit before excavation of the site can occur. The CPRC

59. 4 NMAC 10.12.11.

60. 4 NMAC 10.12.12.

61. NMSA 1978, § 18-6-2 (1969). The act in its entirety is encompassed by sections 18-6-1 through 18-6-23.

62. *Id.* § 18-6-11 (1989).

63. *Id.* § 18-6-11.2 (1989).

64. *Id.* § 18-6-9.1 (1991).

65. *Id.* § 18-6-5 (1986). The CPRC is a nine-member, governor-appointed panel comprised of cultural resource professionals with expertise in prehistoric and historic archaeology, history, architecture, and architectural history; one member of a New Mexico Indian tribe; one member of the general public; and the State Historian. *Id.* § 18-6-4 (2005).

Detailed application, implementation, and reporting requirements for permits are stipulated in 4 NMAC 10.8 (permits to conduct archaeological investigations on state land); 4 NMAC 10.14 (permits for mechanical excavation on private land); 4 NMAC 10.15 (standards for historic property survey and inventory); 4 NMAC 10.16 (standards for excavation and test excavation); and 4 NMAC 10.17 (standards for monitoring).

reviews the application, which consists of a research design stipulating the field procedures to be used and the specific research questions to be addressed. The field procedures must be tailored to the research questions, and the CPRC can deny the permit if a clear relationship between the field procedures and research questions is not present or is unclear. The CPRC holds public bimonthly meetings for permit applications that allow public comment on the permits.

Executive Order – Tribal Consultation and Sacred Site Protection

Executive Order No. 2005-003 pertains to Adoption of Statewide Tribal Consultation Policy on the Protection of Sacred Places and Repatriation.⁶⁶ This Executive Order recognizes the necessity of a tribal consultation process to protect Native American sacred sites and objects from the adverse effects of state actions. The Governor directs eight state agencies to jointly produce a “tribal consultation policy on the protection of sacred places and repatriation” in consultation with tribal governments and the Department of Indian Affairs.⁶⁷ The Executive Order is a mandate for certain state agencies to develop tribal consultation policies; it is not a mandate stipulating that all state agencies must consult with tribes on all proposed activities with the potential to affect tribal sacred places or objects. Furthermore, the Executive Order is silent as to the responsibilities of local governments, such as the City of Albuquerque, with respect to tribal consultation. While the Executive Order demonstrates the Governor’s general concern that state agencies craft policies for consultation with tribes in New Mexico as a means of protecting sacred sites and objects, the Executive Order stops short of mandating that local governments receiving state funds develop plans for tribal consultation. The Executive Order is silent on whether a cause of action is created for tribes such that a tribe could sue the State for not creating a tribal consultation policy in the time allotted by the Order.

Executive Order – Pilot Tribal Consultation Plans

Executive Order No. 2005-004 pertains to State Wide Adoption of Pilot Tribal Consultation Plans.⁶⁸ This Executive Order directs 17 state agencies to adopt tribal consultation plans “to address a specific and single area of the agency’s operations that involve interaction with tribal governments, communities, and/or tribal members within New Mexico” in

66. Adoption of Statewide Tribal Consultation Policy on the Protection of Sacred Places and Repatriation, N.M. Exec. Order No. 2005-003 (Feb. 1, 2005), available at http://www.governor.state.nm.us/orders/2005/EO_2005_003.pdf.

67. *Id.*

68. Statewide Adoption of Pilot Tribal Consultation Plans, N.M. Exec. Order No. 2005-004 (Feb. 1, 2005), available at http://www.governor.state.nm.us/orders/2005/EO_2005_004.pdf.

consultation with tribal governments and the Department of Indian Affairs.⁶⁹ The pilot plan does not apply to all agency activities, rather the plan focuses on only a single program or area within an agency's decision-making jurisdiction. Like the Executive Order discussed above, this Executive Order is also silent regarding the responsibility of local governments to develop tribal consultation plans and on whether the Executive Order creates a cause of action for tribes to sue the State if the pilot consultation plans are not completed by the required deadline.

PLANNING THE PASEO EXTENSION

The EIS Process (1989-1992)

Planning for the larger transportation project (the Unser Middle Project) that would include the Paseo extension began in November 1989,⁷⁰ after the Las Imagines Archaeological District was established but before the creation of Petroglyph National Monument. The purpose of the Unser Middle Project that includes the Paseo extension was to improve "transportation service on the west side of Albuquerque, to relieve existing and future traffic congestion on...area arterials, and to distribute traffic in the most efficient manner to adequately serve east-west travel across the Rio Grande."⁷¹ By November 1992, the City had released a Final Environmental Impact Statement (EIS) for the project that evaluated six possible build alternatives and a "no action" alternative.⁷² All six build alternatives included the Paseo extension, while several alternatives that would have bypassed the Monument were rejected early on in the EIS process because they did not meet the project purpose and need.⁷³ In addition, the City argued that the alternatives that avoided the Monument were not prudent and feasible because of their "extraordinary cost and community disruption, magnitude and degree of other unique impacts and matters of sound engineering."⁷⁴

After early rejection of the alternatives that would have avoided the Monument and selecting an alternative that would require the least amount of land from the Monument, the City proposed several measures to minimize harm to the Monument. These included consolidation of drainage

69. *Id.*

70. Memorandum Opinion and Order, *supra* note 4, at 4.

71. CITY OF ALBUQUERQUE PUB. WORKS DEP'T, UNSER MIDDLE TRANSPORTATION CORRIDOR STUDY FINAL ENVIRONMENTAL IMPACT STATEMENT 2-1 (1992) [hereinafter IMPACT STATEMENT] (on file with Natural Resources Journal).

