WHEN THE PAST HALTS THE PRESENT

The impact of cultural resources management on right of way scoping

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A few years ago, a state agency and large engineering contractor were working on a relatively small-scale right of way project in my service area. Having been in development for six years, the project had a healthy budget of $5 million. All the real estate, permitting and design work had been completed without any issues and the project had wide public and community support.

But then, just three days into construction, the project's bulldozers began to unearth human skulls.

The project was stopped in an instant. The agency chief and the engineering company CEO appeared before a public meeting with Native American tribal leaders and community members to offer a heartfelt apology. The city immediately halted all area infrastructure construction projects for review.

How the public perceives these cultural and historical resources is what makes the difference between a positive and negative response to a project.

The project was ultimately delayed for six months. The trust and goodwill that the agency and engineering firm had built with the city government and local communities evaporated overnight. The company faced multiple liability lawsuits and paid nearly $500,000 for a burial salvage project. Perhaps more costly, the issue lingered in the local press and social media for more than a month. And yet, all of this could have been prevented for $20,000 or less.

A cultural resources study by a qualified professional would have noted the trail of historical documents referencing the cemetery going back to the late 1600's. This study would have likely led to a consultation with local tribal historians and elders who knew the area intimately. Such a study would have certainly noted the roadside historical marker located blocks away from the project area, describing the location's dense tribal, cultural and historical village use.

Cultural Resources Management

When people think of cultural resources, they often think of archaeological sites. However, cultural resources management (CRM) is much more. It represents the management of physical historical buildings, properties and places in a right of way project. It also requires an understanding of less tangible cultural aspects of the land and its use. For a CRM survey to be a valuable tool, historical preservation, archaeology, tribal consultations and community/client relationship efforts must all be considered.

The CRM process began to take shape more than 50 years ago during the general environmental movement. It was first codified under the National Historic Preservation Act (NHPA) of 1966 and later heavily strengthened by the National Environmental Policy Act (NEPA) of 1970. Tribal relationship issues joined the suite of regulations following the adoption of the American Indian Religious Freedom Act in 1978 and the Native American Graves and Repatriation Act (NAGPRA) in 1990.

These early federal laws—combined with subsequent executive orders, federal agency directives and protocols, as well as state and local county and municipal historic preservation regulations—make up the compliance and permitting portions of what we have today. Individual state CRM laws vary greatly from extremely regulatory to those with more passive and semi-voluntary compliance laws. Burial protection laws vary in strength and protocol, but the most stringent burial avoidance laws are found at the state level.

The majority of right of way projects encounter CRM issues in one of two ways. The first is through agency permitting and regulations, and the second is project-related federal funding or oversight sources that activate the NHPA's operational code Section 106. Most federal and state agencies combine cultural resources into the general environmental compliance portion of project review, environmental impact statement (EIS) or environmental assessment (EA) development or as a standalone Section 106 requirement for an archaeological and cultural study.

Archaeological sites and historic buildings may need to be avoided by redesign, mitigated by surrounding them in project green-space or removed by archaeologists. However, a project may not have a strict legal compliance mandate that requires you to survey and consider the impacts of your projects on these historic sites. In that case, do you disregard them altogether or conduct voluntary cultural and historical site measures as part of your project?

Managing the CRM Liability

Timing in discovery is the critical aspect of a cultural resource's impact on a right of way project. In general, the earlier a cultural site or area is identified in the project's lifecycle, the easier it is to deal with from a cost and public relations perspective. The potential financial losses, project delays and bad publicity will steadily increase in scope and severity the later they are encountered in the project's schedule.

Cultural resource issues are usually faced during one of three general phases, with each riskier and potentially more damaging to the project. The first and best-case scenario is when cultural resources are anticipated or screened for in the

pre-planning phase. This is the most risk-adverse strategy, as issues can be recognized and identified early enough for project designers and managers to account for their possible effects and take all stakeholders into account. This is by far the best practice when doing CRM work.

Secondly, and sadly more frequently, is when a project does not anticipate cultural resources until well into design, and only after the project signals a compliance CRM trigger involving agency permitting, regulatory authorities or land access needs. If a major archaeological site is encountered or a significant tribal cultural/sacred site has the potential to be disturbed, the project can face a significant setback. At this point, the project team can only react to cultural resource finds in the right of way corridor. There is little flexibility because previous project alternatives may have been eliminated, and the costs of redesign and additional real estate acquisition will only serve to increase costs and delays. Negative press will surely follow.

The last and worst-case scenario is when cultural resources are not considered whatsoever during the project planning or design phases, and construction may have already started. Either the project manager did not know about the potential for issues, was never told by regulatory agencies or perhaps simply tried to do the bare minimum of cultural screening to cut costs. Regardless, the impact is felt when the project is in full swing, at final design or even has materials and crew on site.

