

Yearbook of Cultural Property Law
2007

YEARBOOK OF CULTURAL PROPERTY LAW

Series Editor: Sherry Hutt

Sponsored by the Lawyers' Committee for Cultural Heritage Preservation

The Yearbook provides those in the heritage-management world with summaries of notable court cases, settlements and other dispositions, legislation, government regulations, policies, and agency decisions that affect their work. Interviews with key figures, refereed research articles, think pieces, and a substantial resources section round out each volume. Thoughtful analyses and useful information from leading practitioners in the diverse field of cultural property law will assist government land managers; state, tribal, and museum officials; attorneys; anthropologists; archaeologists; public historians; and others to better preserve, protect, and manage cultural property in domestic and international venues. All royalties go directly to the Lawyers' Committee for Cultural Heritage Preservation.

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Rediscovery of the Tse-whit-zen Village and Native Burial Grounds *Misplaced Reliance on Section 106?*



Douglas P. Wheeler¹ and Jeffrey C. Nelson²

Introduction

At the wrenching conclusion of a three-year struggle to protect the centuries old Tse-whit-zen Village and ancestral burial ground in Port Angeles, Washington, none of the parties could be completely satisfied with the outcome. The Washington State Department of Transportation (WSDOT) had inadvertently begun to build an immense dry dock—known technically and ironically as a “graving” dock—on the site of an ancient Klallam Indian village and burial ground. When it stopped construction, WSDOT had spent \$60 million with little to show for it, and was months behind on the repair of the critical Hood Canal Bridge.³

The Lower Elwha Klallam Tribe, whose ancestors lived at Tse-whit-zen for 2,700 years, view the results of this struggle as only a partial win for the tribe. The tribe had spent nine painful months helping project proponents remove 337 intact tribal burials and thousands of fragmentary human remains so that the graving dock project could proceed. Eventually, the tribe’s sense of loss and knowledge that an unknown number of burials would be left behind beneath the construction site became too much to bear, and the tribe made the difficult decision to withdraw its support of the project. Although the tribe was grateful that WSDOT honored the tribe’s request and abandoned the project, many tribal concerns over the disposition of the human remains—both those removed and those left at the site—went unresolved for nearly two more years.

From the perspective of a practitioner in historic preservation and Indian law matters, the events surrounding Tse-whit-zen demonstrate several significant faults in the current legal system. But the outcome speaks for itself—even though it was a painful and protracted process, the body of preservation law did create a framework within which an Indian tribe could rally public and official support for the protection of cultural, historical, and spiritual values.

This article reflects the perspective of the historic preservation and Indian law practitioners who were privileged to assist the Lower Elwha Klallam Tribe in its navigation of the legal and public policy landscape created by the National Historic Preservation Act (NHPA),⁴ the National Environmental Policy Act (NEPA),⁵ and to a limited extent, the Native American Graves Protection and Repatriation Act (NAGPRA).⁶ Through these efforts, the Lower Elwha Klallam Tribe was able to protect a site that is being described as the largest ancient Indian village ever unearthed in the State of Washington, and one of the entire Pacific Northwest's most significant archaeological discoveries.

The Beginning and the End of the Port Angeles Graving Dock

Everyone agrees that the Hood Canal Bridge, originally built between 1958 and 1961, is badly in need of rehabilitation. The floating bridge spans 1.5 miles over the northern end of Hood Canal, a 50-mile-long natural fjord extending off Puget Sound. The most unusual feature of the Hood Canal Bridge is that it floats—the bridge is supported by 35 hollow concrete pontoons, each up to 360 feet long and weighing up to 8,500 tons. The pontoons are each attached by cables running to large concrete anchors sitting on the bottom of Hood Canal. The inherent vulnerability of this type of construction became all too evident in 1979, when a severe storm caused structural damage and sank the west half of the bridge. Transportation planners considered replacing the entire bridge at that time, but decided instead to replace only the missing west half. In 1997, a WSDOT evaluation determined that the original east half of the bridge suffered from widespread corrosion-related deterioration and no longer met structural design standards. Therefore, WSDOT developed plans to rehabilitate the east half of the bridge, including replacement of 14 pontoons, refurbishment of three west-half pontoons, and replacement of 20 anchors.

The Federal Highway Administration (FHWA) agreed to provide the majority of funds for this project. Although the FHWA would not manage operations, the grant of federal funds triggered federal NEPA, NHPA, and

Endangered Species Act (ESA) obligations. The U.S. Army Corps of Engineers (ACOE) also would be involved as a federal permitting agency, both at the Hood Canal Bridge site and at the site eventually selected for the graving dock.