72. *See generally id.*

73. RECORD OF DECISION, *supra* note 17, at 4.

74. *Id.*

and utility structures in a single corridor, reduction in the escarpment cut-section width, landscaped berms in the escarpment fill-section to mitigate visual impacts, revegetation of disturbed lands in the roadway corridor, and a pedestrian underpass allowing passage between the portions of the Monument north and south of the Paseo extension.⁷⁵ To further minimize harm to the Monument and as a condition of their approval of the alternative selected in the Final Environmental Impact Statement/Record of Decision (FEIS/ROD), the Albuquerque City Council directed the City to examine the possibility of a tunnel through the escarpment as part of the project's final design phase.⁷⁶ A realistic tunnel design never materialized because the City interpreted the Council's directive to mean a tunnel design that would entirely underlie the Monument (including the portion of the proposed roadway at grade), resulting in the portion of the at-grade roadway resembling a giant artificial roof covered with dirt that was prohibitively more expensive and, therefore, not a viable option.⁷⁷

During the EIS process, the City had discussions with and received comments from the general public, the State Historic Preservation Officer (SHPO), the National Park Service (NPS), and Native American tribes. In April 1991, following the City's release of the initial corridor analysis report identifying the six alternatives carried forward for study in the EIS, the SHPO sent a letter to the City indicating that all of the alternatives would result in either partial destruction or alteration to the Las Imagines Archaeological District.⁷⁸ After the City's release of the draft EIS in March 1992, the SHPO sent another letter indicating that the Paseo extension constituted a "use" of the District under the Preservation Act.⁷⁹ The SHPO sent a third letter to the City in June 1993 stating that the City was out of compliance with the Preservation Act.⁸⁰ In the December 1993 Record of Decision (ROD), the City conceded that the Paseo extension would use a portion of the District, but countered that it had met the requirement of the Preservation Act by doing an analysis of the five potential Monument avoidance alternatives proposed by the SHPO, NPS, and Friends of the Albuquerque Petroglyphs. When none of the alternatives were found to be prudent and feasible, the City engaged in planning to minimize harm to the

75. *Id.* at 13.

76. *Id.*

77. E-mail from Dr. David Phillips, Jr., Archaeology Curator for the Maxwell Museum in Albuquerque, N.M. (Sept. 29, 2006, 06:33:07 MST) (on file with Natural Resources Journal). Dr. Phillips is past vice president of the New Mexico Archaeological Council, one of the plaintiff organizations in *SAGE Council v. Chavez*.

78. Memorandum Opinion and Order, *supra* note 4, at 5.

79. *Id.*

80. *Id.* at 7. This SHPO letter was in response to the final EIS, which was released in November 1992.

Monument from the selected alternative.⁸¹ Following the City's issuance of the ROD and the approval of the Paseo extension, the SHPO sent a fourth letter to the City asserting that the Preservation Act had not been satisfied because the City had failed to select the least harmful alternative, failed to take adequate measures to minimize harm to the Monument, and failed to adequately consult with tribes.⁸²

Attempts to include Native American Tribes in the planning process were initiated as early as 1990 when the City Council resolution establishing the Citizens Advisory Committee (CAC) for the project also designated the All Indian Pueblo Council (AIPC) as the representative of the tribes.⁸³ The resolution directed the AIPC to designate one member to be on the CAC and regularly participate in the committee's meetings. Other than the AIPC representation on the CAC and general invitations to tribes to attend public meetings about the project, the City engaged in only minimal government-to-government formal consultations with two tribes and the Southern Pueblo Governors Council (SPGC) during the EIS process.⁸⁴ These consultation efforts were not proactive on the part of the City, but instead were responses triggered by the resolutions passed by the Sandia and Isleta tribal councils and the SPGC against the Paseo extension. Although the City met with the two tribes and the SPGC to discuss their respective concerns with the project, the tribal concerns were not resolved and the City concluded that it had made a "reasonable and diligent effort to seek an understanding of the concerns of Native American Indians" and had made efforts to mitigate harm to the Monument, thereby meeting any obligations it had under the American Indian Religious Freedom Act.⁸⁵

Although the City's completion of an EIS/ROD would seem to indicate that the Paseo extension, and the Unser Middle Project in general, was a federal undertaking, the City stated in the ROD that NEPA did not apply to the Paseo extension project because neither federal funds nor permits were required to build the project and the land was owned by the City; however, federal clean air and clean water laws would apply to the

81. *See id.* at 8.