A cultural resources encounter at this point in the project is referred to as an "inadvertent discovery." This makes clear that the project did not intentionally seek to destroy a cultural site. Inadvertent discoveries are most often the result of a lack of planning or simply ignoring something that was anticipated to have had a low chance of occurring. Yet, when issues arise this late in the project, the results can be catastrophic. If a project impacts a tribal sacred area, the response may include injunction lawsuits, public protests and agency hearings. If it is a burial disturbance, it may mean extensive project stoppages, cemetery salvage costs and the associated negative tribal or local community reactions.

A cultural consultant can inform you of any other potential tribal, cultural or historical impacts your project may encounter, whether real or perceived. This would include any potential conflicts that may ensue with landowners, local communities, or local units of government based on historical or local cultural sites or areas of concern. If your cultural consultant is particularly skilled, they should be able to offer you solutions and mechanisms to address these issues before your project ever starts.

Avoid, Mitigate or Disregard?

Regardless of how or when a cultural resource surfaces, a project proponent has three basic options: avoid, mitigate or disregard. Legally, you may or may not be bound by federal, state, or agency regulations or permits to deal with the site/area in a compliance mode. This is definitely the case with human burials or potential burial grounds like earthen mounds, all of which are protected under federal and state criminal statutes.

CRM surveys primarily focus on archaeology and historic buildings. As something tangible, delineated and avoidable, archaeological sites and old buildings can be mapped and addressed during design and right of way layout.

What about a culturally-significant spring that is sacred to a local Native American community? Or the battleground of a small skirmish from the Civil War important to local historical re-enactors? How about a street corner in Springfield where Lincoln gave a famous speech? These sites may have cultural, historical and even religious importance to the local communities but may not be "concrete" archaeological or historical sites that can be readily delineated.

Enhanced cultural resource surveys can often spot trouble zones early in the process. When issues arise during construction, the results can be catastrophic.

As such, these more vague forms of cultural areas become much more difficult to deal with from a project perspective, but they may still influence public or agency perceptions of the project impact on the surrounding community's history and culture.

Enhanced CRM and Its Rewards

Why not simply do the minimum the law or a permit requires? From a timing and budget perspective, this seems to be the easiest option and the reason why so many right of way companies take this approach. However, the overall cost of most cultural resources work is minimal compared to the cost of even small delays or slowdowns in the schedule. Perhaps the best way to look at enhanced cultural resource project surveys is as a project insurance policy, and a cheap one at that. As one of my clients is fond of reminding me, "Cultural work is generally a cheaper line item on my budget than coffee or donuts."

Enhanced cultural resource surveys can often spot project trouble zones early in the process. They lessen the chances for the most detrimental of cultural encounters: the inadvertent discovery during construction. From a real estate perspective, they may identify areas of tribal or community owned lands that have historical or cultural significance and will likely become right of way acquisition issues. If there is a high probability of burial encounters during construction, they might suggest the usefulness of maintaining late-stage design alternate routes.

Consulting with tribal groups and other special communities—like the Amish and Mennonite—also fall under the category of enhanced CRM. Project-driven interactions with these special communities can range from mutually satisfying and cooperative to outright hostile and confrontational. The reality is, taking time to research the cultural factors and history of the land is crucial to understanding the views and perspective of these minority groups in relation to the project and the project area.

The Community Culture

All places and communities of people have a "Community Culture," something that defines them and the relationship to the area in which they live. From an abandoned community church that grandparents were married in to historic forts and battles that provide a sense of local heritage and tourism income, these historical, cultural and sacred places are a core part of the community culture. How the public perceives these cultural and historical resources is what makes the difference between a positive and negative response to a project.

Any project that appears to callously threaten these places is inherently seen as a threat to the community and can expect negative public sentiment, as well as potential regional and local political opposition. In contrast, with minimum expense and effort, a right of way project and its proponent can almost always publicly demonstrate an interest in protecting the history and culture of a project area, with a resulting reward of local and community goodwill.

An Enhanced Integrated Approach

The two keys to effective cultural resources management on a project are early pre-planning and flexible and responsive coordination. This involves asking key questions and continuing to ask until answers are provided. Is the corridor going to change? If cultural sites are encountered, can they be avoided by alternatives? Can they be mitigated or removed from project impacts?

Cultural resources should be included in a project's general environmental and permitting screening as early in the project's development as possible. This is best accomplished with the use of an integrated environmental compliance team—one that brings experts in all sub-disciplines of environmental compliance to the table. This includes specialists in wetlands, endangered species, environmental remediation and cultural resources. Together, the team can coordinate the juggling of permit schedules, regulatory challenges, project needs and route changes as a cohesive work unit. This is vital for fast-tracking projects through the cultural resources and general environmental compliance process.

While it's impossible to anticipate every potential challenge that may arise on a project, having a disciplined team working collaboratively, communicating openly and considering alternatives can play a key role in effectively moving projects forward. ✪

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