Earlier, in May 2001, the Washington State Legislature had created the Transportation Permit Efficiency and Accountability Committee (TPEAC) in order to streamline the permitting and approval process for transportation projects in the state.⁷ In November 2001, the TPEAC designated the Hood Canal Bridge project as one of three permit reform pilot programs. Originally, WSDOT planned to lessen its own burden by putting its construction contractor in charge of determining where and how to fabricate the necessary concrete pontoons and anchors for the bridge rehabilitation. Therefore, WSDOT—as project proponent—began to assist the federal agencies in undertaking NHPA and NEPA reviews for this project, but initially limited the scope of review to the bridge work itself. Specifically, a NHPA Section 106 consultation process was conducted and a NEPA Environmental Assessment was issued without discussion of the Port Angeles graving dock site, and without significant comment or controversy. In May 2002, FHWA issued a NEPA Finding of No Significant Impact (FONSI) based on an Environmental Assessment regarding the original bridge and its nearby environment and historic sites. However, WSDOT later decided that it would expedite the graving dock permitting process if WSDOT itself assumed responsibility for selecting a graving dock site and obtained the permits for its construction—a decision made after the bridge work NHPA and NEPA reviews were complete.

In November 2002, WSDOT announced its intention to construct the graving dock in the City of Port Angeles. The entire project site would be 22.5 acres, with nearly 10 acres devoted to the graving dock itself. Project planners then turned to the matter of securing permits for the graving dock project, consistent with the programmatic goal of streamlining the permitting process. For NEPA compliance, WSDOT provided the FHWA with a “Re-evaluation” of the Environmental Assessment prepared earlier for the bridge, and the FHWA concurred that the addition of the graving dock in Port Angeles did not require a more comprehensive supplement to the Environmental Assessment or any serious reconsideration of its bridge-project FONSI.

Cultural Resources Survey

In order to address its NHPA obligations, WSDOT contracted with an archaeological firm to conduct a Cultural Resources Survey of the site, including a literature review, ground survey, structural review, and tribal consultation.

WSDOT asked its consultant to finish this project in three weeks, explaining that “[t]he project is being fast tracked and we encourage you to accomplish this task with urgency.”⁸

The Cultural Resources Survey was completed in about seven weeks. It included a literature review, some effort to conduct tribal consultation, and a physical archaeological survey performed by means of augers and backhoe trenching.⁹ The literature review uncovered exactly what it should have, but the tribal consultation and the field work did not. According to the literature review section of the Cultural Resources Survey:

Port Angeles was the location of at least two of eleven Klallam village sites reported along the south shore of the Strait of Juan de Fuca. . . . Tse-whit-zen was a village site at the base of Ediz Hook in the general vicinity of the project area. The village was a large and important village . . . of considerable importance in aboriginal times.

• • •

Every village had a cemetery, generally on a sandpit, but occasionally in the woods. . . . Cemeteries were typically near the beach, not a great distance from their dwellings. They fronted the water. The graves were arranged irregularly. The cemetery associated with Tse-whit-zen was in the general vicinity of the mill complex, although the precise location is not known. Excavation for the construction of the Washington Pulp and Paper Corporation disturbed hundreds of Indian bones . . . when ground was broken for the foundation.¹⁰

In a retrospective assessment several years later, WSDOT requested its archaeological contractor to recount the substance of the early coordination with tribal interests.¹¹ WSDOT learned that the consultation consisted of a telephone discussion and a brief meeting with the cultural resources representative of the Jamestown S’Klallam Tribe that did not yield substantive information, and an unreturned telephone call to a representative of the Lower Elwha Klallam Tribe.¹²

The field investigation involved one archaeologist, assisted by a WSDOT construction crew, working for four days in the rainy month of November. Seventeen backhoe trenches (6 × 2 feet) were excavated on the site to an average depth of seven feet, and nine auger holes were drilled to a depth of 35 feet. Wet soils made the work difficult, and the archaeology field investigator would later be unable to recall whether any of the auger samples were actually screened for cultural materials.¹³ Additionally, no effort was made to concentrate the location of the trenches and auger holes behind the preindustrial shoreline, despite the fact that the literature review determined that the Tse-whit-zen Village was

in the vicinity, and that village cemeteries usually were near the beach, fronting the water. Moreover, the field survey was performed before construction plans had been completed. As a result, sampling locations did not include an area just to the northwest of the graving dock wall that later would be dug out to create drainage and storm water treatment swales, and where the largest concentration of burials was discovered.¹⁴ As it was, the archaeologist did not identify any evidence of prehistoric occupation in analyzing the subsurface trenching samples,¹⁵ finding only dredged sediments or “historic-era debris” associated with a former mill operation, and concluding that “[n]one of the historic archaeological features appear to meet the requirements of eligibility for National Register of Historic Places (NRHP) listing.”¹⁶ Although no significant archaeological resources were identified, the Cultural Resources Survey did recommend that an archaeological monitor observe ground-disturbing activities during construction of the graving dock.¹⁷