82. *Id.*

83. IMPACT STATEMENT, *supra* note 71, at 6-8

84. *Id.* at 6-8 to 6-11. The final EIS reports CAC and public involvement meetings from April 1990 through July 1992. The first formal request by the City for tribal consultation was made on August 3, 1992, four months after the draft EIS was released and several months after the Pueblos of Sandia and Isleta and the SPGC passed resolutions in opposition to the Paseo extension. The only consultation efforts made throughout the EIS process were with Sandia and Isleta Pueblos and SPGC.

85. *Id.* at 6-11 to 6-12. In the ROD, the City again asserted that it had met the AIRFA requirements by consulting with Sandia and Isleta Pueblos and the SPGC. RECORD OF DECISION, *supra* note 17, at 18.

project.⁸⁶ The City maintained that the authority to construct the Paseo extension was part of the 1990 legislation creating the Monument because the Paseo right-of-way was shown on the original map designating the Monument boundaries.⁸⁷ The City's position that NEPA does not apply to the Unser Middle Project while other federal environmental regulations do apply is at odds with the City's action in completing an EIS/ROD. This position is also at odds with the City Attorney's May 1992 conclusion that the Paseo extension could not be built without the Secretary of the Interior's consent because the corridor was located on land that was part of the Monument.⁸⁸ The land ownership and NEPA issues were partly resolved in 1998 when a congressional act removed the corridor for the Paseo extension from the Monument.

The 1998 Boundary Adjustment Act

New Mexico Senator Pete Domenici introduced S. 633 in 1997 to remove the 8.5 acre corridor for the Paseo extension from the Monument boundaries, thereby removing the parcel from federal jurisdiction and transferring it to the City of Albuquerque.⁸⁹ This Act was buried in the 1998 Emergency Supplemental Appropriations Bill, which included provisions allocating billions of dollars for military personnel and operations, ensuring that a proposal to change the boundary of a national monument would be overlooked amidst funding for national security purposes. The bill's findings echo the City's position in the ROD that the 1990 Act establishing the Monument contemplated construction of the Paseo extension by including the roadway corridor on the original map establishing the Monument boundaries.⁹⁰ Furthermore, the Act states that it was the City's understanding that creation of the Monument would not impede the City's plans to develop the Paseo corridor through the Monument. In summary, the Act cited both congressional intent and the expectations of the City as justification for officially removing a portion of the Monument from federal control.

The corridor for the Paseo extension defined in S. 633 is different from the route investigated and selected in the City's original EIS.⁹¹ The

86. RECORD OF DECISION, *supra* note 17, at 16.

87. *Id.* at 15.

88. Memorandum Opinion and Order, *supra* note 4, at 6.

89. See Petroglyph National Monument Boundary Adjustment Act, Pub. L. No. 105-174, § 3005, 112 Stat. 82-85 (1998).

90. *Id.* § 3005(b)(4).

91. LEEDSHILL-HERKENHOFF, INC., UNSER MIDDLE TRANSPORTATION CORRIDOR STUDY SUPPLEMENTAL ANALYSIS FOR THE REVISION TO THE MIDDLE ALIGNMENT FOR THE EXTENSION OF PASEO DEL NORTE FROM GOLF COURSE ROAD, UNSER MIDDLE TRANSPORTATION CORRIDOR STUDY (1995).

subsequent corridor shift was predicated on avoiding physical impacts to three petroglyph boulders in the roadway corridor. The road alignment was relocated south of the petroglyph boulders in an area previously surveyed by archaeologists in 1990; the survey indicated that no petroglyphs were present in the area of the revised alignment.⁹² As discussed above, four petroglyph boulders and one archaeological site were recorded during the 2004 archaeological survey of the roadway corridor for the Paseo extension.

From Planning to Construction of the Paseo Extension (2003 to Present)

In May 2003, the City voted to move forward with the Unser Middle Project.⁹³ Because the Paseo corridor was no longer under federal jurisdiction, federal laws such as NEPA and NHPA were not applicable. The state Preservation Act was still applicable, however, because the 1998 Boundary Adjustment Act only removed the Monument designation from the corridor; it did not alter the Archaeological District designation for the portion of the corridor through the escarpment. Between March and May 2003, the SHPO sent three letters to the City reiterating the SHPO's earlier position that the City was out of compliance with the Preservation Act.⁹⁴ In September of that same year, the SHPO released the National Park Service's ethnographic landscape report for the Monument detailing Native American tribes' affiliation with and continuing use of the Monument.⁹⁵

A major catalyst for the project came in March 2004 when Governor Bill Richardson announced the availability of \$3.3 million in state capital outlay funds for the Paseo extension.⁹⁶ In May 2004, the Middle Region Council of Governments (MRCOG) issued a new study of the Paseo extension and possible alternatives at the request of the mayor of Los Ranchos de Albuquerque. The report conducted a limited alternatives analysis based on traffic projections. According to traffic projections for the year 2010, while some of the roads surrounding the Paseo extension could experience a 10 to 30 percent drop in traffic volume as a result of the extension, other roads in the vicinity could experience a 10 to 20 percent increase in traffic volume since the Paseo extension would mainly serve to redistribute traffic in the general vicinity.⁹⁷ While the 2010 analysis showed some reduction in traffic volumes from the extension, the 2025 projections showed the opposite result because the extension "would reduce travel times between bottlenecks, but the severity of congestion at bottlenecks

92. *Id.* at 1.

93. Memorandum Opinion and Order, *supra* note 4, at 9.

94. *Id.*

95. Anschuetz et al., *supra* note 25.

96. Memorandum Opinion and Order, *supra* note 4, at 9.

97. N.M. MID-REGION COUNCIL, *supra* note 16, at 15, 17.

would increase."⁹⁸ In terms of 2025 travel costs, total annual travel costs would increase such that the benefits of the extension would be "slightly in the negative."⁹⁹

In October 2004, the governor released the \$3.3 million from the capital outlay fund for the Paseo extension, and in November 2004 Albuquerque voters approved a street bond measure that included funds for the Paseo extension.¹⁰⁰ The project then moved from the planning stage to the construction stage. Before construction could begin on the Paseo extension, however, the City had to apply for a permit from the CPRC to conduct archaeological excavations to remove the cultural materials in the path of the roadway and to move the petroglyph boulders identified by the previous archaeological survey. Although the section of land on which the extension would be built was no longer federal land subject to federal environmental laws, the land was still within the boundaries of the Las Imagines Archaeological District, which was listed on the State Register of Cultural Properties and was, therefore, subject to the Preservation Act.

In June 2005, the City submitted its first archaeological excavation permit application to the CPRC, which included a plan for assessing the nature and extent of subsurface cultural materials at one archaeological site located in the roadway corridor and a proposal to remove the four petroglyph boulders in the roadway footprint to the general vicinity of their original location but outside the construction zone.¹⁰¹ Following a public meeting of the CPRC in which several tribal and community members encouraged the CPRC not to grant the City's permit request because of the lack of adequate tribal consultation regarding the affected petroglyphs, the CPRC approved only the section of the permit related to archaeological testing of the site in the construction zone.

The CPRC tabled the sections of the permit requesting authorization for archaeological data recovery and relocation of the petroglyph boulders "pending a good faith effort to participate in tribal consultations."¹⁰² The CPRC also directed the City to conduct non-destructive studies of the petroglyph boulders to determine the feasibility of moving the boulders without damaging the petroglyphs.¹⁰³

98. *Id.* at 23.

99. *Id.* at 25.

100. Memorandum Opinion and Order, *supra* note 4, at 10.

101. Application for Archaeological Excavation Permit on Lands Owned or Controlled by the State of New Mexico, Excavation Permit No. SE-232 (May 26, 2005) (copy on file with Historic Preservation Division, Santa Fe, N.M.).

102. Letter from Michelle M. Ensey, Archaeologist, Dept. of Cultural Affairs, Historic Preservation Division, to John R. Castillo, Director, Municipal Development Department, City of Albuquerque (June 28, 2005) (on file with Natural Resources Journal).

103. *Id.*

At the next CPRC meeting, in August 2005, the City submitted an amendment to its permit application that included the results of archaeological testing, the feasibility of moving the petroglyph boulders without damaging the petroglyphs, and tribal consultation efforts. The permit request was again tabled due to the City's lack of a good faith effort to engage in meaningful tribal consultation regarding relocation of the petroglyph boulders.¹⁰⁴ This determination was based on the City's lack of action regarding an August 10 letter from the AIPC requesting that the City engage in meaningful consultation with the AIPC. The Mayor of Albuquerque responded to the AIPC's request by stating that the City would delay moving the petroglyph boulders if the AIPC would support the City's archaeological excavation permit request.

The City returned to the CPRC again in October 2005 to report on their tribal consultation efforts with Picuris Pueblo, the Jicarilla Apache Nation,¹⁰⁵ and the AIPC. Much of the meeting's discussion centered on what constituted "'meaningful'" tribal consultation from the tribes' perspective.¹⁰⁶ Testimony from tribal members and SAGE Council representatives revealed that tribal consultation should involve options for bypassing the Monument. The City responded that building the Paseo extension was non-negotiable; rather, the City was only willing to consult on efforts to minimize harm to the petroglyphs and on options for their relocation.¹⁰⁷

Following this protracted discussion, the CPRC determined that the City had not met an earlier stipulation to conduct good faith tribal consultation and required that the City provide documentation that it had sent a description of the proposed Paseo extension as well as results of archaeological investigation to all New Mexico Tribes.¹⁰⁸ The CPRC further stipulated that the City consult in good faith with both Picuris Pueblo and the Jicarilla Apache Nation within 30 days and provide documentation of these consultations to the CPRC.¹⁰⁹ The CPRC agreed to hold a special meeting to determine whether the City had met these stipulations and, if so, the CPRC would issue the permit for archaeological excavation and removal of the petroglyphs from the construction zone.

104. Minutes of the State of New Mexico Cultural Properties Review Committee Meeting Transcript 9 (Oct. 14, 2005) (on file with Natural Resources Journal).

105. *Id.* At some point between the August and October CPRC meetings, Picuris Pueblo contacted the City, "indicating their intent to engage in tribal consultation." *Id.* During the October meeting, the City disclosed that it had not followed through with the Picuris Pueblo's request. *Id.* at 10.