WSDOT shared the Cultural Resources Survey with six nearby tribes, including the Lower Elwha Klallam Tribe. The tribal leaders and staff personnel who reviewed the report were concerned about the proximity of the project to Tse-whit-zen, but they did not have direct knowledge of the exact site of the ancient village and cemetery. In fact, tribal government leaders asked the tribe’s environmental planner to investigate the likely location of Tse-whit-zen using a U.S. government map from 1853 that depicts the village along with certain identifiable features of the harbor. This analysis concluded that the most likely village location was to the southeast of the project site. Understandably, tribal leaders took confidence in WSDOT’s professional archaeological survey, together with their own staff’s assessment. Even so, in responding to WSDOT’s request for comments, the then-Chairman of the Lower Elwha Klallam Tribe stated: “The proposed site within Port Angeles has clearly been significantly altered, however its proximity to known Klallam village sites and traditional use areas argues strongly for caution.”¹⁸ The Chairman went on to agree that an archaeological monitoring plan should be developed and implemented at the construction site.¹⁹

Groundbreaking and the First Inadvertent Discoveries

An archaeological monitoring plan was developed and provided to the interested parties, including the Lower Elwha Klallam Tribe, and construction work began at the Port Angeles site with a groundbreaking ceremony on August 6, 2003. Ten days later, an excavation crew uncovered the first archaeological

deposit—a clamshell midden and dark soils on the eastern portion of the site. Construction work in that area was suspended as an archaeological investigation began, and on August 20, 2003, the archaeologists found the first human remains—a piece of skull and several bone fragments. This discovery triggered new requirements. The appropriate parties were notified, the local police made a report, and 24-hour security was established. Over the next few days, several more fragments of human skeletal remains were discovered, along with other shell middens. On August 26, recognizing that the “inadvertent discovery” provisions of the NHPA regulations had been triggered,²⁰ WSDOT suspended all construction work at the site until additional archaeological investigation could be undertaken and the site reassessed.

Thus began a more comprehensive Section 106 review process under the NHPA and a reassessment of whether the site was eligible for listing on the National Register of Historic Places. While WSDOT, as the project proponent and site owner, still coordinated most of the activities, the FHWA and the ACOE took a more active role in the consultations, and the Lower Elwha Klallam Tribe hired its own archaeological consultants.

Archaeological Reassessment and Section 106 MOA

Through extensive consultation, the parties developed an Archaeological Assessment Plan. This plan was focused on the assessment of nonfunerary archaeological material, but also contained a protocol to be applied if more human remains or funerary objects were discovered. To everyone's credit, from the very beginning, the parties agreed that any human remains uncovered at the site would be removed only with the tribe's involvement, placed in hand-crafted cedar boxes according to tribal custom, and conveyed to the tribe for reburial.

The archaeological reassessment took place over about two weeks and involved two teams of archaeologists hired separately by WSDOT and the tribe, plus several tribal members themselves. In the end, this team would make 81 new investigatory excavations over the construction site. But once again, the archaeologists did not attempt to determine the location of the prehistoric shoreline in deciding where to survey for archaeological resources. Even so, ten of the new excavations yielded archaeological material, including eight separate discoveries of fragmentary human remains. But the reassessment uncovered no intact human burials, and the full extent of the archaeological resource was still far from understood. In its 2006 Graving Dock

Report, WSDOT stated: “the failure of any information to emerge about significant numbers of burials right under the ground on which teams of archaeologists and Tribal members were now working seems in hindsight almost unbelievable.”²¹ But there was little doubt at this point that the site was eligible for listing on the National Register of Historic Places, and the SHPO made such a determination in October 2003.

Because the site was now determined eligible for listing on the National Register, it became subject to the NHPA requirement that plans be made to minimize and mitigate the project’s adverse effects on the cultural resource. The usual method by which this is accomplished is by negotiating a Memorandum of Agreement (MOA). This was the goal of the parties in this case, and formal consultation was initiated.