106. *Id.* at 11-13.

107. *Id.*

108. *Id.* at 18.

109. *Id.*

In November 2005, the CPRC held a special meeting to hear the results of the City's consultation efforts with the Jicarilla Apache Nation and Picuris Pueblo. The City reported the results of a field visit to the Monument attended by representatives for the Jicarilla Apache Nation, Picuris Pueblo, and Zuni Pueblo.¹¹⁰ During the field visit to the Monument, the Jicarilla Apache Nation representatives discussed the meaning and importance of the petroglyphs on the boulders proposed for relocation and "cautioned that the City will be responsible/incur consequences for what happens if the rock's angle is moved."¹¹¹ The Jicarilla Apache Nation recognized, however, that the extension was going to be built and requested that a tribal member be present on site when the boulders were relocated to observe and offer advice. The Jicarilla Apache Nation also requested a 30-day extension before issuing the permit to move the boulders so that other tribal members could visit the site to view the petroglyphs. The CPRC granted the 30-day extension and stipulated that the City's permit to relocate the petroglyph boulders would become effective on December 21, 2005, to allow for completion of tribal consultation.¹¹²

The City made its final appearance at the December 2005 CPRC meeting to present a progress report on its consultations with the Jicarilla Apache Nation, whose representatives also attended the meeting and provided comments on the mixed results of the tribal consultation process. A tribal representative voiced her concern with the December 21 deadline for completion of consultation, which the Tribe believed rendered consultations "meaningless" because it left little to no time to consider alternatives to relocating the petroglyphs and the City was unwilling to compromise with respect to modifying the extension alignment.¹¹³ The CPRC chairman concluded the discussion by criticizing the City's minimal tribal consultation efforts and suggested the City adopt a resolution similar to one developed by the City of Santa Fe mandating establishment of government-to-government relationships between the City and the Tribes.¹¹⁴ Following activation of the City's permit on December 21, 2005, the petroglyph boulders were relocated and construction commenced on the Paseo extension.

110. Minutes of the State of New Mexico Cultural Properties Review Committee Special Meeting Transcript 2 (Nov. 21, 2005) (on file with Natural Resources Journal). From the meeting transcript, it is unclear how Zuni Pueblo became involved in consultations; however, the City reported that it sent letters and faxes to the tribes, which may be how Zuni Pueblo was notified about the field visit. *Id.*

111. *Id.* at 5.

112. *Id.* at 8-9.

113. Minutes of the State of New Mexico Cultural Properties Review Committee Meeting Transcript 13 (Dec. 2, 2005) (on file with Natural Resources Journal).

114. *Id.* at 14.

THE LEGAL BATTLE FOR PROTECTION OF THE LAS IMAGINES DISTRICT

On February 17, 2005, a group of plaintiffs filed an action for declaratory and injunctive relief in the New Mexico state district court against the City of Albuquerque, the mayor, and the Albuquerque City Council alleging the Defendants (hereafter City) had violated the Preservation Act when they failed to adequately consider reasonable alternatives by bypassing the District, failed to undertake all possible planning to minimize harm to the District, and failed to prepare an appropriate environmental reevaluation of the proposed extension.¹¹⁵ SAGE Council was the lead plaintiff in the case. Other plaintiffs included the New Mexico Archaeological Council, National Trust for Historic Preservation, Sierra Club, Southwest Organizing Project, Southwest Network for Environmental and Economic Justice, and four individuals. All of the plaintiffs alleged that their ability to experience the District would be compromised by the road passing through it.

On October 11, 2005, the court granted summary judgment in the City's favor on one of three allegations. First, the court held that the City adequately demonstrated that no prudent and feasible alternative existed to using the Las Imagines District and the City's decision was, therefore, "not arbitrary, capricious, nor an abuse of discretion."¹¹⁶ Second, the court denied summary judgment to the City on the issue of whether the City had made every effort to minimize harm to the District in its planning process.¹¹⁷ Lastly, the court reserved summary judgment on the issue of whether the City needed to prepare a supplemental EIS or other supplementary environmental documentation given its holding on the second allegation.¹¹⁸

Each of the three bases for the complaint is discussed separately below, along with a separate section on the court's discussion of sacred sites and tribal concerns.

Prudent and Feasible Alternatives to Use of the District

The first prong of the Preservation Act forbids use of a District if a prudent and feasible alternative to its use exists. The plaintiffs did not dispute that the City had followed the procedural requirements of the Preservation Act; rather, the plaintiffs argued that the City's determination that there was no prudent and feasible alternative to the use of the District

115. Memorandum Opinion and Order, *supra* note 4, at 3.

116. *Id.* at 27.

117. *Id.* at 33.