During these negotiations, the tribe and the other parties were not aware that more than 300 intact burials eventually would be uncovered and removed. At the time, archaeologists had unearthed only small fragments of human bones, representing from eight to twelve individuals. Even so, the issue of repatriation and reburial was enormously important to the tribe. In the negotiations, the tribe informed the state and federal parties that mitigation measures should include conveyance to the tribe of about ten acres of land very near or adjacent to the construction site, so that the tribe could rebury the remains of its ancestors as close as possible to Tse-whit-zen. The tribe also requested funds for construction and operation of a museum on this new land.

WSDOT agreed that the tribe’s requests were reasonable, but did not want to tie the project to any party’s ability to obtain an additional ten acres of land adjacent to the project site. Therefore, WSDOT proposed instead to provide \$3 million for consultants, temporary curation of human remains, land acquisition, creation of a permanent cemetery, a museum, and support for other mitigation activities. The tribe worried that the actual costs could eventually be around \$9–10 million or more. In the end, WSDOT agreed to increase the payment to \$3.437 million, and agreed to help the tribe seek other funding sources to cover any additional costs of mitigation. This proposal was acceptable to the tribe, but the FHWA and ACOE voiced objections, apparently because of concern that a \$3.4 million mitigation payment would set an overly generous precedent. Therefore, the federal agencies insisted that the \$3.4 million payment not be included in a Section 106 MOA but instead in a side-agreement between WSDOT and the tribe. Agreeing to this

demand, WSDOT, the SHPO, and the tribe drafted a “Settlement Agreement and Release” whereby the State of Washington agreed to provide the tribe with the \$3.4 million mitigation payment, and barring the tribe from further claims against the state. A perfunctory Section 106 MOA also was signed by the FHWA as the lead federal agency, the SHPO, WSDOT, the tribe, and the ACOE. This document included several mitigation measures that WSDOT agreed to perform, and also included a dispute resolution provision whereby the FHWA agreed to seek the guidance of the Advisory Council on Historic Preservation (ACHP) in resolving any disputes that might arise under the Agreement. The MOA, an archaeological Site Treatment Plan, and the Settlement Agreement and Release were all signed on March 16, 2004.

Discovery of Intact Burials

Major construction activity resumed in April 2004, while at the same time, archaeological work continued in the areas of archaeological interest within the site. Almost immediately, however, construction crews working in the new drainage swale area immediately to the northwest of the graving dock footprint uncovered the first intact, previously undisturbed Native American burial. The complete skeletal remains were still wrapped by the hand-woven cedar mat in which the body was buried hundreds of years before. This discovery stunned tribal members working on the site and shattered expectations that important cultural resources were confined to the previously identified areas of archaeological interest. In what would become a morbidly common practice on the site, tribal members performed a ceremony and helped archaeologists remove the remains so that they could be transported to an off-site location where the tribe could keep them safe both physically and spiritually while awaiting reburial.

It soon became obvious that the area designated for the project’s drainage swale was on top of a major burial ground. One burial recovery led to another. By mid-May, 12 intact burials had been discovered and removed, along with hundreds of artifacts from across the site. In addition, in another location the archaeologists discovered the floor of a longhouse, and came to realize that the twentieth-century sawmills had not disturbed much of the underlying village site as had previously been believed.

Burial Recovery Disputes

By the end of May, 40 intact burials were removed from Tse-whit-zen. With the understanding that the project was moving forward, but with the new knowledge that intact ancestral graves laid below, the tribe became more focused on

getting its burials out before they were crushed or entombed under the massive concrete graving dock. With project planners pushing for completion of the archaeology and resumption of construction activity, burial removal took the form of a rescue operation, with less emphasis on archaeological or ceremonial protocol. The tribe argued for greater emphasis on burial recovery, over insistence by WSDOT that construction stay on schedule. Additional tribal members were brought to the site to assist, and the tribe's heartbreaking work intensified. By mid-June, more than 70 intact burials were removed.

During this time, a fundamental difference of opinion between WSDOT and the tribe emerged. WSDOT was willing to allow removal of burials that were uncovered during the regular course of construction, but denied responsibility for any additional graves that may have been buried lower than the immediate zone of excavation. As WSDOT attempted to explain using the language of Section 106, the vertical Area of Potential Effects (APE) of this project extended only as deep as the construction disturbance. But the tribe could not accept this view. The dense concentration of intact graves uncovered in the excavation areas, some of which were deeper than others, made it a near certainty that other graves existed below the more shallow excavations. Tribal members held a strong belief—as many non-Indians would—that it was unacceptable to leave their ancestors' remains buried under an industrial complex. There were technical disputes discussed and debated about whether the construction work or graving dock activity would damage skeletal remains left below the site, but the real issue was one of tribal values and cultural beliefs. For spiritual reasons, the tribe could not accept anything less than a legitimate effort to find and remove all of the ancient cemetery's graves from the project site.

Positions Harden and the Tribe Prepares to Litigate

WSDOT was not prepared to conduct archaeological excavation of the entire site down to soils that were unlikely to hold human remains. Such a commitment likely would have increased the cost and delay of the project beyond the breaking point. The Section 106 MOA had not clearly addressed this issue. As negotiations proceeded regarding the extent of the recovery operation, the parties continued to remove burials from the excavation areas. By mid-July, more than 130 intact burials had been recovered from the graving dock site. Internal pressure on the tribal government mounted as the number of burials climbed, and the parties continued to meet and exchange correspondence regarding the scope of burial recovery. WSDOT made some concessions regarding the extent of burial recovery, but it continued to assert that its obligation to remove burials

extended only to those discovered during construction. Therefore, reluctantly, the tribe and its lawyers began to lay the groundwork for a lawsuit.

Given the facts and circumstances in this case, NEPA seemed to provide the strongest federal claim, because the project had been subject to an Environmental Assessment and FONSI that were completed even before Port Angeles had been selected for the graving dock site, with only a cursory reevaluation of the EA to assess the potential environmental and social effects of the Port Angeles graving dock when that site was selected. This reevaluation was completed during the time period of the original Cultural Resources Survey, when almost nothing was understood about the significance of the site. Given the dramatic adverse effects of the graving dock project on significant archaeological resources, there seemed little question that the federal agencies should have initiated at least a Supplemental EA, if not a full Environmental Impact Statement. But even if a federal court were to agree with this claim, the most that the tribe could expect would be a temporary halt to the project while the agencies fulfilled NEPA's procedural mandates.

It surprised many people who learned about the tribe's situation that there is no federal statute that would prohibit WSDOT from paving over a Native American burial ground. One presumed avenue of relief—based on its name—was the Native American Graves Protection and Repatriation Act (NAGPRA).²² But the provisions of NAGPRA that govern the unearthing of Native American burials and funerary objects apply only to projects on land owned by the federal government or by Indian tribes,²³ and give the tribes veto power only over intentional excavations on tribal lands.²⁴ In this case, because the project site was owned by the State of Washington, those apparently pertinent provisions did not apply. Even so, the tribe was prepared to argue that under the repatriation section of NAGPRA, WSDOT was a "museum" as defined by the statute, because it received federal financial assistance and held Native American remains in its custody, and was therefore obligated to repatriate those remains—even those still in the ground—before destroying the remains or precluding repatriation by paving over them. The tribe did not have the opportunity to discover whether this claim would have found favor with a federal court, because events in the late fall of 2004 changed the course of the graving dock project.

Public Pressure Causes a Shift

Two developments in the fall of 2004, combined with the tribe's threat of a federal lawsuit, led to the state's decision to reconsider the graving dock proj-

ect in Port Angeles. First, the Lower Elwha Klallam Tribe decided to send a delegation to Washington, D.C., for the opening ceremonies of the National Museum of the American Indian, and also to ask for the support of the tribe's representatives in Congress—Senator Patty Murray, Senator Maria Cantwell, and Representative Norm Dicks. The contrast between the tribe's struggle to save ancestral souls back home and a national celebration of Native American culture in the Capital struck a responsive chord with the congressional delegation. The tribe would later learn that the delegation worked diligently, albeit behind the scenes, to bring about a resolution that took into consideration the tribe's interests.

A second factor also played a critical role. In November, the saga of the graving dock and the tribe's heartbreaking struggle hit the front page of the *Seattle Times*²⁵ and was reported nationally by the Associated Press. Overnight, the political environment changed as the public bombarded WSDOT and other government officials with comments critical of the project and the state's continued construction activity on the site. WSDOT defended its actions by pointing out that the Lower Elwha Klallam Tribe had always supported the Hood Canal rehabilitation project and the graving dock construction. Finally, on December 1, 2004, the Washington State Secretary of Transportation informed the tribe that the project would continue only with the tribe's continued support.

Project Termination

Until that point, the tribe had not believed that termination of the project was an option. For too many years, the tribe had been pushed aside when other parties had big plans for development in and around Port Angeles, and the graving dock project was seen as a continuation of that history. With WSDOT's statement indicating that the tribe may now control the fate of the graving dock project, the tribe's thinking changed. On December 10, 2004, the tribe sent a letter to the Washington State Secretary of Transportation requesting that WSDOT find a new site for the graving dock project.²⁶ The tribe stated its continued support of the Hood Canal Bridge reconstruction project, but concluded that construction of the graving dock in Port Angeles would result in unacceptable destruction of the tribe's ancestral burials.