118. *Id.* at 39.

was arbitrary and capricious because the City lacked a reasonable basis for this decision and based it on "findings not supported by substantial evidence."¹¹⁹ Furthermore, the "Plaintiffs argue[d] that the ROD's discussion of alternatives was conclusory and perfunctory, and that the City failed to properly evaluate whether the no-action alternative or the chosen alternative would fulfill the stated purpose."¹²⁰

To determine whether the discussion of alternatives in the ROD was conclusory, the court examined evidence of the City's activities from the draft EIS to the issuance of the ROD.¹²¹ The court noted that the ROD would be problematic if it was based solely on the alternatives discussion in the draft EIS, since the draft EIS only included consideration of alternatives that went through the District. Following issuance of the draft EIS, however, the City held public hearings that led to the evaluation of other possible alternatives that would bypass the District. The court found the City's consideration and subsequent analysis of these additional alternatives to be adequate for reaching a determination that these alternatives were not prudent and feasible "because they did not meet project purposes and needs,"¹²² were significantly more expensive than any alternatives through the District, and would result in "extensive community disruption."¹²³ Furthermore, the court found persuasive the claims in both the final EIS and ROD that the City used the same level of evaluation for both in-District and outside-District alternatives.

The plaintiffs used errors in the City's traffic analysis for the EIS to support their claim that the City acted in an arbitrary and capricious manner in its selection of the preferred alternative. The first error in the traffic analysis was the City's modeling of traffic volumes for a six-lane Paseo extension, rather than modeling a four-lane facility as proposed in the final EIS. The analysis using a six-lane model showed "greater capacity, less congestion, and greater traffic flow" resulting from the Paseo extension.¹²⁴ Traffic analysis in the final EIS also modeled other roads in the surrounding area as having a greater traffic capacity than was currently planned. The effects of these discrepancies in modeling parameters were not clarified by either the City's or plaintiffs' experts. The City expert's position was that "in 1992 it would have been an acceptable practice to utilize the six-lane final

119. *Id.* at 20-21. The procedural requirements of the Preservation Act include holding public hearings to solicit input on alternatives that would avoid use of the District (4 NMAC 10.12.11.2) and preparing written documentation of the entity's consideration of alternatives proposed at the hearings (4 NMAC 10.12.11.4).

120. *Id.* at 21.

121. *Id.*

122. *Id.*

123. *Id.* at 22.

124. *Id.* at 23, 25.

configuration of Paseo del Norte traffic volume forecasts," while the plaintiffs' expert's response was that "[use] of a 6 lane Paseo extension rather than a 4 lane road would prejudice the results of any analysis against all other alternatives without the 6 lane Paseo extension."¹²⁵

The court seemed to miss the point of the flawed modeling parameters when it focused on the conflicting expert opinions and determined that disagreements among experts do not invalidate an EIS.¹²⁶ The court also determined that the plaintiffs failed to show the connection between the City's analysis errors and an arbitrary/capricious decision-making process on the part of the City.¹²⁷

Flaws in modeling parameters would seem to be enough to indicate that the City's decision was based on a potentially erroneous analysis that artificially tipped the scales in favor of the selected alternative. This situation strongly suggests the presence of an issue of material fact, which would be enough for the plaintiffs to withstand summary judgment in favor of the defendants.¹²⁸ Plaintiffs, however, did not provide any evidence that it was not "an acceptable practice" to use inaccurate modeling parameters that did not reflect the actual facility proposed in the EIS/ROD, an omission that the court implied signaled the plaintiffs acceptance of the City expert's statement.¹²⁹

All Possible Planning to Minimize Harm to the District

The second prong of the Preservation Act was considered after a determination that no prudent and feasible alternatives existed to use of the District. This prong requires all possible planning to minimize harm to the District, and such a plan must be included as a separate section of the ROD. The City specified that its plan to minimize harm included reducing the size of the escarpment cut section, shifting the road alignment to minimize direct impacts to the petroglyphs, and visual and noise impact mitigation measures, although a specific mitigation plan would not be developed until after final roadway design.¹³⁰ Because the final roadway design was not completed, plaintiffs argued that the City could not have conducted all

125. *Id.* at 24–25.

126. *Id.* at 25.

127. *Id.* at 23.

128. *Id.* at 17. In articulating the summary judgment standard, the court stated, "Once the defendants have made a prima facie showing that they are entitled to summary judgment, the burden is on the plaintiffs to show that there is a genuine factual issue and the defendants are not entitled to summary judgment." *Id.*

129. *Id.* at 25.

130. *Id.* at 29.

possible planning to minimize harm to the District prior to issuance of the ROD.¹³¹

While stipulating that every detail of a plan to minimize harm does not have to be finalized for compliance with the Preservation Act, the court was persuaded by the plaintiffs' argument and the City's own disclosure that a specific mitigation plan would not be developed until some future time.¹³² Furthermore, the court pointed out that the City's original approval of the ROD was conditioned on the City conducting a detailed examination of two additional design options during the final design phase: a southern shift in the road alignment and a tunnel under the escarpment.¹³³ Because the court could not find any evidence in the record that the City had considered these design options or was in the process of developing a specific mitigation plan, the court held that "questions of material fact remain" regarding whether the City had met this second prong of the Preservation Act.¹³⁴ The court's holding on this issue hinged on the lack of any evidence of final design plans and the lack of any detailed mitigation plan beyond the general commitments made in the ROD.