WSDOT recognized that public opinion had shifted, and decided that the state should not attempt to move forward with the graving dock project in the face of the tribe's opposition. On December 14, 2004, WSDOT announced

that the state would not proceed with the graving dock facility in Port Angeles. A formal written statement included three reasons for the state's decision: (1) the site's importance as a resting place for ancestors of Lower Elwha Klallam people and its significance for relating the history of Native American culture on the Pacific Northwest coast; (2) the uncertainty of additional costs to continue, given the still unknown features of the site, including the possibility of many more burials; and (3) the possibility of protracted controversy—even litigation—created an unacceptable level of uncertainty regarding the cost and time that it would take to modernize the Hood Canal Bridge.

Failure of the Site Assessments

The failure of the two site assessments to identify the significance of the historical resource stands out among the major problems in this case study. Two factors seem to have contributed most significantly to the failure of these assessments. First, neither site assessment included any information drawn from the oral history of tribal elders. Second, the subsurface sampling on both occasions was done either with extraordinary bad luck or without proper planning and attention.

As the number of recovered burials began to climb to staggering proportions and the media began to ask questions of tribal members, several tribal elders confirmed knowledge of the Tse-whit-zen site. They knew which areas were sacred grounds because of the burial sites, and could have provided warnings. When asked later why they did not provide such warnings, the elders usually indicated quite simply that nobody had asked. While these elders may have known about the site, they did not know that their input would be valued and could have made a difference. So whose responsibility was it to approach them?

The legal responsibility to conduct Section 106 consultations and an Environmental Assessment falls to the lead federal agency—in this case, FHWA—under supervision of the ACHP and in consultation with the SHPO. But as with many major projects that have a third-party proponent, the federal agency in this case assumed a secondary role with regard to NHPA and NEPA compliance, and left the day-to-day responsibilities with WSDOT. In turn, WSDOT hired a contractor to handle the historic resource aspects of the permitting process, and during the initial Cultural Resources Survey, that contractor contacted the Lower Elwha Klallam Tribe's government and offered opportunities to comment on the

survey work as it progressed. The tribe's governmental leaders assigned the duty to develop comments to its technical staff, and such comments were made on the tribe's behalf. The tribe's comments were technical in nature, and obviously not drawn from the oral history of tribal elders. In short, no party involved in the Section 106 consultations sought out oral history from tribal elders, and no party realized—or if they did realize, no party thought it mattered—that the oral history component was missing. Every party had the opportunity at least to raise the issue of oral history in conducting or reviewing the cultural and historical resource survey work, and with such opportunity, each party must share part of the responsibility for its absence.

The other major deficiency was the archaeologists' failure—on two separate surveying occasions—to detect the significance of the historical resource through subsurface sampling. Given the background knowledge that Tse-whit-zen was somewhere in the area and the staggering number of burials, artifacts, shell middens, fire pits, and structural remnants later found on the site, one has to wonder why the archaeologists were not able to provide a proper assessment of the significant archaeological resources on this property. In our opinion, it was a mistake to put the graving dock project on the fast track. The entire bridge rehabilitation project, including the graving dock, was made part of the State of Washington's TPEAC permit streamlining pilot program, and project managers set out to find ways to reduce project lead time. These goals may have created a mindset that carried forward into the cultural resource assessment. For instance, the record shows that WSDOT implored its consultant to complete the task “with urgency” and provided a very short timeline for the amount of work and the size of the site.

Furthermore, WSDOT has in retrospect identified several aspects of the archaeological work that may have been streamlined, only to cause difficulty in the long term. First, although background information indicated that Indian village cemeteries like Tse-whit-zen were often located on the beach, fronting the water, no geomorphology landform analysis was conducted so that survey work could be concentrated immediately behind the historical waterline. Given that most of the burials were indeed found behind the historical waterline, some targeted sampling behind the historical waterline may have found human remains early in the assessment. Second, the field investigation for the Cultural Resources Survey was conducted by one associate investigator—the consultant's principal investigator for this survey never visited the site to provide the assistance or supervision of a more experienced

archaeologist. Third, equipment problems plagued the effort, but the four-day investigation was not extended to make up for time lost due to a broken auger drill bit and an out-of-service backhoe. Fourth, conditions were rainy during the four-day investigation, causing parts of the site to be underwater and soil samples to be very wet, unstable, and difficult to handle and interpret. According to WSDOT's review, the field investigator was not able to recall whether she actually screened any of the auger samples for cultural materials.²⁷ The extent of screening performed on the trenching samples is equally unclear. These are very troubling revelations about the scope and attention given to the archaeological assessment, especially given that a significant historical resource was known to have been in the area.

What Worked?

For all the problems and heartache caused by the graving dock project and the shortcomings of the legal and archaeological processes, there were aspects of this project that worked as they were supposed to. Most importantly, the process, however imperfect, did result in protection of the cultural resource.

Along the way, several NHPA requirements and NHPA-based practices helped to achieve that result. First, WSDOT involved the Lower Elwha Klallam Tribe in nearly every major step of the process. While the two sides did not always agree, the tribe was allowed to participate and make meaningful comments that obviously had impact on WSDOT's planning. Second, although the original Cultural Resources Survey failed to identify the historical resource, it did recognize the need to put in place an archaeological monitoring plan, and implementation of that monitoring plan caused construction to stop soon after workers discovered the first archaeological deposit. Third, once the parties knew more about the archaeological resource, WSDOT and the SHPO readily agreed that the site was eligible for listing on the National Register of Historic Places, thereby triggering further Section 106 obligations, including the negotiation of an MOA. Fourth, many tribal members were put to work on the construction site as monitors and archaeological assistants, and the tribe was allowed to perform ceremonies, recover burials in its own manner, and take immediate custody of all human remains recovered from the project site. Fifth, WSDOT and the other parties allowed the tribe to decide when, or even whether, sensitive information about the cultural resource should be disclosed to the public. Ultimately, the

tribe made the decision to tell the press and the public about the human remains and thousands of artifacts being unearthed at the graving dock site. But before the tribe made that decision, WSDOT kept the information closely guarded in order to protect the resource and the tribe's cultural values. Finally, WSDOT and the tribe also kept the site itself fenced and guarded, preventing vandalism and artifact hunting from becoming a problem.

Lessons Learned

The story of the Port Angeles graving dock provides some lessons for project proponents, state and federal agencies, tribal governments, and stakeholders who are parties to a Section 106 consultation. Perhaps the overriding lesson to take from this experience is that the NHPA's Section 106 process has real value for project planning, if properly implemented, and should not be "streamlined." It may not be apparent as project planning gets underway, but early time and serious effort devoted to NHPA compliance can save millions of dollars down the road and prevent a serious project delay.

Along those same lines, there can be no mistaking the importance of promptly securing an oral history from knowledgeable sources. Even scientific processes like an archaeological survey are no substitute for gathering as much human intelligence as possible about the cultural resource. Project managers cannot assume that individuals with special knowledge will voluntarily come forward into the public arena without being asked in an appropriate manner.

Third, an archaeological survey must be done with the degree of planning and attention that is appropriate under the circumstances. The scope of work for an archaeological survey must be well-planned, taking into account what is known about the site and what still must be answered by the archaeologists. Project managers should take steps, including on-site supervision, to ensure that the archaeological consultant follows the scope of work and performs the site survey with proper care and attention.

Finally, each party or invited signatory to a Section 106 MOA should make sure that the MOA covers the "what ifs." What happens if an inadvertent discovery is made? What happens if such discoveries change the fundamental understanding of the cultural resource and the project's adverse effects? What will happen if burials are encountered, or if more burials are likely to be present below the excavation?

Epilogue

Once the graving dock project had been halted by its state and federal sponsors, important questions remained concerning disposition of the human remains and funerary objects. Further removal or stabilization of disturbed remains, custodial care, and reburial of recovered remains were important priorities for the tribe and its supporters. But WSDOT officials were loath to commit additional funds for these purposes, given intense public criticism of the millions of dollars already spent at the site. The tribe insisted on resolution of these issues, but its pleas went unheeded. In part, the indecision of responsible parties resulted from genuine uncertainty about their obligations under the MOA. And the Advisory Council on Historic Preservation (ACHP) offered scant guidance.

Faced with these uncertainties, and the continuing deterioration of site conditions, the tribe sought relief under state statutes that were written to protect cemeteries and gravesites from disturbance.²⁸ Remarkably, the tribe determined that these little-known statutes might prove more effective in protecting a National Register–eligible site and redressing the tribe’s grievances than a panoply of federal laws that had been written for this purpose. After making repeated demands that their ancestors’ remains be reinterred, the tribe and several of its members filed suit against the state in Thurston County Superior Court for violations of the state’s cemetery laws.