Supplemental EIS or Environmental Reevaluation

Because the City's proposed extension of Paseo del Norte is not a federal action and, thus, not governed by NEPA, the plaintiffs did not argue that a supplemental EIS was required under the NEPA regulations. Instead, the question was whether a supplemental EIS or another form of environmental reevaluation of the project were required by the Preservation Act or the New Mexico State Department of Transportation's (NMDOT) Location Study Procedures given that 13 years had passed since the issuance of the EIS/ROD.¹³⁵ As discussed above, the court reserved summary judgment on this issue because "questions of material fact remain[ed] as to the 'all possible planning' requirement that could lead to changes in the proposed action, or to new information relevant to environmental concerns and significant impacts not previously evaluated."¹³⁶ With this holding, the court implied that supplemental environmental analysis could be necessary if changes to the proposed action required to minimize harm to the District resulted in new, previously unevaluated impacts.

Although the court reserved summary judgment on this issue, it briefly considered whether the NMDOT Location Study Procedures might

131. *Id.* at 31.

132. *Id.*

133. *Id.* at 30-31.

134. *Id.* at 33.

135. *Id.* at 34.

136. *Id.* at 39.

require completion of supplementary environmental analysis absent a federal action but failed to reach a conclusion.¹³⁷ The City argued that the NMDOT Procedures were meant to provide guidance for entities undertaking road projects that were subject to NEPA, while the court found nothing in the Procedures to indicate that they were so limited.¹³⁸ It is difficult to determine why the court conducted this brief analysis of the potential requirements of the NMDOT Procedures in the present case if it did not intend to get to the question of whether supplemental analyses were required. The excerpts from the Procedures quoted in the opinion seemed to support the City's argument that the Procedures were intended as guidance for complying with NEPA when federal funding was involved in a road project. The Procedures themselves, however, are not legally binding apart from federal or state regulations so, regardless of whether they were applicable in this case, they could not independently impose any legal obligations on entities using them for guidance.

With respect to the Preservation Act, the court concluded that, "[g]iven the spirit of the act, it is not logical that changes or new information not previously evaluated could be ignored simply because they became apparent after the initial FEIS/ROD."¹³⁹ Changes in the proposed action or new information relevant to environmental concerns could require supplemental environmental analysis by the City. The court qualified its holding, however, by asserting that any new information did not necessarily trigger the requirement for supplemental environmental analysis because to do so "would render agency decision making intractable, always awaiting updated information, only to find the new information outdated by the time a decision is made."¹⁴⁰ The court used NEPA case law to determine the conditions under which supplemental environmental analyses might be required under the Preservation Act and then went on to determine that these conditions were not met in the present case, implying that supplemental analyses would not have been required had the court ruled on this issue.¹⁴¹

The Las Imagines Archaeological District as a Sacred Site

Recognizing that the plaintiffs' complaint against the City was based on violation of the Preservation Act, the court devoted a separate section of its opinion to the lack of effort made by the City to adequately

137. *Id.* at 36.

138. *Id.* at 34.

139. *Id.* at 37.

140. *Id.* at 38 (citing *Marsh v. Or. Nat. Resources Council*, 490 U.S. 360, 374 (1989)).

141. *Id.* at 39.

address tribal concerns. Although this section of the opinion was dicta, it provided valuable insight into the court's expectations for what constitutes adequate tribal consultation, regardless of the fact that tribal consultation is not a specific requirement under the Preservation Act. The court was troubled by both the City's lack of attention to specific tribal concerns about the Paseo extension as reflected in tribal resolutions opposing the project and the City's lack of effort to "substantively reach out to the Pueblos as sovereign governments."¹⁴² To illustrate this second point, the court referred to the single tribal representative on the Citizen Advisory Board created for the project in the early 1990s and stated, "the Court cannot help but wonder about the effectiveness of input from one representative for 19 pueblos."¹⁴³

The court also acknowledged that the District is "a place of irreplaceable heritage" for Pueblo people and, as such, is exactly the type of place the Preservation Act was meant to protect.¹⁴⁴ It recognized the "historical, cultural, and religious significance" of the District to the Pueblo people and cautioned that this significance "should not be dismissed lightly...[n]or should the validity of religious beliefs and cultural heritage be questioned."¹⁴⁵ One possible reading of this section of the opinion, which precedes the court's analysis and summary judgment holdings, is that the court is explicating that the legal issue was not whether the District is an important sacred place deserving of protection; rather, the issue was whether the City violated the Preservation Act in its planning for and selection of the Paseo extension. The court also made a distinction between the protection the District received under the Preservation Act "as a significant prehistoric and historic site" and additional protection the District might receive under federal regulations such as the NHPA, the Native American Graves Protection and Repatriation Act (NAGPRA), or the American Indian Religious Freedom Act (AIRFA) by virtue of being a sacred site. The court further pointed out that there had never been a complaint against the City for violation of any of these federal regulations before.¹⁴⁶

None of these federal regulations, however, are applicable to this case. As discussed above, the NHPA only applies to federal undertakings. The NAGPRA specifically protects Native American human burials, associated funerary objects, and objects of cultural patrimony "excavated or discovered on Federal or tribal lands."¹⁴⁷ After the 1998 Act transferring the Paseo extension corridor to the City, the corridor was no longer on

142. *Id.* at 12.

143. *Id.*

144. *Id.* at 11-12.

145. *Id.* at 12.

146. *Id.* at 11.

147. Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3002 (2000).

federal land; thus, NAGPRA would not apply to any subsequent excavations removing Native American funerary remains or objects. Prior to the 1998 Act, there had been no excavations in the Paseo extension corridor and, thus, no protected objects removed from the Monument that could be subject to protection under NAGPRA. Finally, a similar argument can be made for the absence of an AIRFA-based complaint against the City because AIRFA is a directive for the federal government to protect Native American free religious exercise¹⁴⁸ and, thus, not applicable to the post-1998 Paseo extension corridor. Prior to 1998, when the corridor was under federal jurisdiction, tribes had free access to the roadway corridor and would not have been prevented from performing any religious ceremonies while the road was still in the planning stages.

Aftermath: Request for Preliminary Injunction

On January 25, 2006, the court denied the plaintiffs' motion for a preliminary injunction preventing the City from moving forward with any planning, financing or construction of the Paseo extension until the City complied with the Preservation Act.¹⁴⁹ The court provided several reasons for its decision, all of which led the court to conclude that the plaintiffs did not have a substantial likelihood of success on the merits. The court referred to its previous decision granting summary judgment to the City on the issue of evaluation of prudent and feasible alternatives to District use and refusing summary judgment on the issue of whether the City had completed all possible planning to minimize harm, and then moved on to consider whether plaintiffs had adequately demonstrated that the City had failed to meet its requirement to complete "all possible planning to preserve, protect, and minimize harm to the...District."¹⁵⁰

The basis of the court's decision to deny the injunction was formed by additional documentation provided by the City showing that it had considered the tunnel and southern alignment shift design options proposed in the ROD as potential mitigation measures, consulted with "other entities," and received an excavation permit from the CPRC.¹⁵¹ The court believed that the City had met the second prong of the Preservation Act; therefore, plaintiffs had little chance of success on the merits.¹⁵²

148. Protection and Preservation of Traditional Religions of Native Americans, 42 U.S.C. § 1996 (2000).

149. Memorandum Opinion and Order, *supra* note 4, at 17.

150. *Id.* at 3.

151. *Id.* at 27.

152. *Id.*

CONCLUDING THOUGHTS

As of this writing, the Paseo extension through Petroglyph National Monument and Las Imagines Archaeological District has been constructed and is currently open to traffic. Archaeological excavations were completed and the petroglyph boulders were moved out of the construction zone for the new road. With state laws, executive orders, and a state district court decision recognizing the importance of Native American sacred places and encouraging agencies to take into account the effects of their land use decisions on these sacred places, one wonders how it was not a violation of state law for the City to build the Paseo extension through the Monument. The Monument has documented importance for many Native American Tribes in New Mexico and Arizona, yet the construction was allowed. The administrative record for the Paseo extension planning process reveals the City's minimal efforts at tribal consultation both during the EIS process in the early 1990s and, more recently, during the archaeological permit process when the CPRC directed the City to conduct good faith tribal consultation as a condition to issuance of the permit. The court also expressed disappointment with the City's lack of attention to Native American concerns over the Paseo extension. The City's tribal consultation efforts can best be summarized as reactive rather than proactive, openly exhibiting a lack of good faith to engage in meaningful consultation with Native American Tribes as sovereign governments.

The Paseo extension project and lawsuit illustrate the disconnect between the letter and spirit of state laws enacted to protect tribal sacred places in New Mexico. On its face, the Preservation Act seems to mandate a rigorous procedure that an agency must follow in order to use a portion of an historic property listed on the State Register of Historic Places. In its application, however, the Act may only serve to delay the inevitable while the agency goes through the motions of evaluating avoidance alternatives and then ultimately concluding that none of those alternatives meet the project purpose, the alternatives would be prohibitively expensive, or the alternatives would cause extensive community disruption. There is also plenty of room for disagreement regarding proposed measures to minimize harm to a property once the agency determines the property cannot be avoided. Thus, while the spirit of the Preservation Act preserves and protects important cultural properties such as the Las Imagines Archaeological District, the letter of the law allows significant impacts to this type of property if an agency meets all of the Act's procedural requirements. This disconnect between the letter and spirit of laws designed to protect important cultural places is also apparent at the federal level, particularly with procedural laws like NEPA and NHPA that mandate only that agencies take into account the effects of their undertakings on cultural

properties but do not completely prohibit undertakings that may significantly damage these properties.

Weaknesses in state and federal laws designed to protect cultural properties, including tribal sacred places, should not prevent Native American Tribes from acting to ensure that agencies are following stipulated procedures. As tribes begin to assert their rights as sovereign entities to have a voice in agency land use decisions that have the potential to affect tribal sacred places, and increasingly invoke the requirements of laws such as NHPA and NEPA for federal projects or the Preservation Act for state projects, federal and state agencies will move toward a more proactive approach to tribal consultation and ultimately lead to truly meaningful consultations where tribes are viewed as equal partners in the decision-making process.