Although the state responded initially by denying liability and filing a counterclaim, its Attorney General soon proposed mediation of the dispute, to be joined by the City and the Port of Port Angeles. Lengthy negotiations resulted in two settlement agreements, among the tribe, state, city, and port on one hand, and between the state and the tribe on the other. In exchange for its waiver of further claims, the tribe is given fee title or a leasehold interest in virtually the entire graving dock site, together with \$2.5 million for reinterment of the remains and interpretation of the property as a National Historic Landmark. While agreeing to respect the integrity of later-discovered cultural resources at other sites within its limits, the city is authorized to proceed with appropriate development along the shoreline in close proximity to Tse-whit-zen. Any such development will be preceded by a citywide “archaeological analysis,” to be conducted by a state-funded city archaeologist, in cooperation with the tribe and other stakeholders. In addition, the city and port received a commitment from the state of “best efforts” to secure \$15 million in support of facilities development and employment opportunities.

The settlement agreements were hailed by the media and political leaders as an equitable resolution of differences between the parties. As she signed the agreements, Tribal Chairwoman Frances Charles said, “We have been forced to understand each other. We look forward to when our ancestors will return to their final resting place. For us, reburial is what this has always been about.” At long last, the tribal members will now be able to bring their ancestors back to the waterfront and forever protect the place they call Tse-whit-zen.

Notes

1. Douglas P. Wheeler is a partner at Hogan & Hartson LLP in Washington, D.C. In July 2004, the Lower Elwha Klallam Tribe retained Hogan & Hartson as co-counsel to help the tribe protect its interests in the Tse-whit-zen matter.
2. Jeffrey C. Nelson was an associate at Hogan & Hartson LLP during the events discussed in this article. He currently is a staff attorney at the National Indian Gaming Commission (NIGC) in Washington, D.C. The views expressed in this article are the authors' own, and do not represent the views of the NIGC, the United States, the Lower Elwha Klallam Tribe, or Hogan & Hartson LLP.
3. The Washington State Department of Transportation recently issued a comprehensive report that details the chronology of events of the Tse-whit-zen rediscovery, identifies most of the issues faced by the various parties, explains why critical decisions were made, and discusses several deficiencies in the Section 106 legal system from the perspective of state project proponents. The Hood Canal Bridge Rehabilitation Project and Graving Dock Program: A Report to the Governor and Legislature of the State of Washington, Douglas B. MacDonald, Secretary of Transportation, and Dan O'Neal, Washington State Transportation Commission Chairman (May 16, 2006) (“Graving Dock Report”).
4. 16 U.S.C. §§ 470–470x-6.
5. 42 U.S.C. §§ 4321–4347.
6. 25 U.S.C. §§ 3001–3013.
7. Washington Senate Bill 6188.
8. Graving Dock Report at 36–37.
9. Cultural Resources Survey for the Washington State Department of Transportation's Port Angeles Graving Dock Facility for the Hood Canal Bridge Retrofit and East-Half Replacement, Clallam County, Washington (Dec. 10, 2002; revised Jan. 6, 2003) (“Cultural Resources Survey”).
10. Cultural Resources Survey at 3–4 (internal quotations and citations omitted).
11. Graving Dock Report at 40.
12. *Id.*

13. *Id.* at 46.
14. *Id.*
15. According to WSDOT's investigative report, "[t]he extent of the material screened is not clear." *Id.* at 46.
16. Cultural Resources Survey at 5.
17. *Id.* at 7.
18. Letter from Dennis R. Sullivan, Tribal Chair, Lower Elwha Klallam Tribe, to Jeffrey Sawyer, WSDOT (Feb. 5, 2003).
19. *Id.*
20. "If historic properties are discovered or unanticipated effects on historic properties found after the [agency] has completed the section 106 process without establishing a process [to resolve any adverse effects upon such properties], the agency official shall make reasonable efforts to avoid, minimize or mitigate adverse effects to such properties. . . ." 36 C.F.R. § 800.13(b) (2003).
21. Graving Dock Report at 77.
22. 25 U.S.C. §§ 3001–3013.
23. 25 U.S.C. § 3001(5), (15).
24. 25 U.S.C. § 3002(c)(2).
25. *Ancient Village Torn Apart by Bridge Project*, SEATTLE TIMES (Nov. 21, 2004).
26. Letter from Frances Charles, Tribal Chairwoman, Lower Elwha Klallam Tribe, to Douglas MacDonald, Washington State Secretary of Transportation (Dec. 10, 2004).
27. Graving Dock Report at 46.
28. Wash. Rev. Code §§ 68.24.010–68.24.110; Wash. Rev. Code §§ 68.60.010–68.60.060.